DEFENDING A PREMISES LIABILITY CLAIM

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DEFENDING A PREMISES LIABILITY CLAIM

COMPLAINT: In defending a PREMISES LIABILITY action, the first place to start is with the Complaint. Does it plead punitive damages – and needs a motion to strike. Does it plead a cause of action or is it subject to a demurrer [or, if you have to file the Answer right away, can you do a motion for judgment on the pleadings]? Has plaintiff adequately plead an exception to assumption of the risk? Is plaintiff's action barred because of Civil Code §846 [recreational immunity]? If the allegations are for "negligent security" has the plaintiff plead sufficient facts to establish there was a duty on the part of the defendant?

ANSWER: If the Complaint is fine then you need to file an Answer [within 30 days of being served, with the appropriate affirmative defenses. Understand the alleagtiosn so that the appropriate affirmative defenses are plead timely.

GOVERNMENT TORT CLAIM: If you have to file a cross-complaint against a government entity you must file a claim – unless the government entity [city, for example] has filed suit against you first. ***Krainock v. Superior Court*** (1990) 216 CA3d 1473, 1478.

CROSS-COMPLAINT: Are there others who share liability for this incident – the persons who attacked the plaintiff; parents for failing to supervise; doctors for possible malpractice; other defendants who contributed to the injury? NOTE: a cross-complaint does not have to be filed to apportion the non-economic damages at trial under Proposition 51 – you just have to add the entity or person on the special jury verdict [and have sufficient evidence to establish a claim against that person/entity at trial]

EXPERTS: perhaps you might want to get experts right away to evaluate the facts of the case and assist in preparation of the defense – or to remove an expert widely used by plaintiffs' counsel. It is important to have the right expert – one that perhaps you have experience with and you know will make a good witness at trial [or you may just want him or her for a consultant]. Medical experts, an engineer, an arborist, a surveyor – there are a host of experts that could be consulted in a premises liability case.

DISCOVERY: It can not be stressed how important careful discovery is to a case. ***While the Judicial Council has approved form interrogatories that are useful, they are never sufficient in a premises liability case.*** Nor is it ever sufficient just to do a deposition and form interrogatories. If a motion for summary judgment is contemplated -- special interrogatories and requests for admissions must ALWAYS be done [you can also do Requests for Admissions along with Judicial Council Interrogatory 17.1]. ***"State all facts" interrogatories are a must in premises liability cases*** – "State all facts in support of your contention that defendant was negligent". "State all facts in support of your contention that more lighting would have prevented this incident? If you contend that security guards would have prevented this incident, state each and every fact in support of such contentions. Further, it cannot be stressed how important Requests for Admissions are. They are intended to eliminate issues to be tried – and they cam be a powerful tool for the defense. If they are not responded to timely and a motion must be filed to deem them admitted, sanctions are mandatory. Further, "costs of proof" may be awarded by the court after a motion for summary judgment or a trial which were necessary for proving that which was denied without a reasonable basis for doing so.

SUMMARY JUDGMENT: An MSJ requires 75 days notice [plus 5 days for mailing] and cannot be heard within 30 days prior to trial [unless the trial court on good cause shortens this 30-day period]. It is therefore necessary to timely coordinate the necessary evidence.

LITIGATION GUIDELINES AND FILING TIMES

COMPLAINT [personal injury] – must be filed 2 years after date of injury or death [C.C.P. §335.1]; fraud/property damage – three (3) years [C.C.P. §338]; Injury/Death from patent deficient planning/construction of improvement to real property [C.C.P. §337.1]; no more than 10 years for damages re: latent deficiencies as to improvements to real property [C.C.P. §337.15]
PROOF OF SERVICE: Must be filed w/in 60 days of service; if Complaint amended to add new party, must file proof of service w/in 30 days for amended party [C.R.C., Rule 3.11.0]
ANSWER: 30 days after service of Complaint [unless demurrer/motion to strike/S.L.A.P.P]
DEMURRER: [challenges sufficiency of allegations] 30 days after service of Complaint [C.C.P. §§430.30 - 430.80, C.R.C. Rule 3.1320].
MOTION TO STRIKE: Strike damages issues or parts of cause of action [I.e., punitive damages] – 30 days after service of Complaint [C.C.P. §435, 436; C.R.C. Rule 3.1322]
MOTIONS TO AMEND: C.C.P. §471.5, §472 any pleading may be amended once without leave of court, prior to answer /demurrer] §473 [C.R.C. Rule 3.1324]
S.L.A.P.P.: Within 60 days of service of Complaint; all discovery stayed [C.C.P. §425.17].
MOTION FOR JUDGMENT ON THE PLEADINGS: Any time after answer filed [However, may be limited by Code of Civil Procedure §438].

DISCOVERY:

(a) **Service**: In UIM proceedings discovery may be served within 20 days of accident [Insurance Code §11580.2(f)(2). See §11580.2(o) for medical exams and wage loss discovery]. In civil cases Plaintiff must wait 10 days after service or appearance of defendant before serving discovery -- 20 days for a deposition [C.C.P. §2030.020(c); §2025.210(b)].

(a) **Cut-Off**: Must be completed 30 days prior to Trial date [except experts]; motions heard no later than 15 days prior to trial date; continuation of trial does not extend discovery cut-off [C.C.P. §2024.020]. **Arbitration**: No discovery after Arbitration award if ordered to Arbitration [C.C.P. §1141.24]. Must complete discovery 15 days prior to Arbitration [C.R.C. Rule 3.822(b)].

(b) **Limits**: (A) **LIMITED**: (1) **Number**: Any combination of a total of 35 interrogatories, demands to produce and requests for admissions plus 1 deposition [C.C.P. §94]. (2) **Statement Identifying Witnesses/Documents for Trial**: No more than 45 days or less than 30 days prior to trial [Response due w/20 days of service].

(B) **UNLIMITED**: 35 Requests for Admissions [C.C.P. §2033.030(a)]; 35 Interrogatories [C.C.P §2030.030(a)(1) [unless Declaration of Necessity filed for further discovery].

(c) **Responses**: 30 days after service [plus 5 for mailing]; Parties can extend in writing

(d) **Depositions**:

(1) Notice: 10 days notice [plus 5 for mailing]. Intent to videotape deposition must be included in notice, and notice must also include notice to use in lieu of treating/consulting physician or an expert at trial [C.C.P. §2025.220(a)(5),(6); §2025.340(m), §2025.620(d)].

(2) Objections: 3 days prior to deposition [must be personally served].

(3) Compel: (1) To compel, must be accompanied by Declaration of attempt to meet and confer to resolve prior to filing a motion. (2) For failure to answer question or produce documents requested– 60 days after completion of record [C.C.P. §2025.480(b)].

(4) Exhibit: Any page of a deposition used as an exhibit must highlight the portion of the page relied upon [C.C.R. Rule 3.116]

EX PARTE APPLICATIONS: [C.R.C. Rules 3.1201-3.1207]. Notice must be given no later than 10:00 a.m. the court day before the hearing [Rule 3.1203(a)].

MOTIONS TO COMPEL:

a. **No Response**: If no responses, no meet and confer or separate statement is required, may bring at any reasonable time

b. **Further Responses**: To compel further responses must file 45 days after service [plus 5 for service by mail. **Must include separate statement of disputed discovery plus declaration of meet and confer.**

c. **Separate Statement Required for:** Compelling further responses to interrogatories, demands to produce, requests for admissions, compel answers at a deposition, compel or quash production of documents at a deposition, medical examination over objection, issue or evidentiary sanctions [C.R.C. Rule 3.1345].

EXPERTS:

(a) **Demand for Designation**: 10th day after Trial date set or 70 days before trial, whatever closer to trial date [C.C.P. §2034.220]

(b) **Designation Exchange**: 50 days prior to initial trial date or 20 days after demand, whatever is closer to trial date – simultaneously exchanged [C.C.P. §2034.230]

(c) **Supplemental Designation**: 20 days after service of designation [C.C.P. §2034.280]

(d) **Motions**: Complete expert discovery 15 days prior to trial; motions heard on or before 10th day prior to trial [C.C.P. §2034.030].

MOTIONS:

1. **Format:** No opening or opposing memorandum may exceed 15 pages [except MSJ – 20 pages]. No reply memorandum may exceed 10 pages [except exhibits, etc.]. If exceed 10 pages must have table of contents and authorities. Rules of Court 3.113(d),(e),(f).

2. **Time**:

A. **Generally**: 16 **court** days prior to hearing date [I.e., demurrers, motions to strike, motions to compel – plus 5 days if mailed.

B. **Opposition** 9 **court** days;

C. **Reply:** 5 **court** days [C.C.P. §1005(b)].

D. [**Filing fee: $40.00**];

3. **MSJ's** : **(1)** **Notice**: 75 **days** prior to hearing date – and no later than 30 days prior to Trial date [unless Court shortens time – court cannot shorten 75 days notice] – 105 days prior to trial [plus 5 if mailed];

(2) **Opposition**: 14 days prior to the hearing date;

(3) **Reply:** 5 days prior to hearing date [C.C.P. §437c].

(4) **Format**: See C.R.C. Rules 3.1350-1352 for format of motion, separate statement and objections.

(5) [**Filing Fee: $500.00**].

MOTION FOR NEW TRIAL: Intent to file for new trial must be filed within 15 days of the date of mailing notice of entry of judgment or 180 days after entry of judgment, whichever is earliest [C.C.P. §659]. Within 10 days of filing the notice, moving party shall file any affidavits intended to be used upon such motion. Any opposing party shall have 10 days to file any counter-affidavits [C.C.P. §659a]. The Court shall have 60 days to rule on the motion after notice of entry of judgment. **MEMORANDUM OF COSTS**: C.R.C. Rule 3.1700 – Memorandum must be filed within 15 days of date of mailing notice of entry of judgment [or 180 days after judgment, whichever is earliest]. Motion to strike costs must be filed within 15 days after service of Memorandum, plus 5 days if mailed.

AFFIRMATIVE DEFENSES

A. GENERAL:

1. ____ Plaintiff was negligent and Plaintiff's recovery of damages shall be reduced accordingly.
2. ____Any damages claimed by Plaintiff were caused in part or in total by the negligence of others and therefore any recovery from this Defendant must be apportioned pursuant to ***Civil Code §§1431, 1432.***
3. ___ Any damage proven to have been sustained by Plaintiff was the direct and proximate result of the independent and superseding action of Plaintiff and other persons or parties.
4. ____ That Plaintiff failed to mitigate any damages alleged. Therefore, any damages awarded to Plaintiff shall be limited to the damages Plaintiff would have sustained had Plaintiff mitigated her damages.
5. ____The Complaint is barred by the statute of limitations including Code of Civil Procedure §335.1.
6. ____ The Complaint and the whole thereof fail to set forth sufficient facts to state a cause of action against Defendant(s).
7. ____ The Complaint is barred by res judicata and/or collateral estoppel.
8. ____ The claim of Plaintiff is barred due to Plaintiff's assumption of risk due to the nature of the sport, activity and/or occupation Plaintiff was engaged in.
9. ____ This civil action is barred in its entirety as a result of Plaintiff's signed agreement to arbitrate.

B. EMPLOYEE/EMPLOYER:

1. ____Plaintiff's recovery is limited to the exclusive provisions of workers compensation.
2. ____ Plaintiff was injured in the course and scope of employment and Plaintiff's employer's negligence caused and/or contributed Plaintiff's damages/injuries. Any recovery by Plaintiff's employer for workers compensation benefits paid out shall therefore be reduce accordingly. ***Witt v. Jackson*** (1961) 57 Cal.2d 57, 72.
3. ____ At all times herein mentioned Plaintiff was an independent contractor.
4. ____ At all times herein relevant Plaintiff did not work the minimum number of hours or earn the requisite monetary amount to qualify as an employee. [Lab.C. 3352(h)].
5. ____Plaintiff(s) allegations are insufficient to state a claim against Defendant/Defendant's employer for punitive damages as such claim cannot be based solely on a claim of respondeat superior [Civil Code §3294].

C. PREMISES:

1. ____Any recovery of the Plaintiff is barred by primary assumption of risk.
2. ____Any recovery of the Plaintiff, if any, is barred by ***Privette v. Superior Court*** (1993) 5 Cal.4th 689, 693, and its progeny.
3. ____The Complaint and any claim of recovery are barred in its entirety as a result of a Release of Liability signed by Plaintiff.
4. ____The claim of Plaintiff is barred by the provisions of ***Civil Code §846*** ["Recreational Immunity"].
5. ____Any defect of the premises, if any, was open and obvious.
6. ____Defendant was not Plaintiff's employer and CAL-OSHA is not applicable.
7. ____This Defendant did not affirmatively contribute to the Plaintiff's injuries therefore the provisions of Labor Code §6304.5 do not apply to Defendant(s).
8. ____At all times Plaintiff represented that he was licensed to do the work contracted for.
9. ____The work Plaintiff was to perform for Defendant(s) was less than $500.00 [B.& P. Code §7048]. No license was required.
10. ____ Any alleged defect of the premises was trivial as a matter of law.

D. DOG BITES:

1. _____ Plaintiff trespassed upon Defendant's property and/or was on Defendants' property without permission, express and/or implied.
2. _____ Plaintiff's action is barred by the doctrine of assumption of risk.
3. _____ At all times Defendant was not an owner of the dog Plaintiff claimed caused the injuries.
4. _____ Defendant lacked notice of any alleged vicious propensities of the dog.
5. _____ Defendant communicated to and put Plaintiff on notice of any alleged vicious propensities.
6. _____ A dog is property and Plaintiff cannot recover for emotional distress damages claimed due to death or injury to dog.

DOG BITES – ANSWER TO COMPLAINT

COME NOW the Defendants,   , above named, and in answer to the Complaint of Plaintiff on file herein admit, deny and allege as follows:

Under the provisions of Section 431.30 of the California Code of Civil Procedure, these answering Defendants deny each, every and all of the allegations of said Complaint, and the whole thereof, and deny Plaintiff has sustained damages in any sum or sums alleged, or in any other sum or at all.

Further answering Plaintiff's Complaint on file herein, and the whole thereof, these answering defendants deny that the Plaintiff has sustained any injury, damages or loss, if any, by reason of any act or omission of these answering Defendants or their agents or employees.

Defendant(s) offer the following Affirmative Defenses:

_____. The incident was caused by Plaintiff's own negligence and any recovery, if any, must be reduced by a percentage of Plaintiff's own lack of care.
_____. That Plaintiff failed to exercise reasonable care and diligence to mitigate any damages sustained by reason of Defendants' alleged acts. Therefore, any damages awarded to Plaintiff shall be limited to the damages Plaintiff would have sustained had Plaintiff mitigated her damages.
_____. Any damage proven to have been sustained by Plaintiff was the direct and proximate result of the independent and superseding action of Plaintiff and other persons or parties, and not due to any act or omission on the part of these Defendants.
negligence of others and therefore any recovery from this Defendant must be apportioned pursuant to Civil Code §§1431, 1432.
_____. Any recovery of the Plaintiff is barred by the doctrine of primary of risk.
_____. At the time of the incident Plaintiff was a trespasser or not in a place where Plaintiff had consent from Defendant to be.
_____. Defendant was not the owner of the dog and had no actual knowledge of any prior violent tendencies or propensities, if any.
____. The Complaint is barred by the statute of limitations including Code of Civil Procedure §_________.
____. Defendant is not liable for a nuisance created by his tenant after the premises are let.
____. The owner of the dog was neither Defendant's employee nor agent. Defendant is not vicariously liable for the owner 's or tenant's negligence and the negligence of a tenant cannot be imputed to the landlord.

WHEREFORE, Defendants pray that Plaintiff takes nothing by reason of the Complaint and that Defendant(s) be dismissed hence with costs.

PREMISES – ANSWER TO COMPLAINT AND DEFENSES

COME NOW the Defendants, , above named, and in answer to the Complaint of Plaintiff on file herein admit, deny and allege as follows:

Under the provisions of Section 431.30 of the California Code of Civil Procedure, these answering Defendants deny each, every and all of the allegations of said Complaint, and the whole thereof, and deny Plaintiff has sustained damages in any sum or sums alleged, or in any other sum or at all. Further answering Plaintiff's Complaint on file herein, and the whole thereof, these answering defendants deny that the Plaintiff has sustained any injury, damages or loss, if any, by reason of any act or omission of these answering Defendants or their agents or employees.

Defendant(s) hereby further submit the following affirmative defenses:

_____. The incident was caused by Plaintiff's own negligence and any recovery, if any, must be reduced by a percentage of Plaintiff's own lack of care.

_____. That Plaintiff failed to exercise reasonable care and diligence to mitigate any damages sustained by reason of Defendants' alleged acts. Therefore, any damages awarded to Plaintiff shall be limited to the damages Plaintiff would have sustained had Plaintiff mitigated her damages.

_____. Any damage proven to have been sustained by Plaintiff was the direct and proximate result of the independent and superseding action of Plaintiff and other persons or parties, and not due to any act or omission on the part of these Defendants.

_____. Any defect or condition complained of was trivial as a matter of law.

_____. Any damages claimed by Plaintiff were caused in part or in total by the negligence of others and therefore any recovery from this Defendant must be apportioned pursuant to Civil Code §§1431, 1432.

_____. Plaintiff's claim is barred by the doctrine of primary assumption of risk.

_____. Any recovery of the Plaintiff, if any, is barred by ***Privette v. Superior Court*** (1993) 5 Cal.4th 689, 693, and its progeny.

______. The Complaint and any claim of recovery is barred in its entirety as a result of a Release of Liability signed by Plaintiff.

_____. If Plaintiff is entitled to any recovery at all Plaintiff's sole and exclusive forum for recovery is workers' compensation.

_____. At all times Plaintiff was engaged in the pursuit of a recreational activity on the defendant's property. Thus Plaintiff's action is barred by ***Civil Code §846***.

____. Any defect of the premises, if any, was open and obvious.

____. Any claim for damages is barred by the exculpatory agreement between Plaintiff and Defendants.

____. The Complaint is barred by the statute of limitations including Code of Civil Procedure § __________.

____. Not all heirs are before this Court and this matter must be stayed and/or abated. Defendants do not waive the "single recovery" rule.

____ . Defendant was not Plaintiff's employer and the provisions of CAL-OSHA are not applicable.

____. This Defendant did not affirmatively contribute to the Plaintiff's injuries therefore the provisions of Labor Code §6304.5 do not apply to Defendant(s).

____. At all times herein mentioned Plaintiff was engaged in household domestic service and therefore the provisions of Labor Code §6304.5 and the provisions of CAL-OSHA do not apply.

____. Plaintiff was not on the Defendant's property with consent or permission.

____. Others are responsible for the incident and their liability must be apportioned pursuant to Civil Code §1431.2.

WHEREFORE, Defendants pray that Plaintiff takes nothing by reason of the Complaint and that Defendant(s) be dismissed hence with costs.

<u>RECREATIONAL IMMUNITY [CIVIL CODE §846]</u>

A. <u>California *Civil Code* Section 846</u>

“An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

In 1963, California became one of the first states to enact a "recreational use immunity" statute, *Civil Code* Section 846. (***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1100, n.3.) The Legislature has established only **<u>two elements as a precondition to immunity</u>**: (1) ***the defendant must be the owner of an “estate or any other interest in release property, whether possessory or nonpossessory***;” **<u>and</u>** (2) ***the plaintiff’s injury must result from the “entry or use [of the ‘premises’] for any recreational purpose.***” ***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1100.

B. <u>The Property Does Not Have To Be Intended For Recreational Purposes</u>

The text of *Civil Code* Section 846 is extremely broad; the immunity applies to the “owner of any estate or any other interest in real property, whether possessory or nonpossessory…” (Italics added.) The Legislature made no distinction between developed and undeveloped property or between urban and rural land, and imposed no requirement that the site be in a “natural” or unaltered state. “Section 846 is by no means limited to land in its natural condition – **it specifically mentions ‘structures’** – it obviously encompasses improved streets.” The Legislature did not intend to confine section 846 immunity to land “suitable” for recreational use. In enacting Section 846, the Legislature plainly extended recreational use immunity to a broad class of landowners. It did not limit the statute to agricultural or rural land, to land in an undeveloped or natural condition, or to land otherwise “suitable” for recreation. ***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1105. The “suitability” precondition to the immunity was held invalid in the Supreme Court’s decision in ***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095. As observed in ***Ornelas*,** Section 846 specifically mentions “structures.” “Assuming the requisite “interest” in land, the plain language of the statute admits of no exceptions, for property “unsuitable” for recreational use or otherwise.” ***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1105.

C. <u>The Term “Recreational Purpose” Is Broadly Defined</u>

The term “recreational purpose” as set forth in *Civil Code* Section 846 expressly enumerate over twenty particularized activities of great variation, from “fishing, hunting, camping, hiking, to “viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.” The “recreational purposes” set forth in the statute are quite broad. Moreover, courts have determined that merely because a particular activity was not set forth in the statute does not mean it should be excluded. Rather, the reach of the statute is defined broadly in terms of enlargement rather than limitation. (***People v. Western Air Lines, Inc.*** (1954) 42 Cal.2d 621, 639.) The examples included in Section 846, however, do not appear to share any unifying trait which would serve to restrict the meaning of the phrase “recreational purpose.” They range from risky activities enjoyed by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary pursuits amendable to almost anyone (e.g., rock collecting, sightseeing, picnicking). Some require a large tract of open space (e.g. hunting) while others can be performed in a more limited setting (e.g., recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites) (***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1100.)

D. <u>An Express, Personal Invitation From The Property Owner To Plaintiff Is Required.</u>

The "express invitation" exception ***requires a direct, personal request from the landowner to the invitee to enter the property*** (***Johnson v. Unocal Corp***. (1993) 21 Cal.App.4th 310, 317; ***Jackson v. Pacific Gas & Elec. Co***. (2001) 94 Cal.App.4th 1110, 1116.) ***The invitation to enter the property must come directly and expressly from the owner of the property***. (See **Johnson v. Unocal Corp.** (1993) 21 Cal.App.4th 310, 317; ***Jackson v. Pacific Gas & Elec. Co***. (2001) 94 Cal.App.4th 1110, 1116 [invitation by owner of easement cannot excuse requirement of express invitation by owner of property.] Thus, the exception does not apply here to bar immunity in favor or defendants.)

E. <u>Consideration From Plaintiff to Property Owner Is Required.</u>

"Section 846 may preclude immunity "where permission to enter…was granted for a consideration…*paid* to… landowner…or where consideration has *been received* from others…" (Italics added.) (*Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 315-316.) The purpose of California *Civil Code* Section 846, is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. Therefore, ***courts should construe exceptions to the statute for instances where the owner receives consideration*** and for express invitees ***narrowly***. (*Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 316-317) "Moreover, as regards California *Civil Code* Section 846, we are aware of no cases in which consideration did not involve ***the actual payment of an entrance fee by plaintiff to defendant***." (**Johnson v. Unocal Corp.** (1993) 21 Cal.App.4th 310, 316-317.) A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under Section 846 comes into play. (***Johnson v. Unocal Corp***. (1993) 21 Cal.App.4th 310, 317.)

F. <u>CIVIL CODE §846 IMMUNITY IS NOT LIMITED TO NEGLIGENCE</u>

Moreover, negligence is insufficient to overcome landowner's immunity under *Civil Code* Section 846, if otherwise applicable. (***Bacon v. Southern California Edison*** (1997) 53 Cal.App.4th 854, 859; ***Shipman v. Boething Treeland Farms, Inc.*** (2000) 77 Cal.App.4th 1424, 1431 (disapproved in part as to applicability of *Civil Code* Section 846 to claims involving operation of vehicles on property)

The recreational immunity of *Civil Code* Section 846 is not limited to negligence actions only, as opposed to negligence per se. Such a limitation would also seem to contradict the Legislature's intent to provide landowners with broad immunity from suit by uninvited recreational users of their property. (See ***Jackson v. Pacific Gas & Electric Co.*** (2001) 94 Cal.App. 4th 1110, 1121, wherein the Court of Appeal declined to limit the scope of immunity under Section 846 to negligence only, as opposed to negligence per se, given the complete absence of statutory language, case law or legislative history to support this distinction.)

G. <u>THE EXCEPTION TO §846 IS "WILLFUL" OR "MALICIOUS" FAILURE TO WARN/REMEDY</u>: This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. ***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1100; ***Manuel v. Pacific Gas & Elec. Co.*** (2009) 173 CA4th 927 [not marked by a mere absence of care; rather, it involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.]

DOGS

NO LIABILITY OF LANDLORD WITHOUT PRIOR KNOWLEDGE

It is well established that a landlord does not owe a duty of care to protect a third party from his or her tenant's dog unless the landlord has actual knowledge of the dog's dangerous propensities, and the ability to control or prevent the harm. (***Yuzon v. Collins*** (2004) 116 Cal.App.4th 149, 152; ***Donchin v. Guerrero*** (1995) 34 Cal.App.4th 1832, 1838; ***Chee v. Amanda Goldt Property Management*** (2006) 143 Cal.App.4th 1360, 1369 [where CC&R's provided for attorney's fees they are recoverable by defense as well]. See: ***Martinez v. Bank of America*** (2000) 82 Cal.App.4th 883, 891 [where the defendant bank "had no knowledge of the dogs' allegedly vicious propensity, the harm was not foreseeable and the Bank had no duty to take measures to prevent the attack"].)

DUTY TO SUPERVISE CHILD IS NOT ON HOST BUT MOTHER OF CHILD

As the testimony of the mother recited above indicates, the child was left in the yard unattended. Although there is no direct evidence as to just what happened, the inference is warranted that the child opened the gate and entered the back yard. (2) Manifestly, the host was not responsible for such conduct on the part of the child. And, in that connection, it should be emphasized that the responsibility of the mother for the welfare of her child does not shift to the host upon a visit by the mother and child to the latter's residence. ***Fullerton v. Conan*** (1948) 87 Cal.App.2d 354, 358. See also: ***Padilla v. Rosas*** (2008) 160 Cal.App.4th 742 [owner of home owed no duty to supervise minor child brought by his parents to the property who subsequently drowned in the swimming pool].

REQUEST FOR ADMISSIONS: [With Judicial Council Interrogatories, No. 17.1]

1. ADMIT that the party propounding these Requests for Admissions had no knowledge of any vicious proclivities of the dog plaintiff claims caused the injuries.
2. ADMIT that the dog Plaintiff claims caused injuries had no prior vicious propensities.
3. ADMIT that the dog Plaintiff claimed caused injuries had never injured anyone else before.
4. ADMIT that there are no facts establishing negligence of the party propounding these Requests for Admissions.
5. ADMIT that the party propounding these Requests for Admissions owed no duty to supervise the Plaintiff.
6. ADMIT that no conduct of the party propounding these Requests for Admissions caused the injuries Plaintiff complains of.
7. ADMIT that no omission of the party propounding these requests for Admissions caused the injuries Plaintiff complains of.
8. ADMIT that the party propounding these Requests for Admissions did not contribute to the incident that resulted in injuries to the Plaintiff.
9. ADMIT that the negligence of others was responsible for the injuries Plaintiff complains of.
10. ADMIT that Plaintiff's negligence was the cause of the injuries Plaintiff complains of.
11. ADMIT that the party propounding these Requests for Admissions did not own the dog that Plaintiff alleges caused the injuries.
12. ADMIT that the party propounding these Requests for Admissions was not the keeper of the dog Plaintiff alleges caused the injuries.
13. ADMIT that Plaintiff incurred no medical bills for any injury Plaintiff contends was caused by a dog.

[Send these with 17.1 of the Judicial Council Form Interrogatories]

PREMISES LIABILITY – "OPEN AND OBVIOUS"

1. NO DUTY TO WARN OF OPEN AND OBVIOUS CONDITION: The general rule of premises liability requires "a property owner to exercise ordinary care in the management of his or her premises in order to avoid exposing persons to an unreasonable risk of harm." (***Scott v. Chevron U.S.A.*** (1992) 5 Cal.App.4th 510, 515; See Civ.Code § 1714, subdivision (a).) In determining the extent of a property owner's duty to warn of a property condition, courts consider whether the condition causing injury is an open and obvious one. "[A]n owner or possessor of land owes no duty to warn of obvious dangers on the property." (***Christoff v. Union Pacific Railroad Co.*** (2005) 134 Cal.App.4th 118, 126.) Thus, the question arises whether the curb, and the dangers posed by the curb, were so open and obvious that a person may be reasonably expected to "perceive that which should be obvious to him in the ordinary use of his senses." (***Danieley v. Goldmine Ski Associates, Inc.*** (1990) 218 Cal.App.3d 111, 121.) "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (***Krongos v. Pacific Gas & Electric Co***. (1992) 7 Cal.App.4th 387, 393).

2. MAY OWE DUTY TO REMEDY DEFECTIVE CONDITION: Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. (6 Witkin, *supra,* Torts § 930, p. 301.) However, this is not true in all cases. "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger [citation] may lead to the *legal* conclusion that the defendant" owed a duty of due care to the person injured. (***Osborn v. Mission Ready Mix*** (1990) 224 Cal.App.3d 104, 121) ***Krongos v. Pacific Gas & Electric Co.*** (1992) 7 Cal.App.4th 387, 393.

That the hazard was open and obvious did not relieve defendant of all possible duty, or breach of duty, with respect to it. In the trial court and again here, defendant argued only that the obvious appearance of the wet pavement excused defendant from a duty to warn of it. That was most likely so. But the obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it. The modern and controlling law on this subject is that "although the obviousness of a danger may obviate the duty to *warn* of its existence, if it is *foreseeable* that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to *remedy* the danger, and the breach of that duty may in turn form the basis for liability ...." (***Osborn v. Mission Ready Mix*** (1990) 224 Cal.App.3d 104, 122; ***Beauchamp v. Los Gatos Golf Course*** (1969) 273 Cal.App.2d 20, 33.) ***Martinez v. Chippewa Enterprises, Inc.*** (2004) 121 Cal.App.4th 1179, 1184 [undisputed that the condition caused by the sprinklers was open and obvious; however, there was no other way for Plaintiff to have traversed the area but to be forced to walk into the street.].

3. DANGERS OBVIOUS TO MINORS: The danger of riding a bicycle down a very steep, wet, grassy hill is obvious from the appearance of the property itself, even to children exercising a lower standard of due care. Even children instinctively recognize steepness of a hill and slipperiness of wet grass. While it is common knowledge that children often heedlessly engage in games or activities which are dangerous or harmful to their health, at some point the obligation of the public entity to answer for the malfeasance or misfeasance of others, whether children or parents, reaches its outer limits." ***Mathews v. City of Cerritos*** (1992) Cal.App.4th 1380, 1385.

4. DETERMINING "OPEN AND OBVIOUS" BY USE OF PHOTOGRAPHS: "Summary judgment cannot be based on photographs where the reviewing court concludes either reasonable minds might differ regarding whether the photographs correctly depict the alleged defect and the surrounding environs or whether the photographs conclusively establish the defect was open and obvious." (*Ibid.*) First, we consider the accuracy of the photographs in depicting the relevant circumstances. In examining photographs, the court "should take into account such factors as: (1) the photograph's subject (i.e., its focal point); (2) the view of the subject (e.g., closeup, distant, isolated, in context); (3) the photograph's perspective (e.g., eye-level, overhead, ground-level); (4) the use of any plain-view altering devices (e.g., camera color filter, fisheye lens, computer manipulation); (5) the characteristics of the photograph (e.g., sharp and clear, blurry, grainy, color or black and white); (6) whether the photograph was taken under identical or substantially similar conditions (e.g., timing, lighting, weather); and (7) any other relevant circumstances (e.g., addition of extrinsic aids, such as a ruler or pointer)." (***Kasparian v. AvalonBay Communities, Inc.*** (2007) 156 Cal.App.4th 11, 15.)

5. NO REQUIREMENT TO MAKE CRITICAL EXAMINATION OF PREMISES
On the other hand, a hotel guest, like any business customer, "is not obliged to make a critical examination of the surroundings he is about to enter, but on the contrary has the right to assume that those in charge have exercised due care in the matter of inspection, and have taken proper precautions for the safety of the patrons, and will use reasonable care in guarding him against injury ." (***Chance v. Lawry's Inc.*** (1962) 58 Cal.2d 368 at pp. 373-374.) A customer shopping in a store may focus her attention on the wares on display and, more or less absorbed by her planned transactions, may not watch the floor. The reasonable anticipation of such behavior increases the necessity for a proprietor to exercise care to keep its floor space and customer aisles clear, safe and fit for its customers' purposes. (***Moise v. Fairfax Markets, Inc.*** (1951) 106 Cal.App.2d 798, 803.)

6. "OPEN AND OBVIOUS" IS FOR THE JURY TO DETERMINE: In ***Neel v. Mannings, Inc***. (1942) 19 Cal .2d 647, a plaintiff traversing the steps of a restaurant, struck her head on a board projecting from the ceiling. The board was in plain view, but plaintiff was distracted by people coming down the stairs. The court held the issue of whether the danger was sufficiently obvious was for the jury to decide. (*Id.* at p. 656.) Likewise, in ***Chance v. Lawry's Inc.***, *supra,* 58 Cal.2d 368, the plaintiff was injured when she lost her balance and fell backward into a planter box located in a narrow foyer at the entrance to defendant's restaurant. The plaintiff testified that she had not seen the planter, but admitted that she could have seen the box if she had looked. (*Id.* at pp. 372-373.) A jury awarded her damages. On appeal, the restaurant argued that the "planter box was so obvious that [the defendant] could reasonably anticipate that patrons would see and apprehend the danger [of losing their balance and falling into the planter]." (*Id.* at p. 374.) The Supreme Court declined to reweigh the issue. "Whether the danger created by the open planter box was sufficiently obvious to relieve Lawry's of its duty to warn [the plaintiff] of its existence was peculiarly a question of fact to be determined by the jury." (*Ibid.*)

7. UNINTENDED USE OF PROPERTY: Numerous cases establish that there is no duty of an owner to take measures to prevent an injury from such an unintended and unforeseeable use of the owner's property. (See ***Edwards v. California Sports, Inc.*** (1988) 206 Cal.App.3d 1284, 1286-1288 [climbing a fence that was properly constructed to prevent the public from falling off the edge of a parking ramp]; ***Biscotti v. Yuba City Unified School Dist.*** (2007) 158 Cal.App.4th 554, 556 [stepping on a bicycle seat to climb a chain link fence to pick oranges on the other side]; ***Schonfeldt v. State of California*** (1998) 61 Cal.App.4th 1462, 1464 [scaling a freeway fence to run across the traffic]; ***Dominguez v. Solano Irrigation Dist.*** (1991) 228 Cal.App.3d 1098, 1103-1104 [scaling an eight-foot wall designed to restrict access to a canal]; ***Smelser v. Deutsche Evangelische, etc***. (1928) 88 Cal.App. 469, 472-475 [climbing a ladder to satisfy one's curiosity in an area not open to common use].

HOMEOWNERS HIRING WORKERS

LABOR CODE PRESUMPTION LICENSE/EMPLOYEE: If the Insured hired the Claimant and if it was necessary for the Claimant to have a license, the Claimant would be presumed to be Insured's employee [Labor Code §2750.50]. This situation triggers application of West Labor Code Ann. § 2750.5, which does two things: (1) creates a rebuttable presumption that a worker performing services for which a license is required is an employee and not an independent contractor and (2) makes a valid license a condition of independent contractor status. The Supreme Court has interpreted § 2750.5 to mean that "the person lacking the requisite license may not be an independent contractor." ***State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, **(1985) 40 Cal.3d 5, 15. Moreover, the statutory presumption, that a person who employees an unlicensed contractor is that person's employer, is conclusive. ***Cedilla v. Workers' Compensation Appeals Bd.*** (2003) 106 Cal.App.4th 227, 233. A license could be required, for example, if the tree trimming requires was above 15 feet.

JOB LESS THAN $500: However, if the project was one which was being performed for less than $500.00 [inclusive of parts and labor and intended for a "small job" – not a series of jobs], then no license would have been required. [See B&P Code §7048].

EMPLOYEE AND HOMEOWNERS: While all homeowners policies in California are required to provide for workers compensation [Insurance Code §11590], an individual doing work on the homeowners property does not qualify as an "employee" unless he/she West Labor Code Ann. § 3351(d), in turn, defines "employee" *for purposes of workers' compensation* as "any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling ....". However, that definition of an "employee" is subject to an exclusion in West Labor Code Ann. § 3352(h), for one who was employed fewer than 52 hours in the 90 calendar days prior to the injury."

IF INJURED PERSON AN "EMPLOYEE" BUT THERE IS NO WORKERS COMPENSATION COVERAGE: (1) Labor Code §3706: If a person is an "employee" but the "employer" does not have workers' compensation coverage, the "employee" may sue the "employer" directly in a civil action. (2) The "employer" is barred from affirmative defenses [Labor Code §3708]; (3) Plaintiff may attach Defendants' property to protect any subsequent judgment [L.C. §3707] and, (4) recover attorney fees [§3709].

PRESUMPTION OF "EMPLOYEE": persons rendering services for another other than as an independent contractor or unless expressly excluded from coverage are presumed to be employees. (Lab.Code §3357). However, this presumption can be rebutted and the law clearly provides that the Labor Code section 3357 's presumption of employee status is overcome if the essential contract of hire, express or implied, is not present under Labor Code section 3351. (***Jones v. Workmen's Comp. Appeals Bd.*** (1971) 20 Cal.App.3d 124, 128; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation, supra, s 7.02(1)(a).) The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the services rendered, and (3) control by the employer over the employee. (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation, supra, at s 30.2.) Although these common law contract requirements are not to be rigidly applied, a consensual relationship between the worker and his alleged employer nevertheless is an indispensable prerequisite to the existence of an employment contract under Labor Code section 3351. (Ibid.) ***Parsons v. Workers' Comp. Appeals Bd.*** (1981) 126 Cal.App.3d 629, 638.

HOMEOWNER AND CAL- OSHA REQUIREMENTS

Our Supreme Court examined whether a homeowner who hired a tree trimmer was required to comply with OSHA regulations in ***Fernandez v. Lawson*** (2003) 31 Cal.4th 31. Lawson hired Fernandez, who did not possess the appropriate license, to trim his tree. In doing so, Fernandez was injured. Fernandez was barred by section 3352, subdivision (h) from being deemed an employee eligible for workers' compensation benefits. He then sued Lawson and asserted, as did appellant, various violations of OSHA safety regulations. The trial court granted Lawson summary judgment, finding that OSHA did not apply to noncommercial tree trimming performed at a private home. The Court of Appeal reversed the trial court..

OSHA requires that "[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." (§ 6400, subd. (a).) As we have discussed, section 6303, subdivision (b) excludes "household domestic service" from the definition of employment. Thus, the Supreme Court considered whether the tree trimming that was performed fell within that exception.

The court noted that the OSHA statutes do not define "household domestic service" and the act's legislative history offers no further guidance as to the meaning of that term. Reviewing the purpose of the 1973 overhaul of the OSHA regulations, which was to develop and enforce occupational safety and health standards throughout the state, it found that "household domestic service" likely refers to the performance of tasks in and outside a private residence and "implies duties that are personal to the homeowner." (***Fernandez,*** *supra,* 31 Cal.4th at p. 379.) The court concluded that "overwhelming public policy and practical considerations make it unlikely the Legislature intended the complex regulatory scheme that is OSHA to apply to a homeowner hiring a worker to perform tree trimming.... 'Moreover, homeowners are ill-equipped to understand or to comply with the specialized requirements of OSHA.' [Citation.]" (*Ibid.*)

Finally, the court rejected the argument that a task requiring a license must always fall outside of OSHA's "household domestic service" exclusion. (*Id.* at p. 38.) It held that OSHA did not apply to the tree trimming work performed and reversed the judgment of the Court of Appeal.

See also: ***Rosas v. Dishong*** (1998) 67 Cal.App.4th 815 [homeowner had no requirement to comply with CAL-OSHA as to person hired to trim tree branches who required a license to do so].

Recently the California Court Supreme Court held that a homeowner would be required to comply with CAL-OSHA when he acted as his own general contractor doing a remodeling of over 700 feet and hired unlicensed workers to tear off an old roof. Plaintiff fell off of the roof. See: ***Cortez v. Abich*** (2011) 51 Cal.4th 285. Plaintiff could not qualify as a "domestic worker" when engaging in such an extensive remodeling job. The Court held that laborer's work on residential remodeling project was "employment" under California Occupational Safety and Health Act (Cal-OSHA), and laborer's work on residential remodeling project was not "household domestic service" under Cal-OSHA. The California Occupational Safety and Health Act (Cal-OSHA) provision stating that Evidence Code provisions "shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation" means that Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions.

ADMISSIBILITY OF CAL-OSHA STANDARDS

ADMISSIBLE AGAINST THIRD PARTIES AS ANY OTHER STATUTE: ***Elsner v. Uveges*** (2004) 34 Cal.4th 915 -- In that case, a subcontractor's employee sued the general contractor for negligence. The contractor moved in limine for an order excluding references to Cal-OSHA regulations. The Supreme Court explained that the amendments codified the common law rule that Cal-OSHA provisions could be used to establish the standard and duty of care in negligence actions, including against third parties. Specifically, the subcontractor's employee could use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant was his employer or a third party contractor.

ONLY WHERE GENERAL CONTRACTOR AFFIRMATIVELY CONTRIBUTED TO PLAINTIFF'S INJURIES: Safety regulations are only admissible in actions by employees of subcontractors brought against general contractors where other evidence establishes that the general contractor affirmatively contributed to the employee's injuries. ***Madden v. Summit View, Inc.*** (2008) 165 Cal.App.4th 1267 [Even if California Occupational Safety and Health (Cal-OSHA) regulation requiring protective railings along all elevated platforms 7 1/2 feet or more above the ground imposed nondelegable safety duty by general contractor to employee of subcontractor, evidence that employee of subcontractor fell from patio with elevation varying from 2 to 8 failed to show whether employee's injury resulted from general contractor's breach of such duty, absent evidence as to elevation of part of patio where employee fell; employee could not establish that guardrail was required on part of patio where he fell].

INDEPENDENT CONTRACTORS : By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements.[FN1] Such delegation does not include the tort law duty the hirer owes *to its own employees* to comply with the same safety requirements, but under the definition of "employer" that applies to California's workplace safety laws (see Lab.Code, § 6304), the employees of an independent contractor are not considered to be the hirer's own employees. plaintiffs here cannot recover in tort from defendant U.S. Airways on a theory that employee's workplace injury resulted from defendant's breach of what plaintiffs describe as a nondelegable duty under Cal–OSHA regulations to provide safety guards on the conveyor. we see no reason to limit our holding in ***Privette*** simply because the tort law duty, if any, that the hirer owes happens to be one based on a statute or regulation. ***SeaBright Ins. Co. v. U.S. Airways, Inc.*** 2011 WL 3655109, 1 (Cal.) (Cal.,2011)

NOTE: ***Hooker v. Department of Transportation*** (2002) 27 Cal.4th 198 -- the hirer of an independent contractor can be liable for a workplace injury of the contractor's employee if the hirer retained control over the contractor's work and exercised that control in a way that "affirmatively contribute[d]" to the employee's workplace injury. (***Hooker,*** at p. 213). ***Tverberg v. Fillner Construction, Inc.*** (2010) 49 Cal.4th 518, -- an independent contractor's hirer is not liable in tort even if the contractor *himself,* rather than the contractor's *employee,* is the one that is injured in the workplace. (***Tverberg,*** *supra,* at pp. 528–529.) Although the contractor in ***Tverberg*** was not entitled to workers' compensation benefits, his claim against the hirer nevertheless failed because of the hirer's presumed delegation to the contractor of responsibility for workplace safety. (*Id.* at pp. 527–528). The independent contractor, ***Tverberg*** said, "has authority to determine the manner in which inherently dangerous ... work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Id.* at p. 522).

EXPERT OPINION CONDITION WAS “DANGEROUS”

Plaintiff asserts prejudicial error was committed in excluding certain evidence. She first argues that her expert should have been permitted to testify as to (1) whether or not ‘the manner of installation of this window constituted a dangerous condition,‘ and (2) whether or not the window ‘had been installed in a manner commonly used in such building trades in Southern California.‘ There was no error in either of these rulings.

(12) As to the former, the rule is that ordinarily an expert cannot testify that a structure constituted a dangerous condition, only the facts may be elicited from which the conclusion follows. (***Baccus v. Kroger,*** 120 Cal.App.2d 802, 804 [262 P.2d 349]; ***Wilkerson v. City of El Monte,*** 17 Cal.App.2d 615, 622 [62 P.2d 790].) In ***Sappenfield v. Main Street etc. R. R. Co.,*** 91 Cal. 48 [27 P. 590], the court, at page 60, stated the principle here applicable in this language: ‘When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence.‘ (10b) The manner of installation of this window was simple and no special knowledge was required to understand its operation. All the pertinent facts could be made perfectly clear to the arbiter of the facts. It was therefore proper to exclude the opinion of plaintiff's expert on this point. (***Wilkerson v. City of El Monte,*** *supra.*) ***Hogan v. Miller*** (1957) 153 Cal.App.2d 107, 116.

“Was expert opinion admissible on whether the condition at the crossing constituted a hazard to motorists? Plaintiffs called a safety engineer as a witness and propounded a hypothetical question to him which called for an opinion as to whether or not the condition at the crossing was hazardous to motorists attempting to cross the tracks. Defendants' objection was sustained. Plaintiffs incorrectly state that the 'point has never been before a California Court.' In ***Wilkerson v. City of El Monte***, 17 Cal.App.2d 615, the almost identical question was propounded to two expert witnesses, both of whom answered that the intersection involved therein was, in their opinion, dangerous and unsafe. The court held: 'The opinions went to the ultimate question of fact ot be determined by the jury.’' (Page 621) The judgment for plaintiff was reversed. ***Martindale v. City of Mountain View*** (1962) 208 Cal.App.2d 109.

NO EXPERT REQUIRED TO DETERMINE OBVIOUS FACT

Expert testimony is not required when negligence is demonstrated by facts that can be evaluated by resorting to common knowledge since scientific enlightenment is not essential for the determination of an obvious fact. (***Friedman v. Dresel*** (1956) 139 Cal.App.2d 333, 341.)

NOTICE OF ALLEGED DEFECT REQUIRED

1. AN OWNER OF PROPERTY IS NOT AN INSURER OF THE VISITOR'S SAFETY. PLAINTIFF MUST ESTABLISH DEFENDANT HAD NOTICE OF THE ALLEGED DEFECT:

Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability. In the absence of actual or constructive knowledge of the dangerous condition, the owner is not liable. Moreover, where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it. In contrast, if the burden of proving lack of notice were placed on the owner in a slip-and-fall case, failure to meet the burden would require a finding of liability and effectively render the owner an insurer of the safety of those who enter the premises. Such a result is contrary to current negligence law. ***Moore v. Wal-Mart Stores, Inc.*** (2003) 111 Cal.App.4th 472, 476 .

A landowner or occupier is not an insurer of the safety of persons on its premises. ***Danieley v. Goldmine Ski Associates, Inc.*** (1990) 218 Cal.App.3d 111, 121; ***Edwards v. California Sports, Inc.*** (1988) 206 Cal.App.3d 1284, 1288; ***Beauchamp v. Los Gatos Golf Course*** (1969) 273 Cal.App.2d 20, 27-28. The landowner or occupier is only required to maintain its premises in a reasonably safe condition, and to warn invitees of concealed perils which it has knowledge of but the invitee does not. (***Danieley***, *supra,* 218 Cal.App.3d at p. 121; ***Edwards***, *supra,* 206 Cal.App.3d at p. 1288; ***Beauchamp***, *supra,* 273 Cal.App.2d at p. 27.)

It is undisputed that to prove negligence, plaintiff would have to establish the elements of duty, breach, causation and damages. (***Ortega v. Kmart Corp.*** (2001) 26 Cal.4th 1200, 1205.) On appeal, plaintiff focuses on the cause of action for premises liability. To establish negligence on this theory, plaintiff would have to prove that defendant had actual or constructive notice of a dangerous condition on its premises and that it had such notice in time to correct the condition. (*Id.* at p. 1203.) A business owner exercises ordinary care "by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved." (*Id.* at p. 1205.) "Because the owner is not the insurer of the visitor's personal safety ... the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability. Although the owner's lack of knowledge is not a defense, '[t]o impose liability for injuries suffered by an invitee due to [a] defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises ...." ' " (*Id.* at p. 1206.)

Where, as here, a claim of negligence is based on an alleged failure to correct a dangerous condition, "the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it. [Citation.] The courts' reasoning is that if the burden of proving lack of notice were placed on the owner in a slip-and-fall case, where the source of the dangerous condition or the length of time it existed cannot be shown, failure to meet the burden would require a finding of liability, effectively rendering the owner an insurer of the safety of those who enter the premises. [Citation.] Several courts believe that shifting the burden to the defendant would, contrary to existing negligence law, permit an inference of negligence to be drawn against the owner based solely on the fact that the fall or accident occurred." (***Ortega v. Kmart Corp***., *supra,* 26 C4th at 1206.)

<u>WHEN THE PREMISES HAVE BEEN TURNED OVER TO A TENANT, THE LANDLORD IS NOT LIABLE UNLESS THE LANDLORD WAS PROVIDED NOTICE OF THE DEFECT OR NEED TO INSPECT</u>:

Where a third party is in possession of premises, absent a showing of actual or constructive knowledge of the dangerous condition or the right or ability to correct the condition, liability cannot be imposed on the landowner. (See ***Laico v. Chevron U.S.A., Inc.*** (2004) 123 Cal.App.4th 649, 661).

"[t]he general duty of care owed by a landowner in the management of his or her property is attenuated when the premises are let because the landlord is not in possession, and usually lacks the right to control the tenant and the tenant's use of the property ." ***Chee v. Amanda Goldt Property Management*** (2006) 143 Cal.App .4th 1360, 1369.

"[T]he landlord's relinquishment of the rental premises to a tenant generally imposes on the tenant, not the landlord, the duty to protect others from dangerous conditions on those premises. (***Uccello v. Laudenslayer*** [(1975)] 44 Cal.App.3d 504, 510-511; Prosser & Keeton, Law of Torts (5th ed.1984) § 63, p. 434 ['In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee ....']; see ***Rowland v. Christian*** (1968) 69 Cal.2d 108, 119-120 [residential tenant liable for dangerous condition within area of leasehold].)''

Thus, landlords generally are not liable for injuries from conditions that arise after the tenant has taken control of leased property, and over which the landlord has no control. ***Uccello v. Laudenslayer****, supra,* 44 Cal.App.3d at p. 511; ***Resolution Trust Corp. v. Rossmoor Corp***. (1995) 34 Cal.App.4th 93, 101-102.

Landlords do not have any responsibility for accidents occurring after their property is transferred to a tenant if the property was not dangerous when transferred to the tenant, used in the manner for which it was intended, and the lessor-owner had given up control of the property. ***Mora v. Baker Commodities, Inc***. (1989) 210 Cal.App.3d 771, 780-782; ***Bisetti v. United Refrigeration Corp***. (1985) 174 Cal.App.3d 643, 650.)

The landlord's duty to inspect the premises after the tenant takes possession is not absolute, but depends upon whether he or she had some reason to know there is a need for an inspection. (***Mora v. Baker Commodities, Inc.****, supra,* 210 Cal.App.3d at p. 781; ***Bisetti v. United Refrigeration Corp****., supra,* 174 Cal.App.3d at p. 649.) Whether a landowner has a duty of inspection is a question of law. ***Delgado v. Trax Bar & Grill*** (2005) 36 Cal.4th 224, 237 & fn. 15 – duty is a question of law to be decided by the Court.)

PARTY AT HOME AND DUTY OWED BY HOMEOWNER

The Court in ***Melton v. Boustred*** (2010)183 Cal.App.4th 521, held that Homeowner did not have a duty to protect guests who were beaten and stabbed by unknown assailants at Homeowner's party that was advertised using a social networking site (MySpace) and featured music and alcohol. Homeowner's conduct in advertising the party did not create the peril that injured the guests, there was no special relationship between Homeowner and the guests, and the criminal act was not foreseeable given that there were no prior similar incidents. Additionally, the proposed security measures of hiring security guards and restricting the guest list were unduly burdensome. The Court further held that a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated. And "in the case of *criminal* conduct by a third party, an extraordinarily high degree of foreseeability is required to impose a duty on the landowner, in part because 'it is difficult if not impossible in today's society to predict when a criminal might strike. In each case, however, the existence and scope of a property owner's duty to protect against third party crime is a question of law for the court to resolve. Id., at 532.

The predicate of any duty to prevent criminal conduct is its foreseeability. Property owners have no duty to prevent unexpected and random crimes." ***Alvarez v. Jacmar Pacific Pizza Corp***. (2002)100 Cal.App.4th 1190, 1209.

Parties are not "inherently dangerous," even assuming that underage drinking would take place. They may be unwise, troublesome, nasty, brutish and long, but they are not "inherently dangerous." ***Tilley v. CZ Master Ass'n*** (2005) 131 Cal.App.4th 464, 489; ***Sakiyama v. AMF Bowling Centers, Inc.*** (2003) 110 Cal.App.4th 398, 408 [no liability for host of "rave" party"].

In the case of *criminal* conduct by a third party, an extraordinarily high degree of foreseeability is required to impose a duty on the landowner, in part because 'it is difficult if not impossible in today's society to predict when a criminal might strike.' ***Melton v. Boustred*** (2010)183 Cal.App.4th 521, 532 [no liability of homeowner when guests were beaten by other participants at party at home. Violence that harmed plaintiffs here was not "a necessary component" of defendant's MySpace party. To impose ordinary negligence liability on [a property owner who] has done nothing more than allow [his home] to be used for [a] party ... would expand the concept of duty far beyond any current models.]

As the court provides in ***Melton***, Id. At p. 536: " In this case, plaintiffs have not alleged facts supporting the existence of any special relationship recognized by law that would trigger a legal duty on defendant's part to protect them. The complaint alleges that plaintiffs came to defendant's house to attend a party. Those facts do not warrant application of the special relationship doctrine, and plaintiffs do not argue otherwise." In fact, as ***Melton*** clearly held at p. 538: "Common sense is not the standard for determining duty…".

PREMISES LIABILITY SUMMARY

ASSUMPTION OF RISK: Owner is required to use due care in management of property to eliminate unreasonable risks of harm to others. Plaintiff's assumption of a risk or hazard on the property is "secondary" and the comparative negligence principles apply. ***Curties v. Hill Top Developers, Inc.*** (1993) 14 Cal.App.4th *165;* ***Bush v. Parents Without Partners*** (1993) 17 Cal.App.4th 322 -- slip and fall on dance floor which was covered by powder designed to make dancers feet glide easier]; ***Morgan v. Fuji Country USA, Inc.*** (1995) 34 Cal.App.4th 127 -- person participating in golfing is barred under doctrine of primary assumption of risk from suing fellow golfer; recovery not barred as against course for premises liability based on design of golf course; ***Calhoon v. Lewis*** (2000) 81 Cal.App.4th 108 [recovery for injuries while skateboarding barred; defect of premises did not increase risk].

SLIPS AND FALLS IN STORES: There is no requirement that a patron in a supermarket must walk with his or her eyes constantly fixed to the ground, and a jury may be instructed that the ***attention of patrons ordinarily is attracted by display of wares for sale. Craddock*** v. Kmart Corporation (2001) 89 Cal.App.4th 1300 [customer tripped over metal bracket lying on floor of store]. Where there has not been an inspection of a self-service store's premises for a certain period of time, a reasonable inference exists that had the store been inspected the defect could have been discovered. ***Ortega v. Kmart Corporation*** (2001) 26 Cal.4th 1200 [slip and fall on puddle of milk on floor]. See also: ***Moore v. Wal-Mart Stores, Inc***. (2003) 111 Cal.App.4th 472 [slip and fall on French fry sold by fast-food restaurant inside of store] -- plaintiff must establish that defendant had actual and/or constructive knowledge of defect or dangerous condition; error for court to refuse to give such an instruction to the jury].

REASONABLE INSPECTIONS: If reasonable inspections are not made, possessor of land will be deemed to have constructive notice of the dangerous condition. See: ***Curland v. Los Angeles County Fair Association*** (1953) 118 Cal.App.2d 691; ***Ortega v. K-Mart*** (2001) 26 Cal.4th 1200, 1210-1211. ***Craddock v. K-Mart*** (2001) 89 Cal.App.4th 1300. O.K. to instruct jury customer's attention may be diverted by display of merchandise. ***Lopez v. Superior Court*** (1996) 45 Cal.App.4th 705 [must show when lease is renewed and executed there was a reasonable inspection of premises with no defects detected; patron of lessee store slips on grape].

STATUTES/CODES: Whether building code/statute applies is issue of law for court. ***Vaerst v. Tanzman*** (1990) 222 Cal.App.3d 1535; ***Nowlon v. Koram Ins. Ctr.*** (1991) 1 Cal.App.4th 1437. Building code in effect at construction is applicable one. ***Salinero v. Pon*** (1981) 124 Cal.App.3d 120.

RES IPSA LOQUITUR: (1) NO -- SLIP AND FALL: In ***Brown v. Poway Unified School District*** (1993) 4 Cal.4th 820, 826-827: "Experience teaches us that slips and falls are not so likely to be the result of negligence as to justify a presumption to that effect ... no inference of negligence arises based simply upon proof of a fall." **(2) COLLAPSING STAIRWAY:** ***Di Mare v. Cresci*** (1962) 58 Cal.2d 292, 298 [Stairways do not collapse in the absence of negligence; no contrary evidence of defendant to rebut presumption of negligence. **(3) COLLAPSING CHAIR/STOOL:** ***Keena v. Scales*** (1964) 61 Cal.2d 779 [res ipsa loquitur present in action for injuries arising from fall from chair on which plaintiff sat on in defendant's office]; ***Howe v. Seven Forty Two Co., Inc***. (2010) 189 CA4th 1155 -- res ipsa for collapsing stool – rebutted by defendant]

SECURITY: A high degree of foreseeability is required to find that scope of a landlord's duty of care requires the hiring of security guards. ***Ann M. v. Pacific Plaza Shopping Center*** *(1*993) 6 Cal. 4th 666, *679.* See: ***Saelzler v. Advanced Group 400*** (2001) 25 Cal.4th 763 [no liability of apartment complex owner when identity of assailant of plaintiff not known; requires speculation as to defendant's liability and cause of incident]. ***Nola M. v. University of Southern California*** (1993) 16 Cal.App.4th 421, 437: "Police protection is, and in our view should remain, a governmental and not private obligation". "Minimum measures" may be required by the landowner to meet its duty of care - ***Delgado v. Trax Bar & Grill*** (2005) 34 C4th 224 [separate patrons before fight; "negligent undertaking" doctrine] and ***Morris v. De La Torre*** (2005) 34 C4th 260 (Call "911", crime in progress).

STRICT LIABILITY: No longer viable in premises liability cases. ***Peterson v. Superior Court*** (1995) 10 Cal.4th 1185. Premises owner is not the insurer of the safety of those on the property. ***Ernest W. Hahn,*** **Inc. v.** ***Superior Court*** (1991) 1 Cal.App.4th 1448; ***Edwards v. California Sports, Inc***. (1988) 206 C.A3d 1284, 1288.

SPIDERS: ***Brunelle v. Signore*** (1989) 215 CA3d 122; ***Butcher v. Gray*** (1994) 29 CA4th 388 – no liability of homeowner for injuries caused by spider bites.

RECREATIONAL IMMUNITY: Civil Code §846; Property does not have to be intended for "recreational activities" and "recreational activities" broadly interpreted [not limited to statute] – ***Ornelas v. Randolph*** (1993) 4 C4th 1095; Person has to be expressly invited by owner of property. ***Johnson v. Unocal Corp***. (1993) 21 CA4th 310. Willful failure to guard/warn may be exception. ***Manuel v. Pacific Gas & Electric Co.*** (2009) 173 CA4th 297; Not applicable to vehicle driving [***Klein v. U.S.*** (2010) 50 C4th 68.

SIDEWALKS: **Streets** ***and*** **Highway Code** ***§5610*** [If any duty at all is owed to repair/maintain sidewalk, it is owed to the municipality, but does not create a duty of care on the part of the adjacent landowner to the pedestrian]. ***(1) Contreras v. Anderson*** (1997) 59 Cal.App.4th 188 [Simple maintenance of the parkway did not amount to an exercise of ownership or control over parking strip; no liability of adjoining landowner].

NONDELEGABLE DUTY: Property owner is answerable for harm caused by the negligent failure of his/her contractor no matter how carefully selected. ***Brown v. George Pepperdine Foundation*** (1943) 23 Cal.2d 256, 260; ***Pappas v. Carson*** (1975) 50 Cal.App.3d *26;* ***Srithong v. Total Inv. Co.*** (1994) 23 Cal.App.4th 721 [duty is nondelegable; "Proposition 51" does not apply, I.e., landowner and contractor jointly liable and cannot apportion noneconomic damages on percentage of fault].

ADMISSIBILITY OF CAL-OSHA: CAL-OSHA regulations admissible in any 3d party action, not just against employer. ***Eisner v. Uveges*** (2004) 34 C4th 915. See: ***Millard v. Biosources, Inc.*** (2007) 156 CA4th 1338 – only if general contract affirmatively contributed to employee's injuries. See: ***Cortez v. Abich*** (2011) 51 C4th 285 - homeowner acting as general contractor for home remodeling required to follow CAL-OSHA.

SWIMMING POOLS: ***Padilla v. Rodas*** (2008) 160 Cal.App.4th 742. Homeowner owed no duty to watch mother's child who drowned in pool. ***Bunch v. Hoffinger Industries, Inc.*** (2004) 123 Cal.App.4th 1278 -danger of diving into a shallow aboveground pool is not open and obvious to an 11 year old as a matter of law [in a products liability case].

<u>DUTY TO WARN</u>: While there is no duty to warn of an open and obvious condition that should have been observed in the exercise of ordinary care. ***Felmee v. Falcon Cable T.V.*** (1995) 36 Cal.App.4th 1032, there is a duty to correct defect. ***Osborne v. Mission Ready Mix*** (1990) 224 Cal.App.3d 104. If it is *foreseeable* that the danger may cause injury despite the fact that it is obvious, there may be a duty to *remedy* the danger, and the breach of that duty may in turn form the basis for liability." ***Martinez v. Chippewa Enterprises, Inc.*** (2004) 121 C.A4th 1179.

<u>DUTY OF CARE:</u> "However, the basic principle to be followed in all these situations is that the owner must use the care required of a reasonably prudent [person] acting under the same circumstances." ***Ortega v. Kmart Corp.*** (2001) 26 Cal.4th 1200, 1205. A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers. (*Ortega v. Kmart Corp., supra,* 26 Cal.4th at p. 1205.) The care required is commensurate with the risks involved. (*Ibid.)****Moore v. Wal-Mart Stores, Inc.*** (2003) 111 Cal.App.4th 472, 476.

<u>TRIVIAL DEFECT:</u> A condition is not a dangerous if the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances. ***Government Code §830.2; Davis*** **v.** ***City of Pasadena*** (1996) 42 Cal.App.4th 701; ***Ursino v. Big Boy Restaurants*** (1987) 192 Cal.App.3d 394, 397-399. Height of defect is not sole determining factor; must look to totality of surrounding circumstances. ***Dolquist v. City of Bellflower*** (1987) 196 Cal.App.3d 261. See: ***Caloroso v. Hathaway*** (2004) 122 Cal.App.4th 922, 927 [no expert necessary; plaintiff has burden to establish; not affirmative defense.]

<u>UNLICENSED CONTRACTORS:</u> Injured person performing work not properly licensed is presumed to be an "employee", and if hirer is not insured, may sue directly in civil action; employer presumed to be negligent **[*Labor Code §2801]*;** ***Furtado v. Schreifer*** (1991) 228 Cal.App.3d 1608 [unlicensed painter]. See also: ***Labor Code §§3352(h), 3351(d)*** and ***Labor Code §2750.5***. CAL-OSHA rules requiring "safe place to work" see: ***Fernandez v. Lawson*** (2003) ***Rosas v. Dishong*** (1998) 67 Cal.App.4th 815 [No as to unlicensed tree trimmer]. Every homeowner policy required to carry Workers 'Compensation coverage. ***Insurance Code §11590***. Presumption of negligence can be rebutted. ***Judd v.Chabeck*** (1958) 162 CA2d 574.

<u>DOG BITES:</u> Civil Code §3342 [strict liability]; Penal Code §399 [mischievous dog causing death or serious injury]; "Bite" even though no wound [***Johnson v. McMahan*** (1998) 68 CA4th 173]. Assumption of risk and comparative negligence still viable defenses. ***Gomes b. Byrne*** (1959) 51 C2d 418. 3 y/o child could be "trespasser" and thus no strict liability [***Bauman v. Beujean*** (1966) 244 CA2d 384]. Common law liability as to owner of animal with dangerous propensities. ***Drake v. Dean*** (1993) 15 CA4th 915, 921.

<u>MERELY BECAUSE PLAINTIFF FELL:</u> '[n]o inference of negligence arises based simply upon proof of a fall upon the owner's floor." ***Brown v. Poway Unified School Dist.*** (1993) 4 Cal.4th 820, 826. See also: ***Vaughn v. Montgomery Ward & Co.*** (1950) 95 Cal.App.2d 553, 557 [simply because plaintiff fell in defendant's store and had oily substance on her clothes does not mean that the floor was in fact slippery]. No speculation. ***Buehler v. Alpha Beta Co.*** (1990) 224 CA3d 729, 734.

"<u>PECULIAR RISK</u>": ***Privette v. Superior Court*** **(**1993) 5 Cal.4th 693. See: ***Kinsman v. Unocal Corp.*** (2005) 37 Cal.4th 659, 664, 672-678 [hirer not liable for conditions which are open and obvious or which could have been detected]; ***McKown v. Wal-Mart Stores, Inc.*** (2002) 27 Cal.4th 219, 222-226, [providing unsafe equipment affirmatively contributing to injury]; ***Hooker v. Department of Transportation*** (2002) 27 Cal.4th 198, 200-202, 206-215 [negligent exercise of retained control affirmatively contributing to injury ***Toland v. Sunland Housing Group, Inc.*** (1998) 18 Cal.4th 253, 256-257, 264-270 [negligent failure to take special precautions].

DUTY OF LANDLORD ACTS OF VIOLENCE BY TENANT

1. LANDLORD NO DUTY:

In ***Sturgeon v. Curnutt*** (1994) 29 Cal. App. 4th 301, 308, the Court of Appeal affirmed the granting of a nonsuit based upon unforeseeability in a shooting case. The tenant of the landlord defendant accidentally shot a visitor while under the influence of alcohol. The landlord knew the tenant had a drinking problem and knew he kept loaded firearms in his residence. But nonsuit was granted because the mere knowledge by the landlord of alcohol abuse and firearms in the residence was not sufficient to conclude that the landlord could reasonably have foreseen that a person would be shot in the absence of knowledge about other shootings or knowledge that the tenant handled firearms in an unsafe manner when he was drunk. *Id.* at 307. "When there is no evidence a tenant has violent propensities or handles firearms unsafely while drinking, a landlord's knowledge that the tenant misuses alcohol and possesses firearms is not a cue the landlord needs to protect visitors from injury." *Id.* at 308. Therefore, the shooting was not reasonably foreseeable. ***Sturgeon v. Curnutt.***

Castaneda v. Olsher (2007) 41 Cal.4th 1205.To establish a landlord's duty to evict existing tenants for dangerous conduct, so as to establish landlord's liability to tenant injured by gang violence, plaintiff must show that violence by the tenants or their guests was highly foreseeable. A landlord is not obliged to institute eviction proceedings whenever a tenant accuses another tenant of harassment.

Anaya v. Turk (1984) 151 Cal.App.3d 1092, 1100-1101 [apartment lessee did not owe guest a duty to protect him from shooting by another guest merely because shooter was known to be an ex-convict, where no evidence was presented of prior "specific acts of violence" by shooter].)

Davis v. Gomez (1989) 207 Cal.App.3d 1401, 1403-1406 (although tenant had a gun and had been acting "peculiar," grumbling loudly to herself and gesturing as if "casting spells on those who walked by," her unprovoked shooting of a neighbor was not sufficiently foreseeable).

Andrews v. Mobile Aire Estates (2005) 125 Cal.App.4th 578. There, the court held one mobilehome park resident's harassing and annoying behavior toward another (splashing mud onto the plaintiff's newly washed cars, aiming a video camera at his living room, using racial epithets and other verbal abuse) did not make his battery of the neighbor sufficiently foreseeable for imposition of a tort duty; it did not "put defendants on notice of [the assailant's] propensity for violence." (*Id.* at p. 596). However, failure to evict disruptive tenant may breach landlord's implied *contractual* duty to preserve other tenants' quiet enjoyment of leased premises.

LANDLORD LIABLE: ***Hawkins v. Wilton*** (2006) 144 Cal.App.4th 936, 944-945 (landlord who allowed a former security guard to remain as a tenant, knowing "he frequented the premises while carrying a firearm and while intoxicated by methamphetamine," may have violated tort duty to exclude a dangerous tenant from the premises); ***Madhani v. Cooper*** (2003) 106 Cal.App.4th 412 -- the plaintiff's neighbor in the defendant's apartment building shoved, bumped and physically blocked the plaintiff and her mother on several occasions, as well as berating them. Despite the plaintiff's frequent complaints to the defendant's property manager, no action was taken against the assailant, who ultimately pushed the plaintiff down the building's stairs, injuring her. (*Id.* at pp. 413-415.) The Court of Appeal held the landlord had had a duty to evict the assaultive tenant if necessary, observing that "[i]t is difficult to imagine a case in which the foreseeability of harm could be more clear."*Id.* at p. 415). ***Barber v. Chang*** (2007) 151 Cal.App.4th 1456. In that case, a tenant sued the owner of a small apartment complex after another tenant (Daniel) shot him. The landlord had received prior written notice that Daniel had brandished a shotgun at another tenant and a visitor in an angry and threatening manner. (*Id.* at pp. 1459-1460, 1466.) The court concluded "that a tenant who brandishes a gun while uttering threats ... poses a foreseeable risk of harm to others…".

DUTY TO CONTROL CONDUCT OF A THIRD PERSON:

"In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages." (***Ortega v. Kmart Corp.*** (2001) 26 Cal.4th 1200, 1205.)

The duty element is the defendant's legal duty to protect the plaintiff from harm. (***Bily v. Arthur Young & Co.*** (1992) 3 Cal.4th 370, 397.) Whether a duty to the plaintiff exists in any particular negligence case is a question of law. (***Kentucky Fried Chicken of Cal., Inc. v. Superior Court*** (1997) 14 Cal.4th 814, 819.) Courts use the concept of duty to restrict the otherwise potentially unlimited liability flowing from a negligent act. (***Bily***, at p. 397.)

"[t]he question of the existence of a legal duty of care in a given factual situation presents a question of law which is to be determined by the courts alone." ***Rotolo v. San Jose Sports and Entertainment, LLC*** (2007) 151 Cal.App.4th 307, 321.

"[A]s a general matter, there is no duty to act to protect others from the conduct of third parties." (***Delgado v. Trax Bar & Grill*** (2005) 36 Cal.4th 224, 235 [Note: Supreme Court also addressed doctrine of "voluntary undertaking"]. While there may be no duty to assist an unrelated person in peril, once such assistance has been undertaken it must be carried out with reasonable care. Thus, the priest and the Levite may walk by the injured traveler with impunity, but the good Samaritan who stops to aid must do so carefully. ***Koepke v. Loo*** (1993) 18 Cal.App.4th 1444, 1452.

The general rule of nonliability is that "no one is required to save another from a danger which is not of his making" (***Andrews v. Wells*** (1988) 204 Cal.App.3d 533, 539). ***Rotolo v. San Jose Sports and Entertainment, LLC*** (2007) 151 Cal.App.4th 307, 325.

As a general rule, "one person [owes] no duty to control the conduct of another [citations], nor to warn those endangered by such conduct...." (***Tarasoff v. Regents of University of California*** (1976) 17 Cal.3d 425, 435.) The creation of a duty, therefore, must rest upon some special circumstance warranting the imposition of a duty, such as a number of special circumstances or "special relations" which give rise to a duty-such as the obligations of common carriers toward their passengers, those of innkeepers to their guests, shopkeepers to their business invitees. ***Koepke v. Loo*** (1993) 18 Cal.App.4th 1444, 1451-1452.

In a negligence case where the plaintiff alleges a defendant had a duty to control another person's conduct, "special rules come into play." (***Megeff v. Doland*** (1981) 123 Cal.App.3d 251, 256-257 (***Megeff***).) "In general, one owes no duty to control the conduct of another person [citations], but the courts have created limited exceptions based on various special relationships between a defendant and . . . the person whose conduct needs to be controlled . . . ." (*Id.* at p. 257.)

A defendant who is found to have a "special relationship" with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency. ***Rotolo v. San Jose Sports and Entertainment, LLC*** (2007) 151 Cal.App.4th 307, 325.

Where a complaint alleges that plaintiffs came to defendant's house to attend a party, those facts do not warrant application of the special relationship doctrine. ***Melton v. Boustred*** (2010) 183 Cal.App.4th 521, 536.

PREMISES LIABILITY AND CHILDREN

DUTY OF CARE OWED CHILDREN AND STANDARD OF CARE

CACI 412 Duty of Care Owed Children: An adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults.

When children are the focus of care, the landlord's duty is to protect the young from themselves and guard against perils that are reasonably foreseeable. [Citation.] 'The determination of the scope of foreseeable perils to children must take into consideration the known propensity for children to intermeddle.' ***Rinehart ex rel. Combs v. Boys & Girls Club of Chula Vista*** (2005) 133 Cal.App.4th 419, 430.

Standards of care for minors have always been much lower than those for adults, and that in dealing with a young child one must exercise greater caution than in dealing with an adult. Accordingly, in this state the cases have found foreseeable many types of injuries to children arising out of childish carelessness, immaturity or heedlessness to danger. ***Holmes v. City of Oakland*** (1968) 260 Cal.App.2d 378, 387.

No duty to minor child injured when he walked off of the property and was injured by vehicle in street; no duty to fence property. (***Brooks v. Eugene Burger Management Corp.*** (1989) 215 Cal.App.3d 1611, 1619. However, see: ***McDaniel v. Sunset Manor Co.*** (1990) 220 Cal.App.3d 1, 5 - Once the property has been fenced, then there is a duty to maintain the fence in good condition to prevent a child from entering an adjacent creek and drowning.

CACI 402 Standard of Care for Minors: [*Name of plaintiff/defendant*] is a child who was years old at the time of the incident. Children are not held to the same standards of behavior as adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that same situation.

UNDER AGE OF 5: Children under the age of 5 generally presumed to be incapable of contributory negligence. I.e., see: ***Fowler v. Seaton*** (1964) 61 Cal. 2d 681 (three years, seven months); ***Crane v. Smith*** (1943) 23 Cal. 2d 288 (three-year-old); ***Morningred v. Golden State Co.*** (1961) 196 Cal. App. 2d 130 (four-year-old) [duty of care of milk truck operating in vicinity of children]; ***Christian v. Goodwin*** (1961) 188 Cal. App. 2d 650 (four years, seven months); ***Ellis v. D'Angelo*** (1953) 116 Cal. App. 2d 310.

STORES:

As the court held in ***Takashi Kataoka v. May Dept. Stores Co.*** (1943) 60 Cal.App.2d 177, 184: "Proprietors of premises who invite children on them must use care to keep them reasonably safe, not omitting precautions against injury from childish impulses. * * * This doctrine is but one phase of the wider doctrine that an owner must keep his premises reasonably safe for the use of people whom he invites to come on them--an application of the general doctrine with special reference to the nature of children, and in accordance with the principle that what constitutes due care in a given instance depends on the degree of danger to be apprehended. [Citing cases.] Because children are more heedless and have less discretion and capacity to avoid danger than adults, more care must be exercised by others for their safety."

OBVIOUS AND PATENT DEFECTS: In ***Hanson v. Luft*** (1962) 58 Cal.2d 443, a five-year-old child brought suit to recover damages for injuries she suffered when her pajamas were ignited while she was standing near an open gas heater in an apartment rented by her parents from defendants. (*Id.,* at p. 444.) The Supreme Court affirmed judgment entered for defendants after the trial court sustained their demurrer without leave to amend. The court said, "It is the settled rule that while a landlord is under a duty to warn the tenant of any hidden danger or defect in the leased premises of which he [or she] has knowledge [citations], there is no duty to warn the tenant of obvious and patent defects and dangers [citations]." (*Id.,* at p. 445.) The danger in question, the court observed, "must have been as obvious to the tenant-parents of the ... plaintiff as it was to the defendants-landlords." (*Id.,* at p. 446.) Even though the landlords had similar previous experience with the appliance (a similar injury to a minor), responsibility for the child's safety did not shift from the parents, to whom the danger must have been apparent.

CIVIL CODE §846 APPLIES TO ACTIVITIES ENGAGED IN BY CHILDREN: The immunity of Civil Code §846 is not limited to adults. For example: Ten-year-old Joshua Jackson was flying a kite in his friend's backyard and suffered serious injuries when he used an aluminum pole to try to dislodge the kite from an electrical power line that traversed the neighboring property owned by the friend's grandmother, Eve Prince. Action barred by Civil Code §846. ***Jackson v. Pacific Gas & Electric Co***. (2001) 94 Cal.App.4th 1110, 1113; Fourteen-year-old Erika Manuel climbed a transmission tower owned by Pacific Gas & Electric Company (PG & E). Tragically, she came in contact with a live transformer and was electrocuted, suffering serious injuries. She died eleven days later. Erika's parents sued PG & E, which ultimately obtained summary judgment based on the immunity provided by Civil Code section 846. ***Manuel v. Pacific Gas & Elec. Co.*** (2009) 173 Cal.App.4th 927, 930. See: ***Ornelas v. Randolph*** (1993) 4 Cal.4th 1095, 1098 -- Plaintiff, a "minor child", together with five other children, was playing on defendant's property where farm equipment was stored. Several of the children were climbing on top of a piece of old machinery when a metal pipe dislodged and fell on plaintiff, causing injuries. Plaintiff was not on the equipment at the time, but was sitting nearby playing with a hand held toy when the accident occurred. Plaintiff's action barred by Civil Code §846. As the Court held in ***Ornelas***, the "unsuitable" property exemption was a judicially-created exemption not provided for by the Legislature in §846. Thirteen-year-old boy sued owner of electrical transmission tower after he was injured when he climbed tower. Summary judgment in favor of defendants affirmed; action barred by immunity of Civil Code §846. ***Bacon v. Southern Cal. Edison Co.*** (1997) 53 Cal.App.4th 854.

DANGER OBVIOUS TO CHILDREN: Danger of riding bicycle down the steep, wet grassy hill was obvious from appearance of property itself, even to children exercising lower standard of due care. ***Mathews v. City of Cerritos*** (1992) 2 Cal.App.4th 1380, 1385 [child was 8 years old];The risk of falling off a bicycle propped against a chain-link fence as 9 year-old climbed on it to pick oranges from tree on other side of fence was obvious. Bike was not intended to be used as a ladder. ***Biscotti v. Yuba City Unified School District*** (2007) 158 Cal.App.4th 554; ***Garcia v. Soogian*** (1959)52 Cal.2d 107 -- The chance was slight that a child of plaintiff's age [12 years 8 months] would fail to see the glass or appreciate what risk was presented when she jumped over it on her bike.

<u>FALL OUT OF WINDOWS</u>: It has been held in California that this duty includes within its scope adopting *reasonable precautions* to prevent young children from toppling out of windows in common areas of the building. ***Amos v. Alpha Management*** (1999) 73 Cal.App.4th 895 [A minor, who at two and a half years old fell out of an apartment building's second story window, brought a negligence action against the owners and managers of the building. The trial court granted summary judgment for defendants on the basis that defendants had no duty to assure that plaintiff did not fall out of the window. The Court of Appeal reversed. The trial court erred in granting summary judgment for defendants on the basis that defendants had no duty to assure that plaintiff did not fall out of the window. Traditional tort principles impose on landlords a duty to exercise due care for the resident's safety in those areas under their control, including adopting reasonable precautions to prevent young children from toppling out of windows in common areas of the building.] However, see: ***Pineda v. Ennabe*** (1998) 61 Cal.App.4th 1603 [A minor, who was injured after falling out of a building's second story window, knocking out the screen as she fell, brought a negligence action against her mother's landlord, the owner of the building. The trial court entered summary judgment in favor of defendant. The Court of Appeal affirmed the judgment. The court held that defendant owed no duty of care to prevent this type of accident. The predominant cause of plaintiff's accident was careless parental placement of a bed under the window, followed by parental negligence in leaving plaintiff unattended and unsupervised. Although a landlord may foresee that his or her tenants might carelessly leave their small children unattended and exposed to dangers, he or she is not required to forestall the foreseeable consequences of others' negligence-only his or her own.

<u>No Liability</u>: (***Schlemmer v. Stokes*** (1941) 47 Cal.App.2d 164, 167 [landlord not liable where baby leaned against screen and fell out window; "[i]t is a matter of common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out"]; ***Gustin v. Williams*** (1967) 255 Cal.App.2d Supp. 929, 932 [landlord not liable where screen has no lock and guest of tenant falls out window].)

<u>Yes Liability</u>:

Roberts* v. *Del Monte Properties Co.* (**1952) 111 Cal.App.2d 69, 73-74, in which the court affirmed a judgment for a seven-year-old tenant who fell through an open fourth floor window while playing on a pile of mattresses and furniture in a hallway. When the child "was on the top mattress he accidentally tumbled backward towards the open window behind the pile, the screen in it gave way, and the boy and screen fell into the patio. The court quickly disposed of defendant's argument it could not be held liable for the plaintiff's injuries because the building's tenants were under orders not to allow their children to play in the hallways. This order was not directed to the children but to their parents. In ***Freeman* v. *Mazzera (1957) 150 Cal.App.2d 61, 62-63. The four-year-old plaintiff was playing on this edge when the iron lattice gave way and he fell to the ground below. There was evidence the landlords breached this duty because they failed to inspect or repair the lattice work even though they knew young children played on it.

DEFINITION OF "DANGEROUS CONDITION"

A definition of a "dangerous condition" is set forth in Government Code section 830(a) which provides: " 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." ***Davis v. City of Pasadena*** (1996) 42 Cal.App.4th 701, 704.

A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used. Government Code §830.2.

As the "Law Revision Commission Comments" following Government Code §830.2 provides: "This section declares a rule that has been applied by the courts in cases involving dangerous conditions of sidewalks. Technically it is unnecessary, for it merely declares the rule that would be applied in any event when a court rules upon the sufficiency of the evidence. It is included in the chapter to emphasize that the courts are required to determine that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk is involved before they may permit the jury to find that a condition is dangerous. [4 Cal.L.Rev.Comm. Reports 1001 (1963)]

TRIVIAL DEFECTS.

The law imposes no duty on landowners to repair trivial defects. As explained recently in ***Caloroso v. Hathaway*** (2004) 122 Cal.App.4th 922, "a property owner is not liable for damages caused by a minor, trivial or insignificant defect in property. [Citation.] Courts have referred to this simple principle as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that plaintiff must plead and prove. The 'trivial defect defense' is available to private, nongovernmental landowners. (***Ursino v. Big Boy Restaurants*** (1987) 192 Cal.App.3d 394, 398-399.) As the ***Ursino*** court stated, 'persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition.' " (***Caloroso**, supra,* at p. 927.)

A walkway defect is trivial if it poses no substantial risk of injury to a pedestrian who exercises ordinary care. (See ***Dunn v. Wagner*** (1937) 22 Cal.App.2d 51, 54 [recognizing "a duty of a pedestrian ... to use ordinary care for his personal safety"].) "Where reasonable minds can reach only one conclusion-that there was no substantial risk of injury-the [trivial defect] issue is a question of law, properly resolved by way of summary judgment." (***Caloroso**, supra,* 122 Cal.App.4th at p. 929.) ***Ursino*** aptly observed, "The rule which permits a court to determine 'triviality' as a matter of law rather than always submitting the issue to a jury provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property. [A] landowner is not an insurer of the safety of its users." (***Ursino**,*192 Cal.App.3d at p. 399.)

<u>TRIAL OF A "NEGLIGENT SECURITY" CASE:</u>

(1) <u>COMPLAINT</u>: Any trial of a "negligent security" case starts from the very beginning – reviewing the Complaint. Many times defense counsel simply files a "form" Answer and routine discovery and then waits until trial to begin earnest preparation of the case. The scope and existence of a duty and the foreseeability of harm are legal issues for the court. ***Margaret W. v. Kelley R.*** (2006) 139 CA4th 141, 150. In examining the Complaint for adequate pleading of "negligent security" it is essential to determine whether or not the Plaintiff has plead sufficient facts to impose a duty on the Defendant. Often a demurrer is appropriate to require the Plaintiff to "flush out" the "duty" – I.e., require the Plaintiff to plead the prior bad acts necessary to impose a duty or enunciate the security measures Plaintiff claims was could have prevented the incident. See: ***7735 Hollywood Blvd. Venture v. Superior Court*** (1981) 116 Cal.App.3d 901, 906: "The complaint here fails to plead sufficient facts to create any duty on the owner of the apartment building or to establish any causal connection between the alleged delict and the injury" [complaint further failed to plead sufficient facts to establish foreseeability, and thus "duty"].

(2) <u>ANSWER</u>: It is vital to understand the allegations of the Complaint and in preparing the Answer that the appropriate affirmative defenses are alleged. It is too late when it comes time for the Motion for Summary Judgment, for example, and you realize that an affirmative defense was not plead that is essential to your motion. Include negligence of others, Proposition 51, Plaintiff's lack of care, etc.

(3) <u>DISCOVERY</u>: It can't be repeated often enough that this is one of the most critical points of preparing the defense of any "negligent security" case. Why? Because the defendant must know from the plaintiff exactly what the plaintiff is contending was the defect of the premises that allowed the assailant to attack the plaintiff – and what the plaintiff contends the defendant should have done to prevent it. In other words, what security should the defendant have utilized to prevent the incident – replace a lock, hire security guards, replace a pane of glass, install security camera, etc. For example, see: ***Barber v. Chang*** (2007) 151 CA4th 1456 -- defendant moved for summary judgment in negligent security case only on issue that plaintiff did not establish a high degree of foreseeability requiring defendant to retain security guards. As the court held in ***Barber v. Chang*** (2007) 151 Cal.App.4th 1456, 1469, in reversing the defendant's summary judgment, as defendant did not address whether minimal burdens could have prevented attack by a tenant: "[A] party may plead negligence ... in general terms." (***Singer v. Superior Court*** (1960) 54 Cal.2d 318, 323.) If, in crafting his motion for summary judgment, Chang desired a more definite statement of the security measures Barber believed Chang neglected, interrogatories and other discovery mechanisms were at his disposal. (*Id.* at p. 324)." See also: ***Hagen v. Hickenbottom*** (1995) 41 CA4th 168, 187; ***Gaggero v. Yura*** (2003) 108 CA4th 884, 892.

FACTORS IN ANALYSIS OF A "NEGLIGENT SECURITY CASE"

The ***Castaneda*** decision lays out this approach: The "court in each case (whether trial or appellate)" must first "identify the specific action or actions the plaintiff claims the defendant had a duty to undertake." (***Castaneda v. Olsher*** (2007) 41 Cal.4th 1205; at p. 1214.) Only then is the court in a position to " 'meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed on the landlord.' " ***Castaneda****, supra,* 41 Cal.4th at p. 1214, **quoting** ***Vasquez v. Residential Investments, Inc****.* (2004) 118 Cal.App.4th 269, 280.)

This balancing breaks down into five discrete steps:

(1) Determine the " 'specific measures" which the " 'plaintiff asserts the defendant should have taken to prevent the harm,'

(2) " analyze " 'how financially and socially burdensome these proposed measures would be to a landlord,' "

(3) " 'identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures,'

(4) " 'assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was that this conduct would occur,' " and then,

(5) compare the burden and foreseeability to determine the " 'scope of the duty the court imposes on a given defendant.' " (***Castaneda****, supra,* 41 Cal.4th at p. 1214, quoting ***Vasquez v. Residential Investments, Inc.*** (2004) 118 Cal.App.4th 269, 285.)

This approach-by requiring a court to first ask specifically what a property owner should have done to prevent a given attack-has the added benefit of enabling the court to determine whether a plaintiff has sufficient evidence to go to the jury on the subject of causation.

IF THERE IS NO DUTY IT IS NOT RELEVANT HOW MINIMUM THE SECURITY MEASURE BURDEN: Even if the proposed measures can be considered minimally burdensome, if. the third party assault was not foreseeable under even the " 'regular' reasonable foreseeability" test (***Delgado****, infra,* 36 Cal.4th at p. 243, fn. 24), the degree of burden is immaterial. "If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another." (***Margaret W. v. Kelley R.*** (2006) 139 Cal.App.4th 141, 150). ***Ericson v. Federal Exp. Corp.*** (2008)162 Cal.App.4th 1291, 1305. If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another. And, while questions concerning whether a duty has been breached and whether that breach caused a plaintiff's injury may be questions of fact for a jury, the existence of the duty in the first place is a question of law for the court. (***Delgado****, supra,* 36 Cal.4th at p. 237.) The existence and scope of any duty, in turn, depends on the foreseeability of the harm, which, in that context, is also a legal issue for the court. (*Ibid.*) ***Margaret W. v. Kelley R.*** (2006) 139 Cal.App.4th 141, 150. See also: ***Ericson v. Federal Exp. Corp.*** (2008)162 Cal.App.4th 1291, 1305.

HOMEOWNERS: See: ***Melton v. Boustred*** (2010) 183 Cal.App.4th 521 [the existence of a duty supporting negligence liability is a question of law for the court; posting invitation to a party on a social networking was not misfeasance; the host was not in any special relationship giving rise to duty to protect guests; it was not reasonably foreseeable that guests would be attacked at party; burden of hiring security guards would outweigh any foreseeable risk of harm; the party was not a public nuisance; and the burden of limiting guest list would outweigh any foreseeable risk of harm; hindsight is not the standard for determining duty supporting premises liability. Demurrer sustained no leave to amend].

SLIDING SCALE – FORESEEABILITY: Our Supreme Court has clearly articulated "the scope of a landowner's duty to provide protection from foreseeable third party [criminal acts].... [It] is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] ' "[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." [Citation.]' [Citation.].... [D]uty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." **Yu *Fang Tan v. Arnel Management Co.*** (2009) 170 Cal.App.4th 1087, 1095.

HIGH DEGREE OF FORESEEABILITY: The higher the burden to be imposed on the landowner, the higher the degree of foreseeability is required. (***Sharon P. v. Arman, Ltd.***, *supra,* 21 Cal.4th at p. 1195, disapproved on other grounds in ***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 853, fn. 19; ***Delgado v. Trax Bar & Grill*** (2005) 36 Cal.4th 224, 243; ***Castaneda***, *supra,* 41 Cal.4th at pp. 1213-1214.) A " *high degree* of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards ... [because the] monetary costs of security guards is not insignificant" and "the obligation ... is not well defined." (***Ann M.***, *supra,* 6 Cal.4th at p. 679, italics added.) The burden of hiring security guards is "so high in fact, that the requisite foreseeability to trigger the burden could rarely, if ever, be proven without prior similar incidents. [Citation.]" (***Wiener v. Southcoast Childcare Centers, Inc***. (2004) 32 Cal.4th 1138, 1147)." ***Yu Fang Tan v. Arnel Management Co.*** (2009) 170 Cal.App.4th 1087, 1096 -- provide *guards* or undertake equally onerous measures, or as when a plaintiff, such as in ***Sharon P***. or ***Wiener***, asserts the defendant had a legal duty to provide bright lighting, activate and monitor security cameras, provide periodic 'walk-throughs' by existing personnel, or provide stronger fencing), heightened foreseeability-shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location-will be required." (***Delgado***, supra, at p. 243, fn. 24. ***Yu Fang Tan v. Arnel Management Co.*** (2009) 170 Cal.App.4th 1087, 1097.

LOW DEGREE OF FORESEEABILITY – "MINIMUM BURDENS": While there were three prior incidents which the court held were "sufficiently similar" to determine foreseeability, the court in ***Yu Fang Tan v. Arnel Management Co***.(2009) 170 Cal.App.4th 1087, 1098-1099, held that the requested security measures was "minimum", such as : (1) moving the existing security gates from the back of the access road, *or* (2) installing "very similar" gates before the visitor and leasing office parking lots. An additional gate could be "any gate ...-that would *not necessarily* impede climbing over it. It wouldn't have spikes or-or be unusually high. It would just define a property boundary ...." "[*v*] *ery similar to the gates they have* ...." (Italics added.) Indeed, *Professor Katz did not reject swing-arm gates.* Any gate could remain open during the day to allow business in the leasing office. Plaintiffs clearly stated they were *not* asking for the hiring of a guard or for any form of ongoing surveillance or monitoring. Furthermore, because existing fencing extends around almost the entire perimeter of the property, only a "very minor" extension over a "very small area" would be necessary to close the fencing gap, Professor Katz testified, and could be achieved by merely mounding dirt.

DUTY TO HIRE SECURITY GUARDS

"Property owners have no duty to prevent unexpected and random crimes." ***Nicole M. v. Sears, Roebuck & Co.*** (1999) 76 Cal.App.4th 1238, 1247.

"While there may be circumstances where the hiring of security guards will be required to satisfy a landowner's duty of care, such action will rarely, if ever, be found to be a 'minimal burden.' The monetary costs of security guards is not insignificant. Moreover, the obligation to provide patrols adequate to deter criminal conduct is not well defined. 'No one really knows why people commit crime, hence no one really knows what is "adequate" deterrence in any given situation.' (***7735 Hollywood Blvd. Venture v. Superior Court*** (1981) 116 Cal.App.3d 901, 905.)

The social costs of imposing a duty on landowners to hire private police forces are also not insignificant. (See ***Nola M. v. University of Southern California*** (1993)] 16 Cal.App.4th 421, 437-438.) A high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. The requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety. Id.,116 Cal.App.3d at p. 905.)

The courts have rejected an argument that installation and monitoring of video or CTTV cameras would be required as a deterrent to crime – and the burden imposed is not any less burdensome than the hiring of security guards – and the deterrent to criminal conduct is questionable. See: ***Sharon P. v. Arman, Ltd.*** (1999) 21 Cal.4th 1181, 1196 [disapproved of on another point in ***Aguilar v. Atlantic Richfield Co.*** (2001) 25 Cal.4th 826]. See also: ***Roe v. McDonald's Corp.*** (2005) 129 Cal.App.4th 1107, 1115. See ***Castaneda v. Olsher*** (2007) 41 Cal.4th 1205, 1222-1223 [no duty to hire security guards at a trailer park where gang members resided].

"If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another." ***Ericson v. Federal Exp. Corp***. (2008) 162 Cal.App.4th 1291, 1305.

In the context of duty of care, foreseeability does not mean the mere possibility of occurrence. ***Hegyes v. Unjian Enterprises, Inc.*** (1991) 234 Cal.App.3d 1103, 1133. As the court held in ***Alvarez v. Jacmar Pacific Pizza Corp.*** (2002) 100 Cal.App.4th 1190, 1212, where there was a verbal and physical confrontation between two groups of customers and a simple statement by one group, unaccompanied by any threat of violence, that it would be back, when the group returned with a weapon and an engaged in execution-style murder of a patron. The incident was not foreseeable. This conclusion is not changed even with the consideration of three violent incidents that had occurred at the restaurant in the two and a half years prior to the victim's murder.

PRIVETTE AND ITS PROGENY

In ***Kinsman v. Unocal Corp.*** (2005) 37 Cal.4th 659, the California Supreme Court considered whether a property owner's liability for injuries to an independent contractor's employee arising from a hazardous condition on the premises was limited by the principles of ***Privette v. Superior Court*** (1993) 5 Cal.4th 689. In reaching its holding, the Court concluded that when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of ***Privette*** and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so. This principle applies when the safety hazard is caused by a preexisting condition on the property, rather than by the method by which the work is conducted. ***Kinsman****, supra,* 37 Cal.4th at pp. 673-674.

In ***Privette***, the Supreme Court held that workplace injuries to an independent contractor's employees are already compensable under California's Workers' Compensation Act (Labor Code §§3600(a), 3716). This no-fault-based recovery provides " 'the exclusive remedy against an employer for injury or death of an employee.' " Because workers' compensation is the exclusive remedy for an employee's workplace injuries, thus barring recovery from the employer, so too an independent contractor's employee should not be allowed to recover damages from the contractor's hirer, who "is indirectly paying for the cost of [workers' compensation] coverage, which the [hired] contractor presumably has calculated into the contract price."]

The plaintiff in ***Privette*** worked for a roofing company hired by a property owner to install a new tar and gravel roof on his duplex. The worker was injured when he fell off a ladder while carrying a five-gallon bucket of hot tar up to the roof. The worker sought workers' compensation benefits for his injuries, and also sued the landowner under the doctrine of peculiar risk. The Court held that Plaintiff's action against the landowner was barred.

In ***Toland v. Sunland Housing Group, Inc.*** (1998) 18 Cal.4th 253, the Court declined to impose peculiar risk liability against a general contractor for the jobsite injuries of an employee of an independent contractor whose negligence had caused the employee's injuries. Peculiar risk liability, we said, "is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the [independent] contractor, because it is the [independent] contractor who has caused the injury by failing to use reasonable care in performing the work." (***Toland****, supra,* at p. 265). General contractors, like all others who hire independent contractors, have "the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Id.* at p. 269).

In ***Hooker v. Department of Transportation*** (2002) 27 Cal.4th 198, the Court held that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a work site, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries.

In ***McKown v. Wal-Mart Stores, Inc.*** (2002) 27 Cal.4th 219, 222, the Court held that a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury.

See: ***Seabright Ins. Co. v. U.S. Airways, Inc.*** (2011) __C4th __ :"***Privette***" applies in matter involving independent contractors/employees.

ASSUMPTION OF RISK – BIKES, SCOOTERS AND SKATEBOARDS

Calhoon v. Lewis (2000) 81 Cal.App.4th 108 -- While waiting for a friend, a young man skateboarded in his friend's driveway. He fell into a planter and was injured by a metal pipe inside the planter. He sued his friend's parents, who had placed the planter in the driveway. Michael skateboarded for about 10 to 15 minutes, successfully performing a trick, known as an "ollie." As he prepared to perform the trick again, Michael skateboarded across the driveway in the direction of the garage. He attempted to ollie again, but lost control of his skateboard. As he was losing his balance, Michael took three steps backwards. The back of his legs struck a planter located near the garage causing Michael to fall and impale himself on a metal pipe in the planter. Michael suffered serious injuries.The trial court granted summary judgment for defendants, finding that plaintiff's claims were barred under the immunity of Civ. Code, § 846 (property owner owes no duty to keep premises safe for entry or use by others for any recreational purposes). The Court of Appeal affirmed. The court initially held that the trial court erred in concluding that plaintiff's claims were barred by the immunity of Civ. Code, § 846. The case fell within an exception listed in the final paragraph of Civ. Code, § 846, permitting an action by one who was expressly invited onto the defendant's property. Plaintiff showed that his friend personally invited him to come onto the property to pick him up. The court further held, however, that summary judgment was properly granted for defendants, since plaintiff voluntarily assumed the risks inherent in skateboarding, and defendants owed no affirmative duty to plaintiff to make the driveway safe for skateboarding activities. Falling is an inherent risk of skateboarding, and the presence of the pipe or the planter had nothing to do with plaintiff's falling. Under the primary assumption of risk doctrine, there is no duty to eliminate or protect a plaintiff against risks that are inherent in a sport or activity. Skateboarding is a type of activity covered by the primary assumption of risk doctrine. An activity falls within that doctrine if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury. These factors apply to skateboarding.

RIDING SCOOTER DOWN THE CITY SIDEWALK – NO ASSUMPTION OF RISK
However, if the person was doing nothing more than merely riding a scooter down the public sidewalk and was caused to fall due to the cracks in the sidewalk, the doctrine of primary assumption of risk would not apply. Riding a scooter on the sidewalk is not inherently dangerous merely because a scooter rider might fall and suffer injury. Falling or a comparable mishap is possible in any physical activity but is not necessarily an *inherent danger* of the activity. The possibility that any person who rides a scooter, bicycle or other wheeled vehicle might be injured by the negligence of another is insufficient to impliedly excuse others from acting with due care to avoid accidents. ***Childs v. County of Santa Barbara*** (2004) 115 Cal.App.4th 64, 73.

MINORS AND ASSUMPTION OF RISK: Danger of riding bicycle down the steep, wet grassy hill was obvious from appearance of property itself, even to children exercising lower standard of due care. ***Mathews v. City of Cerritos*** (1992) 2 Cal.App.4th 1380, 1385 [child was 8 years old];The risk of falling off a bicycle propped against a chain-link fence as 9 year-old climbed on it to pick oranges from tree on other side of fence was obvious. Bike was not intended to be used as a ladder. ***Biscotti v. Yuba City Unified School District*** (2007) 158 Cal.App.4th 554; ***Garcia v. Soogian*** (1959)52 Cal.2d 107 -- The chance was slight that a child of plaintiff's age [12 years 8 months] would fail to see the glass or appreciate what risk was presented when she jumped over it on her bike.

EXPERTS AND SPECULATION

Plaintiff's case is based on nothing more than speculation. Speculation and conjecture are not competent evidence. *See e.g* ***Salazar v. Upland Police Dept***. (2004) 116 Cal.App.4th 934, 941 (speculation and conjecture insufficient to avoid summary judgment); ***Saelzler v. Advance Group 400*** (2001) 25 Cal.4th 763, 775 (claim cannot be based on speculation or conjecture). Courts need not waste time indulging in speculative evidentiary wheel spinning: speculative evidence is not relevant and is properly excluded. ***William DalPorto & Sons, Inc. v. Agricultural Labor Relations Board*** (1987) 191 Cal.App.3d 1195, 1211.

Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning. (See ***Golden Eagle Refinery Co. v. Associated Internat. Ins. Co.*** (2001) 85 Cal.App.4th 1300, 1315; ***McGonnell v. Kaiser Gypsum Co., Inc***. (2002) 98 Cal.App.4th 1098, 1106.

"An expert's speculations do not rise to the status of contradictory evidence, and a court is not bound by expert opinion that is speculative or conjectural.... [Parties] cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning." (***McGonnell v. Kaiser Gypsum Co***. (2002) 98 Cal.App.4th 1098, 1106.) ***Bozzi v. Nordstrom, Inc.*** (2010) 186 Cal.App.4th 755, 763-764.

"[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value." (***Jennings v. Palomar Pomerado Health Systems, Inc.*** (2003) 114 Cal.App.4th 1108, 1117; ***Lockheed Litigation Cases*** (2004) 115 Cal .App.4th 558, 564 ["An expert opinion has no value if its basis is unsound."].)

An opinion is only as good as the facts and reasons on which it is based. (***Kelley v. Trunk*** (1998) 66 Cal.App.4th 519, 523; ***Pacific Gas & Electric Co. v. Zuckerman*** (1987) 189 Cal.App.3d 1113, 1135 ["The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed"].) ***Bozzi v. Nordstrom, Inc.*** (2010) 186 Cal.App.4th 755, 763.

An Opposition to a motion for summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative, or based on conjecture and speculation. ***Joseph E. Di Loreto, Inc. v. O'Neill*** (1991) 1 Cal.App.4th 149, 161; ***O'Neil v. Dake*** (1985) 169 Cal.App.3d 1038, 1044; ***Baron v. Mare*** (1975) 47 Cal.App.3d 304, 309, 311.)

NO JUDICIAL NOTICE WET FLOOR IS SLIPPERY

In ***Peterson v. Superior Court*** (1995) 10 Cal.4th 1185, 1188-1189, the California Supreme Court held that owners of property are not subject to strict products liability for injuries to their tenants and guests that are caused by a defect in the premises.

A store owner is not the insurer of the safety of its patrons. (***Ortega v. Kmart Corp***. (2001) 26 Cal.4th 1200, 1205.) "Because the owner is not the insurer of the visitor's personal safety [citation], the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability."***Moore v. Wal-Mart Stores, Inc.*** (2003) 111 Cal.App.4th 472, 476.

As the California Supreme Court held in ***Brown v. Poway Unified School Dist.*** (1993) 4 Cal.4th 820, 826-827: "The burden is on the plaintiff to prove every essential fact on which she relies [citation]. This burden is not met merely by proof that plaintiff invitee stepped on something while on invitor's premises and thereby was caused to fall and receive injuries, for '[n]o inference of negligence arises based simply upon proof of a fall upon the owner's floor. The doctrine of res ipsa loquitur is not applicable to such cases.' [Citations]" (*Id.,* at p. 741

"Experience teaches that slips and falls are not so likely to be the result of negligence as to justify a presumption to that effect. As Prosser and Keeton explain, "there are many accidents which, as a matter of common knowledge, occur frequently enough without anyone's fault.... [A]n ordinary slip and fall ... will not in [itself] justify the conclusion that negligence is the most likely explanation…". ***Brown v. Poway Unified School Dist***., supra, 4 Cal.4th 820, 826.

Merely because a floor might be wet does not raise a presumption of negligence nor does it create an inference that a substantial risk of harm existed. See ***Buehler v. Alpha Beta Co.*** (1990) 224 Cal.App.3d 729, 734 [negligence is never presumed; conjecture about whether store's floor was slippery at place of slip and fall accident insufficient to defeat summary judgment].)

In ***Bradley v. Wal-Mart Stores, Inc.*** (W.D.Wash., 2008) 544 F.Supp.2d 1167, 1170, the court held that a wet floor does not establish the existence of a dangerous condition: "In ***Kangley v. United States,*** 788 F.2d 533 (9th Cir.1986), the Ninth Circuit set forth a test to prove negligence of a property owner when an invitee slips and falls on water. ***Kangley,*** 788 F.2d at 534. The Ninth Circuit set forth three essential elements: "To prove negligence, the plaintiff must prove [1] that water makes the floor dangerously slippery and [2] that the owner knew or should have known both that water would make the floor slippery and [3] that there was water on the floor at the time the plaintiff slipped." *Id.* (enumeration added). A wet floor does not establish the existence of a dangerous condition. *Id.* at 535. Moreover, a dangerous condition cannot be inferred from the fact that the plaintiff fell. ***Knopp v. Kemp & Hebert,*** 193 Wash. 160, 164-65, 74 P.2d 924 (1938). The Ninth Circuit in ***Kangley*** states that if we were to hold that a person who slips inside a door where a mat has been placed on a day when it is wet outside may recover for injuries sustained without showing anything more, we would place an intolerable burden on businesses in areas like Tacoma where it is often wet outside."

Nor may a court take judicial notice that simply because a floor may be wet it is dangerously slippery. See: ***Faulkner v. J. H. Corcoran & Co***. (Mass. 1961) 342 Mass. 94, 96, 172 N.E.2d 94, 95 [court may not take judicial notice that terrazzo floor becomes dangerously slippery when wet].

EMOTIONAL DISTRESS AND PROPERTY DAMAGE CLAIM

Cooper v. Superior Court (1984) 153 Cal.App.3d 1008, 1012-- a contractor's tractor rolled from the place it was parked and crashed into the plaintiff's home, causing damage thereto. The plaintiff claimed emotional distress resulting from having to move out of her home due to the damage. She alleged that the stress caused her emotional and physical injuries in the form headaches and intestinal disorders. The appellate court found there was no pre-existing relationship between the plaintiff and defendant, and thus, recovery for emotional distress damages was not allowed. *Id.* at 1012 1013. Court held: *"[n]o California case has allowed recovery for emotional distress arising solely out of property damage, absent a threshold showing of some preexisting relationship or intentional tort*

The rule of ***Cooper*** was followed in ***Lubner v. City of Los Angeles*** (1996)45 Cal.App.4th 525. In ***Lubner,*** the plaintiffs art work was damaged when a city trash truck rolled into their home. Since the art work was "property" and there was no preexisting relationship between the parties, emotional distress damages were denied. *Id.* at 532.

Moreover, a pre-existing relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted in only an economic injury to the plaintiff. ***Smith v. Superior Court*** (1992) 10 Cal.App.4th 1033, 1040, fn. 1; ***Mercado v. Leong*** (1996) 43 Cal.App.4th 317, 324 [emotional distress damages are unlikely when the interests affected are merely economic]; ***Camenisch v. Superior Court*** (1996) 44 Cal.App.4th 1689, 1691; ***Merenda v. Superior Court*** (1992) 3 Cal.App.4th 1,7 [The fact that emotional distress damages maybe awarded in some circumstances (citation) does not mean that they are available in every case in which there is an independent cause of action founded upon negligence].

In ***Sher v Leiderman*** (1986) 181 Cal.App.3d 867, 884, the parties were neighbors. Defendants' trees shaded plaintiffs' solar house resulting in diminution in value, increased heating costs and emotional distress. (*Id.* at 875). The court noted that ***Cooper*** stated the law in California, denying plaintiff damages for emotional distress. (*Id.* at 883). The court noted that in those cases the preexisting relationships which gave rise to a duty of care had all involved an aspect of trust and confidence. (*Id.* at page 884).

But see: ***Windeler v. Scheers Jewelers*** (1970) 8 Cal.App.3d 844, 850-852 [plaintiff left several rings with jeweler emphasizing that they were of great emotional value to her. Jeweler lost the rings. Court allowed plaintiff to seek recovery of emotional distress damages based upon the relationship which existed between plaintiff and defendant and of the "special circumstances" of the known sentimental value of the rings.]

DOGS: ***Penal Code §491*** ["Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property"]. ***McMahon v. Craig*** (2009) 176 Cal.App.4th 1502: no recovery emotional distress damages for alleged veterinary malpractice; no recovery for loss of the companionship of a pet.

INTENTIONAL TORTS: Emotional distress damages are available for intentional torts. See: ***Thing v. La Chusa*** (1989) 48 Cal.3d 644, 649-650 [emotional distress is an accepted item of damages that may be recovered in actions for assault, battery, abuse of process; false imprisonment; libel; and invasion of privacy]. Emotional distress damages are also recoverable for nuisance and trespass cases, without establishing physical injury. ***Acadia, California, Ltd. v. Herbert*** (1960) 54 Cal.2d 328, 337. See: *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 474-475 [emotional distress recoverable for conversion of personal items in storage facility].

MOTION TO STRIKE PUNITIVE DAMAGES

A plaintiff may recover punitive damages in an action for the breach of an obligation not arising out of contract where the defendant has been guilty of oppression, fraud, or malice. (Civ.Code, § 3294, subd. (a).) “Malice” exists when the defendant intends to cause injury to the plaintiff or the defendant engages in despicable conduct with willful and conscious disregard of the rights or safety of others. (Civ.Code, § 3294, subd. (c)(1).) “Oppression” exists when the defendant in conscious disregard of a person's rights engages in despicable conduct subjecting that person to cruel and unjust hardship. (Civ.Code, § 3294, subd. (c)(2).)

The “despicable” reference was added to the punitive damage section by the 1987 Reform Act. (Stats.1987, ch. 1498, § 5.) It was a new substantive limitation on punitive damage awards and refers to “circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ ” (***College Hospital, Inc. v. Superior Court*** (1994) 8 Cal.4th 704, 725.) As amended, the statute now requires “despicable” conduct in addition to willful and conscious disregard for a plaintiff's interests. (*Ibid.*) ***Angie M. v. Superior Court*** (1995) 37 Cal.App.4th 1217, 1228.

It was error to instruct the jury that: “Non-intentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party performs an act which he knows, or should know, is highly probable to cause damage to another”, as it is a misstatement of law. ***Mock v. Michigan Millers Mutual Ins. Co.*** (1992) 4 Cal.App.4th 306, 331.

In 1980, the Legislature adopted the standard in ***Taylor v. Superior Court*** (1979) 24 Cal.3d 890, for an award of punitive damages where a defendant did not intend to harm the plaintiff: a conscious disregard for the rights or safety of another, which involves knowledge of the probable consequences but a deliberate indifference to them. (***Lackner v. North*** (2006) 135 Cal.App.4th 1188, 1211.) However, within a decade, the Legislature added a criterion for this "unintentional" malice that it must be premised on *despicable* conduct, and elevated the burden of proof to the standard of clear and convincing evidence. (Id. at pp. 1211- 1212.) The addition of the criterial adjective "despicable" was a significant substantive limitation on the recovery of punitive damages (along with the elevation of the burden of proof), as it is a "powerful term." (***College Hospital, Inc. v. Superior Court*** (1994) 8 Cal.4th 704, 725.) On the continuum of conduct, it is toward the extreme, eliciting adjectives such as vile or base and rousing the contempt or outrage of reasonable people. (***American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*** (2002) 96 Cal.App.4th 1017, 1050-1051).

The adjective “despicable” connotes conduct that is “ ‘... so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.’ ” (***Mock v. Michigan Millers Mutual Ins. Co.*** (1992) 4 Cal.App.4th 306, 331, quoting BAJI No. 14.72.1 (1989 rev.); ***Cloud v. Casey*** (1999) 76 Cal.App.4th 895, 912). ***Lackner v. North*** (2006) 135 Cal.App.4th 1188, 1210.

The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' ” (***Tomaselli v. Transamerica Ins. Co.*** (1994) 25 Cal.App.4th 1269, 1287). ***Lackner v. North*** (2006) 135 Cal.App.4th 1188, 1210.

Punitive damages are not automatic and a jury does not have to award them – even if it finds “despicable conduct”. See ***Sumpter v. Matteson*** (2008) 158 Cal.App.4th 928, 936.

PREMISES SPECIAL JURY INSTRUCTIONS

Jury Instructions – See California Rules of Court, Rule 2.1055

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her that] is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case. ***Norman v. Life Care Centers of America, Inc.*** (2003) 107 Cal.App.4th 1233, 1242.

(1) ***Biscotti v. Yuba City Unified School Dist***. (2007) 158 Cal.App.4th 554, 561

Landowners have no duty to prevent members of the public from scaling guardrails and fences erected for the purpose of keeping them out of areas of relative danger.

(2) ***Fullerton v. Conan*** (1948) 87 Cal.App.2d 354, 357.

A guardrail is a barrier just as a door to a home; both in effect are notifications that what is beyond them is private. And it must be assumed that when guardrails and doors are a part of the property involved they represent such a purpose.

(3) ***Amos v. Alpha Property Management*** (1999) 73 Cal.App.4th 895, 901:

The fact that Defendant complied with all regulatory or code requirements does not establish that the defendant was not negligent [or the premises were not defective].

As the court held in ***Amos v. Alpha Property Management*** (1999) 73 Cal.App.4th 895, 901: "Defendants contend the fact the window in question met all applicable fire, building and safety codes establishes due care as a matter of law. There is no merit to this argument. (***Nevis v. Pacific Gas & Electric Co.*** (1954) 43 Cal.2d 626, 630; ***Perrine v. Pacific Gas & Elec. Co***. (1960) 186 Cal.App.2d 442, 448 and see 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 756, p. 96 and cases cited therein.) The correct rule was stated in ***Perrine****:* "We are mindful that even though P.G. & E. complied with all applicable governmental safety regulations, this would not serve to absolve it from a charge of negligence, but just negligence *per se,* for one may act in strict conformity with the terms of such enactments and yet not exercise the amount of care which is required under the circumstances." (186 Cal.App.2d at p. 448, citations omitted.)Thus, although the fact the window complied with applicable safety regulations is relevant to show due care, it is not dispositive."

NOTE: Non-negligent ignorance of the facts which bring a regulation into operation will support a finding that violation thereof is civilly excusable. ***Nevis v. Pacific Gas & Elec. Co.*** (1954) 43 Cal.2d 626, 633.

(4) ***Edwards v. California Sports, Inc.*** (1988) 206 Cal.App.3d 1284, 1288.

There is a limit as to how far society should go by way of direct governmental regulation of commercial and private activity, or indirect regulation thereof through the tort system, in order to protect individuals from their own stupidity, carelessness, daring or self-destructive impulses.

TORT LIABILITY OF COMMON CARRIERS

WHAT IS A "COMMON CARRIER"?: Civil Code §2168 defines a common carrier as "[e]veryone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages . . . ." Under the statute, therefore, "a common carrier . . . is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit. [Citations.]" (***Squaw Valley Ski Corp. v. Superior Court*** (1992) 2 Cal.App.4th 1499, 1508).

DUTY OF UTMOST CARE: Common carriers owe their passengers the highest duty of care. (***Gomez v. Superior Court*** (2005) 35 Cal.4th 1125, 1128–1130 – injuries/death caused by "Indiana Jones" amusement ride). In California, a common carrier "must use the utmost care and diligence for [the] safe carriage [of its passengers, and] must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." (§ 2100; see also CACI No. 902; see also: Civil Code §2101.) A common carrier, however, is not an insurer of its passengers' safety. (***Gomez***, *supra*, 35 Cal.4th at p. 1130; ***Lopez v. Southern Cal. Rapid Transit Dist.*** (1985) 40 Cal.3d 780, 785.) "Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier….]." (***Lopez***, at p. 785.)

EXAMPLES OF COMMON CARRIERS: Railways (***Metz v. California Southern R. R. Co***. (1890) 85 Cal. 329; ***Kerrigan v. Southern Pac. R. R. Co.*** (1889) 81 Cal. 248); buses (*Lopez*, *supra*, 40 Cal.3d 780, ***Prunty v. Allred*** (1946) 73 Cal.App.2d 67); stage coaches (***Fairchild v. The California Stage Company*** (1859) 13 Cal. 599); guided tours provided by mule train (***McIntyre v. Smoke Tree Ranch Stables*** (1962) 205 Cal.App.2d 489 (*McIntyre*)); streetcars or cable cars (***Kline v. Santa Barbara etc. Ry. Co.*** (1907) 150 Cal. 741; ***Finley v. City and County of San Francisco*** (1952) 115 Cal.App.2d 116); taxicabs (***Larson v. Blue & White Cab Co***. (1938) 24 Cal.App.2d 576, 578); elevators (***Treadwell v. Whittier*** (1889) 80 Cal. 574; escalators (***Vandagriff v. J. C. Penney Co.*** (1964) 228 Cal.App.2d 579); airplanes (***Smith v O'Donnell*** (1932) 215 Cal. 714); and chair lifts at ski resorts (***Squaw Valley Ski Corp. v. Superior Court***, *supra*). Further, amusement parks have been held to be common carriers for purposes of operating a rollercoaster in the nature of miniature scenic railway (see ***Barr v. Venice Giant Dipper*** (1934) 138 Cal.App. 563), and a horse-drawn surrey (see ***Kohl v. Disneyland, Inc.*** (1962) 201 Cal.App.2d 780). (See also ***Neubauer v. Disneyland, Inc***. (C.D.Cal.1995) 875 F.Supp. 672 [amusement park operating "Pirates of the Caribbean" ride involving boats held common carrier].)

DISCOUNT TICKETS AND COMMON CARRIERS: ***Simon v. Walt Disney World Co.*** (2004) 114 Cal. App. 4th 1162 [discounts offered to residents of certain states did not violate any concerns regarding equal charges because a theme park cannot be considered a common carrier in and of itself. In order for the common-carrier obligations to apply, a person or entity must first have been acting as a common carrier within the meaning of the Civil Code. A common-carrier designation does not extend to cases where the relation of carrier and passenger does not exist; a "ride" may be "common carrier", not park].

COMMON CARRIER LIABILITY IS MATTER OF LAW: ***Ballard v. Uribe*** (1986) 41 Cal.3d 564, 572, fn. 6 ["question of 'duty' is decided by the court, not the jury"]; ***Squaw Valley Ski Corp. v. Superior Court*** (1992) 2 Cal.App.4th 1499, 1506 [common carrier liability is matter of law when material facts are not in dispute].)

FALLING OFF A ROOF

Falling off of a roof is a well known incidental risk of roof -- even to a person who is not a professional. Primary assumption of risk is applicable because appellant chose to encounter a well-known incidental risk of roofing; slipping and falling off the roof. "As to those risks, the [respondent] has no duty to protect the [appellant] and, thus, if the [appellant's] injury arises from an incidental risk, the [respondent] is not negligent." ***Olson v. Hansen,*** 299 Minn. 39, 216 N.W.2d 124, 127 (1974). ***Goodwin v. Legionville School Safety Patrol Training Center, Inc.*** (1988) 422 N.W.2d 46, 50.

"Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (***Krongos v. Pacific Gas & Electric Co.*** (1992) 7 Cal.App.4th 387, 393.) It strains reason to suggest that a partial roof in the midst of demolition is not an open and obvious dangerous condition. Appellant's attempt to parse the specific flaw in the roof—the alleged soft spot—in order to claim he lacked notice is unavailing. Any reasonable person who sees a partial roof and *knows* that he or she is there to dismantle it is confronted with an open and obvious danger as a matter of law. This is no less so simply because he or she does not know *exactly why* the roof presents a danger.

Slippery condition of icy or frosty roof of house under construction was open and obvious, and owner of subdivision development did not breach premises liability duty of reasonable care in failing to warn painting subcontractor's employee of the condition, even though owner was also the general contractor, as owner had no reason to foresee that various contractors and their employees would not take appropriate precautions in dealing with open and obvious conditions of construction site, and there were no special aspects of condition that made the open and obvious risk unreasonably dangerous. ***Perkoviq v. Delcor Homes-Lake Shore Pointe, Ltd.*** (2002) 466 Mich. 11, 643 N.W.2d 212.

NO DUTY TO HIRE EXPERT TO INSPECT ROOF

When defect in roof on defendant's building was discertainable only to an expert, failure of defendant to have expert inspect roof prior to allowing intestate to enter thereon was not failure to exercise due care for safety of business visitor. ***Wild v. Atlantic Refining Co***. 195 F.2d 151 (C.A.3 1952) [plaintiff's intestate when he fell through roof on defendant's building on which he was working; Where death of plaintiffs' intestate occurred when he fell though roof in defendant's building on which intestate was working, and defect in roof was such that only expert could detect it as dangerous, intestate did not walk into open danger when he entered upon roof and there was no assumption of risk].

Defendant demonstrated that he had neither actual nor constructive notice of the allegedly dangerous condition of the wood beneath the shingles covering his home's roof. ***Beckford v. Canessa*** 205 A.D.2d 655, 656, 613 N.Y.S.2d 659, 660 (N.Y.A.D. 2 Dept.,1994) [Here it is uncontroverted that the defendant exercised no supervisory control. He hired an amateur handyman to finish shingling the roof after a prior contractor had to cease work due to health problems. In the absence of any evidence that the defendant was aware of the allegedly deteriorated condition of the roof or that he controlled the manner of the work, the defendant is not liable].

Latent defects are commonly defects that are concealed in some way-by paint or by a wall. For example, in ***Hale v. Depaoli*** (1948) 33 Cal.2d 228, 231, the court concluded a railing that gave way due to improper nailing by the defendant was a latent defect. The heads of the nails and thus nature of the defect were concealed by putty and paint. (*Id.* at p. 229.)

LIABILITY OF PRIOR OWNERS FOR SUBSEQUENT INJURY

"Absent concealment, a prior owner of real property is not liable for injuries caused by a defective condition on the property after the owner has relinquished ownership and control, even if the prior owner negligently created the condition. ***Lewis v. Chevron U .S.A., Inc.*** (2004) 119 Cal.App.4th 690, 693.

Even if it had created the defect, a predecessor owner of real property is not liable to third parties injured by a defective condition on the property after the property is sold. ***Preston v. Goldman*** (1986) 42 Cal.3d 108 and ***Lorenzen–Hughes v. MacElhenny, Levy & Co.*** (1994) 24 Cal.App.4th 1684. ***Lewis v. Chevron U.S.A., Inc.*** (2004) 119 Cal.App.4th 690, 693.

The ***Preston*** court stated the issue and its resolution clearly at the beginning of the opinion. "Should former owners, allegedly negligent in constructing an improvement on their property, be subject to liability for injuries sustained on that property long after they have relinquished all ownership and control? The Restatement Second of Torts proposes that liability is terminated upon termination of ownership and control except under specified exceptions, and we agree." (***Preston***, *supra,* 42 Cal.3d). ***Lewis v. Chevron U.S.A., Inc.*** (2004) 119 Cal.App.4th 690, 695.

The Supreme Court rejected the lower court's conclusion that a vendor of land who negligently creates an unreasonably dangerous condition on his land is liable for subsequent injuries as the creator of the condition, rather than as owner of the property. (***Preston***, *supra,* 42 Cal.3d at pp. 112, 126–127). ***Lewis v. Chevron U.S.A., Inc.*** (2004) 119 Cal.App.4th 690, 696.

Restatement provides for no liability unless a seller knows of a hidden defect and conceals it. The court in ***Lorenzen***, *supra,* 24 Cal.App.4th 1684, addressed the appropriate rule in the case of a latent defect, and held: "the transferor of an interest in real property is not liable for latent defects in the property which the transferor did not know about, and had no reason to believe existed." (***Lorenzen***, *supra,* at p. 1685.) The injury in ***Lorenzen*** occurred when a cabinet fell from the wall and injured plaintiff who was working at her desk. The cabinet had been installed 11 years earlier by a contractor working for a prior tenant. Since that time the tenant transferred its assets and the lease to plaintiff's employer.
(***Lorenzen,*** *supra,* at p. 1686.)

The ***Lorenzen*** court explained that ***Preston*** did not exclude latent defects from its holding and that once the previous tenant showed the absence of ownership or control, the burden shifted to the plaintiff to show an exception to the general rule of nonliability.[FN6] In the absence of any showing that the transferor knew of the condition and deliberately concealed it, the court affirmed summary judgment in favor of the defendant. As is the case here, the plaintiff in ***Lorenzen*** admitted, " 'no one could have known that [the cabinet had not been properly attached to the wall], until the cabinet fell.' " (***Lorenzen***, *supra,* 24 Cal.App.4th at pp. 1688–1689, 30 Cal.Rptr.2d 210, italics omitted.) ***Lewis v. Chevron U.S.A., Inc.*** (2004) 119 Cal.App.4th 690, 698.

FIREFIGHTER'S RULE AND PREMISES LIABILITY

NO BAR: Among the duties of a private security guard employed by a guard service company was to discover and report dangerous conditions on the property. He fell while patrolling the owner's premises when he slipped on a puddle of water created by condenser water pipes. The court held the firefighter's rule did not immunize the property owner from liability for the guard's injuries. The guard was not a public employee with the special pay and benefits for hazardous work. The guard merely earned the minimum wage. Also, there is no special relationship between the injured party and the property owner because the guard was an employee of a guard service engaged by the owner. Even the fact that the injured party's responsibilities included discovery of safety hazards did not relieve the owner of liability. ***Marquez v. Mainframe*** (1996) 42 Cal.App.4th 881.

BARRED: An off-duty police officer was returning to the apartment building where he lived when he saw evidence that a crime was being committed on the premises. He was injured when he struggled with and shot a suspected burglar on the premises. The officer filed an action to recover damages from the owner of the apartment house, alleging that the failure to correct known security and maintenance problems on the premises was the cause of the injuries. The court applied the "firefighter's" rule because the police officer acted as a peace officer, identified himself as such to the criminal suspect, and exercised his statutory authority to use deadly force against a person suspected of committing a serious crime. Although he was not on duty and not being compensated for the services at that time, compensation is not essential for the application of the rule when the services are of the type for which the officer is trained and employed to perform. ***Hodges v. Yarian*** (1997)53 Cal.App.4th 973.

NO BAR: A policeman who was chasing a suspect was injured when he attempted to climb the fence and it fell over because the owner had permitted it to become dilapidated and unsafe. The court distinguished the "firefighter's rule" which exempts the property owner from liability when police or firefighters come onto the premises for official duties relating to the premises. When the instrument causing the injury is unrelated to the officer's presence on the property, the landowner owes the same duty to the officer as he or she owes to any other third person who enters onto the premises. ***Kocan v. Garino*** (1980) 107 Cal.App.3d 291.

NO BAR: A firefighter inspected rental properties without prior notice to the owner as part of his regular duties. While inspecting the owner's property, he noticed that the stairs had recently been hosed and were wet. He tried to be careful, but the stairs did not have skid-resistant treads and he slipped and fell, suffering serious injuries. The court held that even though firefighter was injured during the regular course of his duties and the hazard was normally encountered as part of his job, the "firefighter's rule" did not bar his action because the rule only applies when the negligence is an obvious risk and is the cause for the fireman's presence. It does not apply to independent acts of misconduct that were not the cause of the firefighter's presence. The cause of his injury was the wet stairs and the absence of skid-resistant treads, which was not the reason for his presence on the premises. Therefore, the owner owed him a duty of care to eliminate the dangerous condition of the property. ***Donohue v. San Francisco Housing Authority*** (1993) 16 Cal.App.4th 658.

MOTION IN LIMINE REMEDIAL MEASURES

"The public policy promoted by exclusion of such evidence is that of encouraging persons to take subsequent precautions for the purpose of promoting safety, without fear of having such conduct used to establish liability." Jefferson, Cal. Avid. Bench book, Vol. 2, §34.2, p. 128.3.

Evidence that defendant changed or repaired the property or product involved after the accident is generally inadmissible in liability cases to prove defendant's fault. See California *Evidence Code* § 1151.

It is generally improper, after an accident, to show additional safety measures installed by a defendant in an attempt to obviate future injuries to persons in somewhat the same position as a plaintiff who has been damaged by the alleged negligence of such a defendant. The rationale of such a rule is sometimes justified by the contention that the proof of such additional safety measures, after the event, is basically irrelevant in that it tends to show either due care under new circumstances or extraordinary care in view of the event, and that it is not a fair standard of what a reasonably prudent person would have done in the way of precautions prior to the accident itself. But even more strongly, it is public policy that, if it were legitimate to prove every new safety measure installed after the occurrence of alleged negligence, the public generally would be discouraged from adopting any new measure for the safety of the public. If to install an additional means of preventing new accidents were to be considered an admission of negligence with respect to the old accident, it is likely that there would be a widespread refusal to do anything of the kind after a suit was instituted against a defendant for alleged former negligence. This would be clearly against public policy as any attempt to safeguard people is to be encouraged, rather than discouraged. Therefore, there can be no proof of the adoption of any new safety measure. ***Westbrooks v. Gordon H. Ball, Inc.*** (1967) 248 Cal.App.2d 209, 215-216.

However, such evidence may be admissible for other purposes. For example, see: ***Alcaraz v. Vece*** (1997) 14 C4th 1149, 1166-1170--evidence of subsequent remedial conduct admissible to show defendant's control over property in negligence action by placing fence around defective water meter box on adjacent property after plaintiff's fall].

Evidence of post-accident remedial or precautionary measures may be admissible if offered to prove something other than defendant's negligence or culpable conduct. See *Evidence Code* § 355; ***Wilson v. Gilbert*** (1972) 25 Cal.App.3d 607, 615; ***Alpert v. Villa Romano Homeowners Ass'n*** (2000) 81 Cal.App.4th 1320, 1341.

Further, while such matters may be admissible to establish impeachment, the witness must have made or ordered safety measures: Subsequent safety measures are admissible for impeachment only if it is shown the witness whose credibility is under attack made or ordered those subsequent measures. [***Sanchez v. Bagues & Sons Mortuaries*** (1969) 271 Cal.App.2d 188, 191-- impeachment not proper where no showing witness involved with installing or ordering installation of abrasive tape on allegedly slippery steps].

CONCLUSION:

Defendant moves the Court for a limiting instruction – allowing the admission of the installation of the cement block after the incident to establish that Defendant had no control over the property at the time and did not instruct anyone to do so but advising the jury that such evidence is not to be used for consideration of any negligence or fault of this Defendant. For example, "If you find that there were measures taken after the incident to repair the gate, you shall not consider such measures in determining the fault, if any, of the Defendant."

CASES OF INTEREST – RE: HOT WATER

1. **NO DUTY TO WARN WATER COULD BE HOT – OPEN AND OBVIOUS**

Failure of manufacturer of water heater to warn residents of apartment in which water was heated by water heater controlled by building owner of risks of hot water was not cause of injuries suffered by infant who was scalded by hot water while being bathed by his 15-year-old brother; even if brother was unaware of precise temperature at which burning could occur, warnings would not have avoided accident, as brother was aware that hot water can burn skin. ***Gonzalez by Gonzalez v. Morflo Industries, Inc.*** (E.D.N.Y.,1996) 931 F.Supp. 159. See also: ***National Bank of Bloomington v. Westinghouse Electric Corp.*** *(4th Dist.1992) 235 Ill.App.3d 697, 175 Ill.Dec. 817, 600 N.E.2d 1275* (water heater manufacturer had no duty to warn that hot water can cause injury because danger was open and obvious.)

2. **LANDLORD NOT LIABLE WHEN PLAINTIFF BURNED BY A SUDDEN BURST OF HOT WATER WHEN LANDLORD HAD NO KNOWLEDGE:**

1. Landlord was not liable in wrongful death action brought after water in apartment's shower suddenly became very hot, inflicting severe burns on plaintiff's decedent, where landlord did not have actual or constructive knowledge of any dangerous condition of the boiler or the building's plumbing system. ***Rodriguez v. Sung Hi Kim*** (N.Y.A.D. 2 Dept.,2007) 42 A.D.3d 442, 841 N.Y.S.2d 590.

2. Mother of infant who was allegedly scalded by hot water that sprayed on her when bathtub hot water faucet handle came off in infant's hand on premises leased by mother failed to show that landlord had prior notice of defective faucet, for purposes of infant's personal injury action; annual housing program inspection report completed by mother about one month prior to accident, and 40 other weekly inspection reports completed by mother during one-year period prior to accident failed to note any complaints of problems with bathtub hot water faucet, and mother admitted at deposition that she never complained to landlord about defective faucet. The infant plaintiff's mother admitted at her deposition that she had never complained to Wyandanch about a defective hot water handle. ***Allen v. Wyandanch Homes & Property Development Corp.*** (N.Y.A.D. 2 Dept.,2002) 298 A.D.2d 474, 748 N.Y.S.2d 401.

3. Personal injury action was brought against building owner stemming from second and third degree burns tenant allegedly sustained as the result of sudden burst of scalding water emitted from a cold water faucet in his bathtub. The court denied owner's motion for summary judgment, and appeal was taken. **Holding:** Building owners did not have notice of alleged defect with tenant's hot water, as required for tenant's negligence claim alleging he sustained second and third-degree burns as a result of a sudden burst of scalding water emitted from the cold water faucet in his bathtub. Reversed. ***LaTronica v. F.N.G. Realty Corp.*** (N.Y.A.D. 1 Dept.,2008) 47 A.D.3d 550, 850 N.Y.S.2d 402 [Plaintiff's expert's opinion is without probative value, as the expert inspected plaintiff's bathroom two years after the incident and did not inspect the boiler; Finally, the doctrine of res ipsa loquitur does not avail plaintiff under these particular circumstances as, at the very least, the element of exclusive control on defendants' part is not established in this record. Plaintiff failed to raise a triable issue of fact whether defendants kept the water at an unsafe temperature because this claim is based on the expert's non-probative conclusion that “the temperature of the water ranged from 103 to 139 degrees”].

SUMMARY JUDGMENT FALL OUT OF TREE

Our Supreme Court has said that the purpose of the 1992 and 1993 amendments to the summary judgment statute was “to liberalize the granting of motions for summary judgment.” (***Aguilar v. Atlantic Richfield Co***. (2001) 25 Cal.4th 826, 854.) “It is no longer called a ‘disfavored remedy.’ It has been described as having a salutary effect, ridding the system, on an expeditious and efficient basis, of cases lacking any merit.” (***Nazir v. United Airlines, Inc***. (2009) 178 Cal.App.4th 243, 248). ***Bozzi v. Nordstrom, Inc.*** (2010) 186 Cal.App.4th 755, 760-761. As recently stated by the Supreme Court in ***Aguilar v. Atlantic Richfield Co.*** (2001) 25 Cal.4th 826, 107: “… All that the defendant need do is to ‘show[ ] that one or more elements of the cause of action ... cannot be established’ by the plaintiff. [Citation.] In others words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action-for example, that the plaintiff cannot prove element *X.* Although he remains free to do so, the defendant need not himself conclusively negate any such element-for example, himself prove *not X.* This is in line with the purpose of the 1992 and 1993 amendments, which was to liberalize the granting of motions for summary judgment.” (***Aguilar v. Atlantic Richfield Co***., *supra,* 25 Cal.4th 826, 854-854).***Sambrano v. City of San Diego*** (2001) 94 Cal.App.4th 225, 233.

To recover for negligence, a plaintiff must demonstrate the defendant owed the plaintiff a legal duty, breached that duty, and that the breach was a cause in fact of the plaintiff's injuries. (***Gordon v. Havasu Palms, Inc***. (2001) 93 Cal.App.4th 244, 252.)

Plaintiff, an adult, was standing in a tree helping out his parents when, as he tried to pull a nail out of one of the boards under the eaves he lost his balance and fell from the tree. The case is not any more complicated than that. Plaintiff can not establish that Defendants were negligent simply because he fell. Plaintiff concedes there was no defect of the ladder, no defect in any tools provided, no defect of the premises – he simply lost his balance as he tried to pull out a nail.

As the California Supreme Court held in ***Brown v. Poway Unified School Dist.*** (1993) 4 Cal.4th 820, 826-827: “The burden is on the plaintiff to prove every essential fact on which she relies [citation]. This burden is not met merely by proof that plaintiff invitee stepped on something while on invitor's premises and thereby was caused to fall and receive injuries, for ‘[n]o inference of negligence arises based simply upon proof of a fall upon the owner's floor. The doctrine of res ipsa loquitur is not applicable to such cases.’ [Citations]” (*Id.,* at p. 741).

See ***Abney v. Coalwell*** (1962) 200 Cal.App.2d 892.895 [“accidents happen every day without anyone's being legally liable for the result. In an action of this kind the court and jury inquire not only as to what did happen but as to whom, it anyone, was to blame. There may be serious injuries without liability.”] Where the plaintiff has merely tumbled down the stairs or fallen while in a tree, such accidents happen every day. The probability of negligence is absent. Where there is merely proof of an accident or injury occurring on the premises, and nothing more, the probability of negligence is not inherent in the facts. It is not the law that the mere fact that a person is injured while on defendant’s property does not create a presumption that the injury was caused by want of care on the part of the defendant operating such property. See: ***Gray v. City and County of San Francisco*** (1962) 202 Cal.App.2d 319, 326.

SPECIAL VERDICT FORM [PREMISES]

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

Question No. 1: Did Defendant ______________ own the property?

Answer "yes" or "no": Yes _____ No _____

If you answered Question No. 1 "yes," then go to Question No. 2;

If you answered Question No. 1 "no," then stop here, answer no further questions, and have the presiding juror sign and date this form.

Question No. 2: Was Defendant ________________ negligent in the use or maintenance of the property?

Answer "yes" or "no": Yes _____ No _____

If you answered Question No. 2 "yes," then go to Question No. 3.

If you answered Question No. 2 "no," then stop here, answer no further questions, and have the presiding juror sign and date this form.

Question No. 3: Was Defendant ______________ negligence a substantial factor in causing harm to Plaintiff ___________?

Answer "yes" or "no": Yes _____ No _____

If you answered Question No. 3 "yes," then go to Question No. 4.

If you answered Question No. 3 "no," then stop here, answer no further questions, and have the presiding juror sign and date this form.

Question No. 4: What are Plaintiff ______________ damages?

a. Past economic loss

Past medical expenses $ ______

Total Past Economic Damages $ _________

b. Future economic loss

Future medical expenses $ _________

Total Future Economic Damages $ ______

c. Past noneconomic loss, including physical pain and mental suffering $ ______

d. Future noneconomic loss, including physical pain and mental suffering $ ______

If Plaintiff has proved any damages, then answer Question No. 5. If Plaintiff Angel Ramirez has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

Question No. 5: Was ____________ also negligent?

Answer "yes" or "no": Yes ______ No ______

If you answered Question No. 5 "yes," then go to Question No. 6.
If you answered Question No. 5 "no," then go to Question 7.

Question No. 6: Was _____________'s negligence a substantial factor in causing harm to her son ____________?

Answer "yes" or "no": Yes ______ No ______

If you answered Question No. 6 "yes" or "no," then answer Question 7.

Question No. 7: Was Plaintiff ___________________ also negligent?

Answer "yes" or "no": Yes ______ No ______

If you answered Question No. 7 "yes," then go to Question No. 8.

If you answered Questions No. 7 and "no," and you also answered Question No. 6 "yes," then go to Question No. 9.

If you answered Questions No. 7 and "no," and you also answered either Question No. 5 or Question No. 6 "no" then stop here, answer no further questions, and have the presiding juror sign and date this form.

Question No. 8: Was Plaintiff's negligence a substantial factor in causing her harm?

Answer "yes" or "no": Yes ______ No ______

If you answered Question No. 8 "yes," then go to Question No. 9.

If you answered Questions No. 8 and "no," and you also answered Question No. 6 "yes," then go to Question No. 9.

If you answered Question No. 8 "no," and you also answered either Question No. 5 or Question No. 6 "no" then stop here, answer no further questions, and have the presiding juror sign and date this form.

Question No. 9: What percentage of responsibility for Plaintiff's harm do you assign to the following?

1. ________________ _________ %
2. ________________ _________ %
3. ________________ _________ %

TOTAL ________________________ 100 %

Please have the presiding juror sign, date, and return this verdict.

DATE: ___________________________________

DEMANDS TO PRODUCE

___ 1. All documents including photographs depicting any injuries you claim to have sustained.

___ 2. All documents including photographs supporting any claim of damage to property.

___ 3. All documents, including bills, records, writings, and reports supporting any claim of medical expenses;

___ 4. All documents, including reports, records, writings, statements, setting forth the nature of any injuries you claimed were caused by Defendant;

___ 5. All documents evidencing the name, address and telephone number of all medical care facilities you received medical treatment, consultation, and/or services from as a result of the incident set forth in your Complaint;

___ 6. All documents supporting any claim of loss of past earnings.

___ 7. All documents supporting any claim of future loss of earnings.

___ 8. All documents supporting any claim of future medical expenses.

___ 9. All witness statements in any form as to the incident you claim.

___10. A copy of your driver's license.

___11. A copy of any police, sheriff or law enforcement investigation reports regarding the incident that is the subject of this action.

___12. All photographs [or color copies] of the scene of the incident which is the subject of this action prior to the date of your incident.

___13. Copies of all writings establishing the amounts of funeral and burial expenses.

___14. Color photographs [or color copies] depicting any repairs to the location of the premises you contend caused your injuries.

___15. Color photographs of the scene of the incident on the date of the incident/premises.

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SPECIAL INTERROGATORIES [PREMISES]

1. Describe the condition causing you to fall.
2. How many times have you been in the area of the fall prior, within 50 feet, to the date of your fall?
3. Describe the lighting conditions within 50 feet of the area of the fall.
4. Describe how you fell, from the moment you first felt a sensation of falling until end.
5. What type of shoes were you wearing at the time of the fall/incident?
6. Were you wearing glasses at the time of the fall/incident?
7. What was your eyesight at the time of the fall or incident?
8. Had you ever made any complaints about any conditions of the premises where you contend you were caused to sustain injuries, within 50 feet prior to the fall?
9. If you made any prior complaints about the area of the fall/incident prior to the date of your injuries, to who were these complaints made?
10. If you made any complaints about the condition of the premises to Defendant or any of its/their agents, what did they say in response to your complaints?
11. How tall were you at the time and date of the incident?
12. What did you weigh at the time of the incident?
13. What was the first notice you had of the condition of the property that you claim caused your injuries?
14. Do you contend lighting was a factor in causing the incident?
15. If you contend that lighting was a contributing factor in the incident causing you injuries, describe in complete detail how lighting contributed.
16. If you contend that Defendant(s) had notice of the condition of the property which you contend caused you injuries prior to the time and date of such injuries, state each and every fact in support of such contention.
17. If you contend that the condition of the property that you contend caused your injuries was not trivial, state each and every fact in support of such contention.
18. If you contend that your conduct did not contribute to the incident state each and every fact in support of such contention.
19. If you contend that others complained to Defendant(s) or their agents prior to the time and date of your incident about the condition of the premises, state the name, address and telephone numbers of all such persons known to you to have made such complaints.
20. If you contend that others may be responsible for the incident you complain of, state each and every fact in support of your contention.
21. If you contend Defendant(s) are/were in some manner responsible for the incident you complain of and your injuries, state each and every fact in support of such contention.
22. If you contend that Defendant(s) negligently maintained their property so as to cause you injuries, state each and every fact in support of such contention.
23. If you contend that Defendant(s) so negligently owned their property so as to cause you injuries, state each and every fact in support of such contention.
24. At the time of the incident complained of were you in the course and scope of your employment?
25. If as a result of any injuries you claimed were caused in the incident which is the subject of your Complaint you filed a workers' compensation claim, state the date such claim was filed and the claim number.
26. If any of your medical expenses were paid for by Medicare or Medi-Cal, please provide your Medicare or Medi-Cal number and the amounts paid by such providers.
27. If as a result of any injuries you claim were caused by the subject incident you were/are unable to return to work, please describe fully why you have such restriction.
28. If you are unable due to any injuries you claim were caused by the subject incident unable to engage in any activities now that you were able to do so prior to the incident, describe each such activity and state why you cannot now engage in such activity.

REQUESTS FOR ADMISSIONS [PREMISES]

[Propound with 17.0 of the Judicial Council "Form" Interrogatories]

1. ADMIT that Defendant(s) had no constructive notice of any condition of the property that you claim caused your injuries.
2. ADMIT that Defendant(s) had no actual notice of any condition of the property that you claim caused your injuries.
3. ADMIT that you are solely at fault for the injuries you are now claiming in this action.
4. ADMIT that others contributed to the incident which you claim caused you injuries or damages.
5. ADMIT that there was no condition of the property owned by Defendants that caused the injuries and damages you are now seeking in this action.
6. ADMIT that the condition of the property that you claim caused your injuries was trivial.
7. ADMIT that lighting did not contribute to your injuries.
8. ADMIT that your use of the property where the incident occurred was not reasonable.
9. ADMIT that your use of the property where the incident occurred was not foreseeable.
10. ADMIT that you did not have the express invitation of the Defendant(s) to enter Defendant(s) property.
11. ADMIT that at the time of your injuries you were engaging in a recreational activity on the Defendant(s) property.
12. ADMIT that you have no facts to establish that Defendant(s) owned the propertgy where you contend you were caused to sustain injuries.
13. ADMIT that you have no facts that Defendant(s) were negligent in the management of their property.
14. ADMIT that you have no facts to establish that the Defendant(s) were negligent in the maintenance of their property.
15. ADMIT that you have no facts to establish that the incident you contend caused you injuries and damages was foreseeable to the Defendant(s).
16. ADMIT that any condition of the property that you contend caused you injuries was open and obvious.
17. ADMIT that Defendants owed you no duty to warn you of a condition of the property which you contend caused you injuries.
18. ADMIT that you have no facts to establish that Defendant(s) owed you a duty to remedy any condition of the property that you contend caused you injuries and damages.

TREE DUTY TO INSPECT

"A landowner does not have a duty to consistently and constantly check all trees on his property for nonvisible rot; 'the manifestation of decay must be visible, apparent and patent.' " ***Klein v. Weaver***, 265 Ga.App. 390, 392 (2004)(citation omitted**). *Accord Ivancic v. Olmstead***, 66 N.Y.2d 349, 488 N.E.2d 72 (1985) ("Although there may have been evidence that would have alerted an expert, upon close observation, that the tree was diseased, there is no evidence that would put a reasonable landowner on notice of any defective condition of the tree"). Finally, the evidence in this case is sufficient to show that the tree fell as the result of an "unforeseeable violent manifestation of nature," which caused Damage independent of any defect in the tree. ***Accord Kirsch v. Kappa Alpha Order*, 373 So.2d 775** (1979). *See also* 54 A.L.R.4th 530, "Tree or limb falls onto adjoining private property: personal injury and property Damage liability".

The owner of a tree is liable for injuries from a falling tree only if he knew or reasonably should have known the tree was diseased, decayed or otherwise constituted a dangerous condition. "[T]here is no duty to consistently and constantly check all ... trees for non-visible rot as the manifestation of decay must be visible, apparent, and patent so that one could be aware that high winds might combine with visible rot and cause damage." ***Cornett v. Agee*** (1977) 143 Ga.App. 55, 57, 237 S.E.2d 522 [cited approvingly in ***Sprecher v. Adamson Companies*** (1981) 30 Cal.3d 358, 365 – providing that there is a duty of reasonable care in the maintenance of property]. ***Willis v. Maloof*** (1987) 184 Ga.App. 349, 350, 361 S.E.2d 512, 513.

TREE ROOTS AND BRANCHES

When roots encroach on adjacent property there is no absolute right to sever them. ***Booska v. Patel*** (1994) 24 Cal. App. 4th 1786 -- roots of a 30–40 year old Monterey pine tree extended into Patel's yard. Patel hired a contractor to excavate along the length of his yard and sever the roots of the tree down to a level of approximately three feet. This killed the tree. The trial court granted summary judgment for Patel on the ground that he had an absolute right to sever any roots that entered his property. REVERSED. Defendant had a duty to act reasonably. Civil Code §3514 requires one to use rights so as not to infringe on the rights of another. Civil Code §1714 imposes a duty on landowners to exercise reasonable care.

TREES WHOSE TRUNKS ARE WHOLLY ON LAND OF ONE. Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another. ***Civil Code § 833***.

Civil Code §3346 provides in pertinent part: “For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment....”.

Code of Civil Procedure §733 provides: “Any person who cuts down or carries off any wood or underwood, tree, or timber, ... or otherwise injures any tree or timber on the land of another person, ... is liable to the owner of such land, ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction.”

DAMAGES FOR INJURY TO TREE: The usual measure of damages in a case involving damage to a tree is the difference between the value of the real property before and after the injury. ***Hassoldt v. Patrick Media Group, Inc.*** (2000) 84 Cal.App.4th 153, 167 [action for trespass and damages – but not intentional infliction of emotional distress – may be brought by owner of property who is not in possession at time of injury].

MENTAL DISTRESS: However, claim for emotional distress damages may be maintained. ***Kornoff v. Kingsburg Cotton Oil Co.*** (1955) 45 Cal.2d 265, 272 (“[i]t appears to us that the discomfort and annoyance suffered by plaintiffs is an injury directly and proximately caused by defendant's invasion of their property and that such damages would naturally result from such an invasion.”); ***Herzog v. Grosso*** (1953) 41 Cal.2d 219, 225 (“[o]nce a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom.”). ***Hassoldt v. Patrick Media Group, Inc.***, 84 Cal.App.4th 153, 172. In ***Merenda v. Superior Court*** (1992) 3 Cal.App.4th 1, 9, the court cited ***Kornoff*** and ***Herzog*** as illustrative of cases where “[r]ecovery also has been sanctioned for emotional distress which could be said naturally to ensue from an act which invaded an interest protected by an established tort.”

SPITE FENCE

Any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance. Any owner or occupant of adjoining property injured either in his comfort or the enjoyment of his estate by such nuisance may enforce the remedies against its continuance prescribed in Title 3, Part 3, Division 4 of this code. ***Civil Code § 841.4***

A row of trees serving as a barrier between adjoining parcels of land can be a "structure in the nature of a fence" regulated by the "spite fence" statute. Downhill neighbors' act of "maliciously maintaining trees that unnecessarily exceed 10 feet for the dominant purpose of annoying" the uphill neighbors was insufficient to support liability under spite fence statute, absent a finding that uphill neighbors sustained injury in their "comfort or the enjoyment of [their] estate by such nuisance." ***Vanderpol v. Starr*** (2011) 194 Cal.App.4th 385.

A row of growing trees, arranged in a line by the person who planted them, can be a "structure," as element for finding such trees are a "structure in the nature of a fence," within meaning of spite fence statute declaring that a fence or other structure in the nature of a fence unnecessarily exceeding ten feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property, is a private nuisance. The question whether a particular fence or fence-like structure "unnecessarily" exceeds ten feet in height, within meaning of spite fence statute, cannot be answered without reference to the ostensible purpose or purposes the defendant claims for the structure; the spite fence statute expresses the judgment of the Legislature that a fence, i.e., a structure built to separate or mark the boundary between two adjoining parcels, does not need to be more than ten feet high to serve that purpose, but if a fence or fence-like structure serves some other purpose as well, then its height above ten feet may be justified by that additional purpose. Defendant's intent to annoy must be dominant purpose. ***Wilson v. Handley*** (2002) 97 Cal.App.4th 1301.

OBSTRUCTIONS OF LIGHT/AIR/VIEW

There is no natural right to air, light, or an unobstructed view over adjoining property, unless the right is created by the parties, by the state legislature, or by a local legislative body. [**Taliaferro v. Salyer** (1958) 162 Cal App 2d 685].

However, at least one local ordinance that seeks to preserve views and sunlight has been held Constitutional by the Court of Appeals. [***Kucera v. Lizza*** (1997) 59 Cal.App.4th 1141].

A building or structure does not constitute a nuisance merely because it obstructs the passage of light and air to the adjoining property, regardless of the impact on the adjoining property, as long as that building or structure does not otherwise constitute a nuisance. [See ***Wolford v. Thomas*** (1987) 190 Cal App 3d 347 (construction of penthouse that interfered with neighbor's light, air, view, and privacy did not constitute nuisance).

See also ***Sher v. Leiderman*** (1986) 181 Cal App 3d 867 (blockage of light to neighbor's property does not constitute actionable nuisance, regardless of impact on injured party's property)].

“SOLAR SHADE CONTROL ACT”:

“The Solar Shade Control Act ... provides limited protection to owners of solar collectors from shading caused by trees on adjacent properties.” (***Sher v. Leiderman**, supra,* 181 Cal.App.3d at p. 880.) Enacted in 1978, the Act has been described as “protecting active or passive solar energy systems (SES's) against obstruction by later-planted or later-grown trees and foliage....” (*Kucera v. Lizza, supra,* 59 Cal.App.4th at p. 1152, statutory citation omitted.)

In pertinent part, the Act provides: “After January 1, 1979, no person owning, or in control of a property shall allow a tree or shrub to be placed, or, if placed, to grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 percent of the collector absorption area” during mid-day hours as specified in the statute. (§ 25982; see generally, 11 Witkin, Summary of Cal. Law, *supra,* Equity, § 137 p. 820.)

The Act permits local jurisdictions to exempt themselves from its operation. The exemption provision states: “Any city, or for unincorporated areas, any county, may adopt, by majority vote of the governing body, an ordinance exempting their jurisdiction from the provisions of this chapter. The adoption of such an ordinance shall not be subject to the provisions of the California Environmental Quality Act (commencing with Section 21000).” (§ 25985.)

Zipperer v. County of Santa Clara (2005) 133 Cal.App.4th 1013, 1021-1022.