DEFENDING A PREMISES LIABILITY CLAIM



JAMES GRAFTON RANDALL, ESQ.

TABLE OF CONTENTS

1. DEFENDING A PREMISES LIABILITY CLAIM 3

2. AFFIRMATIVE DEFENSES 4

3. DOG BITES ANSWER TO COMPLAINT 5

5. PREMISES ANSWER TO COMPLAINT 6

6. RECREATIONAL IMMUNITY [CIVIL CODE §846] 7-8

7. DOGS 9

8. PREMISES LIABILITY OPEN AND OBVIOUS 10-11

9. HOMEOWNERS HIRING WORKERS 12

10. HOMEOWNERS AND CAL-OSHA STANDARDS 13

11. ADMISSIBILITY OF CAL-OSHA STANDARDS 14

12. EXPERT OPINION CONDITION "DANGEROUS" 15

13. LANDLORD MUST HAVE NOTICE OF DEFECT 16-17

14. PARTY AT HOME AND DUTY OWED BY HOMEOWNER 18

15. PREMISES LIABILITY SUMMARY 19-20

16. DUTY OF LANDLORD VIOLENCE BY TENANT 21

17. PREMISES LIABILITY AND CHILDREN 22-24

18. DEFINITION OF A "DANGEROUS CONDITION" 25

19. TRIAL OF A NEGLIGENT SECURITY CASE 26-29

20. PRIVETTE AND PROGENY 30

21. DEMANDS TO PRODUCE 31

22. SPECIAL INTERROGATORIES 32

23. REQUESTS FOR ADMISSIONS 33

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.

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.

MOTIONS FOR SUMMARY JUDGMENT: A motion for summary judgment needs 75 days notice [plus 5 for mailing] and they can not be set for hearing within 30 days prior to trial unless the court allows it [the 75 days can not be shortened; the 30-day period can be]. If one is doing a motion for summary judgment in a "negligent security" case, it is vital during discovery that one ascertain from the plaintiff all security measures that plaintiff claims should have been used – from the "high burden" measures such as guards, to the "low burden" measures such as a lock, call "911", replace a piece of glass, etc. – as each of these measures must be addressed and eliminated in the motion. MSJ's are very time-consuming and require considerable preparation time, so plan accordingly.

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.

RECREATIONAL IMMUNITY [CIVIL CODE §846]

A. California *Civil Code* Section 846

"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 **two elements as a precondition to immunity**: (1) ***the defendant must be the owner of an "estate or any other interest in release property, whether possessory or nonpossessory***;" **and** (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. The Property Does Not Have To Be Intended For Recreational Purposes

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. The Term "Recreational Purpose" Is Broadly Defined

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].

<u>REQUEST FOR ADMISSIONS</u>: [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.

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. <u>MAY OWE DUTY TO REMEDY DEFECTIVE CONDITION:</u> 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. <u>DETERMINING "OPEN AND OBVIOUS" BY USE OF PHOTOGRAPHS:</u> "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.)

4. <u>NO REQUIREMENT TO MAKE CRITICAL EXAMINATION OF PREMISES</u>
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.)

5. <u>WHETHER DEFECT WAS "OPEN AND OBVIOUS" IS FOR THE JURY TO DETERMINE</u>: 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.*)

6. <u>NO DUTY TO PREVENT INJURY FROM UNINTENDED USE OF PROPERTY</u>:
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];

7. <u>DANGERS OBVIOUS TO MINORS</u>: 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.

8. <u>PRODUCTS LIABILITY AND "OPEN AND OBVIOUS":</u> Courts considering diving mishaps involving children perceive "open and obvious" dangers in a slightly different light than dangers involving adults. ***Bunch v. Hoffinger Industries, Inc.*** (2004) 123 Cal.App.4th 1278, 1297 [danger of diving into a shallow aboveground pool is not open and obvious to an 11 year old as a matter of law; doctrine of assumption of risk inapplicable in a products liability action].

<u>HOMEOWNERS HIRING WORKERS</u>

<u>LABOR CODE PRESUMPTION LICENSE/EMPLOYEE</u>: 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 prime 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 CONTRACTOR [WITH NO EMPLOYEES] CANNOT RELY UPON CAL-OSHA REQUIREMENTS AS THERE WAS NO EMPLOYMENT RELATIONSHIP: See: ***Iverson v. California Village Homeowners Assoc.*** (2011) 194 CA4th 107: A violation of Cal-OSHA regulations may establish negligence per se only in an action brought by an employee; they do not apply to a licensed, one-man independent contractor. Addressing a question of first impression, the California Court of Appeal affirmed, ruling that Cal-OSHA regulations do not apply to an action brought by a licensed independent contractor who had no employees. Under Cal-OSHA, the employment and place of employment provided to employees must be safe and healthful. Cal. Labor Code § 6400(a). The evidentiary effect of a violation of a Cal-OSHA regulation is addressed in Cal. Labor Code § 6304.5 which, as amended in 1999, provides:

It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety.

The ***Iversen*** ruling is limited in its application by two, salient facts: the plaintiff (1) is a contractor without employees and (2) is licensed. Referring to the latter factor first, had the contractor *not* been licensed, he would have been the owner's statutory employee by operation of California's sui generis statutory employment doctrine, which imposes statutory employer status on a hirer if the contractor was unlicensed at the time of the injury. See Cal. Labor Code § 2705.5; ***State Compensation Ins. Fund v. Workers' Compensation Appeals Bd***., (1985) 40 Cal.3d 5; and ***Zellers v. Playa Pacifica, Ltd.*** (1998) 61 Cal.App.4th 129 -- (contractor who was licensed when hired, but unlicensed when injured, was the statutory employee of the owner). However, "employee" status for Iversen might have been negated by application of Cal. Labor Code § 3352(h), which excludes from the definition of an

"employee" one who had worked fewer than 52 hours during the ninety days preceding the accident.

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.)

A LANDLORD MUST HAVE NOTICE OF ALLEGED DEFECT

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.)

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:

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.

DUTY TO WARN: 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.

DUTY OF CARE: "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.

TRIVIAL DEFECT: 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].

UNLICENSED CONTRACTORS: 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.

DOG BITES: 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.

MERELY BECAUSE PLAINTIFF FELL: '[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.

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].

"PECULIAR RISK": *Privette v. Superior Court* (1993) 5 Cal.4th 693. See: ***Kinsman v. Unocal Corp.*** (2005) 37 Cal.4th 659, 664, 672-678 [undisclosed hazardous conditions – 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…".

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.

FALL OUT OF WINDOWS: 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. **No Liability**: (***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].)

Yes Liability:

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)]

TRIAL OF A "NEGLIGENT SECURITY" CASE:

(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.

<u>FACTORS IN THE COURT ANALYSIS OF A "NEGLIGENT SECURITY CASE"</u>

- 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 – HIGH DEGREE OF FORESEEABILITY

"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.

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 document 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 of the scene of the incident which is the subject of this action.

///

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.