2nd Civil No. B_____

**Stay Requested**
**November 24, 2003 Trial**

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

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| RALPH CASSADY and CASSADY CORPORATION,<br><br>Petitioners,<br><br>vs.<br><br>SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,<br><br>Respondent.<br>_____<br><br>MORGAN, LEWIS & BOCKIUS LLP, a limited liability partnership,<br><br>Real Party in Interest.<br>_____ | (Case No. BC 277144;<br>Hon. John P. Shook, Judge) |

**PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF; REQUEST FOR STAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION**

**[EXHIBITS FILED UNDER SEPARATE COVER]**

LAW OFFICES OF BAIRD A. BROWN
BAIRD A. BROWN (SBN 56627)
1000 Wilshire Blvd., Suite 620
Los Angeles, California 90017-2463
(213) 688-7795/Fax (213) 688-1080

GREINES, MARTIN, STEIN & RICHLAND LLP
MARC J. POSTER (SBN 048493)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3697
(310) 859-7811/Fax (310) 276-5261

Attorneys for Plaintiff, Cross-Defendants And Petitioners
Ralph Cassady and Cassady Corporation

# INTRODUCTION

## A. Respondent Superior Court Has Turned Employment Law Upside Down.

As between employer and employee, who should pay for the successful defense of a negligence action brought against them both on account of the employee's conduct in the course of his employment?

In this case, on cross-motions for summary judgment or summary adjudication, the trial court has ruled that the employee who successfully defended himself in a third-party negligence action arising out of his services for his employer must pay his own defense costs and also may be required to pay his employer's separate defense costs as well, almost $1 million all told.

To reach this remarkable result, the trial court decided that an employee cannot recover his defense costs from his employer unless he proves the truth of allegations of the unsuccessful tort action against him, and that the employer can recover its defense costs from the employee even though neither of them should have been sued by the third party in the first place.

This cannot be the result the law intends, and the applicable statutes and appellate decisions should not be read that way. Under governing law,

it is the employer, not the employee, who must bear costs arising out of conduct performed for the employer's benefit.

Petitioners respectfully ask this Court to set the record straight before this case careens onward, wastefully consuming further judicial resources, in a trial on all the wrong issues, now scheduled for November 24, 2003.

## B. Factual Summary.

### 1. The Lawsuit: Employee And Employer Sue Each Other For Indemnity For The Cost Of Successfully Defending A Third-Party Tort Action.

In the underlying action, Rallie Rallis sued petitioners, attorney Ralph Cassady and his professional corporation (referred to here individually and collectively as "Cassady"), and real party in interest, the law firm Morgan, Lewis & Bockius LLP ("Morgan Lewis"), for, among other things, legal malpractice arising out of services provided by Morgan Lewis and by Cassady as a Morgan Lewis employee. Morgan Lewis defended itself but refused to defend Cassady, so Cassady hired his own attorney. Both Cassady and Morgan Lewis were eventually exonerated in the *Rallis* action as to all claims involving Cassady's services while

Cassady was employed by Morgan Lewis. (*Rallis v. Cassady*, Oct. 24, 2000, 2d Dist., Div. 3, B127047, B131724.)

In the present action in respondent Los Angeles Superior Court, Cassady seeks indemnity from Morgan Lewis for the $270,000 attorney fees and costs, plus interest, he incurred in defending the *Rallis* action, pursuant to the common law employment rights and to Labor Code section 2802, subdivision (a), which provides:

> An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Morgan Lewis has cross-complained against Cassady to recover $479,070.05 for its own fees and costs in defending the *Rallis* action, pursuant to Labor Code section 2865, which provides:

> An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer. The employer is liable to the employee if the service is not gratuitous, for the value of the services only as are properly rendered.

### 2. Respondent Court's Backwards Rulings On Cross-Motions For Summary Judgment or Summary Adjudication: The Employee Must Pay His Own And His Employer's Defense Costs.

Even though Cassady was sued by Rallis for alleged malpractice as a Morgan Lewis employee and even though Cassady successfully defended the malpractice suit and therefore cannot now fairly be deemed "guilty of a culpable degree of negligence" under Section 2865, the trial court has denied Cassady's motion to summarily adjudicate his non-liability for Morgan Lewis's defense costs under Section 2865.

Worse still, respondent court has granted summary judgment to Morgan Lewis on Cassady's own Section 2802 indemnity claim. The grant is based on the court's reversal of the traditional burden of proof in summary judgment proceedings and its conclusion that, despite the record of the *Rallis* action, and despite Cassady's own and his attorney's sworn statements and legal bills, Cassady cannot prove he incurred any attorney fees in defending the *Rallis* action. The court invoked a Catch-22: Cassady loses because he failed to offer evidence that he committed malpractice as a Morgan Lewis employee, of which there could be no evidence because he was not found liable for malpractice.

The net result: The case is now going to trial on only half of the case – on just Morgan Lewis's claim for its fees in defending the *Rallis* action – which is exactly the *wrong* half.

### C. Extraordinary Relief Is Necessary And Appropriate To Set Aside Respondent Court's Rulings: There Is No Adequate And Speedy Remedy At Law To Challenge The Court's Rulings On Significant And Novel Issues, And The Impending Trial On The Wrong Issue Will Be A Waste Of Everyone's Time, Effort And Resources.

Writ review is appropriate and necessary to address the significant substantive and procedural issues presented by respondent court's misguided rulings. Code of Civil Procedure section 437c, subdivision (m)(1), expressly authorizes a writ to review such orders.

The parties and respondent court should not be left with the untenable prospect of just going through the motions, trying a case that should not be tried, and only then, after an appeal, going back to try the case that was not tried but should have been tried in the first place.

This individual case aside, an appellate decision on the issues presented would be useful for all California employers and employees. First, employers are frequently sued because of the alleged negligence of

their employees. Labor Code sections 2802 and 2865 may apply in all such cases. How the statutes work, and how they work together, are thus critical issues in all employment relationships. As this case demonstrates, however, these statutes are not well understood and the applicable law is far from settled. Must an employee prove that the underlying negligence action against him was valid in order to obtain reimbursement from his employer for defending that action? Can an employer obtain indemnity from the employee under a statute that requires proof that the employee was guilty of culpable negligence, when it has already been established that the employee was not guilty? Can both employer and employee obtain their litigation costs from each other at the same time?

Second, summary judgment procedures have been pushed into uncharted territory in this case. The court has misread recent changes to the summary judgment statute and improperly shifted the burden of proof to the responding party, Cassady, thereby denying Cassady's right to a jury trial on material disputed issues. Furthermore, the court misread the record in concluding Cassady has no evidence, and can produce no evidence, that he incurred attorney fees and costs in successfully defending the malpractice action. As we shall explain, the evidence is there.

Trial is set for November 24, 2003. Cassady respectfully requests a stay of the trial so the important and controlling legal issues presented by this petition may be decided before, not after, the case goes to trial.

## PETITION

By this verified petition, petitioners Ralph Cassady and Cassady Corporation allege as follows:

### A. Jurisdiction For This Petition.

1. Petitioner Ralph Cassady is the plaintiff, petitioners Ralph Cassady and Cassady Corporation are the cross-defendants (individually and collectively "Cassady"), and real party in interest Morgan, Lewis & Bockius, a limited liability partnership ("Morgan Lewis"), is the defendant and cross-complainant in an action now pending in respondent Superior Court for the County of Los Angeles, entitled *Cassady v. Morgan Lewis & Bockius*, No. BC277144, assigned to Judge John P. Shook. Cassady filed his complaint on July 5, 2002 (Exhs. 1),[1] and Cross-complainant Morgan Lewis filed its cross-complaint on August 8, 2002 (Exhs. 7).

[1] "Exhs. 1" refers to page 1 of the consecutively-paginated exhibits to this petition. The exhibits are identified and designated by letter in paragraph 21 of this petition, below.

### B. The Underlying Case: Rallis Sues Cassady and Morgan Lewis For Alleged Legal Malpractice In 1987-1988, While Cassady Worked For Morgan Lewis.

2. Morgan Lewis employed Cassady as an attorney from February 1, 1987 to March 4, 1988. (Exhs. 50, ¶ 16; 130.)[2]

3. In 1995, Rallie Rallis sued Cassady, Morgan Lewis, and others for legal malpractice and other causes of action. Rallis alleged that Cassady, and the various firms with which he was associated, had handled all legal matters from 1982 through 1994 for Rallis and certain corporations in which Rallis was an officer, a director and/or a shareholder. (Exhs. 158, Brown Declaration, ¶ 5; 344, Rallis Second Amended Complaint ["SAC"], ¶ 30.) In particular, Rallis sought damages and equitable relief for professional negligence, breach of contract, and breach of fiduciary duty against Cassady and Morgan Lewis with regard to their handling of the affairs of Mark Equipment Center of South Florida, Inc. ("MEC-SF") in 1987 (Exhs. 346-350; SAC ¶¶ 40, 43, 46), with damages in excess of $1,000,000, and the sale of stock in American Hi-Lift Corporation

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[2] Cassady was associated with other law firms, including Hahn, Cazier & Smaltz, before that time, and continued to work as an attorney for himself or his professional corporation, or in association with another attorney, Raymond M. Klein, and others, after that time. (Exhs. 50-51, ¶¶ 15, 17, 18, 19; 130.)

("AHLC") from October 1987 through February 1988, with damages in excess of $500,000 (Exhs. 346-350, 354-363, 368-370, 375-376; SAC ¶¶ 40, 43, 46, 63-73, 87-96, 114-116). With respect to MEC-SF, Rallis' primary claims were that Cassady and Morgan Lewis should have dissolved MEC-SF in 1987 and that they should have settled a MEC-SF shareholder claim before suit was filed in Florida in 1987. (Exhs. 158, Brown Declaration, ¶ 4.)[3]

4. The trial court in the *Rallis* action granted summary judgment to all defendants based on the statute of limitations and other grounds. On appeal, the Court of Appeal affirmed the judgment as to Morgan Lewis and Cassady with regard to claims against them jointly, but reversed the judgment as to Cassady on some claims unrelated to his employment with Morgan Lewis. (Exhs. 391, 4063; *Rallis v. Cassady* (2000) 84 Cal.App.4th 285, 305-306, fn. omitted, opn. deleted on direction of Supreme Court dated January 24, 2001, 100 Cal.Rptr.2d 763.)

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[3] Rallis also alleged that in 1988 Morgan Lewis failed to disclose a dispute and eventual compromise between Morgan Lewis and Ackers U.S.A./AHLC arising from the omission of litigation matters from its opinion letter to Ackers USA at the time of the stock sale. (Exhs. 371-372; SAC ¶¶ 103-108.)

### C. The Present Case: Cassady's Labor Code Section 2802 Indemnity Claim As An Employee Against Morgan Lewis For His Fees And Costs In Defending The *Rallis* Action; Morgan Lewis's Labor Code Section 2865 Counter-Claim As An Employer Against Cassady For Fees And Costs In Defending The *Rallis* Action.

5. In July 2002, in the present action, Cassady has sued Morgan Lewis for damages under Labor Code section 2802 and common law indemnity principles. He alleges Morgan Lewis has wrongfully refused to reimburse him for attorney fees and costs (exceeding, with interest, $400,000) incurred by him in defending the *Rallis* action up to the time that the judgment in *Rallis* became final in favor of Morgan Lewis. (Exhs. 1-3.)[4]

6. By cross-complaint, Morgan Lewis seeks $479,070.05 in damages from Cassady for its fees and costs in defending the *Rallis* action, pursuant to Labor Code section 2865 and to an indemnity clause in a letter agreement dated January 30, 1987 (the "January 1987 Agreement")

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[4] After the *Rallis* case was remanded for further proceedings on those claims against Cassady and defendants other than Morgan Lewis that were not barred by the statute of limitations, the case settled. (Exhs. 235, ¶ 5.)

pursuant to which partners and employees of Cassady's previous firm, Hahn, Cazier & Smaltz, agreed to join Morgan Lewis. (Exhs. 7.)[5]

[5] The pertinent portion of the January 1987 Agreement, Paragraph 11, provides as follows: "All assets, obligations and liabilities of HC&S of any and all kinds whatsoever as of January 31, 1987 shall remain the assets, obligations and liabilities of said firm and its partners, except as specifically transferred to or assumed by ML&B as provided in Paragraph 9 hereof and/or in Exhibit F hereto. HC&S warrants and represents that as of January 31, 1987 . . . there are no claims as to any act, omission or breach or neglect of duty or obligation in the performance of professional services or any personal injury ('claims') or potential claims against it, nor is it aware of any circumstances which will result, or which may reasonably be expected to result, in a claim at some time in the future except as set forth in Exhibit G hereof. Under provisional Addendum No. 4 dated January 28, 1986 to ML&B's Professional Indemnity Insurance Policy, which has a limit of liability of $50 million and a $500,000 retention, HC&S partners and other personnel who become partners or personnel of ML&B are covered under ML&B's policy, subject otherwise to its terms, conditions, limitations and exclusions, for acts committed by such HC&S partners and other personnel prior to joining ML&B, excepting such claims or circumstances which have previously been notified to the insurers of HC&S on any other policy of insurance and excepting such claims as may arise out of circumstance known to HC&S prior to such HC&S partners and other personnel joining ML&B which HC&S at such time knew would result, or should have reasonably expected would result, in a claim against them at some time in the future. HC&S as a firm and its partners as individuals will defend, hold harmless and indemnify ML&B for any loss or damage (including expenses and reasonable attorneys' fees) arising from such claims not covered by ML&B's said insurance, such reimbursement to include any amount which ML&B shall in fact pay after consultation with former HC&S partners who become ML&B partners because of the limits or deductible provisions of such policy." (Exhs. 254-255.)

### D. Morgan Lewis's Summary Judgment Motion On Cassady's Complaint.

7. Morgan Lewis moved for summary judgment on Cassady's indemnity complaint. (Exhs. 19.) Rather than disprove any element of Cassady's claim, Morgan Lewis asserts that, in light of certain discovery responses, Cassady has no affirmative evidence to prove his claim. (Exhs. 30-36.) According to Morgan Lewis:

a. Cassady cannot prove his defense costs in the *Rallis* action were incurred as a direct consequence of the discharge of his duties while employed at Morgan Lewis because: (1) the allegations of the *Rallis* complaint that Cassady acted in the course and scope of his Morgan Lewis employment are not sufficient to establish that Cassady's costs were incurred as a consequence of the discharge of his duties while employed by Morgan Lewis; (2) Cassady relies on the allegations of the *Rallis* complaint; and therefore (3) Cassady cannot prove his case. (Exhs. 30-33.)

b. "Cassady provides nothing more than conjecture, guesswork, and speculation" as to what he necessarily expended in direct consequence of the discharge of his duties while employed by Morgan Lewis. (Exhs. 33.) Morgan Lewis disagrees with Cassady's approach, based on his and his attorney's personal knowledge and analysis of the work done in the *Rallis* action, of taking the total fees he incurred –

$280,000 – calculating the amount that was attributable to matters unrelated to Morgan Lewis – $10,000 – and coming up with a net result – $270,000. (Exhs. 35.)

c. Cassady has no common law claim because "common law indemnification does not apply between vicariously liable tortfeasors and tortfeasors guilty of the acts and omissions causing the harm." (Exhs. 36.)

8. Cassady submitted the following in opposition to Morgan Lewis's summary judgment motion: (Exhs. 133.)

a. With regard to his defense fees, Cassady offered authenticated copies of his attorney's billing records in the *Rallis* action up to June 29, 2001, when Morgan Lewis extricated itself from the action. (Exhs. 158, Brown Declaration, ¶ 2; 161-180, billing records.)

b. With regard to this attribution of fees to non-Morgan Lewis related matters, Baird Brown, Cassady's attorney in the *Rallis* action as well as this action, stated in his declaration, among other things, that with regard to the two matters not related to Morgan Lewis in the *Rallis* action, Cassady successfully demurred to Rallis's Mark Industries claim and the International Water Management, Inc. ("IWM") claim was dismissed early in the action with little effort on Cassady's part. Brown stated that "I have reviewed my records, and have independent recollection, and estimate that I

spent less than 40 hours on these two claims." (Exhs. 158, Brown Declaration, ¶ 3.)

### E. Cassady's Motion For Summary Adjudication On Morgan Lewis's Cross-Complaint.

9. On June 5, 2002, Cassady moved for summary adjudication of Morgan Lewis's statutory and contractual indemnity claims for its attorney fees and costs in defending the *Rallis* action. (Exhs. 209.) Cassady made the following points:

a. As to Morgan Lewis's statutory indemnity claim, there can be no finding that he was "guilty of a culpable degree of negligence" under Section 2865, or that a judgment had been rendered against Morgan Lewis on account of Cassady's conduct as a Morgan Lewis employee, because both Cassady and Morgan Lewis prevailed on Morgan Lewis-related claims in the *Rallis* action. (Exhs. 212-213.)

b. As to Morgan Lewis's contractual indemnity claim, the January 1987 Agreement, if it can be understood at all, cannot reasonably be understood to require Cassady to indemnify his employer for costs incurred in the successful defense of a malpractice action. That would contradict both public policy and the express terms of Labor Code section 2802. Moreover, the January 1987 Agreement required indemnity only for

claims that were not covered by Morgan Lewis's insurance. The *Rallis* action was covered by that insurance, as Morgan Lewis admitted in answers to interrogatories in the *Rallis* action and as the insurer agreed in correspondence with Cassady's counsel on July 7, 1997. (Exhs. 213-214, 236.)

c. In support of the motion, Cassady requested judicial notice of the Superior Court's file in the *Rallis* action. (Exhs. 235, Brown Declaration ¶ 6.) Brown declared that all of the Rallis claims were decided in favor of the defendants on summary judgment motions. The Court of Appeal reversed the summary judgment only as to claims not involving Morgan Lewis. The claims that did not involve Morgan Lewis were settled in 2002. (*Id*., ¶ 5.) Cassady submitted the January 30, 1987 Agreement (*id*. ¶ 7), Morgan Lewis's responses to Cassady's demand for production of documents in this case (*id*., ¶ 8), Morgan Lewis's responses to Rallis's interrogatories in the Rallis action which stated that Morgan Lewis was insured for the claims alleged in Rallis's complaint by Morgan Lewis's malpractice insurer, Attorneys' Liability Assurance Company (ALAS), with coverage of $70 million per claim, and that the insurer has been notified of the lawsuit and has not asserted any coverage defenses (Exh. 236, ¶ 9; Exhs. 282, 284) and a copy of a July 7, 1997 letter from ALAS, stating that Cassady would be considered an insured under the ALAS policy and offering to defend Cassady for the time he was affiliated with the Hahn

Cazier and Morgan Lewis firms, however no reimbursement obligation would commence until a $1 million self-insured retention is satisfied by a combination of costs incurred by Morgan Lewis and by Cassady. (Exhs. 236, Brown Declaration ¶ 10.)

10. Morgan Lewis opposed Cassady's motion on the following grounds (Exhs. 295):

a. There are triable issues of fact whether Cassady failed to use ordinary skill and care. (Exhs. 296-299.)

b. The January 1987 Agreement provides for indemnity for amounts Morgan Lewis has paid because those amounts do not satisfy the deductible provisions of Morgan Lewis's insurance. (Exhs. 299-300.)

**F. Respondent Court's Rulings: Cassady Recovers No Defense Costs From Morgan Lewis; Morgan Lewis May Recover Its Defense Costs From Cassady.**

11. On September 15, 2003, the court adopted Morgan Lewis's proposed order granting summary judgment on Cassady's complaint. (Exhs. 431.) In summary, the order states:

a. In calculating his indemnity claim, Cassady did not review the pleadings in the *Rallis* action or any diary entries other than bills. (Exhs. 433, ¶¶ 5, 6.)

b. Cassady's counsel's bills are not segregated by cause of action, by where Cassady was employed at the time of the alleged conduct, or by client. (Exhs. 433-434, ¶¶ 7, 8.)

c. Cassady and his counsel admit Cassady's indemnity claim is based on the allegations in the *Rallis* action. (Exh. 435, ¶ 14.)

d. Cassady's indemnity claim includes fees for conduct both while Cassady was an employee of Morgan Lewis and as a Hahn Cazier partner. (*Ibid*.)

e. Cassady has abandoned his transactional method of calculating his indemnity claim. (*Ibid*.)[6]

12. From this the court concludes:

a. "Morgan Lewis has presented evidence that Cassady does not possess, and cannot reasonably obtain, needed evidence to establish that his expenditures were necessary, or that such expenditures were incurred as a direct consequence of the discharge of his duties while employed at Morgan Lewis. Thus, Morgan Lewis has successfully shifted the burden to Cassady to show that a triable issue of one or more material facts exists." (Exhs. 434, ¶ 13.)

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[6] The order also considers if there is a triable issue of fact whether Cassady claims indemnity for fees and costs of $280,000 or $400,000 (Exhs. 432-433, ¶¶ 3, 4), but that is not a material dispute for purposes of Morgan Lewis's motion, which is solely to determine whether Cassady can prove any indemnity claim at all.

b. Cassady has failed to carry his burden on his statutory claim. Cassady improperly relies on the allegations of Rallis's complaint rather than "what Cassady actually did which caused Rallis to sue him." Cassady relied on a "transactional" method for calculating his indemnification claim which is only "conjecture, guesswork and speculation," and in any event he has abandoned that method and "improperly attempted to shift to Morgan Lewis his burden of apportioning fees and costs sought in his claim." His attempt to include fees related to conduct while he was at Hahn Cazier is at odds with Section 2802, because the statute only requires an employer to indemnify an employee for conduct within the scope of employment with that employer. (Exhs. 435, ¶ 14.)

c. Cassady has failed to carry his burden on his common law indemnity claim. Moreover, common law indemnification does not apply between vicariously liable tortfeasors and tortfeasors guilty of acts and omissions causing the harm. (Exhs. 435, ¶ 15.)

13. Morgan Lewis gave notice of entry of respondent Court's order on September 17, 2003.

14. On September 24, 2003, the court also adopted the order prepared by Morgan Lewis to deny Cassady's summary adjudication motion, which provides, in summary:

a. Morgan Lewis objected to Cassady's statement of fact that Morgan Lewis claims a right to indemnity for fees incurred in the

*Rallis* action as "inaccurately limited the breadth and scope of Morgan Lewis' cross-complaint." (Exhs. 452, Order, ¶ 2.)

b. Cassady's attorney's recitation on his personal knowledge of the procedural events in the *Rallis* action "lacks foundation, constitutes inadmissible hearsay, and an improper request for judicial notice." (Exhs. 452, Order, ¶ 3.)

c. That there was no finding of guilt in the *Rallis* action "is legally irrelevant, as Morgan Lewis need only show that Cassady 'fail[ed] to use ordinary care consistent with the degree and skill required and to be used as provided in Labor Code section 2858 and 2859.'" (Exhs. 452, Order, ¶ 4.)

d. That there was no adverse judgment against Morgan Lewis in the *Rallis* action "is legally irrelevant pursuant to well-settled California authority recognizing that an employer can maintain an indemnification action against a negligent employee under Labor Code § 2865 even where a judgment has not been rendered against an employer." (Exhs. 452-453, Order, ¶¶ 5, 6.)

e. Cassady's statement of fact that the January 1987 Agreement does not obligate Cassady to indemnify MLB herein is disputed. (Exhs. 453, Order, ¶ 7.)

f. Whether the Rallis claims were covered by Morgan Lewis's insurance is disputed. "Given the language of the January 30, 1987

letter agreement, as well as Morgan Lewis' submission of admissible evidence demonstrating that its expenses and reasonable attorneys' fees totaled $479,070.05 (less than the deductible amount of $500,000), a triable issue of material fact exists . . . . " (*Id*., ¶ 8.)

15. Morgan Lewis gave notice of entry of the court's September 24, 2003 order on September 29, 2003. (Exhs. 456.)

### G. A Writ And A Stay Are Necessary And Appropriate Remedies For Respondent Court's Improper Summary Judgment Rulings.

16. This petition is authorized by Code of Civil Procedure section 437c, subdivision (m)(1), and is filed within twenty days of notices of entry of respondent court's orders on September 17, 2003 and September 29, 2003 (Exhs. 440, 456), the time prescribed by that subdivision.

17. Respondent court exceeded its jurisdiction and abused its discretion in granting Morgan Lewis's summary judgment motion and denying Cassady's summary adjudication motion. There are triable issues of material fact that require a jury trial on Cassady's complaint, and no such triable issues of fact on Morgan Lewis's cross-complaint. Respondent court overlooked material evidence and misread the applicable substantive and

procedural law, and the court's findings do not support its orders, all as more fully explained in the memorandum of points and authorities, below.

18. Petitioners have no plain, speedy and adequate remedy in the ordinary course of law. There is no right of appeal from respondent court's orders because they do not dispose of all the issues between the parties. Morgan Lewis' cross-complaint against Cassady remains to be tried. If the points presented by this petition have merit, then there should be no trial on Morgan Lewis's cross-complaint and there should be a trial on Cassady's complaint. Respondent court should not be burdened with conducting a trial in a proceeding that is invalid and unnecessary from the start. Code of Civil Procedure section 437c, subdivision (m)(1), expressly authorizes the filing of a writ petition in these circumstances.

19. The issues presented by this Petition are of great and general significance to all California courts and litigants with regard to summary judgment procedure and the shifting of burdens of proof under amendments to summary judgment law, and to all California employers and employees with regard to indemnity rights when employer and employee are sued by third parties for conduct arising in the course of the employment relationship.

20. For the same reasons, a stay of the trial contemplated by respondent court's orders is necessary and appropriate to preserve the status quo until petitioners have exhausted their appellate remedies. Without a

stay, respondent court intends to proceed with what is, at best, trial of only half the case and, at worst, a trial that is entirely unnecessary.

### H. The Exhibits In Support Of This Petition.

21. True copies of the following documents are submitted under separate cover and are incorporated by reference in the allegations of this petition:

| Exhibit | Title | Date |
|---|---|---|
| | **Pleadings** | |
| A. | Complaint | 07/05/02 |
| B. | Defendant's Answer to Complaint for Damages (Indemnity) | 08/08/02 |
| C. | Defendant's Cross-Complaint for Indemnity | 08/08/02 |
| D. | Answer to Cross-Complaint | 09/27/02 |
| | **Morgan Lewis's Summary Judgment Motion** | |
| E. | Defendant Morgan Lewis & Bockius LLP's Notice of Motion and Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues | 06/05/03 |
| F. | Memorandum of Points and Authorities in Support of Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues | 06/05/03 |
| G. | Appendix of Non-California Authority Submitted by Defendant Morgan Lewis & Bockius LLP in Support of Its Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues | 06/05/03 |

| Exhibit | Title | Date |
|---|---|---|
| H. | Separate Statement of Undisputed Material Facts and Supporting Evidence in Support of Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues | 06/05/03 |
| I. | Declaration of Andrea Sheridan Ordin in Support of Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues | 06/05/03 |
| J. | Compendium of Evidence in Support of Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues [and Exhibits] | 06/05/03 |
| K. | Memorandum of Points and Authorities in Opposition to Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment/Summary Adjudication | 08/05/03 |
| L. | Plaintiff's Separate Statement of Undisputed and Disputed Facts in Opposition to Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or Summary Adjudication | 08/05/03 |
| M. | Evidence and Request for Judicial Notice Submitted in Opposition to Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment/ Summary Adjudication [and Exhibit] | 08/05/03 |
| N. | Reply Memorandum in Support of Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues against Plaintiff Ralph Cassady | 08/14/03 |
| O. | Reconciliation of the Parties' Separate Statements of Genuine Issues of Material Fact Regarding Defendant Morgan Lewis & Bockius LLP's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues | 08/14/03 |
| | **Cassady's Summary Adjudication Motion** | |

| Exhibit | Title | Date |
|---|---|---|
| P. | Notice of Motion and Motion for Summary Adjudication; Memorandum of Points and Authorities [and Exhibit] | 06/05/03 |
| Q. | Separate Statement of Undisputed Facts in Support of Motion for Summary Adjudication | 06/05/03 |
| R. | Evidence and Request for Judicial Notice in Support of Motion for Summary Adjudication [and Exhibits] | 06/05/03 |
| S. | Morgan, Lewis & Bockius LLP's Memorandum of Points and Authorities in Opposition to Ralph Cassady's Motion for Summary Adjudication | 08/05/03 |
| T. | Defendant Morgan, Lewis & Bockius LLP's Statement of Genuine Issues of Material Fact in Opposition to Plaintiff Ralph Cassady's Motion for Summary Adjudication | 08/05/03 |
| U. | Morgan, Lewis & Bockius LLP's Compendium of Evidence in Opposition to Ralph Cassady's Motion for Summary Adjudication [and Exhibit] | 08/05/03 |
| V. | Defendant Morgan, Lewis & Bockius LLP's Objections to and Request to Strike Portions of Declaration of Baird A. Brown | 08/05/03 |
| W. | Cross-Defendant and Cross-Complainant Davis Wright Tremaine LLP's Separate Statement of Undisputed Facts; Declaration of John A. Reed with Exhibits A-G; Declaration of Andrew R. Hall with Exhibits H-P | 08/05/03 |
| X. | Plaintiff's Reply Memorandum in Support of Motion for Summary Adjudication | 08/14/03 |
| | **Respondent Court's Rulings** | |
| Y. | Reporter's Transcript | 08/19/03 |
| Z. | Minute Order | 08/19/03 |

| Exhibit | Title | Date |
|---|---|---|
| AA. | Amended Order Granting Defendant Morgan, Lewis & Bockius LLP's Motion for Summary Judgment | 09/15/03 |
| BB. | Notice of Entry of Amended Order Granting Defendant Morgan, Lewis & Bockius LLP's Motion for Summary Judgment | 09/17/03 |
| CC. | Order Denying Cross-Defendant Ralph Cassady's Motion for Summary Adjudication | 09/24/03 |
| DD. | Notice of Entry of Order Denying Cross-Defendant Ralph Cassady's Motion for Summary Adjudication | 09/29/03 |

## PRAYER

Wherefore, petitioners pray that this Court:

1. Issue a temporary stay of trial scheduled for November 24, 2003, in *Cassady v. Morgan Lewis*, (Super. Ct. L.A. County, No. BC277144), until final disposition of this petition; and

2. Thereafter issue, in the first instance, a peremptory writ of mandate or such other appropriate relief as is warranted by the facts, directing respondent court to vacate its September 15, 2003 and September 24, 2003 orders granting Morgan Lewis's summary judgment motion on Cassady's complaint and denying Cassady's summary adjudication motion on Morgan Lewis's cross-complaint, and to enter new

and different orders denying Morgan Lewis's motion and granting Cassady's motion; or

3. Alternatively, thereafter issue an alternative writ of mandate, or such other appropriate relief as is warranted by the facts, directing respondent court to vacate its September 15, 2003 and September 24, 2003 orders granting Morgan Lewis's summary judgment motion on Cassady's complaint and denying Cassady's summary adjudication motion on Morgan Lewis's cross-complaint, and to enter new and different orders denying Morgan Lewis's motion and granting Cassady's motion, or to show cause before this Court why it should not be directed to do so; and

4. Award petitioners their costs of this proceeding; and

5. Grant such other and further relief as may be just and proper.

Dated: October 7, 2003

Respectfully submitted,

LAW OFFICES OF BAIRD A. BROWN
BAIRD A. BROWN

GREINES, MARTIN, STEIN & RICHLAND LLP
MARC J. POSTER

By_____
Marc J. Poster
Attorneys for Petitioners

## VERIFICATION

I, Ralph Cassady, declare:

I am one of the petitioners in this matter. I have read the foregoing petition. On my own personal knowledge I verify that the facts alleged in the petition are true.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this verification was executed at Los Angeles, California, on October __, 2003.

_____
Ralph Cassady

## MEMORANDUM OF POINTS AND AUTHORITIES

## IN SUPPORT OF PETITION

A motion for summary judgment or summary adjudication involves pure questions of law. The trial court has no discretion to exercise. "If a triable issue of material fact exists as to the challenged causes of action, the motion must be denied. If there is no triable issue of fact, the motion must be granted." (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 752.)

An appellate court therefore reviews rulings on these motions "de novo to determine whether the moving and opposing papers show a triable issue of material fact." (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.)

As we now explain, Morgan Lewis is not entitled to summary judgment in its favor on Cassady's Labor Code section 2802 claim. Cassady is entitled to summary adjudication in his favor on Morgan Lewis's Labor Code section 2865 claim. Respondent court erred in ruling otherwise, and a writ should issue to prevent a needless trial on all the wrong issues.

## I.

## MORGAN LEWIS IS NOT ENTITLED TO SUMMARY JUDGMENT ON CASSADY'S LABOR CODE SECTION 2802 CLAIM; RESPONDENT COURT MISREAD BOTH THE LAW AND THE FACTS.

### A. An Employee Should Not Be Required To Prove The Truth Of The Allegations Of The Third-Party Action Against Him And His Employer In Order To Obtain Indemnity From His Employer For The Successful Defense Of The Action.

Labor Code section 2802, subdivision (a), states unequivocally that an employer must indemnify its employee for losses incurred in direct consequence of the employee's duties:

> An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Being sued for what an employee does in the course of employment is a "consequence of the discharge of his or her duties." And the costs of

defense of such a lawsuit are certainly "expenditures or losses incurred by the employee."

Here, Cassady was sued and incurred defense costs for what he did while in Morgan Lewis's employ.[7] Section 2802 therefore requires that Morgan Lewis indemnify Cassady for those defense costs. End of story.

Inexplicably, for respondent court it was not the end of the story. The court granted summary judgment against Cassady's Section 2802 claim based on Morgan Lewis's argument that "Cassady and his counsel have repeatedly failed to identify what Cassady *actually* did caused Rallis to sue him and to state whether such *actual* conduct was within or without the scope of his employment. Instead, they only say that, *if* Cassady did what Rallis *alleged* that he did, then Cassady's conduct would have been within the scope of his employment." (Exhs. 33, original emphasis; 435 ¶ 14.)

Morgan Lewis's argument makes no sense at all. Section 2802"s "obvious purpose . . . is to protect employees from suffering expenses in direct consequence of doing their jobs." (*Grissom v. Vons Companies, Inc.* (1991) 1 Cal.App.4th 52, 59-60.) Rallis sued Cassady and Morgan Lewis

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[7] Morgan Lewis has objected to Cassady's request for judicial notice of the complaint and Court of Appeal decision in the *Rallis* action. There is, however, no question that courts must judicially notice the decisional law of this state (Evid. Code, § 451, subd. (a); ) and the courts' own court records (Evid. Code, §§ 452, subd. (d), 453; *Artucovich v. Arizmendiz* (1967) 256 Cal.App.2d 130, 133-134; *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997 [judicial notice of trial transcript in related case].)

for negligence in providing legal services while Cassady was employed by Morgan Lewis. Thus, on account of his employment with Morgan Lewis, Cassady had to incur the cost of defending himself in that action. There is no suggestion that Rallis's allegations of Cassady's Morgan Lewis employment were sham, or that the alleged wrongs on their face were outside the usual scope of an attorney's employment with a law firm. And even if Rallis's allegations were sham, Cassady still had to defend against them.[8]

This case is materially different than the sole authority and the linchpin of Morgan Lewis's "prove you really did what was alleged" argument, *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449. In *Douglas*, an employee was sued for wrongdoing that, on the face of the lawsuit, appeared to be *outside* the scope of his employment. His employer was not sued in that action at all. After the employee was exonerated in the third-party lawsuit, he sued his employer for reimbursement of his defense costs. The trial court found in the employer's favor because none of the acts *alleged* in the underlying action was committed within the course and scope of the employment.

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[8] Even if Rallis had made it all up (which no one claims he did), Morgan Lewis's grievance is with Rallis, not Cassady. "The employee who is sued for authorized acts in the scope of his employment is as much in need and deserving of indemnity if the third person acts in bad faith as the employee is if the third person acts in good faith." (*Douglas v. Los Angeles Herald-Examiner*, *supra*, 50 Cal.App.3d at p. 464.)

The appellate court in *Douglas* reversed the judgment in the employer's favor. The appellate court ruled that the trial court's finding that the acts alleged in the underlying action were outside the employee's scope of employment did not compel a judgment for the employer under Section 2802. Instead, the trial court should have determined whether, despite the absence of such allegations, the employee's conduct in fact arose in the course of his employment. The appellate court explained:

> If an employer, regardless of his knowledge, elects to run a risk and refuses to defend and indemnify an employee who is sued as a result of acts and conduct within the scope of his employment, then the employer must bear the consequences of Labor Code section 2802 if it is established that the employee was sued as a result of acts and conduct within the scope of his employment.

(*Id.* at p. 464.) Here, there is no issue whether the facts alleged by Rallis against Cassady came within the course of Cassady's employment with Morgan Lewis. They plainly do. Rallis did *not* solely allege facts that, if true, on the face of it would put Cassady entirely *outside* the scope of his employment with Morgan Lewis.

Section 2802 does not require that the employee prove that the allegations of the third-party complaint are true in order to recover his defense costs, nor should the employee be required to make such proof. That would put an undue burden on the exercise of the employee's statutory right to obtain indemnity from his employer for expenses incurred on account of his employment. And it would mean that in proving his claim

under Section 2802, the employee could also be proving his employer's counter-claim under Section 2865. It would lead to the bizarre result that both employee and employer would be able to recover defense costs from the other. That cannot be what the Legislature had in mind.

### B. Cassady Has Not Conceded His Claim.

In any event, Morgan Lewis's characterization of Cassady's position as relying solely on the allegations of the *Rallis* complaint is incorrect. Morgan Lewis claims "Cassady and his counsel admit that Cassady's claim against Morgan Lewis for indemnification under Labor Code section 2802 is based upon the allegations in the Rallis action." (Exhs. 49-50, ¶ 14, citing Cassady deposition at 65:4-10, 120:1-121:17, and 256:23-258:2.; Cassady's Complaint ¶ 6, and Cassady's Supplemental Response to Morgan Lewis' Special Interrogatory No. 6, at p. 2.)

Morgan Lewis's misstatement of Cassady's position, which was adopted by respondent court in an order prepared by Morgan Lewis (Exhs. 435, ¶ 14), has its genesis in the clumsy wording of Morgan Lewis's own Special Interrogatory No. 6: "Specify each and every act that YOU contend YOU were sued for in the RALLIS ACTION and the names of the PERSON(S) that YOU were employed by at the time of each act or the entities with which YOU were affiliated." (Exhs. 69, original

capitalization.) Cassady answered the interrogatory exactly as Morgan Lewis posed it: "Cassady does not 'contend' that he was sued for one thing or another. The question is what Rallis alleged." (Exhs. 60.)

Cassady was not thereby limiting the potential proof of his claim to what the Rallis complaint alleged. The interrogatory did not ask to list all evidence that supports his claim. Morgan Lewis cannot pretend to know Cassady's response to other interrogatories that Morgan Lewis never asked. (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 135-136 ["We cannot assume that all information was provided to an interrogatory that was not propounded"]; *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 80 ["plaintiff had no duty to volunteer information that was not requested"].)[9]

Before summary judgment can be granted on the ground that the plaintiff cannot prove his claim, the defendant must make an affirmative showing that the plaintiff does not have and could not obtain evidence to support his claim. (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 173.) Morgan Lewis has not carried that burden here. It does not follow

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[9] Deposition testimony relied on by Morgan Lewis, purportedly to show that Cassady cannot prove his claim, is to the same effect as the interrogatory question and answer discussed above. Rather than procuring Cassady's testimony as to whether the conduct for which he was sued arose out his employment, the parties jousted about whether the allegations of Rallis's complaint were relevant. (Exhs. 78, 92-93.) As we have shown, they are relevant, if not conclusive, and nothing in the *Douglas* case or in common sense says otherwise.

from Cassady's discovery responses to the conclusion that he neither has, nor can have, evidence establishing Morgan Lewis's liability under Section 2802. The fact that he relies on Rallis's allegations does not mean he can rely on nothing else. For example, Cassady's answer to Special Interrogatory 6 also refers to other sources of evidence to establish his indemnity claim: Morgan Lewis's "counsel in the Rallis action . . . prepared a number of good summaries of the Rallis claims. One of the summaries is contained in a September 17, 1997 letter . . . . Rather than reinvent the wheel, Cassady incorporates by reference Mr. Long's summary of the claims in his September 17, 1997 letter." (Exhs. 60.) Separately, Cassady also presented the declaration of his attorney in the Rallis action, Baird Brown, as to the nature of the claims in the *Rallis* action. (Exhs. 158, ¶ 4.)

Thus, even if Rallis's allegations were not alone sufficient to support Cassady's Section 2802 indemnity claim (they are, see above), Morgan Lewis has still failed to establish that Cassady cannot prove his case. As a consequence, the burden of going forward never shifted to Cassady. Morgan Lewis is not entitled to summary judgment, and Cassady is entitled to his day in court. (*Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 212 ["If the defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied'].)

### C. There Are Disputed Issues Of Material Fact Whether Cassady Incurred Defense Costs On Account Of His Morgan Lewis Employment; His And His Attorney's Testimony As To Apportionment Of Fees Is Substantial Evidence, Not Speculation.

Cassady incurred $280,000 in attorney fees for defense of the *Rallis* action. (Exhs. 160-180.) Based on personal knowledge of the defense of the Rallis action, Cassady and his attorney calculated that only $10,000 of that amount was attributable to matters unrelated to his Morgan Lewis employment. (Exhs. 75-77, 158.) His claim against Morgan Lewis under Section 2802 is therefore $270,000, plus interest.

Respondent court adopted Morgan Lewis's argument that this was just speculation and therefore not substantial evidence to support Cassady's claim. The argument rests principally on *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1. In *Wiz*, the plaintiff corporation blamed one of its former accounting firms for various losses incurred after the accounting firm resigned. However, when the accounting firm moved for summary judgment and presented evidence from a subsequent accountant that the resignation caused no harm, the plaintiff's opposition consisted of nothing more than its own officers' conclusory declarations, without evidentiary backup, that the firm's resignation caused new

accounting costs and a fall in the market value of the corporation's stock. The appellate court held these conclusory and unsupported declarations as to causation and damages were not enough to overcome the accounting firm's evidence to the contrary. (*Id*. at pp. 15-16.)

Again, this case is materially different than the case relied on by Morgan Lewis. Here, unlike the moving party in *Wiz*, Morgan Lewis has offered *no* evidence that Cassady incurred *no* defense costs in the *Rallis* action. Instead, Morgan Lewis takes the substantially more difficult route of attempting to conclusively prove a negative, that Cassady has no evidence, and can obtain no evidence, to prove his claim. Here, unlike the responding party in *Wiz*, Cassady *has* offered competent evidence that he did incur litigation costs on account of his employment with Morgan Lewis. In addition to Cassady's own deposition testimony (Exhs. 86-89), Cassady's attorney submitted his declaration as to the apportionment of his work defending Cassady on claims arising from his Morgan Lewis employment, with evidentiary backup, his itemized bills. (Exhs. 158-180.) This is surely evidence enough to let a trier of fact decide the issue.[10]

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[10] Morgan Lewis's argument that Cassady has "abandoned" his "transactional" method of calculating his defense costs is mystifying. Cassady's position has not changed at all. If Morgan Lewis means that Cassady should somehow be judicially estopped to assert his claim, Morgan Lewis has not even attempted to meet the requirements of judicial estoppel. (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735 [party invoking judicial estoppel must show (1) the party against whom the

(continued...)

Morgan Lewis quibbles with Cassady's method of apportioning his defense costs among the claims against him and among the other parties represented by his counsel. However, fees need not be apportioned among claims that share common issues. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 685-686.) Moreover, based on attorney Brown's detailed bills and declaration (Exhs. 158-180), a trier of fact would have to conclude that at least a portion, if not all, of the fees were incurred in defense of claims against Cassady arising out of his Morgan Lewis employment. Even in the absence of detailed billing records, an attorney's testimony as to his work is sufficient evidence to support an award of attorney fees. (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293.) Morgan Lewis's evidentiary quibbles are for the trier of fact, not for the court on summary judgment.

For all these reasons, respondent court erred in granting Morgan Lewis's summary judgment motion on Cassady's Section 2802 claim.

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[10](...continued)
estoppel is asserted took an inconsistent position in a prior proceeding and (2) the position was adopted by the first tribunal in some manner such as by rendering a favorable judgment].)

Similarly, Morgan Lewis's attempt to unearth a tacit judicial admission buried in Cassady's discovery responses is unavailing. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 [summary judgment cannot be based on tacit admissions or fragmentary and equivocal concessions].)

## II.

## CASSADY IS ENTITLED TO SUMMARY ADJUDICATION IN HIS FAVOR ON MORGAN LEWIS'S CLAIM TO RECOVER ITS DEFENSE COSTS UNDER LABOR CODE SECTION 2865 AND UNDER A WRITTEN EMPLOYMENT AGREEMENT.

### A. Cassady Was Not Found Guilty Of Negligence, Much Less Negligence Arising Out Of His Employment, As Required For Morgan Lewis's Indemnity Claim Under Section 2865.

Ordinarily, under Section 2865 "[d]efense costs can only be recovered where 'a judgment has been rendered against an employer for damages occasioned by the unauthorized negligent act of his employee . . . .'" (*O'Hara v. Teamsters Union Local No. 856* (9th Cir. 1998) 151 F.3d 1152, 1160.) No judgment of guilt was entered against Morgan Lewis in the *Rallis* action. (Exhs. 391-406.)

Even if something short of a judgment were sufficient to support an employer's claim under Section 2865, the employer must still show that the employee was guilty of a "culpable degree of negligence." (Lab. Code, § 2865.) Exactly what "culpable degree of negligence" must be shown is

unclear, but whatever that phrase is supposed to mean, there can be no such showing here. Cassady was not found liable for negligence in any degree in the *Rallis* action. To the contrary, the claims jointly against him and Morgan Lewis were dismissed, and the dismissal was upheld on appeal. (Exhs. 391-406.)[11] Morgan Lewis and Cassady took the same stand in the *Rallis* action and won. Morgan Lewis can hardly be heard now to say that its own legal position in the *Rallis* action was wrong.

Respondent court therefore should have summarily adjudicated Morgan Lewis's Section 2865 claim in Cassady's favor.

### B. The Employment Agreement Did Not, And Could Not, Negate Cassady's Statutory Employment Rights.

Morgan Lewis attempts to read Paragraph 11 of the January 1987 Agreement, pursuant to which Hahn Cazier partners and employees joined Morgan Lewis, as requiring Cassady to indemnify Morgan Lewis for defense costs, up to the limit of its deductible, for claims that are covered by its malpractice insurance.

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[11] Cassady and other defendants settled with regard to aspects of the *Rallis* action unrelated to Morgan Lewis without an admission of liability. (Exhs. 235, ¶ 5.)

Paragraph 11 is impenetrable.[12] Run-on sentences make it impossible to divine its intended meaning, especially as to the last dangling clause: "such reimbursement to include any amount which ML&B shall in fact pay after consultation with former HC&S partners who become ML&B partners because of the limits or deductible provisions of such policy." This is nonsense in that no one became partners "because of the limits or

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[12] Paragraph 11 provides, in terms of which only a lawyer could be proud: "All assets, obligations and liabilities of HC&S of any and all kinds whatsoever as of January 31, 1987 shall remain the assets, obligations and liabilities of said firm and its partners, except as specifically transferred to or assumed by ML&B as provided in Paragraph 9 hereof and/or in Exhibit F hereto. HC&S warrants and represents that as of January 31, 1987 . . . there are no claims as to any act, omission or breach or neglect of duty or obligation in the performance of professional services or any personal injury ('claims') or potential claims against it, nor is it aware of any circumstances which will result, or which may reasonably be expected to result, in a claim at some time in the future except as set forth in Exhibit G hereof. Under provisional Addendum No. 4 dated January 28, 1986 to ML&B's Professional Indemnity Insurance Policy, which has a limit of liability of $50 million and a $500,000 retention, HC&S partners and other personnel who become partners or personnel of ML&B are covered under ML&B's policy, subject otherwise to its terms, conditions, limitations and exclusions, for acts committed by such HC&S partners and other personnel prior to joining ML&B, excepting such claims or circumstances which have previously been notified to the insurers of HC&S on any other policy of insurance and excepting such claims as may arise out of circumstance known to HC&S prior to such HC&S partners and other personnel joining ML&B which HC&S at such time knew would result, or should have reasonably expected would result, in a claim against them at some time in the future. HC&S as a firm and its partners as individuals will defend, hold harmless and indemnify ML&B for any loss or damage (including expenses and reasonable attorneys' fees) arising from such claims not covered by ML&B's said insurance, such reimbursement to include any amount which ML&B shall in fact pay after consultation with former HC&S partners who become ML&B partners because of the limits or deductible provisions of such policy." (Exhs. 254-255.)

deductible provisions of such policy." The clause has no discernable meaning and cannot be enforced. (Civ. Code, § 1598 [contract "so vaguely expressed as to be wholly unascertainable . . . is void"].)

To the extent Paragraph 11 can be penetrated at all, it cannot reasonably be read to mean that an employee of Morgan Lewis who is sued along with Morgan Lewis for negligence arising out of the employee's employment with Morgan Lewis must pay Morgan Lewis's defense costs even though both the employee and Morgan Lewis are both exonerated. That would make the employee Morgan Lewis's insurer. And that would be contrary to the public policy of this State as embodied in Section 2802, which says that the employee recovers defense costs from the employer, not the other way around. A contract limiting an employee's statutory remedies would be unconscionable. (Civ. Code, § 3513 ["a law established for a public reason cannot be contravened by a private agreement"]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100.) Thus, the January 1987 Agreement cannot be construed, as Morgan Lewis would have it, to require Cassady to pay Morgan Lewis's defense costs rather than the other way around. (Civ. Code, § 1670.5 [unconscionable contract cannot be enforced].)

At most, the January 1987 Agreement required indemnity for claims that arose out of conduct occurring before Cassady was employed by Morgan Lewis and that are not covered by Morgan Lewis's insurance. The

*Rallis* action was covered by Morgan Lewis's insurance, as Morgan Lewis admitted in answers to interrogatories in the *Rallis* action and as the insurer agreed in correspondence with Cassady's counsel on July 7, 1997. (Exhs. 281-282, 291-293.)

For these reasons as well, Cassady is entitled to summary adjudication against Morgan Lewis on its cross-complaint for indemnity.

## III.

## WRIT RELIEF IS NECESSARY AND APPROPRIATE TO PREVENT FURTHER PROCEEDINGS IN EXCESS OF RESPONDENT COURT'S JURISDICTION.

Defendants have no plain, speedy and adequate remedy in the ordinary course of law. There is no right of appeal from respondent court's orders. (Code Civ. Proc., § 437c, subd. (o), § 904.1; *Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 111.) The orders do not dispose of all of the claims between the parties.

Where, as here, the trial court's erroneous rulings on summary judgment or summary adjudication will result in trial on nonactionable claims, a writ of mandate will issue. (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 946.) And conversely, where, as here, an order bars a substantial portion of a party's

case from being heard on the merits, "a petition for writ of mandate to vacate that order may be maintained." (*Nazaroff v. Superior Court* (1978) 80 Cal.App.3d 553, 557-558; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807.)

Writ review is further warranted where, as here, the case presents important issues of first impression in this state which should be resolved by an appellate court decision. (*Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, 273.)

The parties and respondent court should not be left with the untenable prospect of trying a case that should not be tried, and only then, after an appeal and belated decision on the significant issues presented, trying the case that was not tried but should have been tried in the first place.

## IV.

## AN IMMEDIATE STAY IS NECESSARY AND APPROPRIATE TO PREVENT FURTHER PROCEEDINGS IN EXCESS OF RESPONDENT COURT'S JURISDICTION PENDING FINAL RESOLUTION OF THIS WRIT PETITION.

This Court has inherent power to issue stay orders in furtherance of its jurisdiction. (*People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 536-539.)

For the same reasons that writ relief is required, a temporary stay of respondent court's orders is also required pending determination by this Court of the issues raised by this petition. If a stay does not issue, the case will proceed to trial on November 24, 2003, and all the wrong issues will be decided.

There would be no undue prejudice to respondent court or the parties by granting a temporary stay. This is a simple dispute over money between a lawyer and the 1300-lawyer international law firm for whom he used to work.

## CONCLUSION

For all the reasons stated herein, petitioners respectfully request that this Court issue an immediate stay of respondent court's September 15, 2003 and September 24, 2003 orders, and thereafter issue its peremptory writ directing respondent court to set aside those orders and enter new orders denying Morgan Lewis's summary judgment motion on Cassady's claim and granting Cassady's motion for summary adjudication of Morgan Lewis's claim.

Dated: October 7, 2003

Respectfully submitted,

LAW OFFICES OF BAIRD A. BROWN
BAIRD A. BROWN

GREINES, MARTIN, STEIN & RICHLAND LLP
MARC J. POSTER

By_____
Marc J. Poster
Attorneys for Petitioners

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 14 (c)(1), the attached Petition for Writ of Mandate is proportionately spaced, has a typeface of 13 points and contains 9,502 words.

Dated: October __, 2003

Respectfully submitted,

LAW OFFICES OF BAIRD A. BROWN
BAIRD A. BROWN

GREINES, MARTIN, STEIN & RICHLAND LLP
MARC J. POSTER

By_____
Marc J. Poster
Attorneys for Petitioners

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