August 9, 2006

The Honorable H. Walter Croskey
The Honorable Patti S. Kitching
The Honorable Richard D. Aldrich
Court of Appeal
Second Appellate District, Division Three
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013-1213

Re: **Morgan, Lewis & Bockius v. Cassady**
2d Civ. No. B177747

Honorable Justices:

On behalf of respondent and appellant Ralph Cassady, we respectfully submit our reply to the July 25, 2006 letter brief filed by appellant and respondent Morgan Lewis & Bockius LLP with regard to the three questions posed by the Court's June 22, 2006 order:

1. Please provide citation to authority, if any, holding that the employee has the burden to prove, for purposes of a Labor Code section 2802 indemnity claim, that his or her expenses were incurred in direct consequence of the discharge of his or her duties.

Morgan Lewis has not provided the Court with any useful authority on the question of burden of proof. Its lead case is an unpublished federal trial court decision, *DeSimone v. Allstate Ins. Co.* (N.D. Cal. 1999) 1999 WL 33226248. The *DeSimone* court granted partial summary judgment to the plaintiffs on one element of their claims for reimbursement for expenses under Labor Code section 2802. The case is not helpful because the moving party on a summary judgment motion – like Morgan Lewis in this case – *always* has the burden of proof, even if the burden of proof would be on the opposing party at trial. (*DeSimone v. Allstate Ins. Co*., *supra,* at * 5 ["The

moving party bears the burden of showing that there is no material factual dispute"], citing *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322-323; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 ["the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact"].) The court in *DeSimone* did not have to decide how the burden of proof would have been assigned at trial – which is the question we understand this Court to be asking.

Similarly, in the unpublished trial court decision in *Mallari v. Home Depot, Inc.* (N.D. Cal. 1996) 1996 WL 130935, also relied on by Morgan Lewis, the court granted the defendant-employer's motion for summary judgment on a Section 2802 claim. The plaintiff-employee sought reimbursement for the cost of defending a sexual harassment suit. The court found, as a matter of law, that the employee's alleged harassment of a co-employee was neither at the employer's direction nor within the scope of employment. Again, the court was not called upon to decide what the burden of proof might have been at trial.

Morgan Lewis is equally off base in relying on *Grissom v. Vons Companies, Inc.* (1991) 1 Cal.App.4th 52 as authority for imposing the burden of proof on the employee. *Grissom* was a pleading case; it said nothing about burden of proof at trial. (Morgan Lewis July 25, 2006 letter brief, pp. 2-3.) The appellate court simply reversed the sustaining of the employer's demurrer to the employee's Section 2802 claim in order to allow the employee to better plead his claim for reimbursement of legal fees incurred in defending a third-party's claim for damages for alleged negligence while the employee was driving his employer's truck. (*Grissom*, at pp. 59-60.)

Nor does Morgan Lewis assist the Court with citation to cases involving the burden of proof for an injured third-party plaintiff to establish the vicarious liability of an employer where the plaintiff's injuries resulted from the negligence of an employee in the scope of employment. (Morgan Lewis July 25, 2006 letter brief, p. 3, citing *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968.) In those cases, unlike an employee's case under Section 2802, the third-party plaintiff has no pre-existing relationship with the employer, and the employer has no statutory duty to indemnify the plaintiff.

Finally, we submit that Morgan Lewis reads *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449 backwards. (Morgan Lewis July 25, 2006 letter brief, p. 3.) In that case, a newspaper reporter sought reimbursement for legal fees incurred defending a defamation claim arising from his work for the defendant newspaper publisher. The trial court granted judgment to the employer after a non-jury trial. The appellate court reversed the judgment because the trial court made no finding on the issue of whether the employer knew there was a potential for the reporter to be held liable for conduct within the course and scope of employment. Rather than establishing that, as Morgan Lewis asserts, an "employee is not entitled to indemnity under Labor Code section 2802 unless he or she is sued solely because of acts performed for, or at the direction of employer" (Morgan Lewis July 25, 2006 letter brief, p. 3), the *Douglas* case actually stands for the proposition that "an employer does not have a duty to defend an employee who is sued *solely* because he was off on a frolic of his own not within the scope of his employment and not in obedience to the directions of his employer." (*Douglas v. Los Angeles Herald-Examiner*, *supra*, 50 Cal.App.3d at p. 464, italics added.) In other words, unless the employee was solely on a frolic, the employer has a duty to indemnify.

Thus, none of the other cases cited by Morgan Lewis provides a meaningful answer to the burden-of-proof question posed by the Court. We answered that question in our July 26, 2006 letter brief: Fairness and sound public policy require that the employer bear the burden of proof under Labor Code section 2802 where, as here, (1) the reimbursement claimed by an employee is for litigation expenses in the defense of a lawsuit brought by a former client against the employer law firm, against certain partners in the law firm, and against the employee attorney, (2) on the face of it, the lawsuit arises from the employee's services in the course and scope of the employment relationship, (3) the employee tenders the defense to his employer before incurring the expenses, and (4) the employer fully participates in the defense of the lawsuit for itself and for its partners but not for its employee.

2. Should analogous contractual indemnity principles applied in the insurance context apply to the question of an employer's duties to indemnify and defend under Labor Code section 2802? Why or why not?

In response to this question, Morgan Lewis cites only one case that has not already been discussed in our July 26, 2006 letter brief, *Boyer v. Jensen* (2005) 129 Cal.App.4th 62. (Morgan Lewis July 25, 2006 letter brief, pp. 3-4.) The issue in *Boyer* was whether, in light of Labor Code section 2802, a third-party plaintiff could pursue the employer as an insurer of a tort judgment obtained by the plaintiff against a now-bankrupt employee. The appellate court said no, an employer is not an insurer of judgments against its employees, nor does Section 2802 render all employees insureds of the employer's own insurer. (*Boyer*, at pp. 73-74.)

The *Boyer* case thus addresses the question of the nature of the relationship between employers and third parties, not the relationship in this case, between employer and employee. As we explained in our July 26, 2006 letter brief (at pp. 4-7), as between employer and employee, public policy considerations impact the duty to defend. "[T]he obvious purpose of [section 2802] is to protect employees from suffering expenses in direct consequence of doing their jobs." (*Grissom v. Vons Companies, Inc.*, *supra*, 1 Cal.App.4th at p. 60.) To provide this protection, the duty to indemnify should include the duty to defend where, as here, the employee has tendered the defense of a third-party action that, on its face, arises out of the employee's discharge of his employment duties.

3. Please provide further briefing on how common law indemnity principles do, or do not, apply to the facts alleged here, i.e., when a lawyer seeks indemnity from his employer law firm in relation to a client malpractice claim alleged against both.

Morgan Lewis takes the wrong fork in the road on this question. It limits its discussion to the question of equitable indemnification based on comparative fault. (Morgan Lewis July 25, 2006 letter brief, p. 5.) But Mr. Cassady is not seeking that type of indemnification, since both he and Morgan Lewis were exonerated on claims arising exclusively out of his employment with Morgan Lewis (the "Ackers" or "AHLC"

transactions). (2JA 392, 398, 402-405, 407.) There can be no comparative fault where there is no fault at all.

Rather, Mr. Cassady seeks indemnification based on common law principles of complete indemnity between principal (employer) and agent (employee), which predate and supplement an employer's statutory obligations under Labor Code section 2802. (*Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn.* (1994) 27 Cal.App.4th 503, 509-510.) Morgan Lewis apparently has no answer to this alternative basis for indemnification.

Morgan Lewis also purports to apportion Mr. Cassady's legal expenses among various claims, entities, and time periods (Morgan Lewis July 25, 2006 letter brief, pp. 5-6), but apportionment, if any, is a matter for the trier of fact. As we have shown, there is ample evidence that Mr. Cassady did incur significant legal expenses as a consequence of his discharge of duties as a Morgan Lewis employee (July 26, 2006 letter brief, p. 3, fn. 1), and that is all that was necessary to defeat Morgan Lewis' summary judgment motion. The trial court properly granted a new trial on Mr. Cassady's indemnity claims.

Respectfully submitted,
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