2nd Civil No. B177747

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MORGAN, LEWIS & BOCKIUS LLP,

Plaintiff, Appellant and Respondent,

vs.

RALPH CASSADY,

Defendant, Respondent and Appellant.

Appeal from the Los Angeles County Superior Court
Hon. John P. Shook, Judge
Case No. BC 277144

RESPONDENT'S BRIEF AND CROSS-APPELLANT'S OPENING BRIEF

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INTRODUCTION

The evidence establishes that:

- Defendant Morgan, Lewis & Bockius LLP employed plaintiff Ralph Cassady as an attorney.
- Cassady and Morgan Lewis were sued for legal malpractice, and the two principal claims in that action arose out of the conduct of Cassady and Morgan Lewis during Cassady's employment with Morgan Lewis.
- Morgan Lewis refused Cassady's request for a defense of the malpractice action under Labor Code section 2802.
- Morgan Lewis defended itself and others named in the malpractice action – except Cassady – and spent almost $480,000 on that defense.
- Cassady incurred more than $270,000 in attorney fees to defend himself in the malpractice action.
- After extensive motions in the trial court and on appeal, Cassady and Morgan Lewis were exonerated on the two principal claims against them as alleged joint tortfeasors in the malpractice action.

This evidence presents triable issues of material fact on Cassady's claims for indemnity from Morgan Lewis under Labor Code section 2802 and the common law. It defies reason for Morgan Lewis to suggest that *none* of the fees incurred by Cassady for defense of the malpractice action can be apportioned to claims arising from Cassady's employment with Morgan Lewis. Obviously, some if not all of the fees must be so apportioned. True, it may not be practical to mechanically apportion Cassady's legal defense costs by periods of his employment. (For example, his successful statute of limitations defense applied to all his conduct over the years before and during his employment with Morgan Lewis, not just to

the period of that employment.) But that is no reason to deny Cassady indemnity altogether for the cost of asserting his defenses. Trial courts can and do make such apportionments all the time based on the same sort of evidence presented here – legal bills and the facts of the underlying case.

Moreover, the fact that it may be difficult to apportion fees incurred by Cassady between claims relating to Cassady's employment with Morgan Lewis and to claims relating to Cassady's other employment, should be a Morgan Lewis problem, not a Cassady problem. Morgan Lewis put itself in this situation by ignoring Labor Code section 2802 and refusing to defend Cassady in the first place. Morgan Lewis never inquired as to Cassady's attorney fees or asked Cassady's attorney to apportion his fees at the time. Had Morgan Lewis defended Cassady while it defended everyone else, Morgan Lewis would have saved itself hundreds of thousands of dollars in fees.

Furthermore, discovery undertaken by Morgan Lewis did not establish that *none* of the fees incurred by Cassady can be attributed to claims arising from Cassady's employment with Morgan Lewis. Cassady did *not* admit that he had no evidence, and that he could not obtain evidence, to prove his indemnity claims. Morgan Lewis' interpretation of Cassady's discovery responses is just that firm's self-serving spin on the question of whether the fees *should* be apportioned, not on the questions of whether fees *could* be apportioned. And Morgan Lewis' discovery efforts were highly selective. Cassady's attorney is the person most knowledgeable as to the services he performed, the costs incurred in defending the malpractice action and how they should be apportioned, yet Morgan Lewis never took his deposition.

In short, Morgan Lewis was not entitled to summary judgment on the Cassady indemnity claims.

After conducting a full trial on the Morgan Lewis claim against Cassady for indemnity for the $480,000 Morgan Lewis spent defending the malpractice action (which indemnity claim was premised, like the Cassady indemnity claim, on the Morgan Lewis-Cassady employment relationship), and after granting judgment in favor of Cassady on that claim in light of evidence that Morgan Lewis had promised it would provide Cassady with full coverage for suits like the malpractice action, the trial court garnered a better understanding of the entire case. Admirably, the court acknowledged that it had erred in granting summary judgment to Morgan Lewis on the Cassady indemnity claims before trial.

The trial court did not abuse its discretion in granting a new trial on the Cassady indemnity claims. The new trial order should be affirmed.

STATEMENT OF THE CASE

A. The Parties: Morgan Lewis And Its Employee, Cassady.

Defendant law firm, Morgan, Lewis & Bockius LLP, employed plaintiff Ralph Cassady as an attorney from February 1, 1987 to March 4, 1988. (1JA 58, ¶ 16; 138.) Cassady had been associated with other law firms, including Hahn Cazier & Smaltz, before that time, and continued to work as an attorney for his professional corporation, in association with others, including the law firm of Davis Wright Tremaine, after that time. (1JA 58-59, ¶¶ 15, 17, 18, 19; 138.)

B. Morgan Lewis And Cassady Are Sued In The *Rallis* Action Based On Conduct Arising Out Of Cassady's Discharge Of His Duties As A Morgan Lewis Employee.

Cassady, and the various firms with which he was associated, including Morgan Lewis, handled legal matters for Rallie P. Rallis and certain corporations in which Rallis was an officer, a director and/or a shareholder from 1969 through 1994. In 1995, Rallis sued Cassady, Morgan Lewis, Hahn Cazier & Smaltz, Davis Wright Tremaine, and other individual attorneys for legal malpractice and other causes of action. (2JA 299, ¶ 5; 342-354, ¶¶ 22-59.)

The Rallis complaint was far from clear, but it appeared to seek damages and other relief with regard to two principal matters involving Cassady's discharge of his duties as a Morgan Lewis employee. (2JA 299, ¶ 4, 347-377, ¶¶ 40, 43, 46, 63-73, 87-96, 114-116.) The first matter related to the handling of certain transactions for Mark Equipment Center of South Florida, Inc. in 1987, while Cassady was employed by Morgan Lewis. (2JA 349, ¶ 44.) Rallis claimed that Cassady and Morgan Lewis should have dissolved Mark Equipment in 1987, and that they should have settled a shareholder claim before a suit was filed in 1987. On this claim against Cassady and Morgan Lewis, Rallis sought damages in excess of $1,000,000. (2JA 361, ¶ 68.)

The second matter related to the documentation of a sale of stock in American Hi-Lift Corporation, beginning in October 1987 and continuing through February 1988, while Cassady was employed by Morgan Lewis. Rallis claimed that Cassady and Morgan Lewis did not correctly document the transaction and that there were omissions from an opinion letter at the time of the stock sale. On this claim against Cassady and Morgan Lewis, Rallis sought damages in excess of $500,000. (2JA 372-373, ¶¶ 103-108.)

C. Morgan Lewis Defends Itself And Other Attorneys Named In The *Rallis* Action, But It Does Not Defend Cassady.

Morgan Lewis retained Sheppard, Mullin, Richter & Hampton LLP to represent it and other attorneys and law firms named in the *Rallis* action, including other former partners of Hahn Cazier & Smaltz that had joined Morgan Lewis in 1987 – but not Cassady. (3JA 787-788.) As Morgan Lewis explained at the time, a bifurcated defense would be neither sensible nor efficient:

> It has generally been the practice of the Firm to provide a defense to its partners or former partners with respect to claims made against them on account of their work at ML&B or on account of their status as partners of the Firm at the time the conduct occurred. We see no good reason in the instant case to depart from that practice.
>
> The claims asserted by Rallis relate to conduct at HC&S and its predecessor firms, conduct during a brief period (February 1, 1987 through March 31, 1988) when Mr. Cassady was with ML&B, and conduct subsequent to March 31, 1988. Under all of these circumstances, the Firm has decided that trying to bifurcate representation between ML&B conduct and the HC&S conduct is neither efficient nor sensible.

(3JA 787-788.)

Morgan Lewis ultimately paid its attorneys from the Sheppard Mullin firm $479,070.05 for fees and disbursements incurred in the defense of the *Rallis* action. (1JA 242, ¶ 4.)

D. Cassady Hires His Own Counsel To Defend Him In The *Rallis* Action.

Morgan Lewis' malpractice insurance carrier agreed to indemnify Cassady for approved fees and costs in the *Rallis* action, but only above a self-insured retention of $1,000,000. (3JA 845-847.)

Morgan Lewis refused to assume Cassady's defense. Cassady therefore retained his own attorney, Baird A. Brown, to represent him in the *Rallis* action. Between April 1995, when the action was filed, and June 2001, when Morgan Lewis was finally dismissed from the action, Cassady incurred over $280,000 in legal fees defending the action. (2JA 301-321.) Cassady incurred additional fees thereafter, but he does not seek indemnity for those fees.

The primary claims litigated in the 1995-1999 phase of the *Rallis* action were that (1) Cassady and Morgan Lewis should have dissolved Mark Equipment in 1987 and that they should have settled a Mark Equipment shareholder claim before suit was filed in 1987, and (2) Cassady and Morgan Lewis did not properly document the American Hi-Lift Corporation sale of stock transaction. (2JA 299, ¶ 4.) As to two other aspects of the *Rallis* action unrelated to Cassady's employment with Morgan Lewis, Cassady successfully demurred to one claim and obtained dismissal of the other early in the action with little effort. (2JA 299, ¶ 3.) Brown spent less than 40 hours on those other two claims. (*Ibid*.) At his billing rate of $250 per hour (2JA 301-321), that would be less than $10,000 attributable to claims other than claims for which Cassady seeks indemnity from Morgan Lewis.

E. The *Rallis* Action Is Resolved.

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 the claims against them jointly. In particular, as to the claim against Cassady and Morgan Lewis relating to the fact that "Cassady, when he practiced with Morgan Lewis, had advised Rallis personally on the indemnity agreement in the stock sale . . . " (2JA 398), the appellate court affirmed that the claim was barred by the statute of limitations (2JA 402-405; 2JA 392, 407; *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.)

The court did reverse the judgment as to Cassady on some claims related to events occurring after his employment with Morgan Lewis. After the *Rallis* action was remanded for further proceedings on those claims not involving Morgan Lewis, the remaining parties settled. (2JA 334, ¶ 6, 417-421.) Cassady does not seek indemnity from Morgan Lewis for that aspect of the *Rallis* action.

F. Cassady Sues For Indemnity From Morgan Lewis; Morgan Lewis Counterclaims For Indemnity From Cassady.

In July 2002, Cassady sued Morgan Lewis for indemnity under both Labor Code section 2802 and common law principles for a portion of the attorney fees and costs he incurred in defending the *Rallis* action. He alleged Morgan Lewis had wrongfully refused to reimburse him for $270,000 in attorney fees (plus interest) incurred by him in defending the

Rallis action up to the time that the judgment in *Rallis* became final in favor of Morgan Lewis. (1JA 1-3.)

Morgan Lewis cross-complained against Cassady, seeking reimbursement for $479,000 in fees and costs it incurred defending the *Rallis* action. The cross-complaint was based on Labor Code section 2865[1] and an indemnity clause in a January 1987 agreement pursuant to which partners and employees of Cassady's previous firm, Hahn Cazier & Smaltz, had agreed to join Morgan Lewis. (1JA 7-10.)

G. Discovery In The Indemnity Action.

The Morgan Lewis Special Interrogatory No. 6 asked that Cassady specify the acts he contends he was sued for in the *Rallis* action and the names of the persons that he was employed by or entities with which he was affiliated at the time of each act. (1JA 68.) Cassady responded by listing his employment history and stating that he "does not 'contend' he was sued for one thing or another. The question is what Rallis alleged." (*Ibid*.) Cassady summarized the facts underlying Rallis' claims (1JA 69) and incorporated by reference a summary of Rallis' claims contained in a September 17, 1997 letter prepared by Morgan Lewis' own counsel, Sheppard Mullin, during the *Rallis* action (*ibid.*; 3JA 849-854). In particular, Cassady identified the second and eighth causes of action of the Rallis complaint against Cassady and Morgan Lewis relating to the negotiation and preparation of an agreement for a sale of corporate stock in 1987, while Cassady was an attorney employed by Morgan Lewis. (1JA 69.)

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[1] Section 2865 provides in part: "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 Morgan Lewis Form Interrogatory 15.1 asked Cassady for facts supporting any *denial* of an allegation or *affirmative defense* in his pleadings. (1JA 125.) Cassady responded in part by stating that "MLB owed a defense and indemnity obligation to Cassady for the alleged conduct of Cassady while at MLB and Hahn." (1JA 113-114.) He denied that he was required to indemnify MLB. He also stated that "[t]here is no factual basis to apportion the subject fees and costs. There is no factual basis for partial, full or comparative indemnity or comparative liability." (1JA 114.) For evidence, he incorporated by reference the pleadings and other documents in the *Rallis* action, Morgan Lewis' 1987 letter agreement with him and other Hahn Cazier partners in which Morgan Lewis represented that Cassady was covered by Morgan Lewis' malpractice insurance for acts committed prior to joining Morgan Lewis, and other correspondence. (*Ibid.*; 1JA 186-187.)

At his deposition, Cassady answered questions regarding how he would segregate his defense costs between claims relating to his time with Morgan Lewis and his time with Hahn Cazier. He testified that he believed "it's very difficult to try to cut this problem with a sharp knife" but, in any event, it was unnecessary to segregate costs because other Hahn Cazier partners were defended by Morgan Lewis without regard to time frames, and he was entitled to such a defense, too. (1JA 93, 102.)

Cassady did not testify that he had no evidence and could not obtain evidence to apportion fees if they have to be apportioned.

Morgan Lewis did not take the deposition of Cassady's attorney in the *Rallis* action.

H. The Court Grants Summary Judgment To Morgan Lewis On Cassady's Indemnity Claim.

1. The Motion.

Morgan Lewis moved for summary judgment on the Cassady indemnity complaint. (1JA 27-29.) Morgan Lewis did not attempt to affirmatively disprove any element of Cassady's claims. Rather, it asserted that, in light of his discovery responses, Cassady has no evidence, and cannot reasonably obtain evidence, of the amount of attorney fees he incurred in defending the *Rallis* action. (1JA 30-45.)

As to Cassady's Labor Code section 2802 claim, Morgan Lewis argued that based on his discovery responses Cassady cannot prove his defense costs in the *Rallis* action were incurred as a consequence of the discharge of his duties while employed at Morgan Lewis. (1JA 38-41.)

As to Cassady's common law indemnity claim, Morgan Lewis argued that "common law indemnification does not apply between vicariously liable tortfeasors and tortfeasors guilty of the acts and omissions causing the harm." (1JA 44.) Morgan Lewis offered no evidence in support of this argument.

In opposition to Morgan Lewis's summary judgment motion (2JA 297), Cassady submitted the following:

(a) Authenticated copies of his attorney's detailed billing records totaling $280,000 for defense of the *Rallis* action up to June 29, 2001, when Morgan Lewis extricated itself from the *Rallis* action. (2JA 299, ¶ 2; 301-321.)

(b) The declaration of Baird A. Brown, Cassady's attorney in the *Rallis* action, that his work in the *Rallis* action as to the few matters *not* related to Morgan Lewis or Hahn Cazier was minimal. These minimal

matters included successfully demurring to the Rallis Mark Industries claim and successfully obtaining dismissal of the International Water Management, Inc. claim early in the action. Brown stated that "I have reviewed my records, and have an independent recollection, and estimate that I spent less than 40 hours on these two claims" (about $10,000 at $250 per hour). (2JA 299, ¶ 3.) Brown further declared that "With respect to MECSF, Rallis' primary claims in Phase I of the Rallis action were that the defendants should have dissolved MECSF in 1987 and that they should have settled a MECSF shareholder claim before suit was filed in Florida in 1987." (2JA 299, ¶ 4.)

2. The Ruling.

On September 15, 2003, the court adopted Morgan Lewis's proposed order granting summary judgment on Cassady's complaint. (3JA 593.) In summary, the order concludes:

(a) 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. (3JA 596, ¶ 13.)

(b) Cassady has failed to carry his burden on his statutory claim. (3JA 597, ¶ 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. (3JA 597, ¶ 15.)[2]

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[2] The order also considered a mystifying contention by Morgan Lewis that there was no triable issue of fact as to the total amount of

(continued...)

I. Cassady Prevails At Trial On The Morgan Lewis Indemnity Claim.

The case proceeded to a court trial on the Morgan Lewis claim for indemnity from Cassady under Labor Code section 2865. The court ruled in Cassady's favor for multiple reasons. (4JA 890-900.)

In its written statement of decision, the court found that:

(a) In the *Rallis* action Morgan Lewis had provided counsel to defend itself and all of Cassady's former partners, except Cassady. (4JA 892.)

(b) Morgan Lewis had waived any claim to indemnity from Cassady by failing to tender its defense to Cassady in the *Rallis* action. (4JA 899.)

(c) Morgan Lewis was estopped to seek indemnity from Cassady because when Cassady and his former partners joined Morgan Lewis, Morgan Lewis led them to believe they would have prior acts malpractice coverage and Morgan Lewis would not seek to recover deductible payments from them (4JA 899-900).[3]

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[2](...continued)
indemnity sought by Cassady. (JA 594-595, ¶¶ 3, 4.) This was not a material dispute for purposes of Morgan Lewis's summary judgment motion, which was solely to determine whether Cassady could establish any indemnity claim at all.

[3] Hahn Cazier partner Michael E. Mills testified that Morgan Lewis provided a defense for him in the *Rallis* action without cost. (2RT 170.) He believed Morgan Lewis was obligated to provide a complete defense based on the deal they had when Hahn Cazier lawyers joined Morgan Lewis in 1987. (2RT 179.)

Cassady testified that he discussed insurance matters with Morgan Lewis before the 1987 agreement between Hahn Cazier lawyers and Morgan Lewis was finalized, and Morgan Lewis represented that it was the (continued...)

The court also incorporated by reference the tentative decision it announced at the trial (4JA 896), in which the court stated that to allow the Morgan Lewis indemnity claim against Cassady "would be unconscionable" (4JA 914; see also 4JA 917 ["to come after him for money, in my opinion, I think is unconscionable"]).

J. The Court Grants A New Trial On The Cassady Indemnity Claim.

Judgment was entered on Cassady's complaint in favor of Morgan Lewis and on the Morgan Lewis cross-complaint in favor of Cassady on May 21, 2004. Cassady timely moved for a new trial on his complaint. (3JA 862.) The grounds included error in law and newly discovered evidence. (3JA 863; 4JA 873-874.)

In response, Morgan Lewis reasserted its arguments that Cassady failed to identify what he did which caused Rallis to sue him and whether such conduct was within the scope of his employment with Morgan Lewis (4JA 964-965) and that Cassady only speculates what fees he incurred for conduct while employed by Morgan Lewis (4JA 965-968).

At the hearing on Cassady's motion, the court explained that it had learned more detailed information and was more focused on the issues during the trial of the Morgan Lewis cross-complaint and on the

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[3](...continued)
firm's policy to pay the insurance deductible for covered claims against its lawyers. (2RT 216-217.) The 1987 written agreement conformed to that representation. (2RT 224-225.) Had Hahn Cazier lawyers thought they could be exposed to payment of sizeable deductibles for covered claims, they would have purchased supplemental insurance. (2RT 218-219.) The *Rallis* action was such a covered claim. (2RT 226.)

malpractice action filed against Morgan Lewis in connection with the legal work that Cassady was doing. (2RT 361.) The court further stated:

> THE COURT: Well, didn't Morgan, Lewis pick up the cost for when they had the Sheppard, Mullin firm that was retained to represent some of the other partners?
>
> MS. ORDIN: Yes.
>
> THE COURT: That was the letter that I didn't focus on or didn't see in the motion for summary judgment. But I'm aware of that correspondence now, you know, having sat through the trial, and it seems to me that this issue as to what - - how the 13 months should be - - how attorney fees should be apportioned for that 13-month period, that is a triable issue.

(2RT 364-365.)

On July 2, 2004 the court granted Cassady's new trial motion and set aside the September 15, 2003 summary judgment order. (4JA 978.)

K. The Appeals.

On August 30, 2004, Morgan Lewis filed notice of appeal from the July 2, 2004 new trial order. (4JA 979.) Morgan Lewis did not appeal from the judgment, and on this appeal it does not challenge the court's findings in Cassady's favor on the Morgan Lewis cross-complaint. That part of the judgment is therefore final. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 330; *Spencer v. Nelson* (1947) 30 Cal.2d 162, 164.)

On September 16, 2004, Cassady filed a protective cross-appeal from the judgment. (4JA 988.) See Cassady's Cross-Appellant's Opening Brief, below.

LEGAL DISCUSSION

I. STANDARD OF REVIEW

Whether or not the trial court specifies its reasons for granting a new trial, if its order can be sustained on any statutory ground asserted in the new trial motion (other than insufficiency of the evidence), the order must be affirmed on appeal. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745.) The court's exercise of discretion to grant a new trial should be upheld even if the error relied on by the court is a minor or debatable one, and even if the error might otherwise be deemed waived or nonprejudicial. (*Id*. at p. 747; *Neal v. Montgomery Elevator Co.* (1992) 7 Cal.App.4th 1194, 1198.)

Here, the trial court ordered a new trial after concluding that it erroneously granted summary judgment. Morgan Lewis' summary judgment motion had made no effort to affirmatively negate, or establish a complete defense to, Cassady's indemnity claims. Instead, Morgan Lewis took the far more circuitous route of attempting to prove a negative – that Cassady had no evidence and could not reasonably obtain evidence to support his indemnity claims. (Code Civ. Proc., § 437c, subd. (p)(2); *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 ["*Aguilar*"].)

As we shall explain, Morgan Lewis' attempt to prove this negative fell far short of its goal. After the trial on Morgan Lewis' counterclaim, the trial court recognized its error in granting the motion. As the court was entitled to do, it set aside the summary judgment and granted a new trial on the Cassady indemnity claims. (See *Kohan v. Cohan* (1988) 204 Cal.App.3d 915, 919, fn. 4.) The trial court did not abuse its discretion.

II. MORGAN LEWIS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT CASSADY HAS NO EVIDENCE, AND CANNOT REASONABLY OBTAIN EVIDENCE, TO SUPPORT HIS INDEMNITY CLAIM UNDER LABOR CODE SECTION 2802.

A. Summary Of Argument.

The evidence establishes that Cassady incurred fees in defense of claims related to his employment with Morgan Lewis. The burden was on Morgan Lewis to prove otherwise, and it did not. Moreover, Cassady should not be required to apportion his fees for claims that were factually and legally intertwined. Even if fees have to be apportioned, there is substantial evidence from which the trial court can make the apportionment. Morgan Lewis was not entitled to summary judgment. The trial court did not abuse its discretion in granting a new trial.

B. Cassady Incurred Substantial Legal Fees Defending A Lawsuit That Charged Him With Malpractice While He Was A Morgan Lewis Employee.

The evidence establishes the following facts.

Cassady was employed by Morgan Lewis from February 1, 1987 to March 4, 1988. (1JA 138.) In 1995, Rallis sued Cassady and Morgan Lewis for legal malpractice and other causes of action arising while Cassady was a Morgan Lewis employee. (2JA 299, ¶ 5; 342-354, ¶¶ 22-59.)

Rallis' vaguely-worded complaint sought damages and other relief from Cassady and Morgan Lewis with regard to two principal matters. (2JA 299, ¶ 4, 347-377, ¶¶ 40, 43, 46, 63-73, 87-96, 114-116.) The first

matter related to their handling of the affairs of Mark Equipment Center of South Florida, Inc. in 1987. (2JA 349, ¶ 44). Rallis claimed that Cassady and Morgan Lewis should have dissolved Mark Equipment in 1987, and that they should have settled a shareholder claim before a suit was filed in 1987. On this claim against Cassady and Morgan Lewis, Rallis sought damages in excess of $1,000,000. (2JA 361, ¶ 68.)

The second matter related to a sale of stock in American Hi-Lift Corporation and legal services rendered in connection with the sale during the period of October 1987 through February 1988, when Cassady was employed by Morgan Lewis. Rallis claimed that Morgan Lewis failed to correctly document the transaction and that there were omissions from an opinion letter at the time of the stock sale. On this claim against Cassady and Morgan Lewis, Rallis sought damages in excess of $500,000. (2JA 372-373, ¶¶ 103-108.)

When Morgan Lewis refused to defend him against the Rallis claims, Cassady retained attorney Baird A. Brown to defend him. Between 1995 and 2001, Cassady incurred over $280,000 in attorney fees defending the *Rallis* action. (2JA 299, ¶¶ 1-2.) Brown's detailed bills are in evidence. (2JA 301-321.)

C. Cassady Is Entitled To Indemnity From Morgan Lewis For His Fees.

Section 2802, subdivision (a), 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.

"Necessary expenditures" includes attorney fees incurred by the employee in defense of lawsuits brought against the employee as a consequence of his or her duties of employment. (See *Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1583; *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 177; *Douglas v. Los Angeles Herald- Examiner* (1975) 50 Cal.App.3d 449, 465.)

Even if the Rallis allegations were sham, Cassady still had to defend against them. "The employee who is sued for authorized acts in the scope of his employment is as much in need of 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. 462 ["*Douglas"*].)

Morgan Lewis would turn the *Douglas* case on its head and require Cassady to prove that he actually did all the things alleged in the *Rallis* action. 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 named in that action. 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 alleged to have been committed within the course and scope of the employment. The appellate court in *Douglas* reversed the judgment in the employer's favor. The 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. (2JA 299, ¶ 4; 347-377, ¶¶ 40, 43, 46, 63-73, 87-96, 114-116.) It is also plain from the declaration of Cassady's attorney (2JA 299), the attorney's detailed bills (2JA 301-321), the Rallis complaint (2JA 337-378) and the Court of Appeal's decision in the *Rallis* action (2JA 392-407), that significant effort was invested on Cassady's behalf in successfully defending against the malpractice claims relating to Cassady's employment with Morgan Lewis.

On the face of it, therefore, Cassady made out a prima facie case for indemnity for fees and costs incurred in defending himself in the *Rallis* action as a consequence of his employment with Morgan Lewis. Under *Douglas*, he is entitled to indemnity from Morgan Lewis. The exact amount of fees may be in dispute, but clearly some fees are due. Cassady met whatever burden of proof was his under Evidence Code section 500. It is absurd for Morgan Lewis to suggest otherwise, especially on a motion for summary judgment.

That ought to be the end of the matter. Morgan Lewis was not entitled to judgment on the Cassady indemnity claims on the theory that there is nothing to indemnify, and after erroneously granting summary judgment the trial court did not abuse its discretion in granting a new trial to Cassady on those claims.

D. No Apportionment Of Fees Should Be Required.

Morgan Lewis nevertheless contends that Cassady is entitled to no indemnity at all, and cannot make a prima facie case, unless in opposition to summary judgment he is able to exactly apportion the fees he incurred in the *Rallis* action between claims relating to his time of employment with Morgan Lewis and claims relating to his employment at some other time.

Morgan Lewis is wrong. An employer is not entirely relieved of its duty to indemnify its employee for the defense of work-related claims simply because the defense of employment-related claims is intertwined with the defense of other claims. The general rule is that where claims involve a common core of facts and are based on related legal theories, attorney fees need not be apportioned. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130 ["Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed"]; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 ["Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units"]; *Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance* (1993) 16 Cal.App.4th 577, 588 ["The liability of Bay Cities and UPI were so factually interrelated that it would have been impossible to separate the activities involved in the arbitration into compensable and noncompensable time units. Allocation was not required"]; *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493 ["Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories"].) There is no reason why that general rule should not apply here.

Indeed, if the rule were otherwise, an employee who was sued for an indivisible course of conduct arising from employment with more than one employer, and who was therefore entitled to indemnity from both employers, might not be able to obtain indemnity from either employer. Employers should not be enabled to escape their statutory duties to their employees so easily.

In short, Cassady did not have to apportion fees in order to establish his indemnity claims.

E. If Fees Must Be Apportioned, The Burden Of Apportionment Ought To Be On Morgan Lewis.

Despite the rule that fees for intertwined facts and claims need not be apportioned, Morgan Lewis contends that this case is different because the fees Cassady seeks to recover under Labor Code section 2802 are an element of his damages, and he has the burden of proving these damages. According to Morgan Lewis, Cassady cannot meet that burden unless he specifically identifies that portion of the fees incurred in defending the *Rallis* action that is attributable to his employment with Morgan Lewis.

Morgan Lewis gets it backwards. Section 2802 is prophylactic legislation. Its "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.) The statute "obligates the employer not only to pay any judgment entered against the employee for conduct arising out of his employment but also to *defend* an employee sued by a third person for such conduct." (*Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640, 647-648, emphasis added; *Devereaux v. Latham & Watkins*, *supra*, 32 Cal.App.4th at p. 1583.) "[I]f the employer elects to run a risk and refuses to defend, the employer must indemnify the employee for

his attorney fees and costs in defending the underlying action if the employee was sued for acts within the scope of his employment." (*Jacobus v. Krambo Corp.* (2000) 78 Cal.App.4th 1096, 1100.) Under a contract for indemnity as well, the indemnitor is bound to defend actions brought against the indemnitee in respect to the matters embraced by the indemnity. (Civ. Code, § 2778, subd. 4.)[4]

Where, as here, the employer ignores its duty under section 2802 and forces the employee to defend himself, the burden of apportioning the employee's defense costs between claims arising from the employment and other claims ought to fall on the employer. The employer gets the benefit of the employee's services in the first place, and then gets the benefit of the employee assuming the defense. The employer therefore should bear the burden of apportioning out the cost of the defense of non-indemnifiable claims. (Civ. Code, § 3521 ["He who takes the benefit must bear the burden"].) That is not an undue burden, especially in a case like this one, where the employer is also named as a defendant and knows what it is paying its own counsel to defend the same claims that the employee is defending.

The burden-of-proof cases relied on by Morgan Lewis are inapposite. They do not involve breach of a direct prophylactic statutory duty. *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, was an ordinary tort action for intentional infliction of emotional distress in which

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[4] Accord: *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449, 461 ["We have no doubt that Labor Code section 2802 requires an employer to defend or indemnify an employee who is sued by third persons for conduct in the course and scope of his employment"]; but see *Grissom v. Vons Companies, Inc.* (1991) 1 Cal.App.4th 52, 57 ["Section 2802 does not say that an employer must 'defend' an employee . . . . It may be, of course, that an employee's expenditure of money on legal costs would be totally unnecessary if his or her employer timely provided competent counsel to defend the employee"].

the plaintiff was awarded an unsegregated amount of compensatory damages for personal injuries and property damage. The plaintiff sought pre-judgment interest because the defendant had turned down a settlement offer less than the judgment the plaintiff obtained. Since the pre-judgment interest statute applies only to personal injury damages, the Supreme Court held that the plaintiff had the burden of establishing what portion of the jury's award was attributable to personal injuries. The court pointed out that a plaintiff can easily establish such an apportionment by requesting a special verdict during trial. (*Id*. at pp. 660-661.) No statutory duty was involved in *Lakin*. Unlike interest, attorney fees cannot be mathematically apportioned. And special verdicts are not available in the underlying action to apportion attorney fees among intertwined malpractice claims.

Golden Eagle Refinery Co. v. Associated Internat. Ins. Co. (2001) 85 Cal.App.4th 1300, was an action on various insurance contracts to recover cleanup costs for environmental contaminations. The plaintiff-insured admittedly could not prove that any of the contamination resulted from occurrences covered by any of the defendant-insurers' policies. The insurers were therefore entitled to summary judgment. Again, no breach of statutory duty was involved. And, unlike the plaintiff in *Golden Eagle*, Cassady does *not* admit he cannot prove that any of his fees incurred in the *Rallis* action are attributable to his employment with Morgan Lewis.

Faria v. M/V Louise V (9th Cir. 1991) 945 F.2d 1142, is even further afield. In that case, a shipowner's employees suffered injuries as a result of accidents in helicopters and on board the ship. The shipowner settled the employees' claims and sought equitable indemnity from the helicopter manufacturer. However, the shipowner offered no evidence that any of the settlement was attributable to the helicopter accidents. The court held that the shipowner had failed to prove its case for indemnity against the helicopter manufacturer. That may be the right result there, but it's not the

right result here. Unlike the helicopter manufacturer who had no preexisting duty to indemnify the shipowner, Morgan Lewis had a pre-existing duty to defend Cassady. When Morgan Lewis failed to defend claims relating to the discharge of his duties of employment with Morgan Lewis, and Cassady did defend those claims, the burden shifted to Morgan Lewis to establish that none of the fees incurred by Cassady were attributable to those claims.

Thus, the employer, Morgan Lewis, and not the employee, Cassady, had the burden of proof on the apportionment issue. Morgan Lewis offered no evidence to establish that *none* of the fees incurred by Cassady related to his conduct in the discharge of his duties as a Morgan Lewis employee. Morgan Lewis was not entitled to summary judgment on the Cassady Labor Code section 2802 claim, 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"].)

F. If Fees Must Be Apportioned, The Trial Court Could Do So On The Existing Evidence.

Morgan Lewis claims it has proved there can be no apportionment of fees in this case because at his deposition Cassady testified that "it's very difficult to try to cut this problem [i.e., segregation of expenses] with a sharp knife" (1JA 93); and in his attorney's bills, hours are not segregated by cause of action or where Cassady was employed at the time of his alleged misconduct (1JA 90).

Morgan Lewis is wrong again. It may be difficult to apportion fees with knife-like accuracy, but it is not impossible to do an apportionment with the abundant evidence available here. There was the Rallis complaint.

(2JA 337-378.) There was a detailed analysis of the Rallis claims against Cassady and Morgan Lewis, written by the attorneys representing Morgan Lewis. (1JA 68; 3JA 849-855.) There was the Court of Appeal's decision in the *Rallis* action. (2JA 392-407.) And there were the attorney's bills. (2JA 301-321.) If any allocation were required, this evidence is sufficient to permit the trial court to exercise its discretion to allocate awards of attorney fees. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297 ['"although time-keeping and billing procedures may make a requested segregation difficult, they do not, without more, make it impossible'" citing *Diamond v. John Martin Co.* (9th Cir. 1985) 753 F.2d 1465, 1467].)

For example, *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, involved an order under Corporations Code section 317 directing a corporation to indemnify its president for $70,000 attorney fees and costs incurred in defending a cross-complaint filed against him in litigation between the corporation and a third party. Section 317 entitles an agent to indemnification for expenses actually and reasonably incurred in connection with an action in which he was sued as an agent of the corporation. The corporation challenged the fee award on the ground that the president had failed to segregate, on an hourly basis, fees attributable solely to his defense against the cross-complaint. His attorney's time records did not separate hours spent on the litigation. However, based on those records and testimony showing the attorney's work, the appellate court held there was sufficient evidence to support the fee award.

The same holds true here as well. There is no legitimate question – and certainly no question beyond all dispute on summary judgment – that Cassady incurred fees defending against the Rallis claims arising from Cassady's discharge of duties as a Morgan Lewis employee. Cassady successfully defeated those claims in the trial court and on appeal. (2JA

392-407.) While Cassady's attorney's time records do not segregate fees claim by claim or by period of Cassady's employment (no attorney's time records ever would), the trial court still could rationally apportion fees to those claims. Trial courts do that all the time. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134 ["Having concluded that the trial court acted properly as a matter of law when it did not require Akins to formally apportion its hours between claims for which attorney fees were compensable by statute and other hours, we find more generally that the trial court acted properly when making the attorney fees award that it did. The amount of an attorney fee to be awarded is a matter within the sound discretion of the trial court"].)

G. The Cassady Discovery Responses Do Not Negate The Possibility Of Apportionment.

Finally, Morgan Lewis contends that in discovery responses Cassady admitted there is no factual basis to apportion fees and costs. (AOB 30-31, citing 1JA114:12.) This was a statement made as part of his response to the Morgan Lewis Form Interrogatory 15.1 which asked for facts supporting his *denial* of an allegation or affirmative defense in his pleadings. (1JA 125.) By its own terms, this interrogatory related to Cassady's defense of the Morgan Lewis claim for indemnity against Cassady, not Cassady's affirmative claim for indemnity from Morgan Lewis. Cassady's answer must necessarily be read in that context. (*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"].) Cassady prevailed on his indemnity claim with proof that Morgan Lewis had promised to provide a complete defense to former Hahn Cazier lawyers for conduct occurring before the lawyers joined Morgan Lewis. (4JA 900; 2RT

170, 179, 216-226.) That is why Cassady took the position that there is no factual basis to apportion fees: Morgan Lewis is responsible for all fees relating to Cassady's conduct as both a Hahn Cazier and a Morgan Lewis lawyer. Cassady was not admitting that fees could not be apportioned. He was asserting that fees should not be apportioned because Morgan Lewis is responsible for them all.

Again, if fees must be apportioned, it can be done. Cassady's attorney can do it. (1JA 281.)[5] Morgan Lewis never took the attorney's deposition. Morgan Lewis cannot pretend to know responses to discovery that it never took and make those imagined responses the basis for summary judgment. (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 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"]; see also *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891 ["Yura's showing that Gaggero unjustifiably refused to respond to questions at his deposition does not satisfy the burden of production requirement established by *Aguilar*"].)

Morgan Lewis failed to conclusively demonstrate that apportionment evidence cannot reasonably be obtained. It was not entitled to summary judgment on this ground, either. (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 173.)

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[5] This is not as Morgan Lewis argues, just a "vague promise of possible evidence." (AOB 33.) Morgan Lewis had the burden of proving that Cassady did not have and could not reasonably obtain evidence to support his indemnity claims. (*Aguilar*, *supra*, 25 Cal.4th at p. 854.) In arguing that Cassady could not reasonably obtain evidence to support his claim, Morgan Lewis completely ignored the most obvious source of that evidence, the attorney that actually defended Cassady.

III. MORGAN LEWIS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT CASSADY HAS NO EVIDENCE, AND CANNOT REASONABLY OBTAIN EVIDENCE, TO SUPPORT HIS COMMON LAW INDEMNITY CLAIM.

Morgan Lewis contends Cassady has no claim for indemnity under common law principles because he has not established that he was found vicariously liable in the *Rallis* action for negligence by Morgan Lewis negligence. (AOB 39.)

In the trial court, Morgan Lewis contended something different, that '"common law indemnification does not apply between vicariously liable tortfeasors and tortfeasors guilty of the acts and omissions causing the harm.'" (1JA 44.) Whichever it is, the contention fails because, on the Morgan Lewis summary judgment motion, Cassady had no burden to establish anything until Morgan Lewis established a complete to defense to his claim. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1606 ["because respondent failed to meet the burden of proof imposed upon him by section 437c, subdivision (o)(2), the obligation of demonstrating a triable issue of fact did not shift to appellant"].) Morgan Lewis did not even purport to do that with regard to Cassady's common law indemnity claim. Morgan Lewis made no showing whatsoever that it was not negligent as alleged in the *Rallis* action or that it would have been held only vicariously liable in the *Rallis* action or that Cassady incurred no loss in the *Rallis* action based on vicarious liability for Morgan Lewis negligence.

The Morgan Lewis statement of undisputed facts in support of summary judgment simply stated that Cassady's indemnity claim has no basis other than what is contained in his complaint, and his complaint alleges he is entitled to indemnity under common law principles. (1JA 60-

61.) This is patently insufficient to shift the burden of proof to Cassady on his common law indemnity claim.

Cassady certainly did not admit, as Morgan Lewis suggests, that this was a "throw-away" claim. (AOB 39.) It is not, as the trial court correctly perceived after reviewing the entire case.

CONCLUSION

After conducting a full trial on the merits of the Morgan Lewis claim for indemnity from Cassady, and after finding that the Morgan Lewis claim was contrary to its agreement with Cassady and otherwise unconscionable, the trial court realized that it had not properly considered all the material evidence when it earlier granted summary judgment against Cassady on his indemnity claim against Morgan Lewis. (2RT 364-365.) The court did the right thing and granted a new trial. It did not abuse its discretion.

The new trial order should be affirmed.

Dated: June __, 2005

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CROSS-APPELLANT'S OPENING BRIEF

If, for some non-substantive reason, the trial court's order granting a new trial to Cassady on his indemnity claims against Morgan Lewis were to be reversed and the judgment reinstated, then Cassady appeals from the judgment insofar as it bars his indemnity claims against Morgan Lewis. (4JA 988.) The appeal is timely. (Cal. Rules of Court, rule 3(e)(2).)

Cassady incorporates by reference his Statement of the Case and his Legal Argument from his Respondent's Brief, above. For all the same reasons stated above, the trial court erred in granting summary judgment to Morgan Lewis on the Cassady indemnity claims. Morgan Lewis failed to establish that there is no triable issue of material fact or that Morgan Lewis is entitled to judgment as a matter of law.

The judgment should be reversed in that regard.

Dated: June __, 2005

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 14(c)(4), the attached **Respondent's Brief and Cross-Appellant's Opening Brief** is proportionately spaced, has a typeface of 13 points and contains 8,086 words.

Dated: June __, 2005

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