4th Civil No. E022011

STATE OF CALIFORNIA

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION TWO

RUSSELL GLEN DAY,

Plaintiff/Appellant,

vs.

CITY OF FONTANA,
COUNTY OF SAN BERNARDINO,

Defendants/Respondents

Appeal from San Bernadino Superior Court
Honorable John P. Wade, Judge
San Bernadino Superior Court Case No. SCV 273682

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INTRODUCTION

The courts of this state have twice upheld Proposition 213 against constitutional challenges. In *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, the Second District concluded that Proposition 213 is constitutional both in its retroactive and prospective applications, specifically holding that it does not violate the due process or equal protection clauses of the state or federal constitutions. The First District reached a similar result in *Quackenbush v. Superior Court* (1997) 60 Cal.App.4th 454, also holding that Proposition 213 is consistent with both due process and equal protection.

Notwithstanding these decisions, plaintiff Russell Day asks the Court to readjudicate the constitutionality of Proposition 213, arguing that *Yoshioka* and *Quackenbush* are "analytically flawed." (AOB 6.) He is wrong:

- California law is clear that in the absence of a "vested right," there can be no due process violation. Because a plaintiff does not have a "vested right" to any particular measure of damages, a legislative change to the damages Day was able to recover, even if retroactively applied, cannot violate due process.
- Even if Day had acquired a vested right under the former legislative scheme, Proposition 213's retroactive amendment of that scheme would not impermissibly violate due process. Vested rights may be impaired without offending due process if the impairment is justified by a sufficiently important state objective. Proposition 213 more than meets this standard, achieving at least three important objectives: restoring balance to the justice system, reducing automobile insurance rates, and

encouraging compliance with the state's Financial Responsibility Law.

- Proposition 213 also satisfies the requirements of the equal protection clause, because the distinctions it draws between insured and uninsured drivers are rationally related to legitimate state interests. The state has a critical interest in being sure that all drivers carry automobile liability insurance; given this interest, it is not unfair or irrational to withhold from drivers who do not carry automobile insurance certain benefits provided to drivers who do.

Yoshioka and *Quackenbush* thus correctly concluded that Proposition 213 is constitutional in all respects. Respondent City of Fontana urges this Court to follow their lead and reject Day's constitutional challenge to Proposition 213.

Day also errs in suggesting that Proposition 213, even if constitutional, does not apply to the present action. This suggestion is inconsistent with Proposition 213's plain language, which states that it applies to "*any action* to recover damages, arising out of the use or operation of a motor vehicle." The suggestion also is inconsistent with Proposition 213's legislative history, which makes clear that the voters specifically contemplated that Proposition 213 would not be limited to cases of vehicular negligence, but would also apply to non-negligence actions against public entities. Therefore, Proposition 213 applies to the present case.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On September 1, 1991, plaintiff Russell Day was injured when a car driven by defendant William Honda struck his motorcycle. (AA 54-55.) Day filed a complaint for premises liability, negligence and public nuisance against William Honda, Irving Schwartz (the owner of property adjacent to the intersection where the accident took place), the City of Fontana and the County of San Bernardino on August 28, 1992. (AA 1-7A.) That complaint alleged, among other things, that the intersection where the accident occurred (which was owned and maintained by the City of Fontana and County of San Bernardino) constituted a danger to vehicles "because of overgrown shrubs, trees, bushes and other associated vegetation surrounding the northeast corner of said intersection, creating a vision obstruction for motorists traveling through the intersection." (AA 5.)

During discovery, defendants learned that Day did not have liability insurance on his motorcycle, as required by state law. (AA 31, 46.)

On November 5, 1996, the voters passed Proposition 213, which prohibits uninsured drivers from collecting noneconomic damages, such as for pain, suffering and physical impairment, in any action arising out of the operation or use of a motor vehicle. (See Civ. Code, §§ 3333.3, 3333.4.) The County of San Bernardino thereafter filed a motion in limine, which the City of Fontana joined, that sought to exclude from trial any evidence of damages based on Day's pain and suffering. (AA 31-60, 61.) The trial court granted the motion on May 13, 1997. (AA 93-94.)

On June 18, 1997, a jury found that Day had suffered $454,574.21 in economic damages and allocated responsibility for those damages between William Honda, the County of San Bernadino, and the City of Fontana.

(AA 101-102.) The trial court entered judgment on the basis of that verdict on November 19, 1997. (AA 152-153.)

Day filed a notice of appeal of the judgment on February 11, 1998. He elected to proceed by Appellant's Appendix in lieu of clerk's transcript, pursuant to California Rules of Court, rule 5.1. (AA 158.) He did not designate a reporter's transcript. (*Ibid.*)

LEGAL ARGUMENT

I.

RETROACTIVE APPLICATION OF PROPOSITION 213 DOES NOT VIOLATE DUE PROCESS.

Retroactive application of a statute to conduct completed before the statute was passed violates the due process clause "if it deprives a person of a vested right without due process of law." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756.) Thus, to invalidate a statute on due process grounds, a court must conclude *both* that retroactive application of the statute disturbs a "vested right" *and* that the disturbance is accomplished without due process. (*In re Marriage of Hilke* (1992) 4 Cal.4th 215, 222-223; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 591-592.) Stated differently, where no vested right is involved, retroactive legislation cannot violate due process. (*In re Marriage of Hilke, supra,* 4 Cal.4th at pp. 223-223.) But even if retroactive legislation *does* impair a vested right, the impairment is not unconstitutional if the state's interest is "sufficiently necessary to the public welfare." (*In re Marriage of Bouquet, supra,* 16 Cal.3d at p. 592.)

To demonstrate that Proposition 213 violates his right to due process, therefore, Day must show both that he had a vested right to

noneconomic damages *and* that depriving him of that right was not justified by a sufficiently important state interest. His challenge to Proposition 213 fails on both counts: first, because it is well settled that a plaintiff does not have a vested right to any particular measure of damages; and second, because important state interests justify retroactive application of Proposition 213. Day's due process challenge therefore must be rejected.[1]

A. Retroactive Application of Proposition 213 Does Not Impair Vested Rights.

The California Supreme Court has held repeatedly that a plaintiff has no vested property right to a particular measure of damages. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368; *Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at p. 982.) The Court has explained:

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[1] Day suggests, citing *In re Marriage of Bouquet,* that the Court should balance the state's interest in retroactive application of Proposition 213 against his interest to the contrary, without first considering whether he had a "vested right" under the former law. (AOB 12 ["Courts frequently state that statutes may not be made to operate retroactively if to do so would cut off a 'vested right'. As the California Supreme Court said, however, this term is conclusory and therefore of little use. . . . The proper test is to balance a variety of factors."].) This analysis, however, is unsupported by California law, including the very case that Day cites. Contrary to Day's assertion, the California Supreme Court in *Bouquet* did not abandon the concept of vested rights, but rather defined it more precisely, "to describe property rights that are not subject to a condition precedent." (*In re Marriage of Bouquet, supra,* 16 Cal.3d at p. 591, fn. 7.) A consideration of whether a right has "vested" thus remains a critical part of the due process analysis. (*Id.* at p. 591; see also *In re Marriage of Hilke, supra,* 4 Cal.4th at p. 222 [due process challenge "fail[ed] at the threshold" because the "right" affected by the challenged legislation was subject to a condition precedent and therefore had not "vested"].)

"[T]he Legislature retains broad control over *the measure*, as well as *the timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverability of damages so long as its action is rationally related to a legitimate state interest." (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at p. 158.)[2]

On this basis, the Court has held that a change in the law that reduces a plaintiff's damages does not violate due process, even if it is retroactively applied. This principle was first discussed in *Tulley v. Tranor* (1878) 53 Cal. 274, a conversion action. At the time the plaintiff filed suit, the Civil Code permitted him to recover either the value of the property at the time of the conversion or the highest market value of the property at any time between the conversion and the verdict. (*Id.* at p. 278.) Prior to trial, however, the statute was amended to eliminate the option to recover the highest market value of the property. (*Ibid.*)

On appeal, defendants challenged the trial court's application of the law in effect at the time of the conversion, contending that it instead should have applied the law in effect at the time of trial. (*Id.* at pp. 275-276.) The Supreme Court agreed, concluding that retroactive application of the amendment did not violate the plaintiff's due process rights, although it reduced his recovery:

> "The only question to be considered . . . is whether the plaintiff will be deprived of a *vested right* if the amendment be held applicable to this case. 'A retrospective statute affecting and changing vested rights is very generally considered, in this country, as founded on unconstitutional

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[2] Day concedes this point, acknowledging that "there is no vested right in a particular remedial measure." (AOB 17, fn. 10.)

> principles, and consequently inoperative and void. *But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature . . .* (*Id.* at pp. 279-280, emphasis added.)

The Court reasoned that because tort recovery is inherently "arbitrary"—it does not compensate a plaintiff for his injury in any precise or necessary way—"[w]e can conceive of no principle of constitutional law which is violated by a *change* in this rule, unless, at least, the new rule on its face deprives a party of every reasonable method of securing just compensation." (*Id.* at p. 280.) Thus, the Court concluded, because the change in the Civil Code merely reduced plaintiff's recovery, but did not eliminate it entirely, it did not disturb vested rights. It therefore did not run afoul of the due process clause. (*Ibid.*)

Citing *Tulley*, the Supreme Court consistently has applied statutes amending the calculation of a plaintiff's damages to torts committed before the statutes were passed. For example, in *Stout v. Turney* (1978) 22 Cal.3d 718, 727, the Court upheld the retroactive application of an amendment to Code of Civil Procedure section 3343, which changed the calculation of the damages recoverable for fraud. The Court reached the same result in *Feckenscher v. Gamble* (1938) 12 Cal.2d 482, 499-500, also applying an amended version of Code of Civil Procedure section 3343 to fraudulent conduct that occurred before the amendment. The Court explained: "The case of *Tulley v. Tranor*, 53 Cal.274, holds unequivocally that no one has a vested right in a measure of damages." (*Id.* at p. 499.) And, in *Augustus v. Bean* (1961) 56 Cal.2d 270, 272, the Court endorsed retroactive application of Code of Civil Procedure section 875, which created a right of contribution among tortfeasors, because, "[a]s of the time of the accident a

person did not have a vested right at common law to avoid paying for the consequences of his negligence merely because there were other tortfeasors involved." (See also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1124 [concluding that *Tulley* and its progeny "provide support for the claim that it is not necessarily unconstitutional for the Legislature to alter the measure of damages with respect to preexisting causes of action"].)[3]

Applying this rule, the Second District Court of Appeal in *Yoshioka v. Superior Court, supra,* concluded that retroactive application of Proposition 213 did not disturb vested rights. The court explained:

> "[N]umerous courts have held that the right to recover specific types of damages is not a vested right because such rights are created by state and common law independent from the Constitution. [Citation.] Therefore, a state and its people may alter such rights. . . . [U]nder Proposition 213, although petitioner may not be able to recover as high a damage award as he would have prior to the initiative's passage, he still is legally entitled to some form of relief. Proposition 213 deprives petitioner of a certain type of damages (noneconomic, i.e., pain and suffering), but petitioner cannot

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[3] The courts have reached the same result with regard to judicial decisions that reduce a plaintiff's recovery, concluding that their retroactive application does not disturb vested rights. (See, e.g., *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 989 [vested rights are not disturbed by retroactive application of *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, which held that an employee may not obtain tort relief for breach of the implied covenant of good faith and fair dealing in an employment contract]; *Industrial Indemnity Co. v. Touche Ross & Co.* (1993) 13 Cal.App.4th 1086, 1092 [vested rights are not disturbed by retroactive application of *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, which eliminated a cause of action by third parties against accountants for professional negligence].)

> claim that he is deprived of every reasonable method of securing just compensation. He is still able to obtain complete recovery for his economic damages." (*Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at p. 982.)

Yoshioka is correct. The cases discussed above make clear that a plaintiff does not have a vested right to a particular measure of damages, and thus that there is no constitutional impediment to applying retroactively a statute that modifies—but does not eliminate completely—the damages recoverable for a tort. These cases are dispositive of the present case. While Proposition 213 limits an uninsured motorist's right to recover for noneconomic losses, it has no effect on his ability to recover for economic losses, and indeed Day was awarded more than $450,000 in economic damages. Since Proposition 213 thus does not "deprive[] a party of every reasonable method of securing just compensation" (*Tulley v. Tranor, supra,* 53 Cal. at p. 280), but merely modifies the damage award to which he is entitled, it does not disturb a "vested right." It therefore does not violate due process.

Day urges that the present case is distinguishable from *Tulley, Feckenscher* and *Stout* because those cases attempted to "refine the measure of damages to more accurately approximate the loss" rather than to "deny recovery of a recognized class of damages." (AOB 14.) But in so contending, Day misses a core assumption on which those decisions are based: recovery for tort is inherently arbitrary. (See *Tulley v. Tranor, supra,* 53 Cal. at p. 280 ["[T]he rule . . . as it stood prior the amendment, is arbitrary. . . . 'it is impossible to determine the exact amount of injury.'"]) This is particularly true with regard to noneconomic damages for pain and suffering; as the California Supreme Court has explained:

"Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, *inter alia*, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence [citation], no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at pp. 159-160.)[4]

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[4] The *Yoshioka* court relied on this analysis in rejecting plaintiff's due process challenge to Proposition 213:

> "Proposition 213 deprives petitioner of a certain type of damages (noneconomic, i.e., pain and suffering), but petitioner cannot claim that he is deprived of every reasonable method of securing just compensation. He is still able to obtain complete recovery for his economic damages. [¶] Notably, assuming petitioner was eligible to recover damages for pain and suffering, it is still questionable whether such a monetary award will ever fully compensate an injured plaintiff. Our Supreme Court has stated, ' . . . money damages are, at best only imperfect compensation' for pain and suffering. [Citation.] Suspicion will often arise as to whether injured plaintiffs are ever fully compensated for noneconomic relief. However, we are certain that the injured will receive complete compensation for those injuries which can be measured monetarily. Proposition 213 ensures this relief is continually available." (*Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at pp. 982-983.)

A jury's calculation of the monetary value of Day's pain and suffering is at least as arbitrary as the damage calculations discussed in *Tulley, Feckenscher* and *Stout*. Retroactively eliminating Day's ability to recover noneconomic damages therefore cannot violate his right to due process.

B. The State's Interest In Retroactively Applying Proposition 213 Justifies Any Imposition On Day's Rights.

Even if Day had a vested right to recover noneconomic as well as economic damages—which, as explained above, he did not—retroactive application of Proposition 213 nonetheless would not violate due process because the state's interest in retroactive application justifies any imposition on that right.

The California Supreme Court has explained that the state may disturb vested rights without violating due process if the disturbance is necessary to the public welfare:

> "'*Vested rights . . . may be impaired 'with due process of law' under many circumstances*. The state's inherent sovereign power includes the so-called 'police power' right to interfere with vested property rights wherever reasonably necessary to the protection of the health, safety, morals, and general well being of the people . . . . The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired . . . but whether such a change reasonably could be believed to be sufficiently necessary to the public

welfare as to justify the impairment.'" (*In re Marriage of Bouquet, supra,* 16 Cal.3d at p. 592, emphasis added.)

In evaluating a retroactive impairment of vested rights, courts have considered a variety of factors, including the significance of the state interest served by the new law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken on the basis of reliance, and the extent to which the retroactive application of the new law would disrupt those actions. (*In re Marriage of Bouquet, supra,* 16 Cal.3d at p. 592; *In re Marriage of Buol, supra,* 39 Cal.3d 751, 761.) However, "[w]here 'retroactive application is necessary to serve a sufficiently important state interest' the inquiry need proceed no further." (*Ibid.,* internal citations omitted; *In re Marriage of Taylor* (1987) 189 Cal.App.3d 435, 442.)

Thus, so long as Proposition 213 serves important public concerns, retroactively applying it cannot violate due process. The burden of demonstrating that the state's interest is "sufficiently necessary" to the public welfare is not a heavy one; the California Supreme Court has explained:

> "Since the demise of the substantive due process analysis of *Lochner v. New York* (1905) 198 U.S. 45 [49 L. Ed. 937, 25 S.Ct. 539], it has been clear that the constitutionality of measures affecting . . . economic rights under the due process clause does not depend on a judicial assessment of the justifications for the legislation or of the wisdom and fairness of the enactment. So long as the measure is *rationally related to a legitimate state interest,* policy determinations as to the

need for, and the desirability of, the enactment are for the Legislature." (*American Bank & Trust Co. v. Community Hospital, supra,* 36 Cal.3d at p. 369, emphasis added.)

As discussed more fully below, each of the factors relevant to the due process analysis weighs in favor of retroactive application of Proposition 213. Thus, retroactive application does not violate Day's right to due process.

1. Retroactive Application of Proposition 213 Is Necessary To Serve Important State Interests.

a. Retroactive Application Of Proposition 213 Restores Balance To The Justice System.

One of the primary objectives of Proposition 213 was "to restore balance to our justice system." (Cal. Ballot Pamp., Text of Proposed Law, Gen. Elec. (Nov. 5 1996) p. 102;[5] *Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at p. 983.) *Yoshioka* identified several aspects of restoring balance: decreasing the number of lawsuits, reducing annual court-related costs to state and local governments, increasing the costs of disobeying

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[5] The relevant pages of the November 6, 1996 California General Election Ballot Pamphlet are attached as Exhibit 1 to the City's Request for Judicial Notice, filed concurrently. A ballot pamphlet may be considered to show the intent of the voters in passing a ballot initiative, and is the proper subject of a request for judicial notice. (*Kidd v. State of California* (1998) 62 Cal.App.4th 386, 407, fn. 7; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 42, fn. 6.)

California's Financial Responsibility Law, and avoiding unreasonable damages being awarded to the uninsured. (*Ibid.*) *Yoshioka* characterized these interests as "significant" (*id.* at p. 984) and concluded that retroactive application of Proposition 213 was critical to achieving them. The court explained:

> "Proposition 213 makes it more difficult for citizens to ignore the Financial Responsibility Law, where motorists are required to obtain insurance if they wish to drive. Once in effect, law abiding citizens are not forced to pay for the injuries of those who choose to disobey the law. Therefore, it was proper for the electorate to consider such an interest in enacting a new initiative." (*Ibid.*)

Moreover:

> "[T]he interest [in restoring balance to the justice system] cannot be effectuated unless the initiative is applied retroactively. The court system will not change until we consider *all* cases scheduled post January 1, which must include certain accidents that occurred prior to this date." (*Id.* at p. 985.)

(See also *Cabral v. Los Angeles County Metropolitan Transportation Authority* (1998) 66 Cal.App.4th 907, 913 [adopting *Yoshioka*'s analysis].)

Retroactive application of Proposition 213 thus is necessary to achieve the electorate's goal of restoring balance to the justice system in a number of important ways. It also helps correct another kind of imbalance—ameliorating the extent to which uninsured drivers benefit from

a mandatory insurance system to which they do not contribute. Under California's Financial Responsibility Laws, automobile insurance (or some other form of financial responsibility) is mandatory. (Veh. Code, §§ 16000 et seq.) The California Supreme Court has explained that the primary objective of this law is to "assure 'monetary protection to that ever changing and tragically large group of persons who . . . suffer grave injury through the negligent use of [the] highways by others.'" (*Jess v. Herrmann* (1979) 26 Cal.3d 131, 138-139.) In other words, the Court explained, liability insurance is required "not only to protect the insured against the adverse impact of liability but to assure that the victim be actually compensated for his tort loss instead of having merely an empty claim against a judgment-proof defendant." (*Id.* at p. 139.)

The recovery scheme contemplated by the Financial Responsibility Law works as the Legislature intended only if all drivers participate. If some drivers do not participate, only persons injured by insured drivers are "actually compensated;" those injured by uninsured drivers are left with "empty claim[s] against judgment-proof defendant[s]." (*Ibid.*) As a result, insured drivers bear the financial burden *both* of accidents that they cause *and* of accidents that are wholly the fault of other drivers, while uninsured drivers avoid financial responsibility for both.

Proposition 213 partially corrects this inequity in the law. While it continues to allow uninsured drivers to recover their economic damages, it prevents them from recovering noneconomic damages. As a result, it limits the ability of uninsured drivers—who do not procure the insurance necessary to protect victims of their own negligence—to profit from a system to which they do not contribute. It thus achieves the state's important interest in a fair and balanced justice system.

Retroactively applying Proposition 213 is critical to achieving this objective. As discussed more fully below (see pp. 17-18 *infra*), applying Proposition 213 retroactively reduces *prospectively* the unfair financial burden on insured drivers, because "there will be a beneficial impact on insurance premiums once the insured is no longer forced to pay for the insurance bills." (*Yoshioka, supra,* 58 Cal.App.4th at pp. 984-985.) Retroactive application of Proposition 213 thus allows the state to realize immediately the benefits of a more balanced system.

b. Retroactive Application of Proposition 213 Reduces The Costs of Mandatory Automobile Insurance.

A second objective of Proposition 213 was reducing the cost of mandatory automobile insurance. (*Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at p. 984; *Cabral v. Los Angeles County Metropolitan Transportation Authority, supra,* 66 Cal.App.4th at p. 913.) The "Argument in Favor of Proposition 213" contained in the November 1996 California Ballot Pamphlet explained:

> "Law-abiding citizens already pay higher insurance premiums to cover uninsured motorists. Law-abiding citizens should not be punished for living responsibly! The system needs to be fixed." (Ballot Pamp., *supra,* p. 50, emphasis omitted.)

The state's interest in reducing the cost of automobile insurance is significant. (*Yoshioka, supra,* 58 Cal.App.4th at p. 984; *Cabral, supra,* 66 Cal.App.4th at p. 913.) As discussed above, automobile insurance assures monetary protection to drivers injured by others' negligence. (*Jess v.*

Herrmann, supra, 26 Cal.3d 131.) The state therefore has a legitimate interest in assuring that insurance is widely procured. Because maintaining reasonable insurance rates is critical to achieving this goal, the voters reasonably could have determined that reducing insurance costs would serve the public interest by increasing the availability of automobile liability insurance, "helping to assure that [persons] who were injured . . . in the future would have a source of . . . insurance to cover their losses." (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at p. 166.)

Limiting damage awards to uninsured drivers directly relates to the electorate's interest in reducing the cost of automobile insurance. Noting that insurance companies doing business in California pay a tax of 2.35 percent of "gross premiums," the Legislative Analyst estimated that Proposition 213 would result in a reduction of nearly $5 million in gross premiums tax revenue. (Ballot Pamp., *supra,* p. 49.) This figure indicates an expectation that Proposition 213 would reduce insurance premiums by *more than $212 million.* (2.35 percent of $212 million is $4.98 million.)

Retroactive application of Proposition 213 is essential to realizing these savings. The *Yoshioko* court again explained:

> "[A]s an experienced insurance agent asserts, there will be a beneficial impact on insurance premiums once the insured is no longer forced to pay for the uninsured's bills. *This effect* [,] *however* [,] *cannot be achieved unless the initiative is applied retroactively.* For example, an automobile insurance underwriter, following the passage of Proposition 213, who is setting rates for 1997, could take into account the reduction in potential exposure for his or her company's insured in those cases in which Proposition 213 applies. This will ensure the initiative's immediate effect. However, if not

applied retroactively, the insured will continue to face exposure for general damages in claims brought by uninsured plaintiffs, ultimately delaying the beneficial effect on liability insurance rates. Therefore, retroactive application is important in effectuating this interest in reducing premium rates." (*Yoshioka, supra,* 58 Cal.App.4th at pp. 984-985; see also *Cabral v. Los Angeles County Metropolitan Transportation Authority, supra,* 66 Cal.App.4th at p. 913.)

Retroactive application of Proposition 213 therefore is necessary to serve California's interest in reducing the cost of mandatory automobile insurance.

c. Retroactive Application of Proposition 213 Encourages Compliance With California's Financial Responsibility Law.

A third important objective of Proposition 213 was encouraging compliance with California's Financial Responsibility Law. (Ballot Pamp., *supra*, p. 102 ["uninsured motorists . . . are law breakers, and should not be rewarded for their irresponsibility and law breaking"]; *Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at p. 983 [one of Proposition 213's objectives was to "increas[e] the costs of . . . disobeying California's Financial Responsibility Law"].)

As discussed, the state's interest in encouraging compliance with the Financial Responsibility Law is significant. (See *supra* pp. 14-15.) Proposition 213 encourages compliance with that law because it eliminates

the "rewards" inherent in the former system, and thus makes breaking the law less attractive. (See *Yoshioka, supra,* 58 Cal.App.4th at p. 984 [Proposition 213 "makes it more difficult for citizens to ignore the Financial Responsibility Law"].)

Retroactively applying Proposition 213 is essential to encouraging compliance. The California Supreme Court has explained in the drunk-driving context that retroactively applying new legal consequences to completed conduct can have prospective deterrent effect because it increases and speeds societal awareness of the new law. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 154-156.) The Court reasoned that the deterrent effect of a legislative scheme designed to alter conduct is effective only as individuals become aware of the new law. Once an individual has been subjected to the new law, both he and others for whom he serves as an example will be aware of the law and will be deterred from engaging in conduct that violates it. (*Ibid.*) Thus, the Court has concluded, retroactive application of enhanced penalties for prohibited conduct is justified because it speeds the public's knowledge of the new penalties:

> "The sooner knowledge of the potential liability saturates the collective consciousness of the driving public, the better the deterrent purpose of the rule is served. Retroactive application will have a potent impact on the driving public as a small but significant group of drunk drivers throughout the state become simultaneously exposed to the prospect of serving as an example to others. [¶] Prospective application would further delay public knowledge of the new rule because the impact of each award would only be felt as

individual cases are decided throughout the state . . . diluting the deterrent purpose." (*Ibid.*)

In the present case, as in *Peterson*, the intent of the electorate in passing Proposition 213 will be furthered by its retroactive application. An uninsured driver whose recovery has been limited by Proposition 213 is made aware of the potential in repeating the conduct, and thus will be deterred from driving without insurance in the future. Moreover, each uninsured driver whose recovery has been limited will serve as an example to others, who will be similarly deterred from driving without insurance. Thus, "[r]etroactive application will have a potent impact on the driving public as a small but significant group of . . . drivers throughout the state become simultaneously exposed to the prospect of serving as an example to others." (*Ibid.*)

2. Day Could Not Legitimately Have Relied On The Former Law.

When retroactive application of a statute is necessary to serve an important state interest, the court need not consider the extent of a plaintiff's reliance on the former law. (*In re Marriage of Bouquet, supra,* 16 Cal.3d at p. 592; *In re Marriage of Buol, supra,* 39 Cal.3d at p. 761.) Thus, the significance of the state interests served by Proposition 213 make consideration of Day's reliance on the former law unnecessary. But even if the Court does factor Day's alleged reliance into the due process analysis, it nonetheless must conclude that retroactive application of Proposition 213 does not violate due process, because Day could not legitimately have relied on the former law when he decided to drive without insurance.

California first enacted a financial responsibility law in 1929. The 1929 version of the law, like those that followed, required all drivers to be "financially responsible," usually by means of insurance, for any injury that they caused while driving. (*King v. Meese* (1987) 43 Cal.3d 1217, 1220.) Enforcement of the 1929 law was triggered when a driver was at fault in an accident that caused either bodily injury or property damage in excess of $100. (*Ibid.*) In 1974, the Legislature amended the financial responsibility law to require a driver to post a bond or file proof of financial responsibility whenever he or she was involved in an accident that resulted in bodily injury or property damage exceeding $200, regardless of fault. (*Id.* at pp. 1220-1221.) The Legislature amended the law again in 1984 to allow a peace officer to request proof of financial responsibility whenever a notice to appear was issued for any alleged moving violation. (*Id.* at p. 1221.) If a driver could not provide such proof, he or she was subject to a fine and suspension of his driver's license. (*Ibid.*)

California law thus has required drivers to carry liability insurance, and has imposed penalties for the failure to do so, for nearly seventy years. On the basis of this long history, *Yoshioka* concluded that "[r]eliance upon the state of the former law is not a viable argument. Actions taken on the basis of the state of the former law should be identical to those taken in response to the new law." (*Yoshioka, supra,* 58 Cal.App.4th at p. 985.)

Yoshioka was correct. The long history of the Financial Responsibility Laws in California gave Day more than adequate notice that driving without liability insurance was prohibited. Under these circumstances, Day could not have relied to his detriment on the former law. As the Court explained in the drunk-driving context:

> "[T]he increased liability is merely a change in the remedy for enforcing a defendant's obligation to refrain from drunk

> driving, not a change in the nature of the obligation itself. Defendant undoubtedly had fair warning that his conduct—driving while intoxicated—was prohibited. Thus, we must reject defendant's assertion that it would be unfair to allow the [increased penalty] to be retroactively applied in this case." (*Peterson v. Superior Court, supra,* 31 Cal.3d at p. 162.)

The Court's analysis in *Peterson* applies with equal force here to compel the conclusion that Day could not have made the decision to drive without insurance in legitimate reliance on the former law. As was true in *Peterson*, the change in the law effected by Proposition 213 was "merely a change in the remedy for enforcing [Day's] obligation" to refrain from driving without insurance, not a change in the nature of the obligation itself. Since Day had fair warning that his conduct was prohibited, he could not legitimately have relied on the former law and it is not unfair to allow Proposition 213 to be applied retroactively to him.

None of the cases that Day cites (AOB 16) support a contrary conclusion. Indeed, each of the cases that he cites—*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, *Gutierrez v. De Lara* (1987) 188 Cal.App.3d 1575 and *Hughes Aircraft Co. v. United States* (1997) 520 U.S. 939 [138 L.Ed.2d 135, 117 S.Ct. 1871]—discusses the retroactivity of statutes that, unlike Proposition 213, were not expressly retroactive in effect. (See *Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1193-1194 ["The drafters of the initiative measure in question . . . did not include any language in the initiative indicating that the measure was to apply retroactively to causes of action that had already accrued"]; *Gutierrez v. De Lara, supra,* 188 Cal.App.3d at p. 1580 ["There is no express provision in

Vehicle Code section 17200 regarding retroactive operation. Further, there is nothing in the wording of section 17200 which would suggest that the Legislature intended that it be applied retroactively."]; *Hughes Aircraft Co. v. United States, supra,* 117 S.Ct. at p. 1876 ["Nothing in the 1986 amendment [to the federal False Claims Act] evidences a clear intent by Congress that it be applied retroactively, and no one suggests otherwise."].) These cases thus are irrelevant to Day's constitutional claims, because in each case the court's holding is based not on due process concerns, but rather on an interpretation of the legislature's intent. As the California Supreme Court has explained:

> "[B]efore reaching any constitutional question we must determine whether, as a matter of statutory interpretation, [a statute] should properly be construed as prospective or retroactive. *If as a matter of statutory interpretation, the provision is prospective, no constitutional question is presented.*" (*Evangelatos, supra,* 44 Cal.3d at p. 1206, emphasis added.)

(See also *Gutierrez, supra,* 188 Cal.App.3d at p. 1580; *Hughes Aircraft, supra,* 117 S.Ct. at pp. 1878-1879.)

Because, therefore, none of the cases on which Day relies reached the constitutional questions presented here, they are irrelevant to the present analysis.

Day's suggestion that retroactively applying Proposition 213 to him is unfair because he relied on the former law in "enter[ing] into a settlement agreement with the driver of the car which struck him" (AOB 15) also must be rejected. As the settlement apparently was entered before Proposition 213 was passed, it must have been based on the parties' expectation that Day would recover both economic and noneconomic damages if he

prevailed at trial. The settlement thus was likely *greater*—perhaps significantly so—than it would have been after Proposition 213's passage. Under these circumstances, Proposition 213 can hardly be said to have attached "'a new disability, in respect to transactions or considerations already passed.'" (AOB 15.)

Moreover, Day could not legitimately have expected to recover from the City the portion of his noneconomic damages for which the driver was responsible. Since 1986, when the voters approved Proposition 51 (the "Fair Responsibility Act of 1986"), a tortfeasor's liability for noneconomic damages has been limited to the proportion of such damages equal to the tortfeasor's own percentage of fault. (Civ. Code, §§ 1431, 1431.5.) Thus, Day's expectations regarding his ability to recover noneconomic damages from the City should have had no effect on the noneconomic damages that he was willing to accept from the driver who hit him.

3. The Balance Of Factors Favors Retroactive Application Of Proposition 213.

The foregoing demonstrates that retroactive application of Proposition 213 serves three important state interests: restoring balance to the justice system, reducing automobile insurance rates, and encouraging compliance with California's Financial Responsibility Law. Moreover, Day could not legitimately have relied on the former law in deciding to drive without insurance. Therefore, retroactive application of Proposition 213 does not violate his right to due process.

C. Day Fails To Demonstrate Either Legal Or Factual Support For His Due Process Claim.

1. The Alleged "Punitive" Effect of Retroactively Applying Proposition 213 Is Irrelevant To The Due Process Analysis.

Day suggests on pages 7-11 of his opening brief that retroactive application of a statutory amendment raises special due process concerns when the amendment is "punitive" in effect. (AOB 7-11 ["Analysis of Proposition 213's retroactivity as a mere change in remedy or in the measure of damages is inadequate, for the measure is quite explicitly punitive."].) However, none of the cases that he cites—nor any other cases of which the City is aware—either support this assertion or suggest that the due process implications of retroactively applying Proposition 213 are properly analyzed under any test other than the one discussed above.

Cases applying the ex post facto clause. Several of the cases that Day cites—*Wilke & Holzheiser, Inc. v. Depart. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, *Weaver v. Graham* (1981) 450 U.S. 24 [67 L.Ed.2d 17, 101 S.Ct. 960], and *In re Paez* (1983) 148 Cal.App.3d 919—discuss the *ex post facto* clause rather than the due process clause.[6] These cases are irrelevant to the present case because the *ex post facto* clause does not apply to civil cases. (See *Peterson v. Superior Court, supra,* 31 Cal.3d at pp. 160-161 [holding that the imposition of a civil penalty does not implicate the *ex post facto* clause].) Moreover, a statute may violate the *ex post facto* clause without violating due process, because while "evaluating

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[6] Moreover, *In Re Paez* was explicitly overruled by the California Supreme Court *In Re Ramirez* (1985) 39 Cal.3d 931, 938.

whether a right has vested is important for claims under the . . . Due Process Clause[]," "a law need not impair a 'vested right' to violate the ex post facto prohibition." (*Weaver v. Graham, supra,* 459 U.S. at pp. 30-31.) The U.S. Supreme Court has explained:

> "Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. [Citation.] The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." (*Ibid.*)

Thus, because the holdings of *Wilke, Weaver* and *In re Paez* all rely on the ex post facto clause, they are inapplicable to Day's due process challenge to Proposition 213.

Cases applying the "presumption against retroactivity." Several other cases on which Day relies are inapplicable to the present case because their holdings are grounded in a "presumption against retroactivity"—a judicial presumption that, *in the absence of statutory language to the contrary*, statutes are intended to operate prospectively only—rather than on a conclusion that retroactive application violates due process. These cases—*In re Cindy B.* (1987) 192 Cal.App.3d 771, 780-781, *Landgraf v. USI Film Products* (1994) 511 U.S. 244 [128 L.Ed.2d 229, 114 S.Ct. 1483, 1496], *Gutierrez v. De Lara* (1987) 188 Cal.App.3d 1575, and *Tapia v.*

Superior Court (1991) 53 Cal.3d 282—are irrelevant to the constitutionality of Proposition 213, because the presumption against retroactivity "is dispositive until such time as other evidence permits us to deduce the Legislature's intent, and is completely irrelevant thereafter." (*In re Marriage of Bouquet, supra,* 16 Cal.3d 583 at p. 591, fn. 6.)

Cases upholding retroactive application of changes in the law. One case cited by Day—*Peterson v. Superior Court, supra,* 31 Cal.3d 147—directly undercuts Day's position, because it holds that retroactive application of a legal rule permitting plaintiffs injured by drunk drivers to recover punitive damages did *not* violate due process. (*Id.* at p. 150.) The Court explained that, although retroactive application of the change increased the penalty for past action, it nonetheless was permissible because the defendant had ample warning that his conduct was prohibited. (*Id.* at pp. 161-162.)

Cases addressing issues other than retroactivity. The other cases discussed by Day do not discuss retroactivity at all or are otherwise irrelevant to Day's due process claim:

BMW of North America, Inc. v. Gore (1996) 517 U.S. 559 [134 L.Ed.2d 809, 116 S.Ct. 1589] concerned a substantive due process challenge to a $2 million punitive damage award. The constitutional issues raised in *BMW* are wholly different than those raised here because *BMW* addressed the imposition of a penalty, while the present case addresses a limitation on plaintiff's recovery. *BMW* is thus distinguishable from the present case for the reasons discussed *infra* at pages 28-29.

Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal.4th 520 did not address the retroactive application of a statute, but rather considered when a cause of action for injuries suffered as a result of exposure to asbestos "accrues." The language quoted by Day—"the relevant inquiry is

not necessarily when the defendant's wrongful conduct occurred but whether the new law attaches new legal consequences to 'events completed' before its enactment" (*id.* at p. 536, fn. 6)—thus pertained to the accrual of a cause of action for a latent injury, not retroactivity. The case has no application to the present question.

Bennett v. Bodily (1989) 211 Cal.App.3d 133 addressed the constitutionality of Vehicle Code § 17200, which automatically reduced a judgment or settlement due to an uninsured motorist in the amount paid to the insured driver by his insurance company. Because Vehicle Code § 17200 eliminated some plaintiffs' recovery *entirely*, it implicated wholly different constitutional concerns than those implicated by Proposition 213. (See *Tulley v. Tranor, supra*, 53 Cal. at pp. 279-280 [holding that, while a statutory enactment that deprived an injured party of "every means of redress" may violate due process, an enactment that merely reduced the plaintiff's recovery does not].)

The cases cited by Day thus do not suggest, as he claims, that retroactive application of a statute raises special due process concerns when the statute is "punitive" in effect.

2. Proposition 213 Does Not Impose An "Arbitrary and Excessive Penalty" On Uninsured Drivers.

Day also argues that Proposition 213 is unconstitutional because it imposes a "penalty" against uninsured drivers that is "arbitrary and excessive." (AOB 24-28.) But all of the cases on which Day relies differ from the present case because they concern impositions of fines, not

limitations on remedies. As such, they implicate wholly different due process concerns and have no bearing on the present case.

The cases cited by Day demonstrate that the courts have occasionally held unconstitutional fines or jail terms that were found to be overly severe. (See AOB 24-28.) But the courts have not applied this analysis to limitations on remedies, and indeed have upheld other legislative limitations on recovery comparable to those imposed by Proposition 213. The clearest example of this is in cases addressing the constitutionality of the Medical Injury Compensation Reform Act (MICRA). MICRA caps medical malpractice awards for noneconomic damages at $250,000, *regardless of the noneconomic damages actually suffered by the plaintiff.* (See Civ. Code, § 3333.2.) Like Proposition 213, MICRA thus "falls more heavily on those with the most serious injuries." (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at p. 162). Despite this disparity in MICRA's effect, the California Supreme Court repeatedly has held MICRA constitutional. (*Id.* at pp. 162-163 ["Just as the complete elimination of a cause of action has never been viewed as invidiously discriminating within the class of victims who have lost the right to sue, the $250,000 limit—which applies to all malpractice victims—does not amount to an unconstitutional discrimination."]; see also *American Bank & Trust Co. v. Community Hospital, supra,* 36 Cal.3d at pp. 370-374 [same result].)

The Court's analyses in *Fein* and *American Bank & Trust Co.* make clear that the extent to which a statute diminishes a plaintiff's recovery is irrelevant to the constitutionality of the statute. Day's contention that Proposition 213 violates due process because it imposes an "excessive penalty" must be rejected.

3. Proposition 213 Allowed Day Adequate Time To Bring His Case To Trial.

Day's contention that Proposition 213 violates due process because it allowed him inadequate time to bring his case to trial also must be rejected. Citing *Aronson v. Superior Court* (1987) 191 Cal.App.3d 294, Day suggests that a statutory change in remedy cannot be applied retroactively unless it "leave[s] plaintiffs a reasonable amount of time in which to file suit." (AOB 29.) But while due process requires that a plaintiff be given an adequate time to file suit before his cause of action is *eliminated entirely* (*Aronson, supra,* 191 Cal.App.3d at p. 297), "no principle of constitutional law . . . is violated by a [retroactive] *change* in" the measure of damages that a plaintiff may recover (*Tulley v. Tranor, supra,* 53 Cal. at p. 280). Thus, due process does not require that Day be allowed a "reasonable time," or any time at all, in which to take advantage of the former law.

Moreover, although nearly two months passed between the passage of Proposition 213 and the date on which it became effective, there simply is no evidence in the record that Day made any attempt to bring his case to trial within this window. And, while Day asserts that the trial was continued due to the unavailability of courtrooms, he offers no evidence in support of this assertion. His "fairness" claim should be rejected.

II.

PROPOSITION 213 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Because Day Raises An Equal Protection Challenge For The First Time On Appeal, The Court Should Not Consider It.

In civil cases, constitutional questions not raised in the trial court are waived. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1485-1486; *Alderette v. Department of Motor Vehicles* (1982) 135 Cal.App.3d 174, 176, fn. 2.) Because Day did not raise an equal protection challenge to Proposition 213 in the trial court (see AA 64-73), this challenge is not properly before this Court on appeal.

B. Proposition 213 Does Not Violate The Equal Protection Clause.

1. Proposition 213 Is Rationally Related To A Legitimate State Purpose.

Courts review legislative classifications among personal injury plaintiffs under "the traditional 'rational relationship' standard." (*American Bank & Trust Co. v. Community Hospital, supra*, 36 Cal.3d at p. 373, fn.12; *Quackenbush v. Superior Court, supra,* 60 Cal.App.4th at p. 466.) This standard requires that courts uphold legislation that "bear[s] some rational relationship to a conceivable legitimate state purpose.'" (*Anacker v. Sillas* (1976) 65 Cal.App.3d 416, 423.) In other words, although courts should

not "invent[] fictitious purposes that could not have been within the contemplation of the Legislature," neither may they "strike down a statute simply because [they] disagree with the wisdom of the law or because [they] believe that there is a fairer method for dealing with the problem." (*Fein v. Permanente Medical Group, supra*, 38 Cal.3d at p. 163.)

Day suggests that Proposition 213 violates the equal protection clause because it treats uninsured drivers more severely than it does "persons who drive in unsafe vehicles or run red lights." (AOB 36.) But the California Supreme Court has held repeatedly that "the equal protection clause does not prohibit a Legislature from implementing a reform measure 'one step at a time' or prevent it 'from striking the evil where it is most felt.'" (*American Bank & Trust Co., supra*, 36 Cal.3d at p. 371, quoting *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 489 [99 L. Ed. 563, 75 S.Ct. 461] and *Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 132.) On the basis of this analysis, the Court concluded that MICRA does not violate the equal protection clause, although it withholds from victims of malpractice various benefits available to those who suffer negligently-inflicted injuries outside of the medical malpractice context:

> "It is clear that the Legislature . . . could rationally conclude from the information before it that the high costs in this particular area posed special problems with respect to the continued availability of adequate insurance coverage and adequate medical care and could fashion remedies—directed to the medical malpractice context—to meet these problems. . . . Since there was a rational and legitimate basis for the Legislature's decision to attempt to reduce insurance costs in the medical malpractice area and since the provisions of [MICRA] are rationally related to that objective, the

> Legislature did not violate equal protection principles in limiting [MICRA's] application to medical malpractice actions." (*American Bank & Trust Co., supra*, 36 Cal.3d at pp. 372-373.)

(See also *Fein v. Permanente Medical Group, supra,* 38 Cal.3d at pp. 161-164 [rejecting an equal protection challenge to another provision of MICRA, which was asserted to "impermissibly discriminate[] between medical malpractice victims and other tort victims . . . and [to] improperly discriminate[] within the class of medical malpractice victims, denying a 'complete' recovery of damages only to those malpractice plaintiffs with noneconomic damages exceeding $250,000"].)

The Court's analyses in *American Bank & Trust Co.* and *Fein* are dispositive of the present case. Like MICRA, Proposition 213 was passed in part to respond to an "insurance premium crisis" brought about as insured motorists were forced to pay "skyrocketing" premiums to cover uninsured motorists. (*Yoshioka, supra,* 58 Cal.App.4th at pp. 983-984; see also Ballot Pamp., *supra,* at p. 50.) Under these circumstances, the electorate's decision to exclude from Proposition 213's coverage "persons who drive in unsafe vehicles or run red lights" (AOB 36) was not an irrational one. To the contrary, it is closely related to the electorate's goals of reducing insurance premiums and restoring balance to the justice system. It thus satisfies the requirements of the equal protection clause. As the court explained in *Quackenbush v. Superior Court, supra:*

> "Proposition 213's primary classification was a division between people who obey the law by purchasing automobile insurance . . . and the [] people who [do not]. [Appellant] cannot reasonably argue that, when allocating the pool of insurance proceeds among members of these two groups, it is

> unfair or irrational for the first group to be relieved of the obligation to pay insurance rates determined in part by the need to pay noneconomic damages . . . to the second group." (*Quackenbush, supra,* 60 Cal.App.4th at p. 466.)

Day also urges that Proposition 213 violates the equal protection clause because it treats uninsured drivers differently than it treats fleeing felons or drivers under the influence of alcohol or drugs. (AOB 31-32.) This argument was rejected by the *Quackenbush* court, which concluded that Proposition 213 passed constitutional muster so long as its "primary classification," between drivers who obey the laws and those who do not, was rationally related to a legitimate government purpose:

> "[T]he superior court directed its attention to perceived inequities in Proposition 213's secondary classification scheme . . . [:] the differences in treatment between uninsured owners and drivers, the perceived advantages for felons and drunk drivers who avoid conviction, and the prospect that an innocent uninsured motorist would be unable to recover from a wealthy uninsured tortfeasor. [Appellant] suggests that each of these distinctions or anomalies must be shown to be rationally related to the primary purposes of Proposition 213. [¶] We disagree. The secondary classification scheme addressed secondary objectives, balancing rights among members of the disfavored groups . . . . It reasonably accomplished these objectives and did not interfere with accomplishment of the primary objectives of the legislation. It was required to do no more." (*Id.* at pp. 466-467.)

Quackenbush thus holds that, so long as Proposition 213's primary division between people who obey the laws and people who do not is rationally related to the legitimate government goals of reducing mandatory insurance rates and restoring balance to the justice system, its "secondary classifications" are not relevant to the constitutional inquiry. But even if this Court were to apply a different standard than did the *Quackenbush* court, it nonetheless would have to conclude that Proposition 213 is constitutional, because each of the alleged "disparities" that Day identifies is rationally related to a legitimate government purpose.

(1) *Fleeing felons are denied recovery under Proposition 213 only if their injuries were proximately caused by their felony or flight, while uninsured drivers are denied recovery in any action to recover damages "arising out of the operation or use of a motor vehicle"* (AOB 31-32): According to the ballot arguments in favor of Proposition 213, a primary purpose of Proposition 213 was to "fix a system that rewards people who break the law" by limiting the damages recoverable by people injured in the course of violating the law. (See Ballot Pamp., *supra*, p. 50.) Proposition 213 is narrowly tailored to achieving this purpose: When an individual violates the law by operating a motor vehicle either without insurance or while under the influence of alcohol or drugs, Proposition 213 limits recovery for injuries arising out of the use of the motor vehicle; when an individual violates the law by committing a felony, Proposition 213 limits recovery for injuries arising out of the commission of the felony. The "disparity" identified by Day thus is an example of Proposition 213's careful tailoring to the disparate behavior it addresses, not a failure to provide equal protection of the law.

(2) *An uninsured owner of a vehicle who is injured by a drunk driver may recover economic and noneconomic damages, while an*

uninsured driver of a vehicle may not (AOB 32): Driving without insurance is prohibited by California law; owning an uninsured vehicle is not. (Veh. Code, §§ 4000.37, 4604.) Since uninsured drivers and uninsured owners therefore are not similarly situated under California law, subjecting uninsured drivers to legal consequences to which uninsured owners are not subjected is not a violation of the equal protection clause. (See, e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243 [no equal protection violation when differently-situated parties are treated differently]; *In re Randy J.* (1994) 22 Cal.App.4th 1497, 1507 [same].) Moreover, such "disparate treatment" is rationally related to the legitimate government purpose of "fix[ing] a system that rewards people *who break the law*" because it falls more heavily on those that break the law than those who do not.

(3) *Felons and drunk drivers are denied recovery under Proposition 213 only upon a criminal conviction, while uninsured drivers are denied recovery without any additional process* (AOB 32): Consistent with its stated purpose to "fix a system that rewards people who break the law," Proposition 213 requires that a court find that one of the laws enumerated in the initiative has been violated before a damage award may be reduced. In the case of drunk driving or the commission of a felony, "instead of creating its own definition of a felon or a drunk driver and requiring a separate determination of guilt during the personal injury case, Proposition 213 reasonably premised membership in each group upon a criminal conviction." (*Quackenbush v. Superior Court, supra,* 160 Cal.App.4th at p. 467.) In the case of driving without insurance, "[a]lthough the statutes do not establish procedures for making this determination, courts may use their normal *in limine* or trial procedures to resolve the question for individual plaintiffs." (*Id.* at p. 468.) Thus, while the procedures established to

determine whether or not a law has been violated are different, in all cases plaintiffs are "provid[ed] an opportunity to contest the conditions leading to loss." (*Ibid.*)

(4) *Drivers who injure uninsured motorists are immune from liability even for reckless or intentional acts, while drivers who injure fleeing felons are immune only for damages caused by negligence* (AOB 32): By taking this provision out of context, Day suggests that Proposition 213 treats uninsured motorists more severely than it treats fleeing felons. In fact, exactly the opposite is true. While Proposition 213 denies uninsured motorists recovery for noneconomic damages, it permits them to recover all of their economic damages. Fleeing felons are much more limited in their recovery, as they generally are denied both noneconomic *and* economic damages. The only exception to this nearly total limitation on damages is that highlighted by Day: a fleeing felon may recover losses incurred as a result of someone's intentional actions, "for instance those resulting from the use of 'excessive force' during an arrest." (Ballot Pamp., *supra,* p. 49.) This alleged "disparity" reflects a rational judgment by the voters that while felons should not ordinarily be permitted to recover any damages for injuries incurred while committing a crime or fleeing a crime scene, a different rule is appropriate when a felon is the victim of excessive brutality during an arrest. Since uninsured motorists are much less likely than felons to be the victim of police brutality, limiting this exception to felons does not constitute a violation of equal protection.[7]

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[7] Day also suggests that the statute is unconstitutional because it applies to all uninsured drivers, "regardless of whether the driver was even aware that the car was uninsured." (AOB 33.) As there is no evidence in the record that Day was not aware that his motorcycle was uninsured, this issue is not properly before the court.

Thus, each of the distinctions drawn by Proposition 213 is rationally related to a legitimate government purpose.[8]

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[8] For this reason, the present case is distinguishable from the cases cited by Day, in which the distinctions drawn by various pieces of legislation were not rationally related to the purposes of the legislation. For example, in *Lindsey v. Normet* (1972) 405 U.S. 56 [31 L.Ed.2d 36, 92 S.Ct. 862], the Court struck on equal protection grounds a portion of an unlawful detainer statute that required a tenant appealing an eviction order to post a larger bond than was required of any other appellant. Although the Court recognized that the state had an interest in insuring that appellants post adequate security, it held that the state had failed to demonstrate that greater security was required in the case of unlawful detainer appeals than in other kinds of appeals. Thus, the Court concluded that the bond requirement was not rationally related to a legitimate government purpose. (*Id.* at p. 77.)

Similarly in *Rinaldi v. Yeager* (1966) 384 U.S. 305 [16 L.Ed.2d 577, 86 S.Ct. 1497], the court held unconstitutional a state statute that required an indigent convict to reimburse the state for the cost of the transcript of trial court proceedings necessary to the convict's appeal, but required no such payment from an indigent defendant who was fined, given a suspended sentence, or placed on probation. "The Equal Protection Clause . . . require[s] that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made' . . . . We may assume that a Legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefitted from county expenditures. To fasten a financial burden only upon those unsuccessful litigants who are confined in state institutions, however, is to make an invidious discrimination[,] . . . since it bears no relationship whatever to the purpose of the repayment provision." (*Id.* at p. 309.)

And, in *Glona v. American Guarantee Co.* (1968) 391 U.S. 73 [20 L.Ed.2d. 441, 88 S.Ct. 1515], the Court held that a wrongful death statute that denied a cause of action to parents of illegitimate offspring violated equal protection because the statute was not rationally related to the state goal of discouraging illegitimacy. "[W]e see no possible rational basis [citation] for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served." (*Id.* at p. 75.)

2. Proposition 213 Provides Uninsured Motorists An Adequate Opportunity To Present "Explanations Or Excuses."

Day also argues that Proposition 213 violates the equal protection clause because it "allows no explanations or excuses, and seems to allow no opportunity for proof of inability to purchase insurance or other good faith." (AOB 37.) This argument was considered and rejected by the *Quackenbush* court, which concluded that Proposition 213 gives uninsured motorists an adequate opportunity to contest the conditions leading to loss. (*Quackenbush v. Superior Court, supra,* 60 Cal.App.4th at pp. 467-468.)

Quackenbush distinguished Proposition 213 from the statutory scheme challenged in *Bennett v. Bodily, supra,* 211 Cal.App.3d 133 (discussed by Day at AOB 37), which required that an uninsured plaintiff's recovery from a negligent defendant be automatically reduced in the amount that the defendant received from his or her insurer. (*Quackenbush, supra,* 60 Cal.App.4th at pp. 467-468; *Bennett, supra,* 211 Cal.App.3d at p. 139.) The *Bennett* court found this scheme to violate due process because it reduced a plaintiff's recovery in the amount that the defendant was "entitled to recover" from his insurer, but did not allow the plaintiff an opportunity to participate in the determination of the amount to which defendant was "entitled." (*Id.* at p. 142.) "Without notice and opportunity to present evidence on the issues of the uninsured's liability, the insured's comparative negligence, and the amount of the insured's damages, before an impartial tribunal, there is an absolute denial of due process." (*Ibid.*)

The *Quackenbush* court concluded that, in contrast to that statutory scheme, Proposition 213 afforded plaintiffs an adequate opportunity to present evidence on the issues relevant to their recovery. The court

explained that under Proposition 213, proof of insurance or financial responsibility is the determinative factor for recovering noneconomic damages. Although Proposition 213 does not establish procedures for making this determination, "courts may use their normal in limine or trial procedures to resolve the question for individual plaintiffs." Since an injured plaintiff therefore has a forum for proving compliance with financial responsibility laws and avoiding Proposition 213, "Proposition 213 does not cause a forfeiture without providing an opportunity to contest the conditions leading to loss." (*Quackenbush, supra,* 60 Cal.App.4th at p. 468.)

Day's suggestion that Proposition 213 must *also* allow a plaintiff to demonstrate his or her inability to purchase insurance is wholly without legal support. Unlike the penal statutes discussed in *Bearden v. Georgia* (1983) 461 U.S. 660 [76 L.Ed.2d 221, 103 S.Ct. 2064] and *Williams v. Illinois* (1970) 399 U.S. 235 [26 L.Ed.2d 586, 90 S.Ct. 2018], Proposition 213 does not penalize an individual for failing to meet his financial obligations; rather, it penalizes him for *choosing to drive* without having met the financial obligations required of all drivers. It thus does not subject him to the kind of automatic penalty held unconstitutional in *Bearden* and *Williams*.

III.

PROPOSITION 213 APPLIES TO GOVERNMENTAL LIABILITY BASED UPON NUISANCE OR THE DANGEROUS CONDITION OF PUBLIC PROPERTY.

Day's final argument, that Proposition 213 does not apply to governmental liability based upon nuisance or the dangerous condition of

public property, must also be rejected, because it is wholly unsupported by the language of the statute and its legislative history.

Initiative-based statutes are subject to the same rules of construction applied to statutes generally. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.) In interpreting a statute, "a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import." (*Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 495.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the [lawmakers]." (*Cabral v. Los Angeles County Metropolitan Transportation Authority, supra,* 66 Cal.App.4th at p. 912, internal quotations omitted.) If the language of the statute is not clear, "'[b]oth the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.'" (*Ibid.*)

Initiative ballot arguments are considered the equivalent of the legislative history of a legislative enactment. (*Kidd v. State of California* (1998) 62 Cal.App.4th 386, 407, fn. 7.) To ascertain the intent of the electorate it is appropriate to consider the official statements made to the voters in connection with the proposition. (*Diamond International Corp. v. Boas* (1979) 92 Cal.App.3d 1015, 1034.)

The construction of a statute is a question of law that the court of appeal reviews de novo. (*Campbell, supra,* 33 Cal.App.4th at p. 493.)

A. The Text Of Proposition 213 Is Inconsistent With Plaintiff's Assertion That It Applies Only To Cases Of Vehicular Negligence.

Day's argument that Proposition 213 should not apply to governmental liability based upon nuisance or the dangerous condition of public property finds no support in the text of the initiative. The portion of Proposition 213 applicable to uninsured motorists (codified as Civil Code, § 3333.4) is expansively worded, reducing a plaintiff's recovery in "*any action* to recover damages *arising out of the use or operation of a motor vehicle.*" By its plain language, then, Civil Code section 3333.4 applies without exception to *all actions* for damages, of which actions for nuisance or for the dangerous condition of public property are a subset.

This interpretation is strengthened by a comparison of this language to the portion of Proposition 213 applicable to felons, codified as Civil Code section 3333.3. That provision applies more narrowly, to "any action for damages *based on negligence*." Interpreting the uninsured motorist portion of Proposition 213 to apply only to vehicular negligence renders surplusage the specific reference to negligence in the portion of the initiative applicable to felons; it thus runs afoul of the well-settled rule of statutory interpretation that "when two statutes touch upon a common subject, we must construe them in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage." (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476, internal quotations omitted.)

The text of Proposition 213 is also inconsistent with Day's suggestion that his action does not "aris[e] out of the use or operation of a motor vehicle." (AOB 44.) While Day urges that this phrase may be

ambiguous in some contexts, he provides no support for his suggestion that injuries resulting from driving a motorcycle do not "aris[e] out of the use or operation of a motor vehicle." Moreover, his narrow interpretation of the relevant language is inconsistent with the very broad interpretation given it by the courts:

> "*Although driving is included within the concepts of operation and use of a vehicle, operation is a broader concept than driving* and does not require that the vehicle be in motion or even have the engine running. Operation includes stopping, parking on the highway, and other acts fairly regarded as a necessary incident to the driving of the vehicle. Operation of a motor vehicle includes opening the driver's door of a parked vehicle to exit, accidentally striking a passing bicyclist. Use is an even broader concept than operation. It extends to any activity utilizing the vehicle. Putting chains on a stopped vehicle constitutes a use of the vehicle. So does parking, leaving the doors open, and failing to set the parking brake. Loading and unloading a vehicle are uses of the vehicle." (*Cabral v. Los Angeles County Metropolitan Transportation Authority, supra,* 66 Cal.App.4th at pp. 913-914, internal citations omitted.)

Based upon this analysis, the Second District concluded that Proposition 213 prevented an uninsured driver from recovering noneconomic damages for injuries suffered when a bus collided with his parked car. (*Id.* at p. 914 ["We conclude [that] plaintiff's action in opening his car door to exit is part of the 'operation' or 'use' of his car within the meaning of Civil Code section 3333.4."].) Given the expansiveness with

which the phrase "arising out of the use or operation of a motor vehicle" has been interpreted, it is clear that driving must fall within it.

B. The Legislative History of Proposition 213 Is Inconsistent With Day's Assertion That It Applies Only To Cases Of Vehicular Negligence.

Day argues that, notwithstanding its plain language, Proposition 213 is inapplicable to his action against the City because applying it to this action does not serve the voters' goal of reducing automobile insurance premiums. (AOB 39-40.) But reducing insurance premiums was only one of the three goals identified in the ballot materials. And the goal of "restoring balance to our justice system" is as well served by applying Proposition 213 to Day's action against the City as by applying it to a negligence action against another driver. As *Yoshioka* explained:

> "[T]he interest in restoring balance to our justice system includes such interests in decreasing the number of lawsuits, reducing annual court-related costs to state and local governments, increasing the costs of drunk driving and disobeying California's Financial Responsibility Law, curtailing commission of felonies and avoiding unreasonable damages being awarded to the uninsured." (*Yoshioka v. Superior Court, supra,* 58 Cal.App.4th at p. 983.)

Each of these goals—decreasing the total number of lawsuits, reducing court costs, increasing the costs of disobeying California's Financial Responsibility Law, and avoiding unreasonable damages being awarded to the uninsured—is achieved by applying Proposition 213 to actions against

municipalities. Thus, applying Proposition 213 to this case is necessary if the voters' objectives are to be realized fully.

Moreover, the Legislative Analyst's Analysis of Proposition 213 makes it clear that the proposition was *specifically intended* to reduce the size of damage awards recoverable against government entities, as well as against individuals. The Legislative Analyst explained that under existing law, "someone who has suffered an injury in a car accident may sue the person, business, *or government* at fault for the injury in order to recover related losses." (Ballot Pamp., *supra*, p. 49, emphasis added.) Proposition 213 would change existing law, the Legislative Analyst explained, to prohibit an uninsured driver's recovery of noneconomic losses. (*Ibid.*) These restrictions "would . . . result in fewer lawsuits filed against state and local governments" and thus in "unknown savings to state and local governments as a result of avoiding these lawsuits." (*Ibid.*) Thus, actions against government entities fall within the clear intent of Proposition 213.

Finally, none of the ballot materials suggest, as Day asserts, that Proposition 213 would apply only to "incidents where defendant's negligent operation of a vehicle is the basis of liability." (AOB 41.) The "Official Summary" of Proposition 213 prepared by the Attorney General explains that Proposition 213 "[d]enies recovery for noneconomic damages (e.g., pain, suffering, disfigurement) to drunk drivers, if subsequently convicted, and to uninsured motorists who were injured while operating a vehicle." (Ballot Pamp., *supra,* p. 48.) The focus of the Official Summary, then, is the *plaintiff's* actions, rather than the defendant's. The Argument In Favor of Proposition 213 has a similar focus, asserting that "Proposition 213 says people who break the law should not be rewarded, while law abiding citizens pick up the tab." (*Id.* at p. 50.) The Argument In Favor of Proposition 213, like the Official Summary, contains no reference to

vehicular negligence. (*Ibid.*) The ballot materials therefore provide no indication that the voters intended Proposition 213 to apply only to this limited category of actions.[9]

There thus is no suggestion in either the language of Proposition 213 or in its legislative history that Proposition 213 does not apply to governmental liability based on nuisance or the dangerous condition of public property. Therefore, Day's challenge to its application in this case must be rejected.

CONCLUSION

The courts of this state consistently have found Proposition 213 constitutional, both in its prospective and retrospective application. This result is clearly correct. Because a plaintiff has no vested right in a particular measure of damages, a legislative reduction of a plaintiff's recovery for tort damages, even if retroactively applied, cannot violate due process. Nor can such a reduction in recovery violate equal protection, where, as here, the reduction is rationally related to a legitimate government

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[9] *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, cited by Day, does not suggest a different result. *Nestle* considered whether section 815 of the Government Code, which provided broad immunity to public entities "except as otherwise provided by statute," barred plaintiffs' action for nuisance against the City of Santa Monica. The Court concluded that section 815 did not bar plaintiffs' nuisance action, because section 3479 of the Civil Code provided the requisite statutory basis for nuisance actions against public entities. (*Id.* at pp. 932-937.) In other words, the Court's conclusion that section 815 did not apply to nuisance actions was based on the language of the statute itself, rather than on a conclusion that nuisance "constitute[s] an independent scheme of liability based not on fault but on the public purpose underlying those statutes." (AOB 43.) *Nestle* thus has no application to the present case.

objective. Therefore, because Proposition 213 does not violate any provision of the state or federal constitutions, and because, by its plain language, it applies to actions for both nuisance and the dangerous condition of public property, Proposition 213 was properly applied to limit Day's recovery in the present case.

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Respectfully submitted,

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