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Borrowed employee doctrine determines employer liability under LHWCA (Bybee, J.)

**Cruz v. National Steel and Shipbuilding Company**

9th Cir.; December 19, 2018; 17-55441

The court of appeals affirmed a district court judgment. The court held that the borrowed employee doctrine determines a maritime employer’s liability for an employee’s injury under the Longshore and Harbor Workers’ Compensation Act (LHWCA).

Sira Cruz worked for staffing agency Tradesmen International, Inc. Tradesmen assigned Cruz to National Steel and Shipbuilding Company (Nassco). Cruz suffered injuries to her ribs and lungs while working for Nassco. She applied for and received workers’ compensation benefits through Tradesmen. She nonetheless filed a negligence action against NASSCO, seeking damages for the same injuries.

The district court granted Nassco’s motion for summary judgment, finding it was immune from suit pursuant to the “one recovery” policy at the heart of workers’ compensation law.

The court of appeals affirmed, holding that the borrowed employee doctrine applies to employees under the LHWCA. The LHWCA establishes a mandatory framework for compensation of maritime employees. An injured employee may file a claim for workers’ compensation benefits with the Office of Workers’ Compensation Programs, which has sole authority to investigate the claim and hold a hearing, and must either reject the claim or make an award. The LHWCA fixes the amount of compensation based on the nature and extent of the injury and the employee’s weekly pay rate. When the LHWCA applies, its remedy is “exclusive and in place of all other liability of [the] employer to the employee.” In return for the guarantee of compensation, the employee surrenders common-law remedies against his or her for work-related injuries.” An employer is thus immune from any suit seeking further recovery for the same injury. Under the borrowed employee doctrine, the relationship between a borrowing employer and its borrowed employee is that of employer-employee. Here, the record established that Nassco was Cruz’s borrowing employer because her work was subject to its direction and control at all relevant times. The court further concluded that Nassco, as borrowing employer, was entitled to the same immunity as a conventional employer under the LHWCA. Accordingly, Cruz, as a borrowed employee who was fully compensated for her injury through the workers’ compensation system, had no right to further recovery for the same injury against Nassco.

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**Criminal Law**

Sentence of 15 years to life for sexual penetration of child 10 years of age or younger not cruel and/or unusual punishment (Fybel, J.)

**People v. Gomez**

C.A. 4th; December 19, 2018; G055352

The Fourth Appellate District vacated in part a judgment of sentence and otherwise affirmed. In the published portion of its opinion, the court held that a sentence of 15 years to life for the sexual penetration of a child 10 years of age or younger is not cruel and/or unusual punishment.

A jury found Pedro Gomez guilty of sexually molesting the young daughter of his live-in girlfriend. The crimes of which he was found guilty included once count of sexual penetration of a child 10 years of age or younger, in violation of Penal Code §288.7(b). The trial court sentenced Gomez to a term of 35 years to life, including an indeterminate term of 15 years to life for the violation of §288.7(b).

Gomez appealed, arguing, among other things, that his sentencing for §288.7(b) constituted cruel and unusual punishment.

The court of appeal affirmed that portion of Gomez’s sentence, holding that it did not constitute cruel and/or unusual punishment. In sentencing Gomez, the trial court found that his crimes involved “great bodily injury harm as well as the threat of future and further great bodily harm and a high degree of cruelty, and viciousness and callousness…He did threaten that he was going to hurt [the victim] or her brother if they told; that he was going to beat their mother if they told. And he molested her from the time she was little until she grew older with the progression of molestation activities that became more and more aggressive.” Regarding the victim, the trial court stated, “She was a little girl who lived in a house with him. She was alone. Physically, he was much larger, and she was too young to be able to fend him off or to even understand or be successful in escaping. She was afraid that everyone would be hurt who she loved if she were to tell, and she pretty much was isolated.” The sole factor in mitigation found by the trial court was Gomez’ lack of criminal background, which the court relied on in not imposing an aggravated term. This record failed to show that Gomez’ punishment was grossly disproportionate to the crime committed. Nor was disproportionality demonstrated by comparing Gomez’s punishment either to punishments for other crimes in this state or to punishments for similar crimes in other states. It was well within the prerogative of the Legislature to determine that sex offenses against young children are deserving of longer sentences than sex offenses against adults or non-sex offenses.
Family Law

Capping of spousal support obligation failed to account for parties’ expectation of steadily increasing income

(Dato, J.)

In re Marriage of T.C. and D.C.

C.A. 4th; December 18, 2018; D073182

The Fourth Appellate District reversed a family court order. The court held that the family court erred in capping an obligor’s spousal support obligation without taking into account the parties’ expectation, at the time they entered into their dissolution agreement, that the obligor’s income would increase annually.

In the dissolution of her marriage to D.C., T.C. agreed to pay him spousal support. The support amount was set at $850 per month, plus ten percent of any calendar year earnings received by T.C. in excess of $180,000. T.C.’s earnings the previous two years had been approximately $190,000, and in prior years had never exceeded $180,000. In 2016, two years after her divorce, T.C. got a new job paying $265,000, with the potential of an annual bonus of an additional $106,000. T.C. moved to modify her support obligation based on changed circumstances, arguing that the existing support order would result in a “windfall” to D.C. far in excess of the amount needed to maintain the standard of living he enjoyed during their marriage.

The family court agreed and capped T.C.’s “percentage” support obligation at $990 per year, regardless of her actual earnings.

The court of appeal reversed, holding that the family court properly found that T.C.’s increased income constituted changed circumstances, but erred in capping additional spousal support at pre-2016 levels. The parties’ dissolution agreements reflected their understanding that T.C.’s relatively recent earnings history included a pattern of increases, averaging 11–12 percent per year. Thus, future increases consistent with this pattern would not amount to changed circumstances sufficient to justify a modification of spousal support. Substantial evidence nonetheless supported the family court’s finding that the “dramatic” increase received by T.C. in 2016 was a changed circumstance because it fell outside the pattern of increases reasonably contemplated by the parties at the time of their agreements. As a result, modification of the “additional spousal support” component of T.C.’s support obligation was appropriate. In fashioning the modification, however, the family court failed to incorporate the parties’ demonstrated understanding that T.C. would likely receive annual increases in her earnings. It accordingly erred in failing to account for those anticipated increased, and in instead simply capping additional spousal support at pre-2016 levels.

Immigration Law

BIA’s determination that criminal offense constituted CIMT not “new rule of law” barred from retroactive application

(Wallace, J.)

Olivas-Motta v. Whitaker

9th Cir.; December 19, 2018; 14-70543

The court of appeals denied a petition for review of an order of the Board of Immigration Appeals. The court held that the BIA’s issuance of an opinion finding, for the first time, that a particular criminal offense constituted a crime involving moral turpitude (CIMT), did not constitute a new rule of law and thus could properly be applied retroactively to a case that was not yet final.

In 2009, an immigration judge (IJ) ordered Manuel Olivas-Motta’s removal because he had been convicted of two CIMTs: a 2003 Arizona conviction for facilitation to commit unlawful possession of marijuana for sale and a 2007 Arizona conviction for felony endangerment. As to the endangerment offense, the IJ determined that it was neither categorically a CIMT nor a CIMT under the modified categorical approach. However, looking to evidence beyond the record of conviction, including police reports, the IJ determined that the offense involved moral turpitude. The BIA upheld that determination.

Olivas-Motta petitioned for review of the Board’s decision. The court of appeals granted Olivas-Motta’s petition, finding that the IJ and the BIA improperly looked beyond the record of conviction in determining that Olivas-Motta’s conviction for felony endangerment constituted a CIMT. While Olivas-Motta’s petition was pending, however, the BIA published In re Leal, 26 I. & N. Dec. 20, 27 (B.I.A. 2012) (Leal I), opinion holding that felony endangerment under Arizona law was categorically a CIMT.

On remand, the BIA applied Leal I to conclude that Olivas-Motta’s crime of felony endangerment was categorically a CIMT and dismissed his appeal. Olivas-Motta again petitioned for review.

The court of appeals denied the petition, holding that the BIA properly applied Leal I in deciding Olivas-Motta’s appeal. Finding that the issuance of Leal I did not constitute a change in the law, the court concluded that it could properly be applied retroactively to Olivas-Motta’s case. Judge Watford dissented, finding the majority erred in concluding that Leal I did not constitute a “new rule” precluding retroactive application.

Insurance Litigation

Insurer did not act in bad faith in delaying payment
of uninsured motorist claims pending resolution of insured’s workers’ compensation claims (Manella, P.J.)

Case v. State Farm Mutual Automobile Insurance Co., Inc.

C.A. 2nd; November 21, 2018; B281732

The Second Appellate District affirmed a judgment. The court held that an insurer did not act in bad faith in delaying payment of an insured’s uninsured motorist claims until it was able to verify the extent to which such claims were eligible for payment through the workers’ compensation system.

Melissa Case was injured in March 2013 when she was struck by an uninsured motorist while running an errand for her employer in her personal vehicle. She submitted a workers’ compensation claim, as well as a claim to State Farm Mutual Automobile Insurance Co., Inc. under her personal automobile policy. In 2014, Case submitted a demand to State Farm for payment of uninsured motorist (UM) policy benefits. When State Farm failed to pay, Case requested arbitration. In May 2015, Case sued State Farm for breach of an insurance contract and bad faith, alleging that State Farm improperly delayed arbitration and settlement of Case’s claim for UM benefits, despite her verification of a final workers’ compensation lien relating to medical expenses no later than November 2014. In September 2015, Case submitted information to State Farm showing that she had exhausted the possibility of receiving additional payments through the workers’ compensation system. In November 2015, State Farm and Case settled her claim for UM benefits for $35,000.

State Farm later moved for summary judgment, arguing that it breached neither the policy nor the implied covenant of good faith by declining to pay or arbitrate Case’s UM claim before her claim for workers’ compensation benefits had been resolved. The trial court granted summary judgment in State Farm’s favor.

The court of appeal affirmed, holding that State Farm had no obligation to pay Case’s claim before her workers’ compensation case was resolved. Under Ins. Code §11580.2(h), any loss payable under UM coverage “may be reduced...[b]y the amount paid and the present value of all amounts payable...under any workers’ compensation law...” Case’s policy contained a similar provision, stating that her UM benefits “shall be reduced by any amount paid or payable to...under any workers’ compensation, disability benefits, or similar law.” Neither §11590.2(h) nor the policy provision was limited in scope to amounts actually paid under workers’ compensation, but instead encompassed all amounts “payable” under that coverage. Both the statute and Case’s policy thus required that the loss payable by State Farm be reduced by the determinable medical expenses eligible for payment through the workers’ compensation system, regardless of whether Case had submitted a claim for them. For that reason, State Farm could not ascertain the loss payable until the amount of such expenses was known to State Farm. Accordingly, the provision authorized State Farm to request a determination regarding the extent to which her past and future medical expenses could be paid through that system. It did not act in bad faith in delaying payment until it received such a determination.

Law Firm Client Relationships

City attorney office’s violation of opposing party’s attorney-client privilege did not warrant “drastic” remedy of disqualification (Dato, J.)

City of San Diego v. Superior Court (Hoover)

C.A. 4th; December 19, 2018; D073961

The Fourth Appellate District granted a petition for writ of mandate. The court held that the San Diego city attorney’s office erred in participating in an internal affairs interview of a city detective who was involved in litigation against the city, disqualification was unwarranted.

As part of an internal affairs investigation regarding the unauthorized disclosure of a confidential police report, the San Diego Police Department questioned Detective Dana Hoover regarding the content of communications between Hoover and attorney Daniel Gilleon, who was representing her in an employment-related lawsuit against the City of San Diego. Although Hoover invoked attorney-client privilege, she was directed to answer the questions or face discipline and/or termination of employment. The interview was suspended, and later resumed with a deputy city attorney in attendance, who both observed and participated in questioning Hoover. Hoover answered the investigators’ questions regarding her communications with Gilleon.

Hoover later moved to disqualify the city attorney’s office from representing the city in her lawsuit. The trial court granted the motion, finding that the city and the city attorney’s office forced Hoover to reveal confidential attorney-client communications, and communicated with her about the subject matter of her litigation without her counsel’s consent. The city petitioned for a writ of mandate challenging that ruling.

The court of appeal granted the city’s writ petition, holding that the circumstances did not warrant the disqualification of counsel. The court agreed with the trial court that the city violated the attorney-client privilege when the investigators insisted Hoover respond to questions despite her invocation of the privilege. The deputy city attorney who attended the interview also violated the California State Bar Rules of Professional Conduct when she began questioning Hoover about her lawsuit without Gilleon’s permission. Disqualification of counsel, however, is a drastic remedy that should be ordered only where the violation of the privilege or other misconduct has a “substantial continuing effect on future judicial
was subject to USC’s policies governing fraternities and USC’s control, even though it was off-campus, because it Barenborg argued that the fraternity house was subject to status as an invitee at premises subject to USC’s control. Nonetheless had a special relationship with her based on her activity. The court rejected Barenborg’s contention that USC her injury and was not engaged in a USC educational ac
tionship. Barenborg was not a USC student at the time of
defendant has a special relationship with the plaintiff or the
court generally has no duty to protect a plaintiff from
currently, an exception exists where the defendant has a special relationship with the plaintiff or the third party. Here, however, there was no such special relationship. Barenborg was not a USC student at the time of her injury and was not engaged in a USC educational activity. The court rejected Barenborg’s contention that USC nonetheless had a special relationship with her based on her status as an invitee at premises subject to USC’s control. Barenborg argued that the fraternity house was subject to USC’s control, even though it was off-campus, because it was subject to USC’s policies governing fraternities and was monitored by USC’s public safety officers. Not so, the court found. USC did not maintain or have a nonexclusive right to use the property, and its invitees did not regularly use the property. Although USC’s policies governing use of alcohol and social events applied to the fraternity, neither those policies nor the use of USC public safety officers to enforce those policies constituted an exercise of control over the property. USC also had no special relationship with the fraternity or its members that would give rise to a duty of care owed to guests at the party.

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**Personal Injury**

University owed no duty of care to partygoer injured at off-campus fraternity party (Micon, J.)

*University of Southern California v. Superior Court (Barenborg)*

C.A. 2nd; November 27, 2018; B288180

The Second Appellate District granted a petition for writ of mandate. The court held that a university owed no duty of care to a member of the public injured at an off-campus fraternity party.

A group of University of Southern California students hosted a party at their off-campus fraternity house. They constructed a makeshift platform, some seven feet tall, for dancing. Partygoer Carson Barenborg, who was not a USC student, was dancing on the platform when another dancer bumped into her. She fell from the platform and was seriously injured. She sued USC and others for negligence, alleging that the university had a duty to protect her from an unreasonable risk of harm and breached that duty by failing to prevent or shut down the party.

The trial court denied USC’s motion for summary judgment. USC filed a petition for writ of mandate challenging that ruling.

The court of appeal granted USC’s writ petition, holding that it had no duty to protect members of the public from the conduct of a third party at an off-campus fraternity party. A defendant generally has no duty to protect a plaintiff from the conduct of third parties. An exception exists where the defendant has a special relationship with the plaintiff or the third party. Here, however, there was no such special relationship. Barenborg was not a USC student at the time of her injury and was not engaged in a USC educational activity. The court rejected Barenborg’s contention that USC nonetheless had a special relationship with her based on her status as an invitee at premises subject to USC’s control. Barenborg argued that the fraternity house was subject to USC’s control, even though it was off-campus, because it was subject to USC’s policies governing fraternities and

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**Real Estate**

Trespass to “lands...under cultivation” includes trespass to portions of property not used for cultivation (Nares, Acting P.J.)

*Hoffman v. Superior Ready Mix Concrete, L.P.*

C.A. 4th; December 19, 2018; D072929

The Fourth Appellate District affirmed a judgment. The court held that a prevailing plaintiff’s statutory right to recover attorney fees in an action to recover damages for a trespass to “lands...under cultivation” is not limited in scope to actions where the trespasser actually invades those portions of the property where plants are being grown.

Lynda Hoffman owns 28 acres of land, a portion of which is used to grow plants for an intended nursery. The property is adjacent to a 211-acre rock quarry owned by National Quarries Enterprises LLC and operated by Superior Ready Mix Concrete L.P. After Hoffman prevailed in a trespass action against National and Superior, the trial court awarded her costs as the prevailing party and attorney fees under Code of Civil Procedure §1021.9, which allows a prevailing plaintiff to recover reasonable attorney fees in any action to recover damages “to personal or real property resulting from trespassing on lands...under cultivation.”

National and Superior appealed the fee award, arguing they did not trespass onto the areas of Hoffman’s property where she was actually growing nursery plants.

The court of appeal affirmed, holding that the trial court properly applied §1021.9. The plain language of the statute does not support defendants’ argument that the trespass must occur to the specific portion of the land under cultivation. Rather, §1021.9 allows the prevailing plaintiff to recover attorney fees if the trespass caused damage to “lands...under cultivation.” Agricultural property is analogous to “commercial property,” which qualifies as such even if part of it is used for non-commercial purposes.” Had the Legislature intended to limit §1021.9’s scope to “those portions of property” under cultivation, it would have so stated.
MANUEL JESUS OLIVAS-MOTTA, AKA Manuel Jesus Olivas-Notta, Petitioner,
v. MATTHEW G. WHITAKER, Acting Attorney General, Respondent.

No. 14-70543
United States Court of Appeals for the Ninth Circuit
Agency No. A021-179-705
On Petition for Review of an Order of the Board of Immigration Appeals
Argued and Submitted September 10, 2018
San Francisco, California
Filed December 19, 2018

OPINION

W ALLACE, Circuit Judge:

An immigration judge (IJ) ordered Manuel Jesus Olivas-Motta’s removal because he had been convicted of two crimes involving moral turpitude (CIMTs). The Board of Immigration Appeals (Board) dismissed Olivas-Motta’s appeal from the IJ’s order. Olivas-Motta now petitions for review of the Board’s dismissal. We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

I.

Olivas-Motta is a citizen of Mexico who was admitted to the United States of America as a lawful permanent resident on or about October 12, 1976. He has since been convicted of two felonies. On August 11, 2003, he was convicted of facilitation to commit unlawful possession of marijuana for sale in violation of Arizona Revised Statutes §§ 13-1004, 13-3405. On November 26, 2007, he was convicted of felony endangerment under Arizona Revised Statutes § 13-1201.

On April 2, 2009, the Department of Homeland Security initiated removal proceedings against Olivas-Motta under 8 U.S.C. § 1227(a)(2)(A)(ii) as an alien convicted of two CIMTs. The IJ determined, and the parties no longer dispute, that the facilitation offense was a CIMT. As to the endangerment offense, the IJ determined that it was neither categorically a CIMT nor a CIMT under the modified categorical approach. However, the IJ examined evidence beyond the record of conviction, including police reports, and determined that the offense involved moral turpitude. The IJ then sustained the charge of removal. The Board relied on the same grounds to conclude that the endangerment offense was a CIMT and dismissed Olivas-Motta’s appeal.

Olivas-Motta petitioned for review of the Board’s decision. While the petition was pending, the Board published an opinion holding that felony endangerment under Arizona Revised Statutes § 13-1201 was categorically a CIMT. In re Leal, 26 I. & N. Dec. 20, 27 (B.I.A. 2012) (Leal I). We upheld that determination. Leal v. Holder, 771 F.3d 1140, 1148–49 (9th Cir. 2014) (Leal II). But we declined to consider Leal I’s relevance to Olivas-Motta in his first petition because the Board had not originally decided his appeal on the ground that felony endangerment was categorically a CIMT. Olivas-Motta v. Holder, 746 F.3d 907, 917 (9th Cir. 2013), as amended (April 1, 2014); see also Ali v. Holder, 637 F.3d 1025, 1029 (9th Cir. 2011) (confining our review to grounds relied upon by the Board). Instead, we granted the petition and remanded because “an IJ and the [Board] are confined to the record of conviction in determining whether an alien has been convicted of a CIMT.” Olivas-Motta, 746 F.3d at 908. On remand, the Board applied Leal I to conclude that felony endangerment was categorically a CIMT and dismissed Olivas-Motta’s appeal.

Olivas-Motta again petitions for review of the Board’s dismissal. He argues that the Board’s application of Leal I was impermissibly retroactive, that preclusion bars the Board from reconsidering whether felony endangerment was categorically a CIMT, and that the phrase CIMT is unconstitutionally vague.

Olivas-Motta also argues that we are not bound by Leal II because it was wrongly decided. But this panel has no power to overrule circuit precedent. Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that circuit precedent may be overturned only en banc, subject to exceptions not applicable here).

II.

We review constitutional claims and questions of law de novo. Latter-Singh v. Holder, 666 F.3d 1156, 1159 (9th Cir. 2012); see also 8 U.S.C. § 1252(a)(2)(C), (D). Whether a new agency interpretation may be applied retroactively is a question of law. See Garfias-Rodriguez v. Holder, 702 F.3d...
504, 514–15 (9th Cir. 2012) (en banc). Whether preclusion is available is also a question of law. Oyeniran v. Holder, 672 F.3d 800, 806 (9th Cir. 2012), as amended (May 3, 2012).

III.

When an agency decides to create a new rule through adjudicatory action, that new rule may apply retroactively to regulated entities. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). “[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.” Id. “If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.” Id.

We have applied this rule in the immigration context to determine whether Board decisions may apply retroactively. See, e.g., Garfias-Rodriguez, 702 F.3d at 515–23; Miguel-Miguel v. Gonzales, 500 F.3d 941, 950–53 (9th Cir. 2007). In such cases, we have relied on the five-factor test set forth in Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322, 1333 (9th Cir. 1982). Olivas-Motta argues that, in this case, the Montgomery Ward factors strongly counsel against retroactively applying Leal I to his case, and that the Board accordingly erred in concluding that Arizona felony endangerment is categorically a CIMT.

A.

As a threshold matter, we must address whether retroactivity is implicated by Leal I. The government argues that a change in law is a prerequisite to Montgomery Ward balancing, and that we should not conduct a retroactivity analysis because no change in law occurred. Olivas-Motta argues that the Montgomery Ward factors themselves account for whether a change in law has occurred, and that Montgomery Ward balancing is therefore appropriate because Leal I was decided after his guilty plea.

We conclude that a change in law must have occurred before Montgomery Ward is implicated. The requirement that the law have changed in some way is generally a settled principle of retroactivity analysis. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991) ("It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained"); Morales-Izquierdo v. Dep’t of Homeland Sec., 600 F.3d 1076, 1090 (9th Cir. 2010), overruled in part on other grounds by Garfias-Rodriguez, 702 F.3d at 516 ("Montgomery Ward and its progeny deal with the problems of retroactivity created when an agency, acting in an adjudicative capacity, so alters an existing agency-promulgated rule that it deprives a regulated party of the advance notice to conform its conduct to the rule"). It would be incongruous to apply a different rule here because the principles animating a statute’s retroactivity — “fair notice, reasonable reliance, and settled expectations” — are equally animating in Olivas-Motta’s immigration proceedings. See Vartelas v. Holder, 566 U.S. 257, 273 (2012) (quoting Landgraf v. USI Film Prod., 511 U.S. 244, 270 (1994)). Moreover, we are to adopt the rule that Montgomery Ward balancing is required regardless of whether a change in law has occurred, the mere existence of a new published decision on an issue would always trigger retroactivity analysis. This too is contrary to settled law on this issue. See Manhattan Gen. Equip. Co. v. Comm’r of Internal Revenue, 297 U.S. 129, 135 (1936) (holding that a tax regulation elaborating on a standard governed by statute “is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand”). We therefore hold that Montgomery Ward retroactivity analysis is only applicable when “an agency consciously overrules or otherwise alters its own rule or regulation,” or “expressly considers and openly departs from a circuit court decision.” Garfias-Rodriguez, 702 F.3d at 518–19.

Olivas-Motta’s primary argument against this conclusion is the language of the Montgomery Ward factors. It is true that the second Montgomery Ward factor is “whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law.” Montgomery Ward, 691 F.2d at 1333 (emphasis added) (quoting Retail, Wholesale and Dep’t Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)). This language suggests that a change in law can occur when the rule was previously unclear, and an adjudicatory decision brings clarity to the issue. But we must consider the Montgomery Ward factors in light of the general rules of retroactivity, which require a change of law. In addition, the other Montgomery Ward factors themselves contemplate a change from a “former rule” or “old standard.” See Montgomery Ward, 691 F.2d at 1333 (quoting Retail, 466 F.2d at 390). We therefore distinguish between cases where a rule, such as 8 U.S.C. § 1227(a)(2) (A)(ii), already exists, and an administrative decision simply clarifies the rule’s application, and cases where the decision itself would “take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.” Vartelas, 566 U.S. at 266 (alterations omitted) (quoting Soc’y for Propagation of Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814)). In the latter cases, the administrative decision has altered the legal consequences flowing from events and “considerations already past,” and thus changed the law. See id. (quoting Soc’y for Propagation of Gospel, 22 F. Cas. at 767). But in the former, where the adjudicatory decision does not trigger

1. Judge Watford disagrees with our analysis and would conclude that a change in law occurs when the Board’s decision was not “clearly foreshadowed.” Diss. at 22. It is true that the Supreme Court has stated that a new principle of law can be established by “deciding an issue whose resolution was not clearly foreshadowed.” Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1991). But “agency decisions are not analogous to court decisions.” Garfias-Rodriguez, 702 F.3d at 520. Chevron Oil, which dealt with court decisions, is not apposite when an agency makes an adjudicatory decision that clarifies the scope of a statute it is charged with executing.
a new obligation, impair a previously vested right, or attach
new harm, no new legal consequences flow from the deci-
sion, and retroactivity is not implicated. The second Mont-
gomery Ward factor is therefore better understood as evaluat-
ing the character of a change in law, once such a change has
occurred, rather than evaluating whether the change occurred
in the first instance.

Olivas-Motta points to language in Garfias-Rodriguez
saying that a change in law is not a prerequisite to Mont-
gomery Ward balancing. See Garfias-Rodriguez, 702 F.3d
at 516 (“Chief Judge Kozinski . . . applies retroactivity prin-
ciples to conclude that retroactivity analysis does not ap-
ply, effectively resolving the retroactivity question against
Garfias”). We do not think Garfias-Rodriguez stands for the
proposition Olivas-Motta believes it does. There was no dis-
pute in that case that the law had changed; rather, the issue
was how we should treat the unquestionable change of law
of this circuit when it was prompted by a decision of the
Board. See id. at 515–20. Garfias-Rodriguez did not hold that
Montgomery Ward balancing is required when no change in
law has taken place.

B

Applying this standard to this case, there was no change in
law. Before Olivas-Motta’s 2007 guilty plea, the Board had
never determined in a precedential opinion whether felony
endangerment in Arizona was a CIMT. The Board had only
issued unpublished decisions on the issue. See, e.g., In Re
Carlos Mario Almeraz-Hernandez, 2006 WL 3203649, at *2
(B.I.A. Sept. 6, 2006) (holding § 13-1201 is not categorically
a CIMT). Unpublished decisions are not precedential and “do
not bind future parties.” Marmolejo-Campos v. Holder, 558
F.3d 903, 909 (9th Cir. 2009).

Olivas-Motta therefore cannot argue that Leal I “attach[ed]
a new disability” to his guilty plea that did not exist at the
time he entered it. See Vartelas, 566 U.S. at 266 (quoting
Soc’y for Propagation, 22 F. Cas. at 767). Rather, 8 U.S.C. §
1227(a)(2)(A)(ii) had already created the legal consequences
of his plea, and it was merely unclear whether it would apply.
Leal I’s settling of that ambiguity did not change the law any
more than “a judicial determination construing and applying
a statute to a case in hand” would have. See Manhattan Gen.
Equiv., 297 U.S. at 135.

Olivas-Motta counters that, notwithstanding the lack of a
precedential opinion on Arizona felony endangerment, Leal
I still constituted a change in law because of broader changes
in the law of CIMTs. According to Olivas-Motta, the law
before 2008 was that a crime with a mens rea of recklessness
could not constitute a CIMT unless the offense presented an
“aggravating factor,” thus preventing Arizona endangerment
from qualifying. But after the Attorney General’s decision
in In re Silva-Trevino, 24 I. & N. 687 (A.G. 2008), argues
Olivas-Motta, the aggravating-factor requirement was abol-
ished, thus leading to the decision in Leal I.

We are not persuaded that Silva-Trevino created the change
in law identified by Olivas-Motta. As we explained in Leal
II, the aggravating-factor requirement “[w]as not due to the
reckless mens rea involved, but rather because of the under-
lying conduct; both this court and the Board have repeat-
eedly stated that simple assault is, in general, not a CIMT.”
771 F.3d at 1148. Thus, in Olivas-Motta’s cited cases, the
aggravating-factor analysis is harmonious with the Attorney
General’s later approach in Silva-Trevino.

Compare In re Fualaau, 21 I. & N. Dec. 475, 478 (B.I.A.
1996) (“In order for an assault to be considered a CIMT in this
case to be deemed a crime involving moral turpitude, the
element of a reckless state of mind must be coupled with an
offense involving the infliction of serious bodily injury” (em-
phasis added)), with Silva-Trevino, 24 I. & N. Dec. at 689 n.1
(“a crime must involve both reprehensible conduct and some
degree of scienter, whether specific intent, deliberateness,
willfulness, or recklessness” (emphasis added)). The earlier
Board cases and Silva-Trevino did not apply the aggravating-
factor requirement to all recklessness crimes, and Silva-Tre-
vino did not purport to overrule decisions holding that simple
assault is not a CIMT. See Leal II, 771 F.3d at 1148 (stating
after Silva-Trevino: “It thus follows that, in order for an as-
ault to be considered a CIMT, there must be some additional
factor involved in the specific offense to distinguish it from
generic simple assault”). As to Arizona felony endangerment
then, Silva-Trevino did not change the law.

Olivas-Motta’s argument to the contrary relies on unpub-
lished Board decisions on this matter. Olivas-Motta is correct
that unpublished Board decisions predating Silva-Trevino
relied on Fualaau to conclude that Arizona endangerment
was not a CIMT. See, e.g., Almeraz-Hernandez, 2006 WL
3203649, at *2. Olivas-Motta is also correct that Leal I cited
Silva-Trevino as the controlling framework before conclud-
ing that Arizona felony endangerment was categorically a
CIMT. 26 I. & N. Dec. at 21, 27. But once more, unpublished
decisions “do not bind future parties.” Marmolejo-Campos,
558 F.3d at 909. Olivas-Motta’s attorney may have made a
calculation that Arizona felony endangerment would not be
considered a CIMT based on unpublished decisions, but
Fualaau did not foreclose the conclusion that it was a CIMT
before Silva-Trevino, nor did Silva-Trevino require the Board
to conclude that it was a CIMT afterwards. The application of
the statute was simply unclear until Leal I, at which point the
published Board opinion resolved the issue. Put differently,
when Olivas-Motta pleaded guilty in 2007, it was possible
that his conviction would not be adjudicated a CIMT, but no
law guaranteed that. Leal I’s conclusive resolution of this
uncertainty did not create a new legal harm to Olivas-Motta
that did not already exist.

Because there was no change in the law raising retroac-
tivity concerns, the Board did not err by applying Leal I to
conclude that Arizona endangerment is a CIMT.
IV.

Preclusion prevents parties “from contesting matters that they have had a full and fair opportunity to litigate,” thus protecting “against ‘the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions.”” Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting Montana v. United States, 440 U.S. 147, 153–54 (1979)). “Under the doctrine of claim preclusion, a final judgment forecloses ‘successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.’” Id. (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)). Under the doctrine of issue preclusion, parties may not relitigate “‘an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” Id. (quoting New Hampshire, 532 U.S. at 748–49). Olivas-Motta contends that, due to both types of preclusion, the Board could not revisit on remand whether felony endangerment was categorically a CIMT, after determining initially that it was not.

A.

Before we can evaluate Olivas-Motta’s argument, we must address whether we have jurisdiction to consider it. The government argues that Olivas-Motta failed to exhaust his administrative remedies because he did not argue preclusion before the Board. Olivas-Motta responds that he could not raise preclusion because it was not implicated until the Board applied Leal I to his appeal.

We conclude that we have jurisdiction. 8 U.S.C. § 1252(d) (1) provides that a court may review a final order of removal only if “the alien has exhausted all administrative remedies available to the alien as of right.” We have held that “1252(d) (1) mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings below.” Barron v. Ashcroft, 358 F.3d 674, 678 (9th Cir. 2004). But section 1252(d)(1) by its terms limits the petitioner’s duty to “remedies available to the alien as of right.” We have thus held that we retain jurisdiction over petitions where the challenged agency action was committed by the Board after briefing was completed, because the only remaining administrative remedies for such an action were not available “as of right.” Alcaraz v. INS, 384 F.3d 1150, 1159–60 (9th Cir. 2004).

In this case, after we granted Olivas-Motta’s first petition and remanded to the Board, Olivas-Motta was never provided an opportunity to argue preclusion until the Board issued its second decision. At that point, his only remedies were discretionary, and there was no higher administrative authority to correct the supposed error. See id. A petition for review to this court was therefore proper, and section 1252(d)(1) does not divest us of jurisdiction.

B.

On the merits of Olivas-Motta’s preclusion argument, we hold there was no error. Claim preclusion requires a final judgment on the merits in a separate action. Valencia-Alvarez v. Gonzales, 469 F.3d 1319, 1323–24 (9th Cir. 2006). By granting Olivas-Motta’s petition for review in 2013, his original action continued, and no separate action commenced. See id. at 1324. Similarly, issue preclusion only applies when issues are “litigated and decided in the prior proceedings.” Oyeniran, 672 F.3d at 806 (emphasis added). Multiple proceedings are a prerequisite before issue preclusion can apply. See id. Because the Board on remand was acting within the same proceedings as in Olivas-Motta’s original appeal, preclusion does not apply.

Olivas-Motta counters this argument by citing an unpublished decision of this court relating to the rule of mandate and making preclusion arguments by analogy. This was also the argument that Olivas-Motta made to the Board on remand. We consider this argument to be a rule of mandate argument, rather than one of claim preclusion or issue preclusion. Olivas-Motta has not argued that the Board could not reconsider this issue because of law of the case.

The rule of mandate is related to, but distinct from, claim preclusion and issue preclusion. Under the rule of mandate, an administrative agency may not deviate from a supervising court’s remand order, and the reviewing court may review the agency’s decision on remand “to assure that its prior mandate is effectuated.” Sullivan v. Hudson, 490 U.S. 877, 886 (1989); see also Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172–73 (9th Cir. 2006) (holding that the rule of mandate applies to decisions of the Board on remand from this court). Thus, as with claim preclusion and issue preclusion, the rule of mandate can prevent parties from relitigating issues already decided. But the scope of the rule is limited to that which is before the court “and disposed of by its decree.” United States v. Thrasher, 483 F.3d 977, 981 (9th Cir. 2007) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895)). An administrative agency may therefore consider on remand “any issue not expressly or impliedly disposed of on appeal.” Stacy v. Colvin, 825 F.3d 563, 568 (9th Cir. 2016) (quoting Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1497 (9th Cir. 1995)).

Our mandate in Olivas-Motta’s first petition did not conclude that felony endangerment was not a CIMT, or that Leal I was wrongly decided. 746 F.3d at 916–17. Instead, we “h[e]ld only that [we] could not deny Olivas-Motta’s petition based on a conclusion reached by the [Board] in a separate case decided two years after it decided the appeal now before us.” Id. at 917. Nothing in our remand restricted the Board from considering the import of Leal I on Olivas-Motta’s appeal. Accordingly, the rule of mandate did not foreclose the Board’s reconsideration of the issue.
V.

The void-for-vagueness doctrine stems from the Fifth Amendment’s guarantee of due process. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015). “[T]he Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” Id. Because “deportation is ‘a particularly severe penalty,’ which may be of greater concern to a convicted alien than ‘any potential jail sentence,’” a provision of immigration law making an alien deportable is subject to the void-for-vagueness doctrine. Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Jae Lee v. United States, 137 S. Ct. 1958, 1968 (2017)).

Olivas-Motta argues that, even if applying Leal I to his appeal was not impermissibly retroactive or precluded, we should nonetheless grant the petition because 8 U.S.C. § 1227(a)(2)(A)(ii) is unconstitutionally vague. While he recognizes that both the Supreme Court and this court have repeatedly rejected that argument, see Jordan v. De George, 341 U.S. 223, 232 (1951); Martinez-De Ryan v. Sessions, 895 F.3d 1191, 1194 (9th Cir. 2018), Olivas-Motta contends that the Board’s interpretation of the statute has expanded the meaning of “moral turpitude” to the point that there is no meaningful standard guiding aliens’ conduct.

We are not persuaded that this argument is distinguishable from those rejected in past cases. As we explained in Leal II, a crime is morally turpitudinous if it involves a conscious decision and a resulting harm, where “more serious resulting harm is required” “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct.” 771 F.3d at 1146 (quoting Ceron v. Holder, 747 F.3d 773, 783 (9th Cir. 2014) (en banc)). That is the standard the Board applied to evaluate Arizona felony endangerment, id. at 1147, and that standard is sufficiently meaningful to provide fair notice under our precedent. Martinez-De Ryan, 895 F.3d at 1193–94. To the extent Olivas-Motta asks us to reconsider those decisions, that is beyond this panel’s authority. Miller, 335 F.3d at 900.

VI.

The Board did not commit any of the raised legal errors by concluding that Olivas-Motta’s conviction for reckless endangerment was a crime involving moral turpitude. We therefore deny the petition.

PETITION DENIED.

WATFORD, Circuit Judge, dissenting:

When a non-citizen is charged with a crime and deciding whether to plead guilty, the immigration consequences of a conviction are often a major consideration. For some defendants, preserving the chance to remain in the United States is more important than the length of any prison sentence that might be imposed. Padilla v. Kentucky, 559 U.S. 356, 368 (2010). With that in mind, competent defense counsel “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.” Id. at 373. Such plea bargains are mutually beneficial for the prosecution: A defendant who might otherwise have proceeded to trial may be persuaded to forgo that right in exchange for a deal that allows him to plead guilty to an offense that reduces the risk of removal. Id.

An assessment of the immigration consequences attending a guilty plea must, of course, be based on the law as it exists at the time of the plea. If the law on that subject changes after a defendant pleads guilty, he usually cannot go back and undo his conviction, even if the conviction now carries far more serious immigration consequences than before. For that reason, when there is an intervening change in the law, we are required to assess whether the new rule may be applied retroactively in subsequent removal proceedings.

The majority refuses to engage in that analysis because it concludes that no “new rule” was adopted after Manuel Olivas-Motta pleaded guilty. I respectfully disagree.

The sole issue in Olivas-Motta’s removal proceedings is whether reckless endangerment under Arizona Revised Statutes § 13-1201 constitutes a crime involving moral turpitude. When Olivas-Motta pleaded guilty to that offense in 2007, the Board of Immigration Appeals (BIA) had not decided in a precedential opinion whether reckless endangerment should be classified as a crime involving moral turpitude. But in 2012, long after Olivas-Motta pleaded guilty, the BIA held for the first time that reckless endangerment under § 13-1201 is a crime involving moral turpitude. Matter of Leal, 26 I. & N. Dec. 20, 27 (BIA 2012), aff’d sub nom. Leal v. Holder, 771 F.3d 1140 (9th Cir. 2014).

The holding in Matter of Leal represents a “new rule” under any definition of that term. The Supreme Court has said that a decision can establish a new rule “either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.” Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (citations omitted). The BIA did not overrule past precedent in Matter of Leal, but it did resolve an issue of first impression—whether reckless endangerment qualifies as a crime involving moral turpitude. The BIA’s resolution of that issue was not clearly foreshadowed by precedent existing at the time Olivas-Motta pleaded guilty. In fact, as discussed below, the BIA’s precedent in 2007 suggested that reckless endangerment under § 13-1201 would not be classified as a crime involving moral turpitude. Thus, Matter of Leal plainly constitutes the “change in law” that the majority identifies as necessary to trigger retroactivity analysis. Maj. op. at 9.
The majority suggests that our case is analogous to one in which a statutory provision is on the books when a defendant pleads guilty, and a court later does nothing more than construe and apply that statute in the case at hand. Maj. op. at 12. In that scenario, the majority asserts, we would not regard the judicial interpretation as a “new rule” subject to retroactivity analysis.

The majority’s assertion would be correct if the court’s decision were “dictat[e(d)] by the plain language of the statute.” Harper v. Virginia Department of Taxation, 509 U.S. 86, 111 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). But that is certainly not the case here. The governing statutory standard is supplied by 8 U.S.C. § 1227(a)(2)(A)(ii), which renders a non-citizen removable if he’s been convicted of two or more “crimes involving moral turpitude.” The quoted phrase has no intelligible meaning; it creates what Justice Jackson rightly labeled “an undefined and undefinable standard.” Jordan v. De George, 341 U.S. 223, 235 (1951) (Jackson, J., dissenting). Neither our court nor the BIA has been able to come up with “any coherent criteria for determining which crimes fall within that classification and which crimes do not.” Núnez v. Holder, 594 F.3d 1124, 1130 (9th Cir. 2010). The BIA has been able to give the statutory standard concrete meaning mainly by declaring, through case-by-case adjudications, which specific offenses are covered and which are not. See Marmolejo-Campos v. Holder, 558 F.3d 903, 910–11 (9th Cir. 2009) (en banc).

Against that backdrop, each BIA decision that designates a new offense (or class of offenses) as a crime involving moral turpitude potentially creates a “new rule” for retroactivity purposes—at least where, as here, the decision was not clearly foreshadowed by prior precedent. That does not mean retroactive application of all such decisions is prohibited; it just means that the decisions must be analyzed under the framework we’ve established for assessing whether retroactive application is permissible.

This case is a prime example of one in which retroactive application of a new rule is impermissible. Olivas-Motta was originally charged with attempted murder and aggravated assault with a deadly weapon, offenses that would clearly render him removable if he were convicted. He had already been convicted of one crime involving moral turpitude; he would be subject to removal if convicted of a second, and the BIA had already classified attempted murder and aggravated assault with a deadly weapon as crimes involving moral turpitude. See Matter of Sanchez-Linn, 201 & N. Dec. 362, 366 (BIA 1991); Matter of Medina, 151 & N. Dec. 611, 614 (BIA 1976).

Minimizing the likelihood of removal was of paramount concern to Olivas-Motta. He was born in Mexico, but his parents brought him to the United States in 1976 when he was only ten days old. He has lived his entire life in this country as a lawful permanent resident. He is married to a U.S. citizen, and both of his children are U.S. citizens. Most of his family members are also either U.S. citizens or lawful permanent residents. For him, being removed to Mexico would truly be “the equivalent of banishment or exile.” Padilla, 559 U.S. at 373 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

Although Olivas-Motta believed himself innocent of the charges he faced, he was no doubt “acutely aware” of the severe immigration consequences a conviction would trigger. INS v. St. Cyr, 533 U.S. 289, 322 (2001). He therefore had his attorney explore the possibility of pleading guilty to a lesser offense. Olivas-Motta’s defense counsel consulted with an experienced immigration lawyer, who surveyed the law as it then stood. She advised that having Olivas-Motta plead guilty to reckless endangerment under § 13-1201 would minimize the risk of deportation because that offense in all likelihood would not be regarded as a crime involving moral turpitude. Olivas-Motta relied on that advice in deciding to plead guilty and forgo his right to a trial.

The advice Olivas-Motta received was sound at the time. The BIA had long held that crimes involving moral turpitude require some form of corrupt or evil intent. See, e.g., Matter of P—, 3 I. & N. Dec. 56, 59 (BIA 1947). The BIA retreated from that position in 1976, when it held that certain offenses committed with a mens rea of recklessness could qualify as well. Medina, 15 I. & N. Dec. at 614. But the Board also made clear that a crime involving reckless conduct is not per se a crime involving moral turpitude. In re Fualaau, 21 I. & N. Dec. 475, 478 (BIA 1996). Something more was required, although exactly what that something more consisted of remained open to debate. In predicting the likely classification of reckless endangerment, the best guidance came from a series of cases involving manslaughter and assault offenses, which held that a crime committed with a mens rea of recklessness had to include as an element some sort of aggravating circumstance, such as the infliction of death or serious bodily injury. See id. (serious bodily injury); Matter of Wojtkow, 18 I. & N. Dec. 111, 113 (BIA 1981) (death); Medina, 15 I. & N. Dec. at 614 (use of a deadly weapon).

As of 2007, the BIA had not issued a precedential decision involving a reckless endangerment offense. Nonetheless, reckless endangerment under Arizona law did not appear to qualify as a crime involving moral turpitude, for although it requires a mens rea of recklessness, it does not require proof of any of the aggravating circumstances found in past cases. The felony version of the offense, to which Olivas-Motta pleaded guilty, simply requires “recklessly endangering another person with a substantial risk of imminent death.” Ariz. Rev. Stat. § 13-1201(A). To be sure, there was ongoing debate about whether placing someone in grave risk of death or serious bodily injury could itself be deemed an aggravating circumstance, see Knapik v. Ashcroft, 384 F.3d 84, 90 (3d Cir. 2004); In re Braimlari, 2006 WL 729794, at *1 (BIA Feb. 14, 2006), but the BIA had rejected that view in two non-precedential decisions, both of which expressly held that reckless endangerment under § 13-1201 did not qualify as a

In 2008, however, the Attorney General replaced the BIA’s former standard for determining which recklessness offenses qualify as crimes involving moral turpitude with a new standard. In Matter of Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008), the Attorney General declared that, to qualify as a crime involving moral turpitude, an offense need involve only “reprehensible conduct and some degree of scienter.” Id. at 689 n.1. The effect of this change was to eliminate the aggravating-circumstance requirement for offenses with a *mens rea* of recklessness. 2 Under the new standard, it was now far more likely that reckless endangerment under § 13-1201 would be classified as a crime involving moral turpitude. After all, placing someone in “substantial risk of imminent death” would certainly seem to qualify as reprehensible conduct. And indeed, in 2012, that is exactly what the BIA concluded in Matter of Leal, where the agency held for the first time that reckless endangerment under § 13-1201 constitutes a crime involving moral turpitude. 26 I. & N. Dec. at 27.

The question thus becomes whether Matter of Leal may be applied retroactively to Olivas-Motta’s case—in other words, whether the immigration consequences of his conviction should be assessed under the law as it stood in 2007, when he pleaded guilty, or under the law as it stood in 2014, when the BIA adjudicated his appeal. To answer that question, we apply the test from *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), which requires us to balance five factors: “(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.” Id. at 1333 (internal quotation marks omitted).

The weight to be accorded the first, fourth, and fifth factors has already been settled. We have held that the first factor does not favor either party in the immigration context. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520–21 (9th Cir. 2012) (en banc). The fourth factor strongly favors Olivas-Motta, as the burden imposed by retroactively applying the law in effect in 2014 is severe: Under the rule adopted in *Matter of Leal*, his conviction for reckless endangerment would be regarded as a crime involving moral turpitude, subjecting him to removal from the United States and separation from his family. See id. at 523. The fifth factor points in the government’s favor, since “non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established.” *Id.*

The second and third factors, then, are dispositive, and they tip the balance in Olivas-Motta’s favor. When he pleaded guilty to reckless endangerment in 2007, the BIA had an established standard for determining which recklessness offenses constitute crimes involving moral turpitude. The Attorney General’s subsequent decision in *Silva-Trevino* represented an “abrupt departure” from that standard, *Montgomery Ward*, 691 F.2d at 1333 (internal quotation marks omitted), in the sense that it replaced the aggravating-circumstance requirement with a new, more expansive standard. That change in the governing standard was outcome determinative with respect to certain offenses, as we know from the way the BIA classified § 13-1201 before and after *Silva-Trevino*. Before the Attorney General’s decision, the BIA had held (in non-precedential decisions) that reckless endangerment under § 13-1201 does not constitute a crime involving moral turpitude; afterward the BIA definitively held exactly the opposite. Because Olivas-Motta had no reason to anticipate elimination of the aggravating-circumstance requirement, his reliance on the pre-*Silva-Trevino* standard when deciding to plead guilty was eminently reasonable. Cf. *Garfias-Rodriguez*, 702 F.3d at 521 (second and third factors weigh in favor of retroactive application when the petitioner “could reasonably have anticipated the change in the law such that the new requirement would not be a complete surprise”) (quoting *Montgomery Ward*, 691 F.2d at 1333–34).

It’s true, as the government argues, that the status of § 13-1201 did not have settled definitively in Olivas-Motta’s favor prior to 2008. So this is not a case in which it is 100% clear that Olivas-Motta would have prevailed under the pre-*Silva-Trevino* standard. But, contrary to the majority’s apparent assumption, see Maj. op. at 14, that is far from fatal under the second and third *Montgomery Ward* factors.

In *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007), we ruled for the petitioner in circumstances quite similar to those present here. When the petitioner in that case pleaded guilty to selling a small amount of cocaine, a relatively minor drug-trafficking offense like his would be classified as a “particularly serious crime” on a case-by-case basis using a multi-factor test. *Id.* at 945–46, 950. After he pleaded guilty, the Attorney General created a new standard that presumed all drug-trafficking offenses to be particularly serious crimes, with the presumption rebuttable only in very narrow circumstances. *Id.* at 946–47. We held that the second and third factors favored the petitioner because at the time he pleaded guilty, there was a “realistic chance” that the BIA would find that his crime was not particularly serious, where-
as under the Attorney General’s new standard there was “a near (if not total) certainty” that his crime would be classified as particularly serious, thereby resulting in his removal. *Id.* at 952; see also *St. Cyr*, 533 U.S. at 321.

Olivas-Motta’s situation is no different. At the time he pleaded guilty, there was at least a realistic chance that his reckless endangerment offense would not be classified as a crime involving moral turpitude; the BIA had already so held in two non-precedential decisions. After the Attorney General’s decision in *Silva-Trevino*, however, it was nearly certain that his offense would be classified as a crime involving moral turpitude, and the BIA’s decision in *Matter of Leal* soon eliminated what little uncertainty remained on that score. To the same extent as in *Miguel-Miguel*, the change in the governing standard “attaches new legal consequences to events completed before its enactment,” *Vartelas v. Holder*, 566 U.S. 257, 273 (2012) (internal quotation marks omitted), and therefore may not be applied retroactively.

Under the *Montgomery Ward* test, the balance of factors weighs in favor of Olivas-Motta. Three of the factors favor him—one strongly so—while only one of the factors points in the government’s favor. That means the status of his conviction for reckless endangerment should be analyzed under the law as it stood in 2007, applying the standard that prevailed before the Attorney General’s decision in *Silva-Trevino*. See *id.* at 261. I would grant Olivas-Motta’s petition for review and remand so that the agency can conduct that analysis in the first instance.

Cite as 18 C.D.O.S. 11946

**SIRA CRUZ,** Plaintiff-Appellant,  
v.  
**NATIONAL STEEL AND SHIPBUILDING COMPANY; PETERSON INDUSTRIAL SCAFFOLDING, INC.,** Defendants-Appellees,  
and  
**UNITED STATES OF AMERICA,** Defendant.  

No. 17-55441  
United States Court of Appeals for the Ninth Circuit  
D.C. No. 3:14-cv-02956-LAB-DHB  
Appeal from the United States District Court for the Southern District of California  
Larry A. Burns, District Judge, Presiding  
Submitted August 29, 2018*  
Pasadena, California  
Filed December 19, 2018  
Opinion by Judge Bybee

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

**COUNSEL**

Preston Easley, Law Offices of Preston Easley, San Pedro, California; Dawn Schock, SK Appellate Group LLP, San Pedro, California; for Plaintiff-Appellant.  
Bradley H. Pace, Philip Barilovits, and Pamela L. Schultz, Hinshaw & Culbertson LLP, San Francisco, California, for Defendant-Appellant.

**OPINION**

**BYBEE, Circuit Judge:**  

In this case we are asked to determine whether a maritime worker who has collected statutory workers’ compensation for her injuries may further recover against a so-called “borrowing employer.” Sira Cruz suffered injuries to her ribs and lungs while working as a tank tester aboard a Navy ship that was docked for repairs. She collected workers’ compensation from her primary employer, a staffing agency. Then, she brought a negligence action against general contractor National Steel and Shipbuilding Company (“Nassco”) seeking recovery for the same injuries. Nassco, which had functioned
as Cruz’s borrowing employer for several years at the time of the accident, asserted that it was immune from suit pursuant to the “one recovery” policy at the heart of workers’ compensation law. The district court granted Nassco’s motion for summary judgment on these grounds. Cruz appeals from that judgment, and we affirm. In this, we join the Third, Fourth, Fifth, and Eleventh Circuits in holding that the borrowed employee doctrine applies to “employees” under the Longshore and Harbor Workers’ Compensation Act (“LHWCA”), 33 U.S.C. §§ 901–50.

I

Except where noted, Cruz and Nassco have stipulated to the following facts.

Nassco is a shipbuilding company that contracts with the U.S. government to build and repair Navy vessels. To carry out this work, Nassco also contracts with labor brokers, including Tradesmen International, Inc. (“Tradesmen”), for temporary personnel. The contract between Nassco and Tradesmen granted Nassco significant control over the temporary employees Tradesmen assigned to Nassco. Nassco could terminate the temporary employees at any time, Tradesmen was required to provide Nassco notice if a temporary employee resigned, and temporary employees needed to seek approval for vacation time from Nassco. Tradesmen employees assigned to Nassco received a badge bearing both companies’ names enabling them to access Nassco job sites. These employees attended daily meetings led by Nassco employees who discussed task assignments. Tradesmen provided some general safety training to employees, but Nassco trained these employees on how to perform shipbuilding and ship repair roles, including “fire watch” and “tank tester.” Tradesmen invoiced Nassco for its employees’ services at a rate agreed upon between the companies, and Tradesmen then paid its employees a separately agreed-upon hourly rate. The contract also required Tradesmen to obtain workers’ compensation coverage for each employee pursuant to the Longshore and Harbor Workers’ Compensation Act (“LHWCA”).

Sira Cruz, a Tradesmen employee assigned to Nassco, was injured while conducting repair work on the USS Makin Island—a Nassco work site—on February 20, 2013. Prior to working for Tradesmen, Cruz had worked at another temporary staffing agency and did some work at Nassco on behalf of that agency. Cruz began her work for Tradesmen in October 2010. In the two years immediately preceding her injury Tradesmen assigned Cruz to work exclusively for Nassco, with the exception of one week where it assigned her to work for another Tradesmen client. In support of its motion for summary judgment, Nassco submitted an August 16, 2016 screenshot of Cruz’s Facebook profile, where she listed her employer as “Nasco” [sic] from March 2008 to the present.

Cruz started her work for Tradesmen at Nassco as a fire watch. She later asked a Nassco employee to move her to the position of tank tester. After many conversations with Nassco employees about this move, Nassco informed Cruz she would become a tank tester. Cruz learned how to test tanks on the job with instructions from another Nassco employee. She has stipulated that she would not have otherwise known how to do the work because Tradesmen did not provide her with tank-testing training. Cruz attended meetings led by Nassco employees each morning, and some of her work clothing had Nassco’s name on it. However, Cruz alleges that even when Nassco gave her work assignments, she controlled the details of her work and Nassco employees did not supervise or direct her.

At the time of her injury on February 20, 2013, Cruz had worked as a tank tester for at least six months on approximately eight different ships that Nassco was repairing. On that day, Nassco employees instructed her to work in a tank on the USS Makin Island. Cruz fell through an access hole in the tank while descending a ladder and suffered rib fractures and a collapsed lung.

Cruz collected LHWCA benefits from Tradesmen, which had obtained LHWCA insurance coverage for her in accordance with its contract with Nassco. She then filed a complaint in admiralty in the Central District of California alleging, among other charges, that Nassco’s negligence caused her injuries. Nassco moved for summary judgment. It argued that it was immune from suit in tort under the LHWCA’s single-recovery provisions. The district court granted summary judgment, holding that “as a matter of law[.] … Cruz was Nassco’s borrowed employee and is barred from suing her employer under [the LHWCA].” Cruz now appeals this judgment.

II

The district court had original jurisdiction over this suit in admiralty, 28 U.S.C. § 1333, and we have appellate jurisdiction to review the district court’s final decision on the merits, 28 U.S.C. § 1291. We review the district court’s grant of summary judgment de novo. Bravo v. City of Santa Maria, 665 F.3d 1076, 1083 (9th Cir. 2011). Viewing the evidence in the light most favorable to the nonmoving party, we consider whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Frudden v. Pilling, 877 F.3d 821, 828 (9th Cir. 2017).

A

The district court correctly found no genuine issue of material fact and ruled as a matter of law that Nassco was immune from Cruz’s tort claims under the LHWCA, 33 U.S.C. §§ 901–50. Enacted in 1927, the LHWCA establishes a mandatory framework for compensation of maritime employees injured on the navigable waters of the United States. A 1972 revision to the statute expanded its coverage to injuries suffered in “any . . . adjoining area customarily used by an employer in loading, unloading, [or] repairing . . . a vessel.” LHWCA Amendments of 1972, Pub. L. No. 92-576, § 2(c), 86...
Stat. 1251, 1251 (codified as amended at 33 U.S.C. § 903(a)). When a covered employee is injured, the employer is liable regardless of fault. 33 U.S.C. § 904(b). A general contractor is liable to the employee of a subcontractor only where the subcontractor fails to procure workers’ compensation insurance or otherwise fails to pay compensation. See id. § 905(a).

An injured employee may file a claim for workers’ compensation benefits with the Office of Workers’ Compensation Programs, which has sole authority to investigate the claim and hold a hearing, and must either reject the claim or make an award. Id. § 919; 20 C.F.R. § 1.2(e). The LHWCA fixes the amount of compensation based on the nature and extent of the injury and the employee’s weekly pay rate. See 33 U.S.C. §§ 906, 908–10.

When the LHWCA applies, its remedy is “exclusive and in place of all other liability of [the] employer to the employee.” Id. § 905(a); see Figueroa v. Campbell Indus., 45 F.3d 311, 314–15 (9th Cir. 1995) (applying the LHWCA’s one-recovery rule). The Supreme Court described the LHWCA’s compensation scheme as a quid pro quo: “In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries.” Wash. Metro. Area Transit Auth. v. Johnson, 467 U.S. 925, 931 (1984) (superseded on other grounds by statute), LHWCA Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639). An employer is thus immune from any suit seeking further recovery for the same injury. See id.

Tradesmen, which paid Cruz’s LHWCA claim, was Cruz’s contractual employer at the time of her injury. However, the district court held that Nassco was legally Cruz’s employer at this time under the borrowed employee doctrine and thus was entitled to assert the defense of LHWCA immunity.

B

We have long recognized the borrowed employee—traditionally, “borrowed servant” or “loaned servant”—doctrine. Parker v. Joe Lujan Enters., Inc., 848 F.2d 118, 120 (9th Cir. 1988); United States v. Bissett-Berman Corp., 481 F.2d 764, 772 (9th Cir. 1973); McCollum v. Smith, 339 F.2d 348, 351–52 (9th Cir. 1964). “When one person puts his [employee] at the disposal and under the control of another for the performance of a particular service … [the employee] is to be dealt with as [that] of the latter and not of the former.” Denton v. Yazoo & Miss. Valley R.R. Co., 284 U.S. 305, 308 (1932). The relationship between a borrowing employer and borrowed employee carries “all the legal consequences” of a conventional employer-employee relationship. See id. (quoting Standard Oil Co. v. Anderson, 212 U.S. 215, 220 (1909)). “[A]uthoritative direction and control” are the “critical factors” by which we resolve a borrowed employee inquiry. Parker, 848 F.2d at 120 (citing McCollum, 339 F.2d at 351); see United States v. N.A. Degerstrom, Inc., 408 F.2d 1130, 1133 (9th Cir. 1969) (“The critical factual inquiry in determining whether the loaned-servant doctrine should be applied is the location of the power to control the servant….”)

[R]esponsibility is regarded as a correlative of power.” (quoting McCollum, 339 F.2d at 351)); see also Wolsiffer v. Atlantis Submarines, Inc., 848 F. Supp. 1489, 1495 (D. Haw. 1994) (applying McCollum and also considering “whether there was a written agreement by the employers regarding the loan of the employee, who paid the employee’s wages and benefits, whether the employee assented to the transfer, and the length of time of the employment”).

Here, the record establishes that Nassco was Cruz’s borrowing employer because her work was subject to its direction and control at all relevant times. Cruz had been “loaned” from Tradesmen to Nassco for two nearly uninterrupted years prior to her injury, and she had worked for Nassco prior to that while she was affiliated with a different temporary staffing agency. Cruz attended daily morning meetings at which Nassco employees gave her tasks to perform. On site, she wore an ID badge identifying her as a Nassco employee. Cruz became a tank tester, the job she performed on the day of her injury and for the six months prior, only because she asked a Nassco employee to promote her to the position and because another Nassco employee trained her. Conversely, Tradesmen provided her with no training or direction on how to perform this job. Nassco had the authority to terminate Cruz’s temporary employment at any time, and Cruz had to seek Nassco’s approval for vacation time. On the day before her injury, Nassco employees instructed Cruz to work in the tank where she was injured.

Cruz presents no compelling argument that she was not subject to Nassco’s direction and control. Although she remained on the payroll of Tradesmen, payroll status is not dispositive in borrowed employee inquiries. See N.A. Degerstrom, 408 F.2d at 1132–33 (affirming a district court’s holding that a loader operator was the borrowed employee of the government despite being on the payroll of the plaintiff company). Her signed declaration that she subjectively considered herself a Tradesmen employee is insufficient to put the matter in controversy: the borrowed employee inquiry is objective; and this declaration made for litigation purposes contradicts Cruz’s personal Facebook profile, where she listed “Nasco” [sic] as her employer from March 2008 until at least August 2016. Finally, Cruz’s assertion that she “sometimes worked in the Tradesmen office” is immaterial to our conclusion that Nassco functioned as her borrowing employer while she was performing repairs on the USS Makin Island.

We next review the district court’s conclusion that Nassco, as a borrowing employer, was entitled to the same immunity as a conventional employer under the LHWCA. Until now, we have never directly addressed this question. See Burnett v. Sierra Nev. Corp., No. 2:14-cv-2761, 2015 WL 5475262 at *6 (D. Ariz. Sept. 18, 2015) (commenting on the lack of Ninth Circuit precedent). We now expressly hold that a borrowed employee is an “employee” and a borrowing employer
is an “employer” for purposes of the LHWCA, and accordingly, a borrowed employee who has been fully compensated under the LHWCA by any party has no further remedy for the same injury against her borrowing employer.

Sound construction of the LHWCA compels this conclusion. Congress enacted the statute’s current definition of the term “employer” in 1984. LHWCA Amendments of 1984, Pub. L. No. 98-426, § 2, 98 Stat. 1639, 1639 (codified as amended at 33 U.S.C. § 902(3)). An “employee,” for purposes of the statute, is “any person engaged in maritime employment … including a ship repairman,” but excluding eight enumerated categories of individuals. 33 U.S.C. § 902(3). Those Congress excluded from employee status include, among others, secretarial and marina personnel, certain types of laborers on small vessels, and “individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer … and (iii) are not engaged in work normally performed by employees of that employer ….” Id. § 902(3)(A)–(H).

Borrowed employees are not among the eight categories of laborers Congress chose to categorically exclude from coverage in § 902(3). Moreover, § 902(3)(D)’s exclusion of individuals (i) employed by suppliers, transporters, or vendors, (ii) temporarily doing business on the premises of an employer, and (iii) not engaged in work normally performed by employees of the employer further supports our conclusion. Section 902(3)(D) excludes only a narrow subset of borrowed employees: those who perform work for the borrowing employer distinct from the type of work that employer’s conventional employees perform.1 This precise language reflects a policy decision by Congress to exclude some borrowed employees—but not all. See also id. § 905(a) (describing the conditions under which a subcontractor’s employees will be deemed employees of the contractor).

We may assume that Congress understood in 1984 that the Supreme Court had long recognized the borrowed employee doctrine and that the statute’s definitions thus reflect this understanding. Denton, 284 U.S. at 308; see Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010) (“We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.”); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1189 (9th Cir. 2003) (“Congress is presumed to know the law and to have incorporated judicial interpretations when adopting a preexisting remedial scheme ….”). Thus, applying the well-recognized canon of expressio unius est exclusio alterius, we conclude that the LHWCA reaches borrowed employees who otherwise fall within Congress’s definition of “employee.” See Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

Our conclusion places us in agreement with the other circuits to address this question. See Langfitt v. Fed. Marine Terminals, Inc., 647 F.3d 1116, 1124 (11th Cir. 2011); White v. Bethlehem Steel Corp., 222 F.3d 146, 149 (4th Cir. 2000); Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935, 940 (3d Cir. 1990); Gaudet v. Exxon Corp., 562 F.2d 351, 355 (5th Cir. 1977). It is also consistent with the broader body of workers’ compensation law. Borrowing employers are generally immune from borrowed employees’ tort suits under various other workers’ compensation schemes. See 1 Modern Workers Compensation § 103:30 (compiling state and federal statutes and cases to conclude that “[e]xcept when the loaned servant doctrine has been abrogated for this purpose, the loaned employee cannot maintain a tort action against the borrowing employer, even if the borrowing employer does not provide workers’ compensation benefits to the loaned employee.” (citations omitted)).

III

Cruz’s remaining arguments are without merit. She alleges that Nassco waived its right to assert that she was its borrowed employee through its contract with Tradesmen, citing two vague provisions of the contract which do not address the borrowed employee doctrine. Under California law,2 waiver is the intentional relinquishment of a known right after knowledge of the facts.” Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 636 (Cal. 1995) (emphasis added) (internal quotation marks and citation omitted). Cruz bears the burden to “prove [waiver] by clear and convincing evidence that does not leave the matter to speculation,” and we resolve doubtful cases against the party asserting waiver. Id. She has not met this burden. Nothing in the contract suggests Nassco intentionally waived its right to assert the borrowed employee doctrine, and even so, a contract cannot alter the truth of an employment relationship by placing parties in different positions from those they actually held. See Kowalski v. Shell Oil Co., 588 P.2d 811, 816 (Cal. 1979) (en banc) (citing Martin v. Phillips Petroleum Co., 117 Cal. Rptr. 269, 271 (Ct. App. 1974)).

Cruz also argues that the district court improperly allowed Nassco to join another defendant’s motion for summary judgment. This argument is irrelevant because Nassco filed its own motion for summary judgment—in which it asserted the defense of immunity under the LHWCA—and we may affirm the district court’s grant of summary judgment on any

1. Cruz, who performed the same type of work on the USS Makin Island as Nassco employees, does not argue that she qualifies for this exclusion.

2. We interpret the agreement between Nassco and Tradesmen according to California contract law. As a general contract principle, the law of the situs state applies. See Thompson v. Enomoto, 915 F.2d 1383, 1388 (9th Cir. 1990). State law may apply in an admiralty case so long as it merely supplements federal maritime law and does not deprive a party of substantive admiralty rights. Pope & Talbot v. Hawn, 346 U.S. 406, 409–10 (1953). Waiver does not disrupt any admiralty right, and we have previously considered claims of contractual waiver while sitting in admiralty. Dant & Russell, Inc. v. Dillingham Tug & Barge Corp., 895 F.2d 507, 511 (9th Cir. 1989).
ground supported by the record. 

*Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

**IV**

The LHWCA provides maritime employees one guaranteed recovery for covered injuries. Cruz received her recovery, and the district court was correct to preclude her from pursuing a second. For these reasons, the judgment of the district court is **AFFIRMED**.
California Courts of Appeal

Cite as 18 C.D.O.S. 11951

MELISSA CASE, Plaintiff and Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., INC., Defendant and Respondent.

No. B281732
In The Court of Appeal of the State of California Second Appellate District
Division Four
(Los Angeles County Super. Ct. No. BC583311)
APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.
Filed November 21, 2018
Certified for publication December 18, 2018

COUNSEL
Shaver, Korff & Castronovo and Michael J. O’Neill for Defendant and Respondent.

ORDER CERTIFYING OPINION FOR PUBLICATION
THE COURT:

The opinion in the above-entitled matter, filed on November 21, 2018, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be certified for publication in its entirety in the Official Reports and it is so ordered.

*MANELLA, P. J., WILLHITE, J., COLLINS, J.*

OPINION

In the underlying action, appellant Melissa Case asserted claims for breach of insurance contract and bad faith against respondent State Farm Mutual Insurance Company, Inc. (State Farm), and requested an award of punitive damages. The trial court granted summary adjudication in State Farm’s favor on each claim and on the request for punitive damages. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The following facts are not in dispute: In March 2013, Case was employed by Lawry’s Restaurant, and insured under a personal automobile policy issued by State Farm. The policy’s uninsured-underinsured motorist (UM) coverage for bodily injury was $100,000 per person and $300,000 per accident. On March 29, 2013, while returning to Lawry’s Restaurant from an off-site catering location, Case was injured in a car accident involving an uninsured driver. The next day, she sought workers’ compensation benefits through her employer’s policy and submitted a claim to State Farm under her personal automobile policy. In 2014, after Case submitted a demand for UM policy benefits, State Farm sought verification of a “final lien” relating to medical expenses incurred as workers’ compensation benefits. When State Farm failed to pay UM benefits, Case requested arbitration.

On May 28, 2015, Case initiated the underlying action against State Farm for breach of an insurance contract and bad faith. The complaint asserted that State Farm acted improperly in delaying arbitration and settlement of Case’s claim for UM benefits, alleging that although she verified a final workers’ compensation lien relating to medical expenses no later than November 2014, State Farm neither paid her claim for UM benefits nor undertook arbitration. The complaint requested compensatory and punitive damages.

In September 2015, Case submitted information to State Farm showing that she had exhausted the possibility of receiving additional payments through the workers’ compensation system. In November 2015, State Farm and Case settled her claim for UM benefits for $35,000.

In December 2016, State Farm sought summary judgment or adjudication on Case’s claims. State Farm requested summary adjudication on the claim for breach of the insurance contract, contending it had provided all policy benefits due Case. Furthermore, relying on Rangel v. Interinsurance Exchange (1992) 4 Cal.4th 1 (Rangel), State Farm contended the bad faith claim failed, arguing that it breached neither the policy nor the implied covenant of good faith by declining to pay or arbitrate Case’s UM claim before her claim for workers’ compensation benefits had been resolved. In view of the purported defects in the claims for breach of an insurance contract and bad faith, State Farm maintained that summary adjudication was proper with respect to Case’s request for punitive damages.

The trial court granted summary judgment, concluding that summary adjudication was proper with respect to Case’s claims and her request for punitive damages. On March 6, 2017, the court entered a judgment in favor of State Farm and against Case. This appeal followed.

DISCUSSION

Case contends the trial court erred in granting summary judgment. For the reasons explained below, we disagree.

A. Standard of Review

“A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. Both are reviewed de novo. [Citations.]” (Lunardi v. Great-West Life Assurance Co. (1995) 37 Cal.App.4th 807, 819.) “A
defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff’s asserted causes of action can prevail. [Citation.]” (Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.) Generally, “the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, “all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X.” (Id. at p. 853, fn. omitted.)

Although we independently assess the grant of summary judgment, our review is governed by a fundamental principle of appellate procedure, namely, that “‘[a] judgment or order of the lower court is presumed correct,’’ and thus, ‘‘error must be affirmatively shown.’” (Denham v. Superior Court (1970) 2 Cal.3d 557, 564, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239, italics omitted.) Under this principle, Case bears the burden of establishing error on appeal, even though State Farm had the burden of proving its right to summary judgment before the trial court. (Frank and Freedom v. Allstate Ins. Co. (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in Case’s briefs. (Christoff v. Union Pacific Railroad Co. (2005) 134 Cal.App.4th 118, 125-126.)

B. Governing Principles

Generally, “[a]n insured can pursue a breach of contract theory against its insurer by alleging the insurance contract, the insured’s performance or excuse for nonperformance, the insurer’s breach, and resulting damages.” (San Diego Housing Com. v. Industrial Indemnity Co. (1998) 68 Cal.App.4th 526, 536.) In view of the requirement for contract-related damages, an insurer may secure summary adjudication on the claim when there are no unpaid policy benefits. (Behnke v. State Farm General Ins. Co. (2011) 196 Cal.App.4th 1443, 1468.)

To establish bad faith, a policy holder must demonstrate misconduct by the insurer more egregious than an incorrect denial of policy benefits. “The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing.” (Wilson v. 21st Century Ins. Co. (2007) 42 Cal.4th 713, 720 (Wilson).) The obligation imposed on the insurer under the covenant “is not the requirement mandated by the terms of the policy itself . . . . It is the obligation . . . . under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.” (California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal.App.3d 1, 54, quoting Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 573-574, italics omitted.) In the context of a bad faith claim, “an insurer’s denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable.” (Wilson, supra, 42 Cal.4th at p. 723.)

Under this standard, “an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured’s coverage claim is not liable in bad faith[,] even though it might be liable for breach of contract.” (Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co. (2001) 90 Cal.App.4th 335, 347.) That is because “where there is a genuine issue as to the insurer’s liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.” (Ibid., italics deleted.)

Here, the key issues concern State Farm’s conduct regarding Case’s claim for UM benefits, which she pursued while seeking workers’ compensation benefits. Under Insurance Code section 11580.2 (section 11580.2), automobile insurance policies must offer UM coverage and provide for binding arbitration of certain disputes relating to UM benefits. (Ins. Code, § 11580.2, subds. (a), (f), (p); Rangel, supra, 4 Cal.4th at pp. 7-8.) The scope of the mandated arbitration is limited: absent an agreement between the insured and the insurer, only the uninsured driver’s liability and the amount of damages caused by the uninsured driver are subject to arbitration; other issues -- including coverage issues relating to the claim for UM benefits -- are not arbitrable. (Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal.4th 1190, 1200.)

As discussed further below, section 11580.2 contains provisions intended to prevent a “double recovery” of UM benefits and workers’ compensation benefits for the same injury. (Rangel, supra, 4 Cal.4th at p. 9.) Among the principal benefits available through the workers’ compensation system are temporary disability indemnity and permanent disability indemnity. (Department of Rehabilitation v. Workers’ Comp. Appeals Bd. (2003) 30 Cal.4th 1281, 1291.) The former replaces a fixed percentage of the wages lost by the worker during the healing period (County of Alameda v. Workers’ Comp. Appeals Bd. (2013) 213 Cal.App.4th 278, 282-283; see Lab. Code, § 4653); the latter provides compensation for the residual loss of function after maximum recovery from the injury, based on a “rating” of that loss (Genlyte Group, LLC v. Workers’ Comp. Appeals Bd. (2008) 158 Cal.App.4th 705, 715-716; see Lab. Code, § 4660).

Additionally, the injured worker is entitled to recover the costs of medical treatments “reasonably required to cure or relieve . . . . the effects of his or her injury.” (Lab. Code, § 4600, subd. (a).) That right is subject to certain limitations, as “[e]mployers and their insurers may establish or contract with a medical provider network to treat injured employees. [Citation.] An injured employee may visit medical providers outside such networks only if the employer has not established a network or if the employee notified the employer in writing prior to the date of injury that he or she has a personal
physician. [Citation.""] (Chorn v. Workers’ Comp. Appeals Bd. (2016) 245 Cal.App.4th 1370, 1377.) Generally, medical providers are permitted to assert liens on workers’ compensation benefits for the costs of medical services that are unpaid or contested. (Ibid.)

Section 11580.2 includes two provisions designed to prevent a double recovery of UM benefits and workers’ compensation benefits for the same injury. (Rangel, supra, 4 Cal.4th at pp. 7-9.) In 1961, the Legislature amended the statute to permit the reduction of UM benefits in the event of workers’ compensation benefits. (Stats. 1961, ch. 1189, § 2, p. 2931; Rangel, supra, 4 Cal.4th at p. 7.) Subdivision (h) of section 11580.2 states: “Any loss payable under the terms of the uninsured motorist . . . coverage to or for any person may be reduced: [¶] . . . By the amount paid and the present value of all amounts payable to him or her . . . under any workers’ compensation law, exclusive of nonoccupational disability benefits.” As explained in Wagga man v. Northwestern Security Ins. Co. (1971) 16 Cal.App.3d 571, 575 (Waggarman), this provision authorizes insurers to include in automobile policies clauses mandating the reduction of UM benefits to reflect workers’ compensation benefits. However, the Legislature has enacted no statute permitting automobile insurers to impose liens on workers’ compensation benefits in order to recover excessive UM benefit payments. (Rangel, supra, 4 Cal.4th at pp. 9-11, 15.)

Section 11580.2 also imposes a stay of arbitration regarding UM benefit disputes until specified circumstances occur relating to a workers’ compensation claim. (Rangel, supra, 4 Cal.4th at p. 8.) Subdivision (f) of the statute provides: “If the insured has or may have rights to benefits, other than nonoccupational disability benefits, under any workers’ compensation law, the arbitrator shall not proceed with the arbitration until the insured’s physical condition is stationary and rat able. In those cases in which the insured claims a permanent disability, the claims shall, unless good cause be shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed.” (§ 11580.2, subd. (f).) Our Supreme Court has explained that in 1973, the Legislature enacted the arbitration stay provision to prevent a type of arbitration-facilitated double recovery identified in Waggar man.2 (Rangel, supra, 4 Cal.4th at p. 9.)

The application of the two provisions described above was examined in Rangel. There, the automobile policy’s UM provisions reduced the loss payable under the policy by the workers’ compensation benefits paid or payable to the insured -- in terms closely tracking subdivision (h)(1) of section 11580.2 -- but permitted arbitration of disputes regarding the loss payable -- thus authorizing an arbitration broader than required under subdivision (f) of section 11580.2. (Rangel, supra, 4 Cal.4th at pp. 11, 17.) After the insured suffered injuries in an accident involving an uninsured motorist, she filed a claim for UM benefits and sought workers’ compensation benefits, including permanent disability indemnity. (Id. at pp. 5-6.) The automobile insurer initially refused to pay UM benefits until her workers’ compensation claim was resolved. (Id. at p. 5.) Almost two years after the accident, the insured requested arbitration of her claim for UM benefits, but the arbitrator ordered the proceeding stayed while the workers’ compensation proceeding was pending. (Ibid.) More than six years after the accident, while the workers’ compensation proceeding was still pending, the automobile insurer paid the maximum amount of the UM coverage. (Id. at p. 6.) When the workers’ compensation proceeding terminated, the insured sued the automobile insurer for bad faith. (Ibid.)

After the trial court granted judgment on the pleadings in favor of the insurer, our Supreme Court affirmed, concluding that under the specific circumstances presented, the arbitration stay provision in section 11580.2, subdivision (f), operated to exonerate the insurer of bad faith. (Rangel, supra, 4 Cal.4th at pp. 10-13.) The court determined that because the insured claimed a permanent disability, the arbitration stay provision expressly required that arbitration be stayed absent a showing of good cause, which the insured never offered. (Id. at pp. 8, fn. 6, 13-14.) The court further determined that under the policy’s terms, the reduction of UM benefits to reflect workers’ compensation benefits was an arbitrable issue: “The policy’s arbitration clause is broader than that required [under section 11580.2, subdivision (f)]. The statute requires only that the damages due from the uninsured motorist be subject to arbitration. In contrast, the policy’s arbitration clause encompasses disputes concerning the amount owing under the insurance policy as well as the damages due from the uninsured motorist.” (Id. at p. 11.) The court concluded: “Because the policy . . . provides for arbitration in the event of a dispute over the loss payable, and because [the insured’s] workers’ compensation claim was not resolved arbitration the amount of UM benefits due under the policy. (Id. at pp. 575-576.) The arbitrator declined to reduce the UM benefits to reflect the plaintiff’s prospective permanent disability award because it could not be valued. (Id. at pp. 573-574.) After the arbitrator’s award was confirmed, the appellate court affirmed. While recognizing that section (h)(1) of section 11580.2 was intended to bar a double recovery of UM benefits and workers’ compensation benefits, the court found nothing in section 11580.2 or the workers’ compensation statutes foreclosing a possible double recovery under the circumstances presented. (Waggar man, supra, at pp. 579-580.)

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1. Subdivision (f) of section 11580.2 further provides: “Any demand or petition for arbitration shall contain a declaration, under penalty of perjury, stating whether (i) the insured has a workers’ compensation claim; (ii) the claim has proceeded to findings or award or settlement on all issues reasonably contemplated to be determined in that claim; and (iii) if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately.”

2. In Waggar man, the plaintiff sought UM policy benefits and workers’ compensation benefits, including permanent disability indemnity. (Waggar man, supra, 16 Cal.App.3d at pp. 573, 575-576.) The UM provisions contained a term mandating that UM benefits be reduced by the workers’ compensation benefits paid or payable, as permitted under section (h)(1) of section 11580.2. (Waggar man, supra, at pp. 574-575.) Prior to the permanent disability award, pursuant to the UM policy provisions, the plaintiff and his insurer submitted to
In so concluding, the court found that the UM policy term reducing the loss payable in the event of workers’ compensation benefits was “clear and unambiguous,” that is, free of any ambiguity relevant to the specific issues presented. (*Rangel, supra, 4 Cal.4th at p. 14.* Relying on that determination, the court rejected the contention that the insurer was required to pay some UM benefits regardless of the outcome of the workers’ compensation proceeding because the UM policy provisions mandated payment of some items of damages -- such as foreseeable economic loss -- not offset by workers’ compensation benefits. (Id. at p. 17.) The court explained that because the insured had “bargained for a policy in which workers’ compensation benefits would be deducted from the uninsured motorist policy limit, . . . the insurer is only liable for the excess, if any, of the policy limit over the workers’ compensation benefits. If there is no excess, the uninsured motorist insurer has no duty to pay general damages that are not compensable by workers’ compensation.” (Ibid.)

C. Underlying Proceedings

We next examine the parties’ showings, with special attention to the evidence bearing on the issues raised on appeal.

1. State Farm’s Evidence

State Farm submitted evidence supporting the following version of the underlying events: The UM provisions of Case’s policy stated: “Any amount payable . . . shall be reduced by any amount paid or payable to . . . the insured [¶] . . . [¶] . . . under any workers’ compensation, disability benefits, or similar law.” (Italics omitted.) Additionally, the policy stated that there was no coverage for bodily injury “to the extent [such coverage would] benefit [¶] . . . any worker’s compensation or disability benefits insurance company.” (Capitalization omitted.) The policy further provided for arbitration of disputes limited to the issues set forth in subdivision (f) of section 11580.2.3

In a letter dated July 17, 2014, Case’s counsel, John W. Phillips, submitted a demand for UM benefits totaling $66,712, including $14,212 in past medical expenses, $25,500 in future medical expenses, and $27,000 for non-economic “pain and suffering” damages. Noting that Case was 27 weeks pregnant when the accident occurred, Phillips stated: “Fortunately, [Case] had a successful birth and has now concluded her physical therapy and other medical treatment.” According to Phillips, Case expected to incur future medical expenses because she had been diagnosed with “significant disc bulges” and required epidural injections to treat on-going pain. The demand stated that a particular doctor -- who had already billed Case for services totaling $1,525 -- had recommended that she undergo three or more epidural injections at a cost of $8,500 per injection. Phillips made no reference to benefits paid to Case through her workers’ compensation claim.

On August 7, 2014, a State Farm claim specialist contacted Phillips and acknowledged receipt of the demand. According to the claim file, the specialist told Phillips that she needed “additional docs to proceed with [the] evaluation,” as well as “WC information.”

On September 22, 2014, Phillips submitted to State Farm medical records relating to the cause of Case’s back injuries. Phillips also presented documentation from Case’s workers’ compensation insurer reflecting an existing lien for $1,873.72. The documentation did not refer to certain claimed items of past medical costs -- totaling $9,794 -- detailed in the July 2014 demand, including the services rendered by the doctor who recommended a course of epidural injections.

In a letter to Phillips dated October 30, 2014, State Farm stated: “[A]dditional information is required to . . . extend an offer. [¶] Please provide a copy of the workers’ compensation final lien and breakdown for our review . . . .” On the same date, State Farm also asked Gallagher Bassett Services, Inc. (Gallagher Bassett), the third party administrator responsible for processing Case’s workers’ compensation claim, to provide the “status of [the] claim and notice of final lien.” Case provided no information establishing that the past medical expenses itemized in the July 2014 demand but not reflected in the September 2014 documentation had been addressed through Case’s workers’ compensation claim. State Farm also received no information establishing that Case’s future medical expenses had been addressed through Case’s workers’ compensation claim.

In November 2014, Case demanded arbitration. In a letter to Case dated December 4, 2014, a State Farm claims manager stated: “You allege State Farm has not made a fair offer of settlement of your [UM benefits] claim. . . . Your workers’ compensation carrier paid $2,164.99 on your behalf and closed your claim. The demand received from . . . Phillips on July 21, 2014, lists past special damages of $14,212 and estimated future medical costs of $25,000. [¶] It appears you withdrew your workers’ compensation claim after your initial treatment in favor of presenting your claim exclusively to State Farm.” After noting that the policy reduced UM benefits in the event of workers’ compensation payments and quoting section 11580.2, subdivision (h)(1), the letter further stated: “[A] determination must be made to what extent workers’ compensation benefits continue to be owed to you prior to State Farm’s ability to determine what is owed from your . . . [p]olicy. [¶] Your attorney requested . . . arbitration.

3. The policy stated: “Two questions must be decided by agreement between the insured and us: 1. Is the insured legally entitled to collect damages from the owner or driver of the uninsured motor vehicle; and 2. If so, in what amount?

If there is no agreement, upon written request of the insured or us, these questions shall be decided by arbitration as provided in section 11580.2.” (Italics omitted.)
State Farm is in the process of preparing your case for referral to legal counsel to begin the discovery process.”

In late February 2015, during prearbitration discovery, Case testified in a deposition that she was still experiencing pain from the injuries she incurred in the accident. Case’s responses to State Farm’s interrogatories also stated that she continued to suffer pain from those injuries.

On March 30, 2015, after Phillips requested a “final” lien balance relating to the workers’ compensation claim, a Gallagher Bassett manager responded: “Unfortunately, the only items I can provide you is . . . [a] benefit printout showing a total of $2,164.99 has been paid to date. Since [Case] was never discharged from care under the workers’ compensation system she may return at a later date and seek additional medical treatment under this claim . . . .”

In a letter dated July 6, 2015, Phillips informed State Farm’s counsel that Case’s medical condition was stationary and that she had received no medical treatments since October 2013. Phillips stated: “There is no better evidence of [Case]’s lack of need for further medical treatment than her lack of further medical treatment. By any reasonable measure, [Case]’s physical condition is ‘stationary and ratable.’ Therefore, the status of her workers’ compensation claim does not excuse State Farm’s refusal to schedule an arbitration date in this matter.” (Emphasis omitted.)

In an e-mail to Phillips dated September 18, 2015, a Gallagher Bassett manager stated: “I have reviewed your request for reimbursement of medical expenses[,] and since [Case] was not treated under the workers’ compensation system, all medical treatment obtained is considered self-procured and is not reimbursable. As you are aware, all bills or treatment obtained . . . is not payable under the workers’ compensation system. Furthermore, there was no authorization, and treatment was not referred by the designated treating physician . . . .” The following day, Phillips forwarded the e-mail to State Farm.

On November 19, 2015, Case and State Farm agreed to settle her UM benefits claim for $35,000. Five days later, State Farm issued the settlement funds to Case.

2. Case’s Evidence

In opposing the motion for summary adjudication or judgment, Case challenged little of State Farm’s showing. Her principal contention was that there were triable issues because that showing was incomplete.4

According to Case’s showing, Phillips responded promptly to State Farm’s October 30, 2014 request for verification of a final workers’ compensation lien by submitting by e-mail evidence that he described as “the workers’ comp lien for my client.” A State Farm claim specialist then asked, “[C]an you send me something in writing that confirms this is a final lien. [¶] . . . Just need something that confirms final lien.” Later, in an e-mail to Phillips dated November 6, 2014, the claim specialist stated: “I revd call from . . . Gallagher and confirmed final lien. I am waiting for authority on it.”

On November 12, 2014, Case demanded arbitration. Accompanying the demand was Phillips’s declaration, which stated: “[Case’s] workers’ compensation claim has settled on all issues reasonably contemplated to be determined in that claim. [Case] has no expectation that she will receive further benefits through that claim.”

State Farm’s claim file reflects the following note dated December 1, 2014: “There is a question as to whether [Case] can ‘opt out’ of [workers’ compensation] benefits in order to pursue UM [benefits] solely through [State Farm]. . . . We have a ‘final’ [workers’ compensation] lien amount; however, [Case] withdrew her [workers’ compensation] claim after she retained counsel so the [workers’ compensation] carrier paid only for initial treatment.” On December 11, 2014, Phillips provided State Farm with another copy of the lien he had given to State Farm.

In a letter to Phillips dated March 11, 2015, after discussing Case’s deposition, State Farm’s counsel stated: “[Case’s] worker[s]’ compensation claim must be completely resolved before State Farm can complete its evaluation of her claim. [¶] . . . [¶] If her claim is still pending, we will have to wait for it to be concluded before State Farm can evaluate the claim. If the claim has been completely resolved, State Farm should be provided with documentation that states what worker[s]’ compensation benefits she received as a result of that claim, so that the evaluation can take place.”

On March 13, 2015, Phillips responded that four months earlier, State Farm obtained satisfactory proof that the workers’ compensation claim was completely resolved, pointing to the State Farm claim specialist’s November 6, 2014 e-mail. Phillips stated: “The fact that [Case]’s workers’ comp claim has resolved is beyond dispute. Any delay in resolving this [UM] claim on the basis of an ‘open’ workers’ comp claim is therefore completely without merit.”

On April 9, 2015, Phillips provided State Farm with another copy of Case’s workers’ compensation lien itemization and asked: “Please confirm that this satisfies your need to verify the ‘final’ status of [Case’s] workers’ compensation claim.” Phillips received no response.

From March through mid-July 2015, State Farm made no requests for documentation establishing the medical expenses she had incurred or the status of her workers’ compensation claim. On July 23, 2015, at State Farm’s request, Case submitted her bills for previous medical services to “workers’ compensation” in order to determine whether they were payable through the workers’ compensation system.

4. In an effort to establish triable issues, Case also asserted evidentiary objections to State Farm’s showing in her separate statement of undisputed facts. Because the trial court did not expressly rule on the objections, it presumptively overruled them. (Archer v. United Rentals, Inc. (2011) 195 Cal.App.4th 807, 813, fn. 4.) As Case has not reasserted her objections on appeal, she has forfeited any claim of error regarding the implied rulings. (Ibid.)
D. Analysis

We conclude that the trial court did not err in granting summary judgment. At the outset, we observe that our inquiry has a narrow scope. Because Case neither discusses her claim for breach of the insurance contract nor suggests that there are unpaid policy benefits, she has forfeited any contention of error that summary adjudication was improperly granted with respect to that claim. (Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal.App.4th 1171, 1177; Yu v. Signet Bank/Virginia (1999) 69 Cal.App.4th 1377, 1398; Reyes v. Kosha (1998) 65 Cal.App.4th 451, 466, fn. 6.) In connection with the bad faith claim, Case contends only that State Farm improperly declined to pay UM benefits -- including non-economic damages -- prior to a determination regarding the extent to which her medical expenses were payable through the workers’ compensation system; she raises no contention that State Farm improperly delayed arbitration under subdivision (f) of section 11580.2. Our inquiry thus focuses primarily on whether State Farm acted unreasonably in applying the key loss-payable-reduction policy provision authorized by subdivision (h)(1) of section 11580.2. As explained below, Case has established no triable issues regarding bad faith.5

1. Loss-Payable-Reduction Policy Provision

We begin by examining the policy to determine the extent to which it permitted State Farm to reduce UM benefits to reflect medical expenses included in her July 2014 demand for which she had not asserted a workers’ compensation claim. We find guidance from Bailey v. Interinsurance Exchange (1975) 49 Cal.App.3d 399 (Bailey).

In Bailey, supra, 49 Cal.App.3d at pages 401-402, the plaintiff’s automobile policy provided coverage for medical expenses, subject to an exclusion stating: “This policy does not apply to bodily injury . . . if benefits therefor are in whole or in part either payable or required to be provided under any Work[ers’] Compensation Law.” After the plaintiff was injured in a car accident in the course of his employment, he did not apply for workers’ compensation benefits. (Id. at p. 402.) When the insurer declined to pay policy benefits for medical expenses, the plaintiff asserted a claim for breach of insurance contract. (See id. at p. 404.) Relying on the policy exclusion, the trial court found that the claim failed. (Id. at p. 402.) Affirming, the appellate court concluded that although the term “‘payable’” in the exclusion was potentially ambiguous in isolation, the exclusion’s meaning was clear: “[T]he additional language ‘or required to be provided under any work[ers’] compensation law’ . . . is susceptible to only one reasonable and logical interpretation. That interpretation is that the policy excludes coverage for an injury for which the insured is eligible for work[ers’] compensation benefits.” (Id. at p. 404.)

We conclude that the loss-payable-reduction provision in Case’s policy authorized State Farm to reduce UM benefits to reflect certain medical expenses potentially included in her July 2014 demand, namely, past and future expenses for injury-related payments payable through -- but not submitted to -- the workers’ compensation system. That provision states that the UM benefit “shall be reduced by any amount paid or payable to . . . the insured [] . . . under any work[ers’] compensation, disability benefits, or similar law.” (Italics omitted and added.) Here, the term “payable” necessarily encompasses medical expenses eligible for payment through the workers’ compensation system, regardless of whether the insured has submitted a claim for them. That conclusion flows from the italicized language, viewed in conjunction with the related policy provision expressly denying coverage for bodily injury “to the extent [such coverage would] benefit[] . . . any workers’ compensation . . . insurance company.” (Capitalization omitted.) The italicized language and accompanying policy provision -- like the additional language in Bailey -- supports only one reasonable interpretation, namely, that the provision applied to medical expenses eligible for payment as workers’ compensation benefits. That interpretation comports with the legislative intent underlying subdivision (h)(1) of section 11580.2, which authorizes the provision. (Rangel, supra, 4 Cal.4th at p. 14; Waggaman, supra, 16 Cal.App.3d at p. 579.)

Our conclusion receives additional support from that statute, as it provides that the loss payable may be reduced by “the present value of all amounts payable” under the workers’ compensation law. (§ 11580.2, subd. (h)(1).) Although the loss-payable-reduction provision in Case’s policy does not qualify the term “payable” by the phrase “the present value of all amounts,” that statutory restriction is necessarily implied. (Mid-Century Inc. Co. v. Gardner (1992) 9 Cal. App.4th 1205, 1219-1220 [UM coverage provisions less favorable to insured than set forth in section 11580.2 are not enforceable.]) The phrase “the present value of all amounts payable,” by its plain meaning, encompasses all determinable workers’ compensation benefits for which the insured is eligible, including benefits that will or can be paid in the future.6

5. In seeking summary adjudication on the bad faith claim, State Farm relied primarily on Rangel, which placed special emphasis on the arbitration stay provisions in section 11580.2, subdivision (f). However, we may assert the summary adjudication on a theory not relied upon by the trial court, provided that the parties have had an adequate opportunity to address that theory. (Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1147; Bains v. Moores (2009) 172 Cal.App.4th 445, 471, fn. 39; Code Civ. Proc., 437c, subd. (m)(2).)

That requirement is satisfied here. Before the trial court and on appeal, State Farm asserted that the loss-payable-reduction policy provision and subdivision (h)(1) of section 11580.2 support summary adjudication on the bad faith claim, and Case presented her views regarding that theory in her reply brief. (Bains v. Moores, supra, 172 Cal. App.4th at p. 471, fn. 39.) We therefore conclude that the alternative theory is properly available to us as a ground for affirming summary judgment. (See Byars v. SCME Mortgage Bankers, Inc., supra, 109 Cal.App.4th at p. 1147; Bains v. Moores, supra, at p. 471, fn. 39.)

6. We recognize that under exceptional circumstances not presented here, the application of the term “payable” in a loss-payable-reduction policy provision may be subject to uncertainty, in view of the statutory requirement that the “payable” amounts of workers’ com-
The provision in Case’s policy thus required that the loss payable be reduced by the determinable medical expenses eligible for payment through the workers’ compensation system, regardless of whether Case submitted a claim for them. For that reason, State Farm could not ascertain the loss payable until the amount of such expenses was known to State Farm. Accordingly, the provision authorized State Farm to request a determination regarding the extent to which her past and future medical expenses could be paid through that system.

2. No Triable Issues Regarding Bad Faith

The remaining question is whether State Farm acted reasonably in delaying payment of UM benefits, including benefits for noneconomic damages. In view of our conclusion regarding the meaning of the loss-payable-reduction provision, the resolution of that question hinges on whether State Farm acted reasonably in connection with its request for a determination of the extent to which Case’s medical expenses were eligible for payment through the workers’ compensation system. That is because State Farm’s maximum liability for all UM benefits was determined by the amount of the eligible expenses. As explained in Rangel, under the loss-payable-reduction policy provision, the insurer is liable only for the “excess, if any, of the policy limit over the workers’ compensation benefits,” that is, the difference between the policy limits and the applicable workers’ compensation benefits. (Rangel, supra, 4 Cal.4th at p. 17.) Accordingly, as the amount of the medical expenses eligible for payment through the workers’ compensation system increased, State Farm’s liability for UM benefits diminished.

In our view, no triable issues exist regarding whether State Farm acted reasonably in seeking an eligibility determination. Generally, the reasonableness of an insurer’s conduct “must be evaluated in light of the totality of the circumstances surrounding its actions.” (Wilson, supra, 42 Cal.4th at p. 723.) Thus, the adequacy of the insurer’s claims handling is properly assessed in light of conduct by the insured delaying resolution of a claim. (Blake v. Aetna Life Ins. Co. (1979) 99 Cal.App.3d 901, 905-906.)

The record establishes that Case’s July 2014 demand sought approximately $40,000 in medical expenses, but did not mention her workers’ compensation claim. The demand included $25,000 for future epidural injections to treat Case’s pain. In August 2014, State Farm informed attorney Phillips that it needed “WC information.” The next month, Phillips submitted documentation showing the existence of a workers’ compensation lien for $1,873.72.

In October 2014, State Farm asked Phillips to provide a workers’ compensation “final” lien and breakdown, and also asked Gallagher Bassett to verify “the status of [the] claim and notice of final lien.” After Phillips submitted to State Farm what he described as “the workers’ comp lien,” State Farm requested confirmation that it was a final lien.

In early November 2014, a State Farm claim specialist informed Phillips that Gallagher Bassett had “confirmed final lien” and that she was “waiting for authority on it.” Shortly afterward, Case submitted her demand for arbitration, supported by Phillips’s declaration stating that Case expected no additional workers’ compensation benefits.

In a letter dated December 4, 2014, in response to the demand for arbitration, State Farm observed that Case appeared to have withdrawn her workers’ compensation claim after having received only $2,164.99 in benefits, even though she asserted the existence of approximately $40,000 in past and future medical expenses. After pointing to the statutory and contractual provisions authorizing the reduction of UM benefits to reflect paid and payable workers’ compensation benefits, State Farm stated: “[A] determination must be made to what extent worker[s’] compensation benefits continue to be owed to you prior to State Farm’s ability to determine what is owed from your . . . policy.”

During prearbitration discovery in February 2015, Case testified that she continued to suffer pain from her injuries. At that time, State Farm again informed Case that her workers’ compensation claim “must be completely resolved before State Farm can complete its evaluation of her claim.” The following month, when Phillips requested a final lien balance, Gallagher Bassett responded that it could provide only a printout showing that $2,164.99 had been paid to date. Gallagher Bassett explained: “Since [Case] was never discharged from care under the workers’ compensation system she may return at a later date and seek additional medical treatment under this claim . . .”

In July 2015, Phillips informed State Farm that Case’s medical condition was stationary, that she had received no medical treatment since October 2013, and that she needed no further treatment. At State Farm’s request, Case also submitted her bills for past medical services to Gallagher Bassett in order to determine whether they were payable through the
workers’ compensation system. In September 2015, Gallagher Bassett determined that Case’s past medical expenses were not recoverable through that system. In November 2015, State Farm settled Case’s claim.

On this record, there are no triable issues regarding the reasonableness of State Farm’s resolution of Case’s claim for UM benefits. When Case submitted her July 2014 demand, State Farm promptly requested information regarding her workers’ compensation claim. Although a dispute arose in November 2014 when Case provided evidence of a purported final lien and denied the likelihood of receiving additional workers’ compensation benefits, the dispute was “genuine,” as State Farm had reason to believe that Case’s medical expenses were eligible for payment through her workers’ compensation claim, which she had withdrawn. (Wilson, supra, 42 Cal.4th at p. 723 [dispute is genuine when insurer advances position “in good faith and on reasonable grounds”).) In early December 2014, State Farm requested a determination regarding the extent to which she was “owed” workers’ compensation benefits for her past and future medical expenses. However, Phillips first asked Bassett Gallagher whether Case’s past medical expenses were payable through the workers’ compensation system in July 2015, when he also disclosed to State Farm that Case had completed her medical treatment. The facts crucial to establishing the loss payable — namely, the extent to which Case was entitled to worker’s compensation benefits — were fully known by State Farm only in September 2015, when Bassett Gallagher made the requested determination. Because State Farm resolved Case’s claim shortly after that determination, no triable issues exist regarding bad faith.

3. Case’s Contentions

Case’s principal contentions rely on regulations requiring insurers to provide explanations of delays in accepting claims, and pay accepted claims promptly. (Cal. Code Regs., tit. 10, § 2695.7, subs. (e), (h).) Case maintains that under those regulations, State Farm was not permitted to delay payment of UM benefits pending a determination of her medical expenses eligible for payment through the workers’ compensation system. We disagree. The regulations in question state: “No insurer shall delay or deny settlement of a first party claim on the basis that responsibility for payment should be assumed by others, except as may otherwise be provided by policy provisions, statutes or regulations, including those pertaining to coordination of benefits.” (Cal. Code Regs., tit. 10, § 2695.7, subd.(e), italics added.) In view of the italicized language, State Farm did not contravene the regulations, as the loss-payable-reduction policy provision and Insurance Code section 11580.2, subdivision (h)(1) expressly authorized the reduction of UM benefits to reflect “payable” workers’ compensation benefits.

Case further contends that as early as November 2014, when she submitted her request for arbitration, State Farm was obliged to settle her claim, or at minimum, pay the non-economic damages she demanded. (Cal. Code Regs., tit. 10, § 2695.7, subd. (h).) She argues that because the declaration from Phillips accompanying her request informed State Farm that she had concluded her medical treatments, State Farm then knew that the maximum potential reduction of the UM benefits was determined solely by Case’s “previously incurred medical bills.” Case thus maintains that State Farm was in a position to calculate the maximum potential reduction and pay all undisputed claimed benefits within the adjusted coverage limit.

Case’s contention fails, as Phillips’s declaration is not plausibly viewed as stating that Case had concluded her medical treatment. Case’s request for arbitration expressly referred to her July 2014 demand for UM benefits, which included a claim for $25,500 in future medical expenses. Phillips’s declaration stated: “[C]ase’s workers’ compensation claim has settled on all issues reasonably contemplated to be determined in that claim. [Case] has no expectation that she will receive further benefits through that claim.” As reflected in State Farm’s December 4, 2014 response to the arbitration request, State Farm reasonably understood Phillips to be affirming nothing more than that Case had withdrawn her workers’ compensation claim. The record otherwise discloses that not until July 2015 did Phillips expressly inform State Farm that Case had concluded her medical treatment.

In a related contention, Case maintains that State Farm failed to explain why it was delaying payment of her UM benefits and how she could secure the benefits. However, State Farm’s December 4, 2014 response stated (1) that Case was claiming past and future medical expenses not paid through her workers’ compensation claim, (2) that she ap-
peared to have withdrawn that claim in order to submit those expenses solely to State Farm for payment, (3) that the policy and section 11580.2 authorized the reduction of UM benefits to reflect “payable” workers’ compensation benefits, and (4) that there must be a determination of the workers’ compensation benefits “owed” to Case. The response thus provided an adequate explanation for State Farm’s conduct. Furthermore, although the response did not expressly ask Case to submit a workers’ compensation claim for her medical expenses, the response’s reference to her withdrawn workers’ compensation claim unmistakably suggested that course of action.

Case also contends that Gallagher Bassett’s September 2015 determination that Case’s past medical expenses were not eligible for payment through the workers’ compensation system conclusively established that State Farm engaged in bad faith. According to Gallagher Bassett, because Case had not been treated within that system, her treatment was “considered self-procured and [was] not reimbursable.” Case argues: “Since the bills [Case] incurred outside the WC system were never payable to begin with, [State Farm’s] insistence that [Case] submit these bills to her [workers’ compensation] carrier for payment consideration before it would pay UM benefits is a position that has no legal basis whatsoever. [State Farm] asserted this position unreasonably, and consequently engaged in bad faith.”

Gallagher Bassett’s determination does not establish State Farm’s bad faith. As explained above (see pt. D.2., ante), the existence of bad faith hinges on when State Farm knew the determination of Case’s eligibility for workers’ compensation benefits, not on the determination itself. The record discloses only that State Farm resolved Case’s promptly after learning of her ineligibility for future Workers’ Compensation benefits. In sum, Case has demonstrated no triable issues precluding summary judgment on her complaint.9

DISPOSITION

The judgment is affirmed. State Farm is awarded its costs on appeal.

MANELLA, P. J.

We concur: WILLHITE, J., COLLINS, J.

Cite as 18 C.D.O.S. 11959

UNIVERSITY OF SOUTHERN CALIFORNIA, Petitioner,

v.

SUPERIOR COURT OF COUNTY OF LOS ANGELES, Respondent;

CARSON BARENBORG, Real Party in Interest.

No. B288180
In The Court of Appeal of the State of California
Second Appellate District
Division Four
(Los Angeles County Super. Ct. No. BC597033)
Filed November 27, 2018
Certified for Publication December 19, 2018

COUNSEL

Hill, Farrer & Burrill, Dean E. Dennis and Jenner C. Tseng for Petitioner.

No appearance for Respondent.

Law Office of Martin N. Buchanan, Martin N. Buchanan; Girardi | Keese and Amanda McClintock for Real Party in Interest.

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:*

The opinion in the above-entitled matter, filed on November 27, 2018, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be certified for publication in its entirety in the Official Reports and it is so ordered.

*MANELLA, P. J., COLLINS, J., MICON, J.**

** Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION

Carson Barenborg was dancing on a makeshift raised platform at a fraternity party near the University of Southern California (USC) when another partygoer bumped into her, causing her to fall to the ground and suffer serious injuries. Barenborg, who was not a USC student, sued USC and oth-
ers for negligence, alleging that the university had a duty to protect her from an unreasonable risk of harm and breached that duty by failing to prevent or shut down the party. The trial court denied USC’s motion for summary judgment. USC filed a petition for a peremptory writ of mandate challenging the denial. USC contends that it had no duty to protect members of the public from the conduct of a third party at an off-campus fraternity party. We agree and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Incident

Several fraternities and sororities affiliated with USC occupy houses in an area near the USC campus known as Greek Row, including a chapter of Sigma Alpha Epsilon Fraternity. On October 10, 2013, the day of a home football game, several fraternities, including Cal. Gamma, held parties on Greek Row where alcohol was served. The street was crowded with partygoers.

USC’s Policy on Alcohol and Other Drugs required fraternities and sororities to obtain prior authorization to serve alcohol at social events. USC’s Social Events Policy prohibited parties after 10 p.m. on evenings preceding school days, and allowed parties only between Fridays at 3:00 p.m. and Sundays at 5:00 p.m. Cal. Gamma’s party on Thursday, October 10, 2013, was unauthorized and violated both of these policies. USC was aware of prior violations of university policy and other misconduct at Cal. Gamma, some involving the use of alcohol, and had recently issued warnings and imposed discipline on the fraternity.

USC’s Department of Public Safety (DPS) employed safety officers who patrolled the USC campus and Greek Row. On October 10, 2013, before Barenborg’s injury, two DPS officers visited Cal. Gamma several times in response to complaints of loud music and public drinking. On each visit, they saw an abundance of alcohol on the property. They asked the person in charge at Cal. Gamma to turn down the music and reminded him that public drinking was not allowed, but they did not shut down the party. The two officers were not aware of USC’s policy prohibiting parties on Thursdays and generally were untrained in the enforcement of USC’s policies governing alcohol use and social events.

Barenborg was a 19-year-old student at Loyola Marymount University at the time of her injury. On October 10, 2013, she visited parties on Greek Row with a group of friends. Barenborg consumed cocaine and five to seven alcoholic beverages before arriving at Cal. Gamma, and she continued drinking alcohol after she arrived there.

The Cal. Gamma party was in the backyard of the fraternity house on and around a basketball court. There were approximately 200 to 250 people at the party. A platform approximately seven feet tall constructed from tables was being used for dancing.

Barenborg and two female friends were stepping up onto the platform where USC student Hollis Barth and another woman were dancing when Barth gave them an unwelcoming look. Just as Barenborg and one of her friends reached the top of the platform, Barth bumped Barenborg and her friend off the platform, they fell to the ground, and Barenborg sustained serious injuries.

2. The Complaint

Barenborg’s second amended complaint filed in September 2016 alleges a single cause of action for negligence against USC, SAE, and Barth. Barenborg alleges that USC’s failure to enforce both its own policies and state and local drinking laws resulted in increased alcohol-related injuries at fraternity parties. She alleges that USC owed members of the public a duty of care to avoid exposing them to an unreasonable risk of harm, and breached that duty by failing to shut down the party on October 10, 2013.

3. The Summary Judgment Motion

USC moved for summary judgment, arguing that it had no duty to protect members of the public from third party conduct and had no special relationship with Barenborg giving rise to a duty of care. USC also argued that it never voluntarily assumed a duty to protect Barenborg and therefore could not be held liable under the negligent undertaking doctrine, among other arguments.

Barenborg argued in opposition that USC owed her a duty of care because (1) USC had a special relationship with its students and their invitees; (2) USC voluntarily assumed a duty to supervise behavior on and around campus, including at fraternity houses on Greek Row, USC increased the risk of harm by failing to shut down the Cal. Gamma party, and Barenborg relied on USC to ensure a safe environment; and (3) USC had the right to control the Cal. Gamma property and therefore owed a duty of care to Barenborg as a social invitee under principles of premises liability.

The trial court heard USC’s summary judgment motion in November 2017. On January 11, 2018, the court filed a 16-page order denying the motion. The trial court summarized its ruling:

“The Court cannot determine that, as a matter of law, Defendant did not owe Plaintiff a duty of care. There are

1. Sigma Alpha Epsilon Fraternity is a nonprofit corporation and a national fraternal organization. We will use the term SAE to refer to the national organization. SAE’s local USC chapter was California Gamma Chapter (Cal. Gamma). California Gamma Building Association, a separate legal entity, owned the Cal. Gamma fraternity house.

2. No criminal charges were brought against Barth.

3. Barenborg later added California Gamma Building Association as a defendant.

4. SAE and California Gamma Building Association successfully moved for summary judgment. Barenborg’s appeal from the judgments in favor of SAE and California Gamma Building Association is currently pending in this court (case No. B289766).
triable issues of material fact as to the existence of a special relationship between Defendant and Plaintiff. Specifically, evidence before the Court suggests Defendant was aware that alcohol abuse in the Greek System, including SAE, was a problem that caused accidents and injuries, Defendant asserted control over SAE and/or SAE’s ability to have events, Defendant voluntarily assumed a protective duty to Plaintiff by having DPS officers patrol and enforce the policies, and Plaintiff relied on Defendant/DPS to provide her with a safe environment.”

4. The Petition for Writ of Mandate
On February 15, 2018, USC filed a petition for a peremptory writ of mandate pursuant to Code of Civil Procedure section 437c, subdivision (m)(1), challenging the denial of its summary judgment motion.5 We issued an order to show cause. We specifically directed the parties to address, in addition to any other arguments, the California Supreme Court’s analysis in Regents of the University of California v. Superior Court (2018) 4 Cal.5th 607 (Regents) regarding a college’s limited duty to protect its students from foreseeable harm, and whether that analysis applies in the present case.6

STANDARD OF REVIEW

“On review of an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law.” [Citation.] We review the entire record, “considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.” [Citation.] Evidence presented in opposition to summary judgment is liberally construed, with any doubts about the evidence resolved in favor of the party opposing the motion. [Citation.]

“Summary judgment is appropriate only ‘where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.’” [Citation.] A defendant seeking summary judgment must show that the plaintiff cannot establish at least one element of the cause of action. [Citation.] … ‘Duty, being a question of law, is particularly amenable to resolution by summary judgment.’” [Citation.]” (Regents, supra, 4 Cal.5th at p. 618.)

5. The parties stipulated to extend the time to file a writ petition by 10 days, and the trial court so ordered.
6. Writ relief is extraordinary because an aggrieved party usually has an adequate remedy by filing a postjudgment appeal. A writ of mandate may be appropriate, however, if the erroneous denial of a summary judgment motion would result in a trial on nonactionable claims. (Pacific Gas and Electric Co. v. Superior Court (2018) 24 Cal. App.5th 1150, 1157; Local TV, LLC v. Superior Court (2016) 3 Cal. App.5th 1, 7.)

DISCUSSION

1. The Duty of Care and Third Party Conduct

A duty of care is an essential element of a negligence cause of action. (Regents, supra, 4 Cal.5th at p. 618.) “The determination whether a particular relationship supports a duty of care rests on policy and is a question of law. [Citation.]” (Id. at p. 620.)

“A judicial conclusion that a duty is present or absent is merely ‘a shorthand statement … rather than an aid to analysis… . [D]uty, is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’” [Citation.] “Courts, however, have invoked the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act… .” [Citation.] (Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP (2014) 59 Cal.4th 568, 573.)

As a general rule, each person has a duty to exercise reasonable care to avoid causing injury to others. (Civ. Code, § 1714, subd. (a); Regents, supra, 4 Cal.5th at p. 619; Cabral v. Ralphs Grocery Co. (2011) 51 Cal.4th 764, 771 (Cabral.) However, a person who has not created a peril generally has no duty to take affirmative action to protect against it, and a person generally has no duty to protect another from the conduct of third parties. (Regents, at p. 619 (“A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act”); Delgado v. Trax Bar & Grill (2005) 36 Cal.4th 224, 235 (Delgado) “[as a general matter, there is no duty to act to protect others from the conduct of third parties”); Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1129 (Zelig) “[a]s a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.”)

Courts have recognized exceptions to the general rule of no duty with respect to third party conduct where a “special relationship” exists and where the defendant engages in a “negligent undertaking.” (Regents, supra, 4 Cal.5th at pp. 619–620; Delgado, supra, 36 Cal.4th at p. 249.)

A defendant may owe a duty to protect the plaintiff from third party conduct if the defendant has a special relationship with either the plaintiff or the third party. (Regents, supra, 4 Cal.5th at pp. 619–620; Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425, 435 (Tarasoff); Rest.3d Torts, Liability for Physical and Emotional Harm, §§ 40, 41.) A related but separate basis for such a duty is where the defendant voluntarily undertakes to provide protective services for the plaintiff’s benefit, and either (a) the defendant’s failure to exercise reasonable care increases the risk of harm to the plaintiff, or (b) the plaintiff reasonably relies on the undertaking and suffers injury as a result. (Delgado, supra, 36
2. Regents Clarifies the Boundaries of a University’s Duty of Care

In Regents, supra, 4 Cal.5th 607, a college student with a known history of mental illness, who had admitted to a university psychologist that he was thinking of harming others, stabbed another student in a chemistry laboratory on campus. The victim sued the university and several of its employees for negligence. (Id. at pp. 613–615.) The California Supreme Court stated, “In general, each person has a duty to act with reasonable care under the circumstances. [Citations.] However, ‘one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.’ [Citation.] ‘A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.’ [Citation.]” (Id. at p. 619.)

Regents first considered whether a university has a special relationship with its students supporting a duty to warn or protect them from foreseeable harm. (Regents, supra, 4 Cal.5th at p. 620.) The court explained that special relationships typically are characterized by the plaintiff’s dependence on the defendant for protection and the defendant’s superior control over the means of protection. (Id. at pp. 620–621.) Special relationships also are limited to specific individuals, rather than the public at large. (Id. at p. 621.) “Finally, although relationships often have advantages for both participants, many special relationships especially benefit the party charged with a duty of care. [Citation.] Retail stores or hotels could not successfully operate, for example, without visits from their customers and guests.” (Ibid.)

Regents explained that shifting cultural attitudes have changed the legal significance of the college-student relationship. Colleges once were regarded as standing in loco parentis to students, resulting in both an obligation to protect students and some degree of immunity from suit by students. Later, when social changes led to greater privacy and autonomy rights for adult students, courts generally treated colleges as “bystanders” with a limited duty to students arising from a business relationship, but no broader duty based on a special relationship. (Regents, supra, 4 Cal.5th at p. 622.) “While the university might owe a duty as a landowner to maintain a safe premises, courts typically resisted finding a broader duty based on a special relationship with students. [Citation.] This was particularly so when injuries resulted from alcohol consumption or fraternity activity. [Citation.]” (Ibid.)

Regents discussed three Court of Appeal opinions from the “bystander” era. (Regents, supra, 4 Cal.5th at pp. 622–624.) In Baldwin v. Zoradi (1981) 123 Cal.App.3d 275 (Baldwin), a college student was injured in an off-campus drag race after the drivers, who were also students, drank alcohol in dormitories on campus despite the university’s prohibition against alcohol on campus. (Id. at p. 279.) Baldwin stated that the former in loco parentis role of college administrators had yielded to students’ greater independence. (Id. at p. 287.) Regents stated, “Distinguishing special relationships in other contexts, the [Baldwin] court concluded the university lacked sufficient control over student behavior to justify imposing a duty to prevent on-campus drinking. [Citation.]” (Regents, supra, 4 Cal.5th at p. 623.)

In Crow v. State of California (1990) 222 Cal.App.3d 192 (Crow), a college student was injured when another student attacked him at a dormitory “keg party.” (Id. at p. 197.) Crow largely followed the reasoning in Baldwin, supra, 123 Cal. App.3d 275, stating, “Given these realities of modern college life, the university does not undertake a duty of care to safeguard its student from the risks of harm flowing from the use of alcoholic beverages.” (Crow, at p. 209.)

In Tanja H. v. Regents of University of California (1991) 228 Cal.App.3d 343 (Tanja H.), a college student was raped by other students in a dormitory on campus after a party with alcohol. (Id. at p. 436.) Citing Baldwin, supra, 123 Cal. App.3d 275, and Crow, supra, 222 Cal.App.3d 192, Tanja H. stated that a duty to prevent alcohol-related crimes would require universities to “impose onerous conditions on the freedom and privacy of resident students—which restrictions are incompatible with a recognition that students are now generally responsible for their own actions and welfare[.]” (Tanja H., at p. 438.)

Regents stated, “When the particular problem of alcohol-related injuries is not involved, our cases have taken a somewhat broader view of a university’s duties toward its students.” (Regents, supra, 4 Cal.5th at p. 623; italics added.) Peterson v. San Francisco Community College Dist. (1984) 36 Cal.3d 799 (Peterson) held that a community college district owed a duty to warn its students of known dangers posed by criminals on campus. The duty was based on the district’s status as a landowner. (Id. at pp. 808–809; see Regents; at p. 624.) Avila v. Citrus Community College Dist. (2006) 38 Cal.4th 148 held that a community college district hosting an intramural sports competition owed a duty to participating students not to increase the risks inherent in the sport. (Id. at p. 162; see Regents; at p. 624.) C.A. v. William S. Hart Union High School Dist. (2012) 53 Cal.4th 861, involving a guidance counselor’s sexual harassment of a high school student, held that a school district had a special relationship with its students arising from mandatory attendance and the district’s “comprehensive control over students,” and that the district owed a duty of care to protect students from foreseeable injury by third parties acting negligently or intentionally. (Id. at pp. 869–870; see Regents; at p. 624.)

Regents concluded that postsecondary schools have a special relationship with their students “while they are engaged in activities that are part of the school’s curriculum or close-
ly related to its delivery of educational services."\(^8\) \((\text{Regents}, \text{supra}, 4 \text{ Cal.5th} \text{ at pp. } 624–625.\)) Students depend on their college to provide structure, guidance, and a safe learning environment. Meanwhile, the college has superior control over the campus environment, imposes rules and restrictions, employs resident advisors, mental health counselors, and campus police, can monitor and discipline students, and, more broadly, has the power to influence students’ values and behavior. \((\text{Id. at p. } 625.\) \(\text{Regents}\) stated, “The special relationship we now recognize extends to activities that are tied to the school’s curriculum but not to student behavior over which the university has no significant degree of control.” \((\text{Id. at p. } 627.\)\)

\(\text{Regents}\) noted the limits of such a special relationship, stating: “Of course, many aspects of a modern college student’s life are, quite properly, beyond the institution’s control. Colleges generally have little say in how students behave off campus, or in their social activities unrelated to school. It would be unrealistic for students to rely on their college for protection in these settings, and the college would often be unable to provide it. This is another appropriate boundary of the college-student relationship: Colleges are in a special relationship with their enrolled students only in the context of school-sponsored activities over which the college has some measure of control.” \((\text{Regents}, \text{supra}, 4 \text{ Cal.5th} \text{ at p. } 626.\)\)

\(\text{Regents}\) concluded that as a result of the special relationship, colleges owe a duty to exercise reasonable care to protect students from foreseeable acts of violence in the classroom and during curricular activities. \((\text{Regents}, \text{supra}, 4 \text{ Cal.5th} \text{ at p. } 627.\) Considering the Rowland factors \((\text{Rowland v. Christian} \text{ (1968) } 69 \text{ Cal.2d } 108.\) \(\text{Regents}\) further concluded that violence in the classroom was sufficiently foreseeable, there was a close connection between the university’s alleged negligence and the plaintiff’s injury, and public policy considerations did not justify precluding liability. \((\text{Regents}, \text{at pp. } 628–634.\)\)

\(\text{Regents}\) disapproved \(\text{Baldwin, supra, 123 Cal.App.3d } 275, \text{Crow, supra, 222 Cal.App.3d } 192, \text{Tanja H., supra, 228 Cal.App.3d } 434, \text{Ochoa v. California State University} \text{ (1999) } 72 \text{ Cal.App.4th } 1300 \text{ (Ochoa), and Stockinger v. Feather River Community College} \text{ (2003) } 111 \text{ Cal.App.4th } 1014 \text{ (Stockinger), but only } [t]o \text{ the extent they are inconsistent with our holdings regarding the special relationship between colleges and students, or colleges’ duty of care }\ldots.”\(^9\) \((\text{Regents, supra, 4 Cal.5th at p. } 634, \text{fn. } 7.\)\)

\(8.\) For purposes of its discussion, \(\text{Regents}\) did not distinguish undergraduate from postgraduate students and used the terms “college” and “university” interchangeably. \((\text{Regents, supra, } 4 \text{ Cal.5th at p. } 613, \text{fn. } 1.\)\)

\(9.\) \(\text{Ochoa}\) held that a university had no special relationship with an adult student and no duty to protect the student from the criminal act of another student during an intramural soccer game. \((\text{Ochoa, supra, } 72 \text{ Cal.App.4th at pp. } 1305–1306.\) \(\text{Stockinger}\) held that a community college owed no duty of care to an adult student participating in a school-sponsored, off campus activity. \((\text{Stockinger, supra, } 111 \text{ Cal.App.4th at pp. } 1031–1036.\)\)

\(3.\) **\text{USC Did Not Have a Special Relationship with Barenborg}\**

A defendant may have an affirmative duty to protect the plaintiff from the conduct of a third party if the defendant has a special relationship with the plaintiff. \((\text{Regents, supra, 4 Cal.5th at p. } 619; \text{Delgado, supra, } 36 \text{ Cal.4th at p. } 235.\)\) Examples of such a relationship include the relationships between common carriers and their passengers, innkeepers and their guests, business proprietors and their invitees, landlords and their tenants, and colleges and students engaged in curricular activities. \((\text{Regents, at p. } 620; \text{Delgado, at pp. } 235–236.\)\)

Unlike the plaintiff in \(\text{Regents, supra, 4 Cal.5th } 607, \text{Barenborg was not a student attending the defendant university at the time of her injury, and she was not engaged in an activity closely related to the delivery of educational services. However, she contends that USC had a special relationship with her based not on her status as a student, but on her status as an invitee at premises subject to USC’s control.} \)

The relationship between a possessor of land and an invitee is a special relationship giving rise to a duty of care. \((\text{Peterson, supra, } 36 \text{ Cal.3d at p. } 806 \text{ [a special relationship exists between “a possessor of land and members of the public who enter in response to the landowner’s invitation”].})\) A person who possesses or controls land has a duty to exercise reasonable care to maintain the land in a reasonably safe condition. \((\text{Alcaraz v. Vece} \text{ (1997) } 14 \text{ Cal.4th } 1149, 1156 \text{ (Alcaraz); Staat's v. Vintner's Golf Club, LLC} \text{ (2018) } 25 \text{ Cal.App.5th } 826, 833.\) “A defendant need not own, possess and control property in order to be held liable; control alone is sufficient.” \((\text{Alcaraz, at p. } 1162; \text{see Johnston v. De La Guerra Properties, Inc.} \text{ (1946) } 28 \text{ Cal.2d } 394, 401 \text{ [tenant owed a duty of care on property outside of the leased premises based on tenant’s exercise of control].})\) The duty of care includes a duty to take reasonable steps to protect persons on the property from physical harm caused by the foreseeable conduct of third parties. \((\text{Peterson, at } 807; \text{see Delgado, supra, } 36 \text{ Cal.4th at p. } 244 \text{ [business proprietor has a duty to take reasonable steps to protect against foreseeable criminal acts of third parties].})\)

Barenborg argues that USC had a special relationship with her based on its control of the property because the fraternity house was subject to USC’s policies and was monitored by its public safety officers. She cites \(\text{Alcaraz, supra, } 14 \text{ Cal.4th } 1149, \text{and Southland Corp. v. Superior Court} \text{ (1988) } 203 \text{ Cal. App.3d } 656 \text{ (Southland) in support of her argument. Neither is is apposite.}\)

In \(\text{Alcaraz,}\) the plaintiff was injured when he stepped into a water meter box near his rental unit. \((\text{Alcaraz, supra, } 14 \text{ Cal.4th at p. } 1152.\)\) The meter box was located on a strip of land owned by the city between the sidewalk and the defendants’ property line. \((\text{Ibid.})\) \(\text{Alcaraz}\) stated that a defendant’s duty to maintain land in a reasonably safe condition extends to land over which the defendant exercises control, regardless of who owns the land. \((\text{Id. at pp. } 1158–1159.\) “As long
as the defendant exercised control over the land, the location of the property line would not affect the defendant’s potential liability.” (Id. at p. 1161.) Evidence that the defendant maintained the lawn surrounding the meter box and, after the plaintiff’s injury, constructed a fence enclosing the entire lawn, including the meter box, created a triable issue of fact as to whether the defendants exercised control over the land where the plaintiff was injured, precluding summary judgment.10 (Id. at pp. 1161–1162, 1167.)

Southland, supra, 203 Cal.App.3d 656, involved an assault on a convenience store customer in a vacant lot adjacent to the store property. The defendant store owners did not own or lease the vacant lot, but their customers often parked there, their lease authorized their nonexclusive use of the lot for customer parking, and store employees previously had taken action to remove loiterers from both the store property and the adjacent lot. (Id. at pp. 666–667.) Southland stated that a defendant may have a duty to protect a plaintiff from the conduct of third parties on property the defendant owns, possesses, or controls. (Id. at p. 664.) The evidence created a triable issue of fact as to whether the defendant exercised control over the adjacent lot, precluding summary judgment.11 (Id. at pp. 666–667.)

Here, in contrast, USC did not exercise control over the property where the injury occurred. Unlike the defendants in Alcaraz, supra, 14 Cal.4th 1149, USC did not maintain and build a fence around the property. Unlike the defendant in Southland, supra, 203 Cal.App.3d 656, USC did not have a nonexclusive right to use the property, and its invitees did not regularly use the property. Although USC’s policies governing use of alcohol and social events applied to SAE, those policies, along with DPS patrols to enforce those policies, did not constitute an exercise of control over the property. (Rabel v. Illinois Wesleyan University (1987) 161 Ill.2d 616, 620) [“an appellate decision is not authority for everything said in the court’s opinion but only ‘for the points actually involved and actually decided’.”]

10. Alcaraz cautioned, “This is not to say that the simple act of mowing a lawn on adjacent property (or otherwise performing minimal, neighborly maintenance of property owned by another) generally will, standing alone, constitute an exercise of control over property and give rise to a duty to protect or warn persons entering the property.” (Alcaraz, supra, 14 Cal.4th at p. 1167; see Contreras v. Anderson (1997) 59 Cal.App.4th 188, 198 [“simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property”].)  

11. Barenborg cites Southland, supra, 203 Cal.App.3d 656, for the proposition that a defendant’s apparent control over the property is sufficient to create a special relationship even if the defendant did not actually own, possess, or control the property. Southland held that the evidence created a triable issue of fact as to whether the defendants actually exercised control over the property. (Id. at pp. 666–667; see Alcaraz, supra, 14 Cal.4th at p. 1163 [describing the reference to “commercial benefit” in Southland as “but one factor bearing upon the dispositive issue of whether the store exercised control over the adjacent property.”].) References in the Southland opinion to “actual or apparent control” (id. at pp. 662, 664) are dicta and do not support the proposition that apparent control is sufficient. (Santisas v. Goodin (1998) 17 Cal.4th 599, 620 [“an appellate decision is not authority for everything said in the court’s opinion but only ‘for the points actually involved and actually decided’.”].)

4. USC Did Not Have a Special Relationship with Cal. Gamma

A defendant may have an affirmative duty to protect the plaintiff from the conduct of a third party if the defendant has a special relationship with the third party. (Regents, supra, 4 Cal.5th at p. 619; Tarasoff, supra, 17 Cal.3d at p. 435.) “[A] duty to control may arise if the defendant has a special relationship with the foreseeably dangerous person that entails an ability to control that person’s conduct. [Citation.]” (Regents, at p. 619.) Examples of such a special relationship include the relationships between parent and child, psychotherapist and patient, and hospital and patient. (Ibid.; Tarasoff, at p. 436.)

Barenborg argues that USC had a special relationship with Cal. Gamma and its members because USC had the ability to control the fraternity by enforcing the university’s policies.

12. We note that Regents cited out-of-state cases in support of its holding that universities have a limited special relationship with their students. (Regents, supra, 4 Cal.5th at pp. 626–627.) We are free to cite both published and unpublished decisions from other jurisdictions and rely on them as persuasive authority. (Lebrilla v. Farmers Group, Inc. (2004) 119 Cal.App.4th 1070, 1077; Brown v. Franchise Tax Board (1987) 197 Cal.App.3d 300, 306, fn. 6.)
regarding alcohol use and social events. She notes that one of the stated goals of USC’s policies was to protect the campus community, including invitees to Greek Row.

The special relationship recognized in Regents, supra, 4 Cal.5th 607, was limited to enrolled students “while they are engaged in activities that are part of the school’s curriculum or closely related to its delivery of educational services.” (Id. at p. 625.) Regents noted that, unlike such curricular activities, “many aspects of a modern college student’s life are, quite properly, beyond the institution’s control. Colleges generally have little say in how students behave off campus, or in their social activities unrelated to school. It would be unrealistic for students to rely on their college for protection in those settings, and the college would often be unable to provide it.” (Id. at p. 626.)

These observations are relevant not only to the college-student relationship and the limited duty it supports, but also to the relationship between a college and fraternity members participating in off-campus social activities. A college has little control over such noncurricular, off-campus activities, and it would be unrealistic for students and their guests to rely on the college for protection in those settings. (See Pawlowski v. Delta Sigma Phi (Conn.Super.Ct., Jan. 23, 2009, No. CV-03-0484661S) 2009 WL 415667, p. 6 (“As a practical matter, it may be impossible for a university to police students’ off-campus alcohol consumption”); A.M. v. Miami University, supra, 88 N.E.3d at pp. 1024–1025 [university did not have a special relationship with student who sexually assaulted another student in off-campus attack; university’s ability to discipline a student for off-campus conduct does not impose a duty to control the conduct of the student].) The dependency and control that are characteristic of special relationships are absent in those circumstances. We conclude that USC had no special relationship with Cal. Gamma or its members so as to give rise to a duty of care owed to guests at the party.

5. The Negligent Undertaking Doctrine Is Inapplicable

The negligent undertaking theory of liability holds that a person who has no affirmative duty to act but voluntarily acts to protect another has a duty to exercise due care if certain conditions are satisfied.13 (Delgado, supra, 36 Cal.4th at p. 249; Paz v. State of California (2000) 22 Cal.4th 550, 558 (Paz).)

“The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. [Citation.] However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. [Citation.]” (Paz, supra, 22 Cal.4th at pp. 558–559.)

“Our cases establish that a volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: either (a) the volunteer’s failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer’s undertaking and suffers injury as a result.” (Delgado, supra, 36 Cal.4th at p. 249.)

The foundational requirement for liability under a negligent undertaking theory is the undertaking of a task that the defendant allegedly performed negligently. (Paz, supra, 22 Cal.4th at p. 559.) The undertaking must be to render services that the defendant should recognize as necessary for the plaintiff’s protection. (Id. at pp. 559–560; Artiglio v. Corning, Inc. (1998) 18 Cal.4th 604, 618 (Artiglio)). In addition to satisfying these requirements, the plaintiff also must satisfy one of two conditions: either (a) the defendant’s failure to exercise reasonable care increased the risk of harm to the plaintiff, or (b) the plaintiff reasonably relied on the undertaking and suffered injury as a result.14 (Delgado, supra, 36 Cal.4th at p. 249; Williams, supra, 34 Cal.3d at p. 23; Rest.3d Torts, supra, § 42; cf. Paz, supra, 36 Cal.4th at p. 560 [assuming the defendant undertook to provide protective services, summary judgment was proper because the plaintiff could not establish any of the conditions for liability].)

Whether the defendant’s undertaking, if proven, gave rise to a duty of care is a question of law for the court to decide. (Artiglio, supra, 18 Cal.4th at p. 615; Peredia v. HR Mobile Services, Inc. (2018) 25 Cal.App.5th 680, 700.) “[T]he scope of any duty assumed depends upon the nature of the undertaking.” (Delgado, supra, 36 Cal.4th at p. 249.) Delgado stated that merely because a business proprietor “chooses to have a security program” that includes provision of a roving security guard does not signify that the proprietor has assumed a duty to protect invitees from third party violence. [Citation.]” (Id. at pp. 249–250.)

Similarly here, we conclude that by adopting policies regarding alcohol use and social events and providing a security patrol both on and off campus, USC did not assume a duty to protect invitees from third-party conduct at fraternity parties. Again, a college has little control over such noncurricular, off-campus activities, and it would be unrealistic for students and their guests to rely on the college for protection in those settings.

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13. The negligent undertaking doctrine is sometimes called the “Good Samaritan” rule, but is actually an exception to that rule. (Delgado, supra, 36 Cal.4th at p. 249, fn. 28.)

14. The negligent undertaking doctrine encompasses both undertakings to render protective services to the plaintiff (Rest.2d Torts, § 323), as Barenborg claims here, and undertakings to render services to a third party to protect the plaintiff (Rest.2d Torts, § 324A). (Delgado, supra, 36 Cal.4th at p. 249, fn. 28.) Section 42 of the Restatement Third of Torts, Liability for Physical and Emotional Harm, replaces section 323 of the Restatement Second of Torts, and section 43 of the Third Restatement replaces section 324A of the Second Restatement. (Rest.3d Torts, supra, §§ 42, com. a, p. 92, 43, com. a, pp. 114–115.)
These considerations support the conclusion not only that there was no special relationship, but also that by adopting those measures to promote safety and a suitable learning environment, USC did not assume a duty to protect guests at off-campus fraternity parties from the conduct of other guests. (See Mynhardt v. Elon University (2012) 220 N.C.App. 368, 375 [by adopting rules and regulations on alcohol use, university did not assume a duty to protect student from injury at an off-campus fraternity party]; Rabel, supra, 161 Ill.App.3d at pp. 362–363 [by equipping its buildings with security devices and employing security guards, university did not assume a duty to protect students from criminal attacks]; Titus, supra, 118 Cal.App.4th at p. 912 [by adopting rules and regulations to protect persons on the property and hiring a security company, homeowners association did not create a duty to protect residents from an inebriated driver]; cf. Coghill v. Beta Theta Pi Fraternity (1999) 133 Idaho 388, 400, [university assumed a duty to protect a student because two university employees were present to supervise a fraternity party and should have known that the student was intoxicated].)

Moreover, the evidence here cannot support an inference that USC’s conduct increased the risk of harm to Barenborg. By establishing policies governing fraternities, providing a security patrol with authority to enforce those policies both on and off campus, and failing to enforce those policies by shutting down the Cal. Gamma party after it began or preventing the party from occurring in the first place, USC did not create any new peril. USC’s failure to prevent or curtail the party allowed the party to occur and continue, but neither created the party nor increased the risks inherent in the party.15

A defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk. (Paz, supra, 22 Cal.4th at p. 560 [“a failure to alleviate a risk cannot be regarded as tantamount to increasing that risk”]; Williams, supra, 34 Cal.3d at p. 27 [highway patrol officers assisting an injured driver “took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed”]; City of Santee v. County of San Diego (1989) 211 Cal.App.3d 1006, 1016 [“nonfeasance which results in failure to eliminate a preexisting risk is not equivalent to nonfeasance which increases a risk of harm”]; see Pawlowski v. Delta Sigma Phi, supra, 2009 WL 415667, p. 4 [university’s alleged failure to enforce its own policies and failure to supervise off-campus alcohol use did not increase the risk of harm].) Barenborg’s argument that USC’s failure to effectively discipline the fraternity for prior unauthorized parties emboldened the fraternity, causing it to hold another unauthorized party with more dangerous conduct is mere speculation without evidentiary support.

The evidence here also cannot support an inference that Barenborg actually or reasonably relied on USC to protect her from harm. Despite her deposition testimony that she relied on DPS to protect her,16 there is no indication that her awareness of the existence of DPS caused her to behave any differently. (Williams, supra, 34 Cal.3d at p. 28 [plaintiff must show detrimental reliance on defendant’s conduct “which induced a false sense of security and thereby worsened her position”].) The evidence also does not support her claim that any reliance was reasonable. Barenborg acknowledged that the party was “very large, very crazy, packed and crowded,” and there was no visible security or control. Alcohol was plentiful. Barenborg had already consumed cocaine and several alcoholic drinks. She stepped onto a makeshift raised platform to dance with her friends amid other partygoers and was bumped off the platform and fell to the ground. In these circumstances, any reliance on USC or DPS to protect her from harm was unreasonable. (Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1239 [“whether a party’s reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts”].)

6. Consideration of the Rowland Factors Does Not Support a Duty of Care

Courts weigh several factors in determining whether to recognize an exception to the general duty under Civil Code section 1714, subdivision (a) to exercise ordinary care. Those factors include, “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” (Regents, supra, 4 Cal.5th at p. 628, quoting Rowland v. Christian (1968) 69 Cal.2d 108, 113.)

An analysis of the Rowland factors may be unnecessary if the court determines as a matter of law based on other policy considerations that no duty exists in a category of cases. (See Zelig, supra, 27 Cal.4th at pp. 1128–1131 [found no special relationship and no negligent undertaking upon which to base a duty of care without a Rowland analysis]; Hoff v. Vacaville Unified School Dist. (1998) 19 Cal.4th 925, 933–937 [held the special relationship between a school district and a student did not create a duty of care toward nonstudents endangered by student conduct without a Rowland analysis]; Williams, supra, 34 Cal.3d at pp. 27–28 [found no special relationship and no negligent undertaking upon which to base a duty of care without a Rowland analysis]; Suarez v. Pacific

15. USC had no opportunity to prevent the party from taking place because Cal. Gamma did not request permission before hand, as required by the rules. There is no evidence that USC had any prior knowledge the party would take place.

16. In her deposition, Barenborg answered “Yes” to the question, “Prior to your injury, did you rely on the USC Department of Public Safety officers to protect you?”
Northstar Mechanical, Inc. (2009) 180 Cal.App.4th 430, 438 [because the balancing of factors has already been performed in establishing the common law rule that there is no duty to come to the aid of another absent a special relationship, it is unnecessary to analyze the Rowland factors in each case]; See v. All-Makes Overhead Doors (2002) 97 Cal.App.4th 1193, 1203 [same]; Eric J. v. Betty M. (1999) 76 Cal.App.4th 715, 729–730 [same].)

In any event, some courts have considered the Rowland factors despite concluding that there was no special relationship and no duty, with the Rowland analysis supporting the conclusion of no duty. (Nally v. Grace Community Church (1988) 47 Cal.3d 278, 296–299; Conti v. Watchtower Bible & Tract Society of New York, Inc. (2015) 235 Cal.App.4th 1214, 1227–1230.) We do so here, and conclude that under Rowland USC did not owe Barenborg a duty of care.

The Rowland factors, "must be evaluated at a relatively broad level of factual generality." [Citation.] In considering them, we determine 'not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.' [Citation.] In other words, the duty analysis is categorical, not case-specific. [Citation.] (Regents, supra, 4 Cal.5th at pp. 628–629.)

"The Rowland factors fall into two categories. The first group involves foreseeability and the related concepts of certainty and the connection between plaintiff and defendant. The second embraces the public policy concerns of moral blame, preventing future harm, burden, and insurance availability. The policy analysis evaluates whether certain kinds of plaintiffs or injuries should be excluded from relief. [Citation.]" (Regents, supra, 4 Cal.5th at p. 629.)

"[A]s to foreseeability, … the court’s task in determining duty is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed … “” [Citations.]” (Kesner v. Superior Court (2016) 1 Cal.5th 1132, 1145 (Kesner).)

The foreseeability question here is whether it is reasonably foreseeable that a university’s failure to enforce policies governing alcohol use and social events could result in harm to a person attending a fraternity party. (Cf. Regents, supra, 4 Cal.5th at p. 629; Cabral, supra, 51 Cal.4th at p. 775.) It is not uncommon for college students drinking alcohol at a fraternity party to behave in a manner that is careless and threatens injury to themselves or others. The possibility of injury at such a party unrestrained by sensible rules and enforcement is reasonably foreseeable.

The second factor, "the degree of certainty that the plaintiff suffered injury" (Rowland, supra, 69 Cal.2d at p. 113), ordinarily is significant only when the claimed injury is intangible, such as emotional distress. (Regents, supra, 4 Cal.5th at p. 630; Kesner, supra, 1 Cal.5th at p. 1148.) Barenborg’s physical injuries are certain, so the certainty of injury is not a relevant factor.

“The third factor, ‘the closeness of the connection between the defendant’s conduct and the injury suffered’ [citation], is ‘strongly related to the question of foreseeability itself’ [citation], but it also accounts for third-party or other intervening conduct. [Citation.] Where the third party’s intervening conduct is foreseeable or derivative of the defendant’s conduct, then that conduct does not ‘diminish the closeness of the connection between defendant’s conduct and plaintiff’s injury… .”’ [Citation.]” (Vasilenko v. Grace Family Church (2017) 3 Cal.5th 1077, 1086 (Vasilenko).)

In Regents, the university’s failure to prevent a violent assault in the classroom was closely connected to the plaintiff’s injury because the university was aware of the risk that the particular student would commit a violent assault against another student. (Regents, supra, 4 Cal.5th at p. 631 [“[w]hen circumstances put a school on notice that a student is at risk to commit violence against other students, the school’s failure to take appropriate steps to warn or protect foreseeable victims can be causally connected to injuries the victims suffer as a result of that violence”].)

The defendant in Vasilenko was a church that maintained an overflow parking lot across the street from its chapel. The plaintiff was directed to park there by church volunteers and was struck by a car while crossing the street on his way to a church function. Vasilenko held that a landowner does not have a duty of care to assist invitees in crossing a public street when the landowner does nothing to obscure or magnify the dangers of crossing the street. (Vasilenko, supra, 3 Cal.5th at p. 1081–1082.) Regarding the closeness of the connection between the defendant’s conduct and the plaintiff’s injury, Vasilenko stated: “unless the landowner impaired the driver’s ability to see and react to crossing pedestrians, the driver’s conduct is independent of the landowner’s. Similarly, unless the landowner impaired the invitee’s ability to see and react to passing motorists, the invitee’s decision as to when, where, and how to cross is also independent of the landowner’s. Because the landowner’s conduct bears only an attenuated relationship to the invitee’s injury, we conclude that the closeness factor tips against finding a duty.” (Id. at p. 1086.)

The intervening conduct here involved Cal. Gamma hosting an unauthorized party, serving alcohol, and erecting an unsafe dance platform; Barenborg attending the party under the influence of cocaine and alcohol; and Barth bumping Barenborg off the platform, whether negligently or intentionally. As in Vasilenko, supra, 3 Cal.5th 1077, USC did nothing to increase the risks inherent in the activity here—attending a fraternity party. The conduct of Cal. Gamma, Barenborg, and Barth was independent of USC’s conduct in failing to enforce its policies governing alcohol use and social events. The attenuated connection between USC’s failure to enforce its policies and the independent conduct by Cal. Gamma,
Barenborg, and Barth weighs against finding a duty. (Cf. id. at p. 1086.)

Regents stated regarding moral blame: “We have previously assigned moral blame, and we have relied in part on that blame in finding a duty, in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue.” [Citation.] With the decline of colleges’ in loco parentis role, adult students can no longer be considered particularly powerless or unsophisticated.” (Regents, supra, 4 Cal.5th at p. 631.) Because adult students, whether they attend USC or another university, cannot be considered particularly powerless or unsophisticated and because universities have little control over students’ off-campus social activities (Ibid), we conclude that USC’s conduct in failing to enforce its policies and more closely monitor off-campus fraternity parties was not particularly blameworthy.

“The policy of preventing future harm is ordinarily served by allocating costs to those responsible for the injury and best suited to prevent it. [Citation.] ‘In general, internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer. That consideration may be “outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability.” ’ [Citation.]” (Vasilenko, supra, 3 Cal.5th at p. 1087.) Because colleges’ control of off-campus social activities is limited, their ability to reduce the risk of injury in those settings is limited. (Cf. Ibid. “[t]he ability of landowners to reduce the risk of injury from crossing a public street is limited”.)

In contrast to colleges, fraternities hosting parties in fraternity houses and the invitees themselves have much greater control over conduct at those parties and a more direct ability to reduce the risk. (Cf. Vasilenko, supra, 3 Cal.5th at p. 1090 “[other entities such as the government, drivers, and invitees themselves have much greater and more direct ability to reduce that risk”.)

Moreover, finding a duty in these circumstances could create a disincentive for universities to regulate alcohol use and social activities and provide security patrols, which to some degree could frustrate the policy of preventing future harm. (See Pawlowski v. Delta Sigma Phi, supra, 2009 WL 415667, p. 6 [finding an assumed duty based on university policies to curb alcohol abuse might discourage the adoption of such policies, which is undesirable]; Mynhardt v. Elon University, supra, 220 N.C.App. at p. 375 [same].) In light of these considerations, we conclude that the policy of reducing future harm weighs against imposing a duty on colleges.

Regarding the burden on the defendant and the community, effective control of off-campus fraternity parties, if achievable, would require close monitoring and considerable resources. The burden on the university and the restrictions on the independence of students engaging in noncurricular activities off campus would be great. (Cf. Baldwin, supra, 123 Cal.App.3d at p. 291 [“The college … has an interest in the nature of its relationship with its adult students, as well as an interest in avoiding responsibilities that it is incapable of performing”]; Tanja H., supra, 228 Cal.App.3d at p. 438 [“onerous conditions” on students’ “freedom and privacy” would be “incompatible with a recognition that students are now generally responsible for their own actions and welfare”].)

Finally, although there is no evidence in the record regarding the availability and cost of insurance for the risk involved, USC “has offered no reason to doubt colleges’ ability to obtain coverage for the negligence liability under consideration.” (Regents, supra, 4 Cal.5th at p. 633.) We conclude that the Rowland factors, on balance, weigh against imposing a duty on USC to protect a fraternity’s invitees from the risk of harm at an off-campus fraternity party. The lack of a close connection between USC’s conduct and Barenborg’s injury, the relatively low moral blame, the policy of preventing future harm, and the burden on colleges and students that would arise by imposing a duty, all weigh against finding a duty.

**DISPOSITION**

The petition is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its order denying USC’s motion for summary judgment and enter a new order granting the motion. USC is entitled to recover its costs in this appellate proceeding.

**MICON, J.**

*We concur: MANELLA, P. J., and COLLINS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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17. Regents disapproved Baldwin, supra, 123 Cal.App.3d 275, Tanja H., supra, 228 Cal.App.3d 434, and other opinions only to the extent they were inconsistent with its holdings concerning the special relationship between colleges and students, or colleges’ duty of care. (Regents, supra, 4 Cal.5th at p. 634, fn. 7.) The holdings in Regents were limited to finding a special relationship between colleges and enrolled students participating in curricular activities and a duty of care to protect students from foreseeable acts of violence in the classroom and during curricular activities. (Id. at pp. 626–627.) Some of Baldwin’s and Tanja H’s statements concerning the college-student relationship remain relevant and viable with respect to noncurricular activities.
CITY OF SAN DIEGO, Petitioner,
v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;
DANA HOOVER, Real Party in Interest.

No. D073961
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(San Diego County Super. Ct. No. 37-2014-00013755-CU-01-CTL)
Original Proceedings in mandate following granting of
motion to disqualify counsel. Katherine A. Bacal, Judge.
Petition granted.
Filed December 19, 2018

COUNSEL
Mara W. Elliot, City Attorney, George F. Schaefer,
Assistant City Attorney, Michael J. McGowan, Deputy City
Attorney for Petitioner.
No appearance for Respondent.
The Gilleon Law Firm, James C. Mitchell and Daniel M.
Gilleon for Real Party in Interest Dana Hoover.

OPINION

As codified in Evidence Code section 950 et seq., the
attorney-client privilege seeks to prevent the disclosure of confi
dential communications between the lawyer and the client.
In the typical situation, where a question at trial or a pretrial
discovery request seeks disclosure of arguably privileged in
formation, an objection to the question or request is raised and the trial court rules on the objection based on whether the privilege applies. If the objection is overruled, the party or witness is ordered to answer or respond; if the objection is sustained, the question or request goes unanswered.

But what if the inquiring party somehow obtains an an
swer to the inquiry before the court has an opportunity to rule on the privilege question, and it is later determined that the privilege applies such that the objection would have been sustained? In many instances, the only available remedy that will preserve the integrity of the process and public respect for the administration of justice would be to disqualify counsel for the inquiring party in conjunction with ordering return of privileged documents and/or sealing of transcripts. Does it make a difference, however, if the answer obtained by the inquiring party included no information likely to affect the ongoing litigation? To put it another way, is disqualification of counsel necessarily the remedy even if the violation of the attorney-client privilege resulted in no actual disclosure of relevant information?

In this case, as part of an internal affairs investigation regarding the unauthorized disclosure of a confidential police report, the San Diego Police Department (Department) questioned plaintiff/real party Dana Hoover, a detective for the Department, regarding the content of communications between Hoover and an attorney representing her in an employment-related lawsuit against defendant/petitioner City of San Diego. Although Hoover invoked the privilege, the Department directed her to answer the internal affairs questions or face discipline and/or termination of employment. The trial court properly concluded that the City violated the attorney-client privilege when Department investigators insisted Hoover respond to questions despite her invocation of the privilege. A deputy city attorney attending the interview as an observer also violated the California State Bar Rules of Professional Conduct when she began questioning Hoover about her lawsuit without the permission of her lawyer in the case (Rules Prof. Conduct, rule 2-100).1

Disqualification of counsel, however—particularly the elected City Attorney—is a drastic remedy that should be ordered only where the violation of the privilege or other misconduct has a “substantial continuing effect on future judicial proceedings.” (Gregori v. Bank of America (1989) 207 Cal.App.3d 291, 309 (Gregori).) There must be a “reasonable probability” and “genuine likelihood” that opposing counsel has “obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation.” (Ibid.) Here, the transcript of the internal affairs interview2 demonstrates that although relevant confidential information could in theory have been elicited in response to the internal affairs questions, in fact no such information was disclosed. Under these circumstances, because “a disqualification order must be prophylactic, not punitive” (id. at pp. 308–309), the drastic remedy of depriving a party of its counsel of choice was unwarranted. We therefore issue the writ as requested by the City.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2014 Hoover filed a lawsuit against the City, her employer, alleging claims of employment-related harassment and retaliation. In particular, she claimed she suffered harassment and retaliation based on complaints she made about perceived investigative failures by the Department’s homicide unit, of which she had been a member. In June 2015, Hoover was represented in her lawsuit by attorney Daniel M. Gilleon.

In late 2017, Gilleon agreed to represent a different cli
t—the mother of a minor sexual assault victim—in a separate claim against the City. On behalf of this new cli-

1. All further rule references are to the California State Bar Rules of Professional Conduct unless otherwise indicated.
2. Filed under seal with both the trial court and this court.
ent, Gilleon alleged that the Department failed to properly investigate the assault and then covered it up. Media outlets reported the claim. In particular, a March 2018 article in the Voice of San Diego referenced a “police report” obtained by the Internet news service.

The Voice of San Diego article prompted an investigation by the Department’s internal affairs unit seeking to determine if and how the media obtained a confidential police investigative report. Suspicion focused on Hoover, and investigators scheduled an interview with her to determine whether she was the source of the leak. An initial interview was conducted by Sergeants Robert Gassman and John Huys on March 14, 2018. Hoover was accompanied by her union representative, Officer Mark Brenner. She was ordered to respond to the investigators’ questions and was told at the outset that any refusal to answer could be treated as insubordination, subjecting her to discipline up to and including termination.

Although she had no involvement in the sexual assault case, Hoover admitted to accessing and reviewing the report. She denied, however, providing the report to or discussing its contents with anyone. At some point the investigators began to inquire about communications between Hoover and Gilleon. Brenner objected based on the attorney-client privilege. Recalling the earlier threats of discipline if she failed to cooperate, Hoover nonetheless began answering the questions.³ Brenner again objected and advised Hoover not to answer any further questions about the content of communications with her lawyer. At that point the investigators took a break and contacted their supervisor; when the questioning resumed they did not make any further inquiries about communications with Gilleon.

Later that same day, Sergeant Huys contacted Hoover, telling her that the City Attorney’s office had concluded that the attorney-client privilege did not preclude questions about her conversations with attorney Gilleon as they related to the sexual assault investigation and the leaked police report. Hoover was ordered to return for a follow-up interview on March 22.

Meanwhile Gilleon learned of the internal affairs investigation and on March 16 sent an e-mail to Deputy City Attorney Michael J. McGowan complaining about the alleged violation of the attorney-client privilege. McGowan responded that he had just “inherited” the case from another attorney, but based on “very limited information” he did not believe the questions were sufficiently “related to the lawsuit.” He nonetheless offered to meet with Gilleon before the rescheduled interview to discuss the matter. Gilleon sent another e-mail, this time also copying the San Diego City Attorney Mara Elliot, warning that if the City proceeded to question Hoover about conversations she had with Gilleon, he would “take immediate legal action including but not limited to: 1) restraining orders; 2) sanctions motion; 3) motion to disqualify; and 4) a report to the State Bar.” Neither Gilleon nor the City made any attempt to seek input or guidance from the trial court.

Hoover’s interview with the same two internal affairs investigators resumed on March 22. Hoover was accompanied by attorney Rick Pinckard, counsel provided by the police officers’ association. Deputy City Attorney Christina Milligan observed the interview but also engaged with Pinckard in occasional discussions of legal issues regarding the attorney-client privilege.

A transcript of that interview has been filed under seal and is part of the record.⁴ In it Hoover described receiving a group text message from Gilleon that referred to the sexual assault investigation. She later contacted him by phone about a different issue, but the sexual assault investigation came up during the discussion. Later, Hoover decided to look at the police report concerning the sexual assault incident out of “professional curiosity.” She printed a copy, read the report, then immediately placed it in a “secured shred bin.” She specifically denied giving a copy of the report to anyone or discussing its contents with anyone, including any member of the press.

When the investigators sought to inquire about the content of the phone conversation with Gilleon that preceded Hoover accessing the report, Pinckard reasserted the attorney-client privilege. In response to a clarifying question by Deputy City Attorney Milligan, Hoover stated that her lawsuit against the City “absolutely” dealt with claims of negligent investigation and a failure to properly investigate. Milligan followed up by asking whether the sexual assault investigation was “encompassed” in Hoover’s case, to which she replied, “No.” But Pinckard then pointed out that “how that claim might in some way support or relate to the claims that are asserted in her action and any discussions that she’s had with her attorney . . . regarding how this incident may or may not fit into that litigation, that would be privileged.”

The questioning by the internal affairs officers resumed. Hoover denied giving Gilleon any information about the sexual assault case. Sergeant Huys pressed her for details of what information Gilleon provided her during the conversation. Hoover summarized what she recalled Gilleon telling her, but admitted she had learned a great deal about the sexual assault case from “media reports” and could not be sure which details she first learned from Gilleon. Huys then asked if and how the sexual assault investigation was related to her case against the City.

Within a few weeks of the March 22 interview, Hoover filed a motion to disqualify the City Attorney in her harassment and retaliation action. The motion claimed that the

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3. Hoover’s declaration is unclear in describing how she responded on March 14, if at all, to questions regarding the content of any communications with Gilleon. Gilleon’s later e-mail to the deputy city attorney on the case indicates that Hoover “rightfully refused” to answer any such questions. Nothing in the transcript of the March 22 interview suggests that any confidential communication was revealed on March 14.

4. Here we refer to the sealed transcript only for the purpose of describing facts that do not involve potentially privileged communications between Hoover and her attorney.
internal affairs interview violated both the attorney-client privilege and Rule 2-100, which generally prohibits a lawyer from contacted a litigant known to be represented by counsel. According to Hoover’s motion, the only appropriate remedy was disqualification of the entire Office of the City Attorney.

The trial court agreed. It found that the City and the City Attorney’s office “(1) forced plaintiff to reveal confidential attorney-client communications, and (2) communicated with plaintiff about the subject matter of the litigation without her counsel’s consent.” The court rejected the City’s argument that the privilege was not violated because the disclosed communications between Gilleon and Hoover did not relate to the lawsuit, noting that a court “may not review the contents of a communication to determine whether the attorney-client privilege protects that communication.” (DP Pham, LLC v. Cheadle (2016) 246 Cal.App.4th 653, 659.)

Relying on cases involving the inadvertent disclosure and receipt of privileged information, the court noted that disqualification is often necessary as a prophylactic rule. In this case, however, the receipt of privileged information was not inadvertent. Indeed, the court noted, it would have been a simple matter for the City to have raised the issue with the court in an ex parte application before the resumed March 22 interview. Under these circumstances, disqualification was warranted “to preserve the public’s trust in the integrity of the judicial process and to prevent future prejudice to the plaintiff.”

After the City filed a petition for writ of mandate/prohibition, we issued an order to show cause.

DISCUSSION

In addressing this writ petition we face two separate issues. First, did the investigators’ interview of Hoover invade the attorney-client privilege? A corollary inquiry is whether the deputy city attorney present at the March 22 interview violated Rule 2-100 by communicating with Hoover about the subject of her lawsuit against the City without the consent of her attorney Gilleon? Second, if the answer to either or both of these preliminary questions is “yes,” does the transgression require disqualification of the Office of the City Attorney?

1. a. Forcing Hoover to divulge the contents of a conversation with her attorney violated the attorney-client privilege.

As codified in Evidence Code section 954, the attorney-client privilege protects from disclosure confidential communications between lawyer and client. (Los Angeles County Bd. of Supervisors v. Superior Court (2016) 2 Cal.5th 282, 292 (Los Angeles County Bd.).) A “confidential communication” in this regard “means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . .” (§ 952.) It “includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” (Ibid.)

“The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship.” (Costco Wholesale Corp. v. Superior Court of San Francisco (2009) 47 Cal.4th 725, 733 (Costco). Where there are conflicting facts, we will affirm a trial court’s finding if it is supported by substantial evidence. (D. I. Chadbourne, Inc. v. Superior Court of San Francisco (1964) 60 Cal.2d 723, 729.) Once the party claiming the privilege “establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.” (Costco, at p. 733; § 917, subd. (a).)

Here, there is no dispute that Gilleon had an attorney-client relationship with Hoover. Indeed, Hoover told the investigators during the interview that Gilleon had been her attorney for three years at the time of the phone call. She stated that she called Gilleon to discuss something. As the trial court found, this was sufficient to meet Hoover’s initial burden of establishing that the discussion in the ensuing phone call was “in the course of” the attorney-client relationship. The burden then shifted to the City to show that the privilege did not apply.

Hoover does not object to questions by the investigators about the initial group text from Gilleon that mentioned the sexual assault investigation. Although this was clearly a “communication between client and lawyer” (§ 954), it was presumably not “confidential” because Hoover knew it was shared with a number of other individuals. (See § 952 [communication is made “in confidence” if transmitted “by a means which, so far as the client is aware, discloses the information to no third persons . . . ”].) She instead focuses on the investigators’ inquiries regarding her subsequent phone call to Gilleon.

The trial court correctly concluded that when the two sergeants from the internal affairs division questioned Hoover over her objection about the content of her phone conversation with Gilleon, they invaded the attorney-client privilege both procedurally and substantively. Procedurally, when the attorney-client privilege is invoked, questions concerning the applicability of the privilege require a hearing by the court before the allegedly confidential communication is disclosed to the opposing party. (See Titmas v. Superior Court (2001) 87 Cal.App.4th 738, 740.) Here, as the trial judge noted, it was not for the Department or the City Attorney to determine unilaterally whether the privilege applied. That was a task for the court to perform, and the court had ex parte procedures in place to address precisely this type of time-sensitive matter. When a facially colorable claim of privilege was raised, the

5. All statutory references are to the Evidence Code unless otherwise indicated.
internal affairs questioning on that topic should have been suspended until the matter could be raised with the court. Indeed, that appears to have happened during the initial interview on March 14. There was more than sufficient time between that date and the resumed questioning on March 22 for the City Attorney to have brought the matter to the court’s attention on its ex parte calendar and obtained a ruling as to the applicability of the privilege.

Substantively as well, the City’s approach to the privilege issue is flawed. The City relies primarily on the fact that Gilleon’s initial group text was sent to third parties as support for the proposition that the entire subject of the sexual assault investigation was never intended to be confidential. The fact that the sexual assault case was first discussed in a group text certainly suggests that the text itself was not confidential, but it hardly follows that Hoover’s subsequent private conversation with Gilleon was not in confidence. In this regard it is significant that the text was sent by Gilleon, but the phone call was initiated by Hoover to discuss something other than the sexual assault case.

It is unclear whether and, if so, how the sexual assault investigation was connected to Hoover’s harassment and retaliation case. But the fact that it plausibly could be is enough because the burden is on the City to show that a communication made in the course of an attorney-client relationship was not privileged. While the purpose for Hoover’s phone call to Gilleon was, appropriately, not disclosed, there is no evidence they were exchanging recipes or movie recommendations. Their relationship was attorney and client; they had no other relationship. In deciding whether a communication is privileged, it is well settled that we do not require disclosure of the assertedly privileged statements. (§ 915, subd. (a); see Costco, supra, 47 Cal.4th at pp. 737, 739.) And plainly, as the trial court observed, it is not for the opposing party to compel disclosure of the attorney-client communications in order to determine whether it believes the privilege properly applies.⁶

At the internal affairs interview Deputy City Attorney Milligan took the position that she was entitled to inquire into whether and how the sexual assault investigation was related to or “encompassed in” Hoover’s lawsuit against the City. But this is precisely the type of inquiry the privilege is designed to preclude. A client may not know why a lawyer is relating certain information or asking a particular question. She may not perceive how the information or her answers will further her case. Yet the information and the question may reveal something about the lawyer’s litigation strategy. The attorney-client privilege places the contents of these lawyer-client discussions presumptively off limits to opposing counsel absent a showing that the privilege does not apply. The City made no such showing here.

1.b. The Rules of Professional Conduct precluded the deputy city attorney from directly questioning Hoover during the interview without the consent of attorney Gilleon.

At the outset of the March 22 interview, Sergeant Huys introduced the participants, including attorney Pinckard representing Hoover for purposes of the interview. Huys also introduced Deputy City Attorney Milligan and a legal intern from the City Attorney’s office, but indicated they “are here only as observers.” He added, “[O]nly Internal Affairs Detective Sergeant Gassman and I will direct any questions to Detective Hoover.”

During the course of the interview, however, attorney Milligan asked several questions of Hoover. Prior to the interview no one in the City Attorney’s office contacted attorney Gilleon and obtained his consent. Nor did Milligan ask permission of attorney Pinckard before asking the questions.⁷

The Rules of Professional Conduct govern the conduct of members of the State Bar of California. Nothing in those rules affected the ability of the Department to question Hoover about the suspected unauthorized disclosure to the press of a confidential police report. But the lawyers employed by the City Attorney’s office are a different matter. They, like other members of the California State Bar, are bound by the Rules of Professional Conduct. Rule 2-100(A) provides: “While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”

By terms of Rule 2-100, Milligan could not communicate “directly or indirectly” with Hoover about anything having to do with her lawsuit against the City unless she first obtained consent from attorney Gilleon, who represented her in that lawsuit. Here, although it was represented she was only present as an observer, Milligan took over questioning at one point in the interview, making several inquiries about the scope of Hoover’s claims in her lawsuit. These questions were indisputably “about the subject of [Gilleon’s] representation,” yet Gilleon’s permission was never obtained and he was never consulted. Although we appreciate that Milligan may only have been trying to expedite the interview process, her direct questioning of Hoover—rather than pausing to advise Huys and Gassman—violated Rule 2-100.

⁶ This is not a situation where the character of the attorney-client communication itself reveals it was not made “for the purpose of legal consultation.” (Los Angeles County Bd., supra, 2 Cal.5th 282, 295 [billing invoices].) Here, Hoover made a phone call for the purpose of consulting her attorney.

⁷ Even if there was such a request, Rule 2-100 requires consent by the “other lawyer,” i.e., the lawyer representing the client in the underlying litigation. Here, there is no dispute that Gilleon was Hoover’s lawyer in her action against the City.
2. Because there is no reasonable likelihood that the misconduct in this case will give the City any unfair advantage, disqualification of the City Attorney is not appropriate.

Having determined that both the attorney-client privilege and Rule 2-100 were violated, the critical question is whether these errors, singly or taken together, require or permit disqualification of the City Attorney’s office. A court’s authority to disqualify a lawyer in a pending proceeding derives from its inherent power to regulate the conduct of court officers, including attorneys, in furtherance of the sound administration of justice. (City and County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 846 (Cobra Solutions); Code Civ. Proc., § 128, subd. (a)(5).) Although the right to counsel of one’s choice is an important one, it “must yield to ethical considerations that affect the fundamental principles of our judicial process.” (People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1145.)

At the same time, courts have recognized that a disqualification order is not without cost. “[I]t must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney’s innocent client, who must bear the monetary and other costs of finding a replacement.” (Gregori, supra, 207 Cal.App.3d at p. 300.) And there are additional and different costs when the disqualified attorney is a public law office, such as the popularly elected San Diego City Attorney in this case. “When an entire government law office is disqualified, the government inevitably incurs the added cost of retaining private counsel [citation], the delay such substitution entails, and in certain types of litigation it may also lose the specialized expertise of its in-house attorneys, hampering its ability to protect the public’s interest.” (Cobra Solutions, supra, 38 Cal.4th at p. 851.)

Deciding whether disqualification is the appropriate remedy thus involves a delicate balancing of competing policy considerations. Where the trial court weighs the proper factors, the resulting decision on a motion to disqualify counsel is generally reviewed for abuse of the court’s discretion. (La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court (2004) 121 Cal.App.4th 773, 782.) But where, as here, there are no material factual disputes, we review the decision to disqualify counsel as a question of law. (Cobra Solutions, supra, 38 Cal.4th at p. 848.)

We do not disqualify a lawyer from representing a client to punish the lawyer’s mistakes or even bad behavior. (Neal v. Health Net, Inc. (2002) 100 Cal.App.4th 831, 844; Gregori, supra, 207 Cal.App.3d at p. 309 [not every instance of unprofessional conduct or bad judgment by an attorney warrants disqualification].) The discipline of lawyers in California is a function reserved to the State Bar. (Myerchin v. Family Benefits, Inc. (2008) 162 Cal.App.4th 1526, 1538, disapproved on a different ground in Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co. (2010) 50 Cal.4th 913, 929, fn. 6; see also Gregori, at p. 309.) Rather, disqualification of counsel is a prophylactic remedy designed to mitigate the unfair advantage a party might otherwise obtain if the lawyer were allowed to continue representing the client. (Clark v. Superior Court (2011) 196 Cal.App.4th 37, 55.)

As early as its decision in Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal.App.3d 597, the court was able to “detect a common theme” in California disqualification cases: “If the status or misconduct which is urged as a ground for disqualification will have a continuing effect on the judicial proceedings which are before the court, it is justified in refusing to permit the lawyer to participate in such proceedings. . . . If, on the other hand, the court’s purpose is to punish a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court’s inherent power to control its proceedings nor Code of Civil Procedure section 128 can be stretched to support the disqualification.” (Id. at p. 607.)

This theme was amplified and explicated in Gregori, which has become one of the seminal California decisions addressing these issues. In that case, one of plaintiff’s attorneys initiated a “social relationship” with a secretary employed by a law firm representing the defendants. (207 Cal.App.3d at p. 295.) The secretary admitted discussing “persons involved in the litigation” but denied disclosing any confidential information. (Id. at p. 296.) The trial court denied the motion to disqualify plaintiff’s counsel. Although it characterized the conduct of the plaintiff’s attorney as “the essence of unprofessionalism and poor judgment,” it ultimately concluded there was no evidence to suggest plaintiff “might gain any unfair advantage” as a result of the contact between the attorney and the secretary. (Id. at p. 299.)

The Court of Appeal in Gregori affirmed. After acknowledging the competing policy considerations that must be balanced when a motion to disqualify counsel is brought (207 Cal.App.3d at pp. 300–301), Justice Kline’s opinion explained that the prophylactic nature of the disqualification remedy means the focus of the analysis must be on “whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court.” (Id. at p. 309.) “Thus, disqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation. . . . Disqualification is inappropriate, however, simply to punish a dereliction that will likely have no substantial continuing effect on future judicial proceedings. [Citation.] There are other sanctions which in that situation must suffice, including imposition of attorneys fees and costs incurred by the other side as a result of the misconduct (Code Civ. Proc., § 128) and reporting of the misconduct to the State Bar of California so that it may determine whether disciplinary action is appropriate . . . .” (Ibid.)

This case presents a somewhat unique set of circumstances. Unlike some others (compare In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 592), here we know exactly what was and was not disclosed when the City elected to question Hoover regarding her phone call with attorney Gilleon. We have the transcript of the March 22 interview. Reviewing that transcript, there is nothing Hoover said during the interview that could “likely be used advantageously against” her in her case against the City. (Gregori, supra, 207 Cal.App.3d at p. 309.) Hoover told the investigators she gave Gilleon no information about the sexual assault case. And although she acknowledged that Gilleon provided her with some information, she could not specifically identify what that information was because she had learned so many more details from the public press, particularly the Voice of San Diego article.

Hoover cites the principle that we cannot generally look at the contents of a communication to determine whether it is privileged. (Costco, supra, 47 Cal.4th at p. 739.) Here, however, we are not looking at the transcript to decide if the privilege applied. We have already concluded that it did. Rather we are reviewing facts known to all the relevant parties—Hoover, the City and the trial court—to determine whether any information disclosed during the interview will have a “substantial continuing effect on future judicial proceedings.” (Gregori, supra, 207 Cal.App.3d at p. 309.) Under these circumstances, we can confidently say there is no “reasonable probability” or “genuine likelihood” that the City’s misconduct will provide it with an unfair advantage or in any other way “affect the outcome of the proceedings before the court.”

DISPOSITION

Let a writ of mandate issue directing the respondent court to vacate its order granting Hoover’s motion to disqualify the San Diego City Attorney and enter a new order denying the motion. The stay issued May 11, 2018 will be vacated when the opinion is final as to this court. In the interests of justice, each party shall bear its own costs.

8. We express no opinion on potential sanctions or other responses to the City’s conduct in this case that the trial court may wish to consider.

DATO, J.

WE CONCUR: HUFFMAN, Acting P. J., HALLER, J.
LYNDA HOFFMAN, Plaintiff and Respondent,

v.

SUPERIOR READY MIX CONCRETE, L.P., et al., Defendants and Appellants.

No. D072929
In The Court of Appeal of the State of California
Fourth Appellate District
APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.
Filed December 19, 2018

COUNSEL
Wright, L’Estrange & Ergastolo, Joseph T. Ergastolo, Andrew E. Schouten and Daniel M. Doft for Defendants and Appellants.
Goode Hemme & Barger and Jerry D. Hemme for Plaintiff and Respondent.

OPINION
Plaintiff Lynda Hoffman owns 28 acres of land (the property), a portion of which is used to grow plants for an intended nursery. The property is adjacent to a 211-acre rock quarry (the quarry) owned by National Quarries Enterprises LLC and operated by Superior Ready Mix Concrete L.P. (together SRM). After Hoffman prevailed in a trespass action against SRM, the trial court awarded her costs as the prevailing party and attorney fees under Code of Civil Procedure section 1021.9, which, in relevant part, allows the prevailing plaintiff to obtain reasonable attorney fees in any action to recover damages “to personal or real property resulting from trespassing on lands … under cultivation.”

SRM appeals, contending Hoffman is not entitled to attorney fees under section 1021.9 because SRM did not trespass onto the areas of land where she was actually growing nursery plants. Assuming we reject this argument, SRM argues that the trial court abused its discretion by awarding Hoffman $289,153.75 in attorney fees because the award was (a) not apportioned between her successful fee and unsuccessful non-fee causes of action, and (b) not reduced to reflect her limited success at trial. SRM also asserts that the trial court abused its discretion by finding that SRM’s section 998 offer was invalid and less favorable than Hoffman’s trial result.

We conclude that the trial court correctly interpreted section 1021.9 and properly awarded Hoffman her attorney fees as the prevailing plaintiff in this trespass action. We also reject SRM’s arguments that the trial court erred when it failed to apportion or reduce Hoffman’s attorney fees award. As SRM concedes, these decisions moot its argument regarding the validity of its section 998 argument.

FACTUAL AND PROCEDURAL BACKGROUND
Following the well-established rule of appellate review, we recite the facts in the light most favorable to the judgment. (People v. Bogle (1995) 41 Cal.App.4th 770, 775.) Because this appeal does not challenge the judgment, we provide an abbreviated account of the facts to provide context for our later discussion.

The Properties
Hoffman’s property is landlocked and surrounded on three sides by SRM’s land, which is a vested mining operation under the Surface Mining and Reclamation Act. Hoffman has an easement across SRM’s land to access her property and SRM has an easement across Hoffman’s property.

Hoffman’s husband purchased the property in May 2000. Hoffman’s husband grew plants as a hobby and developed a fairly substantial plant collection. The Hoffmans purchased the property intending to use their plant collection to open a commercial nursery and koi-growing operation on the site. The Hoffmans placed roads on the property and installed a water well, a water storage tank, an extensive irrigation system and fencing. From around 2001 through 2010, the Hoffmans grew a variety of plants, including palm trees, subtropical and tropical fruit trees, and citrus trees. They also propagated the plants by seed or cuttings to increase their inventory. In 2007 Hoffman’s husband quitclaimed the property to Hoffman. During the summer of 2010, the water well pump on the property broke and the Hoffmans lost approximately 65 percent of their plant inventory.

The Lawsuit and Trial
In June 2015 Hoffman filed this action against SRM alleging causes of action for: (1) trespass to land, (2) private nuisance, (3) negligence, (4) negligence per se, (5) quiet title to prescriptive easement, (6) quiet title to easement by necessity, and (7) quiet title to easement by implied reservation. SRM answered the complaint and filed a cross-complaint seeking declaratory relief and to quiet title to easement by implied reservation, and to quiet title to prescriptive easement. Hoffman asserted that SRM’s trespass, which started in 2012, damaged five areas on their property as follows:

Area 1: Widening and reconfiguring the easement road on the property which blocked drainage, changed the natural water drainage patterns, and interfered with the operation of Hoffman’s gate.
Area 2: Constructing a desiltation basin that encroached onto the property by about 5,000 square feet and caused silt build-up.

Area 3: SRM maintained gravel and/or dirt berms on the property above a natural ravine, which caused erosion.

Area 4: SRM constructed a large dirt berm which encroached on the property in one area and caused dirt and silt runoff onto the property.

Area 5: SRM cleared and graded along the western portion of the common property line and constructed a 672-foot long dirt berm along the common property line, which disrupted water flow and caused dirt and silt runoff onto the property.

The matter proceeded to trial with the parties stipulating that the court would decide the equitable issues raised by Hoffman’s and SRM’s quiet title and declaratory relief claims and instruct the jury on its findings. The parties also agreed to dismiss their causes of action for a prescriptive easement. Prior to instructing the jury, the trial court decided the parties’ quiet title and declaratory relief claims. It determined that Hoffman had a 40-foot-wide right-of-way and utilities easement across the quarry, while SRM had a 20-foot right-of-way easement across the property. It also found that, except for a single berm, SRM’s activities on the property were not within its secondary easement rights.

The jury later returned a special verdict finding for Hoffman on her trespass cause of action, but against her on the nuisance and negligence causes of action. The jury awarded Hoffman $17,000 in compensatory damages, $0 in discomfort and annoyance damages, and $0 in punitive damages. The trial court’s judgment noted that Hoffman, in addition to her monetary award, had a 40-foot wide nonexclusive right-of-way easement to install electrical lines.

Posttrial Motions
Both parties filed a memorandum of costs. Hoffman sought costs and expert fees she incurred throughout the entire action. SRM sought costs and expert fees incurred by it on or after May 16, 2016, the service date of its section 998 offer. Hoffman filed a motion to recover her attorney fees under section 1021.9 and moved to strike or tax SRM’s costs. SRM also moved to strike or tax Hoffman’s costs.

The trial court issued a tentative ruling on the motions finding that Hoffman was the prevailing party in the action and awarded her costs. It concluded that SRM’s section 998 offer was not reasonable and thus was not valid and, even if the offer were valid, that Hoffman obtained a more favorable judgment at trial than SRM’s section 998 offer. It denied Hoffman attorney fees under section 1021.9, finding the statute inapplicable to the facts and circumstances of this case because SRM’s trespass onto the property did not disrupt any agricultural cultivation on the property.

The court heard oral argument, which focused on Hoffman’s right to recover attorney fees under section 1021.9. Hoffman’s counsel explained how the case law did not support the court’s interpretation of section 1021.9. The trial court took the matter under submission, stating: “It’s going to take some time, so don’t expect a quick decision. At a minimum, I will have read every single one of those cases and know them better than you do before I make my final decision in this case.”

In its final ruling on the posttrial motions the court confirmed its rulings on the section 998 issues. It reversed its ruling with respect to Hoffman’s motion for attorney fees, concluding that Hoffman was entitled to attorney fees as the prevailing plaintiff under section 1021.9. The court ruled that Hoffman was entitled to all attorney fees she requested, even though she did not prevail on every cause of action, because “all of Plaintiff’s claims were based on the same core set of facts.” After a small reduction in Hoffman’s claimed costs, the court awarded Hoffman $16,178.66 in costs and $289,153.75 in attorney fees. SRM timely appealed from the judgment.

DISCUSSION
I. THE TRIAL COURT DID NOT ERR IN AWARDING HOFFMAN HER ATTORNEY FEES

SRM contends that the trial court erred in awarding Hoffman attorney fees under section 1021.9 because she failed to demonstrate eligibility for such an award as a matter of law. Specifically, SRM argues that it is undisputed that Hoffman used only six out of 28 acres for nursery purposes and that its trespass onto the property did not damage the portion of the property that Hoffman used for cultivation, nor did the trespass damage any of Hoffman’s nursery plants. Hoffman disagrees, arguing that the trial court properly interpreted section 1021.9 because the term “lands … under cultivation” refers to the character of the land, not the specific area of the land that was trespassed upon. We agree with Hoffman.

The question presented is the proper interpretation of section 1021.9, an issue that we review de novo. (In re R. T. (2017) 3 Cal.5th 622, 627.) “Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty
exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.] A statute should be construed whenever possible so as to preserve its constitutionality.” (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386-1387.)

Section 1021.9 provides: “In any action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney’s fees in addition to other costs, and in addition to any liability for damages imposed by law.” SRM does not challenge that Hoffman is the prevailing plaintiff in an action to recover damages to real property resulting from SRM’s trespasses. The sole question is whether the trial court properly concluded that the trespass occurred on “lands . . . under cultivation.” On this issue we do not write on a blank slate.

In Haworth v. Lira (1991) 232 Cal.App.3d 1362 (Haworth), the plaintiffs raised horses and other animals on their property in an area zoned as an “‘equestrian district,’ “ which permitted homeowners to keep horses and other large domestic animals as an accessory to residential use. (Id. at p. 1366.) Plaintiffs prevailed in a trespass action against a neighbor after the neighbor’s dogs came onto their property and injured one of their horses and bit one of the plaintiffs. (Id. at pp. 1365, 1368.) The appellate court held that the trial court had discretion to award attorney fees under section 1021.9 since the trespass occurred on lands used for the raising of livestock, holding that section 1021.9 was not limited to actions brought by commercial ranchers and farmers. (Haworth, at pp. 1368-1371.)

In Quarterman v. Kefauver (1997) 55 Cal.App.4th 1366 (Quarterman) the appellate court concluded that section 1021.9 did not apply to the prevailing plaintiffs in a trespass action after their neighbors’ sanding and repainting of their house caused lead contamination to plaintiffs’ backyard garden. (Quarterman, at pp. 1368-1369.) The Quarterman court first examined several statutes using the phrase “lands . . . under cultivation” to determine its meaning. (Id. at p. 1373.) Based on this examination, the Quarterman court concluded that “when the Legislature refers to land as cultivated, under cultivation, used for cultivation, or suitable for cultivation, the ordinary import of the description usually is to agricultural land used for farming and growing crops, or at least rural land as opposed to urban backyards.” (Ibid., italics added.) The Quarterman court next examined the legislative history of section 1021.9 to determine the meaning of “lands . . . under cultivation.” (Quarterman, at pp. 1373-1375.) Based on this examination, the court concluded that the phrase “lands . . . under cultivation” “must be read as part of the entire descriptive phrase, ‘lands either under cultivation or intended or used for the raising of livestock,’ a phrase denoting two alternative uses of rural land.” (Id. at p. 1375.)

Here, while the Hoffmans had not yet opened a nursery business on the property, the property is zoned for agriculture and is located in a rural area characterized by farming. Over the course of the Hoffmans’ ownership of the property they had mulch, planting mix and tree boxes delivered for their future nursery business. Before the well pump broke in 2010, the Hoffmans had about 20,000 plants growing on the property. Thereafter, the Hoffmans maintained their remaining plant inventory and tried to increase it. These facts show that the property was under cultivation, a point SRM does not challenge. (Quarterman, supra, 55 Cal.App.4th at p. 1373.) Based on these circumstances, the fact that the Hoffmans had not yet opened their nursery business is of no significance. (See Haworth, supra, 232 Cal.App.3d at p. 1371.)

SRM next contends that section 1021.9 does not apply because its trespass did not damage that portion of the property under cultivation. In other words, its trespass did not damage the land where the Hoffmans grew their plants, or the plants themselves. The plain language of the statute does not support SRM’s argument that the trespass must occur to the specific portion of the land under cultivation. Rather, section 1021.9 allows the prevailing plaintiff to recover attorney fees if the trespass caused damage to “lands . . . under cultivation.” While not directly addressed by the Quarterman and Haworth courts, these courts focused on the character of the land as a whole. (Quarterman, supra, 55 Cal.App.4th at p. 1375; see Haworth, supra, 232 Cal.App.3d at pp. 1370-1371.) As Hoffman notes in her brief, “A property used for commercial uses is a ‘commercial property’ even though part of it is used for non-commercial purposes.”

SRM contends that Hoffman is eligible for fees under section 1021.9 only if its trespass against land (that was being prepared or used for agricultural purposes) constituted the cause-in-fact of her damages. Had the Legislature intended to only award attorney fees depending where on the plaintiff’s property the trespass occurred, it could have drafted section 1021.9 to state: “In any action to recover damages to personal or real property resulting from trespassing on [the portion of] lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney’s fees in addition to other costs, and in addition to any liability for damages imposed by law.” (Bracketed language added.)

If we were to accept SRM’s interpretation of section 1021.9 then a hypothetical plaintiff, after successfully showing that a defendant’s trespass made the only road to its cultivated land impassable, would not be able to recover attorney fees because the trespass did not damage that portion of the “lands . . . under cultivation.” We do not believe that the Legislature intended this result.

Finally, SRM argues that the plain language of the statute distinguishes between lands under cultivation (which must actually be under cultivation) and lands used for raising live-
stock (which must either be used or intended to be used for raising livestock). This distinction, however, does not further SRM’s argument because Hoffman’s land was under cultivation. The issue is whether the defendant’s trespass must cause damage to that portion of land actually being cultivated.

Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal.App.4th 583 (Starrh) supports our interpretation that fees may be awarded under section 1021.9 for trespass on agricultural land being cultivated, even where defendant did not damage crops themselves or interfere with agricultural operations. In Starrh, the plaintiff farmed land next to defendant’s oil field. (Starrh, at p. 589.) Plaintiff prevailed in an action against defendant alleging subsurface trespass resulting from the migration of polluted water produced from defendant’s oil production activities into the native subsurface groundwater underlying plaintiff’s property. (Id. at pp. 588-589.) It was undisputed that the native groundwater was not usable for drinking or other municipal purposes and was too salty to use for irrigation of most agricultural crops. (Id. at p. 590.) The parties disagreed, however, whether the native water was usable for some crops and whether it had any economic value. (Ibid.) Nothing in the Starrh opinion suggests that the subsurface trespass damaged plaintiff’s crops or interfered with its farming activities.

The trial court denied plaintiff’s request for attorney fees under section 1021.9 finding that the trespass was not to “‘lands … under cultivation.” ‘ (Starrh, supra, 153 Cal. App.4th at p. 589.) The appellate court disagreed, stating that plaintiff “has a right to extract the groundwater and put it to reasonable use. This is one of the bundle of rights [plaintiff] holds as a property owner.” (Id. at p. 607.) In examining the legislative history of section 1021.9, the Starrh court noted that while the initial bill “was limited to the harm caused by entry onto rural land by motor vehicles or by trespassers walking upon the land through fences and gates, the ultimate version of the bill broadened the statute’s scope in order to ‘enhance the ability of ranchers to sue trespassers for damages.’ [Citation.] It included any action to recover damages of any kind caused by trespass to lands under cultivation. The Legislature’s obvious concern was for the farm and ranch communities of our state.” (Starrh, at p. 608.) The Starrh court also referenced an argument made in support of the bill that the expanded language would “‘enhance the ability of ranchers to sue trespassers for damages, particularly in those cases where the rancher must now either compromise a significant portion of a valid claim by suing in small claims court … or by spending a major share of the recovery to pay his or her attorney.’” (Ibid.)

In Starrh, supra, 153 Cal.App.4th 583 it was irrelevant that the subsurface trespass did not damage plaintiff’s land or plants or that plaintiff did not presently use the native groundwater. Rather, the relevant inquiry was whether the land was under cultivation. Thus, the Starrh decision contradicts SRM’s unsupported interpretation that, to be entitled to an attorney fees award under section 1021.9, the trespass must cause damage to those areas of land actually being cultivated. Accordingly, we conclude that the trial court correctly interpreted section 1021.9 and properly awarded Hoffman her attorney fees as the prevailing plaintiff in this trespass action.

II. THE TRIAL COURT DID NOT ERR IN DECLINING TO APPORTION OR REDUCE THE ATTORNEY FEES AWARD

Assuming Hoffman is entitled to section 1021.9 attorney fees, SRM contends the trial court abused its discretion in awarding her $289,153.75 because it (1) failed to apportion Hoffman’s fees incurred on the fee-shifting claim (trespass) from the non-fee-shifting claims (nuisance and negligence), and (2) refused to reduce her fee award to account for her limited success at trial. We disagree.

A. Apportionment

“Once a trial court determines entitlement to an award of attorney fees, apportionment of that award rests within the court’s sound discretion.” (Carver v. Chevron U.S.A., Inc. (2004) 119 Cal.App.4th 498, 505 (Carver).) “‘Attorneys 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.’ [Citation.] ‘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.’ [Citation.] Apportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney’s time into compensable and noncompensable units.” (Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal.App.4th 140, 158-159 (Graciano).)

Here, SRM argued to the trial court that, should it award Hoffman her attorney fees, the fees should be apportioned to award fees only on her successful trespass claim. The trial court rejected this argument stating that, except as to Hoffman’s quiet title cause of action, “[a]s previously discussed, all of [Hoffman’s] claims were based on the same core set of facts” and that “case authority holds allocation of fees between causes of action is unnecessary in such circumstances . . . .”2 The trial court had previously stated:

2. SRM contends that the “core set of facts” standard used by the trial court and advocated by Hoffman is incorrect and that the court should have considered whether Hoffman’s tort claims were “inextricably intertwined” making apportionment impractical or impossible. Because the trial court used the wrong legal standard, SRM claims we must remand with instructions to reassess the issue under the correct legal standard. We reject this argument because the standard used by the trial court is one of three related standards that a court may use in exercising its discretion regarding the apportionment of attorney fees. (Graciano, supra, 144 Cal.App.4th at pp. 158-159.)
“In filing suit, [Hoffman] sought to put an end to [SRM’s] unauthorized use and alteration of her land. She alleged that from the end of 2012 through the filing of the action, [SRM] widened and reconfigured a dirt road that ran through her property, changed the grading of the area in a way that negatively impacted surface water flow and damaged [Hoffman’s] storm drain system, removed trees and vegetation, creating retention ponds, storing gravel and vehicles, filling a natural ravine on [Hoffman’s] property with quarry waste, and blocking [Hoffman’s] gate. These allegations formed the basis for each of [Hoffman’s] claims.

“While [Hoffman] did not prevail on all seven causes of action, the entire action and thus all seven causes of action pertained to the same set of facts. Success on one cause of action, combined with retention of a 40-foot-wide easement across the Quarry Property, and a ruling in her favor as to [SRM’s] activities on her property, establishes [Hoffman] prevailed under the circumstances regardless of a monetary damages award significantly smaller than sought.”

Although SRM acknowledges that attorney fees need not be apportioned when incurred for representation of an issue common to both successful fee and unsuccessful nonfee claims, it argues that this case falls into that category of cases where “overlapping fees may be denied where awarding them would ‘impair legislative policies implicated by the respective claims.’ “ In support of this argument, SRM relies on Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780 (Cassim) and Carver, supra, 119 Cal.App.4th 498.

Cassim, supra, 33 Cal.4th 780 involved an exception to the rule providing that each party to a lawsuit ordinarily pays its own attorney fees for insurance bad faith cases. (Id. at p. 806.) This exception allows an insured to recover its attorney fees incurred to compel payment of benefits due under an insurance policy as damages in an insurance bad faith action. (Id. at pp. 806-807, citing Brandt v. Superior Court (1985) 37 Cal.3d 813.) Accordingly, apportionment was necessary because the plaintiff in Cassim could recover attorney fees for work done to obtain benefits under the insurance policy, but could not recover fees for work done on a tort cause of action for bad faith. (See Cassim, at pp. 807-813.)

Carver, supra, 119 Cal.App.4th 498 was an action for violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.), fraud, and breach of contract. (Id. at p. 501.) Defendant prevailed and moved for attorney fees, but under the Cartwright Act only a prevailing plaintiff could recover attorney fees. (Carver, at p. 503.) The trial court declined to award attorney fees that related exclusively to or inextricably overlapped Cartwright Act issues and apportioned the fees. (Carver, at p. 503.) The appellate court affirmed, holding that “the unilateral fee-shifting provision of [Business and Professions Code] section 16750, subdivision (a) prohibits an award of attorney fees for successfully defending Cartwright Act and non-Cartwright Act claims that overlap. To allow [defendant] to recover fees for work on Cartwright Act issues simply because the statutory claims have some arguable benefit to other aspects of the case would superimpose a judicially declared principle of reciprocity on the statute’s fee provision, a result unintended by the Legislature, and would thereby frustrate the legislative intent to ‘encourage improved enforcement of public policy.’ “ (Carver, at p. 504.)

Cassim, supra, 33 Cal.4th 780 and Carver, supra, 119 Cal. App.4th 498 are inapposite as neither case addressed whether attorney fees need to be apportioned between successful fee and unsuccessful nonfee claims to a prevailing plaintiff under a unilateral fee-shifting statute. Although SRM argues that apportionment is mandatory because Hoffman’s nonfee claims did not further section 1021.9’s purposes, it cited no authority to support this contention, and we have located no published authority addressing this issue under section 1021.9. We also examined case law addressing several other unilateral fee shifting statutes regarding fee apportionment, namely: Labor Code section 1194; Business & Professions Code section 16750, subdivision (a); Welfare and Institutions Code sections 15657, subdivision (a) and 15657.5, subdivision (a); and Civil Code sections 54.3 and 52, subdivision (a). We located no published cases requiring apportionment under these statutes.

Given this judicial landscape and SRM’s failure to identify how awarding Hoffman her attorney fees on unsuccessful nonfee claims would impair a legislative policy, we conclude that the trial court did not err when it applied the general rule stated in Reynolds Metals Co. v. Alperson (1979) 25 Cal.3d 124 that “[a]ttorney’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.” (Id. at pp. 129-130.)

Hoffman’s complaint shows that her trespass, nuisance and negligence causes of action were all based on the same set of facts. Moreover, the jury instructions identified the same measure of damages for each cause of action and the special verdict form asked the jurors to answer just one set of questions regarding of which cause of action prevailed. Finally, Hoffman’s motion for attorney fees included a declaration from her counsel stating that the trespass, nuisance and negligence causes of action were based upon the same set of core facts and that professional services were so intertwined among these claims that it was impractical to separately bill for each cause of action. Finally, the record on appeal does not contain the reporter’s transcripts for the entire trial. Thus, we cannot ascertain the amount of trial time

3. SRM argues that Hoffman’s tort causes of actions were not based on the same core set of facts because the nuisance and negligence claims required Hoffman to prove additional facts beyond those required for her trespass claim. This argument, however, confuses the elements of the three causes of action with the facts underlying these claims. The facts underlying each cause of action were identical.
spent addressing each of the three causes of action and, absent a record demonstrating error, the order is presumptively correct. (See Denham v. Superior Court (1970) 2 Cal.3d 557, 564.)

B. Reduction

SRM next asserts that the trial court abused its discretion when it refused to reduce Hoffman’s requested fees in light of her limited success at trial. SRM claims that the trial court was required to first determine Hoffman’s lodestar figure on her successful claims and then consider her relative success in achieving her objective on overlapping claims and reduce the amount if appropriate. Relying on Mann v. Quality Old Time Service, Inc. (2006) 139 Cal.App.4th 328 (Mann) and San Diego Police Officers Assn. v. San Diego Police Department (1999) 76 Cal.App.4th 19 (San Diego Police Officers Assn.), SRM argues that we should reverse the attorney fee award and remand with instructions that the trial court exercise its discretion under the ‘‘correct legal standard.’’

In evaluating the amount of attorney fees awarded by the trial court our review is deferential as ‘‘the ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.’’ (Serrano v. Priest (1977) 20 Cal.3d 25, 49.) ‘‘The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.]

The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.’’ (PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1096.) ‘‘[T]here is no requirement that the trial court make an award of attorney fees in an amount that is commensurate with or in proportion to the degree of success in the … litigation.’’ (Bernardi v. County of Monterey (2008) 167 Cal.App.4th 1379, 1398.) We review the trial court’s award of attorney fees for abuse of discretion, which we find only if no reasonable basis for the court’s action is shown. (Citizens Against Rent Control v. City of Berkeley (1986) 181 Cal.App.3d 213, 233.)

Here, in arguing that the trial court erred in the amount of attorney fees awarded, SRM exclusively focuses on Hoffman’s success at trial. While the success of the party seeking fees is relevant, it is but one factor in the trial court’s analysis. (PLCM Group v. Drexler, supra, 22 Cal.4th at p. 1096.) As another court explained, ‘‘[a] rule of proportionality that would limit fee awards … to a proportion of the damages recovered … is inconsistent with the flexible approach to lodestar calculations that takes into account all considerations relevant to the reasonableness of the time spent.’’ [Citation.]

‘‘We do not reflexively reduce fee awards whenever damages fail to meet a plaintiff’s expectations in proportion to the damages’ shortfall.’’ (Harman v. City and County of San Francisco (2007) 158 Cal.App.4th 407, 421.) Additionally, we do not agree with SRM’s contention that the trial court applied the wrong legal standard. In making this argument SRM cites Mann, supra, 139 Cal.App.4th 328 and San Diego Police Officers Assn., supra, 76 Cal.App.4th 19.

In San Diego Police Officers Assn., supra, 76 Cal.App.4th 19 the trial court granted plaintiff’s motion for attorney fees under section 1021.5. (San Diego Police Officers Assn., at p. 24.) The trial court, however, applied a negative multiplier to reduce the requested fees. (Ibid.) The appellate court affirmed the reduction where the record showed that the plaintiff ‘‘had achieved very limited success; the portion of its writ petition on which it prevailed … did not involve complex issues of law; the case did not preclude [the association’s] attorneys from working on other matters and did not involve a contingency fee; and the award of fees would ultimately be borne by the taxpayers.’’ (Ibid.) The San Diego Police Officers Assn. court further noted that ‘‘[t]he vast majority of [the plaintiff’s] time and effort was clearly spent on issues upon which the [defendant] prevailed.’’ (Ibid.)

The Mann court reviewed an attorney fees award to prevailing defendants under California’s anti-SLAPP statute (Code Civ. Proc., § 425.16) where defendants succeeded in striking one of four challenged causes of action. (Mann, supra, 139 Cal.App.4th at p. 333.) The Mann court stated that ‘‘[t]he fees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way[, including evaluation of other] relevant factors, such as the experience and abilities of the attorney and the novelty and difficulty of the issues . . . .’’ (Id. at p. 345.) It concluded that the trial court ‘‘erred in failing to reduce the attorney fees award for fees attributable to the causes of action that remained in the litigation. Although the amount to be awarded could not be calculated through a purely mechanical approach by allocating particular hours to particular claims, the court should have considered the significance of the overall relief obtained by defendants in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel’s time was reasonable in relation to the success achieved.’’ (Ibid.)

The Mann court determined that an attorney fees award proportionate to the success achieved in the anti-SLAPP motion would advance ‘‘the objectives of the anti-SLAPP statute and minimizes abuses.’’ (Mann, at p. 347.) As a threshold matter, Mann, supra, 139 Cal.App.4th 328 and San Diego Police Officers Assn., supra, 76 Cal.App.4th 19 do not stand for the proposition that a statutory attorney fees award must be proportional to the degree of success obtained in the litigation. Additionally, neither case addressed section 1021.9 and are thus distinguishable. As our high court has noted ‘‘every fee-shifting statute must be construed on its own merits . . . .’’ (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1136.) Accordingly, we disagree with SRM’s contention that Mann and San Diego Police Officers Assn. set forth
the correct legal standard to evaluate a fee award under section 1021.9.

We reviewed the legislative history for section 1021.9. Comments on the bill note that plaintiffs suing for trespass “spend[] a major share of the recovery to pay his or her attorney.” (Assem. Com. on Judiciary, com. on Sen. Bill No. 2513 (1985-1986 Reg. Sess.) as amended Aug. 12, 1986.) Thus, the unilateral fee award to prevailing plaintiffs in a trespass action “enhance[s] the ability of [farmers and] ranchers to sue trespassers for damages . . . .” (Ibid.) Here, while Hoffman’s monetary recovery was modest, she obtained a declaration of rights defeating SRM’s claim that it was authorized under its right to “secondary easements” to maintain a silt basin, gravel and dirt berms, widen the road in excess of 20 feet, change the flow of surface water, or change the grade on its easement. In declaring Hoffman the prevailing party and awarding her attorney fees, the trial court acknowledged that Hoffman’s “damages award [was] significantly smaller than sought.” Nonetheless, the court did not reduce Hoffman’s attorney fees award because Hoffman achieved her primary litigation goal of protecting her property and refuting SRM’s secondary easement claims. Under these circumstances, we reject SRM’s argument that the trial court abused its discretion when it declined to reduce Hoffman’s attorney fees award.

III. SRM’S SECTION 998 OFFER

A. Additional Background

Hoffman instituted this action in June 2015. In May 2016, a few weeks before trial, SRM served a section 998 offer that offered: (1) to grant Hoffman a right of way easement over the existing road on the quarry property 20 feet in width, (2) to abandon any right to an easement over the her property, and (3) to pay Hoffman $70,000 in satisfaction of all damages, attorney fees and costs. Hoffman did not accept the offer.

B. Analysis

The trial court concluded that SRM’s section 998 offer was not reasonable and thus was not valid and, even if the offer were valid, it concluded that Hoffman obtained a more favorable judgment at trial than SRM’s section 998 offer. SRM claims that the trial court erred in finding that SRM’s section 998 offer was invalid and abused its discretion in how it compared Hoffman’s recovery with SRM’s section 998 offer. In its reply brief, SRM conceded that a ruling against it regarding the propriety of Hoffman’s attorney fees award moots this issue.

Section 998 “is a cost-shifting statute which encourages the settlement of actions, by penalizing parties who fail to accept reasonable pretrial settlement offers.” (Heritage Engineering Construction, Inc. v. City of Industry (1998) 65 Cal.App.4th 1435, 1439.) “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment . . . , the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer.” (§ 998, subd. (c)(1).) To determine whether the judgment obtained by a plaintiff is more favorable than an offer that specified the amount of the offered judgment includes reasonable attorney fees and costs, the court must add the amount of damages recovered by the plaintiff to the amount of his or her recoverable preoffer costs (Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co. (1999) 73 Cal.App.4th 324, 330) and the amount of preoffer attorney fees authorized by statute (Heritage, at p. 1441), and compare that total amount to the amount of the section 998 offer.

Assuming the validity of SRM’s section 998 offer and ignoring the valuation of the nonmonetary components of SRM’s section 998 offer, SRM offered Hoffman “$70,000.00, in satisfaction of all claims or damages, costs and expenses, attorney’s fees, and interest in the complaint and cross-complaint of this action.” When Hoffman received the offer she had already incurred $6,082.50 in preoffer costs and $93,827 in preoffer attorney fees. Thus, when Hoffman’s monetary recovery of $17,000 is added to her preoffer costs and fees it far exceeded SRM’s $70,000 offer. Accordingly, we accept SRM’s concession and deem this issue moot.

DISPOSITION

The judgment is affirmed. Respondent is entitled to her costs on appeal.

WE CONCUR: IRION, J., DATO, J.

NARES, Acting P. J.
In re Marriage of T.C. and D.C.


No. D073182

In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. DN172178)

APPEAL from an order of the Superior Court of San Diego County, William Y. Wood, Judge. Reversed.

Filed December 18, 2018

COUNSEL

Dennis G. Temko for Appellant.
Niddrie Addams Fuller Singh and Victoria E. Fuller for Respondent.

OPINION

D.C. (Husband) appeals from an order granting a petition for modification of spousal support filed by his former spouse T.C. (Wife). The trial court found that a significant increase in Wife’s earnings since the last spousal support order amounted to “changed circumstances” and on that basis reduced her support payments to Husband. Husband makes several arguments in support of his appeal, including that: the parties’ reasonable expectations as expressed in their dissolution agreements contemplated that an increase in Wife’s salary would not constitute changed circumstances; and the court improperly found the spousal support provisions ambiguous; and the court’s Family Code section 4320 analysis was flawed because it mistakenly treated Husband’s income as taxable at the time of separation.

As a threshold matter, we conclude substantial evidence supports the trial court’s finding of changed circumstances sufficient to justify reduction of the additional spousal support paid by Wife. But the court erred when, in fashioning the specific modification, it failed to consider the parties’ reasonable expectations as expressed in their dissolution agreement that Wife’s earnings would continue to increase. We therefore reverse and remand for modification of Wife’s spousal support obligations consistent with the principles expressed in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Dissolution of the Marriage and the Relevant Agreements

Husband and Wife were married for 18-and-a-half years and have two children together. Both worked outside the home during their marriage. They separated in 2012 and in 2014, dissolved their marriage according to the terms of two agreements, a Marriage Settlement Agreement (MSA) incorporated into the court’s judgment in March 2014, and an August 2014 Post Judgment Stipulation (PJS) (collectively, the Agreements) that reflected newly available details regarding Husband’s benefits and compensation.

In the MSA, the parties agreed Wife would pay Husband $850 per month as base spousal support from July 2013 through the end of 2020. According to the MSA, “[t]his spousal support award meets Husband’s reasonable needs. These needs are consistent with the standard of living established during the marriage.” On top of the $850, Wife would also pay as additional spousal support 10 percent of any earnings in a calendar year in excess of $180,000. The parties further agreed the parties could petition the court to modify the spousal support:

“Upon application of either party to modify or terminate support, the court may consider the annual incomes of each party during marriage and at date of separation. At date of separation, Husband had gross monthly income of $12,932.81 (primarily non-taxable income per his income and expense declaration filed on October 30, 2012), and Wife had gross monthly income of $10,300 plus bonus potential (per her income and expense declaration filed on November 29, 2012). After separation and after the filing of the dissolution, Husband changed employers wherein his monthly income decreased to $7,500, and Wife changed employers wherein her monthly income increased to $15,000, plus bonus potential.”

Wife also agreed to provide Husband with written notice each time she changed employment.

The PJS maintained the general structure and termination terms of spousal support obligations but modified the specific payment amounts. For July to November 2013, Wife’s support was reduced to $760 per month; for December 2013, $754; for January to March 2014, $755 per month; and from April 2014 through the end of 2020, $551 per month.

1. We utilize initials and former generic designations to provide the parties with a semblance of privacy.
2. Further references are to Family code section 4320 unless otherwise indicated.
B. Procedural Overview

In December 2016, Wife filed a Request for Order (RFO) to modify her spousal support obligations. She had found a new job with a higher salary and contended that in light of these changed circumstances, her obligations under the Agreements exceeded the marital standard of living and would result in a windfall to Husband. Whereas in 2012 Wife’s earnings included a $180,000 base salary and a potential bonus capped at 20 percent of her salary, in 2016 Wife earned $265,000 with a possible bonus of up to 40 percent of her salary. At the initial hearing the court issued an oral decision denying Wife’s petition. But on the following day, it filed a minute order indicating it would reconsider its prior decision on its own motion. Several months later the court issued its Findings and Order After Hearing.

The court found that while Husband’s expectation at the time of the agreements was to receive 10 percent of Wife’s bonus of $9,900, if Wife received all of her potential new bonus, Wife’s additional payment would climb to $19,100. Primarily because of the significant disparity between $990 and $19,100, the court found sufficient evidence for changed circumstances. After analyzing the spousal support factors outlined in section 4320, the court maintained the base spousal support as dictated by the Agreements, and it maintained additional spousal support at 10 percent of Wife’s earnings above $180,000. But the court added a new restriction, capping additional spousal support at $990 per year irrespective of Wife’s actual earnings.

Husband filed Objections and Requests for Findings and Rulings relating to the court’s Findings and Order After Hearing. The court declined to address the objections, and to the extent Husband sought a statement of decision consistent with Code of Civil Procedure section 632 or Rule 3.1590 of the California Rules of Court, the court denied the request as untimely.

DISCUSSION

A. Governing Law and Applicable Legal Standards

On appeal, an order modifying spousal support obligations is reviewed for abuse of discretion. We start with the presumption the trial court’s decision was correct; the appealing party must affirmatively show error. ([In re Marriage of Dietz (2012) 206 Cal.App.4th 1467, 1484.]) “‘So long as the court exercised its discretion along legal lines, its decision will not be reversed on appeal if there is substantial evidence to support it.’” ([In re Marriage of Minkin (2017) 11 Cal.App.5th 939, 957 (Minkin), quoting In re Marriage of Dietz (2009) 176 Cal.App.4th 387, 398 (Dietz).])

To modify spousal support, a trial court must first find “a material change of circumstances since the last order.” ([Minkin, supra, 11 Cal.App.5th at p. 956; Dietz, supra, 176 Cal.App.4th at p. 396; see also In re Marriage of Smith (1990) 225 Cal.App.3d 469, 480 (Smith) (“Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order.”).) In its changed-circumstances analysis, the court considers all factors affecting the supported spouse’s needs and the supporting spouse’s ability to pay. ([In re Marriage of West (2007) 152 Cal.App.4th 240, 246.]) An “increase in the supporting spouse’s ability to pay” may constitute a change in circumstances. ([In re Marriage of McCann (1996) 41 Cal.App.4th 978, 982, citing In re Marriage of Hoffmeister (1984) 161 Cal.App.3d 1163, 1173.]) When support is governed by a marital settlement agreement or stipulated judgment, the trial court’s changed-circumstances determination must “‘give effect to the intent and reasonable expectations of the parties as expressed in the agreement.’” ([Minkin, supra, 11 Cal.App.5th at p. 957.])

Likewise, the “‘trial court’s discretion to modify the spousal support order is constrained by the terms of the marital settlement agreement.’” ([Dietz, supra, 176 Cal.App.4th at p. 398.]) Marital settlement agreements incorporated into a dissolution judgment are interpreted under the same rules governing contract interpretation generally. ([In re Marriage of Hibbard (2013) 212 Cal.App.4th 1007, 1012; In re Marriage of Iberti (1997) 55 Cal.App.4th 1434, 1439.]) “‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs.’” ([Hibbard, at p. 1013.])

B. Substantial Evidence Supports the Trial Court’s Finding of Changed Circumstances.

Husband argues the Agreements themselves reflect the parties’ reasonable expectations upon entering the agreements that an increase in Wife’s salary would not constitute changed circumstances. Specifically, he points to the fact the parties did not cap the spousal support but did include a termination date in 2020, years before spousal support obligations would ordinarily terminate after dissolution of a lengthy marriage.4 Alternatively, Husband argues there is insufficient evidence of changed circumstances. He contends the 2012 marital standard of living “was roughly $475,000,” based on Wife’s 2012 taxable income of $189,000 and Husband’s income of $156,516, $151,899 of which was nontaxable. Husband further points out that at the time of Wife’s petition, he was earning $125,000, while Wife’s base salary was $265,000, which is short of the marital standard of living even without accounting for inflation.

4. Husband additionally argues the “trial court found the agreement was reasonably susceptible to Wife’s interpretation and admitted extrinsic evidence that supported her view.” This argument is misplaced. The court did not consider the ambiguity of any of the Agreement’s terms, and it did not need to do so. Likewise, the court did not improperly admit extrinsic evidence or find the agreement reasonably susceptible to any interpretation offered by Wife. Instead, as expressly directed by the Agreements it “consider[ed] the annual incomes of each party during marriage and at date of separation.”
The court found changed circumstances as a result of Wife’s “dramatic[1]” increase in earnings. The court noted several relevant facts regarding the relative earnings increase. When she entered into the Agreements, Wife had “earned more than $180,000.00 only twice: $189,900 in 2012, and $189,717 in 2013.” Under the terms of Wife’s employment at that time, “[t]he maximum additional spousal support, had such bonuses been earned, could not have exceeded $3,600.00 per year.” Wife’s “new remuneration ($265,000.00) is $85,000.00 greater than her salary at the date of separation; additional bonuses of up to 40 percent of her new base salary could add another $106,000.00.” As additional spousal support, Wife would thus be required to pay “between $8,500.00 (10% of $85,000.00) and $19,100.00 (10% of $191,000.00).”

We disagree with Husband that the Agreements demonstrate a reasonable expectation that an increase in Wife’s earnings could never amount to a change in circumstances. Certainly, the trial court is required to take the Agreements into account in determining whether there are changed circumstances. (Minkin, supra, 11 Cal.App.5th at p. 957.) And the Agreements do reflect the parties’ reasonable expectation that Wife’s earnings would continue to increase, which we discuss below. But nothing in the Agreements compels a leap from that expectation to an understanding that an earnings increase could never constitute changed circumstances.

The real question is what magnitude of earnings increase would be necessary to create changed circumstances. On this point we are forced to conclude substantial evidence supports the trial court’s finding that Wife’s dramatic one-year leap in earnings constitutes a material change in circumstances such that it could consider modification of spousal support. Not only did Wife’s bonus potential go from $36,000 to $106,000 in one year, but also by November 2016 records indicate she had already earned $96,152 in bonus income above her $265,000 annual base salary. Thus, we can set aside the speculation regarding potential bonuses and distill the key facts for an appropriate apples-to-apples analysis as follows. In the year prior to filing her RFO, Wife’s total earnings climbed from $242,252.00 in 2015 to $361,403.84 in 2016, a 49 percent increase. Wife’s earnings in the five years prior to the Agreements increased at an average rate of 12 percent with a standard deviation of 8.7 percent. Through a broader lens, Wife’s earnings in the 10 years prior to the Agreements increased at an average rate of 11 percent with a standard deviation of 9.4 percent. In that context, an increase of 49 percent in one year amounts to substantial evidence of changed circumstances.

C. The Court Erred When It Failed to Consider the Parties’ Reasonable Expectation That Wife’s Earnings Would Increase.

Although its ability to modify a spousal support order is constrained by the terms of the marital settlement agreement (Dietz, supra, 176 Cal.App.4th at p. 398), the trial court has significant discretion when weighing the various section 4320 factors. (See, e.g., Minkin, supra, 11 Cal.App.5th at p. 957.) For the same reasons substantial evidence supported the court’s changed-circumstances finding, particularly Wife’s dramatic earnings increase, substantial evidence likewise supports the court’s conclusion that some reduction of Wife’s spousal support obligations was appropriate. However, by revising the parties’ agreement to cap additional spousal support payment at “10% of Wife’s income above $180,000.00 per year, up to $189,900” (i.e., the amount of Wife’s earnings in 2012), the order fails to account for the parties’ reasonable expectation that Wife’s earnings would continue to increase. The order thus exceeds the constraints imposed by the terms of the marital settlement agreement. (See Dietz, supra, 176 Cal.App.4th at p. 398; In re Marriage of Khera & Sameer (2012) 206 Cal.App.4th 1467, 1476.)

The Agreements reflect the parties’ reasonable expectation that Wife’s earnings would continue to increase, primarily through the way the parties agreed to calculate spousal support. The MSA divides spousal support into two tiers, base “spousal support” and “additional spousal support.” The tiers are distinguished in two ways. First, whereas the base spousal support is set at a specific monthly figure, the additional spousal support is determined as a percentage of the amount by which Wife’s annual earnings exceed $180,000. Second, before discussing additional spousal support, the MSA asserts the base “spousal support award meets Husband’s reasonable needs. These needs are consistent with the standard of living established during the marriage.” These distinctions thus evidence the expectation that while base support would be linked to Husband’s reasonable needs and the marital standard of living, the additional spousal support provision—one bargained-for term among many in the expansive dissolution agreements—would allow Husband to receive a percentage of Wife’s likely earnings increase, irrespective of the marital standard of living or Husband’s reasonable needs. The PJS maintains the MSA’s distinction between the tiers of support.

Furthermore, the parties’ earnings history is expressly contemplated in the Agreements’ modification provision: “the court may consider the annual incomes of each party during marriage and at date of separation.” (Italics added.) Later in the same paragraph, the Agreements recite, “[a]fter separation and after the filing of the dissolution . . . Wife changed employers wherein her monthly income increased to $15,000 plus bonus potential.” (Italics added.) And the Agreements’ provision that Wife provide notice regarding any change in employment anticipates the possibility, or perhaps likelihood, that she would again change jobs. The inclusion of these details relating to Wife’s new job and her

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5. Because the record does not indicate Wife’s earnings for December 2016, it is possible she earned more.

6. For convenience, these values are rounded to two significant figures.
increased earnings reinforces the parties’ understanding implicit in the Agreements that her earnings would continue to increase. As discussed above, Wife’s annual earnings unmistakably show a pattern of significant increases throughout the marriage, including the five and 10-year periods before execution of the Agreements.\(^7\)

In summary, the parties’ Agreements reflected their understanding that Wife’s relatively recent earnings history included a pattern of increases, averaging 11–12 percent per year. Thus, future increases consistent with this pattern would not amount to changed circumstances sufficient to justify a modification of spousal support. Here, however, the trial court properly found that the unusual—what it termed “dramatic[\(]\)—increase received by Wife in 2016 was a changed circumstance because it fell outside the normal pattern of increases reasonably contemplated by the parties at the time of their Agreements. As a result, modification of the “additional spousal support” component of the Agreements was appropriate. In fashioning the modification, however, what the trial court failed to do was incorporate the parties’ demonstrated understanding that Wife would likely receive not insignificant increases in her earnings. It thus erred in simply capping additional spousal support at pre-2016 levels.\(^8\)

Because of its history with the parties and firsthand experience, it is for the trial court to craft a specific modification to spousal support in light of its finding of changed circumstances. But any restriction on additional spousal support should not deny Husband what the parties reasonably contemplated at the time they entered into the Agreements. For our part, we only direct that on remand the court (1) take ac-

7. In the five years prior to the Agreements, Wife’s earnings increased at an average rate of 12 percent; in the ten years prior to the Agreements, her earnings increased at an average rate of 11 percent. (Ante, at pp. 9–10.) For the period from the beginning of the marriage through execution of the Agreements, Wife’s annual income grew at an average rate of 22 percent with a standard deviation of 37 percent, a dynamic earnings history with several steep increases. If a more robust analysis were necessary, consideration of external factors such as inflation would be helpful, but for our purposes a basic analysis of total earnings amounts is sufficient to demonstrate a pattern of substantial and fairly consistent earnings increases.

8. In light of our conclusion, we find it unnecessary to extensively discuss Husband’s additional assertion of a specific factual mistake in the court’s order. Indeed, both parties agree the court erred when it considered Husband’s 2012 base pay to be taxable when it was in fact nontaxable, which affected the court’s evaluation of the parties’ standard of living at the time of dissolution, a spousal support factor the court considers under section 4320. Even so, we question the relevance of any such error. The marital standard of living factor does not compel the court to tie spousal support to a specific annual income; it merely requires the court to take into account the “general station in life enjoyed by the parties during their marriage.” (Smith, supra, 225 Cal.App.3d at p. 475.) Furthermore, as discussed above, the Agreements demonstrate that base spousal support, which the court declined to modify, is part of the spousal support award that was intended to address the parties’ marital standard of living. In fact, Husband specifically agreed that the base spousal support award met his reasonable needs and was consistent with the marital standard of living. Nonetheless, we assume that to the extent the marital standard of living is relevant to its analysis, the trial court on remand will not repeat any prior error.

9. It is a settled matter of procedure that courts of appeal “do not entertain new points raised for the first time in a reply brief absent good cause.” (Jay v. Mahaffey (2013) 218 Cal.App.4th 1522, 1542.) On these grounds, Wife asks that we strike the portions of Husband’s reply brief arguing that the trial court’s section 4320 analysis amounted to prejudicial error. We decline to do so. While Wife is correct that Husband did not use the term ‘prejudice’ in his opening brief, failure to employ the most appropriate legal terminology is not always the basis for a motion to strike. Here, Husband’s opening brief argued the general point that the trial court’s section 4320 analysis was flawed and detrimental to him because it mistakenly considered his 2012 income to be taxable. Husband did not raise a new point in his reply; instead, he developed a point he discussed, albeit obliquely, in his opening brief.

DISPOSITION

The order is reversed and the matter is remanded to the superior court to modify the spousal support obligations in accordance with this opinion. Appellant is entitled to costs on appeal.

DATO, J.

WE CONCUR: McCONNELL, P. J., BENKE, J.
THE PEOPLE, Plaintiff and Respondent,
v.  
PEDRO GARCIA GOMEZ, Defendant and Appellant.

No. G055352
In The Court of Appeal of the State of California
Fourth Appellate District
Division Three
(Super. Ct. No. 15CF0276)
Appeal from a judgment of the Superior Court of Orange
County, Kimberly Menninger, Judge. Affirmed, sentence vacated in part, and remanded for resentencing.
Filed December 19, 2018

CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I., II., III., IV.B., IV.C., and V.

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OPINION

INTRODUCTION
Defendant Pedro Garcia Gomez was convicted of crimes involving the sexual molestation of the victim, who is the daughter of defendant’s live-in girlfriend. The molestation occurred over several years during which time the victim was between three and eight years of age. Defendant was sentenced to 35 years to life. He raises several arguments on appeal challenging his convictions and his sentence. We affirm and, as the Attorney General concedes, we must remand for resentencing.

We conclude:

1. The prosecutor’s rebuttal argument did not constitute burden shifting and was not misconduct.

2. Defendant forfeited the issue of whether the trial court erred in permitting an expert to testify regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). If we were to address the issue, however, we would conclude that there was no error.

3. Three jury instructions—those addressing (1) CSAAS testimony, (2) the testimony of a child 10 years of age or younger, and (3) the elements of a violation of Penal Code section 288.7, subdivision (a)—are correct statements of the law.

4. The trial court erred in instructing the jury that the violation of section 288.7, subdivision (b) was a general intent crime. When that statute is violated by sexual penetration, it is a specific intent crime. However, the error was harmless beyond a reasonable doubt because the jury was also instructed with the correct elements of the crime, including specific intent. In light of the full charge to the jury and the record, we conclude no rational jury could have found the specific intent element to be unproven.

5. In the published portion of our opinion, we hold that a sentence of 15 years to life for the sexual penetration of a child 10 years of age or younger is not cruel and/or unusual punishment. Under United States Supreme Court precedent, and in light of the serious nature of the crime, we find no error under the Eighth Amendment to the United States Constitution. We also conclude there was no error under the California Constitution, considering the nature of the offense and the offender, and the lack of disproportionality between the required sentence for violation of section 288.7, subdivision (b), and either the punishment for other crimes in California or the punishment for similar crimes in other states.

6. The trial court erred in imposing full-term consecutive sentences for defendant’s two violations of section 288, subdivision (a). We will vacate these sentences and remand the matter to the trial court for resentencing on these two counts only.

7. The trial court did not err in imposing a $300 restitution fine and a $300 parole revocation fine.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The victim lived in a one-bedroom apartment with her mother, her older brother, defendant (who was the mother’s boyfriend), and two half-siblings, who were the children of the mother and defendant. Defendant was like a father to the victim. The victim’s mother taught the victim to respect defendant, and defendant helped raise the victim and her brother. On numerous occasions when the victim was between
three and eight years old, defendant engaged in inappropriate sexual conduct with her, including touching her under her clothes, digitally penetrating her, making the victim touch his genitals, and forcing the victim to orally copulate him.

Defendant told the victim that if she ever told anyone about the molestation, he would hurt the victim’s mother. Defendant also threatened to hit the victim when she attempted to get away from him. Defendant promised to give the victim money if she would orally copulate him.

The victim’s older brother saw defendant touch the victim’s “private parts” on more than one occasion. The brother heard defendant say he would kill their maternal grandmother if the victim told anyone. The brother also witnessed defendant attempt to sodomize the victim. The brother tried to push defendant away, but defendant shoved him to the ground. When the brother said he was going to tell his mother what had happened, defendant threatened to kill the mother and the maternal grandmother. On another occasion, the brother heard defendant tell the victim to touch his genitals. The victim tried to fight back by kicking defendant, but defendant grabbed her legs and put his hand over her mouth.

When the victim was seven years old, her maternal grandmother moved in with the family, and slept in the living room. The maternal grandmother witnessed several incidents that caused her to suspect that defendant was sexually abusing the victim. The maternal grandmother asked the victim if defendant was touching her, but the victim denied it. The maternal grandmother claimed that she had a photo of defendant putting his hand on the victim’s leg and asked the victim to tell the truth. The victim first said that defendant did not touch her, then said he touched her leg accidentally.

The maternal grandmother told the victim’s mother to talk to the victim. The victim was initially nervous and upset and was laughing; eventually she said to her mother, “I want to tell you that . . . [defendant] is touching me.” The victim’s mother did not contact the police. Instead, she moved the victim to the top bunk bed, promised to make sure the victim was never alone with defendant, and promised to call the police if defendant ever touched the victim again.

When the victim was eight years old, the maternal grandmother again asked whether defendant had touched her. The victim revealed that defendant had penetrated her with his fingers. The maternal grandmother notified someone at the victim’s school, who contacted the police.

In the presence of a police officer and a social worker, the victim initially denied any molestation and denied telling her mother she had been molested. She told the police officer she did not want to talk because she was afraid defendant would hurt her or her mother. As the interview progressed, the victim confirmed she had seen defendant’s penis. During the interview, the victim was shaking and crying.

The victim had two separate interviews with social workers from the Child Abuse Services Team (CAST). The victim’s discussion of the acts of molestation was much more detailed during the CAST interviews than when she testified at trial.

In an information, defendant was charged with two counts of committing lewd acts on a child under 14 (§ 288, subd. (a) [counts 1 and 3]), one count of forcibly committing a lewd act on a child under 14 (§ 288, subd. (b)(1) [count 2]), and one count of sexual penetration with a child 10 years of age or younger (§ 288.7, subd. (b) [count 4]). Following a jury trial, defendant was convicted of all counts.

The trial court sentenced defendant to a term of 35 years to life: an indeterminate term of 15 years to life on count 4, plus consecutive determinate terms of eight years on count 2, and six years each on counts 1 and 3. The trial court also ordered defendant to pay a $300 restitution fine (§ 1202.4), and a $300 parole restitution fine (§ 1202.45). Defendant timely filed a notice of appeal.

DISCUSSION

[ PARTS I., II. AND III., See FOOTNOTE*, Ante ]

IV.

SENTENCING ISSUES

A.

Is the Life Sentence on the Section 288.7, Subdivision (b) Count Cruel and/or Unusual?

Defendant was sentenced to 15 years to life on count 4, for the sexual penetration of a child 10 years of age or younger. Defendant contends on appeal that this sentence constitutes cruel and/or unusual punishment because it is disproportional to his criminal culpability and criminal history and to punishments for other crimes in California and for similar crimes in other states. In this case of first impression, we hold that defendant’s sentence of 15 years to life on count 4 for sexual penetration of a child 10 years of age or younger is constitutional.

Special laws on the subject of sexual abuse of children have been enacted describing the types of acts that may be deemed criminal sexual misconduct. These laws “generally operate without regard to force, fear, or consent.” (People v. Reyes (2016) 246 Cal.App.4th 62, 85.) The act of setting prison terms for specific crimes “involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’” (Harmelin v. Michigan (1991) 501 U.S. 957, 998.) When considering a claim that a particular sentence amounts to cruel and unusual punishment, we give substantial deference both to the Legislature’s broad authority to determine the parameters for

2. The brother slept on the top bunk of the bunk bed, while the victim and her half-sisters slept on the bottom bunk.
the punishments for crimes, and to the trial court’s discretion in imposing specific sentences. (Solem v. Helm (1983) 463 U.S. 277, 290.) “Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.” (People v. Martinez (1999) 76 Cal.App.4th 489, 496.)

The federal Constitution prohibits imposition of punishment that is “cruel and unusual.” (U.S. Const., 8th Amend.; see Robinson v. State of California (1962) 370 U.S. 660, 666-667.) The United States Supreme Court has concluded that neither a 25-years-to-life sentence for stealing three golf clubs nor a 50-years-to-life sentence for stealing videotapes valued at $153 constitutes cruel and unusual punishment. (Ewing v. California (2003) 538 U.S. 11, 30-31; Lockyer v. Andrade (2003) 538 U.S. 63, 77.) In the present case, by contrast, defendant committed acts of sexual molestation against a very young child—with whom he had the equivalent of a parent/child relationship—to satisfy his own sexual desires. Given the United States Supreme Court precedent and the nature of defendant’s crimes, we conclude the sentence imposed did not constitute cruel and unusual punishment under the Eighth Amendment.

Our state Constitution provides: “Cruel or unusual punishment may not be inflicted or excessive fines imposed.” (Cal. Const., art. I, § 17.) A sentence may be cruel or unusual if it is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (In re Lynch (1972) 8 Cal.3d 410, 424.) “The main technique of analysis under California law is to consider the nature both of the offense and of the offender.” (People v. Martinez, supra, 76 Cal.App.4th at p. 494, citing People v. Dillon (1983) 34 Cal.3d 441, 479.)

In examining the nature of the offense, we “look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant’s involvement, and the consequences of defendant’s acts.” (People v. Reyes, supra, 246 Cal.App.4th at p. 87.) In examining the nature of the offender, we consider “whether the punishment is grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (Ibid.)

We quote from the trial court’s comments at the sentencing hearing regarding both of these criteria:

“[T]he court does find that pursuant to [California Rules of Court, rule] 4.421(a) the crime did involve great bodily injury harm as well as the threat of future and further great bodily harm and a high degree of cruelty, and viciousness and callousness.

“He did threaten that he was going to hurt [her] or her brother if they told; that he was going to beat their mother if they told. And he molested her from the time she was little until she grew older with the progression of molestation activities that became more and more aggressive.

“She would kick him. He would contain her legs. He was much larger and so, you know, his progress at this was extremely disturbing for her and for her family.

“Under [rule] 4.421(a)(8) the manner in which it was carried out did indicate some amount of planning in that they all lived in the same house. There wasn’t a lot of privacy in the house. But he would make sure that he had access to her when her mother was gone and when the grandmother was not around so no one could see what was happening.

“It was only when the [grandmother walked] in and saw his hand on her leg and he moved it quickly that suspicion really arose to a different level, and the grandmother finally took all these fact[s] to the school because she didn’t trust that her daughter would do the right thing and leave him, because there had already been things going on in the house, according to her, in that there was evidence from both I believe from grandma, and from the victim, that the defendant was actually striking the mother as well, none of which was charged, but certainly played into whether or not someone [would] report this particular crime.

“Pursuant to [rule] 4.421(a)(3) the victim, compare[d] to other victims, was really vulnerable. She was a little girl who lived in a house with him. She was alone. Physically, he was much larger, and she was too young to be able to fend him off or to even understand or be successful in escaping. She was afraid that everyone would be hurt who she loved if she were to tell, and she pretty much was isolated.

“Pursuant to rule 4.421(a)(11) the defendant did take advantage of a position of trust. He was the one who was suppose[d] to care for her and keep her safe when mother was at work, and unfortunately took advantage of that situation and he violated the trust that her mother had placed in him, and that she probably had in him to keep her safe.

“The factors in mitigation with a regard to the actions are none, but that factors in mitigation as to his background are that he has no criminal background that the court is aware of, so he has that in his benefit which is why the court is not giving an aggravated term.”

Defendant, an adult, was in the position of a father figure to the victim, who was a child of very tender years when the molestation began. Defendant used the trust placed in him by the victim’s mother, his physical dominance over the
victim, and fear instilled by threats of harm to the victim and her family members to commit these crimes. Defendant had a very limited criminal record, his defense expert testified that defendant did not suffer from paraphilia, and witnesses on behalf of defendant testified he was honest and did not have a reputation for being “vulgar” with children. On the whole, however, the nature of the offender and the nature of the offense do not establish that the punishment was grossly disproportionate to the crime committed.

No disproportionality is demonstrated either by comparing defendant’s punishment to punishments for other crimes in this state, or by comparing defendant’s punishment to punishments for similar crimes in other states. Defendant notes that the 15-years-to-life sentence for violation of section 288.7, subdivision (b) is equal to that imposed for second degree murder, and is greater than the sentences imposed for first degree robbery, forcible rape, or forcible sodomy. It is well within the prerogative of the Legislature to determine that sex offenses against young children are deserving of longer sentences than sex offenses against adults or non-sex offenses. “Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime. Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual.” (People v. Baker (2018) 20 Cal.App.5th 711, 727.)

Defendant presents the sentence ranges for sexual penetration with a minor from 10 other states. Defendant posits that because six of those jurisdictions give the sentencing court discretion to sentence a defendant to a determinate term, his term of 15 years to life is constitutionally infirm. We read defendant’s survey differently. One of the jurisdictions cited (Florida) permits a sentence of life without the possibility of parole. Three others (Kansas, Nevada, and Ohio) permit a term of years to life, where the term of years is at least as long as that imposed here. Thus, several other jurisdictions permit equivalent or harsher punishment for the equivalent crime. The punishment prescribed for violation of section 288.7, subdivision (b) does not shock the conscience.

Therefore, we conclude that the 15-years-to-life sentence imposed on defendant for violating section 288.7, subdivision (b) is not cruel and/or unusual punishment.

[ PARTS IV.B., IV.C., AND V., See FOOTNOTE*, Ante ]

DISPOSITION

The sentences on counts 1 and 3 are vacated. The matter is remanded to the trial court for resentencing on counts 1 and 3. The judgment is affirmed in all other respects.

3. Defendant’s previous arrests were for leaving the scene of an accident involving property damage (Veh. Code, § 20002, subd. (a)); driving without a license (id., § 12500, subd. (a)); making an unsafe turn (id., § 22107); and disorderly conduct (§ 647, subd. (f)).
Endnotes
1 Undesignated statutory references are to the Code of Civil Procedure.