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Building the record that survives summary judgment

HOW DISCOVERY, EVIDENCE, AND EXPERT OPINIONS COMBINE TO CREATE TRIABLE ISSUES OF FACT ON EMPLOYER LIABILITY AND RELATED DERIVATIVE CLAIMS

A motion for summary judgment is won or lost long before the hearing. It is won or lost during the discovery phase of a case, when the record that will later fill a separate statement is created. A recent ruling from the Los Angeles Superior Court in a vicarious-liability case illustrates the point with unusual clarity. In the order, the trial court denied summary adjudication of the wrongful-death and vicarious-liability claims because discovery had a well-developed factual record. The court granted summary adjudication of two derivative claims.

In broad strokes, the case arises from a wrongful-death claim against a municipality following a shooting committed by one of its employees who was not law enforcement. The employee was later convicted in a related criminal proceeding. The decedent's family brought claims against the City for negligence and wrongful death premised on vicarious liability, along with derivative claims brought by a surviving family member. The City moved for summary judgment, arguing that the employee's conduct fell entirely outside the scope of his employment and that the family's remaining claims failed as a matter of law.

The trial court denied summary judgment on the wrongful-death and negligence claims and denied summary adjudication of the vicarious-liability theory, but granted summary adjudication as to the derivative claims brought by the surviving family member. The split result is instructive because it was not a close call on the law. It was a function of what the discovery record did, and did not, contain.

Discovery

Defense counsel in employer-liability cases will almost always frame the scope-of-employment inquiry around the single, worst moment of the case – the discharge of a firearm. Plaintiffs cannot allow discovery to be confined to that frame. The record developed in this case shows why.

One useful way to structure that discovery is to work backward from the CACI instructions the jury will receive. Here, that meant building the record around CACI No. 3720 (Course and Scope of Employment), CACI No. 1621 (Negligent Infliction of Emotional Distress, Bystander), and CACI No. 3066 (Bane Act). Each of those instructions identifies, in plain terms, exactly what a jury must find, and each therefore tells plaintiffs' counsel exactly what discovery needs to develop long before any motion is filed.

Reconstructing how the job actually functioned

Plaintiffs' discovery did not just accept the City's characterization of the employee's role at face value; it reconstructed how the position operated in practice. Personnel records, disciplinary history, and deposition testimony from City witnesses established that the employee was hired without an independent interview, did not meet the City's own stated qualifications for the position, and had previously been disciplined for failing to properly account for his work time, with no meaningful corrective action afterward.

Testimony from the Defendant also established that his day-to-day activities went far outside of the job description. No single document contained these facts. These facts emerged from a combination of personnel files, disciplinary records, and testimony describing how employees were actually hired, evaluated, and supervised, as well as how the job was actually performed. This was used in comparison to the job description on paper.

The administrative and financial records tied to the position were crucial: mileage reimbursement, an auto allowance, social media posts made during the 'work day,' a cell-phone stipend, and time records reflecting hours worked on the day in question.

Those records established that the City compensated the employee for field work involving transportation and out-of-office functions rather than deskbound administrative tasks. Plaintiffs should not overlook these categories of discovery. Expense reimbursements, mileage logs, stipends, and time records are often the clearest, least disputable evidence that an employer both authorized and benefited from the very activity that later gave rise to the claim.

Discovery into notice and the absence of oversight

Plaintiffs needed discovery directed at what the City did not do. Specifically, Plaintiffs, through deposition testimony of City personnel witnesses, established that the City did not maintain meaningful guidelines governing how certain employees performed their duties in the field, did not conduct required periodic evaluations, and lacked any real mechanism to monitor how the employee's work time was spent.

Plaintiffs also developed evidence, through both civil deposition testimony and testimony given in the related criminal proceeding, regarding alcohol consumption during work hours and the employee's practice of carrying a personal firearm in the course of his duties.

Plaintiffs established that neither practice violated any written City policy. When the City argued that the conduct giving rise to the wrongful death was not part of the employee's job description, Plaintiffs were able to show, through various evidence, that the events leading up to the shooting were part of the employee's day-to-day job performance regardless of whether it was contained in a written policy. As in prior employer-liability cases, the absence of supervision or a policy, despite the City's asserted awareness of surrounding circumstances warranting closer oversight, became part of the plaintiffs' affirmative case.

Discovery of this kind should be designed from the outset to capture not only what the employer did, but what it failed to do despite having notice of a risk. Counsel should also look beyond the civil record itself to any parallel criminal proceeding, where testimony given under oath can meaningfully supplement the civil discovery record, which was done here.

Evidence

Discovery only matters if it is converted into admissible evidence tied to the elements the defense has put at issue. The ruling in this case shows how that conversion succeeded on the vicarious liability claim and illustrates the specific factual showing of the derivative claims required.

The evidence that defeated summary judgment on the vicarious liability claim

Applying the governing test under *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499, the court asked whether the activities that caused the employee to become an instrument of danger were undertaken with the City's permission and for its benefit, or, absent proof of benefit, constituted a customary incident of employment.

The court found that plaintiffs' evidence, including the compensation and reimbursement records, the time record for the day in question, the alcohol consumption during work-related meetings, and the extended, unsupervised carrying of a firearm without objection from the City, was sufficient to raise a triable issue under that test.

The court declined to isolate the shooting from the broader course of employment-related conduct that preceded it, holding that a reasonable jury could conclude the employee's presence at the scene, and the events that followed, were an outgrowth of his employment or broadly incidental to it. Due to the evidence supporting competing inferences, the scope-of-employment question was left for the jury to decide.

Applying the derivative-claim standards

The result was different for the derivative claims brought by a surviving family member who was present at the scene at the time of the shooting. On the claim for negligent infliction of emotional distress as a bystander, under *Thing v. La Chusa* (1989) 48 Cal.3d 644, recovery is generally limited to close blood relatives or people residing in the same household absent exceptional circumstances.

Plaintiffs presented evidence of a close familial relationship, but the court found that evidence insufficient without proof of cohabitation or facts equivalent to it, consistent with *Moon v. Guardian Postacute Services, Inc.* (2002) 95 Cal. App.4th 1005 and distinguishable from *Krivensov v. San Rafael Taxicabs, Inc.* (1986) 186 Cal.App.3d 1445. A close relationship, standing alone, is not enough. Where a plaintiff's case includes facts establishing cohabitation, or circumstances equivalent to it, that gap is avoidable.

The Bane Act claim requires a similar, additional showing. Civil Code section 52.1 requires evidence that the defendant intentionally interfered, or attempted to interfere, with the plaintiff's own exercise of a constitutional or statutory right through threat, intimidation, or coercion.

The evidence in the record established only that the family member witnessed the underlying violation of the decedent's rights, not that the employee's conduct was directed at, or intended to interfere with, any right belonging to that family member individually. The court was explicit that presence and proximity, without more, cannot substitute for evidence of intent directed at the bystander plaintiff.

Both rulings illustrate a single evidentiary lesson: a close relationship and resulting emotional harm are necessary, but not sufficient alone, when the cause of action requires proof of something more specific, whether cohabitation or intent directed at the plaintiff himself. Where a plaintiff's case includes facts showing the defendant's conduct was directed at the bystander individually, or facts establishing cohabitation or its functional equivalent, these claims will be sufficient.

Experts

The record in this case was built

almost entirely through fact discovery and percipient witness testimony, which is itself a reminder that expert testimony is not a substitute for a well-developed factual record. But experts remain an essential complement to that record, particularly where there are gaps in the record.

Treating providers as the first line of expert proof

Treating providers occupy a unique position in cases involving claimed emotional distress. They can testify to observations made in the course of treatment without the disclosure requirements that accompany a retained expert, while also offering diagnostic opinions that carry real weight with a jury. In any case involving emotional distress, plaintiffs' counsel should identify treating providers early, ensure their records document the closeness of the relationship at issue and the mechanism of injury in appropriate detail, and be prepared to designate them as experts, or retain a supplementing expert, well before the discovery cutoff.

Retained experts and the derivative claims

Where fact discovery reveals any kind of gap that proves dispositive on a derivative claim, a retained expert can sometimes help close it, but only if the underlying facts support the opinion. A forensic accountant or economist can quantify the financial support a decedent provided, turning a general assertion of financial support into a concrete number.

A family systems or forensic social work expert can speak to functional cohabitation and caretaking arrangements in non-traditional households, particularly where extended family members share caregiving responsibilities without a single, continuous residential address. None of these experts can manufacture facts that discovery never developed. Their value depends entirely on whether depositions, records, and declarations gave them something to analyze.

Municipal liability and human resources experts

On the employer-liability side, a human resources or municipal governance expert can be useful to explain, in terms

a jury will find intuitive, why the absence of interviews, performance evaluations, and field supervision left the City without a reliable means of knowing what the employee was actually doing in the field, and why compensation structures such as mileage reimbursement and auto allowances are recognized indicators that an employer has authorized, and benefits from, an employee's field activities.

Used correctly, that testimony does not replace the discovery record built through depositions and personnel files. Rather, it frames that record for the jury and shows the circumstances were a foreseeable consequence of how the position was structured. They were not something unique to this employee.

Practical considerations

Several considerations from the discovery, evidence, and expert record discussed above apply broadly to employer liability and wrongful death cases facing an eventual summary judgment motion.

- Discovery should not be limited to the incident itself. Plaintiffs' counsel should develop the broader employment relationship, including hiring practices, compensation structures, and supervision.
- Counsel should identify the CACI instructions applicable to each pleaded cause of action at the outset of the case (even prior to filing) and design written discovery, depositions, and expert disclosures around the specific elements those instructions require the jury to find.

- Administrative and financial records, such as mileage logs, auto allowances, expense reimbursements, and time records, are often the clearest and least disputable evidence of an authorized and compensated activity.
- Personnel and human resources witnesses should be examined about actual practice, not merely written policy, including what supervision, evaluation, or discipline did or did not take place. A written policy is not enough to show what actually happened.
- Counsel should identify what the employer knew, and when, regarding any risk associated with the employee or a related party, and what action was or was not taken in response.
- When derivative claims are pleaded, counsel should map the specific elements of each cause of action onto the available facts early in the case, so that any evidentiary gap is identified and addressed before the defense files its motion.
- Treating providers should be identified early, and counsel should evaluate whether a retained expert is appropriate to address any gap that fact discovery has identified but not fully closed.
- The separate statement should be used to organize the factual record around the precise legal question the court must decide, instead of an administrative formality.

Conclusion

Where discovery reconstructed how an employment relationship actually functioned, through personnel records, compensation data, and deposition testimony, the record was sufficient to send the scope-of-employment question to a jury despite a violent and unauthorized act. And as to derivative claims, a close relationship alone does not satisfy a derivative claim.

If Plaintiffs are pursuing a bystander NIED claim, the case needs specific facts establishing cohabitation or its equivalent. If pursuing a Bane Act claim, Plaintiffs need facts showing the defendant's conduct was directed at the bystander individually. The lesson for plaintiffs' counsel is not simply to conduct more discovery, but to conduct very specific discovery based on the CACI instructions. Plaintiffs' counsel should gather evidence and retain experts with the elements of every pleaded claim in mind from the outset of the case.



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