PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 26 | Issue 3 Article 8

4-15-1999

California Supreme Court Survey-A Review of Decisions: August 1997-June 1998

LeAllen Frost

California Supreme Court Survey

August 1997 - June 1998

The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of issues that the supreme court has addressed, as well as to serve as a starting point for researching any of the topical areas. Attorney discipline, judicial misconduct, and death penalty appeal cases have been omitted from the survey.

Summaries provide a brief outline of the areas of law addressed in selected California Supreme Court cases. Summaries are designed to provide the reader with a basic understanding of the legal implications of cases in a concise format.

I. ARCHITECTS, ENGINEERS, AND SURVEYORS

An architect may be disciplined for acts or omissions prior to licensure under Business and Professions Code sections 5583 and 5584; although not licensed, the architect was "in the practice of architecture"; such a construction is consistent with the legislative intent as evidenced by the language of the code, the statutory purpose of protecting the public, and the legislative history of the code in general; thus discipline by the Board for pre-licensure acts is not a violation of the Due Process clause or any other constitutional provisions.

II. CIVIL RIGHTS

A. *In order for an organization's membership decisions to be under the purview of the Unruh Civil Rights Act, it must be a business establishment. A charitable organization, with a social purpose not related to the promotion of its member's economic interests, is not indicative of a business establishment. An organization that offers members a program not equivalent to a traditional place of public accommodation or amusement is not indicative of a business establishment. An organization that does not sell its rights and activities to nonmembers is not indicative of a business establishment.*

B. *The Boy Scouts of America is not a "business organization of every kind whatsoever" within the definition of the Unruh Civil Rights Act (Civil Code, section 51); recovery is thus precluded under the Act for an individual who was denied an assistant scoutmaster position because of his declared homosexuality.*

III. CONSUMER PROTECTION

IV. CORPORATIONS

V. CRIMINAL LAW

D. *A prior conviction does not have to be brought and tried separately from another conviction in order to count as a separate strike under the three strikes law. Additionally, a defendant must seek relief through a petition for writ of habeas corpus when the record is silent as to whether the trial court understood that it retained discretion under section 1385 to dismiss a prior felony conviction.*
People v. Fuhrman 728

E. *A defendant may appeal a judgment of conviction entered on a plea of guilty or nolo contendere without filing the required statement of grounds and obtaining an executed certificate of probable cause from the trial court if the defendant alleges solely that errors resulted in the trial court hearings for the purpose of ascertaining the degree of the crime and penalty to impose and does not challenge the validity of the plea. The notice of appeal must state these grounds expressly or impliedly to become operative.*
People v. Lloyd 731

F. *The failure of a prosecutor, or any agency acting on the prosecutor's behalf, to turn over possible exculpatory evidence to a defendant will be charged against the prosecutor, despite any actual knowledge by the prosecution of the evidence or any lack of bad faith by any party. The prosecutor has an affirmative duty to search out exculpatory evidence and any failed attempt to transmit the exculpatory evidence will not be sufficient to meet the due process requirements that the rule is meant to protect. However, non-disclosure will give rise to a denial of due process only when the evidence is material.*
***In re* Brown** 734

G. *A tort action of public disclosure of private facts against a television producer is appropriately dismissed in summary judgment because coverage of a car accident scene and helicopter rescue is 'newsworthy,' which acts as a complete bar to a public disclosure action; however, the tort action of intrusion may appropriately proceed because a reasonable jury could find that the camera operator intruded into a private place, conversation, or matter in a manner highly offensive to a reasonable person; and further, news organizations are not afforded the same First Amendment protections in news gathering as are given when publishing news.*
Shulman v. Group W Prod., Inc. 738

H. *A prosecutor's duty to disclose witness information pursuant to California Penal Code section 1054.1 is limited to "witnesses" and not information regarding defense witnesses; thus, a prosecutor's failure to disclose information regarding the witness' credibility is not discoverable and did not violate the defendant's right to due process.*
People v. Tillis 743

IX. INDEPENDENT CONTRACTORS

Employees of an independent contractor who are injured by the contractor's negligence cannot seek recovery in tort against the hiring person under the peculiar risk doctrine because of the availability of workers' compensation benefits.

X. LABOR

In an action by an employee to recover unpaid wages under California Labor Code section 98, the statute of limitations date used to calculate recoverable backpay should be the filing date of the claim rather than the date on which the hearing is held.

XI. PARENT AND CHILD

A biological father does not have a constitutionally protected interest in establishing a relationship with his child conceived and born during the mother's marriage to another man; therefore, California Family Code sections 7611 and 7630 may constitutionally be applied to preclude an alleged biological father from establishing his paternity of a child born during the mother's marriage to another man.

XII. TORTS

In cases where the victim of intentional destruction of evidence, committed by a party to the underlying cause of action to which the evidence is pertinent, knows or has constructive knowledge of the alleged act before the trial pertaining to the underlying action, a new tort remedy will not be created.

XIII. WORKMEN'S COMPENSATION

I. ARCHITECTS, ENGINEERS, AND SURVEYORS

An architect may be disciplined for acts or omissions prior to licensure under Business and Professions Code sections 5583 and 5584; although not licensed, the architect was "in the practice of architecture"; such a construction is consistent with the legislative intent as evidenced by the language of the code, the statutory purpose of protecting the public, and the legislative history of the code in general; thus discipline by the Board for pre-licensure acts is not a violation of the Due Process clause or any other constitutional provisions.

Hughes v. Board of Examiners, Supreme Court of California, Decided March 26, 1998, 17 Cal. 4th 763, 952 P.2d 641, 72 Cal. Rptr. 2d 624.

Facts. The respondent, Charles Scott Hughes, obtained a license to practice architecture with the California Board of Architectural Examiners on September 10, 1990. Prior to his application, the respondent had successfully completed an architectural examination in Washington D.C., but did not receive his license for failure to satisfy all the requirements. He did, however, run his own architectural firm and held himself out as a licensed architect, even passing off other licensed architects' stamps as his own. Hughes also applied for membership to the American Institute of Architects using another architect's registration certificate and falsely representing that he was registered as an architect in other states. Upon discovery of these actions, the Board of Architectural Examiners of Washington began disciplinary proceedings against Hughes. A grand jury indicted Hughes on one count of misrepresentation and Hughes was ordered to perform community service. Eventually, the prosecutor dismissed the charge because Hughes had complied with the court imposed conditions.

Prior to the dismissal of the case, Hughes applied to the California Board of Architectural Examiners (the Board) and completed an application on which he indicated that he had never been convicted of any offense (including offenses dismissed for satisfaction of court imposed conditions). Soon after Hughes sent the application, he wrote a supplemental letter in which he admitted that "he had never completed the licensing process" and that he was involved in civil litigation regarding his status as a licensed architect. He also related the events of the litigation, including his satisfaction of the probation terms, and he indicated that the charges against him had been dismissed (although technically, they were not formally dismissed until May 1, 1990, about two weeks after Hughes wrote the supplemental letter). Hughes obtained his license from the Board on September 10, 1990.

On February 5, 1992, the Board learned that Hughes had been denied

registration in other states due to problems with his moral character. After an investigation, the Board made the following accusations against Hughes: 1) that he knowingly made a false statement on his application, 2) that he had been convicted of "a crime substantially related to the qualifications, functions, and duties of an architect" in violation of section 5577; 3) that he had engaged in fraud and deceit in the practice of architecture in violation of section 5583; and 4) that he was guilty of willful misconduct in the practice of architecture in violation of section 5584. In response to these allegations, an administrative law judge ordered that Hughes' license be revoked. The Board adopted this resolution and revoked Hughes' license on June 16, 1993. Hughes filed a petition for a peremptory writ of mandate in the superior court soon after.

The superior court denied Hughes' petition, holding that Business and Professions Code sections 5583 and 5584 allowed the Board to take disciplinary action for conduct occurring pre-licensure. The appellate court reversed and the Supreme Court of California granted review to consider "whether an architect may be disciplined for misconduct occurring before a license is issued if the license was not obtained by fraud or misrepresentation."

Holding. Sections 5583 and 5584 of the Business and Professions Code authorize disciplinary proceedings against a licensed architect for conduct occurring prior to licensure. Such an interpretation is consistent with the legislative purpose "to regulate the practice of architecture in the interest and for the protection of the public health, safety, and welfare." In reaching this conclusion, the court looked at the Architects Practice Act as a whole, including the statutory intent and legislative history.

Article 4 of the act governs the issuance of licenses and provides the basis for denial of a certificate of registration. Article 5 allows the Board to suspend or revoke a license for disciplinary reasons. Article 5 further specifies particular acts or omissions for which a license may be revoked. Included in Article 5 are sections 5583 and 5584, which allow disciplinary proceedings for fraud, deceit, negligence, and willful misconduct committed in the practice of architecture by the holder of a license. Respondent Hughes argued that Articles 4 and 5 are mutually exclusive based on the temporal distinction of pre and post licensure. Thus, he contended the disciplinary proceedings authorized by Article 5 only apply to acts occurring when the individual is actually licensed. Consequently, acts committed prior to licensure would be relevant only during the application procedure as grounds on which to deny licensure. The supreme court rejected this approach as inconsistent with the statutory purpose and language of the act as a whole. While recognizing that the statute is ambiguous, the court pointed to language in Article 5 indicating that the Board may discipline a licensee if he "is practicing in violation of the provisions of this chapter." This language suggests disciplinary proceedings may be initiated against an individual for acts occurring prior to licensure as delineated in Article 4, as well as for acts occurring after licensure.

Further, the court pointed to the legislative history of the act, particularly the

previous distinction made between a provisional and final certificate. Historically, section 5 of the act authorized disciplinary proceedings against the holder of either a provisional or a final certificate. Thus, section 5 allowed for disciplinary proceedings for pre-licensure acts. As these sections were amended, the legislature eliminated these distinctions; however, the court concluded that none of these amendments were aimed at imposing temporal limitations on the reach of disciplinary authority under Article 5. The court noted that the purpose of the statute was to protect public welfare and thus it was subject to broad interpretation. The court further recognized that past conduct is important in determining the fitness of a person in a particular profession.

Additionally, the court held that allowing the Board to revoke a license for acts committed prior to obtaining a license would not violate the due process clauses of the Fifth and Fourteenth Amendments. Although recognizing that the holder of a license has a vested fundamental right, the court reiterated that this only guarantees him certain procedural protections which are satisfied by the procedural requirements contained in the Act. Further, the act is not subject to strict review because the purpose of the Act is to regulate the practice of architecture, not to punish the individual. Accordingly, giving the Board power to discipline licensees for acts inconsistent with the general standards and qualifications of the profession, even those occurring prior to licensure, helps protect the public.

Finally, the court rejected the respondent's claim that the court's construction violated established jurisdictional principles. The court held that "conduct occurring anywhere . . . may provide the basis for such denial without offending jurisdictional principles." The court also concluded that the applicable statutes were not being applied retroactively because they had been in effect since 1941. Subsequently, the court rejected the respondent's equitable and collateral estoppel arguments as inapplicable to the current circumstances. The court recognized that applying equitable estoppel "would defeat the strong public policy of regulating the architectural profession." The doctrine of collateral estoppel was also inappropriate because the Board had not made a final decision in an adversarial hearing. Yet the court cautioned the Board that it may not "defer to the post-licensure phase its examination of questions raised concerning an applicant's background" and that in different circumstances, the doctrines of estoppel or laches might apply.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. V (the federal government cannot deprive an individual "of life liberty or property without due process of the law").

U.S. CONST. amend. XIV (providing that the same due process requirement applies to the states).

CAL. BUS. & PROF. CODE § 5583 (West 1990 & Supp. 1998) (authorizing disciplinary action where the holder of a license has been guilty of fraud or deceit in the practice of architecture).

CAL. BUS. & PROF. CODE § 5584 (West 1990 & Supp. 1998) (authorizing disciplinary action where the holder of a license has been guilty of negligence or willful misconduct in the practice of architecture).

Case Law:

Berlinghieri v. Department of Motor Vehicles, 33 Cal. 3d 392, 657 P.2d 383, 188 Cal. Rptr. 891 (1983) (discussing different standards of review for vested and non-vested rights in licensing situations).

Yamaha Corp. of Am. v. State Bd. of Equalization, 19 Cal. 4th 1, 960 P.2d 1031, 78 Cal. Rptr. 2d 1 (1998) (specifying the standard of review for administrative interpretations as independent judgment).

Clayton v. Superior Ct., 67 Cal. App. 4th 28, 78 Cal. Rptr. 2d 750 (1998) (reiterating that judicial construction of statutes is aimed at giving effect to their statutory purpose. Provisions should be interpreted in regards to the subject matter as a whole).

Legal Texts:

3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 27(b) (4th ed. 1996) (discussing the nature of certain disciplinary proceedings by licensing boards as quasi-criminal, but noting that they are not governed by rules of criminal procedure).

9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Administrative Proceedings* § 3 (4th ed. 1997 & Supp. 1998) (generally discussing due process and other constitutional limits on administrative proceedings).

8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 285 (4th ed. 1997) (providing examples of vested rights, including the right to an existing license or permit).

11 CAL. JUR. 3d *Business and Occupation Licenses* § 46 (1996 & Supp. 1998) (discussing power to revoke license for grounds substantially related to the qualifications, functions, and duties of the profession).

11 CAL. JUR. 3d *Business and Occupational Licenses* § 47 (1996) (discussing procedural due process requirements in the administrative area).

11 CAL. JUR. 3d *Business and Occupational Licenses* § 9 (1996) (indicating that the substance and purpose are controlling in interpreting a statute. All provisions are construed together in regards to the act in its entirety).

6 CAL. JUR. 3d *Architects* § 12 (1998) (discussing the grounds for revocation of a license).

6 CAL. JUR. 3d *Architects* § 13 (1998) (discussing the procedure for revocation and other disciplinary actions).

Law Review and Journal Articles:

Sam Walker, *Judicially Created Uncertainty: The Past, Present, and Future of the California Writ of Mandamus*, 24 U.C. DAVIS L. REV. 783 (1991) (examining the historical development of the writ in judicial review of administrative actions and the relevant standard of review).

Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157 (1995) (generally discussing the authority of administrative review agencies and judicial review thereof).

Mark R. Fondacaro & Dennis P. Stolle, *Revoking Motor Vehicle and Profession Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications*, 5 CORNELL J. L. & PUB. POL'Y 355 (1996) (discussing the Due Process Clause as applied to revocation of professional and driver's licenses).

Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984) (delineating the difference between substantive and procedural due process issues as applied to administrative actions).

JULIE TROTTER

II. CIVIL RIGHTS

A. In order for an organization's membership decisions to be under the purview of the Unruh Civil Rights Act, it must be a business establishment. A charitable organization, with a social purpose not related to the promotion of its member's economic interests, is not indicative of a business establishment. An organization that offers members a program not equivalent to a traditional place of public accommodation or amusement is not indicative of a business establishment. An organization that does not sell its rights and activities to nonmembers is not indicative of a business establishment.

Randall v. Orange County Council, Boy Scouts of Am., Decided March 23, 1998, 17 Cal. 4th 736, 952 P.2d 261, 72 Cal. Rptr. 2d 453.

Facts. The plaintiffs, Michael and William Randall, were in the Cub Scout pack in Culver City. The plaintiffs testified that they did not repeat the word "God" when reciting the Cub Scout Promise and that their den leader allowed the boys to refrain from doing so after they explained they did not believe in God. However, the den leader testified that the boys neither raised questions about their belief in God, nor did they refrain from omitting any portion of the promise. The plaintiffs advanced from "Tiger Cub" to "Bobcat" to "Wolf" rank, while participating in the Cub Scout pack in Culver City. The Randall family moved to Anaheim Hills in Orange County and the boys joined Cub Scout Den 4, affiliated with Pack 519 and a part of the defendant Orange County Council. In an effort to obtain the rank of "Bear," the plaintiffs were required to fulfill a requirement necessitating the advancement of their religion in 1990. The material provided to the boys stated the following: "We are lucky the people who wrote and signed our Constitution were very wise. They understood the need of Americans to worship God as they choose. A member of your family will be able to talk to you about your duty to God. Remember, this achievement is part of your Cub Scout Promise. 'I, _, promise to do my best to do my duty to God and my country.'" Moreover, the boys were called upon to: "Practice your religion as you are taught in your home, church, synagogue, mosque or other religious community." The boys notified their den leader that they did not believe in God. Thereafter, the den leader notified the boys' mother that the belief in God was a necessity for completing the den requirement. The defendants, Orange County Council and Boy Scouts of America, affirmed that they could not allow the boys to advance unless they fulfilled their duty to God.

The plaintiffs brought an action, through their mother as guardian ad litem, alleging the defendants violated the Unruh Civil Rights Act because the boys were denied equal access to an organization because of their religious beliefs. The complaint sought statutory damages, attorney's fees, and injunctive relief prohibiting any exclusion or impediment to participation in scouting activities.

The court ordered a temporary restraining order prohibiting the Orange County Council and agents from requiring plaintiffs to use the word "God" in any pledge vow or from making advancement only available upon the completion of religious requirements. The court also issued a preliminary injunction, which offered the same relief and also prohibited the defendants from disallowing advancement because the religious requirements were not completed. The defendants appealed and the court of appeal granted a petition for writ of supersedeas. However, before the matter could be ultimately resolved, the case went to trial.

The first issue addressed at trial was whether the defendants operated as a business establishment, thus subjecting them to the purview of the Unruh Civil Rights Act. The plaintiffs argued in the affirmative, suggesting that the Orange County Council operates as a business establishment. The bases for this argument were that it maintained substantial holdings in real estate, employed 55 full time employees and twelve part time employees, opened the operations of its commercial establishments to the public, and conducted large-scale revenue-raising and revenue-earning activities. On the contrary, the defendants argued that the Orange County Council was not, in fact, a business establishment. They offered evidence that most of its income comes from charitable contributions, that its stores serve members and produce no profit, that camp facilities are available for rental to nonmembers for a nominal fee, that most programs are guided by volunteers, that those employed serve the volunteers, and that volunteers make up the board of governors.

The second issue pertinent to the case was if the defendants are under the Unruh Civil Rights Act, would the prohibition of the defendants from excluding the plaintiffs from membership and advancement in the organization violate the defendants' rights of expression under the First and Fourteenth Amendments of the United States Constitution. The plaintiffs adamantly argued that no constitutional violation exists because religion is not an expressive function of the defendants. First, the plaintiffs illustrated that religion plays a minimal role in Cub Scout activities and that the social and recreational qualities of the club are the predominate attributes. The plaintiffs also pointed out that the Boy Scouts of America's program activities expressly obviate the fact that religion is to be learned at their home and at their particular religious organizations. In addition, the plaintiffs noted that the United Way funded the defendants on the condition that funding and funded programs would not be limited to those of a certain religious belief, and that a religious activity could not be a condition precedent towards receiving any service. The defendants accepted funding from United Way.

The defendants offered ample evidence supporting their expressive function of advocating a religious message and spreading the message to the Cub Scouts. The defendants pointed out that all applicants to the Cub Scouts must recognize a

duty to God and are taught to carry out this duty. Furthermore, the Scout Law requires that the scout be reverent and faithful in his religious duties. In addition, the defendants supplied evidence that Boy Scouts of America instills religious values by training adult leaders to encourage participation in religious programs and church activities, to advocate the value of reverence for God, to recognize the obligation to God, to reinforce the Scout Promise at den meetings, and to create a protective environment in the Cub Scout program, whereby religious principles can be taught. Other evidence presented showed that fifty percent of dens are sponsored by religious organizations in the regional council's territory. There was also testimony by Cub Scouts' parents supporting the emphasis of religious values on the youth. Finally, the defendants argued that allowing nonbeliever members would hinder efforts to teach the religious message.

Despite the significant amount of evidence offered by the defendants, the trial court ruled in favor of the plaintiffs, awarding statutory damages of $250 and issuing a permanent injunction. The trial court held that the defendants are a business establishment and are therefore subject to the Unruh Civil Rights Act. With regard to the constitutional issues, the trial court found the evidence did not support the defendant's claim. The court reasoned that the Orange County Council was too large an association to have intimate associational rights. Further, the court failed to see how the intimate and associational rights of den leaders and Cub Scouts would be handicapped if members, who refuse to fulfill a duty to God, are not permitted. In response to the ruling, the defendants appealed; however, the court of appeal affirmed the trial court in all respects, but reversed the enjoinment of the pack's and den's actions because these were not defendants to the action. Thereafter, the Supreme Court of California granted the defendant's petition for review.

Holding. The Supreme Court of California concisely reversed the judgement of the court of appeal, but affirmed the reversal of the enjoinment of the pack's and den's actions. The court ruled that the Unruh Civil Rights Act is inapplicable to the defendant's membership decisions because the organization is not operating as a business establishment. The court pointed out that the evidence indicated that the organization is a charitable organization rather than a business establishment. First of all, the court emphasized that the organization has a predominately expressive social purpose that is not related to the economic interests of its members. Secondly, the court noted that the organization offers members a program not equivalent to a traditional place of public amusement or accommodation. Finally, the court demonstrated that the organization does not sell the right to participate in activities it offers to members. Because of the foregoing factors, the court concluded that the defendants were not operating as a business establishment.

The court determined that because it held the Unruh Act inapplicable to the defendants, the question of the constitutionality of the application of the Act need not be considered.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. I (protecting the right of freedom of expression or "intimate or expressive association").

U.S. CONST. amend. XIV (protecting due process of law as a right to all individuals and right to expression within the law).

Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1998) (indicating that all persons are entitled to full and equal protections without discrimination in "business establishments").

Case Law:

Curran v. Mount Diablo Council of the Boy Scouts of Am., 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (holding Boy Scouts did not constitute a "business establishment" within the broad meaning of the Unruh Civil Rights Act).

Ibister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985) (holding that the Boy's Club, which was operating in a community recreational facility, was a "business establishment" and under the Unruh Civil Rights Act).

Rotary Club of Duarte v. Board of Dir. of Rotary Int'l, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986) (determining that international organizations and local clubs thereunder can be subject to the Unruh Civil Rights Act if they are designated as "business establishments").

Legal Texts:

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 749 (9th ed. 1988) (discussing the application of the Unruh Civil Rights Act).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 752A (9th ed. Supp. 1997) (noting that a nonprofit corporation that has no paid employees, but does have annual dues, is not a "business establishment" under the Unruh Civil Rights Act).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 750 (9th ed. Supp. 1997) (indicating Mothers Against Drunk Driving is a "business establishment" under the Unruh Civil Rights Act).

Law Review and Journal Articles:

Edward Bigham, *Civil Rights–Seventh Circuit Permits Boy Scouts of America to Exclude Atheist–Welsh v. Boy Scouts of America,* 67 TEMP. L. REV. 1333 (1994) (pointing out that the *Welsh* court took note of California's Unruh Civil Rights Act).

Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs,* 2 MICH. J. GENDER & L. 27 (1994) (noting that in recent years discrimination has been attacked in many forums, including disputes over the Boy Scouts as a "business establishment").

Julie Gannon Shoop, *Boys Scouts May Exclude Gays and Atheists, California Court Holds,* 34-JUN TRIAL 19 (1998) (noting that because the Boy Scouts are not a "business establishment" and, thus, not under the Unruh Civil Rights Act, they can exclude not only atheists, but men who acknowledge they are gay as well).

John E. Theuman, *Exclusion or Expulsion from Association or Club as Violation of State Civil Rights Act,* 38 A.L.R.4th 628 (1981) (providing a detailed case history and references for determining what constitutes a "business establishment" under the Unruh Civil Rights Act).

Shannon Wead, *Statutory Interpretation: Boy Scouts in the Bible Belt; Boy Scouts' Rejection of Atheist Not Illegal in Kansas, Seaborn v. Coronado Area Council, Boy Scouts of America,* 35 WASHBURN L.J. 359 (1996) (noting that the *Seaborn* court took note of California's Unruh Civil Rights Act and the "business establishment" prerequisite).

NATHANUEL THOMAS

B. The Boy Scouts of America is not a "business organization of every kind whatsoever" within the definition of the Unruh Civil Rights Act (Civil Code, section 51); recovery is thus precluded under the Act for an individual who was denied an assistant scoutmaster position because of his declared homosexuality.

Curran v. Mount Diablo Council of the Boy Scouts of Am., Supreme Court of California, Decided March 23, 1998, 17 Cal. 4th 670, 952 P.2d 218, 72 Cal. Rptr. 2d 410.

Facts. The plaintiff, Timothy Curran, a former member of a Boy Scout troop, filed an application to become an assistant scoutmaster in order to attend the 1981 Boy Scouts of America National Jamboree. The defendant had become aware of the plaintiff's declared homosexuality when the plaintiff had participated in a three-part article that ran in the Oakland Tribune on the lives of gay teenagers. On the basis of the plaintiff's avowed homosexuality, the defendant denied his application to become an assistant scoutmaster, stating that his lifestyle ran contrary to the morals of the Boy Scouts. The plaintiff, in response, filed an action pursuant to the Unruh Civil Rights Act.

California Civil Code section 51 (the Unruh Civil Rights Act) requires free and equal treatment to individuals without reference to sex, race, religion, ancestry, national origin, or disability in access to the facilities and service of all business establishments of every kind. The trial court initially bifurcated the case into two issues. First, the trial court addressed whether or not the Boy Scouts fell within the definition of a business organization under the Unruh Civil Rights Act, and secondly, it considered whether or not judicially placing the plaintiff into the defendant's organization violated the Boy Scouts' constitutional right of association. As to the first issue, the trial court decided that the defendant did fall under the auspices of the Unruh Civil Rights Act, basing its decision on the Boy Scouts' prominence in the community and public service. Having established liability under section 51, the court addressed the second phase of the trial. The court determined that an order prohibiting the defendant from denying the plaintiff's application would not violate the defendant's right to intimate association. The trial court, however, did conclude that the defendant's right to expressive application would be violated because the plaintiff's homosexuality collided with the Boy Scouts' belief system, explicit in the Boy Scout Oath and Law.

Both parties appealed from their respective judgements. The plaintiff argued that there was no violation of the defendant's right of association, while the defendant argued that it was not a business establishment under the gambit of the Unruh Civil Rights Act. The appellate court affirmed the trial court's decision as

to the violation of the defendants' constitutional rights to expressive association. The court of appeal, however, reversed both decisions in favor of the plaintiff, finding a violation of the right to intimate association and also concluding that the Boy Scout organization did not fall into the business establishment definition of the Unruh Civil Rights Act.

Holding. The California Supreme Court affirmed the court of appeal's decision, agreeing as to the first issue that the Boy Scouts of America is not a business establishment within the meaning of the Unruh Civil Rights Act. Consequently, the court determined that this preempted the defendant's affirmative defense of a violation of constitutional right of access.

The court initially dismissed the plaintiff's argument that the defendant's organization is definitively established as a business organization under the Unruh Civil Rights Act by the law of the case doctrine. Analyzing previous decisions under the Unruh Civil Rights Act, the court concluded that the issue as to whether the Boy Scouts were a "business establishment" within the Act had not been determined by those prior holdings. Although section 51 does not expressly define what will be considered a "business establishment," the court has stated that the term will be interpreted in "the broadest sense possible." The court thus recognized that it is still bound by the underlying principles defined in the previous cases, the legislative history, and the Act itself.

Beginning with the express language of Civil Code section 51, the court recognized that it has applied the Act to many entities, including for profit and nonprofit businesses. However, the court also concluded that no prior decision has interpreted the term "business establishment" to apply to "charitable, expressive, [or] social organization[s]" such as the Boy Scouts. The court concluded that the Boy Scouts organization did not perform such functions that would further the economic interests of its members. The court further concluded that because the Boy Scouts met in small groups and participated in a variety of rituals, they were not a place of public accommodation.

The Boy Scouts, in addition to their regular activities, conducted regular retail business with nonmembers. The plaintiff construed these activities as pulling the organization under the "business establishment" clause of section 51. The court, though, viewed these activities of the organization as separate from the core functions of the Boy Scouts. Specifically, the court stated that nonmembers could not purchase rights to partake of the daily activities or even the educational and recreational activities of the troop. The court sustained the plaintiff's argument to the extent that the Unruh Civil Rights Act would apply only to those activities that concern retail sales to nonmembers, and hence would fall outside the plaintiff's contention.

As a final note, the court raised the general concern discussed at the trial level that exclusion of the Boy Scouts from the Unruh Civil Rights Act would sanction them to blanket immunity with which they could discriminate on any basis they prefer. The court, however, dismissed this concern with alternative remedies, such

as denial of tax-exempt status that is afforded nonprofit entities. Additionally, the court invoked the statutory language of the Unruh Civil Rights Act, refusing to extend it to a situation where it simply did not apply.

The court thus ruled for the Mount Diablo Council of the Boy Scouts of America, refusing to extend the "business establishment" clause of the Unruh Civil Rights Act to their organization. The resolution of the first issue in the defendant's favor rendered the defendant's affirmative defense of a constitutional violation of right to association a moot point.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 51 (West 1982 & Supp. 1997) (addressing liability for denial of accommodations, privileges, facilities or services and limiting that liability to "all business establishments of every kind whatsoever").

Case Law:

Hart v. Cult Awareness Network, 13 Cal. App. 4th 777, 16 Cal. Rptr. 2d 705 (1993) (discussing that cult awareness group was not held to be a business establishment within the meaning of section 51).

Isbister v. Boys' Club of Santa Cruz, 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985) (holding that Boys' Club that discriminated based on gender was a "business establishment" covered under the Unruh Civil Rights Act, despite the fact that it was a private, nonprofit corporation).

O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983) (concluding that a condominium development was a "business establishment" for purposes of the Unruh Civil Rights Act).

Randall v. Orange County Council, Boy Scouts of Am., 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1998) (holding that two boys who were refused membership in the Boy Scouts because of their religious beliefs could not file suit under the Unruh Civil Rights Act because the organization was not a "business establishment" within the meaning of civil code section 51).

Warfield v. Peninsula Golf & Country Club, 10 Cal. 4th 594, 896 P.2d 776, 42 Cal. Rptr. 2d 50 (1995) (holding that private country club was a "business establishment" and therefore the court barred it from denying women as members).

Legal Texts:

7 CAL. JUR. 3D *Association and Clubs* § 25 (1989 & Supp. 1998) (discussing *Curran* and a homosexual's rights to notice of a specific offense before being expelled from an organization).

12 CAL. JUR. 3D *Civil Rights* §§ 3-16 (1974 & Supp. 1998) (discussing the Unruh Civil Rights Act).

8 B.E. WITKIN, CALIFORNIA CONSTITUTIONAL LAW, *Employment Discrimination* § 479 (1998 & Supp. 1998) (discussing employment discrimination in general).

8 B.E. WITKIN, CALIFORNIA CONSTITUTIONAL LAW, *Invalid Classifications* § 692 (1988 & Supp. 1998) (discussing discrimination against homosexuals in general).

8 B.E. WITKIN, CALIFORNIA CONSTITUTIONAL LAW §§ 748-755 (1988 & Supp. 1998) (discussing the Unruh Civil Rights Act in general).

Law Review and Journal Articles:

Steven B. Arbuss, Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. (1983) (discussing generally the Unruh Civil Rights Act and its application).

Harold W. Horowitz, *The 1959 California Equal Rights in "Business Establishment" Statute-A Problem in Statutory Application,* 33 S. CAL. L. REV. 260 (1960) (discussing generally the historical development of the term "business establishments").

Sharon Swain, Note, *Forcing Open the Doors of Private Clubs:* Warfield v. Peninsula Golf & Country Club–*Did the Court Go Too Far?,* 30 U.C. DAVIS L. REV. 909 (1997) (discussing the California Supreme Court's decision and ramifications applying the Unruh Civil Rights Act to a private golf club).

Daniel C. Tepstein, Note, *'Unruhly' State of Affairs*: Warfield v. Peninsula Golf and Country Club, 26 SW. U. L. REV. 167 (1996) (discussing the California Supreme Court's decision applying the Unruh Civil Right Act to a private golf club).

Thomas Weathers, Comment, *Gay Civil Rights: Are Homosexuals Adequately Protected From Discrimination in Housing and Employment?,* 24 PAC. L.J. 541 (1992) (discussing that California courts have applied the Unruh Civil Rights Act to situations involving discrimination against homosexuals).

Steven Wyllie, Comment, *The Unruh Civil Rights Act: A Weapon to Combat Homophobia in Military On-Campus Recruiting*, 24 LOY. L.A. L. REV. 1333 (1991) (advocating that allowing military institutions to recruit on campus violates the Unruh Civil Rights Act because these organizations specifically bar homosexuals from their services).

MORGAN STEWART

III. CONSUMER PROTECTION

The cost-shifting provision of the Song-Beverly Consumer Warranty Act, which allows plaintiffs to recover their costs, does not preclude recovery of costs by prevailing defendants as provided for under California Code of Civil Procedure sections 998 and 1032(b).

Murillo v. Fleetwood Enter., Inc., Supreme Court of California, Decided April 27, 1998, 17 Cal. 4th 985, 953 P.2d 858, 73 Cal. Rptr. 2d 682.

Facts. In 1991, plaintiff Roberto Murillo bought a Fleetwood Pace Arrow motor home from an authorized retail dealer. The motor home was covered by an express warranty against defects by defendants Fleetwood Enterprises, Inc., Fleetwood Motor Homes of California, Inc., and Oshkosh Truck Corporation (collectively sellers). Later that same year, Murillo believed the vehicle to have defects and brought it in for repairs. Murillo remained dissatisfied with the repairs and filed suit in March 1993. The complaint alleged that the sellers had breached express and implied warranties and statutory provisions of the Song-Beverly Consumer Warranty Act, more commonly known as the "lemon law."

Sellers offered to settle the case for $12,000, as well as allowing Murillo to keep the vehicle. Murillo refused the offer of settlement and proceeded to trial. The jury found in favor of the sellers on all counts. Subsequently, sellers filed a memorandum of costs. Murillo made a motion to strike the memorandum of costs or, in the alternative, to tax costs. The trial court denied the motion to strike, finding that the Song-Beverly Act did not bar sellers' statutory right to recover costs under Code of Civil Procedure sections 998 or 1032. Additionally, the trial court denied the alternative motions to tax in their entirety. The court of appeal affirmed the trial court's decision. The California Supreme Court granted review to consider whether the provisions of the Song-Beverly Act, granting plaintiffs the right to recover costs, provide an express exception to the statutory right of the prevailing party to recover costs under sections 998 and 1032(b).

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that the Song-Beverly Act's statutory scheme for providing costs to buyers does not abridge a prevailing defendant's general statutory right to recover costs.

California Civil Code section 1032(b) provides that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." The court found no preemption of this right when a plaintiff sues under the Song-Beverly Act merely because no statutory scheme is expressed for recovery of costs by prevailing defendants. The court rejected the losing buyer's argument that the rule of statutory construction that the inclusion of one is the exclusion of the other applied in this case. This rule of

construction does not trump the plain meaning of the statutory language. Where the legislature has used the language "except as otherwise expressly provided by statute," an express provision must exist to contravene this intent.

Although the court supported the idea that the cost-shifting provision of the Song-Beverly Act is more specific than the general cost-recovery statute, and that when inconsistent, a more specific statute controls over a more general one, the court held that the two statutes are not inconsistent because they may be reconciled. If a buyer prevails under the Song-Beverly Act, she is entitled to costs, expenses, and attorney's fees. Should a seller prevail in an action brought under the Song-Beverly Act, it is entitled to costs under Code of Civil Procedure section 1032(b).

The court also held that the defendants were entitled to expert witness fees per Code of Civil Procedure section 998 because the plaintiff recovered less than the sellers offered for settlement. Section 998 provides for augmentation of costs under section 1032 where a plaintiff fails to obtain a judgment more favorable than the amount offered by the defendant to settle. The court concluded that the same rationale as applied to section 1032(b) controlled this issue because of the inclusion of the same language. "Because the cost-shifting provisions of the Song-Beverly Act do not 'expressly' disable a prevailing defendant from recovering section 998 costs and fees in general, or expert witness fees in particular," the trial court's award was proper.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 998 (West Supp. 1998) (explaining that a prevailing party is entitled to expert witness fees when the losing party receives a judgment less than the settlement offer).

CAL. CIV. CODE § 1032(b) (West 1982) ("[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.").

CAL. CIV. CODE § 1790 (West 1998) (Song-Beverly Consumer Warranty Act, known as the "lemon law").

CAL. CIV. CODE § 1794(d) (West 1998) (broadening a buyer's remedies to include costs, attorney's fees, and civil penalties).

Case Law:

California State Elec. Ass'n v. Zeos Int'l Ltd., 41 Cal. App. 4th 1270, 49 Cal. Rptr. 2d 127 (1996) (stating that the Song-Beverly Act was intended to supplement the California Uniform Commercial Code, not supersede it).

Kwan v. Mercedes-Benz of N. Am., 23 Cal. App. 4th 174, 28 Cal. Rptr. 371 (1994) (stating that because the Song-Beverly Act is intended to protect the consumer, it should be construed broadly to bring its benefits into action).

Brown v. West Covina Toyota, 26 Cal. App. 4th 555, 32 Cal. Rptr. 2d 85 (1994) (stating that although the plaintiffs sued under the Song-Beverly Act, the prevailing defendants were awarded costs under California Civil Code sections 2981-2984.4).

National R.V., Inc. v. Foreman, 34 Cal. App. 4th 1072, 40 Cal. Rptr. 2d 672 (1995) (holding that a motor home coach falls under the "lemon law" provision).

Legal Texts:

13 CAL. JUR. 3D *Consumer and Borrower Protection Laws* §§ 337-355 (1984 & Supp. 1998) (generally discussing consumer protection laws for sales of goods).

40 CAL. JUR. 3D *Judgements* § 104 (1984 & Supp. 1998) (explaining entitlement of costs and procedures to obtain them).

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Sales* § 307 (2d ed. 1987) (discussing statutory requirements for consumer warranties).

7 B.E. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Judgment* § 85 (stating that the right to recover costs is wholly dependent upon statute).

Law Review and Journal Articles:

Angela M. Burdine, *Consumer Protection: "Lemon Law Buyback"–Requirements Regarding the Return and Resale of Vehicles*, 27 PAC. L.J. 508 (1996) (describing the requirements and significance of the Song-Beverly Act).

Louis J. Sirico, Jr., *Automobile Lemon Laws: An Annotated Bibliography*, 8 LOY. CONSUMER L. REP. 39 (1996) (detailing the rise of "lemon laws" and a comprehensive citing of such laws and materials written about them).

Bruce Mann & Thomas J. Holdych, *When Lemons Are Better than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1 (1996) (arguing against the imposition of lemon laws like the Song-Beverly Act because they limit market forces).

Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589 (1985) (questioning the actual benefit to consumers of lemon laws).

MICHELLE PIROZZI

IV. CORPORATIONS

"Stock Purchase Agreements," commonly referred to as "buy-sell agreements," which are silent as to the shareholder rights during the postemployment period that is necessary to determine the value of shares, do not imply on their faces an intention by the parties to deny the minority shareholders those rights during postemployment.

Stephenson v. Drever, Supreme Court of California, Decided December 15, 1997, 16 Cal. 4th 1167, 947 P.2d 1301, 69 Cal. Rptr. 2d 764 (1997).

Facts. The plaintiff, Allen W. Stephenson, began his employment with Drever Partners, Inc., a closely-held corporation, in 1980. On December 15, 1990, the plaintiff and Maxwell Bruce Drever, the majority stockholder of Drever Partners, entered into a contract entitled "Stock Purchase Agreement." The contract recited that in recognition of the value of the plaintiff's services and as an incentive for him to remain in its employ, Drever Partners agreed to sell the plaintiff 500 shares of its common stock. The agreement provided, "in the event of the termination of Stephenson's employment for any reason whatsoever, including his retirement or death, then, on or before ninety (90) days after the date of such termination, Drever Partners shall have the right and obligation to repurchase all of the shares" that it agreed to sell to Stephenson. This type of agreement is commonly known as a "buy-sell agreement." The Stock Purchase Agreement further provided that after September 15, 1991, the repurchase price of the shares would be "the fair market value thereof." If the parties could not agree on the fair market value, it would be fixed by an independent appraiser. Drever Partners sold the 500 shares to the plaintiff pursuant to the contract, which amounted to eleven percent of the outstanding common stock of the corporation. Maxwell Drever owned the remaining 89 percent. On May 16, 1994, Drever and the plaintiff entered into another agreement providing that the plaintiff's employment by Drever Partners would terminate as of July 1, 1994. The agreement provided that the plaintiff's shares would be valued as of May 1, 1994. The parties were unable to agree on the fair market value of the shares, and a dispute over the appraisal process ensued. Because of that dispute, the fair market value of the plaintiff's shares had not yet been determined and Drever Partners has not repurchased those shares. The plaintiff remained their record owner. On May 8, 1995, the plaintiff filed the present action against Drever and two other persons in their capacities as officers and directors of Drever Partners. The complaint charged that Drever breached the fiduciary duty that he owed as a director and as controlling shareholder to treat the plaintiff, as the minority shareholder, fairly, in good faith, and in a manner that benefits all shareholders proportionately.

The defendants demurred on two principal grounds. First, they contended that they owed no fiduciary duty to the plaintiff at any time alleged in the complaint

because the plaintiff's status as a shareholder assertedly terminated as of May 1, 1994, the valuation date of the shares he had agreed to resell to Drever Partners upon leaving its employ. Second, the defendants contended the action was derivative in nature and the plaintiff lacked standing to sue derivatively because his shareholder's status had terminated.

The trial court sustained the demurrer on the first ground without leave to amend. The court ruled as a matter of law that on the face of the contract, the defendants' fiduciary duty to the plaintiff by reason of his status as a shareholder ceased as of May 1, 1994, and after that date the plaintiff's rights were contractual only and his relationship to Drever Partners was as a creditor, not as a shareholder. The trial court also noted that it found the defendant's derivative action persuasive. The court of appeal and the California Supreme Court construed this as a formal ruling sustaining the demurrer on the defendant's second ground as well. The trial court dismissed the complaint with prejudice. The court of appeal affirmed the judgment of dismissal on the first ground of the demurrer, and for that reason declared it unnecessary to reach the second ground.

Holding. Reversing the judgment of the court of appeal, the California Supreme Court held the Stock Purchase Agreement, which was silent as to shareholder rights during the postemployment period necessary to determine the value of his shares, did not imply on its face an intention by the parties to deny the minority shareholder those rights during that period.

The Stock Purchase Agreement entered into was an executory contract to buy and sell personal property–specifically, shares of corporate stock owned by an employee–if and when a particular event occurs, i.e., the termination of employment. The California Supreme Court relied upon the general rule in *Gilfallan v. Gilfallan,* 168 Cal. 23, 141 P. 623 (1914), which stated, "[u]pon a executory agreement to buy and sell personal property, title does not pass to the buyer until delivery is made to him or is due to him and is offered to be made, unless there is something in the contract specifying or implying a different intention." Due to the fact that the plaintiff had not delivered his shares to Drever Partners because their fair market value had not been determined and delivered to him, legal title to the plaintiff's shares had not passed to Drever Partners. The plaintiff remained a shareholder of record of the corporation with all rights appurtenant to that status.

The court noted that the contract did not expressly provide that when Stephenson's employment terminated, he immediately lost his status as a shareholder and was entitled to the value of his shares but was no longer entitled to participation in the corporation. However, the court recognized that the contract plainly contemplated some delay in consummating the repurchase of the plaintiff's shares after the termination of his employment. For example, the provision providing that the repurchase may take place at any time "on or before ninety (90)

days after the date" of the plaintiff's termination, and the provision providing for an appraiser to make a determination of the fair market value of the stock if the parties cannot agree. The court explained that these provisions negated any inference that the repurchase of the shares be consummated–that the plaintiff's status as a shareholder be terminated–immediately upon termination as an employee.

The court further explained that recognition of the implied termination provision urged by the defendants would affect the plaintiff's rights as a shareholder under California law. After discussing the wide range of statutory rights a shareholder has to participate in corporate affairs, the court expressed concern that interpreting the Stock Purchase Agreement to deny the plaintiff his rights as a shareholder immediately when his employment terminated would have the effect of stripping the plaintiff of all the statutory shareholder's rights, even though he remained legal owner of record; representing eleven percent of Drever Partners' equity.

Therefore, the California Supreme Court concluded that the trial court erred in sustaining the demurrer on the first ground and the judgment of the court of appeal upholding that ruling should be reversed. In the court of appeal, the plaintiff also challenged the second ground on which the trial court sustained the demurrer, that the action was derivative in nature. Because the court of appeal did not resolve that contention, the court remanded the case for it to do so.

REFERENCES

Statutes and Legislative History:

CAL. CORP. CODE §§ 600-604 (West 1990 & Supp. 1998) (generally describing shareholders meetings and the ability of shareholders to consent).

CAL. CORP. CODE § 800 (West 1990 & Supp. 1998) (describing shareholder derivative actions).

CAL. CORP. CODE § 158 (West 1990 & Supp. 1998) (defining a close corporation).

Case Law:

Gilfallan v. Gilfallan, 168 Cal. 23, 141 P. 623 (1914) (explaining the general rule that upon an executory agreement to buy and sell personal property, title does not pass to the buyer until delivery is made to him or is due to him and is offered to be made, unless there is something in the contract specifying or implying a different intention).

Coleman v. Faub, 638 F.2d 628 (3d Cir. 1981) (standing for the proposition than an employee-shareholder may bargain away his right to remain a shareholder after

termination of his employment).

Richards v. Pacific Southwest Discount Corp., 44 Cal. App. 2d 551, 112 P.2d 698 (1941) (stating that the owner and holder of legal title to stock is entitled to its earnings).

Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (holding that California no longer follows the rule recognizing the right of majority stockholders to dispose of their stock without consent of the minority).

Legal Texts:

15 CAL. JUR. 3d *Corporations* § 64 (1983 & Supp. 1998) (generally discussing the qualifications of shareholders).

15 CAL. JUR. 3d *Corporations* § 313 (1983 & Supp. 1998) (describing the relationship between a shareholder and a corporation).

15 CAL. JUR. 3d *Corporations* § 320 (1983 & Supp. 1998) (noting that a dominant shareholder has a fiduciary duty not only to the corporation but also to the minority shareholders).

15 CAL. JUR. 3d *Corporations* § 315 (1983 & Supp. 1998) (stating that a shareholder retains his status and relationship until a transfer of his shares has been registered on the corporate book. In addition, a sale of shares under an invalid assessment does not terminate a shareholder's rights).

9 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 40 (9th ed. 1989 & 1998 Supp.) (describing a shareholder's agreement as a written agreement among all of the shareholders of a close corporation).

9 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 38 (9th ed. 1989 & 1998 Supp.) (stating that a close corporation is one whose articles require that its shares be held by only a specified number of persons, not exceeding thirty-five).

9 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 99 (9th ed. 1989 & 1998 Supp.) (generally describing the fiduciary relationship of directors in their relation with a corporation).

Law Review Articles:

John C. Carter, *The Fiduciary Rights of Shareholders*, 29 WM. & MARY L. REV. 823 (1988) (defining the circumstances in which fiduciary duties to corporate shareholders arise and which individuals have fiduciary responsibilities).

Walter R. Hinnart, Comment, *Fiduciary Duties of Directors: How Far Do They Go?*, 23 WAKE FOREST L. REV. 163 (1988) (suggesting that directors' duties extend beyond the traditionally united realm of shareholder protection).

James Van Vliet Jr. & Mark D. Snider, *The Evolving Fiduciary Duty Solution for Shareholders Caught in a Closely Held Corporation Trap*, 18 N. ILL. U. L. REV. 239 (1998) (describing the circumstances in which shareholders in closely held corporations have been held to owe a partner a fiduciary duty).

D. Gordon Smith, *The Shareholder Primacy Form*, 23 J. CORP. L. 277 (1998) (arguing that directors do not always act in the best interests of the shareholders).

Park Meginly, *The Twilight of Fiduciary Duties: On the Need For Shareholders Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163 (1997) (explaining why courts almost always apply the duty of loyalty towards shareholders inconsistently).

NICHOLLE PETRIKAS

V. CRIMINAL LAW

A. Where a person is convicted of any combination of at least three misdemeanor violations that fall under the penumbra of California Vehicle Code section 23175, any similar future convictions that occur within seven years of the three prior convictions will be subject to an enhanced penalty in accordance with section 23175, regardless of the order in which the offenses were actually committed. Additionally, increasing the penalty for a fourth violation from a misdemeanor to a felony does not violate ex post facto laws, regardless of the fact that the fourth infraction occurred before the prior three triggering violations, so long as the offense increasing the penalty occurred after the effective date of section 23175 as amended in 1984.

People v. Snook, Supreme Court of California, Decided December 18, 1997, 16 Cal. 4th 1210, 947 P.2d 808, 69 Cal. Rptr. 2d 615.

Facts. A recidivist statute, California Vehicle Code section 23175 heightens what would normally be a misdemeanor conviction to a felony after the fourth violation following any combination of three or more prior separate violations that result in convictions. The violations listed under the statute include DUI (prohibited by section 23152(a)), and driving with a blood alcohol level at or above .08 percent (prohibited by section 23152(b)). Any convictions following the prior three convictions, however, must have occurred within seven years of the three triggering convictions in order to fall under the purview of section 23175. Section 23175 was enacted in 1983, but was amended in 1984, replacing the words "prior offenses" for the words "separate offenses," effective in 1985.

Guy Edward Snook, the defendant, was arrested on April 6, 1992 for DUI. He was charged with three misdemeanors, one for DUI under section 23152(a), one for driving with a blood alcohol level of .08 percent under section 23152(b), and one for driving with a suspended license under section 14601.1. At his court appearance, however, the court had no record of his violations and thus rescheduled trial for a later date. Meanwhile, Snook was again arrested for DUI on three separate occasions: June 11, 1992, September 23, 1993, and October 25, 1993. He was convicted of all three latter violations on October 2, 1992, January 25, 1994, and February 25, 1994, respectively. On April 27, 1994, an amendment was made to the complaint charging the three original violations stemming from April 1992, such that count number one and number two for the DUI violations were charged by the prosecutor to be felonies instead of misdemeanors under section 23175. The court found the defendant guilty as charged of the original April 1992 violations, and thus sentenced him for one misdemeanor and two felonies in accordance with section 23175.

The defendant appealed, claiming that his right to a speedy trial had been denied because he had to wait twenty-two months to be tried for the original violations, and also claimed that the heightened sentence of two of his original violations from the status of a misdemeanor to a felony violated ex post facto laws. Rejecting the defendant's claim of a failure to be given a speedy trial, the court of appeal held section 23175 as violative of ex post facto laws because a law cannot allow for later violations of law to increase the penalty for previous violations. Also, the court of appeal refused to apply section 23175 to the defendant because the purpose of this statute is to deter recidivism, and in the court's view, a person will not be deterred from committing earlier crimes by enhancing the penalty for that conduct at a later time. The California Supreme Court granted review to consider whether section 23175, as applied to the case at hand, does in fact further the ends of a proper recidivist statute, and also to consider whether section 23175 violates ex post facto laws of the state of California or of the Constitution of the Unites States.

Holding. The Supreme Court of California reversed the court of appeal, holding that section 23175 will likely prohibit a person who has DUI charges pending from committing any further such violations out of a fear that any future infringements may subject him or her to a felony sentence for future violations, regardless of the chronology of the offenses. Also, the court reversed the lower court, holding that section 23175 does not violate ex post facto laws.

According to the court, its job in interpreting the statue is to determine the legislative intent behind the law. To determine this intent, the court must first look to the plain words of the statute, which are presumed to be the actual meaning of the statute so long as the words are unambiguous. Stating section 23175(a) word for word, the court noted that the 1984 amendment states that a person will be subject to enhanced punishment under section 23175 for "separate violations" of three or more DUI offenses within the last seven years. Because section 23175 uses the words "separate violations," there is no requirement that the triggering violations occur before the offense sought to be enhanced. Furthermore, "separate violations" means only that the triggering violations be different from the one sought to be enhanced, not that the triggering offenses occur at chronologically different times from different criminal acts by a defendant. Noting that the statute states that a misdemeanor can be enhanced where the offense occurred within seven years "of" three or more offenses, the court also stated that the legislature was clear that the chronological order of offenses was not important in interpreting the statute because the legislature could have used the word "after" rather than "of."

As enacted in 1983, section 23175 increased the punishment for a DUI to a felony where the latter offense occurred "within five years of three or more prior offenses." The legislature changed the text in 1984 by replacing the words "five years" with "seven years," and "prior offenses" to "separate offenses." At the same time the legislature reworded section 23175, it also reworded a similar statute

in like fashion, section 23217 of the same code. According to the legislature, it changed the text of section 23217 to read "separate offenses" in an effort to prevent criminals from attempting to get around the intent of congress, which is to punish the recidivist with increasingly greater punishment. The legislature further explained that the timing of a crime should not be used as a loophole to get around the effect of a recidivist statute, regardless of whether the offenses and convictions for those offenses were committed simultaneously or not. Analogizing the legislative intent behind changing section 23217 to 23175, the court inferred that it was thus the legislative intent to similarly broaden the power of section 23175. As such, the court stated that the combination of three things shows congressional intent to punish a recidivist for his actions under section 23175, regardless of the order of such offenses: 1) legislative substitution of the words "separate offenses" for "prior offenses," 2) the reasoning for doing so by the legislature in relation to section 23217, and 3) the purpose of assembly bill number 3833, passed in 1984, which was to close the timing loophole being used by recidivists.

The court also attacked what it perceived as the faulty rationale of the appellate court in stating that section 23175 does nothing to prohibit recidivism, which rationale presumes that a person will only be dissuaded from committing multiple DUI offenses where he is under a threat of increasingly harsher penalties. The California Supreme Court stated that where a person with pending DUI charges has awareness that future violations may expose him to felony punishment, he may well refrain from any future violations in order to avoid such increased punishment. Also, the rationale of the court of appeals was faulty because it perpetuates the loophole that the legislature intended to destroy.

Stating that California's prohibition against ex post facto laws is to be interpreted exactly like the prohibition in the federal constitution, the court noted a case before the United States Supreme Court that stated that the prohibition against ex post facto laws is intended to prohibit three categories of legislative acts: those which 1) punish an act as a crime that was innocent when performed, 2) increase the burden of a punishment after it has already been committed, and 3) deprive a person charged with a crime of a defense he was entitled to at the time of the supposed criminal act. The defendant argued that section 23175 violates the second category because he had only committed misdemeanors on April 6, 1992, but that the penalties were enhanced by section 23175 to felonies by the time he was convicted. Rejecting this argument, the California Supreme Court stated that the law had not changed between the time he had committed the acts and was convicted. Instead, the defendant's own conduct caused the enhancement. This self-inflicted change is insufficient to prove an ex post facto violation. The purpose of the prohibition against ex post facto laws is to stop the government from giving a lack of fair notice when increasing punishments beyond that originally contemplated when a law was enacted. There was no violation in the present case

because the defendant was on fair notice that repeatedly violating DUI laws would subject him to felony punishments in accordance with the requirements of section 23175.

REFERENCES

Statutes and Legislative History:

U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

CAL. CONST. art I, § 9 ("A[n] . . . ex post facto law . . . may not be passed . . . .").

CAL. VEH. CODE § 23175(a) (West 1988) (enhancing a misdemeanor conviction to a felony where a person has violated certain statutes more than three times within the last seven years).

CAL. VEH. CODE § 23152(a) (West 1988) ("It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.").

CAL. VEH. CODE § 23152(b) (West 1988) ("It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.").

CAL. VEH. CODE § 14601.2(a) (West Supp. 1992) ("No person shall drive a motor vehicle at any time when that person's driving privilege is suspended or revoked for a conviction of a violation of section 23152 or 23153, if the person so driving has knowledge of the suspension or revocation.").

Case Law:

Collins v. Youngblood, 497 U.S. 37 (1990) (defining the three types of ex post facto situations that the Constitution was intended to prevent).

People v. Albitre, 184 Cal. App. 3d 895, 229 Cal. Rptr. 289 (1986) (opining that a sentence can be enhanced regardless of the order in which DUI offenses took place).

People v. Balderas, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985) (following other habitual offender statutes that a criminal who is undeterred by prior experience with the criminal justice system should suffer increased punishment).

People v. Pieters, 52 Cal. 3d 894, 802 P.2d 420, 276 Cal. Rptr. 918 (1991) (stating that California's Constitution should be interpreted similarly to the Federal Constitution).

People v. Wells, 12 Cal. 4th 979, 911 P.2d 1374, 50 Cal. Rptr. 2d 699 (1996) (stating that the legislative use of similar terms in a related statute shows legislative intent that the two statutes are to receive the same interpretation).

Legal Texts:

17 CAL. JUR. 3d *Criminal Law* § 9 (1984 & Supp. 1998) (discussing ex post facto laws generally).

22 CAL. JUR. 3d *Criminal Law* §§ 3362-3391 (1985 & Supp. 1998) (discussing the enhancement of punishment for crimes generally).

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* §§ 16-20 (2d ed. 1988 & Supp. 1998) (outlining general principles of ex post facto laws).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Three or More Separate Convictions* § 926 (2d ed. 1989 & Supp. 1998) (discussing the application of section 23175).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Driving While License Suspended or Revoked* § 935 (2d ed. 1989 & Supp. 1998) (generally discussing the law against driving with a suspended or revoked license).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Enhancements* § 1384 (2d ed. 1989 & Supp. 1998) (discussing the legality of enhancing a criminal sentence).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Prior Prison Term Enhancement* § 1511 (2d ed. 1989 & Supp. 1998) (showing that repeat offenders of certain crimes are subject to a one year prison enhancement where a criminal served prior time in jail).

Law Review and Journal Articles:

David M. Brown, *Review of Selected 1993 California Legislation – Transportation and Motor Vehicles: Habitual Traffic Offenders*, 25 PAC. L.J. 836 (1993)

(outlining California Vehicle Code section 23190, a recidivist statute similar to 23175).

Loren L. Barr, *The "Three Strikes" Dilemma: Crime Reduction at Any Price?*, 36 SANTA CLARA L. REV. 107 (looking at the cost-benefit of a recidivist statute).

Mark W. Owens, *California's Three Strikes Law: Desperate Times Require Desperate Measures–But Will it Work?*, 26 PAC. L.J. 881 (1995) (looking at the danger of imposing harsh recidivist statutes).

Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193 (1990) (discussing, among other things, the policy reasons against the current trend towards increased, broad recidivist statutes).

Marty Jaquez, *"Strike Three, Yer Out!": Examining the Constitutional Limits on the Use of Prior Uncounseled DWI Convictions to Impose Mandatory Prison Sentences on Repeat DWI Offenders*, 28 SAN DIEGO L. REV. 685 (1991) (analyzing the effects and boundaries of laws which allow for the enhanced punishment of DUI recidivists).

PAUL NEIL

B. The United States Supreme Court determined in *Harris* that evidence obtained by a police officer who knowingly violates a defendant's *Miranda* rights may still be used against the defendant at trial for impeachment purposes. The *Harris* rule applies regardless of whether the police officer intentionally violates the defendant's *Miranda* protections.

People v. Peevy, Supreme Court of California, Decided May 7, 1998, 17 Cal. 4th 1184, 953 P.2d 1212, 73 Cal. Rptr. 2d 865.

Facts. On January 30, 1995, Airreque Peevy was arrested by San Bernardino County Deputy Sheriff Douglas Combs for attempted theft. After Deputy Combs advised him of his *Miranda* rights, Peevy stated that he wished to remain silent. Peevy was then taken to the office of Detective Dennis Henderson who again advised him of his rights pursuant to *Miranda.* At that time, Peevy requested an attorney. Detective Henderson continued to question Peevy even though he had invoked his *Miranda* rights. After ten minutes of questioning, during which Detective Henderson spoke in a conversational tone, did not threaten or make promises to Peevy, and remained three feet away from him at all times, Peevy admitted that he went to the Kentucky Fried Chicken in Hesperia with the intent to steal money from the manager, Jack McBrayer. Later, while he was being transferred to the county jail, Peevy began to make more incriminating statements to Deputy Combs, who then advised him of his *Miranda* rights for a third time. Peevy stated that he knew his rights and wished to talk. He then implicated Joshua Jenkins, his accomplice, claiming that he was only helping Jenkins, a disgruntled KFC employee.

In a motion *in limine* to exclude evidence of any statements by the defendant, Detective Henderson stated that he knew that he was violating *Miranda*, but that he continued to question Peevy because he knew that any information obtained in violation of *Miranda* would be admissable for impeachment purposes. Deputy Combs was present during the interview. The trial court found that the police had interviewed the defendant in deliberate violation of his *Miranda* rights. The prosecution was barred from using the information in its case-in-chief, but was allowed to use it for impeachment purposes. The trial court further found that the defendant's statements to Deputy Combs were inadmissable for any purpose because that interrogation was "abusive," as it came after a third *Miranda* advisement.

At trial, Peevy testified that there was no plan to rob McBrayer. Instead, he claimed to be an unwilling accomplice who took no part in the actual attempted robbery. In rebuttal, Detective Henderson testified that Peevy had admitted being there with the intent to rob McBrayer. In surrebuttal, Peevy denied making any statements to the police. The jury ultimately found Peevy guilty of second degree

attempted robbery and he was sentenced to two years in state prison.

On appeal, the defendant argued that the trial court erred in allowing Detective Henderson to testify as to statements made by the defendant in violation of *Miranda.* The court of appeal upheld the conviction, noting that the United States Supreme Court had determined that statements taken in violation of *Miranda* are admissable for impeachment purposes. The California Supreme Court granted review to determine whether the *Harris* rule applies when a police officer intentionally disregards a defendant's invocation of his *Miranda* protections in order to obtain evidence for impeachment purposes.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that a defendant's post-Mirandized statements are admissable for impeachment purposes regardless of the police officer's intent to violate the defendant's *Miranda* rights.

In order to protect a defendant's Fifth Amendment rights against self-incrimination, the United States Supreme Court instituted the *Miranda* protections. These protections require the police to inform a suspect, prior to custodial interrogation, of his rights to remain silent and have counsel available during questioning. In *Harris v. New York*, 401 U.S. 222 (1971), the United States Supreme Court determined that statements taken in violation of *Miranda* are admissible for impeachment purposes as long as the statements are otherwise voluntary. The Court reasoned that *Miranda* was intended to prevent involuntary confessions, but that it does not follow that a defendant should be allowed to perjure himself if those *Miranda* rights are violated. In later decisions, the Court noted that the *Harris* rule struck a balance between the need to deter police misconduct and the need to expose perjury. In *Oregon v. Hass*, 420 U.S. 714 (1975), the Court specifically addressed a situation in which the officers might deliberately ignore a suspect's *Miranda* rights in order to gain evidence solely for impeachment purposes. The Court specifically noted that, in such a case, actions amounting to "abuse" would make the statements involuntary and thus inadmissable even for impeachment purposes. Finally, in *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court stated that, in situations where the police ignore a suspect's *Miranda* rights, the "search for truth" outweighs the "speculative possibility" that exclusion of evidence might deter police misconduct.

In the present case, the defendant argued that his statements should have been excluded, even for impeachment purposes, because the detective intentionally violated his *Miranda* rights. The defendant argued that the *Harris* rule is only meant to apply in cases of unknowing violations of *Miranda* rights. The California Supreme Court found, however, that *Harris* did not clearly address this issue. Instead, the court found that the intention behind excluding evidence obtained in violation of *Miranda* is to deter police misconduct. This deterrence is achieved by excluding this evidence from the prosecution's case-in-chief. The court concluded that a defendant has no right to then perjure himself on the stand in light of prior inconsistent statements, regardless of the intent of the officer in obtaining those

statements. The supreme court based its conclusion on the decisions in *Hass* and *Harvey*, which seemed to include statements made in deliberate violation of *Miranda*. The court further reasoned that the officer's subjective state of mind is irrelevant to a determination of a *Miranda* violation. Instead, it is the defendant's state of mind that matters and whether the statements made were voluntary.

The supreme court rejected the defendant's argument that *Butts* is controlling on this issue. In *California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996), the federal district court held that a suspect's statements may be inadmissable if the police officers knowingly violate his *Miranda* rights in order to gain impeachment evidence. The court argued that *Butts* is inapposite because the state trial court held that the defendant's statements were inadmissable because they were involuntary. The court also rejected the State's argument that *Miranda* protections are merely evidentiary concerns. It re-iterated that *Miranda* rights are designed to prevent police misconduct and that the *Harris* rule is designed to balance the need to deter police misconduct against the need to expose a defendant's perjury.

Finally, the supreme court refused to consider the defendant's argument that the *Harris* rule has resulted in widespread police misconduct designed to gain evidence for impeachment purposes. The defendant failed to raise this issue at trial, and was therefore barred from raising it on appeal.

The California Supreme Court held that because Article I, section 28 of the California Constitution provides that statements taken in violation of *Miranda* are only to be excluded to the extent required under the federal constitution, the *Harris* rule is applicable regardless of the intent of the police officer in violating a defendant's *Miranda* rights. As long as the statements are otherwise voluntary, they are admissable for impeachment purposes.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

CAL. CONST. art. I, § 28, subd. (d) (establishing that statements taken in violation of *Miranda* are to be excluded from evidence only to the extent required by the federal constitution).

Case Law:

Miranda v. Arizona, 384 U.S. 436 (1966) (holding that when a suspect is in custody, police must inform him of his right to remain silent and have an attorney present during questioning and cease questioning if the rights are invoked).

Harris v. New York, 401 U.S. 222 (1971) (providing that a statement taken in violation of *Miranda* is admissable for impeachment purposes as long as the statement is otherwise voluntary).

Oregon v. Hass, 420 U.S. 714 (1975) (stating that *Harris* struck a balance between the need to deter police misconduct and the need to expose defendants who perjure themselves at trial).

Michigan v. Harvey, 494 U.S. 344 (1990) (stating that the "search for truth" outweighs the "speculative possibility" that excluding statements for impeachment purposes would deter police misconduct).

California Attorneys for Criminal Justice v. Butts, 922 F. Supp. 327 (C.D. Cal. 1996) (suggesting that the applicability of the *Harris* rule might depend upon whether the police acted purposefully in violating *Miranda* rights).

Legal Texts:

9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§ 789-790 (3d ed. 1985) (stating that an appellate court is generally not the forum for establishing additional facts).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2886 (2d ed. 1989) (generally discussing the admissability of evidence at trial).

19 CAL. JUR. 3D *Criminal Law* § 2189 (1984 & Supp. 1997) (discussing the general rule that coerced confessions are inadmissable).

19 CAL. JUR. 3D *Criminal Law* §§ 2182-2188 (1984 & Supp. 1997) (generally discussing the privilege against self-incrimination that is guaranteed by both the federal and state constitutions).

Law Review and Journal Articles:

Kelly McMurry, *California Supreme Court Chips Away at Miranda*, 34-AUG TRIAL 81 (1998) (cautioning that, in light of *Peevy*, criminal defendants' *Miranda* protections may become nothing more than a meaningless ritual).

Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo*

Ante, 33 WAKE FOREST L. REV. 261 (1998) (arguing that the exclusionary rule's value is not as a deterrent to police misconduct, but operates instead to place both parties, the state and the accused, in the position they would have been had the Constitution not been violated).

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (examining the effects of *Miranda* on police effectiveness in combating crime and connecting it with the limitations on police questioning as a direct result of *Miranda*).

PAUL VALCORE

C. Where a court has stayed a sentence on an otherwise qualifying prior conviction under California Penal Code section 654 because imposing the sentence would constitute multiple punishment, it is within the discretion of a trial court to later treat the stayed conviction as a strike.

People v. Benson, Supreme Court of California, Decided May 14, 1998, 18 Cal. 4th 24, 954 P.2d 557, 74 Cal. Rptr. 2d 294.

Facts. California Penal Code section 667(b)-(i) is commonly known as a Three Strikes Law. Under the statute, a defendant with prior qualifying convictions can receive a longer sentence than a first-time offender when he receives second or third qualifying convictions. On November 30, 1994, the defendant was arrested for stealing a twenty dollar carton of cigarettes from a department store. At trial, a jury convicted him of petty theft with a prior conviction. He was found to have two other strikes and was subsequently sentenced to twenty-five years to life in prison. The defendant's two prior convictions arose out of a single transaction in 1979. The defendant broke into a residence and stabbed its occupant over twenty times. He was subsequently convicted of both residential burglary and assault with the intent to commit murder. Both of the felonies qualify as prior felony convictions under the Three Strikes Law. Following the convictions, the trial court stayed the sentence on the assault conviction to avoid multiple punishment. California Penal Code section 654 prohibits separate punishments for offenses arising out of the same incident: in this case, the assault with intent to commit murder was the underlying felony for the burglary conviction. While the trial court did not expressly refer to section 654 in its record, both parties assumed the stay was pursuant to that section and the court of appeal found the assumption reasonable. The supreme court granted review to consider whether the defendant's two prior convictions can be considered separate strikes under the Three Strikes Law where the convictions were imposed for offenses that were part of an indivisible transaction committed against a single victim, and where one of the sentences was stayed because imposition of separate punishments for those offenses would constitute multiple punishments prohibited by section 654.

The defendant's claim was two-fold. First, he argued that the Three Strikes Law was not intended to make a two-strike offender out of offenses committed in an indivisible transaction unless the legislature specifically stated otherwise. Second, the defendant contended that the language of the Three Strikes Law is not sufficiently clear. He argued that because the statute does not specifically enumerate a stay of sentence compelled under section 654, those stays must be excluded as prior convictions under the Three Strikes Law. The court of appeal affirmed the trial court's conviction on the petty theft with a prior and remanded it to the trial court on the issue of striking the prior offenses. The court of appeal instructed the trial court that it was within its discretion to strike the prior conviction.

Holding. The California Supreme Court affirmed the court of appeal's decision and held that when a court has stayed sentence on an otherwise qualifying conviction under section 654, that conviction *may* later be treated as a strike. The court specifically found that the defendant had two strikes stemming from the 1979 incident. The court pointed to the legislative history, the legislative purpose, and the plain meaning of the statute as the grounds for its conclusion. Rejecting the defendant's contention that the Three Strikes Law was not intended to allow multiple strikes to arise out of a single indivisible transaction, the court dissembled his two-prong argument. First, the defendant relied on the supreme court's holding, eight years prior to the enactment of the Three Strikes Law, in *People v. Pearson*, 42 Cal. 3d 351, 721 P.2d 595, 228 Cal. Rptr. 509 (1986). The rule from *Pearson* stated that where service of sentence on a conviction was stayed, the conviction may only be the basis for an enhanced sentence where the legislature has specifically allowed it. The precise issue in this case, then, was whether the legislature spoke clearly enough in the Three Strikes Law regarding stays of sentence to overcome the rule from *Pearson*.

The defendant argued that a stay of sentence arises in many different contexts outside those granted under section 654, and because section 667 did not specify a particular *kind* of stay of sentence, it was ambiguous and did not overcome the rule from *Pearson*. The court decisively rejected this argument and said that while there were statutes that were ambiguous, there were few that were as clear as section 667, and therefore its plain meaning governed. No stay of sentence, regardless of qualification or exception, will affect the determination that a prior conviction is a prior felony under the Three Strikes Law.

The court went on to say that even if there were reason to look beyond the statute's plain meaning, the legislative history of the bill clearly showed that the issue of multiple strikes arising out of a single transaction was considered by the legislative committees, and that no requirement that the prior offenses be separate was ever drafted into law. The court further reasoned that the primary focus of the Three Strikes Law is the status of the defendant as a repeat felon after the initial strike or strikes. Regardless of whether he had one or two strikes, the fact that he was still committing crime was the basis for the sentence enhancements. The court said that the defendant had notice after the two prior convictions, regardless of the stayed sentence, that reoffending would bring stiff penalties. Allotting the defendant two strikes rather than one is entirely in keeping with the purpose of the three strikes law. The defendant's prior offenses were extremely violent crimes, and society has a strong interest in punishing him more severely for his reciditivist behavior.

In a footnote, the court specifically stated that it did not decide whether there are circumstances where two prior felony convictions are so closely connected, i.e. they arose out of a single act instead of multiple acts in a single transaction, that a

trial court would abuse its discretion by not striking one of the prior convictions.

REFERENCES:

Statutes and Legislative History:

CAL. PENAL CODE § 667 (West 1998).

CAL. PENAL CODE § 654 (West 1998).

Case Law:

People v. Fuhrman, 16 Cal. 4th 930, 941 P.2d 1189, 67 Cal. Rptr. 1 (1997) (holding that prior convictions do not have to be brought and tried separately to qualify as strikes).

People v. Allison, 41 Cal. App. 4th 841, 48 Cal. Rptr. 2d 756 (1995) (finding no brought-and-tried separately requirement, and further finding the language of section 667 clear and unambiguous).

People v. Pearson, 42 Cal. 3d 351, 721 P.2d 595, 228 Cal. Rptr. 509 (1986) (finding that the defendant was not subject to future enhancements for two convictions where the sentences were stayed to avoid multiple punishment, unless the legislature specifically declared that such convictions could later be used to penalize him).

People v. Niles, 227 Cal. App. 2d 749, 39 Cal. Rptr. 11 (1964) (setting forth the stay-procedure emphasized by the dissent as being the standard for the last thirty years).

Legal Texts:

17 CAL. JUR. 3D *Criminal Law* § 524 (1984 & Supp. 1998) (generally discussing multiple punishment).

18 CAL. JUR. 3D *Criminal Law* § 1206 (1984 & Supp. 1998) (generally discussing sentence enhancements).

22 CAL. JUR. 3D *Criminal Law* § 3381 (1984 & Supp. 1998) (discussing prior convictions being used for sentence enhancement).

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 271 (2d ed. 1988 & Supp. 1998) (summarizing California statutes and constitutional

provisions addressing former jeopardy).

3 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* §§ 1382-1387 (2d ed. 1989 & Supp. 1998) (discussing invalid multiple punishments, enhancements, included offenses, and single versus multiple prosecution).

Law Review and Journal Articles:

Lisa E. Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615 (1998) (discussing the purpose, application, and policy behind three strikes laws and why rehabilitation is a better focus than retribution).

John Clark et al., *"Three Strikes and You're Out": Are Repeat Offender Laws Having Their Anticipated Effects?*, 81 JUDICATURE 144 (1998) (surveying the states' three strikes laws).

Criminal Procedure: Trial and Post-Trial Issues, 28 RUTGERS L.J. 1074 (1997) (discussing developments in state constitutional law, particularly multiple punishments and double jeopardy).

Ilene M. Shinbein, *"Three Strikes and You're Out": A Good Political Slogan to Reduce Crime, But a Failure in its Application*, 22 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 175 (1996) (discussing the current and future impact of three strikes laws nationwide, and specifically in California).

Meredith McClain, Note, *"Three Strikes and You're Out": The Solution to the Repeat Offender Problem?*, 20 SETON HALL LEGIS. J. 97 (1996) (analyzing the legislative history and constitutionality of federal three strikes legislation).

KIRSTEN SEEBART

D. A prior conviction does not have to be brought and tried separately from another conviction in order to count as a separate strike under the three strikes law. Additionally, a defendant must seek relief through a petition for writ of habeas corpus when the record is silent as to whether the trial court understood that it retained discretion under section 1385 to dismiss a prior felony conviction.

People v. Fuhrman, Supreme Court of California, Decided August 28, 1997, 16 Cal. 4th 930, 941 P.2d 1189, 67 Cal. Rptr. 2d 1.

Facts. California Penal Code section 667(c)(6) and (7) provide in pertinent part that:

> [i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e). If there is a current conviction for more than one serious or violent felony . . . the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced . . . .

The trial court found that the defendant, Scott Robert Fuhrman, who was convicted of robbery and assault in a prior proceeding, had two prior strikes under the three strikes law even though the two convictions were from that single prior proceeding. Subsequently, the defendant, who was convicted of robbery and unlawfully driving or taking a vehicle in another proceeding, was convicted as a third strike defendant under Penal Code section 667, subdivisions (c) and (e). The defendant attempted to remand the case to the trial court under section 1385 in order for the court to use its discretionary powers to strike one or more of the defendant's prior convictions.

The defendant acknowledged that his prior conviction for robbery and assault with a deadly weapon was a serious or violent felony as required under the Three Strikes law. However, the defendant argued that the prior felony conviction should have been "brought and tried separately" in order to count as two strikes. In support of his argument, the defendant reasoned that the meaning of "prior conviction" under section 667, subdivision (d) of the Three Strikes law is ambiguous. The defendant also noted that section 667(c)(6) and (7) provided that the court cannot sentence the defendant consecutively on each count "[unless] there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same operative facts." The defendant also argued that section 667(a) imposes a five year enhancement for each prior violent or serious felony conviction for charges "brought and tried separately." The defendant also argued that even if two strikes were allowed in a single proceeding, separate strikes cannot stand because the trial court in the prior proceeding determined that separate punishment was precluded under section 654. The court of appeal affirmed the judgment of the lower court.

Holding. The California Supreme Court affirmed the court of appeal's decision, holding that the Three Strikes law does not require convictions to be "brought and tried" separately to count as a separate strike. The court further held that the case would not be remanded to the trial court for it to exercise its discretion in striking either of the defendant's prior serious felonies. In respect to the first holding, the court reasoned that section 667(a) is a seperate enhancement statue and not relevant to the Three Strikes law. The court further reasoned that the drafters would have included the "brought and tried" separately clause under the Three Strikes law if that was their intent. The court noted that the drafters did not include this language in section 667, subdivision (d). The court further noted that section 667, subdivision (c)(6) and (7) has no bearing upon the meaning of "prior conviction." Thus, the court concluded that the language which refers to "prior conviction" in 667, subdivision (d) is not vague or ambiguous. In respect to the 654 issue, the court reasoned that this case is "not an appropriate vehicle for deciding the . . . 654 issue."

In respect to the second holding, the supreme court reasoned that in *Romero,* the court left the door open to whether a case should be remanded to trial where the record does not affirmatively disclose if the trial court misunderstood its discretionary powers to strike convictions. Thus, the California Supreme Court reasoned that because there was not an "[a]ffirmative indication in the record that the trial court committed error or would have exercised discretion under section 1385, relief on appeal is not appropriate . . . ."

REFERENCES

Statues and Legislative History:

California Penal Code § 667(a)-(i) (West 1998) (discussing the elements of the three strikes law).

California Penal Code § 1385 (West 1998) (noting that court has discretion to strike a defendant's prior conviction).

Case Law:

People v. Jones, 17 Cal. 4th 279, 949 P.2d 890, 70 Cal. Rptr. 2d 793 (1998) (discussing sentencing procedures).

Williams v. Cambra, 1997 WL 703779, *2 (N.D. Cal. 1997).

Legal Texts:

17 CAL. JUR. 3D *Criminal Law* § 9 (1984 & Supp. 1997) (discussing ex post facto laws in helping to understand *Romero*).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Prior Serious Felonies* § 1515(c) (2d ed. Supp. 1998) (discussing the new statutory requirements for a prior serious felony).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *New Application of Romero Rule* § 1515(i) (2d ed. Supp. 1989) (discussing the *Romero* rule).

Law Review and Journal Articles:

Christine Markel, Note and Comment, *A Swing and a Miss: California's Three Strikes Law*, WHITTIER L. REV. (1996) (examining the history of the Three Strikes law).

Grace Lidia Suarez, *Striking a Prior Conviction in Three Strikes Cases,* 16 NOV CAL. LAW 32. (1996) (discussing section 1385).

Victor S. Sze, Note and Comment, *A Tale of Three Strikes,* 28 LOY. L.A. L. REV. 1047 (1995) (discussing the impact of the Three Strikes law).

Steven M. Vartabedian, *The Limits: Without Limitations,* 23 PAC. L.J. 105 (1992) (discussing section 667).

Michael Vitiello, *Three Strikes and the* Romero *Case*, 30 LOY. L.A. L. REV. 1643 (1997) (discussing the impact of the *Romero* ruling).

SHAUNA ALBRIGHT

E. A defendant may appeal a judgment of conviction entered on a plea of guilty or nolo contendere without filing the required statement of grounds and obtaining an executed certificate of probable cause from the trial court if the defendant alleges solely that errors resulted in the trial court hearings for the purpose of ascertaining the degree of the crime and penalty to impose and does not challenge the validity of the plea. The notice of appeal must state these grounds expressly or impliedly to become operative.

People v. Lloyd, Supreme Court of California, Decided March 16, 1998, 17 Cal. 4th 658, 951 P.2d 1191, 72 Cal. Rptr. 2d 224.

Facts. California Penal Code section 1237.5 and Rule 31(d) of the California Rules of Court state that a defendant is prohibited from appealing a judgment of conviction resulting from a plea of guilty or nolo contendere unless: (1) the defendant files a written statement under oath with the trial court, reasonably contesting the "legality of the proceedings;" and (2) the trial court executes and files a certificate of probable cause. An exception to the rule exists if the defendant seeks review to challenge the legitimacy of a search or seizure, or challenges the "adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed," and does not contest the validity of the plea. The notice of appeal must state the above grounds to become operative.

The defendant, Lloyd, robbed an individual at knife point in San Pedro and was arrested soon thereafter. The defendant was charged with a serious violent felony, which invoked the "Three Strikes" law due to Lloyd's past convictions of serious felonies. Originally, Lloyd pleaded not guilty, but later withdrew the plea and entered a plea of nolo contendere to "spare the victim." Lloyd hoped that a pending decision before the Supreme Court of California would hold favorably towards him regarding the Three Strikes law. At the defendant's trial, the court stated that it would have vacated one or more of the prior findings against the defendant under the Three Strikes law, but did not believe it had the authority to do so. When the Supreme Court handed down a judgment which held that a trial court has authority to vacate a prior serious or felony conviction under the Three Strikes law, Lloyd appealed. The People moved to dismiss Lloyd's appeal, alleging that Lloyd had not adhered to California Penal Code section 1237.5 and California Rule of Court 31(d) because a statement of grounds was not submitted and a certificate of probable cause by the trial court had not been executed and filed. Lloyd's notice of appeal did not expressly state the grounds of appeal, which presented the problem of whether or not the notice was operative.

Holding. Reversing the court of appeal's decision that dismissed Lloyd's appeal,

the California Supreme Court remanded the cause for reinstatement. The court held that Lloyd's appeal was operative even though the notice of appeal stated, "[d]efendant hereby appeals from the judgment . . ." with the printed word "judgment" crossed out and the handwritten word "sentence" written above it because the sentence was imposed after the entry of the plea. The court reiterated that a notice of appeal must be "liberally construed in favor of its sufficiency," according Rule 31(b). Rejecting the argument that a notice of appeal must expressly state that the appeal is based "on grounds . . . occurring after entry of the plea that do not challenge its validity," the court held that an implied statement will suffice.

Because the grounds for Lloyd's appeal resulted after the entry of his plea and prior to his sentence, which was imposed six months after his plea was entered, the appeal did not warrant dismissal. Also, because the grounds of Lloyd's appeal "did not challenge the validity" of Lloyd's appeal within the meaning of Rule 31(d), the appeal did not warrant dismissal. Because the trial court erred in its decision that it believed it did not have the authority to vacate Lloyd's prior serious and/or violent felony convictions under the Three Strikes law, Lloyd's appeal was granted and the court of appeal's decision to dismiss was reversed.

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 1237.5 (West 1998).

CAL. PENAL CODE § 667(e)(2)(A)(iii) (West 1998).

CAL. R. CT. 31(d).

Case Law:

People v. Superior Ct. (Romero), 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996) (holding that a trial court has the authority to vacate prior serious and/or violent felony convictions in regard to the Three Strikes law).

People v. Ward, 66 Cal. 2d 571, 426 P.2d 881, 58 Cal. Rptr. 313 (1967) (holding that an exception to the general rule of section 1237.5 exists if the defendant contends solely that errors occurred in the hearings and does not dispute the validity of the plea guilty or nolo contendere).

Legal Texts:

22 CAL. JUR. 3D *Criminal Law* § 3651 (1985) (generally discussing when a certificate of probable cause is not needed).

22 CAL. JUR. 3D *Criminal Law* § 3367 (1985 & Supp. 1998) (discussing violent and serious felonies including the "Three Strikes Law").

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Appeal* § 3141 (2d ed. 1989) (discussing when the statutory grounds are not expandable concerning the right to appeal after a guilty or nolo contendere plea).

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Appeal* § 3139 (2d ed. 1989) (discussing in general the conditions of the statute concerning the right to appeal after a guilty or nolo contendere plea).

Law Review and Journal Articles:

George Nicholson, *Administrative & Judicial Duties in the Trial Court After a Guilty or No Contest Plea*, 45 HASTINGS L.J. 573 (March 1994) (discussing generally the requirements of Penal Code section 1237.5 and exceptions to the code).

William Thornbury, *What Is the Meaning of Three Strikes and You Are Out Legislation?*, 26 U. WEST L.A. L. REV. 303 (1995) (discussing the three strikes legislation in general).

Major Terry Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 242 (Fall 1991) (discussing the requirements and effects of a guilty and nolo contendere plea).

Allison C. Goodman et al., *Procedural Issues*, 31 AM. CRIM. L. REV. 911, 943 (Spring 1994) (discussing generally the effects of guilty and nolo contendere pleas).

William Athanas, *Lack of Knowledge Concerning Deportation Consequences Does Not Invalidate Nolo Contendere Plea*, 29 SUFFOLK U. L. REV. 607 (1995) (discussing knowledge requirements for nolo contendere pleas).

ALISON RYAN

F. The failure of a prosecutor, or any agency acting on the prosecutor's behalf, to turn over possible exculpatory evidence to a defendant will be charged against the prosecutor, despite any actual knowledge by the prosecution of the evidence or any lack of bad faith by any party. The prosecutor has an affirmative duty to search out exculpatory evidence and any failed attempt to transmit the exculpatory evidence will not be sufficient to meet the due process requirements that the rule is meant to protect. However, non-disclosure will give rise to a denial of due process only when the evidence is material.

In re Brown, Supreme Court of California, Decided April 2, 1998, 17 Cal. 4th 873, 952 P.2d 715, 72 Cal. Rptr. 2d 698.

Facts. The defendant, Brown, opened fire on police officers in an Orange County bar, killing one officer and seriously wounding two other officers and two civilians. The state charged the defendant with first degree murder. The defendant had a history of extensive drug use, including phencyclidine (PCP), and asserted a defense of diminished capacity based on methamphetamine intoxication. The Orange County Sheriff-Coroner Department of Forensic Science Services performed two toxicology tests of the defendant's blood. A gas chromatography mass spectrometry (GC/MS) tested negative for PCP, however a radioactive immunoassay (RIA) tested positive for PCP. The RIA test results were noted on a lab worksheet, but because the crime lab considered the GC/MS test as final and more reliable, the results sheet listed the defendant as negative for PCP drug use. A notation on the defendant's worksheet indicated that the defendant had received a copy of the positive drug results as well as the negative result sheet, but no copy of the worksheet was ever received by either the defendant or the prosecutor.

At trial, the prosecutor rebutted the defendant's claim of methamphetamine intoxication with the negative test results. A jury found the defendant guilty of first degree murder and of the special circumstance of intentionally killing a peace officer during the course of his duties. The defendant was sentenced to death. On automatic appeal, the California Supreme Court affirmed the jury's finding. The defendant then sought a writ of habeas corpus to the California Supreme Court based upon the prosecution's alleged error, based on *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to forward the RIA test results. The supreme court issued an order to show cause and an order of reference to a referee to determine: 1) whether the prosecution disclosed the RIA test to the defendant; and 2) how the two different test results could be reconciled. The referee found that the prosecutor had disclosed the RIA test and that the tests were reconciled by the fact that the RIA test was unreliable.

Holding. Reversing the findings of the referee, the supreme court found that the prosecution had not disclosed the RIA test to the defendant. Specifically, the court found that because the prosecutor had no knowledge of the positive test, it would be impossible for the prosecutor to have disclosed such information, and thus any

evidence even indicating that the crime lab had disclosed the information was irrelevant.

Relying on *Brady* and its progeny, which held that the prosecution will be responsible for disclosing any possibly exculpatory evidence known by the prosecutor or any agency working for the government to the defendant, the *Brown* court further held that the prosecution would remain on the hook for any *Brady* violations, regardless of the prosecution's actual knowledge of the exculpatory evidence or the crime lab's attempt to transmit the worksheet, because to hold otherwise would deny the defendant his due process rights.

The court emphasized that the duty placed on the prosecution to disclose is non-delegable to other agencies working for the prosecution so far as the prosecutor remains the ultimate party responsible for any non-compliance by any of the parties. The court held that such a responsibility is equivalent to an affirmative duty on the part of the prosecution to seek out exculpatory evidence because the prosecution will be imputed with the knowledge that its agencies have and will be ultimately responsible if such information is not disclosed. Although harsh, the court reasoned that it was the only way to satisfy the defendant's right to due process.

The supreme court addressed the second *Brady* prong, the remedy allowed, recognizing that only material non-disclosures merit court action. The court held that failing to disclose the positive results of the RIA test was material. The court found that there was no evidence to indicate that the RIA test was innately inaccurate and that it was possible that each test was accurate. The court opined that it was not the defendant's burden to show that the verdict would have been different with the non-disclosed evidence, only that the evidence was material enough to cause a lack of confidence in the verdict. The court held that the defendant's reliance upon a methamphetaine intoxication during trial was crucial to establishing materiality because the non-disclosed evidence would have allowed the defendant to refocus the defense on a credible theory of PCP intoxication, as well as to diffuse or negate the negative test results the prosecution introduced.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. VI (establishing a criminal defendant's right to due process).

Case Law:

Brady v. Maryland, 373 U.S. 83 (1963) (seminal case in this area holding that the prosecution has a duty to disclose any material exculpatory evidence to a

defendant).

United States v. Agurs, 427 U.S. 97 (1976) (holding that failure of a defendant to request exculpatory evidence will not exclude a prosecutor's duty to disclose).

United States v. Bagley, 473 U.S. 667 (1985) (defining *Brady*'s materiality standard and eliminating the distinction between undisclosed evidence that is substantively exculpatory or for impeachment).

Kyles v. Whitley, 514 U.S. 419 (1995) (holding that determination of materiality for *Brady* disclosures is based upon a totality effect of all supposed evidence and not on the basis of each piece of evidence on its own).

United States v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997) (holding that the rights to exculpatory evidence conferred under *Brady* are absolute only as to disclosure and not timing; therefore *Brady* entrusts when such disclosures must be made to the district court's case-by-case evaluation).

Legal Texts:

21 CAL. JUR. 3D *Criminal Law* § 2847 (1985 & Supp. 1997) (discussing prosecution's affirmative duty to preserve and disclose material evidence that may possibly be favorable to the defendant).

19 CAL. JUR. 3D *Criminal Law* § 2075 (1985) (discussing the due process implications from material evidence non-disclosure and the prosecution's affirmative duty to produce such evidence in certain situations).

3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Effect of Nondisclosure* § 1781 (3d ed. 1986) (discussing the materiality standard for error in non-disclosure of favorable exculpatory evidence).

3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Suppression by Prosecution: Federal Cases* § 1779A (3d ed. 1986) (discussing suppression by the prosecution of favorable evidence to the defendant).

CAL. PRAC. GUIDE, PROFESSIONAL RESPONSIBILITY, *Special Duty Owed by Prosecuting Attorney*, ch. 8-A:30 (1997) (discussing the prosecutor's ethical obligation to disclose possible exculpatory evidence, including disclosures that may negate guilt, mitigate the degree of the offence, or reduce the appropriate punishment to a defendant in order to ensure a fair and impartial trial).

Law Review and Journal Articles:

Emily D. Quinn, Comment, *Standards of Materiality Governing the Prosecutorial Duty to Disclose Evidence to the Defense*, 6 ALASKA L. REV. 147 (1989) (discussing the standards of materiality for *Brady* disclosures related to voluntary disclosure by prosecutors or from defense counsel requests).

Richard J. Oparil, *Making the Defendant's Case: How Much Assistance Must the Prosecutor Provide?*, 23 AM. CRIM. L. REV. 447 (1986) (discussing the affirmative duty of prosecutors to either test evidence or preserve evidence in order to allow the defendant to conduct tests that may be exculpatory).

Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673 (1996) (clarifying the obligations *Brady* imposes, especially on prosecutors to search out exculpatory evidence as well as the duties *Brady* set forth for all state agencies).

Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L. J. 957 (1989) (outlining the workings of *Brady* in the context of a prosecutor's guilty plea negotiations with the defendant).

Christian F. Dubia, Jr., Note, *The Duty of the Prosecutor to Disclose Unrequested Evidence: United States v. Agurs*, 4 PEPP. L. REV. 435 (1977) (discussing the impact of *United States v. Agurs* materiality of non-disclosure on prosecutorial non-disclosure).

A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution, 94 HARV. L. REV. 887 (criticizing *Agurs* and discussing the prosecutor's responsibility of disclosing promises made to prosecution witnesses).

JENNIFER VANSE

G. A tort action of public disclosure of private facts against a television producer is appropriately dismissed in summary judgment because coverage of a car accident scene and helicopter rescue is 'newsworthy,' which acts as a complete bar to a public disclosure action; however, the tort action of intrusion may appropriately proceed because a reasonable jury could find that the camera operator intruded into a private place, conversation, or matter in a manner highly offensive to a reasonable person; and further, news organizations are not afforded the same First Amendment protections in news gathering as are given when publishing news.

Shulman v. Group W Prod., Inc., Supreme Court of California, Decided June 1, 1998, 18 Cal. 4th 200, 955 P.2d 469, 74 Cal. Rptr. 2d 843.

Facts. A mother and son who were severely injured in an automobile accident sued the television producer of "On Scene: Emergency Response," who filmed portions of the accident scene and the helicopter flight to the hospital and later aired the film on television. The filming included a camera operator that surveyed and filmed the scene of the accident and rode along while filming the helicopter flight to the hospital. Additionally, a wireless microphone was placed on the flight nurse, which recorded conversations between the plaintiff and the nurse while on the ground and in flight.

The plaintiff's complaint included two causes of action for invasion of privacy, one based on the defendants' public disclosure of private facts and the other based on intrusion for taping the rescue in the first place. The trial court granted summary judgment on both causes of action for the defendant, based on the finding that the "accident and rescue were matters of public interest and public affairs." The court of appeal reversed on limited grounds, finding that a triable issue of fact remained regarding the public disclosure of the helicopter flight portion of the story because the plaintiff had a reasonable expectation of privacy in the helicopter. Further, the court of appeal reversed and remanded the intrusion cause of action, finding that the trial court should have balanced the "plaintiffs' privacy rights against defendants' First Amendment interest in recording the rescue" instead of allowing a complete defense of newsworthiness.

Holding. The Supreme Court of California affirmed the court of appeal's finding as to the remand of the intrusion claim and reversed as to the remand of the public disclosure of private facts claim. The court held that the broadcast of the accident material was "newsworthy as a matter of law," which made summary judgment in favor of the defendants appropriate as to the public disclosure of private facts claim. The court, however, held that triable issues existed as to the intrusion claim and that a reasonable jury could find that the plaintiff's privacy was invaded when the camera operator rode along on the helicopter and when the camera operator recorded confidential conversations at the scene of the accident and during the helicopter flight. Further, the court held that no First Amendment privilege existed

to allow the defendant to intrude in the plaintiff's private space or communications.

The court stated the elements of the public disclosure tort as "public disclosure of a private fact which would be offensive and objectionable to the reasonable person and which is not of legitimate public concern." The court focused almost exclusively on the final element of "presence or absence of legitimate public concern" or "newsworthiness." The court found that if the matter published is newsworthy, the public disclosure action is completely barred both constitutionally (through the First Amendment) and at common law.

The court engaged in a lengthy discussion of the history of and policy behind what has been found newsworthy. The approach settled on was one that "balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report." The standard appropriately, the court stated, gave editors and journalists broad discretion to publish anything in which the public may "reasonably be expected to have a legitimate interest."

Connecting the newsworthy standard with the facts of the case, the court found that automobile accidents and rescues are areas which are, as a matter of law, issues of legitimate public concern. Accordingly, the court found that summary judgment was proper on publication of private facts claim.

Turning to the intrusion into private places tort, the court stated the elements as "intrusion into a private place, conversation or matter, in a manner highly offensive to a reasonable person." The court found that a jury could find that the plaintiff had a reasonable expectation of privacy in the interior of the rescue helicopter and in her conversations with the flight rescue nurse. Additionally, the court looked to California Penal Code section 632 (The Invasion of Privacy Act)--which prohibits recording of any "confidential communication"--as statutory recognition of the prohibition on intrusion.

Next, the court stated that a reasonable jury could regard recording the plaintiff's conversation with rescue personnel and the presence of the camera operator in the helicopter as "highly offensive to a reasonable person." Finally, the court explored the First Amendment protection of the press during news gathering. The court found that the constitutional protection of news gathering is much narrower than the protection of published material. In fact, the court concluded that: "the press has no recognized constitutional privilege to violate generally applicable laws in pursuit of material." Thus, the court allowed remand for trial regarding the plaintiff's action for intrusion.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . obtaining safety, happiness, and privacy.").

CAL. PENAL CODE § 632 (West Supp. 1999) (imposing criminal penalties on those who, without the consent of all parties, record confidential communications).

Case Law:

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (holding that the press enjoys no privilege or immunity from generally applicable laws).

Florida Star v. B.J.F., 491 U.S. 524 (1989) (finding that if a journalist lawfully obtains truthful information about a matter of public significance, state officials may not constitutionally punish publication).

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (finding that press publication of a fact that is a matter of public record cannot sustain an invasion of a privacy cause of action as a matter of law).

Forsher v. Bugliosi, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980) (most recent previous California Supreme Court decision discussing public disclosure of private facts; includes discussion of the definition and breadth of who is a public figure).

Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1987) (news organization taping the work of medical personnel; adopted elements of intrusion cause of action).

Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983) (defining and giving the elements of the public disclosure of private facts cause of action).

Noble v. Sears, Roebuck and Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (finding that a person has an exclusive right to occupancy in a hospital room so that one who encroaches upon that without permission is invading privacy).

Legal Texts:

Intrusion by News-Gathering Entity as Invasion of Right of Privacy, 69 A.L.R.4th 1059 (1990) (general survey of nationwide cases regarding news organizations and intrusion claims).

RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

RESTATEMENT (SECOND) OF TORTS § 652D (1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.").

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Invasion of Privacy* § 1116 (2d ed. 1988) (discussing generally the state right to privacy, including the state constitutional right and the Invasion of Privacy Act).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *California Invasion of Privacy Act*, §§ 2468-2471 (2d ed. 1988) (discussing specifically the statutory Invasion of Privacy Act).

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts, Intrusion into Private Affairs*, §§ 580-581 (9th ed. 1988) (cites elements and cases to prove intrusion claim).

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts, Public Disclosure of Private Facts* §§ 582-583 (9th ed. 1988) (cites elements and cases to prove public disclosure of private facts claim).

Law Review and Journal Articles:

Dennis F. Hernandez, *Current Developments in Privacy Litigation*, 523 PLI/PAT 263 (1998) (overview of all invasion of privacy torts and current decisions across the nation).

Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507

(1998) (general discussion of current balance between invasion of privacy torts and First Amendment protection for newsgathering activities).

Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147 (1997) (general discussion of the public disclosure of private facts cause of action and the effect of the newsworthiness defense, especially considering the First Amendment and recent Supreme Court interpretations).

Victor A. Kovner, *Recent Developments in Newsgathering, Invasion of Privacy and Related Torts*, 498 PLI/PAT 539 (1997) (overview of recent cases and developments in newsgathering techniques and invasion of privacy tort actions).

Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989) (discussing the philosophical and policy foundations of the common law invasion of privacy torts).

CHRISTOPHER JETER

H. A prosecutor's duty to disclose witness information pursuant to California Penal Code section 1054.1 is limited to "witnesses" and not information regarding defense witnesses; thus, a prosecutor's failure to disclose information regarding the witness' credibility is not discoverable and did not violate the defendant's right to due process.

People v. Tillis, Supreme Court of California, Decided June 18, 1998, 18 Cal. 4th 284, 956 P.2d 409, 75 Cal. Rptr. 2d 447.

Facts. California Penal Code section 1054.1 requires prosecutors to disclose potential witnesses to the defense. The defendant, Marcellous Lee Tillis, was convicted of multiple crimes stemming from his involvement in a shooting. At trial, the defense called Dr. Stephen Pittel, a psychologist, who testified as an expert that the defendant suffered from a history of depression and possible brain damage because the defendant habitually abused heroin. On cross-examination by the prosecutor, Dr. Pittel admitted that Dr. Pittel was arrested for using drugs during a lunch break while he was testifying as an expert in a similar case. Defense counsel did not object to this line of questioning by the prosecutor. The trial court ruled the impeachment material relevant and admissible.

The defendant claimed that the prosecutor's failure to disclose the information about Tillis' drug use was a violation of California criminal discovery statutes. The defendant argued that the failure to disclose the information violated his right to due process of law and was in violation of California Penal Code section 1054.1. The trial court allowed the prosecutor's impeachment material and the defendant was convicted. The court of appeal disagreed and said that the prosecution violated California Penal Code section 1054.1 and violated the defendant's right to due process of law. However, the court of appeal stated that the prosecution's errors were harmless and affirmed the defendant's convictions. The California Supreme Court granted review to consider whether the prosecutor had the duty to disclose the impeachment evidence to the defendant pursuant to the applicable discovery principles and, if so, whether the failure to disclose the impeachment evidence prejudiced the defendant.

Holding. Affirming the court of appeal's decision on different grounds, the California Supreme Court held that the impeachment evidence was not discoverable under California Penal Code section 1054.1.

California Penal Code section 1054.1 requires the prosecution to disclose the names and addresses of witnesses it intends to call and "all relevant real evidence seized or obtained as a part of the investigation of the offenses charged." The court reasoned that absent affirmative information that the prosecution intended to call

a specific witness to testify regarding the impeachment material, the impeachment material was not discoverable pursuant to California Penal Code section 1054.1. Moreover, the court rejected the defendant's contention that the prosecutor denied the defendant due process because the prosecutor did not disclose to the defense evidence it obtained as a result of defense supplied discovery. The court stated that the prosecutor must only disclose evidence if the defense is required to do the same following discovery of the prosecution's witnesses. The defense does not have a duty to disclose such information, and therefore the prosecutor does not have such a duty.

Accordingly, the prosecutor's failure to disclose the impeachment material regarding Dr. Pittel was not discoverable under California Penal Code section 1054.1 because the defendant could not establish that the prosecutor intended to call any witness to substantiate the information.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. XIV (Due Process Clause).

CAL. CONST. art. I, § 30(c) ("Discovery in criminal cases shall be reciprocal in nature").

CAL. PENAL CODE § 1054.1 (West 1998) (prosecuting attorney; disclosure of materials to defendant).

Case Law:

Izazaga v. Superior Ct., 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991) (holding reciprocity under Due Process Clause requires notice that defendant will have the opportunity to discover prosecutor's rebuttal witnesses).

In re Littlefield, 5 Cal. 4th 122, 851 P.2d 42, 19 Cal. Rptr. 2d 248 (1993) (holding that the presence of a witness that the counsel's investigator had interviewed, and counsel's request that the court order the witness to appear on the day the case was in trial, was sufficient information to lead the trial court to determine counsel's intent to call that witness).

Sandeffer v. Superior Ct., 18 Cal. App. 4th 672, 22 Cal. Rptr. 2d 261 (1993) (holding that appellate courts should not speculate about witnesses whose identity or existence is not on record).

Wardius v. Oregon, 412 U.S. 470 (1973) (holding that a discovery statute that required the defense to provide the names of alibi witnesses to the prosecutor, but

did not require the prosecutor to provide names of rebuttal witnesses to the defense, was unconstitutional).

Legal Texts:

21 CAL. JUR. 3d *Criminal Law* § 2844 (1985 & Supp. 1998) (generally discussing disclosure of names and addresses of witnesses prosecution intends to call).

21 CAL. JUR. 3d *Criminal Law* § 2846 (1985 & Supp. 1998) (discussing prosecution's disclosure requirements).

2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery & Production of Evidence* § 1663 (3d ed. 1986) (generally discussing requirements for discovery).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2498A (2d ed. Supp. 1997) (generally discussing a comprehensive and exclusive system of discovery for criminal trials).

Law Review and Journal Articles:

Michael Alden Miller, California Supreme Court Survey, *Criminal Law*, 21 PEPP. L. REV. 320, 322-23 (1993) (discussing the reciprocal discovery requirements of Proposition 115).

Steve Holden, Casenote, Izazaga v. Superior Court*: Affirming the Public's Cry to Unshackle the Criminal Prosecution System*, 23 PAC. L.J. 1721, 1789-90 (1992) (generally discussing that the prosecution must disclose the names and addresses of all persons intended to be called as witnesses).

Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) (generally discussing the disclosure requirement of impeachment evidence).

ANN KIM

I. The Kelly/Frye foundational test for the admissibility of evidence based upon new scientific technique is composed of three prongs. The first prong, which requires that reliability be established by showing that the technique has gained general scientific acceptance, can be established if a previously published appellate decision has already upheld the admissibility of that technique. However, the third prong, which requires that the procedures used in the instant case complied with those of the generally accepted standard, is case specific and cannot rely on previously published decisions.

People v. Venegas, Supreme Court of California, Decided May 11, 1998, 18 Cal. 4th 47, 954 P.2d 525, 74 Cal. Rptr. 2d 262.

Facts. In 1989, a hotel guest was assaulted and raped upon attempting to enter her hotel room. The defendant informed her that he had a knife and, while in her room for approximately two hours, raped her, cut her with the knife, hit her, and bound her with bedding and an electrical cord. Medical personnel later took hair, blood, and saliva samples from both the victim and the defendant. After sending these samples to the FBI laboratory in Washington, D.C. for DNA testing, it was reported that the defendant's DNA profile "matched" the DNA profiles from swabs taken from the crime scene and found in the victim's body.

An initial Kelly/Frye hearing determined that the prosecution would be permitted to present certain restricted results of DNA testing utilizing the FBI's Restriction Fragment Length Polymorphism ("RFLP") methodology. On the day of this ruling, the court of appeal in *People v. Pizarro,* 10 Cal. App. 4th 57, 12 Cal. Rptr. 2d 436 (1992), held that the prosecution must demonstrate, using impartial expert testimony, the general scientific acceptance of the FBI's RFLP methodology despite the fact that the court of appeal had already determined in *People v. Axell,* 235 Cal. App. 3d 836, 1 Cal. Rptr. 2d 411 (1991), that Cellmark's RFLP methodology is accepted in the scientific community.

Relying on the ruling in *Pizarro*, the defendant sought, but failed, to have the trial court's initial Kelly/Frye ruling set aside in the court of appeal. Following this failed attempt at relief in the court of appeal, the defendant's request to reopen the Kelly/Frye hearing at the trial court level was granted. The trial court permitted the cross-examination of an FBI agent in charge of the prosecution's DNA testing, and allowed testimony of a defense expert who testified that the FBI did not follow correct scientific procedures.

This re-opened hearing, however, did not convince the trial court to further restrict the admissibility of DNA evidence and, ultimately, the jury returned a verdict of guilty on all counts. On appeal, the court of appeal reversed the trial court decision, holding that: (1) the prosecution failed to prove the general scientific acceptance of the FBI's RFLP methodology, and (2) the FBI did not comply with the correct procedures for RFLP analysis. The California Supreme Court granted the Attorney General's request for review and affirmed the court of appeal's decision on the second, but not the first ground stated by the court of

appeal.

Holding. The California Supreme Court unanimously affirmed the judgment of the court of appeal on the grounds that the prosecution had not shown that the FBI had complied with the correct procedures for conducting RFLP analysis. However, the California Supreme Court rejected the argument set forth by the court of appeal that the prosecution failed to prove general scientific acceptance of RFLP methodology.

The Kelly/Frye foundational test for the admissibility of evidence based upon new scientific technique requires the proponent of such evidence to set forth a preliminary showing that the technique has gained general acceptance in the scientific community. Justice Baxter, writing for the court, explained that this requirement contains an important corollary, which provides that previously published appellate decisions that have already established the general scientific acceptance of a certain technique set precedent for subsequent trials, so long as general scientific opinion of that technique has not since materially changed. The prosecution at the trial court level relied on the California appellate decision in *People v. Axell,* 235 Cal. App. 3d 836, 1 Cal. Rptr. 2d 411 (1991), which established the general scientific acceptance of RFLP analysis. While the specific methodology employed by the FBI in conducting RFLP analysis may differ from the generally accepted methodology, this query is not the concern of Kelly/Frye's first prong. This prong requires only the general scientific acceptance of RFLP analysis as a technique.

Turning its attention to the court of appeal's second ground for reversal, the California Supreme Court affirmed the court of appeal's holding that the FBI had not complied with the correct procedures for conducting RFLP analysis. Unlike the first prong of the Kelly/Frye test, which requires general scientific acceptance of the technique itself, the third prong queries whether the actual procedures utilized in the instant case complied with those that are generally accepted in the scientific community. As such, the requirements of the third prong of the Kelly/Frye test can not be met merely by setting forth precedent of a previously published decision. This prong, rather, requires a case-by-case analysis. After a careful review of the record below and a thorough overview of RFLP analysis, the supreme court concluded that the FBI had not, in fact, complied with the generally accepted procedures for conducting RFLP analysis. The National Research Council's "modified ceiling" method has gained general scientific acceptance as a means of calculating the statistical probability that a DNA sample "matches" that of a defendant. In its RFLP analysis, the FBI failed to use the correct bin procedure, as recommended by the National Research Council, in their DNA calculations–opting for the floating bin rather than the fixed bin–and such an error affects the admissibility of the evidence, not merely the weight of the evidence.

REFERENCES

Case Law:

People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (discussing California's adoption of a slightly modified federal *Frye* test for the admissibility of novel scientific evidence).

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (discussing the federal evidentiary standard for the admissibility of novel scientific evidence).

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (holding that the federal *Frye* test has been abrogated by Rule 702 of the Federal Rules of Evidence).

People v. Axell, 235 Cal. App. 3d 836, 1 Cal. Rptr. 2d 411 (1991) (discussing the general scientific acceptance of restriction fragment length polymorphism (RFLP) analysis).

People v. Barney, 8 Cal. App. 4th 798, 10 Cal. Rptr. 2d 731 (1992) (discussing, in full detail for the nonscientific reader, the processes involved in RFLP analysis).

People v. Pizarro, 10 Cal. App. 4th 57, 12 Cal. Rptr. 2d 436 (1992) (holding that the prosecution must demonstrate, using impartial expert testimony, the general scientific acceptance of the FBI's RFLP methodology as compared to Cellmark's RFLP methodology).

Legal Texts:

2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* § 864 (3d ed. 1986) (a discussion of the Kelly/Frye test, including a full analysis of each prong).

2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* §§ 864F-H (3d ed. Supp. 1998) (discussing the general principles of DNA identification evidence).

WILLIAM E. WEGNER ET AL., CALIFORNIA PRACTICE GUIDE, *Civil Trials & Evidence* §§ 8:563–8:624 (The Rutter Group 1997) (discussing the relationship between the federal and California tests for the admissibility of scientific evidence).

31 CAL. JUR. 3D *Evidence* §§ 489-516 (1976 & Supp. 1998) (generally discussing the admissibility and effect of expert testimony).

Law Review and Journal Articles:

Robert Hupe, *The Development of DNA Fingerprint Use In Courts of Law,* 19 SW. U. L. REV. 1045 (1990) (discussing the development of DNA and blood tests for use in court as well as a comparison between their use in criminal versus civil trials).

D.H. Kaye, *DNA, NAS, NRC, DAB, RFLP, PCR, and More: An Introduction to the Symposium on the 1996 NRC Report on Forensic DNA Evidence,* 37 JURIMETRICS J. 395 (1997) (discussing DNA evidence with respect to the findings of the National Research Council).

R. Stephen Kramer, Comment, *Admissibility of DNA Statistical Data: A Proliferation of Misconception,* 30 CAL. W. L. REV. 145 (1993) (discussing DNA, DNA evidence, and the various tests that have been used to effectuate DNA testing).

Kamrin T. MacKnight, Comment, *The Polymerase Chain Reaction (PCR): The Second Generation of DNA Analysis Methods Takes The Stand,* 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 287 (1993) (discussing RFLP analysis, PCR analysis, and the use of such analyses in criminal trials).

Paul B. Tyler, California Supreme Court Survey, *The Kelly-Frye "General Acceptance" Standard Remains the Rule for Admissibility of Novel Scientific Evidence:* People v. Leahy, 22 PEPP. L. REV. 1274 (1995) (discussing California's formulation of the Kelly/Frye test and its application).

BRETT WATSON

VI. DAMAGES

A prepayment provision in a short-term loan between a construction loan and a buyer's permanent loan is a penalty for delinquency in meeting the contractual interest payments, and thus unenforceable, if it bears no relationship to the potential damages the defendant would incur from a late interest payment.

Ridgley v. Topa Thrift and Loan Ass'n, Supreme Court of California, Decided April 20, 1998, 17 Cal. 4th 970, 953 P.2d 484, 73 Cal. Rptr. 2d 378.

Facts. The plaintiff, Robert M. Ridgley, a property developer, purchased a parcel in order to build and sell a custom home. In late 1990, the home was near complete and was placed on the market for sale. However, because the construction loan that the plaintiff had secured was coming due, the plaintiff negotiated a bridge loan with the defendant, Topa Thrift and Loan Association.

The parties agreed on the terms of a loan in the amount of $2.3 million and a promissory note (Note), assignment of rents, and deeds of trust were executed on December 21, 1990. Pursuant to the terms of the Note, interest payments were due on the twenty-first day of every month.

The Note was on a preprinted form provided by Topa and included the following language:

> Borrower may at any time prepay the outstanding principal balance of the Note in whole or in part; provided, however, Borrower will pay to Lender a prepayment charge of six (6) months' interest at the rate in effect at the time of prepayment on the amount prepaid. Such a prepayment charge will be made whether such prepayments are made voluntarily, involuntarily or upon acceleration of this Note. No such prepayment charge will be made on prepayments made five (5) or more years after the date of this Note.

The plaintiff objected to the provision and Topa added a typewritten addendum to the Note. The addendum read:

> Provided All Scheduled Payments Have Been Received Not More Than 15 Days After Their Scheduled Due Date, And Further Provided That There Have Been No Other Defaults Under The Terms Of This Note Or Any Other Now Existing Or Future Obligation Of Borrower To Topa, Then No Prepayment Charge Will Be Assessed If This Loan Is Paid In Full After June 21, 1991.

In late 1991, pursuant to the plaintiff's request, Topa agreed to change the due date for the interest payments from the twenty-first to the first of each subsequent month. The plaintiff made his payment due January 1 within a ten day grace period, and made no further payments until March 12, 1992. By February, the property was in escrow and scheduled to close in April. On March 3, Topa agreed

to accept payments by the plaintiff in the amount of $19,500 on March 12, 1992 and April 12, 1992. The plaintiff timely made the March 12, 1992 payment.

Topa made a payment demand to the escrow officer for $2,365,502, which included a prepayment charge, a demand fee, and a late charge, purportedly for the March payment, these charges and fees together totaling $114,622. The plaintiff objected to these assessments and Topa agreed to release the deed of trust on the property; however, it maintained the $114,622 balance as a lien on the plaintiff's home. The plaintiff paid this balance, plus accrued interest, when he refinanced his home.

The plaintiff sued Topa for breach of contract and money paid by mistake. The trial court found that the prepayment clause was a late charge and an unenforceable forfeiture penalty, and judgment was entered for the plaintiff. The court of appeal reversed and held that because the penalty was triggered by the prepayment, it was a valid prepayment provision and was not an invalid late charge or forfeiture.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that the prepayment provision was a penalty for delinquency in meeting the contractual interest payments, and thus was unenforceable because it bore no relationship to the potential damages Topa would incur from a late interest payment. Under the provision, the court reasoned, any late payment or other default by the plaintiff would result in a severe penalty--the inability to sell the property without payment of a sizable preset charge. The court further reasoned that the purpose of the provision was to coerce timely payment of interest, not to compensate Topa for interest payments lost through prepayment of principle. The central question decided by the court was whether the provision contained in the Note could be viewed as a charge for prepayment of the loan principal or as a penalty for delinquency in a monthly interest payment. The court looked to section 1671(b) of the California Civil Code, which applies a strict standard to liquidated damages clauses in certain contracts, for guidance on the question.

There is a presumption that such a clause is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time of the contract. The court determined that a liquidated damages clause will generally be considered unreasonable, and thus unenforceable under section 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The court found that in the absence of such a relationship, a contractual clause purporting to predetermine damages must be construed as a penalty. Furthermore, under California law, a contractual provision that imposes a penalty is ineffective, and the wronged party may only collect actual damages sustained when it requires the forfeiture of either money or property without regard to the

actual damage suffered. Pursuant to this principle, charges for late payment of loan installments are unenforceable where they bear no reasonable relationship to the injury the creditor might suffer from such late payments.

The court further determined that if the provision were construed as a charge for prepayment, it would be valid. This is because under the law, contractual charges for prepayment of the loan principle are generally considered valid provisions for alternative performance, rather than penalties or liquidated damages for breach. They are merely a way for the lender to be compensated for interest lost when the borrower pays the principle prematurely.

The court held that the provision cannot reasonably be regarded as a prepayment charge, because the condition that limits its operation--the late payment of interest--is logically unrelated to the charge's purported function as compensation for prepayment. The provision, rather, is intended to provide incentive to the borrower to make prompt interest payments. Alone, the court reasoned, this would not be fatal to the Note, however, because the amount of the preset charge (six months of interest) was unreasonable, the provision is invalid and thus, unenforceable.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 1671(b)-(d) (West 1985 & Supp. 1997) (determining that a liquidated damages provision is unenforceable if it is unreasonable).

CAL. COM. CODE § 2718(1) (West 1985 & Supp. 1997) (requiring liquidated damages clauses in contracts for sales of goods or services to be "reasonable in light of the anticipated or actual harm caused by the breach").

Case Law:

Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n, 9 Cal. 3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973) (holding that a prepayment charge, conditioned on late interest payments, constitutes an unenforceable liquidation of damages).

Meyers v. Home Sav. & Loan Ass'n, 38 Cal. App. 3d 544, 113 Cal. Rptr. 358 (1974) (holding that a provision that provides a surcharge compensating the defendant for prepayment of the principal is valid).

Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985) (holding a contractual provision imposing a penalty is ineffective, and the wronged party can collect only actual damages sustained).

Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n, 22 Cal. App. 3d

303, 99 Cal. Rptr. 417 (1971) (holding that a prepayment provision may bear a reasonable relationship to damages sustained by the lender and may, therefore, be valid).

Weber, Lipshie & Co. v. Christian, 52 Cal. App. 4th 645 (1997) (holding that a liquidated damages provision is not invalid merely because it is intended to encourage a party to perform).

Legal Texts:

1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 512 (9th ed. 1987 & Supp. 1998) (discussing the validity of prepayment penalties in loan contracts as they are neither liquidated damages clauses nor penalties).

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* § 83 (9th ed. 1987 & Supp. 1998) (discussing prepayment clauses in mortgages and deeds of trust when the loan is prepaid, whether voluntarily or involuntarily, and the charge is reasonable).

Law Review and Journal Articles:

Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557 (1998) (revealing the difficulties of interpreting contracts and the court's imposition of a "just result" when parties have not expressed any discoverable intent as to an unforeseen situation).

Dale A. Whitman, *Mortgage Prepayment Clauses: An Economic and Legal Analysis*, 40 UCLA L. REV. 851 (1993) (discussing an economic perspective on mortgage prepayment as support for set legal recommendations).

JESSICA RIGLEY

VII. DISSOLUTION OF MARRIAGE

A spouse who contributes separate property to the acquisition of community property is entitled to reimbursement upon dissolution of the marriage from the original acquisition or community property that is traced from the proceeds of the original property, absent a written waiver.

In re Marriage of Walrath, Supreme Court of California, Decided April 6, 1998, 17 Cal. 4th 907, 952 P.2d 1124, 72 Cal. Rptr. 2d 856.

Facts. California Family Code section 2640 states that in the division of the community estate, unless there is a written waiver, the spouse shall be reimbursed for his or her separate property contributions to the acquisition or improvement of community property to the extent the party traces the contributions to a separate property source. The issue in this case was whether reimbursement is only allowed from the original acquisition or includes property purchased from the proceeds of the original acquisition and how the contribution was traced.

Gilbert and Gladys Walrath were married in January 1992. In June of 1992, Gilbert deeded his separate property house in Lucerne, California to Gilbert and Gladys as joint tenants. At that time, the property had a market value of $228,000 with a mortgage of $82,000, leaving an equity of $146,000. Gladys used $20,000 of her separate property to pay down the mortgage. In 1993, the couple refinanced the Lucerne home, borrowing $180,000, of which $60,000 was used to pay off the existing loan on the Lucerne home, $62,000 to pay off the mortgage on a property in Nevada, $40,500 to purchase and improve a property in Utah, $16,000 went into a joint savings account, and the remaining $1,500 was not specified in the record. When the Walraths separated, less than three years after their marriage, the Lucerne property decreased in value to $175,000, with a mortgage of $174,000.

The trial court held that the right of reimbursement extended only to the originally acquired property, the Lucerne home. It determined that Gilbert contributed eighty-eight percent and Gladys twelve percent of their separate property to the Lucerne acquisition, and thus granted Gilbert $880 and Gladys $120 from the equity in that property. The court of appeal affirmed and the California Supreme Court granted review.

Holding. The California Supreme Court reversed the decision of the lower courts. In interpreting what is "property" as used in California Family Code section 2640, the supreme court determined it "included not only the specific community property to which the separate property is originally contributed, but also any other community property that is subsequently acquired from the proceeds of the initial property, and to which the separate property contribution can be traced." The court's rationale for the reversal was to encourage diversification of investments, which would be avoided for fear of losing reimbursement rights. It extended the

right because of the strong legislative history favoring reimbursement.

The supreme court further held that a spouse who contributes separate property to the acquisition of community property is entitled to reimbursement upon dissolution of the marriage from the original acquisition or community property that is traced from the proceeds of the original property, absent an enforceable waiver. Originally, in *Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), the court held that separate property contributions to community property assets were presumed to be a gift to the community. Rebutting the presumption required an enforceable agreement by the parties that the contribution was not a gift. For example, if a spouse used his or her separate property or a gift from parents to make a down payment on the family home held in community property, the right to reimbursement was lost if the couple did not sign a written contract during marriage that the contribution was not a gift.

In 1983, the California Legislature passed California Civil Code section 4800.2, now Family Code section 2640, with the express purpose of overruling the *Lucas* decision. The section states that a spouse who made a separate property contribution to community property is entitled to reimbursement, unless there was an enforceable agreement that the contribution was a gift.

The issue then became whether the act would be applied retroactively to property contributed before enactment of the statute on January 1, 1984. In the instant case, the parties were not married until 1990, and therefore the provision applied to them, but it was the strong legislative response favoring reimbursement that caused the court to allow tracing of the contribution.

The court held that this section is not retroactive. The governor issued emergency legislation requiring the section to apply to all proceedings not final before January 1, 1984. The court's response was the unanimous pronouncement in *Marriage of Heikes*, 10 Cal. 4th 1211, 899 P.2d 1349, 44 Cal. Rptr. 155 (1995), that the interest will not be applied retroactively. In *Marriage of Heikes*, the court ruled that the statute was not applied retroactively because the act would divest the other spouse of a vested property interest in the property that was previously deemed community property. Taking that right would be a violation of due process "because it amounted to expropriation." California's interest in a uniform law of community property distribution was not sufficient to allow a retroactive application that would divest a spouse of a vested property interest.

After determining there was an overwhelming state preference for reimbursement, the issue became how it is traced. The supreme court set forth a formula for that determination. The trial court must determine what percentage of contribution the spouses made in the original acquisition and what percentage of its proceeds were used to pay for other property. The right to reimbursement is limited by the maximum value of the property to which it was contributed. When the property is insufficient to pay the reimbursement, the reimbursement is divided

pro rata by contribution.

The court assumed the amount of the refinance was to total equity in the Lucerne home. The amount of the refinance was $180,000, of which Gilbert contributed $146,000, or eighty-one percent, and Gladys $20,000, or eleven percent. The rest of the funds were community property. $60,000 was reinvested in the Lucerne home, $40,500 in the Utah property, $62,000 in the Nevada property, and $16,000 into a joint savings account. The spouses received a pro rata reimbursement of any equity in those properties and the bank account up to those amounts. In the case of the Lucerne property, the equity was $1,000, which was divided pro rata, $810 for Gilbert, $110 for Gladys, and $80 for the community. The record was silent as to the equity in the other property, so the case was remanded.

The court dismissed Gladys' argument that it was inherently unfair that reimbursement be paid first and that the community bears the first risk of deprecation. The court stated the legislative intent "to permit full reimbursement for separate property contributions indicates that the contributions receive greater protection from depreciation than the community's interest, provided only that any appreciation in the value of community assets above the amount of the separate property contributions to that asset belongs to the community." This means that if the only equity in the Nevada and Utah properties is the amount of the spouses' contributions, the community will not be allocated anything, even if community funds were later contributed to make interest payments or other improvements in the property.

REFERENCES

Statutes and Legislative History:

CAL. FAM. CODE § 2640(b) (West 1998) (stating that in the division of the community estate, unless a party made a written waiver, a spouse shall be reimbursed for his or her separate property contributions to the acquisition of community property to the extent the party traces the contributions to a separate property source).

Case Law:

In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), *overruled by* CAL. FAM. CODE § 2640 (West 1998) (stating that a party is only entitled to reimbursement of separate property contributed to the community if there was a written agreement between the parties. There is a presumption that, absent an agreement, the party intended the contribution to be a gift).

In re Marriage of Fabian, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986) (stating that community property rights held by a spouse under the *Lucas* interperati

on are vested).

In re Marriage of Heikes, 10 Cal. 4th 1211, 899 P.2d 1349, 44 Cal. Rptr. 155 (1995) (stating that section 2640 is not applied retroactively because it would divest the other spouse of a vested property interest).

In re Marriage of Stoll, 63 Cal. App. 4th 837, 74 Cal. Rptr. 2d 506 (1998) (stating that a spouse is entitled to render an opinion on the source of the funds that purchased the community property to prove a claim of the right to reimbursement).

Legal Texts:

11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 199 (9th ed. Supp. 1997) (stating that there is no retroactive application of section 2640 for quasi-community property acquired before January 1, 1985).

11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 264 (9th ed. Supp. 1997) (stating that section 2640 is retroactively applied where a vested property interest is not affected).

11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 268 (9th ed. Supp. 1997) (stating that reimbursement is made without interest payment or adjustment for change in value, but that payment may not exceed the value of the property).

2 HOGOBOOM & KING, CALIFORNIA PRACTICE GUIDE, *Family Law* § 8:466 (Rutter Group 1997) (stating that the reimbursement award comes off the top of the community property item in question before the community property interest in the property is divided).

Law Review and Journal Articles:

Ira Lurvey, *California Supreme Court Family Law Issues in 1995*, 16 NO. 4 Fair$hare 7 (1996) (stating that *Marriage of Heikes* settled the law that section 2640 is not applied retroactively).

Litigation Roundup, 16 NO. 4 MATRIMONIAL STRATEGIST 8 (1998) (stating that a spouse's right to reimbursement for a separate property contribution to a community property acquisition includes property traced from the original acquisition, unless there is a signed written wavier).

Lesles J. Newman, *Family Law Corner: The Payback*, 40 ORANGE COUNTY LAW. 40 (1998) ("FAM. CODE § 2640 under *Walrath* and *Stoll* greatly expands the right to separate property reimbursement from community assets.").

SARA DAYTON

VIII. EMINENT DOMAIN

The California Coastal Commission's erroneous assertion of permit jurisdiction over a lot line adjustment that prevented any economically viable use of the property is merely a developmental delay and does not constitute a regulatory taking of the property. Absent evidence that a delay was caused by anything other than a bona fide dispute between the two parties, a governmental mistake cannot be classified as a taking.

Landgate, Inc., v. California Coastal Comm'n, Supreme Court of California, Decided April 30, 1998, 17 Cal. 4th 1006, 953 P.2d 1188, 74 Cal. Rptr. 2d 841.

Facts. The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." If a government's activities result in a taking of all use of property, then the government must provide compensation for the period during which the taking occurred. In October of 1990, the plaintiff, Landgate, Inc., bought a sloped lot in Malibu Hills and received county approval in concept for grading and building plans for a large home. The lot was within the coastal zone and therefore was subject to development restrictions imposed by the California Coastal Act of 1976. Under the act, the Coastal Commission had jurisdiction over the area in which Landgate's property was located. After purchasing the property, Landgate applied to the Commission for permits to build the house and related structures. At its December 1990 and February 1991 meetings, the Commission objected to Landgate's proposed development plans because it was below the allowable height contained in the Malibu LUP, the amount of grading required was too much, and the Commission had not approved the lot line adjustment obtained from the county by Landgate's predecessor in interest.

In March 1991, Landgate filed a petition for writ of mandate against the Commission, asserting that the Commission did not have jurisdiction over the lot line adjustment. The petition was conjoined with a complaint, arguing that a taking of property had occurred without just compensation and seeking damages and declaratory relief. In April of 1991, the Commission heard Landgate's request for reconsideration, but still denied the application because the new proposal did not constitute new evidence or error of fact or law. Litigation proceeded and in October 1991, the trial court granted Landgate's petition for writ of mandate. The trial court did not order the approval of any particular development proposal, but did order the Commission to consider the subject property to be a legal lot because the Commission had mistakenly asserted jurisdiction over the lot line. In December 1992, the court of appeal affirmed the trial court's decision in an unpublished

opinion. In February 1993, the Commission again considered Landgate's project and set forth conditions for building that Landgate did not challenge. Subsequently, Landgate moved for summary adjudication for the takings claim. The trial court granted Landgate's motion, ruling that the Commission had temporarily taken Landgate's property from February 1991 to February 1993. The court of appeal affirmed the trial court's decision and stated that the delay was not a reasonable mistake. The California Supreme Court granted review to address the question of whether the Commission's apparently mistaken assertion of jurisdiction of the lot line adjustment led to a temporary taking of Landgate's property.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that an error by a governmental agency in the development approval process does not amount to a taking if it is part of a reasonable regulatory process designed to advance legitimate government interests. Even though the error diminishes the value of the subject property and may result in substantial losses, the government agency is not liable under the takings clause.

The court did not say that no delays would result in a taking, but rather that good faith mistakes would not result in the government agency being liable. In certain situations, it is possible for the delay to be considered a taking, thus requiring compensation if there is evidence to show that the delay was not a reasonable result of a mistake. If the non-approval does not advance a legitimate state interest and is merely a delaying tactic, then the government will be liable for a taking and must provide just compensation to the person or entity being harmed.

The supreme court rejected the court of appeal's view that the Commission was motivated by a jurisdictional spat with Landgate because the Commission expressed frustration over the county's failure to recognize the Commission's jurisdiction. Furthermore, the Commission's point of view was based on the legitimate environmental concerns, and once required to adhere to a court ruling, it only imposed conditions to reduce adverse environmental impacts. Part of the regulatory process is the imposition of certain procedural conditions and substantive requirements on development and that is what the Commission was doing. In California, a condition for obtaining a permit for development within the coastal zone is the procurement of a coastal permit. The Commission's position, although ultimately legally erroneous, that Landgate or its predecessor failed to comply with one of the conditions of obtaining a coastal development permit by illegally reconfiguring the boundaries of the lot, was a plausible position.

In conclusion, the court chose not to accept Landgate's argument because it had not presented adequate evidence to show that the development delay between February 1991 and February 1993 was due to anything other than a bona fide dispute over the legality of Landgate's lot and the Commissioners' jurisdictional authority over the lot line adjustment. This type of delay is an incident of property ownership and not a taking of property. While it may be unfortunate that the delay results in the loss of time and money, the government agency will not be liable for a good faith mistake.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend V ("nor be deprived of life, liberty, or property, without due process of law").

CAL. CONST. art. I, §§ 7, 15 (providing that no person may be deprived of life, liberty, or property without due process of law).

CAL. PUB. RES. CODE § 30519 (West 1998) (discussing permit jurisdiction).

CAL. PUB. RES. CODE § 30000 (West 1998) (providing development restrictions).

CAL. GOVT. CODE § 818.5 (West 1998) (providing that a public entity cannot be held liable "for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked").

Case Law:

First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) (holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective").

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (eschewing any set formula for determining when a government regulation goes too far and becomes a taking).

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (stating that the requirement of obtaining a permit before engaging in the certain use of a property does not itself constitute a taking of the property).

Littoral Dev. Co. v. San Francisco Bay Conservation and Dev. Comm'n, 33 Cal. App. 4th 211, 39 Cal. Rptr. 2d 266 (1994) (finding no regulatory taking of property when delay resulted from factual or legal uncertainties).

Legal Texts:

13 CAL. JUR. 3D *Constitutional Law* § 270 (1989 & Supp. 1998) (discussing due process generally).

13 CAL. JUR. 3D *Constitutional Law* § 274 (1989 & Supp. 1998) (discussing the agencies and persons bound by guaranty).

5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 648 (4th ed. 1997 & Supp. 1998) (discussing damage to property).

5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Administrative Proceedings* § 3 (4th ed. 1997 & Supp. 1998) (discussing due process and other constitutional limits).

Law Review and Journal Articles:

Karena C. Anderson, *Strategic Litigating in Land Use Cases:* Del Monte Dune v. City of Monterey, 25 ECOLOGY L.Q. 465, 501-03 (1998) (generally discussing law in the area of "takings").

Michael M. Berger, *Making the Takings Issue Argument*, SD14 ALI-ABA 995, 998-99 (1998) (addressing the issue of normal delays that do not constitute a taking).

Robert Meltz, *Takings Claims Against the Federal Government*, SC43 ALI-ABA 57, 76-77 (1998) (discussing damage for takings).

Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996) (providing a general discussion in the area of takings).

Quintin Johnston, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 446 (1994) (discussing permit delays).

ANDY ROBERSON

IX. Independent Contractors

Employees of an independent contractor who are injured by the contractor's negligence cannot seek recovery in tort against the hiring person under the peculiar risk doctrine because of the availability of workers' compensation benefits.

Toland v. Sunland Hous. Group, Inc., Supreme Court of California, Decided June 1, 1998, 18 Cal. 4th 253, 955 P.2d 504, 74 Cal. Rptr. 2d 878.

Facts. Under the doctrine of peculiar risk, a person who hires an independent contractor to do inherently dangerous work can be liable for tort damages when the contractor causes injury to others by negligently performing the work. The doctrine serves to ensure that innocent bystanders or neighboring landowners injured by the hired contractor's negligence will have a source of compensation even if the contractor turns out to be insolvent. In December 1992, Timothy Toland was working for a framing contractor, CLP Construction, Inc., at a housing development under construction. While helping other CLP employees in raising a large and heavy framed wall, Toland was injured when the wall fell on him. The project's owner and general contractor was Sunland Housing Group, Inc. Toland sought recovery from his employer, CLP Construction, under the Workers' Compensation Act. He sued Sunland, alleging that raising the wall created a peculiar risk of injury for which Sunland should have required subcontractor CLP Construction to take special precautions.

Sunland moved for summary judgment in the trial court, asserting that Toland's action was barred under the court's then recent decision in *Privette v. Superior Court*, 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993), holding that under the peculiar risk doctrine, the hiring person's liability does not extend to the hired contractor's employees. Toland argued that *Privette* had eliminated peculiar risk liability for employees of independent contractors only in actions based on section 416 of the Restatement (Second) of Torts (hiring person liable for contractor's negligence in spite of providing that the contractor take special precautions), but that *Privette* had no effect on an action such as his, which was brought under section 413 of the Restatement (Second) of Torts (hiring person who fails to provide for special precautions liable for contractor's negligence).

The trial court entered summary judgment for Sunland, finding that the plaintiff, as the employee of an independent contractor, could not recover against the hiring person under the peculiar risk doctrine. The court of appeal affirmed. The California Supreme Court granted review.

Holding. Affirming the decision of the court of appeal, the California Supreme

Court held that employees of an independent contractor who are injured by the contractor's negligence cannot seek recovery in tort against the hiring person under the peculiar risk doctrine. This is so, irrespective of whether the recovery is sought under the theory of peculiar risk that the hiring person who fails to provide for special precautions is liable for the contractor's negligence, or the theory of peculiar risk that the hiring person is liable for the contractor's negligence in spite of providing that the contractor take special precautions.

The court noted that under the decision in *Privette*, even though a person hiring an independent contractor to do inherently dangerous work can be liable under the peculiar risk doctrine for failing to see to it that a hired contractor takes special precautions to protect neighboring property owners or innocent bystanders, such a person has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees. Absent an obligation, there can be no liability in tort. Thus, *Privette* bars employees of a hired independent contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, irrespective of whether recovery is based on section 413 or section 416 of the Restatement (Second) of Torts. The court believed that in either situation it would be unfair to impose liability on the hiring person when the liability of the contractor is limited to workers' compensation coverage.

REFERENCES

Statutes and Legislative History:

CAL. LAB. CODE § 3600 (West 1971) (providing that workers compensation is the exclusive remedy against employers for injuries sustained by their employees arising out of and in the course of employment).

CAL. LAB. CODE § 3602 (West 1986) (providing that a civil suit is permitted where an employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection to the job).

Case Law:

Mackey v. Campbell Constr., 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980) (holding a peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor).

Privette v. Superior Ct., 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993) (holding that the doctrine of peculiar risk should not apply to contractor's own employees).

Legal Texts:

65 CAL. JUR. 3D *Worker Injury Compensation* § 170 (1981 & Supp. 1998) (noting that an employer's failure to provide safety devices and safeguards will be found to constitute serious and wilful misconduct).

65 CAL. JUR. 3D *Worker Injury Compensation* § 173 (1981 & Supp. 1998) (noting that wilful misconduct of the employer cannot be found from the existence of a danger which he should have known about had he put his mind to it).

2 B.E. WITKIN, CALIFORNIA WORKERS' COMPENSATION, *Injury Arising Out of Employment* § 220 (9th ed. 1987) (stating that workers' compensation laws require the injury to arise out of the employment).

2 B.E. WITKIN, CALIFORNIA WORKERS' COMPENSATION, *Injury Arising Out of Employment* § 221 (9th ed. 1987) (noting that causation is satisfied where the work of the employee brings him into a position of danger at the time and place of employment).

Law Review and Journal Articles:

William Douglas, *Vicarious Liability and the Administration of Risk*, 38 YALE L.J. 584 (1928) (analyzing the entrepreneur theory by which a court can determine whether the owner-employee or contractor has more characteristics of an entrepreneur for purposes of imposing liability).

Kathleen McKenna, Comment, *The Peculiar Risk Doctrine: High Rise Benefits For California Construction Workers*, 19 LOY. L.A. L. REV. 1495 (1986) (noting it is a common practice in the construction industry for general contractors to hire subcontractors to do particular jobs).

Mark Monheimer, Comment, *Liability for the Torts of Independent Contractors In California*, 44 CAL. L. REV. 762 (1956) (noting liability was imposed where work created a nuisance).

Harry M. Philo, Comment, *Revoke The Legal License to Kill Construction Workers,* 19 DEPAUL L. REV. 1 (1969) (stating it is common knowledge that workmen killed in construction work do not receive full compensation under the Workmen's Compensation Act for damages they sustain).

Errol Tyler, Comment, *Liability of Landowners*, 13 HASTINGS L.J. 1 (1961) (noting the early view was that because an employer has no right to control the manner in which the contractor performs his work, the enterprise should be regarded as the contractor's, who is in the better position to prevent, administer, and distribute the risk).

ROB HAILEY

X. LABOR

In an action by an employee to recover unpaid wages under California Labor Code section 98, the statute of limitations date used to calculate recoverable backpay should be the filing date of the claim rather than the date on which the hearing is held.

Cuadra v. Millan, Supreme Court of California, Decided March 30, 1998, 17 Cal. 4th 855, 952 P.2d 704, 72 Cal. Rptr. 2d 687.

Facts. In separate proceedings, three plaintiffs filed claims against their former employers under California Labor Code section 98, attempting to recover backpay. The claims alleged violations of the statutory minimum wage/overtime pay requirements. The plaintiffs were seeking backpay for the full three-year period preceding the date their claims were filed with the Labor Commissioner (commissioner). The Division of Labor Standards Enforcement informed the plaintiffs that, pursuant to the commissioner's policy, the three-year limitations period for recovery of backpay would be calculated from the date of their hearings rather than from the date when the claims were filed. As a result of this policy, the plaintiffs were awarded from three to seven months less backpay than if the filing date of their claims had been used for the calculation of wages due.

The plaintiffs filed a joint petition in superior court, seeking a writ of mandate ordering the commissioner to use the claim filing date rather than the hearing date for all calculations of backpay under section 98. At the hearing, counsel for the commissioner argued that the determination of limitations dates was within the discretion of the commissioner. The court found that the use of the hearing date, rather than the filing date, was an abuse of discretion, and granted the writ of mandate.

The commissioner appealed, but the court of appeal affirmed the judgment of the lower court. The court reasoned that section 98 hearings (Berman hearings) were legislatively intended to be an efficient, informal method of resolving claims without resorting to the court system. Because the commissioner's policy effectively penalized claimants months or even years of backpay by using the hearing date rather than the filing date, the court held that the policy did not effectuate the legislature's intent and upheld the issuance of a writ of mandate.

Holding. The Supreme Court of California affirmed the decision of the court of appeal, ruling that the commissioner's policy, using the hearing date to determine the calculation of recoverable back pay in Berman proceedings was an abuse of discretion. The court reasoned that even though section 98 is silent as to time

limitations for filing claims, the commissioner is implicitly authorized to enact policies to further the legislative intent of the statute. The commissioner had already enacted policies adopting the general statutes of limitations for backpay wage claims contained in California Code of Civil Procedure section 312. Among these was the adoption of a three-year statute of limitations on claims for wage liability created by statute, such as the claims in the present case. The major policy not adopted by the commissioner from the California Code of Civil Procedure was section 350, the rule that recoverable backpay should be calculated from the date a suit is filed, rather than from the date the suit is heard. The court determined that because the commissioner had already enacted a policy using the hearing date to calculate recoverable backpay, the argument that he did not have power to change this policy to use the filing date was unpersuasive.

The court further reasoned that because section 98.1(b) provides that the commissioner shall award any due and unpaid wages, including interest on those wages, from the date the wages were due and payable, the legislature clearly intended that claimants should be able to use Berman proceedings to collect all unpaid wages. The court indicated that this legislative intent is best served by calculating backpay from the filing date of the claim, in order to minimize any potential loss of unpaid wages.

The court also addressed the issue by acknowledging that an employee who files for a Berman hearing will always recover a lesser amount than an employee with the same claim who files a civil lawsuit. The reason for this discrepancy is completely due to the commissioner's policy, and in no way due to acts or omissions of the employee. The court indicated that such a policy frustrates the remedial intent of the legislation, and therefore is an abuse of discretion.

Finally, the commissioner argued that a writ of mandate should not be issued because the plaintiffs had an adequate remedy at law, namely an appeal of the commissioner's ruling in the court system. The court of appeal rejected this argument, determining that the remedy would not be adequate because it would defeat the purpose of Berman hearings by making the proceeding more costly and time consuming. The supreme court did not agree with this rationale. It determined that the right to an immediate review by appeal is considered an adequate remedy unless the parties can show some special circumstances that would render it inadequate. But the court also decided that because the appeal would have simply dealt with the merits of the case that had already been decided, it would accept the court of appeal's decision as to the inadequacy of the remedy for the purposes of this proceeding. Because this issue was important to a large part of the workforce, the court wanted to avoid any unnecessary delay in issuing its decision.

REFERENCES

Statutes and Legislative History:

CAL. LAB. CODE § 98 (West 1989 & Supp. 1998) (providing administrative procedures for recovery of due and payable wages).

CAL. CIV. PROC. CODE § 312 (West 1982 & Supp. 1998) (generally providing statutes of limitations for civil actions).

CAL. CIV. PROC. CODE § 350 (West 1982 & Supp. 1998) (providing that an action commences on the date the complaint is filed).

Case Law:

Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987) (holding that an administrative agency cannot create a remedy that the legislature withheld).

Dickey v. Raison Proration Zone No. 1, 24 Cal. 2d 796, 151 P.2d 505 (1944) (stating that the labor commissioner may exercise implicit power to efficiently administer powers expressly granted by statute).

Jones v. Tracy Sch. Dist., 27 Cal. 3d 99, 611 P.2d 441, 165 Cal. Rptr. 100 (1980) (stating that the court counts back from the filing date to calculate all due and unpaid amounts earned during the limitation period).

Legal Texts:

41 CAL. JUR. 3D *Labor* § 12 (1978 & Supp. 1998) (detailing the duties and responsibilities of the labor commissioner).

4 CAL. JUR. 3D *Administrative Law* § 320 (1973 & Supp. 1998) (discussing time requirements for administrative mandamus proceedings).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency & Employment* § 292 (9th ed. 1987 & Supp. 1998) (providing that the labor commissioner may prosecute actions for backpay and conduct hearings to adjudicate the actions).

3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 407 (4th ed. 1996) (stating that tolling of statute of limitations is a temporary suspension caused by certain events

or acts).

Law Review and Journal Articles:

William H. Chamblee, Comment, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions*, 16 ST. MARY'S L.J. 155 (1984) (discussing the increase in regulation and adjudication through administrative agencies).

James M. Fischer, *The Limits of Statutes of Limitations*, 16 SW. U. L. REV. 1 (1986) (discussing statutory tolling provisions under the California Code of Civil Procedure).

Gary G. Mathiason & Paula Champagne, *Interrelationship of Administrative, Local, State, and Federal Procedures, Issue Preclusion and Statute of Limitations Problems*, C780 ALI-ABA 981 (1993) (discussing equitable tolling of the statute of limitations under California law).

Michael D. Moberly, *Fair Labor Standards Act Preemption of State Wage Payment Remedies*, 23 ARIZ. ST. L.J. 991 (1991) (discussing whether state statutory remedies for unpaid wages are preempted by the Fair Labor Standards Act of 1938).

Sam Walker, *Judicially Created Uncertainty: The Past, Present, and Future of California Writ of Administrative Mandamus*, 24 U.C. DAVIS L. REV. 783 (1991) (discussing the history and present use of administrative mandamus in California).

JOHN CORRINGTON

XI. PARENT AND CHILD

A biological father does not have a constitutionally protected interest in establishing a relationship with his child conceived and born during the mother's marriage to another man; therefore, California Family Code sections 7611 and 7630 may constitutionally be applied to preclude an alleged biological father from establishing his paternity of a child born during the mother's marriage to another man.

Dawn D. v. Superior Ct., Supreme Court of California, Decided April 6, 1998, 17 Cal. 4th 932, 952 P.2d 1139, 72 Cal. Rptr. 2d 871.

Facts. California Family Code section 7611, subdivision (a) provides that a man will be presumed to be the natural father of a child if he "and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by the court." Subdivisions (b) and (c) establish more complex means by which a man may be the presumed father of a child, involving attempted and subsequent marriage to the mother. Family Code section 7630 states that "[a] child, the child's natural mother, or a man *presumed to be the child's father under subdivision (a), (b), or (c) of Section 7611,* may bring an action . . . at any time for the purpose of declaring the existence of the father and child relationship presumed . . ." (emphasis added). The alleged biological father in this case, Jerry, challenged the application of these statutes, which denied him the right to establish paternity of his alleged son.

Dawn D. and Frank F. married in June 1989. In January 1995, Dawn separated from Frank and began living with Jerry K. Dawn became pregnant the following month. In April 1995, she moved out of Jerry's home and resumed living with her husband, Frank. In August 1995, Jerry filed a complaint to establish a parental relationship with the then unborn child. Frank and Dawn continued to live together as husband and wife through the resolution of the action and the child had lived with them since its birth. Jerry attempted to negotiate a child support and visitation arrangement with Dawn and Frank, but they never effectuated such an agreement.

Dawn moved for judgment on the pleadings, arguing that California law recognizes only one natural father for any child and that Jerry did not have standing under the California Family Code to seek blood testing to establish parentage. The trial court denied Dawn's motion, finding that because Jerry had done all he could to demonstrate a commitment to his parental responsibilities, he had established

"due process rights" and should be permitted to try to establish biological parentage. The court thus granted Jerry's motion for blood testing. The court of appeal denied Dawn's petition to compel the trial court to vacate its order. The California Supreme Court granted review to consider whether the presumption created by Family Code section 7611 and the standing provisions of section 7630 may constitutionally be applied to preclude an alleged biological father from establishing his paternity of a child born during the mother's marriage to another man.

Holding. The California Supreme Court reversed the judgment of the court of appeal, holding that Jerry did not establish a constitutionally protected liberty interest in being allowed to form a parent-child relationship with a child born while the mother was married to another man and that application to Jerry of Family Code sections 7611 and 7630 did not, therefore, deprive him of due process.

The court first noted that Dawn's husband, Frank, was the presumed father of the child under section 7611. Jerry, on the other hand, did not meet any of the statutory provisions for presumed fatherhood. While the statutory presumptions are rebuttable, section 7630 limits standing to bring a paternity action to the child's natural mother, the child, or a *presumed* father, thus precluding Jerry from bringing a paternity action. Jerry thus argued that a biological father has a liberty interest, protected by substantive due process mandates, in being permitted to establish a parent-child relationship with his offspring.

In evaluating his claim, the court noted that California case law demands that "reasonableness of a statutory limitation on a right to offer proof of parentage" must be determined on a case-by-case basis. In doing so, however, the court recognized that it must be guided by the methodology developed by the United States Supreme Court for deciding whether an asserted interest is a fundamental liberty. It outlined that inquiry as follows: 1) the court must make a "careful description" of the asserted liberty interest; 2) the court, informed by the nation's history, traditions, and conscience, must determine whether the interest is fundamental; and 3) if the court decides that it is fundamental, it must weigh the state's countervailing interest to determine if it justifies infringement upon that liberty. Again, this will require a complex balancing on a case-by-case basis. Applying this framework, the court described Jerry's asserted liberty interest as that of "establishing a relationship with his child born to a woman married to another man at the time of the child's conception and birth."

In determining whether that interest is a fundamental liberty, the court considered the 1989 Supreme Court plurality opinion in *Michael H. v. Gerald D.*, 498 U.S. 110 (1989). In *Michael H.*, the plurality held that the biological father of a child born to a woman married to another man had no protected liberty interest in continuing his relationship with that child, even though he had lived with the mother and child for almost a year. Three dissenting justices in that case concluded that the biological father's *actual relationship* with the child engendered a protected liberty interest in a continuing relationship with that child. The

California Supreme Court in this case thus concluded that "at least seven of the nine high court justices in *Michael H.* expressly rejected the view that an unwed father's biological link to a child alone gives rise to a protected liberty interest." Because Jerry never had an actual relationship with the child, the court concluded that his claim must fail.

The court addressed the dissent's contention that the United States Supreme Court's decision in *Lehr v. Robertson*, 463 U.S. 248 (1983), supported finding a constitutionally protected liberty interest for Jerry. In *Lehr*, an unwed mother later married another man who sought to adopt the child. The Court held that due process entitled the unwed natural father to notice and a hearing before the child could be adopted. The California Supreme Court here distinguished that case as involving two unwed parents at the time of the child's birth. Further, the court noted that the Court's subsequent decision in *Michael H.* resolved any ambiguities in *Lehr* in favor of the state.

Finally, the court rejected Jerry's contention that the state has an interest in an accurate determination of biological paternity. It distinguished the authority Jerry offered, *Salas v. Cortez,* 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979), as inapplicable because it addressed only the rights of defendants in paternity actions prosecuted by the state, not those in which, as here, the man is actively seeking to establish his paternity of a child born to a woman married to another man who is the statutorily presumptive father. Because Jerry was unable to establish a constitutionally protected liberty interest, the court did not reach step three of the above-mentioned analysis and concluded that application of sections 7611 and 7630 to Jerry did not deprive him of due process.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .").

CAL. FAM. CODE § 7540 (West 1994 & Supp. 1998) ("the child of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.").

CAL. FAM. CODE § 7611 (West 1994 & Supp. 1998) (defining the circumstances in which a man may be declared the presumptive natural father).

CAL. FAM. CODE § 7630 (West 1994 & Supp. 1998) (defining standing requirements for bringing a paternity action).

Case Law:

Washington v. Glucksberg, 521 U.S. 702 (1997) (discussing general principals which must guide a court considering extending constitutional protection to an asserted right or liberty interest).

Reno v. Flores, 507 U.S. 292, 301-02 (1993) (stating that a substantive due process claim relies upon the line of cases guaranteeing due process to include "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion holding that the biological father of a child born to a woman married to another man had no liberty interest in continuing his relationship with the child).

Lehr v. Robinson, 463 U.S. 248 (1983) (holding that an unwed biological father had a due process right to notice and a hearing before the mother's husband could adopt the child).

Steven W. v. Matthew S., 33 Cal. App. 4th 1108, 39 Cal. Rptr. 2d 535 (1995) (holding that because the presumptive father and mother were not living together at the time of conception, the presumption created under section 7611 is not conclusive).

Michael M. v. Giovanna F., 5 Cal. App. 4th 1272, 7 Cal. Rptr. 2d 460 (1992) (holding that where unwed parents conceive and the mother marries another before the child's birth, a substantive due process right to a relationship with the child requires that the biological father be allowed standing to attempt to establish paternity).

Adoption of Kelsey S., 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992) (holding that when a child is conceived by unwed parents, the biological father has a constitutionally protected interest in continuing a parental relationship with the child if he has undertaken "full parental responsibilities").

Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979) (holding that procedural due process requires the appointment of counsel for indigent defendants in paternity actions prosecuted by the state).

Lisa R. v. Victor R., 13 Cal. 3d 636, 651, n.17, 532 P.2d 123, 119 Cal. Rptr. 475 (1975) (stating that a court must make a case by case preliminary determination that "due process concepts would be offended if the particular claimant to parentage

were denied an opportunity to prove his claim").

Legal Texts:

10 CAL. JUR. 3D *Family Law* § 246 (1994 & Supp. 1998) (generally discussing the nature of the presumptions engendered by marriage).

10 CAL. JUR. 3D *Family Law* § 247 (1994 & Supp. 1998) (discussing due process and equal protection concerns associated with the fatherhood presumptions).

10 CAL. JUR 3D *Family Law* § 249 (1994 & Supp. 1998) (detailing the rebuttable presumptions of natural fatherhood).

1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* § 283 (3d ed. 1986 & Supp. 1998) (discussing cases in which natural fathers brought suit to establish a right to a continued relationship with their children).

10 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 412-415 (9th ed. 1989 & Supp. 1998) (generally discussing presumed fatherhood).

Law Review and Journal Articles:

Tracy Cashman, Comment, *When is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959 (1997) (discussing the history of due process claims for unwed fathers).

Carol A. Gorenberg, *Fathers' Rights versus Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L. Q. 169 (1997) (discussing the rights of unwed fathers in the adoption context).

David Hadek, Comment, *Why the Policy Behind the Irrebuttable Presumption of Paternity Will Never Die*, 26 SW. U. L. REV. 359 (1997) (discussing *Michael H.* and the California Family Code fatherhood presumptions).

Wolfgang Hirczy, *Larry Succeeds Where Michael Failed: Texas Courts Reconsider Parental Rights Claims Denied by the United States Supreme Court*, 59 ALB. L. REV. 1621 (1996) (discussing the Texas Supreme Court's recent holdings that denial of a biological father's right to bring a paternity action constitutes a denial of due process under the Texas state constitution).

Batya F. Smernoff, Comment, *California's Conclusive Presumption of Paternity and the Expansion of Unwed Fathers' Rights,* 26 GOLDEN GATE L. REV. 337 (1996) (discussing two California appellate court decisions expanding unwed fathers' rights to attack the presumption of a husband's paternity).

JILL JONES

XII. TORTS

In cases where the victim of intentional destruction of evidence, committed by a party to the underlying cause of action to which the evidence is pertinent, knows or has constructive knowledge of the alleged act before the trial pertaining to the underlying action, a new tort remedy will not be created.

Cedars-Sinai Med. Ctr. v. Bowyer, Supreme Court of California, Decided May 11, 1998, 18 Cal. 4th 1, 954 P.2d 511, 74 Cal. Rptr. 2d 248.

Facts. Kristopher Schon Bowyer, the plaintiff, was allegedly injured during birth due to oxygen deprivation. Through his guardian ad litem, the plaintiff brought a medical malpractice action against the defendant, Cedars-Sinai Medical Center. During the discovery phase of trial, Bowyer's attorney attempted to obtain from the defendant copies of the plaintiff's medical records. The defendant claimed it was unable to locate certain records, including fetal monitoring strips that recorded the child's heartbeat during labor.

The plaintiff then filed an amended complaint, adding a cause of action for intentional spoliation of evidence. In this complaint, the plaintiff sought punitive damages, alleging that the defendant had intentionally destroyed the evidence requested during discovery to prohibit the plaintiff from succeeding in the underlying malpractice cause of action. The court granted review to determine whether it should recognize a tort remedy for the intentional destruction of evidence by a party to the underlying cause of action.

Holding. Addressing a dispositive issue not raised by the parties below that did not turn on the facts of the case, the court held that a tort remedy will not be created for intentional spoliation of evidence, committed by a party to the underlying action to which the evidence is pertinent, when the victim knew or should have known of the alleged destruction before the trial on the primary cause of action. Against the plaintiff's objection, the court held that even though the existence of the tort was not an issue raised in the courts below, its power of decision extended to the entire case.

The court condemned the act of intentional destruction of evidence, but stated that this act alone was not sufficient justification for a new tort remedy. In determining whether or not to create a tort remedy, the court focused on the narrow issue in the case. Specifically, the court asked whether a tort remedy for such conduct would produce social benefits beyond those created through present remedies. The California Supreme Court recognized its past decisions involving

litigation-related misconduct where the court preferred imposing sanctions within the underlying lawsuit rather than creating new tort remedies. The potential for a new tort remedy to increase costly and time consuming litigation was a central reason behind the court's holding.

Analogizing perjury to the issue in the instant case of intentional spoliation of evidence, the court found another reason for not creating a new tort remedy. Both perjury and intentional spoliation of evidence hinder the search for truth and justice, the court held. Relying on a previous decision, the court acknowledged that there was no civil remedy in damages against a witness who commits perjury while testifying. The court reasoned that the denial of tort remedies in these cases rested upon a concern for the finality of adjudication. This interest was persuasively explained when the court cited *Pico v. Cohn,* 91 Cal. 129, 135 (1891), which held that "[e]ndless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice . . . ."

The court noticed the number of non-tort remedies that were developed to discourage and penalize the intentional destruction of evidence, including the evidentiary inference set forth in Evidence Code section 413, and the number of strong sanctions for such conduct under Code of Civil Procedure section 2023. The court also recognized sanctions that could be imposed on lawyers involved in such spoliation conduct, and that modern civil discovery statutes encourage lawyers to take control of their clients' evidence for the sake of preserving potentially pertinent evidence. Furthermore, the court listed another remedy found in Penal Code section 135 that creates criminal penalties for spoliation.

Next, the court realized that the uncertainty of harm in spoliation cases would foster jury speculation problems. Because the jury would not know the content and significance of the destroyed evidence, the jury could only hypothesize as to its effect on the fundamental cause of action.

Finally, the court focused on the costs imposed by a tort remedy in these situations. Among its concerns, the majority focused on the indirect costs imposed by erroneous spoliation determinations. Specifically, persons would be forced to preserve, for uncertain periods, documents of no apparent value so that they might avoid the likelihood of spoliation liability. Also, the costs of creating a new tort remedy would impose upon the courts and defendants the hassle and inefficiency of disputing unmeritorious spoliation claims.

In conclusion, the court held that, due to the remedies already available in first party spoliation cases, no tort remedy will be available for such conduct when the victim, or plaintiff here, knows or should know of the alleged spoliation before the trial of the underlying action.

REFERENCES

Case Law:

Dunham v. Condor Ins. Co., 57 Cal. App. 4th 24, 66 Cal. Rptr. 2d 747 (1997) (holding that a defendant charged with spoliation has no duty to preserve evidence for plaintiff's use against a third party).

Johnson v. United Serv. Auto. Ass'n, 67 Cal. App. 4th 626, 79 Cal. Rptr. 2d 234 (1998) (defining intentional spoliation and reaffirming the court's holding in *Cedars-Sinai*).

Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998) (decision by the Texas Supreme Court explaining that in medical malpractice cases, Texas does not recognize a tort for intentional spoliation).

Legal Texts:

36 CAL. JUR. 3D *Healing Arts and Institutions* § 351 (1997) (describing the concealment of negligence in medical malpractice cases).

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Legal Duty Toward Person Harmed* § 6 (9th ed. 1988) (explaining the basic tort concept that, whether intentional or negligent, a tort involves a violation of a legal duty).

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Spoliation of Evidence* § 576 (9th ed. 1988) (discussing, in general, the spoliation of evidence and the limitations and accrual of actions from the spoliation of evidence).

Law Review and Journal Articles:

J. Brian Slaughter, *Spoliation of Evidence: A New Rule of Evidence is the Better Solution,* 18 AM. J. TRIAL ADVOC. 449 (1994) (discussing the problems and obstacles caused by introducing a new remedy for the spoliation of evidence).

Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles,* 26 ST. MARY'S L.J. 351 (1995) (explaining the historical development of the spoliation tort and the case law surrounding the current trends).

Maurice B. Graham, *Spoliation of Medical Records,* 52 J. MO. B. 87 (1996) (describing the procedure of most jurisdictions, deciding cases regarding

intentional spoliation, who require evidence of intentional spoliation to trigger the presumption that the spoliator must have been conscious of the damage the evidence, if produced, would do to his or her position).

David A. Bell, *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation,* 29 ARIZ. ST. L.J. 769 (1997) (discussing the origins and problems of the tort of spoliation).

James T. Sparkman, *Spoliated Evidence: Better Than The Real Thing?,* 71-AUG FLA. B.J. 22 (1997) (explaining how spoliation can actually benefit the victim through the imposition of sanctions and evidentiary presumptions).

COLIN BATCHELOR

XIII. WORKMEN'S COMPENSATION

A. An employee's injury must occur in the course of his employment and by reason of a condition or incident of his employment to be covered under a workers' compensation plan; thus, an employee's deadly injury from a bacterial infection contracted in the hospital while receiving medical treatment for a heart attack suffered during a business trip, did not occur in the course of his employment or by reason of a condition or an incident of that employment and, accordingly, was not compensable under the workers' compensation law.

LaTourette v. Workers' Compensation Appeals Bd., Supreme Court of California, Decided March 12, 1998, 17 Cal. 4th 644, 951 P.2d 1184, 72 Cal. Rptr. 2d 217.

Facts. California Labor Code section 3600(a) creates an employer's workers' compensation liability for an employee's injury or death if it "ar[ose] out of and in the course of the employment." Subdivision (2) further requires that "the employee [be] performing services growing out of and incidental to [the] employment" to create such a liability. In October, 1990, Mr. LaTourette was on a business trip in Reno, Nevada for his employer, the Long Beach Community College District. While attending a conference there, he suffered a heart attack caused by a preexisting medical condition and was hospitalized. In the course of the treatment in the Reno hospital, LaTourette developed a bacterial infection. On November 12, 1990, he died during an emergency open heart surgery, apparently due to complications caused by the infection. In December, 1990, the petitioner, decedent's widow, filed a workers' compensation claim, seeking temporary disability, the costs of medical treatment, burial expenses, and death benefits. The petitioner alleged that LaTourette died of a heart attack due to work-related stress while attending the conference. The workers' compensation judge concluded that the petitioner had produced insufficient evidence of stress and held that the decedent "did not sustain injury arising out of and occurring in the course of . . . employment to his heart resulting in death on November 12, 1990." The petitioner appealed to the Workers' Compensation Appeals Board, which denied the petition for reconsideration, adopting the workers' compensation judge's finding that even though the decedent had been a "commercial traveler," the death did not arise out of the employment.

The petitioner thereafter sought a writ of review in the California Court of Appeal, which was summarily denied. The Supreme Court of California granted review and remanded the case to the court of appeal with directions to vacate the denial and issue a writ of review. The court of appeal affirmed the Workers' Compensation Appeals Board's decision, holding that the decedent acted within

the course of his employment at the time of the heart attack but that there was no causal connection between the injury leading to his death and the employment. The court rejected the petitioner's argument that she was only required to establish that the need for treatment of the original injury was a reasonable expectation of a commercial traveler and therefore arising out of and within the course of the employment. The California Supreme Court granted review to consider whether the medical treatment an employee receives for a nonoccupational heart condition during a business trip is compensable under the workers' compensation laws.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that the self-directed seeking of medical treatment during the course of employment does not create an employer's liability under the workers' compensation laws when the medical conditions neither arose out of the employment nor were a condition or incident of employment. Consequently, the court further held that workers' compensation liability does not arise when an employee contracts and is injured by a nonoccupational disease during the course of his employment.

To receive workers' compensation, the applicant must establish by a preponderance of the evidence the reasonable probability of industrial causation. Labor Code section 3600 requires that the injury "aris[e] out of and in the course of the employment," setting forth a two prong test. The first part of the test requires a showing that the injury occurred "in the course of the employment." Consequently, the applicant must show that he acted under the express or implied authorization of his employer. The second part of the test mandates the applicant to show that the injury "ar[ose] out of" the employment. Hence, the injury must "occur by reason of a condition or incident of [the] employment" and, accordingly, requires a causal connection between injury and employment. The court explained that when an employee travels on behalf of his employer, he is regarded as a "commercial traveler" and is acting within the course of employment during the entire period of his travel. But the court emphasized that the remaining conditions set forth in section 3600 of the Labor Code equally applied to "commercial travelers."

Accordingly, the court found that commercial travelers were also subject to the general rules governing injury from a non-occupational disease–an injury that is held not to arise out of the employment and is, consequently, noncompensable. The court recapped the rules of nonoccupational diseases by emphasizing that no causal connection is established by the contraction of a nonoccupational disease and the person's employment. Two exceptions apply to the general rule of noncompensability for nonoccupational diseases. "First, if the employment subjects the employee to an increased risk compared to that of the general public, the injury is compensable. Second, if the immediate cause of the injury is an intervening human agency or instrumentality of the employment, the injury is compensable." The court made clear that if neither one of the exceptions applied, the applicant for workers' compensation could not seek compensation for a

nonoccupational disease contracted during the course of employment.

Accordingly, the decedent's injury from a bacterial infection, which apparently resulted in his death, was a nonoccupational injury that is noncompensable, even though the heart attack occurred "in the course of the employment." The court reasoned that the petitioner failed to prove by a preponderance of the evidence that the decedent's injury from the bacterial infection occurred "in the course of employment," or that it "arose out of the employment." The court rejected the argument "that obtaining medical treatment for a nonoccupational disease is a 'reasonable expectation of the commercial traveler's needs.'" The court reasoned that the medical treatment sought by the decedent for his preexisting medical condition was not an activity a healthy traveler would be exposed to "in the course of employment" and was "'a purely personal undertaking,' outside the scope of the employment." The court further concluded that neither one of the two exceptions to the noncompensability of nonoccupational diseases applied in this case because neither did a special risk of infection exist, nor did the decedent's employer require or authorize him to undergo treatment in Reno, Nevada. Because the decedent's injury did not occur in the course of his employment or by reason of a condition or incident of his employment, he was not covered under the employer's workers' compensation plan.

REFERENCES

Statutes and Legislative History:

CAL. LAB. CODE § 3202.5 (West 1998) (establishing "proof by a preponderance of the evidence" as the applicable standard in workers' compensation cases).

CAL. LAB. CODE § 3600 (West 1998) (imposing liability on the employer for an employee's injury or death that occurred in the course of the employment while the employee was performing services out of and incidental to his employment and was working within the course of his employment).

Case Law:

Dalgleish v. Holt, 108 Cal. App. 2d 561, 237 P.2d 553 (1952) (holding that "a purely personal undertaking" falls outside the scope of the employment).

Maher v. Workers' Compensation Appeals Bd., 33 Cal. 3d 729, 661 P.2d 1058, 190 Cal. Rptr. 904 (1983) (discussing the twofold requirements of section 3600).

McAllister v. Workmen's Compensation Appeals Bd., 69 Cal. 2d 408, 445 P.2d

313, 71 Cal. Rptr. 697 (1968) (establishing that an applicant for workers' compensation has the burden of establishing the "reasonable probability of industrial causation").

Legal Texts:

65 CAL. JUR. 3D *Work Injury Compensation* § 1 (1981 & Supp. 1998) (stating the purpose and origin of workers'. compensation laws).

65 CAL. JUR. 3D *Work Injury Compensation* § 7 (1981 & Supp. 1998) (setting forth the conditions of liability for workers' compensation).

65 CAL. JUR. 3D *Work Injury Compensation* § 73 (1981 & Supp. 1998) (discussing the condition that the injury arise out of and in the course of the employment).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers Compensation* § 184 (9th ed. 1987) (setting forth essential conditions that must be satisfied to receive workers' compensation).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers Compensation* § 185 (9th ed. 1987) (discussing the requirement for an injury to "aris[e] out of and in the course of the employment").

Law Review and Journal Articles:

Carin C. Azarcon et al., *Workers' Compensation; Workers' Compensation Reform*, 25 PAC. L.J. 850 (1994) (explaining the modern workers' compensation laws and recent reforms).

Angel Gomez, III, *Preemption And Preclusion of Employee Common Law Rights by Federal and State Statutes*, 11 INDUS. REL. L.J. 45, 62-63 (1989) (discussing that the workers' compensation laws preclude all other state common law claims).

Joan Hansen, *Scientific Decisionmaking In Workers' Compensation: A Long Overdue Reform*, 59 S. CAL. L. REV. 911 (1986) (discussing workers' compensation claims for occupational diseases).

KESTER SPINDLER

B. When the owner of a residential dwelling purchases comprehensive personal liability insurance, the insurance policy must provide coverage for workers' compensation benefits for any person employed by the owner whose duties are incidental to the maintenance of the dwelling, who worked more than 52 hours and earned more than $100 during the 90 days proceeding the injury.

State Farm Fire and Cas. Co. v. Workers' Compensation Appeals Bd., Supreme Court of California, Decided December 18, 1997, 16 Cal. 4th 1187, 947 P.2d 795, 69 Cal. Rptr. 2d 602.

Facts. Leonard Sr. and his wife purchased a homeowner's insurance policy from State Farm Insurance. The policy covered comprehensive personal liability and included an "Additional Coverage Endorsement," as required by Insurance Code section 11590, for workers' compensation benefits with respect to "residence employees." "Residence employee" was defined in the policy as an employee who "performs duties . . . in connection with the maintenance or use of the residence premises." The additional coverage endorsement stated that "[a] residence employee is covered if during the 90 calendar days immediately before the injury the employee has (a) actually been engaged in such employment by the insured for no less than 52 hours; and (b) earned no less than one hundred dollars in wages."

Leonard Sr. employed his son, Leonard Jr., to perform repairs on one of his residential properties. Leonard Jr. injured his back in the course of this employment. He filed an application for determination of a workers' compensation claim. State Farm contended that Leonard Jr. was barred from recovering workers' compensation benefits under Labor Code section 3352, subdivision (a), because he was the son of his employer. Leonard Jr. argued that he was entitled to such benefits as a "residence employee" under the policy.

After a hearing on the subject, the workers' compensation referee issued an opinion concluding that Leonard Jr. was a covered employee under the worker's compensation law. State Farm petitioned for reconsideration, but the Workers' Compensation Appeals Board denied reconsideration and adopted the referee's opinion. State Farm then filed a writ of review. The court of appeal held that the homeowners did not elect to extend insurance coverage to their son by purchasing the "additional coverage endorsement." The court of appeal invalidated the decision of the Workers' Compensation Appeal Board. The Supreme Court of California granted review to determine whether an injured person is entitled to workers' compensation benefits when it is a family member's policy of comprehensive personal liability insurance.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that when a residential dwelling owner purchases comprehensive personal liability insurance, the policy must provide coverage for worker's compensation benefits for any person employed by the owner whose duties are incidental to the maintenance of the dwelling. The coverage does not apply, however, according to Labor Code section 3352, if the person employed worked less than 52 hours and earned less than $100 during the ninety days preceding the injury. The court reasoned that under Insurance Code section 11590, the term "employee" is interpreted more broadly than under the general workers' compensation law, which excludes "any person employed by his or her parent, spouse, or child." The broader interpretation is used for comprehensive personal liability insurance to make the coverage truly "comprehensive," the insured is protected against liability for damages and workers' compensation law even when claims are bought by a family member. The court, in interpreting workers' compensation statutes, construes them liberally to cover persons injured in the course of employment.

Accordingly, the court dismissed the appellate court's argument that the Insurance Code section should be read to incorporate Labor Code section 3352(a), which would exclude from the definition of "employee" any person employed by his or her parent, spouse or child. The court further noted that Labor Code section 4151 even permits the "election" of workers' compensation benefits for any person not defined as an "employee" and who does not satisfy the hours and wage requirements of Labor Code section 3352, and any person employed by a parent, spouse, or child.

REFERENCES

Statutes and Legislative History:

CAL. INS. CODE § 11590 (West 1989 & Supp. 1998) (imposing mandatory workers' compensation coverage for comprehensive personal liability insurance policies).

CAL. LAB. CODE § 3202 (West 1989 & Supp. 1998) (requiring liberal interpretation of workers' compensation statutes to extend benefits to injured workers).

CAL. LAB. CODE § 3351 (West 1989 & Supp. 1998) (defining employee).

CAL. LAB. CODE § 3352 (West 1989 & Supp. 1998).

CAL. LAB. CODE § 4151 (West 1989 & Supp. 1998) (explaining ways in which an employer can elect to be subject to compensation liability).

Legal Texts:

82 AM. JUR. 2D *Workers' Compensation* § 156 (1992 & Supp. 1998) (discussing, in general, family member status in workers' compensation claims).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers Compensation* § 8 (9th ed. 1987 & Supp. 1998) (discussing liberal construction of statutes in favor of claimant).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers Compensation* § 173 (9th ed. 1987 & Supp. 1998) (discussing employees that are covered under workers' compensation law).

65 CAL. JUR. 3D *Work Injury Compensation* §§ 47, 56, 57 (1981 & Supp. 1998) (defining employee and exclusion of employees).

Law Review and Journal Articles:

Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403 (1998) (investigating the effects of recent cases and legislation on the relationship between injured workers and employers).

Bert Bookham Meek, Jr. & John Harold Swan, *Labor Law: Scope of Term "Employee,"* 32 CAL. L. REV. 289 (1944) (examining the scope of the term "employee").

Dean Stern, *Employment Relation in Workman Compensation and Employer Liability Legislation*, 10 UCLA L. REV. 161 (1962) (discussing the effect of workers' compensation legislation on the scope of employment relations).

VASU MUTHYALA