PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 26
Issue 4 *Symposium on Reform of the Exclusionary Rule*

Article 10

5-15-1999

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

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California Supreme Court Survey

June 1998 - November 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. ADMINISTRATIVE LAW

An administrative agency's interpretation of the legal effect of a statute is entitled to consideration and respect by the courts, but is not equivalent to a quasi-legislative regulation adopted by an agency to which the legislature has delegated law-making power, which bind courts the same as statutes passed by the legislature itself. Therefore, the interpretation of tax laws published by the State Board of Equalization do not have a binding effect on courts, but rather should only be given circumstantial power to persuade depending on factors that support the merit of the interpretation.

II. CONSUMER AND BORROWER PROTECTION LAWS

To obtain a deficiency judgment after the sale of a reposed automobile, a creditor must comply with both the Rees-Levering Motor Vehicle Sales & Finance Act and California's Uniform Commercial Code requirements for adequate notice.

III. CRIMINAL LAW

A. *In future cases anytime an accomplice testifies to the effect of incriminating the defendant or presents testimony that is unfavorable to the defendant, then the testimony should be viewed with care and caution. This rule applies when an accomplice testifies or where a witness may be a possible accomplice, regardless of which party called the accomplice.*

VI. LIBEL AND SLANDER

For purposes of libel actions, an involuntary public figure is a person who takes steps calculated to invite public comment or criticism and who has substantial access to the media to protect his reputation. Under California law, there is no neutral reportage privilege extending to defamatory reports regarding private figures.

VII. NEGLIGENCE

A public safety member who is jointly engaged in the discharge of his responsibilities with fellow public safety personnel cannot be held liable for negligently injuring another public safety member known to be present because the common law firefighter's rule prevents such liability, and no statutory exceptions apply; thus, a police officer's injury from the discharge of a fellow officer's shotgun during a joint attempt to subdue and arrest a suspect is not actionable against the other officer because liability is precluded by the firefighter's rule.

VIII. PARENT AND CHILD

For dissolution actions under California Family Code section 4009, and for paternity actions under the Welfare and Institution Code sections 11475 and 11475.1, the functional date of a child support order is retroactively effective as of the date of the notice of motion or order to show cause, not the date on which the original complaint was filed.

IX. UNFAIR COMPETITION

Insurers are subject to the UCL; thus, the plaintiff's complaint alleging that the defendants engaged in a conspiracy to deny title insurance to all property acquired from a tax sale despite the insurers' guaranty to insure good title adequately stated a cause of action for violation to the UCL and interference with contractual relations.

X. WORKER'S COMPENSATION

A. *Where there has been a work related disability, resulting in the ultimate termination of an individual, that individual's rights to recover are not limited to Labor Code section 132a, and as a consequence, the individual may also plead the California Fair Employment and Housing Act and common law remedies as a route to recovery.*
City of Moorpark v. Superior Ct. 1106

B. *Delay in providing payment of worker's compensation benefits requires additional evidence beyond the mere existence of a delay to be considered unreasonable enough to initiate penalty under California Labor Code section 5814; thus, slightly delayed compensation benefits did not trigger any permanent penalty in the absence of additional evidence of unreasonableness.*
State Compensation Ins. Fund v. Workers Compensation Appeals Bd. 1114

C. *Because medical treatment transportation expenses are properly included as part of the overall expense of medical treatment when the employee is required to undergo medical treatment away from home, the penalty for unreasonable delay in payment of medical treatment transportation expenses applies to the full amount of the award for medical treatment expenses under Labor Code section 5814; furthermore, the employer or its insurer has sixty days after receipt of documentation in which to reimburse the injured worker for medical treatment transportation costs, pursuant to Labor Code section 4603.2, subdivision (b).*
Avalon Bay Foods v. Workers' Comp. Appeals Bd. 1118

I. ADMINISTRATIVE LAW

An administrative agency's interpretation of the legal effect of a statute is entitled to consideration and respect by the courts, but is not equivalent to a quasi-legislative regulation adopted by an agency to which the legislature has delegated law-making power, which bind courts the same as statutes passed by the legislature itself. Therefore, the interpretation of tax laws published by the State Board of Equalization does not have a binding effect on courts, but rather should only be given circumstantial power to persuade depending on factors that support the merit of the interpretation.

Yamaha Corp. of Am. v. State Bd. of Equalization, Decided August 27, 1998, 19 Cal. 4th 1, 960 P.2d 1031, 78 Cal. Rptr. 2d 1.

Facts. Yamaha Corporation of America (Yamaha) is a national retailer of musical instruments. It purchased a quantity of instruments outside of California without paying tax on the purchase, and eventually made promotional gifts of the instruments to various customers, such as artists and musical equipment dealers. The instruments were delivered to customers both inside and outside of California. The State Board of Equalization (Board) subsequently audited Yamaha and determined that the company had used the instruments within California and was subject to the state's use tax, based on a percentage of the instrument's purchase price. Yamaha paid the $700,000 tax assessed by the Board, but brought suit for a refund, claiming that it did not owe taxes on gifts given to customers outside of California.

The trial court agreed with Yamaha's contention that the use tax did not apply to gifts made outside of California and ordered a refund of those taxes paid to the Board. The court of appeal reversed the trial court, relying on an annotation published by the Board indicating that gifts that the donor divests itself of within California are subject to the use tax. The court of appeal treated the annotation as dispositive and reinstated the Board's tax assessment.

Holding. The supreme court reversed the decision of the court of appeal, determining that the court had given too much weight to the Board's published annotation interpreting the application of the use tax statute. The court distinguished between an administrative agency's interpretation of the meaning and legal effect of a statute, and a quasi-legislative regulation adopted by the agency to which the legislature delegated legal authority to make law in a particular area. The court indicated that while an agency's interpretation of a statute should be afforded consideration and respect by the courts, it should not be considered binding in the same fashion as a quasi-legislative regulation. The court stated that agency interpretations considered outside of the context in which they are produced may not even be authoritative.

The court discussed the two categories of administrative rules mentioned above and their distinctions. The court noted that quasi-legislative rules are actual substantive laws within the jurisdiction delegated to the agency by the legislature. Because the agency is actually making law when it promulgates quasi-legislative rules, the court stated that judicial review is narrowly limited to whether the rule is within the authority granted to the agency and whether the rule is reasonably necessary to further the purpose of the statute. Once this has been determined, the court is bound to enforce the rule as issued by the administrative agency.

In discussing administrative rules, which simply interpret statutes, the court noted that this does not involve the exercise of law-making power delegated to an agency by the legislature. The court indicated that because these types of rules merely represent the agency's opinion as to the force and effect of a statute, they are given a lesser degree of judicial deference than quasi-legislative rules. The court stated that the appropriate level of review in cases involving administrative interpretations is to grant them great weight and consideration, but to keep the ultimate responsibility for statutory interpretation in the hands of the court.

The court went on to discuss certain factors to be used when assessing the weight to be given an administrative interpretation. One factor is to what degree the agency has expertise and technical knowledge of a subject that is particularly obscure or complex. The court stated that more deference should be given to an agency's interpretation of its own regulations rather than statutes, because the agency is likely to be very familiar with them and the implications of differing interpretations. The court noted other factors, such as the degree of careful consideration given the interpretation by senior staff members of the agency, whether the interpretation has been a long standing or vacillating position of the agency, and whether the interpretation was adopted in accordance with the provisions of the Administrative Procedure Act, which would enhance the accuracy of the ruling.

In discussing the present case, the court noted that the court of appeal adopted the position that courts will generally not depart from an administrative interpretation that is long-standing and to which parties with an interest in the matter have acquiesced. Because the court determined that this position gave too much deference to an administrative interpretation, essentially elevating it to the level of a quasi-legislative ruling, the decision of the court of appeal was reversed and remanded for the court of appeal to apply the appropriate standard of review.

REFERENCES

Statutes:

CAL. REV. & TAX. CODE § 6001 et seq. (West 1998) (detailing provisions of sales and use taxes).

Case Law:

Western States Petroleum Assn. v. Superior Ct., 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995) ("Quasi-legislative administrative decisions are properly placed at the point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference.").

Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 109 P.2d 935 (1941) ("[I]t is the duty of this court . . . to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction.").

Legal Texts:

2 CAL. JUR. 3D *Administrative Law* § 279 (1973 & Supp. 1998) (stating that courts must be careful not to violate separation of powers doctrine when reviewing quasi-legislative acts of an administrative agency).

2 CAL. JUR. 3D *Administrative Law* § 107 (1973 & Supp. 1998) (stating that construction of a statute by an agency charged with enforcement and interpretation is entitled to great weight, but is not controlling on the courts).

7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 99 (9th ed. 1988 & Supp. 1998) (stating that administrative construction of statutes should be used to aid in determining legislative intent).

9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Administrative Proceedings* § 111 (4th ed. 1997 & Supp. 1998) ("Courts must give appropriate deference to the agency's interpretation.").

Law Review and Journal Articles:

Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157 (1995) (discussing judicial review of agency interpretations of California law).

Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992) (discussing nonlegislative administrative regulations and their interpretation under California law).

David A. Herrman, *To Delegate or Not to Delegate–That is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157 (1997) (addressing problems that exist when administrative agencies preempt state law while avoiding federal procedural safeguards).

Dan R. Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415 (1993) (discussing methods for overseeing executive agency rulemaking including the legislative veto of administrative rules).

Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984) (discussing rules of judicial deference as they apply to agency interpretations of administrative regulations).

JOHN CORRINGTON

II. CONSUMER AND BORROWER PROTECTION LAWS

To obtain a deficiency judgment after the sale of a reposed automobile, a creditor must comply with both the Rees-Levering Motor Vehicle Sales & Finance Act and California's Uniform Commercial Code requirements for adequate notice.

Bank of Am. v. Lallana, Supreme Court of California, Decided August 31, 1998, 19 Cal. 4th 203, 960 P.2d 1133, 77 Cal. Rptr. 2d 910.

Facts. In February 1991, Felisa Lallana and her son-in-law, Sherden Williams (Lallana), purchased a 1991 Mitsubishi Eclipse on credit from the dealer. The dealer assigned the contract and security agreement to Bank of America (Bank). After failing to make several payments, the Bank repossessed the car. In November 1991, the Bank sent Lallana a "Notice of Intent to Sell Repossessed or Surrendered Vehicle," which included a notification that she had the right to redeem the car or reinstate the contract within fifteen (15) days. This notice did not contain the time or location of the sale.

The car was sold by Forest Faulknor & Sons (Faulknor), the Bank's vendor. Faulknor advertises its weekly sales of repossessed cars in local newspapers and specialized newspapers as "public auto auction[s]" and states they are "open to the public sealed bid auto action[s]." The car was sold by a sealed bid for $5,000 (an amount approved by the Bank). The Kelly Blue Book estimated wholesale value of the car was $12,050 and retail value was $14,820.

On November 24, 1992, the Bank sought a deficiency judgment against Lallana for $11,249.84 (the amount she owed on the car minus the $5,000 from the sale of the car). Lallana cross-complained, claiming the notice was given for a private sale and the Bank sold the car in a public sale without proper notice, violating California Commercial Code section 9504 and constituting an unfair business practice under California Business and Professions Code section 17200. The trial court rejected the cross-complaint and the court of appeal reversed.

Holding. The California Supreme Court held that a secured creditor, who sells a defaulting debtor's repossessed car, must comply with the Rees-Levering Act and division 9 of the California Commercial Code in order to obtain a deficiency judgment. The Bank argued that the Rees-Levering Act, which deals with consumer protection, is a specific statute and controls over general provisions of the California Commercial Code. The Bank contended the "rule of statutory construction" requires that when a general statute conflicts with a special act, the special act is to be considered an exception to the rule.

The court determined that the "rule of statutory construction" did not apply in this case. First, the two statutes do not conflict because it is possible to comply with both. Secondly, the legislature specifically intended that creditors comply

with both. The California Civil Code section 2983.8(b) states that a creditor's sale must comply with both laws.

The court further held that giving notice of a private sale, then conducting a public sale without giving the notice required of a public sale does not comply with the notice requirements of the California Commercial Code section 9504, subdivision 3. The Bank argued that because it gave notice of a private sale, the sale is private regardless of the character of the sale. The court recognized the purpose of giving notice of the time and location of a public sale was important to the debtor because it gave the debtor the opportunity to redeem the collateral, produce another purchaser to bid higher, see that the sale is conducted in a commercially reasonable manner, and to inspect the collateral for damage caused after repossession. Given the importance of notice, the court will not allow the creditor to lead the debtor to believe there will be one type of sale and then hold a different one.

The court then examined whether the sale conducted was public or private. Recognizing that there is no authority in California defining a "public" sale, the court looked to other jurisdictions who adopted the same section of the Uniform Commercial Code. It determined a "public" sale is one that is publicly advertised, open to the public, and is sold after competitive bidding to the highest bidder. In the present case, Faulknor advertised its auctions in newspapers, allowed the public to bid, and sold the car to the highest bidder in a two day sealed-bid auction. The sale was determined to be public and the Bank failed to give proper notice; therefore, the Bank could not collect a deficiency judgment against Lallana.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 2983.2 (West 1999) (Rees-Levering Motor Vehicle Sales and Finance Act requires notice to debtor of the right to redeem before selling a repossessed car).

CAL. COM. CODE § 9504(3) (West 1999) (notice requirements listed must be followed to sell repossessed collateral).

CAL. CIV. CODE § 2983.8 (West 1999) (no deficiency judgment allowed, if the creditor does not comply with the California Civil Code and the California Commercial Code).

Case Law:

Fox v. Kramer, 70 Cal. App. 4th 177, 82 Cal. Rptr. 2d 513 (1999) (discussing rule of statutory construction).

People v. Gilbert, 1 Cal. 3d 475, 462 P.2d 580, 82 Cal. Rptr. 724 (1969) (discussing rule of statutory construction).

Creditors Bureau v. De La Torre, 16 Cal. App. 3d 558, 94 Cal. Rptr. 145 (1971) (held creditor need only comply with the Rees-Levering Act), *overturned by* CAL. CIV. CODE § 2983.8).

First Nat'l Bank of Belen v. Jiron, 741 P.2d 1382 (N.M. 1986) (holding that when a creditor gives a notice of a private sale, then holds a public one, the creditor has not complied with the UCC).

Legal Texts:

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Sales* § 230 (1998) (stating purpose of the Rees-Levering Act was to protect automobile purchasers from abusive sales tactics).

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Sales* § 242 (1998) (discussing notice requirements to collect a deficiency judgment).

Law Review and Journal Articles:

Julie B. Strickland & Andrew Moritz, Defending Against Claims Brought under California Business and Professions Code Section 17200 et seq., 990 A PLI/CORP 727 (1997) (discussing how to bring a claim under California's Unfair Competition law).

Court Upholds Debtor's Claim Bank Did Not Inform Her of Car's Sale, 7/2/97 ANDREWS' BANK & LENDER LIAB. LITIG. REP. 9 (1997) (a sealed bid auction is a public sale.).

Boyd J. Peterson, Secured Transactions: What is Public or Private Sale under UCC § 9-504(3), 60 A.L.R.4th 1012 (1988) (discussing factors to determine whether a sale is public).

Sufficiency of Secured Party's Notification of Sale or Other Intended Disposition of Collateral under UCC § 9-504(3), 11 A.L.R.4th 241 (1982) (stating that when a creditor gives a notice of a private sale, then holds a public one, the creditor has not complied with the UCC).

SARA DAYTON

III. CRIMINAL LAW

A. In future cases anytime an accomplice testifies to the effect of incriminating the defendant or presents testimony that is unfavorable to the defendant, then the testimony should be viewed with care and caution. This rule applies when an accomplice testifies or where a witness may be a possible accomplice, regardless of which party called the accomplice.

People v. Guiuan, Supreme Court of California, Decided July 6, 1998, 18 Cal. 4th 558, 957 P.2d 928, 76 Cal. Rptr. 2d 239.

Facts. The defendant, Guiuan, was convicted of first-degree murder and kidnapping of Marston. The prosecution presented the testimony of accomplices to the alleged crimes. Prince, Josh, and Elisha testified that Guiuan was the one behind Marston's confinement and the execution of her murder. They also testified that Guiuan tried to convince them that Josh and Marston were "snitches" and were to blame for placing her children in danger. Furthermore, the witnesses noted that Guiuan's paranoid belief that she was followed by gang members and that snipers were outside of her home were results of methamphetamine use.

In her defense, Guiuan presented an expert that testified she suffered from "borderline personality disorder," which caused her to act dissociated or psychotic under stress. The defendant also argued that this condition made her feel as if Marston was a threat to her family and that people were after her because she volunteered as an informant. Guiuan also pointed to portions of the accomplices' testimony, which she argued showed she suffered a mental disorder, acted under duress, and lacked intent to kill. First of all, Elisha testified that the defendant never said she wanted Marston dead or that she would kill her. Second, Josh testified that the defendant never said she wanted Marston hurt, but wanted her "in a safe place," "taken care of," or "out of here." Finally, the defendant pointed out that Prince heard her say that she felt sick and could not go through with it.

The trial court instructed the jury that accomplice testimony should be viewed with distrust. The court of appeal noted that the trial court should have modified the instruction, *sua sponte*, to indicate that the rule does not apply to testimony which is favorable to the defendant. However, the court of appeal found this to be a harmless error and affirmed the trial court. The California Supreme Court granted review and affirmed the judgment of the court of appeal.

Holding. The court first identified the rule that when the prosecution calls an accomplice as a witness, then the court must instruct the jury, *sua sponte*, to view the testimony with distrust. On the other hand, the court noted, if the defendant calls an accomplice, the instruction need only be given if the defendant requests it. If the instance arises where both parties call the accomplice, the court emphasized that the instruction should apply only to testimony on the prosecution's behalf.

After the court presented the law, it found discord with what the law demanded of the trial court. The court noted that the law requires the trial court to sift through an accomplice's testimony and determine what is favorable and what is unfavorable to the defendant.

After identifying the problem with the present law, the court held that in future cases, anytime an accomplice testifies to the effect of incriminating the defendant or presents testimony that is unfavorable to the defendant, the testimony should be viewed with care and caution. The court noted that this rule applies when an accomplice testifies or where a witness may be a possible accomplice. The court warned that accomplices might have a motive to testify falsely in order to promote leniency in their own prosecution. The court continued that this concern is addressed with the new instruction. Moreover, the instruction proposed by the court simplifies matters because it is applicable no matter whether the defendant or the prosecution called the witness.

In giving analysis to the case at bar, the court pointed out that although the accomplices testified for the prosecution, their testimony may have been favorable to the defendant. This is so because the portions of the accomplices' testimony supported the defendant's argument that she lacked intent to kill, acted under duress, and suffered from "borderline personality disorder." The court pointed out that the defendant called none of the accomplices, and at the prosecutor's request, the trial court gave the instruction to view the testimony with distrust. The court also indicated that the defendant did not object to the instructions, and therefore the court had no requirement to modify the instructions. Furthermore, the court emphasized that the trial court's instructions were consistent with over half of a century of prior statutory and decisional law. It is for the foregoing reasons that the California Supreme Court affirmed the court of appeal.

REFERENCES

Statutes and Legislative History:

CALJIC No. 3.18 (6th ed. 1996) (indicating when a jury should be informed to view an accomplice's testimony with distrust).

Cal. Law Revision Comm., 21-22 West's Annotated Code Civ. Proc. § 2061 (1983 ed.) (noting that the repealing of former section 2061 of the Code of Civil Procedure in 1965 shall have no effect on the giving of instructions within the section).

Case Law:

People v. Caffey, 161 Cal. 433 (1911) (noting that if evidence from an accomplice comes from a tainted source, then the testimony is not to be considered as that of a "clean man").

People v. Graham, 83 Cal. App. 3d 736, 149 Cal. Rptr. 6 (1978) (holding that the instruction involving the distrust with which the testimony of the accomplice witness should be regarded was improper, even though the witness testified in the defendant's favor).

People v. Toro, 47 Cal. 3d 966, 766 P.2d 577, 254 Cal. Rptr. 811 (1989) (pointing out that the defendant's failure to object to the jury instructions constituted an implied consent to the jury's consideration of a lesser-favored offense).

People v. Williams, 45 Cal. 3d 1268, 756 P.2d 221, 248 Cal. Rptr. 834 (1988) (requiring courts to give the "with distrust" instruction to the jury when an accomplice is called by the prosecution).

Legal Texts:

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2948 (2d ed. 1989) (discussing the court's roll in giving jury instructions in situations where there is accomplice testimony).

Law Review and Journal Articles:

J. Arthur L. Alarcon, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOYOLA L.A. L. REV. 953 (1987) (noting that accomplice testimony in situations where the accomplice was denoted as a criminal of the "vilest character").

Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800 (1987) (pointing out that accomplices usually receive a reduction in sentence if the prosecutor is satisfied with their testimony or if the testimony is truthful).

Neil B. Eisenstadt, *Let's Make A Deal: A Look at U.S. v. Daily and Prosecutor–Witness Cooperative Agreements*, 67 B.U. L. REV. 749 (1987) (indicating that eliciting testimony from accomplices often involves a deal struck between the government and the guilty witness).

Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81 (1994) (noting that informant and accomplice misconduct victimizes many innocent people).

NATHANUEL THOMAS

B. A defendant's attempt to cash a forged check by dropping it in a chute in the window of a check-cashing facility did not constitute burglary; passing the check through the chute was not an "entry" as contemplated by the burglary statute.

People v. Davis, Supreme Court of California, Decided July 30, 1998, 18 Cal. 4th 712, 958 P.2d 1083, 76 Cal. Rptr. 2d 770.

Facts. The defendant was convicted of burglary, forgery, and receiving stolen property when he placed a forged check through the chute of a check-cashing facility. The defendant presented a check to the cashier that was drawn from the account of a third party. The defendant had forged the name of the third party on the check, and made the check payable to himself under an alias. The cashier passed the check back to the defendant through the chute and asked him to place his thumbprint and signature on the back of the check. In the meantime, the cashier called the owner of the check to verify the transaction. When the owner denied writing the check, the cashier called the police, who arrested the defendant at the scene. The Attorney General conceded that no part of the defendant's body entered into the chute. The defendant was convicted of the three offenses and the court of appeal affirmed the judgment.

Holding. The California Supreme Court reversed the court of appeal's decision in so far as it held the defendant guilty of burglary. The court held that placing the forged check through the chute did not constitute an "entry" as contemplated by the burglary statute.

Noting that the burglary statute, section 459, does not define the word "enter," the court looked at the underlying policy behind the common law crime and those policies expressed in more recent California decisions, in reaching its conclusion. The court observed that the technical, common law definition of burglary was aimed at protecting the sanctity of the home when the occupants were most vulnerable, at night. Further, although the crime of burglary has been modified by statute, the court found that the requirements of "breaking" and "entry" still aim at protecting an occupant's possessory interest in the building. The court recognized that, in California, a person can be convicted of burglary regardless of whether an instrument was used to actually effectuate the felony or larceny, or was used only to gain "entry." However, the court concluded that passing a forged check through a chute that opened to the outside did not threaten such an interest and thus did not constitute an "entry" as contemplated in the modern statute.

In reaching this decision, the court examined *People v. Ravenscroft*, a case in which the court of appeal upheld a conviction for burglary where the defendant stole an ATM card and used it to illegally withdraw funds from an ATM machine. The court in the present case agreed with the court of appeal in *Ravencroft*, that the insertion of the ATM card invaded the air space of the machine, but concluded that such an invasion was not sufficient to constitute an "entry." The court argued that

treating this as an "entry" to satisfy the burglary elements would be too expansive. While an ATM card used to "jimmy" a lock would be an entry, inserting a stolen ATM card into an ATM machine, or a forged check into a chute would not. The court concluded that the latter two situations do not violate the occupant's possessory interest in the building and thus do not constitute an "entry" as contemplated by the statute.

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 459 (West & Supp. 1999) (generally setting forth the elements for burglary).

Case Law:

People v. Frye, 18 Cal. 4th 894, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998) (holding that you need not have a trespass to have an entry).

People v. Ravenscroft, 198 Cal. App. 3d 639, 243 Cal. Rptr. 827 (1988) (discussing an entry into the air space of a structure for purposes of satisfying the burglary elements).

People v. Salemme, 2 Cal. App. 4th 775, 3 Cal. Rptr. 2d 398 (1992) (holding that entry can occur even where the occupant is not threatened with physical danger by the occupant's presence).

Legal Texts:

18 CAL. JUR. 3D *Criminal Law* § 1090 (1984 & Supp. 1998) (generally discussing the entry requirement in the burglary statute).

18 CAL. JUR. 3D *Criminal Law* § 1091 (1984 & Supp. 1998) (stating that entry be accompanied with requisite intent and that entry may occur where a part of the body or an instrument is inserted in the structure).

2. B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* § 661(b) (2d. ed. 1989) (generally discussing methods of entry; entry can be indirect).

2. B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* § 662 (requiring that entry be without consent and focusing on the possessory interest being threatened.)

Law Review and Journal Articles:

Gary Spero, *Eliminating the "Structure" Requirement Loophole in California's Criminal Looting and Burglary Statutes*, 13 WHITTIER L. REV. 615 (1992) (discussing the entry requirement as it applies to looting and the structure requirement).

Judy E. Zelin, J.D., *Maintainability of Burglary Charge Where Entering the Building Is Made With Consent*, 58 A.L.R.4th 335 (discussing issues involving consent as well as entry into hallways or parts of buildings open to the public as sufficient to constitute an entry for burglary).

Michale M. Padeco, *The Armed Career Criminal Act: When Burglary Is Not Burglary*, 26 WILLAMETTE L. REV. 171 (tracing the development of modern burglary statutes to their common law origins and briefly discussing the requirement of entry in modern statutes).

JULIE TROTTER

C. Because the mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder, all murder conspiracies are conspiracies to commit first degree murder and as such are in all instances punishable with the penalty prescribed for premeditated and deliberated first degree murder; thus, the trial court properly did not require the jury to determine the degree of the murder alleged as the target offense of conspiracy.

People v. Cortez, Supreme Court of California, Decided August 27, 1998, 18 Cal. 4th 1223, 960 P.2d 537, 77 Cal. Rptr. 2d 733.

Facts. According to California Penal Code section 182(a), a crime of conspiracy is punishable in the same manner as the target offense. Where the crime is divisible by degree and the jury fails to determine the degree of the felony to which the defendant conspired, the lesser degree will be prescribed. However, in excepting murder from its prescription, section 182(a) states that the punishment prescribed is that for murder in the first degree.

In an effort to avenge the death of their fellow gang member, Mario Cortez and Mauricio Corletto performed a drive-by shooting of a rival gang. Corletto fired four shots before he was killed by the rival gang's return fire. Cortez was convicted of conspiracy to commit murder and sentenced to twenty-five years to life in prison. Claiming error based on the trial court's failure to require the jury to determine the degree of murder to which the defendant conspired and failure to give specific instructions on premeditation and deliberation, Cortez appealed. The court of appeal rejected Cortez's claim and affirmed the trial court's judgement. The court reasoned that conspiracy to commit murder is necessarily a conspiracy to commit premeditated murder, making the trial court's failure to require a determination of degree proper and specific instructions on premeditation and deliberation needless. The California Supreme Court granted review to determine whether, as Cortez urged, conspiracy to commit murder is divisible into degrees and therefore punished according to degree, or whether, as the trial court found and the court of appeals affirmed, in every instance a conspiracy to commit murder is a conspiracy to commit first degree murder.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated murder in the first degree and as such, all defendants convicted of conspiracy to commit murder are punishable to the extent called for by a conviction of murder in the first degree. Consequently, the court

further held that the lack of both a determination of degree of murder and a specific instruction on premeditation and deliberation were not error.

The court attributed confusion surrounding the interpretation of section 182 to two seemingly conflicting cases. The first case, *People v. Kynette*, expressly held that conspiracy to commit murder can only be a conspiracy to commit first degree murder because conspiracy necessarily includes premeditation and deliberation. Fifteen years after the California Supreme Court decided *Kynette*, the Legislature amended section 182. Twenty years after the Legislature amended section 182 and thirty-five years after *Kynette*, the California Supreme Court handed down *People v. Horn*, which addressed in dicta the effects of the section 182 amendments. In a sharp contrast to *Kynette*, the *Horn* court stated that conspiracies, including murder, are divisible according to degree. In taking the position aligned with the *Kynette* decision, the court resolves the conflict by explaining first that, unlike *Horn*, *Kynette* was premised on laws similar to those currently in existence, second that the *Horn* interpretation of section 182 is at odds with section 182's policy, third that the legislature amended section 182 to codify *Kynette's* holdings, and finally that the statements made in *Horn* were simply dicta.

The court stated that *Horn* was premised on law that is no longer in existence today. When *Horn* was decided, section 189 required a defendant to "maturely and meaningfully reflect upon the gravity of his contemplated act" in order to satisfy the premeditation and deliberation requirements of murder in the first degree. The Legislature amended section 189 and such reflection is no longer necessary. Currently, the necessary showing is that of a "mere 'advanced planning of the crime,'" consistent with the definition in existence when *Kynette* was decided. The *Horn* court also relied on the diminished capacity defense to support its view that conspiracy to commit murder is divisible. The Legislature has since abrogated that defense.

The court next stated that it is possible to conclude from section 182 that the purpose of the amendment was to effectuate the holding in *Kynette*, which provides that conspiracy to commit murder can only be conspiracy to commit first degree murder. Finally, the court reasoned that punishment was not at issue in *Horn* and therefore interpretation of section 182's punishment provision by that court is pure dicta and therefore not binding precedent.

Consequently, the supreme court concluded that pursuant to the punishment provision of section 182, in every instance, conspiracy to commit murder is necessarily conspiracy to commit first degree murder. The court reasoned that Cortez could not have agreed to commit the drive-by shooting with Corletto, without the requisite premeditation and deliberation required for first degree murder because intent to conspire "does not arise of a sudden within a single person but is necessarily formed and then shared by at least two persons." Accordingly, the trial court's refusal to require the jury to determine the degree of murder to which Cortez conspired was entirely proper.

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 182(a) (West 1988 & Supp. 1998) (setting forth the definition and punishment for crimes of conspiracy).

CAL. PENAL CODE § 189 (West 1988 & Supp. 1998) (no longer imposing that a defendant must have meaningfully and maturely reflected upon his act to constitute that defendant acted with premeditation and deliberation).

Case Law:

People v. Swain, 12 Cal. 4th 593, 909 P.2d 994, 49 Cal. Rptr. 2d 390 (1996) (discussing the requisite level of intent required to establish conspiracy to commit murder).

People v. Horn, 2 Cal. 3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974) (discussing in dicta the effects of legislative amendments to California Penal Code section 182).

People v. Kynette, 15 Cal. 2d 731, 104 P.2d 794 (1940) (explaining the premeditation and deliberation necessary to a finding of conspiracy to commit murder).

Legal Texts:

17 CAL. JUR. 3D *Criminal Law* § 166 (1984 & Supp. 1994) (generally discussing jury instructions with respect to conspiracy charges).

17 CAL. JUR. 3D *Criminal Law* §§ 153-156 (1984 & Supp. 1994) (explaining the required elements necessary to prove a conspiracy charge).

17 CAL. JUR. 3D *Criminal Law* § 152 (1984 & Supp. 1994) (stating the general punishments for crimes of conspiracy).

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Elements Of Crime* § 156 (2d ed. 1988) (generally discussing elements of the crime of conspiracy).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2951 (2d ed. 1988) (discussing the effect of error where the judge, while giving the jury instructions, misstates either the elements of a crime or defenses available to the defendant.

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Elements Of Crime* § 165 (2d ed. Supp. 1998) (discussing the necessary intent to commit the target offense of the conspiracy).

Law Review and Journal Articles:

Jonathan Simonds Pyatt, *The Required Mental State for Conspiracy to Commit Murder Is Intent to Kill, and a Court Commits Reversible Error by Instructing a Jury on Theories of Implied Malice: People v. Swain*, 24 PEPP. L. REV. 757, 765 (1997) ("California's conspiratorial homicide laws remain unsettled as the void caused by 'piecemeal' judicial interpretation and incomplete statutory abrogation becomes more confusing.").

Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1 (1992) (surveying conspiracy law of the past and present as well as discussing expectations of conspiracy law in the 21st century).

Patrick A. Broderick, Note, *Conditional Objectives of Conspiracies*, 94 YALE L.J. 895, 895 (1985) (defining the objectives of criminal conspiracies in a way that is both uniformly enforceable and consistent with the limited and justifiable goals of conspiracy law: preventing likely crimes and apprehending likely criminals).

Anthony M. Perez & Tammy L. Samsel, *Crimes; Carjacking and Drive-by Shooting–First Degree Murder*, 25 PAC. L.J. 513, 513 (1994) (referencing California code sections that impose first degree murder on defendants found to engage in murder resulting from drive-by shootings).

Howard Sukenic, *Gang Wars: Prosecuting Gang-related Offenses–the Legal and Logistical Hurdles*, 33 JAN ARIZ. ATT'Y 25 (1997) (providing information and advice on preparing for and trying gang related crimes).

PIA VITALIS

D. Where a search condition is properly imposed, a warrantless, suspicionless search of an adult parolee is reasonable within the meaning of the Fourth Amendment to the United States Constitution because such a search does not violate an expectation of privacy that society is prepared to recognize as legitimate; thus, pursuant to a properly imposed conditional parole agreement, the trial court appropriately denied the defendant's motion to suppress inculpatory evidence obtained by police during a search without particularized suspicion.

People v. Reyes, Supreme Court of California, Decided August 21, 1998, 19 Cal. 4th 229, 961 P.2d 984, 78 Cal. Rptr. 2d 295.

Facts. In its *People v. Burgener* decision, the California Supreme Court held that government agents conducting a warrantless search of a parolee subject to a search condition must maintain at least a reasonable suspicion that the parolee has or is going to engage in criminal activity. However, the court's *In re Tyrell J.* opinion held valid a suspicionless, warrantless search of a juvenile probationer subject to a proper search condition.

Pursuant to an anonymous telephone tip, the defendant's parole officer requested police officers to evaluate whether the defendant was involved with drugs. Police searched and found a small amount of methamphetamine in a shed from which the defendant, who was subject to a proper search condition, emerged. The trial court found that the defendant's parole officer made an adequate showing of reasonable suspicion and consequently dismissed the defendant's motion to suppress the methamphetamines. As a result, the defendant pled guilty and admitted one prior felony conviction. Finding the search was not evidenced by the requisite reasonable suspicion, the court of appeal reversed the trial court's decision. The supreme court granted review to determine whether the court of appeal correctly held that reasonable suspicion is a prerequisite to a valid parolee search or whether, as the Attorney General asserted, the court should extend the reasoning of *In re Tyrell J.* and thereby validate suspicionless searches pursuant to proper search conditions.

Holding. Agreeing with the Attorney General, the California Supreme Court reversed the court of appeal's decision and held that a parole search may be reasonable despite the absence of particularized suspicion. The court sought guidance from the United States Supreme Court, which previously stated that although some measure of particularized suspicion is necessary to validate a warrantless search, such is not imposed by the Fourth Amendment. The court pointed out that our highest court looks to several factors to determine whether a search violates the Fourth Amendment, including: "(1) the individual's interest,

(2) the government's interest, (3) the necessity for the intrusion, and (4) the procedure used in conducting the search."

The court concluded that the individual's interest is outweighed by both the government's interest and the necessity for the intrusion as long as the procedure does not reach a level that constitutes "arbitrary or oppressive conduct by the searching officer." The court reasoned that a parolee's privacy interest is significantly diminished when it is subject to a proper search condition that dispenses with a warrant requirement. The court further reasoned that the government's interest in public safety and rehabilitative efforts assured by compliance with conditions of freedom weighs significantly in the government's favor. Next, the court explained that the defendant's conduct exemplified in the original conviction created a compelling need for government intrusion and diminution of the defendant's privacy expectation. Finally, the court supported the government's interest by citing recent United States Supreme Court decisions eliminating the requirement of particularized suspicion where such would jeopardize a compelling governmental interest advanced by the search.

Consequently, the court concluded that the "level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely monitored." The court further concluded that where the purpose is to protect the public and deter future crimes, balance weighs in favor of the intrusion and against the parolee.

Accordingly, the parole agreement subjecting the defendant to searches of person and property "without a warrant by an agent of the Department of Corrections or any law enforcement officer" was reasonable. Thus, the trial court's refusal to suppress drugs found in an area occupied by the defendant, a parolee, did not violate his Fourth Amendment rights.

REFERENCES

Statutes and Legislative History:

U.S. CONST. amend. IV.

CAL. PENAL CODE § 3000 et seq. (West 1988 & Supp. 1998) (imposing period of parole upon prisoner who has no choice but to accept it).

Case Law:

Morrissey v. Brewer, 408 U.S. 471 (1972) (generally discussing the function and importance of the parole system).

People v. Redic, 68 Cal. App. 4th 235, 79 Cal. Rptr. 2d 906 (1998) (applying California Supreme Court's decision in *Reyes*, the present case).

People v. Burgener, 41 Cal. 3d 505, 532, 714 P.2d 1251, 1268, 224 Cal. Rptr. 112, 130 (1986) (stating that "a warrantless search condition is a reasonable term in any parole of a convicted felon from state prison.").

In re Tyrell J., 8 Cal. 4th 68, 876 P.2d 519, 32 Cal. Rptr. 2d 33 (1994) (holding that police officer's warrantless search did not violate Fourth Amendment rights of juvenile probationer who was subject to condition of probation authorizing warrantless searches even though the police officer was unaware of the probation condition).

Legal Texts:

49 CAL. JUR. 3D *Penal Institutions* § 185 (1979 & Supp. 1994) (generally discussing parole contracts and agreements).

49 CAL. JUR. 3D *Penal Institutions* § 167 (1979 & Supp. 1994) (explaining certificates of conditional release with respect to parolees).

20 CAL. JUR. 3D *Criminal Law* § 2543 (1985 & Supp. 1994) (generally discussing probation and parole).

4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2282 (2d ed. 1989) (discussing generally search of paroled prisoners' premises).

1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Introduction to Evidence* § 27 (3d ed. 1986) (explaining repercussions of offenses committed during parole).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1725 (2d ed. 1989) (generally discussing the institution of parole).

Law Review and Journal Articles:

Sunny A. M. Koshy, Note, *The Right of [All] the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 451 (1988) (arguing that "courts should not restrict fundamental Fourth Amendment rights simply because the individual is a probationer or parolee.").

Thomas J. Bamonte, *The Viability of Morrissey v. Brewer and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U. L.J. 121, 122-23 (1993) ("Parolees and probationers are in a nether world between free citizens and prisoners. They live and circulate among the rest of us. They bear no obvious stigma. Yet, parolees and probationers remain in the legal 'custody' of the state until the expiration of their criminal sentences. Their liberty is conditioned upon compliance with state-imposed restrictions of varying degrees of severity.") (citations omitted).

Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to Be Free from Unreasonable Searches and Seizures?* 35 SANTA CLARA L. REV. 1237 (1995) (discussing limitations placed on probations released according to conditional agreements).

John Warren May, Note, *In re Tyrell J.: California's Application of Search and Seizure Limitations to Juvenile Probationers*, 21 J. CONTEMP. L. 307 (1995) (finding erroneous the court's decision to allow officers to search without reasonable cause juvenile probationers subject to conditional agreements).

Lidia Stiglich, Comment, *Fourth Amendment Protection for Juvenile Probationers in California, Slim or None?: In re Tyrell J.*, 22 HASTINGS CONST. L.Q. 893 (1995) (analyzing juvenile probationers' Fourth Amendment rights in light of court's decision to allow search without reasonable cause).

PIA VITALIS

E. A criminal defendant does not have a unilateral right to jury instructions on lesser related offenses that are not necessarily included in the charged offense.

People v. Birks, Supreme Court of California, Decided August 31, 1998, 19 Cal. 4th 108, 960 P.2d 1073, 77 Cal. Rptr. 2d 848.

Facts. In *People v. Geiger*, the California Supreme Court held that, in certain circumstances, a criminal defendant has a state constitutional right to jury instructions on lesser offenses that are related to, but not necessarily included in, the stated charge. In the instant case, the state charged the defendant with two counts of second degree burglary after he was caught "red-handed" after he entered two closed and locked restaurants at night. The owner of the first restaurant reported that some food items were missing. The missing food was never found. The owner of the second restaurant reported no items missing. The information further alleged that the defendant had two prior serious felony convictions for purposes of the "Three Strikes" law.

At trial, the prosecution conceded to the defense request that the jury receive a trespass (which is a misdemeanor) instruction on Count Two. Defense counsel argued that the evidence failed to show intent to steal. The court, however, refused to grant the defense request for a trespass instruction on Count One. The jury found the defendant guilty on both Counts One and Two of second degree burglary and the court sentenced the defendant to a Three Strikes term of twenty-five years to life on Count One, with a concurrent one year jail sentence on Count Two.

The court of appeal held that the trial court's refusal to give trespass instructions on Count One was reversible error and reversed the defendant's conviction. The court reasoned that although trespass is not a lesser necessarily included offense of burglary, *Geiger* required that the trial court give a trespass instruction because 1) the evidence of intent to steal was weak; 2) entry into the restaurant exposed the defendant to prosecution for trespass; 3) the defense theory was consistent with conviction of the lesser offense; and 4) trespass was, by nature, closely related to the crime of burglary.

Holding. The California Supreme Court reversed the court of appeal's holding that the defendant's conviction must be overturned for *Geiger* error and remanded the case for determination of the defendant's other claims of error under the Three Strikes law, which the appellate court did not adequately address. In overruling *Geiger*, the court first noted that, under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the two offenses are such that the greater cannot be committed without committing the

lesser or if the facts alleged in the pleading include all of the elements of the lesser offense, such that the greater cannot be committed without committing the lesser. This is permissible because the stated charge thus notifies the defendant, for due process purposes, that he must be ready to defend against the necessarily included lesser offense. Furthermore, California law has long required that a court instruct the jury on the lesser included offense if there is substantial evidence that the defendant is guilty of only the lesser offense. The *Geiger* rule, however, went beyond these basic principles to mandate that, in some instances, a defendant is entitled to instructions on lesser offenses that are not necessarily included, but only bear a close relationship to the stated offense. To avoid the constitutional difficulty of requiring notice to the defendant of the charges against him, *Geiger* held that such an instruction was available only upon the defendant's request.

In deciding whether to overturn *Geiger*, the court noted that the federal law seemingly in support of *Geiger* had been overturned. In *Schmuck v. United States*, the United States Supreme Court held that a noncapital defendant may get instructions on a lesser included offense only when the offense is necessarily included under a strict comparison of the elements of the greater and allegedly lesser offenses. The court extended its holding to capital defendants in *Hopkins v. Reeves*.

The California Supreme Court next asserted that the *Geiger* rule violated principles of fundamental fairness by giving the defendant greater rights either to require, or prevent, the consideration of lesser non-included offenses, despite the fact that the State alone should be responsible for determining the charges. Under *Geiger*, the prosecution can only obtain a conviction for uncharged offenses to which the defense agrees and must hence devote its resources only to the stated charges. Thus, giving instructions on related charges invites the jury to convict the defendant only of something that no party may have attempted to prove beyond a reasonable doubt. On the other hand, if the evidence presented at trial convinces the prosecution or the court that only some lesser related charge has been established and that the jury should consider this option, the defendant may be able to block consideration of this offense by raising notice objections, thereby leaving acquittal as the only viable option for the jury. Additionally, the prosecution may suffer unfair prejudice when evidence of a lesser offense surfaces at trial and the defendant then has the power to determine whether the court should give instructions on such an offense.

The court also noted the vagueness and uncertainty inherent in *Geiger*'s "relationship" test. What evidence is needed to show that one offense is sufficiently related to another? The court asserted that, without the clear "elements" test to guide the parties, trial planning strategy is more difficult. The court further asserted that there can be no clear standards for determining whether a lesser offense is sufficiently related to another offense.

Finally, the court argued that when additional non-included offenses are interjected at the trial itself, or even at the pleading stage, prosecutorial discretion to control the charges is violated. This, the court reasoned, may violate the fact that

the prosecution should have sole discretion to decide what charges to bring. While the court chose not to fully resolve the separation of powers issue involved, it noted that, when possible, a court should avoid interpretations in one area that raise constitutional questions in another. In reversing *Geiger*, the court also stated that its holding applied to the instant defendant and was generally retroactive. Its holding, it stated, does not violate due process because the new rule does not expand criminal liability or enhance punishment for conduct previously committed.

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 459 (West 1988 and Supp. 1999) (defining burglary).

CAL. PENAL CODE § 460-461 (West 1988 and Supp. 1999) (distinguishing first and second degree burglary).

CAL. PENAL CODE § 602 (West 1988 and Supp. 1999) (defining trespass).

Case Law:

Hopkins v. Reeves, 524 U.S. 88 (1998) (concluding that a state may deny a capital defendant instructions on a lesser non-included offense pursuant to a general rule denying such instructions in all cases).

Schmuck v. United States, 489 U.S. 705 (1989) (holding that the right of a federal noncapital defendant to obtain instructions on a lesser offense is limited by a strict elements test, which compares the statutory elements of the crimes).

Beck v. Alabama, 447 U.S. 625 (1980) (holding that a defendant has a right to instructions on lesser necessarily included offenses in state capital cases).

People v. Barton, 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995) (reiterating that the trial court has a duty to instruct on lesser offenses sua sponte).

People v. Geiger, 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984), *overruled by* People v. Birks, 19 Cal. 4th 108 (1998) (holding that, in some circumstances, a criminal defendant has a unilateral right to jury instructions on lesser offenses that are not necessarily included in the offense charged).

People v. Lohbauer, 29 Cal. 3d 364, 627 P.2d 183, 173 Cal. Rptr. 453 (1981) (affirming that a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense or the facts alleged in the pleading are such that the greater offense cannot be committed without committing the lesser offense).

Legal Texts:

17 CAL. JUR 3D *Criminal Law* § 78 (1984 & Supp. 1998) (generally discussing how to determine whether an offense is a lesser included offense).

17 CAL. JUR 3D *Criminal Law* § 79 (1984 & Supp. 1998) (discussing what constitutes a lesser included offense).

21 CAL. JUR. 3D *Criminal Law* § 3067 (Supp. 1998) (generally discussing a court's duty to instruct on lesser included offenses).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2936 (1989 & Supp. 1998) (discussing generally lesser included offenses).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2938 (1989 & Supp. 1998) (discussing instructions on lesser *related* offenses).

Law Review and Journal Articles:

Michael G. Pattillo, Note, *When "Lesser" Is More: The Case for Reviving the Constitutional Right to a Lesser Included Offense*, 77 TEX. L. REV. 429 (1998) (arguing that the recent decline in a defendant's "right" to an instruction on lesser included offenses should be reversed).

Russell G. Donaldson, Annotation, *Lesser-Related Offense Instructions: Modern Status*, 50 A.L.R.4th 1081 (1997) (summarizing states' laws on instructions on lesser-related offenses).

Tim Dallas Tucker, *State v. Black: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases*, 41 S.D. L. REV. 465 (1996) (discussing constitutional considerations and tests used in other jurisdictions, including *Geiger's* "inherent relations" test).

James A. Shellenberger & James A. Strazzella, *The Lesser Included Doctrine and the Constitution; The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1 (1995) (discussing the constitutional considerations related to instructions on lesser included offenses).

Christen R. Blair, *Constitutional Limitations of the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445 (1984) (concluding that a lesser-included instruction is necessary in some cases to maintain the reliability of the criminal fact-finding process).

JILL JONES

F. California Penal Code section 12022(a)(1) allows for sentence enhancement of a criminal defendant who a jury has found, separate of the substantive crime charged, was armed during the commission of the crime; therefore when two or more defendants are charged jointly with a substantive crime, a finding by the jury that one defendant is armed within the meaning of California Penal Code is sufficient to find all defendants as armed for sentence enhancement purposes.

People v. Paul, Supreme Court of California, Decided July 23, 1998, 18 Cal. 4th 698, 958 P.2d 412, 76 Cal. Rptr. 2d 660.

Facts. The defendant, Justin Paul, and his co-defendant, Lloyd Lewis Pattison, attempted to carjack a Honda Prelude in a public parking lot. Paul drove the van the defendants rode in while Pattison actually attempted the carjacking using a handgun. The victim did not surrender his car and drove the car in reverse trying to evade Pattison. Pattison shot the victim in the face, injuring, but not killing the victim. Pattison abandoned his attempt to steal the car, after which Paul picked up Pattison and the two drove away. Pattison attempted to alter his appearance but both men were later apprehended by police.

Pattison and Paul were tried jointly for attempted carjacking and attempted murder. A jury found both men guilty on each count. With respect to Pattison only, the jury was also instructed to find whether in the commission of the attempted carjacking, Pattison personally used a firearm within the meaning of California Penal Code section 12022(a)(1). Section 12022(a)(1) allows for a sentence enhancement of one year if a firearm is used during the commission of a felony and a firearm is not already a required element of that felony. California Penal Code section 1158a requires that a jury must return a special verdict as to whether a defendant used a firearm in commission of a felony in cases where the use of a firearm is alleged but is not an element of the substantive crime.

The jury found Pattison had used a firearm pursuant to section 12022(a)(1). Paul was sentenced to seven years for the attempted murder, concurrent with a two-and-a-half year term for the attempted carjacking. Paul's sentence was enhanced one-year for the attempted murder, but the enhancement was stayed for the attempted carjacking.

Paul appealed his one-year sentence enhancement on the grounds that the jury never specifically returned a verdict finding that Paul was armed with a firearm pursuant to sections 1158a and 12022(a)(1).

Holding. Upholding the court of appeal, the California Supreme Court held that a special finding by the jury that one defendant was armed under California Penal Code section 12022(a)(1) sufficiently demonstrates that a codefendant jointly charged with the same substantive offense and found to be a principal in that offense is subject to section 12022(a)(1)'s sentence enhancement. The court agreed with the reasoning set out by the court of appeal that because the jury found

that both Paul and Pattison were principals in the substantive offenses and that Pattison was armed by a special verdict according to the requirements of section 12022(a)(1) and 1158a, those findings correctly subjected Paul to the sentence enhancement provisions as well.

Section 12022(a)(1) provides that any person found to be a principal in the commission of the felony will be considered armed for sentence enhancement purposes, regardless of whether that person was actually armed when the crime took place. However, in order for section 12022(a)(1) to apply, section 1158a requires that a jury make a separate finding that the defendant was armed, in addition to finding the defendant guilty on the substantive offense. The *Paul* court reasoned that, in a joint trial, a special finding by the jury that each individual defendant was armed is unnecessary because section 12022(a)(1) does not require that each defendant be personally armed during the commission of the felony in order to be considered personally armed for purposes of the statute. Therefore, when defendants are tried jointly as to an underlying offense, when a jury returns a special verdict pursuant to section 1158a that one defendant was armed during the commission of that substantive offense and the jury has also found that each defendant is a principal in the commission of the crime, finding that one defendant was armed is sufficient to subject both defendants to the sentence enhancement provisions of section 12022(a)(1).

REFERENCES

Statutes and Legislative History:

CAL. PENAL CODE § 12022(a)(1) (West 1992) (allowing for sentence enhancement of persons armed with a firearm during the commission of a felony where use of a firearm is not an element of the offense).

CAL. PENAL CODE § 1158a (West 1992) (requiring a special verdict by the jury that the defendant used a firearm during the commission of a felony in order to enhance a defendant's sentence)

Case Law:

People v. Bland, 10 Cal. 4th 991, 898 P.2d 391, 43 Cal. Rptr. 2d 77 (1995) (holding that sentence enhancement applies to any principal involved in the commission of the felony, regardless of whether or not each defendant is personally armed).

People v. Gonzales, 8 Cal. App. 4th 1658, 11 Cal. Rptr. 2d 267 (1992) (holding that sentence enhancement may be imposed upon any principal involved in the commission of a felony if one of the coperpetrators is armed).

People v. Mendival, 2 Cal. App. 4th 562, 3 Cal. Rptr. 2d 566 (1992) (holding that two people are capable of being "personally armed" with one firearm for sentence enhancement purposes if one defendant is personally armed).

People v. McGreen, 107 Cal. App. 3d 504, 166 Cal. Rptr. 360 (1980) (finding that it is not necessary that defendant knew or should have known his coperpetrator was armed in order to enhance the defendant's sentence for use of a firearm during the commission of a felony).

Legal Texts:

21 CAL. JUR. 3D *Criminal Law* § 1628 (1984 & Supp. 1998) (generally discussing enhancement of sentence for use of a firearm during the commission of a felony).

21 CAL. JUR. 3D *Criminal Law* § 1629 (1984 & Supp. 1998) (discussing sentence enhancement for committing a felony while armed with a firearm).

21 CAL. JUR. 3D *Criminal Law* § 1630 (1984 & Supp. 1998) (discussing sentence enhancement for committing a felony while armed with a dangerous or deadly weapon).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1501 (2d ed. 1989) (discussing California statues that allow for sentence enhancements).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1502 (2d ed. 1989) (outlining the procedure required for enhancing a sentence for using or being armed with a weapon).

3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1506 (2d ed. 1989) (summarizing the difference between "armed" and "use" of a firearm).

Law Review and Journal Articles:

Michael Blazina, Comment, *"With the Intent to Inflict Such Injury": The Courts and the Legislature Create Confusion in California Penal Code Section 12022.7,* 28 SAN DIEGO L. REV. 963 (1991) (discussing California Penal Code section 12022.7 and the element of intent to inflict injury as a prerequisite to sentence enhancement).

Jennifer Popick, Note, *People v. Wims*, 23 PEPP. L. REV. 1057 (1996) (analyzing sentence enhancement following the California Supreme Court decision in *People v. Wims*).

Lori Proudfit, Note, *People v. Bland*, 23 PEPP. L. REV. 1033 (1996) (analyzing sentence enhancement following the California Supreme Court decision in *People v. Bland*).

George Maxim, Comment, *Moving Beyond Three Strikes Through California's Firearm Sentencing Enhancements*, 29 MCGEORGE L. REV. 531 (1998) (discussing the harsher sentence enhancement available under Chapter 503 for use of a firearm during the commission of a felony).

Tung Yin, Comment, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419 (1995) (discussing the use of charges dismissed during plea bargaining for sentencing purposes, including sentence enhancement).

JENNIFER VANSE

G. Applying both the "elements" test and the "accusatory pleading" test, the misdemeanor child annoyance violation of Penal Code section 647.6(a) is not a lesser included offense of felony lewd act upon a child under the age of fourteen in violation of Penal Code section 288(a). Because trial judges are only required to instruct the juries on lesser included offenses, there was no error when the judge did not provide the instruction sua sponte.

People v. Lopez, Supreme Court of California, Decided November 2, 1998, 19 Cal. 4th 282, 965 P.2d 713, 79 Cal. Rptr. 2d 195.

Facts. In 1995 Arielle H., an eight-year-old girl, was playing outside an apartment building in Escondido with a friend, Vicky. While the two girls were playing, the defendant, Caesar Augustus Lopez, approached them and offered them a lollipop. After being warned not to go near the man or accept his candy, Arielle took the lollipop and accompanied Lopez to a secluded walkway. At that time, Lopez touched Arielle through her underwear. Vicky approached and witnessed Lopez touch Arielle in this manner, however, she thought that Lopez was attempting to lift Arielle. Vicky grabbed Arielle by the arm and pulled her away from Lopez and took her to Vicky's mother and relayed what had occurred.

Neighbors detained Lopez until police arrived to search and arrest him. During the search, police found evidence consistent with one who would molest children. Lopez was read his *Miranda* rights. After waiving his rights, Lopez told police that he noticed Arielle and Vicky and had touched Arielle through her underwear for the purpose of sexual gratification. Evidence indicated that Lopez was involved in a similar offense in 1984 with a different girl.

Lopez was arrested, charged, and convicted of violating section 288(a) of the California Penal Code, which makes it a felony offense for any person who, with the intent to arouse either himself or the victim, touches the body of a child under the age of fourteen. On appeal, Lopez argued that the trial court erred when it did not, sua sponte, instruct the jury on misdemeanor child annoyance, section 647.6(a) of the Penal Code, which prohibits any person from annoying or molesting a child, as a lesser included offense.

The court of appeal remanded the matter for reconsideration of sentencing to allow the trial court to exercise its discretion, and otherwise affirmed the judgment, holding that child annoyance is not a lesser included offense of a lewd act upon a child under the age of fourteen requiring sua sponte instructions. The California Supreme Court granted review to decide the issue.

Holding. The California Supreme Court held that although trial judges are required to provide juries with instructions for lesser included offenses sua sponte, no error was committed because section 647.6(a) is not a lesser included offense to section 288(a). The court applied both the elements test as well as the accusatory pleading test to determine that section 647.6(a) is not a lesser included offense to section 288(a).

Under the elements test of included offenses, the elements required to prove section 288(a) are compared to the elements of 647.6(a). Section 288(a) states a felony offense for any person who "willfully and lewdly commits any lewd or lascivious act" on the body of a child under the age of fourteen, "with the intent of arousing . . . the lust, passions, or sexual desires of that person or the child." California law is clear that *any* touching of a child under the age of 14 violates this section, even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the intent to arouse or gratify the sexual desires or either the victim or the perpetrator. Section 647.6(a) states a misdemeanor offense for every person who "annoys or molests any child under the age of 18." In contrast to section 288(a), section 647.6(a) does not require an actual touching, but case law is clear that it does require (1) conduct that a normal person would be irritated by and (2) conduct motivated by abnormal sexual interest in the victim.

Under the elements test for lesser included offenses, the criminal conduct that section 288(a) prohibits could occur without necessarily also violating section 647.6(a). Section 288(a) requires a touching, *any touching*, even one innocuous or innocent on its face that is done with a lewd intent. Section 647.6(a), however, requires an act that is *objectively and unhesitatingly viewed as irritating or disturbing*, prompted by an abnormal sexual interest in children. The court stated that "clearly, not every touching with lewd intent will produce the objective irritation or annoyance necessary to violate section 647.6." The court went on to state that the California Legislature intended a plain meaning of the statutes and would not want the terms to have any meaning other than their ordinary ones.

Lopez argued, in the alternative, that when the accusatory pleading test is applied, his conduct would have necessarily violated section 647.6(a). The supreme court, however, disagreed, stating that the language of the complaint does not necessarily allege an objectively irritating or annoying act of child molestation, and it could indicate a non-enforceable or apparently consensual touching. The court reiterated that a defendant could violate section 288(a) even if the underage victim appears to consent to the touching, providing he harbors the requisite lewd intent.

Because a violation of section 288(a) does not necessarily mean a violation of section 647.6(a) under both the elements and accusatory pleading test, the supreme court held that trial judges need not provide the jury with the instruction sua sponte.

REFERENCES

Statutes:

CAL. PENAL CODE § 288(a) (West 1999) (making it a felony to commit any lewd or lascivious act on a child under the age of fourteen with the intent of arousing oneself or the child).

CAL. PENAL CODE § 647.6(a) (West 1999) (making it punishable to annoy or molest any child under the age of eighteen).

Case Law:

People v. Barton, 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995) (holding that trial judges must provide juries with lesser included offense instructions).

People v. Birks, 19 Cal. 4th 108, 960 P.2d 1073, 77 Cal. Rptr. 2d 848 (1998) (noting that if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former).

People v. Carskaddon, 49 Cal. 2d 423, 318 P.2d 4 (1957) (noting that the words "annoy" and molest" in section 647.6(a) are synonymous to conduct designed to disturb, irritate, offend or at least tend to injure, another person).

People v. Martinez, 11 Cal. 4th 434, 903 P.2d 1037, 45 Cal. Rptr. 2d 905 (1995) (explaining the elements compromising the offense described in section 288(a)).

People v. Memro, 11 Cal. 4th 786, 905 P.2d 1305, 47 Cal. Rptr. 2d 219 (1995) (holding that if there is evidence to convict the defendant of the lesser offense and the greater offense, both instructions must be given by the judge).

People v. Ramkeeson, 39 Cal. 3d 346, 702 P.2d 613, 216 Cal. Rptr. 455 (1985) (holding that a court must instruct on lesser included offenses when the evidence raises question as to the presence of all elements needed to prove the greater offense).

People v. Wickersham, 32 Cal. 3d 307, 650 P.2d 311, 185 Cal. Rptr. 436 (1982) (holding that a court must instruct sua sponte on general principles of law that are closely and openly connected with facts presented at trial).

Legal Texts:

20 CAL. JUR. 3D *Criminal Law* §§ 617, 771, 786, 967, 1951, 1952, 1954, 1959 (1988 and Supp. 1999) (discussing generally California's laws regarding committing lewd acts on children).

CAL. JUR. 3D *Delinquent and Dependent Children* §§ 51, 131 (discussing the misdemeanor of child annoyance as opposed to lewd acts on children, which is a felony).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 786 (2d ed. 1988) (generally discussing California's law prohibiting lewd acts with children under the age of fourteen).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 876 (2d ed. 1988) (discussing the misdemeanor of child annoyance).

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 326 (2d ed. 1988) (generally discussing the premise that a defendant who is convicted of a lesser included offense may not subsequently be tried for the greater).

2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1375 (2d ed. 1988) (generally discussing the rule that a defendant has the right to choose whether or not lesser included offense instructions are given to the jury).

Law Review and Journal Articles:

Wendy M. Hunter, Note, *People v. Barton*, 24 PEPP. L. REV. 744 (1997) (providing an analysis of the *Barton* case as well as discussing the impact on the criminal judicial system after this requirement).

Lewd or Lascivious Acts with a Child under Fourteen: California's Extension of Force under Penal Code Section 288, 9 CRIM. JUST. 119 (1986) (generally discussing criminal prosecution under section 288).

JESSICA RIGLEY

H. A petition for writ of habeas corpus in capital case is barred if not made within 90 days from date of filing of reply brief in direct appeal, unless the petitioner can show (1) no substantial delay, measured from when the petitioner or his counsel did or should have known of the fact substantiating the claim, (2) good cause for the delay, or (3) an applicable exception to his claim. Further, the duty of appellant or habeas corpus counsel to investigate possible claims, does not require counsel to investigate all possible claims that might exist, only those that would reasonably lead to a possible meritorious claim.

In re Clark on Habeas Corpus, Supreme Court of California, Decided August 3, 1998, 18 Cal. 4th 770, 959 P.2d 311, 77 Cal. Rptr. 2d 153.

Facts. The petitioner sought a writ of habeas corpus. The California Supreme Court issued an order to show cause in this case and a companion case, *In re Gallego*, 18 Cal. 4th 825, 959 P.2d 290, 77 Cal. Rptr. 2d 132 (1989), solely for the purpose of analyzing the procedural timeliness issue in habeas corpus petitions and explaining how these timeliness issues are applied by the court.

The petitioner was convicted and sentenced to death in 1983 of the murder and kidnapping of a six-year-old boy. The judgment was affirmed in 1988. In 1989, the petitioner sought a writ of habeas corpus in state court and was denied. After a federal court ordered the petitioner to exhaust his state court remedies in March of 1995, the California Supreme Court appointed federal habeas corpus counsel to represent the petitioner. The petitioner's new counsel subsequently filed this petition in September of 1995. Specifically, in this case, the court issued an order to show cause on Claim I of the petitioner's writ. Claim I contained allegations of prosecutorial misconduct in discovery and perjury by witnesses that allowed in particular evidence used to establish elements necessary for a death-qualifying murder. This evidence was related to a confession made by the petitioner, at the time he confessed to the murder in this case, that he had previously murdered a boy in Texas.

In 1993, an investigator for the petitioner started looking into the particular circumstances of the New Jersey detention of the petitioner, the detention in which the petitioner confessed to the murder of the six-year-old and the Texan boy. After the investigator sought access to the district attorney's records of the petitioner for the relevant time period and was denied, the petitioner filed an ex parte request for access from the superior court in Santa Barbara and was again turned down. The petitioner eventually gained access in April or May of 1995 from an order by a federal court. The petitioner's investigator stated in his declaration that a search of these records revealed unknown and suppressed facts that related to evidence given at trial. These facts led the investigator to information that the petitioner used to support Claim I of his habeas corpus petition.

Holding. After the court determined that Claim I could be broken into four subclaims, the court held that the first three subclaims were timely, but the fourth was not.

The court, laying out the timeliness framework, stated that there is a presumptive untimeliness bar to any habeas corpus brief filed ninety days after the filing of the reply brief in the direct appeal. This presumptive bar can be defeated if the petitioner can show (1) an absence of substantial delay, (2) good cause for the delay, or (3) that the claim falls within an exception to the bar of untimeliness.

The court held the first three subclaims were not substantially delayed because counsel for the petitioner did not possess the facts that triggered the counsel's duty to investigate until April and May of 1995, when the investigator gained access to the prosecutor's files on the petitioner's case. The court rejected the state's argument that the petitioner possessed these "triggering facts" from the testimony given at trial. The court, in clarifying the scope of the duty of counsel in investigating habeas corpus claims, stated that counsel is not required to make an unfocused inquiry into all facts in the appellate record that would possibly give a basis for a claim. Counsel is only required to follow up any facts discovered in preparation for appeal that would reasonably lead to a possible meritorious claim. Therefore, because the court determined that the testimony made at the defendant's trial would be common to many trials, it would not "trigger" one to investigate for prosecutorial misconduct and witness perjury. The court also rejected the state's argument that there existed an overriding societal interest of finality and that the petitioner's claims should be considered untimely as long as the state did not unconstitutionally prevent the defendant from discovering the claim. The court stated that the claim could not be accurately characterized as one in which the state did not unconstitutionally prevent the defendant from discovering. The court did not determine whether such an overriding interest could possibly exist.

The court found the fourth subclaim to be untimely because the petitioner did not make any specific allegation, either in the petition or any appended material, that the claim was not substantially delayed, the petitioner stated no good cause for a substantial delay, and the subclaim did not fall under any of the exceptions to the untimeliness bar. The court reasoned that although the petitioner stated it did not have the triggering facts until 1995, it did not allege with any specificity why the petitioner could not have obtained these facts earlier.

The court rejected the petitioner's argument as to all of his claims that his petition was not untimely because his petition was made only two years after the court's 1993 decision in *In re Clark* because the rule for delay was made in 1989 in Policy 3 of Supreme Ct. Policies Regarding Cases Arising From Judgments of Death.

The court determined that the exceptions to the untimeliness bar should be determined under state law, except for the unlawful statute exception, which should

be considered under federal law. The court also determined that the timing for a claim of ineffective assistance of counsel should be measured not from when new counsel was appointed, but rather from when the claim was or should have been reasonably discovered.

In summary, the court found three subclaims from Claim I to be timely for not being substantially delayed. As the order to show cause was issued solely to consider the procedural issue of timeliness for Claim I, the merits were not considered.

REFERENCES

Statutes:

CAL. PENAL CODE § 1473 (West Supp. 1999) (allowing writ of habeas corpus to all unlawfully imprisoned).

CAL. PENAL CODE § 1474 (West Supp. 1999) (providing that a writ of habeas corpus must be made by petition).

CAL. PENAL CODE § 1505 (West Supp. 1999) (providing for appeal to the supreme court upon the return of a writ of habeas corpus).

CAL. R. CT., SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, POLICY 3 (West 1996) (outlining the standards governing filing of habeas corpus petitions and the duties of habeas corpus and appeal counsel).

Cases:

In re Gallego, 18 Cal. 4th 825, 959 P.2d 290, 77 Cal. Rptr. 2d 132 (1998) (companion case to *In re Robbins*).

In re Clark, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993) (holding that defendant must state all grounds for appeal in a single writ in a timely petition).

McCleskey v. Zant, 499 U.S. 467 (1991) (holding that petitioner in a subsequent petition for writ of habeas corpus may have a duty to show why it did not raise the claim earlier).

In re Miller, 17 Cal. 2d 734, 112 P.2d 10 (1941) (barring repetitive habeas corpus claims previously denied on the merits in a prior habeas corpus proceeding).

In re Horowitz, 33 Cal. 2d 534, 203 P.2d 513 (1949) (barring habeas corpus claims that could have been raised in an earlier habeas corpus proceeding).

In re Waltreus, 62 Cal. 2d 218, 397 P.2d 1001, 42 Cal. Rptr. 9 (1965) (barring habeas corpus claims that were raised and rejected on appeal).

Legal Texts:

36 CAL. JUR. 3D *Habeas Corpus* § 66 (1997) (discussing the proper time to file a writ of habeas corpus and the ninety day rule in death penalty cases).

19 CAL. JUR. 3D *Criminal Law* (1997) (discussing the duties and effectiveness of counsel on appeal).

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Habeas Corpus and Other Extraordinary Writs* (2d ed. Supp. 1998) (discussing limitations on the writ in general).

6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 3360 (2d ed. Supp. 1998) (discussing duty of counsel on automatic appeal).

Law Review and Journal Articles:

Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1514-70 (1997) (discussing federal law that limits the time state prisoners have to file a federal habeas corpus petition).

Rae K. Inafuku, *Coleman v. Thompson Sacrificing Fundamental Rights in Deference to the States: The Supreme Court's 1991 Interpretation of the Writ of Habeas Corpus*, 34 SANTA CLARA L. REV. 625, 638-42 (1994) (discussing the federal requirement of state exhaustion of remedies and federal deference to state procedures).

Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 558-71 (1992) (discussing the writ of habeas corpus under the constitution).

Larry W. Yackle, *The Future of Habeas Corpus: Reflections on Teague v. Lane and Beyond–The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993) (discussing the federal movement to limit the writ).

KATHRYN PHELAN

I. A trial court has a duty to instruct sua sponte on all lesser included offenses supported by the evidence. Additionally, a failure to instruct sua sponte on a lesser included offense constitutes a "misdirection of the jury," and under article VI, section 13 of the California Constitution, instructional errors are not reversible absent a miscarriage of justice. Furthermore, a trial court's instructional omission requires reversal only when an examination of the entire record establishes a reasonable probability that the omission affected the outcome.

People v. Breverman, Supreme Court of California, Decided August 31, 1998, 19 Cal. 4th 142, 960 P.2d 1094, 77 Cal. Rptr. 2d 870.

Facts. On December 17, 1993, Yoon Ju and Hyun Kim walked past the defendant's residence and exchanged words with a larger group of young people in the garage and driveway area. Subsequently, a fight ensued, causing Ju and Kim to receive minor injuries. Ju and Kim returned the next evening, along with six to ten friends, to have an "even fight" with the individuals who had beaten them up the night before. Kim approached the defendant's residence, and when it appeared as though nobody was home, he slashed a tire of a BMW automobile parked in the defendant's driveway. At this point, the defendant, who was not present at the fight the night before, came out of his house to check on the BMW. When he saw the group accompanying Kim, he went back inside.

Shortly thereafter, four or five members of the group began hitting the BMW with a baseball bat, a "Club" automotive security device, and a broomstick. The BMW's security alarm went off, and a few moments later, shots were fired from the front door of the defendant's residence. One of the bullets hit Andreas Suryaatmadja in the back of the head, and he died several hours later at the hospital.

At trial, the defendant did not testify on his own behalf. However, the prosecution played a tape of the defendant's interview with police as part of their case-in-chief. In the interview, the defendant told police that as he went out to his car to go to the market, he observed a group of unknown men coming toward him and yelling at him. After reactivating his BMW's security alarm, he ran back inside and told his mother to call 911. A few minutes later, the defendant said he went back outside, at which time the group again approached him. He returned inside, and then heard the BMW's security alarm go off. The defendant told police that he saw at least 12 people "mobbing" and "bashing" his car. He then broke the glass of the residence's front door and claimed to have fired three or four shots in a "downward" direction "to get them to stop" so they could be "arrested or whatever." The defendant also insisted to police that the group was rushing the door as he was firing the weapon, and that he "thought we were going to get

killed."

The police recovered four shell casings from inside the house and another ten casings from the driveway. There was bullet damage to the BMW and to two other automobiles parked on the street at heights and angles which suggested level firing. Additionally, the pool of blood where Suryaatmadja fell was on the street, 182 feet from where the shell casings in the defendant's driveway were located.

At the close of the prosecution's case, the trial court ruled that there was no evidence of premeditation or deliberation, and therefore the jury would be limited to considering second-degree murder. The court also provided instructions on reasonable self-defense or defense of others as justifiable homicide, on the permissible use of force to resist a violent domestic intruder, on voluntary manslaughter as an intentional killing arising from an honest but unreasonable belief in the need for self-defense, and on involuntary manslaughter by the reckless or grossly negligent commission of a highly dangerous act. Both the prosecution and defense agreed to the instructions the court provided to the jury. The jury convicted the defendant of second-degree murder and use of a firearm during the commission of a crime. The court sentenced the defendant to a term of eighteen years to life.

On appeal, the defendant argued that the trial court erred by failing to instruct the jury sua sponte on an unlawful intentional killing "upon a sudden quarrel or heat of passion," a second theory of involuntary manslaughter. The court of appeal reversed the defendant's conviction, reasoning that the same evidence of fear of harm supporting a claim of unreasonable self-defense also permitted a "heat of passion" manslaughter verdict. Because the jury had not necessarily resolved the heat of passion issue, the court of appeal concluded that the trial court's error was prejudicial and required reversal.

Holding. The California Supreme Court affirmed the court of appeal's decision that the trial court erred by failing to fully instruct the jury sua sponte on all lesser necessarily included offenses that the evidence supported, specifically by failing to instruct the jury on the "heat of passion" theory of involuntary manslaughter. Under the California Constitution, a criminal defendant has the right to have a jury determine "every material issue presented by the evidence." This duty to instruct is designed to prevent an "all-or-nothing" choice for the jury. The court emphasized that the state has no legitimate interest in obtaining a conviction for a greater offense than supported by the evidence, nor does a defendant have a right to an acquittal when the evidence supports conviction on a lesser included offense. Additionally, the rule seeks to ensure that a jury will consider the full range of possible verdicts "regardless of the parties' wishes or tactics." Therefore, the trial court is required to instruct the jury sua sponte on theories of all lesser included offenses supported by the evidence, including theories inconsistent with one another.

The court rejected the People's argument that a trial court need only instruct a jury on the theory of a lesser included offense that is most consistent with the

evidence. The court reasoned that the interests of justice would be substantially undermined by allowing a trial court to limit its instructions on lesser included offenses to those theories that it believes to be the most meritorious, while ignoring other theories that the evidence supports. However, the court emphasized that a trial court has no duty to instruct the jury on theories that have no evidentiary support.

The court determined that a rational jury could conclude that the defendant did not have time to cool or subside from the group's initial intimidating conduct, and therefore the defendant killed intentionally, but while his judgment was obscured by sufficient provocation. Accordingly, despite the failure of the defense to request such an instruction, the trial court erred by failing to instruct the jury on the heat of passion theory of voluntary manslaughter.

However, the supreme court disagreed with the court of appeal's decision that the trial court's omission of the heat of passion instruction required automatic reversal of the defendant's conviction. The court noted that the court of appeal applied the correct standard regarding erroneous omission of instructions on lesser included offenses under *People v. Sedeno*, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974). Under *Sedeno*, omission of a jury instruction on a lesser included offense requires reversal unless the jury resolved the omitted instruction's factual question adversely to the defendant under another properly given instruction. Although the court recognized that the jury did not resolve the heat of passion question under another jury instruction, the court concluded that the *Sedeno* standard was "too strict" and replaced it with an "actual prejudice" standard.

The court rejected the defendant's contention that the trial court's failure to instruct sua sponte on all lesser included offenses required reversal under both the United States and California Constitutions. Rather, the court noted that the United States Supreme Court has expressly refused to recognize a federal constitutional right to jury instructions on lesser included offenses in noncapital cases. Therefore, the court determined that the instructional omission in the present case implicated California law alone.

Additionally, the court concluded that a failure to instruct sua sponte on a lesser included offense constitutes a "misdirection of the jury," and under article VI, section 13 of the California Constitution, instructional errors are not reversible absent a miscarriage of justice. Therefore, the court announced that a trial court's failure to instruct sua sponte on a lesser included offense in a noncapital case requires reversal only when the examination of the entire record establishes a reasonable probability that the omission affected the outcome. Accordingly, because the court of appeal evaluated the omission of the heat of passion instruction under the *Sedeno* standard, the supreme court remanded the case to the court of appeal and instructed it to examine the entire record, and to determine whether it was reasonably probable that the omission of the instruction affected the

outcome of the case.

REFERENCES

Statutes:

CAL. CONST. art. VI, § 13 ("No judgment shall be set aside . . . on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.").

CAL. PENAL CODE § 187 (West 1999) (defining murder as "the unlawful killing of a human being, or a fetus, with malice aforethought.").

CAL. PENAL CODE § 192 (West 1999) ("Manslaughter is the unlawful killing of a human being without malice.").

Case Law:

Beck v. Alabama, 447 U.S. 625 (1980) (holding that the Due Process Clause requires state trial courts to provide jury instructions on lesser included offenses in capital cases if supported by the evidence).

Cooper v. California, 386 U.S. 58 (1967) (concluding that when "state standards alone have been violated, the State is free to apply its own state harmless-error rule to such errors of state law.").

Hopkins v. Reeves, 524 U.S. 88 (1998) (holding that state trial courts are not required to provide jury instructions on lesser included offenses of murder that are not recognized under state law).

Keeble v. United States, 412 U.S. 205 (1973) (refusing to recognize a federal constitutional right to jury instructions on lesser included offenses in noncapital cases).

People v. Birks, 19 Cal. 4th 108, 960 P.2d 1073, 77 Cal. Rptr. 848 (1998) (defining a lesser offense as included in a greater offense if the greater offense contains all the elements of the lesser offense and cannot be committed without also committing the lesser offense).

People v. Barton, 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995) (concluding that regardless of the arguments presented by the prosecution and defense, the trial court must instruct the jury sua sponte on any lesser included offense, such as heat of passion voluntary manslaughter, so long as it is supported

by the evidence).

People v. Cahill, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993) (interpreting article VI, section 13 of the California Constitution as eliminating the presumption that any substantial trial error causes a "miscarriage of justice," but instead requiring a prejudicial effect on the defendant's case).

People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) (noting that the California Constitution guarantees a criminal defendant the "right to have the jury determine every material issue presented by the evidence."), *abrogated by* People v. Breverman, 19 Cal. 4th 142, 960 P.2d 1094, 77 Cal. Rptr. 2d 870 (1998).

People v. Sedeno, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974) (requiring reversal of conviction for the omission of a jury instruction on a lesser included offense unless the omitted instruction's factual question was resolved adversely to the defendant under another properly given instruction), *overruled by* People v. Breverman, 19 Cal. 4th 142, 960 P.2d 1094, 77 Cal. Rptr. 2d 870 (1998).

People v. Watson, 46 Cal. 2d 818, 299 P.2d 243 (1956) (holding that a "miscarriage of justice" under article VI, section 13 of the California Constitution only occurs when it appears "reasonably probable" that the defendant would have received a more favorable result had the error not occurred).

People v. Wims, 10 Cal. 4th 293, 895 P.2d 77, 41 Cal. Rptr. 2d 241 (1995) (applying a harmless error standard to an instructional omission that constituted a state law error alone).

Legal Texts:

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2926 (2d ed. 1989 & Supp. 1995) (discussing the trial court's duty to instruct sua sponte on lesser included offenses).

5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2936 (2d ed. 1989 & Supp. 1996) (summarizing the parameters of instructing on lesser included offenses)

21 CAL. JUR. 3D *Criminal Law* § 3067 (1985 & Supp. 1996) (discussing the defendant's right to instructions on lesser included offenses).

Law Review and Journal Articles:

David F. Abele, Comment, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step*, 23 U.C. DAVIS L. REV. 375 (1990) (arguing that the step approach to lesser included offense instructions is the most effective means of organizing jury deliberations).

Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Included Offenses at Trial*, 37 WM. & MARY L. REV. 199 (1995) (discussing a trial court's duty to instruct sua sponte versus instructing at the request of the prosecution or defense).

Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. PUGET SOUND L. REV. 185 (1992) (addressing the reasons behind providing jury instructions on lesser included offenses).

DAVID FORNSHELL

IV. EMPLOYER AND EMPLOYEE

Administrative regulations may be used as a source of fundamental public policy, limiting an employer's right to discharge an at-will employee; thus, plaintiffs asserting wrongful discharge in violation of public policy can now use administrative regulations in addition to constitutional and statutory provisions as a source for their public policy argument.

Green v. Ralee Eng'g Co., Supreme Court of California, Decided August 31, 1998, 19 Cal. 4th 66, 960 P.2d 1046, 78 Cal. Rptr. 2d 16.

Facts. The defendant, Ralee Engineering Company, manufactured fuselage and wing components for aviation companies. In 1968, the plaintiff, Richard Green, was employed by the defendant as a quality control inspector. Because the plaintiff was an at-will employee, his employment could be terminated at any time, with or without cause, by his employer.

When the plaintiff noticed in 1990 that the defendant was shipping parts that failed the plaintiff's inspection, the plaintiff registered internal complaints with his supervisors, management, and the president of the defendant company. In order to prove that the defendant was shipping defective parts, the plaintiff photocopied inspection reports without the knowledge or consent of the defendant.

The defendant discharged the plaintiff in March of 1991, citing a decrease in business. The plaintiff then filed a wrongful termination action against the defendant, alleging that the termination was in retaliation for his complaints. The plaintiff urged that his complaints advanced the fundamental public policy of aviation safety, and this entitled him to tort damages even though he was an at-will employee.

The defendant moved for summary judgment, arguing that even if the plaintiff was discharged in retaliation for his complaints about inspection and shipping practices, this termination was permitted. The defendant pointed out that the plaintiff, an at-will employee, could not establish a cause of action for wrongful termination because the plaintiff could not establish that his termination violated a public policy embedded in either statutory or constitutional provisions. The plaintiff did not cite a specific statute establishing a fundamental public policy.

The trial court agreed with the defendant and granted the motion for summary judgment. The court of appeal reversed. The court, after conducting its own legal research and requesting additional briefing, concluded that federal regulations regarding aviation safety could be used as a basis for the plaintiff's public policy claim.

Holding. Affirming the court of appeal, the California Supreme Court held that federal safety regulations may serve as a source of fundamental public policy.

Under prior judicial decisions, an exception to the statutory rule regarding termination of at-will employees was created. Under California Labor Code section 2922, an at-will employee could be terminated with or without cause at any time. Courts, however, carved out a small exception to this rule, holding that the right to discharge is limited by fundamental public policies: That is, an employer cannot discharge *any* employee in violation of a public policy. These courts noted that in order for a policy to be fundamental it had to be sufficiently "public." Specifically, the policy had to be directed at promoting public interests and concerns. Courts held that these policies could be found in both constitutional and statutory provisions. After reviewing the prior decisions, the *Green* court concluded that in order for a plaintiff to assert wrongful termination in violation of public policy, the plaintiff had to show that the policy was sufficiently public by showing that it was rooted in either a constitutional or statutory provision. The court noted that regulations may form a basis for public policy if that public policy is sufficiently tethered to statutory provisions.

The court then concluded that the public policy behind federal regulations promoting aviation safety was rooted in the statutory provisions of the Federal Aviation Act. The court noted that Congress delegated regulatory power to the Federal Aviation Administration in order to implement Congress' public policy of promoting aviation safety. To this end, the public policy enunciated in the federal regulations was sufficiently tethered to the statutory provisions delegating authority to the FAA. Thus, because the public policy supporting federal regulations regarding airline safety was based in statutory provisions, the plaintiff stated a cause of action for wrongful termination in violation of public policy by urging that he was terminated for reporting violations of federal regulations.

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49 U.S.C. § 44704(a), (b) (1997 & Supp. 1998) (outlining the Federal Aviation Administration's role in overseeing the design and manufacture of aircraft parts).

14 C.F.R. § 21.143 (1998) (imposing quality control data requirements on manufacturers of aircraft parts).

CAL. LAB. CODE § 1102.5(b) (West 1989) (providing that an employer may not retaliate against an employee for disclosing a violation of a state or federal regulation to a governmental or law enforcement agency).

CAL. LAB. CODE § 2922 (West 1989) ("An employee, having no specified term, may be terminated at the will of either party on notice to the other.").

Case Law:

General Dynamics Corp. v. Superior Ct., 7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994) (holding that an attorney can assert a retaliatory discharge claim against an employer who discharged the attorney for refusing to violate a professional rule or statute).

AIU Ins. Co. v. Superior Ct., 51 Cal. 3d 807, 799 P.2d 1253, 275 Cal. Rptr. 820 (1990) (noting that it is the Legislature, not the courts, that must declare the public policy of the state).

Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (holding that employee's actions further public policy).

Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (holding that an employer's right to discharge an at-will employee is limited by public policy).

Legal Texts:

29 CAL. JUR. 3D *Employer and Employee* § 74 (1986 & Supp. 1998) (discussing employer's liability in tort for discharging an employee in violation of public policy).

29 CAL. JUR. 3D *Employer and Employee* § 63 (1986 & Supp. 1998) (discussing the public policy limitation on an employer's right to discharge an employee).

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M.E. Knack, Comment, *Do State Fair Employment Statutes by "Negative Implication" Preclude Common-law Wrongful Discharge Claims Based on the Public Policy Exception?*, 21 MEM. ST. U. L. REV. 527 (1991) (discussing courts' application of the rule of statutory construction to preclude claims for wrongful discharge in violation of the public policy against discrimination).

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CHRISTIAN W. JOHNSTON

V. INSURANCE CONTRACTS AND COVERAGE

A. An "Imminent and Substantial Endangerment Order and Remedial Action Order" from California Environmental Protection Agency's Department of Toxic Substances Control does not constitute a 'suit' for purposes of coverage under a comprehensive general liability insurance policy.

Foster-Gardner Inc. v. National Union Fire Ins. Co., Supreme Court of California, Decided August 3, 1998, 18 Cal. 4th 857, 959 P.2d 265, 77 Cal. Rptr. 2d 107.

Facts. Foster-Gardner served as a wholesale pesticide and fertilizer business since 1959. Prior to its banning in 1972, Foster-Gardner handled DDT as well as anhydrous ammonia. Foster-Gardner maintained comprehensive general liability (CGL) policies with four different insurers.

Pursuant to California's Superfund law, the Department of Toxic Substance Control (DTSC) of the California Environmental Protection Agency issued an "Imminent and Substantial Endangerment Order and Remedial Action Order" (Order) to Foster-Gardner. The Order made factual findings that Foster-Gardner "incurred liability for cleaning up the Site." The Order charged Foster-Gardner with several tasks designed to facilitate the clean-up process. The Order also stated that it did not preclude any action at law to protect public health from Foster-Gardner's hazardous waste or to recoup costs to clean up the hazard.

The DTSC has three options available when it finds potential public health endangerment due to the release of hazardous substances. Other than issuing an Order, the DTSC may alternatively contract for removal of the hazardous substance or request that the Attorney General take action in order to abate the potential health hazard.

Subsequent to receiving the Order, Foster-Gardner submitted its defense to the Order to four of its insurers. Each of the four policies contained language that consistently treated the terms 'suit' and 'claim' separately and distinctly. Additionally, each of the policies undertook the duty to defend in any suits against the insured but merely reserved the right to investigate and settle claims against the insured. The insurers either refused to defend against the Order or agreed to defend with a reservation of rights. These responses did not meet Foster-Gardner's expectations of coverage.

The court of appeal reversed the entry of summary judgment on behalf of the insurers, holding that the trial court misconstrued the nature of the Order when the trial court found that the Order did not rise to the level of a suit. The appellate court relied on three factors in determining that an Order could constitute a 'suit'

for purposes of CGL coverage. The court noted the irrevocable consequences which occur in a Superfund proceeding prior to any court filing, the lack of definition of 'claim' and 'suit' in the CGL policies, and the standards of interpretation of insurance policies manifested in *AIU Insurance Co. v. Superior Court*, 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990), which applied a nontechnical, functional approach to term definition. Subsequently, a different division of the same district court of appeal reached the opposite conclusion regarding term definition in *Fireman's Fund Insurance Co. v. Superior Court*, 57 Cal. App. 4th 1252, 67 Cal. Rptr. 2d 585 (1997). The *Fireman* court held that the term "suit" was clear and unambiguous, thus rendering the insurer free of any duty to defend. The supreme court granted review to clarify the appropriate standard for interpretation of insurance policy terms.

Holding. Justice Brown's plurality decision on this issue of first impression in California reversed the appellate court's judgment and held that the Order did not constitute a "suit" for purposes of CGL policy coverage. The court held that the Order did not commence a lawsuit or any such adjudicative proceeding. Such proceedings would only commence if Foster-Gardner failed to comply with the tasks outlined in the Order.

The plurality discussed the lack of ambiguity in the use of "claim" and "suit" in the CGL policies. The terms were not used interchangeably and "suit" clearly refers to court proceedings. The court further noted that when determining whether an insurer has a duty to defend, the inquiry compares the complaint's allegations with the insurance policy. Because there is no complaint there can be no comparison. Thus, no duty to defend arises. Additionally, the court reasoned that its holding protects the benefit of the bargain for the insurer who undertook only to defend in suits. Any inconsistent holding would provide a windfall to the insured, who did not bargain for such extensive coverage.

The court distinguished its holding from *AIU*, where the court gave a broad definition of "damages" in an insurance policy to include reimbursement for response costs. The court in Foster-Gardner pointed out that while the distinction between the implications of a "claim" and "suit" is clear, the term "damages" does not sufficiently distinguish legal and equitable remedies for the average policy holder.

The court chose to adopt a literal approach to term definition, giving a term its plain meaning, rather than a functional or hybrid approach, which both inquire into the coerciveness of the action to determine whether a suit has been commenced. The court noted that the literal approach reduces the potential for excess litigation and also promotes efficient and expedient clean-up of hazardous material.

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CAL. HEALTH AND SAFETY CODE § 25358.3(a) (West 1988 & Supp. 1999) (delineating courses of action available to DTSC upon finding a hazardous substance injurious to public health).

Case Law:

Aerojet-General Corp. v. Transport Indem. Co., 17 Cal. 4th 38, 948 P.2d 909, 70 Cal. Rptr. 2d 118 (1997) (holding insurer's duty to defend may include environmental investigation expenses pursuant to an administrative order).

AIU Ins. Co. v. Superior Ct., 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990) (allowing recovery of equitable relief from insurer where policy covered claims of damages generally).

Fireman's Fund Ins. Co. v. Superior Ct., 57 Cal. App. 4th 1252, 67 Cal. Rptr. 2d 585 (1997) (finding no insurer duty to defend California EPA notices because the words at issue were clear and unambiguous).

Legal Texts:

39 CAL. JUR. 3D *Insurance Contracts* §§ 39-40 (1985 & Supp. 1998) (generally discussing the rules of contract and rules of interpretation of terms governing insurance contracts).

39 CAL. JUR. 3D *Insurance Contracts* §§ 472-473 (1985 & Supp. 1998) (discussing insurer duties upon notice of claim and interpretation of words in CERCLA actions giving rise to insurer duties).

1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 699 (9th ed. & Supp. 1998) (discussing interpretation of ambiguities and uncertainties that arise in insurance policies).

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Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436 (1955) (discussing various problems that arise under the insurer's duty to defend).

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Brette S. Simon, Comment, *Environmental Insurance Coverage Under the Comprehensive General Liability Policy: Does the Personal Injury Endorsement Cover CERCLA Liability?*, 12 U.C.L.A. J. ENVTL. L. & POL'Y 435 (1994) (discussing actions arising under CERCLA and the duty to defend under comprehensive general liability policies).

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STACEY PERKINS-ROCK

B. Where an insured seeks relief under a comprehensive general liability insurance policy for environmental pollution, the insured bears the burden of proof to show that the damage was "sudden and accidental," thereby bringing it within the exception to the exclusion of damages for pollution, offering an incentive for manufacturers to discover their own pollution.

Aydin Corp. v. First State Ins. Co., Supreme Court of California, Decided August 20, 1998, 18 Cal. 4th 1183, 959 P.2d 1213, 77 Cal. Rptr. 2d 537.

Facts. The plaintiff, Aydin Corporation, operated a transformer production plant in Palo Alto, California, during the years 1969 to May 1984. Aydin, in the process of research and manufacture of these transformers, utilized and stored chemicals, solvents, oil, and waste products. These chemicals were stored in metal drums or tanks, which were kept either above or below ground.

The case at hand turned on a particular instance in 1980, when Aydin encountered ground soil contamination from the chemical polychlorinated biphenyl (PCB). The company attempted to correct the problem, but it reoccurred in July of 1981. The company found that in this instance it had affected a much larger area and included not only PCB, but also solvent contamination. Upon removal of the underground tanks in 1986, the company discovered numerous holes in the metal where the chemicals had leaked. The California Department of Health Services required that Aydin take a course of action including cleanup, monitoring, and studies of the Palo Alto complex.

Aydin was insured under First State Insurance Company (First State) during the period between the first discovery of contamination and the later larger scale contamination. Under the five million excess coverage policy, First State excluded coverage for discharge of toxic chemicals, waste materials, and liquids, among others upon land or water. Specifically this was a broad exclusion for all instances unless the discharge, escape, or dispersal was "sudden or accidental."

Upon commencement of the present action by Aydin for indemnification, First State argued that the continuous dispersal of the toxic substances was not "sudden and accidental" and that therefore they were not responsible under the policy exclusion for environmental pollution. The trial court gave a two-fold instruction to the jury on who bears the burden of proof. First, the court said that First State had the burden on proving that Aydin was liable for the discharge of pollutants, and secondly, that the discharge was not "sudden and accidental." First State argued that they should not bear the burden of proof on the latter portion of this instruction. The jury found that First State had not met its burden of proof on either of these points and entered declaratory judgment in favor of Aydin. The court of appeal reversed the holding of the trial court and found that Aydin should have borne the burden of proof with respect to the issue of whether the discharge

was "sudden and accidental" or continuous. The Supreme Court of California granted review to determine who bears the burden of proof as to that issue, clarifying an issue that has never been previously addressed.

Holding. In Justice Brown's majority opinion, the California Supreme Court affirmed the court of appeal's judgment and held that the insured bears the burden of proof to show that an incident was "sudden and accidental," thereby bringing it within the exception to the insurance coverage exclusion for pollution causing incidents. The court began with the "established" premise that the insured is responsible for proving an incident falls under its insurance policy, whereupon the burden shifts to the insurer to show that there is a specific policy exclusion such as in the cases of pollution that would be applicable.

The court then focused on the dispute at the heart of the case, recognizing the differing views on whether the "sudden and accidental" policy provision has a coverage or exclusionary slant. Aydin on the one hand argued that "First State should bear the burden of negating the exception because it 'does not grant coverage; it serves only to establish the reach of the exclusion by describing what coverage already provided by the policy's broadly worded basic coverage provision is not being taken away.'" First State rebutted with the argument that because Aydin was attempting to circumvent the established exclusion of no coverage for environmental pollution, it should bear the burden of proof with regard to the "sudden and accidental" provision of the policy. The court then dismissed the two principal cases that Aydin placed its arguments on as unhelpful in resolving the sole policy issue.

Aydin first alleged the applicability of *Bebbington v. Cal. Western etc. Ins. Co.*, 30 Cal. 2d 157, 180 P.2d 673 (1947), as relevant to deciding who bears the burden of proof. In *Bebbington,* the California Supreme Court discussed the relevance of an insurance policy, which limited recovery for the insured's death in a plane accident to the reserve of the policy. The current court summarized the inapplicability of *Bebbington* to the case at hand in three points. First, the court noted that the burden of proof of the respective parties was not an issue in the case. Secondly, the court noted the difficulty in drawing any comparison because the policy language was not set out in *Bebbington.* Finally, the court limited any discussion of the burden of proof in *Bebbington* to that factual situation.

The court also dismissed Aydin's reliance on *Strubble v. United States Automobile Assn.*, 35 Cal. App. 3d 498, 110 Cal. Rptr. 828 (1973). In *Strubble,* the court of appeal discussed an all-encompassing insurance policy, which included earthquakes as part of its risks. However, limiting the policy was a specific exclusion for earth movement. The court required that the insurer had the burden of proving that the loss at issue was as a result of earth movement and not the included earthquake risk. Applying *Strubble* to the present case, the court addressed its invalidity by delineating the types of policies at issue in each of the cases. For instance, in *Strubble* the policy was clear in its intention to cover all risks without any regard to a burden on the insured to prove that the policy was

applicable. The court contrasted that against the policy at issue in the present case where the insured had to prove that the policy applied.

The court turned to other states' resolution of the issue, in the absence of any California holdings on the burden of proof issue. The court thus drew an analogy with five other state high courts and the United States Court of Appeals for the Ninth Circuit that placed the burden of proof on the insured. The court proceeded with an analysis on the holdings of these cases and noted the longstanding principle that insurance policies be interpreted as a whole. The court also noted Aydin's acknowledgment that it is the express language that controls and not the particular location of that language that is important. Even in the face of broad exclusionary language that exempts coverage, the court read the "sudden and accidental" language as restoring coverage where it would otherwise not exist.

The court dismissed Aydin's argument that allocating the burden on the insured would encourage the insurance industry to adjust policy language so that the burden of proof will be shifted to the insured. It framed the argument so that it would fit the facts applicable to its case, particularly a broad exclusion and a narrow inclusion device. However, the court found that this was too large of a leap. Specifically, it stated that different policy language results in differing allocations of burden of proof and it has been established as so. The court deferred to the respective parties' "general freedom to contract" and the fact that they chose this particular contract as fault and not how the wording of the contract should be written as their ruin. The court interpreted their position as an obligation to "give effect to the language the parties chose, not the language [that] they might have chosen."

Turning to the particular facts of the case, the court considered whether there would be any rationale in shifting the burden to the insurer in this specific case. Setting forth four particular facts that shift the burden of proof in certain cases, the court sided with the court of appeal and concluded that there was no "compelling reason" to differ the allocation of the burden of proof in this particular case with regard to the "sudden and accidental" policy provision.

The court weighed heavily in not altering the burden of proof, charging that placing the burden of proof on the insurer would encourage blindness on the part of the insured to root out pollution. It reasoned that the insured could plead ignorance to ongoing pollution and rely on insurance coverage to clean up the environmental pollution. In addition, the court noted that the insured would be in the best position to know its own manufacturing plant and property and to realize when there may be liability for one of its operations. The court in this vein observed the differing states of First State (Massachusetts) and Aydin (California) and the impracticability of First State to monitor Aydin from across the country. Rather, the court pressed for contractual duties that are inherent in policy-making to replace this monitoring. The court specifically noted the requirements of

reporting losses and cooperating with the insurance company to recover.

The Supreme Court of California closed by reiterating its rationale in placing the burden of proof regarding the "sudden and accidental" provision on the insured. It noted that there was inherent in the policy a duty for the insured to prove coverage under the policy where it would not exist. Secondly, the court gave strong policy arguments that an insured knows his property and would be given an incentive to discover pollution problems if the burden were allocated to him.

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Case Law:

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E.I. du Pont de Nemours v. Allstate Ins., 693 A.2d 1059 (Del. 1997) (discussing a Delaware Supreme Court opinion that placed the burden of proof regarding the "sudden and accidental" exception on the insured).

Highlands Ins. Co. v. Aerovox Inc., 676 N.E.2d 801 (1997) (discussing a Massachusetts Supreme Court opinion that placed the burden of proof regarding the "sudden and accidental" exception on the insured).

Northville Indus. v. National Union Ins., 679 N.E.2d 1044 (1997) (discussing a New York Court of Appeals opinion that placed the burden of proof regarding the "sudden and accidental" exception on the insured).

SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995) (discussing a Minnesota Supreme Court opinion that placed the burden of proof regarding the "sudden and accidental" exception on the insured).

Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535 (Wyo. 1996) (discussing a Wyoming Supreme Court opinion that placed the burden of proof regarding the "sudden and accidental" exception on the insured).

Legal Texts:

39 CAL. JUR. 3D *Insurance* § 461 (1996 & Supp. 1998) (defining coverage for "occurrence" and "accident" within the purview of a general comprehensive liability policy).

39 CAL. JUR. 3D *Insurance* § 464 (1996 & Supp. 1998) (discussing coverage under an insurance policy for "continuous, intermittent, or recurrent events").

39 CAL. JUR. 3D *Insurance* § 474 (1996 & Supp. 1998) (discussing the pollution liability exclusion under a general comprehensive insurance policy).

1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contract Law* § 700 (9th ed. 1988 & Supp. 1998) (discussing exclusionary clauses in the realm of insurance contracts).

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MORGAN STEWART

VI. LIBEL AND SLANDER

For purposes of libel actions, an involuntary public figure is a person who takes steps calculated to invite public comment or criticism and who has substantial access to the media to protect his reputation. Under California law, there is no neutral reportage privilege extending to defamatory reports regarding private figures.

Khawar v. Globe Int'l, Inc., Supreme Court of California, Decided November 2, 1998, 19 Cal. 4th 254, 965 P.2d 696, 79 Cal. Rptr. 2d 178.

Facts. In November 1988, Roundtable Publishing, Inc. published a book by Robert Morrow about the assassination of Senator Robert Kennedy. In the book, Morrow alleged that Kennedy was killed by a coalition of Iranian secret police and the Mafia and that the assassin was not Sirhan Sirhan, but a young Pakistani named Ali Ahmand who, while posing as a photographer, used a fake camera that was actually a gun to kill Senator Kennedy. The book contained four photographs of a young man alleged to be Ali Ahmand standing in a crowd of people around Senator Kennedy the night that he was killed. On April 4, 1989, the weekly tabloid newspaper, *Globe*, published by Globe International Inc., ran a story that briefly and uncritically summarized the allegations made by Morrow in his book. The *Globe* article included a photograph from the book showing a group of men standing around Kennedy. *Globe* enlarged the image and added an arrow pointing toward one of the men, identifying him as the alleged assassin, Ali Ahmand.

The young man identified in the *Globe* article as Ali Ahmand, the alleged true assassin of Senator Robert Kennedy, was actually Khalid Iqbal Khawar. Khawar and his father, Ali Ahmad (not Ahmand), immediately sued Robert Morrow, Roundtable Publishing, and *Globe* for making false and defamatory statements about them. Morrow defaulted and Roundtable settled, leaving *Globe* as the sole remaining defendant at trial. The evidence showed that Khawar was a Pakistani citizen and free-lance photojournalist working on assignment the day that Kennedy was assassinated. He stood on the podium near Kennedy so that he could photograph Kennedy and so that a friend could photograph him with Kennedy. Khawar admitted knowing that other cameras were focused on the podium and that his image would be publicized. Khawar, however, was not present in the hotel kitchen where Kennedy was assassinated and was never a suspect in the investigation. As a result of the *Globe* article, Khawar, now a naturalized United States citizen, received numerous death threats, threatening phone calls, and his home and his son's car were vandalized.

The trial court dismissed Ahmad's claim because the article was not "of and concerning" him. The jury returned four special verdicts in favor of Khawar, finding that: (1) the *Globe* article contained false and defamatory statements about Khawar, (2) these statements were made negligently and with malice, (3) that Khawar was a private figure, and (4) that the *Globe* article was a neutral and accurate report of the Morrow book. Khawar was awarded a total of $1,175,000 in compensatory and punitive damages. The trial court disagreed with and rejected the jury's last special verdict, finding that the *Globe* article was *not* a neutral and accurate report of the Morrow book because Khawar could not have been specifically identified from the book's small, grainy photograph. The *Globe* article, however, magnified the image and used an arrow to specifically identify Khawar as the alleged assassin.

The court of appeal affirmed the judgment, concluding that: (1) Khawar was a private figure, (2) California has no neutral reportage privilege for private figures, (3) in light of those findings, it was unnecessary to determine whether California has a neutral reportage privilege for public figures or whether the *Globe* article was a neutral and accurate report of the Morrow book, and (4) the evidence at trial supported a finding of negligence and actual malice by the *Globe*. The California Supreme Court granted review to determine whether (1) a person becomes an involuntary public figure for the limited purpose of media coverage about a published book that places him at the center of a controversy?; (2) Does the First Amendment mandate a privilege for a media defendant's publication of a neutral, accurate report about a controversial book's allegations regarding matters of public concern?; (3) Does the evidence at trial support the jury's findings of negligence and actual malice?; and (4) Did the trial court violate *Globe*'s due process rights when it determined the *Globe* article to be "original libel" without allowing *Globe* to be heard or present evidence on the issue?

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that Khawar was not a public figure, California does not recognize a neutral reportage privilege for republication of libel, and the evidence at trial supported the jury's findings of negligence and actual malice.

Globe contended that Khawar was an "involuntary public figure," relying on language in *Gertz* that suggested that it is possible for a person to become a public figure through no purposeful action of his own. By making this argument, *Globe* conceded that Khawar did not intentionally thrust himself into this public controversy. The court rejected this argument, finding it inconsistent with the United States Supreme Court's reasons for declaring a person to be a public figure for purposes of libel actions. According to the supreme court, the actual malice standard is applied to public figures because they have substantial access to the media, allowing them to defend their reputations and because they have voluntarily invited comment and criticism by thrusting themselves into public controversies. Thus, the court determined that Khawar was not an involuntary public figure because he did nothing to thrust himself into this public controversy and he had no

substantial media access *prior* to the publication of the *Globe* article with which to defend his reputation. The court reasoned that Khawar's conduct in being pictured with Kennedy occurred before the assassination and its resultant controversy, so his actions could not be considered to be a purposeful thrusting into the public eye. Citing *Wolston*, where the Supreme Court stated that a private person does not automatically become a public figure by becoming associated with a matter that attracts public attention, the court also found that Khawar's actions on that day were too trivial to make him a public figure. Finally, the court noted that Khawar merely sought to be photographed near Kennedy, not to thrust himself into any public controversy. In sum, Khawar did not become a public figure because his actions were not "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue."

Acknowledging that the neutral reportage privilege exists, the court found it inapplicable to the present case because Khawar is a private figure and the privilege only applies to defamatory statements made against public figures. Noting that the neutral reportage privilege is controversial among scholars, has been rejected by many federal and state jurisdictions, and has never been mandated by the Supreme Court, the court held that the neutral reportage privilege is inapplicable to statements made about private figures because there is little value to such information when balanced with the right to privacy. The court concluded this section by stating that it's reasoning only applied to private figures, declining to address whether the privilege could be applied to public figures under California law or whether the *Globe* article report of the accusation was fair or accurate.

Last, the court affirmed the trial court's awards of both compensatory and punitive damages. First, the court analyzed the evidence of actual malice. In order to prove actual malice, the plaintiff must demonstrate by clear and convincing evidence reckless disregard by the publisher, which means that they knew the statement was false or entertained serious doubts as to the truth of the publication. The court found that *Globe* obviously had serious doubts as to the truth of the accusation, citing the exhaustive FBI investigation that resulted in a jury trial conviction of Sirhan Sirhan. In light of these findings, the Morrow book's claim that Khawar was the actual assassin was "highly improbable." The court also noted that there were no serious time pressures precluding more thorough investigation of the accusation and that the *Globe* had not made any attempt to investigate the accusation for its truthfulness. Instead, the *Globe* relied almost solely on its claim that the article was merely a neutral and accurate report of the Morrow book's accusations. The court rejected this argument as well, noting that the trial court found that the article was not neutral and accurate and that *Globe* failed to cite any reasons for its unsubstantiated reliance on Morrow's highly improbable accusations. Turning to the negligence analysis, the court found that negligence could be assumed because actual malice had been satisfactorily proved. The court also

noted that negligence could only have been disproved if the court was willing to assume that a neutral reportage privilege existed and that the *Globe* article was a neutral, accurate report. Because the court had previously rejected the privilege, the argument was inapplicable in this case.

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. CIV. CODE § 47 (West 1994) (defining situations in which republication of defamatory statements is privileged).

Case Law:

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that a public official may collect damages for libel only if the statements are made with "actual malice").

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (applying the actual malice standard to actions brought by public "figures").

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (where the Court defined two types of public figures, those who achieve such fame and notoriety that they are public figures for all purposes and in all contexts and those who involuntarily are drawn into the public light for the purpose of a single controversy or event and thereby become public figures for a limited number of issues).

Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157 (1979) (holding that the plaintiff was a private figure because his actions were not calculated to thrust himself into the public eye).

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that a private figure plaintiff must demonstrate actual malice to recover punitive damages in a defamation action).

Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977) (establishing a First Amendment neutral reportage privilege that protects the accurate and disinterested reporting of charges made by a responsible, prominent organization against a public figure).

Brown v. Kelly Broad. Co., 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989) (holding that California law requires only a showing of negligence for a private plaintiff to recover compensatory damages in defamation actions).

Legal Texts:

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 548-551 (9th ed. 1988) (discussing California's judicially established fair comment privilege).

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 537 (9th ed. 1988) (defining who is not a public figure for purposes of defamation actions).

6 CAL. JUR. 3D *Assault* § 197 (1994) (stating that it is no defense to a defamation action that you were merely repeating another's defamation).

6 CAL. JUR. 3D *Assault* § 242 (1994) (noting that actual malice must be shown in order to recover punitive damages for defamation).

Law Review and Journal Articles:

Ray Worthy Campbell, Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983) (arguing that the privilege should only apply to reports about public figures, be fair and accurate, not endorse the defamation, and apply only to preexisting public controversy).

James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L. J. 455 (1991) (arguing that the privilege should apply when the source is responsible, even if the report is not neutral, as long as either the source or the target is a public figure).

Justin H. Wertman, Note, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern*, 65 FORDHAM L. REV. 789 (1996) (arguing that the privilege apply where the report relates to a matter of public concern, rather than the lower standard of newsworthiness).

Mark W. Page, Comment, *Price v. Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate*, 75 MINN. L. REV. 157 (1990) (arguing that the report must relate to a matter of public concern, but should apply regardless of whether either the accuser or the target is a public figure, so long as the report does not adopt the accusation as its own).

PAUL VALCORE

VII. NEGLIGENCE

A public safety member who is jointly engaged in the discharge of his responsibilities with fellow public safety personnel cannot be held liable for negligently injuring another public safety member known to be present because the common law firefighter's rule prevents such liability, and no statutory exceptions apply; thus, a police officer's injury from the discharge of a fellow officer's shotgun during a joint attempt to subdue and arrest a suspect is not actionable against the other officer because liability is precluded by the firefighter's rule.

Calatayud v. State, Supreme Court of California, Decided August 6, 1998, 18 Cal. 4th 1057, 959 P.2d 360, 77 Cal. Rptr. 2d 202.

Facts. The common law doctrine known as the firefighter's rule holds that "[o]ne who negligently causes the event to which a police officer responds owes no duty of care with respect to the initial negligent act." Accordingly, a police officer cannot sue for any injury that is proximately caused by that individual's original negligence. Several statutory exceptions to the firefighter's rule, however, are provided in California Civil Code section 1714.9. Subdivision (a)(1) provides that "*any person* is responsible . . . for the results of that person's willful acts causing injury to a peace officer . . . [w]here the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer."

In February, 1990, the plaintiff, Eduardo Calatayud, a Pasadena police officer, received an "officer needs assistance" call and proceeded to the origin of the call. He observed two other officers attempting to control and subdue a highly agitated suspect. Both of the officers, Mr. Charles DeVille and Mr. Michael Byrd of the California Highway Patrol, were holding shotguns while trying to arrest the suspect. Mr. Calatayud approached the officers to help subdue and detain the suspect. While Mr. Calatayud placed a partial control hold on the suspect, Officer Byrd pushed the suspect's body to the ground to keep him from standing up. While doing so, Officer Byrd fell, accidentally causing his shotgun to discharge, injuring Mr. Calatayud. Mr. Calatayud sued the State of California and Officer Byrd for negligence. During the three-week trial, the defendants unsuccessfully tried to interpose the firefighter's rule as a bar to liability. The jury returned a $700,000 decision for Officer Calatayud. The defendants appealed the verdict, and the court of appeal affirmed the judgment, even though it determined that the firefighter's rule did apply. The court found that the facts of the case fell within the statutory exception of California Civil Code section 1714.9, subdivision (a)(1). The defendants thereafter sought a petition for review in the Supreme Court of

California, which was granted to determine whether the words "any person" in the statute included fellow public safety members who were jointly engaged in the discharge of their responsibilities.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that under Civil Code section 1714.9, the words "any person" responsible for negligently injuring a public safety member known to be present do not include fellow public safety members who are jointly engaged in the discharge of their responsibilities. Consequently, the court further decided that the firefighter's rule applies in cases where one public safety member negligently injures another public safety member during their joint encounter, and accordingly, precludes any liability by the negligent public safety member.

Under the common law doctrine known as the firefighter's rule, "[o]ne who negligently causes the event to which a [public safety member] responds owes no duty of care with respect to the initial negligent act," thereby limiting the public's liability. Accordingly, a public safety member who gets injured due to the proximate negligence of another may not sue that person for damages. The reason behind the firefighter's rule is the underlying legal principle of assumption of risk by the public safety member because no duty exists toward the public safety member because he is specially trained and paid to assume such risk. Further, the rule is based on the public policy consideration that public safety members are paid for performing dangerous activities and are receiving special compensation for injuries that occur while exercising their duties; accordingly, the court found that public safety members should not receive double compensation–compensation from the government they work for and then from the person that was responsible for the initial negligence. In addition, the firefighter's rule serves efficient judicial administration by eliminating claims that would put an additional burden on the courts without any beneficial effect because the monies paid to the injured public safety member would come from public funds, regardless of causation.

In 1982, however, the California Legislature enacted Civil Code section 1714.9, codifying certain exceptions to the common law firefighter's rule. Subdivision (a)(1) of that section provides that "*any person* is responsible . . . for the results of that person's willful acts causing injury to a peace officer . . . [w]here the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer."

The court found that the language "any person" as used in Civil Code section 1714.9, subdivision (a)(1) does not include public safety members that are employed by a different agency. In holding so, the court considered the legislative intent for the enactment of section 1714.9. The Legislature adopted the section to impose liability where a person knows or should have known of the presence of the public safety member after the initial negligent act, which is shielded from liability by the firefighter's rule. In analyzing the legislative intent, the court found that the Legislature did not intend section 1714.9(a)(1) to impose liability for injuries caused by fellow public safety members who are jointly engaged in the discharge

of their duties. It based its holding partly on the legislative treatment of Labor Code section 3852, which is part of the Workers' Compensation Act, and found that a public employer would not be liable for negligent injury caused by a co-employee. Further, the court found that the Legislature focused its attention on civilian third party tortfeasors and did not mean to include public safety members in its definition of "all persons" under Civil Code section 1714.9. The court realized that an inclusion of all public safety personnel in the "all persons" definition would increase the possibility of lawsuits by public safety members and would also "seriously compromise public safety during joint operations . . . ." The court went on to state that imposing liability on public safety members could also lead to overriding certain statutory immunities presently conferred on public safety personnel and their employers, such as an immunity for injury resulting from the condition of firefighting equipment or for injury caused in fighting fires. In addition, the added possibility for costly litigation would far outweigh the compensation now provided by legislatively enhanced disability benefits or other benefits, and increase the taxpayer's cost for injuries incurred. The court concluded its observations by holding that "the Legislature did not intend 'any person' as used in section 1714.9(a)(1) to include fellow public safety members who are jointly engaged in the discharge of their responsibilities." Because the officer in this case was a fellow public safety member, the firefighter's rule precluded his liability for the negligent discharge of the shotgun.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 1714.9(a)(1) (West 1998) (creating a statutory exception to the firefighter's rule "where the conduct causing the injury occurs after the person knows or should have known of the presence of" the public safety member).

CAL. LAB. CODE § 3852 (West 1998) (allowing an employee injured in the course of employment to bring an action against a third party tortfeasor notwithstanding a claim for workers' compensation and also allowing the employer to sue to recover any benefits paid).

Case Law:

Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968) (explaining that complex determinations of causation would present "difficult problems requiring lengthy trials," which ought to be avoided where possible).

Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 805 P.2d 873, 278 Cal. Rptr. 614 (1991) (stating that the legislative intent behind Civil Code section 1714.9 was not to reimburse officers for injuries that were caused by fellow officers).

Neighbarger v. Irwin Indust., Inc., 8 Cal. 4th 532, 882 P.2d 347, 34 Cal. Rptr. 2d 630 (1994) (stating that the underlying principle of the firefighter's rule is the public safety member's assumption of risk).

Walters v. Sloan, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (holding that a person who negligently causes the event to which a police officer responds owes no duty of care with respect to the initial negligent act).

Legal Texts:

46 CAL. JUR. 3D *Negligence* § 1 (1978 & Supp. 1998) (defining negligence).

46 CAL. JUR. 3D *Negligence* § 5 (1978 & Supp. 1998) (illustrating the statutory exemptions and limitations that bar actions for negligence).

46 CAL. JUR. 3D *Negligence* § 12 (1978 & Supp. 1998) (setting forth the general rescue doctrine and emphasizing that the doctrine does not apply to persons such as firefighters whose occupation, by its very nature, exposes them to particular risks of harm).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 743 (9th ed. 1988 & Supp. 1998) (setting forth the application of the fireman's rule in cases involving policemen).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 746 (9th ed. 1988 & Supp. 1998) (discussing the liability for wilful or negligent acts under statutory exceptions to the fireman's rule in Civil Code section 1714.9).

Law Review and Journal Articles:

Benjamin K. Riley, Comment, *The Fireman's Rule: Defining its Scope Using the Cost-Spreading Rationale*, 71 CAL. L. REV. 218 (1983) (analyzing the rationale for the fireman's rule using a cost-spreading rationale).

Jack W. Fischer, *The Connecticut Fireman's Rule: 'House Arrest' for a Police Officer's Tort Rights*, 9 U. BRIDGEPORT L. REV. 143 (1988) (illustrating the use of the fireman's rule in Connecticut to limit tort recovery by police officers).

David L. Straus, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031 (1992) (tracing the development of the firefighter's rule and its one hundred year existence).

Louie A. Wright, *The Missouri "Fireman's Rule": An Unprincipled Rule in Search of a Theory*, 58 UMKC L. REV. 329 (1990) (examines the validity of the fireman's rule as it is applied in Missouri).

John P. Ludington, *Products Liability: "Fireman's Rule" as Defense*, 62 A.L.R. 4th 727 (1989) (discussing how the fireman's rule applies to products liability cases).

Marjorie A. Caner, *Application Of "Fireman's Rule" to Preclude Recovery by Peace Officer for Injuries Inflicted by Defendant in Resisting Arrest*, 25 A.L.R. 5th 97 (1995) (illustrating how the fireman's rule applies to peace officers).

KESTER SPINDLER

VIII. PARENT AND CHILD

For dissolution actions under California Family Code section 4009, and for paternity actions under the Welfare and Institution Code sections 11475 and 11475.1, the functional date of a child support order is retroactively effective as of the date of the notice of motion or order to show cause, not the date on which the original complaint was filed.

County of Santa Clara v. Perry, Supreme Court of California, Decided June 25, 1998, 18 Cal. 4th 435, 956 P.2d 1191, 75 Cal. Rptr 2d 738.

Facts. This case is the consolidation by the Attorney General of three separate cases: two cases from the county of Santa Clara, and one from Riverside. Because the appellate courts in both county's decided differently on substantially similar issues, the Attorney General consolidated the cases as brought before the supreme court in an effort to resolve the conflicting interpretations of the lower courts.

Two identical code sections were at issue in this case. California Family Code section 4009 governs the effective date of child support orders during a proceeding for dissolution. It states that a child support order is retroactive to the date in which the notice of motion or order to show cause for the support order was made, except as restricted by federal law. As a separate law, the Welfare and Institutions Code sections 11475 and 11475.1 provide that the district attorney of a state shall take appropriate actions to establish paternity for out-of-wedlock children. Furthermore, the latter sections provide that the effective date of any child support modification is from the date that notice was given to the obligee by the obligor. Both the Family Code and the Welfare and Institutions Code give jurisdiction to the county through the district attorney. It is the district attorney's job to obtain child support orders.

In *County of Santa Clara v. Perry*, the district attorney filed a complaint to establish paternity and child support on September 20, 1995. Perry, the defendant, admitted paternity via his answer on January 16, 1996, but requested a separate hearing on the issue of support. The notice of motion for judgment for temporary support was filed on October 1, 1995. By the order of the commissioner, no arrearages were assessed for the time in between the date the original complaint was filed and February 20, 1996. The Sixth District Court of Appeal affirmed.

In *County of Santa Clara v. Hernandez*, the district attorney filed a complaint to establish paternity and child support on October 3, 1995. Cesar O. Hernandez, the defendant, admitted paternity via an answer on October 3, 1995, but requested a separate hearing in regards to child support. The notice of motion for judgment for temporary support was filed on March 5, 1996. The referee determined that support be effective as of March 5, 1996. The Sixth District Court of Appeal affirmed.

In *County of Riverside v. Keegan*, the custodial parent enlisted help from the county to establish paternity and to obtain support for one of her children. The complaint was filed on August 21, 1989. The defendant, Raymond J. Keegan, filed an answer on March 14, 1991 that stipulated to a blood test to determine if he was a parent of the child. After the test showed that Keegan was the father, there was a temporary support order obtained against him on November 19, 1991, which was filed December 9, 1991. On September 13, 1993, Keegan admitted paternity to the court and the commissioner ordered arrearages to be paid, declaring the effective date of support to be retroactive beginning on August 21, 1989. The Fourth District Court of Appeal affirmed.

The California Supreme Court granted review to consider whether a child support order is retroactive to the date of the notice of motion or order to show cause for the support order, or whether the effective date of the order for support begins as of the date of the original complaint.

Holding. Noting that California Family Code section 4009 is broad enough in its scope to cover any discussion of the Welfare and Institutions Code sections 11475 and 11475.1, the court limited its discussion to what constitutes compliance with California Family Code section 4009. The court began by comparing section 4009 to section 3653. Section 3653 allows for orders that terminate or modify a support order to be retroactive to the filing date of the motion or order to show cause, except as provided by federal law. Looking to federal law, section 666(a)(9) of Title IV-D (the Social Security Act), the court noted that the retroactivity of a modification of a pre-existing child support order under federal law is effective as of the date of service of the order to show cause or as of the motion for modification. Unlike the federal law, however, the court noted that the issue at bar is slightly different because it concerns the interpretation of the effective date for which a support order is effective for an *original* order, not for an order modifying or terminating support.

The court continued its analysis by stating the differences between a civil complaint and a motion. A complaint, the court declared, sets forth the formal allegations and claims of a party. In contrast, a motion is a request for an order or judgment. As such, the court said that a complaint in paternity cases does not meet the statutory requirements of a motion because the defendant in a family action has time to file an answer, stipulate, or default on a plaintiff's claim. But because of the ambiguity in the language of the California sections at issue, the court looked to extrinsic sources, specifically viewing the legislative history of California Family Code section 4009.

In 1992, the California Legislature created the Family Code as a consolidation of other various statutes. Formerly, California Family Code section 4009 was codified as California Civil Code section 4700(a). California Civil Code section

4700(a) dealt exclusively with modifications, stating that any amount of money stemming from a support order that was modified could be retroactively applied to amounts of money that accrued prior to the date of the filing of the notice of motion or order to show cause. According to the court, the legislature expressed concerns during the period that California Civil Code section 4700(a) was still effective because it encouraged an incentive for non-custodial parents to delay proceedings. In an effort to rectify this situation, the legislature changed section 4700(a) to include *any* order for child support, thus making the code apply to all original orders as well as modified ones. According to the proponents of the amendment, the statute was amended as a direct effort to make the effective date of a child support order retroactive to the date of the original claim for support. The court observed, however, that the legislature unfortunately continued to blur the distinction between the filing of a complaint and the filing of a motion. As such, courts that ruled during the time that section 4700(a) was in effect continued to apply section 4700(a) using differing interpretations. In 1992, when the legislature codified California Family Code section 4009, it failed to clarify the distinction between the filing of a complaint and a motion in the words of the new statute. Noting that both the Welfare and Institutions Code sections 11475-11475.1 and California Family Code section 4009 only refer to the date of filing of the notice of motion or order to show cause, the court thus refused to read anything into the law that the legislature failed to add. Instead, the court assumed that the legislature meant what it said in the plain words of these statutes. Thus, the court held that both the Welfare and Institutions Code sections 11475-11475.1and California Family Code section 4009 are to be interpreted in line with the cases from the County of Santa Clara, meaning that a child support order is retroactive to the date of filing the notice of motion or order to show cause, not to the date that the original claim for support was made.

REFERENCES

Statutes and Legislative History:

CAL. CIV. CODE § 4700(a) (amended 1980), *repealed by* CAL. FAM. CODE § 4009 (West 1994).

CAL. FAM. CODE § 3653 (West 1994) (allowing for a modified support order to be retroactive to the date of filing of the notice of motion or order to show cause).

CAL. FAM. CODE § 4009 (West 1994) ("An order for child support may be made retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date, except as provided by federal law.").

CAL. WELF. & INST. CODE §§ 11350- 11350.1 (Deering Supp. 1998) (providing that the county has jurisdiction over child support issues in paternity actions, and giving the district attorney the responsibility to act on behalf of the minor child in obtaining support).

CAL. WELF. & INST. CODE § 11475 (Deering 1994) (setting forth the state law for securing child support and determining paternity).

CAL. WELF. & INST. CODE § 11475.1 (Deering Supp. 1998) ("the district attorney shall take appropriate action, both civil and criminal, to establish, modify, and enforce child support.").

42 U.S.C. § 666(a)(9) (1998) (stating that the retroactivity of the modification of a pre-existing child support order under federal law is effective as of the date of service of notice of the order to show cause or as of the notice of motion of modification).

Case Law:

In re Marriage of Goosmann, 26 Cal. App. 4th 838, 31 Cal. Rptr. 2d 613 (1994) (opining that when federal law is applied to state code provisions, it is clear that modification orders of child support are retroactive only to the date of the order to show cause or notice of motion for modification).

Mercy Hosp. v. Farmers Ins. Group, 15 Cal. 4th 213, 932 P.2d 210, 61 Cal. Rptr. 2d 638 (1997) (asserting that where the words of a statute are not clear, the court may examine the context in which the statute was made in determining its interpretation).

People v. Coronado, 12 Cal. 4th 145, 906 P.2d 1232, 48 Cal. Rptr. 2d 77 (1995) (explaining that the court is bound by the words of a statute and must infer that the legislature meant what it said in the statute).

Legal Texts:

32 CAL. JUR. 3D *Family Law* § 261 (1994) (showing that where paternity is established, the court may order child support payments).

33 CAL. JUR. 3D *Family Law* §§ 1137-1138 (1994) (discussing modification of child support payments).

33 CAL. JUR. 3D *Family Law* § 1077 (1994) (setting forth the general duty of parents to support minor children).

10 B.E. WITKIN, PARENT & CHILD, *Retroactive Modification* § *297* (9th ed. 1989 & Supp. 1998) (outlining general principles of modifying child support orders).

10 B.E. WITKIN, PARENT & CHILD, *Recovery of Arrearages* § *306* (9th ed. 1989 & Supp. 1998) (discussing arrearages and late support payments).

10 B.E. WITKIN, PARENT & CHILD, *Execution* § *310* (9th ed. 1989 & Supp. 1998) (laying out the execution of child support payments generally).

Law Review and Journal Articles:

Amy E. Watkins, *The Child Support Recovery Act of 1992: Squeezing Blood from a Stone*, 6 SEETON HALL CONST. L.J. 485 (1996) (addressing the process of recovering child support arrearage and the problems associated with doing so).

Sarah K. Funke, *Preserving the Purchasing Power of Child Support Awards: Can the Use of Escalator Clauses be Justified After the Family Support Act?*, 69 IND. L.J. 921 (1994) (analyzing the problems and effects of the federal government's unification of the amount of child support awards given to the custodial spouse after a marriage dissolution).

Faye R. Goldberg, *Child Support Enforcement: Balancing Increased Federal Involvement with Procedural Due Process*, 19 SUFFOLK U. L. REV. 687 (1985) (covering the history of child support enforcement in America and analyzing its strengths and weaknesses).

Robert W. Peterson, *A Few Things You Should Know About Paternity Tests (But Were Afraid to Ask)*, 22 SANTA CLARA L. REV. 667 (1982) (talking about the problems with paternity tests as required by federal law).

Arthur Gilbert & William Gorenfeld, *The Constitution Should Protect Everyone –Even Lawyers*, 12 PEPP. L. REV. 75 (1984) (discussing a hypothetical case of a parent who seeks the help of a public defender to represent him in an action to determine paternity and child support).

PAUL NEIL

IX. UNFAIR COMPETITION

Insurers are subject to the UCL; thus, the plaintiff's complaint alleging that the defendants engaged in a conspiracy to deny title insurance to all property acquired from a tax sale despite the insurers' guaranty to insure good title adequately stated a cause of action for violation to the UCL and interference with contractual relations.

Quelimane Co. v. Stewart Title Guar. Co., Supreme Court of California, Decided September 23, 1998, 19 Cal. 4th 26, 960 P.2d 513, 77 Cal. Rptr. 2d 709.

Facts. According to the California Revenue and Taxation Code section 3691, a "tax deed . . . is the means by which property which has defaulted to the state for failure to pay assessed taxes is transferred to a private buyer." Section 3712 of that code states that where the state transfers title by this means, the purchaser receives title "free of all encumbrances." The plaintiffs were holders, owners, sellers, and financiers of real property that the state sold to them at tax sales in El Dorado County. The defendants were the only three title insurance companies in El Dorado County. The defendants utilized the television media to advertise the importance of title insurance and to guaranty to insure good title. Nevertheless, the defendants conditioned the issuance of or refused to issue title insurance to purchasers of property acquired at a tax sale on three separate occasions.

Based on these actions, the plaintiffs claimed that the defendants conspired to deny title insurance which constituted: 1) violations of the Unfair competition Laws (UCL) predicated on restraint of trade in violation of the Cartwright Act, and false, misleading, or unfair advertising; 2) interference with contractual relations; and 3) negligence. The defendants demurred to these causes of action and the trial court sustained them without leave to amend. The plaintiffs appealed the trial court's decision. The California Court of Appeal affirmed, reasoning that the California Insurance Code exclusively governs title insurers and therefore exempts them from liability under the UCL.

The plaintiffs contended that the legislative intent with respect to the Insurance Code makes clear that the defendants are subject to the UCL. The defendants contended that this lawsuit attempted to create an official public policy forcing title insurers to issue policies, that title insurers are excluded from the UCL, and that they had valid reasons for conditioning the issuance of policies based on tax sales.

The California Supreme Court granted review to determine the sufficiency of the plaintiffs' complaint against the defendants' general demurrer. Because the plaintiffs' complaint alleged a violation of the UCL, the court was required to make a threshold determination as to whether the California Insurance Code exempts the

defendants from the requirements of the UCL so that they could then determine whether the conspiracy the plaintiffs alleged in their complaint as a violation of the UCL adequately stated a cause of action to overcome the defendants' demurrer.

Holding. In order to determine whether the plaintiffs sufficiently pled a cause of action against a general demurrer, the court needed only to determine that the "factual allegations of the complaint were adequate to state a cause of action under any legal theory." The California Supreme Court reversed the decision of the court of appeal, holding that the defendants in their capacity as title insurers are subject to the UCL and further that the plaintiffs' complaint sufficiently alleged facts to support causes of action for violations to the UCL and interference with contractual relations, but that the plaintiffs did not sufficiently plead a cause of action for negligence.

Previous cases by this court have held that in construing the Unfair Insurance Practices Act (UIPA), California Insurance Code section 790.03, the Legislature did not grant title insurers a "general exemption from . . . unfair competition statutes." Setting forth the exclusivity of the California Insurance Code, the last sentence in section 12414.29 concludes with the phrase, "notwithstanding any local regulation or ordinance." The court interpreted this phrase to indicate that the "legislative purpose was to preempt local regulation, not to exempt title insurers from [the UCL]."

The court made clear that testing truth and accuracy are not a function of a demurrer, but rather, sufficiency of pleading is the test the court is to apply. Dismissing the contention that specific pleadings should be required in UCL liability cases, the court set forth the well established requirements for alleging a cause of action for conspiracy in restraint of trade in violation of the Cartwright Act, which in turns serves as a predicate for a violation to the UCL: "1) the formation and operation of the conspiracy, 2) the wrongful act or acts done pursuant thereto, and 3) the damage resulting from such act or acts." The court concluded that general allegations suffice where the plaintiff does not "merely restate the elements of the Cartwright Act violation" and alleges "facts in addition to the elements of the alleged unlawful act so that the defendant can understand the nature of the alleged wrong and discovery is not a blind 'fishing expedition' for some unknown wrongful acts."

In determining whether a conspiracy to deny title insurance to properties acquired from tax sales is a violation of the Cartwright Act, which prohibits "acts by two or more persons . . . to create or carry out restrictions in trade or commerce," the court stated that where a refusal to sell a product is the "result of a . . . conspiracy to make that product unavailable in a given market a prohibited restraint of trade may be found." However, the conspiracy is only prohibited by the Cartwright Act if it is for the purpose of restraining trade. Thus, the court had to determine whether the complaint adequately alleged that the defendants' agreement to withhold title insurance was for the purpose of restraining trade. The plaintiffs pled that the defendants, the only title insurers in the county, persuaded the El

Dorado County public that title insurance is essential for their protection when purchasing real estate and then proceeded to agree to deny such insurance to purchasers of tax sale real estate. The court concluded that the plaintiffs' pleading was adequate to establish that the defendants' conspiracy intended a restraint of trade in violation of the Cartwright Act. The court noted that other allegations regarding interference with contractual sales also implied a purpose to restrain trade and strengthened the conclusion that the defendants' conspiracy violated the Cartwright Act.

A violation predicated on "unfair, deceptive, untrue, or misleading advertising" can constitute a UCL violation separate from a UCL violation predicated on the Cartwright Act. Section 17500 of the Business and Professional Code (part of the UCL) prohibits "untrue or misleading statements 'concerning any circumstance or matter of fact connected with the proposed performance or disposition [of property.]'" The plaintiffs alleged that the defendants, in their advertisements, guaranteed to issue title insurance to any property issued with "good title," yet they denied title insurance to tax deeded property. The court pointed out that the defendants did not deny that a tax deed conveys good title, which according to the court, is consistent with clear legislative intent and with the fact that protections in the form of statutes of limitations protect tax properties. The defendants argued that tax sale properties are too speculative to insure and so refuse to insure them, and the plaintiffs, in their complaint, pointed out that the defendants did not exclude them from their advertised promise to insure. Thus, although whether a tax deed conveys good title is a factual question to be addressed at trial, the court concluded that the plaintiff sufficiently pled a violation of the UCL where the defendants promised to insure good title and subsequently failed to insure tax deeded property.

The court next stated that the in order to state a cause of action for intentional interference with contractual relations, there must be a valid contract between the plaintiff and a third party, the defendant must know of this contract, the defendant must commit "intentional acts designed to induce a breach or disruption of the contractual relationship," there must be an "actual breach or disruption of the contractual relationship," and there must be resulting damage. In determining whether the plaintiffs were sufficient in this area, the court deemed it necessary to distinguish the tort of interference with prospective economic advantage. The court explained that in the cause of action at issue, unlike its related tort, the actor's primary purpose need not be disruption of the contract. It is enough if the interference is "incidental to the actor's primary purpose and desire but known to him to be a necessary consequence of his action." Thus, the court concluded that where: 1) the plaintiffs allege the defendants' knowledge of the contract impliedly in the plaintiffs' contention that the defendants refused to issue title insurance, 2) the plaintiffs allege disruption in the purchasers' refusal to complete payment for

a tax deeded property as a result of the defendants' refusal to issue a policy, and 3) the plaintiffs pled damages in the form of loss of fruits of the canceled transaction, the plaintiffs sufficiently pled a cause of action for intentional interference with existing contractual relations.

As to negligence, the court held that the plaintiffs failed to state a cause of action in their contention that the defendants "owed a duty to members of the public . . . to issue insurance to any parcel of land, including reporting the legal status of the Title thereof, without discrimination." The court explained that it was not prepared to recognize a duty in the midst of these factors. Where the defendants lacked affiliation to the properties at issue, lacked control over the disposition, and lacked a preexisting association with the purchasers, the defendants' refusal to issue a policy was incidental. As to foreseeability, the defendants should have foreseen that property without title insurance would yield a lower price than property issued with a title insurance policy. However, the court followed with the fact that financial injury alone is not a predication for charging negligence. The court described the relationship between the defendants' actions and the plaintiffs' losses as "tenuous at best."

Finally, the court stated that as to morality of blame and prevention of future harm, although the defendants may be morally to blame for some of the plaintiffs' harm, the defendants' actions were in stark contrast to other cases of negligence where the defendants had knowledge, control, and ability for prevention of the plaintiffs' harm. Instead, the court likened the defendants in this case to the defendants in other cases that act in their own business interest where imposition of negligence is out of proportion with the defendants' fault.

Further, the court held that even if the defendants had a duty, the plaintiffs failed to plead a negligent act. The plaintiffs failed to allege how its practice of withholding title insurance from tax deeded properties fell below the standard of care required from a "prudently managed" title insurer. Thus, the court held that the plaintiffs failed to state a cause of action for negligence.

Despite the fact that the allegations failed to state a cause of action for negligence, and because the legislature clearly did not exempt title insurers from the UCL other than in rate-making instances, the plaintiffs' allegations that the defendants conspired to deny title insurance to all properties acquired from tax sales did sufficiently state a cause of action for violations to the UCL and interference with contractual relations. The court made clear that its duties in this case did not include the truth or determination of the causes of actions, only whether they were adequately pled. Therefore, the defendants' demurrers did not withstand the plaintiffs' complaint and the California Supreme Court accordingly reversed the decision of the court of appeals.

REFERENCES

Statutes and Legislative History:

CAL. CIV. PROC. CODE § 430.10(e) (West 1980 & Supp. 1998) (setting forth grounds upon which a defendant may object by demurrer).

CAL. BUS. & PROF. CODE § 16700 (West 1977 & Supp. 1999) (California's Cartwright Act is patterned after the Sherman Act, 15 U.S.C. § 1).

CAL. BUS. & PROF. CODE § 17000 (West 1977 & Supp. 1999) (permitting any person to initiate an action for damages against a person or business entity who has engaged in unlawful, unfair, or fraudulent business act or practice or "unfair, deceptive, untrue or misleading advertising").

CAL. REV. & TAX. CODE § 3691 (West 1998) (setting forth the procedures under which tax sale is made, for giving notice prior to the tax sale, and for sharing of proceeds by taxing entities).

CAL. INS. CODE § 12414.29 (West 1988) (describing rules supplementing and modifying rules governing title insurers).

Case Law:

Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946) (setting forth the pleading requirements necessary to sustain a general demurrer and stating that the insurance industry is not exempt from Cartwright Act claims).

Chicago Title Ins. Co. v. Great Western Fin. Corp., 69 Cal. 2d 305, 444 P.2d 481, 70 Cal. Rptr. 849 (1968) (announcing the elements constituting a necessary statement of a cause of action for a conspiracy in restraint of trade).

Munter v. Eastman Kodak Co., 28 Cal. App. 660, 153 P. 737 (1915) ("A cause of action for restraint of trade under the Cartwright Act or common law principles must allege both a purpose to restrain trade and injury to the business of the plaintiff traceable to actions in furtherance of that purpose.").

Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 791 P.2d 587, 270 Cal. Rptr. 1 (1990) (listing the "elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations.").

Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (examining and proscribing the balancing test used to determine "whether in a specific case the defendant will be held liable to a third person not in privity.").

Legal Texts:

49 CAL. JUR. 3D *Pleadings* §§ 124-172 (1979 & Supp. 1994) (generally discussing pleading requirements imposed by general demurrers).

1 CAL. JUR. 3D *Abstracts* §§ 14-19 (1972 & Supp. 1994) (generally discussing regulation of title insurers).

1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 576 (9th ed. & Supp. 1998) (discussing the general application of restraint of trade with respect to the Cartwright Act).
1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 699C (9th ed. & Supp. 1998) (discussing rules of interpretation with respect to provisions governing insurance contracts).

Law Review and Journal Articles:

Gary L. Fontana & Joseph Hunsader, *Application of the California Cartwright Act to Vertical Restraints*, 659 PLI/CORP 655 (1989) (including in its analysis a general discussion of the Cartwright Act).

Mary B. Cranston & Ellyn Freed, *The Tension Between Federal Antitrust and State Unfair Competition Laws*, 968 PLI/CORP 135 (1997) (examining "the tension between federal antitrust law and California law designed to regulate the competitive marketplace, including California's Unfair Competition Act, Unfair Practices Act, and common law business torts.").

Bernard M. Rifkin, *Title Insurance*, 434 PLI/REAL 281 (1998) (generally discussing the recognized importance of title insurance in the acquisition of real property).

John C. Christie, Jr., *The Title Insurance Industry: a Reexamination Revisited*, 18 REAL EST. L.J. 354 (1990) (arguing for competition in the title insurance industry at several levels).

Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637 (1993) (generally discussing the parameters of the demurrer).

PIA VITALIS

X. WORKER'S COMPENSATION

A. Where there has been a work related disability, resulting in the ultimate termination of an individual, that individual's rights to recover are not limited to Labor Code section 132a, and as a consequence, the individual may also plead the California Fair Employment and Housing Act and common law remedies as a route to recovery.

City of Moorpark v. Superior Ct., Supreme Court of California, Decided August 17, 1998, 18 Cal. 4th 1143, 959 P.2d 752, 77 Cal. Rptr. 2d 445.

Facts. The plaintiff, Theresa L. Dillion, worked for the City of Moorpark from May 1990 until February 28, 1994. She sustained a work-related injury in her work as an administrative secretary, and as a result had to have knee surgery. Upon her return to work, her employer, City Manager Steve Kueny, terminated her, stating that her disability would prevent her from performing her job functions. The plaintiff appealed to Assistant City Manager Richard Hare and in writing to Kueny, arguing that her disability in no way hampered her ability to do her job effectively. When her efforts to appeal to the City Manager and his assistant failed, the plaintiff filed a complaint with the California Department of Fair Employment and Housing. She received notice of a right to sue under Government Code section 12965, subdivision (b). The plaintiff filed a cause of action on February 22, 1995, alleging discrimination under the Fair Employment and Housing Act (FEHA), wrongful termination in violation of public policy (common law wrongful discharge), breach of contract, and intentional infliction of emotional distress.

The City of Moorpark demurred to the plaintiff's allegations, basing its argument on the theory that because the plaintiff's injury and resulting disability were work related, her sole resolution would have to be based on section 132a of the Labor Code (section 132a). However, section 132a provides less protection than the FEHA because it does not offer as many remedial options, has no right to a jury trial, and has a limit on the amount of overall awards. The superior court overruled the demurrer, denying the defendant's request that the court take judicial notice of plaintiff's section 132a cause of action. However, the court did sustain the demurrer as to the breach of contract and emotional distress causes of action. The plaintiff hence dropped the two causes of action.

The defendants petitioned to the court of appeal on a writ of mandate citing the same rationale, that 132a should be the plaintiff's exclusive remedy. The court of appeal, in rejecting the writ, cited the 1993 amendment to the FEHA, in which the legislature decreed that no law could provide less protection than the FEHA. In effect, the court of appeal determined that because 132a provided less protection than FEHA, it could not be the exclusive remedy. The court of appeal limited this holding to the exclusivity portion of section 132a and did not repeal any other portion. The Supreme Court of California granted review to determine if the

FEHA was an acceptable alternative to disability claims when a worker has been terminated.

Holding. The California Supreme Court began by addressing the defendant's contention that section 132a would provide the exclusive remedy for disability discrimination in the workplace. First, by examining the language of section 132a, the court concluded that "[o]n its face, section 132a's remedies apply only when employers retaliate against employees for pursuing their rights under the workers' compensation law." However, the court determined that section 132a claims did extend to those cases in which discrimination on the basis of an injury was alleged. The court analyzed the exclusivity claim recognizing that as background, several court of appeal cases have previously held that section 132a provides the exclusive remedy under a claim for discrimination based on a work-related disability. This is so even after the 1993 amendment to the FEHA, which stated clearly the intention of the legislature to make sure that no other law that provided less protection would govern exclusively.

The court first discussed the precedent set forth in *Portillo v. G.T. Price Products, Inc.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982), holding that section 132a provides the exclusive remedy for a workers' compensation claim. The court, citing the rationale in *Portillo*, discussed the legislative compromise that is inherent in section 132a claims. The legislative compromise that takes place in section 132a allows employers quick determination of their cases before a Workers' Compensation Appeals Board, while allowing workers this forum without questions as to fault or negligence. The court then reviewed the case of *Pickrel v. General Telephone Co.*, 205 Cal. App. 3d 1058, 252 Cal. Rptr. 878 (1988), which extended the holding of *Portillo* to disability discrimination actions. In *Pickrel*, the plaintiff brought an action based on FEHA, and the court of appeal held that section 132a provided the exclusive remedy where an employee was suing based on a work-related disability.

Second, the supreme court reviewed cases in which plaintiffs sought damages for wrongful termination, but did not implicate section 132a directly. In *Shoemaker v. Myers*, 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990), the court addressed a "whistleblower" protection statute and concluded that it was an additional remedy possible to those that are wrongfully terminated from a position. The court held that this fell outside the compensation bargain that is addressed in section 132a. The court thus concluded that this provided for a specific declaration of the Legislature to provide for a new remedy.

The court additionally addressed whether or not a plaintiff could pursue a common law wrongful discharge claim as a remedy for wrongful termination. Reviewing *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992), the court refused to deny a plaintiff the right to recover under

common law wrongful discharge where it was obnoxious to the public policy of the state. The court then extended that holding in *Angell v. Peterson Tractor, Inc.*, 21 Cal. App. 4th 981, 26 Cal. Rptr. 2d 541 (1994), accepting for fact that disability discrimination "could form the basis of a common law wrongful discharge claim." Regardless of that conclusion though, the court of appeal in *Angell* again held that section 132a was the exclusive remedy for those terminated for their disability.

The supreme court proceeded with the holdings in *Portillo, Pickrel, Shoemaker, Gantt* and *Angell* as reference points, concluding that Labor Code section 132a was not a plaintiff's exclusive remedy for disability discrimination. At the outset though, the court made it apparent that it did not rely on the rationale that the court of appeal relied upon. Namely, it gave no weight to the 1993 amendment to the FEHA. Instead, the supreme court used *Portillo* as the vehicle to disprove reliance on Labor Code section 132a as an employee's exclusive remedy.

First, the court noted that Labor Code section 132a focuses on the infringement of an employee's civil rights without regard to a medical injury. The court took issue with the fact that section 132a does not even contain an exclusive remedy provision. This was established even as one defendant stated that section 132a provides the exclusive remedy. The court refuted any inference of section 132a as exclusive by noting that the Labor Code does provide for an exclusivity portion, however this limitation lies in division 4 of the Labor Code, whereas section 132a lies in division 1. Specifically, the Labor Code in reference to exclusivity refers inwardly to "this division," limiting exclusivity to division 4 and by inference providing for no exclusivity in all other divisions. The court thus concluded that section 132a has no exclusivity limitation placed upon it and therefore it can co-exist with other remedies.

The second point that the court touched upon was the "compensation bargain" relied upon in *Portillo.* This compensation bargain means the balance allowed by the Labor Code wherein employee complaints are resolved by the Workers Compensation Board, allegedly benefitting both employees and employers. The former would be assisted by a quick determination of their claims, while a single forum in which to resolve claims benefits the latter. The *Portillo* court reasoned that the compensation bargain applied to section 132a claims. The court found this reasoning unpersuasive. The court, drawing its rationale from precedent, recognized that prior holdings concluded that certain employer conduct falls outside the lines drawn by the compensation bargain. Specifically, the court stated that where discrimination is "obnoxious to the interests of the state and contrary to public policy," it would fall outside the compensation bargain. Comparing a section 132a violation to racial or sexual discrimination, the court held it to be equally obnoxious and therefore outside the delineation of the compensation bargain.

Third, the court granted that even if a section 132a claim is recognized, it is not an employee's exclusive remedy. The court extended this rationale into the conclusion that the legislature is free to enact new remedies to supplement the existing law. In this case it was the creation of the FEHA that supplemented

section 132a. Therefore the court concluded that two remedies can co-exist without infringing upon their respective rights. The court thus overruled *Portillo* on all issues.

The court next analyzed the rationale and prior interpretations of the California Fair Employment and Housing Act, in relation to the plaintiff's claim. It stated that the FEHA is intentionally drawn liberally, and this lends itself to the conclusion that it is meant to supplement other remedies. The court based this decision on its prior precedent in which the FEHA covered civil service employees regardless of equally protective portions of the Civil Service Act. Additionally, in other case law, the court allowed for FEHA to supplement common law wrongful discharge claims. Last, the court relied upon the workers' compensation law as it relates to the public education provisions. Specifically, the public education provisions require that employers continually update their employees with regard to the California Fair Employment and Housing Act. The court read this as an implicit legislative mandate, which would make little sense if section 132a were the exclusive remedy.

Therefore on the points raised, both refuting the prior holding in *Portillo* and interpreting the FEHA as liberally drawn, the court held that Labor Code section 132a is not an employee's exclusive remedy. The court tempered this conclusion by also holding that not every instance of disability discrimination under section 132a will also give rise to a valid FEHA claim. This is because the standards for establishing a disability claim are not equal under section 132a and FEHA.

The court next addressed the plaintiff's common law wrongful discharge cause of action. Relying upon the court's decision in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980), the court recognized an employee's right to pursue a tort action. In that case, the plaintiff was allegedly terminated for its unwillingness to participate in a price fixing scheme. The court, in responding to a demurrer, held that a plaintiff may seek both contractual and tort relief where the wrongful act was committed in the course of a contractual relationship. The court has extended this holding to cases involving sex, age, and retaliation for testifying truthfully. However, the court has never addressed whether or not disability discrimination can form the basis of a common law wrongful discharge claim.

The court has developed a four-part test for determining if disability discrimination can support a common law wrongful discharge claim. First, the policy has to be delineated in either constitutional or statutory provisions. The court found that this requirement was satisfied by the FEHA, in addition to other legislative pronouncements, such as disability discrimination in public accommodations and state civil service employment. The second point under the test is whether or not the policy serves the public at large rather than a singular individual. The court found this satisfied by the fact that all segments of the public may

become disabled. Third, the policy has to be well established at the time of the discharge. This prong was satisfied with reference to the date of enactment of the FEHA. It was enacted July 1, 1974 and therefore the court felt it was well established.

Last, the court said the policy had to be substantial and fundamental. The court recognized that disabilities in some instances impact upon an individuals' ability to do a particular job. The court stated that therefore in many instances an employer may have a valid reason to treat disabled employees differently. However, the court concluded that if an employee can prove that it can do a job on an equal footing with a nondisabled person, then it violates a substantial and fundamental policy. Therefore, the court held that disability discrimination could form the basis of a common law wrongful discharge claim.

REFERENCES

Statutes and Legislative History:

CAL. GOV'T CODE § 12900 (West 1992 & Supp. 1999) (discussing the California Fair Employment and Housing Act).

CAL. GOV'T CODE § 12920 (West 1992 & Supp. 1999) (discussing the general public policy of the state to protect all individuals in search of employment without discrimination).

CAL. GOV'T CODE § 12921 (West 1992 & Supp. 1999) (discussing the general civil right to employment without discrimination).

CAL. GOV'T CODE § 12940 (West 1992 & Supp. 1999) (concluding that it is unlawful to discriminate against those with a disability).

Case Law:

Angell v. Peterson Tractor, Inc., 21 Cal. App. 4th 981, 26 Cal. Rptr. 2d 541 (1994) (holding that disability discrimination could form the basis of a common law wrongful discharge claim).

Gantt v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992) (holding that the "compensation bargain" does not extend to a policy which is obnoxious to the interests of the state).

Pickrel v. General Tel. Co., 205 Cal. App. 3d 1058, 252 Cal. Rptr. 878 (1988) (holding that Labor Code section 132a is the exclusive remedy for an individual alleging disability discrimination).

Portillo v. G. T. Price Prod., Inc., 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982) (holding that where Labor Code section 132a applies, it is deemed to be the individual's exclusive remedy).

Shoemaker v. Myers, 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990) (holding that in the case of a "whistleblower" protection statute, the legislature showed the intention to create a new remedy, thereby not limiting a remedy to Labor Code section 132a).

Stevenson v. Superior Ct., 16 Cal. 4th 880, 941 P.2d 1157, 66 Cal. Rptr. 2d 888 (1997) (articulating a four part test for the determination of when a particular policy allows for an action based on common law wrongful discharge).

Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discussing the right to pursue a tort action as an employee where there was a wrongful discharge).

Legal Texts:

29 CAL. JUR. 3D *Employer and Employee* § 63 (1986 & Supp. 1998) (discussing public policy limitations on grounds for discharge of an employee).

41 CAL. JUR. 3D *Labor* § 4 (1978 & Supp. 1998) (discussing the Fair Employment Practice Act in general).

41 CAL. JUR. 3D *Labor* § 5 (1978 & Supp. 1998) (discussing enforcement of the Fair Employment Practice Act by the Department of Fair Employment and Housing).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 21-23 (9th ed. 1987) (discussing Labor Code section 132a in general).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 25-26 (9th ed. 1987) (discussing Labor Code section 132a as an exclusive remedy under workers' compensation law).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *California Constitutional Law* § 756 (9th ed. 1988 & Supp. 1998) (discussing the nature and purpose of the Fair Employment and Housing Act).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *California Constitutional Law* § 757 (9th ed. 1988 & Supp. 1998) (discussing the scope of the Fair Employment and Housing Act).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *California Constitutional Law* § 762 (9th ed. 1988) (applying the Fair Employment and Housing Act to those who are discriminated against because they disabled).

8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *California Constitutional Law* § 762(a) (9th ed. Supp. 1998) (discussing specifically discrimination against the disabled under the Fair Employment and Housing Act).

Law Review and Journal Articles:

Daniel T. Dashiell, Comment, *Employment Discrimination After the 1993 Amendments to FEHA: A Change in the Once Settled Bargain*, 32 U.S.F. L. REV. 433 (1998) (discussing the 1993 amendment to the Fair Employment and Housing Act as a precursor to uncertainty and controversy to the settled law on worker's compensation law).

Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983) (discussing that the Fair Employment and Housing Act fills in a gap left uncovered by federal employment law).

Linda J. Lorenat, Comment, *"Disabling" Workers' Compensation Exclusivity: Enabling California Workers to File Work-Related Disability Discrimination Claims in State Court*, 38 SANTA CLARA L. REV. 893 (1998) (arguing that the Fair Employment and Housing Act governs over disability discrimination claims, not just Labor Code section 132a).

Ellyn Moscowitz, *Outside the "Compensation Bargain": Protecting the Rights of Workers Disabled on the Job to File Suits for Disability Discrimination*, 37 SANTA CLARA L. REV. 587 (1997) (discussing generally the case of *City of Moorpark v. Superior Court*).

David Benjamin Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies*, 23 U.S.F. L. REV. 145 (1989) (concluding that common law remedies are still available in certain situations, but not for sexual discrimination).

MORGAN STEWART

B. Delay in providing payment of worker's compensation benefits requires additional evidence beyond the mere existence of a delay to be considered unreasonable enough to initiate penalty under California Labor Code section 5814; thus, slightly delayed compensation benefits did not trigger any permanent penalty in the absence of additional evidence of unreasonableness.

State Compensation Ins. Fund v. Workers Compensation Appeals Bd., Supreme Court of California, Decided August 20, 1998, 18 Cal. 4th 1209, 959 P.2d 1204, 77 Cal. Rptr. 2d 528.

Facts. California Labor Code section 5814 subjects a workers' compensation insurer to a penalty of a ten percent increase in the overall amount of the award if a workers' compensation judge finds that payment of benefits was unreasonably delayed. Adrienne Stuart began receiving workers' compensation payments after sustaining at-work injuries in 1991. State Compensation Insurance Fund (SCIF) handled the payments. Stuart received the payments regularly until May 15, 1995, when Stuart's May 15 check was delayed. In April of 1995, the claims adjuster at SCIF normally handling Stuart's case took a vacation and a substitute claims adjuster took over his duties. During this time, a change of address from Stuart's former employer was received by the office. The substitute claims adjuster mistakenly entered a change of address for the former employer as a change of address for Stuart, which caused the delay. Stuart's attorney contacted SCIF on May 18, 1995 and May 19, 1995 regarding the delayed payment. Stuart was reissued the check along with additional amounts for penalties and interest as required by California Labor Code section 4650(d) and Stuart received the check a total of one week after the May 15, 1995 due date.

Stuart claimed that the payment was unreasonably delayed and petitioned for an increase of ten percent of the overall award pursuant to section 5814. At the hearing, the regular claims adjuster speculated that the substitute adjuster had made the error and testified that he would not have made the mistake. The workers' compensation judge found SCIF had unreasonably delayed the payment and granted Stuart the increase. The Workers' Compensation Appeals Board and the court of appeal agreed with the judge that the mistaken reading of the change of address letter was inexcusable and therefore the delay was unreasonable and the penalty justified. The California Supreme Court granted review to consider whether the Workers' Compensation Appeals Board's decision represented a fair balance between employee and employer interests considering the evidence available.

Holding. Reversing the decisions of the workers' compensation judge, the Workers' Compensation Appeals Board, and the court of appeal, the California Supreme Court held that the mere existence of delay in workers' compensation payments is not unreasonable. The supreme court pointed out the difference in

penalties available when workers' compensation payments are delayed. Specifically, the court pointed out that the ten percent penalty imposed by section 4650(d) of the Labor Code is much different than the ten percent penalty imposed by section 5814 because section 5814 applies to all future payments and increases the general amount of the award rather than a one time penalty for a late payment. Because section 4650(d) provides a remedy for a delayed payment, the court reasoned that the California Legislature intended something beyond mere delay in order to trigger the application of section 5814. The court used this reasoning in review of the workers' compensation judge's initial finding that SCIF's one week delay constituted an unreasonable delay. The court took care to point out that if Stuart had presented any other evidence against SCIF, a history of improperly handled payments, mismanagement of its claims adjusters caseload, or of its business practices such that errors were more likely or that the delay was intentional, that a different outcome could be in order. However, because no evidence beyond the human error of the substitute claims adjuster was presented, the court found that the evidence did not support the judge's finding. As such, the court found that the Workers' Compensation Appeals Board's reliance on the report of those findings was unsupportable and annulled the penalty imposed on the SCIF.

REFERENCES

Statutes and Legislative History:

CAL. LAB. CODE § 5814 (West 1989) (authorizing increasing a workers' compensation award by ten percent if a delay or refusal of payment is found to be unreasonable).

CAL. LAB. CODE § 4650(d) (West 1987 & Supp. 1999) (requiring the payment of a ten percent penalty on any delayed workers' compensation payment, regardless of the reason for the delay).

Case Law:

State v. Workers' Compensation Appeals Bd., 44 Cal. App. 4th 128, 51 Cal. Rptr. 2d 606 (1996) (highlighting the distinguishing factor between California Labor Code sections 4650 and 5814 in that section 4650 holds responsible parties liable for a ten percent penalty for undue delay in workers' compensation payment without consideration for the reason of the delay).

Smith v. Workers' Compensation Appeals Bd., 186 Cal. App. 3d 1451, 231 Cal. Rptr. 364 (1987) (holding that a genuine dispute as to whether an employer had already paid a certain amount justified a delay of payment to the disabled employee).

Jensen v. Workers' Compensation Appeals Bd., 170 Cal. App. 3d 244, 216 Cal. Rptr. 33 (1985) (suggesting that an unintentional delay in disability payments is per se unreasonable, a holding disapproved of in the instant case).

Kampner v. Workers' Compensation Appeals Bd., 86 Cal. App. 3d 376, 150 Cal. Rptr. 222 (1978) (holding that a small delay in payment is not unreasonable, considering the realities of the procedure of business claims processing).

Kerley v. Workmen's Compensation Appeals Bd., 4 Cal. 3d 223, 481 P.2d 200, 93 Cal. Rptr. 192 (1971) (holding that employers are not entitled to discontinue disability payments unless the employer holds an authentic medical or legal doubt regarding the liability of the disability payments that must be proved by the employer).

Legal Texts:

65 CAL. JUR. 3D *Work Injury Compensation* § 332 (1998) (discussing the time of payment for temporary disability payments).

65 CAL. JUR. 3D *Work Injury Compensation* § 340 (1998) (discussing the penalties enforced for late payments).

65 CAL. JUR. 3D *Work Injury Compensation* §§ 769-794 (1998) (generally discussing judicial review of findings by the Workers' Compensation Board).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 408 (9th ed. 1987 & Supp. 1998) (discussing the nature of penalties applied for delay in payment).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 410 (9th ed. 1987 & Supp. 1998) (discussing the measure of penalty applied).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 448 (9th ed. 1987 & Supp. 1998) (generally discussing the effect of an award annulment).

Law Review and Journal Articles:

Note, *Workers' Compensation*, 21 PAC. L.J. 571 (1990) (outlining reforms in the California workers' compensation statutory scheme).

Aya V. Matsumoto, Comment, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 LOY. L.A. L. REV. 1327 (1994) (discussing the various areas of reform enacted by the California Legislature in an effort to address problems surrounding mental stress claims filed under the workers' compensation system).

Linda J. Lorenat, Comment, *"Disabling" Workers' Compensation Exclusivity: Enabling California Workers to File Work-Related Disability Discrimination Claims in State Court*, 38 SANTA CLARA L. REV. 893 (1998) (addressing the impact of the Fair Employment and Housing Act on California's workers' compensation laws and how it affects disability discrimination claims).

Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983 (1993) (discussing the prevalence of fraud in the workers' compensation system, and in California in particular, and the implemented and proposed reforms to such abuses).

Note, *Workers' Compensation*, 24 PAC. L.J. 1085 (1993) (outlining several changes to California workers' compensation law in the areas of advertising by workers' compensation attorneys, declaration of adequate insurance and public liability, garnishment of benefit, and regulation of self-insured employers).

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C. Because medical treatment transportation expenses are properly included as part of the overall expense of medical treatment when the employee is required to undergo medical treatment away from home, the penalty for unreasonable delay in payment of medical treatment transportation expenses applies to the full amount of the award for medical treatment expenses under Labor Code section 5814; furthermore, the employer or its insurer has sixty days after receipt of documentation in which to reimburse the injured worker for medical treatment transportation costs, pursuant to Labor Code section 4603.2, subdivision (b).

Avalon Bay Foods v. *Workers' Comp. Appeals Bd., Supreme Court of California, Decided August 20, 1998, 18 Cal. 4th 1165, 959 P.2d 1228, 77 Cal.Rptr.2d 552.*

Facts. The plaintiff, Robert Moore, while working as a food production worker for Avalon Bay Foods, suffered injury to his leg on February 7, 1995. On May 23, 1996, Moore filed a claim to ITT Hartford Underwriters Insurance, Inc. (ITT) seeking reimbursement for expenses incurred while traveling to Sacramento from his home to receive medical treatment. Pursuant to ITT's reimbursement procedure, Moore submitted a mileage log detailing the trips to ITT on May 28, 1996. However, because ITT's claim adjuster was uncertain whether Moore was using his own car for the trips or had others drive him by paying them, she requested Moore to send her more detailed information. The claim adjuster paid nothing until Moore furnished the requested information, believing that she had sixty days to act on the claim pursuant to Labor Code section 4603.2, which provides that payment of medical treatment be paid within sixty days of proper documentation. On May 29 and June 12, Moore's attorney requested the payment of Moore's travel claim. On June 26, 1996, ITT paid a total sum of $240, which represented reimbursement for 12 trips Moore had to take for medical treatment at $20 per trip. A few weeks later, Moore also received a mileage check for $68.40.

On June 28, Moore filed a declaration of readiness, requesting medical mileage and seeking a penalty against ITT for unreasonable delays in processing his claim. The Workers' Compensation Appeal Board (WCAB) determined that ITT's refusal to pay either the chauffeur's fee or the mileage expense was unreasonable within the meaning of section 5814 of the Labor Code and assessed a ten percent penalty on all past, present, and future medical costs, including mileage. The court of appeal annulled the WCAB's order based on the finding that the penalty for delay in payment only applied to the total expense for transportation, although the finding of unreasonable delay was supported by evidence. The supreme court granted review.

Holding. Affirming the court of appeal, the California Supreme Court held that medical treatment transportation benefits are an element of overall medical treatment benefits under Labor Code section 4600 and are subject to the 60-day time limit for payment applicable to other medical treatment benefits. The court

observed that even though the language of the statute did not expressly refer to medical treatment transportation expenses as an aspect of medical treatment benefits, awarding medical treatment transportation expenses as part of medical treatment benefits is of long standing under the workers' compensation laws. The court, after surveying relevant case law, concluded that in light of all the previous cases and legislative intent, the right to medical treatment transportation expenses under Labor Code section 4600 is implied as dependent on, and ancillary to, medical treatment benefits, not as a different benefit. The court emphasized that the Workers' Compensation Act should be viewed from the perspective of an injured worker, with the objective of securing the maximum benefits to which the injured employee is entitled.

Next, the supreme court discussed the penalty provision found under Labor Code section 5814. The court held that because medical treatment transportation expenses arise as an aspect of the broad class of medical treatment benefits, it follows that a penalty for unreasonable delay or refusal should be computed on the basis of the total amount of medical treatment expenses. The court noted that the policy behind Labor Code section 5814 is to compel prompt payment of benefits, to assist injured workmen, and to assure that they return to employment without undue delay. And because timely provision of medical treatment is essential to achieving this purpose, failure to provide transportation for medical treatment can deprive a worker of necessary treatment and defeat the purpose of the workers' compensation law.

Finally, the supreme court determined that the court of appeal erred in treating transportation expenses to obtain medical treatment as an independent class of benefits for the purpose of assessing a penalty. The court explained that although Labor Code section 4600 lists numerous items of expenses for medical treatment, the individual expenses for purposes of receiving a medical treatment do not constitute different classes or categories of benefits. The court viewed transportation expenses to be a necessary part of obtaining medical treatment and thus inseparable from the overall expense. It was necessary under Labor Code section 5814, the court reasoned, to impose a penalty on the full amount of a class of benefits to deter unreasonable delay in payment of the benefits to injured workmen.

The supreme court, however, affirmed the court of appeal's ruling on the ground that the payment to Moore was properly made within sixty days. The court explained that because Labor Code section 4603.2, subdivision (b), specifically provides that a payment for medical treatment be made by the employer within sixty days after receipt of itemized billing, ITT had sixty days to process Moore's claim. The court also added that adhering to the sixty-day period established by the legislature would also provide all parties a clear, predictable rule that is easy to follow. The court, however, recognized that although the sixty-day rule, as it is applied to medical treatment transportation expenses, may be seen as extending the

time employees are "out-of-pocket for transportation expenses, [the workers] can to a large degree control mitigation of any detriment because they determine the timing of their reimbursement request."

REFERENCES

Statues:

CAL. LAB. CODE § 4600 (West 1989 & Supp. 1999) (imposing liability on employers to compensate medical costs).

CAL. LAB. CODE § 4603.2 (b) (West Supp. 1999) (explaining payment procedure for medical treatment).

CAL. LAB. CODE § 4650 (West 1989 & Supp. 1999) (explaining when payments for workers' compensation shall commence and cease according to the degree of injury suffered).

CAL. LAB. CODE § 5814 (West 1989 & Supp. 1999) (imposing a mandatory penalty for unreasonable refusal or delay of workers' compensation benefits prior to or subsequent to the issuance of an award).

Case Law:

Rhiner v. Workers' Comp. Appeals Bd., 4 Cal. 4th 1213, 848 P.2d 244, 18 Cal. Rptr. 2d 129 (1993) (holding that the ten percent penalty required by Labor Code section 5814 for unreasonably delayed or refused payment of workers' compensation must be assessed against the entire amount awarded to the employee).

Hutchinson v. Workers' Comp. Appeals Bd., 209 Cal. App. 3d 372, 257 Cal. Rptr. 240 (1989) (holding that transportation expenses to obtain prescription medication are compensable under Labor Code section 4600).

Gallamore v. Workers' Comp. Appeals Bd., 23 Cal. 3d 815, 591 P.2d 1242, 153 Cal. Rptr. 590 (1979) (holding that preaward and postaward delinquencies are equally subject to the ten percent penalty and that the penalty is mandatory despite the de minimis nature of the amounts involved).

Adams v. Workers' Comp. Appeals Bd., 18 Cal. 3d 226, 555 P.2d 303, 133 Cal. Rptr. 517 (1976) (holding that the ten percent penalty award under section 5814 also applied to medical-legal costs awarded).

Caldwell v. Workmen's Comp. App. Bd., 268 Cal. App. 2d 912, 74 Cal. Rptr. 517 (1969) (holding that a 1959 amendment to Labor Code section 4600 specifically provided travel expenses where the employee is required to submit to a medical examination).

Legal Texts:

82 AM. JUR. 2D, *Workers' Compensation* § 477 (1992 & Supp. 1998) (discussing an insurer's liability for wrongful delay or refusal to pay benefits).

101 C.J.S., *Workmen's Compensation* § 848 (1958 & Supp. 1998) (describing various penalties added to an award against an employer or insurance carrier for failing to comply with workers' compensation statute).

65 CAL. JUR. 3D *Work Injury Compensation* §§ 287, 318-320, 370 (1981 & Supp. 1998) (discussing proceedings before the Workers' Compensation Appeals Board and employer's and insurance carrier's rights and remedies).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 408 (9th ed. 1987 & Supp.) (discussing penalties imposed for delay or refusal to pay).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 408-413 (9th ed. 1987 & Supp. 1998) (explaining the nature and measure of section 5814 penalties).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 414 (9th ed. 1987 & Supp. 1998) (explaining multiple penalties for successive delays in payment).

Law Review and Journal Articles:

Anna Hur, *Rhiner v. Workers' Compensation Appeals Board, Supreme Court of California*, 21 PEPP. L. REV. 1060 (1994) (discussing California Supreme Court's holding that UEF is not subject to penalty under Cal. Lab. Code section 5814).

Stephen A. Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets.*, 53 CAL. L. REV. 207 (1965) (discussing the history of workers' compensation laws in California).

Arthur W. Coasts, *Liability for Fault–Distinguishing Feature of Workmen's Compensation Law*, 42 CAL. ST. BAR J. 534 (1965) (discussing various penalties found under Cal. Lab. Code section 5814).

Michael A. Rosenhouse, *Tort Liability of Workers' Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due*, 8 A.L.R. 4th 902 (1981 & Supp. 1997) (discussing various approaches employed by different jurisdictions to penalize employers and insurers who wrongfully withhold benefits to claimants).

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