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California Supreme Court Survey: May 1997- August 1997

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California Supreme Court Survey

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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.

The survey will review California Supreme Court cases in a summary format. Summaries provide the facts, holdings and brief outlines of the areas of law addressed in California Supreme Court cases. Additionally, summaries include references to additional research sources. Summaries are designed to provide the reader with a basic understanding of the legal implications of cases in a concise format.

SUMMARIES

I. Arbitration/Workers' Compensation

When a party to a judicial arbitration subsequently elects a trial de novo, California Labor Code section 3856(b) entitles the electing party to recover reasonable litigation expenses and attorney's fees from the judgment before it is subject to a claim for reimbursement of worker's compensation benefits, despite California Code of Civil Procedure section 1141.21(a)(ii), which requires that the party electing a trial de novo, who receives a less favorable judgment, pay the costs incurred by the opposing party without recovering his own litigation expenses.

II. Criminal Law

A. Although a minor defendant's statements to a probation officer in preparation for a juvenile court fitness hearing under Welfare and Institutions Code section 707(c) may not be used substantively at a subsequent criminal trial to prove guilt, such statements are admissible to impeach the minor defendant's trial testimony.

B. An accomplice who aids and abets a robbery only after the principal, acting alone, commits a killing during the robbery is not guilty of first degree murder under Penal Code section 189. A trial court's failure to instruct the jury on that principle is not reversible error, however, where other parts of the verdict demonstrate that the jury necessarily found the defendant guilty of first degree murder on a proper theory.

C. Where a picture of victims at a crime scene is sought to be introduced at trial, the photograph may be relevant to corroborate witness testimony, to show premeditation of a crime, and, under a felony-murder theory, to show that a murder occurred. Further, where the photograph is not overly gruesome, it will likely not be considered unduly prejudicial.

III. Healing Arts and Institutions

The statutory "reasonable licensee defense" set forth in section 1424 of the Health and Safety Code does not negate or repeal the common law doctrine of nondelegable duties for licensees, and allows long-term health care facility licensees that have received citations for violations of patient care laws to rebut a presumption of negligence by showing that both the licensee and its agents acted reasonably under the circumstances.

IV. Juror Misconduct

When a juror is unable to render a verdict upon the evidence presented, and instead reaches a verdict based on extraneous information, which creates a state of mind rendering a juror unable to act with entire impartiality and without prejudice, the juror has failed to act as a competent juror under California law, and, therefore, a new trial for the defendant must be granted.

V. Statute of Limitations

When a plaintiff, suing for medical malpractice under the Medical Injury Compensation Reform Act, serves a defendant with the required ninety day notice of intent to sue prior to the expiration of the original

three year statute of limitations, the notice serves to toll the original statute of limitations for ninety days.

I. Arbitration/Worker's Compensation

When a party to a judicial arbitration subsequently elects a trial de novo, California Labor Code section 3856(b) entitles the electing party to recover reasonable litigation expenses and attorney's fees from the judgment before it is subject to a claim for reimbursement of worker's compensation benefits, despite California Code of Civil Procedure section 1141.21(a)(ii), which requires that the party electing a trial de novo, who receives a less favorable judgment, pay the costs incurred by the opposing party without recovering his own litigation expenses.

Phelps v. Stostad, Supreme Court of California, Decided July 21, 1997, 16 Cal. 4th 23, 939 P.2d 760, 65 Cal. Rptr. 2d 360.

Facts. The plaintiff was injured when a vehicle driven by the defendant crashed into the building where the plaintiff was working. The plaintiff filed an action against the defendant to recover damages for his injuries, and his employer intervened to recover the cost of worker's compensation benefits paid to the plaintiff. In a judicial arbitration proceeding, the plaintiff was awarded $45,000 and his employer was awarded the entire cost of the plaintiff's compensation benefits. Pursuant to California Code of Civil Procedure section 1141.20(b), the plaintiff rejected the award and elected a trial de novo in the superior court. Prior to trial, the plaintiff's employer assigned its right to reimbursement for its worker's compensation expenditures to the defendant in exchange for $20,000.

At the conclusion of the trial, the court awarded the plaintiff $7100 in economic damages, and $7500 in general damages. The defendant filed a memorandum seeking costs of $6,933.02, as well as a motion requesting that $28,000 be set off against the judgment to reflect the amount of compensation benefits paid to the plaintiff. The plaintiff claimed that, pursuant to California Labor Code section 3856(b), he was entitled to have his litigation costs and attorney's fees (totaling more than $18,000) paid from the judgment before it was subject to reduction for payment of worker's compensation benefits.

The trial court ruled that Civil Procedure Code section 1141.21(a)(ii) precluded the recovery of litigation expenses and attorney's fees under Labor Code section 3856(b) because the plaintiff elected a trial de novo and received a judgment less favorable than the original arbitration award. Pursuant to this ruling, the court offset the plaintiff's award of $7100 for economic damages by the $28,000 cost of compensation benefits, and reduced the plaintiff's $7500 award for general damages by the defendant's costs of $6933.02, leaving the plaintiff with an award of $566.98. The plaintiff appealed and the court of appeal affirmed the trial court's judgment.

Holding. The California Supreme Court reversed the court of appeal and remanded the case back to the trial court. The court held that even when a party who elects a trial de novo subsequent to judicial arbitration is precluded from recovering his costs under Civil Procedure Code section 1141.21(a)(ii), the judgment is still subject to allocation pursuant to Labor Code section 3856(b), including payment of reasonable litigation expenses and attorney's fees. The court reasoned that the two statutes do not conflict because they apply to different relationships. Civil Procedure Code section 1141.21(a)(ii) controls the allocation of costs between adverse parties, while Labor Code section 3856 controls the distribution of a judgment between an injured employee and his employer.

The court stated that the legislature enacted Civil Procedure Code section 1141.21 to encourage parties to accept reasonable arbitration awards. This purpose is accomplished by requiring that the party electing a trial de novo, who receives a less favorable award, to pay the costs incurred by the opposing party, and by precluding him from recovering his own costs.

In contrast, the court indicated that the legislature enacted Labor Code section 3856 as part of California's comprehensive worker's compensation system, one purpose of which is to relieve workers from any costs associated with injuries sustained in the course of their employment. Section 3856 accomplishes this purpose, in part, by providing that the injured employee may recover his reasonable litigation expenses and attorney's fees from a judgment, prior to any set-off for worker's compensation benefits already paid to the employee. The court noted that this rule was enacted specifically for situations like the present case, where the amount of a judgment is insufficient to cover both the employee's litigation expenses as well as the employer's worker's compensation payment.

The court then stated that a party does not "recover his or her costs", as the term is used in Civil Procedure Code section 1141.21(a)(ii), when a portion of the party's judgment is used to pay his litigation expenses or attorney's fees. The court indicated that to interpret the statute in the

same manner as the court of appeal would lead to undesirable results. For example, the plaintiff electing a trial de novo and receiving a less favorable judgment would not only have to pay the costs of the opposing party without being able to recover his own litigation expenses, but would also be precluded from using his judgment to pay litigation costs or attorney's fees. The court concluded that the legislature did not intend this result.

REFERENCES

Statutes:

CAL. CIV. PROC. CODE § 1141.10 (Deering 1981 & Supp. 1998) (requiring arbitration of civil claims for less than $50,000).

CAL. CIV. PROC. CODE § 1141.21 (Deering 1981 & Supp. 1998) (providing for recovery of costs resulting from a trial de novo).

CAL. LAB. CODE § 3856 (Deering 1991 & Supp. 1998) (providing for allocation of payments from a judgment for damages).

Legal Texts:

6 CAL. JUR. 3D *Arbitration and Awards* §§ 119-121 (1988 & Supp. 1996) (discussing a plaintiff's right to a trial de novo subsequent to judicial arbitration).

6 CAL. JUR. 3D *Arbitration and Awards* § 123 (1988 & Supp. 1996) (discussing the recovery of costs by a defendant following a trial de novo).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Worker's Compensation* § 73 (9th ed. 1987) (discussing the procedures for apportionment of attorney's fees).

6 B.E. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* § 579 (4th ed. 1997 & Supp. 1997) (discussing the allocation of costs and fees from a trial de novo).

Law Review and Journal Articles:

Sharon A. Jennings, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or "Second Class" Justice*, 6 OHIO ST. J. ON DISP. RESOL. 313 (1991) (discussing compulsory judicial arbitration).

Joseph H. King, *The Exclusiveness of an Employee's Worker's Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988) (discussing recovery under workers compensation systems).

Daoud A. Awad, Note, *On Behalf of Mandatory Arbitration*, 57 S. CAL. L. REV. 1039 (1984) (discussing judicial arbitration and provisions for a trial de novo).

Philip D. Oliver, Comment, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a 3rd Party*, 58 FORDHAM L. REV. 117 (1989) (proposing that employees be prohibited from suing third parties in tort to recover additional damages beyond those provided by worker's compensation).

Nancy Reynolds, Note, *Why We Should Abolish Penalty Provisions for Compulsory Nonbinding Alternative Dispute Resolution*, 7 OHIO ST. J. ON DISP. RESOL. 173 (1991) (discussing three forms of compulsory nonbinding alternative dispute resolution).

JOHN W. CORRINGTON

II. Criminal Law

A. Although a minor defendant's statements to a probation officer in preparation for a juvenile court fitness hearing under Welfare and Institutions Code section 707(c) may not be used substantively at a subsequent criminal trial to prove guilt, such statements are admissible to impeach the minor defendant's trial testimony.

People v. Macias, Supreme Court of California, Decided Aug. 26, 1997, 16 Cal. 4th 739, 941 P.2d 838, 66 Cal. Rptr. 2d 659.

Facts. In 1992, a sixteen-year-old juvenile defendant participated in a failed attempt to smuggle individuals from Mexico into the United States. During a high-speed chase with immigration officials, the defendant caused an accident resulting in the death of six persons. Seeking to have the minor tried as an adult for operating a motor vehicle without a license and to try him for six counts of murder, the prosecutor petitioned the juvenile court for a fitness hearing under California Welfare and Institutions Code sections 707(c)[1] to determine whether the defendant was fit to be tried as a juvenile. Because the defendant was charged with murder, one of the enumerated felonies in section 707(b)(1), a statutory presumption of unfitness applied, shifting the burden to the defendant to prove his fitness for juvenile treatment.

Prior to the fitness hearing, section 707(c) requires a probation officer to evaluate and submit a report to the court on "the behavioral patterns and social history of the minor being considered for a determination of unfitness." As part of his evaluation, the probation officer interviewed the defendant in the presence of his attorney. During this interview, the defendant made statements to the probation officer describing his background and the events surrounding the smuggling attempt. At the fitness hearing, the court determined that Macias should be tried as an adult. The defendant subsequently testified at his criminal trial, making several statements that were inconsistent with his prior statements to the proba-

1. All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

tion officer. The prosecution impeached the defendant's trial testimony, using the inconsistent statements made to the probation officer during the pre-hearing interview. The jury ultimately found the defendant guilty of six counts of second degree murder and one count of operating a motor vehicle without a valid license.

The court of appeal reversed the convictions, holding that the trial court improperly permitted the prosecution to impeach the defendant's trial testimony using the statements he made to the probation officer. The appellate court relied on dictum from *People v. May*, 44 Cal. 3d 309, 317, 748 P.2d 307, 311-12, 243 Cal. Rptr. 369, 373-74 (1988), which interpreted the prior case of *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 810, 693 P.2d 789, 795, 210 Cal. Rptr. 204, 210 (1985), to hold that a juvenile's statements made in connection with a fitness evaluation were "legislatively compelled" and thus could not be used against a minor defendant at a subsequent criminal trial "for any purpose." The California Supreme Court granted review to clarify its decision in *Ramona R.* and to consider "whether the prosecution may impeach a minor defendant at a criminal trial with the inconsistent statements he made to a probation officer who was evaluating him in preparation for a juvenile court fitness hearing under Welfare and Institutions Code section 707(c)."

Holding. In Justice Chin's plurality opinion, the California Supreme Court reversed the court of appeal's judgment and held that, contrary to the dictum in *May*, "statements made in connection with juvenile fitness hearings are not legislatively compelled, and, absent some demonstration of involuntariness, they are admissible for the sole purpose of impeachment at the defendants' subsequent trials." The court observed that *Ramona R.*, which held that a minor's statements to her probation officer or during a juvenile fitness hearing may not be used *substantively* against the minor in a subsequent trial, specifically left open the issue of whether statements to a probation officer in preparation for a fitness hearing could be used for the impeachment purposes.

The supreme court clarified the rationale of *Ramona R.*, asserting that the holding was not, as the dictum in *May* suggests, founded upon a finding that the minor's statements in preparation for a juvenile fitness hearing were legislatively compelled. On the contrary, "[s]ection 707(c) does not require the minor to speak during the probation evaluation period, and indeed provides the minor with alternatives during the evaluation process for producing any mitigating evidence that would rebut the [un]fitness presumption." The court further explained that *Ramona R.*'s grant of substantive use immunity was based on the need to protect a minor's privilege against self-incrimination by eliminating the constitutionally impermissible cruel trilemma of self-accusation, perjury or contempt faced by a minor during the juvenile certification process. The Cal-

ifornia Constitution does not, however, preclude the use of such statements for impeachment when a minor voluntarily testifies inconsistently at trial.

The plurality further distinguished the instant case from *New Jersey v. Portash*, 440 U.S. 450, 458-59, 99 S. Ct. 1292, 1296-97, 59 L.Ed.2d 501, 509-10 (1979), which held that involuntary or coerced statements made during a defendant's grand jury testimony could not be used for any purpose at the defendant's subsequent trial. Here, the minor defendant's statements during the pre-hearing evaluation period were not compelled, and thus, *Portash* does not preclude the admission of such statements for the purpose of impeachment. This conclusion is also consistent with United States Supreme Court and California Courts of Appeal decisions allowing the limited use of voluntary statements made in other contexts for impeachment, even though such statements are otherwise substantively inadmissible. Chief Justice George and Justice Werdegar concurred in the opinion of the court.

In a separate concurring opinion, Justice Baxter argued that because the plurality concluded that statements to a probation officer in preparation for a juvenile fitness hearing were not compelled and thus, not obtained in violation of the privilege against self-incrimination, it follows that they are admissible for any purpose and not just for impeachment.

In his dissenting opinion, Justice Mosk argued that the rationale of *Ramona R.* precludes the use of the defendant's statements for impeachment. Contrary to the assertion of the plurality, Justice Mosk argued that *Ramona R.* was premised on the "unanimous conclusion that the statements made by a juvenile in connection with a fitness hearing are not voluntary." Consequently, Justice Mosk asserted that although not specifically addressed in *Ramona R.*, it necessarily follows that such involuntary statements are inadmissible for any purpose, including impeachment.

REFERENCES

Constitutional Provisions:

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

CAL. CONST. art. I, § 15 (state constitutional provision securing the right against self-incrimination).

CAL. CONST. art. I, § 28(d) (Right to Truth in Evidence provision, popularly referred to as Proposition 8) ("[R]elevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. . . . Nothing in this section shall affect any existing statutory rule of evidence relating the privilege . . . .").

Statutes:

CAL. EVID. CODE § 940 (West 1995) (providing that "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.").

CAL. WELF. & INST. CODE § 602 (West 1984) (subjecting minors under the age of eighteen to the jurisdiction of the juvenile court for violation of criminal laws).

CAL. WELF. & INST. CODE § 707 (West 1984) (requiring a fitness hearing, upon petition for adult prosecution, to determine whether a minor fourteen years of age or older is amenable to the "care, treatment, and training program available through the facilities of the juvenile court").

Case Law:

New Jersey v. Portash, 440 U.S. 450, 458-59, 99 S. Ct. 1292, 1296-97, 59 L.Ed.2d 501, 509-10 (1979) (holding that the defendant's involuntary grand jury testimony could not be used to impeach his credibility at trial).

People v. May, 44 Cal. 3d 309, 317, 748 P.2d 307, 311-12, 243 Cal. Rptr. 369, 373-74 (1988) (holding that following passage of the Right to Truth in Evidence amendments to the California Constitution, prior inconsistent statements elicited in violation of Miranda v. Arizona, 384 U.S. 436 (1966), could be used to impeach the defendant).

Ramona R. v. Superior Court, 37 Cal. 3d 802, 810, 693 P.2d 789, 795, 210 Cal. Rptr. 204, 210 (1985) (holding that "a minor's statements made to a probation officer in preparation for a fitness hearing [may] not be used as substantive evidence against the minor at a subsequent trial.").

People v. Coleman, 13 Cal. 3d 867, 892, 533 P.2d 1024, 1044, 120 Cal. Rptr. 384, 404 (1975) (concluding that use immunity for statements made during the probation revocation hearing did not extend to impeachment once the probationer voluntarily took the stand).

Bryan v. Superior Court, 7 Cal. 3d 575, 587, 498 P.2d 1079, 1087, 102 Cal. Rptr. 831, 839 (1972) (holding, prior to passage of Proposition 8, that a juvenile has substantive use immunity for statements made to a probation officer and the court in a juvenile fitness hearing).

Sheila O. v. Superior Court, 125 Cal. App. 3d 812, 817, 178 Cal. Rptr. 418, 420 (1981) (holding that "testimony given by the juvenile at the fitness hearing is inadmissible at the jurisdictional hearing except for the purpose of impeachment.").

Legal Texts:

27 CAL. JUR. 3D *Delinquent and Dependant Children* §§ 122-136 (1987 & Supp. 1997) (addressing a minor's fitness for treatment under juvenile court law).

10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 754-774 (9th ed. 1989) (discussing the juvenile fitness hearing).

GENNARO F. VITO & DEBORAH G. WILSON, THE AMERICAN JUVENILE JUSTICE SYSTEM (1985) (providing an overview of the juvenile justice system).

Law Review and Journal Articles:

Martha E. Bellinger, *Waving Goodbye to Waiver for Serious Juvenile Offenders: A Proposal to Revamp California's Fitness Statute*, 11 J. JUV. L. 1 (1990) (proposing a complete renovation of the fitness statute to give minors who commit serious offenses greater accountability).

Elizabeth W. Browne, *Guideline for Transfer of Juveniles to Criminal Court*, 4 PEPP. L. REV. 479 (1977) (generally discussing the transfer of juveniles to adult court).

Richard A. Gadbois, Jr. & Kenneth A. Black, *1976 Amendments to the Juvenile Court Law: Adult Treatment of 16-17 Year-Old Offenders*, 9 U. WEST L.A. L. REV. 13 (1977) (focusing on the section 707 fitness hearings).

James R. McCall, *Truth in Evidence and the Privilege Clause—A Compromised Relationship*, 23 PAC. L.J. 1061 (1992) (discussing the Right to Truth in Evidence amendments to the California Constitution, popularly referred to as Proposition 8).

David Parker, *Juveniles in Criminal Courts: Substantive View of the Fitness Decision*, 23 UCLA L. REV. 988 (1976) (criticizing the decision to transfer youthful offenders to the adult correctional system).

Joseph N. Sorrentino & Gary K. Olsen, *Certification of Juveniles to Adult Court*, 4 PEPP. L. REV. 497 (1977) (providing a general overview of juvenile certification statutes).

Note, *California Supreme Court Holds that Statements Made During Juvenile Transfer Hearing May Be Used For Impeachment—California v. Macias*, 111 HARV. L. REV. 837, 840 (1998) (arguing that *Macias* was wrongly decided because it "failed to preserve the protection against self-incrimination, to prevent manipulative police practices during transfer evaluations, and to clarify doctrinal tensions.").

SHANNON MASON

B. An accomplice who aids and abets a robbery only after the principal, acting alone, commits a killing during the robbery is not guilty of first degree murder under Penal Code section 189. A trial court's failure to instruct the jury on that principle is not reversible error, however, where other parts of the verdict demonstrate that the jury necessarily found the defendant guilty of first degree murder on a proper theory.

People v. Pulido, Supreme Court of California, Decided May 29, 1997, 15 Cal. 4th 713, 936 P.2d 1235, 63 Cal. Rptr. 2d 625.

Facts. The defendant Michael Robert Pulido was prosecuted for robbery and first degree murder arising from his participation in the robbery of a gas station during which the attendant was killed. At trial, the defendant testified that another person killed the attendant, and that he joined the robbery as an aider and abettor only after the victim was killed. Conflicting evidence indicated, however, that the defendant was the actual killer. The jury convicted the defendant of robbery and first degree murder, and found true a robbery-murder special-circumstance allegation. Based on this verdict, the trial court sentenced the defendant to life in prison with no possibility of parole, pursuant to Penal Code section 190.2.

Relying on *People v. Esquivel*, 28 Cal. App. 4th 1386, 34 Cal. Rptr. 2d 324 (1994), the defendant appealed the first degree murder conviction on the ground that the trial court failed to instruct the jury that, under Penal Code section 189 (the "felony-murder rule"), the defendant was not liable for the murder if he formed the intent to aid and abet the robbery only after the victim was killed. The court of appeal affirmed the murder conviction and sentence, reasoning that because the defendant intentionally assisted in the asportation phase of the robbery, he was guilty of robbery and thus, also guilty of first degree murder under section 189 for any killing that occurred during the robbery, regardless of when the defendant formed the intent to aid and abet the robbery. The California Supreme Court granted review to resolve the conflict between the appellate court's broad interpretation of section 189 and the more limited *Esquivel* interpretation.

Holding. The supreme court unanimously affirmed the judgment of the court of appeal, but rejected the lower court's interpretation of Penal Code section 189. Under the section 189 felony-murder rule, a murder committed during the perpetration or attempted perpetration of one of the enumerated felonies, including robbery, constitutes first degree murder. Contrary to the court of appeal, the California Supreme Court held that an aider and abettor who joins a robbery after the killing has been completed is not guilty of first degree murder under section 189 because the killer was not then acting in pursuit of any common design or purpose with the accomplice. The court observed that its "cases establishing the complicity of a nonkiller in a felony murder have . . . uniformly required, at a minimum, that the accomplice have been, at the time of the killing, a conspirator or aider and abettor in the felony." Furthermore, the supreme court declined to extend section 189's first degree felony-murder rule to killings committed before the aider and abettor joined the felonious enterprise, noting that punishing aiders and abettors for earlier homicides committed by others will not serve section 189's primary purpose of deterring felons from killing negligently or accidentally in the commission of the underlying felony.

Affirming the murder conviction and sentence, the supreme court further held that the trial court's failure to instruct the jury that "a felony murder verdict could be based on an aiding and abetting theory only if [the defendant] aided and abetted the robbery before the infliction of the fatal wound" did not constitute reversible error. In this case, the jury received an instruction that the robbery-murder special-circumstance allegation could not be found true unless the defendant was engaged in the robbery at the time of the killing. By its special-circumstance verdict, the jury explicitly found that the defendant's involvement in the robbery, whether as a principal or as an aider and abettor, preceded the killing of the victim. Thus, because the jury necessarily resolved the omitted factual issue adversely to the defendant, no prejudicial harm arose from the trial court's failure to specially instruct. In reaching this conclusion, it was unnecessary for the supreme court to determine whether the trial court had a *sua sponte* duty to instruct on the nonliability of late joining accomplices.

Turning its attention to the standard jury instructions related to this issue, the supreme court observed that the combination of CALJIC No. 8.27 (first degree felony-murder aider and abettor instruction) and CALJIC No. 9.40.1 (timing of intent to aid and abet robbery) could incorrectly suggest that "a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule." Accordingly, the court noted that modification or qualification of these instructions is appropriate in cases where the evidence suggests that the defendant

aided and abetted the perpetrator of the felony only after the victim was fatally wounded.

REFERENCES

Statutes:

CAL. PENAL CODE § 187 (West 1997) (defining murder as the "unlawful killing of a human being, or a fetus, with malice aforethought").

CAL. PENAL CODE § 189 (West Supp. 1998) ("All murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . [certain enumerated felonies, including] robbery . . . is murder of the first degree.").

CAL. PENAL CODE § 190.2(a)(17)(A) (West Supp. 1998) (the "special circumstances" charge) (providing that the penalty for a defendant convicted of first degree robbery-murder is death or life imprisonment with no possibility of parole).

CAL. PENAL CODE § 211 (West 1988) (defining robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear").

Case Law:

People v. Asher, 273 Cal. App. 2d 876, 890 & n.2, 78 Cal. Rptr. 885 (1969) (approving instruction that to convict accomplices of murder, jury must find they "either conspired to rob or aided, abetted or participated in the robbery prior to the time the fatal shot was fired").

People v. Cooper, 53 Cal. 3d 1158, 1165, 811 P.2d 742, 282 Cal. Rptr. 450 (1991) (holding that a person commits robbery as an aider and abettor if the person "form[s] the intent to facilitate or encourage commission of the robbery prior to or during the carrying away of the loot to a place of temporary safety").

People v. Esquivel, 28 Cal. App. 4th 1386, 34 Cal. Rptr. 2d 324 (1994) (holding that a defendant who forms intent to aid and abet a robbery after the victim has been fatally wounded cannot be found guilty of felony-murder).

People v. Martin, 12 Cal. 2d 466, 472, 85 P.2d 880 (1938) (liability for murder extends to all persons "jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery").

People v. Sedeno, 10 Cal. 3d 703, 721, 518 P.2d 913, 112 Cal. Rptr. 1 (1974) (holding that the failure to instruct on a factual issue is not reversible error where "the factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions"), *overruled on other grounds*, People v. Flannel, 25 Cal. 3d 668, 684 n.12, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).

People v. Vasquez, 49 Cal. 560 (1875) (approving instruction on complicity of one robber for the murder committed by another robber when done "in furtherance of their common purpose to rob").

People v. Washington, 62 Cal. 2d 777, 782, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) ("All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design.").

Legal Texts:

17 CAL JUR. 3D *Criminal Law* §§ 207-215, 230 (1984 & Supp. 1997) (discussing the felony-murder rule in general).

17 CAL. JUR. 3D *Criminal Law* §§ 223-224 (1984 & Supp. 1997) (specifically addressing the liability of accomplices for killing committed by a co-felon).

1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against The Person* §§ 470-485 (2d ed. 1988) (discussing the felony-murder doctrine).

3 B.E. WITKIN & NORMAL L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1569, 1582-1587 (2d ed. 1989 & Supp. 1997) (discussing the special-circumstances allegation in general and as it relates to felony-murder).

Law Review and Journal Articles:

George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L.REV. 413 (1980-81) (criticizing the felony-murder doctrine).

Barry B. Klopfer, *The California Supreme Court Assaults Felony-Murder Rule*, 22 STAN. L.REV. 1059 (1970) (discussing the supreme court's criticism and limitation of the felony-murder rule).

Perkins, *The Act of One Conspirator*, 26 HASTINGS L.J. 337, 344-45 (1974) (explaining that the imposition of retroactive liability on a conspirator is not a criminal-law doctrine).

Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 618 n.25 (1984) (discussing the complicity aspect of the felony-murder rule).

SHANNON MASON

C. **Where a picture of victims at a crime scene is sought to be introduced at trial, the photograph may be relevant to corroborate witness testimony, to show premeditation of a crime, and, under a felony-murder theory, to show that a murder occurred. Further, where the photograph is not overly gruesome, it will likely not be considered unduly prejudicial.**

People v. Scheid, Supreme Court of California, Decided July 17, 1997, 16 Cal. 4th 1, 939 P.2d 748, 65 Cal. Rptr. 2d 348.

Facts. The defendant contacted Kazumi Hanano (Hanano) about a Corvette Hanano had advertised for sale. After going to Hanano's residence and test-driving the car, the defendant later returned with her boyfriend and another man. While her boyfriend was purchasing the car, the defendant left Hanano's home. Her boyfriend and his partner then handcuffed Hanano and his wife, ordered them to kneel in their bedroom, and pulled a mattress over their heads. Her boyfriend then shot Hanano and his wife several times, paralyzing Hanano and killing his wife. He then took Hanano's wallet and drove away in the Corvette.

At trial, the defendant's boyfriend and his partner were convicted of murder, attempted murder, robbery, and burglary. The defendant was charged with the same offenses. At pretrial, the defense moved to exclude a photograph of the victims taken at the crime scene which depicted their hands cuffed together and their heads laying on the bloody mattress. The defense agreed to stipulate that the boyfriend committed first-degree murder.

The trial court found that the photograph was not overly gruesome, and that the probative value of the photograph far exceeded any prejudice that would result from its admission. Thereafter, the jury convicted the defendant of one count of first-degree murder, one count of burglary, and two counts of robbery. The court of appeal reversed the judgment, finding that the trial court erroneously allowed the photograph into evidence because it was irrelevant and prejudicial.

Holding. Reversing the decision of the court of appeal, the California Supreme Court held that the photograph of the victims was admissible. The court focused on both the relevancy and prejudicial effect of the photograph, as well as the *Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956), standard for harmless error in reaching its decision.

The court held that the photograph was relevant to the case for three reasons. First, the photograph corroborated the testimony of Hanano and his son given both on the witness stand and to police during the investigation, thus bolstering the witnesses' credibility. Second, the photograph offered proof that a murder actually occurred. The fact that the prosecution presented the theory of felony-murder did not preclude the need to show that a murder actually occurred in the progress of the underlying crime. Finally, the photograph depicted the victims handcuffed, suggesting that the perpetrators planned the robbery. The fact that they brought handcuffs to the scene illustrated their intent to incapacitate the victims while the robbery was carried out. The court also stated that the defense's offer to stipulate as to the way in which the murder occurred did not negate the photograph's relevance.

The court further held that the probative value of the photograph was not outweighed by the potential prejudice it may have invoked upon the defendant. The photograph was probative of the deliberation with which the robbery and murder were consummated. Further, little prejudice would result from the photograph because "although the photograph [was] unpleasant, it [was] not unduly gory or inflammatory." Because the photograph was taken from a distance, it did not graphically detail morbid wounds. Additionally, the victims were face down, thus hiding any contorted facial expressions. Further, the jury knew that the defendant was not present at the time of the murder, and this knowledge decreased any prejudicial effect the photograph may have caused.

Finally, the court noted that even if the trial court erred in admitting the photograph, the error would have been harmless under the *Watson* standard. Under this standard, erroneously admitting a photograph will only result in reversal if "it is reasonably probable the jury would have reached a different result had the photograph been excluded." In the case at bar, the prosecution presented sufficient evidence to support the defendant's conviction, even in the absence of the only photograph. Moreover, the photograph depicted images related in graphic witness testimony, and the prosecution presented only one photograph, on which it spent little time.

REFERENCES

Statutes:

CAL. CONST. art. I, § 28(d) (stating that relevant evidence shall not be excluded from criminal proceedings).

CAL. EVID. CODE § 210 (West 1995) (defining relevant evidence).

CAL. EVID. CODE § 350 (West 1995) (stating that only relevant evidence is admissible).

CAL. EVID. CODE § 351 (West 1995) ("Except as other provided by statute, all relevant evidence is admissible.").

CAL. EVID. CODE § 352 (West 1995) (stating when courts may exclude evidence).

Case Law:

People v. Hines, 15 Cal. 4th 997, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997) (holding that use of photographs of victims was harmless error in light of the strength of the prosecution's other evidence pointing to the defendant's guilt).

People v. Bradford, 14 Cal. 4th 1005, 929 P.2d 544, 60 Cal. Rptr. 2d 225 (1997) (permitting photographs in a first degree murder capital case).

People v. Jackson, 13 Cal. 4th 1164, 920 P.2d 1254, 56 Cal. Rptr. 2d 49 (1996) (affirming the trial court's admission of three post mortem photographs of the victim).

People v. Lucas, 12 Cal. 4th 415, 907 P.2d 373, 48 Cal. Rptr. 2d 525 (1995) (stating that an express evaluation of prejudice is not required to admit photographs of a victim).

People v. Memro, 11 Cal. 4th 786, 905 P.2d 1305, 47 Cal. Rptr. 2d 219 (1995) (stating that the court enjoys broad discretion in admitting photographs of a victim).

People v. Medina, 11 Cal. 4th 694, 906 P.2d 2, 47 Cal. Rptr. 2d 165 (1995) (allowing photograph of the defendant to be used during the guilt phase for identification purposes).

People v. Cain, 10 Cal. 4th 1, 892 P.2d 1224, 40 Cal. Rptr. 2d 481 (1995) (allowing photographs of the victims where they were not unduly gruesome or inherently inflammatory).

People v. Garceau, 6 Cal. 4th 140, 862 P.2d 664, 24 Cal. Rptr. 2d 664 (1993) (finding no abuse of discretion in admitting photographs of the victims' bodies).

People v. Price, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991) (stating that photographs of victims are not cumulative where used to assist the jury in understanding and evaluating the testimony).

Legal Texts:

21 CAL. JUR. 3D *Criminal Law* § 3136 (Supp. 1997) (discussing demonstrative evidence generally).

31 CAL. JUR. 3D *Evidence* § 399 (1976) (discussing trial court discretion to admit photographic evidence).

2 B.E. WITKIN, CALIFORNIA EVIDENCE § 834 (3d ed. & Supp. 1986) (discussing admissibility and relevance of demonstrative evidence).

2 B.E. WITKIN, CALIFORNIA EVIDENCE § 837 (3d ed. & Supp. 1997) (discussing admissibility of photographic evidence of victims despite some prejudicial effect).

2 B.E. WITKIN, CALIFORNIA EVIDENCE § 839 (3d ed. & Supp. 1997) (discussing admissibility of photographic evidence generally).

Law Review and Journal Articles:

Sean W. Baker, *Evidence*, 56 MD. L. REV. 849 (1997) (discussing admissibility of photographs of victims during life).

Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 323, 324-26 (1996) (discussing relevance of photograph of defendant taken at time of arrest).

Amy S. Thomas, Note, *Utah Rule of Evidence 403 and Gruesome Photographs: Is a Picture Worth Anything in Utah?*, 1996 UTAH L. REV. 1131 (1996) (discussing admissibility of graphic evidence under the Utah Rules of Evidence).

LEALLEN FROST

III. Healing Arts and Institutions

The statutory "reasonable licensee defense" set forth in section 1424 of the Health and Safety Code does not negate or repeal the common law doctrine of nondelegable duties for licensees, and allows long-term health care facility licensees that have received citations for violations of patient care laws to rebut a presumption of negligence by showing that both the licensee and its agents acted reasonably under the circumstances.

California Ass'n of Health Facilities v. Department of Health Servs., Supreme Court of California, Decided Aug. 7, 1997, 16 Cal. 4th 284, 940 P.2d 323, 65 Cal. Rptr. 2d 872.

Facts. The plaintiff, an association representing various licensees of long-term health care facilities, filed an action for declaratory relief against the Department of Health Services (the Department), the agency charged with enforcement of patient care laws and regulations under the Long-Term Care, Health, Safety, and Security Act of 1973 (the Act). Under the Act, the Department has authority to inspect facilities and issue citations to licensees for violations of state and federal regulations governing long-term health care facilities. Such citations may include civil monetary penalties. In this action, the plaintiff sought an interpretation of the "reasonable licensee defense" set forth in section 1424 of the Health and Safety Code, which requires dismissal of a citation if the licensee proves that it "did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation."

The plaintiff asserted that section 1424 relieves a licensee of vicarious liability for the actions of its employees as long as the licensee itself acted reasonably. The trial court agreed and granted the plaintiff's motion for summary judgment, declaring that a licensee is not vicariously liable for the unreasonable actions of its employees if three specific conditions are satisfied. After modifying the judgment to eliminate the conditions, the court of appeal affirmed the trial court's conclusion that, in applying the section 1424 reasonableness defense, the department cannot hold the licensee vicariously liable for the misconduct of its employees.

The California Supreme Court granted review to interpret the reasonable licensee defense set forth in section 1424.

Holding. In a unanimous decision, the supreme court reversed the judgment of the court of appeal, holding that the reasonable licensee defense set forth in section 1424 does not negate a licensee's vicarious liability for the misconduct of its employees. The court first recognized that section 1424 is remedial in nature and should be liberally construed in favor of the nursing care patients it is intended to protect. Furthermore, following the general rule that "[u]nless expressly provided, statutes should not be interpreted to alter [or conflict with] the common law," the court must construe section 1424 consistently with the settled common law doctrine of nondelegable duties of licensees. This doctrine holds a licensee responsible for the conduct of its agents in order to ensure that the license is exercised in compliance with the law and to prevent "future harm to the public by giving the licensees strong incentives to ensure that their employees' conduct conforms to the law."

The court then examined the language of the statute to determine whether the legislature intended to repeal the common law rule of nondelegable duties of licensees. First, the court noted that section 1424's reasonable licensee defense is modeled after section 669(b) of the Code of Evidence, under which a showing of reasonableness will rebut a presumption of negligence per se. Second, the court determined that the legislature must have intended the reasonable licensee defense to be interpreted consistently with the judicial construction of section 669(b), which has not been construed to repeal the principle of nondelegable duty or respondeat superior liability. Thus, the supreme court concluded that section 1424 imposes nondelegable duties upon long-term health care facility licensees and that the licensee will be held liable for its agents failure to perform such duties in accordance with the law. The reasonable licensee defense requires dismissal of a citation only when the licensee can prove that, both it and its agents acted reasonably under the circumstances, despite the existence of a violation.

REFERENCES

Statutes:

CAL. HEALTH & SAFETY CODE § 1424(b) (West Supp. 1998) (providing that a citation shall be dismissed if the licensee proves that it "did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation.")

CAL. EVID. CODE § 669(b) (West 1995) (providing that the presumption of negligence per se for violation of a statute, ordinance or regulation of a public entity may be rebutted by proving the violator acted reasonably under the circumstances).

Case Law:

People *ex rel.* Lungren v. Superior Court, 14 Cal. 4th 294, 313-314, 926 P.2d 1042, 1054-55, 58 Cal. Rptr. 2d 855, 868-69 (1996) (holding that a remedial statute should be liberally construed in favor of the class of persons it is intended to protect).

Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 12 Cal. 4th 291, 306, 907 P.2d 358, 367, 48 Cal. Rptr. 2d 510, 519 (1995) (holding that a health care provider was not vicariously liable in tort for an employee's sexual assault on a patient because the employee's actions occurred outside the scope of employment).

Kizer v. County of San Mateo, 53 Cal. 3d 139, 142-43, 806 P.2d 1353, 1354-55, 279 Cal. Rptr. 318, 319-20 (1991) (summarizing the licensing enforcement regime under the Long Term Care, Health, Safety, and Security Act of 1973).

Ford Dealers Ass'n v. Department of Motor Vehicles, 32 Cal. 3d 347, 360, 650 P.2d 328, 335, 185 Cal. Rptr. 453, 460 (1982) (explaining that under the rule of nondelegable duties, the licensee must ensure that the license is not used in violation of the law and thus, the licensee is responsible for the conduct of its employees in the exercise of the license).

Maloney v. Rath, 69 Cal. 2d 442, 444-48, 445 P.2d 513, 514-17, 71 Cal. Rptr. 897, 898-901 (1968) (interpreting an analogous reasonableness defense (later codified verbatim as Evidence Code section 669) to overcome a presumption of negligence per se and holding that the defense does not negate the principle of nondelegable duties).

Goodman v. Zimmerman, 25 Cal. App. 4th 1667, 1676, 32 Cal. Rptr. 2d 419, 424 (1994) (holding that statutes should be interpreted consistently with common law rules, unless the legislature expressly provides otherwise).

Legal Texts:

29 CAL. JUR. 3D *Employer and Employee* §§ 91-124 (1986 & Supp. 1997) (generally discussing the vicarious liability of an employer for the wrongs of employees to third parties).

36 CAL. JUR. 3D *Healing Arts and Institutions* §§ 56-63, 67-76 (1997) (discussing the regulation of long-term health care facilities and the enforcement provisions under the Long-Term Care, Health, Safety, and Security Act of 1973).

2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency* § 115 (9th ed. 1987 & Supp. 1997) (discussing the nature and theory of the respondeat superior doctrine).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 818-20, 830-32 (9th ed. 1988) (explaining the principle of negligence per se as codified in Evidence Code section 669, its application to violations of statutes and administrative regulations, and a violator's ability to rebut the presumption of negligence by proving he acted reasonably in spite of the violation).

6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1017-18 (9th ed. 1988) (discussing the theory of nondelegable duties and a public licensee's liability for the actions of independent contractors).

Law Review and Journal Articles:

Review of Selected 1992 California Legislation, 24 PAC. L.J. 919 (1993) (explaining the 1992 amendments to the citation appeal process for nursing facilities).

SHANNON MASON

IV. Juror Misconduct

When a juror is unable to render a verdict upon the evidence presented, and instead reaches a verdict based on extraneous information, which creates a state of mind rendering a juror unable to act with entire impartiality and without prejudice, the juror has failed to act as a competent juror under California law, and, therefore, a new trial for the defendant must be granted.

People v. Nesler, Supreme Court of California, Decided August 21, 1997, 16 Cal. 4th 561, 941 P.2d 87, 66 Cal. Rptr. 2d 454.

Facts. Following the guilt phase of a bifurcated trial, the defendant was convicted of voluntary manslaughter for killing the man charged with molesting her son. During a break in the sanity phase of the trial, one juror obtained extraneous information regarding the defendant's parenting skills and use of illegal drugs, which the juror shared with fellow jurors during jury deliberations. At the conclusion of their deliberations, the jury determined that the defendant was sane at the time of the incident. Consequently, the defendant moved for a new trial based on juror misconduct, arguing that the juror involved was biased and prejudiced during voir dire and that her comments to fellow jurors evidenced an inability to act as an impartial juror throughout the deliberations.

The trial court refused to grant the defendant's motion for a new trial. The court held that the juror was not biased and prejudiced during voir dire because the extraneous information was received after voir dire. Moreover, the court concluded that any questionable comments and characterizations made by the juror during jury deliberations failed to establish her actual bias because the comments could have reasonably stemmed from the evidence presented at trial. The trial court further reasoned that a new trial was unnecessary because the extraneous information was irrelevant to the issues presented to the jury for consideration.

The court of appeal, applying a two part test, affirmed the decision of the trial court. The court of appeal first determined that there was sufficient evidence in the record to show that the questionable juror did not conceal information during voir dire. Second, the court of appeal was

unconvinced that the juror was biased by the extraneous information, and, therefore, concluded that any questionable comments and characterizations made by the juror during deliberations were the result of the evidence presented at trial.

Holding. Reversing the court of appeal, the supreme court held that the juror's actions indicated a "substantial likelihood of actual basis" during the sanity phase of the trial, and as a result the defendant was entitled to a new trial limited to the sanity issue. The court observed that a jury verdict must be vacated for juror misconduct where it appears that there is a substantial likelihood of actual juror bias. Based on the applicable California law, the court defined actual bias as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

The court demonstrated that such bias is shown in one of two situations; first, where extraneous information received by a juror is so prejudicial that it is sufficiently likely to influence a juror, and second, where the information is not facially prejudicial, but the court has determined that the juror was actually biased by the information. In determining whether a juror is biased, the court stressed that when the extraneous information is received is irrelevant. Instead, the court focused on the questionable juror's state of mind and their ability to act impartially and without prejudice.

The court conceded that the juror involved in the present case was not guilty of blameworthy conduct, however, the court believed that the nature of the juror's continued comments concerning the defendant evidenced her own actual bias. The juror's comments, including calling the defendant a "crankster" (referring to the defendant's alleged drug use), established that the juror had a particular state of mind which rendered her unable to act with entire impartiality. Moreover, the court reasoned that the juror's disclosure of the extraneous information to other jurors evidenced a desire to influence the jury deliberations in accordance with her own biased opinions of the defendant.

The court further held that the defendant was entitled to a new sanity trial because the extraneous information involved did directly relate to the issues presented to the jury during the original sanity phase of the trial. In contrast to the court of appeal, the court was convinced that the rumors concerning the defendant's drug use were central to the defendant's argument that she experienced a temporary psychosis on the day of the murder due to her past drug use, and was, therefore, not sane during the incident. Thus, the court was of the opinion that the extraneous information most likely influenced the jury's evaluation of material elements of the trial.

REFERENCES

Statutes:

CAL. CONST., art. I, § 16 (requiring that a criminal defendant has a constitutional right to a trial by an unbiased and impartial jury).

CAL. CIV. PROC. CODE § 225 (West Supp. 1998) (dictating that a jury verdict should stand unless the irregularity of the questioned information goes to the merits of the trial or works to influence any of the jurors).

CAL. CIV. PROC. CODE § 227 (West Supp. 1998) (articulating that during voir dire a challenge for cause may be exercised against an individual juror for actual or implied bias).

CAL. EVIDENCE CODE § 1150 (West Supp. 1995) (stating that when a verdict is challenged, evidence may received concerning the statements, conduct, or events which occurred either in or outside the jury room that may have influenced the verdict).

CAL. PENAL CODE § 1181 (West Supp. 1998) (allowing for a new trial when the jury has received any extraneous evidence).

Case Law:

People v. Holloway, 50 Cal. 3d 1098 (1990) (holding that a criminal conviction cannot stand where a single juror has been improperly influenced).

In re Carpenter, 9 Cal. 4th 634 (1995) (declaring that the appellate court alone has the power to review charges of juror misconduct, not the trial court).

In re Hitchings, 6 Cal. 4th 97 (1993) (holding that it is misconduct for a juror to receive extraneous information concerning the pending case).

Legal Texts:

50A C.J.S. *Juries* § 462 (1997) (defining a defendant's right to a fair trial to include the right to have potential jurors "sworn and examined as to their qualifications").

50A C.J.S. *Juries* § 463 (1997) (showing that the purpose of voir dire is to determine whether potential jurors are qualified, competent and can act impartially).

23A C.J.S. *Criminal Law* § 1410 (1995) (stating that where there is an unambiguous jury verdict, it is not necessary to look to the jury's intent. Where, however, the jury renders an ambiguous verdict, the court must construe the verdict considering the evidence presented at trial and the entire record).

23A C.J.S. *Criminal Law* § 1415 (1995) (defining the scope of a court's investigation into a charge of juror misconduct as limited, and appropriate only in situations of extraordinary circumstances and where there is a preliminary showing of a need to investigate).

89 C.J.S. *Trials* § 523 (1955) (stating that jurors cannot impeach their own verdicts, but affidavits of jurors may be used to show the verdict received by the court does not embody the true finding of the jury).

59 CAL. JUR. 3D *Trials* § 52 (1980 & Supp. 1997) (discussing that juries must be guarded against improper influences).

Law Review and Journal Articles:

Paul Jeffery Wallin, *To Impeach or Not to Impeach: The Stability of Juror Verdicts in Federal Courts*, 4 PEPP. L. REV. (1977)(discussing the federal rule prohibitions on juror impeachment).

MAIRI SANFORD

V. Statute of Limitations

When a plaintiff, suing for medical malpractice under the Medical Injury Compensation Reform Act, serves a defendant with the required ninety day notice of intent to sue prior to the expiration of the original three year statute of limitations, the notice serves to toll the original statute of limitations for ninety days.

Russell v. Stanford University Hospital, Supreme Court of California, Decided June 5, 1997, 15 Cal. 4th 783, 937 P.2d 640, 64 Cal. Rptr. 2d 97.

Facts. The plaintiff, two years after receiving surgical treatment from the defendants, a hospital and a physician, alleged that the defendants negligently performed medical treatment on her hand, causing it to become disfigured and unusable. The plaintiff served the defendants with a notice of her intent to sue, as required by the Medical Injury Compensation Reform Act, fifty-one days prior to the expiration of the original three year statute of limitations.

Following the expiration of the required ninety day notice period, and thirty-nine days after the running of the original statute of limitations, the plaintiff filed a complaint in the superior court alleging medical malpractice. The trial court, bound by *Rewald v. San Pedro Peninsula Hospital*, 27 Cal. App. 4th 480, 32 Cal. Rptr. 2d 411 (1994), refused to interpret California Code of Civil Procedure section 364 as tolling the original three year statute of limitations set forth in California Code of Civil Procedure section 340.5, and granted the defendants' motion for summary judgment, reasoning that the plaintiff's action was not timely. The court of appeal reversed, refusing to follow *Rewald*, which held that section 364 did not toll the three year statute of limitations.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that when the required notice of an intent to sue for medical malpractice is served prior to the running of the original three year statue of limitations and pursuant to California Code of Civil Procedure section 364, the original statute of limitations is tolled for ninety days. The court reasoned that interpreting section 364 as tolling the original statute of limitations advanced the legislative purpose of the statute.

The court examined the statutory history which revealed that the purpose of the legislation was to encourage negotiation between the parties in an attempt to reduce the burdensome costs of medical malpractice litigation. The court further noted that the legislative purpose is evidenced by the current amended statute which provides for a ninety day notice of an intent to sue to facilitate a period of negotiation.

The court then discussed why tolling the original statute of limitations did not unfairly prejudice a defendant in a medical malpractice suit. The court pointed out that tolling the statute of limitations equally benefits both parties. The court explained that the notice itself serves to inform defendants of the pending action and provides them an opportunity to negotiate and compile information to avoid costly and burdensome formal litigation.

The court also considered the usual statutory rule that where two statutes are in conflict, the most recent statutory provision controls. Here, the court pointed out that section 364 was the most recent statutory provision; therefore, its tolling provision controlled the three year statute of limitations provided under section 340.5.

Thus, the court held that even though the plaintiff filed her complaint after the expiration of the original statute of limitations, she was nevertheless within the guidelines of section 364, and was therefore timely.

REFERENCES

Statutes:

CAL. CIV. PROC. CODE § 340 (West 1982 & Supp. 1998) (defining the beginning of the statute of limitations as the time when the patient discovers the injury).

CAL. CIV. PROC. CODE § 364 (West 1982 & Supp. 1998) (setting forth the legislation generally; including the legislative intent for requiring the injured party to serve a ninety day notice of intention to sue, limitations of the notice, tolling, and the effect of failing to comply with this provision).

Case Law:

Woods v. Young, 53 Cal. 3d 315, 807 P.2d 455, 79 Cal. Rptr. 613 (1991) (holding that California Code of Civil Procedure section 364 tolls the one year statute of limitations under MIRCA).

Noble v. Superior Court, 191 Cal. App. 3d 1189, 237 Cal. Rptr. 38 (1987) (limiting the tolling provisions of California Code of Civil Procedure section 364 to negligence cases, not intentional torts).

Hilburger v. Madsen, 177 Cal. App. 3d 45, 222 Cal. Rptr. 713 (1986) (discussing the tolling effect of California Code of Civil Procedure section 364).

Legal Texts:

26 A.L.R. 5th 245 (1995) (examining equal protection challenges to MIRCA).

61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* §§ 316-325 (1981 & Supp. 1997) (explaining the general limitations on a medical malpractice claim).

61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 372 (1981) (discussing modern approaches to medical malpractice claims).

36 CAL. JUR. 3D *Healing Arts & Institutions* § 347 (1997 & Supp. 1997) (defining the limitations of California Code of Civil Procedure section 340.5).

36 CAL. JUR. 3D *Healing Arts & Institutions* § 350 (1997 & Supp. 1997) (discussing the tolling of the statute of limitations under MIRCA).

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 778-779 (9th ed. 1987 & Supp. 1997) (considering the nature and purpose of MIRCA as well as its constitutionality).

5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 786 (9th ed. 1987 & Supp. 1997) (explaining the notice of intent to sue requirement under California Code of Civil Procedure section 364).

Law Review and Journal Articles:

Paul F. Arentz, *Defining "Professional Negligence" After* Central Pathology Service Medical Clinic v. Superior Court: *Should California's Medical Injury Compensation Reform Act Cover Intentional Torts*, 30 CAL. W.L. REV. 221 (1993) (describing the history behind the enactment of MIRCA and giving a general overview of its provisions).

Selected 1975 California Legislation: Torts; Medical Malpractice, 7 PAC. L.J. 544 (1975) (summarizing the recent and future changes in the medical field with the enactment of MIRCA).

MAIRI J. SANFORD