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California Supreme Court Survey - A Review of Decisions: May 1995-August 1996

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California Supreme Court Survey

May 1995 - August 1996

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 either an article or summary format. Articles provide an in-depth analysis of selected California Supreme Court cases including the potential impact a case may have on California law. Additionally, articles guide the reader to secondary sources that focus on specific points of law.

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.

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I. CONSTITUTIONAL LAW

The California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, which authorizes the levy of inspection fees on imported foreign agricultural goods, is unconstitutional because it discriminates unjustifiably in violation of the Commerce Clause:

Pacific Merchant Shipping Ass'n v. Voss.

I. INTRODUCTION

In *Pacific Merchant Shipping Ass'n v. Voss*,¹ the California Supreme Court addressed whether the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act² (Act) violated the federal Commerce Clause.³ The Act required vessels carrying agricultural goods from foreign countries to pay an inspection fee upon entering California, but allowed the inspection fees for domestic goods entering California to be paid out of the state's general operating fund.⁴ The Supreme Court of

1. 12 Cal. 4th 503, 907 P.2d 430, 48 Cal. Rptr. 2d 582, *cert. denied*, 116 S. Ct. 1851 (1995). Justice Mosk wrote the opinion of the court in which Chief Justice Lucas, and Justices Kennard, Arabian, Baxter, George, and Werdegar joined. *Id.* at 503-32, 907 P.2d 430-47, 48 Cal. Rptr. 2d 582-99.

2. CAL. FOOD & AGRIC. CODE §§ 5350-5353 (West 1986 & Supp. 1996).

3. U.S. CONST., art. I, § 8, cl. 3. The Commerce Clause provides: "Congress shall have Power . . . [T]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." *Id.*

4. *Pacific Merchant*, 12 Cal. 4th at 508, 907 P.2d at 432, 48 Cal. Rptr. 2d at 584. Congress authorized the USDA to implement an expansive inspection program of shipments entering the United States. *Id.* at 508-09, 907 P.2d at 432, 48 Cal. Rptr. 2d at 584. Nevertheless, in 1990 California passed the Act in an effort to protect its \$19.9 billion agricultural industry from pests, including the Mediterranean fruit fly. *Id.* at 509, 512, 907 P.2d at 432, 434, 48 Cal. Rptr. 2d at 584, 586. The Act required the California Department of Food and Agriculture (the Department) to compile a "list of countries which [it] has reason to believe are potential sources of . . . pests" and to establish an inspection program at California's airports and marine facilities for goods that either originated in or stopped at a country on the list. *Id.* at 511, 907 P.2d at 433, 48 Cal. Rptr. 2d at 585; *see* CAL. FOOD & AGRIC. CODE § 5352 (West 1986 & Supp. 1996) (directing the Department to compile a list of countries that are potential sources of pests); *id.* § 5350 (mandating the imposition of the inspection fee scheme); *id.* § 5353 (delineating the amount of the fees to be collected). The Act authorized the Department to fund the program through imposition of inspection fees on carriers of such foreign goods. *Pacific Merchant*, 12 Cal. 4th at 509-11, 907 P.2d at 432-33, 48 Cal. Rptr. 2d at 584-85; *see* CAL. FOOD & AGRIC. CODE § 5351 (authorizing the levy of inspection fees on air carriers); *id.* § 5352 (authorizing the levy of fee on marine carriers). Through this program, the Department paid for an increased number of federally-conducted inspections, though the types of inspections conducted by the USDA did not change. *Pacific Merchant*, 12 Cal. 4th at 510, 907 P.2d at 432-33, 48 Cal. Rptr. 2d at 584-85. To ensure conformity with California's agricultural quarantines, goods crossing

California, reversing the court of appeal, held that the Act was facially discriminatory because the sole determinant for disparate treatment under the inspection fee scheme was a shipment's place of origin.⁵ Under the strict scrutiny standard,⁶ the Act's discrimination could not be justified.⁷ Therefore, the court held that the Act violated the Commerce Clause.⁸

II. TREATMENT

After reviewing the history of the Act,⁹ the Supreme Court of California examined the constitutional limitations imposed upon a state's authority to enact legislation affecting federally protected commerce.¹⁰ The court observed that although the Commerce Clause omits specific reference to state legislatures,¹¹ courts nevertheless have consistently held that the Commerce Clause tacitly declares that a state may not unjustifiably discriminate against a protected form of commerce.¹² This "neg-

California's land borders are inspected at state-run sites at no cost to the carrier (excluding the border with Mexico, where the USDA conducts inspections). *Id.* at 510 & n.2, 907 P.2d at 433 & n.2, 48 Cal. Rptr. 2d at 585 & n.2. These inspections of domestic ground shipments are paid for out of the general operating fund of the state. *Id.* at 512, 907 P.2d at 434, 48 Cal. Rptr. 2d at 586.

5. *Pacific Merchant*, 12 Cal. 4th at 527, 907 P.2d at 443, 48 Cal. Rptr. 2d at 595; see *infra* notes 15-23 and accompanying text.

6. While the validity of federal statutes enacted under the Commerce Clause is subject to "rational basis" review, *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995), state statutes that discriminate against interstate commerce, i.e., statutes that violate the "dormant" Commerce Clause, receive "strict scrutiny" review. *Associated Indus. v. Lohman*, 114 S. Ct. 1815, 1820 (1994).

7. *Pacific Merchant*, 12 Cal. 4th at 532, 907 P.2d at 447, 48 Cal. Rptr. 2d at 599; see *infra* notes 24-35 and accompanying text.

8. *Pacific Merchant*, 12 Cal. 4th at 532, 907 P.2d at 447, 48 Cal. Rptr. 2d at 599.

9. *Id.* at 508-13, 907 P.2d at 432-35, 48 Cal. Rptr. 2d at 584-87; see *supra* note 4 (providing an overview of relevant provisions).

10. *Pacific Merchant*, 12 Cal. 4th at 514, 907 P.2d at 435, 48 Cal. Rptr. 2d at 587.

11. See *supra* note 3 (reciting relevant text of the Commerce Clause). See generally 13 CAL. JUR. 3D *Constitutional Law* §§ 214-217 (1989) (discussing the commerce power under federalism).

12. *Pacific Merchant*, 12 Cal. 4th at 514-15, 907 P.2d at 435-36, 48 Cal. Rptr. 2d at 587-88; see, e.g., *Barclays Bank v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2276 (1994) (recognizing that the Commerce Clause "has long been understood . . . to provide protection from state legislation inimical to the national commerce even where Congress has not acted") (internal quotations omitted); *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345, 1349 (1994) ("The Commerce Clause [has] a 'negative' aspect that denies the States the power unjustifiably to discriminate against [interstate com-

ative" or "dormant" Commerce Clause is inferred from the intent of the Framers of the Constitution¹³ and has been repeatedly and recently reaffirmed by the United States Supreme Court.¹⁴

The first of two prongs of the court's analysis under the negative Commerce Clause was whether the Act regulates "evenhandedly"—i.e., whether the Act is discriminatory under the Commerce Clause.¹⁵ A statute that treats differently in-state (or domestic) economic interests and out-of-state (or foreign) economic interests is discriminatory under Com-

merce.]). See generally 15A AM. JUR. 2D *Commerce* § 95 (1976 and Supp. 1996) (discussing discriminatory state legislation under the dormant Commerce Clause); 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 1090 (1988 & Supp. 1995) (citing cases interpreting discriminatory state legislation under the Commerce Clause); 13 CAL. JUR. 3D *Constitutional Law* §§ 220-222 (1989 & Supp. 1996) (discussing state legislation under the Commerce Clause); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) (advocating that courts can properly determine the constitutionality of legislation using values implied in the constitution); Zain E. Hussain, Comment, *Barclays Bank PLC v. Franchise Tax Board of California: Does the Application of Worldwide Unitary Taxation to Non-U.S. Parent Corporate Groups Violate the Commerce Clause?*, 18 FORDHAM INT'L L.J. 1475, 1487-97 (1995) (discussing the dormant Commerce Clause in the context of international commerce and taxation).

13. *Pacific Merchant*, 12 Cal. 4th at 514-15, 907 P.2d at 435-36, 48 Cal. Rptr. 2d at 587-88; *Barclays Bank*, 114 S. Ct. at 2276 & n.9; see THE FEDERALIST NO. 42 (James Madison) (advocating federal congressional power over commerce to prevent coastal states from excessively profiting from local import taxes at the expense of other states). See generally Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 433 (1989) (arguing that the purpose of the Commerce Clause was to promote national unity); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1207-08 (1986) (discussing the Framers' intent behind the Commerce Clause); Eric W. Hagen, Note, *United States v. Lopez: Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1361, 1363-64 (1996) ("[T]he original purpose of the Commerce Clause was not so much a grant to Congress of a general police power, but rather a means of eliminating trade barriers among the states.").

14. *Pacific Merchant*, 12 Cal. 4th at 514-15, 907 P.2d at 435, 48 Cal. Rptr. 2d at 587. See generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092-1287 (1986) (analyzing Supreme Court cases interpreting the negative Commerce Clause).

15. *Pacific Merchant*, 12 Cal. 4th at 516-17, 907 P.2d at 437, 48 Cal. Rptr. 2d at 589. This prong of a court's inquiry affects the resolution of the case dramatically because a state statute that regulates evenhandedly with "only incidental effects on [protected] commerce [is] valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 517, 907 P.2d at 437, 48 Cal. Rptr. 2d at 589 (quoting *Oregon Waste*, 114 S. Ct. at 1350). See generally 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 1092 (1988 & Supp. 1995) (discussing state legislation that is unduly burdensome under the Commerce Clause). However, a state statute that discriminates against interstate commerce is strictly scrutinized by the court and is "virtually per se invalid." *Pacific Merchant*, 12 Cal. 4th at 517, 907 P.2d at 437, 48 Cal. Rptr. 2d at 589 (quoting *Oregon Waste*, 114 S. Ct. at 1350).

merce Clause analysis, regardless of the state's interest in creating the statute.¹⁶ In the instant case, because the sole determinant for assessing an inspection fee was the shipment's country of origin,¹⁷ the supreme court found the Act to be facially discriminatory.¹⁸

In finding the Act to be facially discriminatory, the court rejected the reasoning adopted by the court of appeal.¹⁹ The supreme court held that the very administrative and financial segregation upon which the court of appeal had erroneously relied in finding the inspections too dissimilar to be compared under the Commerce Clause was the heart of the discrimination in the regulatory scheme.²⁰ Moreover, in contrast to the court of appeal, the California Supreme Court refused to require that the burdened carriers demonstrate sufficient similarity to unburdened carriers before the court would find the Act discriminatory.²¹ The court observed that substantial similarity has no bearing on whether a statute is facially discriminatory.²² Regardless, the court concluded that applying the substantially similar requirement would not alter its determination that the Act was facially discriminatory.²³

The court next turned to the second prong of its analysis: whether the discrimination under the Act could be justified.²⁴ The court reiterated that a state statute that discriminates against a federally protected class

16. *Pacific Merchant*, 12 Cal. 4th at 517, 907 P.2d at 437, 48 Cal. Rptr. 2d at 589; *Oregon Waste*, 114 S. Ct. at 1350 ("[T]he purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.")

17. *Pacific Merchant*, 12 Cal. 4th at 520-21, 907 P.2d at 439-40, 48 Cal. Rptr. 2d at 591-92; see *supra* note 4.

18. *Pacific Merchant*, 12 Cal. 4th at 527, 907 P.2d at 443, 48 Cal. Rptr. 2d at 595.

19. *Id.* at 520-27, 907 P.2d at 439-43, 48 Cal. Rptr. 2d at 591-95.

20. *Id.* at 522, 907 P.2d at 440, 48 Cal. Rptr. 2d at 592. Nor could the state properly rely on administrative convenience to justify the disparate treatment. *Id.* at 522 n.11, 907 P.2d at 440 n.11, 48 Cal. Rptr. 2d at 592 n.11.

21. *Id.* at 523, 907 P.2d at 440-41, 48 Cal. Rptr. 2d at 592-93. The court observed that the United States Supreme Court had applied this "similarly situated" requirement only when discussing whether a state tax on foreign or domestic interstate commerce was justified. *Id.* at 522, 907 P.2d at 441, 48 Cal. Rptr. 2d at 593. In the context of a compensatory tax, substantial similarity is but one logical element of the justification prong of the court's analysis. *Id.* at 523, 907 P.2d at 441, 48 Cal. Rptr. 2d at 593. Such compensatory taxes simply "make interstate commerce bear a burden already borne by intrastate commerce." *Id.*

22. *Id.* at 523, 907 P.2d at 441, 48 Cal. Rptr. 2d at 593.

23. *Id.* at 525, 907 P.2d at 442-43, 48 Cal. Rptr. 2d at 594-95. The court emphasized that only differences of degree, not differences in kind or purpose, existed between the inspections of foreign produce compared with those of domestic produce. *Id.*

24. *Id.* at 527, 907 P.2d at 443, 48 Cal. Rptr. 2d at 595.

will pass constitutional muster only if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”²⁵ Under this “strictest scrutiny” standard, statutes found to discriminate under the Commerce Clause are “typically struck down without further inquiry.”²⁶ Applying this standard of review, the court conceded that preservation of California’s agricultural industry was a legitimate local interest advanced by the state when enacting the Act.²⁷ Additionally, the court observed that a class of commerce subject to a regulation may be required to pay for the regulation’s implementation, provided the regulation is applied evenhandedly.²⁸ Thus, under the court’s analysis, California could require carriers of foreign produce to pay for their fair share of the inspection costs, including a higher fee if inspections of foreign commerce carriers are more expensive than those of domestic goods carriers.²⁹ However, under the Act, only one class of carriers, those importing foreign commerce, paid any inspection fee.³⁰ In contrast, the state completely subsidized the inspections of domestic commerce carriers.³¹ Therefore, the disparate treatment under the Act could be justified neither as resulting from the difference in the administration costs of the inspections nor as a compensatory tax.³²

Finally, the court declared that there was no triable issue of fact as to whether the state’s scheme was the least restrictive means to accomplish its legitimate purpose.³³ The court held that under the strict scrutiny standard, either of two proposed alternatives—removing the inspection fees from foreign commerce carriers or imposing a similar fee on domestic goods carriers—would constitute a reasonable and less discriminatory means of achieving the legitimate state objective.³⁴ Thus, because the

25. *Id.* at 527, 907 P.2d at 444, 48 Cal. Rptr. 2d at 596 (quoting *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994)).

26. *Id.* (quoting *Associated Indus. v. Lohman*, 114 S. Ct. 1815, 1820 (1994)). For two rare exceptions where states successfully defended statutes that discriminated against interstate commerce, see *Maine v. Taylor*, 477 U.S. 131, 140-52 (1986) (holding that the threat to local fisheries justified a facially discriminatory statute banning the importation of out-of-state baitfish), and *Mintz v. Baldwin*, 289 U.S. 346 (1933) (holding that risk of disease affecting beef justified a discriminatory state statute requiring local inspections of imported meat).

27. *Pacific Merchant*, 12 Cal. 4th at 527, 907 P.2d at 444, 48 Cal. Rptr. 2d at 596.

28. *Id.*

29. *Id.*

30. *Id.* at 528, 907 P.2d at 444, 48 Cal. Rptr. 2d at 596.

31. *Id.* at 529, 907 P.2d at 444, 48 Cal. Rptr. 2d at 596.

32. *Id.* at 529, 907 P.2d at 445, 48 Cal. Rptr. 2d at 597.

33. *Id.*

34. *Id.* at 529-30, 907 P.2d at 445-46, 48 Cal. Rptr. 2d at 597-98.

Act's discrimination could not be justified, the court concluded that the inspection fee scheme violated the Commerce Clause.³⁵

III. IMPACT AND CONCLUSION

Pacific Merchant presents what is perhaps an unusual fact pattern in recent Commerce Clause cases in that California's inspection scheme did not benefit its own economy at the expense of its sister states; rather, it burdened foreign commerce while benefiting domestic trade.³⁶ Still, an undivided California Supreme Court correctly observed that such a case exemplifies the very problems the Framers sought to avoid when they inserted the Commerce Clause into the United States Constitution.³⁷ Following black-letter rules of Commerce Clause analysis, the court held that the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act was facially discriminatory and subject to the strictest judicial scrutiny because the Act required importers of foreign produce to pay an inspection fee upon entering California, while the state paid for the inspections of similar domestic shipments.³⁸ Under this standard of review, the disparate treatment under the inspection scheme could not be justified.³⁹ Therefore, the court concluded that the Act was an unconstitutional violation of the Commerce Clause.⁴⁰ Thus, *Pacific Merchant* returns to the political process the issue of how to properly fund an adequate agricultural and animal inspection program. *Pacific Merchant* presents to the legislature the option of either accepting the federally-funded USDA inspections of imported produce as adequate protections for California's agricultural industry, or enacting further legislation that conforms with constitutional standards.

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35. *Id.* at 532, 907 P.2d at 447, 48 Cal. Rptr. 2d at 599.

36. *Id.* at 518, 907 P.2d at 438, 48 Cal. Rptr. 2d at 590.

37. *See supra* notes 9-14 and accompanying text.

38. *See supra* notes 15-27 and accompanying text.

39. *See supra* notes 28-35 and accompanying text.

40. *Pacific Merchant*, 12 Cal. 4th at 532, 907 P.2d at 447, 48 Cal. Rptr. 2d at 599.

II. CONTRACTS

A tort cause of action for bad faith denial of a contract's existence does not lie in a noninsurance contract breach:
Freeman & Mills, Inc. v. Belcher Oil Co.

I. INTRODUCTION

In *Freeman & Mills, Inc. v. Belcher Oil Co.*,¹ the California Supreme court considered whether a tort cause of action exists for a party's bad faith denial of the existence of a contract.² The trial court entered judgment for Freeman & Mills, indicating that the accounting firm should recover in tort for Belcher Oil's bad faith denial of the existence of the contract.³ The court of appeal reversed, "finding no special relationship between the parties to justify" a recovery in tort.⁴ The California Supreme Court affirmed the court of appeal, overruled *Seaman's*,⁵ and

1. 11 Cal. 4th 85, 900 P.2d 669, 44 Cal. Rptr. 2d 420 (1995). Chief Justice Lucas wrote the majority opinion in which Justices Baxter, Klein, and Werdegar concurred. *Id.* at 87-103, 900 P.2d at 670-80, 44 Cal. Rptr. 2d at 421-31. Justice Kennard wrote a concurring opinion in which Justice Arabian joined. *Id.* at 104, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431 (Kennard J., concurring). Justice Mosk concurred in part and dissented in part. *Id.* at 104-17, 900 P.2d at 680-89, 44 Cal. Rptr. 2d at 431-40 (Mosk J., concurring and dissenting).

2. *Id.* at 87-88, 900 P.2d at 670, 44 Cal. Rptr. 2d at 421. In June of 1987, Belcher Oil retained the law firm of Morgan, Lewis, & Bockius (Morgan) to defend itself against a lawsuit. *Id.* at 88, 900 P.2d at 670, 44 Cal. Rptr. 2d at 421. As part of the retainer, Belcher Oil agreed to pay for the costs of the suit, including any accounting fees. *Id.* Belcher Oil's general counsel, William Dunker, expressly authorized the accounting firm of Freeman & Mills, Inc. to provide accounting services related to the pending litigation. *Id.* In April of 1988, Neil Bowman, who replaced Dunker as general counsel for Belcher Oil, discharged Morgan. *Id.* Bowman requested a summary of the work that Freeman & Mills prepared and informed them that their services would no longer be necessary. *Id.* Freeman & Mills final summary included a bill for \$77,538.13 for services rendered. *Id.* For approximately one year, Freeman & Mills sent monthly statements to Belcher Oil indicating an outstanding balance. *Id.* at 89, 900 P.2d at 670, 44 Cal. Rptr. 2d at 421. In September of 1989, Bowman finally refused to pay, stating that Belcher Oil had never been advised of the extent of the accounting firm's services. *Id.* Freeman & Mills filed a cause of action for breach of contract and an action in tort for bad faith denial of the contract. *Id.* at 89, 900 P.2d at 671, 44 Cal. Rptr. 2d at 422. For a discussion of when a breach of contract is also a tort, see 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 821 (9th ed. 1987 & Supp. 1995).

3. *Freeman*, 11 Cal. 4th at 89, 900 P.2d at 671, 44 Cal. Rptr. 2d at 422.

4. *Id.* at 90, 900 P.2d at 671, 44 Cal. Rptr. 2d at 422.

5. The court of appeal relied on *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984), overruled by, *Freeman*, 11 Cal. 4th 85, 900 P.2d 669, 44 Cal. Rptr. 2d 420 (1995), to evaluate when tort recovery is available where there is a bad faith denial of a contractual relationship. *Freeman*, 11 Cal. 4th at 90, 900 P.2d at 671, 44 Cal. Rptr. 2d at 422.

found that a tort recovery for bad faith denial of the existence of a contractual relationship did not apply.⁶

II. TREATMENT

A. Majority Opinion

The court began its analysis by calling into question the validity of the holding in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*,⁷ which recognized the existence of a tort for bad faith denial of contract.⁸ The court reviewed its decisions rendered prior to *Seaman's* and found that the cases were uniform in suggesting that tort recovery in breach of contract cases is unavailable in noninsurance related agreements.⁹ The court found further support to overrule *Seaman's* by assessing the lower courts' application of the tort recovery rule.¹⁰ The court recognized that

6. *Freeman*, 11 Cal. 4th at 90, 103, 900 P.2d at 671, 680, 44 Cal. Rptr. 2d at 422, 431. For a discussion of *Seaman's*, see Jill Pride Anderson, Comment, *Lender Liability for Breach of the Obligation of Good Faith Performance*, 36 EMORY L.J. 917, 958-60 (1987).

7. *Seaman's*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354. In *Seaman's*, the California Supreme Court held that "a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." *Id.* at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

8. *Freeman*, 11 Cal. 4th at 90-92, 900 P.2d at 671-73, 44 Cal. Rptr. 2d at 422-24.

9. *Id.* at 93-95, 900 P.2d at 674-75, 44 Cal. Rptr. 2d at 425-26. Courts "should limit tort recovery in contract breach situations to the insurance area, at least in the absence of violation of an independent duty arising from principles of tort law other than the denial of the existence of, or liability under, the breached contract." *Id.* at 95, 900 P.2d at 675, 44 Cal. Rptr. 2d at 426. In coming to this conclusion, the court examined several of its opinions. *Id.* at 93-95, 900 P.2d at 674-75, 44 Cal. Rptr. 2d at 425-26; see *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 869 P.2d 454, 28 Cal. Rptr. 2d 475 (1994) (holding that tort recovery is not available when a contracting party arranges to breach the contract); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 864 P.2d 88, 26 Cal. Rptr. 2d 8 (1993) (precluding tort recovery for employer misrepresentations related to the termination of employment contracts); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (declining to extend tort recovery in the context of employment contracts).

10. *Freeman*, 11 Cal. 4th at 95-98, 900 P.2d at 675-77, 44 Cal. Rptr. 2d at 426-28. See generally Dana Rae Landsdorf, Comment, *California's Detortification of Contract Law: Is the Seaman's Tort Dead?*, 26 LOY. L.A. L. REV. 213, 222-31 (1992) (discussing California's trend toward limiting *Seaman's*).

lower courts constantly encountered difficulty in applying the *Seaman's* decision and frequently interpreted it inconsistently.¹¹

The court also considered policy reasons that favor the exclusion of tort remedies for noninsurance breach of contract cases.¹² For example, allowing tort recovery for breach of contract could increase the load on an already overburdened judicial system.¹³ The court reasoned that courts would be flooded if every party denying a contractual breach were subjected to tort actions for merely defending a lawsuit.¹⁴ In assessing the traditional goals of contract remedies, the court found that, unlike tort remedies, contract remedies encourage "efficient breaches."¹⁵ The court explained that the notion of efficient breaches allows for the "increased production of goods and services at lower cost to society."¹⁶ The court also espoused its preference for allowing the legislature to define the applicable remedies in contract cases.¹⁷

The court concluded that the holding in *Seaman's*, allowing tort recovery for bad faith denial of the existence of a contract, should be overruled.¹⁸ The court favored a general rule precluding tort recovery for noninsurance contract breach in cases where no other duty arising from tort principles has been violated.¹⁹ Since the court found that no tort action was available for bad faith denial of the existence of a contract, the court thereby affirmed the court of appeal and held that *Freeman & Mills* could not recover under a tort cause of action.²⁰

11. *Freeman*, 11 Cal. 4th at 95-98, 900 P.2d at 675-77, 44 Cal. Rptr. 2d at 426-28.

12. *Id.* at 97-98, 900 P.2d at 676-77, 44 Cal. Rptr. 2d at 427-28.

13. *Id.* at 97, 900 P.2d at 676, 44 Cal. Rptr. 2d at 427.

14. *Id.* *Seaman's* offered no guidelines to help attorneys determine whether they were defending against a suit or committing a tort. See James H. Cook, Comment, *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.: Tortious Breach of the Covenant of Good Faith and Fair Dealing in a Noninsurance Commercial Contract Case*, 71 IOWA L. REV. 893, 897-98 (1986) (discussing the problems created by such a lack of specificity).

15. *Freeman*, 11 Cal. 4th at 97-98, 900 P.2d at 676-77, 44 Cal. Rptr. 2d at 427-28. See generally Stephen S. Ashley, BAD FAITH ACTIONS §§ 11:05-10 (1984 & Supp. 1995) (analyzing the theory of efficient contract breach); C. Delos Putz, Jr. & Nona Klippen, *Commercial Bad Faith: Attorney Fees—Not Tort Liability—Is the Remedy for "Stonewalling,"* 21 U.S.F. L. REV. 419, 429-32 (1987) (differentiating between contract and tort remedies).

16. *Freeman*, 11 Cal. 4th at 98, 900 P.2d at 676-77, 44 Cal. Rptr. 2d at 427-28.

17. *Id.* at 98, 900 P.2d at 677, 44 Cal. Rptr. 2d at 428 (citing *Harris v. Atlantic Richfield Co.*, 14 Cal. App. 4th 70, 80-82, 17 Cal. Rptr. 2d 649, 656-57 (1993)).

18. *Id.* at 103, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431.

19. *Id.* at 102, 900 P.2d at 679-80, 44 Cal. Rptr. 2d at 430-31.

20. *Id.* at 103, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431.

B. Justice Kennard's Concurring Opinion

Justice Kennard concurred with the majority, but took issue with the majority's discussion of *Hunter v. Up-Right, Inc.*²¹ Justice Kennard stated that a discussion of *Hunter* was unnecessary since the facts of *Hunter* encompassed a violation of an independent duty arising out of tort principles, facts which were not present in the case at bar.²²

C. Justice Mosk's Concurring and Dissenting Opinion

In Justice Mosk's separate opinion, he concurred in the majority's judgment, but disagreed with the majority's holding that *Seaman's* was incorrectly decided.²³ Justice Mosk agreed with the majority's holding that a breach of contract is made tortious when an independent duty arising from tort principles is breached.²⁴ Justice Mosk identified two broad categories of cases where tortious conduct in a contractual setting should also lead to tort recovery.²⁵ The first category of cases involves the use of tortious means by one contracting party to coerce the other party into foregoing contractual rights.²⁶ The second category involves an intentional breach of contract where the breaching party intentionally and knowingly causes severe injury to the other party.²⁷

In assessing the holding of *Seaman's*, Justice Mosk indicated that tortious recovery was properly permitted in that instance since it fell into the second category, allowing tort recovery for an intentional breach of contract where the breaching party knew that the other party would suffer severe consequential damages.²⁸ Since Justice Mosk believed that

21. *Id.* at 104, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431 (Kennard, J., concurring); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 864 P.2d 88, 26 Cal. Rptr. 2d 8 (1993) (precluding tort recovery for employer misrepresentations affecting an employment contract).

22. *Freeman*, 11 Cal. 4th at 104, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431 (Kennard, J., concurring).

23. *Id.* at 104, 900 P.2d at 680-81, 44 Cal. Rptr. 2d at 431-32 (Mosk, J., concurring and dissenting).

24. *Id.* at 104, 900 P.2d at 681, 44 Cal. Rptr. 2d at 432 (Mosk, J., concurring and dissenting).

25. *Id.* at 109-10, 900 P.2d at 684, 44 Cal. Rptr. 2d at 435 (Mosk, J., concurring and dissenting).

26. *Id.* at 110-11, 900 P.2d at 684-86, 44 Cal. Rptr. 2d at 435-37 (Mosk, J., concurring and dissenting).

27. *Id.* at 111-12, 900 P.2d at 686, 44 Cal. Rptr. 2d at 437 (Mosk, J., concurring and dissenting).

28. *Id.* at 115-16, 900 P.2d at 688-89, 44 Cal. Rptr. 2d at 439-40 (Mosk, J., concurring

the case at bar did not fall into either category, however, he concurred with the majority and stated that tort recovery was not available.²⁹

III. IMPACT

Although the court held that tort recovery was impermissible for a breach of contract absent some other violation of a duty arising out of tort principles, the court emphasized that this holding should not interfere with existing precedent allowing tort recovery in insurance cases.³⁰ Indeed, the unique characteristics of insurance contracts, including the fiduciary relationship between the insurance company and the insured, the public service aspects of insurance, and the adhesive nature of most insurance agreements, compel the imposition of tort liability.³¹ In terms of the duty owed to insurance carriers, the court's ruling does not affect the duty of good faith and fair dealing, and it should not be extended to deny an insured the right to recover in tort for a breach of contract.³²

In addressing the reaches of its holding, the court noted that the legislature should be responsible for drafting additional remedies for noninsurance breach of contract cases.³³ The court suggested that such

and dissenting).

29. *Id.* at 117, 900 P.2d at 689, 44 Cal. Rptr. 2d at 440 (Mosk, J., concurring and dissenting).

30. *Id.* at 103, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431.

31. *Id.* at 109, 900 P.2d at 684, 44 Cal. Rptr. 2d at 435 (Mosk, J., concurring and dissenting) (citing *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 620 P.2d 141, 169 Cal. Rptr. 691 (1979) (holding that an insurance company's failure to investigate a policy may constitute a tortious breach of contract)), *cert. denied*, 445 U.S. 912 (1980); see also *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958) (holding that a breach of the covenant of good faith and fair dealing by an insurance company may give rise to a recovery in tort). See generally Sandra Chutorian, Comment, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 382-84 (1986) (analyzing the development of the tortious breach of contract in the insurance context).

32. See *Freeman*, 11 Cal. 4th at 103, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431.

33. *Id.* "[N]othing we say here would prevent the Legislature from creating additional civil remedies for noninsurance contract breach, including such measures as providing litigation costs and attorney fees in certain aggravated cases, or assessing increased compensatory damages covering lost profits and other losses attributable to the breach." *Id.* See generally John D. Calamari & Joseph M. Perillo, CONTRACTS § 14-3 (3d ed. 1987) (discussing punitive damages in contract actions); Putz & Klippen, *supra* note 14 (arguing for the expansion of awarding attorney's fees in breach of contract cases); John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565 (1986) (discussing available and proposed remedies for breach of contract).

enactments could include allowing attorney's fees or increasing the compensatory damages to include other losses attributable to the breach.³⁴

IV. CONCLUSION

Prior to *Freeman*, uncertainty existed as to whether tort remedies were available in breach of contract cases.³⁵ This uncertainty stemmed from the court's ruling in *Seaman's*, which allowed for a tort remedy in a noninsurance breach of contract case, but did not clarify the extent of such an action.³⁶ By overruling *Seaman's*, the California Supreme Court limited the scope of tort recovery in breach of contract cases to two scenarios: (1) breach of contract insurance cases, and (2) where a party breaches a duty grounded in tort principles.³⁷

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34. *Freeman*, 11 Cal. 4th at 103, 900 P.2d at 680, 44 Cal. Rptr. 2d at 431.

35. *Id.* at 95-97, 900 P.2d at 675-76, 44 Cal. Rptr. 2d at 426-27.

36. *Id.*

37. *Id.* at 102, 900 P.2d at 679-80, 44 Cal. Rptr. 2d at 430-31.

III. CRIMINAL LAW

- A. *The trial court has a duty to instruct the jury sua sponte on any lesser included offense supported by the evidence, regardless of the arguments of the prosecution and defense: People v. Barton.*

I. INTRODUCTION

In *People v. Barton*,¹ the California Supreme Court considered whether a defendant can prevent the trial court from instructing the jury on a lesser offense included within the crime charged.² The supreme court affirmed the judgment of the court of appeal, holding that the jury should be instructed on any lesser included offense supported by the evidence regardless of a party's opposition or an inconsistent defense theory.³ The

1. 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995). Justice Kennard delivered the unanimous opinion of the court. *Id.* at 190-204, 906 P.2d at 532-41, 47 Cal. Rptr. 2d at 570-79.

2. *Id.* at 190, 906 P.2d at 532, 47 Cal. Rptr. 2d at 570. Marco Sanchez encountered Andrea Barton while driving in Pacific Beach on the morning of February 22, 1990. *Id.* at 191, 906 P.2d at 532, 47 Cal. Rptr. 2d at 570. Sanchez honked his horn when Ms. Barton's car stalled in the intersection, and she replied with a rude gesture. *Id.* Sanchez swerved into Ms. Barton's lane, forced her to the side of the road, and spat on her vehicle's closed passenger window. *Id.* Ms. Barton, upset by the incident, contacted her father, Howard Barton. *Id.* Mr. Barton, who was carrying a gun, accompanied his daughter to look for Sanchez's car, which they found in a parking lot at a nearby shopping center. *Id.* at 191, 906 P.2d at 533, 47 Cal. Rptr. 2d at 571. Mr. Barton found Sanchez in a store and they argued. *Id.* Eventually Sanchez tried to leave the shopping center in his car. *Id.* Mr. Barton approached Sanchez's car, drew his gun, and told Sanchez to get out of the car. *Id.* at 191-92, 906 P.2d at 533, 47 Cal. Rptr. 2d at 571. Mr. Barton then shot and killed Sanchez. *Id.* at 192, 906 P.2d at 533, 47 Cal. Rptr. 2d at 571. At trial, the defendant contended that Sanchez grabbed for a knife and that the gun accidentally fired. *Id.* at 192-93, 906 P.2d at 533-34, 47 Cal. Rptr. 2d at 571-72. Experts conflicted as to the likelihood of the gun accidentally discharging. *Id.* at 193, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572. The defense requested the court not to instruct the jury on voluntary manslaughter as a lesser offense included within the crime of murder. *Id.* The trial court denied the request, and the jury convicted the defendant of voluntary manslaughter. *Id.* at 193-94, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572. The defendant appealed his conviction and argued that the evidence failed to support an instruction on voluntary manslaughter and that his objection should have prevented the trial court from giving the instruction. *Id.* at 194, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572. The court of appeal disagreed and affirmed the defendant's conviction. *Id.* The California Supreme Court granted review to resolve the confusion regarding a trial court's broad duty to instruct on lesser included offenses and its more limited duty to instruct on possible defenses. *Id.* at 194, 906 P.2d at 534-35, 47 Cal. Rptr. 2d at 572-73.

3. *Id.* at 204, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579. See generally 21 CAL. JUR. 3D *Criminal Law* § 3049 (1985 & Supp. 1996) (outlining a court's duty to give instructions sua sponte).

court also held that a trial court has a more limited duty to instruct sua sponte on a particular defense, but should not instruct on a defense that is either inconsistent with the defendant's theory at trial or is opposed by the defense.⁴

II. TREATMENT

Justice Kennard, writing for a unanimous court, began the opinion by reviewing the case of *People v. Sedeno*.⁵ In *Sedeno*, the California Supreme Court held that when the evidence is sufficient to establish a lesser included offense, a trial court must instruct the jury on that offense.⁶ The *Sedeno* court also held that a trial court has a limited duty to give the jury instructions on possible defenses when the defendant appears to rely on such a defense or when the defense seems consistent with the defense theory.⁷

In *Barton*, the defendant asked the court to overrule *Sedeno* and hold that a trial court's duty to instruct the jury is the same for both lesser included offenses and defenses.⁸ The supreme court disagreed with the defendant, and stated that a trial court has a broad duty to instruct on lesser included offenses because the jury must be aware of all its options in order to make a fair decision.⁹ However, the court reasoned that the duty to instruct the jury on particular defenses is more limited because an instruction inconsistent with the defense's theory of the case could

4. *Barton*, 12 Cal. 4th at 197, 906 P.2d at 536, 47 Cal. Rptr. 2d at 574.

5. 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

6. *Barton*, 12 Cal. 4th at 194-95, 906 P.2d at 535, 47 Cal. Rptr. 2d at 573 (citing *People v. Sedeno*, 10 Cal. 3d 703, 715, 518 P.2d 913, 921, 112 Cal. Rptr. 1, 9 (1974)). See generally 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2936 (2d ed. 1989 & Supp. 1996) (summarizing the requirements 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); Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445 (1984) (discussing the constitutional concerns for jury instructions on lesser included offenses); Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191 (1984) (analyzing the legal standards applied to the lesser included offense doctrine).

7. *Barton*, 12 Cal. 4th at 195, 906 P.2d at 535, 47 Cal. Rptr. 2d at 573 (citing *People v. Sedeno*, 10 Cal. 3d 703, 716, 518 P.2d 913, 921, 112 Cal. Rptr. 1, 9-10 (1974)).

8. *Id.* at 196, 906 P.2d at 536, 47 Cal. Rptr. 2d at 574. The defendant argued that a trial court should only instruct the jury on a lesser included offense if it is consistent with the defendant's theory of the case and if the defense agrees that the instruction should be given. *Id.*

9. *Id.*

prejudice the defendant.¹⁰ The defendant insisted that the court's ruling in *People v. Saille*¹¹ undermined the holding of *Sedeno*.¹² In *Saille*, the trial court was not required to give an instruction, absent a request by a party, that related to specific facts that were elements of the case.¹³ Justice Kennard explained that the instruction in *Saille* did not concern a lesser included offense or a defense; therefore, its holding did not affect *Sedeno* or *Barton*.¹⁴

The court continued its discussion by stating that the difference between a lesser included offense and a defense may not be easy to discern.¹⁵ In *Barton*, the defense objected to an instruction on voluntary manslaughter.¹⁶ Voluntary manslaughter is similar to an affirmative defense to murder and therefore its classification as a lesser included offense may be questioned.¹⁷ Nevertheless, the court explained that regardless of whether unreasonable self defense or killing in the heat of passion motivated the homicide, voluntary manslaughter is a lesser included offense within the crime of murder and not a true defense.¹⁸

The defendant's final argument, that he had no previous notice of the voluntary manslaughter charge and therefore his due process rights were violated, was also rejected by the court.¹⁹ The court held that because voluntary manslaughter is a lesser offense included within the crime of murder, sufficient notice was given.²⁰

The court concluded by applying the holding in *Sedeno* to the facts in the present case.²¹ The court determined that there was substantial evidence from which a jury could conclude that the defendant was guilty of

10. *Id.* at 197, 906 P.2d at 536, 47 Cal. Rptr. 2d at 574.

11. 54 Cal. 3d 1103, 820 P.2d 588, 2 Cal. Rptr. 2d 364 (1991).

12. *Barton*, 12 Cal. 4th at 197-98, 906 P.2d at 537, 47 Cal. Rptr. 2d at 575.

13. *Saille*, 54 Cal. 3d at 1120, 820 P.2d at 598-99, 2 Cal. Rptr. 2d at 374-75.

14. *Barton*, 12 Cal. 4th at 197-98, 906 P.2d at 537, 47 Cal. Rptr. 2d at 575.

15. *Id.* at 199, 906 P. 2d at 538, 47 Cal. Rptr. 2d at 576.

16. *Id.* at 193, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572.

17. *Id.* at 199, 906 P. 2d at 538, 47 Cal. Rptr. 2d at 576. The court stated that voluntary manslaughter may seem like an affirmative defense because the defense may argue the lesser included offense to dispute a charge of murder. *Id.* Voluntary manslaughter, which may arise from a claim of unreasonable self-defense, is similar to a defense because it includes the word "defense" and because it is linked to the actual affirmative defense of self-defense. *Id.* at 199-200, 906 P.2d at 538, 47 Cal. Rptr. 2d at 576.

18. *Id.* at 200-01, 906 P.2d at 539, 47 Cal. Rptr. 2d at 577. The court reasoned that voluntary manslaughter is a killing which remains a crime regardless of whether it arises from unreasonable self defense or a sudden heat of passion. *Id.* Thus, the court determined that voluntary manslaughter is properly characterized as a lesser included offense within the crime of murder. *Id.*

19. *Id.* at 203, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579.

20. *Id.* at 203-204, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579.

21. *Id.* at 201-03, 906 P. 2d at 539-41, 47 Cal. Rptr. 2d at 577-79.

voluntary manslaughter.²² The court held that a trial court's duty to instruct on its own initiative depends on the evidence at trial and not the arguments of counsel.²³

III. IMPACT

Prior to the supreme court's decision in *Barton*, *Sedeno* was the last word on the duty of trial courts to instruct sua sponte on lesser included offenses.²⁴ As evidenced by the present case, there was general confusion regarding a trial court's duty to instruct on defenses and lesser included offenses and confusion regarding whether voluntary manslaughter was a lesser offense included within the crime of murder or a defense.²⁵ The court in *Barton* emphasized that a trial court has a much broader duty to instruct on lesser included offenses and counsel need not request or even agree with the instruction in order for it to be given.²⁶ The court also reiterated the fact that voluntary manslaughter is not a defense subject to a trial court's more limited duty to instruct.²⁷

The holding in *Barton* ensures that the jury will be instructed on all lesser included offenses that are supported by the evidence at trial.²⁸ When the defense cannot prevent a court from giving all of the relevant instructions, the jury will not be forced to choose between convicting a defendant of a greater crime or acquitting simply because the verdict it would choose is not an option.²⁹

22. *Id.* at 201-03, 906 P.2d at 539-41, 47 Cal. Rptr. 2d at 577-79. The record showed that the defendant was upset and that he was "[s]creaming and swearing" when he confronted Sanchez just before the gun discharged. *Id.* at 202, 906 P.2d at 540, 47 Cal. Rptr. 2d at 578.

23. *Id.* at 203, 906 P.2d at 540-41, 47 Cal. Rptr. 2d at 578-79. See generally 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2926 (2d ed. 1989 & Supp. 1995) (discussing the court's duty to instruct on lesser included offenses even when not requested by counsel); 75B AM. JUR. 2D *Trial* §§ 1427, 1428 (1992 & Supp. 1996) (discussing when instructions on lesser included offenses should be given).

24. See *People v. Sedeno*, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

25. *Barton*, 12 Cal. 4th at 196-201, 906 P.2d at 536-39, 47 Cal. Rptr. 2d at 574-77.

26. *Id.* at 203, 906 P.2d at 540-41, 47 Cal. Rptr. 2d at 578-79; see Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Included Offenses at Trial*, 37 WM. & MARY L. REV. 199 (1995) (discussing the court's duty to instruct sua sponte versus instructing at the request of counsel).

27. *Barton*, 12 Cal. 4th at 203, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579; see *supra* note 17 and accompanying text.

28. *Barton*, 12 Cal. 4th at 204, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579.

29. *Id.* at 196, 906 P.2d at 536, 47 Cal. Rptr. 2d at 574.

IV. CONCLUSION

In *Barton*, the California Supreme Court held that trial courts have a duty to instruct juries on any lesser included offenses supported by sufficient evidence at trial.³⁰ The court held that as long as there is sufficient evidence at trial, the trial courts can give the instructions on their own initiative regardless of any opposition by counsel.³¹ The supreme court also emphasized that trial courts have only a limited duty to instruct sua sponte on particular defenses.³² A trial court can only instruct on a defense if the defendant is relying on that defense, there is substantial evidence supporting the defense, and the defense is consistent with the defense's theory of the case.³³ Furthermore, while differences between a lesser included offense and a defense are sometimes blurred, the supreme court clarified that voluntary manslaughter is indeed a lesser included offense.³⁴

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30. *Id.* at 204, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579; see Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. PUGET SOUND L. REV. 185 (1992) (discussing the reasoning behind instructing on lesser included offenses); Kyron Huigens, Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62 (1962) (same).

31. *Barton*, 12 Cal. 4th at 203, 906 P.2d at 541, 47 Cal. Rptr. 2d at 579.

32. *Id.* at 195, 906 P.2d at 535, 47 Cal. Rptr. 2d at 573.

33. *Id.*

34. *Id.* at 200-01, 906 P.2d at 539, 47 Cal. Rptr. 2d at 577.

- B. *The sufficiency of an uncorroborated, out-of-court identification to support a conviction should be measured by the substantial evidence test:*

People v. Cuevas.

I. INTRODUCTION

In *People v. Cuevas*,¹ the California Supreme Court overruled *People v. Gould*,² which held that an out-of-court identification that could not be corroborated at trial was per se insufficient to sustain a conviction in the absence of other evidence connecting the defendant to the crime.³ Reversing the decision of the court of appeal,⁴ the supreme court abolished *Gould*'s corroboration requirement, deeming it illogical and inconsistent with state and federal evidence law.⁵ The court concluded that the sub-

1. 12 Cal. 4th 252, 906 P.2d 1290, 48 Cal. Rptr. 2d 135 (1995). Justice Kennard authored the court's opinion in which Chief Justice Lucas and Justices Mosk, Arabian, Baxter, George and Werdegard concurred. *Id.* at 257-77, 906 P.2d at 1292-1306, 48 Cal. Rptr. 2d at 137-51. This case arose from a gang-related shooting in which two gunmen approached a rival gang's late-night alley party and one of the gunmen opened fire. *Id.* at 257-58, 906 P.2d at 1293, 48 Cal. Rptr. 2d at 138. Officers interviewed witnesses Guzman and Gomez separately at the hospital and each stated that "Beto," a West Side Anaheim gang member, was the shooter; Gomez also identified Cuevas as "Beto" from a series of photographs. *Id.* at 258-59, 906 P.2d at 1293, 48 Cal. Rptr. 2d at 138. At trial, Gomez retracted his identification statement, explaining that he had only fingered Cuevas as "payback" for an earlier, unrelated incident. *Id.* at 259, 906 P.2d at 1293-94, 48 Cal. Rptr. 2d at 139. Guzman also recanted his prior statements, denying that he identified the gunman. *Id.* at 259, 906 P.2d at 1294, 48 Cal. Rptr. 2d at 139. The interviewing officers testified to Gomez and Guzman's positive identifications and descriptions of the gunman and another witness, Rodriguez, testified that, at the time of the shooting, "Gomez exclaimed: 'I know that guy. He's from West Side Anaheim.'" *Id.* at 259, 906 P.2d at 1294, 48 Cal. Rptr. 2d at 139. Cuevas was convicted of assault with a firearm. *Id.* at 260, 906 P.2d at 1294, 48 Cal. Rptr. 2d at 139.

2. 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960).

3. *Id.* at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278.

4. Although the court of appeal found that Gomez and Guzman's extrajudicial identification statements corroborated each other as mandated by *Gould*, it determined that, by failing to instruct the jury that corroboration was required, the trial court committed reversible error. *Cuevas*, 12 Cal. 4th at 260, 906 P.2d at 1294, 48 Cal. Rptr. 2d at 139.

5. *Id.* at 265-67, 906 P.2d at 1298-99, 48 Cal. Rptr. 2d at 143-44.

stantial evidence test⁶ is the proper standard to determine the sufficiency of an extrajudicial identification to sustain a conviction.⁷

II. TREATMENT

A. *The Gould Exception to the Substantial Evidence Standard*

After reviewing the facts, Justice Kennard began a discussion of the substantial evidence standard.⁸ Although the substantial evidence test applies when the sufficiency of the evidence is questioned both on appellate review and when a trial court is deciding a motion for acquittal,⁹ the legislature has carved out a few exceptions which deem limited categories of evidence insufficient as a matter of law to sustain a conviction.¹⁰ In *People v. Gould*, the court established an exception to the substantial evidence standard by requiring corroboration for an extrajudicial identification unconfirmed by the witness at trial.¹¹ On appeal, the Attorney

6. The substantial evidence test was established by the California Supreme Court in *People v. Johnson*, 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980), which held that the reviewing court must consider "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *Id.* at 578, 606 P.2d at 751, 162 Cal. Rptr. at 445. See 22 CAL. JUR. 3D *Criminal Law* § 3763 (1985) ("Substantial evidence is evidence that is reasonable in nature, credible, and of solid value, and that reasonably inspires confidence."); see also 3 B.E. WITKIN, CALIFORNIA EVIDENCE § 1802 (3d ed. 1986) (discussing the *Johnson* substantial evidence standard). See generally Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 43-45 (1994).

7. *Cuevas*, 12 Cal. 4th at 272, 906 P.2d at 1302, 48 Cal. Rptr. 2d at 147. See also Brenda G. Hamilton, Note, *Expert Testimony on the Reliability of Eyewitness Identification: A Critical Analysis of its Admissibility*, 54 MO. L. REV. 733, 734-36 (1989); Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1402-06 (1985) (discussing the reliability of eyewitness identification).

8. *Cuevas*, 12 Cal. 4th at 260, 906 P.2d at 1294, 48 Cal. Rptr. 2d at 139. See generally 6 B.E. WITKIN & NORMAN EPSTEIN, CALIFORNIA CRIMINAL LAW, *Appeal* § 3205 (1989 & Supp. 1996) (discussing the sufficiency of evidence to support a conviction).

9. Pursuant to CAL. PENAL CODE § 1118.1 (West 1985 & Supp. 1995).

10. *Cuevas*, 12 Cal. 4th at 261, 906 P.2d at 1295, 48 Cal. Rptr. 2d at 140. These exceptions include a corroboration requirement to sustain a conviction on the testimony of an accomplice. CAL. PENAL CODE § 1111 (West 1985 & Supp. 1995). See 6 B.E. WITKIN & NORMAN EPSTEIN, CALIFORNIA CRIMINAL LAW, *Appeal* §§ 3206, 3208 (1989 & Supp. 1996); 21 CAL. JUR. 3D *Criminal Law* § 3264 (1985 & Supp. 1996) (discussing particular evidence which is unsubstantial to sustain a conviction). See generally J. Arthur L. Alarcon, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Un corroborated Accomplice Testimony*, 25 LOY. L.A. L. REV. 953, 960-62 (1992).

11. *People v. Gould*, 54 Cal. 2d 621, 631, 354 P.2d 865, 870, 7 Cal. Rptr. 273, 278 (1960), *rev'd*, 12 Cal. 4th 252, 906 P.2d 1290, 48 Cal. Rptr. 2d 135 (1995).

General challenged the validity of the *Gould* corroboration requirement, arguing that post-*Gould* case law has consistently rejected similar corroboration requirements¹² and that the passage of California Evidence Code section 411 supplanted the *Gould* holding.¹³ Although the court rejected the Attorney General's argument on the grounds that the Evidence Code drafters did not intend to invalidate the *Gould* requirement,¹⁴ the court nevertheless elected to overrule *Gould* to the extent that it requires corroboration for out-of-court identifications.¹⁵

B. A Baseless, Illogical Rule

The court explained that *Gould's* corroboration requirement directly conflicts with the substantial evidence test because it concentrates on an individual piece of evidence to determine whether a conviction is supported—requiring reversal on appeal if the only evidence proffered is an uncorroborated out-of-court identification—regardless of the probative value of the identification.¹⁶ Because “[c]orroboration requirements are the exception, not the rule,” and there is a presumption against their use, they must overwhelmingly justify themselves as “useful and efficacious”¹⁷ in order to be preserved. Such justification was absent in the *Gould* corroboration rule.¹⁸

12. *Cuevas*, 12 Cal. 4th at 262, 906 P.2d at 1295-96, 48 Cal. Rptr. 2d at 140-41. The Attorney General primarily relied on the court's decision in *People v. Alcala*, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984), which rejected a corroboration requirement for the testimony of jailhouse informants. *Id.* at 623, 685 P.2d at 1135, 205 Cal. Rptr. at 784.

13. *Cuevas*, 12 Cal. 4th at 262, 906 P.2d at 1295-96, 48 Cal. Rptr. 2d at 140-41. California Evidence Code § 411 states, “[E]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.” CAL. EVID. CODE § 411 (West 1995).

14. *Cuevas*, 12 Cal. 4th at 262-63, 906 P.2d at 1296, 48 Cal. Rptr. 2d at 141. The court based its conclusion on two factors. First, extrajudicial identifications may not constitute “direct evidence” because they are hearsay evidence which has been previously deemed indirect evidence by the court. *Id.* at 263, 906 P.2d at 1296, 48 Cal. Rptr. 2d at 141 (citing *Gould*, 54 Cal. 2d 621, 629-30, 354 P.2d 865, 869-70, 7 Cal. Rptr. 273, 277-78). Second, Evidence Code § 411 merely intended to restate former Civil Procedure Code § 1844, an action which “would not necessarily abolish the *Gould* corroboration requirement.” *Id.* at 263, 906 P.2d at 1296, 48 Cal. Rptr. 2d at 141.

15. *Id.* at 263, 906 P.2d at 1296, 48 Cal. Rptr. 2d at 141.

16. *Id.* at 263-64, 906 P.2d at 1297, 48 Cal. Rptr. 2d at 142.

17. *Id.* at 264, 906 P.2d at 1297, 48 Cal. Rptr. 2d at 142 (quoting 7 WIGMORE, EVIDENCE § 2034, at 342 (Chadbourn ed. 1978)).

18. *Id.* at 264, 906 P.2d at 1297, 48 Cal. Rptr. 2d at 142.

The *Gould* court based its ruling solely on *Reamer v. United States*,¹⁹ a Sixth Circuit case which refused to sustain a defendant's conviction because the court found two extrajudicial identifications unreliable and did not find additional evidence connecting the defendant to the crime.²⁰ *Reamer*, however, did not establish a per se rule that out-of-court identifications alone are insufficient to sustain a conviction, nor did it provide justification for such a rule.²¹ Additionally, the court found it absurdly incongruous to sustain a conviction based on an in-court identification but hold an extrajudicial identification insufficient to support the same conviction,²² or to require corroboration for this type of statement but not for other forms of hearsay.²³

The court also discovered that the requirement was irreconcilable with other state and federal laws, noting that in the thirty-five years since the *Gould* decision, no jurisdiction has adopted the corroboration requirement.²⁴ Further, because the *Gould* corroboration requirement deems all out-of-court identifications insufficient, regardless of the probative value of such identifications, it does not consider important circumstances which may lend credibility to the extrajudicial statement.²⁵ The *Gould* corroboration requirement also fails to account for significant factors regarding the witness' inability to confirm the identification at trial.²⁶ Both of these papers may significantly affect the probative value of the out-of-court statement.²⁷ Had this been a question of first impression,

19. 229 F.2d 884 (6th Cir. 1956).

20. *Cuevas*, 12 Cal. 4th at 264-65, 906 P.2d at 1297, 48 Cal. Rptr. 2d at 142 (citing *Reamer*, 229 F.2d at 886).

21. *Id.* at 265, 906 P.2d at 1297, 48 Cal. Rptr. 2d at 142-143.

22. *Id.* at 265, 906 P.2d at 1298, 48 Cal. Rptr. 2d at 143.

23. *Id.* at 265-266, 906 P.2d at 1298, 48 Cal. Rptr. 2d at 143.

24. *Id.* at 266-67, 906 P.2d at 1298-99, 48 Cal. Rptr. 2d at 143-44.

25. *Id.* at 267, 906 P.2d at 1299, 48 Cal. Rptr. 2d at 144. These considerations include: (1) prior contact with the person identified; (2) occasion to view the person identified; (3) possible iniquitous motive to wrongfully implicate; and (4) the degree of detail in the identification. *Id.*

26. *Id.* at 267-68, 906 P.2d at 1299-1300, 48 Cal. Rptr. 2d at 144-45. Such factors include: (1) whether the identifier admits, denies, or forgets having made the statement of identification; (2) whether the identifier recalls the event but is unsure of the accuracy of the identification; (3) if the identifier claims the statement was false, whether he is able to justify such a falsification; (4) if the identifier declares memory loss, whether there is an explanation for such a lack of recall; (5) whether it is shown that the inability to verify the identification at trial is due to "the witness's appreciation that doing so would result in the defendant's conviction"; or (6) whether the failure to verify results stems from "fear or intimidation." *Id.*

27. *Id.* at 268, 906 P.2d at 1300, 48 Cal. Rptr. 2d at 145. To illustrate this point, the court offered two hypothetical situations in which these factors would affect the probative value of the identification statement. *Id.* The first is the situation where the identification statement has low probative value, in which an imprisoned witness simply tells his cellmate, in no detail, that he observed the defendant committing the crime. *Id.* At

suggested Justice Kennard, the sweeping *Gould* requirement would be rejected as overbroad.²⁸

C. *The Considerations of Stare Decisis*

As this was not a question of first impression, but rather the result of a thirty-five year old unanimous opinion, the court was forced to evaluate the *Gould* rule in light of the doctrine of *stare decisis*.²⁹ A cardinal component of the *stare decisis* inquiry is the consideration of possible impact on any "private or legislative reliance interests that have sprung up in dependence on the existing rule," if the rule were altered.³⁰ The court found no such interests in this case and additionally recognized that the *Gould* corroboration rule is a judicially-created, common-law rule, not a question of statutory interpretation which might force a more careful consideration before overruling.³¹

trial, the cellmate recounts the declarant's statement but the declarant denies having made the statement, knowing anything about the crime, or having any prior knowledge of the defendant. *Id.* The defense then proves that the witness was not in the same state as the defendant when the crime occurred and that the cellmate had been assured a sentence reduction for his testimony. *Id.* In the second scenario, where the identification statement is highly probative, a witness who has known the defendant for a length of time gives a videotaped statement after witnessing the defendant perpetrate the crime, recounting very specific details of the crime. *Id.* Before trial, the witness suffers amnesia from a car accident and is unable to confirm her identification statement at trial. *Id.* Although these two scenarios differ significantly, each is insufficient under *Gould* to independently support a conviction. *Id.* at 269, 906 P.2d at 1300, 48 Cal. Rptr. 2d at 145.

28. *Id.*

29. *Id.* at 269, 906 P.2d at 1300, 48 Cal. Rptr. 2d at 145-46. The doctrine of *stare decisis* requires the court to follow applicable precedent even if reconsideration of the issue likely would result in a different decision by the current court. *Id.* at 269, 906 P.2d at 1300-01, 48 Cal. Rptr. 2d at 146. However, the doctrine does "not shield court-created error from correction." *Id.* at 269, 906 P.2d at 1301, 48 Cal. Rptr. 2d at 146 (quoting *People v. Latimer*, 5 Cal. 4th 1203, 1213, 858 P.2d 611, 617, 23 Cal. Rptr. 2d 144, 150 (1993)). For a discussion of the doctrine of *stare decisis*, see generally Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis after Payne v. Tennessee*, 82 GEO. L.J. 1689 (1994). See also John Wallace, Note, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 BUFF. L. REV. 187, 189-201 (1994) (discussing the development of *stare decisis* from its English and American roots).

30. *Cuevas*, 12 Cal. 4th at 270, 906 P.2d at 1301, 48 Cal. Rptr. 2d at 146.

31. *Id.* The court noted that the defendant has "a legitimate interest in not being convicted on evidence that is insufficient to prove" his guilt, but "no defendant has a

The court also noted that the *Gould* corroboration requirement has already been limited in two respects where the probative value and reliability of the out-of-court identifications were high.³² Based on these reasons, the court abandoned the corroboration requirement, overruling *Gould* to the extent that it deemed all out-of-court identifications independently insufficient to sustain a conviction and substituting the substantial evidence test as the applicable standard.³³

D. Ample Defense Safeguards Exist

Responding to the defense's concern that the *Gould* corroboration requirement is essential to protect defendants from perjured identifications, the court pointed out the numerous safeguards that already exist to guarantee the credibility of extrajudicial identifications.³⁴ The first safeguard, cross-examination of the identifying witness, serves two valuable purposes: it provides the jury with the opportunity to observe the witness' demeanor, and it allows the defense attorney to elicit testimony regarding possible bias or motive to falsify the identification and to expose the witness' personal characteristics such as bad eyesight or memory, both of which may bolster or lessen the witness' credibility in the eyes of the jury and satisfy the confrontation clause.³⁵

In addition to conducting cross-examination, the defense may present evidence to impeach the witness' identification³⁶ or request appropriate

legitimate interest in holding the prosecution to a greater burden of proof." *Id.*

32. *Id.* at 270-71, 906 P.2d at 1301-02, 48 Cal. Rptr. 2d at 146-47. See *People v. Chavez*, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981) (holding that a pretrial identification made under oath at the preliminary hearing is sufficient in itself to sustain a conviction); see also *People v. Lucky*, 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988) (finding that a repudiated extrajudicial identification can be corroborated by the repudiated extrajudicial statement of another witness which links the defendant to the crime).

33. *Cuevas*, 12 Cal. 4th at 272, 906 P.2d at 1302-03, 48 Cal. Rptr. 2d at 147-48.

34. *Id.* at 272, 906 P.2d at 1303, 48 Cal. Rptr. 2d at 148.

35. *Id.* at 272-74, 906 P.2d at 1303-04, 48 Cal. Rptr. 2d at 148-49. The court observed that this notion finds abundant support from several sources including the opinion of Judge Learned Hand in *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925), McCormick's treatise on evidence, 2 MCCORMICK, EVIDENCE § 251, p. 120 (4th ed. 1992), and the United States Supreme Court decision of *United States v. Owens*, 484 U.S. 554, 559-60 (1988). See generally Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration under the Confrontation Clause*, 81 VA. L. REV. 149 (1995) (discussing cross-examination of hearsay witnesses as satisfaction of the confrontation clause).

36. *Cuevas*, 12 Cal. 4th at 274, 906 P.2d at 1304, 48 Cal. Rptr. 2d at 149. This includes "evidence that the identifying witness was not present at the scene of the crime, was not previously familiar with the defendant, or had a motive to implicate the defendant." *Id.*

jury instructions to apprise the jury of the considerations which may affect the probative value of the extrajudicial identification.³⁷ Finally, the court advised that the substantial evidence test provides an additional safeguard at both the trial and appellate levels by ensuring that the conviction is duly supported by evidence.³⁸ These protections, the court concluded, were adequate to guard a defendant from conviction on an unreliable out-of-court identification.³⁹

E. Due Process Does Not Prevent Retroactive Application of This Standard

Finally, the court addressed the defendant's contention that due process and equal protection prevent the court from retroactively applying its decision to his case because the holding expands criminal liability.⁴⁰ The court maintained that adoption of the substantial evidence test to determine the sufficiency of an extrajudicial identification does not expand criminal liability because the focus of the test is on the activity for which the defendant was convicted.⁴¹ That, explained the court, "was criminal long before this case arose."⁴² Thus, the court adopted the substantial evidence test and applied it to Cuevas' conviction, holding that the conviction must stand because, from the evidence, a reasonable jury could have concluded that the two identifying witnesses were initially telling the truth but "recanted those statements in court for gang-related reasons."⁴³

IV. IMPACT AND CONCLUSION

The *Cuevas* decision abolished a thirty-five year old California evidence standard, unleashing the possibility for a conviction based on a single, out-of-court identification that is unconfirmed by the identifier at trial.⁴⁴ Instead of categorically reversing convictions based on uncorrobor-

37. *Id.*; see CALJIC Nos. 2.91, 2.92 (5th ed. 1988).

38. *Cuevas*, 12 Cal. 4th at 274, 906 P.2d at 1304, 48 Cal. Rptr. 2d at 149.

39. *Cuevas*, 12 Cal. 4th at 274-75, 906 P.2d at 1304, 48 Cal. Rptr. 2d at 149. All jury instructions and cases which follow the *Gould* corroboration requirement are also overruled by this decision "to the extent they are inconsistent with [this opinion]." *Id.* at 275 n.5, 906 P.2d at 1304 n.5, 48 Cal. Rptr. 2d at 149 n.5.

40. *Id.* at 275, 906 P.2d at 1304-05, 48 Cal. Rptr. 2d at 149-50.

41. *Id.* at 275, 906 P.2d at 1305, 48 Cal. Rptr. 2d at 150.

42. *Id.*

43. *Id.* at 276-77, 906 P.2d at 1305-06, 48 Cal. Rptr. 2d at 150-151.

44. See 21 CAL. JUR. 3D *Criminal Law* §§ 3159, 3263 (1985) (discussing the pre-

orated extrajudicial statements of identification, the court will employ a case-by-case analysis to weigh the probative value of the statements and determine whether a reasonable trier of fact could have concluded that the statements established the elements of the crime beyond a reasonable doubt.⁴⁵

The *Cuevas* decision protects both the community at large and the confrontation rights of defendants. California defendants will no longer benefit from improperly influencing identification witnesses through threat or fear to recant previous identification statements in cases where the out-of-court identification is the only evidence linking the defendant to the crime.⁴⁶ Sufficient safeguards still exist to ensure that defendants will not be convicted solely on a perjured extrajudicial identification.⁴⁷

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Cuevas notion that out-of-court identifications are insufficient to support a conviction).

45. *See Out of Court Identification Needs No Corroboration*, NAT'L L.J., Jan. 22, 1996, at B15; *see also supra* text accompanying note 43.

46. *See supra* note 1 and text accompanying note 43.

47. *See supra* notes 34-39 and accompanying text.

- C. *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.*

I. INTRODUCTION

In *People v. Swain*,¹ the California Supreme Court granted review to clarify the required mental state for conspiracy to commit murder.² Re-

1. 12 Cal. 4th 593, 909 P.2d 994, 49 Cal. Rptr. 2d 390 (1996). Justice Baxter delivered the opinion of the court in which Chief Justice Lucas and Justices George and Werdegar joined. *Id.* at 593-611, 909 P.2d at 994-1004, 49 Cal. Rptr. 2d at 390-400. Justice Mosk wrote a concurring opinion in which Justice Arabian joined. *Id.* at 611-20, 909 P.2d at 1004-10, 49 Cal. Rptr. 2d at 400-06 (Mosk, J., concurring). Justice Kennard filed a concurring opinion. *Id.* at 621-30, 909 P.2d at 1011-17, 49 Cal. Rptr. 2d at 407-13 (Kennard, J., concurring).

2. *Id.* at 599, 909 P.2d at 996, 49 Cal. Rptr. 2d at 392. Hagbom Saileele, a 15-year-old youth of Samoan descent, was the victim of a fatal drive-by shooting on January 31, 1991 when he and his friends were listening to music at Hunter's Point in San Francisco. *Id.* at 597, 909 P.2d at 995, 49 Cal. Rptr. 2d at 391. Later, police discovered an abandoned van containing two handguns, surgical gloves, and a ski mask. *Id.* Police traced one of the guns to defendant Chatman and found defendant Swain's fingerprints on the inside of the van's driver's side window. *Id.* The police arrested Chatman and Swain. *Id.* While incarcerated before trial, Swain boasted to jailmates about his "good aim" and described his ability to shoot the youth while traveling 30 miles per hour in a hilly area. *Id.* In both his conversations with the police and at trial, Swain contended he was not in the van on the night of the shooting. *Id.* The owner of the van testified that Swain had never been in the van prior to the shooting and that Swain threatened to harm him if he told police otherwise. *Id.* at 598, 909 P.2d at 995, 49 Cal. Rptr. 2d at 391.

At trial, Chatman testified that he drove to Hunter's Point to steal a car from a rival gang and that he fired shots wildly in self-defense. *Id.* Swain testified that he had been in the van on the night of the shooting, but that he left before the shooting and spent the night with a relative. *Id.* at 598, 909 P.2d at 995-96, 49 Cal. Rptr. 2d at 391-92. Swain denied boasting about the shooting or threatening any witnesses. *Id.* at 598, 909 P.2d at 996, 49 Cal. Rptr. 2d at 392.

The trial court instructed the jury on the elements of conspiracy and murder, including principles of implied malice under second-degree murder. *Id.* at 602, 909 P.2d at 998, 49 Cal. Rptr. 2d at 394. First, the jury returned verdicts finding Chatman guilty of second-degree murder and conspiracy to commit murder in the second degree. *Id.* at 598, 909 P.2d at 996, 49 Cal. Rptr. 2d at 392. Later, the jury returned verdicts finding Swain not guilty of murder or its lesser-included offenses, but found him guilty of conspiracy and guilty of threatening a witness. *Id.* The trial court sentenced Chatman to 15 years for murder, 15 years for conspiracy, and four years for using a firearm in the commission of a felony. *Id.* The trial court sentenced Swain to 15 years for conspiracy and three years for threatening a witness. *Id.* at 599, 909 P.2d at 996, 49 Cal.

jecting the theory that a conviction for conspiracy to commit murder could be sustained on an implied malice jury instruction,³ the supreme court reversed the court of appeal and held that a specific intent to kill must be proved.⁴

II. TREATMENT

A. *Majority Opinion*

1. The Required Mental States for Conspiracy and Murder

The court first reviewed the required mental states for conspiracy and murder.⁵ The majority emphasized that a conspiracy conviction must be supported by proof of two specific mental states:⁶ the intent to conspire and the intent to commit each element of the target offense.⁷ The court ruled that a conviction of murder in the first degree requires express malice or an intent to kill.⁸ The majority illustrated that a conviction for murder in the second degree, which both the jury and the court of appeal found to be the target offense, may be based on any of three mental

Rptr. 2d at 392. The court of appeal affirmed the convictions and judgments and imposed the full sentences as set forth by the lower court. *People v. Swain*, 39 Cal. App. 4th 1658, 1664-65, 25 Cal. Rptr. 2d 598, 602 (1993), *vacated*, 12 Cal. 4th 593, 909 P.2d 994, 49 Cal. Rptr. 2d 390 (1996).

3. See *infra* notes 12-20 and accompanying text.

4. *Swain*, 12 Cal. 4th at 607, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397.

5. *Id.* at 598-607, 909 P.2d at 996-1001, 49 Cal. Rptr. 2d at 392-97.

6. *Id.* at 600, 909 P.2d at 997, 49 Cal. Rptr. 2d at 392.

7. *Id.* (citing *People v. Horn*, 12 Cal. 3d 290, 296, 524 P.2d 1300, 1304, 115 Cal. Rptr. 516, 520 (1974)). See generally Comment, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 922, 935-40 (1959) (surveying the criminal intent requirement generally); Comment, *Criminal Law—Conspiracy and Conspirators in California*, 26 S. CAL. L. REV. 64, 67-68 (1952) (providing an historical overview of the intent requirement in the state of California).

8. *Swain*, 12 Cal. 4th at 601, 909 P.2d at 997, 49 Cal. Rptr. 2d at 393 (citing *People v. Saille*, 54 Cal. 3d 1103, 1114, 820 P.2d 588, 595, 2 Cal. Rptr. 2d 364, 371 (1991)). See Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 495-507 (1996) (analyzing inconsistent interpretations of express and implied malice and advocating comprehensive legislative reform).

states: unpremeditated murder with express malice,⁹ implied malice,¹⁰ or second-degree felony murder.¹¹

Because conspiracy is a specific-intent crime, the court reasoned that an implied malice instruction was illogical and thus "at odds with the very nature of the crime of conspiracy."¹² The majority concluded that the specific intent to kill must be proved.¹³ Otherwise, the commission of the crime of conspiracy to commit murder, an inchoate crime that does not require the successful commission of the target offense,¹⁴ could not be established until and unless a death resulted from an intentional act.¹⁵

9. The mental state of unpremeditated murder with express malice may be found "when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation." *Swain*, 12 Cal. 4th at 601, 909 P.2d at 998, 49 Cal. Rptr. 2d at 394 (quoting CALJIC No. 8.30). See *People v. Goodman*, 8 Cal. App. 3d 705, 708-09, 87 Cal. Rptr. 665, 666-67 (1970) (holding that deliberate intent to kill is not an element of second-degree murder), *overruled on other grounds by*, *People v. Beagle*, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). See generally 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* §§ 490-491 (2d ed. 1988 & Supp. 1995) (discussing lack of premeditation and insufficient provocation).

10. Implied malice may be found when three elements are proved: first, a killing must result from an intentional act; second, the natural consequences of that act must be dangerous to human life; and third, that act must be deliberately performed with knowledge of danger to human life or a conscious disregard for human life. See, e.g., *People v. Poddar*, 10 Cal. 3d 750, 759-60, 518 P.2d 342, 349, 111 Cal. Rptr. 910, 917 (1974). See generally 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* §§ 503-507 (2d ed. 1988 & Supp. 1995) (discussing theories of implied malice where intentional acts involve risk of death or injury).

11. *Swain*, 12 Cal. 4th at 601-02, 909 P.2d at 997-98, 49 Cal. Rptr. 2d at 393-94. A second degree felony-murder instruction is appropriate when the unlawful killing of a human being accompanies the commission of a felony and the perpetrator acted with the specific intent to commit that felony; malice need not be proved. See, e.g., *People v. Dillon*, 34 Cal. 3d 441, 475-76 & n.23, 668 P.2d 697, 718 & n.23, 194 Cal. Rptr. 390, 411-12 & n.23 (1983). See generally 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* §§ 474, 493-500 (2d ed. 1988 & Supp. 1995) (discussing second-degree felony murder rule).

12. *Swain*, 12 Cal. 4th at 603, 909 P.2d at 999, 49 Cal. Rptr. 2d at 395.

13. *Id.* at 607, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397.

14. *Id.* at 599, 909 P.2d at 996, 49 Cal. Rptr. 2d at 392 (citing *United States v. Feola*, 420 U.S. 671, 694 (1975)); *People v. Manson*, 71 Cal. App. 3d 1, 47, 139 Cal. Rptr. 275, 301 (1977) (ruling that agreement between two people to rob and murder an unidentified victim, combined with an overt act in furtherance of the crime, constitutes conspiracy).

15. *Swain*, 12 Cal. 4th at 603, 909 P.2d at 999, 49 Cal. Rptr. 2d at 395.

While the court arrived at this conclusion with little effort, it had to reconcile the result with apparently inconsistent language in *People v. Horn*.¹⁶ In a footnote, the *Horn* court reasoned that conspiracy to commit second-degree murder or manslaughter was legally cognizable.¹⁷ The majority distinguished *Horn* on two grounds. First, at the time the court decided *Horn*, premeditation required proof that one "could maturely and meaningfully reflect upon the gravity of his contemplated act."¹⁸ Second, when the court decided *Horn*, an allegation of express malice could be rebutted by a showing of diminished capacity.¹⁹ Noting that nothing in *Horn* suggested that a conviction for conspiracy to commit murder could be sustained on a theory of implied malice, the court asserted that its present decision did not require overruling *Horn*.²⁰

2. Harmless Error Standard

As in other cases where a jury receives improper instructions,²¹ the majority applied the harmless error standard set forth in *Chapman v. California*.²² Because the trial court gave the jury instructions on both express and implied malice, and because the jury returned general verdicts that failed to indicate the theory upon which they based their second-degree conspiracy convictions,²³ the court was unable to conclude

16. 12 Cal. 3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974). In *Horn*, the defendants were convicted of conspiracy to commit first-degree murder, arson, and the unlawful manufacture of a firebomb. *Id.* at 293, 524 P.2d at 1301, 115 Cal. Rptr. at 517. At trial, the defendants claimed that they were so intoxicated that they lacked capacity to form the intent to kill, but the trial court refused to instruct the jury on a diminished capacity defense. *Id.* at 293, 524 P.2d at 1301-02, 115 Cal. Rptr. at 517-18. When the court decided *Horn*, evidence of a diminished mental capacity could show that a homicide was committed without premeditation or malice aforethought and the language of Penal Code § 182 made conspiracy to commit second-degree murder a logical possibility. *Id.* at 295 & n.5, 524 P.2d at 1303 & n.5, 115 Cal. Rptr. at 519 & n.5.

17. *Id.* at 295 & n.5, 524 P.2d at 1303 & n.5, 115 Cal. Rptr. at 519 & n.5. By failing to instruct the jury about the defense of diminished capacity, the court held that the trial court "effectively emasculated" the defendants of manslaughter verdicts and reversed their convictions. *Id.* at 291, 524 P.2d at 1306-07, 115 Cal. Rptr. at 522-23.

18. *Swain*, 12 Cal. 4th at 606, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397 (quoting *Horn*, 12 Cal. 3d at 298, 524 P.2d at 1305, 115 Cal. Rptr. at 521).

19. *Id.* (citing *Horn*, 12 Cal. 3d at 298, 524 P.2d at 1305, 115 Cal. Rptr. at 521).

20. *Id.*

21. *See, e.g.*, *People v. Harris*, 9 Cal. 4th 407, 424-25, 886 P.2d 1193, 1203-04, 37 Cal. Rptr. 2d 200, 210-11 (1994) (citing list of cases applying harmless error standard where the jury is improperly instructed), *cert. denied*, 115 S. Ct. 2280 (1995).

22. 386 U.S. 18 (1967). The *Chapman* standard requires reversal unless it can be determined beyond a reasonable doubt that "the error complained of did not contribute to the verdict obtained." *Id.* at 24.

23. *Swain*, 12 Cal. 4th at 607, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397.

beyond a reasonable doubt that the jury found an intent to kill and therefore reversed the defendants' conspiracy convictions.²⁴

3. Conspiracy and Second-Degree Murder

Because the court left *Horn's* holding and "controversial footnote"²⁵ intact, it grappled with the "conceptually difficult" issue of whether it is possible to convict a person of conspiracy to commit murder in the second degree.²⁶ The majority refused to decide that a murder conspirator must agree to commit first-degree murder.²⁷ Rather, the court held only that a conviction cannot be based on a second-degree theory of implied malice.²⁸ The court suggested that a conviction of conspiracy to commit second-degree murder would not necessarily be inconsistent with its holding so long as it was based on unpremeditated express malice²⁹ rather than on a theory of implied malice.³⁰

The majority concluded by declining to decide either the appropriate punishment for conspiring to commit second-degree murder or whether the constitutional prohibition against double jeopardy barred the defendants' retrial.³¹

24. *Id.* at 607, 909 P.2d at 1002, 49 Cal. Rptr. 2d at 398.

25. *Id.* at 609, 909 P.2d at 1003, 49 Cal. Rptr. 2d at 399. The footnote in *Horn* states in pertinent part:

[The] assertion that a conspiracy to commit murder is always a conspiracy to commit first degree murder is inconsistent with the present language of Penal Code section 182 As this language is written and punctuated, it plainly authorizes the trier of fact to return a verdict finding conspiracy to commit murder in the second degree Since the Legislature has authorized a verdict of conspiracy to commit second degree murder, it clearly does not believe that crime to be a logical impossibility.

People v. Horn, 12 Cal. 3d at 298 n.5, 524 P.2d at 1305 n.5, 115 Cal. Rptr. at 521 n.5 (1974). The *Swain* court reasoned that its decision in *Horn* could stand because the footnote was only dicta and because the decision failed to address the specific issue of whether a conviction for conspiracy could be sustained when the intent to commit the substantive offense was implied rather than proved. *Swain*, 12 Cal. 4th at 606, 610, 909 P.2d at 1001, 1003, 49 Cal. Rptr. 2d at 397, 399.

26. *Swain*, 12 Cal. 4th at 608, 909 P.2d at 1002, 49 Cal. Rptr. 2d at 398.

27. *Id.* at 608-10, 909 P.2d at 1002-04, 49 Cal. Rptr. 2d at 398-400.

28. *Id.* at 607, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397.

29. *See supra* note 9 and accompanying text (explaining express malice).

30. *Swain*, 12 Cal. 4th at 610, 909 P.2d at 1003, 49 Cal. Rptr. 2d at 399.

31. *Id.* at 610, 909 P.2d at 1004, 49 Cal. Rptr. 2d at 400.

B. Justice Mosk's Concurring Opinion

Justice Mosk concurred in the result on the narrow ground that the crime of conspiracy to commit second-degree murder does not exist.³² He departed from the court's determination of the required mental state for first-degree murder, stating that malice aforethought does not require "a *premeditated and deliberate* intent to kill unlawfully."³³ Justice Mosk, who dissented in *Horn*,³⁴ sought to overrule that decision,³⁵ describing it as a "citation without substance"³⁶ that "has been wanting from the day it was decided."³⁷ He disagreed with the majority that murder conspiracies could be classified into degrees,³⁸ rather, he stated that only a "conspiracy to commit murder *simpliciter*" existed as a matter of law.³⁹

Reaching decisions on issues not discussed by the majority,⁴⁰ Justice Mosk stated that the punishment for conspiracy to commit murder should necessarily conform to that of first-degree murder.⁴¹ Justice

32. *Id.* at 619, 909 P.2d at 1010, 49 Cal. Rptr. 2d at 406 (Mosk, J., concurring). Reasoning that the prosecution did not support the "crime" of conspiracy to commit murder in the second degree as a matter of law, Justice Mosk wrote that he would not allow the judgment to stand on the narrow ground of due process. *Id.* (Mosk, J., concurring).

33. *Id.* at 613, 909 P.2d at 1005-06, 49 Cal. Rptr. 2d at 401-02 (Mosk, J., concurring). "It is evident that the mental state required for the crime of murder is malice aforethought. Intent to kill is not *necessary* [I]t is satisfied by the presence of an 'abandoned and maligned heart' or the absence of 'considerable provocation.'" *Id.* at 612 n.2, 909 P.2d at 1005 n.2, 49 Cal. Rptr. 2d at 401 n.2 (Mosk, J., concurring) (quoting CAL. PENAL CODE § 188).

34. See *People v. Horn*, 12 Cal. 3d 290, 301-04, 524 P.2d 1300, 1307-09, 115 Cal. Rptr. 2d 516, 523-25 (Mosk, J., dissenting) (reasoning that "there are no degrees of conspiracy" and that a jury "has no comfortable option of reducing conspiracy to a lesser offense").

35. *Swain*, 12 Cal. 4th at 615-17, 909 P.2d at 1007-08, 49 Cal. Rptr. 2d at 403-04 (Mosk, J., concurring).

36. *Id.* at 617, 909 P.2d at 1008, 49 Cal. Rptr. 2d at 404 (Mosk, J., concurring).

37. *Id.* at 615, 909 P.2d at 1007, 49 Cal. Rptr. 2d at 403 (Mosk, J., concurring). Justice Mosk preferred the opinion of *People v. Kynette*, 15 Cal. 2d 731, 745, 104 P.2d 794, 801 (1940), which held that the crime of conspiracy to commit murder can only be found in the first degree. *Swain*, 12 Cal. 4th at 613-17, 909 P.2d at 1006-08, 49 Cal. Rptr. 2d at 402-04 (Mosk, J., concurring).

38. *Swain*, 12 Cal. 4th at 613-17, 909 P.2d at 1006-08, 49 Cal. Rptr. 2d at 402-04 (Mosk, J., concurring).

39. *Id.* at 619, 909 P.2d at 1009, 49 Cal. Rptr. 2d at 405 (Mosk, J., concurring).

40. *Id.* at 611-20, 909 P.2d at 1004-10, 49 Cal. Rptr. 2d at 400-06 (Mosk, J., concurring). Justice Mosk criticized the majority for balking on the sentencing and double jeopardy questions and allowing those issues to "cause mischief" and result in "years of unnecessary litigation" in lower courts. *Id.* at 611 n.1, 909 P.2d at 1004 n.1, 49 Cal. Rptr. 2d at 400 n.1 (Mosk, J., concurring).

41. *Id.* at 619, 909 P.2d at 1009, 49 Cal. Rptr. 2d at 405 (Mosk, J., concurring). California Penal Code § 190(a) provides that conspiracy to commit murder is punishable

Mosk further stated that the defendants could be retried without offending the protection against double jeopardy.⁴² However, he stated that fair notice principles of due process precluded sentencing the defendants to a duration greater than those enumerated in *Horn*.⁴³

C. Justice Kennard's Concurring Opinion

Justice Kennard agreed with the majority that an unlawful intent to kill must be proved in order to sustain a conviction for conspiracy to commit murder.⁴⁴ However, unlike the majority's equivocation, Justice Kennard praised *Horn's* logic⁴⁵ and stated that conspiracy to commit first degree murder and conspiracy to commit second degree murder were separate crimes that deserved separate punishments.⁴⁶ She reasoned that the cor-

by imprisonment for a term of 25 years to life. CAL. PENAL CODE § 190(a) (West 1996).

42. *Swain*, 12 Cal. 4th at 619-20, 909 P.2d at 1010, 49 Cal. Rptr. 2d at 406 (Mosk, J., concurring). Justice Mosk reasoned that because the prosecution tried the defendants under the theories of conspiracy to commit murder in the first and second degrees—rather than under the theory of “conspiracy to commit murder *simpliciter*”—that they would not be prosecuted twice for the same offense. *Id.* (Mosk, J., concurring) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (holding that principles of double jeopardy protect persons from being prosecuted twice for the “same offense” regardless of the jury’s verdict)). See generally William S. Theis, *The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy*, 49 SMU L. REV. 269, 284-91 (1996) (reviewing Supreme Court precedent regarding double jeopardy and multiple conspiracies).

43. *Swain*, 12 Cal. 4th at 620, 909 P.2d at 1010, 49 Cal. Rptr. 2d at 406 (Mosk, J., concurring) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (noting “a deprivation of the right of fair warning can result . . . from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language”) and *Beazell v. Ohio*, 269 U.S. 167, 169 (1925) (holding that a retroactive application of the law violates due process if the punishment is “more burdensome”)). Thus, Justice Mosk reasoned that, if found guilty of conspiracy to commit murder on retrial, the defendants should be sentenced to terms of 15 years to life. *Id.* (Mosk, J., concurring).

44. *Swain*, 12 Cal. 4th at 621, 909 P.2d at 1011, 49 Cal. Rptr. 2d at 407 (Kennard, J., concurring).

45. *Id.* at 623-25, 909 P.2d at 1012-14, 49 Cal. Rptr. 2d at 408-10 (Kennard, J., concurring).

46. *Id.* at 621, 909 P.2d at 1011, 49 Cal. Rptr. 2d at 407 (Kennard, J., concurring). Justice Kennard stated that the rationale for *Horn's* dual classification for conspiracies was easily seen because of the disparity in punishment:

If conspiracy to [commit] murder were a unitary crime that required only intent to kill, which is the mental state of second degree murder, but was punished as first degree murder, then conspiracies that involve agreements to commit only the elements of second degree . . . murder would be punished more severely than the completed crime of second degree murder.

rect charge depended upon whether the intent to kill was deliberate and premeditated,⁴⁷ emphasizing that an inordinately small number of cases would comprise the second-degree classification because an agreement “persisting beyond more than the briefest duration” would constitute deliberation and premeditation.⁴⁸

Justice Kennard also suggested that the defendants could be retried without violating the constitutional protection against double jeopardy.⁴⁹ Because she concluded that conspiracy to commit second-degree express malice murder was a crime as a matter of law,⁵⁰ Justice Kennard reasoned that the defendants could be retried because the court convicted, rather than acquitted, both defendants, of conspiracy to commit second-degree murder.⁵¹

III. IMPACT AND CONCLUSION

The court’s decision in *People v. Swain* makes clear two concepts. The required mental state for conspiracy to commit murder is an intent to kill,⁵² and a court may not instruct a jury on an implied malice theory.⁵³ However, whether a court may instruct on a second-degree murder theory of unpremeditated express malice and whether defendants may be retried after an erroneous instruction are issues left undecided by the California Supreme Court.⁵⁴ Because the legislature amended Penal

Id. at 625, 909 P.2d at 1013-14, 49 Cal. Rptr. 2d at 409-10 (Kennard, J., concurring). Justice Kennard concluded that each classification for conspiracy to commit murder should reflect the sentence provided by the appropriate degree of murder. *Id.* at 621, 909 P.2d at 1011, 49 Cal. Rptr. 2d at 407 (Kennard, J., concurring).

47. *Id.* at 624, 909 P.2d at 1013, 49 Cal. Rptr. 2d at 409 (Kennard, J., concurring).

48. *Id.* at 625, 909 P.2d at 1014, 49 Cal. Rptr. 2d at 410 (Kennard, J., concurring).

49. *Id.* at 628-30, 909 P.2d at 1015-17, 49 Cal. Rptr. 2d at 411-13 (Kennard, J., concurring). See generally George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986) (analyzing the Supreme Court’s double jeopardy jurisprudence).

50. *Swain*, 12 Cal. 4th at 629, 909 P.2d at 1016, 49 Cal. Rptr. 2d at 412 (Kennard, J., concurring).

51. *Id.* (Kennard, J., concurring) (citing *Montana v. Hall*, 481 U.S. 400, 402 (1987) (“It is a venerable principle of double jeopardy jurisprudence that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge.”)) (internal quotation marks, punctuation, and citations omitted); see *People v. Santamaria*, 8 Cal. 4th 903, 910-11, 884 P.2d 81, 83, 35 Cal. Rptr. 2d 624, 626 (1994) (stating that the double jeopardy clause’s protections against successive prosecution do not preclude the government from retrying a defendant who successfully sets aside his conviction due to a procedural error).

52. *Swain*, 12 Cal. 4th at 607, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397.

53. See *supra* notes 12-20 and accompanying text (discussing conspiracy as a specific-intent crime).

54. *Id.* at 621, 909 P.2d at 1011, 49 Cal. Rptr. 2d at 407 (Kennard, J., concurring).

Code section 189 to include drive-by shootings on the list of specified felonies in which an intent to kill will be presumed, lower courts will be guided should facts similar to *Swain* arise in the future.⁵⁵ Meanwhile, California's conspiratorial homicide laws remain unsettled as the void caused by "piecemeal" judicial interpretation⁵⁶ and incomplete statutory abrogation becomes more confusing.⁵⁷

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55. CAL. PENAL CODE § 189 (West 1996); Anthony M. Perez & Tammy L. Samsel, *Review of Selected 1993 California Legislation: Crimes; Carjacking and Drive-by Shooting—First Degree Murder*, 25 PAC. L.J. 513 (1994).

56. Hobson, *supra* note 8, at 495. Mr. Hobson argues that the judiciary's attempts to solve problems created by California's "archaic" homicide statutes have largely failed and that only sweeping legislative reform "can correct the errors of the past and limit future errors from further confusing homicide law." *Id.*

57. *Swain*, 12 Cal. 4th at 613-17, 909 P.2d at 1006-08, 49 Cal. Rptr. 2d at 402-04 (Mosk, J., concurring).

IV. EMPLOYER & EMPLOYEE

An employer's course of conduct and representations may create an enforceable, implied-in-fact contract prohibiting the employer from demoting an employee without cause: Scott v. Pacific Gas & Electric Co.

I. INTRODUCTION

In *Scott v. Pacific Gas & Electric Co.*,¹ the California Supreme Court considered whether courts can enforce implied terms in employment contracts that prohibit employers from demoting employees without cause.² At trial, the jury found for Scott and Johnson, determining that the parties entered into an agreement preventing Pacific Gas and Electric Company (PG&E) from demoting its employees without cause and that PG&E breached the agreement by demoting the two employees without good cause.³ The court of appeal reversed the trial court's judgment,

1. 11 Cal. 4th 454, 904 P.2d 834, 46 Cal. Rptr. 2d 427 (1995). Justice Mosk authored the unanimous opinion in which Chief Justice Lucas and Justices Kennard, Arabian, and George concurred. *Id.* at 458-74, 904 P.2d at 834-46, 46 Cal. Rptr. 2d at 428-39. Justice Puglia, presiding Justice for the Third District Court of Appeal, and Justice Cottle, presiding Justice for Sixth District Court of Appeal, sitting under assignment, also concurred in the opinion. *Id.*

2. *Id.* at 463, 904 P.2d at 838, 46 Cal. Rptr. 2d at 431. Scott and Johnson were employees of Pacific Gas and Electric Company (PG&E) working as engineering consultants. *Id.* at 459, 904 P.2d at 836, 46 Cal. Rptr. 2d at 429. During their employment, Scott and Johnson worked off-hours to form S&J Engineering (S&J), an outside engineering consulting business. *Id.* PG&E was fully aware of Scott and Johnson's involvement in S&J and did not have any policies against outside business involvement as long as it did not create a conflict of interest with PG&E. *Id.* During the end of 1988, PG&E's internal auditing department began investigating Scott's and Johnson's supervisory practices and outside business interests. *Id.* Scott and Johnson alleged that the investigation was prompted by personal animosity harbored against them by Ralf Stewart, an investigator in the internal auditing department. *Id.* Due to the investigation, Scott and Johnson were charged with negligent supervision and conflicts of interest. *Id.* at 460, 904 P.2d at 836, 46 Cal. Rptr. 2d at 429. On August 9, 1989, Scott and Johnson were suspended without having an opportunity to respond to the charges. *Id.* Approximately one month passed before Scott and Johnson were allowed to read the internal audit report and prepare a response. *Id.* at 460, 904 P.2d at 836-37, 46 Cal. Rptr. 2d at 429-30. Although their response contained extensive documentary support for their denials of wrongdoing, Scott and Johnson were demoted in October of 1989. *Id.* at 460, 904 P.2d at 837, 46 Cal. Rptr. 2d at 430. Testimony by personnel supervisors revealed that the decision to demote Scott and Johnson was made in July of 1989, one month before Scott and Johnson were allowed to defend against the charges. *Id.* Feeling that they were unfairly demoted, Scott and Johnson sued for breach of contract, claiming that PG&E breached an implied agreement not to demote employees without cause. *Id.*

3. *Id.* at 462, 904 P.2d at 838, 46 Cal. Rptr. 2d at 431.

reasoning that a contract action for wrongful demotion was "inherently vague" and that judicial activism in employment demotion disputes would create uncertainty and intrusion and, therefore, is unwarranted.⁴ The California Supreme Court reinstated the judgment of the trial court and held that a cause of action does exist for breach of an implied contractual agreement not to demote an employee without good cause.⁵

II. TREATMENT

The court began its analysis by reviewing the principles set forth in employment contract statutes and cases.⁶ Section 2922 of the California Labor Code creates a presumption that employment for an indefinite period of time is terminable at the will of either the employer or the employee.⁷ This presumption is similar to the common law presumption that an employer may demote an employee at his or her discretion.⁸ However, the court acknowledged its holding in *Foley v. Interactive Data Corp.*,⁹ that the presumption of at-will employment can be overcome by proof of contractual agreements.¹⁰ As the *Foley* court determined, an employer's representations and conduct indicating that employment will not be terminated without good cause may create an implied-in-fact agreement not to terminate an employee without cause.¹¹ The court explained that the terms of an agreement, as well as the parties' understanding, as manifested by their conduct, form the basis for determining contractual rights and liabilities.¹² Therefore, the court con-

4. *Id.*

5. *Id.* at 474, 904 P.2d at 846, 46 Cal. Rptr. 2d at 439.

6. *Id.* at 463, 904 P.2d at 838, 46 Cal. Rptr. 2d at 431.

7. *Id.* California Labor Code § 2922 states in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other." CAL. LAB. CODE § 2922 (West 1989 & Supp. 1996).

8. *Scott*, 11 Cal. 4th at 464-65, 904 P.2d at 839-40, 46 Cal. Rptr. 2d at 432-33.

9. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

10. *Scott*, 11 Cal. 4th at 463, 904 P.2d at 838, 46 Cal. Rptr. 2d at 431.

11. *Id.*; see *Foley*, 47 Cal. 3d at 679-80, 765 P.2d at 387, 254 Cal. Rptr. at 225. See generally 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 156 (9th ed. 1987 & Supp. 1996) (discussing the requirement of good cause in the employment termination context); 29 CAL. JUR. 3D *Employer and Employee* § 72 (1986 & Supp. 1996) (stating that a breach of an implied-in-fact promise not to terminate an employee without cause may give rise to a cause of action).

12. *Scott*, 11 Cal. 4th at 463, 904 P.2d at 838, 46 Cal. Rptr. 2d at 431. "[C]ourts seek to enforce the actual understanding of the parties to a contract, and in so doing may inquire into the parties' conduct to determine if it demonstrates an implied contract." *Id.* (quoting *Foley*, 47 Cal. 3d at 677, 765 P.2d at 385, 254 Cal. Rptr. at 223).

cluded that the presumption of an employer's right to demote without cause may be overcome by proof of an implied contractual agreement to the contrary.¹³

In determining whether PG&E's right to demote without cause was overcome by an implied agreement to the contrary, the court examined whether there was sufficient evidence to support the trial court's finding of an implied agreement limiting PG&E from exercising its discretion to demote Scott and Johnson.¹⁴ The court found that PG&E's personnel policy manual and statements from a PG&E personnel director, which indicated that employees had a reasonable expectation that PG&E would not discipline its employees without good cause, constituted compelling evidence to conclude that PG&E implicitly entered into an agreement not to demote its employees without good cause.¹⁵

Having found an implied agreement to demote only for cause, the court then analyzed whether there was sufficient evidence to support the trial court's finding of a breach of this agreement by PG&E.¹⁶ Because the evidence was sufficient to show that Scott and Johnson did not have any conflicting interests in running their other business, and because PG&E failed to follow its personnel policies in dealing with its employees, the court concluded that PG&E's demotion of Scott and Johnson constituted a breach of its implied agreement.¹⁷

Next, the court analyzed PG&E's arguments that contractual agreements which limit an employer's right to demote at will should not be

The court further explained that the application of this realistic approach to contract interpretation means that courts will not confine themselves to examining the express agreements . . . but will also look to the employer's policies, practices, and communications in order to discover the contents of an employment contract." *Scott*, 11 Cal. 4th at 463, 904 P.2d at 839, 46 Cal. Rptr. 2d at 432; see also 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 11 (9th ed. 1987 & Supp. 1996) (distinguishing between express and implied contracts); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 171-174 (9th ed. 1987 & Supp. 1996) (describing the effects of implied contracts on at-will employment); 14 CAL. JUR. 3D *Contracts* §§ 180-181 (1974 & Supp. 1996) (describing the creation of implied-in-fact contract terms).

13. *Scott*, 11 Cal. 4th at 465, 904 P.2d at 840, 46 Cal. Rptr. 2d at 433. "We perceive no reason under the principles enunciated in *Foley* why the presumption that an employer has the right to demote an employee at will may not also be rebutted by evidence of a contractual agreement, express or implied, to limit the employer's power of demotion." *Id.*

14. *Id.* ("When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment.")

15. *Id.*

16. *Id.*

17. *Id.* at 465-66, 904 P.2d at 840, 46 Cal. Rptr. 2d at 433.

enforced.¹⁸ The court dismissed PG&E's first contention that a contractual agreement requiring good cause prior to demoting an employee would be unenforceably vague.¹⁹ The court reasoned that the requirement of good cause was not unenforceably vague because good cause could be shown to exist whenever an employer had a fair and true reason for his or her actions.²⁰ PG&E's second contention, that Scott and Johnson's cause of action should be dismissed because their demotions did not constitute constructive discharges, was similarly rejected by the court.²¹ The court noted that the laws regulating constructive discharge causes of action²² did not prevent a suit for breach of an implied agreement not to demote without cause because the two causes of action differ, and Scott and Johnson were not seeking the same damages as would be allowed in a constructive discharge suit.²³

The court rebutted PG&E's final claim that implied contractual agreements requiring good cause prior to demoting an employee are unenforceable because of public policy considerations.²⁴ The court found

18. *Id.* at 466-74, 904 P.2d at 840-46, 46 Cal. Rptr. 2d at 433-39.

19. *Id.* at 466-67, 904 P.2d at 840-41, 46 Cal. Rptr. 2d at 433-34. See generally 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 145, 146 (9th ed. 1987 & Supp. 1996) (describing the requirement of certainty in contract terms).

20. *Scott*, 11 Cal. 4th at 467, 904 P.2d at 841, 46 Cal. Rptr. 2d at 434. Good cause means "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." *Id.* (quoting *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 928 (1981) (quoting *R. J. Cardinal Co. v. Ritchie*, 218 Cal. App. 2d 124, 145, 32 Cal. Rptr. 545, 558 (1963))) (internal quotation marks omitted). For a discussion of the requirements imposed on employers to terminate an employee for cause, see Michael D. Fabiano, Note, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, 44 HASTINGS L.J. 399 (1993).

21. *Scott*, 11 Cal. 4th. at 467-68, 904 P.2d at 841-42, 46 Cal. Rptr. 2d at 434-35.

22. A constructive discharge occurs whenever an employer creates an intolerable working condition which effectively coerces the employee to resign. *Id.* at 468, 904 P.2d at 842, 46 Cal. Rptr. 2d at 435. See generally Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39 (1995) (identifying the standards for a constructive discharge cause of action in employment discrimination cases); April Lorraine Anstett, Note, *California Supreme Court Survey: Review of Decisions: Turner v. Anheuser-Busch, Inc.*, 22 PEPP. L. REV. 1795 (1995) (summarizing the California Supreme Court's decision in *Turner* which defined the elements necessary for a cause of action for constructive discharge).

23. *Scott*, 11 Cal. 4th at 468, 904 P.2d at 842, 46 Cal. Rptr. 2d at 435.

24. *Id.* at 468-70, 904 P.2d at 842-43, 46 Cal. Rptr. 2d at 435-36. PG&E relied on *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994), for the proposition that public policy considerations may make em-

that such agreements have been noted by scholars to be beneficial to the employer-employee relationship.²⁵ Additionally, the court found that public policy does not render the agreements unenforceable because of the voluntary nature of such agreements.²⁶

III. IMPACT

The California Supreme Court decided that implied agreements not to demote employees without cause are enforceable.²⁷ The court determined that a company's communications, practices, and procedures could form the basis of an implied-in-fact agreement not to demote an employee without cause.²⁸ An issue for consideration is how employers can protect themselves from blindly entering into implied agreements. The court stated that the burden of limiting exposure to such implied liabilities lies on the employer.²⁹ However, the court did not state how an employer could limit his or her exposure to such implied liabilities. Is it possible for a company to protect itself by placing disclaimers in each policy manual and in each employment contract stating that the company is not responsible for any implied liabilities?³⁰ The court purposely did not decide whether disclaimers in employment contracts would immunize employers from implied agreements.³¹

ployment contracts unenforceable. *Scott*, 11 Cal. 4th at 468-69, 904 P.2d at 842, 46 Cal. Rptr. 2d at 435; see also Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583 (1994) (focusing on the role of public policy in employment contracts). For a discussion of *General Dynamics*, see Michelle M. Gubola, Note, *In-House Attorneys' Claim for Wrongful Discharge: General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994), 64 U. CIN. L. REV. 227 (1995).

25. *Scott*, 11 Cal. 4th at 469, 904 P.2d at 843, 46 Cal. Rptr. 2d at 436. See, e.g., Chimezie A.B. Osigweh & William R. Hutchinson, *Positive Discipline*, 28 HUM. RESOURCES MGMT. 367, 382 (1989) (stating that a policy of positive discipline reduces employee absenteeism).

26. *Scott*, 11 Cal. 4th at 470, 904 P.2d at 843, 46 Cal. Rptr. 2d at 436 ("Whatever the benefits or detriments of [an employer's] adopting a disciplinary system . . . we cannot say that an employer's voluntary commitment to such a policy is contrary to public policy.").

27. *Id.* at 474, 904 P.2d at 846, 46 Cal. Rptr. 2d at 439.

28. *Id.* at 463, 904 P.2d at 839, 46 Cal. Rptr. 2d at 432.

29. "[W]e nonetheless find no basis to the argument that employers who consistently articulate and implement policies designed to preserve their traditional managerial prerogatives lack the capacity to limit their exposure to implied contractual liability." *Id.* at 472, 904 P.2d at 845, 46 Cal. Rptr. 2d at 438.

30. For an article addressing disclaimers, see Michael J. Phillips, *Disclaimers of Wrongful Discharge Liability: Time for a Crackdown?*, 70 WASH. U. L.Q. 1131, 1140-53 (1992) (describing the law regarding disclaimers of wrongful discharge liability).

31. *Scott*, 11 Cal. 4th at 472, 904 P.2d at 839, 46 Cal. Rptr. 2d at 438.

The court recognized that an employer's policies and procedures may give rise to an implied agreement.³² Companies, however, often change their practices and procedures over time as business necessitates.³³ Thus, a further issue in need of consideration is whether a company may alter its implied agreements with its employees by simply altering its policies.³⁴ If the enumeration of a company's policies creates an implied agreement,³⁵ does the alteration of its policies also alter the agreement? If a company alters its policies and the change affects the employees, will the company have to prove that it had good cause to make the changes?³⁶ These questions will undoubtedly be answered by the courts as they are faced with the ramifications of *Scott v. Pacific Gas & Electric Co.*

IV. CONCLUSION

The California Supreme Court decided that implied-in fact agreements in employment contracts, limiting an employer's ability to demote an employee without cause, are enforceable.³⁷ Because there was sufficient evidence to show that PG&E implicitly entered into an agreement not to demote its employees without good cause, and because PG&E breached this agreement, the court held that Scott and Johnson could recover for wrongful demotion.³⁸

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32. *Scott*, 11 Cal. 4th at 463, 904 P.2d at 839, 46 Cal. Rptr. 2d at 432.

33. For a discussion of corporate downsizing and the resulting legal implications, see Frank C. Morris, *Litigation Challenges to Reductions in Force, in Employment Discrimination and Civil Rights Actions in Federal and State Courts*, (A.L.I.-A.B.A. Course of Study, June 1, 1995), available in WESTLAW, C108 A.L.I.-A.B.A. 181 (1995).

34. See generally Stephen Carey Sullivan, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 262 (1995) (examining whether an employer can unilaterally modify an employee handbook and thus modify contractual rights).

35. See *Scott*, 11 Cal. 4th at 463, 904 P.2d at 839, 46 Cal. Rptr. 2d at 432.

36. It should be recognized that employers will have to deal fairly with their employees and act in good faith pursuant to the implied-in-law covenant of good faith and fair dealing. See generally 29 CAL. JUR. 3D *Employer and Employee* § 73 (1986 & Supp. 1995) (detailing the cause of action in tort and in contract for breach of the implied-in-law covenant of good faith and fair dealing).

37. *Scott*, 11 Cal. 4th at 465, 904 P.2d at 840, 46 Cal. Rptr. 2d at 433.

38. *Id.* at 466, 904 P.2d at 840, 46 Cal. Rptr. 2d at 433.

V. EMPLOYER LIABILITY

- A. *An employee who sexually harasses co-workers will not be able to seek indemnity from the employer when the conduct is not a risk that may fairly be regarded as typical of or broadly incidental to the operation of the employer's enterprise: Farmers Insurance Group v. County of Santa Clara.*

I. INTRODUCTION

In *Farmers Insurance Group v. County of Santa Clara*,¹ the California Supreme Court considered whether the County of Santa Clara (County) had to indemnify a deputy sheriff and pay his expenses from defending a sexual harassment suit brought by other county sheriffs.² The su-

1. 11 Cal. 4th 992, 906 P.2d 440, 47 Cal. Rptr. 2d 478 (1995). Justice Baxter wrote the majority opinion in which Chief Justice Lucas and Justices Arabian, George, and Werdegar concurred. *Id.* at 997-1020, 906 P.2d at 444-59, 47 Cal. Rptr. 2d at 482-97. Justice Baxter filed a concurring opinion. *Id.* at 1020, 906 P.2d at 459, 47 Cal. Rptr. 2d at 497 (Baxter, J., concurring). Justice George filed a concurring opinion in which Chief Justice Lucas joined. *Id.* at 1020-23, 906 P.2d at 459-61, 47 Cal. Rptr. 2d at 497-99 (George, J., concurring). Justice Werdegar filed a concurring opinion. *Id.* at 1023-25, 906 P.2d at 461-63, 47 Cal. Rptr. 2d at 499-501 (Werdegar, J., concurring). Justice Mosk filed a dissenting opinion. *Id.* at 1025-37, 906 P.2d at 463-71, 47 Cal. Rptr. 2d at 501-09 (Mosk, J., dissenting). Justice Kennard filed a dissenting opinion. *Id.* at 1038-48, 906 P.2d at 471-78, 47 Cal. Rptr. 2d at 509-16 (Kennard, J., dissenting).

2. *Id.* at 997, 906 P.2d at 444, 47 Cal. Rptr. 2d at 482. In 1980, the County of Santa Clara enacted a policy forbidding sexual harassment in the workplace. *Id.* at 998, 906 P.2d at 444, 47 Cal. Rptr. 2d at 482. See Nancy L. Abell et al., *Recent Developments in Sexual Harassment Litigation, in Employment Discrimination and Civil Rights Actions in Federal and State Courts*, (A.L.I.-A.B.A. Course of Study, Apr. 28, 1994) available in WESTLAW, C902 A.L.I.-A.B.A. 637, 668 ("Where an employer has an established policy prohibiting sexual harassment, indemnity for tort liability is highly unlikely."). In 1983 and 1984, Deputy Sheriff Craig Nelson "made lewd, suggestive, and sexually offensive comments" to Deputy Sheriff Cynthia Bates and touched her legs. *Farmers*, 11 Cal. 4th at 998, 906 P.2d at 444-45, 47 Cal. Rptr. 2d at 482-83. In 1984, while Nelson was Bates' training officer, Nelson admits that he continued his sexually offensive comments and conduct toward Bates. *Id.*

In 1984, Nelson also harassed Deputy Sheriff Toni Daugherty. *Id.* at 999, 906 P.2d at 445, 47 Cal. Rptr. 2d at 483. In addition to Nelson's indecent conduct and comments to Daugherty, Nelson began making obscene phone calls to Daugherty's home after she reported his behavior. *Id.*

After Bates and Daugherty reported their experiences, Deputy Sheriff Zana Murphy came forward and said that Nelson had also made offensive comments to her. *Id.* Following an investigation, the sheriff's department suspended Nelson without pay for 14 days which an arbitrator later reduced to two days. *Id.*

The female deputies complained about another deputy and alleged that the lieutenants did not act in a timely manner in investigating their complaints. *Id.* Following an investigation, the County determined that the claims were unfounded. *Id.*

preme court reversed the decision of the court of appeal and directed the court to vacate the judgment for Farmers and enter judgment in favor of the County.³ The California Supreme Court held that an employee who sexually harasses co-workers will not be able to seek indemnity from the employer if the behavior "is not a risk that may fairly be regarded as typical of or broadly incidental to the operation of" the employer's enterprise.⁴

II. TREATMENT

A. *The Majority Opinion*

1. Torts Claim Act

Justice Baxter first discussed the Tort Claims Act which requires that a public entity defend a public employee and pay any judgment against a public employee in a civil action.⁵ Section 995 of the Tort Claims Act provides in pertinent part: "a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or

In 1987, Bates, Daugherty and Murphy filed suit against Nelson, the County and other County employees. *Id.* The County denied Nelson's request to defend and indemnify him stating that he acted outside the scope of his employment during the incidents of sexual harassment. *Id.* Farmers Insurance Group (Farmers) paid for Nelson's legal representation through his homeowner's insurance policy. *Id.* at 1000, 906 P.2d at 445, 47 Cal. Rptr. 2d at 483.

Murphy's action against Nelson was later dismissed, and Nelson later settled with Bates and Daugherty for \$150,000 which was paid by Farmers. *Id.* at 1000, 906 P.2d at 445-46, 47 Cal. Rptr. 2d at 483-84. See 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 32 (9th ed. 1988 & Supp. 1994) ("An agent or employee is always liable for his own torts, whether his employer is liable or not."). The claims against the County continued and a jury awarded damages to all three of the female deputies. *Farmers*, 11 Cal. 4th at 1000, 906 P.2d at 446, 47 Cal. Rptr. 2d at 484.

Farmers and Nelson then brought an action against the County seeking indemnity for the amount of Nelson's settlement and the cost of Nelson's defense. *Id.* The trial court found that Nelson acted outside the scope of his employment but the court of appeal disagreed. *Id.* at 1000-01, 906 P.2d at 446, 47 Cal. Rptr. 2d at 483. The appellate court found that "Nelson's misconduct occurred on the jail premises while the deputies were in uniform and on duty, and that Nelson had authority over Bates and could give direct orders that she had to obey." *Id.* at 1001, 906 P.2d at 446, 47 Cal. Rptr. 2d at 483. Thus, the court of appeal directed the trial court to grant Farmers and Nelson's motion for summary judgment. *Id.*

3. *Id.* at 1020, 906 P.2d at 459, 47 Cal. Rptr. 2d at 497.

4. *Id.* at 997, 906 P.2d at 444, 47 Cal. Rptr. 2d at 482.

5. *Id.* See CAL. GOV. CODE §§ 825, 995 (West 1995).

individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.⁶ The court observed that the statutory provisions place the burden on the public employee to establish that the conduct was within the scope of the employment.⁷ The majority agreed with the County's position that Nelson's acts were, as a matter of law, outside the scope of his employment.⁸

The court thoroughly discussed what the phrase "within the scope of employment" encompassed.⁹ Justice Baxter noted that "the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise."¹⁰ To determine whether liability will extend, Justice Baxter set forth the foreseeability test for respondeat superior which considers whether the actions of an employee are "unusual or startling."¹¹

The majority presented various rules reflecting California's liberal interpretation of what is meant by scope of employment, but emphasized "that an employer is not strictly liable for all actions of its employees during working hours."¹² The court further asserted that "[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior."¹³

6. CAL. GOV. CODE § 995 (West 1995). See generally 35 CAL. JUR. 3D *Government Tort Liability* § 138 (1988 & Supp. 1995) (explaining indemnification rights of public employees).

7. *Farmers*, 11 Cal. 4th at 1002, 906 P.2d at 447, 47 Cal. Rptr. 2d at 485.

8. *Id.* at 1003, 906 P.2d at 447, 47 Cal. Rptr. 2d at 484.

9. *Id.* at 1003-19, 906 P.2d at 447-59, 47 Cal. Rptr. 2d at 485-97. See generally 29 CAL. JUR. 3D *Employer and Employee* § 107 (1986 & Supp. 1995) (interpreting the phrase "within the scope of employment").

10. *Farmers*, 11 Cal. 4th at 1003, 906 P.2d at 448, 47 Cal. Rptr. 2d at 486 (citing *Perez v. Van Groningen & Sons, Inc.* 41 Cal. 3d 962, 719 P.2d 676, 227 Cal. Rptr. 106 (1986) (finding employer vicariously liable for the plaintiff's injuries when the plaintiff fell from a tractor operated by his uncle since the uncle/employee was acting within the scope of his employment)).

11. *Id.* See generally 29 CAL. JUR. 3D *Employer and Employee* § 108 (1986 & Supp. 1995) (defining foreseeability in the context of respondeat superior).

12. *Farmers*, 11 Cal. 4th at 1004, 906 P.2d at 449, 47 Cal. Rptr. 2d at 487.

13. *Id.* at 1005, 906 P.2d at 449, 47 Cal. Rptr. 2d at 487 (quoting *Alma W. v. Oakland Unified Sch. Dist.*, 123 Cal. App. 3d 133, 140, 176 Cal. Rptr. 287, 290 (1981)). See 29 CAL. JUR. 3D *Employer and Employee* § 110 (1986 & Supp. 1995) ("In order to exonerate the employer from liability for the acts of the employee it is essential that the employee's deviation from his duty be for entirely personal purposes.").

2. Respondeat Superior Doctrine

Justice Baxter went on to compare the instant case with numerous other cases dealing with the respondeat superior doctrine and concluded that when the misconduct is of a personal nature and not related to the business, the employer is not vicariously liable.¹⁴ The majority recited a number of decisions where the courts rejected the notion of vicarious liability.¹⁵ The court pointed out that in each of these cases, the employee's actions were strictly personal in nature and had no relation to the employee's position with the employer.¹⁶ Justice Baxter further stressed that the actions of the employees did not relate to their responsibilities to their employers, "nor had they been necessary to the employees' comfort, convenience, health, or welfare while at work."¹⁷

Applying these cases and principles to the instant case, Justice Baxter first emphasized that neither party disputed that Nelson's comments and actions were personally motivated and not related to his duties as a sheriff.¹⁸ In addition, Nelson's actions were neither necessary for his work nor related to his work.¹⁹ The court noted that Nelson violated the County policy against sexual harassment and the County penalized him for this violation.²⁰ Justice Baxter reiterated that an employer will not be held accountable when the employee was not directly or indirectly serving his employer.²¹

The majority flatly rejected Farmer's argument that there were other decisions that found the employer liable where there were "far more serious physical injuries caused by misconduct far more egregious and shocking."²² The court distinguished these cases by asserting that "those

14. *Farmers*, 11 Cal. 4th at 1005-06, 906 P.2d at 449-50, 47 Cal. Rptr. 2d at 487-88. See generally Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589 (1993) (arguing that employer liability for sexual harassment should not be analyzed under the respondeat superior doctrine).

15. *Farmers*, 11 Cal. 4th at 1005-07, 906 P.2d at 449-50, 47 Cal. Rptr. 2d at 487-88.

16. *Id.* at 1007, 906 P.2d at 450, 47 Cal. Rptr. 2d at 488.

17. *Id.*

18. *Id.* at 1007, 906 P.2d at 451, 47 Cal. Rptr. 2d at 489.

19. *Id.*

20. *Id.* at 1007-08, 906 P.2d at 451, 47 Cal. Rptr. 2d at 489. See generally 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency & Employment* § 393 (9th ed. 1988 & Supp. 1994) (defining sexual harassment in the workplace).

21. *Farmers*, 11 Cal. 4th at 1008, 906 P.2d at 451, 47 Cal. Rptr. 2d at 489.

22. *Id.*

decisions involved an assault precipitated by a work-related dispute²³

Justice Baxter agreed that sexual harassment in the workplace is a widespread problem, but declined to give it any probative value because the question is whether “lewd propositioning and offensive touchings of coworkers are typical of or broadly incidental to the . . . county jail.”²⁴ The court maintained that it is imperative to demonstrate that “asking individual employees for sexual favors and targeting those individuals for inappropriate touching is either typical of or broadly incidental to the operation of a county jail or to the duties and tasks of deputy sheriffs at such a jail.”²⁵ The court rejected Farmer’s argument that Nelson’s misbehavior toward Bates was partly due to the fact that he was her training officer.²⁶ Reasoning that Nelson harassed Bates prior to the time he was her supervisor, Justice Baxter went on to cite a number of cases to demonstrate that “employees do not act within the scope of employment when they abuse job-created authority over others for purely personal reasons.”²⁷

3. Respondeat Superior Policy Goals

The majority provided an extensive review of the three policy goals of the respondeat superior doctrine.²⁸ Justice Baxter set forth three main reasons why the first policy goal, “to prevent recurrence of the tortious conduct,” did not persuade the court that Nelson was acting within the scope of employment.²⁹ First, the State statutorily requires the County

23. *Id.*

24. *Id.* at 1009, 906 P.2d at 452, 47 Cal. Rptr. 2d at 490. The majority then criticized Justice Mosk’s dissenting opinion for concluding that “lewd propositioning and offensive touching fall within the scope of employment at a county jail.” *Id.* Justice Baxter claimed that Justice Mosk’s analysis was flawed, because Justice Mosk did not cite any authority for his approach and ignored the requirement that “the tortious act must arise out of the employment.” *Id.* at 1010-11, 906 P.2d at 452-53, 47 Cal. Rptr. 2d at 490-91.

25. *Id.* at 1011, 906 P.2d at 453, 47 Cal. Rptr. 2d at 491.

26. *Id.* at 1011-12, 906 P.2d at 453-54, 47 Cal. Rptr. 2d at 491-92. The majority distinguished the case at hand from *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991), which found the City of Los Angeles vicariously liable for the rape of a woman committed by a police officer who pulled her over for a traffic violation. *Farmers*, 11 Cal. 4th at 1012, 906 P.2d at 454, 47 Cal. Rptr. 2d at 492. Justice Baxter declined to equate the “work-related authority” a supervisor has over an employee with the “extraordinary power and authority” a police officer has over a citizen. *Id.*

27. *Id.* at 1013, 906 P.2d at 454, 47 Cal. Rptr. 2d at 492.

28. *Id.* at 1013-17, 906 P.2d at 455-57, 47 Cal. Rptr. 2d at 492-95.

29. *Id.* at 1013-15, 906 P.2d at 454-56, 47 Cal. Rptr. 2d at 492-94.

to prohibit sexual harassment in the workplace.³⁰ Second, vicarious liability motivates the County to try to eradicate sexual harassment in the work environment.³¹ Third, the "deterrence objectives are better served by denying sexual harassers the right to indemnity than by insulating them from financial responsibility for their own misconduct."³²

The court found the second policy justification, "to give greater assurance of compensation to the victim," unconvincing because the deputies already received compensation from the County.³³

The majority also considered the third policy goal of the respondeat superior doctrine which is to "ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury."³⁴ The court espoused that Nelson had no authority over two of the three officers and had no authority over Bates at the time that he initially harassed her so "the connection between Nelson's duties and his deliberate targeting of the three women for sexual harassment was 'simply too attenuated' to be deemed as falling within the range of risks allocable to the community in this case."³⁵ Justice Baxter concluded that

30. *Id.* at 1014-15, 906 P.2d at 455-56, 47 Cal. Rptr. 2d at 493-94.

31. *Id.* at 1015, 906 P.2d at 456, 47 Cal. Rptr. 2d at 494.

32. *Id.*

33. *Id.* at 1016, 906 P.2d at 456-57, 47 Cal. Rptr. 2d at 494-95 (citing *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 209, 814 P.2d 1341, 1343, 285 Cal. Rptr. 99, 100 (1991)); see Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1463 (1986) (advocating that "a plaintiff can rarely rely on traditional tort theories for adequate compensation"). Justice Baxter also expressed concern over the difficulty the County would have in obtaining insurance if they were required to indemnify Nelson. *Farmers*, 11 Cal. 4th at 1016, 906 P.2d at 456-57, 47 Cal. Rptr. 2d at 494-95; see Larry M. Golub, *Insurance Coverage Issues in Employment Discrimination and Civil Rights Actions*, in *Employment Discrimination and Civil Rights Actions in Federal and State Courts*, (A.L.I.-A.B.A. Course of Study, June 17, 1992), available in WESTLAW, C742 A.L.I.-A.B.A. 921, 936-48 (discussing insurance coverage for sexual harassment claims).

34. *Farmers*, 11 Cal. 4th at 1016, 906 P.2d at 457, 47 Cal. Rptr. 2d at 495 (citing *Mary M.*, 54 Cal. 3d at 209, 814 P.2d at 1349, 285 Cal. Rptr. at 107). Justice Baxter again distinguished *Mary M.*, which held that "[t]he cost . . . should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power." *Farmers*, 11 Cal. 4th at 1016, 906 P.2d at 457, 47 Cal. Rptr. 2d at 495 (quoting *Mary M.*, 54 Cal. 3d at 217, 814 P.2d at 1349, 285 Cal. Rptr. at 107 (1991)).

35. *Farmers*, 11 Cal. 4th at 1017, 906 P.2d at 457, 47 Cal. Rptr. 2d at 495. See *John R. v. Oakland Unified Sch. Dist.*, 48 Cal. 3d 438, 452, 769 P.2d 948, 956, 256 Cal. Rptr. 766, 774 (1989) (holding that a school district was not vicariously liable under the doctrine of respondeat superior when a school teacher allegedly sexually molested a stu-

the evaluation of the three policy goals of respondeat superior supported the majority's conclusion that Nelson was not acting within the scope of his employment.³⁶

4. The County's Defense of Other Employees

The majority's final analysis considered the court of appeal's determination that Nelson was acting within the scope of employment because the County defended other employees in the sexual harassment litigation.³⁷ Justice Baxter proclaimed that the County's representation of the other employees was not inconsistent with their refusal to represent Nelson because these other employees were accused of not properly doing their job of investigating complaints of sexual harassment.³⁸ Thus, these employees were clearly acting within the scope of their employment.³⁹

5. Scope of Employment Question Resolved as a Matter of Law

The court agreed with the parties "that the scope of employment question may be resolved as a matter of law."⁴⁰ Justice Baxter clarified that determining if the employer's acts are within the scope of employment is a matter of law when the facts are undisputed.⁴¹ In this case, the facts indicated that Nelson did not act within the scope of his employment; therefore, the majority concluded Nelson could not obtain indemnification and defense costs from the County.⁴²

dent); *Jeffrey E. v. Central Baptist Church*, 197 Cal. App. 3d 718, 723, 243 Cal. Rptr. 128, 131 (1988) (determining that a church is not vicariously liable for the actions of a Sunday school teacher).

36. *Farmers*, 11 Cal. 4th at 1017, 906 P.2d at 457, 47 Cal. Rptr. 2d at 495.

37. *Id.* at 1018-19, 906 P.2d at 458, 47 Cal. Rptr. 2d at 496.

38. *Id.*

39. *Id.*

40. *Id.*; see also *Elder v. Rice*, 21 Cal. App. 4th 1604, 26 Cal. Rptr. 2d 749 (1994) (declaring that the scope of employment issue is usually a question of fact; however, it becomes a matter of law when the facts are undisputed and there are no possible inferences).

41. *Farmers*, 11 Cal. 4th at 1019, 906 P.2d at 458-59, 47 Cal. Rptr. 2d at 496-97.

42. *Id.* The majority concluded by assuring that their holding neither "eliminate[s] the incentive for employers to prevent or respond to sexual harassment in the workplace [n]or . . . leave[s] sexual harassment victims without adequate means to recover compensation" *Id.* at 1019-20, 906 P.2d at 459, 47 Cal. Rptr. 2d at 497.

B. Justice Baxter's Concurring Opinion

Even though Justice Baxter wrote the majority opinion, he drafted a concurring opinion agreeing with Justice George's concurrence that *Mary M. v. City of Los Angeles*⁴³ should be overruled.⁴⁴ However, Justice Baxter thought that the present case was too distinguishable from *Mary M.* to effectively overrule it.⁴⁵

C. Justice George's Concurring Opinion

Justice George's concurring opinion, in which Chief Justice Lucas concurred, declared that *Mary M.* should be overruled.⁴⁶ Justice George analogized Nelson's acts of sexual harassment to the police officer's act of rape in *Mary M.* and determined that both instances were outside the scope of employment because the perpetrators acted solely for their own personal satisfaction.⁴⁷ Concerned that lower courts would follow the "special rules" set forth in *Mary M.*, Justice George concluded that by overruling *Mary M.* "all cases will be governed by the general rules of respondeat superior ably set forth and applied in the majority opinion."⁴⁸

D. Justice Werdegar's Concurring Opinion

Justice Werdegar wrote separately to criticize Justice Mosk's dissent.⁴⁹ Justice Werdegar maintained that Justice Mosk's view, that sexual harassment in a male-dominated workplace is foreseeable, was inconsistent with the true issue of the required duties of the employee.⁵⁰

Justice Werdegar further criticized Justice Mosk for relying on *Carr v. Wm. C. Crowell Co.*,⁵¹ because *Carr*, "rather than supporting Justice

43. 54 Cal. 3d 202, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991).

44. *Farmers*, 11 Cal. 4th at 1020, 906 P.2d at 459, 47 Cal. Rptr. 2d at 497 (Baxter, J., concurring).

45. *Id.* (Baxter, J., concurring).

46. *Id.* (George, J., concurring).

47. *Id.* at 1021-22, 906 P.2d at 460-61, 47 Cal. Rptr. 2d at 498-99 (George, J., concurring). Justice George also insisted that "the rape of a detainee by a police officer . . . is 'so unusual and startling' that it cannot fairly be said to have arisen from the employment." *Id.* at 1023, 906 P.2d at 460, 47 Cal. Rptr. 2d at 498 (George, J., concurring).

48. *Id.* at 1023, 906 P.2d at 461, 47 Cal. Rptr. at 499 (George, J., concurring).

49. *Id.* (Werdegar, J., concurring).

50. *Id.* at 1024, 906 P.2d at 462, 47 Cal. Rptr. 2d at 500 (Werdegar, J., concurring).

51. 28 Cal. 2d 652, 171 P.2d 5 (1946) (finding the employer liable when a contractor

Mosk's view, instead highlights the difficulty of articulating a plausible link between sexual harassment and Deputy Nelson's duties as a deputy sheriff.⁵² Justice Werdegar noted that even if sexual harassment does occur in the workplace, it is not a determinative factor.⁵³ Justice Werdegar concluded by admonishing the dissent for giving too "much weight to statistical considerations."⁵⁴

E. Justice Mosk's Dissenting Opinion

Justice Mosk's dissent declared that Nelson's conduct was within the scope of employment.⁵⁵ Justice Mosk maintained that "the best way to determine whether a risk is inherent in or created by an enterprise is to ask . . . whether the employee's conduct was 'so unusual or startling' in the context of that enterprise that it would be unfair to include the resulting loss in the employer's costs of doing business."⁵⁶

Justice Mosk focused on the pervasiveness of sexual harassment in fields traditionally dominated by males.⁵⁷ By using case law and testimony, Justice Mosk illustrated the widespread practice of men sexually harassing female co-workers in jails and prisons.⁵⁸ Justice Mosk concluded that "when women deputy sheriffs were thrust into the traditionally male workplace of the county jail, sexual harassment became a risk 'inherent in or created by the enterprise' and hence within the scope of employment for respondeat superior purposes."⁵⁹

Justice Mosk criticized the majority for establishing a rule that considers foreseeability irrelevant in determining liability in the respondeat superior context.⁶⁰ Justice Mosk contended that Nelson's conduct was sufficient to invoke respondeat superior liability.⁶¹ Thus, the indemnifi-

and subcontractor got into an argument over their job related tasks and one threw a hammer at the other).

52. *Farmers*, 11 Cal. 4th at 1024, 906 P.2d at 462, 47 Cal. Rptr. 2d at 500 (Werdegar, J., concurring).

53. *Id.* at 1025, 906 P.2d at 462, 47 Cal. Rptr. 2d at 500 (Werdegar, J., concurring).

54. *Id.* at 1025, 906 P.2d at 463, 47 Cal. Rptr. 2d at 501 (Werdegar, J., concurring).

55. *Id.* (Mosk, J., dissenting).

56. *Id.* at 1028, 906 P.2d at 464, 47 Cal. Rptr. 2d at 502 (Mosk, J., dissenting).

57. *Id.* at 1029-31, 906 P.2d at 465-67, 47 Cal. Rptr. 2d at 503-05 (Mosk, J., dissenting).

58. *Id.* at 1033, 906 P.2d at 468, 47 Cal. Rptr. 2d at 506 (Mosk, J., dissenting).

59. *Id.* at 1031-35, 906 P.2d at 467-69, 47 Cal. Rptr. 2d at 505-07 (Mosk, J., dissenting).

60. *Id.* at 1035-36, 906 P.2d at 469-70, 47 Cal. Rptr. 2d at 507-08 (Mosk, J., dissenting).

61. *Id.*

cation statute was applicable and the plaintiffs' motion for summary judgment should have been granted.⁶²

F. Justice Kennard's Dissenting Opinion

Justice Kennard wrote separately to avow that the County's liability was a question of fact, and thus should have been determined by the trier of fact.⁶³

Justice Kennard stressed that the important question for the court to consider was whether Nelson's conduct was "so unusual or startling as to fall outside the scope of his employment."⁶⁴ Disagreeing with the majority's holding that this question could be resolved as a matter of law, Justice Kennard advocated that the case should not be resolved, arguing there is a factual dispute as to whether Nelson was acting within the scope of employment.⁶⁵ Justice Kennard criticized the majority's use of cases that employed the "motive" test to demonstrate that Nelson acted outside the scope of employment because California no longer applies this test.⁶⁶

Justice Kennard opposed Justice Mosk's view "that *as a matter of law* Deputy Nelson's conduct fell *within* the scope of his employment."⁶⁷ Justice Kennard cited two main reasons for her opposing position.⁶⁸ First, Justice Kennard rejected Justice Mosk's view that Nelson's conduct was the result of resentment of women coming into a male-dominated occupation because Farmers never provided the court with this argument.⁶⁹ Second, Justice Kennard objected to Justice Mosk's use of surveys and studies, showing that sexual harassment was common in tradi-

62. *Id.* at 1037, 906 P.2d at 470, 47 Cal. Rptr. 2d at 508 (Mosk, J., dissenting).

63. *Id.* at 1038, 906 P.2d at 471, 47 Cal. Rptr. 2d at 510 (Kennard, J., dissenting).

64. *Id.* at 1042, 906 P.2d at 474, 47 Cal. Rptr. 2d at 512 (Kennard, J., dissenting).

65. *Id.* (Kennard, J., dissenting). Justice Kennard expressed that the center of the debate was whether Nelson's conduct was typical behavior in the county jail. *Id.* at 1043, 906 P.2d at 475, 47 Cal. Rptr. 2d at 513 (Kennard, J., dissenting). Justice Kennard also stated that "whether Nelson was engaged in joking and horseplay is a disputed issue of fact." *Id.* at 1045, 906 P.2d at 476, 47 Cal. Rptr. 2d at 514 (Kennard, J., dissenting).

66. *Id.* at 1046, 906 P.2d at 476, 47 Cal. Rptr. 2d at 514 (Kennard, J., dissenting).

67. *Id.* at 1046, 906 P.2d at 477, 47 Cal. Rptr. 2d at 515 (Kennard, J., dissenting).

68. *Id.* at 1047, 906 P.2d at 477, 47 Cal. Rptr. 2d at 515 (Kennard, J., dissenting).

69. *Id.* (Kennard, J., dissenting).

tionally male dominated professions because they were not a part of the record before the court.⁷⁰

Justice Kennard concluded by stating that "whether an employee's acts of harassment fall within the scope of employment should be decided on a case-by-case basis, by closely examining that nature of the conduct and its relationship to the employer's enterprise."⁷¹

III. IMPACT AND CONCLUSION

In *Alma W. v. Oakland Unified School District*,⁷² the court held that an employer cannot be held vicariously liable when an employee acts for personal reasons and substantially deviates from his duties to the employer.⁷³ Five years later, in *Perez v. Van Groningen & Sons, Inc.*,⁷⁴ the California Supreme Court maintained that employer liability extends to risks inherent in or created by an employer's enterprise.⁷⁵ The *Perez* court also set forth the foreseeability test for vicarious liability when it stated that "[a] risk arises out of the employment when 'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business'"⁷⁶

In *Farmers*, the California Supreme Court narrowed employer liability by holding that an employee who sexually harasses co-workers will be unable to receive indemnification from his employer when the employee's conduct is outside the scope of employment.⁷⁷ The California Supreme Court's decision is in sharp contrast to the current trend of holding employers "liable for sexual harassment by employees under the doctrine of respondeat superior."⁷⁸ The court deviated from the current

70. *Id.* (Kennard, J., dissenting).

71. *Id.* at 1048, 906 P.2d at 477, 47 Cal. Rptr. 2d at 515 (Kennard, J., dissenting). Justice Kennard would have reversed the judgment of the court of appeal and ordered the trial court to deny both party's motions for summary judgment. *Id.* (Kennard, J., dissenting).

72. 123 Cal. App. 3d 133, 176 Cal. Rptr. 287 (1981).

73. *Id.* at 139, 176 Cal. Rptr. at 289.

74. 41 Cal. 3d 962, 719 P.2d 676, 227 Cal. Rptr. 106 (1986).

75. *Id.* at 968, 719 P.2d at 680, 227 Cal. Rptr. at 110.

76. *Id.* (quoting *Rodgers v. Kemper Constr. Co.*, 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143, 149 (1975)).

77. *Farmers*, 11 Cal. 4th at 997, 906 P.2d at 444, 47 Cal. Rptr. 2d at 482.

78. Jana Howard Carey & Theresa C. Marnion, *Sexual Harassment Litigation: 1995, New Developments in the Law of Sexual Harassment from Meritor to Harris*, Karibian and Steiner, 524 PRAC. L. INST. 7, 18 (1995).

trend and provided a deterrence to employees who sexually harass their co-workers since sexual harassers may not be able to seek indemnity if their co-workers sue them for their misbehavior.

LORI L. PROUDFIT

- B. *A hospital will not be vicariously liable under the doctrine of respondeat superior for an employee's sexual assault of a patient when the assault was not engendered by the employment: Lisa M. v. Henry Mayo Newhall Memorial Hospital.*

I. INTRODUCTION

In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,¹ the California Supreme Court decided whether a hospital could be held vicariously liable for the intentional misconduct of its employee under the doctrine of respondeat superior.² The trial court granted the hospital's motion for

1. 12 Cal. 4th 291, 907 P.2d 358, 48 Cal. Rptr. 2d 510 (1995). Justice Werdegar delivered the opinion of the majority, in which Chief Justice Lucas and Justices Arabian, Baxter, and George concurred. *Id.* at 294-306, 907 P.2d at 359-67, 48 Cal. Rptr. 2d at 511-19. Justice George wrote a concurring opinion in which Chief Justice Lucas concurred. *Id.* at 306, 907 P.2d at 367, 48 Cal. Rptr. 2d at 519 (George, J., concurring). Justice Kennard authored a dissenting opinion. *Id.* at 308-14, 907 P.2d at 369-73, 48 Cal. Rptr. 2d at 519-24 (Kennard, J., dissenting). Justice Mosk wrote a separate dissenting opinion. *Id.* at 306-08, 907 P.2d at 368-69, 48 Cal. Rptr. 2d at 524-25 (Mosk, J., dissenting).

2. *Id.* at 294, 907 P.2d at 359, 48 Cal. Rptr. 2d at 511. Plaintiff Lisa M., a pregnant 19 year-old woman, sought treatment at the emergency room of defendant Henry Mayo Newhall Memorial Hospital after being injured in a fall. *Id.* at 294, 907 P.2d at 359, 48 Cal. Rptr. 2d at 511. At the direction of an emergency room physician, Bruce Wayne Tripoli took the plaintiff to the ultrasound room for ultrasonic imaging. *Id.* at 294-95, 907 P.2d at 359, 49 Cal. Rptr. 2d at 511. Tripoli, an ultrasound technician, was employed by Mediq Imaging Services, Inc. and was contracted to perform ultrasound services for the hospital. *Id.* at 296 n.2, 907 P.2d at 360 n.2, 48 Cal. Rptr. 2d at 512 n.2. Alone in the ultrasound room with the plaintiff, Tripoli performed the ordered examination. *Id.* at 295, 907 P.2d at 359-60, 48 Cal. Rptr. 2d at 511-12. Tripoli had the plaintiff lift her shirt and pull her shorts down to reveal her pubic region. *Id.* at 295, 907 P.2d at 360, 48 Cal. Rptr. 2d at 512. Tripoli then rubbed gel into the plaintiff's skin and used the ultrasound generating wand to take images of the plaintiff's upper and lower abdominal regions. *Id.* To properly perform the upper-right-quadrant exam, Tripoli lifted the plaintiff's right breast. *Id.* Tripoli left the plaintiff to develop the images and returned 10 minutes later. *Id.* Tripoli asked the plaintiff if she wanted to know her baby's gender. *Id.* The plaintiff answered yes, and Tripoli falsely informed her that he would need to take further ultrasound images of her lower pubic area and that she would feel discomfort. *Id.* The plaintiff agreed to the procedure. *Id.* With the plaintiff's cooperation, Tripoli pulled the plaintiff's shorts down and scanned her pubic region. *Id.* During the procedure, Tripoli inserted the ultrasound wand into the plaintiff's vagina, fondled the plaintiff with his fingers, and informed the plaintiff that he needed to excite her to get a better picture of the baby. *Id.* When Tripoli ended the molestation, he returned the plaintiff to the emergency room. *Id.* The plaintiff, after being released from the hospital, discussed the incident with her regular obstetrician who informed her that Tripoli's actions were improper. *Id.* at 295-96, 907 P.2d at 360, 48 Cal. Rptr. 2d at 512. Tripoli was criminally prosecuted and pleaded no contest to a felony charge stemming from the molestation. *Id.* at 296, 907 P.2d at 360, 48 Cal. Rptr. 2d at 512.

summary judgment.³ The court of appeal reversed the trial court's ruling, relying on the theory of vicarious liability.⁴ The California Supreme Court reversed the court of appeal's judgment and held that the hospital was not vicariously liable.⁵

II. TREATMENT

A. Majority Opinion

The court began its analysis by reviewing the law pertaining to the doctrine of respondeat superior.⁶ The court noted that under the doctrine an employer can be vicariously liable for an employee's wrongdoings committed within the scope of employment.⁷ Noting the reaches of the doctrine, the court stated that an employee's intentional and malicious actions may be within the scope of employment even if the employer never authorized such activity.⁸ However, the court acknowledged that an action will fall within the scope of employment, and an employer will be vicariously liable, when there is a causal connection between the employee's work and the commission of the tort.⁹ The

The plaintiff sued Tripoli and Henry Mayo Newhall Memorial Hospital for professional negligence, battery, and intentional and negligent infliction of emotional harm. *Id.* The hospital filed a motion for summary judgment. *Id.* Although Tripoli was contracted by the hospital and was an employee of Mediq, the hospital was considered to be Tripoli's employer for purposes of summary judgment. *Id.* at 296 n.2, 907 P.2d at 360 n.2, 48 Cal. Rptr. 2d at 512 n.2. Otherwise, Tripoli's status as an employee or independent contractor was neither considered nor decided.

3. *Id.* at 294, 907 P.2d at 359, 48 Cal. Rptr. 2d at 511.

4. *Id.* at 296, 907 P.2d at 360, 48 Cal. Rptr. at 512. The court of appeal did not address the issue of whether the hospital was directly negligent. *Id.*

5. *Id.* at 306, 907 P.2d at 367, 48 Cal. Rptr. 2d at 519.

6. *Id.* at 296-99, 907 P.2d at 360-63, 48 Cal. Rptr. 2d at 512-15. For a discussion of how an innocent employer can be held vicariously liable for the torts of his or her employee, see generally 29 CAL. JUR. 3D *Employer and Employee* §§ 91-100 (1986 & Supp. 1996). See generally 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 115 (9th ed. 1987 & Supp. 1994).

7. *Lisa M.*, 12 Cal. 4th at 296, 907 P.2d at 360, 48 Cal. Rptr. 2d at 512. See generally 29 CAL. JUR. 3D *Employer and Employee* §§ 107-117 (1986 & Supp. 1996) (discussing whether an employee's actions will fall within the scope of his or her employment).

8. *Lisa M.*, 12 Cal. 4th. at 296-97, 907 P.2d at 360-61, 48 Cal. Rptr. 2d at 512-13. "It is a fundamental rule that an act need not be authorized to be within the scope of the employment." 29 CAL. JUR. 3D *Employer and Employee* § 107 (1986).

9. *Lisa M.*, 12 Cal. 4th at 297, 907 P.2d at 361, 48 Cal. Rptr. 2d at 513 ("While the employee thus need not have intended to further the employer's interests, the employer

court defined causal connection by distinguishing it from "but for" causation.¹⁰ A finding of causation under the "but for" test is insufficient to constitute the causal connection necessary to make an employer liable for the actions of his or her employee.¹¹ The court pronounced that to be sufficient, the risk of the tort occurring must be an inherent part of the employment environment.¹² Addressing the issue of sexual assaults, the court stated that the causal connection requirement will be met when the emotions motivating the sexual assault are fairly attributable to a work-related condition or event.¹³ Thus, before an employer will be held vicariously liable, the commission of the tort must be a foreseeable risk arising from the employer's business.¹⁴

In determining whether Tripoli's sexual assault was within the scope of his employment, the court noted that the tort was causally connected to Tripoli's employment in the sense that the assault never would have occurred if Tripoli had not been employed by the hospital.¹⁵ However, the court also noted that for respondeat superior to be properly applied, the risk of the intentional tort's occurrence must have been both an inherent part of the employment and foreseeable.¹⁶ Because the court found that Tripoli's desire to assault Lisa M. sexually did not arise from workplace responsibilities or conditions, but instead arose from his own lust, the court held that the causal connection requirement was not met.¹⁷ Additionally, the court found that Tripoli's actions were not a

will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employee's work."). For a review of judicial interpretations of scope, see Christine W. Young, Comment, *Respondeat Superior: A Clarification and Broadening of the Current "Scope of Employment" Test*, 30 SANTA CLARA L. REV. 599, 611-24 (1990).

10. *Lisa M.*, 12 Cal. 4th at 298, 907 P.2d at 362, 48 Cal. Rptr. 2d at 514.

11. *Id.* ("That the employment brought tortfeasor and victim together in time and place is not enough.").

12. *Id.* (citing *Carr v. Wm. C. Crowell Co.*, 28 Cal. 2d 652, 657, 171 P.2d 5, 7-8 (1946)). Causal nexus requires that "the tort be engendered by or arise from the work." *Id.* at 298, 907 P.2d at 362, 48 Cal. Rptr. 2d at 514.

13. *Id.* at 301, 907 P.2d at 364, 48 Cal. Rptr. 2d at 516. For a discussion of when willful, malicious, or criminal acts will be regarded as falling within the scope of employment, see 29 CAL. JUR. 3D *Employer and Employee* § 116 (1986 & Supp. 1996).

14. *Lisa M.*, 12 Cal. 4th at 299, 907 P.2d at 362, 48 Cal. Rptr. 2d at 514 ("The employment, in other words, must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought.").

15. *Id.* at 299, 907 P.2d at 363, 48 Cal. Rptr. 2d at 515.

16. *Id.* at 300, 907 P.2d at 363, 48 Cal. Rptr. 2d at 515.

17. *Id.* at 301-02, 907 P.2d at 364, 48 Cal. Rptr. 2d at 516; see *id.* at 303, 907 P.2d at 365, 48 Cal. Rptr. 2d at 517 ("The assault, rather, was the independent product of Tripoli's aberrant decision to engage in conduct unrelated to his duties.").

generally foreseeable consequence of his employment, and thus, the hospital could not be held vicariously liable for Tripoli's tort.¹⁸

The court also acknowledged the three policy goals of respondeat superior but found them wanting in this instance.¹⁹ The first two policy goals, preventing future injuries and assuring compensation to the victim, gave no clear guidance on the issue of whether respondeat superior should be applied to the hospital.²⁰ The third policy rationale, spreading the risk of loss among the beneficiaries of the enterprise, also proved non-dispositive.²¹ The court concluded that the attenuated link between Tripoli's actions and his employment duties did not support a finding that the hospital should bear part of the cost of the patient's injury.²² Public policy considerations, therefore, failed to warrant a finding that the hospital be vicariously liable under the doctrine of respondeat superior.²³

B. Justice George's Concurring Opinion

Justice George, in his concurring opinion, agreed with the majority's holding,²⁴ but he intimated that the majority's definition of an

18. *Id.* at 302, 907 P.2d at 364-65, 48 Cal. Rptr. 2d at 516-17.

19. *Id.* at 304-05, 907 P.2d at 366-67, 48 Cal. Rptr. 2d at 518-19. For a theoretical basis of respondeat superior, see 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 115 (9th ed. 1987 & Supp. 1995).

20. *Lisa M.*, 12 Cal. 4th at 304-05, 907 P.2d at 366-67, 48 Cal. Rptr. 2d at 518-19 ("Although imposition of vicarious liability would likely lead to adoption of some further precautionary measures, we are unable to say whether the overall impact would be beneficial to or destructive of the quality of medical care. . . . The second policy consideration is . . . also of uncertain import here; imposing vicarious liability is likely to provide additional compensation to some victims, but the consequential costs of ensuring compensation in this manner are unclear.").

21. *Id.* at 305, 907 P.2d at 367, 48 Cal. Rptr. 2d at 519.

22. *Id.*

23. *Id.* For a discussion of respondeat superior in the context of hospital employee negligence, see Carmen D. Rasmussen, Comment, *Hospital Liability Related to Understaffing of Nursing Services: Walking the Fine Line Between Respondeat Superior and Corporate Negligence*, 94 W. VA. L. REV. 1083, 1091-95 (1992). See generally Lynn D. Lisk, *A Physician's Respondeat Superior Liability for the Negligent Acts of Other Medical Professionals—When the Captain Goes Down Without the Ship*, 13 U. ARK. LITTLE ROCK L.J. 183 (1991) (arguing that Arkansas should apply the "actual control" test to doctors in determining liability under respondeat superior).

24. *Lisa M.*, 12 Cal. 4th at 306, 907 P.2d at 367, 48 Cal. Rptr. 2d at 519 (George, J., concurring).

employee's scope of employment should be construed more narrowly.²⁵ Justice George referenced his concurring opinion in *Farmers Insurance Group v. County of Santa Clara*.²⁶ In that opinion, Justice George stated that the court's holding in *Mary M. v. City of Los Angeles*²⁷ was an aberration and therefore should have been overruled.²⁸

C. Justice Kennard's Dissenting Opinion

In her dissenting opinion, Justice Kennard contended that the trial court improperly granted the hospital's motion for summary judgment because the issue of scope of employment was a question of fact to be resolved by the trier of fact.²⁹ Justice Kennard noted that a motion for summary judgment may be properly granted whenever there is no triable issue of a material fact.³⁰ Because the issue of whether Tripoli's actions arose within the scope of his employment was a disputed question, Justice Kennard stated that summary judgment could not be properly granted.³¹ Therefore, Justice Kennard concluded that the trial court erred in granting the hospital's motion for summary judgment.³²

D. Justice Mosk's Dissenting Opinion

Justice Mosk espoused his belief that the majority erred in affirming the trial court's decision to grant the hospital's motion for summary judgment.³³ Justice Mosk also stated that the issue of whether the sexual assault was causally connected to the scope of employment was a ques-

25. *Id.* (George, J., concurring).

26. *Id.* (citing *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992, 1020-23, 906 P.2d 440, 459-61, 47 Cal. Rptr. 2d 478, 497-99 (1995) (George, J., concurring)).

27. 54 Cal. 3d 202, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991). In *Mary M.*, the court found that a police officer's rape of a detainee was within the police officer's scope of employment and held that the officer's employer was vicariously liable. *Id.* at 221, 814 P.2d at 1352, 285 Cal. Rptr. at 110. The court maintained that the rape "arose from misuse of official authority." *Id.* For a further discussion of *Mary M. v. City of Los Angeles*, see Christopher E. Krueger, Note, *Mary M. v. City of Los Angeles: Should a City Be Held Liable Under Respondeat Superior for a Rape by a Police Officer?*, 28 U.S.F. L. REV. 419 (1994).

28. *Farmers Ins.*, 11 Cal. 4th at 1020-23, 906 P.2d at 459-61, 47 Cal. Rptr. 2d at 497-99 (George, J., concurring) (stating that the court's holding in *Mary M.* should be overruled in order to prevent its misapplication).

29. *Lisa M.*, 12 Cal. 4th at 308-14, 907 P.2d at 369, 48 Cal. Rptr. 2d at 521 (Kennard, J., dissenting).

30. *Id.* at 311, 907 P.2d at 370-71, 48 Cal. Rptr. 2d at 522 (Kennard, J., dissenting).

31. *Id.* at 311, 907 P.2d at 371, 48 Cal. Rptr. 2d at 523 (Kennard, J., dissenting).

32. *Id.* at 314, 907 P.2d at 373, 48 Cal. Rptr. 2d at 525 (Kennard, J., dissenting).

33. *Id.* at 306-08, 907 P.2d at 368-69, 48 Cal. Rptr. 2d at 519-20 (Mosk, J., dissenting).

tion of fact.³⁴ Noting the possibility that Tripoli's desire to sexually assault the patient arose within the scope of his employment, Justice Mosk stated that the hospital's motion for summary judgment should have been denied.³⁵ Therefore, Justice Mosk agreed with the court of appeal's decision that the trial court erred in granting the hospital's motion for summary judgment.³⁶

III. IMPACT

The court analogized this case to other intentional tort cases and render the decision that hospitals will not be held vicariously liable for intentional sexual assaults committed by employees not acting within the scope of their employment.³⁷ Although the court declined to adopt the conclusion that sexual misconduct in the workplace is per se outside the scope of employment,³⁸ the court seemed to limit the possibility of employers ever being vicariously liable for the sexual torts of their employees.

Distinguishing *Mary M. v. City of Los Angeles*, the court stated that the abuse of job-created authority test was inapplicable to the present case.³⁹ Reasoning that Tripoli had limited authority and control over the plaintiff and that the plaintiff was expected to put only limited trust in Tripoli, the court concluded that the misuse of these connections with the plaintiff was insufficient to find that Tripoli's actions fell within the scope of his employment.⁴⁰ In so doing, the court limited the possibility that respondeat superior could ever be based on an employee's working relationship with a patient.⁴¹

34. *Id.* at 307-08, 907 P.2d at 368-69, 48 Cal. Rptr. 2d at 524 (Mosk, J., dissenting).

35. *Id.* at 308, 907 P.2d at 368, 48 Cal. Rptr. 2d at 520 (Mosk, J., dissenting). For a discussion of when sexual relationships are considered to arise within the scope of employment, see generally Linda M. Jorgenson, et al., *Transference of Liability: Employer Liability for Sexual Misconduct by Therapists*, 60 BROOK. L. REV. 1421 (1995).

36. *Lisa M.*, 12 Cal. 4th at 308, 907 P.2d at 369, 48 Cal. Rptr. 2d at 520 (Mosk, J., dissenting).

37. *Id.* at 296-99, 907 P.2d at 360-63, 48 Cal. Rptr. 2d at 512-15.

38. *Id.* at 300, 907 P.2d at 363, 48 Cal. Rptr. 2d at 515 ("We are not persuaded that the roots of sexual violence and exploitation are in all cases so fundamentally different from those other abhorrent human traits as to allow a conclusion sexual misconduct is per se unforeseeable in the workplace.").

39. *Id.* at 303-04, 907 P.2d at 365-66, 48 Cal. Rptr. 2d at 517-18.

40. *Id.* at 304, 907 P.2d at 366, 48 Cal. Rptr. 2d at 518.

41. *See id.*

This limitation is further seen in the court's express desire not to hold medical care providers strictly liable for the deliberate sexual acts of employees who are required to engage in physical contact with patients.⁴² The court concluded that, in these types of cases, although the employee's job may require contact with a patient's private areas, any sexually assaultive contact with the patient is not a result of the employment environment, but rather, a result of the employee's lust.⁴³ Because the court concluded that such an assault derived from the employee's lust, the court foreclosed the possibility that a deliberate sexual assault could ever be attributed to the nature of employment.⁴⁴

IV. CONCLUSION

The California Supreme Court held that a hospital is not vicariously liable under the doctrine of respondeat superior for an intentional tort committed by its employee when the employee was not acting within the scope of his employment.⁴⁵ The court reasoned that respondeat superior will render an employer liable when there is a causal connection between the misconduct and the employment and when the employment environment poses a foreseeable risk that the tort will occur.⁴⁶ Because Tripoli's sexual assault was not causally connected to his duties and responsibilities, and because the risk of an employee sexually assaulting

42. *See id.* at 306, 907 P.2d at 364-65, 48 Cal. Rptr. 2d at 516-17. Some commentators have argued that employers should be held strictly liable for their employee's intentional sexual assaults. *See generally* Adam A. Milani, *Patient Assaults: Health Care Providers Owe a Non-Delegable Duty to Their Patients and Should be Held Strictly Liable for Employee Assaults Whether or Not Within the Scope of Employment*, 21 OHIO N.U. L. REV. 1147 (1995) (stating that hospitals should be held strictly liable for the intentional sexual torts of its employees); Shana L. Malinowski, Note, *A Matter of Trust: Imposing Employer Vicarious Liability for the Intentional Torts of Employees*, 3 D.C. L. REV. 167 (1995) (giving justification for expanding employer liability to cover intentional sexual torts of employees).

43. *Lisa M.*, 12 Cal. 4th at 302, 907 P.2d at 365, 48 Cal. Rptr. 2d at 517.

44. *See id.* at 302-03, 907 P.2d at 365, 48 Cal. Rptr. at 517. The court expressly declined to decide whether a physician's emotional or sexual involvement with a willing patient may create vicarious liability on the physician's employer. *Id.* at 303 n.7, 907 P.2d at 365 n.7, 48 Cal. Rptr. 2d at 517 n.7. For a discussion of when employers can be vicariously liable for sexual assaults against their patients, see Jorgenson et al., *supra* note 35.

45. *Id.* at 306, 907 P.2d at 367, 48 Cal. Rptr. 2d at 519.

46. *Id.* at 298-99, 907 P.2d at 362, 48 Cal. Rptr. 2d at 514.

a patient was not foreseeable, the court held that respondeat superior did not apply and that the hospital was not vicariously liable for the employee's intentional tort.⁴⁷

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47. *Id.* at 306, 907 P.2d at 367, 48 Cal. Rptr. 2d at 519.

VI. IMMUNITY

When a government employee driving a motor vehicle negligently, injures or kills a person while acting within the scope of his employment, California Government Code section 845.8 does not protect public entities from the liabilities imposed by Vehicle Code section 17001: Thomas v. City of Richmond.

I. INTRODUCTION

In *Thomas v. City of Richmond*,¹ the California Supreme Court discussed whether public entities are liable for injuries inflicted by police officers who negligently operate motor vehicles while acting within the scope of their employment.² The court held that the immunities granted to public entities by California Government Code section 845.8³ are subject to the liabilities imposed upon public entities by Vehicle Code section 17001⁴ for injuries caused as a result of a public employee's negli-

1. 9 Cal. 4th 1154, 892 P.2d 1185, 40 Cal. Rptr. 2d 442 (1995). Justice Arabian delivered the majority opinion, in which Chief Justice Lucas and Justices Kennard and Werdegard concurred. *Id.* at 1156-65, 892 P.2d at 1185-92, 40 Cal. Rptr. 2d at 442-49. In addition, Justice Mosk wrote a concurring opinion, in which Justice Baxter joined. *Id.* at 1165-69, 892 P.2d at 1192-94, 40 Cal. Rptr. 2d at 449-51 (Mosk, J., concurring). Justice George alone dissented. *Id.* at 1169-77, 892 P.2d at 1194-99, 40 Cal. Rptr. 2d at 449-56 (George, J., dissenting).

2. *Id.* at 1154-65, 892 P.2d at 1185-92, 40 Cal. Rptr. 2d at 442-449. On September 4, 1990, Richmond police officers reacted to a report that there were two armed men standing at the corner of Sixth Street and Pennsylvania Avenue. *Id.* at 1156, 892 P.2d at 1185-86, 40 Cal. Rptr. 2d at 442. When the two men at the corner, the plaintiff Pele Thomas and a friend, noticed the officers approaching, they ran despite being ordered to "stop" by the officers. *Id.* at 1156, 892 P.2d at 1185, 40 Cal. Rptr. 2d at 442. The chase of Thomas by the officers ended violently when Thomas was struck by the pursuing officer's car, leaving him a quadriplegic and planting the roots for the eventual lawsuit. *Id.*

3. CAL. GOV'T CODE § 845.8 (Deering 1982 & Supp. 1995). Section 845.8 of the California Government Code provides that "neither a public entity nor a public employee is liable for . . . any injury caused by: an escaping or escaped prisoner; an escaping or escaped arrested person; or a person resisting arrest." *Id.* The court explained that even though the statute spoke of an escaping person, prisoner, or person resisting arrest, it also applies to situations where a person is only detained or where there has been an attempt to detain a person, such as in the present case. *Thomas*, 9 Cal. 4th at 1158, 892 P.2d at 1187, 40 Cal. Rptr. 2d at 444; see *Kisbey v. California*, 36 Cal. 3d 415, 418-19, 682 P.2d 1093, 1095-96, 204 Cal. Rptr. 428, 430-31 (1984) (holding that the intent of the legislature was not to form a statute with strict technical language that would allow certain events to slip through the "cracks" of immunity granted to public entities within the statute).

4. California Vehicle Code § 17001 provides: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or

gent operation of a motor vehicle.⁵ The court grounded its decision on the basis that the legislature had implicitly upheld this interpretation by not expressly overruling "in-total"⁶ previous appellate court decisions interpreting the statutes in the same manner.⁷

II. TREATMENT

A. *Justice Arabian's Majority Opinion*

1. The immunities granted by section 845.8 are subject to the liabilities imposed in section 17001 because the legislature did not overrule this judicial interpretation.

Justice Arabian provided a short background of the two statutes in question before proceeding to the crux of his argument.⁸ He began by

omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." CAL. VEH. CODE § 17001 (Deering 1984 & Supp. 1995).

5. *Thomas*, 9 Cal. 4th at 1159-65, 892 P.2d at 1187-92, 40 Cal. Rptr. 2d at 444-49.

6. *Id.* at 1162-63, 892 P.2d at 1189-90, 40 Cal. Rptr. 2d at 446-47; *see infra* notes 19-24 and accompanying text.

7. *Thomas*, 9 Cal. 4th at 1162-63, 892 P.2d at 1189-90, 40 Cal. Rptr. 2d at 446-47. Despite the current trend at the appellate level in interpreting the liabilities under Vehicle Code § 17001 to preempt the immunities granted in Government Code § 845.8, the superior court granted summary judgment in favor of Richmond holding that the city was not liable for Thomas' injuries because of the immunities granted in § 845.8. *Id.* at 1156, 892 P.2d at 1186, 40 Cal. Rptr. 2d at 443. The court of appeal reversed the superior court by following the trend employed at the appellate level, finding that indeed the immunities given in § 845.8 were subject to the liabilities imposed by § 17001. *Id.*

8. *Id.* at 1157-59, 892 P.2d at 1186-87, 40 Cal. Rptr. 2d at 443-44. Justice Arabian reiterated the basic rule governing public entity immunity in California provided in Government Code § 815. *Id.* at 1157, 829 P.2d at 1186, 40 Cal. Rptr. 2d at 443.

Section 815 states in relevant part: "Except as otherwise provided by statute, [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." CAL. GOV'T CODE § 815 (Deering 1982 & Supp. 1995). *See generally* James V. Arnold, *Governmental Liability for Torts of Employees—The End of Sovereign Immunity in California*, 5 SANTA CLARA L. REV. 81 (1964) (discussing general and discretionary immunity). While Government Code § 815 sets forth the general rules for liability, other statutory sources, such as Vehicle Code § 17001, can impose liability. *Thomas*, 9 Cal. 4th at 1157-59, 892 P.2d at 1186-87, 40 Cal. Rptr. 2d at 443-44 (citing *Duarte v. San Jose*, 100 Cal. App. 3d 648, 161 Cal. Rptr. 140 (1980)).

The court noted that it previously held that § 815 was subject to the liabilities under § 17001. *Id.* at 1158, 892 P.2d at 1186-87, 40 Cal. Rptr. 2d at 443-44; *see Brummett v. Sacramento*, 21 Cal. 3d 880, 582 P.2d at 952, 148 Cal. Rptr. 361 (1978);

stating that the language of the two statutes did not “expressly state how each affects the other.”⁹ Because the court had not previously considered this issue,¹⁰ the majority examined the appellate courts’ decisions interpreting the two statutes.¹¹ Since 1980, the court of appeal held on three separate occasions¹² that public entities are liable for injuries inflicted upon innocent third parties by suspects fleeing police officers under the liabilities imposed by Vehicle Code section 17001,¹³ despite the immunities granted to these same entities under Government Code section 845.8.¹⁴

see also 35 CAL. JUR. 3D *Government Tort Liability* §§ 7, 43 (1979 & Supp. 1995) (discussing governmental tort liability in automobile accidents); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Governmental Tort Liability* §§ 129, 229 (9th ed. 1988 & Supp. 1995) (discussing the adoption of the Tort Claims Act and negligent operation of a vehicle). Thus, the city of Richmond did not claim that § 815 granted it immunity, but rather argued § 845.8 must be interpreted differently to protect against the liabilities imposed by § 17001. *Thomas*, 9 Cal. 4th at 1157-59, 892 P.2d at 1186-87, 40 Cal. Rptr. 2d at 443-44.

9. *Id.* at 1159, 892 P.2d at 1187, 40 Cal. Rptr. 2d at 444.

10. *Id.* at 1157-59, 892 P.2d at 1186-87, 40 Cal. Rptr. 2d at 443-44. The court had previously ruled that § 815.2 was subject to the liabilities imposed by § 17001. *Id.* For an indepth look into the liability of local governments under certain federal statutes, see Karen M. Blum, *Local Government Liability Under Section 1983*, 511 SUFFOLK U. L. REV. 329 (1994).

11. *Thomas*, 9 Cal. 4th at 1157-60, 892 P.2d at 1186-88, 40 Cal. Rptr. 2d at 443-45.

12. *Id.* In each of the cases an innocent third party was injured by an escaping suspect. *Id.* In each instance the court of appeals held the public entity liable under § 17001 despite the protections granted under § 845.8. *Id.*; see *Duarte*, 100 Cal. App. 3d 648, 161 Cal. Rptr. 140; *Stark v. Los Angeles*, 168 Cal. App. 3d 276, 214 Cal. Rptr. 216 (1985); *San Jose v. Superior Court*, 166 Cal. App. 3d 695, 212 Cal. Rptr. 661 (1985). For a broader discussion, see 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 198-201 (9th ed. & Supp. 1992); 57 AM. JUR. 2D *Municipal, County, School and State Tort Liability* §§ 458-462, 474-478 (1988 & Supp. 1995); 52 CAL. JUR. 3D *Public Officers and Employees* §§ 230, 234 (1979 & Supp. 1995); Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145, 156-63 (1994); Jeffery M. Epstein, *Liability Under the Federal Civil Rights for Injuries Sustained During Police Pursuits*, 41 FED. B. NEWS & J. 356 (1994); Robert L. Hughes, *Liability of State to Members of Public Harmed by Convicts During Escapes Occasioned by Negligence of State Agents*, 7 HASTINGS L.J. 330 (1956).

13. *Thomas*, 9 Cal. 4th 1157-60, 892 P.2d at 1186-88, 40 Cal. Rptr. 2d at 443-45.

14. *Id.* at 1157-60, 892 P.2d at 1186-88, 40 Cal. Rptr. 2d at 443-45.

2. The effect of the general rule provided in Government Code section 815 conflicts with liabilities imposed by other statutes.

The city of Richmond argued that the language within section 815 proposed a general rule that immunities will prevail over liabilities in situations of conflicting statutes.¹⁵ In addition, the city cited the legislative history of the section, which stated that when statutes do not adhere to this general rule the legislature will make this evident.¹⁶ The city also cited three statutes which imposed the liabilities of Vehicle Code section 17001 over the immunities given to public entities.¹⁷ Thus, Richmond argued that because Government Code section 845.8 was not expressly subject to Vehicle Code section 17001, it followed that the immunities of section 845.8 should prevail over the liabilities in section 17001.0.¹⁸ Justice Arabian conceded that while this argument might logically apply, the legislature's actions in 1987 undermined this argument.¹⁹

3. Defining the effect of the legislature's enactment of Vehicle Code section 17004.7.

Justice Arabian continued by stating that the passage of section 17004.7,²⁰ which grants immunity to public entities for injuries caused by fleeing suspects in motor vehicles if a specified written policy was

15. *Id.* at 1160, 892 P.2d at 1188, 40 Cal. Rptr. 2d at 445.

16. *Id.*

17. *Id.* at 1160-62, 892 P.2d at 1188-90, 40 Cal. Rptr. 2d at 445-47. Richmond cited three statutes that expressly yielded to the liabilities under § 17001: (1) Government Code § 844.6(b) states that "nothing in this section affects the liability of a public entity under [Vehicle Code §§ 17000-17004.7]"; (2) section 850.4 provides immunity "except as provided in [Vehicle Code § 17000]"; and (3) section 854.8(b) contains the same language as 844.6. *Id.* For a closer look at governmental liability due to car accidents, see 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 226 (9th ed. 1988 & Supp. 1995), 35 CAL. JUR. 3D *Government Tort Liability* § 7 (1988 & Supp. 1995), 57 AM. JUR. 2D *Municipal, County, School and State Tort Liability* §§ 236-239 (1988 & Supp. 1995), and 83 A.L.R. 2D 452 (1962).

18. *Thomas*, 9 Cal. 4th at 1160-61, 892 P.2d at 1188-89, 40 Cal. Rptr. 2d at 445-46.

19. *Id.* at 1160-61, 892 P.2d at 1189-90, 40 Cal. Rptr. 2d at 445-46.

20. Vehicle Code § 17004.7(b) provides in relevant part: "A public agency employing peace officers which adopts a written policy on vehicular pursuits complying with subdivision (c) is immune from liability for civil damages [that occur as a consequence of a collision caused by a suspect fleeing the police]." CAL. VEH. CODE § 17004.7(b) (West Supp. 1996). See generally 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 226-232 (9th ed. 1988 & Supp. 1995) (discussing governmental liability in the operation of motor vehicles).

adopted, was a direct reaction to previous decisions holding public entities liable under section 17001.²¹ Justice Arabian noted that section 17004.7 provides immunity only if the entity adopted a specified written policy.²² Therefore, the legislature “impliedly approved” the previous lower courts’ judgments by making immunity contingent on the adoption of a specified written policy, instead of expressly overruling those decisions.²³ Thus, the court explained that it was bound by the previous interpretations of how section 17001 affected section 845.8 and could not overrule the legislative action.²⁴

B. Justice Mosk’s Concurring Opinion

In his concurring opinion, Justice Mosk disagreed with the majority’s contention that Government Code section 845.8 applied to the present case.²⁵ He further argued that the words “caused by” used in section 845.8 contain the solution to the court’s conflicting views.²⁶ He maintained that section 845.8 only granted immunity to public entities in the event the an injury was “caused by” an escaping suspect.²⁷ Therefore, because in the present case the injury was “caused to” the suspect by the police the immunities of Government Code section 845.8 did not apply. Instead, Justice Mosk argued that the liabilities imposed by Vehicle Code section 17001 for the negligent operation of a motor vehicle should apply.²⁸

21. *Thomas*, 9 Cal. 4th at 1161-62, 892 P.2d at 1189-90, 40 Cal. Rptr. 2d at 446-47; see *supra* notes 10-14 and accompanying text.

22. *Id.* at 1162, 892 P.2d at 1189, 40 Cal. Rptr. 2d at 446.

23. *Id.* at 1162, 892 P. 2d. at 1189-90, Cal. Rptr. 2d. at 446-47.

24. *Id.*

25. *Id.* at 1166-69, 892 P.2d at 1192-94, 40 Cal. Rptr. 2d at 449-51 (Mosk, J., concurring).

26. *Id.* at 1166, 892 P.2d. at 1192, 40 Cal. Rptr 2d at 449 (Mosk, J., concurring). Justice Mosk believed that the legislature understood the distinction between “caused by” and “caused to.” *Id.* (Mosk, J., concurring). He argued this because in other statutes, such as Government Code § 856.2, the legislature had purposely included the words “caused to” in order to grant immunity to public entities for any injuries actually “caused to” an escaping mental patient. *Id.* at 1167-68, 892 P.2d. at 1193, 40 Cal. Rptr 2d at 450 (Mosk, J., concurring). Additionally, he contended the legislature in § 856.2 had also granted immunity to a public entity for any injuries “caused by” an escaping patient because the statute included these specific words. *Id.* (Mosk, J., concurring).

27. *Id.* at 1168-69, 892 P.2d. at 1193-94, 40 Cal. Rptr 2d at 450-51 (Mosk, J., concurring).

28. *Id.* (Mosk, J., concurring).

C. Justice George's Dissenting Opinion

Justice George stated that the foundational case of *Duarte v. San Jose*,²⁹ which was relied on by the majority, is flawed because it incorrectly holds that the immunities in Government Code section 845.8 are subject to the liabilities imposed by Vehicle section 17001.³⁰ He also argued that, contrary to the views of the majority, the legislature's enactment of section 17004.7 had not "impliedly approved" the holding in *Duarte* and its prodigy, and therefore the court was not bound to accept their erroneous reasoning.³¹ Justice George recognized, as did Justice Mosk, that Government Code section 845.8 granted immunity to public entities for all injuries "caused by" a fleeing suspect.³² Unlike Justice Mosk, however, Justice George left open the question whether the plaintiff's injuries in the present case were "caused by" himself because he had fled, or if they were "caused to" him by the officer driving negligently.³³ In Justice George's opinion, the determination of who caused the injury should have controlled whether to apply section 845.8 or section 17001 to the present case.³⁴

III. IMPACT AND CONCLUSION

Thomas clarifies the interplay between two statutes, one which grants immunities to public entities under the California Tort Claims Act,³⁵ and the other which imposes liabilities for the negligent operation of motor

29. 100 Cal. App. 3d 648, 161 Cal. Rptr. 140 (1980).

30. *Thomas*, 9 Cal. 4th at 1169-77, 892 P.2d at 1194-99, 40 Cal. Rptr. 2d at 452-56 (George, J., dissenting). No other Justices joined in Justice George's dissent. *Id.* (George, J., dissenting). Among other flaws, he pointed out that § 845.8 did not contain any express language subjecting it to the liabilities imposed by § 17001, although other statutes did. *Id.* at 1171, 892 P.2d at 1195-96, 40 Cal. Rptr. 2d at 452-53 (George, J., dissenting).

31. *Id.* at 1171-72, 892 P.2d at 1196, 40 Cal. Rptr. 2d at 453 (George, J., dissenting). Justice George's most compelling argument was the timing aspect of the enactment of § 17004.7. *Id.* at 1172, 892 P.2d at 1196, 40 Cal. Rptr. 2d at 453 (George, J., dissenting). The legislature passed the statute nearly seven years after the holding in *Duarte*, thus it seems unlikely that it was passed in response to the holding. *Id.* at 1172-73, 892 P.2d at 1196-97, 40 Cal. Rptr. 2d at 453-54 (George, J., dissenting).

32. *Id.* (George, J., dissenting); see *supra*, notes 25-27 and accompanying text.

33. *Id.* at 1174-76, 892 P.2d at 1198-99, 40 Cal. Rptr. 2d at 455-56 (George, J., dissenting); see *supra* notes 25-27 and accompanying text.

34. *Id.* (George, J., dissenting).

35. *Id.* at 1157, 892 P.2d at 1186, 40 Cal. Rptr. 2d at 443. The California Tort Claims Act grants immunity to public entities in various situations. *Id.*

vehicles under Vehicle Code section 17001 by employees of a public entity.³⁶ It is now apparent that in certain factual scenarios, public entities are liable under section 17001 despite the immunities granted by various California Government Code 800 sections.³⁷ Liability will therefore attach whether or not the legislature has expressly stated this within the statute.³⁸ In the future, public entities can now expect to be held liable for any injuries caused by the negligent operation of motor vehicles, unless the legislature sees fit to authorize new policy.

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36. *Id.*

37. *Id.* at 1157-65, 892 P.2d at 1186-92, 40 Cal. Rptr. 2d at 443-49.

38. *Id.* at 1157-62, 892 P.2d at 1186-90, 40 Cal. Rptr. 2d at 443-47.

VII. INSURANCE

Insurance policies obtained by highway carriers pursuant to state regulations remain in effect until the Public Utilities Commission receives notice of cancellation; however, insurance companies are entitled to reimbursement for certain payments made pursuant to the regulations administered by the Public Utilities Commission:

Transamerica Insurance Co. v. Tab Transportation, Inc.

I. INTRODUCTION

In *Transamerica Insurance Co. v. Tab Transportation, Inc.*,¹ the California Supreme Court considered whether insurance companies, under policies issued to highway carriers (carriers),² remained liable for these policies until the Public Utilities Commission (PUC)³ received notice of cancellation, or alternatively, if liability expired pursuant to the terms contained within the policies.⁴ Contrary to the finding of the court of

1. 12 Cal. 4th 389, 906 P.2d 1341, 48 Cal. Rptr. 2d 159 (1996). Justice Kennard wrote the majority opinion, in which Justices Mosk, George and Werdegar concurred. *Id.* at 393-404, 906 P.2d at 1342-49, 48 Cal. Rptr. 2d at 160-67. In addition, Justice Arabian filed a dissenting opinion. *Id.* at 404-05, 906 P.2d at 1349-50, 48 Cal. Rptr. 2d at 167-68 (Arabian, J., dissenting). Justice Baxter also filed a dissenting opinion, in which Chief Justice Lucas and Justice Arabian concurred. *Id.* at 405-14, 906 P.2d at 1350-56, 48 Cal. Rptr. 2d at 168-73 (Baxter, J., dissenting).

2. *Id.* at 393-404, 906 P.2d at 1342-49, 48 Cal. Rptr. 2d at 160-67. The statute defines highway carriers as motor vehicles used in the "transportation of property for compensation." See CAL. PUB. UTIL. CODE § 3511 (Deering 1990 & Supp. 1996) (giving the statutory definition of highway carriers and exceptions); see also 37 CAL. JUR. 3D *Highway Freight Transport* § 10 (1977 & Supp. 1995) (explaining what generally can be classified as common carriers); 14 AM. JUR. 2D *Carriers* § 2 (1964 & Supp. 1995) (discussing common carriers); Boris H. Lakusta, *Regulation of Truckers For Hire in California*, 41 CAL. L. REV. 63 (1953) (exploring the regulation of truckers in California). Highway carriers licensed in California are subject to regulations administered by the Public Utilities Commission. See 53 CAL. JUR. 3D *Public Utilities* § 12 (1979 & Supp. 1995) (describing the function of the commission). One of these regulations requires that the carriers submit proof that they possess adequate insurance. *Transamerica*, 12 Cal. 4th at 397, 906 P.2d at 1343, 48 Cal. Rptr. 2d at 160.

3. For a more detailed discussion of the duties of the Public Utilities Commission see 53 CAL. JUR. 3D *Public Utilities* §§ 12-31 (1979 & Supp. 1995) (relating the structure, jurisdiction and powers of the public utilities commission). See also 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 889 (1988 & Supp. 1995) (detailing the duties of the PUC).

4. *Transamerica*, 12 Cal. 4th at 393-97, 906 P.2d at 1342-46, 48 Cal. Rptr. 2d at

appeal,⁵ the supreme court held that the insurance policies in controversy did not expire pursuant to their own terms, but only written notice to the PUC could cancel the policies.⁶ Moreover, the court held that insurance companies were entitled to reimbursement for any amounts which would not have been paid but for the regulations administered by the PUC.⁷

II. TREATMENT

A. *Majority Opinion*

1. Insurance providers remain liable for policies issued to highway carriers until the policies are cancelled by written notice to the Public Utilities Commission.

Justice Kennard began the majority opinion by discussing the regulatory history of the Highway Carriers' Act of 1935.⁸ She explained that the legislature promulgated the act to protect the public from highway car-

160-63. In 1980, Tab, a commercial trucking company, purchased liability insurance from Transamerica in compliance with the Highway Carriers' Act. *Id.* at 395, 906 P.2d at 1343, 48 Cal. Rptr. 2d at 161. The policy provided for coverage from February 1, 1980 to February 1, 1981. *Id.* Prior to February 1, 1981, Tab bought another insurance policy. *Id.* at 395, 906 P.2d at 1343-44, 48 Cal. Rptr. 2d at 161. Neither Tab nor Transamerica sent a notice of cancellation to the PUC as the PUC endorsement form attached to the policy required. *Id.* at 395, 906 P.2d at 1344, 48 Cal. Rptr. 2d at 161.

In 1989, a truck owned by Tab collided with an Amtrak passenger train, injuring numerous passengers and killing the truck driver. *Id.* at 395, 906 P.2d at 1344, 48 Cal. Rptr. 2d at 162. As a result of the accident, the victims sued Tab for millions of dollars. *Id.* at 396, 906 P.2d at 1344, 48 Cal. Rptr. 2d at 162. In turn, Tab sought coverage under its insurance policies for the settlements which eventually resulted. *Id.* In 1992 Transamerica sought declaratory judgment to be relieved of any liability resulting from the accident and in the alternative to be entitled to reimbursement for "any payments made under the policy." *Id.* Tab counter-claimed, contending coverage existed under the policy. *Id.* The superior court granted summary judgment for Tab, but commenced with trial to determine the issue of reimbursement. *Id.* The court held in favor of Transamerica. *Id.* Subsequently, each party appealed to the appellate court. *Id.*

5. *Id.* at 396-97, 906 P.2d at 1344-45, 48 Cal. Rptr. 2d at 162. The court of appeal reversed on the issue of coverage, determining that the policy issued had expired by its own terms on February 1, 1981; accordingly, Tab did not have the obligation to cancel the policy by sending notice to the PUC. *Id.* Therefore, Transamerica's possible liability ceased when the policy expired. *Id.*

6. *Id.* at 404, 906 P.2d at 1349, 48 Cal. Rptr. 2d at 167.

7. *Id.* at 403-04, 906 P.2d at 1349, 48 Cal. Rptr. 2d at 167. The court of appeal did not address the issue of reimbursement due to its holding that Transamerica's coverage had expired in 1981. *Id.* at 397, 906 P.2d at 1344, 48 Cal. Rptr. 2d at 162.

8. *Id.* at 397, 906 P.2d at 1345, 48 Cal. Rptr. at 162-63; see CAL. PUB. UTIL. CODE § 3501 (Deering 1990 & Supp. 1996). See generally Arlo D. Poe, *Regulation of Highway Carriers in California*, 30 S. CAL. L. REV. 131 (1957) (explaining California's common carriers regulatory system).

riers with inadequate insurance.⁹ Thus, to fulfill the purposes of the act, all policies issued to highway carriers must now contain a standard PUC endorsement form, incorporating certain regulatory provisions into the issued policies.¹⁰ Additionally, all highway carriers must file proof of the insurance agreement¹¹ with the PUC.¹²

a. Insurance policies provided to highway carriers cannot expire but can only be cancelled.

After examining the history behind the regulations, the court explained that the purpose of a statute requiring insurance is to ensure that the insurance policy will include the provisions of the statute within the policy itself.¹³ Accordingly, any policy conditions in disagreement with the state statute become nullified.¹⁴ Based on prior holdings,¹⁵ the

9. *Transamerica*, 12 Cal. 4th at 397-98, 906 P.2d at 1345-46, 48 Cal. Rptr. 2d at 162-63; see *Keller v. Thorton Canning Co.*, 66 Cal. 2d 963, 429 P.2d 156, 59 Cal. Rptr. 836 (1967) (naming inadequate insurance as a paramount concern of the Highway Carriers' Act); see also 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 907 (1988 & Supp. 1995) (relating to information about state regulatory powers).

10. *Transamerica*, 12 Cal. 4th at 398, 906 P.2d at 1345, 48 Cal. Rptr. 2d at 162. The relevant provisions in this case come from PUC General Order No. 100-I, which provides that an insurance policy can not be cancelled on less than 30 days notice and that all policies under the Carriers' Act would remain in full force until they are cancelled in the manner provided in PUC General Order No. 100-I. *Id.*

11. *Id.* A carrier also has the option of purchasing a surety bond instead of an insurance policy. *Id.* at 398; see CAL. PUB. UTIL. CODE §§ 3633, 3634 (Deering 1990 & Supp. 1996) (explaining the options of carriers).

12. *Transamerica*, 12 Cal. 4th at 397-98, 906 P.2d at 1345, 48 Cal. Rptr. 2d at 163. The certificate of insurance filed with the PUC states in pertinent part that all the provisions of the standard endorsement form apply to the issued policies. *Id.* See generally 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 896 (1988 & Supp. 1995) (describing how the PUC regulates common carriers).

13. *Transamerica*, 12 Cal. 4th at 398, 906 P.2d at 1345-46, 48 Cal. Rptr. 2d at 162-63. "The obligations of such a policy are measured and defined by the pertinent statute, and the two together form the insurance contract." *Id.* at 398, 906 P.2d at 1346, 48 Cal. Rptr. 2d at 163 (quoting *Samson v. Transamerica Ins. Co.*, 30 Cal. 3d 220, 231, 636 P.2d 32, 39, 178 Cal. Rptr. 343, 350 (quoting 6c JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4463 at 615-17 (Richard B. Buckley, ed. 1979))).

14. *Id.* at 399, 906 P.2d at 1346, 48 Cal. Rptr. 2d at 163-64. The court explained this is especially true in the case "where the policy itself expressly so provides [for a conflict with state law]." *Id.* at 399, 906 P.2d at 1346, 48 Cal. Rptr. 2d at 164 (quoting *Samson v. Transamerica Ins. Co.*, 30 Cal. 3d 220, 231, 636 P.2d 32, 39, 178 Cal. Rptr. 343, 350 (quoting 6c JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4463 at 615-17 (Richard B. Buckley, ed. 1979))).

15. *Id.* The majority drew most of its reasoning from *Samson v. Transamerica Ins.*

court further stated that the contract between Transamerica and Tab must be read as having incorporated all relevant statutory provisions.¹⁶ Again, the effect of the incorporation effectively nullified any provisions in the policy that conflicted with state regulations.¹⁷ Thus, in the present contract, the regulation that the policy shall remain in effect until cancelled by written notice barred cancellation of the policy by any other means.¹⁸

Transamerica argued that the statutory provisions only applied to situations where one party wanted to cancel a contract before coverage ended and not to situations where a policy expired pursuant to its own terms.¹⁹ The court, however, dismissed these contentions, arguing that the statutory language made no such distinction, and that prior interpretations still applied.²⁰ Therefore, only written notice could cancel Transamerica's policy as opposed to expiration by its' own terms.²¹

Co., 30 Cal. 3d. 220, 636 P.2d 32, 178 Cal. Rptr. 343 (1981) (revealing the effects of insurance required by law). See generally Steven L. Paine & Wynn Heather Sourial, *Recent Developments in California Insurance Law: Enforceability of Stipulated Judgments Against Insurance Carriers*, 22 PEPP. L. REV. 1017 (1995) (discussing trends in California insurance law as to stipulated judgments); 45 C.J.S. *Insurance* § 357 (1993 & Supp. 1996) (espousing important considerations of insurance law).

16. *Transamerica*, 12 Cal. 4th at 400-01, 906 P.2d at 1347, 48 Cal. Rptr. 2d at 164. The relevant provisions being that the policy shall remain in effect until cancelled by written notice to the PUC. *Id.* at 400, 906 P.2d at 1348, 48 Cal. Rptr. at 164-65.

17. *Id.* at 399-400, 906 P.2d at 1346-47, 48 Cal. Rptr. at 163-64. The conflict in the present case was that the policy would expire one year after being purchased regardless of notification of cancellation. *Id.*

18. *Id.*

19. *Id.* at 400-01, 906 P.2d at 1347, 48 Cal. Rptr. at 165. This was a distinction drawn by the court of appeal in *Farmers Insurance Exchange v. Vincent*, 248 Cal. App. 2d 534, 541, 56 Cal. Rptr. 775, 780 (1967), where the court stated that "[i]n the ordinary sense of the terms, there is a difference between cancellation of a policy and its lapse by reason of the expiration of the term for which written"; see also 37 CAL. JUR. 3D *Highway Freight Transport* § 26 (1977 & Supp. 1996) (explaining the requirement of cancellation); 13 AM. JUR. 2D *Carriers* § 102 (1964 & Supp. 1996) (discussing the requirement of cancellation).

20. *Transamerica*, 12 Cal. 4th at 400-01, 906 P.2d at 1347, 48 Cal. Rptr. 2d at 164-65.

21. *Id.* at 401, 906 P.2d at 1347, 48 Cal. Rptr. 2d at 165. Consequently, Transamerica had to pay part of the settlement resulting from Tab's accident with the Amtrak train. *Id.*

- b. *Insurance policies provided to highway carriers which are not cancelled properly remain in effect despite the carrier being protected by alternate insurance.*

The court also addressed the argument that an insurer's non-compliance with state regulations only exposes the insurer to continued liability if the carrier does not have other insurance.²² Justice Kennard cited an analogous situation in *Fireman's Fund Insurance Co. v. Allstate Insurance Co.*²³ where the court of appeal held that the cancellation requirement applied regardless of whether the insured bought replacement insurance.²⁴ The court agreed with the holding in *Firemans' Fund*, arguing that the interpretation was most consistent with the regulatory scheme.²⁵ Thus, Tab's purchase of alternate insurance did not relieve Transamerica of liability for failing to comply with the proper cancellation procedures.²⁶

2. Insurance providers are entitled to reimbursements for any liability arising from accidents occurring with the highway carrier after the policy would have expired under its own terms.

Within the endorsement agreement attached to the policy between Transamerica and Tab was a provision stating that the insured agreed to reimburse the insurer for any payments made that would not have been made but for state regulations.²⁷ Justice Kennard simply applied the same principles as had been used for the other disputed provisions.²⁸

22. *Id.* at 401-03, 906 P.2d at 1347-49, 48 Cal. Rptr. 2d at 165-66. Transamerica contended this argument because Tab had purchased two more policies since the date that Transamerica's policy should have expired. *Id.*

23. 234 Cal. App. 3d 1154, 286 Cal. Rptr. 146 (1991).

24. *Transamerica*, 12 Cal. 4th at 401-03, 906 P.2d at 1347-48, 48 Cal. Rptr. 2d at 165-66. See 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 907 (1988 & Supp. 1996) (explaining the extent of the state's regulatory powers with respect to carriers); 11 CAL. JUR. 3D *Carriers* § 15 (1974 & Supp. 1996) (discussing general state regulation of carriers). See generally J. Byron McCormick, *The Regulation of Motor Transportation*, 22 CAL. L. REV. 24 (1933) (analyzing state regulation of motor transportation).

25. *Transamerica*, 12 Cal. 4th at 401-03, 906 P.2d at 1347-48, 48 Cal. Rptr. 2d at 165-66.

26. *Id.* at 402-03, 906 P.2d at 1348, 48 Cal. Rptr. 2d at 166.

27. *Id.* at 403, 906 P.2d at 1349, 48 Cal. Rptr. 2d at 166. See generally Douglas R. Richmond, *Issues and Problems In "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373 (1995) (exploring insurance contracts).

28. *Transamerica*, 12 Cal. 4th at 403-04, 906 P.2d at 1349, 48 Cal. Rptr. 2d at 166.

She explained that like the cancellation requirement, the reimbursement requirement was a part of state regulations, and therefore, the insurance contract incorporated the statutory reimbursement requirement.²⁹ As a result, the court required Tab to reimburse Transamerica for all payments made after the time the policy would have ended but for the requirement that the coverage shall last until cancelled.³⁰

B. Justice Arabian's Dissenting Opinion

Justice Arabian stated that the majority's holding unjustly placed too much of a burden on the insurer for slight clerical oversights.³¹ He argued that if the carrier has other insurance then this insurance protects the public.³² Thus, the court should relieve the insurer of liability when it fails to comply with cancellation procedures.³³ Justice Arabian concluded by stating that the majority's interpretation of the statute placed form over substance and caused an unjust result.³⁴

C. Justice Baxter's Dissenting Opinion

Justice Baxter agreed with the court of appeal, in that the statute in question only referred to how a policy could be cancelled and did not also pertain to the expiration of a policy on its own terms.³⁵ Consequently, when Transamerica's policy expired with Tab, so too did Transamerica's liability.³⁶ He also noted that because the statutory provisions only refer to cancellation, the policy's referral to the expiration of the coverage in the contract did not give rise to conflicting terms which would nullify the policy's provisions.³⁷ Lastly, Justice Baxter refrained from addressing the issue of reimbursement because under his analysis the issue would never arise.³⁸

29. *Id.*

30. *Id.* at 404, 906 P.2d at 1349, 48 Cal. Rptr. 2d at 167. The court noted that the right of reimbursement would be of little effect if the previously insured became insolvent, but in light of the purposes of the statutes to protect the public, the court held that the insurer should bear the risk of loss. *Id.*

31. *Id.* at 404-05, 906 P.2d at 1349-50, 48 Cal. Rptr. 2d at 167-68 (Arabian, J., dissenting).

32. *Id.* at 405, 906 P.2d at 1350, 48 Cal. Rptr. 2d at 167-68 (Arabian, J., dissenting).

33. *Id.* (Arabian, J., dissenting).

34. *Id.* at 405, 906 P.2d at 1350, 48 Cal. Rptr. 2d at 168 (Arabian, J., dissenting).

35. *Id.* at 407-10, 906 P.2d at 1351-53, 48 Cal. Rptr. 2d at 169-71 (Baxter, J., dissenting). The majority of Justice Baxter's dissent incorporates the opinion of the court of appeal. *Id.* (Baxter, J., dissenting).

36. *Id.* at 410, 906 P.2d at 1353, 48 Cal. Rptr. 2d at 171 (Baxter, J., dissenting).

37. *Id.* at 412-13, 906 P.2d at 1354-55, 48 Cal. Rptr. 2d at 172-73 (Baxter, J., dissenting).

38. *Id.* at 408, 906 P.2d at 1351-52, 48 Cal. Rptr. 2d at 169 (Baxter, J., dissenting).

III. IMPACT AND CONCLUSION

The court's holding in *Transamerica* firmly establishes that insurers must comply with the statutory requirements for cancellation of policies with highway carriers or else face liability for accidents that occur years later.³⁹ The court will not relieve liability for non-compliance whether or not the insured has obtained replacement insurance or if the contract expires by its own terms.⁴⁰ However, despite these strict requirements, the insurer will have the right to reimbursement by the insured for any payments made that would not have been made but for state regulations.⁴¹

While the court's reading of the applicable statutes and regulations is strict, it does ensure that a member of the public injured by a reckless highway carrier will have recourse. Although the insurance companies bear the risk that there might not be reimbursement, the court's holding nonetheless seems equitable in that it protects the public welfare.⁴²

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39. *See id.* at 400-01, 906 P.2d at 1347, 48 Cal. Rptr. 2d at 164-65.

40. *Id.*

41. *Id.* at 403-04, 906 P.2d at 1349, 48 Cal. Rptr. 2d at 167.

42. *Id.* at 404, 906 P.2d at 1349, 48 Cal. Rptr. at 167.

VIII. LEGAL MALPRACTICE

Under California Code of Civil Procedure section 340.6(a)(1), the determination of when a plaintiff has suffered "actual injury" for the purpose of commencing the statute of limitations in a legal malpractice cause of action is generally a question of fact, unless the facts are undisputed wherein the determination is a matter of law: Adams v. Paul.

I. INTRODUCTION

In *Adams v. Paul*,¹ the California Supreme Court considered at what point in time a plaintiff has suffered "actual injury" as a result of legal malpractice where the statute of limitations in a legal malpractice lawsuit is tolled until the plaintiff has sustained "actual injury."² In addressing

1. 11 Cal. 4th 583, 904 P.2d 1205, 46 Cal. Rptr. 2d 594 (1995). Justice Arabian delivered the plurality opinion, in which Justices Baxter and Werdegar concurred. *Id.* at 585-93, 904 P.2d at 1206-12, 46 Cal. Rptr. 2d at 595-601. Justice Kennard wrote a separate concurring opinion. *Id.* at 593-99, 904 P.2d at 1212-16, 46 Cal. Rptr. 2d at 601-05 (Kennard, J., concurring). Chief Justice Lucas wrote a dissenting opinion, in which Justices Mosk and George concurred. *Id.* at 599-606, 904 P.2d at 1216-20, 46 Cal. Rptr. 2d at 605-09 (Lucas, C.J., dissenting).

2. *Id.* at 585-93, 904 P.2d at 1206-12, 46 Cal. Rptr. 2d at 595-601. In *Adams*, Katherine Adams sought to file a wrongful death action against her former husband's estate for the death of their child. *Id.* at 586, 904 P.2d at 1207, 46 Cal. Rptr. 2d at 596. Adams consulted attorney Aaron Paul on the matter, but Paul negligently provided erroneous advice regarding the time period within which Adams should file the wrongful death action. *Id.* As a result of Paul's negligence, Adams alleged that she was forced to settle and dismiss the wrongful death action. *Id.* This resulted in Adams receiving less money than she would have if the defendants did not have the statute of limitations defense. *Id.* at 587, 904 P.2d at 1207, 46 Cal. Rptr. 2d at 596.

Adams next sought to instigate a legal malpractice action against her former attorney, Aaron Paul, for damages in excess of \$200,000. *Id.* At trial, Paul demurred on the ground that Adams' action against him was barred by the statute of limitations under California Code of Civil Procedure § 340.6(a) because the suit against him had been filed more than one year after Paul had given a declaration admitting that he gave Adams incorrect advice. *Id.* at 587, 904 P.2d at 1207-08, 46 Cal. Rptr. 2d at 596-97. Section 340.6(a) states that the statute of limitations in a legal malpractice action commences only after the plaintiff has suffered "actual injury." *Id.* at 588 n.1, 904 P.2d at 1208 n.1, 46 Cal. Rptr. 2d at 597 n.1. The primary issue in the present case was therefore when the "actual injury" arose. *Id.* at 588, 904 P.2d at 1208, 46 Cal. Rptr. at 597.

Sustaining Paul's demurrer, the trial court held that Adams' malpractice action was untimely because Adams had suffered "actual injury" when the statute of limitations expired in her wrongful death action. *Id.* at 587, 904 P.2d at 1207-08, 46 Cal. Rptr. 2d at 596-97.

Affirming the trial court's holding, but using a different rationale, the court of appeal reasoned that Adams suffered "actual injury" when she was forced to oppose

this issue, the court looked closely at the policy and history surrounding the relevant sections of the California Code of Civil Procedure.³ Overruling the holding of the court of appeal, the California Supreme Court held that the time when a plaintiff has suffered an "actual injury" that will commence the statute of limitations in a legal malpractice cause of action is a question of fact for the trier of fact to determine, unless the facts are undisputed wherein the determination is a matter of law.⁴

II. TREATMENT

A. Majority Opinion

Justice Arabian, writing for the majority, began the opinion by examining California Code of Civil Procedure section 340.6(a)(1).⁵ Section 340.6(a)(1) defines the statutory period in which a legal malpractice cause of action⁶ must be filed, and tolls⁷ the commencement of the stat-

Paul's motion for summary judgment. *Id.* at 587, 904 P.2d at 1208, 46 Cal. Rptr. 2d at 597.

3. *Adams*, 11 Cal. 4th at 587-93, 904 P.2d at 1208-12, 46 Cal. Rptr. 2d at 596-601.

4. *Id.* at 588, 904 P.2d at 1208, 46 Cal. Rptr. 2d at 597.

5. California Code of Civil Procedure § 340.6(a)(1) provides:

An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: (1) The plaintiff has not sustained actual injury

CAL. CIV. PROC. CODE § 340.6(a) (West 1982 & Supp. 1996).

6. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 732 (9th ed. 1988 & Supp. 1994) (describing the elements of a negligence cause of action); Martin T. Fletcher, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 773 (1968) ("[T]he elements necessary to establish a prima facie case of medical or legal malpractice are the same as those necessary to state a cause of action for ordinary, non-professional negligence").

7. See generally 54 C.J.S. *Limitations of Actions* § 85 (1988 & Supp. 1995) (describing the tolling of the statute of limitations); 51 AM. JUR. 2D *Limitation of Actions* § 107 (1970 & Supp. 1993) (explaining when the period of limitation is tolled).

ute of limitations⁸ period in such cases until "actual injury" has been determined.⁹

Seeking to resolve whether the "actual injury" should be determined as a question of fact or a matter of law, Justice Arabian examined the policy,¹⁰ history,¹¹ and precedent¹² associated with the statute, and ultimately stated that while the issue of "actual injury" generally raises a question of fact,¹³ the court may resolve the issue of "actual injury" when material facts are undisputed and the plaintiff suffered "manifest and palpable injury" as a matter of law.¹⁴

8. See generally 54 C.J.S. *Limitations of Actions* § 172 (1988 & Supp. 1996) (describing how the statute of limitations applies in legal malpractice); 51 AM. JUR. 2D *Limitation of Actions* § 2 (1970 & Supp. 1993) (providing a general overview of the statute of limitations); 43 CAL. JUR. 3D *Limitation of Actions* § 23 (1978 & Supp. 1996) (describing the commencement of the statute of limitations); 7 CAL. JUR. 3D *Attorneys at Law* § 340 (1989 & Supp. 1995) (explaining how attorneys use the statute of limitations as a defense); Debra T. Landis, Annotation, *What Statute of Limitations Governs Damage Action Against Attorney for Malpractice*, 2 A.L.R. 4TH 284 (1980 & Supp. 1995) (discussing when the statute of limitations commences in malpractice lawsuits); Laura C. Hart et al., *From Offense to Defense: Defending Legal Malpractice Claims*, 45 S. CAL. L. REV. 771, 781-84 (1994) (discussing the use of the statute of limitations to bar an attorney malpractice action).

9. *Adams*, 11 Cal. 4th at 588, 904 P.2d at 1208, 46 Cal. Rptr. 2d at 597.

10. The myriad of circumstances under which statute of limitations issues may arise in missed statute cases sharply illustrates the practicality of applying the prevailing 'question-of-fact' rule to the determination of when actual injury occurs. The number of potential variables, which do not necessarily follow a set pattern, precludes defining the point of harm as a fixed point or event because reasonable application becomes too problematic (citations omitted). The issue may be resolved 'as a matter of law' only if the facts are undisputed.

Id. at 588-89, 904 P.2d at 1208, 46 Cal. Rptr. 2d at 597.

11. "[W]e find nothing in the language or history of section 340.6(a)(1) indicating the Legislature intended, in codifying decisional law, to alter the well-settled principle that in legal malpractice actions statute of limitations issues, including injury, are at base factual inquiries." *Id.* at 588, 904 P.2d at 1208, 46 Cal. Rptr. 2d at 597.

12. *Id.*; see *McCann v. Welden*, 153 Cal. App. 3d 814, 824, 200 Cal. Rptr. 703, 708-09 (1984) (holding that because actionable harm may occur at any one of several points in time subsequent to an attorney's negligence, the determination is generally a question of fact); *Budd v. Nixen*, 6 Cal. 3d 195, 202, 491 P.2d 433, 438, 98 Cal. Rptr. 849, 854 (1971) (establishing the "actual injury" tolling provision from which California Code of Civil Procedure § 340.6 is derived).

13. See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 749 (9th ed. 1988 & Supp. 1994) (providing examples of what constitutes a question of fact).

14. *Adams*, 11 Cal. 4th at 588-93, 904 P.2d at 1208-12, 46 Cal. Rptr. 2d at 597-601. See generally 7 AM. JUR. 2D *Attorneys at Law* § 224 (1980 & Supp. 1996) (discussing the importance of distinguishing between questions of law and fact in attorney malpractice actions); 7 CAL. JUR. 3D *Attorneys at Law* § 343 (1989 & Supp. 1996) (discussing questions of law and fact in attorney malpractice causes of action); 6 B.E. WITKIN,

Justice Arabian next sought to explain how and when "actual injury" arises as a result of attorney malpractice.¹⁵ To aid in his explanation, Justice Arabian broke "actual injury" into two categories.¹⁶ The first category deals with facts similar to the instant case, where the attorney failed to file the client's claim or cause of action within the time required by the statute of limitations.¹⁷ In these "missed statute" cases, the general rule¹⁸ states that the statute of limitations will begin at the time the statutory period lapses.¹⁹ Hence, in the instant case, Adams would argue that the "actual injury" occurred when the statute of limitations expired in her wrongful death action.²⁰

If the attorney is negligent in some manner other than missing the statute of limitations, determining when "actual injury" occurs and the statute of limitations commences for the attorney malpractice cause of action is contingent upon a determination²¹ that the plaintiff suffered

SUMMARY OF CALIFORNIA LAW, *Torts* § 967 (9th ed. 1988 & Supp. 1994) (explaining the difference between questions of law and fact).

15. *Adams*, 11 Cal. 4th at 589-91, 904 P.2d at 1209-10, 46 Cal. Rptr. 2d at 598-99. See generally 7 CAL. JUR. 3D *Attorneys at Law* § 340 (1989 & Supp. 1996) (describing certain acts that constitute attorney malpractice); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 859 (9th ed. 1988 & Supp. 1996) (describing relationships that give rise to a duty); Steven H. Felderstein, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L.J. 795 (1973) (discussing reform in the area of legal malpractice); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994) (detailing the prevalence of legal malpractice); *Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547 (1994) (discussing legal malpractice in relation to a lawyer's responsibilities).

16. *Adams*, 11 Cal. 4th at 589-91, 904 P.2d at 1209-10, 46 Cal. Rptr. 2d at 598-99.

17. *Id.* at 589-90, 904 P.2d at 1209-10, 46 Cal. Rptr. 2d at 598-99.

18. There are a few exceptions to this general rule. For example, supposing that an attorney failed to commence an action for the client against a third party within the time required by the applicable statute of limitations, determination of "actual injury" may require resolution of factual issues such as which limitation period applies to the third party claim and whether the third party waived or would be estopped to assert a defense based on expiration of the limitations period." *Id.* at 596, 904 P.2d at 1214, 46 Cal. Rptr. 2d at 603 (Kennard, J., concurring). See *infra* note 27.

19. *Adams*, 11 Cal. 4th at 589-91, 904 P.2d at 1209-10, 46 Cal. Rptr. 2d at 598-99. "[T]he plaintiff suffers actual harm at the time the statutory period lapses because, assuming the claim was otherwise viable, the right and/or remedy of recovery on the action has been substantially impaired." *Id.* at 589, 904 P.2d at 1209, 46 Cal. Rptr. 2d at 598.

20. *Id.* at 588, 904 P.2d at 1208, 46 Cal. Rptr. 2d at 597. The supreme court reversed the judgment of the court of appeal, and remanded the case to the trial court for further proceedings consistent with the present opinion. *Id.* at 593, 904 P.2d at 1212, 46 Cal. Rptr. 2d at 601.

21. In legal malpractice actions involving contingent or speculative harm, "the de-

“definite and certain injury”²² or more than nominal or insubstantial damages.”²³

B. Justice Kennard’s Concurring Opinion

In a separate concurring opinion, Justice Kennard sought to expand on the holding propounded by the majority.²⁴ First, Justice Kennard agreed with the majority that the “actual injury” determination is generally a question of fact in legal malpractice cases.²⁵ Next, seeking to clarify the term “actual injury,” Justice Kennard noted the significance of *Budd v. Nixen*,²⁶ which provides the analytical framework for making the “actual injury” determination in all attorney malpractice cases.²⁷ Lastly, Justice Kennard discussed the profound significance that the expiration of the statute of limitations can have on a third party claim.²⁸

C. Justice Lucas’ Dissenting Opinion

In his dissent, Justice Lucas criticized the majority for refusing to make an express determination as to when the plaintiff in a legal malpractice action has suffered “actual injury.”²⁹ As a result of the majority’s nonconclusive determination, Justice Lucas argued that the trier of fact in future attorney malpractice cases will have no criteria by which to determine when “actual injury” occurred.³⁰ For these reasons,

termination of actual injury does not necessarily depend upon or require some form of final adjudication, as by judgment or settlement.” *Id.* at 591, 904 P.2d at 1210, 46 Cal. Rptr. 2d at 599. *See generally* 40 CAL. JUR. 3D *Judgments* § 1 (1995) (describing the fundamental principles of judgments).

22. “[T]he fact of damage rather than the amount is the relevant consideration.” *Adams*, 11 Cal. 4th at 589, 904 P.2d at 1209, 46 Cal. Rptr. 2d at 598.

23. *Id.* at 590-91, 904 P.2d at 1210, 46 Cal. Rptr. 2d at 599. *See generally* Ronald E. Mallen, *Limitations and the Need for “Damages” in Legal Malpractice Actions*, 60 DEF. COUNS. J. 234 (1993) (explaining how actual damage must arise before the statute of limitations commences in legal malpractice actions).

24. *Adams*, 11 Cal. 4th at 594, 904 P.2d at 1212, 46 Cal. Rptr. 2d at 601 (Kennard, J., concurring).

25. *Id.* (Kennard, J., concurring).

26. 6 Cal. 3d 195, 202, 491 P.2d 433, 98 Cal. Rptr. 849 (1971); *see supra* note 12.

27. *Adams*, 11 Cal. 4th at 594-96, 904 P.2d at 1213-14, 46 Cal. Rptr. 2d at 602-03 (Kennard, J., concurring).

28. *Id.* at 596-99, 904 P.2d at 1214-16, 46 Cal. Rptr. 2d at 603-05 (Kennard, J., concurring). The third party refers to the defendant whom the plaintiff originally sought to sue, but was unable to sue because of attorney malpractice committed either by failing to commence an action for the client against the third party within the time required by the applicable statute of limitations, or by misadvising the client about that requirement. *Id.* (Kennard, J., concurring); *see supra* note 18.

29. *Adams*, 11 Cal. 4th at 599-600, 904 P.2d at 1216, 46 Cal. Rptr. 2d at 605 (Lucas, C.J., dissenting).

30. *Id.* at 602-03, 904 P.2d at 1218-19, 46 Cal. Rptr. 2d at 607-08 (Lucas, C.J., dis-

Justice Lucas would have held that where an attorney is using a statute of limitations defense to avoid being sued for legal malpractice, the plaintiff's "actual injury" occurs "at the time of disposition of the client's underlying lawsuit, whether by dismissal, settlement or entry of adverse judgment."³¹

III. IMPACT & CONCLUSION

Rather than defining "actual injury" by expressly determined criteria, the majority in *Adams* held that the determination of when a plaintiff has suffered actual damages in a legal malpractice claim for the purpose of commencing the statute of limitations is generally a question of fact.³² *Adams* therefore promotes judicial economy by resolving prior conflicting decisions within the trial and appellate courts. More importantly, *Adams*' clarification of the current state of the law is essential to future malpractice litigation, particularly as the incidence of attorney malpractice claims continues to rise at unprecedented levels.

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senting).

31. *Id.* at 605, 904 P.2d at 1220, 46 Cal. Rptr. 2d at 609 (Lucas, C.J., dissenting).

32. *Id.* at 593, 904 P.2d at 1212, 46 Cal. Rptr. 2d at 601.

IX. PRODUCTS LIABILITY

Landlords and hotel proprietors may not be held strictly liable for injuries to their tenants or guests caused by defects in the premises: Peterson v. Superior Court.

I. INTRODUCTION

In *Peterson v. Superior Court*,¹ the California Supreme Court considered whether a hotel guest who is injured on the premises may sue the hotel proprietor in strict products liability for an alleged defect in the premises.² The court held that strict liability was not an appropriate standard because the proprietor of a hotel is “not a part of the manufacturing or marketing enterprise of the allegedly defective product.”³ In so holding, the supreme court overruled its previous decision in *Becker v. IRM Corp.*,⁴ in which it held that strict liability was an appropriate standard in a products liability claim against a residential landlord.⁵ The

1. 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836 (1995). Justice George wrote the unanimous opinion, in which Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and Werdegar concurred. *Id.* at 1188, 1210, 899 P.2d at 906, 921, 43 Cal. Rptr. 2d at 837, 852.

2. *Id.* at 1188, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837. The plaintiff, Nadine Peterson, brought an action against the owners and the operator of the Palm Springs Marquis Hotel after she sustained serious injuries on the premises. The plaintiff alleged that she sustained these injuries when she slipped and fell in the bathtub while taking a shower at the hotel. *Id.* She alleged that the bathtub was defective because it was very slippery and did not contain any “safety measures” such as ‘anti-skid surfaces, grab rails, rubber mats, or the like.’ *Id.* The manufacturer of the bathtub, who was also a named defendant in the action, settled with the plaintiff. *Id.*

Before trial, the owners of the hotel and the operator of the hotel moved to preclude the use of the strict liability theory during the case. *Id.* at 1189, 899 P.2d at 906-07, 43 Cal. Rptr. 2d at 837-38. The court granted the motion. *Id.* The case went to trial, but was declared a mistrial for an unrelated reason. *Id.* at 1190, 899 P.2d at 907, 43 Cal. Rptr. 2d at 838. The trial court confirmed that the strict liability cause of action would not be allowed in the retrial. *Id.* The court of appeal denied the plaintiff’s subsequent petition for a writ of mandate or prohibition. *Id.* The plaintiff then petitioned the California Supreme Court, which ordered the court of appeal to grant the writ. *Id.* The court of appeal issued a writ of mandate forcing the trial court to allow the strict liability cause of action in the retrial. *Id.* The defendants then sought review in the California Supreme Court. *Id.*

3. *Id.* at 1188, 899 P.2d at 906, 43 Cal. Rptr. 2d at 836.

4. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), *overruled by Peterson*, 10 Cal. 4th 1185, 899 P.2d 905, 43 Cal. Rptr. 2d 836.

5. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219. In *Becker*, the plaintiff alleged that he was injured by the shower door in his apartment. *Id.* at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214. The plaintiff alleged that the door was a defect in the premises because it was made of untempered glass and he sued his landlord. *Id.* The court ruled that “a landlord engaged in the business of leased dwellings is

court determined that its decision in *Becker* represented an unwarranted extension of the doctrine of "products liability" and reversed the court of appeal's decision to the extent that it permitted the plaintiff to proceed on a strict liability theory.⁶

II. TREATMENT

The supreme court in *Peterson* began by re-examining its decision in *Becker v. IRM Corp.*⁷ In *Becker*, the court had ruled that a landlord makes an "implied assurance of safety"⁸ when he rents his premises, and therefore, he is strictly liable for any damages arising out of a latent defect in the premises that existed on the day the premises were leased.⁹

The *Peterson* court next discussed the fundamental principles of strict liability.¹⁰ First, the court stated that it is a well established principle that retailers could be held strictly liable in a products liability case because, like manufacturers, they are in the business of distributing goods to the public at large.¹¹ Second, the court noted that the retailer is also in a position to pressure the manufacturer to make safe products.¹² In addition, the costs of production can be allocated equally between the retailer and the manufacturer to spread any added safety cost.¹³ Justice George noted however that, by analogizing a landlord to a retailer, the *Becker* court failed to recognize the fact that many of the policy arguments which justify a strict liability standard to be imposed upon a retail-

strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were leased to the tenant." *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

6. *Peterson*, 10 Cal. 4th at 1210, 899 P.2d at 921, 43 Cal. Rptr. 2d at 852.

7. *Id.* at 1190-95, 899 P.2d at 907-10, 43 Cal. Rptr. 2d at 838-41.

8. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.

9. *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

10. *Peterson*, 10 Cal. 4th at 1188-1210, 899 P.2d at 906-21, 43 Cal. Rptr. 2d at 837-52.

11. *Id.* at 1198, 899 P.2d at 912-13, 43 Cal. Rptr. 2d at 843-44. See generally 50 CAL. JUR. 3D *Products Liability* § 30 (1985 & Supp. 1995) (providing information on strict liability in products liability cases); Virginia E. Nolan & Edmund Ursin, *Foreword, Symposium on the American Law Institutes' Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213 (1993) (discussing products liability reform); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) (tracking judicial changes in products liability); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) (analyzing the recent changes in products liability law).

12. *Peterson*, 10 Cal. 4th at 1198, 899 P.2d at 912-13, 43 Cal. Rptr. 2d at 843-44.

13. *Id.*

er do not apply to cases involving landlords or hotel proprietors.¹⁴ For instance, a landlord usually cannot pressure a manufacturer to make safe products, and hotel proprietors would have to pay almost all the cost of insuring a completely safe room because, unlike retailers, they cannot charge a higher rate for safety.¹⁵

In addition, the supreme court noted that the implied warranty of habitability does not stretch so far as to impose strict liability for injuries to a tenant because it would place "an undue burden on the landlord, regardless of fault or ability to avoid injury."¹⁶ Instead, the purpose of the implied warranty of habitability is to prevent inaction by landlords when they are aware of a problem and to encourage landlords to take reasonable steps to discover problems, not to fix problems of which they could not possibly be aware.¹⁷

The supreme court noted that strict liability might apply to landlords and hotel proprietors where the landlord or hotel proprietor participated in the construction of the premises or product.¹⁸ In *Peterson*, however, there were no facts alleged which would prove that the hotel proprietor participated in the construction of the hotel or the bathtub.¹⁹ Therefore, the supreme court reversed the court of appeal's decision to the extent that it directed the superior court to apply the standard of strict liability, and affirmed the decision as to all other respects.²⁰

III. IMPACT & CONCLUSION

After the decision in *Becker*, courts were forced to apply the strict liability standard to product liability claims involving a landlord or a hotel proprietor when there was injury to a tenant or guest.²¹ The adverse reaction to this decision caused the California Supreme Court to re-examine its decision, and in *Peterson*, the supreme court held that a

14. *Id.* at 1198-99, 899 P.2d at 913, 43 Cal. Rptr. 2d at 844.

15. *Id.* at 1199, 899 P.2d at 913, 43 Cal. Rptr. 2d at 844.

16. *Id.* at 1204, 899 P.2d at 916-17, 43 Cal. Rptr. 2d at 847-48.

17. *Id.*

18. *Id.* at 1200, 899 P.2d at 913-14, 43 Cal. Rptr. 2d at 844-45. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1290 (9th ed. 1988) (reviewing the general rules regarding which types of plaintiffs and defendants are subject to strict liability).

19. *Peterson*, 10 Cal. 4th at 1200 & n.9, 899 P.2d at 914 & n.9, 43 Cal. Rptr. 2d at 845 & n.9.

20. *Id.* at 1210, 899 P.2d at 921, 43 Cal. Rptr. 2d at 852.

21. *See* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 610 (9th ed. 1987 & Supp. 1996) (discussing recent applications of the *Becker* holding); Emily M. Haliday, Comment, *California's Approach to Landlord Liability for Tenant Injuries: Strict Liability Reexamined*, 26 U.C. DAVIS L. REV. 367 (1993) (discussing burdens the *Becker* case places on landlords).

negligence standard, rather than a strict liability standard is the appropriate standard in such circumstances.²² Hence, parties that are not within the manufacturing or marketing enterprise of a product may no longer be held strictly liable for damages caused by defects in the product.²³ However, landlords or hotel proprietors that participate in the construction of the premises or product are deemed to be part of the enterprise and can be held strictly liable.²⁴

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22. *Peterson*, 10 Cal. 4th at 1188-89, 899 P.2d at 906, 43 Cal. Rptr. 2d at 837.

23. See Douglas H. Cook, *Negligence or Strict Liability? A Study in Biblical Tort Law*, 13 WHITTIER L. REV. 1 (1992) (examining the differences between the negligence and strict liability standards); see also 42 CAL. JUR. 3D *Landlord and Tenant* § 98 (1978 & Supp. 1996) (listing other landlord responsibilities).

24. *Peterson*, 10 Cal. 4th at 1200, 899 P.2d at 913-14, 43 Cal. Rptr. 2d at 844-45.

SUMMARIES

I. Community Property

When an employee spouse continues to work after the date upon which retirement benefits become due and the nonemployee spouse chooses immediate payment of their share of the benefits, the nonemployee spouse is entitled to obtain payments from the date on which he or she files a motion seeking immediate payment.

In re Marriage of Carlos, Supreme Court of California, decided May 30, 1996, 13 Cal. 4th 381, 916 P.2d 476, 53 Cal. Rptr. 2d 81.

Facts. In 1978, after twenty-one years of marriage, Carlos and Lois Cornejo were divorced. Carlos worked for the San Francisco Unified School District and belonged to the State Teachers' Retirement System. On May 16, 1989, he was sixty years old and eligible for retirement. However, Carlos continued to work, forestalling his retirement benefit payments to which Lois was entitled to a portion thereof. On August 3, 1992, Lois wrote a letter to Carlos stating her intent to file a motion to amend the final judgment of their divorce to account for her community property interest in his retirement benefits. On March 31, 1993, Lois filed the motion and sought immediate payments of benefits due to her retroactive to May 16, 1989. On October 14, 1996, the trial court modified the final judgment to reflect Lois' share of the retirement benefits and ordered payments to be made retroactive to May 16, 1989. Carlos appealed the portion of the judgment directing the retroactive payments. The appellate court affirmed the trial court's holding.

Holding. Reversing the appellate court on the issue of when a nonemployee spouse is entitled to receive payments from a working former spouse's retirement plan, the supreme court held that payments begin from the date of filing of a motion for such payment, not from the date of the employee spouse's eligibility to retire. The court stated that choosing the filing date provided a bright line for courts to follow, clearly communicated the nonemployee spouse's choice to commence payments, and made clear to the employee spouse that payments could be avoided by retiring.

II. Criminal Law

- A. **Statute authorizing serious felony enhancement for prior conviction of burglary of "inhabited dwelling house" encompassed burglary of inhabited vessel at time of enactment of statute.**

People v. Cruz, Supreme Court of California, decided August 5, 1996, 13 Cal. 4th 764, 919 P.2d 731, 55 Cal. Rptr. 2d 117.

Facts. The defendant was convicted of two counts of second degree robbery and one count of possession of a firearm by an ex-felon. In a second proceeding, the jury found that the defendant had been convicted of a prior first degree burglary. At a third proceeding, the jury convicted the defendant for one count of escape. At the final proceeding, the court revoked the defendant's probation for the first burglary. The defendant received a twelve-year, eight month sentence which included a five-year enhancement for the prior first degree burglary. On appeal, the defendant argued that under the California Penal Code, his prior conviction should not have been considered a "prior serious felony." The defendant reasoned that because it could have been a burglary of a vessel it did not qualify under the Code.

Holding. Reversing the court of appeal, the supreme court held that the phrase "inhabited dwelling house" as used in California Penal Code section 1192.7(c)(18) is to be broadly construed and includes inhabited vessels. While section 460 (which divides burglary into degrees) specifically addresses inhabited vessels, its absence in section 1192.7(c)(18) does not make its definition of burglary as a serious felony less inclusive. The court stated that legislative history demonstrates the intent that section 1192.7(c)(18) conform with the definition of first degree burglary in section 460. Furthermore, the court reasoned that the danger of violence in an inhabited vessel is the same as that in a home or any other living quarters. Thus, burglary of an inhabited vessel should likewise be treated as a serious felony.

- B. **Because the defendant's initial display of a firearm contributed to the completion of an essential element of subsequent sex crimes, the defendant used the firearm within the meaning of Penal Code section 12022.3(a), which provides for sentence enhancements when the person uses a firearm or other deadly weapon in the commission of the crime.**

People v. Masbruch, Supreme Court of California, decided August 26, 1996, 13 Cal. 4th 1001, 920 P.2d 705, 55 Cal. Rptr. 2d 760.

Facts. The defendant was convicted of rape, sodomy, burglary, two counts of residential robbery, two counts of false imprisonment, and two counts of torture for which the defendant received a sentence which included two four-year enhancements under Penal Code section 12022.3(a). Section 12022.3(a) provides for sentence enhancements for the "use" of a firearm in the commission of a crime. Although the defendant conceded that such enhancements were appropriate for the theft offenses, the defendant challenged the application of the enhancements pertaining to the multiple sex offenses on the basis that the initial display of the firearm prior to the commission of the sex crimes did not constitute a use of the firearm within the statutory meaning.

Holding. Affirming the decision of the court of appeal, the supreme court held that the defendant's initial display of the firearm constituted a use of the firearm within the meaning set forth in section 12022.3(a) because the display of the firearm aided in the completion of an essential element of the sex crimes. Accordingly, the court affirmed the imposition of section 12022.3(a) enhancements for those crimes. Furthermore, the court stated that its conclusion furthered the legislative intent of section 12022.3(a)'s enhancements which is to deter the use of firearms in the commission of violent crimes.

- C. **California Penal Code section 969a allows the prosecution to amend a "pending indictment or information" to allege prior convictions after the defendant has been convicted but before he has been sentenced.**

People v. Valladoli, Supreme Court of California, decided July 18, 1996, 13 Cal. 4th 590, 918 P.2d 999, 54 Cal. Rptr. 2d 695.

Facts. The defendant was charged with one count of sale of heroin and cocaine. The original complaint contained ten enhancement allegations which were mistakenly crossed out due to a clerical error. After the defendant had been found guilty at trial, the prosecution made a motion to amend the information to allege the prior felony convictions. The defense council objected arguing that information could not be amended after the verdict had been rendered because the information was no longer "pending" as required by California Penal Code section 969a, which governs amendments of prior convictions. The trial court allowed the information to be amended. The jury found the defendant had three prior felony convictions and added an additional seven years to his five year sentence. The court of appeal affirmed.

Holding. Affirming the decision of the court of appeal, the supreme court held that the language "pending information or indictment" allows the prosecution to amend after the verdict but before sentencing. The supreme court noted that the language employed by California Penal Code section 969a is similar to Penal Code section 969 ½ which governs amendments for prior convictions in the cases where the defendant pleads guilty. The supreme court found these to be parallel statutes because a guilty plea and a guilty verdict are tantamount for most purposes. The court recognized that because these provisions are parallel statutes they must be construed together. The court therefore concluded that the intent of the legislature was to allow informations and indictments to be amended up until sentencing.

III. Eminent Domain

Under the Eminent Domain Law of California, a provision of a lease which provides for termination in the event of

acquisition for public use does not prevent the lessee from receiving compensation for the taking of his leasehold or other property.

Vista v. Fielder, Supreme Court of California, decided July 25, 1996, 13 Cal. 4th 612, 919 P.2d 151, 54 Cal. Rptr. 2d 861.

Facts. The City of Vista, as the plaintiff, brought suit to condemn the property of the defendants in order to broaden and realign the adjoining street. The Johnsons owned the property in fee simple absolute and executed a lease to defendant Todo, Inc. doing business as Bittners Restaurant Equipment. Clause 5 of the lease provided that upon condemnation of the property through no fault of the lessee, the lease would terminate. The lessee sued the City of Vista for damages to the "goodwill" of their business. The superior court granted the city's motion for summary judgment, and the court of appeal reversed and remanded. On remand, the superior court made essentially the same determination after a bench trial, holding that Clause 5 operated to deprive the lessee of any right to compensation. The court of appeal affirmed, basing its decision on the "majority rule under the general common law that a provision of a lease that declares that the lease terminates . . . deprives the lessee of any right he may have to compensation. . . ."

Holding. The Supreme Court of California reversed the decision of the court of appeal. The Court stated that the Eminent Domain Law, title 7 of part 3 of the Code of Civil Procedure, commencing with section 1230.010, generally entitles a lessee to "compensation for the value of his leasehold interest . . . and any of his property taken . . . including goodwill." In addition, the Eminent Domain Law provides that "termination of a lease . . . does not preclude a lessee's recovery of compensation." Therefore, the court of appeal erred in its determination of the effect of Clause 5. Furthermore, the California Supreme Court stated that the court of appeal did not have the authority to apply the "majority rule under the general common law" because the rule provided by the Eminent Domain Law is directly contrary. Therefore, the California Supreme Court held that under the Eminent Domain Law of California, a provision of a lease which provides for termination in the event of acquisition for public use does not prevent the lessee from receiving compensation for "the taking of his leasehold or other property."

IV. Hearsay

When proving convictions of "prior serious felonies," excerpts from a preliminary hearing transcript are admissible under the former testimony hearsay exception because although the witnesses may be actually available to testify, they are "unavailable" under controlling case law; however, statements from a probation report that fail to fit under any hearsay exception are inadmissible.

People v. Reed, Supreme Court of California, decided April 25, 1996, 13 Cal. 4th 217, 914 P.2d 184, 52 Cal. Rptr. 2d 106.

Facts. The defendant was charged and convicted of second degree robbery. In order to increase the defendant's sentence under California Penal Code, section 667(a), which allows a five-year increase in sentences for each prior serious felony, the prosecution presented evidence of the defendant's prior serious felonies in the form of two documents, a preliminary hearing transcript and a probation report excerpt. The trial court admitted the evidence, found a prior serious felony, and imposed a five-year sentence enhancement. The court of appeal affirmed the sentence enhancement, finding that the preliminary transcript fell within a statutory exception to the hearsay ban and that admission of the probation report was harmless error.

Holding. Affirming the decision of the court of appeal, the California Supreme Court held that the preliminary transcript fell within the former testimony hearsay exception because: (1) the preliminary transcript was part of the record of the prior conviction, which the trier of fact is limited to in formulating the substance of the prior conviction by *People v. Guerrero*, 44 Cal. 3d 343, 748 P.2d 1150, 243 Cal. Rptr. 688 (1988); (2) the preliminary transcript itself was within the official records exception to the hearsay prohibition; and (3) the statements made by the victims fell within the former testimony exception to the hearsay ban because although they were technically available to testify in the instant proceeding, they were barred from testifying as to the prior convictions under *Guerrero*.

The court further held that the portions of the probation report were inadmissible hearsay, as they did not fit within any of the hearsay exceptions. Nevertheless, the supreme court agreed with the appellate

court that admission of the probation report excerpts at the trial court level was merely duplicative of the preliminary transcript evidence, and thus the error was harmless.

V. Lotteries

The California State Lottery may not operate the game Keno because it does not meet the statutory definition of a "lottery game" or that of a "lottery" in accordance with the California State Lottery Act.

Western Telcon, Inc. v. California State Lottery, Supreme Court of California, decided June 24, 1996, 13 Cal. 4th 475, 917 P.2d 651, 53 Cal. Rptr. 2d 812.

Facts. After the California State Lottery began operating the game Keno, Western Telcon and the California Horsemen's Benevolent & Protective Association brought an action against the California State Lottery (CSL), seeking a declaration that Keno is illegal, as well as an injunction against its further operation. In Keno, participants attempt to match between one and ten numbers to a set of twenty numbers randomly selected, in exchange for a payoff. The trial court granted CSL's summary judgment motion, permitted the California-Nevada Indian Gaming Association (CNIGA) to intervene as a defendant, and entered judgment for the defendants CSL and CNIGA. The court of appeal affirmed, holding that CSL Keno "fully complied" with the provisions of the initiative measure authorizing the state lottery. The California Supreme Court granted the plaintiffs' and CSL's petitions for review.

Holding. Reversing the decision of the court of appeal, the supreme court held that CSL Keno is not an authorized lottery game. The court referred to the California State Lottery Act, which allows CSL to conduct only lotteries. The court reasoned that CSL may not run any game that does not meet the statutory definition of a "lottery game" or a "lottery." The court stated that a lottery is a prize which is distributed by chance and has been paid for with consideration. In a lottery, the prize will always be distributed, and thus, a lottery operator does not have a stake in the outcome of the draw.

The court stated that CSL Keno was clearly a house banking game, where there is a wager between two parties which may be won by either party. The court reasoned that in the game of Keno, each player places a wager on the outcome of the draw of random numbers, and either the player will win, or CSL will keep the wager. Because the payoffs are de-

terminated by the draw, the Keno operator has a stake in the outcome. Thus, the court held that CSL Keno was not a lottery, and CSL is not authorized to conduct the game.

VI. Public Aid and Welfare

- A. **California Welfare and Institutions Code section 14170(a)(1) requires the Department of Health Services to challenge the truth or accuracy of providers' cost reports within three years, but does not establish a time limitation governing the final determination of the reimbursement amount due providers.**

Robert F. Kennedy Medical Center v. Belshe, Supreme Court of California, decided August 1, 1996, 13 Cal. 4th 748, 919 P.2d 721, 55 Cal. Rptr. 2d 107.

Facts. The plaintiff, Robert F. Kennedy Medical Center, is a health services provider under the Medi-Cal program, the state's implementation of the national Medicaid program. The plaintiff sought a writ to rescind the Department of Health Services' final settlement determination of the amount due to the plaintiff for Medi-Cal reimbursement because notice of the determination was issued more than three years after the plaintiff submitted its cost reports. The Welfare and Institutions Code section 14170(a)(1) provides that cost reports "shall be considered true and correct unless audited or reviewed within three years" of submission. The plaintiff argued that this creates a three year period in which the department must determine the final amount of reimbursement based on the cost reports, i.e., the three year requirement applies to the entire reimbursement procedure. The Department argued that the three year limitation only forecloses the opportunity to challenge the veracity and accuracy of the cost reports. The dispute arose after the Department concluded that interim payments to the plaintiff during the determination of the final settlement had exceeded the amount of the final settlement and the Department sought to recoup those payments. The plaintiff's administrative hearing before the Department contesting the overpayment determination yielded the conclusion that the three year limit only applies to the determination of the accuracy of the reports, not the entire process. The plaintiff then filed a writ to rescind the ruling based on section

14170(a)(1) and Civil Procedure Code section 338, which establishes a time limitation on liabilities created by statute. The trial court rejected the plaintiff's petition but was reversed by the court of appeal.

Holding. Reversing the court of appeal and resolving a conflict between two divisions of the court of appeal, the supreme court held that the three year limitation is only applicable to the determination of the truth and accuracy of the cost reports and not to the entire reimbursement procedure. The court reached this conclusion for several reasons: first, the court interpreted the legislative intent through a "plain meaning" examination of the statute, emphasizing that the statutory provision in question only addresses truth and accuracy and not final settlements; second, the time limit existed prior to the state's implementation of a more restrictive reimbursement standard that necessarily resulted in delay, so applying the three year limit to the entire process would frustrate the legislature's intent to implement the new process; third, the existence of separate appellate processes for grievances arising from audits and from final settlements indicates the legislature's intent that they be examined separately; lastly, the Department has consistently interpreted the time limit as governing solely the audit process, and the legislature has impliedly endorsed this practice by continually amending and reenacting the statutory provision containing the time limitation without altering the language to indicate that the limitation applies to the entire reimbursement process. The supreme court therefore reversed the court of appeal, but remanded because the court of appeal never addressed the plaintiff's challenge to the final settlement under Civil Procedure Code section 338.

B. Under rule 1466(b) of the California Rules of Court, a juvenile court judge is not limited to making a determination of a change of circumstances only if a "sua sponte" condition exists. Additionally, a juvenile court judge is not barred from making a determination of a change of circumstances if a party makes a request to the court without filing a petition for modification on the ground of changed circumstances.

San Diego County Department of Social Services v. Superior Court, Supreme Court of California, decided August

8, 1996, 13 Cal. 4th 882, 919 P.2d 1329, 55 Cal. Rptr. 2d 396.

Facts. Upon petition by the San Diego County Department of Social Services (Department) in July 1992, the juvenile court declared that two children were within their jurisdiction due to sexual abuse. The court removed the children from their parents' home, placed them in foster care, and began family reunification services. In January 1995, after both parents made few attempts to contact their children, the court discontinued the reunification services and ordered long-term foster care as a permanent plan. In June 1995, after both parents still had made few efforts to contact their children, the Department found the children a prospective adoptive parent. In July 1995, the mother, her legal counsel, and the father's legal counsel made an appearance at the six-month status review. During the status review, the Department requested the court to schedule a hearing on adoption as the new permanent plan. The court, believing circumstances had changed due to the presence of the parents, conditioned the scheduling of a hearing on the Department's submittal of a petition for modification on the ground of changed circumstances. The court of appeal issued a writ of mandate ordering the juvenile court to vacate its order conditioning the hearing on the submission of a petition for modification.

Holding. Affirming the court of appeal, the supreme court disaffirmed *In re Nina P.*, 26 Cal. App. 4th 615, 31 Cal. Rptr. 2d 687 (1994), and held rule 1466(b) of the California Rules of Court does not limit a juvenile court judge from making a determination of a change of circumstances only in the presence of a sua sponte condition. The court also held that a juvenile court judge may make a determination of changed circumstances based on a request by a party without a petition for modification being filed. Further, the court held that neither act threatens due process rights because the petition is determined on the basis of "a change of circumstances at the threshold and entails a subsequent noticed hearing on the merits."

VII. Schools

California Education Code, section 44929.21(b), providing the reelection procedures for probationary teachers which a school district must follow, preempts any con-

flicting procedural protections to be set forth in a collective bargaining agreement.

Board of Education of the Round Valley Unified School District v. Round Valley Teachers Ass'n, Supreme Court of California, decided April 29, 1996, 13 Cal. 4th 269, 914 P.2d 193, 51 Cal. Rptr. 2d 115.

Facts. The School District (District) and the Teachers Association (Association) entered into a collective bargaining agreement, as permitted by California Government Code, sections 3540 through 3549.3. The agreement stated that any decision by the District not to reelect a probationary teacher for the following school year must satisfy two requirements: (1) a thirty-day notice requirement, and (2) specific reasons must be provided for the decision not to reelect the teacher. Pursuant to the collective bargaining agreement, just cause was required for a decision not to reelect probationary teachers.

The District's superintendent notified a probationary teacher that his contract would not be renewed without providing the teacher with specific reasons. Defendant Association filed a grievance alleging that the District had violated the reelection procedures under the collective bargaining agreement. Upon an arbitrator's finding that the District must comply with the procedures set forth in the agreement, the District sought to vacate the arbitration order by arguing that the agreement was preempted by California Education Code, section 44929.21(b), which allows for non reelection decisions without a hearing or statement of reasons. The District further alleged that section 44929.21(b) exclusively governed reelection procedures of probationary teachers. The trial court held the arbitrator exceeded its power by allowing the provisions of the collective bargaining agreement to supersede the California Education Code. The District requested the court of appeal to overturn the vacation of the arbitrator's award on the grounds that the procedural protections set forth in the agreement did not conflict with California Education Code, section 44929.21(b).

Holding. Reversing the decision of the court of appeal, the supreme court held that California Education Code, section 44929.21(b), preempts collective bargaining agreements from addressing reelection procedures of probationary teachers. Looking to the legislative intent of the statute, the court stated that where the legislature vests exclusive discretion in the District to determine whether to reelect a probationary teacher, such decisions may not be the subject of collective bargaining. The court further stated that the legislatures' findings that the state's interest in dis-

charging unsuitable teachers outweighs due process considerations of teachers must be validated by the courts. Since the legislature deemed that a reelection decision may be made without cause, the supreme court concluded that any agreement to the contrary is in direct conflict with the statute, and is therefore preempted.

The court further held that an arbitrator's award enforcing specific procedural provisions of a collective bargaining agreement may be subject to judicial review in limited circumstances. The court noted that strong public policy favors deference to arbitrator decisions. The court concluded, however, that an arbitrator's decision which is inconsistent with a party's statutory rights is an exceptional circumstance that justifies judicial review.

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