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California Supreme Court Survey - A Review of Decisions: February 1994-December 1994

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California Supreme Court Survey

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The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. BOUNDARIES

The agreed-boundary doctrine does not apply to resolve boundary disputes between adjoining landowners when a legal record of the true boundary exists, unless there is evidence that the landowners, or their successors in interest, were initially uncertain as to the true boundary and agreed to fix the boundary at a chosen location: **Bryant v. Blevins.**

I. INTRODUCTION

In *Bryant v. Blevins*,[1] the California Supreme Court addressed the issue of whether the "agreed-boundary" doctrine,[2] which allows adjoining landowners to establish a common boundary by agreement when the owners are uncertain as to the true boundary,[3] should be applied to resolve a boundary dispute between adjoining landowners where an available legal record fixed the true location of their boundary and the party relying on the doctrine introduced no evidence that the landowners, or

1. 9 Cal. 4th 47, 884 P.2d 1034, 36 Cal. Rptr. 2d 86 (1994). Justice George wrote the majority opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, and Werdegar concurred. *Id.* at 49-61, 884 P.2d at 1035-43, 36 Cal. Rptr. 2d at 87-95. Justice Mosk wrote a separate dissenting opinion in which Justice Kennard concurred. *Id.* at 61-68, 884 P.2d at 1043-47, 36 Cal. Rptr. 2d at 95-99 (Mosk, J., dissenting).

2. *See generally* 2 CAL. JUR. 3D *Adjoining Landowners* § 86 (1973 & Supp. 1994) (discussing the agreed-boundary doctrine). The agreed-upon boundary is binding on the parties and on their successors in interest. Bryant, 9 Cal. 4th at 54-55, 884 P.2d at 1039, 36 Cal. Rptr. 2d at 91 (citing Young v. Blakeman, 153 Cal. 477, 481-82, 95 P. 888, 890 (1908)); *see also* 2 CAL. JUR. 3D Adjoining Landowners § 94 (1973 & Supp. 1994) (discussing persons bound by the agreement).

3. *Bryant*, 9 Cal. 4th at 49-50, 884 P.2d at 1035, 36 Cal. Rptr. 2d at 87. If the agreed-boundary doctrine applies, the agreement establishes the location of the boundary line; *see* 2 CAL. JUR. 3D *Adjoining Landowners* § 93 (1973 & Supp. 1994). *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 160-164 (9th ed. 1987 & Supp. 1994) (discussing the use of the agreed-boundary doctrine); Stewart E. Sterk, Neighbors in American Land Law, 87 COLUM. L. REV. 55, 61 (1987) (discussing the doctrine as a means of resolving boundary disputes). The court explained that the doctrine provided stability to long-standing boundary agreements developed "'when surveys were notoriously inaccurate and the monuments and landmarks they described often could not be found in later years.'" *Bryant*, 9 Cal. 4th at 56, 884 P.2d at 1040, 36 Cal. Rptr. 2d at 92 (quoting Armitage v. Decker, 218 Cal. App. 3d 887, 903, 267 Cal. Rptr. 399, 408 (1990)).

their successors in interest, were initially uncertain as to the true boundary and agreed to fix the boundary at a chosen location.[4] The court declined to expand the agreed-boundary doctrine and held that "the doctrine is inapplicable under these circumstances."[5]

II. TREATMENT

A. *Majority Opinion*

The court began by noting that the agreed-boundary doctrine "constitutes a firmly established exception to the general rule that accords determinative legal effect to the description of land contained in a deed."[6] The purpose of the doctrine, the court explained, "'is to secure

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4. *Bryant*, 9 Cal. 4th at 50, 884 P.2d at 1035, 36 Cal. Rptr. 2d at 87. The plaintiffs and the defendants were adjoining landowners. *Id.* Their respective parcels resulted from the division of a lot situated within a subdivision located in Sacramento County. *Id.*

In 1909, the Brandenburgers developed and subdivided a one-square-mile tract of land into 64, ten-acre parcels. *Id.* The Brandenburgers conveyed the west one-half of "Lot 57" to the plaintiffs' predecessors in interest that same year. *Id.* at 51, 884 P.2d at 1036, 36 Cal. Rptr. 2d at 88. In 1965, the Brandenburgers conveyed the east one-half of "Lot 57" to the defendants' predecessors in interest. *Id.* The defendants acquired title to the eastern one-half of the lot in 1977 and the plaintiffs acquired title to the western one-half in 1986. *Id.*

In 1977, the defendants' predecessors in interest informed the defendants that the boundary line between the east and west halves of the lot was marked by a barbed wire fence. *Id.* Thereafter, the defendants took down the barbed wire fence and replaced it with a pipe panel fence. *Id.*

In 1986, the plaintiffs discovered that their enclosed lot was actually 4.9 acres as opposed to the 5.3 acres to which they were legally entitled. *Id.* As a result, the plaintiffs hired a surveyor who "discovered that the fence erected by [the] defendants . . . was not located on the true boundary between the eastern and western halves of the property." *Id.* at 51, 884 P.2d at 1036-37, 36 Cal. Rptr. 2d at 88-89. The survey identified a 0.4 acre strip of land between the true boundary line and the defendants' fence. *Id.* at 52, 884 P.2d at 1037, 36 Cal. Rptr. 2d at 89.

Unable to resolve the boundary suit with the defendants, the plaintiffs sued to recover the land. *Id.* The "[d]efendants cross-complained for declaratory relief to establish the boundaries, to quiet title, for a prescriptive easement, and for damages and fees." *Id.* Relying on the agreed-boundary doctrine, the trial court found for the defendants. *Id.* at 52, 884 P.2d at 1037, 36 Cal. Rptr. 2d at 89. The court of appeal affirmed the trial court's decision. *Id.*

5. *Id.* at 50, 884 P.2d at 1035, 36 Cal. Rptr. 2d at 87.

6. *Id.* at 54, 884 P.2d at 1038, 36 Cal. Rptr. 2d at 90. "[B]ecause [the] defendants claimed title to the disputed strip of land under the agreed-boundary doctrine, they had the burden of proving each element necessary to establish the agreed boundary . . . ." *Id.* at 55, 884 P.2d at 1039, 36 Cal. Rptr. 2d at 91.

repose, to prevent strife and disputes concerning boundaries, and [to] make titles permanent and stable.'"[7] However, the court cautioned that use of the doctrine is limited to instances where there is "'[1] an uncertainty as to the true boundary line, [2] an agreement between the [adjoining] owners fixing the line, and [3] acceptance and acquiescence in the line . . . for a period equal to the statute of limitations or [where] substantial loss would be caused by a change of its position.'"[8]

The court reasoned that the agreed-boundary doctrine must be narrowly applied because an expansive interpretation "would be . . . a significant step backward toward the days of unrecorded agreements and frontier justice, thereby injecting added uncertainty into this area of the law and spawning much needless litigation."[9] By contrast, the court explained, a narrow interpretation of the doctrine would encourage parties to rely on "title searches, deed descriptions, and other objectively certain methods" to resolve their boundary disputes, thereby keeping the parties out of court.[10]

The court concluded that when "existing legal records provide a basis for fixing the boundary," additional evidence "as to when, or why, the fence was built," is required to apply the agreed-boundary doctrine.[11] In the instant case, the court found no such evidence to support an inference "that the prior owners were uncertain as to the location of the true boundary or that they agreed to fix their common boundary at the location of a fence."[12] Accordingly, the court held that the defendants "failed

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7. *Id.* at 54, 884 P.2d at 1039, 36 Cal. Rptr. 2d at 91 (quoting Young v. Blakeman, 153 Cal. 477, 482, 95 P. 888, 890 (1908)).

8. *Id.* at 55, 884 P.2d at 1039, 36 Cal. Rptr. 2d at 91 (quoting Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 707, 336 P.2d 525, 528 (1959)); *see also* Armitage v. Decker, 218 Cal. App. 3d 887, 899, 267 Cal. Rptr. 399, 406 (1990) (enumerating the elements necessary for the application of the agreed-boundary doctrine); Mesnick v. Caton, 183 Cal. App. 3d 1248, 1255, 228 Cal. Rptr. 779, 781-82 (1986) (discussing the elements of the doctrine).

9. *Bryant*, 9 Cal. 4th at 60, 884 P.2d at 1042, 36 Cal. Rptr. 2d at 94. The court added that expansion of the doctrine "would add unnecessary expense and stress to the prospect of real property ownership in California." *Id.*

10. *Id.* The court pointed to advances in the accuracy of surveys and "verifiable recorded deeds" as justifications for its narrow application of the doctrine. *Id.* at 57, 884 P.2d at 1040, 36 Cal. Rptr. 2d at 92.

11. *Id.* at 58, 884 P.2d at 1041, 36 Cal. Rptr. 2d at 93.

12. *Id.* The court rejected the defendants' contention that the "long-standing presence of the fence" without objection was sufficient to support the inference "that the parties' predecessors in interest were uncertain as to the location of the true boundary separating the parcels, and agreed to rely upon the fence as the boundary." *Id.* at 53-54, 884 P.2d at 1038, 36 Cal. Rptr. 2d at 90. The court observed that there may be several possible reasons for building a fence apart from marking a boundary, including "aesthetics, the control of livestock, and the need to constrain young children from wandering too far from a residence." *Id.* at 59, 884 P.2d at 1042, 36 Cal. Rptr. 2d at 94. Further, the court explained several factors which may influence the

to establish the 'uncertainty' and 'agreement' required in order to establish an agreed boundary."[13]

B. Justice Mosk's Dissenting Opinion

Justice Mosk concluded that the agreed-boundary doctrine applied in the instant case.[14] He explained that the doctrine "is premised on the belief that the expectations and understandings of adjacent landowners regarding the location of their boundary are vitally important" and that courts should accord deference to these expectations.[15] Justice Mosk criticized the majority for "put[ting] too much faith in legal descriptions" of tracts of land.[16] He reasoned that the legal description was dependent upon each individual surveyor's level of skill and that each survey will not always "accurately reflect the 'true' boundary."[17]

Additionally, Justice Mosk reasoned that, through long-term acquiescence by a landowner regarding the existence of a "physical barrier" on his property, "it is reasonable to infer" that the landowner was initially uncertain as to the true boundary location and "that he has agreed, either expressly or impliedly, that [the physical barrier] represents the true

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"precise placement of the fence" apart from "the location of one's property line." *Id.* These factors include: terrain, landscaping, "the skill of the builder, and even the subsequent movement of the fence through disrepair, pressure exerted by livestock, or loss of lateral and subjacent support." *Id.*

13. *Id.* at 60, 884 P.2d at 1043, 36 Cal. Rptr. 2d at 95; *see also* Armitage v. Decker, 218 Cal. App. 3d 887, 901-02, 267 Cal. Rptr. 399, 407-08 (1990) (finding that acquiescence alone is not enough to support an inference of uncertainty and agreement); *cf.* Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 708, 336 P.2d 525, 528-29 (1959) (concluding that acceptance and acquiescence in a long-standing fence is sufficient to support an inference of uncertainty and agreement). *See generally* 2 CAL. JUR. 3D *Adjoining Landowners* §§ 87-89, 91-92 (1973 & Supp. 1994) (concluding issue in accord with *Bryant* and *Armitage*).

14. *Bryant*, 9 Cal. 4th at 67-68, 884 P.2d at 1047, 36 Cal. Rptr. 2d at 99 (Mosk, J., dissenting).

15. *Id.* at 62, 884 P.2d at 1043-44, 36 Cal. Rptr. 2d at 95-96 (Mosk, J., dissenting).

16. *Id.* at 62, 884 P.2d at 1044, 36 Cal. Rptr. 2d at 96 (Mosk, J., dissenting).

17. *Id.* at 63, 884 P.2d at 1044, 36 Cal. Rptr. 2d at 96 (Mosk, J., dissenting). Justice Mosk explained:

> In light of the complexity of the rules of surveying, the skill necessary to apply them correctly, and the possibility that different surveyors will reach different conclusions about the location of a boundary even if there is a precise description of its location in a deed or map, it is impractical to disregard adjacent landowners' long-standing agreements regarding the physical location of the boundary merely because such a document is available.

Id. at 64, 884 P.2d at 1045, 36 Cal. Rptr. 2d at 97 (Mosk, J., dissenting).

boundary."[18] Therefore, because there was long-term acceptance and acquiescence by the plaintiffs regarding the existence of the physical barrier in the instant case, Justice Mosk concluded that the agreed-boundary doctrine should apply.[19]

III. IMPACT AND CONCLUSION

In *Bryant*, the California Supreme Court expressed a clear preference with respect to boundary disputes—that the parties to the dispute consult existing legal records to determine their true boundary, rather than litigate the case in reliance upon the somewhat antiquated agreed-boundary doctrine.[20] However, the court did not expressly foreclose use of the doctrine.[21] If the party relying on the doctrine can establish that an uncertainty as to the true boundary led the landowners or their successors in interest to agree on a common boundary, the doctrine may apply.[22] In light of Justice Mosk's observations regarding the difficulty of proving the "uncertainty" and "agreement" elements necessary to succeed, it appears that the party who chooses to rely on the doctrine will have a difficult time in doing so.[23]

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18. *Id.* at 65-66, 884 P.2d at 1046, 36 Cal. Rptr. 2d at 98 (Mosk, J., dissenting). Justice Mosk reasoned that a landowner who was aware that a barrier had been placed upon his land by an adjoining landowner would surely object if he "determine[d] that the physical barrier is actually on his own property." *Id.* at 65, 884 P.2d at 1045-46, 36 Cal. Rptr. 2d at 97-98 (Mosk, J., dissenting). He noted, however, that the persuasiveness of the inference depends on the type of barrier used, the "distance from the true boundary," and the purpose of the barrier. *Id.* at 66, 884 P.2d at 1046, 36 Cal. Rptr. 2d at 98 (Mosk, J., dissenting).

19. *Id.* at 67, 884 P.2d at 1047, 36 Cal. Rptr. 2d at 99 (Mosk, J., dissenting). Justice Mosk argued that a broader interpretation of the agreed boundary doctrine would "allow[] adjacent landowners to resolve their disputes easily without resort to attorneys, to surveyors, or to the courts, and ensures that their mutual understanding regarding the location of their boundary . . . will be respected and given legal effect." *Id.* (Mosk, J., dissenting).

20. *See id.* at 60, 884 P.2d at 1043, 36 Cal. Rptr. 2d at 95.

21. *See id.*

22. *See id.*

23. *See id.* at 62, 884 P.2d at 1044, 36 Cal. Rptr. 2d at 96 (Mosk, J., dissenting).

II. CIVIL RIGHTS

Employers with fewer than five employees are not subject to tort liability for wrongful termination resulting from age discrimination because such employers are exempt from age provisions in the Fair Employment and Housing Act; no other law establishes a "fundamental policy" prohibiting age discrimination by such an employer:
Jennings v. Marralle.

I. INTRODUCTION

In *Jennings v. Marralle*,[1] the California Supreme Court addressed the issue of whether an employee who is not protected by the age discrimination provision of the Fair Employment and Housing Act[2] (FEHA) may institute a lawsuit for tortious discharge in violation of public policy as established by California Government Code section 12920.[3]

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1. 8 Cal. 4th 121, 876 P.2d 1074, 32 Cal. Rptr. 2d 275 (1994). Justice Baxter authored the unanimous opinion, in which Chief Justice Lucas and Justices Mosk, Kennard, Arabian, George, and Werdegar concurred. *Id.*

The plaintiff, Jennings, worked for the defendant, Marralle, an endodontist, for almost four years before she was terminated. *Id.* at 125, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277. Jennings claimed that the defendant fired her because of her age, and her impending entitlement to pension benefits. Jennings further alleged that the defendant "expressly and impliedly represented to her that she would be employed indefinitely as long as she carried out her duties competently; and that notwithstanding her competent performance her employment was terminated." *Id.*

2. CAL. GOV'T CODE § 12941 (West 1992 & Supp. 1994). Section 12941(a) states in relevant part: "It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action." *Id.*

3. *Jennings*, 8 Cal. 4th at 124, 876 P.2d at 1075, 32 Cal. Rptr. 2d at 276; *see* CAL. GOV'T CODE § 12920 (West Supp. 1994). Section 12920 of the California Government Code provides in part:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities

The court first resolved the issue of appellate court jurisdiction.[4] The court held that a party may appeal a final judgment on an arbitration award for claims which are independent of the arbitrated claim, and which were not submitted to arbitration because of their pre-arbitration dismissal.[5]

The court then examined the FEHA policy statement against age discrimination in section 12920,[6] and held that section 12920 applies to all employers, not just those who fall within the definition of section 12926(d).[7] The court added, however, that this policy statement was not intended by the legislature to create a common law cause of action for tortious discharge in violation of public policy.[8] Further, the court found that because no provision of the California Constitution and no other state statute forbids age discrimination by small employers, there is currently no "fundamental policy" which bars age discrimination by a employer with fewer than five employees.[9] As a result, the court concluded that there was no legal basis for the plaintiff to maintain her action for tortious discharge in violation of public policy.[10]

II. TREATMENT

A. *Jurisdiction*

The California Supreme Court first addressed the issue of whether it had proper jurisdiction to hear the appeal.[11] A brief procedural history helps to lay out the jurisdictional issue in this case. The plaintiff initiated this lawsuit in state court, alleging three causes of action: failure to pay back wages and pension benefits, wrongful termination, and age discrimination in violation of section 12941 of the Government Code.[12] The de-

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for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.

CAL. GOV'T CODE § 12920 (West Supp. 1994).

4. *Jennings*, 8 Cal. 4th at 126-29, 876 P.2d at 1076-79, 32 Cal. Rptr. 2d at 278-80.

5. *Id.* at 129, 876 P.2d at 1078, 32 Cal. Rptr. 2d at 279.

6. *Id.* at 129-36, 876 P.2d at 1079-83, 32 Cal. Rptr. 2d at 280-84.

7. *Id.* at 124-25, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277; *see* CAL. GOV'T CODE § 12926(d) (West Supp. 1994) (stating that FEHA only applies to employers with more than five employees).

8. *Jennings*, 8 Cal. 4th at 134-35, 876 P.2d at 1082, 32 Cal. Rptr. 2d at 283.

9. *Id.* at 125, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277.

10. *Id.*

11. *Id.* at 126, 876 P.2d at 1077, 32 Cal. Rptr. 2d at 278.

12. *Id.* at 125, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277; *see* CAL. GOV'T CODE § 12941 (West 1992 & Supp. 1994). *See generally* 29 U.S.C.A. § 623 (West Supp. 1994) (federal prohibition against age discrimination); 45A AM. JUR. 2D *Job Discrimination* §§ 168-170 (1993) (considering federal age discrimination prohibitions, addressing employers affected, government contractors, and the effect of federal law on state laws); 41 CAL. JUR. 3D *Labor* § 2 (1978) (covering California citizens' constitutional right to

fendant removed the lawsuit to a federal district court pursuant to federal question jurisdiction.[13] The district court granted the defendant's motion for summary judgment with regard to the age discrimination claim, on the ground that the defendant was not subject to FEHA's age provision because he regularly employed fewer than five employees.[14] Furthermore, the district court dismissed, without prejudice, the allegation concerning pension benefits, explaining that the claim properly arises under Employee Retirement Income Security Act (ERISA).[15] Finally, the court remanded the remaining causes of action for wrongful termination to the state court based upon a claim for breach of an implied contract and the claim for failure to pay back wages.[16]

The plaintiff petitioned the superior court for leave to amend her complaint in order to state a cause of action for tortious discharge in violation of public policy against age discrimination.[17] The court denied

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work); WILLIAM J. EMANUEL & MICHAEL L. WOLFRAM, CALIFORNIA EMPLOYMENT LAW § 7, at 23-27 (1989) (comprehensive discussion on age discrimination in employment); 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 740, 761 (9th ed. 1988) (discussing Federal Age Discrimination Act and California age discrimination provision); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 304 (9th ed. 1987) (same); Jeffrey S. Brand & Katherine E. Hardy, *Evaluating and Pleading Age Discrimination and Wrongful Termination Cases: A Plaintiff's Perspective*, 321 PRAC. LAW INST./ LIT. 391 (1987) (giving an extensive discussion on pleading and procedure in age discrimination cases); Peter M. Panken et al., *Age Discrimination: Selected Current Topics*, C902 A.L.I.-ABA 509 (1994) (containing coverage of the following subjects: early retirement, reductions in force, validity of releases, damages, and class actions); Annotation, *Application of State Law to Age Discrimination in Employment*, 96 A.L.R.3D 195 (1980) (§ 2b specifically discusses practice pointers for age discrimination in California).

13. *Jennings*, 8 Cal. 4th at 126-27, 876 P.2d at 1076-77, 32 Cal. Rptr. 2d at 277-78 (case removed to the United States District Court for the Central District of California); *see also* 28 U.S.C. § 1441 (1994) (discussing removal to federal courts based upon federal question or diversity jurisdiction); 29 U.S.C. §§ 1001-1461 (1994) (ERISA).

14. *Jennings*, 8 Cal. 4th at 126, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277; *see* CAL. GOV'T CODE § 12941 (West 1992 & Supp. 1994) (prohibiting age discrimination in employment).

15. *Jennings*, 8 Cal. 4th at 126, 876 P.2d at 1076-77, 32 Cal. Rptr. 2d at 277-78; *see also* 29 U.S.C. §§ 1001-1461 (1994) (ERISA).

16. *Jennings*, 8 Cal. 4th at 126, 876 P.2d at 1077, 32 Cal. Rptr. 2d at 278.

17. *Id. See generally* Rojo v. Kliger, 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990) (recognizing a common law cause of action for wrongful termination in violation of public policy against sex discrimination); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (holding that no substantial public policy exists which prohibits an employer from discharging an employee for re-

her motion.[18] The plaintiff and defendant then agreed to binding arbitration on the claims for wrongful termination based on an implied contract and for failure to pay back wages.[19] The arbitrator ruled that there was no implied contract for employment, and thus, there was no breach. However, the court concluded that the plaintiff was entitled to back wages for unpaid overtime.[20] The superior court entered judgment on the arbitrator's award.[21] The arbitrator did not address the plaintiff's attempt to amend the complaint to state a cause of action for tortious discharge in violation of a public policy against age discrimination.[22] The plaintiff subsequently appealed the superior court's denial of her petition for leave to amend.[23] The court of appeal reversed and ordered the plaintiff's proposed amended complaint for tortious discharge in violation of public policy be accepted for filing.[24]

The supreme court expressed concern regarding appellate jurisdiction, largely due to the fact that a judgment resulting from a judicial arbitration award is not ordinarily appealable.[25] The court took judicial notice of the parties' written stipulation to judicial arbitration, which indicated the parties' agreement to preserve the plaintiff's right to appeal the claims not submitted to arbitration.[26] The court also examined sec-

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porting information relevant to employer's interest); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (establishing a cause of action for wrongful termination in violation of public policy); David A. Cathcart, *New Developments in Employment Litigation Theories*, C579 A.L.I.-ABA 367, 384-87 (1991) (covering discharges contrary to public policy); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 168, 169 (9th ed. 1987 & Supp. 1994) (discussing public policy exceptions to termination at will); 29 CAL. JUR. 3D *Employer and Employee* §§ 63, 74 (1986 & Supp. 1994) (covering public policy limitations on grounds for discharge and tort actions for discharge in violation of recognized principle of public policy).

18. *Jennings*, 8 Cal. 4th at 126, 876 P.2d at 1077, 32 Cal. Rptr. 2d at 278.

19. *Id.*

20. Jennings v. Marralle, 22 Cal. App. 4th 606, 610, 21 Cal. Rptr. 2d 562, 564 (1993), *rev'd*, 8 Cal. 4th 121, 876 P.2d 1074, 32 Cal. Rptr. 2d 275 (1994).

21. *Jennings*, 8 Cal. 4th at 126, 876 P.2d at 1077, 32 Cal. Rptr. 2d at 278.

22. *Id. See generally* Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568 (1990) (discussing arbitration of claims arising under the federal statute prohibiting age discrimination).

23. *Jennings*, 8 Cal. 4th at 126, 876 P.2d at 1077, 32 Cal. Rptr. 2d at 278.

24. *Id.* at 126-27, 876 P.2d at 1077, 32 Cal. Rptr. 2d at 278.

25. *Id.* An arbitration award "shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and it may not be attacked or set aside except as provided by Section 473, 1286.2, or Judicial Council rule." CAL. CIV. PROC. CODE § 1141.23 (West Supp. 1995).

26. *Jennings*, 8 Cal. 4th at 127, 876 P.2d at 1078, 32 Cal. Rptr. 2d at 278-79. The court stressed that "[a]lthough jurisdiction may not be conferred by consent of the parties (citations omitted), the parties' understanding is relevant to a determination of the scope of arbitration and the effect of the subsequent award." *Id.* at 127, 876 P.2d

tion 904.1 of the Code of Civil Procedure and determined that, without a clear waiver of the right to appeal, an order denying leave to amend is appealable once there is a final judgment in the action.[27] Moreover, the court focused on the legislative intent behind section 1141.23, which is to encourage arbitration, and the court reasoned that preventing parties from appealing pre-arbitration rulings would act as a deterrent to that end.[28] The court held that parties may appeal "pre-arbitration judicial rulings on claims not submitted to arbitration which are independent of the arbitrated claim" once the court enters the judgment on the arbitration award.[29] Finding jurisdiction to hear the appeal, the court then addressed the validity of plaintiff's claim for wrongful termination in violation of public policy.[30]

B. Age Discrimination in Violation of Public Policy

The California Supreme Court focused its analysis on the determination of finding a public policy prohibiting age discrimination which applied to the defendant.[31] Justice Baxter, writing for the unanimous court, first considered the previous supreme court case of *Gantt v. Sentry Insurance*.[32] In *Gantt*, the court determined the scope of the public policy exception to the rule of termination at will.[33] The court limited the

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at 1078, 32 Cal. Rptr. 2d at 279.

27. *Id.* at 128, 876 P.2d at 1078, 32 Cal. Rptr. 2d at 279; *see* CAL. CIV. PROC. CODE § 904.1 (West Supp. 1995).

28. *Jennings*, 8 Cal. 4th at 128-29, 876 P.2d at 1078, 32 Cal. Rptr. 2d at 279. The remedy provided to parties who are displeased with the arbitration award is to request a trial de novo. The accessibility of this remedy is the legislative justification for preventing parties from appealing judicial arbitration awards. *Id; see* CAL. CIV. PROC. CODE § 1141.20 (West Supp. 1995).

29. *Jennings*, 8 Cal. 4th at 129, 876 P.2d at 1078, 32 Cal. Rptr. 2d at 279.

30. *Id.* at 129, 876 P.2d at 1079, 32 Cal. Rptr. 2d at 280.

31. *Id.* at 129-36, 876 P.2d at 1079-83, 32 Cal. Rptr. 2d at 280-84.

32. 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992); *see Jennings*, 8 Cal. 4th at 130, 876 P.2d at 1079, 32 Cal. Rptr. 2d at 280.

33. *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82; *Jennings*, 8 Cal. 4th at 130, 876 P.2d at 1079, 32 Cal. Rptr. 2d at 280; *see* CAL. LAB. CODE § 2922 (West 1989) (stating termination at will upon notice is the general rule); Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135 (1990) (asserting that employment at will is soon to be only a memory in California, and proposing a new statute); S. Lynn Appleton, Comment, *The State of At-Will Employment in California after* Foley, 8 ST. LOUIS U. PUB. L. REV. 393 (1989) (discussing the exceptions to the employment at will doctrine and the effect of *Foley* on the same).

scope of the public policy exception by requiring a plaintiff to identify either a constitutional or statutory provision which sets forth a "fundamental public policy" of the state.[34]

The plaintiff asserted that section 12920 of FEHA established a fundamental public policy against age discrimination.[35] The court disagreed, declaring that the legislature did not intend to create a common law cause of action for tortious discharge in violation of public policy.[36] Moreover, the court found that the legislative intent under this section was to prevent small employers from being liable for violations of this policy.[37] Therefore, the court stated that the plaintiff could not maintain

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34. *Jennings*, 8 Cal. 4th at 130, 876 P.2d at 1079, 32 Cal. Rptr. 2d at 280; *Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82; *see also* Sequoia Ins. Co. v. Superior Court, 13 Cal. App. 4th 1472, 16 Cal. Rptr. 2d 888 (1993) (applying the same test as *Gantt*). The court in *Gantt* reasoned:

> A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of the law. Employees are protected against employer actions that contravene fundamental state policy. And society's interests are served through a more stable job market, in which its most important policies are safeguarded.

Gantt, 1 Cal. 4th at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82.

35. *Jennings*, 8 Cal. 4th at 124, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277; *see* CAL. GOV'T CODE § 12920 (West Supp. 1994).

36. *Jennings*, 8 Cal. 4th at 134-35, 876 P.2d at 1082, 32 Cal. Rptr. 2d at 283. *See generally* David B. Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?*, 23 U.S.F. L. REV. 145 (1989).

37. *Jennings*, 8 Cal. 4th at 130, 876 P.2d at 1079, 32 Cal. Rptr. 2d at 280; *see* CAL. GOV'T CODE § 12926(d) (West Supp. 1994). The court emphasized the reasons for the small employer exemption, taken from a law review article:

> [First], [a] sense of justice and propriety led the framers to believe that individuals should be allowed to retain some small measure of the so-called freedom to discriminate; besides, they feared the political repercussions of eliminating totally an area of free choice whose infringement had been so bitterly opposed. In the second place, the framers believed that discrimination on a small scale would prove exceedingly difficult to detect and police. Third, it was believed that an employment situation in which there were less than five employees might involve a close personal relationship between employer and employees and that fair employment laws should not apply where such a relationship existed. Finally, the framers were interested primarily in attacking protracted large-scale discrimination by important employers and strong unions.

Jennings, 8 Cal. 4th at 133, 876 P.2d at 1082, 32 Cal. Rptr. 2d at 283 (quoting Michael C. Tobriner, *California FEPC*, 16 HASTINGS L.J. 333, 342 (1965)).

a claim for tortious discharge in violation of public policy based upon age discrimination under the provisions of the FEHA because her employer did not employ five or more persons.[38]

The court then searched for another state statute or constitutional provision creating the right to be free from age discrimination in employment which would be applicable to the defendant and establish a fundamental public policy of the state.[39] The court found no present statute, apart from the FEHA, which prohibits age discrimination in employment.[40] The court concluded that the absence of prohibitions against age discrimination in the law, other than the FEHA provisions, indicated that the legislature did not intend to create a fundamental public policy against age discrimination to be applied against small employers.[41]

Consequently, the court held that the plaintiff could not maintain her action for tortious discharge in violation of public policy based upon age discrimination.[42] The supreme court reversed the court of appeal and remanded to the trial court, instructing it to dismiss the action.[43]

III. IMPACT

This decision is potentially devastating to the increasing number of older workers who seek employment in a competitive market. Many people may prefer the slower pace of a small business, only to find that they may be discriminated against merely because of their age. This group's only clear recourse is to petition the legislature to establish prohibitions against age discrimination for all employers, regardless of how many people they employ. This course of action, however, will likely be met with strong opposition by owners of small businesses.

APRIL ANSTETT

38. *Jennings*, 8 Cal. 4th at 130, 876 P.2d at 1079-80, 32 Cal. Rptr. 2d at 280-81.

39. *Id.* at 130-36, 876 P.2d at 1080-83, 32 Cal. Rptr. 2d at 281-84.

40. *Id.* at 132, 876 P.2d at 1081, 32 Cal. Rptr. 2d at 282. After examining former Unemployment Insurance Code § 2070 and former Labor Code § 1420.1, which did prohibit age discrimination but which were repealed when the FEHA provisions were enacted, the court determined that the legislative intent was that such provisions would not apply to businesses with fewer than five employees. *Id.* at 130-32, 876 P.2d at 1080-81, 32 Cal. Rptr. 2d at 280-82.

41. *Id.* at 135, 876 P.2d at 1083, 32 Cal. Rptr. 2d at 284.

42. *Id.* at 125, 876 P.2d at 1076, 32 Cal. Rptr. 2d at 277.

43. *Id.* at 136, 876 P.2d at 1083, 32 Cal. Rptr. 2d at 284.

III. CONDOMINIUMS

A condominium association's recorded and uniformly enforced use restrictions prohibiting pet ownership are presumptively valid and reasonable equitable servitudes under California Civil Code section 1354: **Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.**

I. INTRODUCTION

In *Nahrstedt v. Lakeside Village Condominium Association, Inc.*,[1] the California Supreme Court considered whether recorded covenants, conditions, and restrictions (CC&Rs) prohibiting pet ownership by condominium association members are unreasonable, and therefore unenforceable, under California Civil Code section 1354.[2] In a precedent-set-

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1. 8 Cal. 4th 361, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994). Justice Kennard wrote the majority opinion, in which Chief Justice Lucas and Justices Mosk, Baxter, George, and Werdegar concurred. *Id.* at 361-89, 878 P.2d at 1275-92, 33 Cal. Rptr. 2d at 63-80. Justice Arabian wrote a dissenting opinion. *Id.* at 390-97, 878 P.2d at 1292-97, 33 Cal. Rptr. 2d at 80-85 (Arabian, J., dissenting).

2. *Id.* at 368, 878 P.2d at 1278, 33 Cal. Rptr. 2d at 66; CAL. CIV. CODE § 1354 (West Supp. 1994).

In 1988, Ms. Nahrstedt bought a condominium unit in Culver City at the Lakeside Village complex. *Nahrstedt*, 8 Cal. 4th at 369, 878 P.2d at 1278, 33 Cal. Rptr. 2d at 66. She moved in with her three cats, Boo-Boo, Dockers, and Tulip. *Id.*; *see* Maura Dolan, *Court Upholds Right to Ban Pets in Condos*, L.A. TIMES, Sept. 3, 1994, at A2. Ms. Nahrstedt claimed that she had no notice of the pet restriction in the CC&Rs which stated: "No animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit." *Nahrstedt*, 8 Cal. 4th at 369, 878 P.2d at 1278, 33 Cal. Rptr. 2d at 66. After members of the Lakeside Village Condominium Association Board "peered" in her windows, the Association ordered Ms. Nahrstedt to remove the cats from the property and warned her that she would be fined for each month that she remained in violation of the restriction against pets. *Id.* at 369, 878 P.2d at 1278-79, 33 Cal. Rptr. 2d at 66-67. Ms. Nahrstedt filed suit against the Association, claiming that the pet restriction was unreasonable "because she kept her three cats indoors and because her cats were 'noiseless' and 'created no nuisance.'" *Id.* at 367, 878 P.2d at 1278, 33 Cal. Rptr. 2d at 66. In addition, she sought relief from the assessments levied against her, an injunction against further assessments, and damages for invasion of privacy and negligent infliction of emotional distress. *Id.* at 369, 878 P.2d at 1278-79, 33 Cal. Rptr. 2d at 66-67.

The trial court sustained the Association's demurrer, which stated that "the pet restriction furthers the collective 'health, happiness and peace of mind' of persons living in close proximity within the Lakeside Village condominium development, and therefore is reasonable as a matter of law." *Id.* at 369, 878 P.2d at 1279, 33 Cal. Rptr. 2d at 67. The trial court then dismissed the complaint. *Id.* On appeal, a divided court reinstated Ms. Nahrstedt's causes of action. *Id.* at 369-70, 878 P.2d at 1279, 33 Cal. Rptr. 2d at 67. The two-member majority stated that the facts of each particular case must be considered in determining whether a use restriction is unreasonable. *Id.*

ting opinion, the court set forth the standard for determining the enforceability of these equitable servitudes.[3] Under section 1354, a restriction is presumed reasonable and enforceable unless proven unreasonable.[4] The court ruled that the plaintiff's allegations were insufficient to overcome the presumption that the pet restriction was reasonable and enforceable.[5] Therefore, the supreme court reversed the court of appeal and remanded the case for further proceedings.[6]

II. TREATMENT

A. *Majority Opinion*

Justice Kennard,[7] writing for the majority, began the opinion with an extensive examination of the history and "general principles governing common interest forms of real property ownership."[8] As a result of this

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The sole dissenter criticized the majority's "case-by-case" approach as contrary to the Legislature's intent that use restrictions be considered presumptively reasonable. *Id.* The Association subsequently petitioned the California Supreme Court. *Id.*

California Civil Code § 1354(a) states in relevant part: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." CAL. CIV. CODE § 1354(a) (West Supp. 1995); *see also* Michael J. Pepek, *Property: Common Interest Developments*, 25 PAC. L.J. 771 (1994) (detailing the coverage of the amended Civil Code § 1354).

3. *Nahrstedt*, 8 Cal. 4th at 380-84, 878 P.2d at 1286-89, 33 Cal. Rptr. 2d at 74-77. *See generally* CAL. CIV. CODE § 1353 (West Supp. 1995) (A recorded declaration shall state the "restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes."); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 328 (9th ed. 1987 & Supp. 1994) ("Covenants and restrictions in the declaration governing a common interest development, unless unreasonable, may be enforced as equitable servitudes; they benefit and bind the owners of all separate interests in the project.").

4. *Nahrstedt*, 8 Cal. 4th at 378, 878 P.2d at 1285, 33 Cal. Rptr. 2d at 73; *see also* RESTATEMENT (FIRST) OF PROPERTY § 539 cmt. f (1944) (noting that restrictions are unreasonable and "illegal when the harm caused by the restriction is so disproportionate to [its] benefit" that it should not be enforced); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 494(2) (9th ed. 1987 & Supp. 1994) (describing the policy that unreasonable restrictions are unenforceable as vague and difficult to define and apply); 12 CAL. JUR. 3D *Condominiums and Cooperative Apartments* § 9 (1974 & Supp. 1994) ("[R]estrictions where reasonable, become enforceable equitable servitudes.").

5. *Nahrstedt*, 8 Cal. 4th at 386-87, 878 P.2d at 1290-91, 33 Cal. Rptr. 2d at 78-79.

6. *Id.* at 389, 878 P.2d at 1292, 33 Cal. Rptr. 2d at 80.

7. Justice Joyce Kennard is, herself, the owner of two cats. Maura Dolan, *Court Upholds Right to Ban Pets in Condos*, L.A. TIMES, Sept. 3, 1994, at A2.

8. *Nahrstedt*, 8 Cal. 4th at 370-77, 878 P.2d at 1279-84, 33 Cal. Rptr. 2d at 67-72.

examination, the majority surmised that the capacity of homeowners, individually or through associations, to enforce the CC&Rs against member owners who violate them is an extremely important factor in the continued popularity of condominiums and other common-interest properties.[9]

Next, the majority turned its attention to California's statutory scheme for governing condominium associations under the Davis-Stirling Common Interest Development Act.[10] The majority focused on section 1354 of the Act as the most pertinent to the enforcement of recorded use restrictions.[11] Specifically, the court analyzed the legislative intent of the phrase "enforceable . . . unless unreasonable,"[12] construing it to indicate a preference for enforcement of recorded use restrictions and a presumption of reasonableness.[13] The court noted that the language "unless unreasonable" served to shift the burden of proof to the challenging party.[14] Moreover, the majority found that a recorded use restriction is enforceable unless shown to be unreasonable to all association members[15]

See generally Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41 (1990) (examining the role of property owners associations and the effect of their regulations and restrictions on the member owners); Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981) (reviewing state and federal judicial decisions on restrictions by condominium associations); 15A AM. JUR. 2D *Condominiums and Co-operative Apartments* §§ 38, 39 (1976 & Supp. 1994) (providing a general overview of the rights of individual owners and the restrictions placed upon them by community associations); 12 CAL. JUR. 3D *Condominiums and Cooperative Apartments* §§ 7-17 (1974 & Supp. 1994) (same).

The court pointed to the following as important general principles: "[R]ecorded CC&R's are the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development. In general, then, enforcement of a common interest development's recorded CC&R's will both encourage the development of land and ensure that promises are kept . . . ." *Nahrstedt*, 8 Cal. 4th at 382-83, 878 P.2d at 1287, 33 Cal. Rptr. 2d at 75.

9. *Id.* at 374, 878 P.2d at 1282, 33 Cal. Rptr. 2d at 70.

10. *Id.* at 377-78, 878 P.2d at 1284, 33 Cal. Rptr. 2d at 72; CAL. CIV. CODE § 1350-1370 (West Supp. 1995) (The Davis-Stirling Common Interest Development Act is a consolidation of definitions and substantive law pertaining to condominiums and their associations.).

11. *Nahrstedt*, 8 Cal. 4th at 378, 878 P.2d at 1285, 33 Cal. Rptr. 2d at 73; CAL. CIV. CODE § 1354(a) (West Supp. 1995).

12. CAL. CIV. CODE § 1354(a) (West Supp. 1995).

13. *Nahrstedt*, 8 Cal. 4th at 380, 878 P.2d at 1285-86, 33 Cal. Rptr. 2d at 74.

14. *Id.*

15. *Id.* at 386, 878 P.2d at 1290, 33 Cal. Rptr. 2d at 78. *See generally* CAL. CIV. CODE § 1353 (West Supp. 1995) (requiring a recorded declaration to state the "restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes"); *see* WITKIN, *supra* note 3, § 328; 12 CAL. JUR. 3D *Condominiums and Cooperative Apartments* § 9 (1974 & Supp. 1994) (stating that restrictions become equitable servitudes and are enforceable

by proving any of the following: (1) the restriction is against public policy; (2) the restriction is arbitrary in that it bears "no rational relationship to the protection, preservation, operation or purpose of the affected land;" or (3) the burden of the restriction substantially outweighs its benefits.[16]

Applying the foregoing to the plaintiff's allegations, the majority listed four reasons for finding her pleadings insufficient to demonstrate that the condominium association's pet restriction was unreasonable: (1) the complaint failed to show that the restriction was unreasonable as applied to all association members;[17] (2) the plaintiff did not contend that the restriction violates public policy, and the privacy provision of the California Constitution does not apply to ownership of pets;[18] (3) the pet restriction is not arbitrary and is rationally related to noise, health, and sanitation concerns justifiably held by condominium owners; and (4) the allegations of the complaint were insufficient to show that the benefit to association members substantially outweighed the burden of the restriction.[19] Therefore, the supreme court reversed the court of appeals on the ground that it applied the wrong standard of reasonableness for recorded use restrictions and accordingly remanded the case for further proceedings.[20]

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where reasonable).

16. *Nahrstedt*, 8 Cal. 4th at 382, 878 P.2d at 1287, 33 Cal. Rptr. 2d at 75; *see also* RESTATEMENT (FIRST) OF PROPERTY § 539 cmt. f (1944) (restrictions are unreasonable and "illegal when the harm caused by the restriction is so disproportionate to [its] benefit" that it should not be enforced); WITKIN, *supra* note 4, § 494(2).

17. The majority disapproved of two cases upon which the court of appeals relied in evaluating the plaintiff's claims by focusing on the facts of the two cases: Portola Hills Community Ass'n v. James, 4 Cal. App. 4th 289, 5 Cal. Rptr. 2d 580 (1992) and Bernardo Villas Mgmt. Corp. Number Two v. Black, 190 Cal. App. 3d 153, 235 Cal. Rptr. 509 (1987). *Nahrstedt*, 8 Cal. 4th at 386, 878 P.2d at 1290, 33 Cal. Rptr. 2d at 78.

18. The court considered and rejected the idea that the California Constitution "implicitly guarantees condominium owners or residents the right to keep cats or dogs as household pets." *Id.* at 387, 878 P.2d at 1290-91, 33 Cal. Rptr. 2d at 78-79; *see* CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.") *Id.*

19. *Id.* at 386-88, 878 P.2d at 1290-91, 33 Cal. Rptr. 2d at 78-79.

20. *Id.* at 389, 878 P.2d at 1292, 33 Cal. Rptr. 2d at 80.

B. *Justice Arabian's Dissenting Opinion*

In a separate dissenting opinion, Justice Arabian emphatically disagreed with the majority opinion.[21] Justice Arabian's opening quote set the tone for his entire dissenting opinion: "[t]here are two means of refuge from the misery of life: music and cats."[22] Justice Arabian proceeded to extol the many virtues of having pets in our daily lives and denounced the majority for trivializing these numerous benefits.[23]

Justice Arabian attacked three primary points of the majority's argument. First, he questioned the standard of presumed validity and enforceability of recorded use restrictions decreed by the majority, hypothesizing that any use restriction could withstand this standard.[24] Second, he argued that the pet restriction was arbitrary in that it allowed possession of birds and fish, yet prohibited all other types of pets, even those more sanitary and less noisy than birds or fish.[25] Finally, Justice Arabian asserted that pets substantially enhance the quality of our daily lives, while the problems associated with allowing pets to live within the confines of the owner's home are minimal.[26] Therefore, according to Justice Arabian, the burden of prohibiting pets far exceeds any assumed benefit of the pet restriction at issue, thereby making the restriction unreasonable.[27]

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21. *Id.* at 390-97, 878 P.2d at 1292-97, 33 Cal. Rptr. 2d at 80-85 (Arabian, J., dissenting).

22. *Id.* (quoting Albert Schweitzer) (Arabian, J., dissenting).

23. *Id.* at 393-96, 878 P.2d at 1295-97, 33 Cal. Rptr. 2d at 83-85 (Arabian, J., dissenting). Examples of the benefits of pet ownership include companionship, therapy for the ill or injured, comfort for survivors when a loved one dies, a reason to live for the lonely, and security for single adults. *Id.* at 393-94, 878 P.2d at 1294-95, 33 Cal. Rptr. 2d at 82-83 (Arabian, J., dissenting).

24. *Id.* at 395-96, 878 P.2d at 1296, 33 Cal. Rptr. 2d at 84 (Arabian, J., dissenting). Illustrating his disdain for this standard, Justice Arabian proclaimed: "Such sanctity has not been afforded any writing save the commandments delivered to Moses on Mount Sinai, and they were set in stone, not upon worthless paper." *Id.* at 396, 878 P.2d at 1296, 33 Cal. Rptr. 2d at 84 (Arabian, J., dissenting).

25. *Id.* at 394-95, 878 P.2d at 1295-96, 33 Cal. Rptr. 2d at 83-84. Sanitation problems associated with birds include the disposal of bird droppings, which causes as much concern as the disposal of cat litter. *Id.* at 394, 878 P.2d at 1295, 33 Cal. Rptr. 2d at 83 (Arabian, J., dissenting). Sanitation problems concerning fish include potential aquarium leakage and disposal of water through common drainage systems. *Id.* (Arabian, J., dissenting). Additionally, birds can sometimes exacerbate allergies or even carry diseases. *Id.* (Arabian, J., dissenting). Finally, birds make a great deal of noise and can be very disruptive. *Id.* (Arabian, J., dissenting).

26. *Id.* (Arabian, J., dissenting) "To the extent such animals are not seen, heard, or smelled any more than if they were not kept in the first place, there is no corresponding or concomitant benefit [in] maintaining the restriction." *Id.* (Arabian, J., dissenting).

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

Further, Justice Arabian declared that contrary to the holding of the majority, the plaintiff's pleadings were "sufficient to allege that the pet restriction is unreasonable as a matter of law."[28]

III. IMPACT

Nahrstedt will likely have broad impact on pet ownership in California considering that approximately six million people live in condominiums and other homes governed by homeowner's associations.[29] The approximately 150,000[30] homeowner associations housing these people will benefit from the strict standard making all recorded use restrictions presumptively reasonable and enforceable unless proven unreasonable. Homeowners affected by the *Nahrstedt* ruling will have to lobby the legislature to change the law if they wish to keep pets prohibited by CC&Rs.[31]

On the national scale, the California Supreme Court has joined other states' courts in enforcing the right of community associations to place restrictions on the number and type of pets allowed in their housing units.[32] Because approximately thirty-two million Americans, almost one in eight, live in homes that are governed by associations with CC&Rs,[33] use restrictions are clearly a part of daily life for a significant portion of Americans. As a result of the trend exemplified by *Nahrstedt*, this large slice of America must increasingly accept or directly protest CC&Rs through homeowner's association boards and the legislatures.

SHERI L. MARVIN

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28. *Id.* at 391, 397, 878 P.2d at 1293, 1297, 33 Cal. Rptr. 2d at 81, 85 (Arabian, J., dissenting).

29. Dolan, *supra* note 2, at A2.

30. Ron Galperin, *Neighborhood Rules Clashing with Freedom of Choice*, L.A. TIMES, Oct. 26, 1993, (Business) at 10 (analyzing the CC&Rs contained in homeowner association agreements).

31. Dolan, *supra* note 2, at A2.

32. *See* Noble v. Murphy, 612 N.E.2d 266 (Mass. App. Ct. 1993) (upholding a pet restriction by a condominium association); Dulaney Towers Maintenance Corp. v. O'Brey, 418 A.2d 1233 (Md. Ct. Spec. App. 1980) (same); Wilshire Condominium Ass'n v. Kohlbrand, 368 So. 2d 629 (Fla. Dist. Ct. App. 1979) (same).

33. Tara Aronson, *Join a Homeowners Association with Your Eyes Open*, S.F. CHRON., July 13, 1994, at 6Z1 (outlining the pitfalls of joining community associations).

IV. CRIMINAL LAW

A. *The Fourth Amendment to the United States Constitution is not violated when a police officer conducts a warrantless search of a minor who is on probation and subject to a probation condition authorizing warrantless searches, even when the searching police officer was unaware of the search condition, because a minor subject to such a search condition has no reasonable expectation of privacy:* **In re Tyrell J.**

I. INTRODUCTION

In *In re Tyrell J.*,[1] the California Supreme Court considered whether the warrantless search of a juvenile subject to a probation condition authorizing warrantless searches violates the Fourth Amendment[2] when the searching police officer was unaware of the search condition.[3] The

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1. 8 Cal. 4th 68, 876 P.2d 519, 32 Cal. Rptr. 2d 33 (1994), *petition for cert. filed*, 63 U.S.L.W. 2131 (U.S. Jan. 17, 1995) (No. 94-7668). Chief Justice Lucas authored the majority opinion, in which Justices Arabian, Baxter, George, and Strankman concurred. *Id.* at 73-90, 876 P.2d at 521-32, 32 Cal. Rptr. 2d at 35-46. Justice Kennard filed a dissenting opinion, in which Justice Mosk concurred. *Id.* at 90-99, 876 P.2d at 532-38, 32 Cal. Rptr. 2d at 46-52 (Kennard, J., dissenting).

2. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. CONST. amend IV. For a discussion of how the Fourth Amendment applies to the states, see Mapp v. Ohio, 367 U.S. 643 (1960). For a discussion of how the Fourth Amendment applies to certain juvenile proceedings, see *In re* William G., 40 Cal. 3d 550, 567 n.17, 709 P.2d 1287, 1298 n.17, 221 Cal. Rptr. 118, 129 n. 17 (1985).

3. *Tyrell J.*, 8 Cal. 4th at 73-74, 876 P.2d at 521, 32 Cal. Rptr. 2d at 35. Officer Villemin, a uniformed Fresno police officer on patrol at a high school football game on October 3, 1991, along with two other Fresno police detectives, stopped Tyrell J. (minor) and two of his male friends. *Id.* at 74, 876 P.2d at 521-22, 32 Cal. Rptr. 2d at 35-36. The police officers were unaware that Tyrell J. had been declared a ward of the court only a few months earlier for a battery committed on school grounds and placed on probation subject to a condition that he "'[s]ubmit to a search of [his] person and property, with or without a warrant, by any law enforcement officer, probation officer or school official.'" *Id.* at 74-75, 876 P.2d at 521-22, 32 Cal. Rptr. 2d at 35-36. For a list of valid juvenile probation conditions, see 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent And Child* §§ 803-806 (9th ed. 1989 & Supp. 1994). *See generally* 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 179 (1987 & Supp. 1994) (discussing the juvenile court's discretion in imposing conditions of probation).

At the time of the stop, Officer Villemin was aware only that there had been a gang shooting incident at a high school football game one week earlier, and that the defendant and his two friends were members of one of the gangs involved in that shooting incident. *Tyrell J.*, 8 Cal. 4th at 74, 876 P.2d at 521-22, 32 Cal. Rptr. 2d at 35-36.

Officer Villemin and one of the detectives approached the trio after noticing that "one of the minor's friends wore a heavy quilted coat" despite the fact that the eve-

court concluded that, while the minor had a subjective expectation of privacy, society would not accept that expectation as legitimate.[4] Therefore, the minor had no reasonable expectation of privacy and thus no violation of the Fourth Amendment occurred.[5] Thus, there was no reason to exclude the evidence.[6]

II. TREATMENT

A. *Majority Opinion*

The court began by noting the Fourth Amendment prohibition against unreasonable searches and seizures by government officials and the resulting exclusionary rule.[7] The court then examined previous Su-

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ning temperature was above 80 degrees. *Id.* at 74, 876 P.2d at 522, 32 Cal. Rptr. 2d at 36. The officers asked the three young men to "hold up," and upon pulling away the coat, one of the officers found a large hunting knife. *Id.* At the officers' request, the trio walked over to a fence. *Id.*

Officer Villemin noticed that the minor adjusted the crotch area of his "unbuttoned and partially unzipped" pants three times as he walked toward the fence. *Id.* at 74-75, 876 P.2d at 522, 32 Cal. Rptr. 2d at 36. Suspecting that Tyrell had a weapon, the officer conducted a pat-down search, but felt only a soft object. *Id.* He retrieved the soft object, a bag of marijuana, despite the fact that he did not think it was a weapon. *Id.*

A petition was filed against the minor, alleging that he was covered under § 602 of the Welfare and Institutions Code—which provides that a minor who violates the law may be adjudged a ward of the court—and that he possessed marijuana for the purpose of sale. *Id.*; *see* CAL. HEALTH & SAFETY CODE § 11359 (West 1991 & Supp. 1994) (stating the punishment for the possession of marijuana for sale is imprisonment in the state prison). Tyrell denied the allegation and moved to suppress the marijuana from evidence. *Tyrell J.*, 8 Cal. 4th at 75, 876 P.2d at 522, 32 Cal. Rptr. 2d at 36; *see* CAL. WELF. & INST. CODE § 700.1 (West 1984 & Supp. 1994) (discussing the procedures for motions to suppress evidence obtained as a result of an illegal search or seizure).

The minor testified at the suppression hearing and claimed that "his belt and pants had come undone" and that "he was merely trying to refasten" them when he was confronted by police. *Tyrell J.*, 8 Cal. 4th at 75, 876 P.2d at 522, 32 Cal. Rptr. 2d at 36. Officer Villemin testified that he had no knowledge of the minor's probation search condition at the time of the search. *Id.* The juvenile court denied the motion to suppress and declared the minor a ward of the court. *Id.* The court of appeal reversed, holding that the "search condition did not validate the otherwise improper search." *Id.*

4. *Id.* at 89-90, 876 P.2d at 532, 32 Cal. Rptr. 2d at 46.

5. *Id.* at 90, 876 P.2d at 532, 32 Cal. Rptr. 2d at 46.

6. *Id.*

7. *Id.* at 75, 876 P.2d at 522, 32 Cal. Rptr. 2d at 36. The exclusionary rule bars the admission of evidence acquired in violation of the Fourth Amendment. *Id.*

preme Court decisions addressing the Fourth Amendment,[8] and noted that, while exceptions to the Fourth Amendment proscription against unreasonable searches and seizures exist,[9] such exceptions apply only when there are "'special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable.'"[10]

In *Griffin v. Wisconsin*,[11] the only United States Supreme Court case addressing the Fourth Amendment implications of probation search conditions, the Supreme Court upheld the constitutionality of a probation search condition.[12] In *Griffin*, the conditions of probation, set by the trial court, included that a probation officer could conduct a warrantless search of Griffin's home if there was approval by the officer's supervisor and if the officer had a reasonable basis "to believe Griffin possessed contraband."[13] Because the probation officer met the requirements established by the trial court, no Fourth Amendment violation occurred.[14] The Supreme Court reasoned that *Griffin* represented a case of "special needs," justifying the warrantless search.[15]

The California Supreme Court distinguished *Griffin* from the instant case.[16] The court emphasized that the search condition in the present case was set forth by statute and not by the trial court as in *Griffin*.[17] The court further noted that, unlike *Griffin*, neither "supervisorial approval" nor "reasonable cause" were required in the present case.[18] In addition, the probation officer in *Griffin*, unlike the police officer in the present case, had knowledge of the search condition.[19] The court concluded that because *Griffin* was distinguishable, and therefore not controlling, there was no Supreme Court decision on point.[20]

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8. *Id.* at 76, 876 P.2d at 522-23, 32 Cal. Rptr. 2d at 36-37. Under California law, courts are forbidden from excluding the fruits of an unreasonable search or seizure unless the federal constitution, as interpreted by the United States Supreme Court, requires such exclusion. *Id.*; *see* CAL. CONST. art I, § 28(d).

9. *Tyrell J.*, 8 Cal. 4th at 76, 876 P.2d at 523, 32 Cal. Rptr. 2d at 37. The burden of justifying the inclusion of evidence via such an exception lies with the People. *Id.*

10. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1984) (Blackmun, J., concurring).

11. 483 U.S. 868 (1987).

12. *Tyrell J.*, 8 Cal. 4th at 77, 876 P.2d at 523, 32 Cal. Rptr. 2d at 37.

13. *Id.* (citing *Griffin*, 483 U.S. at 870-71).

14. *Id.* (citing *Griffin*, 483 U.S. at 872-73).

15. *Id.* (citing *Griffin*, 483 U.S. at 873).

16. *Id.* at 78-79, 876 P.2d at 524, 32 Cal. Rptr. 2d at 38.

17. *Id.* at 78, 876 P.2d at 524, 32 Cal. Rptr. 2d at 38.

18. *Id.*

19. *Id.* at 79, 876 P.2d at 524, 32 Cal. Rptr. 2d at 38.

20. *Id.*

The court then turned to state law to interpret the Fourth Amendment as applied in the instant case.[21] The court analyzed whether the facts in the instant case fit into the recognized exception of consent for warrantless searches.[22] The court examined the People's contention that *People v. Bravo*,[23] holding that an adult subject to a probation search condition gives advance "consent[] to the waiver of his Fourth Amendment rights," and can be searched without a warrant or reasonable cause, should be extended to the instant case.[24]

The court concluded that a minor could not consent to a condition of probation.[25] While both adult and juvenile probationary procedures are premised upon rehabilitation, juvenile offenders, unlike adults, have no right to refuse probation since "[t]he conditions are deemed necessary for . . . the youthful offender."[26] Therefore, because a minor has no choice regarding the acceptance of a probation condition subjecting him to warrantless searches, he cannot truly give consent for purposes of the Fourth Amendment.[27]

The court further inquired as to whether the defendant had a reasonable expectation of privacy, because such an expectation is necessary to claim a Fourth Amendment violation.[28] The court applied the two-part analysis established in *Katz v. United States*[29] to the facts of the instant case.[30] Under *Katz*, the defendant must have "'manifested a subjective expectation of privacy in the object of the challenged search,'" and society must be "'willing to recognize that expectation as reasonable.'"[31] The court found that the defendant clearly manifested a subjective expectation of privacy because he kept the marijuana hidden in his pants.[32]

The court relied on two lower court opinions for guidance regarding the second prong of the *Katz* analysis.[33] The court noted *In re*

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21. *Id.*
22. *Id.* at 79-81, 876 P.2d at 525-26, 32 Cal. Rptr. 2d at 39-40.
23. 43 Cal. 3d 600, 738 P.2d 336, 238 Cal. Rptr. 282 (1987), *cert. denied*, 485 U.S. 904 (1988).
24. *Tyrell J.*, 8 Cal. 4th at 80, 876 P.2d at 525-26, 32 Cal. Rptr. 2d at 39-40 (quoting *Bravo*, 43 Cal. 3d at 608, 738 P.2d at 336, 238 Cal. Rptr. at 282).
25. *Id.* at 83, 876 P.2d at 527, 32 Cal. Rptr. 2d at 41.
26. *Id.* at 81-82, 876 P.2d at 526-27, 32 Cal. Rptr. 2d at 40-41.
27. *Id.* at 83, 876 P.2d at 527, 32 Cal. Rptr. 2d at 41.
28. *Id.*
29. 389 U.S. 347 (1967) (Harlan, J., concurring).
30. *Tyrell, J.*, 8 Cal. 4th at 83, 876 P.2d at 527, 32 Cal. Rptr. 2d at 41.
31. *Id.* (quoting California v. Ciraolo, 476 U.S. 207, 211 (1986)).
32. *Id.*
33. *Id.* at 84, 876 P.2d at 528, 32 Cal. Rptr. 2d at 42.

Marcellus L.,[34] and *People v. Binh L.*,[35] where similar searches of juveniles subject to probation search conditions were held constitutional. The California Supreme Court agreed with the reasoning in both *Marcellus* and *Binh*, and concluded that the general rule—that adult probationers have a diminished expectation of privacy—likewise applied to juveniles on probation.[36]

Therefore, the court concluded that the surrounding circumstances in the instant case demonstrated that the second prong of the *Katz* analysis was not met, that is, the minor's expectation of privacy was not one that society was willing to accept as legitimate.[37] The court further concluded that "a juvenile probationer subject to a valid search condition [did] not have a *reasonable* expectation of privacy over his person or property."[38]

In the instant case, the court noted the validity of the search condition imposed on the minor.[39] The court further noted that, presumably, the minor had knowledge of that search condition and the fact that he could be searched anywhere and at anytime.[40] In addition, the court found no evidence that the minor believed that searching officers had to be aware of his search condition before invoking it.[41] Therefore, the court concluded that the minor had no reasonable expectation of privacy.[42]

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34. 229 Cal. App. 3d 134, 279 Cal. Rptr. 901 (1991). In *Marcellus*, a warrantless search of a juvenile subject to a condition of probation which authorized warrantless searches was held constitutional despite the fact that the searching officer had no knowledge of the search condition. *Id.* at 145-46, 279 Cal. Rptr. at 908. The court in *Marcellus* found critically important the fact that the juvenile subject to a "legitimate" probation search condition had no reasonable expectation of privacy. *Id.* at 145, 279 Cal. Rptr. at 908.

35. 5 Cal. App. 4th 194, 6 Cal. Rptr. 2d 678, *cert. denied*, 113 S. Ct. 424 (1992). In *Binh*, also analogous to the instant case, a juvenile was subject to a condition of probation authorizing warrantless searches and the searching officer was unaware of the search condition. *Id.* at 198, 6 Cal. Rptr. 2d at 679. The *Binh* court found the fact that the officer lacked knowledge of the search condition "irrelevant," *Tyrell J.*, 8 Cal. 4th at 84, 876 P.2d at 528, 32 Cal. Rptr. 2d at 42, because the juvenile had no reasonable privacy expectation and upheld the search as constitutional. *Binh*, 5 Cal. App. 4th at 205, 6 Cal. Rptr. 2d at 684.

36. *Tyrell J.*, 8 Cal. 4th at 89, 876 P.2d at 532, 32 Cal. Rptr. 2d at 46.

37. *Id.* at 86, 876 P.2d at 529, 32 Cal. Rptr. 2d at 43; *see* Hudson v. Palmer, 468 U.S. 517 (1984) (holding that prisoners have no reasonable expectation of privacy over their prison cells); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (holding that covered railway workers involved in accidents have a diminished expectation of privacy and are subject to blood and urine tests).

38. *Tyrell J.*, 8 Cal. 4th at 86, 876 P.2d at 529, 32 Cal. Rptr. 2d at 43.

39. *Id.*

40. *Id.* at 86, 876 P.2d at 529-30, 32 Cal. Rptr. 2d at 43-44.

41. *Id.* at 86, 876 P.2d at 530, 32 Cal. Rptr. 2d at 44.

42. *Id.*

Furthermore, the court expressed that while knowledge of a search condition by a searching officer is not required, it is not "undesirable" either.[43] In fact, such knowledge assures that a search is not conducted for the wrong reasons, for example, harassment.[44] The court further noted that its decision in the instant case conformed with the underlying purpose of the exclusionary rule of deterring future police misconduct.[45] The court reasoned that "law enforcement officers still [had] a sufficient incentive to try to avoid improperly invading a person's privacy."[46]

B. Justice Kennard's Dissenting Opinion

Justice Kennard, joined by Justice Mosk, dissented because she interpreted the majority opinion as "erod[ing] the credibility of the constitutional prohibition against unreasonable searches and seizures."[47] Justice Kennard asserted that two questions should be addressed.[48]

> First, may the prosecution rely on the probation search condition . . . when the searching officer did not know of the condition's existence? Second, assuming the prosecution may rely on the search condition, must it nevertheless show that the searching officer had a "reasonable suspicion" that the minor was in violation of the law or of the terms of probation?[49]

In addressing the first question, Justice Kennard agreed with the majority's assertion that *Griffin v. Wisconsin*[50] was not controlling.[51] However, she emphasized that *Griffin* was distinguishable because the search in the instant case was conducted by a police officer, not a probation officer, and furthermore, that the police officer was unaware of the search condition.[52] Justice Kennard asserted that *Griffin* stood for the proposition that such a search by a police officer was unconstitutional

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43. *Id.* at 87, 876 P.2d at 530, 32 Cal. Rptr. 2d at 44.

44. *Id.* For an example of a finding of harassment after numerous warrantless searches failed to reveal any evidence of wrongdoing, see People v. Clower, 16 Cal. App. 4th 1737, 21 Cal. Rptr. 2d 38 (1993).

45. *Tyrell J.*, 8 Cal. 4th at 89, 876 P.2d at 531, 32 Cal. Rptr. 2d at 45.

46. *Id.* at 89, 876 P.2d at 532, 32 Cal. Rptr. 2d at 46.

47. *Id.* at 90, 876 P.2d at 532, 32 Cal. Rptr. 2d at 46 (Kennard, J., dissenting).

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

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

50. 483 U.S. 868 (1987)

51. *Tyrell J.*, 8 Cal. 4th at 92, 876 P.2d at 533, 32 Cal. Rptr. 2d at 47 (Kennard, J., dissenting); *see also supra* notes 15-20 and accompanying text.

52. *Tyrell J.*, 8 Cal. 4th at 92, 876 P.2d at 533, 32 Cal. Rptr. 2d at 47 (Kennard, J., dissenting). The *Griffin* Court, according to Justice Kennard, emphasized the fact that it was a probation officer who conducted a search, and not a police officer, because the two positions have entirely distinct roles. *Id.* (Kennard, J., dissenting).

because of the inherent differences between police officers and probation officers.[53]

Justice Kennard asserted as a rule "that the prosecution may not rely on a defendant's search condition when the police officer conducting the search did not know of its existence."[54] Although the decisions cited in support of this argument dealt with parolees,[55] Justice Kennard noted that the majority of courts hold that there are no "significant differences, for purposes of the Fourth Amendment, between probation search conditions and parole search conditions."[56] In fact, according to Justice Kennard, a probationer could conceivably "consent to a more substantial waiver of Fourth Amendment rights" than a parolee.[57]

The dissent further argued that the majority opinion "encourage[d] police officers to embark on a practice of 'search first and ask questions later.'"[58] Turning to the second question, the dissent pronounced that the rule in *People v. Bravo*—holding that adult probationers may consent to a search—was inapplicable because minors cannot consent to waive their rights under the Fourth Amendment.[59] Therefore, because *Bravo* did not apply, the dissent claimed that even assuming that the prosecution could rely on the search condition, the searching officer still must have a reasonable suspicion.[60] The dissent declared that to hold otherwise would promote exactly "the kind of conduct that the exclusionary rule seeks to deter."[61]

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53. *Id.* at 92, 876 P.2d at 533-34, 32 Cal. Rptr. 2d at 47-48 (Kennard, J., dissenting).

54. *Id.* at 94, 876 P.2d at 535, 32 Cal. Rptr. 2d at 49 (Kennard, J., dissenting).

55. *See In re* Martinez, 1 Cal. 3d. 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970) (affirming the principle that a parolee's status could not be relied on to justify an otherwise illegal search), *cert. denied*, 400 U.S. 851 (1970); People v. Gallegos, 62 Cal. 2d 176, 397 P.2d 174, 41 Cal. Rptr. 590 (1964) (holding that prosecution may not rely on the parole status of a defendant as a justification for a search).

56. *Tyrell J.*, 8 Cal. 4th at 94, 876 P.2d at 535, 32 Cal. Rptr. 2d at 49 (Kennard, J., dissenting). Justice Kennard further asserted that there is no distinction between adult probation or parole and juvenile probation. *Id.* at 96, 876 P.2d at 536, 32 Cal. Rptr. 2d at 50 (Kennard, J., dissenting).

57. *Id.* at 95, 876 P.2d at 535, 32 Cal. Rptr. 2d at 49 (Kennard, J., dissenting) (citing People v. Bravo, 43 Cal. 3d 600, 608, 738 P.2d 336, 341, 238 Cal. Rptr. 282, 287 (1987), *cert. denied*, 485 U.S. 904 (1988)).

58. *Id.* at 99, 876 P.2d at 538, 32 Cal. Rptr. 2d at 52 (Kennard, J., dissenting).

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

60. *Id.* at 98, 876 P.2d at 538, 32 Cal. Rptr. 2d at 51-52 (Kennard, J., dissenting). The dissent maintained that the searching officer in the instant case had a "reasonable suspicion that the minor had violated the law." *Id.*

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

III. CONCLUSION

The supreme court's decision in *Tyrell J.* is seemingly consistent with other cases interpreting the Fourth Amendment. Although a minor subject to a probation search condition may have a subjective expectation of privacy, society will not accept that expectation as legitimate. Therefore, a minor subject to such a condition has no reasonable expectation of privacy. Because there can be no Fourth Amendment violation without a reasonable expectation of privacy, there is no reason to exclude the evidence obtained by the warrantless search. The protections provided by the Fourth Amendment against unreasonable searches and seizures are not violated because if there is no reasonable expectation of privacy, the warrantless search is not unreasonable.

KANDY L. PARSON

B. *Under the due process clause of the Constitution, a preliminary hearing transcript is inadmissible at a probation revocation hearing because a defendant may confront and cross-examine adverse witnesses unless the declarant is unavailable or shows good cause:* **People v. Arreola.**

I. INTRODUCTION

In *People v. Arreola*,[1] the California Supreme Court assessed the constitutional adequacy of preliminary hearing transcripts as a routine substitute for live testimony in probation revocation proceedings.[2] The supreme court reversed the decision of the court of appeal and concluded that the admission of the hearsay transcript was non-prejudicial.[3] However, the court conditioned the constitutionality of the procedure on a showing of "good cause."[4]

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1. 7 Cal. 4th 1144, 875 P.2d 736, 31 Cal. Rptr. 2d 631. Justice George delivered the unanimous opinion, joined by Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and Werdegar. *Id.* at 1147, 875 P.2d 738, 31 Cal. Rptr. 2d 633.

2. *Id.* at 1148, 875 P.2d at 738, 31 Cal. Rptr. 2d at 633; *see* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1706 (3d ed. 1989) (discussing the right of confrontation); 22 CAL. JUR. 3D *Criminal Law* § 3481 (1985 & Supp. 1994) (discussing due process requirements); Annotation, *Admissibility of Hearsay Evidence in Probation Revocation Hearings*, 11 A.L.R. 4TH 999 (1982) (reviewing definitive case law on the admissibility of hearsay evidence in probation revocation). *See generally* Donald T. Kramer, Annotation, *Procedural Requirements, Under Federal Constitution, Applicable to Revocation of Probation or Parole*, 36 L. Ed. 2d 1077 (1993) (reciting general due process guidelines in the procedures surrounding revocation of probation and parole); Scott Graham, *Chutzpah Comes in Handy in Hearings Before High Court*, THE RECORDER, June 14, 1994 at 23 (chronicling Arreola's argument before the California Supreme Court); Scott Graham, *Ruling that Toughened Conflict Rules Is Erased*, THE RECORDER, July 15, 1994 at 21 (evaluating the *Arreola* holding).

3. *Arreola*, 7 Cal. 4th at 1148, 875 P.2d at 738-39, 31 Cal. Rptr. 2d at 633-34. In October of 1991, Deputy Sheriff Gary Peterson apprehended Sergio Arreola on suspicion of a drunk driving violation. *Id.* at 1149, 875 P.2d at 739, 31 Cal. Rptr. 2d at 634. Arreola was already on probation resulting from four prior drunk driving convictions. *Id. See generally* CAL. VEH. CODE §§ 23152, 23175 (West 1995). The complaint formalizing the new charges contained the following notice regarding Santa Clara County probation procedure: "[A]ny evidence presented at a preliminary hearing in the instant case will be used not only as a basis for a holding in this case but also as a circumstance for a violation of probation." *Arreola*, 7 Cal. 4th at 1149, 875 P.2d at 739, 31 Cal. Rptr. 2d at 634. Subsequent to both the preliminary hearing and the ensuing trial, the Santa Clara Municipal Court conducted a hearing on Arreola's probation status. *Id.* at 1150, 875 P.2d at 740, 31 Cal. Rptr. 2d at 635. Relying solely on the notice, the presiding judge admitted a transcript of Deputy Peterson's preliminary hearing testimony over the defendant's hearsay objection. *Id.* at 1150-51, 875 P.2d at 740, 31 Cal. Rptr. 2d at 635.

4. *Id.* at 1161, 875 P.2d at 747, 31 Cal. Rptr. 2d at 642; *see* People v. Winson, 29

II. TREATMENT

A. *Majority Opinion*

The court faced the issue of determining the constitutionality of the hearsay use of preliminary hearing transcripts to facilitate probation revocation.[5] Justice George, writing for a unanimous court, prefaced the opinion with a detailed account of the underlying facts.[6] Acknowledging the absence of a relevant statute,[7] Justice George launched the substantive evaluation of those facts by focusing on the controlling federal case law.[8] With respect to the due process issues surrounding probation statutes, the majority propounded a singular controlling mandate that probationers retain the right to confront adverse witnesses.[9]

The majority explained that the right to confront adverse witnesses was the constitutional framework facilitating the California Supreme Court holding in *People v. Winson*.[10] In *Winson*, the court explicitly de-

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Cal. 3d 711, 631 P.2d 55, 175 Cal. Rptr. 621 (1981) (denying admission of preliminary hearing transcript in probation revocation hearing), *cert. denied*, 455 U.S. 975 (1982).

5. *Arreola*, 7 Cal. 4th at 1148, 875 P.2d at 738, 31 Cal. Rptr. 2d at 633.

6. *Id.* at 1148-51, 875 P.2d at 739-41, 31 Cal. Rptr. 2d at 634-36.

7. "The pertinent California statute—Penal Code section 1203.3—prescribes few procedural guidelines governing probation revocation proceedings." *Id.* at 1152, 875 P.2d at 741, 31 Cal. Rptr. 2d at 636; *see* CAL. PENAL CODE § 1203.3 (West 1982).

8. *Arreola*, 7 Cal. 4th at 1152, 875 P.2d at 741, 31 Cal. Rptr. 2d at 636. Before addressing the arguments propounded by the state, Justice George traced the evolution of probation jurisprudence as advanced by the United States Supreme Court. *Id.* Under the Court's holding in Morrissey v. Brewer, 408 U.S. 471 (1972), the majority explained that parolees enjoy certain minimum due process rights. *Arreola*, 7 Cal. 4th at 1152, 875 P.2d at 741, 31 Cal. Rptr. 2d at 636. Among these are: notice of alleged violations, access to adverse evidence, opportunity to appear and make a case, judgment by an impartial parole board, a written report by that board on the evidence applied in revocation, and significantly, the right to confront witnesses for the state. *Id.* at 1152-53, 875 P.2d at 741, 31 Cal. Rptr. 2d at 636 (citing *Morrisey*, 408 U.S at 489). The majority then considered the high court's subsequent holding in Gagnon v. Scarpelli, 411 U.S. 778 (1973), which applied the principles in *Morrissey* to probationers in analogous circumstances. *Arreola*, 7 Cal. 4th at 1153, 875 P.2d at 742, 31 Cal. Rptr. 2d at 637; *see also* People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972) (applying minimum due process requirements to California probation revocation hearings). *See generally* Mihal Nahari, *Due Process and Probation Revocation: The Written Statement Requirement*, 56 FORDHAM L. REV. 759 (1988) (discussing *Morrissey's* procedural impact).

9. *Arreola*, 7 Cal. 4th at 1153, 875 P.2d at 742, 31 Cal. Rptr. 2d at 637.

10. *Id.*; *see* People v. Winson, 29 Cal. 3d 711, 631 P.2d 55, 175 Cal. Rptr. 621 (1981), *cert. denied*, 455 U.S. 975 (1982). The appellant in *Winson* was a probationer subsequently accused of armed robbery. *Id.* at 714, 631 P.2d at 56, 175 Cal. Rptr. at

cided the issue at hand, requiring a finding of good cause before allowing for the admission of preliminary hearing transcripts in the probation revocation setting.[11] Reaffirming *Winson*, the unanimous court emphasized the historical preference for face to face accusation under the confrontation clause.[12] The court noted that unlike preliminary hearing transcripts, documentary evidence does not have accusatory testimony at its source, and therefore, the same principle did not govern their subsequent holding in *People v. Maki*.[13]

Against this backdrop of limpid constitutional doctrine, the majority directly confronted the Attorney General's dual contentions which were poised in the alternative.[14] The primary argument on appeal was that, under *Maki*, a transcript proven sufficiently reliable is not subject to

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11. *Arreola*, 7 Cal. 4th at 1154, 875 P.2d at 742, 31 Cal. Rptr. 2d at 637 (citing *Winson*, 29 Cal. 3d at 713-14, 631 P.2d at 56, 175 Cal. Rptr. at 622). Despite the congenial language of the Attorney General's brief in this case requesting a "clarification" of *Winson*, the respondent was actually seeking a result that would overturn the 13-year precedent. Graham Article 6/14/94, *supra* note 2, at 23. The court was not swayed by this manipulation of terms as manifested in this exchange between Justice Kennard and Deputy Attorney General Jeffrey Bryant during oral argument:

Justice Kennard: "You're asking us to 'clarify' Winson . . . Why should we overrule Winson?"

Attorney General Bryant: "While I said clarify, unfortunately I think I mean overrule it." *Id.*

12. *Arreola*, 7 Cal. 4th at 1155, 875 P.2d at 743, 31 Cal. Rptr. 2d at 638; *see* Ohio v. Roberts, 448 U.S. 56 (1980) (evaluating declarant unavailability as hearsay exception in light of the confrontation clause). "[T]he Clause envisions 'a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 63-64 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1985)). *See generally* Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1079 (1991) (discussing demeanor and detection of deception); Joel R. Brown, Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U. L. REV. 949 (1987) (discussing the confrontation clause and the hearsay problem); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986) (same).

13. *Arreola*, 7 Cal. 4th at 1155-56, 875 P.2d at 743-44, 31 Cal. Rptr. 2d at 638-39 (citing People v. Maki, 39 Cal. 3d 707, 704 P.2d 743, 217 Cal. Rptr. 676 (1985)). In *Maki*, an out-of-state, car rental receipt, signed by the defendant, was used as evidence to show that he had left the state in violation of his probation. *Maki*, 39 Cal. 3d at 709, 704 P.2d at 744, 217 Cal. Rptr. at 678. The court held that traditional documentary evidence of this type was admissible when accompanied by sufficient indicia of reliability. *Id.* at 717, 704 P.2d at 751, 217 Cal. Rptr at 684.

14. *Arreola*, 7 Cal. 4th at 1148, 875 P.2d at 738, 31 Cal. Rptr. 2d at 633.

Winson's good cause requirement.[15] The argument relied on the premise that the defendant's notification as to the potential use of the contested procedure provided him with a heightened motive to cross examine.[16] Therefore, the state contended that notice was the factor that made the preliminary hearing transcript independently reliable and free from the required good cause showing.[17]

The state's secondary argument urged that the holding in *Maki* impliedly overturned *Winson's* procedural mandates entirely.[18] The court refuted any attempted reinterpretation of *Winson* through *Maki* by reemphasizing the distinctions between the documentary and the testimonial evidence.[19] Confrontation is valuable because it provides the trier of fact with a view of witness demeanor.[20] The court asserted that demeanor is lost without live testimony.[21] Therefore, the court rejected the government's attempt to frame the two decisions as inconsistent.[22] The court further noted that nothing in the *Maki* opinion explicitly overruled *Winson*.[23] Finally, the court cataloged the recent United States Supreme Court's decisions reaffirming the importance of testimonial confrontation.[24]

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15. *Id.* at 1156, 875 P.2d at 744, 31 Cal. Rptr. 2d at 639.

16. *Id.*

17. *Id.*

18. *Id.* at 1148, 875 P.2d at 738, 31 Cal. Rptr. 2d at 633.

19. *Id.* at 1156-57, 875 P.2d at 744, 31 Cal. Rptr. 2d at 639.

20. *Id.* The divergence of thought on the importance of demeanor in probation revocation hearings was manifest during oral argument by Justice Arabian on one hand, "'We're dealing now with a court trial, with a professional trial judge not so easily swayed by emotion and demeanor . . . . Is it in the interest of judicial and law enforcement economy to have the same dance a second time?'" and Justice Baxter on the other, "'Is demeanor any less important to a judge than to a jury? . . . Where you have a trial judge who has heard hundreds and hundreds of witnesses it seems to me the trial judge might become quite expert at determining who's telling the truth and who isn't.'" Scott Graham, *Chutzpah Comes in Handy in Hearings Before High Court*, THE RECORDER, June 14, 1994 at 26. *See generally* David B. Sweet, *Federal Constitutional Right to Confront Witnesses—Supreme Court Cases*, 98 L. Ed. 2d 1115 (1993).

21. *Arreola*, 7 Cal. 4th at 1157, 875 P.2d at 744, 31 Cal. Rptr. 2d at 639.

22. *Id.*

23. *Id.* at 1157, 875 P.2d at 744-45, 31 Cal. Rptr. 2d at 639-40.

24. *Id.* at 1158-59, 875 P.2d at 745-46, 31 Cal. Rptr. 2d at 640-41. According to the court, nothing in subsequent Supreme Court rulings justified a retreat from the principles espoused in *Winson*. *Id.*; *see* Coy v. Iowa, 487 U.S. 1012 (1988) (expounding on the constitutional preference for face-to-face confrontation); United States v. Inadi, 475 U.S. 387 (1986) (detailing constitutional limits on the use of transcripted former testimony); Black v. Romano, 471 U.S. 606 (1985) (upholding probationer's right to confrontation absent good cause).

Responding to the economic concerns that precipitated the Santa Clara County practice, the court proposed that jurisdictions avoid the duplication of effort by combining the preliminary and probation revocation hearings.[25]

Finally, the court reiterated the *Winson* mandate that the admission of former testimony be evaluated on a case by case basis and ratified only upon a showing of good cause.[26] Finding this precept compromised in the instant case, the court held that Arreola had been denied due process.[27] However, the strength of other relevant evidence employed by the trier of fact led the court to conclude harmless error beyond a reasonable doubt.[28]

II. IMPACT AND CONCLUSION

Arreola's substantive significance as a rare victory for California's criminal defense bar is overshadowed by the decision's procedural impact. The majority, in judicially sanctioning a cooperative probation revocation/preliminary hearing, achieved a reasonable compromise between judicial economy and the rights of probationers. However, the implementation of this device requires probation departments to coordinate their evaluations within the constitutional time constraints required of criminal proceedings. Since *Arreola* impacts the capacity of municipal probation departments to meet this increased demand for timeliness, the holding's effect on judicial economy remains to be seen.

DANIEL P. FLIFLET

25. *Arreola*, 7 Cal. 4th at 1159, 875 P.2d at 746, 31 Cal. Rptr. 2d at 641.

26. *Id.* at 1159-60, 875 P.2d at 746, 31 Cal. Rptr. 2d at 641. "'[G]ood cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard . . . (2) when the declarant . . . can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm . . . to declarant." *Id.*; *see generally* Kirkpatrick, *supra* note 12.

27. *Arreola*, 7 Cal. 4th at 1160, 875 P.2d at 747, 31 Cal. Rptr. 2d at 642.

28. *Id.* at 1161-62, 875 P.2d at 747-48, 31 Cal. Rptr. 2d at 642-43. Arreola's conviction on the drunk driving charge, although contested, was the predominant factor precipitating the court's decision. *Id.*

C. *Under Evidence Code section 1101, evidence of a defendant's subsequent uncharged acts of criminal misconduct, which are similar to the charged offense, is not admissible to prove intent if the evidence is merely cumulative because the prejudicial effect of the evidence outweighs its probative value; however, when the similarities support an inference that both the uncharged and the charged offenses are manifestations of a common design or plan, the evidence is admissible to show a common design or plan, unless its prejudicial effect outweighs its probative value:* **People v. Balcom.**

I. INTRODUCTION

In *People v. Balcom*,[1] the California Supreme Court considered whether Evidence Code section 1101[2] barred the admissibility of evidence that

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1. 7 Cal. 4th 414, 867 P.2d 777, 27 Cal. Rptr. 2d 666 (1994). Justice George authored the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, and Panelli joined. *Id.* at 418, 867 P.2d at 778, 27 Cal. Rptr. 2d at 667. Justice Arabian filed a separate concurring opinion. *Id.* at 428, 867 P.2d at 785, 27 Cal. Rptr. 2d at 674 (Arabian, J., concurring). Justice Baxter filed a separate opinion concurring in part and dissenting in part. *Id.* at 432, 867 P.2d at 788, 27 Cal. Rptr. 2d at 677 (Baxter, J., concurring and dissenting). Justice Mosk filed a dissenting opinion. *Id.* at 435, 867 P.2d at 790, 27 Cal. Rptr. 2d at 679 (Mosk, J., dissenting).

2. Section 1101 provides:

> (a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

CAL. EVID. CODE § 1101 (West 1966 & Supp. 1995). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 325-326, 356 (3d ed. 1986 & Supp. 1994) (discussing the inadmissibility of character evidence); 31 CAL. JUR. 3D *Evidence* § 204 (1976 & Supp. 1994) (discussing general rule that character evidence is inadmissible to

the defendant committed similar uncharged acts after the charged offenses,[3] and whether the evidence of the uncharged offenses[4] was admissible to prove intent.[5] The court concluded that such evidence was inadmissible to prove intent because the evidence was merely cumulative,[6] and therefore, its substantial prejudicial effect outweighed its limited probative value.[7] However, the court held that the evidence was suffi-

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prove conduct on a specific occasion and the reasoning underlying the rule).

3. *Balcom*, 7 Cal. 4th at 421, 867 P.2d at 780-81, 27 Cal. Rptr. 2d at 669-70. The defendant was charged by information with rape (under § 261, subdivision (2)), and the related offenses of burglary and robbery. *Id.* at 418, 867 P.2d at 779, 27 Cal. Rptr. 2d at 668. *See generally* CAL. PENAL CODE § 459 (West 1988 & Supp. 1995) (burglary); CAL. PENAL CODE § 211 (West 1988 & Supp. 1995) (robbery). A jury found the defendant guilty of first degree robbery but because the jury was unable to reach a verdict on the rape and burglary counts, the judge set the case for retrial on the rape count alone. *Balcom*, 7 Cal. 4th at 418, 867 P.2d at 779, 27 Cal. Rptr. 2d at 668. Prior to the second trial, the evidence of defendant's uncharged offenses was admitted and the jury convicted the defendant for rape. *Id.* At the time of the crime, § 261, subdivision (2), defined rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . (2) Where it is accomplished against a person's will by means of force, violence, or fear of immediate or unlawful bodily injury on the person or another." CAL. PENAL CODE § 261 (West 1988). The legislature subsequently amended the statute, redesignated this provision as section 261, subdivision (a)(2), and added acts of intercourse accomplished by means of duress or menace to the definition of rape. *See* CAL. PENAL CODE § 261 (West 1988 & Supp. 1995).

4. On the stand, the defendant admitted his conviction for "criminal sexual assault" in Michigan. *Balcom*, 7 Cal. 4th at 421, 867 P.2d at 780, 27 Cal. Rptr. 2d at 669. He stated that his sentence for that offense was a term of 50 years in prison but that he was appealing the judgment. *Id.* In rebuttal, the prosecution presented Theresa H., who testified that six weeks after the commission of the charged offense, she was stopped by the defendant who was wearing a cap, while driving out of her apartment complex early in the morning. *Id.* He held a handgun to her head, and though he initially professed his intention to rob her, he drove her car to another location and raped her. *Id.* The defendant then took Theresa's ATM card out of her purse, and forced her to provide him with the correct PIN. *Id.* He made her leave the vehicle and he drove away in her car. *Id.* at 420-21, 867 P.2d at 780-81, 27 Cal. Rptr. 2d at 669-70.

5. *Id.* at 420, 867 P.2d at 781, 27 Cal. Rptr. 2d at 670; *see* CAL. EVID. CODE § 1101(b) (West 1966 & Supp. 1995).

6. *Balcom*, 7 Cal. 4th at 422-23, 867 P.2d at 781-82, 27 Cal. Rptr. 2d at 670-71.

7. *Id.* at 423, 867 P.2d at 783, 27 Cal. Rptr. 2d at 671. The court weighed the probative value of the evidence against its prejudicial effect pursuant to § 352, which provides, in pertinent part, that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1966 & Supp. 1995). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 298-308 (3d ed. 1986 & Supp. 1994) (discussing the exclusion of relevant evidence under § 352 for policy reasons); Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV.

ciently similar to prove the existence of a common design or plan, and because its probative value was not outweighed by its prejudicial effect, the evidence was admissible.[8]

II. STATEMENT OF THE CASE

The victim, Denise B., testified that on July 24, 1988, she heard a knock on the front door of the condominium she shared with her roommate, Jace O.[9] Looking through the peephole, she observed a caucasian male wearing a cap, and she opened the door.[10] The man asked her if someone named Mike lived in the condominium and Denise answered no.[11] As she closed the door, the man walked away.[12]

Denise heard another knock on the door a few minutes later.[13] Once again, she looked out the peephole and observed a man wearing a cap.[14] This time, instead of opening the door, she went out onto her patio to look over the fence and saw the defendant, a six-foot-tall black man, standing by her front door holding a rifle.[15] The defendant ran toward

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1003 (1984) (discussing broad judicial discretion regarding the admissibility of character evidence as compared to the common law rules favoring the exclusion of such evidence).

8. *Balcom*, 7 Cal. 4th at 418, 867 P.2d at 778-79, 27 Cal. Rptr. 2d at 667-668. The court found that evidence of the uncharged offenses was relevant whether the defendant used such a plan when he committed the charged offenses or developed one at that time and followed that plan again in the subsequent offenses. *Id. See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 374-375 (3d ed. 1986 & Supp. 1994) (discussing the admissibility of character evidence to prove a common design or plan); 21 CAL. JUR. 3D *Criminal Law* § 3169 (1985) (discussing the admissibility of character evidence to prove the existence of a common design or plan). It is no surprise that Justice Mosk dissented in this case, since he also dissented in a case the court relied on in its analysis. Compare *Balcom*, 7 Cal. 4th at 435, 867 P.2d at 790, 27 Cal. Rptr. 2d at 679 (Mosk, J., dissenting) with People v. Ewoldt, 7 Cal. 4th 380, 408, 867 P.2d 757, 774, 27 Cal. Rptr. 2d 646, 663 (1994) (Mosk, J., dissenting).

9. *Balcom*, 7 Cal. 4th at 418, 867 P.2d at 779, 27 Cal. Rptr. 2d at 668.

10. *Id.* at 418-19, 867 P.2d at 779, 27 Cal. Rptr. 2d at 668.

11. *Id.* at 419, 867 P.2d at 779, 27 Cal. Rptr. 2d at 668.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

her, jumping over the fence.[16] He pointed the weapon at Denise and directed her inside.[17]

The defendant initially announced his intention to rob Denise and asked for her automated teller machine (ATM) card and personal identification number (PIN).[18] She gave him her correct PIN number and then, at his insistence, also gave him the key to her automobile.[19] The defendant searched for other valuables, but, upon finding little of value, manifested his intention to rape her.[20] He tied her wrists with a belt and ordered her to kneel on the floor.[21] He held the gun to her face, gagged her, and raped her.[22]

Before leaving the apartment, the defendant took Denise's watch, camera, and a towel, and tied her ankles with another belt.[23] Although he threatened to return and kill her if she reported him, she managed to remove the gag and call the police after he left.[24] The police arrived and found Denise, bound at the wrists and ankles, inside the ransacked condominium, and discovered her car was stolen.[25]

Denise identified the defendant as her assailant in a photographic lineup approximately six weeks later.[26] Other evidence introduced against the defendant included testimony by an eyewitness who saw the defendant leaving the apartment complex on the morning of the crime, and proof that the defendant pawned Denise's camera.[27] In addition, the police found the defendant's fingerprints on the pawn slip and on Denise's jewelry box, and a semen analysis matched the defendant's blood type.[28]

The defendant testified that he met Denise and her roommate, Jace O., when he and a friend sold drugs to Jace at Denise's condominium.[29] The defendant claimed that he returned to Denise's condominium the following night to collect money owed him for a necklace which Jace had

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 419, 867 P.2d at 780, 27 Cal. Rptr. 2d at 669.
25. *Id.* at 420, 867 P.2d at 780, 27 Cal. Rptr. 2d at 669.
26. *Id.* Denise was shown two photographic lineups. The defendant's photograph was not included in the first lineup and Denise indicated that none of the pictured men was the defendant. The defendant's photograph was included in the second photographic lineup and Denise identified him at that time as her rapist. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

agreed to buy on the previous night.[30] The defendant further testified that he and Denise had consensual sexual intercourse.[31] The defendant explained that he became angry and demanded the money from Denise when she told him that Jace did not intend to pay him the money for the necklace.[32] When she refused to give him the money, he demanded her ATM card, but she refused to meet his demand.[33] He then removed the card from her purse but when she would not disclose her PIN, he took her camera, setting it on her bed, and proceeded to look for other valuables.[34] When Denise grabbed the camera and threw it at him, he tied her wrists and ankles together with belts.[35] The defendant further asserted that he gagged Denise only after she threatened to cry rape.[36] When Denise finally supplied him with her PIN, he took her ATM card, camera, and car keys, and drove off in her car.[37]

III. TREATMENT

A. *Majority Opinion*

Justice George, writing for the majority, noted that Evidence Code section 1101 allows the admission of evidence of a criminal defendant's uncharged offenses only if it is relevant to prove a fact other than the defendant's character.[38] The court initially addressed the prosecution's contention that evidence of the defendant's similar acts of rape and robbery committed several weeks after the charged offenses was admissible to prove intent.[39]

The court considered the different accounts of the sexual encounter given by the victim and the defendant.[40] While the victim testified that the defendant put a gun to her head and raped her, the defendant testi-

30. *Id.* at 420, 867 P.2d at 780, 27 Cal. Rptr. 2d at 669.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 420-21, 867 P.2d at 780, 27 Cal. Rptr. 2d at 669.
36. *Id.* at 421, 867 P.2d at 780, 27 Cal. Rptr. 2d at 669.
37. *Id.* The defendant also admitted that he withdrew $200 from her bank account and pawned the camera. *Id.*
38. *Id.* at 422, 867 P.2d at 781, 27 Cal. Rptr. 2d at 670. Evidence can be admitted to prove relevant facts, such as, motive, intent, opportunity, and common design or plan. CAL. EVID. CODE § 1101(b) (West 1966 & Supp. 1995).
39. *Balcom*, 7 Cal. 4th at 422, 867 P.2d at 781, 27 Cal. Rptr. 2d at 670.
40. *Id.*

fied that he and the victim engaged in consensual sexual intercourse.[41] The court emphasized that because the two stories were so different, no reasonable juror could find that the defendant committed the alleged acts but lacked the requisite intent to commit rape because of a reasonably mistaken belief that the victim consented.[42] The court reasoned that if the jury believed the victim's testimony, her testimony constituted compelling evidence of defendant's intent.[43]

The court further reasoned that if the jury believed the victim's testimony, it alone would establish the requisite intent, and evidence of defendant's uncharged offenses would be only cumulative on the issue.[44] The court concluded that the prejudicial effect of the evidence outweighed its limited probative value to prove intent when the evidence was only cumulative.[45] Therefore, the evidence of defendant's uncharged acts was inadmissible to prove intent.[46]

The court then addressed the admissibility of the evidence to prove a common design or plan.[47] The court noted that to establish a common design or plan, the evidence "need not be distinctive or unusual,"[48] but only "'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'"[49] The court reasoned that the defendant's

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41. *Id.*
42. *Id.*
43. *Id.* at 423, 867 P.2d at 781-82, 27 Cal. Rptr. 2d at 670-71.
44. *Id.*
45. *Id.* at 423, 867 P.2d at 782, 27 Cal. Rptr. 2d at 671.
46. *Id.*
47. *Id.*
48. *Id.* at 424, 867 P.2d at 783, 27 Cal. Rptr. 2d at 672. Generally, to prove identity, the evidence of the uncharged offenses and the charged offenses must share characteristics so distinctive and unusual that they are like a signature. *Id.* at 424-25, 867 P.2d at 783, 27 Cal. Rptr. 2d at 672 (citing People v. Ewoldt, 7 Cal. 4th 380, 403, 867 P.2d 757, 770-71, 27 Cal. Rptr. 2d 646, 659-60 (1994) (citation omitted) (reasoning that in a child sexual molestation case, evidence of defendant's prior, uncharged lewd acts on the victim's sister was admissible even though uncorroborated)). The existence of shared distinctive or unusual characteristics, although not required, may, however, increase the probative value of evidence used to prove a common design or plan. *Id.* at 425, 867 P.2d at 783, 27 Cal. Rptr. 2d at 672; *see, e.g.*, People v. Peete, 28 Cal. 2d 306, 317-18, 169 P.2d 924, 931-32 (1946) (finding increased probative value of evidence that the defendant had previously killed her landlord in the same manner as the victim in the case under review, with one shot to the back of the neck, the bullet having struck the fourth vertebra, and that both bodies were found buried at the defendant's residence).
49. *Balcom*, 7 Cal. 4th at 423-24, 867 P.2d at 782, 27 Cal. Rptr. 2d at 671 (quoting *Ewoldt*, 7 Cal. 4th at 393-94, 867 P.2d at 764, 27 Cal. Rptr. 2d at 653 (citation omitted)). The *Ewoldt* court overruled a prior holding that evidence of uncharged misconduct was admissible to show a common design or plan only if the charged and the uncharged offenses were part of a "single, continuing conception or plot." *Ewoldt*, 7

uncharged offenses shared enough common features with the charged offenses to support an inference that both were part of a common design.[50]

The court then expounded upon the similarities between the uncharged and the charged offenses.[51] First, the court noted that on both occasions, which occurred only about six weeks apart, the defendant, dressed in similar clothing, "went to an apartment complex in the early morning, sought out a lone woman unknown to him, and [held her] at gunpoint."[52] Second, the court observed that in both instances the defendant initially professed that he only wanted money, but then moved the victim to another location, forcibly undressed the victim, and committed a single act of intercourse.[53] Finally, in both situations, the defendant demanded the victim's ATM card and PIN and escaped in her automobile.[54] The court found that these similarities supported an inference that the defendant either employed a design or plan in the commission of the uncharged offenses or that he developed such a design or plan during the commission of the charged offenses.[55]

The court then considered whether the prejudicial effect of the evidence of defendant's uncharged offenses, stemming from the similarities to the charged offenses, substantially outweighed its probative value.[56] The close proximity of the uncharged offenses to the charged offenses and the independence of the sources increased the probative value of the

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Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. at 658 (citing People v. Tassel, 36 Cal. 3d 77, 85, 679 P.2d 1, 5, 201 Cal. Rptr. 567, 571 (1984)).

50. *Balcom*, 7 Cal. 4th at 424, 867 P.2d at 782, 27 Cal. Rptr. 2d at 671.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* The fact that the uncharged offenses were committed subsequent to the commission of the charged offenses did not decrease their relevance in determining a common design or plan. *Id.* at 425, 867 P.2d at 783, 27 Cal. Rptr. 2d at 672; *see* People v. Coefield, 37 Cal. 2d 865, 870, 236 P.2d 570, 573 (1951) (holding that because the evidence was relevant to establish a common scheme and intent to commit robbery, it made no difference whether the uncharged offenses committed were prior or subsequent to the charged offenses). *But cf.* People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980) (holding that admission of evidence of uncharged robbery and burglary was prejudicial error when the central issue was defendant's specific intent to steal).

56. *Balcom*, 7 Cal. 4th at 426-27, 867 P.2d at 784, 27 Cal. Rptr. 2d at 673; *see* CAL. EVID. CODE § 352 (West 1966 & Supp. 1995).

evidence.[57] While dissimilarities between the two sets of offenses decreased the probative value of the evidence, the defendant's prior conviction for the uncharged offenses offset the effect of those dissimilarities by decreasing the prejudicial impact.[58] Therefore, the court held that the probative value outweighed the prejudicial impact and that the evidence was admissible to prove a common design or plan.[59]

B. Justice Arabian's Concurring Opinion

Justice Arabian concurred with the majority opinion and wrote separately to state an additional reason for the admissibility of the evidence.[60] He believed that the evidence corroborated the victim's testimony in the present case.[61] Justice Arabian noted that credibility problems run rampant in trials for sex crimes because those crimes are generally committed in private and the only witnesses are usually the victim and the defendant.[62] Therefore, because of the increased importance of corroboration evidence to determine credibility of the parties, the jury should be allowed to consider such evidence.[63]

C. Justice Baxter's Concurring and Dissenting Opinion

Justice Baxter wrote an opinion concurring in the admissibility of the evidence to establish a common design or plan, but dissenting with the majority regarding the evidence's inadmissibility to prove intent.[64] Justice Baxter agreed with the majority's assertion that, due to the com-

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57. *Balcom*, 7 Cal. 4th at 427, 867 P.2d at 784, 27 Cal. Rptr. 2d at 673.

58. *Id.* at 427, 867 P.2d at 785, 27 Cal. Rptr. 2d at 674.

59. *Id.*

60. *Id.* at 428, 867 P.2d at 785, 27 Cal. Rptr. 2d at 674 (Arabian, J., concurring).

61. *Id.* (Arabian, J., concurring). Justice Arabian claimed that "[t]he more similar, and the more independent, the two accounts are, the greater the strength of the corroboration." *Id.* at 428, 867 P.2d at 786, 27 Cal. Rptr. 2d at 675 (Arabian, J., concurring). He discussed the doctrine of corroboration and affirmed it with restrictions on remoteness and similarity. *See id.* at 429-31, 867 P.2d at 786-87, 27 Cal. Rptr. 2d at 675-76 (Arabian, J., concurring) (citing People v. Thomas, 20 Cal. 3d 457, 468-470, 573 P.2d 433, 438-40, 143 Cal. Rptr. 215, 220-22 (1978) (holding that evidence of prior misconduct is admissible to prove common design or plan)). Justice Arabian also claimed that the doctrine of chances, when the victim's story in the uncharged offenses was so similar to the one told by the victim in the charged offenses that the chances both victims lied are remote, was another rationale for the admission of the evidence. *Id.* at 430-32, 867 P.2d at 786-88, 27 Cal. Rptr. at 675-77 (Arabian, J., concurring).

62. *Id.* at 431, 867 P.2d at 786-87, 27 Cal. Rptr. 2d at 676-77 (Arabian, J., concurring).

63. *Id.* (Arabian, J., concurring).

64. *Id.* at 432, 867 P.2d at 788, 27 Cal. Rptr. 2d at 677 (Baxter, J., concurring and dissenting).

pletely different accounts of the sexual encounter given by the victim and the defendant, once the jury accepted either story, there could be no dispute as to intent.[65] Justice Baxter also agreed that the prosecution needed to prove only the wilful commission of the proscribed conduct because rape is a general intent crime, and therefore, the state of mind of the defendant is a fact that must be independently resolved only if there is an inference of reasonable mistake on the part of the defendant.[66] However, Justice Baxter claimed that intent here was still a material issue, despite the lack of evidence indicating reasonable mistake.[67]

Justice Baxter asserted that because the defendant claimed that the victim consented, evidence of his intent was circumstantial evidence that the defendant actually committed the charged offenses.[68] He claimed that intent was an intermediate fact from which the ultimate fact of defendant's guilt could be inferred.[69] Justice Baxter believed that the evidence of the uncharged offenses was not offered as propensity evidence, which is prohibited under section 1101, and therefore was relevant to prove not only a common plan, but also to prove the intent of the defendant.[70]

D. Justice Mosk's Dissenting Opinion

Justice Mosk wrote a dissenting opinion to express his belief that the evidence of the uncharged offenses was not relevant to establish a common design or plan.[71] He asserted that the majority held the evidence relevant only to demonstrate the type of crime that the defendant allegedly committed.[72] Justice Mosk disagreed with the majority's assertions that the crimes appeared to be part of an overall plan and that they were exceptionally similar.[73] Justice Mosk claimed that the evidence of the

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65. *Id.* (Baxter, J., concurring and dissenting).

66. *Id.* (Baxter, J., concurring and dissenting).

67. *Id.* at 432-33, 867 P.2d at 788, 27 Cal. Rptr. 2d at 677 (Baxter, J., concurring and dissenting).

68. *Id.* at 433, 867 P.2d at 788, 27 Cal. Rptr. 2d at 678 (Baxter, J., concurring and dissenting).

69. *Id.* at 433, 867 P.2d at 789, 27 Cal. Rptr. 2d at 678 (Baxter, J., concurring and dissenting) (citing People v. Thompson, 27 Cal. 3d 303, 315, 611 P.2d 883, 888, 165 Cal. Rptr. 289, 294 (1980)).

70. *Id.* at 435, 867 P.2d at 790, 27 Cal. Rptr. 2d at 679 (Baxter, J., concurring and dissenting).

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

72. *Id.* at 436, 867 P.2d at 790, 27 Cal. Rptr. 2d at 679 (Mosk, J., dissenting).

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

uncharged offenses was nothing but propensity evidence and was therefore inadmissible under section 1101.[74]

IV. CONCLUSION

The court's holding in *Balcom* is consistent with its prior holdings concluding that evidence of a defendant's criminal misconduct is not admissible to prove intent but is admissible to prove a common design or plan.[75] The court, however, reiterated that such decisions require a case-by-case analysis and an independent weighing of the probative value of the evidence against its prejudicial effect.[76] Where the evidence is merely cumulative, the prejudicial effect outweighs the probative value and the evidence is inadmissible. But where there are sufficient similarities between the uncharged offenses and the charged offenses, and the probative value of the evidence is not outweighed by its prejudicial effect, the evidence is admissible.

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74. *Id.* at 436, 867 P.2d at 790-91, 27 Cal. Rptr. 2d at 680 (Mosk, J., dissenting).

75. *See* People v. Ewoldt, 7 Cal. 4th 380, 867 P.2d 757, 27 Cal. Rptr. 2d 646 (1994).

76. *See Balcom*, 7 Cal. 4th at 426-27, 867 P.2d at 784, 27 Cal. Rptr. 2d at 673; *see also* CAL. EVID. CODE § 352 (West 1966 & Supp. 1995).

D. *Exclusion of evidence concerning "partition ratio" is proper because section 23152 of the California Vehicle Code does not create a conclusive presumption of intoxication, but rather defines the substantive offense of driving with a specified concentration of alcohol in the body:* **People v. Bransford.**

I. INTRODUCTION

In *People v. Bransford*,[1] the California Supreme Court considered whether the trial court erred in refusing to allow defendants to show that their personal partition ratio[2] differed from the standard partition ratio that used to convert breathalyzer breath-alcohol readings to blood-alcohol equivalents.[3] The court of appeal affirmed the judgment of the trial court, holding that the exclusion of evidence was proper.[4] The California Supreme Court affirmed the decision of the court of appeal.[5]

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1. 8 Cal. 4th 885, 884 P.2d 70, 35 Cal. Rptr. 2d 613 (1994). Justice Mosk wrote the majority opinion of the court with Chief Justice Lucas, Justices Arabian, Baxter, George, and Werdegar concurring. *Id.* at 887-893, 884 P.2d at 70-75, 35 Cal. Rptr. 2d at 613-18. Justice Kennard filed a separate concurring and dissenting opinion. *Id.* at 893, 884 P.2d at 75, 35 Cal. Rptr. 2d at 618 (Kennard, J., concurring and dissenting).

2. Partition ratio is the ratio of breath-alcohol concentration to blood-alcohol concentration. *Id.* at 888, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614.

3. *Id.* at 887-88, 884 P.2d at 70-71, 35 Cal. Rptr. 2d at 613-14. On August 18, 1991, the defendant, Donald E. Bransford, was arrested for driving under the influence. *Id.* Bransford took a breath test following the arrest which registered a 0.09 percent blood-alcohol concentration. *Id.* Subsequently, on October 22, 1992, a jury convicted him of violating California Vehicle Code § 23152(b)—driving under influence of alcohol. *Id.* at 888, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614.

A second defendant, Ralph Maldonado, was arrested June 27, 1991 for driving under the influence, and was subsequently convicted on September 24, 1991 for violating § 23152(b). *Id.*

Both defendants sought to introduce evidence concerning the variables which affect the actual ratio of their breath-alcohol to blood-alcohol concentration. *Id.* However, the trial court did not allow the presentation of such evidence. *Id.*

The court of appeal affirmed the conviction. *Id.*; *see* People v. Bransford, 26 Cal. App. 4th 332, 342-43, 19 Cal. Rptr. 2d 595, 601 (1993). The California Supreme Court granted review. *Bransford*, 8 Cal. 4th at 887, 884 P.2d at 70, 35 Cal. Rptr. 2d at 613.

4. *Bransford*, 26 Cal. App. 4th at 342, 19 Cal. Rptr. 2d at 601.

5. *Bransford*, 8 Cal. 4th at 888, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614.

II. TREATMENT

A. *Majority opinion*

The court began by asserting that California Vehicle Code section 23152(b)[6] is "a valid exercise of the police power and is not void for vagueness."[7] The court then noted the 1989 alteration to section 23152(b),[8] emphasizing that the statute, in 1989, still defined driving under the influence as "grams of alcohol per 100 milliliters of blood."[9] Because numerous factors such as "body temperature, atmospheric pressure, medical conditions, sex, and the precision of the measuring device" have an impact on the ratio of breath-alcohol concentration to blood-alcohol concentration,[10] courts had allowed defendants charged under the 1989 version of section 23152(b) to challenge breath test results.[11]

In the case at hand, the defendants were convicted under the 1990 version of section 23152(b).[12] This amended version defines driving under the influence in terms of "grams of alcohol per 100 milliliters of blood *or grams of alcohol per 210 liters of breath.*"[13] The defendants argued that

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6. CAL. VEH. CODE § 23152(b) (West 1985 & Supp. 1995). This subsection states: "It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." CAL. VEH. CODE § 23152(b) (West 1985 & Supp. 1995). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* §§ 917-920 (2d ed. 1988 & Supp. 1994) (defining "drunk driving," "under the influence," and "with unlawful blood alcohol"); 18 CAL. JUR. 3D *Criminal Law* §§ 1654-1655 (1984 & Supp. 1994) (discussing driving under the influence and the elements of the offense).

7. *See Bransford*, 8 Cal. 4th at 888, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614 (citing Burg v. Santa Clara Mun. Court, 35 Cal. 3d 257, 266-73, 673 P.2d 732, 737-42, 198 Cal. Rptr. 145, 150-54 (1983), *cert. denied*, 466 U.S. 967 (1994)).

8. *Id.* at 888, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614. The statute was changed to read "0.08" instead of "0.10" percent blood-alcohol concentration, thus lowering the prohibited blood-alcohol concentration. *Id.*

9. *Id.* at 888-89, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614. Thus, in order to acquire readings in terms of 100 milliliters of blood when breath tests were taken, a standard partition ratio had to be implemented. The ratio implemented by the Department of Health Services stated that the amount of alcohol in 210 liters of breath *equaled* the amount of alcohol per 100 milliliters of blood. *Id.* at 889, 884 P.2d at 71, 35 Cal. Rptr. 2d at 614.

10. *Id.* (citing Stephen G. Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301, 327 (1983)).

11. *Id.* at 889, 884 P.2d at 71-72, 35 Cal. Rptr. 2d at 614-15. The challenge is made on the basis that the defendant's own personal partition ratio was in fact different than the standard ratio used to compute blood-alcohol concentration. *Id. See generally* People v. Herst, 197 Cal. App. 3d Supp. 1, 243 Cal. Rptr. 83 (1987); People v. Pritchard, 162 Cal. App. 3d Supp. 13, 209 Cal. Rptr. 314 (1984).

12. *Bransford*, 8 Cal. 4th at 889, 884 P.2d at 72, 35 Cal. Rptr. 2d at 615.

13. *Id.* at 890, 884 P.2d at 72, 35 Cal. Rptr. 2d at 615 (emphasis added).

the revised version did not change the meaning of the statute, but rather codified the existing standard partition ratio.[14] Furthermore, defendants asserted that the addition of the phrase "or grams of alcohol "merely furnished an alternative method to calculate blood-alcohol concentrations.[15]

The California Supreme Court rejected the defendants' interpretation of the statute.[16] Examining the legislative history of the statute in question, the court found that the intent was to "eliminate the need for conversion of a breath quantity to a blood concentration of alcohol."[17] The court concluded that the revised version of the statute provided an "alternative definition of the offense of driving with a prohibited blood-alcohol concentration."[18]

The defendants additionally argued that section 23152(b) created "an irrebuttable, conclusive presumption that the amount of alcohol in 210 liters of breath was equivalent to the amount of alcohol in 100 milliliters of blood."[19] The court rejected this line of reasoning, reaffirming its decision in *Burg v. Santa Clara Municipal Court.*[20]

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14. *Id.* The standard partition ratio was not codified in the previous § 21352(b). *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 891, 884 P.2d at 73, 35 Cal. Rptr. 2d at 616. Legislative history also showed dissatisfaction with the attacks by defendants on the standard partition ratio, stating that it "result[s] in expensive and time consuming evidentiary hearings and undermine[s] successful enforcement of driving under the influence laws." *Id.*

18. *Id.* at 892, 884 P.2d at 73, 35 Cal. Rptr. 2d at 616; *see* Burg v. Santa Clara Mun. Court, 35 Cal. 3d 257, 265, 673 P.2d 732, 736-37, 198 Cal. Rptr. 145, 149. (1983) ("[T]he statute defines, in precise terms, the conduct proscribed.").

19. *Bransford*, 8 Cal. 4th at 892, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617; *see also* Sandstrom v. Montana, 442 U.S. 510 (1979) (holding unconstitutional a jury instruction which presumes the outcome of a person's action); Ulster County Court v. Allen, 442 U.S. 140 (1979) (holding constitutional a statutory presumption that a firearm in a car is presumed to be in the illegal control of everyone in the car). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 920 (2d ed. 1988 & Supp. 1994); 18 CAL. JUR. 3D *Criminal Law* § 1658 (1984 & Supp. 1994); 8 CAL. JUR. 3D *Automobiles* § 487 (1993).

20. *Bransford*, 8 Cal. 4th at 892, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617; *see Burg*, 35 Cal. 3d at 265, 673 P.2d at 736-37, 198 Cal. Rptr. at 149 (holding that the statute "does not create a conclusive presumption of intoxication . . . [i]nstead, the statute defines, in precise terms, the conduct proscribed"). The statute does "not presume that the driver was intoxicated or 'under the influence'; instead, it defined the substantive offense of driving with a specified concentration of alcohol in the body." *Bransford*, 8 Cal. 4th at 892-93, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617.

The defendants next argued that by prohibiting the defense from presenting the evidence in question, the trial court violated section 28(d) of the California Constitution, which states that "courts shall not exclude relevant evidence."[21] The court rejected this assertion in lieu of its conclusion that "variability of partition ratios [is] not relevant evidence."[22] The defendants also relied on the United States Constitution, arguing a denial of their rights to confrontation and counsel.[23] Again, the court rejected this argument on the basis that a defendant does not have the right to present "testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[24]

B. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard disagreed with the court's decision regarding defendant Bransford, but agreed in upholding the conviction of defendant Maldonado.[25] Justice Kennard asserted that the majority's interpretation of section 21352(b) was erroneous and in effect created a new crime.[26] Justice Kennard cited a long line of cases to support a principle known "as the rule of lenity by the United States Supreme Court."[27]

Interpreting section 23152(b), Justice Kennard concluded that a plain language reading of the statute results solely in a prohibition against driving with alcohol in the blood, not driving with alcohol in the breath.[28]

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21. *Id.* at 893, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617. "[R]elevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I § 28(d).

22. *Bransford*, 8 Cal. 4th at 893, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617. Because § 23152(b) defines the offense of driving under the influence without considering the partition ratios, evidence of variability of partition ratios is not relevant. *Id.*

23. *Id.*; *see* U.S. CONST. amend. VI.

24. *Bransford*, 8 Cal. 4th at 893, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617 (citing Taylor v. Illinois, 484 U.S. 400, 410 (1988)).

25. *Id.* at 902, 884 P.2d at 80, 35 Cal. Rptr. 2d at 623-24 (Kennard, J., concurring and dissenting).

26. *Id.* (Kennard, J., concurring and dissenting). Justice Kennard titled the new crime, "driving with alcohol in one's breath." *Id.* at 894, 884 P.2d at 75, 35 Cal. Rptr. 2d at 618 (Kennard, J., concurring and dissenting).

27. *Id.* at 895, 884 P.2d at 76, 35 Cal. Rptr. 2d at 619 (Kennard, J., concurring and dissenting). Justice Kennard indicated that the majority delineated from this precedent. *Id.* at 898, 884 P.2d at 77, 35 Cal. Rptr. 2d at 620 (Kennard, J., concurring and dissenting). Where more than one interpretation exists, a court should choose the less stringent interpretation of a criminal statute. *Id.* at 896, 884 P.2d at 76, 35 Cal. Rptr. 2d at 619 (Kennard, J., concurring and dissenting). *See generally* United States v. Bass, 404 U.S. 336 (1971) (discussing the rule of lenity).

28. *Bransford*, 28 Cal. 4th at 897, 884 P.2d at 77, 35 Cal. Rptr. 2d at 620 (Kennard, J., concurring and dissenting).

Justice Kennard further criticized the majority's reasoning and its interpretation of the statute.[29] She then revisited the rule of lenity, noting that even if the majority interpretation could be supported by the text of the statute, the court should still have selected the interpretation of the statute which favored the defendants.[30]

The first sentence of the statute renders the proscribed conduct illegal.[31] The second sentence describes the correlation between blood alcohol levels and breath alcohol levels.[32] Relying on the relationship between the second sentence and the first, Justice Kennard found that a rebuttable presumption exists.[33] Furthermore, Justice Kennard asserted that even if driving with 0.08 percent of alcohol in one's breath were unlawful, the defendants in the instant case were charged in their complaints with driving with a 0.08 percent of alcohol in their blood, the jury instructions referred to alcohol in the blood, and the verdict form referred only to alcohol in the blood.[34]

Based on the dissent's findings and interpretations of the statute, the evidence excluded by the trial court was relevant, and as such should not have been excluded.[35] Justice Kennard then considered the pivotal issue—whether the exclusion of the evidence resulted in prejudicial error. As for Maldonado, the absence of an "adequate record from which [the] court can assess whether the trial court's error was prejudicial" invited an affirmation of the conviction.[36] However, because Bransford did produce an adequate record, Justice Kennard asserted that a reason-

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29. *Id.* at 897-98, 884 P.2d at 77-78, 35 Cal. Rptr. 2d at 620-21 (Kennard, J., concurring and dissenting).

30. *Id.* at 898, 884 P.2d at 77-78, 35 Cal. Rptr. 2d at 620-21 (Kennard, J., concurring and dissenting).

31. *Id.* at 899, 884 P.2d at 78, 35 Cal. Rptr. 2d at 621 (Kennard, J., concurring and dissenting). The first sentence of the statute states that "[i]t is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her *blood* to drive a vehicle." CAL. VEH. CODE § 23152(b) (West 1985 & Supp. 1995) (emphasis added).

32. The basis for this conclusion is the fact that the statute uses the words "shall be based upon" instead of a word such as "define." *Bransford*, 8 Cal. 4th at 899, 884 P.2d at 78, 35 Cal. Rptr. 2d at 621 (Kennard, J., concurring and dissenting).

33. *Id.* at 899, 884 P.2d at 78-79, 35 Cal. Rptr. 2d at 621-22 (Kennard, J., concurring and dissenting).

34. *Id.* at 900-01, 884 P.2d at 79, 35 Cal. Rptr. 2d at 622 (Kennard, J., concurring and dissenting).

35. *Id.* at 901, 884 P.2d at 79, 35 Cal. Rptr. 2d at 622-23 (Kennard, J., concurring and dissenting).

36. *Id.* at 901, 884 P.2d at 80, 35 Cal. Rptr. 2d at 623 (Kennard, J., concurring and dissenting).

able probability existed that a jury may have held differently if the trial court had permitted the excluded evidence.[37]

III. CONCLUSION

In *Bransford*, the California Supreme Court held that the exclusion of evidence concerning the variability of partition ratios used to convert breath alcohol readings to blood alcohol readings is proper.[38] In deciding this issue, the court held that section 23152(b) of the California Vehicle Code does not create "an irrebuttable, conclusive presumption that the amount of alcohol in 210 liters of breath is equivalent to the amount of alcohol in 100 milliliters of blood."[39] Rather, the statute sets out in specific terms the conduct which is proscribed.[40]

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37. *Id.* at 901-02, 884 P.2d at 80, 35 Cal. Rptr. 2d at 623 (Kennard, J., concurring and dissenting).

38. *Id.* at 887-88, 884 P.2d at 70-71, 35 Cal. Rptr. 2d at 613-14.

39. *Id.* at 892, 884 P.2d at 74, 35 Cal. Rptr. 2d at 617.

40. *Id.*

E. *Under Article I, section 16 of the California Constitution, the defendant must make an express waiver in open court before the right to trial by jury may be waived:* **People v. Ernst.**

I. INTRODUCTION

People v. Ernst[1] provided the California Supreme Court with the opportunity to decide whether a reversal of a conviction is warranted in a criminal case where the defendant did not expressly waive his right to trial by jury.[2] The court of appeal held that the lack of an express waiver

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1. 8 Cal. 4th 441, 881 P.2d 298, 34 Cal. Rptr. 2d 238 (1994). Justice George authored the majority opinion of the court, with Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and Justice Sills (David G. Sills, Presiding Justice, Court of Appeal, Fourth Appellate District, Division Three) concurring. *Id.* at 443, 881 P.2d at 303, 34 Cal. Rptr. 2d at 243.

2. *Id.* at 443, 881 P.2d at 299, 34 Cal. Rptr. 2d at 239; *see* CAL. CONST. art. I, § 16 (stating that jury trial may be waived only if the defendant and the defendant's counsel expressly waive a jury in open court).

The facts of the underlying case were as follows: At approximately 11:00 p.m., Ernst was driving in the City of Santa Rosa. People v. Ernst, 27 Cal. App. 4th 326, 328, 14 Cal. Rptr. 2d 19, 20 (1992). He ran a red light and caused a fatal accident. *Id.* The accident injured the passengers in Ernst's vehicle and killed both occupants of the other automobile. *Id.* At the time of the accident, Ernst was traveling at an excessive speed and had a blood alcohol content of .20 percent, two times the legal limit. *Id.*

At a pretrial hearing on October 5, 1990, in the presence of Ernst, defense counsel stated that "they 'would confirm the matter for trial'" and indicated that they were "prepared to waive a jury as to both phases of the trial at this time, and my client is prepared to go on the record to that effect." *Ernst*, 8 Cal. 4th at 444, 881 P.2d at 299, 34 Cal. Rptr. 2d at 239. The district attorney answered "that [the people] were not 'prepared to waive jury at this time.'" *Id.* Because the State would not waive a jury, the court did not accept the defendant's waiver. *Id.*

Ernst and defense counsel appeared for trial on October 15, 1990. *Id.* The district attorney told the court, "[t]here is a waiver." *Id.* Defense counsel replied, "[w]e are prepared to waive jury as to both issues." *Id.* Ernst, himself, never indicated that he waived a jury. *Id.* The court did note, however, that the jury had been "waived by both sides." *Id.*

The trial proceeded as scheduled on October 17, 1990. *Id.* The prosecutor, who was new to the case, asserted that "there was to be a jury waiver [by the defense]" and "[i]n the event that happens, we're also prepared to waive jury." *Ernst*, 27 Cal. App. 4th at 329, 14 Cal. Rptr. 2d at 21. Defense counsel indicated that jury had been waived on October 15, 1990, and asked, "[d]o we do that again?" *Id.* The court reviewed the records from October 15, 1990. *Id.* Defense counsel stated, "[w]e're prepared to reiterate." *Id.* "[T]he trial court stated: 'Jury waived by both sides. It's been

of a jury trial by the defendant mandated a reversal of the trial court's verdict.[3] The California Supreme Court affirmed the decision of the court of appeal.[4]

II. TREATMENT

The court began by reaffirming the long-settled notion that a defendant in a criminal prosecution has the right to a trial by jury under both the federal and California constitutions.[5] The state contended that the lack of an express waiver of trial by jury does not constitute reversible error.[6] The state based its reasoning on the 1992 case of *People v. Howard*.[7] In *Howard*, the court held that a court should apply a "totality of the circumstances" test in determining whether a defendant's guilty plea was voluntary and intelligent.[8] The state argued that the defendant's position would create an "anomaly" in the law because "an omission of an express waiver of a jury trial by a defendant who pleads guilty . . . would be reviewed under the federal totality of the circumstances test, while a similar omission involving a defendant who gives up only his right to a

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done. Is this going as a nonjury case?'" *Ernst*, 8 Cal. 4th at 444, 881 P.2d at 299, 34 Cal. Rptr. 2d at 239. Defense counsel and the People responded in the affirmative. *Id.*

Ernst was subsequently convicted of two counts of murder and two counts of driving under the influence of alcoholic beverages causing bodily injury. *Ernst*, 27 Cal. App. 4th at 327-28, 14 Cal. Rptr. 2d at 20.

3. *Id.* at 331, 14 Cal. Rptr. 2d at 22.

4. *Ernst*, 8 Cal. 4th at 449, 881 P.2d at 303, 34 Cal. Rptr. 2d at 243.

5. *Id.* at 444, 881 P.2d at 300, 34 Cal. Rptr. 2d at 240; *see* U.S. CONST. art. III, § 2 (stating "trial of all crimes . . . shall be by jury"); CAL. CONST. art. I, § 16 (stating "[t]rial by jury is an inviolate right and shall be secured to all"); *see also* CAL. PENAL CODE § 689 (West 1985 & Supp. 1994) (stating "[n]o person can be convicted of a public offense unless by verdict of a jury"); CAL. PENAL CODE § 1042 (West 1985) (stating "[i]ssues of fact shall be tried in the manner provided in Article I, section 16 of the Constitution of this State"). *See generally* 19 CAL. JUR. 3D *Criminal Law* § 2110 (1984 & Supp. 1994); 41 CAL. JUR. 3d *Jury* §§ 2-4 (1978 & Supp. 1994); 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* §§ 2630-2632 (2d ed. 1989 & Supp. 1994); 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Trial* §§ 82-83 (3d ed. 1985 & Supp. 1994); 29 CAL. DIG. 2D *Jury* § 10 (1982).

6. *Ernst*, 8 Cal. 4th at 445, 881 P.2d at 300, 34 Cal. Rptr. 2d at 240. The state argued that the court should apply a totality of the circumstances standard to determine whether the waiver was voluntary and intelligent. *Id.* at 443, 881 P.2d at 300, 34 Cal. Rptr. 2d at 239. *See generally* 19 CAL. JUR. 3D *Criminal Law* §§ 2114-2118 (1984 & Supp. 1994); 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* §§ 2644, 2646-2648 (2d ed. 1989 & Supp. 1994); 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Trial* §§ 102-103 (3d ed. 1985 & Supp. 1994).

7. 1 Cal. 4th 1132, 824 P.2d 1315, 5 Cal. Rptr. 2d 268, *cert. denied*, 113 S. Ct. 383 (1992).

8. *See id.* at 1180, 824 P.2d at 1342-43, 5 Cal. Rptr. 2d at 295-96 (relying on Boykin v. Alabama, 395 U.S. 238 (1969)).

jury . . . would be reversible per se."[9] The supreme court acknowledged this anomaly, but held that the California Constitution nevertheless requires an express waiver of the right to jury trial.[10]

The court next analyzed both the text[11] and the history[12] of article I, section 16 of the California Constitution.[13] The court also analyzed case law interpreting this section.[14] The court concluded that the California Constitution's requirement of an express waiver of the right to a jury trial does not apply when a defendant pleads guilty.[15]

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9. *Ernst*, 8 Cal. 4th at 446, 881 P.2d at 301, 34 Cal. Rptr. 2d at 241. The state essentially argued that the same standard of review should apply to a waiver of a jury trial as applies to guilty pleas. *Id.* A guilty plea must be *voluntary and intelligent* under the totality of circumstances whereas waiver of jury trial must be express. *Id.* The state's argument is premised on the fact that a waiver of trial by jury is inherent in a guilty plea. *See id.*

10. *Id.* The court asserted that "the requirement of an express waiver of the right to a jury applies when a defendant elects a court trial, but not when a defendant pleads guilty." *Id. See generally* 19 CAL. JUR. 3D *Criminal Law* § 2120 (1984 & Supp. 1994).

11. *Ernst*, 8 Cal. 4th at 447, 881 P.2d at 301, 34 Cal. Rptr. 2d at 241. The constitution requires consent of both parties for a waiver. CAL. CONST. art. I, § 16. This requirement concerns "when a 'jury' may be waived—not when a 'trial' may be waived." *Ernst*, 8 Cal. 4th at 447, 881 P.2d at 301, 34 Cal. Rptr. 2d at 241. The court noted that if the constitutional requirement applied in guilty pleas, the prosecution could prevent such pleas by simply declining to consent. *Id.*

12. *Id.* at 447-48, 881 P.2d at 301-02, 34 Cal. Rptr. 2d at 241-42. The court reviewed the changes in the statutory language of article I, § 16 (formerly article I, § 3 superseded by article I, § 7), focusing on the time between 1849 and 1928. *Id.* During this period, a criminal defendant charged with a felony could not waive a jury trial. *Id.* Nonetheless, in *People v. Noll*, 20 Cal. 164, 165 (1862), the court stated that "[t]here is no provision of the Constitution or of any statute which prevents a defendant from pleading guilty instead of having a trial by jury." *Ernst*, 8 Cal. 4th at 447-48, 881 P.2d at 301-02, 34 Cal. Rptr. 2d at 241-42 (citing *Noll*, 20 Cal. at 165 (1862)).

13. Article I, § 16 provides: "Trial by jury is an inviolate right . . . . A jury may be waived in a criminal cause by the consent of both parties *expressed in open court by the defendant* and the defendant's counsel." CAL. CONST. art. I, § 16 (emphasis added). *See generally* 19 CAL. JUR. 3D *Criminal Law* §§ 2114-2115 (1984 & Supp. 1994); 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* §§ 2644, 2646 (2d ed. 1989 & Supp. 1994); 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Trial* § 103 (3d ed. 1985 & Supp. 1994).

14. *See* People v. Sovereign, 27 Cal. App. 4th 317, 325, 20 Cal. Rptr. 2d 413, 418 (1993) (holding that § 16 does not apply to cases where a defendant pleads guilty); Dale v. City Court of Merced, 105 Cal. App. 2d 602, 607, 234 P.2d 110, 113 (1951) (finding that where there is a guilty plea, there are no issues and thus, there can be no trial). *See generally* 19 CAL. JUR. 3D *Criminal Law* § 2120 (1984 & Supp. 1994); 16 CAL. DIG. 2D *Criminal Law* § 1086.10 (1981 & Supp. 1994).

15. *Ernst*, 8 Cal. 4th at 447, 881 P.2d at 304, 34 Cal. Rptr. 2d at 242. The court

Finally, the court determined whether the denial of the right to a jury trial warranted reversal of the trial court's verdict.[16] The court noted that reversal is warranted only where "the error complained of has resulted in a miscarriage of justice."[17] The court classified the denial of the right to a jury trial as a "structural defect" which "by its nature, results in such a 'miscarriage of justice.'"[18] Accordingly, the court upheld the reversal of the trial court's conviction.[19]

III. CONCLUSION

In *Ernst*, the California Supreme Court acknowledged that article I, section 16 of the California Constitution does not apply when a defendant pleads guilty. Therefore, a defendant may plead guilty without first expressly waiving his right to a trial by jury. However, where the guilt of a defendant is determined in a court trial without express waiver of a jury trial by the defendant, the California Constitution requires that the judgment be reversed.[20]

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stated that "the requirement in article I, § 16, of an express waiver applies only when the defendant exercises his or her right to a trial." *Id.*

16. *Id.* at 448-49, 881 P.2d at 302-03, 34 Cal. Rptr. 2d at 242-43.

17. *Id.* at 448-49, 881 P.2d at 302, 34 Cal. Rptr. 2d at 242 (quoting People v. Cahill, 5 Cal. 4th 478, 493, 853 P.2d 1037, 1047, 20 Cal. Rptr. 2d 582, 592 (1993)).

18. *Id.* (citing People v. Holmes, 54 Cal. 2d 442, 444, 353 P.2d 583, 584-85, 6 Cal. Rptr. 871, 872-73 (1960) (holding that reversal is warranted where trial by jury is not waived in the manner required by the California Constitution)).

19. *Id.* at 449, 881 P.2d at 302-03, 34 Cal. Rptr. 2d at 242-43. The court held that "article I, section 16, of the California Constitution requires that the judgment be reversed because defendant's guilt was determined by a court trial without there having been an express waiver by defendant of his right to a jury trial." *Id.*

20. *Id.* at 449, 881 P.2d at 302-03, 34 Cal. Rptr. 2d at 242-43. *Contra* People v. Guzman, 14 Cal. App. 4th 1420, 1422, 18 Cal. Rptr. 2d 380, 381 (1993) (holding totality of circumstances may be reviewed to determine whether jury waiver was voluntary and intelligent), *overruled by Ernst*, 8 Cal. 4th 441, 881 P.2d 298, 34 Cal. Rptr. 2d 238. *Guzman* is thus disapproved. *Ernst*, 8 Cal. 4th at 449 n.1, 881 P.2d at 303 n.1, 34 Cal. Rptr. 2d at 243 n.1.

F. *Keeping a search warrant affidavit sealed after an in camera review in order to protect the identity of a confidential informant does not violate the discovery rights of a criminal defendant:*
People v. Hobbs.

I. INTRODUCTION

In *People v. Hobbs*,[1] the California Supreme Court evaluated the procedural adequacy of an in camera review used by the trial court to deny Janet Hobbs access to the identity of a confidential informant.[2] The supreme court reversed the decision of the court of appeal and held that withholding the identity did not violate the defendant's discovery rights.[3]

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1. 7 Cal. 4th 948, 873 P.2d 1246, 30 Cal. Rptr. 2d 651 (1994). Chief Justice Lucas authored the majority opinion of the court, with Justices Kennard, Arabian, Baxter, and George concurring. *Id.* at 954, 873 P.2d at 1247, 30 Cal. Rptr. 2d at 652. The Honorable Christopher Cottle, who is the Presiding Justice of the Sixth District and whom the Judicial Council assigned to the case, also concurred with the majority. *Id.* Justice Mosk filed a dissenting opinion. *Id.* at 978, 873 P.2d at 1263, 30 Cal. Rptr. 2d at 668 (Mosk, J., dissenting).

2. *Id.* at 955, 873 P.2d at 1248, 30 Cal. Rptr. 2d at 653; *see* 3 B.E WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §§ 1265, 1277 (3d ed. 1986 & Supp. 1994) (describing the privilege of nondisclosure of an informant's identity and the nature of an in camera hearing); *cf.* Thomas J. Oliver, *Application, In Federal Civil Action, of Governmental Privilege of Nondisclosure of Identity of Informer*, 8 A.L.R. FED. 6 (1993) (discussing the Federal Government's privilege of keeping an informant's identity confidential in civil cases). *But see* 3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1274 (3d ed. 1986 & Supp. 1994) ("An informer whose information is the essential basis of probable cause for an arrest and search must be disclosed."). *See generally* C. P. Jhong, *Right of Accused In State Courts to Inspection or Disclosure of Evidence In Possession of Prosecution*, 7 A.L.R.3D 8 (1994); Cynthia G. Lawrence, Comment, *The Rivas Motion: The Creative Defense Attorney's Attempt to Circumvent* Franks v. Delaware *and the Informer's Privilege Rule*, 20 PAC. L.J. 1207 (1989).

3. *Hobbs*, 7 Cal. 4th at 976, 873 P.2d at 1262-63, 30 Cal. Rptr. 2d at 667-68. At the trial level, the defendant, Janet Hobbs pleaded no contest to a charge of controlling and making available a place for storing or manufacturing a controlled substance in violation of California Health and Safety Code § 11366.5. *Id.* at 954, 873 P.2d at 1247-48, 30 Cal. Rptr. 2d at 652-53. The affidavit of a confidential government informant was the basis for probable cause in the inculpating search of the defendant's dwelling. *Id.* at 954, 873 P.2d at 1248, 30 Cal. Rptr. 2d at 653. This affidavit, along with a tape recording of the issuing magistrate's interview with the informant and a transcription of the interview, were sealed in order to protect the affiant's identity. *Id.* at 954-55, 873 P.2d at 1248, 30 Cal. Rptr. 2d at 653. The only information contained in the public portion of the warrant was a description of the location to be searched and a report from a public utility identifying the defendant as the occupant

The court found that the trial court's in camera review of the sealed portion of a search warrant properly balanced the state's interest in protecting confidential affiants with the defendant's right to information that might serve as a basis for challenging the validity of the warrant.[4]

II. TREATMENT

A. *Majority Opinion*

The court considered whether keeping a search warrant affidavit sealed after an in camera review in order to protect the identity of a confidential informant violated the discovery rights of a criminal defendant.[5] The court first affirmed the defendant's right to appellate review.[6] Generally, the only appealable issues form a plea of no contest are "issues based on reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings resulting in the plea."[7] Accordingly, the Attorney General contended that the defendant's plea of no contest barred her subsequent challenge to the search since the challenge related to guilt, not to the legality of the no contest plea's proceedings.[8]

The court rejected this argument and pointed to section 1538.5 of the California Penal Code, which allows a defendant to appeal the validity of a search and seizure despite the defendant's no contest plea.[9] The defendant's appeal contested the validity of the search warrant, which was premised upon a confidential affidavit.[10] Such a situation, the court noted, is distinct from appeals that seek publication of confidential testi-

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thereof. *Id.* at 978, 873 P.2d at 1263-64, 30 Cal. Rptr. 2d at 668-69. Seeking access to information upon which she might attack the finding of probable cause, the defendant moved to unseal the warrant and discover the informant's identity. The defendant also moved to quash the search warrant and to suppress the accompanying evidence. *Id.* at 955, 873 P.2d at 1248, 30 Cal. Rptr. 2d at 653. The trial court conducted an in camera review of the warrant's sealed portion and subsequently denied defendant's motion. *Id.* The court of appeal reversed, holding that the trial court's action violated the defendant's due process rights. *Id.*

4. *Id.* at 976-77, 873 P.2d at 1262-63, 30 Cal. Rptr. 2d at 667-68.

5. *Id.* at 957, 873 P.2d at 1249, 30 Cal. Rptr. 2d at 654.

6. *Id.*

7. *Id.* at 955, 873 P.2d at 1248, 30 Cal. Rptr. 2d at 653 (quoting People v. DeVaughn, 18 Cal. 3d 889, 895-96, 558 P.2d 872, 875, 135 Cal. Rptr. 786, 789 (1977)).

8. *Id.* at 955-56, 873 P.2d at 1248, 30 Cal. Rptr. 2d at 653.

9. *Id.* at 956-57, 873 P.2d at 1248-49, 30 Cal. Rptr. 2d at 653-54. Section 1538.5(m) provides: "A defendant may seek further review or the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgement of a conviction is predicated upon a plea of guilty." CAL. PENAL CODE § 1538.5 (West 1982 & Supp. 1995).

10. *Hobbs*, 7 Cal. 4th at 956-57, 873 P.2d at 1248-49, 30 Cal. Rptr. 2d at 653-54.

mony on the grounds that the information is material to the issue of guilt or innocence.[11] In the former case, the motion to unseal the warrant affidavit is equivalent to a motion to suppress evidence.[12] Therefore, under section 1538.5, the defendant retained the right to appeal despite her no contest plea.[13]

The majority then focused on the substantive issues raised when the trial court used an in camera procedure to uphold the warrant.[14] According to the court, its task was to balance the State's interest in confidentiality with the defendant's right to warrant information.[15] To do this, the court first examined the broad common law basis for the informer's privilege.[16] Next, the court found useful the nature of the defendant's appeal and tipped the balance in the State's favor.[17] The court reasoned that the law requires discovery of an informant's identity in cases where the informant is also a material witness, but not in cases where the informant is a "mere informer."[18] Consequently, the court held that denial of a defendant's motion to unseal an affidavit in a suppres-

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11. *Id.*

12. *Id.* (citing People v. Seibel, 219 Cal. App. 3d 1279, 269 Cal. Rptr. 313 (1990)). For purposes of analysis, *Seibel* is factually similar to the case at bar. Consequently, the court utilized much of its reasoning throughout the opinion.

13. *Id.* at 957, 873 P.2d at 1249, 30 Cal. Rptr. 2d at 657.

14. *Id.* at 957-77, 873 P.2d at 1249-63, 30 Cal. Rptr. 2d at 654-68.

15. *Id.* at 957, 873 P.2d at 1249-50, 30 Cal. Rptr. 2d at 654-55.

16. *Id.* at 958, 873 P.2d at 1250, 30 Cal. Rptr. 2d at 655.

> Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> That the government has this privilege is well established, and its soundness cannot be questioned. 8 WIGMORE, EVIDENCE § 2374, at 762 (McNaughton rev. 1961); *see also* McCray v. Illinois, 386 U.S. 300, 308-13 (1967) (quoting same language from Wigmore and holding that nondisclosure of informant's identity in a preliminary hearing did not violate the defendant's due process rights); People v. Keener, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961) (holding that courts will not require the prosecution to disclose an informer's identity when a search is based on a warrant valid on its face). *See generally* 3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1265 (3d ed. 1986 & Supp. 1994) (describing policy behind privilege); Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951) (describing legal issues surrounding the development of the use of informers).

17. *Hobbs*, 7 Cal. 4th at 959, 873 P.2d at 1250-57, 30 Cal. Rptr. 2d at 655-56.

18. *Id.* The court stated that because "a mere informer has a limited role . . . [h]is identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies." *Id.* (quoting People v. McShann, 50 Cal. 2d 802, 808, 330 P.2d 33, 36 (1958)).

sion hearing implicates no fundamental trial right.[19] The majority cited sections 1041 and 1042 of the California Evidence Code as legislative codifications of this principle.[20]

Sections 1041 and 1042 also figured prominently into the court's establishment of the scope of the State's privilege.[21] According to the majority, a "well established corollary" to the confidentiality principle allows the State to exclude the contents of an informant's statement where disclosure of such information would effectively reveal his identity.[22] The majority noted that portions of a warrant found benign regarding identification must be discoverable to the defense.[23] Furthermore, where possible, the court may redact the informant's statements to eliminate reference to the confidential source.[24] Where neither option is adequate for the protection of the State's interest, the trial court may follow in camera procedures.[25]

In support of their judicial sanctioning of in camera review as the correct procedure in such cases, the court cited section 915 of the California Evidence Code.[26] Section 915 broadly authorizes trial courts to employ such review when evaluating the non disclosure of allegedly privileged information.[27]

Affirming this statute's applicability to cases where the defense challenges the veracity of an informant's statements in the affidavit, the majority disapproved the lower court's rejection of in camera review.[28] The procedural adequacy of this safeguard was a source of direct conflict

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19. *Id.* at 960, 873 P.2d at 1251, 30 Cal. Rptr. 2d at 656.

20. *Id.* Section 1041 provides in pertinent part that "a public entity has a privilege to refuse to disclose the identity of a person who has furnished information . . . if . . . [d]isclosure of the identity of the informer is against the public interest." CAL. EVID. CODE § 1041 (West 1966 & Supp. 1995). Section 1042 further clarifies the nature of the privilege: "[w]here a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal . . . the identity of an informer in order to establish the legality of the search." CAL. EVID. CODE § 1042(b) (West 1966 & Supp. 1995).

21. *Hobbs*, 7 Cal. 4th at 960-61, 873 P.2d at 1251-52, 30 Cal. Rptr. 2d at 656-57.

22. *Id.* at 961-62, 873 P.2d at 1252, 30 Cal. Rptr. 2d at 657 (citing 8 WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961)).

23. *Id.* at 963, 873 P.2d at 1253, 30 Cal. Rptr. 2d at 658.

24. *Id.*

25. *Id.* at 963, 873 P.2d at 1253, 30 Cal. Rptr. 2d at 658.

26. *Id.*

27. Section 915 contemplates the following circumstances: "When a court is ruling on a claim of privilege . . . and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought . . . to disclose the information in chambers out of the presence and hearing of all persons." CAL. EVID. CODE. § 915 (West 1966 & Supp. 1995).

28. *Hobbs*, 7 Cal. 4th at 967, 873 P.2d at 1256, 30 Cal. Rptr. 2d at 661.

between the court of appeal's decision in the instant case and the decision in *People v. Seibel*.[29] The court's endorsement of the reasoning in *Seibel* over the reasoning of the court of appeal hinged upon the proper application of state law.[30] The majority construed the legislative enactment of section 915, combined with its decision in *People v. Luttenberger*,[31] as espousing in camera review to balance the conflicting interests of the state and the accused.[32]

The court upheld the constitutional adequacy of this procedure by following the reasoning advanced in similar federal and state decisions.[33] The court noted that cases involving a defendant's attack on the inclusion of evidence characteristically hold the state's interest in confidentiality above the defendant's right to mount an effective warrant challenge.[34] This trend is predicated upon two main rationale: (1) the inclusion of evidence does not affect actual guilt or innocence, and (2) the issuance of a warrant by a magistrate is already replete with procedural safeguards.[35] The task of the reviewing court is, therefore, merely to evaluate the finding of probable cause.[36] In camera review, the majority

29. 219 Cal. App. 3d 1279, 269 Cal. Rptr. 313 (1990).

30. *Hobbs*, 7 Cal. 4th at 966-67, 873 P.2d at 1256, 30 Cal. Rptr. 2d at 661.

31. 50 Cal. 3d 1, 784 P.2d 633, 265 Cal. Rptr. 690 (1990). In *Luttenberger*, the defendant, pursuing a subfacial search warrant challenge, sought discovery of police files regarding the confidential informant's reliability. *Id.* at 7-8, 784 P.2d at 636, 265 Cal. Rptr. at 693. The California Supreme Court expressly limited the defendant's right to discovery by requiring a preliminary showing refuting the warrant's presumed veracity. *Id.* at 20-21, 784 P.2d at 645-46, 265 Cal. Rptr. at 702-03. The majority approved the use of in camera review, where necessity is shown, as a means of balancing the conflicting interests of the state and the accused. *Id.* at 24, 784 P.2d at 648, 265 Cal. Rptr. at 705.

32. *Hobbs*, 7 Cal. 4th at 966-67, 873 P.2d at 1256, 30 Cal. Rptr. 2d at 661.

33. *Id.* at 967-70, 873 P.2d at 1256-58, 30 Cal. Rptr. 2d at 661-63; *see* McCray v. Illinois, 386 U.S. 300 (1967) (distinguishing the implications of a sealed affidavit in cases where the defense is seeking an informant's identity to challenge probable cause from those where the defense seeks the identity of an informant who is a material witness); United States v. Moore, 522 F.2d 1068 (9th Cir. 1975) (approving in camera review as a mechanism for balancing the competing interests of the government and the accused), *cert. denied*, 423 U.S. 1049 (1976); People v. Castillo, 607 N.E.2d 1050 (N.Y. Ct. App. 1992) (rejecting a due process challenge of a warrant sealed under the informant's privilege where the judge conducts an in camera hearing and finds an adequate basis for probable cause), *cert. denied* 113 S. Ct. 1854 (1993); State v. Casal, 699 P.2d 1234 (Wash. 1985) (endorsing in camera review of a sealed affidavit where the defendant raises a reasonable doubt as to its veracity).

34. *Hobbs*, 7 Cal. 4th at 967-70, 873 P.2d at 1256-58, 30 Cal. Rptr. 2d at 661-63.

35. *Id.*

36. *Id.*

noted, is therefore an "'acceptable accommodation of the competing interests of the Government and the accused.'"[37]

The court flatly rejected the appellate court's assertion that trial judges are inadequate trustees of the accused's Fourth Amendment rights.[38] Such an assertion, the majority concluded, is inconsistent with the fact that the legislature entrusts trial judges with the administration of justice.[39] The court concluded that in order to effectuate the informant's privilege (a) all or part of a search warrant affidavit may be sealed and (b) lower courts have express authority "to utilize an in camera review and discovery procedure to effectuate implementation of the privilege."[40]

The court outlined the appropriate procedures for application of this holding in analogous circumstances.[41] Specifically, the court noted that where the defense is unable to effectively challenge the warrant because the affidavit is under seal, the court must, upon the defendant's filing of a motion to quash or suppress the warrant, conduct an in camera review pursuant to the guidelines set forth in section 915, subdivision b.[42] In accordance with section 915, the prosecution may be present during the proceeding; however, the defense is excluded unless the prosecutor agrees to allow their presence.[43] For this phase, the trial judge may require the presence of the affiant, confidential informant, or other witnesses for the purpose of conducting an independent assessment of the informant's credibility.[44]

The standard of review to be applied by the trial judge at the hearing is partially contingent upon whether the defendant files a motion to quash or a motion to traverse the warrant.[45] If the defendant files a motion to traverse the warrant, the court must determine the validity of the

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37. *Id.* at 970, 873 P.2d at 1258, 30 Cal. Rptr. 2d at 663 (quoting *Moore*, 522 F.2d at 1072).

38. *Id.* at 970-71, 873 P.2d at 1258-59, 30 Cal. Rptr. 2d at 663.

39. *Id.* at 971, 873 P.2d at 1259, 30 Cal. Rptr. 2d at 663; CAL. EVID CODE § 1040 (West 1966 & Supp. 1995); *see* United States v. Anderson, 509 F.2d 724, 729 (9th Cir. 1974) (affirming trial court's adequacy as the forum for in camera review), *cert. denied*, 420 U.S. 910 (1975).

40. The court concluded that, in order to effectuate the informant's privilege, (a) all or part of a search warrant affidavit may be sealed and (b) the lower court may conduct "an in camera review and discovery procedure to effectuate implementation of the privilege." *Hobbs*, 7 Cal. 4th at 971, 873 P.2d at 1259, 30 Cal. Rptr. 2d at 664.

41. *Id.* at 972-73, 873 P.2d at 1259-60, 30 Cal. Rptr. 2d at 664-65.

42. *Id.* at 972, 873 P.2d at 1259, 30 Cal. Rptr. 2d at 664; *see* CAL. EVID. CODE § 915 (West 1966 & Supp. 1995) (listing guidelines for in camera hearings). The court must initially determine whether identity of the affidavit involved was properly sealed. *Hobbs*, 7 Cal. 4th at 973, 873 P.2d at 1260, 30 Cal. Rptr. 2d at 665.

43. *Id.*

44. *Id.*

45. *See id.* at 974, 873 P.2d at 665, 30 Cal. Rptr. 2d at 1260.

defendant's assertions that the affidavit contains material misrepresentations.[46] "Generally, in order to prevail on such a challenge, the defendant must demonstrate that (1) the affidavit included a false statement made 'knowingly and intentionally, or with reckless disregard for the truth,' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'"[47] On the other hand, if the defendant opts to move for a motion to quash the warrant, a "totality of the circumstances" standard is applied to ascertain whether, "there was a 'fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant."[48] Lastly, the trial court must place in the record a "sealed transcript of the in camera proceedings" to accommodate appellate review.[49]

The majority upheld the trial court's use of discretion, confirmed the trial court's denial of defendant's motions, and reversed the decision of the court of appeal.[50]

B. Justice Mosk's Dissent

Justice Mosk expressly limited his dissent to situations where the sealing of a warrant conceals from the defendant "all [of] the material facts used to establish probable cause."[51] Nevertheless, his criticism of the majority was adamant.[52] Justice Mosk characterized the majority's decision as ill-advisedly placing, the State's interest above a criminal defendant's constitutional guarantees.[53]

In this regard, Justice Mosk opposed the majority's construction of sections 1041 and 1042 and found its interpretation subject to constitutional challenge for two reasons.[54] First, Justice Mosk noted that by creating a mechanism which effectively prohibits warrant challenges, the

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46. *Id.*
47. *Id.* at 974, 873 P.2d at 665-66, 30 Cal. Rptr. 2d at 1260-61 (citation omitted).
48. *Id.* at 975, 873 P.2d at 666, 30 Cal. Rptr. 2d at 1261 (citations omitted).
49. *Id.* at 975, 873 P.2d at 1262, 30 Cal. Rptr. 2d at 667.
50. *Id.* at 976-77, 873 P.2d at 1262-63, 30 Cal. Rptr. 2d at 667-68.
51. *Id.* at 978, 873 P.2d at 1263, 30 Cal. Rptr. 2d at 668 (Mosk, J., dissenting).
52. *Id.* at 977-78, 873 P.2d at 1263, 30 Cal. Rptr. 2d at 668 (Mosk, J., dissenting). By way of introduction, Justice Mosk poses the biting hypothetical question: "Did this scenario occur in a communist dictatorship? Under a military junta? Or perhaps in a Kafka novel?" *Id.* at 978, 873 P.2d at 1263, 30 Cal. Rptr. 2d at 668 (Mosk, J., dissenting).
53. *Id.* (Mosk, J., dissenting).
54. *Id.* at 980-81, 873 P.2d at 1265, 30 Cal. Rptr. 2d at 670 (Mosk, J., dissenting).

court violates a criminal defendant's due process rights.[55] Second, since a suppression hearing is a "critical stage" of the trial, state action that deprives a defendant of effective assistance may therein violate the Sixth Amendment.[56] Justice Mosk was also concerned with the court's potential creation of an "automatic appeal" for similarly situated defendants.[57] To avoid these imminent problems, Justice Mosk would require the police to do further investigation to corroborate the sealed information of the informant, thus providing the defendant additional information without revealing the identity of the informer.[58]

III. CONCLUSION

Hobbs' main impact upon California criminal procedure lies in its demarcation of a bright line rule for law enforcement, prosecutors, and judges. Where the State claims the informant's privilege, a search warrant's validity is wholly detached from the degree to which its contents are discoverable. Thus, *Hobbs* limits the capacity of criminal defendants to attack a search where the warrant is properly sealed. This deft reinforcement of the privilege will undoubtedly assist law enforcement in securing probable cause through confidential testimony. Additionally, the fact that the court expressly confines these limitations to mere informers and couples this with extensive procedural safeguards renders future due process objections constitutionally untenable.

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55. *Id.* at 981, 873 P.2d at 1265, 30 Cal. Rptr. 2d at 670 (Mosk, J., dissenting). Justice Mosk argued that concealment of all material facts denies a defendant the opportunity to be heard. *Id.*

56. *Id.* (Mosk, J., dissenting). Relying on Walker v. Georgia, 467 U.S. 39, 46-47 (1984), Justice Mosk asserted that at times the suppression hearing is in essence "the only trial" because the defendant often enters a guilty plea in accordance with a plea bargain after the hearing. *Id.* at 981, 873 P.2d at 1266, 30 Cal. Rptr. 2d at 671 (Mosk, J., dissenting).

57. *Id.* at 981, 873 P.2d at 1265, 30 Cal. Rptr. 2d at 670 (Mosk, J., dissenting).

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

V. DISSOLUTION OF MARRIAGE

When a custodial parent purposely conceals the location of herself and child and the noncustodial parent makes reasonable efforts to locate them, the custodial parent is estopped from collecting child support arrearages for the time of concealment:
In re Marriage of Damico.

I. INTRODUCTION

In re Marriage of Damico[1] clarifies the circumstances in which a trial court may consider a noncustodial parent's concealment defense in child support enforcement proceedings.[2] Based on case law, the California Supreme Court determined that California Family Code sections 4845 and

1. 7 Cal. 4th 673, 872 P.2d 126, 29 Cal. Rptr. 2d 787 (1994). Justice Arabian authored the majority opinion of the court with Chief Justice Lucas and Justices Mosk, George, and Boren concurring. *Id.* at 675, 872 P.2d at 126, 29 Cal. Rptr. 2d at 787. Justice Kennard wrote a separate concurring opinion. *Id.* at 686, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794 (Kennard, J., concurring). Justice Baxter filed a dissenting opinion. *Id.* at 690, 872 P.2d at 136, 29 Cal. Rptr. at 797 (Baxter, J., dissenting).

2. *Id.* at 685, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794. In May 1960, Mary (mother) and Ronald Damico (father) divorced and Ronald Damico was ordered to pay child support. *Id.* at 676, 872 P.2d at 126-27, 29 Cal. Rptr. 2d at 787-78. Later in 1960, mother told father that she did not want him to be involved in her and their child's life and successfully concealed the whereabouts of herself and child from 1960 to 1979, despite Ronald Damico's repeated attempts to locate them. *Id.* at 676, 872 P.2d at 127, 29 Cal. Rptr. 2d at 788. Consequently, father stopped making child support payments and was not contacted by mother until he was served with an application for past child support payments in 1979. *Id.* at 677, 872 P.2d at 127, 29 Cal. Rptr. 2d at 788. Due to a misunderstanding, father's attorney did not appear on his behalf, and the court entered a default judgment in 1980 against father. *Id.* at 677, 872 P.2d at 127, 29 Cal. Rptr. 2d at 788. In 1991, mother served father with a registration of foreign support order, while father sought to vacate the 1980 judgment and the 1990 renewed judgment of child support arrearages. *Id.* at 676, 872 P.2d at 127, 29 Cal. Rptr. 2d at 788. The trial court declined to examine his concealment defense, deeming it irrelevant to the issue of arrearages and ordered father to pay the child support arrearages plus interest. *Id.* at 677, 872 P.2d at 127, 29 Cal. Rptr. 2d at 788. Father appealed and the court of appeal reversed, finding that a parent's active concealment of a child constituted a valid defense to the enforcement of child support arrearages, and thus remanded the case to examine father's concealment defense. *Id.* Mother appealed to the supreme court and the court granted review to explain the effect of a concealment defense in determining the enforcement of child support arrearages. *Id.* at 677 & n.1, 872 P.2d at 127 & n.1, 29 Cal. Rptr. 2d at 788 & n.1.

3556[3] govern the scope of such proceedings.[4] In analyzing the statutory intent, the court found that the controlling statutes did not expressly preclude a noncustodial parent from raising a concealment defense in an action to enforce child support arrearages.[5] The supreme court held that "a custodial parent who actively conceals him- or herself and the child from the noncustodial parent until the child reaches the age of majority, despite reasonably diligent efforts to locate them, is estopped from later collecting child support arrearages for the time of concealment."[6]

II. TREATMENT

A. *Majority Opinion*

The issue facing the California Supreme Court involved a noncustodial parent's duty to pay child support when the custodial parent went into hiding with her minor child until the child reached the age of majority.[7]

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3. Effective January 1, 1994, California Civil Procedure Code § 1694, a section of the former Revised Uniform Reciprocal Enforcement of Support Act, was repealed and replaced with an equivalent provision in Family Code § 4845. Family Code § 4845 provides, in pertinent part: "The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court." CAL. FAM. CODE § 4845(b) (West 1994) (formerly CAL. CIV. PROC. CODE § 1694 (repealed 1994)). Also effective January 1, 1994, Civil Code § 4382, governing the enforcement of judgments under the Family Law Act, was repealed and made part of the new Family Code § 3556. Family Code § 3556 provides:

> The existence or enforcement of a duty of support owed by a noncustodial parent for the support of a minor child is not affected by a failure or refusal by the custodial parent to implement any right as to custody or visitation granted by a court to the noncustodial parent.

CAL. FAM. CODE § 3556 (West 1994) (formerly CAL. CIV. CODE § 4382 (repealed 1994)).

4. *Damico*, 7 Cal. 4th at 678-79, 872 P.2d at 128-29, 29 Cal. Rptr. 2d at 789-90. The court acknowledged that the reclassified statutes remain substantially identical to their former counterparts and can be analyzed in the same manner. *Id.* at 678 & n.2, 872 P.2d at 128 & n.2, 29 Cal. Rptr. 2d at 789 & n.2. *See generally* 23 CAL. LAW REV. Comm. Reports 1 (1993) (stating that Family Code §§ 4845 and 3556 replaced their equivalent former sections without substantive change).

5. *Id.* at 679, 872 P.2d at 129, 29 Cal. Rptr. 2d at 790. Effective January 1, 1994, the Revised Uniform Reciprocal Enforcement of Support Act (RURESA) was renamed the Uniform Reciprocal Enforcement of Support Act (URESA). CAL. FAM. CODE § 4800 (West 1994).

6. *Id.* at 679-80, 872 P.2d at 133, 29 Cal. Rptr. 2d at 790; *see* CAL. FAM. CODE § 4845 (West 1994) (formerly CAL. CIV. PROC. § 1694 (repealed 1994)); CAL. FAM. CODE § 3556 (West 1994) (formerly CAL. CIV. CODE § 4382 (repealed 1994)).

7. *Damico*, 7 Cal. 4th at 675, 872 P.2d at 126, 29 Cal. Rptr. 2d at 787. *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 84 (9th ed. 1989 & Supp. 1994) (discussing various defenses, including concealment, to an action enforcing child support arrearages); 33 CAL. JUR. 3D *Family Law* § 1084 (1994) (dis-

Because the fundamental purpose of child support payments is to advance the well-being of the child, interference with the other parent's visitation order generally fails to affect the duty to provide child support.[8] However, the court sought to differentiate between a custodial parent's mere interference with the noncustodial parent's visitation rights and the purposeful concealment of herself and the child.[9]

The supreme court began its analysis by examining the controlling statutes within the Family Code.[10] First, the court determined that the language of the statutes did not expressly prohibit a noncustodial parent from claiming an estoppel defense when the custodial parent actively concealed the child.[11] Second, the court interpreted the fundamental goal of the statutes as providing for the child's well-being during the

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cussing the effect of the custodial parent's refusal to comply with custody or visitation rights of the other parent).

8. *Damico*, 7 Cal. 4th at 678, 872 P.2d at 129, 29 Cal. Rptr. 2d at 789; *see* Moffat v. Moffat, 27 Cal. 3d 645, 651-52, 612 P.2d 967, 970, 165 Cal. Rptr. 877, 881 (1980) (holding that a parent's deliberate interference with the noncustodial parent's visitation rights did not constitute a defense against payment of child support arrearages).

9. *Damico*, 7 Cal. 4th at 679-80, 872 P.2d at 129-30, 29 Cal. Rptr. 2d at 790-91; *see also In re* Marriage of McLucas, 210 Cal. App. 3d 83, 89, 258 Cal. Rptr. 133, 137 (1989) (finding that concealment defense to relieve obligation of child support arrearages does not always contravene the best interests of the child); *In re* Marriage of Smith, 209 Cal. App. 3d 196, 202, 257 Cal. Rptr. 47, 50-51 (1989) (holding that evidence of concealment may constitute estoppel or waiver for the collection of arrearages during the period of concealment); Solberg v. Wenker, 163 Cal. App. 3d 475, 480-81, 209 Cal. Rptr. 545, 548-49 (1985) (holding that deliberate concealment of a child constitutes more than a mere interference with visitation and may create an estoppel to collect child support arrearages). *But see In re* Marriage of King, 16 Cal. App. 4th 1250, 1253, 20 Cal. Rptr. 2d 486, 487-88 (1993) (stating that "child concealment is an aggravated form rather than a concept outside the definition of failure or refusal to implement [custody or visitation rights]"); *In re* Marriage of Tibbett, 218 Cal. App. 3d 1249, 1254, 267 Cal. Rptr. 642, 645 (1990) (declining to find concealment a defense to an action to collect child support arrearages).

10. *Damico*, 7 Cal. 4th at 678, 872 P.2d at 129, 29 Cal. Rptr. 2d at 789; *see* CAL. FAM. CODE § 4845 (West 1994) (formerly CAL. CIV. PROC. CODE § 1694 (repealed 1994)); CAL. FAM. CODE § 3556 (West 1994) (formerly CAL. CIV. CODE § 4382 (repealed 1994)). *See generally* Greg Geisman, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitations as Complementary Activities*, 38 S.D. L. REV. 568 (1993) (discussing the interdependence between the right to child support and the compliance of visitation rights).

11. *Damico*, 7 Cal. 4th at 679, 872 P.2d at 129, 29 Cal. Rptr. 2d at 790. The court declined to interpret the Family Code statutes as barring equitable defenses, absent express intent of the legislature. *Id.* at 679-80, 872 P.2d at 129, 29 Cal. Rptr. 2d at 790.

child's minority.[12] The payment of child support arrearages after the child reaches the age of majority defeats the statutes' objective by serving to benefit the custodial parent rather than the child.[13] Third, the supreme court emphasized that unlike a case of mere interference with a visitation order, the noncustodial parent lacks adequate recourse to prevent the concealment of the child.[14]

Concluding that a custodial parent's actual concealment of herself and her child exceeds the protective limits intended by the controlling statutes, the court sought to determine the applicability of estoppel and waiver defenses to the noncustodial parent's obligation to pay child support arrearages.[15] The supreme court acknowledged the lack of authority supporting the proposition that concealment itself constituted a valid defense to an action to collect child support arrearages.[16] Instead, the court focused on the custodial parent's unreasonable conduct and the unfairness of requiring a noncustodial parent to pay child support to a custodial parent and child who, despite the searching parent's reasonable attempts to locate them, cannot be found.[17] The court rejected the contention that a noncustodial parent must seek the state's help in locating the concealed child before permitting an estoppel defense.[18] The court also stated that although the state's assistance may ultimately help find the child, the noncustodial parent lacks a sufficient remedy against the custodial parent's actions during the time of concealment unless the noncustodial parent invokes an estoppel defense.[19] The court reasoned that a custodial parent's deliberate concealment of herself and child, not only violated the terms of the noncustodial parent's visitation order, but also deprived the child a relationship with his father and any opportunity to benefit from child support during his minority years.[20]

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12. *Id.* at 680, 872 P.2d at 129, 29 Cal. Rptr. 2d at 790.

13. *Id.*

14. *Id.* at 680, 872 P.2d at 129-30, 29 Cal. Rptr. 2d at 790-91.

15. *Id.* at 680-83, 872 P.2d at 130-32, 29 Cal. Rptr. 2d at 791-93.

16. *Id.* at 680-81, 872 P.2d at 129, 29 Cal. Rptr. 2d at 787; *see* State of Washington *ex rel.* Burton v. Leyser, 196 Cal. App. 3d 451, 455-56, 241 Cal. Rptr. 812, 815 (1987) (declining to determine whether concealment is a valid defense to enforcement of child support arrearages).

17. *Damico*, 7 Cal. 4th at 683, 872 P.2d at 131, 29 Cal. Rptr. 2d at 792. The California Supreme Court rejected the court of appeal's reasoning that concealment constitutes an excessive form of interference. *Id.*

18. *Id.* at 684, 872 P.2d at 132, 29 Cal. Rptr. 2d at 793.

19. *Id.* However, the court noted that if the noncustodial parent locates the custodial parent and child before the child reaches the age of majority, the obligation to pay child support stands unaffected by the past concealment. *Id.*

20. *Id.* at 685, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794.

In addition, the court rejected the argument that the custodial parent's misconduct should determine the child's right to support.[21] However, the court acknowledged that while child support is intended to promote the well-being of the child during minority, in the case at bar, the child had already reached the age of majority.[22] The court based its decision in equity and refused to condone Mary Damico's misconduct in concealing the location of both herself and the child, and therefore estopped her from collecting child support arrearages for the period of concealment.[23]

B. Justice Kennard's Concurring Opinion

Justice Kennard concurred with the majority's determination of when a noncustodial parent is relieved of the obligation to pay child support.[24] However, she questioned whether, in the instant case, Ronald Damico could establish sufficient justification for setting aside the 1980 child support judgment and the 1990 renewal of that judgment.[25] Justice Kennard reasoned that for the court to consider Ronald Damico's concealment defense, the court first must find equitable justification to set aside the final judgment, which ordered him to pay child support arrearages.[26] Justice Kennard concluded that the court should determine the applicability of Ronald Damico's concealment defense in accordance with finding equitable grounds to successfully challenge Mary Damico's final judgment.[27]

C. Justice Baxter's Dissenting Opinion

Justice Baxter criticized the majority's decision to relieve the noncus-

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21. *Id.*

22. *Id.* at 685, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794. The court expressly limited its holding to cases where the child has reached the age of majority before the concealment ends, thereby leaving unanswered the situation where concealment ends while the child is still a minor. *Id.*

23. *Id.*

24. *Id.* at 686, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794 (Kennard, J., concurring).

25. *Id.*; *see* CAL. R. CT. 28(e)(2) (1993) (stating that "[t]he statement of an issue will be deemed to comprise every subsidiary issue fairly included in it").

26. *Damico*, 7 Cal. 4th at 686, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794 (Kennard, J., concurring). Justice Kennard stated that to set aside the judgment, "the moving party must establish: (1) facts constituting extrinsic fraud or mistake; (2) a substantial defense on the merits; and (3) diligence in seeking relief from the adverse judgment." *Id.* at 688, 872 P.2d at 135, 29 Cal. Rptr. 2d at 796 (Kennard, J., concurring).

27. *Id.* at 690, 872 P.2d at 136, 29 Cal. Rptr. 2d at 797 (Kennard, J., concurring).

todial parent of the child support obligation, despite the noncustodial parent's failure to follow the legislative procedure in obtaining such relief.[28]

First, Justice Baxter emphasized that the noncustodial parent has adequate remedies against a custodial parent who conceals a child, and thus may not use concealment as a defense to justify violating a child support order.[29] According to Justice Baxter, the majority rewards a noncustodial parent by terminating the duty to pay child support without requiring that parent to follow the legal procedures to obtain this judicial relief, while punishing the custodial parent for violating the terms of the other parent's visitation order.[30]

Second, Justice Baxter disagreed with the majority's determination that the noncustodial parent may raise a concealment defense in an URESA proceeding to enforce child support arrearages in other states.[31] Justice Baxter emphasized that the purpose of a URESA proceeding is to provide an efficient and expedient means for the enforcement of child support orders, and not a forum to litigate related claims of custody and visitation rights.[32] Recognizing that this court's decision will affect future cases, Justice Baxter criticized the majority's decision to allow courts to consider concealment defenses in child support enforcement actions as not only contradicting, but adding uncertainty and burdening litigation to the established statutory provisions embodied within URESA.[33] Determining that the majority's decision undermines the Legislature's intent, and challenges established law, Justice Baxter would reverse the judgment of the court of appeal.[34]

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28. *Id.* at 690-91, 872 P.2d at 136-37, 29 Cal. Rptr. 2d at 797-98 (Baxter, J., dissenting).

29. *Id.* at 691-93, 872 P.2d at 137-38, 29 Cal. Rptr. 2d at 798-799 (Baxter, J., dissenting). Justice Baxter suggested several remedies available to the noncustodial parent, including: using the district attorney's locator service, researching school records, and seeking a modification or termination of child support. *Id.*; *see also* CAL. FAM. CODE § 3131 (West 1994) (stating that a noncustodial parent whose visitation rights are infringed upon may seek enforcement of the order); *In re* Marriage of Ciganovich, 61 Cal. App. 3d 289, 293, 132 Cal. Rptr. 261, 263 (1976) (listing appropriate sanctions against a custodial parent who fails to comply with noncustodial parent's visitation rights).

30. *Damico*, 7 Cal. 4th at 693, 872 P.2d at 138, 29 Cal. Rptr. 2d at 799 (Baxter, J., dissenting).

31. *Id.* at 693-94, 872 P.2d at 138-39, 29 Cal. Rptr. 2d at 799 (Baxter, J., dissenting).

32. *Id.* at 696, 872 P.2d at 139-40, 29 Cal. Rptr. 2d at 801 (Baxter, J., dissenting).

33. *Id.* at 697-98, 872 P.2d at 140-41, 29 Cal. Rptr. 2d 801-02 (Baxter, J., dissenting).

34. *Id.* at 700, 872 P.2d at 142-43, 29 Cal. Rptr. 2d at 804 (Baxter, J., dissenting).

III. IMPACT AND CONCLUSION

The California Supreme Court held that a custodial parent's concealment of herself and her child constitutes a valid defense to a noncustodial parent's obligation to pay child support.[35] In distinguishing concealment from mere interference with a parent's visitation rights, the court created an exception to the well-established rule that prohibits the adjudication of visitation and custody issues in a proceeding to enforce child support arrearages.[36] As a result of this case, courts may now consider the relevancy of the noncustodial parent's concealment defense in determining whether to enforce the noncustodial parent's obligation to pay child support arrearages.[37] However, the court's decision leaves unanswered the treatment of cases where the concealment ends before the child reaches the age of majority, or where the child support payments are assigned to a government entity, therefore future courts must redefine these limitations.[38]

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35. *Id.* at 685, 872 P.2d at 133, 29 Cal. Rptr. 2d at 794.
36. *Id.* at 683, 872 P.2d at 131-32, 29 Cal. Rptr. 2d at 792-93.
37. *Id.* at 684-85, 872 P.2d at 132-33, 29 Cal. Rptr. 2d at 793-94.
38. *Id.*

VI. EMINENT DOMAIN

The ninety day limitations period set forth in Government Code section 66499.37 governs any action challenging a local legislative decision made pursuant to an ordinance established under the authority of the Subdivision Map Act; a property-owner must exhaust available administrative and judicial remedies before bringing an action for inverse condemnation when attacking the validity or application of an ordinance restricting development:
Hensler v. City of Glendale.

I. INTRODUCTION

In *Hensler v. City of Glendale*,[1] the California Supreme Court addressed two issues. First, the court determined whether the statutory limitation period set forth in California Government Code section 66499.37 governs an action challenging a local legislative decision made pursuant to an ordinance established under the Subdivision Map Act.[2] Next, the court assessed whether a property owner may bring an action for inverse condemnation before exhausting the judicial and administrative remedies available to aggrieved property owners.[3] The court found

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1. 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244 (1994), *cert. denied*, 115 S. Ct. 1176 (1995). Justice Baxter wrote the court's unanimous opinion, with Chief Justice Lucas and Justices Mosk, Kennard, Arabian, George, and Anderson concurring. *Id.* at 29, 876 P.2d at 1061-62, 32 Cal. Rptr. 2d at 263. Justice Anderson was assigned from the Court of Appeal, First Appellate District, Division Four.

2. *Id.* at 6-7, 876 P.2d at 1046-47, 32 Cal. Rptr. 2d at 247-48. Section 66499.37 provides in relevant part:

> Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations.

CAL. GOV'T CODE § 66499.37 (West 1983). *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 46 (9th ed. 1987 & Supp. 1994) (stating that the 90-day limitations period of § 66499.37 is "broadly construed to apply to all challenges to legislative inaction under Subdivision Map Act").

3. *Hensler*, 8 Cal. 4th at 9, 876 P.2d at 1048, 32 Cal. Rptr. 2d at 249. The facts of this case may be summarized as follows: The plaintiff owned a 300-acre tract of

that the purpose behind section 66499.37 was to require that claims challenging a decision made pursuant to the Subdivision Map Act be brought promptly.[4] The court emphasized that because this action was essentially a challenge to a decision made in accordance with the Subdivision Map Act, it is governed by the ninety day limitations period set forth in section 66499.37.[5] Further, the court held that a property owner must first exhaust the available administrative and judicial remedies before bringing an action for inverse condemnation.[6] Accordingly, the supreme court affirmed the court of appeal's decision.[7]

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land in Glendale. *Id.* at 7, 876 P.2d at 1047, 32 Cal. Rptr. 2d at 248. In 1981, the defendant, the City of Glendale, enacted an ordinance pursuant to the Subdivision Map Act, which restricted development on ridge lines within city limits. *Id.* On April 1, 1986, the City of Glendale approved a plan for the construction of 588 residential units on the plaintiff's property but restricted the plaintiff from developing on the ridge lines within the tract. *Id.* at 8, 876 P.2d at 1047, 32 Cal. Rptr. 2d at 248. In 1989, the plaintiff brought this action in inverse condemnation alleging that the restrictive ordinance constituted a taking because it restricted development of 40 percent of the tract. *Id.* The defendant demurred on two grounds, claiming: (1) that the 90-day limitations period under Government Code § 66499.37 barred the action; and (2) that the plaintiff's failure to challenge the ordinance restricting development on the ridge lines barred an action in inverse condemnation. *Id.* Sustaining the demurrer, the trial court dismissed the action for failure to comply with the 90-day statutory period of § 66499.37. *Id.* at 8, 876 P.2d at 1047-48, 32 Cal. Rptr. 2d at 248-49.

The court of appeal affirmed, rejecting the plaintiff's argument that his claim should be governed by the longer statutory period set forth in California Civil Procedure Code §§ 318, 319, and 338(j). *Id.* at 8-9, 876 P.2d at 1048, 32 Cal. Rptr. 2d at 249 (citing CAL. CIV. PROC. CODE § 318 (West 1982) (five year period); CAL. CIV. PROC. CODE § 319 (West 1982) (five year period); CAL. CIV. PROC. CODE § 338(j) (West 1982 & Supp. 1994) (three year period)). Instead, the court determined that this was an "action[] based on a decision made pursuant to an ordinance enacted under the authority of the Subdivision Map Act" governed by the 90-day limitation period set forth in Government Code § 66499.37. *Id.*

4. *Id.* at 7, 876 P.2d at 1047, 32 Cal. Rptr. 2d at 248.

5. *Id.* The court noted that under § 66499.37, a party cannot avoid this short statutory period simply by labelling the action one for inverse condemnation. *Id.* The court emphasized that any claim alleging that an action made pursuant to the authority of the Subdivision Map Act constitutes a "taking" necessarily questions the validity of the ordinance and falls within the scope of § 66499.37. *Id.* at 24-25, 876 P.2d at 1058-59, 32 Cal. Rptr. 2d at 259-60.

6. *Id.* at 19, 876 P.2d at 1054-55, 32 Cal. Rptr. 2d at 255-56. The court declared that failure to seek these available remedies effectively waives any "taking" claim. *Id.* at 19, 876 P.2d at 1055, 32 Cal. Rptr. 2d at 256.

7. *Id.* at 7, 876 P.2d at 1047, 32 Cal. Rptr. 2d at 248; *see supra* note 3 and accompanying text.

II. TREATMENT

A. *When Alleging a Regulatory Taking, a Property Owner Must Exhaust All Administrative and Judicial Remedies as a Prerequisite to Bringing an Action for Inverse Condemnation*

The California Supreme Court rejected the plaintiff's contention that an action in inverse condemnation could be maintained without first challenging the ordinance or decision alleged to have effectuated the taking.[8] The court noted that the Fifth Amendment to the United States Constitution allows the State to take private property for public use provided "just compensation" is paid.[9] The state retains the right to establish the procedures by which takings claims must be brought.[10]

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8. *Hensler*, 8 Cal. 4th at 13, 876 P.2d at 1050-51, 32 Cal. Rptr. 2d at 251-52. The court observed that the plaintiff's claim was based primarily upon the takings clause of the Fifth Amendment to the United States Constitution. *Id.* at 9 n.4, 876 P.2d at 1047 n.4, 32 Cal. Rptr. 2d at 249 n.4. The court explained the difference between a physical taking and a regulatory taking:

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.

Id. at 9-10, 876 P.2d at 1048, 32 Cal. Rptr. 2d at 249-50 (quoting Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992) (citation omitted)). The court explained that an inverse condemnation action may be brought immediately in the case of a physical taking, but when the property owner alleges a regulatory taking, he or she must give the governmental entity the opportunity to rescind its determination before an action for inverse condemnation may be brought. *Id.* at 9-11, 876 P.2d at 1048-49, 32 Cal. Rptr. 2d at 250-51. The court observed that in deciding whether a regulatory taking constitutes a compensable taking, there must be an assessment of the impact of the regulation upon the property in question and its relationship to a legitimate state interest. *Id.* at 10, 876 P.2d at 1048-49, 32 Cal. Rptr. 2d at 249-50. The court stated that "[c]ompensation need not be paid unless the ordinance or regulation fails to serve an important governmental purpose or 'goes too far' as applied to the specific property that is the object of the litigation." *Id.* at 12, 876 P.2d at 1050, 32 Cal. Rptr. 2d at 251 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 918-1071 (9th ed. 1988 & Supp. 1994) (providing a summary of federal and state law in the areas of eminent domain and inverse condemnation); 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 870-872 (9th ed. 1988 & Supp. 1994) (discussing the impact of zoning ordinances as a basis for a claim alleging inverse condemnation); 29 CAL. JUR. 3D *Eminent Domain* §§ 1-310 (1986 & Supp. 1994) (summarizing the law of eminent domain, emphasizing California procedure for bringing such an action).

9. *Hensler*, 8 Cal. 4th at 13, 876 P.2d at 1050-51, 32 Cal. Rptr. 2d at 251-52 (quoting U.S. CONST. amend. V).

10. *Id.* at 13, 876 P.2d at 1051, 32 Cal. Rptr. 2d at 252. In examining the takings

The court found that California provides an appropriate procedure for bringing an action for inverse condemnation.[11] This procedure allows such an action "if, after exhausting administrative remedies to free the property from the limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted."[12] When alleging a regulatory taking as a result of the application of zoning regulations that limit development, "the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction."[13]

The court specified that a landowner effectively waives his "taking" claim if he bypasses the available state remedies.[14]

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clause of the Fifth Amendment, the court explained that "[i]t leaves to the state, however, the procedures by which compensation may be sought. 'If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking.'" *Id.* (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985)).

11. *Id.*

12. *Id.* After a judicial determination that just compensation is due, the state still has the option to reconsider its action. *Id.* at 10-11, 876 P.2d at 1049, 32 Cal. Rptr. 2d at 250. At this point, the State may (1) exercise its power of eminent domain and, accordingly, pay for a permanent taking; or (2) exempt the property from the regulation or ordinance or strike down the ordinance, in which case it would only have to pay for a temporary taking. *Id.* at 11, 876 P.2d at 1049-50, 32 Cal. Rptr. 2d at 250-51.

13. *Id.* at 13, 876 P.2d at 1051, 32 Cal. Rptr. 2d at 252. The normal procedure to accomplish this is to (1) seek a variance, then (2) pursue other available administrative and judicial remedies. *Id.* This gives the state the opportunity to strike down the ordinance or exempt certain parcels from its application to avoid the necessity of paying compensation for a permanent taking. *Id.* at 19, 876 P.2d at 1054-55, 32 Cal. Rptr. 2d at 255-56. The economic benefits of such a policy are obvious, as this allows the State to assess whether the price it would have to pay for a permanent taking is worth the policy furthered by such action. *See id.* at 14, 876 P.2d at 1051-52, 32 Cal. Rptr. 2d at 252-53. By requiring a California landowner to first seek a variance, California law offers a procedure that attempts to resolve the dispute before any substantial loss has been realized. *See id.*

14. *Id.* at 19, 876 P.2d at 1055, 32 Cal. Rptr. 2d at 256. This prevents a party from attempting an end-run around the established procedures, if a party does not challenge the action in the allowable method, he or she loses the right to bring an action in inverse condemnation. *See id.* The plaintiff in this case was granted approval for the project with the condition that there would be no development upon major ridge lines. *Id.* at 8, 876 P.2d at 1047, 32 Cal. Rptr. 2d at 248. The court noted that "one who accepts the benefits of a permit may not later challenge conditions imposed on or in the permit." *Id.* at 19 n.9, 876 P.2d at 1055 n.9, 32 Cal. Rptr. 2d at

B. *An Action Challenging a Local Legislative Decision or Act Made Pursuant to an Ordinance Established Under the Authority of the Subdivision Map Act is Subject to the Ninety Day Limitation Period Prescribed By Government Code Section 66499.37*

The California Supreme Court rejected the plaintiff's argument that this action should be governed by the limitations periods set forth in Civil Procedure Code sections 318, 319, and 338(j).[15] The court emphasized that those statutes apply only to actions that have no other statutory limitation.[16] The court observed that a 'taking' claim "necessarily challenges the validity either of the ordinance or regulation or of the acts taken by the local agency or appeal board pursuant to the ordinance or regulation"[17] and held that such actions are "governed by section 66499.37 regardless of the plaintiff's characterization of the cause of

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256 n.9. It would be inequitable to allow the plaintiff to take advantage of the approved project which presumably allowed for more intense development than would normally have been allowed in order to compensate him for any loss from the ridge line restrictions and then sue for inverse condemnation at a later time. *See id.* at 19, 876 P.2d at 1054-55, 32 Cal. Rptr. 2d at 255-56.

15. *Id.* at 22, 876 P.2d at 1057, 32 Cal. Rptr. 2d at 258. The plaintiff asserted that his action did not challenge the validity of the ordinance but merely sought compensation for the taking that occurred as a result of the application of the ordinance. *Id.* at 23, 876 P.2d at 1057, 32 Cal. Rptr. 2d at 258. The court rejected this argument. *See infra* notes 17-18 and accompanying text.

16. *Hensler*, 8 Cal. 4th at 22, 876 P.2d at 1057, 32 Cal. Rptr. 2d at 258.

17. *Id.* at 24, 876 P.2d at 1058, 32 Cal. Rptr. 2d at 259.

action."[18]

III. IMPACT AND CONCLUSION

The California Supreme Court set forth a broad application of Government Code section 66499.37 that furthers the legislative intent of that section—ensuring that challenges to decisions made pursuant to an ordinance enacted under the authority of the Subdivision Map Act are brought in a timely manner.[19] The strong public policy furthered by requiring these claims to be brought within ninety days is two-fold: (1) it does not allow a property owner to reap the benefits of a permit and then sue for an alleged "taking" at some future time;[20] and (2) it allows local governments to be put on notice of claims alleging a regulatory taking within ninety days of such action, giving them the ability to assess quickly their position and the opportunity to rescind their action.[21] The language of section 66499.37 is clear; the court merely gave effect to the intent of the legislature.

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18. *Id.* at 7, 876 P.2d at 1047, 32 Cal. Rptr. 2d at 248. The court noted that a broad application of this statute was necessary in order to carry out the legislative intent behind it. *Id.* at 25-26, 876 P.2d at 1059-60, 32 Cal. Rptr. 2d at 260-61. If a party were able to avoid the 90-day limitation period by simply bringing an action for inverse condemnation, the purpose of the statute, which is to encourage these claims to be brought promptly, would be undermined. *See id.* at 23-26, 876 P.2d at 1057-60, 32 Cal. Rptr. 2d at 258-61. The court explained that the purpose of statutes that provide short limitations periods for actions challenging the validity of such regulations or decisions is "to permit and promote sound fiscal planning by state and local governmental entities." *Id.* at 27, 876 P.2d at 1060, 32 Cal. Rptr. 2d at 261. The proper procedure in a case such as this would be for the affected property owner to first seek a variance. *See supra* note 13 and accompanying text. This would allow the local governmental entity an opportunity to change its decision in order to avoid the necessity of paying compensation for a taking. *Id.* If such a variance were denied, administrative and judicial review could be sought to establish that a taking has occurred. *Id.* If the property owner establishes this, the governmental entity then has the decision either to exercise its power of eminent domain, in which case it would have to pay for a permanent taking, or change its previous decision, in which case the property owner would be entitled to compensation for a temporary taking. *Id.*

19. *See supra* note 18 and accompanying text.

20. *See supra* note 14 and accompanying text.

21. *See supra* note 18 and accompanying text.

VII. HEALING ARTS & INSTITUTIONS

A hospital cannot be liable for both "ordinary" and "professional" negligence when a patient falls off a gurney and injures herself: **Flowers v. Torrance Memorial Hospital Medical Center.**

I. INTRODUCTION

In *Flowers v. Torrance Memorial Hospital Medical Center*,[1] the California Supreme Court determined whether a hospital can be liable for both "ordinary" and "professional" negligence when a patient falls off a gurney and injures herself.[2] The court held that because ordinary and professional negligence are not separate theories of liability, a defendant has only one duty of care.[3]

II. TREATMENT

A. *Majority Opinion*

The law imposes a duty on every person to exercise the amount of "'care that a person of ordinary prudence would exercise under the circumstances.'"[4] A person who fails to meet this standard of care breaches

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1. 8 Cal. 4th 992, 884 P.2d 142, 35 Cal. Rptr. 2d 685 (1994). Justice Arabian wrote the majority opinion, in which Chief Justice Lucas and Justices Kennard, Baxter, George, and Werdegar concurred. Justice Mosk wrote a separate opinion, in which he concurred with the majority's reasoning but dissented from the majority's disposition of the case. *See infra* notes 18-26, and accompanying text.

2. *Flowers*, 8 Cal. 4th at 995, 884 P.2d at 143, 35 Cal. Rptr. 2d at 686. In *Flowers*, the Torrance Memorial Hospital Medical Center admitted Darlene Flowers to its emergency room when she complained about bladder pain. *Id.* A nurse assisted Flowers onto a gurney and raised the railing on only one side of the gurney. *Id.* Flowers then fell asleep while waiting for medical treatment. *Id.* When she woke up and tried to roll over, Flowers fell off the gurney and injured her back and arm. *Id.* She sued the hospital and the nurse for general negligence and premises liability. *Id.* at 995-96, 884 P.2d at 143, 35 Cal. Rptr. 2d at 686.

The hospital moved for summary judgment based on its expert's declaration that standard practice in local emergency rooms is to put the rails up on gurneys only for small children and patients who are elderly, confused, inebriated, or medicated. *Id.* at 996, 884 P.2d at 143, 35 Cal. Rptr. 2d at 686. The trial court granted the motion, but the court of appeal reversed, holding that the defendants failed to address the alternative theory of ordinary negligence even though they "negated any 'professional' negligence." *Id.* at 996, 884 P.2d at 144, 35 Cal. Rptr. 2d at 687.

3. *Id.* at 1000, 884 P.2d at 146, 35 Cal. Rptr. 2d at 689.

4. *Id.* at 997, 884 P.2d at 144, 35 Cal. Rptr. 2d at 687 (quoting Polk v. City of Los Angeles, 26 Cal. 2d 519, 525, 159 P.2d 931, 934 (1945)); *see* CAL. CIV. CODE § 1714(a) (West 1992 & Supp. 1995) ("Every one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill . . . ."). *See generally* 46

a legal duty and may be liable for negligence.[5]

The court of appeal held that the defendant may be liable for both ordinary and professional negligence, when it failed to raise both rails on the plaintiff's gurney, thereby causing the plaintiff to fall and injure herself.[6] The California Supreme Court reversed the court of appeal's holding.[7] The supreme court reasoned that "a defendant has only *one* duty, measured by one standard of care, under any given circumstances."[8]

The court stated that it is a "legal impossibility" for a defendant to have "two independent obligations to exercise . . . due care" arising from the same factual basis.[9] Thus, the hospital had only one duty to exercise care arising from the plaintiff's stay as a patient. No additional duty arose simply because the defendant provided professional medical services.[10]

Next, the court stated that the single duty to exercise care is measured by a single standard of care—ordinary prudence.[11] Although the amount of care that constitutes ordinary prudence varies according to the circumstances, the standard remains constant.[12] Accordingly, professionals

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CAL. JUR. 3D *Negligence* § 8 (1992 & Supp. 1994) ("Generally, a person owes a duty . . . .").

5. *Flowers*, 8 Cal. 4th at 997, 884 P.2d at 144, 24 Cal. Rptr. 2d at 687 (quoting RESTATEMENT (SECOND) OF TORTS § 282 (1965 & Supp. 1993) ("Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.")). *See generally* 46 CAL. JUR. 3D *Negligence* § 1 (1992 & Supp. 1994) ("Negligence has been defined as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do . . . the failure to exercise ordinary care under the circumstances . . . .").

6. *Flowers*, 8 Cal. 4th at 996, 884 P.2d at 144, 35 Cal. Rptr. 2d at 687; *see supra* note 2 and accompanying text.

7. *Flowers*, 8 Cal. 4th at 1000, 884 P.2d at 146, 35 Cal. Rptr. 2d at 689.

8. *Id.*

9. *Id.*

10. *Id.* at 997-98, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688.

11. *Id.* at 997, 884 P.2d at 144, 35 Cal. Rptr. 2d at 687. The court noted an exception to the general standard of ordinary prudence in § 3125 of the Health and Safety Code. *Id.* at 997 n.2, 884 P.2d at 145 n.2, 35 Cal. Rptr. 2d at 688 n.2. Section 3125 imposes an affirmative duty on specific parties to report to a health officer a person suffering a contagious disease. CAL. HEALTH & SAFETY CODE § 3125 (West 1992 & Supp. 1994).

12. *Flowers*, 8 Cal. 4th at 997, 884 P.2d at 144-45, 35 Cal. Rptr. 2d at 687-88 (quoting Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 871, 118 P.2d 465, 469 (1941) ("There are no 'degrees' of care as a matter of law; there are only different amounts of care, as a matter of fact.")). The court described the standard as "due care com-

and laymen have the same duty of care—they must exercise ordinary prudence.[13] The court noted that the specialized education and training of professionals are merely additional circumstances that help determine the amount of care that constitutes ordinary prudence.[14]

According to the court, the statutory distinction between ordinary and professional negligence serves purposes "not directly related to the elements of negligence itself," such as damage limits and statute of limitations distinctions.[15] Thus, this distinction affects neither the single duty to exercise care nor the single standard of ordinary prudence, which are both elements of negligence.[16]

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mensurate with the risk posed by the conduct taking into consideration all relevant circumstances." *Id.*; *see, e.g.*, Dalzell v. County of Los Angeles, 88 Cal. App. 2d 271, 276, 198 P.2d 554, 556-57 (1948) ("In driving an automobile in fog, the driver is required to exercise a degree of care that is to be expected of an ordinarily prudent person under the same or similar circumstances.").

13. *Flowers*, 8 Cal. 4th at 997-98, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688. The unique situation of caring for sick people is merely a circumstance that helps determine what ordinary prudence is for hospitals. *Id.* at 998, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688. *See generally* 36 CAL. JUR. 3D *Healing Arts and Institutions* § 138 (1992 & Supp. 1994) ("Patients in a hospital are owed the duty of reasonable care, . . . and the measure of such duty is the degree of care and skill used by hospitals generally in the community according to what the undertaking to treat the particular patient requires in each instance.").

14. *Flowers*, 8 Cal. 4th at 997-98, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 187 (5th ed. 1984) (stating that professionals must exercise "the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing"); *see* 46 CAL. JUR. 3D *Negligence* § 35 (1992 & Supp. 1994) ("[E]xperts are bound to exercise ordinary skill and competence in their respective professions and are considered negligent if they fail to live up to this standard."); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 774 (9th ed. 1988 & Supp. 1994) (stating that the degree of care medical practitioners must exercise).

15. *Flowers*, 8 Cal. 4th at 998-99, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688; *see, e.g.*, CAL. CIV. CODE § 3333.2 (West 1992 & Supp. 1994) (limiting to $25,000 the noneconomic damages recoverable in professional negligence actions against health care providers); CAL. CIV. PROC. CODE § 425.13 (West 1992 & Supp. 1994) (prohibiting a claim for punitive damages in professional negligence actions against health care providers without a court order allowing such). *Compare* CAL. CIV. PROC. CODE § 340 (West 1992 & Supp. 1994) (one year statute of limitations for ordinary negligence actions) *with* CAL. CIV. PROC. CODE § 340.5 (West 1992 & Supp. 1994) (three year statute of limitations for professional negligence actions against a health care provider). *See generally* Nathalie Huynh et al., Special Project, *Annotated California Statutes of Limitation*, 23 SW. U. L. REV. 689 (1994) (surveying California Code sections that contain time restrictions affecting various causes of action, including professional negligence actions).

16. *Flowers*, 8 Cal. 4th at 999, 884 P.2d at 146, 35 Cal. Rptr. 2d at 689. The supreme court also noted that the court of appeal erroneously relied on Gopaul v. Herrick Memorial Hospital, 38 Cal. App. 3d 1002, 113 Cal. Rptr. 811 (1974). *Id.* The court in *Gopaul* stated that "[t]he need to strap plaintiff to the gurney while she was

Because there is only one duty of care, measured by one standard of care, the California Supreme Court held that the court of appeal erred when it divided the plaintiff's complaint into professional and ordinary negligence theories of liability.[17]

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk wrote a separate opinion in which he concurred with the majority's reasoning but dissented from the majority's disposition of the case.[18] He agreed that a defendant cannot be liable for both professional and ordinary negligence.[19] However, he would affirm the court of appeal's decision to reverse summary judgment.[20]

Justice Mosk asserted that courts should be cautious when confronted with a motion for summary judgment because "summary judgment is a drastic measure that deprives the losing party of a trial on the merits."[21] Thus, courts should grant a summary judgment motion only when "there is no triable issue as to any material fact."[22]

In the instant case, Justice Mosk believed that the amount of care that constituted ordinary prudence for hospitals when placing patients on gurneys was a material fact.[23] Justice Mosk stated that the hospital's pol-

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ill and unattended would have been obvious to all;" therefore, expert testimony was not required to establish the standard of care. *Gopaul*, 38 Cal. App. 3d at 1007, 113 Cal. Rptr. at 814. The court pointed out that this statement related to the manner of proving the standard of care, and not to the actual character of the standard of care. *Flowers*, 8 Cal. 4th at 1000, 884 P.2d at 147, 35 Cal. Rptr. 2d at 690.

17. *Id.* at 1000, 884 P.2d at 146, 35 Cal. Rptr. 2d at 689. The supreme court reversed the decision of the court of appeal to deny the motion for summary judgment. However, the supreme court remanded the case to the court of appeal because the supreme court could not determine whether the faulty reasoning below affected the "determination of the requisite standard of care" or the decision regarding the existence of a triable issue of material fact. *Id.* at 1001, 884 P.2d at 147, 35 Cal. Rptr. 2d at 690.

18. *Id.* at 1002, 884 P.2d at 148, 35 Cal. Rptr. 2d at 691 (Mosk, J., concurring and dissenting).

19. *Id.* (Mosk, J., concurring and dissenting).

20. *Id.* (Mosk, J., concurring and dissenting).

21. *Id.* (Mosk, J., concurring and dissenting) (quoting Molko v. Holy Spirit Ass'n, 46 Cal. 3d 1092, 1107, 762 P.2d 46, 53, 252 Cal. Rptr. 122, 129).

22. *Id.* (Mosk J., concurring and dissenting) (quoting CAL. CIV. PROC. CODE § 437c (c) (West 1992 & Supp. 1994)). Consequently, the distinction affects a motion for summary judgment only in the sense that it identifies "any specialized knowledge or skill that may be a relevant 'circumstance'" in determining what constitutes ordinary prudence for professionals. *Id.* at 1000, 884 P.2d at 147, 35 Cal. Rptr. 2d at 690.

23. *Id.* at 1003, 884 P.2d at 148, 35 Cal. Rptr. 2d at 691 (Mosk, J., concurring and

icy statements were an important piece of evidence in determining the requisite amount of care.[24] Justice Mosk highlighted the discrepancy between the hospital's "Orientation to the Emergency Department" packet, which stated that "both side rails are to be put up on a patient lying on a gurney," and the hospital's "Emergency Policy and Procedures Manual," which required the raising of rails only in specifically listed conditions.[25] Justice Mosk reasoned that this discrepancy gave rise to a triable issue of material fact, which should preclude the court from upholding a grant of summary judgment.[26]

III. IMPACT AND CONCLUSION

The *Flowers* decision makes it more difficult for plaintiffs to prevail in professional negligence causes of action. Specifically, plaintiffs cannot allege separate theories of ordinary and professional negligence because professionals are subject to only one duty of care—ordinary prudence.[27] Plaintiffs must ascertain the professional customs and practices in the community and prove that the defendants failed to exercise ordinary prudence in light of these standards.[28]

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dissenting).

24. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk stated that the hospital policy statements are more reliable than expert witness declarations because "the former are forward-looking prescriptions of proper medical practice, . . . while the latter . . . [are] post hoc justifications of past behavior designed for use in litigation." *Id.*; *see also*, Richard E. Leahy, Comment, *Rational Health Policy and the Legal Standard of Care: A Call For Judicial Deference to Medical Practice Guidelines*, 77 CAL. L. REV. 1483 (1989) (proposing that medical societies should promulgate practice guidelines, which will serve as the basis for determining the controlling standard of care in medical malpractice actions).

25. *Flowers*, 8 Cal. 4th at 1003, 884 P.2d at 148-49, 35 Cal. Rptr. 2d at 691-92 (Mosk, J., concurring and dissenting). The plaintiff did not meet the conditions listed in the Manual but offered the "Orientation to the Emergency Department" packet to demonstrate a lack of due care. *Id.* (Mosk, J., concurring and dissenting). On the other hand, the defendant offered the "Emergency Policy and Procedures Manual," claiming that the Manual was the official policy of the hospital regarding the raising of rails on gurneys. *Id.* (Mosk, J., concurring and dissenting).

26. *Id.* at 1003-04, 884 P.2d at 149, 35 Cal. Rptr. 2d at 692 (Mosk, J., concurring and dissenting). According to Justice Mosk, it was not obvious whether the Manual prevailed over the Packet the defendant claimed. *Id.* (Mosk, J., concurring and dissenting). In fact, Justice Mosk found the Packet more persuasive because it explicitly mentioned the word "gurneys," whereas the Manual did not. *Id.* (Mosk, J., concurring and dissenting).

27. *See id.* at 1000, 884 P.2d at 146, 35 Cal. Rptr. 2d at 689.

28. *See id.* at 998, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688. Proof of the requisite amount of care requires the testimony of experts. *Id.* at 1001, 884 P.2d at 147, 35 Cal. Rptr. 2d at 690 (quoting Landeros v. Flood, 17 Cal. 3d 399, 410, 551 P.2d 389, 394, 131 Cal. Rptr. 69, 74 (1976) ("The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of ex-

At the same time, the *Flowers* decision shields defendants from multiple negligence theories of liability arising out of a single incident.[29] Nevertheless, the court emphasized that professionals have a duty to act according to the standards that their professional communities set forth.[30] Failure to exercise this ordinary prudence will likely result in liability.

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perts . . . ."). *But see supra* note 24 and accompanying text.

29. *See Flowers*, 8 Cal. 4th at 1000, 884 P.2d at 146, 35 Cal. Rptr. 2d at 689.

30. *See id.* at 998, 884 P.2d at 145, 35 Cal. Rptr. 2d at 688.

VIII. JUDGMENTS

The trial court must consider the specific facts of each case where the parties agree to an oral stipulation on the record to determine if the parties made the stipulation "before the court" as required under California Civil Procedure Code section 664.6. The factors that the trial court should consider in making this decision are whether: (1) material terms of the stipulation were sufficiently defined; (2) the supervising person questioned the parties to ensure that they understood the terms of the stipulation; and (3) the parties appreciated the fact that they would be bound by their stipulation:

Assemi v. Assemi.

I. INTRODUCTION

In *Assemi v. Assemi*,[1] the California Supreme Court determined whether an oral stipulation, made before the final arbiter assigned to the case, settling various marital dissolution issues, was "before the court" as required by California Civil Procedure Code section 664.6.[2] The trial

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1. 7 Cal. 4th 896, 872 P.2d 1190, 30 Cal. Rptr. 2d 265 (1994). Justice George wrote the majority opinion, with Chief Justice Lucas and Justices Arabian and Peterson concurring. *Id.* at 896-911, 872 P.2d at 1190-1200, 30 Cal. Rptr. 2d at 265-75. Justice Peterson is a Presiding Justice, from the Court of Appeal, First Appellate District, Division Five, assigned by the Acting Chairperson of the Judicial Council. *Id.* at 911, 872 P.2d at 1200, 30 Cal. Rptr. 2d at 275. Justice Mosk, joined by Justice Baxter, filed a dissenting opinion. *Id.* at 911-23, 872 P.2d at 1200-07, 30 Cal. Rptr. 2d at 275-82 (Mosk, J., dissenting). Justice Kennard also wrote a dissenting opinion. *Id.* at 923-25, 872 P.2d at 1207-08, 30 Cal. Rptr. 2d at 282-83 (Kennard, J. dissenting).

2. *Id.* at 900, 872 P.2d at 1192, 30 Cal. Rptr. 2d at 267. On June 2, 1989, Mr. Farid Assemi filed for a dissolution of his nine year marriage to Shirin Assemi. *Id.* at 900-01, 872 P.2d at 1192, 30 Cal. Rptr. 2d at 267. After settlement discussion in superior court, the judge entered a judgment of dissolution, but referred the parties to binding arbitration before retired Judge Meyers to resolve the remaining issues of division of property and monetary support. *Id.* at 901-02, 872 P.2d at 1192-93, 30 Cal. Rptr. 2d at 267-68. Judge Meyers delayed formal arbitration proceedings to allow the parties to reach an amicable agreement, and thereafter the parties informed Judge Meyers of such a resolution. *Id.* at 902, 872 P.2d at 1193, 30 Cal. Rptr. 2d at 268. Before accepting the stipulation, the judge questioned the parties individually to ensure that they understood and agreed to the terms of the settlement. *Id.* A certified reporter transcribed the proceedings. *Id.*

Following their oral stipulation, Mr. Assemi's attorney sent a proposed draft of the settlement to Mrs. Assemi's counsel, which counsel subsequently returned bearing several minor changes. *Id.* at 903, 872 P.2d at 1193-94, 30 Cal. Rptr. 2d at 268-69. Mrs. Assemi refused to sign the settlement, however, based on her belief that Mr.

court ruled that the oral stipulation was in fact a judicially supervised proceeding before the court.[3] The court of appeal reversed,[4] reasoning that because Judge Meyers was not acting as a judge, the oral stipulation was not properly made before the court.[5] The California Supreme Court reversed the appellate decision, holding that the parties had adequately fulfilled all of the requirements set forth in California Civil Procedure Code section 664.6.[6]

II. TREATMENT

A. *Majority Opinion*

The court in its opinion first outlined the two main approaches governing the enforcement of settlement stipulations prior to the enactment of California Civil Procedure Code section 664.6.[7] In support of its broad

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Assemi failed to include approximately $40,000 allegedly available in various bank accounts. *Id.* at 903, 872 P.2d at 1194, 30 Cal. Rptr. 2d at 269. Because of this discrepancy, the parties were unable to finalize a written settlement agreement. *Id.* Based on this impasse and in an effort to enforce the settlement agreement, Mr. Assemi's attorney filed a motion for entry of judgment pursuant to California Civil Procedure Code § 664.6. *Id.* at 902, 872 P.2d at 1193, 30 Cal. Rptr. 2d at 268.

At the time of the proceeding, California Civil Procedure Code § 664.6 read: "If parties to pending litigation stipulate, in writing or orally *before the court*, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." CAL. CIV. PROC. CODE § 664.6 (West 1987), *amended by* CAL. CIV. PROC. CODE § 664.6 (West 1995) (emphasis added). Following amendments in both 1993 and 1994, California Civil Procedure Code § 664.6 now reads:

> If the parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

CAL. CIV. PROC. CODE § 664.6 (West Supp. 1995).

While the court analyzed the case under the original statute, the result would still be the same under the statute as amended in 1994. Unless otherwise indicated, all further statutory references are to the California Civil Procedure Code.

3. *Assemi*, 7 Cal. 4th at 904, 872 P.2d at 1194, 30 Cal. Rptr. 2d at 269.

4. 19 Cal. App. 4th 964, 19 Cal. Rptr. 2d 7 (1993).

5. *Assemi*, 7 Cal. 4th at 904, 872 P.2d at 1194, 30 Cal. Rptr. 2d at 269.

6. *Id.* at 906, 872 P.2d at 1196, 30 Cal. Rptr. 2d at 271.

7. *Id.* at 904-05, 872 P.2d at 1194-95, 30 Cal. Rptr. 2d at 270. One line of authority limited the enforcement of such settlements to either a summary judgment order,

definition for the term "before the court," the court noted the legislature's willingness to expand the scope of the nonstatutory motion for judgment.[8] This code section balances the need to minimize conflicting interpretations of the settlement agreement with the power of the court to settle material issues of dispute.[9] Because section 664.6 authorizes enforcement of an oral settlement agreement only if made before the court, the majority examined the meaning of this important and somewhat ambiguous phrase.[10]

On the one hand, an oral stipulation made before a judge at a settlement conference always satisfies the "before the court" requirement of the statute.[11] An oral stipulation to settle made at a deposition without anyone acting in a judicial capacity, however, is unenforceable.[12] Therefore, in *Assemi*, whether the oral stipulation is binding hinges on Judge Meyers' function in this proceeding.[13]

In *Assemi*, neither the stipulation nor the order clearly describes Judge Meyers' role.[14] At best, Judge Meyers acted in a role somewhere between that of a temporary judge and that of an arbitrator.[15] Analyzing

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"a separate suit in equity to enforce the agreement; or . . . an amendment to the pleadings, asserting the settlement as an affirmative defense." *Id.* at 904, 872 P.2d at 1194-95, 30 Cal. Rptr. 2d at 69-70. The other method of enforcement was through a nonstatutory motion for judgment based on the judicially supervised settlement. *Id.* at 905, 872 P.2d at 1195, 30 Cal. Rptr. 2d at 70. In support of this second theory, the court cited Gopal v. Yoshikawa, 147 Cal. App. 3d 128, 195 Cal. Rptr. 36 (1983). In *Gopal*, the court reasoned that in order to further the purpose of a settlement conference, a court must be vested with the authority to grant a judgment based on a stipulated settlement agreement. *Gopal*, 147 Cal. App. 3d at 132-33, 195 Cal. Rptr. at 39.

8. When enacting § 664.6, the legislature expanded the courts' power to enforce settlement agreements by including both written and oral stipulations made before the court. *Assemi*, 7 Cal. 4th at 905, 872 P.2d at 1195, 30 Cal. Rptr. 2d at 270.

9. *Id.*

10. *Id.* at 906, 872 P.2d at 1195, 30 Cal. Rptr. 2d at 270.

11. *Id.* at 906, 872 P.2d at 1196, 30 Cal. Rptr. 2d at 271.

12. *Id.*

13. *Id.*

14. *Id.* at 907, 872 P.2d at 1196, 30 Cal. Rptr. 2d at 271. Both the stipulation and order contain conflicting language, referring to the appointment of a trial judge, as well as an arbitrator, when attempting to define Judge Meyers' role in the dispute. *Id.* at 907, 872 P.2d at 1196-97, 30 Cal. Rptr. 2d at 271-72.

15. *Id.* The California Constitution provides the court with the power to appoint a temporary judge. CAL. CONST. art. VI, § 21; *see also* 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 278 (3d ed. 1985 & Supp. 1994). The main requirements and procedure for appointment of a temporary judge are as follows: "(a) A written stipulation, with name and address of proposed appointee is submitted to the Presiding Judge . . . (c) The temporary judge takes the oath of office which is attached to the stipulation and order on file. (d) The case is then assigned to him and he proceeds with its determination." 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 279 (3d ed. 1985 & Supp. 1994); *see also* 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 284 (3d

the situation, the court argued that even though Judge Meyers did not take an oath, he acted more like a temporary judge than an arbitrator.[16] In support of this conclusion, the court noted that Judge Meyers followed the rules and procedures of court and his decision was similar to that of a court judgment in its finality.[17] The court decided that Judge Meyers possessed a hybrid role between temporary judge and arbitrator, giving him a quasi-judicial capacity when the parties presented their oral stipulations.[18]

The court considered various other factors in making its determination. First the parties recognized and acknowledged Judge Meyers' authority.[19] Furthermore, Judge Meyers questioned the parties to ensure that each side fully understood the agreement and assented to the requisite terms.[20] Because the parties were aware of Judge Meyers' binding power, appreciated the purpose and objective of the settlement, and understood the binding nature of the stipulation, the court determined that the oral stipulation made before the court satisfied the requirements of California Civil Procedure Code section 664.6.[21]

The court also drew support from the "strong policy favoring settlement of litigation."[22] The court reasoned that if parties believed that settlement agreements reached before a temporary judge or arbitrator were unenforceable, these same parties would not pursue any genuine attempts at settlement.[23] Further, parties may not have access to the courtroom at the precise time they reach an agreement.[24] In addition, the court's result helps to encourage parties to explore alternative dispute resolution techniques.[25] Lastly, because a transcript of an arbitra-

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ed. 1985 & Supp. 1994). The arbitrator, on the other hand, does not need to take an oath of office. *Assemi*, 7 Cal. 4th at 908, 872 P.2d at 1197, 30 Cal. Rptr. 2d at 272. Additionally, in an arbitration the rules applicable in a judicial proceeding do not necessarily govern. *Id.*; *see* CAL. CIV. PROC. CODE § 1282.2(d) (West 1982). To finalize the arbitration, the court must either correct or vacate the award. CAL. CIV. PROC. CODE § 1285 (West 1982).

16. *Assemi*, 7 Cal. 4th at 908, 872 P.2d at 1197, 30 Cal. Rptr. 2d at 272.

17. *Id.*

18. *Id.* at 909, 872 P.2d at 1197-98, 30 Cal. Rptr. 2d at 272-73.

19. *Id.* at 909, 872 P.2d at 1198, 30 Cal. Rptr. 2d at 273.

20. *Id.*

21. *Id.* at 910, 872 P.2d at 1198, 30 Cal. Rptr. 2d at 273.

22. *Id.*; *see* CAL. BUS. & PROF. CODE §§ 465-.5 (West 1990) (embodying the legislative intent encouraging the use of alternative dispute resolution).

23. *Assemi*, 7 Cal. 4th at 910, 872 P.2d at 1198, 30 Cal. Rptr. 2d at 273.

24. *Id.* at 910, 872 P.2d at 1198-99, 30 Cal. Rptr. 2d at 273-74.

25. *Id.* at 910, 872 P.2d at 1199, 30 Cal. Rptr. 2d at 274; *see also supra* note 22.

tion hearing cannot be used to reverse the arbitrator's award on substantive grounds, it is futile to declare a validly stipulated settlement between the parties as unenforceable merely on the basis of procedural grounds.[26]

The *Assemi* court set forth the following factors which the trial court should consider in determining whether the stipulation of settlement is an accurate reflection of the parties' agreement: "(1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms."[27] The supreme court found that substantial evidence supported the trial court's finding that the parties had reached a valid, binding, and accurate settlement agreement.[28]

B. Justice Mosk's Dissenting Opinion

Justice Mosk wrote a dissenting opinion,[29] in which Justice Baxter concurred.[30] Justice Mosk stated that the majority's decision transforms a bright line rule into an issue that must be decided on a case by case basis.[31] Justice Mosk agreed with the court of appeal as this court emphasized that an oral stipulation must be made before the court not only to ensure that the parties understand and appreciate the settlement, but also to avoid conflicting interpretations of the settlement.[32]

Justice Mosk adopted the appellate court finding that the legislature typically uses the word "court" synonymously with the word "judge," and that the legislative history showed no intent to use a different meaning.[33] According to the court of appeal and Justice Mosk, only an oral stipulation presented to a judge satisfies the requirements of California Civil Procedure Code section 664.6.[34] Because the court will not deal with a matter sent to judicial arbitration unless there is a request for a trial de novo, there is no legislative intent here to treat arbitrators and judges the same under California law.[35] Since general arbitration is even less similar to court proceedings than judicial arbitration, Justice Mosk agreed that a reasonable construction of section 664.6 would not equate a gener-

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26. *Assemi*, 7 Cal. 4th at 911, 872 P.2d at 1199, 30 Cal. Rptr. 2d at 274.
27. *Id.*
28. *Id.* at 911-12, 872 P.2d at 1199, 30 Cal. Rptr. 2d at 274.
29. *Id.* at 912, 872 P.2d at 1200, 30 Cal. Rptr. 2d at 275 (Mosk, J., dissenting).
30. *Id.* at 923, 872 P.2d at 1207, 30 Cal. Rptr. 2d at 282 (Baxter, J., dissenting).
31. *Id.* at 912-13, 872 P.2d at 1200, 30 Cal. Rptr. 2d at 275 (Mosk, J., dissenting).
32. *Id.* at 915-16, 872 P.2d at 1202, 30 Cal. Rptr. 2d at 277 (Mosk, J., dissenting).
33. *Id.* at 916, 872 P.2d at 1202, 30 Cal. Rptr. 2d at 277 (Mosk, J., dissenting).
34. *Id.*
35. *Id.* at 917, 872 P.2d at 1203, 30 Cal. Rptr. 2d at 278 (Mosk, J., dissenting).

al arbitrator to a judge.[36] In addition, the lack of a record in arbitration proceedings makes these proceedings vulnerable to conflicting interpretations.[37] The key to understanding whether a proceeding is before the court "is the identity of the officer who supervises the proceeding where the oral settlement is reached."[38]

Justice Mosk then explained that while the legislature had ample opportunity to relax the requirements of California Civil Procedure Code section 664.6 pending the decision of the court of appeal, it actually heightened the requirements by demanding that oral stipulations be placed on the record.[39] Discounting the majority's position, Justice Mosk argued that the legislature would have written the word arbitrator into the statute if it intended to include persons in arbitration.[40] Justice Mosk contended that the majority, by rewriting section 664.6 to include arbitrators, impliedly expanded the number of agreements exempted from the statute of frauds, something which a court is not permitted to do.[41]

Justice Mosk asserted that enforcing the plain meaning construction of section 664.6 would not frustrate policy considerations favoring settlement because there are alternative means of enforcing settlement agreements available to parties.[42] For these reasons, Justice Mosk would affirm the decision of the court of appeal.[43]

C. Justice Kennard's Dissenting Opinion

Justice Kennard dissented, stating that the decision by the majority is an improper broadening of section 664.6.[44] While Justice Kennard admitted that the legislature sought to encourage settlements through enactment of this statute, she contended that this policy interest must be weighted against competing interests, such as protecting the parties' rights and avoiding unnecessary litigation.[45] Justice Kennard concluded

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36. *Id.* at 917-18, 872 P.2d at 1203-04, 30 Cal. Rptr. 2d at 278-79 (Mosk, J., dissenting).
37. *Id.* at 918, 872 P.2d at 1204, 30 Cal. Rptr. 2d at 279 (Mosk, J., dissenting).
38. *Id.*
39. *Id.* at 921, 872 P.2d at 1205, 30 Cal. Rptr. 2d at 280 (Mosk, J., dissenting).
40. *Id.* at 921, 872 P.2d at 1206, 30 Cal. Rptr. 2d at 281 (Mosk, J., dissenting).
41. *Id.* at 922, 872 P.2d at 1206-07, 30 Cal. Rptr. 2d at 281-82 (Mosk, J., dissenting).
42. *Id.* at 923, 872 P.2d at 1207, 30 Cal. Rptr. 2d at 282 (Mosk, J., dissenting).
43. *Id.*
44. *Id.* at 923-24, 872 P.2d at 1207, 30 Cal. Rptr. 2d at 282 (Kennard, J., dissenting).
45. *Id.* at 924, 872 P.2d at 1207-08, 30 Cal. Rptr. 2d at 282-83 (Kennard, J., dissent-

that because of these competing interests, it is the legislature, not the court, which should enlarge the scope of section 664.6.[46]

III. IMPACT AND CONCLUSION

Prior to this decision, the plain meaning of California Civil Procedure Code section 664.6 gave the courts a bright line rule to follow. This decision will expand the number of enforceable oral stipulations by relaxing the meaning of the requirement that the stipulation be made before the court. While the fact that more settlements will be enforceable may help to reduce the litigation time for the courts, the fact that the courts will now have to analyze this issue on a case by case basis may counteract the intention of this court.

JILL ELIZABETH LUSHER

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ing).

46. *Id.* at 924-25, 872 P.2d at 1208, 30 Cal. Rptr. 2d at 283 (Kennard, J., dissenting).

IX. LIBEL AND SLANDER

When a defendant raises the common interest privilege as an affirmative defense to a claim of slander, the defendant must prove that the statement was made on an occasion that falls under the privilege, but once the defendant proves this fact, the burden shifts to the plaintiff to prove the statement was made with malice: **Lundquist v. Reusser.**

I. INTRODUCTION

In *Lundquist v. Reusser*,[1] the court considered whether under the common-interest privilege, the defendant must prove both that the statement was made on an occasion that falls under the privilege and that the statement was made without malice, or whether once the defendant has proven that the statement falls under the common-interest privilege, the burden shifts to the plaintiff to prove that the statement was made with malice.[2] The supreme court granted review to settle the

1. 7 Cal. 4th 1193, 875 P.2d 1279, 31 Cal. Rptr. 2d 776 (1994). Justice George wrote the unanimous opinion of the court, with Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and Werdegar concurring. *Id.* at 1193-1214, 875 P.2d at 1279-92, 31 Cal. Rptr. 2d at 776-89.

2. The plaintiff, Vivienne Lundquist, breeds Peruvian Paso horses. *Id.* at 1198, 875 P.2d at 1281, 31 Cal. Rptr. 2d at 778. One of her horses, Perla de Oro, developed a throat abscess when she was about eight months old. *Id.* A veterinarian surgically removed this abscess, leaving a 14-inch scar which was clearly visible in the summer, but harder to see in the winter when the mare's coat became thicker. *Id.*

In the mid-1980's Heinz and Sylvia Reusser became interested in buying Perla de Oro for breeding purposes. *Id.* The Reussers bought Perla de Oro in 1985 for $25,000. *Id.* at 1199, 875 P.2d at 1281, 31 Cal. Rptr. 2d at 777. When the Reussers bred Perla de Oro to HMS Domingo (the mare's half-brother), the foal, Tanya, was born with a bulge in her neck that the Reussers believed to be a genetic defect. *Id.* at 1199, 875 P.2d at 1281, 31 Cal. Rptr. 2d at 778-79. Perla de Oro previously gave birth to four other foals that had no genetic defects. *Id.* at 1198-99, 875 P.2d at 1281, 31 Cal. Rptr. 2d at 778. At the time of Tanya's birth, the Reussers did not consult a veterinarian or any other specialist regarding the bulge in Tanya's neck. *Id.* at 1199, 875 P.2d at 1281, 31 Cal. Rptr. 2d at 779.

When Perla de Oro shed her winter coat, the Reussers discovered the scar on her neck situated in the same area as the bulge on Tanya's neck. *Id.* at 1199, 875 P.2d at 1281-82, 31 Cal. Rptr. 2d at 779. The Reussers then consulted a veterinarian who told them that the scar could have been the result of either a medical or a cosmetic surgery. *Id.* at 1199, 875 P.2d at 1282, 31 Cal. Rptr. 2d at 779. The Reussers concluded, without even consulting Vivienne Lundquist, that Lundquist surgically al-

issue in light of the conflicting decisions reached by the courts of appeal.[3] The court of appeal in this case held that the trial judge committed reversible error when he instructed the jury that the defendant had the burden of proving that the statement was made without malice.[4] The supreme court affirmed that the burden shifts to the defendant to prove that there was no malice.[5] However, the court found that the error was not prejudicial and thus reinstated the verdict of the jury for the plaintiff.[6]

II. TREATMENT

A. *Common Interest Privilege*

In California, slander is defined as "'a false and unprivileged publication, orally uttered, . . . [tending] directly to injure [any person] in respect to his office, profession, trade or business.'"[7] The common-interest

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tered Perla de Oro to hide a genetic defect. *Id.*

At a panel discussion addressing the use of drugs and cosmetic surgery on show horses, Heinz Reusser stated that he owned a champion mare who had been surgically altered while his wife passed around pictures of Perla de Oro. *Id.* at 1197-98, 875 P.2d at 1280, 31 Cal. Rptr. 2d at 777-78. Although Heinz Reusser did not identify either the mare or the breeder, the other breeders at the discussion recognized Perla de Oro and discerned that Vivienne Lundquist was the breeder. *Id.* Rumors spread, even to individuals who did not attend the panel discussion, that Vivienne Lundquist surgically altered her horses to hide genetic defects. *Id.* at 1200, 875 P.2d at 1282, 31 Cal. Rptr. 2d at 779.

3. *Id.* at 1202, 875 P.2d at 1283, 31 Cal. Rptr. 2d at 780.

4. *Id.* at 1196, 875 P.2d at 1280, 31 Cal. Rptr. 2d at 777.

5. *Id.* at 1196-97, 875 P.2d at 1280, 31 Cal. Rptr. 2d at 777.

6. *Id.* at 1197, 875 P.2d at 1280, 31 Cal. Rptr. 2d at 777.

7. *Id.* at 1203, 875 P.2d at 1284, 31 Cal. Rptr. 2d at 781 (quoting CAL. CIV. CODE § 46 (West 1994)). The full definition of slander is:

> Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
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> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
>
> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to him impotence or a want of chastity; or
>
> 5. Which, by natural consequence, causes actual damage.

CAL. CIV. CODE § 46 (West 1994); *see* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 490 (9th ed. 1988 & Supp. 1990) (same definition); 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 133 (1988 & Supp. 1994) (same definition).

privilege is a conditional privilege that shields the defendant from liability where the statement was made without malice regarding a matter of common interest.[8] The legislature codified the common-interest privilege in California Civil Code section 47(c).[9] In the instant case, the defamatory statements were not at issue; liability turned on whether the defamatory statements were made with malice.[10] Therefore, the supreme court's analysis concentrated on who bore the burden of proof regarding malice.[11]

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8. *Id.* at 1203-04, 875 P.2d at 1284-85, 31 Cal. Rptr. 2d at 782. The common-interest privilege occurs "where there is a common interest in the matter published, that is, an interest on the part of both the person communicating it and the person to whom it is communicated, and the communication is of a kind reasonably calculated to protect or further that interest." 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 222 (1988 & Supp. 1994); *see also* Paul J. McCue, *California Supreme Court Survey*, 17 PEPP. L. REV. 523, 575 n.3 (1990) (analyzing holding and impact of *Brown* decision); Fred H. Cate, comment, *Defining California Civil Code Section 47(3): The Resurgence of Self-Governance*, 39 STAN. L. REV. 1201, 1204 (1987) (explaining the common-interest privilege); Robert D. Sack, *Common Law Libel and the Press: A Primer*, 372 PRACTISING L. INST. PAT. 35 (1993) (defining the common-interest or public interest privilege as a qualified privilege that protects communications that are made without malice on matters of public interest or between parties sharing a common interest).

9. *Lundquist*, 7 Cal. 4th at 1203-04, 875 P.2d at 1284-85, 31 Cal. Rptr. 2d at 782. California Civil Code § 47(c) defines the common-interest privilege as one that is made:

> In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

CAL. CIV. CODE § 47 (West 1982 & Supp. 1995). Prior to 1990, this section was labeled as section 47, subdivision (3). *Id.*

10. *Lundquist*, 7 Cal. 4th at 1204, 875 P.2d at 1285, 31 Cal. Rptr. 2d at 782. California Civil Code § 48 states: "In the case provided for in [section 47(c)], malice is not inferred from the communication." CAL. CIV. CODE § 48 (West 1994). Actual malice is established by a showing that the publication was motivated by hatred or ill will toward the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights. 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 148 n.98 (1985 & Supp. 1990). Actual malice is also defined as knowledge of falsity of the statement or "reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 280 (1964). Actual malice is "conclusively presumed from the fact of a defamatory and unprivileged communication." 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 149 (1988 & Supp. 1994).

11. *Lundquist*, 7 Cal. 4th at 1204, 875 P.2d at 1285, 31 Cal. Rptr. 2d at 782.

The supreme court first looked to the applicable statutes to determine whether legislative intent was apparent on its face.[12] The court found that the language did not specifically address which party must prove malice.[13]

The supreme court then examined the legislative history of the statutes.[14] The court remarked that it recently had looked extensively into the legislative history of California Civil Code section 47 in *Brown v. Kelly Broadcasting Co.*.[15] In *Brown*, the court found that the legislature intended to adopt the common law definition of the common-interest privilege.[16] The common law rule provided that once the defendant proved that the defamatory statement fell under the common-interest privilege, the plaintiff then had the burden to show malice, or the plaintiff would recover nothing.[17]

The court considered the plaintiff's contention that the court should follow the line of cases that began with *Snively v. Record Publishing Co.*,[18] which held that if the defendant raised the common-interest privilege as a defense, then the defendant had to prove both that the statement was privileged and that the statement was made without malice.[19]

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12. *Id.* at 1205, 875 P.2d at 1285, 31 Cal. Rptr. 2d at 782.

13. *Id.* at 1205, 875 P.2d at 1285, 31 Cal. Rptr. 2d at 782-83.

14. *Id.* at 1205, 875 P.2d at 1285, 31 Cal. Rptr. 2d at 783.

15. *Id.* at 1205, 875 P.2d at 1286, 31 Cal. Rptr. 2d at 783. In Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989), the court focused on whether the legislature intended to codify a broad public interest privilege under California Civil Code § 47(c) to protect the publications of the media. *Id.* at 727, 771 P.2d at 414, 257 Cal. Rptr. 2d at 716. The supreme court looked at the development of the public interest and common-interest privileges as part of its analysis. *Id.* at 726-29, 771 P.2d at 414-16, 257 Cal. Rptr. 2d at 716-18. Much of the analysis of the history of the common-interest privilege is relevant to the current discussion. *Lundquist*, 7 Cal. 4th at 1205, 875 P.2d at 1285, 31 Cal. Rptr. 2d at 783.

16. *Id.* at 1206, 875 P.2d at 1286, 31 Cal. Rptr. 2d at 783-84 (citing *Brown*, 48 Cal. 3d at 726, 771 P.2d at 414, 257 Cal. Rptr. at 716 (1989)). At the time of the enactment of California Civil Code § 47(c), strict liability applied to defamation under the common law. *Id.* at 1205, 875 P.2d at 1286, 31 Cal. Rptr. 2d at 783. Privileges and defenses to defamation developed to lessen the harshness of the strict liability standard, including the common-interest privilege. *Id.* at 1206, 875 P.2d at 1286, 31 Cal. Rptr. 2d at 783. The common law common interest privilege protected communications made in good faith on a matter in which the speaker and hearer shared an interest or duty. *Id.*

17. *Lundquist*, 7 Cal. 4th at 1207-08, 875 P.2d at 1287, 31 Cal. Rptr. 2d at 784-85 (citing Lewis & Herrick v. Chapman, 16 N.Y. 369, 373 (1857), and Thorn v. Moser, 1 Denio 488, 492-93 (N.Y. Sup. Ct. 1845), to support the interpretation of the common law rule because the codification of the common interest privilege in New York was identical to the codification in California).

18. 185 Cal. 565, 198 P. 1 (1921).

19. *Lundquist*, 7 Cal. 4th at 1208, 875 P.2d at 1288, 31 Cal. Rptr. 2d at 785. The supreme court lists eight cases, mostly decided in the 1920's, that followed the rule

The court explained why the court of appeal failed to follow *Snively* on the issue of who had the burden of proof with regard to malice.[20]

First, the court in *Snively* cited no authority supporting the position that a defendant asserting the common-interest privilege had to prove the absence of malice.[21] In addition, the court did not consider the common law background of the common-interest privilege or the legislative intent behind the enactment of California Civil Code section 47(c).[22] Next, the supreme court noted that its decision in *Locke v. Mitchell*[23] weakened the reasoning behind *Snively*.[24] Subsequent decisions of the supreme court recognized that the plaintiff needed to show malice to recover once the defendant had shown that a statement fell under the privilege.[25] Also, most appellate court cases after *Locke* hold that the burden of proof regarding malice shifts to the plaintiff once the defendant shows that the statement was privileged.[26]

The court next noted the consistency of the decision of the court of appeal with California Evidence Code section 500.[27] First, the legislature did not intend for enactment of the California Evidence Code to conflict

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in *Snively*. *Id.* at 1208-09, 875 P.2d at 1288, 31 Cal. Rptr. 2d at 785.

20. *Id.* at 1209, 875 P.2d at 1288, 31 Cal. Rptr. 2d at 785. The decision in *Brown* did not overrule *Snively* on this issue. *Id.*

21. *Id.*

22. *Id.*

23. 7 Cal. 2d 599, 61 P.2d 922 (1936).

24. *Lundquist*, 7 Cal. 4th at 1209, 875 P.2d at 1288, 31 Cal. Rptr. 2d at 785. Although the reasoning in Locke v. Mitchell applied to the burden of pleading malice, the basis for the court's conclusion is that for a qualified privilege, actual malice will not be inferred from the circumstances. *Id.* Therefore, applying this reasoning to the burden of proof, if a qualified privilege is raised, actual malice will not be inferred and the plaintiff bears the burden of proving actual malice. *See id.* at 1209-10, 875 P.2d at 1288-89, 31 Cal. Rptr. 2d at 785.

25. *Id.* at 1210, 875 P.2d at 1289, 31 Cal. Rptr. 2d at 786; *see, e.g.*, Sanborn v. Chronicle Publishing Co., 18 Cal. 3d 406, 413-14, 556 P.2d 764, 134 Cal. Rptr. 402 (1976) (showing that plaintiff must prove actual malice in order to recover damages); Brewer v. Second Baptist Church, 32 Cal. 2d 791, 796-800, 197 P.2d 713 (1948) (same); Emde v. San Joaquin County Cent. Labor Council, 23 Cal. 2d 146, 154-55, 161, 143 P.2d 20, 25 (1943) (same).

26. *Lundquist*, 7 Cal. 4th at 1210, 875 P.2d at 1289, 31 Cal. Rptr. 2d at 786-87.

27. *Id.* at 1211, 875 P.2d at 1290, 31 Cal. Rptr. 2d at 787. California Evidence Code § 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." CAL. EVID. CODE § 500 (West 1966 & Supp. 1995).

with any law in effect.[28] Second, California Evidence Code section 500 merely states that each party must plead the facts essential to its claim or defense.[29] The court decided that there was no conflict between the common law rule and the California Evidence Code with regard to the allocation of the burden of proof for the common-interest privilege.[30]

Finally, the supreme court addressed the plaintiff's contention that some of the court's statements in *Brown*[31] implied that the defendant must prove that a statement falling under the common-interest privilege was not malicious.[32] However, the burden of proof was not at issue in *Brown*, and therefore, the court did not address it.[33] The statements to which the plaintiff referred explained why the common-interest privilege did not apply in *Brown* rather than where the burden of proof lies.[34]

The supreme court concluded that the common law rule regarding the burden of proof for the common-interest privilege applied in California, and thus upheld the ruling of the court of appeal. The supreme court rejected the reasoning set forth by the plaintiff and held that when the defendant proves that the defamatory statement was made on a privileged occasion, the plaintiff must then prove that the statement was made with malice.

B. Prejudicial Error

Before a reviewing court can reverse a judgment based on an instructional error, an appellant must show not only error, but also that the error was prejudicial.[35] Here, the court incorrectly instructed the jury

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28. *Lundquist*, 7 Cal. 4th at 1211, 875 P.2d at 1290, 31 Cal. Rptr. 2d at 787.

29. *Id.* at 1211-12, 875 P.2d at 1290, 31 Cal. Rptr. 2d at 787.

30. *Id.* at 1212, 875 P.2d at 1290, 31 Cal. Rptr. 2d at 787.

31. 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989).

32. *Lundquist*, 7 Cal. 4th at 1212, 875 P.2d at 1290, 31 Cal. Rptr. 2d at 788.

33. *Id.* The first statement in question is: "'[s]ection 47(3) provides a privilege to specified communications made 'without malice.' . . . If section 47(3) applies to the occasion on which a communication is made and if it was made without malice, it is privileged and cannot constitute a defamation under California law.'" *Id.* (quoting Brown v. Kelly, 48 Cal. 3d 711, 723, 771 P.2d 406, 411-12, 257 Cal. Rptr. 708, 713-14 (1989)). The plaintiff contended that this statement required the defendant to prove that the defamatory statement was made without malice. *Id.* However, the court did not consider the allocation of proof when it made this statement, and the court rejected this interpretation. *Id.*

34. *Id.* at 1213, 875 P.2d at 1291, 31 Cal. Rptr. 2d at 788. The court again pointed out that the these statements in *Brown* had nothing to do with the burden of proof issue considered in the instant case, and rejected this argument as well. *Id.*

35. *Id.* The general rule is:

> [E]rror in the giving or refusing of instructions will not be considered as a ground for reversal unless the record contains enough evidence to show that . different instructions might have affected the outcome of the trial. Thus, to

that the defendant had the burden of proving that the statement was made without malice.[36] However, the court also instructed the jury that to award punitive damages it would have to find that the defendant acted with actual malice.[37] Because the jury awarded punitive damages, it must have determined that the defendant acted with actual malice.[38] Therefore, because the incorrect jury instruction did not affect the verdict, the error was not prejudicial, and thus the court had no reason to reverse the judgment of the trial court.[39]

III. IMPACT AND CONCLUSION

In this case the supreme court settled a matter of law that was under dispute in California's courts of appeal.[40] The supreme court determined that California will adhere to the rule that is followed throughout the majority of the United States and the majority of California's courts of appeal.[41] This decision further clarifies the application of the common-interest privilege: the defendant must prove that the statement was made on an occasion that falls under the common-interest privilege, and once proven, the plaintiff must prove that the statement was made with malice.

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avail himself of the point that an instruction was erroneous, an appellant must ordinarily bring before the reviewing court sufficient evidence to show that, upon proper instruction, there might have been a finding in his favor. The only relaxation of the rule in this respect is where an instruction given would be erroneous on any conceivable state of the facts.

5 CAL. JUR. 3D *Appellate Review* § 512 (1973 & Supp. 1994).

36. *Lundquist*, 7 Cal. 4th at 1214, 875 P.2d at 1291, 31 Cal. Rptr. 2d at 789.
37. *Id.*
38. *Id.* at 1214, 875 P.2d at 1291-92, 31 Cal. Rptr. 2d at 789.
39. *Id.* at 1214, 875 P.2d at 1292, 31 Cal. Rptr. 2d at 789.
40. *Id.* at 1202, 875 P.2d at 1283, 31 Cal. Rptr. 2d at 780.
41. *Id.* at 1202-03, 875 P.2d at 1284, 31 Cal. Rptr. 2d at 781.

X. LIMITATION OF ACTIONS

A defendant who intentionally conceals his identity may be equitably estopped from asserting the statute of limitations when, as a result of the concealment, the plaintiff is unable to discover the defendant's actual identity: **Bernson v. Browning-Ferris Industries of California, Inc.**

I. INTRODUCTION

In *Bernson v. Browning-Ferris Industries of California, Inc.*,[1] the California Supreme Court considered whether the intentional concealment of a defendant's identity from the plaintiff tolls the statute of limitations.[2] Addressing the issue for the first time in a case where all of the defendants were unidentified, the court concluded that equitable considerations required the tolling of the statute of limitations.[3] The court's holding is not surprising in light of the obvious inequity in situations where the defendant fraudulently conceals his identity until the statute of limitations runs. Further, the holding in *Bernson* is consistent with other jurisdictions which already embrace a rule tolling the statute in similar situations.[4] Therefore, the court's decision represents the most recent extension of a modern legal trend which will likely have an impact in a wide variety of factual settings and causes of action.[5]

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1. 7 Cal. 4th 926, 873 P.2d 613, 30 Cal. Rptr. 2d 440 (1994). Justice Arabian authored the majority opinion, in which Justices Mosk, Baxter, George, and Kline concurred. *Id.* at 938, 873 P.2d at 620, 30 Cal. Rptr. 2d at 447. Justice Kennard wrote a dissenting opinion, in which Chief Justice Lucas joined. *Id.* at 947, 873 P.2d at 626, 30 Cal. Rptr. 2d at 453 (Kennard, J., dissenting).

2. The effect of fraudulent concealment on the statute of limitations, as addressed in *Bernson*, had been discussed previously in California. *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 529 (3d ed. 1985 & Supp. 1994) ("There seems little justification in principle for limiting the estoppel rule to concealment of the cause of action"). From the outset, the scenario in *Bernson* must be distinguished from what happens in most cases. Usually the plaintiff is aware of the identity of at least one defendant even though many other defendants may be unknown. In such situations, the plaintiff may file the action against the known defendant and include the unknown parties as Does. The plaintiff would then presumably determine the identity of unknown defendant's through the use of discovery. *See* CAL. CIV. PROC. CODE § 474 (West 1979) (allowing the use of Doe defendants). In *Bernson*, however, the plaintiff was wholly unaware of the identity of any of the defendants. Therefore, as the court noted, he was precluded from learning their identities through normal discovery procedures. *Bernson*, 7 Cal. 4th at 933, 873 P.2d at 616, 30 Cal. Rptr. 2d at 443.

3. *Id.* at 937, 873 P.2d at 620, 30 Cal. Rptr. 2d at 447.

4. *See infra* note 20.

5. *See infra* note 34.

II. FACTS OF THE CASE

In 1988, a highly critical report circulated within the Los Angeles media concerning Los Angeles City Council Member Hal Bernson.[6] The report documented alleged misuse of public funds by Bernson including "extensive personal travel" that the report labelled "legally questionable."[7] However, the report did not identify its author or distributor.[8]

During the next two years, Bernson was unable to discover who had written the report.[9] In 1990, however, two reporters from the Los Angeles Times told Bernson that Browning-Ferris Industries (BFI) had produced the report.[10] Bernson immediately contacted the legal council for BFI who patently denied the allegation and subsequently sent a letter to the Los Angeles Times both denying BFI's involvement and demanding a retraction.[11] Bernson relied on this representation, but discovered one year later that BFI had in fact produced the report.[12] Within a year after this discovery, Bernson filed a libel action against BFI.[13] The trial court dismissed the case on the grounds that the statute of limitations had run and the court of appeal affirmed.[14]

III. TREATMENT OF THE CASE

A. *Majority Opinion*

The majority held that the fraudulent concealment of a defendant's

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6. *Bernson*, 7 Cal. 4th at 929, 873 P.2d at 614, 30 Cal. Rptr. 2d at 441.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 928, 873 P.2d at 614, 30 Cal. Rptr. 2d at 441.
12. *Id.*
13. *Id.* Bernson had often been critical of BFI and the two are usually at odds on political issues. *Id.* Most notable was Bernson's opposition to BFI's operation of the Sunshine Canyon landfill, located in Bernson's legislative district. *Id.*; *see, e.g.*, John Schwada, *Council Plans to Appeal After Losing Bid to Block Sunshine Canyon Landfill*, L.A. TIMES, April 1, 1992, at B4 (calling Bernson a "longtime critic of Browning-Ferris"); John Schwada, *Sunshine Canyon Dumping Is Illegal Opponents Allege*, L.A. TIMES, Oct. 15, 1991 at B3 (calling Bernson "a staunch foe of . . . [BFI's] Sunshine Canyon landfill").
14. *Bernson*, 7 Cal. 4th at 930, 873 P.2d at 614-15, 30 Cal. Rptr. at 441; *see also Bernson's Libel Suit Against Landfill Firm Dismissed*, L.A. TIMES, July 25, 1992, at B2 (briefly discussing the dismissal of Bernson's libel action).

identity from the plaintiff tolls the statue of limitations.[15] Initially, the court recognized that "the general rule in California has been that ignorance of the *identity* of the defendant is not essential to a claim and therefore will not toll the statute."[16] However, ignorance of the *cause of action* does toll the statute.[17] The common-law distinction between discovery of the cause of action and discovery of the identity of the plaintiff is based on the notion that once the plaintiff is aware of the cause of action he can file a Doe complaint and discover the defendant's identity through discovery techniques.[18]

In *Bernson*, however, the plaintiff was entirely unaware of the identity of all defendants. Therefore, filing a Doe complaint would have been ineffectual.[19] Considering the rules in other jurisdictions,[20] the court

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15. *Bernson*, 7 Cal. 4th at 937, 873 P.2d at 620, 30 Cal. Rptr. 2d at 447.

16. *Id.* at 932, 873 P.2d at 616, 30 Cal. Rptr. 2d at 443 (emphasis added).

17. *Id.*; *see also* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 530-535 (3d ed. 1985 & Supp. 1994) (discussing the decisions holding the statue tolls when there is fraudulent concealment of the cause of action); 43 CAL. JUR. 3D *Limitation of Actions* § 161 (1978 & Supp 1994) (same); 51 AM. JUR. 2d *Limitation of Actions* §§ 146-147 (1970 & Supp. 1994) (discussing the general rule that fraudulent concealment of the cause of action tolls the statue); 54 C.J.S. *Limitation of Actions* § 88 (1987 & Supp. 1994) (same).

18. *Id.*; *see also* Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988) (holding that plaintiff's ignorance of the manufacturer's identity did not toll the statute since she could have filed a Doe complaint pursuant to CAL. CIV. PROC. CODE § 474). As the court in *Bernson* noted, however, § 474 applies only when the name of "a defendant" is unknown while the identities of others are known. *Bernson*, 7 Cal. 4th at 933, 873 P.2d at 616, 30 Cal. Rptr. 2d at 443. In such a situation, the Doe complaint allows the name of the unknown defendant to be added later when normal discovery reveals the unknown defendant's identity. *Id.* In *Bernson*, however, the plaintiff knew none of the defendants. *Id.*

19. The court stated that "if [the plaintiff] has no knowledge of the wrongdoer's identity . . . it is scarcely expectable that he will file an action and hope that something turns up . . . ." *Bernson*, 7 Cal. 4th at 936, 873 P.2d at 619, 30 Cal. Rptr. 2d at 446 (citing 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 529 (3d ed. 1985 & Supp. 1994)).

20. *Id.* at 933-34, 873 P.2d at 617, 30 Cal. Rptr. 2d at 444; *see* Royal Indem. Co. v. Petrozzino, 598 F.2d 816, 819 (3rd Cir. 1979) (tolling statute despite availability of Doe complaint, until the bank robber's identity was discovered); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, 717 F. Supp. 1374, 1388 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (holding that the doctrine of fraudulent concealment tolls the statute of limitations until the owner of stolen art work discovers the location of the property); O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980) (holding that statute of limitations was tolled until rightful owner of artwork should have known the location of stolen paintings and identity of possessor; Noel v. Teffeau, 174 A. 145, 147 (N.J. Ch. 1934) (tolling the statute of limitations pending identification of hit and run driver); Spitler v. Dean, 436 N.W.2d 308, 310 (Wis. 1989) (stating that "[a] statute of limitations barring relief to victims before the defendant is, or could be, discovered violates [the equitable] guarantee of fairness").

noted that "the equitable principle that a defendant who intentionally conceals his or her identity may be equitably estopped from asserting the statute of limitations to defeat an untimely claim, has been widely embraced."[21] Accordingly, the court held that the statute of limitations tolls when the defendant intentionally and fraudulently conceals his identity from the plaintiff in a libel action.[22] In light of this new rule, the court remanded the case for a determination of whether the defendant's actions constituted intentional concealment.[23]

B. Justice Kennard's Dissenting Opinion

Justice Kennard based her dissent on two separate theories.[24] First, Justice Kennard deviated from the majority in the application of the Doe statute, opining that the plaintiff's mere lack of knowledge of the defendant's identity does not mean that the cause of action has not accrued.[25] As a result, she stated that the plaintiff can file suit using the Doe pleading procedure.[26] Justice Kennard concluded in *Bernson*, that the statute of limitations should not toll because the plaintiff "ignored this established procedure."[27]

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21. *Bernson*, 7 Cal. 4th at 934, 873 P.2d at 617-18, 30 Cal. Rptr. 2d at 444-45.

22. *Id.* at 936, 873 P.2d at 619, 30 Cal. Rptr. 2d at 446. The court stressed equitable principles, emphasizing that the statute is to be used not as a sword but as a shield. *Id.* at 935, 873 P.2d at 618, 30 Cal. Rptr. 2d at 445. However, the court pointed out that in order for this new rule of law to apply, the plaintiff must have exercised "reasonable diligence" in determining the defendant's identity. *Id.* at 936, 873 P.2d at 619, 30 Cal. Rptr. 2d at 447. The court stated that lack of knowledge of defendant's identity alone does not toll the statute. *Id.* This requirement is consistent with that of other jurisdictions which have considered the issue. *See supra* note 20 and accompanying text.

23. *Id.* at 937, 873 P.2d at 620, 30 Cal. Rptr. 2d at 447.

24. *Id.* at 938-39, 873 P.2d at 620-21, 30 Cal Rptr. 2d at 447-48 (Kennard, J., dissenting).

25. *Id.* at 938, 873 P.2d at 619, 30 Cal. Rptr. 2d at 447 (Kennard, J., dissenting).

26. *Id.* at 942, 873 P.2d at 623, 30 Cal. Rptr. 2d at 450 (Kennard, J., dissenting).

27. Unfortunately, Justice Kennard misquoted the Doe statute. *See* CAL. CIV. PROC. CODE § 474 (West 1979) states, in relevant part:

> [w]hen the plaintiff is ignorant of the name of *a defendant*, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.

See id. (emphasis added). As emphasized, the statute applies when "a defendant" is unknown. Justice Kennard misquoted the statute as saying "the defendant." *Bernson*, 7

Second, Justice Kennard noted that no fraud existed until more than one year after the report's publication.[28] By that time, the one-year statute of limitations had already run and Bernson had taken no legal action.[29] As a result, Justice Kennard concluded that Bernson failed to include the necessary factual allegations in the complaint to toll the statute.[30] Therefore, Justice Kennard concluded that Bernson's lawsuit should not have been able to continue.[31]

IV. CONCLUSION

The majority decision acknowledges a distinct legal trend by recognizing a new rule of law in California: a defendant in a libel action will not be able to invoke the statute of limitations when, as a result of intentional concealment, the plaintiff is unable to discover the defendant's identity. In so holding, the court follows the lead of other jurisdictions that have previously considered the issue[32] as well as the legal scholarship in California that has already noted the trend in this direction.[33]

Cal. 4th at 942, 873 P.2d at 622, 30 Cal. Rptr. 2d at 450 (Kennard, J., dissenting) ("By its terms, section 474 applies when a plaintiff is ignorant 'of the name of the defendant.'"). If the statute had been worded as Justice Kennard had indicated, her analysis would be more persuasive.

Further, Justice Kennard opined that the Doe complaint affords the plaintiff three additional years to discover the defendant's identity. *Id.* (Kennard, J., dissenting). However, her dissent failed to address the contingency of a plaintiff who is unable to identify the defendant in those three additional years. If the plaintiff is prevented from discovering the defendant's identity for more than three additional years due to the defendant's fraudulent concealment, Justice Kennard's view would prevent the naming of that individual as the Doe defendant.

Such a rule would have prevented the equitable holding found in the *Autocephalous*, *O'Keeffe*, and *Spitler* cases. *See supra* note 20 *see also* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 529 (3d ed. 1985 & Supp. 1994) ("Giving the fraudulent defendant the benefit of our short limitations as a reward for his fraud is hardly consistent with the purpose of the statute [of limitations].").

28. *Bernson*, 7 Cal. 4th at 946, 873 P.2d at 625, 30 Cal. Rptr. 2d at 452 (Kennard, J., dissenting).

29. *Id.* at 947, 873 P.2d at 625-26, 30 Cal. Rptr. 2d at 452-53 (Kennard, J., dissenting).

30. *Id.* at 947, 873 P.2d at 626, 30 Cal. Rptr. 2d at 453 (Kennard, J., dissenting).

31. *Id.*

32. *See supra* note 20 and accompanying text.

33. The rule has previously been that the plaintiff who knows of the cause of action takes the risk of discovering the identity of the defendant. *See generally* 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 529 (3d ed. 1985 & Supp. 1994) (summarizing the cases supporting this view). However, Witkin argues that this rule is "breaking down" in light of (1) "a broadening of the confidential relations exception," and (2) by the "impressive number of decisions holding the statute tolled by fraudulent concealment of the cause of action." *Id.*; *c.f.* Allan E. Korpela, Annotation, *Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limita-*

The court's opinion recognizes the inequity that would result in refusing to create such a rule and presumably allows application in a broad range of factual patterns and causes of action.[34]

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tions, 43 A.L.R.3D 429 (1972 & Supp. 1994) (collecting cases in which equitable estoppel has prevented the defendant from invoking the statue of limitations when the plaintiff was fraudulently induced to delay a timely action).

34. In making its decision, the court relied on cases involving a wide variety of factual settings including, stolen artwork, assault cases, a case involving the identity of a bank robber, the identity of a hit and run driver, and others. *See supra* note 20 (listing these cases). Therefore, the rule established in this case will likely be applicable to an extremely wide variety of civil cases.

XI. MUNICIPALITIES

Because the California Integrated Waste Management Act of 1989 only authorizes a city to award an exclusive franchise for the handling of "discarded" materials, the owner of undiscarded recyclable materials may sell them to someone other than the exclusive franchisee: **Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.**

I. INTRODUCTION

Under the California Integrated Waste Management Act of 1989[1] (the Act), the legislature gave cities and other local agencies the power to grant exclusive franchises for the purpose of providing solid waste handling services.[2] In *Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.*,[3] the California Supreme Court considered whether the Act prevents "the owner of recyclable materials from selling them to someone other than the exclusive franchisee."[4] The court held that the owner of recyclable materials may sell them to a competing company,[5] reasoning that undiscarded materials are not classified as waste and are, therefore, not regulated by the Act.[6]

II. STATEMENT OF THE CASE

The City of Rancho Mirage (the City) entered into an exclusive franchise agreement with Waste Management of the Desert, Inc. (Waste Management) to handle the City's commercial and residential waste collec-

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1. CAL. PUB. RES. CODE §§ 40000-49620 (West Supp. 1994). The California Integrated Waste Management Act of 1989 replaced the Nejedly-Z'berg-Dills Solid Waste Management and Recovery Act of 1972. 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 75 (9th ed. Supp. 1993). *See generally* 50 CAL. JUR. 3D *Pollution and Conservation Laws* §§ 447-452 (1993 & Supp. 1994) (discussing the California Integration Waste Management Act of 1989).

2. CAL. PUB. RES. CODE § 40059(a)(2) (West Supp. 1994) (stating that "if, in the opinion of its governing body, the public health, safety, and well-being so require," a city, county, or district may provide solid waste handling services by means of a "partially exclusive or wholly exclusive franchise").

3. 7 Cal. 4th 478, 869 P.2d 440, 28 Cal. Rptr. 2d 461 (1994). Justice Baxter authored the majority opinion, with Chief Justice Lucas and Justices Kennard, Panelli, and Cottle concurring. Justice George wrote a separate dissenting opinion, in which Justice Mosk concurred. *Id.* at 490, 869 P.2d at 447, 28 Cal. Rptr. 2d at 468 (George, J., dissenting).

4. *Id.* at 481, 869 P.2d at 441, 28 Cal. Rptr. 2d at 462.

5. *Id.* at 489, 869 P.2d at 446, 28 Cal. Rptr. 2d at 467.

6. *See infra* notes 15-19 and accompanying text.

tion.[7] Under this agreement, Waste Management was permitted to keep a portion of the profits derived from selling recyclable materials.[8] In addition, the City adopted an ordinance which prohibited any person other than the City or its agent from handling refuse accumulated within the city.[9]

The present case arose out of alleged violations of both the exclusive franchise agreement and the city ordinance.[10] The City and Waste Management brought suit against Palm Springs Recycling (the defendant) on the grounds that the defendant had violated their rights by collecting recyclable materials from commercial customers.[11] The trial court found for the plaintiffs and issued an injunction preventing the defendant from collecting recyclable materials within city limits.[12] The court of appeal reversed the trial court, holding that the Act only permits a city to award an exclusive franchise for handling recyclable materials that have been "discarded" in receptacles designated for pick-up by the city or its authorized agent.[13] The supreme court granted review.[14]

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7. *Waste Management*, 7 Cal. 4th at 482, 869 P.2d at 441, 28 Cal. Rptr. 2d at 462. There were two components of the agreement: (1) a "Refuse Collection Agreement" and (2) a "Recycling Agreement." *Id.* The Refuse Collection Agreement gave Waste Management the exclusive right to "collect, receive, transport, segregate, recycle, and dispose of" the type of refuse "customarily deposited by residents and businesses" in collection receptacles or disposal areas. *Id.* The Recycling Agreement gave Waste Management the exclusive right to collect materials placed in "separate recycling containers" on streets or in locations designated for recyclable materials by commercial and residential establishments. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 483, 869 P.2d at 441, 28 Cal. Rptr. 2d at 462.

11. *Id.*

12. *Id.* at 483, 869 P.2d at 442, 28 Cal. Rptr. 2d at 463.

13. *Id.* at 484, 869 P.2d at 442, 28 Cal. Rptr. 2d at 463. The court of appeal relied on § 41952 of the Act, which states: "Nothing in this chapter limits the right of any person to donate, sell, or otherwise dispose of his or her recyclable materials." *Id.* (quoting CAL. PUB. RES. CODE § 41952 (West Supp. 1994)). At first glance, it seems as if § 41952 answers the central issue of the case. However, as the dissent noted, § 41952 "[b]y its express terms . . . pertains solely to chapter 9" of part 2 of the Act. *Id.* at 500 n.5, 869 P.2d at 452 n.5, 28 Cal. Rptr. 2d at 473 n.5. Section 41952 merely explains that nothing in chapter nine limits the right of any person to control the disposal of his recyclable materials; it does not address the situation in which a city has awarded an exclusive franchise for solid waste handling services. *Id.* This is probably why the majority does not rely on § 41952 to support its position.

Chapter nine deals specifically with unlawful acts and punishment for those acts. *See, e.g.* CAL. PUB. RES. CODE §§ 41950-41951 (West Supp. 1994) (stating that it is illegal to remove segregated recyclable materials from a collection location designated

III. TREATMENT OF THE CASE

A. *If It Is Not Discarded, It Is Not Waste*

The majority began its analysis by explaining that the California Integrated Waste Management Act was created for the purpose of regulating "waste," and not "materials of economic value to their owner."[15] The court emphasized that whether or not property has "value" to its owner is determined by "the manner in which the property is disposed."[16] If an owner of certain materials chooses not to discard them but rather to sell them for compensation, those materials do not constitute waste and are not within the scope of the Act.[17] In contrast, if the owner of such materials does discard them, an inference arises that the property has no value to the owner, and thus, it may be classified as waste subject to the Act.[18] More importantly, the Act's own definition of waste suggests that it encompasses only "discarded" materials.[19]

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for pick-up by the city or its authorized agent); § 41953 (dealing with treble damages and civil penalties for unauthorized removal of recyclable materials).

14. *Waste Management*, 7 Cal. 4th at 483, 869 P.2d at 442, 28 Cal. Rptr. 2d at 463.

15. *Id.* at 485, 869 P.2d at 442-43, 28 Cal. Rptr. 2d at 463-64. The court supports this view by quoting from the Act, itself, which defines solid waste as "'all putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances . . . sewage sludge . . . , manure . . . , and other discarded solid and semisolid waste.'" *Id.* at 485, 869 P.2d at 443, 28 Cal. Rptr. 2d at 464 (quoting CAL. PUB. RES. CODE § 40191(a) (West Supp. 1994)).

16. *Id.* at 485, 869 P.2d at 443, 28 Cal. Rptr. 2d at 464.

17. *Id.*

18. *Id.*

19. *See supra* note 15 for statutory definition of solid waste. The Act, itself, defines waste as being certain listed materials and "other discarded solid and semisolid waste," indicating that an item is not waste until it is discarded. *See* CAL. PUB. RES. CODE § 40191(a) (West Supp. 1994). Congress and other state legislatures, have also defined solid waste as "discarded" material. *See* 42 U.S.C.A. § 6903(5) (West 1983) (defining solid waste as "any garbage, refuse, sludge . . . and other discarded material"); *see also* American Mining Congress v. United States Environmental Protection Agency, 824 F.2d 1177, 1183 (D.C. Cir. 1987) (stating that Congress has "defined 'solid waste' as 'discarded material'"); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1236-37 (E.D. Pa. 1993) (discussing Congress' intent that solid waste be limited to discarded materials); Ticonderoga Farms v. County of Loudoun, 409 S.E.2d 446, 449 (Va. 1991) (stating that statutory definition of "solid waste" referred to "discarded material"); Darling Delaware Corp. v. District of Columbia, 380 A.2d 596, 597 (D.C. 1977) (same).

All of the foregoing cases have interpreted the term "discard" as meaning to abandon or to throw away. *See, e.g., American Mining Congress*, 824 F.2d at 184 (stating that the "ordinary, plain-English meaning of the word 'discarded' is . . . 'thrown away' or 'abandoned'"); *Reading Co.*, 823 F. Supp. at 1236-37 (citing numerous sources which have defined the word "discarded" as material which has been

B. The Distinction Between Discarding and Selling

The court explained that selling and discarding are mutually exclusive, stating that if one "sells the property, he cannot discard it; and if he discards it, he cannot sell it."[20] Where a city has an exclusive franchise for waste-handling services, residents may only "discard" their property with the exclusive franchisee,[21] but they may sell them to someone other than the franchisee.[22] In other words, an owner of recyclables may not throw them into the collection container of a competing waste-handling company without receiving compensation.[23] If the competitor pays the owner for the materials, however, the property has not been discarded and is not within the domain of the exclusive franchise.[24] It should also be noted that in addition to selling, "other methods of disposition by which the owner receives or donates the value of the recyclable materials are not discarding and are not subject to the Act."[25]

The majority partially affirmed the court of appeal's holding that property[26] does not become waste under the Act until discarded, but re-

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abandoned or thrown away); Carothers v. Capozziello, 574 A.2d 1268, 1291 (Conn. 1990) (stating that the most common usage of the term "discard" is to throw away).

20. *Waste Management*, 7 Cal. 4th at 486, 869 P.2d at 443, 28 Cal. Rptr. 2d at 464. The court cited *Darling Delaware Corp.* as an illustration of the "distinction between selling and discarding." *Id.* at 486, 869 P.2d at 444, 28 Cal. Rptr. 2d at 465 (citing *Darling Delaware Corp.*, 380 A.2d at 598). In *Darling Delaware Corp.*, the defendant was convicted of transporting solid waste, in the form of animal meat fat and bones, without a license. Darling Delaware Corp., 380 A.2d at 597. The court held that the animal meat fat and bones did not constitute "solid waste" within the meaning of the regulation allegedly violated because the animal by-products were never "discarded," but rather were sold "directly to a few retail customers or frozen for sale to large buyers." *Id.* at 598.

21. *Waste Management*, 7 Cal. 4th at 486, 869 P.2d at 444, 28 Cal. Rptr. 2d at 465.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 487, 869 P.2d at 444, 28 Cal. Rptr. 2d at 465.

26. The City and Waste Management argued that a special rule should apply to recyclables, contending that owners of recyclables should not be able to sell them for compensation. *Id.* at 488, 869 P.2d at 445, 28 Cal. Rptr. 2d at 466. They supported this view with the statutory definitions of solid waste handling contained within the Act. *Id.* The definition of "solid waste handling" includes the "recycling" of solid waste. *Id.* The court rejected this interpretation of the Act, reemphasizing that if the owner does not discard his property, then it does not become waste in the first place. *Id.* Subjecting an item to the exclusive franchise merely because it is capable of being recycled leads to absurd and unintended consequences; an owner of any

versed the court of appeal to the extent that it suggested that an owner may discard his property in any way he pleases.[27] The Act was designed to regulate waste, and the Act authorizes a city to have an exclusive franchise for waste-handling services in order to expedite this purpose.[28] Therefore, once an owner decides to discard his property, thereby reducing it to waste, it is subject to the Act and may not be deposited with a competing waste hauler.[29] The court ultimately held that the exclusive franchise agreement between the City and Waste Management could not be enforced under the Act with respect to recyclable materials that did not constitute waste within the meaning set forth by the court.[30] It declined to address the scope of the City's police power independent of the Act.[31]

IV. IMPACT

In holding that an owner of recyclable goods may sell them to someone other than a city's exclusive franchisee,[32] the California Supreme Court has preserved an owner's right to sell his or her property, while simultaneously promoting the underlying purpose of the Integrated Waste Management Act.[33] The stated purpose of the Act is to "reduce, recycle,

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potentially recyclable good would not be able to sell it or otherwise transfer it. *Id.* at 489, 869 P.2d at 445, 28 Cal. Rptr. 2d at 466.

27. *Id.* at 490-91, 869 P.2d at 446, 28 Cal. Rptr. 2d at 467. If an owner of materials could discard them in any way he pleased, it would be impossible to have an exclusive franchise for waste-handling services. *Id.* at 485-86, 869 P.2d at 443, 28 Cal. Rptr. 2d at 464.

28. *Id.* at 487-88, 869 P.2d at 444-45, 28 Cal. Rptr. 2d at 465-66.

29. *Id.* at 488, 869 P.2d at 444-45, 28 Cal. Rptr. 2d at 465-66.

30. *Id.* at 489, 869 P.2d at 446, 28 Cal. Rptr. 2d at 467.

31. *Id.* The court, however, did state that "the question of the City's own police power raises the important issue of whether the comprehensive Act has preempted any power the City might otherwise have had." *Id.*

In his dissent, Justice George adamantly argued that "regulation and control of waste collection and disposal constituted a proper exercise of municipal police power reserved to state and local governments." *Id.* at 494, 869 P.2d at 448-49, 28 Cal. Rptr. 2d at 469-70 (George, J., dissenting). Justice George further argued that such police power, which is in the interest of public health and safety, should be supreme over the incidental property interests of individuals. *Id.* at 494, 869 P.2d at 449, 28 Cal. Rptr. 2d at 470 (George, J., dissenting). The court of appeal, however, held that it is not within the City's police power to limit recycling services exclusively to a waste collection agency chosen by the city. *Id.* at 484, 869 P.2d at 442, 28 Cal. Rptr. 2d at 463.

32. *Id.* at 489, 869 P.2d at 446, 28 Cal. Rptr. 2d at 467 (stating that "the owner of undiscarded recyclables is not required to transfer them to the holder of an exclusive franchise under the Act").

33. The dissent felt, however, that "the majority's interpretation . . . is clearly incorrect and will frustrate, rather than further, the important purposes of the Act by

and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner."[34] By allowing residential and commercial customers to sell their recyclable goods to private recycling companies not affiliated with a city, the court's decision provides an incentive to separate these valuable materials from other trash. The profits accrue to these customers rather than a city's exclusive franchisee.[35] Moreover, if private enterprises are willing to pay for recyclable materials, it not only reduces the amount of waste,[36] but also ensures that these recyclable materials will be put to their most "efficient" use in the most "cost-effective manner."[37] Finally, it forces a city or a city's exclusive franchisee to compete against other companies for recyclable

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excluding a significant proportion of recyclable material from its operation." *Id.* at 492, 869 P.2d at 447, 28 Cal. Rptr. 2d at 468 (George, J., dissenting). Justice George cited several environmental concerns, such as the fact that we are running out of landfill space and that there are health threats as a result of landfill emissions, ash, and litter. *Id.* at 492 n.1, 869 P.2d at 447-48 n.1, 28 Cal. Rptr. 2d at 468-69 n.1 (George, J., dissenting). However, he never explained why allowing recyclable materials to be sold to someone other than an exclusive franchisee will have a negative impact on these concerns. In fact, his position is illogical, considering the fact that if recyclable materials are sold on the market, they will be diverted from landfills or any other waste disposal site.

34. CAL. PUB. RES. CODE § 40052 (West Supp. 1995).

35. The dissent pointed out, however, that under the actual franchise agreement between the City of Rancho Mirage and Waste Management, Waste Management was "required to credit to each commercial customer a fixed percentage . . . of the revenue received by Waste Management from the sale of recyclable materials collected from that customer." *Waste Management*, 7 Cal. 4th at 497 n.3, 869 P.2d at 450 n.3, 28 Cal. Rptr. 2d at 471 n.3 (George, J., dissenting).

36. The court stated that "[t]he fundamental purpose of the Act is to reduce the amount of material entering into the waste stream." *Id.* at 487, 869 P.2d at 444, 28 Cal. Rptr. 2d at 465. It further stated that when materials are bought and sold, "those materials remain in circulation and do not enter into the waste stream." *Id.* at 487-88, 869 P.2d at 444, 28 Cal. Rptr. 2d at 465.

37. *See supra* note 34 and accompanying text (quoting CAL. PUB. RES. CODE § 40052 (West Supp. 1994)).

goods, either by making deposit and pick-up of these materials more convenient, or by offering equivalent monetary compensation.[38]

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38. The dissent argued, however, that "competition in the solid waste handling industry may impede necessary regulation and encourage cost-cutting devices that pose a threat to the public health." *Waste Management*, 7 Cal. 4th at 495, 869 P.2d at 450, 28 Cal. Rptr. 2d at 470 (George, J., dissenting).

XII. NEGLIGENCE

A third party owes a duty of care to private safety employees injured as a result of a fire caused by the third party's negligence:
Neighbarger v. Irwin Industries, Inc.

I. INTRODUCTION

In *Neighbarger v. Irwin Industries, Inc.*,[1] the California Supreme Court held that private safety employees may maintain a cause of action against third parties who negligently cause fires.[2] In clarifying the extent to which the firefighter's rule applies to private safety employees, the court overturned the court of appeal, which held that the assumption-of-risk doctrine precludes a private safety employee from recovering for injuries sustained during the course of employment.[3]

II. TREATMENT OF THE CASE

The court began its analysis by stating the general rule: A person owes a duty to a bystander who attempts a rescue mission which became necessary as a result of that person's negligence.[4] The court noted that

1. 8 Cal. 4th 532, 882 P.2d 347, 34 Cal. Rptr. 2d 630 (1994). Justice Mosk wrote the unanimous opinion of the court, with Chief Justice Lucas and Justices Kennard, Arabian, Baxter, George, and Werdegar concurring. *Id.* at 534, 882 P.2d at 349, 34 Cal. Rptr. 2d at 632.

2. Powerline Oil Company employed Craig Neighbarger and John Magana as safety supervisors. *Id.* at 534, 882 P.2d at 349, 34 Cal. Rptr. 2d at 632. Both employees were specially trained to combat industrial fires. *Id.* Their duties included responding to emergency fires, participating in the Powerline fire brigade, and giving safety orientations to new employees and visitors. *Id.* Powerline hired the defendant, Irwin Industries, to provide maintenance services. *Id.* Irwin employees dislodged a valve blockage with a sharp instrument, releasing liquid petroleum. *Id.* Both Neighbarger and Magana, who were in the vicinity of the leak, tried to close the valve. *Id.* at 535, 882 P.2d at 350, 34 Cal. Rptr. 2d at 632. The petroleum ignited and burned both plaintiffs. *Id.* They sued for compensation for the injuries sustained, and the trial court granted the defendant's motion for summary judgment on the basis that the firefighter's rule and the assumption-of-risk doctrine barred recovery. *Id.* at 535, 882 P.2d at 350, 34 Cal. Rptr. 2d at 632-33.

3. *Id.* at 542, 882 P.2d at 358, 34 Cal. Rptr. 2d at 640.

4. *Id.* at 536, 882 P.2d at 350, 34 Cal. Rptr. 2d at 633; *see* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1061 (1988 & Supp. 1994) (explaining the duty

under this general rule, the defendants owe the plaintiffs a duty of care.[5] The court stated that this duty of care would exist unless either a statute or a public policy concern dictated otherwise.[6]

To determine whether an exception to this general rule existed in the case at bar, the court examined the doctrine of assumption of risk.[7] First, the court discussed the state of the law regarding assumption of risk as set forth in *Knight v. Jewett*.[8] The court concluded that the nature of the activity and the relationship between the defendant and the plaintiff will determine whether assumption of risk will bar a plaintiff's claim.[9]

The court then discussed the firefighter's rule, which is an extension of the assumption-of-risk doctrine.[10] The firefighter's rule provides that citizens who negligently start fires do not owe a duty of care to firefighters summoned to combat them.[11] The court explained that this rule alone was not dispositive of the issue in the case at bar because there are several exceptions to this rule.[12]

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to bystanders).

5. *Neighbarger*, 8 Cal. 4th at 536, 882 P.2d at 350, 34 Cal. Rptr. 2d at 633.

6. *Id.* at 537, 882 P.2d at 351, 34 Cal. Rptr. 2d at 633; *see* Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). The defendants claimed that a duty of care should not exist in the present case because of "the public policy expressed in the doctrine of assumption of risk and the so-called firefighter's rule." *Neighbarger*, 8 Cal. 4th at 537, 882 P.2d at 351, 34 Cal. Rptr. 2d at 633.

7. *Neighbarger*, 8 Cal. 4th at 538, 882 P.2d at 351, 34 Cal. Rptr. 2d at 633-34.

8. *Id.* at 538, 882 P.2d at 351, 34 Cal. Rptr. 2d at 634 (citing Knight v. Jewett, 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992)). In *Knight*, the supreme court distinguished primary assumption of risk from secondary assumption of risk. 3 Cal. 4th at 314-15, 834 P.2d at 714, 11 Cal. Rptr. 2d at 13-14. Primary assumption of risk arises when the defendant owes no duty to protect the plaintiff from a particular risk of harm, and therefore necessarily bars the plaintiff's recovery. *Id.* Secondary assumption of risk permits recovery based on relative degrees of fault where the plaintiff reasonably proceeds to encounter a known risk created by the defendant's breach of duty. *Id.*

9. *Neighbarger*, 8 Cal. 4th at 538, 882 P.2d at 351, 34 Cal. Rptr. 2d at 634 (citing *Knight*, 3 Cal. 4th at 313, 314-15, 834 P.2d at 713, 714-16, 11 Cal. Rptr. 2d at 13-14).

10. *Id.* at 538, 882 P.2d at 351, 34 Cal. Rptr. 2d at 634.

11. *Id.* (citing Walters v. Sloan, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977)). *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 741-742 (1988 & Supp. 1994) (applying fireman's rule); 46 CAL. JUR. 3D *Negligence* § 12.5 (Supp. 1994) (explaining duty toward firefighters, police officers, and other medical personnel).

12. *Neighbarger*, 8 Cal. 4th at 538, 882 P.2d at 352, 34 Cal. Rptr. 2d at 634. "The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene." *Id.* (citations omitted).

Having explained the legal principles involved in the present case, the court proceeded to determine whether the firefighter's rule bars recovery by private safety employees.[13] In doing so, the court analyzed three public policy justifications for the firefighter's rule:[14] First, firefighters should not benefit financially from the public danger that necessitates their employment.[15] Second, firefighters receive special pay which already compensates them for risk of injury.[16] Finally, "the abolition of the firefighter's rule would embroil the courts in relatively pointless litigation over rights of indemnification among the employer, the retirement system, and the defendants' insurer."[17] In analyzing these justifications, the court reviewed several cases dealing with the application of the firefighter's rule.[18]

In applying these policy considerations to the present case, the court focused on the difference in the relationship between firefighters and the public and the relationship between third parties and private safety employees.[19] The court stated that the public, in essence, pays firefighters' compensation in the form of taxes.[20] Requiring the public to pay a

13. *Id.* at 539-40, 882 P.2d at 354, 34 Cal. Rptr. 2d at 636.

14. *Id.* at 539, 882 P.2d at 353, 34 Cal. Rptr. 2d at 635.

15. *Id.*

16. *Id.*; *see Benjamin K. Riley, Comment, The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale*, 71 CAL. L. REV. 218, 222 (1983). The court noted that private safety employees do not receive the special pay, disability, and retirement benefits offered to public firefighters. *Neighbarger*, 8 Cal. 4th at 541, 882 P.2d at 355, 34 Cal. Rptr. 2d at 637-38. The court stated, however, that to rely solely on the issue of compensation in determining the existence of a duty disregards the important public policy underlying the rule, which is to encourage citizens to freely request firefighters' services without the fear of liability. Consequently, this assures a quick response to dangerous situations which threaten the public good. *Id.* at 542, 882 P.2d at 356, 34 Cal. Rptr. 2d at 638.

17. *Id.* at 540, 882 P.2d at 353, 34 Cal. Rptr. 2d at 635 (quoting *Walters*, 20 Cal. 3d at 206, 571 P.2d at 613, 142 Cal. Rptr. at 156.)

18. *Id.* at 540, 882 P.2d at 353, 34 Cal. Rptr. 2d at 635; *see* Lipson v. Superior Court, 31 Cal. 3d 362, 644 P.2d 822, 182 Cal. Rptr. 629 (1982) (holding that the firefighter's rule did not apply where the defendant misled the plaintiff with regard to the nature of the risk and the plaintiff failed to take adequate precautions); Hubbard v. Boelt, 28 Cal. 3d 480, 620 P.2d 156, 169 Cal. Rptr. 706 (1980) (holding that the firefighter's rule prohibited recovery by a police officer injured in a high-speed chase on the theory that police officers are adequately compensated for the risks they encounter); *Walters*, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (stating that "it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront").

19. *Neighbarger*, 8 Cal. 4th at 542, 882 P.2d at 355, 34 Cal. Rptr. 2d at 637.

20. *Id.* The public is like a person who hires a contractor to cure a dangerous

firefighter in the event the firefighter is injured would force the public to pay twice.[21] No such relationship exists between the third party and a private safety employee.[22] Because of these differences in relationships, the policy concerns supporting the firefighter's rule do not exist in the private safety employee scenario.[23]

The court found that the defendant offered no compelling reasons for extending the firefighter's rule to private safety employees.[24] Rather, the court found that policy reasons require that third parties remain liable for their negligence.[25] Accordingly, the court refused to extend either the doctrine of assumption of risk or the firefighter's rule to private safety employees.[26]

III. IMPACT AND CONCLUSION

The California Supreme Court analyzed the assumption of risk rationale and the cost-spreading rationale in determining the limits of the firefighter's rule. What was once a bright line test is now a rule riddled with exceptions, the most recent of which prohibits its application to private safety employees. In allowing recovery for injuries received in the scope of the employees' duties, the supreme court runs the risk of defeating the public policy which was originally advanced by the

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situation. *Id.* If a contractor who was hired to cure a dangerous situation is injured on the job, he should not be allowed to recover on the theory that the defendant's negligence caused the dangerous condition. *Id.* at 541, 882 P.2d at 354, 34 Cal. Rptr. 2d at 635. *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers Compensation*, § 231 (1987 & Supp. 1994) (explaining worker's compensation for firefighters).

21. *Neighbarger*, 8 Cal. 4th at 542, 882 P.2d at 355, 34 Cal. Rptr. 2d at 638.

22. *Id.*

23. *Id.* The court also distinguished the case at bar from the veterinarian's rule, which shields dog owners from liability when their dogs bite the veterinarian during treatment. *Id.* at 543-44, 882 P.2d at 356-57, 34 Cal. Rptr. 2d at 639. The court stated that the veterinarian rule bars recovery if the injury is a result of the "foreseeable occupational hazard[s]." *Id.* at 544, 882 P.2d at 356, 34 Cal. Rptr. 2d at 639. The rule applies when there is a relationship between the dog owner and the veterinarian which would give rise to the rule. *Id.* at 544, 882 P.2d at 356-57, 34 Cal. Rptr. 2d at 639. *See* Davis v. Gaschler, 11 Cal. App. 4th 1392, 14 Cal. Rptr. 2d 679 (holding that the veterinarian rule did not apply when a professional breeder encountered the dog as a "Good Samaritan" when the dog was injured). Applying the veterinarian rule to the present case, the court found that there was no relationship between the plaintiff and the defendant which would mandate application of the rule. *Neighbarger*, 8 Cal. 4th at 545, 882 P.2d at 357, 34 Cal. Rptr. 2d at 639-40.

24. *Id.* at 546, 882 P.2d at 357, 34 Cal. Rptr. 2d at 640.

25. *Id.* The court noted that the policy supporting liability is particularly strong in the hazardous industrial setting. *Id.*

26. *Id.* at 547, 882 P.2d at 357-58, 34 Cal. Rptr. 2d at 640.

firefighter's rule—to encourage citizens to protect the public welfare by reporting dangerous situations without the fear of liability.

STEVEN HORNBERGER

XIII. USURY

Debt restructuring settlements that do not involve a loan or forbearance of money are exempt from the usury law provisions; additionally, despite the form of the subsequent transaction, the nature of the initial transaction determines whether connected transactions are subject to usury law provisions: **Ghirardo v. Antonioli.**

I. INTRODUCTION

In *Ghirardo v. Antonioli*,[1] the California Supreme Court considered whether a debt restructuring settlement resulting from a dispute involving payments owed on a note was usurious.[2] The supreme court reversed the court of appeal's decision and held that usury law provisions are inapplicable to debt restructuring plans that do not involve the essential element of a loan or forbearance.[3] The court concluded that the instant case involved a modification of a credit sale, and therefore exempt from usury law.[4]

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1. 8 Cal. 4th 791, 883 P.2d 960, 35 Cal. Rptr. 2d 418 (1994). Justice Baxter wrote the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, George, and Werdegar concurred. *Id.* at 795-809, 883 P.2d at 965-72, 35 Cal. Rptr. 2d at 421-30. Justice Mosk filed a dissenting opinion. *Id.* at 809-11, 883 P.2d at 972-74, 35 Cal. Rptr. 2d at 430-32 (Mosk, J., dissenting).

2. *Id.* at 795, 883 P.2d at 963, 35 Cal. Rptr. 2d at 421. This case was filed after a long series of transactions involving a 20-acre parcel of property located in Novato, California. *Id.* at 795-97, 883 P.2d at 963-64, 35 Cal. Rptr. 2d at 421-22. Antonioli bought the property, giving the previous owners a promissory note (the Antonioli note). Later, Antonioli sold the property to Philip Gay Associates (Gay), subject to the Antonioli note. *Id.* Subsequently, Gay sold the property to Ghirardo, subject to the existing Gay note and deed of trust. *Id.* Problems arose when Ghirardo fell behind on his payments on the note, to which Antonioli was the direct receiver. *Id.* As a consequence, Antonioli initiated foreclosure proceedings against Ghirardo. *Id.* To avoid foreclosure of the property, Ghirardo entered into a settlement agreement with Antonioli whereby Antonioli granted a time extension for payments owed on the note in consideration for an increase in the interest rates on the notes and an additional $100,000 fee. *Id.*

3. *Id.* at 795, 809, 883 P.2d at 963, 972, 33 Cal. Rptr. 2d at 421, 430. In reversing the court of appeal, the supreme court distinguished transactions that are merely modifications of a credit sale from debt restructuring settlements involving a loan or forbearance. *Id.* at 801-07, 883 P.2d at 967-71, 35 Cal. Rptr. 2d at 425-29.

4. *Id.* at 808, 883 P.2d at 971, 35 Cal. Rptr. 2d at 429. The settlement agreement between Ghirardo and Antonioli consisted of two notes. *Id.* at 796-97, 883 P.2d at 964-65, 35 Cal. Rptr. 2d at 422. The smaller of the two notes had a stated interest rate of 13 percent. *Id.* The larger note carried an interest rate of 10 percent, which effectively increased to 17.46 percent with the inclusion of the $100,000 consideration fee. *Id.* At the time of the settlement agreement, the maximum rate permissible by

II. TREATMENT

A. Majority Opinion

The supreme court framed the issue as whether the debt restructuring settlement in the present case constituted a modification of a credit sale, thereby exempting it from usury laws, or a loan or forbearance, thus subjecting it to such laws.[5] The plaintiff, Ghirardo, contended that the interest due on both notes was usurious because the interest rates exceeded the amount permitted by law.[6] Conversely, the defendant, Antonioli, cross-complained for the amount due on the largest of the two notes, and in so doing denied that either of the notes was usurious.[7]

1. A De Novo Standard of Appellate Review Applies

In reviewing the court of appeal's determination that the interest rates were usurious, the supreme court sought to determine the proper standard of appellate review to be applied.[8] The plaintiff argued that the court should utilize the substantial evidence standard, requiring that the reviewing court defer to the trial court's determination.[9] Conversely, the defendant maintained that the court should review this issue de novo.[10] The supreme court adopted the defendant's argument based on two independent findings.[11]

First, the court determined whether the facts in the instant case were in dispute. Concluding that they were not, the court acknowledged the recognized premise that where "[t]he decisive facts are undisputed, we [the appellate court] are confronted with a question of law and are not bound by the findings of the trial court."[12] Second, the court determined

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law was 10.5 percent. *Id.*

5. *Id.* at 801, 883 P.2d at 967, 35 Cal. Rptr. 2d at 425; *see* 13 CAL. JUR. 3D *Consumer and Borrower Protection Laws* § 398 (1989) (discussing what is considered interest).

6. *Ghirardo*, 8 Cal. 4th at 797, 883 P.2d at 964, 35 Cal. Rptr. 2d at 422; *see supra* note 4.

7. *Ghirardo*, 8 Cal. 4th at 797, 883 P.2d at 964, 35 Cal. Rptr. 2d at 422.

8. *Id.* at 799-801, 883 P.2d at 965-67, 35 Cal. Rptr. 2d at 423-25.

9. *Id.* at 799, 883 P.2d at 965, 35 Cal. Rptr. 2d at 423. *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 278 (3d ed. 1985 & Supp. 1994) (stating that when evidence is in dispute, the appellate court will only disturb the findings of the trial court if they are without foundation).

10. *Ghirardo*, 8 Cal. 4th at 799, 883 P.2d at 965, 35 Cal. Rptr. 2d at 423.

11. *Id.* at 799-801, 883 P.2d at 965-67, 35 Cal. Rptr. 2d at 423-25.

12. *Id.* at 799, 883 P.2d at 965, 35 Cal. Rptr. 2d at 423 (citing Mole-Richardson Co.

that the issue before it included only an inquiry into the nature of the transaction rather than the broader question of the parties' intent in entering into the transaction.[13] In reframing the issue, the court created a basis for reviewing the parties' dispute and subsequent settlement agreement de novo rather than under the substantial evidence standard.[14]

2. The Settlement Agreement Did Not Constitute a Loan or Forbearance

After determining the applicable standard of review, the court next addressed the substantive issue of whether the settlement agreement was subject to the usury law provisions.[15] In reviewing the elements of a usurious transaction, the court focused specifically on the requirement that the transaction involve a loan or forbearance of money.[16] The court stated that the form of the transaction should be carefully examined.[17] Where the form of the transaction fails to demonstrate a loan or forbearance, courts should be hesitant in characterizing it as such.[18] In analyzing the transaction in question, the court found that the plaintiff failed to prove that either of the two notes involved a loan or forbearance.[19]

The court explained that the creation of a debtor-creditor relationship does not automatically involve a loan or forbearance.[20] Specifically, "credit-sales" and "time-place" transactions are exempted from usury

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v. Franchise Tax Bd., 220 Cal. App. 3d 889, 269 Cal. Rptr. 662 (1990)).

13. *Id.* at 799-801, 883 P.2d at 966-67, 35 Cal. Rptr. 2d at 424-25.

14. *Id.* at 801, 883 P.2d at 967, 35 Cal. Rptr. 2d at 425.

15. *Id.* at 801-07, 883 P.2d at 967-71, 35 Cal. Rptr. 2d at 425-29; *see also* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 483 (9th ed. 1987 & Supp. 1992) (discussing the circumstances under which the usury law does not apply).

16. *Ghirardo*, 8 Cal. 4th at 801-02, 883 P.2d at 967, 35 Cal. Rptr. 2d at 425. This requirement mirrors the language of the California Constitution. *Id.* (quoting CAL. CONST. art. XV, § 1). The court stated that in order for a transaction to be usurious: "(1) [t]he transaction must be a loan or forbearance; (2) the interest to be paid must exceed the statutory maximum; (3) the loan and interest must be absolutely repayable by the borrower; and (4) the lender must have a willful intent to enter into a usurious transaction." *Id.* at 798, 883 P.2d at 965, 35 Cal. Rptr. 2d at 423. *See generally* Edward H. Rabin & Robert W. Brownlie, *Usury Law in California: A Guide Through the Maze*, 20 U.C. DAVIS L. REV. 397 (1987) (explaining the intricacies and background of usury law).

17. *Ghirardo*, 8 Cal. 4th at 802, 883 P.2d at 967, 35 Cal. Rptr. 2d at 425.

18. *Id.*

19. *Id.* The court determined that the issue presented by this case involved a mixed question of law and fact, specifically the application of law to the facts, and therefore is properly reviewed as de novo. *Id.* at 801, 883 P.2d at 967, 35 Cal. Rptr. 2d at 425.

20. *Id.* at 802, 883 P.2d at 968, 35 Cal. Rptr. 2d at 426.

laws.[21] The court found that the instant transaction was exempt because it was a bona fide credit sale.[22]

The court relied on *DCM Partners v. Smith*,[23] a similar case involving credit-sale exemptions.[24] The court noted that in a foreclosure proceeding, the holder has two options, foreclosure or extension of the note.[25] The seller, however, reserves the right to state the interest rate he desires, creating a "credit sale" which is not subject to the usury laws.[26] Acknowledging that both parties in the present case were well-advised, the court declined to create an exception for "sophisticated buyers" who, despite adequate representation, get caught in such situations.[27] Justice Baxter concluded by stating that this modification was the "functional equivalent" of the modification exempted in *DCM*, and, as such, is "not subject to the usury law."[28]

B. Justice Mosk's Dissenting Opinion

Justice Mosk dissented, stating that the majority had improperly analogized the present case to *DCM*.[29] Instead, Justice Mosk explained that the $100,000 fee constituted a forbearance in the form of "an extension of time for enforcing the debt on the property."[30] Justice Mosk felt

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21. *Id.*

22. *Id.* at 802-03, 883 P.2d at 968, 35 Cal. Rptr. 2d at 426.

23. 228 Cal. App. 3d 729, 278 Cal. Rptr. 778 (1991). In *DCM*, a buyer renegotiated payment terms on a note in exchange for a 50% increase in the interest rate. *Id.* at 732, 278 Cal. Rptr. at 779. The court allowed the transaction because it was merely a modification of an initially exempt transaction. *Id.* at 736-37, 278 Cal. Rptr. at 782-83. In the instant case, the court of appeal rejected *DCM*'s analysis. *Ghirardo*, 8 Cal. 4th at 803, 883 P.2d at 568, 35 Cal. Rptr. 2d at 426.

24. *Id.* at 804, 883 P.2d at 969, 35 Cal. Rptr. 2d at 427. The court had no difficulty analogizing the present situation in which a seller is initiating foreclosure proceedings to the situation in which the seller has the initial right to sell his property to anyone. *Id.*

25. *Id.*

26. *Id.* at 804, 883 P.2d at 968, 35 Cal. Rptr. 2d at 426.

27. *Id.* at 807-08, 883 P.2d at 971, 35 Cal. Rptr. 2d at 429. As to the defendant's cross-complaint pleading for affirmative relief, the court declined to decide the issue, remanding it back to the trial court. *Id.* at 808, 883 P.2d at 971-72, 35 Cal. Rptr. 2d at 429-30. Additionally, the final determination of Antonioli's payment of Ghirardo's attorney's fees was likewise remanded. *Id.* at 808-09, 883 P.2d at 972, 35 Cal. Rptr. 2d at 430.

28. *Id.*

29. *Id.* at 811, 883 P.2d at 973, 35 Cal. Rptr. 2d at 431 (Mosk, J., dissenting).

30. *Id.* at 810, 883 P.2d at 972, 35 Cal. Rptr. 2d at 430 (Mosk, J., dissenting).

that this forbearance is comparable to a loan and that it, too, should be subject to the usury law.[31] Justice Mosk argued that the public policy supporting usury law is intended to protect borrowers from exorbitant interest rates as a result of foreclosure proceedings.[32] Justice Mosk also noted the relatively unequal bargaining powers of the parties to such transactions.[33] In closing, Justice Mosk stated that "the people of California have made it emphatically clear that they reject the exaction of usurious rates of interest as an acceptable commercial practice."[34]

III. CONCLUSION

The California Supreme Court clarified the standard of appellate review in debt restructuring settlements involving possible usurious transactions, applying a de novo standard where facts are not in dispute. Additionally, the court affirmed the principle that the nature of the transaction, and not the relative inequities of the situation, determines whether the usury laws apply. The court's decision will serve as a warning to real property buyers to review options before consenting to a settlement offer in attempts to avoid foreclosure proceedings.

APRIL ANSTETT

31. *Id.* (Mosk, J., dissenting).
32. *Id.* at 810-11, 883 P.2d at 973-74, 35 Cal. Rptr. 2d at 431-32 (Mosk, J., dissenting).
33. *Id.* (Mosk, J., dissenting).
34. *Id.* (Mosk, J., dissenting).

XIV. WORKERS COMPENSATION

To establish a case of unlawful constructive discharge, an employee must prove, by a preponderance of the evidence, that: (1) a reasonable employee under similar circumstances would find the working conditions intolerable; (2) the employer had actual knowledge of such conditions, but did not take action to remedy the situation; and (3) the alleged constructive discharge either constituted a breach of contract or violated public policy:

Turner v. Anheuser-Busch, Inc.

I. INTRODUCTION

In *Turner v. Anheuser-Busch, Inc.*,[1] the California Supreme Court assessed the validity of an employee's claim that he was constructively discharged after he reported his company's alleged involvement in illegal activity.[2] In granting review, the court examined the elements an employee must prove to establish a cause of action for constructive discharge.[3]

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1. 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223 (1994). Chief Justice Lucas wrote the opinion of the court, with Justices Arabian, Baxter, and George concurring. *Id.* at 1243-59, 876 P.2d at 1024-35, 32 Cal. Rptr. 2d at 225-36. Justice Mosk wrote a concurring and dissenting opinion. *Id.* at 1259-60, 876 P.2d at 1035, 32 Cal. Rptr. 2d at 236 (Mosk, J., concurring and dissenting). Justice Kennard wrote a dissenting opinion, in which Justice Woods (Woods, Presiding Justice, Court of Appeal, Second Appellate District, Division Four) joined. *Id.* at 1260-72, 876 P.2d at 1035-43, 32 Cal. Rptr. 2d at 236-44 (Kennard, J., dissenting).

2. *Id.* at 1243, 876 P.2d at 1024, 32 Cal. Rptr. 2d at 225. Turner, the plaintiff, accused his employer, Anheuser-Busch (ABI), of engaging in a continual pattern of harassment designed to compel Turner to resign. *Id.* at 1253, 876 P.2d at 1030-31, 32 Cal. Rptr. 2d at 231-32. Turner claimed that he received "less than satisfactory performance evaluations" after he reported his supervisors' involvement in illegal activity, and that these evaluations constituted the intolerable working conditions which caused him to ultimately resign. *Id.* at 1253, 876 P.2d at 1031, 32 Cal. Rptr. 2d at 232.

3. *Id.* at 1244-51, 876 P.2d at 1025-29, 32 Cal. Rptr. 2d at 226-30. *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 184-I (9th ed. Supp. 1994) (discussing the elements of a cause of action based on constructive discharge); 29 CAL. JUR. 3D *Employer and Employee* § 70 (discussing employees' remedies for wrongful constructive discharge) (1986 & Supp. 1993); 45B AM. JUR. 2D *Job Discrimination* § 1093 (discussing method of proving a case of constructive discharge) (1993 & Supp. 1994).

Specifically, the court clarified what constitutes "intolerable working conditions" and defined the level of employer knowledge required to constitute constructive discharge.[4] Additionally, the court considered whether summary judgment was appropriate when an employee failed to establish that the alleged constructive discharge constituted a breach of contract or violated public policy.[5]

In resolving these issues, the court held that an employee must prove, by a preponderance of the evidence, that a reasonable employee would find the working conditions intolerable and that the employer had actual knowledge of such employment conditions, but did not take action to remedy the situation.[6] The court held that the employer, Anheuser-Busch, Inc. (ABI), was entitled to summary judgment because the employee, Turner, failed to prove that the alleged constructive discharge constituted a breach of contract or violated public policy.[7]

II. TREATMENT

A. *Majority Opinion*

The court focused its inquiry on the interpretation of the elements of a constructive discharge cause of action.[8] Turner argued that because he reported his reporting his employer's alleged illegal conduct, he was laterally reassigned and later received a poor performance rating. Turner alleged that this treatment established a pattern of intolerable working conditions, which ultimately amounted to his constructive discharge.[9] ABI, seeking dismissal of the case through a summary judgment motion, argued that Turner failed to satisfy the elements of constructive discharge.[10]

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4. *Turner*, 7 Cal. 4th at 1246-51, 876 P.2d at 1026-29, 32 Cal. Rptr. 2d at 227-30.

5. *Id.* at 1252-53, 876 P.2d at 1030-35, 32 Cal. Rptr. 2d at 231-36; *see also* CAL. CIV. PROC. CODE § 437(c) (West 1973 & Supp. 1994) (stating requirements for summary judgment).

6. *Turner*, 7 Cal. 4th at 1251, 876 P.2d at 1029, 32 Cal. Rptr. 2d at 230.

7. *Id.* at 1259, 876 P.2d at 1035, 32 Cal. Rptr. 2d at 236.

8. *Id.* at 1243, 876 P.2d at 1024, 32 Cal. Rptr. 2d at 225. Prior to *Turner*, the established law, under *Brady v. Elixir Industries*, stated that an employer may be held liable for wrongful constructive discharge if the employee demonstrates that the employer possessed either actual or constructive knowledge of the alleged intolerable working conditions. Brady v. Elixir Indus., 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324, 328 (1987) (holding that the employer's level of knowledge of the alleged intolerable conditions may be either actual or constructive); *see also Turner*, 7 Cal. 4th at 1260, 876 P.2d at 1036, 32 Cal. Rptr. 2d 237 (Kennard, J., dissenting).

9. *Id.* at 1253, 876 P.2d at 1030-31, 32 Cal. Rptr. 2d at 231-32.

10. *Id.* at 1253 n.6, 876 P.2d at 1030 n.6, 32 Cal. Rptr. 2d at 231 n.6. The court noted that because the district court granted summary judgment to ABI prior to the 1992 amendment to the summary judgment statute, the court's discussion on the summary judgment issue was limited only to the pre-1993 status of the summary judg-

The court initially defined the elements of a wrongful constructive discharge cause of action.[11] The court determined that an employee alleging such a wrongful constructive discharge cause of action must first demonstrate that "intolerable working conditions" exist at his place of employment.[12] Second, the court attempted to define intolerable.[13] The court noted that an objective standard governs whether working conditions are intolerable—the test is whether a reasonable employee under similar circumstances would consider the working conditions intolerable.[14] Third, the employer must have actual knowledge of the "intolerable working conditions" and subsequently fail to correct the situation.[15]

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ment statute. *Id.*

11. *Id.* at 1246-51, 876 P.2d at 1026-30, 32 Cal. Rptr. 2d at 227-30.

12. *Id.* at 1246-47, 876 P.2d at 1026-27, 32 Cal. Rptr. 2d at 227-28. The court recognized that while an employee may not reasonably expect to have a completely stress-free workplace, an employee need not endure working conditions so egregious as to make a reasonable employee, under similar circumstances, feel pressured to quit. *Id.* at 1246-47, 876 P.2d at 1026-27, 32 Cal. Rptr. 2d at 227-28. *See generally* 45B AM. JUR. 2D *Job Discrimination* § 1094 (discussing circumstances constituting intolerable working conditions) (1993 & Supp. 1994).

13. *Turner*, 7 Cal. 4th at 1248, 876 P.2d at 1027, 32 Cal. Rptr. 2d at 228.

14. *Id.* at 1248, 876 P.2d at 1027, 32 Cal. Rptr. 2d at 228; *see* Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 213, 23 Cal. Rptr. 2d 793, 799 (1993) (stating that occasional criticism of job performance in itself does not constitute an intolerable working condition), *overruled by Turner*, 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223. *Compare* Valdez v. City of Los Angeles, 231 Cal. App. 3d 1043, 1057, 282 Cal. Rptr. 726, 734 (1991) (rejecting holding that an employee who continues to work on the job after the onset of the intolerable working conditions "is barred as a matter of law from claiming work conditions were intolerable") *with* Panopulos v. Westinghouse Elec. Corp., 216 Cal. App. 3d 660, 670, 264 Cal. Rptr. 810 (1989) (holding that an employee cannot maintain a cause of action based on constructive discharge if he remains on the job for over one year after the onset of the alleged intolerable working conditions), *overruled by Turner*, 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223.

15. *Turner*, 7 Cal. 4th at 1248-51, 876 P.2d at 1027-29, 32 Cal. Rptr. 2d at 228-30. The court rejected the employer knowledge test promulgated in *Brady v. Elixir Industries*, which required that the employee show that the employer possessed either actual or constructive knowledge of the intolerable working conditions. *Id.* at 1248, 876 P.2d at 1027-28, 32 Cal. Rptr. 2d at 228-29 (citing Brady v. Elixir Indus., 196 Cal. App. 3d 1299, 242 Cal. Rptr. 324 (1987)). Instead the court expressly limited the liability incurring from an employer's knowledge to those situations where the employer had actual knowledge of the intolerable working conditions and did not remedy the situation. *Id.* at 1249-50, 876 P.2d at 1028, 32 Cal. Rptr. 2d at 229; *see Brady*, 196 Cal. App. 3d 1299, 242 Cal. Rptr. 324. Additionally, the court rejected the line of cases following the *Brady* decision. *Id.* at 1251, 876 P.2d at 1029, 32 Cal. Rptr. 2d at 230. *See generally*, Zilmer v. Carnation Co., 215 Cal. App. 3d 29, 263 Cal. Rptr. 422

Furthermore, in addition to satisfying the elements of a constructive discharge cause of action, an employee must also establish that the constructive discharge constituted a breach of contract or a violation of public policy.[16]

The court noted that although Turner reported the illegal activity in his workplace, he was never asked by his employer to participate in the alleged improper activity.[17] The court determined, therefore, that Turner's act of "whistleblowing" did not in itself constitute an intolerable working condition.[18] Additionally, the court examined the nexus between Turner's reporting of ABI's illegal activity and his subsequent reassignment and poor performance rating.[19] The court noted that while an isolated incident, such as a demotion or reassignment, does not in itself constitute an intolerable condition, the reoccurrence of such acts over an extended duration of time could constitute an intolerable condition.[20] The court found, however, that Turner did not establish a continuous pattern of adverse working conditions because he had received "good" performance ratings and pay increases for a three year period prior to receiving a "needs improvement" rating on a single performance report.[21]

The court further determined that Turner failed to establish that a reasonable employee, under similar circumstances, would have found the working conditions intolerable.[22] The court stated, however, that the length of time between the onset of the alleged intolerable conditions and the resignation could serve as circumstantial evidence of whether a reasonable employee under similar circumstances would have considered the working conditions intolerable.[23] The court reasoned that Turner's

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(1989), *overruled by Turner*, 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223; Soules v. Cadam Inc., 2 Cal. App. 4th 390, 3 Cal. Rptr. 2d 6 (1991), *overruled by Turner*, 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223; *Rochlis*, 19 Cal. App. 4th 201, 23 Cal. Rptr. 2d 793, *overruled by Turner*, 7 Cal. 4th 1238, 876 P.2d 1022, 32 Cal. Rptr. 2d 223.

16. *Turner*, 7 Cal. 4th at 1251, 876 P.2d at 1030, 32 Cal. Rptr. 2d at 231 (citing *Soules*, 2 Cal. App. 4th at 399, 3 Cal. Rptr. 2d at 10 (requiring an employee to prove that the intolerable conditions which compelled him to quit also constituted a breach of his employment contract or violated public policy)).

17. *Turner*, 7 Cal. 4th at 1254, 876 P.2d at 1032, 32 Cal. Rptr. 2d at 233.

18. *Id.* However, the *Turner* court suggested that intolerable working conditions may exist if an employer insists that an employee commit a crime in order to keep his job. *Id.* at 1247 n.3, 876 P.2d at 1027 n.3, 32 Cal. Rptr. 2d at 228 n.3.

19. *Id.* at 1254-55, 876 P.2d at 1031-32, 32 Cal. Rptr. 2d at 232-33.

20. *Id.* at 1247, 876 P.2d at 1027, 32 Cal. Rptr. 2d at 228.

21. *Id.* at 1255, 876 P.2d at 1032, 32 Cal. Rptr. 2d at 233.

22. *Id.* at 1254-55, 876 P.2d at 1032, 32 Cal. Rptr. 2d at 233; *see supra* note 12.

23. *Turner*, 7 Cal. 4th at 1254, 876 P.2d at 1031, 32 Cal. Rptr. 2d at 232. However, the court added that "length of time" was only one factor to be considered and in no way was dispositive of whether a reasonable person would have felt compelled to

continued employment following his whistleblowing act did not adequately support his contention that the working conditions at ABI were so abominable as to support a constructive discharge claim.[24] The court, therefore, avoided a discussion of whether ABI had actual knowledge of the alleged intolerable conditions.[25]

The court further acknowledged that had Turner satisfied the elements of constructive discharge, he still could not prevail because he failed to show that his alleged constructive discharge constituted a breach of his employment contract or violated public policy.[26] The court rejected Turner's contention that ABI's alleged violations of its internal policies and collective bargaining agreements qualified as violations of public policy.[27] The court reasoned that Turner failed to demonstrate that his alleged constructive discharge constituted a violation of a specific public policy embodied within the general statutory provisions of either the California Alcohol Beverage Control Act or the Federal Alcohol, Tobacco, and Firearms laws.[28] The court concluded that Turner's accusations were insufficient to establish a cause of action based on wrongful constructive discharge, and therefore granted ABI's summary judgment request.[29]

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk concurred with the majority's opinion that Turner did not experience intolerable working conditions while employed at ABI.[30] However, he disagreed with the majority's decision that an employer must have actual knowledge, as opposed to constructive knowledge, to be held liable for an employee's constructive discharge.[31] Justice Mosk

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resign. *Id.*

24. *Id.* at 1255, 876 P.2d at 1032, 32 Cal. Rptr. 2d at 233; *see supra* note 13 and accompanying text.

25. *Turner*, 7 Cal. 4th at 1256, 876 P.2d at 1032, 32 Cal. Rptr. 2d at 233.

26. *Id.* at 1256, 876 P.2d at 1032-33, 32 Cal. Rptr. 2d at 233-34.

27. *Id.* at 1257-58, 876 P.2d at 1033-34, 32 Cal. Rptr. 2d at 234-35. The court stated that to establish that a constructive discharge violates a public policy, an employee must prove that the policy is: "(1) fundamental, (2) beneficial for the public, and (3) embodied in a statute or constitutional provision." *Id.* at 1256, 876 P.2d at 1032-33, 32 Cal. Rptr. 2d at 233-34 (footnotes omitted) (citing Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1095, 824 P.2d 680, 687, 4 Cal. Rptr. 2d 874, 881-82 (1992)).

28. *Id.* at 1257, 876 P.2d at 1033-34, 32 Cal. Rptr. 2d at 234-35.

29. *Id.* at 1258-59, 876 P.2d at 1034, 32 Cal. Rptr. 2d at 235.

30. *Id.* at 1259-60, 876 P.2d at 1035, 32 Cal. Rptr. 2d at 236.

31. *Id.* at 1259, 876 P.2d at 1035, 32 Cal. Rptr. 2d at 236 (Mosk, J., concurring and

also stated that the jury, instead of the judge, should assess the validity of Turner's allegations of a pattern of harassment.[32]

Despite his reservations, Justice Mosk maintained his approval of the majority's decision based upon Turner's confession that his resignation was not entirely the result of his intolerable working conditions, but also a strategic attempt to preserve his claim for future litigation.[33]

C. *Justice Kennard's Dissenting Opinion*

Justice Kennard dissented, arguing that the majority's refusal to allow an employee to prove the existence of intolerable working conditions based on an employer's constructive knowledge of such conditions is contrary to established law.[34] Expressing concern that this decision will most likely affect future California cases, Justice Kennard recounted both federal and state cases that have permitted an employee to use constructive knowledge to satisfy the requisite level of employer knowledge.[35] Justice Kennard argued that an employer should be held liable for constructive discharge based on the employer's constructive knowledge of the employee's intolerable working conditions when "any reasonably attentive employer would notice [the intolerable working conditions]" or when the employer fails to listen and respond to the employee's complaints.[36]

Justice Kennard also disagreed with the majority's decision to grant ABI's request for summary judgment.[37] She argued that the jury should determine whether Turner was subjected to continual harassment because a "legally sophisticated employer" could intentionally make an employee's resignation look uncoerced by using harassment techniques spread far enough apart in time as to appear isolated.[38] According to Justice Kennard, Turner presented enough evidence to establish a triable issue of fact for the jury, and thus this case should not have been dismissed on summary judgment.[39]

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dissenting). Justice Mosk expressed concern that requiring an employee to establish that the employer had actual knowledge of the intolerable working conditions might permit an employer to unjustly "escape liability." *Id.* (Mosk, J., concurring and dissenting).

32. *Id.* (Mosk, J., concurring and dissenting).

33. *Id.* (Mosk, J., concurring and dissenting).

34. *Id.* at 1260, 876 P.2d at 1035, 32 Cal. Rptr. 2d at 236 (Kennard, J., dissenting).

35. *Id.* at 1260-64, 876 P.2d at 1036-38, 32 Cal. Rptr. 2d at 237-39 (Kennard, J., dissenting).

36. *Id.* at 1263, 876 P.2d at 1037-38, 32 Cal. Rptr. 2d at 238-39 (Kennard, J., dissenting).

37. *Id.* at 1264, 876 P.2d at 1038, 32 Cal. Rptr. 2d at 239 (Kennard, J., dissenting).

38. *Id.* at 1271, 876 P.2d at 1043, 32 Cal. Rptr. 2d at 244 (Kennard, J., dissenting).

39. *Id.* at 1272, 876 P.2d at 1043, 32 Cal. Rptr. 2d at 244 (Kennard, J., dissenting).

III. IMPACT AND CONCLUSION

In *Turner*, the California Supreme Court modified the requisite employer's knowledge element of a wrongful constructive discharge claim.[40] In doing so, the court refused to follow the *Brady* decision, and instead limited an employer's liability for constructive discharge only to those situations where an employee can prove that his employer had actual knowledge of the intolerable working conditions and failed to correct the situation.[41] As a result of this case, employees must meet a higher burden of proof than previously established by the *Brady* court.[42]

APRIL LORRAINE ANSTETT

40. *See supra* note 14 and accompanying text.
41. *See supra* note 14 and accompanying text.
42. *See supra* note 14 and accompanying text.