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California Supreme Court Survey - A Review of Decisions: June 1992-December 1992

Richard John Bergstrom III

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. APPELLATE REVIEW

A. *Summary denial of a petition for extraordinary relief will not preclude reconsideration of an issue on appeal following final judgment even where the court denied the writ petition without issuing an alternative writ and the "sole possible ground" for denial was that the court had acted on the merits of the case; however, the issue may be precluded from reconsideration on appeal if an appellate court issues an alternative writ, the matter is fully briefed, opportunity for oral argument exists, and the cause is decided by written opinion:* **Kowis v. Howard.**

I. INTRODUCTION

In *Kowis v. Howard*,[1] the California Supreme Court considered whether an issue in a pretrial motion for extraordinary relief that was summarily denied by the court of appeal could be raised again on final appeal of the case.[2] The court concluded that summary denial of an extraordinary writ does not establish the law of the case, and thus, does not operate as a bar to raising the same issue on appeal.[3]

The plaintiff slipped on a patch of oil on defendant's property, allegedly suffering damages. The defendant failed to make a timely response to the plaintiff's request for admissions.[4] The plaintiff moved that the admissions be deemed admitted and the trial court granted the motion. After the defendant dismissed his first attorney and retained new coun-

1. 3 Cal. 4th 888, 838 P.2d 250, 12 Cal. Rptr. 2d 728 (1992). Justice Arabian wrote the opinion for the court, joined by Chief Justice Lucas, and Justices Panelli, Kennard, Baxter, and George. Justice Mosk wrote a separate opinion, concurring and dissenting. *Id.* at 901, 838 P.2d at 257, 12 Cal. Rptr. 2d at 735.

2. *Id.* at 891, 838 P.2d at 251, 12 Cal. Rptr. 2d at 729.

3. *Id.* The court did not attempt to rule on the merits, instead concluding that the matter should be heard on appeal. *Id.* at 901, 838 P.2d at 257, 12 Cal. Rptr. 2d at 735. For a discussion of the law-of-the-case doctrine, see 5 CAL. JUR. 3D, *Appellate Review* §§ 634-54 (1973 & Supp. 1992).

4. Plaintiff requested that the defendant admit the following: "(1) that plaintiff was injured when he slipped on defendant's property, (2) that plaintiff injured his lower back as a result of the fall, (3) that defendant was negligent in not inspecting the property, and (4) that defendant's negligence was a proximate cause of plaintiff's injury." *Kowis*, 3 Cal. 4th at 891-92, 838 P.2d at 251, 12 Cal. Rptr. 2d at 729.

sel, he moved for relief on the grounds of attorney neglect. The trial court denied the motion and the defendant filed a petition for writ of mandate with the court of appeal. The court of appeal summarily denied the defendant's petition and the case was continued to trial.[5]

The jury rendered a special verdict on the issues of damages and valued the total injury at $210,000, for which the defendant was twenty-one percent at fault. On appeal, the defendant again attempted to raise the admissions issue. The court of appeal held that the earlier denial of the petition for writ of mandate had been made on the merits, and thus, precluded reconsideration under the doctrine of law of the case.[6] The supreme court granted review solely on the issue of preclusion under this doctrine.[7]

II. TREATMENT

The court began by analyzing the law-of-the-case doctrine. The law-of-the-case doctrine bars litigants from further litigation of any issue that has already been decided on appeal by means of an extraordinary writ.[8] In this case, the supreme court faced the issue of whether the doctrine applied to a pretrial writ.[9]

The court analyzed the three ways in which a court of appeal may address an extraordinary writ. First, the court can summarily deny the writ, either immediately or upon consideration of any opposition.[10] Sec-

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5. "The Court of Appeal denied the petition with the following order: 'The petition for writ of mandate and request for stay and the opposition have been read and considered by Presiding Justice Kremer and Justices Wiener and Huffman. The petition is denied.'" *Id.* at 892, 838 P.2d at 251, 12 Cal. Rptr. 2d at 729 (citing Carroll v. Abbott Labs., Inc. 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982)).

6. A different panel of the same division of the court of appeal determined that the earlier denial for the writ of mandate was on the merits. *Id.*

7. *Id.*

8. *Id.* at 893, 898 P.2d at 251-52, 12 Cal. Rptr. 2d at 729-30. The court, however, did not find it necessary to consider all of the exceptions to the doctrine. *Id.* at 893 n.1, 838 P.2d at 252 n.1, 12 Cal. Rptr. 2d at 730 n.1. For further study, see Clemente v. California, 40 Cal. 3d 202, 707 P.2d 818, 219 Cal. Rptr. 445 (1985) (finding law-of-the-case doctrine merely a rule of procedure that does not go to the power of a court and inapplicable where it will result in an unjust decision); and Searle v. Allstate Life Ins. Co., 38 Cal. 3d 425, 696 P.2d 1308, 212 Cal. Rptr. 466 (1985) (holding law-of-the-case doctrine applicable to the California Supreme Court even though a previous appeal was before the court of appeal). *See also* 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§ 142-49 (1985 & Supp. 1992).

9. The court considered it unnecessary to distinguish between writs of mandate and writs of prohibition. *Kowis*, 3 Cal. 4th at 893, 838 P.2d at 252, 12 Cal. Rptr. 2d at 730.

10. *Id.* (citing Cal. Rules of Court, Rule 24(a) (West 1992); Bay Dev., Ltd. v. Superior Court, 50 Cal. 3d 1012, 791 P.2d 290, 269 Cal. Rptr. 720 (1990)). The court in

ond, the court can issue an alternative writ commanding the respondent to act in conformity with the order, or to show cause why it should not be so ordered.[11] Third, the court can issue a peremptory writ under Code of Civil Procedure section 1088, provided the parties are given proper notice.[12]

In this case, the court of appeal employed the first course of action and summarily denied the petition without issuing an alternative writ or a peremptory writ. The court declined to hear or decide the cause of either party[13] because the parties did not fully brief the matter nor were they given the opportunity for oral argument. The court cited precedent that clearly recognized that law of the case is established in a pretrial proceeding where (1) a court of appeal has issued an alternative writ; (2) the matter was fully briefed; (3) there was opportunity for oral argument; and (4) the court issued a written opinion.[14] The court found that the law-of-the-case doctrine generally does not apply to summary denials of writ petitions,[15] but noted a line of cases that recognized an exception to the general rule.[16] The exception is known as the "sole possible

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Bay found an exception to the general rule that court of appeal decisions become final as to that court thirty days after filing, unless an alternative writ or order to show cause is issued. The court stated that the general rule applies only to summary denials of writ petitions, not to cases in which the court of appeal sets a writ matter for oral argument, hears oral argument, and resolves the matter by full written opinion. *Id.*

11. *Kowis*, 3 Cal. 4th at 893, 838 P.2d at 252, 12 Cal. Rptr. 2d at 730 (citing Palma v. U.S. Indus. Fasteners, Inc., 36 Cal. 3d 171, 177-78, 681 P.2d 893, 896-97, 203 Cal. Rptr. 626, 629-30 (1984)).

12. *Id.* Section 1088 states:

> When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.

CAL. CIV. PROC. CODE § 1088 (West 1992).

13. *Kowis*, 3 Cal. 4th at 894, 838 P.2d at 252, 12 Cal. Rptr. 2d at 730.

14. *Id.* (citing *Palma*, 36 Cal. 3d 171, 681 P.2d 893, 203 Cal. Rptr. 626 (1984) (holding law-of-the-case doctrine inapplicable where no notice provided and merits not considered)).

15. *Id.* at 894, 838 P.2d at 253, 12 Cal. Rptr. 2d at 731 (citing People v. Medina, 6 Cal. 3d 484, 492 P.2d 686, 99 Cal. Rptr. 630 (1972)).

16. *Id.* at 895-97, 838 P.2d at 253-55, 12 Cal. Rptr. 2d at 731-33. *See, e.g.*, Consum-

ground" exception and the plaintiff in this case argued that the court of appeal had properly applied it.[17]

The "sole possible ground" exception was derived from an interpretation of language used in *Hagan v. Superior Court.*[18] In *Hagan*, the California Supreme Court discussed the law-of-the-case doctrine and found that

> [t]he rule is well settled that a denial by this or the appellate court of an application for a writ without opinion 'is not res judicata of the legal issues presented by the application unless the *sole possible* ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits.'[19]

The *Kowis* court analyzed this statement as giving rise to two implications.[20] First, the *Kowis* court felt this language reiterated "the general rule that a summary denial does not establish law of the case."[21] Second, "if a summary denial is on the merits, either because there is no other possible ground or because it affirmatively appears that the denial was intended to be on the merits, then it comes within an exception to the general rule, and establishes law of the case."[22]

While the court agreed with the first point, it took issue with the second. Although many cases have cited to the "sole possible ground" exception, there has never been an actual need to apply the exception.[23] Thus, all of these references remain, dicta.[24]

In *Richer v. Superior Court*,[25] a court of appeal effectively applied the exception without citing to the "sole possible ground" rule.[26] In *Richer*, an occupant of real property moved in superior court to abate a petition filed in probate court on the ground that the probate action was similar

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ers Lobby Against Monopolies v. Public Utils. Comm'n, 25 Cal. 3d 891, 603 P.2d 41, 160 Cal. Rptr. 124 (1979); Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972); Asbestos Claims Facility v. Berry & Berry, 219 Cal. App. 3d 9, 267 Cal. Rptr. 896 (1990); Donia v. Alcoholic Beverage Control Appeals Bd., 167 Cal. App. 3d 588, 213 Cal. Rptr. 447 (1985); People v. Pipes, 179 Cal. App. 2d 547, 3 Cal. Rptr. 814 (1960); Confidential, Inc. v. Superior Court, 157 Cal. App. 2d 75, 320 P.2d 546 (1958).

17. *Kowis*, 3 Cal. 4th at 897, 838 P.2d at 255, 12 Cal. Rptr. 2d at 733.

18. 57 Cal. 2d 767, 371 P.2d 982, 22 Cal. Rptr. 206 (1962).

19. *Id.* at 770, 371 P.2d at 984, 22 Cal. Rptr. at 208 (quoting McDonough v. Garrison, 68 Cal. App. 2d 318, 325, 156 P.2d 983, 987 (1945) (emphasis in original)).

20. *Kowis*, 3 Cal. 4th at 896, 838 P.2d at 254, 12 Cal. Rptr. 2d at 732.

21. *Id.*

22. *Id.*

23. *But see infra* note 25 and accompanying text.

24. *Kowis*, 3 Cal. 4th at 897, 838 P.2d at 254, 12 Cal. Rptr. 2d at 732.

25. 63 Cal. App. 3d 748, 134 Cal. Rptr. 52 (2d Dist. 1976).

26. The *Richer* court actually considered all actions an appellate court must take prior to invoking the law-of-the-case doctrine and found an exception where the law-of-the-case doctrine might result in injustice. *Id.* at 758, 134 Cal. Rptr. at 57.

to the superior court action. The motion was granted and the executrix of the decedent's estate, who allegedly owned the property, filed for writ of mandate.[27] The court of appeal held that a previous denial of the occupant's prior petition for prohibition was a decision on the merits, even though no alternative writ or order to show cause was entered.[28] The *Richer* court concluded that denial of the writ established the law of the case, and thus, the superior court should not have granted the occupant's motion.[29]

The California Supreme Court found the dicta in prior cases and the holding in *Richer* unpersuasive.[30] Instead, the court applied a bright line rule which would "serve to preserve scarce judicial resources."[31] The court was primarily concerned with the fact that the "sole possible ground" exception might result in unnecessary litigation.[32] The court's concern focused on the uncertainty that might result when attempting to decide whether a summary denial was resolved on the merits, thus establishing law of the case.[33] In short, parties would be forced to second-guess whether a pretrial order would ultimately become law of the case.[34]

Upon consideration of these factors, the court stated that "[t]he firm rule that a denial without an alternative writ and written opinion does not establish law of the case is clear and would rarely, if ever, cause uncertainty."[35] The court reasoned that such a rule would strengthen the principle that a right to oral argument exists before any appeal can be decided on the merits.[36] Justice Arabian pointed out that this merely ensured the *opportunity* for oral argument, which may be, and often is, waived.[37]

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27. *Id.* at 751-56, 134 Cal. Rptr. at 53-58.

28. *Id.* at 756, 134 Cal. Rptr. at 56.

29. *Id.* at 758-59, 134 Cal. Rptr. at 58.

30. "A summary denial does not decide a 'cause' and should therefore not be given law of the case effect. Sound policy reasons also support this conclusion." *Kowis*, 3 Cal. 4th at 897, 838 P.2d at 255, 12 Cal. Rptr. 2d at 733 (citations omitted).

31. *Id.* at 898, 838 P.2d at 255, 12 Cal. Rptr. 2d at 733.

32. *Id.*

33. *Id.*

34. "Thus, judicial economy would be hampered, not furthered, by recognition of an exception to the general rule." *Id.*

35. *Kowis*, 3 Cal. 4th at 897, 838 P.2d at 255, 12 Cal. Rptr. 2d at 733.

36. *Id.* (citing People v. Medina, 6 Cal. 3d 484, 489-90, 492 P.2d 686, 689, 99 Cal. Rptr. 630, 633 (1972)).

37. *Id.* at 899 n.3, 838 P.2d at 256 n.3, 12 Cal. Rptr. 3d at 734 n.3.

The plaintiff relied on *Pigeon Point Ranch, Inc. v. Perot*,[38] in which the California Supreme Court determined that law of the case could be established without a written opinion. The *Pigeon Point* court held that denial of a defendant's motion to dismiss without written opinion was a final determination of appealibilty.[39] The court based its decision on the law-of-the-case doctrine rather than res judicata.[40]

In *Kowis*, the supreme court felt compelled to reconsider *Pigeon Point* in light of recent decisions.[41] In doing so, the court expressed its concern that should *Pigeon Point* be followed, parties would be reluctant to bring motions to dismiss when they could be denied without a full hearing, in effect, denying the party supporting the motion from any future argument.[42] Thus, the supreme court overruled *Pigeon Point*, reasoning that motions to dismiss were of significant value in reducing litigation.[43]

The court concluded that "[a] summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason."[44] The court decided that in future cases, for the law-of-the-case doctrine to apply, the appellate court must issue an alternative writ; the matter must be fully briefed; opportunity must exist for oral argument, and the cause must be decided by written opinion.[45] The court remanded the case to the court of appeal to decide whether the admissions should be set aside based on the merits.[46]

III. CONCLUSION

Kowis establishes a bright line test for the application of the law-of-the-case doctrine. Summary denial of a petition will not be sufficient to establish law of the case. Rather, the court of appeal must hear, or at least provide an opportunity for, oral argument, and issue a written opinion before the doctrine may be invoked to bar future debate on an issue.

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38. 59 Cal. 2d 227, 379 P.2d 321, 28 Cal. Rptr. 865 (1963).

39. "The court [of appeal], however, was presented with only one question, namely, appealability of the judgment, and, in the interests of orderly administration of justice, the denial of the motion, made without qualification, should be interpreted as a final determination." *Id.* at 231, 379 P.2d at 323, 28 Cal. Rptr. at 867.

40. *Id.* at 231, 379 P.2d at 322, 28 Cal. Rptr. at 866.

41. *Kowis*, 3 Cal. 4th at 900, 838 P.2d at 257, 12 Cal. Rptr. 2d at 735.

42. *Id.*

43. *Id.* at 901, 838 P.2d at 257, 12 Cal. Rptr. 2d at 735. Justice Mosk disagreed with this part of the opinion. *Id.* at 901-02, 838 P.2d at 257-58, 12 Cal. Rptr. 2d at 735-36 (Mosk, J., concurring and dissenting).

44. *Id.* at 899, 838 P.2d at 256, 12 Cal. Rptr. 2d at 734.

45. *Id.* at 894, 838 P.2d at 252, 12 Cal. Rptr. 2d at 730.

46. The supreme court expressed no opinion on the merits of the claim. *Id.* at 901, 838 P.2d at 257, 12 Cal. Rptr. 2d at 735.

This rule will ultimately serve to reduce litigation by creating greater certainty in the effect of a peremptory writ. Further, the *Kowis* ruling ensures that the rights of litigants will be protected by providing an the opportunity to be heard.

DAN O'DAY

B. *Absent extraordinary circumstances, an appellate court shall grant a stipulated request made by all parties pending appeal to reverse a trial court judgment in order to effectuate their settlement:* **Neary v. Regents of the University of California.**

I. INTRODUCTION

In *Neary v. Regents of the University of California*,[1] the California Supreme Court decided whether an appellate court may grant a stipulated request by all the parties to reverse a trial court judgment in order to effectuate a settlement.[2] The court held that an appellate court should grant such a request by the parties absent extraordinary circumstances.[3] On the ground that no extraordinary circumstances existed, the California Supreme Court held that the appellate court below erred in failing to grant the parties' stipulated request.[4]

The petitioner, Neary, obtained a judgment for seven million dollars in a libel action against the respondents, the Regents of the University of California.[5] The respondents appealed the judgment, and the petitioner cross-appealed.[6] While their appeals were pending, the parties reached a settlement.[7] Their agreement provided that the respondents pay three

1. 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992). Justice Baxter wrote the majority opinion with Chief Justice Lucas and Justices Panelli, Arabian, and George concurring. Justice Mosk wrote a concurring opinion. Justice Kennard wrote a dissenting opinion.

2. *Id.* at 275, 834 P.2d at 119-20, 10 Cal. Rptr. 2d at 859.

3. *Id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866.

4. *Id.*

5. *Id.* at 275-76, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860. The respondents in this action were three veterinarians employed by a Regents University. The jury verdict was entered against all respondents. *Id.*

6. *Neary*, 3 Cal. 4th at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

7. *Id.*

million dollars to the petitioner, both appeals be dismissed with prejudice, and the court of appeal vacate the trial court's judgment.[8]

Subsequently, the parties filed a joint application to the court of appeal requesting reversal of the trial court's judgment and asking that the action be remanded for dismissal with prejudice.[9] The court of appeal, however, denied their application.[10] The California Supreme Court reversed, holding that, absent extraordinary circumstances, an appellate court should grant a stipulated request to vacate a trial court judgment in order to effectuate the parties' settlement.[11]

II. TREATMENT

A. *Majority Opinion*

1. Authority of the Appellate Courts

The court proclaimed that an appellate court has the authority to reverse a trial court's judgment in order to give effect to a mutual settlement by the parties.[12] The court reasoned that no California statutory or constitutional provision denied the appellate courts this power.[13] In fact, the court noted that the opposite was true: the California Constitution expressly vests in the appellate courts the power to control judicial proceedings.[14] In addition, California Code of Civil Procedure section 128(a)(8) gives courts the power "to amend and control its process and orders so as to make them conform to law and justice."[15] The court concluded that where the parties wish to terminate their dispute by settling, a stipulated reversal is consistent with the courts' authority to conform to justice.[16]

2. Presumption Favoring Settlement

The court next determined that when all parties involved in an action have requested a stipulated reversal for the purpose of effectuating the

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Neary*, 3 Cal. 4th at 275, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.
12. *Id.* at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.
13. *Id.*
14. *Id.* (citing CAL. CONST. art. VI, § 1).
15. *Id.* (quoting CAL. CIV. PROC. CODE § 128(a)(8) (West 1982 & Supp. 1993)).
16. *Neary*, 3 Cal. 4th at 277, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860 (citing CAL. CIV. PROC. CODE § 128(a)(8) (West 1982 & Supp. 1993)). *See also* B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 519 (1985 & Supp. 1992) (discussing appellate settlements).

settlement, their request should be granted absent extraordinary circumstances.[17] The court provided several justifications for this general rule.

a. Efficiency

The court first recognized that while pre-judgment settlements are more efficient than post-judgment settlements, the latter are still more efficient than allowing the litigation to continue needlessly.[18] The court reasoned that although a post-judgment settlement does not spare the judiciary and the parties the costs of a trial, it does avoid the additional costs of an appeal and a possible retrial on remand.[19] Furthermore, the court noted that both California and federal appellate courts have consistently granted such requests by parties for stipulated reversals.[20]

The court rejected the respondents' contention that allowing stipulated reversals effectuating post-judgment settlements will discourage parties from settling pre-judgment.[21] First, the court reasoned that initially the high monetary costs of litigation will continue to encourage parties to settle pre-judgment.[22] Second, the court reasoned that in addition to the monetary costs there are several other burdens of litigation, such as negative publicity, which will provide further incentives for parties to settle pre-judgment.[23] Third, the court posited that parties often find post-judgment settlements to be less favorable than pre-judgment settlements after having reconsidered the strengths and weaknesses of their

17. *Neary*, 3 Cal. 4th at 277, 834 P.2d at 121, 10 Cal. Rptr. 2d at 860.

18. *Id.* at 277, 824 P.2d at 121, 10 Cal. Rptr. 2d at 861.

19. *Id.* at 278-79, 834 P.2d at 121-22, 10 Cal. Rptr. 2d at 861-62. The court recognized that forcing parties to engage in further litigation over a matter that is no longer in dispute "is wasteful of the resources of the judiciary." *Id.* at 277, 834 P.2d at 121, 10 Cal. Rptr. 2d at 859 (quoting Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277, 280 (Fed. Cir. 1987) (requiring an administrative agency to vacate its decision upon settlement of the parties)). In the present case, continuing the litigation would be quite costly where the transcripts alone totaled more than 13,000 pages. *Neary*, 3 Cal. 4th at 278, 834 P.2d at 122, 10 Cal. Rptr. 2d at 861.

20. *Id.* at 278, 834 P.2d at 121, 10 Cal. Rptr. 2d at 861. *See also Federal Data Corp.*, 819 F.2d at 280; Nestle Co. v. Chester's Market, Inc., 756 F.2d 280, 282-83 (2d Cir. 1985) (vacating judgment due to post-judgment settlement).

21. *Neary*, 3 Cal. 4th at 279, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862.

22. *Id.* The court criticized a law review article relied upon by the respondents as failing to consider the significance of the considerable initial litigation costs. *Id.* (citing Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 596 (1991)).

23. *Id.*

cases.[24] Finally, the court observed that despite the fact that many appellate courts have granted stipulated reversals, the number of pre-judgment settlements have not decreased.[25]

b. Fairness

The court's second justification for its holding was that strong consideration should be given to the interests of the parties to the action since they are the ones most affected by the judgment.[26] The court noted the many risks of litigation, such as adverse publicity and potential liability for a large judgment.[27] Thus, if the parties to an action mutually agree to avoid such risks, a court should respect the agreement and aid them in effectuating a settlement.[28] The court stressed that this was especially true in the present case where a complex defamation action with high monetary and psychological costs had been pending for thirteen years.[29] The court concluded that it would be unfair to deny the parties their mutual desire to end such a long-standing dispute.[30]

c. Avoiding arbitrary distinctions

The court rejected the court of appeal's conclusion that a post-judgment settlement would constitute a waste of the time and expense spent on the trial below.[31] The court posited that the costs of trial are not always an issue with post-judgment settlements because pre-trial judgments can be rendered by motion, and thus, there would be no need for a trial.[32] Moreover, the court reasoned that many parties who settle during trial often do so just prior to judgment,[33] thus, any time and money saved by denying post-judgment settlements would be insignificant. Finally, the court concluded that any line drawn at judgment would be arbitrary and without justification.[34]

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24. *Id.*
25. *Neary*, 3 Cal. 4th at 279-80, 834 P.2d at 122, 10 Cal. Rptr. 2d 862.
26. *Id.* at 280, 834 P.2d at 122-23, 10 Cal. Rptr. 2d at 862 (citing *Federal Data Corp.*, 819 F.2d at 280 (discussing the importance of fairness to the parties)). "The courts exist for litigants. Litigants do not exist for courts." *Id.* at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 862.
27. *Id.* at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 863.
28. *Id.*
29. *Neary*, 3 Cal. 4th at 280-81, 834 P.2d at 123, 10 Cal. Rptr. 2d at 863.
30. *Id.*
31. *Id.* at 281, 834 P.2d at 123, 10 Cal. Rptr. 2d at 863.
32. *Id.*
33. *Id.*
34. *Id.*

d. Integrity of the judiciary

Next, the court rejected the court of appeal's argument that stipulated reversals trivialize the work of trial courts and undermine the integrity of the judiciary.[35] The court criticized the court of appeal's conclusion that the primary purpose of the judiciary is to search for "legal truth"[36] and opined that the ultimate goal of the judiciary is to provide the public with a forum to peaceably settle their disputes.[37] The court stated that when a dispute is resolved the goal of the judicial process has been attained, even if the resolution comes from a post-judgment settlement.[38] In addition, the court asserted that a trial educates the parties as to the value of settlement, and thus, resolution by post-judgment settlement achieves the ultimate end of the judicial process.[39]

e. Public interest

The court rejected the rationale adopted by the court of appeal that stipulated reversals should be denied whenever the public interest would be adversely affected.[40] Furthermore, the court rejected the argument that a judgment must stand as a "'commentary' on the performance of public officials" such as the respondents.[41] Rather, the court advocated a strong presumption in favor of allowing stipulated reversals, rebuttable only when the reversal adversely affects a "specific, demonstrable, well-established and compelling" public interest.[42]

The supreme court concluded that the settlement did not adversely affect any such public interest.[43] The court, in fact, observed that the contrary was true in commenting that this settlement weighed strongly in

35. *Neary*, 3 Cal. 4th at 281, 834 P.2d at 124, 10 Cal. Rptr. 2d at 863-64.

36. *Id.*

37. *Id.* at 281-82, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864 (quoting Vecki v. Sorensen, 171 Cal. App. 2d 390, 393, 340 P.2d 1020, 1021 (1959)).

38. *Id.* at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

39. *Id.*

40. *Neary*, 3 Cal. 4th at 283, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

41. *Id.* at 285, 834 P.2d at 125, 10 Cal. Rptr. 2d at 866. The court believed that the public interest in having this "commentary" was outweighed by the public interest in the monetary savings resulting from the settlement. *Id.*

42. *Id. See also* Anne-Thérèse Béchamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117 (1990) (discussing the public interest against confidentiality of settlements).

43. *Neary*, 3 Cal. 4th at 285, 834 P.2d at 125, 10 Cal. Rptr. 2d at 866.

favor of the public interest by saving the Regents of the University of California, as well as the taxpayers, four million dollars.[44]

f. Conclusion

The court held that absent extraordinary circumstances, there is a general presumption in favor of allowing stipulated reversals to effectuate post-judgment settlements.[45] Without any extraordinary circumstances to address in the present case, the court stopped short of instituting a clear a rule for determining exactly what constitutes extraordinary circumstances.[46] The court's only comment on the issue was that any such determination of extraordinary circumstances must be made on a case-by-case basis.[47]

3. Applying the Presumption

In holding that the presumption should be applied unequivocally in the present case,[48] the court reasoned that permitting post-judgment settlements would save the parties, as well as the judiciary, a substantial amount of time and money, whereas denial of such settlements would not only be unfair to the parties, it could potentially jeopardize the integrity of the judiciary by foregoing resolution of an existing dispute.[49] In addition, the public interest would be furthered by such a large monetary savings. Thus, the court concluded that there were no extraordinary circumstances to justify not applying the presumption in this case.[50]

B. Concurring Opinion

While Justice Mosk concurred with the majority based on the facts of the case, he was nevertheless concerned with the court's decision to create a presumption for granting stipulated reversals absent extraordinary circumstances stating that such a rule was much too broad.[51] Jus-

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44. *Id.* at 283, 834 P.2d at 124-25, 10 Cal. Rptr. 2d at 864-65.

45. *Id.* at 284, 834 P.2d at 125-26, 10 Cal. Rptr. 2d at 865. The court explained that a negative presumption, one denying stipulated reversals absent a showing that the stipulation should be granted, would be unnecessarily burdensome on parties and the appellate courts alike. *Id.* at 284, 834 P.2d at 126, 10 Cal. Rptr. 2d at 865. According to the court, under a presumption favoring stipulated reversals, the parties need not make a showing that the stipulations should be granted unless a nonparty objects to the settlement. *Id.*

46. *Neary*, 3 Cal. 4th at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

47. *Id.*

48. *Id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866.

49. *Id.*

50. *Id.*

51. *Neary*, 3 Cal. 4th at 286, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866 (Mosk, J.,

tice Mosk posited that the better rule would be to leave the decision of whether to grant a stipulated reversal to the discretion of the appellate courts.[52] Justice Mosk reasoned that, in some circumstances, a stipulated reversal might actually be against public policy, and the public policy may not be strong enough to overcome the majority's presumption.[53]

C. Dissenting Opinion

Justice Kennard criticized the majority opinion by attacking the court's assertion that the main purpose of the judiciary is to serve as a dispute resolution service.[54] Justice Kennard stated that while that might be one goal, the ultimate purpose of the judiciary is "to administer the laws of th[e] state, and thereby . . . do substantial justice."[55]

Next, Justice Kennard supplied several rationales in support of her critique of the majority's presumption in favor of granting stipulated reversals.[56] First, Justice Kennard asserted that stipulated reversals negatively affect the public's perception of the judiciary.[57] She reasoned that by allowing a defendant who lost at trial to "purchase" a stipulated reversal, the majority, in effect, fosters the perception that justice is directly proportional to a party's financial means.[58] Justice Kennard stated that the trial courts are the cornerstone of the judicial process and deserve respect.[59] She believed that allowing stipulated reversals without a showing of legal error would sacrifice the integrity of judges and ju-

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concurring).

52. *Id.* at 286, 834 P.2d at 127, 10 Cal. Rptr. 2d at 866 (Mosk, J., concurring).

53. *Id.* (Mosk, J., concurring). For example, Justice Mosk was concerned that in a products liability action the defendant might seek a post-judgment settlement with the plaintiff to ensure the confidentiality of the result and avoid being sued by other plaintiffs. Where the plaintiff needed the money badly enough to settle, Justice Mosk's concern was that other victims of the defective product would be adversely affected. *Id.*

54. *Id.* at 286, 834 P.2d at 127, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting).

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

56. *Neary*, 3 Cal. 4th at 287, 834 P.2d at 127, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting).

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

58. *Id.* at 287, 834 P.2d at 127-28, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting). *See generally* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991).

59. *Neary*, 3 Cal. 4th at 288, 834 P.2d at 128, 10 Cal. Rptr. 2d at 868 (Kennard, J., dissenting).

rors.[60] Justice Kennard posited that when appellate courts disrespect trial courts they cannot expect the public to do any differently.[61]

Second, Justice Kennard asserted that a strong presumption in favor of stipulated reversals will discourage pre-trial settlements, reasoning that motivation for pre-trial settlement is virtually nonexistent when the parties know they can get a stipulated reversal.[62] Thus, according to Justice Kennard, allowing stipulated reversals actually encourages parties who might have settled pre-trial to go forward with their trials thereby wasting the judiciary's resources.[63] Justice Kennard concluded that while granting stipulated reversals might encourage post-judgment settlements, any resulting benefits would not be worth the toll on the number of pre-trial settlements.[64]

Third, Justice Kennard contended that judgments with value to nonparties to an action should always be preserved.[65] Justice Kennard noted that because this was a libel suit against a public entity involving public employees and a publication funded by public tax dollars, the judgment clearly had value to nonparties, namely the public in general.[66]

Finally, Justice Kennard asserted that appellate courts should require the parties to provide a legitimate reason for conditioning their settlement on a stipulated reversal before granting their request.[67] Justice Kennard reasoned that if the parties could produce no legitimate reason, they should not be permitted "to dictate an appellate court's actions" and possibly damage the dignity of the judiciary.[68] In this instance, Justice Kennard believed that the reason provided, to protect the respondents'

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

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

62. *Id.* at 290, 834 P.2d at 130, 10 Cal. Rptr. 2d at 869 (Kennard, J., dissenting). *See also In re* Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988) (recognizing that proscribing stipulated reversals encourages pretrial settlement).

63. *Neary*, 3 Cal. 4th at 290, 834 P.2d at 130, 10 Cal. Rptr. 2d at 869 (Kennard, J., dissenting) (citing Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991)).

64. *Id.* at 291, 834 P.2d at 130, 10 Cal. Rptr. 2d at 870 (Kennard, J., dissenting).

65. *Id.* (Kennard, J., dissenting). *See also In re* Marriage of Shapiro, 39 Cal. App. 3d 460, 464, 114 Cal. Rptr. 277, 279 (1974) (refusing to reverse a judgment because of its possible "consequences affecting interests not directly involved in th[at] proceeding"). For a good discussion of stipulated reversals, see generally B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 644 (1985 & Supp. 1992); RONALD M. GREENBERG, CALIFORNIA CIVIL APPELLATE PRACTICE, *Decision on the Merits; Retrial After Reversal* § 16.24 (1985).

66. *Neary*, 3 Cal. 4th at 292-93, 834 P.2d at 130-31, 10 Cal. Rptr. 2d at 870-71 (Kennard, J., dissenting).

67. *Id.* at 293-94, 834 P.2d at 132, 10 Cal. Rptr. 2d at 871 (Kennard, J., dissenting).

68. *Id.* at 293, 834 P.2d at 131, 10 Cal. Rptr. 2d at 871 (Kennard, J., dissenting).

reputation, was not sufficiently legitimate given the fact that the jury found the respondents liable for defamation.[69]

Justice Kennard concluded her analysis by recognizing the benefits of post-judgment settlements, but continuing to criticize the majority for adopting such a broad rule which created a strong presumption in favor of stipulated reversals.[70] According to Justice Kennard, parties should always be allowed to settle post-judgment, but they should not be allowed to condition such a settlement upon destruction of the judgment, especially where the judgment is a matter of public interest and the parties have not set forth any legitimate reason for requiring the stipulated reversal.[71]

III. IMPACT

In *Neary v. Regents of the University of California*, the California Supreme Court created a presumption in favor of granting stipulated reversals to effectuate post-judgment settlements absent extraordinary circumstances, which the court failed to clearly define.[72] This decision is indicative of California's strong public policy preference for settlements. It is evident that the court now favors settlement at any stage in the litigation process, even post-trial.[73]

Ultimately, will granting stipulated reversals to effectuate post-judgment settlements increase judicial efficiency and fairness? Or instead, is the court "cutting off its nose to spite its face" by discouraging pre-trial settlements, and thereby, going against its own preference for public policy? Justice Kennard warned that *Neary*'s effect will be the latter, stating that the court is, in actuality, permitting unsuccessful parties to

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69. *Id.* at 294, 834 P.2d at 132, 10 Cal. Rptr. 2d at 871-72 (Kennard, J., dissenting). Justice Kennard indicated that granting such a stipulated reversal would encourage and assist the respondents in the practice of deception. *Id.* at 294, 834 P.2d at 132, 10 Cal. Rptr. 2d at 872 (Kennard, J., dissenting).

70. *Neary*, 3 Cal. 4th at 294, 834 P.2d at 132, 10 Cal. Rptr. 2d at 871-72 (Kennard, J., dissenting).

71. *Id.* at 295, 834 P.2d at 132-33, 10 Cal. Rptr. 2d at 872 (Kennard, J., dissenting).

72. *Id.* at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

73. This case is indicative of the trend in California whereby courts are trying to reduce the huge backlog of cases awaiting trial and appeal. *See, e.g.*, Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 33, 832 P.2d 899, 919, 10 Cal. Rptr. 2d 183, 203 (1992) (holding that arbitration decisions are reviewable only in very narrow circumstances). *See also* Gail D. Cox, *Innovation—Or Just Court Triage?*, NAT'L L.J., Oct. 5, 1992, at 1 (discussing the court's acute interest in efficiency).

buy their way out of a "bad" judgment, while simultaneously trivializing the work of trial courts.[74]

In creating such a strong presumption, the California Supreme Court has given appellate courts permission to grant stipulated reversals with only minimal scrutiny of the circumstances of the case. However, it remains to be seen whether this will hasten or hinder judicial efficiency.

NANCY G. DRAGUTSKY

II. ARBITRATION

Subject to a few limited exceptions, an arbitral award is not reviewable by the judiciary for either factual or legal errors, even when the error appears on the face of the award and causes substantial injustice: **Moncharsh v. Heily & Blase.**

I. INTRODUCTION

In *Moncharsh v. Heily & Blase*,[1] the California Supreme Court decided the circumstances in which a trial court may review an arbitrator's decision for errors.[2] Based on case law, the court determined that California Code of Civil Procedure sections 1286.2 and 1286.6 provide the only grounds on which a trial court may review a private arbitration award.[3] The court held that because these statutes do not provide for judicial review of private arbitral awards based on errors of law or fact, an arbitrator's decision is not reviewable for the type of error at issue.[4]

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74. *See supra* notes 54-71 and accompanying text. *See also* Bob Rossi, *Appellate Court Must Give Up Settled Case; First District Had Resisted Request For Stipulated Reversal*, THE RECORDER, Aug. 14, 1992, at 2.

1. 3 Cal. 4th 1, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992). Chief Justice Lucas wrote the majority opinion with Justices Panelli, Arabian, Baxter, and George concurring. Justice Kennard wrote a separate opinion, concurring in part and dissenting in part in which Justice Mosk joined.

2. *Id.* at 6, 832 P.2d at 900, 10 Cal. Rptr. 2d at 184.

3. *Id.* at 33, 832 P.2d at 919, 10 Cal. Rptr. 2d at 203. Section 1286.2 sets forth the grounds for vacating an arbitral award. CAL. CIV. PROC. CODE § 1286.2 (West 1982 & Supp. 1993). Section 1286.6 sets forth the grounds for correcting an arbitral award. CAL. CIV. PROC. CODE § 1286.6 (West 1982 & Supp. 1993). [All further references to code sections are to the Code of Civil Procedure unless otherwise specified].

4. *Moncharsh*, 3 Cal. 4th at 33, 832 P.2d at 919, 10 Cal. Rptr. 2d at 203.

A. Background

The issues of arbitral finality and the availability of review of arbitral awards have been the subject of much California case law for more than one hundred years.[5] The common-law rule prior to statutory enactment was that while an arbitrator's decision was considered final, review was permitted for gross errors of law or fact appearing on the face of the award.[6] Shortly after the adoption of this common-law rule, the Civil Practice Act of 1851, section 386, was enacted, which listed the grounds for vacating an arbitral award. However, the Act failed to provide review for gross error on the face of the award.[7] For the next seventy years, courts relied upon the common-law rule in their decisions, while merely mentioning the statute in dicta.[8]

In the 1920's, arbitration became unpopular because disputants could revoke their arbitration submissions prior to a final arbitration determination.[9] In 1927, section 128 of the Code of Civil Procedure, which codified, verbatim, The Cure Practice Act of 1851, was renumbered as section 1288 and amended slightly in an attempt to encourage private arbitration.[10] Since then, the courts have followed the statute, asserting that

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5. *Id.* at 14-27, 832 P.2d at 906-15, 10 Cal. Rptr. 2d at 190-99. *See infra* notes 6, 8, 11, and 13 for examples of cases dealing with judicial review of arbitrator's decisions.

6. *Id.* at 14-16, 832 P.2d at 906-07, 10 Cal. Rptr. 2d at 190-91 (citing Muldrow v. Norris, 2 Cal. 74 (1852)). *See also* Tyson v. Wells, 2 Cal. 122, 131 (1852) (finding that "the Court will not disturb the award of an arbitrator . . . unless the error . . . appears on the face of the award"), *overruled by* Cappe v. Brizzolara, 19 Cal. 607 (1862).

7. *Moncharsh*, 3 Cal. 4th at 16, 832 P. 2d at 907-08, 10 Cal. Rptr. 2d at 191-92.

8. *Id.* at 16-18, 832 P.2d at 908-09, 10 Cal. Rptr. 2d at 192-93. For example, in Peachy v. Ritchie, 4 Cal. 205 (1854), the court construed the statute narrowly and decided to perpetuate the common-law rule. *Id.* at 16-17, 832 P.2d at 908, 10 Cal. Rptr. 2d at 192. *Cf. In re* Connor, 128 Cal. 279, 282, 60 P. 862, 863 (1900) (upholding an arbitral award, reasoning that no statutory ground for vacation was available). *See also* Utah Constr. Co. v. Western Pac. Ry., 174 Cal. 156, 160, 162 P. 631, 633 (1916), *overruled by*, *Moncharsh*, 3 Cal. 4th at 27-28, where the court boldly proclaimed, "[T]he code provisions are in aid of the common-law remedy of arbitration, a reaffirmance thereof, and do not alter its principles," holding an arbitral award causing substantial injustice reviewable for errors on its face. *Id.* at 160-61, 162 P. at 633.

9. *Moncharsh*, 3 Cal. 4th at 20, 832 P.2d at 910, 10 Cal. Rptr. 2d at 194. Arbitration's unpopularity was partly due to the unenforceability of contractual arbitration clauses. *Id.*

10. *Id.* at 20-21, 832 P.2d at 910-11, 10 Cal. Rptr. 2d at 194-95. Former § 1288 pro-

the legislature intended to "adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate."[11] The statute has since been renumbered as section 1286.2, but remains today substantially the same as its predecessor.[12] Modernly, many courts agree that statutory grounds provide the only means by which an arbitral award may be reviewed. A line of recent cases, however, uphold the common-law rule.[13]

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vided in pertinent part,

> In either of the following cases the . . . court . . . must make an order vacating the award, upon the application of any party . . . : (a) Where the award was procured by corruption, fraud or undue means . . . (b) where there was corruption in the arbitrators . . . (c) Where the arbitrators were guilty of misconduct . . . (d) where the arbitrators exceeded their powers . . . .

Id. See generally Eddy S. Feldman, *Arbitration Law in California: Private Tribunals For Private Government*, 30 S. CAL. L. REV. 375, 471-90 (1957) (discussing former § 1288).

11. *Moncharsh*, 3 Cal. 4th at 23, 832 P.2d at 912, 10 Cal. Rptr. 2d at 196 (quoting Crofoot v. Blair Holdings Corp., 119 Cal. App. 2d 156, 182, 260 P.2d 156, 169 (1953) (holding arbitral decisions reviewable only as provided by statute)). The *Crofoot* court relied in part on Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 174 P.2d 441 (1946), where the supreme court refused to vacate an arbitral award where no statutory ground applied. *Pacific Vegetable*, 29 Cal. 2d at 239-40, 174 P.2d at 448-49. The fact that the *Pacific Vegetable* court made no mention of the common-law rule is significant. *Moncharsh*, 3 Cal. 4th at 22, 832 P.2d at 911, 10 Cal. Rptr. 2d at 195.

12. Section 1286.2 provides, in pertinent part:

> [T]he court shall vacate the award if . . . (a) The award was procured by corruption, fraud or other undue means; (b) There was corruption in any of the arbitrators; (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator; (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or (e) The rights of such party were substantially prejudiced . . . .

CAL. CIV. PROC. CODE § 1286.2 (West 1982 & Supp. 1993). For an in-depth analysis of § 1286.2, see 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1194 (1988 & Supp. 1992); 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 40 (1990 & Supp. 1992); 6 CAL. JUR. 3D, *Arbitration and Award* §§ 65, 75, 76, 83-85 (1988 & Supp. 1992). *Cf.* 6 C.J.S. *Arbitration* § 154 (1975) (discussing guidelines on the reviewability of arbitral awards for error). *See generally* Comment, *Some Problems Relating To Enforcement of Arbitration Awards Under the New California Arbitration Act*, 9 UCLA L. REV. 422 (1962) (discussing developments in the statutory law regarding arbitration).

13. For cases upholding the statute exclusively, see *Moncharsh*, 3 Cal. 4th at 26, 832 P.2d at 914, 10 Cal. Rptr. 2d 198 (citing Severtson v. Williams Constr. Co., 173 Cal. App. 3d 86, 220 Cal. Rptr. 400 (1985); State Farm Mut. Auto. Ins. Co. v. Guleserian, 28 Cal. App. 3d 397, 104 Cal. Rptr. 683 (1972)). For cases upholding the common-law rule, see *Moncharsh*, 3 Cal. 4th at 27, 832 P.2d at 915, 10 Cal. Rptr. 2d at 199 (citing Schneider v. Kaiser Found. Hosps., 215 Cal. App. 3d 1311, 264 Cal. Rptr. 227 (1989); Abbott v. California State Auto. Ass'n, 68 Cal. App. 3d 763, 137 Cal. Rptr. 580 (1977)).

B. Statement of the Case

Moncharsh was hired as an attorney by the law firm of Heily & Blase subject to an employment agreement that provided he would not cause clients of the firm to terminate their relationship, and if such should happen, Moncharsh would be required to reimburse the firm.[14] The agreement also contained an arbitration clause providing that an arbitrator would not have the power to change the terms of the agreement, with any arbitrator's decision being final and binding on the parties.[15]

Less than two years later, Moncharsh terminated his employment with Heily & Blase. The senior partner of the firm notified Moncharsh's clients that he would be representing them in Moncharsh's absence.[16] Six clients, however, decided to continue being represented by Moncharsh.[17] As a result, the firm sought to enforce the provision providing for reimbursement, and Moncharsh offered to settle for a lesser amount.[18] The firm refused the offer and the parties submitted the dispute to an arbitrator. Based on the briefs of both sides and two days of testimony, the arbitrator decided that Moncharsh was bound by the terms of the agreement.[19]

Moncharsh moved to have the award vacated on the ground that the

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14. *Moncharsh*, 3 Cal. 4th at 6, 832 P.2d at 900-01, 10 Cal. Rptr. 2d at 184-85. The relevant provision in the employment agreement, paragraph X-C, provided in pertinent part:

> Employee . . . agrees not to do anything to . . . cause or contribute to any of firm's clients terminating the attorney-client relationship with firm . . . . In the event that any firm client should terminate the attorney-client relationship with firm . . . then, in addition to any costs which client owes firm up to the time of such substitution, as to all fees which employee . . . may actually receive from that client or that client's successor attorney on any such cases, Blase will receive eighty percent (80%) of said fee and employee . . . will receive twenty percent (20%) of said fee.

Id.

15. The arbitration clause read in part: "Any dispute arising out of this Agreement shall be subject to arbitration . . . . No arbitrator shall have any power to alter, amend, modify or change any of the terms of this agreement. The decision of the arbitrator shall be final and binding on [firm] and [employee] . . . ." *Id.* at 7 n.1, 832 P.2d at 901 n.1, 10 Cal. Rptr. 2d at 185 n.1.

16. *Id.* at 6, 832 P.2d at 901, 10 Cal. Rptr. 2d at 185.

17. *Id.* Moncharsh had represented five of the six clients prior to his employment at Heily & Blase. The sixth client had retained Moncharsh shortly before Moncharsh left the firm. *Moncharsh*, 3 Cal. 4th at 6, 832 P.2d at 901, 10 Cal. Rptr. 2d at 185.

18. *Id.* at 6-7, 832 P.2d at 901, 10 Cal. Rptr. 2d at 185.

19. *Id.* at 7-8, 832 P.2d at 901, 10 Cal. Rptr. 2d at 185-86.

arbitrator erred. The trial court denied his petition because, under section 1286.2, the claimed error was not a legitimate ground for vacation, nor did the case fall under the common-law exception permitting review for error appearing on the face of the award.[20] Moncharsh appealed the trial court's decision. Both the court of appeal and the supreme court affirmed.[21]

II. TREATMENT

A. *Majority Opinion*

1. Arbitral Finality

The California Supreme Court first acknowledged the general rule that when parties agree to submit to arbitration, they are impliedly agreeing that the decision of the arbitrator is final.[22] The court also recognized that public policy strongly favors arbitration because it saves the parties time and the courts are relieved of some burdensome cases.[23] As suggested, the purpose of arbitration is to "put the dispute to rest".[24] The court explained that parties who contractually agree to submit their disputes to arbitration are presumed to know that the decision will be final and binding.[25] The court believed that permitting judicial review of arbitral decisions would deprive the parties of the advantages of the arbitration process, especially the benefit of ending the dispute promptly.[26] The court further reasoned that arbitrators possess the unique advantage of basing their decisions on broad principles of equality and justice rather than on formal legal principles.[27] Thus, arbitral awards are commonly immune from judicial review.[28]

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20. *Id.* at 8, 832 P.2d at 902, 10 Cal. Rptr. 2d at 186.

21. *Id.*

22. *Moncharsh*, 3 Cal. 4th at 10, 832 P.2d at 903, 10 Cal. Rptr. 2d at 187. The court further noted that, in this case, the arbitration clause in the agreement made the implied agreement express. The clause served as even stronger evidence that the parties intended to dispose of the dispute by arbitration. *Id.*

23. *Id.* at 9, 832 P.2d at 902, 10 Cal. Rptr. 2d at 186. The purpose of the policy favoring enforcement of arbitration decisions is to encourage parties to resolve their disputes privately. *Id.* at 9, 832 P.2d at 903, 10 Cal. Rptr. 2d at 187 (citing *Utah Constr. Co.*, 174 Cal. 156, 162 P. 631 (1916)).

24. *Id.* at 10, 832 P.2d at 903, 10 Cal. Rptr. 2d at 187 (citing Jonathan Yarowsky, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. REV. 936, 948-49 (1976)).

25. *Moncharsh*, 3 Cal. 4th at 9, 832 P.2d at 903, 10 Cal. Rptr. 2d at 187.

26. *Id.* at 10, 832 P.2d at 903, 10 Cal. Rptr. 2d at 187 (citing Victoria v. Superior Court, 40 Cal. 3d 734, 710 P.2d 833, 222 Cal. Rptr. 1 (1985)).

27. *Id.* at 10-11, 832 P.2d at 904, 10 Cal. Rptr. 2d at 188.

28. *Id.* at 11, 832 P.2d at 904, 10 Cal. Rptr. 2d at 188 (citing Case v. Alperson, 181 Cal. App. 2d 757, 5 Cal. Rptr. 635 (1960)).

Although the court recognized that, despite its many benefits arbitration can result in a mistake,[29] the court believed that the risk was reasonably mitigated by the parties' acceptance of that risk when they contracted to submit to arbitration. In addition, limited statutory grounds exist for judicial review of an arbitration award.[30] Thus, the general rule is that arbitral decisions are final and binding upon the parties.[31] The petitioner in the instant case unsuccessfully argued three exceptions to this general rule.[32]

2. Errors on the Face of the Award

Moncharsh first contended that judicial vacation of an arbitral award is permitted under common law where an error of law or fact appears on the face of the award and where the error causes substantial injustice.[33] Upon analyzing the case and statutory law in this area,[34] the court determined that recent decisions indicated a split of authority, with some courts upholding the common-law rule and others upholding the statutory grounds for review exclusively.[35] The court ultimately held that the only bases for vacation of an arbitrator's decision are those listed in section 1286.2.[36] The court commented on the fact that many decisions, both in California and in other jurisdictions, follow this rule.[37] The court further reasoned that because statutes in other states governing arbitration include error as a ground for review, the specific exclusion of such a ground in California's statute reveals the intent of the legislature that error not be a sufficient basis for vacation under section 1286.2.[38] In addition, the court observed that the Law Revision Commission, when considering the proposed adoption of section 1286.2, recommended that

29. *Id.*

30. *Moncharsh*, 3 Cal. 4th at 12, 832 P.2d at 905, 10 Cal. Rptr. 2d at 189. *See also* CAL. CIV. PROC. CODE §§ 1286.2, 1286.6 (West 1990). *See supra* note 12 for the language of §§ 1286.2 and 1286.6.

31. *Moncharsh*, 3 Cal. 4th at 13, 832 P.2d at 905, 10 Cal. Rptr. 2d at 189.

32. *Id.* at 13, 832 P.2d at 905-06, 10 Cal. Rptr. 2d at 189-90.

33. *Id.*

34. *See supra* notes 5-13 and accompanying text.

35. *See supra* note 13 and accompanying text.

36. *Moncharsh*, 3 Cal. 4th at 27-28, 832 P.2d at 915-16, 10 Cal. Rptr. 2d at 199-200.

37. *See supra* note 13 and accompanying text.

38. *Moncharsh*, 3 Cal. 4th at 25-26, 832 P.2d at 914, 10 Cal. Rptr. 2d at 198. For example, the court observed that § 1296, a statute governing public construction contract arbitration, allows for judicial review of errors of law. *Id.* (citing CAL. CIV. PROC. CODE § 1296 (West 1982 & 1992)).

"'[e]ven a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation, unless the error amounts to actual or constructive fraud,'"[39] and that "'no good reason exists to codify into the California statute the case law as it presently exists.'"[40] The court recognized that while Moncharsh's assertion was consistent with the early common-law rule, error was not one of the grounds specifically listed in the statute.[41] Thus, the court concluded that error could not be a proper basis for vacation of the award regardless of whether it is on the face of the award or causes substantial injustice.[42]

3. Scope of Arbitrator's Power

Moncharsh next argued that the arbitrator exceeded his powers on the ground that his decision was not properly based on legal principles.[43] The court recognized that when an arbitrator exceeds his powers, such is a ground for vacating an award under section 1286.2(d).[44] The court, however, stressed that arbitrators who "merely . . . assign an erroneous reason for their decision" have not exceeded their powers, and any holding to the contrary would, in effect, allow for judicial review of almost every arbitration award.[45] Furthermore, the court asserted that statutory law allows an arbitrator to resolve the entire merits of the matter submitted, which is precisely what the arbitrator did in this case.[46] The court concluded that since the arbitrator did not exceed his power, the award was not reviewable.[47]

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39. *Id.* at 25 n.10, 832 P.2d at 913 n.10, 10 Cal. Rptr. 2d at 197 n.10 (quoting *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REP. G-55 (1961)).

40. *Id.* at 25, 832 P.2d at 914, 10 Cal. Rptr. 2d at 198 (quoting *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS G-54 (1961)).

41. *Id.* at 26, 832 P.2d at 914, 10 Cal. Rptr. 2d at 198. The court viewed this exclusion as intentional by the legislature, illustrating that only limited judicial review was intended for private arbitration decisions. *Id.*

42. *Moncharsh*, 3 Cal. 4th at 27-28, 832 P.2d at 915-16, 10 Cal. Rptr. 2d at 199-200.

43. *Id.* at 13, 832 P.2d at 906, 10 Cal. Rptr. 2d at 190. The court noted, however, that Moncharsh failed to argue that the arbitrator went beyond the scope of the arbitration clause; instead, Moncharsh contended that the arbitrator exceeded his standard powers. *Id.* at 28, 832 P.2d at 916, 10 Cal. Rptr. 2d at 200.

44. *Id.* (citing CAL. CIV. PROC. CODE § 1286.2(d) (West 1982 & 1992)). *See also* 6 CAL. JUR. 3D *Arbitration and Award* § 80 (1988) (discussing when an arbitrator has exceeded his or her powers and the consequences of such action under § 1286.2(d)).

45. *Moncharsh*, 3 Cal. 4th at 28, 832 P.2d at 916, 10 Cal. Rptr. 2d at 200 (quoting O'Malley v. Petroleum Maintenance Co., 48 Cal. 2d 107, 111, 308 P.2d 9, 12 (1957)).

46. *Id.* (citing CAL. CIV. PROC. CODE §§ 1286.2(d), 1286.6(b),(c) (West 1982 & Supp. 1992)).

47. *Id.*

4. Illegality of the Contract Providing for Arbitration

Moncharsh argued finally that a vacation of the award was proper because a material clause of the employment contract was illegal and against public policy.[48] The court addressed this contention, noting that Moncharsh's failure to object to arbitration, in itself, did not waive further review of the issue.[49] The court next addressed Moncharsh's argument that the arbitral award should be reviewable simply on the illegality of the employment agreement.[50] In distinguishing the authority cited by Moncharsh, the court noted that the contracts in those cases were illegal in their entirety, whereas Moncharsh had only alleged that one clause in his contract was illegal.[51] Although the court recognized the possibility of judicial review on such a ground, because of the strong public policy favoring arbitration, the court concluded that review should occur in only the most limited of circumstances.[52] The court held that this was not such a circumstance and denied review on that ground.[53]

B. Concurring and Dissenting Opinion

Although Justice Kennard concurred with the result of the majority's opinion, she expressed strong disagreement with the court's analysis. She based her criticism on what she saw as the court's misjudgment of its charge to uphold justice over and above all legal principles.[54] According to Justice Kennard, to uphold justice was the initial and overriding duty of the judiciary.[55] Accordingly, she reasoned that by applying the statute

48. *Id.* at 13, 832 P.2d at 906, 10 Cal. Rptr. 2d at 190.

49. *Id.* at 29-31, 832 P.2d at 916-18, 10 Cal. Rptr. 2d at 200-02.

50. *Moncharsh*, 3 Cal. 4th at 31-32, 832 P.2d at 918-19, 10 Cal. Rptr. 2d at 202-03 (citing Loving & Evans v. Blick, 33 Cal. 2d 603, 204 P.2d 23 (1949); All Points Traders, Inc. v. Barrington Assocs., 211 Cal. App. 3d 723, 259 Cal. Rptr. 780 (1989)). Moncharsh relied on these cases because they allowed for judicial review of arbitration decisions involving contracts that were illegal. *Id.*

51. *Id.*

52. *Id.* at 32, 832 P.2d at 919, 10 Cal. Rptr. 2d at 203. For example, the court believed that review might be appropriate in cases where arbitral finality would lead to a result contrary to a party's statutory rights. *Id.*

53. *Moncharsh*, 3 Cal. 4th at 33, 832 P.2d at 919, 10 Cal. Rptr. 2d at 203.

54. *Id.* at 34, 832 P.2d at 920, 10 Cal. Rptr. 2d at 204 (Kennard, J., concurring and dissenting).

55. *Id.* (Kennard, J., concurring and dissenting).

regardless of whether it resulted in substantial injustice, the court had erred, and thus, misjudged its duty.[56]

Justice Kennard asserted that while parties who agree to arbitration are "deemed to have accepted the increased risk of error," reasonable contracting parties should never be expected to accept the risk of being bound by a *substantially unjust result.*[57] Justice Kennard sharply criticized the court for equating substantial injustice with mistake.[58] She agreed with the majority, however, that routine judicial review of arbitral awards based on mere mistake would be contrary to the policy of arbitration.[59] Nevertheless, she believed that substantial injustice was a proper ground for judicial review.[60]

Next, Justice Kennard criticized the authority cited by the majority to support its decision.[61] She believed that the majority relied on "subtle shifts" in the case law, rather than on the bulk of cases holding that "courts will not knowingly perpetuate and enforce an arbitration award that is substantially unjust."[62] Furthermore, the dissent asserted that the majority misinterpreted the case law as narrowing the circumstances which would allow review to a degree greater than the cases actually required.[63]

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56. *Id.* at 34-35, 832 P.2d at 920, 10 Cal. Rptr. 2d at 204 (Kennard, J., concurring and dissenting).

57. *Id.* at 35, 832 P.2d at 920, 10 Cal. Rptr. 2d at 204 (Kennard, J., concurring and dissenting). Justice Kennard described the potential risk of being bound by a substantially unjust result as "unnecessary and self-destructive." *Moncharsh*, 3 Cal. 4th at 35, 832 P.2d at 920, 10 Cal. Rptr. 2d at 240. (Kennard, J., concurring and dissenting).

58. *Id.* at 35, 832 P.2d at 920-21, 10 Cal. Rptr. 2d at 204-05 (Kennard, J., concurring and dissenting) (citing CAL. CONST. art. VI, § 13 (only unjust judgments may be vacated for error)).

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

60. *Id.* at 35, 832 P.2d at 921, 10 Cal. Rptr. 2d at 205 (Kennard, J., concurring and dissenting).

61. *Id.* at 36, 832 P.2d at 921, 10 Cal. Rptr. 2d at 205 (Kennard, J., concurring and dissenting).

62. *Moncharsh*, 3 Cal. 4th at 36-37, 832 P.2d at 921-22, 10 Cal. Rptr. 2d at 205-06 (Kennard, J., concurring and dissenting). Justice Kennard implied that the court had to search for authority to overrule the common-law principle allowing for judicial review of substantially unjust arbitral awards. *Id.* at 37, 832 P.2d at 922, 10 Cal. Rptr. 2d at 206 (Kennard, J., concurring and dissenting).

63. *Id.* (Kennard, J., concurring and dissenting). According to the dissent, the majority misplaced its reliance on *Pacific Vegetable*, a case that, in actuality, reaffirms the common-law principle that arbitral awards are reviewable to prevent "'misuse of the proceeding, where . . . *gross error*, or mistake has been carried into the award to the *substantial prejudice* of a party to the proceeding.'" *Id.* (Kennard, J., concurring and dissenting) (quoting Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 240, 174 P.2d 441, 449. (1946)).

Lastly, Justice Kennard disagreed with the majority's interpretation of the legislative intent behind section 1286.2.[64] She did not believe that the statute was intended to alter the common-law grounds for judicial review of arbitration decisions.[65] Justice Kennard believed that the majority had quoted from the Law Revision Commission out of context,[66] in that the commission was not attempting to codify the judicial scope of review.[67]

Justice Kennard made clear that her concurrence with the majority's result was grounded solely in her perception that this case did not result in substantial injustice.[68]

III. IMPACT

In *Moncharsh v. Heily & Blase*, the court ruled that, subject to a few limited exceptions, arbitration awards are generally held to be final and binding on the parties and the only grounds for judicial review are set forth in sections 1286.2 and 1286.6 of the California Civil Procedure Code.[69] In so holding, the court reconciled a growing split in judicial authority. The court effectively overruled the use of a long-standing common-law rule, and mandated exclusive use of the statute.

This decision affords arbitrators significantly more power to render decisions grounded solely on general principles of justice with little if any reliance on legal principles. While on the one hand this departure

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64. *Id.* at 38, 832 P.2d at 922-23, 10 Cal. Rptr. 2d at 206-07 (Kennard, J., concurring and dissenting).

65. *Moncharsh*, 3 Cal. 4th at 38, 832 P.2d at 922-23, 10 Cal. Rptr. 2d at 206-07 (Kennard, J., concurring and dissenting).

66. *See supra* note 39 and accompanying text. Justice Kennard claimed that the quote used by the majority was not a part of the commission's recommendations on judicial review, but instead, was derived from another area of the recommendations. *Moncharsh*, 3 Cal. 4th at 38, 832 P.2d at 923, 10 Cal. Rptr. 2d at 207 (Kennard, J., concurring and dissenting).

67. .

> '*Nothing in the California statute defines the permissible scope of review by the courts* . . . . Neither the Uniform Arbitration Act nor other state statutes attempt to express the exact limits of court review of arbitration awards. And no good reason exists to codify into the California statute the case law as it presently exists.'

Id. (Kennard, J., concurring and dissenting) (quoting *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS G-53-G-54 (1961)).

68. *Id.* at 40, 832 P.2d at 924, 10 Cal. Rptr. 2d at 208 (Kennard, J., concurring and dissenting).

69. *Id.* at 33, 832 P.2d at 919, 10 Cal. Rptr. 2d at 203.

from traditional legal analysis might provide an added incentive for contracting parties to employ an arbitration clause, this increased power to render a decision fraught with legal errors might result in some abuse by arbitrators. Nevertheless, this case serves to clarify the law regarding judicial review of arbitration decisions, and thus, eliminates much of the uncertainty in this area.

NANCY G. DRAGUTSKY

III. CIVIL PROCEDURE

A. *Expert witness fees awarded under subdivision (c) of section 998 of the Code of Civil Procedure constitute non-routine fees that are not automatically stayed on appeal, absent an appeal bond or other undertaking:* **Bank of San Pedro v. Superior Court.**

I. INTRODUCTION

In *Bank of San Pedro v. Superior Court*,[1] the California Supreme Court determined the effect of a party's appeal on expert witness fees awarded under section 998(c).[2] The court concluded that when expert

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1. 3 Cal. 4th 797, 838 P.2d 218, 12 Cal. Rptr. 2d 696 (1992). In *Bank of San Pedro*, Wallace A. Goodstein brought suit against the Bank of San Pedro ("Bank"). *Id.* at 799, 838 P.2d at 219, 12 Cal. Rptr. 2d at 697. The Bank offered to settle and Goodstein rejected the offer. *Id.* The trial court granted a nonsuit against Goodstein. *Id.* Consequently, the Bank sought costs and fees pursuant to section 998 of the Code of Civil Procedure [all further references to code sections are to the Code of Civil Procedure unless otherwise indicated]. *Id.* The trial court ultimately awarded the Bank $116,184.05 in expert witness fees and $22,237.62 in other costs on the ground that the trial's outcome was less favorable to Goodstein than the settlement offer he had previously rejected. *Bank of San Pedro*, 3 Cal. 4th 799, 838 P.2d at 219, 12 Cal. Rptr. 2d at 697.

Goodstein appealed the award, but failed to file a bond or arrange for any payment of the award. *Id.* The Bank sought to recover the expert witness fees and Goodstein refused, believing that the judgment was automatically stayed while his appeal was pending. *Id.* The trial court refused to order collection of the fees and costs and the court of appeal subsequently granted a writ of mandamus filed by the Bank. *Id.* The court of appeal declared that the expert witness fees were extraordinary, and thus, not automatically stayed on appeal under section 998. *Id.* The California Supreme Court affirmed. *Bank of San Pedro*, 3 Cal. 4th 799, 838 P.2d at 219, 12 Cal. Rptr. 2d at 697.

2. *Id.* at 804-05, 838 P.2d at 223, 12 Cal. Rptr. 2d at 701. Section 998(c) requires that a plaintiff pay the costs incurred by the defendant when a reasonable settlement offer is rejected and a more favorable judgment is not obtained. CAL. CIV. PROC.

witness fees are awarded under section 998(c), they are considered non-routine and are therefore not automatically stayed upon the filing of an appeal.[3]

II. ANALYSIS

The court articulated several reasons why the execution of section 998(c) costs are not automatically stayed upon the filing of an appeal.[4] The court first determined that the section 998(c) expert witness fees awarded by the trial court were of a non-routine nature.[5] A losing party as well as a prevailing party may recover costs when a prior settlement offer ultimately proves higher than the judgment.[6] Such costs, however, are not considered routine. In addition, because the award of expert witness fees is completely within the discretion of the trial court, they can be distinguished from routine costs which are awarded as a matter of right.[7]

The court looked to the legislature's intent in affirming the court of appeal's rationale.[8] The supreme court reasoned that because expert

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CODE § 998(c) (West 1980).

3. *Bank of San Pedro*, 3 Cal. 4th at 804-05, 838 P.2d at 222-23, 12 Cal. Rptr. 2d at 700-01.

4. *Id.* at 803, 838 P.2d at 222, 12 Cal. Rptr. 2d at 700. Section 917.1 states that an appeal will not stay the enforcement of a judgment that directs the payment of money. CAL. CIV. PROC. CODE § 917.1 (West 1980). Practically all judgments, however, involve the payment of money, therefore, the court looked to whether the judgment at issue was for routine costs before determining whether the execution of such costs should be stayed. *Bank of San Pedro*, 3 Cal. 4th at 801, 838 P.2d at 220-21, 12 Cal. Rptr. 2d at 698-99. *See also* Vadas v. Sosnowski, 210 Cal. App. 3d 471, 474, 258 Cal. Rptr. 374, 376 (1989) (holding that a judgment for costs alone is not a judgment directing the payment of money and may properly be stayed); Chamberlain v. Dale's R.V. Rentals, Inc., 188 Cal. App. 3d 356, 362, 232 Cal. Rptr. 785, 788 (1986) (setting forth the principle for distinguishing routine costs from nonroutine costs).

5. *Bank of San Pedro*, 3 Cal. 4th at 803, 838 P.2d at 222, 12 Cal. Rptr. 2d at 700.

6. *Id.* Pursuant to Code of Civil Procedure section 1032(b), routine costs may not be awarded to a losing party. *Id.* Section 1032(b) states in relevant part that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." CAL. CIV. PROC. CODE § 1032(b) (West 1980). *See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE *Actions* § 286 (3d. ed. 1985) (right to recover attorney fees and costs); 16 CAL. JUR. 3D *Costs* § 62 (1983) (right to recover witness fees); 6 CAL. PRACTICE *Costs and Attorneys' Fees* §§ 52:2-6 (1980) (factors affecting recovery of costs); 20 AM. JUR. 2D *Costs* § 4-25 (1965) (discussing an individual's right to recover costs).

7. *Bank of San Pedro*, 3 Cal. 4th at 803, 838 P.2d at 222, 12 Cal. Rptr. 2d at 700. *See supra* text accompanying note 5.

8. *Id.* at 804, 838 P.2d at 222, 12 Cal. Rptr. 2d at 700. It was necessary for the

witness fees awarded under section 998(c) direct the payment of money, such fees fall within the purview of section 917.1(a),[9] and thus, are not automatically stayed upon the filing of an appeal.[10] The court concluded that the legislature's intended policy of encouraging settlement was satisfied by holding that expert witness fees are not automatically stayed pending an appeal.[11] To permit a party to stay the execution of such fees by filing an appeal, the underlying policy of encouraging settlements by awarding the costs of an opposing party's expert witness would be frustrated.[12]

III. CONCLUSION

In holding that expert witness fees awarded under section 998(c) are nonroutine fees which are not automatically stayed on appeal, the court has effectively encouraged litigants to accept settlement offers.[13] The requirement of an appeal bond or other undertaking serves to further reinforce the potential penalty a party may face should they decide to decline a settlement offer.[14]

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court to look to the legislative intent behind the enactment of the relevant statutes because the issue addressed relied solely on statutory law, not common law principles. *Id.* at 800, 838 P.2d at 219, 12 Cal. Rptr. 2d at 697.

9. Section 917.1(a) states in relevant part:

> The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given.

CAL. CIV. PROC. CODE § 917.1(a) (West Supp. 1993). *See generally* 9 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* §§ 205-07 (3d ed. 1985) (defining automatic stay of judgment); 8 CAL. PRACTICE *Costs* § 61:372 (1968) (discussing right to costs on appeal).

10. *Bank of San Pedro*, 3 Cal. 4th at 800, 838 P.2d at 219, 12 Cal. Rptr. 2d at 697. A literal reading of section 917.1 could lead to the inclusion of practically all judgments, thereby abolishing the existence of an automatic stay for any judgment based on the filing of an appeal. *Id.* The court, however, determined the critical factor to be whether the costs in question were routine, because only nonroutine costs require an appeal bond or other undertaking in order to stay execution. *Id.*

11. *Id.* at 804, 838 P.2d at 222-23, 12 Cal. Rptr. 2d at 700-01.

12. *Id.* at 804, 838 P.2d at 222, 12 Cal. Rptr. 2d at 700.

13. *Id.* at 803, 838 P.2d at 222, 12 Cal. Rptr. 2d at 700. *See supra* note 7.

14. *Bank of San Pedro*, 3 Cal. 4th at 805, 838 P.2d at 223, 12 Cal. Rptr. 2d at 701. An undertaking is defined as a "promise or security in any form." BLACK'S LAW DICTIONARY 794 (Abr. 5th ed. 1983).

B. *Parents who knowingly and voluntarily plead "no contest" to allegations under section 300(e) of the Welfare and Institutions Code waive their right to appeal the applicability of the section to their conduct:* **In re Troy Z.**

I. INTRODUCTION

In re Troy Z.,[1] presented the California Supreme Court with the question of whether parents entering a "no contest" plea to a petition which alleged that their child came within the jurisdiction of the juvenile court due to their conduct may appeal on the ground that their conduct does not constitute the required neglect.[2] The supreme court held that parents

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1. 3 Cal. 4th 1170, 840 P.2d 266, 13 Cal. Rptr. 2d 724 (1992). Chief Justice Lucas authored the majority opinion. Justices Mosk, Panelli, Kennard, Arabian, Baxter, and George concurred.

2. *Id.* at 1172, 840 P.2d at 267, 13 Cal. Rptr. 2d at 725.

In 1989, the defendants' son, Troy, was admitted to a hospital. Physicians concluded that he was suffering from emaciation caused by starvation, and that such starvation would continue if the child was sent home with his parents. The hospital placed a protective hold on Troy and contacted the police and the San Diego County Department of Social Services [hereinafter DSS]. The DSS filed a petition to have Troy declared a dependent of the court. *Id.* at 1174, 840 P.2d at 268, 13 Cal. Rptr. 2d at 726.

In order to determine whether Troy's parents' conduct fell within § 300 of the Welfare and Institutions Code, the court held a jurisdictional hearing at which both parents entered pleas of "no contest." *Id.* Having established that these pleas were made knowingly and voluntarily, the court concluded that it had jurisdiction. *Id.* Subsequently, at a disposition hearing for the purposes of determining whether Troy should be reunified with his parents, the court denied reunification. *In re Troy Z.*, 3 Cal. 4th at 1174, 840 P.2d at 268, 13 Cal. Rptr. 2d at 726.

Both of Troy's parents filed motions to withdraw their "no contest" pleas, claiming that they misunderstood the meaning of the section. *Id.* However, the court found no mistake of law and denied the defendants' motions because counsel revealed that their pleas were tactical decisions entered into only after extensive discussion of the consequences. *Id.* at 1178, 840 P.2d at 271, 13 Cal. Rptr. 2d at 729.

At the subsequent selection and implementation hearing, the court found that adoption would be in Troy's best interest. *Id.* at 1179, 840 P.2d at 271, 13 Cal. Rptr. 2d at 729. Accordingly, all parental rights were terminated and Troy was referred to the DSS for permanent adoption.

Both parents appealed, alleging that the § 300(e) finding was erroneous and that insufficient evidence was presented to support the termination order. The court of appeal concluded that starvation did not constitute "severe physical abuse" under § 300(e), and reversed in part the jurisdictional finding below. *Id.* at 1179, 840 P.2d at 271, 13 Cal. Rptr. 2d at 729-30. In addition, the court of appeal reinstated the parental rights of the defendants, and remanded the case to the trial court with

who knowingly and voluntarily plead "no contest" to allegations under section 300(e) of the Welfare and Institutions Code waive their right to appeal the applicability of the section to their conduct.[3]

II. ANALYSIS

The California Supreme Court began its analysis by examining the well-established rule[4] that in a criminal proceeding, a defendant may not appeal the issue of guilt after having plead either "nolo contendere" or "guilty."[5] The court stated that the same rule applies in the event of a "no contest" or "nolo contendere" plea.[6]

The court extended this rule to the case at hand, finding that in a juvenile proceeding a "no contest" plea is an admission[7] and is equivalent to

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instructions to offer reunification services. *In re Troy Z.*, 3 Cal. 4th at 1179, 840 P.2d 271-72, 13 Cal. Rptr. 2d at 730.

3. *Id.* at 1181, 840 P.2d at 273, 13 Cal. Rptr. 2d at 731. Section 300(e) of the Welfare and Institutions Code states that "[a]ny minor . . . is within the jurisdiction of the juvenile court . . . [if the minor] has suffered severe physical abuse by a parent . . . . '[S]evere physical abuse' means . . . the willful, prolonged failure to provide adequate food." CAL. WELF. & INST. CODE § 300(e) (West 1984 & Supp. 1993) [hereinafter section 300(e)].

See generally 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 143 (3d ed. 1985); 32 CAL. JUR. 3D, *Family Law* §§ 177-80 (1977) (custody, protection, and welfare of minors); 32 CAL. JUR. 3D, *Family Law* § 210 (1977) (cruel treatment and neglect by parents); 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 3, 156-7 (9th ed. 1989) (neglected and abused children and parental authority); 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 182, 188-90 (9th ed. 1989) (dependency proceedings, cruelty, and neglect).

4. *In re Troy Z.*, 3 Cal. 4th at 1179-80, 840 P.2d at 272, 13 Cal. Rptr. 2d at 730.

5. *Id.* In People v. Pinon, 96 Cal. App. 3d 904, 158 Cal. Rptr. 425 (1979), the defendant entered a plea of guilty to violating the statute that prohibits possession of a firearm by anyone who has been convicted of a felony. *Id.* at 907, 158 Cal. Rptr. at 427. The defendant appealed, claiming that he was convicted only of a misdemeanor and not the required felony. The court of appeal stated that "these issues may not be raised on appeal: since they go to the question of guilt or innocence, they have been 'removed from consideration' by the guilty plea." *Id.* at 909-10, 158 Cal. Rptr. at 428. The *Pinon* court went on to say that a defendant's guilty plea operates "to remove such issues from consideration as a plea of guilty admits all matters essential to the conviction." *Id.* at 910, 158 Cal. Rptr. at 428 (citing People v. DeVaughn, 18 Cal. 3d 889, 895-96, 558 P.2d 872, 875, 135 Cal. Rptr. 786, 789 (1977)).

See generally 6 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL PROCEDURE, *Appeal* § 3141 (2d ed. 1989) (stating that a judgment of conviction on a plea is ordinarily not appealable).

6. *In re Troy Z.*, 3 Cal. 4th at 1181, 840 P.2d at 273, 13 Cal. Rptr. 2d at 731. *See* People v. Shults, 151 Cal. App. 3d 714, 718-19, 199 Cal. Rptr. 33, 35-36 (1984) (stating that a plea of nolo contendere admits the evidence before the court and an appeal cannot subsequently be filed contesting the sufficiency of that evidence).

7. 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 686 (9th ed. 1989 & Supp. 1993) (stating that a plea of no contest is an admission of the allega-

a plea of "guilty" or "nolo contendere" in a criminal proceeding.[8] Upon review of the record, the court found that the parents had knowingly and voluntarily entered a plea of "no contest" and consequently had admitted all the elements required for application of the statute.[9] In light of the plea entered by the defendants, the court found that the defendants had effectively waived their right to an appeal of the applicability of the statute to their conduct.[10]

III. CONCLUSION

In denying parents the right to appeal the applicability of section 300(e) once a plea of "no contest" has been knowingly and voluntarily entered, the court has promoted the legislative intent of expediting the adoption of children who will not benefit from reunification with their natural parents.[11] In addition, the court's holding extends to the juvenile courts, the criminal law principle that a guilty or no contest plea waives the right to file an appeal based on the sufficiency of the evidence.[12]

In either context, the court's holding equates a plea of "nolo contendere" or "no contest" to an admission of guilt. As a practical matter, the holding of the court may actually create a chilling effect by dissuading parents from entering pleas of "no contest" as a tactical move. Although

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tions).

8. *In re Troy Z.*, 3 Cal. 4th at 1181, 840 P.2d at 273, 13 Cal. Rptr. 2d at 731. The court specified that a plea of "no contest" during a jurisdictional hearing admits all matters required for the court to exercise jurisdiction. *Id.*

9. *Id.* In order to determine whether the pleas were made "voluntarily and knowingly," the court inquired whether counsel had explained the consequences of such a plea to their respective clients and both answered affirmatively. The court then asked the parents if they understood the consequences of their pleas and they both answered affirmatively. *Id.* at 1176, 840 P.2d at 269, 13 Cal. Rptr. 2d at 727. *See generally* 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 143 (3d ed. 1985) (stating that judgment entered with consent of defendant cannot be appealed); 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 686 (9th ed. 1989 & Supp. 1993) (stating that a no contest plea admits allegations of the petition).

10. *In re Troy Z.*, 3 Cal. 4th at 1181, 840 P.2d at 273, 13 Cal. Rptr. 2d at 731.

11. *Id.* at 1182, 840 P.2d at 273, 13 Cal. Rptr. 2d at 273. *See* Adoption of Alexander S., 44 Cal. 3d 857, 750 P.2d 778, 245 Cal. Rptr. 1 (1988).

12. *In re Troy Z.*, 3 Cal. 4th at 1181, 840 P.2d at 273, 13 Cal. Rptr. 2d at 731. *See supra* note 5 and accompanying text.

such pleas may prove advantageous in the parents' subsequent criminal case, the court's current holding attaches a price: the loss of the right to deny culpability and the attendant risk of losing one's child.

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IV. CONSTITUTIONAL LAW

Section 57103 of the California Government Code, which limits the right to vote on issues of municipal reorganization to residents within the area to be reorganized, does not violate the Equal Protection Clause of the Fourteenth Amendment: **Board of Supervisors v. Local Agency Formation.**

I. INTRODUCTION

In *Board of Supervisors v. Local Agency Formation*[1] the California Supreme Court addressed the issue of whether section 57103 of the California Government Code[2], which denies county residents the right to vote on municipal incorporation[3] unless they are residents of the area to be incorporated,[4] violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[5] The court held that sec-

1. 3 Cal. 4th 903, 838 P.2d 1198, 13 Cal. Rptr. 2d 245 (1992). Justice Mosk delivered the unanimous opinion of the court. *Id.* at 906, 838 P.2d at 1199, 13 Cal. Rptr. 2d at 246. Chief Justice Lucas, and Justices Panelli, Kennard, Arabian, Baxter, and George concurred. *Id.* at 925, 838 P.2d at 1212, 13 Cal. Rptr. 2d at 259.

2. Section 57103 states in pertinent part: "any resolution ordering a change of organization or reorganization subject to confirmation of the voters, the conducting authority shall call an election: (a) Within the territory of each city or district ordered to be incorporated . . . ." CAL. GOV'T CODE. § 57103 (West Supp. 1993). [Hereinafter all statutory references are to the California Government Code].

3. "Incorporation" is defined in the California Government Code as "the incorporation, formation, creation, and establishment of a city with corporate powers." CAL. GOV'T CODE § 56043 (West Supp. 1993). *See generally* 45 CAL. JUR. 3D *Municipalities* § 2 (1978) (defining municipal corporation, such as an incorporated city, as a specified region created by government for a public purpose).

4. For an overview of voting restrictions effecting incorporation elections, see generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 229 (9th ed. 1988) (discussing classifications of voters for elections concerning incorporation of a city or annexation).

5. *Board of Supervisors*, 3 Cal. 4th at 906-07, 838 P.2d at 1199, 13 Cal. Rptr. 2d at 246-47. *See* U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7.

tion 57103 was constitutional because it bore a fair relationship to a legitimate government purpose.[6]

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[7] Although the Equal Protection Clause does not expressly confer a right to vote, the Supreme Court has interpreted the clause as establishing a fundamental right to vote.[8] Therefore, the restriction on the right to vote present in section 57103 raises equal protection issues.[9]

In 1986, residents of Citrus Heights seeking municipal incorporation petitioned the Sacramento County Agency Formation Commission (hereinafter the Commission).[10] In accordance with section 57103, the Commission ordered a confirming election to be held only within the proposed city's territory.[11] The plaintiffs[12] filed a complaint alleging that the statute deprived them of their right to vote on the incorporation issue, thereby violating the Equal Protection Clause.[13] The trial court found the limitation on voting rights constitutional.[14] The court of appeal disagreed and declared section 57103 unconstitutional.[15] After re-

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6. *Board of Supervisors*, 3 Cal. 4th at 923, 838 P. 2d at 1211, 13 Cal. Rptr. at 258.

7. U.S. CONST. amend. XIV, § 1.

8. *Board of Supervisors*, 3 Cal. 4th at 913, 838 P.2d at 1204, 13 Cal. Rptr. 2d at 251 (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

9. *Id.*

10. *Id.* at 907-08, 838 P.2d at 1200, 13 Cal. Rptr. 2d at 247.

11. *Id.* at 908, 838 P.2d at 1200, 13 Cal. Rptr. 2d at 247-48. *See supra* note 2 for statutory text.

12. The plaintiffs included the Sacramento County Board of Supervisors, the Sacramento County Deputy Sheriffs' Association, and other county sponsored organizations. *Board of Supervisors*, 3 Cal. 4th at 908, 838 P.2d at 1200, 13 Cal. Rptr. 2d at 247.

13. *Id.* at 908, 838 P.2d at 1200-01, 13 Cal. Rptr. 2d at 247-48. *See also*, Ethan B. Lipsig, Comment, *Annexation Elections and the Right to Vote*, 20 UCLA L. REV. 1093, 1113 n.96 (1973) (stating "When tax rates, service levels, and traffic patterns may change in the city, the territory, or the county, . . . those living on the land to be annexed are not the only individuals who have a substantial stake in the outcome of the election."); Note, *The Right to Vote in Municipal Annexations*, 88 HARV. L. REV. 1571, 1578-79 (1975)(asserting that residents of an annexing city, as well as the group to be annexed, care about the welfare of their area, and therefore, forbidding either region an election would appear invalid).

14. *Board of Supervisors*, 3 Cal. 4th at 908, 838 P.2d at 1202, 13 Cal. Rptr. 2d at 248.

15. *Id.* at 908-09, 838 P.2d at 1201, 13 Cal. Rptr. 2d at 248. The court of appeal determined that the potential voters had a significant interest in the incorporation, and therefore, disenfranchisement of the voters was subject to strict scrutiny. *Id.* at

view, the California Supreme Court held that section 57103 was a rational means of achieving a legitimate state purpose, and therefore, did not violate the Equal Protection Clause.[16]

II. TREATMENT

In determining the constitutionality of section 57103, the court first addressed the issue of whether to apply the strict scrutiny or rational basis standard of review.[17] The court noted that, in general, regulations impairing the fundamental right to vote are subject to strict scrutiny review.[18] In this case, however, the court determined that the rational basis test should apply.[19] The court reasoned that because a state has wide discretion in boundary modification, the method of municipal incorporation used justified a finding that "city and noncity residents possessed genuinely different relevant interests."[20] Further, the court noted that the United States Supreme Court applied the rational basis test to review a similar statute.[21] Therefore, the court concluded that the rational basis

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909, 838 P.2d at 1201, 13 Cal. Rptr. 2d at 248.

16. *Id.* at 923-24, 838 P.2d at 1211, 13 Cal. Rptr. 2d at 258.

17. *Id.* at 913, 838 P.2d at 1204, 13 Cal. Rptr. 2d at 251. The strict scrutiny test requires that the "classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible." *Id.*

In contrast, the rational basis test is a lower standard necessitating only a classification "rationally related to a legitimate governmental purpose." *Id.* (quoting Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985)).

18. *Board of Supervisors*, 3 Cal. 4th at 913, 838 P.2d at 1204, 13 Cal. Rptr. 2d at 251. *See generally* California Supreme Court Survey, *Citizens Against Forced Annexation v. Local Agency Formation Comm.*; *Fullerton Join Union High School District v. State Board of Education*, 11 PEPP. L. REV. 187, 212 (1983) (reviewing the California Supreme Court's affirmation that franchise restrictions affecting annexation are subject to the strict scrutiny standard of review).

19. *Board of Supervisors*, 3 Cal. 4th at 917, 838 P.2d at 1206, 13 Cal. Rptr. at 253. The court concluded that section 57103 "touches on the right to vote," but is "insufficiently implicated" to require strict scrutiny. *Id. But see* Curtis v. Board of Supervisors, 7 Cal. 3d 942, 955, 501 P.2d 537, 546, 104 Cal. Rptr. 297, 306 (1972) (holding that classifications affecting voting rights are subject to a strict standard).

20. *Id.* at 916, 838 P.2d at 1206, 13 Cal. Rptr. 2d at 253. The court cited Hunter v. Pittsburgh, 207 U.S. 161, 179 (1907), where the Supreme Court declared that "the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." *See also The Right to Vote in Municipal Annexations*, *supra* note 13, at 1579-81 (discussing courts' willingness to find annexation laws valid under a rational basis test after *Hunter*).

21. *Board of Supervisors*, 3 Cal. 4th at 916, 838 P.2d at 1206, 13 Cal. Rptr. 2d at 253 (citing Lockport v. Citizens for Community Action, 430 U.S. 259 (1977)). In *Lockport*, a statute required separate majorities of both city and noncity residents to

standard of review should be applied.[22]

The court then examined whether section 57103 satisfied rational basis scrutiny.[23] The court found that the statute promoted a legitimate public purpose[24] by limiting the election to those residents of the area seeking to incorporate.[25] Therefore, the court held that section 57103 did not violate the Equal Protection Clause.[26]

III. CONCLUSION

The California Supreme Court held that section 57103 of the California Government Code does not violate the Equal Protection Clause because it bears a rational basis to a legitimate public purpose.[27] The court applied the rational basis standard of review, thereby setting a low standard for a state to justify denying county residents outside the incorporation area the right to vote in local municipal incorporation elections.

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vote in an election to approve a new county charter. *Lockport*, 430 U.S. at 261-62. A group of county voters claimed they were being denied equal representation. *Id.* at 263. The Supreme Court concluded that the classification did not violate the Equal Protection Clause. *Id.* at 272-73.

22. *Board of Supervisors*, 3 Cal. 4th at 917, 838 P.2d at 1206, 13 Cal. Rptr. 2d at 253. In addition, the court concluded that its plurality opinion in Fullerton Joint Union High School District v. State Board of Education, 32 Cal. 3d 779, 654 P.2d 168, 187 Cal. Rptr. 398)(1982)(plurality opinion) lacked authority as precedent. *Board of Supervisors*, 3 Cal. 4th at 918, 838 P.2d at 1207, 13 Cal. Rptr. 2d at 254. In *Fullerton*, the court applied the strict scrutiny test to an education board's decision to hold an election only within an area attempting to break away from the county school district. *Fullerton*, 32 Cal. 3d at 803, 654 P.2d at 184, 187 Cal. Rptr. at 414. The court concluded that excluding county residents was unconstitutional because no compelling state interest existed. *Id.* at 806, 654 P.2d at 186-87, 187 Cal. 7 Rptr. at 416-17.

23. *Board of Supervisors*, 3 Cal. 4th. at 923, 838 P.2d at 1211, 13 Cal. Rptr. at 258. The court indicated that the statute must have a "fair relationship to a legitimate public purpose." *Id.*

24. *See* CAL. GOV'T. CODE § 56001 (West Supp. 1993) (finding the state's purpose in enacting the statute is "to encourage orderly growth and development which are essential to the social, fiscal, and economic well-being of the state").

25. *Board of Supervisors*, 3 Cal. 4th at 923, 838 P.2d at 1211, 13 Cal. Rptr. 2d at 258.

26. *Id.* at 924, 838 P.2d at 1211, 13 Cal. Rptr. 2d at 258.

27. *Id.* at 923, 838 P.2d at 1210, 13 Cal. Rptr. 2d at 257.

As a result, county residents outside the incorporation area cannot cast an opposing vote to an incorporation, but instead, must persuade city residents to do so for them.

KIMBERLY J. HERMAN

V. CONTRACT LAW

When experienced business parties place a choice-of-law provision in their contract, the chosen law applies to all contractual claims that arise, as well as any noncontractual causes of action that stem from the underlying contract: **Nedlloyd Lines B.V. v. Superior Court.**

I. INTRODUCTION

California courts have generally followed the Second Restatement approach to conflict of laws problems when adjudicating disputes arising from contractual relationships.[1] In *Nedlloyd Lines B.V. v. Superior Court*,[2] the issue before the California Supreme Court was whether a choice-of-law provision in a contract between sophisticated multi-national parties should be enforced, and if so, whether the provision should also apply to a related noncontractual cause of action.[3] The supreme

1. 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 40 (9th ed. 1987) (noting that California has adopted the Second Restatement approach). California courts generally defer to the Restatement Second of Conflict of Laws when reviewing freely negotiated choice-of-law clauses contained within parties' contracts. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). *Compare* Harold W. Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 758-79 (1974) (describing the procedural analysis employed in California under the Second Restatement) *with* Albert A. Ehrenzweig, *Choice of Law in California—A "Prestatement,"* 21 UCLA L. REV. 781, 784-93 (1974) (viewing the approach employed by California courts as merely inchoate specific rules and not general principles).

2. 3 Cal. 4th 459, 834 P.2d 1148, 11 Cal. Rptr. 2d 330 (1992). Justice Baxter authored the court's opinion with Chief Justice Lucas and Justices Arabian and George concurring. Justice Panelli wrote a concurring and dissenting opinion in which Justice Mosk joined. *Id.* at 472-74, 834 P.2d at 1156-57, 11 Cal. Rptr. 2d at 338-39 (Panelli, J., concurring and dissenting). Justice Kennard wrote a separate concurring and dissenting opinion. *Id.* at 474-94, 834 P.2d 1157-71, 11 Cal. Rptr. 2d at 339-53 (Kennard, J., concurring and dissenting).

3. *Id.* at 462, 834 P.2d at 1149, 11 Cal. Rptr. 2d at 331. The court noted that the issue of the enforceability of a choice-of-law clause was one of first impression. *Id.* at 464, 834 P.2d at 1150, 11 Cal. Rptr. 2d at 332. *See generally* John Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English*

court held that freely negotiated choice-of-law clauses are enforceable pursuant to the approach discussed in section 187 of the Restatement Second of Conflict of Laws.[4] Upon reaching this conclusion, the majority did not hesitate to extend the applicability of the choice-of-law clause to a related noncontractual cause of action.[5]

II. STATEMENT OF THE CASE

The Defendants, Nedlloyd Lines B.V.,[6] entered into a shareholders' agreement with the Plaintiff, Seawinds Limited,[7] to purchase Seawinds stock.[8] The stated purpose of the agreement was to establish a joint venture company to engage in the trans-oceanic shipping business.[9] Seawinds subsequently sued Nedlloyd, alleging three causes of action based on the shareholders' agreement.[10] Nedlloyd demurred, arguing

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and American Approaches to the Conflict of Laws, 58 CORNELL L. REV. 433, 436-40 (1973) (providing a thorough history of conflict of laws and choice of law rules).

4. *Nedlloyd*, 3 Cal. 4th at 464-65, 834 P.2d at 1150-51, 11 Cal. Rptr. 2d at 332-33.

5. *Id.* at 468-69, 834 P.2d at 1153-54, 11 Cal. Rptr. 2d at 335-36. The court reasoned that the parties should have expected Hong Kong law to apply to all causes of action "arising from or related to their contract" after they explicitly provided that the agreement "shall be governed by and construed in accordance with Hong Kong law." *Id. See also* CAL. CIV. CODE § 1639 (West 1985) (deriving the intention of the parties from the written contract if at all possible); CAL. CIV. CODE § 3513 (West 1970) (allowing for the waiver of a privilege or advantage of a law).

6. Defendants [hereinafter "Nedlloyd"] consisted of several interrelated shipping companies, an Oregon corporation, a Hong Kong corporation, a British corporation, and several California residents. *Nedlloyd*, 3 Cal. 4th at 462, 834 P.2d at 1149, 11 Cal. Rptr. 2d at 331.

7. Plaintiff, Seawinds Limited, [hereinafter "Seawinds"] a shipping company incorporated in Hong Kong, was undergoing Chapter 11 bankruptcy reorganization at the time this case was litigated. *Id.*

8. *Id.*

9. The shareholders' agreement obligated the parties to use "means reasonably available" to ensure the success of the business. *Id.* at 463, 834 P.2d at 1150, 11 Cal. Rptr. 2d at 332. The agreement also contained a choice-of-law/choice-of-forum clause which stated, "This agreement shall be governed by and construed in accordance with Hong Kong law and each party hereby irrevocably submits to the non-exclusive jurisdiction and service of process of the Hong Kong courts." *Id.* at 475, 834 P.2d at 1158, 11 Cal. Rptr. 2d at 340 (Kennard, J., concurring and dissenting).

10. *Nedlloyd*, 3 Cal. 4th at 463, 834 P.2d at 1150, 11 Cal. Rptr. 2d at 332. In its original complaint, Seawinds claimed: (1) breach of contract, breach of the implied covenant of good faith and fair dealing; (2) tortious breach of the implied covenant of good faith and fair dealing; and (3) breach of fiduciary duty. *Id.* at 475, 834 P.2d at 1158, 11 Cal. Rptr. 2d at 340 (Kennard, J., concurring and dissenting).

that under Hong Kong law, the complaint failed to state a cause of action.[11] The trial court applied California law and sustained Nedlloyd's demurrer with leave to amend all three claims.[12]

Nedlloyd petitioned the court of appeal for a writ of mandate, directing that Hong Kong law be applied, but the petition was denied.[13] The court of appeal reasoned that Hong Kong had no substantial relationship with the litigation.[14] Seawinds filed an amended complaint, and the trial court again overruled Nedlloyd's demurrer and applied California law to all causes of action.[15] Nedlloyd petitioned for a writ of mandate which the court of appeal summarily denied.[16]

The California Supreme Court granted review, limited to determining the enforceability of a choice-of-law provision.[17] The court reversed and remanded with instructions to the court of appeal to issue a peremptory writ directing the trial court to apply Hong Kong law and reconsider its ruling on Nedlloyd's demurrer to Seawinds' amended complaint.[18]

III. TREATMENT

A. *Justice Baxter's Majority Opinion*

Justice Baxter, writing for the court, began by outlining the proper test for analyzing choice-of-law provisions.[19] The court recognized that, under the Second Restatement, parties to a contract are generally able to specify the terms of their contract, including both the applicable law and forum for any disputes that may arise.[20] Section 187 of the Restatement

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11. *Id.* (Kennard, J., concurring and dissenting).

12. *Id.* (Kennard, J., concurring and dissenting).

13. Nedlloyd Lines B.V. v. Superior Court, 6 Cal. App. 4th 299, 277 Cal. Rptr. 822 (1991), *rev'd*, 3 Cal. 4th 459, 834 P.2d 1148, 11 Cal. Rptr. 2d 330 (1992).

14. *Id.* at 307, 277 Cal. Rptr. at 827.

15. *Nedlloyd*, 3 Cal. 4th at 476, 834 P.2d at 1159, 11 Cal. Rptr. 2d at 341 (Kennard, J., concurring and dissenting).

16. *Nedlloyd*, 6 Cal. App. 4th at 303 n.2, 277 Cal. Rptr. at 824 n.2.

17. *Nedlloyd*, 3 Cal. 4th at 464, 834 P.2d at 1150, 11 Cal. Rptr. 2d at 332.

18. *Id.* at 471-72, 834 P.2d at 1156, 11 Cal. Rptr. 2d at 338.

19. *Id.* at 464-66 834 P.2d at 1150-52, 11 Cal. Rptr. 2d at 332-34. Despite the apparent novelty of the choice-of-law issue, the court analogized the requisite analysis to that invoked in cases involving the enforceability of choice-of-forum provisions. *Id.* at 464, 834 P.2d at 1150-51, 11 Cal. Rptr. 2d at 332-33.

20. *Id.* at 464-65, 834 P.2d at 1151, 11 Cal. Rptr. 2d at 333. *See* Mencor Enter., Inc. v. Hets Equities Corp., 190 Cal. App. 3d 432, 435, 235 Cal. Rptr. 464, 466 (1987) (reaffirming the general rule that contracting parties may choose the specific law governing their contract in advance, and California courts will respect such choice provided enforcement does not result in an evasion of public policy or California law). *See generally* 12 CAL. JUR. 3D *Conflict of Laws* §§ 69, 75 (1974 & Supp. 1992) (explaining that contracting parties may expressly specify the law governing their con-

Second of Conflict of Laws[21] provides that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied."[22] Lower California courts have consistently embraced the Restatement approach when reviewing choice-of-law issues.[23]

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tract and such choice will be respected subject to a few limitations; EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 18.1 (1982) (defining party autonomy as allowing parties to select the law that will govern their contracts).

21. All further section references are to the Restatement Second of Conflict of Laws.

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Section 187 provides in full:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Id.

23. *Nedlloyd*, 3 Cal. 4th at 464, 834 P.2d at 1151, 11 Cal. Rptr. 2d at 333 (citing Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 495-96, 551 P.2d 1206, 1208-09, 131 Cal. Rptr. 374, 376-78 (1976) (finding no public policy reason to deny enforcement of a freely negotiated choice-of-forum provision)). *See* S.A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co., 641 F.2d 746, 749 (9th Cir. 1981) (indicating that California should apply the law selected by the contracting parties *unless* either the chosen state's law has no substantial relationship to the parties or transaction, *or* application of such law would be contrary to a fundamental policy of the state.) *Accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmts. f & g (1971). *See also* Beck v. American Health Group Int'l, Inc., 211 Cal. App. 3d 1555, 1561-62, 260 Cal. Rptr. 237, 241-42 (1989) (finding objective intent of parties, evidenced by their explicit words, as paramount to an analysis of their subjective intent when determining whether a contract is reasonably susceptible to a construction that satisfies a cause of action for breach); Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 995 n.6, 101 Cal. Rptr. 347, 353 n.6 (1972) (noting that choice-of-law provisions are usually honored by California courts). *See generally* 12

Next, the court applied section 187(2) to determine whether the chosen jurisdiction, Hong Kong, had a substantial relationship to the parties or their transaction or whether the parties had a reasonable basis for choosing Hong Kong law.[24] In so doing, the court addressed each of Seawinds' causes of action.[25] As for the implied covenant of good faith and fair dealing, Justice Baxter found that Hong Kong possessed a substantial relationship to the parties and presented no apparent conflict with any fundamental California policy.[26]

However, the fiduciary duty cause of action presented a more difficult question.[27] Justice Baxter declined to accept Nedlloyd's argument that

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CAL. JUR. 3D §§ 69-76 (1974 & Supp. 1992) (detailing the policy considerations under the Second Restatement approach).

24. *Nedlloyd*, 3 Cal. 4th at 466, 834 P.2d at 1152, 11 Cal. Rptr. 2d at 334. The court noted that should either question be met, the next step is to determine whether a fundamental conflict exists with California policy. *Id.* In other words, if California possessed a substantially greater interest than Hong Kong in the parties or their transaction, California would not recognize the chosen law. *Id. See generally* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 18.8, 18.9 (1982) (summarizing the Second Restatement approach and the public policy reasons behind this second step).

25. *Nedlloyd*, 3 Cal. 4th at 467-68, 834 P.2d at 1152-53, 11 Cal. Rptr. 2d at 334-35. The court summarily dismissed the breach of contract claim on the ground that the court granted review on the limited issue of the appropriateness of applying Hong Kong law when ruling on the demurrers. *Id.* at 467, 834 P.2d at 1152, 11 Cal. Rptr. 2d at 334.

26. *Id.* at 467, 834 P.2d at 1153, 11 Cal. Rptr. 2d at 335. The court reasoned that Seawinds was incorporated under Hong Kong law and maintained a registered office there, thus connecting the parties to the chosen forum's law. *Id.* at 467, 834 P.2d at 1153, 11 Cal. Rptr. 2d at 335. The court viewed the covenant as an implied promise, placed in the contract to ensure fulfillment of the parties' intentions. *Id.* (citing Foley v. Interactive Data Corp., 47 Cal. 3d 654, 689-90, 765 P.2d 373, 393-94, 254 Cal. Rptr. 211, 231-32 (1988) (explaining that when courts enforce implied covenants, they protect the parties' mutual interest in having promises performed)).

27. Justice Panelli, joined by Justice Mosk, noted that Seawinds' breach of fiduciary duty claim was predominately noncontractual in nature, and thus, concluded that this cause of action was outside the scope of the choice-of-law clause in the contract. *Nedlloyd*, 3 Cal. 4th at 472, 834 P.2d at 1156, 11 Cal. Rptr. 2d at 338 (Panelli, J., concurring and dissenting). Both Justice Kennard and the court of appeal acknowledged the significant differences in Hong Kong and California law. *Id.* at 476, 834 P.2d at 1159-60, 11 Cal. Rptr. 2d at 341-42 (Kennard, J., concurring and dissenting). Under Hong Kong law shareholders owe no apparent fiduciary duty to the corporation, whereas under California law, a controlling or majority shareholder owes a fiduciary duty to both the corporation and other shareholders. *Id.* at 476, 834 P.2d at 1159, 11 Cal. Rptr. 2d at 341 (Kennard, J., concurring and dissenting). *See also* Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 108-11, 460 P.2d 464, 471-74, 81 Cal. Rptr. 592, 599-602 (1969) (reaffirming the established rule that majority shareholders owe a fiduciary duty to both minority shareholders and to the corporation); *see generally* 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §§ 189, 240 (9th ed. 1989) (discussing the general fiduciary duties imposed on controlling and majority shareholders).

Seawinds' fiduciary duty claim was outside the scope of the choice-of-law clause in the shareholders' agreement.[28] Instead, the court determined that any fiduciary duties that Nedlloyd might owe to Seawinds could only be derived from the shareholders' agreement, and thus, were subject to the law and forum governing that agreement.[29] The court reasoned that a rational businessperson entering into a contract would logically expect that the governing law specified in the contract would apply to any and all disputes arising from the transaction or relationship.[30]

Justice Baxter concluded that a valid choice-of-law provision should apply to all causes of action "arising from or related to" a particular agreement.[31] In addition to Hong Kong's substantial interest the court found that application of California law would subvert California's policy of respecting the decisions of parties who freely negotiate choice-of-law provisions into their contracts.[32]

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28. *Nedlloyd*, 3 Cal. 4th at 468, 834 P.2d at 1153, 11 Cal. Rptr. 2d at 335.

29. *Id.* at 469, 834 P.2d at 1154, 11 Cal. Rptr. 2d at 336.

30. *Id.* at 469-70, 834 P.2d at 1154, 11 Cal. Rptr. 2d at 336. The general policy underlying contract law is the protection and preservation of justified party expectations. *See* B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 43 (9th ed. 1987 & Supp. 1992) (supporting such a position, unless some state interest substantially outweighs the value of protecting party expectations); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971) (presenting the various policy considerations and tradeoffs between potential state interests, the justifiable need to protect the expectations of parties, and the desire to achieve predictability and certainty of outcomes); *see generally* Michael Gruson, *Governing Law Clauses in Commercial Agreements—New York's Approach*, 18 COLUM. J. TRANSNAT'L L. 323, 323-26 (1979) (emphasizing commercial parties' need for certainty and predictability in their contractual relationships).

31. *Nedlloyd*, 3 Cal. 4th at 470, 834 P.2d at 1153, 11 Cal. Rptr. 2d at 337. The court could not find any reason to ignore the law chosen by the parties in their shareholders' agreement. *See id.* at 468-70, 834 P.2d at 1153-55, 11 Cal. Rptr. 2d at 335-37. In dicta, the court went on to state that even if no choice-of-law clause existed, there was overwhelming evidence to support the application of Hong Kong law to the claims at issue. *Id.* at 470-71, 834 P.2d at 1155, 11 Cal. Rptr. 2d at 337.

32. *Id.* at 471, 834 P.2d at 1155, 11 Cal. Rptr. 2d at 337. *See* Ury v. Jewelers Acceptance Corp., 227 Cal. App. 2d 11, 18, 38 Cal. Rptr. 376, 381 (1964) ("Parties naturally expect that the obligations of a contract will be fulfilled."); *see generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3C (3d ed. 1986) (describing commercial convenience and fulfillment of party expectations as justifying the validation of a contract when reasonable).

B. *Justice Kennard's Dissenting View*

Justice Kennard wrote a separate opinion expressing her view that, unless expressly provided for, noncontractual causes of action flowing indirectly from the underlying agreement should not be adjudicated under the specified law.[33] Justice Kennard summarized the facts in *Nedlloyd*[34] prior to engaging in a lengthy discussion of the significance of party autonomy and predictability in the commercial setting.[35]

Under Justice Kennard's analysis, California's interest in respecting the contracting parties' choice of law was as great as the state's interest in applying its own law to the transaction.[36] Justice Kennard believed that

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33. *Nedlloyd*, 3 Cal. 4th at 491, 834 P.2d at 1169, 11 Cal. Rptr. 2d at 351 (Kennard, J., concurring and dissenting). In distinguishing the forum-selection clause validated in *Smith*, Justice Kennard relied on the limiting nature of the language employed in the *Nedlloyd* choice-of-law clause. *Id.* at 490, 834 P.2d at 1168, 11 Cal. Rptr. 2d at 350 (Kennard, J., concurring and dissenting) (discussing in reference Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 497, 551 P.2d 1206, 1210, 131 Cal. Rptr. 374, 378 (1976)).

In *Smith*, the defendant argued that the forum-selection clause was limited to breach of contract actions and did not extend to tort claims arising from the contract. *Smith*, 17 Cal. 3d at 497, 551 P.2d at 1210, 131 Cal. Rptr. at 378. The *Smith* court rejected the defendant's argument, and instead interpreted the language of the forum selection clause electing to employ Pennsylvania law for any actions "arising under *or growing out of the contract*" as encompassing all causes of action arising directly from the contractual relationship. *Id.* (emphasis in original)

Justice Kennard found the Nedlloyd choice-of-law provision ambiguous and interpreted the language to apply only to those causes of action based in contract. *Nedlloyd*, 3 Cal. 4th at 490-91, 834 P.2d at 1168-69, 11 Cal. Rptr. 2d at 350-51 (Kennard, J., concurring and dissenting).

34. *See supra* notes 9-12, 15 and accompanying text; *Nedlloyd*, 3 Cal. 4th at 474-76, 834 P.2d at 1158-59, 11 Cal. Rptr. 2d at 340-41. (Kennard, J., concurring and dissenting).

35. *Id.* at 485-87, 834 P.2d at 1165-66, 11 Cal. Rptr. 2d at 347-48 (Kennard, J., concurring and dissenting). Party autonomy protects the justified expectations of the parties thereby promoting contract predictability. *Id.* at 486, 834 P.2d 1165-66, 11 Cal. Rptr. 2d at 347-48 (Kennard, J. concurring and dissenting). Justice Kennard further recognized the compelling state interest in respecting the choices of sophisticated international business entities. *Id.* at 487, 834 P.2d at 1166, 11 Cal. Rptr. 2d at 348 (Kennard, J., concurring and dissenting). *See generally* Thomas W. Pounds, Comment, *Party Autonomy—Past and Present*, 12 S. TEX. L.J. 214, 228-30 (1970) (addressing the effect of the Restatement Second on party autonomy); Morris J. Levin, *Party Autonomy: Choice-of-Law Clauses in Commercial Contracts*, 46 GEO. L.J. 260, 270-80 (1957-58) (examining party autonomy in the United States); Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553, 562 (1957) (noting that the international commercial shipping industry frequently contains choice-of-law provisions).

36. *Nedlloyd*, 3 Cal. 4th at 487, 834 P.2d at 1166, 11 Cal. Rptr. 2d at 348 (Kennard, J., concurring and dissenting). Justice Kennard evaluated the parties' choice-of-law

the majority's application of Hong Kong law to both the contractual and noncontractual causes of action was overbroad because there was no extrinsic evidence of the parties' intent regarding noncontractual causes of action.[37]

Justice Kennard ultimately concluded that the choice-of-law clause should apply only to the contractual cause of action for breach of the implied covenant of good faith and fair dealing, but not to the noncontractual cause of action for breach of fiduciary duty.[38]

IV. CONCLUSION

Nedlloyd holds that a court should enforce a freely entered choice-of-law clause contained within a contract to all causes of action arising from or related to that contract despite how the cause of action is characterized or phrased.[39] While Justice Kennard expressed a legitimate concern regarding the potential abuse inherent in the majority's

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clause under the same Second Restatement approach employed by the majority. *Id.* at 479-87, 834 P.2d at 1161-66, 11 Cal. Rptr. 2d at 343-48 (Kennard, J., concurring and dissenting). Justice Kennard's determination that the choice-of-law provision was applicable to Seawinds' cause of action for breach of the implied covenant of good faith and fair dealing was consistent with the majority opinion. *Id.* at 348, 834 P.2d at 1166, 11 Cal. Rptr. 2d at 348 (Kennard, J., concurring and dissenting). However, Justice Kennard concluded that the breach of fiduciary duty claim fell outside the scope of the choice-of-law provision. *Id.* at 491, 834 P.2d at 1169, 11 Cal. Rptr. 2d at 351 (Kennard, J., concurring and dissenting).

37. *Id.* at 494, 834 P.2d at 1171, 11 Cal. Rptr. 2d at 353 (Kennard, J., concurring and dissenting). According to Justice Kennard, the majority's rationale, when advanced to its fullest logical extent, would lead to the inescapable dilemma that once two sophisticated commercial parties enter into a contract with a choice-of-law provision, they are thereafter limited to the specified law for noncontractual causes of actions as well. *Nedlloyd*, 3 Cal. 4th at 492, 834 P.2d at 1169, 11 Cal. Rptr. 2d at 351 (Kennard, J., concurring and dissenting). Justice Kennard further opined that a party attempting to resist the application of such a clause would be unable to present any evidence revealing an intent contrary to the language of the contract. *Id.*

38. *Id.* at 494, 834 P.2d at 1171, 11 Cal. Rptr. 2d 353 (Kennard, J., concurring and dissenting).

39. *Id.* at 470, 834 P.2d at 1155, 11 Cal. Rptr. 2d at 337. California courts will honor choice-of-law clause whether the cause of action sounds in contract or tort, or whether it is characterized as noncontractual in nature, provided the parties freely negotiate the clause and the claim "arises from or is related to" the parties' agreement. *Id. See* Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 497, 551 P.2d 1206, 1210, 131 Cal. Rptr. 374, 378 (finding no independent significance in the characterization of a cause of action, whether contractual or tortious, when determining the applicability of a choice-of-law clause).

holding, her view may ultimately be shortsighted. The approach that she offered is not without its own disadvantages.[40]

In applying the expressly chosen law perhaps the majority has the better approach.[41] Under such circumstances the parties are not left to indiscriminately hypothesize about which law the courts will choose to apply. Instead, they may conform all future decisions regarding conduct with a known and readily ascertainable law because they have chosen the applicable law in advance.[42]

JAMES J. MOLONEY

VI. CRIMINAL LAW

A. *A defendant may challenge a conviction and sentence when ineffective assistance of counsel results in the rejection of a plea bargain offer more favorable than the result achieved at a subsequent fair trial:* **In re Alvernaz.**

I. INTRODUCTION

The Sixth Amendment right to counsel ensures a criminal defendant the fundamental right to a fair trial.[1] When ineffective assistance of

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40. In advocating a Restatement type analysis every time parties leave an ambiguous choice-of-law clause in their contract, Justice Kennard actually does injustice to the penultimate goal of promoting and protecting the expectations of parties to a contract. *See* Willis L.M. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 17 (1977) (describing the desired predictability of choice-of-law decisions as attainable primarily through rules which are of significant value to parties entering contracts).

41. By laying down a bright line rule, the court "best accords with the need of the commercial community for certainty and predictability in interstate and international transactions." Russell J. Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399, 407-08 (1968). *See also* Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, (1988) (advocating the adoption of a uniform system of rules for conflict of laws problems occurring in international commercial transactions).

42. *See* II E. ALLAN FARNSWORTH & ALFRED MCCORMACK, FARNSWORTH ON CONTRACTS §§ 5.3a, 5.4a (1990) (providing several examples in which contracting parties want to know the applicable law before entering an agreement; *see generally* Michael Gruson, *Governing Law Clauses in Commercial Agreements—New York Approach*, 18 COLUM. J. TRANSNAT'L L. 323, 323-26, 351, 378 (1979) (commenting on the need for certainty in commercial transactions and New York's strides toward adopting a uniform policy).

1. U.S. CONST. amend. VI. *See* Strickland v. Washington, 466 U.S. 668, 684-86 (1984) (interpreting the criminal defendant's right to effective assistance of counsel as

counsel leads a criminal defendant to plead guilty, the defendant suffers a constitutional violation giving rise to a claim for relief from the guilty plea.[2] *In re Alvernaz*[3] provided the California Supreme Court with the opportunity to decide whether a defendant, who is improperly advised by counsel to reject a plea bargain offer more favorable than the result achieved at an otherwise fair trial, is entitled to challenge the conviction and sentence on the ground of ineffective assistance of counsel.[4] The supreme court held, as have other federal and state courts,[5] that when a

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requiring more than the mere presence of an attorney at trial). Counsel is charged with the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688 (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). *See generally* Franz E. Miller, *OOPS!: An Analysis of Post-Pope Attorney Incompetency Cases for Trial and Appellate Counsel*, 17 W. ST. U. L. REV. 257, 260-61 (1990) (discussing what constitutes attorney incompetency and when it will lead to reversal).

2. *In re* Alvernaz, 2 Cal. 4th 924, 934, 830 P.2d 747, 753, 8 Cal. Rptr. 2d 713, 719 (1992) (citing Hill v. Lockhart, 474 U.S. 52, 56-60 (1985) (analyzing attorney error leading to defendant's decision to plead guilty under the two-part test set forth in *Strickland*)). A defendant must prove that counsel's performance was deficient and the deficient performance somehow prejudiced the defense. *Strickland*, 466 U.S. at 687.

3. 2 Cal. 4th 924, 830 P.2d 747, 8 Cal. Rptr. 2d 713 (1992). Justice George wrote for the majority, with Chief Justice Lucas and Justices Panelli, Arabian, and Baxter concurring. Justice Mosk dissented with Justice Kennard concurring with the dissent.

4. *Id.* at 928, 830 P.2d at 749, 8 Cal. Rptr. 2d at 715. *Alvernaz* resolves the apparent conflict between two factually similar cases decided on June 25, 1991, by the Court of Appeal, Fourth District, Division One. *Compare In re* Alvernaz, 231 Cal. App. 4th 1059, 1076-77, 282 Cal. Rptr. 601, 611-12 (1991) (finding that a fair trial remedies pretrial ineffective assistance of counsel) *with* People v. Pollard, 2 Cal. App. 4th 1090, 1106, 282 Cal. Rptr. 588, 597 (1991) (concluding that ineffectiveness of counsel which causes prejudice during plea negotiations entitles the defendant to either accept or reject the original offers subject to the trial court's approval of the offer, unless the prosecution withdraws the offer upon a showing of good cause). For an excellent discussion of the issues presented by the contradiction in these two cases, see Todd R. Falzone, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 CAL. W. L. REV. 431 (1991-92).

5. *See, e.g.*, Lewandowski v. Makel, 949 F.2d 884, 890 (6th Cir. 1991) (recognizing possible ineffective assistance when counsel failed to convey a counteroffer to a plea offer and inadequately rendered advice regarding the consequences of rejecting the plea offer); Turner v. Tennessee, 858 F.2d 1201, 1205-07 (6th Cir. 1988) (holding that an incompetently counseled decision to proceed to trial lies within the range of Sixth Amendment protection), *vacated*, 492 U.S. 902 (1989). *Accord* Johnson v. Duckworth, 793 F.2d 898, 900-02 (7th Cir.) (acknowledging that a criminal defendant has the right to effective assistance of counsel when deciding whether to accept an offered plea bargain), *cert. denied*, 479 U.S. 937 (1986); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982) (noting that defendant's decision to reject an offered

defendant receives erroneous advice, and that advice causes the defendant to either plead guilty or reject an offered plea bargain, a claim of ineffective assistance of counsel will stand.[6]

II. STATEMENT OF THE CASE

The defendant, John P. Alvernaz, was charged with one count of first degree robbery,[7] two counts of second degree robbery,[8] one count of first degree burglary,[9] and one count of kidnapping for the purpose of robbery.[10] The indictment also alleged that the defendant used a firearm during each offense.[11] In addition, there was an allegation that he had a prior conviction for receiving stolen property.[12] Before trial, at a plea-bargaining session, defense counsel led Alvernaz to believe that if he pled guilty to one count of robbery, the other charges would be dropped.[13] Counsel informed the defendant that the proposed plea would amount to a maximum of four to five years imprisonment with a "net" time of approximately two and one-half years after a deduction for work-time credits.[14] When the defendant questioned his counsel regarding the potential consequences of losing at trial, counsel asserted that the

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plea bargain occurs at a critical stage in the criminal proceeding at which the right to effective assistance of counsel attaches); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981) (finding ineffective assistance of counsel when the defendant withdrew a negotiated plea of guilty and decided to go to trial based on counsel's erroneous advice regarding the available options and possible consequences); Lloyd v. Georgia, 373 S.E.2d 1, 2 (Ga. 1988) (finding that the rejection of a plea offer without adequate communication by defense counsel supports an ineffective assistance claim); People v. Brown, 177 Cal. App. 3d 537, 550, 223 Cal. Rptr. 66, 74 (1986) (describing counsel as having a duty to competently pursue any plea negotiations to their conclusion).

6. *In re* Alvernaz, 2 Cal. 4th at 934 & n.5, 830 P.2d at 753-54 & n.5, 8 Cal. Rptr. 2d at 719-20 & n.5. For a treatment of appellate decisions, see 19 CAL. JUR. 3D *Criminal Law* § 2169 (1984 & Supp. 1992) (outlining the California standard for constitutionally adequate counsel). However, in the instant case, the defendant was ultimately denied relief because he could not adequately establish that he would have accepted the proffered plea if he had received proper advice. *In re* Alvernaz, 2 Cal. 4th at 945, 830 P.2d at 761, 8 Cal. Rptr. 2d at 727.

7. CAL. PENAL CODE §§ 211, 212.5(a) (West 1988).

8. CAL. PENAL CODE §§ 211, 212.5(b) (West 1988).

9. CAL. PENAL CODE §§ 459-60 (West 1988).

10. CAL. PENAL CODE § 209(b) (West 1988).

11. CAL. PENAL CODE § 12022.5 (West 1992); *In re* Alvernaz, 2 Cal. 4th at 929, 830 P.2d at 750, 8 Cal. Rptr. 2d at 716. A defendant's sentence will be enhanced when such an allegation is proven. *Id.*

12. CAL. PENAL CODE § 496(1) (West 1988); *In re* Alvernaz, 2 Cal. 4th at 929, 830 P.2d at 750, 8 Cal. Rptr. 2d at 716.

13. *In re* Alvernaz, 2 Cal. 4th at 930, 830 P.2d at 751, 8 Cal. Rptr. 2d at 716-17.

14. *Id.*, at 930, 803 P.2d at 751, 8 Cal. Rptr. 2d at 717.

maximum penalty was approximately eight years imprisonment with a "net" sentence of approximately four years after a deduction for work-time credits.[15] Defense counsel optimistically predicted that there was a seventy to eighty percent chance of prevailing if the case went to trial.[16] Based on this information, the defendant elected to reject the plea bargain offer and proceed to trial.[17]

Contrary to his counsel's assertions, the defendant faced a maximum penalty significantly greater than eight years imprisonment.[18] The defendant was in fact subject to a sentence of life imprisonment with an actual prison term of approximately sixteen to seventeen years.[19] After a jury trial, the defendant was convicted on all charges except the burglary charge.[20] The trial court sentenced the defendant to life imprisonment with the possibility of parole, plus an additional two years for the enhancement charges.[21] By the defendant's own estimate, he would have to serve sixteen years and seven and one-half months before being released on parole.[22]

The defendant appealed and the court of appeal affirmed the conviction.[23] The supreme court denied the defendant's subsequent petition for review.[24] Next, the defendant sought relief in the trial court by writ of habeas corpus, claiming that counsel's erroneous advice constituted ineffective assistance of counsel under the Sixth Amendment right to counsel.[25] The trial court acknowledged that the advice was negligent, but denied the writ on the ground that the defendant had not adequately demonstrated that he would have accepted the plea bargain.[26] The defendant renewed his writ on appeal and the appellate court held that despite an adequate showing of both ineffective assistance of counsel

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15. *Id.*
16. *Id.* at 930-31, 830 P.2d at 751, 8 Cal. Rptr. 2d at 717.
17. *Id.* at 929, 930-31, 830 P.2d 750-51, 8 Cal Rptr. 2d at 716-17.
18. *In re* Alvernaz, 2 Cal. 4th at 931, 830 P.2d at 751, 8 Cal. Rptr. 2d at 717.
19. *Id.*
20. *Id.* at 929, 830 P.2d at 750, 8 Cal. Rptr. 2d at 716.
21. *Id.*
22. *Id.* Although the Attorney General disputed the actual method for determining the term of prison confinement, the Attorney General did not dispute the defendant's approximation that he faced a potential sentence in the range of 16 to 17 years. *In re* Alvernaz, 2 Cal. 4th at 929 n.3, 830 P.2d at 750 n.3, 8 Cal. Rptr. 2d at 716 n.3.
23. *Id.* at 929, 830 P.2d at 750, 8 Cal. Rptr. 2d at 716.
24. *Id.*
25. *Id.* at 930, 830 P.2d at 750, 8 Cal. Rptr. 2d at 716.
26. *Id.*

and a reasonable probability that the defendant would have accepted the offered plea bargain, the error was harmless because the defendant received a fair trial.[27] The California Supreme Court affirmed the defendant's conviction.[28]

III. TREATMENT

A. *The Majority Opinion*

The supreme court concluded that when erroneous advice causes a defendant to reject an offered plea bargain and proceed to trial, such advice is tantamount to a constitutional violation which is not subsequently remedied by a fair trial.[29] The court determined that, under the circumstances, neither enforcing the originally offered plea bargain, nor compelling the prosecution to reinstate its offer would be an appropriate remedy.[30] In proposing an appropriate remedy, the court suggested that upon a court's grant of relief, the prosecutor should submit the previously offered plea bargain to the trial court for approval.[31] However, if within thirty days the prosecutor decides to retry the defendant, the plea negotiation process should start over again.[32]

The supreme court began its analysis by recognizing the importance of the plea bargaining process within the criminal justice system.[33] The supreme court agreed with the court of appeal's reasoning that it mattered little whether the ineffective assistance of counsel resulted in a guilty plea or a decision to stand trial because the attorney owes the defendant the same standard of professional responsibility in either case.[34]

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27. *In re* Alvernaz, 2 Cal. 4th at 932-33, 830 P.2d at 752, 8 Cal. Rptr. 2d at 718.

28. *Id.* at 946, 830 P.2d at 762, 8 Cal. Rptr. 2d at 728.

29. *Id.* at 936, 830 P.2d at 755, 8 Cal. Rptr. 2d at 721.

30. *Id.* at 944, 830 P.2d at 760, 8 Cal. Rptr. 2d at 726.

31. *Id.*

32. *In re* Alvernaz, 2 Cal. 4th at 944, 830 P.2d at 760, 8 Cal. Rptr. 2d at 726.

33. *Id.* at 933, 830 P.2d 752, 8 Cal. Rptr. 2d 718 (citing Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 260-61 (1971)). *See generally* Judge Harry A. Ackley, *Plain Talk About Plea Bargaining*, 10 PEPP. L. REV. 39, 43-53 (1982) (comparing the benefits of plea bargaining with the attendant costs); Peter A. Whitman, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1088-92 (1967) (comparing judicial and prosecutorial plea bargaining).

34. *In re* Alvernaz, 2 Cal. 4th at 934 & n.5, 830 P.2d 753-54 & n.5, 8 Cal. Rptr. 2d 719-20 & n.5, *rev'g*, *In re* Alvernaz, 2 Cal. App. 4th 1059, 1069, 282 Cal. Rptr. 601, 606 (1991) (*citing* People v. Brown, 177 Cal. App. 3d 537, 223 Cal. Rptr. 66 (1986) (finding the right to competent assistance of counsel to exist at the plea bargaining stage)). *See also* Gregory G. Sarno, *Adequacy Of Defense Counsel's Representations Of Criminal Client Regarding Guilty Pleas*, 10 A.L.R. 4th 8, 169-83 (1981) (discussing cases requiring an effectiveness hearing after finding incompetent representation with respect to incorrectly advising a criminal defendant regarding possible penal conse-

However, the supreme court differed with the court of appeal regarding whether a subsequent fair trial would have an effect on the defendant's rights when pretrial representation was inadequate.[35] While the court of appeal held that a fair trial remedied the earlier ineffective assistance, the supreme court concluded otherwise.[36] The supreme court opined that if it adopted the court of appeal's view, the resulting holding would "undermine" the plea negotiation process.[37] In addition, the supreme court viewed the defendant's right to participate in decisions central to the defense as "crucial," and stated that such decisions should not be entered into with "grave misconceptions."[38]

Next, the court employed the two-part "ineffective assistance" test set forth in *Strickland v. Washington*[39] to determine whether the representation the defendant received was inadequate under the Constitution.[40] According to *Strickland*, the defendant must prove the following: (1) counsel's representation was deficient,[41] and (2) the deficiency subjected the defendant to prejudice.[42] The *Alvernaz* court devoted little time to determining whether counsel's performance was "inadequate," instead

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quences).

35. *In re* Alvernaz, 2 Cal. 4th at 935-36, 830 P.2d at 754, 8 Cal. Rptr. 2d at 720.

36. *Id.* at 936, 830 P.2d at 755, 8 Cal. Rptr. 2d at 721.

37. *Id.* at 936, 830 P.2d at 754, 8 Cal. Rptr. 2d at 720. *See* 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* §§ 2179, 2180 (2d ed. 1989 & Supp. 1992) (providing an overview of the statutory and judicial authorization of plea bargaining in California).

38. *In re* Alvernaz, 2 Cal. 4th at 936, 830 P.2d at 755, 8 Cal. Rptr. 2d at 721 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981)).

39. 466 U.S. 668, 687-96 (1984).

40. *In re* Alvernaz, 2 Cal. 4th at 936-37, 830 P.2d at 755, 8 Cal. Rptr. 2d at 721.

41. *Strickland*, 466 U.S. at 687. Counsel's representation must be so deficient or counsel's errors so material as to fall below the Sixth Amendment guarantee of effective assistance of counsel. *Id. See generally* Billie Ann Uilani Higa, *The Right To Effective Assistance Of Counsel In California: Adoption Of The Sixth Amendment "Reasonably Competent Attorney" Standard*, 12 SW. U. L. REV. 53, 85 (1981) (finding effective assistance of counsel to require "quality representation" both during and prior to the proceedings).

42. *Strickland*, 466 U.S. at 687. In other words, counsel's errors must be so material as to deprive the defendant of a fair trial whose result is reliable. *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. *See generally* 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2785 (2d ed. 1989) (reviewing the development of what action constitutes ineffective assistance of counsel at the plea bargaining stage).

focusing on what the defendant must show to satisfy the second requirement of "prejudice."[43]

The court refused to engage in a lengthy analysis of the "inadequate representation" element because the defendant failed to show the existence of any prejudice.[44] In examining the defendant's claim of prejudice, the court listed several factors which would support a defendant's contention that he would have accepted the plea bargain.[45] The court reasoned, however, that because the defendant failed to produce any objective evidence, protested his innocence at trial, and failed to establish that the trial court would have approved the plea bargain, no prejudice resulted.[46] The court concluded that the defendant failed to estab-

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43. *In re* Alvernaz, 2 Cal. 4th at 937-41, 830 P.2d at 755-58, 8 Cal. Rptr. 2d at 721-24. "To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." *Id.* at 937, 830 P.2d at 756, 8 Cal. Rptr. 2d at 722. *See also* People v. Haskett, 52 Cal. 3d 210, 248, 801 P.2d 323, 345-46, 276 Cal. Rptr. 80, 102-03 (1990). The *Alvernaz* court was particularly concerned with the relative ease with which a defendant could manufacture a claim that he or she would have accepted the proffered plea offer to satisfy the prejudice element. *In re* Alvernaz, 2 Cal. 4th at 938, 830 P.2d at 756, 8 Cal. Rptr. 2d at 722. In response to this concern, the court proposed a policy by which the parties to a plea negotiation would memorialize the discussions in writing prior to trial. *Id.* at 938 n.7, 830 P.2d at 756 n.7, 8 Cal. Rptr. 2d at 722 n.7. This proposed writing would include: (1) the fact that a plea offer was made, (2) the fact that the defendant was fully informed of the offer, its terms, and potential consequences (i.e. minimum and maximum punishment faced by the defendant should the offer be accepted, or rejected and the case proceed to trial), and (3) the defendant's response to the offer. *Id.*

44. *Id.* at 945-46, 830 P.2d at 760-61, 8 Cal. Rptr. 2d 726-27. A court is not required to decide whether the defendant's representation was inadequate prior to analyzing the prejudice suffered. *Strickland*, 466 U.S. at 697.

45. *In re* Alvernaz, 2 Cal. 4th at 938, 830 P.2d at 756, 8 Cal. Rptr. 2d at 722. The court listed such relevant factors as whether counsel actually and accurately communicated the plea offer, whether the defendant gave any indication of a willingness to negotiate a plea, and whether the actual negotiated terms differed substantially from the consequences of proceeding to trial. *Id.* The court was unsatisfied with the defendant's "self serving" statement that he would have accepted the plea bargain if he had been accurately informed of the consequences of losing at trial. Therefore, the court required that the defendant's statement be corroborated by some form of objective evidence. *Id.*

46. *Id.* at 940-41, 830 P.2d at 757-58, 8 Cal. Rptr. 2d 723-24. The defendant suggested that the trial court's approval of the proffered plea bargain should be considered a "presumption." *Id.* at 941, 830 P.2d at 758, 8 Cal. Rptr. 2d at 724. The court rejected this suggestion on the ground that trial courts are responsible for protecting and promoting the public's welfare. *In re* Alvernaz, 2 Cal. 4th at 941, 830 P.2d at 758, 8 Cal. Rptr. 2d at 724. Therefore, despite the regularity with which plea bargains are approved in practice, a trial court's acceptance of a plea bargain should *not* be presumed. *Id. See also* People v. Stringham, 206 Cal. App. 3d 184, 194, 253 Cal. Rptr. 484, 489 (1988); People v. Cardoza, 161 Cal. App. 3d 40, 43-44, 207 Cal. Rptr. 388,

lish with reasonable probability that he would have accepted the offered plea bargain if he had been adequately informed by counsel.[47]

Despite ruling against the defendant, the court fashioned its own remedy for the deprivation of effective assistance of counsel during the plea negotiation stage.[48] Although the defendant sought specific performance of the previously offered plea bargain, the court declined to approve such a remedy.[49] The court commented that specific performance was not constitutionally mandated and was inconsistent with both the trial court's discretion in determining the defendant's sentence and the prosecution's discretion in negotiating a plea.[50] In an attempt to return the parties to their original bargaining positions, the court held that upon a trial court or appellate court's grant of relief, the district attorney should submit the previously offered plea bargain to the trial court for approval.[51] In the event that within thirty days the district attorney chooses to relitigate the case, the plea negotiation process should start over.[52]

B. The Dissenting Opinion

Justice Mosk agreed with the general law on the subject as set forth by the majority, but differed with the court in respect to whether the defendant met his burden of establishing prejudice.[53] Specifically, Justice Mosk argued that the defendant would most likely have accepted the

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390-91 (1984). *See generally* George Nicholson, *Victim's Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 PAC. L.J. 815, 840-41 (1992) (discussing the judicial and legislative goal of protecting victims' rights as an attempt to protect and promote the rights of the public at large); Charles F. Gorder, Jr., *Judicial Power To Dismiss Criminal Charges*, 64 CAL. L. REV. 495, 497-502 (1976) (examining the scope of judicial discretion in approving plea bargains).

47. *In re* Alvernaz, 2 Cal. 4th at 946, 830 P.2d at 761, 8 Cal. Rptr. 2d at 727.

48. *Id.* at 942, 830 P.2d at 758-59, 8 Cal. Rptr. 2d at 724-25. *See generally* 6 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Reversible Error* §§ 3303, 3305 (2d ed. 1989) (analyzing when impairment of the right to counsel constitutes reversible error).

49. *Id.* at 942-43, 830 P.2d at 759, 8 Cal. Rptr. 2d at 725. *See also* United States v. Osif, 789 F.2d 1404, 1405 (9th Cir. 1986) (noting that a defendant has no constitutional right to a plea bargain, and the government is under no obligation to reoffer a previously rejected plea bargain).

50. *In re* Alvernaz, 2 Cal. 4th at 942-43, 830 P.2d at 759, 8 Cal. Rptr. 2d at 725.

51. *Id.* at 944, 830 P.2d at 760, 8 Cal. Rptr. 2d at 726.

52. *Id.* The court recognized that while the prosecution might be in a better bargaining position having already obtained a conviction, the defendant obtained the benefit of knowing the strengths and weaknesses of each side's case. *Id.*

53. *Id.* at 947, 830 P.2d at 762, 8 Cal. Rptr. 2d at 728 (Mosk, J., dissenting).

proffered plea bargain if he had been adequately informed by counsel.[54] While Justice Mosk did not object to the requirement of objective evidence, he questioned the court's strict enforcement of that requirement when it resulted in an abrogation of the defendant's constitutional rights.[55]

Justice Mosk viewed the defendant's assertion of innocence at trial as a rational response under the given circumstances.[56] According to the dissent, a reasonable defendant would be more inclined to negotiate a plea the greater the maximum penalty, given a constant probability of acquittal.[57] Justice Mosk reasoned that the disparity between the actual maximum penalty and the sentence that the defendant would have received under the plea bargain was a substantial factor in assessing what the defendant would have done had he been adequately informed.[58] Therefore, the disparity justified the holding of an evidentiary hearing.[59]

IV. CONCLUSION

In re Alvernaz stands for the proposition that a pretrial violation of a defendant's constitutional right to competent counsel can not be subsequently remedied by a fair trial.[60] The court affirmed the continuing applicability of the two-part *Strickland* test in evaluating ineffective assistance of counsel claims and designated the appropriate remedy for such constitutional violations.[61] However, it remains unclear whether the defendant faces an undue burden regarding the "prejudice" element be-

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54. *In re* Alvernaz, 2 Cal. 4th at 947, 830 P.2d at 762, 8 Cal. Rptr. 2d at 728 (Mosk, J., dissenting).

55. *Id.* at 950, 830 P.2d at 764, 8 Cal. Rptr. 2d at 730 (Mosk, J., dissenting). According to Justice Mosk, under the court's reasoning, the defendant would be in a sense required to give up his right to put on a defense to assert his right to competent counsel. *Id.* at 952, 830 P.2d at 765, 8 Cal. Rptr. 2d at 731 (Mosk, J., dissenting). Justice Mosk referred to the majority's reliance on the defendant maintaining his innocence at trial. *Id.* at 951, 830 P.2d at 765, 8 Cal. Rptr. 2d at 731 (Mosk, J., dissenting). Thus, the majority erroneously concluded that the defendant was unwilling or reluctant to negotiate a plea with the prosecutor, and his stance contradicted any claim that he would have accepted the proffered plea bargain. *Id.* (Mosk, J., dissenting).

56. *In re* Alvernaz, 2 Cal. 4th at 950-51, 830 P.2d at 764-65, 8 Cal. Rptr. 2d at 730-31 (Mosk, J., dissenting).

57. *Id.* at 950-51, 830 P.2d at 764, 8 Cal. Rptr. 2d at 730 (Mosk, J., dissenting).

58. *Id.* at 954, 830 P.2d at 767, 8 Cal. Rptr. 2d at 733 (Mosk, J., dissenting).

59. *Id.* at 955, 958, 830 P.2d at 767, 770, 8 Cal. Rptr. 2d at 733, 736 (Mosk, J., dissenting). *See* Sarno, *supra* note 34, at 169-83.

60. *In re* Alvernaz, 2 Cal. 4th at 936, 830 P.2d at 755, 2 Cal. Rptr. 2d at 721.

61. *See* Falzone, *supra* note 4, at 449 (commenting on the confusion regarding the proper remedy).

cause plea negotiations are rarely memorialized in writing.[62] In response, the court recommended documenting plea bargains to provide objective evidence for any future challenges.[63] What remains clear is that the defendant's sworn statement alone is insufficient, and a writing formalizing the plea bargain arrangement would greatly assist the defendant in sustaining his burden of proof.[64]

JAMES J. MOLONEY

B. *Under Penal Code section 12022.7, a jury may conclude that a victim has suffered "great bodily injury" even though no "permanent, prolonged, or protracted disfigurement, impairment, or loss of bodily function" resulted:* **People v. Escobar.**

I. INTRODUCTION

In *People v. Escobar*,[1] the California Supreme Court overturned *People v. Caudillo*,[2] which held that any harm inflicted on a victim must include "permanent, prolonged or protracted disfigurement" to justify a finding of great bodily injury[3] as set forth in section 12022.7 of the California Penal Code[4]. In reversing *Caudillo*, the *Escobar* court maintained that if the

62. *See In re* Alvernaz, 2 Cal. 4th at 938, 830 P.2d at 756, 2 Cal. Rptr. 2d at 722.

63. *Id.* at 938 n.7, 830 P.2d at 756 n.7, 2 Cal. Rptr. 2d at 722 n.7. *See also* LYNN M. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL-CASE DISPOSITION 8, 50, 56-58 (1979) (describing the plea bargaining process as typically taking place immediately before court sessions or during a recess, without any formalities).

64. *In re* Alvernaz, 2 Cal. 4th at 938, 830 P.2d at 756, 8 Cal. Rptr. 2d at 722 ("[A] defendant's self-serving statement . . . is insufficient in and of itself . . . and must be corroborated independently by objective evidence.").

1. 3 Cal. 4th 740, 837 P.2d 1100, 12 Cal. Rptr. 2d 586 (1992). Justice Arabian delivered the unanimous opinion of the court, in which Chief Justice Lucas, and Justices Panelli, Kennard, Baxter, and George concurred. Justice Mosk wrote a separate, concurring opinion.

2. 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

3. *Id.* at 588, 580 P.2d at 290, 146 Cal. Rptr. at 875. For further discussion of great bodily injury as defined by California law, see 3 B.E. WITKIN AND N. EPSTEIN, CALIFORNIA CRIMINAL LAW *Punishment for Crimes*, § 1479 (2d ed. 1989 & Supp. 1992); 22 CAL. JUR. 3D *Criminal Law* §§ 3363, 3470 (1985 & Supp. 1992); 17 CAL. JUR. 3D *Criminal Law* § 621 (1984 & Supp. 1992).

4. CAL. PENAL CODE § 12022.7 (Deering 1992). *See infra* note 6 and accompanying text for text of section 12022.7 before and after its amendment in 1977 (hereinafter,

injury suffered exceeded the inherent aspects of the crime, it may fall into the ambit of "great bodily injury" under section 12022.7.[5]

In 1977, the California legislature amended section 12202.7 to exclude specific references to physical conditions that constitute great bodily injury.[6] The amendment consolidated the definition of great bodily injury into one concise phrase: "[G]reat bodily injury means a significant or substantial physical injury." The disparity between the court's decisions in *Escobar* and *Caudillo* is predicated on the differing interpretations of the phrase.[7]

In *Escobar*, Maria C. was waiting for a bus when she was kidnapped and raped by Joaquin Escobar.[8] Escobar told Maria that he had a gun, forced her into his car, and drove away. At one point, when Escobar had stopped the car, Maria attempted to escape by jumping out.[9] Escobar caught her, pulled her hair, and slapped her before throwing her back into the car. He continued down the freeway and finally stopped on the

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all statutory references are to the California Penal Code unless otherwise specified).

5. *Escobar*, 3 Cal. 4th at 750, 837 P.2d at 1106, 12 Cal. Rptr. 2d at 592. The court couched its analysis in terms of what type of injury is "routinely associated with [the crime]." *Id.* When a defendant has exhibited brutality and violence beyond that necessarily associated with the offense, a finding of great bodily injury may be supported. *Id.*

6. Prior to 1977, section 12202.7 stated in pertinent part:

> [G]reat bodily injury means a serious impairment of physical condition, which includes any of the following: (a) Prolonged loss of consciousness. (b) Severe concussion. (c) Protracted loss of any bodily member or organ. (d) Protracted impairment of function of any bodily member or organ or bone. (e) A wound or wounds requiring extensive suturing. (f) Serious disfigurement. (g) Severe physical pain inflicted by torture.

CAL. PENAL CODE § 12022.7 (West 1992) (reprinted following the current text of section 12022.7).

After the 1977 amendment, section 12022.7 stated in pertinent part: "[G]reat bodily injury means a significant or substantial physical injury." CAL. PENAL CODE § 12202.7 (Deering 1992).

7. *Escobar*, 3 Cal. 4th at 747-48, 837 P.2d at 1104-05, 12 Cal. Rptr. 2d at 590-91. Justice Arabian intimated that the *Caudillo* court failed to give due deference to the legislative intent behind the 1977 amendment of section 12202.7 and was, therefore, misguided in its interpretation of "significant or substantial physical injury." *Id.*

8. *Id.* at 743-44, 837 P.2d 1101, 12 Cal. Rptr. 2d at 587. For further discussion of the facts, see Phillip Carrizosa, *Court Overrules Controversial Rape Decision: Bird Court Ruling on "Great Bodily Injury" Rejected on 6-1 Vote: Will Aid Prosecutors*, L.A. DAILY J., Oct. 23, 1992, at 1; Harriet Chiang, *Court Expands "Bodily Injury" Standard*, S.F. CHRON., Oct. 23, 1992, at A30; Philip Hager, *Longer Prison Terms For Some Felons OKd; Jurisprudence: State Justices Abandon a Bird Court Decision That Limited Additional Prison Time For Criminals Who Inflict Added Injury On Their Victims*, L.A. TIMES, Oct. 23, 1992, at A3.

9. *Escobar*, 3 Cal. 4th at 744, 837 P.2d at 1102, 12 Cal. Rptr. 2d at 588. Escobar had exited the car momentarily to urinate when Maria attempted her escape. *Id.*

roadside, where he forced Maria out of his car, dragged her by the hair to a bridge and raped her. During the course of the rape, Escobar pressed his knee into Maria's chest, covered her mouth with his hand, violently jerked her hair, and pushed his finger into her eye socket.[10] For more than a week after the incident, Maria was unable to walk without assistance.[11]

Following a jury trial, Escobar was found guilty of kidnapping, rape, and assault with a deadly weapon.[12] In addition, the jury found that Escobar had inflicted great bodily injury on Maria during the commission of the offense.[13] As a result, Escobar was sentenced to an eight-year term for the rape. In light of the great bodily injury inflicted on the victim, the court added a three-year enhancement[14] to the sentence to run consecutively.[15]

The California Court of Appeal set aside the jury's finding of great bodily injury, relying on *Caudillo*. The court held that the victim's injuries "did not meet the test of 'severe' and 'protracted' harm articulated [in *Caudillo*]."[16] Upon review, the California Supreme Court held that a victim need not suffer "permanent, prolonged, or protracted" disfigurement, instead finding that if the injury resulted from brutality and violence not commonly associated with the crime, the standard of great bodily injury as established by section 12022.7 may be satisfied.[17]

II. TREATMENT

A. *Majority Opinion*

The California Supreme Court began its analysis of the case by examining the definition of great bodily injury.[18] The court noted at the outset that the legislature has provided a clear definition of great bodily inju-

10. *Id.* at 744, 837 P.2d at 1101, 12 Cal Rptr. 2d at 587. Justice Arabian stated that a jury could properly find great bodily injury based on "precisely the quantum of evidence presented here." *Id.* at 750, 837 P.2d at 1106, 12 Cal. Rptr. 2d at 592.

11. *Id.* at 743, 837 P.2d at 1101, 12 Cal. Rptr. 2d at 587.

12. *Id.* at 745, 837 P.2d at 1102, 12 Cal. Rptr. 2d at 588.

13. *Id.*

14. *Id.* For a discussion of determinate sentencing and available enhancements, see 22 CAL. JUR. 3D *Criminal Law* § 3410, 3417 (1985 & Supp. 1992).

15. *Escobar*, 3 Cal. 4th at 745, 837 P.2d at 1102, 12 Cal. Rptr. 2d at 588.

16. *Id.* (quoting People v. Caudillo, 21 Cal. 3d 562, 588-89, 580 P.2d 274, 290, 146 Cal. Rptr. 859, 875 (1978).

17. *Id.* at 750, 837 P.2d at 1106, 12 Cal. Rptr. 2d at 592.

18. *Id.* at 745, 837 P.2d at 1102-03, 12 Cal. Rptr. 2d at 588-89.

ry[19] but that the *Caudillo* court and its progeny have attached "judicially created baggage" to the definition.[20] The court concluded that the *Caudillo* test for great bodily injury, namely permanent, prolonged, or protracted disfigurement, should be replaced by the lesser standard of significant or substantial injury.[21]

In overruling *Caudillo*, the supreme court detailed the legislative history behind section 12022.7.[22] It recognized that the legislature intended great bodily injury to be found when a "substantial injury beyond that inherent in the offense" occurred.[23] The court stated, however, that by amending the specific version of the statute in favor of a more general one,[24] the legislature clearly intended to preclude future courts from construing the specific examples in section 12022.7 as an exclusive list of injuries.[25] The high court concluded that while the *Caudillo* language became the touchstone[26] in cases concerning issues of great bodily injury, the limitation could no longer stand because section 12022.7 contains no requirement that a victim suffer permanent, prolonged, or protracted disfigurement.[27]

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19. *Id.* at 745, 837 P.2d at 1103, 12 Cal. Rptr. 2d at 589; *see supra* note 6 and accompanying text.

20. *Id.*

21. *Id.* at 750, 837 P.2d at 1106, 12 Cal. Rptr. 2d at 592.

22. *Id.* at 747-50, 837 P.2d at 1104-06, 12 Cal. Rptr. 2d at 590-92.

23. *Id.* at 747-48, 837 P.2d at 1103, 12 Cal. Rptr. 2d at 589.

24. The version of section 12022.7 finally adopted by the legislature was taken directly from the applicable jury instruction on the subject, which reads in pertinent part: "'Great bodily injury' as used in this instruction means a *significant or substantial physical injury.*" CALJIC No. 17.20 (v.2 5th ed. 1988) (emphasis added).

25. *Escobar*, 3 Cal. 4th at 747, 837 P.2d at 1104, 12 Cal. Rptr. 2d at 590. The court stated that the jurists deciding *Caudillo* "encountered difficulty" because legislative history indicates an intent to discard the original detailed definition, and the *Caudillo* court "inexplicably" failed to consider that in its analysis. *Id.* at 748, 837 P.2d at 1104-05, 12 Cal Rptr. 2d at 590-91.

26. *Id.* at 749, 837 P.2d at 1105, 12 Cal. Rptr. 2d at 591. Although subsequent courts have looked at *Caudillo* as the standard of review for great bodily injury, none has increased the threshold for what constitutes great bodily injury. *See, e.g.*, People v. Johnson, 181 Cal. App. 3d 1137, 1140, 225 Cal. Rptr. 251, 253 (1986) (holding transmission of a sexually transmitted disease constitutes great bodily injury); People v. Sanchez, 131 Cal. App. 3d 718, 732, 182 Cal. Rptr. 671, 733 (1982) (finding multiple abrasions and lacerations, scratches on the back, and numerous bruises as well as swelling of the eyes and face to constitute great bodily injury); People v. Williams, 115 Cal. App. 3d 446, 454-55, 171 Cal. Rptr. 401, 405-06 (1981) (finding evidence of the forcible rape of a virgin, who suffered genital tearing and bleeding, sufficient to merit a great bodily injury enhancement); People v. Jaramillo, 98 Cal. App. 3d 830, 836, 159 Cal. Rptr. 771, 774-75 (1979) (holding evidence of a child's being beaten with a wooden dowel, suffering contusions over her body, swelling, and severe discoloration in places, sufficient to support a finding of great bodily injury).

27. *Escobar*, 3 Cal. 4th at 747, 837 P.2d at 1104, 12 Cal. Rptr. 2d at 590.

B. Concurring Opinion

Justice Mosk concurred in the judgment,[28] but wrote separately because he saw no reason to reconsider or disapprove any aspect of the *Caudillo* decision.[29] In response, the majority opinion stated that it was not purporting to overrule *Caudillo* entirely, but instead rejected only the portion of the opinion that distorted the legislative history behind section 12022.7.[30] Justice Mosk believed that the amendment to section 12022.7 was "not intended to lessen the magnitude of bodily injury required by the 1976 detailed definition of great bodily injury."[31]

III. CONCLUSION

Escobar stands for the proposition that great bodily injury need not result in permanent, prolonged, or protracted disfigurement.[32] Rather, when the injury suffered goes beyond that which is inherent to the crime, then it constitutes great bodily injury under section 12022.7.[33] In addition, the majority recognized that the question of whether a victim suffered great bodily injury is purely a question of fact, not law.[34] Thus, such a decision should be left in the hands of the jury.[35] It is reasonable to assume, therefore, that the new, lesser standard adduced by the *Escobar* court represents a decisive victory for California state prosecutors.[36]

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28. *Escobar*, 3 Cal. 4th at 753, 837 P.2d at 1108, 12 Cal. Rptr. 2d at 594 (Mosk, J., concurring).

29. Interestingly, Justice Mosk is the only justice on the court today who originally sat on the *Caudillo* court. Carrizosa, *supra* note 8.

30. *Id.* at 751, 837 P.2d at 1107, 12 Cal. Rptr. 2d at 593 n.5.

31. *Id.* at 755, 837 P.2d at 1109, 12 Cal. Rptr. 2d at 595 (Mosk, J., concurring).

32. *Id.* at 747-48, 837 P.2d at 1103, 12 Cal. Rptr. 2d at 589.

33. *Id.* at 750, 837 P.2d at 1106, 12 Cal. Rptr. 2d at 592.

34. *Id.* The opinion stated that "'[i]f there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.'" *Id.* (quoting People v. Wolcott, 34 Cal. 3d 92, 107, 665 P.2d 520, 530, 192 Cal. Rptr. 748, 758 (1983)).

35. *Id.*

36. Deputy Attorney General M. Howard Wayne remarked: "We've gotten rid of the language [in *Caudillo*] . . . [n]ow the public will be greater [sic] protected against acts of gratuitous violence." Hagar, *supra* note 8.

It should be noted, however, that while not directly addressed by the supreme court in *Escobar*, the question remains whether this new ruling will open the door for the inclusion of severe *psychological* injury within the definition of great bodily injury.[37] Taken to its extreme, an argument could be made that *Escobar* undermines the *Caudillo* court's clearly articulated refusal to equate physical and psychological injuries. At a minimum, the California practitioner should note that a showing of permanent, prolonged, or protracted impairment, or loss of bodily function is no longer required for a finding of great bodily injury.[38]

ALAN J. JACKSON

C. *Section 1202.1 of the California Penal Code, which requires a sexual offender to submit to an AIDS test, does not violate the Ex Post Facto Clause on the grounds that an AIDS test does not constitute punishment:* **People v. McVickers.**

I. INTRODUCTION

In *People v. McVickers*,[1] the Supreme Court of California considered whether section 1202.1 of the California Penal Code (hereinafter section 1202.1),[2] which makes AIDS[3] blood testing mandatory for certain

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37. The *Caudillo* panel specifically contrasted physical injury with psychological injury, stating that they "were aware of no statutory interpretation that would permit the legislative language—great *bodily* injury—to be construed as including a . . . victim's emotional trauma." *Caudillo*, 21 Cal. 3d at 582, 580 P.2d at 286, 146 Cal. Rptr. at 870 (emphasis in original).

38. *Escobar*, 3 Cal. 4th at 750, 837 P.2d at 1106, 12 Cal. Rptr. 2d at 592.

1. 4 Cal. 4th 81, 840 P.2d 955, 13 Cal. Rptr. 2d 850 (1992). Justice Mosk wrote the majority opinion in which Chief Justice Lucas and Justices Panelli, Kennard, Arabian, Baxter, and George concurred.

In *McVickers*, the defendant committed certain sexual crimes with a minor between 1983 and 1989, including lewd and lascivious acts, intercourse, oral copulation, and sodomy. Under § 1202.1 of the California Penal Code, which became effective January 1, 1989, a defendant convicted of offenses must submit to a blood test for AIDS. The defendant was convicted and sentenced in 1989, and, pursuant to § 1202.1, the trial court ordered him to submit to a blood test. The defendant appealed, arguing that § 1202.1 violated the Ex Post Facto Clause because his crimes were committed prior to enactment of the statute. The court of appeal agreed and struck the order for the blood test. Granting review, the Supreme Court of California reversed, holding that an AIDS blood test was not to be considered punishment for Ex Post Facto purposes.

2. California Penal Code § 1202.1 states, in pertinent part: "[t]he court shall order every person convicted of a violation of a sexual offense . . . to submit to a blood test for evidence of . . . acquired immune deficiency syndrome (AIDS)." CAL. PENAL CODE § 1202.1 (West Supp. 1993). *See generally* 4 B. WITKIN & N. EPSTEIN, CALIFOR-

sexual offenders, violated the Ex Post Facto Clause.[4] The court concluded that the blood test was not "punishment," and therefore, did not violate the Ex Post Facto Clause.[5]

II. ANALYSIS

The court reasoned that an AIDS blood test was not punishment for Ex Post Facto purposes because: (1) the blood test is a simple procedure that is relatively painless,[6] (2) the test results are revealed only to the defendant and his or her attorney,[7] and (3) the procedure is consistent with the legislature's stated goals.[8]

NIA CRIMINAL LAW, *Introduction to Criminal Procedure* § 1821D (2d ed. 1989 & Supp. 1992) (discussing the testing of defendants convicted of sex crimes).

3. Acquired immune deficiency syndrome ("AIDS") is a virus that attacks the body's immune system. AIDS is transmitted by "sexual contact, and also through the sharing of hypodermic needles, contaminated blood transfusions, and during pregnancy." CAL. HEALTH & SAFETY CODE § 199.46 (West 1990).

4. *McVickers*, 4 Cal. 4th at 83, 840 P.2d at 956, 13 Cal. Rptr. 2d at 851.

Subdivision (d) of § 1202.1 states that the term "sexual offenses" includes rape, statutory rape, spousal rape, sodomy, and oral copulation. CAL. PENAL CODE § 1202.1 (d) (West 1982 & Supp. 1993).

5. *McVickers*, 4 Cal. 4th at 90, 840 P.2d at 961, 13 Cal. Rptr. 2d at 856. The U.S. Constitution states in pertinent part that: "no state shall . . . pass any . . . ex post facto law." U.S. CONST. ART. X, § 10, cl. 1; *see also* CAL. CONST. ART. I, § 9. The court determined that the purpose of the Ex Post Facto Clause was to prevent retrospective legislation with punitive effects. *Id.* at 87, 840 P.2d at 959, 13 Cal. Rptr. 2d at 854. For a discussion of the Ex Post Facto Clause, *see generally* 17 CAL. JUR. 3D *Criminal Law* § 9 (1984) (defining an ex post facto law as one that applies retrospectively to crimes committed before the enactment of an applicable statute).

6. *McVickers*, 4 Cal. 4th at 88, 840 P.2d at 960, 13 Cal. Rptr. 2d at 855. The court indicated that the physical invasion involved in drawing blood is not significant. *Id.* at 88, 854 P.2d 959-60, 13 Cal. Rptr. 2d 854-55. Therefore, the court concluded that such a minor discomfort as drawing blood could not be considered punishment. *Id.* For an analysis of a recent California Supreme Court decision holding that an AIDS blood test does not violate the Fourth Amendment right to be free from unreasonable searches and seizures, see Karin Zink, Note, Love v. Superior Court: *Mandatory AIDS Testing and Prostitution*, 22 GOLDEN GATE U. L. REV. 795 (1992).

7. *McVickers*, 4 Cal. 4th at 88, 840 P.2d at 960, 13 Cal. Rptr. 2d at 855. The prosecution could, however, use a positive test result to enhance a sentence if the offender were involved in a future criminal offense. *Id.*

8. *Id.* at 89, 840 P.2d at 960, 13 Cal. Rptr. 2d at 855. The court noted that "[t]he rapidly spreading AIDS epidemic poses an unprecedented major public health crisis . . . ." *Id.* (citing CAL. HEALTH & SAFETY CODE § 199.45 (West 1990)).

III. CONCLUSION

In *McVickers*, the court concluded that an AIDS blood test was not "punishment" within the meaning of the Ex Post Facto Clause.[9] This holding permits a court to order a sexual offender to submit to an AIDS test, even where the offense was committed prior to enactment of the statute. The court's holding is reasonable with respect to the policy of protecting the health of the offender, the victim, and society at large. Moreover, considering the recent steps that society has taken to cope with the AIDS virus, the court may have been more willing to overlook the potential for other forms of punishment that may result from the AIDS test.[10]

KIMBERLY J. HERMAN

D. *A criminal defendant has no right to an arraignment on charges pending in one county when the defendant has been caught previously in another county and proceedings are still pending:* **Ng v. Superior Court.**

I. INTRODUCTION

In *Ng v. Superior Court*,[1] the Supreme Court of California considered

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9. *Id.* at 90, 840 P.2d at 961, 13 Cal. Rptr. 2d at 855. In addition, § 1202.1 was "not excessive in relation to the statute's asserted purpose," nor did it "promote a traditional aim of punishment-retribution." *Id.* at 89, 840 P.2d at 960, 13 Cal. Rptr. 2d at 854.

10. One punishment that may result from retrospective application of this test is an increase in the sentence received for a second conviction. CAL. PENAL CODE § 12022.85.

1. 4 Cal. 4th 29, 840 P.2d 961, 13 Cal. Rptr. 2d 856 (1992). Justice Arabian wrote the majority opinion in which Chief Justice Lucas, and Justices Panelli, Kennard, Baxter, and George concurred. Justice Mosk wrote a separate opinion, also concurring in the judgment.

In *Ng*, the defendant had two outstanding arrest warrants on murder charges issued in San Francisco in 1985 and 1986. Sometime thereafter, Canadian officials incarcerated the defendant. On September 26, 1991, Canada extradited him to California. On September 27, 1991, the defendant was arraigned on unrelated capital charges in Calaveras County. Prior to commencement of the trial, the defendant sought transfer to San Francisco for arraignment on the previous murder charges. The court of appeal filed an opinion ordering a peremptory writ of mandamus, stating that "to facilitate the relief requested this order is final forthwith." *Id.* at 33, 840 P.2d at 963, 13 Cal. Rptr. 2d at (quoting CAL. RULES OF COURT Rule 24 (d) (West 1992)). Purporting to act pursuant to a peremptory writ of mandamus, the San Francisco Superior Court issued its own peremptory writ for an arraignment. The supreme court stayed the orders and granted review, holding that the court of appeal opinion was not a peremptory writ itself, and therefore, was not effective until it became final as to the supreme court. *Id.* at 33, 840 P.2d at 963, 13 Cal. Rptr. 2d at 858.

whether the court of appeal erred in issuing a peremptory writ of mandamus,[2] ordering a defendant who had been arraigned in one county on felony charges to be transferred to another county for arraignment on other unrelated felony charges.[3] The supreme court concluded that the transfer should not have been ordered because the defendant does not need to be arraigned in the second county until the conclusion of criminal proceedings in the first county.[4]

II. ANALYSIS

The court reasoned that the peremptory writ of mandamus should not have been issued because: (1) the court of appeal lacked authority to issue a peremptory writ without a prior order directing its issuance;[5] (2) this was not one of the "rare"[6] cases requiring an accelerated procedure;[7] and (3) the defendant would not be harmed by being forced to await prosecution in the second county until the completion of criminal proceedings in the first county.[8]

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2. For a discussion on the writ of mandamus, see generally 4 B. WITKIN AND N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Extraordinary Writs* § 3326 (2d ed. 1989) (writ of mandamus is directed at courts to compel actions).

3. *Ng*, 4 Cal. 4th at 32, 840 P.2d at 962, 13 Cal. Rptr. 2d at 857.

4. *Id.* at 36, 840 P.2d at 965, 13 Cal. Rptr. 2d at 860.

5. *Id.* at 33, 840 P.2d at 963, 13 Cal. Rptr. 2d at 858. The supreme court noted that the court of appeal relied upon the language in rule 24(d) to accelerate the date of finality. Rule 24(d) states in pertinent part that "a court of appeal may order that a decision granting a peremptory writ within its jurisdiction shall become final as to that court . . . immediately if early finality is necessary to prevent mootness or to prevent frustration of the relief granted." CAL. RULES OF COURT Rule 24(d) (West 1992). In holding the writ invalid, the court reasoned that in order to be final pursuant to Rule 24(d) the writ must be final as to the court of appeal and the supreme court. *Ng*, 4 Cal. 4th at 34, 840 P.2d at 963-64, 13 Cal. Rptr. 2d at 858-59.

6. *Ng*, 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 859. The court announced in Palma v. U.S. Indus. Fasteners, Inc., 36 Cal. 3d 171, 681 P.2d 893, 203 Cal. Rptr. 626 (1984), that the accelerated procedure should be the "exception" to the normal writ process. *Id.*

7. *Ng*, 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 859. The court indicated that such "rare" instances are "where such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts or when there is an unusual urgency requiring acceleration of the normal process." *Id.* The court believed that there was no need to issue a peremptory writ in the first instance because under the undisputed facts it was unclear whether the defendant was entitled to multiple arraignments. *Id.*

8. *Id.* at 39, 840 P.2d at 967, 13 Cal. Rptr. 2d at 862. The court examined the court of appeal's opinion relying upon California Constitution article I, § 14, which

III. CONCLUSION

In reversing the court of appeal, the California Supreme Court promoted a policy of efficiency in the criminal judicial system.[9] The court stated that because multiple arraignments are costly and cause undue delays,[10] it is practical to permit the county which captured the accused first to arraign the accused.[11] However, the court's reasoning appears to ignore cases in which the defendant is held on minor charges in one county, but has much more serious charges pending in another county.[12] Thus, the court's holding may be limited to such instances where the crimes in competing counties are somewhat similar.

KIMBERLY J. HERMAN

E. *The amendment to California Penal Code section 190.2 by Proposition 115, including the changes in subdivisions (a) and (b) and the addition of subdivisions (c), (d) and (e), is not preempted by Proposition 114, which received more votes, inasmuch as the changes made to section 190.2 by Proposition 114 were nonsubstantive:* **Yoshisato v. Superior Court.**

I. INTRODUCTION

In *Yoshisato v. Superior Court*,[1] the California Supreme Court determined whether, under the California Constitution, a statute that is reenacted by the voters can be further amended by provisions of other mea-

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provides that "a person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court." CAL. CONST. art. I, § 14. The court also noted that the constitutional right to a speedy trial was not denied if prompt arraignment occurs after completion of the first trial. *Ng*, 4 Cal. 4th at 40, 840 P.2d at 968, 13 Cal. Rptr. 2d at 863.

9. *Id.* at 39, 840 P.2d at 967, 13 Cal. Rptr. 2d at 862.

10. *Id.* The court pointed out that multiple arraignments would require shuffling the defendant from county to county and may interfere with constitutionally protected time limits. *Id.*

11. *Id.* at 39, 840 P.2d at 967, 13 Cal. Rptr. 2d at 863.

12. *Ng*, 4 Cal. 4th at 41, 840 P.2d at 968, 13 Cal. Rptr. 2d at 863-64. In his concurring opinion, Justice Mosk noted that the sequence of prosecution should not depend on what county captures the accused first. *Id.*

1. 2 Cal. 4th 978, 831 P.2d 327, 9 Cal. Rptr. 2d 102 (1992). Chief Justice Lucas authored the opinion of the court in which Justices Panelli, Kennard, Arabian, Baxter, and George concurred. Justice Mosk wrote a separate dissenting opinion.

sures which appear on the same ballot.[2] This case involved propositions 114 and 115, which were approved by the voters in the June 1990 Primary Election.[3] Although both propositions were approved, Proposition 114 received more votes than Proposition 115.[4] Both propositions provided for amendments to California Penal Code section 190.2 [hereinafter section 190.2].[5] The California Supreme Court held that Proposition 114 does not create a comprehensive scheme and that Proposition 115 is complementary or supplementary to Proposition 114.[6] Thus, the changes made by Proposition 115 are operative.[7]

Proposition 114 began as a "peace officer special circumstance" amendment to Senate Bill No. 353, which changed the classification and treatment of peace officers.[8] The amendment was presented to the voters as Proposition 114 pursuant to article II, section 10[9] of the California Constitution.[10] The only substantive change to section 190.2 presented by Proposition 114 was to subdivision (a), paragraph (7), which identifies

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2. *Id.* at 990, 831 P.2d at 334-35, 9 Cal. Rptr. 2d at 109-10.

3. *Id.* at 981, 831 P.2d at 328, 9 Cal. Rptr. 2d at 103. Yoshisato was charged with first degree murder with the special circumstance of the murder being that it was committed while engaged in "rape with a foreign instrument." *Id.* A finding of special circumstance requires that the sentence be either death or life in prison without possibility of parole. *Id.* Under Proposition 114, section 190.2 did not classify "rape with a foreign instrument" as a special circumstance. *Id.* at 981-82, 831 P.2d at 328-29, 9 Cal. Rptr. 2d at 103-04. Proposition 115, however, amended section 190.2 to include "rape with a foreign instrument" as a special circumstance. *Id.* Yoshisato demurred to the charge claiming that Proposition 115 was superseded by Proposition 114, and therefore, was not operative in amending section 190.2. The trial court overruled the demurrer. *Id.* at 982, 831 P.2d at 329, 9 Cal. Rptr. 2d at 104. The court of appeal reversed, finding that Proposition 114 precluded proposition 115. *Id.* The California Supreme Court reversed the judgment of the court of appeal. *Id.* at 992, 831 P.2d at 336, 9 Cal. Rptr. 2d at 111.

4. *Id.* at 992-93, 831 P.2d at 336, 9 Cal. Rptr. 2d at 111 (Mosk, J., dissenting).

5. *Id.* at 992, 831 P.2d at 336, 9 Cal. Rptr. 2d at 111.

6. *Id.* at 989-92, 831 P.2d at 333-36, 9 Cal. Rptr. 2d at 108-11.

7. *Id.*

8. *Id.* at 982, 831 P.2d at 329, 9 Cal. Rptr. 2d at 104.

9. Article II, section 10 provides in relevant part:

> (b) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail. (c) The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

CAL. CONST. art. II, § 10.

10. *Yoshisato*, 2 Cal. 4th at 982, 831 P.2d at 329, 9 Cal. Rptr. 2d at 104.

the classifications of peace officers covered by the "special circumstance" provision.[11] All other proposed changes to section 190.2 were nonsubstantive, syntactic changes and substitutions of gender neutral language.[12]

Proposition 115 was a much broader measure designed to make "comprehensive reforms . . . to our criminal justice system."[13] It proposed six constitutional changes and the repeal, amendment, or addition of many provisions in the Code of Civil Procedure, the Evidence Code, and the Penal Code.[14] These changes included a number of substantive changes to section 190.2.[15] The amendment at issue in this case was the addition

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11. *Id.* at 983, 831 P.2d at 330, 9 Cal. Rptr. 2d at 105. The proposed amendment read as follows:

> The victim was a peace officer as defined in [Penal Code] Section 830.1, 830.2, 830.3, 830.31, 830.32 [school police], 830.33 [transportation police], 830.34 [utility security officers], 830.35, 830.36, 830.37 [fire investigators], 830.4, 830.5, [repealed by Stat. 1980, ch. 1340, § 14], 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his or her duties was intentionally killed, and the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties . . . .

Id. (citation omitted).

12. *Id.*

13. *Id.* at 984, 831 P.2d at 330, 9 Cal. Rptr. 2d at 105 (quoting Prop. 115, § 1(a)).

14. *Id.* at 984, 831 P.2d at 330, 9 Cal. Rptr. 2d at 105.

15. *Id.* at 985, 831 P.2d at 331, 9 Cal. Rptr. 2d at 106. The changes to section 190.2 proposed by Proposition 115 are as follows:

> 1. *Amendments to Section 190.2, Subdivision (a)*
>
> (i) The opening paragraph of subdivision (a) was amended to delete the requirement that special circumstances be "charged and specially" found; the revised version provides that a defendant convicted of first degree murder shall face the penalty of death, or life in prison without the possibility of parole, if "one or more of the following special circumstances has been ~~charged and specially~~ found under Section 109.4 to be true: . . . " (Ballot Pamp., Prop. 115, Primary Elec. (June 5, 1990) p. 66.)
>
> (ii) Paragraph (10) (the "witness killing" special circumstance) was amended to apply to the intentional killing of a witness to prevent his or her "testimony in any criminal *or juvenile* proceeding . . . ," (Ballot Pamp., Prop. 115, Primary Elec. (June 5, 1990) p. 66.)
>
> (iii) Paragraphs (11) and (12) (the "prosecutor murder" and "judge murder" special circumstances) were amended to apply only if the murder was "*intentionally* carried out in retaliation for or to prevent the performance of the victim's official duties." (Ballot Pamp., Prop. 115, Primary Elec. (June 5, 1990) p. 66.)
>
> (iv) Paragraph (17) (the "felony murder" special circumstance) was amended to add two death-qualifying felonies: "(x) Mayhem in violation of Section 203" and "(xi) Rape by instrument in violation of Section 289."
>
> (v) The last sentence of paragraph (18) (the "torture murder" special circumstance) was deleted. The revised section omits the requirement of "proof

of "[r]ape by instrument in violation of Section 289" as a felony-murder special circumstance under paragraph (17) of subdivision (a).[16] It is important to note, however, that no substantive changes were made to Section 190.2, subdivision (a), paragraph (7) under Proposition 115.[17]

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of infliction of extreme physical pain," and reads as follows: "The murder was intentional and involved the infliction of torture. ~~For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.~~" (Ballot Pamp., Prop. 115, Primary Elec. (June 5, 1990) p. 66.)

2. *Amendments to Section 190.2, Subdivision (b)*

(i) It deleted the first sentence of former subdivision (b) . . . and replaced it with the following: "Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer as to whom such special circumstance has been found to be true under Section 190.4 need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in state prison for a term of life without the possibility of parole."

(ii) It added subdivision (c), as follows: "Every person not the actual killer who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been found true under Section 190.4."

(iii) Finally, it added subdivision (d), as follows: "Notwithstanding subdivision (c), every person not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for life without the possibility of parole, in any case in which a special circumstance enumerated in paragraph (17) of subdivision (a) of this section has been found to be true under Section 190.4."

Yoshisato, 2 Cal. 4th at 985-87, 831 P.2d at 331-32, 9 Cal. Rptr. 2d at 106-07 (footnotes omitted).

Proposition 115 also created subdivision (e), which reiterates the last sentence of the former section 190.2 which reads: "The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5." *Id.* at 987 n.4, 831 P.2d at 332 n.4, 9 Cal. Rptr. 2d at 107 n.4.

16. *Id.* at 985, 831 P.2d at 331, 9 Cal. Rptr. 2d at 106.

17. *Id.*

II. TREATMENT OF THE CASE

Previously, in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*,[18] the California Supreme Court determined that where the measures "were presented to the voters as 'competing' or 'alternative' measures,"[19] article II, section 10, subdivision (b) of the California Constitution was to control.[20] Application of the California Constitution would require that only the provisions of the measure receiving the greater affirmative vote be enforced and none of the provisions of the other measures, whether conflicting or not, could be operative.[21] However, where two measures were not competing or alternative measures, but contained minor provisions that happened to conflict, the conflicting provisions of the less popular measure could be excised and the remainder of the measure given effect if its principal purpose would not be affected.[22]

Therefore, the first issue the supreme court addressed was whether Propositions 114 and 115 were competing or complementary.[23] The ballot materials distributed to the voters demonstrated that the propositions "were not expressly or even impliedly presented to the voters as competing or alternative measures."[24]

Pursuant to its decision in *Taxpayers*, the supreme court also addressed the issue of whether Propositions 114 and 115 "sought to 'create . . . a comprehensive regulatory scheme related to the same subject . . . .'"[25] Yoshisato claimed that the two propositions presented competing versions of section 190.2.[26] He argued that Proposition 114, in addition to expanding the "peace officer special circumstance" provisions, proposed the affirmation of unamended provisions.[27] Yoshisato reasoned that because Proposition 115 proposed amendments to provisions that were unamended in Proposition 114, the two measures were

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18. 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990).

19. *Yoshisato*, 2 Cal. 4th at 986, 831 P.2d at 332, 9 Cal. Rptr. 2d at 107.

20. CAL. CONST. art. II, § 10(b) provides: "If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." *Id.*

21. *Taxpayers*, 51 Cal. 3d at 747, 799 P.2d at 1221, 274 Cal. Rptr. at 788.

22. *Id.* at 771 n.12, 799 P.2d at 1237 n.12, 274 Cal. Rptr. at 804 n.12.

23. *Yoshisato*, 2 Cal. 4th at 988, 831 P.2d at 333, 9 Cal. Rptr. 2d at 108.

24. *Id.* at 989, 831 P.2d at 333, 9 Cal. Rptr. 2d at 108.

25. *Id.* (quoting *Taxpayers*, 51 Cal. 3d at 747, 799 P.2d at 1221, 274 Cal. Rptr. at 788).

26. *Id.* at 989, 831 P.2d at 333-34, 9 Cal. Rptr. 2d at 108-09.

27. *Id.* at 989, 831 P.2d at 334, 9 Cal. Rptr. 2d at 109.

competing comprehensive schemes, and, therefore, only the provisions of Proposition 114 should be given effect.[28]

The California Constitution,[29] provides that when provisions within a statute are amended the entire statute must be reenacted as amended.[30] The court stated that the constitutionally compelled reenactment of an entire statute when amending any portion of that statute does not create a presumption that the voters intended the reenactment to be a comprehensive scheme.[31] Examining the ballot materials, the supreme court concluded that the voters intended solely to amend section 190.2 in the manner specifically provided by Proposition 114 and that the voters did not intend to create a comprehensive scheme which would render Proposition 115 inoperative.[32]

After establishing that Propositions 114 and 115 are not competing or alternative measures, and that Proposition 114 does not create a comprehensive scheme, the majority proceeded to determine whether the two propositions conflicted.[33] In examining each provision of Proposition 115 as it related to Section 190.2,[34] the court concluded that the changes made to the opening paragraph of subdivision (a) and the amendments to paragraphs (11), (12), and (17) of subdivision (a) were all operative inasmuch as there were no provisions in Proposition 114 relating to these areas.[35]

The court next considered the amendments to section 190.2, consisting of the nonsubstantive changes made by Proposition 114 and substantive changes made by Proposition 115.[36] The nonsubstantive changes of Proposition 114 to subdivisions (a)(10) and (b) were held not to have

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28. *Id.*

29. CAL. CONST. art. IV, § 9 provides:

> A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is reenacted as amended.

Id.

30. *Yoshisato*, 2 Cal. 4th at 989, 831 P.2d at 334, 9 Cal. Rptr. 2d at 108.

31. *Id.* at 990, 831 P.2d at 334-35, 9 Cal. Rptr. 2d at 109-10.

32. *Id.*

33. *Id.* at 991, 831 P.2d at 335, 9 Cal. Rptr. 2d at 110.

34. *Id.*

35. *Yoshisato*, 2 Cal. 4th at 991, 831 P.2d at 335, 9 Cal. Rptr. 2d at 110.

36. *Id.* at 992, 831 P.2d at 335-36, 9 Cal. Rptr. 2d at 111.

been intended to preclude all other changes.[37] Furthermore, the provisions of Proposition 115 relating to section 190.2 were found not to be in "conflict" with Proposition 114 under article II, section 10 of the California Constitution, and thus, are fully operative.[38] The court reversed the decision of the court of appeal, holding that Yoshisato was properly charged with the special circumstance of "rape by instrument" under section 190.2(a)(17).[39]

Justice Mosk, expressing his belief that the two propositions conflicted, wrote a separate dissenting opinion. Mosk argued that "[i]t is axiomatic that two provisions conflict when one authorizes what the other prohibits."[40] He disagreed with the majority's interpretation of "provision" to mean "paragraph" instead of "section" or "measure."[41]

Justice Mosk also disagreed with the majority's finding that the two propositions did not constitute a comprehensive scheme.[42] He contended that inasmuch as "Proposition 114's section 190.2 and Proposition 115's section 190.2 each fully and exclusively regulate the subject of death eligibility for first degree murderers," they each constitute a comprehensive scheme.[43] Justice Mosk further reasoned that because Proposition 115 allows for the death penalty in circumstances that Proposition 114 would not, the two schemes are conflicting and Proposition 114 must prevail.[44]

III. CONCLUSION

The California Supreme Court's decision that Proposition 115 is operative has the effect of drastically broadening both the number and the types of cases for which the death penalty can be sought. Proposition 115 expands the eligibility for the death penalty. For the first time in California, an accomplice can be put to death without proof of intent to kill.[45] In addition, the death penalty is now available for the murder of a witness in a juvenile proceeding and for any killings occurring dur-

37. *Id.*
38. *Id.*
39. *Id.*
40. *Yoshisato*, 2 Cal. 4th at 995, 831 P.2d at 337, 9 Cal. Rptr. 2d at 112 (Mosk, J., dissenting).
41. *Id.* at 995, 831 P.2d at 338, 9 Cal. Rptr. 2d at 113 (Mosk, J., dissenting).
42. *Id.* (Mosk, J., dissenting).
43. *Id.* (Mosk, J., dissenting).
44. *Id.* (Mosk, J., dissenting).
45. Philip Hager, *Expanded Death Penalty Under Prop. 115 Upheld*, L.A. TIMES, June 26, 1992, at A3.

ing the commission of mayhem or rape with a foreign instrument.[46] This decision is a major victory for proponents of the death penalty in California.

DAVID C. WRIGHT

VII. CRIMINAL PROCEDURE

A trial court is required to give a jury instruction that a rape defendant's actual and reasonable mistaken belief of consent is a defense to rape only if there is substantial evidence of the prosecutrix' equivocal conduct which would lead a person to reasonably believe she had consented: **People v. Williams.**

I. INTRODUCTION

A *Mayberry* instruction (CALJIC No. 10.65) advises the jury that it is a defense to rape if a defendant reasonably, and in good faith, mistakenly believes that a person has consented to sexual intercourse.[1] In *People v.*

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46. *Id.*

1. People v. Williams, 4 Cal. 4th 354, 360, 841 P.2d 961, 965, 14 Cal. Rptr. 2d 441, 445 (1992). The *Mayberry* defense was first recognized by the Supreme Court in People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975). The thrust of the *Mayberry* defense is that a defendant's reasonable mistake of fact precludes wrongful intent. *Williams*, 4 Cal. 4th at 360, 841 P.2d at 965, 14 Cal. Rptr. at 445. The defendant in *Williams* requested an instruction providing in relevant part:

> In the crime of forcible rape, general criminal intent must exist at the time of the commission of forcible rape. There is no general criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge.
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had general criminal intent at the time of the sexual intercourse, you must find him not guilty of such crime.

Id. at 359 n.1, 841 P.2d at 964 n.1, 14 Cal. Rptr. 2d at 444 n.1 (citing CALJIC no. 10.65 (5th ed. 1988 & supp. 1990))(the "Mayberry instruction"). *See also*, 2 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* § 774 (2d ed. 1988)(discussing lack of consent as an element of rape generally and the *Mayberry* de-

Williams,[2] the California Supreme Court clarified the factors relevant to determining whether the court must give a requested *Mayberry* instruction.[3] The supreme court held that a trial court need not give a *Mayberry* instruction unless there is substantial evidence of equivocal conduct supporting the defendant's actual and reasonable mistaken belief that the victim consented to sexual intercourse.[4]

A. The Majority Opinion

The majority first noted that a rape defendant must satisfy both a subjective and an objective component in order to justify an instruction regarding a *Mayberry* defense.[5] The court stated that the subjective component is satisfied when a rape defendant shows that he actually believed he was engaging in consensual sexual intercourse.[6] The objective component is satisfied if the defendant can show that his mistaken belief was reasonable.[7] The majority further reasoned that when the prosecution's evidence is incompatible with consensual sexual intercourse, the defendant bears the burden of establishing the reasonableness of his belief of consent to justify a *Mayberry* instruction.[8] Finally,

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fense). On defending a rape prosecution generally, see 18 AM. JUR. TRIALS 341 (1971 & Supp. 1993).

2. 4 Cal. 4th 354, 841 P.2d 961, 14 Cal. Rptr. 2d 441 (1992). In *Williams*, the defendant who was charged with rape relied on a defense that the prosecutrix consented to sexual intercourse. *Id.* at 359, 841 P.2d at 964, 14 Cal. Rptr. 2d at 444. The trial court provided an instruction regarding rape, but refused to advise the jury of the defense of actual and reasonable mistaken belief of consent. *Id.* The defendant was convicted of two counts of rape and one count of false imprisonment. *Id.* The court of appeal reversed, holding that a *Mayberry* instruction was required based on the defendant's testimony pertaining to consensual sexual intercourse. *Id.* at 360, 841 P.2d at 964, 14 Cal. Rptr. 2d at 444. The California Supreme Court reversed. *Id.* at 365, 841 P.2d at 968, 14 Cal. Rptr. 2d at 948. Justice Arabian authored the majority opinion, with Chief Justice Lucas and Justices Panelli, Baxter, and George concurring. Justices Mosk and Kennard each wrote separate concurring opinions. *Id.*

3. *Williams*, 4 Cal. 4th at 356, 841 P.2d at 962, 14 Cal. Rptr. 2d at 442. For a survey of the divergent views of California appellate courts regarding the circumstances requiring a *Mayberry* instruction, see 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 225 (2d ed. 1988).

4. *Williams*, 4 Cal. 4th at 363, 841 P.2d at 967, 14 Cal. Rptr. 2d at 447.

5. *Id.* at 360, 841 P.2d at 965, 14 Cal. Rptr. 2d at 445.

6. *Id.* at 360-61, 841 P.2d at 965, 14 Cal. Rptr. 2d at 445.

7. *Id.* at 361, 841 P.2d at 965, 14 Cal. Rptr. 2d at 445.

8. *Id.* (citing *People v. Mayberry*, 15 Cal. 3d 143, 157, 542 P.2d 1337, 1346, 125 Cal. Rptr. 745, 754 (1975); People v. Babbit, 45 Cal. 3d 660, 694, 755 P.2d 253, 271-72, 248 Cal. Rptr. 69, 87-88 (1988), *cert. denied*, 488 U.S. 1034 (1989)). The defendant's burden of production is met if the defendant produces enough evidence to raise a reasonable doubt. *Williams*, 4 Cal. 4th at 361, 841 P.2d at 965, 14 Cal. Rptr 2d at 445. *See also*, B. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* § 166 (3d ed. 1986)(defendant's burden in criminal cases generally); 5 B. WITKIN & N.

the majority concluded that, because a jury must find that the defendant's belief of consent was in fact mistaken before it can consider whether the mistake was reasonable, a trial court must give a *Mayberry* instruction only when there is substantial evidence of equivocal conduct in support of the defendant's claim of an actual and reasonable mistaken belief that the victim consented to sexual intercourse.[9]

Next, the court applied the mandatory *Mayberry* instruction criteria to the facts of *Williams*. The court acknowledged that the evidence introduced by the defendant, if believed, established actual consent which is a separate defense to a charge of rape.[10] However, in regard to the appropriateness of a *Mayberry* instruction, the court stated that if the jury believed the prosecution's evidence, there could be no reasonable mistaken belief of consent.[11] The court concluded that the *Mayberry* instruction was not required because the incompatible testimony regarding the events that took place could not be harmonized in a manner providing substantial evidence of equivocal conduct which the defendant could have reasonably misunderstood.[12]

EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* §§ 2655(d), 2656 (2d ed. 1988) (analyzing shifting burden as applied in *Mayberry*). *See also*, GRACE LIDIA SUAREZ, ET. AL., CALIFORNIA CRIMINAL LAW, PROCEDURE AND PRACTICE, C.E.B. § 32.20A (Supp. 1992)(noting that because the accused's actual mistaken belief is within his knowledge alone, shifting the burden of production to the defendant is permissible).

9. *Williams*, 4 Cal. 4th at 361, 841 P.2d at 966, 14 Cal. Rptr. 2d at 446. The court emphasized that a *Mayberry* defense requires a finding by the jury that the defendant's belief in the victim's consent was in fact mistaken. *Id.* at 361-62, 841 P.2d at 966, 14 Cal. Rptr. 2d at 446.

10. *Id.* at 362, 841 P.2d at 966, 14 Cal. Rptr. 2d at 446. The defendant "testified that [the victim] initiated sexual contact, fondled him to overcome his impotence, and inserted his penis inside herself." *Id.*

11. *Id.* The victim "testified that the sexual encounter occurred only after [the defendant] blocked her attempt to leave, punched her in the eye, pushed her onto the bed, and ordered her to take her clothes off, warning her that he did not like to hurt people." *Williams*, 4 Cal. 4th at 361, 841 P.2d at 966, 14 Cal. Rptr. 2d at 446.

12. *Id.* In dicta, the court advised lower courts that when there is evidence that a threat of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another" preceded by the prosecutrix' allegedly equivocal conduct, the trial court must still give a *Mayberry* instruction upon introduction of substantial evidence supporting the defendant's claim. *Id.* at 364, 841 P.2d at 967-68, 14 Cal. Rptr. 2d at 447-48 (citing People v. Mayberry, 15 Cal. 3d at 147-48, 542 P.2d at 1340-41, 125 Cal. Rptr. at 748-49 (1975). However, the supreme court advised that in such a case the jury should also be instructed "that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.'" *Id.* at 364, 841 P.2d at 968, 14 Cal.

B. *Justice Mosk's Concurring Opinion*

Justice Mosk concurred in the judgment but disagreed with the majority's analysis of the criteria required for a *Mayberry* instruction.[13] Justice Mosk stated that a jury is entitled to believe or disregard all or part of the testimony of any witness, including the defendant.[14] He pointed out that the defendant's testimony regarding the events that took place constituted substantial evidence requiring a *Mayberry* instruction because, if the jury believed him, a reasonable doubt may have developed as to guilt as a result of the defendant's actual and reasonable belief that he was engaging in consensual sexual intercourse.[15] Justice Mosk concluded that the defense of actual consent and the separate defense of actual and reasonable mistaken belief of consent are compatible defenses, thus entitling the defendant to a jury instruction regarding both defenses when justified by the evidence.[16] Justice Mosk concurred in the decision of the majority because he believed that the trial court's failure to charge the jury with the *Mayberry* instruction did not prejudice the defendant.[17]

C. *Justice Kennard's Concurring Opinion*

Justice Kennard concurred with the majority opinion that the defendant was not entitled to a *Mayberry* instruction.[18] However, Justice Kennard asserted that the standard as to the appropriateness of a *Mayberry* instruction requires more definition than the "equivocal con-

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Rptr. 2d at 448.

13. *Id.* at 365, 841 P.2d at 968, 14 Cal. Rptr. 2d at 448.

14. *Williams*, 4 Cal. 4th at 369, 841 P.2d at 971, 14 Cal. Rptr. 2d at 451.

15. *Id.* at 367, 841 P.2d at 970, 14 Cal. Rptr. 2d at 450.

16. *Id.* at 370, 841 P.2d at 972, 14 Cal. Rptr. 2d at 452. *But see*, 75 C.J.S. *Rape* § 19 (Supp. 1992)(surveying several jurisdictions and concluding that the defense of consent requires that the defendant introduce evidence of the victim's equivocal conduct); David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1240-41 & n.83 (1985)(examining the mistake of fact defense in rape prosecutions and criticizing the California Supreme Court's application of the defense to the facts in *Mayberry*).

17. *Williams*, at 371-72, 841 P.2d at 972-73, 14 Cal. Rptr. 2d at 452-53. Justice Mosk reasoned that the defendant did not suffer prejudice because the jury's guilty verdict as to the charge of rape implicitly required a finding by the jury that the "defendant intentionally engaged in an act of sexual intercourse that was in fact unconsented and forcible . . . . By further implication, [the jury] necessarily found that [the defendant] acted without a reasonable and honest belief in consent." *Id.* at 371, 841 P.2d at 973, 14 Cal. Rptr. 2d at 453.

18. *Id.* at 372, 841 P.2d at 973, 14 Cal. Rptr. 2d at 453.

duct" test that the majority provided.[19] Justice Kennard identified only three factual situations which, in her opinion, warrant giving the *Mayberry* instruction, all of them having the common elements of a defendant's threat or use of force and his reasonable and actual belief that the prosecutrix consented.[20] According to Justice Kennard, *Mayberry* is appropriate when the defendant uses a small amount of force,[21] the victim is agreeable to the use of force,[22] or when a substantial amount of time lapses between the threat or use of force and sexual intercourse.[23] Because the facts presented in *Williams* did not fit any of these situations, Justice Kennard concurred in the majority's reversal of the appellate court.[24]

II. CONCLUSION

In *People v. Mayberry*, the supreme court attempted to settle the disagreement among California appellate courts regarding the factors that necessitate charging the jury with a *Mayberry* instruction. The court held that a *Mayberry* instruction is required only when there is substantial evidence of the prosecutrix' equivocal conduct which corroborates the defendant's reasonable mistaken belief that the prosecutrix consented to sexual intercourse.[25] It remains to be seen whether the "equivocal conduct" test that the court identified provides sufficient guidance to the lower courts when determining whether a *Mayberry* instruction is appropriate.

MICHAEL EMMET MURPHY

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19. *Id.*

20. *Id.* at 374, 841 P.2d at 974, 14 Cal. Rptr. 2d at 454.

21. *Williams*, 4 Cal. 4th at 374, 841 P.2d at 974, 14 Cal. Rptr. 2d at 454. In this situation, the force is "sufficient to accomplish the sexual intercourse against the victim's will but not so great as to render unreasonable a belief by the defendant that the victim consented notwithstanding the use or threat of force." *Id.*

22. *Id.* Justice Kennard emphasized that this situation is rare.

23. *Id.* In this situation, "the defendant could reasonably believe that the victim's participation in the act of sexual intercourse was not coerced." *Id.*

24. *Williams*, 4 Cal. 4th at 374-75, 841 P.2d at 975, 14 Cal. Rptr. 2d at 455.

25. *See generally*, Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687 (1991); Sakthi Murthy, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History To Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541 (1991).

VIII. EVIDENCE

The psychotherapist-patient privilege applies to statements made in confidence regardless of whether they are confidential or later disclosed; only the patient has the power to waive or invoke the privilege; the "dangerous patient" exception to the privilege applies when the psychotherapist has reasonable cause to believe that the patient is dangerous and disclosure is necessary to prevent harm; no actual disclosure, however, is required to trigger the exception: **Menendez v. Superior Court.**

I. INTRODUCTION

In *Menendez v. Superior Court*,[1] three audiotape cassettes containing notes and actual recordings of several therapy sessions were seized from a psychotherapist's office.[2] The California Supreme Court considered whether the tapes were admissible in light of the psychotherapist-patient privilege[3] and the "dangerous patient"[4] exception.[5] Justice Mosk stated

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1. 3 Cal. 4th 435, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992). Justice Mosk authored the unanimous opinion of the court.

2. *Id.* at 440-41, 834 P.2d at 788-89; 11 Cal. Rptr. 2d at 94-95.

3. For additional information relating to the psychotherapist-patient privilege, see generally 81 AM. JUR. 2D *Witnesses* §§ 436-520 (1992); 3 CAL. JUR. 3D *Evidence*, §§ 426-82 (1976); 97 C.J.S. *Witnesses* §§ 252-314 (1957); STANLEY MOSK, *Psychotherapist and Patient in the California Supreme Court: Ground Lost and Ground Regained*, 20 PEPP. L. REV. 415 (1993).

4. *See* MOSK, *supra* note 2, at 415-16.

5. *Menendez*, 3 Cal. 4th at 446, 834 P.2d at 793, 11 Cal. Rptr. 2d at 99. On August 20, 1989, Jose and Mary Louise Menendez, the parents of Erik and Lyle Menendez, were killed. A magistrate issued a search warrant authorizing a search of the offices and home of Leon Oziel, a clinical psychologist. *Id.* Dr. Oziel was the psychotherapist for Lyle and Erik Menendez. *Id.* During the search, three audiotape cassettes pertaining to treatments of Lyle and Erik were seized. *Id.* at 441, 834 P.2d at 789, 11 Cal. Rptr. 2d at 95. One cassette contained Dr. Oziel's notes from sessions with Lyle and Erik on October 31 and November 2, 1989; another cassette contained Dr. Oziel's notes from a session with Erik on November 28, 1989; and a third cassette contained a recording of an actual session with Lyle and Erik on December 11, 1989. *Id.* Dr. Oziel asserted the psychotherapist-privilege, claiming that the cassettes were privileged and therefore could not be disclosed. *Id.* at 440-41, 834 P.2d at 789, 11 Cal. Rptr. 2d at 95. The tapes were then sealed pending a hearing on their admissibility. *Id.* at 440-41, 834 P.2d at 789, 11 Cal Rptr. 2d at 95. In the meantime, Lyle and Erik were each arrested, placed in custody, and charged with the murder of their parents. *Id.*

After an *in camera* hearing regarding the admissibility of the tapes, the superior court ruled that the psychotherapist-patient privilege did not to apply to any of the

that the superior court erred in its interpretation of *People v. Clark*[6] in deciding that all of the tapes were admissible.[7] Instead, the California Supreme Court relied generally on its decision in *People v. Wharton*,[8] which was issued prior to the judgments of both lower courts in *Menendez*.[9] Applying different reasoning than the lower courts, the supreme court affirmed the admissibility of the first two tapes, but overturned the ruling as to the third cassette on the ground that it was protected by the psychotherapist-patient privilege.[10]

II. TREATMENT OF THE CASE

Justice Mosk first examined the findings of fact and conclusions of law issued by the lower courts.[11] The superior court made reference to a number of detailed findings of fact in reaching its decision to admit the tapes. First, a relationship existed between Dr. Oziel as a psychotherapist and Lyle and Erik as patients.[12] Second, the communications made in all four psychotherapy sessions were confidential as defined in California Evidence Code Section 1012.[13] In addition, the communications on the

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three tapes. *Id.* at 443, 834 P.2d at 790, 11 Cal. Rptr. 2d at 96. The court of appeal summarily denied the defendants' petition appealing the ruling. *Id.* at 445, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98. The supreme court vacated the denial and ordered the appellate court to consider the issue. *Id.* at 445-46, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98. The court of appeal affirmed the superior court's finding that the tapes were admissible. *Id.* at 446, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98. The supreme court then reconsidered the admissibility issue of the tapes and affirmed the court of appeal's judgment in part and reversed in part. *Id.* at 457-58, 834 P.2d at 800, 11 Cal. Rptr. 2d at 106.

6. 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990). The court in *Clark* held that once a communication between a psychotherapist and a patient is revealed to a non-privileged third party, the communication loses its confidential status. *Id.* at 619-20, 789 P.2d at 151, 268 Cal. Rptr. at 423. For a discussion of the holding in *Clark* as it relates to the psychotherapist-patient privilege, see MOSK, *supra* note 2, at 416-19.

7. *Menendez*, 3 Cal. 4th at 447, 834 P.2d at 793, 11 Cal. Rptr. 2d at 99.

8. 53 Cal. 3d 522, 809 P.2d 290, 280 Cal. Rptr. 631 (1991) (expanding the application of the "dangerous patient" exception). For a discussion of the holding in *Wharton* as it applies to the psychotherapist-patient privilege, see MOSK, *supra* note 2, at 415-16.

9. *Menendez*, 3 Cal. 4th at 447, 834 P.2d at 793, 11 Cal. Rptr. 2d at 99.

10. *Id.* at 457-58, 834 P.2d at 800, 11 Cal. Rptr. 2d at 106.

11. *Id.* at 443-46, 834 P.2d at 790-92, 11 Cal. Rptr. 2d at 96-98.

12. *Id.* at 443-44, 834 P.2d at 791, 11 Cal. Rptr. 2d at 97.

13. Section 1012 provides in relevant part:

[C]onfidential communications between patient and psychotherapist" means in-

tapes fell within the psychotherapist-patient privilege under section 1014 of the California Evidence Code.[14] Third, all therapy sessions at issue were conducted for the sole purpose of therapy; therefore, the "crime or tort" exception to the psychotherapist-patient privilege as defined in section 1018[15] was inapplicable.[16] Fourth, Lyle and Erik neither expressly nor impliedly waived the privilege relating to any communication, made at any time.[17] Fifth, the October 31 and November 2 sessions were covered by the "dangerous patient" exception set forth in section 1024,[18] because Lyle and Erik each made threats to Dr. Oziel that collaterally included both his wife and lover.[19] Sixth, all the sessions were deemed "one communication."[20] Lastly, all communications between Dr. Oziel and the Menendez brothers lost their confidential status when Dr. Oziel's lover learned of the communications and informed others.[21]

Further, the superior court issued several conclusions of law.[22] Specifically, the court held that for a communication to be considered confidential, it must be confidential at the time of its making and must remain confidential thereafter.[23] Moreover, the court indicated that confidential

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> formation . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose *for which the psychotherapist is consulted* . . . .

CAL. EVID. CODE § 1012 (West 1992) (emphasis in original).

14. *Menendez*, 3 Cal. 4th at 444, 834 P.2d at 791, 11 Cal. Rptr. 2d at 97. Section 1014 provides that "the patient . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ." CAL EVID. CODE. § 1014 (West 1992).

15. Section 1018 states: "There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort." CAL. EVID. CODE § 1018 (West 1992).

16. *Menendez*, 3 Cal. 4th at 444, 834 P.2d at 791, 11 Cal. Rptr. 2d at 97.

17. *Id.*

18. CAL. EVID. CODE § 1024 (West 1992). Section 1024 states:

> There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

Id.

19. *Menendez*, 3 Cal. 4th at 444, 834 P.2d at 791, 11 Cal. Rptr. 2d at 97.

20. *Id.* at 445, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98.

21. *Id.* at 445, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98.

22. *Id.* at 443-45, 834 P.2d at 790-92, 11 Cal. Rptr. 2d at 96-98.

23. *Id.* at 444, 834 P.2d at 791, 11 Cal. Rptr. 2d at 97.

communications may lose their confidential status by the disclosure of prior communications of a similar nature.[24]

The court of appeal affirmed the decision of the superior court.[25] While the court agreed with the superior court's analysis of the first two sessions, it held that the tapes of the third and fourth sessions were admissible because the sessions were not conducted "'for the purpose of therapy.'"[26] The appellate court reasoned that Dr. Oziel conducted the last two sessions simply to ensure his own safety.[27]

Justice Mosk began the court's analysis by restating the supreme court's interpretation of the law on the psychotherapist-patient privilege.[28] The court held, contrary to the superior court, that the "privilege can cover a communication that was never . . . 'confidential.'"[29] The court went on to state that provided the "communication . . . [is made] in confidence by a means which, so far as the patient is aware, discloses the information to no 'outside' third person," the privilege may protect information that is not, in fact, confidential.[30] Additionally, the privilege gives the patient the power to "bar testimony by anyone," including "'outside' third persons."[31] Relying on *Roberts v. Superior Court*,[32] the court also reiterated that only the patient can waive the privilege.[33]

Justice Mosk next addressed the "dangerous patient" exception, stating that the exception applies where "there is reasonable cause for the psychotherapist to believe that; (1) the patient is dangerous and; (2) disclosure of the communication is necessary to prevent any harm."[34] The supreme court held that the exception does not require actual disclosure, but the psychotherapist must believe that disclosure is necessary to prevent harm.[35]

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24. *Id.* at 445, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98.
25. *Id.* at 446, 834 P.2d at 792, 11 Cal. Rptr. 2d at 98.
26. *Id.*
27. *Id.*
28. *Id.* at 447, 834 P.2d at 793, 11 Cal. Rptr. 2d at 99.
29. *Id.*
30. *Id.* at 447, 834 P.2d at 793, 11 Cal. Rptr. 2d at 99.
31. *Id.* at 448, 834 P.2d at 794, 11 Cal. Rptr. 2d at 100.
32. 9 Cal. 3d 330, 341, 508 P.2d 309, 316, 107 Cal. Rptr. 309, 316 (1973) (holding that only the patient possesses the right to waive the privilege).
33. *Menendez*, 3 Cal. 4th at 448-49, 834 P.2d at 794, 11 Cal. Rptr. 2d at 100 (1992).
34. *Id.* at 449, 834 P.2d at 794, 11 Cal. Rptr. 2d at 100 (citing People v. Wharton, 53 Cal. 3d 522, 548-63, 809 P.2d 304-14, 280 Cal. Rptr. 631, 645-55 (1991).
35. *Id.* at 451, 834 P.2d at 796, 11 Cal. Rptr. 2d at 102 (citing *Wharton*, 53 Cal. 3d at 560-61, 809 P.2d at 312-13, 280 Cal. Rptr. at 653-54.

Having laid down the analytical framework, Justice Mosk turned to the resolution of the factual issues. The court first considered the portion of those tapes relating to the October 31 session.[36] Justice Mosk agreed with superior court's findings that, initially, the privilege applied to the communications in this session.[37] He disagreed, however, with the lower court's conclusion that the privilege was destroyed by Dr. Oziel's subsequent disclosure to his wife and lover, and his lover's discovery and dissemination of the confidential information.[38] The supreme court affirmed, relying upon the "dangerous patient" exception, using as support the superior court's factual findings.[39] Thus, the court affirmed the superior court's ruling of admissibility concerning the November 2 tapes under essentially the same analysis.[40]

The next tapes considered were those containing notes from the November 28 session with Erik,[41] and the actual recording of the December 11 session with both Erik and Lyle.[42] The supreme court agreed with the superior court that the privilege applied to these sessions, finding the court of appeal's contrary conclusions to be in error.[43] The court of appeal held that these sessions were not "for the purpose of therapy"; rather, they were a result of the self-interest of each of the parties, and thus, not protected by the privilege.[44] In dismissing this finding, the supreme court stated that motive by itself is virtually irrelevant, since psychotherapy rarely occurs for its own sake.[45] The court held that "the dispositive

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36. *Id.* at 449, 834 P.2d at 794, 11 Cal. Rptr. 2d at 100.
37. *Id.* at 449-50, 834 P.2d at 795, 11 Cal. Rptr. 2d at 101.
38. *Id.* at 450, 834 P.2d at 795, 11 Cal. Rptr. 2d at 101.
39. *Id.* at 450-51, 834 P.2d at 795, 11 Cal. Rptr. 2d at 101. The reasonableness test is an objective test based on a an average psychotherapist but gives the psychotherapist wide discretion. *Id.* at 451, 834 P.2d at 795, 11 Cal. Rptr. 2d at 101. The court analogized the "dangerous patient" exception to the psychotherapist's common law duty, as established in *Tarasoff*, to warn intended victims of patients who pose a serious threat of danger. *Menendez*, 3 Cal. 4th at 452, 834 P.2d at 796, 11 Cal. Rptr. 2d 102 (citing Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)). The court reaffirmed the *Tarasoff* court's rationale, stating, "'[T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.'" *Id.* (quoting *Tarasoff*, 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27). For a discussion of the *Tarasoff* duty to warn, see 6 B. WITKIN SUMMARY OF CALIFORNIA LAW *Torts* § 860 (9th ed. 1988).
40. *Menendez*, 3 Cal. 4th at 452-53, 834 P.2d at 797, 11 Cal. Rptr. 2d at 103.
41. *Id.* at 453, 834 P.2d at 797, 11 Cal. Rptr. 2d at 103.
42. *Id.* at 455, 834 P.2d at 798, 11 Cal. Rptr. 2d at 104.
43. *Id.* at 454, 834 P.2d at 797, 11 Cal. Rptr. 2d at 103.
44. *Id.* at 453-54, 834 P.2d at 797, 11 Cal. Rptr. 2d at 103.
45. *Id.* at 454, 834 P.2d at 797, 11 Cal. Rptr. 2d at 103.

fact is what the participants do, not why."[46]

In doing so, the supreme court departed from the superior court's reasoning. The superior court held that all the tapes were admissible, reasoning that the communications in the latter sessions were the same as those in the first two sessions. Therefore, the communications lost their privileged status "before the fact" due to prior disclosure of the earlier sessions.[47] The superior court concluded that all four sessions constituted "one communication."[48]

The supreme court evaluated the "dangerous patient" exception to determine whether the lower court's ruling could be sustained.[49] The court determined, however, that there was insufficient evidence to support a finding of reasonable cause to believe that disclosure was necessary to prevent harm.[50] Thus, the "dangerous patient" exception did not apply. Because the superior court had explicitly found that no waiver of the privilege occurred, the supreme court ruled the November 28 and December 11 tapes protected under the psychotherapist-patient privilege, and thus, inadmissible as evidence.[51]

III. CONCLUSION

In summary, the supreme court sustained the ruling of admissibility on the October 31 and November 2 tapes, and reversed the finding of admissibility with respect to the sessions of November 28 and December 11.[52] In its analysis, the court departed from its prior interpretation of the psychotherapist-patient privilege. The court, however, fell short of expressly overruling *Clark* when it held that a communication between a patient and a psychotherapist need not be nor remain confidential in order for the privilege to apply.[53]

In addition, the court modified its decision in *Wharton* by concluding that it is the actual communication which the therapist must reasonably believe needs to be disclosed to prevent harm. Previously, under the "dangerous patient" exception, it was "any and all communications that

46. *Id.* at 454, 834 P.2d at 798, 11 Cal. Rptr. 2d at 104.
47. *Id.* at 454-55, 834 P.2d at 798, 11 Cal. Rptr. 2d at 104.
48. *Id.* at 455, 834 P.2d at 798, 11 Cal. Rptr. 2d at 104.
49. *Id.*
50. *Id.*
51. *Id.* at 456-58, 834 P.2d at 799-800, 11 Cal. Rptr. 2d at 105-06.
52. *Id.*
53. MOSK, *supra* note 2, at 422.

may be deemed to trigger reasonable cause for [such] belief."[54] The supreme court's analysis in this case has resulted in the psychotherapist-patient privilege becoming broader and stronger while the "dangerous patient" exception has narrowed, resulting in increased protection for patients.

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IX. LABOR LAW

Under Government Code sections 20020 and 20020.9, detention officers may not claim "local safety" status for purposes of retirement benefits unless the city elects to treat the officers as local policeman: **City of Huntington Beach v. Board of Administration.**

I. INTRODUCTION

In *City of Huntington Beach v. Board of Administration*,[1] the California Supreme Court[2] considered whether jailers could rely on Government Code section 20020[3] to claim local safety member status under the Public Employees' Retirement System for purposes of retirement bene-

54. MOSK, *supra* note 2, at 424.

1. 4 Cal. 4th 462, 841 P.2d 1034, 14 Cal. Rptr. 2d 514 (1992). In *Huntington Beach*, 17 detention officers [hereinafter jailers], entitled to membership in the Public Employees' Retirement System ("PERS"), sought to change their membership status from "local miscellaneous" employees to "local safety" employees. *Id.* at 464-65, 841 P.2d at 1036, 14 Cal. Rptr 2d at 516. Superior retirement benefits afforded to local safety employees prompted this request. *Id.* at 466, 841 P.2d at 1037, 14 Cal. Rptr. 2d at 517. After reviewing the case, the PERS Board granted the change in status to the jailers. *Id.* at 465, 841 P.2d at 1036, 14 Cal. Rptr. 2d at 516. The city petitioned for writ of administrative mandamus in superior court. *Id.* The court denied the petition, and the court of appeal affirmed. The California Supreme Court granted review. *Id.* at 464, 841 P.2d at 1036, 14 Cal. Rptr. 2d at 516.

2. Justice Baxter delivered the opinion of the court, with Chief Justice Lucas, and Justices Mosk, Panelli, Kennard, Arabian, and George concurring. *Id.* at 464-73, 841 P.2d at 1034-41, 14 Cal. Rptr. 2d at 514-21.

3. CAL. GOV'T CODE § 20020 (West 1980 & Supp. 1993). Note that all statutory references are to the Government Code.

Section 20020 provides in pertinent part: "'Local policeman' means any officer or employee of a police department of a contracting agency which is a city, except one whose . . . functions do not clearly fall within the scope of active law enforcement service . . . ." *Id.*

fits.[4] The court held that jailers are precluded from qualifying for local safety member status unless the city expressly elects to treat them as "local policemen" under section 20020.9.[5]

II. ANALYSIS

In deciding that it is within the city's discretion to determine whether or not jailers are considered local policemen, the court explained that section 20020 must be read in concert with section 20020.9.[6] Under the rules of statutory construction,[7] section 20020.9 could include jailers

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4. *Huntington Beach*, 4 Cal. 4th at 464, 841 P.2d at 1036, 14 Cal. Rptr. 2d at 516.

5. *Id.* at 464, 472, 841 P.2d at 1036, 1041, 14 Cal. Rptr. 2d at 516, 521. Section 20020.9 states:

> 'Local policeman' also includes any employee of a contracting agency which is a city, who is employed in a jail or a detention or correctional facility and having as their primary duty and responsibility the supervision and custody of persons committed to the jail or facility . . . .
>
> This section shall not apply to the employees of any contracting agency nor to any contracting agency unless and until the contracting agency elects to be subject to this section by amendment to its contract with the board . . . .

CAL. GOV'T CODE § 20020.9 (West Supp. 1993).

6. *Huntington Beach*, 4 Cal. 4th at 467-68, 841 P.2d at 1037-38, 14 Cal. Rptr. 2d at 517-18. The court stated that the two sections are in "pari materia." *Pari materia* is a Latin phrase meaning "[o]f the same matter." BLACK'S LAW DICTIONARY 1115 (6th ed. 1990). The court explained that §§ 20020 and 20020.9 must be construed together in order to remain consistent with the intent of the legislature. *Id. See also In re* Estate of McDill, 14 Cal. 3d 831, 836-37, 537 P.2d 874, 877, 122 Cal. Rptr. 754, 757 (1975) (concluding that statutes on the same subject "should be read together and construed to achieve harmony between seemingly conflicting provisions rather than holding that there is an irreconcilable inconsistency"); Proctor v. San Francisco Port Auth., 266 Cal. App. 2d 675, 682, 72 Cal. Rptr. 248, 253 (1968) (holding that statutes which generally address the same subject matter are in *pari materia* and must be "construed together and harmonized whenever possible").

For a comprehensive discussion of relevant statutes on the same subject matter, see generally 82 C.J.S. *Statutes* § 366 (1953 & Supp. 1992).

7. Justice Baxter stressed that "[t]he rules governing statutory construction are well established" in California law. *Huntington Beach*, 4 Cal. 4th at 468, 841 P.2d at 1038, 14 Cal. Rptr. 2d at 518. *See also* Hartford Fire Ins. Co. v. Macri, 4 Cal. 4th 318, 326, 842 P.2d 112, 116, 14 Cal. Rptr. 2d 813, 817 (1992) (explaining that to gain an understanding of the legislature's intent behind a statute, the court "must first turn to the words of the statute itself"); Kimmel v. Goland, 51 Cal. 3d 202, 208-09, 793 P.2d 524, 527, 271 Cal. Rptr. 191, 194 (1990) (deciding that to effectuate legislative intent, the court must "look first to the language of the statute giving effect to its 'plain meaning'") (quoting Tiernan v. Trustees of Cal. State Univ. and Colleges, 33 Cal. 3d

within its definition of local policemen.[8] The court concluded, therefore, that the legislature did not intend section 20020 to represent an alternative and independent method of classifying jailers.[9] The court further concluded that because the city did not decide to define jailers as local policemen under section 20020.9, the jailers failed to qualify as local safety members under PERS.[10]

III. CONCLUSION

Huntington Beach established that in order for a detention officer to receive local safety member retirement benefits, the employing agency must expressly elect to classify detention officers as local policemen under section 20020.9.[11] Justice Baxter clearly stated that section 20020 will not suffice as an alternative means of defining jailers as local policemen for purposes of PERS.[12]

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211, 218-19, 655 P.2d 317, 322, 188 Cal. Rptr. 115, 120 (1982)); California Teachers Ass'n v. San Diego Community College, 28 Cal. 3d 692, 698, 621 P.2d 856, 858-59, 170 Cal. Rptr. 817, 820 (1981) (indicating that legislative intent must be afforded due deference when construing the statutory language); Campbell v. State Farm Mut. Auto. Ins. Co., 209 Cal. App. 3d 871, 874-75, 257 Cal. Rptr. 542, 543 (1989) (stating that when statutory language is clear, the court may not engage in liberal interpretations); DeYoung v. City of San Diego, 147 Cal. App. 3d 11, 17-18, 194 Cal. Rptr. 722, 725-26 (1983) (stressing that every word of a statute should be strictly scrutinized to ascertain the specific legislative purpose).

For a discussion of statutory construction, see generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Laws*, § 94 (9th ed. 1988); 58 CAL. JUR 3D *Statutes* §§ 82-133 (1980); 82 C.J.S. *Statutes* §§ 311, 321 (1953 & Supp. 1992).

8. Justice Baxter is referring to language in § 20020.9 expressly limiting the application of the statute to only those agencies that elect to be bound by it. *See supra* note 5.

9. *Huntington Beach*, 4 Cal. 4th at 468, 841 P.2d at 1038, 14 Cal. Rptr. 2d at 518. Justice Baxter warned that statutory construction which allows § 20020 to be construed as an alternative to § 20020.9 would necessarily render § 20020.9 "superfluous and irrelevant." *Id.* Justice Baxter based his concerns on § 20020.9 which specifically includes the optional expansion in § 20020 to include jailers within the definition of "local policeman." *Id.* Justice Baxter concluded, therefore, that the legislature could not possibly have intended § 20020 to incorporate the same definition that the legislature enacted in § 20020.9. *Id.* "[L]egislation must be construed as a whole *while avoiding an interpretation which renders any of its language surplusage.*" *Id.* (emphasis added) (citing McAlpine v. Superior Court, 209 Cal. App. 3d 1, 7, 257 Cal. Rptr. 32, 35 (1989)).

10. *Id.* at 472, 841 P.2d at 1041, 14 Cal. Rptr. 2d at 521.

11. *See generally id.* at 464-73, 841 P.2d at 1036-41, 14 Cal. Rptr. 2d at 514-21.

12. *Id.* at 468, 841 P.2d at 1038, 14 Cal. Rptr. 2d at 518.

X. TORT LAW

Under Harbors and Navigation Code section 658, the operator of a water ski boat owes a duty to avoid endangering the lives or property of third persons; however, the vessel operator owes no corresponding duty to a water skier other than the duty not to engage in conduct that is either intended to injure or is so reckless as to be outside the scope of the sport: **Ford v. Gouin.**

I. INTRODUCTION

The California Supreme Court has historically held that one who knowingly and voluntarily engages in an activity assumes that activity's inherent risks and cannot recover for injuries resulting therefrom.[1] However, in *Li v. Yellow Cab Co.*,[2] the court caused confusion with respect to the extent that the assumption of risk doctrine survived California's transformation from a contributory to a comparative negligence state.[3]

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1. Walters v. Sloan, 20 Cal. 3d 199, 204, 571 P.2d 609, 612, 142 Cal. Rptr. 152, 155 (1977) (affirming the applicability of the fireman's rule under the fundamental principle that "one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby"). *See also* Vierra v. Fifth Ave. Rental Serv., 60 Cal. 2d 266, 272, 383 P.2d 777, 780, 32 Cal. Rptr. 193, 196 (1963) (allowing assumption of risk defense when an individual voluntarily accepts a risk, either expressly or impliedly, with actual knowledge and appreciation of that risk) (citing Prescott v. Ralph's Grocery Co., 42 Cal. 2d 158, 161-62, 265 P.2d 904, 906 (1954)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 484-85 & n.50 (5th ed. 1984) (describing implied assumption of risk and finding those who participate in a sport to impliedly assume the known risks of injury); 46 CAL. JUR. 3D *Negligence* § 145 (1978) (indicating that a person who willingly encounters a dangerous situation assumes only those risks that are inherent to that situation).

2. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

3. After more than 100 years of the "all-or-nothing" rule of contributory negligence, the *Li* court moved California to a more equitable system of pure comparative negligence. *Id.* at 813, 828-29, 532 P.2d at 1232-33, 1243, 119 Cal. Rptr. at 864-65, 875. *See also id.* at 832, 532 P.2d at 1246, 119 Cal. Rptr. at 878 (Clark, J., dissenting). The court concluded that the assumption of risk defense is merely a variant of contributory negligence, and thus, merges into the system of assessing liability in proportion to negligence. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875. However, subsequent decisions at the appellate court level demonstrated the apparent confusion surrounding the assumption of risk doctrine's continued applicability. *Compare* Ordway v. Superior Court, 198 Cal. App. 3d 98, 104, 243 Cal. Rptr. 536, 539 (1988)

The supreme court has since attempted to clarify *Li*'s effect on the assumption of risk doctrine both in *Ford v. Gouin*[4] and its companion case, *Knight v. Jewett*.[5]

(recognizing the doctrine of "reasonable implied assumption of risk" as meaning that a plaintiff who reasonably and voluntarily accepts a known risk impliedly agrees to reduce the defendant's duty of care) *with* Segoviano v. Housing Auth., 143 Cal. App. 3d 162, 164, 191 Cal. Rptr. 578, 579 (1983) (holding that the defense of reasonable implied assumption of risk serves no function in California's comparative negligence system).

The supreme court's own indecisiveness possibly spurred further confusion on the subject. *See* Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 406, 572 P.2d 1155, 1163-64, 143 Cal. Rptr. 13, 22 (1978) (applying the assumption of risk doctrine in determining whether a non-experienced patron voluntarily accepted the risk of alcohol poisoning when an experienced bartender served an excessive amount of alcohol to that patron); *Walters*, 20 Cal. 3d at 204, 571 P.2d at 612, 142 Cal. Rptr. at 155 (describing the fireman's rule as having its basis in assumption of risk concepts which apply broadly to cases involving employee negligence, products liability, and comparative negligence). *See also* Paul Rosenlund & Paul Killion, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. REV. 225, 253-54 (1986) (commenting on the California Supreme Court's failure to provide adequate guidance on what role assumption of risk should play under the comparative negligence system).

4. 3 Cal. 4th 339, 834 P.2d 724, 11 Cal. Rptr. 2d 30 (1992). Justice Armand Arabian authored the court's opinion. Justice Kennard wrote a concurring opinion in which Justices Panelli and Baxter joined. *Id.* at 351, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38 (Kennard, J., concurring). Justice George wrote an opinion concurring in part and dissenting in part, in which Chief Justice Lucas joined. *Id.* at 364, 834 P.2d at 741, 11 Cal. Rptr. 2d at 47 (George, J., concurring and dissenting). Justice Mosk dissented. *Id.* at 369, 834 P.2d at 744, 11 Cal. Rptr. 2d at 50 (Mosk, J., dissenting).

5. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992). In *Knight*, the court addressed several post-*Li* appellate decisions that divided assumption of risk into two categories: (1) when the plaintiff "reasonably" accepted a risk knowingly and voluntarily and (2) when the plaintiff "unreasonably" accepted a known risk that the defendant's negligence presented. *Id.* at 306, 834 P.2d at 701-02, 11 Cal. Rptr. 2d at 7-8. Affirming its earlier determination in *Li* that assumption of risk was only a variant of contributory negligence, the court concluded that the assumption of risk doctrine, as a complete defense, failed to survive the adoption of comparative negligence. *Id.* at 307, 834 P.2d at 702, 11 Cal. Rptr. 2d at 8.

The court explained its interpretation of assumption of risk in *Li* as containing a "primary" and "secondary" distinction, rather than a "reasonable" and "unreasonable" distinction. *Id.* at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9. The *Knight* court described primary assumption of risk as a case where the defendant owes no duty to protect the plaintiff against a certain risk and secondary assumption of risk as a case where the defendant owes the plaintiff a duty, but the plaintiff knowingly accepts the risk caused by the defendant's breach of duty. *Id.* In discussing which standard courts should follow, the *Knight* court noted the significant disparity between the two approaches. *Knight*, 3 Cal. 4th at 309, 834 P.2d at 704, 11 Cal. Rptr. 2d at 10. Under a reasonable/unreasonable approach, a plaintiff who acts reasonably is completely barred from recovery while a plaintiff who acts unreasonably suffers only a reduction in recovery. *Id.* at 306-07, 834 P.2d at 702, 11 Cal. Rptr. 2d at 8. Under the primary/secondary approach, primary assumption of risk bars recovery because no

In both *Knight* and *Ford*, the court faced the complicated task of reconciling the appropriate relationship between assumption of risk and comparative negligence as espoused in *Li*.[6] The court acknowledged the common misconception among appellate courts regarding the continued applicability of the assumption of risk doctrine and set forth the appropriate standard that courts should use in future assumption of risk cases.[7]

The *Knight* court noted that in an active sports context, the duty one participant owes another varies depending upon the activity and the role each participant assumes.[8] Absent any statutory duty, a defendant in an active sports case will be liable solely for conduct that is either intended to injure or is so reckless as to fall completely outside the scope of the activity.[9]

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duty exists. *Id.* at 309, 834 P.2d at 704, 11 Cal. Rptr. at 10. However, when a secondary assumption of risk situation exists, the defendant's liability flows according to the duty owed, which varies according to the activity. *Id.*

6. *Id.* at 300, 834 P.2d at 697, 11 Cal. Rptr. 2d at 3; *Ford*, 3 Cal. 4th at 342, 834 P.2d at 726, 11 Cal. Rptr. 2d at 32. *See generally* Stephanie M. Wildman & John C. Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California*, 25 U.S.F. L. REV. 647, 647-50 (1991) (suggesting that the confusion surrounding implied assumption of risk litigation justifies abolishing the doctrine to avoid "doctrinal repetition").

7. *Knight*, 3 Cal. 4th at 306-07, 834 P.2d at 701-02, 11 Cal. Rptr. 2d at 7-8 (criticizing those appellate decisions that interpreted *Li* as distinguishing between reasonable and unreasonable assumption of risk). *See, e.g.*, Nunez v. R'Bibo, 211 Cal. App. 3d 559, 562-63, 260 Cal. Rptr. 1, 2 (1989) (following *Ordway*'s holding that the adoption of comparative negligence did not abolish reasonable assumption of risk); Ordway v. Superior Court, 198 Cal. App. 3d 98, 107, 243 Cal. Rptr. 536, 541 (1988) (interpreting *Li* as upholding "reasonable implied assumption of risk" as a complete defense); Neinstein v. Los Angeles Dodgers, Inc., 185 Cal. App. 3d 176, 183, 229 Cal. Rptr. 612, 615 (1986) (determining that the assumption of risk doctrine applies when the plaintiff knowingly and reasonably assumes the risk). The *Knight* court interpreted *Li* as distinguishing between primary and secondary assumption of risk by determining whether the defendant breached a legal duty or not. *Knight*, 3 Cal. 4th at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9.

8. *Knight*, 3 Cal. 4th at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16. *See generally* 4 HARPER ET AL., THE LAW OF TORTS § 21.5, at 238-41 & n.17 (2d ed. 1986) (reviewing an exhaustive list of various sports activities and the corresponding duty in each setting).

9. *Knight*, 3 Cal. 4th at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16; *Ford*, 3 Cal. 4th at 345, 834 P.2d at 728, 11 Cal. Rptr. 2d at 34 (applying the general rule to noncompetitive, active sports such as waterskiing). *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 484 nn.40, 41 (5th ed. 1984) (stating that public policy considerations disfavor the application of assumption of risk when reckless conduct or an intentional tort occurs). *See also* Neil R. Tucker, *Assumption Of Risk And Vicarious Liability In Personal Injury Actions Brought By Professional*

In *Ford*, Justice Arabian interpreted Harbors and Navigation Code section 658(d)[10] as imposing upon both a vessel operator and a water skier the duty *not* to cause a collision with any third person or property.[11] As between vessel operator and water skier, however, Justice Arabian determined that the legislature did not intend a comparable duty of care.[12] In establishing that a ski boat operator owes no legal duty of care to a water skier in tow, the *Ford* court held that the court of appeal properly barred the water skier's cause of action on a primary assumption of risk theory where the operator was, at most, negligent in directing the vessel.[13]

II. STATEMENT OF THE CASE

Larry Ford, an experienced water skier, was seriously injured when his head struck an overhanging tree limb while water skiing barefoot and backward.[14] He sued Jack Gouin, the driver of the ski boat, for negligently directing the vessel too close to shore.[15] It was undisputed that Ford selected the location, the length of the tow rope, and the method of skiing.[16] The primary factual dispute in this case, centered on whether Gouin's navigation was the proximate cause of Ford's injuries.[17]

The trial court granted summary judgment in favor of Gouin,[18] and the court of appeal affirmed.[19] The court of appeal held that by planning and engaging in an activity with a slim margin for error, Ford impliedly

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Athletes, 1980 DUKE L.J. 742, 745-50 (1980) (examining the general duty that one participant owes another in a sports context and what risks are assumed by voluntary participation).

10. CAL. HARB. & NAV. CODE § 658(d) (West Supp. 1993). All further statutory references are to the Harbors and Navigation Code.

11. *Ford*, 3 Cal. 4th at 350, 834 P.2d at 731, 11 Cal. Rptr. 2d at 37.

12. *Id.* at 350, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38. Harbors and Navigation Code § 658(d) provides in full:

> No person shall operate or manipulate any vessel, towrope, or other device by which the direction or location of water skis, an aquaplane, or a similar device may be affected or controlled so as to cause the water skis, aquaplane, or similar device, or any person thereon, to collide with or strike against, any object or person. This subdivision does not apply to collisions of two or more persons on water skis, aquaplanes, or similar devices being towed by the same vessel.

CAL. HARB. & NAV. CODE § 658(d) (West 1978 & Supp. 1993).

13. *Ford*, 3 Cal. 4th at 351, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38.

14. *Id.* at 342-43, 843 P.2d at 726, 11 Cal. Rptr. 2d at 32.

15. *Id.* at 343, 843 P.2d at 726, 11 Cal. Rptr. 2d at 32.

16. *Id.*

17. *Id.*

18. *Ford*, 3 Cal. 4th at 344, 834 P.2d at 727, 11 Cal. Rptr. 2d at 33.

19. *Id.*

assumed the risk that Gouin might veer too close to shore and cause him to collide with an object.[20] Thus, the court determined that Ford knowingly and reasonably assumed the risk of injury.[21] The California Supreme Court affirmed, stating that under the statute, Gouin owed no duty to Ford, and hence, Gouin did not breach any legal duty of care.[22]

III. TREATMENT

A. *Justice Arabian's Lead Opinion*

Justice Arabian, writing the lead opinion, began where *Knight v. Jewett*[23] left off. In *Knight*, the court held that the assumption of risk doctrine bars a plaintiff who willingly engages in an active sport from bringing a negligence action against a coparticipant unless the plaintiff can show that the coparticipant owed the plaintiff a specific legal duty of care.[24] The *Knight* court described the general duty of care applicable to a coparticipant in an active sport as the duty to refrain from intentionally injuring another or from engaging in conduct that is so reckless as to fall outside the scope of the sport.[25]

In *Ford*, Justice Arabian expediently brought water skiing within the confines of the general rule, which limits the duty of care owed to coparticipants in an active sport.[26] Justice Arabian explained that the

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20. *Id.* at 354, 834 P.2d at 734, 11 Cal. Rptr. 2d at 40 (Kennard, J., concurring). *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 485 (5th ed. 1984) ("By entering freely and voluntarily into any relationship where the negligence of the defendant is obvious, the defendant may be found to accept it and consent to it, and to undertake to look out for himself and relieve the defendant of the duty.").

21. Ford v. Gouin, 6 Cal. App. 4th 379, 393-94, 266 Cal. Rptr. 870, 879 (1990) (citing Ford's 15 years of experience as a water skier, extensive preparation prior to water skiing, and general familiarity with the location where the injury occurred). *See generally* 46 CAL. JUR. 3D *Negligence* § 143 (1978) (discussing assumption of risk and the requisite elements of knowledge and appreciation of the particular risks).

22. *Ford*, 3 Cal. 4th at 350-51, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38.

23. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992).

24. *Id.* at 318, 320, 834 P.2d at 710, 711, 11 Cal. Rptr. 2d at 16, 17. The *Knight* court explained that under primary assumption of risk, a defendant owes no duty to the plaintiff. *Id.* at 310, 834 P.2d at 704, 11 Cal. Rptr. at 10. Therefore, a plaintiff would be completely barred from bringing a cause of action because the defendant did not breach a legal duty of care. *Id.*

25. *Id.* at 320, 834 P.2d at 711, 11 Cal. Rptr. 2d at 17. *See also Ford*, 3 Cal. 4th at 345, 834 P.2d at 727-28, 11 Cal. Rptr. at 33-34.

26. *Ford*, 3 Cal. 4th at 345, 834 P.2d at 728, 11 Cal. Rptr. 2d at 34. The limited

reasoning behind the general rule is to avoid any chilling effect on sports which might otherwise occur if courts imposed liability upon a participant due to ordinary negligence.[27]

Next, Justice Arabian addressed the issue of whether the defendant owed the plaintiff a duty of care under section 658(d).[28] Justice Arabian interpreted section 658(d) within the context of surrounding subdivisions and concluded that the legislature provided protection solely for third parties and their property, and not for the participants themselves.[29]

Based on his conclusion that the plaintiff was not within the class of protected persons under the statute, and further that the plaintiff failed to show that the defendant acted recklessly or with the intent to injure, Justice Arabian reasoned that the lower court properly barred the plaintiff's action.[30]

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duty is one of "avoidance of intentional and reckless misconduct." *Id.* While water skiing may not be competitive, it is an active sport. *Id.* For a discussion of how courts treat the similar sport of snow skiing, see Lori J. Henkel, Annotation, *Ski Resort's Liability for Skier's Injuries Resulting From Condition of Ski Run or Slope*, 55 A.L.R. 4TH 632, 642 (1987) (providing a list of cases in which the skier assumed the risk of injury resulting from the inherent hazards of the sport); Donald M. Zupanec, Annotation, *Liability for Injury or Death From Ski Lift, Ski Tow, or Similar Device*, 95 A.L.R. 3D 203, 206-07 (1979) (discussing the duty of care owed by the operator of a ski tow or similar device).

27. *Ford*, 3 Cal. 4th at 345, 834 P.2d at 728, 11 Cal. Rptr. 2d at 34. *See Knight*, 3 Cal. 4th at 318-19, 834 P.2d at 710-11, 11 Cal. Rptr. 2d at 16-17 (providing a detailed history of cases in which courts limited the duty of care owed to a coparticipant in an active sport under the rationale that the imposition of unlimited liability would have a chilling effect on the sport).

28. *Ford*, 3 Cal. 4th at 346, 834 P.2d at 728, 11 Cal. Rptr. 2d at 34. It is interesting to note that while neither party raised the issue at trial or on appeal, the California Supreme Court looked to § 658 to determine the duty a ski boat operator owes to a water skier in tow. *Id.* at 346 & n.2, 834 P.2d at 728 & n.2, 11 Cal. Rptr. 2d at 34 & n.2. Even though the plaintiff in *Ford* was not wearing water skis, the court interpreted the statute as "clearly" encompassing barefoot water skiing. *Id.* at 348, 834 P.2d at 730, 11 Cal. Rptr. 2d at 36. *See* CAL. HARB. & NAV. CODE § 658 (West 1978 & Supp. 1993).

29. *Ford*, 3 Cal. 4th at 349-50, 834 P.2d at 730-32, 11 Cal. Rptr. 2d at 36-38. Justice Arabian interpreted § 658(d) as imposing a duty on both the vessel operator and the water skier to act in a manner consistent with avoiding collisions with any person or object. *Id.* at 349, 834 P.2d at 730, 11 Cal. Rptr. 2d at 36. However, Justice Arabian interpreted the second sentence in § 658(d) as suggesting that the legislature did not intend to impose upon the vessel operator a duty to the water skier. *Id.* at 349, 834 P.2d at 730-31, 11 Cal. Rptr. 2d at 36-37. As a result, Justice Arabian concluded that the obligation to avoid a collision ran not from the vessel operator to the water skier, but from each water skiing participant to third parties and their property. *Id.* at 350, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38.

30. *Id.* at 351, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38.

B. Justice Kennard's Concurring Opinion

Justice Kennard concurred with Justice Arabian's opinion that the water skier should be barred from bringing an action, but did not agree that section 658 imposed no duty on the vessel operator.[31] Rather, Justice Kennard believed that implied assumption of risk, as a complete defense, survived California's adoption of comparative negligence in *Li*.[32]

Justice Kennard began her analysis with a quick review of the "traditional" definition of assumption of risk and the critical elements of the defense.[33] Justice Kennard stressed the significance of correctly distinguishing between contributory negligence and assumption of risk when determining whether *Li* bars the latter as a complete defense.[34] Despite

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31. *Ford*, 3 Cal. 4th at 351, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38. (Kennard, J., concurring). Justices Panelli and Baxter joined in Justice Kennard's concurrence. *Id.* at 364, 834 P.2d at 741, 11 Cal. Rptr. 2d at 47 (Kennard, J., concurring).

32. *Id.* at 351-52, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38 (Kennard, J., concurring). Justice Kennard cited her dissent in *Knight* to support her decision that implied assumption of risk should continue as a complete defense in a negligence action. *Id.* at 354, 834 P.2d at 734, 11 Cal. Rptr. 2d at 40 (Kennard, J., concurring) (citing Knight v. Jewett, 3 Cal. 4th 296, 324, 834 P.2d 696, 714, 11 Cal. Rptr. 2d 2, 20 (1992) (Kennard, J., dissenting)). *See generally* Victor E. Schwartz, *Li v. Yellow Cab Company: A Survey Of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 748-56 (1976) (recognizing the questionable viability of the assumption of risk doctrine shortly after the *Li* decision).

33. *Ford*, 3 Cal. 4th at 354-55, 834 P.2d at 734-35, 11 Cal. Rptr. 2d at 40-41 (Kennard, J., concurring). The affirmative defense of assumption of risk has commonly been defined as the voluntary acceptance of a risk with knowledge and appreciation of that risk. *Id.* at 355, 834 P.2d at 734, 111 Cal. Rptr. 2d at 40 (Kennard, J., concurring). Justice Kennard cited a long line of cases establishing assumption of risk as a defense. *Id.* at 356, 834 P.2d at 735-36, 11 Cal. Rptr. 2d at 41-42 (Kennard, J., concurring). *See also* Grey v. Fibreboard Paper Prods. Co., 65 Cal. 2d 240, 244, 418 P.2d 153, 155, 53 Cal. Rptr. 545, 547 (1966) (finding the assumption of risk defense available when a person voluntarily accepts a risk with either express or implied knowledge of the particular risk); Vierra v. Fifth Ave. Rental Serv., 60 Cal. 2d 266, 271-72, 383 P.2d 777, 780-81, 32 Cal. Rptr. 193, 196-97 (1963) (finding that the plaintiff must appreciate the magnitude of the risk before assumption of risk can apply); Prescott v. Ralph's Grocery Co., 42 Cal. 2d 158, 161-62, 265 P.2d 904, 906 (1954) (comparing the contributory negligence defense where a person could have discovered a risk upon the exercise of due care with an assumption of risk defense where a person voluntarily accepted a risk with knowledge and appreciation of the hazard).

34. *Ford*, 3 Cal. 4th at 356-57, 834 P.2d at 735-36, 11 Cal. Rptr. 2d at 41-42 (Kennard, J., concurring). Justice Kennard contrasted the two defenses by pointing to the different theories underlying each defense. *Id.* (Kennard, J., concurring). In con-

acknowledging the pivotal impact of *Li* on tort law in California, Justice Kennard affirmatively decided that assumption of risk survived the adoption of comparative negligence.[35]

Justice Kennard cited *Ordway v. Superior Court*[36] to support the proposition that assumption of risk survived *Li*.[37] The *Ordway* court held that the terms "reasonable" and "unreasonable" assumption of risk tended to confuse courts when attempting to distinguish between a form of assumption of risk that merged into comparative negligence, and a form that did not.[38] The *Ordway* court viewed assumption of risk not as a complete defense,[39] but as a method of determining the exact duty owed by a defendant.[40]

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tributory negligence, a court compares the plaintiff's actions to those of a reasonable person in similar circumstances, but in assumption of risk, the focus is on the plaintiff's subjective perspective. *Id.* (Kennard, J., concurring). *See generally* 46 CAL. JUR. 3D *Negligence* § 139 (1978 & Supp. 1992) (distinguishing contributory negligence from assumption of risk doctrine); 4 HARPER ET AL., THE LAW OF TORTS §§ 22.1-.18, at 261 (2d ed. 1986) (contrasting comparative negligence with contributory negligence).

35. *Ford*, 3 Cal. 4th at 357, 834 P.2d at 736, 11 Cal. Rptr. 2d at 42 (Kennard, J., concurring). Justice Kennard cited three post-*Li* decisions supporting the view that *Li* did not abolish all forms of assumption of risk. *Id.* (Kennard, J., concurring). *See* Lipson v. Superior Court, 31 Cal. 3d 362, 375 n.8, 644 P.2d 822, 830-31 n.8, 182 Cal. Rptr. 629, 637-38 n.8 (1982) (noting that the assumption of risk doctrine has been abolished only to the extent that it overlaps with contributory negligence); Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 406, 572 P.2d 1155, 1163-64, 143 Cal. Rptr. 13, 22 (1978) (recognizing the continued applicability of the assumption of risk doctrine post-*Li*); Walters v. Sloan, 20 Cal. 3d 199, 204, 571 P.2d 609, 612, 142 Cal. Rptr. 152, 155 (1977) (explaining the continued viability of the fireman's rule under the fundamental tenets of the assumption of risk doctrine).

36. 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988).

37. *Ford*, 3 Cal. 4th at 359-60, 834 P.2d at 738-39, 11 Cal. Rptr. 2d at 44-45 (Kennard, J., concurring).

38. *Id.* at 360, 834 P.2d at 739, 11 Cal. Rptr. 2d at 45 (Kennard, J., concurring). The *Ordway* court stated that under comparative negligence, it is necessary to consider the risks assumed by the plaintiff before attempting to measure the duty owed by the defendant. *Ordway*, 198 Cal. App. 3d at 107, 243 Cal. Rptr. at 541 (quoting Turcotte v. Fell, 502 N.E.2d 964, 967 (N.Y. 1968)). Although, the court held that assumption of risk was not an absolute defense, it indicated that the doctrine survived the adoption of comparative negligence as a measure of the defendant's duty of care. *Id.* (quoting Turcotte v. Fell, 502 N.E.2d 964, 968 (N.Y. 1986)). The *Ordway* court concluded that a plaintiff's reasonable implied assumption of risk reduces the duty of care owed by a defendant and may even result in the defendant owing no duty at all. *Id.*

39. Such a concept is inconsistent with a comparative negligence scheme in which liability is apportioned according to fault. *See generally* 46 CAL. JUR. 3D *Negligence* §§ 117, 118 (1978 & Supp. 1992) (noting that *Li* superseded the all-or-nothing contributory negligence approach and adopted a form of recovery proportionate to fault).

40. *Ordway*, 198 Cal. App. 3d at 107, 243 Cal. Rptr. at 541. However, Justice Kennard may have misplaced reliance upon *Ordway* as explicitly recognizing the survival of implied assumption of risk as a complete defense. The *Ordway* court

Next, Justice Kennard examined the essential elements of assumption of risk and concluded that the plaintiff voluntarily and knowingly assumes the risk of injury during a sports activity.[41] Unlike the lead opinion and dissent, Justice Kennard did not find section 658 dispositive on whether the plaintiff was barred from bringing an action against the defendant.[42] Relying instead on the continued viability of assumption of

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interpreted *Li* as upholding the doctrine of reasonable implied assumption of risk as a viable defense and "where applicable," the doctrine provides a complete defense. *Id.* The key words are "where applicable." The court did not state that reasonable implied assumption of risk was tantamount to a complete defense in all cases. *See id.* Rather, the court said that a complete defense arises where the plaintiff reasonably assumed a risk sufficient to reduce the defendant's duty of care to no duty at all. *Id.*

Here, the reasoning in *Ordway* is more consistent with the *Knight* court's interpretation of assumption of risk than with Justice Kennard's interpretation. In *Knight*, the court distinguished between primary and secondary assumption of risk. Knight v. Jewett, 3 Cal. 4th 296, 308, 834 P.2d 646, 703, 11 Cal. Rptr. 2d 2, 9 (1992). The *Knight* court defined primary assumption of risk as when the defendant owed no duty to the plaintiff. *Id.* The court defined secondary assumption of risk as when the defendant owed a duty, but the plaintiff knowingly encountered the risk of injury. *Id.* Thus, when applying comparative negligence principles to secondary assumption of risk, liability is apportioned according to fault. *Id.* at 310-11, 834 P.2d at 704-05, 11 Cal. Rptr. 2d at 10-11. This approach is similar to *Ordway's* analysis in which a plaintiff's reasonable implied assumption of risk reduces the duty owed by a defendant. *See Ordway*, 198 Cal. App. 3d at 107, 243 Cal. Rptr. at 541.

41. *Ford*, 3 Cal. 4th at 362, 834 P.2d at 739-40, 11 Cal. Rptr. 2d at 45-46 (Kennard, J., concurring).

42. *Id.* at 362, 834 P.2d at 740-41, 11 Cal. Rptr. 2d at 46 (Kennard, J., concurring). Justice Kennard found both parties' conduct to be outside the scope of § 658. *Id.* (Kennard, J., concurring). However, she hypothesized that if the court interpreted the statute to include barefoot water skiers within the protected class of persons, the defendant would have been barred from asserting the assumption of risk defense. *Id.* (Kennard, J., concurring).

Justice George, joined by Chief Justice Lucas, agreed with Justice Arabian on the duty approach to assumption of risk. *Id.* at 365, 834 P.2d at 741, 11 Cal. Rptr. 2d at 47 (George, J., concurring and dissenting). However, Justice George reached the opposite conclusion, finding the water skier in tow as part of the class of persons protected under the statute. *Ford*, 3 Cal. 4th at 365, 834 P.2d at 741, 11 Cal. Rptr. 2d at 47. (George, J., concurring and dissenting). He believed that § 658 could reasonably be interpreted as affording protection for both third parties and water skiers from any collisions caused by a vessel operator. *Id.* at 366, 834 P.2d at 743, 11 Cal. Rptr. 2d at 49 (George, J. concurring and dissenting).

Justice Mosk maintained that the doctrine of implied assumption of risk should be abolished in its entirety. *Id.* at 369, 834 P.2d at 745, 11 Cal. Rptr. 2d at 51 (Mosk, J., dissenting). He also expressed concern over Justice Arabian's apparent uncertainty in discerning the legislative intent behind § 658. *Id.* at 369, 834 P.2d at 744-45, 11

risk as a complete defense, Justice Kennard reasoned that the plaintiff impliedly assumed the risk of injury when he chose to water ski backward and barefoot with knowledge and appreciation of the inherent risks.[43] Therefore, Justice Kennard concluded that the plaintiff should be barred from bringing a negligence action against the defendant.[44]

IV. CONCLUSION

While the California Supreme Court may have intended to clarify the correct interpretation of the assumption of risk doctrine, a great amount of confusion still surrounds the matter.[45] In *Knight*, the court recognized primary and secondary assumption of risk as the appropriate terms under which all assumption of risk cases should be reviewed.[46] However, what the court gives in *Knight*, the court takes away in *Ford*. In *Ford*, three justices supported the primary/secondary approach, three justices advocated the traditional approach, whereby assumption of risk would be treated as a complete defense, and one justice called for total abolishment of the doctrine.[47]

Cal. Rptr. 2d at 50-51 (Mosk, J., dissenting).

43. *Id.* at 363-64, 834 P.2d at 741, 11 Cal. Rptr. 2d at 47.

44. *Ford*, 3 Cal. 4th at 363-64, 834 P.2d at 741, 11 Cal. Rptr. 2d at 47. *See generally* Kenneth W. Simons, *Assumption of Risk And Consent In The Law Of Torts: A Theory Of Full Preference*, 67 B.U. L. REV. 213 (1987) (providing an in-depth analysis of the traditional approach to assumption of risk as advocated by Justice Kennard).

45. Knight v. Jewett, 3 Cal. 4th 296, 322, 834 P.2d 696, 712-13, 11 Cal. Rptr. 2d 2, 18-19 (1992) (recognizing the tremendous confusion caused by the many interpretations and definitions of the term "assumption of risk" and advocating complete elimination of the doctrine) (Mosk, J., concurring and dissenting).

46. *Id.* at 308-09, 834 P.2d at 703-04, 11 Cal. Rptr. 2d at 9-10.

47. *Ford*, 3 Cal. 4th at 351 n.1, 834 P.2d at 732 n.1, 11 Cal. Rptr. 2d at 38 n.1 (Kennard, J., concurring). For a summary of the various approaches taken by the appellate courts in California, see Ann K. Bradley, *Knight v. Jewett: Reasonable Implied Assumption of Risk as a Complete Defense in Sports Injury Cases*, 28 SAN DIEGO L. REV. 477, 480-85 (1991) (arguing that the California Supreme Court should find reasonable implied assumption of risk a complete defense separate and apart from the comparative negligence scheme). *See also* John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717, 726 (1991) (setting out three basic approaches to assumption of risk in chart form). Diamond explained the dilemma faced by the California Supreme Court prior to its ruling in *Knight* and *Ford*. *See generally id.* at 736-41.

Arguably, the only issue that *Ford* clarifies is that even the supreme court is having difficulty in applying the standards recently established in *Knight*.[48] It is safe to "assume" that the doctrine of assumption of risk will continue to "bedevil the law" for quite some time.[49]

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48. The only point which all justices seem to agree on is that when the plaintiff expressly assumes a risk, the assumption of risk doctrine bars the plaintiff's action for negligence. *Knight*, 3 Cal. 4th at 308 n.4, 834 P.2d at 703 n.4, 11 Cal. Rptr. 2d at 9 n.4 (analogizing express assumption of risk to primary assumption of risk in which no duty is owed, and thus, the plaintiff is barred from bringing a negligence cause of action). *See also* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 68, at 482-86 (5th ed. 1984) (indicating the significant burden that the defendant must meet before a court will recognize an express assumption of risk).

49. *Knight*, 3 Cal. 4th at 322, 834 P.2d at 713, 11 Cal. Rptr. 2d at 19 (Mosk, J., concurring and dissenting) (quoting Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring)).