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California Supreme Court Survey - A Review of Decisions: March 1987-August 1987

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California Supreme Court Survey March 1987-August 1987

The California Supreme Court Survey is 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 cases have been omitted from the survey.

I. CIVIL PROCEDURE

A. *A sexual harassment claimant who alleges ongoing emotional distress is vulnerable to a court-ordered mental examination without the presence of counsel; however, inquiries into the claimant's unrelated sexual conduct are permissible only in extraordinary cases:* Vinson v. Superior Court.

In *Vinson v. Superior Court*, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987), the supreme court considered whether a court-ordered mental examination violated the right to privacy of a plaintiff who claimed ongoing emotional distress from alleged job-related sexual harassment. The court also examined whether such a plaintiff had an absolute right to the presence of counsel during the mental examination. *See* CAL. CIV. PROC. CODE §§ 2032(a), 2036.1 (West 1983 & Supp. 1987) [hereinafter section 2032(a) and section 2036.1, respectively] (repealed 1987 and replaced by sections 2032(d) and 2017(d), respectively).

Under section 2032(a), a court may order a mental examination of a party where the mental or emotional condition is placed in controversy. Section 2036.1 requires a showing of specific, relevant facts to justify inquiry into a sexual harassment claimant's unrelated sexual conduct. The *Vinson* court unanimously agreed that although a defendant has a right to meaningful discovery, the scope should be limited to prevent unjustifiable intrusions into a plaintiff's private life. The court refused, however, to grant a plaintiff an absolute right to the presence of counsel during the examination.

In considering the appropriateness of such an examination, the court evaluated whether the plaintiff's mental state was "in controversy" as required by section 2032(a). By alleging ongoing emotional distress, the plaintiff effectively placed her mental state in controversy. *Compare Cody v. Marriot Corp.*, 103 F.R.D. 421 (D. Mass. 1984) (an emotional distress claim does not automatically place the claimant's mental state in controversy). Therefore, where ongoing emotional injuries are alleged, the existence and severity thereof are discoverable, subject to privacy considerations. *See* 2 J. HOGAN, MODERN CALIFORNIA DISCOVERY §§ 8.05-.06 (3d ed. 1986 & Supp. 1987); 23 AM. JUR. 2D *Depositions & Discovery* §§ 290-292 (1983 & Supp. 1987); 27 CAL. JUR. 3D, pt. 2, *Depositions & Discovery* § 209 (rev. ed. 1987).

The court then analyzed whether the plaintiff's sexual harassment suit effected a waiver of her right to privacy, thereby allowing spe-

cific inquiry into her past and current sexual practices. California considers an individual's right to privacy an "inalienable right." CAL. CONST. art. I, § 1. This right has been extended to sexual relations. *E.g.*, *Fults v. Superior Court*, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979).

The court determined that the plaintiff partially waived her right to privacy by alleging continuing mental ailments. However, this waiver did not extend to sexual practices since the plaintiff did not allege the sexual harassment was detrimental to her present sexuality.

The court noted the legislature's intent that such inquiries be permitted only in extraordinary circumstances, so as to avoid unjustifiable intrusions into a claimant's privacy. *See* Act approved Sept. 30, 1985, ch. 1328, § 1, 1985 Cal. Legis. Serv. 571-72 (West) (codified at CAL. CIV. PROC. CODE § 2036.1 (West Supp. 1987)). Under section 2036.1, a higher standard of "good cause" must be met before discovery into sexual conduct will be allowed. Since the defendant failed to show specific facts justifying the sex-related questions, the inquiry was not permissible.

Finally, the court reviewed whether the plaintiff had an absolute right to the presence of counsel during the examination. In revising section 2032(a), the legislature indicated that existing case law should not be disturbed. *See* CAL. CIV. PROC. CODE § 2032(d) (West Supp. 1987) [hereinafter section 2032(d)]. Consequently, the court refused to alter its decision in *Edwards v. Superior Court*, 16 Cal. 3d 905, 549 P.2d 846, 130 Cal. Rptr. 14 (1976), which held that no such absolute right exists.

The court stressed that the presence of counsel would negate the examination's value by adversely impacting the rapport between the interviewer and the examinee. Sufficient protective devices were deemed to exist under current procedural rules, including the right to audio-tape the examination under section 2032(d). *See* 2 J. HOGAN, MODERN CALIFORNIA DISCOVERY § 8.11 (3d ed. 1981 & Supp. 1986); 2 B. WITKIN, CALIFORNIA EVIDENCE § 1550 (3d ed. 1986 & Supp. 1987); 23 AM. JUR. 2D *Depositions & Discovery* §§ 305-306 (1983 & Supp. 1987); 27 CAL. JUR. 3D, pt. 2, *Depositions & Discovery* § 215 (rev. ed. 1987).

However, consistent with recent federal decisions, the court acknowledged a trial court's discretion to allow the presence of counsel or impose other protective measures when abusive discovery tactics are evident. *See, e.g.*, *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635 (E.D. Wis. 1984); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296 (E.D. Pa. 1983).

Thus, the court has refused to substantially restrict a defendant's

right to conduct a meaningful investigation of a sexual harassment claimant's alleged emotional injuries. Where the claimant places her mental condition in controversy by alleging ongoing emotional distress, she is vulnerable to a court-ordered mental examination. The claimant's right to privacy is only partially waived. Thus, a prohibition on inquiries into unrelated sexual conduct is justified absent a specific showing of good cause to the contrary. Finally, where there are indicia of discovery abuses, the trial court may impose further protective measures, including attendance by the claimant's counsel. *See generally* 2 J. HOGAN, MODERN CALIFORNIA DISCOVERY §§ 8.04-.15 (3d ed. 1981 & Supp. 1986); 2 B. WITKIN, CALIFORNIA EVIDENCE §§ 1542-1552 (3d ed. 1986 & Supp. 1987); 23 AM. JUR. 2D *Depositions & Discovery* §§ 282-306 (1983 & Supp. 1987); 27 CAL. JUR. 3D, pt. 2, *Depositions & Discovery* §§ 214-217 (rev. ed. 1987).

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B. *A motion for a new trial made subsequent to the trial court's granting a dismissal, but prior to the actual entry of judgment, is deemed to be timely filed, and the granting or denial of the motion for new trial by the trial court extinguishes its jurisdiction over the case:* **Wenzoski v. Central Banking System, Inc.**

In *Wenzoski v. Central Banking System, Inc.*, 43 Cal. 3d 539, 736 P.2d 753, 237 Cal. Rptr. 167 (1987), the California Supreme Court dismissed an appeal for lack of jurisdiction because the plaintiffs had not filed the notice of appeal within the thirty-day time period prescribed by rule 3(a) of the California Rules of Court. The plaintiffs' civil suit against Central Banking had been dismissed upon a motion brought by the defendants. The dismissal was granted on December 19, 1980, but a judgment of dismissal was not recorded until January 2, 1981. The plaintiffs filed a motion for new trial on December 31, 1980, prior to the actual entering of judgment. Upon discovering this fact, the plaintiffs filed a second motion for new trial on January 16, 1981. The trial court denied the plaintiffs' first motion on January 20, 1981, and denied the second motion on February 26, 1981. The plaintiffs, wishing to contest the denial of a new trial, filed a notice of appeal on March 20, 1981.

The supreme court held that the notice of appeal was not timely filed because more than thirty days had elapsed between the denial of the first motion, on January 20, and the filing of the notice of ap-

peal, on March 20. Although the notice of appeal was filed within thirty days of the denial of the second motion, the court concluded that the trial court had extinguished its jurisdiction over the case after it had denied the first motion for new trial. Therefore, it could not properly consider the second motion. The court emphasized that once a trial court rules on a motion for new trial, the trial court exhausts its jurisdiction over the case and can amend its decision only if it is attempting to correct a clerical error or inadvertence. *See* 8 B. WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment in Trial Court* § 129(b) (3d ed. 1985).

In a supplemental brief filed with the supreme court, the plaintiffs attempted to assert that they were correcting a clerical error by filing the second motion. However, the plaintiffs had not propounded this theory at any time prior to the filing of the supplemental brief. The supreme court felt the only reason the plaintiffs filed a second motion was fear that the first motion was filed in an untimely fashion. The plaintiffs had never claimed to the trial court that the second motion was filed because of a clerical error in the first motion. The court pointed to case law which expressed that a motion for new trial filed under circumstances similar to the plaintiffs' would be considered timely. *See* 47 CAL. JUR. 3D *New Trial* §§ 74-78 (1979).

The supreme court rendered the only decision it was capable of rendering under the facts presented: The thirty-day time period began to run when the trial court denied the first motion for new trial. Therefore, the final day to file a notice of appeal would have been February 20, 1981. The fact that the trial court went on to deny the second motion is moot. The trial court no longer had jurisdiction over the case. The trial court ruling on the second motion was not at all persuasive to the supreme court, nor should it have been. Once a trial court relinquishes its jurisdiction, it cannot be reclaimed. Subsequent, improper action by a trial court will not bring the case back under its jurisdiction.

This case makes evident two salient points which should be of great importance to any litigating attorney: (1) a motion for new trial filed after an order granting dismissal, but prior to a judgment is considered to be timely filed; and (2) after a trial court rules on a motion for new trial, it extinguishes its jurisdiction over the case and the thirty-day time period for filing notice of appeal begins to run.

MARK J. STUMP

II. CONSTITUTIONAL LAW

A probationer, who has agreed to be subject to warrantless searches as a condition of receiving probation, may be subject to such warrantless searches even if the search is not based on reasonable cause: **People v. Bravo.**

In *People v. Bravo*, 43 Cal. 3d 600, 738 P.2d 336, 238 Cal. Rptr. 282 (1987), the California Supreme Court held that an individual who has waived his constitutional rights to be free from warrantless searches, as a condition to receiving probation, shall be subject to searches even when the law enforcement agency conducting the search does not have reasonable cause to do so. The court emphasized that this ruling does not permit law enforcement personnel to conduct searches of a probationer's person or property for the purpose of harassing the individual, nor does it allow "arbitrary or capricious" searches.

The appellant in *Bravo* had been convicted of possessing marijuana. He was granted probation after agreeing to waive his rights to be free from warrantless searches at any time of the day or night. While on probation, a warrantless search of the appellant's premises revealed cocaine and illicit firearms leading to his arrest. The appellant plead guilty to the charges against him. Following the judgment, he appealed the case.

On appeal, the appellant maintained that the search of his apartment and subsequent seizure of the illicit property was unlawful because of the police officers' lack of reasonable cause to conduct the search. He did not claim that the police officers could not conduct a warrantless search. Rather, he insisted that in spite of the probationary conditions applicable to him regarding searches, the officers must have reasonable cause to institute a search.

The court of appeal overturned the judgment on the grounds that the appellant's waiver of his constitutional protection against warrantless searches did not subject him to unreasonable searches. The court viewed a search based on an unconfirmed tip, as the appellant's search was, as an unreasonable search. The court of appeal reached this decision by applying the same strict scrutiny test to the search waiver as would be applied to any other advance waiver of fundamental rights.

The supreme court rejected the application of a strict scrutiny test to the waiver of protection against warrantless searches. The court reasoned that fourth amendment rights were significantly different

from other fundamental rights. The court concluded that the proper test for determining the validity of a waiver of fourth amendment rights should be an objective test. If the individual waiving his fourth amendment rights does so in a manner which signifies a reasonable understanding of the implications of the waiver, then the objective test has been met. Here, the court believed that the appellant had a reasonable understanding of the waiver because the specific wording of the consent agreement validated the warrantless search even without reasonable cause.

The supreme court acted reasonably in reversing the court of appeal's decision. By allowing the appellant to voluntarily waive his fourth amendment rights in order to stay out of jail, the purposes of the probation scheme were effectively met. The probationer is deterred from committing additional crimes, and the law enforcement agencies are provided with an appropriate means to determine whether the probationer is following the conditions of his probation. The specific language of the waiver made it clear that the appellant did not have to agree to the consent, but was only obligated to the conditions of the waiver if the agreement was voluntarily entered into. At the point of time when the appellant agreed to the waiver, his only protection from searches was a shielding from searches which were arbitrary, capricious, or intended to harass. The search in the present case, while possibly lacking reasonable cause, did not deny the appellant any rights he had not already relinquished.

MARK J. STUMP

III. CRIMINAL PROCEDURE

A. *When a defendant is convicted of first degree murder and attempted rape, and the jury is unable to reach a verdict in the penalty phase of the trial, a retrial involving the issue of rape and attempted rape does not prejudice the defendant or place him in double jeopardy. In addition, during a special circumstance trial on allegations of murder committed during the course of rape or attempted rape, evidence of assault with intent to commit rape of another victim which took place shortly before the special circumstance crime is admissible to prove intent to commit rape in the special circumstances crime:* **People v. Ghent.**

I. INTRODUCTION

In *People v. Ghent*,[1] the defendant was convicted of first degree murder and attempted rape of one victim and assault with intent to commit rape of another victim. The jury deadlocked on the issue of special circumstances.[2] A subsequent jury agreed that special circumstances existed and returned a sentence of death.[3] The instant appeal was automatic.[4]

II. FACTUAL SUMMARY

On February 21, 1978, Ghent proceeded into the bedroom of a female housemate and attempted to force her to engage in sexual relations. When the housemate's child entered the room, Ghent gave up the attack and left the house.[5] A short time later, Ghent went to the home of his friends, Paul and Patricia Bert. Paul was not at home. Patricia, dressed only in a robe, was there and she engaged in conversation with Ghent. During this time, Ghent observed Patricia's robe

1. 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987). The majority opinion was written by Chief Justice Lucas, with Panelli, Arguelles, Eagleson, and Kaufman concurring. Justice Mosk and Justice Broussard each wrote a separate concurring opinion.

2. In order to sentence an individual to death, a jury must find special circumstances are involved—one of which is that the murder was committed while the defendant was committing or attempting to commit rape. CAL. PENAL CODE § 190.2(a)(17)(iii) (West Supp. 1987).

3. *Ghent*, 43 Cal. 3d at 748, 739 P.2d at 1255, 239 Cal. Rptr. at 87.

4. CAL. PENAL CODE § 1239 (West Supp. 1987).

5. *Ghent*, 43 Cal. 3d at 748-49, 739 P.2d at 1255-56, 239 Cal. Rptr. at 88.

fall open, revealing her nude body. According to Ghent, the next thing he could remember was standing over Patricia's dead body.[6] Ghent remembered holding a bloody knife in his hand and seeing Patricia's hands tied behind her back. Ghent claimed he then left the house only to return shortly thereafter to remove his fingerprints from the premises. Ghent was subsequently arrested.

III. THE MAJORITY OPINION

A. Guilt Phase Issues

The defendant had numerous contentions on appeal regarding both the guilt and penalty phases of his trial. The defendant's first contention was that his *Miranda* rights were violated when a police officer and a psychiatrist, employed by the police department, continued questioning him after he had requested the assistance of an attorney.[7]

The supreme court agreed that any questions posed subsequent to a request for counsel do violate a defendant's *Miranda* rights. Nevertheless, the court held that the questioning and resulting testimony constituted harmless error because the testimony merely indicated premeditation and there was overwhelming evidence to show that a felony murder had occurred while the defendant attempted to rape his victim.[8]

The defendant also claimed that the exclusion for cause of jurors who were automatically opposed to the death penalty denied him a jury which represented a cross-section of the community.[9] The supreme court rejected this claim out of hand, relying on prior case precedent.[10]

The defendant argued next that the People had failed to properly preserve a semen sample so that the defense could conduct its own tests.[11] The court held that proper care had been exercised and that if any deterioration had occurred to the sample inhibiting defense

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6. *Id.* at 749, 739 P.2d at 1256, 239 Cal. Rptr. at 88. Ghent testified that he must have raped Bert as soon as he saw her nude body. The prosecution believed that Ghent left the house and then returned later to rape and murder Mrs. Bert.

7. *Id.* at 750, 739 P.2d at 1256, 239 Cal. Rptr. at 89. The defendant indicated several times that he wished to talk to an attorney. Despite his requests, the interrogation continued with questions from police officers and a police psychiatrist.

8. *Id.* at 752, 739 P.2d at 1258, 239 Cal. Rptr. at 90.

9. *Id.* at 753, 739 P.2d at 1259, 239 Cal. Rptr. at 91.

10. *Id.* at 753-54, 739 P.2d at 1259, 239 Cal. Rptr. at 91. The court relied on its decision in People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983).

11. *Ghent*, 43 Cal. 3d at 754, 739 P.2d at 1259, 239 Cal. Rptr. at 91. A semen sample was obtained during a vaginal wash of Mrs. Bert's body. During the subsequent tests, the sample was frozen by the police and was then sent to the defense laboratory where it sat on a desk for three to four days. The court admitted that the sample may have been damaged, but the damage was not the fault of the police. *Id. See* People v. Nation, 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980).

tests, it was the fault of the defense rather than the People.[12]

The defendant also argued that his counsel was incompetent in the first trial because counsel had failed to furnish a defense psychiatrist with the defendant's complete records involving prior sex offenses. However, the court found that the first trial involved the murder charge and that the psychiatrist was fully prepared for a murder defense.[13] The prior sex offense information was only pertinent to the second trial which concerned special circumstances.[14] The court found the psychiatrist was fully prepared in the second trial and had been provided all of the relevant information regarding prior sex offenses by defense counsel.[15]

The defendant then argued that the trial court erred by not instructing the jury at the first trial about lesser-included offenses of rape as they pertained to the assault on Patricia Bert. The supreme court saw no use in this advisement as defendant did not specifically deny the crime, but merely claimed a loss of memory as to when the rape occurred.[16] The supreme court found that the defendant was guilty of rape, attempted rape, or was not guilty, and that collateral issues involving lesser offenses were useless to the defendant's case.[17]

The defendant also claimed the trial court erred in not cautioning the jury more fully regarding the taking of notes. The supreme court agreed that the admonitions given probably could have been more inclusive, but found that the overwhelming evidence of defendant's guilt outweighed the incomplete admonitions.[18]

Prior to trial, the defendant had moved to have the charges resulting from his assault on his housemate severed from the charges involving the murder and rape of Bert.[19] This issue had been appealed

12. *Ghent*, 43 Cal. 3d at 755-56, 739 P.2d at 1260, 239 Cal. Rptr. at 92.

13. *Id.* at 756, 739 P.2d at 1261, 239 Cal. Rptr. at 93. The court determined that the evidence of prior sex offenses was only relevant to the special circumstances issue because it involved the issue of premeditation. The first trial involved the murder charge alone, and thus evidence regarding premeditation of rape was irrelevant.

14. *Id.*

15. *Id.*

16. *Id.* at 757, 739 P.2d at 1261, 239 Cal. Rptr. at 93. The court agreed that a trial court must give instructions on relevant legal issues if it is necessary for the jury to get a clear understanding of the case. However, when there is *no* evidence that the offense is less than that which has been charged, then the instructions need not be given. *Id.* *See* People v. Noah, 5 Cal. 3d 469, 487 P.2d 1009, 96 Cal. Rptr. 441 (1971). Since Ghent did not deny the rape or attempted rape, the offense could not have been less than what was charged.

17. *Ghent*, 43 Cal. 3d at 757, 739 P.2d at 1261, 239 Cal. Rptr. at 93.

18. *Id.* at 758, 739 P.2d at 1262, 239 Cal. Rptr. at 94.

19. *Id.*

previously and denied.[20] The supreme court upheld the denial, holding that evidence of the first assault would have been admissible in any event in order to show defendant's motive for attacking Bert.[21] Thus, there was no need to sever the charge.

B. Special Circumstances Contentions

1. Double Jeopardy Violation

At his first trial, the defendant was convicted of murder, attempted rape, and assault with intent to commit rape. The first jury was unable to reach a unanimous verdict on the special circumstances issue and a second jury was empaneled to resolve the conflict.

The second jury was informed that the defendant had already been found guilty of murder, but with permission from the People and the defense, the jury was not informed that the defendant had also been found guilty of attempted rape.[22] The second jury then heard evidence and redecided the rape/attempted rape issue as a component of the special circumstances issue.

The defendant asserted that this put him in double-jeopardy because he had already been found guilty of rape. The supreme court disagreed, stating that section 190.4 of the Penal Code[23] did not require any relitigation of the rape issue and that the defendant actually received a free, undeserved additional shot to exonerate himself of the attempted rape conviction.[24]

2. Prosecutor's Misconduct

The defendant alleged that the prosecutor improperly attacked the defense counsel's honesty when he attempted to impeach the defense psychiatrist. The prosecutor tried to show that the defendant was not capable of forming his defense without having heard an explanation of the law from defense counsel.[25] The supreme court did not accept the contention that this line of questioning attacked the honesty of the defense counsel.[26] The court also held that the failure of

20. Ghent v. Superior Court, 90 Cal. App. 3d 944, 153 Cal. Rptr. 720 (1979).

21. *Ghent*, 43 Cal. 3d at 759, 739 P.2d at 1263, 239 Cal. Rptr. at 95. The court found evidence of the first assault to be highly probative of the defendant's premeditation of the subsequent crimes. Premeditation was a central issue in the special circumstance segment of the trial.

22. *Id.* at 760, 739 P.2d at 1263, 239 Cal. Rptr. at 96.

23. Former CAL. PENAL CODE § 190.4 (West 1970).

24. *Ghent*, 43 Cal. 3d at 761, 739 P.2d at 1264, 239 Cal. Rptr. at 96. Section 190.4 stated that when a jury was unable to reach a unanimous verdict on special circumstances, a new jury shall be empaneled, but the new jury shall not try the issues of guilt found by the first jury. Therefore, Ghent was not in double-jeopardy but actually received a bonus trial.

25. *Ghent*, 43 Cal. 3d at 761, 739 P.2d at 1263, 239 Cal. Rptr. at 96.

26. *Id.* at 762, 739 P.2d at 1264, 239 Cal. Rptr. at 97. The court interpreted the

defense counsel to ask for an admonition from the judge effectively waived any objections to the questions posed.[27]

C. Penalty Phase Contentions

1. Juror Dismissal

The defendant alleged that the trial court erred in excluding certain jurors in the penalty phase due to their view on the death penalty. The defendant argued that in order for jurors to be excused, they would have to unequivocally state that they would vote against the death penalty no matter what evidence was produced at trial. The supreme court rejected the defendant's contentions and, relying on *Wainwright v. Witt*,[28] stated that a juror's bias need not be made unmistakably clear.[29] The court went on to state that even if the juror's dismissal was examined under the old test set forth in *Witherspoon v. Illinois*,[30] the trial court had exercised proper restraint.[31] The court held that *Witt* now takes precedent over *Witherspoon* in California and, therefore, a trial court's decision to excuse a juror must have deference even when that juror has not expressly stated that he would vote against the death penalty.[32]

The supreme court went on to deny numerous other defense allegations of impropriety during the penalty phase. The court held that the prosecutor's brief mention of a Governor's power to commute a death sentence during voir dire did not constitute reversible error, especially because of the defense counsel's failure to ask for an admonition.[33]

The supreme court also denied the defendant's contention that a prosecutor's brief reference to the deterrent effect of the death penalty was reversible error. While the court observed that discussion of the deterrent effect of the death penalty should be left out of closing arguments, the court did not find that it had a harmful effect in the

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prosecutor's line of questioning as merely trying to ascertain whether the defendant had the mental capabilities to form his defense without the help from his counsel.

27. *Id. See* People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

28. 469 U.S. 412 (1985).

29. *Ghent*, 43 Cal. 3d at 767, 739 P.2d at 1268, 239 Cal. Rptr. at 100.

30. 391 U.S. 510 (1968).

31. *Ghent*, 43 Cal. 3d at 767, 739 P.2d at 1268, 239 Cal. Rptr. at 100. The court thought *Witt* made good sense because a judge can often form a view of a juror's true feelings despite the fact that the feelings have not been expressly stated.

32. *Id.* at 767, 739 P.2d at 1268, 239 Cal. Rptr. at 100.

33. *Id.* at 769, 739 P.2d at 1269, 239 Cal. Rptr. at 101-02.

present case.[34]

The court also rejected the defendant's claim that the prosecutor's statements regarding lack of remorse violated his privilege against self-incrimination. The court held first that the statements did not violate the defendant's privilege against self-incrimination because the prosecutor did not directly refer to the defendant's failure to testify.[35] In fact, the defendant did take the stand in his defense. Further, the court held that the issue of remorse is valid in a jury's deliberation of the death penalty.[36]

The court rejected the defendant's claim that the prosecutor's mention of his age as an aggravating factor constituted misconduct. The court held that age alone could not be considered an aggravating factor, but it could be used to show maturity and sophistication. Therefore, the defendant was not deserving of mercy even though a young, immature person might be so deserving.[37]

Finally, the defendant argued that the California death penalty provision was invalid under international law. The court, while acknowledging that international resolutions can certainly influence legislation, decided that it was up to the legislature to decide how much deference to give to such resolutions.[38] The court reaffirmed the constitutionality of the California death penalty law and rejected the defendant's arguments.[39] The court then affirmed the trial court's decision to sentence the defendant to death.[40]

IV. THE SEPARATE OPINIONS

A. Justice Mosk's Concurring Opinion

Justice Mosk concurred in the judgment, but wrote separately to note two reservations. First, Mosk believed the issue of age may always be mentioned by the prosecutor and the defense counsel would then have an opportunity to argue against its use. The jury could then attach as much relevance to the age issue as it deemed necessary.[41]

Justice Mosk was also disturbed by the casual treatment the major-

34. *Id.* at 771, 739 P.2d at 1270-71, 239 Cal. Rptr. at 102.

35. *Id.*

36. *Id.* at 775, 739 P.2d at 1273-74, 239 Cal. Rptr. at 106.

37. *Id.* at 778, 739 P.2d at 1276, 239 Cal. Rptr. at 108. The court felt that the prosecutor merely introduced the defendant's age in order to argue the inapplicability of a mitigating factor. The court seemed to feel that, in general, age should not be admitted as an aggravating factor.

38. *Id.* at 778, 739 P.2d at 1276, 239 Cal. Rptr. at 108.

39. *Id.* at 780, 739 P.2d at 1277, 239 Cal. Rptr. at 109.

40. *Id.*

41. *Id.* at 781, 739 P.2d at 1277, 239 Cal. Rptr. at 109 (Mosk, J., concurring).

ity gave the issue of international law.[42] Although he believed more deference must be given to international law, Justice Mosk did not believe it required elimination of the death penalty.[43]

B. Justice Broussard's Concurring Opinion

While agreeing with the judgment, Justice Broussard wrote separately to state his belief that a prosecutor cannot use the absence of mitigating factors as a positive aggravating factor.[44] The prosecutor, during the penalty phase argument, had advised the jury that there was no evidence to support certain mitigating factors and, therefore, an aggravating factor resulted. Broussard strongly disagreed with this reasoning and felt that it could be highly prejudicial to jury members. However, in the present case, the prosecutor made only one passing reference to this rationale, and thus Justice Broussard did not consider the error to be reversible.[45]

V. CONCLUSION

There were numerous errors committed in Ghent's trial, both at the guilt phase and the penalty phase. The court, while acknowledging the existence of many of the errors, declined to find any of the discrepancies worthy of reversal of the conviction or sentence. This case may be indicative of the manner in which death penalty cases will be reviewed in the coming years. The Bird court[46] was very lenient in finding that certain errors warranted reversal. This case shows that the Lucas court may be more tolerant of prosecutorial indiscretions and defense counsel errors when the evidence in the case is so overwhelmingly against the defendant.

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

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

44. *Id.* at 781, 739 P.2d at 1278, 239 Cal. Rptr. at 110 (Broussard, J., concurring).

45. *Id.* at 783, 739 P.2d at 1279, 239 Cal. Rptr. at 110-11 (Broussard, J., concurring).

46. *Ghent* was the first death penalty case upheld by the supreme court since Justice Lucas became the Chief Justice in January of 1987. Former Chief Justice Bird, along with Justice Reynoso and Justice Grodin, were voted out of the supreme court in November 1986. One of the principal attacks on the three Justices was their unwillingness to uphold death penalty sentences.

B. *In a murder trial involving pleas of not guilty and not guilty by reason of insanity, it is reversible error for the trial court to reempanel a jury to decide the sanity issue when that jury was released by the court after the guilt phase of the trial:* **People v. Hendricks.**

In *People v. Hendricks*, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987), the supreme court held that when a defendant pleaded not guilty and not guilty by reason of insanity, and was convicted of murder by a jury which was released by the court immediately thereafter, later reconvening of the same jury to hear the sanity phase of the trial constituted reversible error. This holding applies even when, as in this case, the jury was not properly discharged.

The case was reviewed by the supreme court as an automatic appeal from a judgment of death as required by California law. *See* CAL. PENAL CODE §§ 190.1-.9 and 1239(b) (West Supp. 1987); *see generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3269-3272 (rev. ed. 1985). Charged with the murder and robbery of two people, the defendant pleaded not guilty and not guilty by reason of insanity. After convicting the defendant on all counts, the jury also found three types of special circumstances present: 1) prior murder convictions (for murders that occurred after the murders in the instant case), 2) multiple murders in this case, and 3) felony murder due to the robberies. The jury, after setting the penalty at death, was discharged by the court.

When the time came for sentencing, the court was reminded that it had failed to conduct a separate sanity hearing immediately after the guilt phase of the trial as mandated by section 190.1(c) of the Penal Code. The court then empaneled a new jury to decide sanity, despite the defendant's insistence that the same jury must decide all issues for a case involving a capital offense. The second jury was unable to reach a decision after extensive deliberations, resulting in a mistrial.

Finally, the court reconvened the original jury—after a lapse of over five months—and ordered them to decide the defendant's sanity. The jurors found him to be sane at the time of the murders, and the court once again invoked the death penalty.

Several other issues were also decided by the supreme court. The defendant raised three objections regarding his own guilt: his confession was involuntary and should not have been admitted; his defense was so inadequate as to be tantamount to a guilty plea, thus requiring express waiver of his rights; and the court wrongly admitted photographs that were prejudicial to his case. The court determined that these objections were either without merit or constituted harmless error.

The defendant also contended that the special circumstances

should not apply with regard to the *prior* murder *convictions* because those murders took place *after* the murders in the case at bar. The court quickly dispensed with this argument, explaining that the relevant factor was the order of the *convictions*, not the order of the *crimes*. *See* CAL. PENAL CODE § 190.2(a)(2) (West Supp. 1987).

Finally, the defendant argued that the trial court committed reversible error by releasing and reconvening the original jury more than five months later for the sanity hearing. The supreme court agreed with this charge of error. The trial court is without jurisdiction to reconvene a jury once that jury has rendered a complete verdict and/or the court loses control over those jurors. The court went on to explain that this rule rests on two primary bases: First, the rule has the effect of protecting a completed verdict. It prevents reconsideration or alteration of that verdict. Second, it guarantees a fair trial by preventing contamination of the jury by outside influences. Once the jury is released by the court, jurors are free to discuss the case with others, answer questions related to the case, examine media coverage, and engage in other activities that may not be desirable during the trial. While the jury is empaneled, the court maintains control over it. However, once a jury leaves the jury box, the trial court effectively loses control over the jurors and has no jurisdiction to reconvene it. This holds true regardless of whether the release can be labeled a "discharge."

Because of the trial court's error in reempaneling the jury, the supreme court vacated the sanity verdict and reversed the death sentence.

BRUCE MONROE

C. *When a trial court issues conflicting instructions to a jury regarding attempted murder, stating that specific intent is required, but falsely instructing that if implied malice is proven the intent to kill need not be found, error results which must be tested for reversal by the harmless-beyond-a-reasonable-doubt test:* **People v. Lee.**

In *People v. Lee*, 43 Cal. 3d 666, 738 P.2d 752, 238 Cal. Rptr. 406 (1987), the California Supreme Court decided that error was committed when a trial court issued conflicting instructions to a jury regarding whether an intent to kill finding was needed to convict an individual of attempted murder. The trial court instructed the jury

that in order to find the defendant guilty of attempted murder, they must find that the defendant had the specific intent to kill the victim. In addition, the jury was instructed that if it found that the defendant acted with implied malice, it would not be necessary to determine if the defendant actually intended to kill the victim. *See* 17 CAL. JUR. 3D, pt. 1, *Criminal Law* § 124 (rev. ed. 1984). While the supreme court found these conflicting instructions to be error, it decided the error was harmless and did not warrant a reversal of the jury's guilty verdict.

In *Lee*, the defendant was charged with the attempted murder of a police officer. The attempted killing took place while the defendant was fleeing from two approaching officers. When the officers came within fifteen to twenty feet of the defendant, he turned and fired one round from an automatic pistol. The pistol then jammed and the defendant was unable to fire additional rounds. The defendant was subsequently arrested by the two officers. At trial he was found guilty of attempted murder. The conviction was appealed due to the conflicting jury instructions.

The court of appeals affirmed the trial court's conviction. While the appellate court did find the divergent jury instructions to be error, it decided the error was not prejudicial and, therefore, the conviction should stand.

The supreme court embraced the reasoning of the lower court and affirmed the decision. The supreme court agreed that the instructions constituted harmless error. The court held that any time a trial court gives conflicting instructions regarding the requisite intent needed for attempted murder, the harmless-beyond-a-reasonable-doubt standard should be utilized to test the severity of the error. *See Chapman v. California*, 386 U.S. 18, 21 (1967). Although the jury instructions were incorrect, the supreme court reasoned that there were enough other factors present to hold that the error was harmless beyond a reasonable doubt.

The supreme court was satisfied that the jury had received ample evidence to determine the defendant had the requisite intent to kill. In addition, the court found that the incorrect implied malice instructions were given only during the jury instructions. The trial court had properly charged the jury at least three times during the trial that a conviction of attempted murder required a determination that the defendant intended to kill the police officer. Also, both the district attorney and the defense attorney addressed the requirement of finding intent in order to hand down an attempted murder conviction in their closing arguments. In the eyes of the supreme court, the jury was most likely under the impression that they had to find *both* intent and malice in order to convict the defendant of attempted mur-

der. Thus, even though conflicting instructions were given, the resulting error was harmless.

The supreme court was heavily influenced by the facts of this case. The defendant fired his weapon at the police officers from a distance of fifteen to twenty feet. This evidence made the defendant's actual intent at the time of the shooting apparent. Even with the conflicting instructions, the supreme court simply did not believe beyond a reasonable doubt that the error was harmful.

MARK J. STUMP

D. *An information charging a defendant with voluntary manslaughter, and alleging that the defendant "willfully," unlawfully, and without malice aforethought killed his victim, adequately puts a defendant on notice that he could face a conviction for involuntary manslaughter:* **People v. Thomas**

In *People v. Thomas*, 43 Cal. 3d 818, 740 P.2d 419, 239 Cal. Rptr. 307 (1987), the issue addressed was whether the defendant's due process rights were violated when he was convicted of involuntary manslaughter (former CAL. PENAL CODE § 192.2, subsequently renumbered 192(a)) under an information which charged him with a violation of "Section 192.1" of the Penal Code (the voluntary manslaughter section) and alleged that he had "willfully," unlawfully, and without malice aforethought killed his victim. The supreme court concluded that the information made out a general charge of manslaughter despite its explicit reference to "section 192.1." This reference was not considered prejudicial to the defendant and thus no due process violation was found.

The defendant was involved in a scuffle with the victim, Tommy Myers. Myers had allegedly raped the mother of the defendant's son. During the struggle, one shot was fired into the air. Another shot, fired at close range, hit Myers in the stomach. The defendant alleged that the shooting was accidental.

Both the prosecutor and the defense counsel submitted instructions on voluntary and involuntary manslaughter. However, in chambers, counsel for the defense withdrew his request for involuntary manslaughter instructions without objecting to the prosecution's request.

The court prefaced its discussion with the recognition that due process mandates an accused be notified of the charges against him so that he may prepare his defense appropriately. *See People v.*

Lohbauer, 29 Cal. 3d 364, 368, 627 P.2d 183, 184, 173 Cal. Rptr. 453, 454 (1981); *People v. West*, 3 Cal. 3d 595, 612, 477 P.2d 409, 419, 91 Cal. Rptr. 385, 395 (1970). The court went on to acknowledge that an adequate accusatory pleading does not have to specifically state by number the statute that the accused is being charged under. *People v. Schueren*, 10 Cal. 3d 553, 558, 516 P.2d 833, 836, 111 Cal. Rptr. 129, 132 (1973); *People v. Deas*, 27 Cal. App. 3d 860, 863, 104 Cal. Rptr. 250, 252 (1972). The allegations of the pleading describe which offenses will be put into the charge. *People v. Marshall*, 48 Cal. 2d 394, 404, 309 P.2d 456, 463 (1957); B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 188 (Supp. I 1985); 21 CAL. JUR. 3D *Criminal Law* § 2744 (rev. ed. 1985). Therefore, it was inconsequential that the information had only specified the Penal Code section dealing with voluntary manslaughter.

The court then analyzed the import of the actual words of the allegation and concluded that, except for the word "willfully" being included, the information alleged an unlawful killing of a human without malice. The word "willfully" did not limit the crime charged to an intentional homicide since it implied a willingness to commit the crime. 21 CAL. JUR. 3D *Criminal Law* § 2746 (rev. ed. 1985).

Furthermore, the court found that the defendant had failed to show any prejudice resulted from the wording of the information. His counsel initially requested instructions on involuntary manslaughter, so he could hardly claim that he lacked notice. His counsel had actually made a decision not to object to the prosecution's instructions. This decision showed that his request to withdraw the instruction was a tactical decision. Lastly, the record of the preliminary examination indicated that the defendant should have been on notice that he faced a conviction for involuntary manslaughter.

As a final note, the court overruled *People v. Bergman*, 154 Cal. App. 3d 30, 201 Cal. Rptr. 54 (1984), to the extent that it was inconsistent with its decision in *Thomas*. In *Bergman*, the defendant had notice from the actual language of the pleading despite the statutory specification. Thus, the crucial question in *Bergman* should have been whether the defendant was misled so as to prejudice him. He was not prejudiced since the court believed that he would not have prepared for his defense differently.

In conclusion, this opinion does not present any radical departure from precedent. On the contrary, it represents an endorsement of legal theories and conclusions that have been expressed for years. Essentially, the court has laid out a two-part test to determine when a defendant's due process rights have been violated by lack of notice from an accusatory pleading. The defendant must show that the lan-

guage of the information was either incorrect or unclear and that this error prejudiced him in that he was not able to prepare his defense appropriately.

STAFF

IV. LABOR LAW

A. *A superior court judgment enforcing a final order of the Agriculture Labor Relations Board is appealable:* **Agriculture Labor Relations Board v. Tex-Cal Land Management, Inc.**

In *Agriculture Labor Relations Board v. Tex-Cal Land Management, Inc.*, 43 Cal. 3d 696, 739 P.2d 140, 238 Cal. Rptr. 780 (1987), the supreme court held that a superior court enforcement order of a final Agriculture Labor Relations Board [hereinafter ALRB or Board] order, entered pursuant to section 1160.8 of the California Labor Code, may be appealed. The court also found that such enforcement orders are subject to the appellate-stay provisions of Part 2 (sections 916-936.1) of the Code of Civil Procedure.

In 1982, the ALRB found that appellant Tex-Cal Land Management, Inc. [hereinafter Tex-Cal] had violated the Agriculture Labor Relations Act of 1975 [hereinafter ALRA] (sections 1140-1166.3 of the California Labor Code) by hiring out work to a contractor without negotiating with the employee representative, and by discharging employees who protested working conditions. The ALRB therefore ordered Tex-Cal to cease and desist from further unilateral modification of working conditions, to cease and desist from the discriminatory discharges, and to reinstate terminated employees, with reimbursement for economic loss.

After the order became final (Tex-Cal obtained dismissal of its own petition for review by the court of appeal), the ALRB requested and received a superior court judgment to enforce Tex-Cal's compliance therewith. When Tex-Cal appealed the superior court judgment shortly after its issuance, the ALRB moved to dismiss the appeal, contending that this type of judgment was not appealable.

The ALRB had already petitioned the superior court for a contempt hearing based on Tex-Cal's alleged continuing refusal to comply with its order. Based on its position that the Board's order was stayed pending appeal, the court declined to hold Tex-Cal in contempt.

The Board then sought writ of mandate from the court of appeal, which combined judgment on the writ with judgment on the appeal. The court denied the ALRB's motion to dismiss the appeal, affirmed superior court enforcement of the order, and partially granted the writ of mandate, holding that some parts of the enforcement order were not stayed pending appeal.

In affirming the court of appeal, the supreme court dealt with both of the ALRB's arguments against allowing appeal of the superior court judgment. First to be considered was the Board's assertion that a superior court judgment was not appealable because it was not a final judgment as required by section 904.1 of the California Code of Civil Procedure.

The court found the Board's reliance upon *Gue v. Dennis*, 28 Cal. 2d 616, 170 P.2d 887 (1946), to be misplaced. *Gue* dealt with enforcement of investigatory subpoenas issued by the Labor Commissioner. A superior court enforcement order under section 93 of the Labor Code was held to be intermediate in nature, since that section "has as its objective an adjudication in contempt if noncompliance persists." *Tex-Cal*, 43 Cal. 3d at 703, 739 P.2d at 143, 238 Cal. Rptr. at 783 (quoting *Gue*, 28 Cal. 2d at 617, 170 P.2d at 887). The *Gue* court went on to state that "an order directing compliance, which *expressly* contemplates a further order, is intermediate in character, and any review thereof should await a subsequent adjudication in contempt." *Id.* (quoting *Gue*, 28 Cal. 2d at 617, 170 P.2d at 887) (italics added by the *Tex-Cal* court). Since the ALRB order in this case had no such statement of further adjudication in contempt, the court found that *Gue* did not apply.

The ALRB's other argument against appealability focused on a provision in section 1160.9 of the California Labor Code, which made the procedures delineated in section 1160.8 "the exclusive method of redressing unfair labor practices." The Board contended that this expression of exclusivity evinced legislative intent that a superior court enforcement order be final and not subject to appeal. Allowing appeal in this situation, according to the Board, would frustrate one of the legislature's purposes in enacting the ALRA—namely, the desire for speedy and efficient enforcement of ALRB orders that have become final on the merits.

Here also, the court found the Board's reasoning unpersuasive. The majority indicated that absent express provision to the contrary in section 1160.8, there was no reason to consider the exclusive remedies therein to be an exception to the general rule of appealability, legislative intentions of speedy enforcement notwithstanding.

In asserting the appealability of superior court judgments enforcing ALRB orders, a closely divided supreme court expressly disapproved

statements to the contrary in *Agriculture Labor Relations Board v. Abatti Produce, Inc.*, 168 Cal. App. 3d 504, 214 Cal. Rptr. 283 (1985). The *Abatti* court had endorsed a broader interpretation of *Gue*, as well as a view of the "exclusive method" language of Labor Code section 1160.9 that was more in harmony with the ALRB's perspective.

The other question decided by the court in this case was whether the superior court's order was stayed pending appeal. In refusing to find Tex-Cal in contempt, the superior court held that its judgment enforcing the Board's order was automatically and *completely* stayed. The court of appeal, on the other hand, found that *parts* (those involving mandatory injunctive relief) of the judgment were stayed, while the Board, naturally, argued that *no part* of the judgment should be stayed.

The majority disagreed with the Board's contention that the appellate-stay provisions of Part 2 of the California Code of Civil Procedure did not apply because Labor Code section 1160.8's enforcement procedure is a "special procedure." The court had previously held that Part 2 applied only to civil "actions" and not to "special proceedings." Here the court saw no reason to consider ALRB order enforcement anything other than a type of "action."

A concise, but effective dissenting opinion, penned by Justice Broussard and joined by Justices Mosk and Arguelles, criticized the majority as adopting too narrow a reading of *Gue*. The dissent would have affirmed *Abatti* and held *Gue* controlling in the instant case.

Justice Broussard also pointed out an anomalous result of the majority's holding. The procedure outlined in section 1160.8 permits a noncomplying recipient of an ALRB order to delay compliance by gaining "risk free" appellate review of superior court enforcement judgments, and avoiding the statute's specifically authorized method of review by the court of appeal.

In conclusion, in *Tex-Cal* the supreme court has authorized appeal of a superior court's enforcement of ALRB orders. Unfortunately, by adopting a narrow interpretation of *Gue v. Dennis*, a majority of the court has put a significant damper on an important purpose of the legislature in enacting the Agricultural Labor Relations Act—effecting rapid resolution of agricultural labor disputes. Recalcitrant employers may now prolong their noncompliance with Board orders by exercising an unnecessary appeal procedure with the result that jus-

tice in some cases will be unjustly delayed for those who need it most: the employees.

BRUCE MONROE

B. *A state law tort claim based on defamatory remarks made during disciplinary investigation of an airline employee is preempted by provisions of the federal Railway Labor Act which requires resolution of claims through arbitration and grievance procedures:* **DeTomaso v. Pan American World Airways, Inc.**

In *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal. 3d 517, 733 P.2d 614, 235 Cal. Rptr. 292 (1987), the California Supreme Court held that the plaintiff's tort claims under state law were preempted by applicable sections of the Railway Labor Act [hereinafter RLA]. 45 U.S.C. §§ 151-188 (1982). The court found that the RLA required the claim to be resolved through arbitration or grievance procedures because the offensive conduct upon which the claim was based occurred in the course of disciplinary proceedings validly instituted by an airline/employer. *See generally* 41 CAL. JUR. 3D *Labor* § 206 (1978); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Agency and Employment* §§ 438-440 (9th ed. 1987).

The plaintiff, DeTomaso, was employed by Pan American World Airways, Inc. [hereinafter Pan Am] when he purchased several salvage bins supposedly filled with abandoned cargo. A portion of the cargo was not abandoned, but merely in the process of being transferred to another airline carrier. Through investigation, Pan Am determined that the transfer cargo was stolen somewhere in the chain of events resulting in sale to the plaintiff. Therefore, DeTomaso was discharged for fraud, dishonesty, and abuse of company policy.

As part of the investigation, Pan Am's director of security examined the cargo in the plaintiff's garage. The director made remarks in the presence of the plaintiff's son that were interpreted by the son as an accusation of theft. Evidence presented at trial suggested that relations between DeTomaso and his family deteriorated after that point.

Based on these and other offensive statements by Pan Am officials, as well as the termination of his employment, DeTomaso brought suit in state court for defamation, intentional infliction of emotional distress, and breach of warranty of title regarding the purchased cargo. He had previously instituted a grievance in relation to the termination. The grievance was eventually successful in reinstating the plaintiff at Pan Am; the decision included restoration of seniority,

benefits, back pay, and removal of the termination letter from his file.

At trial, a jury awarded the plaintiff $265,000 in general damages and $300,000 in punitive damages. Dissatisfied with the trial court's order for a new trial on the issue of damages, conditioned upon his acceptance of a remittitur, DeTomaso appealed the order. The court of appeal reinstated the jury's award due to the failure of the trial court to comply with section 657 of the Civil Procedure Code. The appellate court, however, expressly found that the tort claims were not preempted by the RLA.

The supreme court limited its review of the case to the issue of RLA preemption. The court cited *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972), a United States Supreme Court decision indicating that when the RLA requires a claim to be settled by processes of arbitration or grievance, those procedures are the claimant's exclusive remedy. The question then became whether the RLA mandated resolution by such procedures in this case.

The court adopted the preemption test discussed in *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978). A claim is preempted unless it is evident from the plaintiff's complaint that the facts underlying the claim either: "(1) are unrelated to matters expressly or impliedly governed by the collective bargaining agreement; or (2) so far exceed the scope of reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim." *DeTomaso*, 43 Cal. 3d at 529, 733 P.2d at 621, 235 Cal. Rptr. at 299.

Finding that DeTomaso's tort claims under state law did not meet either portion of the test, the supreme court concluded that RLA preemption was appropriate in this case. The plaintiff's sole remedy thus lay in the grievance procedures specified by Pan Am's collective bargaining agreement.

BRUCE MONROE

V. WORKERS' COMPENSATION

Receipt of benefits from the Public Employees' Retirement System does not prevent recovery of benefits from workers' compensation. In addition, city streets are the workplace of city police officers, and failure by the city to maintain its streets in a safe condition will not leave the city open to a civil suit by an injured officer or officer's dependents: **Jones v. Kaiser Industries Corp.**

In *Jones v. Kaiser Industries Corp.*, 43 Cal. 3d 552, 737 P.2d 771, 237 Cal. Rptr. 568 (1987), the California Supreme Court held that surviving dependents who received death benefits from the Public Employees' Retirement System [hereinafter PERS] are not prevented from receiving benefits from workers' compensation. In addition, the court ruled that the streets of a city are considered to be the workplace of a city police officer. As a result, the city, acting in the capacity of employer of the police officer, owes a duty to the officer to maintain the streets in a safe condition. If a hazardous condition arises due to the city's failure to maintain the streets in a safe condition, and a police officer is injured due to the city's negligence, the officer's sole remedy is supplied through workers' compensation benefits. Because of the exclusivity of the workers' compensation remedy in California, an officer or an officer's dependents cannot bring a common law suit against the city for negligence in maintaining city streets.

The plaintiffs were the surviving family members of a Fremont city police officer who was fatally injured in a traffic accident while officially on duty. The family filed a wrongful death action against the city, based on their claim that the city maintained a hazardous condition on the streets in the area where the accident occurred. The defendant city alleged as an affirmative defense that the plaintiffs were prohibited from bringing a negligence action because of the exclusivity of the workers' compensation remedy.

The trial court rejected the defendant's affirmative defense and allowed the plaintiffs to proceed with the suit. A jury found in favor of the defendant, determining that the city was not negligent in its maintenance of the city streets. The plaintiffs appealed the decision. The court of appeal reversed the outcome of the jury trial based on inappropriate jury instructions. More importantly, the court of appeal affirmed that part of the trial court's decision which allowed the plaintiffs' standing to bring the wrongful death suit. The defendant then appealed to the supreme court on the single issue of whether the plaintiffs could properly bring their common-law suit.

The plaintiffs propounded two theories in support of the propriety of bringing the civil suit. The plaintiffs first claimed that because the

decedent had been a member of PERS, the defendants were obligated to accept the PERS special death benefit to the exclusion of the benefits provided by workers' compensation. Under California law, if the conditions for workers' compensation do not exist, the employee may proceed with a common law suit against the employer. On the other hand, if the conditions are met, the workers' compensation benefits shall represent an injured employee's sole remedy. The plaintiffs claimed that the existence of PERS benefits rendered workers' compensation benefits unavailable and, therefore, the lawsuit was properly brought. The supreme court rejected this claim.

The court wrote that section 4707 of the Labor Code states that no workers' compensation benefits, except burial expenses, would be awarded to a member or the family of a member of PERS if that member qualified for the PERS special death benefits. The court explained that this did not preclude payment of workers' compensation benefits because burial expenses qualified as compensation. In the present case, the burial expenses were in fact paid to the plaintiffs.

The PERS benefits also provided that in the event the PERS special death benefit was *less* than what a surviving dependent would receive under workers' compensation then the difference would be paid to the dependents through workers' compensation. The plaintiffs attempted to argue that since the benefits they received from PERS were actually *higher* than what they would have received from workers' compensation, they were effectively prevented from collecting workers' compensation benefits.

The court rejected this line of thinking for two reasons: (1) workers' compensation benefits had been paid to the plaintiffs in the form of burial costs, and (2) the court did not believe the legislature could have intended to allow dependents who happened to get lower PERS benefits to bring a common law suit while denying the same right to dependents who received higher payments. The court reasoned that the purpose of the monetary offset in section 4707 was to ensure that the surviving dependents received the maximum allowable benefits, not to decide which victims could file civil suits against the employer.

The second theory proffered by the plaintiffs was that the civil suit should be allowed through the utilization of the dual capacity doctrine. The dual capacity doctrine represents the proposition that if an employer stands in a capacity to his employee in addition to that of employer, which carries with it different obligations than that of employer, and the employee is injured because of circumstances arising from the additional capacity, the employee may properly bring a

civil suit. *See* 65 CAL. JUR. 3D *Work Injury Compensation* § 25 (1981).

The court declined to accept this argument. Instead, the court upheld the "well-established rule" that an employer cannot be sued by an employee for failing to provide a safe area in which to work. Since the court viewed the streets as the police officer's place of work, the city could not be sued even if it had been negligent in maintaining the streets.

The supreme court's decision fortifies the already sturdy employment law philosophy that workers' compensation provides the sole remedy in employer negligence cases. The court reiterated the advantages the workers' compensation system provided the employees and then ruled accordingly. The court recognized that allowing the plaintiffs to bring a common law suit in the present case would seriously erode the protections which workers' compensation provided employees and employers. The court was wisely unwilling to begin such an erosion.

MARK J. STUMP