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California Supreme Court Survey - A Review of Decisions: March 1986-May 1986

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California Supreme Court Survey
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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.

Disposition of the award residue of class action suits is a matter properly within the discretion of the trial court. Under the doctrine of "fluid recovery," the trial court has the option of using a price rollback, general or special escheat, consumer trust funds, or claimant fund sharing: **State of California v. Levi Strauss & Co.**

In *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 715 P.2d 564, 224 Cal. Rptr. 605, *modified*, 41 Cal. 3d 860(a) (1986), the court interpreted and reviewed the doctrine of "fluid recovery" as applied to plaintiffs' damage awards in class action suits. Under the doctrine of *cy pres*, if the terms of a charitable trust become impossible to comply with, a court may put the trust's funds to "the next best use," in accordance with the donor's original intent. This doctrine is sometimes used by courts to distribute the awards in class actions, and in that context is referred to as the doctrine of "fluid recovery."

In this case, the court set out four factors that trial courts should consider in choosing a particular method of "fluid recovery": 1) the amount of compensation provided to class members; 2) the proportion of class members sharing in the recovery; 3) the extent to which nonclass members will benefit and the effect such a benefit will have on the underlying substantive law; and 4) the costs of administering the distribution of the award. The court held that fluid recovery is not precluded in private antitrust class actions by the *parens patriae* statute. CAL. BUS. & PROF. CODE § 16760 (West Supp. 1986). *See also Bruno v. Superior Court*, 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981).

Pursuant to an administrative complaint issued by the Federal Trade Commission alleging antitrust violations against Levi Strauss & Co., the Attorney General of the State of California sought to recover damages for residents of the state. A settlement was agreed upon and an intervenor objected to the Attorney General's plan for the distribution of the $12.5 million which was received as damages. The intervenor alleged that the Attorney General's plan would not compensate members of the class, that nonmembers of the class would benefit from the plan, and that the administration of the payback plan would be excessively expensive. The intervenor was repeatedly rebuffed by the lower court and most of the intervenor's objections were not made part of the lower court's record and were thus not reviewed by the supreme court.

The supreme court noted at the outset of its decision that $1.5 million of the fund had already been spent on the Attorney General's distribution plan. At oral argument, the intervenor conceded that the claims filed and accepted by the Attorney General should be paid

to the claimants and the court used this as a rationale to uphold the settlement as negotiated by the Attorney General. The court upheld the settlement as a whole. The court cited to precedent that in class actions, the court must approve the settlement as a whole, unless it is possible to determine that the parties considered different portions of the agreement to be independent. *See Trotsky v. Los Angeles Federal Savings & Loan Association*, 48 Cal. App. 3d 134, 153, 121 Cal. Rptr. 637, 649 (1975).

In an effort to provide guidance to the lower courts, the court discussed the "consumer trust fund" as a method of "fluid recovery" in class actions. First, the court described the general development of "fluid recovery" in class actions as it developed from the doctrine of *cy pres*. Second, the court discussed the various methods of "fluid recovery" and their overall effect on the compensation of the class. The court ended its discussion by comparing and contrasting the methods of "fluid recovery" used under the *parens patraie* statute, CAL. BUS. & PROF. CODE § 16760 (West 1964) and the Cartwright Act, CAL. BUS. & PROF. CODE § 16720 (West 1964).

The court set out the three steps necessary to implement a "fluid recovery." First, the defendant's total damages must be paid over to a class fund. Second, under a lower standard of proof, members of the class must be allowed the opportunity to claim their individual share of the fund. Finally, the remaining unclaimed share of the fund is to be distributed by one of the several procedures developed by the court. These procedures include a price rollback, escheat, a consumer trust fund, and claimant fund sharing. Each of these fluid recovery methods and their strengths and weaknesses were discussed. Four factors were designated as criteria by which to determine the most appropriate method of fluid recovery: 1) amount of compensation, 2) the proportion of sharing class members, 3) the benefits to nonclass members, and 4) the costs of administration.

Under a price rollback, the uncollected portion of a class recovery is distributed to the class "through the market by lowering the price of the defendant's product for a specified period" of time. *Levi Strauss & Co.*, 41 Cal. 3d at 473, 715 P.2d at 571, 224 Cal. Rptr. at 612 (footnote omitted). This method is useful where the action involves the purchase of "repeat items" that are bought regularly. Escheat allows the funds to be disbursed to a governmental organization to use on projects that will benefit the overall class. This method is called "earmarked escheat," and benefits the silent portion of the class. Escheat also includes payment of the residue to a general fund to be

used by a general governmental body. This is referred to as "general escheat" and is used as a last resort where a more appropriate method cannot be utilized. Under "claimant fund sharing," the residue of the fund is divided among each of the individual claimants. Claimant fund sharing is used when a large portion of the class has responded to the initial opportunity to claim class funds. The consumer "trust fund" uses the residue of the recovery to indirectly benefit the consumers and to give full effect to the underlying substantive law. However, the consumer trust fund requires the state to set up an individual organization to administer the fund. The fund is segregated from the general budget, and it has its own administrative expenses.

The supreme court proposed guidelines for the lower courts to use in class actions where "fluid recovery" is necessary to distribute the residue in class recoveries. Trial courts generally have the ability to use any of the methods of "fluid recovery." The decision in *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) should give some guidance, along with the present decision, to allow the lower courts to develop practical legal devices to "simplify complex litigation" and to protect the interests and rights of all the parties involved. *Levi Strauss & Co.*, 41 Cal. 3d at 471, 715 P.2d at 570, 224 Cal. Rptr. at 611 (quoting *Vasquez*, 4 Cal. 3d at 820, 484 P.2d at 977, 94 Cal. Rptr. at 809). *See also United States v. Exxon Corp.*, 773 F.2d 1240 (1985) (Temp. Emer. Ct. App.) (Department of Energy's antitrust action against Exxon for overcharging customers in violation of oil price regulations); *Alexander v. National Farmers' Organization*, 614 F. Supp. 745 (W.D. Mo. 1985) (class action brought by farmers' organization to recover damages for dairy cooperatives' alleged antitrust violations); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D. N.Y. 1984) (class action for the Vietnam veterans who were exposed to herbicides used in the war in Southeast Asia in which the proposed settlement was approved by the court). For an overview of the use of fluid recovery in federal actions, see H. Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 405-09 (1983).

JOHN ERWIN TRYTEK

II. CRIMINAL LAW

The question of whether a promissory note is a security within the meaning of the Corporations Code, for the purposes of a criminal charge, is a question for the jury, not the court, no matter how much evidence exists, and the defendant's burden of proving an exemption to securities regulations is to raise a reasonable doubt that the security is not required to be registered: **People v. Figueroa.**

I. INTRODUCTION

In *People v. Figueroa*,[1] the supreme court held that it was reversible error for the trial judge to fail to specify the magnitude of the defendants' burden of proving an exemption from the securities regulations and for the trial judge to inform the jury that the promissory note in question was a security within the meaning of the securities law. In addition, the defendants should have been allowed to present evidence of the noteholder's participation in the business, as part of their defense that the note was not required to be registered as a security.

II. FACTUAL BACKGROUND

Joseph Figueroa and his son, Dennis, owned three businesses, Figueroa Insulation & Energy Co., Inc. [hereinafter Figueroa Insulation], Figueroa Financial Insurance Services, Inc. [hereinafter Figueroa Insurance] and Figueroa Business & Financial Consultants [hereinafter Figueroa Consultants]. In March of 1979, they sought to raise capital for their existing businesses and for a new solar energy business. They advertised for a partner, inactive or active, who could contribute $7,000 or more. Arlo Kurrle responded to the advertisement and subsequently agreed to lend the company $10,000. In addition, he agreed to be an active partner in the business.[2] The loan was paid in five installments, each loan being evidenced by a two year note payable at ten percent interest. The fourth note was the basis of the conviction of the Figueroas. The note, dated April 27, 1979, was entitled a "Corporation Promissaroy [sic] Note," and was signed by

1. 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986). Chief Justice Bird wrote the majority opinion, with which Justices Mosk, Broussard, Grodin, and Takei (Taketsugu) concurred. Justice Reynoso wrote a separate concurring opinion in which Justice Lucas concurred.

2. *Id.* at 718, 715 P.2d at 682, 224 Cal. Rptr. at 722.

Dennis on behalf of Figueroa Insulation.[3]

Kurrle began working for the businesses in early April 1979 and worked with the companies for about four months. Along with being made secretary/treasurer of Figueroa Insurance and Figueroa Insulation, his responsibilities included updating loan source lists, contacting potential lenders, accompanying Dennis on sales calls, and developing a sales kit for use in sales presentations. The court implied that Kurrle was never repaid for the loans.[4] The Figueroas were convicted of one count of selling unqualified securities in violation of section 25110 of the California Corporations Code.[5]

III. ANALYSIS

A. The trial court's failure to specify appellants' burden of proof was reversible error.

The first issue discussed by the court was the trial court's failure to inform the jury of the Figueroas' burden of proving that their conduct came under an exemption to the securities regulations.[6] The court adopted the court of appeal's analysis on this issue,[7] noting that the issue of the precise burden of proving an exemption to securities regulations was an issue of first impression in California.[8]

In criminal cases, the general rule is that if the defendant is asserting an affirmative defense, the burden is only to raise a reasonable doubt, and if he is asserting a collateral issue, the burden is to prove it by a preponderance of the evidence.[9] Here, the appellants' defense was affirmative, and the trial court's failure to inform the jury that the defendants needed only to raise a reasonable doubt that they were not required to register the notes was reversible error.[10]

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3. *Id.* at 719, 715 P.2d at 683, 224 Cal. Rptr. at 722.

4. *Id.*

5. *Id.* at 718, 715 P.2d at 682, 224 Cal. Rptr. at 721. Section 25110 of the Corporations Code states that "[i]t is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified under sections 25111, 25112 or 25113 . . . or unless such security or transaction is exempted under Chapter 1 (commencing with section 25100) of this part." CAL. CORP. CODE § 25110 (West 1977).

6. The Figueroas raised a defense that they had made a private offering exempted from the requirements of section 25110 by section 25102(e) of the Corporations Code. CAL. CORP. CODE §§ 25102(e), 25110 (West 1977 & Supp. 1986).

7. 41 Cal. 3d at 720, 715 P.2d at 683, 224 Cal. Rptr. at 722.

8. *Id.* at 721, 715 P.2d at 684, 224 Cal. Rptr. at 723.

9. *See* People v. Tewksbury, 15 Cal. 3d 953, 963-64, 544 P.2d 1335, 1343-44, 127 Cal. Rptr. 135, 143-44 (1976); 2 B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 45.1, at 1640 (2d ed. 1982).

10. 41 Cal. 3d at 722-23, 715 P.2d at 685, 224 Cal. Rptr. at 724.

B. The trial court's error in instructing the jury that the notes were securities was reversible error.

The second issue raised by the appellants, and the principal question in the case, was whether the trial court erred in informing the jury that the notes involved were securities within the meaning of the corporate securities law.[11] The court cited an abundance of authority for the rule that in a criminal case, the trial judge may not direct a verdict or take an issue from the jury regardless of the strength of the evidence.[12] The court had previously interpreted a United States Supreme Court case[13] as supporting the proposition that such an error is reversible, because withdrawing an issue from the jury would be a violation of due process and the right to a jury trial.[14]

The court discussed extensively *United States v. Johnson*,[15] a fifth circuit case which held that it was error to withhold from the jury the question of whether a document was a security when that fact was an element of the crime alleged.[16] The court then rejected the Attorney General's argument that that rule did not apply when either (1) there was little doubt as to whether the element had been established or (2) the question at issue was one of law properly decided by the judge.[17]

The first argument was rejected because the right to a jury trial guarantees that all factual issues, not only the complex ones, must be decided by the jury.[18] The second argument was criticized because the question of whether a document fits the legal definition of a security is a mixed question of law and fact properly decided by the jury. It is the judge's duty to instruct the jury as to the *definition* of a security (the question of law), but it is for the jury to decide whether the document in question fits that definition (the mixed question of law and fact).[19]

11. *Id.* at 723, 715 P.2d at 685, 224 Cal. Rptr. at 724.
12. *See, e.g.*, Connecticut v. Johnson, 460 U.S. 73 (1983); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947).
13. Conneticut v. Johnson, 460 U.S. 73.
14. People v. Garcia, 36 Cal. 3d 539, 551, 684 P.2d 826, 832, 205 Cal. Rptr. 265, 271 (1984).
15. 718 F.2d 1317 (5th Cir. 1983) (en banc).
16. 41 Cal. 3d at 729, 715 P.2d at 689, 224 Cal. Rptr. at 728.
17. *Id.* at 730, 715 P.2d at 691, 224 Cal. Rptr. at 730.
18. *Id.*
19. *Id.*

The court then criticized a line of appellate court cases which held that the question of whether a document met the definition of a security was a question of law.[20] The original case in this line, *People v. McCalla*,[21] presented the rule without citing any authority or analyzing how the rule affected the rights of due process and of trial by jury.[22] Subsequent cases did not discuss those issues either, but simply accepted the rule as presented in *McCalla*. This entire line of cases is in conflict with *United States v. Johnson*,[23] and with the established rule prohibiting directed verdicts in criminal trials.[24] Therefore, those cases did not justify the trial court's instructions, and the error required reversal.[25]

C. Appellants' evidence that the noteholder participated in the business was relevant to their defense, and this evidence should be admitted on retrial.

The appellants' defense was that the notes issued to Kurrle were not securities and did not need to be registered. The trial court concluded that they were securities, basing its decision on section 25019 of the Corporations Code.[26] According to current case law, however, substance governs over form[27] in determining whether an instrument meets the statutory definition. "[T]he 'critical question' the courts have sought to resolve in these cases is whether a transaction falls within the regulatory purpose of the law regardless of whether it involves an instrument which comes within the literal language of the definition."[28]

In determining whether an instrument comes within the statutory definition of a security, this state has used the "risk capital" test, first articulated in *Silver Hills Country Club v. Sobieski*.[29] Under this

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20. *See* People v. Skelton, 109 Cal. App. 3d 691, 167 Cal. Rptr. 636 (1980); People v. Marvin, 48 Cal. App. 2d 180, 119 P.2d 413 (1941); People v. Dutton, 41 Cal. App. 2d 866, 107 P.2d 937 (1940); People v. McCalla, 63 Cal. App. 783, 220 P. 436 (1923).

21. 63 Cal. App. 783, 220 P. 436.

22. *Id.* at 789, 220 P. at 439.

23. 718 F.2d 1317.

24. *See supra* note 12 and accompanying text.

25. 41 Cal. 3d at 733-34, 715 P.2d at 693-94, 224 Cal. Rptr. at 732-33.

26. Section 25019 lists examples of instruments, including notes and evidences of indebtedness, that qualify as securities. CAL. CORP. CODE § 25019 (West 1977 & Supp. 1986).

27. 41 Cal. 3d at 734, 715 P.2d at 694, 224 Cal. Rptr. at 733; *See* Leyva v. Superior Court, 164 Cal. App. 3d 462, 210 Cal. Rptr. 545 (1985); People v. Shock, 152 Cal. App. 3d 379, 199 Cal. Rptr. 327 (1984).

28. 41 Cal. 3d at 735, 715 P.2d at 694, 224 Cal. Rptr. at 733.

29. 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961). The "risk capital" approach has been adopted by the ninth circuit to decide whether a promissory note fits the definition of a security under federal securities laws. *See* El Khadem v. Equity Sec. Corp., 494 F.2d 1224 (9th Cir.), *cert. denied*, 419 U.S. 900 (1974). The federal court's interpretation of the test focuses on whether the investor "contributed 'risk capital'

test, the appropriate factors to consider include the adequacy of collateral given for the investment and the degree of the investor's participation in the business.[30] In applying these facts to the present case, it was apparent that Kurrle did not receive any collateral for his investment; in addition, he may have contributed sufficient services to the businesses to exert control and eliminate the "risk" element of the transaction.[31] The latter was an issue which should have been determined by the jury.[32] Therefore, the trial judge erred in refusing to admit evidence of Kurrle's participation. For this reason, the judgment of the court of appeal was reversed.[33] "On retrial, the trial court should permit evidence of Kurrle's participation in appellants' businesses."[34]

IV. THE CONCURRING OPINION

Justice Reynoso agreed that in this case, the question of whether the notes were securities was a jury question and that it was reversible error to exclude evidence of Kurrle's participation in the businesses.[35] However, he did not agree with the court's decision to formulate an absolute rule which requires the jury to decide every issue of fact, no matter how convincing the evidence.[36] On the facts presented, he did not feel that such a rule was necessary to decide the case.[37]

V. CONCLUSION

A criminal case requires that the jury, not the court, decide the is-

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subject to the 'entrepreneurial or managerial efforts' of [others]." Great W. Bank & Trust v. Kotz, 532 F.2d 1252, 1257 (9th Cir. 1976), *cert. denied*, 451 U.S. 911 (1981). The Supreme Court has reserved judgment on whether to adopt the risk capital test. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 857 n.24, *reh'g denied*, 423 U.S. 884 (1975). *See also* Annotation: *"Risk Capital" Test For Determination of Whether Transaction Involves a Security, Within Meaning of Federal Securities Act of 1933 (15 USCS §§ 77a et seq.) and Securities Exchange Act of 1934 (15 USCS §§ 78a et seq.)*, 68 A.L.R. FED. 89 (1984); Annotation: *Promissory Notes as Securities Under § 2(1) of Securities Act of 1933 (15 USCS § 77b(1)), and § 3(a)(10) of Securities Exchange Act of 1934 (15 USCS § 78c(a)(10))*, 39 A.L.R. FED. 357 (1978).

30. *Silver Hills*, 55 Cal. 2d at 815, 361 P.2d at 908, 13 Cal. Rptr. at 188; People v. Schock, 152 Cal. App. 3d 379, 386, 199 Cal. Rptr. 327, 330 (1984).

31. 41 Cal. 3d at 738-39, 715 P.2d at 696-97, 224 Cal. Rptr. at 735-36.

32. *Id.* at 740, 715 P.2d at 698, 224 Cal. Rptr. at 736-37.

33. *Id.* at 741, 715 P.2d at 699, 224 Cal. Rptr. at 738.

34. *Id.*

35. *Id.* (Reynoso, J., concurring).

36. *Id.* at 741-42, 715 P.2d at 699, 224 Cal. Rptr. at 738 (Reynoso, J., concurring).

37. *Id.* (Reynoso, J., concurring).

sue of whether or not a document is a security within the meaning of the Corporations Code, no matter how much evidence exists. This case provides that a criminal defendant, charged with violating the securities regulations, need only raise a reasonable doubt that the security was not required to be registered in proving an exemption.

EILEEN M. LAVIGNE

III. CRIMINAL PROCEDURE

A. *Mandatory imposition of full, separate and consecutive prison terms pursuant to section 667.6(d) of the California Penal Code for perpetration of sex offenses against the same victim on "separate occasions" requires a finding that the perpetrator temporarily lost or abandoned the opportunity to continue his attack:* **People v. Craft.**

People v. Craft, 41 Cal. 3d 554, 715 P.2d 585, 224 Cal. Rptr. 626 (1986), represented defendant's appeal from a conviction for multiple counts of rape which resulted in consecutive sentencing. *See also* Annotation, *Multiple Instances of Forceable Intercourse Involving Same Defendant and Same Victim as Constituting Multiple Crimes of Rape*, 81 A.L.R. 3d 1228 (1977); 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 304 (1957).

The trial court failed to cite the relevant statutory section that it used to sentence the defendant, and failed to indicate the reasons for imposing consecutive sentences. Craft contended that the trial court erred by doing either of the following: (1) sentencing under section 667.6(c) of the California Penal Code and failing to enunciate reasons as required; or (2) sentencing pursuant to section 667.6(d) of the California Penal Code, incorrectly finding that the offenses had occurred on "separate occasions." CAL. PENAL CODE § 667.6(c), (d) (West Supp. 1986).

Section 667.6(c) of the California Penal Code substantively allows for the discretionary imposition of full, separate and consecutive terms, whether or not the crimes were committed during a "single transaction." Case law dictates that the courts must articulate their reasons for the imposition of these sentences and for the failure to utilize sentencing pursuant to section 1170.1(a) of the California Penal Code. *See, e.g., People v. Smith*, 155 Cal. App. 3d 539, 202 Cal. Rptr. 259 (1984). Section 667.6(d) of the California Penal Code, however, mandates that consecutive sentencing occur if such crimes involve "separate victims or involve the same victim on separate occasions." *See People v. Fleming*, 140 Cal. App. 3d 540, 189 Cal. Rptr. 619 (1983).

In *Craft*, the court interpreted and identified the standard for determining if the offenses occurred on "separate occasions." Statutory construction entails an evaluation of several factors: (1) the language itself, (2) the overall statutory scheme, (3) avoidance of a construction that negates the force of another statutory component, and (4) a construction allowing the benefit of the doubt to the defendant. The court found that the language of subdivision (d) was ambiguous, and required construction in light of the statute as a whole. Section 667.6, subdivisions (a) and (b), of the California Penal Code, apply to repeat offenders, while subdivisions (c) and (d) apply to multiple offenses. Subdivision (c) allows the discretionary imposition of consecutive sentences, while (d) mandates their imposition. Inferentially, the legislative purpose of subdivisions (c) and (d) must be to address differing classes of offenders, one more culpable than the other, thus identifying the need for harsher punishment in the one instance.

Having identified the legislative purpose, the court found that a narrow construction of the term "separate occasions" was neccessary to effectuate that purpose. They held that subdivision (d) applied only to offenses against the same victim between which the perpetrator had lost or abandoned the opportunity to continue his attack. It did not simply denote distinct moments in time; rather, loss of the opportunity to continue is exemplified by the victim becoming free of the criminal activity. Abandonment is signified by the actions of the perpetrator, specifically, his engaging in a "significant activity" unrelated to the attack even if the victim remains under his control.

The court offered several rationales for this construction. The requirement in subsection (d) of mandatory imposition of the consecutive term, alluded to the extended culpability of this offender. If "separate occasions" denotes an attacker who discontinues the act, and allowing time for reflection, subsequently instigates another offense, this individual arguably deserves harsher punishment than one who perpetrates several offenses in one "uninterrupted sequence of events." Narrow construction is also consistent with subdivision (d)'s applicability to offenses against "separate victims," both inferring discontinuation and reaffirmation of the activity. Further, any broader construction negates the force and effect of subdivision (c). Virtually all offenses would fall within subdivision (d)'s term "separate occasion" if it merely denoted distinct points in time. The court found that an interpretation giving "guided discretion to the trial judge" was preferred.

In applying this standard to the facts of the case, the court found

that the defendant's activities did not occur on "separate occasions." Thus, if the sentencing were pursuant to subdivision (d), it was in error. Sentencing, pursuant to subdivision (c), was also erroneous because no statement of reasons was given. The court remanded the case for resentencing only. The court gave this holding full retroactive effect, noting that defendants who should have been sentenced under subdivision (c), but were erroneously sentenced pursuant to subdivision (d), may now seek relief by petition for habeas corpus.

In guiding trial courts to more effective sentencing, the court suggested that sentencing under subdivision (d) should be accompanied by reasons for the imposition of the sentence, and should state the sentence that would have been imposed if subdivision (d) did not apply. This suggestion was made to prevent "fruitless appeals" where lower courts erred in choosing between subdivisions (c) and (d).

The differentiation utilized by the court is not free of difficulties in terms of application. Ascertaining what "significant activity" unrelated to the act consists of, or when the victim becomes "free of the criminal activity," may require further guidance from the court. For further discussion of this topic, see 21 AM. JUR. 2D *Criminal Law* § 606 (1981); 17 CAL. JUR. 3D *Criminal Law* § 269 (1984); CAL. DIG. OF OFFICIAL REPORTS 3D *Rape* § 16 (1984); CAL. DIG. OF OFFICIAL REPORTS 3D *Criminal Law* § 526 (1985).

PAMELA JOAN MINETTO

B. *When sentencing convicted criminals, the double-base term rule does not apply if any of the specified enhancements listed as exceptions in section 1170.1(g) of the California Penal Code are imposed:* **People v. Magill.**

The double-base term rule is a statutory limitation on the prison term which is imposed for multiple crimes. *People v. Wright*, 92 Cal. App. 3d 811, 813, 154 Cal. Rptr. 926, 927 (1979). Section 1170.1(g) of the California Penal Code provides in part: "The term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term. . . ." CAL. PENAL CODE § 1170.1(g) (West Supp. 1986). The defendant in *People v. Magill*, 41 Cal. 3d 777, 715 P.2d 662, 224 Cal. Rptr. 702 (1986), was sentenced to a prison term of five years and eight months for conviction of four counts of embezzlement and one count of false pretenses. The defendant's base term was two years determined by count one. A one year enhancement was added pursuant to section 12022.6(a) of the California Penal Code (commission of an excessive taking during a felony). CAL. PENAL CODE § 12022.6(a)(West 1982). The remaining four counts subjected

the defendant to an additional prison term of two years and eight months, for a total sentence of five years and eight months. The defendant appealed the lower court's decision, arguing that her total prison term should have been restricted to five years premised on the double-base term rule.

Section 1170.1(g) of the California Penal Code establishes four statutory exceptions to the double-base sentence limitation. These exceptions are as follows: (1) a conviction of a violent felony, (2) a serious prison offense, (3) an imposition of a special enhancement and (4) a conviction of a felonious prison escape. This case dealt primarily with the enhancement exception. Because the language of the statute is nebulous, the statute has been subject to conflicting interpretations. Two specific explanations have been offered.

One interpretation, which was the defendant's contention, was that the prison term was limited to twice the base term plus the enhancement. This view was substantiated in *People v. Sequeira*, 126 Cal. App. 3d 1, 20-21, 179 Cal. Rptr. 249, 260 (1981), where the court distinguished between enhancements and the remaining three exceptions and concluded that the legislature could not possibly have intended to be so severe with respect to enhancements. The second interpretation is that the exceptions are indistinguishable and that presence of any of the exceptions makes the double-base term restriction inapplicable. This approach was followed in *Wright*, 92 Cal. App. 3d at 813, 154 Cal. Rptr. at 927, and affirmed by the court in this case.

Special enhancements are activated by (1) being armed with or using a firearm during a felony, (2) providing a firearm to a co-conspirator in the commission of a felony, (3) committing an excessive taking during a felony, (4) inflicting great bodily injury during a felony or (5) intentionally causing the termination of a pregnancy during a felony. CAL. PENAL CODE §§ 12022, 12022.4, 12022.5, 12022.6, 12022.7, 12022.9 (West 1982 & Supp. 1986) (this list is not exhaustive). To interpret the enhancement exception exclusive of the other three exceptions would require a fine line judgment. The court in this case found all four exceptions equally severe and held the double-base term rule completely inoperative.

ARIAN COLACHIS

C. *When extradition is sought, the asylum state may inquire into the guilt or innocence of the extraditee who asserts that no crime was committed under the laws of the demanding state:* **People v. Superior Court (Smolin).**

In *People v. Superior Court* (Smolin), 41 Cal. 3d 758, 716 P.2d 991, 225 Cal. Rptr. 438 (1986), the Governor of Louisiana requested the extradition of Richard Smolin and his father for the alleged kidnapping of Smolin's two young children from a bus stop in Louisiana. The defendants filed a writ of habeas corpus to resist extradition, admitting that while they had committed the acts for which they were charged, those acts did not constitute a crime in the demanding state. The trial court issued a writ discharging the defendants after taking judicial notice of a California custody decree granting sole custody of the children to the father. The supreme court affirmed.

The extradition clause of the United States Constitution provides for the "absolute right" to obtain extradition of one charged with a crime to the state having jurisdiction over the crime. U.S. CONST. art. IV, § 2, cl. 2. This right confers on a court in the asylum state a "correlative obligation to deliver, without reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." *Kentucky v. Dennison*, 65 U.S. 66, 103 (1861). The California Supreme Court in *In re Kimler*, 37 Cal. 2d 568, 233 P.2d 902 (1951), prohibited the asylum state's inquiry "into the guilt or innocence of the person sought by the demanding state." *Id.* at 571, 233 P.2d at 904. In considering a habeas corpus request after extradition has been granted, a court can only inquire into the following: whether the documents were facially proper; whether the petitioner, who had been charged with the crime in the demanding state, was the same person named in the extradition request; and whether the defendant was a fugitive. *See Michigan v. Doran*, 439 U.S. 282, 289 (1982).

The supreme court was able to circumvent this limitation on the scope of inquiry based on section 1548.2 of the California Penal Code (adopted from the Uniform Criminal Extradition Act). This section requires that a demand for extradition be accompanied by an indictment which "substantially charges" a crime under the demanding state's laws. CAL. PENAL CODE § 1548.2 (West 1982). The defendants claimed that they had not been substantially charged with a crime under the laws of Louisiana, and therefore, they were entitled to discharge. The court was required to analyze the Louisiana kidnapping statute to arrive at a determination of whether the petitioner had been charged with a crime in the demanding state. LA. REV. STAT. ANN. § 14:45 (West 1986).

The Louisiana statute defines kidnapping as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state." *Id.* The court determined that at the time of the alleged kidnapping, Richard Smolin was entitled to legal custody of the children based on a California custody decree of February 27, 1981, which granted him sole custody; this decree was binding on Louisiana under the Parental Kidnapping Prevention Act of 1980. 28 U.S.C.A. § 1738A (West Supp. 1986). Since Richard had sole custody of the children pursuant to federal and Louisiana law, he could not be guilty of the crime of kidnapping as defined by Louisiana law.

For additional materials on this topic *see* 20 CAL. JUR. 3D *Criminal Law* § 2416, at 248 (1985) (discussing scope of inquiry); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent Child* §§ 53-54 (8th ed. 1974) (on procedure for extradition); and Note, *Sufficiency of Information as Basis for Extradition*, 1 U.C.L.A. L. REV. 216 (1954).

GORDON W. JOHNSON

D. *Admissions of prior convictions will result in statutory enhancement of the sentence, and the admissions need not be part of a plea bargain in order to be effective:* **People v. Thomas.**

In *People v. Thomas*, 41 Cal. 3d 837, 718 P.2d 94, 226 Cal. Rptr. 107 (1986), the supreme court held that for the purpose of the five year statutory enhancement for each prior conviction of a serious felony under section 667 of the California Penal Code, an admission of a prior conviction of burglary, without specific reference to the residential character of the crime, was sufficient to be a "serious felony" under section 1192.7 of the California Penal Code. The court pointed out that the issue was not whether the defendant entered a residence, but whether the burglary was committed in such an offensive manner as to render it a serious felony under section 1192.7(c)(8) of the California Penal Code. The court also held that the admissions of prior convictions were effective, regardless of whether they were a part of a plea bargain, provided that certain requirements were satisfied. In essence, the issue of adequate consideration was held to be an irrelevant factor in determining the effectiveness of the admission.

Prior to trial, the defendant, who was charged with rape, admitted to four prior convictions of burglary without specifically admitting to

the entrance of the residences. The admissions were made to prevent the court from submitting the question of the validity of the prior convictions before the jury. The jury found the defendant guilty of rape. Consequently, the defendant was sentenced to twenty-eight years in prison: eight years for the rape, and pursuant to section 667(a) of the California Penal Code, five years for each prior conviction, resulting in a statutory enhancement of twenty years. The court carefully pointed out that such harsh exercise of statutory enhancement was due to the state's desire to limit the defendant's contact with the public because of his dangerous schizophrenic mental disorder.

On appeal, the defendant raised two contentions. First, he argued that the admissions were ineffective for the purpose of the statutory enhancement. The defendant unsuccessfully argued that under section 1192.7(c)(8) of the California Penal Code, the burglary must be "of a residence" to be a serious felony. The defendant, therefore, asserted that without the admission of entrance into a residence, his prior burglaries could not be a serious felony under the Penal Code.

The court rejected this argument by holding that a burglary need not involve a residence to be a serious felony. Under section 1192.7(c)(8) of the California Penal Code, a serious felony is defined as any felony "in which the defendant inflicts great bodily injury on any person, other than an accomplice. . . ." CAL. PENAL CODE § 1192.7(c)(8) (West 1982). The court acknowledged the existence of a defect in the pleading as it failed to specify the nature of the burglaries committed by the defendant. Nonetheless, the court declined to reverse the trial court's holding. Ruling on a procedural question, the court held that the defendant must demur in order to raise a deficiency in the pleading. Failure to enter a demurrer is deemed as a waiver. Thus, since the defendant failed to demur, the court held it to be a waiver. Interestingly, the court's suggested remedy for a possible injustice caused by the rule (for example, when counsel fails to explain the essentials of the charge to the defendant) was to petition for a writ of habeas corpus.

The defendant also contended that his admissions were ineffective for want of adequate consideration as they were not a part of plea bargaining. The court also rejected this argument by holding that the only relevant issue was whether the defendant's admissions were made voluntarily and with knowledge of his constitutional rights and the consequences. Provided these requirements were satisfied, an admission was held to be effective regardless of whether adequate consideration had been given.

In conclusion, this case shows the court's willingness to broaden the definition of a serious felony under section 1192.7 of the Califor-

nia Penal Code. Since section 1192.7(c)(18) specifically lists "burglary of a residence," one could interpret this as limiting the definition of a "serious felony" in burglary-related crimes. The court, however, interpreted this subdivision as an example of a broader definition stated in section 1192.7(c)(8) of the California Penal Code. Another interesting aspect of this case was the court's suggested remedy as a result of its rigid procedural rule. Considering that the court is known for its willingness to provide greater protection for criminal rights than federal courts, the suggested remedy through habeas corpus appears to be a deviation from the norm.

SUNG-DO GONG

IV. DEATH PENALTY

A. *A parole agent must be in possession of facts which infer a reasonable suspicion that a parolee has violated or is planning to violate his parole, in order to authorize a search of his residence. Claims of jury misconduct must be brought in a petition for habeas corpus, and reversal of a capital case is mandated when an attorney fails to put forth mitigating evidence during a trial's penalty phase at the instruction of his client:* **People v. Burgener.**

I. INTRODUCTION

In *People v. Burgener*,[1] the defendant, Michael Burgener, had been convicted of the murder of a sales clerk in a 7-Eleven convenience store.[2] In finding that the murder was of the first degree committed during the commission of a robbery, the jury imposed the death sentence.[3] The instant appeal was automatic.[4]

II. FACTUAL SUMMARY

On October 31, 1980, the sales clerk in a Riverside 7-Eleven con-

1. 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986). The majority opinion was written by Justice Grodin, with Justices Reynoso and Wallin concurring. Separate concurring opinions were authored by Justices Mosk and Broussard. Chief Justice Bird wrote a separate concurring and dissenting opinion.

2. Burgener was found guilty of murder and robbery with the use of a firearm, infliction of great bodily injury, and possession of a firearm while on probation. *Id.* at 511, 714 P.2d at 1254, 224 Cal. Rptr. at 115.

3. California's death penalty is set forth in section 190.2 of the California Penal Code. CAL. PENAL CODE § 190.2 (West Supp. 1986).

4. CAL. PENAL CODE § 1239 (West Supp. 1986).

venience store was shot during a robbery attempt and eventually died. During trial, testimony indicated that shortly after the shooting, Burgener was at an apartment which he shared with his girlfriend.[5] Later that morning, his girlfriend arranged to exchange a gun owned by her with the man who had originally sold it to her, explaining that the gun had been used to kill someone during the commission of a crime. The man telephoned the police and, with their knowledge, arranged to meet the defendant and his girlfriend to "exchange guns" later that day. It was at this exchange that Burgener was arrested while in possession of a gun which could have been used in the shooting,[6] wearing shoes which tested positive for the presence of blood, and carrying $72.[7] With the permission of Burgener's parole officer, the police initiated a search of the apartment and found a paper bag from a 7-Eleven store with two $5 bills inside.

III. THE MAJORITY OPINION

A. Guilt Phase Issues

1. Motion for Co-counsel

The defendant contended that the trial court erred in refusing his motion to appoint co-counsel in that it was a denial of effective assistance of counsel. The motion was based upon the premise that since two attorneys were statutorily permitted, it was a denial of equal protection not to appoint such.[8]

The supreme court held that it was within the trial court's discretion to determine the need to appoint co-counsel. Thus, the supreme court reaffirmed the rule which it laid down in *People v. Jackson*[9] and *Keenan v. Superior Court*.[10] Although defendant's counsel had

5. *Burgener*, 41 Cal. 3d at 513, 714 P.2d at 1255, 224 Cal. Rptr. at 117. This testimony was given by Burgener's girlfriend who, in addition, testified that she thought he had mentioned "shooting someone in self defense," "a robbery," and "one of those little stores." *Id.* The testimony of the defendant himself at trial contradicted this evidence; however, such was in direct conflict with similarly differing statements which he made to his parole officer and the police prior to the trial. *Id.* at 515-16, 714 P.2d at 1256-57, 224 Cal. Rptr. at 118.

6. Ballistics tests upon the gun in the possession of Burgener and ammunition found in a community area of the girlfriend's apartment house were inconclusive. The tests merely showed that fragments of such ammunition found in the body of the clerk could have come from the gun and could have come from the same melt of lead. *Id.* at 515, 714 P.2d at 1256, 224 Cal. Rptr. at 118.

7. *Id.* at 514, 714 P.2d at 1256, 224 Cal. Rptr. at 117.

8. CAL. PENAL CODE § 1095 (West 1985).

9. 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980) (holding that determination of need for court appointed co-counsel is at the discretion of the trial court and defense counsel must put forth facts which indicate a need for additional counsel).

10. 31 Cal. 3d 424, 640 P.2d 108, 180 Cal. Rptr. 489 (1982) (holding that determination of need for court appointed co-counsel is at the discretion of the trial court and must be based upon a "genuine need").

to file a "couple of writs," the court found that this was insufficient to satisfy the factual assertion of genuine need required by *Jackson* and *Keenan*.[11] Therefore, there was no reversible error.

2. Cross-examination

The defendant further contended that the trial court erred in disallowing cross-examination for impeachment purposes of his girlfriend regarding her possible prior criminal associations with the man from whom she had bought the gun at issue in the present case.[12] The court noted that such evidence is generally admissible. However, the court ruled that given the totality of the damaging evidence with respect to the girlfriend's credibility,[13] the trial court was within its discretion to disallow its admittance on the grounds that such additional evidence would waste the court's time while merely having a cumulative effect.[14]

3. Admission of Blood Tests on Defendant's Shoes

The defendant next argued that the trial court erred in allowing evidence relating to a blood screening test run on his shoes. The tests were positive, indicating the presence of blood; however, the tests were susceptible to error and could have produced such a positive reaction even if no blood were in fact present.

Although the tests were inconclusive as to the exact nature of the substance found on the shoes or the length of time such had been there, the supreme court held that this was not grounds for precluding admission of that evidence.[15] Rather, the court reasoned that the fact that a test is not absolutely certain is simply a factor to take into

11. *Burgener*, 41 Cal. 3d at 522-24, 714 P.2d at 1261-63, 224 Cal. Rptr. at 123-24.

12. Section 780(f) of the California Evidence Code provides that evidence which tends to prove the existence of a bias on the part of a witness is admissible for impeachment purposes. CAL. EVID. CODE § 780(f) (West 1966).

13. The girlfriend testified that she was a heroin addict and was undergoing methadone treatment. In addition, she testified that she had taken valium the night before and the day of the crime. *Burgener*, 41 Cal. 3d at 525, 714 P.2d at 1263, 224 Cal. Rptr. at 125.

14. *Id.* at 526, 714 P.2d at 1264, 224 Cal. Rptr. at 125. Section 352 of the California Evidence Code provides that a court may exclude evidence when such will have no more than a cumulative effect. CAL. EVID. CODE § 352 (West 1966).

15. *Burgener*, 41 Cal. 3d at 526-27, 714 P.2d at 1264-65, 224 Cal. Rptr. at 125-26. The court specifically rejected the court of appeal's reasoning in People v. Sloan, 76 Cal. App. 3d 611, 143 Cal. Rptr. 61 (1978) (testimony upon such tests is irrelevant due to its inherent uncertainty and is inadmissible under section 210 of the California Evidence Code).

account. The court relied on section 210 of the Evidence Code[16] which bars as irrelevant only evidence which has *no* tendency to prove guilt or innocence.[17] However, section 352 of the Evidence Code became applicable as the court, in its discretion, had to determine if the substance of the evidence was outweighed by its potential for prejudice.[18] As the trial court failed to make such a determination with any degree of specificity, the supreme court had to determine whether the outcome was, in fact, a miscarriage of justice requiring reversal.[19] The court held that the remaining evidence, which was properly admitted, left no reasonable probability that the judgment would have been different without the error.[20] Therefore, the lower court's decision was not reversible upon this ground.

4. Warrantless Search of Apartment

The defendant also argued that the search of his shared apartment was unlawful; therefore, the two $5 bills and the brown 7-Eleven bag should have been excluded. The defendant contended that the rationale behind allowing warrantless intrusions when there was a signed probationary agreement allowing such was not applicable in the present case. While most probation agreements are voluntarily acceded to by the parolee, the defendant's probation[21] was mandated by law; therefore, he argued that the rationale did not apply.[22]

The court noted that a parolee does have a greater degree of protection[23] from such warrantless intrusions than he did while in

16. Section 210 provides in pertinent part that " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . having *any* tendency . . . to prove or disprove any disputed fact. . . ." CAL. EVID. CODE § 210 (West 1966) (emphasis added).

17. *Burgener*, 41 Cal. 3d at 527, 714 P.2d at 1264-65, 224 Cal. Rptr. at 126.

18. *Id.* at 527, 714 P.2d at 1265, 224 Cal. Rptr. at 126 (citing People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980), for the proposition that section 352 of the Evidence Code requires the trial court to determine whether the substance of the evidence at issue is outweighed by the increase in potential for prejudice, and if no such determination is made, it represents reversible error to the extent that it resulted in a miscarriage of justice).

19. *See* CAL. CONST. art. VI, § 13.

20. *Burgener*, 41 Cal. 3d at 528, 714 P.2d at 1265, 224 Cal. Rptr. at 127.

21. The defendant had signed a standard parole agreement upon release from prison providing for allowance of warrantless searches by law enforcement officials. *Burgener*, 41 Cal. 3d at 529 n.10, 714 P.2d at 1266 n.10, 224 Cal. Rptr. at 127 n.10.

22. *Id.* at 529, 714 P.2d at 1266, 224 Cal. Rptr. at 127-28. *See* People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971) (parole search upheld on grounds that probationer freely accepted written conditions of parole in exchange for government's granting of such, including warrantless searches, and that such agreement is binding). The defendant argued that the court's decision in *Mason* should be distinguished on the grounds that in the instant case the parole was mandatory; therefore, the defendant could not "freely" agree to the limitations imposed upon his freedom. *Burgener*, 41 Cal. 3d at 529, 714 P.2d at 1266, 224 Cal. Rptr. at 127.

23. The court specifically noted that while the argument in the present case was based entirely upon the fourteenth amendment to the U.S. Constitution, section 13 of

prison.[24] However, the court refused to extend this greater protection to the extent of that enjoyed by citizens not on parole. Rather, the court mandated that a balancing of society's interest against that of the parolee is required to determine the extent to which a parolee's rights under the constitution may be curtailed.[25] By balancing the parolee's privacy and liberty interests against the interests of society, namely that of public safety in the avoidance of *future criminality*, the court found that such warrantless intrusions are not per se unreasonable if related to parole supervision in some manner.[26]

To be related to parole supervision, the court found that a search "must be based on information which leads the parole agent who conducts or authorizes the search to believe that the parolee has violated the law or another condition of his parole, or is planning to do so."[27] The supreme court analogized the situation faced by a school administrator who must regulate and maintain order over the actions of pupils with that of a parole agent who must regulate and maintain order over the actions of assigned parolees. Thus, the court was able to apply the *reasonable suspicion standard* of review which had been recently set forth in *In re William G.*[28] The court reasoned that the information received by Burgener's parole agent from the police was adequate for the agent to infer a reasonable suspicion.[29] The court further ruled that the fact that the search was not conducted by the parole agent or for the sole purpose of determining a parole violation was inconsequential.[30] The court reasoned that any violation of the law by parolees is a violation of their parole; thus, the ability to permit such a warrantless intrusion falls under the umbrella of the pa-

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Article 1 of the California Constitution would afford greater protection against such searches, but refused to make such a distinction in this particular instance. *Burgener*, 41 Cal. 3d at 529 n.11, 714 P.2d at 1266 n.11, 224 Cal. Rptr. at 127 n.11 (citing People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975)).

24. *Burgener*, 41 Cal. 3d at 530, 714 P.2d at 1267, 224 Cal. Rptr. at 128.

25. *Id.* at 531, 714 P.2d at 1267, 224 Cal. Rptr. at 129.

26. *Id.* at 532-33, 714 P.2d at 1268-69, 224 Cal. Rptr. at 130-31.

27. *Id.* at 533, 714 P.2d at 1269, 224 Cal. Rptr. at 130. It is interesting to note that the court left open the door to allow for the possibility of justification of unannounced or random searches by stating that the court has "no occasion to determine" such in the present case. *Id.* at n.13, 714 P.2d at 1269 n.13, 224 Cal. Rptr. at 130 n.13.

28. 40 Cal. 3d 550, 709 P.2d 1287, 221 Cal. Rptr. 118 (1985) (holding that a school administrator may make warrantless intrusions by searching students when there is reasonable suspicion of illegal activity); *see* Note, *California Supreme Court Survey: In re William G.*, 13 PEPPERDINE L. REV. 1120 (1986).

29. *Burgener*, 41 Cal. 3d at 536, 714 P.2d at 1271, 224 Cal. Rptr. at 132-33.

30. *Id.*

role officer's powers.[31]

The extension of the *reasonable suspicion standard* to parolees may indicate a recent willingness on the part of the supreme court to limit the protection of certain constitutional rights when necessary to protect the interests of society. However, it is still unclear as to whether the court will extend this approach to other situations in which an administerial role would be facilitated by such power.

5. Jury Instructions

The defendant argued that the trial court gave incorrect jury instructions. This argument was based on the following two grounds: First, since general verdicts are required in criminal cases, the instruction that a special finding of express malice be found was reversible error; second, the fact that the jury was not specifically instructed that a finding of express malice had to be unanimous and based upon the "beyond a reasonable doubt" standard was reversible error.

With respect to the first of these arguments, the supreme court reasoned that section 1150[32] of the Penal Code does not contradict section 190.4[33] of the Penal Code. The court held that the terms "special finding," used in section 190.4, and "special verdict," used in section 1150, were not synonymous. Therefore, the trial court's instruction requesting such a special finding was not a violation of section 1150.[34]

With respect to the second argument, the supreme court applied the well settled rule that the correctness of jury instructions is viewed in light of the instructions as a whole, and not by way of a piecemeal approach.[35] Since the jury was instructed to use unanimous decisions with guilt beyond a reasonable doubt as criterion, the court reasoned that the failure to specifically reinstruct the jury to do so was not reversible error.[36]

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31. The court specifically disapproved of the prior appellate decision in People v. Coffman, 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969), to the extent that it is inconsistent with the present opinion. *Burgener*, 41 Cal. 3d at 536 n.14, 714 P.2d at 1271 n.14, 224 Cal. Rptr. at 133 n.14.

32. CAL. PENAL CODE § 1150 (West 1985) (requiring that a jury render a general verdict).

33. CAL. PENAL CODE § 190.4 (West Supp. 1986) (requiring a special jury finding as to alleged special circumstances).

34. *Burgener*, 41 Cal. 3d at 537-38, 714 P.2d at 1272, 224 Cal. Rptr. at 133-34.

35. *Id.* at 538, 714 P.2d at 1273, 224 Cal. Rptr. at 134 (citing People v. Rhodes, 21 Cal. App. 3d 10, 98 Cal. Rptr. 249 (1971); People v. Salas, 51 Cal. App. 3d 151, 123 Cal. Rptr. 903 (1975)).

36. *Burgener*, 41 Cal. 3d at 539-40, 714 P.2d at 1273-74, 224 Cal. Rptr. at 135.

6. Alleged Juror Misconduct

The defendant next contended that the trial court's failure to examine a juror during the trial whose integrity was brought into question violated the defendant's right to a jury trial. During deliberations, the jury foreman informed the judge that one juror was obviously intoxicated and that four jurors had expressed concern about this to him.[37] During consultation with counsel, defendant's counsel objected to either replacing the jurors with an alternate or bringing the juror in for questioning by the judge. The objection was based upon the defense counsel's belief that such a singling out of that particular juror would "destroy the jury," and the possibility that the accusation was false and intended to get the particular juror off of the panel. Eventually, the trial court judge, with agreement of the defense counsel, elected to admonish the entire jury against the use of intoxicants and allow the jury panel to remain as it was.[38]

The court distinguished *People v. Lee Chuck*[39] by noting that in this case, unlike *Lee Chuck*, there was insufficient evidence to show that the juror in question actually was under the influence of any intoxicant.[40] The court distinguished *People v. McNeal*[41] in that the trial court in that case was under a statutorily prescribed duty to initiate a formal hearing unlike the situation presented by the present case.[42] However, the court specifically determined that even absent such a statutory necessity, an inquiry is required whenever the court has notice that there may be good cause to remove a juror.[43] Therefore, the trial court's failure to perform any formal inquiry in the present case was error.[44]

The court, however, did not find that the trial judge's failure to in-

37. *Id.* at 517, 714 P.2d at 1257, 224 Cal. Rptr. at 119.

38. *Id.*

39. 78 Cal. 317, 20 P. 719 (1889) (holding that proof of juror's usage of intoxicants during a trial or deliberations requires reversal if not corrected at trial stage).

40. *Burgener*, 41 Cal. 3d at 518, 714 P.2d at 1258, 224 Cal. Rptr. at 119-20.

41. 90 Cal. App. 3d 830, 153 Cal. Rptr. 706 (1979) (holding that a trial court must determine if there is good cause for discharge of a juror, generally through examination, if the juror declares personal involvement with the case at issue).

42. *Burgener*, 41 Cal. 3d at 519-20, 714 P.2d at 1259, 224 Cal. Rptr. at 120-21.

43. *Id.* at 519, 714 P.2d at 1259, 224 Cal. Rptr. at 120. The court reasoned that even though the substitution of a juror was discretionary, the failure to conduct an investigation to determine the validity of allegations against a juror results in an abuse of discretion and is subject to appellate review. *Id.* at 519-20, 714 P.2d at 1259, 224 Cal. Rptr. at 120-21.

44. *Id.* at 521, 714 P.2d at 1260, 244 Cal. Rptr. at 122.

vestigate constituted reversible error.[45] Rather, the supreme court held that there was a lack of evidence on appeal validating the charges and that, unlike *McNeal*, this lack of evidence was due in total to the objections of the defense counsel.[46] Therefore, there was insufficient evidence to evaluate a claim of juror misconduct at the appellate level, and the actions of the trial court were affirmed.[47] The supreme court, analogizing the present situation to that in *People v. Pope*,[48] ruled that claims of jury misconduct must be brought in a petition for habeas corpus as such a forum allows for an evidentiary hearing to avoid the "second guessing" of the circumstances surrounding the issue.[49]

B. Penalty Phase Issue

During the penalty phase of his trial, the defendant refused to allow his counsel to put forth any evidence which would tend to mitigate sentencing. The only evidence presented by the defendant during the penalty phase of the trial was the reading by counsel of a statement written by Burgener which, in effect, asked the jury to impose the death penalty upon him for what he had done.[50] The supreme court relied upon its decisions in *People v. Deere*[51] and *People v. Brown*[52] to overturn the jury's finding, and lower court order, which had imposed the penalty of death.

The supreme court held that the failure of defense counsel to bring forth mitigating evidence when such was available required reversal under *Deere*.[53] The court viewed the *Deere* decision as mandating reversal of any capital case upon "the failure of defense counsel to present any mitigating evidence in the penalty phase . . . in obedience to his client's request. . . ."[54] This language, in effect, represents a modification, rather than a following, of the *Deere* decision.

In *Deere*, unlike the present case, the court specifically noted that the decision to exempt mitigating evidence during the penalty phase

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45. *Id.*

46. *Id.* In the present case, only the foreman believed that the juror was intoxicated. An important factor in the supreme court's determination was the belief that the defense counsel's objections were tactically motivated. *Id.*

47. *Id.* at 522, 714 P.2d at 1261, 224 Cal. Rptr. at 122.

48. 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979). The court in *Pope* stated, in pertinent part, that "where the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed." *Id.* at 425, 590 P.2d at 866, 152 Cal. Rptr. at 739.

49. *Burgener*, 41 Cal. 3d at 522, 714 P.2d at 1261, 224 Cal. Rptr. at 122-23.

50. *Id.* at 540-41, 714 P.2d at 1274-75, 224 Cal. Rptr. at 136. The statement concluded with the following: "I [defendant] ask you to return a sentence of death." *Id.*

51. 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).

52. 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985).

53. *Burgener*, 41 Cal. 3d at 542, 714 P.2d at 1275, 224 Cal. Rptr. at 137.

54. *Id.* at 541, 714 P.2d at 1275, 224 Cal. Rptr. at 136.

was due entirely to the desires of the defendant and had no basis in a tactical decision by the attorney.[55] Justice Broussard, in his concurrence, stated that he was "confident that we [the court] would not reverse a penalty judgment after the trial court had taken independent steps to assure a fair and balanced penalty trial, even though the mitigating evidence was not presented by defense counsel."[56]

Thus, in *Deere* the court had apparently limited the use of this rule to those situations in which it was obvious that the decision not to bring forth mitigating evidence was not a tactical one. In the present case, the court followed no such limitation. The lack of this limitation further exposes a rule mandating introduction of mitigating evidence. This can probably be attacked on the grounds that it forces legal aid upon an unwilling client, and forces a person to grovel for mercy by playing upon the jury's emotions and perhaps lose every shred of esteem left to him. In addition, it can be misused by counsel for a tactical advantage: counsel can refuse to bring forth mitigating evidence and then get the death penalty sentence reversed.[57]

The supreme court also applied the rule set forth in *Brown*. This rule mandates that the jury in death penalty cases must be instructed that they may take into account mitigating factors other than those brought forth in the penalty phase of the trial. The court based this decision upon the trial court's failure to specifically inform the jury that it had the "sole discretion to determine the appropriate penalty for defendant under all the relevant circumstances."[58] The court felt that such an instruction was necessary in view of the lack of mitigating evidence presented and the actual language of section 190.3 of the Penal Code. The court failed to discuss, however, the impact that this decision will have upon a jury's ability to effectively impose the death penalty in deserving situations. What occurs when the defendant's counsel brings forth a single piece of mitigating evidence on which the jury places little weight in an attempt to circumvent the

55. *Deere*, 41 Cal. 3d at 364 n.3, 710 P.2d at 931 n.3, 222 Cal. Rptr. at 20 n.3. In addition, unlike the present case, defendant's counsel had argued in favor of offering the evidence but, during the trial, grew to "appreciate and concur with his client's point of view." The attorney's view was that he had "no right whatsoever to infringe upon his decisions about his own life." *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 17-18. Statements like these led the court in *Deere* to exclude the possibility of a tactical decision by the attorney, geared to gain sympathy from the jurors. In the present case, there exists no such evidence.

56. *Id.* at 370, 710 P.2d at 935, 222 Cal. Rptr. at 24 (Broussard, J., concurring).

57. *See id.* at 370-72, 710 P.2d at 935-37, 222 Cal. Rptr. at 24-25 (Lucas, J., dissenting). It is interesting to note that Justice Lucas took no part in the *Burgener* decision.

58. *Burgener*, 41 Cal. 3d at 542, 714 P.2d at 1275-76, 224 Cal. Rptr. at 137.

Deere requirements? Must the jury still be admonished that it has the right to look at all mitigating evidence? And what happens when there is a great wealth of mitigating evidence and little for the prosecution? Must the judge then instruct the jury that it may take into account prosecutorial evidence which was not brought forth during the penalty phase? This demonstrates that the ever increasing scope of the *Brown* decision may create eventual uncertainty and inconsistency within the penalty phase.

IV. CONCURRING AND DISSENTING OPINIONS

A. Justice Mosk's Separate Concurring Opinion

Justice Mosk, while generally in concurrence with the majority opinion, disagreed with the court's suggestion that a petition for habeas corpus be used by defendants in cases of jury misconduct. As a result of logistical problems with finding jurors and other evidence at such a late date, Mosk proposed that a judgment should be made "with finality here [at the supreme court] where the buck stops," as opposed to passing it on to another tribunal.[59] Although Mosk agreed with the final decision of the court, he based his reasoning upon the fact that even if the juror had been intoxicated during deliberations, there was a night's sleep and further deliberations the next day before a verdict was issued. Such a rest period, he argued, would have resulted in the dissipation of the intoxicants before the final verdict was reached.[60]

B. Concurring Opinion of Justice Broussard

Justice Broussard presented a simple two sentence concurrence with the majority opinion, citing his concurring opinion in *Deere*.[61]

C. Concurring and Dissenting Opinion of Chief Justice Bird

Chief Justice Bird, while concurring in the outcome of the majority opinion as to the need for mitigating evidence, strongly dissented to the court's holding that there was not ample evidence to have required the trial court to pursue an inquiry into the juror's condition. Her dissent was based primarily upon her interpretation of the

59. *Burgener*, 41 Cal. 3d at 543, 714 P.2d at 1276, 224 Cal. Rptr. at 138 (Mosk, J., concurring).

60. *Id.* at 543-44, 714 P.2d at 1276-77, 224 Cal. Rptr. at 138 (Mosk, J., concurring). Mosk's analysis was based upon an analogy between the present case and People v. Crocker, 47 Cal. 2d 348, 303 P.2d 753 (1956) (the fact that the majority of jurors drank the night before the verdict was determined did not constitute reversible error as the effects of intoxication would have disappeared the next day).

61. *Burgener*, 41 Cal. 3d at 544, 714 P.2d at 1277, 224 Cal. Rptr. at 138 (Broussard, J., concurring).

court's previous decision in *McNeal* which would require reversal of verdicts where a trial court failed to inquire into a juror's condition, no matter what arguments or objections were raised by defense counsel.[62] In addition to the general logistical problems which the defendant would face, if relitigation of the juror's competence was in order, Chief Justice Bird argued that the juror in question would most certainly lie upon the witness stand to save his own skin.[63] She therefore concluded that a petition for habeas corpus would not increase the amount of evidence available to a tribunal. Therefore, a decision should be made by the supreme court.

Chief Justice Bird failed to distinguish *McNeal* in that it represented a situation in which the jurors themselves had brought into question their impartiality.[64] In any event, her criticism of the court for failing to follow the rule laid down by *McNeal* lacks merit for the simple reason that the court of appeal case was of no precedential value with respect to the supreme court. In addition, the lengthy argument of difficulty in finding evidence and the probability of the affected jurors perjuring themselves on the stand, may be used against any situation which requires a party to seek out evidence in preparation for trial. The potential for perjury and waste of evidence are present in *any* courtroom situation, even at the initial trial stage. If we were to determine our protocol based upon these fears, an entire new system of justice would have to be implemented.

V. CONCLUSION

The court's decision in *Burgener* is another indication that the supreme court is stretching existing doctrine in order to avoid implementing the California death penalty statute. On its face, the argument that a lack of mitigating evidence cheats the state out of its right to fairly determine the constitutional use of the death penalty is sound. However, the court fails to discuss the rationally related situation of what happens when a defendant produces mitigating evidence which is minimal or actually harmful to their case. How will

62. *Id.* at 545-47, 714 P.2d at 1277-78, 224 Cal. Rptr. at 139-40. (Bird, C.J., concurring and dissenting). *See also* note 41 and accompanying text.

63. *Id.* at 548-49, 714 P.2d at 1275-80, 224 Cal. Rptr. at 141. (Bird, C.J., concurring and dissenting) (general logistical problems mentioned by Chief Justice Bird included the difficulty in finding witnesses and the inability of witnesses to recall exactly what had happened).

64. *McNeal*, 90 Cal. App. 3d at 830, 153 Cal. Rptr. at 706.

the court handle such a situation given the "societal protection" rationale?

The court's holding that a petition for habeas corpus is required when an issue arises as to the failure of a trial court to dismiss or interrogate a juror when such a lack of evidence exists at the appellate stage is sound. It would be contrary to our system of justice for an appellate court to determine whether a person was or was not intoxicated without allowing that person to testify. The desire of some to mitigate the hardships found by the defendant should not be allowed to overshadow a person's ability to defend himself.

ROBERT W. LANGHOLZ, JR.

B. *Special circumstance of murder-during-the-course-of-a-robbery cannot be found to exist unless the defendant had the specific intent to kill:* **People v. Ratliff.**

In *People v. Ratliff*, 41 Cal. 3d 675, 715 P.2d 665, 224 Cal. Rptr. 705 (1986), the supreme court reversed an attempted murder conviction and set aside the felony-murder special circumstance, thereby reversing the imposition of the death penalty. The court affirmed in all other respects. In so doing, the court made specific rulings in the areas of voluntary consent to a search, prosecutorial misconduct, and imposition of the special circumstance of murder-in-the-course-of-a-robbery.

The defendant was tried and convicted for the armed robbery of a San Pedro gas station and the murder of the attendant. The court admitted the evidence that was seized in two warrantless searches of the defendant's car. In addition, the court refused to suppress the line-up or in-court identification of the defendant, although police photographs used for the initial identification had been destroyed. The jury returned guilty verdicts on charges of first degree murder, attempted murder, robbery, and burglary. The jury also found that the murder occurred during the commission of a robbery, thereby constituting a special circumstance warranting the imposition of the death penalty.

The defendant first contended that the warrantless search of his car by the police officers immediately following his arrest was illegal, requiring the fruits of the search to be suppressed. Although the defendant had given his consent to the search, he claimed that it was not given voluntarily because the police officers first approached him with their guns drawn, failed to give him the *Miranda* warnings, and handcuffed him. The court declined to hold, as a matter of law, that consent to a search is invalid solely because a police officer initially

drew his weapon when confronting the defendant. The court stated that even if the officers had initially drawn their weapons, there was no evidence to indicate that their guns were still drawn when the consent to the search was made. In this case, the officers clearly indicated to the defendant that his permission was being requested for the search, and he consented. The fact that the defendant was handcuffed does not make his consent invalid. Restraint by handcuffs is but one factor to be considered in judging the voluntariness of consent to a search. Finally, previous cases have held that failure to give the *Miranda* warnings does not render consent to a search involuntary. *See People v. James*, 19 Cal. 3d 99, 561 P.2d 1135, 137 Cal. Rptr. 447 (1977).

The defendant also challenged his conviction based on allegations of prosecutorial misconduct. In his closing argument, the district attorney referred to the fact that the defendant had been positively identified by one of the victims at the preliminary hearing. This fact, however, was not in evidence. Also, the prosecutor remarked on the failure of the defense to present any evidence showing that the defendant did not commit the charged offenses, and that the defendant argued that this diminished his constitutional right to remain silent. The court summarily disposed of these contentions, observing that when the defendant failed to object to the prosecutor's statements at trial, the present objections were waived. However, the court went on to say (in dicta) that the prosecutor's statements were not objectionable on the grounds asserted by the defendant. A defendant's right to remain silent covers only a prosecutor's references to a defendant's failure to take the stand and testify in his own defense. This protection does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses.

Finally, the defendant contended that with respect to the felony-murder special circumstance, the jury was never instructed that a specific intent to kill was required. The prosecutor conceded that the trial court erred in its instructions, but argued that the error was harmless because the defendant's intent was established by the evidence. The supreme court disagreed, refusing to accept the prosecutor's contention that the method of killing established the defendant's intent to commit murder. Shooting a victim at close range, although strongly indicative of an intent to kill, cannot conclusively establish the intent to kill as a matter of law. Furthermore, if the defendant had realized that intent was relevant to the special cir-

cumstance charge, he might well have submitted evidence of brain damage, since this evidence was indeed presented during the penalty phase of the trial. Therefore, the special circumstance finding and the death penalty judgment were set aside.

JEFF BOYKIN

V. EVIDENCE

A. *Section 669.5 of the Evidence Code applies to growth control ordinances enacted by initiative after the effective date of that section, but section 65863.5 of the Government Code does not apply to initiative measures:* **Building Industry Association of Southern California, Inc. v. City of Camarillo.**

In *Building Industry Association of Southern California, Inc. v. City of Camarillo*, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986), the supreme court held that section 669.5 of the California Evidence Code, which shifts the burden of proof to the city and/or county enacting a growth control ordinance to prove that such ordinance is necessary for the protection of the public health, safety, or welfare, is applicable to ordinances adopted by initiative after the effective date of that section. However, section 65863.6 of the California Government Code, requiring such ordinances to contain findings as to the public health, safety, and welfare, does not apply to initiative measures.

On June 2, 1981, the voters of the City of Camarillo [hereinafter the City] adopted an initiative for a growth control ordinance limiting the number of "dwelling units" to be constructed between 1982 and 1995 [hereinafter Measure A]. Building Industry Association of Southern California, Inc. and Pardee Construction Company filed separate complaints, which were consolidated for trial, challenging the validity of Measure A. In June 1983, the trial court granted partial summary judgment holding the following: 1) section 669.5 of the Evidence Code is inapplicable to Measure A; 2) Measure A does not conflict with sections 65302.8, 65580, 65583, or 65584 of the Government Code; 3) Measure A does not conflict with the Subdivision Map Act; and 4) Measure A does not conflict with section 65863.6 of the Government Code. The court of appeal, addressing only the issues of section 669.5 of the Evidence Code and section 65863.6 of the Government Code, ruled that neither section 669.5 of the Evidence Code nor section 65863.5 of the Government Code applied to initiatives.

In concluding that section 669.5 of the Evidence Code did apply to initiative measures, the supreme court focused on the language of the statute and statutory construction. The controversy centered on the

term "governing body" in subdivision (a), and the exemption of initiatives adopted prior to the effective date of the section in subdivision (d). The City argued that the term "governing body" was not ambiguous; therefore, its plain meaning, which excluded the electorate, should be used. *See Reidman v. Brison*, 217 Cal. 383, 387, 18 P.2d 947, 948 (1933). However, the court stated that the statute must be construed as a whole and, where ambiguity and conflict exist within the statute, the courts must look beyond the specific language to ascertain the legislative intent. *See Marrujo v. Hunt*, 71 Cal. App. 3d 972, 138 Cal. Rptr. 220 (1977).

The court determined that section 669.5 is ambiguous. If the pertinent language of subdivision (a), "the governing body of a city, county, or city and county," is taken literally, all ordinances adopted by initiative are excluded. Therefore, subdivision (d), exempting initiative measures adopted prior to the effective date of the section, would be meaningless. CAL. EVID. CODE § 669.5(a) (West Supp. 1986). The legislative history of Assembly Bill No. 3252 revealed that language exempting *all* initiative measures in the original version of section 669.5 was deleted and subdivision (d) was added. *See Lee v. City of Monterey Park*, 173 Cal. App. 3d 798, 219 Cal. Rptr. 309 (1985). Moreover, exempting all initiatives would be inconsistent with the legislative purpose of counteracting unjustified limitations on the local housing supply. Thus, the court concluded that section 669.5 does apply to initiative measures adopted after the effective date of the statute.

The court further held that section 669.5 did not "effectively bar" the power of initiative reserved on behalf of the electorate. Section 669.5 merely requires the city or county, in which the ordinance was adopted, to bear the burden of proving a reasonable relationship to the public health, safety, or welfare of the population effected if the ordinance is challenged. The court rejected the argument that proponents of an initiative would have no effective way of defending the initiative. The court noted that the city or county has a duty to defend the ordinance, and proponents who believed that their interests were not being vigorously defended have the right to file a motion to intervene in the action. Furthermore, a trial court's failure to allow intervention under such circumstances may be an abuse of discretion. Thus, section 669.5 of the Evidence Code does not unconstitutionally impair the initiative process.

The supreme court also upheld the court of appeal's ruling that section 6583.6 of the Government Code did *not* apply to initiative

measures. That section requires a city or county to consider and balance local housing needs against the residents' public service needs and the available fiscal and environmental resources. Further, any ordinance passed pursuant to section 6583.6 must contain findings as to the public health, safety, and welfare of the city or county that the ordinance is going to promote. The court held that the legislature intended for the guidelines established in section 65863.6 of the Government Code to be followed by the governing body of the city or county before enacting a growth control ordinance, not by the electorate when adopting initiative measures. The guidelines could not reasonably be applied to the initiative process. It would be impractical, if not impossible, to prove that the voters did in fact balance the enumerated factors. Moreover, requiring documentation of the findings to be included in the ordinance would substantially impair the initiative process by placing an unreasonable burden upon it.

STEPHANIE FANOS

B. *Evidence at a criminal trial relating to third-party culpability is admissible if it raises a reasonable doubt as to the guilt of defendant:* **People v. Hall.**

In *People v. Hall*, 41 Cal. 3d 826, 718 P.2d 99, 226 Cal. Rptr. 112 (1986), the court elucidated the applicable standard for admitting evidence of third-party guilt in criminal trials. The court ruled that evidence which tends to show culpability in one other than the defendant is admissible if it meets the minimum requirement of raising a reasonable doubt as to the defendant's guilt. To the extent that previous decisions applying the so-called *Mendez-Arline* rule were at variance with *Hall*, they were overruled.

The facts revealed that defendant Hall was implicated in a murder by an informant. The informant stated that Hall boasted to him about the details of the murder. The informant's account of the particular circumstances surrounding the death was so accurate that Hall was arrested for first degree murder. At trial, the defense proffered evidence intended to prove that the informant, rather than Hall, was actually the murderer. This evidence included facts such as the informant's intimate knowledge of the distinctive characteristics of the murder. Furthermore, the defense's argument was supported by the likelihood that the fatal blow was administered by a left-handed person, together with proof that Hall was right-handed and the informant was left-handed, the informant had a history as a pathological liar and as a violent drunk, and also that the informant had possession of shoes capable of making tracks such as those found at the murder site.

The trial court refused to admit the evidence based on its determination that it did not rise above the *Mendez-Arline* test, which required that the evidence provide a probable ground for suspecting the third-party. The court cited its discretion, under section 352 of the Evidence Code, to exclude evidence it deemed unduly time consuming, unnecessarily prejudicial, confusing, or misleading. CAL. EVID. CODE § 352 (West 1966). Nonetheless, the defense managed to present most of the implicating evidence to the jury. Despite the implication of the informant, Hall was convicted. He appealed on the basis that the trial court's exclusion of evidence of third-party guilt was prejudicial. The appellate court and supreme court affirmed the conviction. The supreme court held that although the trial court's application of the *Mendez-Arline* rule was erroneous, the error was harmless given that the majority of the exculpating evidence was introduced notwithstanding the refused proffer.

The *Mendez-Arline* threshold admissibility test, used by the trial court to determine whether to allow evidence of third-party guilt, derived from the cases of *People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924) and *People v. Arline*, 13 Cal. App. 3d 200, 91 Cal. Rptr. 520 (1970). In *Mendez*, the court held inadmissible evidence that a feasible motive for the crime rested in third parties. Thus, *Mendez* stood for the proposition that evidence casting possible suspicion on a third party is insufficient to merit admission. *Mendez*, 193 Cal. at 51, 223 P. at 70. The state of the law subsequent to *Mendez* was that evidence of third-party guilt which merely cast a possible suspicion on another was inadmissible, but evidence somewhat less than that needed to sustain a conviction of the third-party could be presented.

This vague standard was refined in *Arline*, 13 Cal. App. 3d at 204, 91 Cal. Rptr. at 522. In *Arline*, the court ruled that evidence implicating a third-party should be excluded unless it provided substantial proof or probability that the third-party actually committed the crime.

The decision in *Hall* overruled the elevated standard of *Arline*. *Hall* redirected the focus of the inquiry from whether the evidence sufficiently implicated the third-party to whether the evidence sufficiently casted doubt on the defendant's guilt. Under *Hall*, a defendant need only provide enough evidence linking the third-party to the crime with which the defendant is charged to raise a reasonable doubt as to the defendant's guilt. Once it is found that the evidence raises a reasonable doubt as to the guilt of the defendant, it is admissible.

The *Hall* court reiterated that mere evidence of motive or opportunity alone is insufficient. The court also cautioned that the policy considerations of section 352 of the Evidence Code still applied. Therefore, evidence of third-party guilt was still required to be relevant and able to outweigh any risk of undue delay, prejudice, or confusion its introduction into the trial might cause. *Hall*, 41 Cal. 3d at 834, 718 P.2d at 104, 226 Cal. Rptr. at 117.

The court in *Hall* also rejected the defendant's attack on section 352 of the Evidence Code as violating his constitutional right to present a defense. Hall argued that the federal standard enumerated in *Alexander v. United States*, 138 U.S. 353 (1891), applied to his case. In *Alexander* the court held that only evidence containing no legitimate exculpating tendencies should be excluded. *Id.* The *Hall* court dismissed this argument with reference to Rule 403 of the Federal Rules of Evidence. *Hall*, 41 Cal. 3d. at 835, 718 P.2d at 105, 226 Cal. Rptr. at 118. (Rule 403 is the Federal counterpart to Evidence Code section 352).

In *Hall*, the court found an opportunity to redefine the threshold standard for the admission of evidence of third-party guilt. The ruling of *Hall*, that evidence is admissible if, at a minimum, it casts a reasonable doubt on defendant's guilt, lowered the previous *Mendez-Arline* standard. This previous standard held that evidence would be excluded unless it provided substantial proof or probability that the third-party committed the crime with which defendant was being prosecuted. *Hall* also confirmed the constitutional validity of section 352 of the Evidence Code which was challenged because it provided a state court with discretion to exclude evidence which a federal court might have admitted.

The fact that the *Mendez-Arline* test was overruled in the *Hall* decision was of no benefit to Hall himself. The court found that the trial court's erroneous application of the restrictive standard did not amount to prejudicial error because Hall was able to introduce most of the exculpating evidence he sought to admit.

VALERIE L. FLORES

C. *Section 1157 of the Evidence Code does not preclude a hospital medical review staff committee member from voluntarily testifying about proceedings of the committee:* West Covina Hospital v. Superior Court.

In *West Covina Hospital v. Superior Court*, 41 Cal. 3d 846, 718 P.2d 119, 226 Cal. Rptr. 132 (1986), the supreme court held that pursuant to section 1157 of the Evidence Code, a hospital medical review staff committee member may not be *required* to testify, but may *volunta-*

rily testify about committee proceedings, provided patients' names are not disclosed.

In a medical malpractice action, the plaintiff sued a surgeon and West Covina Hospital for negligently granting surgical privileges and retaining the allegedly negligent surgeon on its medical staff. The plaintiff planned to call Dr. Anwar, who served on a medical review committee which evaluated the surgeon, to testify about specific details of the committee's evaluation. The trial court, over objections by the hospital, held that Dr. Anwar could waive the exclusion of section 1157 of the Evidence Code and could testify to the proceedings of the staff meeting as long as the patients' names were not disclosed.

The court of appeal granted the writ of mandate sought by the hospital, compelling the trial court to vacate its order and to exclude the testimony of Dr. Anwar. The supreme court directed the court of appeal to vacate its writ, holding that a hospital medical review committee staff member was not precluded from voluntarily testifying about the proceedings of the committee.

The court held that the critical language of section 1157(b), "no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting," is construed to preclude involuntary testimony only. CAL. EVID. CODE § 1157(b) (West Supp. 1986). A provision excluding required testimony does not prevent *all* testimony, nor does it confer a privilege upon the hospital or committee to preclude testimony.

The court noted that the care with which the legislature drafted the other provisions in the same chapter reinforces the conclusion that the legislature knew what it was saying when it excluded required testimony, as opposed to an absolute bar on all testimony from a committee member. *Tracy v. Municipal Court*, 22 Cal. 3d 760, 764, 587 P.2d 227, 229, 150 Cal. Rptr. 785, 787 (1977). Moreover, the principle that privileges should be construed narrowly so as not to bar relevant evidence and obstruct justice, bolsters the conclusion that section 1157 excludes only involuntary testimony, not voluntary testimony. *People v. McGraw*, 141 Cal. App. 3d 618, 622, 190 Cal. Rptr. 461, 463 (1983). There is also a well established rule that when the legislature amends a statute, without changing a provision that has previously been judicially construed, it is deemed to have acquiesced in that construction. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 734, 640 P.2d 115, 123, 180 Cal. Rptr. 496, 504 (1982). Additionally, the court stated that when the language of the statute is clear and unam-

biguous, as it is in section 1157, courts should give effect to its plain meaning.

The court stated that the fundamental legislative purpose of section 1157 of the Evidence Code is "to improve the quality of medical care in the hospitals by the use of peer review committees." *West Covina Hospital*, 41 Cal. 3d. at 851, 718 P.2d at 122, 226 Cal. Rptr. at 135. In order to recruit doctors to serve on these committees, the legislature concluded that it was necessary to exempt them from being required to testify about their committee work; this is because testifying would consume a large portion of their time and effort and discourage them from serving on the committees. However, a doctor who voluntarily decides to testify is willing to expend the time and effort involved and thus, the legislative purpose would not be thwarted.

The court also stated that there are two competing public policies at issue here: 1) the need for external access to medical review committees in order for plaintiffs to gain access to relevant evidence; and 2) the need for confidentiality in these committees in order to effectively increase candor and objectivity. Section 1157 of the Evidence Code reflects the balanced approach of the legislature. Recognizing these competing policies, the legislature chose to draw the line at involuntary testimony, thus providing for the admission of voluntary testimony in order to facilitate a plaintiff's need for evidence.

STEPHANIE FANOS

VI. FAMILY LAW

Retroactive application of section 4800.2 of the California Civil Code to cases which were pending appeal at the time of enactment is unconstitutional as it substantially alters individual property rights and fails to promote a significant state interest in redressing a prior inequity in existing law: **In re Marriage of Fabian.**

In *In re Marriage of Fabian*, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986), the California Supreme Court faced the issue of whether section 4800.2 of the California Civil Code should retroactively apply to marital settlement cases initiated prior to the enactment of the statute but where judgment was not rendered until after such enactment. Section 4800.2 applies directly to the division of community property upon settlement of divorce. The statute provides, in pertinent part, that unless there is a written waiver to the contrary, a "party shall be reimbursed for his or her contributions to the acquisition of the [community] property to the extent the party

traces the contributions to a separate property source." CAL. CIV. CODE § 4800.2 (West Supp. 1986).

In *Fabian*, James and Kathleen Fabian had purchased a motel during their marriage, with title specifying that the motel was to be community property. A total of $275,000 of separate property had been invested by James into the motel, with net equity at the time of the trial determined to be $790,391. Since there was no agreement between the parties to the contrary, the trial court ruled that James' contribution should be considered a gift to the community; therefore, James was not entitled to reimbursement. From this ruling James appealed.

The supreme court first concluded that the trial court did not err in its finding that the motel was in fact community property in its entirety. The court based its conclusion primarily upon the fact that the motel had been acquired in the names of James and Kathleen "as community property." As property acquired during marriage is presumed community in nature, particularly when the title itself specifies such, a party must prove the existence of an agreement to the contrary in order to preempt such a presumption. Such an agreement must be proven by a preponderance of the evidence and, in the instant case, the court found no such preponderance to exist. *See In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); *See v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966) (both cases standing for the general presumption that community property acquired during marriage with separate property contributions is presumed community property in its entirety unless agreement to the contrary is shown to exist by an objective view of the evidence).

The court then addressed the issue of retroactivity. Assembly Bill 26, section 4, which incorporated section 4800.2, was enacted while the present appeal was pending. The court emphasized the fact that the law prior to enactment of section 4800.2 set forth in *Lucas*, did not allow for reimbursement unless such was specifically agreed to by the parties. Therefore, until the enactment of section 4800.2, Kathleen possessed a vested property interest in the motel. The court then looked to its previous decision in *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985), for guidance as to what standard to apply in determining the constitutionality of the retroactivity of section 4800.2.

In *Buol*, the court had determined that section 4800.1, contained in Assembly Bill 26 along with section 4800.2, could not be retroactively

applied to cases which were pending appeal at the time of enactment. In determining the constitutionality of retroactive application, the court balanced the state interest against the overall justifiable reliance by citizens upon the former law. The court in *Buol* distinguished section 4800.1 from other retroactive statutory applications which it had previously upheld on the basis that those 'constitutional' applications were "necessary to remedy 'the rank injustice of the former law.' " The court could find no such rank injustice with respect to section 4800.1. *Buol*, 39 Cal. 3d at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37 (quoting *In re Marriage of Boquet*, 16 Cal. 3d 583, 594, 546 P.2d 1371, 1377, 128 Cal. Rptr. 427, 433 (1976); *see also Addison v. Addison*, 62 Cal. 2d 558, 567, 399 P.2d 897,902-03, 43 Cal. Rptr. 97, 102-03 (1965) (implies 'injustice' standard, but does not specifically state it as seen above)).

In applying the rationale used in *Buol* to section 4800.2, the court found that "[a]bsent patent unfairness in the former law, retroactivity of section 4800.2 is wholly unnecessary." *Fabian*, 41 Cal. 3d at 449, 715 P.2d at 258, 224 Cal. Rptr. at 338. Reasoning that the legal status of separate property could be easily maintained under the law existing prior to section 4800.2 by simple agreement between the parties, there was necessarily no patent unfairness upon which retroactivity could be justified.

The supreme court found that section 4800.2 of the Civil Code results in a significant infringement upon vested property rights and not merely the changing of a procedural rule. The court generally looks to the true substantive effect of a statute in question as opposed to its facial appearance in determining constitutionality. However, the line between the two poles is not always clear; therefore, the judgment of the court as to the eventual classification may often be the result of the desired outcome more than the result of a set judicial test. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 282-83, 285-88 (8th ed. 1974) (general discussion of retroactive applicability of statutes); Laughran, *Management and Control of Community Property in California: "Retroactive" Application of the 1795 Amendments*, 9 LOY. L.A.L. REV. 493, 514-20 (1976) (no clear line as to when retroactivity of community property statutes overstep constitutional boundaries); Comment, *Retroactive Application of California Civil Code Section 4800.1: Procedural Rule or Violation of Due Process?*, 16 PAC. L.J. 1007, 1013-17 (1985) (general discussion of court review of retroactive application of community property statutes).

Buol alone might easily have been overlooked as an anomoly in the court's general approach of leaning toward retroactivity. Prior to *Buol* and *Fabian*, it was generally accepted that the legislature's in-

terest in the marital relationship, and any inequity which existed within it, was a sufficient ground to allow for retroactivity of applicable statutes. *See* Shue and Velman, *California Civil Code 4800.1 and 4800.2: Review, Analysis, and Suggestions for Reform*, 12 COMMUNITY PROP. J. 5, 11-14 (1985) (discussion of the judiciary's previous rulings upon retroactivity). However, when considered along with the court's opinion in *Fabian*, there is some justification for the opinion that the court is becoming more conservative in its approach to legislative enactment, at least insofar as it relates to the law surrounding community property interests. The cases indicate most certainly that the court will not allow the legislature to injure such vested rights with total impunity. There must not only be an injustice which such retroactivity seeks to remedy, but such injustice must be "substantial" as well.

Perhaps the most important aspect of the court's decision in *Fabian* is not the specific holding for which it stands. Rather, the most important aspect may well be the decision's potential indication that the court is taking a more conservative and watchful view with respect to retroactive application of statutes which infringe upon property rights. Such a conservative stance would allow the court to disallow the retroactivity of such statutes not only with respect to situations in which an appeal is pending at the time of enactment, but also to those property interests to which no legal claim has yet been placed. Requiring the average property owner to employ counsel each time a statute is passed by the legislature to scrutinize its effects upon their vested property interests is patently inequitable and cannot be reasonably expected. The legislature's ability to retroactively redefine vested property rights should be strictly limited to those minimal situations in which equity cries out for such a harsh change. Therefore, the only fair test to determine the constitutionality of retroactive application would be to use the same basis of scrutiny as was applied in both *Fabian* and *Buol*, assuring an overwhelming governmental need to intervene.

ROBERT W. LANGHOLZ, JR.

VII. LABOR LAW

A. *Local public agencies must give notice to and meet and confer with representatives of a recognized employee bargaining unit prior to eliminating and reassigning employment positions pursuant to the Meyers-Milias-Brown Act:* **Building Material & Construction Teamsters' Union, Local 216 v. Farrell.**

In *Building Material & Construction Teamsters' Union, Local 216 v. Farrell*, 41 Cal. 3d 651, 715 P.2d 648, 224 Cal. Rptr. 688 (1986), the supreme court held that a public agency's failure to give notice to or to meet and confer with representatives of the union's bargaining unit prior to eliminating and reassigning employment positions violated the Meyers-Milias-Brown Act [hereinafter the Act]. CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1986). The defendants' unilateral actions fell within the scope of representation as defined by the Act, and thus constituted a violation of the Act.

The Meyers-Milias-Brown Act was enacted to encourage communications between public employers and employees, and to improve personnel management and employer-employee relations. The Act effectuates these goals by giving local government employees the right to organize collectively and to be represented by employee organizations. In addition, employers are under a duty to bargain with employee representatives regarding matters that fall within the "scope of representation." Section 3504 of the Government Code defines "scope of representation" to include "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment . . . ." CAL. GOV'T CODE § 3504 (West 1980). The phrase exempts from consideration the "merits, necessity, or organization of any service or activity provided by law or executive order." *Id. See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, § 410 (8th ed. 1974).

Pursuant to the Act, public agencies must give employee organizations written notice of any proposed actions relating to matters within the scope of representation. Furthermore, representatives of both the agencies and employee organizations must meet and confer if either party so requests.

The Department of Public Health [hereinafter DPH] eliminated two truck driver positions from their hospital budget that were within the union's bargaining unit: one vacant, full-time position, and one part-time position filled by Antone Metaxas. Simultaneously, three new full-time utility worker positions were created that were not within the bargaining unit. The three new workers were to be responsible for fulfilling the duties assigned to the two eliminated po-

sitions. DPH's actions were reviewed and subsequently approved by the San Francisco Civil Service Commission [hereinafter the Commission]. Although Metaxas was transferred to a full-time position as truck driver at another hospital, the plaintiff filed a grievance on behalf of Metaxas, alleging that Metaxas was improperly denied his part-time position. Additionally, the plaintiff requested that the DPH and the Commission meet and confer regarding the reorganization and reclassification of positions. DPH and the Commission denied these requests, arguing that these matters were not within the meet and confer obligations imposed on public agencies. The plaintiff subsequently sought a writ of mandate to compel the defendants to reinstate Mr. Metaxas with back pay. The trial court held that the meet and confer requirements were not applicable, and the court of appeal affirmed.

In attempting to define "scope of representation," the supreme court looked to both state and federal law for guidance. *E.g.*, *Fibreboard Corp. v. Labor Board*, 379 U.S. 203 (1964); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Dublin Professional Fire Fighters, Local 1885, AFL-CIO v. Valley Community Services Dist.*, 45 Cal. App. 3d 116, 119 Cal. Rptr. 182 (1975). A review of these cases illustrates that an action must have a *significant* effect on the "wages, hours, and other terms and conditions of employment" of the bargaining unit in order to fall within the scope of representation and, thus, invoke the mandatory bargaining requirement. *Farrell*, 41 Cal. 3d at 659, 715 P.2d at 652, 224 Cal. Rptr. at 692. Any permanent transfer of work away from a bargaining unit has a significant effect on the wages, hours, and other terms of employment; consequently, courts have held that an employer is required to bargain if the transfer *adversely* affects the bargaining unit in question.

An adverse effect has been held to occur where positions have been terminated and work has been transferred to independent contractors and where an employer has transferred bargaining unit work to nonbargaining unit employees. *Farrell*, 41 Cal. 3d at 659, 715 P.2d at 652, 224 Cal. Rptr. at 692. The supreme court applied these principles to the present case where positions were terminated within the bargaining unit and reassigned to positions outside the bargaining unit which were expressly created to perform that work. The court concluded that the reorganization and reclassification of positions by the DPH adversely effected the bargaining unit and its employees. By refusing to meet and confer with representatives, the DPH and the Commission violated the specific provisions of the Act.

The defendants argued that their actions fell within the fundamental managerial policy exception to the Act. CAL. GOV'T CODE § 3504 (West 1980). This "general managerial policy" exception, developed by the federal courts, was incorporated into section 3504 and excepts the "merits, necessity, or organization of any service or activity provided by law or executive order" from the scope of representation. *Id.* The court summarily rejected this argument by declaring that the reorganization and reclassification of positions was not fundamental since it had no effect on public services. Rather, those actions had a significant effect on the wages, hours and working conditions of the employees in the bargaining unit; thus, they were a proper subject for negotiation.

The court further held that the provisions of the San Francisco Charter [hereinafter the Charter] are compatible with the meet and confer requirements of the Act. Although the Charter gives the Commission the right to "reclassify" and "relocate," this power is not inconsistent with the requirement to meet and confer with representatives about the proposed classifications before the changes take effect. In addition, the Charter does not prohibit the Commission from negotiating before any changes are implemented.

TAMI J. TAECKER

B. *The Agriculture Labor Relations Board can appoint independent hearing officers to conduct hearings to determine whether a disputed election of a bargaining agent should be certified and that independent officer can make findings, conclusions, and recommendations:* **Lindeleaf v. Agricultural Labor Relations Board.**

I. INTRODUCTION

In *Lindeleaf v. Agricultural Labor Relations Board*,[1] the supreme court held that title 8, section 203070(a), (f) of the California Administrative Code[2] did not violate section 1156.3(c) of the California La-

1. 41 Cal. 3d 861, 718 P.2d 106, 226 Cal. Rptr. 119 (1986). Justice Mosk wrote the majority opinion in which Acting Chief Justice Broussard and Justices Reynoso and Grodin concurred. Justice Panelli authored a separate dissenting opinion in which Justices Lucas and Low concurred. Justice Low was assigned by the chairperson of the judicial counsel.

2. CAL. ADMIN. CODE tit. 8, § 20370(a), (f) (1986). Subdivison (a) reads, in pertinent part: "The executive secretary shall appoint an investigative hearing examiner to conduct an investigative hearing on objections filed . . . . No person who is an official or an employee of a regional office shall be appointed to act as an investigative hearing examiner." CAL. ADMIN. CODE tit. 8, § 20370(a) (1986).

Subdivision (f) in pertinent part reads as follows: "Within a reasonable time after the close of taking of testimony, the investigative hearing examiner shall issue an ini-

bor Code.[3] In addition, the court upheld the Agriculture Labor Relations Board's [hereinafter ALRB or the Board] summary dismissal of Lindeleaf's allegations as not providing a prima facie evidentiary basis for a charge of election misconduct. The court further held that the ALRB did not abuse its discretion in overruling, as unmeritorious, Lindeleaf's objections which were referred to an investigative hearing, and upheld the ALRB's imposition of a make-whole order on Lindeleaf.

II. FACTUAL SUMMARY

On August 29, 1980, the United Farm Workers [hereinafter UFW] filed a petition with the ALRB seeking certification as the exclusive bargaining agent for the agricultural employees of Robert Lindeleaf. UFW was the decisive winner in a subsequent election.[4] Lindeleaf filed eleven objections with the ALRB that allegedly warranted setting aside the election. The ALRB's executive secretary summarily dismissed some of these objections in their entirety and others in part. Lindeleaf filed a request for review, and the ALRB set four issues for hearing.

An investigative hearing examiner [hereinafter IHE] conducted the hearing and determined that the objections were uniformly unmeritorious and did not affect the outcome of the election. The Board affirmed the IHE's rulings, findings, and conclusions, and adopted her recommendation to certify the UFW.

Lindeleaf refused to bargain with the UFW, and the union filed charges of unfair labor practices. The ALRB determined that Lindeleaf's refusal to bargain constituted an unfair labor practice. Therefore, the ALRB ordered the parties to bargain in good faith, and imposed a make-whole sanction on Lindeleaf, requiring reimbursement to present and former employees who suffered pay and other economic losses as a result of the refusal to bargain.

Lindeleaf petitioned the court of appeal for review, contending that the ALRB abused its discretion in summarily dismissing and overrul-

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tial decision including findings of fact, conclusions of law, a statement of reasons in support of the conclusions, and a recommended disposition of the case." CAL. ADMIN. CODE tit. 8, § 20370(f) (1986).

3. CAL. LAB. CODE § 1156.3(c) (West Supp. 1986). This section reads in pertinent part: "Such hearing may be conducted by an officer or employee of a regional office of the board. He shall make no recommendations with respect thereto." *Id.*

4. Election results: UFW-71; no-union-35; void-1; challenged ballots-4. *Lindeleaf*, 41 Cal. 3d at 868, 718 P.2d at 111, 226 Cal. Rptr. at 123.

ing his objections. For the first time, Lindeleaf challenged the ALRB's delegation of authority to an investigative hearing examiner to issue findings and to recommend a decision as contravening an express mandate of the Agriculture Labor Relations Act of 1975 [hereinafter ALRA].[5] The court of appeal annulled the ALRB's decision, holding that the ALRB improperly delegated its authority to the IHE and that three of Lindeleaf's summarily rejected objections required a full hearing. It remanded the matter to the ALRB for reconsideration without reference to the IHE's findings, conclusions, and recommendations.

III. THE COURT'S ANALYSIS

A. Propriety of Issues Before the Court

Initially, the supreme court had to determine whether Lindeleaf's challenge to the Board's hearing procedures were properly before the court, since it was not raised before the Board. In cases involving administrative regulations, a petitioner is generally required to exhaust all his administrative remedies before redress in the courts is allowed, and is deemed to have waived any objections that were not raised before the administrative agency.[6] Recognizing the principle that the court may agree to hear a case involving important questions of public policy,[7] the court elected to address this issue.

B. Selection and Duties of Investigative Hearing Examiners

Lindeleaf maintained that section 20370(a) and section 20370(f) of the California Administrative Code[8] contravened the language of section 1156.2(c) of the California Labor Code,[9] contending that the administrative regulations prohibited what the statute allowed (hearings conducted by regional ALRB office employees and officers) and required what the statute prohibited (findings and recommendations by IHE).[10] The court, however, disagreed.

First, the court noted that section 1156.3(c) of the Labor Code provided for a hearing to determine certification of a disputed election, and section 1142(b) of the Labor Code authorized the ALRB to appoint hearing officers to conduct those hearings.[11] If those officers

5. CAL. LAB. CODE §§ 1140-66.3 (West Supp. 1986).

6. 41 Cal. 3d at 869, 718 P.2d at 111, 226 Cal. Rptr. at 124.

7. 41 Cal. 3d at 870-71, 718 P.2d at 112, 226 Cal. Rptr. at 125.

8. CAL. ADMIN. CODE tit. 8, § 20370(a), (f) (1986). *See supra* note 2 and accompanying text.

9. CAL. LAB. CODE § 1156.3(c) (West Supp. 1986). *See supra* note 3 and accompanying text.

10. 41 Cal. 3d at 871, 718 P.2d at 112, 226 Cal. Rptr. at 125.

11. CAL. LAB. CODE § 1142(b) (West Supp. 1986). This section, in pertinent part, reads as follows:

were not allowed to reach preliminary determinations their "function would be rendered nugatory," thwarting the purposes of the legislature in enacting the statutes.[12]

Second, section 1156.3(c) of the Labor Code provides that hearings "may be conducted by an officer or employee of a regional office of the Board" but it does not require that they *must* be so conducted. Moreover, the ALRB has interpreted subdivision (c) to "require that only a hearing examiner who is an officer or employee of a regional office . . . [be] barred from recommending disposition of election challenges."[13] Since officers and employees of regional ALRB offices are prohibited from issuing findings and recommendations, the ALRB, in order to expedite its review process, enacted an administrative regulation,[14] permitting independent hearing officers to conduct hearings and prohibiting regional officers and employees from conducting such hearings. In addition, the regulation required these independent hearing officers to issue findings and recommendations.[15] Thus, the court held that although the regulation is narrower than the statute, it is permissible.[16] Moreover, these regulations serve the legislative purpose of the statute by precluding a situation in which employees of the same regional office "review the conduct of their own colleagues during local elections."[17]

Third, the court rejected Lindeleaf's reading of section 1156.3(c) of the Labor Code.[18] Lindeleaf contended that the phrase "of a regional office" qualified only the word "employee" and that the word "officer" referred to any officer, including independent IHE's; therefore, this barred any person conducting the hearing from issuing findings and recommendations. The court stated that this reading "defies

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> The board may delegate to the personnel of these offices such powers as it deems appropriate to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, to direct an election . . . and to certify the results of such election, and to investigate, conduct hearings and make determinations relating to unfair labor practices.

Id.

12. 41 Cal. 3d at 872, 718 P.2d at 112, 226 Cal. Rptr. at 125.

13. *Id.* at 871, 718 P.2d at 112, 226 Cal. Rptr. at 125.

14. CAL. ADMIN. CODE tit. 8, § 20370(a) (1986).

15. CAL. ADMIN. CODE tit. 8, § 20370(f) (1986).

16. 41 Cal. 3d at 872, 718 P.2d at 113, 226 Cal. Rptr. at 126.

17. *Id.*

18. "Such hearings may be conducted by an officer or employee of a regional office of the Board. He shall make no recommendation with respect thereto." CAL. LAB. CODE § 1156.3(c) (West Supp. 1986).

both grammar and sense."[19] The terms "officer and employee" must be read together and both are qualified by the phrase "of a regional office of the Board."[20]

Fourth, the court held the ALRB does not delegate its ultimate authority to IHE's. An aggrieved party may file an exception to an IHE's finding, conclusion or recommendation, triggering an independent review of the entire proceeding by the Board.[21]

C. Summary Dismissal of Election Objections

The court rejected Lindeleaf's claim that the ALRB abused its discretion in summarily dismissing three of his objections. The court reaffirmed its decision in *J.R. Norton, Co. v. Agricultural Labor Relations Board*,[22] which upheld the ALRB requirement that a petition for hearing must be "accompanied by a declaration or declarations which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election."[23] A petitioner must present a prima facie case before it can command an evidentiary hearing.[24]

The court noted that although the ALRA does not specifically state that a prima facie showing is required, the ALRB has the statutory authority to adopt "such rules and regulations as may be necessary to carry out the provisions of [the ALRA]."[25] Thus, since Lindeleaf's objections were not sufficiently supported by factual declarations, the ALRB acted properly in summarily dismissing them.

Lindeleaf failed to support his claim that UFW organizers campaigned for the union immediately before and during the balloting. The ALRB has held that "last-minute electioneering in the polling place does not warrant setting aside an election unless it continues during actual voting or is intimidating and coercive to employees."[26]

The court stated that Lindeleaf's declaration raising this issue did not explicitly state that the campaigning occurred *during* the actual voting nor that the declarant or any other person alleged voter coercion or intimidation.[27] Similarly, a prima facie showing of pre-election misconduct was not established in declarations which alleged that UFW organizers threatened employees. The declarations stated that the threats occurred *after* the election and Lindeleaf failed to

19. 41 Cal. 3d at 872, 718 P.2d at 113, 226 Cal. Rptr. at 126.
20. *Id.*
21. CAL. ADMIN. CODE tit. 8, § 20365(g) (1986).
22. 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 710 (1979).
23. CAL. ADMIN. CODE tit. 8, § 20365 (1986).
24. 41 Cal. 3d at 874, 718 P.2d at 114, 226 Cal. Rptr. at 127.
25. CAL. LAB. CODE § 1144 (West Supp. 1986).
26. 41 Cal. 3d at 875, 718 P.2d at 115, 226 Cal. Rptr. at 128.
27. *Id.*

show how the subsequent threats affected the outcome of the election.

Finally, the court agreed with the ALRB that Lindeleaf failed to provide sufficient evidence to establish that the Board's rejection of Carlos Acevedo as a union observer was prejudicial.[28]

D. Election Objections Referred to an Investigative Hearing

The court held that the ALRB did not abuse its discretion by referring Lindeleaf's objections to an IHE. In addition, the court adopted the IHE's recommendations.[29]

Once again, Lindeleaf failed to provide sufficient evidence to support his allegations of the UFW threats to workers that they would lose their jobs if the union won and they did not vote for the union. Recognizing "the rule that an election must be set aside if employees were coerced into voting for the union,"[30] the court agreed with the ALRB that the testimony of Lindeleaf's witnesses regarding this charge was inadmissible as hearsay.[31] Therefore, the Board properly dismissed this objection.

Lindeleaf further claimed that the ALRB did not act promptly in removing a UFW organizer from a "quarantined area" and, as a result, the organizer was able to speak in Spanish to one of its employees. Although Lindeleaf's witness testified about this incident, he was unable to determine the content of the conversation because he did not speak Spanish. The court characterized the event as trivial, and agreed with the Board that Lindeleaf failed to produce adequate evidence to support his claim.[32]

Lindeleaf next contended that the election should be set aside due to the ALRB's failure to seek proper voter identification and its refusal to note challenges individually. Challenged voters were allowed to vote "after being recognized and identified by a UFW observer."[33] However, the court noted that voter identification may be in the form of "any . . . identification which the Board agent, in his or her discretion, deems adequate"[34] and recognition of an employee " 'may, at the discretion of a board agent, constitute adequate identifi-

28. *Id.* at 876, 718 P.2d at 115, 226 Cal. Rptr. at 128.
29. *Id.* at 876, 718 P.2d at 115-16, 226 Cal. Rptr. at 128-29.
30. *Id.* at 877, 718 P.2d at 116, 226 Cal. Rptr. at 129 (period omitted).
31. *Id.*; *see* CAL. ADMIN. CODE tit. 8, § 20370(c) (1986).
32. 41 Cal. 3d at 878, 718 P.2d at 116, 226 Cal. Rptr. at 129.
33. *Id.* at 878, 718 P.2d at 117, 226 Cal. Rptr. at 130.
34. CAL. ADMIN. CODE tit. 8, § 20355(c) (1986) (period omitted).

cation.' "[35]

The final objection referred to the hearing involving alleged access violations. Lindeleaf claimed that UFW organizers repeatedly campaigned on company property.[36] The court stated that an election will be invalidated only when "access violations have deprived voters of their exercise of free choice,"[37] and declined to "adopt a per se rule requiring an election to be set aside whenever access violations have occurred."[38] The court agreed with the ALRB finding that the violations involved were *de minimis* and did not effect the outcome of the election.

E. Imposition of Make-Whole Relief

Imposition of make-whole relief is not automatic. However, when an employer unreasonably pursues litigation, in an attempt to thwart the collective bargaining process after a fair election, make-whole relief is appropriate.[39] The ALRB determined that Lindeleaf's refusal to bargain was not in good faith and his pursuit of judicial review either lacked evidential support or had little or no effect on the outcome of the election. Under the circumstances, the court concluded that the ALRB did not abuse its discretion in imposing make-whole relief and awarding employees compensation for their economic loss.

IV. DISSENT

The only issue addressed by the dissent[40] was the imposition of make-whole relief. Justice Panelli noted that the majority imposed such relief on the basis that Lindeleaf's refusal to bargain was not in good faith. He pointed out that a majority on the panel of the court of appeal agreed with Lindeleaf, annulling the UFW certification. Therefore, he contended it was "incongruous to say that Lindeleaf pursued judicial relief in bad faith,"[41] and inappropriate to grant make-whole relief, absent other justification.

V. CONCLUSION

Even though the administrative regulation was narrower than the labor statute, the supreme court held that the ALRB could appoint

35. 41 Cal. 3d at 878, 718 P.2d at 117, 226 Cal. Rptr. at 130 (*quoting* Toste Farms, Inc., 1 ALRB No. 16, 3 (1975)).

36. *Id.* at 879, 718 P.2d at 117, 226 Cal. Rptr. at 130.

37. *Id.* at 879, 718 P.2d at 117-18, 226 Cal. Rptr. at 130-31.

38. *Id.* at 879, 718 P.2d at 118, 226 Cal. Rptr. at 131.

39. *Id.* at 880, 718 P.2d at 118, 226 Cal. Rptr. at 131; *see* Comment *Make-Whole Relief Under the California Agricultural Labor Relations Act: The Ex-Cell-O Doctrine Revisited*, 21 SANTA CLARA L. REV. 1069 (1982).

40. 41 Cal. 3d at 881, 718 P.2d at 119, 226 Cal. Rptr. at 132. (Panelli, J., dissenting).

41. *Id.*

independent hearing officers to conduct hearings to determine whether or not an election of a bargaining agent should be certified. They further held that the hearing officer could make findings of facts, conclusions of law, and recommendations of disposition. Furthermore, the court held that in order for the regional director of the NLRB to review alleged misconduct, the complaining party must show a prima facie case that would warrant setting aside the election.

STEPHANIE FANOS

C. *Medical housestaff paid by the Regents of the University of California participating in their residency programs are employees entitled to collective-bargaining rights:* Regents of the University of California v. Public Employment Relations Board.

INTRODUCTION

In *Regents of the University of California v. Public Employment Relations Board*,[1] the California Supreme Court interpreted subdivision (f) of section 3562 of the California Government Code[2] [hereinafter section 3562(f)] to include medical house staff for consideration as employees within the meaning of the Higher Education Employer-Employee Relations Act [hereinafter HEERA or the Act].[3] The court thereby affirmed the administrative decision of the Public Employment Relations Board [hereinafter PERB or the Board][4] that house

1. 41 Cal. 3d 601, 715 P.2d 590, 224 Cal. Rptr. 631 (1986). The opinion was written by Chief Justice Bird. Justices Mosk, Broussard, and Reynoso concurred. A separate dissenting opinion was written by Justice Campbell Lucas with which Justice Malcolm Lucas concurred. Justice Campbell Lucas was assigned by the chairperson of the Judical Council.

2. CAL. GOV'T CODE § 3562(f) (West Supp. 1986). This section provides:

> "Employee" or "higher education employee" means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or the Board of Trustees of the California State University, whose employment is principally within the State of California. However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

Id. Section 3562(f) is a part of the Higher Education Employer-Employee Relations Act. CAL. GOV'T CODE §§ 3560-99 (West Supp. 1986).

3. CAL. GOV'T CODE §§ 3560-99 (West Supp. 1986).

4. The Public Employment Relations Board is an independent California state agency established pursuant to section 3541 of the California Government Code and

staff[5] participating in the University[6] residency programs were employees entitled to collective-bargaining rights because (1) the participants' educational objectives were subordinate to the services they provide and (2) granting them collective-bargaining rights would further the purposes of HEERA.[7]

II. FACTUAL BACKGROUND

HEERA, enacted in 1978 and effective July 1, 1979, enlarged the number of individuals entitled to collective-bargaining rights to include employees of the University of California, Hastings College of the Law and the California State University [hereinafter the University].[8] As a result, the University refused to recognize house staff as employees required under HEERA. The University recognized house staff as students only, thereby precluding any collective-bargaining rights.

A hearing before the PERB ensued, and on February 14, 1983, after heated debate, the Board concluded that house staff were employees within the meaning of HEERA. As a result, the Board held that house staff were entitled to collective-bargaining rights. The Board issued a Cease and Desist Order against the University and instructed the University to acknowledge and accept the status of house staff as employees.

The University sought a Writ of Review to vacate the decision of the PERB pursuant to section 3564 of the California Government Code.[9] The court of appeal annulled the Board's decision and remanded with direction.[10] The California Supreme Court granted the writ to review the matter, superseding the opinion of the court of appeal, and affirmed the Board's conclusion.

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consists of five members. CAL. GOV'T CODE § 3541 (West Supp. 1986). The Board has the power to conduct studies relating to employer-employee relations and determine employer-employee disputes regarding wages, hours, and other conditions of employment between public and state employee organizations. CAL. GOV'T CODE §§ 3512, 3541, 4541.3 (West Supp. 1986).

5. Medical interns, residents, and clinical fellows paid by the university in which the individual participates. *Public Employment Relations Bd.*, 41 Cal. 3d at 604 n.1, 715 P.2d at 591 n.1, 224 Cal. Rptr. at 632 n.1.

6. The "University" refers to the University of California, Hastings College of the Law, and the California State University.

7. *Public Employment Relations Bd.*, 41 Cal. 3d at 601, 715 P.2d at 590, 224 Cal. Rptr. at 631.

8. The University operates medical schools at five of its campuses: San Francisco (UCSF), Los Angeles (UCLA), Davis (UCD), Irvine (UCI), and San Diego (UCSD). For a comprehensive study on this subject see Brownstein, *Medical Housestaff: Scholars or Working Stiffs? The Pending PERB Decision*, 12 PAC. L.J. 1127 (1981).

9. CAL. GOV'T CODE § 3564(c) (West 1980).

10. *Regents of University of California v. Public Employment Relations Bd.*, 158 Cal. App. 3d 688, 205 Cal. Rptr. 49 (1984).

III. THE MAJORITY OPINION

The first issue resolved by the court was whether HEERA barred house staff from being considered employees. In its analysis the court reviewed both the statutory language and legislative intent behind HEERA. The court held that the statute's language left open the potential for house staff to fall within its scope, and that the legislature's intent was for the Board to make the ultimate decision as to the status of a particular student.

The court made reference to the legislative history behind HERRA, and focused on the language, and lack thereof, of the bill first introduced.[11] This bill contained no reference to students and was subsequently amended to exclude students who worked less than ten hours a week from coverage under HEERA.[12] The final bill [13] eliminated this distinction and instead required case-by-case analysis of the relationship between a student's educational objectives and his or her employment. Because HEERA did not specifically exclude house staff, the majority concluded that HEERA could, in fact, have included them.

The dissent strongly argued that HEERA ought to be construed like the National Labor Relations Act [hereinafter NLRA][14] which has been interpreted in a number of cases to provide that interns and residents are primarily students rather than employees.[15] The majority opinion explained that section 3562(f) clearly indicated the legislature's intent to create new criteria for ascertaining house staff employee status, rather than to incorporate the National Labor Relations Board [hereinafter NLRB] precedent and deny such status. Further, "its creation of a statutory standard distinct from NLRB precedent was intended to permit PERB to make an independent determination of the status of housestaff [sic]."[16]

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11. Assem. Bill No. 1091 (1977-78 Reg. Sess.) (Mar. 24, 1977).

12. Assem. Amend. to Assem. Bill No. 1091 (1977-78 Reg. Sess.) (May 23, 1977).

13. Sen. Amend. to Assem. Bill No. 1091 (1977-78 Reg. Sess.) (Aug. 7, 1978).

14. In 1935 Congress passed the National Labor Relations Act. 29 U.S.C. §§ 151-69 (1976). This Act remains the cornerstone of labor relations policy and specifically gives employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives . . . for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1976). The NLRA created an administrative agency, the National Labor Relations Board (NLRB), to enforce the statute.

15. St. Clare's Hospital, 229 N.L.R.B. 1000 (May 26, 1977); Cedars-Sinai Medical Center, 223 N.L.R.B. 251 (Mar. 23, 1976).

16. *Public Employment Relations Bd.*, 41 Cal. 3d at 609, 715 P.2d at 595, 224 Cal. Rptr. at 636.

The court addressed the parallel construction of the two Acts by distinguishing the facts. In the past, the NLRB cases addressing house staff employee status focused on the house staff's subjective intent in participating in medical residency programs with little attention paid to the actual services performed. Using a "primary purpose" test, the NLRB determined that a house staff's general purpose was scholastic rather than compensatory, and consequently refused to extend employee status. The NLRB concluded that students employed by their own educational institutions either (1) in a capacity unrelated to their course of study or (2) in a capacity directly related to their educational program were not entitled to collective-bargaining rights.[17]

The majority concentrated on the language of section 3562 (f). This section provides in part that:

> The [B]oard may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.[18]

Section 3562(f)'s language infers a similar classification scheme to that which the NLRB uses, but the court stated that HEERA, as opposed to NLRA, "*expressly* permits PERB to find students in both categories [outlined above] *entitled* to collective bargaining rights in appropriate circumstances."[19] "Thus, in defining 'employees' under HEERA, the Legislature specifically rejected the NLRB rulings."[20] It was the later portion of section 3562(f) which governed this case: "that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter."[21]

The court concluded that under NLRB decisions, the issue was whether the student's objectives were primarily educational, regardless of the services performed. Alternatively, under HERRA, the issues are whether the student's academic goals are subordinate to the services provided, and if so, whether granting collective-bargaining rights would further the purposes of HEERA regardless of the house staff's educational motive. Hence, both the individual's goals and the services performed must be considered.

The court reinforced its determination that HEERA did not intend to exclude house staff from employee status consideration by refer-

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17. St. Clare's Hospital, 229 N.L.R.B. at 1000-02.

18. CAL. GOV'T CODE § 3562(f) (West Supp. 1986).

19. *Public Employment Relations Bd.*, 41 Cal. 3d at 612, 715 P.2d at 597, 224 Cal. Rptr. at 638 (emphasis in original).

20. *Id.*

21. CAL. GOV'T CODE § 3562(f) (West Supp. 1986).

ring to section 3562(o)(1) of the California Government Code.[22] This section defines a "professional employee" which the court found to clearly encompass house staff.

The court concluded that HEERA did not exclude house staff from employee status consideration. Chief Justice Bird then turned to the second issue: whether there was substantial evidence to support the Board's decision that the house staff's educational objectives are subordinate to the services rendered, and if so, whether granting them collective-bargaining rights furthers the purposes of HEERA.

When reviewing an administrative judgment, the court has a duty to act with deference.[23] HEERA requires that the Board's findings of fact be conclusive if supported by substantial evidence on the record as a whole.[24] Thus, judicial review is limited. In this case, the Board's substantial evidence included the following: (1) the importance of patient care to the hospital, (2) the substantial time house staff spent on direct patient care and outside clinical activities,[25] (3) the amount of medical procedures performed without supervision, and (4) specific characteristics of employment that identify house staff as employees rather than students.[26] Based on the Board's evi-

22. CAL. GOV'T CODE § 3562(o)(1) (West Supp. 1986) provides:

> "Professional employee" means: (1) [a]ny employee engaged in work: (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

Id.

23. *Public Employment Relations Bd.*, 41 Cal. 3d at 617, 715 P.2d at 600-01, 224 Cal. Rptr. at 641-42.

24. *Id.* at 617, 715 P.2d at 601, 224 Cal. Rptr. at 642. *See also* CAL. GOV'T CODE § 3564(c) (West 1980).

25. More than 75 percent of an 80-100 hour week is usually spent in direct patient care. *Public Employment Relations Bd.*, 41 Cal. 3d at 619, 715 P.2d at 602, 224 Cal. Rptr. at 643.

26. House staff are considered employees for tax purposes. *Id.* at 620 n.18, 715 P.2d at 602 n.18, 224 Cal. Rptr. at 643 n.18. House staff also receive fringe benefits including paid vacations and medical coverage. *Id.* at 620, 715 P.2d at 603, 224 Cal. Rptr. at 644. In addition, house staff pay no tuition or student fees, do not take University examinations on a regular basis, receive no grades and receive no degrees upon completion of the program. *Id.* It is interesting to note, however, that house staff are eligible for financial aid and, for purposes of such aid, their status is that of students enabling them to defer payment of the loan.

dence, the court deferred to the Board's finding that educational objectives are subordinate to the services they perform.

In determining whether according house staff collective-bargaining rights would further the purposes of HEERA, the court focused on the legislative intent behind HEERA. "In enacting HEERA, the Legislature found that the people of this state 'have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees.' "[27] Wages, hours, and working conditions are substantial employment concerns, which the court held "are manifestly amenable to collective negotiations and have a direct and primary impact on the employment relationship of housestaff [sic] with the University."[28]

The University argued that according house staff collective-bargaining rights may lead to strikes. Rejecting this contention, the court emphasized the widely accepted holding in *San Diego Teacher Association v. Superior Court*[29] that collective-bargaining rights are an alternative dispute resolution mechanism which diminish the probability that vital services will be interrupted.[30] The court thereby affirmed the Board's determination that by allowing house staff collective-bargaining rights, the purposes of HEERA would be furthered because house staff could directly partake in the determination of their working environment and such rights would provide a viable mechanism for resolving disputes.

IV. THE DISSENTING OPINION

Justice Lucas[31] contended in a separate dissenting opinion that the Board abused its discretion by inadequately interpreting section 3562(f). The majority, he argued, added to this error by interpreting the plain meaning of section 3562(f) to create a "substantial evidence" test.[32] Justice Lucas believed that the California Legislature enacted section 3562(f) to define "employees" consistent with the language contained in the NLRA. Therefore, following NLRB precedent, the "primary purpose" test should have been invoked, rather than the "substantial evidence" test. The appropriate disposition of

27. *Public Employment Relations Bd.*, 41 Cal. 3d at 622, 715 P.2d at 604, 224 Cal. Rptr. at 645. *See also* CAL. GOV'T CODE § 3560(a) (West Supp. 1986).

28. *Public Employment Relations Bd.*, 41 Cal. 3d at 622, 715 P.2d at 604, 224 Cal. Rptr. at 645.

29. 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

30. *Id.* at 8-9, 13, 593 P.2d at 843, 846, 154 Cal. Rptr. at 898, 901.

31. Justice Campbell Lucas is an Associate Justice of the court of appeal, second appellate district, assigned to the supreme court by the Chairperson of the Judicial Council.

32. *Public Employment Relations Bd.*, 41 Cal. 3d at 624-25, 715 P.2d at 606, 224 Cal. Rptr. at 646 (C. Lucas, J., dissenting).

the case, therefore, should have been to issue a Writ of Mandate ordering the Board to vacate its decision and issue a new decree.

Justice Lucas concentrated on NLRB disputes, which held house staff to be "students" rather than "employees." He argued that even though the house staff in these cases also showed indicia of employment and similar resident activities which the Board found determinative in this case, these factors were irrelevant in ultimately determining house staff employee status.

Quoting the NLRB's findings in *Cedars-Sinai Medical Center*,[33] Justice Lucas purported to explain his position: "[i]nterns, residents and clinical fellows are primarily engaged in graduate educational training . . . their status is therefore that of students rather than employees . . . . They participate in these programs not for the purpose of earning a living . . . [but] to pursue the graduate medical education that is a requirement for the practice of medicine . . . . Their choice [of program is] based on the quality of the educational program," and not on the salary provided.[34] Furthermore, Justice Lucas believed that national labor policy precluded the extension of collective-bargaining rights to these individuals.

While Justice Lucas agreed with the majority opinion that subdivision (f) permits the Board to deviate from NLRB precedent and find particular students to fall within HEERA, he believed that house staff are not such students. Justice Lucas believed that HEERA clearly dictated that the *student's* educational objectives and intention in rendering the services required should be the primary focus rather than the majority's view of weighing educational objectives against services performed. Moreover, Justice Lucas criticized the Board's emphasis on a student's educational benefits when the statute specifically requires analysis of a student's educational *objectives*, not *benefits*.[35] Under the majority's approach, the "substantive evidence" test affirms the Board's administrative decision that services performed outweigh educational objectives, according house staff collective-bargaining rights. Under Justice Lucas' approach, the "primary purpose" test found that scholastic motive outweighed economic motive, denying house staff collective-bargaining rights.

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33. 233 N.L.R.B. 251 (Mar. 23, 1976).

34. *Public Employment Relations Bd.*, 41 Cal. 3d at 629, 715 P.2d at 609, 224 Cal. Rptr. at 649-50 (C. Lucas, J., dissenting) (quoting Cedars-Sinai Medical Center, 223 N.L.R.B. at 253).

35. *Public Employment Relations Bd.*, 41 Cal. 3d at 649-50, 715 P.2d at 623, 224 Cal. Rptr. at 664 (C. Lucas, J., dissenting).

V. CONCLUSION

Chief Justice Bird's holding that medical house staff are employees entitled to collective-bargaining rights was in direct conflict with the NLRB precedent. The issue was really one of semantics. While HEERA may justify this analysis of section 3562(f), according house staff the right to bargain with their employer-hospital may prove deleterious to the high standard of medical care presently provided to their patients.

ARIAN COLACHIS

VIII. TORTS

A. *If special circumstances are present, machinery owners owe a duty of due care to third persons, to protect against injuries occuring as a result of the vehicle's operation:* **Ballard v. Uribe.**

I. INTRODUCTION

In *Ballard v. Uribe*,[1] the California Supreme Court held that a machinery owner owed a duty of care to prevent injury to third persons resulting from the operation of a vehicle, upon a finding that special circumstances were present. In doing so, the court sidestepped addressing the *Richards v. Stanley*[2] rule of nonliability and reaffirmed the utility of the special circumstances exception. The court declined to address the issue of juror misconduct giving rise to verdict impeachment by finding an insufficient record upon which to review.

II. FACTUAL SUMMARY

The defendant and the plaintiff were both employed by the Guy F. Atkinson Company at the time of the December 1975 injury. The defendant performed services as a subcontractor. These services included bringing his aerial manlift to the construction site.[3] The defendant noticed in November or December of 1975 that the stabilizing cable, attached to the basket in which workmen were raised and lowered, was "frayed and broken."[4] In anticipation of his absence

1. 41 Cal. 3d 564, 715 P.2d 624, 224 Cal. Rptr. 664 (1986). Justice Grodin wrote for the court with Justices Broussard and Reynoso concurring. Separate concurrences were authored by Justices Mosk and Lucas. Chief Justice Bird wrote a separate concurring and dissenting opinion.

2. 43 Cal. 2d 60, 271 P.2d 23 (1954). *See* Note, *Torts: The Key in the Ignition and California's "Special Circumstances" Doctrine*, 38 S. CAL. L. REV. 125 (1965). *See also* 5 WEST'S CALIFORNIA DIGEST 2D *Automobiles* §§ 173(8), 192(1) (1981).

3. *Ballard*, 41 Cal. 3d at 568, 715 P.2d at 625-26, 224 Cal. Rptr. at 666.

4. *Id.* at 569, 715 P.2d at 626, 224 Cal. Rptr. at 666.

from the site, he contacted Atkinson's project manager, Boli, for permission to leave the lift in Atkinson's fenced yard until his return.

A conflict in testimony arose at this point. Boli testified that he asked the defendant for permission to use the equipment and, after being informed of the defect, offered to have it repaired. He further stated that the defendant agreed to its use after repair. The defendant, however, stated that he "never gave permission," but on another occasion admitted giving permission for use after repair.[5]

The defendant failed to lock the control box, left keys in both engines, and did not post warning signs as to the defect.[6] Atkinson's mechanic testified that he removed the broken cable and was awaiting a replacement part when the injury occurred. On December 11, 1975, the plaintiff used the aerial manlift, unaware of its defective condition, and was ejected, suffering injuries.[7]

The issues were bifurcated, separating the determinations as to liability and damages. The trial court instructed the jury on two alternative theories of liability. At trial, the jury found for the plaintiff on the issue of liability, and a second jury awarded the plaintiff $200,000 in damages. The defendant appealed the liability determination and the plaintiff cross appealed the award of damages.[8]

III. ANALYSIS

The court was confronted with two issues requiring resolution. First, given these facts, must a duty of due care be imposed upon a vehicle owner, owing to a third party, when special circumstances exist, creating a reasonably foreseeable risk of harm resulting from operation of the vehicle? Second, is impeachment of a jury verdict proper under these circumstances?

The court began its analysis by addressing the defendant's first contention of error, namely the issuance of two separate jury instructions. Instruction one[9] explained the duty of care applicable to a

5. *Id.*

6. *Id.*

7. There was disputed testimony as to whether the mechanic, following removal of the cable, "tied down" the basket to compensate for the missing part. *Id.* at 570 n.1, 715 P.2d at 626 n.1, 224 Cal. Rptr. at 667 n.1.

8. *Id.* at 568, 715 P.2d at 625, 224 Cal. Rptr. at 666.

9. The bailor/bailee instruction read in pertinent part:

> When one gives possession and the right to use personal property to another and the latter agrees to return the same property to him at a future time, the transaction is known in law as a bailment . . . . The bailor has a duty to those whom he should expect to use the property . . . .

bailor-bailee relationship, specifically in situations where "one gives possession *and the right to use* personal property of another."[10] The second instruction[11] dealt with situations involving unauthorized use and imposed a duty if special circumstances were present. The court found both instructions were warranted, basing its determination upon the defendant's presentation of contradictory evidence as to his granting of use privileges.

The court next addressed the defendant's contention that the "special circumstances" doctrine was inapposite to the facts in this case, and as such should not have been used to instruct the jury on the principles of liability involving unauthorized use.[12] This doctrine arose as an exception to *Richards v. Stanley*,[13] which established that a defendant owed no duty to "protect plaintiff from harm resulting from the activities of third persons . . . ."[14] The case involved the theft of the defendant's automobile following her failure to remove the keys, which resulted in injury to a third person. *Richards* alluded to the possibility that such a duty may be imposed.

In a series of cases following the *Richards* decision, the court began to carve out exceptions that allowed the imposition of this duty upon a vehicle owner. *Richardson v. Ham*,[15] held that "[t]he extreme danger created . . . and the foreseeable risk of intermeddling fully justif[ies] imposing a duty on the owner to exercise reasonable care to protect third parties from injury . . . ."[16] *Richardson* involved the unauthorized use of bulldozers by youths resulting from the defendant's failure to adequately lock the ignition system. *Hergenrether v. East*,[17] held that the issue of the existence of special circumstances

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Id. at 570 n.2, 715 P.2d at 627 n.2, 224 Cal. Rptr. at 667 n.2.

10. *Id.* at 571, 715 P.2d at 627, 224 Cal. Rptr. at 668 (emphasis in original).

11. Special Instruction Number 5 stated in pertinent part:

> In the absence of special circumstances an owner of a vehicle has no duty to control the conduct of third persons resulting from the keys having been left in the vehicle.
>
> However, where the owner knew or should have known of special circumstances which create a reasonably foreseeable risk of harm from the use or operation of the vehicle, if the keys are left in the vehicle, then the owner of the vehicle has a duty to use reasonable care to protect the general public from such risks.

Id. at 571 n.3, 715 P.2d at 627 n.3, 224 Cal. Rptr. at 667-68 n.3.

12. *Id.* at 572, 715 P.2d at 628-29, 224 Cal. Rptr. at 668-69.

13. 43 Cal. 2d 60, 271 P.2d 23 (1954). *See* Annot., 51 A.L.R. 2d 633 (1953); Annot., 92 A.L.R. 2d 1326 (1963); Annot., 45 A.L.R. 3d 787 (1972).

14. *Richards*, 43 Cal. 2d at 66, 271 P.2d at 27.

15. 44 Cal. 2d 772, 285 P.2d 269 (1955). *See* 46 CAL. JUR. 3D *Negligence* § 13 (1978); 8 CAL. JUR. 3D *Automobiles* § 450 (1973). *See also* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 490, 545, 645 (8th ed. 1974 & Supp. 1984).

16. *Richardson*, 44 Cal. 2d at 776, 285 P.2d at 271.

17. 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964). *See* Note, *Torts: Negligence: Car Owner Leaving Key in Vehicle has a Duty to Third Person Injured by Thief*, 12 UCLA L. REV. 1260 (1965); Note, *Torts: Owner's Liability — Leaving Ignition Keys in*

should be determined by considering each case on its own facts, and if the foreseeable risk of harm was unreasonable, the owner owed a duty of due care to third persons to prevent injurious conduct.[18] In *Palma v. U.S. Industrial Fasteners, Inc.*,[19] the court reversed a summary judgment and remanded the case, noting that factors which established a duty in *Hergenrether*, were also present in the case at hand.[20] Further, the court specified that the conclusion drawn in *Hergenrether* may be appropriate, specifically that "a foreseeable risk of harm was posed by the truck left with its keys in the ignition . . . warranting imposition of a duty on the owner . . . to . . . third persons . . . ."[21]

The court found that the facts presented in this case fit squarely within the special circumstances exception, finding *Richardson* established that "the significant danger posed by the unauthorized use of heavy construction machinery warrants recognition of a duty on the part of machinery owners to use due care to prevent the injurious misuse of the machinery by others."[22] The application of this doctrine to the owner of an aerial manlift is analogous to its application in *Richardson*, where the vehicle involved was a bulldozer. The defendant's contention that the facts were distinguishable and thus no duty should be imposed was without merit. The fact that he left the machinery in a fenced area did not negate the general duty that attached. The court found that minimizing the potential injury to a third person was a factor by which the jury could find the defendant not negligent, but not the basis for finding that no duty was owing.[23]

The court discussed the functional roles of both the trial court and jury in applying the special circumstances exception.[24] The court

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Unattended and Unlocked Vehicle: Hergenrether v. East, 5 SANTA CLARA L. REV. 91 (1964).

18. *Hergenrether*, 61 Cal. 2d at 445, 393 P.2d at 167, 39 Cal. Rptr. at 7.

19. 36 Cal. 3d 171, 681 P.2d 893, 203 Cal. Rptr. 626 (1984). The facts in *Palma*, analogous to those in *Hergenrether* that led to a finding of special circumstances, included: (a) area where the vehicle was left, (b) intent for vehicle to remain for extended period of time, (c) keys left in ignition, and (d) the fact that the ability to safely operate the vehicle was not common knowledge to many. *Id.*

20. *Id.* at 185, 681 P.2d at 902, 203 Cal. Rptr. at 635.

21. *Id.*

22. *Ballard*, 41 Cal. 3d at 573, 715 P.2d at 629, 224 Cal. Rptr. at 669.

23. *Id.*

24. The parameters of the jury and court in regard to the special circumstances exception in *Richardson* and *Hergenrether* become confused because of the foreseeability factor. Foreseeability of harm is a factor to be utilized by the court in making a general finding whether the "negligent conduct at issue is sufficiently likely to result in the kind of harm experienced . . .[,]" thus imposing a duty. Whereas, the foresee-

agreed with the defendant's contention that *Richardson* and *Hergenrether* offer guidance as to when a duty arises, an issue to be determined by the court, not the jury. However, the court found that the trial court's error in submitting the issue of duty to the jury was not prejudicial, as the defendant had a clearly established duty.[25] The defendant's final contention, that there was insufficient evidence to support a finding of negligence and that the trial court erred in submitting this issue to the jury, was found to be unsubstantiated.[26]

In reaching all issues presented, the court addressed plaintiff's cross appeal. The plaintiff alleged juror misconduct, and requested impeachment of the jury verdict. The court held that the plaintiff failed to provide an adequate record upon which to review the trial court's finding. Thus, no further consideration as to the merits of this contention was required.[27] All three supporting opinions found this issue ripe for discussion.

IV. CONCURRENCES AND DISSENTS

Justice Mosk, concurring, strongly criticized the "incipient trend . . . of losing parties attempting to impeach jury verdicts."[28] He distinguished juror affidavits offered in support of impeachment as representative of two different concerns, either subjective or objective. Allowing jurors to attest to subjective concerns, as a basis for jury misconduct and impeachment, "would be a grave disservice to the integrity of the jury system . . . ."[29] He stated that *People v. Hutchinson*[30] was binding, which held that "jurors are competent witnesses to prove *objective facts* to impeach a verdict . . . ."[31] Objective facts are exemplified by the following: a) the intrusion of the bailiff into deliberation,[32] b) an alternate juror sitting with the deliberating jurors,[33] c) the foreman contacting an attorney for advice,[34] and d) a

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ability issue within the province of the jury relates to "focused, fact-specific settings," looking specifically to the actions of the plaintiff and defendant. *Id.* at 572-73 n.6, 715 P.2d at 628-29 n.6, 224 Cal. Rptr. at 669 n.6.

25. *Id.* at 572-73, 715 P.2d at 628-29, 224 Cal. Rptr. at 669.

26. *Id.* at 573-74, 715 P.2d at 629, 224 Cal. Rptr. at 670.

27. *Id.* at 574-75, 715 P.2d at 629-30, 224 Cal. Rptr. at 670.

28. *Id.* at 575, 715 P.2d at 630, 224 Cal. Rptr. at 670 (Mosk, J., concurring).

29. *Id.* at 577, 715 P.2d at 632, 224 Cal. Rptr. at 672 (Mosk, J., concurring).

30. 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969).

31. *Ballard*, 41 Cal. 3d at 575-76, 715 P.2d at 630-31, 224 Cal. Rptr. at 671 (Mosk, J., concurring) (emphasis in original) (quoting People v. Hutchinson, 71 Cal. 2d 342, 351, 455 P.2d 132, 137-38, 78 Cal. Rptr. 196, 201-02 (1969)).

32. *Hutchinson*, 71 Cal. 2d at 351, 455 P.2d at 137-38, 78 Cal. Rptr. at 201-02.

33. People v. Valles, 24 Cal. 3d 121, 123, 593 P.2d 240, 240-41, 154 Cal. Rptr. 543, 543-44 (1979).

34. People v. Honeycutt, 20 Cal. 3d 150, 154-55, 570 P.2d 1050, 1051-52, 141 Cal. Rptr. 698, 699 (1977).

juror providing instruction as to the law.[35]

Justice Lucas concurred with Justice Mosk, but restated his disagreement with the holding in *In re Stankewitz*,[36] which found juror misconduct and held that one juror's providing instruction as to the law was an "objective concern."

Chief Justice Bird, in a lengthy dissent, affirmed the majority's holding that the trial court did not err in giving alternative instructions.[37] Finding that the record contained sufficient evidence to indicate either authorized or unauthorized use, instructions in the alternative were proper.

In a historical progression, the Chief Justice analyzed and distinguished the nonliability doctrine arising out of *Richards v. Stanley*, and its progeny that carved out the special circumstances exception. She concluded that resolution in this case did not require ascertaining the continuing viability of the *Richards* rule, noting, however, that "if the question were squarely presented . . . I [C.J. Bird] would overrule the *Richards* no-duty rule."[38]

In finding the special circumstances doctrine inapplicable, she distinguished the facts presented in this case from those in the cases that developed the doctrine. Specifically, this case involved: a) a risk of harm arising from a hidden defect, b) a plaintiff that is the operator, not a third party injured as a result of an operator's negligence, c) a plaintiff that is not a thief, and d) the defendant could foresee a risk of harm to the plaintiff, whereas in prior cases no foreseeable risk existed, "absent the intervening negligence of a third party."[39] The Chief Justice repudiated the *Richards* analysis to the extent that findings of "foreseeability of the risk" and "unreasonableness of the risk" are treated as separate determinations.[40]

Launching into the second issue of the plaintiff's cross appeal, the Chief Justice, finding juror misconduct, stated that "the presumption of a prejudice requires reversal of that portion of the judgment re-

35. In re Stankewitz, 40 Cal. 3d 391, 396, 708 P.2d 1260, 1261, 220 Cal. Rptr. 382, 383 (1985), *modified*, 41 Cal. 3d 439(a) (1986).

36. *Id.*

37. *Ballard*, 41 Cal. 3d at 589, 715 P.2d at 640, 224 Cal. Rptr. at 680 (Bird, C.J., concurring and dissenting).

38. *Id.* at 586 n.11, 715 P.2d at 638 n.11, 224 Cal. Rptr. at 678 n.11 (Bird, C.J., concurring and dissenting).

39. *Id.* at 587, 715 P.2d at 638-39, 224 Cal. Rptr. at 679 (Bird, C.J., concurring and dissenting).

40. *Id.* at 588-89, 715 P.2d at 640, 224 Cal. Rptr. at 680 (Bird, C.J., concurring and dissenting).

flecting the verdict for damages. . . ."[41] She asserted that the affidavits presented created a rebuttable presumption of prejudice which neither the defendant nor the reviewing court rebutted and, thus, a new trial should ensue. She discounted the majority's reliance on insufficient record by finding that the plaintiff's attorney's statements regarding voir dire were an effective substitute for transcripts.[42] In conclusion, the Chief Justice addressed the issues presented in Justice Mosk's concurring opinion.

V. IMPACT

The majority opinion does little more than add to the list of "exceptions" to the non-liability doctrine established in *Richards*. It also refrained from addressing the tempting issue of "verdict impeachment." In taking a middle-of-the-road approach to both issues, the court avoids controversy yet does little to enhance the state of the law in either area.

PAMELA JOAN MINETTO

B. *Absent legislative authority to create an independent action for malicious or frivolous appeal for the purpose of delay, an aggrieved party's remedy is contained in section 907 of the Civil Procedure Code:* **Coleman v. Gulf Insurance Group.**

The plaintiffs in *Coleman v. Gulf Insurance Group*, 41 Cal. 3d 782, 718 P.2d 77, 226 Cal. Rptr. 90 (1986), obtained a $350,000 judgment against the City of Monrovia [hereinafter the City] for a wrongful death action. Subsequently, the City, who was insured by Gulf Insurance Group, appealed the lower court's decision; during the pendency of that appeal, however, the parties settled for a reduced amount of $300,000. Thereafter, the plaintiffs filed suit for frivolous appeal, asserting that the City knew an appeal would be unsuccessful, but filed the appeal in order to delay payment and force the plaintiffs to settle. Thereafter, plaintiffs attempted to create a new and separate action for malicious appeal instigated for the purpose of delay supported by four legal theories: (1) abuse of process, (2) malicious prosecution of appeal, (3) breach of covenant of good faith and fair dealing, and (4) violation of section 790.03(h)(5) of the Insurance Code. Heretofore, an action for malicious appeal based on these contentions had never been recognized.

41. *Id.* at 595-96, 715 P.2d at 645, 224 Cal. Rptr. at 685 (Bird, C.J., concurring and dissenting).

42. *Id.* at 593-94, 715 P.2d at 642-43, 224 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

The court declared that malicious filing of an appeal for the purpose of delay subjects the appellant to legislatively created sanctions. Section 907 of the Civil Procedure Code provides the following: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, . . . [the appellate court] may add to the costs on appeal such damages as may be just." CAL. CIV. PROC. CODE § 907 (West 1980). Since the plaintiffs failed to assert section 907 at the beginning or during the pendency of the defendant's appeal, the plaintiffs were denied further damages.

The court relied on its earlier decision in *In re Marriage of Flaherty*, 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982), which focused on the difficulty in discerning frivolous appeals from nonfrivolous appeals. In an effort to gauge damages to avoid the deterrence of legitimate appeals, the court in *Flaherty* emphasized that the appellate judge is in the best position to assess the unworthiness of the appeal. Based on its decision in *Flaherty*, the court determined that this independent action requested by the plaintiffs would require the imposition of a lay jury whose decision would be inferior to that of the appellate judge where the alleged meritless appeal was originally filed.

Next, the court established that the plaintiffs' first proposed theory for abuse of process was without merit. A cause of action for abuse of process requires an improper motive and a willful act committed in an unlawful manner. The court sustained plaintiffs' proof of the first element, finding that defendant's ulterior motive in filing the appeal was to delay payment of the judgment and subsequently settle for less. The court, however, rejected plaintiffs' contention as to the second element and held that the defendant merely exercised his right to appeal by using the process for its proper purpose in an authorized manner.

The court rejected the plaintiffs' second alternative theory for malicious prosecution of appeal. One essential element for the tort of malicious prosecution is that the prior action be instigated by or at the direction of the present defendant. However, the holding in *Bertero v. National General Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974), seemed to suggest that a malicious cross-complaint by a defendant in the original action could be subject to this tort. The court distinguished this case from *Bertero* by stating that "cross pleadings are treated as distinct and independent actions," while an appeal is not a separate proceeding, but rather "the continuation of

an attempt 'to repel' plaintiff's attack." *Coleman*, 41 Cal. 3d at 794, 718 P.2d at 83, 226 Cal. Rptr. at 96.

The plaintiffs' third argument stated that the defendant's insurance company breached the covenant of good faith and fair dealing implied by law in every insurance contract. The court quickly rejected the plaintiffs' claim and stated that since the plaintiffs were not the contracting parties, but rather independent third parties, an action could not be sustained.

The last argument presented was that the plaintiffs' claim should be supported by section 790.03(h)(5) of the Insurance Code. This section places a duty on an insurer to attempt in good faith to settle claims in which liability is "reasonably clear." CAL. INS. CODE § 790.03(h)(5) (West Supp. 1986). The court held that the plaintiffs were not entitled to maintain this claim since liability had already been established when the plaintiffs' judgment was rendered. The court contended that this section applied only to an insurer's prejudgment actions.

After thorough analysis of the theories presented by the plaintiffs to create an independent action and thereby avoid the statutory sanctions already available, the supreme court concluded that the plaintiffs' theories could not be sustained and that their sole remedy for a frivolous appeal lay in section 907 of the Civil Procedure Code.

ARIAN COLACHIS