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Emerging Trends in California Jurisprudence: The First Three Years of the Sixth District Court of Appeal

Russell J. Hanlon*

I. INTRODUCTION TO THE SIXTH DISTRICT COURT OF APPEAL

On November 19, 1984, the Sixth District Court of Appeal of the State of California opened its doors in downtown San Jose to entertain and decide appeals and writ petitions. The Sixth District was carved out of the First District Court of Appeal to review cases which were generated from four counties: Santa Clara, Santa Cruz, Monterey and San Benito.

The three original justices appointed to the new court came from the three largest counties within the Sixth District. Justice Edward A. Panelli assumed the Presiding Justice position on September 13, 1984. He had served as a Santa Clara County Superior Court Judge from March 17, 1972, to October 3, 1983, and as an Associate Justice on the First District Court of Appeal from October 3, 1983, until September 13, 1984. Justice Nat A. Agliano became an Associate Justice on November 2, 1984. He had been a Monterey County Municipal Court Judge from October 1, 1971, to March 15, 1972, and a Monterey County Superior Court Judge from March 16, 1972,

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2. Id. at 423-24.
3. Id. at 119.
until November 2, 1984. Justice Harry F. Brauer also assumed the office of Associate Justice on November 2, 1984. He had considerable judicial experience, beginning with his service as a Santa Cruz County Municipal Court Judge from January 2, 1962, to January 2, 1973, and continuing with his service as a Santa Cruz County Superior Court Judge from January 2, 1973, until November 2, 1984.

A little over a year after the court began to operate, the Sixth District experienced its first change in personnel. On December 24, 1985, Justice Panelli was elevated to an Associate Justice position on the California Supreme Court. Thereafter, Justice Agliano took over as Presiding Justice. Despite the vacancy, the court had to operate for ten months without a permanent third justice. Superior court judges filled the void through temporary assignments by the Chairperson of the Judicial Council. On October 24, 1986, Justice Walter P. Capaccioli assumed the duties of an Associate Justice with the court. Justice Capaccioli had served as a San Mateo County Municipal Court Judge from January 20, 1971, to January 7, 1974, and as a San Mateo County Superior Court Judge from January 7, 1974, until October 24, 1986.

From its inception, the court struggled with the problem of an excessive caseload. The Administrative Office of the Courts even concluded that the Sixth District needed eight justices to handle the caseload produced by the superior courts in its four counties. This need was not satisfied until recently. Instead, the overload situation steadily worsened. Whereas the court had 293 civil and criminal appeals pending as of June 30, 1985, it had a total of 557 appeals pending as of June 30, 1986, and 726 appeals pending as of June 30, 1987. Between July 1, 1985, and June 30, 1987, over 60 appeals were filed each month in the superior courts within the Sixth District and 34 writ petitions per month were filed with the court. As of

4. Id.
5. Id. at 158.
6. Id.
7. Id. at 423.
8. Id. at 119.
9. Id. at 177.
10. Id.
13. For the first full two years for which figures are available, the court received 750 civil and criminal appeals and 406 writ petitions between July 1, 1985 and June 30, 1986 and

1068
June 30, 1987, in the typical civil appeal, ten months passed between the date on which briefing was deemed to be completed and the date on which the opinion was filed.\textsuperscript{14}

The Sixth District Justices worked intensively to meet the challenge posed by the increasing backlog. According to the most recent figures available, the Court of Appeal in San Jose is the most productive court among the six district courts of appeal. For the year ending June 30, 1987, the Sixth District decided 147 appeals and writ petitions by majority opinion \textit{per justice}, the highest rate in the state and 26 percent higher than the statewide average of 117 per justice.\textsuperscript{15} During the same time period, the Sixth District disposed of 400 appeals and writ petitions, with and without opinion, \textit{per justice}, 27 percent more than the second highest ratio (in the Fourth District) and 57 percent higher than the statewide average of 255 per justice.\textsuperscript{16}

It appears that the Sixth District Justices may no longer have to watch their backlog increase, even as they lead the state in productivity. They recently received relief through the appointment of three new justices to the court. Santa Cruz County Superior Court Judge Christopher C. Cottle and Santa Clara County Superior Court Judges Franklin D. Elia and Eugene M. Premo joined the court in October 1988. Both the bench and the bar eagerly await the contributions of the three new justices to California law.

\section*{II. General Trends in Civil Cases}

In its first three full years of issuing decisions (1985-1987), the Sixth District published over 100 opinions in civil appeals and original civil proceedings. In this article, the general philosophy and trends which emerge from the court's published civil cases for the years 1985 through 1987 will be discussed. Also, the article will focus on cases in which the court either broke new ground or disagreed with a ruling of another district court of appeal. Finally, the reasoning in the court's most significant cases will be analyzed. Both scholars and

\begin{itemize}
\item a total of 727 appeals and 413 writ petitions between July 1, 1986 and June 30, 1987. \textsc{Judicial Council of California, 1988 Annual Report}, 164, Table A-3. The 380 filings per justice for the year ending June 30, 1987 was 43\% higher than the second highest filings per justice ratio (in the Fourth District) and 75\% higher than the statewide average ratio of 217 per justice. \textit{Id.} at 34, Figure 3.
\item \textit{Id.} at 64, Table T-23.
\item \textit{Id.} at 35, Figure 5.
\item \textit{Id.} at 35, Figure 4.
\end{itemize}

1069
practitioners should benefit from getting acquainted with the court’s approach to deciding cases.

As Republican Governor George Deukmejian appointed all of the Justices to the Sixth District, the conventional wisdom was that the court would issue conservative—perhaps very conservative—opinions. Overall, the court’s approach to civil cases seems guided by a conservative judicial philosophy, but not necessarily a conservative political philosophy. Results are usually predictable, if not flamboyant.

The court’s decisions in civil cases have produced several notable trends. Perhaps the most significant trend is that the Sixth District frequently interprets statutes in a strict manner, even if the result is harsh. The court seems mindful of the maxim that “tough cases make bad law.” In the words of Justice Brauer:

This court is disinclined to make new law, confident that such a role is best played by the entity to which the Constitution assigned it. We are even less inclined to make bad law.  

The court refrains from exercising judicial creativity in formulating exceptions to statutes. Similarly, the court is reluctant to create new causes of action or to expand the reach of the law so as to confer the right to bring an action in a novel situation.

This cautious approach is especially noticeable in the court’s decisions in the areas of torts, employment law, and landlord-tenant relations. However, the court demonstrates that its decisions are not predicated on ideology in the areas of real property, environmental, and consumer law; it frequently rules against large institutions and developers in its published decisions.

In other areas of law, such as constitutional law and legal ethics, the court has published significant decisions, but its few published opinions have yielded no general trends to date. The bar should take note of some of the court’s important decisions regarding civil procedure, as well as appellate procedure and jurisdiction.

18. See infra notes 29-112 and accompanying text.
19. See infra notes 113-207 and accompanying text.
20. See infra notes 246-268 and accompanying text.
21. See infra notes 208-245 and accompanying text.
22. See infra notes 269-299 and accompanying text.
23. See infra notes 300-313 and accompanying text.
24. See infra notes 314-331 and accompanying text.
25. See infra notes 332-344 and accompanying text.
26. See infra notes 345-353 and accompanying text.
27. See infra notes 354-364 and accompanying text.
Finally, like all appellate courts, the Sixth District has frequently announced and defined the standards of review that apply in particular types of cases.\(^\text{28}\)

### III. TORT LAW TRENDS

#### A. Strict Interpretation of Time Limits for Filing Tort Claims

The Sixth District refuses to come to the aid of a sympathetic plaintiff who has not timely pursued available remedies. For example, in *Aronson v. Superior Court*,\(^\text{29}\) a minor brought a medical malpractice action against a doctor and a university for negligently providing prenatal and delivery care. Applying the shortened statute of limitations in the Medical Injury Compensation Reform Act (MICRA) that took effect after the minor’s injuries occurred, the court of appeal issued a writ directing the trial court to sustain the defendants’ demurrers, even though the minor had suffered brain injuries which caused total paralysis and an inability to speak.\(^\text{30}\) The court recognized that retroactive application of a shortened statute of limitations may violate due process where the new statute leaves a particular party with little or no time to file suit. However, the court ruled that the plaintiff’s action was barred because the action had not been filed within the limitations period set forth in California Code of Civil Procedure section 340.5.\(^\text{31}\) The amount of time within which the minor had to bring suit after MICRA became effective—four years—was considered reasonable.\(^\text{32}\) Undoubtedly, the court chose to make a tough decision which produced the harsh result of cutting off a severely injured minor’s cause of action, rather than make, from its point of view, “bad law”—the arguable result if the court had created an exception to the legislative scheme.

In *DeRose v. Carswell*,\(^\text{33}\) the court affirmed a judgment in favor of the defendant after a demurrer had been sustained, based upon a statute of limitations defense.\(^\text{34}\) *DeRose* was an action by an adult

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28. See infra notes 365-406 and accompanying text.
34. Id. at 1015, 242 Cal. Rptr. at 369-70.
against her step-grandparent to recover damages for the injuries which she had suffered because the step-grandparent allegedly had sexually abused her as a child between thirteen and twenty years earlier. The court specifically declined the plaintiff's invitation to apply the delayed discovery doctrine. Under that doctrine, as the court explained, a limitations period does not begin to run until the plaintiff is aware of, or reasonably should have discovered, all facts essential to a particular cause of action. Based upon the assumption that a sexual assault causes immediate serious harm as a matter of law, the court concluded that the allegations in the DeRose complaint showed that the plaintiff had long been aware of all facts necessary to plead a cause of action for assault against her step-grandparent. Thus, the resulting immediate harm gave the plaintiff a right to sue at the time the assaults occurred. The court observed that the plaintiff could have invoked the delayed discovery doctrine if she had pleaded that she had repressed her memories of the sexual assaults until a date no earlier than twelve months before she had filed her complaint. The plaintiff did not plead any repression, but instead, alleged that psychological processes had prevented her from recognizing any harm from the assaults or the causal relationship between the assaults and the harm. Nevertheless, the court rejected her argument and held that she could not benefit from the delayed discovery rule.

The court's conclusion was justifiable only if one indulges in the assumption that a sexual assault on a child causes immediate harm as a matter of law. That assumption does not seem warranted in every case. Although a sexual assault on a child is a horrible act in the eyes of an adult, the victim, like DeRose, may not immediately appreciate the full extent of the harm or the link between the misdeed and the harm. Clinical studies reveal that many women who have been sexually abused as children sustain psychological injuries which remain latent until adulthood. If the victim is not aware of her

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36. Id. at 1017-18, 242 Cal. Rptr. at 371.
37. Id. at 1017, 242 Cal. Rptr. at 371.
38. Id. at 1018, 242 Cal. Rptr. at 371.
39. Id. at 1018-19, 242 Cal. Rptr. at 372.
40. See, e.g., M. Tsai, S. Feldman-Summers & M. Edgar, Childhood Molestation: Variables Relating to Differential Impacts on Psychosexual Functioning in Adult Women, 88 J. Abnorm. Psychol. 407, 413-14 (1979) (finding that women who had been sexually molested as children, as a group, were significantly less well adjusted and significantly less satisfied with their psychosexual functioning as adults compared to women who had never been molested). See also Note, Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedies, 7 Harv. Women's L.J. 189, 199-202 (1984) (describing psychosexual and emotional injuries suffered by female victims of incest that are not manifested until adulthood).
injury or the fact that the sexual assault caused her injury, then she is not aware of all facts essential to the cause of action for assault. Consequently, without the court's assumption regarding immediate harm, DeRose seemed to qualify for application of the delayed discovery doctrine. Given that the court of appeal reviewed the case at the demurrer stage, the better course would have been to allow the plaintiff to try to prove her case, rather than bar the plaintiff's action based upon an assumption which is not applicable in every case. If DeRose filed her action more than one year after she became aware of her emotional harm and the cause of that harm, her action would be barred by California Code of Civil Procedure section 340(3). This factual issue is a matter of proof, not pleading.

In DeRose, the Sixth District also announced its vigorous opposition to the judicial trend whereby a party may avoid the bar of a statute of limitations by splitting a cause of action in a case where a defendant's act caused both small immediate harm and severe subsequent harm. In DeRose, the plaintiff argued that she could state a separate cause of action as a result of the subsequent emotional harm, even if the statute of limitations barred her action to recover for the harm immediately caused by the assaults. The plaintiff relied upon the decision of the Fourth District Court of Appeal in Zambrano v. Dorough.

In Zambrano, the plaintiff suffered immediate physical injury and distress as a result of a doctor's misdiagnosis and treatment and was forced thirty months later to undergo a complete hysterectomy as a result of the same medical malpractice. The Fourth District Court of Appeal held that the plaintiff could pursue an action against the doctor for the loss of her reproductive capacity because that injury was different from the physical injury and emotional distress which she had originally suffered. Although noting that the traditional view precludes a plaintiff from splitting a cause of action, the Fourth District decided to follow the trend which allows the splitting of a cause of action in the interests of justice. In doing so, the court relied upon the Second District decision in Martinez-Ferrer v. Richardson-Merrell, Inc.

42. DeRose, 196 Cal. App. 3d at 1021, 242 Cal. Rptr. at 374. See also infra notes 43-57 and accompanying text (discussing this judicial trend).
44. Zambrano, 179 Cal. App. 3d at 174, 224 Cal. Rptr. at 326.
45. Id. at 173, 224 Cal. Rptr. at 325.
In *Martinez-Ferrer*, the plaintiff, after taking an anti-cholesterol drug for a period of time, soon developed an allergic reaction in his eyes and a rash over his entire body and was forced to miss work for several weeks. Sixteen years later, he also developed cataracts in his eyes as a result of his ingestion of the drug. The Second District Court of Appeal held that the plaintiff could sue the drug manufacturer for the injuries which he sustained sixteen years after he had stopped taking the drug, even though he obviously sustained substantial damages from the initial injuries.\(^47\) In explaining its refusal to apply the rule against splitting causes of action, the court reasoned:

These developments [in the law] . . . certainly are straws which indicate which way the wind is blowing: away from a blind adherence to rigid concepts of what constitutes a cause of action and toward a set of rules which will enable plaintiffs to recover for just claims where that is possible without prejudice to defendants or insult to established rules of law. . . . We make no attempt to even summarize where all this may lead. We are, however, convinced that under the peculiar circumstances of this case it would be a miscarriage of justice not to permit plaintiff to go to trial.\(^48\)

In his majority opinion in *DeRose*, Justice Brauer concluded that the answer was not blowing in the wind. Justice Brauer pointed to the rule established by the supreme court in *Davies v. Krasna*,\(^49\) which provides that a limitations period does not start to run until the occurrence of all events which entitle a plaintiff to a true legal remedy, as opposed to a mere symbolic judgment for nominal damages.\(^50\) Justice Brauer concluded that the *Zambrano* decision did not properly apply the *Davies* rule because the plaintiff’s earlier injuries in *Zambrano* were serious, not minor.\(^51\) He also noted that the *Zambrano* decision did not need to avoid the rule against splitting causes of action because the court had found that the earlier and subsequent injuries to the plaintiff’s reproductive system involved invasions of different primary rights and thus, the plaintiff could state two different causes of action without regard to the rule.\(^52\)

In *DeRose*, Justice Brauer also criticized the “assault” on the rule against splitting a cause of action by the *Martinez-Ferrer* court because

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\(^{48}\) *Id.* at 327, 164 Cal. Rptr. at 597.

\(^{49}\) *Davies*, 14 Cal. 3d at 502, 535 P.2d 1161, 121 Cal. Rptr. 705 (1975).

\(^{50}\) *Davies*, 14 Cal. 3d at 513, 535 P.2d at 1168, 121 Cal. Rptr. at 712.

\(^{51}\) *DeRose*, 196 Cal. App. 3d at 1023, 242 Cal. Rptr. at 375.

\(^{52}\) *Id.* at 1023-24, 242 Cal. Rptr. at 375.
the plaintiff in that case was entitled, under *Davies*, to recover damages for the cataracts injuries after experiencing, much earlier, a short-lived rash. He concluded his analysis by stating that the *Martinez-Ferrer* result was compatible with *Davies*, but the *Zambrano* result was inconsistent with *Davies*; also, *Zambrano* did not justifiably extend the *Davies* rule that nominal harm does not start the running of a limitations period. The statutory period begins to run, under *Davies*, upon the infliction of any actual and appreciable harm, and the plaintiff in *Zambrano* suffered such harm at the time of the tortious act.

If the essence of a cause of action is the injury rather than the wrongful act, Justice Brauer’s evaluation of *Zambrano* was correct, insofar as he stated that the *Zambrano* court did not need to come within any exception to the rule against splitting a cause of action. The *Zambrano* plaintiff suffered two distinct harms and could have properly pleaded two separate causes of action, even though both resulted from the same wrongful act and were separate in time. The same analysis could apply to the *Martinez-Ferrer* decision. For that matter, the court’s rejection of the plaintiff’s position in *DeRose* is mysterious in that the plaintiff alleged that she suffered immediate physical harm (barred, for the sake of argument, by the statute of limitations) and subsequent emotional harm as a result of the sexual assaults. Thus, the plaintiff properly stated separate causes of action for assault and for intentional infliction of emotional distress. Whether or not she timely commenced that action should have be resolved by evidence, rather than allegations.

On a separate matter, Justice Brauer incorrectly concluded that the *Martinez-Ferrer* result fell squarely within the *Davies* rule. In *Martinez-Ferrer*, the court of appeal expressly rejected the plaintiff’s argument that his earlier injuries were so minor that they did not result in the accrual of any cause of action. The court found that the plaintiff had suffered a substantial amount of damages, including a considerable loss of earnings. Indeed, the court made that determination immediately after its discussion of the *Davies* case. Thus, the

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53. *Id.* at 1023-25, 242 Cal. Rptr. at 376.
54. *Id.* at 1025, 242 Cal. Rptr. at 377.
57. *Id.*
Martinez-Ferrer court believed that it was extending, not merely following, Davies.

In the final analysis, the Second and Fourth District Courts of Appeal have indicated that circumstances can justify an exception to the rule against splitting a cause of action. The Sixth District disagrees. It will not extend the law beyond the Davies rule. However, the Sixth District recognizes that two injuries, separate in time and resulting from one wrongful act, can produce two distinct causes of action. The corollary of that principle is that an action to recover for the subsequent injuries may be timely, by virtue of the delayed discovery doctrine, even if the applicable limitations period has passed from the date of the wrongful act and the immediate injury.

In a third tort case involving the construction of a statute which imposed a filing deadline, a county had rejected a petition to allow the presentation of an untimely tort claim where more than one year had passed from the date that the petitioner had notice of the claim as a result of service of a third party's personal injury complaint on the petitioner. The Sixth District held, in Greyhound Lines Inc. v. County of Santa Clara that the petition was untimely under California Government Code section 911.4, even though the petitioner did not discover the facts indicating the county's potential liability to the third party for medical malpractice until after the one-year period had expired. The result, although correct in view of the authorities cited by the court, was harsh because it allowed the aggravation of the plaintiff's injuries, resulting from the alleged medical malpractice of a county doctor, to go uncompensated. In a concurring opinion, Justice Brauer agreed that the result was unjust, but emphasized that the legislature, rather than the courts, should create a "late discovery" exception to the time limitations for filing government tort claims with public entities.

These three tort cases show that the Sixth District will strictly construe and apply a statute which limits the right to bring an action, even if the result leaves a severely injured plaintiff without a remedy.

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59. Id.
60. Cal. Gov't Code § 911.4 (West 1980 & Supp. 1989). Section 911.4 requires the filing of an application for leave to present an untimely tort claim with a governmental entity within one year of the accrual of the claim. Id. § 911.4(b).
62. Id. at 488, 231 Cal. Rptr. at 706, (Brauer, J. concurring).
63. See also Marquez-Luque v. Marquez, 192 Cal. App. 3d 1513, 1516-17, 238 Cal. Rptr.
While the court’s approach to statutory construction operates to extinguish rights of injured parties, its interpretation of the “consumer expectation” test makes recovery relatively easy in a strict liability action.

B. The Court Adopts a Liberal Version of the Consumer Expectation Test in Strict Liability Cases

In a strict product liability action, must the circumstances surrounding the use of the product—or the product itself—be a matter of common experience to allow a plaintiff to establish, without expert testimony, a design defect with evidence that the product failed to perform as safely as an ordinary consumer would expect? Disagreeing with the First District Court of Appeal, the Sixth District holds that the consumer expectation test can apply so long as the use of the product is within the realm of common experience.64

In Barker v. Lull Engineering Co.,65 the California Supreme Court articulated the consumer expectation test as follows:

[A] product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.66

In Campbell v. General Motors Corp.,67 the supreme court stated the standards for a prima facie case of design defect under the consumer expectation test in the following terms:

[If] the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety.68

172, 175 (1987) (holding that Code of Civil Procedure section 527.6, which authorizes the issuance of an injunction to enjoin civil harassment, did not allow the trial court to evict a beneficiary of an estate from the decedent’s home, even though the beneficiary had threatened to kill his sister and burn the house down if she took the house away from him through probate proceedings).

65. 20 Cal. 3d at 432, 573 P.2d at 454, 143 Cal. Rptr. 225 (1978).
67. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).
68. Campbell, 32 Cal. 3d at 127, 649 P.2d at 233, 184 Cal. Rptr. at 900.
In *Campbell*, the plaintiff was injured on a bus manufactured by the defendant when thrown to the floor as the bus made a sharp turn. The court held that the plaintiff satisfied the test with proof that the absence of a restraining pole or bar within her reach did not meet ordinary consumer safety expectations and caused her injury. 69

In *Lunghi v. Clark Equipment Co.*, 70 the First District considered a request to apply the consumer expectation test. That case involved a wrongful death action to recover on behalf of a worker who was crushed by a falling boom and bucket of a Bobcat front-end loader manufactured by the defendant. The accident had occurred when the loader was at rest with the engine turned off. The court of appeal upheld the trial court’s refusal to give a jury instruction based upon the consumer expectation test where the plaintiff had presented no expert testimony. 71 The appellate court concluded that an ordinary consumer was not a user of a loader and thus, would not know whether the boom and the bucket could fall with fatal force, even when the engine of the loader was turned off. 72 Therefore, the First District refused to apply the consumer expectation test where an ordinary consumer would lack familiarity with the product whose design was allegedly defective. In *Bates v. John Deere Co.*, 73 the First District again refused to apply the consumer expectation test on the ground that the allegedly defective product—a cotton picking machine—was outside the realm of the ordinary consumer’s experience. 74

The Sixth District has fashioned a more liberal version of the consumer expectation test. In *Akers v. Kelley Co.*, 75 the plaintiff was severely injured when a 700 pound steel truck-loading platform flew apart and a piece of it struck him in the head. The court of appeal held that the case was appropriate for an application of the consumer expectation test because any juror with no prior experience with loading platforms could conclude that the platform involved in that case had failed to meet consumer expectations regarding safety. 76 Explaining its disagreement with the First District’s decisions in *Lunghi* and *Bates*, the Sixth District refused to construe the supreme court’s

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69. Id. at 127, 649 P.2d at 233, 184 Cal. Rptr. at 900.
72. Id. (citing *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 127, 649 P.2d 224, 233, 184 Cal. Rptr. 891, 900 (1982)).
76. *Akers*, 173 Cal. App. 3d at 651, 219 Cal. Rptr. at 524.
above-quoted statement in *Campbell* to mean that the test is inapplicable where the ordinary consumer would lack experience with the product at issue.\(^7\) Instead, the Sixth District interpreted *Campbell* to hold only that the plaintiff could and did establish, without expert testimony, a prima facie case of the failure of the bus design to meet consumer expectations regarding safety because public transportation was a matter of common experience.\(^7\)

In *West v. Johnson & Johnson Products Inc.*,\(^7\) the Sixth District reiterated its analysis of the consumer expectation test, as well as its disagreement with the First District.\(^8\) The court stated that the test can be applied even if expert testimony has been introduced at trial, suggesting that the First District believed otherwise.\(^8\) Also, the court held that the consumer expectation test was applicable in an action to recover damages for toxic shock syndrome resulting from the use of a tampon manufactured by the defendant, where the plaintiff had the right to expect that use of the product would not cause severe injury.\(^8\)

In rebuttal, the First District has objected to the Sixth District’s criticism of its views regarding the consumer expectation test. In *Rosburg v. Minnesota Mining & Manufacturing Co.*,\(^8\) the First District disagreed that its *Lunghi* and *Bates* decisions involved a refusal to utilize the consumer expectation test where an ordinary consumer would lack experience with the product at issue.\(^8\) Instead, those decisions, according to the court, merely applied well-settled rules regarding the need for expert testimony.\(^8\) Distinguishing its prior cases from the Sixth District cases, the First District stated that *Lunghi* and *Bates* did not involve a bizarre accident, as in *Akers*, nor a typical consumer product, as in *West*.\(^8\) The First District noted that expert testimony was necessary in *Lunghi* and *Bates* to establish

\(^7\) *Id.* at 649-50, 219 Cal. Rptr. at 523.

\(^8\) *Id.*
how the complex machinery should perform under the circumstances of the case. \textsuperscript{87} Finally, the court observed that the consumer expectation test could have applied in \textit{Lunghi} and \textit{Bates} if the plaintiff had presented expert testimony on the reasonable expectations of a consumer. \textsuperscript{88}

It is doubtful that the interpretations of the test by the two courts of appeal can be reconciled, as \textit{Rosburg} suggests. In \textit{Rosburg}, the First District stated, just as it did in \textit{Lunghi} and \textit{Bates}, that the consumer expectation test can apply, without expert testimony, where “the product at issue is within the scope of common experience. . . .” \textsuperscript{89} Thus, the First and Sixth District Courts of Appeal continue to disagree regarding the circumstances under which the consumer expectation test is applicable. The First District finds that the test can apply only when consumers are familiar with the \textit{product} at issue, whereas the Sixth District concludes that the test can apply when the \textit{use} of the product is a matter of common experience. \textsuperscript{90}

\textbf{C. Admissibility of Evidence Regarding Punitive Damages.}

Like other courts, the Sixth District has shown that it will resist any effort to extend the tort of breach of the implied covenant of good faith and fair dealing to an action on the context of a commercial contract. In \textit{Palmer v. Ted Stevens Honda Inc.}, \textsuperscript{91} a car owner sued a car dealership for fraud and bad faith denial of a contract after the dealership had failed to perform its obligations under an alleged oral consignment for sale of the owner’s car. The trial court allowed the plaintiff to introduce evidence of the amount of attorneys’ fees which he had incurred in the litigation, as well as the dealership’s bad faith litigation tactics, to support his claim for punitive damages. \textsuperscript{92}

\textsuperscript{87} \textit{Id}.
\textsuperscript{88} \textit{Id}.
\textsuperscript{89} \textit{Id.} at 733, 226 Cal. Rptr. at 303. The court cited \textit{Akers}, of all cases, for that proposition. \textit{Id}.
\textsuperscript{90} In \textit{Grimshaw v. Ford Motor Co.}, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), the Second District Court of Appeal approved the consumer expectation test jury instruction given by the trial court in a personal injury action. \textit{Id.} at 801-02, 174 Cal. Rptr. at 377. Given that the product at issue was a car, the instruction would have been proper whether the issue was a consumer’s familiarity with the product or with the use of the product. Therefore, \textit{Grimshaw} does not help resolve the conflict in authority.
\textsuperscript{91} 193 Cal. App. 3d 530, 238 Cal. Rptr. 363 (1987).
\textsuperscript{92} \textit{Palmer}, 193 Cal. App. 3d at 537, 238 Cal. Rptr. at 366-67.

1080
The court of appeal reversed, holding that the admission of that evidence was prejudicial error.\textsuperscript{93}

In \textit{Palmer}, the Sixth District Court of Appeal rejected the plaintiff's argument that the proffered evidence was admissible under the supreme court decision in \textit{White v. Western Title Insurance Co.}\textsuperscript{94} In \textit{White}, the court allowed an insured, in an action for breach of the implied covenant of good faith and fair dealing against his insurance company, to present evidence of his litigation expenses as one component of damages resulting from that tort.\textsuperscript{95} Given that \textit{Palmer} involved a typical commercial contract, the Sixth District refused to extend \textit{White} to permit introduction of evidence of litigation expenses to establish punitive, rather than compensatory, damages in an action which lacked any special relationship between the parties.\textsuperscript{96} In this regard, the court noted that the supreme court, in \textit{Seaman's Direct Buying Service Inc. v. Standard Oil Co.},\textsuperscript{97} refused to extend the tort of breach of the implied covenant of good faith and fair dealing to a breach of contract case involving a mere commercial contract.\textsuperscript{98} Finally, the Sixth District explained that an attorney's actions in defending a bad faith lawsuit are not relevant to the issue of whether the attorney's client acted in bad faith prior to the lawsuit.\textsuperscript{99}

It should be noted that the supreme court, in \textit{Seaman's}, discussed the tort of breach of the implied covenant of good faith and fair dealing, but held that the defendant was potentially liable for a different tort: bad faith denial of the existence of a contract.\textsuperscript{100} The \textit{Seaman's} tort can apply in the context of an ordinary commercial contract so long as the defendant denies, in bad faith and without probable cause, that the contract exists. Indeed, \textit{Seaman's} itself involved a typical commercial contract: a dealership agreement between an oil supplier and a marina operator whereby the oil company would supply the fuel requirements of the marina operator.\textsuperscript{101} Therefore, the applicability of the \textit{Seaman's} tort should not be confused

\textsuperscript{93} \textit{Id.} at 540, 238 Cal. Rptr. at 369.

\textsuperscript{94} \textit{Id.} at 537, 238 Cal. Rptr. at 367 (citing \textit{White v. Western Title Ins. Co.}, 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509, (1985)).

\textsuperscript{95} \textit{White}, 40 Cal. 3d at 890, 710 P.2d at 320, 221 Cal. Rptr. at 520.

\textsuperscript{96} \textit{Palmer}, 193 Cal. App. 3d at 538-39, 238 Cal. Rptr. at 368.

\textsuperscript{97} 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

\textsuperscript{98} \textit{Palmer}, 193 Cal. App. 3d at 538, 238 Cal. Rptr. at 367-68.

\textsuperscript{99} \textit{Id.} at 539, 238 Cal. Rptr. at 368.

\textsuperscript{100} \textit{Seaman's}, 36 Cal. 3d at 769-70, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

\textsuperscript{101} \textit{Id.} at 760-61, 686 P.2d at 1160-61, 206 Cal. Rptr. at 356-57.
with the scope of the tort of breach of the implied covenant of good faith and fair dealing.

The Sixth District decision in Palmer is well reasoned and consistent with the current trend among California courts to limit application of the tort of breach of the implied covenant of good faith and fair dealing to actions involving special relationships between the parties.102

\[D. \hspace{5pt} The \hspace{5pt} Court \hspace{5pt} Decides \hspace{5pt} Its \hspace{5pt} First \hspace{5pt} AIDS \hspace{5pt} Case.\]

The Sixth District has had occasion to decide a case involving the issue of strict liability for the transfer of acquired immune deficiency syndrome (AIDS) from a blood transfusion. In Hyland Therapeutics v. Superior Court,103 the court held that the manufacturer of a blood product provides a service—and does not conduct a sale—under the plain language of California Health and Safety Code section 1606;104 consequently, the manufacturer could not be sued under a strict product liability theory for the sale of a blood product contaminated with a virus known to cause AIDS.105 The court concluded that the separation of powers doctrine precluded it from rewriting the unambiguous statutory language and that section 1606 did not deny equal protection to users of blood products.106

Despite the sympathetic posture of the plaintiffs (the decedent’s heirs), the court’s decision was sound and was supported by solid precedent. In two cases involving the transmission of hepatitis by means of a blood transfusion, the courts held that section 1606 precluded the plaintiffs from pursuing a strict liability theory against

102. See, e.g., Seaman’s, 36 Cal. 3d 752, 768-69, 686 P.2d 1158, 1166-67, 206 Cal. Rptr. 354, 362-63; Rogoff v. Grabowski, 200 Cal. App. 3d 624, 631-32, 246 Cal. Rptr. 185, 190 (2nd Dist. 1988) (ruling that limousine lessor-lessee relationship was not a special relationship); Martin v. U-Haul Co., 204 Cal. App. 3d 396, 412-15, 251 Cal. Rptr. 17, 26-18 (5th Dist. 1988) (finding that equipment rental dealership with rental company was not a special relationship); Commercial Cotton Co. v. United California Bank, 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551, 554 (4th Dist. 1985) (concluding that a banker-bank depositor relationship was a special relationship). In its recent decision in Foley v. Interactive Data Corp., 47 Cal. 3d 654, 690-93, 765 P.2d 373, 394-96, 254 Cal. Rptr. 211, 232-34 (1988), the California Supreme Court declined to embrace the special relationship test, but did decide that the employer-employee relationship was not a special relationship (like, for example, the insurer-insured relationship) in holding that a terminated employee could not sue his former employer in tort for breach of the implied covenant of good faith and fair dealing.


104. CAL. HEALTH & SAFETY CODE § 1606 (West 1979).


106. Id. at 514-16, 220 Cal. Rptr. at 592-94.
a blood manufacturer or supplier. In *Hyland*, the result was not as harsh as it may seem because the plaintiffs were not deprived of any remedy. The Sixth District merely directed the trial court to sustain the blood manufacturer’s demurrer to the cause of action for strict product liability, but left the plaintiffs free to pursue an action for negligence.

In tort cases, the Sixth District has proceeded with great caution. The court has strictly interpreted and applied statutes which cut off rights, even if its ruling renders a severely injured plaintiff bereft of a remedy. In doing so, the court has stated that the legislature, rather than the judiciary, should establish the statutory exceptions advocated by the plaintiffs. In a similar vein, the court has shown that it is not receptive to an extension of the tort of breach of an implied covenant of good faith and fair dealing to situations in which no special relationship exists between the parties. Also, the court has refused to allow the heirs of an AIDS victim to proceed with a strict liability action against a manufacturer of a blood product, resting its decision on the separation of powers doctrine. An exception to the court’s judicial conservatism in tort cases is that it adopted a liberal version of the consumer expectations test, which requires less proof to establish a strict product liability claim.

IV. EMPLOYMENT TRENDS

The Sixth District has issued several significant decisions in the area of employment law. Without exception, the court has ruled in favor of employers in every case. For example, employers prevailed in all five published wrongful termination cases decided by the court.

108. See supra notes 29-63 and accompanying text.
109. See supra note 62 and accompanying text.
110. See supra notes 91-102 and accompanying text.
111. See supra notes 103-107 and accompanying text.
112. See supra notes 64-90 and accompanying text.
113. See also infra notes 114-156 (discussing these five opinions).
A. Pro-Employer Decisions in Wrongful Termination Cases

In Ketchu v. Sears, Roebuck and Co.,114 the court held that an employer’s good faith belief in the existence of good cause for termination of an employee is a valid defense to an action for breach of the implied covenant of good faith and fair dealing, even if no good cause for discharge actually existed.115 The employee’s written employment agreement contained an at-will termination provision, but the employer had a personnel manual which required that the employer have “reasons” for terminating an employee. The employer had contended that it had an honest belief that discharge of the plaintiff was for a proper business reason because the plaintiff had punched another employee and had stated that he could not work with the other employee and would do the same thing again under the same circumstances. The Sixth District ruled that the trial court committed prejudicial error by failing to instruct the jury on the employer’s good faith defense.116 In arriving at its holding, the court relied upon Koehrer v. Superior Court,117 an opinion authored by supreme court Justice Kaufman, then a Fourth District Court of Appeal Justice.

In Koehrer, Justice Kaufman drew the contours which differentiate actions for breach of an employment contract (breach of an implied covenant to terminate only for good cause), tortious discharge (termination in violation of a public policy) and bad faith discharge (breach of the implied covenant of good faith and fair dealing).118 He also stated that the Seaman’s tort, like the tort of bad faith discharge, necessarily involved a breach of the implied covenant of good faith and fair dealing.119 Applying Seaman’s in the wrongful termination context, Justice Kaufman concluded that termination of an employee does not violate the implied covenant of good faith and fair dealing where the employer asserts in good faith and with probable cause that it had good cause for termination.120

116. Id. at 1605-06, 231 Cal. Rptr. at 586-87.
119. Id. at 1170, 226 Cal. Rptr. at 829.
120. Id. at 1170-71, 226 Cal. Rptr. at 829. In Foley v. Interactive Data Corp, 47 Cal. 3d 654, 715-723, 765 P.2d 373, 412-18, 254 Cal. Rptr. 211, 250-56 (1988) (Kaufman, J. dissenting),
The portion of the Koehrer decision upon which Ketchu relied is troublesome. Justice Kaufman's interpretation of Seaman's is that the supreme court must be understood to have decided that the defendant was potentially liable for breach of the implied covenant of good faith and fair dealing. However, the supreme court expressly stated in Seaman's that its decision was not predicated upon that claim. Indeed, Seaman's involved an ordinary commercial contract and the supreme court made clear that the breach of implied covenant action should rarely, if ever, apply in a case involving an ordinary commercial contract. Thus, the supreme court unmistakably intended to create the existence of a separate tort: for bad faith denial of a contract. The analysis in Koehrer seems faulty to the extent that Justice Kaufman fused the two causes of action discussed in Seaman's to reach the result that an employer is not liable for breach of the implied covenant of good faith and fair dealing, so long as it had a good faith belief in a good cause for termination. If there is no distinction between the two causes of action analyzed in Seaman's, any plaintiff can allege a claim for breach of the implied covenant of good faith and fair dealing in any action involving a typical commercial contract, the very result condemned by the supreme court in Seaman's and by numerous other courts, including the Sixth District in Palmer v. Ted Stevens Honda, Inc., as noted above. In its recent decision in Foley v. Interactive Data Corp., the supreme court, in holding that an action for breach of the implied covenant of good faith and fair dealing in an employment contract cannot result in an award of tort damages, expressly rejected the attempt in Koehrer to weld together the two causes of action that were analyzed in Seaman's.

The supreme court granted review in Ketchu, perhaps to decide whether the inquiry in an action for breach of the implied covenant of good faith and fair dealing in an employment agreement should focus on the employer's subjective motives or its objective grounds.
for discharging an employee. The choice is critical, particularly for employees. If the employer's subjective intent is always the key issue, discharged employees will often receive unfair results. Armed with knowledge of the law, employers could easily fabricate a paper trail which reveals a good faith "belief" in valid grounds for discharge, even if they have neither valid grounds nor a good faith belief in valid grounds for discharge. For the terminated employee, it would be much easier to present evidence that the objective grounds for discharge were improper rather than that the employer's subjective intentions were improper.

The supreme court has indicated in Foley that intent should not be the dispositive issue. In Foley, the court disapproved Koehrer on the ground that the intentions of the breaching party are irrelevant to the scope of damages which a plaintiff may recover for breach of the implied covenant of good faith and fair dealing in the employment context because that action sounds in contract rather than tort. Foley foreshadows a ruling in Ketchu that the subjective intentions of an employer are likewise irrelevant to the issue of liability in an action for breach of the implied covenant of good faith and fair dealing; liability in such an action should be predicated on the employer's lack of valid, objective grounds for termination.

In a second wrongful termination case, Fowler v. Varian Associates Inc., the Sixth District affirmed a trial court's summary judgment in favor of the employer on the ground that the employer had good cause for constructive discharge of the plaintiff. The court found that the plaintiff had breached his duty of loyalty to the employer by assisting an enterprise in organizing to compete with the employer. Although the employee argued that summary judgment should not have issued because the existence of "good cause" for discharge necessarily involved an issue of fact, the court rejected that argument, concluding that the evidence of the employee's disloyalty established the employer's good cause. The court reiterated its view that an employer's good faith, reasonable belief in good cause for termination, even if none actually existed, constitutes a valid defense to a wrongful discharge action based upon breach of the implied

128. Id. at 699, 765 P.2d at 400-401, 254 Cal. Rptr. at 238-39.
130. Fowler, 196 Cal. App. 3d at 41-43, 241 Cal. Rptr. at 543-44.
131. Id.
132. Id. at 42-43, 241 Cal. Rptr. at 544.
covenant of good faith and fair dealing. Given the circumstances in this case, the court correctly decided that the employer had good cause for termination, notwithstanding the plaintiff's contention that summary judgment is rarely granted where "good cause" is at issue.

In *Robinson v. Hewlett-Packard Corp.*, a terminated employee claimed that his employer breached the implied covenant of good faith and fair dealing by deliberately assigning him to a job which, as a result of a previous work-related injury, he could not perform and by firing him after he failed to perform that job adequately. The Sixth District affirmed the trial court's rejection of the plaintiff's wrongful termination claim. The court found that no evidence supported the plaintiff's view that the employer made the job transfer in bad faith. Also, the evidence showed that the employee violated the terms of his probation by performing work at an unacceptable level. The court further decided that an Unemployment Insurance Appeals Board's finding that the plaintiff was discharged for something less than misconduct did not collaterally estop the employer from demonstrating that the employee was discharged exclusively for poor performance because "misconduct" in the context of unemployment compensation proceedings does not include inefficiency or unsatisfactory job performance. Finally, the court likewise rejected the plaintiff's racial discrimination claim based upon its finding that he was terminated, instead, for poor job performance.

In *Robinson*, the Sixth District ruled in favor of the employer on the employment law claims essentially because it found substantial evidence that the termination resulted from the plaintiff's poor job performance. Thus, the decision is not particularly illuminating as to the court's approach toward employment law cases. However, the court failed to analyze clearly the plaintiff's different employment law claims. The court pointed out that the plaintiff was relying upon two separate causes of action, one for breach of the implied covenant of good faith and fair dealing and one for breach of an implied-in-fact promise to terminate only for good cause. In analyzing the evidence, however, the court blurred that distinction. It expressly

133. *Id.* at 40 n.7, 241 Cal. Rptr. at 543 n.7.
136. *Id.* at 1123-24, 228 Cal. Rptr. at 600.
137. *Id.* at 1123-25, 228 Cal. Rptr. at 601-02.
138. *Id.* at 1123-24, 228 Cal. Rptr. at 600.
139. *Id.* at 1125-26, 228 Cal. Rptr. at 601-02.
140. *Robinson*, 183 Cal. App. 3d at 1120-21, 228 Cal. Rptr. at 598.
rejected the plaintiff’s breach of the implied covenant of good faith and fair dealing claim, but stated no conclusion regarding the claim for breach of an implied-in-fact promise to discharge only for good cause. The flaw is understandable because, as Justice Kaufman observed in his Koehrer opinion, courts and attorneys frequently fail to distinguish the different claims which a discharged employee can bring against a former employer.

A thorny issue in employment law is the identity of the circumstances under which a court should imply a promise to terminate an employee only for good cause. In Robinson, the court noted that the employer’s "Personnel Policies and Guidelines"—as well as specific performance evaluations, warnings and instructions actually given to the employee—could and did establish an implied-in-fact promise to terminate only for good cause. Although the Sixth District may find an implied termination "for cause" requirement in an office manual, it will not find such a requirement in an alleged contemporaneous oral agreement which contradicts an "at will" termination provision in a written employment contract.

In Gerdlund v. Electronic Dispensers International, the plaintiff sued his former employer for wrongful termination of a written employment agreement. The agreement contained an integration clause which stated that the written agreement superseded all other agreements between the parties and constituted the parties’ entire agreement. The contract also recited that there were no oral or collateral agreements between the parties. Finally, it specifically provided that either party could terminate it on thirty days written notice for any reason. The Sixth District Court of Appeal reversed the trial court’s decision to admit parol evidence of the parties’ alleged intention that the employer would not terminate the plaintiff, so long as he was doing a good job; the written agreement unmistakably was terminable at will, while the plaintiff’s theory of the case made the agreement terminable only for good cause.

In a clarion opinion in Gerdlund, the Sixth District, through Justice Brauer, held that the written employment contract was integrated and

141. Id. at 1123-25, 228 Cal. Rptr. at 599-601.
145. Gerdlund, 190 Cal. App. 3d at 273, 235 Cal. Rptr. at 284.
thus, parol evidence was inadmissible to contradict its terms regarding termination of the agreement.\textsuperscript{146} Although observing that the implied covenant of good faith and fair dealing can supply a requirement of good cause for termination where a written contract is silent or ambiguous on the subject of grounds for termination, the court reasoned that the implied covenant cannot operate to destroy a right to terminate a contract at will where that right is expressly stated in the written contract.\textsuperscript{147} The court reached a proper result in a well-reasoned decision.

In \textit{Mixon v. Fair Employment and Housing Commission},\textsuperscript{148} the court upheld the Commission's conclusion that a union had terminated the plaintiff, a black man, for a non-discriminatory reason, even though he had established a prima facie case of racial discrimination.\textsuperscript{149} The court accepted the union's claim that the firing resulted from its desire to reduce expenses incurred from the employee's long commute.\textsuperscript{150} Ultimately, it decided that the employee failed to establish by a preponderance of the evidence that discriminatory animus was the true cause for his discharge.\textsuperscript{151} The court found against the employee despite considerable evidence of discrimination, an administrative law judge decision in favor of the employee, and a final decision by a \textit{divided} (3-2) Commission against the employee.\textsuperscript{152} The result could be explained by the court's strict application of the pertinent standard of review. The employee challenged the Commission's decision on the ground that it was not supported by the findings, rather than on the ground that the findings were not supported by the evidence. Thus, the Sixth District stated that it would not consider, for the first time on appeal, whether substantial evidence supported the Commission's decision.\textsuperscript{153} The court's holding was that the Commission's findings supported its conclusion that the employee's termination did not result from racial discrimination.\textsuperscript{154} In reaching that conclusion, however, the court did not simply analyze the Commission's findings and conclusions. It did sift through the evidence. The evidence showed that the defendant had not terminated eight white

\textsuperscript{146} Id. at 270-72, 235 Cal. Rptr. at 282-83.
\textsuperscript{147} Id. at 277, 235 Cal. Rptr. at 286.
\textsuperscript{149} \textit{Mixon}, 192 Cal. App. 3d at 1320-23, 237 Cal. Rptr. at 892-94.
\textsuperscript{150} Id. at 1320, 237 Cal. Rptr. at 892.
\textsuperscript{151} Id. at 1319-22, 237 Cal. Rptr. at 892-94.
\textsuperscript{152} Id. at 1311-16, 237 Cal. Rptr. at 886-89.
\textsuperscript{153} Id. at 1310-11, 237 Cal. Rptr. at 885-86.
\textsuperscript{154} Id. at 1323, 237 Cal. Rptr. at 894.
employees who had long commutes. The union’s countervailing evidence — that the eight white workers did not work in the Stockton office and were employed before a new controller began cracking dawn on long commutes whereas, the plaintiff did work in the Stockton office (where dues could not cover operating expenses) and started his job after the crackdown on long commutes — was hardly credible. If part of the Stockton office’s expenses had to be paid from sources other than dues from Stockton members, that source could pay the small additional expense resulting from the plaintiff’s long commute. Also, if the crack down on long commutes was so essential to reduce operating expenses, the policy should have applied to all employees. If the evidence in this case was material, it strongly supported the conclusion that the union failed to rebut the plaintiff’s prima facie case of racial discrimination.

In each of its published wrongful termination cases, the Sixth District ruled in favor of the employer. A recurring theme was that an employer has broad discretion to terminate an employee for poor job performance, even in the face of evidence of discrimination against the employee. It seems too early, however, to conclude that the court is deciding wrongful termination cases based upon a politically conservative philosophy. The court’s holding in Ketchu—that an employer’s good faith belief in good cause for discharge is a valid defense to a wrongful termination action—was questionable. The Mixon result was also questionable although perhaps correct in light of the standard of review recited by the court. Otherwise, the court based its decisions on the sufficiency of the evidence and sound legal analysis. The court’s future decisions in wrongful termination cases deserve special attention.

B. Pro-Employer Decisions in Public Employee Dismissal Cases.

In employment law cases, the government, as employer, enjoyed the same favorable results from the Sixth District as private employers. In Sienkiewicz v. County of Santa Cruz, a county detention officer, after sustaining facial injuries in a motorcycle accident, informed his commanding officer that he was psychologically unfit to perform his

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155. Id. at 1321, 237 Cal. Rptr. at 893.
156. Id.
regular duties involving inmate contact without posing a threat of
danger to himself and other workers. He was assigned to a light duty
position for the first nine months after he returned to work. After
the nine months passed, he requested that the sheriff allow him to
keep the light duty position for three additional months, at which
time his status would be reevaluated. In response, the sheriff forced
him to work his regular job and, a few days later, effectively
suspended him without any prior notice or hearing. After he ap-
pealed that decision to the county Civil Service Commission, the
Commission held a hearing on the suspension and scheduled a second
hearing. Before the second hearing, he was fired. At the second
hearing, evidence was introduced to show that the sheriff had a policy
to accommodate injured officers with appropriate light duty assign-
ments involving limited inmate contact.

In Sienkiewicz, the Sixth District held that the discharge was proper,
concluding that the plaintiff, although a permanent employee who
had a vested right to continued employment, had no right to retain
a specific job assignment, such as a light duty job. The court
reasoned that a public employer may enforce mental or physical
standards reasonably related to the employee’s job duties and to the
health and safety of the employee and other workers. Consequently,
the court concluded that the sheriff’s termination of the plaintiff was
proper because the employee had stated that he was unfit to perform
his duties without posing a threat of danger to other workers and
himself. The discharge was not an excessively severe penalty, ac-
cording to the court, because it was reasonably related to the danger
posed to the sheriff’s office. Finally, the court determined that the
county did not deny the employee due process, even though he was
afforded an administrative appeal subsequent to his suspension. Due
process only requires, in the case of a short-term suspension, that a
public employer afford the disciplined employee only an opportunity
to respond to the charges either while the suspension is in effect or
within a reasonable time afterwards.

158. Sienkiewicz, 195 Cal. App. 3d at 139, 240 Cal. Rptr. at 453.
159. Id.
160. Id.
161. Id. at 137-40, 240 Cal. Rptr. at 452-54.
162. Id. at 141-42, 240 Cal. Rptr. at 455.
163. Id. at 142, 240 Cal. Rptr. at 455.
164. Id. at 141-42, 240 Cal. Rptr. at 455.
165. Id. at 143, 240 Cal. Rptr. at 456.
166. Id. at 141, 240 Cal. Rptr. at 454.
167. Id.
The Sixth District's decision in *Sienkiewicz* was both harsh and unjustifiable. The commission did not provide the employee with a pre-termination hearing, in violation of the due process standards set forth in the supreme court's decision in the landmark case of *Skelly v. State Personnel Board*. The commission's first hearing occurred before the employee's discharge, but concerned only his suspension. The second hearing concerned both the suspension and the discharge, but both forms of discipline were accomplished facts at the time of the second hearing. Moreover, the record suggested that the county may have discharged the employee for the impermissible reason that the employee had challenged his suspension before the Civil Service Commission. Also, the discipline seemed excessive in view of the fact that the employee requested only a few more months, and not permanent placement, at the light duty position and the sheriff had a policy to accommodate injured officers with light duty assignments. In sum, it appears that the employee was denied due process, was terminated for an unlawful retaliatory reason and received excessive discipline under the circumstances.

In *County of Santa Clara v. Willis*, the Sixth District found that a disciplined employee had failed to perform his duties to care for paralyzed patients in a responsible manner, failed to maintain satisfactory and harmonious working relationships with patients and employees and engaged in gross misconduct (including making sexual advances toward patients and other workers). On these facts, the court ruled that a county personnel board had abused its discretion in reinstating the employee. In deciding whether an agency has abused its discretion in the context of public employee discipline, the court explained, the primary consideration is whether the employee's conduct has caused or is likely to cause harm to the public service. Under the circumstances of this case, the Sixth District properly concluded that the employee's conduct resulted in public harm.

In its two public employee cases, the Sixth District showed no more sympathy for terminated public employees than it has shown for

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169. *See Sienkiewicz*, 195 Cal. App. 3d at 139-40, 240 Cal. Rptr. at 453-54 (plaintiff was dismissed after he appealed the sheriff's suspension decision and before the Civil Service Commission completed hearings on his appeal, even though he received an adequate evaluation of his job performance a week after he had resumed his detention officer duties).
172. *Id.*
173. *Id.* at 1251, 225 Cal. Rptr. at 250.
discharged private employees. The court seemed to take a broad view of an employer's right to terminate an employee based upon the employee's job performance. The evidence seemed to justify the result in Willis. In Sienkiewicz, however, the result seemed unfair because countervailing circumstances should have outweighed the job performance factor, especially where the employee had not been guilty of poor performance on the job.

C. Pro-Employer Ruling in Unlawful Competition Case

In its only reported unlawful competition case, the Sixth District addressed the novel question of whether Business and Professions Code section 16600 voids a non-interference agreement between an employer and a terminated employee that precludes the latter from raiding employees of their former employer. In Loral Corp. v. Moyes, the court answered the question in the negative, ruling that the trial court erred in granting a nonsuit as to the employer's cause of action for breach of the termination agreement, following its opening statement at trial. The court reasoned that a restraint against raiding the employees of the former employer would have no greater impact on the former employee's profession or business than a clearly lawful restraint on disclosure of confidential information or on solicitation of customers. Significantly, the court narrowly construed the contractual restraint to prohibit the terminated employee only from making the first contact; the former officer could receive applications from and hire employees of his former employer if they contacted him first. The opinion of Justice Agliano was well-reasoned and achieved a proper resolution of this question of first impression.

D. Pro-Employer Rulings in Labor Law Cases

The Sixth District ruled in favor of employers in two cases concerning the rights and duties of union employees. In the first of these cases, Watsonville Canning & Frozen Food Co. v. Superior Court, 179

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174. CAL. BUS. & PROF. CODE § 16600 (West, 1987). Section 16600 voids any contract which restrains any person from engaging in a lawful business or profession. Id.
177. Id. at 279, 219 Cal. Rptr. at 843-44.
178. Id. at 279-80, 219 Cal. Rptr. at 844.
the Sixth District held that an overbroad injunction order issued in a labor dispute was not void because the activities of the union local members enjoined by the order were not privileged nor constitutionally protected. The court distinguished the supreme court decision in In re Berry on the ground that the overbroad order in Berry, unlike the injunction in Watsonville Canning, prohibited labor activities in violation of the constitutional right to freedom of speech.

The Watsonville Canning decision is sound only if the distinction between that case and Berry is also sound. In Berry, the supreme court decided that an injunction against a union was completely invalid based upon an application of the rule that an injunction in a labor dispute is entirely void if a court cannot reasonably eliminate its invalid restrictions on free speech from its lawful provisions. In Watsonville Canning, the order was partially invalid because it enjoined union local members from making threats or engaging in acts of physical violence against interested parties, as well as against "any other person." Thus, the order extended the controversy beyond the parties to the dispute. However, the portion of the order which enjoined threats or acts of violence against any other person could be disregarded as surplusage. Accordingly, the Sixth District correctly determined that the valid portion of the order was enforceable.

In another labor case, the Sixth District held that the Federal Railway Labor Act preempted state tort law as to any claim by an airline employee against her employer that was subject to the applicable collective bargaining agreement between the airline and the employee's union. The court rejected the employee's creative attempt to avoid preemption with the argument that state tort law should apply because she had no adequate remedy for emotional and physical distress under the applicable collective bargaining agreement. Instead, the Sixth District preferred a strict construction and application of the pertinent statute. The decision seems correct because the plaintiff's claims necessarily arose under her union's collective bar-

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180. Id. at 1246-47, 224 Cal. Rptr. at 305-06.
183. Berry, 68 Cal. 2d at 156-57, 436 P.2d at 286, 65 Cal. Rptr. at 286.
184. Watsonville Canning, 178 Cal. App. 3d at 1246, 224 Cal. Rptr. at 305.
185. Id. at 1248, 224 Cal. Rptr. at 306-07.
188. Miller, 174 Cal. App. 3d at 887, 220 Cal. Rptr. at 689-90.
gaining agreement with her employer. That agreement required that she pursue a grievance and arbitration process as the exclusive remedy for any dispute with her employer.\(^{189}\)

**E. Pro-Employer Rulings in Two Workers' Compensation Cases**

In two cases, the Sixth District refused to allow workers to pursue, in lieu of workers' compensation benefits, negligence actions against employers to recover damages for job-related injuries. In *Santa Cruz Poultry, Inc. v. Superior Court*,\(^{190}\) a temporary employee was injured on the job to which he was assigned by his temporary employment agency. If the company for whom the employee actually performed the work were deemed to be his employer, his exclusive remedy for the job-related injury would be workers' compensation under California Labor Code section 3601.\(^{191}\) The court of appeal determined that the primary consideration, in ascertaining whether a special employment relationship exists in a case where an injured employee may have two employers, is whether the special employer exercised control over the details of the employee's work.\(^{192}\) Ultimately, the court found that the injured employee was controlled and directed by the employer for whom he performed the work and therefore could not bring an action for negligence against that employer under section 3601.\(^{193}\)

In reaching its decision, the Sixth District distinguished the supreme court case of *Kowalski v. Shell Oil Co.*\(^{194}\) In *Kowalski*, the plaintiff, an employee of a general contractor, sued Shell to recover for job-related injuries which he sustained on Shell's job site. The jury returned a special verdict finding that Kowalski was *not* Shell’s special employee.\(^{195}\) The trial court granted Shell's motion for a judgment notwithstanding the verdict on the ground that Kowalski was a special employee of Shell\(^{196}\) and thus, he was relegated to his workers' compensation remedy.\(^{197}\) The supreme court reversed, holding that

\(^{189}\) *Id.* at 886-89, 220 Cal. Rptr. at 689-91.
\(^{192}\) *Santa Cruz Poultry*, 194 Cal. App. 3d at 579-80, 239 Cal. Rptr. at 580-81.
\(^{193}\) *Id.* at 583, 239 Cal. Rptr. at 583.
\(^{195}\) *Id.* at 174, 588 P.2d at 814, 151 Cal. Rptr. at 674.
\(^{196}\) *Id.*
\(^{197}\) See *id.* at 172, 588 P.2d at 813, 151 Cal. Rptr. at 673.
the plaintiff never consented to an employment relationship with Shell.\textsuperscript{198} The supreme court also specifically noted that the critical inquiry in deciding whether a special employment relationship exists is whether the special employer had the right to direct and control the work performed by the putative employee.\textsuperscript{199}

In \textit{Santa Cruz Poultry}, there was a question of fact as to whether the injured employee consented to an employment relationship with the special employer, and for that reason, the trial court denied the employer's summary judgment motion.\textsuperscript{200} Focusing on the control-over-the-employee test, the Sixth District concluded that the employee consent rule in \textit{Kowalski} was mere dictum.\textsuperscript{201} The analysis of \textit{Kowalski} could have gone either way. One could read \textit{Kowalski} to require proof of both employer control and employee consent in order to establish a special employment relationship. The Sixth District did not do so. Instead, the court determined that employer control was the critical test and that employee consent was incidental; a special employment relationship exists if the employer proves its control over the employee, even if there was no evidence of employee consent.\textsuperscript{202} Thus, the court issued a writ directing the trial court to enter summary judgment in favor of the special employer.\textsuperscript{203} The court's analysis of \textit{Kowalski} is analytically sound, but not compelling. Other courts may discern more significance in the result in \textit{Kowalski} and decide that \textit{Kowalski} should be construed to require employee consent.

In an employee's action under California Labor Code section 4558,\textsuperscript{204} the court properly affirmed a trial court's summary judgment in favor of the employer.\textsuperscript{205} In \textit{Swanson v. Matthews Products, Inc.},\textsuperscript{206} the court determined that the employee had failed to produce sufficient evidence to establish any of the following requisite elements: (1) The equipment manufacturer attached or required the attachment of safety guards to the power press; (2) the manufacturer apprised the employer of those specifications; and (3) the employer authorized the non-

\begin{itemize}
\item \textsuperscript{198} \textit{Kowalski}, 23 Cal. 3d at 178-79, 588 P.2d at 817-18, 151 Cal. Rptr. at 677-78.
\item \textsuperscript{199} \textit{Id}. at 175, 588 P.2d at 815, 151 Cal. Rptr. at 675.
\item \textsuperscript{200} \textit{Santa Cruz Poultry}, 194 Cal. App. 3d at 579, 239 Cal. Rptr. at 581.
\item \textsuperscript{201} \textit{Id}. at 581, 239 Cal. Rptr. at 581-82.
\item \textsuperscript{202} \textit{Id}. at 579-84, 239 Cal. Rptr. at 581-84.
\item \textsuperscript{203} \textit{Id}. at 584, 239 Cal. Rptr. at 584.
\item \textsuperscript{204} \textit{CAL. LAB. CODE} § 4558 (West Supp. 1989). Section 4558 creates an exception to the workers' compensation laws by allowing an action against an employer by an employee injured as a result of the absence of a power press safety guard under certain circumstances. \textit{Id}.
\item \textsuperscript{205} \textit{Swanson v. Matthews Products, Inc.}, 175 Cal. App. 3d 901, 221 Cal. Rptr. 84 (1985).
\item \textsuperscript{206} 175 Cal. App. 3d 901, 221 Cal. Rptr. 84 (1985).
\end{itemize}
installation or removal of the safety guards on the power press.\textsuperscript{207}

The Sixth District ruled in favor of the employer in every one of the above employment law cases. In most cases, the court's decision seems analytically sound. In some cases, however, the result seems questionable and suggests that the court favors employers in labor disputes. For example, the court's adoption of a "good faith belief" defense in wrongful termination cases seems much easier for employers to prove than "good cause" for discharge. Also, the court seems to uphold any discharge ostensibly based on job performance, dismissing the employee's countervailing evidence. Moreover, when the analysis and decision could have gone either way, the court decided to make it easier for an employer to prove a "special relationship" with a temporary employee and thereby bar, under the Workers' Compensation laws, the employee's action to recover for job-related injuries. The court's future employment law cases should hold great interest. Will this pro-employer trend in employment law cases continue or are the results in employment law cases during the court's first three years a mere coincidence?

V. REAL PROPERTY TRENDS

The Sixth District has issued several significant opinions regarding rights to real property. These opinions offer clear trends and demonstrate that the court does not reach its decisions based upon any particular ideology.

A. Enforcement of the Protections Afforded to Debtors by the Anti-Deficiency Laws

California courts have repeatedly rejected efforts by secured creditors to avoid the effect of the anti-deficiency statutes\textsuperscript{208} through evasive schemes.\textsuperscript{209} In doing so, the courts follow the rationale in the

\textsuperscript{207} \textit{Swanson}, 175 Cal. App. 3d at 906-08, 221 Cal. Rptr. at 86-88.

\textsuperscript{208} \textit{CAL. CIV. PROC. CODE} §§ 580a, 580b, 580d (West 1976 & Supp. 1989).

\textsuperscript{209} \textit{Cornelison v. Kornbluth}, 15 Cal. 3d 590, 605, 542 P.2d 981, 991-92, 125 Cal. Rptr. 557, 567-68 (1975) (holding that California Code of Civil Procedure section 580d barred a creditor from recovering a judgment for waste following a nonjudicial foreclosure sale unless the debtor caused the waste in bad faith); \textit{Freedland v. Greco}, 45 Cal. 2d 462, 466-67, 289 P.2d 463, 465 (1955) (ruling that section 580d precluded a creditor from obtaining a judgment on one note for $7,000 after foreclosing on real property which secured a second note for $7,000 from the same debtor where the debtor indisputably owed only one obligation
supreme court's celebrated decision in *Roseleaf Corp. v. Chierighino* that a creditor who holds real property security is never entitled to a double recovery; the creditor cannot obtain both irredeemable title to the real property security following a foreclosure sale and a deficiency judgment. In its first three years, the Sixth District has adhered to this tradition.

In *Ballengee v. Sadlier*, the holders of a second deed of trust bid in the real property security at their foreclosure sale, but never acquired title under a trustee’s deed. The holder of the first deed of trust subsequently acquired title at its foreclosure sale. The former holders of the second trust deed sued to collect on their promissory note. The Sixth District held that their action was barred by California Code of Civil Procedure section 580d, concluding that their foreclosure sale constituted a completed sale of the real property security, even though no trustee’s deed had been executed to transfer title to them. Section 580d precluded a deficiency judgment because the property had been sold under power of sale in a deed of trust. The plaintiffs argued that they were still junior lienholders at the time of the senior lienor’s sale and became sold-out junior lienors at that sale, thereby allowing them to collect on the note. The court, however, expressly rejected that argument. Accordingly, in its first encounter with the anti-deficiency laws, the Sixth District correctly refused to permit a creditor to evade those laws through an artful device.

In *Pacific Valley Bank v. Schwenke*, the court addressed the novel question of whether the one-action rule, set forth in California Code of Civil Procedure section 726, protects a co-obligor who is not a party to the deed of trust which secures the debt. In that case, the beneficiary-bank reconveyed a co-debtor’s deed of trust, on which the defendant-debtor was not a trustor, without the knowledge of $7,000 to the creditor); Union Bank v. Wendland, 54 Cal. App. 3d 393, 406-07, 126 Cal. Rptr. 549, 558-59 (1976) (concluding that a bank, after foreclosing on a first deed of trust and thereby extinguishing the second deed of trust which it also held, could not sue on the note for which the second trust deed had served as security).

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211. 59 Cal. 2d at 43-44, 378 P.2d at 101-02, Cal. Rptr. at 877-78.
212. 179 Cal. App. 3d 1, 224 Cal. Rptr. 301 (1986).
214. *Ballengee*, 179 Cal. App. 3d at 4-5, 224 Cal. Rptr. at 302-03.
215. *Id.* at 5, 224 Cal. Rptr. at 303.
216. *Id.* at 4, 224 Cal. Rptr. at 302.
or consent of the defendant-debtor. The bank sued to recover on the underlying promissory note. The Sixth District, in a majority opinion written by Justice Brauer, ruled that the bank's action was barred by the one-action rule in Code of Civil Procedure section 726. Justice Brauer explained that section 726 applied to all notes secured by deeds of trust, regardless of whether the obligor under the note and the trustor under the deed of trust are the same person. A debtor can waive the protections of section 726 by allowing a beneficiary to cancel a deed of trust without cancelling the underlying note. In this case, however, the bank reconveyed the co-debtor's deed of trust without notifying or receiving the consent of the defendant-debtor and thereby unilaterally relinquished its security in violation of the section 726 protections.

In a dissenting opinion, Justice Agliano stated that section 726 was inapplicable because the trial court had found that the defendant had agreed with the co-obligor, whose trust deed was reconveyed, to pay the balance due on the note and therefore, the defendant waived the right to claim that the co-obligor's property was primarily responsible for the debt. Justice Agliano believed that the defendant waived the protections of section 726, even though the defendant did not advise the bank that he had consented to the reconveyance of the co-obligor's deed of trust. Justice Brauer disagreed, pointing out that the defendant had stated that he would assume responsibility for the debt in negotiations for the dissolution of his partnership with the trustor under the deed of trust. Thus, the defendant's statement constituted a mere "balance sheet entry," rather than a modification of the loan agreement between him and the bank. Also, the defendant never communicated to the bank any intention to release the security. Thus, Justice Brauer found that there was insufficient evidence to establish a waiver of section 726.

In both cases, the court applied the anti-deficiency laws in favor of the debtor. In Ballingee, the court blocked a blatant scheme to

220. *Id.* at 140-41, 234 Cal. Rptr. at 301-02.
221. *Id.* at 142, 234 Cal. Rptr. at 303.
222. *Id.* at 141-42, 234 Cal. Rptr. at 301-02.
223. *Id.*
225. *Id.*
226. *Id.* at 145, 234 Cal. Rptr. at 305.
227. *Id.* at 145, 234 Cal. Rptr. at 304-05.
228. *Id.* at 145, 234 Cal. Rptr. at 305.
evade those statutes. In *Pacific Valley Bank* the court ruled for the debtor, even though the creditor did not seem to engage in deceptive conduct. Indeed, it appeared that the defendant had even agreed to pay the note at issue before he sought refuge in the anti-deficiency laws. Accordingly, it appears that the Sixth District will interpret and apply the anti-deficiency laws so as to afford debtors maximum protection.

**B. Rights and Duties of Junior Lienor**

The Sixth District published two opinions concerning the rights and duties of a junior lienholder who seeks to protect his or her interests at a senior lienholder’s foreclosure sale. In *Pacific Trust Co. TTEE v. Fidelity Federal Savings and Loan Association*,229 the holder of a junior deed of trust sought to take over property subject to pending foreclosure proceedings by paying off a note secured by a senior trust deed.230 The court concluded that the junior lienor must pay all sums which the borrower was obligated to pay to the senior lender, including any prepayment penalty.231 The rationale for this result was that the junior lienor had constructive notice of the terms of the senior deed of trust, including the terms regarding defaults, and had an accompanying duty to inquire about the terms of the underlying promissory note. Thus, it could redeem the property only upon the same contractual terms as the borrower, even though the junior lienor was not a party to the senior note and trust deed.232 The junior lienor also argued that the prepayment penalty provision in the senior note was invalid as an unreasonable liquidated damages clause under California Civil Code section 1671.233 The court rejected that argument because such a provision is authorized by Federal Home Loan Bank Board Regulations, which preempt the state statute in the event that the two are in conflict.234

At first glance, this decision appears to break new ground. The courts usually hold that a prepayment penalty clause is operative only when the borrower prepaYS the obligation; it is *not* triggered by the

231. *Id.*
232. *Id.* at 825-26, 229 Cal. Rptr. at 274-75.
233. [CAL. CIV. CODE § 1671 (West 1982)].
lender's election to accelerate and require full payment upon default.\textsuperscript{235} Notwithstanding this line of cases, the Sixth District decided that the senior lender could enforce the prepayment penalty clause upon acceleration of the debt.\textsuperscript{236} The prepayment penalty clause in \textit{Pacific Trust}, however, specifically required payment of the penalty: "...whether said prepayment is voluntary or involuntary, including any prepayment effected by the holder's exercise of the Acceleration Clause."\textsuperscript{237} Thus, the \textit{Pacific Trust} decision is best understood as a case which turns on its peculiar facts, rather than as a departure from existing law. A lender which desires to achieve the result in \textit{Pacific Trust} should simply utilize the language in the prepayment clause involved in that case. A junior lienor who seeks to avoid that result would need to obtain from the senior lender, before the junior lender approved its loan to the borrower, a special waiver of the prepayment penalty clause in the event that the junior lienor redeems the property.

In \textit{Pacific Loan Management Corp. v. Superior Court},\textsuperscript{238} the Sixth District faced the novel issue of whether the trustor or a junior lienor is entitled to the surplus proceeds resulting from a senior lienor's foreclosure sale where the junior lienor bid in the property at that sale. The court concluded that, absent collusion or fraud, the junior lienor was entitled to have its debt satisfied, in whole or in part, out of surplus proceeds of the foreclosure sale of the security, even if it purchased the property at that sale.\textsuperscript{239} In other words, the junior lienor does not forfeit its equitable claim to receive the surplus proceeds simply because it was the purchaser at the senior lienor's foreclosure sale. The court explained that the result was just because the junior lienor could not use the amount of its lien as a credit bid at the senior lienor's foreclosure sale, and it would have to pay the amount of its bid in cash, like any other bidder.\textsuperscript{240} Consequently, the junior lienholder has no unfair advantage at that sale.

In \textit{Pacific Loan}, the trustor argued that the case was governed by the decision in \textit{Walter E. Heller Western, Inc. v. Bloxham},\textsuperscript{241} which

\begin{itemize}
\item \textsuperscript{236} \textit{Pacific Trust}, 184 Cal. App. 3d at 824, 229 Cal. Rptr. at 274.
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{238} 196 Cal. App. 3d 1485, 242 Cal. Rptr. 547 (1987).
\item \textsuperscript{239} \textit{Pacific Loan}, 196 Cal. App. 3d at 1492-95, 242 Cal. Rptr. at 551-53.
\item \textsuperscript{240} \textit{Id.} at 1493, 242 Cal. Rptr. at 552.
\item \textsuperscript{241} 176 Cal. App. 3d 266, 221 Cal. Rptr. 425 (4th Dist. 1985).
\end{itemize}
hled that a junior lienor who purchases the property at a senior lienor’s foreclosure sale is subject to the fair value limitations of California Code of Civil Procedure section 580a\textsuperscript{242} because the junior lienor cannot obtain a double recovery as a result of an “underbid” (a bid below market value).\textsuperscript{243} The Sixth District distinguished \textit{Walter E. Heller} on the ground that the junior lienor in \textit{Pacific Loan} overbid the property, whereas the \textit{Walter E. Heller} junior lienholder underbid.\textsuperscript{244} This difference was significant because if the \textit{Pacific Loan} junior lienor received the surplus proceeds from the \textit{overbid}, the amount of its debt would be reduced, as would the amount of any deficiency judgment in favor of the junior lienor.\textsuperscript{245} For these practical reasons, the anti-deficiency laws could not aid the debtor under the circumstances.

In his majority opinion in \textit{Pacific Loan}, Justice Brauer made an important contribution to a complicated area of law. He correctly decided the novel question of a junior lienor’s entitlement to the surplus proceeds from a senior lienor’s foreclosure sale. The trustor would receive a windfall if he or she could keep the surplus proceeds and just ignore the junior debt. By contrast, the surplus proceeds constitute partial payment on the junior debt for the junior lienor who must pay off the senior debt in cash in order to purchase the property at the foreclosure sale. Justice Brauer’s analysis was sound, even though the result was that the anti-deficiency laws did not favor the debtor.

C. Pro-Landlord Decisions in Landlord/Tenant Cases

The Sixth District has resolved all three published cases regarding the rights and duties of landlords and tenants in favor of landlords. One decision laid down a significant ruling on the allocation of the burden of proof in an unlawful detainer action.

In \textit{Western Land Office, Inc. v. Cervantes},\textsuperscript{246} the Sixth District decided the question of whether the landlord or the tenant has the burden of proof on the issue of the landlord’s retaliatory motive in an eviction action. The court held:

\begin{flushright}
\textsuperscript{243} \textit{Walter E. Heller}, 176 Cal. App. 3d at 273-74, 221 Cal. Rptr. at 429-30.
\textsuperscript{244} \textit{Pacific Loan}, 196 Cal. App. 3d at 1494-95, 242 Cal. Rptr. at 552-53.
\textsuperscript{245} Id.
\textsuperscript{246} 175 Cal. App. 3d 724, 220 Cal. Rptr. 784 (1985).
\end{flushright}
In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code section 1942.5, the tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence.²⁴⁷

Although the landlord has the burden, under California Civil Code section 1942.5(e),²⁴⁸ to establish that a non-retaliatory ground was the true reason for the eviction, the tenant ultimately has the burden, under Civil Code section 1942.5(a),²⁴⁹ of proving that the eviction was based upon a prohibited, retaliatory reason.

In Western Land, the court expressly rejected two arguments of the tenant: (1) that subdivisions (a) and (e) of Civil Code section 1942.5 should be construed together to place on the landlord the burden of persuasion on the issue of the landlord's non-retaliatory motive; and (2) that upon the tenant's presentation of evidence that the landlord had taken an adverse action against the tenant within 180 days after the tenant had exercised protected rights, section 1942.5 establishes a rebuttable presumption of retaliation, and shifts to the landlord the burden of proof on the issue of retaliatory motive.²⁵⁰

First, the court reasoned that a tenant, as the proponent of the alleged fact that the landlord had a retaliatory motive, must have the burden to prove that fact under Evidence Code sections 500 and 520.²⁵¹ Second, in Fisher v. City of Berkeley,²⁵² the California Supreme Court, without mentioning Civil Code section 1942.5, decided that a city ordinance which created a presumption of retaliation and which thrust upon the landlord the burden to prove a non-retaliatory motive, conflicted with Evidence Code section 500.²⁵³ Third, in 1979, the legislature considered and rejected the adoption of a rebuttable pre-

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²⁴⁷. Western Land Office, 175 Cal. App. 3d at 742, 220 Cal. Rptr. at 797. See CAL. CIV. CODE § 1942.5 (West 1985).
²⁴⁸. CAL. CIV. CODE § 1942.5(e) (West 1985).
²⁴⁹. Id. § 1942(a).
²⁵⁰. Western Land, 175 Cal. App. 3d at 740, 220 Cal. Rptr. at 795-96.
²⁵¹. Id. at 740, 220 Cal. Rptr. at 796. California Evidence Code section 500 provides that the proponent of a fact has the burden to prove that fact. Evidence Code section 520 provides that a party who claims that another party is guilty of wrongdoing has the burden to prove that claim. See CAL. EVID. CODE §§ 500, 520 (West 1966 & Supp. 1989).
²⁵³. Fisher, 37 Cal. 3d at 698, 693 P.2d at 300-04, 209 Cal. Rptr. at 721-25. See Western Land, 175 Cal. App. 3d at 740-41, 220 Cal. Rptr. at 796.
sumption of a landlord's retaliatory motive in Civil Code section 1942.5. Finally, the court determined that the tenant always had the burden to prove the retaliatory eviction defense under the common law and that the California legislature never intended to modify that rule. Notwithstanding the ambiguity in the statute and the tenant's arguments, the court's reasoning was convincing. If a tenant asserts the defense of retaliatory eviction, he or she should have the burden of persuasion as to that defense, unless the legislature specifies otherwise.

The court again ruled in favor of a landlord in a rent control case. In *Whispering Pines Mobile Home Park Ltd. v. City of Scotts Valley*, a city rent-review commission allowed the plaintiff to raise rents by two percent. The Sixth District ruled that the commission's findings were not supported by the evidence because the only evidence before the commission on a fair rate of return for a mobile home park was the testimony of the landowner's expert, who stated that the minimum fair rate of return was nine percent. The commission, according to the court, unjustifiably disregarded the expert's testimony. The court also determined that the commission, if it intended to rely on its expertise and knowledge regarding local real estate matters, should have made a record of its expertise in order to allow a reviewing court to determine whether the commission's decision had adequate support. On a procedural issue, the court found that the commission failed to provide the landowner with notice and an opportunity to present evidence on economic factors which the commission had considered.

In *Whispering Pines*, the court did not address the constitutionality of any provision in a rent control ordinance. Instead, the court merely decided, on evidentiary and procedural grounds, that a rent-review commission failed to act properly in applying a rent-control ordinance. Thus, despite the ruling in favor of the landlord, there is no basis to conclude that the court has any particular predisposition toward rent control ordinances.
In *Tri-County Apartment Association v. City of Mountain View*, the court held that California Civil Code section 827 preempted a city ordinance which provided that a landlord could not raise the rent for residential property leased on a month-to-month basis without giving at least sixty days notice to the tenant. This decision was unjustifiable. Observing that section 827 specifies the thirty-day notice requirement and prohibits the parties from agreeing to a shorter notice period, the court then stated its essential conclusion as follows: "With unambiguous language, the Legislature has asserted its control over landlord-tenant notification procedures." However, section 827 merely prescribes a minimum notice period and does not, by its terms, reflect any intention by the legislature to preempt consistent rules or regulations. Significantly, the city ordinance at issue merely lengthened the notification requirement by an additional thirty days. Thus, the ordinance was entirely consistent with section 827. Also, the ordinance was rationally related to a legitimate objective because the city showed that it had adopted the ordinance in order to remedy a specific local problem: the significant community disruption caused by a rent increase notice which made it difficult or impossible for tenants to adjust to the increase after only thirty days. Moreover, the court misplaced its reliance upon numerous statutes which regulate the timing of assertion of rights or satisfaction of obligations by landlords or tenants. As the court previously pointed out, application of the preemption doctrine depends upon how broadly or narrowly the field at issue is defined. In *Tri-County Apartment Association*, the court had already found that "the Ordinance deals with notification," and thus the court should not have relied upon statutes which did not deal with notification. The preemption doctrine was inapplicable in this case and the ordinance seemed valid.

Although the court ruled in favor of landlords in all three decisions, it is too early to say that the Sixth District has a singular approach to landlord-tenant cases. The issues had little in common in these decisions.

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262. Cal. Civ. Code § 827 (West 1982). Section 827 provides that a landlord must give at least 30 days written notice to a tenant before raising the rent on residential property leased on a month-to-month basis. *Id.*
264. *Id.* at 1297, 242 Cal. Rptr. at 446.
265. *Id.* at 1289, 242 Cal. Rptr. at 441.
266. *Id.* at 1297-98, 242 Cal. Rptr. at 446-47.
267. *Id.* at 1294-95, 242 Cal. Rptr. at 444-45.
268. *Id.* at 1293, 242 Cal. Rptr. at 444.
three cases. *Western Land* decided a critical burden of proof issue in favor of landlords, but the result seems correct. *Whispering Pines* turned on an evidentiary issue. *Tri-County Apartment* primarily involved a preemption issue. A review of the court’s future landlord-tenant cases is necessary before a trend can be discerned.

VI. PRO-CONSERVATION TREND IN ENVIRONMENTAL LAW CASES

The Sixth District has consistently issued rulings which command developers and public agencies to comply strictly with environmental laws and regulations. In cases involving the California Environmental Quality Act (CEQA), the court has heeded the supreme court’s call to construe CEQA so as to afford maximum protection to the environment. Outside of CEQA, the court published one decision which favored coastal protection over a claim of impairment of contractual rights.

In *City of Carmel-by-the-Sea v. Board of Supervisors* and *Chamberlin v. City of Palo Alto*, the Sixth District announced its position on a critical CEQA issue which has divided the courts of appeal. The issue typically arises in a case where a party challenges a public agency’s decision to adopt a negative declaration—which the agency may do if it finds that the proposed project will have no significant environmental effects—in lieu of the preparation of an environmental impact report (EIR). Some courts, following the Fourth District’s opinion in *Pacific Water Conditioning Association, Inc. v. City Council*, hold that the standard of review in that situation is whether substantial evidence in light of the whole record supports the agency’s decision. Other courts adopt the standard of review first articulated by the First District in *Friends of “B” Street v. City of Hayward*.

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274. See CAL. PUB. RES. CODE §21080(c) (West 1986).
which requires a court to set aside an agency's decision to dispense with the preparation of an EIR if the court perceives substantial evidence that the proposed project may have a significant environmental impact.278 Still other courts have noted the existence of the conflict in authority, but have found it unnecessary to choose sides in the cases before them.279 The difference between the two standards is quite simple. An agency’s decision to proceed by negative declaration is overturned under the Pacific Water Conditioning standard only if the court finds that there is not substantial evidence supporting the finding that the project will not have significant environmental effects. The agency decision is reversed under the Friends of "B" Street standard if the court finds that there is substantial evidence that the project may have significant environmental effects.

In Chamberlin and Carmel-by-the-Sea, the Sixth District, without discussion of the split in authority, adopted the Friends of "B" Street standard.280 In these two opinions authored by Justice Brauer, the Sixth District made the correct choice. In a doubtful case, an EIR will more likely be required if a court must look for substantial evidence of significant environmental effects, rather than search for substantial evidence that the proposed project will generate no significant environmental effects. The purposes of CEQA281 are more fully satisfied if an EIR, rather than a negative declaration, is prepared in a doubtful case. Therefore, the Sixth District adopted the standard which maximizes protection of the environment.

In Carmel-by-the-Sea, the Sixth District held that a public agency failed to comply with CEQA where it adopted a negative declaration


281. CEQA casts upon a public agency the duty to adopt all feasible measures which will mitigate or avoid the significant environmental effects of a project approved by the agency. Cal. Pub. Res. Code §§ 21002; 21002.1(b) (West 1986 & Supp. 1989). The purposes of an EIR are to inform public agencies and the public regarding the significant environmental effects of a proposed project, to identify measures which can mitigate or avoid such significant effects and to identify alternatives to the proposed project. Id. §§ 21002.1(a), 21061; No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 86, 529 P.2d 66, 78, 118 Cal. Rptr. 34, 46 (1974).
in the face of evidence that the proposed project produced conflicting assertions, disagreement among experts and public controversy regarding possible environmental effects. The court decided that the preparation of an EIR was necessary to resolve the factual disputes. Significantly, the court noted that disagreement among experts and public controversy can constitute the substantial evidence which necessitates the preparation of an EIR.

In *Carmel-by-the-Sea*, the court also held that the rezoning of property is a "project," for the purposes of CEQA, and not a mere preliminary governmental approval, even where the zoning authority is not approving a specific development in connection with the rezoning. After determining that an EIR was necessary for the zoning approval, the court concluded that a subsequent EIR, prepared prior to the approval of a proposed specific development on the rezoned property, was not sufficient to comply with CEQA, insofar as the rezoning was concerned; an EIR must be prepared at the earliest possible stage of a proposed project, even if additional EIRs will be prepared for later stages of the project. The court further concluded that a Carmel area land use plan was not an adequate substitute for an EIR on the rezoning because the plan did not analyze specific environmental effects which might result from the rezoning. Thus, in a major CEQA case, the Sixth District required a public agency to comply strictly with CEQA's requirements at all stages of the approval and development process.

In *Browning-Ferris Industries, Inc. v. City Council*, the Sixth District applied the *Pacific Water Conditioning* test, rather than the *Friends of "B" Street* standard, in reviewing the propriety of a city's approval of a project and an EIR, where the EIR, allegedly failed to analyze significant environmental effects. In doing so, the court found an important distinction between a CEQA case in which a

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285. *Id.* at 241-44, 227 Cal. Rptr. at 907-09.
286. *Id.* at 249-52, 227 Cal. Rptr. at 913-15.
287. *Id.* at 253, 227 Cal. Rptr. at 915-16.

1108
negative declaration is attacked and a CEQA case in which the adequacy of an EIR is challenged. In most cases involving the adequacy of an EIR, the focus is on whether the EIR sufficiently analyzed indisputable significant environmental effects. In *Browning-Ferris Industries*, however, the issue was whether the EIR was inadequate in that it completely failed to analyze two significant environmental effects. If the purpose of the *Friends of “B” Street* standard is to require an agency to analyze all significant environmental effects of a proposed project in an EIR whenever there is substantial evidence of significant environmental effects, then that standard should apply whether the agency ignores the significant environmental effects by preparing an inadequate EIR or by adopting a negative declaration. Therefore, the *Friends of “B” Street* standard should apply in a case where the agency has allegedly failed to analyze all significant environmental effects in a completed EIR. In *Browning-Ferris Industries*, the result should have been an order directing the agency to prepare a modified EIR in which the agency would be required to analyze the neglected significant environmental effects.

In the *Browning-Ferris Industries* case, the court also decided a significant procedural issue. The petitioner had presented no written comments on a draft EIR and had not raised any objections to that document at public hearings conducted by the city’s planning commission. However, the petitioner did submit a letter and a report regarding the adequacy of the EIR to the city council, the lead agency with the ultimate responsibility for approving the final EIR. Under these circumstances, the Sixth District held that the petitioner’s action challenging the adequacy of the final EIR was not barred by the doctrine of exhaustion of administrative remedies. At the same time, the court ruled that a lead agency is not required to respond in writing to comments submitted after expiration of the period during which comments on a draft EIR were allowed.

The lesson in *Browning-Ferris Industries* is that participation in the environmental review process at the earliest possible stage is advisable, but not necessary. A party can attack the sufficiency of an EIR in court, so long as the party has appeared before the agency charged with final approval of the EIR. However, a party may waive certain

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291. Id. at 865-66, 226 Cal. Rptr. at 583-84.
292. Id. at 860, 226 Cal. Rptr. at 580.
293. Id.
294. Id. at 862, 226 Cal. Rptr. at 581.
grounds for challenging an agency’s compliance with CEQA, such as the adequacy of responses to written comments on a draft EIR, if the party has not timely participated in the environmental review process.

The Sixth District published one important non-CEQA case in the area of environmental law. In *Delucchi v. County of Santa Cruz*, a landowner and a county entered into an agreement, pursuant to the Williamson Act, whereby the use of certain land would be restricted to agricultural and compatible uses at a time when the applicable zoning allowed all agricultural uses (including the construction of accessory buildings) without a permit. The court held that the contract could not reasonably be construed as a promise by the county that the existing zoning would not be changed so as to require a permit for the construction of any accessory buildings. Thus, the court decided that the Williamson Act contract did not preclude the county from enacting and enforcing more restrictive zoning to conform to the California Coastal Act. If the contract were interpreted so as to impose a restriction on the county’s power to rezone the property, the contract would constitute an invalid attempt by the county to relinquish its future right to exercise the police power. Thus, the court properly disapproved the landowner’s attempt to invalidate the Coastal Act, insofar as it impaired a landowner’s Williamson Act contract.

In its environmental law cases, the Sixth District has shown that it will enforce CEQA to the maximum extent possible. The court has adopted the liberal Friends of “B” Street standard of review of an agency’s decision to issue a negative declaration. It has determined that public controversy and disagreement among experts regarding the effects of a proposed project can constitute substantial evidence that a project may have significant environmental effects, necessitating the preparation of an EIR. Finally, the court will not shy away from

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296. CAL. GOV’T CODE §§ 51200-51298 (West 1983 & Supp. 1989). Under a Williamson Act contract between a city or county and the owner of agricultural land, the land owner agrees to restrict the use of his or her property to agriculture for at least ten years and the property is taxed on the basis of the agricultural use, rather than the land’s highest and best use, even if surrounded property is used in a more valuable manner (e.g., residential use). See Lewis v. City of Hayward, 177 Cal. App. 3d 103, 108-109, 222 Cal. Rptr. 781, 783-84 (1986).
compelling a public agency to comply with the procedural require-
ments of CEQA. In sum, despite its conservative reputation, the Sixth
District liberally interprets and applies CEQA.

VII. PRO-CONSUMER TREND IN CONSUMER LAW CASES

In the four published decisions affecting the rights of consumers, the
Sixth District ruled in favor of the consumer in each case. Two
cases involved application of the California Uniform Commercial
Code ("CUCC"). In its first published civil decision, Ford Motor
Credit Co. v. Price, the Sixth District held that the notice of public
sale requirement of CUCC section 9504(3) was mandatory, and thus
a creditor’s failure to satisfy that requirement barred a deficiency
judgment following the foreclosure sale. In a subsequent case, Backes v. Village Corner, Inc., the court reaffirmed that ruling.

In two other cases, the Sixth District likewise strictly enforced
statutory requirements for the benefit of a consumer. The court held in Cerra v. Blackstone that a car dealer who fails to give the
original car buyer the notice of sale required by California Civil Code
section 2983 or who refuses to allow reinstatement of the contract
under Civil Code section 2983 forfeits its right to a deficiency
judgment. The court further ruled that violation of either statute
gives the original car buyer the right to possession of the car with
the accompanying right to bring an action for conversion against the
dealer. In another case, Donaldson v. Doe, the court reversed a
judgment in favor of an auto mechanic for work performed, where
the mechanic had failed to comply with the requirement of California

302. Section 9504(3) requires publication of a notice of sale of personal property collateral
in the county in which the public sale of the collateral is scheduled. CAL. COM. CODE §
9504(3) (West Supp. 1989).
307. CAL. CIV. CODE § 2983.2 (West Supp. 1989). Section 2983.2 requires a car dealer to
give the original car buyer notice of its intent to sell a repossessed car, including a statement
of the buyer’s rights and the amount necessary to cure the default. Id.
308. Id. § 2983.3.
310. Id at 609, 218 Cal. Rptr. at 18-19.
Business and Professions Code section 9884.9\textsuperscript{312} that he provide a customer with an initial written estimate of the cost of the repair work before performing the work.\textsuperscript{313}

Although it decided all four consumer law cases in favor of the consumer, the court hardly showed a pro-consumer bias. Instead, the court essentially decided in each case that a statute meant what it said and would be enforced.

VIII. No Clear Trends in Constitutional Law

During its first three years, the Sixth District has published three significant constitutional law decisions.\textsuperscript{314} Each of these opinions could generate sufficient discussion for a separate article. Thus, it is beyond the scope of this article to analyze these cases thoroughly. As the three decisions involve different areas of constitutional law, they do not produce any discernible trend.

In \textit{Franklin v. Leland Stanford Junior University},\textsuperscript{315} a Stanford University law professor was discharged for making a speech, at an anti-Vietnam war protest, in which he urged demonstrators to shut down the university's computation center, as well as for subsequently interfering with a police dispersal order. The Sixth District held that the professor's conduct was not protected by the federal or state constitution and warranted his termination from employment at the university.\textsuperscript{316} The court reasoned that the constitution does not shield a teacher who substantially disrupts the operations of his or her employer.\textsuperscript{317} Although the professor argued that the court should apply the test established in the United States Supreme Court decision in \textit{Brandenburg v. Ohio},\textsuperscript{318} Justice Agliano, in his majority opinion, refused; he stated that \textit{Brandenburg} applies in a criminal case, but

\begin{itemize}
\item \textsuperscript{312} \textsc{Cal. Bus. & Prof. Code} § 9884.9 (West 1975 & Supp. 1989). Section 9884.9 requires automotive dealers to provide written estimates for labor and parts before any repair work is performed. \textit{Id.}
\item \textsuperscript{313} \textit{Donaldson}, 194 Cal. App. 3d at 818, 239 Cal. Rptr. at 802.
\item \textsuperscript{315} 172 Cal. App. 3d 322, 218 Cal. Rptr. 228 (1985).
\item \textsuperscript{316} \textit{Franklin}, 172 Cal. App. 3d at 341-43, 218 Cal. Rptr. at 239-40.
\item \textsuperscript{317} \textit{Id.} at 341, 218 Cal. Rptr. at 239.
\item \textsuperscript{318} 395 U.S. 444, 447 (1969) (holding that the First Amendment prohibits a state from proscribing advocacy of the use of force or of violation of the law unless such advocacy is intended to incite "imminent lawless action" and is likely to produce such action).
\end{itemize}

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In this regard, Justice Agliano concluded that expressive conduct can justify employee discipline, even if the same conduct could not subject the speaker to civil or criminal liability. Instead of the Brandenburg standard, the court found applicable the six-part test set forth by the United States Supreme Court in Pickering v. Board of Education.

The decision in Franklin may appear to turn on the application of the Pickering test, instead of the Brandenburg test. Upon close scrutiny, however, it is clear that the Sixth District determined that the law professor’s position could not have survived application of even the Brandenburg standard.

In Kahn v. Superior Court, a professor who was denied tenure on the Stanford University faculty sued the university and sought to take the deposition of another professor, who had participated in the faculty meeting on the tenure decision, to discover statements and motives relevant to the faculty committee’s consideration of the tenure application. The Sixth District issued a writ to preclude the taking of the deposition, holding that, in the absence of a discrimination claim, the candidate’s interest in receiving money damages for an unlawful denial of the appointment and the compelling state interest in ascertaining truth in legal proceedings were outweighed by the faculty committee member’s right to participate in a confidential tenure selection process without fear of compelled disclosure of his opinion and by the public interest in academic excellence. In perhaps the most memorable opinion written by Justice Brauer to date, the court determined that the plaintiff was not entitled to discover the votes cast, the underlying intentions of the committee members, or the opinions expressed during the meeting on the tenure decision. These matters, according to Justice Brauer, were privileged under the Cali-

319. Franklin, 172 Cal. App. 3d at 337, 218 Cal. Rptr. at 236.
320. Id. at 341, 218 Cal. Rptr. at 239.
321. Id. at 336, 218 Cal. Rptr. at 235-36. See Pickering v. Board of Education, 391 U.S. 563, 569-75 (1968) (analyzing the following considerations in holding that a public school teacher was unlawfully fired for writing a letter to a local newspaper in which he criticized operations at his school: (1) whether the communication disrupted close working relationships; (2) whether the communication caused conflict or interfered with the employer’s operations; (3) whether the communication addressed a subject of public interest; (4) whether the employer had an opportunity to rebut the communication; (5) whether the communication indicated the employee’s incompetence at his or her job; and (6) whether the communication was deliberately false).
325. Id. at 755, 233 Cal. Rptr. at 663.
fornia constitutional right to privacy; that privilege promotes the public policy to foster academic excellence. In this case, Justice Brauer properly balanced the significant competing interests.

In Wilson v. Superior Court, a superior court adjudged a county board of supervisors in contempt of court for violating a court order to accelerate the construction of single cells in county jails to conform with a court-imposed schedule. On review, the Sixth District ruled that the contempt judgment was void because the underlying trial court order violated the separation of powers doctrine, under which a court cannot directly require a specific, future legislative act. The court emphasized that the judicial role in a jail reform case is limited to deciding whether constitutional violations exist and crafting narrow remedies to correct those violations. Also, the court relied upon the United States Supreme Court's holding in Rhodes v. Chapman that the Eighth Amendment's prohibition against cruel and unusual punishment does not always require single celling.

In Wilson, the court of appeal achieved, if not a satisfying opinion, a resolution of a tense confrontation between two branches of government. Although Rhodes held that single celling is not constitutionally necessary, it certainly did not prohibit a finding that single celling is required by the Eighth Amendment under some circumstances. Also, nothing in the Wilson opinion indicated that the superior court did anything other than find constitutional violations and fashion narrow remedies. Thus, it appears that the trial court properly performed its limited role. Perhaps the court of appeal simply could not condone county supervisors serving five days in the same county jail which the supervisors neglected to expand and maintain, as would have been required by the trial court's judgment of contempt.

IX. LEGAL ETHICS TRENDS

As in the province of constitutional law, the Sixth District has issued some important decisions regarding legal ethics, but not enough decisions to establish any general trends. Every civil litigation attorney

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326. Id. at 769-70, 233 Cal. Rptr. at 673-74. See Cal. Const. art. 1, § 1.
328. Wilson, 194 Cal. App. 3d at 1268, 240 Cal. Rptr. at 137.
329. Id. at 1268-69, 240 Cal. Rptr. at 137.
331. Wilson, 194 Cal. App. 3d at 1269, 240 Cal. Rptr. at 137-38.
knows the truth of the following words of wisdom from the California Supreme Court’s decision in Comden v. Superior Court:\footnote{\textsuperscript{332}}: “It would be naive not to recognize the motion to disqualify opposing counsel is frequently a tactical device to delay litigation.”\footnote{\textsuperscript{333}} To what extent may a court rely upon the tactical abuse factor in denying an attorney disqualification motion?

The Sixth District’s answer is that a trial court may consider the tactical abuse factor in ruling upon a motion to disqualify counsel. In \textit{Maruman Integrated Circuits, Inc. v. Consortium Co.},\footnote{\textsuperscript{334}} the court ruled that the trial court properly considered, in denying a disqualification motion, the possibility that the plaintiff had filed the motion as a tactical ploy to delay the trial, where the hearing on the motion was held on the day before the trial was scheduled to commence.\footnote{\textsuperscript{335}} Refusing to part company with \textit{Earl Scheib, Inc. v. Superior Court},\footnote{\textsuperscript{336}} the court suggested that a trial court could not properly deny a disqualification motion on the \textit{sole} ground of prejudicial delay or tactical abuse.\footnote{\textsuperscript{337}} In \textit{Maruman}, the Sixth District decided to put some teeth into the supreme court’s admonition in \textit{Comden}.

In \textit{River West, Inc. v. Nickel},\footnote{\textsuperscript{338}} the Fifth District criticized the \textit{Maruman} decision for adopting a balancing test for attorney disqualification motions in a case outside of the attorney-witness situation.\footnote{\textsuperscript{339}} Although \textit{River West} was otherwise a scholarly opinion, its criticism of \textit{Maruman} was unwarranted. \textit{Maruman} did not advocate a balancing test; it merely stated that a trial court could consider the tactical abuse factor.\footnote{\textsuperscript{340}} Indeed, \textit{River West} travelled beyond \textit{Maruman} by holding that a trial court may deny a disqualification motion on the \textit{sole} ground of unreasonable and prejudicial delay, even if the lower court has found that the challenged attorney’s representation of his client in the pending litigation is substantially related to that attorney’s former representation of the moving party.\footnote{\textsuperscript{341}} In view of the Sixth District’s recognition of the importance of the tactical abuse

\footnotesize{\textsuperscript{332} 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978).}
\footnotesize{\textsuperscript{333} \textit{Comden}, 20 Cal. 3d at 915, 576 P.2d at 975, 145 Cal. Rptr. at 13.}
\footnotesize{\textsuperscript{334} 166 Cal. App. 3d 443, 212 Cal. Rptr. 497 (1985).}
\footnotesize{\textsuperscript{335} \textit{Id.} at 450-51, 212 Cal. Rptr. at 501.}
\footnotesize{\textsuperscript{336} 253 Cal. App. 2d 703, 707, 710, 61 Cal. Rptr. 386, 389, 391 (1967) (holding that a trial court abused its discretion in denying a motion to disqualify counsel for the sole reason that the motion was untimely).}
\footnotesize{\textsuperscript{337} \textit{Maruman}, 166 Cal. App. 3d at 450 n.5, 212 Cal. Rptr. at 501 n.5.}
\footnotesize{\textsuperscript{338} 188 Cal. App. 3d 1297, 234 Cal. Rptr. 33 (1987).}
\footnotesize{\textsuperscript{339} \textit{River West}, 188 Cal. App. 3d at 1307-08, 234 Cal. Rptr. at 39-40.}
\footnotesize{\textsuperscript{340} \textit{See Maruman}, 166 Cal. App. 3d at 450, 212 Cal. Rptr. at 501.}
\footnotesize{\textsuperscript{341} \textit{River West}, 188 Cal. App. 3d at 1308-09, 234 Cal. Rptr. at 40-41.}
factor in *Maruman*, the *River West* holding may set the next trend for the Sixth District.

In another case concerning ethical rules, *Atari, Inc. v. Superior Court*, the Sixth District concluded that a potential class member is not, prior to class certification, a party represented by counsel for the purposes of Rule 7-103 of the California Rules of Professional Conduct. Thus, the defendant’s attorneys in a class action may contact potential class members before class certification. In drawing its conclusion, the Sixth District expressly rejected federal authorities which had reached the opposite result.

### X. Significant Rulings on Civil Procedure

While the court’s decisions in the area of civil procedure do not generate any themes, they have produced some important rulings which practicing attorneys should heed. In *San Francisco Newspaper Printing Co. v. Superior Court*, the court issued a writ directing the trial court to dissolve a preliminary injunction on the ground that the injunction should not have issued because the moving party failed to establish the probability of her success on the merits of her action. The traditional test for deciding a request for a preliminary injunction is that the trial court should consider both whether the moving party will suffer more harm if the injunction is denied than the amount of harm that the opposing party will suffer if the injunction is granted and whether the moving party can demonstrate likelihood of success on the merits. In its most recent opinion on this subject, the California Supreme Court stated that a trial court may issue a preliminary injunction if the moving party satisfies either the balance of harm test or the probability of success on the merits test. In *San Francisco Newspaper Printing*, the Sixth District did not consider

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the balance of harm test. Thus, by overturning a preliminary injunc-
tion for failure to satisfy the probability of success test alone, the
Sixth District’s decision conflicts with the supreme court’s standards
for the issuance of a preliminary injunction.

The Sixth District’s position has much more analytical appeal than
the supreme court’s approach. As the Fourth District has noted:

In a practical sense it is appropriate to deny an injunction where
there is no showing of reasonable probability of success even though
the [act to be enjoined] will create irreparable harm, because there
is no justification in delaying that harm where, although irreparable,
it is also inevitable.349

Consequently, the courts should require satisfaction of both the
balance of harm test and the probability of success on the merits test
before a preliminary injunction will issue.

In other procedural rulings, the Sixth District held that an order
sustaining a demurrer without leave to amend is an abuse of discretion
if there is a reasonable possibility that the defect could be cured by
amendment, even if no request for leave to amend was made in the
trial court.350 Thus, on appeal from a judgment after a demurrer has
been sustained without leave to amend, a party does not waive the
issue of the trial court’s failure to grant leave to amend by reason of
that party’s failure to request leave to amend. In another case, the
court determined that, where a notice of intention to move for new
trial has been filed before service of a notice of entry of judgment,
the filing of the former notice is the operative event which determines
the commencement of the sixty-day period within which the trial court
must hear and decide the motion under Code of Civil Procedure
section 660.351 In a different case, the court decided that a party who
appeals from a small claims court judgment has neither a constitu-
tional nor a statutory right to a jury trial at the trial de novo in the
superior court.352 On review, the supreme court affirmed that deci-
sion.353

(1986).
352. Crouchman v. Superior Court, 192 Cal. App. 3d 102, 110, 217 Cal. Rptr. 910, 916
Rptr. at 626-27 (1988).
XI. Appellate Procedure and Jurisdiction

As in the area of civil procedure, the Sixth District has handed down several notable rulings which affect appellate procedure and jurisdiction. Again, no trends emerge because the cases involve disparate issues.

In *In re Marriage of Noghrey*, the court ruled that it had jurisdiction over an appeal from a trial court’s interim ruling on a bifurcated issue—upholding the validity of an ante-nuptial agreement—in a family law case. However, the Fourth District has stated that the *Noghrey* decision constituted “an act in excess of jurisdiction,” holding that a court of appeal cannot decide an appeal from a superior court’s interim order on a bifurcated issue. Thus, there is a conflict among the courts of appeal regarding the appealability of a trial court’s interim ruling on a bifurcated issue in a family law case.

In another ruling affecting appellate and writ practice, the Sixth District determined that a consent judgment is appealable if it were given merely to facilitate an appeal after the trial court’s adverse determination of a critical issue. Thus, a judgment of nonsuit, to which the parties stipulated following the trial court’s rulings on motions in limine, was appealable. Insofar as a request for judicial notice under Evidence Code section 459 is concerned, the court announced that the requesting party must satisfy the standard set forth in Evidence Code section 453 before the court of appeal will grant such a request. The court denied a request for judicial notice of a proposition stated in numerous treatises where the court was not supplied with sufficient information to establish that the treatises were

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359. CAL. EVID. CODE § 453 (West 1966). Section 453(b) requires the requesting party to provide the court with enough information to allow the court to take judicial notice of the matter at issue. *Id.* § 453(b).
accurate. In another case, the court observed that an appellate court has the power to decide a moot case if the case presents an important issue which is likely to recur. In a different case, the Sixth District stated that a reviewing court has the power to order a retrial on a limited issue, if that issue can be separately tried without denying any party a fair trial as a result of confusion or uncertainty. Finally, on the subject of writs, the court indicated that a court of appeal can issue a writ of mandate, even if the challenged trial court order is appealable, where the appellate remedy is inadequate under the circumstances.

XII. STANDARDS OF APPELLATE REVIEW

Last, but certainly not least to the appellate practitioner, the Sixth District has articulated the standards of review on appeal that apply in a variety of contexts. In the absence of a prejudicial error of law, application of the standard of review is usually dispositive because an appellant is entitled to review in the court of appeal, not a new trial. The Sixth District does not break any new ground in its expositions of the standards of appellate review. Those standards are set forth below primarily for the convenience of the appellate practitioner.

When an appeal presents the sole issue of the sufficiency of the evidence, the only task of the court of appeal is to determine whether substantial evidence, contradicted or uncontradicted, supports the conclusions of the trial court. In defining the substantial evidence standard, Justice Brauer initially stated that substantial evidence is any supporting evidence which is not patently unbelievable. The court subsequently retreated from that broad definition. Justice Agliano has stated that substantial evidence is evidence which has

361. Id.
"ponderable legal significance;" it cannot be just any evidence, but instead, is evidence which is credible and reasonable in nature and which constitutes solid proof of the requisite elements which the law demands in a specific case. In a subsequent opinion, Justice Brauer specified a similar standard: substantial evidence is evidence which has probative force and which is such relevant proof that a person might reasonably accept as sufficient to establish a conclusion. The court has also consistently noted that the testimony of one witness, even the party who prevailed at trial, can constitute substantial evidence.

The Sixth District has specified numerous standards which come into play when the court applies the substantial evidence test. The court will view the evidence in a light most favorable to the respondent and the judgment. On one occasion, the court even stated that it will look only at the evidence which supports the position of the prevailing party and will disregard contrary evidence. The court of appeal likewise will resolve all evidentiary conflicts in favor of the respondent and the judgment. Also, the court will draw every reasonable inference from the evidence that supports the respondent or the judgment. Moreover, the Sixth District will not substitute its inference for any reasonable inference drawn by the trial court.

368. Louis & Diederich, 189 Cal. App. 3d at 1592, 234 Cal. Rptr. at 899.
370. Donaldson v. Doe, 194 Cal. App. 3d 817, 818, 239 Cal. Rptr. 801, 802 (1987); County of Santa Cruz v. City of Watsonville, 177 Cal. App. 3d at 845, 233 Cal. Rptr. at 272; Santa Clara County Environmental Health Ass'n v. County of Santa Clara, 173 Cal. App. 3d at 81, 218 Cal. Rptr. at 682.
371. Santa Clara County Environmental Health Ass'n, 173 Cal. App. 3d at 81, 218 Cal. Rptr. at 682.
Similarly, the court will defer to the trial court’s credibility determinations.\textsuperscript{375}

The Sixth District has set forth special rules which apply when a judgment is based upon circumstantial evidence. A reasonable inference from circumstantial evidence can overcome contrary direct evidence. Also, a judgment can be supported by substantial evidence based upon inferences drawn from other inferences, even in the face of opposing direct evidence.\textsuperscript{376} In that situation, however, the first inference must be drawn from sufficient evidence and the second inference must not be too remote; otherwise, the building of inference upon inference can result in an untenable and unsupportable conclusion.\textsuperscript{377} Finally, an inference must be logical and reasonable and must rest upon evidence and probability rather than conjecture.\textsuperscript{378}

Not every standard of review favors the respondent. The Sixth District has stated that it will accept the appellant’s version of the facts whenever that version is the only one presented.\textsuperscript{379} Also, if there is no conflict in the evidence and only one reasonable inference can be drawn from the evidence, the court will reject an unreasonable inference made by the trial court.\textsuperscript{380} Finally, the court of appeal will reverse a judgment when no evidence supports a necessary finding.\textsuperscript{381}

When the Sixth District reviews a jury verdict, the following standards of review apply, in addition to the usual rules in effect when the substantial evidence test governs the case. The court will assume that a general verdict has decided all factual issues in favor of the respondent.\textsuperscript{382} Also, the court will affirm the verdict if substantial evidence supports one valid legal theory which the trial judge submitted to the jury.\textsuperscript{383} The court of appeal will reverse only where an error likely permeated every claim for relief.\textsuperscript{384} Furthermore, the court will assume that the jury observed the trial judge’s jury instructions.\textsuperscript{385}

\textsuperscript{375} Louis & Diederich, 189 Cal. App. 3d at 1584, 234 Cal. Rptr. at 894; Kahan, 174 Cal. App. 3d at 68, 219 Cal. Rptr. at 704.

\textsuperscript{376} Louis & Diederich, 189 Cal. App. 3d at 1584, 234 Cal. Rptr. at 894.

\textsuperscript{377} Louis & Diederich, 189 Cal. App. 3d at 1584, 234 Cal. Rptr. at 894-95.

\textsuperscript{378} Id. at 1584-85, 234 Cal. Rptr. at 895.


\textsuperscript{381} Claussen, 186 Cal. App. 3d at 437, 230 Cal. Rptr. at 753.


\textsuperscript{383} Id.

\textsuperscript{384} Id.

\textsuperscript{385} Id.
When the Sixth District reviews a summary judgment, the standards which apply are quite different from the rules in effect under the substantial evidence test. On appeal, the court will deem a summary judgment motion to raise only issues of law regarding the interpretation and effect of the papers filed in support of and in opposition to the motion. Thus, the court of appeal will independently examine all of the papers, including all evidence submitted by the parties. Significantly, the court will resolve all doubts about granting or denying the motion against the moving party, even if that party prevailed in the trial court.

The Sixth District has had occasion to state the standards of review which apply in an administrative mandamus case. When the petitioner cannot claim that a fundamental or vested right is at issue and the trial court has reviewed the agency's decision for substantial evidence, the court of appeal will determine whether substantial evidence supports the agency's decision, not the trial court's decision. When a fundamental or vested right is involved and the trial court exercises its independent judgment on the evidence presented to the agency, the court of appeal will review the trial court's decision to determine whether that decision is supported by substantial evidence. In analyzing the evidence, the court will resolve evidentiary conflicts and draw inferences from the evidence in favor of the judgment. The court will also limit its review to the issues in the record before the agency.

In an appeal from a judgment after the trial court has sustained a demurrer without leave to amend, the Sixth District will apply the following standards of review. The court of appeal will deem a demurrer to admit all material facts which are properly pleaded. In other words, the court will assume that all material facts set forth in the complaint are true, except those which are contradicted by judi-

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387. Id.
388. Id.
391. Sienkiewicz 195 Cal. App. 3d at 137, 240 Cal. Rptr. at 452.
cially noticed facts. However, the court will give no credit to legal conclusions or contentions alleged in the complaint. The Sixth District will treat specific factual allegations as modifying and limiting inconsistent general allegations. Similarly, the court will disregard a general description of an attached exhibit in the complaint, if that description is inconsistent with the exhibit. The court of appeal will also ignore pleading defects which have no impact on the substantial rights of the parties. Overall, the court will independently decide whether the complaint, when liberally construed, pleads sufficient facts to state a valid cause of action. As a demurrer contests only the legal adequacy of a complaint, the court will not consider whether the plaintiff can establish the facts alleged in his or her pleading. Ultimately, the court of appeal will affirm a judgment on a demurrer if the prevailing party conclusively negates an essential element of the plaintiff’s claim and thereby establishes that the plaintiff has no basis for recovery under any valid legal theory.

Similar standards apply when the Sixth District reviews a judgment based upon the granting of a defendant’s motion for nonsuit. The court will review the plaintiff’s evidence under the same rules which apply in the trial court: the court will accept the truth of the plaintiff’s evidence, unless it is inherently unbelievable, and will resolve conflicts and draw reasonable inferences from the evidence in favor of the plaintiff. If the nonsuit results from the plaintiff’s opening statement, the court of appeal will assume that the plaintiff can prove all favorable facts recited in the opening statement. The court will also consider the plaintiff’s trial exhibits which would likely be admitted into evidence. The Sixth District will uphold a nonsuit based upon

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398. Id. at 953, 230 Cal. Rptr. at 194-95.


403. Id.

404. Id.
the opening statement only if the court determines that no evidence
would support a judgment for the plaintiff. In any event, the court
will not consider any ground for the nonsuit that was not presented
to the trial court, except one which identifies an incurable defect.

XIII. Conclusion

During its first three years, the Sixth District Court of Appeal has
made a significant contribution to California jurisprudence. Analysis
of the court’s civil decisions during that time period reveals the court’s
judicial philosophy, as well as numerous trends. The court’s general
approach in civil cases is marked by judicial conservatism, but not
political conservatism. For example, the court strictly construes and
applies statutes, regardless of the identity of the legal issues and the
parties.

In tort cases, the court will strictly apply a statute of limitations
or other statute which cuts off rights, even if a severely injured
plaintiff is left without a remedy. In strict liability cases, however,
the court, contrary to the First District, will apply the “consumer
expectation” test—which requires less proof to establish a strict
product liability claim—if the use of the product (and not the product
itself) is within the realm of common experience of an ordinary
consumer. Finally, the Sixth District has revealed that it is not
receptive to any expansion of the tort of breach of the implied
covenant of good faith and fair dealing beyond the situation where
a special relationship exists between the two parties.

Employers are undoubtedly satisfied with the Sixth District’s deci-
sions. In numerous published employment law cases, the court has
ruled in favor of the employer in every case. The court rejects any
effort to expand the law on wrongful termination. For example, the
court has ruled that an employer’s mere good faith belief in good
cause for termination, even if no good cause actually existed, is a
valid defense to an action for wrongful termination. The court
seems to uphold the termination of an employee if the employer

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405. Id.
406. Id.
407. See supra notes 29-63 and accompanying text.
408. See supra notes 64-90 and accompanying text.
409. See supra notes 91-102 and accompanying text.
410. See supra notes 113-207 and accompanying text.
411. See supra notes 114-128 and accompanying text.
presents evidence that the employee could not perform an assigned job, even if there was evidence of discrimination on the part of the employer or other countervailing circumstances. The court has disapproved, under the parol evidence rule, an employee's effort to establish an oral collateral agreement that he could be terminated only "for cause," where his written employment agreement was integrated and had an "at will" termination provision.

The court's refusal to adhere to a particular ideological path is most notable in cases concerning real property law. On the one hand, the court follows the California judicial tradition to construe strictly the anti-deficiency laws to prevent creditors—usually large institutional lenders—from circumventing those laws to obtain a deficiency judgment of money damages, in addition to the real property security from a debtor. On the other hand, the court has ruled in favor of the landlord in every one of the few landlord-tenant cases which it has published. In its few environmental law cases, the court seems predisposed to enforce the requirements of the California Environmental Quality Act ("CEQA") to the maximum extent possible. Notwithstanding its conservative reputation, the court has issued pro-consumer rulings in every one of the four consumer law cases which it has published.

Given that three new justices have recently joined the court, it will be interesting to watch the future trends which the court establishes in upcoming years.

412. See supra notes 134-142, 148-169 and accompanying text.
413. See supra notes 144-147 and accompanying text.
414. See supra notes 208-228 and accompanying text.
415. See supra notes 246-268 and accompanying text.
417. See supra notes 264-294 and accompanying text.
418. See supra notes 300-313 and accompanying text.