

Case No. 75373-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FERNANDO VENTRESCA and GREG SHERRELL,

Appellants,

v.

WORKHOUSE MEDIA, INC., a Washington corporation,

Respondent.

BRIEF OF RESPONDENT, WORKHOUSE MEDIA, INC.

Arnold M. Willig, WSBA #20104
Elizabeth H. Shea, WSBA #27189
Charles L. Butler, III, WSBA #36893
Attorneys for Workhouse Media, Inc.
HACKER & WILLIG, INC., P.S.
520 Pike Street, Suite 2500
Seattle, Washington 98101
Tel.: (206) 340-1935
Fax: (206) 340-1936

2016 SEP 30 PM 4:41
STATE OF WASHINGTON
COURT OF APPEALS DIVISION I

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II. INTRODUCTION

Respondent, Workhouse Media, Inc., a Washington corporation (“Workhouse”), Plaintiff below, by and through its attorneys, HACKER & WILLIG, INC., P.S., respectfully presents this Brief of Respondent pursuant to Washington Rule of Appellate Procedure (“RAP”) 10.1(b)(2) and 10.3.

Appellants, Fernando Ventresca aka Fernando Ventura and Greg Sherrell (“Ventresca,” “Sherrell,” and/or, together, “Appellants”), popular morning radio personalities and Defendants below, each signed a contract with Workhouse (the “Agency Agreements”), agreeing to pay Workhouse an 8% commission on all contracts Workhouse negotiated on their behalf. CP 132, 135. Workhouse negotiated separate, five-year guaranteed contracts that paid each Appellant an annual base salary of more than \$500,000, which escalated to \$600,000 per year in the fifth year of the contract. CP 126-127. In the first year alone, the employment contracts paid each Appellant \$150,000 *more* per year than their previous contracts, escalating to almost double the base salary under their previous contracts: the new contracts negotiated by Workhouse were above industry standard in that they were 5-year, no-cut deals: they were the *crème de la crème* of deals for similar radio personalities. CP 138.

Appellants seek to conflate the multiple contracts in the record for purposes of their “choice of law” analysis, but only one contract matters:

the Agency Agreement. CP 132, 135. Workhouse conducted its business entirely from Seattle, Washington, which, for purposes of the choice of law analysis here as to Appellants' contracts *with Workhouse*, this is the nexus that should apply, not Appellants' own employment agreements with their CBS radio station. The Agency Agreements required Workhouse to provide services, including employment searches, career strategy, and negotiating continuing employment. CP 132, 135.

Workhouse performed these services entirely from Seattle, Washington. CP 125. Appellants were fully aware that Workhouse operated out of Seattle, Washington, when they hired Workhouse. Appellants sent their regular payment checks to Seattle, Washington. Appellants contractually agreed that Washington law should apply. CP 125, 133, 136. The fact that Appellants' *employment* contracts with CBS are performed by Appellants in California is irrelevant to "choice of laws."

Rather than pay Workhouse the commissions it earned, Appellants forced Workhouse to file a collection lawsuit in King County Superior Court. CP 1-11. After only five (5) months of litigation, the trial court dismissed all of Appellants' purported counterclaims. CP 101-102. Curiously, Appellants later filed a Confirmation of Joinder in the lower court and thereby confirmed on the record that all mandatory pleadings had been filed and that no additional claims or defenses would be raised.

CP 419-420. After more than eight (8) months of continuous litigation and the (not then appealed) dismissal of all of Appellants' counterclaims against Workhouse, the lawsuit ended with the King County Superior Court entering summary judgment against Ventresca and Sherrell and dismissing all of their alleged counterclaims. CP 246, 351, 354, 357, 101.

On appeal, Appellants do not dispute that they signed the straight-forward, two-page contracts in the record. CP 23. Rather, they assign error to the lower court for applying the choice of law provision they agreed to – that the contracts are governed by the laws of the State of Washington – for failing to strike that provision from the contracts, and, once stricken, for failing to engage in a “conflict of law” analysis to reach the incongruous conclusion that only California law should have governed the contracts (which are somehow “void” after being performed for approximately eight years by all parties). CP 143. Appellants' arguments continue, that had the lower court reached that conclusion, as artists they would have been relieved of paying Workhouse anything because Workhouse (a Washington corporation, paying taxes in Washington, and doing business in and from Washington) is not licensed in California as a “talent agency,” and that “talent agents” in California cannot be paid unless they are licensed. CP 145.

Of course, the lower court correctly applied Washington State law

as the parties had agreed and intended in the contracts. CP 133, 136, 246. Further, outside the contract, Appellants consented to Washington jurisdiction and King County venue by alleging counterclaims (albeit unsuccessfully) [CP 22-29] and proceeding with litigation right up to the time the final Judgments were entered against them.¹ CP 444.

Appellants sought-out Workhouse to negotiate their lucrative radio employment contracts, and negotiated and voluntarily signed the Agency Agreement with Workhouse, which obligated Appellants to pay Workhouse the commissions it earned. The Judgments entered against Appellants eight (8) months after this case was filed should be affirmed.

Thus, Workhouse respectfully requests that the lower court's Orders and Judgments be affirmed, that this appeal be dismissed, and that Workhouse be awarded its reasonable attorneys' fees and costs herein.

III. ASSIGNMENTS OF ERROR

Workhouse assigns no error to any action taken, ruling made, or order entered by the trial court. Workhouse is not appealing any decision of the trial court in this matter, and respectfully requests that the Orders and Judgments entered in the trial court be affirmed.

¹ Appellants are actually collaterally attacking the Washington State Judgments by filing post-litigation actions in San Francisco County Superior Court (objecting to recording the sister-state judgments) and before the California Labor Commission (attempting to apply California law and the Talent Agencies Act to Washington contracts and Washington Judgments), discussed *infra*.

Appellants raise four (4) assignments of error:

- 1) The lower court acted without subject matter jurisdiction;
- 2) The lower court did not conduct a “conflict of law analysis”;
- 3) The lower court improperly applied Washington law, as specified by the Agency Agreements; and
- 4) The lower court erred in entering its March 18th Order and the attendant Judgments thereon.

Curiously, Appellants do not assign error to the Order Denying Defendants’ Counterclaims dated January 12, 2016.

IV. STATEMENT OF THE CASE

A. Appellants Signed Enforceable Agreements With Workhouse, Located in Seattle.

Appellants entered into agreements with Workhouse knowing that Workhouse was located in Seattle, Washington, and was not a resident of or licensed to do business in California. CP 129, 132, 135. Workhouse represented Appellants for years, all the while being located in and working from Seattle, Washington. CP 125. Appellants are popular morning radio personalities who jointly host their own broadcast radio program in San Francisco; Workhouse negotiated and secured Appellants’ present lucrative employment. *Id.* Appellants argue strenuously that California has such a special relationship with “talent” (analogizing radio personalities) that this Court should ignore the law of the jurisdiction in which we stand and somehow apply the “Talent Agencies Act” (“TAA”) out of California to invalidate the parties’ contracts here. Appellants’

Brief (“AB”) 1. Appellants fail to recognize, however, that Workhouse represents primarily radio personalities around the country, and that such “talent” is not unique to California: there are radio personalities in most jurisdictions – if not every single jurisdiction – in every state across the country. Though California may be the “entertainment capitol of the world,” as Appellants stated to the trial court during the summary judgment hearing [Verbatim Report of Proceedings (“VRP”), pg. 14], California does not have a chokehold on the *radio* entertainment industry. In fact, many radio shows are aired with the participants talking over the phone, making the actual location of the radio personality (or the person being interviewed) even less significant.

The enforceable contracts between the parties are straight-forward. On May 12, 2009, Appellant Sherrell and Workhouse entered into a written Agency Agreement (the “Sherrell Agreement”). CP 132-133. On May 15, 2009, Appellant Ventresca and Plaintiff entered into a written Agency Agreement (the “Ventresca Agreement”). CP 135-136.² The respective terms of the Agency Agreements were properly extended on more than one occasion. CP 125. Until Appellants’ commissions payments stopped abruptly, contrary to the terms and in breach of the

² The Sherrell and Ventresca Agreements are identical and thus will be collectively referred to as the “Agency Agreements.”

Agency Agreements, Appellants routinely, over a period of many years, sent their commissions checks to Workhouse in Seattle. CP 129.

Under the terms of the Agreements, which are customary, the parties agreed, in part, as follows:

2. Fees & Commissions. Artist [Sherrell/Ventresca] agrees to pay Agent [Workhouse Media] eight percent (8%) of Artist's gross compensation for any new deal negotiated by Agent. Gross compensation is defined as the amount received by Artist before deductions, including base salary, signing bonus, syndication revenue, ratings and incentive bonuses, and other guaranteed compensation such as endorsement or appearance guarantees. Agent's commission will be computed on a yearly basis and billed and payable on a monthly basis. Commissions for incentive compensation, such as ratings bonuses, shall be paid by Artist when earned.

If Artist enters into any employment agreement which would have been otherwise covered by this Agency Agreement within four (4) months after the termination hereof, with any person, station or corporation as to whom a submission has been made and/or negotiations commenced on Artist's behalf during the term of this Agency Agreement then, then any such employment contract shall be considered entered into during the term hereof and Artist shall pay Agent Commissions earned in accordance with paragraph 2 above.

CP 132, 135 (emphasis added).

As discussed more fully below, it is the four-month provision emphasized immediately above that entitles Workhouse to payment by

Appellants over the full term of their current CBS contract. CP 132, 135.

B. Workhouse Negotiated Appellants' Prior CBS Radio Employment Contracts from Seattle.

Workhouse is, and always has been, based in Washington. At all relevant times, Workhouse conducted its business as a media agent for Appellants from its offices in Seattle, Washington. CP 125. Beginning in November of 2011, Sherrell and Ventresca were under employment contracts (together, the "CBS Radio Contract") to work for CBS Radio KMVQ-FM, Inc., an affiliated radio station of CBS Radio known as KMVQ-FM. *Id.* Working from Seattle, Workhouse negotiated the lucrative CBS Radio Contract on behalf of both Appellants. *Id.* The CBS Radio Contract expired by its terms on November 10, 2014. *Id.*

The CBS Radio Contract provided for base salary payments to Sherrell and Ventresca culminating with \$350,000 **each** for the third year of employment. The CBS Radio Contract also specified that quarterly (four times annually) bonuses be paid to Appellants, depending on audience ratings, and Appellants have traditionally been in the top-tier rankings for audience ratings. CP 125-126.

On or about July 18, 2014, Workhouse began negotiating a new employment contract on behalf of Sherrell and Ventresca with CBS Radio. CP 126. On July 22, 2014, CBS Radio's Senior Vice President of

Programming and Music Initiatives, sent an email to Sherrell, Ventresca, and Workhouse Media, among others, stating that the email was CBS Radio's "official notice for CBS RADIO/KMVQ's intent to renew your deal." *Id.* Indeed, the CBS Radio Contract required this, stating: "If Employer [CBS Radio] desires to continue to utilize Employee's [Appellants'] services after the expiration of this Agreement, Employer shall notify Employee, in writing, at least ninety (90) days prior to the expiration of the Term." *Id.* CBS Radio contract renewal discussions ensued led by Workhouse from Seattle, Washington. *Id.*

C. Workhouse Negotiated Appellants' iHeart Radio Proposed Employment Contract from Seattle.

Between October and November, 2014, at Appellants' request (apparently because they had a preference for the programming management team at iHeart Radio as compared with CBS), Workhouse Media also began negotiating on behalf of Appellants Sherrell and Ventresca with iHeartMedia + Entertainment, Inc., doing business as iHeart Radio ("iHeart Radio"). CP 126. On or about November 14, 2014, iHeart Radio sent a written proposed employment agreement to Workhouse Media for review by Appellants Sherrell and Ventresca (the "iHeart Radio Contract"). *Id.*

The proposed iHeart Radio Contract was for an employment

period of five years, beginning December 1, 2014, and ending on November 30, 2019 (the so-called five-year, no-cut deal). CP 126. The iHeart Radio Contract provided for a significant increase in Appellants' compensation, with a starting base salary for each of them of \$500,000 per year, culminating with a base salary of \$600,000 **each** for the fifth and final year of the agreement. CP 126-127. In the fifth and final year of their iHeart Radio Contracts, Appellants' base salaries would have nearly doubled. *Id.* Like the CBS Radio Contract, the proposed iHeart Radio Contract also provided for generous quarterly (four times annually) bonuses to Appellants, depending on audience ratings, and Appellants remained in the top-tier bonus position. CP 127. Thus, in the first year alone, the proposed iHeart Radio Contract would have paid Appellants each an **additional** \$150,000 per year in base salary, plus a possible **additional** \$120,000 per year in bonus compensation. In sum, the proposed iHeart Radio Contract would have paid Appellants Sherrell and Ventresca millions of dollars over the term of the contract. CP 126-127.

D. The iHeart Radio Contract Represented its Highest and Best Offer, it Would Go No Higher.

iHeartRadio is on the record and has confirmed it would not have upped its offer in order to beat-out competitive bidding by CBS. CP 137-139. iHeart Radio was informed of a "right to match" by CBS and

consciously elected not to do so. *Id.* The legal enforceability of this “right to match” that was written into the CBS Radio Contracts was questioned at the time by Appellants, but they chose not to dispute it in court. CP 138. In any event, the work performed by Workhouse (from Seattle, Washington) in negotiating this deal lead directly to the consummation of the matching offer by CBS. *Id.*

iHeart Radio’s Senior Vice President of Business Affairs, Keith Kauffman, has long been on record that he and Paul Anderson, the President of Appellant Workhouse, negotiated the proposed iHeart Radio Contract, as they have routinely done many times before and since on behalf of Appellants and other talent. CP 138. Every aspect of the iHeart Radio negotiation with respect to Appellants was conducted exclusively by and between Mr. Anderson, from Seattle, and Mr. Kauffman. CP 125, 138, 182. Workhouse fully performed its obligations under the Agency Agreements from Seattle, Washington. CP 125, 182.

Prior to any offers being made to Appellants, iHeart Radio was aware of CBS’s purported “right to match” any deal that Appellants, through Workhouse, negotiated with a competing radio broadcaster. CP 138. Mr. Kauffman prepared a document for Appellants in approximately November of 2014, summarizing the terms of iHeart Radio’s offer to Appellants. *Id.* iHeart Radio has confirmed in no uncertain terms that the

offer presented to Appellants represented iHeart Radio's highest, best, and final offer. *Id.* Moreover, iHeart Radio would not have increased Appellants' offer in any way. *Id.* For the radio entertainment industry, this offer was very rare in that it represented a longer term and higher salary point than the vast majority of other offers Mr. Kauffman has seen during his career: the deal was a five-year, no-cut deal with an annual salary of \$500,000. *Id.* In other words, it was the crème de la crème of deals for similar radio personalities. *Id.* Mr. Kauffman states unequivocally that Appellants would not have received a better, more lucrative offer from any other radio company in the country. *Id.*

Appellants' desire to work for iHeart Radio and not CBS, and their conclusion that they could have "made more money" by working at iHeart Radio versus CBS, comes only from Appellants' own self-interested, unsupported statements, and not from any testimony by iHeart Radio or CBS. Such facts are simply not in the present record.

E. CBS Matched the iHeart Radio Contract and Appellants Voluntarily Signed the New CBS Radio Contract.

On or about November 19, 2014, as required under the CBS Radio Contract, and with Appellants' full knowledge and consent, Workhouse Media informed CBS Radio about the proposed iHeart Radio Contract. CP 127. Under the terms of Appellants' CBS Radio Contract, CBS Radio

had the option to match any competing employment agreement proposed to Appellants under a “right of first refusal” provision. *Id.* Pursuant to the CBS Radio contract, if Appellants did not want CBS Radio to “match” the terms of a different contract, they were restricted from entering into any employment agreement with another radio station in the market for six (6) months. *Id.* The CBS Radio Contract expired on November 10, 2014, and Appellants elected to stay on the air. *Id.*

On or about November 19, 2014, CBS Radio’s representative sent an email to Workhouse Media stating that CBS Radio was invoking its “right of first refusal” and insisted on reviewing the proposed contract from iHeart Radio. CP 127. Workhouse Media complied with CBS Radio’s request, with Appellants’ consent and direction. *Id.* Indeed, the CBS Radio Contract required Appellants to notify it “of all offers of employment received by [Appellants] from any third party to perform broadcasting services[.]” *Id.* iHeart Radio was aware that, at the time it presented Workhouse Media with the iHeart Radio Contract, CBS Radio had a contractual right of first refusal. *Id.*

On or about December 3, 2014, CBS Radio notified Workhouse Media that it was exercising its right of first refusal and matching the terms of the proposed iHeart Radio Contract. CP 128. In December of 2014, Appellants executed new employment contracts with CBS Radio

under the same terms negotiated by Workhouse Media, matching those terms originally offered by iHeart Radio in the proposed iHeart Radio Contract (the “New CBS Radio Contract”). *Id.* In sum, the New CBS Radio Contract, which Workhouse negotiated on behalf of Appellants, pays Appellants Sherrell and Ventresca millions of dollars over the term of the contract. *Id.* Appellant Ventresca made one payment – and no further payments – to Workhouse Media under the New CBS Radio Contract) and Appellant Sherrell has made no payments to Workhouse Media under the New CBS Radio Contract. *Id.* This constitutes breach of the Appellants’ Agency Agreements with Workhouse. *Id.*

F. Appellants Purported to “Terminate” Workhouse, Then Breached the Agency Agreements.

Pursuant to each Agency Agreement, Appellants were free to terminate Workhouse at any time, and vice versa. CP 133, 136. But they were still obligated to pay Workhouse its commissions. CP 132, 135.

On or about December 6, 2014, Appellant Sherrell purported to terminate the Sherrell Agreement and sent Workhouse Media an email stating that he was “terminating his relationship with you and Work House [sic.] Media.” On January 9, 2015, Appellant Ventresca purported to terminate the Ventresca Agreement with Workhouse Media. CP 128.

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G. Monies Are Owed to Workhouse Given Appellants' Breach; Judgment Was Properly Entered Thereon.

Appellants purported to terminate their relationship with Workhouse Media well within the four (4) month period referenced under Paragraph 2 of the Agreements, i.e., within four (4) months of their execution of the New CBS Radio Contract. CP 132, 135. Thus, they are still obligated to pay the commissions as referenced herein to Workhouse Media. CP 128.

Workhouse Media carefully and accurately tracks the amounts owed by all of its clients in commissions payments, as it does with Appellants' commissions payments owing. Appellants do not, however, appear to dispute the specific amounts Workhouse claims are owed to it in commissions payments, but rather Appellants seek an order by a Washington court that the Agency Agreements are void under California law. AB 3. Thus, as to the amounts owing to Workhouse as set forth in the Judgments entered against Appellants, Workhouse will rely on the record below to substantiate and support same. CP 249-360.

Appellants' **guaranteed** salaries under the New CBS Radio Contracts (five-year, no-cut deals), lucrative terms which Workhouse negotiated from Seattle, entitle each Appellant to receive the following:

<u>Dates</u>	<u>Salary</u>
12/03/14 to 12/02/15	\$500,000.00

12/03/15 to 12/02/16	\$500,000.00
12/03/16 to 12/02/17	\$525,000.00
12/03/17 to 12/02/18	\$575,000.00
12/03/18 to 12/02/19	\$600,000.00

CP 126-127.

The above base salaries are *exclusive* of Appellants quarterly ratings bonuses. For purposes of comparison, Appellants' prior salaries under their prior CBS employment agreements hit a maximum base salary of \$350,000 apiece. CP 125. Workhouse negotiated for Appellants a \$125,000/year raise, all but doubling their base salaries over the full term of the new CBS employment agreements. *Id.*

Appellants do not appear to question the trial court's calculation of the Judgments. Thus, because the lower court correctly interpreted the facts and applied the law, the Judgments should stand.

H. Workhouse Was Forced to File Its Complaint Herein.

Given Appellants' breach, Workhouse demanded payment by Appellants pursuant to the terms of their Agreements. CP 129. Appellants flatly refused, though they each make nearly \$1 million per year based on employment contracts which Workhouse successfully negotiated on their behalf. *Id.* Therefore, based on the afore-described nonpayment, and having demanded payment from Appellants and not receiving any further payment, Workhouse was left with no other

reasonable option than to file its Complaint, which it did on or about August 26, 2015. CP 6. Despite their efforts to avoid service of process, the Complaint was later served on both Appellants. CP 384-385.

I. Venue and Jurisdiction Were Selected by the Parties.

Pursuant to the terms of separate written contracts executed between Plaintiff and each Appellant, the parties agreed that Washington State law governs, and that any action to enforce the terms of the contracts shall be brought only in the Courts of King County, Washington. CP 133, 136. The Agency Agreements each provide:

9. Governing Law & Venue. **This agreement shall be governed by the laws of the State of Washington, and any action to enforce its terms shall be made in King County, Washington.** The prevailing party in any action shall be entitled to reasonable attorney's fees from the non-prevailing party.

CP 133, 136 (emphasis added).

For this reason alone, venue and jurisdiction over the parties and the subject matter are proper in Washington courts. Given the foregoing, and in light of the legal authority set forth below, Workhouse respectfully requests that the Judgments and Orders of the lower court be affirmed.

V. ISSUES PRESENTED

Appellants raise four (4) "issues" pertaining to their asserted "assignments of error," one with multiple claimed subparts. AB 4-7.

None of Appellants' stated "issues" offers any sufficient or legitimate legal basis on which they may prevail in this appeal. In any event, this Court should decide as follows:

1. Appellants admit in their Brief that "Plaintiff is not now and has never registered as a 'talent agency' as required under the TAA." AB 4. This is correct, because Workhouse is not obligated to so "register." Appellants were thrilled to contract with a Washington corporation to negotiate lucrative "crème de la crème" employment deals on their behalf over many years, and so were all of the radio stations and parent companies with whom Workhouse deals on a routine and continuous basis. Appellants were aware that Workhouse operated from Washington State and that Workhouse would be providing its services from Washington. The trial court properly granted summary judgment in favor of Workhouse where, as here, the parties voluntarily entered into the Agency Agreements in the record. Appellants have cited no Washington law to the contrary.

2. Appellants admit they signed the Agency Agreements in the record and authorized Workhouse to provide services to them under the Agency Agreements, which resulted in their securing a "five-year, no-cut" lucrative employment deals worth millions of dollars to each Appellant. AB 7. Appellants happily engaged Workhouse to handle all of

their employment negotiations for many years until, in their own minds, their feelings toward Workhouse “soured.” AB 8. Now, Appellants are attempting to litigate their way out of contracts they no longer like, but Appellants’ self-serving claims make the Agency Agreements no less enforceable. The contractual choice of law, which the parties voluntarily put in place, is enforceable and Appellants cannot now sue their way out of their straight-forward obligations to Workhouse. The trial court correctly entered summary judgment against Appellants, and Appellants have cited no Washington law to the contrary.

3. The trial court here conducted a thorough choice of law analysis, which was fully briefed and argued by Appellants. CP 143-155. Here, under Washington law, a Washington trial court has jurisdiction to decide the case and enter the judgments it entered. Appellants have not cited any binding authority that the courts of this State should defer to California law or California administrative procedure for enforcement of a Washington contract, performed in Washington [CP 125, 138, 182], selecting and applying only Washington law. Washington, here and in every similar case, has legitimate interests in enforcing contracts that are performed in the state and/or that select Washington law as their choice of law. To ignore such a provision in a situation where another state’s law might be different from Washington’s would have far reaching

consequences for persons and entities doing business with Washington residents, both individuals and corporations alike. The King County Superior Court properly decided this case under Washington law: Appellants have given no compelling reason to upend settled Washington law with respect to choice of law provisions in a contract, and there are plenty of reasons not to (scores of years of precedent, predictability in contracting, etc.). Further, Appellants allowed all of their counterclaims to be dismissed, did not seek reconsideration thereof, and only appealed the dismissal months later with the Judgments. To the extent Appellants claim the trial court erred by refusing to apply out-of-state authority to grant them relief and void the Agency Agreements pursuant to Appellants' counterclaims, Appellants should have sought discretionary review as soon as their counterclaims were dismissed. The outright dismissal of all of Appellants' counterclaims has become the law of the case, and Appellants have cited no Washington law to the contrary.

4. Having already dispensed with Appellants' TAA-related arguments, Appellants fail to alert this Court that they flat-out missed the one-year statute of limitations under the TAA. Cal. Lab. Code, § 1700.44, subd. (c) ("No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding.").

Appellants' Appendix A-161. By Appellants' own admission, Workhouse's alleged illegal "employment procurement" is alleged to have occurred from July-December 2014, yet Appellants' Petition to the California Labor Commissioner was not filed until March 14, 2016 – more than a year after Workhouse's alleged violation of the TAA. Accordingly, Appellants' are not entitled to any relief, before the California Labor Commissioner or otherwise, and Appellants have cited no Washington law to the contrary.

A further issue must be raised at this time. As set forth under Section VII(F) below, should Workhouse prevail in this appeal as it did in the lower court, Workhouse unquestionably is entitled to its attorneys' fees and costs incurred on appeal. Contrary to RAP 18.1(b), Appellants failed to devote a section in their opening brief to their request for attorneys' fees and costs. Therefore, even if Appellants prevail on appeal, they will not be entitled to any award of attorneys' fees and costs against Workhouse.

In short, the trial court got it right, and saw this case for what it is: an attempt by Appellants to litigate out of a contract they now dislike. Appellants each have a multi-year history and practice of making payments to Workhouse – in Seattle – pursuant to the parties' Agency Agreements. Now, after Workhouse negotiated for them a five-year, no-

cut deal (the crème de la crème of employment contracts in radio), Appellants simply stopped paying Workhouse the commissions payments which they undeniably owe, claiming the obligation was “void.”

Despite Appellants’ many efforts to throw sand in the Court’s eyes, the lower court conducted the proper choice of law analysis and found that Appellants were obligated to Workhouse in the amounts alleged, entering judgment thereon prior to trial. Appellants’ aggressiveness in this litigation has often crossed the line, leading to outright false statements by Appellants. For example, Workhouse **does not** have “an office in Santa Monica, California.” AB 2. A separate company, Workhouse *Creative*, in a different line of business, maintains an address in Santa Monica, California. Respondent’s Appendix A-1. Workhouse Creative films content for multi-media use – Workhouse Creative has no involvement whatsoever in representing radio talent, in stark contrast to Workhouse, Respondent here, who clearly does. *Id.*

Accordingly, the decision of the lower court and the Orders and Judgments entered therein should be affirmed.

VI. STANDARD OF REVIEW

“A grant of summary judgment is reviewed *de novo*.” *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

This Court views the facts and all reasonable inferences from them in the

light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The nonmoving party “must set forth specific facts showing a genuine issue.” *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Mere allegations or conclusory statements of fact unsupported by evidence are not sufficient. CR 56(e); *Baldwin*, 112 Wn.2d at 132.

Here, Workhouse carried its burden of demonstrating that there is no genuine issue as to any material fact in this case, and that it is entitled to a judgment as a matter of law. CR 56(c); *Federal Way Sch. Dist.*, 167 Wn.2d at 523; *Bank of Am., NA v. Owens*, 173 Wn.2d 40, 48-49 (2011).

VII. LEGAL AUTHORITY & ARGUMENT

A. Summary Judgment Was Properly Granted Against Appellants.

The purpose of summary judgment is to avoid useless trials when there is no issue of any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). If there is no issue as to any material fact, the trial court may grant summary judgment as a matter of law. *State Farm General Insurance Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984).

On summary judgment, the moving party is not compelled to meet every speculation, conjecture, or possibility by alleging facts to the contrary. *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). A question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799 (2002).

To avoid summary judgment, the nonmoving party must present specific facts to demonstrate that genuine issues of material fact exist. *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490 (1983); *Tokaz v. Frontier Fed. Savings & Loan Assn.*, 33 Wn. App. 456 (1982). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008). Conclusory statements are insufficient to overcome a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

A fact for purposes of summary judgment must be a reality and not a supposition or opinion. *McBride v. Walla Walla County*, 95 Wn. App. 33, 36-37, 975 P.2d 1029 (1999). Again, “[u]ltimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not

suffice.” *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002) (quoting, *Grimwood*, 110 Wn.2d at 359) (citation omitted).

Here, Appellants were given every opportunity to present their case to the trial court, opposing summary judgment with purported substantive arguments. CP 140-168. Appellants raised substantive counterclaims and then allowed them to be dismissed [CP 25-28], thereafter filing a stipulated Confirmation of Joinder [CP 419-420], and Appellants demanded a King County Jury [CP 27-28].

Following entry of the Judgments, Appellants filed the California Labor Commissioner Action and the improvident San Francisco County Action. CP 549-552. Appellants tried everything, but the trial court found no merit to any of their arguments, which amount to self-serving statements without any evidentiary support in the record. The documentary evidence shows a clear contractual obligation on the part of Appellants which they willfully refused to fulfill.

Also, Appellants could not show the existence of any genuine issue as to any material fact. After consenting to the jurisdiction of Washington courts by filing counterclaims against Workhouse and failing to bring a motion to dismiss, Appellants cannot now be heard to object to the law applied or the lower court’s correct finding of jurisdiction over the parties and the subject matter of this dispute.

The decisions of the trial court should be upheld.

B. The Trial Court Has Personal Jurisdiction Over the Parties.

Washington's long-arm statute provides for personal jurisdiction over nonresident defendants as follows:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state[.]

RCW 4.28.185 (West 2016 ed.).

Here, though the Defendants were each personally served out of state [CP 384-385], they transacted business with Workhouse within Washington and thus submitted to the personal jurisdiction of Washington Courts. RCW 4.28.185(1)(a).

To exercise specific personal jurisdiction under RCW 4.28.185, the following three-part test must be met:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of

the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 767, 783 P.2d 78 (1989).

Accord, Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 230 P.3d 625 (2010). In *Freestone*, the out-of-state parties disputing jurisdiction had signed contracts with the Washington company, had multiple contacts with the Washington company, regularly corresponded by telephone, e-mail, and mail, and had visited Washington. *Id.* Here, the facts are nearly analogous: Appellants admit to signing the Agency Agreement, have a multi-year history of paying Workhouse in Washington, regularly corresponding by telephone, e-mail, and mail, and have visited Washington. CP 180-193.

Appellants cannot reasonably dispute that the lower court had proper personal jurisdiction over them in entering the Judgments.

C. The Trial Court Has Subject Matter Jurisdiction Over a Contract Executed by Workhouse in Washington, Negotiated by Workhouse in Washington, and Performed by Workhouse in Washington.

This matter involves a contract written by a Plaintiff in Washington State, executed by the Plaintiff in Washington State, and performed by the Plaintiff in Washington State. CP 125.

The Washington State Constitution vests the Superior Courts with

“original jurisdiction ... in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law” as well as “in all cases and proceedings in which jurisdiction shall not have been by law vested exclusively in some other **court**[.]” *See*, Washington Constitution Art. IV, sec. 6 (emphasis added). The legislature may not deprive a court of jurisdiction conferred by the Washington State Constitution. *See, e.g. State ex rel. Roseburg v. Mohar*, 169 Wash. 368 (1932); *State ex rel. Sim v. Superior Court*, 169 Wash. 254 (1932).

Given that the Washington legislature cannot divest a Washington court of jurisdiction, it is axiomatic that a California code cannot divest a Washington court of jurisdiction over an action involving its own resident, particularly in favor of a foreign administrative labor commission.

Appellants here argue in circles and claim that merely because *they* are located in California and are radio personalities, that a contract they entered into with a Washington corporation **for services that were performed by that corporation in the State of Washington**, pursuant to which they agreed that venue and jurisdiction would be placed in Washington, are somehow exclusively subject to a California regulatory scheme. This unsupported argument is simply insufficient to preclude subject matter jurisdiction.

In arguing that the trial court lacked subject matter jurisdiction, Appellants cite primarily to California Labor Commission rulings, which have no precedential value in Washington whatsoever. But, even these decisions can be distinguished from the case at hand. Only **one** of the decisions cited, *Sebert v. DAS Comms., Ltd.*, No. TAC-19800 (Cal. Lab. Comr. March 27, 2012), appears to have involved an agent that was in any way located outside of California. In that case, however, although DAS Communications, Ltd. was a New York entity, its employee/agent assigned to represent the petitioner “**resided in Los Angeles at the time of the parties’ initial contact in 2005 and continued to reside there for the first eleven months that the contract was in effect.**” The day-to-day manager then moved to New York but continued to regularly manage petitioner in California, through frequent e-mail and telephone communications to petitioner in California, and through periodic trips to California to personally meet with her and participate in a variety of career related activities.” *Sebert* at 12 (App. Appendix A-117) (emphasis added).

Workhouse, on the other hand, has no presence in California. Contrary to the Appellants’ unsupported allegations, Workhouse maintains no office in California at all. Instead, the record shows that at all relevant times, Workhouse conducted its business as a media agent for the Appellants **from its offices in Seattle, Washington.** CP 125. Indeed,

Appellant Sherrell travelled to Seattle, Washington to meet with Workhouse on more than one occasion. CP 125. The Appellants were at all times aware that Workhouse worked out Seattle and they sent regular correspondence to Workhouse in Seattle. CP 129.

There is no evidence or controlling case law presented that establishes that a Washington corporation which enters into a contract with individuals in California becomes subject to the “exclusive jurisdiction” of the California Labor Commission.

1. Appellants Affirmatively Consented to Washington Jurisdiction Pursuant to the Contracts They Signed.

Appellants’ primary argument, distilled to its essence, is that they should not be bound by the terms of their written contracts. As set forth above, the terms of the Agency Agreements are abundantly clear, and none of Appellants’ post hac litigation strategies seem to be working.

In Washington, a party is responsible for knowing the contents of the documents they sign. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 380 (1987).³ Strong public policy exists to enforce written contracts

³ The relevant principles are summarized in *National Bank v. Equity Investors*, 81 Wn.2d 912-13, 506 P.2d 20 (1973):

It is a general rule that a party to a contract which he has not voluntarily signed will not be heard to declare that he did not read it if he was ignorant of its contents. *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.2d 661 (1934). One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his

in Washington; to refuse to do so where another state's law might be different than Washington's would have far reaching consequences for persons and/or entities doing business with Washington residents.

Here, not only do Appellants fully understand the implications of their Agency Agreements, they promptly paid Workhouse pursuant to same for many, many years. CP 189-190. What appears to have happened is this: Appellants were so upset by the fact that they signed employment agreements containing a "right to match" provision in favor of CBS, that when CBS invoked its right to match, whether or not such right is enforceable under California law, Appellants promptly fired Workhouse and stopped making their commissions payments. But, Appellants well know that, even if they terminate Workhouse, if they enter into an employment contract within four (4) months, all commissions owed to Workhouse thereunder and properly payable to Workhouse. CP 132, 135. This is akin to a listing agreement in the real estate purchase and sale context: the listing agent does all the work to find a buyer, and if the seller fires the listing agent or the listing agreement expires and the seller sells to a buyer because of the efforts of the listing agent, the listing agent still gets paid. The same is true here: Workhouse negotiated the

own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand.

very terms memorialized by CBS and Appellants in the New CBS Radio Contracts, within four (4) months of Appellants' purported termination of Workhouse. Accordingly, the Judgments and Orders entered in the trial court should be affirmed.

2. Appellants Affirmatively Consented to Washington Jurisdiction by Bringing Counterclaims.

In addition, Appellants already consented to actual personal jurisdiction in this Court by bringing multiple counterclaims against Workhouse, and in so doing failed to raise any claims under the California Talent Agencies Act ("TAA"), California Labor Code Sec. 1700 et seq., which they now allege has *exclusive* jurisdiction in this matter. *See*, Defendants' Answer Complaint [*sic.*], Affirmative Defenses and Counterclaim [*sic.*]; CP 22-29.

On November 30, 2015, Appellees answered and brought counterclaims against Workhouse, alleging (1) professional negligence/negligence; (2) negligent misrepresentation; and (3) unjust enrichment. In filing counterclaims in the King County lawsuit, Appellants not only further submitted to, but indeed invoked, the Washington State Court's jurisdiction. *Kuhlman Equip. Co. v. Tammermatic, Inc.*, 29 Wash. App. 419, 424 (1981) (a party who counterclaims cannot at the same time deny that the court has

jurisdiction); *Grange Ins. Ass'n v. State*, 10 Wash. 2d. 752, 765 (1988) (even where a party has objected to personal jurisdiction, it may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court).

The King County Superior Court plainly had jurisdiction over the parties and the subject matter. Indeed, Appellants actively litigated the King County litigation, including by responding to Workhouse's Complaint, asserting counterclaims against Workhouse based on the Agreements, and defending Workhouse's motion for partial summary judgment. CP 22-29, 140-168.

Appellants were provided notice and an opportunity to be heard in the lower court, as they actively litigated the breach of contract dispute in this action for more than eight months. In the end, Appellants felt it necessary to seek clarification of the lower court's orders, perhaps a strategic move to paint the appeal of the Order Dismissing Counterclaims [CP 101] as timely. CP 444. During this eight-month period, Appellants responded to Workhouse's Complaint, asserted counterclaims against Workhouse based on the Agency Agreements, defended against Workhouse's motion for partial summary judgment, and substantively opposed entry of the Judgments against them. *Id.*; see also, *World Wide Imports, Inc. v. Bartel*, 145 Cal. App. 3d 1006, 1010 (finding Full Faith

and Credit where “the persons and the parties who appeared and in fact litigated the matter in the State Washington were given not only reasonable notice, but also ample opportunity to defend the case against themselves”).

It has been long-established in this State that a limited or special appearance for the specific purpose of challenging the sufficiency of jurisdiction may be appropriate so long as the party does “not ask for affirmative relief[.]” *Matson v. Kennecott Mines Co.*, 103 Wash. 499, 507, 175 P. 181, 183-184 (1918). The reason for the rule is stated in *F.C. Austin Mfg. Co. v. Hunter*, 16 Okl. 86, 87-88, 86 Pac. 293, 294 (1905), where the Court stated:

The rule just referred to is based upon the assumption that a defendant is involuntarily in court, and that he is being compelled to litigate the case against his will, and so long as he simply defends against the cause or causes of action pleaded in plaintiffs’ petition, he can urge the want of jurisdiction over his person in the appellate court, **but not so where he files a cross-petition and asks for affirmative relief, for, by such act, he voluntarily submits himself to the jurisdiction of the court, and vests it with power to render any judgment necessary in the disposition of any and all of the issues involved in the entire controversy.**

Id. (emphasis added).

And yet, “special appearances” have generally gone by the wayside in Washington. *See, Wright v. Yackley*, 459 F.2d 287 (9th Cir.

1972); *Matthies v. Knodel*, 19 Wn. App. 1, 4, 573 P.2d 1332, 1335 (1977).

Now a defendant may object to personal jurisdiction under CR 12(b).

However, even where the defendant has objected to personal jurisdiction under CR 12(b), he or she may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court. *Livingston v. Livingston*, 43 Wn. App. 669, 671, 719 P.2d 166, 167-168 (1986) (emphasis added); *In re Marriage of Parks*, 48 Wn. App. 166, 737 P.2d 1316 (1987).

Appellants' "arguments" and "defenses" in this case lack consistency and uniformity; similar to the Hydra: when one failed argument is cut off, two more ill-advised arguments grow in its place, e.g.:

MR. BORDBER: As you can see, my clients have filed cross-claims indicating that they do believe that Mr. Anderson did not live up to his obligation as a talent agent in that he did not convey this right-to-match clause that Mr. Willig referred to, to Keith Kauffman at iHeartRadio, before the offer to Greg and Fernando was made.

THE COURT: These cross-claims were filed where?

MR. BORDNER: In this Court, Your Honor. And we have amended cross-claims as well.

THE COURT: The Court that you do not believe to be valid?

MR. BORDNER: I didn't say that. *I'm not challenging the jurisdiction or the venue.*

VRP, pg. 13, Ins. 10-22 (emphasis added).

The above-quoted statement of Appellants' attorney is laughable as Section V(A) of Appellants' Brief is titled: "The Trial Court Did Not Have

Subject Matter Jurisdiction to Render a Decision as to Defendants’ TAA Defense.” AB 13.

There is no question that venue and jurisdiction over the parties and the subject matter are proper in King County Superior Court, both by contract and Appellants’ later affirmative consent in this litigation.

D. The Lower Court Conducted A Thorough Choice Of Law Analysis, And Found That Washington Law Applies.

The enforceable contracts in the record contain clear a choice of law and venue provisions:

9. Governing Law & Venue. **This agreement shall be governed by the laws of the State of Washington, and any action to enforce its terms shall be made in King County, Washington.** The prevailing party in any action shall be entitled to reasonable attorney’s fees from the non-prevailing party.

CP 133, 136.

Washington Courts have a strong preference in favor of enforcing choice of law provisions in contracts. *See, Brown v. MHN gov’t Servs., Inc.*, 178 Wn.2d 258, 262 (2013). The U.S. Supreme Court agrees: in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972), the Court held that a forum-selection clause found in a “freely negotiated private . . . agreement” should be specifically enforced, unless the party resisting enforcement “could clearly show that

enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *Id.* at 12, 15.

Appellants cite *in Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 167 P.3d 1112 (2007) for the proposition that, despite the parties clear agreement and intention that Washington law be applied, that they should now be relieved of the application of Washington law because they are located in California. However, this reliance on *Erwin* is misguided. In fact, *Erwin* clearly favors the result of the trial court here; that Washington law applies. The trial court correctly analyzed choice of laws in upholding the contractual agreement and applying Washington law.

In *Erwin*, the parties entered into a contract by which the plaintiff, Casey Erwin (“Erwin”), would provide real estate services to the defendants, James Cotter and Cotter Health Centers, Inc. (“hereinafter, jointly, “Cotter”) *Id.* at 682. Erwin was a Washington resident and a licensed Washington real estate broker. *Id.* at 681. James Cotter was a Texas resident with a home in California and Cotter Health Centers were located in California and Texas. *Id.* The contract gave Erwin the exclusive right to sell or lease designated health care facilities owned by defendants and provided for a “fee” of 14% of the first year’s annual lease for any new operation lease entered into by Cotter. *Id.* at 682. The contract included a provision that Washington law would apply to any

disputes under the contract and that venue and jurisdiction would be set in Washington. Inevitably, a dispute arose as to Erwin's entitlement to a fee. Pursuant to the terms of the contract, Erwin brought an action against Cotter in Yakima County Superior Court seeking to collect fees from Cotter relating to two Texas leases and four California leases. *Id.* at 685.

Following a bench trial, the trial court found in favor of Erwin and concluded that the forum selection clause and choice of law provision were effective and that Washington law applied. *Id.* at 685. Cotter appealed and the Court of Appeals affirmed the trial court and awarded Erwin costs and fees on appeal. *Erwin v. Cotter Health Ctrs., Inc.*, 133 Wn.App. 143, 155, 135 P.3d 547 (2006). The Washington Supreme Court upheld the decision, *supra* at pg. 37.

The instant case is strikingly similar to *Erwin*. In *Erwin*, Cotter, after becoming unhappy with the fee arrangement, argued that because the real property that was the subject of the contract was located in California, California law should govern the contract and that as a result Erwin would be prohibited from claiming a fee because he was not licensed as a real estate broker in California.

Likewise, here, Appellants, after becoming unhappy with a professional fee arrangement, argue that because they are located in California, California law should govern the contract, and that, as a result,

Workhouse should be prohibited from seeking its fees because it is not licensed as a talent agent in California. The argument is equally unavailing in both instances.

The *Erwin* Court performed an analysis under Restatement § 187 in determining that Washington law was appropriately applied, and performing a similar analysis under the facts of this case likewise confirms that Washington law is appropriately applied here.

Restatement (Second) Conflict of Laws § 187(2) provides:

(2) the law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision to the agreement directed at that issue, unless either

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement § 187 (West 2016 ed.).

The *Erwin* Court addressed this issue as follows:

Under the section 187(2)(b) exception, “three questions are posed,” all of which must be answered in the affirmative for the exception to apply. *O’Brien*, 90 Wn.2d at 685. To wit, application of the parties’ chosen law must be “[1] contrary to a fundamental policy of a state [(2)] which has a materially greater interest than the chosen state in the

determination of the particular issue and [(3)] which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”
RESTATEMENT § 187(2)(b).

Erwin, 161 Wn.2d at 696.

The chosen state has a clear substantial relationship to the parties and the transaction in this matter. Workhouse is located in Washington and all of the services provided to Appellants were conducted in Washington. CP 125, 138, 182.

California has no materially greater interest in this matter than Washington. Workhouse provides media services primarily for radio personalities. California has no greater connection or monopoly on radio personalities than any other state. The nature of the work allows it to be done from almost any location and radio personalities live in and work from every state. The mere fact that Appellants are currently located in California does not suddenly give California a greater interest in the contracts at issue. Further, applying Washington law in this matter is not contrary to any fundamental policy of California. Appellants alleged that the history and purpose of the TAA was explained by the California Supreme Court, stating “[e]xploitation of artists by representative has remained the Act’s central concern through subsequent incarnations to the present day.” *Marathon Entertainment, Inc. v. Blasi*, 42 Cal. 4th 974, 984

(2008) (citation omitted) (Appellants' Appendix A-72 – A-91). But there are absolutely no allegations of any “exploitation” or “abuses” in this matter. CP 22-29, 48-57. At most, the Appellants are unhappy with representation that garnered them a secure, guaranteed, five-year contract that pays them each significantly more than they had been making previously. Even the petition to determine controversy filed by the Appellants with the California Labor Commission following does not allege anything more than pro-forma violations of the TAA. CP 469-476. There are no allegations of exploitation or abuse.

Because California has only a secondary interest in these contracts, and because applying Washington law is not contrary to any policy of California, there is no question that Washington law should apply.

Further, Restatement (Second) Conflict of Laws § 188 provides no basis for denying that Washington law applies. Restatement § 188(2) provides:

(2) in the absence of an effective choice of law by the parties (see sec. 187), the contacts to be taken into account in applying the principles of sec. 6 to determine the law applicable to an issue include:

- (a) the place of contracting;
- (b) the place of negotiation of the contract;
- (c) the place of performance;
- (d) the location of the subject matter of the contract; and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) Conflict of Laws § 188 (West 2016 ed.).

Contrary to Appellants allegations, the contracts at issue, the Agency Agreements, were entered into by Workhouse in Seattle, Washington. CP 125. They were negotiated by Workhouse in Seattle, Washington. CP 125. **Most importantly, they were performed, in their entirety, by Workhouse, in Seattle, Washington.** CP 125, 182. There is no “location of the subject matter” because the Agency Agreements were service contracts which were performed by Workhouse primarily in Seattle. The fact that the Appellants entered into employment contracts in California does not mean that the “subject matter” is “located” in California. Finally, the domicile of the parties is a neutral factor. The Appellants reside in California. Workhouse is a Washington corporation and is located in Washington, and contrary to Appellants unsupported allegations, Workhouse has no office in California and the undisputed evidence demonstrates that Workhouse operated in this matter entirely from Washington. CP 125.

Appellants utterly fail in their attempt to cherry-pick a selected “conflict of laws analysis” that does not apply here. Citing *Erwin* correctly slams the door on Appellants’ protestations that this Court should somehow apply California’s TAA. Again, Appellants are attempting to manufacture a “conflict of law” simply by making a claim

that they think there is one.

Further, after Workhouse’s Motion for Partial Summary Judgment was filed, Appellants threatened to – and did – file a complaint against Workhouse Media before the California Labor Commissioner, which is both a red herring and entirely disingenuous: even under Appellants’ own authority, any dispute filed with the California Labor Commissioner under the California TAA must be done with a one-year statute of limitations. *Blanks v. Seyfarth Shaw LLP*, 171 Cal.App.4th 336, 346 (2009) (Appellants’ Appendix A-17 – A-49). Appellants breached the Agreements in December, 2014, and January, 2015, respectively. CP 128. They alleged breaches by Workhouse in November, 2014. CP 52-55. Even if Appellants filed a complaint with the Commissioner, it would be time-barred. Thus, Appellants’ argument that California has a materially greater interest in this issue – like Appellants’ “choice of law” and “not the real party in interest” arguments – is demonstrably meritless.

Additionally, Mr. Anderson is a licensed attorney in Washington. To the extent that Appellants are claiming that California licensing for talent agents protects clients, so does Washington’s licensing for attorneys establish rules of professional conduct. Appellants’ feigned desire to be protected, as artists, “from long recognized abuses and exploitation” is particularly ironic here, where they want California law to be applied so

they don't have to pay commissions on lucrative contracts negotiated for them by Workhouse. Here, again, Appellants also misread *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 959, 331 P.3d 29, 32 (2014), which found that Washington law was appropriately applied in a case involving alleged fraud and violation of the Washington State Securities Act against Washington residents. *FutureSelect*, while not precisely on point because it involves evaluation of tort claims, supports a finding of application of Washington State law here. As in *FutureSelect*, here, the Plaintiff (Respondent Workhouse) is a Washington resident who is being defrauded by Appellants, who seek to avoid paying an earned commission by subjecting Workhouse to a California regulatory scheme that does not apply to it.

In any event, the lower court read and considered a great breadth of California legal authority supplied by Appellants in response to Workhouse's Motion for Partial Summary Judgment, confirming same at the hearing:

**THE COURT: I also received and familiarized myself with your non-Washington authority --
MR. BORDNER: Thank you.**

VRP pg. 9, lns. 10-12.

Appellants certainly cannot argue that the lower court refused to consider their voluminous (inapplicable) authority or their many ginned-

up arguments based on California's TAA. But the fact is that Appellants' authority is unpersuasive and their arguments are not well founded.

E. Appellants Have Been Forum-Shopping in Two Separate California Courts Since the Judgments Were Entered in Washington.

In what amounts to unabashed forum-shopping, since the Judgments were properly entered in King County Superior Court, Appellants have filed separate, simultaneous proceedings in two different California forums: a Petition to Determine Controversy before the California Labor Commissioner [CP 560-567] and a Complaint for Damages in the San Francisco County Superior Court [CP 631-645]. Neither action has any merit, and Workhouse has been forced to retain counsel and incur additional attorneys' fees to oppose both actions.

1. Appellants' Petition Before the Labor Commissioner is Time-Barred.

Appellants flat-out missed the one-year statute of limitations under the TAA. Cal. Lab. Code, § 1700.44, subd. (c) ("No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding."). Appellants' Appendix A-161. By Appellants' own admission, Workhouse's alleged illegal "employment procurement" is alleged to have occurred from July-

December 2014, yet Appellants' Petition to the California Labor Commissioner was not filed until March 14, 2016 – more than a year after Workhouse's alleged violation of the TAA. Accordingly, Appellants' are not entitled to any relief, before the California Labor Commissioner or otherwise, and Appellants have cited no Washington law to the contrary.

2. Appellants' Claims Before the California Labor Commissioner Are Further Barred By The Doctrine Of Waiver.

Since entry of the judgment against them, Appellants have been collaterally attaching the judgment in California, while concurrently appealing the entry of judgment here. They have opposed entry of the judgment in the California Courts and have also filed an action before the California Labor Commission.

Appellants unquestionably missed the one-year statute of limitations concerning their petition (untimely) brought before the California Labor Commissioner. *See*, Section V(4), *supra*. Though more is not needed, the doctrine of waiver further precludes Appellants from seeking relief before the California Labor Commissioner. Waiver generally denotes the “voluntary relinquishment of a known right, [and] it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right.” *Saint Agnes Med. Ctr. v. Pacificare of Cal.*, 31

Cal.4th 1187, 1195 n.4 (2003); *see also*, *Salton Community Servs. Dist. v. Southard*, 256 Cal.App. 2d 526,532-33 (1967) (explaining waiver may be implied from conduct inferentially manifesting an intention to waive.”).

Importantly, a party benefited by a statutory provision may waive that benefit if the statute does not prohibit waiver.” *Sharon S. v. Super. Ct.*, 31 Cal.4th 417, 426 (2003); *accord*, *City of Santa Cruz v. Pac. Gas & Elec. Co.*, 82 Cal. App.4th 67, 1129 (2000). And, here, there is no provision that prohibits a party’s waiver of the application of the TAA.

It is undisputed that Appellants actively – and extensively – litigated this breach of contract dispute in Washington State Court, for more than eight months. CP 1, 444. During this eight-month period, Appellants responded to Workhouse’s Complaint, asserted counterclaims against Workhouse based on the Agency Agreements, defended against Workhouse’s motion for partial summary judgment, and substantively opposed entry of the Judgments against them. *Id.* Appellants failed to move to challenge Washington State Court’s jurisdiction, stating before the Court just the opposite:

MR. BORDNER: I didn't say that. I'm not challenging the jurisdiction or the venue.” VRP pg. 13, lns. 21-22.

Similarly, Appellants at no point sought a stay of the Washington State Court action on any basis, including that Washington was not the

appropriate venue and that the California Labor Commissioner had original jurisdiction of the action under the TAA. CP 22, 322. As a result of each and all of these actions and failures, Appellants waived their right to now raise claims before the California Labor Commissioner. Thus, the doctrine of waiver further requires the dismissal of the instant Petition.

3. Appellants' Claims Are Further Barred By The Doctrine Of Estoppel.

Appellants should further each be estopped from bringing their Petition before the California Labor Commissioner. The doctrine estoppel is applicable when a party “lulls [the plaintiff] into a false sense of security resulting inaction[.]” *Brookview Condo. Owners' Assoc. v. Hehzer Enters. Brookview*, 218 Cal. App. 3d 502, 510 (1990) (quoting, *Tejada v. Blas*, 196 Cal. App. 3d 1335, 1341 (1987)); *see also, Salton*, 256 Cal. App. 2d at 533. “[E]stoppel must be available to prevent [the party] from profiting from his deception.” *Brookview*, 218 Cal. App. 3d at 510.

Once more, despite actively litigating the action for more than eight months, Appellants never moved to challenge the court’s jurisdiction, or seek a stay of the Washington State Court action on the basis that the California Labor Commissioner had original jurisdiction because the claims arose under the TAA. CP 22, 322. Instead, throughout the course of the Washington litigation, Appellants consented that the

Washington State Court's jurisdiction was proper via their lack of action to the contrary. The Washington State Court spent significant time, effort, and resources adjudicating the parties' claims. Similarly, Appellants spent a significant amount of time, effort, and resources (including substantial attorneys' fees) litigating the Washington State Court action. Now, after receiving an unfavorable decision from the Washington State Court, Appellants want a "do-over" in a multiplicity of jurisdictions, and suddenly assert that the Washington State Court lacked subject matter jurisdiction over the parties' claims. The additional costs and added time in having this matter re-litigated in California would result in substantial harm to Workhouse and completely undermine judicial efficiencies.

Appellants should not be permitted to profit from what can only be viewed as an intentional strategy to deceive the Washington Courts and Workhouse.

F. Workhouse Is Entitled To Its Attorneys' Fees And Costs In This Appeal.

Pursuant to RAP 18.1, Workhouse respectfully requests an award of its attorneys' fees, costs, and expenses incurred in this appeal.

Workhouse's attorneys' fees and costs were properly awarded against the Appellants in the trial court. CP 351-360. The Agency Agreement specifies that Workhouse is entitled to repayment of all its

attorneys' fees and costs, if there is a default. CP 133, 136. As the prevailing party, the trial court properly awarded Workhouse its attorneys' fees, costs, and expenses in this matter pursuant to RCW 4.84.330.

Workhouse has incurred significant additional attorneys' fees and costs in this appeal. Thus, under RAP 18.1, should Workhouse prevail on appeal, Workhouse respectfully requests an award of its attorneys' fees and costs incurred since entry of the Judgment, including in this appeal.

For the record, Workhouse objects to any award of attorneys' fees and/or costs to the Appellants. Because the Appellants should not prevail on appeal, they should not be entitled to any award of their attorneys' fees, costs, or expenses, either on appeal or in the trial court.⁴

VIII. CONCLUSION

Appellants' arguments subsist on little more than self-serving statements without evidentiary support in the record, and Appellants do not find support in the law they cite. For all the reasons stated above, the Orders and Judgments should be affirmed and this appeal dismissed without further delay.

The trial court committed no error of any kind, and its rulings should be upheld.

⁴ The Appellants failed to request fees in their opening brief as required by RAP 18.1(b) and therefore are ineligible for any fee award even in the unlikely event that they prevail on appeal.

DATED this 30th day of September, 2016.

Respectfully submitted,

HACKER & WILLIG, INC., P.S.

A handwritten signature in black ink, appearing to be 'AW', written over a horizontal line.

Arnold M. Willig, WSBA #20104

Elizabeth H. Shea, WSBA #27189

Charles L. Butler, III, WSBA #36893

Attorneys for Respondent,

Workhouse Media

IX. APPENDIX A

Website:

www.workhousecreative.com.....A-1

Cases:

Brookview Condo. Owners' Assoc. v. Hehzer Enters. Brookview,
218 Cal. App. 3d 1335, 1341 (1987)A-2

City of Santa Cruz v. Pac. Gas & Elec. Co., 82 Cal. App.4th 67,
1129 (2000).....A-13

F. C. Austin Mfg. Co. v. Hunter, 16 Okl. 86, 87-88, 86 Pac. 293,
294 (1905).....A-28

Saint Agnes Med. Ctr. v. Pacificare of Cal., 31 Cal.4th 1187,
1195 n.4 (2003).....A-31

Salton Community Servs. Dist. v. Southard, 256 Cal.App. 2d 526,
532-533 (1967).....A-51

Sharon S. v. Super Ct., 37 Cal.4th 417, 426 (2006).....A-59

Tejada v. Blas, 196 Cal. App. 3d 1335, 1341 (1987).....A-108

The Bremen v. Zapata Off-Shore Co. 407 U.S. 1, 32 L. Ed. 2d
513, 92 S. Ct. 1907 (1972)A-114

World Wide Imports, Inc v. Bartel., 145 Cal. App. 3d, 1006,
1010.....A-127

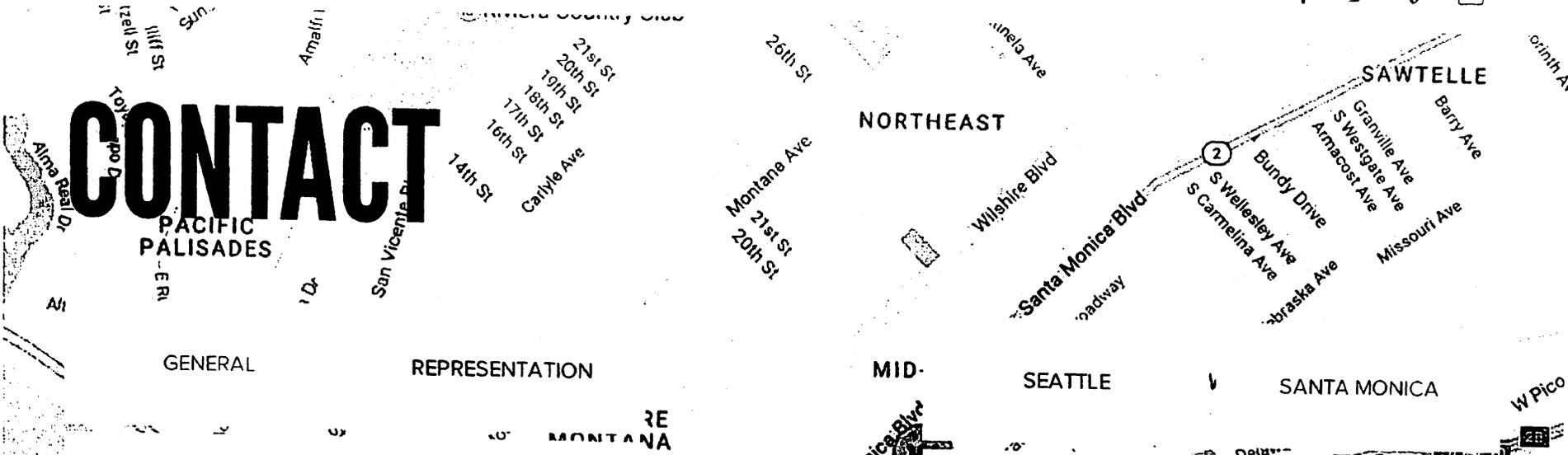
Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972).....A-135



WORK DIRECTORS TEAM APPROACH SOCIAL CONTACT



CONTACT



GENERAL

GENERAL INQUIRIES

info@workhousecreative.com

BUSINESS INQUIRIES

eli@workhousecreative.com

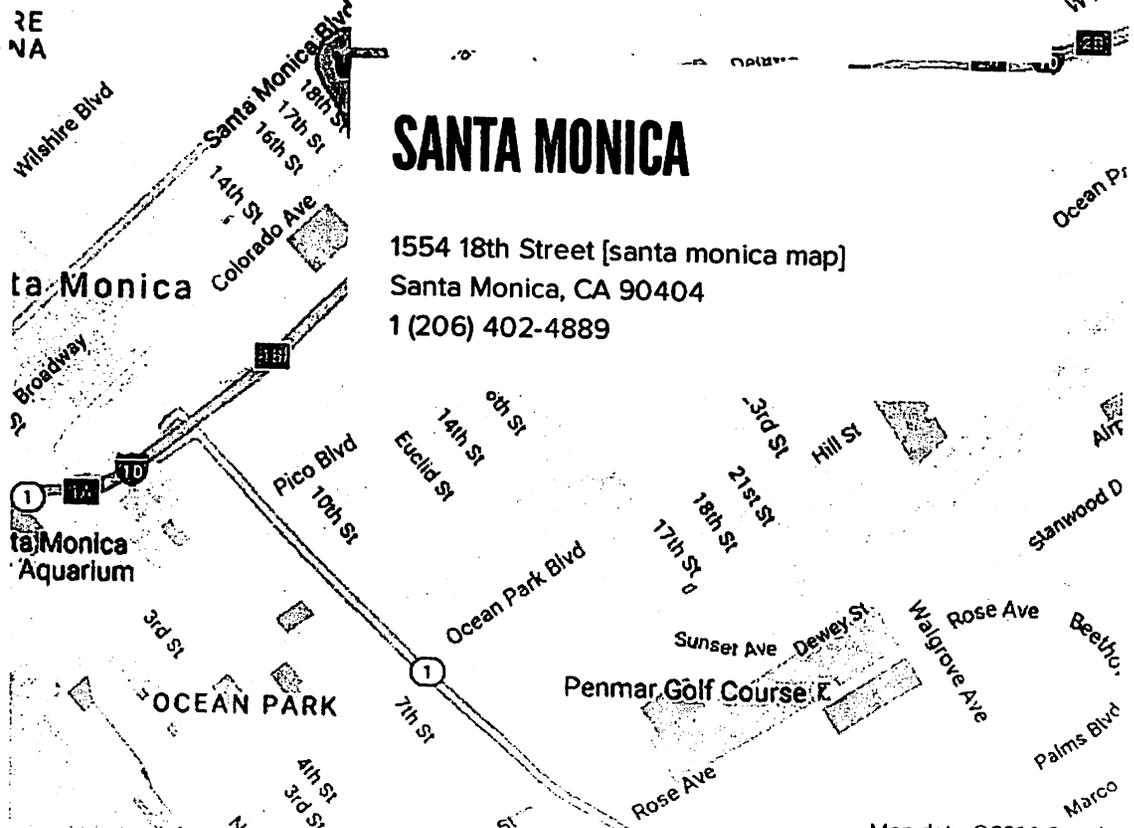
EMPLOYMENT INQUIRIES

hireme@workhousecreative.com

JOBS

SANTA MONICA

1554 18th Street [santa monica map]
Santa Monica, CA 90404
1 (206) 402-4889



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Brookview Condominium Owners' Ass'n v. Heltzer Enterprises-Brookview

Court of Appeal of California, Fourth Appellate District, Division Three

February 28, 1990

No. G004539

Reporter

218 Cal. App. 3d 502; 267 Cal. Rptr. 76; 1990 Cal. App. LEXIS 185

BROOKVIEW CONDOMINIUM OWNERS' ASSOCIATION, Plaintiff and Appellant, v. HELTZER ENTERPRISES-**BROOKVIEW** et al., Defendants and Respondents

Subsequent History: [***1] A petition for a rehearing was denied March 28, 1990.

Prior History: Superior Court of Orange County, No. 364658, Harmon G. Scoville, Judge.

Disposition: The orders dismissing the complaint and denying the motion to vacate and set aside that dismissal are affirmed. Respondents shall recover costs on appeal.

Core Terms

estoppel, general appearance, trial court, three-year, motion to dismiss, lower court, three year, participated, waive, contends, estopped, summons, right to dismissal, fail to serve, Condominium, lawsuit, parties, cases

Case Summary

Procedural Posture

Appellant condominium owner sought review of orders of the Superior Court of Orange County (California), which dismissed a complaint against respondent developer for failure to serve the complaint within three years and denied a motion for reconsideration.

Overview

Appellant condominium owner filed a complaint to recover damages caused by construction defects to the condominiums. The complaint named numerous entities as defendants, but did not name respondent project owner and developer. Instead, appellant named another company as project owner and developer. That

company denied it was the project owner and developer. Over three years later, appellant filed an amendment to the complaint naming respondent. The trial court granted a motion to dismiss appellant's complaint against respondent due to appellant's failure to serve respondent within three years and denied appellant's motion for reconsideration. The court affirmed the orders, holding that the trial court did not abuse its discretion by dismissing the action and denying appellant's motion to vacate the dismissal. The court rejected appellant's contention that respondent's extensive participation in the lawsuit constituted a general appearance that barred dismissal; that respondent was barred from seeking dismissal under the doctrine of equitable estoppel; and that respondent waived its right to have the action dismissed.

Outcome

The court affirmed the trial court's dismissal of appellant condominium owner's action and denial of a motion to set aside that dismissal. The court rejected appellant's contentions that the trial court committed reversible error by failing to find that respondent project owner and developer made a general appearance and by refusing to consider evidence of estoppel and waiver.

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > General Overview

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN1 The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of Cal. Civ. Proc. Code § 583.210(a) an action is commenced at the time the complaint is filed. Cal. Civ.

Proc. Code § 583.210(a).

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN2 If service is not made in an action within the time prescribed in Cal. Civ. Proc. Code § 583.250: (1) The action shall not be further prosecuted and no further proceedings shall be held in the action. (2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties. The requirements of § 583.250 are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute. Cal. Civ. Proc. Code § 583.250.

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > ... > Pleadings > Time Limitations > Extension of Time

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN3 The parties may extend the time within which service must be made pursuant to Cal. Civ. Proc. Code § 583.230 by the following means: (a) By written stipulation (b) By oral agreement made in open court. Cal. Civ. Proc. Code § 583.230.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN4 In computing the time within which service must be made pursuant to Cal. Civ. Proc. Code § 583.240, there shall be excluded the time during which any of the following conditions existed: (a) The defendant was not amenable to the process of the court. (b) The prosecution of the action or proceeding in the action was stayed and the stay affected service. (c) The validity of service was the subject of litigation by the parties. (d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision. Cal. Civ. Proc. Code § 583.240.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN5 The time within which service must be made pursuant to Cal. Civ. Proc. Code § 583.220 does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action. Cal. Civ. Proc. Code § 583.220.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6 Nothing in the chapter abrogates or otherwise affects the principles of waiver and estoppel. Cal. Civ. Proc. Code § 583.140.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN7 Failure to serve the summons and complaint within three years mandates dismissal of the action unless one of the express statutory exceptions applies. Cal. Civ. Proc. Code § 583.250(b).

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN8 Cal. Civ. Proc. Code § 583.220 provides an exception to the three-year time period for service where the defendant enters into a stipulation in writing or does another act that constitutes a general appearance. To prevent dismissal, any claimed general appearance must have occurred within the mandatory three-year period. An appearance made thereafter does not deprive a defendant of his right to dismissal.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN9 The doctrine of equitable estoppel is applicable to motions to dismiss for failure to effectuate service within three years. If a trial court finds statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception.

218 Cal. App. 3d 502, *502; 267 Cal. Rptr. 76, **76; 1990 Cal. App. LEXIS 185, ***1

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN10 The determination of whether a defendant's conduct is sufficient to invoke the doctrine of equitable estoppel is a factual question entrusted to the trial court's discretion.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN11 Waiver refers to the act, or the consequences of the act, of one side only, while estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN12 To support a finding of waiver, there must be an existing right, benefit, or advantage, actual or constructive knowledge of the right's existence, and either an actual intention to relinquish it or conduct so inconsistent with any intent to enforce the right as to induce a reasonable belief that it has been relinquished.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN13 The waiver of a legal right cannot be established without a clear showing of intent to give up such right. The burden is on the party claiming the waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN14 Whether there has been a waiver is a question of fact to be determined in light of all the evidence.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN15 The existence or nonexistence of a waiver involves issues of fact determined by the lower court. Where different inferences might fairly and reasonably have been drawn the choice made by the trial court, in the absence of an abuse of discretion, is binding on appeal.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Criminal Law & Procedure > ... > Reviewability > Waiver > Admission of Evidence

HN16 On appeal, the substantial evidence rule must be applied, and the court must consider the evidence in the light most favorable to the prevailing party.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a condominium association's action to recover damages caused by defects in design or construction of members' condominiums, the trial court dismissed the action against a developer for plaintiffs' failure to serve the complaint and summons within three years (Code Civ. Proc., §§ 583.210, 583.250). Plaintiffs' original complaint named as a defendant an entity with a similar name as the developer, but did not name the developer. The developer was later added as a "Doe" defendant, and was served more than three years after the filing of the complaint. The developer filed a joint answer with the similarly named defendant, participated in pretrial discovery, and filed a cross-complaint. A cross-defendant in the developers cross-complaint moved to dismiss the cross-complaint for plaintiff's failure to timely serve the developer. Thereafter, the developer moved for dismissal. The court granted the cross-defendant's motion and dismissed the complaint as to the developer. (Superior Court of Orange County, No. 364658, Harmon G. Scoville, Judge.)

The Court of Appeal affirmed. It held that the general appearance exception to the three-year time period for service (Code Civ. Proc., § 583.220), did not apply where defendant took no action in the lawsuit prior to the expiration of the three-year period. It also held that defendant was not estopped from seeking dismissal, nor had defendant waived its right to dismissal, where it had done nothing in the three-year period to lull plaintiff into a sense of security. (Opinion by Moore, J., with

Sonenshine, J., concurring. Separate opinion by Wallin, Acting P. J., concurring in the result only.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

CA(1) (1)

Dismissal and Nonsuit § 16 > Delay in Service, Return, or Entry of Judgment > Mandatory Dismissal > Defendant's General Appearance > Defendant's Voluntary Entry Into Lawsuit After Three-year Period for Service Expired.

—Code Civ. Proc., § 583.220, provides an exception to the three-year time period for service of summons and complaint mandated by Code Civ. Proc., § 583.210, where the defendant enters into a stipulation in writing or does another act that constitutes a general appearance. To prevent dismissal, any claimed general appearance must have occurred within the mandatory three-year period. An appearance made thereafter does not deprive a defendant of his right to dismissal. Thus, in a civil action, the trial court properly dismissed defendant, notwithstanding defendant's filing of an answer, its entry into pretrial discovery, and its filing of a cross-complaint, where defendant was not served within three years, and there was no evidence of its participation in the suit during those three years.

CA(2) (2)

Dismissal and Nonsuit § 18 > Involuntary Dismissal > Delay in Service, Return, or Entry of Judgment > Mandatory Dismissal > Excuse and Estoppel.

—The doctrine of equitable estoppel is applicable to motions to dismiss for failure to effectuate service within three years as required by Code Civ. Proc., § 583.210. If a trial court finds statements or conduct by a defendant that lulls the plaintiff into a false sense of security resulting in plaintiff's inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception.

CA(3) (3)

Dismissal and Nonsuit § 18 > Involuntary Dismissal > Delay in Service, Return, or Entry of Judgment > Mandatory Dismissal > Excuse and Estoppel > Defendant's Inaction for Three-year Period in Which Service Must Be Completed.

—In a civil action, the trial court did not abuse its

discretion in concluding that defendant was not estopped from seeking dismissal for failure to be served within three years as required by Code Civ. Proc., § 583.210, where there was no evidence that defendant, or its attorneys, made any representation to plaintiffs or engaged in any conduct that lulled plaintiffs into a false sense of security resulting in inaction prior to the running of the three-year period. Although a similarly named entity was named as a defendant, was served, and participated in the action, defendant engaged in no action that may have misled plaintiff until after the three-year period had expired.

CA(4a) (4a) CA(4b) (4b)

Dismissal and Nonsuit § 18 > Involuntary Dismissal > Delay in Service, Return, or Entry of Judgment > Mandatory Dismissal > Excuse and Estoppel > Waiver of Right to Dismiss for Failure to Serve Within Three Years by Voluntarily Entering Suit.

—In a civil action, the trial court did not abuse its discretion in finding that defendant had not waived its right to move to dismiss for failure to serve within three years (Code Civ. Proc., §§ 583.210, 583.250), notwithstanding defendant's injection of itself into the litigation after the three-year period had expired. Defendant did not engage in any act that misled plaintiffs into failing to timely serve the summons and complaint, and was under no duty to inform plaintiffs that it had not been timely served and was not waiving its right to dismissal. By filing an answer, participating in pretrial discovery, and filing a cross-complaint, defendant was not waiving its right to dismissal. Further, plaintiffs made no showing that it was prejudiced in any way by defendant's continued participation in the litigation.

CA(5) (5)

Estoppel and Waiver § 2 > Definitions and Distinctions.

—Waiver refers to an act, or the consequences of an act, of one party to a lawsuit only, while estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts. To support a finding of waiver, there must be an existing right, benefit, or advantage, actual or constructive knowledge of the right's existence, and either an actual intention to relinquish it or conduct so inconsistent with any intent to enforce the right as to induce a reasonable belief that it has been relinquished. The waiver of a legal

right cannot be established without a clear showing of intent to give up such right. The burden is on the party claiming the waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation. Whether there has been a waiver is a question of fact to be determined in light of all the evidence. Where different inferences might fairly and reasonably have been drawn, the choice made by the trial court, in the absence of an abuse of discretion, is binding on appeal.

Counsel: Procopio, Cory, Hargreaves & Savitch, David A. Niddrie, Corona & Prager and Michael B. Sayre for Plaintiff and Appellant.

Cummings & Kemp, Thomas B. Cummings, Scott Whitcomb, Loeb & Loeb, Douglas E. Mirell, Robin Meadow, Bye & Piggott, George B. Piggot, Rigg & Dean, Howard Franco, Jr., Robert Parker Mills, Kathleen McCain, John Schroeder, Kelly W. Bixby, Herlihy & Herlihy, Ann V. Marsh, Barry H. Herlihy, Beam & Brobeck, Byron J. Beam, Kirk H. Nakamura, Wood, Ward & Garnett, Patrick E. Whelan, Howard, Moss, Loveder & Strickroth, Robert A. Walker, Allen & Flatt, Christian W. Wilbert, Martin & Stamp, Mark E. Petersen, Gunsaulus & Reed, Gerald Spala, James D. Reed, Kroll & Firestone, Charles C. Hunter and Gerald L. Kroll for Defendants and Respondents.

Judges: Opinion by Moore, J., with Sonenshine, J., concurring. Separate opinion by Wallin, Acting P. J., concurring in the result only.

Opinion by: MOORE

Opinion

[*505] [**78] Brookview Condominium [***2] Owners' Association (appellant) appeals the dismissal of its complaint against Heltzer Enterprises-Brookview (respondent or Heltzer Enterprises), for failure to serve the complaint within three years. ¹ It is undisputed the complaint was not served within the required three-year

¹ Under Code of Civil Procedure section 902, any aggrieved party may appeal, and any party adverse to the appellant is designated as a respondent. Here, although some of the respondents were defendants below, and others cross-defendants, inasmuch as all respondents have an identity of interest on this appeal, they are referred to collectively as either "Respondent" or "Heltzer Enterprises."

time period. However, appellant contends the trial court committed reversible error by failing to find that Heltzer Enterprises made a general appearance, and by refusing to consider evidence of estoppel and waiver.

We hold the trial court did not abuse its discretion by dismissing the action, and affirm.

Procedural History

On October 5, 1981, appellant, [***3] numerous condominium owners, filed a complaint to recover damages caused by defects in design or construction of their condominiums. The complaint named numerous entities as defendants, including one known as Heltzer Building Company.

[*506] Respondent Heltzer Enterprises was not named in the complaint.

On November 8, 1982, appellant filed a first amended complaint, once again naming Heltzer Building Company and other entities, and omitting respondent.

In its answer to the first amended complaint, Heltzer Building Company denied it was the developer and general contractor of the condominium construction project.

In fact, Heltzer Building Company was not the developer or general contractor of the project. Indeed, Heltzer Building Company did not come into existence until nearly two and one-half years after the project was completed. Numerous publicly recorded documents indicate respondent was the project's owner and developer.

However, it was not until June 6, 1985, that appellant filed an amendment to the complaint, naming Heltzer Enterprises as Doe 1.

On October 21, 1985, Heltzer Enterprises and Heltzer Building Company filed a joint answer to the first amended complaint. [***4] Their answer denied either defendant was the project's developer or general contractor, and alleged improper use of the Doe statute as an affirmative defense. (Code Civ. Proc., § 474.)²

Thereafter, Heltzer Enterprises actively participated in pretrial discovery. Heltzer Enterprises participated in approximately 45 depositions -- at least 7 of which it

² All statutory references are to the Code of Civil Procedure unless otherwise specified.

noticed – served and responded to numerous discovery requests, and filed a cross-complaint. Respondent also participated in a mandatory settlement conference, and joined with Heltzer Building Company in filing a motion to bifurcate and hold trial on special defenses not involving the merits.

Heltzer Enterprises filed a cross-complaint against several entities including Professional Community Management, Inc. (PCM). On June 6, 1986, PCM filed a motion to dismiss respondent's cross-complaint, asserting appellant's failure to serve the complaint within three years constituted [***5] a complete bar to any action appellant [***79] could maintain against Heltzer Enterprises, and thus the cross-complaint should be dismissed.

[*507] Appellant voluntarily dismissed Heltzer Building Company from the action June 9, 1986.³

The remaining cross-defendants joined PCM's motion. Another cross-defendant, Ticor Properties Corporation, also filed a motion to dismiss appellant's complaint against Heltzer Enterprises, due to the failure to serve the complaint within three years.

Thereafter, Heltzer Enterprises filed its own motion for dismissal, based upon the failure to serve the complaint within three years, and also filed a joinder in Ticor's motion.

Appellant opposed the motions alleging, as it does on appeal, that Heltzer [***6] Enterprises entered a general appearance, and the doctrines of estoppel and waiver precluded application of the three-year service requirement.

After thorough argument, the trial court granted Ticor's motion to dismiss, dismissed the complaint as to Heltzer Enterprises, and denied appellant's subsequent motion for reconsideration.

Discussion

|

Summary

Appellant concedes the complaint was not served on

³ After the lower court dismissed Heltzer Enterprises, appellant brought a motion to vacate its voluntary dismissal of Heltzer Building Company and to amend the complaint to add Heltzer Enterprises. That motion was denied. Appellant took no appeal from this ruling and it is now a final order.

Heltzer Enterprises until well after the three-year time period expired. (§§ 583.210, 583.250.)⁴ [***7] Neither does it contend the time for service was tolled or extended by the provisions of *Code of Civil Procedure sections 583.230* or *583.240.*⁵ Accordingly, [*508] the critical inquiry is whether dismissal of the action is precluded because Heltzer Enterprises made a general appearance or by applying the principles of estoppel or waiver. (§§ 583.220, 583.140.)⁶

⁴ *Section 583.210, subdivision (a)*, states: "HN1 The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed."

Section 583.250 states: "HN2 "(a) If service is not made in an action within the time prescribed in this article: [para.] (1) The action shall not be further prosecuted and no further proceedings shall be held in the action. [para.] (2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties. [para.] (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

⁵ *Section 583.230* provides in part: "HN3 The parties may extend the time within which service must be made pursuant to this article by the following means: [para.] (a) By written stipulation. . . . [para.] (b) By oral agreement made in open court, . . ."

Section 583.240 states: "HN4 In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [para.] (a) The defendant was not amenable to the process of the court. [para.] (b) The prosecution of the action or proceeding in the action was stayed and the stay affected service. [para.] (c) The validity of service was the subject of litigation by the parties. [para.] (d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision."

⁶ *Section 583.220* provides in part: "HN5 The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action. . . ."

Section 583.140 states: "HN6 Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel."

218 Cal. App. 3d 502, *508; 267 Cal. Rptr. 76, **79; 1990 Cal. App. LEXIS 185, ***7

[***8] Before discussing the appeal's merits, we consider several of appellant's arguments regarding the scope of review. First, citing Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019 [213 Cal.Rptr. 712], appellant suggests a motion to dismiss under section 583.110 et seq. is [***80] subject to plenary review on appeal. Hurtado was expressly disapproved by the Supreme Court in Shamblin v. Brattain (1988) 44 Cal.3d 474, 479, footnote 4 [243 Cal.Rptr. 902, 749 P.2d 339].

Second, appellant's reliance on our prior decisions in Luti v. Graco, Inc. (1985) 170 Cal.App.3d 228 [215 Cal.Rptr. 902] and Troupe v. Courtney (1985) 169 Cal.App.3d 930 [215 Cal.Rptr. 703] is misplaced. Those cases involved dismissals entered under the trial court's discretionary authority. **HN7** Failure to serve the summons and complaint within three years mandates dismissal of the action unless one of the express statutory exceptions applies. (§ 583.250, subd. (b).) Case law creating implied exceptions to the statute of limitations is also inapposite. ([***9] Tzolov v. International Jet Leasing, Inc. (1989) 214 Cal.App.3d 325, 327 [262 Cal.Rptr. 606].)

II

General Appearance

(1) (1) **HN8** Section 583.220 provides an exception to the three-year time period for service where "the defendant enters into a stipulation in writing or does another act that constitutes a general appearance." Appellant contends Heltzer Enterprises' extensive participation in the lawsuit, after it was named and served as Doe 1, constituted a general appearance which bars dismissal. We disagree.

[*509] To prevent dismissal, any claimed general appearance must have occurred within the mandatory three-year period. An appearance made thereafter does not deprive a defendant of his right to dismissal. (Busching v. Superior Court (1974) 12 Cal.3d 44, 52 [115 Cal.Rptr. 241, 524 P.2d 369].) As the Supreme Court has continually held, even if Heltzer Enterprises' conduct could be deemed to be a general appearance, dismissal is mandatory because "a general appearance after the three years had run did not operate to deprive a defendant of his right to a dismissal . . ." (Blank v. Kirwan (1985) 39 Cal.3d 311, 333 [216 Cal.Rptr. 718, 703 P.2d 58], [***10] quoting Busching, supra, 12 Cal.3d at p. 52, italics in original.)

Although Busching was decided under former section 581a, courts have consistently noted nothing in section 583.210 et seq. alters this result. (See, e.g., Dale v. ITT Life Ins. Corp. (1989) 207 Cal.App.3d 495, 499, fn. 4 [255 Cal.Rptr. 8]; Tires Unlimited v. Superior Court (1986) 180 Cal.App.3d 974, 982 [226 Cal.Rptr. 25]; Mannesmann DeMag, Ltd. v. Superior Court (1985) 172 Cal.App.3d 1118, 1125 [218 Cal.Rptr. 632].)

Given the continued validity of Busching, we are compelled to find that Heltzer Enterprises' participation in the lawsuit did not constitute a general appearance which deprived it of its right to dismissal. The record is devoid of any indication that respondent participated in any way in the lawsuit, or was even represented by counsel, prior to the filing of its answer, over four years after the filing of the original complaint.

The record does reflect that after filing its answer, Heltzer Enterprises, represented by the same counsel which represented [***11] Heltzer Building Company, participated in the lawsuit for some eight months, until the filing of its motion to dismiss. However, nothing indicates any action whatsoever by Heltzer Enterprises prior to the running of the three-year date. The evidence before the trial court disclosed no legal relationship between Heltzer Building Company and respondent herein. Appellant neither alleged an alter ego theory, nor presented facts to the lower court which would support such a theory.

The case of Synanon Foundation, Inc. v. County of Marin (1982) 133 Cal.App.3d 607 [184 Cal.Rptr. 129], relied upon by appellant, is inapposite. That case, as noted by respondent, predates the Supreme Court's opinion in Blank v. Kirwan, supra, 39 Cal.3d 311, as well as the Court of Appeal opinions in Dale v. I.T.T. Ins. Corp., supra, 207 Cal.App.3d 495, Tires Unlimited v. Superior Court, supra, 180 Cal.App.3d 974, and Mannesmann DeMag Ltd. v. Superior Court, supra, 172 Cal.App.3d 1118. [***81] In addition, Synanon Foundation [***12] dealt with a one-year service of summons requirement [*510] and the dismissal scheme arising under Revenue and Taxation Code section 5147, which does not contain an exception for "general appearance." Moreover, the court in Synanon Foundation noted that "the mere entry of a general appearance after the statutory time limit has expired does not prevent a defendant from seeking dismissal," before proceeding to consider whether "remaining in the action and proceeding to litigate the merits" might preclude a defendant from seeking dismissal. (Synanon Foundation, Inc. v. County of Marin, supra,

133 Cal.App.3d at p. 614, fn. 7.)

Under the facts, and the law articulated in *Busching* and its progeny, the lower court correctly found that Heltzer Enterprises did not make a general appearance which deprived it of its right to a dismissal of the action.

III

Estoppel

Appellant next argues that respondent was barred from seeking dismissal under the doctrine of equitable estoppel. (§ 583.140.)

(2) (2) *HN9* The doctrine of equitable estoppel is applicable to motions to dismiss for failure to effectuate service within three years. (*Tresway Aero, Inc. v. Superior Court* (1971) 5 Cal.3d 431, 437-439 [96 Cal.Rptr. 571, 487 P.2d 1211].) [***13] "If a trial court finds statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception." (*Tejada v. Blas* (1987) 196 Cal.App.3d 1335, 1341 [242 Cal.Rptr. 538].)

(3) (3) Here, appellant concedes *HN10* the determination of whether a defendant's conduct is sufficient to invoke the doctrine of equitable estoppel is a factual question entrusted to the trial court's discretion. (*Tresway Aero, Inc. v. Superior Court, supra*, 5 Cal.3d at p. 440; *Gray v. Firthe* (1987) 194 Cal.App.3d 202, 211 [239 Cal.Rptr. 389]; *Borglund v. Bombardier, Ltd.* (1981) 121 Cal.App.3d 276, 281-282 [175 Cal.Rptr. 150].) However, appellant contends the lower court committed reversible error by refusing to even consider appellant's evidence of estoppel.

That assertion is contradicted by the record.

The defenses of estoppel and waiver were thoroughly briefed and argued by the parties beginning with Tigor's initial [***14] motion to dismiss appellant's complaint against Heltzer Enterprises, and in appellant's motion for [***11] reconsideration. At oral argument on Tigor's motion, the lower court indicated that "the main concern the court has is that I fail to see the estoppel." During oral argument of appellant's motion, the trial court specifically directed counsel to address the issues of waiver and estoppel, and counsel did so.

Because the lower court did consider appellant's estoppel claim, we consider whether the dismissal

constituted an abuse of discretion. We may not substitute our decision for that of the trial court. The issue is not, as stated by appellant, whether consideration of appellant's evidence could reasonably have led the lower court to conclude respondent should be estopped from seeking dismissal. Rather, the issue is whether, viewing the evidence and all inferences therefrom in the light most favorable to respondent, there was substantial evidence upon which the court could reasonably have found as it did. (*Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478-479; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d p. 920, 925 [101 Cal.Rptr. 568, 496 P.2d 480].) [***15]

Appellant contends respondent hid behind "the corporate fiction of separateness", and that "[a]t all times during this litigation, the confusion with regard to the defendant responsible for [appellant's] problems has been created and perpetuated by Heltzer Enterprises-*Brookview*." [***82] (Italics added.) The facts are otherwise. And, appellant concedes as much when it contends that the issue on appeal is "whether Heltzer Building Co.'s (*sic*) conduct supports application of estoppel principles" (Italics added.)

In this regard, in each of the cases cited by appellant which found estoppel to seek dismissal, the defendant had been timely served and had engaged in misleading or deceptive acts. (See, e.g., *Griffis v. S. S. Kresge Co.* (1984) 150 Cal.App.3d 491 [197 Cal.Rptr. 771] [defense counsel withheld information or was overtly false regarding statutory time period]; *Borglund v. Bombardier, Ltd., supra*, 121 Cal.App.3d 276 [defendant breached promise not to seek dismissal after statutory period]; *State Air Resources Bd. v. Superior Court* (1979) 93 Cal.App.3d 803 [155 Cal.Rptr. 726] [***16] [petitioner acknowledged service, then moved to dismiss for failure to serve attorney general]; *Tresway Aero, Inc. v. Superior Court, supra*, 5 Cal.3d 431 [defendant served with ineffective summons requested additional time to plead, resulting in plaintiff's failure to properly serve complaint within statutory period]; *Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736 [329 P.2d 489] [defendant's intentional concealment frustrated timely service].)⁷

⁷ Equally inapposite are the so-called "misnomer" cases relied upon by appellant. In each of those cases, the plaintiff timely served the correct defendant, albeit by an incorrect name. Such an error, in view of the timely service, was deemed harmless. (See, e.g., *Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240 [195 Cal.Rptr. 58]; *Mavberry v.*

[***17] [***512] Here, the record contains no evidence whatsoever that respondent or its attorneys made any representations to appellant, or engaged in any conduct which lulled appellant "into a false sense of security resulting in inaction," prior to the running of the three-year date. (*Tejada v. Blas, supra, 196 Cal.App.3d at p. 1341.*) None of the facts reveal any action by respondent until June 6, 1985 – more than three years after the filing of the complaint – when respondent "accepted service and filed a response." As previously noted, this action did not constitute a general appearance, nor a voluntary election to appear and litigate the action. Similarly, respondent simply engaged in no act which would estop it from seeking dismissal. (*Sanchez v. Superior Court (1988) 203 Cal.App.3d 1391, 1400 [250 Cal.Rptr. 787].*)

There was substantial evidence upon which the trial court could have found that respondent engaged in no act which misled appellant into failing to serve respondent prior to the running of the three-year date. Accordingly, the trial court did not abuse its discretion in finding that respondent [***18] was not estopped to seek dismissal.

IV

Waiver

(4a) (4a) Finally, appellant contends Heltzer Enterprises, by extensively participating in the litigation after being served and before the filing of the motion to dismiss, voluntarily "elected to litigate the dispute," thereby waiving its right to have the action dismissed.

It is true Heltzer Enterprises participated in the action after it was named as Doe 1. Accordingly, we address the issue of whether respondent, although not timely served with the summons and complaint, nevertheless waived its right to seek dismissal, by participation in the action after the running of the three-year date.

(5) (5) **HN11** Waiver refers to the act, or the consequences of the act, of one side only, while estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to

Coca Cola Bottling Co. (1966) 244 Cal.App.2d 350 [53 Cal.Rptr. 317]; Canifax v. Hercules Powder Co. (1965) 237 Cal.App.2d 44 [46 Cal.Rptr. 552].) Such is not the case here, where appellant simply served, then voluntarily dismissed an improper defendant, while failing to timely serve the proper defendant.

repudiate its acts. (*Wilcox v. Ford (1988) 206 Cal.App.3d 1170, 1179-1180 [254 Cal.Rptr. 138]; Insurance Co. of the West v. Haralambos [***513] Beverage Co. (1987) 195 Cal.App.3d 1308, 1320 [***83] at fn. 6 [241 Cal.Rptr. 427].*)

HN12 To support a finding of [***19] waiver, there must be an existing right, benefit, or advantage, actual or constructive knowledge of the right's existence, and either an actual intention to relinquish it or conduct so inconsistent with any intent to enforce the right as to induce a reasonable belief that it has been relinquished. (*In re Marriage of Paboojian (1987) 189 Cal.App.3d 1434, 1437 [235 Cal.Rptr. 65]; Rubin v. Los Angeles Fed. Sav. & Loan Assn. (1984) 159 Cal.App.3d 292, 298 [205 Cal.Rptr. 455].*)

HN13 The waiver of a legal right cannot be established without a clear showing of intent to give up such right. (*Pacific Valley Bank v. Schwenke (1987) 189 Cal.App.3d 134, 145 [234 Cal.Rptr. 298].*) The burden is on the party claiming the waiver "to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation." (*In re Marriage of Vomacka (1984) 36 Cal.3d 459, 469 [204 Cal.Rptr. 568, 683 P.2d 248].*)

HN14 Whether there has been a waiver here is a question [***20] of fact to be determined in light of all the evidence. (*Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal.App.3d 391, 405 [94 Cal.Rptr. 33]; O'Connell v. Weitzman (1959) 168 Cal.App.2d 400, 404 [336 P.2d 592].*) As we have previously noted, the lower court did consider appellant's evidence of waiver.

HN15 The existence or nonexistence of a waiver involved issues of fact determined by the lower court. Where different inferences might fairly and reasonably have been drawn the choice made by the trial court, in the absence of an abuse of discretion, is binding on appeal. (*In re Marriage of Paboojian, supra, 189 Cal.App.3d at pp. 1438-1439; Rubin v. Los Angeles Fed. Sav. & Loan Assn., supra, 159 Cal.App.3d at pp. 297-298.*)

(4b) (4b) Appellant contends Heltzer Enterprises "voluntarily injected itself into the litigation," and cites *Synanon Foundation, Inc. v. City of Marin, supra, 133 Cal.App.3d 607*, for the proposition that dismissal statutes may be waived by voluntary actions indicating an intent to submit issues to trial on [***21] the merits. Assuming, without deciding, that a party not timely

served with the summons and complaint may nevertheless waive its right to seek dismissal by filing an answer and participating in the litigation, the trial court did not abuse its discretion in finding no waiver by Heltzer Enterprises in the instant case.

[*514] Respondent did not engage in any act which misled appellant into failing to timely serve the summons and complaint, and was under no duty to inform appellant that it had not been timely served and was not waiving its right to dismissal. (*Sanchez v. Superior Court, supra, 203 Cal.App.3d at p. 1400; Lesko v. Superior Court (1982) 127 Cal.App.3d 476, 486 [179 Cal.Rptr. 595].*) Here, respondent simply did not engage in any act which led appellant to believe the time for service had been tolled.

Tresway Aero, Inc. v. Superior Court, supra, 5 Cal.3d 431, relied upon by appellant, is distinguishable in that the court was addressing estoppel, not waiver. There, the defendant knew service was defective, but requested and received an extension to [***22] answer, fully aware that the extension would expire beyond the three-year period. Instead of answering, he moved to dismiss. The court found defendant's conduct to be a deliberate maneuver calculated to mislead plaintiff into believing service had been accomplished, and held that defendant was estopped to seek dismissal. (*Id. at pp. 440-442.*)

In the instant case, respondent engaged in no such conduct. Indeed, as the trial court properly found, respondent engaged in no conduct at all until after the running of the three-year period.

Appellant suggests respondent waived its right to dismissal by waiting until two months before trial – and until after appellant voluntarily dismissed Heltzer [***84] Building Company – to seek dismissal. In light of the facts that respondent neither caused appellant to delay service, nor to believe it was waiving its right to seek dismissal, we disagree.

We do not, by our decision, condone protracted and unnecessary litigation. However, any injury caused by Heltzer Enterprises' decision to continue participating in the litigation would have been suffered by Heltzer Enterprises, in the form of increased attorney's [***23] fees and costs. Here, appellant made no showing that it was prejudiced in any way by Heltzer Enterprises' continued participation in the litigation.

There was substantial evidence upon which the trial

court could have found that appellant was not misled, and did not hold any honest belief that Heltzer Enterprises intended to waive its right to assert the untimeliness of service. We reemphasize it was appellant's burden to establish waiver. **HN16** On appeal, the substantial evidence rule must be applied, and we must consider the evidence in the light most favorable to the prevailing party. (*Rubin v. Los Angeles Fed. Sav. & Loan Assn., supra, 159 Cal.App.3d at p. 298.*)

The orders dismissing the complaint and denying the motion to vacate and set aside that dismissal are affirmed.

[*515] Respondents shall recover costs on appeal.

Concur by: WALLIN

Concur

WALLIN, Acting P. J.

I concur in the result only.

Plaintiff *Brookview* Condominium Owners' Association did not serve the summons and complaint on defendant and respondent Heltzer Enterprises-*Brookview* (Enterprises) within three-years after filing suit. In this court *Brookview* contends Enterprises made a general appearance [***24] before its motion to dismiss and therefore cannot assert the bar of the three-year statute. As the lead opinion states, a general appearance after an untimely service does not affect a defendant's right to dismissal. (*Blank v. Kirwan (1985) 39 Cal.3d 311, 333 [216 Cal.Rptr. 718, 703 P.2d 58]; Busching v. Superior Court (1974) 12 Cal.3d 44, 52 [115 Cal.Rptr. 241, 524 P.2d 369]; Dale v. ITT Life Ins. Corp. (1989) 207 Cal.App.3d 495, 499, fn. 4 [255 Cal.Rptr. 8]; Tires Unlimited v. Superior Court (1986) 180 Cal.App.3d 974, 982 [226 Cal.Rptr. 25]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter 1989) §§ 11:73-11:75, p. 11-27.*)

Brookview's primary contention is that Enterprises' conduct after its general appearance estopped it from claiming the protection of the statute. The trial court considered, and rejected, this argument and I agree with the lead opinion that this was not an abuse of discretion.

Of course, deciding it was not an abuse of discretion necessarily implies the view that a defendant [***25] who not only makes a general appearance, but also

actively involves itself in a lawsuit for an extended period of time may be deemed estopped from claiming the right to a dismissal. Here Enterprises chose, for reasons not clear in the record, to answer the complaint, cross-complain against new parties, and aggressively involve itself in the discovery process. In considering whether this conduct amounted to an estoppel, the trial court correctly assumed that it had the discretion to deny the motion to dismiss.

No reported cases discuss what conduct after an

untimely service is sufficient to estop a defendant from obtaining a dismissal. While the trial court's ruling renders it unnecessary to determine what conduct bars assertion of the statute, this case comes perilously close to the line. Certainly a defendant who wants to waive the statutory protection and proceed with the litigation, despite the late service, is free to do so. Had Enterprises begun the trial it would be estopped from seeking the protection of the [*516] statute. What conduct short of trying the case constitutes a waiver or estoppel is a question for another day.

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Neutral

As of: September 30, 2016 5:29 PM EDT

City of Santa Cruz v. Pac. Gas & Elec. Co.

Court of Appeal of California, Sixth Appellate District

August 8, 2000, Decided

No. H019427.

Reporter

82 Cal. App. 4th 1167; 99 Cal. Rptr. 2d 198; 2000 Cal. App. LEXIS 623; 2000 Cal. Daily Op. Service 6625; 2000 Daily Journal DAR 8765

CITY OF SANTA CRUZ et al., Plaintiffs and Appellants, v. PACIFIC GAS & ELECTRIC CO., Defendant and Respondent.

Prior History: [***1] Superior Court of Santa Cruz County. Super. Ct. No. 128936. Samuel S. Stevens, Judge.

Disposition: The judgment against Arcata, Colusa, Dinuba, Emeryville, Ferndale, Fortuna, Lemoore, Los Banos, Paso Robles, Red Bluff, Sanger, Sausalito, Sonoma, and Vacaville is reversed. As to the remaining appellants, the judgment is affirmed. Costs on appeal are awarded to plaintiffs.

Core Terms

franchise, lighting, cities, ordinance, electricity, estoppel, streets, predecessor, summary judgment, plaintiffs', board of trustees, electric light, complementary, recital, poles, franchise fee, municipality, supplied, grantee, incorporation, conclusive, formula, parties, triable issue of fact, conveyance, minutes, wires, statute of limitations, gross annual receipts, chain of title

Case Summary

Procedural Posture

Plaintiff cities appealed a summary judgment grant to defendant electric utility, entered by the Santa Cruz County Superior Court (California), in a case where plaintiffs alleged defendant underpaid certain California cities for electric franchises in violation of Cal. Pub. Util. Code §6231(c).

Overview

Plaintiff cities sued defendant electric utility and alleged

defendant had underpaid franchise fees to certain cities. Defendant had represented that it held a constitutional franchise for light, thereby entitling it to pay a lower "complementary" franchise fee. A 1911 constitutional amendment eliminated the constitutional franchise, but did not impair the rights of any utility already using the streets to supply water or light to a city, or to any successor-in-interest. Defendant moved for summary judgment. It claimed a constitutional franchise regarding all 72 plaintiffs involved. The trial court agreed as to 70 plaintiffs. Plaintiffs appealed. The court reversed as to 14 of the 70 plaintiffs. The court held as to 14 plaintiffs that a material issue of fact existed about whether defendant or a predecessor-in-interest had been granted a constitutional franchise prior to the 1911 amendment, thus allowing defendant to pay the lower "complementary" fee at issue.

Outcome

Judgment affirmed regarding 56 of 70 plaintiff cities, but judgment reversed regarding remaining 14 plaintiff cities, because material issue of fact existed whether defendant electric utility had a constitutional franchise in those 14 cities, and thus, was entitled to pay the lower "complementary" fee for its electric franchise in them.

LexisNexis® Headnotes

Energy & Utilities Law > Utility Companies > Contracts for Service

HN1 Cal. Pub. Util. Code §6231(c) recognizes constitutional franchises in prescribing the formula for calculating franchise fees. If a utility holds a constitutional franchise, the fee for the complementary franchise is the greater of one formula involving two percent of the utility's gross annual revenues arising from the use, operation, or possession of the franchise or one-half of one percent of its gross annual receipts. If the utility does not hold a constitutional franchise, then it

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must pay according to the formula or one percent of its gross annual receipts, whichever is greater. The one-percent/one-half-percent formula generates a higher fee.

Energy & Utilities Law > Utility Companies > Contracts for Service

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN2 Cal. Pub. Util. Code §453(a) prohibits utilities from granting preferences to or discriminating against "any corporation or person" with respect to rates or service. Cal. Pub. Util. Code §453(c) proscribes unreasonable differences in rates or service between localities or classes of service.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. Cal. Civ. Proc. Code §437c(c). A defendant making the motion has the initial burden of affirmatively showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. Cal. Civ. Proc. Code §437c(o)(2). If the moving papers establish a prima facie showing that justifies a judgment, the burden then shifts to the plaintiff to demonstrate the existence of a material factual issue. On appeal, the reviewing court exercises its independent judgment, deciding whether the moving party has established undisputed facts that negate the opposing party's claim or state a complete defense.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Appeals > Standards of Review

HN4 In reviewing a motion granting summary judgment, the defendant's papers are strictly construed, while the plaintiff's papers are liberally construed, and the court must be convinced that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial. If the defendant fails to meet this burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. An appellate court regards facts as undisputed only if they are not contradicted by the opposing party's evidence. Any doubts are resolved against the moving party.

Evidence > ... > Documentary
Evidence > Writings > General Overview

HN5 See Cal. Evid. Code §622.

Business & Corporate Compliance > ... > Formation of Contracts > Contracts Law > Formation of Contracts

Evidence > ... > Documentary
Evidence > Writings > General Overview

HN6 Parties who have expressed their mutual assent are bound by the contents of the instrument they have signed and may not thereafter claim that its provisions do not express their intentions or understanding.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Fees

Energy & Utilities Law > Utility Companies > Contracts for Service

Governments > Local Governments > Ordinances & Regulations

HN7 A complementary franchise is contractual only in the sense that the parties mutually agree to enter into the franchise relationship; it is offered on a take-it-or-leave-it basis. Terms of the ordinance such as the franchise fee are dictated by the legislature, and the factual predicate of those terms is defined by the status of the franchisee under Cal. Const. art. XI, § 19 (1879).

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

HN8 The general rule is that estoppel will not be invoked against the government or its agencies except in rare and unusual circumstances. In no event will such estoppel operate where the act or contract relied on to create the estoppel is outside the corporate powers of the governmental agencies or officials. Just as a city cannot rely on estoppel in defense of its invalid restrictions on a constitutional franchise, the doctrine is equally unavailable when the shoe is on the other foot.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Local Governments > Claims By & Against

HN9 Courts do not favor the doctrine of acquiescence, or estoppel. There is much respectable authority holding that public officials and public agencies cannot alienate public rights by mere failure to assert such rights in behalf of the public which they represent.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN10 Waiver is the intentional relinquishment or abandonment of a known right. A party may waive a statutory provision if a statute does not prohibit doing so; the statute's public benefit is merely incidental to its primary purpose and waiver does not seriously compromise any public purpose that the statute was intended to serve.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN11 For waiver to be effective, there must be an actual intention to relinquish the right based on knowledge of the underlying facts. Although waiver need not be express, an implied waiver must nonetheless be based on conduct indicating an intention to relinquish the right.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Energy & Utilities Law > Utility Companies > Contracts for Service

Governments > Local Governments > Claims By & Against

Governments > Public Improvements > General Overview

HN12 Cal. Const. art. XI, § 19 does not apply to any city in which there were public works owned and controlled by the municipality for supplying the same with artificial light.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Standards of Review

HN13 An appellate court's function in a summary judgment proceeding is limited to issue finding, not issue determination, and it must resolve all doubts against the motion.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a class action by cities against an electrical utility alleging that defendant had been underpaying the cities for electric franchises in violation of Pub. Util. Code, § 6231, subd. (c), the trial court found, on defendant's motion for summary judgment, that in many of the cities defendant had a constitutional franchise for lighting that entitled it to pay lower fees for nonlighting franchises. The constitutional franchise arose under Cal. Const., art. XI, § 19. Any individual or company that had received a franchise for lighting a city before the adoption of a 1911 amendment had acquired a vested right that could not be impaired. The trial court granted defendant summary judgment as to 70 of the 72 cities. (Superior Court of Santa Cruz County, No. 128936, Samuel S. Stevens, Judge.)

The Court of Appeal reversed as to 14 of the cities and otherwise affirmed. The court held that for each city in which a constitutional franchise was established by evidence of lighting service through bill payment or express grant, there was evidence of an effective transfer to the next utility in the chain of title. The conveyances were not invalid for failing to identify constitutional franchises in the transfer or for failing to obtain governmental approval. However, the evidence was insufficient as to those cities for which it was shown only that there was a transfer of an established franchise, but not that the grantor had a lighting franchise to convey. The court held that once a constitutional franchise was acquired, no fee could thereafter be imposed for its continuous exercise to the extent that it was used to provide light or water. Also, on the day of a city's incorporation, every service provider,

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including any company already in operation through a county franchise, was entitled to avail itself of Cal. Const., art. XI, § 19, and thereby acquire a constitutional franchise in the new city. However, a fee could be charged for electricity provided for purposes other than lighting (Pub. Util. Code, § 6231). (Opinion by Elia, J., with Cottle, P. J., and Mihara, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES Classified to California Digest of Official Reports

CA(1a) (1a) CA(1b) (1b) CA(1c) (1c)

Franchises from Governmental Bodies § 3 > Grant or Acquisition > Constitutional Franchise for Provision of Artificial Lighting > Operation and Effect.

—Cal. Const., art. XI, § 19, allowed any person or company to supply artificial light to a city without approval by legislative or municipal officers. All that was required for the grant to be effective was acceptance by the provider, that is, the actual installation of the pipes, conduits and poles necessary to perform the service. The franchise then constituted a valid contract with the state, which conferred upon the person or company a protected property right. In 1911, the Constitution was amended to eliminate the constitutional franchise, but the amendment did not impair the rights of any utility that had already undertaken to use the streets to supply light or water to a city. Thus, once the franchise was acquired, no fee could thereafter be imposed for its continuous exercise to the extent that it was used to provide light or water. Also, on the day of a city's incorporation, every service provider, including any company already in operation through a county franchise, was entitled to avail itself of Cal. Const., art. XI, § 19, and thereby acquire a constitutional franchise in the new city. However, a fee could be charged for electricity provided for purposes other than lighting (Pub. Util. Code, § 6231).

CA(2) (2)

Summary Judgment § 11 > Affidavits > Sufficiency > By Defendant.

—A defendant making a motion for summary judgment has the initial burden of affirmatively showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. If the moving papers establish a prima facie showing that justifies a judgment, the burden then

shifts to the plaintiff to demonstrate the existence of a material factual issue. On appeal, the reviewing court exercises its independent judgment, deciding whether the moving party has established undisputed facts that negate the opposing party's claim or state a complete defense. The defendant's papers are strictly construed, while the plaintiff's papers are liberally construed, and the court must be convinced that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial. If the defendant fails to meet this burden, it is unnecessary to examine the plaintiff's opposing evidence; in that case, the motion must be denied. The court regards facts as undisputed only if they are not contradicted by the opposing party's evidence. Any doubts are resolved against the moving party.

CA(3) (3)

Contracts § 31 > Construction > By Parties > Estoppel by Contract.

—The application of Evid. Code, § 622, a codification of the doctrine of estoppel by contract, is based on the principle that parties who have expressed their mutual assent are bound by the contents of the instrument they have signed and may not thereafter claim that its provisions do not express their intentions or understanding.

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 176.]

CA(4a) (4a) CA(4b) (4b) CA(4c) (4c)

Estoppel and Waiver § 13.4 > Estoppel > Against Public Entities > By Ordinance.

—Ordinances that included statements that an electrical utility held constitutional franchises under Cal. Const., art. XI, § 19, which allowed any person or company to supply artificial light to a city without approval by legislative or municipal officers, and entitled them to a lower franchise fee for other electricity uses, did not constitute an estoppel by contract against cities alleging that the utility did not in fact have constitutional franchises. The terms of the ordinance were dictated by the Legislature, and the factual predicate of those terms was defined by the status of the franchisee under Cal. Const., art. XI, § 19. Also, even if the statement that the utility had a constitutional franchise was viewed as a declaration necessary to the enactment of the

ordinance, the ordinance was invalid if it established a right contrary to state law.

CA(5) (5)

Estoppel and Waiver § 13 > Estoppel > Against Public Entities.

--Estoppel will not be invoked against the government or its agencies except in rare and unusual circumstances. In no event will estoppel operate where the act or contract relied on to create the estoppel is outside the corporate powers of the governmental agencies or officials.

CA(6) (6)

Limitation of Actions § 31 > Commencement of Period > Accrual of cause of Action

--In an action by cities against an electrical utility alleging underpayment of franchise fees, a cause of action arose on each underpayment of fees (Code Civ. Proc., § 338, subd. (a)).

CA(7) (7)

Estoppel and Waiver § 20 > Waiver > Statutory Provision.

--A party may waive a statutory provision if the statute does not prohibit doing so, the statute's public benefit is merely incidental to its primary purpose, and waiver does not seriously compromise any public purpose that the statute was intended to serve.

CA(8) (8)

Franchises from Governmental Bodies § 3 > Grant or Acquisition > Constitutional Franchise for Provision of Artificial Lighting.

--In a class action by cities against an electrical utility alleging that defendant had been underpaying the cities for electric franchises in violation of Pub. Util. Code, § 6231, subd. (c), the trial court properly found, on defendant's motion for summary judgment, that in many of the cities defendant had a constitutional franchise for lighting that entitled it to pay lower franchise fees for nonlighting franchises. The constitutional franchise arose under Cal. Const., art. XI, § 19. Any individual or company that had received a franchise for lighting a city before the adoption of an October 10, 1911 amendment had acquired a vested right that could not be impaired. For each city in which a constitutional franchise was

established by evidence of lighting service through bill payment or express grant, there was evidence of an effective transfer to the next utility in the chain of title. The conveyances were not invalid for failing to identify constitutional franchises in the transfer or for failing to obtain governmental approval. However, the evidence was insufficient as to cities for which it was shown only that there was a transfer of an established franchise, but not that the grantor had a lighting franchise to convey.

Counsel: Cotchett, Pitre & Simon, Frank M. Pitre, Nancy L. Fineman; Ruby & Schofield, Allen Ruby, Glen W. Schofield; Law Office of Paul Meltzer, Paul Meltzer and Rose Braz for Plaintiffs and Appellants.

Heller, Ehrman, White & McAuliffe, M. Laurence Popofsky, Kirk Werner; Hoge, Fenton, Jones & Appel, Charles H. Brock, Robert S. Luther; J. Michael Reidenbach; and Richard L. Meiss for Defendant and Respondent.

Judges: Opinion by Elia, J., with Cottle, P. J., and Mihara, J., concurring.

Opinion by: Elia

Opinion

[*1170] [*200] ELIA, J.

The issue presented in this appeal is whether defendant Pacific Gas & Electric Co. (PG&E) has been underpaying 70 California cities for electric franchises, in violation of Public Utilities Code section 6231, subdivision (c).¹ The superior court found that [*2] in 70 cities of the 72-member class, PG&E had a "constitutional franchise" for lighting, which entitled it to pay a lower franchise fee to the plaintiff cities for nonlighting franchises. The court [*201] therefore granted PG&E summary judgment against these 70 class members. We find triable issues of fact as to 14 of the plaintiff cities and accordingly reverse the judgment in part.

[*1171] BACKGROUND

The central point of dispute in this class action is whether PG&E holds a constitutional franchise to supply light in the plaintiff cities. (1a) (1a) A franchise in this context is the right to use city streets to distribute

¹ All further unspecified statutory references are to the Public Utilities Code.

electricity, gas, or water to the city and its inhabitants.
² Normally the utility is charged a franchise fee as consideration for that privilege. (*County of Tulare v. City of Dinuba* (1922) 188 Cal. 664, 670 [206 P. 983].) No payment is required, however, for the exercise of a [***3] constitutional franchise.

Constitutional franchises are derived from article XI, section 19 of the California Constitution of 1879 (hereafter, article XI, section 19). As amended in 1884, article XI, section 19 stated as follows: "In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent [***4] of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This provision eliminated the system of governmental grants of franchises, which had led to favoritism and monopolies in derogation of free competition. (See *Stockton Gas etc. Co. v. San Joaquin Co.* (1905) 148 Cal. 313, 318 [83 P. 54]; *Russell v. Sebastian* (1914) 233 U.S. 195, 206 [34 S. Ct. 517, 520, 58 L. Ed. 912].) It allowed any person or company to supply water or artificial light to a city³ without approval by legislative or municipal officers. All that was required for the grant to be effective was acceptance by the provider—that is, [***5] the actual installation of the pipes, conduits and poles necessary to perform the service. (*Stockton Gas*

² A franchise has been defined as "a privilege conferred upon an individual or a corporation for use of a sovereign body's property." (*Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988) 204 Cal. App. 3d 660, 666 [251 Cal. Rptr. 411]; see also *City of Oakland v. Hogan* (1940) 41 Cal. App. 2d 333, 346 [106 P.2d 987] [franchise is a special privilege conferred upon a corporation or individual by a government legally empowered to grant it].)

³ The city must not have already had its own artificial lighting system for the provision to apply.

etc. Co. v. San Joaquin Co., *supra*, 148 Cal. 313, 318.) The franchise then constituted a valid contract with the state, which conferred upon the person or company a protected [***1172] property right. (*Russell v. Sebastian*, *supra*, 233 U.S. at p. 204 [34 S. Ct. at p. 519].) On October 10, 1911, the Constitution was amended to eliminate the constitutional franchise, but the amendment did not impair the rights of any utility that had already undertaken to use the streets to supply light or water to a city. (*Id.* at p. 210 [34 S. Ct. at p. 522].) Thus, once acquired, no fee could thereafter be imposed for its continuous exercise to the extent that it was used to provide light or water.

However, the same poles and wires that carried electricity [***6] for lighting supplied electricity for other uses such as heat and cooking. For these other purposes, holders of constitutional franchises entered into agreements with cities for "complementary" franchises, which required them to pay a fee for the privilege of using city [***202] streets to provide gas or electricity for uses other than light.

On March 22, 1905, the Legislature enacted the Broughton Act, which established procedures for granting nonconstitutional franchises and devised a formula for computing complementary franchise fees based on receipts attributable to the use of the franchise. (Stats. 1905, ch. 578, pp. 777-780; see § 6001 et seq.) According to this formula, a public entity could charge the utility 2 percent of the utility's gross annual receipts "arising from [the] use, operation, or possession" of the franchise. (Stats. 1905, ch. 578, § 3, p. 779; see § 6006.)

The segregation of receipts for lighting, which required no payment, from other uses presented practical accounting problems in the application of the formula. (See *Los Angeles County v. Southern Counties Gas Co. of Cal.* (1954) 42 Cal. 2d 129, 132 [266 P.2d 27]; *County of Tulare v. City of Dinuba*, *supra*, 188 Cal. 664, 672.) [***7] In 1937 an alternative scheme took effect as the Franchise Act of 1937, now set forth in section 6201 et seq. (See generally *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal. App. 4th 1691, 1695 [60 Cal. Rptr. 2d 187].)

HN1 Section 6231, subdivision (c), recognizes constitutional franchises in prescribing the formula for calculating franchise fees. If a utility holds a constitutional franchise, the fee for the complementary franchise is the greater of the Broughton Act formula (2 percent of its gross annual revenues "arising from the

use, operation, or possession of the franchise" [§ 6006]) or .05 percent of its gross annual receipts. If the utility does not hold a constitutional franchise, then it must pay according to the Broughton Act [*1173] formula or 1 percent of its gross annual receipts, whichever is greater. ⁴ Eventually the Broughton Act formula yielded to the 1 percent/0.5 percent formula, which generated a higher fee. (*County of Alameda v. Pacific, Gas & Electric Co.*, *supra*, 51 Cal. App. 4th 1691, 1695.)

[***8] Beginning in 1938, many cities throughout California enacted nearly identical ordinances granting complementary electric franchises to public utilities under the Franchise Act of 1937. Each ordinance typically recited an understanding that the grantee held a constitutional franchise in that city, thus recognizing the exemption from fees for the grantee's provision of lighting.

PROCEDURAL HISTORY

In May 1994 the City of Santa Cruz filed this class action, alleging that PG&E had been deliberately underpaying franchise fees to 107 of the 228 cities in its service area. According to plaintiffs, they had accepted PG&E's representation that the utility held a constitutional franchise for light, thereby entitling it to pay the lower "complementary" fee for its electric franchise. In fact, plaintiffs claimed, PG&E did not hold such a constitutional franchise and therefore was required to pay the amount required by statute for a noncomplementary franchise. The differential fee [**203] structure, argued plaintiffs, violated section 453, subdivisions (a) and (c), ⁵ and section 6231, subdivision

⁴ More specifically, once a utility's application for a franchise is accepted, it is required to pay the municipality "during the life of the franchise 2 percent of the [utility's] gross annual receipts arising from the use, operation, or possession of the franchise, except that this payment shall be not less than 1 percent of the [utility's] gross annual receipts derived from the sale within the limits of the municipality of the utility service for which the franchise is awarded." (§ 6231, subd. (c).) If the franchise is "complementary" to a constitutional franchise, however, the amount of the fee is "2 percent of the [utility's] gross annual receipts arising from the use, operation, or possession of the franchise, except that this payment shall be not less than one-half of 1 percent of the [utility's] gross annual receipts from the sale of electricity within the limits of the municipality under both the electric franchises . . ." (§ 6231, subd. (c).)

⁵ HN2 Section 453, subdivision (a), prohibits utilities from granting preferences to or discriminating against "any corporation or person" with respect to rates or service.

(c). Plaintiffs also claimed breach of contract and breach of the implied covenant of [***9] good faith and fair dealing, and they sought damages, a constructive trust, declaratory relief, and an accounting.

On June 1, 1995, PG&E moved for class decertification and for summary judgment against City of Santa Cruz as class representative. PG&E argued that it could not be liable for unlawful discrimination under section 453 because (1) recitals in the Santa Cruz ordinance created a conclusive presumption that PG&E held a valid constitutional franchise in that city; and (2) [*1174] it was merely complying with section 6231 in paying the complementary rate. PG&E also argued that plaintiffs' claims were barred by the statute of [***10] limitations, estoppel, waiver, and laches.

On September 1, 1995, Judge Robert B. Yonts of the Santa Cruz County Superior Court denied PG&E's motions, finding a common issue among class members and a triable issue of fact as to whether a constitutional franchise ever existed in the City of Santa Cruz. In a more detailed order filed November 22, 1995, Judge Yonts again denied the motions. The court rejected PG&E's assertion of a conclusive presumption of a constitutional franchise based on the city's ordinance, and it found no evidence that the city had known that PG&E lacked a constitutional franchise, thus vitiating PG&E's claims of waiver and estoppel. Finally, the court noted that each allegedly inadequate payment constituted a separate act; consequently, for those payments made within the applicable statutory period, neither the doctrine of laches nor the statute of limitations barred the city's claims.

On January 12, 1996, Judge Yonts granted PG&E's motion for reconsideration but affirmed the order denying summary judgment. PG&E thereafter petitioned for a writ of mandate, which this court denied on January 23, 1996.

On November 22, 1995, PG&E again moved for summary judgment, [***11] this time against five individual class cities. In March 1996 it moved for judgment on the pleadings as to 31 charter cities. PG&E's motions were heard by Judge Samuel S. Stevens. In its written order filed February 15, 1996, the court granted summary judgment on the ground that it was undisputed that PG&E held constitutional franchises in the five cities, and their ordinances provided for fee payment according to the formula

Subdivision (c) proscribes unreasonable differences in rates or service between localities or classes of service.

prescribed for complementary franchises. As to the motion for judgment on the pleadings, the court again ruled in PG&E's favor, reasoning that charter cities were bound by the terms of their franchises.⁶ This court affirmed both the summary judgment and the judgment on the pleadings on September 8, 1997.

On April 7, 1998, PG&E filed a third summary judgment motion pertaining to the remaining 72 class cities. The defendant again asserted the untimeliness [***12] of plaintiffs' position, invoking waiver, estoppel, and all conceivably applicable statutes of limitations. PG&E also renewed its claim that the Franchise Act ordinances alone were sufficient, if not conclusive, evidence of the constitutional franchise owned by PG&E. Alternatively, PG&E attempted to establish in each city the chain of title evincing a constitutional franchise held by one entity and passed on by successive transfers to PG&E.

[*1175] At the hearing on the new motion Judge Stevens refused to revisit the procedural [**204] issues on which Judge Yonts had already ruled. Instead, turning to the central issue of whether PG&E held constitutional franchises, Judge Stevens expressed the tentative conclusion that there was "substantial evidence" of such franchises in 70 of the 72 cities. In the remaining two cities—Blue Lake and Point Arena—the court found "substantial evidence that the constitutional franchise was not transferred" to PG&E. Accordingly except as to Blue Lake and Point Arena, the court granted the motion and entered judgment for PG&E.

DISCUSSION

1. Scope and Standard of Review

The parties acknowledge the applicable principles governing [***13] determination of summary judgment motions. *HN3* Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc.*, § 437c, subd. (c).) (2) (2) A defendant making the motion has the initial burden of affirmatively showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (*Code Civ. Proc.*, § 437c, subd. (o)(2); *Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 214 [51 Cal. Rptr. 2d 642]; *Sanchez v. Swinerton &*

⁶ One of the cities affected by this judgment was the City of Santa Cruz. That city is therefore not before us in this appeal.

Walberg Co. (1996) 47 Cal. App. 4th 1461, 1465 [55 Cal. Rptr. 2d 415].) If the moving papers establish a prima facie showing that justifies a judgment, the burden then shifts to the plaintiff to demonstrate the existence of a material factual issue. (*Addy v. Bliss & Glennon, supra*, 44 Cal. App. 4th at p. 213; *Lopez v. Superior Court* (1996) 45 Cal. App. 4th 705, 713 [52 Cal. Rptr. 2d 821].) On [***14] appeal, the reviewing court exercises its independent judgment, deciding whether the moving party has established undisputed facts that negate the opposing party's claim or state a complete defense. (*Addy v. Bliss & Glennon, supra*, 44 Cal. App. 4th at p. 214; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 487 [59 Cal. Rptr. 2d 20, 926 P.2d 1114].)⁷

HN4 The defendant's papers are strictly construed, while the plaintiff's papers are liberally construed, and the court must be convinced that " 'under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which [***15] requires examination by trial.' " (*Sanchez v. Swinerton & Walberg Co.*, *supra*, 47 Cal. App. 4th at p. 1465, quoting *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal. App. 4th [***1176] 544, 548 [5 Cal. Rptr. 2d 674].) If the defendant fails to meet this burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. (*Ibid.*) We regard facts as undisputed only if they are not contradicted by the opposing party's evidence. (*Soderberg v. McKinney* (1996) 44 Cal. App. 4th 1760, 1764 [52 Cal. Rptr. 2d 635].) Any doubts are resolved against the moving party. (*Id.* at p. 1765.)

2. Evidentiary Preclusion

We first consider PG&E's assertions that plaintiffs' silence over the decades and the parties' assumption that PG&E had a constitutional franchise preclude an action based on contrary facts. More specifically, PG&E contends that plaintiffs' action is barred by *Evidence Code section 622*, by the statute of limitations, and by the doctrines of waiver and contractual estoppel. If correct, these theories would entitle PG&E to judgment independently [***16] of any factual disputes regarding the violation of section 6231, subdivision (c).

a. Estoppel

⁷ Because this court's review is de novo, it is unnecessary to address plaintiffs' argument that the superior court's use of the term "substantial evidence" indicates an impermissible weighing of evidence in deciding the summary judgment motion.

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(3) (3) *HN5 Evidence Code section 622* provides: "The facts recited in a written instrument [**205] are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." The application of this provision, a codification of the doctrine of "estoppel by contract," is based on the principle that *HN6* parties who have expressed their mutual assent are bound by the contents of the instrument they have signed, and may not thereafter claim that its provisions do not express their intentions or understanding. (See *Estate of Wilson (1976) 64 Cal. App. 3d 786, 801-802 [134 Cal. Rptr. 749].*) (4a) (4a) PG&E invokes *Evidence Code section 622* in noting that the ordinances passed under the Franchise Act of 1937 included statements that PG&E held constitutional franchises in those [***17] *cities*. According to PG&E, those "factual determinations" must be conclusively presumed to be true. Because plaintiffs "chose" to enter into these complementary franchise agreements, PG&E argues, they are bound by the recitals of the existence of the constitutional franchise, on which the lower franchise fee is premised.

PG&E's theory is inapplicable in the procedural circumstances presented here. This is not a situation involving arm's length negotiations marked by the opportunity of both sides "to accept, reject, or modify the terms of the agreement," as PG&E asserts. *HN7* A complementary franchise is contractual only in the sense that the parties mutually agree to enter into the franchise relationship; it is offered "on a take-it-or-leave-it basis." (*County of Alameda [**1177] v. Pacific Gas & Electric Co., supra*, 51 Cal. App. 4th at p. 1696, fn. 3.) Terms of the ordinance such as the franchise fee are dictated by the Legislature, and the factual predicate of those terms is defined by the status of the franchisee under article XI, section 19 of the *1879 Constitution*. [***18] (*County of Sacramento v. Pacific Gas & Elec. Co. (1987) 193 Cal. App. 3d 300, 308, fn. 5 [238 Cal. Rptr. 305].*)

Furthermore, contractual estoppel based on factual recitations in an instrument is inapplicable to the extent that the agreement is void. Even if the statement that PG&E has a constitutional franchise is viewed as a declaration necessary to the enactment of the ordinance, the ordinance is invalid if it establishes a right in PG&E contrary to state law. (Cf. *Garamendi v. Mission Ins. Co. (1993) 15 Cal. App. 4th 1277, 1288-1289 [19 Cal. Rptr. 2d 190].*) (5) (5) *HN8* The general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual

circumstances In no event will such estoppel operate where the act or contract relied on to create the estoppel is outside the corporate powers of the governmental agencies or officials." (*Wheeler v. City of Santa Ana (1947) 81 Cal. App. 2d 811, 817 [185 P.2d 373].*) Just as a *city* cannot rely on estoppel in defense of its invalid restrictions on a constitutional [***19] franchise (see, e.g., *Town of St. Helena v. Ewer (1914) 26 Cal. App.. 191, 197 [146 P. 191]; City of Arcata v. Green (1909) 156 Cal. 759, 764 [106 P. 86]*), the doctrine is equally unavailable when the shoe is on the other foot. (4b) (4b) Here PG&E is seeking to use estoppel to compensate for the alleged invalidity of ordinances under state law. If PG&E in fact has no constitutional franchise in the plaintiff *cities*, the lower franchise fee it has been paying is contrary to state law and in derogation of the public good. *HN9* We do not favor the doctrine of acquiescence, or estoppel, as applied to a situation of this kind. There is much respectable authority holding that public officials and public agencies cannot alienate public rights by mere failure to assert such rights in behalf of the public which they represent." (*Terminal Rys. v. County of Alameda (1924) 66 Cal. App.. 77, 83 [225 P. 304].*)

PG&E also relies on *Porter v. City of Riverside (1968) 261 Cal. App. 2d 832 [68 Cal. Rptr. 313]*, which involved an ordinance authorizing [***20] reimbursement of out-of-pocket expenses for *city* council members. The ordinance recited that inflation and other demands had resulted in an increase in [**206] these expenses, and that \$ 350 per month represented a reasonable amount of monthly expenses. The ordinance therefore provided for a monthly expense allowance of that amount without requiring the council members to present an expense claim. The trial court determined that the allowance exceeded actual expenses and therefore constituted compensation, in violation of the *city's* charter. The appellate court reversed, noting the presumption of [**1178] validity applicable to statutes and ordinances. By receiving evidence and making findings contrary to the declaration of facts in the ordinance, the trial court had exceeded its powers. (*Id. at pp. 836-837.*)

According to PG&E, the *Porter* holding compels an analogous result here, that the ordinances at issue must be presumed to be valid by "conclusively deem[ing]" recitals of fact to be true. We disagree. This is not a case in which "the right to enact a law depends upon the existence of a fact," as in *Porter*. (*Porter v. City of Riverside, supra*, 261 Cal. App. 2d at p. 836. [***21] italics added.) The ordinances at issue here were based on factual assumptions, not formal findings of fact on

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which the power to enact them depended.

Thus, neither *Porter* nor Evidence Code section 622 supports the application of a conclusive presumption in these procedural circumstances. We therefore agree with the superior court that the question of whether PG&E held a constitutional franchise was not conclusively determined by factual assumptions reflected in the ordinances, but those assumptions were nonetheless relevant evidence on that issue.

b. Statute of Limitations

(6) (6) PG&E also contends that plaintiffs' "extraordinary delay" in bringing this action bars their claim under any applicable statute of limitations.⁸ According to PG&E, the complaint is tantamount to a claim for rescission, based on the *cities'* mistake in agreeing that PG&E had a constitutional franchise. Any cause of action based on mistake accrued at the time PG&E accepted the franchise ordinance, it argues, and plaintiffs failed to provide evidence justifying a tolling defense based on their claimed recent discovery of the facts. Instead, what was discovered was not new [***22] facts but a new legal theory enabling them to invalidate and rewrite the ordinances. In any event, PG&E concludes, plaintiffs should be charged with knowledge of the facts they would have discovered through diligent inquiry.

In ruling on PG&E's first motion for summary judgment, Judge Yonts determined that plaintiffs' claims accrued upon each underpayment of fees. This ruling finds support in case law. In *City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal. 2d 823, 834 [271 P.2d 5]*, the court noted that the three-year limitations period applicable to liability created by statute (presently *Code of Civil Procedure section 338, subdivision (a)*) "runs from [***23] the time the cause of action accrues, and the cause of action accrues when the tax becomes delinquent." [***1179]

Tehama v. Pacific Gas & Elec. Co. (1939) 33 Cal. App. 2d 465, 474 [91 P.2d 936], on which PG&E relies, is distinguishable. In that case PG&E operated a franchise for 22 years without making any required payments of franchise taxes and without any demand for payment by

⁸ PG&E argues the claim is precluded whether it is controlled by a three-year or four-year limitations period. (See *Code Civ. Proc., §§ 337* [four years for breach of contract], *338* [three years for statutory liability], and *343* [four years for wrong not otherwise specified].)

the county. The court in dicta noted that the action was barred by the applicable statute of limitations. However, there was no representation by PG&E that it was acting properly; it simply failed to make the required payments and the county failed to demand them. In this case, according to the complaint, plaintiffs accepted the lower franchise fee each year upon PG&E'S representation, [***207] under penalty of perjury, that it had paid the amounts it owed.⁹

[***24] The same distinction applies to *City of L.A. v. County of L.A. (1937) 9 Cal. 2d 624 [72 P.2d 138, 113 A.L.R. 370]*, where a railway corporation made payments to the county rather than the *city* over a period exceeding 15 years without objection or demand by the *city*. As to the corporation, the *city's* claims were barred by laches and estoppel, since the *city* had impliedly represented that it would not require payment as long as the corporation paid the county. As to its claim against the county, however, the *city* was not barred from recovering those amounts payable within the applicable statute of limitations period. Here, plaintiffs allege, PG&E annually represented under oath that its payments were correct. Their failure to challenge the payments resulted not simply from inaction, as in *City of L.A. v. County of L.A.*, but from their reliance on an affirmative misrepresentation by PG&E. Thus, Judge Yonts did not err in determining that a cause of action accrued with each of these annual statements.

c. Waiver

(7) (7) As the parties recognize, *HN10* waiver is "the intentional [***25] relinquishment or abandonment of a known right." (*Bickel v. City of Piedmont (1997) 16 Cal. 4th 1040, 1048 [68 Cal. Rptr. 2d 758, 946 P.2d 427]* (abrogated by statute with regard to construction of the Permit Streamlining Act [Stats.1998, ch. 283, § 5]).) A party "may waive a statutory provision if a statute does not prohibit doing so (*16 Cal. 4th at pp. 1048-1049, fn. 4*), the statute's 'public benefit . . . is merely incidental to [its] primary purpose' (*id. at p. 1049*), and 'waiver does not seriously compromise any public purpose that [the statute was] intended to serve' (*id. at p. 1050*)."⁹ (*DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 668-669 [85 Cal. Rptr. 2d 292, 976 P.2d 843]*.)

As Judge Yonts found, these criteria are not met in the instant case. Here it is not a private party that is subject

⁹ Plaintiffs also suggest fraudulent concealment by PG&E of the facts on which its causes of action depend, thus tolling the limitations period by estoppel.

to waiver, as in *Bickel and DeBerard* [*1180] *Properties*, but a public entity. The public benefit in franchise fees is obviously central to the purpose of section 6231, subdivision (c), and that benefit would unquestionably be compromised by applying the waiver doctrine [***26] to the plaintiff *cities*. Furthermore, *HN11* for waiver to be effective, there must be an actual intention to relinquish the right based on knowledge of the underlying facts. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal. 4th 1, 31 [44 Cal. Rptr. 2d 370, 900 P.2d 619]; *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal. App. 4th 54, 60 [35 Cal. Rptr. 2d 515].) Although waiver need not be express, an implied waiver must nonetheless be based on conduct indicating an intention to relinquish the right. (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal. 4th at p. 31.) This is a question of fact requiring clear and convincing evidence, which is not established as a matter of law by PG&E's moving papers.

3. Sufficiency of PG&E's Showing

We next address the evidence offered by PG&E in support of its summary judgment motion, to ascertain whether the undisputed facts and reasonable inferences therefrom establish PG&E's right to judgment as a matter of law. The superior court found that a triable issue [***27] of fact existed in only two *cities*, where there was an insufficient showing that a constitutional franchise was transferred to PG&E by its predecessors. In our de novo review, and resolving all doubts in favor of plaintiffs, as we must, we find a triable issue of fact as to whether PG&E holds a constitutional [**208] franchise in 14 of the 70 remaining *cities*.

a. Preliminary Assumptions

This court's determination of the motion is premised on certain assumptions regarding the nature of a constitutional franchise and its effective transfer. (1b) (1b) First, the acquisition of such a franchise should be distinguished from the supply of lights and service. The privilege granted in article XI, section 19 was that of using the public streets *and* of laying conduits and connections as was necessary to introduce and supply light to the *city*. Thus, if a utility used *city* streets to provide lighting before October 10, 1911, that company had a constitutional franchise regardless of who initially erected the poles and wires for that purpose.

(4c) (4c) Secondly, we do not regard the recital of a constitutional franchise alone as sufficient to shift the burden to plaintiffs. PG&E's applications for [***28] complementary franchises under the Franchise Act of

1937 were completely standardized, as were the resulting ordinances. PG&E's argument that the franchise ordinances are "sufficient in and of themselves" is only a variation [*1181] on the theme of conclusive presumptions, which we have already rejected for purposes of summary judgment. Instead, it is necessary to examine the evidence offered by PG&E in support of its assertion that the chain of title in each *city* demonstrates its acquisition of a constitutional franchise from its predecessors.

An essential ingredient of this chain-of-title evidence is an effective transfer from the owner of a constitutional franchise. We reject plaintiffs' contention that a conveyance from the owner of a constitutional franchise must specifically identify the nature of the franchise. Where the transfer documents convey "all franchises" we may infer an intent to transfer any constitutional franchise possessed by the grantor.

We do agree with plaintiffs that certain transfers required government approval to be valid. As part of the October 10, 1911 amendment to the Constitution, section 22 created a Railroad Commission, and section 23 subjected [***29] public utilities to the control of and regulation by the commission. The Public Utilities Act of 1911, which implemented the new constitutional provision, took effect on March 23, 1912. Under section 51 of the act, the assignment of a franchise required authorization by the Railroad Commission. ¹⁰ (Stats. 1911, ch. 14, § 51, p. 44.) Before March 23, 1912, however, approval by two-thirds of the stockholders of a granting corporation was sufficient for an effective conveyance of the grantor's entire property, including franchises, to another corporation. (Former Civ. Code § 361a [Stats. 1903, ch. 271, § 1, p. 396]; *South Pasadena v. Pasadena Land etc. Co.* (1908) 152 Cal. 579, 584-586 [93 P. 490].)

We must also address plaintiffs' assertion that a person or company did not have a constitutional franchise if the *city* granted a franchise for [***30] a term of years or in consideration of the grantee's payment of money. In several *cities*, a board of trustees passed an ordinance expressly granting an electrical franchise to an individual or company, often the "highest bidder" (e.g., Emeryville, San Juan Bautista, Cloverdale). These franchises were to last a finite period such as 15 years (Benicia), 25 years (Suisun *City*) or 50 years (Fort Bragg, Sebastopol). Because the franchises were not

¹⁰ This provision is now contained in section 851. The requisite approval is made by the Public Utilities Commission.

"free and perpetual," they could not, according to plaintiffs, be constitutional franchises.

(1c) (1c) This argument cannot succeed. Whoever received a franchise for lighting a city before the adoption of the October 10, 1911 amendment acquired a vested right that could not be impaired by legislative or [**209] municipal acts. Thus, any requirement of payment for this privilege or limitation on its [*1182] duration was an invalid restriction. (See *Oakland v. Great Western Power Co.*, *supra*, 186 Cal.570, 581-583; *Suisun City v. Pacific Gas etc. Co.* (1917) 35 Cal. App.. 380, 381 [170 P. 1078]; *Town of St. Helena v. Ewer*, *supra*, 26 Cal. App.. 191, 197.)

Finally, it is necessary to clarify the nature [***31] of the privilege held by a service provider that operates under a franchise originating in a grant by a county board of supervisors. The issue, which the parties have addressed in supplemental briefs, is whether a county franchise may give rise to a constitutional franchise once the area in use becomes part of an incorporated city. Plaintiffs contend that a grant of a lighting franchise by a county precluded acquisition of a new franchise from the state. Once incorporated, plaintiffs argue, both the city and the utility were bound by the terms of any franchises already in existence. Since the pipes and conduits were already laid in those cities, no new franchise could be acquired.

PG&E, however, contends that upon incorporation of the city a utility acquired a constitutional right which superseded any preexisting county franchise to the extent that the franchises were inconsistent. Thus, if a utility had already begun installation or service when a city incorporated, it acquired a constitutional franchise upon the city's incorporation, as long as the incorporation occurred before October 10, 1911 (as is the case in each of the plaintiff cities).

PG&E offers the better argument. [***32] Article XI, section 19 applies to *any* individual or *any* company, and the privilege encompasses not only the initial "laying down" of poles and wires in the streets but also, more broadly, the "using" of the streets to supply light. The purpose of the provision, to promote free competition, would not be served by restricting the privilege to newcomers. Thus, on the day of incorporation, every service provider, including any company already in operation through a county franchise, was entitled to avail itself of article XI, section 19 and thereby acquire a constitutional franchise in the new city.

With these legal assumptions guiding our review of the chain-of-title evidence, we proceed to determine whether PG&E met its burden of showing that it had a constitutional franchise in each city and was therefore entitled to judgment as a matter of law. The first question is whether PG&E or its predecessor used the streets of each city to supply it with lighting. If it was a predecessor who was so engaged, it is necessary also to determine whether the transfer of the lighting franchise from the predecessor to PG&E was valid.

[*1183] b. *History of Electrical Service in Each [***33] City*

In Auburn, King City, Livermore, St. Helena, Pinole, Rocklin, Selma, Lemoore, Fowler, Santa Maria, Nevada City, Yuba City, Lincoln, Rio Vista, Hollister, Antioch, Concord, Calistoga, and Sonora, the existence of a constitutional franchise is shown by the minutes of the board of trustees meetings in which the board approved payment of claims for "lights," "street lights," "electric lights," or "lighting." These billing statements pertain to service provided before October 10, 1911, and are therefore sufficient to satisfy PG&E's initial burden of showing that the service provider was using the streets and thoroughfares of the city to supply the city with light. If there was rebuttal evidence that the privilege to do so was not a constitutional franchise, it was incumbent upon plaintiffs to offer that evidence in order to raise a triable issue of fact.

Plaintiffs did offer such evidence with respect to Lemoore. *HN12* Article XI, section 19 did not apply to any city in which there were "public works owned and controlled by the municipality, for supplying the same with . . . artificial light. [***34] " (Art. XI, § 19.) [**210] In August 1902 the Lemoore Board of Trustees passed an ordinance setting the rates it intended to charge residents and businesses for electric lights. The ordinance specifically referred to the electric light poles and wires belonging to the city. In 1910, the board approved payment of bills from PG&E's predecessor, San Joaquin Light & Power Co., for "street lights" and for a "street lighting system." San Joaquin Light & Power Co. thus may have acquired a lighting franchise while there was already a municipal electric distribution system in place. We conclude, therefore, that plaintiffs have presented a triable issue of fact as to whether article XI, section 19 applied to the city of Lemoore.

In Coalinga the minutes do not identify the purpose of the bill from the Coalinga Water & Electric Co., but they do report extensive discussions about the lights and

lighting service provided by the company. This is sufficient to shift the burden to plaintiffs. Similarly, in a January 1909 board of trustees meeting in Larkspur, the board discussed the need for changes in the location of street lights and resolved to request action by PG&E on the decision. This [***35] evidence is sufficient to show that PG&E was providing lighting service to Larkspur during the constitutional period. It was plaintiffs' burden to meet this showing with evidence raising a triable issue of fact. On the other hand, in Sausalito, Vacaville, Fortuna, Paso Robles, and Colusa, the minutes in which the authorization of bill payment is recorded do not identify the purpose of the claim as being for lighting, nor are there [*1184] board discussions regarding lighting service actually provided by the claimant. In these cities a question of fact remains as to the nature of the franchise held by PG&E or its predecessors.¹¹

In some cities there is more direct evidence of a pre-1911 lighting contract or franchise granted by the board [***36] of trustees to a specific individual or company. In Jackson, Fort Bragg, Los Gatos, Sebastopol, Benicia, Placerville, Kingsburg, Orland, Red Bluff, Willows, Suisun City, Belvedere, Burlingame, San Anselmo, Woodland, Dixon, Wheatland, Winters, Morgan Hill, San Juan Bautista, Antioch, Martinez, Cloverdale, Lakeport, Sonoma, and Emeryville, the board of trustees authorized the provider to install or maintain a lighting system or to furnish lights.

With three exceptions, in each of these cities where a franchise was awarded by contract or ordinance, there is evidence of the grantee's acceptance of the privilege by supplying light to the city. In Sebastopol, Benicia, Willows, Orland, Burlingame, Wheatland, Winters, Antioch, San Juan Bautista, and Lakeport, the minutes of the board of trustees meetings reflect the board's payment of claims for lights or lighting by the service provider.¹² [***37] In other cities¹³ there is evidence of

¹¹Moreover, in Vacaville, the sale of the Vacaville Water & Light Company (the payee listed in the city treasurer's cash book) to the Vacaville Water & Power Company occurred after the former company "ceased to exist" due to the expiration of its corporate charter.

¹²There are also claims approved in Los Gatos, Kingsburg, Belvedere, San Anselmo, and Cloverdale, but they do not specify that the bill is for lighting. Nevertheless, in these cities (1) the minutes do not indicate that any other provider was supplying light, and (2) there is additional evidence that the franchisee supplied light in subsequent documents transferring the franchise to the next provider in the chain of title. Thus, we

acceptance in the documents executed in the course of [***211] transferring the assets (including franchises) of the grantee to the next utility in the chain of title.

The evidence provided to show acceptance of a lighting franchise is insufficient for summary judgment in three of these cities, however. In Red Bluff the board granted a 50-year franchise to Sacramento Valley Power Co. to erect and maintain poles and wires for electric power "for the various purposes for which the same may be used." We may infer that this franchise included lighting, but the record does not indicate whether the utility exercised its franchise to provide an electrical system for light or for some other [*1185] use. In Sonoma, [***38] the board granted C.T. Ryland a franchise to supply the city with light. The board subsequently approved payment of lighting bills from Sonoma Valley Co., but there is no apparent connection between that company and C.T. Ryland. The assignment from Ryland to his successor (California Telephone and Light Company, the immediate predecessor of PG&E) only referred generally to his electric light and power plant and his business of selling electric light in Sonoma County. Without more, there remains a question of fact as to whether Ryland exercised his franchise to provide light to the City of Sonoma. Finally, in Emeryville, an October 1910 ordinance granted Great Western Power Co. a franchise to transmit electricity for *heat and power*. The ordinance did include a provision that upon demand the company shall sell available electricity for lighting; but the record contains no evidence that Great Western Power Co. actually supplied electricity to the town for lighting purposes before October 10, 1911.

In two cities the evidence of a contract is inadequate to establish its nature as a lighting franchise. In Dinuba, the board minutes do not specify the nature of either the contract awarded [***39] to San Joaquin Light & Power Company or the ensuing bills from the company. No other evidence denotes a lighting franchise in San

may infer that the grantee of the franchise actually supplied light pursuant to the authorizing ordinance or contract.

¹³These transfer documents, including deeds and written findings by the Railroad Commission, reflect a lighting distribution system or service by the grantee in Los Gatos, Benicia, Kingsburg, Belvedere, Burlingame, and Lakeport. In Fort Bragg, Sebastopol, Placerville, Willows, Suisun City, Woodland, Dixon, Wheatland, Winters, Martinez, and Cloverdale, the transfer documents from the grantee to its successor specifically identified the franchise awarded to the grantee. In San Anselmo and Burlingame PG&E itself received a pre-1911 lighting franchise.

Joaquin Light & Power Company or its successor, San Joaquin Light & Power Corporation. Similarly, in Los Banos the board of trustees authorized San Joaquin Light & Power Co. to "install poles and wires," but there is no mention of the purpose of the proposed installation, and no indication that the utility accepted the franchise by October 10, 1911, six days later. ¹⁴

[***40] (8) (8) For each city in which a constitutional franchise was established by evidence of lighting service through bill payment or express grant, there is evidence of an effective transfer to the next utility in the chain of title. We have already rejected plaintiffs' argument that the conveyances were invalid for failing to identify *constitutional* franchises in the transfer or for failing to obtain governmental approval. The chain of title has been established for summary judgment purposes even where "all franchises" were generally conveyed, and in each corporate conveyance that took place before March 23, 1912, two-thirds of the stockholders approved the transaction.

[*1186] Several cities incorporated when PG&E's predecessor was already providing lighting service to the occupants through a county franchise. Prior to the incorporation of Arroyo Grande, Newman, Pinole, [**212] South San Francisco, Colfax, Tracy, ¹⁵ [***42]

¹⁴ The conveyance from Miller & Lux to San Joaquin Light & Power Co. is also insufficient to establish the latter's constitutional franchise in Los Banos. First, there is no evidence that Miller & Lux supplied light to the city. In July 1910 the board granted Miller & Lux permission to build a fireproof warehouse at a specified location, and it instructed the clerk to have Miller and Lux "remove all poles and electric wires not in use" in the city. The board also told the clerk that day to ask PG&E how soon it could begin work on its line; if PG&E could not complete the work by winter, the board would have to make other arrangements for light for the winter. In September 1911 Miller & Lux conveyed some land and its appurtenances, but there is no mention of franchises whatsoever. There is one claim from Miller & Lux for an unspecified purpose, which was approved for payment on October 4, 1911.

¹⁵ PG&E's moving papers did not include the actual documents evidencing the assignment from the original grantee to Mt. Diablo Light & Power Co. (Mt. Diablo) or from the latter to its successor, Sierra & San Francisco Power Co. (Sierra). It initially appears, therefore, that evidence of the requisite approval was absent in PG&E's showing. However, Mt. Diablo itself provided lighting service during the constitutional period, and the minutes of the board of supervisors meeting on March 4, 1912, recite that the assignment of the franchise from Mt. Diablo to Sierra was "duly signed and approved."

Oakdale, Madera, ¹⁶ Taft, Maricopa, Coming, Orland, Tehama, Fairfield, ¹⁷ Burlingame, and Hillsborough, the applicable county board of Supervisors passed an ordinance granting a lighting franchise to an individual or company. ¹⁸ In Daly City the board of trustees [***41] discussed the unsatisfactory lighting service provided by the South San Francisco Power & Light Company and decided to inform the board of supervisors of the company's inadequate performance of its contract. ¹⁹ In each of these cities there is affirmative evidence of an effective conveyance of the service provider's franchises to the next utility in the chain of title. Accordingly, we may infer that PG&E retained the constitutional franchise that was acquired on the city's incorporation date. Plaintiffs did not offer evidence to rebut such an inference.

[***43] In Arcata, Ferndale, and Sanger PG&E relied on evidence of franchises other than bill payments or express grants from the city or county. While there is indirect evidence of lighting service in these cities, it does not establish a constitutional franchise as a matter of law. The only evidence offered for Arcata (aside from the assumption made in the 1960 Franchise Act

Minutes of the city's board of trustees meeting in September 1911 mention locating all the "electric light poles belonging to the city." If Tracy maintained its own public lighting works during the constitutional period, a private supplier could not thereafter have acquired a constitutional franchise. Plaintiffs do not make this argument as to Tracy, however.

¹⁶ Plaintiffs do not mention a county franchise applicable to Madera, though there is evidence of a lighting contract between the utility and the county in the board's discussion of rates for arc lights. Whether or not there was a preexisting county franchise, however, PG&E's predecessors clearly were providing lighting to Madera after incorporation but during the constitutional period.

¹⁷ PG&E asserted that in Fairfield the board of trustees gave Leonard Prior a franchise to set up a lighting and power system in the town. Plaintiffs do not question the accuracy of this statement, but the record discloses that it was the county board of supervisors that granted the franchise in 1901, before the town was incorporated.

¹⁸ The record also indicates that before the incorporation of Fowler and Santa Maria, the board of supervisors in their respective counties granted a lighting franchise to PG&E's predecessor. However, as to these cities plaintiffs do not object that PG&E's predecessor had only a county franchise.

¹⁹ W.J. Martin originally obtained an electric franchise from San Mateo County for the South San Francisco Power & Light Company.

ordinance) is a conveyance on August 4, 1911, from the Arcata Light & [*1187] Power Company to Western States Gas & Electric Co., PG&E's immediate predecessor in several cities. The indenture on that date does not specifically describe any lighting franchise in Arcata, but identifies certain parcels and includes "all franchises . . . poles, pole lines, wires . . . and all other personal property . . . which *may* belong to [Arcata Light & Power Company], or in which it *may* have any interest." (Italics added.) While such generality is sufficient to show the *transfer* of an established franchise, it cannot alone create a basis for presuming that the grantor had a lighting franchise to convey.

In Ferndale PG&E's evidence included indenture agreements between Ferndale Electric Light Co. and two citizens. [***44] The first, executed in March 1905, allowed the company water rights for the use of its "Electric Light Plant only" and a right of way across the grantor's private property to lay pipes to conduct the water. The [**213] second, executed in December 1899, conveyed a right of way to the company to lay conduits for transmitting electricity over a certain parcel. Neither of these agreements affirmatively demonstrated that Ferndale Electric Light Co. obtained these rights in order to serve this city or its residents with light. The subsequent conveyance from Ferndale Electric Light Co. to Western States Gas & Electric Co. on August 4, 1911 employed a standard indenture form like that used in Arcata; it contained no recital of fact permitting the inference that the grantor was transferring a lighting business in the city of Ferndale.

The evidence pertaining to Sanger suffers from similar limitations. In April 1909, prior to the city's incorporation, C.M. Blackman conveyed to A.G. Wishon certain property connected with the "electric light works" in Sanger. The next document is an authorization to draw a warrant in favor of the San Joaquin Light & Power Corp., with no connection to the [***45] previous service provider. The purpose of the payment is not specified and the authorization occurs in December 1911, after

the amendment of article XI, section 19. The undisputed evidence in Sanger, like Arcata and Ferndale, is insufficient to establish PG&E's entitlement to judgment as a matter of law.

CONCLUSION

PG&E's moving papers established its constitutional franchise in 56 cities. As to those class members, plaintiffs failed to adduce evidence raising a triable issue of fact. In the following cities, however, there remain factual issues requiring resolution by trial: Arcata, Colusa, Dinuba, Emeryville, Ferndale, Fortuna, Lemoore, Los Banos, Paso Robles, Red Bluff, Sanger, Sausalito, Sonoma, and Vacaville.

This holding should not be interpreted to mean that no substantial evidence exists to support PG&E's position. It may turn out that PG&E easily [*1188] defends against plaintiffs' complaint on the ground that it holds a constitutional franchise in these cities. Such an outcome, however, is for the trier of fact, not this court, to decide. *HN13* Our function in a summary [***46] judgment proceeding is limited to issue finding, not issue determination, and we must resolve all doubts against the motion. (*Mann v. Cracchiolo (1985) 38 Cal. 3d 18, 36 [210 Cal. Rptr. 762, 694 P.2d 1134]; Soderberg v. McKinney, supra, 44 Cal. App. 4th 1760, 1764-1765.*) Consequently, the principles governing summary judgment compel the conclusion that as to those 14 cities material factual issues preclude the entry of judgment as a matter of law.

DISPOSITION

The judgment against Arcata, Colusa, Dinuba, Emeryville, Ferndale, Fortuna, Lemoore, Los Banos, Paso Robles, Red Bluff, Sanger, Sausalito, Sonoma, and Vacaville is reversed. As to the remaining appellants, the judgment is affirmed. Costs on appeal are awarded to plaintiffs.

Cottle, P. J., and Mihara, J., concurred.

F. C. Austin Mfg. Co. v. Hunter

Supreme Court of Oklahoma

June, 1905, Decided ; September 7, 1905, Filed

No Number in Original

Reporter

1905 OK 100; 16 Okla. 86; 86 P. 293; 1905 Okla. LEXIS 104

F. C. AUSTIN MANUFACTURING COMPANY, a corporation v. A. J. HUNTER, et al.

Prior History: Error from the District Court of Comanche County; before Frank E. Gillette, Trial Judge.

Disposition: Judgment affirmed.

Core Terms

special appearance, machinery, pleaded, engine, refuse to receive, cross petition, quash service, co-partners, partnership, deposited, damages, shipped, rights

Case Summary

Procedural Posture

Appellant seller sought review of a decision of the District Court of Comanche County (Oklahoma), which entered judgment in favor of appellee buyers in an action to recover damages related to a contract for the purchase of well-drilling appliances.

Overview

The buyers jointly purchased appliances for a well-drilling outfit. All the property contracted for was shipped, but there were problems with the shipment, and the buyers refused to receive it. They sued the seller for damages, attached the property, and made service by publication. The seller entered a special appearance and moved to quash the service. The motion was overruled, and the seller filed an answer denying liability and praying for an affirmative judgment. The trial court entered judgment in favor of the buyers, and the seller appealed, contending, inter alia, that it was error to overrule its motion to quash service. The court affirmed, holding that the case was an exception to the general rule that where a party entered a special appearance and moved to quash service of summons, if his motion was overruled, he could proceed without

waiving his rights under his special appearance. That rule was based on the assumption that a defendant was involuntarily before a court, but it did not apply where the party filed a cross petition and asked for affirmative relief because, by that act, he voluntarily submitted himself to jurisdiction of the court.

Outcome

The court affirmed the trial court's judgment.

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1 Where one enters a special appearance and moves to quash service of summons, if his motion is overruled, he is not compelled to desist from further participating in the case, but may file his answer and proceed to trial, without waiving his rights under his special appearance.

Headnotes/Syllabus

Headnotes

1. PRACTICE--Jurisdiction of Person, Waived When. Where one appears especially and objects to the jurisdiction of the court over his person, by reason of defective service of summons, and his objections are overruled, he may file his answer and proceed to trial and he will not be deemed to have entered a general appearance by reason thereof, if his objections are meritorious. Chicago Building & Mfg. Co. v. Kirby 63 P. 966. 10 Okla. 730; Jones v. Chicago Building & Mfg. Co., 10 Okla. 628. But where he in addition to defending against the action of a plaintiff, files a cross-petition and asks for affirmative relief against the

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plaintiff, he thereby submits his person to the jurisdiction of the court for all purposes of the entire action, and thereby estops himself from questioning the jurisdiction of the court in the first instance.

2. JOINT OWNERS--Pleadings. Where three persons enter into a written contract for the purchase of personal property (each signing his individual name) with a third party, in the absence of an allegation in the pleading or proof to the contrary, they will be deemed to be joint owners.

3. EVIDENCE--Not Reviewed, When. When the evidence reasonably supports the verdict and judgment, this court will not weigh the evidence to determine as to whether or not the preponderance was for the other party.

Counsel: Stevens & Miller and I. B. Lipson, for plaintiff in error.

W. I. Gilbert, and Chas. Mitschrich, for defendant in error.

Judges: BURWELL, J. Gillette. J., who presided in the court below, not sitting; all the other Justices concurring.

Opinion by: BURWELL

Opinion

[**87] [***294] Opinion of the court by

BURWELL, J.: [*P1] A. J. Hunter, Frank L. Stetson and Chas. S. Albright, in their individual names, jointly purchased a boiler, engine and other appliances for a well-drilling outfit from the F. C. Austin Manufacturing Company. All of the property contracted for was shipped, but Hunter and Albright refused to receive it on the ground that the engine was too small. A second engine was shipped, but they refused to receive it, claiming that it had been used and was not new. They, having paid the freight, sued the defendant for damages, attached the property and attempted to make service by publication. The defendant entered a special appearance and moved to quash the service, which motion was overruled, and it excepted. It then filed its answer, denying liability to the plaintiffs and, with it and as part of the same pleading, set out the contract of sale, alleging the facts in relation thereto, and prayed for an affirmative judgment against the plaintiffs, and Frank L. Stetson, who had been a defendant because he refused to join with the plaintiffs in the bringing or

prosecution of the suit. The Austin Manufacturing Co. contends that the court erred in overruling its motion to quash the service, which was made by publication. It is not necessary to decide this question, for, while it has been held by this court that, HN1 where one enters a special appearance and moves to quash service of summons, if his motion is overruled, he is not compelled to desist from further participating in the case, but may file his answer and proceed to trial, without waiving his rights under his special appearance, yet this case is an exception to that general rule. The rule just referred to is based upon the assumption that a defendant is involuntarily in court, and that he is being compelled [**88] to litigate the case against his will, and so long as he simply defends against the cause or causes of action pleaded in plaintiff's petition, he can urge the want of jurisdiction over his person in the appellate court, but not so where he files a cross petition and asks for affirmative relief, for, by such act, he voluntarily submits himself to the jurisdiction of the court, and vests it with power to render any judgment necessary in the disposition of any and all of the issues involved in the entire controversy. Thompson v. Greer (Kan.), 64 P. 48; Chandler, et al. v. Citizens National Bank of Evansville (Ind.), 49 N.E. 579.

[*P2] It is argued by appellant that A. J. Hunter, Charles S. Albright and Frank J. Stetson were partners, and each was bound by the acts of the other. The record does not justify this conclusion. The appellant did not allege in his answer and cross petition that they were co-partners. They adopted no partnership name, and the pleadings throughout treat them simply as joint owners, or rather as persons entering upon a joint venture. If they were co-partners, in the absence of an admission to that effect, the burden was upon the appellant to establish that fact. Either of the parties who purchased the property could have sold his interest therein, and the grantee could have compelled recognition of his rights. There was no agreement of partnership, and the facts pleaded do not justify such a conclusion; and the acceptance of the machinery by Stetson did not bind the other two, if such acceptance was over their objections and protests, and the machinery was not as represented. G. H. Logan v. Oklahoma Mill Co., 14 Okla. 402; 79 P. 103.

[*P3] When the contract of purchase was entered into the plaintiffs deposited a part of the purchase price of the machinery [**89] in a local bank, and by the verdict of the jury and the judgment of the court the plaintiffs were permitted to take down the money so deposited, but were awarded no damages, and the verdict

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amounted to a general verdict against the defendant.

[*P4] The evidence reasonably supports the judgment; therefore, we will not weigh it for the purpose of determining as to whether the preponderance is with the appellant or appellees. Another jury might have returned a different verdict, but so long as the evidence in a case is sufficient to fall within the rule herein announced, it must be upheld.

[*P5] The instructions fairly presented the case to the

jury, and we find no substantial error either in those given or in the refusal to give others requested by the appellant.

[*P6] We have considered the entire record, and are satisfied that the judgment of the trial court should be affirmed at the cost of the appellant. It is so ordered.

[*P7] Gillette. J., who presided in the court below, not sitting; all the other Justices concurring.

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[No. S111323. Dec. 18, 2003.]

SAINT AGNES MEDICAL CENTER, Plaintiff and Respondent, v.
PACIFICARE OF CALIFORNIA et al., Defendants and Appellants.

SUMMARY

A health maintenance organization (HMO) filed a lawsuit in Los Angeles County against a medical center and others to resolve disputes about the parties' contractual rights and obligations under two health services agreements. A month later, the medical center responded by filing a suit in Fresno County for wrongful breach of the later entered health services agreement (HSA). Over the objections of the HMO, the medical center prevailed on its motion to transfer the HMO's Los Angeles County action to Fresno County. Meanwhile, the HMO unsuccessfully moved to transfer the medical center's Fresno County action to Orange County. Four months after it initiated the Los Angeles lawsuit, the HMO filed a petition to compel arbitration of portions of the Fresno action and to stay proceedings. The trial court denied the stay and the motion to compel arbitration. (Superior Court of Fresno County, No. 01CECG01243, Stephen Joseph Kane, Judge.) The Court of Appeal, Fifth Dist., No. F039699, reversed the trial court's judgment and remanded with directions to grant the HMO's petition, concluding that the record did not establish that the HMO had as a matter of law waived its right to compel arbitration.

The Supreme Court affirmed the judgment of the Court of Appeal. The court noted that there was no dispute that the medical center and the HMO had agreed to the written terms of the later entered HSA, including the arbitration clause, and that the HSA fell within the provision of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. The principal question was whether or not the HMO had waived its contractual right to arbitration. The court observed that both state and federal law reflect a strong policy favoring arbitration agreements and require close jurisdiction of waiver claims. The trial court had ruled that the HMO had waived its right to enforce the arbitration clause by seeking declaratory relief in a Los Angeles court that the HSA was void *ab initio*. Since the essential facts were not disputed, the Supreme Court was not bound by this ruling. The court held that it was compelled by the United States Supreme Court's recognition of the principle that an arbitration clause is separable from other portions of a contract, to conclude

that the arbitration clause in the HSA was sufficient to require arbitration of the medical center's claims which related to that contract. The HMO's legal challenge to the validity of the HSA was not inconsistent with an intent to invoke arbitration pursuant to the contract. The HMO's repudiation of the HSA did not amount to a waiver of its contractual arbitration rights. Furthermore, the court held that the HMO's mere filing of the Los Angeles action did not constitute a waiver of its right to seek arbitration, where the medical center's arbitrable causes of action had not been litigated to judgment or judicially addressed on their merits. What was determinative under either federal or state law, was whether or not the litigation had resulted in prejudice. The court held that it had not, as the HMO had neither substantially undermined the public policy in favor of arbitration or substantially impaired the medical center's ability to take advantage of the benefits and efficiencies of arbitration. Finally, the court held that the HMO's efforts to transfer venue did not support an inference that the HMO had waived or otherwise forfeited its contractual arbitration rights. The only reasonable inference that the court could draw from the record and its undisputed facts was that the HMO had not waived its contractual right to arbitration under the HSA. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, Chin, Brown, and Moreno, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

- (1) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Burden of Proof.**—The Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) permits a party to obtain a stay of judicial proceedings pending arbitration unless such party is in default of that right. (9 U.S.C. § 3.) Although this principle of default is akin to waiver, the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred. Accordingly, a party who resists arbitration on the ground of waiver bears a heavy burden and any doubts regarding a waiver allegation should be resolved in favor of arbitration.

- (2) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Burden of Proof.**—California rules with regard to waiver of arbitration rights are in accord with federal rules. State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. Although a court may deny a petition to compel arbitration on the ground of waiver (Code Civ. Proc., § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.

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- (3) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—No Single Test.**—Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration.
- (4) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Question of Fact.**—Generally, the determination of waiver of arbitration rights is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court.
- (5) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Estoppel, Waiver and Defenses.**—An arbitration clause is separable from other portions of a contract, such that fraud in the inducement relating to other contractual terms does not render an arbitration clause unenforceable, even when such fraud might justify rescission of the contract as a whole. A party's assertion of the invalidity of an entire contract does not categorically waive that party's right to arbitrate pursuant to a provision in that contract. (Disapproving to the extent inconsistent: *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213 [30 Cal.Rptr. 719].)
[6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 501.]
- (6) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Repudiation of Agreement—Arbitration Clause Enforceable.**—An arbitration clause in a health services agreement (HSA) which reflected the signatures of both contracting parties, a health maintenance organization (HMO) and a medical center, was sufficient to require arbitration of claims made by the medical center relating to that agreement even though the HMO which sought to compel arbitration had previously filed suit to have the HSA declared void *ab initio*.
- (7) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Legal Challenge to Validity of Agreement—Not Waiver of Contractual Arbitration Rights.**—A legal challenge by a health maintenance organization (HMO) to the validity of a health services agreement (HSA) was not inconsistent with an intent to invoke arbitration pursuant to that contract. The HMO's repudiation of the HSA as such did not amount to a waiver of its contractual arbitration rights.
- (8) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Filing of Lawsuit, Without More, Does Not Result in Waiver.**—The filing of a lawsuit, without more, does not result in a waiver of a right to arbitration and is not so inconsistent with

the exercise of the right to arbitration as to constitute an abandonment of that right. A waiver generally does not occur where the arbitrable issues have not been litigated to judgment.

- (9) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Filing of Lawsuit, Without More, Does Not Result in Waiver—Arbitrable Causes of Action Not Litigated to Judgment.**—Where a medical center’s arbitrable causes of action had not been litigated to judgment or judicially addressed on their merits, the mere filing by a health maintenance organization (HMO) of an action to have a health services agreement (HSA) entered between the two parties declared void *ab initio* did not constitute a waiver of the HMO’s right under the HSA to seek arbitration in a different action filed by the medical center.
- (10) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Prejudice.**—Whether or not litigation results in prejudice is critical in the determination of the waiver of a right to arbitration.
- (11) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Court Costs and Legal Expenses.**—Because merely participating in litigation, by itself, does not result in a waiver of arbitration rights, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.
- (12) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Prejudice—Litigation of a Dispute.**—Prejudice from the litigation of a dispute typically is found only where the conduct of a party subsequently petitioning for arbitration has substantially undermined the public policy in favor of arbitration or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration.
- (13) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Prejudice—Litigation of a Dispute.**—There was no prejudice to a medical center which opposed arbitration where the record did not reflect that the parties had litigated the merits or the substance of the center’s arbitrable claims, or that any discovery of those claims had occurred. There was no indication that the HMO which sought to compel arbitration had used either of two judicial actions filed to gain information about the medical center’s case that otherwise would have been unavailable in arbitration. Finally, there appeared to be no claim that the HMO’s actions had impaired the

medical center's ability to have the arbitrable disputes in this action resolved fairly through arbitration.

- (14) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Prejudice—Litigation of a Dispute—Petition for Change of Venue.**—A petitioning party does not waive its arbitration rights merely by seeking to change judicial venue of an action prior to requesting arbitration. A party is not required to litigate the issue of arbitration in an improper or inconvenient venue, and a party's position on venue does not necessarily reflect a position on arbitrability.
- (15) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Prejudice—Litigation of a Dispute—Petition for Change of Venue—Not Inconsistent with Exercise of Right to Arbitration.**—A health maintenance organization (HMO) did not waive or otherwise forfeit its contractual arbitration rights by seeking to transfer venue of a judicial action filed by medical center against which it sought to enforce an arbitration agreement or by opposing a venue change of an action it had filed. Although the HMO did not prevail on its venue positions, there had been no finding that it acted wrongly in asserting them. Moreover, both lawsuits involved nonarbitrable causes of action that belonged in court; further reinforcing the conclusion that the HMO's efforts to secure a particular judicial venue for each action were not so inconsistent with the exercise of the right to arbitration as to constitute a waiver of that right.
- (16) **Arbitration and Award § 12—Statutory Procedures for Compulsory Arbitration—Waiver—Prejudice—Litigation of a Dispute—Petition for Change of Venue—Costs and Expenses.**—As a health maintenance organization's efforts to seek particular venues in two judicial actions did not support an inference that it had waived its right to arbitrations, it followed logically that the costs and expenses incurred by the medical center against whom it sought to enforce arbitration in responding to such efforts likewise did not support a finding of waiver or prejudice.
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COUNSEL

K & R Law Group, Konowiecki & Rank, Peter Roan, Karen S. Fishman, Cameron H. Faber, Samuel J. Woo; Greines, Martin, Stein & Richland, Timothy T. Coates and Peter O. Israel for Defendants and Appellants.

Epstein Becker & Green, William A. Helvestine, Michael T. Horan and Elizabeth Arenson for California Association of Health Plans as Amicus Curiae on behalf of Defendants and Appellants.

Manatt, Phelps & Phillips, Craig J. De Recat, John F. Libby, Seth A. Gold, Jeffrey J. Maurer, Joanna S. McCallum, Terri D. Keville and Barry S. Landsberg for Plaintiff and Respondent.

Haight, Brown & Bonesteel, Roy G. Weatherup, J. Alan Warfield; Marschak, Shulman, Hodges & Bastian, Ronald S. Hodges, J. Ronald Ignatuk and Michael S. Kelly for Alfonso G. De Grezia and Malynda A. De Grezia as Amici Curiae on behalf of Plaintiff and Respondent.

OPINION

BAXTER, J.—This matter comes to us after the Court of Appeal reversed an order of the trial court that denied the petition of defendant PacifiCare of California (PacifiCare) to compel arbitration. The central issue is whether PacifiCare waived its contractual right to arbitration pursuant to a clause contained in a health services contract with plaintiff Saint Agnes Medical Center (Saint Agnes). Relying on *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213 [30 Cal.Rptr. 719] (*Bertero*), the trial court found that a waiver occurred when PacifiCare filed a separate lawsuit that purported to repudiate the health services contract. The Court of Appeal disagreed, finding *Bertero* unpersuasive in light of subsequent case law.

We agree that *Bertero's* analysis is outdated and should be disapproved to the extent it holds that a party's repudiation of a contract categorically precludes it from invoking an arbitration clause therein. We also find that the only reasonable inference to be drawn from the undisputed facts here is that PacifiCare did not waive its contractual right to arbitration and that therefore its petition to compel arbitration should have been granted. We affirm the judgment of the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2001, PacifiCare filed a lawsuit in Los Angeles County Superior Court against Saint Agnes and others to resolve disputes about the parties' contractual rights and obligations under a health services agreement entered in 1994 (the 1994 HSA) and a second health services agreement entered in June 2000 (the June 2000 HSA).¹ PacifiCare's complaint alleges that the June 2000 HSA is void *ab initio* due to a condition subsequent. Among other things, the complaint seeks a judgment declaring the June 2000 HSA void *ab initio* and declaring its rescission, and enforcement of the parties' rights under the 1994 HSA as if the June 2000 HSA never existed.

¹ The parties also refer to a settlement agreement, an amendment to the 1994 HSA, and other instruments that may affect their contractual rights and obligations.

In April 2001, Saint Agnes responded by filing the instant action in Fresno County against PacifiCare and others, seeking damages and other relief for PacifiCare's wrongful conduct in allegedly breaching the June 2000 HSA.

In June 2001, over PacifiCare's objections, Saint Agnes prevailed on its motion to transfer the venue of PacifiCare's Los Angeles lawsuit to Fresno County.² Meanwhile, PacifiCare unsuccessfully moved to transfer the venue of Saint Agnes's Fresno action to Orange County.

As relevant here, the June 2000 HSA contains a clause providing that "[a]ny controversy, dispute or claim arising out of the interpretation, performance or breach of this Agreement . . . shall be resolved by binding arbitration at the request of either party." The 1994 HSA contains no such clause.

On July 25, 2001, PacifiCare sent a letter to Saint Agnes requesting that Saint Agnes voluntarily submit seven of the 11 causes of action in its Fresno complaint to arbitration on the ground that they arose out of the interpretation, performance or breach of the June 2000 HSA and therefore fell within the scope of that contract's arbitration clause. PacifiCare offered, on the same ground, to arbitrate six of the 14 causes of action in its Los Angeles lawsuit. Saint Agnes responded it could not agree to arbitration at that time.

On July 31, 2001, some four months after it initiated the Los Angeles lawsuit, PacifiCare filed a petition to compel arbitration of portions of the Fresno action and to stay proceedings. PacifiCare grounded its petition in the California Arbitration Act (Code Civ. Proc., § 1280 et seq.; all further statutory references are to this code unless otherwise indicated), the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (the FAA), and the arbitration clause in the June 2000 HSA. Saint Agnes opposed arbitration, contending that PacifiCare had waived its right to invoke arbitration by expressly repudiating the June 2000 HSA and seeking its judicial rescission on the ground it was void *ab initio*. Saint Agnes also claimed that PacifiCare's delay in seeking arbitration caused it to incur substantial legal fees and costs with respect to both the Fresno and Los Angeles lawsuits.

The trial court denied the petition to compel arbitration, finding that PacifiCare's Los Angeles complaint "show[ed] a clear attempt . . . to repudiate the June 2000 HSA" and that its filing of suit "was inconsistent with any intent to invoke arbitration." Because PacifiCare initiated the Los Angeles action before seeking to compel arbitration, the trial court concluded that Saint Agnes could seek relief in the courts, and that once it did so, PacifiCare "may not retract its repudiation of the contract and insist on arbitration."

² For ease of reference, we will continue to refer to this separate action as the Los Angeles action or the Los Angeles lawsuit.

The Court of Appeal reversed the trial court's judgment and remanded with directions to grant PacificCare's petition. Concluding that the record "does not establish . . . as a matter of law [that] PacificCare waived its right to compel arbitration," the appellate court held the trial court abused its discretion when it failed to stay proceedings and order arbitration. We granted Saint Agnes's petition for review.

DISCUSSION

The Court of Appeal determined the record sufficiently establishes that the June 2000 HSA involves interstate commerce and therefore falls within the provisions of the FAA. (See 9 U.S.C. §§ 1, 2.) Saint Agnes does not dispute that determination, and PacificCare expressly agrees with it. Although the FAA generally preempts any contrary state law regarding the enforceability of arbitration agreements (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 405 [58 Cal.Rptr.2d 875, 926 P.2d 1061]), the federal and state rules applicable in this case are very similar.

As relevant here, the FAA provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) A district court, upon being satisfied that the issue in controversy is arbitrable, "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." (9 U.S.C. § 3.)

In California, section 1281 similarly provides: "A written agreement to submit to arbitration . . . a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Section 1281.2 provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. . . ."

For purposes of this case, there is no dispute that authorized agents of Saint Agnes and PacificCare signed the June 2000 HSA on their behalf, and no

dispute that those entities, by signing that contract, agreed to its written terms, including the arbitration clause.³ The principal question is whether or not PacificCare waived its contractual right to arbitration.⁴ We start by setting forth the rules governing waiver of arbitration agreements and the appropriate standard of review.

(1) As mentioned, the FAA permits a party to obtain a stay of judicial proceedings pending arbitration unless such party is “in default” of that right. (9 U.S.C. § 3.) “ ‘Although this principle of “default” is akin to waiver, the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred.’ ” (*Microstrategy, Inc. v. Lauricia* (4th Cir. 2001) 268 F.3d 244, 249.) Accordingly, a party who resists arbitration on the ground of waiver bears a heavy burden (*id.* at p. 251; *Walker v. J.C. Bradford & Co.* (5th Cir. 1991) 938 F.2d 575, 577), and any doubts regarding a waiver allegation should be resolved in favor of arbitration (see *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24–25 [74 L.Ed.2d 765, 103 S.Ct. 927]).

(2) Our state waiver rules are in accord. State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782 [191 Cal.Rptr. 8, 661 P.2d 1088].) Although a court may deny a petition to compel arbitration on the ground of waiver (§ 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof. (*Christensen v. Dewor Developments, supra*, 33 Cal.3d at p. 782; see also *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189 [151 Cal.Rptr. 837, 588 P.2d 1261] (*Doers*).)

(3) Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. (E.g.,

³ We note that the arbitration clause in the June 2000 HSA states it applies to disputes between Saint Agnes and Priority Health Services (another party to that contract), and that PacificCare alleges in the Los Angeles action that the June 2000 HSA was never effectively assigned to PacificCare. We express no opinion as to whether these circumstances might establish that PacificCare failed to show it is a party to the agreement to arbitrate. Although Saint Agnes raised this point in a footnote in its reply brief and again at oral argument, it had not petitioned for review of the issue in challenging the Court of Appeal’s judgment in favor of PacificCare. We reject the belated attempt to expand the scope of review at this juncture.

⁴ As our decisions explain, the term “waiver” has a number of meanings in statute and case law. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982–983 [64 Cal.Rptr.2d 843, 938 P.2d 903] (*Engalla*).) While “waiver” generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party’s failure to perform an act it is required to perform, regardless of the party’s intent to relinquish the right. (*Engalla, supra*, 15 Cal.4th at p. 983; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 [24 Cal.Rptr.2d 597, 862 P.2d 158].) In the arbitration context, “[t]he term ‘waiver’ has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.” (*Platt Pacific, Inc. v. Andelson, supra*, 6 Cal.4th at p. 315.)

Engalla, supra, 15 Cal.4th at p. 983; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249–1250 [100 Cal.Rptr.2d 403]; *Adams v. Merrill Lynch Pierce Fenner & Smith* (10th Cir. 1989) 888 F.2d 696, 701; *Burton-Dixie Corp. v. Timothy McCarthy Construction Co.* (5th Cir. 1971) 436 F.2d 405, 408; *Brownyard v. Maryland Casualty Co.* (D.S.C. 1994) 868 F.Supp. 123, 126.) “ ‘In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the “bad faith” or “wilful misconduct” of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]’ ” (*Engalla, supra*, 15 Cal.4th at p. 983, quoting *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425–426 [158 Cal.Rptr. 828, 600 P.2d 1060].)

In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980 [72 Cal.Rptr.2d 43], the Court of Appeal referred to the following factors: “In determining waiver, a court can consider ‘(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether “the litigation machinery has been substantially invoked” and the parties “were well into preparation of a lawsuit” before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) “whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place”; and (6) whether the delay “affected, misled, or prejudiced” the opposing party.’ ” (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at p. 992, quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir. 1988) 849 F.2d 464, 467–468.) We agree these factors are relevant and properly considered in assessing waiver claims.

(4) Generally, the determination of waiver is a question of fact, and the trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. (*Platt Pacific, Inc. v. Andelson, supra*, 6 Cal.4th at p. 319; see also *Engalla, supra*, 15 Cal.4th at p. 983.) “When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court’s ruling.” (*Platt Pacific, Inc. v. Andelson, supra*, 6 Cal.4th at p. 319.) In the case before us, the essential facts are not disputed.

As reflected by its order, the trial court’s waiver finding was based on the circumstances that (1) by seeking declaratory relief that the June 2000 HSA is

void *ab initio*, “PacifiCare essentially contends and asserts that [the contract] is invalid and unenforceable” and (2) although PacifiCare did not initiate the Fresno action, it initiated the Los Angeles lawsuit and at no time sought to invoke the contractual right to arbitration before doing so.

Saint Agnes agrees that a waiver occurred, observing that PacifiCare’s “total repudiation” of the June 2000 HSA, its initiation of the Los Angeles action, and its attempts to force litigation in the judicial venues it preferred, all amounted to conduct inconsistent with a right to arbitrate. Saint Agnes also contends the Court of Appeal erred when it reversed the trial court’s order on the ground that Saint Agnes had not established prejudice resulting from PacifiCare’s delay in seeking to compel arbitration.

We address these matters below.

A. *PacifiCare’s Challenge to the Validity of the June 2000 HSA*

The trial court’s order states: “PacifiCare essentially contends and asserts that the [June 2000] HSA is invalid and unenforceable.” PacifiCare acknowledges that it seeks to have the June 2000 HSA declared void *ab initio* and to have the parties’ rights under the 1994 HSA enforced as if the later contract never existed.

Under the authority of *Bertero, supra*, 216 Cal.App.2d 213, the trial court ruled that PacifiCare waived its arbitration rights by repudiating the very contract from which those rights originated. *Bertero*, apparently, has never been disapproved or criticized by any subsequent decision or secondary authority.

In *Bertero*, an employee and his employer signed a written employment contract and a written modification of that contract, both of which contained an arbitration clause. Although they adhered to the contractual terms for several years, the employer eventually sent the employee a letter claiming the modified contract was invalid and unenforceable. The employee sued to enforce the contract and the employer sought to compel arbitration. (*Bertero, supra*, 216 Cal.App.2d at pp. 214–216.)

Relying on Corbin on Contracts and decisions from other states, *Bertero* held that the employer’s repudiation of the entire employment contract deprived it of any right to rely on any provision of the contract, including its arbitration clause: “[T]o say in . . . a letter that the contract is ‘invalid and unenforceable’ could mean only that it created no rights or duties which either party could stand upon.” (*Bertero, supra*, 216 Cal.App.2d at p. 220.) *Bertero* rejected the argument that the letter meant that the employee’s

asserted right to contract benefits was invalid but that the employer's right to arbitration was not invalid, remarking, "No more precise and emphatic language could have been chosen to notify Bertero that the company was declaring its independence without qualification or reservation. [¶] . . . [¶] . . . When National said 'the agreement' was not enforceable, it was saying that the portion relating to arbitration was not enforceable." (*Id.* at pp. 220–221.) "Thus it is not because National has repudiated its promise to pay Bertero's salary, but because it has repudiated its promise to arbitrate, that Bertero was justified in resorting to the courts." (*Id.* at p. 221.)

Although *Bertero* appears to support a waiver finding here, significant developments in the law have occurred since 1963 when that case was decided. Both federal and California law now hold that, in the absence of a specific attack on an arbitration agreement, such agreement generally must be enforced even if one party asserts the invalidity of the contract that contains it.

Significantly, a few years after *Bertero* the United States Supreme Court decided *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395 [18 L.Ed.2d 1270, 87 S.Ct. 1801] (*Prima Paint*). That decision recognized the principle that "except where the parties otherwise intend—arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." (*Prima Paint, supra*, 388 U.S. at p. 402, quoting and thereafter adopting the view of the Second Circuit Court of Appeals.) In concluding that federal courts may consider a claim of fraud in the inducement of an arbitration clause itself, but not a claim of fraud in the inducement of the contract generally, the high court sought to "honor the plain meaning of [the FAA]" and "also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." (*Prima Paint, supra*, 388 U.S. at p. 404.)

The logic of *Prima Paint* has led many courts, including this one, to hold that contractual arbitration clauses generally must be enforced where one of the parties seeks rescission of the entire contract on the basis that it allegedly was induced by fraud, mistake, or duress, or where an alleged breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract. (E.g., *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 319, 322–323 [197 Cal.Rptr. 581, 673 P.2d 251] [fraudulent inducement claim is subject to arbitration]; *Large v. Conseco Finance Servicing Corp.* (1st Cir. 2002) 292 F.3d 49, 53 [mere assertion of statutory right of rescission does not undo obligation to take

rescission claim to arbitration]; *Burden v. Check Into Cash of Kentucky, LLC* (6th Cir. 2001) 267 F.3d 483, 489–490 [claim of illegality]; *Coleman v. Prudential Bache Securities, Inc.* (11th Cir. 1986) 802 F.2d 1350, 1352 [claims of fraudulent inducement and coercion]; *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.* (5th Cir. 1986) 797 F.2d 238, 244 [claim of illegality]; see also *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 415, fn. 8.)

(5) As we explained, the central rationale of *Prima Paint* was that an arbitration clause is separable from other portions of a contract, such that fraud in the inducement relating to other contractual terms does not render an arbitration clause unenforceable, even when such fraud might justify rescission of the contract as a whole. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 416.) “By entering into the arbitration agreement, the parties established their intent that disputes coming within the agreement’s scope be determined by an arbitrator rather than a court; this contractual intent must be respected even with regard to claims of fraud in the inducement of the contract generally.” (*Ibid.*) In light of *Prima Paint* and its progeny, we disapprove *Bertero v. Superior Court*, *supra*, 216 Cal.App.2d 213, to the extent it holds that a party’s assertion of the invalidity of an entire contract categorically waives that party’s right to arbitrate pursuant to a provision in that contract.

Here, the June 2000 HSA names PacifiCare and Saint Agnes as contracting parties and reflects the signatures of both parties’ agents. Neither party challenges its assent to the June 2000 HSA; nor does either specifically challenge the arbitration clause contained therein. Indeed, PacifiCare filed a declaration claiming it had performed its obligations according to the terms of the June 2000 HSA prior to notifying Saint Agnes and others in March 2001 that it considered the contract terminated due to a condition subsequent. Consequently, the record makes reasonably clear PacifiCare’s position that it could properly view the June 2000 HSA as terminated or void due to an event transpiring after its effective date. (6) On this record, *Prima Paint*’s recognition of the separable nature of arbitration agreements compels us to conclude that the arbitration clause in the June 2000 HSA is sufficient to require arbitration of Saint Agnes’s claims relating to that contract.

Seizing on PacifiCare’s allegations in the Los Angeles lawsuit that the June 2000 HSA is void *ab initio* and PacifiCare’s concession that it seeks damages for breach of the 1994 HSA as if the later contract never existed, Saint Agnes argues this situation falls within an exception to the *Prima Paint* line of cases. Specifically, Saint Agnes points to authorities holding or recognizing that because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute that it did not agree to so submit. (E.g.,

Rosenthal v. Great Western Fin. Securities Corp., *supra*, 14 Cal.4th 394; *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348 [72 Cal.Rptr.2d 598]; *Sandvik AB v. Advent International Corp.* (3d Cir. 2000) 220 F.3d 99; *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.* (9th Cir. 1991) 925 F.2d 1136.) In those cases, the issue was not whether the underlying contract was merely voidable, but rather whether any contract had ever existed. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at pp. 416–417 [parties opposing arbitration claimed contracts were void for fraud in their execution or inception]; *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at pp. 358–361 [while evidence showed plaintiff's oral agreement to specified dealings with defendant, it failed to show any agreement, oral or otherwise, to arbitrate]; *Sandvik AB v. Advent International Corp.*, *supra*, 220 F.3d at p. 100 [party moving for arbitration alleged that individual who signed agreement on its behalf lacked authority to do so]; *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, *supra*, 925 F.2d at p. 1138 [party resisting arbitration claimed contract was invalid because unauthorized individual signed it].)

The decisions Saint Agnes cites have a logical rationale: If a party can show that it did not know it was signing a contract, or that it did not enter into a contract at all, both the contract and its arbitration clause are void for lack of mutual assent. (See *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at pp. 416–417; *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at pp. 358–359; *Sandvik AB v. Advent International Corp.*, *supra*, 220 F.3d at pp. 106–108; *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, *supra*, 925 F.2d at pp. 1140–1141.) But that rationale has no application here because, notwithstanding PacificCare's use of certain legal terminology, neither PacificCare nor Saint Agnes denies its knowing and voluntary agreement to the June 2000 HSA and the terms it contained. Moreover, PacificCare's petition to compel arbitration reflects its apparent position that it considered itself bound to perform under the June 2000 HSA at least until March 2001, when it notified Saint Agnes that the contract was terminated. Accordingly, this is not a case where mutual assent to the subject contract and its terms was lacking.

(7) In sum, we conclude that PacificCare's legal challenge to the validity of the June 2000 HSA is not inconsistent with an intent to invoke arbitration pursuant to that contract. Contrary to Saint Agnes's contentions, PacificCare's repudiation as such does not amount to a waiver of its contractual arbitration rights.

B. PacificCare's Initiation of the Los Angeles Lawsuit

Doers, *supra*, 23 Cal.3d 180, held that the mere filing of a lawsuit does not waive contractual arbitration rights. (*Doers*, at pp. 185–188; see also *Kalai v.*

Gray (2003) 109 Cal.App.4th 768, 774 [135 Cal.Rptr.2d 449]; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1099 [101 Cal.Rptr.2d 412]; accord, *Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos* (2d Cir. 1977) 553 F.2d 842, 845; *Chatham Shipping Co. v. Fertex Steamship Corp.* (2d Cir. 1965) 352 F.2d 291, 293; *Realco Enterprises, Inc. v. Merrill Lynch, Pierce, Fenner & Smith* (S.D.Ga. 1990) 738 F.Supp. 515, 518–519, and cases cited therein.) Although *Doers* phrased the issue as one of “waiver,” we more recently characterized the critical issue there as “whether a party’s filing of a lawsuit in the face of an agreement to arbitrate was conduct so inconsistent with the exercise of the right to arbitration as to constitute an abandonment of that right.” (*Platt Pacific, Inc. v. Andelson, supra*, 6 Cal.4th at p. 318.)

(8) In finding that the filing of a lawsuit, without more, does not result in a waiver (and is not so inconsistent with the exercise of the right to arbitration as to constitute an abandonment of that right), *Doers* disapproved several Court of Appeal decisions that had misinterpreted other precedents holding only that waiver occurs when the parties have litigated the merits of the arbitrable dispute. (*Doers, supra*, 23 Cal.3d at pp. 185–188.) *Doers* reiterated the rule that a waiver generally does not occur where the arbitrable issues have not been litigated to judgment. (*Id.* at p. 188.)

Here, PacificCare did not initiate the instant Fresno action, in which it seeks to compel arbitration. PacificCare did, however, initiate the Los Angeles action to have the June 2000 HSA declared void *ab initio* and to enforce its rights under the 1994 HSA, a contract that contains no arbitration clause and that allegedly governs the parties’ rights and obligations if the June 2000 HSA were to be found unenforceable. (9) Significantly, Saint Agnes’s arbitrable causes of action have not been litigated to judgment or judicially addressed on their merits. Consistent with *Doers*, we conclude that PacificCare’s mere filing of the Los Angeles action did not constitute a waiver of its right under the June 2000 HSA to seek arbitration in this Fresno action. (Accord, *American Recovery Corp. v. Computerized Thermal Imaging, Inc.* (4th Cir. 1996) 96 F.3d 88, 95–96; *Lawrence v. Comprehensive Business Services Co.* (5th Cir. 1987) 833 F.2d 1159, 1164–1165; cf. *Christensen v. Dewor Developments, supra*, 33 Cal.3d at pp. 783–784 [waiver found where plaintiff knew of existence of arbitration clause and arbitrability of its claims, but filed suit without first demanding arbitration and pursued litigation through several demurrers for admitted purpose of obtaining verified pleadings from defendants that would reveal their legal theories, resulting in lost evidence].)

Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal.3d 888 [95 Cal.Rptr. 53, 484 P.2d 1397] (*Charles J. Rounds*) does not compel us to hold otherwise. In that case, the trial court had dismissed a

plaintiff employer's contract action against a defendant union on the ground that the dispute at issue was covered by an arbitration clause in the agreement. As relevant here, the issue presented was whether "the relief granted was proper in this case—dismissal of the action—or whether a stay of judicial proceedings pending arbitration should have been granted." (*Charles J. Rounds, supra*, 4 Cal.3d at p. 894.) We upheld the dismissal, observing that the only matter in dispute came within the scope of the arbitration clause, that the plaintiff had never attempted to pursue its arbitration remedy despite the defendant's efforts to obtain arbitration, and that because the plaintiff sought relief that traditionally was within an arbitrator's power to award, dismissal of the action, rather than a mere stay of proceedings, was proper. (*Id.* at p. 899.)

Saint Agnes appears to read *Charles J. Rounds* as precluding any party who "repudiates" arbitration by filing a lawsuit from ever enforcing its contractual arbitration rights. In particular, Saint Agnes relies on a passage in *Charles J. Rounds* stating that "where the only issue litigated is covered by the arbitration clause, and where plaintiff has not first pursued or attempted to pursue his arbitration remedy, it should be held that . . . plaintiff has impliedly waived his right to arbitrate." (*Charles J. Rounds, supra*, 4 Cal.3d at p. 899.)

Preliminarily we observe that, to the extent the foregoing passage can be read to suggest that a party may waive its right to arbitration merely by filing a lawsuit without first requesting arbitration, our holding to the contrary in *Doers, supra*, 23 Cal.3d 180, controls. (See *Kalai v. Gray, supra*, 109 Cal.App.4th at p. 774.) But *Charles J. Rounds* held only that dismissing the judicial action there, as opposed to staying it, was appropriate because the sole issue in dispute was properly subject to arbitration. Viewed in context, *Charles J. Rounds* provides no support for denying arbitration of arbitrable claims in an action where, as here, the party seeking arbitration did not file the lawsuit in which arbitration is sought, but had initiated a separate lawsuit containing nonarbitrable causes of action.⁵ (See *Charles J. Rounds, supra*, 4 Cal.3d at pp. 898–899.)

Nor can Saint Agnes credibly claim that PacificCare waived its contractual right to arbitration by unequivocally refusing to arbitrate. (See *Local 659, I.A.T.S.E. v. Color Corp. Amer.* (1956) 47 Cal.2d 189 [302 P.2d 294] [waiver and repudiation found where plaintiff refused defendant's repeated demands to comply with a contractual arbitration clause].) As the record discloses, Saint Agnes never requested arbitration of the Fresno and the Los Angeles

⁵ As indicated earlier, PacificCare's nonarbitrable causes of action seek damages and/or other relief against Saint Agnes and other parties arising out of the 1994 HSA and other instruments having no arbitration clause but potentially affecting the parties' rights and obligations if the June 2000 HSA is not enforced.

actions; Saint Agnes, in fact, rebuffed PacificCare's informal request and offer to arbitrate before the instant petition to compel arbitration was filed.

C. *Prejudice from Participating in Litigation*

More than two decades ago, we observed that “[u]nder federal law, it is clear that the mere filing of a lawsuit does not waive contractual arbitration rights. The presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law.” (*Doers, supra*, 23 Cal.3d at p. 188, fn. omitted, relying on *Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos, supra*, 553 F.2d at p. 845; *Demsey & Associates v. S.S. Sea Star* (2d Cir. 1972) 461 F.2d 1009, 1018; *Chatham Shipping Co. v. Fertex Steamship Corp., supra*, 352 F.2d at p. 293.) Our review of more recent federal authorities discloses that this rule remains largely intact.⁶

(10) In California, whether or not litigation results in prejudice also is critical in waiver determinations. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 605 [183 Cal.Rptr. 360, 645 P.2d 1192], disapproved on other grounds, *Southland Corp. v. Keating* (1983) 465 U.S. 1 [79 L.Ed.2d 1, 104 S.Ct. 852]; *Doers, supra*, 23 Cal.3d at pp. 188–189; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212 [69 Cal.Rptr.2d 79].) That is, while “ ‘[w]aiver does not occur by mere participation in litigation’ ” if there has been no judicial litigation of the merits of arbitrable issues, “ ‘waiver could occur prior to a judgment on the merits if prejudice could be demonstrated.’ ” (*Christensen v. Dewor Developments, supra*, 33 Cal.3d at p. 782.)

(11) Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses. (See *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197 [98 Cal.Rptr.2d 836] [mere expense of responding to motions or other preliminary pleadings filed in court is not the type of prejudice that bars a later petition to compel arbitration]; accord, *Crysen/Montenay Energy Co. v. Shell Oil Co.* (2d Cir. 2000) 226 F.3d 160, 163.)

⁶ (E.g., *Creative Solutions Group, Inc. v. Pentzer Corp.* (1st Cir. 2001) 252 F.3d 28, 32; *American Recovery Corp. v. Computerized Thermal Imaging, Inc., supra*, 96 F.3d at pp. 95–96; *Walker v. J.C. Bradford & Co., supra*, 938 F.2d at p. 577; *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 694; *Rush v. Oppenheimer & Co.* (2d Cir. 1985) 779 F.2d 885, 887; *Tenneco Resins, Inc. v. Davy Int'l, AG* (5th Cir. 1985) 770 F.2d 416, 420–422; *Creative Telecommunications, Inc. v. Breden* (D. Hawaii 1999) 120 F.Supp.2d 1225, 1232; *Realco Enterprises, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 738 F.Supp. at p. 518; cf. *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.* (7th Cir. 1995) 50 F.3d 388, 390 [admittedly taking “the minority position” in holding that prejudice is not required to find waiver of right to arbitrate].)

Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect "a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution" and are intended "to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899].) (12) Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.

For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration (e.g., *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366 [96 Cal.Rptr.2d 295]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 [94 Cal.Rptr.2d 201]; *Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 215); where a party unduly delayed and waited until the eve of trial to seek arbitration (e.g., *Sobremonte v. Superior Court*, *supra*, 61 Cal.App.4th at pp. 995-996); or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence (e.g., *Christensen v. Dewor Developments*, *supra*, 33 Cal.3d at p. 784).

(13) The record in this case does not reflect that the parties have litigated the merits or the substance of Saint Agnes's arbitrable claims, or that any discovery of those claims has occurred. Nor is there any indication that PacificCare used the Los Angeles and Fresno actions to gain information about Saint Agnes's case that otherwise would be unavailable in arbitration.⁷ Finally, there appears no claim that PacificCare's actions have impaired Saint Agnes's ability to have the arbitrable disputes in this action resolved fairly through arbitration.

Saint Agnes, however, claims it has been prejudiced because it incurred substantial costs and expenses in opposing PacificCare's motion to change venue in this action, as well as PacificCare's unsuccessful attempt to block a venue change to Fresno in its Los Angeles action.⁸ This claim is not well taken.

⁷ With regard to discovery, we note that the June 2000 HSA reflects the parties' agreement that "[c]ivil discovery for use in such arbitration may be conducted in accordance with the provisions of California law, and the arbitrator(s) selected shall have the power to enforce the rights, remedies, duties, liabilities and obligations of discovery by the imposition of the same terms, conditions and penalties as can be imposed in like circumstances in a civil action by a court of competent jurisdiction of the State of California."

⁸ Although Saint Agnes submitted two declarations generally referring to the "substantial" and "significant" legal fees and costs it incurred, the declarations provided no details as to

(14) Although we have found no California or United States Supreme Court decisions on point, other courts that have addressed this issue hold that a petitioning party does not waive its arbitration rights merely by seeking to change judicial venue of an action prior to requesting arbitration. (E.g., *American Heart Disease Prevention Foundation, Inc. v. Hughey* (4th Cir. 1997) 106 F.3d 389; *Thompson v. Skipper Real Estate Co.* (Ala. 1999) 729 So.2d 287, 292–293; but see *R.W. Roberts Construction Co., Inc. v. Masters & Co., Inc.* (Fla. Dist. Ct. App. 1981) 403 So.2d 1114, 1115 [upholding trial court’s waiver finding without addressing the matter of prejudice].) In so holding, those courts reason that a party is not required to litigate the issue of arbitration in an improper or inconvenient venue, and that a party’s position on venue does not necessarily reflect a position on arbitrability. We agree with that reasoning, and find it consistent with California and federal case law holding that a waiver determination requires the consideration of all circumstances, including the absence or presence of prejudice.

(15) Under the foregoing authorities, PacifiCare did not waive or otherwise forfeit its contractual arbitration rights by seeking to transfer venue of the Fresno action or by opposing a venue change of the Los Angeles action. Although PacifiCare did not prevail on its venue positions, there has been no finding that it acted wrongly in asserting them. Moreover, both the Los Angeles and Fresno lawsuits involve nonarbitrable causes of action that belong in court; this circumstance further reinforces the conclusion that PacifiCare’s efforts to secure a particular judicial venue for each action are not so inconsistent with the exercise of the right to arbitration as to constitute a waiver of that right.

(16) Because PacifiCare’s venue-related efforts do not support an inference of waiver, it follows logically that the costs and expenses Saint Agnes incurred in responding to such efforts likewise do not support a finding of waiver or prejudice. (See *Becker v. DPC Acquisition Corp.* (S.D.N.Y. May 30, 2002, No. 00-Civ. 1035) 2002 U.S. Dist. LEXIS 9605, *40.)⁹

specific dollar amounts or time spent on the venue matters. Other documents in the record, however, indicate that Saint Agnes incurred at least \$4,460 on venue-related matters in the Los Angeles action.

⁹ Saint Agnes additionally makes an estoppel claim based on the same facts that predicate its claim of waiver. We reject this claim. As explained above, PacifiCare may properly invoke the arbitration clause while simultaneously contending the June 2000 HSA is not enforceable. Moreover, we cannot say that PacifiCare should be estopped from asserting its arbitration rights based on its filing of the Los Angeles lawsuit and its venue efforts in the two actions because, among other things, both actions contain nonarbitrable claims.

CONCLUSION AND DISPOSITION

When the facts are undisputed and only one inference may reasonably be drawn, the issue of waiver is one of law and the reviewing court is not bound by the trial court's ruling. (*Platt Pacific, Inc. v. Andelson, supra*, 6 Cal.4th at p. 319.) Here, the only reasonable inference we can draw from the record and its undisputed facts is that PacificCare did not waive its contractual right to arbitration under the June 2000 HSA.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred.



Positive

As of: September 30, 2016 5:25 PM EDT

Salton Community Services Dist. v. Southard

Court of Appeal of California, Fourth Appellate District, Division One

November 29, 1967

Civ. No. 8704

Reporter

256 Cal. App. 2d 526; 64 Cal. Rptr. 246; 1967 Cal. App. LEXIS 1882

SALTON COMMUNITY SERVICES DISTRICT, Plaintiff and Respondent, v. **WALTER SOUTHARD** et al., Defendants and Appellants

Prior History: [***1] APPEAL from a judgment of the Superior Court of Imperial County. George R. Kirk, Judge.

Action in unlawful detainer.

Disposition: Reversed. Judgment for plaintiff reversed.

Core Terms

covenant, camping, sublease, premises, lease, estoppel, lessor, defenses, lessee, leased premises, demurrer, defendants', offer of proof, Concessionaires, forfeiture, permission, declare, amend, waive, rent

Case Summary

Procedural Posture

Plaintiff lessor, a government agency, brought an action against defendant lessees for breach of a certain lease covenant. The Superior Court of Imperial County (California) sustained the lessor's demurrer to the lessees' assertions of waiver and estoppel and denied the lessees leave to amend. The lessees appealed.

Overview

The lessees alleged that the covenant in their lease that provided that they were not to permit camping on the property was waived and that the lessor was equitably estopped from declaring a forfeiture of the lease by the breach. The court held that, given the offers of proof of the lessees - that the lessor was aware of the camping and that the lessees took actions to prevent the camping to no avail, the trial court abused its discretion in refusing to permit them to amend the separate defenses alleged in their answer to which demurrers

were sustained. Because the obligation on the lessees was to not permit camping, the trial court also erred in sustaining objections to certain of the offers of proof which were material to the issue whether there was "sufferance or permission" by the lessees of the alleged camping. Evidence that the lessor's directors believed it was impossible to prevent camping on the premises and required the lessees to remove a sign stating that camping not was permitted was material to a determination of whether the acts or omissions of the lessees constituted "sufferance or permission" of any camping upon the premises.

Outcome

The decision of the trial court was reversed.

LexisNexis® Headnotes

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN1 A lessee may not add to the terms of a lease by use of an estoppel based upon representations of the lessor made prior to its execution. On the other hand, where a lessor, by conduct subsequent to execution of the lease, leads a lessee to believe strict compliance with a covenant will not be required and the latter acts accordingly to his detriment, the lessor will be estopped to assert a failure to comply as a ground for forfeiture.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

HN2 Although the elements essential to the defense of

256 Cal. App. 2d 526, *526; 64 Cal. Rptr. 246, **246; 1967 Cal. App. LEXIS 1882, ***1

equitable estoppel differ from those essential to the defense of waiver, the circumstances in a given case may support both defenses. A waiver is an intentional relinquishment of a known right; may be expressed or implied and may be implied from conduct inferentially manifesting an intention to waive.

Contracts Law > Breach > General Overview

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > Landlord & Tenant > Landlord's Remedies & Rights > Power to Reenter & Terminate

HN3 The mere breach of a covenant in a lease does not effect its termination. On the happening of such a breach the lessor may elect to disregard it and continue the lease in effect, or rely upon it and declare a forfeiture. Conduct of the lessor, with knowledge of a breach, consistent with the continued existence of the lease and inconsistent with its termination by forfeiture supports an inference the lessor has waived the breach. Acceptance of benefits under the lease is such conduct.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN4 The elements of the doctrine of estoppel are as follows: Whenever a party has, by his conduct, intentionally and deliberately leads another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such conduct, permitted to contradict it.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN5 Conduct of a lessor following execution of a lease leading the lessee to believe compliance with a particular covenant will not be enforced, and reliance upon this belief by the lessee with consequent performance by him of other covenants of the lease, estops the lessor to declare a forfeiture of the lease on account of a breach of the particular covenant.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

HN6 Where a demurrer to a special defense is sustained, it is an abuse of discretion to deny leave to amend where it is probable the amendment would adequately state the defense.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Governments > Local Governments > Claims By & Against

HN7 Although a governmental agency may not be estopped by the conduct of its officers or employees in every instance, where justice and right require it the doctrine will be applied.

Contracts Law > Contract Interpretation > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Real Property Law > Landlord & Tenant > Lease Agreements > Subleases

HN8 Attendant upon imposition of an obligation in a covenant is a recognition of control over the act the covenantor should not suffer or permit.

Contracts Law > Contract Interpretation > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

HN9 A covenant the breach of which may result in a forfeiture will be construed strictly against the person relying upon the breach.

Headnotes/Syllabus

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1a) (1a) CA(1b) (1b)

Landlord and Tenant > Termination > Breach of Covenant.

--The breach of a covenant in a sublease that the lessee shall permit no house trailers or camping on the leased premises was the type of breach that cannot be cured; and a demurrer to a complaint for unlawful detainer on the ground that the notice to deliver

possession did not comply with the requirements of Code Civ. Proc., § 1161, in that it was limited to a demand for possession rather than the alternative demands of performance or possession was properly overruled.

CA(2) (2)

Id. > Termination > Breach of Covenant > Demand:
Unlawful Detainer.

--Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action.

CA(3a) (3a) CA(3b) (3b) CA(3c) (3c)

Id. > Termination > Breach of Covenant > Waiver and Estoppel: Unlawful Detainer > Appeal > Reversible Error.

--In an unlawful detainer action, based on an alleged breach by defendants of a covenant in a sublease, it was an abuse of discretion, on sustaining a demurrer to the answer, to refuse to permit defendants to amend the defenses of waiver and estoppel alleged in their answer, where the court's rulings did not appear to be predicated on a lack of pleading of these defenses, but on the belief defendants relied exclusively on payment of rent and representations made prior to execution of the sublease as a basis for their claim of waiver and estoppel, where the offers of proof did not support this belief, and where evidence tending to prove the asserted facts would have been admissible on properly pleaded issues of waiver and estoppel.

CA(4) (4)

Id. > Estoppel > Estoppel of Landlord.

--A lessee may not add to the terms of the lease by use of an estoppel based upon representations of the lessor made prior to its execution, but where a lessor, by conduct subsequent to execution of the lease, leads the lessee to believe strict compliance with a covenant will not be required and the latter acts accordingly to his detriment, the lessor will be estopped to assert failure to comply as a ground for forfeiture.

CA(5) (5)

Estoppel > Equitable Estoppel.

--Although the elements essential to the defense of

equitable estoppel differ from those essential to the defense of waiver, the circumstances in a given case may support both defenses.

CA(6) (6)

Waiver > Requisites.

--A waiver is an intentional relinquishment of a known right, it may be expressed or implied, and may be implied from conduct, and may be implied from conduct inferentially manifesting an intention to waive.

CA(7) (7)

Landlord and Tenant > Termination > Breach of Covenant.

--The mere breach of a covenant in a lease does not effect its termination; on the happening of such a breach the lessor may elect to disregard it and continue the lease in effect, or rely upon it and declare a forfeiture.

CA(8) (8)

Id. > Termination > Breach of Covenant > Waiver.

--Conduct of the lessor, with knowledge of the breach of a covenant contained in a lease, consistent with the continued existence of the lease and inconsistent with its termination by forfeiture supports an inference that the lessor has waived the breach, and acceptance of benefits under the lease is such conduct.

CA(9) (9)

Id. > Termination > Breach of Covenant > Waiver and Estoppel.

--Conduct of a lessor following execution of a lease leading the lessee to believe compliance with a particular covenant will not be enforced, and reliance upon this belief by the lessee with consequent performance by him of other covenants of the lease, estops the lessor to declare a forfeiture of the lease on account of the breach of the particular covenant.

CA(10) (10)

Pleading > Demurrer > Amendment After Demurrer Sustained.

--Where a demurrer to a special defense is sustained, it is an abuse of discretion to deny leave to amend where it is probable the amendment would adequately state

the defense.

CA(11) (11)

Estoppel > Equitable Estoppel > Operation Against Government.

—Although a governmental agency may not be estopped by the conduct of its officers or employees in every instance, where justice and right require it the doctrine will apply.

CA(12a) (12a) CA(12b) (12b)

Landlord and Tenant > Unlawful Detainer > Appeal > Reversible Error.

—In an unlawful detainer action, based upon the alleged breach by defendants of a covenant of a sublease providing that defendants should permit no house trailers or camping upon the leased premises, that it should be the duty and responsibility of defendants to enforce the prohibition, and that any sufferance or permission of such camping should be deemed a substantial and total breach of the agreement, it was error for the court to refuse the introduction of evidence that plaintiff believed it was impossible to prevent camping on the premises and required defendants to remove the sign stating plaintiff would not permit camping, although the erection of such a sign appeared to be authorized by the sublease, where such evidence was material to a determination whether the acts or omissions of defendants constituted "sufferance or permission" of any camping upon the leased premises within the meaning of the covenant.

CA(13) (13)

Covenants > Breach.

—A covenant, the breach of which may result in a forfeiture, will be strictly construed against the person relying on the breach.

Counsel: McCarroll & McCarroll and Mary H. McCarroll for Defendants and Appellants.

McDaniel & Pinney and Franklin D. McDaniel for Plaintiff and Respondent.

Judges: Coughlin, J. Brown (Gerald), P. J., and Whelan, J., concurred.

Opinion by: COUGHLIN

Opinion

[*528] [**248] Defendants appeal from a judgment upon a directed verdict in favor of plaintiff in an unlawful detainer action.

The judgment, in effect, makes no adjudication; recites the verdict of the jury finding "plaintiff is entitled to restitution of the premises involved and costs of suit"; but decrees plaintiff "is awarded judgment against defendants . . . in the sum of _ Dollars (\$ _), lawful money of the United States, _ and for his costs fixed at _ Dollars (\$ _)." The judgment in the form entered obviously is the product of a clerical error and is subject to correction ex parte. Under these circumstances, it is appropriate to consider the issues raised on the appeal upon the assumption the judgment conforms [***2] to the verdict.

In December 1962, plaintiff and defendants executed a written sublease of property in the Salton Sea area. Defendants were to use the property as concessionaires in the [*529] operation of a "bathing beach bath house facility and a short-order, self-service restaurant." **CA(1a) (1a)** A pertinent provision of the sublease provided as follows: "Notwithstanding that members of the public shall have access to the subleased premises, there shall be absolutely no house trailers and no camping permitted on the subleased premises, and within this prohibition is included sleeping in so-called 'campers' transported on the beds of pickup trucks. It shall be the duty and responsibility of Concessionaires to enforce this prohibition, and any sufferance or permission of any such camping shall be deemed a substantial and total breach of this agreement. In this connection, Concessionaires are hereby constituted agents of Salton Community Services District for purposes of asserting proprietary control over the said subleased premises." [**249] Plaintiff claimed a breach of the foregoing provisions; served defendants with a notice demanding possession of the premises within three days [***3] on account of such breach, asserting its election to declare a forfeiture of the sublease; and thereafter filed the complaint in the instant action. Defendants demurred upon the ground the notice to deliver possession did not comply with the requirements of Code of Civil Procedure, section 1161 in that it was limited to a demand for possession rather than the alternative demands of performance or possession. The pertinent part of section 1161 upon which defendants premised their contention declares a lessee is guilty of unlawful detainer when he continues in possession of leased premises after a failure to perform

covenants of the lease and "three days' notice, in writing, requiring the performance of such conditions and covenants, or the possession of the property, shall have been served upon him. . . ." Plaintiff contended a demand for performance was not required because section 1161 further provides "if the conditions and covenants of the lease, violated by the lessee, cannot afterwards be performed, then no notice, as last prescribed herein, need be given to the lessee . . . demanding the performance of the violated conditions or covenants of the lease." The trial court overruled [***4] the demurrer. Defendants contend this was error.

CA(2) (2) Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (Schnittger v. Rose, 139 Cal. 656, 662 [73 P. 449].) CA(1b) (1b) The covenant and breach in question are of this type. (Hignell [***530] v. Gebala, 90 Cal.App.2d 61, 67-69 [202 P.2d 378]; Harris v. Bissell, 54 Cal.App. 307, 311 [202 P. 453]; Matthews v. Digges, 45 Cal.App. 561, 564 [188 P. 283].) The order overruling the demurrer was proper.

Defendants answered; denied a breach of the covenant; and asserted waiver and estoppel, the allegations in support of which were set forth in separate defenses. Plaintiff demurred generally to these defenses. The demurrer was sustained without leave to amend. Defendants contend the facts alleged in these defenses support a waiver and estoppel and, in any event, they should not have been foreclosed from amending their answer to supply any deficiency.

In substantial part the allegations in the separate defenses concerned facts preceding execution of the written sublease, acceptance of rental after [***5] breach, and the making of substantial improvements to the leased premises approved by plaintiff with knowledge of the breach. The complaint alleged defendants had "suffered and permitted camping by members of the public on the subleased premises beginning in 1963 and continuing intermittently to the present time" despite repeated demands by agents of plaintiff that such camping be eliminated. A copy of the sublease was made a part of defendants' answer. One of the provisions thereof declared:

"The waiver by the District of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The

subsequent acceptance of rent hereunder by the District shall not be deemed to be a waiver of any prior occurring breach by Concessionaires of any term, covenant or condition . . . regardless of the district's knowledge of such prior existing breach at the time of acceptance of such rent." CA(3a) (3a) By virtue of the foregoing provision, the demurrer directed to the defense of waiver based solely upon acceptance of rent properly was sustained. [***6] (Karbelnig v. Brothwell, 244 Cal.App.2d 333, 341-343 [53 Cal.Rptr. 335].) The defense purportedly premised on an application of the doctrine of estoppel was inartfully presented; did not adequately allege all of the elements of an estoppel; but set forth facts supporting a waiver premised upon acceptance of benefits under the sublease after knowledge of the breach; [***250] and, by virtue of these facts, under principles of law hereinafter considered, stated a cause of defense.

[***531] At this juncture it is proper to note defendants alleged, among other things, plaintiff assured them at the time the lease was executed it would not enforce the no-camping covenant. CA(4) (4) HN1 A lessee may not add to the terms of a lease by use of an estoppel based upon representations of the lessor made prior to its execution. (Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 515-516 [24 P.2d 163]; see also Berverdor, Inc. v. Salver Farms, 97 Cal.App.2d 459, 461-464 [218 P.2d 138].) On the other hand, where a lessor, by conduct subsequent to execution of the lease, leads a lessee to believe strict compliance with a covenant will not be required and the latter acts [***7] accordingly to his detriment, the lessor will be estopped to assert a failure to comply as a ground for forfeiture. (Alameda County Title Ins. Co. v. Panella, *supra*, 218 Cal. 510, 516; see also Myers v. Herskowitz, 33 Cal.App. 581, 584 [165 P. 1031].)

At the trial, following presentation of plaintiff's case, defendants made offers of proof directed to the issues of breach, waiver and estoppel. Objections thereto were sustained. Thereupon defendants stated they had no evidence to present other than that in support of their offers of proof which had been rejected. Plaintiff moved for and obtained a directed verdict.

CA(3b) (3b) The orders of the court sustaining objections to offers of proof of facts in support of the defenses of waiver and estoppel, in light of the previous order sustaining demurrers to those defenses without leave to amend, were proper because no issue then was before the court respecting these matters. However, the rulings of the court do not appear to be

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predicated on a lack of pleading of these defenses, but upon the belief defendants relied exclusively upon payment of rent and representations made prior to execution of the sublease as a basis for their [***8] claim of waiver and estoppel. The offers of proof do not support this belief. Among other things, defendants offered to prove the camping upon the leased premises to which plaintiff objected occurred intermittently during their entire occupancy; plaintiff knew of this camping; defendants posted no-camping signs upon the premises, fenced the same, and otherwise endeavored to prevent camping; the signs were destroyed, the fences were broken down, and defendants' efforts to enforce the no-camping covenant did not prevent the camping; with knowledge of the alleged breaches, plaintiff approved defendants' construction of permanent improvements [***2] upon the subleased premises and permitted them to engage in other expenditures incident to their operations as concessionaires; defendants erected a sign stating the District insisted no camping be allowed upon the premises, but plaintiff required them to remove the sign even though by the terms of the sublease they were constituted agents of the District for the purpose of asserting proprietary control over the premises in order to prevent camping thereon; at all times plaintiff maintained a sign just outside the leased premises stating: [***9] "No overnight camping. Camping allowed eight-tenths of a mile to the north," and the actual distance from that sign to the snack bar on the subleased premises was "seven-tenths plus of a mile," whereas the camp ground maintained by plaintiff was two miles from the sign; plaintiff, with knowledge of the alleged breaches of the covenant, insisted defendants comply with the terms of the sublease requiring part payment of lighting expenses totaling \$ 800, and part of a patrolman's salary, and also required defendants to make expenditures for the upkeep of a parking lot it contended was their obligation under the sublease; and, at a meeting of the board of directors of plaintiff at which its manager advised them of his inability, and that of a deputy sheriff, to prevent camping upon the subleased premises, the president of the board said, "Well, if it's an impossible situation, forget it," and with respect to the covenant in the sublease, said: "Well, if we can't -- if it's impossible to enforce it, it should be taken out," and the directors "just agreed to forget the whole thing."

[**251] Evidence tending to prove the foregoing facts would have been admissible upon properly pleaded [***10] issues of waiver and estoppel.

CA(5) (5) HN2 Although the elements essential to the

defense of equitable estoppel differ from those essential to the defense of waiver, the circumstances in a given case may support both defenses. (Gen. see Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 240 [156 P.2d 488].)

CA(6) (6) A waiver is an intentional relinquishment of a known right (Henderson v. Drake, 42 Cal.2d 1, 5 [264 P.2d 921]; Bastanchury v. Times-Mirror Co., supra, 68 Cal.App.2d 217, 240); may be expressed or implied (Johnson v. Kaeser, 196 Cal. 686, 698 [239 P. 324]; Jones v. Sunset Oil Co., 118 Cal.App.2d 668, 673 [258 P.2d 510]; Prairie Oil Co. v. Carleton, 91 Cal.App.2d 555, 559 [205 P.2d 81]); and may be implied [***3] from conduct inferentially manifesting an intention to waive. (Johnson v. Kaeser, supra, 196 Cal. 686, 698; Jones v. Sunset Oil Co., supra, 118 Cal.App.2d 668, 673; Bettelheim v. Hagstrom Food Stores, Inc., 113 Cal.App.2d 873, 878-879 [249 P.2d 301].)

CA(7) (7) HN3 The mere breach of a covenant in a lease does not effect its termination. (Gen. see 30 Cal.Jur.2d, Landlord and Tenant, § 278, p. 419.) On [***11] the happening of such a breach the lessor may elect to disregard it and continue the lease in effect, or rely upon it and declare a forfeiture. (*Ibid.*) CA(8) (8) Conduct of the lessor, with knowledge of a breach, consistent with the continued existence of the lease and inconsistent with its termination by forfeiture supports an inference the lessor has waived the breach. (Bettelheim v. Hagstrom Food Stores, Inc., supra, 113 Cal.App.2d 873, 878-879; Group Property Inc. v. Bruce, 113 Cal.App.2d 549, 556 [248 P.2d 761].) Acceptance of benefits under the lease is such conduct. (Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 445 [6 P.2d 71, 80 A.L.R. 453].)

In Schnittger v. Rose, supra, 139 Cal. 656, 661, the court said: "Upon no legal principle can it be contended that there is an unlawful detainer simply because a lessee remains in possession after breach of a covenant in a lease of which the lessor may or may not take advantage, as he is minded. Such a covenant is solely for the benefit of the lessor, which he may waive, and in law does waive, unless within a reasonable time he insists upon it."

HN4 The elements of the doctrine of estoppel applicable [***12] to the case at bench are stated in Evidence Code, section 623 as follows: "Whenever a party has, by his . . . conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation

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arising out of such . . . conduct, permitted to contradict it." (See also former Code Civ. Proc., § 1962, subd. 3.)

CA(9) (9) HN5 Conduct of a lessor following execution of a lease leading the lessee to believe compliance with a particular covenant will not be enforced, and reliance upon this belief by the lessee with consequent performance by him of other covenants of the lease, estops the lessor to declare a forfeiture of the lease on account of a breach of the particular covenant. This conclusion is dictated by the rationale of the decisions in Fowler v. Ozcoidi, 7 Cal.2d 268 [60 P.2d 279], Schulze v. [***534] Schulze, 121 Cal.App.2d 75, 83 [262 P.2d 646], Jones v. Sunset Oil Co., supra, 118 Cal.App.2d 668, 673-674; Industrial Indem. Co. v. Industrial Acc. Com., 115 Cal.App.2d 684, 689 [252 P.2d 649]; Bettelheim v. Hagstrom Food Stores, Inc., supra, 113 Cal.App.2d 873, 878-879, Klein v. [***43] Farmer, 85 Cal.App.2d 545, 551 [194 P.2d 106], and Galli v. Schlobohm, 44 Cal.App.2d 702, 706 [112 P.2d 905].

The covenant imposing upon defendants obligations incident to avoidance of breach on account of their "sufferance or permission" of camping upon the leased [***252] premises was a continuing covenant. The determinative effect of an application of the doctrines of waiver and estoppel to this case is dependent upon whether all breaches were waived or plaintiff was estopped from asserting any breach. We make no determination respecting these issues. **CA(3c) (3c)** Defendants' offers of proof show an abuse of discretion by the trial court in refusing to permit them to amend the separate defenses alleged in their answer to which demurrers were sustained. Our reference to the facts set forth in those offers must be considered accordingly.

CA(10) (10) HN6 Where a demurrer to a special defense is sustained, it is an abuse of discretion to deny leave to amend where it is probable the amendment would adequately state the defense. (Gen. see Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 107 [280 P.2d 1]; MacIsaac v. Pozzo, 26 Cal.2d 809, 815 [161 P.2d 449].)

[***14] Plaintiff contends the limited application of the doctrine of estoppel to public agencies forecloses an estoppel in this case. **CA(11) (11) HN7** Although a governmental agency may not be estopped by the conduct of its officers or employees in every instance, where justice and right require it the doctrine will be applied. (Driscoll v. City of Los Angeles, 67 Cal.2d 297, 306 [61 Cal.Rptr. 661, 431 P.2d 245]; Lerner v. Los Angeles City Board of Education, 59 Cal.2d 382, 397

[29 Cal.Rptr. 657, 380 P.2d 97]; Farrell v. County of Placer, 23 Cal.2d 624, 627 [145 P.2d 570, 153 A.L.R. 323]; City of Los Angeles v. Cohn, 101 Cal. 373, 376 [35 P. 1002]; City of Imperial Beach v. Alger, 200 Cal.App.2d 48, 52 [19 Cal.Rptr. 144].) The circumstances in this case, accepting the orders of proof as descriptive thereof, justify an application of the doctrine against plaintiff.

CA(12a) (12a) Not only did the court err in refusing permission to amend defendants' answer, but also in sustaining objections [***535] to certain of the offers of proof which were material to the issue whether there was "sufferance or permission" by defendants of the camping plaintiff alleged occurred [***15] on the leased premises. The covenant did not provide the sublease should be terminated in the event any camping took place on the premises. Instead, the obligation imposed on defendants was not to suffer or permit such camping. **HN8** Attendant upon imposition of such an obligation is a recognition of control over the act the covenantor should not suffer or permit. (Cf. Block v. Citizens Trust etc. Bank, 57 Cal.App. 518, 525 [207 P. 510]; Crist v. Fife, 41 Cal.App. 509, 511 [183 P. 197].) **CA(13) (13) HN9** A covenant the breach of which may result in a forfeiture will be construed strictly against the person relying upon the breach. (Karbelnig v. Brothwell, supra, 244 Cal.App.2d 333, 341; see also 2 Witkin, Summary of Cal. Law (1960) Real Property, § 277, p. 1103.) **CA(12b) (12b)** Evidence that the directors of the District believed it was impossible to prevent camping on the premises, and required defendants to remove the sign stating the District would not permit camping although the erection of such a sign appears to be authorized by the sublease, was material to a determination whether the acts or omissions of defendant constituted "sufferance or permission" of any camping upon the leased [***16] premises within the meaning of the covenant. Likewise, evidence indicating the extent of the efforts made by defendants to prevent camping was material to the same issue. The refusal of the court to permit the introduction of such evidence was error.

In light of another trial, it is pertinent to note that: (1) Evidence of the declarations of plaintiff's agents prior to and at the time of execution of the lease respecting enforcement of the covenant, although not admissible to establish a waiver or estoppel, is admissible to prove its intention as manifested by subsequent conduct; (2) evidence of plaintiff's inability to prevent camping on its property prior to execution of the sublease would be relevant to the issue of the ability of a lessee to control camping on the subleased premises; and (3) evidence

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of acceptance of rent after an alleged breach of [**253] tending to prove plaintiff's satisfaction with defendants' the covenant, although not proof of a waiver, would be efforts to prevent camping. relevant to the issue of performance of the covenant as

The judgment is reversed.

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[No. S102671. Aug. 4, 2003.]

SHARON S., Petitioner, v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;
ANNETTE F., Real Party in Interest.

SUMMARY

The birth mother of a child conceived through artificial insemination filed a petition for writ of mandate challenging the superior court's denial of her motion to dismiss second parent adoption proceedings that had been filed by her former domestic partner at a time when the two women intended to coparent. Before moving to dismiss the adoption proceedings, the birth mother had moved to withdraw her consent to the adoption. The child's counsel had also moved to dismiss the proceedings. The trial court denied both motions to dismiss. The trial court found that the birth mother had not attempted to withdraw her consent to the adoption within the time required by law and that resolution of the petition was likely to be based on the child's best interest. (Superior Court of San Diego County, No. A46053, Susan D. Huguenor, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D037871, granted the birth mother's petition for a writ of mandamus, directing the trial court to permit her to withdraw her consent to, and to terminate, the adoption. The court held that, except for stepparent adoptions, an adoption where a consenting parent does not relinquish all parental rights has no statutory basis.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the cause for further proceedings. It held that a birth parent consenting to the adoption of her child by a domestic partner may waive the termination of her parental rights. Nothing in Fam. Code, § 8617, which provides that a birth parent of an adopted child is, from the time of the adoption, relieved of all parental duties towards the adopted child, or in any other statutory provision, prohibits the parties to an independent adoption from waiving the provision of § 8617. The court concluded that Fam. Code, § 8617, is not a mandatory prerequisite to every valid adoption. The birth mother had signed an adoption consent form stating her intention to retain coparental rights and responsibilities and permitting her partner to assume coparental rights and responsibilities. The former partner signed adoption forms clearly stating her intention to accept and share those

coparental rights. The court held that it had not been the intent of the Legislature to thwart the result so clearly intended by the parties. Adherence to the appellate court's construction of Fam. Code, § 8617, as precluding second parent adoption would have unnecessarily eliminated access to a duly promulgated, well-tested adoption process that had become routine in the state. Neither due process nor the separation of powers doctrine constituted a bar to the former partner's adoption of the child. Fam. Code, § 8617, did not prevent the trial court from proceeding to a best interests analysis of the former partner's petition. The court remanded the cause to the appellate court to consider the birth mother's claim that she had signed the adoption consent form under fraud, undue influence, and duress. Subject to the Court of Appeal's resolution of that issue, the trial court could validly exercise its discretion to order the former partner's adoption of the child under the independent adoption statutes if it concluded that all legal requirements were satisfied. The birth mother retained the right to oppose finalization of the adoption on the ground that it was contrary to the child's interests. (Opinion by Werdegar, J., with George, C. J., Kennard, J., and Moreno, J., concurring. Concurring and dissenting opinion by Baxter, J., with Chin, J., concurring (see page 447). Concurring and dissenting opinion by Brown, J. (see page 457).)

HEADNOTES

Classified to California Digest of Official Reports

- (1) **Adoption § 11—Proceedings—Consent—Domestic Partners—Termination of Birth Mother's Parental Rights.**—An independent adoption proceeding commenced by a birth mother and her former domestic partner was legislatively authorized even though the birth mother who consented to the adoption did not agree to termination of her parental rights and later sought to withdraw her consent to the adoption of the child. The birth mother retained the right to oppose finalization of the adoption on the ground that it was contrary to the child's best interests.
[10 Witkin, Summary of Cal. Law (9th ed. 1989) Parent and Child, § 400B.]
- (2) **Adoption § 17—Proceedings—Consent—Withdrawal of Consent.**—Birth parents can consent to an independent adoption by entering into an adoption placement agreement with a prospective adoptive parent (Fam. Code, § 8801.3). The birth parents have 30 days in which to revoke this consent (Fam. Code, § 8814.5, subd. (a)(1)). If they fail to do so, their consent becomes permanent and irrevocable (Fam. Code, §§ 8801.3, subd. (c)(2), 8814.5, subds. (a)(1), (3), (b), 8815, subd. (a)).

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- (3) **Estoppel and Waiver § 20—Waiver—Rights and Privileges Waivable.**—A party may waive compliance with statutory conditions intended for his or her benefit, so long as the Legislature has not made those conditions mandatory.
- (4) **Adoption § 3—Construction of Statutes—Independent Adoption—Waiver of Statutory Benefits.**—Since the provisions of Fam. Code, § 8617, are for the benefit of the parties to an adoption petition and the section contains no language prohibiting a waiver, the section declares a legal consequence of the usual adoption, waivable by the parties thereto, rather than a mandatory prerequisite to every valid adoption.
- (5) **Adoption § 2—Definitions and Distinctions—Essential Elements.**—The essential elements of every valid adoption are: a voluntary and informed parental consent to the adoption except where the parent has surrendered or has been judicially deprived of parental control (Fam. Code, §§ 8604–8606); a suitable adoptive parent at least 10 years older than the child, or in a specified preexisting family relationship with the child (Fam. Code, §§ 8601, 8717, 8801, 8811–8811.5); and a judicial determination that the interest of the child will be promoted by the adoption (Fam. Code, § 8612).
- (6) **Adoption § 2—Definitions and Distinctions—Independent Adoption.**—Independent adoption is a procedure that is not limited to married persons. Unmarried persons always have been permitted to adopt children (Fam. Code, § 8600).
- (7) **Marriage § 1—Domestic Partnerships.**—With an exception for some seniors, the state’s domestic partner registry is open only to same-sex couples, and not to heterosexuals (Fam. Code, § 297, subd. (b)(6)).
- (8) **Adoption § 4—Who May Adopt—Domestic Partners.**—Registered domestic partners must have a common residence (Fam. Code, § 297, subd. (b)(1)); thus otherwise qualified adoptive parents who have come to live apart for reasons having no bearing on whether an adoption is in a particular child’s interest cannot ratify a second parent adoption by complying with domestic partner registration provisions. Similarly, blood relatives cannot register, and therefore cannot adopt, as domestic partners (Fam. Code, § 297, subd. (b)(4)), even though many modern adoptions are kinship adoptions.

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- (9) **Adoption § 11—Proceedings—Consent—Voluntariness.**—With a few statutory exceptions, a legal parent's valid consent is a jurisdictional prerequisite to an adoption, regardless of the child's interests. Where a parent's consent to adoption is obtained through fraud or duress, the consent is not voluntary and the jurisdictional prerequisite to a valid adoption is lacking.
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COUNSEL

Douglas Shepersky, William Blatchley; John L. Dodd & Associates, John L. Dodd and Lisa A. DiGrazia for Petitioner.

Kronick, Moskovitz, Tiedemann & Girard and Andrew P. Pugno for Proposition 22 Legal Defense and Education Fund as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Terence Chucas and Judith E. Klein for Minor.

Leigh A. Kretzschmar, Kathleen Murphy Mallinger; Luce Forward, Hamilton & Scripps and Charles A. Bird for Real Party in Interest.

Robert H. Lynn; Jason A. Barsi; Maxie Rheinheimer Stephens & Vrevich and Darin L. Wessel for Tom Homann Law Association as Amicus Curiae on behalf of Real Party in Interest.

Martha Matthews and Katina Ancar for National Center for Youth Law as Amicus Curiae.

Alice Bussiere for Youth Law Center as Amicus Curiae.

Shannan Wilber for Legal Services for Children as Amicus Curiae.

Farella Braun & Martel, Norman Formanek and Julie Salamon for Child Advocacy Program, University of California at Berkeley as Amicus Curiae.

Donna Furth for Northern California Association of Counsel for Children as Amicus Curiae.

Marvin Ventrell for National Association of Counsel for Children as Amicus Curiae.

Jordan C. Budd for American Civil Liberties Union Foundation of San Diego & Imperial Counties; Mark Rosenbaum for American Civil Liberties Union Foundation of Southern California; Alan L. Schlosser for American Civil Liberties Union Foundation of Northern California; Jennifer C. Pizer for Lambda Legal Defense and Education Fund; Shannon Minter and Courtney Joslin for The National Center for Lesbian Rights as Amici Curiae on behalf of Children of Lesbians and Gays Everywhere, American Civil Liberties Union Foundation of San Diego & Imperial Counties, American Civil Liberties Union Foundation of Southern California, American Civil Liberties Union Foundation of Northern California, Bay Area Lawyers for Individual Freedom, Family Matters, Family Pride Coalition, Lambda Legal Defense and Education Fund, LHR: The Lesbian and Gay Bar Association, The Los Angeles Gay and Lesbian Center, The National Center for Lesbian Rights, Our Family Coalition and The Pop Luck Club.

Diane Goodman for Academy of California Adoption Lawyers as Amicus Curiae.

Nancy E. Lofdahl for California Association of Adoption Agencies and the California Alliance of Child and Family Services as Amici Curiae.

Morrison & Foerster, Michael N. Feuer and Elizabeth A. Thornton for the Los Angeles County Bar Association, Bar Association of San Francisco, Santa Clara County Bar Association, The Bar Association of Silicon Valley, Beverly Hills Bar Association, San Fernando Valley Bar Association, Women Lawyers' Association of Los Angeles, Bet Tzedek Legal Services, Public Counsel and Northern California Chapter of the American Academy of Matrimonial Lawyers as Amici Curiae.

Dennis J. Herrera, City Attorney (San Francisco), Therese M. Stewart, Chief Deputy City Attorney, Kamala Harris, Julia M. C. Friedlander, Ellen Forman and Sherri Sokeland Kaiser, Deputy City Attorneys, for City and County of San Francisco and California State Association of Counties as Amici Curiae.

Bill Lockyer, Attorney General, James M. Humes, Assistant Attorney General, John H. Sanders and Susan A. Nelson, Deputy Attorneys General, for California Department of Social Services as Amicus Curiae.

Latham & Watkins, Richard S. Zbur, Robert J. Schulze and James R. Repking for National Association of Social Workers and California Chapter, National Association of Social Workers as Amici Curiae.

OPINION

WERDEGAR, J.— (1) This dispute arises in independent adoption proceedings commenced by a birth mother, Sharon S. (Sharon), and her former domestic partner Annette F. (Annette) to effect Annette's adoption of Joshua (now three and a half years old) who, like his older brother Zachary (now six years old and previously adopted by Annette), was conceived by artificial insemination of Sharon and born during the partnership.¹ The question presented is whether an independent adoption in which the birth parent does not agree to termination of her parental rights is legislatively authorized and, if so, whether the statutes are constitutional. The Court of Appeal granted a writ of mandamus directing the trial court to permit Sharon to withdraw her consent to, and to terminate, the adoption. For the following reasons, we reverse the judgment of the Court of Appeal and remand the cause for further proceedings.

BACKGROUND

Sharon and Annette attended Harvard Business School together and were in a committed relationship from 1989 through mid-2000. In 1996, after being artificially inseminated with sperm from an anonymous donor, Sharon gave birth to Zachary. With Sharon's consent and approval, Annette petitioned to adopt Zachary in a "second parent" adoption, using official forms and procedures that expressly provided that Sharon consented to Zachary's adoption by Annette but intended to retain her own parental rights.² The trial court approved Annette's adoption petition, and Annette has since been one of Zachary's two parents.

Three years later, in 1999, Sharon was inseminated again with sperm from the same anonymous donor and gave birth to Joshua. On August 30 of that year, Sharon signed an "Independent Adoption Placement Agreement" (Agreement), which begins: "Note to birth parent: This form will become a permanent and irrevocable consent to adoption. Do not sign this form unless you want the adopting parents named below to adopt your child." The Agreement goes on to recite Sharon's "permanent and irrevocable consent to the adoption on the 91st day after I sign" the Agreement.

¹ Independent adoptions (Fam. Code, § 8800 et seq.) are those in which no agency, state or private, joins in the adoption petition (*id.*, § 8524), although the state does have a role in investigating, evaluating and commenting upon the petition. (See *id.*, § 8807.) Further unlabeled section references are to the Family Code.

² "The phrase 'second-parent adoption' refers to an independent adoption whereby a child born to [or legally adopted by] one partner is adopted by his or her non-biological or non-legal second parent, with the consent of the legal parent, and without changing the latter's rights and responsibilities." (Doskow, *The Second Parent Trap* (1999) 20 J. Juv. L. 1, 5.) As a result of the adoption, the child has two legal parents who have equal legal status in terms of their relationship with the child.

The Agreement also recites that, upon the court's approval of the Agreement, Sharon will "give up all rights of custody, services, and earnings" with respect to Joshua. However, a written "Addendum to Independent Adoption Placement Agreement" (Addendum), a form developed by the California Department of Social Services (CDSS), was signed by Sharon and Annette on the same date as they signed the Agreement. The Addendum stated Sharon's intent, as Joshua's birth parent, to retain parental rights and control of Joshua while placing him with Annette for the purpose of independent adoption. These were essentially the same procedures and forms Sharon and Annette had used for Zachary's adoption.³

Subsequently, Annette filed a petition to adopt Joshua as a second parent with Sharon. The petition stated that Sharon, as "birth mother of the children [Zachary and Joshua,] consents to this adoption and will execute a limited written consent to the child's [Joshua's] adoption in the manner required by law." The petition also stated that Sharon "intends to retain all her rights to custody and control as to said child." In April 2000, the San Diego County Department of Health and Human Services (HHS), acting in its capacity as an agency licensed by CDSS under the Family Code to investigate and report upon proposed independent adoptions, recommended that the court grant Annette's adoption petition.

Annette and Sharon's relationship has been somewhat volatile. Apparently owing to continuing difficulties, Sharon repeatedly requested postponement of the hearing on Annette's adoption petition. In August 2000, Sharon asked Annette to move out of the family residence, which Annette did. Each retained new counsel. In mediation, the parties agreed on a temporary visitation schedule affording Annette time with both boys, but they could not reach an agreement respecting permanent custody or visitation.

On October 23, 2000, Annette filed a motion for an order of adoption respecting Joshua, contending, *inter alia*, that Sharon's consent had become irrevocable pursuant to section 8814.5 and that the adoption was in Joshua's best interest.

After a family court mediator recommended that Sharon and Annette share custody and that Annette have specified visitation, Sharon moved for court approval to withdraw her consent to the adoption. She contended there was no legal basis for the adoption, that her consent had been obtained by fraud or duress, and that withdrawal of her consent was in Joshua's best interest. HHS

³CDSS forms and procedures for second parent adoptions have been developed over the past decade and presently are maintained in accordance with a policy announced by CDSS on November 15, 1999. (See CDSS, All County Letter No. 99-100 (Nov. 15, 1999) <<http://www.dss.cahwnet.gov/getinfo/ac199/99-100.pdf>> [as of Aug. 4, 2003].)

subsequently filed a supplemental report with the court, noting that Sharon had moved to withdraw her consent but had not done so within the statutorily specified period for revocation. HHS further reported that Annette had shared in Joshua's medical expenses and in the planning and handling of his daily care since birth, that Annette had a close and loving relationship with Joshua as his second parent, and that Annette's relationship with Joshua was similar to her relationship with Zachary. Finding that adoption continued to be in Joshua's best interest, HHS again recommended that Annette's petition to adopt Joshua be granted.

In late November 2000, the court ordered interim visitation, encouraged the parties to try to agree on an ongoing visitation schedule, and appointed counsel for Joshua.⁴ Shortly thereafter, Sharon obtained a domestic violence restraining order against Annette and moved to dismiss the adoption petition. She argued, again, that the adoption was unauthorized by statute and also that Annette lacked standing to adopt Joshua. Joshua's counsel also moved to dismiss the adoption petition, on the ground that Sharon and Annette's original counsel had not complied with her statutory obligations as an attorney representing both the birth and prospective adoptive parents in an independent adoption. (See § 8800.) The court denied both dismissal motions. Although it did not separately discuss Sharon's request for permission to withdraw consent, the court noted that Sharon had not attempted to withdraw her consent within the time required by law and that resolution of the adoption petition was likely to be based on Joshua's best interest.

Thereupon, Sharon filed a petition for a writ of mandate, joined in by counsel for Joshua, challenging the denial of her motion to dismiss. In a divided opinion, the court, citing section 8617, held that, except for stepparent adoptions, an adoption where a consenting parent does not relinquish all parental rights has no statutory basis. We granted Annette's petition for review.

DISCUSSION

I. Section 8617

"The right to adopt a child, and the right of a person to be adopted as the child of another, are wholly statutory." (*Estate of Sharon* (1918) 179 Cal. 447, 454 [177 P. 283].) California's adoption statutes appear in division 13 of the Family Code, which is divided into three parts. Part 1 (§§ 8500–8548) provides definitions applicable throughout. Part 2 (§§ 8600–9206) addresses

⁴ As Joshua's appellate counsel noted during oral argument, the function of a court-appointed attorney for the child in such proceedings as these is to represent the child's interests. (See § 3150.)

adoption of unmarried minors, and part 3 (§§ 9300–9340) adoption of adults and married minors. The part with which we are concerned, part 2, is in turn divided into several chapters. Chapter 1 (§ 8600 et seq.) contains general provisions. Subsequent chapters deal with agency adoptions (§ 8700 et seq.), independent adoptions (§ 8800 et seq.), intercountry adoptions (§ 8900 et seq.), and stepparent adoptions (§ 9000 et seq.).

As noted, in petitioning to adopt Joshua, Annette has proceeded under the independent adoption provisions. (2) Pursuant to the current statutory scheme, birth parents can consent to an independent adoption by entering into an adoption placement agreement with a prospective adoptive parent. (Fam. Code, § 8801.3; see also Cal. Code Regs., tit. 22, § 35108, subd. (b).) The birth parents have 30 days in which to revoke this consent. (Fam. Code, § 8814.5, subd. (a)(1).)⁵ If they fail to do so, their consent becomes permanent and irrevocable. (§§ 8801.3, subd. (c)(2), 8814.5, subs. (a)(1), (3), (b), 8815, subd. (a).)

Once the adoption placement agreement has been signed, the prospective adoptive parent may petition for adoption. (§ 8802, subd. (a)(1)(C).) The court clerk must give CDSS notice of the petition (*id.*, subd. (a)(2)), and the petitioner must file a copy of the petition with CDSS (§ 8808).

Subsequently, it is incumbent on CDSS to “investigate the proposed independent adoption” (§ 8807, subd. (a)) and “ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child.” (Fam. Code, § 8806; see also Cal. Code Regs., tit. 22, §§ 35079, subd. (b), 35081, 35083, 35087, 35089, 35093.) CDSS interviews the petitioner and the birth parents. (Fam. Code, § 8808; see also Cal. Code Regs., tit. 22, § 35083.) Within 180 days after the petition is filed, CDSS must “submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition.” (Fam. Code, § 8807, subd. (a); see also Cal. Code Regs., tit. 22, §§ 35091, 35123, subd. (a).) A copy of CDSS’s report is given to the petitioner. (Fam. Code, § 8821.) Although the report is not binding, the court is to accord due weight to CDSS’s expertise. (*San Diego County Dept. of Pub. Welfare v. Superior Court* (1972) 7 Cal.3d 1, 16 [101 Cal.Rptr. 541, 496 P.2d 453].) Assuming other statutory prerequisites are met, if the court is “satisfied that the interest of the child will be promoted by the adoption, the court may make and enter an order of adoption of the child by the prospective adoptive parent or parents.” (§ 8612, subd. (c).)

⁵ In 1999, when Annette petitioned to adopt Joshua, section 8814.5 provided that a birth parent consenting to an adoption had 90 days to revoke consent or sign a waiver of the revocation right. Since then, section 8814.5 has been amended to shorten the revocation period to 30 days. (See Stats. 2001, ch. 688, § 2.)

Annette argues that these statutes authorize the superior court to finalize her adoption of Joshua, because she has complied with the substantive and procedural prerequisites for an independent adoption. Sharon contends that the adoption is not authorized, because section 8617 mandates full termination of birth parental rights in every independent adoption.

Section 8617 provides: "The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child." The section does not appear in the chapter devoted to independent adoptions (ch. 3, § 8800 et seq.), but is, rather, one of the general provisions appearing in chapter 1 of part 2 of division 13 of the Family Code.

"The rule is that the adoption statutes are to be liberally construed with a view to effect their objects and to promote justice. Such a construction should be given as will sustain, rather than defeat, the object they have in view." (*Department of Social Welfare v. Superior Court* (1969) 1 Cal.3d 1, 6 [81 Cal.Rptr. 345, 459 P.2d 897]; see also *Adoption of Barnett* (1960) 54 Cal.2d 370, 377 [6 Cal.Rptr. 562, 354 P.2d 18]; *Adoption of McDonald* (1954) 43 Cal.2d 447, 459 [274 P.2d 860]; *In re Santos* (1921) 185 Cal. 127, 130 [195 P. 1055].) Consistently with these principles, we previously have concluded that the Legislature did not intend section 8617's nearly identical precursor to bar an adoption when the parties clearly intended to waive the operation of that statute and agreed to preserve the birth parent's rights and responsibilities. (*Marshall v. Marshall* (1925) 196 Cal. 761, 767 [239 P. 36].) Nothing in section 8617's text, context, history, or function justifies departure in this case from "the established rule that rights conferred by statute may be waived unless specific statutory provisions prohibit waiver." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049, fn. 4 [68 Cal.Rptr.2d 758, 946 P.2d 427].)

A. Waiver of Statutory Rights

In *Bickel v. City of Piedmont*, *supra*, 16 Cal.4th 1040 (*Bickel*), we held that a party benefited by a statutory provision may waive that benefit if the statute does not prohibit waiver (*id.* at p. 1049, fn. 4), the statute's "public benefit . . . is merely incidental to [its] primary purpose" (*id.* at p. 1049), and "waiver does not seriously compromise any public purpose that [the statute was] intended to serve" (*id.* at p. 1050). (See also Civ. Code, § 3513 [anyone "may waive the advantage of a law intended solely for his benefit"].) The principles underlying *Bickel* are well established. As we have recognized for over a century, the law "will not compel a man to insist upon any benefit or advantage secured to him individually." (*Knarston v. Manhattan Life Ins. Co.* (1903) 140 Cal. 57, 63 [73 P. 740].) (3) Accordingly, a party may waive

compliance with statutory conditions intended for his or her benefit, so long as the Legislature has not made those conditions mandatory. (*Murdock v. Brooks* (1869) 38 Cal. 596, 602; see also *Wells, Fargo & Co. v. Enright* (1900) 127 Cal. 669, 674 [60 P. 439].)

Applying these established principles “to determine whether in this case [section 8617] bars application of the waiver doctrine, we must ascertain (1) whether [the statute’s provisions] are for the benefit of [the parties to an adoption petition] or are instead for a public purpose, and (2) whether there is any language in [the statute] prohibiting a waiver.” (*Bickel, supra*, 16 Cal.4th at pp. 1048–1049.)

Addressing the latter point first, we immediately observe that section 8617 contains no language prohibiting the parties to an independent adoption from agreeing to waive its provisions. Rather, section 8617 contains a single sentence: “The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child.” Nor need we move beyond the statute’s plain language in order to discern its primary purpose. By its terms, section 8617 exists to “relieve[.]” birth parents of “duties towards and all responsibility for, the adopted child” and to assure adoptive parents of exclusive parental control by ending birth parents’ “right over the child” from “the time of the adoption.” Section 8617 thus affords all the parties to the ordinary adoption an incentive for concluding it. But nothing therein, or in any other statutory provision, prohibits the parties to an independent adoption from waiving the benefits of section 8617 when a birth parent intends and desires to coparent with another adult who has agreed to adopt the child and share parental responsibilities.

(4) Since section 8617’s provisions are for the benefit of the parties to an adoption petition and the section contains no language prohibiting a waiver (*Bickel, supra*, 16 Cal.4th at pp. 1048–1049), we conclude that section 8617 declares a legal consequence of the usual adoption, waivable by the parties thereto, rather than a mandatory prerequisite to every valid adoption. (*Bickel, supra*, at p. 1048.)⁶

⁶ In so holding, we do not decide, contrary to what our concurring and dissenting colleagues suggest (see conc. & dis. opn. of Baxter, J., *post*, at p. 453; conc. & dis. opn. of Brown, J., *post*, at p. 463), whether there exists an overriding legislative policy limiting a child to two parents. This case involves only a second parent adoption, so we have no occasion to address that point. Justice Baxter errs, therefore, in asserting that our decision today frees a family court to assign at will “as many legal parents as the lone judge deems in the child’s best interest.” (Conc. & dis. opn. of Baxter, J., *post*, at p. 453; see also conc. & dis. opn. of Brown, J., *post*, at p. 464.) While the Family Code contains in several sections language suggesting the Legislature may harbor a two-parent policy (see, e.g., §§ 3003, 3011, 3161, 3624, 4071, 7572, 7822, 7840, 8604), those statutes are not in issue. Section 8617, which is in issue, does not

Such a conclusion accords with our previous pronouncements respecting the essential elements of an adoption. The adoption laws always have made a fundamental distinction between the ordinary legal consequences of an adoption and “what provisions of the law are essential and therefore mandatory.” (*In re Johnson* (1893) 98 Cal. 531, 536 [33 P. 460].) In *Johnson*, for example, we held that Civil Code former section 227’s provision for “the examination of a child under the age of consent” by the judge before the child is adopted “should not be deemed indispensable to the validity of the adoption proceeding.” (*In re Johnson, supra*, at p. 539.) In so holding, we noted “it is necessary that there should be a substantial compliance with all of the essential requirements of the law under which the right [of adoption] is claimed; but, in determining what provisions of the law are essential and therefore mandatory, the statute is to receive a sensible construction, and its intention is to be ascertained, not from the literal meaning of any particular word or section, but from a consideration of the entire statute, its spirit and purpose.” (*Id.* at p. 536.)

Of course, one “who claims that an act of adoption has been accomplished must show that every essential requirement of the statute has been strictly complied with” (*Estate of Sharon, supra*, 179 Cal. at p. 454), but Sharon points to no California decision stating or even implying that termination of birth parental rights and responsibilities under section 8617 is among these essential requirements.

While California’s adoption statutes nowhere concisely define “adoption,” they do state the essential elements of a valid adoption. “[A]fter careful consideration of the question as to what requirements are essential, the conclusion was stated [in *In re Johnson, supra*, 98 Cal. 531] as follows: ‘The proceeding is essentially one of contract between the parties whose consent is required. It is a contract of a very solemn nature, and for this reason the law has wisely thrown around its creation certain safeguards, by requiring, not only that it shall be entered into in the presence of a judge, but also that it shall receive his sanction, which is not to be given until he has satisfied himself of these three things: 1. That the person adopting is ten years older than the child. 2. That all the parties whose consent is required do consent, fully and freely, to the making of such contract. 3. That the adoption contemplated by the contract will be for the best interest of the child adopted.’ These requirements are there held to be jurisdictional. Unless they coexist, the proceeding for adoption is insufficient, the attempted contract is invalid, the judge is without power to approve it, and there is no lawful adoption.” (*Estate of Sharon, supra*, 179 Cal. at p. 454, citing several cases.)

speak to parental numerosity, except incidentally to recognize, in its use of the plural “birth parents,” that a child ordinarily has two of these.

(5) Thus, in current statutory terms, the essential elements of every valid adoption are: a voluntary and informed parental consent to the adoption except where the parent has surrendered or has been judicially deprived of parental control (§§ 8604–8606); a suitable adoptive parent at least 10 years older than, or in a specified preexisting family relationship with, the child (see §§ 8601, 8717, 8801, 8811–8811.5); and a judicial determination that “the interest of the child will be promoted by the adoption” (§ 8612). When these essential elements are present, “the objective of the adoption statutes to protect the interests of both the natural or legal parent(s) and the child through the consent and best interests requirements” is not frustrated when statutory provisions like section 8617 are treated as nonmandatory. (Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child’s Best Interests* (1987–1988) 3 Berkeley Women’s L.J. 96, 117, discussing Civ. Code former § 229.)

The Court of Appeal majority failed to recognize this distinction between essential elements and ordinary legal consequences, asserting that the “statutes governing independent adoptions require a relinquishment of parental rights” and “mandate that the parental rights of the birth parent be terminated.” In fact, the statutes contain no such mandates.

“ ‘Independent Adoption’ means the adoption of a child in which neither the department nor an agency licensed by the department is a party to, or joins in, the adoption petition.” (§ 8524.) In addition to the essential elements of all adoptions set out above, the independent adoption statutes require parental consent after notice and advisement (§§ 8800, 8801.3, 8814, 8821), opportunities under specified conditions timely to revoke consent (§ 8814.5) or with court approval to withdraw it (§ 8815), selection of the adoptive parent or parents by the birth parent or parents personally (§ 8801), advice to the birth parent of his or her rights by an adoption service provider or licensed out-of-state agency (§ 8801.5), execution of an adoption placement agreement satisfying specified requirements on a form prescribed by CDSS (§ 8801.3), administrative investigation by CDSS or its delegate (§§ 8806–8811, 8817), an appropriate petition filed with the superior court, usually in the county in which the petitioner resides (§ 8802), and an appearance before the court by the prospective adoptive parents and the child (§§ 8612, 8613, 8823). Nowhere does any mandate or requirement of relinquishment of a birth parent’s rights and responsibilities appear.

Most people who place their children with unrelated adoptive parents presumably desire to be “relieved of all parental duties towards, and all responsibility for, the adopted child,” as section 8617 declares, once the adoption is final. But, as noted, section 8617 neither prohibits a birth parent and another qualified adult from jointly waiving application of the statute in

order to coparent an adoptable child, nor prohibits a court under such circumstances from ordering an otherwise valid adoption. (See *Bickel, supra*, 16 Cal.4th at pp. 1048–1049.)⁷

B. *Marshall*

Decades ago, we held that Civil Code former section 229, the predecessor statute to Family Code section 8617, was no bar to second parent adoption of a type—stepparent adoption—that was then not expressly provided for by statute. (*Marshall v. Marshall, supra*, 196 Cal. at p. 767 (*Marshall*)). We agree with the dissenting justice in the Court of Appeal that the considerations we treated as dispositive in *Marshall*, which did *not* include the marital status of the parties, are fully present in the instant case and lead to the same result.

In *Marshall*, the second husband of a widowed mother adopted her two minor children. When the couple later divorced, they agreed the stepfather would pay support for the two children, but that he would surrender his adoption of them and their mother would readopt them. On the mother's petition and with the father's consent, a decree was entered purporting to accomplish the mother's readoption of her children. Thereafter, the superior court entered interlocutory and final orders for child support. (*Marshall, supra*, 196 Cal. at pp. 763–764.) One year later, the father moved to modify the orders by striking the provision for child support. The superior court granted the motion on grounds that, by the time the orders issued, it had lacked jurisdiction to award the child support, because the mother's readoption of the children had changed their status so that they were no longer the "children of the parties" to the divorce action. (*Marshall, supra*, 196 Cal. at p. 764.)

We reversed, holding that the superior court had erred in its determination that the earlier child support orders were void as beyond the court's jurisdiction. (*Marshall, supra*, 196 Cal. at p. 767.) In reaching our conclusion, we

⁷ *Estate of Jobson* (1912) 164 Cal. 312, 317–318 [128 P. 938], cited by our concurring and dissenting colleagues (see conc. & dis. opn. of Baxter, J., *post*, at p. 453; conc. & dis. opn. of Brown, J., *post*, at p. 458), does not compel a contrary conclusion. Our passing remark in that intestacy case that "duties of a child cannot be owed to two fathers at one time" (*Estate of Jobson, supra*, at p. 317) was dictum uttered in the context of concluding that a birth father who "by virtue of the adoption proceeding [in that case], ceased to sustain the legal relation of father" could not thereafter inherit the adopted person's estate (*ibid.*). As *Jobson* involved an ordinary adoption in which "the natural relationship between the child and its parents by blood is superseded" (*ibid.*), we did not consider the contingency before us today—viz., two parties who voluntarily have waived the benefit of section 8617 in order to effect a second parent adoption, where the natural parent's relationship with the child is not superseded. Our holding that they may waive the statute does not contravene *Jobson's* holding that an adopted person's relationship with his birth parent, once legally severed, is not automatically "revived by the death of the foster parent" (*Jobson, supra*, at p. 317).

addressed the validity and effect of the prior proceeding where the mother had purported to adopt her own children. Noting that the adoption statutes then, as now, did not contain a definition of the word "adoption" (*id.* at p. 765), we characterized that proceeding as one "by which the adopting parent assumes a parental relationship toward the *child of another*" (*id.* at p. 766). Reasoning that a "natural mother of a child could legally adopt such child only in a case wherein her parental relationship had theretofore been severed as a matter of law" (*ibid.*), we considered whether the stepfather's prior adoption of the children had the effect of legally severing the mother's parental rights and responsibilities. As relevant here, we held it had not, "notwithstanding the provisions of [Family Code section 8617's predecessor] Civil Code, [former] section 229, that 'the parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.'" (*Marshall, supra*, at p. 766.)

In declining to construe section 8617's predecessor as having severed the mother's parental rights to her children, we noted in *Marshall* that it was "plain from the record of the adoption proceedings," including the terms of the mother's consent and of the adoption order, that the parties "did not intend . . . to sever the parental relationship between the mother and the children" when effecting the latter's adoption by the mother's new spouse. (*Marshall, supra*, 196 Cal. at p. 766.)

Thus, we held in *Marshall* that "although no express authority therefor is to be found in the code, nevertheless a husband and wife may jointly adopt a child pursuant to the procedure therein prescribed, the result of which is to make the child, in law, the child of both spouses." (*Marshall, supra*, 196 Cal. at p. 767, citing *In re Williams* (1894) 102 Cal. 70, 70-79 [36 P. 407].) Section 8617's predecessor was not, we held, "intended to apply to a situation such as this, and to effect a result so plainly opposite to that which was intended" by the parties. (*Marshall, supra*, at p. 767.)

In *Marshall*, we thus effectively read second parent adoption into the statutory scheme, by approving a type of second parent adoption, stepparent adoption, which at that time the adoption statutes did not expressly authorize. (*Marshall, supra*, 196 Cal. at p. 767.) In so doing, we necessarily determined that relinquishment of the birth parent's rights was not essential to adoption and that section 8617's predecessor was not mandatory.

Contrary to the view of the Court of Appeal majority, our determination in *Marshall* that the stepfather's adoption had not severed the mother's parental rights was essential to our conclusion that the trial court had had jurisdiction to enter the child support orders at issue and had erred in setting them aside

as void. Our invalidation of the trial court's order vacating the support orders was based on our conclusion that the mother's purported readoption of her children had been "an utter nullity" (*Marshall, supra*, 196 Cal. at p. 767), as, therefore, was the parties' effort thereby to sever the stepfather's parental relationship (*ibid.*). In order to reach that conclusion we had to determine whether or not the stepfather's prior adoption of the two children had the effect of legally severing the mother's parental relationship with them. (*Id.* at p. 766.) It is on the answer we gave—viz., that "notwithstanding the provisions of Civil Code, section 229," the stepfather's prior adoption of the minors had *not* severed the mother's parental rights (*ibid.*)—that Annette relies. In relying on *Marshall's* pronouncement that Family Code section 8617's predecessor was not intended by the Legislature "to apply to a situation such as this, and to effect a result so plainly opposite to that which was intended" by the parties (*Marshall, supra*, at p. 767), Annette thus relies on part of our essential reasoning, not on dictum. (See generally *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)

Marshall is factually apposite as well. Just as Family Code section 8617 is the clear successor to Civil Code former section 229, the language and forms developed by CDSS and used in this case to effect and document Annette's adoption of Joshua are comparable to those used by the parties in *Marshall*. In *Marshall*, the stepfather's petition for adoption recited that he was a fit person to be allowed " 'joint custody and control' " of the children along with the mother, and the petition prayed for a court order that the stepfather " 'shall jointly together with [the mother] be adjudged on such adoption as having the status of the natural father of said minors.' " (*Marshall, supra*, 196 Cal. at p. 766, italics omitted.) In consenting to the adoption, the children's mother stated that their stepfather would adopt the " 'minors, my children, as his own natural children and . . . in conjunction and jointly with me act, maintain and have the legal status of a father and . . . jointly with me maintain the relationship of a parent to said minors herein mentioned.' " (*Id.* at pp. 766–767, italics omitted.)

Similarly, Sharon signed an adoption consent form stating her intention to retain coparental rights and responsibilities and permitting Annette to assume coparental rights and responsibilities. Annette signed adoption forms clearly stating her intention to accept coparental rights and responsibilities for Joshua to be shared with Sharon. We conclude that, just as its predecessor was not intended by the Legislature "to effect a result so plainly opposite to that which was intended" by the parties in *Marshall, supra*, 196 Cal. at page 767, section 8617 was not intended to bar Annette's adoption of Joshua.

Acknowledging that *Marshall* supports Annette's claim, Justice Brown nevertheless chides us for "read[ing] contemporary norms into a 1925

decision” (conc. & dis. opn. of Brown, J., *post*, at p. 460; see also *id.* at p. 461). In a similar vein, Sharon takes the position that whatever the factual and legal parallels between *Marshall* and this case, *Marshall* “did not consider either unmarried adopting parents or same-sex adoptions” and therefore is “too factually and legally different to be relevant.” We disagree. Although we mentioned in *Marshall* that the adoption involved was by a husband, we said nothing to suggest we regarded the presence of marriage as bearing on our implicit treatment of section 8617’s predecessor as waivable and not mandatory. (See *Marshall, supra*, 196 Cal. at p. 767.)

California’s adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents. Section 8600 provides that “[a]n unmarried minor may be adopted by an adult,” and an adult may adopt a child so long as he or she is “at least 10 years older than the child” (§ 8601, subd. (a)). Section 8542 defines “prospective adoptive parent” as “a person who has filed or intends to file a petition . . . to adopt a child who has been or who is to be placed in the person’s physical care” None of these statutes mentions marital status. Under these circumstances, no justification appears for treating section 8617 differently in this case than we did its predecessor in *Marshall*.⁸

In the years since *Marshall* was decided, the Legislature has reorganized and reenacted the adoption statutes⁹ and amended them many times, inter alia, to acknowledge stepparent adoptions (§§ 9000–9007) and define them as “an adoption of a child by a stepparent where one birth parent retains custody and control of the child” (§ 8548). In doing so, the Legislature has neither repudiated *Marshall* nor expressly excepted stepparent adoptions from application of section 8617. “There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts.” (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353 [211 Cal.Rptr. 742, 696 P.2d 134].) That is because, “[w]hen the Legislature amends a statute without changing those portions . . . that have previously been construed by the courts, the Legislature is presumed to have known of and to have acquiesced in the previous judicial construction.” (*People v. Atkins* (2001) 25 Cal.4th 76, 89–90 [104

⁸ Consistently with this conclusion, CDSS, the administrative agency that oversees the county child welfare agencies that perform home studies in all adoption cases, has determined that unmarried couples who seek to adopt are to be evaluated on the same basis as married couples. (CDSS, All County Letter No. 99-100 (Nov. 15, 1999); see *ante*, fn. 3.)

⁹ “Effective January 1, 1994, the Legislature repealed the Civil Code sections governing adoption and reenacted them as part of the new Family Code. (Stats. 1992, ch. 162, §§ 4, 10.) There is no substantive difference between the relevant sections of the Family Code and their predecessors in the Civil Code.” (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1049, fn. 1 [43 Cal.Rptr.2d 445, 898 P.2d 891].)

Cal.Rptr.2d 738, 18 P.3d 660].) Moreover, when comprehensively reorganizing the adoption statutes in 1990, the Legislature replaced the version of section 8617's predecessor that we construed in *Marshall*, Civil Code former section 229, with another version containing immaterial changes (Civ. Code, former § 221.76). In so doing, the Legislature expressly stated that it did not intend thereby "to lose legislative history or judicial precedent [including necessarily *Marshall*] applicable to statutory provisions replaced by this act." (Civ. Code, former § 220.10, subd. (e); see generally Stats. 1990, ch. 1363, § 3, pp. 6055–6066.)

Thus, for more than 75 years, the Legislature has acquiesced in *Marshall's* treatment of section 8617's predecessor, implying that an adoption court may order an otherwise valid adoption in which the parties plainly have stated their intention to waive section 8617's benefits.

We long have recognized that if the Legislature enacting a specific adoption provision did not intend compliance with that provision to be jurisdictional, "strict and literal adherence to the letter and form" of that statute is not required to effect a valid adoption. (*Estate of Johnson, supra*, 98 Cal. at p. 539; see also *Adoption of Baby Girl B.* (1999) 74 Cal.App.4th 43, 54 [87 Cal.Rptr.2d 569].) As noted, section 8617 contains no mandate or requirement of termination. Rather, the statute simply describes how birth parents ordinarily are relieved of all parental rights and duties after an adoption. Because the Legislature presumptively was aware of *Marshall's* treatment of Civil Code former section 229 as waivable, its retention of parallel language in Family Code section 8617 requires that we "construe the present provision . . . in conformity with the established judicial interpretation." (*Malcolm v. Superior Court* (1981) 29 Cal.3d 518, 528 [174 Cal.Rptr. 694, 629 P.2d 495].)

On their face, moreover, the adoption statutes reveal the Legislature's understanding that while ordinarily "[t]he birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child" (§ 8617), adoptions based on modified application of that principle, wherein "one birth parent retains custody and control of the child" (§ 8548, referencing stepparent adoptions), may exist. (See also *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, 841, fn. 8 [279 Cal.Rptr. 212] [judicially recognizing the same with respect to second parent adoptions].) Sharon acknowledges that for us to construe section 8617 literally as a "general provision" mandating termination of all birth parents' rights in every adoption would be contrary to the stepparent adoption provisions. But she contends that, nevertheless, "section 8617 must apply to all Chapter 3 Independent Adoptions," regardless of the parties' intent.

Certainly the stepparent adoption provisions contain no such suggestion. Those statutes neither expressly nor impliedly bar an independent adoption by a second parent that preserves the child's legal relationship with one birth parent. In fact, the stepparent adoption provisions make no mention of independent adoption. Contrary to Justice Brown's assertions (see conc. & dis. opn. of Brown, J., *post*, at pp. 458, 461), that the Legislature, when defining stepparent adoption, noted that "one birth parent retains custody and control of the child" (§ 8548) neither logically nor historically implies an intent to confine to the stepparent context our implication in *Marshall, supra*, 196 Cal. 761, that a birth parent consenting to an adoption may waive termination of her parental rights. The scant legislative history available suggests that the Legislature, when originally adopting that language, sought only to relieve CDSS's predecessor of certain administrative burdens in adoptions that were being conducted by stepparents.¹⁰ Moreover, any suggestion that the statutory availability of stepparent adoption implies legislative disapproval of other kinds of second parent adoption is belied by the possibility¹¹ of second parent adoptions being effected through agency procedures. (See § 8700 et seq.)¹²

¹⁰ Compare Statutes 1927, chapter 691, section 3, page 1197 (first modern revision of Civ. Code, former § 226 to require CDSS's predecessor in every nonagency adoption to witness consents, verify allegations, and determine the adoptability of the child and the suitability of the home) with Statutes 1931, chapter 1130, section 3, page 2402 (amending Civ. Code, former § 226 to retain those requirements "except in the case of an adoption by a step-parent where one natural parent retains his or her custody of the child"). See also tenBroek, *California's Adoption Law and Programs* (1955) 6 Hastings L.J. 261, 266 (relating that the former Department of Social Welfare requested the 1931 amendment because "almost all of the 425 stepparent petitions investigated in the two years 1928-1929 had been favorably recommended and that the time of its limited staff could be better spent on actual placement cases").

¹¹ After CDSS confirmed the possibility in a letter brief filed by the Attorney General, the Court of Appeal observed that the equivalent of a second parent adoption may be accomplished through an agency adoption in which the birth parent relinquishes her or his rights to the custody and control of the child to the adoption agency or adoption district office, but expressly designates the adoptive parents to be herself or himself and the prospective second parent.

¹² We are not persuaded, as Justice Brown speculates, that the Legislature's 1993 amendment of provisions for adoption of adults expressly to preserve rights and responsibilities of a birth parent when the birth parent's spouse is adopting the birth parent's child (§ 9306, subd. (b)), constitutes or recognizes a "statutory restriction on second parent adoptions" of children. (See conc. & dis. opn. of Brown, J., *post*, at p. 458.) Justice Brown opines on the basis of comments in a cursory legislative committee report that the 1993 amendment "served [the same] purpose" as is served by section 8548, the statutory definition of stepparent adoption (conc. & dis. opn. of Brown, J., *post*, at p. 459), but she nowhere demonstrates that section 8548 either constitutes or recognizes, as we have concluded it does not, a statutory restriction on second parent adoptions.

C. *Administrative Construction and Practice*

Established administrative construction and practice to which we owe substantial deference buttress the aforestated legal arguments for reversal. While taking ultimate responsibility for the construction of a statute, we accord “great weight and respect to the administrative construction” thereof. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal.Rptr.2d 1, 960 P.2d 1031]; see also *Styne v. Stevens* (2001) 26 Cal.4th 42, 53 [109 Cal.Rptr.2d 14, 26 P.3d 343] [administrator’s “interpretation of a statute he is charged with enforcing deserves substantial weight”].) CDSS has adopted the view that “[a] petition or an application for a limited consent or limited relinquishment adoption, in which a birth parent, or adoption parent, simultaneously retains parental rights and consents [to the adoption], agrees [to the adoption], or designates the adoptive parent of his or her child [to be] an unrelated adult, is to be reviewed on its merits pursuant to the California Family Code.” (CDSS, All County Letter No. 99-100 (Nov. 15, 1999); see *ante*, fn. 3.)¹³

Deference to administrative interpretations always is “situational” and depends on “a complex of factors” (*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at p. 12), but where the agency has special expertise and its decision is carefully considered by senior agency officials, that decision is entitled to correspondingly greater weight (*id.* at pp. 12–15). CDSS indisputably is familiar with the independent adoption provisions as well as with the entire scheme of the adoption law it enforces, and its interpretation of section 8617 comes from authoritative legal and policymaking levels of the agency. Accordingly, this is a case in which the administrative construction would appear to be entitled to great weight. In any event, as it is not clearly erroneous, we owe substantial deference to CDSS’s views of section 8617 as waivable and of second parent adoptions as valid under the

¹³ Our concurring and dissenting colleagues correctly observe that CDSS practice prior to November 15, 1999, included periods both of opposing and of not opposing adoptions by unmarried couples, generally. (See conc. & dis. opn. of Baxter, J., *post*, at pp. 448–450; conc. & dis. opn. of Brown, J., *post*, at p. 459.) As Justice Brown also correctly points out, CDSS itself ultimately recognized that any former policy of categorical opposition was “an underground regulation inconsistent with the Administrative Procedure Act [(APA)]” (CDSS, All County Letter No. 99-100 (Nov. 15, 1999)), such as we have recognized is “void for failure to comply with the APA” (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576 [59 Cal.Rptr.2d 186, 927 P.2d 296]). We know of no authority for Justice Brown’s apparent implication (see conc. & dis. opn. of Brown, J., *post*, at p. 459) that CDSS, before acknowledging the invalidity of such an underground regulation and returning to “case-by-case” consideration of second parent adoption petitions “on [their] merits pursuant to the California Family Code” (CDSS, All County Letter No. 99-100 (Nov. 15, 1999), was required to comply with APA notice and comment procedures for the promulgation of regulations. (See *Tidewater Marine Western, Inc.*, *supra*, at pp. 574–575 [noting a regulation will “apply generally” and “predicts how the agency will decide future cases”].)

independent adoption laws. (*Kelly v. Methodist Hospital of So. California* (2001) 22 Cal.4th 1108, 1118 [95 Cal.Rptr.2d 514, 997 P.2d 1169].)

D. Public Policy

Several important considerations of public policy also buttress our conclusion. Precisely how many second parent adoptions have been granted in California over the years is difficult to know, partly because adoption proceedings are generally confidential (see § 9200 et seq.), but published materials suggest they number 10,000 to 20,000.¹⁴ That the second parent adoption procedures promulgated by CDSS under the independent adoption statutes have received such widespread acceptance and have been so extensively used speaks not only to their utility in the modern context, but to their effectiveness in promoting the fundamental purposes that adoption has always served.

1. Fundamental purposes of adoption

The basic purpose of an adoption is the “welfare, protection and betterment of the child,” and adoption courts ultimately must rule on that basis. (*Reeves v. Bailey* (1975) 53 Cal.App.3d 1019, 1022–1023 [126 Cal.Rptr. 51].) While the child’s “best interest” is “an elusive guideline that belies rigid definition,” obviously overall “[i]ts purpose is to maximize a child’s opportunity to develop into a stable, well-adjusted adult.” (*Adoption of Michelle T.* (1975) 44 Cal.App.3d 699, 704 [117 Cal.Rptr. 856].) That there are a variety of “costs” if a legal relationship with a second parent is not established—costs that can be both financial and emotional” is well recognized. (Doskow, *The Second Parent Trap*, *supra*, 20 J. Juv. L. at p. 9.) Second parent adoption can secure the salutary incidents of legally recognized parentage for a child of a nonbiological parent who otherwise must remain a legal stranger.

Second parent adoptions also benefit children by providing a clear legal framework for resolving any disputes that may arise over custody and

¹⁴ See, e.g., Pizer, *What About the Children?* (Nov. 9, 2001) *The Advocate*, p. 1 <http://www.advocate.com/html/stories/850/850_lambda_pizer.asp> (as of Aug. 4, 2003) (“Between 10,000 and 20,000 California families have been made secure and reassured through this process, just like families in nearly two dozen other states across the country”); Tuller, *Now You’re a Parent, Now You Aren’t* (Nov. 28, 2001) *Salon.com*, p. 1 <http://archive.salon.com/mwt/feature/2001/11/28/illegal_adoption/index.html> (as of Aug. 4, 2003) (estimating the Court of Appeal decision in this case placed “10,000 to 15,000 previously completed” second parent adoptions in doubt); Curtis, *Analysis: Gay Adoptions Get Boost from New California Law, Support from Pediatricians* (Apr. 2, 2002) *Christian Times on the Web*, p. 1 <http://www.christiantimes.com/Articles/Articles20Apr02/Art_Apr02_10.html> (as of Aug. 4, 2003) (citing the Court of Appeal decision in this case as “throwing the legitimacy of more than 10,000 adoptions statewide into question”).

visitation. Our explicitly recognizing their validity will prevent uncertainty, conflict, and protracted litigation in this area, all of which plainly are harmful to children caught in the middle.¹⁵ Unmarried couples who have brought a child into the world with the expectation that they will raise it together, and who have jointly petitioned for adoption, should be on notice that, if they separate, the same rules concerning custody and visitation as apply to all other parents will apply to them.

In addition, second parent adoptions offer the possibility of obtaining the security and advantages of two parents for some of California's neediest children, including many with "special needs" for whom a second parent adoption may constitute the "closest conceivable counterpart of the relationship of parent and child" available. (*Adoption of Barnett, supra*, 54 Cal.2d at p. 377.) The same is true as regards thousands of others in foster care for whom it is state policy to seek permanent adoptive placement.¹⁶

We need not review here the nonlegal benefits of adoption for children, parents, and society as a whole, nor need we "assume, either as a policy or factual matter, that adoption is necessarily in a child's best interest" (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 845 [4 Cal.Rptr.2d 615, 823 P.2d 1216]) in every case. We may observe, however, that neither the Court of Appeal nor any party or amici curiae has suggested that, where an adoption *would* be in a child's best interests, second parent adoption differs categorically from other types of independent adoption in its ability to achieve adoption's practical ends.

Amicus curiae Proposition 22 Legal Defense and Education Fund suggests that to affirm the statutory permissibility of second parent adoption "would offend the State's strong public interest in promoting marriage." We disagree. (6) This case involves independent adoption, a procedure that is not limited to married persons. Unmarried persons always have been permitted to adopt children. (See 1 Ann. Civ. Code, § 221 (1st ed. 1872, Haymond & Burch, commrs. annotators [any adult may adopt any eligible child]; Fam. Code, § 8600 [same].) More generally, Justice Brown argues at some length that our

¹⁵ See generally *Adoption of Michael H., supra*, 10 Cal.4th at page 1072 (conc. & dis. opn. of Kennard, J.).

¹⁶ It is "the policy of the Legislature that . . . children have a right to a normal home life free from abuse, that reunification with the natural parent or parents or another alternate permanent living situation such as adoption or guardianship is more suitable to a child's well-being than is foster care, that this state has a responsibility to attempt to ensure that children are given the chance to have happy and healthy lives . . ." (Welf. & Inst. Code, § 396; see generally Fam. Code, § 8730 et seq. [adoptions by foster parents or relative caregivers].) In 1996, there were 97,000 children living in foster care in California, but only about 6,000 adoptions. Approximately one-fourth of adoptions from foster homes by foster parents were by unmarried adults. (Editorial, *Wrongheaded Adoption Rule*, Fresno Bee (Oct. 12, 1996) p. B6.)

decision today “trivializes family bonds.” (Conc. & dis. opn. of Brown, J., *post*, at p. 463; see generally *id.* at pp. 463–465.) To the contrary, our decision encourages and strengthens family bonds. As Justice Scalia has noted, the “family unit accorded traditional respect in our society . . . includes the household of unmarried parents and their children.” (*Michael H. v. Gerald D.* (1989) 491 U.S. 110, 123, fn. 3 [105 L.Ed.2d 91, 109 S.Ct. 2333].)¹⁷

Justice Brown purports to discern a legislative “insistence that the adopting parent have a legal relationship with the birth parent” (conc. & dis. opn. of Brown, J., *post*, at p. 464), but she cites no authority for the existence of such a requirement, and we know of none. Established legislative policy “‘bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents.’” (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 89 [19 Cal.Rptr.2d 494, 851 P.2d 776] [discussing Uniform Parentage Act]; see also § 7602 [“The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents”].)

The Court of Appeal recited that “in 1997 and 1998, the Legislature considered, but did not adopt, a bill that would have provided that two unmarried adults may adopt a child,” thereby implying that the Legislature had considered and rejected the possibility of such adoptions. (See Assem. Bill No. 53 (1997–1998 Reg. Sess.) §§ 1, 2 (hereafter Assembly Bill 53).) Not so. Although the Court of Appeal’s remark correctly describes Assembly Bill 53, a bill introduced in that session, it misleads to the extent it invites readers to assume the Legislature’s inaction on the bill reflected a rejection of its substance.

Assembly Bill 53 dealt with adoption by single persons, as well as by unmarried couples, and was promulgated to nullify a proposed CDSS regulation that the bill’s proponents perceived would inhibit both. (See Assembly Bill 53, § 1, subd. (c) [“Excluding potential adoptive parents on the basis of marital status is not in the best interests of the children who are eligible for adoption”].) The proposed regulation giving rise to Assembly Bill 53 would have barred agency recommendation of any adoption by an unmarried person or persons. (See Notice of Proposed Changes in Regulations of the California Department of Social Services (CDSS), Cal. Reg. Notice Register 96, No. 29,

¹⁷ Justice Brown states she would find “reasonable any legislative provision requiring that adopting parents share a common residence” (conc. & dis. opn. of Brown, J., *post*, at p. 464, citing § 297, subd. (b)(1) [common residence requirement for domestic partner registration]), but she does not claim the adoption statutes contain any such across-the-board requirement. Nor does Justice Brown explain what bearing her remark might have on the legality or utility of second parent adoption. She does not demonstrate that living apart is a greater phenomenon among couples who utilize second parent adoption procedures than it is among couples who utilize other procedures or, indeed, among parents generally.

p. 446 [proposing adoption of Cal. Code Regs., tit. 22, § 35124].)¹⁸ Promulgated in response, Assembly Bill 53 would have added to the Family Code a new section explicitly restating what is already implicitly provided in sections 8600 and 8601, i.e., that any otherwise qualified single adult or two adults, married or not, may adopt a child. (See Assembly Bill 53, § 2.) After the proposed regulation was withdrawn, the responsive bill (i.e., Assembly Bill 53), which had passed the Assembly Committee on the Judiciary by a vote of 10–4, died in the inactive file. (Assem. Bill No. 53, Assem. Final Hist. (1997–1998 Reg. Sess.))

Sharon argues that reversal of the Court of Appeal's decision will permit CDSS to authorize unusual adoptions, e.g., involving multiple parties, far removed from those contemplated by the Legislature. Justice Baxter also expresses concern that our decision will lead to "new and even bizarre family structures" (conc. & dis. opn. of Baxter, J., *post*, at p. 451), while Justice Brown inexplicably refers to our supposed "irretrievabl[e] commit[ment] to . . . the-more-parents-the-merrier view of parenthood" (conc. & dis. opn. of Brown, J., *post*, at p. 463). Nonsense. While CDSS has for some time treated section 8617 as waivable, such scenarios have not materialized. Our explicit recognition in this case of the legal ground for second parent adoptions—a nonmandatory construction of section 8617 that comports with judicial precedent and ratifies administrative interpretation and practice in which the Legislature has acquiesced—obviously cannot be taken as authority for multiple parent or other novel adoption scenarios. Nothing we say in this case can validate an adoption that is not in the child's interest, omits any essential statutory element, or is in violation of a public policy the Legislature may express. CDSS's construction honors the established principle that the beneficiary of a statute may waive it, is consistent both with judicial precedent and discernible legislative intent, and serves the best interests of California's children.

In sum, adherence to the Court of Appeal's construction of section 8617 as precluding second parent adoption would unnecessarily eliminate access to a duly promulgated, well-tested adoption process that has become "routine in California" (Eskridge & Hunter, *Sexuality, Gender and the Law* (1997) p. 866) and that is fully consistent with the main purpose of the adoption statutes to promote "the welfare of children 'by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child' " (*Department of Social Welfare v. Superior Court*, *supra*, 1 Cal.3d at p. 6).

¹⁸ Annette and Sharon each have submitted a request for judicial notice of legislative history materials generally available from published sources. We deny both requests as unnecessary. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1988) 19 Cal.4th 26, 46, fn. 9 [77 Cal.Rptr.2d 709, 960 P.2d 513].)

2. *Settled familial expectations*

The Court of Appeal's implication that California courts lack jurisdiction to grant second parent adoptions potentially called into question the legitimacy of existing families heretofore created in this state through established administrative and judicial procedures. Such families are of many types.

Although second parent adoptions may involve children conceived, as in this case, by artificial insemination,¹⁹ others involve children placed directly by their birth parents or private agencies with two unmarried adoptive parents. (See generally 1 Hollinger, *Adoption Law and Practice* (2002) *Placing Children for Adoption*, §§ 3.01–3.02, pp. 3-3 through 3-18.)²⁰ Others involve dependent children, often with special needs because of prior abuse or neglect, who were placed by public agencies with an unmarried “fost-adopt” parent whose partner later became a second adoptive parent. Still others are “kinship” adoptions, in which a grandparent or other relative became a second legal parent of a child whose very young mother was unable to raise the child on her own. Such adoptions also have involved children born in other countries and adopted either in their country of origin or in California by an unmarried adult whose partner later became a second adoptive parent. (1 Hollinger, *Adoption Law and Practice*, *supra*, §§ 3.01–3.02, pp. 3-3 through 3-18.) Established practice in California thus has created settled expectations among many different types of adoptive families.²¹ Affirmance would unnecessarily risk disturbing these.

¹⁹ Such children otherwise would have only one parent, as in California a mere sperm donor is not a legal parent. (§ 7613, subd. (b).)

²⁰ “Second parent adoptions may occur when a child's heterosexual parents are unable or unwilling to marry and establish paternity or when the parents are lesbian or gay.” (Bryant, *Second Parent Adoption: A Model Brief* (1995) 2 *Duke J. of Gender L. & Pol'y* 233, 233, fn. omitted; see also Ellis, *Bitterly Opposed Adoption Rule Died Quiet Death*, *L.A. Times* (Nov. 29, 1998) p. A1 [reporting that most unmarried couples who adopt are heterosexual]; see, e.g., Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child's Best Interests*, *supra*, 3 *Berkeley Women's L.J.* at pp. 128–130, citing *In re Adoption Petition of D.J.L.* (Super. Ct. San Diego County, 1988, No. A-28,345) [second parent adoption granted to child's mother and former stepfather after they divorced]; *In re Adopting Parent* (Super. Ct. Riverside County, 1985, No. A-10,169) [same].)

²¹ California practice accords with the national trend. As of 2001, at least 21 American jurisdictions had recognized second parent adoption. (Lilith, *The G.I.F.T. of Two Biological and Legal Mothers* (2001) 9 *Am.U. J. Gender, Soc. Pol'y & L.* 214.) The highest state courts in Massachusetts, New York and Vermont expressly have permitted second parent adoption without requiring termination of the birth parent's rights. (See *Adoption of Tammy* (Mass. 1993) 416 *Mass.* 205 [619 *N.E.2d* 315]; *In re Jacob* (1995) 86 *N.Y.2d* 651 [660 *N.E.2d* 397, 636 *N.Y.S.2d* 716]; *Adoption of B.L.V.B. and E.L.V.B.* (1993) 160 *Vt.* 368 [628 *A.2d* 1271].) The remainder have permitted second parent adoptions at intermediate appellate and lower court levels.

Affirmance not only would cast a shadow of uncertainty over the legal relationships between thousands of children and their adoptive parents (contrary to the clearly stated intention of all interested parties), but potentially could prompt some adoptive parents to disclaim their established responsibilities. Indeed, as the Court of Appeal dissenter noted, perpetuating the Court of Appeal opinion “would invite attempts to nullify completed second party adoptions in myriad species of litigation including support/custody/visitation disputes, inheritance contests and withdrawals of entitlements to previously available health and pension benefits, both governmental and private. The ultimate financial and emotional losers will be children who are the intended beneficiaries of the adoption laws.”

Sharon errs in asserting that, even if we were to affirm, persons who previously had completed a second parent adoption would have remedies such as compliance with the domestic partner registration provisions (§ 297 et seq.)²² if they wish to “ratify” the earlier proceeding. Domestic partner registration constitutes no such panacea. (7) With an exception for some seniors, California’s domestic partner registry is open only to same-sex couples, and not to heterosexuals. (§ 297, subd. (b)(6).)

(8) Registered domestic partners, moreover, must have a common residence (§ 297, subd. (b)(1)), thus excluding qualified adoptive parents who might live apart for reasons having no bearing on whether an adoption is in a particular child’s interest. Similarly, blood relatives cannot register, and therefore cannot adopt, as domestic partners (*id.*, subd. (b)(4)), even though many modern adoptions are kinship adoptions. (See 1 Hollinger, *Adoption Law and Practice, supra*, Placing Children for Adoption, §§ 3.01–3.02, pp. 3-3 through 3-18.) And families that have moved out of state, or where one adoptive parent has died, will not be able to seek ratification as domestic partners.²³ Even for parents who are legally qualified to register as domestic partners, undertaking a “re-adoption” would pose financial hardship and painful legal uncertainty.²⁴ No parent should have to face these kinds of choices, and no child should be placed in this kind of needless jeopardy.

²² Added by Statutes 1999, chapter 588, section 2; amended by Statutes 2001, chapter 893, section 3.

²³ Additionally, privacy concerns undermine the utility of domestic partner registration for some qualified adoptive parents who require confidentiality. While records in adoption cases generally are confidential (§ 9200 et seq.), domestic partner registration requires a declaration that the couple shares “an intimate and committed relationship,” in a document generally subject to public disclosure. (§ 298.5; 84 Ops.Cal.Atty.Gen. 55 (2001).)

²⁴ Forcing established adoptive families to return to court to ratify their family ties would burden the justice system with re-addressing consensual arrangements that have already been administratively and judicially ratified. Such duplication hardly would constitute the “prompt resolution of adoption proceedings” (*Adoption of Kelsey S., supra*, 1 Cal.4th at p. 851) on which we consistently have placed a priority.

Nothing on the face of the domestic partnership provisions, or in their history as revealed in the record, states or implies a legislative intent to forbid, repeal, or disapprove second parent adoption or CDSS's forms and procedures facilitating such. Thus, contrary to Justice Brown's assertion, the Legislature's conferring on domestic partners "the right . . . to adopt a child of his or her partner *as a stepparent*" (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 25 (2001–2002 Reg. Sess.) as amended Sept. 7, 2001, pp. 1–2, italics added), far from "confirm[ing] its understanding" that second parent adoption was not available (conc. & dis. opn. of Brown, J., *post*, at p. 459), simply streamlines the adoption process for a subset of those who already were accessing second parent procedures, much as occurred in 1931 when the Legislature streamlined stepparent adoption itself. (See *ante*, fn. 10.) Domestic partner registration does not broadly secure for California's children the benefits of the availability of second parent adoption, nor does it eliminate the uncertainty the Court of Appeal's decision created for existing second parent adoptees and their parents.

II. *Constitutional Considerations*

Sharon, in opposing review, specified two additional questions: whether Annette's adoption of Joshua would violate the constitutional doctrine of separation of powers and whether the adoption would violate Sharon's due process rights under the Fourteenth Amendment to the United States Constitution.

A. *Separation of Powers*

In promulgating forms and procedures to facilitate second parent adoptions, Sharon asserts, CDSS—an agency of the executive branch of our state government—is improperly engaging in the equivalent of legislation. She cites three Court of Appeal cases discussing child visitation, apparently for the proposition that courts should leave innovation in adoption policy to the Legislature. (See *West v. Superior Court (Lockrem)* (1997) 59 Cal.App.4th 302 [69 Cal.Rptr.2d 160] (*West*); *Nancy S. v. Michele G.*, *supra*, 228 Cal.App.3d 831 (*Nancy S.*); *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597 [272 Cal.Rptr. 520] (*Curiale*.) With that proposition generally, we do not disagree. But, as discussed, second parent adoption is the status quo in California, not an innovation.

The cases Sharon cites are not apposite. They all address the jurisdiction of California courts to award visitation to a "de facto" parent; none addresses

the validity of an adoption.²⁵ Annette is not seeking custody of Joshua on the basis of her past relationship as caregiver to him, nor on any other equitable theory. Rather, she seeks finalization of an independent adoption, with at least partial custody as one of its incidents. In passing on the validity of these adoption proceedings, we have no occasion to address de facto parenthood.

In any event, in suggesting that de facto parenthood involves policy questions best left to the Legislature (see *West, supra*, 59 Cal.App.4th at p. 307; *Nancy S., supra*, 228 Cal.App.3d at p. 841; *Curiale, supra*, 222 Cal.App.3d at pp. 1600–1601), the courts in the cases Sharon cites did not hold that any judicial action in this area would be unconstitutional. And to the extent each relied partly on a de facto parent's failure to adopt the child involved, they impliedly recognized the viability of second parent adoption under existing statutes. (See *West, supra*, at p. 304; *Nancy S., supra*, at p. 841; *Curiale, supra*, at p. 1599; see also *In re Guardianship of Z.C.W.* (1999) 71 Cal.App.4th 524, 527 [84 Cal.Rptr.2d 48].) The Court of Appeal in *Nancy S.*, citing our *Marshall* decision for support, expressly found “nothing in these provisions that would preclude a child from being jointly adopted by someone of the same sex as the natural parent.” (*Nancy S., supra*, at p. 841, fn. 8.)

Sharon concedes the Legislature authorized CDSS to promulgate for use in the independent adoption process a form adoption placement agreement (§ 8801.3, subd. (b)) that includes a consent to the adoption (*id.*, subd. (c)(5)), but urges that CDSS “has no power by regulation or otherwise to add to or detract from the rules for adoption prescribed in the Civil [now Family] Code” (*Adoption of McDonald, supra*, 43 Cal.2d at p. 461). As we have explained at length, however, in interpreting the independent adoption statutes to permit parental consent to a second parent adoption where the procedural prerequisites thereto and the essential elements of a valid adoption are satisfied, CDSS does not “add to or detract from” those statutes but, rather, construes them reasonably.

B. Due Process

Sharon in her brief on the merits expressly refrains from arguing that Annette's adoption of Joshua would violate her due process rights, but in opposing review she suggested this case presents that question. She cited in support *Troxel v. Granville* (2000) 530 U.S. 57, 75 [147 L.Ed.2d 49, 120

²⁵ “The de facto parenthood doctrine simply recognizes that persons who have provided a child with daily parental concern, affection, and care over substantial time may develop legitimate interests and perspectives, and may also present a custodial alternative, which should not be ignored in a juvenile dependency proceeding.” (*In re Keshia E.* (1993) 6 Cal.4th 68, 77 [23 Cal.Rptr.2d 775, 859 P.2d 1290].)

S.Ct. 2054] (*Troxel*), wherein a plurality of the high court held that a Washington State statute providing that any person may at any time petition for visitation of an unrelated child, and that the court may order such visitation when it is in the child's best interest, violated the birth mother's substantive due process rights.

Troxel is readily distinguishable. Most fundamentally, *Troxel* was a visitation case, whereas this case involves an adoption, and in California the statutes and procedures governing adoption are different from those governing visitation. (Compare generally §§ 3100–3103 with §§ 8600–9206.) The Washington statute at issue in *Troxel* provided specifically that “[a]ny person may petition the court for visitation rights at any time” and that courts may award visitation whenever “visitation may serve the best interest of the child” (Wash. Rev. Code, § 26.10.160(3), italics added). Calling this language “breathtakingly broad,” the high court noted it “effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent’s children to state-court review.” (*Troxel, supra*, 530 U.S. at p. 67, 120 S.Ct. 2054.) California law provides for no such freestanding visitation proceeding. Nor is Annette just “any person” (Wash. Rev. Code, § 26.10.160(3)); she is a prospective adoptive mother.

The statute at issue in *Troxel* did not require parental consent (or a finding of parental unfitness), and it was that fact, primarily, that led to its invalidation. (See *Troxel, supra*, 530 U.S. at pp. 67–70.) While Sharon now wishes to terminate these proceedings, she does not deny that she originally joined Annette in invoking the superior court’s adoption jurisdiction (§ 200) or that she failed to revoke her consent within the prescribed statutory period (§ 8814.5, subd. (b)).

In short, *Troxel* neither involved nor discussed adoption. Nor, as discussed, are the California adoption statutes subject to the constitutional criticisms the high court leveled there against Washington’s visitation statute.

For the foregoing reasons, we conclude that neither due process nor the doctrine of separation of powers constitutes a bar to Annette’s adoption of Joshua. Consequently, section 8617 does not prevent the superior court from proceeding to a best interests analysis of Annette’s petition. (§ 8612.)

III. *Fraud and Duress*

As noted at the outset of this opinion, in requesting approval to withdraw her consent to the adoption, Sharon, in addition to the statutory and constitutional objections reviewed above, argued to the trial court that she had signed the adoption consent form under fraud, undue influence, and duress and that

the original adoption attorney representing her and Annette had failed to obtain a signed waiver regarding conflict of interest. In her writ petition, Sharon reprised these arguments.

(9) With a few statutory exceptions not relevant here, a legal parent's valid consent is a jurisdictional prerequisite to an adoption, regardless of the child's interests. (See *In re Adoption of Cozza* (1912) 163 Cal. 514, 523 [126 P. 161], disapproved on another ground in *Adoption of Barnett, supra*, 54 Cal.2d at p. 378.) Where a parent's consent to adoption is obtained through fraud or duress, the consent "is not voluntary and the jurisdictional prerequisite to a valid adoption is lacking." (*Adoption of Kay C.* (1991) 228 Cal.App.3d 741, 751 [278 Cal.Rptr. 907]; see also *In re Yoder* (1926) 199 Cal. 699, 701 [251 P. 205] [order of adoption may be set aside for fraud, mistake, inadvertence, surprise, or excusable neglect].) Since the Court of Appeal agreed with Sharon's statutory argument, it had no occasion to address the superior court's implicit rejection of her contentions respecting fraud and undue influence. We shall remand the cause to permit the Court of Appeal to address this issue in the first instance. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 95 [124 Cal.Rptr.2d 530, 52 P.3d 703]; *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal.4th 291, 306 [48 Cal.Rptr.2d 510, 907 P.2d 358].)

Subject to the Court of Appeal's resolution of this remaining issue, the superior court on remand may validly exercise its discretion to order Annette's adoption of Joshua under the independent adoption statutes if it concludes that the administrative procedures, including a section 8617 waiver, duly established thereunder have been complied with and that all statutory prerequisites are satisfied. Sharon retains the right to oppose finalization of the adoption on the ground that new circumstances make it contrary to Joshua's interests. (See *County of Los Angeles v. Superior Court* (1969) 2 Cal.App.3d 1059, 1065-1066 [82 Cal.Rptr. 882].) We take no position on such outstanding factual questions, and nothing in this opinion should be taken by the court below on remand to indicate a view as to whether adoption is in Joshua's interests.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Court of Appeal and remand the cause for further proceedings consistent with this opinion.

George, C. J., Kennard, J., and Moreno, J., concurred.

BAXTER, J., Concurring and Dissenting.—The majority’s principal holding—which recognizes second parent adoptions¹ as valid in California—is unremarkable. At least 20 other jurisdictions have already done so (Krause & Meyer, *What Family for the 21st Century?* (2002) 50 Am. J. Comp. L. 101, 114, fn. 23), including the highest courts of three sister states. (Maj. opn., *ante*, at p. 441, fn. 21, citing *Adoption of Tammy* (1993) 416 Mass. 205 [619 N.E.2d 315]; *Matter of Jacob* (1995) 86 N.Y.2d 651 [660 N.E.2d 397, 636 N.Y.S.2d 716]; *Adoption of B.L.V.B.* (1993) 160 Vt. 368 [628 A.2d 1271].) I join fully in that holding.

I part company with the majority, however, over its interpretation of Family Code section 8617 (section 8617), which states that from the time of adoption, the birth parent shall “have no right over the child.” I would hold that the parties to an adoption may waive section 8617 in the limited circumstance of a second parent adoption. This is sufficient to resolve the case. Unfortunately, the majority does not stop there but makes the additional holding that section 8617 is a nonmandatory consequence of an adoption and can be waived *whenever* the parties agree to do so. (Maj. opn., *ante*, at pp. 427, 429, 440.) Under the majority’s approach, section 8617’s termination of the birth parents’ rights in *any* type of adoption—not merely those that seek to add a second parent—can be waived by mutual agreement, thus permitting a child to have three or more parents.

This makes new law, not only here but nationwide. Other states—even those states that have already validated second parent adoptions—have not taken this step. (E.g., *Adoption of B.L.V.B.*, *supra*, 628 A.2d at p. 1274, fn. 3 [declining to characterize a Vermont termination-of-rights statute as “directory rather than mandatory”]; see also *In Interest of Angel Lace M.* (1994) 184 Wis.2d 492 [516 N.W.2d 678, 683–684] [construing a similar Wisconsin termination-of-rights statute as mandatory].)² I find this out-of-state authority persuasive. (See 3 Singer, *Statutes and Statutory Construction* (6th ed. 2001) § 57:6, p. 30 [“The manner in which similar statutes in other states have been construed may be an element bearing upon this question”].) Unlike the majority, but in accordance with our sister states, I would hold that our termination-of-rights statute can be waived in the limited circumstance of a second parent adoption. Just as it has not been necessary to declare similar

¹ I adopt the majority opinion’s definition of “second parent adoption” (maj. opn., *ante*, at p. 422, fn. 2) and, like the majority, distinguish such adoptions from stepparent adoptions. (See Fam. Code, §§ 8548, 9000–9007.)

² Indeed, the New York Court of Appeals’ construction of a similar termination-of-rights statute as “mandatory in all cases” was superseded only by subsequent legislation. (*Matter of Jacob*, *supra*, 660 N.E.2d at p. 404.)

provisions to be directory to affirm second parent adoptions in other states, it is not necessary to make new law to uphold second parent adoptions in California.

I cannot fathom why the majority has deliberately chosen a rationale that is unnecessary to the disposition of this case *and* that has been avoided by other jurisdictions, but I do understand and fear the effect of the majority's additional holding: to put at risk fundamental understandings of family and parentage. Tomorrow, the question may be: *How many legal parents may a child have in California?* And the answer, according to the majority opinion, will be: *As many parents as a single family court judge, in the exercise of the broadest discretion in our law, deems to be in the child's best interest.*

As stated, I do concur in the judgment. But for the reasons that follow, I will not join the majority opinion.

I

If it is true that you can't get where you're going if you don't know where you've been, then it should come as no surprise the majority finds itself in uncharted territory. The majority claims (without any citation) that "[e]stablished" (maj. opn., *ante*, at p. 436.) administrative interpretation and practice by the California Department of Social Services (CDSS) supports its affirmance of second parent adoptions. It is quite simple, as detailed below, to verify CDSS's interpretation and practice during the relevant period. Unless "established" is redefined to mean "very recent," the historical claim made by the majority cannot be defended.

The first petitions for second parent adoptions were filed in the early 1980's. Between that time and 1999, with only a brief exception, CDSS maintained a policy of opposing "any petition for adoption in which a child is to be adopted into an unmarried couple." (Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World* (1999) 20 J. Juv. L. 1, 7.) The lone exception to this policy lasted "only a few months" and was promptly reversed when "then-Governor Pete Wilson became aware of the change and ordered [CDSS] to return to its original policy." (*Id.* at p. 7 & fn. 31, citing CDSS, All County Letter No. 95-13 (Mar. 11, 1995), rescinding CDSS, All County Letter No. 94-104 (Dec. 5, 1994).) The original policy then continued in force until November 15, 1999. (Doskow, *supra*, 20 J. Juv. L. at p. 8; see CDSS, All County Letter No. 99-100 (Nov. 15, 1999).) Thus, contrary to the assertion in the majority opinion, CDSS had an established and long-standing administrative interpretation and practice of *opposing* second parent adoptions—based on its interpretation of section 8617—that lasted for well over a decade. (Doskow, *supra*, 20 J. Juv. L. at pp. 12–13;

see also Notice of Proposed Changes in Regulations of the CDSS, Cal. Reg. Notice Register 96, No. 29, p. 446 [proposing adoption of Cal. Code Regs., tit. 22, § 35124].) Moreover, that policy remained in effect until the year before this litigation commenced. Accordingly, any claim that CDSS policy has “for some time” (maj. opn., *ante*, at p. 440) supported second parent adoption is demonstrably incorrect.

Even if the new CDSS policy had not been of such recent vintage, the majority ought to have steered clear of substantial reliance on it. The majority correctly recites that deference to administrative interpretation “is ‘situational’ and depends on ‘a complex of factors.’” (Maj. opn., *ante*, at p. 436, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [8 Cal.Rptr.2d 1, 960 P.2d 1031] (*Yamaha Corp.*)). But the majority then fails to apply those factors. Where an agency (like CDSS) is merely construing a controlling statute, the weight of the agency’s interpretation “‘will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’” (*Yamaha Corp.*, *supra*, 19 Cal.4th at pp. 14–15, italics omitted, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140 [89 L.Ed. 124, 65 S.Ct. 161].)

Analysis of the appropriate factors here would counsel caution, not a kowtow to the agency’s recent change in policy. CDSS’s consideration of the applicable statutes was hardly *thorough*: the All County Letter announcing the policy reversal is less than one page long and nowhere indicates it was issued in accordance with the Administrative Procedure Act. (*Yamaha Corp.*, *supra*, 19 Cal.4th at p. 13.) The *validity* of CDSS’s reasoning is impossible to evaluate: the All County Letter simply announces a reversal in policy, without providing any supporting reasons, and rejects the prior long-standing policy based solely on the fact that it was “an underground regulation inconsistent with the Administrative Procedure Act.” (CDSS, All County Letter No. 99-100, *supra*.) This indicates merely that the prior rule was promulgated in an impermissible manner, not that it misinterpreted the statute. (E.g., *Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217 [81 Cal.Rptr.2d 406] [“‘underground’ regulations” are “rules which only the government knows about”].) The new CDSS policy plainly is not *consistent*: the All County Letter abandons long-standing policy and had been in effect less than 12 months prior to the institution of this action. (Cf. *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801 [85 Cal.Rptr.2d 844, 978 P.2d 2] [agency’s interpretation of statute for “almost 20 years” is “‘long-standing’”].) Nor is CDSS’s policy reversal reasonably contemporaneous with the adoption of the relevant statutes. (*Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1118, fn. 4 [95 Cal.Rptr.2d 514, 997 P.2d 1169].)

In short, *none* of these factors supports the majority's conclusion that the 1999 policy reversal "would appear to be entitled to great weight" and merits "substantial deference." (Maj. opn., *ante*, at p. 436.) Accordingly, I would not make such a claim. The significance of the 1999 policy reversal, in my view, is that we are no longer bound to defer to CDSS's established and long-standing policy of *disapproving* second parent adoptions. (*Yamaha Corp.*, *supra*, 19 Cal.4th at p. 13 ["[a] vacillating position . . . is entitled to no deference' "].) We need not (and ought not) torture settled administrative law to go further than that.

II

As stated above, I conclude that in the limited circumstance of a second parent adoption, the parties may waive section 8617's requirement that the parental rights of the birth parent be terminated. Unlike the majority, however, I do not rest my conclusion that section 8617 can be waived in this limited circumstance on the theory that it is merely directory.

The designation of a statute as either mandatory or directory must be made with reference to the statute's purpose. (*People v. McGee* (1977) 19 Cal.3d 948, 962 [140 Cal.Rptr. 657, 568 P.2d 382].) Designating section 8617 as nonmandatory or directory means that the termination of parental rights at the time of adoption is "immaterial" and involves only a matter of "convenience." (*Francis v. Superior Court* (1935) 3 Cal.2d 19, 28 [43 P.2d 300].) Designating section 8617 as directory also means that it may be waived at the will of the parties. (*In re Johnson* (1893) 98 Cal. 531, 539 [33 P. 460].) This, of course, is the view advanced by the majority, which states that the termination of parental rights in section 8617 is not "for a public purpose" but instead is "for the benefit of the parties to an adoption petition" and thus is "waivable by the parties thereto." (Maj. opn., *ante*, at p. 427.) This analysis is contrary to our precedents, contrary to legislative policy, and has predictably unfortunate consequences.

Now that section 8617 has been classified as directory, the parties to every type of adoption are free to disclaim its effect whenever they choose. Any number of consenting adults may thus agree to adopt the same child, so long as a single family court judge finds the adoption is in the child's interest. (See maj. opn., *ante*, at p. 446.) Nothing in the Family Code would be left to prevent a child from having three or four or a village's worth of legal parents, so long as all the would-be parents agree to waive section 8617 and a sole family court judge sometime, somewhere, finds the adoption to be in the child's interest. (*In re Johnson*, *supra*, 98 Cal. at p. 539 [a directory provision "is to be complied with or not in the discretion of the judge"].) Inasmuch as there is "[n]o higher discretion" than that vested in a trial court resolving a

petition of adoption (*In re Adoption of Bewley* (1914) 167 Cal. 8, 10 [138 P. 689]), the majority all but guarantees new and even bizarre family structures.

The majority discounts this possibility as “[n]onsense,” claiming that “[w]hile CDSS has for some time treated section 8617 as waivable, such scenarios have not materialized.” (Maj. opn., *ante*, at p. 440.) I do not find this comforting. Nothing in CDSS policy states that section 8617 is nonmandatory. Rather, the new CDSS policy, like this separate opinion, permits section 8617 to be waived only in the limited circumstance of a second parent adoption. In any event, it is far too soon to gauge the effect of the recent reversal in CDSS policy, which (as Justice Brown points out) postdates the adoption agreement in this case. (Conc. and dis. opn. of Brown, J., *post*, at p. 459, fn. 2.) The regime the majority announces today has not yet been tested here.

However, it does not take much imagination to predict what that regime will look like. Commentators have recognized that a child may end up with any number of parents when family structure becomes a matter of private ordering. (King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction* (1995) 5 UCLA Women’s L.J. 329, 388 (King) [“Unlike the nuclear family model, families of consent can include one, two, or more parents”].) The available empirical evidence supports this prediction. An Alaska superior court’s finding that a similar termination-of-rights statute was directory was followed quickly by an adoption in which neither natural parent severed ties with the child. “Accordingly, *the child now has three legal parents.*” (Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child’s Best Interests* (1987–1988) 3 Berkeley Women’s L.J. 96, 132, *italics added* (Patt).) Moreover, at oral argument, Annette’s counsel informed us that superior courts in this state have already allowed a child to have more than two legal parents, apparently based on counsel’s theory that section 8617 is merely directory.³

³ The majority states that because “[t]his case involves only a second parent adoption,” we have no occasion to consider “whether there exists an overriding legislative policy limiting a child to two parents.” (Maj. opn., *ante*, at p. 427, fn. 6.) Naturally, I wholeheartedly agree. After all, it is only the *majority’s* gratuitous holding that section 8617 is directory—and hence waivable at the election of the parties—that raises concerns about how many parents a child might acquire through the adoption process. The majority’s alternate assertion that it does not intend to validate an adoption that “omits any essential statutory element” or “is in violation of a public policy the Legislature may express” (maj. opn., *ante*, at p. 440) is mere wishful thinking—for without section 8617, there *is* no statutory element, essential or otherwise, that protects the child who completes the adoption process from ending up with more than two legal parents. Tellingly, the majority does not even purport to identify one.

Since I am not a legislator, my own views as to whether children should be allowed to have three or more legal parents are not relevant here, although it does appear that such arrangements are highly problematic. (See Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies* (1997) 25 Hofstra L.Rev. 1091, 1199 [“The facts of *Michael H. v. Gerald D.* (1989) 491 U.S. 110 [105 L.Ed.2d 91, 109 S.Ct. 2333] highlight the practical difficulties of a divided authority and a disrupted family unit that may result from more than two legal parents”].) The existence of multiple parents would also make more difficult the resolution of disputes that may arise over custody and visitation, as well as conflicts over other parental rights and responsibilities. (Cf. maj. opn., *ante*, at p. 424.) In any event, the important point—and the one the majority deliberately ignores—is that “[e]xisting law recognizes a maximum of two parents per child.” (King, *supra*, 5 UCLA Women’s L.J. at p. 386.) Indeed, no commentator of whom I am aware shares the majority’s agnosticism as to “whether there exists an overriding legislative policy limiting a child to two parents.” (Maj. opn., *ante*, at p. 427, fn. 6; cf. Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships After Reproductive Technological Mistakes* (2002) 5 DePaul J. Health Care L. 15, 53 [“I suggest that the statutory requirements that children can have only two parents be changed”]; Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000* (2001) 53 Me. L.Rev. 523, 573, fn. 226 [“innumerable state and federal statutes . . . are premised on a maximum of two parents”]; Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past* (1994) 57 Albany L.Rev. 733, 755 [“The premises underlying the legal definitions of parent and nonparent have been that a child should have no more than two legal parents”]; see also *Michael H. v. Gerald D.*, *supra*, 491 U.S. at p. 118 (plur. opn. of Scalia, J.) [“California law, like nature itself, makes no provision for dual fatherhood”].) Moreover, numerous provisions of the Family Code—including the sections cited by the majority—demonstrate the Legislature intended to limit a child to no more than two legal parents. In fact, this intent is made manifest in section 8617 itself, which terminates the birth parents’ rights “from the time of the adoption.” Since a child can have no more than two birth parents (see Fam. Code, § 8512; *id.*, § 7613, subd. (b); see also *Johnson v. Calvert* (1993) 5 Cal.4th 84, 92, fn. 8 [19 Cal.Rptr.2d 494, 851 P.2d 776]), section 8617 ensures that the child does not acquire more than two through the process of adoption. The majority’s unique unwillingness to acknowledge section 8617’s role in limiting a child to no more than two parents defies common sense.⁴

⁴ In its truncated discussion of section 8617’s purpose, the majority seems to operate under the impression that a statute’s public purpose must be ascertained by considering the provision in isolation. If so, the majority is again mistaken. (*Francis v. Superior Court*, *supra*, 3 Cal.2d at p. 28 [“Another rule equally well recognized in the construction of such a statute is that whether a statute is mandatory or directory depends upon the legislative intent as ascertained

The majority's contention that section 8617 "does not speak to parental numerosity" (maj. opn., *ante*, at p. 427, fn. 6) is not only very hard to understand, but is also flatly contrary to our precedents. In *Estate of Jobson* (1912) 164 Cal. 312 [128 P. 938], we construed the predecessor to section 8617 in a situation where the biological father sought a partial distribution of his decedent son's estate. The decedent, however, had been adopted by his maternal grandparents years before. In rejecting the biological father's claim, we explained the operation of the statute: "These various rulings seem to establish the doctrine that the effect of an adoption under our Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded Once we have reached the conclusion that the effect of an adoption under the code is to substitute the adopting parent for the parent by blood, we must give to that conclusion its logical results. From the time of the adoption, the adopting parent is, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child. From the same moment, the parent by blood ceases to be, in a legal sense, the parent. *His place has been taken by the adopting parent.*" (*Estate of Jobson, supra*, 164 Cal. at pp. 316-317, italics added.)

I read *Estate of Jobson* as confirming the pivotal role of section 8617's predecessor in limiting the number of legal parents a child may acquire through an adoption. And I do not think mine is an idiosyncratic reading. Commentators—even those quoted by the majority itself—have recognized that section 8617 "protects the child from the burden of owing duties and obligations to two families." (Patt, *supra*, 3 Berkeley Women's L.J. at p. 117.) Thus, by gratuitously holding that section 8617 is nonmandatory, the majority guts that protection, to the detriment of children generally.

The majority claims to agree that courts should leave innovation in adoption policy to the Legislature. (Maj. opn., *ante*, at p. 443.) But the claim rings hollow here—since by classifying section 8617 as directory, this court has usurped the Legislature's power to limit a child to no more than two parents and has bestowed it instead on an individual family court judge, who may assign a child as many legal parents as the lone judge deems in the child's best interest. In my view, that is a breathtaking innovation in adoption policy. A change of this scope should be decided only by the Legislature or

from the consideration of the whole act"]; *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1513 [55 Cal.Rptr.2d 443] ["considering the purpose and provisions of the statutory scheme as a whole"].) Indeed, since at least *In re Johnson, supra*, 98 Cal. at page 536, we have found it "necessary" to read the statute in question "with other sections of the same code relating to the subject of adoption" to determine whether the statute was mandatory or directory.

the people by initiative. (*Williams v. North Carolina* (1942) 317 U.S. 287, 303 [87 L.Ed. 279, 63 S.Ct. 207].)

III

To the extent the majority believes itself compelled to classify section 8617 as directory in order to authorize second parent adoptions in California, it is mistaken. Our case law—including the same case law the majority purports to apply—would allow the parties to an adoption to waive the effect of section 8617, as long as the waiver did not seriously compromise the provision’s public purpose. Second parent adoptions, by definition, pose no threat to the legislative policy limiting a child to no more than two legal parents. Hence, under our existing case law, it is enough to say that section 8617 does not bar second parent adoptions generally or this proposed adoption in particular.

We begin with our rules for construing the Family Code. Although the law of adoption is “wholly statutory” (*Estate of Sharon* (1918) 179 Cal. 447, 454 [177 P. 283]), “[t]he rule is that the adoption statutes are to be liberally construed with a view to effect their objects and to promote justice. Such a construction should be given as will sustain, rather than defeat, the object they have in view.” (*Department of Social Welfare v. Superior Court* (1969) 1 Cal.3d 1, 6 [81 Cal.Rptr. 345, 459 P.2d 897].) “The main purpose of adoption statutes is the promotion of the welfare of children . . . by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child.” (*Adoption of Barnett* (1960) 54 Cal.2d 370, 377 [6 Cal.Rptr. 562, 354 P.2d 18].)

A second parent adoption promotes the welfare of children by formalizing in law a relationship that already exists in fact between the child and the prospective parent. Moreover, it does so without compromising the public purpose, set forth in section 8617, of limiting a child to no more than two parents. Therefore, in this limited circumstance, the parties should be permitted to waive the requirements of section 8617 and avoid the termination of the birth parent’s rights.

There is ample precedent for permitting a limited waiver of statutes that serve important public purposes. After all, this is the analytical model we employed in *Cowan v. Superior Court* (1996) 14 Cal.4th 367 [58 Cal.Rptr.2d 458, 926 P.2d 438] (*Cowan*). This is also the analysis we approved in *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040 [68 Cal.Rptr.2d 758, 946 P.2d 427] (*Bickel*). And this is the analysis we invoked most recently *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793 [118 Cal.Rptr.2d 167, 42 P.3d 1034] (*County of Riverside*). None of these cases even uttered the words “mandatory” or “directory.”

In *Cowan*, we held that a criminal defendant under certain circumstances may waive the benefit of a statute of limitations to a lesser offense than that charged, even though the statute existed partly to achieve certain public benefits. (*Cowan, supra*, 14 Cal.4th at pp. 374–375; *Bickel, supra*, 16 Cal.4th at p. 1050.) We described the operative waiver as one that is knowing, intelligent, and voluntary; is made for the defendant's benefit after consultation with counsel; and does not handicap the defense “ ‘or contravene any other public policy reasons motivating the enactment of the statutes.’ ” (*Cowan, supra*, 14 Cal.4th at p. 372.)

Similarly, in *Bickel*, we observed that developers could waive the benefits of the Permit Streamlining Act “if the administrative record shows that the applicant has made a knowing, intelligent, and voluntary waiver in circumstances where the applicant might reasonably anticipate some benefit or advantage from the waiver, and if the waiver does not seriously compromise any public purpose that the Act's time limits were intended to serve.” (*Bickel, supra*, 16 Cal.4th at p. 1050.)

Finally, in *County of Riverside*, we upheld a limited waiver by a probationary deputy sheriff of the Public Safety Officers Procedural Bill of Rights Act—which is yet another law “ ‘established for a public reason.’ ” (*County of Riverside, supra*, 27 Cal.4th at p. 804.) This waiver, once again, was limited to the circumstance where “enforcement of the waiver would not particularly undermine the public purpose of the Act.” (*Id.* at p. 806.)

Unlike the majority, I would find it sufficient to apply *Cowan*, *Bickel*, and *County of Riverside* here and permit the parties to a second parent adoption to knowingly, intelligently, and voluntarily waive the termination of parental rights otherwise required by section 8617, inasmuch as the waiver would not contravene, compromise, or undermine the statute's public purpose. (Cf. *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 668–671 [26 Cal.Rptr.2d 703] [strict compliance with mandatory provision is unnecessary where every reasonable objective of the statute has been satisfied].)

Construing section 8617 in this manner is not only consistent with our canons of construction generally, it is also consistent with our precedents in the area of adoption law. In *Marshall v. Marshall* (1925) 196 Cal. 761 [239 P. 36], which nowhere mentions the terms “directory” or “mandatory,” we permitted the parties to waive the predecessor to Family Code section 8617 in an analogous circumstance. We held that a stepfather's adoption of his wife's children did not terminate her parental relationship with the children, notwithstanding the provisions of Civil Code former section 229, on the ground that the parties to that adoption “did not intend thereby to sever the parental

relationship between the mother and the children.” (*Marshall, supra*, at p. 766.) But, rather than make the provision waivable in all circumstances, we merely recognized a limited waiver to permit “a husband and wife . . . [to] jointly adopt a child pursuant to the procedure therein prescribed, the result of which is to make the child, in law, the child of both spouses.” (*Id.* at p. 767.) Had *Marshall* intended to make the provision directory, it would not have been necessary to limit our holding, as we did repeatedly, to “the circumstances of this case” (*id.* at p. 766) and “a situation such as this” (*id.* at p. 767).

In my view, *Marshall’s* construction of Civil Code former section 229 was grounded on the circumstance that the stepparent adoption did not contravene, compromise, or undermine that provision’s public purpose, which we had discussed previously in *Estate of Jobson, supra*, 164 Cal. 312. *Marshall* thus supports the validity of second parent adoptions involving unmarried persons, which similarly do not undermine section 8617’s public purpose. A fair reading of *Marshall* refutes the notion that we have ever deemed Civil Code former section 229—or its successor—to be directory.

IV

The majority’s remaining justifications for classifying section 8617 as directory are similarly without merit.

The majority appears to reason that because section 8617 is not jurisdictional, it cannot be classified as mandatory. (Maj. opn., *ante*, at pp. 428, 434.) The majority has made a common mistake. “A typical misuse of the term ‘jurisdictional’ is to treat it as synonymous with ‘mandatory.’ ” (2 Witkin, *Cal. Procedure* (4th ed. 1996) *Jurisdiction*, § 4, pp. 548–549.) “But for the Legislature to declare that a section is mandatory does not necessarily mean that a failure to comply with its provisions causes a loss of jurisdiction to make any decision whatever.” (*Liberty Mut. Ins. Co. v. Ind. Acc. Com.* (1964) 231 Cal.App.2d 501, 509 [42 Cal.Rptr. 58].) Hence, the fact that section 8617 is not jurisdictional does not shed light on whether it is nonetheless mandatory. (*County of Santa Clara v. Superior Court* (1971) 4 Cal.3d 545, 551, fn. 2 [94 Cal.Rptr. 158, 483 P.2d 774].)

Likewise, it is irrelevant that compliance with section 8617 is not an “essential element[] of every valid adoption.” (Maj. opn., *ante*, at p. 428.) Section 8617, of course, is not even intended to apply to *every* valid adoption. For example, section 8617 would not apply where the birth parents are deceased or have otherwise had their rights terminated, and does not apply at all in agency adoptions. (See *Fam. Code*, § 8700 et seq.) That section 8617 does not apply in some circumstances, though, has no bearing on whether it

is mandatory in the circumstances in which it does apply. Not surprisingly, the majority offers no authority to the contrary.

The majority also lacks support for its artificial distinction between a “mandatory prerequisite” to an adoption (maj. opn., *ante*, at p. 427) and a “legal consequence.” (*Id.* at p. 427.) In particular, nothing in *In re Johnson*, which addressed the validity of an adoption where the minor child was not examined by the judge under Civil Code former section 227, supports the claim that the adoption laws “always have made a fundamental distinction between the ordinary legal consequences of an adoption and ‘what provisions of the law are essential and therefore mandatory.’” (Maj. opn., *ante*, at p. 428, quoting *In re Johnson, supra*, 98 Cal. at p. 536.) Consequences, like prerequisites, can be mandatory. (E.g., *West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 949 [98 Cal.Rptr.2d 612] [mandatory consequences of court-ordered emancipation].) In fact, much of law involves attaching mandatory consequences to a particular constellation of facts. That section 8617 may describe a consequence rather than an element of an adoption thus has no bearing on whether it is mandatory.

In sum, nothing in law or policy justifies the majority’s evisceration of the important public purpose underlying section 8617—namely, the legislative declaration and case authority that a child needs no more than two legal parents.

V

Second parent adoptions by unmarried persons are consistent with California law. I would apply that settled law to decide this case. It is disappointing that, in reaching the same result, the majority has instead upset fundamental legislative policy concerning family structure, substantially altered administrative law concerning deference to executive agencies, and rendered unrecognizable our own case law concerning the distinction between statutory provisions that are mandatory and those that are directory. I can therefore join only in the judgment.

Chin, J., concurred.

BROWN, J., Concurring and Dissenting.—This case raises questions concerning the past, present and future of California adoption law. Regarding the past, I agree that we should not disturb settled familial relationships. Regarding the present, Annette F. may deserve partial custody based on estoppel. The most important question, however, is whether the California Department of Social Services ought to continue authorizing these second parent

adoptions in the thousands of cases that will arise in the future. The Legislature has heretofore required a legal relationship between the birth and second parent, and I would defer to this rule and bar second parent adoptions that violate the statutory scheme.

I. THE LEGISLATURE HAS PRECLUDED SECOND PARENT ADOPTIONS EXCEPT IN LIMITED CIRCUMSTANCES

This case turns on whether we deem Family Code section 8617¹ directory or mandatory. The statute provides “[t]he birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child.” (*Ibid.*) As a general rule, adoption extinguishes the rights of the natural parents forever, although stepparenthood provides a “narrow exception[]” to this rule. (*Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1707, fn. 8 [22 Cal.Rptr.2d 590].) This norm reflects the imperative that there should not be any ambiguity about who is a child’s “real” parent. “[T]he effect of an adoption . . . is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded. *The duties of a child cannot be owed to two fathers at the same time.*” (*Estate of Jobson* (1912) 164 Cal. 312, 316–317 [128 P. 938], italics added (*Jobson*).) The majority asserts the Legislature has merely described, rather than prescribed, this transfer of parental authority and responsibility, which is thus merely one option for the birth and adopting parents involved. Twice in the past decade, however, the Legislature has indicated otherwise.

The logical starting point for construing section 8617 is section 9306, which concerns the adoption of an adult (“person”) rather than a child. The text is nearly identical: “[T]he birth parents of a person adopted . . . are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted person, and have no right over the adopted person.” (§ 9306, subd. (a).) In 1993, the Legislature added subdivision (b) to section 9306, which provides, “Where an adult is adopted by the spouse of a birth parent, the parental rights and responsibilities of that birth parent are not affected by the adoption.” (Stats. 1993, ch. 266, § 2.) If, as the majority claims, there is no statutory restriction on second parent adoptions, subdivision (b) is superfluous.

But the Legislature perceived no superfluity. On the contrary, “[t]he purpose of this bill is [to] create an exception to the automatic severance of

¹ Hereafter, all statutory references are to the Family Code unless otherwise indicated.

parent-child relationships.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 970 (1993–1994 Reg. Sess.) May 18, 1993, p. 2.) The Senate Judiciary Committee’s analysis quoted section 8548 in observing “existing law” provided that a birth parent retains custody and control when a stepparent adopts a *child*. (See § 8548 [“ ‘Stepparent adoption’ means the adoption of a child by a stepparent where one birth parent retains custody and control of the child”].) Thus, no special subdivision (b) was needed for section 8617 because section 8548 served that purpose. There was no counterpart to section 8548 to provide for second parent adoptions of *adults*; section 9306, subdivision (b), therefore conformed the law for these circumstances. “It is unclear why such distinctions were drawn between a stepparent adoption of minors and a stepparent adoption of adult children of spouses but the distinctions seem unnecessary and outmoded.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 970 (1993–1994 Reg. Sess.) May 18, 1993, p. 3.) The amendment to section 9306 indicates stepparenthood was the only context in which the ordinary transfer of duties and rights from birth parent(s) to adoptive parent(s) did not occur.

The Legislature confirmed its understanding that second parent adoptions were not a universal option when it allowed registered domestic partners to participate in this procedure. As the Senate Rules Committee’s analysis explained, “This bill expands California law on domestic partnerships by . . . conferring on domestic partners various rights, privileges and standing conferred by the State on married couples . . . [¶] . . . [¶] [including] [t]he right of a domestic partner to adopt a child of his or her partner as a stepparent.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 25 (2001–2002 Reg. Sess.) as amended Sept. 7, 2001, pp. 1–2.) Section 9000, subdivision (f), now provides that “[f]or the purposes of this chapter, stepparent adoption includes adoption by a domestic partner.”

Against these two expressions of legislative limits on second parent adoption, the majority offers a six-sentence “letter” issued by the California Department of Social Services on November 15, 1999 (the Letter), abolishing any marital requirements for second parent adoption. (See maj. opn., *ante*, at p. 423, fn. 3.) The letter purports to invalidate prior letters expressing a different policy,² which it characterized as “an underground regulation inconsistent with the Administrative Procedure Act”—an apt description for the Letter itself. The Administrative Procedure Act (hereafter APA; Gov. Code, § 11346 et. seq.) “establish[es] basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations.” (*Ibid.*) The APA requires the government agency offering the regulation to provide, *inter alia*, a copy of the proposed regulation; a statement of reasons

² Even assuming the Letter validly described the law, the contrary rule was thus in place in August 1999, when Sharon and Annette signed the adoption agreement for Joshua.

for the adoption, amendment, or repeal of a regulation; identification of every study justifying the change; a description of alternatives to the proposal; and the agency's reasons for rejecting those alternatives. (Gov. Code, § 11346.2.) The APA also provides for public input through either a public hearing or written comments. (Gov. Code, § 11346.8.) Because the California Department of Social Services failed to observe these procedures, the Letter did not comply with the statutory requirements, and is thus as much an underground regulation as any former rule.

The Letter fails in substance as well as procedure. Government Code section 11349, subdivision (a), requires a “ ‘[n]ecessity’ ” for the rule, “to effectuate the purpose of [a] statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific” Subdivision (e) requires “ ‘[r]eference’ ” to the statute, court decision, or other legal provision. The Letter provides neither of these. Furthermore, the regulation must “be[] in harmony with, and not in conflict with” existing law. (*Id.*, § 11349, subd. (d).) Since, as noted, the Legislature has provided only narrow exceptions to Family Code section 8617, the Letter arguably conflicts with the law as it then existed. Nevertheless, the lesson of the majority opinion is that administrative agencies need not follow the dictates of the Legislature or this court, we will follow them. The California Department of Social Services' violation of the statutory law thus serves as its retroactive justification.

II. NEITHER MARSHALL NOR WAIVER PRINCIPLES SUPPORT PROSPECTIVE VALIDATION OF SECOND PARENT ADOPTIONS OUTSIDE THE STATUTORY SCHEME

Against the expressed intent of the Legislature, the majority abrogates any status-based requirements for second parent adoptions, relying on our decision in *Marshall v. Marshall* (1925) 196 Cal. 761 [239 P. 36] (*Marshall*) and the principle that parties may waive rules imposed primarily for their benefit. Neither justification supports the majority's conclusion.

A. *Marshall*

The court in *Marshall* retroactively authorized a second parent adoption by the new husband of a widow and held that “a *husband* and *wife* may jointly adopt a child . . . the result of which is to make the child, in law, the child of both *spouses*.” (*Marshall, supra*, 196 Cal. at p. 767, italics added.) The majority both disregards the context and finds the italicized language immaterial, concluding instead that the opinion authorizes adoption by any couple wishing to adopt, regardless of marital status. This reads contemporary norms into a 1925 decision, when the prevailing precedents deemed marriage “the

most important relation in life, and one in which the state is vitally interested The well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation and illicit unions." (*Deyoe v. Superior Court* (1903) 140 Cal. 476, 482 [74 P. 28].)

Moreover, the Legislature subsequently enacted former section 226 of the Civil Code, which contained four separate references to "an adoption *by a step-parent* where one natural parent retains his or her custody and control of the child." (Italics added.) Had the Legislature deemed stepparenthood immaterial, it would not have specifically included the italicized language. Accordingly, even if the *Marshall* court had been indifferent to the existence of a marital commitment, the Legislature was not. The Legislature has since added an entire chapter of statutes expressly regulating stepparent adoptions. (Fam. Code, § 9000 et seq.) These provisions reflect the Legislature's understanding that it was creating a special procedure for adoption and an exception to the general rule set forth in Family Code section 8617. Section 9000, subdivision (f), confirms this understanding.

The Legislature also recently extended to registered domestic partners the opportunity to follow the stepparent adoption procedure. Unlike the pre-*Marshall* legal landscape, where there was no statutory authorization for a child to live with a birth parent and a second parent, the law currently provides that opportunity to all couples who comply with the statutory prerequisites by formalizing their relationship.

Thus, even if the *Marshall* court lacked any legislative guidance, we do not. The Legislature has twice prescribed the terms by which a child may gain a second parent without losing the first: only where the two parents are related by marriage or domestic partnership. This court has no authority to reject the legislative rule for one it deems preferable.

At most, *Marshall* supports Annette's claim; as we vindicated the intent and expectations of the Marshalls, perhaps so too should we vindicate the (original) intent and expectations of Sharon S. and Annette. But retroactive authorization of the adoption in *Marshall* did not create a prospective rule that any second parent adoption would be valid. Even if it had, subsequent legislation established that this option is available only to those couples who marry or form a domestic partnership, nullifying any contrary expectation or assumption. The majority may have justification for applying equitable principles to preserve a family attachment already created, but it has no basis for prospectively abrogating a legislative scheme that has stood for more than 70 years.

B. Waiver

The majority also asserts that the section 8617 transfer of authority from birth parent to adoptive parents is optional, because it amounts to a benefit for the parents themselves. But section 8617 is but one of many rules governing adoption that exist to effect not the preferences of the adults but the welfare of the child, and thus society itself. The majority's reconstruction of section 8617 ignores this imperative.

In addressing the questions of whether the statute is designed to benefit the parties or the public, the majority construes the provision as a primarily private benefit to the parents only through a selective citation of the text. Perhaps birth parents often wish to be " 'relieved of all . . . duties towards, and all responsibility for, the adopted child.' " (Maj. opn., *ante*, at p. 429, quoting § 8617.) After all, many people may wish to limit their duties and responsibilities. But this disregards the second part of the statute, which deprives the birth parent of any "right over the child." (§ 8617.) A rule that strips both duties and rights from one party is not primarily intended to benefit that party.

Nor is the argument that the law is primarily designed for the benefit of the birth *and* adoptive parents any stronger, for it suffers from the same defect. The law both deprives the birth parents of their rights and imposes duties and responsibilities on the adoptive parents. In terms of the legal position of the parties, therefore, they swap places in a zero-sum game. There would be no point for the Legislature to specify terms if the adoption were nothing more than a mutually self-interested contract between two adults or couples.

But it is not. "The agreement is *for the benefit of the child*, not of the parents or persons making it." (*Estate of Grace* (1948) 88 Cal.App.2d 956, 966 [200 P.2d 189]; see also *Adoption of Barnett* (1960) 54 Cal.2d 370, 377 [6 Cal.Rptr. 562, 354 P.2d 18] [" 'The main purpose of adoption statutes is the promotion of the welfare of children' "].) We have explained how a complete transfer of duties and rights is necessary to prevent the confusing position of multiple lines of parental authority. We thus announced the general imperative (from which the *Marshall* court and then the Legislature carved exceptions) that "[f]rom the time of adoption, the adopting parent is, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child. From the same moment, the parent by blood ceases to be, in a legal sense, the parent." (*Jobson, supra*, 164 Cal. at p. 317.)

This rule prevents the child from being burdened with a conflict between the birth parent(s) and adoptive parents(s). If the agreement were simply a

means for the birth and adopting parents to effect their private preferences, the law could authorize all permutations of divided rights and duties. The Legislature has concluded otherwise, insisting on an unambiguous transfer of authority unless the birth parent and adopting parent have formally joined together to forge a common future.

III. THE MAJORITY TRIVIALIZES FAMILY BONDS

The majority's reliance on a mutual waiver imports the principles of the marketplace into the realm of home and family, which was once thought to represent a "haven in a heartless world" of self-interested interactions. (Lasch, *Haven in a Heartless World* (1977).) The family is the area where people act not in accordance with specifically contracted agreements but the duties of the heart. Parents are not simply self-interested utility maximizers. Raising a child is, like hope, a task of the spirit. It is so much more than an aggregation of services.

Parenthood instead is the opportunity and responsibility to join the web of human connectedness through which we touch the past, the present, and the future. The relationship of parent and child is the most fundamental bond humans share and the influence of family in determining what kind of people we become is profound. Society has a considerable stake in the health and stability of families, because it is upon the families—what Burke calls "the little platoon—that we rely [on] not only to nurture the young but to provide the seed beds of civic virtue required for citizenship in a self-governing community. [The family teaches us to] care for others, [and] to moderate . . . self-interest . . ." (Berns, *The First Amendment and the Future of American Democracy* (1976) p. 222.) All tasks which will be hampered if the family is simply "a collection of individuals united temporarily for their mutual convenience and armed with rights against each other." (Schneider, *Moral Discourse and the Transformation of American Family Law* (1985) 83 Mich. L.Rev. 1803, 1859.) The "arduous, long-term educational process [of raising a child] requires not a spirit of contractualist autonomy, but a spirit of adult commitment and . . . sacrifice." (Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging* (1991) 1991 BYU L.Rev. 1, 30.)

The majority, irretrievably committed to its the-more-parents-the-merrier view of parenthood, declines to interpret section 8617 to effectively preclude a child from having more than two parents; and at oral argument Annette's counsel asserted no such limit should exist. Such a position is consistent with the stunted view of parenthood as purely ministerial and economic—signing consent slips and providing health insurance. But this is the least part of being a parent, as anyone who has ever seen a newborn resting securely in her father's hand can understand; and anyone who has sat up late at night

awaiting the safe return of a newly minted teenage driver knows. The all-encompassing nature of parenthood renders eminently reasonable any legislative provision requiring that adopting parents share a common residence with each other and the adopted child. (See Fam. Code, § 297, subd. (b)(1).) Parenthood requires more than a telephone and a checkbook.

The United States Supreme Court has found parental authority constitutes a zero-sum game. (*Michael H. v. Gerald D.* (1989) 491 U.S. 110, 118 [105 L.Ed.2d 91, 109 S.Ct. 2333].) Parental authority cannot not be divided because it goes beyond ministerial functions; the parent “ ‘direct[s] the child’s activities; . . . make[s] decisions regarding the control, education, and health of the child; . . . [and exercises] the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.’ ” (*Id.* at p. 119, quoting 4 Cal. Fam. Law (1987) § 60.-02[1][b], fns. omitted.) Devolving these responsibilities on a multitude of parties would lead to a variety of conflicts and inconsistencies, as Justice Baxter correctly notes. (See conc. & dis. opn. of Baxter, J., *ante*, at p. 453.)

The two-person limit is one point on which proponents of Proposition 22 and Assembly Bill No. 25 (2001–2002 Reg. Sess.) agree. The Legislature’s insistence that the adopting parent have a legal relationship with the birth parent reflects the fact that the adoptive parent’s relationship with the child does not exist in a vacuum but is related to the parents’ relationship with each other. Justice Thurgood Marshall wrote for a unanimous Supreme Court in holding it was proper to distinguish between formerly married and never-married fathers in granting only the former the right to veto an adoption by the mother’s new husband. (*Quilloin v. Walcott* (1978) 434 U.S. 246, 256 [54 L.Ed.2d 511, 98 S.Ct. 549].) “[T]he State was not foreclosed from recognizing this difference in the extent of [the] commitment to the welfare of the child.” (*Ibid.*) This “commitment enables the courts, as well as those most personally involved, to make certain assumptions—even knowing they will at times be disappointed—about what to expect.” (Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests* (1983) 81 Mich. L.Rev. 463, 499.)

The law permits single individuals to adopt a child on their own because one parent is better than none. It does not follow, however, that two unrelated parents are better than one. The majority cites the legislative policy that “ ‘adoption or guardianship is more suitable to a child’s well-being than is foster care’ ” (maj. opn., *ante*, at p. 438, fn. 16, quoting Welf. & Inst. Code, § 396), as adoption is a more permanent relationship than foster care. However, if the birth parent has a relationship with a second parent, and then a third, and then a fourth, the child may be worse off than if the birth parent

had simply raised the child alone. The choice in second parent adoption cases is not between adoption and foster care. The birth parent in such circumstances is willing and able to continue expressing parental responsibility. If the two adults are uncertain whether the second parent will be a permanent resident of the household, the adoption ought to wait until they are ready for that commitment.

There is a long-standing tension within the law as to whether legal standards should reflect ideal behavior or simply the mean.³ The majority, however, refuses to impose even a standard of the mean. Couples who raise children together do predominantly have a formal legal relationship with each other. It is not a standard that individuals cannot reach absent heroism, and every Californian adult has access to such a relationship. Today's decision maximizes the self-interest and personal convenience of parents, but poorly serves the state's children who deserve as much stability and security as legal process can provide.

Petitioner's petition for a rehearing was denied October 22, 2003. Brown, J., did not participate therein. Baxter, J., and Chin, J., were of the opinion that the petition should be granted.

³ "All systems of ethics, no matter what their substantive content, can be divided into two main groups. There is the "heroic" ethic, which imposes on men demands of principle to which they are generally *not* able to do justice, except at the high points of their lives, but which serve as signposts pointing the way for man's endless *striving*. Or there is the "ethic of the mean," which is content to accept man's everyday "nature" as setting a maximum for the demands which can be made.'" (Schneider, *Moral Discourse and the Transformation of Family Law*, *supra*, 83 Mich. L.Rev. at p. 1819, quoting letter from Max Weber to Edgar Jaffe (1907).)



Positive

As of: September 30, 2016 5:30 PM EDT

Tejada v. Blas

Court of Appeal of California, First Appellate District, Division Three

December 15, 1987

No. A035102

Reporter

196 Cal. App. 3d 1335; 242 Cal. Rptr. 538; 1987 Cal. App. LEXIS 2424

MYRNA F. TEJADA, Plaintiff and Appellant, v. EMILIA S. BLAS, Defendant and Respondent

Prior History: [***1] Superior Court of the City and County of San Francisco, No. 773464, Raymond D. Williamson, Jr., Judge.

Disposition: The order of dismissal is affirmed.

Core Terms

five-year, arbitration, arbitration hearing, deposition, expiration, five year, representations, impracticable, continuance, memorandum, diligence, at-issue

Case Summary

Procedural Posture

Plaintiff filed suit against defendant, who later moved to dismiss the action. Plaintiff appealed from the order of the Superior Court of the City and County of San Francisco (California), which granted the motion for failure to bring the action to trial within five years, pursuant to Cal. Civ. Proc. Code §§ 583.310 and 583.360. Plaintiff contended it was impossible, impracticable, and futile to have brought the action within such period.

Overview

Plaintiff appealed from an order that dismissed her action for failure to have brought it to trial within five years. The court affirmed. The court held that the action had to be brought to trial within five years after it was commenced, under Cal. Civ. Proc. Code § 583.310. In the five-year computation, the time during which bringing the action to trial was impossible, impracticable, or futile was excluded. Plaintiff contended that defendant's failure to have made herself available for

deposition and her repeated requests for a continuance of the arbitration hearing made it impossible, impracticable, and futile to have brought the action to trial within the period. The court held that the critical factor was whether plaintiff exercised reasonable diligence, by having made every reasonable effort, in her prosecution within the five-year period. The record had not established reasonable diligence. Uncooperative conduct by defendant did not justify plaintiff's inaction. Moreover, defendant's failure to have appeared voluntarily for her deposition had not precluded plaintiff from going forward, as plaintiff could have sought a court order that compelled defendant's appearance.

Outcome

The order of dismissal of plaintiff's complaint was affirmed. The trial court's finding that it was not impossible, impracticable, or futile for plaintiff to have brought the action to trial within five years did not constitute an abuse of discretion. The requirement of reasonable diligence had not allowed plaintiff to delay proceeding to trial based upon defendant's representations of later availability.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN1 An action must be brought to trial within five years after commenced against the defendant. Cal. Civ. Proc. Code § 583.310. If not brought to trial within five years, the action must be dismissed, subject only to extension, excuse, or exception provided by statute. Cal. Civ. Proc. Code § 583.360. In computing the five-year period, the time during which bringing the action to trial was impossible, impracticable, or futile is excluded. Cal. Civ. Proc. Code § 583.340(c).

Civil Procedure > Dismissal > Involuntary
Dismissals > General Overview

HN2 What is impossible, impracticable, or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties. The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case. To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his or her duty to expedite the resolution of the case at all stages of the proceedings. Central to this duty is the specific duty to use every reasonable effort to bring the matter to trial within the five-year period of Cal. Civ. Proc. Code § 583.310.

Civil Procedure > ... > Responses > Defenses, Demurrers &
Objections > General Overview

HN3 Where a plaintiff possesses the means to bring a matter to trial before the expiration of the five-year period of Cal. Civ. Proc. Code § 583.310, by filing a motion to specially set the matter for trial, plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability.

Civil Procedure > Dismissal > Involuntary
Dismissals > General Overview

Contracts Law > ... > Estoppel > Equitable
Estoppel > General Overview

HN4 The doctrine of equitable estoppel is applicable to Cal. Civ. Proc. Code § 583.310 dismissal motions. If a trial court finds statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered an order dismissing plaintiff's civil action for her failure to bring it to trial within five years after commencing it (Code Civ. Proc., § 583.310). In dismissing the action, the trial court found that it was not impossible, impracticable, or futile to bring the matter to trial within five years (Code Civ. Proc., §§ 583.360, 583.340, subd. (c)). Plaintiff had been prepared to go

forward with an arbitration hearing one year prior to the expiration of the five-year period, but defendant failed to appear; defendant sought continuances of the arbitration hearing date and finally represented to plaintiff's counsel that she would be available for the arbitration several months later. After the five-year period had expired, defendant moved to dismiss pursuant to § 583.360. (Superior Court of the City and County of San Francisco, No. 773464, Raymond D. Williamson, Jr., Judge.)

The Court of Appeal affirmed. It held that the trial court's finding that it was not impossible, impracticable, or futile to bring the action to trial within five years did not constitute an abuse of discretion, since plaintiff did not exercise reasonable diligence in prosecuting her case at every stage of the proceedings and did not use every reasonable effort to bring it to trial within the five-year period. Although plaintiff was prepared to go forward with the arbitration hearing and the conduct of defendant substantially impeded plaintiff's efforts to proceed, plaintiff did not use reasonable efforts to bring the matter to trial during the following year preceding the expiration of the five-year period. It also held that defendant was not estopped from seeking such dismissal. It held that when faced with the expiration of the five-year period, the requirement of reasonable diligence does not allow a plaintiff to delay proceeding to trial based upon the defendant's representations of availability for trial at a later date. (Opinion by Merrill, J., with White, P. J., and Scott, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1a) (1b) (1c)

Dismissal and Nonsuit § 35 > Involuntary Dismissal > Delay
in Bringing Action to Trial > Five-year
Limitation > Impracticability or Impossibility > Reasonable
Diligence.

--In a civil action, the trial court did not abuse its discretion in finding it was not impossible, impracticable or futile to bring the matter to trial within five years and in dismissing the action under Code Civ. Proc., §§ 583.310, 583.360, 583.340, subd. (c), since plaintiff did not exercise reasonable diligence in prosecuting her case at every stage of the proceedings and did not use every reasonable effort to bring it to trial within the five-year period. Although plaintiff was prepared to go

forward with an arbitration hearing one year prior to the expiration of the period and defendant's conduct substantially impeded such efforts, plaintiff did not use reasonable efforts to bring the matter to trial during the following year preceding the expiration of the period. A motion for preferential treatment on the arbitration or trial calendar would have been appropriate, but plaintiff made no motion to have the matter specially set for trial.

CA(2) (2)

Dismissal and Nonsuit § 35 > Involuntary Dismissal > Delay in Bringing Action to Trial > Five-year Limitation > Impracticability or Impossibility > Acts and Conduct of Parties.

—What is impossible, impracticable or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties. The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case. To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his or her duty to expedite the resolution of the case at all stages of the proceedings. Central to this duty is the specific duty to use every reasonable effort to bring the matter to trial within the five-year period.

CA(3) (3)

Dismissal and Nonsuit § 35 > Involuntary Dismissal > Delay in Bringing Action to Trial > Five-year Limitation > Impracticability or Impossibility > Motion to Specially Set Matter for Trial.

—Where a plaintiff possesses the means to bring a matter to trial before the expiration of the five-year period by filing a motion to specially set the matter for trial, the plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability. Uncooperative conduct by a defendant does not justify inaction on the part of a plaintiff.

(4a) (4b)

Dismissal and Nonsuit § 32.2 > Involuntary Dismissal > Delay in Bringing Action to Trial > Five-year Limitation > Waiver and Estoppel > Misrepresentations of Defendant.

—In a civil action in which the trial court granted defendant's motion to dismiss based upon plaintiff's failure to bring the matter to trial within five years (Code

Civ. Proc., §§ 583.310, 583.360, 583.340, subd. (c)), defendant was not estopped from seeking dismissal. Although defendant had failed to appear voluntarily for her deposition, then sought continuances of an arbitration hearing, and finally represented that she would be available for the arbitration several months later, such conduct did not constitute false assurances as to the running of the five-year period, and there was no evidence as to representations to plaintiff concerning the calculation of the five-year period or an agreement to an extension of the five-year period. Moreover, the failure to appear for the deposition did not preclude plaintiff from going forward with the case. Plaintiff's recourse was to seek a court order under Code Civ. Proc., § 2019, subd. (b)(2), compelling defendant to appear, and request sanctions if she failed to do so.

CA(5) (5)

Dismissal and Nonsuit § 32.2 > Involuntary Dismissal > Delay in Bringing Action to Trial > Five-year Limitation > Waiver and Estoppel > Equitable Estoppel.

—The doctrine of equitable estoppel is applicable to motions to dismiss an action for the plaintiff's failure to bring it to trial within five years (Code Civ. Proc., §§ 583.310, 583.360). If a trial court finds statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel may be available to prevent the defendant from profiting from his deception.

CA(6) (6)

Dismissal and Nonsuit § 32.2 > Involuntary Dismissal > Delay in Bringing Action to Trial > Five-year Limitation > Defendant's Representations of Availability for Trial at Later Date.

—When faced with the expiration of the five-year period, the requirement of reasonable diligence does not allow a plaintiff to delay proceeding to trial based upon the defendant's representations of availability for trial at a later date. The plaintiff must obtain either a written stipulation or an oral stipulation in open court by the defendant extending the five-year deadline pursuant to Code Civ. Proc., § 583.330, or use every effort to secure a trial date within the five-year period.

Counsel: Robert E. Thompson for Plaintiff and Appellant.

Janet L. Dobrovoly for Defendant and Respondent.

Judges: Opinion by Merrill, J., with White, P. J., and Scott, J., concurring.

Opinion by: MERRILL

Opinion

[*1338] [**539] Plaintiff Myrna F. Tejada, doing business as Phil-Am Films Exchange, appeals from an order dismissing her action for failure to bring it to trial within five years. (Code Civ. Proc., §§ 583.310, 583.360.)¹ We affirm.

I

Facts

Plaintiff filed the complaint on November 10, 1980. The complaint named as defendants Emilia S. Blas, Cecilia D. Pennington, and G.S. Sikand among others.² Blas and Pennington filed an answer and a cross-complaint on February 17, 1981, and an amended cross-complaint on May 15, 1981. Plaintiff answered the amended [***2] cross-complaint on June 11, 1981. G.S. Sikand, the remaining defendant, answered the complaint on August 10, 1981.

Plaintiff filed an at-issue memorandum on November 18, 1982. On April 25, 1983, plaintiff noticed the taking of the depositions of the three defendants, including Blas, for June 1983. Defendant Blas, however, was a resident of the Philippines at the time of service of the notice, and was not required to attend the deposition absent court order. (§§ 1989, 2019, subd. (b)(2).) Plaintiff's counsel apparently did not seek such court order. Following the filing of a trial setting and arbitration conference statement, the matter was scheduled for arbitration on April 5, 1984, and then was rescheduled for May 29, 1984. Counsel for defendants Blas and Pennington then sought to withdraw as counsel of record for these defendants. Following additional delays [***3] caused by the illness of defendant Blas's attorney and then his withdrawal as counsel of record, the arbitration was continued to October 3, 1984. On that date, defendant Blas failed to appear at the [*1339] arbitration hearing, and the

¹All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

²Prior to the date of hearing on the motion to dismiss the action, all defendants other than defendant Blas had been dismissed with prejudice.

arbitration was continued to November 27, 1984. Defendant Blas then retained new counsel who advised the arbitrator that her client was required to be in the Philippines for medical reasons in November and would not be available until January 1985. Plaintiff opposed a continuance. The arbitrator, in a letter dated October 30, 1984, addressed to both counsel, responded that "In the circumstances, I am quite prepared to grant a continuance although I realize that the plaintiff has had a difficult time through no fault of hers to have her day in Court." He further stated: "While it would be preferable to have Mrs. Blas present at the trial I suggest that we proceed in January." The arbitrator then rescheduled the arbitration for January 3, 1985, and stated that "she [Blas] will have to decide whether she wishes to return for the hearing."

On November 28, 1984, plaintiff first substituted herself in propria persona in place of her attorney of [***4] record and then [**540] substituted Robert Thompson as her attorney of record. On that date, for reasons not clear from the record, the action was removed from the arbitration hearing list and civil active list by court order. Between November 1984, when the matter was dropped from the arbitration hearing list, and November 10, 1985, the date of expiration of the five-year period, plaintiff's counsel did not file a new at-issue memorandum. Nor did he make a motion or take any other steps to advance the matter on the civil trial or arbitration calendar. He filed a new at-issue memorandum on December 23, 1985, after the five-year period had expired. Defendant Blas moved to dismiss pursuant to section 583.360. The court granted the motion.

II

Discussion

HN1 An action must be brought to trial within five years after commenced against the defendant. (§ 583.310.) If not brought to trial within five years, the action must be dismissed, subject only to extension, excuse, or exception provided by statute. (§ 583.360.) In computing the five-year period, the time during which bringing the action to trial was "impossible, impracticable, or futile" is excluded. (§ 583.340, subd. [***5] (c).)

Plaintiff contends that defendant Blas's failure to make herself available for deposition and her repeated requests for a continuance of the arbitration hearing, when plaintiff was prepared and desired to proceed with

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the hearing, made it impossible, impracticable and futile to bring the action to trial within the five-year period.

HN2 What is impossible, impracticable, or futile must be determined in light of all the circumstances in the individual case, including the acts and [*1340] conduct of the parties. The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised "reasonable diligence" in prosecuting his or her case. (Moran v. Superior Court (1983) 35 Cal.3d 229, 238 [197 Cal.Rptr. 546, 673 P.2d 216]; Minkin v. Levander (1986) 186 Cal.App.3d 64, 69 [230 Cal.Rptr. 592]; Him v. Superior Court (1986) 184 Cal.App.3d 35, 39 [228 Cal.Rptr. 839].) To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his or her duty to expediate the resolution of the case at all stages of the proceedings. (Minkin v. Levander, supra, at p. 69; Griffis [***6] v. S. S. Kresge Co. (1984) 150 Cal.App.3d 491, 496 [197 Cal.Rptr. 771].) Central to this duty is the specific duty to use every reasonable effort to bring the matter to trial within the five-year period. (*Ibid.*)

Here, the record does not establish that plaintiff exercised reasonable diligence in prosecuting her case at every stage of the proceedings, or that she used every reasonable effort to bring the matter to trial within the five-year period. It is undisputed that plaintiff was prepared to go forward with the arbitration hearing through November of 1984 and that the conduct of defendant Blas substantially impeded her efforts to proceed with arbitration through that period. However, the record establishes that plaintiff did not use reasonable efforts to bring the matter to trial during the following one-year period preceding the expiration of the five years. The arbitrator had set the matter for arbitration on January 3, 1985, and had made clear that the arbitration would go forward even if defendant Blas failed to appear. Prior to the date set for hearing the matter was dropped from the arbitration hearing list and the civil active list. Thereafter, her counsel [***7] failed to file a new at-issue memorandum and took no action whatsoever to advance the matter on the civil active list. A motion for preferential treatment on the arbitration or trial calendar would have been particularly appropriate in this case where plaintiff initially had been fully prepared to proceed with the arbitration and the continuances had been at the defendant's request, and the five-year deadline was approaching. (See San Bernardino City Unified School Dist. v. Superior Court (1987) 190 Cal.App.3d 233, 238 [235 Cal.Rptr. 356].) Plaintiff, however, made no motion to have the matter specially set [***541] for trial. **HN3** Where a plaintiff

possesses the means to bring a matter to trial before the expiration of the five-year period by filing a motion to specially set the matter for trial, plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability. (Griffis v. S. S. Kresge Co., supra, 150 Cal.App.3d at p. 498; State of California v. Superior Court (1979) 98 Cal.App.3d 643, 649-650 [159 Cal.Rptr. 650].) Uncooperative conduct by a defendant does not justify inaction on the part of a plaintiff. There [***8] is an arsenal of weapons available to a plaintiff to insure that a defendant does not benefit from dilatory tactics. If necessary, a plaintiff must initiate these [*1341] procedures to make certain that the action proceeds in a timely manner or that appropriate sanctions are levied against the defendant, which under some circumstances may include striking the answer and entering defendant's default.

III

Plaintiff next argues that because she relied to her detriment upon the repeated representations of Blas and her attorney that she would be returning from the Philippines and would eventually be available for her deposition and trial, defendant Blas was barred from seeking dismissal of the action under the doctrine of equitable estoppel.

HN4 The doctrine of equitable estoppel is applicable to section 583.310 dismissal motions. (Tresway Aero. Inc. v. Superior Court (1971) 5 Cal.3d 431, 438 [96 Cal.Rptr. 571, 487 P.2d 1211]; Griffis v. S. S. Kresge Co., supra, 150 Cal.App.3d at p. 498.) If a trial court finds statements or conduct by a defendant which lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel [***9] must be available to prevent defendant from profiting from his deception. (Griffis, supra, at pp. 498-499; Borglund v. Bombardier, Ltd. (1981) 121 Cal.App.3d 276, 281 [175 Cal.Rptr. 150].) For example, in Griffis, the court held that the defense attorney's misleading representations to the trial court concerning the calculation of the five-year period, upon which the plaintiff's attorney relied, estopped the defendant from seeking dismissal upon the expiration of the five-year period. The court held that the plaintiff's attorney was entitled to believe that the defense attorney, as an officer of the court, intended his representations to be relied upon. (*Id.*, at pp. 499-500.)

Here, the record contains no evidence that the defendants or their attorney made any representations to plaintiff concerning the calculation of the five-year

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period or that they would agree to an extension of the five-year period. The record indicates only that defendant Blas failed to appear voluntarily for her deposition, then sought continuances of the arbitration hearing date, and finally represented to plaintiff's counsel that she would be available for the arbitration during the [***10] summer of 1985. Such conduct does not constitute false assurances concerning the running of the five-year period.

Moreover, Blas's failure to appear voluntarily for her deposition did not preclude plaintiff from going forward with the case. Plaintiff's recourse was to seek a court order compelling Blas to appear for her deposition pursuant to section 2019, subdivision (b)(2), and request sanctions if she failed to do so. When faced with the expiration of the five-year period, the [*1342] requirement of reasonable diligence does not allow a

plaintiff to delay proceeding to trial based upon the defendant's representations of availability for trial at a later date. Plaintiff must obtain either a written stipulation or an oral stipulation in open court by the defendant extending the five-year deadline pursuant to section 583.330, or use every effort to secure a trial date within the five-year period. From November 28, 1984, when the action was ordered removed from the arbitration hearing list and the civil active list until November 10, 1985, when the five-year period expired, plaintiff failed to file a new at-issue memorandum or take any steps to advance the case for trial.

[***11] [**542] We conclude the trial court's finding that it was not impossible, impracticable, or futile to bring the action to trial within five years did not constitute an abuse of its discretion.

The order of dismissal is affirmed.

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The Bremen v. Zapata Off-Shore Co.

Supreme Court of the United States

March 21, 1972, Argued ; June 12, 1972, Decided

No. 71-322

Reporter

407 U.S. 1; 92 S. Ct. 1907; 32 L. Ed. 2d 513; 1972 U.S. LEXIS 114

THE BREMEN ET AL. v. ZAPATA OFF-SHORE CO.

Prior History: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: 428 F.2d 888 and 446 F.2d 907, vacated and remanded.

Core Terms

district court, courts, tow, parties, Appeals, towage, contractual, clauses, bargaining, Contracting, litigate, forum-selection, inconvenient, convenience, admiralty, disputes, damages, Sea, proceedings, witnesses, public policy, casualty, waters, motion to dismiss, negotiated, Drilling, freely, exculpatory clause, enforceable, vessel

Case Summary

Procedural Posture

Petitioner sought review by certiorari of the judgment entered by the United States Court of Appeals for the Fifth Circuit in which a forum-selection clause in a contract between petitioner German corporation and respondent United States corporation was held invalid.

Overview

The German corporation contracted with the United States corporation to transport an oil rig from Louisiana to the Adriatic Sea. During transportation, the rig was damaged and was towed to Tampa, Florida, where the United States corporation filed suit. The German corporation, however, asked the district court to enforce the forum-selection clause contained in the contract placing jurisdiction in England. The district court refused to enforce the clause and the lower appellate court affirmed. Reversing the lower appellate court's judgment, the court held that the forum-selection clause should be enforced unless the party resisting the clause

could show that enforcement would be unreasonable. Furthermore, the court held that the argument that such clauses ousted a court of jurisdiction was not valid, and the German corporation did not waive operation of the clause by appearing in the federal court. As a result, the court held that the forum-selection clause was valid and the case was remanded for a determination of whether enforcement was unreasonable.

Outcome

The court vacated the lower appellate court's judgment and remanded the case for a determination of whether enforcement of the forum-selection clause was unreasonable.

LexisNexis® Headnotes

Admiralty & Maritime Law > Practice & Procedure > Forum Selection

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN1 Forum-selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. This is the correct doctrine to be followed by federal district courts sitting in admiralty.

Admiralty & Maritime Law > Practice & Procedure > Forum Selection

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Waivers > Notice

HN2 Parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to

waive notice altogether.

Admiralty & Maritime Law > Practice & Procedure > Forum Selection

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN3 Where the choice of a forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, absent some compelling and countervailing reason, it should be honored by the parties and enforced by the courts.

Lawyers' Edition Display

Summary

A German corporation (Unterweser) agreed to tow the off-shore drilling rig of an American corporation (Zapata) from Louisiana to the Adriatic Sea under a contract providing that "any dispute arising must be treated before the London Court of Justice." The rig was seriously damaged in a severe storm, and was towed to Tampa, Florida, where Zapata sued Unterweser and Unterweser's vessel in the United States District Court for the Middle District of Florida, alleging negligent towage and breach of contract. Unterweser moved to dismiss or stay the suit; sued Zapata in the High Court of Justice in London; and when the 6-month period for filing a limitation-of-liability action was about to expire, filed such an action in the same Federal District Court. Zapata then refiled its initial claim in the limitation action. The District Court denied Unterweser's motion to stay the limitation action pending determination of the London suit, and enjoined Unterweser from prosecuting the London suit (*296 F Supp 733*). The United States Court of Appeals for the Fifth Circuit affirmed (*428 F2d 888*), and on petition for rehearing en banc, adopted the panel's judgment (*446 F2d 907*).

On certiorari, the United States Supreme Court vacated the judgment of the Court of Appeals. In an opinion by Burger, Ch. J., expressing the views of seven members of the court, it was held that (1) the forum clause should be specifically enforced unless Zapata could clearly show that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching; (2) there was nothing in the

record which would support a refusal to enforce the forum clause; (3) Unterweser's filing its limitation complaint did not preclude it from relying on the forum clause; and (4) the clause provided for an exclusive forum, and included in rem actions.

White, J., concurring, stated his agreement with the court's judgment and opinion except insofar as it commented on remanded issues.

Douglas, J., dissented on the ground that the District Court wisely exercised its discretion to enjoin the London litigation.

Headnotes

CONTRACTS §101 > forum clauses -- validity --
> Headnote:

LEdHN[1] [1]

Federal District Courts sitting in admiralty should apply the doctrine that forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.

COURTS §529 > jurisdiction -- consent -- > Headnote:

LEdHN[2] [2]

In federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an "agent" for receipt of process in that jurisdiction.

TOWAGE §2 > forum clause -- > Headnote:

LEdHN[3] [3]

A forum clause in an international towage contract between an American corporation and a German corporation, providing that any dispute arising therein "must be treated before the London Court of Justice," controls absent a strong showing that it should be set aside.

ADMIRALTY §84 > TOWAGE §2 > dismissal -- forum clause -- > Headnote:

LEdHN[4] [4]

In a suit in admiralty in a Federal District Court for damages in personam and in rem, alleging negligent

towage and breach of contract, in which the respondent in moving to dismiss invokes a clause in the towing contract providing that "any dispute arising must be treated before the London Court of Justice," the clause should be specifically enforced unless the libellant can clearly show that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud or overreaching.

CONTRACTS §101 > forum clauses – validity –
> Headnote:

LEdHN[5] [5]

A contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

EVIDENCE §289 > burden of proof – validity of contract –
> Headnote:

LEdHN[6] [6]

Even where the remoteness of the forum may suggest that the forum selection clause of an agreement was an adhesive clause, or that the parties did not have the particular controversy in mind when they made their agreement, the party making such a claim should bear a heavy burden of proof.

TOWAGE §2 > forum clause – validity – > Headnote:

LEdHN[7] [7]

Under a freely negotiated international commercial agreement between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea, with a London forum selection clause, the party seeking to avoid trial in London must show that trial there would be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.

ESTOPPEL AND WAIVER §79 > forum – filing suit –
> Headnote:

LEdHN[8] [8]

An admiralty respondent's filing an action to limit its liability, when the 6-month statutory period for filing such an action had almost run without a judicial ruling, in the action in which it was a respondent, on its motion to dismiss or stay the action because a forum clause in the

party's contract required that the action be brought in England, does not preclude the respondent from relying on the forum clause.

TOWAGE §2 > forum clause – construction –
> Headnote:

LEdHN[9] [9]

A forum clause in an international towage agreement, providing that "any dispute arising must be treated before the London Court of Justice," is clearly mandatory and all-encompassing so as to provide for an exclusive forum and to include in rem actions.

Syllabus

Petitioner Unterweser made an agreement to tow respondent's drilling rig from Louisiana to Italy. The contract contained a forum-selection clause providing for the litigation of any dispute in the High Court of Justice in London. When the rig under tow was damaged in a storm, respondent instructed Unterweser to tow the rig to Tampa, the nearest port of refuge. There, respondent brought suit in admiralty against petitioners. Unterweser invoked the forum clause in moving for dismissal for want of jurisdiction and brought suit in the English court, which ruled that it had jurisdiction under the contractual forum provision. The District Court, relying on Carbon Black Export, Inc. v. The *Monrosa*, 254 F.2d 297, held the forum-selection clause unenforceable, and refused to decline jurisdiction on the basis of *forum non conveniens*. The Court of Appeals affirmed. *Held*: The forum-selection clause, which was a vital part of the towing contract, is binding on the parties unless respondent can meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust. Pp. 8-20.

Counsel: David C. G. Kerr argued the cause for petitioners. With him on the briefs was Jack C. Rinard.

James K. Nance argued the cause for respondent. With him on the brief was Dewey R. Villareal, Jr.

Judges: Burger, C. J., delivered the opinion of the Court, in which Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist, JJ., joined. White, J., filed a concurring statement, post, p. 20. Douglas, J., filed a dissenting opinion, post, p. 20.

Opinion by: BURGER

Opinion

[*2] [***516] [**1909] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit declining to enforce a forum-selection clause governing disputes arising under an international towage contract between petitioners and respondent. The circuits have differed in their approach to such clauses.¹ For the reasons stated hereafter, we vacate the judgment of the Court of Appeals.

In November 1967, respondent Zapata, a Houston-based American corporation, contracted with petitioner Unterweser, a German corporation, to tow Zapata's ocean-going, self-elevating drilling rig *Chaparral* from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea, where Zapata had agreed to drill certain wells.

Zapata had solicited bids for the towage, and several companies including Unterweser had responded. Unterweser was the low bidder and Zapata requested it to submit a contract, which it did. The contract submitted by Unterweser contained the following provision, which is at issue in this case:

"Any dispute arising must be treated before the London Court of Justice."

[*3] In addition the contract contained two clauses purporting to exculpate Unterweser from liability for damages to the towed barge.²

¹ Compare, e. g., *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (CA3 1966), and *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (CA2), cert. denied, 350 U.S. 903 (1955), with *Carbon Black Export, Inc. v. The Monroe*, 254 F.2d 297 (CA5 1958), cert. dismissed, 359 U.S. 180 (1959).

² The General Towage Conditions of the contract included the following:

"1. . . . [Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2. . . .

"b) Damages suffered by the towed object are in any case for account of its Owners."

In addition, the contract provided that any insurance of the *Chaparral* was to be "for account of" Zapata. Unterweser's

[**1910] After reviewing the contract and making several changes, but without any alteration in the forum-selection or exculpatory clauses, a Zapata vice president executed the contract and forwarded it to Unterweser in Germany, where Unterweser accepted the changes, and the contract became effective.

On January 5, 1968, Unterweser's deep sea tug *Bremen* departed Venice, Louisiana, with the *Chaparral* in tow bound for Italy. On January 9, while the flotilla was in international waters in the middle of the Gulf of Mexico, a severe storm arose. The sharp roll of the *Chaparral* in Gulf [***517] waters caused its elevator legs, which had been raised for the voyage, to break off and fall into the sea, seriously damaging the *Chaparral*. In this emergency situation Zapata instructed the *Bremen* to tow its damaged rig to Tampa, Florida, the nearest port of refuge.

On January 12, Zapata, ignoring its contract promise to litigate "any dispute arising" in the English courts, commenced a suit in admiralty in the United States [*4] District Court at Tampa, seeking \$ 3,500,000 damages against Unterweser *in personam* and the *Bremen in rem*, alleging negligent towage and breach of contract.³ Unterweser responded by invoking the forum clause of the towage contract, and moved to dismiss for lack of jurisdiction or on *forum non conveniens* grounds, or in the alternative to stay the action pending submission of the dispute to the "London Court of Justice." Shortly thereafter, in February, before the District Court had ruled on its motion to stay or dismiss the United States action, Unterweser commenced an action against Zapata seeking damages for breach of the towage contract in the High Court of Justice in London, as the contract provided. Zapata appeared in that court to contest jurisdiction, but its challenge was rejected, the English courts holding that the contractual forum provision conferred jurisdiction.⁴

initial telegraphic bid had also offered to "arrange insurance covering towage risk for rig if desired." As Zapata had chosen to be self-insured on all its rigs, the loss in this case was not compensated by insurance.

³ The *Bremen* was arrested by a United States marshal acting pursuant to Zapata's complaint immediately upon her arrival in Tampa. The tug was subsequently released when Unterweser furnished security in the amount of \$ 3,500,000.

⁴ Zapata appeared specially and moved to set aside service of process outside the country. Justice Karminski of the High Court of Justice denied the motion on the ground the contractual choice-of-forum provision conferred jurisdiction and would be enforced, absent a factual showing it would not

[5] [1911] In the meantime, Unterweser was faced with a dilemma in the pending action in the United States court at Tampa. The six-month period for filing action to limit its liability to Zapata and other potential claimants was about to expire,⁵ but the United States District Court in Tampa had not yet ruled on Unterweser's motion to dismiss or stay Zapata's action. On July 2, 1968, confronted with difficult alternatives, Unterweser filed an action to limit its liability in the District Court in Tampa. That court entered the customary [518] injunction against proceedings outside the limitation court, and Zapata refilled its initial claim in the limitation action.⁶

be "fair and right" to do so. He did not believe Zapata had made such a showing, and held that it should be required to "stick to [its] bargain." App. 206, 211, 213. The Court of Appeal dismissed an appeal on the ground that Justice Karminski had properly applied the English rule. Lord Justice Willmer stated that rule as follows:

"The law on the subject, I think, is not open to doubt It is always open to parties to stipulate . . . that a particular Court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the 'London Court,' which I take as meaning the High Court in this country. *Prima facie* it is the policy of the Court to hold parties to the bargain into which they have entered. . . . But that is not an inflexible rule, as was shown, for instance, by the case of *The Fehmam*, [1957] 1 Lloyd's Rep. 511; (C. A.) [1957] 2 Lloyd's Rep. 551

"I approach the matter, therefore, in this way, that the Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country" [1968] 2 Lloyd's Rep. 158, 162-163.

⁵ 46 U.S.C. §§ 183, 185. See generally G. Gilmore & C. Black, Admiralty § 10-15 (1957).

⁶ In its limitation complaint, Unterweser stated it "reserve[d] all rights" under its previous motion to dismiss or stay Zapata's action, and reasserted that the High Court of Justice was the proper forum for determining the entire controversy, including its own right to limited liability, in accord with the contractual forum clause. Unterweser later counterclaimed, setting forth the same contractual cause of action as in its English action and a further cause of action for salvage arising out of the *Bremen's* services following the casualty. In its counterclaim, Unterweser again asserted that the High Court of Justice in London was the proper forum for determining all aspects of

[6] It was only at this juncture, on July 29, after the six-month period for filing the limitation action had run, that the District Court denied Unterweser's January motion to dismiss or stay Zapata's initial action. In denying the motion, that court relied on the prior decision of the Court of Appeals in *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 (CA5 1958), cert. dismissed, 359 U.S. 180 (1959). In that case the Court of Appeals had held a forum-selection clause unenforceable, reiterating the traditional view of many American courts that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced." 254 F.2d at 300-301.⁷ Apparently concluding that it was bound by the *Carbon Black* case, the District Court gave the forum-selection clause little, if any, weight. Instead, the court treated the motion to dismiss under normal *forum non conveniens* doctrine applicable in the absence of such a clause, citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Under that doctrine "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Id. at 508. The District Court concluded: "The balance of conveniences here is not strongly in favor of [Unterweser] and [Zapata's] choice of forum should not be disturbed."

Thereafter, on January 21, 1969, the District Court denied another motion by Unterweser to stay the limitation action pending determination of the controversy in the High Court of Justice in London and granted Zapata's motion to restrain Unterweser from litigating [7] further in the London court. The District Judge ruled that, having taken jurisdiction in the limitation proceeding, he had jurisdiction to determine all matters relating to the controversy. He ruled that Unterweser should be required to "do equity" by refraining from also litigating the controversy in the London court, not only for the reasons he had previously stated for denying Unterweser's first motion to stay Zapata's action, but also because Unterweser had invoked the United States court's jurisdiction to obtain the benefit of the Limitation Act.

the controversy, including its counterclaim.

⁷ The *Carbon Black* court went on to say that it was, in any event, unnecessary for it to reject the more liberal position taken in *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (CA2), cert. denied, 350 U.S. 903 (1955), because the case before it had a greater nexus with the United States than that in *Muller*.

[**1912] On appeal, a divided panel of the Court of Appeals affirmed, and on rehearing *en banc* the panel opinion was adopted, with six of the 14 *en banc* judges dissenting. As had the [***519] District Court, the majority rested on the *Carbon Black* decision, concluding that "at the very least" that case stood for the proposition that a forum-selection clause "will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought." From that premise the Court of Appeals proceeded to conclude that, apart from the forum-selection clause, the District Court did not abuse its discretion in refusing to decline jurisdiction on the basis of *forum non conveniens*. It noted that (1) the flotilla never "escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court"; (2) a considerable number of potential witnesses, including Zapata crewmen, resided in the Gulf Coast area; (3) preparation for the voyage and inspection and repair work had been performed in the Gulf area; (4) the testimony of the *Brømen* crew was available by way of deposition; (5) England had no interest in or contact with the controversy other than the forum-selection clause. The Court of Appeals majority further noted that Zapata was a United States citizen and "the discretion [8] of the district court to remand the case to a foreign forum was consequently limited" – especially since it appeared likely that the English courts would enforce the exculpatory clauses.⁸ In the Court of Appeals' view, enforcement of such clauses would be contrary to public policy in American courts under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963). Therefore, "the district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance."⁹

⁸The record contains an undisputed affidavit of a British solicitor stating an opinion that the exculpatory clauses of the contract would be held "prima facie valid and enforceable" against Zapata in any action maintained in England in which Zapata alleged that defaults or errors in Unterweser's tow caused the casualty and damage to the *Chaparral*.

In addition, it is not disputed that while the limitation fund in the District Court in Tampa amounts to \$ 1,390,000, the limitation fund in England would be only slightly in excess of \$ 80,000 under English law.

⁹The Court of Appeals also indicated in passing that even if it took the view that choice-of-forum clauses were enforceable

We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy. For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American [9] company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under [***620] our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the [**1913] doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

LEdHN[1] [1] LEdHN[2] [2] Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy," or that their effect was to "oust the jurisdiction" of the court.¹⁰ Although [10] this view

unless "unreasonable" it was "doubtful" that enforcement would be proper here because the exculpatory clauses would deny Zapata relief to which it was "entitled" and because England was "seriously inconvenient" for trial of the action.

¹⁰Many decisions reflecting this view are collected in Annot., 56 A. L. R. 2d 300, 306-320 (1957), and Later Case Service (1967).

For leading early cases, see, e. g., *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174 (1856); *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N. E. 678 (1916); *Benson v. Eastern Bldg. & Loan Assn.*, 174 N. Y. 83, 66 N. E. 627 (1903).

The early admiralty cases were in accord. See, e. g., *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (CA2 1930); *The Ciano*, 58 F.Supp. 65 (ED Pa. 1944); *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387

apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such *HN1* clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.¹¹ We believe this is the correct doctrine to be followed by federal district courts [***521] sitting in admiralty. It is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), holding that in federal courts a party may validly consent to be sued in a jurisdiction [11] where he cannot be found for service of process through contractual designation of an

(*SDNY 1918*); *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (*SDNY 1889*).

In *In Insurance Co. v. Morse*, 20 Wall. 445 (1874), this Court broadly stated that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Id.*, at 451. But the holding of that case was only that the State of Wisconsin could not by statute force a foreign corporation to "agree" to surrender its federal statutory right to remove a state court action to the federal courts as a condition of doing business in Wisconsin. Thus, the case is properly understood as one in which a state statutory requirement was viewed as imposing an unconstitutional condition on the exercise of the federal right of removal. See, e. g., *Wisconsin v. Philadelphia & Reading Coal Co.*, 241 U.S. 329 (1916).

As Judge Hand noted in *Krønger v. Pennsylvania R. Co.*, 174 F.2d 556 (CA2 1949), even at that date there was in fact no "absolute taboo" against such clauses. See, e. g., *Miltenthal v. Mascaagni*, 183 Mass. 19, 66 N. E. 425 (1903); *Daley v. People's Bldg., Loan & Sav. Assn.*, 178 Mass. 13, 59 N. E. 452 (1901) (Holmes, J.). See also *Cerro de Pasco Copper Corp. v. Knut Knutsen, O. A. S.*, 187 F.2d 990 (CA2 1951).

¹¹E. g., *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (CA3 1966); *Anastasiadis v. S. S. Little John*, 346 F.2d 281 (CA5 1965) (by implication); *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (CA2), cert. denied, 350 U.S. 903 (1955); *Cerro de Pasco Copper Corp. v. Knut Knutsen, O. A. S.*, 187 F.2d 990 (CA2 1951); *Central Contracting Co. v. C. E. Youngdahl & Co.*, 418 Pa. 122, 209 A. 2d 810 (1965).

The *Muller* case was overruled in *Indussa Corp. v. S. S. Ranborg*, 377 F.2d 200 (CA2 1967), insofar as it held that the forum clause was not inconsistent with the "lessening of liability" provision of the Carriage of Goods by Sea Act, 46 U. S. C. § 1303 (8), which was applicable to the transactions in *Muller*, *Indussa*, and *Carbon Black*. That Act is not applicable in this case.

"agent" for receipt of process in that jurisdiction. In so holding, the Court stated:

"It is settled . . . that *HN2* parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be [***1914] served by the opposing party, or even to waive notice altogether." *Id.*, at 315-316.

This approach is substantially that followed in other common-law countries including England.¹² It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws.¹³ It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to [12] have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. *HN3* The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

The argument that such clauses are improper because

¹²In addition to the decision of the Court of Appeal in the instant case, *Unterweser Reederei G. m. b. H. v. Zapata Off-Shore Co.* [*The Chaparral*], [1968] 2 Lloyd's Rep. 158 (C. A.), see e. g., *Mackender v. Feldia A. G.*, [1967] 2 Q. B. 590 (C. A.); *The Fehmam*, [1958] 1 W. L. R. 159 (C. A.); *Law v. Garrett*, [1878] 8 Ch. D. 26 (C. A.); *The Eleftheria*, [1970] P. 94. As indicated by the clear statements in *The Eleftheria* and of Lord Justice Willmer in this case, *supra*, n. 4, the decision of the trial court calls for an exercise of discretion. See generally A. Dicey & J. Morris, *The Conflict of Laws* 979-980, 1087-1088 (8th ed. 1967); Cowen & Mendes da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, 13 Am. J. Comp. Law 179 (1964); Reese, *The Contractual Forum: Situation in the United States*, *id.*, at 187, 190 n. 13; Graupner, *Contractual Stipulations Conferring Exclusive Jurisdiction Upon Foreign Courts in the Law of England and Scotland*, 59 L. Q. Rev. 227 (1943).

¹³*Restatement (Second) of the Conflict of Laws* § 80 (1971); Reese, *The Contractual Forum: Situation in the United States*, 13 Am. J. Comp. Law 187 (1964); A. Ehrenzweig, *Conflict of Laws* § 41 (1962). See also Model Choice of Forum Act (National Conference of Commissioners on Uniform State Laws 1968).

they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause "ousted" the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations [***522] of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, ¹⁴ such [**13] as that involved [**1915] here, should be given full effect. In this case, for example, we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. The *Chaparral* could have been damaged at any point along the route, and there were countless possible ports of refuge. That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities. It cannot be doubted for a moment that the parties sought to provide

¹⁴The record here refutes any notion of overweening bargaining power. Judge Wisdom, dissenting, in the Court of Appeals noted:

"Zapata has neither presented evidence of nor alleged fraud or undue bargaining power in the agreement. Unterweser was only one of several companies bidding on the project. No evidence contradicts its Managing Director's affidavit that it specified English courts 'in an effort to meet Zapata Off-Shore Company half way.' Zapata's Vice President has declared by affidavit that no specific negotiations concerning the forum clause took place. But this was not simply a form contract with boilerplate language that Zapata had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties' signatures. . . ." *428 F.2d 888, 907.*

for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the *Bremen* or *Unterweser* might happen to be found. ¹⁵ The elimination [***523] of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, [**14] commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, ¹⁶ and it would be unrealistic

¹⁵At the very least, the clause was an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves. Moreover, while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. See, e. g., *Tzortzis v. Monark Line A/B*, [1968] 1 W. L. R. 406 (C. A.); see generally 1 T. Carver, *Carriage by Sea* 496-497 (12th ed. 1971); G. Cheshire, *Private International Law* 193 (7th ed. 1965); A. Dicey & J. Morris, *The Conflict of Laws* 705, 1046 (8th ed. 1967); Collins, *Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England*, 2 J. Mar. L. & Comm. 363, 365-370 and n. 7 (1971). It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.

The record contains an affidavit of a Managing Director of Unterweser stating that Unterweser considered the choice-of-forum provision to be of "overriding importance" to the transaction. He stated that Unterweser towage contracts ordinarily provide for exclusive German jurisdiction and application of German law, but that "in this instance, in an effort to meet [Zapata] half way, [Unterweser] proposed the London Court of Justice. Had this provision not been accepted by [Zapata], [Unterweser] would not have entered into the towage contract . . ." He also stated that the parties intended, by designating the London forum, that English law would be applied. A responsive affidavit by Hoyt Taylor, a vice president of Zapata, denied that there were any discussions between Zapata and Unterweser concerning the forum clause or the question of the applicable law.

¹⁶See nn. 14-15, *supra*. Zapata has denied specifically discussing the forum clause with Unterweser, but, as Judge Wisdom pointed out, Zapata made numerous changes in the contract without altering the forum clause, which could hardly have escaped its attention. Zapata is clearly not unsophisticated in such matters. The contract of its wholly owned subsidiary with an Italian corporation covering the contemplated drilling operations in the Adriatic Sea provided

to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations. Under these circumstances, as Justice Karminski reasoned in sustaining jurisdiction over Zapata in the High Court of Justice, "the force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful."

[*15] [*1916] *LEdHN[3]* [3] *LEdHN[4]* [4] Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside. Although their opinions are not altogether explicit, it seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. Accordingly, the case must be remanded for reconsideration.

LEdHN[5] [5] We note, however, that there is nothing in the record presently before us that would support a refusal to enforce the forum clause. The Court of Appeals suggested that enforcement would be contrary to the public policy of the forum under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), because of the prospect that the English courts would enforce the clauses of the towage contract purporting to exculpate Unterweser from liability for damages to the *Chaparral*. A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See, e. g., *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263 (1949). It is clear, however, that whatever the proper scope of the policy expressed in *Bisso*,¹⁷ it does not

that all disputes were to be settled by arbitration in London under English law, and contained broad exculpatory clauses. App. 308-311.

¹⁷ *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) (*per curiam*), merely followed *Bisso* and declined to subject its rule governing towage contracts in American waters to "indeterminate exceptions" based on delicate analysis of the facts of each case. See 372 U.S. at 698 (Hartan, J., concurring).

reach this case. *Bisso* rested on considerations with respect to the towage business strictly in [*16] American waters, and [***524] those considerations are not controlling in an international commercial agreement. Speaking for the dissenting judges in the Court of Appeals, Judge Wisdom pointed out:

"We should be careful not to over-emphasize the strength of the [*Bisso*] policy. . . . Two concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence. . . . Here the conduct in question is that of a foreign party occurring in international waters outside our jurisdiction. The evidence disputes any notion of overreaching in the contractual agreement. And for all we know, the uncertainties and dangers in the new field of transoceanic towage of oil rigs were so great that the tower was unwilling to take financial responsibility for the risks, and the parties thus allocated responsibility for the voyage to the tow. It is equally possible that the contract price took this factor into account. I conclude that we should not invalidate the forum selection clause here unless we are firmly convinced that we would thereby significantly encourage negligent conduct within the boundaries of the United States." 428 F.2d, at 907-908. (Footnotes omitted.)

LEdHN[6] [6] Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be "unreasonable" and unenforceable if the chosen forum is *seriously* inconvenient for the trial of the action. Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of [*1917] inconvenience should be heard to render the forum clause unenforceable. [*17] We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the party claiming should

bear a heavy burden of proof.¹⁸ Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum. For example, so long as *Bisso* governs American courts with respect to the towage business in American waters, it would quite arguably be improper to permit an American towee to avoid that policy by providing a foreign forum for resolution of his disputes with an American towee.

LEdHN[7] [7] This case, however, involves a freely negotiated international [***525] commercial transaction between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly [***18] foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

In the course of its ruling on Unterweser's second motion to stay the proceedings in Tampa, the District Court did make a conclusory finding that the balance of convenience was "strongly" in favor of litigation in Tampa. However, as previously noted, in making that finding the court erroneously placed the burden of proof on Unterweser to show that the balance of convenience was strongly in its favor.¹⁹ Moreover, the finding

¹⁸ See, e. g., Model Choice of Forum Act § 3 (3), *supra*, n. 13, comment: "On rare occasions, the state of the forum may be a substantially more convenient place for the trial of a particular controversy than the chosen state. If so, the present clause would permit the action to proceed. This result will presumably be in accord with the desires of the parties. It can be assumed that they did not have the particular controversy in mind when they made the choice-of-forum agreement since they would not consciously have agreed to have the action brought in an inconvenient place."

¹⁹ Applying the proper burden of proof, Justice Karminski in the High Court of Justice at London made the following findings, which appear to have substantial support in the record:

[***1918] falls far short of a conclusion that Zapata would be effectively deprived of its day in court should it be [***19] forced to litigate in London. Indeed, it cannot even be assumed that it would be placed to the expense of transporting its witnesses to London. It is not unusual for important issues in international admiralty cases to be dealt with by deposition. Both the District Court and the Court of Appeals majority appeared satisfied that Unterweser could receive a fair hearing in Tampa by using deposition testimony of its witnesses from distant places, and there is no reason to conclude that Zapata could not use deposition testimony to equal advantage if forced to litigate in London as it bound itself to do. Nevertheless, to allow Zapata opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of trial in Tampa (that is, that it will be far more inconvenient for Zapata to litigate in London than it will be for Unterweser to litigate in Tampa), but also that a London trial will be so manifestly and gravely [***526] inconvenient to Zapata that it will be effectively deprived of a meaningful day in court, we remand for further proceedings.

LEdHN[8] [8] Zapata's remaining contentions do not require extended treatment. It is clear that Unterweser's action in filing its limitation complaint in the District Court in Tampa was, so far as Zapata was concerned, solely a defensive measure made necessary as a response to Zapata's breach of the forum clause of the contract. When the six-month statutory period for filing an action to limit its liability had almost run without the District Court's having ruled on Unterweser's initial motion to

"[Zapata] pointed out that in this case the balance of convenience so far as witnesses were concerned pointed in the direction of having the case heard and tried in the United States District Court at Tampa in Florida because the probability is that most, but not necessarily all, of the witnesses will be American. The answer, as it seems to me, is that a substantial minority at least of witnesses are likely to be German. The tug was a German vessel and was, as far as I know, manned by a German crew Where they all are now or are likely to be when this matter is litigated I do not know, because the experience of the Admiralty Court here strongly points out that maritime witnesses in the course of their duties move about freely. The homes of the German crew presumably are in Germany. There is probably a balance of numbers in favour of the Americans, but not, as I am inclined to think, a very heavy balance." App. 212.

It should also be noted that if the exculpatory clause is enforced in the English courts, many of Zapata's witnesses on the questions of negligence and damage may be completely unnecessary.

dismiss or stay Zapata's action pursuant to the forum clause, Unterweser had no other prudent alternative but to protect itself by filing for limitation of its liability.²⁰ Its action in so doing was a direct consequence [*20] of Zapata's failure to abide by the forum clause of the towage contract. There is no basis on which to conclude that this purely necessary defensive action by Unterweser should preclude it from relying on the forum clause it bargained for.

LEdHN[9] [9]For the first time in this litigation, Zapata has suggested to this Court that the forum clause should not be construed to provide for an exclusive forum or to include *in rem* actions. However, the language of the clause is clearly mandatory and all-encompassing; the language of the clause in the *Carbon Black* case was far different.²¹

The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Concur by: WHITE

Concur

MR. JUSTICE WHITE, concurring.

I concur in the opinion and judgment of the Court except insofar as the opinion comments on the issues which are remanded to the District Court. In my view these issues are best left for consideration by the District Court in the first instance.

Dissent by: DOUGLAS

Dissent

²⁰Zapata has suggested that Unterweser was not in any way required to file its "affirmative" limitation complaint because it could just as easily have pleaded limitation of liability by way of defense in Zapata's initial action, either before or after the six-month period. That course of action was not without risk, however, that Unterweser's attempt to limit its liability by answer would be held invalid. See G. Gilmore & C. Black, Admiralty § 10-15 (1957). We do not believe this hazardous option in any way deprived Unterweser's limitation complaint of its essentially defensive character so far as Zapata was concerned.

²¹ See 359 U.S., at 182.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner Unterweser contracted with respondent to tow respondent's drilling barge from Louisiana to Italy. The towage contract contained a "forum selection clause" [*21] providing that any dispute [***1919] must be litigated before the High Court of Justice in London, England. While the barge was being towed in the Gulf of Mexico a casualty was suffered. The tow made for Tampa Bay, the nearest port, where respondent brought suit for damages in the District Court.

Petitioners sued respondent in the High Court of Justice in London, which denied respondent's motion to dismiss.

[***527] Petitioners, having previously moved the District Court to dismiss, filed a complaint in that court seeking exoneration or limitation of liability as provided in 46 U. S. C. § 185. Respondent filed its claim in the limitation proceedings, asserting the same cause of action as in its original action. Petitioners then filed objections to respondent's claim and counterclaimed against respondent, alleging the same claims embodied in its English action, plus an additional salvage claim.

Respondent moved for an injunction against petitioners' litigating further in the English case and the District Court granted the injunction pending determination of the limitation action. Petitioners moved to stay their own limitation proceeding pending a resolution of the suit in the English court. That motion was denied. 296 F.Supp. 733.

That was the posture of the case as it reached the Court of Appeals, petitioners appealing from the last two orders. The Court of Appeals affirmed. 428 F.2d 888, 446 F.2d 907.

Chief Justice Taft in *Hartford Accident Co. v. Southern Pacific*, 273 U.S. 207, 214, in discussing the Limitation of Liability Act said that "the great object of the statute was to encourage shipbuilding and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending, in cases of damage or wrong, happening without the privity or [*22] knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this proceeding for limitation of liability is to be found in the general maritime law, differing from the English maritime law; and that such a proceeding is entirely within the constitutional grant of power to

Congress to establish courts of admiralty and maritime jurisdiction."

Chief Justice Taft went on to describe how the owner of a vessel who, in case the vessel is found at fault, may limit his liability to the value of the vessel and may bring all claimants "into concourse in the proceeding, by monition" and they may be enjoined from suing the owner and the vessel on such claims in any other court. Id., at 215.

Chief Justice Taft concluded: "This Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. . . . The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person." Id., at 215-216.

The Limitation Court is a court of equity and traditionally an equity court may enjoin litigation in another court where equitable considerations indicate that the other litigation might prejudice the proceedings in the Limitation Court. [***528] Petitioners' petition for limitation [23] subjects them to the full equitable powers of the Limitation Court.

Respondent is a citizen of this country. Moreover, if it were remitted to the English court, its substantive rights would be adversely affected. Exculpatory [**1920] provisions in the towage control provide (1) that petitioners, the masters and the crews "are not responsible for defaults and/or errors in the navigation of the tow" and (2) that "damages suffered by the towed object are in any case for account of its Owners."

Under our decision in Dixilyn Drilling Corp v. Crescent Towing & Salvage Co., 372 U.S. 697, 698, "a contract which exempts the tower from liability for its own negligence" is not enforceable, though there is evidence in the present record that it is enforceable in England. That policy was first announced in Bisso v. Inland Waterways Corp., 349 U.S. 85; and followed in Boston

Metals Co. v. The Winding Gulf, 349 U.S. 122; Dixilyn, supra; Gray v. Johansson, 287 F.2d 852 (CA5); California Co. v. Jumonville, 327 F.2d 988 (CA5); American S. S. Co. v. Great Lakes Towing Co., 333 F.2d 426 (CA7); D. R. Kincaid, Ltd. v. Trans-Pacific Towing, Inc., 367 F.2d 857 (CA9); A. L. Mechling Barge Lines, Inc. v. Derby Co., 399 F.2d 304 (CA5). Cf. United States v. Seckinger, 397 U.S. 203. Although the casualty occurred on the high seas, the *Bisso* doctrine is nonetheless applicable. The Scotland, 105 U.S. 24; The Belgenland, 114 U.S. 355; The Gylfe v. The Trujillo, 209 F.2d 386 (CA2).

Moreover, the casualty occurred close to the District Court, a number of potential witnesses, including respondent's crewmen, reside in that area, and the inspection and repair work were done there. The testimony of the tower's crewmen, residing in Germany, is already available by way of depositions taken in the proceedings.

[*24] All in all, the District Court judge exercised his discretion wisely in enjoining petitioners from pursuing the litigation in England. "

* It is said that because these parties specifically agreed to litigate their disputes before the London Court of Justice, the District Court, absent "unreasonable" circumstances, should have honored that choice by declining to exercise its jurisdiction. The forum-selection clause, however, is part and parcel of the exculpatory provision in the towing agreement which, as mentioned in the text, is not enforceable in American courts. For only by avoiding litigation in the United States could petitioners hope to evade the *Bisso* doctrine.

Judges in this country have traditionally been hostile to attempts to circumvent the public policy against exculpatory agreements. For example, clauses specifying that the law of a foreign place (which favors such releases) should control have regularly been ignored. Thus, in The Kensington, 183 U.S. 263, 276, the Court held void an exemption from liability despite the fact that the contract provided that it should be construed under Belgian law which was more tolerant. And see E. Gerli & Co. v. Cunard S. S. Co., 48 F.2d 115, 117 (CA2); Oceanic Steam Nav. Co. v. Corcoran, 9 F.2d 724, 731 (CA2); In re Lea Fabrics, Inc., 226 F.Supp. 232, 237 (NJ); F. A. Straus & Co. v. Canadian P. R. Co., 254 N. Y. 407, 173 N. E. 564; Siegelman v. Cunard White Star, 221 F.2d 189, 199 (CA2) (Frank, J., dissenting). 6A A. Corbin on Contracts § 1446 (1962).

The instant stratagem of specifying a foreign forum is essentially the same as invoking a foreign law of construction except that the present circumvention also requires the American party to travel across an ocean to seek relief.

I would affirm the judgment below.

References

Am Jur, Shipping (1st ed 508)

18 Am Jur Pl & Pr Forms, Shipping, Forms 18:791-18:801

US L Ed Digest, Contracts 101; Towage 2

ALR Digests, Contracts 348; Towage 2

L Ed Index to Anno, Shipping

ALR Quick Index, Ships and Shipping

Federal Quick Index, Ships and Shipping

Annotation References:

Validity or enforceability, under Carriage of Goods by Sea Act (46 USCS 1300 et seq.), of clauses in bill of lading or shipping contract as to jurisdiction of foreign courts or applicability of foreign law. 2 ALR Fed 963.

Validity of contractual provision authorizing venue of action in particular place, court, or county. 69 ALR2d 1324.

Validity of contractual provision limiting place or court in which action may be brought. 56 ALR2d 300.

Unless we are prepared to overrule *Bisso* we should not countenance devices designed solely for the purpose of evading its prohibition.

It is argued, however, that one of the rationales of the *Bisso* doctrine, "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains" (349 U.S., at 91), does not apply here because these parties may have been of equal bargaining stature. Yet we have often adopted prophylactic rules rather than attempt to sort the core cases from the marginal ones. In any event, the other objective of the *Bisso* doctrine, to "discourage negligence by making wrongdoers pay damages" (*ibid.*) applies here and in every case regardless of the relative bargaining strengths of the parties.

[Civ. No. 51811. First Dist., Div. Four. Aug. 15, 1983.]

**WORLD WIDE IMPORTS, INC., Plaintiff and Respondent, v.
PEGGY BARTEL et al., Defendants and Appellants.**

SUMMARY

Plaintiff filed an action for breach of contract against defendants in the State of Washington. Defendants appeared and made a belated request for a jury trial. After the matter came up for trial, the court ruled that defendants had waived their right to a jury trial by failure to comply with Washington court rules. A court trial was held and a money judgment was entered against defendants. Plaintiff initiated an action in California to enforce the Washington judgment under the Uniform Sister State Money Judgments Act (Code Civ. Proc., § 1710.10 et seq.). After the clerk entered a "judgment on the sister state judgment" in accordance with the uniform act, defendants moved to vacate the sister state judgment on the basis that the Washington judgment was unenforceable in California because it had been rendered in violation of defendants' constitutional right to a jury trial. The superior court denied defendants' motion. (Superior Court of the City and County of San Francisco, No. 769846, Ira A. Brown, Jr., Judge.)

The Court of Appeal affirmed. The court held that the Washington judgment was entitled to full faith and credit and therefore could not be vacated under Code Civ. Proc., § 1710.40, despite defendants' claim it violated a fundamental California public policy which favors a jury trial and interprets a waiver of jury more liberally than the laws of the State of Washington, since the Washington court had the requisite fundamental jurisdiction in the action and the questions raised in the suit had been fully and fairly litigated and finally decided by the foreign forum, since differing public policy or laws of the enforcing state cannot contravene the full faith and credit clause of the Constitution, and since the gist of defendants' claim was clearly a procedural matter which is determined by the local rules of the forum state. (Opinion by Caldecott, P. J., with Poché, J., and Schwartz, J.,* concurring.)

*Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) Judgments § 101—Enforcement—Foreign Judgments—Uniform Sister State Money Judgments Act—Vacation of Judgment—Public Policy.—In proceedings to enforce a Washington judgment under the Uniform Sister State Money Judgments Act (Code Civ. Proc., § 1710.10 et seq.), the judgment was entitled to full faith and credit and could not be vacated under Code Civ. Proc., § 1710.40, despite a claim it violated a fundamental California public policy which favors a jury trial and interprets a waiver of jury more liberally than the State of Washington. The Washington court had the requisite fundamental jurisdiction in the action—it had indisputable jurisdiction over both subject matter and the persons, and the parties who appeared and in fact litigated the matter in the State of Washington were given not only reasonable notice, but also ample opportunity to defend the case against themselves. Furthermore, the differing public policy or laws of the enforcing state cannot contravene the full faith and credit clause of the Constitution. Finally, the gist of defendants' claim was that, while both Washington and California guarantee the right to a jury trial, the waiver of jury trial was tested by less demanding standards on appeal in Washington than in California, and this was clearly a procedural matter which was determined by the local rules of the forum state.

[See Cal.Jur.3d, Enforcement of Judgments, § 277; Am.Jur.2d, Judgments, §§ 905, 906.]

- (2) Judgments § 101—Enforcement—Foreign Judgments—Full Faith and Credit—Permissible Scope of Inquiry.**—Upon a claim that a foreign judgment is not entitled to full faith and credit, the permissible scope of inquiry is limited to a determination of whether the court of forum had fundamental jurisdiction in the case. Accordingly, a judgment entered by one state must be recognized by another state if the state of rendition had jurisdiction over the parties and the subject matter and all interested parties were given reasonable notice and an opportunity to be heard.
- (3) Judgments § 101—Enforcement—Foreign Judgments—Recognition—Policy Objections.**—California courts must, regardless of policy objections, recognize the judgment of another state as res judicata, even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of California.

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- (4) **Conflict of Laws § 1—Enforcement of Substantive and Procedural Rights.**—While the courts generally enforce the substantive rights created by the laws of other jurisdictions, the procedural matters are governed by the law of the forum. The terms “practice” and “procedure” include the mode of procedure by which a legal right is enforced as distinguished from the substantive law which gives or declares the right.
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COUNSEL

Cartwright, Sucherman, Slobodin & Fowler, Robert E. Cartwright and Dennis Kruszynski for Defendants and Appellants.

Richard Haas, William E. Mussman III and Lasky, Haas, Cohler & Munter for Plaintiff and Respondent.

OPINION

CALDECOTT, P. J.—This is an appeal from an order denying motion to vacate a sister state money judgment.

The parties to the action are plaintiff World Wide Imports, Inc., a Washington corporation (hereinafter respondent), engaged in selling wholesale jewelry, and defendants Peggy Bartel and Harry Glassman, California residents (hereafter appellants), in the business of buying wholesale jewelry.

In 1977 and 1978, appellants bought jewelry on credit from respondent in Seattle, Washington. When they refused to pay the purchase price, on October 5, 1978, respondent brought an action against them in the Superior Court of King County, State of Washington, alleging that in violation of the contract, appellants failed to pay the agreed upon price of \$18,286.45.

On December 28, 1978, the matter was set for trial for September 27, 1979. The same day the parties signed a “Stipulation for Agreed Setting,” stating that the “case is Nonjury.” In Washington, the right to jury trial is preserved only if, at the time of filing the “Stipulation for Agreed Setting,” a written demand for jury is filed and a jury fee is deposited by the party (Wash. Civ. Rules for Super. Ct., rule 38(b); see also Wash. Rev. Code, § 36.18.020(5)). Appellants concede that they did not demand a jury trial or deposit the jury fee at either the time of filing the “Stipulation for Agreed

Setting" on January 3, 1979, or at the granting of two continuances on September 17, 1979, and October 5, 1979, respectively. Appellants made a belated request for a jury trial only on March 5, 1980, when they requested a third continuance.

After the matter came up for trial on May 5, 1980, the court ruled that appellants had waived their right to a jury trial by a failure to comply with rule 38(b), which requires that a written demand for a jury shall be made and jury fees posted at the time the case is first set for trial. Thereupon a court trial was held at the conclusion of which money judgment was entered against appellants in the sum of \$16,956.60.

Appellants failed to move for a new trial and/or appeal the judgment in the forum state. Rather they attacked the judgment collaterally when respondent initiated an action in California in order to enforce the Washington judgment under the Uniform Sister State Money Judgments Act (Uniform Act). (Cal. Code Civ. Proc., § 1710.10 et seq.)¹ After the clerk of the San Francisco Superior Court entered a "judgment on the sister state judgment" in accordance with the Uniform Act, appellants moved to vacate the sister state judgment on the basis that the Washington judgment was unenforceable in California because it had been rendered in violation of appellants' constitutional right to a jury trial. After a hearing and legal arguments of the parties, the superior court denied appellants' motion. The present appeal followed.

(1a) Repeating their argument made in the trial court appellants contend on appeal that the Washington judgment was not entitled to full faith and credit and should have been vacated under section 1710.40, because it violated a fundamental California public policy which favors a jury trial and interprets the waiver of jury more liberally than the laws of the State of Washington.

In addressing appellants' contention, we initially point out that a sister state money judgment entered pursuant to the provisions of the Uniform Act may be vacated in California only when the statutory ground or grounds therefor have been established. Section 1710.40 provides in relevant part that "A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment." In elaborating on the defense available under section 1710.40, the Law Revision Commission makes the following comment: "Common defenses to enforcement of a sister state judgment include the following: the

¹Unless otherwise indicated, all further references will be made to the California Code of Civil Procedure.

judgment is not final and unconditional (where finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated); the judgment was obtained by extrinsic fraud; the judgment was rendered in excess of jurisdiction; the judgment is not enforceable in the state of rendition; the plaintiff is guilty of misconduct; the judgment has already been paid; suit on the judgment is barred by the statute of limitations in the state where enforcement is sought." (19A West's Ann. Codes (1982) p. 694; accord: 5 Witkin, Cal. Procedure (2d ed. 1971) Enforcement of Judgment, §§ 194-195, pp. 3549-3550; Rest.2d Conf. of Laws, §§ 103-121.)

Appellants candidly concede that none of the defenses enumerated above are available in this case and that based upon the traditional legal principles they are entitled to no relief. Appellants insist, however, *Thomas v. Washington Gas Light Co.* (1980) 448 U.S. 261 [65 L.Ed.2d 757, 100 S.Ct. 2647], a case recently decided by the Supreme Court, has radically changed the existing law and that case permits the denial of enforcement of a foreign judgment if the latter violates a fundamental public policy of the enforcing state. Since in the case at bench, continue appellants, the *Washington* procedure, in essence, denied their right to a jury trial and the judgment so rendered is thus violative of a fundamental California public policy favoring trials by the jury, California should not give full faith and credit to the sister state money judgment. Appellants' contention is unfounded and must be rejected for a variety of reasons.

(2) To start with, the law is well established that upon a claim that a foreign judgment is not entitled to full faith and credit, the permissible scope of inquiry is limited to a determination of whether the court of forum had fundamental jurisdiction in the case. Accordingly, a judgment entered by one state must be recognized by another state if the state of rendition had jurisdiction over the parties and the subject matter and all interested parties were given reasonable notice and opportunity to be heard. (*Durfee v. Duke* (1963) 375 U.S. 106, 116 [11 L.Ed.2d 186, 193-194, 84 S.Ct. 242]; *Miliken v. Meyer* (1940) 311 U.S. 457, 462 [85 L.Ed. 278, 282-283, 61 S.Ct. 339, 132 A.L.R. 1357]; *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725 [285 P.2d 636]; *Thorley v. Superior Court* (1978) 78 Cal.App.3d 900, 907-908 [144 Cal.Rptr. 557].) (1b) In the case at bench, the Washington court had indisputable jurisdiction over both subject matter, and the persons and the parties who appeared and in fact litigated the matter in the State of Washington were given not only reasonable notice, but also ample opportunity to defend the case against themselves. In short, since in the present instance the sister state court had the requisite fundamental jurisdiction in the action and the questions raised in the suit have

been fully and fairly litigated and finally decided by the foreign forum, we cannot but accord full faith and credit to the judgment at issue.

Second, contrary to appellants' argument, the California law is clear that the differing public policy or laws of the enforcing state cannot contravene the full faith and credit clause of the Constitution. (3) As has been repeatedly stated, California must, regardless of policy objections, recognize the judgment of another state as *res judicata*, and this is so even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of California. (*New York Higher Education Assistance Corp. v. Siegel* (1979) 91 Cal.App.3d 684, 688 [154 Cal.Rptr. 200]; *Harrah v. Craig* (1952) 113 Cal.App.2d 67 [247 P.2d 855]; 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 19, pp. 3262-3263.) This is in harmony with Restatement Second of Conflict of Laws, section 117, which sets forth that: "A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State *even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.*" (Italics added.)

Third, *Thomas v. Washington Gas Light Co.* does not change the basic rules set out above and does not stand for the proposition that the contrary public policy of the enforcing state constitutes a bar to according full faith and credit to a foreign judgment. *Washington Gas* dealt with the narrow issue of whether the workers' compensation award granted to the injured employee by an administrative board of one state has prevented the employee from seeking a supplemental award in another state under the full faith and credit clause of the Constitution. In answering this question in the negative, the Supreme Court first reiterated the long established law that the judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced (*Thomas v. Washington Gas Light Co.*, *supra*, 448 U.S. at p. 270 [65 L.Ed.2d at p. 766]). However, due to the peculiar nature of the workers' compensation,² the court allowed the supplemental award in another state by emphasizing that "the critical differences between a court of

²As the court noted: "The reason for this is the special nature of a workmen's compensation remedy. It is not merely a grant of a lump-sum award at the end of an extended adversary proceeding. See 4 A. Larson § 84.20, at 16-9: '[A] highly developed compensation system does far more than that. It stays with the claimant from the moment of the accident to the time he is fully restored to normal earning capacity. This may involve supervising an ongoing rehabilitation program, perhaps changing or extending it, perhaps providing, repairing, and replacing prosthetic devices, and supplying vocational rehabilitation. Apart from rehabilitation, optimum compensation administration may require reopening of the award from time to time for change of condition or for other reasons. . . ." (*Thomas v. Washington Gas Light Co.*, *supra*, 448 U.S. at p. 282, fn. 28 [65 L.Ed.2d at p. 774].)

general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards." (Pp. 281-282 [65 L.Ed.2d, p. 773].) In short, *Washington Gas* is confined to the unique subject of workers' compensation and deals with an award made by an administrative agency, not with a judgment rendered by a court of general jurisdiction. As a consequence, it is clearly inapplicable to the factual situation here presented.

But even aside from the aforesaid reasons, there is an additional, independent ground upon which appellants' claim must be rejected.

(4) It is well established that while the courts generally enforce the substantive rights created by the laws of other jurisdictions, the procedural matters are governed by the law of the forum (*Bernkrant v. Fowler* (1961) 55 Cal.2d 588 [12 Cal.Rptr. 266, 360 P.2d 906]; *Grant v. McAuliffe* (1953) 41 Cal.2d 859 [264 P.2d 944, 42 A.L.R.2d 1162]; *Roberts v. Home Ins. Indem. Co.* (1975) 48 Cal.App.3d 313 [121 Cal.Rptr. 862]; Rest.2d Conf. of Laws, § 122; 12 Cal.Jur.3d, Conflicts of Laws, § 105, p. 608).³ As defined in the case law, the terms "practice" and "procedure" include the mode of procedure by which a legal right is enforced as distinguished from the substantive law which gives or declares the right. (*Bohme v. Southern Pac. Co.* (1970) 8 Cal.App.3d 291, 298 [87 Cal.Rptr. 286]; *Woodward v. Southern Pac. Co.* (1939) 35 Cal.App.2d 130, 137-138 [94 P.2d 1028]; *King v. Schumacher* (1939) 32 Cal.App.2d 172, 181 [89 P.2d 466].)

(1c) In the instant case, the gist of appellants' claim is that while both Washington and California guarantee the right to a jury trial (Cal. Const., art I, § 7; Code Civ. Proc., § 631; Wash. Const., art. I, § 21; Wash. Rev. Code Civ. Proc., § 4.44.100), the waiver of jury trial is tested by less demanding standards on appeal in Washington than in California (cf. *Tobacco v. Rubatino* (1950) 35 Wn.2d 398 [212 P.2d 1019]; *Hoye v. Century Builders, Inc.* (1958) 52 Wn.2d 830 [329 P.2d 474], with *De Castro v.*

³The rationale why the law of the forum governs all matters of pleading and conduct of proceedings in the court is well illustrated by comment a to Restatement Second of Conflict of Laws, section 122, which states as follows: "Each state has local law rules prescribing the procedure by which controversies are brought into its courts and by which the trial of these controversies is conducted. These rules for conducting lawsuits and administering the courts' processes vary from state to state. The forum has compelling reasons for applying its own rules to decide such issues even if the case has foreign contacts and even if many issues in the case will be decided by reference to the local law of another state. The forum is more concerned with how its judicial machinery functions and how its court processes are administered than is any other state. Also, in matters of judicial administration, it would often be disruptive or difficult for the forum to apply the local law rules of another state. The difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state's local law is designed to promote."

Rowe (1963) 223 Cal.App.2d 547 [36 Cal.Rptr. 53]; *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472 [116 P.2d 109]). That this is clearly a procedural matter which is determined by the local rules is well illustrated by *Bohme v. Southern Pac. Co.*, *supra*, 8 Cal.App.3d 291, where in an analogous situation the court stated: "The process of determining on appeal whether error was committed by the trial court during the trial of the cause, and if so, whether such error is prejudicial and therefore constitutes a ground for reversal, is a matter of practice and procedure." (Pp. 297-298.)

In summary, appellants' basic contention is that a fundamental California public policy guaranteeing the right to a jury trial has been violated. We cannot say because the State of Washington's policy on withdrawal of a waiver of jury trial is not as liberal as California's that this amounts to a violation of a fundamental public policy that would excuse compliance with the United States Constitution.

In light of our conclusion the other issues raised by the parties need not be discussed.

The judgment is affirmed.

Poché, J., and Schwartz, J.,* concurred.

A petition for a rehearing was denied August 25, 1983.

*Assigned by the Chairperson of the Judicial Council.



Wright v. Yackley

United States Court of Appeals for the Ninth Circuit

April 20, 1972

No. 25710

Reporter

459 F.2d 287; 1972 U.S. App. LEXIS 9993; 15 Fed. R. Serv. 2d (Callaghan) 1520

Mina WRIGHT, Plaintiff-Appellant, v. James YACKLEY,
Defendant-Appellee

Disposition: [**1] Affirmed

Core Terms

prescriptions, due process, forum state, consequences, services, mailing, medical services, effects, long-arm, resident, factors, patient

Case Summary

Procedural Posture

Appellant patient sought review of an order of the United States District Court for the District of Idaho that dismissed her medical malpractice action against appellee doctor based on lack of personal jurisdiction.

Overview

Appellant patient was treated by appellee doctor in South Dakota. Appellee prescribed medicine for appellant and renewed the prescriptions for her when she moved to Idaho. Appellant filed a medical malpractice suit against appellee claiming she was injured by use of the prescribed drugs. The district court dismissed the suit for lack of personal jurisdiction, and appellant sought review. The court held that exercise of jurisdiction over appellee would have been unreasonable. Appellee made no systematic or continuing effort to provide services in Idaho. Appellant's residency had no relevance to the services provided by appellee, who did not purposefully avail himself of the privilege of conducting business within Idaho. The interest of Idaho in protecting its citizens was outweighed by the citizens' access to medical services wherever needed. The court concluded that no tort was committed within Idaho that would constitutionally confer jurisdiction under the state long arm statute, Idaho Code

§ 5-514. The mere foreseeability that appellant would return to Idaho was insufficient to make Idaho's exercise of jurisdiction over appellee proper. Thus, the order of dismissal was affirmed.

Outcome

The order dismissing appellant patient's medical malpractice action against appellee doctor was affirmed because the exercise of personal jurisdiction over appellee in Idaho would have been unreasonable and unconstitutional; appellee did not make a systematic effort to provide services in Idaho, did not purposefully avail himself of conducting business in Idaho, and committed no tort in Idaho.

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1 See Idaho Code § 5-514.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2 A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Governments > Legislation > Interpretation

HN3 Idaho Code §§ 5-514 through 5-517 are designed

to provide a forum for Idaho residents. As such, the law is remedial legislation of the most fundamental nature. It is to be liberally construed. The legislature, in adopting Idaho Code §§ 5-514 through 5-517, intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN4 The due process test must be a flexible one that will consider the various circumstances of a particular case. Due process requires that the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The criteria cannot be simply mechanical or quantitative. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. The ultimate question, then, is reasonableness.

Judges: Merrill and Ely, Circuit Judges, and Jameson, District Judge.

Opinion by: MERRILL

Opinion

[*288] MERRILL, Circuit Judge:

Appellant here appeals from dismissal of a medical malpractice action. She brought the action in the District Court for the District of Idaho and asserted jurisdiction on grounds of diversity of citizenship.

While a resident of South Dakota appellant had been treated by appellee, a South Dakota doctor, and at his direction was taking drugs acquired by prescriptions permitting unlimited refills. She moved from South Dakota to Idaho and, four months after appellee had last treated her, she sought to have the prescriptions refilled at an Idaho drugstore on the basis of copies of the prescriptions issued by a South Dakota drugstore. The druggist advised her that to continue to honor unlimited refill prescriptions he would require confirmation of the prescriptions from the doctor. Appellant then wrote appellee, and at her request (without charge) appellee

furnished copies of the original prescriptions. This satisfied the druggist. [*2] Appellant alleges that eventually she was injured by use of the drugs.

The District Court dismissed the action for lack of jurisdiction over the person of the defendant-appellee. On appeal the question presented is whether Idaho's long-arm statute provided jurisdiction to sue the South Dakota doctor in an Idaho court. Idaho Code §§ 5-514 to 5-517.¹ [*3] If so, Rule 4(e) of the Federal Rules of Civil Procedure provides that he could be properly served in accordance with Idaho procedure so as to permit the Federal District Court in Idaho to entertain the suit despite service in South Dakota.² The principal issue raised by the attempted application of the Idaho statute is whether, assuming a tortious act was committed within the State of Idaho,³ the asserted long

¹ That portion of Idaho's long-arm statute which is relevant to our discussion on this appeal is HN1 Idaho Code § 5-514. It provides that: "Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;

(b) The commission of a tortious act within this state;

• • •

² See Martens v. Winder, 341 F.2d 197, 199 (9th Cir.), cert. denied, 382 U.S. 937, 86 S. Ct. 391, 15 L. Ed. 2d 349 (1965); Swanson Painting Co. v. Painters Local No. 260, 391 F.2d 523, 524 (9th Cir. 1968).

³ In Doggett v. Electronics Corp. of America, 93 Idaho 26, 28-29, 454 P.2d 63, 65-66 (1969), the Idaho Supreme Court construed the Idaho statutory provision extending jurisdiction over a person who commits a tortious act "within the state" — § 5-514(b), quoted in note 1 *supra* — to include nonresidents whose actions taken outside Idaho result in injury to persons in Idaho. Pointing out that the Idaho act was based on the Illinois long-arm statute, the court followed the lead of Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961). See also B.B.P. Ass'n, Inc. v. Cessna Aircraft Co., 91 Idaho 259, 264-265, 420 P.2d 134, 139-140

* Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

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-arm jurisdiction would be contrary to constitutional principles of due process.

If appellee was guilty of malpractice, it was through acts of diagnosis and prescription performed in South Dakota. The [**4] mailing of the prescriptions to Idaho did not constitute new prescription. [**289] It was not diagnosis and treatment by mail. It was simply confirmation of the old diagnosis and prescription and was recognized by the druggist as such. It did, of course, put the doctor on notice that consequences of his South Dakota services would be felt in Idaho and that it was by his very act of mailing that this would be made possible. In our view however, this does no more than put the doctor in the position of one who, in South Dakota, treats an Idaho resident with knowledge of her imminent return to Idaho and that his treatment thus may cause effects there. ⁴

[**5] With reference to such a situation, § 37 of the Restatement (Second) of Conflict of Laws (1971) states the rule:

"HN2 A state has power to exercise judicial jurisdiction over an individual who causes effects in

(1966).

⁴If the malpractice charge in this case were to be founded solely on the act of mailing copies of the earlier prescriptions to Idaho, we think exercise of long-arm jurisdiction would violate due process. The mailing was an isolated act, providing only minimal contact between the forum state and the nonresident doctor. See International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Its alleged consequences in Idaho were not intended by appellee. While those consequences may have been foreseeable, something more than foreseeability was required in this case where no benefit was to be derived by the doctor from his single, unsolicited connection with Idaho. Compare McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969); Jones Enterprises, Inc. v. Atlas Service Corp., 442 F.2d 1136 (9th Cir. 1971).

The balance of factors involved in a due process determination might be different if a doctor could be said to have treated an out-of-state patient by mail or to have provided a new prescription or diagnosis in such fashion. In that event, the forum state's interest in deterring such interstate medical service would surely be great. Here, however, the mailing of the copies was simply reflective of, and indeed a part of, the earlier treatment and prescription. See discussion in text *infra*.

the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." ⁵

The question is whether Idaho (assuming its acceptance of this general proposition) ⁶ may apply the rule in such a fashion as to confer jurisdiction upon its courts in such a case as this. In our judgment it could not; the exercise of jurisdiction in these circumstances would be unreasonable and in fact would work contrary to what we deem to be the dominant state interest.

[**6] In the case of personal services focus must be on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need. The need is personal and the services rendered are in response to the dimensions of that personal need. They are directed to no place but to the needy person herself. It is in the very nature of such services that their consequences will be felt wherever the person may choose to go. However, the idea that tortious rendition of such services is a [**290] portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available. Medical services in particular should not be proscribed by the doctor's

⁵Reasonableness is a convenient shorthand for the various factors that must be considered in a determination as to compliance with due process. See note 7 *infra*.

⁶See Doggelt v. Electronics Corp. of America, 93 Idaho 26, 30, 454 P.2d 63, 67 (1969), where the Idaho Supreme Court stated:

"HN3 §§ 5-514 through 5-517 are designed to provide a forum for Idaho residents. As such, the law is remedial legislation of the most fundamental nature. It, therefore, is to be liberally construed. * * * Under the circumstances we believe that the legislature, in adopting I.C. §§ 5-514 through 5-517, intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution." (emphasis supplied)

See also B.B.P. Ass'n, Inc. v. Cessna Aircraft Co., 91 Idaho 259, 264, 420 P.2d 134, 139 (1966); Peterson, Jurisdiction of Idaho Courts Over Nonresidents, 36 Idaho State Bar Proceedings 58, 64 (1962).

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concerns as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it. The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, [**7] rather than by geography.

This focus on the provision of medical services in the location where they are needed leads to the conclusion that the exercise of *in personam* jurisdiction in this situation would be unreasonable in terms of certain of the factors that must be balanced to determine compliance with due process.⁷ First, the amount of contact between defendant and forum state is determined by the chance occurrence of a resident of the forum state seeking treatment by the doctor while in the latter's state. From the very nature of the average doctor's localized practice, there is no systematic or continuing effort on the part of the doctor to provide services which are to be felt in the forum state. Compare *International Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[**8] Second, the nature of the contacts is normally grounded outside of any relationship with the forum

⁷ See *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965) (Blackmun, J.); *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 323 F. Supp. 996, 998-999 (D.Colo.), aff'd, 449 F.2d 775 (10th Cir. 1971). That *HN4* the due process test must be a flexible one that will consider the various circumstances of a particular case was made evident in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). There the Supreme Court provided an inherently general formulation; it said due process requires that the defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316, 66 S. Ct. at 158. Further, it stated that:

"The criteria * * * cannot be simply mechanical or quantitative * * * Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

Id. at 319, 66 S. Ct. at 159-160. See also *L. D. Reeder Contractors v. Higgins Industries, Inc.*, 265 F.2d 768, 772 (9th Cir. 1959) ("The ultimate question, then, is reasonableness.")

state. Unlike a case involving voluntary, interstate economic activity, for example, which is directed at various states in order to benefit from effects sought in those states, compare *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969); *Jones Enterprises, Inc. v. Atlas Service Corp.*, 442 F.2d 1136 (9th Cir. 1971), here the residence of a recipient in the forum state is irrelevant and incidental to the benefits provided by the defendant in his location. See *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 649, 438 P.2d 128, 134 (1968); *Developments in the Law – State-Court Jurisdiction*, 73 Harv.L.Rev. 909, 929 (1960). Thus the defendant is not one who "purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958). Nor are medical services comparable to acts performed [**9] by a nonresident for the very purpose of having their consequences felt in the forum state. See Currie, *The Growth of the Long Arm*, 1963 Ill.L.Forum 533, 549; Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L.Rev. 249, 260-61 (1959).

Finally, the forum state's natural interest in the protection of its citizens is [**91] here countered by an interest in their access to medical services whenever needed. In our opinion, a state's dominant interest on behalf of its citizens in such a case as this is not that they should be free from injury by out-of-state doctors, but rather that they should be able to secure adequate medical services to meet their needs wherever they may go. This state interest necessarily rejects the proposition that the sufficiency of out-of-state treatment is subject to in-state inquiry. Thus, state interest in general, another of the factors relevant to a due process inquiry, see *McGee v. International Life Ins. Co.*, supra, 355 U.S. at 223, 78 S. Ct. 199, 2 L. Ed. 2d 223; *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965), does not, in combination [**10] with the character of the other factors, suffice to support jurisdiction.

We conclude that no tort was committed within the State of Idaho which would constitutionally confer jurisdiction under that state's long-arm statute. In terms of the constitutional translation offered by the Restatement, *supra*, the relationship between Idaho and appellee makes such jurisdiction unreasonable. Given the costs discussed above of extending Idaho's reach, mere foreseeability of the alleged effects occurring in Idaho is insufficient in the over-all context of appellee's South

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Dakota activity.⁸

We find no merit in appellant's contention that appellee's gratuitous act of accommodation constituted the transaction of business within the State of Idaho such as to confer jurisdiction under Idaho Code § 5-514(a), *supra* at note 1.

jurisdiction. See Hays v. United Fireworks Mfg. Co., 420 F.2d 836, 844 & 844 n.10 (9th Cir.1969).

Judgment affirmed.

Nor do we find merit in her contention that appellee voluntarily submitted [**11] to the jurisdiction of the Idaho District Court through general appearance. Rule 12 of the Federal Rules of Civil Procedure has abolished the formal distinction between general and special appearances.⁹ [**12] What is required under Rule 12(g), (h) is that the defense of lack of jurisdiction over the person be raised by pre-answer motion or in the answer itself no later than the raising of other defenses under Rule 12.¹⁰ This appellant did. He raised all his Rule 12 defenses in a single motion to dismiss.¹¹ Such a consolidation of defenses properly presented the particular defense of lack of *in personam*

⁸ See generally Jack O'Donnell Chevrolet, Inc. v. Shankles, 276 F. Supp. 998, 1004 (N.D.Ill.1967).

⁹ Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir.), cert. denied, 322 U.S. 740, 64 S. Ct. 1057, 88 L. Ed. 1573 (1944); Martens v. Winder, 341 F.2d 197, 200 (9th Cir.), cert. denied, 382 U.S. 937, 86 S. Ct. 391, 15 L. Ed. 2d 349 (1965); Davenport v. Ralph N. Peters & Co., 386 F.2d 199, 204 (4th Cir. 1967); see Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 243 n. 2 (9th Cir. 1967); 2A Moore's Federal Practice para. 12.12, at 2324-25 (2d ed. 1968); 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1344 (1969).

Despite appellant's suggestion that Idaho law is determinative, it has been recognized that the federal rules govern such a clearly procedural matter as the making of defense appearances in response to a complaint. Neifeld v. Steinberg, 438 F.2d 423, 426 (3d Cir. 1971); C. Wright & A. Miller, *supra*, § 1343.

¹⁰ See Hays v. United Fireworks Mfg. Co., 420 F.2d 836, 844 (9th Cir. 1969); Guardian Title Co. v. Sulmeyer, 417 F.2d 1290 (9th Cir. 1969); 2A Moore's Federal Practice paras. 12.01 [33], 12.07 [3] at 2264-65 (2d ed. 1968); C. Wright & A. Miller, *supra* note 9, §§ 1342, 1360, 1386.

¹¹ In addition to lack of jurisdiction over the person, appellee's motion to dismiss asserted insufficiency of process, lack of jurisdiction over the subject-matter, failure to join an indispensable party, and failure to state a claim upon which relief could be granted.

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