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NINTH CIRCUIT COURT OF APPEAL

Doe v. Holder **BIA** **Immigration Law** **12804**

Russian homosexual demonstrated government's inability or unwillingness to control nongovernmental actors who engaged in persecution (Alarcon, J.)

Mondragon v. Capital One Auto Finance **S.D. CA** **Consumer Protection** **12809**

Lack of necessary evidence on disputed citizenship of prospective class members supported order remanding putative consumer class action to state court (Clifton, J.)

Makaeff v. Trump University, LLC **S.D. CA** **12812**

Order denying the petition for rehearing en band

NINTH CIRCUIT BANKRUPTCY APPELLATE PANEL

In re Montano **N.D. WA** **Bankruptcy** **12820**

California law precluded creditor's claim to except junior residential purchase loan from discharge on basis of fraud in inducement (Pappas, J.)

SUPREME COURT OF CALIFORNIA

Barry v. State Bar of California **C.A. 2nd** **12833**

Petition for review granted: Can a SLAPP plaintiff avoid the penalties provided for in the anti-SLAPP statute by filing the SLAPP action in a court that lacks jurisdiction to hear the matter?

California Building Industry Association v. Bay Area Air Quality Management District **C.A. 1st** **12833**

Petition for review granted: Under what circumstances, if any, does the California Environmental Quality Act require an analysis of how existing environmental conditions will impact future residents or users of a proposed project?

People v. Aguilar **C.A. 1st** **12834**

Petition for review granted: Does the California Supreme Court's recent decision requiring contemporary objection to the imposition of a criminal justice administration fee apply to court-ordered payment of attorney fees? Does the decision apply only to challenges based on the absence of findings with respect to the defendant's ability to pay, or does it apply to all appellate challenges?

People v. Trujillo **C.A. 6th** **12834**

Petition for review granted: Does a failure to object to a presentence investigation fee and probation supervision forfeit a claim on appeal of failure to make a finding of ability to pay?

Beauchamp v. City of Long Beach **12835**

Grant of request for answer on question of California law: How broadly is the term "each offense" to be construed for purposes of assessing damages for violation of California's Disabled Persons Act? Would a broad construction violate the due process clause of the California Constitution?

CONTINUED ON NEXT PAGE

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SUMMARIES

Bankruptcy & Creditors and Debtors Rights

California law precluded creditor's claim to except junior residential purchase loan from discharge on basis of fraud in inducement (Pappas, J.)

In re Montano

9th Cir. B.A.P.; November 1, 2013; 13-1173

The Bankruptcy Appellate Panel affirmed a bankruptcy court judgment. The court held that a creditor's claim to except a junior residential purchase loan from discharge on the basis of fraud was barred by California law shielding purchasers of owner-occupied property from claims of fraud in the inducement on loans of less than $150,000. The court held further that the bankruptcy court did not err in awarding the prevailing debtor recovery of his attorney fees where the creditor proceeded on its claim absent evidence that the original lender issued the loan in reasonable reliance on the debtor's purported misrepresentations.

Jesus Montano had minimal English language skills when he bought a house in Oakland, California. Montano arranged financing through a mortgage broker, who in turn obtained approvals from WMC Mortgage Corporation for a primary purchase loan of $348,750 and a second purchase loan of $89,990. Montano's Universal Residential Loan Application (URLA), however, contained false information about the sources and amounts of his income. Montano later asserted that the false information was generated by the mortgage broker without his knowledge.

After several months Montano defaulted on the primary loan. WMC foreclosed under the first priority deed of trust and the property was sold.

The then-unsecured second loan note was purchased by Heritage Pacific Financial, Inc. Upon allegedly discovering that Montano misrepresented his income on the URLA, Heritage sued Montano in California state court, contending that he obtained the second loan by fraud.

Montano filed a chapter 7 bankruptcy petition. Heritage initiated an adversary proceeding, asking for a determination that its claim based upon the second note was excepted from discharge for fraud pursuant to Bankruptcy Code §§523(a)(2)(A) and (B). The bankruptcy court ultimately granted summary judgment in favor of Montano, dismissing Heritage's complaint pursuant to California Code of Civil Procedure §§726(f) and (g).

The Bankruptcy Appellate Panel affirmed, holding that the bankruptcy court did not err in granting Montano's motion for summary judgment against Heritage because §726 barred enforcement of Heritage's claim.

The panel observed that §§726(f) and (g) are part of a maze of elaborate and interrelated foreclosure and antideficiency statutes in California relating to the enforcement of obligations secured by interests in real property. Section 726 provides generally that a lender's primary, and sometimes only, remedy to collect a mortgage loan is foreclosure, subject to a right to seek a personal judgment against the borrower for any deficiency.

Under Code of Civil Procedure §580b, no deficiency judgment can be obtained under a deed of trust on a residential dwelling occupied by the buyer. But §726(f) provides an exception where the action is premised on fraud and a borrower's fraudulent conduct in inducing the original lender to make the loan. That exception is itself subject to an exception under §726(g), which says that §726(f) does not apply to loans for single-family, owner-occupied residential real property when the properly is actually occupied by the borrower and the loan is for no more than $150,000.

The court concluded that §726(g) applied in Montano's case, so that enforcement of the WMC second loan was subject to the one-action rule and to the antideficiency statutes.

Contrary to Heritage's argument, California case authority was clear that the deficiency action bar under §726(b), and subject to §580b, applies to holders of purchase money second mortgage loans.

It was true that, fairly read, §726(f) creates an exception to the general rule barring deficiency actions under §726(b), and made §580b applicable to purchase money loans. But the exception to that exception remains, namely §726(g). The record before the bankruptcy court supported application of §726(b), and the court refused to conclude that the bankruptcy court should have adjusted the $150,000 cap where aggregate loans by one lender to a borrower were at issue.

Heritage offered no non-speculative grounds to avoid the application of §726(g) on the basis of legislative intent or policy. Among other things, the court opined, it would not be absurd to conclude that the California Legislature intended to carve out an exception regarding the purportedly fraudulent behavior of borrowers on smaller loans. As a result, the bankruptcy court did not err in granting Montano's motion for summary judgment against Heritage. Operating together, §§726 and 580b barred enforcement of Heritage's claims.

On a separate issue, the court concluded that the bankruptcy court did not err when it reconsidered its prior order on summary judgment. In essence, it was not abuse of discretion for the bankruptcy court to reconsider an order that the bankruptcy court had conceded on the record was in error.

Nor did the bankruptcy court err when it awarded attorneys fees and costs to Montano under §523(d). As the bankruptcy court had correctly explained to Heritage in the original proceedings, to qualify for its asserted exception to discharge, Heritage had to demonstrate that WMC reasonably relied on Montano's allegedly false written statements. Yet Heritage could not even prove actual reliance by WMC, which was no longer in existence. Heritage then failed to provide the bank-

ruptcy court competent evidence from knowledgeable people formerly at WMC, or at all, that WMC had actually relied on the contents of the URLA. This meant Heritage failed to show that its position was substantially justified, rendering it subject to an adverse award of attorney fees under §523(d) in its failed action seeking to except from discharge a consumer debt.

The court affirmed the bankruptcy court orders granting Montano summary judgment and awarding him attorney fees and costs.

Civil Rights & Constitutional Law

California's medical marijuana laws did not establish constitutional right to cultivate marijuana (Duarte, J.)

Maral v. City of Live Oak

C.A. 3rd; November 26, 2013; C071822

The Third Appellate District affirmed a judgment. The court held that California's medical marijuana laws did not create a constitutional right to cultivate marijuana.

The City of Live Oak passed an ordinance prohibiting the cultivation of marijuana within city limits.

James Maral and others brought suit to enjoin enforcement of the ordinance, arguing that California's the Compassionate Use Act (CUA) and the Medical Marijuana Program (MMP) gave them a constitutional right to cultivate marijuana.

The trial court sustained the city's demurrer without leave to amend.

The court of appeal affirmed, holding that neither the CUA nor the MMP gave Maral the right to cultivate marijuana.

In *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, the California Supreme Court held that California's medical marijuana laws did not preempt a local ban on facilities that distributed medical marijuana. The high court found that the objectives of the CUA and MMP were "modest," and those acts did not create a "broad right" to access medical marijuana.

The *Inland Empire* rationale applied with equal force here, the court of appeal found. All four causes of action in the underlying complaint were premised on the assertion that the CUA and the MMP created a right to cultivate marijuana. Because *Inland Empire* held that there is no right, constitutional or otherwise, to cultivate medical marijuana, the premise of each cause of action in the complaint necessarily failed. The plaintiffs thus failed to state a viable cause of action.

Consumer Protection

Lack of necessary evidence on disputed citizenship of prospective class members supported order remanding putative consumer class action to state court (Clifton, J.)

Mondragon v. Capital One Auto Finance

9th Cir.; November 27, 2013; 13-56699

The court of appeals vacated an order of the district court and remanded. The court held that a lack of requisite evidence on the disputed citizenship of prospective class members supported an order remanding a putative class action to state court.

Jose Mondragon filed a putative class action against Capital One Auto Finance and others in California state court. Mondragon alleged violations of state law related to automobile finance-contract disclosures. Capital One removed the case to federal court based on 28 U.S.C. §§1332(d) and 1453(b) of the Class Action Fairness Act (CAFA). Mondragon sought remand to state court under the "local controversy" exception to federal jurisdiction in §1332(d)(4)(A). Thus, it was Mondragon's burden to prove that the exception applied.

However, Mondragon submitted no evidence regarding the disputed issue, specifically the citizenship of prospective class members. Nonetheless, the district court found that Mondragon had satisfied his burden based solely on an inference from the class definition -- which limited class membership to consumers who purchased and registered cars in California -- that the requirements for the local-controversy exception were satisfied. Capital One appealed.

The court of appeals vacated and remanded, holding that there was no requisite evidence that supported the disputed citizenship of prospective class members.

Section 1332(d)(4)(A)(i)(I) provides that a case shall be remanded if, among other things, greater than two-thirds of the prospective class members are citizens of the state where the action was filed. The statute also requires that where facts are in dispute, the district court had to make factual findings before granting a motion to remand to state court. The statute does not say that remand can be based simply on a plaintiff's allegations when they are challenged by the defendant, as Mondragon's were by Capital One.

Accordingly, the court concluded, there ordinarily must be at least some facts in evidence from which the district court can make findings regarding class members' citizenship for purposes of the CAFA local-controversy exception. By failing to produce any evidence regarding citizenship in the face of Capital One's challenge to his jurisdictional allegations, Mondragon failed to satisfy his burden of proof.

The court acknowledged that it was likely that most of the prospective class members, perhaps more than the required two-thirds, were California citizens at the time the lawsuit was filed. However, it was also likely that some of them were not. For example, the proposed class reached back to cover

purchases made as long as four years before the filing of the complaint, which could mean five years or more prior to the date on which the case became removable.

Thus, assumedly, at least some purchasers who were California citizens at the time of purchase subsequently moved to other states. There was simply no evidence to support a finding that the citizens outnumbered the non-citizens by more than two to one. On remand, the district court was directed to allow Mondragon an opportunity to renew his remand motion and to take jurisdictional discovery tailored to proving that more than two-thirds of the putative class were citizens of California.

Criminal Law

Handcuffing of suspect to prevent flight did not render officer's single question regarding ownership of apparently stolen vehicle "custodial" for *Miranda* purposes (Yegan, J.)

People v. Davidson

C.A. 2nd; November 26, 2013; B244607

The Second Appellate District affirmed a judgment of conviction. The court held that an officer's brief handcuffing of a suspect he feared would flee did not convert the single question he thereafter posed to the suspect, regarding the ownership of an apparently stolen motorcycle, into a "custodial" interrogation for purposes of *Miranda*.

A passerby saw a man, later identified as Andrew Davidson, pushing a motorcycle down a street. Seeing wires were hanging out of the ignition, he suspected the motorcycle was stolen and called the police.

Simi Valley Police Officer Patrick Coulter responded. When Davidson saw Officer Coulter approaching, he attempted to hide. Officer Coulter ordered Davidson to put the motorcycle down and step towards him. Davidson put a flat-blade screwdriver down on the motorcycle seat. Officer Coulter was concerned for his safety because the screwdriver could be used as a weapon. He noticed that jumper wires were hanging out the ignition switch. He opined that Davidson was acting "hanky" and looked ready to flee.

Officer Coulter handcuffed Davidson and told him to sit on the sidewalk curb. He said that he was investigating a possible stolen motorcycle in the area. He asked one question: "Is this your vehicle?" Davidson said he found the motorcycle in some bushes nearby.

Davidson was arrested. The owner of the motorcycle was contacted. He confirmed that Davidson did not have his permission to take the motorcycle.

Davidson was charged with the unlawful taking of a motor vehicle and with possession of a methamphetamine pipe found on his person after his arrest.

At Davidson's jury trial, the prosecution admitted Davidson's pre-arrest statement about finding the motorcycle.

Davidson argued at trial that someone else stole the motorcycle, damaged it, and dumped it. He found it and had no knowledge that it had been stolen. He was convicted.

The court of appeal affirmed, holding that Davidson's *Miranda* rights were not violated by the admission of his pre-arrest statement at trial.

At issue for purposes of *Miranda* was whether Officer Coulter's single question to Davidson – "Is this your vehicle?" – constituted a custodial interrogation. The court of appeal agreed with the trial court that it did not.

The court noted that the *Miranda* opinion itself permits general, on-the-scene questioning regarding the facts surrounding a crime. Officer Coulter's use of handcuffs, in the circumstances presented here, did not compel a different outcome.

Handcuffing a suspect during an investigative detention does not automatically make it custodial interrogation for purposes of *Miranda*. Here, the court found, it was obvious that the reason for the handcuffing was Davidson's possession of a screwdriver that could be used as a weapon, coupled with the officer's belief that Davidson was about to flee.

Further, the court noted, the detention was brief. It lasted no more than two minutes. Additionally, Officer Coulter was alone, and Davidson was questioned on a public sidewalk. These circumstances were readily distinguishable from a prolonged interrogation at a police station by multiple interrogators.

The court acknowledged that there are, of course, limits to the rule allowing "brief and casual" investigatory questions. Such questions may not be aggressive, confrontational, accusatory, coercive, or sustained. The single question posed to Davidson by Officer Coulter did not exceed these limits.

Criminal Law

Sentencing court erred both in manner in which sex offender fine was imposed and in its determination of amount of penalty assessment (Marquez, J.)

People v. Hamed

C.A. 6th; November 26, 2013; H039223

The Sixth Appellate District affirmed a judgment as modified. The court held that the trial court erred in determining the amount of the penalty assessments that were to be attached to a defendant's statutory sex-offender fine.

Naheed Hamed was convicted by a jury of possessing child pornography under Penal Code §311.11. Hamed admitted service of a prior prison term as alleged. Hamed was sentenced to prison. At sentencing, the trial court imposed fines and fees that included a $1,230 sex-offender fine under

§290.3. Hamed appealed, contending only that the amount of the sex-offender fine was not authorized by the statute, that the correct amount was $300, and that the abstract of judgment did not identify the statutory basis for any additional assessments.

The court of appeal affirmed as modified, holding that the amount of the penalty assessments was not determined properly.

The correct amount of the base fine under §290.3 was $300 and the correct amount of the penalty assessments at the time of Hamed's offense was $900. The trial court when it imposed an extra $30. In particular, Hamed's base fine was subject to seven penalty assessments. Those were a state penalty assessment under §1464(a)(1) of $300 and a state surcharge under §1465.7 of $60. Hamed's penalty assessments also included an additional penalty under Gov't Code §76000(a)(1) of $210, a state court construction penalty under §70372 of $150, and an additional penalty for emergency medical services under §7600.5 of $60. Finally, under §76104.6(a)(1), Hamed was subject to an additional DNA penalty of $30, as well as to an additional state-only DNA penalty under former §76104.7 that was equal to $90.

As to the abstract of judgment, which noted only that the "applicable penalty assessments" totaled $1230 "per PC 290.3," the court pointed out that under cases, base fines and penalty assessments must be enumerated in the judgment and listed on the abstract. The court directed the trial court clerk to prepare an amended abstract of judgment setting forth the amounts and the statutory bases of the sex-offender fine and each of the penalty assessments that was imposed.

Criminal Law

Trail court erred in allowing bailiff to demonstrate operation of murder weapon to jury outside defendant's presence (Mosk, Acting P.J.)

People v. Johnson

C.A. 2nd; November 26, 2013; B239867

The Second Appellate District affirmed a judgment of conviction. The court held that the trial court erred in allowing the court's bailiff to demonstrate the operation of the murder weapon for the jury after deliberations had begun and outside the presence of the defendant.

California Highway Patrol office Tomiekia Johnson shot and killed her husband after the two got in an altercation after leaving a bar. When he was shot, Johnson's husband was sitting in the passenger seat of their car with the door open. Johnson was standing next to the open passenger's side door. According to Johnson, her husband was reaching for her handgun, which had fallen on the ground. She grabbed it to prevent him from getting. When she did so, the gun accidentally discharged. The bullet struck her husband in the head, killing him. Johnson was charged with murder.

According to the prosecution, the shooting was deliberate. The prosecution offered the medical examiner's testimony that muzzle of the gun was in contact with the victim's head when he was shot. The prosecution also noted Johnson's firearms expertise and offered the expert testimony of criminalist Keil regarding the operation of the gun. Keil explained how the gun's safety and firing mechanisms operated. He also demonstrated them for the jury.

Johnson did not challenge Keil's testimony regarding the operation of the gun.

After deliberations had begun, the jury requested a reading of Johnson's testimony about how the gun discharged, an opportunity to view the gun, and a demonstration of the gun's "safety, hammer, & trigger." Outside the presence of the jury, the trial court proposed allowing the bailiff to demonstrate the operation f the gun. Defense counsel agreed and waived his client's presence, saying he had spoken to her about the jury's request to have testimony read back regarding the gun's operation, and she declined to be present.

The bailiff demonstrated the gun's operation for the jury. He also responded to juror questions regarding the gun's operation. Defense counsel did not object.

After resuming deliberations, the jury found Johnson guilty.

On appeal, Johnson argued the trial court erred prejudicially in allowing the bailiff to demonstrate the operation of the gun and respond to juror questions outside her presence.

The court of appeal affirmed, holding that the trial court erred, but the error was harmless.

Although the bailiff was not a sworn witness, the court found, his demonstration, coupled with his responses to the jurors' questions, essentially amounted to testimony. Johnson had a right to be present at each critical stage of the trial, and because the bailiff's demonstration resulted in the jury's receipt of evidence, it constituted a critical stage of Johnson's trial. The trial court accordingly deprived Johnson of her statutory and constitutional rights in allowing the demonstration to go forward in her absence.

Counsel's waiver of Johnson's presence was ineffective, the court found. Penal Code §977(b)(1) entitles an accused to be present "during those portions of the trial when evidence is taken before the trier of fact." Under §977(b)(2), a defendant's waiver of that right must be executed in writing. Thus, although counsel had the authority to waive his client's presence during the reading back of prior testimony, he could not waive her presence during the taking of new testimony.

Further, the court noted, even if counsel had the authority to waive Johnson's presence, it was clear from counsel's statements to the court that Johnson had been advised only of the jury's request to have certain portions of Johnson's prior testimony read back. Johnson was not advised that the jury had requested another demonstration of the operation of the

murder weapon. She thus did not waive her right to be present at such a demonstration.

The court nonetheless found that the trial court's error in allowing the demonstration was harmless. The bailiff's demonstration was substantially the same as Keil's. Both men demonstrated for the jury, and spoke to the jury about, the weapon's operation including the location, use, and effect of the gun's safety, hammer, and slide. Further, even though Keil's testimony was significantly more extensive and detailed than the bailiff's, Johnson did not challenge that testimony at trial, either through cross-examination, her own testimony, or the testimony of a defense expert. Johnson's firearms and trajectory reconstruction expert did not disagree with Keil's testimony concerning the operation of the gun.

The substantial similarity between Keil's unchallenged testimony and the bailiff's demonstration precluded a finding of prejudice, the court concluded.

Health Law

Hospital board of trustees properly applied independent judgment standard in reviewing decision on physician's application for hospital staff privileges (Nares, J.)

Michalski v. Scripps Mercy Hospital

C.A. 4th; November 27, 2013; D062270

The Fourth Appellate District affirmed a judgment. The court held that a hospital system's health board of trustees applied the correct "independent judgment" standard when considering whether to overturn a hospital judicial review committee's decision to reject a medical executive committee's recommendation to deny a physician's application for medical staff privileges.

The Medical Board of California found that Dr. Michael Michalski engaged in sexually harassing behavior toward female employees at the Sharp Grossmont hospital (Sharp). As a result, Dr. Michalski promised to cease such conduct, apologize to his victims, and seek psychiatric counseling. Dr. Michalski did not disclose that at that time he was engaged in a "secret, sexual relationship" with a registered nurse at Sharp. When that relationship ended, Dr. Michalski verbally abused the nurse and directed her to avoid making any specific requests about his patients.

Sharp's Medical Executive Committee (MEC) recommended revocation of Dr. Michalski's staff privileges, a recommendation upheld by the Scripps Judicial Review Committee (JRC). The Sharp Board revoked Dr. Michalski's privileges, and the Medical Board of California opened a disciplinary investigation.

Dr. Michalski applied for medical staff membership and privileges at three Scripps Health hospitals. After interim peer review proceedings, Dr. Michalski sought a hearing on the recommendations against him.

Despite finding, upon hearing, that Dr. Michalski's behavior at Sharp included "egregious acts of sexual harassment" that were "aggressive, predatory, and reprehensible," the JRC rejected the MEC's recommendations to deny Dr. Michalski's application. The MEC appealed to the Scripps Health Board of Trustees, which reversed and confirmed the recommendation to deny Dr. Michalski's application.

Dr. Michalski unsuccessfully petitioned for a writ of mandate to overturn the Board's decision.

The court of appeal affirmed, holding that the Board's decision was made under the proper standard and was supported by substantial evidence.

The court of appeal concluded first that, contrary to Dr. Michalski's assertion, the Board properly applied the "independent judgment" standard mandated by the Scripps La Jolla Medical Staff Bylaws. The bylaws specifically provided that the Board had to use its independent judgment in determining whether the JRC's decision was supported by the evidence, and this was consistent with California regulations and case authority related to hospital governance. The court rejected Dr. Michalski's argument that the Board's standard of review was more limited.

The court held further that the Board properly applied the independent judgment standard in finding that Dr. Michalski did not meet the pertinent fitness standard for admission to staff privileges. The Board considered and gave great weight to all of the JRC's findings, even adopting many of those findings as its own. It further relied on evidence showing that Dr. Michalski had been under intense scrutiny since his behavior was discovered at Sharp, leading to a concern that he would revert to his pattern of misconduct when he was no longer the focus of such attention. The Board likewise noted, among other things, the psychiatric reports submitted by Dr. Michalski, to which the Board afforded little weight.

Having concluded that the Board applied the correct standard of review, the court ultimately concluded that its decision was supported by substantial evidence.

Immigration Law

Russian alien who was homosexual demonstrated government's inability or unwillingness to control nongovernmental actors who engaged in persecution (Alarcon, J.)

Doe v. Holder

9th Cir.; November 27, 2013; 09-72161

The court of appeals granted a petition for review of an order of the Board of Immigration Appeals. The court held that a Russian native who suffered unprosecuted citizen assaults

because he was homosexual met his burden of showing that the Russian government was unable or unwilling to control the nongovernmental actors who persecuted him. The court held further that the Russian petitioner was not required to demonstrate that the Russian government sponsored or condoned the persecution of homosexuals or was unwilling for that reason to control the petitioner's persecution.

John Doe (a pseudonym approved by the court of appeals in light of the sensitive nature of Doe's circumstances) was a Russian citizen from the Republic of Buryatia. When Doe was 18, his classmates at a technological university surmised that he was homosexual. Immediately thereafter they began mocking him, and a few months later he was violently attacked by classmates and others in a park. Doe reported the attack to police, but they made it evident they did not want to deal with him.

Doe continued to suffer harassment, culminating in another violent beating by persons who derided him because of his homosexuality. That beating resulted in internal brain hemorrhaging, a concussion, and a three-week hospitalization. Doe's father reported the attack to police, and the police interviewed Doe in the hospital, but his father's application for the prosecution of Doe's attackers was rejected. Doe suffered more harassment after he was released from the hospital.

Doe moved to Moscow, but there he experienced discrimination based on his ethnicity. He then moved to the U.S. to study under a nonimmigrant student visa.

When Doe stopped attending school, the Department of Homeland Security initiated removal proceedings for Doe's violation of his nonimmigrant status. Doe applied for asylum under the Immigration and Nationality Act (INA), as well as withholding of removal, and he sought relief under the Convention Against Torture. Doe cited his past persecution on account of his membership in a particular social group, specifically, "gay people, or homosexuals," and maintained that he had a well-founded fear of facing future persecution if returned to Russia. He also argued that he could not reasonably relocate to Moscow because of ethnic discrimination, including harassment and inability to find work.

Upon hearing, an immigration judge (IJ) found Doe credible but denied relief. The IJ reasoned that the record did not support a final conclusion that the Russian government was unable or unwilling to protect Doe, and that Doe should be able to relocate to Moscow. The Board of Immigration Appeals (BIA) agreed, concluding that Doe had not shown that there was widespread persecution of homosexuals in Russia which was sponsored or condoned by the Russian government.

Doe petitioned for review.

The court of appeals granted the petition, holding that the BIA erred in concluding that Doe failed to demonstrate that the Russian government was unable or unwilling to control the persons he identified as having persecuted him on account of his homosexuality.

The court of appeals observed that homosexuality is a protected ground for purposes of asylum or withholding of removal. To show entitlement to such relief, an applicant must present substantial evidence of persecution, on account of a protected ground, that is committed by the government or forces the government is either unable or unwilling to control.

The court noted that there was no requirement of a direct nexus between the government's inability or unwillingness to control nongovernmental persecutors and a statutorily-protected ground. The only nexus requirement is that the persecutors act on a protected ground.

On the record here, the court was persuaded that the BIA erred in concluding that Doe failed to demonstrate that the Russian government was unable or unwilling to control the persons he identified as having persecuted him on account of his homosexuality. The court admonished that the government offered no evidence to rebut Doe's undisputed testimony that he was seriously assaulted by individuals because he was homosexual, or to show that the Russian government was able and willing to control nongovernmental actors who attack homosexuals. Thus the BIA should have presumed a well-founded fear of future persecution on Doe's part. That would have required the government to show a change in circumstances that would negate such a well-founded fear.

In light of the BIA's errors, the court remanded for further evidentiary proceedings to allow the government to attempt to meet its burden.

The court noted further that the BIA erred by addressing Doe's arguments about the mistreatment and discrimination he suffered in Moscow, due to his ethnicity, as a separate claim for asylum. He raised the issues to show he could not reasonably relocate to Moscow, not as a separate ground for claiming asylum. The court likewise remanded to allow the BIA to consider the reasonable feasibility of Doe's relocation under the appropriate standard governing the relocation issue.

Labor and Employment Law

Existence of company policy denying compensation for certain tasks constituted factual question common to all class members (Croskey, J.)

Jones v. Farmers Insurance Exchange

C.A. 2nd; October 28, 2013; B237765

The Second Appellate District reversed a trial court order. The court held that the trial court erred in concluding that common issues did not predominate with regard to the existence of a purported company policy denying employee compensation for certain tasks.

Kwesi Jones worked as an "auto physical damage" (APD) claims adjuster for Farmers Insurance Exchange. Jones and

the other APD adjusters spent most of their time in the field inspecting damaged vehicles at auto body shops or other locations, meeting with claimants, negotiating the settlement of claims, and accessing and entering information onto Farmers's database, from their homes or cars, using laptop computers.

APD adjusters worked from home, accessing the Farmers database first thing in the morning to get their assignments for the day, and then driving from their homes to their first assignments. Farmers' stated policy was not to provide compensation to its APD adjusters for any time spent accessing the Farmers database in the morning or driving to their first assignments. According to Farmers, the work day for an APD adjuster began when the adjuster arrived at his or her first assignment, unless the commute to that assignment was unusually long.

Jones and other APD adjusters sued Farmers for failing to compensate the APD adjusters for work performed before the beginning of their scheduled shifts. The plaintiffs sought, among other things, unpaid overtime. Jones alleged that such unpaid work includes starting up their computers each day, accessing the Farmers database, obtaining their first assignments, downloading property damage estimate forms, contacting auto body shops to confirm the location of damaged vehicles, contacting the insureds, and driving to the auto body shops or other locations of their first assignments.

The plaintiffs sought to certify as a class the APD adjusters, with Jones as their named representative.

The trial court denied the motion for class certification, finding that individual issues predominated. The court found that whether or not any individual class member would be approved for overtime created individualized questions that would have to be addressed before it could be determined that Farmers did not compensate the class member for off-the-clock work.

The court also found the plaintiffs failed to establish that Jones was an adequate class representative.

The court of appeal reversed, holding that the trial court erred in finding that common issues did not predominate.

The plaintiffs' theory of recovery was that Farmers applied a uniform policy to all putative class members denying them compensation for "computer sync time" work performed at home before the beginning of their scheduled shifts. The court found the existence of such a policy was a factual question that was common to all class members and was amenable to class treatment. Whether such a policy, if it existed, deprives employees of compensation for work for which they were entitled to compensation was a legal question that was also common to all class members and thus amenable to class treatment.

Farmers denied the existence of a uniform policy. It also argued that individual issues predominated in determining whether APD claims representatives performed compensable off-the-clock work for which they were uncompensated. These arguments did not compel a different outcome, the court found. Farmers's evidence concerning the existence of a uniform policy pertained to a common question amenable to class treatment. Its evidence regarding individual issues concerned the right to recover damages and, as such, did not preclude class certification.

The court found further that the predominance of common issues compelled the conclusion that class certification would provide substantial benefits to the litigants and the courts. A class action was thus a superior method of resolving the dispute. The trial court erred in finding otherwise.

The trial court did not err, however, in concluding that the plaintiffs failed to establish that Jones was an adequate class representative. The plaintiffs' counsel filed a declaration stating that Jones had reviewed the operative complaint, understood the basic theories of the case, and understood his role as class representative. Jones himself, however, filed no declaration. The court of appeal agreed with the trial court that plaintiffs' counsel could not file a declaration on Jones's behalf. By not filing his own declaration, Jones failed to show an understanding of his fiduciary obligation owed to the class and thus failed to prove that he was an adequate class representative.

The lack of an adequate class representative, however, did not justify the denial of the class certification motion. Instead, the trial court was required to allow the plaintiffs an opportunity to amend their complaint to name a suitable class representative.

The court reversed the trial court order denying class certification with directions (1) to allow the plaintiffs an opportunity to amend their complaint to name a new class representative and (2) to grant the class certification motion as to the plaintiffs' claim for compensation for their routine early morning computer time if the trial court approved a class representative.

FULL TEXT OPINION

Ninth Circuit Court of Appeal

Cite as 13 C.D.O.S. 12804

JOHN DOE, Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General, Respondent.

No. 09–72161
United States Court of Appeals for the Ninth Circuit
Agency No. A098–690-486

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted September 9, 2013 — San Francisco, California

Filed November 27, 2013

Before: Arthur L. Alarcón, Raymond C. Fisher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Alarcón

COUNSEL

Katherine M. Lewis (argued), Van Der Hout, Brigagliano & Nightingale, LLP, San Francisco, California; Allan A. Samson, Law Office of Allan A. Samson, San Francisco, California, for Petitioner.

Carol Federighi (argued), Senior Litigation Counsel, and Kimberly A. Burdge, Trial Attorney, United States Department of Justice, Civil Division/Office of Immigration Litigation, Washington, D.C., for Respondent.

OPINION

ALARCÓN, Senior Circuit Judge:

John Doe[1] has petitioned for a review by this Court of the Board of Immigration Appeals' ("BIA") dismissal of his appeal from the denial of his applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). He contends that he has a well-founded fear of future persecution if he is removed to Russia because he is a homosexual. An immigration judge ("IJ") found, and the BIA did not disagree, that Doe had been subjected to past persecution in Russia by nongovernmental forces because he is a homosexual. The IJ concluded, however, that Doe failed to carry his burden of demonstrating that the Russian government was unable or unwilling to control his nongovernmental persecutors.

The BIA dismissed Doe's appeal from the IJ's decision based on the BIA's conclusion that Doe "failed to demonstrate that the government was unable or unwilling to control the non-governmental actors who attacked the Respondent in Russia" or prove that "there is widespread persecution of homosexuals in Russia which is sponsored or condoned by the Russian government."

We grant the petition in this matter because we conclude that Doe met his burden of presenting evidence that the Russian government was unable or unwilling to control the nongovernmental actors who persecuted him because he is a homosexual. We also hold that in order to obtain the relief he requested, Doe was not required to demonstrate that the Russian government sponsored or condoned the persecution of homosexuals or was unwilling for that reason to control persecution of Doe. We remand with directions that the BIA determine whether the Government can meet by a preponderance of the evidence its burden of demonstrating either that changed circumstances in Russia overcome the presumption that Doe has a well-founded fear of future persecution based on the past persecution he was subjected to because he is a homosexual or that Doe reasonably can relocate to an area of safety within Russia.

I

A

Doe is a Russian citizen who was born in Ulan-Ude, the capital of the Republic of Buryatia, and is ethnically a Buryat.[2] Doe identifies his sexual orientation as homosexual or bisexual.

After high school, Doe attended East Siberian Technological University in Ulan-Ude for two years. During his first year, Doe joined a club for homosexuals, called Kletka. Members of Kletka socialized and supported each other when they had problems. In April 2002, when he was eighteen years old, some of Doe's classmates from the university saw him socializing with members of Kletka and surmised that Doe was a homosexual. When Doe returned to school the following Monday, almost "everybody [he] knew" — classmates, persons from Doe's wrestling club, students from his former school — began mocking him.

In his testimony, Doe described two violent attacks. The first occurred in September 2002 while he was walking in a

1. Petitioner moved to have this disposition filed using a pseudonym. "We are cognizant that the identity of the parties in any action, civil or criminal, should not be concealed except in an unusual case, where there is a need for the cloak of anonymity." *United States v. Doe*, 488 F.3d 1154, 1155 n.1 (9th Cir. 2007) (internal quotation marks omitted). Nevertheless, we have allowed the use of pseudonyms in exceptional cases where necessary "to protect a person from harassment, injury, ridicule or personal embarrassment." *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981). We agree that this matter presents the "unusual case" and therefore refer to Petitioner herein as "John Doe."

2. The IJ expressly found that Doe's testimony, and the facts set forth in his application, were credible. The BIA did not contradict that finding. We are bound by that finding. *Singh v. INS* (*R.J. Singh*), 94 F.3d 1353, 1356 (9th Cir. 1996).

park with his partner, Mark. A group of five persons, some of whom were Doe's classmates, approached Doe and Mark and asked what they were doing. Doe at first remained silent or gave short answers. The group then became enraged, pushing Mark and knocking Doe to the ground where they beat and kicked him. Doe attempted to defend himself, but he could not. His attackers' assaults injured his eye and bruised his body, but he was able to go home unassisted.

Following the attack, Doe went to the police station and filed "an application for a complaint" describing the attack and naming his assailants. The police officer on duty told Doe that he did not want to receive the report and that Doe's injuries were "just bruises, nothing." The officer then discussed Doe's complaint with his supervisor and told Doe "to wait for the boss." When the officer returned, he told Doe that "maybe [he could] come back later" and that his "case is not so serious." The officer further commented that Doe was a man and asked why he had not defended himself. Doe testified that the police were "really busy and physically [could] not exam[ine] [his] report." Doe eventually left, because "[t]hey simply clearly let [him] know that they d[id]n't want to consider it at all."

After the first incident, Doe continued to suffer harassment and was pushed and hit "[a]lmost constantly." During a second attack in April 2003, Doe was beaten severely while he was at a restaurant with Mark. Between five and ten persons, three of whom Doe knew, entered the restaurant and sat near Doe and Mark. A man named Timur spoke to him in a kind tone at first, but then began to speak more rudely. Timur then hugged Doe, stuck his tongue out at him, and asked Doe, "[D]o you like this? Do you like this?" Timur then "started to say dirty words." Doe pushed Timur away. Timur hit Doe, and the group joined in, beating both Doe and Mark. Doe was beaten until he lost consciousness. He regained consciousness in the ambulance on the way to the hospital.

Doe suffered internal brain hemorrhaging and a concussion as a result of the attack. He was hospitalized for three weeks.

While Doe was in the hospital, his father reported the attack on his son to the police. Law enforcement officers interviewed Doe at the hospital. Doe told the police officers what happened and provided the names of some of his attackers. Doe does not believe that police took any further action aside from conducting this initial interview, because his attackers "were just walking free."

Doe introduced into evidence a "Confirmation Paper" he received from law enforcement officers. The Confirmation Paper states that his father's application for the prosecution of Doe's persecutors "was rejected on the basis of Criminal Code of the Russian Federation, Regulation 24 Chapter 1 Paragraph 2." The Confirmation Paper did not set forth the text of the regulation. No evidence was presented to the BIA by Doe or the Government regarding the contents of Regulation 24.

After Doe was released from the hospital, he saw some of his attackers. At first, they ignored him, but they soon began harassing him again.

In July 2003, Doe moved to Moscow, where he lived for approximately four months, until November 2003. Doe testified that while he was in Moscow, he was discriminated against based on his ethnicity. Doe testified that persons he encountered said things like, "[Y]ou narrow slanted eye person." He could not find work. In addition, police stopped Doe on several occasions to check his registration, but did not stop people near Doe who were ethnically Russian. On one occasion, a police officer detained Doe for several hours because the officer suspected that Doe's registration documents were false. The officer eventually released Doe after concluding that his documents were genuine. Doe believed the police stopped him because he is not ethnically Russian and he does not "look like the typical Russian person."

Doe moved from Moscow to the United States on November 11, 2003, to attend American Language Communications Center in New York on a nonimmigrant student visa.

On February 14, 2005, the Department of Homeland Security filed a notice to appear, which initiated removal proceedings against Doe because he violated the conditions of his nonimmigrant status when he stopped attending school. Doe admitted the factual allegations at the notice to appear hearing and conceded his removability as charged.

Doe applied for asylum, under § 208 of the Immigration and Nationality Act ("INA"), and withholding of removal, under INA § 241(b)(3). Doe also sought relief under the Convention Against Torture. Alternatively, Doe requested voluntary departure. Doe argued he was eligible for asylum because he suffered past persecution on account of his membership in a particular social group, specifically, "gay people, or homosexuals," and had a well-founded fear of facing future persecution if returned to Russia. He also argued that he could not reasonably relocate to Moscow, because of ethnic discrimination, including harassment and inability to find work, that he faced there. The IJ found that Doe "testified credibly and his application was credible."

B

On October 29, 2007, the IJ denied Doe's application for asylum, withholding of removal, and relief under CAT. The IJ concluded that Doe suffered physical injury and persecution in April 2003 on account of a "cognizable particular social group consisting of homosexuals." The IJ found, however, that "the record does not support the conclusion that the government was unable or unwilling to protect the respondent."

In finding that Doe failed to prove that the Russian government was unable or unwilling to protect him, the IJ stated that "the comments of the officer at the time of the first incident do indeed reflect societal prejudices." The IJ also commented, however, that while he did "not condone the police reaction to the first incident," the two incidents were "best considered together." The IJ noted that the police officers

responded to Doe's father's report regarding the second violent attack by coming to the hospital to interview Doe. The IJ observed that the police rejected that report on the basis of a specific provision of Russian law, but that the record did not contain evidence of what the cited code section sa*id.* The IJ stated, "Without more the Court is unable to conclude that the police decision was based on an improper motive," because the Russian police had taken "affirmative action in response to the complaint and appeared not to have rejected the complaint out of hand." As a result, the IJ held, "[T]he record does not support the conclusion that the government was unable or unwilling to protect the respondent."

The IJ also determined that Doe "was apparently able to relocate to Moscow." While noting that Moscow was "inhospitable in certain ways" to ethnic minorities, the IJ reasoned that Doe should be able to relocate to Moscow because he "had no serious problems during his time there." The IJ stated that he had taken notice of the "background evidence submitted regarding the difficulties that gay people have in Russia," but determined that Doe's experiences in Moscow "demonstrate that it is possible for gay people to live there without having these things happen to them."

The IJ further concluded that, because Doe did not meet the lower burden of proof that is applicable to an application for asylum, he failed to meet the higher burden required for withholding of removal. The IJ also denied Doe's relief under CAT, concluding that he failed to prove that it was "more likely than not" that he would be tortured if he was removed to Russia. Finally, the IJ granted Doe's application for voluntary departure.

C

Doe filed a notice of appeal with the BIA on November 23, 2007. In his appeal, he contended that the IJ erred in concluding that the police were unable or unwilling to protect him, and in finding that he could relocate to Moscow in light of his homosexuality and ethnicity. The BIA agreed with the IJ that Doe "failed to establish his eligibility for asylum and withholding of removal."[3] The BIA held that Doe failed to prove that the Russian government was unable or unwilling to control his attackers. The BIA reasoned that Doe's "claim is based on isolated hate crimes which, while deplorable, do not establish his eligibility for asylum or withholding of removal." It concluded that Doe had "not shown that there is widespread persecution of homosexuals in Russia which is sponsored or condoned by the Russian government."

The BIA held that Doe had not demonstrated that "the police, who interviewed [him] after he was attacked in 2003, failed to conduct adequate investigations due to [his] homosexuality." The BIA stated that "the 2003 complaint was ultimately rejected based on a specific Russian law." It emphasized that Doe "failed to explain the Russian law cited in the certificate" and bore "the burden of establishing foreign law on which he… relie[d]." The BIA also reasoned that Doe "did not establish that the cited law was merely a pretext for ignoring [his] complaint because of his sexual orientation." The BIA concluded that, as a result, Doe had "failed to establish that he was persecuted in the past on account of his sexual orientation, or that he faces an objectively reasonable risk of persecution on account of the same if he returns to Russia, at the hands of individuals whom the government is unable or unwilling to control."

The BIA further held that Doe did not demonstrate a "well-founded fear of [future] persecution on account of his ethnicity," because the problems Doe experienced in Moscow related to his ethnicity did not rise to the level of persecution. The BIA also concluded that the evidence in the record "of discrimination as well as isolated incidents of violence against individuals of non-Russian ethnicity does not demonstrate that the respondent faces a realistic probability of experiencing harm rising to the level of persecution, as opposed to harassment or discrimination, upon return to Russia."

Doe timely petitioned for review of the IJ's decision on July 13, 2009.

II

A

We first address the question whether the BIA erred in concluding that Doe failed to carry his burden of demonstrating that the Russian government was unable or unwilling to protect him from past persecution by nongovernmental actors. Doe seeks asylum and withholding of removal on the ground that he suffered past persecution in Russia on account of his homosexuality.

Where, as here, "the BIA conducted an independent review of the record and provided its own grounds for affirming the IJ's decision," we review only the BIA's opinion, *Navas v. INS*, 217 F.3d 646, 654 (9th Cir. 2000), except to the extent the BIA expressly adopted portions of the IJ's decision, *see Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) ("Where, as here, the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's.").

We review the BIA's construction and application of the law *de novo. See Murillo-Espinoza v. INS*, 261 F.3d 771, 773 (9th Cir. 2001). "We review the BIA's findings of fact for substantial evidence" and "grant the petition only if the evidence compels a contrary conclusion from that adopted by the BIA." *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)); *see* 8 U.S.C. § 1252(b)(4)(B) (in reviewing an order of removal, "the administrative findings of fact are conclusive unless any

3. The BIA also held that Doe waived his CAT claim by failing to raise it in his appeal. In his petition to this Court, Doe does not challenge the BIA's conclusion that he waived his CAT claim or otherwise mention CAT. Thus, his CAT claim is waived. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (stating that the applicant waived withholding-of-removal and CAT claims where the claims were not raised in the opening brief).

reasonable adjudicator would be compelled to conclude to the contrary").

B

To qualify for asylum and withholding of removal, a person who is outside the country of his or her nationality must establish that he is unable or unwilling to return to it "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

> An applicant can make this showing, and be eligible for asylum, in two ways. First, the applicant can show past persecution on account of a protected ground. 8 C.F.R. § 208.13(b)(1). Once past persecution is demonstrated, then fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that "there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution," or "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country." 8 C.F.R. § 208.13(b)(1)(i) & (ii).

Deloso v. Ashcroft, 393 F.3d 858, 863–64 (9th Cir. 2004).

We have previously held that "homosexuals are a 'particular social group,' and therefore that homosexuality is a protected ground." *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013) (citing *Karouni v. Gonzales*, 339 F.3d 1163, 1171–72 (9th Cir. 2005)).

To demonstrate entitlement to asylum or withholding of removal on the basis of past persecution, an applicant must present substantial evidence of "(1) an incident, or incidents, that rise to the level of persecution; (2) that is on account of one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either unable or unwilling to control." *Afriyie*, 613 F.3d at 931 (internal quotation marks omitted); *see id.* at 936 ("As with asylum, to show past persecution, an applicant for withholding of removal must show that government forces have either directly persecuted him or were unable or unwilling to control private persecutors."). The only nexus required to establish a past-persecution asylum claim is that the applicant's persecution be "on account of" one of the statutorily enumerated grounds. *See* 8 U.S.C. § 1101(a)(42)(A); *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir. 1997) (holding that the applicant must provide some evidence, direct or circumstantial, that the persecutor was or would be motivated to persecute him because of a protected ground). In other words, the second ("on account of") element modifies the "persecution" clause in the first element. The third element, however, independently specifies that *the source* of the persecution must be the government itself or persons that the government is unable or unwilling to control. Thus, where a *nongovernmental* actor is the source of the persecution, an applicant must present evidence (1) that the nongovernmental actor persecuted the applicant on account of a protected ground, *and* (2) that the government is unable or unwilling to control that nongovernmental actor.

Neither this Court nor the Supreme Court has required (or implied) a direct nexus between the government's inability or unwillingness to control nongovernmental persecutors and a statutorily-protected ground. The only nexus requirement is that the actual persecutors, whether governmental or nongovernmental, act on a protected ground. Indeed, we have held that "[i]t does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution. What matters instead is that the government 'is unwilling or *unable* to control those elements of its society' committing the acts of persecution." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (quoting *Mgoian v. INS*, 184 F.3d 1029, 1036 (1999)) (emphasis in original).

This Court has recognized that unwillingness or inability to control persecutors is not demonstrated simply because the police ultimately were unable to solve a crime or arrest the perpetrators, where the asylum applicant failed to provide the police with sufficiently specific information to permit an investigation or an arrest. *See, e.g.*, *Truong v. Holder*, 613 F.3d 938, 941 (9th Cir. 2010) (declining to conclude that the Italian government was "complicit in or unwilling to stop" the applicants' persecution, where the police dutifully made reports after each incident and indicated that they would investigate, but where the attackers' identities were completely speculative); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (holding that the applicant had not demonstrated the government was unable or unwilling to control the perpetrators where he contended that the police failed to investigate his reports, but "admitted that he did not give the police the names of any suspects because he did not know any specific names" and his wife testified "that the police investigated the complaints, but were ultimately unable to solve the crimes").

In contrast, in *Mashiri v. Ashcroft*, 383 F.3d 1112, 1115, 1121 (9th Cir. 2004), we held that evidence compelled the conclusion that the government was unable or unwilling to protect the applicant where police investigated but made no arrests after the applicant's husband was beaten and "quickly closed their investigation into the attack on [her family's] apartment as simple theft, despite evidence that the attack was motivated by anti-foreigner hatred." Similarly, here, Doe presented evidence that the Russian police rejected his first complaint out of hand, questioning why he did not simply defend himself, and subsequently dismissed his second complaint without doing anything more than interviewing him at the hospital where he was being treated for his injuries. The police did so even though Doe did identify his attackers both times, and there was substantial evidence that the assaults were motivated by anti-homosexual bias.

We are persuaded, after reviewing this record, that the BIA erred in concluding that Doe failed to demonstrate that the

Russian government was unable or unwilling to control the persons he identified as having persecuted him on account of his homosexuality. The Government failed to present any evidence to rebut Doe's undisputed testimony that he suffered serious assaults at the hands of individuals on account of his homosexuality or to show that the Russian government was able and willing to control nongovernmental actors who attack homosexuals.

Because the evidence demonstrated that Doe was subjected to past persecution on account of his homosexuality and that the Russian government was unable or unwilling to control his persecutors, the BIA should have presumed that Doe has a well-founded fear of future persecution. It should then have required the Government to meet its burden to show by a preponderance of the evidence that "there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" or "the applicant could avoid future persecution by relocating to another part of the applicant's country." *Deloso*, 393 F.3d at 864 (alteration omitted) (quoting 8 C.F.R. § 208.13(b)(1)(i)–(ii)). Because of these errors, we remand this matter to the BIA for further evidentiary proceedings to determine whether the Government can meet this burden.

III

The BIA addressed Doe's arguments regarding the discrimination and mistreatment that he suffered in Moscow on the basis of his ethnicity as a separate claim for asylum. This was error. Doe raised these issues to support his contention that he could not reasonably relocate to Moscow, not as a separate ground for asylum.

Moreover, although the BIA and IJ found that Doe had not suffered persecution in Moscow, a different standard applies with regard to the purpose for which Doe actually raised the ethnic discrimination issue, the reasonableness of relocation. For that purpose, it is not enough for the government to establish "that applicants could escape persecution by relocating internally." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003). Instead, it also "must be reasonable to expect them to do so." *Id.* The applicable regulation, 8 C.F.R. § 1208.13(b)(3), sets forth a non-exhaustive list of factors that the adjudicators should consider in determining whether internal relocation is reasonable, including "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." To establish such factors, it is not necessary to establish *persecution* on account of a protected ground; difficulties short of persecution can suffice. *See Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090–91(9th Cir. 2005) (holding that the government had not carried its burden to show that internal relocation was reasonable where the evidence showed that the petitioner "would face significant social and cultural constraints as a gay man with AIDS in Mexico, as hostility towards and discrimination against HIV/AIDS patients is common in Mexico," and would not be able to "obtain his required medication"); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004) (finding age, inability to find work, lack of family connections and "abysmal" quality of life to weigh against a finding of reasonableness).

The BIA did not address the reasonable feasibility of relocation at all, with respect to ethnicity or sexual orientation, as it held that Doe had not suffered cognizable past persecution on any protected ground. We remand so that it may do so, leaving it to the agency to consider the evidence of ethnic discrimination and discrimination based on sexual orientation in Moscow under the standard applicable to the relocation question.

CONCLUSION

We **GRANT** the petition for review of the BIA's decision that Doe is not entitled to asylum or withholding of removal because he failed to demonstrate that he met his burden of presenting substantial evidence that he has a well-founded fear of future persecution if he is removed to Russia. We **REMAND** for further proceedings regarding whether there has been a change in Russia regarding the persecution of homosexuals and whether it would be reasonable for Doe to relocate within Russia.

Cite as 13 C.D.O.S. 12809

JOSE MONDRAGON, individually and on behalf of all others similarly situated, Plaintiff - Appellee,

v.

CAPITAL ONE AUTO FINANCE, a Division of Capital One, N.A., Defendant - Appellant,

and

RON BAKER CHEVROLET, a California Corporation, Defendant.

No. 13-56699
D.C. No. 3:13-cv-00363-H-RBB
United States Court of Appeals for the Ninth Circuit
Appeal from the United States District Court for the Southern District of California
Marilyn L. Huff, District Judge, Presiding
Argued and Submitted November 5, 2013 Pasadena, California
Before: GOODWIN, FISHER, and CLIFTON, Circuit Judges.
Opinion by Judge Clifton
Filed Novermber 27, 2013

COUNSEL

Hunter R. Eley (argued), William H. Edmonson, and Johari N. Townes, Doll Amir & Eley LLP, Los Angeles, California; David N. Anthony, Alan D. Wingfield, and Nicholas R. Klaiber, Troutman Sanders LLP, Richmond, Virginia, for Defendant-Appellant.

Christopher P. Barry (argued) and Lacee B. Smith, Rosner, Barry & Babbitt, LLP, San Diego, California, for Plaintiff-Appellee.

OPINION

CLIFTON, Circuit Judge:

This case presents another issue under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4. Defendant-Appellant Capital One Auto Finance appeals the district court's order remanding a putative class action lawsuit to California state court under CAFA's "local controversy" exception to federal jurisdiction, 28 U.S.C. § 1332(d)(4)(A). Plaintiff Jose Mondragon, as the party seeking remand to state court, bears the burden of proving that the exception applies. Plaintiff submitted no evidence regarding the disputed issue, the citizenship of prospective class members. Nevertheless, the district court held that Plaintiff had satisfied his burden based solely on an inference from the class definition that the requirements for the local controversy exception were satisfied. We disagree, vacate the remand order and remand for further proceedings.

We conclude that there must ordinarily be facts in evidence to support a finding that two-thirds of putative class members are local state citizens, which is one of the local controversy exception's requirements, if that question is disputed before the district court. A pure inference regarding the citizenship of prospective class members may be sufficient if the class is defined as limited to citizens of the state in question, but otherwise such a finding should not be based on guesswork. In reaching this conclusion, we join the other circuits that have considered the issue.

I. BACKGROUND

Plaintiff Jose Mondragon filed this putative class action against defendants Capital One Auto Finance and Ron Baker Chevrolet in the San Diego County Superior Court, alleging violations of various provisions of California state law[1] related to automobile finance contract disclosures. Capital One removed the case to the U.S. District Court for the Southern District of California based on CAFA, 28 U.S.C. §§ 1332(d), 1453(b).

Through CAFA, Congress broadened federal diversity jurisdiction over class actions by, among other things, replacing the typical requirement of complete diversity with one of only minimal diversity, *see id.* § 1332(d)(2), and allowing aggregation of class members' claims to satisfy a minimum amount in controversy of $5 million, *see id.* § 1332(d)(6). However, Congress also provided exceptions allowing certain class actions that would otherwise satisfy CAFA's jurisdictional requirements to be remanded to state court. Among these is the exception commonly referred to as the local controversy exception, set forth in 28 U.S.C. § 1332(d)(4)(A).[2] One of the requirements of the local controversy exception is

1. The operative complaint alleged violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, the Automobile Sales Finance Act, Cal. Civ. Code § 2981, *et seq.*, and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*

2. In its entirety, the local controversy exception reads:

> A district court shall decline to exercise jurisdiction under paragraph (2)—
>
> (A)
>
> (i) over a class action in which—
>
> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
>
> (II) at least 1 defendant is a defendant—
>
> (aa) from whom significant relief is sought by members of the plaintiff class;
>
> (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
>
> (cc) who is a citizen of the State in which the action was originally filed; and
>
> (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

that "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed." *Id.* § 1332(d)(4)(A)(i)(I).

Shortly after the case was removed to federal court, Mondragon moved to remand it to state court under the local controversy exception. Mondragon did not present any evidence of the citizenship of the putative class members. Instead, he sought to rely entirely on his proposed class definitions, arguing that the court should infer from those definitions that more than two-thirds of the class members were citizens of California.

Mondragon's putative class action complaint alleged violations of California law against three classes, only two of which remain in the case. The Second Amended Complaint defined the two remaining classes as:

> "CLASS 1:" All persons who, in the four years prior to the filing of this complaint, (1) purchased a vehicle from Ron Baker for personal use to be registered in the State of California, and (2) signed a [Retail Installment Sale Contract (RISC)] that failed to separately disclose, on the RISC, the amounts paid for license fees and/or the amounts paid for registration, transfer, and/or titling fees.
>
> . . .
>
> "CLASS 3:" All persons who, in the four years prior to the filing of this complaint, (1) purchased a vehicle in California for personal use to be registered in the State of California, (2) signed a RISC that failed to separately disclose on the RISC the amounts paid for registration/transfer/titling fees, and (3) whose RISC was assigned to Capital One.

Mondragon argued that these definitions, limiting putative class members to those consumers who purchased and registered cars in California, were sufficient to establish that this action fell within CAFA's local controversy exception. The district court agreed, concluding that the "class allegations sufficiently show that at least two-thirds of the potential class members will be California citizens. As such, Plaintiff has satisfied his burden of proving that CAFA's local controversy exception applies." The district court thus granted Mondragon's motion to remand the case to state court.

Capital One filed in this court a petition for permission to appeal the district court's remand order, pursuant to 28 U.S.C. § 1453(c). This court granted the petition for permission to appeal.[3]

II. DISCUSSION

We review a district court's remand order de novo. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 679 (9th Cir. 2006) (per curiam).

We have previously held that the burden of proof for establishing the applicability of an exception to CAFA jurisdiction rests on the party seeking remand, which in this case, as in most cases, is the plaintiff. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007). Mondragon must thus establish that greater than two-thirds of prospective class members were citizens of California as of the date the case became removable, which the district court determined was January 15, 2013. *See* 28 U.S.C. § 1332(d)(4)(A)(i)(I) (two-thirds requirement); *id.* § 1332(d)(7) ("Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of the filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.").

Mondragon argues that more than two-thirds of the members of a class defined to be limited to persons who "purchased a vehicle in California for personal use to be registered in the State of California" will necessarily be California citizens. Mondragon presented no evidence to the district court to support that proposition, however, even after Capital One challenged it.

Where facts are in dispute, the statute requires district courts to make factual findings before granting a motion to remand a matter to state court. The statute in question provides that a case shall be remanded if, among other things, greater than two-thirds of the prospective class members are citizens of the state where the action was filed. 28 U.S.C. § 1332(d)(4)(A)(i)(I). The statute does not say that remand can be based simply on a plaintiff's allegations, when they are challenged by the defendant. *Cf. Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1015 (9th Cir. 2011) (holding that a court may look beyond the allegations of the complaint when deciding a defendant's citizenship under § 1332(d)(4)(A)(i)(II)(cc)). A district court makes factual findings regarding jurisdiction under a preponderance of the evidence standard. *See, e.g.*, *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004). A complete lack of evidence does not satisfy this standard.

Joining the other three circuits that have considered the issue, we conclude that there must ordinarily be at least some facts in evidence from which the district court may make findings regarding class members' citizenship for purposes of CAFA's local controversy exception. *See In re Sprint Nex-*

> (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons . . . .
>
> 28 U.S.C. § 1332(d)(4).

3. Capital One also filed a motion for a stay of the ongoing state proceedings, which was also granted by this court.

tel Corp., 593 F.3d 669, 673–76 (7th Cir. 2010); *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 798–802 (5th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165–66 (11th Cir. 2006). By failing to produce any evidence regarding citizenship in the face of Capital One's challenge to his jurisdictional allegations, Mondragon has failed to satisfy his burden of proof.

As recognized by the other circuits, a burden of proof usually requires the party bearing the burden to present evidence upon which the district court may rely to find that the party has met its burden. Mondragon's arguments for allowing a district court to make the required factual finding where no evidence has been presented are unpersuasive. As the Seventh Circuit noted, such freewheeling discretion amounts to no more than "guesswork. Sensible guesswork, based on a sense of how the world works, but guesswork nonetheless." *Sprint*, 593 F.3d at 674. A jurisdictional finding of fact should be based on more than guesswork.

We acknowledge that our holding may result in some degree of inefficiency by requiring evidentiary proof of propositions that appear likely on their face. The inference drawn by the district court in this case was understandable. It is likely that most of the prospective class members—we would guess more than two-thirds of them—were California citizens at the time the lawsuit was filed. But it is also likely that some of them were not. We imagine that some automobiles were purchased and registered in California by members of the military, by out-of-state students, by owners of second homes, by other temporary residents who maintained legal citizenship in other states, and by persons who live in California but are not U.S. citizens. That a purchaser may have a residential address in California does not mean that person is a citizen of California. *See, e.g.*, *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). In addition, the proposed class reaches back to cover purchases made as long as four years before the filing of the complaint, which could mean five years or more prior to the date on which the case became removable, and we imagine that at least some purchasers who were California citizens at the time of purchase subsequently moved to other states, such that they were not California citizens as of January 15, 2013. There is simply no evidence in the record to support a finding that the group of citizens outnumbers the group of non-citizens by more than two to one.

The Seventh Circuit acknowledged a similar circumstance in *Sprint*. In that case, it was probably even more likely that the proposed class consisted overwhelmingly of Kansas citizens, for the class as defined included only people who had a Kansas cell phone number, a Kansas billing address, and paid a Kansas fee. 593 F.3d at 671. Nonetheless, the court vacated a remand order and sent that case back to the district court for further proceedings because the plaintiffs had not submitted any evidence of citizenship. *Id.* at 673, 676.[4]

Similarly, in this case, we suspect that, if he decides to expend the effort, Mondragon will be able to gather and submit evidence to support his contention that more than two-thirds of prospective class members were citizens of California at the time the case became removable, thereby justifying a remand to state court and landing the case back in the same place it was before this appeal. Any such inefficiency is largely of the parties' own making, though. Mondragon could have limited the class by defining it to consist only of California citizens,[5] or he could have proceeded in federal court once Capital One chose to remove the case. Likewise, Capital One could have allowed the case to proceed in state court initially or once the district court had entered its remand order. Instead, both parties chose to assert their rights to the utmost, and that is their prerogative.

Perhaps recognizing that Mondragon will probably be able to prove that this class action is subject to remand under the local controversy exception, Capital One argues that we should remand the case to the district court with instructions to deny the motion to remand, requiring the case to continue in federal court without giving Mondragon another opportunity to establish the facts that would require remand. Capital One contends that we should preclude Mondragon from what it calls "another bite at the apple" because of the inefficiency and delay that will result from permitting the district court to revisit the issue. But that inefficiency and delay is at least equally attributable to Capital One for insisting that Mondragon affirmatively prove with evidence a proposition that seems likely to be true. Moreover, at the time that Mondragon presented its motion to remand to the district court, there was no guidance from this court on the relevant issue, and there were district court rulings that supported Mondragon's position. We instruct the district court to allow Mondragon an opportunity, if he chooses to do so, to renew his motion to remand and to take jurisdictional discovery tailored to proving that more than two-thirds of the putative class are citizens of California.

As a final note, we observe that a party with the burden of proving citizenship may rely on the presumption of continuing domicile, which provides that, once established, a person's state of domicile continues unless rebutted with sufficient evidence of change. This presumption has been widely accepted, including by this circuit. *See Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986); *see also, e.g.*, *Anderson v. Watts*, 138 U.S.694, 706 (1891); *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571 (5th Cir. 2011) (per curiam); 13E

4. The subsequent history of the case illustrated the inefficiency of the holding. After jurisdictional discovery (including surveys of the class and expert testimony) that lasted almost one year, the district court again remanded the case to state court. *See In re Text Messaging Antitrust Litig.*, Nos. 08 C 7082, 09 C 2192, 2011 WL 305385, at *3 (N.D. Ill. Jan. 21, 2011).

5. The Seventh Circuit suggested that the class in *Sprint* could be defined as limited to Kansas citizens. 593 F.3d at 676. Capital One argues that this alternative was available to Mondragon, accepting that it would be appropriate to remand an action with a class so defined to state court even without additional evidence as to the citizenship of prospective class members. We agree.

Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3612 & nn. 32–33 (3d ed. 2013). In addition, numerous courts treat a person's residence as prima facie evidence of the person's domicile. *See, e.g.*, *Anderson*, 138 U.S. at 706 ("The place where a person lives is taken to be his domicile until facts adduced establish the contrary . . . "); *Hollinger*, 654 F.3d at 571 ("Evidence of a person's place of residence . . . is prima facie proof of his domicile."); 13E Wright & Miller, *supra*, § 3612 & n.28 ("It is assumed . . . that a person's current residence is also his domicile . . . "). It does not appear that this circuit has yet adopted this presumption. Because the issue is not squarely presented by this appeal, we decline to reach that issue here.

The burden of proof placed upon a plaintiff should not be exceptionally difficult to bear. We do not think, as the Seventh Circuit suggested, that evidence of residency can never establish citizenship. We agree with the observation of the Fifth Circuit that a court should consider "the entire record" to determine whether evidence of residency can properly establish citizenship. *Preston*, 485 F.3d at 800. Factual findings made by a district court after considering the entire record will be, as usual, subject to clear error review. *See, e.g., Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (per curiam). As a general proposition, district courts are permitted to make reasonable inferences from facts in evidence, and that is true in applying the local controversy exception under CAFA, as well. And, even under CAFA, the jurisdictional allegations in the complaint can be taken as a sufficient basis, on their own, to resolve questions of jurisdiction where no party challenges the allegations. *See, e.g.*, *Uston v. Grand Resorts, Inc.*, 564 F.2d 1217, 1218 (9th Cir. 1977) (per curiam).

III. CONCLUSION

We vacate the district court's remand order and remand the case with instructions to allow Mondragon an opportunity, if he so chooses, to renew his motion to remand and to gather evidence to prove that more than two-thirds of putative class members are citizens of California.

VACATED and REMANDED.

Cite as 13 C.D.O.S. 12812

TARLA MAKAEFF, on behalf of herself and all others similarly situated, Plaintiff-counter-defendant-Appellant,

and

BRANDON KELLER; ED OBERKROM; PATRICIA MURPHY, Plaintiffs,

v.

TRUMP UNIVERSITY, LLC, a New York limited liability company, AKA Trump Entrepreneur Initiative, Defendant-counter-claimant-Appellee,

and

DONALD J. TRUMP, Defendant.

No. 11-55016
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:10-cv-00940-IEG-WVG

Appeal from the United States District Court for the Southern District of California

Irma E. Gonzalez, Chief District Judge, Presiding

Argued and Submitted January 18, 2012—Irvine, California

Filed November 27, 2013

Before: Alex Kozinski, Chief Judge, Kim McLane Wardlaw and Richard A. Paez, Circuit Judges.

Order; Concurrence by Judge Wardlaw; Dissent by Judge Watford

ORDER DENYING THE PETITION FOR REHEARING EN BANC

Chief Judge Kozinski and Judge Paez have voted to grant the petition for rehearing en banc. Judge Wardlaw has voted to deny the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

Appellee's petition for rehearing en banc, filed April 30, 2013, is denied. Judge Watford's dissent from denial of en banc rehearing, and Judges Wardlaw and Callahan's concurrence in the denial of en banc rehearing, are filed concurrently with this Order.

IT IS SO ORDERED.

WARDLAW and CALLAHAN, Circuit Judges, with whom Judges FLETCHER and GOULD join, concurring in the denial of rehearing en banc:

"En banc courts are the exception, not the rule." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). They are "not favored," Fed. R. App. P. 35, and "convened only when extraordinary circumstances exist," *American-Foreign S.S. Corp.*, 363 U.S. at 689. Because the panel opinion faithfully follows our circuit's precedent, creates no inter-circuit split, does not present an issue of exceptional importance, and because the contrary result would create a circuit split, a call to rehear this appeal en banc failed to gain the support of a majority of our active judges. We concur.

Our dissenting colleagues urge us to overrule our decisions in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), and *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). In *Newsham*, we held that the motion to strike and attorneys' fees provisions of California's anti-SLAPP statute apply in diversity cases; in *Batzel*, we held that the denial of an anti-SLAPP motion is immediately appealable under the collateral order doctrine. *Newsham* and *Batzel* were correctly decided. Not only is the dissent's desire to use this appeal as a vehicle to change our circuit's law based on a misreading of Supreme Court precedent; it also distorts our standard for rehearing an appeal en banc.

I.

The dissent asserts that the motion to strike provision of California's anti-SLAPP statute collides with Federal Rules 12 and 56. This was exactly the argument advanced by the SLAPP plaintiff in *Newsham*. There, we concluded that there was no "direct collision" because the motion to strike and attorneys' fees provisions of the anti-SLAPP statute and Rules 12 and 56 "'can exist side by side . . . each controlling its own intended sphere of coverage without conflict.'" *Newsham*, 190 F.3d at 972 (ellipsis in original) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)). We reasoned that, under the anti-SLAPP statute, a SLAPP defendant may bring a special motion to strike. If he is successful, the SLAPP counterclaim will be dismissed and the plaintiff-counter-defendant may be entitled to attorneys' fees. If he is unsuccessful, he "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Id.*

The Supreme Court's decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010), does not change this reasoning. There, the Supreme Court addressed whether a New York statute that precluded class actions in suits seeking penalties or statutory minimum damages collided with Federal Rule of Civil Procedure 23. The Court framed the "direct collision" inquiry in a new way: it asked whether the state statute at issue "attempts to answer the same question" as the Federal Rule. *Id.* at 399. To determine the questions answered by Rule 23, the Court looked to the plain language of the Rule, which "states that '[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Id.* at 398 (alteration in original) (quoting Fed. R. Civ. P. 23(b)). Focusing on Rule 23's use of the words "may be maintained," the Court continued:

> By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. (The Federal Rules regularly use "may" to confer categorical permission, *see, e.g.*, Fed. Rules Civ. Proc. 8(d)(2)-(3), 14(a)(1), 18(a)-(b), 20(a)(1)-(2), 27(a)(1), 30(a)(1), as do federal statutes that establish procedural entitlements, *see, e.g.*, 29 U.S.C. § 626(c)(1); 42 U.S.C. § 2000e–5(f)(1).)

Id. at 398–99. The Rule "provides a one-size-fits-all formula for deciding the class-action question." *Id.* at 399. The state statute directly conflicted with Rule 23's categorical rule because it "states that Shady Grove's suit 'may *not* be maintained as a class action' (emphasis added) because of the relief it seeks," even if Shady Grove's suit meets the requirements of Rule 23. *Id.*

The dissent's assertion that Rules 12 and 56 together define a cohesive system for weeding out meritless claims that is akin to Rule 23's categorical rule turns *Shady Grove*'s lens into a kaleidoscope. This assertion overlooks the Court's reliance on textual analysis in *Shady Grove*. Rule 23 states that "[a] class action may be maintained" if certain requirements are met. Therefore, Rule 23 provides a categorical rule: *if* the requirements are met, *then* a plaintiff is entitled to maintain his suit as a class action.

In contrast, Rules 12 and 56 do not provide that a plaintiff is entitled to maintain his suit if their requirements are met; instead, they provide various theories upon which a suit may be disposed of before trial. California's anti-SLAPP statute, by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial, supplements rather than conflicts with the Federal Rules.[1]

Rule 12 provides a mechanism to test the legal sufficiency of a complaint. The question asked by Rule 12 is whether the plaintiff has stated a claim that is plausible on its face and upon which relief can be granted. California's anti-SLAPP statute does not attempt to answer this question; instead, California Code of Civil Procedure § 430.10, the state statutory analog of Rule 12, does. *See* Cal. Civ. Proc. Code § 430.10.[2] That the California legislature enacted both

1. *Cf. Godin v. Schencks*, 629 F.3d 79, 91 (1st Cir. 2010) ("Neither Rule 12 nor Rule 56 of the federal rules of procedure purport to be so broad as to preclude additional mechanisms meant to curtail rights-dampening litigation through the modification of pleading standards.").

2. Section 430.10 provides:

> The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> (a) The court has no jurisdiction of the subject of the

an analog to Rule 12 and, additionally, an anti-SLAPP statute is strong evidence that the provisions are intended to serve different purposes and control different spheres. Moreover, the anti-SLAPP statute asks an entirely different question: whether the claims rest on the SLAPP defendant's protected First Amendment activity and whether the plaintiff can meet the substantive requirements California has created to protect such activity from strategic, retaliatory lawsuits.

Furthermore, the contention that California Code of Civil Procedure § 425.16 imposes a probability requirement at the pleading stage ignores California Supreme Court precedent. Although § 425.16 asks courts to determine whether "the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim," (emphasis added), the California Supreme Court has held that:

> past [California state] cases interpreting this provision establish that the Legislature did not intend that a court . . . would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.

Taus v. Loftus, 40 Cal. 4th 683, 714 (2007). In other words, a reviewing court "should grant the motion if, *as a matter of law*, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." *Vargas v. City of Salinas*, 46 Cal. 4th 1, 20 (2009) (emphasis added). Thus, even if we were to conclude that § 425.16 and Rule 12 serve similar purposes, at worst, a motion to strike functions merely as a mechanism for considering summary judgment at the pleading stage as is permitted under Rule 12(d). *See* Fed. R. Civ. P. 12(d).

California also has a state statutory equivalent to Rule 56. *See* Cal. Civ. Proc. Code § 437c(c). ("The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). And as already explained, the test for legal sufficiency embodied in § 425.16 conflicts with neither Rule 12 nor Rule 56.

The Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is instructive. In *Cohen*, the Supreme Court determined that a New Jersey statute that required certain plaintiffs to post a bond in shareholder derivative suits could be enforced consistent with former Federal Rule 23 (now Rule 23.1). 337 U.S. at 557. New Jersey enacted the statute at issue in *Cohen* to protect against so called "strike suits," that is, suits "brought not to redress real wrongs, but to realize upon their nuisance value." *Id.* at 547–48. The Court recognized that former Rule 23 "deals with plaintiff's right to maintain such an action in federal court," and places certain requirements on shareholder derivative suits, including that the stockholder's complaint be verified by oath and show that the plaintiff was a stockholder at the time of the transaction at issue, and that the action not be dismissed without approval of the court and notice to all parties. *Id.* at 556. However, former Rule 23, like current Rule 23.1, did not provide that a shareholder derivative suit "may be maintained" if the requirements were met. Instead, it set forth minimum requirements that were prerequisites—necessary, but not necessarily sufficient—to maintain a suit. Despite the fact that the state statute created an additional and indeed onerous requirement for the maintenance of a shareholder derivative suit, the Court determined that the state statute did not conflict with the requirements of Rule 23 and therefore should apply in federal court.

Just as the New Jersey statute in *Cohen* sought to limit frivolous strike suits, California's anti-SLAPP statute seeks to limit frivolous suits brought primarily for the purpose of chilling the valid exercise of First Amendment rights. And, just as the state statute in *Cohen* did not conflict with former Rule 23 even though it created supplemental, even onerous requirements for certain plaintiffs, the motion to strike and attorneys' fees provisions of California's anti-SLAPP statute do not conflict with Rules 12 and 56 even though they create supplemental requirements for certain plaintiffs.

California's interest in securing its citizens' free speech rights also cautions against finding a direct collision with the Federal Rules. In *Shady Grove*, a majority of the justices recognized that state interests are significant, even in determining whether there is a conflict. 559 U.S. at 421 n.5 (Stevens, J., concurring in part and concurring in the judgment) (indicating that he agreed with the four dissenting justices that the Federal Rules must be interpreted in light of considerations including "sensitivity to important state interests"). Indeed, in *Godin*, the First Circuit thoroughly and persuasively analyzed *Shady Grove* before concluding that Maine's anti-SLAPP law was enforceable in federal court. 629 F.3d at 86–91.

Where there is no direct collision between a Federal Rule and a state statute, we must make the "typical, relatively unguided *Erie* Choice." *Hanna v. Plumer*, 380 U.S. 460, 471

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cause of action alleged in the pleading.

(b) The person who filed the pleading does not have the legal capacity to sue.

(c) There is another action pending between the same parties on the same cause of action.

(d) There is a defect or misjoinder of parties.

(e) The pleading does not state facts sufficient to constitute a cause of action.

(f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.

(h) No certificate was filed as required by Section 411.35.

(i) No certificate was filed as required by Section 411.36.

(1965). Every circuit that has considered the issue has agreed with our conclusion in *Newsham* that anti-SLAPP statutes like California's confer substantive rights under *Erie*.[3] If we had taken this appeal en banc, and decided the other way (as our colleagues advocate in their concurrences), we would have created an inter-circuit split; a result at odds with Rule 35 of the Federal Rules of Appellate Procedure.

II.

Our colleagues also want us to overrule *Batzel*—not because of any intervening Supreme Court decision or conflicting circuit opinion, but because they find *Batzel*'s reasoning "unpersuasive."[4] In *Batzel*, we held that the denial of an anti-SLAPP motion to strike is immediately appealable under the collateral order doctrine. 333 F.3d at 1024–26. For the collateral order doctrine to apply, the order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotation marks omitted). In the dissent's view, the denial of an anti-SLAPP motion to strike fails the second and third prongs of the test.

In *Batzel*, we determined that a denial of an anti-SLAPP motion resolves a question separate from the merits in that the purpose of an anti-SLAPP motion is to determine whether a party suffers harassment by the prosecution of a frivolous lawsuit designed to chill otherwise constitutionally-protected expressive conduct. 333 F.3d at 1024–25. In contrast, the question on the merits is whether the defendant is ultimately liable for defamation (or whatever the underlying claim might be). *Id.* at 1025.

For example, here Tarla Makaeff sued Trump University accusing it of, among other things, deceptive business practices. *Makaeff*, 715 F.3d at 260. Trump University counterclaimed, alleging that Makaeff's letters and online postings, written months prior to the filing of this action and complaining of Trump University's business practices, constituted defamation. *Id.* Using California's anti-SLAPP law, Makaeff moved to strike Trump University's defamation counterclaim.[5] *Id.* at 260, 270–71. Trump University's counterclaim was obviously designed to overwhelm Makaeff by making it more burdensome and expensive for her to pursue her deceptive business practices claims against Trump University. Makaeff's motion to strike concerned the frivolity of Trump University's allegation that her speech about its deceptive business practices was defamatory; its very purpose was to determine whether Trump University's counterclaim was designed to chill Makaeff's valid exercise of her First Amendment rights.[6] The issue adjudicated through the mechanism of the motion to strike was not whether Makaeff was liable for defamation because of her statements condemning Trump University's alleged deceptive business practices—the question at the heart of Trump University's underlying counterclaim.[7] Thus, while the inquiry on the motion to strike may glance at the merits, its central purpose is to provide an added statutory protection from the burdens of litigation that is unavailable during the ultimate merits inquiry.

The Supreme Court has held that issues concerning immunity from suit are often separate from the merits of the underlying dispute in the litigation, even though part of the traditional inquiry touches on the merits: whether a particular constitutional right was clearly established at the time of the alleged governmental misconduct. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 527–28 (1985) (noting that a claim of qualified immunity "is conceptually distinct from the merits of the plaintiff's claim"); *Abney v. United States*, 431 U.S. 651, 659 (1977) (holding that denial of a claim of double jeopardy immunity is separate from the question of whether

3. *See Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 144–48 (2d Cir. 2013) ("[T]he aspects of California's anti-SLAPP rule considered substantive by federal law continue to apply in this case . . . . California's anti-SLAPP rule reflects a substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity."); *Godin*, 629 F.3d at 87–88 ("[W]e hold that the dual purposes of *Erie* are best served by enforcement of [Maine's anti-SLAPP statute] in federal court . . . . Maine has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities."); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168–69 (5th Cir. 2009) ("Louisiana law, including the nominally-procedural [Louisiana anti-SLAPP] statute, governs this diversity case." (citing *Newsham*, 190 F.3d at 972–73)).

4. Judge Paez's concern over the "significant state-by-state variations within the circuit" regarding whether the denial of an anti-SLAPP motion is immediately appealable, *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Paez, J., concurring, and Kozinski, C.J., concurring), ignores our instruction that although the state "statutes have common elements, there are significant differences as well, so that each state's statutory scheme must be evaluated separately," *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012). For instance, in *Ferrell* we concluded that Nevada's anti-SLAPP statute did not satisfy the collateral order doctrine because "its underlying values and purpose are satisfied without resort to an immediate appeal." *Id.* at 800–01.

5. We reversed the denial of the anti-SLAPP motion because the district court erroneously concluded that Trump University was not a public figure, and therefore was required to demonstrate actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Trump University may ultimately demonstrate actual malice upon remand, however, this is a demanding standard to meet.

6. Like in *Batzel*, the anti-SLAPP inquiry here tested whether the defamation claim was "brought to deter common citizens from exercising their political or legal rights or to punish them for doing so." 333 F.3d at 1024. That was the ultimate question. Assessments of whether Makaeff's allegedly defamatory statements were protected activity under § 425.16 or whether Trump University had a reasonable probability of prevailing on its defamation claim were merely intermediate steps used to answer that core inquiry—was Trump University's defamation counterclaim filed to chill Makaeff's speech.

7. While the original action was Makaeff's deceptive business practices suit, the underlying action for purposes of the separateness inquiry under the collateral order doctrine is Trump University's defamation counterclaim. If, *arguendo*, we compared the district court's order denying Makaeff's anti-SLAPP motion to the merits of Makaeff's deceptive business practices claim, the divide separating those two is even greater.

the defendant is guilty of the charged crime). As the Fifth Circuit reasoned in its separability analysis concerning an analogous Louisiana anti-SLAPP statute:

> The immunity decisions indicate that some involvement with the underlying facts is acceptable, as the Court has found the issue of immunity to be separate from the merits of the underlying dispute "even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue."

Henry, 566 F.3d at 175 (quoting *Mitchell*, 472 U.S. at 529). In other words, an order can touch on the merits and still be sufficiently separate from the merits to satisfy the requirements of the collateral order doctrine. As we concluded in *Batzel*, "[t]he purpose of an anti-SLAPP motion is to determine whether the defendant is being forced to defend against a meritless claim," not to determine whether the defendant actually committed the relevant tort. *Batzel*, 333 F.3d at 1025. The motion to strike thus "exists separately from the merits of the defamation claim itself." *Id.* Furthermore, § 425.16 does not conflict with *Johnson v. Jones*, 515 U.S. 304 (1995), because the "probability" inquiry asks a purely legal question: "whether the facts alleged . . . support a claim" that survives a motion to strike. *Id.* at 313 (internal quotation marks omitted). Unlike the sufficiency of evidence inquiry at issue in *Johnson*, it does "not consider the correctness of the plaintiff's version of the facts." *Id.*

Finally, the policy animating the separability requirement favors our determination in *Batzel* that the motion to strike inquiry is separable. As the Fifth Circuit observed in *Henry*, the separability requirement furthers the purpose of the final order rule "by preventing appeals on issues that will be definitively decided later in the case." 566 F.3d at 176. However, issues that are decided before trial and then not normally revisited, such as immunity, do not implicate this concern. The denial of an anti-SLAPP motion is similar: "although an [anti-SLAPP] motion looks to the plaintiff's probability of success, the court decides it before proceeding to trial and then moves on." *Id.*

We recently reaffirmed the validity of *Batzel* in light of the Supreme Court's intervening decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). *See DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009 (9th Cir. 2013). We remarked that *Mohawk Industries* redirected our focus towards "whether delaying review would imperil a substantial public interest or some particular value of a high order." *Id.* at 1015 (internal quotation marks and citations omitted). Applying this rule, we held:

> [T]he denial of a motion to strike made pursuant to California's anti-SLAPP statute remains among the class of orders for which an immediate appeal is available. This is especially so given the particular public interests that the anti-SLAPP statute attempts to vindicate. It would be difficult to find a value of a "high[er] order" than the constitutionally-protected rights to free speech and petition that are at the heart of California's anti-SLAPP statute. Such constitutional rights deserve particular solicitude within the framework of the collateral order doctrine. The California legislature's determination, through its enactment of the anti-SLAPP statute, that such constitutional rights would be imperiled absent a right of interlocutory appeal deserves respect. We must make particular efforts to accommodate the substantive aims of states when, as here, we entertain state law claims as a federal court sitting in diversity.

Id. at 1015–16 (second alteration in original; citation omitted).

III.

Through anti-SLAPP laws, the legislatures of Arizona, California, Guam, Hawaii, Nevada, Oregon, and Washington have decided to impose substantive limitations on certain state law actions. *See* Thomas R. Burke, *Anti-SLAPP Litigation* App. B (2013) (listing the text of each state's anti -SLAPP statute). Refusing to recognize these limitations in federal court is bad policy. If we ignore how states have limited actions under their own laws, we not only flush away state legislatures' considered decisions on matters of state law,[8] but we also put the federal courts at risk of being swept away in a rising tide of frivolous state actions that would be filed in our circuit's federal courts. Without anti-SLAPP protections in federal courts, SLAPP plaintiffs would have an incentive to file or remove to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP defendant's speech-related activities.[9] Encouraging such forum-shopping chips away at "one of the modern cornerstones of our federalism." *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).

* * *

Newsham and *Batzel* were correctly decided. Every circuit to consider these issues has agreed with our holdings in these cases, concluding that similar anti-SLAPP provisions apply in federal court and rulings on the motions are immediately appealable. Our dissenting colleagues wanted to take this case en banc to overrule *Newsham*, *Batzel*, and their

8. Notably, under the Rules Enabling Act, the Federal Rules of Civil Procedure cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The failure to enforce the anti-SLAPP laws would arguably enlarge state law causes of action and abridge state law speech protections. *See Shady Grove*, 559 U.S. at 416–17 (Stevens, J., concurring in part and concurring in the judgment) (agreeing that "there are some state procedural rules that federal courts must apply in diversity casesbecause they function as part of the State's definition of the substantive rights and remedies").

9. *See, e.g.*, Eliza Krigman, *Yelp Pushes for Federal Anti-SLAPP Laws*, Politico (Jan. 4, 2013, 4:40 AM), http://www.politico.com/story/2013/01/ yelp-pushes-for-federal-anti-slapp-laws-85737.html (noting that a lawsuit was filed in Virginia instead of the District of Columbia because Virginia had no anti-SLAPP law).

progeny, and, in so doing, create an inter-circuit split. But our circuit has already held that citizens of the seven jurisdictions within our circuit that have anti-SLAPP laws should not be stripped of their state's free speech protections whenever they step inside a federal court.

En banc review is not an opportunity for us to dig through our circuit's trove of opinions and call cases that we would have decided differently. "We must recognize that we are an intermediate appellate court," *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), and that we should only invoke the en banc process to secure or maintain uniformity of our decisions or because a question of exceptional importance is involved. *See* Fed. R. App. Proc. 35. Supreme Court precedent does not require us to change course and the majority of active judges in our court wisely refused to grant en banc consideration.

WATFORD, Circuit Judge, joined by KOZINSKI, Chief Judge, and PAEZ and BEA, Circuit Judges, dissenting from the denial of rehearing en banc:

In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), we held that California's anti-SLAPP statute must be applied in federal court. *Id.* at 972–73. In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), we compounded that mistake by holding that litigants are entitled to take interlocutory appeals from rulings on anti-SLAPP motions. *Id.* at 1024–26. Neither of those decisions is consistent with controlling Supreme Court precedent, and both warranted reexamination by the court sitting en banc.

I

The Supreme Court has long held that federal courts may not apply state statutes that interfere with the operation of the Federal Rules of Civil Procedure. In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court established the governing test. "When a situation is covered by one of the Federal Rules," a federal court must apply the Federal Rule, notwithstanding the existence of a conflicting state statute. *Id.* at 471. The Federal Rule governs so long as it "trangresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions." *Id.*; *see also Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4510, p. 293 (2d ed. 1996). Only if the Federal Rule is inapplicable or invalid must the court "wade into *Erie*'s murky waters." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

The Supreme Court's recent decision in *Shady Grove* sheds new light on how this conflict analysis should proceed. That case concerned a challenge to a New York statute precluding class certification of any action seeking penalties or statutory minimum damages. *Id.* at 396–97 & n.1. The Court held that the statute conflicted with Federal Rule of Civil Procedure 23. The conflict arose because Rule 23 sets out "a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," while the New York statute "attempts to answer the same question—*i.e.*, it states that Shady Grove's suit 'may *not* be maintained as a class action' (emphasis added) because of the relief it seeks." *Id.* at 398–99. The Court found a conflict between the two provisions because it viewed Rule 23 as establishing an exclusive set of criteria governing class certification that States may not supplement. *See id.* at 398–400.

Viewed through *Shady Grove*'s lens, California's anti-SLAPP statute conflicts with Federal Rules 12 and 56. Taken together, those rules establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court. *See Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring) ("The Federal Rules aren't just a series of disconnected procedural devices. Rather, the Rules provide an integrated program of pre-trial, trial and post-trial procedures . . . "). California's anti-SLAPP statute impermissibly supplements the Federal Rules' criteria for pre-trial dismissal of an action.

Let's take the conflict with Rule 12 first. Rule 12 provides the sole means of challenging the legal sufficiency of a claim before discovery commences. To survive a Rule 12(b)(6) motion to dismiss—the closest Rule 12 analog to an anti-SLAPP motion to strike—the plaintiff must allege facts stating a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This standard "does not impose a probability requirement at the pleading stage." *Id.* at 556. Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is *improbable*." *Id.* (emphasis added); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a probability requirement . . . " (internal quotation marks omitted)).

Any attempt to impose a probability requirement at the pleading stage would obviously conflict with Rule 12. Yet that is exactly what California's anti-SLAPP statute does. It bars an action from proceeding beyond the pleading stage "unless the court determines that the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1) (emphasis added). By forcing the plaintiff to establish that success is not merely plausible but probable, the anti-SLAPP statute effectively stiffens the Rule 12 standard for testing the legal sufficiency of a claim. Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed.

Similar problems plague the interaction between California's anti-SLAPP statute and Rule 56. Motions to strike almost invariably require consideration of matters outside the pleadings, and in those circumstances the Federal Rules state that "the motion *must* be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d) (emphasis added).

Under Rule 56, a party is entitled to summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Conversely, to avoid summary judgment, the non-movant need only "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (internal quotation marks omitted). The anti-SLAPP statute eviscerates Rule 56 by requiring the plaintiff to prove that she will probably prevail if the case proceeds to trial—a showing considerably more stringent than identifying material factual disputes that a jury could reasonably resolve in the plaintiff's favor.

Our decision in *Metabolife International, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001), further highlights the conflict between the anti-SLAPP statute and Rule 56. California's anti-SLAPP statute mandates a stay of all discovery pending the court's resolution of a motion to strike. Cal. Civ. Proc. Code § 425.16(g). In *Metabolife*, we held that "the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56," and we therefore refused to apply the statute's discovery provisions in federal court. *Metabolife*, 264 F.3d at 846 (internal quotation marks omitted). At the same time, however, we allowed the motion-to-strike regime to stand. As Chief Judge Kozinski has noted, the resulting amalgamation of anti-SLAPP and Rule 56 procedures has "crippled" the anti-SLAPP statute, leaving us with "a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed." *Makaeff*, 715 F.3d at 275 (Kozinski, C.J., concurring).

In short, California's anti-SLAPP statute creates the same conflicts with the Federal Rules that animated the Supreme Court's ruling in *Shady Grove*. That intervening decision should have led us to revisit—and reverse—our precedent permitting application of state anti-SLAPP statutes in federal court.

II

Even if anti-SLAPP motions may be brought in federal court, we should stop entertaining interlocutory appeals from rulings on such motions. In *Batzel*, we held that interlocutory appeals are authorized under the collateral order doctrine, which applies only if three conditions are met. The order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotation marks omitted); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). Orders granting or denying anti-SLAPP motions don't satisfy the second condition of this test, because California's anti-SLAPP statute requires courts to assess the merits of the action when ruling on a motion to strike.

California's anti-SLAPP statute states that a motion to strike shall be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1). In *Batzel*, we held that a ruling under this provision involves a question completely separate from the merits because "it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed." *Batzel*, 333 F.3d at 1025. *Batzel*'s reasoning on this point is unpersuasive. A court cannot gauge the probability of success on a claim without assessing the merits of the claim itself. Such a predictive analysis may not amount to *deciding* the claim on the merits, but there's no credible argument that it's "*completely* separate from the merits." *Will*, 546 U.S. at 349 (emphasis added). For proof, we need look no further than the panel's opinion in this case, which engages in an exhaustive analysis of the merits of Trump University's defamation claim. *See Makaeff*, 715 F.3d at 261–71.

The absence of an issue completely separate from the merits is sufficient, without more, to preclude application of the collateral order doctrine, since all three of the doctrine's conditions must be met. But hold on, some have objected, that can't be right. California's anti-SLAPP statute is intended to afford an immunity *from trial*, not just from liability, and without the ability to take an immediate appeal that immunity may well be lost. However, even if California's anti-SLAPP statute provides an immunity from trial, as we concluded in *Batzel*, 333 F.3d at 1025–26, that doesn't make anti-SLAPP rulings immediately appealable. (As Judge Paez has noted, we've held that similar anti-SLAPP statutes in other States do *not* afford immunity from trial and thus do not trigger application of the collateral order doctrine. *See Makaeff*, 715 F.3d at 276 (Paez, J., concurring). That has added yet another layer of incoherence to our circuit's anti-SLAPP jurisprudence.)

The Supreme Court has specifically resisted the notion that all claims of a right to avoid trial satisfy the collateral order doctrine's requirements. In *Will*, the Court cautioned: "Those seeking immediate appeal therefore naturally argue that any order denying a claim of right to prevail without trial satisfies the third condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement of § 1291 in tatters." 546 U.S. at 350–51. Thus, even cases squarely presenting a claimed right not to stand trial must be treated with skepticism. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

We should be skeptical here. The Supreme Court has permitted immediate appeals of immunity rulings in part because immunity questions generally involve issues distinct from the merits and don't require extensive factual inquiry. For example, the Court has allowed immediate appeals of absolute and Eleventh Amendment immunity determinations, both of which turn on the legal status of the defendant. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142–47 (1993); *Nixon v. Fitzgerald*, 457 U.S. 731, 741–43 (1982).

Similarly, the Court has allowed immediate appeals of many, but not all, qualified immunity determinations. Un-

der *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), courts must determine whether the law the defendant allegedly violated was "clearly established." *Id.* at 818. In holding that such determinations are immediately appealable under the collateral order doctrine, the Court stressed: "An appellate court reviewing the denial of the defendant's claim of immunity *need not consider the correctness of the plaintiff's version of the facts*, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law . . . " *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (plurality opinion) (emphasis added).

In cases where the qualified immunity inquiry strays beyond a purely legal question, however, the Court has refused to entertain immediate appeals. In *Johnson v. Jones*, 515 U.S. 304 (1995), the Court held that defendants asserting qualified immunity may not appeal "a *fact*-related dispute"—sufficiency of the evidence—under the collateral order doctrine. *Id.* at 307. The Court later explained that *Johnson*'s holding is rooted in separability concerns: "[I]f what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim . . . " *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

This type of determination—"whether the evidence could support a finding that particular conduct occurred"—is exactly what California's anti-SLAPP statute requires. To assess the "probability that the plaintiff will prevail," Cal. Civ. Proc. Code § 425.16(b)(1), the reviewing court must assess the strength of the evidence supporting the plaintiff's allegations. The statute clearly contemplates such a fact-bound inquiry: "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." § 425.16(b)(2). Indeed, in this very case the panel characterized the anti-SLAPP inquiry as "inherently fact-intensive." *Makaeff*, 715 F.3d at 271. Engaging in this exercise under the collateral order doctrine is plainly at odds with *Johnson*.

The Court recognized in *Johnson* that denying immediate appeals of qualified immunity decisions "threatens to undercut the very policy (protecting public officials from lawsuits)" that would ordinarily justify immediate appellate review. *Johnson*, 515 U.S. at 317. But the Court concluded that when the immunity issues are not distinct from the merits, "precedent, fidelity to statute, and underlying policies" do not permit interlocutory appeals. *Id.* Thus, even if California's anti-SLAPP statute confers a right not to stand trial, that fact alone is not enough to satisfy the collateral order doctrine's requirements.

* * *

Our circuit's anti-SLAPP jurisprudence runs afoul of two separate lines of Supreme Court precedent, both of which involve matters fundamental to the operation of the federal courts. We should have taken this case en banc to bring our case law in line with *Shady Grove* and the Supreme Court's decisions establishing the proper scope of the collateral order doctrine.

Bankruptcy Appellate Panel

Cite as 13 C.D.O.S. 12820

In re: JESUS EDGAR MONTANO, Debtor.

HERITAGE PACIFIC FINANCIAL, LLC, Appellant,

v.

JESUS EDGAR MONTANO, Appellee.

BAP No. NC-12-1579-PaDJu
United States Bankruptcy Appellate Panel of the Ninth Circuit
Bk. No. 10-71788
Adv. No. 11-04008

Argued and Submitted on September 20, 2013 at San Francisco, California

Filed November 1, 2013

Appeal from the United States Bankruptcy Court for the Northern District of California

Hon. William J. Lafferty, U.S. Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN and JURY, Bankruptcy Judges.

COUNSEL

Appellant(s): Brad. A. Mokri (Attorney for Heritage Pacific Financial LLC) LAW OFFICES OF MOKRI & ASSOCIATES.

Appellee(s): Tessa M. Santiago (Attorney for Jesus Edgar Montano) LINCOLN LAW FIRM, LLP.

OPINION

PAPPAS, Bankruptcy Judge:

Creditor Heritage Pacific Financial, LLC ("Heritage") appeals the decisions of the bankruptcy court: (1) granting a summary judgment dismissing Heritage's § 523(a)(2) complaint against chapter 7[1] debtor Jesus Edgar Montano ("Montano") because enforcement of its claim was barred by Cal. Code Civ. Proc. § 726 (f) and (g);[2] and (2) after initially denying the motion, on reconsideration, granting Montano's request for an award of attorneys fees and costs. We AFFIRM.

FACTS

Montano is a native of El Salvador, with limited spoken English language skills, and no ability to read or write English. In November 2006, Montano purchased a house in Oakland, California (the "Property"). To obtain financing, he contacted a mortgage broker who, according to Montano, collected his financial information in a conversation over the phone and then later incorporated it into a Universal Residential Loan Application (Form 1003) (the "URLA"). The record is not clear when this telephone conversation took place, or how WMC Mortgage Corporation ("WMC"), the eventual lender, was contacted. However, the record shows that WMC was asked by the broker to consider Montano's application for a primary loan of $348,750, and a second loan of $89,990, to purchase the Property.

Montano's loan requests were approved by WMC. On November 22, 2006, Montano appeared before a notary to complete the paperwork for the loan applications. At that time, he signed the URLA, the notes for the two loans, and separate deeds of trust securing each loan. Significantly, Montano initialed each page of the URLA, except for the page which contained specific information regarding the income he purportedly received from wages and self-employment.

The parties agree that the URLA contained incorrect information about Montano's income. The URLA stated that Montano received a total of $8,090 per month, $3,500 of which were wages he earned working as an auto detailer at a local dealership, and the remainder as income generated from his supposed business, Montano Moving Services. Although Montano was in fact employed at the auto dealership at the time of applying for the loans to purchase the Property, Montano maintains that he was never self-employed, nor that he received any income from Montano Moving Services.

There are other documents that Heritage asserts were contained in Montano's loan application materials submitted to WMC: (1) separate letters of reference from Joel Rendon, Marta Madriz and Vantu Tran, each stating that they were happy with the moving services supposedly provided by Montano; (2) copies of two Craigslist internet advertisements for Montano Moving Services; and (3) a letter from Guadalupe Perez, on the letterhead of "Perez Income Tax," indicating that she had provided accounting services for Montano and Montano Moving Services for the previous three years. Montano alleges that these documents were all forgeries created without his knowledge by Joel Rendon, an employee of the loan broker.

The Montano loan application file also contained WMC's prefunding audit forms signed by Jonathan Cobb on November 30, 2006. One such form relates to Montano's self-employment; it indicates that Cobb "spoke with tax preparer. He verified that he has filed schedule C tax info for the borrower for the last 3 years." The second form relates to employment verification. Cobb supposedly spoke with the human resources manager for the auto dealership and verified that Montano was employed there. There is no indication on either form that the income amounts shown in the loan application were verified to be accurate.

1. Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. Civil Rule references are to the Federal Rules of Civil Procedure 1-86.

2. For brevity, we abbreviate Cal. Code Civ. Proc. as CCCP.

WMC approved both of Montano's loans on December 4, 2006.[3]

Montano resided at the Property purchased with the loans for seven months, until about June 2007. After making only five payments on the loans, he defaulted on the primary loan and, on July 17, 2007, WMC filed a notice of default to foreclose the first priority deed of trust. A trustee's sale occurred, and the Property was sold on October 22, 2007. The now-unsecured second loan note was purchased by Heritage on January 20, 2009.

Heritage alleges that, only after purchasing the second loan note, it discovered that Montano had misrepresented his income on the URLA. Heritage filed a complaint in Alameda County Superior Court in April 2010, alleging that Montano obtained the second loan by fraud.

Montano filed a chapter 7 bankruptcy petition on October 13, 2010. His schedule F lists a debt for $89,990.00 owed to Heritage for the second mortgage loan.

Heritage commenced the adversary proceeding giving rise to this appeal on January 9, 2011. In its complaint, Heritage asked the bankruptcy court to determine that its $89,990.00 claim against Montano based upon the second loan note was excepted from discharge for fraud under § 523(a)(2)(A) and (B). According to Heritage, Montano knew that the URLA and supporting documentation he submitted to WMC to obtain the loans were materially false.

Montano's initial response to the complaint was a motion to dismiss under Civil Rule 12(b)(5) and (6), filed on February 17, 2011, and amended on February 25, 2011. In the motion, Montano challenged Heritage's right to relief because the complaint failed to establish Heritage's status as a creditor. Further, Montano argued that Heritage had not pled sufficient facts to support an exception to discharge under either § 523(a)(2)(A) or (B). Also on February 25, 2011, Montano filed a cross-complaint against Heritage seeking to recover his attorneys fees and costs incurred in the adversary proceeding under § 523(d).

A hearing on Montano's dismissal motion was conducted on March 25, 2011. After hearing from the parties, the bankruptcy court[4] denied Montano's motion to dismiss, ruling, among other things, that Heritage had pled sufficient facts to state a claim under § 523(a)(2)(A) plausible on its face.[5] Although Montano's cross-claim seeking recovery of attorneys fees under § 523(d) was not addressed at that hearing, the court made extensive comments regarding the challenges Heritage would face in establishing that it had substantial justification for prosecuting the adversary proceeding against Montano:

> The original lender has to show or you for Heritage have to show that the original lender justifiably relied in this case, not what some expert says some hypothetical lender would normally do. . . . How are you going to prove it [?] And I'm not hearing a very good answer. . . . But I also would like to be practical too and not waste time if at the end of the day you simply don't have a case to prove. . . . If we start with the fact that the original lender is defunct and whoever made a decision at the original lender is nowhere to be found. But the law of the [*Boyajian*] case makes it abundantly clear that you [have] got to show who made the reliance and who was defrauded. Not your client. So I don't know how you are going to prove it.

Hr'g Tr. 7:9–8:9, March 25, 2011.

After considerable sparring in discovery disputes, Montano filed a motion for summary judgment on February 21, 2012. Montano's motion was founded on his arguments that: (1) enforcement of Heritage's claim was barred by the statute of limitations; (2) the claim was barred by California's one-action rule; (3) the claim was barred by California's anti-deficiency statutes; (4) the claim should be dismissed because Heritage had not established that it was the real party in interest; (5) Heritage was not properly assigned the claim; and (6) Heritage could not establish that any fraud occurred.

Heritage responded to the summary judgment motion on March 1 and 7, 2012. In addition to some procedural arguments regarding timeliness of Montano's motion under the local rules, Heritage countered Montano's arguments, contending that: (1) its claim was not time-barred because the statute of limitations did not begin to run until the foreclosure occurred; (2) neither the one-action rule nor the anti-deficiency statutes apply to a claim against a borrower for fraud; (3) CCCP § 726(a) does not apply to "sold-out" junior lienholders; (4) Heritage is the valid holder of the note on the second mortgage loan; and (5) WMC had complied with industry standards for determining Montano's creditworthiness in relying on the URLA and supporting documents. Attached to Heritage's response was a declaration of Mark G. Scheuerman, offered as an expert witness, who stated that, in his opinion, WMC abided by the general standards of practices and customs in the lending industry in determining a

3. There is very little information in the record concerning the closing of the loan transactions. WMC refers to its December 4, 2006 actions as "settlement of the loan." We assume that the funds were disbursed on or after this settlement.

4. The Honorable Dennis Montali presided at the hearing on March 25, 2011, and ruled on the motion. The adversary proceeding was subsequently assigned to the Honorable William Lafferty, who entered the orders at issue in this appeal.

5. The bankruptcy court did not address Heritage's claim under § 523(a)(2)(B). This is curious since Heritage's theory is that Montano obtained the loan through use of a fraudulent loan application and supporting written materials concerning his financial condition, a claim governed exclusively by § 523(a)(2)(B). By its terms, § 523(a)(2)(A) excludes "a statement respecting the debtor's or an insider's financial condition." By contrast, § 523(a)(2)(B)(ii) explicitly requires such a written statement. *Tallant v. Kaufman (In re Tallant)*, 218 B.R. 58, 69 (9th Cir. BAP 1998).

At oral argument before the Panel, Heritage clarified that it has abandoned its claim under § 523(a)(2)(A) and proceeded in the bankruptcy court and this appeal solely under § 523(a)(2)(B).

borrower's creditworthiness at the time of the loans. Also attached was a declaration of Diane Taylor that had been prepared for an unrelated state court case, identifying her as "assistant secretary" of WMC Mortgage, LLC, the successor to WMC. Taylor declared that "WMC relied on the information provided by an applicant-borrower in his/her loan application through all stages of the underwriting process."

Lengthy hearings on the summary judgment motion took place on April 11 and 23, 2012. As shown in the transcripts, all issues raised by the parties were addressed by counsel, and the bankruptcy court actively engaged in discussions with them. At the conclusion of the hearings, the court explained the reasons for its decision:

> I am convinced that [CCCP §§] 726(f) and (g) apply to this situation and on that basis I'm going to grant the motion for summary judgment. . . . On this set of facts, I'm concluding that this was owner-occupied property and I'm also concluding that the amount of the debt falls within the prohibition [of § 726(g)]. I'm aware of the argument that perhaps the Legislature meant something else in terms of what the aggregate debt would be, but that is not what the statute says. It's something that easily could have been expressed as such and easily, frankly, could have been corrected thereafter but it hasn't been. So I'm dealing with the statute as I believe it to be. . . . I am not accepting the proposition that [§] 726(f) and (g) simply parallel some other doctrine of allowing fraud claims against borrowers. I see nothing in the way the statute is drafted or the words of the [Legislative History] to indicate that. . . . I'm determining that summary judgment is appropriate on the grounds of the applicability of sections 726(f) and (g) in this case. I think many other arguments were made are of some interest, and obviously a lot of time and effort went into those arguments. But because this disposes of the matter, I'm going to leave it at that.

Hr'g Tr. 107:18–108:22, April 23, 2012. In response to a query by Montano's counsel noting that "we had moved for fees under [§] 523(d) and that the debt remains discharged, it was a consumer debt, and the complaint was brought without a reasonable basis in law," the bankruptcy court responded, "I'm denying that. I think those are close questions. I'm denying that." Hr'g Tr. 109:4-9, April 23, 2012.

On June 5, 2012, the bankruptcy court entered an Order on Defendant's Motion for Summary Judgment (the "Summary Judgment Order"), granting the motion "on the basis that the [Heritage] claim is barred by California Code [of Civil Procedure §] 726(f) and (g) for the reasons orally stated on the record."

On June 19, 2012, Montano filed a motion for reconsideration. In it, Montano argued that it was legal error for the bankruptcy court to deny his § 523(d) motion for an award of attorneys fees and costs without making appropriate findings, especially where Heritage could not show substantial justification for prosecuting the adversary proceeding. Heritage responded to this motion on July 18, 2012, arguing that Montano was merely rearguing issues that were previously raised in the summary judgment proceedings. Heritage further asserted that its complaint against Montano was substantially justified by the facts and the law.

At an initial hearing on the motion for reconsideration on August 1, 2012, the bankruptcy court directed the parties to submit additional briefing on whether Heritage's action against Montano was substantially justified at all stages of the case. At the continued hearing on September 5, 2012, after hearing more argument from counsel, the bankruptcy court noted that it had disposed of summary judgment by ruling on only one ground: that CCCP §§ 726(f) and (g) barred Heritage from asserting its fraud claim against Montano. While the court acknowledged that it had not reached Montano's other arguments regarding standing, assignability of the note, Montano's lack of intent to deceive, or Heritage's reliance on the loan application income information, the court concluded that,

> the right analysis for [§] 523(d) is to go back and see if there were facts and law on [Heritage's] side, even though I didn't reach them in disposing of the summary judgment motion. I think once I have a request under [§] 523(d), that's what I'm supposed to do, and frankly is what I didn't do at the end of the hearing because I was focusing on what I did decide.

Hr'g Tr. 41:2–9, September 5, 2012.

After next hearing arguments from counsel regarding Heritage's position at each stage of the litigation regarding the elements of fraud, the bankruptcy court focused on one necessary element of Heritage's fraud claim, reliance, and questioned whether Heritage had met its burden of showing that WMC had actually relied on the income representations in the loan application materials submitted by Montano. The court then reminded Heritage of the court's earlier admonition at the hearing on the dismissal motion that Heritage would face a significant hurdle to establish actual reliance by a defunct lender.

Heritage had submitted three declarations to support its position that WMC had actually relied on the misrepresentations allegedly made by Montano in approving the loans, in which: Mr. Ganter, Heritage's in-house counsel, described his investigation of Montano's alleged statements; Mr. Scheuerman, an expert witness, opined that WMC met industry standards for determining creditworthiness; and Ms. Taylor, an assistant secretary in the successor business to WMC, stated that WMC relied on the income assertions in the loan application at all stages of the loan process.

The bankruptcy court rejected Heritage's showing. It noted that the Ganter declaration simply did not address whether WMC relied on the URLA and that, additionally,

Montano had pointed out several inconsistencies in Ganter's statements. The Scheuerman declaration, according to the court, "helps me decide whether something meets an industry standard or not. So he's not talking about actual reliance [by WMC]." Hr'g Tr. 43:5-6, September 5, 2012.

The bankruptcy court expressed befuddlement regarding the Taylor declaration: "I couldn't tell who she was from the declaration, frankly. I couldn't tell how she'd have any knowledge of the issue. She didn't identify . . . the person who looked at [the URLA], and what she said was so completely conclusory." *Id.* at 43:8-13. The court concluded:

> I am granting the motion for reconsideration to the extent that it put into issue the elements under [§] 523(a)(2)(B) that were set forth in the motion for summary judgment. Those directly included the reliance element. The predicate for any reliance element is that there was actual reliance by a person, and I'm finding that that simply was not demonstrated, and its not a credibility issue. The declarations simply didn't go to the subject in any meaningful way.

Id. at 45:3-11.

An order granting the motion for reconsideration, and awarding attorneys fees and costs under § 523(d) to Montano, was entered on September 27, 2012 (the "Reconsideration Order").[6] Following entry of a final judgment in the adversary proceeding on October 22, 2012, Heritage filed a timely appeal regarding both the Summary Judgment Order and Reconsideration Order, on November 2, 2012.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (I). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

Whether the bankruptcy court erred in granting Montano's motion for summary judgment against Heritage because CCCP § 726 barred enforcement of Heritage's claim against Montano.

Whether the bankruptcy court abused its discretion in reconsidering its earlier order denying an award of attorneys fees and costs to Montano and then granting that award under § 523(d).

STANDARDS OF REVIEW

We review de novo the bankruptcy court's grant of summary judgment. *SNTL Corp. v. Ctr. Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826, 834 (9th Cir. 2009). The bankruptcy court's interpretation of state law is also reviewed de novo. *Lahoti v. Vericheck*, 636 F.3d 501, 505 (9th Cir. 2011).

We review decisions regarding relief from judgment under Rules 9024 and 9023, which incorporate Civil Rules 60(b)(1) and 59(e), for abuse of discretion. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000); *Morris v. Peralta (In re Peralta)*, 317 B.R. 381, 385 (9th Cir. BAP 2004).

A bankruptcy court's order awarding attorneys fees and costs under § 523(d) is reviewed for abuse of discretion. *First Card v. Hunt (In re Hunt)*, 238 F.3d 1098, 1101 (9th Cir. 2001) (adopting the BAP's standard of review of § 523(d) announced in *First Card v. Carolan (In re Carolan)*, 204 B.R. 980, 984 (9th Cir. BAP 1996)). Under this standard of review, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). And if the bankruptcy court identified the correct legal rule, we then determine under the clearly erroneous standard whether its factual findings and its application of the facts to the relevant law were: "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (internal quotation marks omitted).

DISCUSSION

I. THE BANKRUPTCY COURT DID NOT ERR IN GRANTING MONTANO'S MOTION FOR SUMMARY JUDGMENT AGAINST HERITAGE BECAUSE CCCP § 726 BARRED ENFORCEMENT OF HERITAGE'S CLAIM AGAINST MONTANO.

In the bankruptcy court, Heritage sought a § 523(a)(2)(B) exception to Montano's discharge because, Heritage alleged, the loan application and other materials Montano submitted to WMC to obtain the second mortgage loan contained fraudulent information. The bankruptcy court granted summary judgment to Montano, and dismissed Heritage's exception to discharge claim, a ruling Heritage challenges in this appeal. This discharge exception provides:

> § 523. Exceptions to discharge
>
> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by . . .
>
> (B) use of a statement in writing —
>
> (i) that is materially false;

6. In its order on Defendant's Motion for Attorney's Fees and Costs, the bankruptcy court awarded Montano $69,782.19 in attorney's fees and $1,085.12 in costs. Heritage has not challenged the amount awarded in this appeal.

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive[.][7]

Summary judgment may be granted "if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Civil Rule 56(a), incorporated by Rule 7056; *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008). Where only a question of law is at issue, summary judgment is proper. *Asuncion v. U.S. Immigration & Naturalization Serv.*, 427 F.2d. 523, 524 (9th Cir. 1970).

Here, the bankruptcy court determined that, as a matter of law, enforcement of Heritage's claim against Montano was barred under applicable state law, CCCP § 726(f) and (g). The court announced its decision on summary judgment at the hearing on September 5, 2012:

> On this set of facts, I'm concluding that this was owner-occupied property and I'm also concluding that the amount of the debt falls within the prohibition [of CCCP § 726(g)]. It's $89,000 some-odd worth of debt. I'm aware of the argument that perhaps the Legislature meant something else in terms of what the aggregate debt would be, but that is not what the statute says. It's something that really could have been expressed as such and easily, frankly, could have been corrected thereafter, but it hasn't been. So I'm dealing with the statute as I believe it to be. . . . I'm determining that summary judgment is appropriate on the grounds of the applicability of Sections 726(f) and (g) in this case.

Hr'g Tr. 107:19–108:21, September 5, 2012.

We agree with the bankruptcy court that the state statutory provisions are dispositive of the issues on appeal and, therefore, we affirm the bankruptcy court's decision to grant summary judgment dismissing Heritage's exception to discharge claim.

In construing the state statutes in this case, we are mindful of the instructions of the California Supreme Court that we are to look to the statutes' plain meaning. *Bonnell v. Medical Bd.*, 82 P.3d 740, 743 (Cal. 2003). When interpreting a statute, we must discover the intent of the legislature to give effect to its purpose, being careful to give the statute's words their "plain, commonsense meaning." *Kavanaugh v. W. Sonoma Cnty. Union High School*, 62 P.3d 54, 59 (Cal. 2003). If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary. *Id.* When the statutory language is unambiguous, "we presume the Legislature meant what it said and the plain meaning of the statute governs." *Diamond Multimedia Sys., Inc. v. Super. Ct.*, 968 P.2d 539, 546 (Cal. 1999).

The parties to this appeal have not argued that CCCP § 726(f) and (g) are ambiguous. Instead, they seem to agree that the statutory language should be viewed as parts of an interconnected series of laws laying out the rules for collection of deficiencies resulting from mortgage and trust deed foreclosure sales, and the exceptions to those rules. In this respect, the parties are correct — no laws should be considered in isolation. Rather, we must "interpret the statute[s] as a whole, so as to make sense of the entire statutory scheme." *Carrisales v. Dep't of Corrections*, 988 P.2d 1083, 1085 (Cal. 1999). However, the process is somewhat challenging in this context, given the maze of elaborate and interrelated foreclosure and antideficiency statutes in California relating to the enforcement of obligations secured by interests in real property. *Alliance Mortg. Co. v. Rothwell*, 900 P.2d 601, 611 (Cal. 1995); *Metropolitan Life Ins. Co. v. Sunnymede Shopping Ctr. (In re Sunnymede Shopping Ctr.)*, 178 B.R. 809, 815 (9th Cir. BAP 1995) (describing the maze of "statutory protections and procedures under California law which protect debtors by restricting the secured creditor's remedies for debts secured by mortgages or deeds of trust in real property."). We examine this statutory framework below.

Our analysis begins by acknowledging that, in California, a lender's primary, and sometimes only, remedy to collect a loan secured by a mortgage is to foreclose:

> **[CCCP] § 726. Form of action** . . . (a) There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter.

Alliance Mortg. Co., 900 P.2d at 611 (only form of action for recovery of any debt or enforcement of any rights secured by a mortgage or deed of trust is action for foreclosure); *Bank of Cal., N.A. v. Leone*, 37 Cal. App.3d 444, 447 (Cal. Ct. App. 1974) ("For the purposes of [CCCP § 726(a)], a deed of trust is treated as a mortgage.").

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7. Of course, Heritage did not loan any money to Montano; its claim against him stems from its acquisition of the second note from the original lender, WMC, after the foreclosure of the primary loan mortgage. Ninth Circuit case law establishes that Heritage may stand in the shoes of WMC and may pursue an exception to discharge under such circumstances, but only if it can establish that Montano, with the intent to deceive, used a materially false written statement to obtain the loan from WMC, and that WMC reasonably relied upon that statement. *Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1093 (9th Cir. 2009) (affirming the BAP's reasoning in *New Falls Corp. v. Boyajian (In re Boyajian)*, 367 B.R. 138, 148 (9th Cir. BAP 2007)).

Of course, a foreclosure may not net the lender sufficient sale proceeds to satisfy the lender's claim in full. Acknowledging that reality, CCCP § 726(b)[8] generally preserves the lender's right to pursue a personal judgment against the borrower for any deficiency, unless that right has been waived by the creditor, "or a deficiency judgment is prohibited by CCCP § 580b."

CCCP § 580a[9] prescribes the rules for a deficiency action. But, as noted in CCCP § 726(b), CCCP § 580b plainly prohibits a lender's right to recover a deficiency judgment for certain types of indebtedness. In pertinent part, that statute provides:

> **[CCCP] § 580b. Contract for sale; deed of trust or mortgage; credit transaction; chattel mortgage; deficiency judgments prohibited**
>
> (a) No deficiency judgment shall lie in any event for the following: . . . (3) Under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling, occupied entirely or in part by the purchaser.[10]

See also Roseleaf, 378 P.2d at 98 ("a creditor's right to judgment against debtor for a deficiency may be limited or barred by section . . . 580b"); *Grammercy Inv. Tr. v. Lakemont Homes Nev., Inc.*, 198 Cal. App.4th 903, 911 (Cal. Ct. App. 2011) (waiver by creditor allowed under CCCP § 726(b)); *Prestige Ltd. P'ship v. E. Bay Car Wash Partners (In re Prestige Ltd. P'ship)*, 234 F.3d 1108, 1117 (9th Cir. 2000) (holding that CCCP § 580b precludes deficiency judgments on purchase money notes).

While the one-action rule provides that a lender secured by a mortgage must foreclose to collect its debt, and CCCP §§ 726(b) and 580b prescribe rules and prohibitions regarding the recovery of a deficiency judgment by a lender after foreclosure, CCCP § 726 also contains an important exception to its operation:

> (f) Notwithstanding this section or any other provision of law to the contrary, any person authorized by this state to make or arrange loans secured by real property or any successor in interest thereto, that originates, acquires, or purchases, in whole or in part, any loan secured directly or collaterally, in whole or in part, by a mortgage or deed of trust on real property or an estate for years therein, may bring an action for recovery of damages, including exemplary damages not to exceed 50 percent of the actual damages, against a borrower where the action is based on fraud under Section 1572 of the Civil Code and the fraudulent conduct by the borrower induced the original lender to make that loan.

Finally, even though under CCCP § 726(f) the one-action rule does not bar a creditor's action to recover damages based on the fraudulent conduct of the borrower that induced the original lender to make a loan, that exception is itself subject to an exception:

> **[CCCP] § 726(g).**
>
> (g) Subdivision (f) does not apply to loans secured by single-family, owner-occupied residential real property, when the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for an amount of one hundred fifty thousand dollars ($150,000) or less, as adjusted annually, commencing on January 1, 1987, to the Consumer Price Index as published by the United States Department of Labor.

In sum, then, in California, under CCCP § 726(f), even though a lender may pursue a borrower for fraud in the inducement of a loan without regard to the one-action rule in CCCP § 726(a) and the antideficiency limits in CCCP § 580b, CCCP § 726(g) makes clear that, with respect to a certain type of loan (i.e., those secured by "owner-occupied residential real property," when actually occupied by the borrower, where "the loan" is for $150,000 or less), the lender may not pursue the borrower for fraud.

CCCP §§ 726(g) applies in this case. It is undisputed here that two separate loans were made by WMC to Montano, both of which were secured by deeds of trust, which Montano used to pay the purchase price for his acquisition of the

8. "(b) The decree for the foreclosure of a mortgage or deed of trust secured by real property or estate for years therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the personal liability of any defendant for the payment of the debt secured by the mortgage or deed of trust and shall name the defendants against whom a deficiency judgment may be ordered following the proceedings prescribed in this section . . . ." CCCP § 726(b).

9. "Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his or her complaint the entire amount of the indebtedness which was secured by the deed of trust or mortgage at the time of sale, the amount for which the real property or interest therein was sold and the fair market value thereof at the date of sale and the date of that sale. . . ." CCCP § 580a.

10. Operating in tandem, CCCP § 726(a) and CCCP § 580b are collectively referred to as California's "antideficiency statutes." There is some authority for the proposition that CCCP § 726(a) does not apply to sold-out junior lienors. *Roseleaf Corp. v. Chierighino*, 387 P.2d 97, 100 (Cal. 1963); *see also CJA Corp. v. Trans-Action Fin. Corp.*, 86 Cal. App.4th 664, 665 (Cal. Ct. App. 2001) ("an exception to the one action rule has been recognized in those cases where the security has been lost through no fault of the creditor"). In this appeal, Montano concedes that CCCP § 726(a) may not apply to Heritage. We conclude, nevertheless, that CCCP § 580b does apply to all debts arising from purchase money loans, except, as discussed below, debts induced by fraud as provided in CCCP §§ 726(f) and (g).

Property. Thus, at least at the time of loan origination, the deeds of trust granted by Montano to WMC were purchase money mortgages.[11] It also seems clear that enforcement of the WMC second loan, upon which Montano's liability to Heritage is based, was subject to the one-action rule, and to the antideficiency statutes. However, Heritage argues, for several reasons, that its claim against Montano is not restricted by these statutes.

Heritage notes that its claim against Montano seeks an exception to discharge to collect on a "sold-out" junior lien. It contends that CCCP § 726(b) would not apply to its action. But California case law establishes that the deficiency action bar allowed under CCCP § 726(b), and subject to CCCP § 580b, applies to holders of purchase money second mortgage loans. *Kurtz v. Calvo*, 75 Cal. App.4th 191, 194 (Cal. Ct. App. 1999) ("Section 580b prohibits a deficiency judgment after a judicial or nonjudicial foreclosure under a trust deed securing a purchase money loan. For purposes of section 580b, a deficiency judgment includes a judgment in an action on the note by a sold-out junior lienholder.") (Citations omitted.)

Heritage relies upon several cases it believes are at odds with *Calvo*. For example, in *Cadlerock v. Lobel*, 206 Cal. App.4th 1531, 1541 (Cal. Ct. App. 2012), the court ruled that an assignee of a junior loan, who was subsequently "sold out" by the senior lienholder's nonjudicial foreclosure sale, can pursue the borrower for a money judgment in the amount of the debt owed. However, *Cadlerock* made its ruling because that case did not involve purchase money loans and, thus, CCCP § 580b did not apply:

> Section 580b is inapplicable to the instant case because the loans at issue were not used as purchase money. Section 580b "prohibits all deficiency judgments" in specified real property transactions involving the provision of purchase money, regardless of whether the creditor conducts a judicial or nonjudicial foreclosure. (See *In re Marriage of Oropallo* (1998) 68 Cal. App.4th 997, 1003, 80 Cal. Rptr. 2d 669.).

Id. at n.2.

In another case cited by Heritage, *Nat'l Enters., Inc. v. Woods*, 94 Cal. App.4th 1217, 1226 (Cal. Ct. App. 2001), the court held that the one-action rule in CCCP § 726(a) did not apply to a sold-out junior lienholder. But again in a footnote, the *Woods* court acknowledged that CCCP § 580b would be applicable if *Woods* were a purchase money mortgage case:

> Nor is section 580b applicable here. It bars any deficiency judgment after foreclosure where the debt is secured by a purchase money mortgage, which is not at issue here.

Id. at 1226 n.5.

In *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Graves*, 51 Cal. App.4th 607 (Cal. Ct. App. 1996), the court examined the claim of a creditor who offered a borrower a line of credit secured by a second trust deed on the property. The money was not used to purchase the property. *Id.* at 610. The court explicitly ruled that the debt in question was the "underlying *nonpurchase* money note." *Id.* at 617 (emphasis added).

The parties also disagree whether, for purposes of CCCP § 580b, a purchase money loan loses that status after a foreclosure. Clearly, it does not. *DMC Inc. v. Downey Sav. & Loan Assn.*, 99 Cal. App.4th 190, 196 (Cal. Ct. App. 2002) ("The facts and circumstances that exist at the time the debt is created determine the character of the obligation as a purchase-money mortgage."). In the final analysis, Heritage has not provided us with any acceptable authority for its argument that collection of Montano's debt is not barred by the antideficiency statute, CCCP § 580b.

Of course, the gravamen of this appeal is Heritage's contention that CCCP § 726(f), preserving a lender's right to pursue a borrower for damages if fraud was employed to induce the loan, constitutes an exception to the antideficiency statutes, and allows it to enforce its claim against Montano. We agree that, fairly read, CCCP § 726(f) creates an exception to the general rule prohibiting deficiency actions under CCCP § 726(b) and makes § 580b applicable to purchase money loans. In other words, when a loan originator makes a loan secured by a mortgage or deed of trust on real estate based upon the fraudulent[12] conduct of the borrower to induce the lender to make the loan, the lender may sue the borrower to recover its damages. But there is an exception to this exception, CCCP § 726(g).

The bankruptcy court concluded that, consistent with CCCP § 726(g), this "was owner-occupied property and I'm also concluding that the amount of the debt falls within the prohibition [of CCCP § 726(g)]. It's $89,000 some-odd worth of debt." Hr'g Tr. 107:19–21, September 5, 2012. In particular, the court found, based upon the undisputed facts in the summary judgment record the parties had submitted, that Montano had occupied the property:

> THE COURT: I would be inclined to find no triable issue with respect to occupancy. And I think it — what I'm looking at is occupancy on the day the loan is made. That's the way I'm reading [CCCP §] 726. Assuming it applies at all.

11. A purchase money transaction occurs when "[t]he sum represented by the note and trust deed was a necessary part of the purchase price." *Stockton Sav. & Loan Bank v. Massanet*, 114 P.2d 592, 600 (Cal. 1941).

12. CCCP § 726(f) internally references Cal. Civ. Code § 1572 for its definition of fraud: "Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true[.]"

HERITAGE COUNSEL: Well, there is additional information that we do have that hasn't been presented . . . that defendant did not actually reside in the property.

THE COURT: Well, you relied on the deposition, right?

HERITAGE COUNSEL: Yes, that was part of the evidence. There's been more . . .

THE COURT: What was . . . the rest of it?

HERITAGE COUNSEL: There's been more that's come to light. We did a further investigation.

THE COURT: Well, is that before me today?

HERITAGE COUNSEL: No.

THE COURT: Okay.

HERITAGE COUNSEL: I would like to make the record right now.

THE COURT: Well, let's see if they're okay with that. Ms. Santiago [addressing MONTANO COUNSEL], we're about to get a supplemental —

MONTANO COUNSEL: No, your Honor.

THE COURT: All right. Okay. . . . I'm going to hold you to the record I have today.

Hr'g Tr. 66:22–67:23, April 19, 2012.

We agree with the bankruptcy court's conclusion in this regard. The only evidence before the bankruptcy court on occupancy was the deposition of Montano, in which he testified that he occupied the Property from the day of the loan approvals. That there may have been other evidence available to Heritage that had not been submitted is no basis to deny Montano's motion for summary judgment.

The bankruptcy court's other important conclusion was that the amount of the loan to Montano that Heritage sought to enforce, $89,000, fell within the dollar limitations in § 726(g):

I'm aware of the argument that perhaps the Legislature meant something else in terms of what the aggregate debt should be, but that's not what the statute says. It's something that could have been expressed as such and easily, frankly, could have been corrected thereafter, but it hasn't been. So I'm dealing with the statute as I believe it to be.

Hr'g Tr. 107:23—108:3.

We also agree with the bankruptcy court that, regarding the $150,000 cap, § 726(g) is plain on its face. Under the plain meaning rule, a court must assume that when passing a statute, the Legislature is aware of existing related laws. *Vieira Enters., Inc. v. City of E. Palo Alto*, 208 Cal. App.4th 584, 604 (Cal. Ct. App. 2012). While CCCP § 726 has been amended four times since its enactment in 1987, neither the amount, nor method of calculating the cap, was ever amended. To the extent Heritage argues that policy considerations mandate that the bankruptcy court should have adjusted the cap to aggregate loans made to a borrower by one lender in applying § 726(g), it asks too much. It is for the Legislature, not the courts, to amend statutes for policy considerations. *Cassell v. Super. Ct.*, 244 P.3d 1080, 1094 (Cal. 2011).

Heritage offers another reason why its fraud action against Montano is not barred by § 726(g). It asserts, with no citation to authority or reasoned argument, that CCCP § 726(g) "merely limits the ability of loan originators to recover exemplary damages provided for in subdivision (f)." This argument lacks merit. Of course, CCCP § 726(g) makes no reference to punitive damages or, indeed, to any kind of damages; by its terms it bars *any* application of CCCP § 726(f) where the loan meets two requirements: where an owner/borrower occupies the property, and the loan amount is less than $150,000. Heritage's argument that the California legislature's sole concern in adopting § 726(f) was to limit awards of punitive damages is speculation. In any case, by the plain, unambiguous terms of CCCP § 726(g), CCCP § 726(f) does not apply to the facts in this appeal.[13]

Finally, Heritage repeatedly argues that the California legislature could not possibly have intended to "carve out" an exception that would endorse the fraudulent behavior of borrowers for smaller loans. Once again, Heritage's position rests on speculation about legislative intent. Moreover, we disagree with Heritage's suggestion that it would be absurd for the California Legislature to overlook potential borrower fraud regarding loans to owner-occupiers for less than $150,000 as a means of requiring lenders to exercise special diligence in making such loans. A statute's plain meaning is absurd only if "it is so gross as to shock the general moral or common sense." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *United States v. Fontaine*, 697 F.3d 221, 228 (3d Cir. 2012) ("An interpretation is absurd when it defies rationality or renders the statute nonsensical and superfluous.")(citations omitted). Here, that California would be-

13. In support of its speculation on the intentions of the California legislature, Heritage provided the Panel with almost 300 pages of the legislative materials concerning § 726(f) and (g). But these materials are almost entirely the reports of interest groups and lobbyists, all authored by non-legislators. None contain the statements of individual legislators or of the governor. The California courts have observed that committee reports and legislative counsel digests are not as useful in understanding the intent of the legislature as the language of the statute itself. *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App.4th 1233, 1238 (Cal. Ct. App. 1992). We decline to rely upon this sort of information to create an ambiguity in a statute where none exists.

stow protection against personal liability for a certain class of borrowers for home loans of modest amounts under limited circumstances does not shock the general moral or common sense, nor does it defy rationality, nor is it nonsensical and superfluous.

We conclude that the bankruptcy court did not err in granting Montano's motion for summary judgment against Heritage because, operating together, CCCP §§ 726 and 580b barred enforcement of Heritage's claim against Montano.

II. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN RECONSIDERING ITS PRIOR ORDER AND AWARDING ATTORNEYS FEES AND COSTS TO MONTANO UNDER § 523(D).

A. The bankruptcy court did not abuse its discretion in granting Montano's motion for reconsideration.

In their briefs, Heritage and Montano both suggest that Montano's motion for reconsideration was founded upon the provisions of Rule 9024, which incorporates Civil Rule 60(b)(1). We disagree. Because Montano's motion for reconsideration was filed within fourteen days after entry of the Summary Judgment Order, the motion should be treated as one to alter or amend the Summary Judgment Order under Rule 9023, which incorporates Civil Rule 59(e). *Fadel v. DCB United LLC (In re Fadel)*, 492 B.R. 1, 18 (9th Cir. BAP 2013)(citing *Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001)). The standard for granting relief under that rule requires the movant to show (a) newly discovered evidence, (b) the court committed clear error or made an initial decision that was manifestly unjust, or (c) an intervening change in controlling law. *Duarte v. Bardales*, 526 F.3d 563, 567 (9th Cir. 2008).

To the extent that Montano sought relief in the bankruptcy court under the wrong Rule, it was harmless error. In its motion, Montano argued that the bankruptcy court made an error of law. Under both Civil Rules 59(e) and 60(b)(1), reconsideration of an order is appropriate to correct a perceived error of law by the trial court.[14] *In re Fadel*, 492 B.R at 18 (Rule 60(b)(1)); *see also Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2004) (applying 59(e) to correct a legal error by the court).

The legal mistake made by the bankruptcy court in originally denying Montano's request for attorneys fees is evidenced in its colloquy with Montano's counsel at the summary judgment hearing reminding the court that "[Montano] had moved for fees under [§] 523(d) and that the debt remains discharged, it was a consumer debt, and the complaint was brought without a reasonable basis in law." The court responded, "I'm denying that. I think those are close questions. I'm denying that." Hr'g Tr. 109:4-9. As Heritage is well aware, this Panel has held that:

> To support a request for attorneys' fees under § 523(d), a debtor initially needs to prove: (1) that the creditor sought to except a debt from discharge under § 523(a), (2) that the subject debt was a consumer debt, and (3) that the subject debt ultimately was discharged. *Stine v. Flynn (In re Stine)*, 254 B.R. 244, 249 (9th Cir. BAP 2000), [*aff'd* 19 Fed. Appx. 626 (9th Cir. 2001)]. "Once the debtor establishes these elements, the burden shifts to the creditor to prove that its actions were substantially justified." Id.

Heritage Pac. Fin. LLC v. Machuca (In re Machuca), 483 B.R. 726, 734 (9th Cir. BAP 2012). Here, the bankruptcy court erred when it declined to consider Montano's § 523(d) request for an award of attorneys fees and costs, after Montano made a prima facie showing to support it, and without requiring Heritage to satisfy its burden to demonstrate prosecution of the action against Montano was substantially justified. The court appropriately acknowledged this when it stated:

> I think that the right analysis for [§ 523(d)] is for me to go back and review the factors and what it is you [Heritage] would have to prove and see if there were facts and law on your side, even though I did not reach them in disposing of the summary judgment motion. I think once I have a request under [§ 523(d)], that's what I am supposed to do, and frankly is what I didn't do at the end of the hearing. . . . But I'm convinced that the right answer is, I have to go back for [§ 523(d)] purposes and look at the broad spectrum.

Hr'g Tr. 41:2–12, September 5, 2012.

Simply put, a trial court's concession that it erred in an earlier order requires that court to set aside the order and reconsider the parties' arguments. *Duarte*, 526 F.3d at 567 (holding that once a court "acknowledged that the basis underlying its original judgment was wrong, it was error not to set aside the judgment."). The bankruptcy court did not abuse its discretion in reconsidering an order that it conceded was entered in error.[15]

14. We discount Heritage's argument that in this context reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and the conservation of judicial resources . . .", citing *Carroll v. Naktani*, 342 F.3d 934, 945 (9th Cir. 2000). The *Carroll* court was quoting a treatise on general principles applied to Civil Rules 59(e) and 60. 12 MOORE'S FEDERAL PRACTICE § 59.30[4] (3d. ed. 2000). Immediately following the quotation from Moore's, however, the *Carroll* court continued with the comment, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court . . . committed clear error[.]" The *Carroll* court's opinion, therefore, would support the bankruptcy court's decision to correct its own clear error of law.

15. Of course, Civil Rules 59 and 60 are not the only tools available to a trial court to reconsider its orders. In particular, bankruptcy courts "as courts of equity [have the power] to reconsider, modify or

B. The bankruptcy court did not abuse its discretion in granting Montano's request for attorney's fees and costs under § 523(d).

Section 523(d) provides that:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Under § 523(d)'s shifting burden of proof, a debtor must establish three elements: (1) that the creditor sought to except a debt from discharge under § 523(a), (2) that the subject debt was a consumer debt, and (3) that the subject debt ultimately was discharged. *In re Stine*, 254 B.R. at 249 (affirmed by the Ninth Circuit at 19 Fed. Appx. 626). It is not disputed that all three of these elements were shown by Montano. The burden of proof then shifted to Heritage to prove that its actions were "substantially justified." *In re Machuca*, 483 B.R. at 734.[16]

The Panel has adopted the "substantial justification" standard employed by courts in weighing requests for fee awards under the Equal Access to Justice Act. *In re Machuca*, 483 B.R. at 733; *In re Carolan*, 204 B.R. at 987. As explained in *Pierce v. Underwood*, 487 U.S. 552, 558 (1987), a creditor must show that its claim had a reasonable basis both in law and in fact. *In re Carolan*, 204 B.R. at 987. Here, the bankruptcy court held that Heritage comes up short in that it did not show that WMC actually relied upon the written representations of Montano at the time it approved his loans, a critical element to establish a claim for relief under § 523(a)(2)(B).

To aid it in its review of Montano's § 523(d) motion, at the hearing on August 1, 2012, the bankruptcy court instructed the parties to prepare supplemental briefing discussing the case law on § 523(d) and discussing "what did people know and when did they know it." Hr'g Tr. 17:1-2, August 1, 2012. At the hearing on September 5, 2012, the court heard argument from counsel for Heritage and Montano detailing the history of the dispute between the parties, the course of the adversary proceeding, and Heritage's position at each stage of the litigation regarding its assertion, first made in its adversary complaint, that Montano provided fraudulent statements in the loan application on which WMC had relied such that Montano's debt, now owed to Heritage, should be excepted from discharge pursuant to § 523(a)(2)(B). Hr'g Tr. 16–30, September 5, 2012.

Recall, under § 523(a)(2)(B)(iii), a creditor must prove that the creditor "reasonably relied" on any alleged false written financial information submitted by the debtor. Reviewing the supplemental briefing and arguments of counsel made at the hearing on September 5, the bankruptcy court expressed doubt concerning its ability, without a trial and attending credibility determinations, to decide whether Heritage could show that Montano made knowingly false statements in the loan application with the intent to deceive WMC. Hr'g Tr. 42:4-8. However, the bankruptcy court determined that, as a matter of law, Heritage had not shown that WMC relied on Montano's written statements about his financial condition. Hr'g Tr. 45:7-10, September 5, 2012. In particular, the bankruptcy court concluded that before Heritage could demonstrate that WMC reasonably relied on Montano's allegedly false written statements, it must first establish it had actually relied on those representations.[17] Because Heritage could not prove actual reliance by WMC, the court decided, it could not establish that its prosecution of the action against Montano was substantially justified for purposes of § 523(d). Heritage challenges the bankruptcy court's conclusion on appeal.

The Code confirms that the bankruptcy court's legal conclusion was correct: § 523(a)(2)(B)(iii), by requiring a creditor to reasonably rely on a debtor's misrepresentations to qualify for an exception to discharge, by necessity implies that the creditor in fact rely on the subject false statements. The case law is also clear that showing actual reliance is a prerequisite to establishing a creditor's reasonable reliance in this context. *Field v. Mans*, 516 U.S. 59, 68 (1995) ("Section 523(a)(2)(B) expressly requires not only reasonable reliance but also reliance in itself. . . ."); *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 413 (5th Cir. 2001) (the "actual reliance" standard requires that the creditor prove that it, in fact, relied on representations of the debtor); *Dollar Bank, F.S.B. v. Wagner (In re Wagner)*, 2009 Bankr. LEXIS 5540, at *7 (Bankr. W.D. Pa. 2009) ("Unless a creditor actually relies upon a false statement, the question whether a creditor's reliance on a false statement was reasonable does not arise. Reasonable reliance presupposes actual reliance.").

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vacate their previous orders so long as no intervening rights have become vested in reliance on the orders." *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.)*, 503 F.3d 933, 941 (9th Cir. 2007). While the bankruptcy court acted properly here under Civil Rule 59(e), it was also within its discretionary authority to reconsider its order where, in light of Montano's prompt request, no intervening rights arose in reliance on the original order.

16. Section 523(d) also allows a creditor to show "special circumstances" that would make an award unjust, even if the creditor could not prove substantial justification. Heritage has not pled any special circumstances in this appeal.

17. Heritage agreed with this approach, as reflected in the transcript:

> THE COURT: Let me ask whether everybody agrees that whether we're talking about [§] 523(a)(2)(A) or (B), the reliance had to be actual. Right?
>
> SANTIAGO(counsel for Montano): Yes.
>
> THE COURT: Correct?
>
> HUPE (counsel for Heritage): Yes.

Hr'g Tr. 30:19-24, September 5, 2012.

In making its decision, the bankruptcy court reminded Heritage of the comments made by the presiding bankruptcy judge at the hearing on Montano's motion to dismiss pointing out that, while the complaint would survive that motion, Heritage was likely facing formidable obstacles in proving that WMC actually relied on Montano's alleged falsities because WMC was now a defunct organization. In response to these warnings, counsel for Heritage assured the bankruptcy judge that it would obtain competent evidence of reliance in discovery from Montano, from the mortgage broker who allegedly created the false documents, and from former WMC agents, even though WMC was no longer in business. Hr'g Tr. 5:16-18, March 25, 2011. Heritage's assurances to the bankruptcy court were apparently in recognition that substantial justification for the pursuit of discharge litigation against consumer debtors requires a showing it is justified at all stages of the litigation. *Gonzalez v. Free Speech Coalition*, 408 F.3d 613, 620 (9th Cir. 2005) (holding that substantial justification cannot be determined from a litigant's ultimate position, but requires the court to examine its positions earlier in the litigation); *In re Carolan*, 204 B.R. at 988 (information obtained during the course of litigation that should dissuade creditor from continuing litigation shows lack of substantial justification); *AT&T Universal Card Servs. v. Williams (In re Williams)*, 224 B.R. 523, 530 (2d Cir. BAP 1998) ("We hold that the creditor must be substantially justified at all times through trial to be insulated from paying attorneys' fees under § 523(d).").

Despite its assurances, Heritage failed to provide the bankruptcy court competent evidence from knowledgeable people formerly at WMC, or at all, that WMC had actually relied on the contents of the URLA. Counsel for Heritage attempted to explain this deficiency by indicating that, while it intended to offer good proof, and was prepared to depose former officers of WMC, it had run out of time for discovery:

> [the parties] had agreed . . . to take the deposition of the person most knowledgeable with respect to WMC. A deposition subpoena was sent out. It was calendared; it was scheduled, and I had orally agreed with opposing counsel that this deposition would be moving forward even though it was after the discovery cutoff date, and after I served the deposition, [Montano] said no, we're not going to do it.

Hr'g Tr. 36:3-10, September 5, 2012. Counsel further assured the bankruptcy court that, "My client has always been in contact with WMC regarding this loan, from day one." Hr'g Tr. 36:17-18, September 5, 2012. Concerning Heritage's reasons for not presenting direct evidence of actual reliance by WMC, the bankruptcy court observed that Heritage had not requested an extension of the discovery deadline to accommodate depositions. Hr'g Tr. 38:7-9, September 5, 2012.

As noted above, Heritage submitted only three declarations from witnesses to support its defense of the § 523(d) motion, all of which the bankruptcy court discounted because none, by direct knowledge of the witnesses, established whether WMC actually relied on the Montano URLA. Specifically, the court noted that the declaration of Mr. Gunter, an associate of Heritage's counsel, merely described the procedures he employed in investigating Montano. In the declaration of Mark G. Scheuerman, a proposed expert witness, he opined that WMC abided by the general standards of practices and customs in the industry in determining a borrower's creditworthiness at the time of the loans. The declarant offered no direct evidence that WMC followed these practices in dealing with respect to the Montano loans. And the declaration of Diane Taylor, prepared for an unrelated state court case, who identified herself as "assistant secretary" of WMC Mortgage, LLC, a successor to WMC, while stating that "WMC relied on the information provided by an applicant-borrower in his/her loan application through all stages of the underwriting process," also offered no insight into the details of the Montano transaction. The bankruptcy court was careful to note that it was not making a credibility determination as to the statements made in any of the Heritage declarations, but simply ruling that the contents did not show that WMC had actually relied on the URLA. Hr'g Tr. 43:14-15, September 5, 2012. Even assuming the witness statements are all true and correct, we cannot fault the bankruptcy court for its unwillingness to accept Heritage's position that it was substantially justified in alleging that WMC actually relied on the income statements in the Montano URLA. Hr'g Tr. 42:20–43:13, September 5, 2012.

In the bankruptcy court, and now in this appeal, Heritage argues that WMC obviously changed its position after receiving the URLA, because it made the requested loans to Montano. It argues that, because it required a written loan application as a condition of lending to Montano, and because it thereafter extended credit to him, the bankruptcy court and this Panel must infer that WMC actually relied on those false statements. They cite to a venerable California case for a definition of "actual reliance":

> Actual reliance occurs when a misrepresentation is the immediate cause of a plaintiff's conduct which alters his legal relations and when absent such representation, he would not, in all reasonable probability, have entered into the contract or other transaction.

Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 919 (Cal. 1997) (quoting *Spinks v. Clark*, 82 P. 45, 50 (Cal. 1905)).

We fear Heritage has taken this quotation out of context. Immediately following this passage in the decision, the court acknowledges a limitation on its prior statement:

> It is not . . . necessary that reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing [the credi-

> tor's] conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.

Engalla, 938 P.2d at 919 (citing RESTATEMENT 2D TORTS § 538 com. e). Fairly read, as it applies to this case, the California court instructs that the bankruptcy court need not infer from the fact that a creditor has changed its position (i.e., approved and made a loan) that it actually relied on a fraudulent misrepresentation. To sustain such an inference, an inquiry must be made concerning the extent to which the creditor considered the misrepresentation a substantial factor in influencing its decision (i.e., actual reliance or reliance in fact).

Summarizing its conclusion, the bankruptcy court explained:

> I am granting the motion for reconsideration to the extent that it put into issue the elements under [§] 523(a)(2)(B) that were set forth in the motion for summary judgment. Those directly included the reliance element. The predicate for any reliance element is that there was actual reliance by a person, and I'm finding that that simply was not demonstrated, and it's not a credibility issue. The declarations simply did not go to the subject in any meaningful way.

Hr'g Tr. 45:2-11, September 5, 2012. Since the bankruptcy court concluded that Heritage had not proven actual reliance, an essential element to prove for an exception to discharge under § 523(a)(2)(B), we agree that it follows that Heritage did not show that its position was substantially justified. *In re Carolan*, 204 B.R. at 987 (to prove that its actions are substantially justified, a creditor "must show that its challenge had a reasonable basis both in law and fact."). And where, as here, a debtor establishes that the creditor sought to except a debt from discharge under § 523(a)(2), that the subject debt was a consumer debt, and that the subject debt ultimately was discharged, "the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified." § 523(d).[18]

Finally, at oral argument before the Panel, Heritage argued that it did not have a fair opportunity to present its case on actual reliance and substantial justification. Specifically, Heritage argues that, after the bankruptcy court granted the motion for reconsideration, it should have been given the opportunity for a separate hearing on the § 523(d) issue.

We do not think so. In addition, this position is inconsistent with Heritage's presentation at the hearing in the bankruptcy court on September 5, 2012, where Heritage's counsel stated that:

> I went back and looked at the language, and it says substantial justification in law and fact, so I believe that we've already satisfied the substantial justification in law based on the [§] 726 discussion and the ruling on the MSJ and the denial of [§] 523(d) on that ground alone. Now with respect to whether it's substantially justified in fact, I also believe that not only was that shown in the motion for summary judgment, even though it wasn't ruled on, but it's also been shown in . . . the evidence and facts that we've presented as well.

Hr'g Tr. 13:23–14:8, September 5, 2012. In short, Heritage represented to the bankruptcy court that it was satisfied that it had established substantial justification on the previous motions and the evidence and facts they presented. We have examined the transcripts of the hearings of August 1 and September 5, 2012, where the reconsideration motion and § 523(d) matters were discussed, as well as the additional briefs submitted by Heritage, and do not find any indication that Heritage requested a further hearing, or the opportunity to present more evidence, on the questions of reliance and substantial justification.

To the extent that Heritage's concern reflects a due process issue, the record is clear that Heritage had adequate notice throughout the proceedings that, if it could not establish the facts needed for an exception to discharge, Montano would request an award of fees if Heritage's arguments were not substantially justified at all stages of the proceedings. Indeed, the § 523(d) issues were raised by Montano's cross-claim, explicitly addressed in connection with the dismissal motion, and argued again in both the Montano summary judgment motion and reconsideration motion. Moreover, before it granted the reconsideration motion and determined that Montano was entitled to recover attorneys fees under § 523(d), the bankruptcy court went "the extra mile" and allowed Heritage to address these issues via supplemental briefing.

But most importantly, and to the extent that Heritage argues here for fair or equitable treatment, we remind it that very early in this case, it was advised by the bankruptcy court that proving reliance would be difficult. At the hearing concerning the motion to dismiss months earlier, the bankruptcy judge's warnings to that effect were loud and clear. In response, Heritage assured the bankruptcy court that it would obtain competent testimony from WMC and other proof that WMC relied on Montano's alleged false representations in approving the loans. As it turned out, and though it had ample time to do so, Heritage failed to provide adequate or, in fact, any evidence to support the reliance allegation.

18. In the bankruptcy court and this appeal, Heritage also argues that we should follow the conclusions reached by an earlier Panel in *In re Tovar*, case no. CC-11-1696 (9th Cir. BAP August 3, 2012), that we can infer reliance based on the fact that the creditor approved a loan based only on the loan documents. Heritage fails to understand that the holding in *Tovar* concerned *reasonable* reliance and the question of actual reliance was never raised. Reasonable reliance is not actual reliance. *Field v. Mans*, 516 U.S. at 68.

We conclude that the bankruptcy court did not abuse its discretion in granting Montano's request for attorney's fees and costs under § 523(d).

CONCLUSION

The orders of the bankruptcy court granting Montano summary judgment and awarding him attorneys fees and costs are AFFIRMED.

Supreme Court of California

Cite as 13 C.D.O.S. 12833

PATRICIA J. BARRY, Plaintiff and Appellant,

v.

STATE BAR OF CALIFORNIA, Defendant and Respondent.

No. S214058
In the Supreme Court of California
Second Appellate District
Division Two - No. B242054
Filed November 26, 2013

The State Bar of California's October 22, 2013, request for judicial notice is granted.

The petition for review is granted.

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12833

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, Plaintiff and Respondent,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT, Defendant and Appellant.

AND CONSOLIDATED CASE.

No. S213478
In the Supreme Court of California
First Appellate District
Division Five - Nos. A135335/A136212
Filed November 26, 2013

The petition for review is granted. The issue to be briefed and argued is limited to the following: Under what circumstances, if any, does the California Environmental Quality Act (Pub. Resources Code,§ 21000 et seq.) require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12834

THE PEOPLE, Plaintiff and Respondent,

v.

OCTAVIO AGUILAR, Defendant and Appellant.

No. S213571
In the Supreme Court of California
First Appellate District
Division Four - No. A135516
Filed November 26, 2013

The petition for review is granted.

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12834

THE PEOPLE, Plaintiff and Respondent,

v.

DONNA MARIE TRUJILLO, Defendant and Appellant.

No. S213687
In the Supreme Court of California
Sixth Appellate District - No. H038316
Filed November 26, 2013

The petition for review is granted.

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12835

LARRY BEAUCHAMP, Plaintiff and Appellant,

v.

CITY OF LONG BEACH, Defendant and Appellee.

No. S213420
In the Supreme Court of California
9th Circuit No. 11-5780
Filed November 26, 2013

The request, made pursuant to California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit, is granted. ·

For purposes of briefing and oral argument, Larry Beauchamp is deemed petitioner to this court.

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12835

THE PEOPLE, Plaintiff and Respondent,

v.

VINH NGUYEN, Defendant and Appellant.

No. S213703
In the Supreme Court of California
Fourth Appellate District
Division Two - No. E048880
Filed November 26, 2013

The petition for review is granted.

Further action in this matter is deferred pending consideration and disposition of a related issue in *People v. Tran*, S211329 and *People v. Blackburn*, S211078 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12836

MARIA GONZALEZ et al., Plaintiffs and Respondents,

v.

METRO NISSAN OF REDLANDS et al., Defendants and Appellants.

No. S214121
In the Supreme Court of California
Fourth Appellate District
Division Two - No. E056160
Filed November 26, 2013

The petition for review is granted.

Further action in this matter is deferred pending consideration and disposition of a related issue in *Sanchez v. Valencia Holding Co.*, S199119 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

CANTIL-SAKAUYE, C. J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CORRIGAN. J., LIU, J.

Cite as 13 C.D.O.S. 12836

DAVID HENDLEMAN et al., Plaintiffs and Appellants,

v.

LOS ALTOS APARTMENTS, L.P. et al., Defendants and Respondents.

No. S213598
In the Supreme Court of California
Second Appellate District
Division Three - No. B235404
Filed November 26, 2013

The petition for review is denied.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed July 22, 2013, which appears at 218 Cal.App.4th 1380. (Cal. Const., art. VI, section 14; rule 8.1125(c)(1), Cal. Rules of Court.)

Kennard, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE, C. J.

Cite as 13 C.D.O.S. 12837

AARON MACDONALD, Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S213450
In the Supreme Court of California
Third Appellate District - No. C069646
Filed November 26, 2013

The request for judicial notice is granted.

The petition for review is denied.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed August 27, 2013 , which appears at 219 Cal. App.4th 67. (Cal. Const., art. VI, section 14; rule 8.1125(c)(1), Cal. Rules of Court.)

CANTIL-SAKAUYE, C. J.

California Courts of Appeal

Cite as 13 C.D.O.S. 12838

KWESI JONES et al., Plaintiffs and Appellants,

v.

FARMERS INSURANCE EXCHANGE, Defendant and Respondent.

No. B237765
In the Court of Appeal of the State of California
Second Appellate District
Division Three
(Los Angeles County) (Super. Ct. No. BC412413)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed with directions.

Filed October 28, 2013
Pub. and mod. order November 26, 2013

COUNSEL

Thierman Law Firm, Mark R. Thierman, Jason J. Kuller; Eric M. Epstein; United Employees Law Group and Walter Haines for Plaintiffs and Appellants.

Seyfarth Shaw, Candice T. Zee, George Preonas, Andrew Paley and Eric Steinert for Defendant and Respondent.

ORDER (1) MODIFYING OPINION; (2) DENYING PETITION FOR REHEARING (3) CERTIFYING OPINION FOR PUBLICATION

BY THE COURT:

It is ordered that the opinion filed in the above-entitled matter on October 28, 2013, be modified as follows:

1. On page 9, line 8, insert a new footnote 3 after "beginning of the shift;" with the footnote stating:

Plaintiffs challenge the denial of class certification only as to their claim for compensation for "computer sync time" work and expressly abandon any challenge to the denial of class certification on other claims. Plaintiffs argued in support of their petition for rehearing, " … the Court needs to focus on so-called 'computer sync time' and ignore the 'administrative' category. On the face of the Work Memo, Farmers pays for preliminary 'administrative' duties so long as it is principle work approved by a supervisor. The 'administrative' category is thus irrelevant for purposes of certification and this appeal."

2. On page 12, line 18, section 3, entitled Common Issues Predominate, delete the entire sentence beginning on line 1 of said section 3, and replace with the following:

Plaintiffs' theory of recovery is that Farmers applied a uniform policy to all putative class members denying them compensation for "computer sync time" work performed at home before the beginning of their scheduled shifts.

3. On page 20, under Disposition, line 1, delete the entire Disposition and replace with the following:

The order denying the class certification motion and striking the amended class certification motion is reversed as to the denial of class certification with directions to (1) allow Plaintiffs an opportunity to amend their complaint to name a new class representative, and (2) grant the class certification motion as to Plaintiffs' claim for compensation for "computer sync time" work if the trial court approves a class representative. The order is otherwise affirmed. Plaintiffs are entitled to recover their costs on appeal.

The petition for rehearing filed by Farmers Insurance Exchange on November 14, 2013, is denied.

When the court's opinion in this matter was originally filed, it was not certified for publication. It now appears that there is good cause for the publication in the Official Reports of the opinion, as modified herein, and it is so ordered.

[There is no change in the judgment.]

OPINION

Kwesi Jones, on behalf of himself and others similarly situated (collectively Plaintiffs), filed a class action complaint against Farmers Insurance Exchange (Farmers) alleging wage and hour violations. Plaintiffs appeal the denial of their motion for class certification and the striking of their amended class certification motion. They contend the trial court erred in concluding that common issues of law or fact do not predominate over individual issues, that class certification would not provide substantial benefits to litigants and the courts, and that Jones cannot adequately represent the class.

We conclude that common issues do predominate and class certification would provide substantial benefits to litigants and the courts. We also conclude that substantial evidence supports the trial court's finding that Jones cannot adequately represent the class, and Plaintiffs have shown no prejudicial error in the striking of their amended class certification motion. We therefore will reverse the order denying the class certification motion and remand with directions to (1) allow Plaintiffs leave to file an amended complaint naming a suitable class representative, and (2) grant the motion for class certification if the court approves a class representative. We also will affirm the order striking Plaintiffs' amended class certification motion.

FACTUAL AND PROCECURAL BACKGROUND

1. Factual Background

Farmers employs claims representatives to adjust insurance claims for physical damage to automobiles. "Auto Physical Damage" (APD) claims representatives spend most of their time in the field inspecting damaged vehicles at auto body shops or other locations, meeting with claimants, negotiating the settlement of claims, and accessing and entering information onto Farmers's database using laptop computers. They obtain their assignments using a computer program known as ServicePower, which they access using laptop computers. Claims representatives travel to their first assignment of the day from their homes rather than from an office, and their travel time to their first assignment is uncompensated unless it exceeds their normal travel time.

Farmers issued a personalized memorandum with the subject line "Work Profile" to each APD claims representative shortly after the ServicePower program was first implemented in 2008. The memorandum stated the normal work hours for each claims representative and stated that each claims representative was required to be present at the location of his or her first assignment at the beginning of the workday. It stated that driving time from the employee's home to the first assignment of the day and from the last assignment of the day back home was not compensable unless the time exceeded the employee's normal commute time or the employee, with the approval of a supervisor, was performing compensable administrative work at home.

The "Work Profile" memorandum also stated that claims representatives might be required to perform work tasks at home for which they would not be compensated. It described compensable and noncompensable work tasks as follows:

"1.) Computer sync time which ordinarily takes minimal time to perform and is not compensable. For example, taking a few minutes to sync your computer, obtaining assignments/driving directions before getting in your car and driving to your first appointment. Your work day does not begin until you arrive at your first assignment, unless your commute was longer than their normal commute.

"2.) Administrative, which is defined as 'principle' work and is compensable. For example, you take 30 minutes to perform required administrative duties, with supervisor approval before getting in your car and driving to your first assignment. Because the administrative work is considered principle work you will be compensated for this time, plus all drive time to your first assignment. The same would be true for the drive home if administrative work needs to be completed at home to end the day."

Jones worked for Farmers as a claims representative from March 2006 until September 2008, when Farmers discharged him for an alleged pattern of reporting that he was working in the field when he was actually at home. Jones filed a complaint against Farmers regarding his discharge. That action has been settled and dismissed.

2. Trial Court Proceedings

Plaintiffs filed their complaint against Farmers in the present action in April 2009 and filed a first amended complaint in May 2010 alleging that Farmers failed to compensate its APD claims representatives for work performed before the beginning of their scheduled shifts. Plaintiffs allege that such unpaid work includes starting up their computer each day, accessing the ServicePower program, obtaining their first assignment, downloading property damage estimate forms, contacting auto body shops to confirm the location of damaged vehicles, contacting the insured, and driving to the auto body shop or other location of their first assignment.

Plaintiffs allege counts for (1) unpaid overtime; (2) failure to provide itemized wage statements; (3) failure to pay minimum wages; (4) civil penalties under Labor Code section 2699; and (5) unfair competition. They seek damages, statutory penalties and restitution. Each count is alleged both by Jones individually and on behalf of a class of current or former Farmers employees who are not exempt from California's overtime laws and who worked as APD claims representative and used the ServicePower program to obtain their work assignments.

Plaintiffs filed a motion for class certification in March 2011 seeking to certify the same class described in the complaint.[1] The motion was supported by the declarations of 51 putative class members. The declarants stated, generally, that they were required to perform various tasks in the morning before arriving at the location of their first assignment, as alleged in the complaint, but were not compensated for the time spent performing those tasks. They stated that their work shifts generally began upon their arrival at the location of their first assignment or at 8:00 a.m. and that they spent, on average, 4.28 hours per week performing unpaid work before the beginning of their shifts. Plaintiffs argued that Farmers had a company-wide policy of requiring APD claims representatives to work at home without compensation and that the "Work Profile" memorandum was evidence of this policy.

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1. Plaintiffs sought certification of two classes defined as follows:"A. Class 'A' is defined as all current or former non-exempt employees employed by Defendant as APD Claims Representatives, Senior APD Claims Representatives, and Special APD Claims Representatives, in the State of California, within the four years preceding the filing of the original Complaint to the date entry of judgment, who used a package of computer software called ServicePower to obtain their assignments for the day. [¶] B. Class 'B' is defined as all current or former non-exempt employees employed by Defendant as APD Claims Representatives, Senior APD Claims Representatives, Special APD Claims Representatives, in the State of California, within the four years preceding the filing of the original Complaint to the date of entry of judgment, who used a package of computer software called ServicePower to obtain their assignments for the day, and who were not furnished either as a detachable part of the check, draft or voucher paying the employee's wages, or by separate document, an accurate itemized statement showing the total hours worked by each employee and/or furnished with all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee in violation of California Labor Code § 226."

Farmers filed an *ex parte* application to continue the hearing on the motion to August 19, 2011. The trial court granted the application on March 30, 2011, continuing the hearing to August 19, 2011. Plaintiffs filed an amended class certification motion in May 2011 seeking to modify the class definition to include all of the previously described employees who used either ServicePower or the Pathways program to obtain their work assignments. The court continued the hearing on the class certification motion to October 28, 2011.

Farmers opposed the class certification motion arguing that it had no uniform policy requiring unpaid preshift work and, absent such a policy, individual issues predominated and class treatment was inappropriate. Farmers argued that its claims representatives were not required to work off-the-clock and were prohibited from doing so, and argued that the "Work Profile" memorandum did not show otherwise. It also argued that Jones was not an adequate class representative and that his claims were not typical of those of the class.

Farmers filed declarations by 11 current or former APD field claims supervisors or managers, five claims representatives, and the director of the Los Angeles claims service division. The declarations stated, generally, that claims representatives regularly received their first assignment of the day on the afternoon of the previous workday and made initial contact with the claimant at that time. They stated that if the claims representatives needed additional time to prepare for an early morning appointment, they requested and regularly received approval to work overtime and that they were prohibited from working outside of their scheduled shifts without prior authorization.

Farmers filed a motion in September 2011 to strike Plaintiffs' amended motion for class certification. It argued that the amended motion was an attempt to amend the complaint to expand the class definition without filing a motion for leave to amend the complaint. It argued that the motion therefore was procedurally improper and should be stricken under Code of Civil Procedure section 436, subdivision (a) as "irrelevant, false, or improper" (*ibid.*) matter. Farmers also argued that its employees did not obtain assignments through the Pathways program and that Farmers would be prejudiced by an expansion of the class definition after two years of litigation. Plaintiffs opposed the motion to strike.

The trial court heard the class certification motion and the motion to strike on October 28, 2011. In a minute order filed on November 3, 2011, the court concluded that the class was sufficiently numerous and ascertainable and that Jones's claims were typical of those of the class. The court found, however, that Jones was not an adequate class representative because (1) he failed to file a declaration in support of the motion and therefore failed to show that he understood his fiduciary obligation owed to the class, and (2) "he was terminated for manipulating Service Power to indicate that he was working when, in fact he was not," showing a "lack of credibility."

The trial court also found that common issues did not predominate. It stated that the parties disputed what tasks were required to be performed before the beginning of the shift, that Farmers's evidence showed that it did not always deny requests for overtime to complete some tasks and that plaintiffs therefore had "not demonstrated that defendant has a classwide policy of refusing to pay overtime." The court stated, "Whether a particular class member would be approved for overtime to complete first contact tasks creates individualized questions that must be addressed before it can be determined that defendant did not compensate the class member for off-the-clock work."

The trial court stated further that whether the putative class members had time to complete the required tasks before the first appointment of the day also involved individualized inquiries and numerous variables including, "1) when a particular assignment was posted to Service Power; 2) how busy the class member was on the day the assignment was posted; 3) whether the amount of time spent on first assignment tasks was de minimus; 4) whether the class member requested overtime to perform first contact tasks; 5) the first appointment time assigned to a class member as compared to the start of their shift; and 6) commute time." It stated that these individualized inquiries compelled the conclusion that common questions did not predominate. The court also stated that the lack of commonality meant that a class action was not a superior method for resolving the dispute.

The trial court stated with respect to the motion to strike the amended motion for class certification that Code of Civil Procedure section 436 was inapplicable because the motion was not a pleading. The court concluded, however, that there was no legal basis for the proposed amendment because the addition of employees who used the Pathways program was outside the scope of the pleadings. The court therefore granted the motion to strike.

Plaintiffs timely appealed the order denying the motion for class certification and the striking of their amended class certification motion.[2]

CONTENTIONS

Plaintiffs contend (1) common issues of law and fact predominate, primarily with respect to the existence of a uniform policy denying compensation for legally compensable work performed prior to the beginning of the shift; (2) a class action is a superior means to conduct this litigation; (3) Jones is an adequate class representative; and (4) the striking of their amended class certification motion was error.

DISCUSSION

1. Class Certification Requirements

A party moving for class certification must show "(1) [] a sufficiently numerous, ascertainable class, (2) [] a well-

2. An order effectively terminating class claims while allowing individual claims to proceed is appealable under the "death knell" doctrine. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757–759.)

defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' [Citation.]" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*).)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines 'whether… the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) The focus in a certification dispute is on whether common or individual questions are likely to arise in the action, rather than on the merits of the case. (*Id.* at p. 327.)

The California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) stated: "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]"[3] (*Id.* at pp. 1021–1022, fn. omitted.)

Sav-On, *supra*, 34 Cal.4th at pages 334–335, similarly stated: "We long ago recognized 'that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.' [Citation.] Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed. [Citations.] [¶] Nor is it a bar to certification that individual class members may ultimately need to itemize their damages. We have recognized that the need for individualized proof of damages is not per se an obstacle to class treatment [citations]."

2. Standard of Review

We review an order granting or denying class certification for abuse of discretion. (*Sav-On*, *supra*, 34 Cal.4th at pp. 326–327.) A trial court is afforded great discretion in ruling on class certification. Such a ruling generally will not be disturbed on appeal unless it is (1) not supported by substantial evidence, (2) based on improper criteria, or (3) based on erroneous legal assumptions. (*Fireside Bank*, *supra*, 40 Cal.4th at p. 1089.)

"Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal ' "even though there may be substantial evidence to support the court's order." ' [Citations.] Accordingly, we must examine the trial court's reasons for denying class certification. 'Any valid pertinent reason stated will be sufficient to uphold the order.' [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.) In other words, we must reverse an order on class certification if the trial court engaged in an incorrect legal analysis, even though there may be substantial evidence to support the order. (*Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1224.)

"Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must 'presum[e] in favor of the… order… the existence of every fact the trial court could reasonably deduce from the record… . [Citation.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1022.)

3. Common Issues Predominate

Plaintiffs' theory of recovery is that Farmers applied a uniform policy to all putative class members denying them compensation for work performed at home before the beginning of their scheduled shifts. The existence of such a policy is a factual question that is common to all class members and is amenable to class treatment. Whether such a policy, if it exists, deprives employees of compensation for work for which they are entitled to compensation is a legal question that is common to all class members and is amenable to class treatment. "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment. [Citations.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

Farmers argued in opposition to the class certification motion that it had no uniform policy denying compensation

3. Some prior opinions had suggested that individual damage issues could be so numerous and substantial compared to the common issues of law or fact as to compel the conclusion in a particular case that common issues did not predominate. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459; *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 396.) *Brinker*, *supra*, 53 Cal.4th 1004, does not necessarily preclude this view in every case, but states the "general rule" that individual proof of damages does not preclude predominance.

for preshift work and that individual issues predominated in determining whether APD claims representatives performed compensable off- the-clock work for which they were uncompensated. It argued that such individual issues included determining what tasks each employee performed before the beginning of his or her shift, whether such activities were de minimis and whether the employee's supervisor was aware of any off- the- clock work. It filed declarations by APD claims representatives and others stating generally that they were not required to perform unpaid preshift work, that they requested and received approval to work overtime if necessary, and that the time required to start up their computers in the morning and access the ServicePower program was minimal.

Farmers's evidence concerns the existence of a uniform policy denying compensation for preshift work, which is a common question amenable to class treatment, as we have stated. Its evidence also goes to individual issues concerning the right to recover damages, which do not preclude class certification. (*Sav-On*, *supra*, 34 Cal.4th at p. 334; *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, 237; *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal. App.4th 1286, 1301–1307 (*Jaimez*); *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1536.)

The trial court stated that the parties disputed what tasks were required to be performed before the beginning of a shift and that Plaintiffs had failed to demonstrate the existence of a uniform policy denying compensation for preshift work. It stated that whether a particular class member would have been approved for overtime if he or she had requested it and whether a class member had time to complete the required tasks after beginning of a shift and before his or her first appointment of the day were individual issues. The court also enumerated several other individual issues, including, "1) when a particular assignment was posted to Service Power; 2) how busy the class member was on the day the assignment was posted; 3) whether the amount of time spent on first assignment tasks was de minimus; 4) whether the class member requested overtime to perform first contact tasks; 5) the first appointment time assigned to a class member as compared to the start of their shift; and 6) commute time."

We conclude that the trial court applied improper criteria by focusing on individual issues concerning the right to recover damages rather than evaluating whether the theory of recovery is amenable to class treatment. (*Jaimez*, *supra*, 181 Cal.App.4th at p. 1299 ["The trial court misapplied the criteria, focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating 'whether the *theory of recovery* advanced by the plaintiff is likely to prove amenable to class treatment' "].) We also conclude that substantial evidence does not support the court's finding that common issues do not predominate. (*Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [held that in light of the plaintiff's theory of recovery based on uniform policies and procedures denying drivers compensation for rest periods, the trial court's conclusion that common issues did not predominate was not supported by substantial evidence].) Plaintiffs' theory of recovery based on the existence of a uniform policy denying compensation for preshift work presents predominantly common issues of fact and law. Farmers's liability depends on the existence of such a uniform policy and its overall impact on its APD claims representatives, rather than individual damages determinations. (*Jaimez*, *supra*, at p. 1300.) Moreover, the trial court erred to the extent that its ruling was based on its evaluation of the merits of Plaintiffs' claim as to the existence of such a uniform policy. (*Ibid.*)

4. Class Certification Would Provide Substantial Benefits

The trial court's conclusion that Plaintiffs failed to establish that a class action was a superior method of resolving the dispute was based on its conclusion that common issues of law or fact did not predominate. In our view, the predominance of common issues in these circumstances compels the conclusion that class certification will provide substantial benefits to the litigants and the courts and that a class action is a superior method of resolving the dispute.

5. Substantial Evidence Supports the Finding that Plaintiffs Failed to Establish that Jones Is an Adequate Class Representative

Plaintiffs seeking class certification have the burden of proving the adequacy of their representation by a member of the putative class. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) A trial court may consider the totality of the evidence in determining whether the plaintiffs have presented evidence sufficient to establish the requirements for class certification. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154 (*Soderstedt*).)

" 'A class action is a representative action in which the class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties. [Citation.] The representative parties not only make the decision to bring the case in the first place, but even after class certification and notice, they are the ones responsible for trying the case, appearing in court, and working with class counsel on behalf of absent members.' " (*Soderstedt*, *supra*, 197 Cal. App.4th at p. 156.) The trial court in *Soderstedt* stated that the declarations filed by the putative class representatives failed to show either that they desired to represent the putative class or that they understood the obligations of serving as class representatives. (*Id.* at p. 155.) The Court of Appeal concluded that it was "reasonable for the trial court to construe appellants' declarations as falling short of establishing their willingness to act as fiduciaries for absent class members, to the extent that the declarations showed that appellants intended to do nothing beyond what any litigant would do in prosecuting an action on his or her own behalf." (*Id.* at p. 156.) *Soderstedt* therefore concluded that substantial evidence supported the finding that the named plaintiffs had

failed to satisfy their burden to show that they were adequate class representatives. (*Ibid.*)

Plaintiffs filed a declaration by their counsel describing counsel's experience and qualifications to serve as class counsel. Plaintiffs' counsel also declared that Jones "has reviewed the operative Complaint, understands the basic theories of the case, and understands his role as class representative." Jones himself, however, filed no declaration. The trial court stated that plaintiffs' counsel could not file a declaration on Jones's behalf and concluded that Jones had failed to show an understanding of his fiduciary obligation owed to the class and therefore failed to prove that he was an adequate class representative. We conclude that substantial evidence supports the court's finding that absent a declaration by Jones stating that he understands his fiduciary obligation to the class, Plaintiffs failed to show that Jones is willing and able to serve as an adequate class representative and therefore failed to prove that he is an adequate class representative. (*Soderstedt*, *supra*, 197 Cal.App.4th at p. 156.) In light of our conclusion, we need not decide whether Jones's alleged lack of credibility also supports the trial court's finding.

We reject Plaintiffs' argument that the trial court applied improper legal criteria by imposing a declaration requirement without any legal basis. In our view, the court simply examined the evidence presented and found that Plaintiffs had failed to prove that Jones was an adequate class representative. Plaintiffs have not shown that the court applied improper legal criteria or that the order is based on an erroneous legal assumption.

The lack of an adequate class representative, however, does not justify the denial of the class certification motion. Instead, the trial court must allow Plaintiffs an opportunity to amend their complaint to name a suitable class representative (*La Sala v. American Sav. & Loan Assn.*[4] (1971) 5 Cal.3d 864, 872.) The court should then grant the class certification motion if it approves a class representative (*Jaimez*, *supra*, 181 Cal.App.4th at p. 1309).

6. Plaintiffs Have Shown No Prejudicial Error in the Striking of Their Amended Class Certification Motion

Plaintiffs challenge the striking of their amended class certification motion. They argue that Code of Civil Procedure section 435 only provides for a motion to strike a "pleading," and the amended class certification motion was not a pleading. They also argue that the motion to strike was not filed "within the time allowed to respond to a pleading" (*id.*, subd. (b)(1)), as required, and that the motion improperly was based on extrinsic evidence. The trial court stated that Code of Civil Procedure section 435 was inapplicable because the amended class certification motion was not a pleading, but granted the motion to strike in any event because it concluded that the class for which Plaintiffs were seeking certification was beyond the scope of the pleadings.

An appellant bears the burden to show not only that the trial court erred, but also that the error was prejudicial in that it resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) An error is prejudicial and results in a miscarriage of justice only if the reviewing court concludes, based on its review of the entire record, that it is reasonably probable that the trial court would have reached a result more favorable to the appellant absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

Plaintiffs do not argue and have not shown that they were entitled to certification of a class broader than that alleged in their operative complaint. They therefore have not shown that their amended class certification motion should have been granted and have shown no prejudice resulting from the striking of their amended motion and no prejudicial error.

DISPOSITION

The order denying the class certification motion and striking the amended class certification motion is reversed as to the denial of class certification with directions to (1) allow Plaintiffs an opportunity to amend their complaint to name a new class representative, and (2) grant the class certification motion if the trial court approves a class representative. The order is otherwise affirmed. Plaintiffs are entitled to recover their costs on appeal.

CROSKEY, J.

We Concur: KLEIN, P. J., ALDRICH, J.

4. The trial court's finding that plaintiffs failed to establish that Jones is an adequate class representative does not preclude the submission of additional evidence, including a declaration by Jones, in an effort to establish such adequacy.

Cite as 13 C.D.O.S. 12844

THE PEOPLE, Plaintiff and Respondent,

v.

ANDREW BARNEY DAVIDSON,
Defendant and Appellant.

2d Crim. No. B244607
In the Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. 2012014702) (Ventura County)
Filed November 26, 2013

COUNSEL

Patricia A. Malone, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

OPINION

Over 40 years ago and during the infancy of *Miranda v. Arizona* (1966) 384 U.S. 436, 16 L.Ed.2d 694 (*Miranda*), Justice Macklin Fleming articulated the rule which controls the *Miranda* issue in this case: "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning, designed to bring out the person's explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges." (*People v. Manis* (1969) 268 Cal.App.2d 653, 665.

Andrew Barney Davidson appeals his conviction by jury of unlawful taking a vehicle (Veh. Code, § 10851, subd. (a)) and possessing a methamphetamine pipe (Health & Saf. Code, § 11364.1, subd. (a)). He admitted a prior auto theft conviction. (Pen. Code, § 666.5.) Pursuant to "sentencing realignment," appellant was sentenced to felony jail: two years county jail and two years mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(A).) Appellant contends that the trial court erred in admitting his pre-arrest statement without prior advisement and waiver of his *Miranda* rights. He also contends that the trial court erred in admitting other crimes evidence. (Ev*id.* Code, § 1101, subd. (b).) We affirm.

FACTS

During the morning of April 22, 2012, Jesse Hofer reported that his new Suzuki motorcycle was stolen from his driveway. Hofer last saw the motorcycle at 3:30 a.m. after a house party ended. Hofer lived in Simi Valley near a riverbed and Ish Street.

At 9:45 a.m., Dennis Tooman saw appellant pushing a motorcycle on Ish Street near the riverbed. Tooman, who had some knowledge of motorcycles, believed the motorcycle was stolen because wires were hanging out of the ignition. Appellant told Tooman that he had been riding the motorcycle and that it stopped. Tooman called 911 and reported what he saw and heard.

At 10:00 a.m., Simi Valley Police Officer Patrick Coulter responded to a call that a white male in baggy pants was pushing a stolen motorcycle down the street. Officer Coulter saw appellant pushing a new Suzuki motorcycle near Ish Street. Appellant saw the patrol car, changed direction, and pushed the motorcycle behind a high profile vehicle in order to hide.

Officer Coulter ordered appellant to put the motorcycle down, remove his backpack, and step towards him. Appellant put a flat-blade screwdriver down on the motorcycle seat. Officer Coulter was concerned for his safety because the screwdriver could be used as a weapon. He noticed that jumper wires were hanging out the ignition switch. He opined that appellant was acting "hanky" and looked like he was ready to flee.

Officer Coulter handcuffed appellant and told him to sit on the sidewalk curb. He said that he was investigating a possible stolen motorcycle in the area. He asked one question: "Is this your vehicle?" Appellant said that he found the motorcycle in some bushes in a nearby industrial-office area. This single answer was at variance with a reasonable explanation of why he was in possession of, and pushing an inoperative but new motorcycle with wires hanging out of the ignition switch.

Appellant was arrested and patted down for weapons, A glass smoking pipe was in his front pants pocket. Hofer was contacted by the police and confirmed that appellant had his motorcycle and did not have permission to take it.

At trial appellant defended on the theory consistent with his statement to Officer Coulter that someone else stole the motorcycle, damaged it, and dumped it. He found it and had no knowledge that it had been stolen.

In rebuttal the People introduced evidence that appellant took Debra Schackelford's car in front of her Simi Valley house on August 19, 2010. The Los Angeles Police saw the car on August 23, 2010, after a license plate recognition camera alerted that the car was stolen. Appellant led the police on a car chase and was stopped. The car ignition was punched out, the radio was missing, and a flat-head screwdriver was on the center console.

Custodial Interrogation Vel Non

Appellant contends that his pre-arrest statement was inadmissible because he was not advised of his *Miranda* rights. The trial court found that handcuffing appellant and asking "Is this your vehicle?" was not a custodial interrogation: "[T]

he officer indicated that he was investigating. The question[] was almost immediately out of his mouth after the handcuffs went on. There is no way this is custody for purposes of *Miranda*. The statement is admissible."

On appeal, we defer to the trial court's factual findings supported by substantial evidence and independently determine from the factual findings whether appellant was in custody for *Miranda* purposes. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) It is settled that *Miranda* advisements are required only when a person is subjected to "custodial interrogation." (*Miranda, supra,* 384 U.S. at p. 444 [16 L.Ed.2d at p. 706]; *People v. Mickey* (1991) 54 Cal.3d 612, 648.) The *Miranda* opinion itself permits "general on-the-scene questioning as to facts surrounding a crime. . . ." (*Id.* at pp. 725–726.) A custodial interrogation does not occur where an officer detains a suspect for investigation and the questioning is limited to the purpose of identifying a suspect or ". . . to obtain sufficient information confirming or dispelling the officer's suspicions. (Citations.) . . ." (*People v. Farnam* (2002) 28 Cal.4th 107, 180; see also *Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [82 L.Ed.2d 317,334]) [answers to investigatory questions by police officer who lawfully detains a person pursuant to a traffic stop are admissible even if the person was not given *Miranda* warnings].

Justice Fleming eloquently explained the common sense premise to the rule allowing "brief and casual" questioning during a temporary detention. "The purpose of temporary detention is to enable the police to determine, with minimum upset to public tranquility and minimum intrusion into personal rights, whether they should arrest a suspect and charge him with crime, whether they should investigate further, or whether they should take no action because their initial suspicion proved groundless. What tools do we allow the police to use in making a decision which often calls for the employment of nice discrimination? Obviously, the police can use their sense of sight, hearing, and smell and thereby obtain a certain amount of information from the person's dress, appearance, physical condition, and demeanor. But where, as here, the circumstances which have induced the temporary detention suggest that stolen property is about to be pawned, the keenest personal observation is apt to prove uninformative and unenlightening. In this, as in many investigations, progress toward a rational decision about what to do next can only be made by asking questions. The information needed by the police to make an intelligent decision on street detention is ordinarily obtainable only from the suspect's answers. 'Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains-if police investigation is not to be balked before it has fairly begun-but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.' (*Culombe v. Connecticut,* 367 U.S. 568, 571 [6 L.Ed.2d 1037, 1040, 81 S.Ct. 1860].)

"Do we then allow the police to ask questions of persons suspected of crime who have been temporarily detained for investigation? In California the answer is yes, an answer initially formulated as the privilege of the police to seek out and question suspects and those believed to have knowledge of crime, but which has been subsequently broadened to include brief questioning of persons who have been involuntarily detained.

(*People v. Mickelson,* 59 Cal.2d 448, 450–452 [30 Cal. Rptr. 18, 380 P.2d 658]; *People v. Martin,* 46 Cal.2d 106, 108 [293 P.2d 52]; *People v. Blodgett,* 46 Cal.2d 114, 117 [293 P.2d 57]; *People v. Michael,* 45 Cal.2d 751, 754 [290 P.2d 852]; *People v. Machel,* 234 Cal.App.2d 37, 46 [44 Cal. Rptr. 126]; *People v. Cowman,* 223 Cal.App.2d 109 [35 Cal. Rptr. 528]; *People v. Beverly,* 200 Cal.App.2d 119, 125 [19 Cal.Rptr. 67]; *People v. King,* 175 Cal.App.2d 386, 390 [346 P.2d 235]; *People v. Jackso*n, 164 Cal.App.2d 759 [331 P.2d 63].)" (*Id,* at pp. 661–662.)

Whether a person is in custody is an objective test: the pertinent inquiry is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (*People v. Leonard*, *supra,* 40 Cal.4th at p. 1400.) The totality of the circumstances are considered and include "(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention: (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning." (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) Additional factors are whether the officer informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement, whether the police were aggressive, confrontational, and/or accusatory, and whether the police used interrogation techniques to pressure the suspect. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

Officer Coulter responded to a call that a man matching appellant's description was pushing a stolen motorcycle. He saw appellant push a new motorcycle down the street and try to hide behind a vehicle. Appellant had a flat-blade screwdriver that could be used as a weapon, was acting "hanky," and was handcuffed for officer safety purposes. Officer Coulter advised appellant that he was being detained while the police investigated a possible motorcycle theft, and asked: "Is this your vehicle?" This single question was asked to confirm or dispel the officer's suspicions. A peace officer harboring the suspicion that a motor vehicle is perhaps stolen may inquire as to ownership. In these circumstances the California Vehicle Code expressly allows an officer to ask for the registration of a vehicle. (Veh. Code § 2804, *People v, Cacioppo* (1968) 264 Cal.App.2d 392, 396–397.)

Appellant claims that handcuffing and asking him a question rendered it a custodial interrogation. But the court must consider all the circumstances surrounding the police encoun-

ter and no one factor is controlling. (*People v. Pilster, supra,* 138 Cal.App.4th at p. 1404.) Handcuffing a suspect during an investigative detention does not automatically make it custodial interrogation for purposes of *Miranda. (Ibid.*; *United States v. Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289.) Here it is obvious that the reason for the handcuffing was appellant's possessing a flat-blade screwdriver and the officer's belief that appellant was about to flee.

Appellant was advised that he "was being detained while we investigate[] this." The detention lasted two minutes. Officer Coulter was alone, and appellant was questioned on a public sidewalk. "This is a significant difference from interrogation at the police station, 'which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.' [Citation.]" (*People v. Pilster, supra,* 138 Cal.App.4th at p. 1404; see *Orozco v. Texas* (1969) 394 U.S. 324, 326–327 [22 L.Ed.2d 311, 314–315] [place of interrogation is not determinative but is a factor to consider].) Based on the totality of the circumstances the trial court reasonably concluded that it was not a custodial interrogation for *Miranda* purposes. (*People v. Clair* (1992) 2 Cal.4th 629, 679–680; *People v. Pilster, supra,* 138 Cal.App.4th at p. 1404.)

There are, of course, limits to the rule allowing "brief and casual" investigatory questions. If the questioning is aggressive, confrontational, accusatory, coercive, or sustained, the court may find a violation of *Mianda*. As Justice Fleming said, *Miranda* warnings are not required "until such time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and became sustained and coercive." (*People v. Manis, supra,* 268 Cal. App.2d at p. 669.)

OTHER CRIME EVIDENCE

Appellant argues that the trial court abused its discretion in admitting evidence of the prior car theft to show knowledge, intent, and common plan. (Ev*id.* Code, § 1101, subd. (b).) Appellant claimed that he innocently found the motorcycle, requiring the prosecution to show that appellant had the specific intent to permanently or temporarily deprive the owner of title or possession. (*People v. O'Dell, supra,* 153 Cal.App.4th at p. 1574.) The prior car theft was sufficiently similar to show knowledge, intent, and common plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403.) Appellant took the car during the early morning hours when it was parked in front of the victim's house. The car ignition was punched out with a flat-blade screwdriver and appellant was stopped after a license plate recognition camera alerted that the car was stolen.

Appellant argues that the other crimes evidence was more prejudicial than probative (Ev*id.* Code, § 352) and the jury could have treated it as propensity evidence. The jury was instructed that the other crimes evidence could only be considered to show knowledge, intent, or common plan. (CALCRIM 375.) It was instructed not to consider the evidence for any other purpose, that it was not to conclude that appellant had a bad character propensity to commit the crime, and that the other crimes evidence "is not sufficient by itself to prove that the defendant is guilty… ." (CALCRIM 375.) It is presumed tht the jury understood and followed the instruction. (*People v. McDermott* (2002) 28 Cal.4th 946, 999.)

The judgment is affirmed.

YEGAN, J.

We concur: GILBERT, P.J., PERREN, J.

Cite as 13 C.D.O.S. 12847

THE PEOPLE, Plaintiff and Respondent,

v.

TOMIEKIA JOHNSON, Defendant and Appellant.

No. B239867
In the Court of Appeal of the State of California
Second Appellate District
Division Five
(Los Angeles County Super. Ct. No. BA379826)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Robert Perry, Judge. Affirmed.

Filed November 26, 2013

COUNSEL

Fay Arfa for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of BACKGROUND, parts A2 and A3, and DISCUSSION, parts A and C through G.

OPINION

INTRODUCTION

Defendant and appellant Tomiekia Johnson (defendant) was convicted of the first degree murder of her husband, Marcus Lemons (Lemons). (Pen. Code, §§ 187, subd. (a), and 189.[1]) On appeal, defendant contends, inter alia, that her statutory and constitutional rights to be present at trial were violated when the trial court, without defendant being present, allowed the bailiff to demonstrate the operation of the murder weapon in response to a jury request and to respond to questions from the jury about how the weapon operated.

In the published portion of this opinion, we hold that the trial court erred by allowing the bailiff, without the presence of defendant, to conduct for the jury a demonstration of how the murder weapon operated and answer jury questions about that subject, but that error was not prejudicial because defendant was present when the prosecution's expert provided testimony that was consistent with the bailiff's communications with the jury. The failure of defendant's counsel to object to the colloquy between the bailiff and the jury forfeited any contention concerning that process. We affirm the judgment of conviction.

BACKGROUND

A. Factual Background

1. Summary of Evidence

A surveillance video from the inside of a bar showed Lemons and defendant drinking at the bar on February 21, 2009. Later that evening, the driver of a car and her passenger observed a physical altercation between a female and a male outside their car and noticed that when the female departed in the couple's car, they only saw the female's head; neither the driver nor her passenger saw the male. They testified the man and woman were African Americans, and that the man wore a baseball hat. Their description of the couple's appearance was consistent with the physical appearance of defendant and Lemons in the video at the bar, and with the hat subsequently recovered near Lemon's body.

In response to a 911 call from defendant's mother, the police found Lemons's body in defendant's car parked outside her mother's house. Lemons had suffered a fatal gunshot wound to the head. Defendant was arrested. The police found in the car a .25 caliber semiautomatic handgun, loaded with a magazine containing five rounds and one round in the chamber. Just behind the driver's seat there was an expended .25 caliber shell casing. The hammer on the gun was in the cocked position, and the safety lever was in the center position.

A deputy medical examiner concluded that based on the trajectory of the bullet and the wound, the gun was in a position above and to the right of Lemons when it was fired and that the gun was in contact or near contact with Lemons's head. She further opined that Lemons was seated on the front passenger seat, and the shooter was standing near the front passenger door frame.

At the time of the shooting, defendant was a seven-year veteran California Highway Patrol (CHP) officer. Nevertheless, she had a past history of making threats, firing her weapon, and engaging in threatening conduct, including, inter alia, against Lemons.

According to defendant, she and Lemons argued on the way home from the bar on the evening of February 21, 2009, and she exited the car to walk home. She thought Lemons was going to reach for a gun that she believed was in her purse that she left in the car. Lemons was in the passenger seat with one foot on the ground. When defendant saw the gun on the ground on the passenger side of the car, she was afraid Lemons would get it so she picked it up, squeezed the gun tightly, and, in so doing, it fired accidentally striking Lemons. She drove him to her parents' house and told them to call 911 because she had shot and killed Lemons. Defen-

1. All statutory citations are to the Penal Code unless otherwise noted.

dant's firearms and trajectory reconstruction expert said that Lemons did not suffer a contact wound and that there was not sufficient evidence to determine Lemons's position when he was shot.

[A2 AND A3, *See* FOOTNOTE*, *Ante*]

B. Procedural Background

The Los Angeles County District Attorney filed an information charging defendant with one count of murder. (§ 187, subd. (a).) It was alleged that defendant personally and intentionally discharged a firearm which caused great bodily injury and death (§12022.53, subd. (d)), that defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and that defendant personally used a firearm (§ 12022.53, subd. (b)).

The jury found defendant guilty of first degree murder and the firearm allegations true. The trial court sentenced defendant to state prison for a term of 50 years to life.

DISCUSSION

[A, *See* FOOTNOTE*, *Ante*]

B. Right to be Present

Defendant contends that her statutory and constitutional rights to be present at trial were violated when, without her presence, the trial court in response to a jury request allowed the bailiff to demonstrate, and answer questions about, the operation of the murder weapon. As set forth above, the evidence at trial showed that after an evening of drinking, defendant and Lemons argued on their way home from a bar. After defendant stopped and exited her vehicle, she shot Lemons at close range with a handgun while he was seated in the passenger seat of the car. Defendant claimed that the handgun discharged accidentally, but, after considering the evidence, including expert witness testimony about the operation of the handgun, the jury rejected that claim. We conclude that although the trial court erred, the error was harmless.

1. Applicable Law

The California Supreme Court has summarized the law relating to a criminal defendant's right to be present at proceeding as follows: " 'A criminal defendant's right to be personally present at trial is guaranteed under the federal Constitution by the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. It is also required by section 15 of article I of the California Constitution and by sections 977 and 1043.' [Citation.] 'Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent "interference with [his] opportunity for effective cross-examination." ' [Citations.] 'Due process guarantees the right to be present at any "stage that is critical to [the] outcome" and where the defendant's "presence would contribute to the fairness of the procedure." ' [Citations.] ' "The state constitutional right to be present at trial is generally coextensive with the federal due process right. [Citations.]" [Citation.] Neither the state nor the federal Constitution, nor the statutory requirements of sections 977 and 1043, require the defendant's personal appearance at proceedings where his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him. [Citations.]' [Citations.] 'Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial.' [Citation.]" (*People v. Blacksher* (2011) 52 Cal.4th 769, 798–799, fn. omitted.)

The California Supreme Court has noted that "a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding." (*People v. Perry* (2006) 38 Cal.4th 302, 312; *People v. Lopez* (2013) 56 Cal.4th 1028, 1051 [a defendant does not have the right to be present in chambers or at bench discussions outside the jury's presence on questions of law]; *People v. Butler* (2009) 46 Cal.4th 847, 865 [discussion of jury instructions is not a critical stage of the proceedings requiring a defendant's presence]; *People v. Rogers* (2006) 39 Cal.4th 826, 855–856 [a defendant's right to attend a counsel's jury screening discussions]; *People v. Avila* (2006) 38 Cal.4th 491, 598 [rereading of testimony is not a critical stage of a criminal proceeding]; *People v. Riel* (2000) 22 Cal.4th 1153, 1196 [the defendant's presence at discussions concerning television coverage, jury instructions, or which exhibits to send to the jury "would neither have contributed to the fairness of the procedure nor have affected the fullness of his opportunity to defend against the charges"]; *People v. Ervin* (2000) 22 Cal.4th 48, 72 [a defendant has no absolute right to be present during a hardship screening]; *People v. Johnson* (1993) 6 Cal.4th 1, 17–20 [the dismissal of a juror for misconduct is not a proceeding at which the defendant must be present], disapproved on other grounds in *People v. Rogers, supra,* 39 Cal.4th at p. 879; see also *Kentucky v. Stincer* (1987) 482 U.S. 730 [a defendant may be excluded from a conference on the competency of child witnesses]; *United States v. Gagnon* (1985) 470 U.S. 522, 526–527 [trial court's *ex parte* discussion with a juror was not at a critical stage of the proceedings].)

The California Supreme Court also has explained, "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice. [Citations.]" (*People v. Perry, supra,* 38 Cal.4th at p. 312.) " 'A defendant claiming a violation of the right to personal presence at trial bears the burden of demonstrating that [the defendant's] personal presence could have substantially benefited the defense. [Citation.]' [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 408, superseded by statute on other grounds as stated in *People*

v. Hinks (1997) 58 Cal.App.4th 1157, 1161.) As the Court of Appeals for the Ninth Circuit pointed out, "The [United States] Supreme Court has 'adopted the general rule that a constitutional error does not automatically require reversal of a conviction… and has recognized that most constitutional errors can be harmless.' [Citation.] Automatic reversal due to a constitutional error is required only if this error was a 'structural defect' that permeated 'the entire conduct of the trial from the beginning to end' or 'affected the framework within which the trial proceeds.' [Citation.] If the error was simply a 'trial error,' on the other hand, a court conducts a harmless-error review. [¶] The list of structural errors that the Supreme Court has recognized is short and limited… . [¶] The [United States] Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error. To the contrary, in *Rushen v. Spain*, 464 U.S. 114, 117, 78 L.Ed.2d 267, 104 S.Ct. 453 (1983) (per curiam), the Court determined that the fact that the defendant was denied the right to be present during an *ex parte* communication between the judge and a juror was a trial error that was subject to harmless error analysis. The court explained that the right to be present during all critical stages of the proceedings and the right to be represented by counsel, 'as with most constitutional rights, are subject to harmless error analysis unless the deprivation, by its very nature, cannot be harmless.' *Id.* at 117 n.2 (citations omitted)." (*Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1171–1172.) Thus, an error pertaining to defendant's presence involving a federal constitutional right is evaluated under the "harmless-beyond-a-reasonable-doubt standard." (*People v. Davis* (2005) 36 Cal.4th 510, 532; see *Chapman v. California* (1967) 386 U.S. 18, 23.)

2. Forensic Evidence

a) Criminalist Keil

Keil, an LASD senior criminalist, testified about the operation of the handgun recovered from the purse found in defendant's car. Keil used a photograph of a firearm to, as he testified, "depict[] the hammer, which is in this particular position in the forward or uncocked position… . The trigger, which is essentially connected to the firearm to the position that holds the hammer in a cocked position so that when it's depressed, the hammer can be released. . . . The slide, which is the part that moves back and forth on a semiautomatic firearm such as this. It controls the operation after firing, the removal, extraction, and ejection of a fired cartridge case. That is the purpose of this slide mechanism as it comes to the rear, pulls that out, extracts and ejects that. As it comes forward, takes another live round off the magazine and chambers it. [¶] The safety mechanism. In this case it's a lever-type safety on the left side of the firearm that swings in this example 180 degrees. So as depicted, this is in a ready-to-fire position. If it were rotated 180 degrees to the front, it would be in a safe position."

Using another photograph of a gun, Keil explained, "This particular safety mechanism on this firearm rotates 180 degrees. It has what's known as a detent or a depression in the frame that as you push it around to engage the safety, it sort of holds it or keeps it there more tightly. So in this position it's held in the… completely off position, [and] can be rotated around using typically your thumb. If you're right-handed, you'd use your right thumb to rotate it around and engage it in the forward position which would be safety on. [¶] In this particular firearm, … [t]he safety will be engaged from six o'clock or greater, meaning that you cannot pull the trigger. [¶] If it's between six o'clock and three o'clock, you will be able to fire the firearm. So it will discharge."

Keil testified that there was an "F" on the gun. According to Keil, when the "F" was showing, the gun was ready to fire. He stated, "F is for 'fire,' meaning that it will discharge with the safety in the position as depicted. [¶]… [¶] [If I move the safety lever] instead of an F, underneath the lever as it is right now you would see an S for 'safe.' "

Keil further testified that he had test-fired the pistol and determined it was functional. He also performed a "push off" examination, which is a test performed by using one's thumb to push down the cocked hammer in an attempt to disengage its mechanism without touching the trigger. Keil determined that he could not disengage the hammer with his thumb.

The prosecutor asked Keil, "Can you tell us how this gun works? [¶] You called it a single-action." Keil responded that as opposed to a double action firearm, "a single-action mode of fire, means that the hammer must be in a cocked position before you attempt to fire it. So the operator can thumb it back, meaning they pull it to the rear where it's held by the internal mechanisms of the firearm until the trigger is depressed, in this case [requiring] at least seven and a half pounds of force, at which time the firearm will release the hammer, the hammer will fall forward, strike the firing pin, the firing pin will ram itself into the primer, causes sparks and flame to go into the gunpowder. That expanding gas operates the top of the firearm known as the slide, bullet leaves down range, slide moves to the rear, and what this does is pulls that fired cartridge case out of the chamber, extracts it and ejects it free of the firearm. As the slide gets all the way to the back and starts moving forward, it takes another live round, if it's present in the magazine, and pushes it into the chamber at the same time recocking the hammer. [¶] The operator then would release the pressure from the trigger and re-depress it if they wish to fire it a second time, hence the name 'semi-automatic.' The trigger can't be held to the rear and continue to be fired. You must release it and re-depress it for subsequent shots."

Using a Titan .25 caliber semi-automatic pistol, i.e., the same type of weapon used in Lemons's shooting, Keil further explained its operation, stating, "[A]t this point the firearm is in a cocked position because the slide has been to the rear. The hammer is held to the rear… . If this had been loaded with a unit of ammunition, it would be in a position where it

could be fired. In this case the safety mechanism is on. The operator would rotate it to the rear, at which point I could apply pressure to the trigger, and the hammer will discharge. The hammer will fall forward striking the firing mechanism and then beginning the process of a cycling where the fired cartridge case will come out of this part on the top and to the rear, and the next live round will come forward as it moves forward. Again, cocking the hammer. [¶]… [¶] So that is the operation of this. It is a single-action, meaning that the hammer must be in a cocked position to fire. If it is not, pulling the trigger accomplishes nothing. It does not function. In a cocked position, putting seven and a half pounds of pressure on the trigger will cause the hammer to be discharged or fall forward."

In response to the prosecutor's request that Keil demonstrate for the jury how one could pull back on the slide to shoot the gun, Keil testified, "[A]fter [the magazine is] loaded and inserted, the operator would then pull the… slide to the rear and release it, and what this . . . movement does [is to cause] that first live round to be pushed up inside the magazine a little bit, and part of the slide mechanism actually pushes on the back of it and pushes it into the chamber, and what this accomplishes is even if this hammer were in a forward position when they started, it's now cocked and held to the rear, so now I can simply, provided the safety is off, apply pressure to the trigger and discharge it."

Keil test-fired the Titan pistol to see what the "natural sweep position would be of [the] safety mechanism" before he shot it. He did so to "educate myself on how this safety mechanism operates. I put it in a cocked condition. I rotated that lever so that the knurled part is facing the front of the firearm which is in a safe position, I can see the letter S for 'safe,' verified that… by pushing the trigger [I could not fire it]. . . . And I tried sweeping the hammer down with my thumb, sweeping it down to see how fast I could disengage [the safety], and when I did that, I noted what position it went in. [¶] So with the natural movement of my thumb as I sweep it down, if I simply sweep my thumb down starting with… my thumb on top of the knurled lever, sweeping it and pulling it all the way down towards the grip, it frequently goes to a four- or five o'clock position, meaning that I can then pull the trigger."

b) Bailiff's Demonstration

During deliberations, the jury requested a reading of defendant's testimony about how the gun discharged, an opportunity to view the gun, and a demonstration of the gun's "safety, hammer, & trigger." In response to those requests, the following exchange occurred between and among the trial court and counsel: "[Trial court]: We are outside the presence of the jury… . The defendant is not present. [Defendant's counsel], what are your thoughts on whether [defendant] has to be here? [¶] [Defendant's counsel]: I traditionally, your honor, waive my client's appearance, particularly when they're out of custody. I spoke with her this morning. I just texted earlier and told her that the jury wanted to read some of the transcript regarding her testimony about the gun and her description during direct examination and she said she'd rather not be here for that and it was okay if I represented her interest. [¶] [Trial court]: So you're waiving her appearance? [¶] [Defendant's counsel]: Yes, Your Honor. [¶] [Trial court]: That's agreeable to the court."

Regarding the jury's request for a demonstration of the operation of the gun, the following exchange occurred outside the presence of the jury: "[Trial court]: The other thing we have to discuss is the second note ask[ing] for viewing of the gun and demonstration of safety, hammer[,] and trigger. [¶] To me this is a significant issue. I don't know how you want to handle it. The Bailiff is prepared to show the jurors the gun and to demonstrate the use of the safety and the hammer and the trigger if that is acceptable. I don't know what else we can do. I'm seeking some advi[c]e here. How would counsel want to proceed in response to this request to [view] the gun and to demonstrate the safety[,] hammer[,] and the trigger. [¶] [Prosecutor]: I'm in agreement with the trial court's suggestion. [¶] [Defendant's Counsel]: I don't think you can do it any other way, your Honor. The Bailiff obviously will be instructed not to answer any questions or any inquiries. [¶] [Trial court]: Well, let's do it in open court. Just have him… do it. In fact, … I'll take him through it and say, okay, show the jurors where the safety is and he can show them where the safety is. And I will ask him, how . . . do you fire the gun and have him do the slide and pull the trigger and pull the hammer back. Are we okay with that? [¶] [Prosecutor]: I'm fine with that. [¶] [Trial court]: The other option is to give the jurors the gun, and we just don't do that as a rule. . . ."

Then the following occurred in the presence of the jury: "[Trial court]: Good morning everyone. We are with the jury and we're going to be responding to the jurors' inquiry. We have two notes from the jury. First of all, I'm going to explain that [defendant] has waived her appearance for this response to your questions. We have questions. I want to take up the question regarding testimony second. Let's deal with the first question which is you have asked to view the gun and you've asked for a demonstration of the safety, hammer[,] and trigger. And so the Bailiff has the gun and he's going to walk over in front of you and he'll show you where the safety is. [¶] [Bailiff]: Safety is right here (indicating). [¶] [Trial court]: [Bailiff], can you show the safety to the on position and off position. [¶] [Bailiff]: Right now the safety is on safe. Safe means that the lever is moved forward. To fire the weapon, I'll rotate lever backwards and there will be a little 'F' there. It's ready to fire. [¶] Juror No. 3: If you were to fire the gun and you've never used it before, I'm looking at like time wise, how much time does it take you to release the safety, pull back the hammer or the slide or whatever it is and fire? Does it take you a second? . . . [¶] [Bailiff]: You can do it if you… are proficient with the weapon, you can do it in a second. [¶] Juror No. 3: Okay. Do the hammer. [¶] Juror No.

11: Do it again. [¶] [Bailiff]: Right now it's on safe. Okay, if I pull it back. – [¶] Juror No. 10: Is that the only way to do the hammer? [¶] [Bailiff]: Another way to do the hammer is this way. [¶] Juror No. 3: So if that gentleman there — can you grab the gun from the front please. [¶] [Trial court]: We're getting way far afield. [¶] Juror No. 11: Repeat that so we can see what it takes to fire. [¶] [Bailiff]: Right now it's on safe. I can't fire. It's not cocked back. Now, if I want to fire it – [¶] [Trial court]: What if you cocked the hammer? [¶] [Bailiff]: Cocked the hammer. [¶] Juror No. 11: It's on safe. [¶] [Bailiff]: It's on safe. I can't fire it if it's on safe. [¶] Juror No. 6: So unsafe it and then shoot. [¶] [Bailiff]: Unsafe it. [¶] Juror No. 8: The slide is already pulled. [¶] [Bailiff]: I have to put a round in the chamber first to fire. If there was a magazine in here. Right now it's on safe, I can't fire. If I wanted to fire – [¶] Juror No. 3: Can you push the safety back at 6:00. [¶] [Bailiff]: It will still fire. [¶] Juror No. 3: At 5:00 or 6:00? [¶] [Bailiff]: It's at 6:00 right now. [¶] Juror No. 3: It went off at 6:00. Okay. [¶] [Bailiff]: At 5:00 it won't. [¶] Juror No. 10: What's 7:00? [¶] [Bailiff]: Oh, I'm looking at it this way. It's at 6:00. [¶] Juror No. 3: At 6:00. [¶] [Bailiff]: I can't fire this. You move it a little bit more at 6:00, it'll fire at 6:00. [¶] Alternate Juror No. 1: You said it will or won't fire? [¶] [Bailiff]: It will fire at 6:00. [¶] Alternate Juror No. 1: When you swing the lever, does it click? [¶] [Bailiff]: No, the lever does not click when I swing it. [¶] Alternate Juror No. 1: So what's the mechanism between disabling and abling a gun? [¶] [Bailiff]: I know how it is internal. [¶] Juror No. 11: But you have to pull the back down or rack? [¶] [Bailiff]: Yeah, I would have to rack it to pull the hammer back. So right now it's ready to fire, but it's on safe. The only way I can fire it, if I pull the lever back from 5:00 — from safety to fire and then I can fire the weapon. [¶] Juror No. 10: Can you do it with your thumb instead of the racking? [¶] [Bailiff]: What do you mean? [¶] Juror No. 10: The handle, cock? [¶] [Bailiff]: Oh, yes. [¶] Juror No. 9: Can you reach the safety with your thumb? [¶] [Bailiff]: Well, I could. [¶] Juror No. 9: You're an expert. [¶] Juror No. 3: And on the slide, do you have to pinch the sides or can you pull it from the top? Does the top slide? [¶] [Bailiff]: This top? [¶] Juror No. 3: Yeah, right there. See, the — [¶] [Bailiff]: This part, you have to pinch it on both sides. Okay. That's why you have the little grooves, so you can get a hold of it to slide it back. That's one way. [¶] [Trial court]: Look, I'm getting uncomfortable. I think we've done enough. If you have additional questions, we'll try to answer them."

3. Analysis

The trial court erred in depriving defendant of her statutory and constitutional rights to be present during the bailiff's demonstration. As explained above, defendant had a right to be present at each critical stage of the trial, and because it amounted to the jury's receipt of evidence, the bailiff's demonstration constituted a critical stage of defendant's trial.

"In all cases in which a felony is charged, the accused shall be present… during those portions of the trial when evidence is taken before the trier of fact . . . ." (§ 977, subd. (b)(1).) " 'Evidence' means testimony . . . or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Ev*id.* Code, § 130.) "Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law . . . ." (Ev*id.* Code, § 710.) Evidence Code section 165 states, " 'Oath' includes affirmation or declaration under penalty of perjury."

Without defendant present, the bailiff spoke extensively[2] to the jury about, and demonstrated for the jury, the operation of the gun's safety and hammer, including their effect on the gun's ability to fire, the time it takes to release the gun's safety, and the "racking" of the gun to ready it for firing — pulling back on the slide thereby cocking the hammer. The bailiff responded to a number of questions posed by the jurors, and one of the juror's at that time expressly characterized the bailiff as "an expert."

Although the bailiff was not a sworn witness, his "demonstration" essentially amounted to testimony. Even if the bailiff's remarks were not testimony, they resulted, in effect, in the jury's receipt of evidence. (*People v. Bolin* (1998) 18 Cal.4th 297, 325 ["Although a jury view is not among the designated proceedings in section 977, we have long held that 'in so viewing the premises the jury was receiving evidence' even if nontestimonial"].) Therefore, the trial court erred by allowing the bailiff to demonstrate to the jury the operation of the gun, including answering the juror's questions, without defendant being present because the demonstration was a critical stage of the trial proceedings.

The Attorney General argues that there was no error because defense counsel waived defendant's presence. There was, however, no valid waiver of defendant's statutory right to be present during the bailiff's demonstration. As noted, section 977, subdivision (b)(1) required defendant "to be present . . . during those portions of the trial where evidence is taken before the trier of fact . . . ." A written waiver executed by a defendant is required for a defendant to waive his or her presence at such a hearing. (§ 977, subd. (b)(2).) Defendant did not execute a written waiver of her right to be present at the bailiff's demonstration, and, therefore, there was not a valid waiver under section 977.

Even if defendant's counsel could waive defendant's constitutional and statutory rights to be present at the bailiff's demonstration, there was no valid waiver. In *Larson v. Tansy* (10th Cir. 1990) 911 F.2d 392, the defendant was found guilty of criminal sexual penetration and sentenced to life imprisonment. During trial, the defendant spent much of the time with his head on counsel table and never talked to his trial counsel. At the conclusion of all testimony, the trial court told the defendant's counsel that the defendant could leave the courtroom if counsel would waive his presence.

2. The bailiff's demonstration to the jury is recorded in approximately three and one-half pages of the reporter's transcript.

Defense counsel agreed, the defendant was escorted back to the psychiatric hospital to which he had been admitted, and defense counsel represented that the defendant was voluntarily absenting himself from the proceedings. The defendant was absent for the remainder of his trial, including the jury instruction conference, jury instructions, closing arguments, and the rendering of the verdict. (*Id.* at p. 393.)

The court in *Larson v. Tansy, supra,* 911 F.2d at page 394 said "that defendant had a constitutional right to be present at the jury instructions, the closing statements, and the rendering of the verdict." In holding that there was not a valid waiver of the defendant's right to be present at those proceedings, the court stated, "The record indicates defendant's counsel, and not defendant, waived defendant's right of presence at trial. The trial court never directly addressed defendant concerning his counsel's request to conduct the remainder of the trial in defendant's absence. We hold that defendant did not waive his right to be present. [¶] Several circuits have held that defense counsel cannot waive a defendant's right of presence at trial. [Citations.]" (*Id.* at p. 396.) The court added, "[T]wo circuits that have allowed a defendant's counsel to waive his client's right of presence both involve counsel that at least communicated with their clients the need or possibility for attendance at trial. *Wilson v. Harris*, 595 F.2d 101, 104 (2d Cir. 1979); *United States v. Dunlap*, 595 F.2d 101, 868 (4th Cir.), cert. denied, 439 U.S. 858, 58 L.Ed. 2d 166, 99 S. Ct. 174 (1978). No such communication took place in this case. Even if defense counsel could have validly waived defendant's right to be present for the conclusion of his trial, where defense counsel did not consult with defendant concerning the waiver and did not obtain defendant's consent, the waiver will not be binding on defendant. [Citations.]" (*Id.* at p. 396, fn. 2.)

In *People v. Davis, supra,* 36 Cal.4th 510, our Supreme Court stated, "It does not appear that we have addressed the question whether defense counsel may waive the defendant's presence. Some federal cases that have addressed this issue have held that defense counsel may do so, but only if there is evidence that the defendant consented to the waiver. (E.g., *Carter v. Sowders* (6th Cir. 1993) 5 F.3d 975, 981–982; *Larson v. Tansy*[, *supra*,] 911 F.2d [at pp.] 396–397; but see *United States v. Gordon* (D.C. Cir. 1987) 264 U.S. App. D.C. 334, 829 F.2d 119, 125–126 [personal on-the-record waiver of presence right required].) At a minimum, there must be some evidence that the defendant understood the right he was waiving and the consequences of doing so. (See *United States v. Nichols* (2d Cir. 1995) 56 F.3d 403, 416–417.) [¶] Here, there is scant evidence of consent, and even less evidence that defendant understood the right he was waiving and the consequences of his waiver. All the record shows is that defense counsel represented to the court that counsel had discussed the hearing with defendant and that defendant would waive his presence. There is no evidence that defense counsel informed defendant of his right to attend the hearing; nor is there evidence that defendant understood that by absenting himself from the hearing he would be unable to contribute to the discussion… . Accordingly, we cannot conclude that defendant knowingly and intelligently waived his right to presence at the hearing." (*Id.* at p. 532, fn. omitted.)

Here, defendant's counsel purportedly waived defendant's presence, but the record reflects only that defendant's counsel advised defendant that the jury wanted a transcript of some of defendant's testimony and, on that basis, she orally agreed with defendant's counsel to waive her presence. There is nothing in the record showing that defendant knew about the proposed demonstration or that the bailiff would answer questions from the jurors. Based on the record, the oral waiver of defendant's presence by defendant's counsel, at most, related only to the jury's request for a transcript of some of defendant's testimony. Thus, defendant did not waive her constitutional rights to be present at the bailiff's demonstration.

The trial court's error in connection with the bailiff's demonstration in defendant's absence does not require a reversal because it was harmless beyond a reasonable doubt. (*People v. Martinez* (2009) 47 Cal.4th 399, 424.) The bailiff's demonstration, which included answering the jurors' questions, although improper, was in substance materially the same as Keil's testimony.[3] Keil, like the bailiff, demonstrated for the jury, and spoke to the jury about, the weapon's operation including, inter alia, the location, use, and effect of the gun's safety, hammer, and slide. In addition to being similar to the bailiff's demonstration, Keil's testimony concerning the operation of the gun was substantially more extensive than that demonstration. Defendant was present during Keil's testimony, and her counsel cross-examined him. Any issues defendant had concerning the accuracy, characterization, or relevance of Keil's testimony could have been raised by objection during Keil's testimony on direct examination, or by defendant's counsel during his cross-examination of Keil.

In addition, defendant testified about her extensive knowledge of firearms, but she did not testify about Keil's testimony or otherwise challenge the manner in which he characterized the operation of the gun. Also, defendant did not offer the testimony of an expert witness to contradict Keil's testimony concerning the operation of the gun, or explain how the gun could discharge accidentally if, as defendant testified, she "squeezed" the gun or held it "tightly" and did not "try to pull the trigger." Moreover, defendant's firearms and trajectory reconstruction expert did not disagree with Keil's testimony concerning the operation of the gun.

Defendant contends that, in a response to one juror's question, the bailiff stated during his demonstration that if a shooter was proficient with the weapon, he or she could release the safety, pull back the hammer or the slide, and fire the gun "in a second." Defendant argues that she was prejudiced by her improper absence during the bailiff's dem-

3. In the attached appendix, we set forth a comparison of relevant portions of Keil's testimony and the bailiff's description of his demonstration.

onstration because Keil did not testify about the time it takes to perform those tasks, and she did not have an opportunity to address the subject.

With respect to the time it takes to perform one of the two steps described by the bailiff — disengaging the safety — Keil testified that in performing a test on the gun, "I tried sweeping the hammer with my thumb, sweeping it down to see how fast I could disengage [the safety]… . [¶] So with the natural movement of my thumb as I sweep it down, if I *simply* sweep my thumb down starting with… my thumb on top of the knurled lever, sweeping it and pulling it all the way down towards the grip, it frequently goes to a four- or five o'clock position, meaning that I can then pull the trigger." (Italics added.) This testimony suggested that a person proficient in the use of handguns, such as defendant, who "simply" swept his or her finger in the manner described by Keil could ready the gun to fire quickly. Thus, defendant could have cross-examined Keil on the issue of how quickly the gun could have been readied to fire. In addition, defendant testified that she did not know whether the gun had the safety on or whether "the hammer was cocked" when she picked up the gun and shot Lemons. Based on that testimony, there was no way to know if, just before defendant shot Lemons, the safety was engaged and the hammer was not cocked (by pulling back the hammer or the slide). Therefore, anything the bailiff said concerning how fast a gun could be readied to fire was of no consequence.

Defendant next contends that the error was prejudicial because, unlike the bailiff, Keil testified that "if the gun were cocked and the safety on, the safety could accidentally disengage and the gun could fire by putting pressure on the trigger." Defendant argues that had she been present, she "could have pointed out that the bailiff's demonstration failed to represent accurately how she maneuvered the gun." The challenged portion of Keil's testimony, however, concerned whether it was advisable to carry a gun in a person's pocket, and there was no testimony in the record that the gun was in defendant's pocket immediately before she shot Lemons. In addition, as noted above, defendant testified that she did not know whether the gun's safety was on or whether "the hammer was cocked" when she picked up the gun.

Further, the prosecution's forensic evidence rebutted defendant's contention that she squeezed the gun tightly and it fired accidentally. That evidence showed that Lemons's wound was caused by a shot from a gun that was placed on or very near Lemons's head, and at the time Lemons was shot he was seated in the car and defendant was standing near the passenger door frame. The evidence also reflected that for the gun to fire, over seven pounds of force had to be applied to the trigger. Thus, Keil's testimony covered the substance of the bailiff's demonstration and was more extensive. The demonstration during defendant's absence from the courtroom was therefore harmless beyond a reasonable doubt. (*People v. Martinez, supra*, 47 Cal.4th at p. 424; *Chapman v. California, supra,* 386 U.S. at pages 22, 24.)

In addition, defendant's counsel acceded to the bailiff's demonstration in defendant's absence. Although defense counsel conditioned his agreement to allow the demonstration on the basis that the bailiff not answer questions, once the bailiff began to answer jurors' questions, defense counsel did not object. Thus, there was a forfeiture of any claim of error with respect to the bailiff's conduct, apart from the issue of defendant's absence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

[C THROUGH G, *See* FOOTNOTE*, *Ante*]

DISPOSITION

The judgment is affirmed.

MOSK, Acting P. J.

We concur: KRIEGLER, J., KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX

1. SUBJECT: The Safety's on and off Positions.

KEIL	THE BAILIFF
A. Keil testified that as depicted in a photograph, the firearm's safety was off, but "[i]f [the safety lever] was rotated 180 degrees to the front, it would be in a safe position."	A. "Right now the safety is on safe. Safe means that the lever is moved forward. To [disengage the safety], I'll rotate lever backwards and there will be a little 'F' there."
B. "The safety will be engaged from six o'clock or greater . . . ."	B. "Right now it's on safe."
C. If the safety is between "six o'clock and three o'clock" you will be able to fire the firearm.	C. The safety is on when the safety lever is in a "5:00" position.
D. "[If I move the safety lever] instead of an F [for 'fire], underneath the lever as it is right now you would see an S for 'safe.' "	D. The safety is off when the safety lever is in the "6:00" position.
E. "In this case the safety mechanism is on."	E. "[R]ight now it's ready to fire, but it's on safe."

2. SUBJECT: The Safety's Effect.

KEIL	THE BAILIFF
A. As depicted in a photograph, the firearm is in a "ready to fire position."	A. When the safety is off, the gun "is ready to fire."
B. When the safety is engaged "you cannot pull the trigger… ."	B. "Right now it's on safe. I can't fire [the gun]."
C. "If [the safety lever] is between six o'clock and three o'clock, you will be able to fire the firearm. So it will discharge."	C. If the hammer is cocked and the safety is on, "I can't fire [the gun]."
D. When the safety lever is moved to the "F" depicted on the gun, "the gun is ready to fire."	D. "Right now it's on safe, I can't fire."
E. The gun "will discharge with the safety in the position as depicted."	E. The gun "will still fire" when the safety is off — i.e., when the safety lever is in a 6:00 position.
F. "The operator would rotate [the safety lever] to the rear, at which point I could apply pressure to the trigger, and the hammer will discharge."	F. The gun will not fire when the safety is on — i.e., when the safety lever is in a 5:00 position.
G. "[P]rovided the safety is off, [I can] apply pressure to the trigger and discharge [the gun]."	G. "You move [the safety lever] a little bit more at 6:00, it'll fire at 6:00."
	H. "It will fire at 6:00."
	I. "[I]f I pull the lever back from 5:00 — from safety to fire[,]… then I can fire the weapon."

3. SUBJECT: The Hammer.

KEIL	THE BAILIFF
A. A graphic photograph of the firearm "depicts the hammer in the forward or uncocked position." B. "[A] single-action mode of fire… means that the hammer must be in a cocked position before you attempt to fire it." C. "[T]he operator can thumb [the hammer] back, meaning they pull it to the rear where it's held by the internal mechanisms of the firearm until the trigger is depressed… at which time the firearm will release the hammer [and the gun will fire]." D. While the gun is firing, the slide "recocks" the hammer. E. "At this point the [trigger] is in a cocked position because the slide has been to the rear." F. "The hammer will fall forward striking the firing mechanism" and ultimately the firing process "cock[s] the hammer." G. "It is a single-action, meaning that the hammer must be in a cocked position to fire. If it is not, pulling the trigger accomplishes nothing. It does not function. In a cocked position, putting… pressure on the trigger will cause the hammer to be discharged or fall forward." H. "[A]fter [the magazine is] loaded and inserted, the operator would then pull the… slide to the rear and release it, and… even if this hammer were in a forward position when they started, it's now cocked and held to the rear, so now I can simply… apply pressure to the trigger and discharge [the gun]."	A. The bailiff's pulled the hammer in the direction of the rear of the gun. B. The bailiff showed the jury "another way" to cock the hammer.

4. SUBJECT: The Slide.

KEIL	THE BAILIFF
A. "The slide . . is the part that moves back and forth on a semiautomatic firearm such as this. It controls the operation of firing, the removal, extraction, and ejection of a fired cartridge case. That's the purpose of this slide mechanism as it comes to the rear, pulls that out, extracts and ejects that. As it comes forward, takes another live round off the magazine and chambers it." B. While the gun is firing, "the expanding gas operates the top of the firearm known as the slide, . . . [the] slide moves to the rear, and what this does is pulls that fired cartridge case out of the chamber, extracts it and ejects it free of the firearm. As the slide gets all the way back and starts moving forward, it takes another live round, . . . and pushes it into the chamber at the same time recocking the hammer." C. "At this point the firearm is in a cocked position because the slide has been to the rear." D. "[A]fter [the magazine is] loaded and inserted, the operator would then pull the… slide to the rear and release it, and what this . . . movement does [is to cause] that first live round to be pushed up inside the magazine a little bit, and part of the slide mechanism actually pushes on the back of it and pushes it into the chamber, and what this accomplishes is even if this hammer were in a forward position when they started, it's now cocked and held to the rear, so now I can simply, provided the safety is off, apply pressure to the trigger and discharge it."	"[O]ne way" to pull the slide back is "to pinch it on both sides" — "[t]hat's why the slide has the little grooves, so you can get a hold of it to slide it back" — and move the slide in the direction of the back of the gun.

5. SUBJECT: Time to Ready The Gun to Fire.

KEIL	THE BAILIFF
"I tried sweeping the hammer down with my thumb, sweeping it [down] to see how fast I could disengage [the safety]… . [¶] So with the natural movement of my thumb as I sweep it down, if I simply sweep my thumb down starting with… my thumb on top of the knurled lever, sweeping it and pulling it all the way down towards the grip, it frequently goes to a four- or five o'clock position, meaning that I can then pull the trigger."	In a response to one of the juror's questions, the bailiff stated during his demonstration that if one is proficient with the weapon, he or she could release the safety, pull back the hammer or the slide, and fire the gun "in a second."

Cite as 13 C.D.O.S. 12857

JAMES MARAL et al., Plaintiffs and Appellants,

v.

CITY OF LIVE OAK, Defendant and Respondent.

No. C071822
In the Court of Appeal of the State of California
Third Appellate District
(Sutter)
(Super. Ct. No. CVCS120144)

APPEAL from a judgment of the Superior Court of Sutter County, Perry Parker, Judge. Affirmed.

Filed November 26, 2013

COUNSEL

John J. Fuery for Plaintiffs and Appellants.

Rich, Fuidge, Morris & Lane, Inc., Brant J. Bordsen and Landon T. Little, for Defendant and Respondent.

OPINION

In December 2011, the City of Live Oak (the City) passed an ordinance prohibiting the cultivation of marijuana for any purpose within the City. Plaintiffs sued, contending the ordinance violated the Compassionate Use Act (CUA) (Health & Saf. Code,[1] § 11362.5), the Medical Marijuana Program (MMP) (§ 11362.7 *et seq.*), equal protection, and due process. The trial court sustained the City's demurrer and dismissed the complaint. Plaintiffs appeal.

Plaintiffs argue that the CUA and the MMP grant them the right to cultivate medical marijuana. As our Supreme Court recently held in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 at page 753 (*Inland Empire*), the objectives of the CUA and MMP were "modest," and those acts did not create a "broad right" to access medical marijuana. *Inland Empire* held that the CUA and the MMP do not preempt the authority of cities and counties to regulate, even prohibit, facilities that distribute medical marijuana. (*Id.* at p. 762.) The reasoning of *Inland Empire* applies to the cultivation of medical marijuana as well as its distribution, as both are addressed in the CUA and MMP. Accordingly, we conclude the CUA and MMP do not preempt a city's police power to prohibit the cultivation of all marijuana within that city. We shall affirm.

1. Further undesignated statutory references are to the Health and Safety Code.

BACKGROUND

The Ordinance

On December 21, 2011, by a vote of 5–0, the City Council of the City adopted Ordinance 538 (Ordinance) regarding the cultivation and sale of medical marijuana within the city limits. The Ordinance added a new Chapter 17.17 to the Live Oak Municipal Code (LOMC).

In adopting the ordinance, the City made several factual findings. It found that the cultivation of medical marijuana had significant impacts or the potential for significant impacts on the City. These impacts included damage to buildings, dangerous electrical alterations and use, inadequate ventilation, increased robberies and other crime, and the nuisance of strong and noxious odors. (LOMC, § 17.17.010, ¶ A.) The City also noted the limited scope of the CUA, which the City said was to provide a criminal defense, and of the MMP, which the City said was to establish a statewide identification program. (*Id.*, ¶ B.) The City found that the CUA and MMP had not "facilitated" their stated goals as most use of marijuana was recreational, not medicinal. (*Id.,* ¶ E.) Further, the possession and cultivation of marijuana remained illegal under federal law, and the City did not wish to violate federal law. (*Id.,* ¶ J.)

Section 17.17.040 of the City's Municipal Code prohibits marijuana cultivation: "Marijuana cultivation by any person, including primary caregivers and qualified patients, collectives, cooperatives or dispensaries is prohibited in all zone districts within the City of Live Oak." The Ordinance further provided that if section 17.17.040 was held to be invalid or unconstitutional, marijuana cultivation required a zoning clearance and compliance with numerous criteria. (LOMC, § 17.17.060.)

Section 17.17.070 prohibits medical marijuana collectives, cooperatives, and dispensaries within the City. (LOMC, § 17.17.070.) Again, the Ordinance provided a number of criteria to be met for prohibited medical marijuana collectives, cooperatives, and dispensaries if the prohibition was held inval*id.* (LOMC, § 17.17.090.)

Any cultivation of marijuana in violation of Section 17.17.040 was declared unlawful and a public nuisance. (LOMC, § 17.17.100.) The Ordinance became effective 30 days after its adoption.

The Lawsuit

Plaintiffs, James Maral, individually and as trustee of the Live Oak Patients, Caregivers and Supporters Association, and other individuals, brought suit to enjoin enforcement of the Ordinance.

The relevant complaint on appeal is the second amended complaint. It alleged that the CUA gave seriously ill Californians the *right* to obtain and use marijuana for medicinal purposes. The first cause of action alleged the Ordinance violated the CUA by proscribing "activity that is not only legal, but that is a constitutionally-protected right in California." The second cause of action alleged the Ordinance violated

the MMP by proscribing "activity that has been preempted by State law." The third cause of action alleged a violation of equal protection because the Ordinance deprived plaintiffs of the right to cultivate and use medical marijuana, without a rational basis. The fourth cause of action alleged a violation of due process because the Ordinance deprived plaintiffs of the constitutionally-protected right to cultivate and use medical marijuana. The second amended complaint sought a declaration that the Ordinance was invalid, a preliminary and permanent injunction, and attorney fees and costs.

The City demurred to this complaint on the grounds that it failed to state facts sufficient to constitute a cause of action. The City argued there was no constitutional right to cultivate marijuana and the Ordinance had a rational basis.

The trial court sustained the City's demurrer without leave to amend. The court entered an order dismissing the second amended complaint.

DISCUSSION

I

Standard of Review

"A demurrer tests the legal sufficiency of factual allegations in a complaint." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42.) The standard of review on appeal from a dismissal after an order sustaining a demurrer is well established. "[W]e review the order *de novo*, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) We give the complaint a reasonable interpretation, and treat the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law. [Citation.]" (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

II

The CUA and MMP

In 1996, California voters adopted Proposition 215, the CUA. The CUA is intended to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana"; to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction;" and "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subds. (b)(1)(A)-(C).)

Rather than granting a blanket right to use marijuana for medical purposes, the CUA only immunizes specific persons from criminal prosecution under two sections of the Health and Safety Code. Thus, the CUA grants only "a limited immunity from prosecution." (*People v. Mower* (2002) 28 Cal.4th 457, 470.) The CUA provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).) The CUA creates only a limited defense to certain crimes, "not a constitutional right to obtain marijuana." (*People v. Urziceanu* (2005) 132 Cal. App.4th 747, 774.)

In 2003, the Legislature passed the MMP; it did so in part to clarify the scope of the CUA and promote its uniform application "among the counties within the state." (Stats. 2003, ch. 875, § 1.) The MMP created a voluntary program for the issuance of identification cards to qualified patients and primary caregivers. (§ 11362.71.)

The MMP also "immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. [Citation.]" (*People v. Mentch* (2008) 45 Cal.4th 274, 290 (*Mentch*).) "Section 11362.765 accords qualified patients, primary caregivers, and holders of valid identification cards, an affirmative defense to certain enumerated penal sanctions that would otherwise apply to transporting, processing, administering, or giving away marijuana to qualified persons for medical use." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1171 (*Kruse*).) The MMP provides that specified individuals "shall not be subject, on that sole basis, to criminal liability" under sections 11357 [possession], 11358 [cultivation], 11359 [possession for sale], 11366 [maintaining location for selling, giving away or using controlled substances], 11366.5 [managing location for manufacture or storage of controlled substance], or 11570 ["drug den" abatement law]. (§ 11362.765, subd. (a).) This immunity extends to those "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) The MMP does not, however, "confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 869 (*Hill*).)

III

Inland Empire

In *Inland Empire, supra,* 56 Cal.4th 729, the California Supreme Court considered whether California's medical marijuana laws preempt a local ban on facilities that distribute medical marijuana. The court concluded they did not. (*Id.* at p. 737.)

The court noted the broad language of intent in the CUA — the language on which plaintiffs rely — but found "the operative steps the electorate took toward these goals were modest." (*Inland Empire, supra,* 56 Cal.4th at p. 744.) The CUA only provided certain protections to physicians who recommended medical marijuana to patients and declared that two statutes prohibiting possession and cultivation of marijuana "did not apply" to certain patients and their primary caregivers. (*Ibid.*) Similarly, while the Legislature used some broad language in its declaration of intent in adopting the MMP, "the steps the MMP took in pursuit of these objectives were limited and specific." (*Id.,* at p. 745.) The MMP established a program for identification cards and granted specified persons engaged in specified conduct certain immunities from criminal prosecution. (*Ibid.*) Neither statute created a "broad right" of access to medical marijuana. (*Id.* at p. 753.)

The high court noted that its earlier decisions had "stressed the narrow reach of these statutes." (*Inland Empire, supra,* 56 Cal.4th at p. 745.) In *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, the court found the modest and narrow immunity provisions of the CUA did not require an employer to accommodate an employee's use of medical marijuana. "[T]he only 'right' to obtain and use marijuana created by the [CUA] is the right of 'a patient, or… a patient's primary caregiver, [to] possess[ ] or cultivate[ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code." (*Id.* at p. 929.) In *Mentch, supra,* 45 Cal.4th 274, the court declined to expand the statutory definition of a "primary caregiver" to provide immunity to one whose caregiving consisted principally of supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments.

Court of Appeal decisions also recognized "the limited reach of the CUA and the MMP" and held these statutes did not preempt local land use regulations involving medical marijuana. (*Inland Empire, supra,* 56 Cal.4th at p. 749; see *Kruse, supra,* 177 Cal.App.4th 1153 [upholding moratorium on medical marijuana dispensaries]; *Hill, supra,* 192 Cal. App.4th 861 [upholding licensing and permitting for medical marijuana dispensaries].)

Recently, in *Browne v. County of Tehama* (2013) 213 Cal. App.4th 704 (*Browne*), we upheld an ordinance regulating the cultivation of medical marijuana. In doing so, we held that "[n]either the Compassionate Use Act nor the Medical Marijuana Program grants petitioners, or anyone for that matter, an *unfettered* right to cultivate marijuana for medical purposes. Accordingly, the regulation of cultivation of medical marijuana does not conflict with either statute." (*Id.* at p. 711, original italics.)

Based on the modest objectives and the narrow scope of both the CUA and the MMP, our Supreme Court found neither statute expressly or impliedly preempted a zoning provision that prohibited a medical marijuana dispensary anywhere within the city limits. (*Inland Empire, supra,* 56 Cal.4th at pp. 752, 762.) The court found that although the MMP exempts "the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law," the MMP does not "*mandate* that local governments authorize, allow, or accommodate the existence of such facilities." (*Id.* at p. 759, original italics.) Local decisions to prohibit medical marijuana dispensaries "do not frustrate the MMP's operation." (*Id.* at p. 761.)

IV

Analysis

Plaintiffs contend the Ordinance is "an impermissible amendment of the CUA." As we explained in *Browne, supra,* 213 Cal.App.4th at page 717, only the Legislature can amend a statute, so the proper analysis is whether the Ordinance is preempted by state law. Plaintiffs assert that no other municipality has banned cultivation of medical marijuana; they suggest the City could have (and should have) adopted less stringent regulation. But the choices other cities may have made with respect to medical marijuana are irrelevant to our analysis of preemption in this particular case.

Here, plaintiffs contend the Ordinance conflicts with the CUA (and thus is preempted by it), because the CUA created a right to obtain and use medical marijuana. They rely on the first section of the CUA, that the CUA is intended to "ensure that seriously ill Californians *have the right to obtain and use marijuana for medical purposes* where that medical use is deemed appropriate and has been recommended by a physician . . ." (§ 11362.5, subd. (b)(1)(A), italics added.) As we have explained, our Supreme Court soundly rejected this argument in *Inland Empire.*

All four causes of action in the second amended complaint are premised on the assertion that the CUA and the MMP create a right to cultivate marijuana. Plaintiffs contend the Ordinance is invalid because it deprives them of the right to cultivate medical marijuana in violation of the CUA, MMP, equal protection, and due process. Because, as we held in *Browne* and our Supreme Court confirmed in *Inland Empire*, there is no right — and certainly no constitutional right — to cultivate medical marijuana, the premise of each cause of action in plaintiffs' second amended complaint fails. They have failed to state a viable cause of action.[2]

2. The City requests that we take judicial notice of the following facts: Sutter County is comprised of approximately 600 square miles, the majority of which is primarily agricultural land; and the Sutter County Ordinance Code has no prohibitions and restrictions on the cultivation of medical marijuana. Because we find this information unnecessary to resolve the issues on appeal, we deny the request.

In several undeveloped arguments, plaintiffs assert various contentions without analysis or citation to authority. First, they claim "[m]edical marijuana patients, by nature of the fact they are medical patients, have a limitation on a major life activity and are disabled by California's liberal standard. [¶] Consequently, the Plaintiff's Second Amended Complaint does state a full claim for an Equal Protection Violation." Second, they claim the actions of the City Council and other City employees in enacting the Ordinance "were fraught with irregularities that arguably violated the Brown Act, fundamental fairness, the right of citizens to be heard in a public forum." Plaintiffs cite various irregularities in public meetings, such as limiting public participation in meetings to those who supported the Ordinance. They assert that because of those irregularities, the second amended complaint stated a cause of action for violation of due process. Third, plaintiffs contend that the City is "unnecessarily negatively impacting long-cherished property rights" by prohibiting the cultivation of medical marijuana in one's home. They argue, "Qualified medical marijuana patients should have the right to use their homes as they see desire [*sic*], as long as this use does not infringe on the property rights of their neighbors." However, "[a]n appellate court is not required to examine undeveloped claims, nor to make arguments for parties. [Citation.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) Our role is to evaluate "legal argument with citation of authorities on the points made." (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Because plaintiffs have failed to make proper arguments on these points, we decline to address them.

DISPOSITION

The judgment is affirmed. The City shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

DUARTE, J.

We concur: MAURO, Acting P. J., HOCH, J.

Cite as 13 C.D.O.S. 12860

MICHAEL MICHALSKI, Plaintiff and Appellant,

v.

SCRIPPS MERCY HOSPITAL et al., Defendants and Respondents.

No. D062270
In the Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. 37–2012-00093521- CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Filed November 27, 2013

COUNSEL

Rosenberg, Shpall & Associates, David Rosenberg and Norman Grissom for Plaintiff and Appellant.

Arent Fox, Lowell C. Brown, Sarah G. Benator and Jonathan E. Phillips for Defendants and Respondents.

OPINION

This action arises out of the denial of medical staff membership and surgical privileges to the plaintiff Michael Michalski, M.D., at three Scripps Health hospitals after Dr. Michalski was found by the Scripps Judicial Review Committee (JRC), Scripps Health Board of Trustees (Board), and the Medical Board of California (Medical Board) to have committed acts of sexual harassment against staff at another hospital, Sharp Grossmont (Sharp). Dr. Michalski brought a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5 (all further undesignated statutory references are to the Code of Civil Procedure) seeking to overturn the denial of his medical privileges. The court denied the petition.

On appeal Dr. Michalski asserts (1) Scripps acted in bad faith in denying his applications for medical staff privileges by virtue of an improper review and summary denial; (2) the Board improperly applied an "independent judgment" standard of review to overturn the JRC's decision to reject the Medical Executive Committee's (MEC's) recommendation to deny Dr. Michalski's applications for medical staff privileges; (3) the Board failed to accord "great weight" to the JRC's findings and conclusions; and (4) the Board's decision to reverse the JRC's decision was not supported by the evidence and constituted an abuse of discretion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Findings of Sexual Harassment

According to the Medical Board's decision, which was issued on December 3, 2008, Dr. Michalski treated a female lab technician in a "self-centered, insensitive, and exploitative manner." Dr. Michalski made "numerous inappropriate and provocative sexual comments" to her and also touched her breast and buttocks while they were working in the cardiac catheterization lab (cath lab). On another occasion, while at a restaurant, Dr. Michalski "pushed her against the wall in a hallway outside the women's restroom." Dr. Michalski also entered the women's locker room at the hospital without permission on several occasions when this employee was present, including one occasion when she was in the process of getting dressed. The Medical Board found the employee's testimony "clear and convincing," in spite of Dr. Michalski's denials.

The Medical Board found that Dr. Michalski also "made numerous inappropriate and provocative sexual comments" to a second female employee at Sharp and "initiat[ed] uninvited physical contact with her." On one occasion, Dr. Michalski "pulled up the hem of [the second employee's] scrub top, exposing her midriff," and on another occasion he "cupped her right buttock with his hand." In another incident, Dr. Michalski "pushed her head down towards his crotch, as if simulating the commencement of oral sex." Dr. Michalski entered the women's locker room when this second employee was there alone. He then "picked up her civilian jeans and said, 'These things are so tiny,' and then put them against his crotch and said, 'I think they'll fit.' " The Medical Board also found the second employee's testimony to be "clear and convincing."

A third female employee, an X-ray technician, testified that Dr. Michalski "patted her on the buttocks on two occasions in 2003."

Dr. Michalski made lewd comments and gestures to a fourth female Sharp employee, a registered nurse, including a "gesture which could only be interpreted as involving oral sex," and engaged in unwanted touching.

While at a conference dinner in Hawaii, Dr. Michalski told a Boston Scientific representative "that he wanted to have sex with her; he suggested that it would be profitable for her to do so, and warned that he would make continuing sales difficult if she refused." The sales representative was so frightened by this conduct that she asked a friend's husband to walk her back to her room "because she feared returning there unaccompanied."

The Medical Board also made the following conclusion in response to Dr. Michalski's own testimony: "While it cannot be concluded that Dr. Michalski knowingly provided false testimony, it is clear, at a minimum, that in some instances he deliberately emphasized or exaggerated matters to excuse his misconduct (e.g., since he was invited into the women's locker room the first time, he concluded he was always welcome there) and that in other instances he simply blocked out some events altogether (e.g., his groping of [the lab technician] in the Cath Lab)."

Following these incidents, Dr. Michalski entered into an agreement with Sharp acknowledging that such "harassment was illegal, unprofessional, and in violation of the Medical Staff Bylaws and Policies." Dr. Michalski agreed to send written apologies to the victims, to seek psychiatric counseling, and to refrain from any further harassing conduct or retaliation.

However, at the time of this agreement Sharp did not know that Dr. Michalski was engaged in a "secret, sexual relationship" with one of Sharp's registered nurses. After that relationship ended a few months later, Dr. Michalski went to the nurse's home and found another man there, "engaging in the type of relationship with [her] that Dr. Michalski had previously enjoyed." Thereafter, Dr. Michalski left the following message on the nurse's answering machine: "You are a sick, disgusting, fucking maggot. I came over to give you a letter of apology for annoying you the past few days, and I fucking heard you. You are lower than porta-potty shit." The next day, Dr. Michalski passed by the employee at the hospital and whispered "whore." "Later that day, Dr. Michalski left a voice mail message asking [her] 'to avoid… making any specific requests about my patients… .' "

Upon learning of this continuing behavior, and his attempt to interfere with patient care, Sharp placed Dr. Michalski on a brief suspension, and Sharp's MEC then recommended that his medical staff privileges be revoked. Dr. Michalski requested and received a JRC hearing at Sharp, and the Sharp JRC upheld the MEC's recommendation. In early 2006, after hearing an appeal from the JRC decision, the Sharp Board agreed with the MEC recommendation and the JRC determination, and revoked Dr. Michalski's privileges. Among other things, the Board found that Dr. Michalski's harassing conduct "had a sufficient nexus to the quality of care in the Hospital to warrant the termination of his privileges on that basis alone." In July 2007 the Medical Board opened an investigation to determine whether discipline by the Medical Board was appropriate.

B. The Peer Review Proceedings

1. Dr. Michalski's application for medical staff membership and privileges at the hospitals

In November 2007 Dr. Michalski applied for medical staff membership and privileges at each of the Scripps Hospitals. On review of Dr. Michalski's application, each of the hospitals' credentials committee (which assist the MEC's in reviewing applications) identified a number of areas in which further inquiry was necessary, including their discovery that Sharp had terminated Dr. Michalski's medical staff membership in 2005, and that the Medical Board's investigation of Dr. Michalski was ongoing. Thereafter, the credentials committees initiated correspondence with Dr. Michalski seeking further information about their concerns. The credentials

committees also required Dr. Michalski to sign a release of information from the various institutions where he currently or previously practiced. The credentials committees then sent questionnaires to those facilities in an attempt to obtain further information regarding Dr. Michalski's behavior and conduct. However, Dr. Michalski did not provide the credentials committees with all of the requested information in a timely manner. Moreover, the questionnaires about Dr. Michalski's conduct that were sent to the other hospitals went largely unanswered. For example, when the office of the chief of staff of Alvarado Hospital responded to the credentials committees on January 14, 2009, it sent a routine one-page form letter, sent by the medical staff coordinator, that provided only Dr. Michalski's dates of staff affiliation, staff status ("active"), specialty, and a statement that "no medical staff disciplinary actions [had] been taken or [were] pending against" Dr. Michalski. Nor did any of the other hospital facilities respond to the questionnaire.

According to Jerrold Glassman, M.D., the Scripps Mercy chief of staff at the time of Dr. Michalski's applications, the Department of Navy responded to the letter, but returned the questionnaire blank. Dr. Glassman also testified that he believed questionnaires were also sent to "Sharp, to the La Mesa Cardiology Group, [and] to Alvarado Hospital," and that he did not "recall any responses" to those questionnaires either. As with the Navy, several of the facilities provided generic responses to the letters sent by the credentials committees, but did not respond to the questionnaires.

Once the Medical Board issued its decision, Dr. Michalski characterized it as "favorable" in letters he sent to the credentials committees.

Dr. Michalski thereafter requested a hearing to challenge all three recommendations.

2. The JRC hearing

The parties agreed to a single hearing with a single JRC consisting of seven physician members, with at least two members from each of the hospitals' medical staffs. A hearing officer was appointed by stipulation of the parties, followed by the selection of JRC candidates, who were then appointed by further agreement of the parties. On June 1, 2010, in preparation for the JRC hearing, the MEC's issued their notice of charges consisting of the following six charges: (1) Dr. Michalski generally failed to meet his burden under Scripps La Jolla Medical Staff Bylaws (bylaws) sections 2.3–1(a), 2.3–1(c), and 4.2 as an applicant to the medical staff to resolve the MEC's reasonable doubts as to whether he is professionally and ethically competent and able to work cooperatively with others so as not to adversely affect patient care (the fitness standard); (2) Dr. Michalski has an admitted history of behavioral misconduct and sexual harassment that does not meet the fitness standard; (3) the September 14, 2005 report of the JRC of Sharp demonstrates that Dr. Michalski does not meet the fitness standard; (4) the December 3, 2008 Medical Board decision demonstrates that Dr. Michalski does not meet the fitness standard; (5) Dr. Michalski's self-serving responses to the hospitals' inquiries demonstrate that he does not meet the fitness standard; and (6) Dr. Michalski's lack of forthrightness in the Sharp JRC hearing demonstrates that he does not meet the fitness standard.

The JRC hearing began on August 11, 2010, and eight evidentiary sessions were held from October 2010 through April 2011. The JRC issued its decision on May 5, 2011. Despite finding that Dr. Michalski's behavior at Sharp included "egregious acts of sexual harassment" that were "aggressive, predatory, and reprehensible," the JRC rejected the MEC's recommendations to deny Dr. Michalski's application. It was not a unanimous decision. Two of the JRC members agreed with the MEC that Dr. Michalski did not meet the fitness standard and that he should not be granted medical staff privileges at the hospitals.

3. The MEC's appeal to the Scripps Health Board of Trustees

Following the JRC's decision, the MEC's timely appealed to the Board.

Section 7.5–6 of the bylaws establishes the Board's standard of review following a JRC decision:

> "DECISION
>
> "a. Except as provided in Section 7 .5–6(b), within thirty (30) days after the conclusion of the appellate review proceedings, the Board of Trustees shall render a final decision and shall affirm the decision of the Judicial Review Committee *if, in the independent judgment of the Board of Trustees*, the Judicial Review Committee's decision is supported by the evidence, following a fair proceeding.
>
> "b. Should the Board of Trustees determine that the Judicial Review Committee decision is not supported by the evidence, *the Board may modify or reverse the decision of the Judicial Review Committee*… . (Italics added.)

On December 12, 2011, the Board held a hearing on the MEC's appeal. On January 9, 2012, the Board issued its decision, reversing the JRC's decision and confirming the MEC's recommendation to deny Dr. Michalski's Application, finding that "the MEC['s] recommendation to deny Dr. Michalski's application was, and remains, reasonable and warranted." The Board's concluding paragraph states that its decision was "based upon the JRC's factual findings and the hearing record, including but not limited to the scope and severity of the prior misconduct which involved repeated abuses of Dr. Michalski's superior position, Dr. Michalski's written statements to the MEC[']s and his oral statements to this Board… ."

4. Dr. Michalski's petition for writ of mandate/ trial court's decision

On March 7, 2012, Dr. Michalski filed a petition for writ of mandate in the Superior Court of San Diego County seeking to overturn the Board's Decision. Prior to the hearing on the petition, the trial court provided the parties with a written tentative ruling indicating that the court was inclined to grant the petition. After hearing oral argument, however, the court denied the petition. In so doing the trial court found that "the Board properly exercised its independent judgment as it was required under the Bylaws in reviewing the JRC's decision." The court found that "the Board gave great weight to the JRC's factual findings, accepting most of those findings, rejecting those that were not supported by substantial evidence and disagreeing with as to the conclusions to be drawn from the others… ." The court further found that "the Board's decision is supported by substantial evidence, including, but not limited to, the uncontroverted evidence presented by the MEC[']s at the JRC hearing as to the meaning and application of the Fitness Standard at the Hospitals — a standard that… is allowed to be more stringent tha[n] those of other hospitals and of the Medical Board of California's standards for licensure."

Dr. Michalski's timely appeal follows.

DISCUSSION

I. STANDARD OF REVIEW

The Court of Appeal in *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136–1137 (*Hongsathavij*) set forth the applicable standard of review for this matter: "As to the function of the Court of Appeal, our function in this context is the same as the superior court's, which was the same as the hospital's governing body. 'Like the trial court, we also review the administrative record to determine whether its findings are supported by substantial evidence in light of the whole record, our object being to ascertain whether the trial court ruled correctly as a matter of law." [Citations.] The appellate court thus does not review the actions or reasoning of the superior court, but rather conducts its own review of the administrative proceedings to determine whether the superior court ruled correctly as a matter of law. [Citation.] [¶] Moreover, an appellate court must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable. [Citations.] A reviewing court will not uphold a finding based on evidence which is inherently improbable [citation], or a finding based upon evidence which is irrelevant to the issues. [Citations.] Therefore, even if a finding is supported by evidence, if that evidence is irrelevant to the charge, the decision must be reversed for insufficient evidence."

Moreover, we may only overturn the decision denying Dr. Michalski's application if (1) the Board proceeded without, or in excess of, its jurisdiction; (2) there was not a fair trial; or (3) there a prejudicial abuse of discretion by the Board. (§ 1094.5, subd. (b).) Dr. Michalski does not dispute that the hospitals acted within their jurisdiction or that there was a fair trial. The only question we are thus presented with is whether there was a prejudicial abuse of discretion by the Board.

Section 1094.5, subdivision (d) defines the abuse of discretion standard of review applicable to Dr. Michalski's petition for writ of mandate: "[I]n cases arising from private hospital boards… abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Moreover, as explained by the Court of Appeal in *Weinberg* v. *Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1106–1107 (*Weinberg*): "[I]n examining a hospital board's decision, the superior court must determine two issues. [Citations.] 'First, it must determine whether the governing body applied the correct standard in conducting its review of the matter. Second, after determining as a preliminary matter that the correct standard was used, then the superior court must determine whether there was substantial evidence to support the governing body's decision.' "

In writ proceedings, the trial court "presumes that the [administrative tribunal's] decision is supported by substantial evidence, and the petitioner bears the burden of demonstrating the contrary." *(McAllister* v. *California Coastal Com.* (2008) 169 Cal.App.4th 912, 921.) Further, because the hospital's governing body has "final responsibility for the quality of its medical staff and care, … its decisions within this domain are entitled to deference" by the court. (*Weinberg, supra,* 119 Cal.App.4th at p. 1109.)

II. ANALYSIS

A. The Board Properly Applied the "Independent Judgment" Standard Mandated by the Bylaws

Dr. Michalski asserts the Board erroneously applied the "independent judgment" standard of review in reviewing the JRC's decision. He contends that the proper standard of review was substantial evidence because the bylaws state that the review by the Board "shall be in the nature of an appellate review." We reject this contention.

The bylaws specifically provide that the Board was required to use its independent judgment in determining whether the JRC's decision was supported by the evidence: "[T]he Board of Trustees shall render a final decision and shall affirm the decision of the Judicial Review Committee if, *in the independent judgment of the Board of Trustees*, the Judicial Review Committee's decision is supported by the evidence." (Bylaws ¶ 7.5–6, subd. (a)], italics added.) The bylaws further provide that the Board can overturn the JRC' s decision if it determines that the decision is not supported by the evidence. (Bylaws ¶ 7.5–6, subd. (b).)

Every California hospital also must have an "organized medical staff *responsible to the governing body* for the adequacy and quality of the medical care rendered to patients" in the hospital." (Cal. Code Regs., tit. 22, § 70703, subd.

(a), italics added.) The medical staff must establish bylaws which "provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." (*Id.* at subd. (b).) California hospital licensing law requires that "[m]embership on the medical staff… be restricted to physicians… competent in their respective fields, worthy in character and in professional ethics." (Cal. Code Regs., tit. 22, § 70701, subd. (a)(l)(E).)

Courts have recognized that "[the board's] primary duty is to its patients to insure the competence of its medical staff. In the exercise of this duty, the hospital must be free to establish and enforce selection and review procedures, so long as they do not result in arbitrary or discriminatory practices." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 501; *see also Weinberg, supra,* 119 Cal.App.4th at p. 1109 ["Ultimate responsibility for the discharging of this duty falls upon the Board, which is entitled to act in accordance with principles of sound corporate governance."].)

Additionally, it has been recognized that courts are not hospitals and that the Legislature has charged hospitals, not courts, to make medical staff appointment decisions. (*Lewin* v. *St. Joseph Hospital* (1978) 82 Cal.App.3d 368, 384.) Moreover, as this court stated in *Medical Staff of Sharp Memorial Hospital* v. *Superior Court* (2004) 121 Cal.App.4th 173, 181–182: "[T]he overriding goal of the state-mandated peer review process is protection of the public and that while important, physicians' due process rights are subordinate to the needs of public safety."

Where permitted by a hospital's bylaws, its governing body may, using its independent judgment, completely overturn the decision of a medical staff-selected hearing committee. (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1135; *Weinberg, supra,* 119 Cal.App.4th at p. 1109; *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1496–1497 (*Ellison*] ["Business and Professions Code section 809.05, subdivision (a) has been interpreted to mean that a hospital governing body may exercise its own independent judgment about evidence presented to a peer review committee composed of medical staff, provided that it gives due weight to the findings of that committee and provided that the hospital's bylaws do not require the governing body to apply a more deferential standard of review."].)

Thus, under the plain language of the applicable bylaws, and the foregoing authority, the Board properly used its independent judgment in determining whether to reverse the JRC's decision.

In asserting that the role of hospital governing bodies are more limited than the foregoing authority has established, Dr. Michalski cites the California Supreme Court's decision in *Mileikowsky* v. *West Hills Hospital & Medical Center* (2009) 45 Ca1.4th 1259 (*Mileikowsky*). However, *Mileikowsky* is inapposite.

In *Mileikowsky,* a hearing officer terminated a peer review hearing due to the physician's disruptive behavior during the prehearing process. The hearing officer's action took place prior to any evidentiary hearing. The hearing committee never heard evidence and was not involved in the hearing officer's decision. The physician appealed to the hospital's board, which upheld the hearing officer's ruling dismissing the case. The Court of Appeal held that the hearing officer did not have legal authority to dismiss a hearing requested by a physician; only the hearing committee could do so. The Court of Appeal also ruled that the governing body could not "correct" the hearing officer's legal error merely by affirming it. Rather, in making appointment decisions, governing bodies must evaluate the recommendations of the peer review bodies and give them great weight. In contrast to the present case, in *Mileikowsky,* "the board gave no weight to the actions of any peer review body" (*Mileikowsky, supra,* 45 Cal.4th at p. 1272, italics omitted) because there was no hearing committee decision at all. (*Ibid.*) The board simply ruled on the hearing officer's dismissal.

In asserting the Board should not have applied the independent judgment standard, Dr. Michalski also relies on *Bode* v. *Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224. In doing so, Dr. Michalski focuses on the *Bode* court's statement that the phrase "in the nature of an appellate review" has been interpreted to mean that the appellate board is not a trier of fact, and thus the appeals body is limited to determining whether the JRC decision is supported by substantial evidence. However, the *Bode* court, citing the *Weinberg* case, specifically recognized that (a) it is the *hospital's bylaws* that determine whether or not the substantial evidence standard applies, and (b) that the substantial evidence standard does not apply in hospitals that have adopted the "independent judgment" standard. (*Bode, supra,* at p. 1236, fn. 6 [the "standard of review for hospital appellate boards is found in each hospital's bylaws; because the bylaws at issue [in *Weinberg*] did not contain language limiting the hospital's appellate body to the substantial evidence rule, the appellate board could exercise independent judgment when reviewing factfinding committee's decision, but still must accord those findings great weight"].) The Court of Appeal in *Bode* also noted that the appeals body in that case expressly stated that it was applying the substantial evidence standard. (*Ibid.*)

Here, by contrast the Board specifically stated that the standard of review applicable in the present case was the independent judgment standard. (Bylaws ¶ 7.5–6, subd.(a)].) The Board's interpretation of the Bylaws in this case, which specifically provide for the "independent judgment" standard of review, was thus correct.

In *Ellison,* the Court of Appeal rejected the very argument Dr. Michalski makes in this case. There, the Court of Appeal held that the phrase "nature of an appellate review" and the independent judgment standard of review are complementary, not contradictory, provisions. (*Ellison, supra,* 183 Cal. App.4th at p. 1497.) There, the JRC found that the sanction

proposed by the medical executive committee was not reasonable and warranted, despite agreeing that the physician behaved inappropriately by fabricating certain information. As in the present case, the hospital's appeal board in *Ellison* agreed with most of the JRC's findings, but ultimately disagreed with the JRC as to the conclusion to be drawn from those findings. The appeal board concluded that the appropriate penalty was termination from the medical staff. The trial court and the Court of Appeal upheld the hospital's decision, concluding that the appeal board appropriately applied the "independent judgment" standard, regardless of the bylaws provision that the appeal shall be in the nature of an appellate hearing. (*Ibid.*) The *Ellison* court also held that when the bylaws provide that the appeal board has the authority to modify the JRC decision, the board can impose a sanction on the practitioner *even greater* than that originally recommended by the medical staffs executive committee or eventually proposed by the JRC. (*Id.* at p. 1499.) Such authority is also present in Scripps' bylaws. (Bylaws ¶ 7.5–6, subd. (b)].) The *Ellison* court thus rejected Dr. Michalski's argument that the phrase, in the "nature of an appellate review," limits the appeal board's independent judgment.

B. The Board's Application of the Independent Judgment Standard in Finding Dr Michalski Did Not Meet the Fitness Standard

Dr. Michalski asserts that in reaching its decision the Board did not appropriately apply the independent judgment standard of review but instead engaged in a "*de novo* review," which "totally disregard[ed] the JRC' s findings of fact and conclusions." This contention is unavailing.

The Board considered and gave great weight to all of the JRC's findings, even adopting many of those findings as its own. On pages 2 through 4 of its decision, the Board noted the many factual issues and JRC findings upon which the Board based its decision. For example, the Board adopted the JRC's finding that Dr. Michalski's behavior at Sharp was "aggressive, predatory, and reprehensible." The Board then determined that, although the finding itself was accurate and supported by the evidence, the JRC's conclusion about the significance of that finding was incorrect. The Board found that "[s]uch professional misconduct in the hospital environment creates a significant risk to the quality of patient care." The Board accepted the JRC's finding that there were no reports of behavioral misconduct at Alvarado Hospital since 2004, but then exercised its independent judgment in determining that "this fact does not necessarily lead to the conclusion that Dr. Michalski has learned professional boundaries." With regard to the witness testimony and other evidence that Alvarado Hospital has not disciplined Dr. Michalski or had complaints of inappropriate conduct, the Board accepted this finding and then exercised its independent judgment in recognizing that "the fact that Dr. Michalski meets Alvarado Hospital's fitness standard, or for that matter, that he meets the California Medical Board's standards for licensure, does not mean that Dr. Michalski meets Scripps' standards for Medical Staff privileges."

The Board further relied on evidence showing that Michalski "has been under intense and essentially uninterrupted scrutiny since the events at Sharp." Based on this evidence, the Board noted that it was "concerned that once Dr. Michalski is no longer the subject of such focused attention, he may revert to his prior misconduct."

The Board accepted the JRC's finding that Dr. Michalski completed the UCSD PACE program regarding professional boundaries, but then exercised its independent judgment as to the significance of that fact. The Board noted that, "When asked by the Board what he had learned about himself and his professional responsibilities, from the Program, Dr. Michalski said that the Program was predominately [sic] people who had done something improper with a patient but he learned that he had not separated personal admiration from professional admiration." The Board further observed that "[i]nterestingly, Dr. Michalski told Dr. Kalish that he had learned that very same 'lesson' before he participated in the PACE Program… . This suggests that, in fact, Dr. Michalski learned nothing from the PACE Program at all."

The Board also considered and relied on the psychiatric reports submitted by Dr. Michalski. The Board noted that one of the psychiatrists whose reports Dr. Michalski submitted had never met with Dr. Michalski, and that Dr. Kalish, who did meet with Dr. Michalski, "assumed that Dr. Michalski is [at] low risk for repeating his misconduct because of the high price he has paid for his transgressions." The Board found that "[t]he fact that Dr. Michalski has suffered consequences for his misdeeds is not enough to resolve the Board's doubts."

The fact that the Board disagreed with the decision reached by five of the JRC members, and instead agreed with the two dissenting JRC members and the three Hospital MEC's, is of no moment. The Board properly exercised its independent judgment, as it was required to do under the bylaws and California law.

C. The Board's Decision Is Supported by Substantial Evidence

Dr. Michalski asserts that the Board's decision is not supported by the evidence and constitutes an abuse of discretion. This contention is unavailing.

Having concluded the Board applied the correct standard of review, we must next determine whether there is substantial evidence to support the Board's decision. (*Weinberg, supra,* 119 Cal.App.4th at pp. 1106–1107.) As discussed, *ante*, we give deference to the governing body's decision and will uphold it "unless the findings are so lacking in evidentiary support as to render them unreasonable." (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1137.)

We conclude the Board's decision is supported by substantial evidence and should be upheld. The Board considered the entire JRC record, accepted written submissions

from Dr. Michalski and the MEC's, heard oral argument by the attorneys for both sides, heard direct testimony from Dr. Michalski, and deliberated on and considered all of that information for over a month after the oral argument. The Board then provided a detailed written decision on January 9, 2012, wherein it cited the most important evidence supporting that decision and explained how and why it exercised its independent judgment to reach a decision that disagreed with the JRC's determination.

The Board relied on the testimony of Dr. Glassman, an interventional cardiologist and then chief of staff of Scripps Mercy Hospital. Dr. Glassman testified during the JRC hearing that he was familiar with the cath lab environment at all three of the hospitals and that Dr. Michalski's conduct caused him "great concern about patient safety" and concern for "a safe environment for [Hospital] employees." He testified in detail concerning why such conduct, and even the fear of the possibility of the repetition of such conduct, affect patient safety and a physician's qualification under the fitness standard. The Board also relied on Dr. Glassman's testimony that "the potential of great risk occurs in the cath lab when you have a cath lab team that cannot work strongly together." Dr. Glassman disagreed with Dr. Michalski's statement in his application that "none of the allegations had anything at all to do with patient care, quality of care, or patient safety."

The Board also considered and cited the testimony of Dr. Michalski's witnesses at the JRC hearing: Patricia Berry, Michael Koumjian, M.D., and Thomas R. Young, M.D. The Board noted that while these witnesses testified "that they had not seen Dr. Michalski engage in inappropriate conduct at Alvarado," they also testified "that they had never witnessed any inappropriate conduct at Sharp." Dr. Koumjian went so far as to claim that "Dr. Michalski's conduct at Sharp was nothing more than consensual flirting and the 'nurses liked it.' " Relying on this evidence, the Board concluded that the lack of any disciplinary action taken by Alvarado Hospital indicated that "Alvarado may be willing to tolerate behavior that other hospitals find unacceptable."

The Board also relied on evidence showing that Dr. Michalski may lack "the insight and understanding necessary for him to make an enduring change, a persistent problem noted by both the Sharp JRC in 2005 and the California Medical Board in 2008." The Board noted that the evidence at the hearing showed that Dr. Michalski has consistently attempted to "minimize his harassment, lay blame for his termination from Sharp on others and deny any connection between his acts and patient care." For example, in Dr. Michalski's November 22, 2008 letter to the hospitals during the application process, Dr. Michalski excused his presence in the women's locker room at Sharp as something that "was not universally considered outrageous at that time," and described his sexual harassment of one nurse as "inappropriate banter" and "incidental touching." In that letter Dr. Michalski also dismissed one of his victim's complaints by claiming that she was a "substandard performer."

The Board further relied on Dr. Michalski's November 12, 2007 letter, submitted as part of his application. In this letter, Dr. Michalski blames his termination from the Sharp medical staff on a vendetta from his former medical group who were "infuriated" by his success. Dr. Michalski also claimed that none of the allegations "had anything at all to do with patient care, quality care, or patient safety."

The Board's decision is also supported by Dr. Michalski's own statements to the Board during oral argument, where the Board observed that Dr. Michalski "expressed no remorse for the damage he had inflicted but instead continued to refer to how embarrassing this has been for him." That finding by the Board is supported by the transcript of that oral argument, where Dr. Michalski characterized his conduct as "a source of tremendous embarrassment to me… ." As the Board noted, this pattern of excusing and minimizing his harassing conduct was not new. The Sharp JRC had already found that "Dr. Michalski consistently denied allegations that were unwitnessed; those that were, he tossed off as playful, or of no real significance. He appeared to have no regard or thought for anyone else's feelings… . He indicated very little, if any, honest remorse about his actions."

A similar conclusion was reached by the Medical Board: "While it cannot be concluded that Dr. Michalski knowingly provided false testimony, it is clear, at a minimum, that in some instances he deliberately emphasized or exaggerated matters to excuse his misconduct (e.g., since he was invited into the women's locker room the first time, he concluded he was always welcome there) and that in other instances he simply blocked out some events altogether (e.g., his groping of [the lab technician] in the Cath Lab)."

The Board further found: "In the independent and unanimous judgment of the Board, based upon the JRC's factual findings and the hearing record, including but not limited to the scope and severity of the prior misconduct which involved repeated abuses of Dr. Michalski's superior position, Dr. Michalski's written statements to the MEC[']s and his oral statements to this Board, the MEC[']s recommendation to deny Dr. Michalski's application was, and remains, reasonable and warranted."

In his reply brief, Dr. Michalski asserts there is no evidence, as required by Scripps bylaws, that there are questions concerning his "current" fitness to practice medicine. In doing so he points to the evidence presented at the JRC hearing, which concerned conduct that occurred nine years earlier.

However, as detailed *ante*, in reaching its decision the Board did not rely solely upon that evidence. It also relied upon letters he sent to hospitals in 2007 and 2008 as part of the application process. In the 2007 letter he blamed his termination from Sharp as based on a "vendetta" by his former medical group. In the 2008 letter he attempted to minimize and excuse his conduct as nothing more than "inappropriate banter" and "incidental touching" and went so far as to dismiss one victim's complaints by referring to her as a "substandard performer."

Further, the Board relied on his statements made to the Board at the hearing itself where he expressed no remorse for the damage he had caused, instead stating that his conduct was "a source of tremendous embarrassment" to him.

Thus, we conclude substantial evidence supports the Board's decision.

DISPOSITION

The judgment is affirmed. Defendants to receive costs on appeal.

NARES, J.

WE CONCUR: McCONNELL, P. J., AARON, J.

Cite as 13 C.D.O.S. 12867

THE PEOPLE, Plaintiff and Respondent,

v.

NAHEED MOHMOUD HAMED,

Defendant and Appellant.

No. H039223
In the Court of Appeal of the State of California
Sixth Appellate District
(Monterey County Super. Ct.
Nos. SS120428A and SS122230A)
Filed November 26, 2013

COUNSEL

Attorney for Defendant and Appellant Naheed Mohmoud Hamed: Michael E. Allen, under appointment by the Court of Appeal for Appellant

Attorneys for Plaintiff and Respondent The People: Kamala D. Harris, Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Gerald A. Engler, Senior Assistant Attorney General; Eric D. Share, Supervising Deputy Attorney General; Ronald E. Niver, Deputy Attorney General

OPINION

Defendant Naheed Mohmoud Hamed was convicted by jury of one count of possessing child pornography (Pen. Code, § 311.11).[1] He admitted enhancement allegations that he had served a prior prison term (§ 667.5, subd. (b)) and was sentenced to prison for a term of four years eight months. At sentencing, the court imposed fines and fees, including a $1,230 sex offender fine (§ 290.3). On appeal, defendant challenges that fine, arguing that section 290.3 does not authorize a $1,230 fine, that the correct amount of the fine is $300, and that the abstract of judgment does not identify the statutory basis for any additional assessments.

We hold that the court erred in both the manner in which it imposed the sex offender fine and in determining the amount of the penalty assessments attached thereto. We will therefore modify the judgment to impose a sex offender fine of $300, plus penalty assessments of $900, a net difference of $30. We will also direct the trial court clerk to prepare an amended abstract of judgment that sets forth the amounts and statutory bases of the sex offender fine and each of the penalty assessments imposed.

FACTS & PROCEDURAL HISTORY

On March 5, 2012, at about 11:30 p.m., Monterey Police Officer Chad Ventimiglia pulled over the BMW defendant was driving for a speeding violation (traveling 80 miles per

1. Unless otherwise stated, all further statutory references are to the Penal Code.

hour on a freeway). As Officer Ventimiglia spoke to defendant, he smelled marijuana. The officer asked defendant if he had any drugs in the car; defendant admitted that he had marijuana. Officer Ventimiglia requested defendant's identification, determined that he was on active parole, did a parole search of the car, and found marijuana residue in the passenger compartment. Officer Ventimiglia and another officer, Amy Carrizosa, then searched the trunk of the BMW. In a duffel bag inside the trunk, they found about 100 photographs depicting naked male and female children of various ages, ranging from infants to teens, engaged in sexual acts, often with adults. The photos had been printed from a variety of Internet websites. Defendant was arrested at the scene.

While being transported to jail, defendant told Officer Carrizosa the photos were not his; he said he found them in the car, which belonged to the auto dealership where he worked. But when Officer Ventimiglia interviewed defendant at the police station, he told two different stories. Initially, he said he got the photos from a friend's computer; later, he said he printed them at work. When Officer Ventimiglia confronted defendant with these discrepancies, defendant said he lied to Officer Carrizosa because he "didn't want to get his friend in trouble."

Case No. SS120428A – Possession of Child Pornography

Defendant was charged by information with one count of possession of child pornography (§ 311.11, subd. (a)). The information also alleged that defendant had served a prior prison term (§ 667.5, subd. (b)). Defendant pleaded not guilty and denied the prison prior.

Defendant filed a motion to suppress the pornographic photographs obtained from the search of his trunk. At the hearing on that motion, defendant testified that he could not have been driving 80 miles per hour because a "governor" had been installed on the BMW, which limited its speed to 72 miles per hour. He submitted an exhibit that purported to be an invoice prepared by the company that manufactured the governor (hereafter Exhibit A). The court denied the motion, stating that it found Exhibit A "quite concerning" because the font in the entry describing the "speed limiter program" was different from the font used in the rest of the invoice. The court also found Officer Ventimiglia's testimony credible.

The case went to trial before a jury. After the jury found defendant guilty on the possession of child pornography count, defendant waived a jury trial on the prison prior allegation and admitted that allegation.

Case No. SS122230A - Perjury and False Evidence

Prior to sentencing in the possession of child pornography case, the prosecution filed a new complaint, charging defendant with three offenses arising out of his conduct at the hearing on the motion to suppress. The complaint charged defendant with one felony count of perjury under oath (§ 118, subd. (a)), one felony count of offering false evidence (§ 132), and one felony count of preparing false evidence (§ 134). An amended complaint added enhancement allegations that defendant had served a prior prison term (§ 667.5, subd. (b)) and that he committed the new offenses while on bail and out of custody in his other case (§ 12022.1; Case No. SS120428A).

In January 2013, pursuant to a negotiated disposition, defendant pleaded no contest to offering false evidence (§ 132) in exchange for a stipulated sentence of eight months in prison (one-third the lower term) consecutive to the sentence to be imposed in the possession-of-child-pornography case and an agreement to dismiss the remaining counts and enhancements in the perjury and false statements case.

Sentencing in Both Cases

The court sentenced defendant in both cases on January 11, 2013. In Case No. SS120428A, the court imposed the upper term of three years for possession of child pornography, plus one year for the prison prior. In Case No. SS122230A, pursuant to the negotiated plea, the court sentenced defendant to eight months for offering false evidence, consecutive to the sentence in the child pornography case. The total term was four years eight months. The court also imposed various fines and fees, including a $1,230 sex offender fine pursuant to section 290.3 in the child pornography case.

DISCUSSION

The sole issue on appeal is defendant's challenge to the $1,230 sex offender fine imposed pursuant to section 290.3.

Section 290.3 provides in relevant part: "(a) Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine."

Contentions

Defendant concedes that possession of child pornography (§ 311.11) is one of the crimes specified in section 290, subdivision (c) and that he is therefore subject to the section 290.3 sex offender fine. We accept that concession. Citing the probation report, defendant contends that this is his first conviction for a crime listed in subdivision (c) of section 290. He also states, based on the probation report, that "[a]lthough the court did not make an express finding of an ability to pay, an implied finding might be supported by evidence that [defendant] had been self-employed as a business owner and automotive technician for two-and-a-half [*sic*] years." We agree that the record supports implied findings that this was defendant's first conviction for a crime listed in section 290, subdivision (c) and that defendant had the ability to pay.

Defendant argues that these circumstances permitted a $300 sex offender fine, but the court erred when it ordered him to pay $1,230 pursuant to section 290.3. He asserts that "[w]hile some penalty assessments may require an increase in this amount… , the abstract of judgment must specifically identify each fine and its statutory basis." He argues, further, that "[b]ecause section 290.3 did not authorize a $1,230 fine and because the abstract of judgment did not identify any statutory bases for an additional assessment," the case must be remanded to the trial court to reconsider the section 290.3 fine and prepare a legally correct abstract of judgment.

The Attorney General agrees that the section 290.3 fine is incorrect, but for different reasons. She contends that the correct amount of the base fine under section 290.3 was $300, that the $1,230 fine imposed included penalty assessments of $930, that the correct amount of the penalty assessments at the time of defendant's offense was $900, and that the trial court therefore erred by imposing an extra $30 in penalty assessments. The Attorney General attributes this error to a change in the amount of the Government Code section 76104.7 state-only DNA penalty, which increased from 30 percent to 40 percent on June 27, 2012, three months after defendant was arrested for possession of child pornography.[2] The Attorney General acknowledges that the imposition of penalty assessments is subject to constitutional prohibitions against ex post facto laws, and argues that the section 290.3 fine (plus penalty assessments) must therefore be reduced by $30 to $1,200. The Attorney General suggests we modify the section 290.3 fine and affirm the judgment as modified.

Fine Imposed In This Case

In the presentencing report, the probation officer recommended that defendant "Pay a 290.3 PC fine of $1,230.00," as well as other fines and fees not at issue on appeal. The probation report did not contain the words "penalty assessments" or an explanation of how the probation officer determined the amount of the section 290.3 fine.

In its oral pronouncement of judgment, the court stated, "You're ordered to pay [a] fine of $1,230 pursuant to Penal Code Section 290.3." The minutes of the sentencing hearing contain the following notation: "Pay a fine of $1,230.00 pursuant to PC 290.3." This order was recorded on the abstract of judgment form (Judicial Council form CR-290 [rev. July 1, 2012]) as: "9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments): [¶][¶] f. Other: $1230.00 per (specify): PC 290.3."

The High Case

Defendant relies on *People v. High* (2004) 119 Cal. App.4th 1192, 1200 (*High*), where the appellate court held the trial court had erred "in the manner in which [it] handled the monetary assessments" at sentencing. The court observed: "Instead of reading the separate fines, fees, penalties and surcharges into the record at sentencing, the court simply stated: 'The court will impose a theft fine pursuant to [Penal Code section] 1202.5… in the sum of $34. The court will impose a criminal laboratory analysis fee in the total sum of $510, a drug program fee, together with surcharges and penalties in the total sum of $1,530, a clandestine drug lab fine, together with penalties, assessments and surcharges totaling $1,700.' The minute order lists the $1,530 sum as a drug program fee. (Health & Saf. Code, § 11372.7.) Both the minute order and the abstract of judgment designate the $1,700 assessment as a clandestine drug lab fine. (Health & Saf. Code, § 11379.6, subd. (a).)" (*High*, *supra*, at p. 1200.)

On this record, the court in *High* concluded as follows: "Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment. [Citations.] The abstract of judgment form used here, Judicial Council form CR-290 (rev. Jan. 1, 2003) provides a number of lines for 'other' financial obligations in addition to those delineated with statutory references on the preprinted form. If the abstract does not specify the amount of each fine, the Department of Corrections cannot fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency. [Citation.] At a minimum, the inclusion of all fines and fees in the abstract may assist state and local agencies in their collection efforts. (Pen. Code, § 1205, subd. (c).) Thus, even where the Department of Corrections has no statutory obligation to collect a particular fee, such as the laboratory fee imposed under Health and Safety Code section 11372.5, the fee must be included in the abstract of judgment." (*High*, *supra*, at p. 1200.)

Penalty Assessments

High thus held that all fines are part of the judgment, which the abstract of judgment must digest or summarize. (*High*, *supra*, 119 Cal.App.4th at p. 1200.) But some fines are subject to assessments, a surcharge, and penalties that are "parasitic to an underlying fine," that could increase the fine by up to 310 percent. (*People v. Voit* (2011) 200 Cal. App.4th 1353, 1374 (*Voit*).)

In *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528–1530 (*Castellanos*), the Second District Court of Ap-

2. When enacted in 2006, Government Code section 76104.7 provided for a "penalty of one dollar ($1) for every ten dollars ($10) or fraction thereof… upon every fine, penalty, or forfeiture collected by courts for criminal offenses… ." (Stats. 2006, ch. 69, § 18, p. 1251, eff. July 12, 2006.) The purpose of the statute is "to fund the operations of the Department of Justice forensic laboratories, including the operation of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, and to facilitate compliance with the requirements of subdivision (e) of Section 299.5 of the Penal Code." (Gov. Code, § 76104.7, subd. (b).) The amount of this penalty was increased in both 2010 and 2012. (Stats. 2009–2010, 8th Ex. Sess., ch. 3, § 1, eff. June 10, 2010 [increasing penalty to "three dollars ($3) for every ten dollars ($10)" or fraction thereof]; Stats. 2012, ch. 32, § 25, eff. June 27, 2012 [increasing penalty to "four dollars ($4) for every ten dollars ($10)" or fraction thereof]; see also Historical and Statutory Notes, 37A, Pt. 2 West's Ann. Gov. Code (2013 supp.) foll. § 76104.7, pp. 28–29.)

peal pointed out that the $10 crime prevention program fine imposed pursuant to section 1202.5 (the same "theft fine" that was at issue in *High*) was subject to additional assessments, penalties, and a surcharge–seven in all. The court held that "[b]ecause the seven additional assessments, surcharge, and penalties are mandatory, their omission may be corrected for the first time on appeal." (*Castellanos*, at p. 1530.) In *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 (*Sharret*) the same court observed that Los Angeles County trial courts "frequently orally impose [these] penalties and surcharge… by a shorthand reference to 'penalty assessments' ."

The seven "penalty assessments" identified in *Castellanos* and *Sharret* include: (1) a 100 percent state penalty assessment (§ 1464, subd. (a)(1)); (2) a 20 percent state surcharge (§ 1465.7); (3) a state court construction penalty of up to 50 percent (Gov. Code, § 70372); (4) a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)); (5) a 20 percent additional penalty if authorized by the county board of supervisors for emergency medical services (Gov. Code, § 76000.5, subd. (a)(1)); (6) a 10 percent additional penalty " 'for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act' " (Gov. Code, § 76104.6, subd. (a)(1)); and (7) a 10 percent additional state-only penalty for the purpose of operating forensic laboratories under the same act (Gov. Code, § 76104.7). (*Castellanos*, *supra*, 175 Cal.App.4th at pp. 1528–1530; *Sharret*, *supra*, 191 Cal.App.4th at pp. 863–864; see also *Voit*, *supra*, 200 Cal.App.4th at pp. 1373–1374.) Adopting the language from *Sharret*, we shall hereafter refer to these seven assessments, surcharge, and penalties jointly as "penalty assessments." (*Sharret*, *supra*, 191 Cal.App.4th at p. 864.)

Various cases have applied these penalty assessments to four different types of fines. *Castellanos* applied them to the $10 crime prevention program fine for defendants who commit theft offenses (§ 1202.5). (*Castellanos*, *supra*, 175 Cal.App.4th at p. 1530.) In *Sharret*, the court applied them to a criminal lab analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and a drug program fee (Health & Saf. Code, § 11372.7, subdivision (a)). (*Sharret*, *supra*, 191 Cal. App.4th at pp. 863–864; see also *People v Sierra* (1995) 37 Cal.App.4th 1690, 1694–1696 [drug program fee].) And in *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249–1250 (*Valenzuela*), the appellate court applied them to the sex offender fine (§ 290.3).[3] (See also *Voit*, *supra*, 200 Cal. App.4th at pp. 1373–1376 [although penalty assessments apply to a section 290.3 sex offender fine, three of the seven penalty assessments did not apply to the fine imposed because the defendant's crimes occurred before the effective dates of the statutes imposing those penalties].)[4] For clarity, we shall hereafter refer to the underlying fines to which penalty assessments apply as the "base fine" or "base fines."

Several variables affect the amount of penalty assessments. The *Castellanos* court observed that the "total due may vary depending on whether the trial court selects $10 as the amount of the section 1202.5… [base] fine and the county where sentencing is occurring. As noted, a trial court is authorized to impose less than the full $10 section 1202.5, subdivision (a) [base] fine. If that occurs, the amount of the section 1465.7, subdivision (a) state surcharge will change." (*Castellanos*, *supra*, 175 Cal.App.4th at p. 1530.) In addition, the amount payable as the state court construction penalty under Government Code section 70372, subdivision (a)(1) varies "depending on the county where it is imposed." (*Castellanos*, at pp. 1529, 1531 [30 percent in Los Angeles County]; see also *Voit*, *supra*, 200 Cal.App.4th at pp. 1374–1375 & fn 18 [court construction penalty was 35 percent in Santa Clara County in 2003; statute has been amend three times since then].) The emergency medical services penalty under Government Code section 7600.5, subdivision (a)(1) applies only if the county board of supervisors in a particular county elects to impose it. (*Castellanos*, at pp. 1529–1530.) And as we have noted, the amount of the Government Code section 76104.7 state-only penalty has changed over time; it is currently "four dollars ($4) for every ten dollars ($10) or part of ten dollars $10." (Gov. Code, § 76104.7, subd. (a); Stats. 2006, ch. 69, § 18, p. 1251 [$1 for every $10 or portion thereof]; Stats. 2009–2010, 8th Ex. Sess., ch. 3, § 1 [increasing penalty to $3 for every $10 or portion thereof]; Stats. 2012, ch. 32, § 25 [increasing penalty to $4 for every $10 or portion thereof].)

As noted, various cases have identified at least four base fines that are subject to penalty assessments and there are currently seven different penalty assessments — some of which vary depending on the county where the fine is imposed — that may apply to a particular fine. Because the statutes imposing these penalty assessments have been enacted and amended over time, the question whether a particular penalty assessment applies and the amount of the assessment will depend on the base fine at issue, the date of the offense, and the county where the penalty is imposed.

Base Fines and Penalty Assessments Must Be Enumerated in the Judgment and Listed on the Abstract

In *High*, the court held that penalty assessments must be (1) specified in the court's oral pronouncement of judgment, and (2) specifically listed in the abstract of judgment. (*High*, *supra*, 119 Cal.App.4th at pp. 1200–1201.) The manner in which the sex offender fine was imposed here is similar to the way some of the fines were imposed by the trial court in *High*. In that case, the trial court imposed a "theft fine pursuant to section 1202.5 … of $34," "a criminal laboratory

3. In *Valenzuela*, the court applied only four of the seven penalty assessments we have identified, since only four of them were in effect when the defendant committed his offenses in 2003. (*Valenzuela*, *supra*, 172 Cal.App.4th at p. 1249.)

4. In *High*, the trial court applied penalty assessments to the clandestine drug lab fine under Health and Safety Code section 11372.7. (*High*, *supra*, 119 Cal.App.4th at p. 1200.) But the appellate court in *High* did not address the propriety of imposing penalty assessments on such a fine and that issue is not before us on appeal.

analysis fee in the total sum of $510, a drug program fee, together with surcharges and penalties in the total sum of $1,530, [and] a clandestine drug lab fine, together with penalties, assessments and surcharges totaling $1,700." (*High*, *supra*, 119 Cal.App.4th at p. 1200.) As the court observed in *High*, "[i]nstead of reading the separate fines, fees, penalties and surcharges into the record at sentencing," the trial court simply described the base fine at issue, without specifying the statutory basis for three of the fines, and stated the total amount imposed, which appears to be the sum of the base fine plus penalty assessments times the number of applicable counts. (*Ibid.*) For two of the fines, the trial court stated that the amounts imposed included penalty assessments. For the other two fines, the trial court did not state whether the order included penalty assessments, although the amounts imposed suggest that it d*id.* After striking some of the penalty assessments on some of the counts on ex post facto grounds (*id.* at pp. 1195–1199), the appellate court held that all fines and fees must be set forth in the abstract of judgment (*id.* at p. 1200) and remanded to the trial court to "separately list, with the statutory basis, all fines, fees and penalties imposed on each count" and "to prepare an amended abstract" of judgment (*id.* at p. 1201).

The order here, which imposes a section 290.3 sex offender fine in the amount of $1,230, is similar to some of the trial court's orders in *High*. Although the Attorney General suggests the court imposed a base fine of $300 and penalty assessments of $930, the record does not list these amounts; it simply says the court imposed $1,230 pursuant to section 290.3. And the record does not mention penalty assessments at all.

In *Sharret*, the appellate court approved a procedure whereby the "trial court orally imposed the $50 criminal laboratory analysis fee ([Health & Saf. Code,] § 11372.5) and the $150 drug program fee ([Health & Saf. Code,] § 11372.7) '*plus penalty assessment.*' " (*Sharret*, *supra*, 191 Cal.App.4th at p. 864; italics in original.) The court explained that "the oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment. [Citations.]" (*Ibid.*) It went on further to explain that "In Los Angeles County, trial courts frequently orally impose the penalties and surcharge discussed above by a shorthand reference to 'penalty assessments.' The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment. This is an acceptable practice." (*Ibid.*)

In *Voit*, the trial court followed the procedure approved in *Sharret* and orally imposed a sex offender fine of $500 for a second offense under section 290.3, "plus penalty assessment," without specifying the statutory basis for or the amount of the penalty assessments. (*Voit*, *supra*, 200 Cal. App.4th at p. 1372.) The minute order of the hearing and the abstract of judgment identified the total amount of the penalty assessments as $1,325. (*Ibid.*) This court held "that the trial court adequately pronounced judgment by imposing a specific [base] fine and generally referring to the applicable penalty assessments." (*Ibid.*)[5]

The trial court order and the abstract of judgment here did not comply with the procedural requirements in *High*, *Sharret,* or *Voit*. Assuming the trial court meant to impose a $300 base fine (§ 290.3) and $930 in penalty assessments, nothing in the record sets forth the amount of the base fine or the amounts or statutory bases for the penalty assessments. The probation officer's report proposed an aggregate number ($1,230) that was arguably the sum of the base fine and penalty assessments. But nothing in the record explains how the probation officer calculated the $1,230 total amount. The trial court then adopted that number and the error was carried forward to the minute order and the abstract of judgment.

Both *High* and *Sharret* address two different aspects of the sentencing process: (1) the oral pronouncement of judgment by the sentencing judge, and (2) the preparation of the abstract of judgment by the court clerk. *High* says that a sentencing court should make a "detailed recitation of all the fees, fines and penalties on the record" and requires that "[a] ll fines and fees must be set forth in the abstract of judgment." (*High*, *supra*, 119 Cal.App.4th at p.1200.) The court recognized that such a detailed recitation "may be tedious," but stated, "California law does not authorize short cuts." (*Ibid.*) *Sharret* affirmed the imposition of a fine where the court, in its oral pronouncement of judgment, stated the amount of the base fine, its statutory basis, and used the shorthand reference "plus penalty assessments." (*Sharret*, *supra*, 191 Cal. App.4th at p. 864.) But *Sharret* also required "the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment." (*Ibid.*)

As for the oral pronouncement of judgment, we note that when *High* was decided in June 2004, there were only four penalty assessments. This area has become more complex since then, with the addition of three more penalty assessments[6] and multiple amendments to the statutes that impose base fines and penalty assessments. In light of this history, additional fines and penalty assessments — or amendments to those already in existence — may be enacted by the Legislature in the years to come.

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5. In *Voit*, this court nonetheless concluded that the court erred in imposing $1,325 in penalty assessments, because: (1) the trial court erred when it imposed $500 as the base fine because at the time of the defendant's offenses, the base fine for a second or subsequent offense under section 290.3 was $300, not $500; and (2) three of the seven penalties imposed did not apply to the defendant because the statutes imposing those penalties were enacted after the defendant committed his crimes. (*Voit*, *supra*, 200 Cal.App.4th at pp. 1372–1376.) This court therefore modified the judgment to impose a $300 base fine and penalty assessments of $675 and directed the trial court to prepare a new abstract of judgment. (*Id.* at p. 1376.)

6. The DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)) was effective on November 3, 2004; the state-only DNA penalty (Gov. Code, § 76104.7, subd. (a)) was effective on July 12, 2006; and the emergency medical services penalty (Gov. Code, § 76000.5, subd (a)(1)) was effective on January 1, 2007. (*Voit*, *supra*, 200 Cal.App.4th at p. 1374.)

Appellate courts are often called upon to correct sentences that contain errors in fines and penalty assessments. Common recurring errors include the imposition of penalty assessments or base fines that did not apply at the time of the offense and are, therefore, prohibited on ex post facto grounds (see *e.g.*, *Voit*, *supra*, 200 Cal.App.4th at p. 1374; *High*, *supra*, 119 Cal.App.4th at pp. 1195–1199; *Valenzuela*, at pp. 1249–1250), as well as the failure to impose mandatory penalty assessments (see *e.g.*, *Castellanos*, *supra*, 175 Cal.App.4th at pp. 1527–1530; *Valenzuela*, *supra*, 172 Cal. App.4th at pp. 1249–1250). Many of these errors could be caught and corrected in the trial court.

A detailed description of the amount of and statutory basis for the fines and penalty assessments imposed would help the parties and the court avoid errors in this area. For example, if the probation report in this case had contained a detailed list of the component parts of the sex offender fine and the penalty assessments attached thereto, perhaps one of the parties would have caught the $30 error that is now the subject of this appeal. A trial court could recite the amount and statutory basis for any base fine and the amounts and statutory bases for any penalty assessments on the record, as *High* suggests should be done. (*High*, *supra*, 119 Cal.App.4th at p. 1200.) Or, in cases where the amounts and statutory bases for the penalty assessments have been set forth in a probation report, a sentencing memorandum, or some other writing, the court could state the amount and statutory basis for the base fine and make a shorthand reference in its oral pronouncement to "penalty assessments as set forth in the" probation report, memorandum, or writing as authorized in *Sharret* and *Voit*. (*Sharret*, *supra*, 191 Cal.App.4th at p. 864; citation to *Voit*.) By itemizing and listing the component parts of base fines and penalty assessments prior to sentencing, the parties would have an opportunity to identify and correct errors in the trial court, avoiding unnecessary appeals. A detailed list would also prompt a sentencing court to take appropriate steps when a fine has an ability-to-pay requirement.

As for the abstract of judgment, both *High* and *Sharret* require the court clerk to list the amount and statutory basis for each base fine and the amount and statutory basis for each penalty assessment in the abstract of judgment. As the court stated in *High*, this assists the Department of Corrections to "fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency." (*High*, *supra*, 119 Cal.App.4th at p. 1200.)

The judgment here must be modified because the sentencing court did not impose the correct amount for the section 290.3 sex offender fine, nor did it specify on the record how it arrived at the $1,230 fine imposed. Since we may correct the error on appeal, there is no need to remand this matter to the sentencing court to orally pronounce the correct judgment. We will therefore direct the trial court clerk to prepare an amended abstract of judgment that complies with *High* and *Sharret* by setting forth in the abstract of judgment form or an attachment the amounts of and statutory basis for the base fine and each of the penalty assessments that we order in this case.

Amount of Base Fine and Penalty Assessments

At the time of defendant's offense (March 5, 2012), the correct amount of the section 290.3 base fine was $300 for a first offense. This $300 base fine was subject to the following penalty assessments: (1) a 100 percent state penalty assessment (§ 1464, subd. (a)(1)) equal to $300; (2) a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)) equal to $210; (3) a 20 percent state surcharge (§ 1465.7) equal to $60; (4) a 50 percent state court construction penalty (Gov. Code, § 70372) equal to $150; (5) a 20 percent additional penalty for emergency medical services (Gov. Code, § 7600.5) equal to $60[7]; (6) a 10 percent additional DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)) equal to $30; and (7) a 30 percent additional state-only DNA penalty (former Gov. Code, § 76104.7) equal to $90.[8] (See also *Sharret*, *supra*, 191 Cal.App.4th at pp. 863–864; *Voit*, *supra*, 200 Cal.App.4th at pp. 1373–1375 & fn. 18.) Thus, the correct amount of the penalty assessments is $900.

"[A]n unauthorized sentence may be corrected at any time even if there was no objection in the trial court. [Citations.] Such an unauthorized sentence may be corrected even when raised for the first time on appeal. [Citations.]" (*Valenzuela*, *supra*, 172 Cal.App.4th at p. 1249, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 886, and *People v. Smith* (2001) 24 Cal.4th 849, 854.) Both the imposition of a section 290.3 fine in the total amount of $1,230 without mentioning penalty assessments and the imposition of a $300 base fine plus $930 in penalty assessments are unauthorized sentences that may be corrected on appeal. We shall therefore modify the judgment to reflect the correct amounts of the sex offender base fine and penalty assessments and affirm the judgment as modified.

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7. The Government Code section 76000.5 assessment applies only if the county has elected to levy it. (Gov. Code, § 76000.5, subd. (a)(1).) On our own motion, we have taken judicial notice of the minutes of the May 15, 2007 meeting at which the Monterey County Board of Supervisors elected to levy this assessment. (Evid. Code, § 452, subd. (h); <http://www.co.monterey.ca.us/cob/minutes/2007/m_051507.htm> [as of Nov. 25, 2013].)

8. The record suggests that the court imposed the wrong amount for the state-only DNA penalty (Gov. Code, § 76104.7). As we have noted, at the time of defendant's offense (March 5, 2012), the statute provided for a penalty of "three dollars ($3) for every ten dollars ($10)" or fraction thereof. (Stats. 2009–2010, 8th Ex. Sess., ch. 3, § 1, eff. June 10, 2010.) The Legislature amended the statute, effective June 27, 2012, increasing the penalty to "four dollars ($4) for every ten dollars ($10)" or fraction thereof. (Gov. Code, § 76104.7, subd. (a)(1); Stats. 2012, ch. 32, § 25.) Defendant was sentenced after the effective date of the 2012 amendment. But this penalty assessment must be imposed based on the date of the underlying offense, not the date of the of the defendant's sentencing, which often occurs much later. (*Voit*, *supra*, 200 Cal.App.4th at p. 1374.) Here, 30 percent of the $300 base fine equals $90. Forty percent of that base fine equals $120. The difference of $30 is the basis for this appeal.

DISPOSITION

The judgment is modified to impose a sex offender fine of $300 pursuant to section 290.3. In addition, defendant is ordered to pay the following penalty assessments: (1) a $300 state penalty assessment (§ 1464, subd. (a)(1)); (2) a $210 additional penalty (Gov. Code, § 76000, subd. (a)(1)); (3) a $60 state surcharge (§ 1465.7); (4) a $150 court construction penalty (Gov. Code, § 70372); (5) a $60 penalty for emergency medical services (Gov. Code, § 76000.5); (6) a $30 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and (7) a $90 state-only DNA penalty (former Gov. Code, § 76104.7). The total amount of penalty assessments on the sex offender fine is $900. As so modified, the judgment is affirmed.

The clerk of the trial court is directed to prepare an amended abstract of judgment that sets forth the amount of and statutory basis for the sex offender fine and the amount of and statutory basis for each penalty assessment as set forth above, and to send a copy of the amended abstract to the Department of Corrections and Rehabilitation.

Márquez, J.

WE CONCUR: Bamattre-Manoukian, Acting P. J., Grover, J.