Statements Of Decision: A Segue To The Court Of Appeal

(Continued from pg. 3)

30. A litigant should not expect the trial court to address issues not stated in the request for a statement of decision. It is the responsibility of counsel, not the court, to identify the issues it wants addressed.
31. *People v. Casa Blanca Convalescent Homes, Inc.*, *supra*, 159 Cal.App.3d at 525.
32. *Id.*, at 524.
33. *People v. Casa Blanca*, *supra*, 159 Cal.App.3d at 526.
34. Code of Civil Procedure §632.
35. *Marriage of Arceneaux*, *supra*, 51 Cal.3d at 1133-1134; *Golden Eagle Insurance Co. v. Foremost Insurance Co.*, *supra*, 20 Cal. App.4th at 1380.
36. *Marriage of Arceneaux*, *supra*, 51 Cal.3rd at 1138.
37. *Id.*, 51 Cal.3d at 1133.
38. *Miramar Hotel Corp. v. Frank B. Hall and Co.*, *supra*, 163 Cal.App.3d at 1129.
39. *Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 285; *Social Services Union/SEIU, AFL-CIO v. County of Monterey* (1989) 208 Cal.App.3d 676, 681.
40. *Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1274.
41. *Marriage of Arceneaux*, *supra*, 51 Cal.3d at 1133-1134; *Golden Eagle Insurance Co. v. Foremost Insurance Co.*, *supra*, 20 Cal. App.4th at 1380; *Marriage of Hebbring*, *supra*, 207 Cal.App.3d at 1274.
42. *United Services Auto Association v. Dalrymple* (1991) 232 Cal.App.3d 182, 186.
43. *Ibid.*
44. In certain family law proceedings, the parties are entitled to a statement of decision regardless of the nature of the proceedings. (See Family Code sections 2127, 3032, 3041, 3087, 3654, 4005(b), 4056, 4332 and 4972.)
    Also, when a matter is referred to a referee pursuant to Code of Civil Procedure section 638, the referee must issue a statement of decision without a request. (*Marriage of Demblewski* (1994) 26 Cal.App.4th 232, 236.)
45. *Malouf Bros. v. Dixon* (1991) 230 Cal.App.3d 280, 284; *Marriage of Simmons* (1975) 49 Cal.App.3d 833, 836-837.
46. *Gonzales v. Jones* (1981) 116 Cal.App.3d 978, 983, 987, fn. 6.
47. *Clinton v. Joshua Hendy Corp.* (1966) 244 Cal.App.2d 183, 188.
48. *Kahn v. Superior Court* (1988) 204 Cal.App.3d 1168, 1173, fn.4.
49. *Id.*, 204 Cal.App.3d at 1174, fn. 4; emphasis added.

Mind Your Manners!

(Continued from pg. 1)

morning calendar, unless absolutely necessary. When you call to ask a question, be prepared, brief, and to the point. Do not make unreasonable requests, such as asking a clerk to run an errand for you. Come prepared with the correct number of copies and the proper equipment, including your business card, a pen and paper. Be on time! Read the local rules! Show respect to the court and the people who work there. Remember your case may be very important to you, but it is only one of five hundred cases handled by the judge and her clerk. These suggestions ran the gamut. Do not chew gum or eat in the courtroom! In short, be courteous and considerate.

Armed with this information, the Executive Committee met and discussed ideas about how the Litigation Section might implement a program seeking to communicate to the clerks that "we have heard them" and to establish an ongoing dialogue between clerks and lawyers. While this proposed program is still in its early stages, the Executive Committee has authorized (i) the staging of a Secretary/Paralegal Walk-Through the Courthouse Program calculated to familiarize legal support personnel with local rules and courtroom organization, (ii) an ongoing clerk/lawyer committee for continuing dialogue, and (iii) a Clerk of the Year Award to be presented each year at the State of the Courts Forum to honor the clerk who best displays respect for the legal system and all its participants. Consideration is being given to hosting a reception or seminar dedicated to this proposed continuing interchange between lawyers and clerks.

The Executive Committee invites your participation in this very important task of returning civility to our courthouses. We invite your ideas and participation in organized project. Even more importantly, we invite your participation on an individual basis. Remember the words of your mother. Mind your manners. If you treat others with grace and consideration, you will very likely receive a positive, respectful response. While it may be unrealistic to expect a universal change of heart and thereby considerate behavior on the part of all lawyers and all clerks, we can begin to make a difference on an individual basis. Jane Austen would be pleased.

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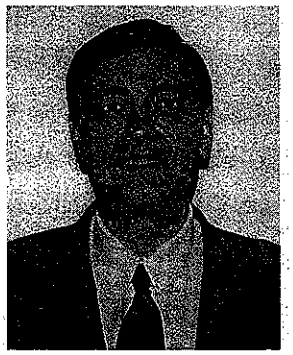
Duties Among Construction Industry Professionals Lacking Privity: The Straw House That *Biakanja* Built

By Robert P. Baker



Robert P. Baker

Historically, California builders were held liable for construction defects only to parties with whom they were in privity of contract. In other words, a developer could be sued for defective construction by the party who purchased the improvement from the developer, but not by subsequent purchasers or others. In the same way, a subcontractor could be held liable to the contractor for negligence, but not to the owner or any subsequent purchaser. Generally, the potential liability of building professionals for their work terminated when the work was accepted.[1]

An exception to this rule was first made so as to allow liability findings — even absent privity of contract — in construction cases in which a defect is found to have been known by the contractor to pose an imminent danger to third persons.[2] Thereafter, this exception was expanded to include construction defects "reasonably certain to place life and limb in peril when negligently made."[3] By 1958, exceptions had so compromised the privity rule that the California Supreme Court decided to re-examine the rule in *Dow v. Holly Manufacturing Co.*[4] In *Dow*, a general contractor had built a defective residential gas heater, which caused the deaths of a couple who had purchased the home from the owner for whom the heater had been built by the contractor. In discussing the state of the law regarding the privity limitation on contractors' liability, the California Supreme Court acknowledged that the rule had been swallowed by its exceptions:

> It should first be observed that the owner for whom the house was built by defendant general contractor had accepted the house and it had been transferred by him, with title vesting in the Dows. At one time this was an obstacle to recovery from the general contractor on the theory that there was no privity of contract between the contractor and the person injured, but it is no longer the law... "All this is now ancient history."[5]

The Supreme Court went on to quote Prosser who lamented the absence of a guiding principle:

> The present state of the law is not altogether clear because of the survival of so many of these exceptions, which afford an opportunity to hold the defendant liable without stating any general rule.[6]

The Supreme Court also noted that several recent decisions had placed the liability of contractors on the same footing as that of suppliers of goods, but had inexplicably stopped short of enunciating a new rule explicitly based upon that analogy.[7]

In *Stewart v. Cox*,[8] three years after *Dow*, the Supreme Court examined a case involving a suit brought by a homeowner against a subcontractor who had negligently built a swimming pool that caused property damage, but no physical injury. Like *Dow*, *Stewart* presented a construction claim by a plaintiff who lacked privity with the defendant. Also lacking was any physical injury or even any allegation that the subject construction involved a known, imminent danger to third parties. Accordingly, *Dow* alone presented an insufficient legal precedent to find for the homeowner in *Stewart*. However, one month ***before*** *Dow* was decided, the Supreme Court had decided the landmark case of *Biakanja v. Irving*,[9] which provided the legal foundation for the ruling in *Stewart* that the swimming pool subcontractor was liable for negligence to the homeowner with whom he lacked privity.

In *Biakanja*, the California Supreme Court held a notary public liable for economic damages suffered by the beneficiary of a will resulting from the notary's failure to properly attest the will, even though the two lacked privity. In part, the holding was based upon previous cases which imposed liability for negligence absent privity where the conduct was reasonably certain to place life or limb in peril.[10] The Supreme Court expressly noted one California case and several out-of-state cases which also applied this rationale to hold defendants liable to those injured lacking privity where the only foreseeable risk was property damage. However, the true basis for *Biakanja's* holding, and its lasting legacy, was the following balancing test enunciated by the court for determining when a defendant can be held liable in negligence even in the absence of privity:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. [Citations omitted.][11]

These *Biakanja* criteria opened judicial floodgates for finding the existence of a duty where none had been previously recognized. *Stewart* merely brought the first water through.

Also in 1961, the California Supreme Court applied the *Biakanja* criteria to hold that an attorney had a duty to a beneficiary to use due care in drafting a will even though the attorney had represented the testator.[12] The following year, the Supreme Court applied the *Biakanja* criteria to affirm a judgment for damages against a realtor and in favor of a prospective purchaser of a home who was injured during an inspection.[13]

No industry, however, has been more substantially affected by *Biakanja* than the construction industry. After *Stewart* came *Sabella v. Wisler*,[14] which affirmed, based upon the *Stewart* and *Biakanja* criteria, a judgment in favor of a homeowner and against a contractor who had negligently built a home upon uncompacted soil.[15] In 1968, the Supreme Court decided *Connor v. Great Western Savings & Loan Association*[16] in which the *Biakanja* test was used to hold a construction lender — which had had more involvement with the builder and the project than a lender typically would have — liable for economic damages resulting from defective foundations suffered by ultimate individual purchasers of the tract homes which the lender had financed.[17] In 1979, the court again used the *Biakanja* criteria to find that a contractor had a duty to a tenant of a building to complete construction on time so as to avoid unnecessary damage to the tenant's business, even though the contractor had contractual privity only with the owner, not with the tenant.[18]

In the foregoing cases, the California Supreme Court found liability where defendant's conduct was marked by unscrupulousness or neglect, where the policy of preventing future harm would be served by the establishment of new duties, and where the plaintiff was at least one of a known prospective class of innocent members of the public potentially affected by the transaction, all as suggested in *Biakanja*.

In 1974, the Court of Appeal, using the *Biakanja* criteria, defied logic in expanding builder liability well beyond the parameters then being forged by the Supreme Court. Specifically, in *U.S. Financial v. Sullivan*,[19] a construction lender sued a borrower-builder, the soil engineer, and the site contractor for impairing the lender's security by negligently designing and constructing homes in such a way that differential settlement occurred causing cracking, foundation failure, and other damage.[20] The Court of Appeal's opinion in *U.S. Financial* lacks any discussion of how these defects escaped the attention of the soil engineer, the site contractor, the foundation contractor, the general contractor, the architect, and the lender's inspector. The opinion notes the by then well settled body of case law — holding builders liable to purchasers of real property for negligence even absent privity of contract — and concludes that there is no compelling reason not to extend such builders' duty to construction lenders as well:

> It is settled law in this jurisdiction that developers, designers and contractors are liable to purchasers of real property for damages resulting from their negligent acts. (*Sabella v. Wisler*, 59 Cal.2d 21, 28 [27 Cal.Rptr. 689, 377 P.2d 889]; *Gagne v. Bertran*, 43 Cal.2d 481, 489-490 [275 P.2d 15]; *Stuart v. Crestview Mut. Water Co.*, 34 Cal.App.3d 802, 809 [110 Cal.Rptr. 543]; *Sweeney v. Stone*, 265 Cal.App.2d 693, 696 [71 Cal.Rptr. 497]; cf. *Stewart v. Cox*, 55 Cal.2d 857, 862-863 [13 Cal.Rptr. 521, 362 P.2d 345]; *Biakanja v. Irving*, 49 Cal.2d 647, et seq. [320 P.2d 16, 65 A.L.R.2d 1358].) We see nothing in principle or public policy that militates against similar liability to a mortgagee or beneficiary of a deed of trust when negligent conduct has resulted in the impairment of the mortgagee's or beneficiary's security interest.[21]

The *U.S. Financial* court went on to discuss the applicability of the *Biakanja* criteria to the facts before it:

> It is common knowledge that the development of residential subdivisions is accomplished financially by means of loans secured by deeds of trust on the real property involved. Therefore, it was not only reasonably foreseeable that the alleged negligence of respondents would result in impairment of plaintiff's security, such a result was substantially certain to occur. It is certain that plaintiff has suffered injury; at least, plaintiff cannot recover without proving that it suffered injury. The connection between respondents' conduct and the injury suffered is direct. The moral blame attached to respondents' conduct is considerable. Respondents are undertaking to provide housing for families to whom the purchase of a home may be assumed to be a major transaction. Negligence on their part in preparing the lots or in constructing the houses would almost certainly result in severe financial injury to such purchasers and, possibly, physical injury. Imposition of liability upon respondents for their negligent conduct might have a desirable prophylactic effect of preventing future negligent conduct. The burden of imposing upon respondents a duty to exercise care with resulting liability for breach is not an unduly

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heavy burden inasmuch as respondents are already under a duty to exercise reasonable care with respect to purchasers. Moreover, insurance for such liability is readily available to respondents.[22]

Based upon that pithy discussion, the *Biakanja* criteria were deemed to indicate liability and all respondents were held liable to the construction lender.[23]

The Court of Appeal's opinion in *U.S. Financial* provides little guidance and surely little certainty regarding the scope of the various participants' duties in a construction context. For example, the respondents included a borrower-builder who had privity with his lender, as well as a soil engineer and a site contractor who lacked such privity. Yet the court made absolutely no distinction among the respondents based upon these privity considerations.

Based on the *Biakanja* criteria, the *U.S. Financial* court found that one construction industry professional had a duty of care not to a third party member of the public who had been victimized by construction defects, and who lacked any relationship to the defendant or to the project, but to ***another*** construction industry professional who was involved in the project and had a contract with the borrower-builder. Thus, *Biakanja* was apparently used as the basis for reaching a defendant "lacking privity" even where plaintiff was in privity with construction industry professionals involved in the project other than the defendant.

The primary claims in *U.S. Financial* — between parties with privity — were clearly actionable prior to *Biakanja* and properly should be governed by the terms of the parties' agreement. The express language of the *Biakanja* criteria, and the context in which they were first articulated by the California Supreme Court, makes it clear that these criteria were to be applied to determine when liability can be found only if privity is lacking. The parties in *U.S. Financial* presumably had executed a written, detailed, fully integrated construction loan agreement establishing their obligations *inter se*, although this is not mentioned in the opinion. It is equally apparent, although another ellipsis, that the failure to build soundly must have violated several contractual obligations running in favor of the lender. Why then did the *U.S. Financial* court need to rely at all on *Biakanja* to find the borrower-builder liable to the lender? Apparently, it was because *U.S. Financial* had already conducted a non-judicial foreclosure on its trust deeds and needed to find a cause of action which survived the operation of California Civil Code § 726, as it then provided.[24] However, the opinion in *U.S. Financial* says nothing about this.

Equally inscrutable is the *U.S. Financial* court's holding that those respondents who lacked privity with the lender, e.g., the soils engineer and site contractor, were also liable to the lender pursuant to the *Biakanja* criteria. Thus, the defendants who were deemed to have a duty of care to plaintiff were not victimized members of the public who had bought defective housing, but other construction industry professionals who were involved in the project, albeit without any contractual relationship with the plaintiff. These construction industry professionals, the soils engineer and site contractor, should not have been held liable to the construction lender because the lender did not stand in the same relationship to them as did third party members of the public who were strangers to the construction project, and who, as laymen, relied on the soundness of housing built by the construction industry. In fact, when the *Biakanja* criteria are applied to a situation like that in *U.S. Financial*, it is apparent that construction industry professionals should not shoulder responsibility for negligence to construction lenders or to any other construction industry professionals with whom they lack privity.

This is sound policy for several reasons. First, privity often exists between construction industry professionals working on the same project, and contractual obligations — which could give rise to liability for negligence — are almost always negotiable among them. Construction lenders typically request some form of third party beneficiary status in the borrower's contracts with the architect, consultants, general contractor, and construction manager. Many construction loan agreements actually provide for the assignment of all the owner's contracts relating to a work of improvement which are perfected upon written notice after the owner's default. After such written notice is provided, construction industry professionals are then working for the construction lender and must discharge their contractual obligations to the construction lender's satisfaction. Prior to providing such written notice, the construction lender has no right to supervise the work. Absent such an agreement, courts should not use the *Biakanja* criteria to rewrite the freely negotiated contracts of construction professionals so as to insert in these contracts additional obligations. Lending institutions are not powerless strangers to the construction process and should not be afforded with the protections set forth in *Biakanja*.

Second, the application of the *Biakanja* criteria to reimburse a lender for losses caused by defective construction is not sound public policy because it might actually foster lender negligence. For example, lenders routinely have inspection and approval rights in the construction process. When a lender's security is impaired by defective construction, it usually means that neither the lender — nor the owner and its representatives, nor the builders — did their jobs properly. A sound public policy obviously would favor providing professionals with incentives to do their jobs properly. Architects and builders are so motivated because they may be liable to the owner. The lender should also be given incentive to perform its inspections competently by having its loan at risk if it fails to do so, and should not be able effortlessly to shift the results of its omissions to other professionals.

Third, such an expansive theory of liability would likely lead to confusion in the construction industry and to a rash of litigation activity. Theoretically, if any construction industry professional could be liable in negligence to any other construction industry professional working on the same project, even absent privity of contract, the normal chain of command of any given project might be disrupted. Whose approval of site work or a foundation pour is needed? Since ***anyone*** working on the project might sue the site subcontractor, he can take no comfort in receiving instructions from the general contractor with whom he has privity, or even in the acceptance of his work by the general contractor, the owner and the architect. In fact, any professional under these circumstances might provide instructions to another professional which could cause confusion, lead to contradictory demands, and perhaps set off legal activity. At the conclusion of a troubled project, there might very well be no end to claims and cross-claims since privity would not operate to limit the universe of claimants and thereby presumably the universe of claims. In fact, there would be no way for any construction industry professional to be sure that his work was satisfactory to every party which might sue, unless he obtained a release from each and every party who touched the project. This kind of exposure to lawsuits could have a depressing impact on the entire construction industry. In *Bily v. Arthur Young & Co.*,[25] the California Supreme Court noted that the threat of a suit could actually ***discourage*** a potential defendant from doing a good job. As the court stated: "[T]he stronger the probability that liability will be incurred when performance is adequate, the weaker is the deterrent effect of liability rules. Why offer a better product if you will be sued regardless...?"[26]

Fourth, construction industry pricing may be adversely affected, and inefficiency may result. Certain subcontractors might have a contract representing a small portion of the cost of a project. A construction manager's fee is typically around 3% of cost. Architects also customarily charge a small percentage of costs. However, if each can have unlimited liability to parties with whom it lacks privity, including potential liability for the full amount of the construction loan, then the cost calculus changes as larger insurance premiums and higher legal fees would presumably need to be budgeted. It makes much more sense for the lender to insure its loan and its security, since it has the larger investment, than for each professional to obtain insurance coverage in an amount needed to make the lender whole on a putative claim seeking the recovery of the lender's entire loan.

Fifth, the establishment of potential liability in negligence to all professionals working on a project would create an inherent tension between that duty of care and the contractual duties which the professionals already have. For instance, the architect and the construction manager customarily have an express contractual obligation to supervise the general contractor and to use best efforts to insure that the general contractor meets all its obligations to the owner, diligently prosecutes the work, follows all the plans and specifications, and completes the project on time and within budget. It would be incompatible with those obligations to impose a conflicting duty upon the architect or construction manager to use due care in its dealings with the general contractor. Such a bizarre rule would require construction industry professionals to serve two masters with conflicting interests. This arrangement would be untenable in practice. For example, a construction manager which is required under its contract with an owner to notify a general contractor to correct defective work should not be required to balance against that obligation a threat by a general contractor to sue for negligence if the construction manager does give that notice.

In *Gay v. Broder*,[27] the Court of Appeal held that an appraiser for loan purposes owed no duty of care to a property owner and could not be held liable for alleged negligence in connection with an appraisal which resulted in the loan request being denied. The court first noted that the existence of a duty of care "is a question of law and depends upon a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances."[28] The court then balanced those considerations and determined that no duty or liability existed, even though the appraisal was for the plaintiff's benefit and at his expense, because the imposition of such a duty would deter the defendant from reporting his honest opinion to the Veteran's Administration, which used the appraisal to decide whether to guaranty the loan. The court explained:

> [T]he duty of the designated fee appraiser is to submit to the administration an appraisal of value consonant with what he believes is the actual reasonable value of the property. Concern with the possibility of claims against him for refusing to set a value as high as the loan desired by the applicant veteran would deter the appraiser from reporting to the administration his true opinion as to value and tend to cause him to breach his duty to the federal government. The policy considerations against the imposition of liability in the instant case are manifest.[29]

Based on those considerations, the court affirmed an order of dismissal after the plaintiff's demurrer was sustained without leave to amend.

The same considerations weigh in favor of a similar approach in the context of construction industry disputes. As part and parcel of their jobs, construction managers and architects are hired by owners to represent the owners' interests in connection with any given project. They customarily review and evaluate the general contractor's work. If they were saddled with a duty of care to the general contractor whose work they had been charged with supervising and evaluating, the threat of negligence claims against them by the general contractor could certainly deter them from vigorously discharging their duties to the owner, *i.e.*, honestly evaluating the work of the general contractor and acting on those evaluations as necessary. As the *Gay v. Broder* court recognized, a party cannot be expected to give an honest opinion regarding another person's or entity's work or property where the threat of legal action by that third person looms over the transaction. While this threat apparently could not be entirely averted, certainly the type of reasoning evident in *U.S. Financial* unnecessarily increases it.

Moreover, in *Gay v. Broder*, the appraiser's work was partly for the benefit of the plaintiff, who paid the appraiser's fee. Customarily, only the owner pays the architect and construction manager, and the issue of whether their work is for the benefit of any third party is the subject of negotiation. Thus, custom and practice in the construction industry lend themselves particularly poorly to a system in which third party negligence claims are countenanced between and among construction industry professionals.

In conclusion, the *Biakanja* test is an important source of protection for innocent members of the public who buy property that was not built for them and at their direction. However, *Biakanja* provides a poor test for determining the rights *inter se* of construction industry professionals working together on a project.

The author is a 1975 graduate of Harvard Law School and is the Managing Partner of Baker and Jacobson. Baker and Jacobson specializes in real estate construction defect and labor litigation, as well as creditor's rights and insolvency litigation.

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1. E.G., *Boswell v. Laird*, 8 Cal. 469, 498 (1857); *Kolburn v. P. J. Walker Co.*, 38 Cal.App.2d 545, 550, 101 P.2d 747. See *Prosser on Torts* (2d Ed. 1955), pp. 517-519.
2. *Johnston v. Long*, 56 Cal.App.2d 834, 837, 133 P.2d 409 (1943).
3. Hale v. Depaoli, 33 Cal.2d 228, 232, 201 P.2d 1, 13 A.L.R.2d 183 (1948).
4. 49 Cal.2d 720, 321 P.2d 736 (1958).
5. 49 Cal.2d at 724.
6. 49 Cal.2d at 725, quoting *Prosser on Torts* (2d Ed.), p. 517.
7. *Id.*
8. *Stewart v. Cox*, 55 Cal.2d 857, 13 Cal.Rptr. 521 (1961).
9. 49 Cal.2d 647, 320 P.2d 16 (1958).
10. *Id.* at 649.
11. *Id.* at 650.
12. *Lucas v. Hamm*, 56 Cal.2d 583, 588-589, 15 Cal.Rptr. 821, 364 P.2d 685 (1961).
13. *Merrill v. Buck*, 58 Cal.2d 552, 562, 25 Cal.Rptr. 456, 375 P.2d 304 (1962).
14. 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889 (1963).
15. *Id.* at 28.
16. 69 Cal.2d 850, 73 Cal.Rptr. 369, 447 P.2d 609 (1968).
17. *Id.* at 865.
18. *J'Aire Corporation v. Gregory*, 24 Cal.3d 799, 157 Cal.Rptr. 407 (1979).
19. 37 Cal.App.3d 5, 112 Cal.Rptr. 18 (1974).
20. *Id.* at 9.
21. *Id.* at 13.
22. *Id.* at 13-14.
23. *Id.* at 14.
24. 37 Cal.App.3d at 9.
25. 3 Cal.4th 370, 392, 11 Cal.Rptr.2d 51, 834 P.2d 745 (1992).
26. 3 Cal.4th at 404.
27. 109 Cal.App.3d 66, 167 Cal.Rptr. 123 (1980).
28. 109 Cal.App.3d at 74.
29. 109 Cal.App.3d at 75.