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ARTICLE

"GOOD" BAD FAITH VS. "BAD" BAD FAITH: EQUITABLE PRINCIPLES AND THE DOCTRINES OF ADVERSE POSSESSION AND PRESCRIPTION

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Adverse possession is the acquisition of title to another's real property by continuous possession and use of the property for the prescribed period of five years.[1] A party seeking title to real property by adverse possession under a claim of right is, by definition, a trespasser or intruder without any bona fide belief that he or she has legal title to the property.[2] For the occupation to be "hostile and adverse," the claimants' possession under a claim of right must be wrongful as to the true owners' title and without recognition of the true owners' rights.[3] One court has colorfully stated that the adverse user "must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest."[4] A claimant may perfect title by adverse possession even though his or her claim to ownership of the property is not asserted in good faith and the claimant knows that he or she does not own title to the property.[5] Similar principles apply in the context of prescriptive easements, where the prescriptive use must be open, notorious and without regard to the rights of the underlying owner.[6]

Despite the inherently "bad faith" nature of an adverse possessor's or prescriptive user's hostile conduct, however, two recent decisions have applied the equitable doctrines of "unclean hands" or "equitable estoppel" to prevent a claimant from obtaining a prescriptive easement or title to real property by adverse possession under

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a claim of right.[7] In both cases, the courts of appeal engrafted notions of fair play and good faith into a doctrine that traditionally rewards trespassers and condones bad faith. At the same time, several other decisions have invoked a doctrine of "balancing of hardships" to reward trespassers who could not meet the criteria for adverse possession or for a prescriptive easement, essentially concluding that a party who needs the use of property more than its actual owner is justified by equitable principles in taking it, with the express acquiescence of the courts.[8]

This article examines the seeming inconsistency of these two strands of case law developments, and suggests the courts are dispensing with well-established legal principles out of an exaggerated interest in "doing equity" in circumstances where equity, or at least the concept of "good faith," formerly had no place.

A. THE *AGUAYO* DECISION

In *Aguayo v. Amaro*, plaintiffs Sofia Aguayo and Jesus Duran Aguayo sought to obtain title by adverse possession to a single family home located in Los Angles, California.[9] The home was owned by a husband and wife who had two sons, Alfred and Richard. The father and mother passed away in 1969 and 1993, respectively. Their two sons, Alfred and Richard, continued to reside at the property after their mother's death.[10] Plaintiff Jesus Duran Aguayo admitted during the bench trial of the adverse possession action that he was in the "business" of acquiring property by adverse possession. He had filed ten previous lawsuits seeking to acquire title to real property through adverse possession, and claimed expertise in the practice of acquiring property through adverse possession. His wife Sofia was also engaged with him in the same occupation of attempting to acquire title to property by adverse possession.[11]

In 1995, Sophia Aguayo sent a letter addressed to the mother at the home inquiring about purchasing the property. Sophia contended that the son, Alfred, responded to the letter and orally agreed to sell his contingent interest in the property to her for $25,000. Jesus Aguayo claimed that he gave Alfred $2,000 in cash in connection with Alfred's separate promise to commence probate proceedings for his mother's estate. No probate was commenced and Alfred passed away without a will in 2001.

In January of 1999, Jesus Aguayo placed a "No Trespassing" sign on the property which stated that Sophia Aguayo was the "owner" of the property. The Aguayos also changed the locks, fenced in the property and made repairs. In April of 1999, Jesus Aguayo also loaned $2,000 to the other son, Richard Infante, and in January of 2000, entered into a written agreement entitled "Part Sale & Rental Agreement" under which Richard agreed to rent the property from Jesus Aguayo (even though the property was technically owned by the Estate of Isabel Infante at the time) and then transfer his rights to the property to Jesus Aguayo in exchange for forgiveness of the earlier $2,000 loan and 54 months of rental payments totaling $21,600. From 1999 until the Aguayos filed their adverse possession litigation in 2004, the son Richard Infante resided at the property. The "No Trespassing" sign remained at the property throughout, and Jesus Aguayo testified that he visited the property on a weekly basis.[12]

Thus far, the Aguayos' conduct was that of a typical adverse possession claimant, craftily entering into possession adverse to the true owners and engaging in actions that should have led the true owners, however naïve they may have been, to seek

to prevent ripening of the claim into an adverse title. However, an essential element of title by adverse possession is payment of property taxes during the prescriptive period of 5 years. Here, the Aguayos engaged in conduct that both the trial court and the court of appeal found was beyond the pale—outside the "legitimate" scope even of a doctrine that explicitly condones bad faith theft of real property by occupancy. On April 27, 2000, Jesus and Sophia Aguayo recorded a quitclaim deed against the property which purported to transfer title to the property from "Jesus Duran" to Jesus Aguayo and Sophia Aguayo. As noted by the the court of appeal, this quitclaim deed was a "wild" deed because it was recorded outside the chain of title by the Aguayos who had no title to convey. The recorded quitclaim deed stated that the property tax statements should be mailed to Sophia Aguayo and changed the mailing address for property taxes from that of the property to Sophia Aguayo's address. Thereafter, the Los Angeles County Registrar-Recorder's Office mailed the property tax bills to Sophia Aguayo. Sophia Aguayo paid the back taxes and all of the current tax bills from 2000 through 2006.

On August 9, 2004, Sophia Aguayo filed a complaint for quiet title to real property based on adverse possession against Michelle Amaro, the Special Administrator of the Estate of Isabel Infante, the mother of Alfred and Richard Infante; Ms. Amaro later acquired from Richard Infante all of his interest in the property.[13] After a bench trial, the trial court ruled that although Sophia Aguayo had met all of the "technical requirements" for adverse possession, her quiet title action "must fail as she proceeded with unclean hands in asserting her adverse interest in this property."[14] The court based its finding of unclean hands on the Aguayos' recording of the "wild deed"; it found that the Aguayos recorded the deed to ensure that the legal owners of the property would not receive the property tax bills, which would have served as a reminder to the true owner that the property taxes were due. As found by the trial court, this act was deceitful and intended to ensure that the legal owner would not pay the property taxes.[15]

The only issue raised by plaintiff Sophia Aguayo on appeal was her contention that the doctrine of unclean hands is not a defense to a quiet title action for adverse possession under a claim of right.[16] To begin with, the court of appeal asserted that a quiet title action is equitable in nature and that the trial court adjudicated the action as a court of equity.[17] The court then noted that the doctrine of unclean hands is generally a defense to an equitable action, including an action to quiet title. The court cited three cases for this proposition, *none of which involved quiet title actions based on a claim of adverse possession to real property*.[18] Although the court of appeal specifically noted that there is no good faith requirement for a party seeking title by adverse possession based on a claim of right and that a claim of right can be founded upon a deliberate trespass, it held that the unclean hands of the adverse possessor can be a defense to the claim where the party claiming adverse possession engages in deceitful interference with the true property owner's ability to defeat the claim of adverse possession.

Ms. Aguayo argued that because adverse possession under a claim of right necessarily involves the wrongful occupancy or trespass to real property, unclean hands cannot be a defense to adverse possession as a matter of law.[19] She relied upon a case, *Brown*

v. Berman, which held that the wrongful act of trespass on the part of the party claiming adverse possession cannot form a defense to a claim of title by adverse possession because, if such a defense existed, adverse possession under a claim of right would not be possible.[20] However, the *Aguayo* court distinguished this case from *Brown*, finding that Amaro's unclean hands defense was not based upon Sophia Aguayo's trespass to the real property. Rather, the "unclean hands" involved Sophia Aguayo's "deceitful act" of recording a wild deed against the property for the express purpose of diverting the tax bills away from the Infantes to Sophia Aguayo. The court of appeal focused on the trial court's finding that the sole purpose for recording the wild deed was to interfere with the Infantes' payment of the real property taxes. Had the Infantes paid the property taxes, the Aguayos would not have satisfied one of the required five elements for adverse possession. There was substantial evidence in the record showing that the Aguayos were sophisticated parties, knowledgeable about the requirements of adverse possession and that the Aguayos had no credible explanation for why they recorded the wild deed or used the name of "Jesus Duran," who had no prior recorded ownership interest in the property, as the grantor on the deed.[21] Moreover, the court of appeal noted, the Aguayos' conduct with respect to the subject property appeared to be criminal conduct under the Penal Code (i.e., recordation of a false or forged instrument affecting title to real property).[22]

The court of appeal also distinguished the case of *Treager v. Friedman*, where the court had refused to consider the defendant's previous action of accepting a fraudulent transfer from the property owner as preventing the defendant from prevailing in an adverse possession claim against the grantor who had perpetrated the fraud.[23] The *Aguayo* court concluded that the alleged unclean hands in *Treager* did not directly relate to the defendant's adverse possession claim but only to its *prior* conduct, and therefore did not defeat the adverse possession claim. Using the same argument as it did in distinguishing *Brown*, the court concluded that Sophia Aguayo's wrongful conduct in recording the wild deed with the intention of diverting the tax bills away from the true owner of the property was "directly related" to the basis for her claim of adverse possession because it allowed her to satisfy one of the five elements for adverse possession, payment of property taxes.[24]

The court of appeal also held that the trial court did not abuse its discretion in holding that the doctrine of unclean hands barred Sophia Aguayo's adverse possession claim.[25] In so holding, the court of appeal focused on three facts: (1) the Aguayos knew their quitclaim deed was "false" because "Jesus Duran" did not have title to or ownership of the property when they recorded the quitclaim deed; (2) the Aguayos were knowledgeable about the elements of adverse possession and knew at the time they recorded the wild deed that they did not need to record the wild deed in order to satisfy requirements of adverse possession; and (3) the Aguayos recorded the wild deed for the sole purpose of diverting the tax bills from the true owner.[26]

The *Aguayo* decision applies an equitable defense to a cause of action that by its very nature involves conduct that may be considered inequitable, a notion that is seemingly at odds with the origins of adverse possession in "squatter's rights" and in the equally significant maxim of jurisprudence, "equity aids the vigilant not those who sleep on their rights." The court of appeal seemingly decided that bad faith and

deception in the context of "open, notorious and hostile possession under a claim of right" defeat the claim, unless the bad faith related only to the act of trespass itself.

B. THE WINDSOR DECISION

The second case, *Windsor Pacific LLC v. Samwood Co.*, likewise applied an equitable defense—equitable estoppel—to prevent a party from acquiring a prescriptive access easement across undeveloped real property.[27] In *Windsor Pacific*, the three relevant parties, Windsor Pacific LLC ("Windsor"), Samwood Co. Inc. ("Samwood"), and Shadow Pines, LLC ("Shadow"), each owned large adjoining parcels of undeveloped property in Los Angeles County, with the Samwood property being located between the Windsor and Shadow properties. The principal of Windsor was a real estate attorney who was seeking to develop the Windsor property. In 2003, Samwood granted to Shadow's predecessor an option to purchase the Samwood property, a license to enter upon the Samwood property and a right of full access and entry to the Samwood property. Samwood later assigned the option agreement and license to Shadow. Between its acquisition of its property in 2003 and 2006, Windsor used the access roads across the Samwood and Shadow properties to access its property.[28] In 2006, Windsor and Shadow entered into a written Agreement Regarding Easements which stated that Shadow owned its property and held an option to purchase the Samwood property. It provided that Shadow would receive easements over the Windsor property if certain conditions were met, and that if Shadow terminated the Agreement Regarding Easements, Shadow would deliver to Windsor a Termination Easement granting Windsor an easement for access over **both** the Samwood and Shadow properties. Later, in 2006, Shadow terminated the Agreement Regarding Easements, and, as it was required to do under the terms of the Agreement, provided Windsor with a Termination Easement granting Windsor a non-exclusive easement over the two access roads across the Samwood **and** Shadow properties. The court of appeal found that 2009 was the first time that Windsor ever claimed it possessed a prescriptive easement over the two access roads across the Samwood property. Windsor filed suit to quiet title to a prescriptive easement across the Samwood property a few months later.[29]

The trial court ruled in favor of Samwood and Shadow, holding that Windsor's use of the roads across the Samwood and Shadow properties was *permissive* beginning in mid-2005 based upon oral agreements between Windsor and Shadow and the later Agreement Regarding Easements executed in 2006. However, the court of appeal affirmed the quiet title judgment in favor of Samwood on a completely different ground, holding that Windsor was *equitably estopped* from claiming a prescriptive easement. The court of appeal focused on the evidence demonstrating that Windsor had formed an intent sometime after mid-2005 to claim a prescriptive easement over the Samwood and Shadow properties, yet had failed to disclose such intention to either Samwood or Shadow. Instead, Windsor had negotiated orally with Shadow for permission to use both the Shadow and Samwood properties for access. The court of appeal also held that Windsor was well aware that a claim of a prescriptive easement was totally inconsistent with its overt actions in seeking permission to use the Samwood and Shadow properties for access (likely because the principal of Windsor was an experienced real estate attorney).[30] The court focused on the fact that Windsor and Shadow entered into

the Agreement Regarding Easements in 2006 which provided that Shadow would grant Windsor an easement to use the roads on both the Shadow and Samwood properties. The court felt that this written Agreement demonstrated both parties' understanding that Shadow had the authority to grant Windsor an easement over the Samwood property. Furthermore, the evidence introduced in the case showed that in prior situations when Windsor had questions as to its use of the Samwood property, it directed those questions to Shadow's predecessor, not to Samwood. According to the court, this evidenced Windsor's recognition of Shadow's predecessor's authority with respect to the use of the Samwood property. The court concluded that Shadow had the right to rely on the appearance created by Windsor's conduct that its use of the roads across the Samwood property was permissive and not adverse.[31] The court also found that both Samwood and Shadow were unaware until early 2009, more than two years after the 2006 Agreement Regarding Easements, that Windsor intended to claim a prescriptive easement based upon its use of the access roads across their properties.[32] Finally, the court found that both Samwood and Shadow would be injured if Windsor were granted a prescriptive easement after it had negotiated and agreed to receive a permissive easement across the properties.[33]

Windsor's ultimate conclusion, denying the claim of the prescriptive claimant, would better have been decided on the basis of permissive use than by injecting the doctrine of equitable estoppel into a cause of action that is, at best, a fundamentally inequitable process, but it stands with *Aguayo* as expanding the role of equity in cases involving prescriptive use or adverse possession.

C. THE EQUITABLE ESTOPPEL CASES

The *Windsor* and *Aguayo* decisions may reflect the propensity of courts to inject their own concepts of fairness and equity into situations formerly thought to be governed by relatively straightforward and well-established legal principles that endorse the trespasser's claims against the true owner. Paradoxically, however, the courts have used the doctrine of an "equitable protected interest," sometimes referred to by the courts as an "equitable easement" or "balancing of the equities," to endorse, rather than reject, a trespasser's right to use the real property of another. Several cases have allowed continued access to property or continued maintenance of long-standing encroachments where the party claiming the right to use land does not meet all of the requirements for adverse possession or a prescriptive easement.[34]

1. The Hirshfield decision

In *Hirshfield v. Schwartz*, the trial court found that the defendants had innocently and mistakenly installed improvements on the defendant's property consisting of a portion of a substantial block wall and a significant amount of underground water and electrical lines, motors and recirculation equipment supporting a pool and waterfall.[35] Applying the relative hardship doctrine, the trial court found that the defendants would incur significant expense in removing all of the encroaching improvements from the plaintiff's property, the plaintiff's claimed evidence about a desire to use his property for other purposes were "insubstantial" or could be rerouted to avoid the encroachments, and that the "balance" tipped in favor of the defendants' continuing maintenance of the encroachments on the plaintiff's property.[36] In denying the plain-

tiff an injunction removing the encroachments, the trial court awarded the defendants an "equitable easement" over the encroaching area. The court of appeal upheld the trial court's application of the balance of the hardship's doctrine, holding that in a proper case, a court may exercise its equitable powers to affirmatively fashion an interest in another's land which will protect the encroacher's long-standing use.[37] In doing so, the court of appeal distinguished cases that preclude the award of an exclusive *prescriptive* easement, holding that the interest awarded by the trial court was not a prescriptive easement, but an "equitable protective interest in land" under the court's equitable powers.[38] The court of appeal noted that the claim of adverse possession or of a prescriptive easement requires an intent to dispossess the owner of the disputed property.[39] In this case, since it was undisputed that the encroacher's intent was "innocent," the court of appeal said the trial court was justified in awarding an equitable interest in land that was in effect a permanent, exclusive easement to protect the encroacher's long-standing use of the disputed property.[40]

2. *Linthicum v. Butterfield*

In *Linthicum v. Butterfield*,[41] various landowners had used a road across United States Forest Service property to reach their homes; some of the use of this roadway dated back to 1969. The plaintiffs acquired their property from the Forest Service in 2000 and promptly filed suit seeking an injunction to prevent the adjoining property owners from using the road across their property.[42] Because the plaintiffs' property had been owned by the federal government until 2000, the defendants could not have acquired a prescriptive easement to use the road, because one cannot obtain a prescriptive easement across property owned by the government.[43] However, the trial court found that: (1) the roadway over the plaintiffs' parcel was the only possible access to all of the defendants' parcels; (2) it was financially infeasible for the defendants to develop alternative access; (3) the plaintiffs could still develop and enjoy full use of their property without removing the roadway; and (4) the "balance of the equities" favored the defendants' continued use of their access roadway to reach their homes.[44] Therefore, the trial court awarded the continued right to use the road to the defendants.

The trial court's decision was affirmed on appeal, based on the court of appeal's observations that: (1) the disputed roadway was the only access to the defendants' parcel; (2) leaving the roadway in place would not substantially affect the plaintiffs' ability to develop their parcel; and (3) that the loss of use of the disputed roadway would be a catastrophic loss to the defendants, who would otherwise have no access to their properties.[45] Furthermore, the court of appeal found that the plaintiffs were responsible for the dispute in the sense that they purchased their property with full knowledge of the historical use of the access roadway by the defendants and made a concerted effort to deprive the defendants of the value and use of their property.[46] Finally, the court of appeal held that some evidence showing slight negligence on the part of the defendants did not defeat the trial court's exercise of its discretion to determine that the balance of the hardships weighed in favor of providing the defendants with access to their property.[47] Again, the conduct of trespassers who "needed" their neighbor's property was allowed to trump their obvious inability to meet the requirements for a "fair and square" prescriptive easement.

3. The *Tashakori* Decison

In *Tashakori v. Lakis*,[48] the plaintiffs Tashakoris owned two adjoining residential lots, one developed with a single-family home. They accessed both lots along a shared driveway that crossed over a portion of the adjoining property owned by Lakis.[49] In 2006, the Tashakoris sold the lot with the home to a third party and retained the undeveloped lot.[50] At the time they originally purchased their lots, the Tashakoris believed, based upon conversations with their realtor and the prior owner, and an (incorrect) preliminary title report, that they possessed a recorded easement to access both of their lots.[51] When they later sold the developed lot, the Tashakoris learned for the first time that they had no recorded easement access to either of their lots.

In 2008, the Tashakoris brought suit against the owner of the fee interest in the land underlying their driveway (the Lakis'), seeking quiet title to a right of ingress and egress across the shared driveway or an equitable easement.[52] The trial court entered a judgment granting an equitable easement for ingress and egress across the driveway in favor of the Tashakoris, finding that the Tashakoris were innocent and neither willful nor negligent in their belief that they had recorded access to both lots, because they reasonably relied upon their pre-purchase discussions with their broker, the prior owner and the incorrect preliminary title report. The trial court further found that the Lakis' would suffer little or no harm from the Tashakoris' use of the driveway due to the configuration of the Lakis' property and the complete separation of the driveway area from the Lakis' property; on the other hand, the Tashakoris would be "irreparably harmed" if the court denied them an equitable easement to reach their land-locked parcel via the shared driveway.[53]

The court of appeal affirmed the trial court's decision, finding that "California courts have exercised their equity power to fashion protective interests in land belonging to another."[54] The court noted that the "relative hardship" test previously has been applied not only for physical encroachments on another's property, but in situations of disputed rights of access over a neighbor's property.[55] After finding that the trial court had properly exercised its discretion in balancing the "hardships" in favor of the Tashakoris, the court of appeal further held that the right to equitable easement could be raised affirmatively by plaintiffs seeking declaratory relief.[56] In addition, the court held that the doctrine of "equitable easement" is not limited to situations involving long-standing prior encroachment or use. Rather, it found that the duration of the encroachment or use is relevant in the assessment of the relative hardships to the parties, which in its view clearly tipped in favor of the Tashakoris in this case.[57]

D. CONCLUSION

The cases summarized in this article reflect a somewhat inconsistent pattern by the courts in favoring the parties who somehow seem deserving of a permanent right to use and enjoy someone else's property and disfavoring those whose character or conduct, in the court's view, should result in denial of the same benefits. The doctrines of adverse possession and prescriptive easement presume that the claimants are trespassers who are acting in bad faith, in the sense that they know they do not own the property they are occupying or that they do not have a legal right to use

it. Even so, courts still will entertain and enforce defenses or arguments based on equity arising from the bad faith conduct of the party asserting adverse possession or a prescriptive easement, at least if the alleged bad faith conduct is: (1) other than the act of trespass itself, and (2) relates directly to the claim of adverse possession or prescriptive use. By contrast, the courts also have shown a proclivity for applying equitable relief in the form of an "equitable protected interest" when an allegedly "innocent" property owner will be deprived of access or the use of long-standing encroachments over adjoining property and they cannot meet the requirements of either adverse possession or a prescriptive easement. In either instance, the decisions seem to come down to a judicial assessment of "character" and "need," rather than a strict regard for established rules of property.

NOTES

1. Civ. Code, §1007; *Thompson v. Dypvik*, 174 Cal. App. 3d 329, 338, 220 Cal. Rptr. 46 (6th Dist. 1985). In order to establish title by adverse possession, the claimant must prove five elements, each of which may involve some level of "bad intentions" vis-à-vis the true owner's interest in the property. These elements are: (1) possession under either a claim of right or color of title (2) actual, open, and notorious occupation of the property in such a manner that constitutes reasonable notice thereof to the record owner of the property; (3) occupation hostile to the title of true record owner of the property; (4) uninterrupted and continuous possession of the property for at least 5 years; and (5) the adverse possessor must pay all the property taxes for the property during the 5-year period. (*Gilardi v. Hallam*, 30 Cal. 3d 317, 321, 178 Cal. Rptr. 624, 636 P.2d 588 (1981); *Dimmick v. Dimmick*, 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824 (1962); *Laubisch v. Roberdo*, 43 Cal. 2d 702, 702-706, 277 P.2d 9 (1954); *Hacienda Ranch Homes, Inc., supra*, 198 Cal. App. 4th at p. 1128.) A person claiming under "color of title" claims under an instrument that purports to transfer title but for some reason is defective and does not transfer title. (*Hacienda Ranch Homes, Inc. v. Superior Court*, 198 Cal. App. 4th 1122, 1128, 131 Cal. Rptr. 3d 498 (3d Dist. 2011), as modified on denial of reh'g, (Sept. 28, 2011).)
2. *Gilardi v. Hallam*, 30 Cal. 3d 317, 322, 178 Cal. Rptr. 624, 636 P.2d 588 (1981); *Sorensen v. Costa*, 32 Cal. 2d 453, 459-460, 196 P.2d 900 (1948); *Estate of Williams*, 73 Cal. App. 3d 141, 147, 140 Cal. Rptr. 593 (2d Dist. 1977).
3. Civ. Code, §325; *Laubisch v. Roberdo*, 43 Cal. 2d 702, 702-706, 277 P.2d 9 (1954); *Mesnick v. Caton*, 183 Cal. App. 3d 1248, 1259, 228 Cal. Rptr. 779 (2d Dist. 1986).
4. *Myran v. Smith*, 117 Cal. App. 355, 362, 4 P.2d 219 (1st Dist. 1931).
5. *Park v. Powers*, 2 Cal. 2d 590, 597-598, 42 P.2d 75 (1935).
6. 6 Miller & Starr, California Real Estate 3d, §§15:29 to 15:41 (prescriptive easements). See generally 6 Miller & Starr, California Real Estate 3d, Chapter 15 (easements), Chapter 16 (adverse possession).
7. *Aguayo v. Amaro*, 213 Cal. App. 4th 1102, 153 Cal. Rptr. 3d 52 (2d Dist. 2013); *Windsor Pacific LLC v. Samwood Co., Inc.*, 213 Cal. App. 4th 263, 152 Cal. Rptr. 3d 518 (2d Dist. 2013).
8. *Tashakori v. Lakis*, 196 Cal. App. 4th 1003, 126 Cal. Rptr. 3d 838 (2d Dist. 2011), review denied, (Sept. 14, 2011); *Linthicum v. Butterfield*, 175 Cal. App. 4th 259, 95 Cal. Rptr. 3d 538 (2d Dist. 2009); and *Hirshfield v. Schwartz*, 91 Cal. App. 4th 749, 110 Cal. Rptr. 2d 861 (2d Dist. 2001).
9. *Aguayo v. Amaro*, 213 Cal. App. 4th 1102, 1107, 153 Cal. Rptr. 3d 52 (2d Dist. 2013).
10. *Id.*, at p. 1105.
11. *Id.*, at p. 1106.
12. *Id.*

13. *Id.* at p. 1107.
14. *Id.*, at p. 1107-1108.
15. *Id.*, at p. 1108.
16. *Id.*, at p. 1109.
17. *Id.*, at p. 1110.
18. *In re Estates of Collins*, 205 Cal. App. 4th 1238, 1246, 141 Cal. Rptr. 3d 227 (3d Dist. 2012), review denied, (July 25, 2012); *Farahani v. San Diego Community College Dist.*, 175 Cal. App. 4th 1486, 1495, 96 Cal. Rptr. 3d 900, 246 Ed. Law Rep. 917 (4th Dist. 2009); and *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 978, 90 Cal. Rptr. 2d 743 (5th Dist. 1999), as modified on denial of reh'g, (Jan. 3, 2000).
19. *Id.*, at p. 1112.
20. *Brown v. Berman*, 203 Cal. App. 2d 327, 21 Cal. Rptr. 401 (1st Dist. 1962).
21. 213 Cal. App. 4th at 1114.
22. *Id.*, at p. 1114. See Pen. Code, §115.5.
23. *Treager v. Friedman*, 79 Cal. App. 2d 151, 173, 179 P.2d 387 (1st Dist. 1947).
24. 213 Cal. App. 4th at 1114.
25. *Id.*
26. *Id.*
27. *Windsor Pacific LLC v. Samwood Co., Inc.*, 213 Cal. App. 4th 263, 267, 152 Cal. Rptr. 3d 518 (2d Dist. 2013).
28. *Id.* at p. 268.
29. *Id.*
30. *Id.*, at pp. 268-272.
31. *Id.*, at p. 272.
32. *Id.*
33. *Id.*
34. *Tashakori v. Lakis*, 196 Cal. App. 4th 1003, 126 Cal. Rptr. 3d 838 (2d Dist. 2011), review denied, (Sept. 14, 2011); *Linthicum v. Butterfield*, 175 Cal. App. 4th 259, 95 Cal. Rptr. 3d 538 (2d Dist. 2009); and *Hirshfield v. Schwartz*, 91 Cal. App. 4th 749, 110 Cal. Rptr. 2d 861 (2d Dist. 2001).
35. *Hirshfield v. Schwartz*, 91 Cal. App. 4th 749, 757-758, 110 Cal. Rptr. 2d 861 (2d Dist. 2001).
36. *Id.*
37. *Id.*, at pp. 764-767.
38. *Id.*, at pp. 767-771.
39. *Id.*, at pp. 769-770.
40. *Id.*, at p. 755.
41. *Linthicum v. Butterfield*, 175 Cal. App. 4th 259, 263-264, 95 Cal. Rptr. 3d 538 (2d Dist. 2009).
42. *Linthicum v. Butterfield*, 175 Cal. App. 4th 259, 263-264, 95 Cal. Rptr. 3d 538 (2d Dist. 2009).
43. *People v. Shirokow*, 26 Cal. 3d 301, 311, 162 Cal. Rptr. 30, 605 P.2d 859 (1980); *People v. Chambers*, 37 Cal. 2d 552, 555-556, 233 P.2d 557 (1951); *Henry Cowell Lime & Cement Co. v. State*, 18 Cal. 2d 169, 172, 114 P.2d 331 (1941); *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 135-136, 287 P. 475 (1930).
44. *Id.*, at p. 265.
45. *Id.*, at p. 266.
46. *Id.*
47. *Id.*, at p. 266-267.
48. *Tashakori v. Lakis*, 196 Cal. App. 4th 1003, 1006, 126 Cal. Rptr. 3d 838 (2d Dist. 2011), review denied, (Sept. 14, 2011).
49. *Id.*

50. *Id.*
51. *Id.*, at p. 1007.
52. *Id.*, at p. 1006.
53. Id,. at p. 1007.
54. *Id.*, at p. 1008.
55. *Id.*, at p. 1009.
56. *Id.*, at p. 1010-1012.
57. *Id.*, at p. 1013.

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