Filed 2/24/06; pub. order 3/7/06 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN DOE, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B178689 (Los Angeles County Super. Ct. No. BC293484)
JOHN DOE 2, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	(Los Angeles County Super. Ct. No. BC308146)

APPEALS from orders of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

Taylor & Ring, David M. Ring, John C. Taylor; Bennett, Johnson & Galler, Todd A. Walburg, and William C. Johnson for Plaintiffs and Appellants John Doe and John Doe 2.

Rockard J. Delgadillo, City Attorney, Janet G. Bogigian, Assistant City Attorney, and Amy Jo Field, Deputy City Attorney, for Defendant and Respondent City of Los Angeles.

Sedgwick, Detert, Moran & Arnold, Gregory H. Halliday, and Thomas A. Delaney for Defendant and Respondent Boy Scouts of America.

Appellants John Doe and John Doe 2 brought actions against respondents City of Los Angeles (City) and Boy Scouts of America (BSA), alleging that a Los Angeles Police Department (LAPD) officer sexually abused them in the 1970's while they participated in LAPD Explorer and Scout programs, and the trial court sustained demurrers to their complaints without leave to amend. We affirm.

RELEVANT PROCEDURAL HISTORY

A. *John Doe*

John Doe initiated his action on April 7, 2003. On May 17, 2004, he filed his fourth amended complaint, which asserts claims for sexual abuse, negligence, sexual battery, assault and battery, and tortious infliction of emotional distress against David J. Kalish, and claims for negligent supervision, training, management, and failure to warn against respondents. The fourth amended complaint alleges that in the 1970's, Kalish—who was then an LAPD officer—was an advisor in the LAPD's Scout and Explorer programs, which the LAPD operated in association with the BSA, and an advisor in the LAPD's Deputy Auxiliary Police (DAP) program. The complaint further alleges that John Doe joined the

DAP program in 1974, when he was 13 years old; he participated in the Scout and Explorer programs from 1975 until 1979, when he was 17 years old; and Kalish sexually abused him from 1974 to 1979.

Respondents demurred to the fourth amended complaint, contending, inter alia, that its claims were time-barred under Code of Civil Procedure section 340.1. The trial court sustained respondents' demurrers without leave to amend on July 26, 2004. John Doe subsequently noticed an appeal.[1]

B. *John Doe 2*

John Doe 2 began his action on December 23, 2003. On July 22, 2004, he filed his first amended complaint, which asserts claims against Kalish and respondents that closely resemble the claims in John Doe's fourth amended complaint. John Doe 2 alleges that he joined the DAP program as a 13 year old in 1975; he participated in the Scout and Explorer programs as a minor from 1977 until 1979; and Kalish sexually abused him from "approximately" 1974 to 1979.[2]

Respondents demurred to the first amended complaint on a number of grounds, including that it was time-barred under Code of Civil Procedure section 340.1. The trial court sustained these demurrers on November 9, 2004, and judgment was entered

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[1] The record discloses that John Doe's notice of appeal was filed prematurely, insofar as it purports to challenge the judgment in favor of the City. Whereas judgment in favor of the BSA was entered on August 23, 2004, judgment in favor of the City was not entered until November 16, 2004, after the notice of appeal was filed on October 6, 2004. In the interest of the orderly administration of justice, we deem the appeal involving the City to be taken from the later-entered judgment. (*In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1341, fn. 1.)

[2] The complaint does not clarify how Kalish came to sexually abuse John Doe 2 before he joined the DAP program.

accordingly in favor of respondents. John Doe 2 appealed from these judgments, and his appeal was subsequently consolidated with John Doe's appeal.

DISCUSSION

Appellants contend that the trial court erred in sustaining the demurrers to their respective complaints without leave to amend. We disagree.

A. *Standard of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted.)

"Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at p. 879, fn. 9.)

Under the first standard of review, "we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial

notice may be taken. [Citation.]" (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.)

Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. (*Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at p. 890.) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Ibid*.)

B. *Timeliness of Claims*

In the present case, the trial court concluded that appellants' claims are time-barred under Code of Civil Procedure section 340.1 (section 340.1). As we explain below, the trial court did not err on this matter.

1. *Section 340.1*

The overarching issue is whether appellants adequately pled that their actions fall within subdivision (b)(2) of section 340.1, which permits the revival of certain claims of sexual abuse that would otherwise be barred by the limitations period in section 340.1. We therefore examine the pertinent provisions of section 340.1.

Subdivision (a) of section 340.1 provides in pertinent part: "In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires

later, for any of the following actions: [¶] (1) An action against any person for committing an act of childhood sexual abuse. [¶] (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff. [¶] (3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff."

Here, appellants' claims against respondents fall within subdivision (a)(2) of section 340.1. With respect to such claims, subdivision (b)(1) of section 340.1 provides: "*No* action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday." (Italics added.) Given the allegations in the complaints, each appellant was over 40 years of age when he initiated his action, and thus our inquiry shifts to subdivisions (b)(2) and (c) of section 340.1, which *revive* certain time-barred claims.

Subdivision (b)(2) of section 340.1 states that the aforementioned deadline in subdivision (b)(1) "does not apply if *the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent*, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard." (Italics added.)

Furthermore, subdivision (c) of section 340.1 provides that "any claim for

damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b)" and "that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is *revived*," provided that an action is "commenced within one year of January 1, 2003." (Italics added.)

Appellants' claims against respondents thus avoid the barrier of the limitations period only if they fall under subdivision (b)(2) of section 340.1, that is, only if respondents "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct" by Kalish. Here, the complaints lack any specific factual allegations that respondents *actually* knew of Kalish's sexual abuse, and appellants' counsel conceded at the hearings on the demurrers that they could not allege that "a supervisor or some particular individual" had actual knowledge of this abuse.[3]

2. *Constructive Knowledge Under Section 340.1, Subdivision (b)(1)*

Our inquiry therefore focuses on the sufficiency of appellants' allegations that respondents had *constructive* knowledge or notice of Kalish's abuse within the meaning of section 340.1, subdivision (b)(2) (subdivision (b)(2)). Generally, "[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Civ. Code, § 19.) Accordingly, we must resolve whether respondents should be

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[3] We may properly treat these concessions as judicial admissions for the purpose of assessing the sufficiency of the complaints. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 560-562.)

imputed knowledge of Kalish's abuse under subdivision (b)(2), given their actual factual knowledge, as alleged by appellants.

This issue is one of first impression. Section 340.1 was amended to incorporate subdivisions (b)(2) and (c) in 2002 (Stats. 2002, ch. 149, § 1, No. 4 West's Cal. Legis. Service, pp. 604-607), and no published decision has addressed the issue presented here.

At the outset, we observe that appellants were obliged to plead *specific* facts sufficient to bring their actions within subdivision (b)(2). As Witkin explains, when a plaintiff seeks to avoid the operation of a statute of limitation by invoking a statutory or judicially developed defense, the plaintiff must allege the specific facts supporting the defense. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 883-886, pp. 342-346.) Thus, if the plaintiff relies on the defense of delayed accrual due to fraud or mistake, "[t]he showing of excuse for late filing must be made in the complaint. Formal averments or general conclusions to the effect that the facts were not discovered until a stated date, and that the plaintiff could not reasonably have made an earlier discovery, are useless. The complaint must set forth specifically (a) the facts of the time and manner of discovery; and (b) the circumstances that excuse the failure to have made an earlier discovery." (*Id*. at § 883, p. 342.) Essentially similar requirements govern the pleading of other statutory defenses and equitable assertions of estoppel. (*Id*. at §§ 884-886, pp. 343-346.)

The key issue, therefore, concerns the nature of the specific facts that appellants were required to allege to invoke the defense provided by subdivision (b)(2). This poses a question of law, namely, the proper interpretation of a statute. (*R & P Capital Resources, Inc. v. California State Lottery* (1995) 31 Cal.App.4th 1033, 1036.)

"The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning." (*In re Jerry R*. (1994) 29 Cal.App.4th 1432, 1437.) However, "the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In applying these principles, we observe that subdivision (b)(2) carves out an exception to the limitation period in section 340.1. Generally, exceptions to a statute are construed narrowly to cover only situations that are "within the words and reason of the exception." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 20.)

In our view, subdivision (b)(2) imposes stringent requirements on the requisite constructive knowledge. To begin, this provision demands awareness—actual or constructive—that the particular individual who is the target of the action committed sexual abuse, and this awareness must be sufficiently firm to warrant removing *that individual* from contact with children. Subdivision (b)(2), by its plain language, applies to an entity that (1) had actual or constructive knowledge of unlawful sexual conduct by a person, yet (2) "failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct *in the future by that person*, including, but not limited to, *preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment*." (Italics added.)

Furthermore, the constructive knowledge required of an entity under subdivision (b)(2) must meet more exacting standards than the foreseeability of misconduct that may impose a duty of care upon the entity. The latter form of foreseeability is an element of an inquiry into the benefits and burdens of declaring

that parties have a duty of care in a specific kind of factual situation. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472-473.) In assessing foreseeability in this context, the court does not examine "'whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed . . . .'" (*Id*. at p. 476, quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573.)

As we have explained (see pt. B.2, *ante*), subdivision (b)(2) creates an exception to the statutory period for actions under subdivision (a)(2) of section 340.1, which include actions for negligence against an entity that "owed a duty of care to the plaintiff." Accordingly, in order for a plaintiff to have an action against an entity under subdivision (a)(2), misconduct must be *foreseeable* for the purposes of imposing a duty of care upon the entity.

To hold that this form of foreseeability, *by itself*, satisfies the requirement for constructive knowledge in subdivision (b)(2) is to render the latter requirement "redundant and a nullity, thereby violating one of the most elementary principles of statutory construction. [Citations.]" (*Cal Pacific Collections, Inc. v. Powers* (1969) 70 Cal.2d 135, 139.) For this reason, subdivision (b)(2) imposes more stringent demands on constructive knowledge than the concept of foreseeability ordinarily applicable to negligence claims.

In view of these determinations, we conclude that to plead constructive knowledge properly under subdivision (b)(2), appellants may not merely allege that respondents knew facts that raised a generalized prospect or possibility of sexual abuse by Kalish. Rather, appellants were obliged to allege in specific terms that respondents knew facts that—if acted upon in a reasonable manner—would

have prompted them to investigate Kalish with a thoroughness likely to establish that he had engaged in unlawful sexual abuse.

3. *Appellants' Complaints*

We therefore turn to the allegations in appellants' complaints. At the threshold, we note that although these complaints do not allege that BSA participated in the day-to-day operations of the LAPD's DAP, Explorer and Scout programs, they assert that the City acted as the BSA's agent. Because an agent's knowledge may be imputed to its principal (Civ. Code, § 2332; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 150, pp. 195-196), we focus our inquiry on the facts alleged to be known to the City through the LAPD.

Here, the complaints allege that Kalish sexually abused appellants and other participants in the pertinent programs. Aside from these allegations, the complaints assert that other LAPD officers involved in the pertinent programs engaged in misconduct. They allege that Jim Dellinger embezzled money from the programs, and Robert Von Villas was convicted of several felonies—including murder—that were apparently unrelated to the programs. However, the complaints lack any allegation that this conduct by Dellinger and Von Villas was known to the LAPD during the pertinent period.

Both complaints allege the following facts on information and belief: During the pertinent period, the LAPD was aware of incidents of sexual abuse unrelated to Kalish that had occurred nationwide in the Explorer program, and within the LAPD program itself. BSA policies and guidelines required the LAPD to "vet" adult participants in the program, recruit only competent adult leaders, and prevent fraternization and one-to-one contact between adults and children outside sanctioned events. Before Kalish became an advisor, it was well known within the

LAPD that he routinely stopped by at DAP events and talked exclusively to young boys. Dellinger once had program participants paint Merlin Olsen's auto body shop, and after Kalish became an advisor, he had program participants wallpaper, paint, and landscape his house. LAPD officers, including Kalish, routinely provided beer to underage participants in the Explorer and Scout programs at sanctioned events, including trips to the Mojave Air Show, motorcycle races, and waterskiing events.

The complaints further allege on information and belief: It was "commonly known among other officers" that after Kalish became an advisor, he hung around boys in the Explorer and Scout programs, offering them rides, beer, and gifts. It was also "commonly known"—here, there is no reference to other officers—that Kalish issued an open invitation to boys in these programs to visit his house outside of sanctioned events, and that inappropriate activities took place at his house, including underage drinking and viewing of pornography. Other officers knew that he traveled to Thailand, "a known haven for pedophiles," and at least one officer saw him there with a young Thai boy. Kalish openly associated with a known pornographer who made "boy-on-boy" films.[4] Many LAPD officers viewed the Explorer and Scout programs as "ticking time bombs" due to the lax supervision and incidents of improper fraternization.

Finally, the complaints allege—apparently not on information and belief—the following facts: Kalish drank alcohol, often in the company of LAPD officers and program participants who also drank alcohol, and he sometimes provided beer

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[4] The complaints also allege on information and belief that this pornographer spent time at Kalish's house, and Kalish pressured appellants and other program participants to make pornographic films, but they lack any allegation that the LAPD was aware of these facts.

to participants. He once openly handed out LAPD coats and T-shirts to several participants in the programs at a police station, and he openly picked up participants—including appellants—at police stations and took them on ride-alongs or gave them rides home or to his house. He took appellants to the police academy, where they would go jogging or play racquetball, and he sometimes bought them gifts in the academy gift shop.

4. *Analysis*

In our view, these allegations do not establish the requisite constructive knowledge.

To begin, the bulk of the material allegations—especially the BSA's and LAPD's policies regarding fraternization—are improperly pled on information and belief. Generally, facts may be alleged on the basis of information and belief when "the allegations are as to matters which are peculiarly within the knowledge of the defendants and as to which plaintiffs could learn only by statements made to them by others." (*Woodring v. Basso* (1961) 195 Cal.App.2d 459, 464-465; see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 359-360, pp. 461-463.)

However, as the court explained in *Woodring v. Basso*, *supra*, 195 Cal.App.2d at pages 464-465, a party seeking to avoid the operation of a statute of limitation on the basis of fraud must meet an additional requirement: there must be "a statement of the facts upon which the belief is founded." In *Woodring*, the plaintiff sought to set aside a judgment of the probate court and avoid the applicable statute of limitations by alleging fraud by the defendants in connection with the distribution of property under the terms of a will. (*Id*. at pp. 461-464.) The plaintiff's second amended complaint alleged on information and belief that the defendants had known of the plaintiff's existence and entitlement to a share of

the property, but they had failed to disclose these facts to the probate court before it entered its judgment. (*Id*. at p. 464.)

After the trial court sustained a demurrer to this complaint without leave to amend, the court in *Woodring* affirmed. (195 Cal.App.2d at pp. 465-468.) It acknowledged that although the facts allegedly known by the defendants might have been "peculiarly" within their knowledge, the plaintiff had failed to allege the source of *her own information* that the defendants had known the facts in question. (*Id*. at p. 465.) Here, the *Woodring* court cited *Dowling v. Spring Valley Water Co.* (1917) 174 Cal. 218, 221, for the proposition that a complaint properly alleges on information and belief that a party possessed the knowledge required for fraud only when it contains "allegations of facts which show positively or by reasonable inference that such knowledge must have been possessed by the person accused of the fraud."

We conclude that the pleading requirements in *Woodring* are applicable here. As we have explained, essentially similar requirements govern the pleading of any defense to the statute of limitations. (See Discussion, pt. B.2., *ante*.) Moreover, the defense of fraud, like the defense provided under subdivision (b)(2), hinges on allegations that the adverse party failed to act properly on information within its ken.

Here, the crux of appellants' allegations pleaded on information and belief is that Kalish openly violated program policies against fraternization in the presence of other LAPD officers and program participants, and these violations were thus known to the LAPD. To the extent that appellants purport to allege "open" or commonly known facts, they are not "peculiarly within the knowledge of the defendants" (*Woodring v. Basso*, *supra*, 195 Cal.App.2d at p. 465), given that appellants otherwise allege that they participated in the program and in activities at

Kalish's house. Accordingly, these facts are improperly alleged on information and belief.

Furthermore, to the extent that the pertinent allegations concern facts that may arguably fall within the "peculiar knowledge" of respondents, they are unsupported by any "statement of the facts upon which the belief is founded." (*Woodring v. Basso*, *supra*, 195 Cal.App.2d at p. 465.) This omission is especially evident regarding the crucial allegations about the program policies. Here, the complaints assert only the following: "Plaintiff further alleges that if such policies and guidelines were not in place at that time that they should have been."

Setting aside the facts improperly pled on information and belief, the complaints establish only that LAPD was aware that (1) Kalish and other officers distributed alcohol to program participants, and (perhaps) they recruited participants to perform chores at Kalish's house and elsewhere; (2) Kalish devoted time to the programs, even before he became an advisor; (3) he favored some program participants; (4) he socialized with participants outside program events; and (5) he traveled to Thailand, where he was once seen in the company of a young Thai boy. Absent properly pled facts about the policies regarding fraternization, these facts reasonably support the conclusion that LAPD should have made a general inquiry into alcohol- and chore-related misconduct by LAPD officers within the programs, but not that LAPD should have launched an investigation focused on Kalish that would uncovered his sexual misconduct.

Appellants disagree, suggesting that LAPD's knowledge of Kalish's conduct, coupled with respondents' knowledge of prior—but unrelated—incidents of sexual abuse within the Explorer and Scout programs, both nationwide and locally, adequately placed them on notice of Kalish's sexual abuse. We are not persuaded. As we have indicated (see Discussion, pt. B.2, *ante*), although these

unrelated incidents of sexual abuse are relevant to the foreseeability of harm pertinent to the imposition of a duty of care, they do not establish the constructive knowledge required under subdivision (b)(2).[5]

In sum, the trial court properly sustained respondents' demurrers to the pertinent complaints.

C. *Denial of Leave to Amend*

Finally, we conclude that the trial court did not err in denying appellants leave to amend their complaints. John Doe has amended his complaint four times, and in sustaining the demurrers to his third amended complaint, the trial court directed him to cure the deficiencies in its allegations regarding respondents' constructive knowledge. Appellants share the same counsel, and thus John Doe 2 was aware of the aforementioned ruling before he filed his first amended complaint. Leave to amend was therefore properly denied.

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[5] At oral argument, appellants' counsel also contended that prior to discovery, the material facts relevant to respondents' constructive knowledge are inaccessible to appellants, and thus must be pled on information and belief. We are not persuaded that this contention dispels the deficiencies in their complaints. As we have indicated, appellants are entitled to plead such facts on information and belief, provided that they also adequately allege the source of their belief that these facts will be uncovered during discovery. However, they have failed to do so.

DISPOSITION

The orders of the trial court are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.*

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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THE COURT:

The opinion in the above-entitled matter filed on February 24, 2006, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

EPSTEIN, P.J. CURRY, J. HASTINGS, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.