Case No. A103827

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

Clyde Terry,
Anne Terry, Plaintiffs and Appellants

v.

Alan Levens,
Karen Levens, Defendants and Respondents

Appeal from the Superior Court for Solano County
Franklin R. Taft, Judge

APPELLANTS' OPENING BRIEF

Patrick H. Dwyer,
Attorney for Plaintiffs and Appellants

April 12, 2004

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I. Introduction

This appeal is from the Judgement entered against the Appellants on July 31, 2003, in Department 15 of the Superior Court for the State of California, County of Solano. The grounds for appeal are extensive and the result of numerous prejudicial rulings by the trial court.

The appealable rulings and orders all began with a hearing on March 14, 2003, concerning Appellants' Motion for a Temporary Restraining Order to abate certain illegal electrical wiring and a trailer installed by the Respondents on premises leased from Appellants (hereafter "TRO Motion"). At the conclusion of the hearing the trial court, rather than simply granting or denying the TRO Motion, instead ordered Appellants' entire case to immediate trial. This incredible order was made despite the fact that the case was less than four months old, discovery had only just started, the case was not entitled to preference on the calendar (and neither party had made any request for preference), and it was impossible for Appellants to properly prepare the case for trial in less than 30 days time.

Once the trial court had made its unprecedented order to try the case without discovery in less than 30 days, the trial court was faced with the consequences of its actions: a trial of Appellants' case without affording them due process of law. The end result was predictable. The subsequent pre-trial hearings, the trial, and the various orders made by the trial court present the epitome of structural due process error and a case study in what the rules of civil procedure are designed to prevent.

Appellants seek the aid of this Court of Appeal to not only correct the structural due process errors, but to conduct a trial *de novo* of the TRO Motion and apply the express language of the lease to the factual findings. If this is done, it should be dispositive of the entire case.

II. Statement of the Case

A. The Lawsuit.

In April, 2001, the Appellants entered into a commercial lease for a certain portion of their property in Dixon, California with Respondents for use as a dog kennel and an obedience training facility. After over a year and a half of attempting to obtain the Respondents' compliance with certain terms of the lease, the Appellants decided that their only recourse was to file a lawsuit to terminate the lease. The Appellants choose not to file an action for unlawful detainer, but instead to proceed with actions at law for breach of contract, trespass, and misrepresentation. Subsequently, injunctive relief was sought with respect to two matters: first, the lack of insurance coverage as required by the lease for the type of dog training being conducted by the Respondents (protection, police and Shutzhund training); and second, the removal of hazardous electrical wiring and an illegal trailer which had been installed by the Respondents on the leased premises without a permit.

B. The First Motion for a Temporary Restraining Order – No Insurance Coverage.

The Appellants filed a motion for a temporary restraining order at the outset of the lawsuit concerning the lack of insurance coverage for the protection (aka attack), police, and Shutzhund type dog training being conducted. See Clerks' Transcript on Appeal (hereafter "CT"), pages 28-40. This motion was urgent because, although the Respondents had a policy of insurance still in effect for thirty more days, there was no coverage under the policy for the types of dog training being conducted, thereby exposing the Appellants to serious legal liability in the event of a incident involving a dog attack. The Appellants' motion for this restraining order did not affect the Respondents' continued commercial operation of the dog boarding kennel on the

leased premises.[1] The Appellants' motion was finally heard on January 23, 2003. Although this first motion for a restraining order was denied, it was denied without prejudice pending further action on the part of the Respondents to obtain new insurance that covered their actual training activities on the leased premises. Reporter's Transcript on Appeal (hereafter "RT"), January 23, 2003, page 27, lines 13-23.

C. **The Demurrer.**

While the parties were waiting for the hearing on the first motion for a restraining order, the Respondents filed a demurrer to the Complaint. The demurrer was denied in all substantive respects.[2]

D. **The Second Motion for a Temporary Restraining Order – Illegal Wiring and Trailer**.

In February, 2003, shortly after the hearings on the first motion for a restraining order and the Demurrer, the Appellants received from Solano County a Notice of Violation and Order to Comply concerning the electrical wiring and trailer that the Respondents had installed on the leased premises in violation of the terms of the lease and without a permit (Plaintiffs' Exhibits 38, Sections 6-7 and Plaintiffs' Exhibit 57). Under the lease, any leasehold improvements had to be made by Respondents in compliance with all applicable regulations and laws (Plaintiffs'

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[1] The Respondents, rather than focus their arguements on the merits concerning whether or not there was insurance coverage, instead began accusing the Appellants of being on a "campaign" to drive them out of business. The Motion for a TRO respecting insurance was properly limited to the dog training activities of Respondents, and did not affect the dog boarding portion of their business. See CT pages 28-29, pages 42-44, 160-161.

[2] It was sustained with respect to a minor technical amendment that Appellants corrected with the filing of the First Amended Complaint. No further challenge was ever made to the Appellants' pleadings.

Exhibit 38, Sections 6-7). The Notice of Violation and Order to Comply gave Appellants thirty days to comply (Plaintiffs Exhibit 57). Because the Appellants had been trying unsuccessfully for over a year to get these problems corrected by the Respondents and had specifically recited these problems in the original complaint filed in late November, 2002 (CT pages 2-27) the Appellants had no choice but to file the second motion for a temporary restraining order to have the illegal electrical wiring and trailer removed from the leased premises (hereafter the TRO Motion"). To not have filed the TRO Motion would have subjected the Appellants to fines and prosecution by Solano County and expose them to legal liability if anyone was injured as a result of these hazardous conditions. The TRO Motion only sought the removal of the offending items, and did not affect any use of the leased premises by Respondents (CT pages 244-253).[3]

On March 14, 2003, the trial court conducted the hearing on the TRO Motion. Appellants presented their evidence respecting the hazardous electrical wiring and the illegal trailer and its hookup to the leased premises. The Respondents did not present any rebuttal evidence.[4]

E. The Trial Court's Ordering of the Entire Case to Immediate Trial Without Discovery.

It was at this juncture that the case went inexplicably awry. At the end of the

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[3] In the same manner as with the Motion for a restraining order respecting insurance, the Respondents accused the Appellants of being on a "campaign" to drive them out of business. CT pages 280-282. The TRO Motion was properly limited to removing the illegal electrical wiring and trailer and would have had no effect on the Respondents' business operations. CT pages 244-253.

[4] Instead, the Respondents argued in their opposition papers that the TRO Motion should be denied on the grounds of laches and unclean hands. Appellants responded to the legal arguments about laches and unclean hands in their reply memorandum. CT pages 398-418.

presentation of evidence and argument on the electrical wiring and trailer, the trial court became visibly angry with both parties. The trial court then, without explanation, pronounced: "I'm going to set the matter for trial." RT March 14, 2003, page 97, line 13.

The trial court gave no explanation for ordering the case to immediate trial. It was clear that the trial court was angry at both sides, especially at Appellants. However, the trial court made no effort to explain what it was angry about or to obtain an explanation or apology from either party. The trial court did not discuss or order sanctions against either party. Appellants best guess is that the trial court ordered the case to immediate trial because it wanted to get rid of the case and to punish the Appellants for unknown reasons.

F. **The Denial of the Motion for a Temporary Restraining Order to Remove the Illegal Electrical Wiring and Trailer.**

The trial court then turned back to the subject of the hearing, the TRO Motion. The trial court, in the midst of its anger, ignored all of the evidence proving the illegal electrical wiring and trailer, and denied the motion on the grounds of laches and unclean hands. RT March 14, 2003, page 97, lines 14-23.

G. **The Severing of any Cross Complaint.**

The trial court then started to set out the pre-trial matters. Counsel for Respondents spoke up and asked what the trial court wanted to do with the anticipated cross complaint. RT March 14, 2003, page 98, lines 25-28. The trial court responded "[a]s to the cross complaint, I'm going to sever it because I'm going to have a trial on this, and the trial is going to be April 11." RT March 14, 2003, page 99, lines 1-3.

H. **The Order Not to File Any More Motions**.

At the end of the TRO Motion hearing, the trial court went one more step along the path of denying Appellants due process. The trial court ordered the Appellants to not file any more motions with the court prior to trial. RT, March 14, 2003, page 100, lines 21-22; see Section VII, infra.

I. **The Pre-Trial Proceedings**.

The trial court's order setting the entire case for trial on April 11 (only 4 months after its filing) forced the Appellants to immediately prepare their entire case for trial without benefit of any discovery under Title 3, of the California Code of Civil Procedure. See California Code of Civil Procedure §2024, which cuts off discovery 30 days before trial.

On April 3, 2003, there was a hearing on a motion by Appellants for leave to file motions to continue the trial and to amend the complaint. The trial court made it clear that it would allow the motions to be filed, but that the case was going to trial on April 11, 2003, no matter what the Appellants said in their motions. RT April 3, 2003, page 6, lines 12-23.

On April 9, 2003, the trial court held a pre-trial hearing. Both sides submitted the necessary materials as best they could in the time allowed. At the hearing, and without any prior notice to either side, the trial court moved the trial date to April 25 to correct for a scheduling error by the court. RT, page 7, line 9, through page 11, line 5.

On April 24, 2003, the trial court held another pre-trial hearing. The trial court began the hearing by announcing that, once again, it had to move the trial date because of a calendar oversight. Then the trial court made its in limine rulings that allowed the Respondents to submit evidence about all kinds of issues that had nothing to do with the causes of action in the complaint. RT April 24, 2003, page 10, lines 12-25. This was a highly prejudicial error that

further made it impossible for the Appellants, without the aid of discovery (let alone the ability to amend the complaint to include issues that the Respondents would raise) to present their evidence and case at trial. RT April 24, 2003, page 10, lines 12-25.

Returning to the date for trial, the trial court told counsel for Appellants that he would force them to try the case in three days or face mistrial unless the Appellants promised not to contact the Respondents' insurer about the extent of the policy coverage. RT April 24, 2003, page 18, lines 8-14. In effect, the trial court was attempting to extort Appellants' agreement not to contact Respondents' insurance company to determine if there was coverage for the types of dog training that the Respondents were doing on the leased premises by threatening to force the Appellants to an early trial date with insufficient time to present their case. Since the Appellants had no other means for discovery as to the nature of the coverage under any of the insurance policies, the Appellants were denied any possible means of gathering evidence to prove a major portion of their lawsuit.

J. **The Trial.**

A list of all witnesses for trial had to be produced by both parties on April 9, 2003. Both Appellants and Respondents timely complied. RT April 9, 2003, pages 4-5, pages 9-11. Just three weeks before the commencement of the trial in July, 2003, the Respondents presented a new, additional list of witnesses that they wanted to call for trial. RT July 21, 2003, page 6, lines 11-25. Appellants objected to the new witnesses on the grounds that they were not on the original witness list as was required to be submitted on April 9, 2003, and that there was no opportunity for discovery concerning these witnesses. RT July 21, 2003, page 6, lines 28 through page 7, line 23. Except for one witness, which the trail court said could be called in

rebuttal, the trial court overruled Appellants' objection and allowed these new witnesses to testify. RT July 21, 2003, page 7, line24 through page 13, line 17.

At the conclusion of the Appellants' case in chief, the trial court granted Respondents' motions for nonsuit with respect to the First, Second, Sixth and Seventh Causes of Action. The record demonstrates that there was no basis in law or fact for the trial court's granting of the nonsuit and that each such nonsuit was reversible error.

After the granting of the nonsuits, Appellants' case was effectively gutted by the trial court. The jury came back from a break to an entirely different case and no one could explain to them what had happened. The damage was obvious and there was nothing that the Appellants could do to overcome what the trial court had done.

III. **Statement of Appealability**

On August 13, 2003, Appellants filed a Notice of Appeal from the Judgement entered on July 31, 2003, in Department 15 of the Superior Court for the State of California, County of Solano. CT page 483. The Notice of Appeal was timely filed under California Rules of Court, Rule 2(a)(1). The Appeal was made pursuant to California Code of Civil Procedure §904.1(a)(1)(appeal from a judgment) and §904.1(a)(6) (appeal from denial of motion for injunctive relief).

IV. Appellants' Lawsuit was Not Entitled to Preference and the Trial Court's Order of March 14, 2003, Ordering the Case to Immediate Trial Was Without Statutory Foundation.

The trial court's order of March 14, 2003, setting Appellants' entire case for immediate trial on April 11, 2003,[5] (hereafter the "Trial Date Order) was based upon the Court's finding that the case was entitled to preference over all other trials except for criminal trials. RT, March 14, 2003, page 97, lines 13 and 24, page 98, line 16-17, page 100, lines 6 through 12. At the time of making the Trial Date Order, the Court did not specify any statutory or other basis for its finding that the case had immediate precedence over any other case.

Appellants subsequently filed a Motion for an Order Shortening Time for Hearing on a Motion to Continue the Trial Date, and a Motion to Amend the First Amended Complaint. CT, pages 447-448 (Motion for Order to Shorten Time); pages 449-466 (Motion to Continue the Trial Date); and pages 430-442 (Motion to Amend).

At a hearing on April 3, 2003, at which time the trial court heard Appellants' Motion for an Order Shortening Time, the trial court made it crystal clear that, although it would allow the Appellants to file the two motions, it was not going to grant them. The trial court's words were:

> I think that you would be better advised to prepare for trial than count on my counting [sic] your motion on the eve of filing them... I'll give you a chance to be heard. I'm not necessarily prejudging it, except that I did make an order, I want this case to be heard, and its going to trial on the date that I set. RT, April 3, 2003, page 6, lines 13-16 and lines 20-23.

The trial court issued a tentative ruling on April 8, 2003, denying Appellants' Motion to Continue the Trial Date and Motion for Leave to Amend The First Amended Complaint.

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[5] The April 11, 2003 trial date was less than 30 days from the March 14, 2003, hearing.

Documents Omitted from Clerks' Transcript on Appeal (hereafter "DOCT"), page no. 35.[6]

The Motion to Amend the First Amended Complaint was denied because the trial court found that "the proposed amendments to the complaint do not add anything substantive to the first amended complaint sufficient to permit the delay inherent in such amendments and responses thereto." DOCT, page no. 35. Considering the fact that, should the Motion to Amend the First Amended Complaint have been granted, there was nothing further to be done but to file a second amended complaint, the trial court's stated grounds for denial of the proposed amendment was without any reasonable foundation. No delay in the trial date would have occurred.

The trial court, determined to force the Appellants to immediate trial, and ignoring Appellants' plea for time to conduct discovery, denied the Appellants' Motion to Continue the Trial Date with the following statement:

> The motion to continue the trial is likewise denied. The case has been pending for over four months, enough time to conduct discovery in such a case, and Plaintiffs have not suggested any specific due process rights which they have been denied by the setting of the current trial date. The court deems this matter to sound in unlawful detainer and injunctive relief, as demonstrated by Plaintiffs', and their counsel's actions during the pendency of the action, and as such has been given preference.

DOCT, page no. 35.

The trial court completely ignored all of the arguments presented in Appellants' Memorandum of Points and Authorities filed in support of the Motion to Continue the Trial Date. CT, pages 451-466. This included the Appellants' argument that the deprivation of any

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[6] The tentative ruling became the final ruling. There was a hearing on April 9, 2003, but there was no further argument before the trial court.

reasonable period of time to conduct discovery (e.g., taking depositions or propounding interrogatories, requests for admission or the like) was a clear violation of the Appellants' due process rights because it prevented them from discovering and then presenting the evidence necessary to support their case. See Section V, infra.

Moreover, the trial court ignored the Appellants' argument that all of the causes of action in the First Amended Complaint were actions at law and that the Appellants had intentionally filed the case on that basis rather than file an action for unlawful detainer under California Code of Civil Procedure §1161 et seq. The trial court cited no authority, statutory or otherwise, for having the power, *sua sponte*, to simply *deem* that the Appellants' case sounded in unlawful detainer, thereby nullifying the Appellants' election to file an action at law.[7]

The California Legislature, when it enacted Chapter 4, Summary Proceedings for Obtaining Possession of Real Property in Certain Cases, California Code of Civil Procedure §1161 et seq., did not eliminate the previously existing actions at law for breach of contract. It simply created a summary procedure for land owners to use to regain possession of real property in a more timely manner than they could under an action for breach of contract. Landowners were given a procedural choice, with pros and cons for each one, as to which type of action to they wanted to bring. See Witkin, Summary of California Law, Ninth Edition, Real Property, Action for Damage, §676, citing to California Civil Code §1951.2; and Witkin, Summary of California Law, Ninth Edition, Real Property, Unlawful Detainer, §685, citing to California

[7] Prior to filing the original complaint, Appellants and their counsel had discussed the possible courses of action and had concluded not to file an unlawful detainer action under Code of Civil Procedure §1161 et seq., but instead, to file an action at law with the various causes of action. It was their legal right to elect what procedural remedy they wanted to pursue.

Code of Civil Procedure §1161 et seq. There is no authority anywhere in Chapter 4, Summary Proceedings for Obtaining Possession of Real Property in Certain Cases, California Code of Civil Procedure §1161 et seq., for a trial court, on its own motion, to "deem" an action filed at law to be, instead, an action for unlawful detainer. This is a decision that the legislature reserved entirely for the landowner.

The April 8, 2003, ruling of the trial court that the case "sounded in unlawful detainer", CT page 35, was not only erroneous, but was contradicted by the trial court, itself, the very next day at a pre-trial hearing. At the April 9, 2003, pre-trial hearing, there was a discussion between counsel for Respondents and Appellants and the trial court regarding what issues were to be decided by the trial court and what issues should go to the jury. The Respondents argued that the entire case sounded in equity and that the trial court should decide the entire case, i.e., that there were no causes of action at law and no questions of fact for a jury to determine. Appellants, of course, disagreed. RT April 9, 2003, page 6, line 1, through page 7, line 6. What is most interesting is the trial court's ruling against the Respondents. The trial court sided with the Appellants finding: "that all of the causes of action are in effect legal causes of action." RT April 9, 2003, page 7, lines 1-6. This ruling that all of Appellants' causes of action were "legal" in nature was the exact legal argument made by Appellants to support their Motion to Continue the Trail Date: i.e., that the case was not an unlawful detainer case or just an action for equitable relief, but an ordinary action at law with no basis for preference on the calendar. CT pages 449-457. This was the very argument that the trial court had just rejected the day before in its ruling denying Appellants' Motion to Continue the Trial Date. ODCT page 35. The inconsistency is striking and makes the trial court's ruling of April 8, 2003, even more troubling.

V. Due Process Under the United States and California Constitutions Gives Appellants the Fundamental Right to Reasonable Discovery of Evidence in the Prosecution of Their Suit.

1. Appellants Have a Due Process Right to a Fair Hearing, Which Includes the Right to Produce Evidence and Cross-Examine Witnesses.

Under the 14th Amendment to the United States Constitution and Article I, Sections 7 & 15 of the California Constitution, no person may be deprived of life, liberty, or property without "due process of law". The words "due process of law" refers to a principal that "fundamental fairness" must be applied to every party in a civil or criminal proceeding. Lassiter v. Department of Social Services (1981) 452 U.S. 18, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648; see also, Witkin, Summary of California Law, Ninth Edition, Constitutional Law, §481.

The due process requirement of fundamental fairness has been expressly interpreted to include the right to have a "fair hearing".[8] A fair hearing includes the right to produce evidence and cross-examine parties. This fundamental element of due process was eloquently summarized by the California Court of Appeals, Second District, in Buchman v. Buchman (1954) 123 Cal. App. 2d 546, 560:

> Judicial absolutism is not part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without a hearing. *When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure*. Procedure is

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[8] Appellants note that the concept of "fundamental fairness" is the starting point for analysis of both "substantive" and "procedural" due process, and that the question before this Court is one of procedural, not substantive, due process. See Witkin, Summary of California Law, Ninth Edition, Constitutional Law, §481.

> the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgement accordingly. (Emphasis Added).

Accord Fewel v. Fewel (1943) 23 C.2d 431, 433; People v. Lawrence (1956) 140 Cal.App.2d 133, 136-137; People v. Thompson (1935) 5 Cal. App. 2d 655, 659-661; see also Witkin Summary of California Law, Ninth Edition, Constitutional Law, §§502-503.

2. **The Denial of the Due Process Right to Produce Evidence and Cross Examine Witnesses is a Structural Error That is a *Per Se* Due Process Violation Requiring Reversal.**

It is axiomatic that the denial of the right to produce evidence and cross-examine witnesses vitiates any possibility of a fair hearing or trial. Both the United States Supreme Court and the California Supreme Court have ruled that where the error is in the basic *framework* of the judicial process in the preparation for trial, it is a *structural defect that cannot be cured* because it is not possible for the trial court to correct such errors in the course of the trial. *Consequently, such an error is reversible per se, and not subject to the application of the harmless error standard.* Arizona v. Fulminate 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1264-1265, 113 L.Ed.2d 302; see Fewel v. Fewel (1943) 23 Cal. 2d 431, 433; Judith P. The Superior Court (2002) 102 Cal. App. 4th 535, 554-558; see also Eisenberg et al, California Practice Guide, Civil Appeals and Writs (The Rutter Group) Ch. 8, §8:308, p. 8-138.

The Court of Appeals, Second District, in Judith P. v. Superior Court at 556-557,[9]

[9] This case dealt with the question of whether the failure of the Los Angeles County Department of Children and Family Services (DCFS) to serve the plaintiff with a copy of the status report concerning the plaintiffs' desired reunification with her three children within the

presented an excellent methodology for determining whether a due process error was a *per se* violation, or subject to the application of the harmless error rule.[10] First, the Court described in two parts the "trial versus structural error" test set down in Arizona v. Fulminate, 499 U.S. at 310, for determining if the violation is subject to the per se rule: did the due process failure involve a "basic protection"; and was the setting of the hearing, which included the pre-hearing process, "fundamentally fair". It then applied this rule as follows:

> Applying the trial versus the structural error analysis here, the failure to give a parent or minor adequate time to prepare for a ... hearing is an error that does not happen *during* the presentation of the case; in other words, it does not happen *during* the ... hearing. Rather, it happens before the hearing. Nor does this kind of error allow an after-the-event assessment of the error in relation to what *did* happen at the hearing.

Judith P.Superior Court at 556-557. Most importantly, the Court of Appeals observed that pre-trial structural errors are very different from errors at trial such as the erroneous admission of evidence or improper instructions. Judith P.Superior Court at 557. This is because the latter can be reviewed in light of the evidence and/or instructions as a whole in contrast to pre-trial structural errors which can not be evaluated. The Appeals Court expounded on this difference with the following analysis:

> Unlike erroneous admission of evidence or improper instructions, which can be reviewed in light of the evidence or instructions as a whole, the impact of having less than the statutorily mandated minimum time within which to (1) confer with one's lawyer, (2) contact witnesses, (3) obtain documents, (4) prepare for

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statutorily mandated ten-day period before a required hearing was a due process error.

[10] The "harmless error" standard of review arises from the U.S. Supreme Court decision in Chapman v. California (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711.

> examination and cross examination, and (5) hone one's arguments, is impossible for either a trial court or appellate court to assess. Thus, these factors indicate that the error is not a trial error.

Judith P.Superior Court at 557.

3. **The Trial Court Denied Appellants Any Reasonable Opportunity for Discovery of Evidence and to Otherwise Prepare Their Case at Trial**.

As described in the Summary of the Case, the Appellants were denied the right to discover and then produce evidence at trial as a direct result of the trial court's *sua sponte* Trial Date Order.

Because the Trial Date Order set a trial date that was less than 30 days from the date thereof, the Appellants were prohibited from doing any meaningful discovery of evidence to support their case at trial. California Code of Civil Procedure §2024 sets a discovery cutoff date that is 30 days before trial.[11] Appellants filed a Motion for a Continuance on April 3, 2003, requesting the trial court to continue the date for trial so as to allow for discovery of evidence through the usual methods, including taking depositions, propounding interrogatories, making document requests, and submitting requests for admission. CT pages 449-466. However, the trial court, by order dated April 8, 2003, denied the Appellants' Motion for a Continuance. CT page 35.

The complete denial of normal civil discovery severely debilitated the Appellants' preparation for trial. For example, the Appellants were unable to take the deposition of the Respondents or any of the third party witnesses they called, including Respondents' expert

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[11] CCP §2024(a) reads in pertinent part: "Except as otherwise provided in this section, any party shall ... complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action."

witnesses.[12] The consequence was a trial in which the Appellants had to present their case with their hands tied behind their backs. It was impossible under these circumstances for the Appellants to effectively present convincing evidence in support of the complaint that they had filed.

4. The Trial Court's Order Denying the Appellants' Due Process Right to Discover Evidence is a Structural Error That is *Per Se* Reversible Error.

Applying the legal standard for *per se* due process error as set forth in the foregoing discussion is straightforward. Appellants were simply unable to conduct any reasonable discovery to prepare their case for trial. As expressly stated by the Second District Court of Appeal in Judith P. at 557, the Appellants had an unequivocal right to "contact witnesses", "obtain documents", prepare for "examination and cross-examination", and "hone one's arguments". The Trial Date Order simply cut the Appellants off at the knees, leaving them to go to trial with no viable means of presenting the best evidence in support of their case.

The extraordinary nature of the Trial Date Order in this case is demonstrated by the Appellants inability to find a single decision in California, or any other state or federal jurisdiction, dealing with the same issue. The action of the trial court in this case was, quite literally, unprecedented.

However, the Appellants have found three California Court of Appeals decisions that, in dictum, are in full accord with the federal and California decisions discussed above that establish

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[12] Such witnesses included the defendants (Alan and Karen Levens), Kennel Pak , Travelers Insurance Co., Dennis Stowers, CNA Insurance Company, and others. The deposition of these witnesses was essential to Appellants' presenting evidence at trial for all of the seven causes of action.

the criteria for determining when a violation of due process is a structural error requiring reversal *per se.* These three appellate decision acknowledged the right of a party to conduct discovery of evidence in a civil case in a reasonable manner and time, and although dictum, are strongly supported by the statutory rules for discovery of evidence created by the California Legislature.

A. **The California Legislature Has Mandated a Right to Conduct Reasonable Discovery in the California Code of Civil Procedure**.

The California Legislature appears to have expressly incorporated the constitutional due process right to reasonable discovery into a statutory mandate as set forth in California Code of Civil Procedure §2017 and §2024. CCP §2017(a) states:

> Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...

And CCP §2024(a) mandates that:

> Except as otherwise provided in this section, any party shall be entitled as a matter of right to complete discovery proceedings ... before the date initially set for the trial of the action.

Applying the "plain language" manner of interpretation to these statutes, it is clear that the California Legislature intended that each party to a civil action has the right to discover any relevant evidence so as to enable that party to offer evidence at trial in support of their position. To allow a trial court to simply bypass these statutory rules for discovery of evidence by ordering the case to immediate trial would be a clear contravention of the California Legislature's intent.

B. The California Court of Appeals Has Clearly Indicated the View that the Denial of Reasonable Discovery in a Civil Suit is a *Per Se* Violation of Due Process.

In Roe v. Superior Court (1990) 224 Cal. App. 3d 642, *review denied* (Jan. 3, 1991), the Fourth District Court of Appeals acknowledged that the due process implications of an early setting of a trial date cutting off a party's discovery rights had not been expressly decided in California.

In the context of a request for trial priority under California Code of Civil Procedure §36, apparently on the grounds of defendant being over 70 years of age, the court summarized the state of the law:

> We are aware that the provisions of section 36 are mandatory. (*Swaithes v. Superior Court* (1989) 212 Cal. App. 3d 1082, 261 Cal. Rptr. 41.) We are also aware that *Swaithes* briefly indicates that this preference can operate to truncate the discovery rights of other parties. (*Id.,* at p. 1085, 261 Cal. Rptr. 41.) *However, we are also aware that the due process implications of this approach have not yet been decided*. (See *Peters v. Superior Court* (1989) 212 Cal. App. 3d 218, 227, 260 Cal. Rptr. 426.) (Emphasis added.)

However, in the case before the Roe Court, the defendant did not argue this point to the Court, and therefore, the Court based its decision on other grounds.[13]

In the context of other time-shortening procedural statutes, a California Court of Appeal has held that parties should be given a reasonable opportunity to obtain evidence through discovery. For example, in Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, *review denied* (Nov 30, 1995), *and cert. denied*, 519 U.S. 809, 117 S.Ct. 53, a

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[13] The Roe Court stated that "[i]n this case, we recognize that it may not be possible to bring the matter to trial within the technical limits of Code of Civil Procedure section 36, subdivision (f). However, defendant Esepenth has not appeared before this court to argue the matter." Id. at 643 n.2, 273 Cal. Rptr. at 745 n2.

case involving California Code of Civil Procedure §425.16 that allows for an expedited special motion to strike and a stay of discovery,[14] the First District Court of Appeal stated that the plaintiff must be given the reasonable opportunity to conduct discovery before the motion to strike is adjudicated. The court stated:

> We acknowledge, however, that the discovery stay and 30-day hearing requirement of [CCP] section 425.16 literally applied in all cases might well adversely implicate a plaintiff's due process rights, particularly in a libel suit against a media defendant.

In stating its reasoning, the Lafayette Court discussed the decision in Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 537. In Looney, the First District Court of Appeal reconciled an apparent conflict between the mandatory requirement of Code of Civil Procedure section 425.13 that defendant be given nine month's notice of a punitive damages claim prior to the trial date, with the plaintiff's right to trial preference under Code of Civil Procedure section 36. The Looney court allowed an exception to be made to the mandatory statute because defendant had, in fact, had ample opportunity to conduct discovery. However, in so holding, the Looney Court found that this exception to Section 425.13 existed only where it was necessary to protect plaintiff's right to a preferential trial date, *and defendant receives a reasonable opportunity to conduct discovery*.

The Lafayette Court presented the following analysis of the statutory time conflict and the right to conduct discovery found in the Looney decision:

> '[a]n ample opportunity to conduct discovery,' by a health care provider sued for punitive damages, was a substantial factor in balancing that defendant's right to nine month's notice of such

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[14] The Lafayette Court was referring to statutes that do not establish trial precedence.

> claim prior to the trial date (§ 425.13) against the plaintiff's right of trial preference (§ 36, subds. (d) & (e)). That opportunity *if sought* is of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn whether the matter published was false and defamatory. Motions under section 425.16 commonly will be filed early in the legal proceedings, before the plaintiff has the opportunity to conduct (or complete) significant and necessary discovery. If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees. Furthermore, while the statute says the motion to strike "shall be noticed for hearing not more than 30 days after service" (§ 425.16, subd. (g)), nothing therein prevents *the court* from continuing the hearing to a later date so that the discovery it authorized can be completed where a reasonable exercise of judicial discretion dictates the necessity therefor. So construed, the statute does not violate a plaintiff's right to due process of law in a libel action against a media defendant.
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> Id. at 867-868 (emphasis in original).

Lastly, the Second District Court of Appeals in Peters v. Superior Court (1989) 212 Cal. App. 3d 218, *review denied* (Oct. 12, 1989), considered an appeal based in part on the grounds that the granting of trial precedence (by motion of a party under California Code of Civil Procedure §36) violated the due process rights of the other party. Although the Peters court denied the appeal, it did not do so on the merits. Instead, it based it ruling on the grounds that the real party in interest “did not claim to the trial court, that if petitioner’s trial setting

preference motion was granted they would have inadequate time to prepare for trial." By reverse implication, the Peters Court would have granted such an appeal as a violation of due process if there had been standing and there had been a timely objection in the lower court.[15] Id. at 227.

Applying the reasoning of the foregoing decisions in Roe, Lafayette, Looney, and Peters to the situation of the Appellants yields only one possible conclusion: that the Trial Date Order, without any logical basis, deprived the Appellants of any reasonable discovery, and as a result, Appellants were deprived of their due process rights. The error of the trial court is a per se violation requiring automatic reversal.

[15] As required by the Peters court, the record in this case shows that Appellants made a timely and clear objection to the cutoff of any discovery by the Trial Date Order.

VI. The Trial Court's Denial of Appellants' Motion for a Temporary Restraining Order Requesting Enforcement of A Solano County Declaration of a Public Nuisance and Order to Abate Was Based Solely Upon Issues of Law and Is Subject to de Novo Review.

The trial courts' March 14, 2003, decision to deny the Appellants' Motion for a Temporary Restraining Order seeking the enforcement of an Order of the Solano County Department of Environmental Management to Abate a Public Nuisance (hereafter the "TRO Denial") was based solely upon questions of law, not fact.[16] Consequently, the trial court's ruling is subject to *de novo* review. Ghirado v. Antonioli (1994) 8 Cal. 4th 791, 799; Tpoango & Victory Partners, LLP v. Toghia (2002) 103 Cal. App. 4th 775, 780-781; see also Eisenberg et al, California Practice Guide, Civil Appeals and Writs (The Rutter Group 2003) Ch. 8, §8:106, p. 8-56.

It is crucial that the Court of Appeals conduct a *de novo* review of the trial courts' TRO Denial for the following reasons:

a. The doctrines of laches and unclean hands, which were the only bases for the trial court's TRO Denial, are doctrines that should not apply to motions for temporary restraining orders for the enforcement of valid local or state codes, regulations or statutes.

b. The trial court's TRO Denial was an unprecedented and unwarranted

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[16] The trial courts' ruling was made sua sponte from the bench. The pertinent part was as follows:

> I'm going to set the matter for trial. The temporary restraining order is going to be denied. I'm going to find, first of all, that it appears that the plaintiffs, probably through Mr. Odom, were making a concerted effort to terminate the lease on whatever basis they can. It started with efforts to cause an insurance cancellation and then now, they're complaining about trailer and electrical work that – that's a year and a half after the fact. I'm going to find they're both subject to laches in defense of (sic) unclean hands.

RT on Appeal, Friday March 14, 2003, page 96, lines 13-21.

judicial nullification of valid Solano County Codes that were adopted by its legislative body for the protection of *public health and safety*, and consequently, the trial courts' action was beyond its judicial authority.

c. A determination that Respondents were, as a matter of law, in violation of the Solano County Codes as of the time of the hearing on Appellants' Motion for a TRO, will dispose of the case *sub judice*, and under the principle of judicial economy, the Court of Appeals should render a judgment on the merits for Appellants.

1. **The Doctrines of Laches and Unclean Hands Do Not Apply to Motions for Temporary Restraining Orders for the Enforcement of Valid Local or State Codes, Regulations or Statutes.**

The trial court's application of the doctrines of unclean hands and laches as the sole bases for the TRO Denial was misplaced as a matter of law. Appellants have been unable to locate any judicial authority that has directly or indirectly considered the application of laches and unclean hands in the specific context of a motion for a temporary restraining order. However, the general principles underlying these legal doctrines indicate that they are inapplicable to the case at bar.

A. **The Doctrine of Laches: Not a Defense to an Action At Law Governed by Statute.**

The doctrine of laches is one that developed in earlier courts of equity (i.e., prior to the merger of equity and law) to act in a manner similar to the modern, codified statutes of limitation. In other words, one must act within a reasonable period of time to protect one's rights. See e.g., ; Akley v. Bassett (1922) 189 Cal. 625; Bagdasian v. Gragnon (1948) 31 Cal. 2d 744, 752. Moreover, the defense of laches "has nothing to do with the merits of the cause against which it is asserted." Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 77.

The defense of laches is not a defense to an action at law that is governed by a statute of limitations. Bagdasian v. Gragnon at 752; Unilogic, Inc. v, Burroughs Corporation (1992)10 Cal. App. 4th 612, 619; Hopkins v. Hopkins (1953) 116 Cal. App. 2d 174, 176. In

Unilogic at 619, the court stated the rule as follows: "to allow a laches defense in a legal action would be to override a time limit mandated by the Legislature."

The defense of laches, if it is to be allowed, requires two elements: first, there must be an unreasonable delay; and second, the complaining party must have either "acquiesced" in the conduct of the defending party or the defending party must be "prejudiced" by the complaining party's delay. See e.g., Volpicelli v. Jared Sydney Torrance Memorial Hospital (1980) 109 Cal. App. 3d 242, 253. In other words, the "defense of laches may be invoked only where refusal to do so would permit an unwarranted injustice to be done to the defendant." Ibid.

i. **The Third and Fourth Causes of Action in Appellants' Complaint are Actions at Law, and the Doctrine of Laches is Not Applicable.**

The Third Cause of Action in Appellants' First Amended Complaint is for breach of contract and the Fourth Cause of Action is for trespass.[17] Both of these are undisputably *actions at law*. Under the rule enunciated in Unilogic, Inc. at 619, the doctrine of laches as a defense to an action at law "would override a time limit mandated by the Legislature," and consequently, cannot be so applied. The trial court's finding that the Appellants' TRO Motion was filed a year and a half after the fact is, thus, irrelevant as a matter of law.

ii. **Unreasonable Delay.**

The amount of time constituting unreasonable delay depends upon the nature of the cause of action. For example, in United Teachers of Ukiah v. Board of Education

[17] These are the causes of action in the First Amended Complaint that provided the foundation for the TRO Motion.

(1988) 201 Cal. App. 3d 632, the court found that six years was not too long for an employee to wait to assert a claim for unfair labor action by the Board of Education. Id. at 642. In Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, the court found that a 15-month delay in the bringing of an employee dismissal action was not too long. Id. at 142. Finally, in Volpicelli v. Jared Sydney Torrance Memorial Hospital, the court held that more than a two-year delay in bringing an action for reinstatement was not sufficient to bar a preliminary injunction.

The amount of time that one is permitted to delay is, of course, interrelated with the amount of prejudice to the defending party. A defendant's mere assertion that there was some harm or prejudice, cannot, without more, bar an action. Rather, the court *must balance* the harm to the defending party against the harm to the prosecuting party. See e.g., United Teachers of Ukiah v. Board of Education at 642-643; Farmer v. City of Inglewood at 142; Volpicelli v. Jared Sydney Torrance Memorial Hospital at 253.

A review of the record in the trial court will immediately reveal that Appellants acted very promptly to have the illegal[18] electrical wiring and un-permitted trailer removed from the leased premises. The Appellants only took the extraordinary action of applying for a temporary restraining order after they had exhausted all other legal means and were faced with a thirty-day order to abate from the County of Solano. The trial court's finding to the contrary (i.e., that the Appellants had waited about a year and a half before taking any action) was completely contrary to the facts presented at the hearing, in the Appellants' moving

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[18] The un-permitted electrical wiring was illegal per se. See the Notice of Violation and Order to Comply issued by the Department of Environmental Management of Solano County on February 14, 2003, which states on page 1 that "[i]nstallation of electrical without permit is deemed substandard and hazardous by code." Plaintiffs' Exhibit 57.

papers, and then later at trial.[19] Under any standard of review, there is simply no factual support for the Court's finding that the Appellants waited too long to act.

iii. **Prejudice to Party.**

Lastly, in order to support a finding of laches, there must be a finding of prejudice to the party who is raising the defense. The party cannot just say it was prejudiced, it must make a reasonable factual showing.[20] See e.g., United Teachers of Ukiah v. Board of Education at 642-643; Farmer v. City of Inglewood at 142; Volpicelli v. Jared Sydney Torrance Memorial Hospital at 253. The existence in this case of any actual prejudice to Respondents seems extremely tenuous in light of the fact that: (1) the lease agreement expressly required the Respondents to always obtain a permit for any modification of the Premises (see Plaintiffs' Exhibit 38, Section 6, Ordinances and Statutes; and (2) the Appellants complained about the

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[19] Appellants wish to direct the Court of Appeals' attention to the undisputed facts that the Appellants first made an effort to have the illegal electrical wiring and un-permitted trailer removed from the leased premises as soon as the Appellants discovered the wiring and trailer, which was shortly after the lease began. See the Plaintiffs' Reply to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Injunctive Relief, page 9, Section 4 and the three letters attached as Exhibits 1-3 thereto, which detail the Appellants' efforts for many months prior to filing suit to have the illegal electrical wiring and trailer removed (CT pages 398-418); see also the RT, March 14, 2003, page 8, line 14 through page 9, line 17; page 10, line 27 to page 14, line 11; page 21, lines 11-22; page 30, lines 14-26; page 33, line 6 through page 34, line 17; page 43, line 1 through page 54, line 3; page 63, line 5-15; and page 71, line 20, through page 72, line 28; see also the RT, July 22, 2003 through July 30, 2003, Volume #1, page 365, line 5, through page 377, line 22.

[20] In situations where there is no clear prejudice to the defending party because of time, the defending party can still raise the issue of acquiescence in the act. See e.g., Volpicelli v. Jared Sydney Torrance Memorial Hospital at 253. Appellants have not found any clear cases where this was the primary grounds for upholding laches as a defense. Thus, it appears to be very uncommon and most parties, instead, stress the time element rather than any act(s) that indicated acquiescence in the other parties actions.

illegal electrical wiring and un-permitted trailer from the time that these things first appeared on the leased premises. See footnote 19, supra.

B. The Doctrine of Unclean Hands Was Misapplied by the Trial Court and was Unsupported by the Facts.

i. There Must Be Significant "Unclean" Conduct.

The modern law of unclean hands is that it is an affirmative defense that may be pleaded in actions at law. Unilogic, Inc. v, Burroughs Corporation at 619-620. [21] The Unilogic Court sets forth an extensive and authoritative analysis of the modern law in this area, including a succinct outline of what is needed to be proven to support the defense.

First, there must be some "unclean" conduct by the party against which the defense is raised. The doctrine cannot be used to try the "morals" of the parties, and the commission of some improper conduct in the past will not forever bar a party from prosecuting an action at law. Unilogic at 621. See also, Boericke v. Weise (1945) 68 Cal. App. 2d 407, 419; Nealis v. Carlson (1950) 98 Cal. App. 2d 65, 69.

ii. The Alleged Misconduct Supporting a Claim of Unclean Hands Must Relate Directly to the Transaction Concerning Which the Defense is Raised.

Second, there must a connection between the cause of action and the defense of unclean hands. Unilogic at 621. Thus, the conduct complained about must relate directly to a transaction or issue directly before the court and affect the equitable relationship

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[21] The Unilogic case embodies essentially the entire modern view of the unclean hands doctrine. The court sets forth an excellent review of the prior law and modern developments and lays out the elements necessary for raising unclean hands as a defense. Almost every important California case is cited and/or discussed by the Unilogic court.

between the parties. Ibid. See also, California Satellite Systems, Inc. v Nichols (1985) 170 Cal. App. 3d 56, 70. In the words of the court in Carmen v. Athearn (1947) 77 Cal. App. 2d 585, 598, the "misconduct must infect the cause of action before the court."

The trial court in this case made no specific findings of any "unclean" conduct by the Appellants. The trial court did note that the Appellants had made a prior motion for a temporary restraining order regarding the lack of proper insurance for the dog training by the Respondents.[22] The trial court also stated that "it *appears* that the plaintiffs, probably through Mr. Odom, were making a concerted effort to terminate the lease on whatever basis they can." RT, March 14, 2003, page 96 lines 14-23 (emphasis added).

A mere statement that there "appears" to be an effort by the Appellants to "terminate the lease on whatever basis they can" is nothing more than an assertion, not an actual finding of such fact. Furthermore, a mere assertion that the Appellants were trying to "terminate the lease" is nothing more than stating that the Appellants were using the legal process established by the legislature for seeking redress of their grievances. A review of the complaint makes it clear that the Appellants were seeking termination of the lease as one element of their prayer for relief. See the complaint, pages 11-15, Prayer for Relief, CT pages 2-27. Moreover, there is absolutely no nexus between the cause of action, i.e., the Appellants' motion for a temporary restraining order to enforce the Notice of Violation and Order to Comply received by

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[22] The Appellants' first motion for a temporary restraining order concerned the alleged lack of insurance by the Respondents for their various dog training activities. Although the motion was denied, it was denied without prejudice and the trial court noted that the Appellants could renew the motion. Moreover, the specific conduct of the Appellants in contacting the Respondents insurance company and in making the motion for a TRO were reviewed by the trial court and no wrongful conduct was found. See RT, January 23, 2003, page 27, line 13 through page 28, line 13.

the Appellants from Solano County, and the effort of the Appellants, through lawful means, to terminate the lease.

The record makes it clear that the actions of the Appellants in seeking a temporary restraining order to enforce the Solano County Notice of Violation and Order to Comply for illegal electrical wiring and an un-permitted trailer were lawful and taken in plain view for all to see. There was simply never any "unclean" conduct by the Appellants. Accordingly, there was no basis to apply the doctrine of unclean hands in denying the Appellants' Motion for a Temporary Restraining Order to remove the illegal electrical wiring and trailer.

2. **The Trial Court's TRO Denial Was an Unprecedented and Unwarranted *Judicial Nullification* of Valid Solano County Codes That Were Adopted by its Legislative Body for the Protection of *Public Health and Safety*, and Consequently, the Trial Courts' Action Was Beyond its Judicial Authority.**

The Appellants, through the act of moving for a temporary restraining order to enforce the Solano County Notice of Violation and Order to Comply, were trying to enforce the Solano County Codes adopted for the purpose of protecting the health and safety of the public, which included the health and safety of the Respondents. The un-controverted testimony presented by Troy Nelson (an electrician) at the March 14, 2003, hearing regarding the nature of the electrical violations demonstrated that these were very serious and that life and limb were literally at stake. RT, March 14, 2003, page 78, line 11 through page 84, line 27.

The trial court, despite the serious danger of the illegal electrical installation, refused to issue an injunction to enforce the Solano County Codes. It is the position of the Appellants that this refusal constituted a *judicial nullification* of the Solano County Codes, and as such, is an error that is reversible *per se.*

As stated by the United States Supreme Court in Sorrells v. United States (1932) 287 U.S. 435, 450, 53 S.Ct. 210, 216, 77 L.Ed. 413, it is the duty of the courts in this nation to enforce the laws adopted by the legislature and that *judicial nullification,* for whatever reason that a court may harbor, is not permissible:

> Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system. The Congress by legislation can always , if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statutes here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction, confessedly contrary to public policy, and then decline to enforce it.

The California Supreme Court has issued consistent opinions that judicial nullification is not to be tolerated in California Courts. In Santa Clara County Counsel Attorneys Association v. Woodside (1994) 7 Cal. 4th 525, at 540, the California Supreme Court held that:

> The County cites no authority for the proposition that, once the Legislature has created a duty in a public agency, a court may limit, on public policy grounds, the availability of a writ of mandate to enforce that duty. It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through normal judicial means. What public policy reasons are there against enforcement of a statutory duty are reasons against the creation of the duty *ab initio,* and should be addressed to the Legislature.

Other California Courts of Appeal have followed the same reasoning. See e.g., Karamzai v. Digitcom (1996) 51 Cal. App. 4th 547, at 550 where the court stated that a "trial court does not have inherent or unrestricted power to extend or shorten the time specified by the Legislature in which an act in a civil action must be done." The refusal of a court to enforce a child support statute is erroneous as a matter of law, and thus, subject to reversal *per se.* Boutte v. Nears (1996) 50 Cal. App. 4th 162, 165-66.

If a court may not limit a writ of mandate to enforce a duty granted to a public agency, see Santa Clara County Counsel Attorneys Association v. Woodside at 540, then on what basis may the trial court in this case refuse to enforce the Solano County Notice of Violation and Order to Comply by refusing to grant the injunctive relief that was sought by the Appellants?

Appellants have searched diligently for other judicial decisions dealing with the refusal of any court to enforce a valid statute or code. It has found no such authority. The absence of any such judicial decisions is a compelling argument that *judicial nullification* is unconstitutional and that it has no place in our system of law.

The refusal of the trial court to grant the Appellants' Motion for a Temporary Restraining Order to enforce electrical codes so as to prevent injury or even death from electrical shock is simply astounding.[23] Appellants urge this Court of Appeal to rule definitively that, absent a showing of the unconstitutionality of a statute or code, any refusal by a court to enforce a health and safety code adopted by a legislative body and properly enforced under the police power inherent in an executive body constitutes judicial nullification of that statute or code, and is reversible *per se*.[24]

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[23] Regardless of what the Court felt about Appellants' lawsuit to terminate the lease, the real possibility of severe physical harm is of far greater concern and should have been the basis for the trial court's ruling.

[24] The facts supporting the Solano County Notice of Violation and Order to Comply, i.e., that there was a public nuisance that had to be abated within 30 days, were proven both by *operation of law* and by the failure of the Respondents to refute any of the material evidence offered by the Appellant. Therefore, if the Appeals Court declines to adopt a rule of reversal per se in cases such as this, then the Appellants argue that the trial court's TRO Denial was entirely contrary to the facts in evidence and should be reversed under the abuse of discretion standard.

3. **A Determination That Respondents Were, as a Matter of Law, in Violation of the Solano County Codes as of the Time of the Hearing on Appellants' Motion for a TRO, Will Dispose of the Case *Sub Judice.***

The factual basis for Appellants' Motion for a Temporary Restraining Order to enforce the Solano County Notice of Violation and Order to Comply was undisputed at the trial court hearing on March 14, 2003. See RT, March 14, 2003, pages 4 through 85. Thus, the question of whether the Respondents, at the time of the hearing, were in violation of the Codes of Solano County, is entirely a question of law. As such, it is subject to the Appellate Court's independent *de novo* review. Ghirado v. Antonioli; Tpoango & Victory Partners, LLP v. Toghia; Eisenberg et al, California Practice Guide, Civil Appeals and Writs (The Rutter Group) Ch. 8, §8:106, p. 8-56. This is clearly a situation in which the Court of Appeal is in an equal, or perhaps, better position, to apply the law to undisputed facts than was the trial court. See e.g., Crocker National Bank v. City & County of San Francisco (1989) 49 Cal. 3d 881, 888.

The undisputed facts are that the Respondents were in violation of the Solano County Codes respecting illegal electrical wiring and the installation of a trailer without a permit. The undisputed facts also show that Section 6 of the Lease, Ordinances and Statutes , Plaintiffs' Trial Exhibit 38, states that:

> Lessee [Respondents] shall comply with all statutes, ordinances, and requirements of all municipal, state and federal authorities now in force, or which may later be in force, regarding the use of the premises. The commencement or pendency of any state or federal court abatement proceeding affecting the use of the premises will, at the option of the Lessor, be deemed a breach of this Lease.

It is a further uncontested fact that, under Section 22 of the Lease, Default, Plaintiffs' Trial Exhibit 38, that the Appellants could, at their option, terminate the lease. Section 22 reads

in pertinent part: "In the event of any breach of this Lease by Lessee, Lessor may, at his or her option, terminate the lease and recover from Lessee ..."

Moreover, it is an uncontested fact that the option to renew that the Respondents had pursuant to Section 33 of the Lease, Option to Renew, Plaintiffs' Trial Exhibit 38, could only be validly exercised "[p]rovided that Lessee is not in default in the performance of this Lease."

The lawsuit filed by the Appellants in November 2002 (in particular the Third and Fourth Causes of Action) constituted an election by the Appellants to consider the illegal electrical wiring and un-permitted trailer, as cited by the Solano County Notice of Violation and Order to Comply, Plaintiffs' Trial Exhibit 57, as a breach of the Lease and that the Lease was, accordingly, terminated.[25]

As part of a trial *de novo*, it is solidly established law that the Court of Appeal may independently interpret written instruments such as a commercial lease like the one in this case. Century Transit Systems, Inc. V. American Empire Surplus Lines Ins. Co. (1996) 42 Cal. App. 4th 121, 125; see also Eisenberg et al, California Practice Guide, Civil Appeals and Writs (The Rutter Group) Ch. 8, §8:113, p. 8-58.

With the relevant facts pertaining to the breach of the Lease by the Respondents with regard to the illegal electrical wiring and the un-permitted trailer uncontested, and the language of the Lease clear on its face, it is for this Court of Appeal, hearing this issue de novo, to interpret the Lease, apply the law of contract, and find that the Respondents were, in fact, in breach of the Lease from the time of the filing of the original complaint (CT pages 2-27) through

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[25] In addition, the term of the Lease expired of its own accord on March 31, 2003. See Section 1, Term.

to the time of the hearing on March 14, 2003. Based upon such a finding, the Court of Appeal should further find that, as a matter of law, the Appellants rightfully exercised their option to terminate the Lease.

VII. The Proceedings in the Trial Court Were So Tainted by Judicial Bias That Appellants Could Not Have Received a Fair Trial.

Commencing with the trial court's Trial Date Order setting the case for immediate trial, and continuing right through to the granting of nonsuits on four of Appellants' causes of action at trial, there has been a series of statements and actions by the trial court that clearly demonstrate significant judicial prejudice against the Appellants. These prejudicial statements and actions of their own accord, apart from the Trial Date Order, made it impossible for the Appellants to receive a fair trial. Indeed, some of these actions of the trial court are discussed as separate grounds of appeal herein.[26]

Judicial bias, when found, is considered to be a structural due process error that is reversible *per se* because it prevents a fair trial. Judith P. v. The Superior Court (2002) 102 Cal. App. 4th 535, 554-558; Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 262; Marriage of Iverson (1992) 11 Cal. App. 4th 1495; see also Eisenberg et al, California Practice Guide, Civil Appeals and Writs (The Rutter Group 2003) Ch. 8, §8:308-310.5, pages 8-138 to 8-140.

1. The Statements by the Trial Court at the Hearing on the Appellants' Motion for a Temporary Restraining Order on March 14, 2003, Reveal an Attitude of Extreme Prejudice and Bias Against the Appellants.

At the conclusion of the testimony by Appellants at the hearing for a temporary restraining order on March 14, 2003, the trial court, instead of simply granting or denying the motion for a temporary restraining order, appeared to go into a rage, and issued factual findings

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[26] See e.g, Sections IV, VI, supra, and Sections VIII, IX, infra, which all discuss statements and actions of the trial court that exhibit extreme prejudice against the Appellants. Although some of the other statements and acts discussed in this section on judicial bias could also be the basis for additional grounds for appeal of their own accord, they are discussed under this Section of Appellants' Opening Brief for the purpose of judicial economy in the review of this case.

that went far beyond the scope of the matters in Appellants' Motion for a Temporary Restraining Order and far beyond what was required to decide the motion. These purported "findings" clearly demonstrate that the trial court, then and there, pre-judged the entire case against the Appellants, and further, that the trial court was intent upon irreparably punishing the Appellants by forcing them to try the entire case in just three weeks' time. RT March 14, 2003, pages 97-100.

As discussed in Section IV, supra, this Trial Date Order was made even though the case was recently filed, the Appellants had not yet undertaken discovery, neither party had requested a trial date, and the case was not entitled to precedence under any provision of the Code of Civil procedure. The words of the trial court, especially the order in which they were pronounced, speak for themselves.[27] Rather than limiting his decision to the subject matter of the hearing by simply denying the motion for a restraining order, the trial court "finds" that the Plaintiffs were "making a concerted effort to terminate the lease on whatever basis they can." Such a factual finding involved Appellants' entire lawsuit, not just the Third and Fourth Causes of Action which pleaded the un-permitted electrical wiring and trailer that had been installed by the Respondents and which was the limited subject matter of the March 14th hearing. CT, pages 2-29. The extraordinarily broad scope of this finding went far beyond anything necessary to rule upon the motion before the trial court. It clearly demonstrated that the trial court had formed an overwhelmingly negative bias and prejudice about the Appellants, their entire case, and their legal counsel. The trial court completely ignored the uncontested facts presented at the hearing by Appellants that the Respondents had installed illegal electrical wiring and an un-permitted

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[27] See footnote 16, supra.

trailer and had refused to remove these despite many previous efforts by Appellants.

But the trial court didn't just stop with making this exceptionally over broad, biased and prejudicial statement against the Appellants. The trial court proceeded to punish the Appellants by ordering, *sua sponte*, that Appellant's entire case be tried in just three weeks time. RT, March 14, 2003, page 98, lines 16-17.

Lastly, the trial court completed this unwarranted judicial outburst by ordering the Appellants to not file any more motions. RT, March 14, 2003, page 100, lines 20-22.[28] It is difficult to conceive of a more biased and prejudicial order. The Appellants could not even file a motion in the case without risking a contempt citation.

2. **The Trial Court Confirmed its Bias and Prejudice at the Hearing on April 3, 2003, When the Appellants Moved for an Order to Shorten Time**.

Despite the likelihood of a contempt citation, the Appellants had no choice but to move on April 3, 2003, for an Order to Shorten Time to file a Motion to Continue the Trial Date and a Motion to Amend the First Amended Complaint, CT pages 443-446 (Motion to Shorten Time), pages 447-448, 449-457 (Motion to Continue the Trial Date), and pages 430-442 (Motion to Amend the First Amended Complaint). The purpose of the Motion to Shorten Time was to

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[28] The RT March 14, 2003, page 100, lines 21-22 as filed with the record on appeal reads as follows: "I'm not going to entertain any more motions on this for temporary restraining orders prior to trial." However, Appellants dispute this reporting of the judges' order. Appellants have included as Special Exhibit 1 the affidavit of Patrick H. Dwyer stating that the language of the order was "I'm not going to entertain any more motions prior to trial." These affidavits are confirmed by the Reporter's Transcript for the hearing on April 3, 2003, page 5 lines 15-18, where opposing counsel, Mr. Hirsch, reminded the trial court that at the March 14th hearing it had ordered counsel for Appellants to file no more motions of any kind. The trial court, page 5, line 18, agreed with the statement: "Yeah; that's what I said." Appellants request the Court of Appeal to order the Reporter's Transcript on Appeal for March 14, 2003, to be corrected to conform to the statement heard by Appellants, Respondents, and subsequently confirmed by the trial court on April 3, 2003.

enable the Appellants to file the Motions to Continue the Trial Date and the Motion to Amend.

A hearing was held on April 3, 2003, on the Motion for an Order to Shorten Time. At this hearing, counsel for the Respondents promptly raised the fact that the trial court, at the end of the March 14, 2003, hearing, had ordered the Appellants not to file any more motions. Mr. Hirsch, counsel for the Defendants stated: "we were under the impression quite frankly that the Court has said there were not going to be any more motions." The trial court (Judge Taft) responded: "Yeah, that's what I said." RT, April 3, 2003, page 5, lines 16 through 18. This statement of the trial court was an unequivocal confirmation of its bias and prejudice against the Plaintiffs.

Although the trial court granted the Motion to Shorten Time, RT, April 3, 2003, page 6, line 12, the trial court made it immediately clear that it was not going to give serious consideration to Appellants' motions. The trial court proceeded to admonished counsel for Appellants that: "I think you would be better advised to prepare for trial than count on my counting (sic) [granting] your motion." RT, April 3, 2003, page 6, lines 13-15. The trial court then made it known that it intended to deny both motions, even though it had not even read or considered the merits of the two motions. The trial court stated: "I'm not necessarily prejudging it, except that I did make an order, I want this case heard, and it's going to go to trial on the date that I set." RT, April 3, 2003, page 6, lines 20-23. This statement is a clear reflection of the trial court's mind set against the Appellants and that the trial court was determined to punish the Appellants by forcing them to immediate trial.

3. The Trial Court's Bias and Prejudice Against Appellants Was Shown Again at the Pre-Trial Hearing on April 24, 2003, When the Appellants Were Given the Choice of Either Foregoing a Legal Right or Being Forced to Accept a Shortened Trial Schedule That Could Only Lead to a Mistrial.

The trial court continued to demonstrate its bias and prejudice against Appellants at the pre-trial hearing on April 24, 2003. During this hearing, the trial court threatened to force the Appellants to go to trial starting on April 25th, and to have only three days to complete the case (or a mistrial would be declared), unless the Appellants agreed not to contact the Respondents' insurance carrier to verify if there was coverage for the Respondents' uses of the Leased Premises under the then existing policy of insurance.[29] In exchange for accepting this limitations on its legal rights under the Lease and under the California Code of Civil Procedure for discovery, the trial court stated that Appellants could have a trial date of July 18, 2003, with no time limit. RT, April 24, 2003, page 13, line 24, through page 18, line 14.

The trial court, in forcing the Appellants to make such a choice, clearly demonstrated that it had already reached the factual conclusion, without any presentation of evidence, argument or hearing of the issue, that it was improper for the Appellants to contact the insurance company to verify that then existing policy covered the Respondents' use of the Leased Premises. This is a clear demonstration of the trial court's bias and prejudice against the Appellants.[30]

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[29] Appellants' remind the Court that Appellants' ability to conduct meaningful discovery had been previously cutoff, and thus, Appellants were left with no means to obtain evidence about whether the then existing policy of insurance provided coverage for the Respondents' use of the Leased Premises. Appellants' hands were tied.

[30] The trial court's forced choice further violated Appellants' right to due process and constitutes a separate ground for appeal, but the issue is argued under this section of Appellants' Opening Brief on Judicial Bias.

4. The Trial Court's Bias and Prejudice Against Appellants Continued Unabated at the Opening of the Trial When the Trial Court Allowed the Respondents to Add New Expert Witnesses to Testify Upon Only Three Weeks Notice and With No Chance of Discovery About These Witnesses.

A list of all witnesses for trial had to be produced by both parties on April 9, 2003. Both Appellants and Respondents timely complied. RT April 9, 2003, pages 4-5, pages 9-11. Just three weeks before the commencement of the trial in July, 2003, the Respondents presented a new, additional list of witnesses that they wanted to call for trial. RT July 21, 2003, page 6, lines 11-25. Appellants objected to the new witnesses on the grounds that they were not on the original witness list as required to be submitted on April 9, 2003, and that there had been no opportunity for discovery concerning these witnesses. RT July 21, 2003, page 6, lines 28 through page 7, line 23.

Except for one witness, which the trial court said could be called in rebuttal, the trial court overruled Appellants' objection and allowed these new witnesses to testify. RT July 21, 2003, page 7, line24 through page 13, line 17. These ruling, at the beginning of the trial, was extremely prejudicial to the Appellants.

A good example of the significance of these last minute witnesses was the testimony of Dennis Stowers. RT July 22, 2003, through July 30, 2003, Vol. I, page 210, line 26 through page 229, line 15, page 232, line 26 through page 255, line 7. These testimony allowed, in essence, the Respondents to put into evidence all kinds of hearsay evidence about why the Respondents' policy with CNA Insurance Co. was cancelled. First of all, the CNA Insurance policy wasn't even at issue in the trial since the only insurance policy pleaded in the First Amended Complaint was the Travelers' policy. DOCT pages 2-29; see also Section VIII, below, regarding the trial court's denial of the Appellants' Motion In Limine.

Second, the trial court allowed, through the testimony of Mr. Stowers, the admission into evidence of considerably hearsay evidence that was irrelevant to the issues at trial and for which the Appellants had no time to prepare since there had been no discovery. A good example is Respondents' Exhibit DD which has nothing to do with the issues at trial and which the Court allowed Mr. Stowers to testify about over the hearsay objections of Appellants. RT July 22, 2003, through July 30, 2003, Vol. I, page 247, line 24, through page 255, line 10. This document was clearly hearsay and irrelevant, but it was allowed into evidence. RT July 22, 2003, through July 30, 2003, Vol. I, page 255, line 10. The court's prejudice against Appellants was obvious.

VIII. **Denial of Appellants' Motions in Limine to Limit the Respondents' Evidence to the Issues in the First Amended Complaint Was Seriously Prejudicial and a Clear Example of the Trial Court's Effort to Punish the Appellants.**

The trial court continued with its prejudicial actions against the Appellants at the pre-trial hearing on April 24, 2003, when the trial court ruled on the Appellants' motion in limine with respect to four categories of evidence.[31] The trial court denied the motion with respect to category numbers 1, 3, and 4 of Appellants' motion. The result of this ruling was that there was a considerable amount of evidence introduced by the Defendants at trial that should have been excluded.

The evidence from categories numbers 1, 3, and 4 had nothing to do with any of the allegations as set forth in the First Amended Complaint. DOCT, pages 2-29. The seven causes of action in the First Amended Complaint have nothing to do with: the amount of rent or rent increases, the amount of utility charges, alleged confrontations with any dog training clients, the plowing of irrigation ditches on the unimproved portions of the property, or alleged notes or notices left on the dog kennel office. Thus, evidence on these items was entirely irrelevant.

Even more prejudicial than the lack of any relevance to the causes of action, the Appellants never had any opportunity whatsoever to conduct any discovery regarding these areas

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[31] 1. Claims by Defendants [Respondents] that Plaintiffs [Appellants] sought unfair rent increases, imposed unfair utility charges, confronted Defendants' clients, plowed irrigation ditches on the unimproved portions of the property, and posted notes and notices on the kennel door;

2. News stories, either print or media, concerning Schutzhund Training;

3. Claims by Defendants [Respondents] that Plaintiffs [Appellants] seek to deprive them of their right of first refusal to purchase the property located at 6677 Midway Road, Dixon, California; and

4. Claims by Defendants [Respondents] the Plaintiffs [Appellants] seek to derive them of the option to renew the lease.

Omitted Documents on Clerks' Transcript on Appeal, No. 30-34.

of evidence prior to the trial. See Section IV, supra. The trial court then allowed this irrelevant evidence, which Appellants' had no fair opportunity to rebut, to go to the jury. This conduct by the trial court was inflammatory, prejudicial, and biased against the Appellants and was just another example of the trial court's efforts to punish the Appellants and deny them due process.

IX. The Trial Court's Granting of Nonsuit On Appellants' First, Second, Sixth, and Seventh Causes of Action was Clearly Error: There Was Substantial Evidence for the Jury that Supported Appellants' Causes of Action.

The Trial Court, upon the resting of Appellants' case in chief, granted Respondents' motion for nonsuit on the First, Second, and Seventh Causes of Action. A review of the evidence and testimony presented by Appellants at trial demonstrates beyond doubt that there was substantial evidence to support these causes of action. On this appeal, the Court should review the evidence and testimony *de novo* and in a light most favorable to Appellants. The Court must reverse of there was *substantial evidence* to support the cause of action such that it should have been presented to the jury. Freeman v. Lind (1968) 181 Cal. App. 3d 791, 799; see also Eisenberg et al, California Practice Guide, Civil Appeals and Writs (The Rutter Group 2003) Ch. 8, §8:1, p. 8-62.

1. The First Cause of Action: Breach of Contract for Unauthorized Use of Premises.

The First Cause of Action in the First Amended Complaint is for breach of contract. DOCT, pages 2-16, paragraphs 14-16. The basic claim by Appellants was that Respondents were conducting protection (aka attack or guard), police, and Shutzhund training on the Leased Premises in violation of Section 3 of the Lease.[32] The trial court granted a nonsuit as to this

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[32] The First Amended Complaint on page 5, lines 10 through 19, uses the terms, "attack" and "Shutzhund" training. The Appellants filed a Motion to Amend the First Amended Complaint on April 3, 2003, to modify this language to include "protection" and "police" dog as additional types of unauthorized training being conducted by the Appellants. CT, pages 430-432. This motion, which was timely made under CCP §473(a)(1), was denied by the trial court by order dated April 8, 2003, on the grounds that "the proposed amendments to the complaint do not add anything substantive to the first amended complaint sufficient to permit the delay inherent in such amendments and responses thereto." DOCT, page 35. Obviously, this denial by the trial court of the Appellants' Motion to Amend, which should have been granted under the liberal wording of Section 473 and the host of cases in support of the policy that such

cause of action. RT, July 22, 2003 through July 30, 2003, Volume II, argument at page 532, line 6 through page 535, line 11, page 558, line 12 through page 559, line 13. The trial court's ruling was made on the basis that the trial court didn't "think there was any protection training, or attack dog training, whatever you want to call it." RT, July 22, 2003 through July 30, 2003, Volume II, page 560, line 3 through line 9. This ruling is in direct contravention of the testimony of Respondent Alan Levens, the Appellants expert witness, Mr. Wayne Davis, and Respondents' website and other advertising materials which unequivocally show that the respondents did, indeed, conduct protection (aka attack and guard), police, and Schutzhund training.

The Appellants first presented expert testimony by Mr. Wayne Davis regarding the nature and type of training that the Respondents were conducting on the leased premises. See RT, July 22, 2003 through July 30, 2003, Volume # I, page 123, line 14 through page 42, line 4, page 150, line 7 through page153, line 5, and Plaintiffs' Exhibits 13 and 13A.[33] Mr. Davis' testimony presented clear evidence that the Respondents were conducting protection (aka attack and guard), police, and Shutzhund training. Mr. Davis reviewed Plaintiffs' Exhibit 13 (a copy of the Respondents' website) showing that it specifically mentioned training techniques that were applicable only to protection or police dog training, not obedience or even Shutzhund training. Moreover, Mr. Davis reviewed a video tape of an actual training session conducted by Respondent Allen Levens, and concluded that elements of the training on the video tape showed Alan Levens doing exercises that were for protection dog training. RT, July 22, 2003 through

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amendments should be liberally granted, constitutes a separate ground for appeal and reversal. See Witkin, California Procedure, Fourth Edition, Pleading, §1128. Appellants raised this matter under Section IV rather than as a separate ground for appeal.

[33] Exhibit 13A is a blowup of Exhibit 13.

July 30, 2003, Volume # I, page 136, line 3 through page 1339, line 5.

Then, on direct examination, Respondent Allen Levens confirmed Mr. Davis' analysis of the type of training being both offered and performed by the Respondents. RT, July 22, 2003 through July 30, 2003, Volume #II, page 425, line 18 through page 431, line 7; Plaintiffs' Exhibits 81-84. This testimony and the accompanying exhibits presented un-refuted evidence by Respondent Allen Levens that the advertisements in telephone books and local newspapers for his dog business at the leased premised included "protection" and "police" dog training and that he performed these types of training on the leased premises.

The testimony of the dog training expert, Mr. Wayne Davis; the testimony of the Respondent, Allan Levens; and Plaintiffs' Exhibits, which included copies of the Respondents' website and various advertisements that the Respondents had placed in the newspapers and telephone books, all add up to un-refuted, very substantial evidence that the Respondents where engaged in conducting types of dog training that were not authorized in the Lease. This was a question of fact for the jury, not the judge. Applying the rule that this evidence must be viewed in the light most favorable to Appellants, the First Cause of Action should have been submitted to the jury and the trial court's nonsuit was reversible error.

2. The Second Cause of Action: Breach of Contract for Failure to Have Insurance that Actually Provided Coverage for the Use of Premises.

The Second Cause of Action in the First Amended Complaint is for breach of contract. The basic claim by Appellants was that Respondents did not have insurance coverage for the various types of dog training that they conducted on the Leased Premises as required by Section 11 of the Lease. See First Amended Complaint, DOCT, pages 2-16, paragraphs 17-20. The trial court granted a nonsuit as to this cause of action. RT, July 22, 2003 through July 30, 2003,

Volume II, argument at page 535, line 12 through page 537, line 9, page 543, line 6 through page 547, line 5. The trial court's ruling was based upon the sole premise that the trial court did not believe that there was a "lapse in the policy." RT, July 22, 2003 through July 30, 2003, Volume II, page 560, line 10 through line 18.

Although the Respondents had a "policy" with Travelers Insurance until it was cancelled prior to the filing of the lawsuit, that policy did not provide coverage for their activities under Section 3 of the Lease as required by Section 11 thereof. The Respondents' conduct left the Appellants completely exposed in the event of a claim arising out of the Respondents' training activities. The trial court's ruling that there had been no lapse in the policy was simply a non-sequitur having no nexus to the issue before the Court. The trial court never even addressed the real issue, that there was no coverage under any policy for the dog training activities conducted by the Respondents.

Not only did the trial court not understand the difference between a policy and what coverage was provided by a policy, the trial court completely failed to understand the relevance of the issue of insurance at any time during the trial.[34] During the testimony of Dolores Sheffield, the representative of Travelers Insurance, the trial court made the following incredible statement directly to the jury:

> Ladies and gentlemen, I'm going to instruct you at this point, whether or not any of the parties to this action are insured, or non-insured, has absolutely no bearing in this case, and you're not to consider the questions of insurance for any purpose whatsoever in

[34] The trial court failed to comprehend the difference between the mere existence of an insurance policy and the coverage under such policy ever since the hearing on Appellants' Motion for a Temporary Restraining Order on January 23, 2003. RT, January 23, 2003, page 27, lines 13-23.

this trial. RT, July 22, 2003 through July 30, 2003, Volume II, page 260, lines 8 through 12.

The Appellants presented expert testimony by Mr. Clinton E. Miller that the insurance coverage under the three different insurance policies purchased by the Respondents to meet the insurance requirements under Section 11 of the Lease did not provide coverage for the type of dog training conducted by the Respondents.[35] Specifically, he testified that the Travelers' Insurance policy (which was the Respondents' first policy of insurance and the one identified by the Appellants in the First Amended Complaint in paragraphs 18-20 of the Second Cause of Action) did not included the dog training activities conducted by the Respondents. RT, July 22, 2003 through July 30, 2003, Volume I, page 277, line 25, through page 280, line 3; page 281, line 16 through page 284, line 1; page 287 line 14, through page 288, line 1; page 309, lines 10-16; page 312 line 24, through page 313, line 7; page 314, line 26, through page 317, line 1. See Plaintiffs' Exhibits 21, 22, 24, 29, 34, 77, 79, 80; Defendants' Exhibits LL, MM, OO. Thus, it was his clear testimony that there was no effective policy of insurance in place, from the time that the lease began until the date the lawsuit was filed, as required by Section 11 of the Lease.[36]

Not only did the Appellants' expert witness present thorough testimony as to why the Respondents did not have any coverage under the insurance policies for the type of dog training

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[35] The first insurance policy was with Travelers Insurance and ran from April 21, 2001, through to April 21, 2003. Plaintiffs Exhibit 77. This policy was canceled by Travelers on November 1, 2002. See Plaintiffs' Exhibit 22. It was due to: (a) the lack of coverage under this policy for the type of dog training by Respondents; and (b) the misrepresentations in the application for this policy, that the Appellants filed the Second and Seventh Causes of Action, respectively, in the First Amended Complaint. DOCT, pages 2-16, paragraphs 17-20, 34-38.

[36] Mr. Miller also testified in the cited RT pages that the second policy of insurance obtained by the Respondents with CNA Insurance Co. did not provide coverage for the dog training activities conducted by the Respondents.

conducted by the respondents, but the Appellants' cross examination of the underwriter from Travelers Insurance (the first insurance policy) resulted in Travelers' admission that the Respondents did not have coverage for their dog training and that the Appellants were not covered as a consequence. RT, July 22, 2003 through July 30, 2003, Volume I, page 261, line 19, through page 266, line 23.

Unquestionably, there was more than enough evidence to present the Second Cause of Action to a jury. The Plaintiffs met their initial burden of proof of the elements for breach of Section 11 of the Lease and, thus, the burden was then shifted to the Respondents. However, the trial court improperly intervened and granted a nonsuit, which was reversible error.

3. **The Sixth Cause of Action: Trespass on the Appellants' Property.**

The Sixth Cause of Action in the First Amended Complaint is for trespass. Appellants claimed that Respondents were trespassing on Appellants' property by operating off-road vehicles, training dogs, allowing children to play, and other unauthorized activities on that portion of the Appellants' property that was not leased to the Respondents. DOCT, pages 2-16, see paragraphs 31-33. The trial court granted a nonsuit as to this cause of action. RT, July 22, 2003 through July 30, 2003, Volume II, argument at page 532, line 6 through page 535, line 11, page 558, line 12 through page 559, line 13. The trial court's specific reason for denying the action for trespass was that it believed that damages had to be shown, and that the Appellants had not shown any damage. RT, July 22, 2003 through July 30, 2003, Volume II, page 560, lines 19 through line 25.

The trial court committed two errors in granting the nonsuit on this count. First, its legal conclusion that the Appellants had to prove a specific amount of damages was contrary to law.

In an action for trespass, the rule is that:

> "[i]t is not necessary to prove actual damage in order to recover for a trespass. In a trespass case, damage is a direct result of some wrongful act, and proof of actual damage is not required because the invasion of the plaintiff's rights is regarded as a tort in itself. The law infers, without proof of actual injury, some damage from every direct invasion of the person or property of another. American Jurisprudence, Second Edition (May 2003), Trespass, Damages, §161.

Moreover, once a party proves the trespass, that party has a right to recover at least nominal damages, but in this case the trial court refused to even allow the jury to consider the issue. As succinctly described in the American Jurisprudence commentary:

> Because from every unlawful entry or direct invasion of the person or property of another, the law infers some damage, the prevailing plaintiff is ordinarily entitled to, in an action for trespass, to at least nominal damages. Even in circumstances where no substantial damages result from a trespass and none are proved, the law will infer nominal damage for the unauthorized entry onto real property of another. American Jurisprudence, Second Edition (May 2003), Trespass, Damages, §161.

The second error was that the Appellants had presented ample testimony in support of their Sixth Cause of Action, including proof of all of the trespasses alleged therein. Mr. Brent Anderson, a neighbor of the Appellants, was the first witness to testify on this issue. He testified that he saw the Respondent, Alan Levens, ride an ATV around on the back portion of the Appellants' property (which was not leased to Respondents) on many occasions. RT July 22nd through July 30th, Volume I, page 111, line 9, through page 113, line 23.

Anne Terry then testified about the boundaries of the Leased Property. RT, July 22, 2003 through July 30, 2003, Volume II, page 451, line 17, through page 453, line 10. Anne Terry then testified that the Respondents, without permission, placed a chain-link, fenced-in kennel on the

un-leased portion of her property. RT, July 22, 2003 through July 30, 2003, Volume II, page 454, line10, through page 455, line 9. Anne Terry continued with testimony about the Respondents placement of a storage trailer on the un-leased property without permission. RT, July 22, 2003 through July 30, 2003, Volume II, page 458, line9, through page 459, line 8. She continued with testimony that Appellants never gave Respondents permission to drive an ATV on their property and that Respondents frequently did so. RT, July 22, 2003 through July 30, 2003, Volume II, page 468, line 13, through page 469, line 5. Mrs. Terry gave further corroborating testimony under cross examination regarding the boundary of the Leased Property. RT, July 22, 2003 through July 30, 2003, Volume II, July 22, 2003 through July 30, 2003, at page 479, line 20, through page 480, line 5.

Clyde Terry gave very clear testimony concerning the boundary of the Leased Premises, and that it did not include the back pasture area. RT, July 22, 2003 through July 30, 2003, Volume II, at page 504, line 23, through page 508, line 6. Clyde Terry also testified that he never gave the Respondents permission to drive an ATV on the un-leased property. RT, July 22, 2003 through July 30, 2003, Volume II, at page 514, line 12, through page 514, line 16.

It is clear from the foregoing testimony that there was more than enough evidence to support the allegations in the Sixth Cause of Action and that it should have been submitted to the jury.

4. The Seventh Cause of Action: Misrepresentation by Respondents that There Was Insurance Coverage for Their Use of the Leased Premises.

The Seventh Cause of Action in the First Amended Complaint is for misrepresentation. Appellants basic claim was that Respondents falsely and knowingly misrepresented to their insurance carrier and to the Appellants the true nature of the various types of dog training that

Respondents were conducting on the Leased Premises, and further, that Respondents misrepresented to the Appellants that they actually had a valid and enforceable insurance policy with coverage for all of the uses that the Respondents were making of the Leased Premises. See the First Amended Complaint, DOCT, pages 2- 16, paragraphs 34-38. The trial court granted a nonsuit as to this cause of action. RT, July 22, 2003 through July 30, 2003, Volume II, argument at page 541, lines 5 through 16, page 543, line 11 through page 547, line 7, page 550, line 3 through page 553, line 3. The Court's reasoning for granting the nonsuit had nothing to do with the evidence regarding the nature of the Respondents' dog training activities, whether those activities were accurately represented to the Appellants and to Travelers Insurance, and whether the Respondents had actual coverage under their insurance policy for the actual dog training that they conducted. RT, July 22, 2003 through July 30, 2003, Volume II, page 560, lines 10-18, page 560, line 26, through page 561, line 2. Instead, the trial court granted the motion for nonsuit on the same grounds that it had granted the nonsuit of the Second Cause of Action, i.e., that in the court's view, there had been no lapse in the policy. RT, July 22, 2003 through July 30, 2003, Volume II, page 560, line 26, through page 561, line 2.

The evidence and testimony entered into evidence by the Appellants was more than sufficient to meet their burden of proof. To avoid redundancy here, the recital of the Appellants' evidence in support of the Second Cause of Action, see subsection 2, supra, fully supported the Appellants' claim that the respondents were conducting protection (aka attack or guard), police and Schutzhund training. In addition, the Appellants presented testimony and exhibits that demonstrate that these types of dog training were never disclosed to the insurance company or the Appellants, thereby misrepresenting the true activities that the Respondents were making of

the Leased Premises.

First, the testimony of Ken Odom discussed how the Appellants discovered the Respondents' misrepresentation to Travelers Insurance about the type of the dog training they were conducting and how Travelers Insurance learned about the true nature of this training. Mr. Odom then reviewed the correspondence with Travelers (and its exclusive agent Kennel Pak) whereby Travelers Insurance proceeded to cancel the Respondents' policy. RT, July 22, 2003 through July 30, 2003, Volume II, page 414, line23, through page 417, line 25; Plaintiffs' Exhibits 21, 22, 24, 30.

Mr. Clinton Miller, who had earlier testified about the exclusions under the Travelers Insurance policy for the types of dog training being conducted by the Respondents, then testified about the application for insurance that the Respondents had submitted to Travelers Insurance via Travelers' exclusive agent, Kennel Pak. Specifically, he testified that the Respondents misrepresented the types of dog training that the Respondents were actually doing and that, as a result of such misrepresentation, Travelers Insurance could have voided the policy *ab initio* for material misrepresentation. RT, July 22, 2003 through July 30, 2003, Volume I, page 301, line 7, through page 303, line 23; Plaintiffs' Exhibit 80.

Mr. Miller also testified regarding the application for insurance for CNA Insurance Co. (the second insurance policy). Specifically. Mr. Clinton testified that, as a result of the misrepresentations on the application for the CNA Insurance policy about the true nature of the Respondents' dog training, CNA Insurance could have refused to pay any claim arising out of the respondents' dog training that was not disclosed in the application and canceled the policy *ab initio*. RT, July 22, 2003 through July 30, 2003, Volume I, page 294, line 17 through page 300,

line 3; see Defendants' Exhibits MM and OO.

Based upon the evidence submitted by Appellants, the burden of proof was shifted to the Respondents and there was more than enough evidence for this count to have been submitted to the jury.

X. **Conclusion**

Appellants were unquestionably denied their due process rights by the trial court in many ways and on many occasions. The most serious errors were structural due process in nature, occurring prior to trial, and preventing the Appellants from exercising their most basic constitutional rights. No party to a litigation can expect to receive a fair hearing if the entire pre-trial process is so biased against them that they cannot even discover the relevant evidence needed to present their case. All semblance of fundamental fairness was discarded by the trial court at the hearing on March 14, 2003, and the bias and prejudice of the trial court continued unabated right through the "trial". A more appalling example of structural due process error would be hard to imagine.

The Appellants are asking the Court of Appeal for relief from the Judgment entered against them on July 31, 2003. This relief consists of two parts. First, the overturning of the final Judgment after trial. Second, a trial *de novo* by the Court of Appeal of the Appellants' Motion for a Temporary Restraining Order concerning the illegal electrical wiring and trailer with a finding that the Respondents were, in fact, in violation of the Solano County Codes at the time of the filing of the original complaint through to the time of the March 14, 2003, hearing, and that correspondingly, the Respondents were in breach of the lease agreement.

Clyde and Anne Terry are now 83 and 78 years old. They entered into the lease with Respondents to provide themselves with some additional retirement income. Instead, they became embroiled in a most ugly and difficult legal battle that has not only drained their financial resources, but has caused them great emotional distress.

Clyde and Anne Terry want this Court to acknowledge that their constitutional right to due process was callously violated and that they were deprived of a fair and impartial trial. With the clear and uncontradicted evidence already in the record, this Court should be able to make a *de novo* determination that the Respondents were in breach of the lease. This would bring the entire matter to a close and allow the Terrys to live the remainder of their lives in peace.

Respectfully Submitted,

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Patrick H. Dwyer,
Attorney for Appellants

April ___, 2004