Supreme Court Case No. S158965

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRIAN REID

Plaintiff and Appellant,

vs.

GOOGLE, INC.

Defendant and Respondent.

After a Decision by the Court of Appeal,
Sixth Appellate District,
No. H029602

On Appeal from the Superior Court of Santa Clara County
No. CV023646
Honorable William J. Elfving

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND PROPOSED BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS (NEUTRAL BRIEF NOT SUPPORTING EITHER SIDE)

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APPLICATION OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to rule 8.520(f) of the California Rules of Court, the California Academy of Appellate Lawyers respectfully requests leave to file an amicus curiae brief regarding the second issue as to which the Court granted review: the proper appellate treatment of summary judgment evidentiary objections on which the trial court did not rule.

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. In aid of these goals, it seeks clear and consistent rules not only in the appellate courts but also in the trial courts, since without consistent trial rules there can be no consistent appellate results. The Academy has participated as amicus curiae in many cases before this Court, including, most recently, *Silverbrand v. County of Los Angeles*, No. S143929 (not yet argued) and *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894.

The Academy has no interest in or connection to either side, and it takes no position as to which side should prevail. It files this brief solely to assist the Court in eliminating the uncertainty that surrounds the treatment of undecided objections and replacing that uncertainty with clear guidance to both the bench and bar.

Because Academy members regularly encounter problems arising in this area, not just in handling appeals but also in consulting with trial counsel, and because of the substantial appellate expertise and experience of its members, the Academy believes its views will assist the Court in resolving this case.

Dated: July 16, 2008

Respectfully submitted,

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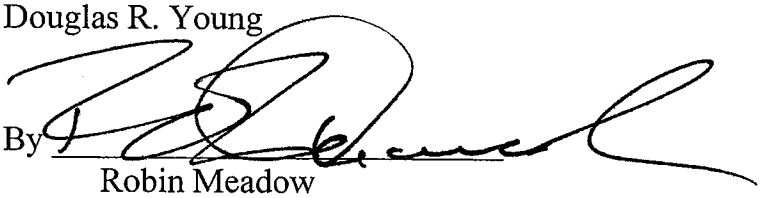

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BRIEF OF AMICUS CURIAE

CALIFORNIA ACADEMY OF APPELLATE LAWYERS

I.

INTRODUCTION.

The problem of how to handle summary judgment objections on which the trial court failed to rule has been plaguing California's appellate courts for nearly two decades. Things have become so unremittingly confused that one writer labeled it a "festering procedural swamp." (*Lawal v. 501(c) Insurance Programs, Inc.* (Cal.App. 6 Dist., Sept. 21, 2007, No. H029060) 2007 WL 2751782 (unpublished), *35 (dis. opn. of Rushing, P.J.)[1]

This Court is finally poised to lead the bench and bar out of that swamp. In support of that effort, the California Academy of Appellate Lawyers urges the Court:

1. To overrule *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 (*Ann M.*) and *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181 (*Sharon P.*) to the extent they hold that when a trial court fails to rule on objections to summary judgment evidence, "the objections are waived and are not preserved for appeal" (*Ann M.*, *supra*, 6 Cal.4th at p. 670, fn. 1);

2. To find that the standard of review on objections to summary judgment evidence is de novo rather than abuse of discretion; and

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[1] We do not cite this opinion as authority, but only as a cogent expression of frustration with the current law—much as if Justice Rushing had expressed his views in a legal journal.

3. To pronounce a rule that will govern what happens when the trial court fails to rule on objections to summary judgment evidence. In doing so, the court should disapprove *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1420 (*Biljac*) to the extent it permits trial courts to decline to make rulings.

As to this last point, if there is no waiver of undecided objections there should be some presumption as to how the trial court ruled, replacing the absence of a ruling with an implied ruling that the parties can brief and the appellate court can address.

The rule could be that the objections are deemed overruled (e.g., *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140-141) or, as Google urges, that they are deemed sustained (Google's Opening Brief, pp. 41-43). However, we believe the best result combines these two approaches: The prevailing party's objections should be deemed sustained, and the losing party's objections should be deemed overruled. For reasons we explain below, beyond being consistent with the general rule that all presumptions favor the judgment, this will best promote the effective briefing of objections.

II.

HOW THE SWAMP CAME TO BE.

A. The Trouble With *Ann M.*

Ann M. states an unyielding waiver rule: If the trial court fails to rule on objections, the objections are waived. (*Ann M.*, *supra*, 6 Cal.4th at p. 670, fn. 1.) This means that the objecting party has no opportunity to press its objections on appeal. The palpable unfairness of this rule has led the Courts of Appeal to craft ways of avoiding it.

Among those courts that take *Ann M.* at face value—that is, they conclude that "waive" really does mean "waive"—the most prominent approach is what we might call the stamp-and-scream rule, first articulated in *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 782-785: If a party asks for rulings insistently enough, it preserves its objections for purposes of appellate review even if the trial court makes no rulings. (See *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 714-715 (dis. opn. of Vogel, J.) [noting that "the objector must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections"]; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234-238.)

Another approach has been to issue a writ of mandate commanding the trial court to rule. (*Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 Cal.App.4th 633, 643 (*Vineyard Springs).*)

Yet other courts dodge the waiver rule by relying on implied overruling, at least where the trial court said that it considered only admissible evidence. (E.g., *Alexander v. Codemasters Group Limited*,

supra, 104 Cal.App.4th 129, 140-141 [failure to rule on objections is implied overruling].)

Finally, at least one court—the Court of Appeal here—has ignored *Ann M.* entirely: The court's lengthy exegesis on undecided objections doesn't even cite the case.

None of these approaches is predictable, efficient, or fair. The parties suffer not because of the failure of their case or their counsel, but because the trial court didn't do its job. A rule that allows—even encourages—this to happen cannot generate respect for the judicial process.

B. The Trouble with *Biljac*.

In *Biljac*, *supra*, 218 Cal.App.3d 1410, Division Two of the First District stated that a trial court need not rule on evidentiary objections because "it is presumed on appeal that a judge has not relied on irrelevant or incompetent evidence." (*Id.* at p. 1420.) The decision has been the express or implied basis for countless trial court refusals to rule on evidentiary objections—even though, as Division Two observed when it overruled *Biljac* last year in *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566, 578 (*Demps*), *Biljac* cannot be reconciled with *Ann M.*[2]

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[2] Division Two now considers undecided objections waived, but has not yet addressed whether to allow exceptions. (*Demps*, *supra*, 149 Cal.App.4th at pp. 566, 578-579 ["However, we need not decide this question [whether to apply any exceptions] because we give Demps the benefit of the situation and consider all the evidence in the record as though the objections were waived. Reviewing the record in that light, we conclude that the trial court's grant of summary judgment was correct"].)

At least until the very recent past, *Biljac* continued to sow confusion despite its near-universal rejection by the Courts of Appeal, as shown by Academy members' experiences and the plethora of recent published and unpublished decisions—seventeen since the beginning of 2007—in which trial courts invoked it.

While *Biljac's* presumption of correctness might be doctrinally accurate, it has proven useless as a guide for appellate briefing and decision-making. Since the parties disagreed in the trial court about what was admissible, they will disagree in the Court of Appeal about how to apply the presumption, and therefore about who has the burden of challenging the trial court's rulings.

C. The Trouble With The Standard Of Review.

Exacerbating these issues is the standard of review that supposedly governs rulings on evidentiary objections, abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; see *Sambrano v. City of San Diego*, *supra*, 94 Cal.App.4th at p. 236 ["ruling on such evidentiary objections can involve a number of considerations more suited to the trial court than the appellate courts, including an exercise of discretion in establishing the record to be reviewed de novo"].) In theory, if summary judgment evidentiary objections really do implicate discretion, then an appellate court can *never* properly review summary judgments without trial court rulings. After all, the Court of Appeal can no more exercise discretion than it can find facts. As this Court has repeatedly said, "'the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272, quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) Further, since "[a]

failure to exercise discretion is an abuse of discretion" (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176), the only correct remedy for a failure to rule should be a remand for rulings (see *Vineyard Springs*, *supra*, 120 Cal.App.4th at pp. 642-643 [mandamus issued to compel trial court to perform duty of ruling on objections]).

In practice, however, as in dealing with *Ann M.*'s waiver rule, courts can avoid the implications of adhering to a true abuse of discretion standard of review. Instead, they end-run these implications by implying a particular exercise of discretion—that objections were overruled.

D. Where Things Stand.

Because of these problems, there are now at least four different appellate approaches to a trial court's failure to rule on summary judgment objections: unqualified waiver of those objections; the stamp-and-scream rule; implied overruling of all objections; and implied correct rulings on all objections (the *Biljac* approach). It only compounds the problem that the issues are not well known or well understood within the trial bar or, for that matter, the trial bench.

The resulting uncertainty puts the appellate lawyer in a quandary, regardless of which side he or she represents. There is a world of difference between objections that have been waived and objections that have been impliedly overruled. On appeal, one need not brief an objection that has been waived—one can go straight to the objected-to evidence and argue its effect. But if the objection has *not* been waived because it was impliedly overruled or sustained, failure to brief it could mean an *appellate* waiver.

Fortunately, the solution to this confused state of affairs is not hard to come by. The Court of Appeal's opinion points in the right direction. With some additional elements, the solution becomes straightforward.

III.

THE ACADEMY'S PROPOSED SOLUTION.

A. Relevant Policy Goals.

Before presenting our proposed solution to the problem of undecided objections, we outline the policy goals that we believe should inform this Court's decision on what rules to pronounce.

1. The rules should increase the likelihood of correct summary judgment rulings.

Summary judgment motions are all about the evidence. "A trial court cannot decide whether a motion should be denied or granted until it has first determined what admissible evidence is in play on the motion." *(Vineyard Springs, supra*, 120 Cal.App.4th at p. 642.) This task cannot be accomplished without rulings on objections, since the court must consider all evidence "except that to which objections have been made and sustained by the court." (Code Civ. Proc., § 437c, subd. (c).)

Beyond failing to do what law requires, a trial court that does not rule on objections is unlikely to be performing the careful evidentiary analysis that summary judgment motions require. The result is more likely to be erroneous, the losing party more likely to appeal, the judgment more likely to be reversed, and respect for the process more likely to diminish.

2. *The rules should encourage lawyers to file limited and narrowly-targeted objections that the trial court can rule on intelligently.*

Without question, the single strongest disincentive for trial courts to rule on summary judgment objections is trial lawyers' habit of filing "blunderbuss objections to virtually every item of evidence submitted." (*Demps*, *supra*, 149 Cal.App.4th at p. 578, fn. 6.) Although it is unlikely that the kind of rules at issue in the present case can do much to abate this practice, at least the Court should not announce rules that encourage it. Certainly it is true that none of the current conflicting rules has had any salutary effect, not even the Draconian waiver rule from *Ann M.* that we ask the Court to overrule.

3. *The rules should promote efficient and well-informed appellate briefing and decision-making.*

As we discuss below, current approaches to reviewing objections vary so widely that it is impossible for parties to know when and how they should argue objections in their briefs. Whatever rules emerge from this Court's decision should be clear about who bears the burden of argument.

B. The Court Should Overrule *Ann M.* And *Sharon P.*

The Association of Southern California Defense Counsel has persuasively argued why the Court should overrule *Ann M.* We join the Association's arguments, and add the following thoughts.

Ann M. serves none of the policy goals outlined above. It does not motivate judges to rule on objections, because there are no appellate consequences from a failure to rule: The waiver of the objections eliminates the possibility of trial court error and therefore of reversal.

While a reviewing court can issue a writ petition or remand for rulings on objections, both of those results are contrary to the need for efficient resolution of appeals—and only a handful of courts have granted such relief.

The way in which *Ann M.* penalizes parties is also inconsistent with how the adversary system is supposed to work. This core aspect of our jurisprudence emphasizes a party's responsibility for action or non-action. So, for example, there can never be a reversal based on the erroneous admission of evidence unless a party objects to it. (Evid. Code, § 353.) But a party who has made an objection has done everything the system demands, and the responsibility for the next move lies with the court. Yet under *Ann M.*, when the trial court fails its duty, *only the parties suffer*. We cannot say it better than Presiding Justice Rushing: "To impose a forfeiture on a party based upon a court's violation of its supposed duties marks in my view an extravagant departure from the core principles on which we rely for a sound jurisprudence." (*Lawal v. 501(c) Insurance Programs, Inc.*, *supra*, 2007 WL 2751782 (unpublished), *36 (dis. opn. of Rushing, P.J.).)

Ann M.'s waiver rule may well have a place in trial practice, where there are ways to immediately address the trial court's failure to rule on an objection. A witness is not even supposed to proceed with an answer until the judge rules, and the objecting party has every right to speak up if the witness tries to do so. And if the court admits evidence conditionally subject to a later ruling on an objection, that is a sufficient signal to the party that the burden of action has shifted back to it, so that the party can be fairly charged with waiver if the court never rules.

In contrast, at a summary judgment oral argument there frequently is little opportunity for any give-and-take between the parties and the court over objections, and once the hearing is over the matter is entirely out of counsel's hands.

Beyond eliminating the unfairness of the waiver rule, overruling *Ann M.* would also eliminate the need for the stamp-and-scream rule and other remedies designed to mitigate *Ann M.*'s harsh effects. The stamp-and-scream rule, in particular, is a good example of why *Ann M.* is so impractical. As we have said, a party who files objections has done everything the adversary system considers necessary to preserve them, at least in the summary judgment context. What more, exactly, does the stamp-and-scream rule require? Suppose the trial court volunteers that it will take the objections under submission and rule on them when it decides the motion. Must the objecting party nevertheless continue to prod the trial court for rulings? How many reminders are enough? The stamp-and-scream rule was a commendable response to the unfairness of the waiver rule, but in truth it requires an empty formality that should not be necessary under any circumstances. Overruling *Ann M.* would eliminate the need for such a charade.

C. The Court Should Declare That The Standard Of Review For Summary Judgment Objections Is De Novo.

As the Court of Appeal noted in the present case, there is very little room for the exercise of discretion on evidentiary objections. (Slip Opn., p. 16 ["While it is true that a trial court enjoys varying amounts of discretion in making some types of evidentiary rulings, many such rulings are not discretionary in the slightest. No court has discretion to admit

hearsay evidence, or expert opinion by an unqualified witness, or testimony manifestly lacking any foundation in personal knowledge, over proper objection"].) Indeed, the basic rule is that admissibility of evidence is a question of law for the court. (Evid. Code, § 310, subd. (a).)[3]

Unlike many other evidentiary proceedings, summary judgment involves a highly structured environment in which the parties must deconstruct their evidence into individual statements of undisputed facts, and in which objections must pinpoint precise pieces of evidence. (Cal. Rules of Court, rule 3.1354.) In addition, unlike in the heat of battle at trial, the trial court can review each piece of evidence in the privacy of its chambers and without the need to consider any impact on a jury. This environment strips evidentiary rulings of most of the discretion and related fact-finding that courts are often called upon to exercise during trial.

1. There can be no credibility determinations in summary judgment proceedings.

One of the things that can influence the admission of evidence at trial may be the credibility of witnesses on a foundational showing, such as authenticating a document or establishing a business records exception. In summary judgment proceedings, however, the non-moving party automatically wins credibility disputes. (E.g., *Miller v. Bechtel Corp.*

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[3] "All *questions of law* (including but not limited to questions concerning the construction of statutes and other writings, *the admissibility of evidence*, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4." (Emphasis added.)

(1983) 33 Cal.3d 868, 874 ["The affidavits of the moving party are strictly construed, while those of the party opposing the motion are liberally construed, and doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion"].)

2. Only rarely can courts considering summary judgment motions exercise discretion under Evidence Code section 352.

Another area in which trial courts unquestionably have discretion is their power under Evidence Code section 352 to exclude otherwise relevant evidence because it is unduly prejudicial or time-consuming.[4] But rarely, if ever, is there a place for exercising this discretion in a summary judgment proceeding:

• In deciding a summary judgment motion, the court must resolve doubts as to the propriety of granting the motion in favor of the non-moving party. (*Miller v. Bechtel Corp.*, *supra*, 33 Cal.3d at p. 874.) Since the potential that evidence might be unduly prejudicial or time-consuming at trial reflects doubt about the possible outcome of the motion, if that piece of evidence is dispositive the non-moving party should win.

• A court hearing a summary judgment motion is in no position to make such a judgment in any event. Section 352's factors are trial oriented

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[4] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

and should have little or no bearing on the decision-making process involved in ruling on a summary judgment motion. Time consumption is not a concern with a motion in the way that it is in a jury trial, and trial judges are in little danger of being confused or misled.

• Even if section 352's factors were appropriate to a motion setting, they should still be off limits in determining a summary judgment motion. That determination anticipates what would happen at a trial if all of the parties' admissible evidence were received—it asks whether there would be anything for the jury to decide. But there is no way that a judge hearing a summary judgment motion can possibly anticipate how he or she—much less another judge—would exercise discretion in the middle of a jury trial, because the ability to judge prejudice and time consumption will depend on that trial's realities. Yet that is precisely what the summary judgment judge would have to do in sustaining a section 352 objection.

One cannot rule out the possibility that some kind of summary judgment evidentiary rulings might involve some kind of exercise of discretion, but those situations are surely rare enough that reviewing courts can deal with them when they arise. The vast majority of summary judgment objections will not trigger any need to exercise discretion—or, as with a section 352 objection, the discretion can almost certainly be exercised only in favor of the non-moving party. Besides, as a practical matter the reviewing court may well be able to decide a case that involves some discretionary rulings on a basis that does not require it to consider those rulings.

The standard of review should reflect, rather than dictate, the reality of summary judgment proceedings. Declaring that the standard of review is

de novo will help appellate courts avoid erroneous analytical paths in addressing rulings on summary judgment evidentiary objections.

D. The Court Should Articulate A New Rule: When The Trial Court Fails To Rule On Summary Judgment Objections, The Reviewing Court Will Presume That The Prevailing Party's Objections Were Sustained And The Losing Party's Objections Were Overruled.

The Court of Appeal held that the absence of trial court rulings should yield a presumption that the trial court overruled evidentiary objections. Google suggests that the presumption be that the objection was sustained. We believe that both approaches have some merit and can be combined.

1. Are implied rulings necessary?

The first question, however, is whether there needs to be *any* kind of implied ruling. If there is no waiver, and if the standard of review is de novo, isn't every objection up for grabs in the Court of Appeal? Does it really matter how the trial court ruled?

The answer is that it does matter, although not necessarily to the substantive analysis of the objections. That is because of the need to foster efficient appellate decision-making in which the roles of the parties and the court are clearly defined.

While the trial court must consider all objections that are timely and in proper form, the Court of Appeal's task is very different. Although in evaluating a summary judgment ruling it must undertake the same principal analytical tasks as the trial court (see *AARTS Productions, Inc. v. Crocker*

National Bank (1986) 179 Cal.App.3d 1061, 1064-1065), it need only consider the arguments in the parties' appellate briefs. An argument not made is waived—including an argument that a particular objection should have been sustained or overruled. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [failure to raise issue in opening brief waives it on appeal]; *Graner v. Hogsett* (1948) 84 Cal.App.2d 657, 662 [challenges to rulings on motions to strike testimony and objections to evidence waived because not raised in opening brief].)

Trial court rulings generally dictate the burden of argument in the Court of Appeal: The losing party must challenge a claimed error or waive the position, while the prevailing party has no duty to support a trial court ruling that the losing party does not challenge. Unless there is a way of allocating implied rulings to one side or the other, parties have no guidance as to who should say what. Essentially, this is the regime *Biljac* created: Each side assumes that its position on the evidence was correct and therefore sees no need to present any argument. While in the end the issues are likely to be sorted out because one side or the other will think to make the necessary arguments somewhere in its brief, that is hardly an approach conducive to efficient briefing and decision-making.

2. Implied overruling and implied sustaining, standing alone, both have drawbacks.

So, some ruling needs to be implied. This not only confirms the absence of any waiver, but also makes clear which party has the burden of arguing the issue: the proponent of the evidence if objections are deemed sustained, or the opponent if they are deemed overruled. However, a one-

size-fits-all approach, in which the implied ruling applies to all objections, has some drawbacks.

Implied overruling. This approach does not necessarily comport with litigation realities. It would mean that the *entirety* of both sides' evidence was received, but in any case where the evidentiary objections really matter it would be very unlikely that the trial court actually saw the case that way. This case is a good example. The statistical evidence concerning Google's claimed discriminatory practices was important to the Court of Appeal's decision that summary judgment was inappropriate. (Opinion, pp. 17-19.) Yet given how clear it apparently was to the Court of Appeal that the trial court erred in granting summary judgment, the trial court *must* have rejected the evidence, since otherwise it would have had to deny the motion.

The awkwardness of this situation becomes apparent when one realizes that, with an implied overruling of the prevailing party's objection to dispositive evidence proffered by the losing party, the prevailing party/respondent must seek *affirmance* on the basis of a presumed trial court *error*. Although Code of Civil Procedure section 906 contemplates such arguments by a respondent, ordinarily it is the appellant who should be arguing trial court error.

Implied sustaining. Google advocates that all undecided objections should be deemed sustained. (Google's Opening Brief, pp. 41-43.) That would likely comport with the trial court's actual thought process here, but the approach still has its limitations.

In most situations, both sides file objections, and—at least the way many lawyers file objections these days—the objections comprehend virtually the entirety of the other side's evidence. If every objection is deemed sustained, then for all practical purposes *there would have been no admissible evidence before the trial court at all.* Since the reviewing court's first task is to determine whether the moving party made a prima facie case as to the absence of triable issues (*AARTS Productions, Inc. v. Crocker National Bank, supra*, 179 Cal.App.3d at pp. 1064-1065), the appellant's first line of argument would be that there was no evidence to support the motion, from which reversal would automatically follow. At least in theory, the appellant would not even need to talk about whether its own evidence created a triable issue. It could properly wait until its reply brief, after the prevailing party/respondent carried the burden of arguing that its own evidence was in fact admissible. To be sure, in an actual case things would not likely play out this way—an appellant would rarely risk such an approach. But that very fact demonstrates the disconnect between implied sustaining and the reality of appellate practice.

Another more abstract but equally problematic aspect of implied sustaining is that, generally speaking, evidence is admissible unless someone objects to it—the burden is usually on the objecting party to keep evidence out, rather than on the proponent to get the evidence in. Implying that all objections were sustained essentially reverses the parties' ordinary roles with respect to the admission of evidence.

3. Implied rulings should depend on who prevailed: The prevailing party's objections should be deemed sustained, and the losing party's deemed overruled.

We believe that the best way to approximate the trial court's actual thought process and to place appellate arguments where they belong is to presume that the prevailing party's objections were sustained and the losing party's objections were overruled. While this approach is no substitute for actual rulings—very rarely are either *all* or *none* of a parties' objections meritorious—it aligns the burden of argument in a way that best promotes efficient presentation of appellate issues. It is also consistent with an overarching rule of appellate review—the doctrine of implied findings, under which the reviewing court presumes that the trial court resolved all controverted issues in favor of the prevailing party. (See, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Ordinarily it is up to the appellant to define the issues that will govern an appeal, and it is most particularly the appellant's burden to challenge any error that it claims led to an incorrect result below. As far as the admission of evidence is concerned, a summary judgment ruling could be based on either the admission of the prevailing party's evidence or the exclusion of the losing party's evidence, but it is not likely to be based on the reverse. So, the losing party ought to have the burden of demonstrating both that its own evidence should have been admitted *and* that the prevailing party's evidence should have been excluded. In the real world, where most evidentiary objections do not matter very much to the decision, the actual arguments will probably be narrow and specific—neither side

will need to address every implied ruling. But in any event the appellant will have the unambiguous burden of initiating the argument sequence.

There will certainly be occasions where this rule does not perfectly align the parties with the presumed rulings. For example, in a multi-issue summary judgment a party might prevail on one issue but lose on another, and it may not be clear which issue various pieces of evidence relate to. But in those relatively few situations in which there is no basis for making a division of rulings, implied overruling could be the fallback. Every objection would still have some kind of implied ruling attached to it that would guide the parties in framing their appellate arguments and eliminate the unfairness and unpredictability of the current state of the law.

We recognize that this approach will not necessarily motivate trial courts to rule, since they will know that the parties' appellate rights are actually better protected than under *Ann M.*'s waiver rule. But unlike the waiver rule, at least with implied rulings the trial court is subject to reversal. And even though the reversal may arise only from an implied ruling, the message will be clear that, at bottom, it may well have occurred because the trial court failed to do its job.

Perhaps more to the point, there really isn't very much that this Court or the Courts of Appeal can do to encourage trial courts to rule, beyond what they have done and what we hope this Court will do in its opinion here: Tell trial courts that parties have a right to have rulings and that courts can't avoid their duty to rule through *Biljac*-like subterfuges.

Perhaps the pronouncement can also include a message to trial lawyers that if they want the trial court to make meaningful rulings, they

should facilitate its doing so by choosing their battles wisely and only objecting to evidence when it matters. Eliminating paper wars over evidentiary objections would go a long way toward solving the problems we have discussed in this brief.

IV.

CONCLUSION.

The pathway out of the "festering swamp" is clear: Change the rules by which appellate courts review evidentiary objections.

The waiver rule serves no valid policy goal and confounds basic notions of fairness, to say nothing of fostering ill will towards the judicial system by clients who cannot understand why they should be penalized when their lawyers have done their job. The court that decided *Biljac* has now recognized that it was not a good idea and should be rejected.

In contrast, implied rulings, combined with a de novo standard of review, serve the interests of justice and simplify the work of both lawyers and the courts. We urge the court to follow this path, and to announce the rule we propose.

Dated: July 16, 2008

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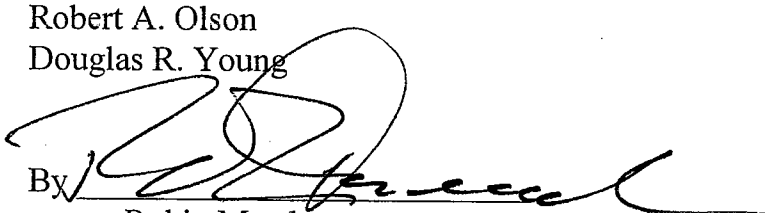
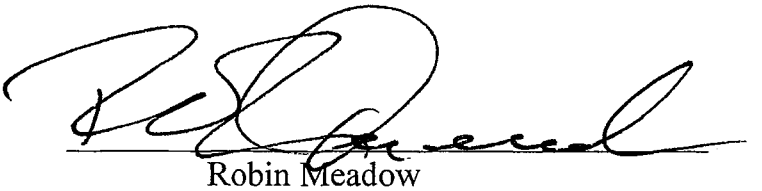
By 
Robin Meadow
Attorneys for Amicus Curiae
California Academy of Appellate
Lawyers

CERTIFICATION

Pursuant to Rules 8.204(c)(1) & (4) and 8.520(c) of the California Rules of Court, I certify that this **APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND PROPOSED BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS** contains 5,612 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: July 16, 2008



Robin Meadow

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On July 16, 2008, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND PROPOSED BRIEF OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS (NEUTRAL BRIEF NOT SUPPORTING EITHER SIDE** on the interested parties in this action by serving:

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(X) **By Envelope** - by placing () the original **(X)** a true copy thereof enclosed in a sealed envelope addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices:

(X) **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **July 16, 2008**, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie

Charice L. Lawrie