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June 24, 2005

Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Gallant v. City of Carson
No. S134196

Dear Chief Justice George and Associate Justices:

The California Academy of Appellate Lawyers submits this letter, under California Rule of Court 28(g), to urge the Court to grant defendants City of Carson, et al.'s petition for review on the second issue raised in defendants' petition: whether the Court should revisit that portion of *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, n. 1, which holds that a party who fails to secure a ruling on evidentiary objections made in the course of a summary judgment proceeding waives the right to challenge the admissibility of the objected-to evidence on appeal.

The Academy is the largest selective organization of appellate lawyers in California. Its members, who have diverse practices that cover all types of civil and criminal appellate proceedings, have a strong interest in clear and consistent rules of appellate procedure. That interest prompts this letter.

Ann M. involved a summary judgment entered on behalf of certain defendants in a premises liability matter. During the Court's introductory discussion about the facts and procedural history, it noted that "[t]he trial court did not rule on [various evidentiary] objections" the defendants made to the plaintiff's evidence submitted with her summary judgment opposition.

6 Cal.4th at 670, n. 1. However, the Court held, "[b]ecause counsel failed to obtain rulings, the objections are waived and are not preserved for appeal. [Citations.]" *Id.* The Court went on to note that "[a]lthough many of the objections appear meritorious, for purposes of this appeal we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record." *Id.*

Ann M.'s rule is a bright-line one that is easy to state, but not so easy—or perhaps more to the point, fair—to apply. It is unfair because waiver is visited on a *party* as a consequence of the *trial court*'s failure to rule on timely (and, as in *Ann M.*, perhaps valid) evidentiary objections. The issue gains importance because when the objections are waived rather than merely overruled, the party who wishes to challenge the admissibility of the evidence cannot argue the merit of those objections on appeal.

The courts of appeal have not been uniform in applying *Ann M.*'s waiver rule. Some, like the majority in this case (where the issue arises in the context of a motion to dismiss under the anti-SLAPP statute, Code of Civil Procedure section 425.16), adhere to a hard-and-fast, bright-line rule: no ruling equals a waiver of the objection. See maj. opn. at 4-5; *accord, e.g., Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 648; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 874, n. 2.

Another line of cases makes an exception when counsel has not only objected but has vigorously asked for a ruling. In that event, the reviewing court has declined to find a waiver. *See, e.g., City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783-784; cf. *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 236 ("That approach seemingly transfers the evidentiary ruling job to the appellate court. This is not always a simple task, and

not one suitable to this court, normally sitting as a three judge panel committed to reviewing issues of law, not fact").[1]

The process is further complicated by the now-prevalent practice of many trial courts which state that, in making their summary judgment rulings, they have considered only admissible evidence, citing *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419. This is an understandable reaction to an equally prevalent (and probably unwelcome) practice of parties lodging tens, if not hundreds, of objections to an opponent's evidence.

The Fourth District, Division One has criticized and disagreed with the *Biljac* approach, calling it "cause for concern" because "it is it is not the function of an appellate court to make such evidentiary rulings in the first instance . . . ." *Sambrano*, 94 Cal.App.4th at 229, 235. This Court has not taken a position on the issue or decided whether a *Biljac*-type statement is a sufficient ruling to avoid a waiver. And despite its concerns about and disagreement with *Biljac*, *Sambrano* found such a statement was sufficient to avoid a waiver. *See id.* at 241 ("if the *Biljac* theory is accepted, the evidence was not admitted, and summary judgment

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[1] The dissenting justice here expressed that view:

> When objections are made to evidence offered in support of or in opposition to a motion for summary judgment, 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. If he doesn't, his objections are waived. . . . [¶] . . . [L]awyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek. Judges know they are supposed to rule on evidentiary objections, and those who fail to do so may frown upon the lawyer who presumes to tell the court how to do its job, placing the lawyer in the unenviable position known in chess as 'Zugzwang,' . . . . (Dis. opn. at 1)

should be upheld. We believe that is the only appropriate approach on this record."). Whether or not the *Biljac* approach is a good one, the solution should not be to foreclose a party from meaningful appellate review by finding the trial court's failure to rule equates with a waiver.

The upshot is that parties presently have no certainty as to what they must do to preserve evidentiary objections in summary judgment proceedings. The Court of Appeal majority here extended that uncertainty by holding the *Ann M.* waiver rule applicable to anti-SLAPP proceedings. Thus, under current law, if parties make an objection and ask for a ruling, will that be sufficient to preserve the issue? Must the request for a ruling be made at the hearing? How many times must a party request a ruling? And, what if the trial court states only it has considered admissible evidence, à la *Biljac*? Is the objection preserved?

Nor do trial courts have certainty about their obligations. Must they rule on objections, with or without a separate oral request that supplements the written objections? May trial courts use the *Biljac* approach? Does doing so avoid a waiver?

These uncertainties plague appellate counsel and appellate courts. They are faced with conflicting rulings and reasoning about how *Ann M.*'s rule should be applied and thus what evidence is fair game on appeal.

The Academy recognizes there are competing arguments. Some view the *Ann M.* rule as unsupported by statute because nothing in Code of Civil Procedure section 437c(c) says anything about waiver of objections. It merely says that if the objection is not sustained, the trial court is to consider the evidence. This language is as consistent with an implied overruling of the objection as it is with waiver. The opponents of the rule also say it is unjust because a party is saddled with a waiver not because the party has failed to assert its rights but because the trial court failed to discharge its duty to make a ruling. This injustice is compounded if the

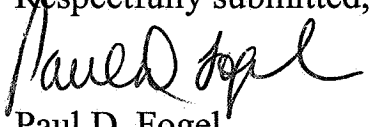
rule applies in situations where the trial court follows *Biljac* and merely states it has considered only admissible evidence without ruling on the objections.

The countervailing argument is that the *Ann M.* rule provides a bright-line standard that allows appellate courts to know definitively what evidence should be considered on appeal, similar to the rule regarding unruled-on objections made at trial.

The Academy takes no position in this letter as to how these issues should be decided. It does, however, believe this Court should resolve the application of the *Ann M.* rule so parties know what they must do to preserve objections for appeal, so trial courts know what their obligations are with regard to such objections, and so appellate counsel and appellate courts know what evidence is properly before the court.

Thank you for considering the Academy's views.

Respectfully submitted,



Paul D. Fogel

First Vice-President, California Academy of Appellate Lawyers

cc: Per attached proof of service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 2 Embarcadero Center, Suite 2000, San Francisco, CA 94111.

On June 24, 2005, I served the foregoing document described as: **LETTER TO CALIFORNIA SUPREME COURT** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

I deposited such envelope(s) in the mail at San Francisco, California. The envelope was mailed with postage thereon fully prepaid.

(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 San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 24, 2005, at San Francisco, California.

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

Victoria Eisenmann

GALLANT v. CITY OF CARSON
California Supreme Court No. S134196]
Second District Court of Appeal, Division One
(No. B176052)

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[LASC Case No. BC309168]

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[Court of Appeal Case No. B176052]