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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

HAO D. BUI,

Plaintiff and Appellant,

v.

4901 CENTENNIAL PARTNERS, LLC et al.,

Defendants and Respondents.

F065656

(Super. Ct. No. CV-271889)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Law Offices of Morton Minikes, Morton Minikes; Castro & Associates, Joel B. Castro and David H. Pierce for Plaintiff and Appellant.

Law Offices of Craig D. Braun, Craig D. Braun; Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and Catherine E. Bennett for Defendants and Respondents.

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Plaintiff Hao D. Bui appeals from the trial court's order granting a motion for nonsuit in an action seeking damages for construction defects in a building plaintiff purchased from defendants 4901 Centennial Partners, LLC, Donald J. Schimnowski, Carlos Sanchez and Manjit S. Sidhu (4901 Centennial).<sup>1</sup> The nonsuit was granted as to all causes of action pled, but plaintiff appeals only that part of the nonsuit order that pertains to its cause of action for negligence.<sup>2</sup> We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, a vascular surgeon, purchased real property from 4901 Centennial. Donald J. Schimnowski, Carlos Sanchez and Manjit S. Sidhu were the members of 4901 Centennial Partners, LLC. The named seller of the property was 4901 Centennial. The property included a "cold-shell building" that was empty and consisted of a roof, four walls, doors, windows and dirt floor.

Plaintiff offered \$939,000 for the property. His offer specified that he be allowed to inspect the building and that closing of the transaction was contingent on his satisfaction with the physical aspects of the property. During escrow, however, plaintiff sought a reduced price of \$919,000 and agreed to waive all contingencies (except the loan contingency), *including the right to inspect and to be satisfied with the property*. This revised offer was accepted by 4901 Centennial.

The written purchase agreement specified that: the seller represented it had no knowledge of any problems with the property (§ 12.1(d)); the buyer was purchasing the property in its "existing condition" (§ 12.2); by the time called for in the contract the buyer will have made or waived all inspections of the property buyer believed was

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<sup>1</sup> Plaintiff sued the individual managing members of the LLC along with the LLC. In light of our affirmance, the question whether the individual defendants were jointly and severally liable to plaintiff is rendered moot.

<sup>2</sup> Such an order amounts to a judgment of nonsuit from which an appeal will lie. (*Socket v. Gottlieb* (1960) 187 Cal.App.2d 760, 763.)

necessary to protect its own interests (*ibid.*); and buyer was allowed 90 days to satisfy itself as to the physical condition of the property (§ 9.1(b)-(g)). The agreement further acknowledged that no representations, promises or assurances concerning the property or any aspect of the occupational safety or health laws or any other act, ordinance or law had been made by either party or brokers or relied upon by either party (§ 12.2).

Plaintiff began building out the building to accommodate medical offices and a vascular center. It was discovered that there was discoloration on portions of the underside of the roof, which turned out to be mold. Plaintiff's water intrusion expert, Robert Tellez, testified that mold was the result of water entering the building from leaks in the roof where sheet metal plates had been installed to cover holes in the roof for later installation of a HVAC system. He testified that the roof had been installed and fabricated in violation of the California Building Code and industry standards. Mr. Tellez also testified that water had seeped into the building from the outside landscaped portion of the property because no vapor barrier had been installed. He also opined that the sheet metal flashing around a pipe going through the roof was not properly installed.

The case was tried to a jury. Defendants made a motion for nonsuit, which the court granted as to all causes of action, including the one for negligence. It is only the granting of the nonsuit as to the negligence cause of action that is the subject of this appeal.

### **STANDARD OF REVIEW**

The judgment or order forming the basis of the appeal is presumed to be correct. If the appealed judgment is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such reasoning was actually invoked. (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1201, citing *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329 & *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

In an appeal from a judgment of nonsuit, the reviewing court is guided by the following rule: “‘The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.’ [Citations.]” (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.) Thus, for the limited purpose of reviewing the nonsuit order, we must give plaintiff’s evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn from the evidence in plaintiff’s favor.

### **THE PURCHASE AGREEMENT**

The parties submitted a joint set of “Stipulated Facts” for submission to the trial court. The statement included the July 8, 2009, purchase agreement executed by the parties. It was entitled “STANDARD OFFER, AGREEMENT AND ESCROW INSTRUCTIONS FOR PURCHASE OF REAL ESTATE.” Paragraph 9 is entitled “Contingencies to Closing.” Paragraph 9.1(b) reads:

“Physical Inspection. Buyer has 90 days from the receipt of the Property Information Sheet or the Date of Agreement, whichever is later, to *satisfy itself with regard to the physical aspects and size of the Property.*” (Italics added.)

Paragraph 12 reads:

“Representations and Warranties of Seller and Disclaimers. [¶] ... [¶] (d) Compliance. *Seller has no knowledge of any aspect or condition of the Property which violates applicable laws, rules, regulations, codes or covenants, conditions or restrictions, or of improvements or alterations made to the Property without a permit where one was required, or of any unfulfilled order or directive of any applicable governmental agency or casualty insurance company requiring any investigation, remediation, repair, maintenance or improvements be performed on the Property.*” (Italics added.)

Paragraph 12.2 reads:

“Buyer hereby acknowledges that, except as otherwise stated in this Agreement, Buyer is purchasing the Property in its *existing condition* and will, by the time called for herein, make or have *waived all inspections* of the Property Buyer believes are necessary to protect its own interest in, and its contemplated use of, the Property. The Parties acknowledge that except as otherwise stated in this Agreement, *no representations*, inducements, promises, agreements, assurances, oral or written, concerning the Property, or any aspect of the occupational safety and health laws, Hazardous Substance laws, *or any other act, ordinance or law*, have been made by either Party or Brokers, or relied upon by either Party hereto.” (Italics added.)

Paragraph 16 reads:

“Attorneys’ Fees. [¶] If any Party or Broker brings an action or proceeding (including arbitration) involving the Property, whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in a proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys’ fees....”

### **TRIAL COURT’S ORDER**

In nonsuiting all of plaintiff’s causes of action, the trial court found that there was no misrepresentation of fact made by any of defendants to plaintiff, no evidence of reliance upon a misrepresentation and there was “simply no evidence whatsoever of a fraud in this case.” The court found that there was no evidence of any breach of the express provisions of the written contract, no evidence that defendants had any knowledge of any defects or code violations, no evidence of negligent misrepresentation of facts and no evidence of concealment of any fact by defendants.

In announcing its decision to grant a nonsuit on the negligence cause of action, the trial court stated:

“All right. Returning to the record in Bui vs. 4901 Centennial Partners, Counsel are present, the parties are present. I had indicated when I left the bench that I was going to give further consideration to the negligence theory as stated in the sixth cause of action of this case of this complaint. My hesitation in terms of ruling on that case was to consider whether the evidence of defect, which has to do with the roof caps and the

shortness of the rim—I'll call it the rim on the roof cap and the gap in the corner of the roof caps—there is evidence that that is a defect and that it is a violation of code standards. The issue is whether that fact alone is sufficient to go to the jury on a negligence theory, and I think that it is not.

“I think it would be—although I have stated and had in mind the disfavored nature of a nonsuit, I think it would be legal error for that theory to go to the jury upon the state of the evidence. There is no—basically I considered the Pollard ... case for the judicially created standard there, but I don't think that is really managed legally under the rubric of negligence. I think it's managed under the rubric of implied warranty. There is no action here that is being pursued upon implication. That's already been made clear in the record. And I believe that there is no evidence sufficient to support a duty or breach of duty in that there is no evidence of the standards of inspection that a building owner would be required to undertake in the sale of the building, and so I will grant the motion for nonsuit on the sixth cause of action, which by my rulings would dispose of the case. Therefore, I plan to bring the jury back in, advise them of my ruling, and discharge the jury.”

### **CONTENTIONS OF THE PARTIES**

Plaintiff contends it was error to grant the nonsuit as to the negligence cause of action because its expert testified that the mold damage resulted from violations of the building code when 4901 Centennial constructed the cold shell building. He contends that it is no defense to the negligence claim that the property was purchased in its “existing condition” (“as is”).

Respondents maintain that the trial court properly granted the motion for nonsuit because, even assuming a duty of care existed, plaintiff contractually agreed to accept the building in its existing condition without inspection, which negates any claim for negligence.

**PLAINTIFF PURCHASED THE PROPERTY IN ITS  
“EXISTING CONDITION,” THEREBY EXCUSING  
ANY DUTY OF CARE ON THE PART OF DEFENDANTS**

1. General Negligence

Plaintiff contends that he established a prima facie case for negligence because he presented evidence that the building he purchased from defendants had construction defects that caused damage to the property. He urges this court to reverse the nonsuit order on the basis that plaintiff’s evidence was sufficient to support a finding of general negligence and also negligence per se (Evid. Code, § 669) based on testimony from plaintiff’s expert that the subject building contained defects resulting from a failure to comply with applicable building codes. We disagree.

When property is sold “as is” or in its “present or existing condition,” the seller is relieved from liability for defects in that condition. The only exception is when the seller commits actual fraud. (*Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 333-334 (*Shapiro*); *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 740-742 (*Lingsch*)). Since the contract provided that plaintiff was purchasing the property in its “existing condition” and the trial court specifically found that defendants did not commit fraud, plaintiff is precluded from maintaining a cause of action for negligence against defendants for the property’s alleged construction defects.

In support of his claim that plaintiff’s evidence established a prima facie case of general negligence, plaintiff cites *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*).

The issue before the high court in *Aas* was:

“May plaintiffs recover in negligence from the entities that built their homes a money judgment representing the cost to repair, or the diminished value attributable to, construction defects that have not caused property damage?” (*Id.* at p. 635.)

The court answered that question in the negative.<sup>3</sup> The holding in *Aas* is simply not pertinent to the issue before this court. It did not address the question whether parties may contractually absolve the seller of a duty of care by including contract language that the property is being sold “as is” or in its “existing condition.” There was no such contract in *Aas*. However, the *Aas* opinion did recognize the general principle that the law of negligence may afford a remedy for construction defects. (*Id.* at pp. 635-636, fn. 4 & authorities cited therein.) Among the authorities cited in the *Aas* opinion were *Sabella v. Wisler* (1963) 59 Cal.2d 21 (*Sabella*) and *Sumitomo Bank v. Taurus Developers, Inc.* (1986) 185 Cal.App.3d 211 (*Sumitomo*), both cited and relied upon by plaintiff herein.

In *Sabella*, defendant Wisler built a home that plaintiff Sabella purchased. Sabella obtained a money judgment against Wisler for negligent construction of the home. Wisler contended that the judgment should be reversed because he was not found guilty of misrepresentation or fraudulent concealment and was thus protected by the doctrine of caveat emptor (buyer beware) as it applied to real property. The court held that Wisler’s liability was predicated solely upon negligence in the construction of the house, rather than upon misrepresentation or implied warranty, and therefore the doctrine of caveat emptor did not apply to the case. (*Sabella, supra*, 59 Cal.2d at p. 27.) Thus, *Sabella* stands for the proposition that a homeowner may sue the homebuilder in negligence for construction defects that cause damage to the property.

However, *Sabella* is not controlling authority here because, as was also the case in *Aas*, there was no evidence that Sabella had entered into a written contract with Wisler to accept the property in its existing condition. The *Sabella* court never addressed the question whether a seller could be relieved of a duty of care by an “as is” contract nor did

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<sup>3</sup> With respect to certain claims by homeowners, the *Aas* holding was superceded by Civil Code section 895 et seq. (See *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1202.)

it address whether a purchaser could contractually waive its right to enforce a duty of care against a builder under Civil Code section 1668, discussed later in this opinion.

In *Sumitomo*, a builder of a condominium project borrowed money from a bank. When the builder defaulted on its payments, the bank acquired the project at a trustee's sale and then brought suit against the builder for construction defects, suing for breach of contract, fraud and negligence, among other theories. The trustee's deed included the following language, which the appellate court characterized as "as is" language:

"Title Insurance and Trust Company, a California corporation (herein called Trustee), as the duly appointed Trustee under the Deed of Trust hereinafter described, does hereby grant and convey, but without warranty, express or implied, to the Sumitomo Bank of California."  
(*Sumitomo, supra*, 185 Cal.App.3d at p. 216.)

The trial court dismissed the case after sustaining demurrers to all causes of action. The Court of Appeal affirmed except as to the negligence cause of action. Citing *Sabella*, the court stated that as a general rule a builder must exercise reasonable care toward those who purchase a "housing structure." (*Sumitomo, supra*, 185 Cal.App.3d at p. 223.) The *Sumitomo* opinion then ventured beyond *Sabella's* holding and concluded that the "as is" provision in the trustee's deed conveyed at the sale did *not* bar a negligence cause of action. (*Sumitomo, supra*, at p. 224.) Citing language in *Sabella* that the builder's liability was predicated solely upon negligence in the construction of the dwelling, rather than upon misrepresentation or implied warranty wherein the doctrine of caveat emptor might apply, the *Sumitomo* opinion declared:

"Under the reasoning of *Sabella*, although an 'as is' provision may under some circumstances establish an absence of fraud, it does not affect liability based on breach of a duty of care." (*Sumitomo, supra*, at p. 224.)

We disagree with the breadth of *Sumitomo's* conclusion that an "as is" provision does not affect liability based on a breach of a duty of care. First, neither *Aas* nor *Sabella* is authority for the proposition that an "as is" contractual provision does not affect liability based on breach of a duty of care because there was no such provision in either

case. Neither opinion even discussed what effect such a provision would have on a negligence claim. Second, the “as is” provision in the trustee’s deed in *Sumitomo* was limited in its scope. It merely acknowledged that the seller was not making any express or implied warranties to the bank. It did not identify or describe the warranties. It did not purport to waive the bank’s right to sue for construction defects that were negligently made. Third, neither *Sabella* nor *Sumitomo* make any reference to Civil Code section 1668 (contracts contrary to policy of law) or to the line of cases that have interpreted it, including *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 (*Tunkl*) and its progeny.<sup>4</sup> Lastly, *Sumitomo*’s sweeping conclusion that an “as is” provision in a sales contract cannot negate a negligence claim conflicts with earlier case law, which the *Sumitomo* opinion ignores. (*Lingsch, supra*, 213 Cal.App.2d at p. 743.)

In the instant case, the contractual provisions limiting defendants’ duties are significantly broader than the provision in *Sumitomo*. They do more than recognize that defendants are not making any express or implied warranties as was the case in *Sumitomo*. Here, the contract expressly stated that plaintiff acknowledged he was purchasing the property in its “existing condition” and would either make or waive all inspections of the property plaintiff believed were necessary. We have the additional fact that the originally agreed purchase price was reduced by defendants in consideration of plaintiff waiving his right to inspect the property. The contract further provided that there were no representations made concerning the property or any aspect of health laws or any other act, ordinance or law. Clearly, the contract entered into between the parties acknowledged that plaintiff was buying the property in its existing condition without any express or implied warranties or representations by defendants. Plaintiff initially reserved the right to inspect the property and later waived that right as part of a renegotiated lower price. Any sale of property “as is” is a sale of the property in its

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<sup>4</sup> The *Sabella* opinion predated the *Tunkl* opinion by six months.

present or existing condition and relieves a seller of real property from liability for defects in the property. (*Lingsch, supra*, 213 Cal.App.2d at p. 742; *Shapiro, supra*, 188 Cal.App.3d at p. 333.) The language of the contract leads to one conclusion: plaintiff was waiving any rights he had to recover damages caused by property defects or noncompliance with applicable laws.<sup>5</sup>

2. Civil Code Section 1668

The question remains whether such a contractual provision is enforceable as against the prohibition codified in Civil Code section 1668.

Civil Code section 1668 provides:

“All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”

In *Tunkl*, the Supreme Court held that an exculpatory provision may stand only if it does not involve the *public interest*. (*Tunkl, supra*, 60 Cal.2d at p. 96.) In providing further explanation, the court described a “rough outline” of the type of transaction in which exculpatory provisions would be held invalid. (*Id.* at p. 98.) Those considerations included: concerning a business of the type generally thought suitable for public regulation; the party seeking exculpation is engaged in performing a service of great importance to the public; the party holds himself out as willing to perform this service for any member of the public who seeks it; the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks its services; in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a

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<sup>5</sup> An exception to this conclusion would obtain if there was evidence of intentional fraud, misrepresentation or concealment. (*Shapiro, supra*, 188 Cal.App.3d at pp. 333-334.) There was no such evidence in this case and the trial court expressly made findings to that effect.

purchaser may pay additional reasonable fees and obtain protection against negligence; and the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or its agents. When some or all of these characteristics are present, the exculpatory clause is invalid under Civil Code section 1668. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 756, quoting *Tunkl, supra*, at pp. 98-101.) It is when the alleged misconduct transcends a purely private agreement and affects the public interest that it results in invalidation. Examples include a release of liability for negligence by a residential landlord, a provider of child care services, banking services and managed health care for Medi-Cal beneficiaries. (*City of Santa Barbara v. Superior Court, supra*, at pp. 757-758.) On the other hand, no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk that the law would otherwise have placed upon the other party. (*Tunkl, supra*, at p. 101; *Brisbane Lodging, L.P. v. Webcor Builders, Inc.* (2013) 216 Cal.App.4th 1249, 1253-1254 [public policy principles afford sophisticated contracting parties the right to abrogate the delayed discovery rule by agreement].) Despite its broad language, Civil Code section 1668 does not apply to every contract or every violation of law. According to Witkin, “The present view is that a contract exempting from liability for ordinary negligence is valid where no public interest is involved ... and no statute expressly prohibits it [citation].” (*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 234.)

The trial court, in announcing his ruling, stated: “There is no—basically I considered the *Pollard* ... case for the judicially created standard there, but I don’t think that is really managed legally under the rubric of negligence. I think it’s managed under the rubric of implied warranty.... And I believe that there is no evidence sufficient to support a duty or breach of duty in that there is no evidence of the standards of inspection that a building owner would be required to undertake in the sale of the building, and so I

will grant the motion for nonsuit on the sixth cause of action, which by my rulings would dispose of the case.”

If the trial court was mistaken in granting the motion for nonsuit under the “rubric of implied warranty,” we emphasize that it is not the trial court’s reasoning but the decision that we review. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451.) The decision to nonsuit the negligence cause of action was correct because any duty of care in constructing the building that might have otherwise been owed to plaintiff was expressly waived by his execution of this purchase contract. The transaction did not involve the public interest as defined in *Tunkl*. It did not concern a business generally thought suitable for public regulation. Defendants were not engaged in performing a service of great importance to the public, as might have been the case if they were large scale homebuilders. (See *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224 [builder of mass-produced homes liable in strict products liability].) Defendants did not hold themselves out as willing to perform this service (constructing buildings) for any member of the public who sought it. There was no evidence that defendants possessed a decisive bargaining strength advantage. Thus, after considering the *Tunkl* factors, the transaction in this case did not involve the public interest such that the exculpatory language is rendered invalid under Civil Code section 1668. As the *Tunkl* court explained in clear terms:

“[N]o public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party ....” (*Tunkl, supra*, 60 Cal.2d at p. 101.)

Plaintiff got what he bargained for, which was a building in its “existing condition” without any promises or warranties concerning its construction quality, compliance with laws or suitability for plaintiff’s purposes. Allowing the case to go to the jury would void that part of the contract to which plaintiff agreed and give plaintiff a windfall. (*City of Santa Barbara v. Superior Court, supra*, 41 Cal.4th at p. 777, fn. 53

[the power of the court to void a contract provision as contravening public policy should be exercised only where the case is free from doubt].) He renegotiated a lower price in consideration that he give up his right to inspect the property as a contingency to completing the transaction. If, as plaintiff urges, the exculpatory language is nullified, then plaintiff would receive the benefit of the lower price without assuming the risk that his waiver of inspection rights carried, namely, that construction defects might be discovered. He can't have it both ways.

We hold that the relevant contract language here that absolved defendants of any duty of care did not violate Civil Code section 1668.

### 3. Negligence Per Se

Plaintiff makes the additional argument that the nonsuit motion should have been denied because his evidence established a presumption of negligence against defendants pursuant to Evidence Code section 669. He points to the testimony of his expert, who testified that the building violated the California Building Code. His argument lacks merit because he confuses duty creation with duty standard.

Evidence Code section 669 provides that a presumption of negligence (negligence per se) may arise from the violation of a statute, ordinance or regulation of a public entity if the conditions enumerated in the statute are met. It is only when a defendant already owes some duty of care to a plaintiff that Evidence Code section 669 might apply. The statute does not create a duty where none otherwise exists. The presumption contained in Evidence Code section 669 concerns the standard, not the duty, of care. (*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 430.)

Defendants arguably owed plaintiff a duty of care. (*Sabella, supra*, 59 Cal.2d at p. 28.) However, plaintiff relieved defendants of that duty when he signed the purchase agreement and agreed to buy the property in its existing condition, agreed not to rely on any implied or express warranties and reserved the right to inspect the property and withdraw from the transaction if he was not satisfied with the physical aspects of the

property. (Civ. Code, § 1668; *Shapiro, supra*, 188 Cal.App.3d at pp.332, 334; *Lingsch, supra*, 213 Cal.App.2d at p. 742.) Having contractually waived the right to enforce that duty, Evidence Code section 669 does not resurrect the duty that was waived, nor does it create a new one. (*Rosales v. City of Los Angeles, supra*, 82 Cal.App.4th at p. 430.)

**DISPOSITION**

The trial court's judgment in favor of defendants is affirmed. Costs on appeal are awarded to defendants.

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Kane, J.

WE CONCUR:

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Levy, Acting P.J.

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Franson, J.