

**In the Supreme Court of the State of California**

**ASHLEY JOURDAN COFFEY**

**Plaintiff and Appellant,**

**v.**

**GEORGE VALVERDE, DIRECTOR, DMV**

**Defendant and Respondent,**

Case No. S213545

SUPREME COURT  
**FILED**

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Deputy

Fourth Appellate District, Division Three, Case No. G047562

Orange County Superior Court, Case No. 30-2012-00549559

Honorable Robert J. Moss, Judge

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## INTRODUCTION

Where there is a valid chemical test showing a driver's blood alcohol content (BAC) after driving, circumstantial evidence in addition to the results of the chemical test should be admissible to establish the driver's BAC at the time of driving.

## PROCEDURAL HISTORY

Plaintiff and Appellant Ashley Jourdan Coffey ("Appellant") was served with an administrative per se order of suspension for driving a vehicle under the influence of alcohol. Defendant and Respondent, George Valverde as Director of the Department of Motor Vehicles ("Respondent") provided Appellant an administrative hearing which resulted in the DMV Hearing Officer's determination that the suspension was appropriate. Appellant filed a writ petition challenging the DMV's suspension of her driving privilege. The trial court's independent review upheld Appellant's suspension based on substantial evidence. The Fourth District Court of Appeal, Division Three, affirmed the trial court's ruling.

## FACTUAL STATEMENT

### A. THE INCIDENT

On November 13, 2011, at approximately 1:32 a.m., Appellant was driving southbound on SR-55, north of Edinger, in Orange County. CHP Sergeant C. Martin observed Appellant driving in front of him in the number 4 lane at 60 m.p.h. (Administrative Record [AR] 16.) Sergeant Martin observed that Appellant allowed the vehicle to weave out of its lane, a violation of the Vehicle Code; Appellant's vehicle swerved one to two feet to the right shoulder lane twice, and then one foot to the number 3 lane, prior to returning to the number 4 lane. (*Id.*) Sergeant Martin pulled

Appellant over. (*Id.*) Upon contact, Sergeant Martin noticed that Appellant's eyes could not follow his finger and that there was a strong smell of alcohol emitting from Appellant's breath. (*Id.*) Appellant told the officers that she had recently turned 21, was returning from a bar, but was dishonest in that she told the officers that she had nothing to drink. (*Id.*)

Sergeant Martin called for back up and conveyed the aforesaid information to CHP Officer D. White. (*Id.*) Officer White made contact with Appellant and conducted field sobriety tests. (AR 17.) Officer White formed the belief that Appellant was intoxicated after observing Appellant to have bloodshot and watery eyes and to emit an odor of alcoholic beverage. (AR 16-18.) In connection with the Horizontal Gaze Nystagmus test, Appellant displayed a lack of smooth pursuit in both eyes. (AR 17.) On the Walk and Turn test, Appellant missed the heel-to-toe on five of the nine steps, turned clockwise instead of counter-clockwise, and used both feet to turn instead of one. (*Id.*) In connection with the Romberg test, Appellant swayed slightly in all directions and her eyes trembled during the test. (*Id.*) Appellant refused to submit to a Preliminary Alcohol Screening Test. (*Id.*) Officer White concluded that Appellant had an unsatisfactory field sobriety test. (AR 18.)

Accordingly, the evidence containing Officer White's opinion was the DS-367 Officer's Sworn Statement, the Driving Under the Influence Arrest and Investigation Report, and the Supplemental Report. (AR 7-22.) Appellant was placed under lawful arrest at 2:00 a.m. for violation of Vehicle Code section 23152, subsection (a). (AR 18.) Officer C. Turner was also present during the investigation and arrest. (AR 19.) Appellant submitted to and completed a chemical test of her breath, with results of 0.08% BAC at 2:28 a.m., and 0.09% BAC at 2:31 a.m. (AR 18.) Appellant also submitted to a blood test at 2:55 a.m. with results of 0.095% BAC. (AR 18, 22.) Officer White recommended that Appellant be charged with

violation of Vehicle Code section 23152, subsections (a) and (b). (AR 14, 19.)

**B. THE ADMINISTRATIVE HEARING AND DECISION**

DMV conducted a hearing on Appellant's Administrative Per Se (APS) Suspension Order. DMV's evidence consisted of the: (1) DS-367; (2) Arrest Report; and (3) Supplemental Report. The exhibits were received into evidence. (AR 3-4; AR 7-22.) Appellant was represented by counsel and did not appear at, or testify, at the hearing.

Appellant's forensic toxicology expert testified at the hearing regarding Appellant's BAC at the time of driving. Appellant's expert expressed the opinion that her BAC at the time of driving was unknown and could be rising. (AR 4.) Appellant's expert testified that he considered the totality of the circumstantial evidence to arrive at his opinion that Appellant's BAC was rising at the time of driving. (AR 46-48, 51, 52, 56.) However, Appellant's expert did not take into account Appellant's pattern of drinking, pattern of eating, weight, or her absorption and elimination rate of alcohol. (See, AR 4; also see, AR 50-57.)

Also, Appellant's counsel stipulated at the administrative hearing that Appellant *did* consume alcoholic beverages prior to driving, although Appellant *lied* to the officers by telling them that she did not consume any alcoholic beverages prior to driving. (AR 52.) Appellant's counsel further stipulated that Appellant drove in a reckless fashion prior to being pulled over and arrested by the CHP officers. (*Id.*)

The DMV Hearing Officer M. Annetta found there was *no* reliable evidence to support Appellant's expert's opinion, the opinion was based on a subjective interpretation of the evidence, and the opinion was insufficient to rebut the official duty presumption. (AR 4; AR 50-57; also see, Evid. Code, § 664.) As such, the DMV Hearing Officer concluded that the

expert's opinion was based on assumptions which were not supported by the record and therefore was too speculative to have evidentiary value. (AR 4.)

Further, the DMV Hearing Officer found that CHP Officer D. White was credible. (AR 4.)

Based on a preponderance of the evidence, the DMV Hearing Officer concluded that (1) the peace officer had reasonable cause to believe that Appellant was driving a motor vehicle in violation of the Vehicle Code; (2) the arrest was lawful; and (3) Appellant was driving a motor vehicle when she had 0.08% or more by weight of alcohol in her blood. (AR 4, 5.) The DMV Hearing Officer did not express any conclusion on whether the statutory presumption of Vehicle Code section 23152(b) was rebutted. Hence, the DMV Hearing Officer's decision provided that Appellant's driving privileges would be suspended effective February 17, 2012, through June 16, 2012. (AR 3.)

### **C. THE TRIAL COURT'S RULING**

On February 29, 2012, Appellant filed a petition for writ of mandate, challenging the DMV Hearing Officer's findings and decision. Appellant also filed an ex parte application to stay the suspension of her driving privilege. On March 12, 2012, the trial court stayed the suspension until a ruling on the writ.

On October 19, 2012, the trial court considered the pleadings filed by the parties and the parties' oral argument, and issued a minute order on Appellant's writ petition which provided:

Petition for writ of mandate. Petition denied. (See, Vehicle Code § 23152(b) and *Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392.) The DMV hearing officer was entitled to reject the uncontradicted testimony of petitioner's expert witness, and the hearing officer set forth reasons for doing so in this case. (See, *People v. Engstrom* (2012) 201 Cal.App.4th 174, 187.) Even assuming that petitioner Coffey rebutted the presumption under

Vehicle Code § 23152(b), there was sufficient evidence based on the blood-alcohol tests and the other circumstantial evidence based on the assessment, observations and tests by the arresting officers at the scene to support the DMV hearing officer's decision under the weight of the evidence. (See, *Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392 and *Jackson v. Department of Motor Vehicles* (4th Dist. 1994) 22 Cal.App.4th 730, 741.) The *Brenner* case is distinguishable as it did not involve expert testimony as to rising blood alcohol levels but miscalibration that could have affected the results by two decimal places. (*Id.*, at p. 369.) The *Beltran* case dealt with proof of driving while intoxicated beyond a reasonable doubt, which is not at issue in this case. Finally, the *Dyer* court held that the trial court erred in finding that the DUI arrest was unlawful, and remanded that matter to the trial court to determine whether Dyer was driving with a BAC at or greater than .08% because the trial court had made no finding on that issue. *Id.*, at 174. Respondent DMV to recover its costs and to give notice.

(Clerk's Transcript [CT] 58 [Trial Court Minute Order].)

#### **D. THE APPELLATE COURT DECISION**

On July 22, 2013, the Fourth District Court of Appeal, Division Three, conducted oral arguments. On August 15, 2013, the Court of Appeal issued a decision.<sup>1</sup>

The Court of Appeal affirmed the trial court. It limited its review to determining whether the trial court's judgment was supported by substantial evidence. (Appellate Opinion [Op.] 2.) The Court of Appeal made the following findings:

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<sup>1</sup> The Court of Appeal's decision was certified for publication: *Coffey v. Shiimoto* (2013) 218 Cal.App.4th 1288 ("Appellate Opinion" [Op.]). However, due to the Supreme Court granting Appellant's Petition for Review, the Court of Appeal decision is now depublished. (Rules of Court, Rule 8.1105(e)(1).)

- Coffey’s BAC test results, though they indicate a pattern of rising blood alcohol on their face, were within the margin of error of each other. Thus they were indicative of rising BAC, but not conclusive.
- In ascertaining whether Coffey’s BAC was at least 0.08 percent at the time of driving, the trial court properly looked to circumstantial evidence. The evidence of Coffey’s erratic driving, failed field-sobriety tests (FST’s), and objective indications of intoxication are substantial evidence that Coffey had a BAC equal to or greater than .08 percent at the time of driving.

(*Id.*)

The Court of Appeal further held:

“The issue boils down to whether non-chemical test circumstantial evidence can prove that Coffey’s BAC at the time of driving was consistent with her BAC at the time of her chemical tests. Based on [*Burg v. Municipal Court* (1983)] 35 Cal.3d [257], 266, footnote 10, we hold it can.”

(*Id.*, at p. 11.)

## ARGUMENT

### A. STANDARD OF REVIEW

The trial court exercised its independent judgment, determined that the weight of the evidence supported the administrative decision to suspend Appellant’s license, and denied Appellant’s petition for writ of mandate.

(*Lake v. Reed* (1997) 16 Cal.4th 448, 456; also see, *Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 395.) On appellate

review, the appellate court sustains the trial court's findings if the findings are supported by substantial evidence. (*Lake, supra*, 16 Cal.4th at p. 457.)<sup>2</sup>

Appellant argues that the trial court did not exercise its independent judgment simply because during oral argument the trial court judge stated that the DMV Hearing Officer rejected Appellant's expert's testimony. (AOB 14.) This is not a fair characterization of the trial court's ruling on the writ petition. (See, RT 2:7-12.) The trial court's Minute Order provides a background on the DMV Hearing Officer's decision, then provides that even if the presumption of Vehicle Code section 23152(b) was rebutted, there was sufficient evidence based on the chemical test and other circumstantial evidence to support the Hearing Officer's decision under the weight of the evidence. (CT 58; also see, RT 2:7-12.) Hence, the trial court exercised its independent judgment and determined that the evidence was sufficient. (*Id.*)

Under the substantial evidence standard, all conflicts are resolved "in favor of the Department of Motor Vehicles, as the party prevailing in the superior court, and give it the benefit of all reasonable inferences in support of the judgment." (*Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App. 4th 1562, 1568.) Under the doctrine of implied findings, this Court should also infer the trial court made all factual findings necessary to support the judgment. (*Fladeboe v. American Isuzu Motors* (2007) 150 Cal.App.4th 42, 58; *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 104; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203.) This Court should not substitute its deductions

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<sup>2</sup> The trial court's factual findings are overturned "only if the evidence before the trial court is insufficient as a matter of law to sustain those findings." (*Id.*; also see, *Lagomarsino v. Department of Motor Vehicles* (1969) 276 Cal.App.2d 517, 520 [the trial court findings are conclusive on appeal if supported by substantial evidence].)

regarding the record for those of the superior court. (*Hildebrand, supra*, 152 Cal.App. 4th at p. 1568; *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1150; *Juchert v. California Water Service Co.* (1940) 16 Cal.2d 500, 506.)

**B. CIRCUMSTANTIAL EVIDENCE, IN ADDITION TO A VALID CHEMICAL TEST TAKEN APPROXIMATELY AN HOUR AFTER DRIVING, CAN BE USED TO ESTABLISH BLOOD ALCOHOL CONTENT AT THE TIME OF DRIVING**

The chemical tests conducted within an hour of Appellant driving provided that her BAC exceeded the legal limit of 0.08 percent. The validity of the chemical tests was not challenged. Rather, at issue is whether Appellant's BAC exceeded the legal limit at the time of driving.

Vehicle Code section 23152, subdivision (b), provides:

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in her or her blood at the time of the performance of a chemical test within three hours of driving.

(Veh. Code, § 23152(b).)

Appellant takes the position that she should get the benefit of her expert's reliance on the totality of circumstantial evidence to prove that her BAC was less than 0.08 percent at the time of driving but deny Respondent from using the very same evidence to demonstrate that her BAC was above the legal limit. Such an approach is not consistent with case precedent or principles of fairness.

Appellant claims that her expert's opinion provides that the "totality of the circumstantial evidence was consistent with a rising BAC and that [Appellant's] BAC was less than 0.08 at the time of driving." (Appellant's Opening Brief [AOB] 2.) Hence, Appellant takes the position that she should be permitted to get the benefit of her expert's reliance on the totality

of circumstantial evidence to prove that her BAC was less than 0.08 percent at the time of driving. At the same time, Appellant argues that Respondent should be denied the same opportunity to rely on evidence of Appellant's erratic driving, poor performance on the FSTs, and objective indications of intoxication to show that Appellant's BAC at the time of driving was consistent with her BAC at the time of her chemical tests. (AOB 3.) Appellant should not be allowed to utilize circumstantial evidence to attempt to rebut the presumption or to show that her BAC was below 0.08 percent, but restrict Respondent from using the same type of evidence to prove the contrary.

### 1. The Case Law Authority

Circumstantial evidence will generally be necessary to establish the requisite blood alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 266, fn. 10.)

Further, both parties are entitled to introduce circumstantial evidence, in addition to the chemical test, to establish BAC at the time of driving. (*Burg, supra*, 35 Cal.3d at p. 266, fn. 10 ["Of course, both parties may also adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood alcohol level while driving"]; Also see, *McKinney v. Department of Motor Vehicles*, (1992) 5 Cal.App.4th 519, 526, fn. 6.) Evidence regarding driving manner, performance on field sobriety tests, and behavior is admissible and relevant as tending to establish whether the driver's BAC exceeded the legal limit at the time of driving. (*Burg, supra*, 35 Cal.3d at p. 266, fn. 10, citing *Fuenning v.*

*Superior Court* (1983) 139 Ariz. 590, 599, 680 P.2d 121, 130.) Hence, the totality of circumstances must be considered.

The California Supreme Court in *Burg* cited to the Arizona Supreme Court's decision in *Fuenning*, which addressed various constitutional challenges to Arizona's analogous statute regarding drunk driving. Arizona's drunk driving statute provided that it is unlawful to drive "under the influence," under subsection A, and to drive "while there is 0.10 percent or more by weight of alcohol in the person's blood," under subsection B. (*Fuenning, supra*, 139 Ariz. at p. 593, 680 P.2d at p. 124.) Defendant was only charged with violating subsection B. (*Id.*) Defendant argued that circumstantial evidence (bad driving, failed FSTs, videotape depicting defendant's behavior) were relevant to the statute's subsection A regarding under the influence, but irrelevant to the statute's subsection B regarding BAC above 0.10. The Arizona Supreme Court determined that the trier of fact should consider the totality of circumstances, including good or bad evidence, to determine whether the driver's BAC exceeded the legal limit at the time of driving, as it held:

"Evidence of defendant's conduct and behavior—good or bad—will be relevant to the jury's determination of whether the test results are an accurate measurement of alcohol concentration at the time of the conduct charged. For instance, the test in the case at bench was given several hours after the arrest and showed a .11% BAC. Defendant attacked the results, presenting evidence regarding margin of error, time lapse and other factors. Such evidence might raise considerable doubt whether the test result of .11% indicated .10% or greater BAC at the time defendant was arrested. Evidence that at that time the person charged smelled strongly of alcohol, was unable to stand without help, suffered from nausea, dizziness or any of the other 'symptoms' of intoxication would justify an inference that a test administered some time after arrest probably produced lower readings than that which would have been produced had the test been administered at the moment of

arrest. The converse is also true. Evidence that at the time of arrest defendant was in perfect control, displayed none of the symptoms of intoxication and had not driven in an erratic manner, is relevant to show that a reading of .11% from a test given some time later does not prove beyond a reasonable doubt that the defendant was driving with a .10% or greater BAC at the time of his arrest. Such evidence has been held admissible. *State v. Clark*, 286 Or. 33, 593 P.2d 123 (1979); *Denison v. Anchorage*, 630 P.2d 1001 (Alaska App.1981). Again, evidence is admissible when it is relevant. Rule 402, Ariz.R.Evid., 17A A.R.S.”

(*Fuenning, supra*, 139 Ariz. at p. 599, 680 P.2d at p. 130.)

Accordingly, the *Fuenning* Court determined that while circumstantial evidence of intoxication are not conclusive, it is relevant. (*Id.*) Appellant’s attempts to distinguish *Fuenning*, by pointing to the timing of the chemical test and the apparent “extreme” circumstantial evidence (i.e., inability to stand, nausea, dizziness), cannot stand. (AOB 28-29.) The reasoning in *Fuenning* remains consistent, “evidence of [the driver]’s conduct and behavior - *good or bad*” are relevant to the trier of fact’s determination of whether the test results were an accurate measurement of BAC at the time of driving. (*Fuenning, supra*, 139 Ariz. at p. 599, 680 P.2d at p. 130 [emphasis added].) Further, the *Fuenning* Court provided that “ ‘symptoms’ of intoxication would justify an *inference* that a test administered *some time after arrest* probably produced lower readings than that which would have been produced had the test been administered *at the moment of arrest.*” (*Id.* [emphasis added].)

This Court, in *Burg*, appropriately relied on such reasoning. Subsequent California appellate decisions relied on *Burg* to allow consideration of the totality of the circumstantial evidence to determine BAC at the time of driving.

For example, in *McKinney, supra*, 5 Cal.App.4th 519, the hearing officer had before him the arresting officer's observation that McKinney was driving in an erratic and dangerous manner, that McKinney had bloodshot and watery eyes, an odor of alcohol, and an unsteady gait and slurred speech, and that McKinney performed poorly on the Field Sobriety Tests. The *McKinney* Court left the door open for circumstantial evidence, as follows:

“While a chemical test result is usually relied upon by the hearing officer as decisive, we point out that it is not the only means of establishing that a driver's BAL was 0.08 or more. As our Supreme Court has noted, what the Legislature has prohibited is *driving* a vehicle with a blood-alcohol rate over the proscribed limit, not driving when a *chemical test* shows it to be over the limit. (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 266, fn. 10.)”

(*McKinney, supra*, 5 Cal.App.4th at p. 526 fn. 6.)

The *McKinney* Court provided further analysis of circumstantial evidence, as follows:

“Evidence regarding the manner in which a defendant drove, performed field sobriety tests, and behaved is *admissible and relevant* as tending to establish that he did or did not have a 0.10 [now 0.08] BAL while driving.”

(*Id.*, quoting *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 7 [emphasis added].)

Accordingly, the *McKinney* Court concluded that circumstantial evidence, unencumbered by any contrary showing, provided independent support for the suspension, beyond reliance upon chemical test results.

(*McKinney, supra*, 5 Cal.App.4th at p. 524.)

In *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, the officer noticed that the driver had symptoms of intoxication (bloodshot watery eyes, odor of alcoholic beverage, unsteady gait and slurred speech), performed less than satisfactory on the Field Sobriety Tests, and subsequent breath test after arrest indicated BAC of 0.08. (*Jackson, supra*, 22 Cal.App.4th at pp. 733-34.) The Court of Appeal found that “substantial evidence and reasonable inferences supported the finding while driving Jackson had a blood-alcohol level of at least 0.08 percent.” (*Id.*, at pp. 740, 741, citing *Bell v. Department of Motor Vehicles* (1994) 11 Cal.App.4th 304, 309.) In doing so, the *Jackson* Court cited to *McKinney*, and *Bell*, that although there was no direct evidence of the time of driving, reasonable inferences indicated that the breath test was performed within three hours of driving and invoked the statutory presumption. (*Jackson, supra*, 22 Cal.App.4th at p. 740) As such, “the hearing officer was not constrained to consider only direct evidence but could draw inferences and deductions of fact from the facts before him.” (*Id.*, citing *Bell, supra*, 11 Cal.App.4th at p. 309, and *McKinney, supra*, 5 Cal.App.4th at p. 524, and Evid. Code, § 600, subd. (b).)

The *Jackson* Court further noted that “circumstantial evidence other than chemical test results may properly be admitted to establish a driver had the proscribed level of blood-alcohol at the time of the offense.” (*Jackson, supra*, 22 Cal.App.4th at p. 741, citing *McKinney, supra*, 5 Cal.App.4th at p. 526.)

*Baker v. Gourley* (2002) 98 Cal.App.4th 1263, held that circumstantial evidence without a valid chemical test was insufficient to suspend a license. (*Baker, supra*, 98 Cal.App.4th at p. 1264; But see,

*People v. Warlick* (2008) 162 Cal.App.4th Supp. 1,<sup>3</sup> and *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.<sup>4</sup>) In *Baker*, the Fourth District Court of Appeal reviewed a DMV suspension after a driver was arrested for driving with a BAC of 0.08 percent or greater. Because the DMV failed to meet its burden of showing that a chemical test that was not conducted in accordance with applicable regulations was nevertheless reliable, the test results were deemed inadmissible. (*Baker, supra*, 98 Cal.App.4th at p.

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<sup>3</sup> In *Warlick*, the chemical test indicated BAC of 0.07 percent and the San Diego County District Attorney's expert attempted to offer testimony based on "retrograde extrapolation" to show that the driver had a BAC of at least 0.08 percent at the time of driving. The trial court excluded the testimony by relying on *Baker, supra*, 98 Cal.App.4th 1263, on grounds that a violation of Vehicle Code section 23152(b) cannot be proven without a valid chemical test showing a BAC of 0.08 percent or greater. (*Warlick, supra*, 162 Cal.App.4th Supp. at p. 3.) The Appellate Division of the San Diego County Superior Court concluded that *Baker* does not stand for such a sweeping proposition, that the prosecution can attempt to prove its case without the benefit of the statutory presumption, and remanded to trial court to reinstate the DUI charge. (*Id.*, at p. 4.)

<sup>4</sup> In *Komizu*, the First District Court of Appeal held that sufficient evidence supported finding that the driver's blood was drawn within three hours of accident. Komizu had driven his vehicle into the San Francisco Bay, was injured at the scene, and taken to the hospital. Accordingly, no field sobriety test was given. The police officer contacted Komizu at the emergency room, where the officer could still smell alcohol on Komizu's breath, and Komizu gave conflicting statements about someone that might have been in his vehicle. The officer informed Komizu that he was under arrest and that he would have to submit to a blood test. Komizu admitted to drinking three sakes with dinner and claimed he let someone else drive his vehicle. The results of the blood test, conducted within three hours of the accident, revealed that Komizu's BAC was 0.13 percent. The *Komizu* Court distinguished *Baker* in that the circumstantial evidence was "in addition to, not instead of, a valid chemical test." (*Komizu, supra*, 103 Cal.App.4th at p.1007, fn.7 [emphasis added].) The *Komizu* Court held that the circumstantial evidence, together with the forensic report, provided the trial court with substantial evidence that the driver's BAC was 0.08 percent or higher at the time of the accident. (*Id.*, at p. 1008.)

1265.) Faced with lack of a valid chemical test, the DMV attempted to justify the suspension with evidence of symptoms typically associated with intoxication, i.e., slurred speech, bloodshot eyes. (*Id.*)

The *Baker* Court decided the following issue: “Can a given amount of blood-alcohol level be established *without a valid chemical test* by evidence of behavior or indicia typically *associated* with intoxication, such as, like here, slurred speech, bloodshot eyes, or an unsteady gait?” (*Baker, supra*, 98 Cal.App.4th at pp. 1265-1266.) Noting that these factors may be present in a person with a BAC of less than 0.08 percent, *Baker* found this evidence inadequate to support the suspension. It was in this context that the *Baker* Court noted that “circumstantial evidence *without a valid chemical test* is insufficient to suspend a license.” (*Id.*, at p. 1273.) Such reasoning is appropriate, as circumstantial evidence of intoxication without a supporting chemical test could leave room for speculation.

*Baker* also considered *McKinney*, and concluded that circumstantial evidence, in addition to the chemical test, could *corroborate* the chemical test results. (*Baker, supra*, 98 Cal.App.4th at p. 1269 [“The *McKinney* court needed only to have addressed whether such evidence could *corroborate* a chemical test (which is an easy question – the answer to that is obviously yes).”].)

Hence, a valid chemical test is a prerequisite to allow the parties to present circumstantial evidence, in addition to the results of the chemical test, to show that the BAC at the time of driving is consistent with the BAC at the time of the chemical test.

Here, there was a chemical test, the validity of which is not challenged. There was also evidence that Appellant was weaving across lanes, had red and watery eyes, odor of an alcoholic beverage, and poor performance on the FSTs. (AR 2.) The DMV Hearing Officer found against Appellant. The trial court cited to *Jackson* and found that, even assuming

Appellant rebutted the presumption under Vehicle Code § (b), “there was sufficient evidence based on the blood-alcohol tests and the other circumstantial evidence based on the assessment, observations and tests by the arresting officers at the scene to support the DMV hearing officer’s decision under the weight of the evidence.” (See, CT 58 [Trial Court Minute Order], citing *Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392 and *Jackson, supra*, 22 Cal.App.4th at p. 741.) Hence, the trial court relied on the totality of the circumstances to arrive at the truth.

*Baker, Jackson, McKinney, and Burg* are all consistent and support the proposition that, where there is a valid chemical test, circumstantial evidence in addition to the results of the test can be used to establish that the driver’s BAC at the time of driving is consistent with the BAC at the time of the chemical test.<sup>5</sup>

## 2. The Totality of the Circumstantial Evidence

The circumstantial evidence here consisted of Appellant’s erratic driving, failed FSTs, and objective indications of intoxication. Erratic driving is clearly a form of circumstantial evidence which the trier of fact

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<sup>5</sup> In the event that the presumption is rebutted, even the jury instruction for criminal cases, where the burden of proof is higher, provide that the jury *may but is not required to* find that the driver’s BAC was 0.08 percent or more at the time of driving:

“If the evidence establishes beyond a reasonable doubt that (1) a sample of defendant’s blood, breath or urine was obtained within three hours after [he] [she] operated a vehicle and (2) that a chemical analysis of the sample established that there was 0.08 percent or more, by weight, of alcohol in the defendant’s blood at the time of the performance of the chemical test, then you *may, but are not required to*, infer that the defendant drove a vehicle with 0.08 percent or more, by weight, of alcohol in [his] [her] blood at the time of the alleged offense.”

(Cal. Jury Instr., Crim. 12.61.1 [emphasis added].)

may find useful in showing that the BAC at the time of driving exceeded the legal limit. Failed FSTs is also circumstantial evidence which could be relied upon by the trier of fact. Finally, indications of intoxication manifest at BAC levels much higher than the BAC levels for impairment. (See, *Burg, supra*, 35 Cal.3d at pp. 262-263 [Research on alcohol's effect on both *motor skills* and *judgment* revealed that *impairment* occurred at BAC as low as 0.05 percent, considerably below the point at which typical clinical *symptoms of intoxication* appear in most persons.].) As such, indicators of intoxication are reliable evidence to support a valid chemical test, to show that the driver's BAC at the time of driving was equal to or greater than her BAC at the time of the chemical test.

Further, Appellant lied to the officers by claiming that she had nothing to drink after returning from the social occasion of celebrating her 21st birthday at a bar. Later, she pled guilty to a wet reckless and her expert assumed consumption of alcohol to assert a rising blood alcohol theory. The rising blood alcohol argument has been referred to as a "variety of Russian roulette." (See, *People v. Schrieber* (1975) 45 Cal.App.3d 917 <sup>6</sup>; also see, *Burg, supra*, 35 Cal.3d at p. 271 ["It is difficult

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<sup>6</sup> In *Schrieber*, the driver's blood test was taken within 70 minutes of being pulled over. The *Schrieber* Court provided the following:

"To accept defendant's thesis that in the ordinary course of events defendant may not be inebriated at the time of driving, but inebriated at the time of the taking of the test, we would necessarily be required to presume that an automobile driver would hurriedly gulp down, as in this instance he would have to have done, eight drinks, jump in his car and hope to reach his destination before he became intoxicated. This variety of Russian roulette leaves a very small margin for error, inasmuch as medical studies demonstrate that the majority of ingested alcohol is absorbed by the body within 15 to 20 minutes and that the brain, requiring as it does a large blood supply, is one of the first organs of the body affected. (See *Alcohol and the Impaired Driver* (1968) A.M.A., Comm. on Medicolegal Problems, pp. 16-17.)"

(*Id.*, at p. 922.)

to sympathize with an “unsuspecting” defendant who did not know if he could take a last sip without crossing the line, but who decided to do so anyway.”]; *Fuening, supra*, 139 Ariz. at p. 598, 680 P.2d at p. 129 [the driver should drive at his peril rather than only at the public’s peril.]

Nonetheless, considering Appellant’s rising blood alcohol argument, the expert must take into account that during a social occasion, i.e., 21st birthday celebration at a bar, where alcohol is typically consumed successively over time, peak concentrations of BAC may be reached even prior to the consumption of the last drink. Hence, the body could be absorbing and eliminating alcohol at the same time. Further, where the subject drinks on an empty stomach, alcohol is absorbed much faster. Appellant’s expert testimony did not consider any of these factors.

Further, Appellant’s expert’s testimony regarding rising blood alcohol relies on the comparison of BAC results of breath tests (0.08 percent at 2:28 a.m. and 0.09 percent at 2:31 a.m. [AR 18]) with the BAC result of a blood test (0.095 percent at 2:55 a.m. [AR 18, 22]). (See, AOB 2, 3.) There are two problems with this theory based on the factors considered. First, the same BAC in the subject could result in different test results in breath and in blood. Hence, it is improper to compare results of two different types of chemical tests to imply that the BAC level was rising. Second, as Appellant’s expert concedes, the margin of error on a chemical test could be as high as 0.02 percent. Such margin of error is especially apparent when two breath tests conducted within three minutes vary by 0.01 percent. Appellant’s expert cannot claim that the BAC increased by 0.01 percent in three minutes, and then increased just .005 in the twenty-four minutes thereafter. (See, AOB 2, 3, 27.) Such reasoning defies logic.

Nonetheless, Appellant’s expert attempts to rely on the totality of circumstances to conclude that Appellant’s BAC was rising at the time of

driving, and was below 0.08 percent. Respondent should also be permitted to rely on the totality of the circumstances supporting its position.

Here, the trier of fact can utilize the totality of the circumstances (i.e., erratic driving, failed FSTs, objective indications of intoxication) to determine that Appellant's BAC at the time of driving is equal to or greater than her BAC at the time of the valid chemical test. Such circumstantial evidence constituted substantial evidence - sufficient to show that the Appellant's BAC at the time of driving is equal to or greater than her BAC at the time of the chemical tests. (See, Op. 11 ["non-chemical test circumstantial evidence can prove that Coffey's BAC at the time of driving was consistent with her BAC at the time of her chemical tests"].)

**C. THE COURT OF APPEAL'S DECISION IS  
CONSISTENT WITH THE REQUIREMENTS OF  
EVIDENCE CODE SECTION 604**

Appellant used the totality of the circumstances to support her rising blood alcohol theory to rebut the statutory presumption and argue that her BAC was below 0.08 percent at the time of driving. The Court of Appeal held that each party may adduce other circumstantial evidence tending to establish that the driver had a BAC above or below the legal limit at the time of driving. (Op. 9-11, citing *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 266, fn. 10.) Respondent also relies on the totality of the circumstances to show that Appellant's BAC was above the legal limit at the time of driving.

With regard to a presumption affecting the burden of producing evidence, Evidence Code section 604 provides:

The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the

presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate. (Evid.Code, § 604.)

“A rebuttable presumption affecting the burden of producing evidence ‘is merely a preliminary assumption in the absence of contrary evidence, *i.e.*, evidence sufficient to sustain a finding of the nonexistence of the presumed fact.’ ” (*Farr v. County of Nevada* (2010) 187 Cal.App.4th 669, 681, citing Evid.Code, § 604, Assem. Comm. on Judiciary Comments.)

With regard to the burden of producing evidence, Appellant carries the burden of producing evidence sufficient to avoid a ruling against her on the issue. (Evid.Code, § 110.) Further, an inference is a deduction of fact that may logically be drawn from another established fact, or group of facts. (Evid.Code, § 600(b).)

It is well established that the trier of fact may draw reasonable inferences from the evidence. (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421; *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1150; *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1570-71.) “Even ‘slight evidence’ in support of the fact to be inferred has been held to be sufficient.” (*Fashion 21, supra*, 117 Cal.App.4th at p. 1150.)

In *Craig*, a wrongful termination action, the trial court granted the employer’s petition for arbitration. The petition was granted based on the employer’s evidence that during plaintiff’s employment, on two separate occasions a memorandum and brochure regarding the arbitration program were mailed to the employee. At issue on appeal was whether the former employee rebutted the statutory presumption that she had received the memorandum and brochure. (See, *Craig, supra*, 84 Cal.App.4th at p. 421, citing Evid. Code, § 641 [a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail].) The

Second District Court of Appeal in *Craig* provided the following procedural analysis regarding a presumption affecting the burden of producing evidence:

“When the foundational facts are established, a presumption affecting the burden of producing evidence obligates the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence-in which event the trier of fact determines the existence or nonexistence of the fact from the evidence and without regard to the presumption. ([Evid. Code,] § 604.) Although the presumption disappears where, as here, it is met with contradictory evidence, *inferences* may nevertheless be drawn from the *same circumstances* that gave rise to the presumption in the first place.”

(*Craig, supra*, 84 Cal.App.4th at p. 421 [emphasis added].)

The former employee’s denial of receipt of the memorandum and brochure rebutted the presumption of receipt, and the presumption disappeared. (*Craig, supra*, 84 Cal.App.4th at p. 421.) However, the employer’s declarations and documents (mailing lists) were circumstantial evidence from which the trial court was *entitled to infer* that employee received the memorandum and brochure. (*Id.*) “*The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.*” (*Id.* at p. 422, quoting *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12.)<sup>7</sup> Hence, although the former employee denied receiving the memorandum and brochure, the Court of Appeal found that the *inference of receipt* from the *proof of mailing* sufficed for substantial evidence. (*Craig, supra*, 84 Cal.App.4th at p. 422.)

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<sup>7</sup> The *Slater* decision was cited in the Appellant’s Brief. However, Appellant’s citation to *Slater* only addressed presumption affecting burden of producing evidence, under the Thayer view, and presumption affecting burden of proof, under the Morgan view. (AOB 24.)

In *Garbell*, homeowners brought a negligence action against a flooring contractor for fire damage. The flooring contractor's worker claimed that, although he smoked cigarettes near the home, it was his routine practice to put the cigarettes out prior to disposal. The homeowners hired an expert fire investigator who concluded that a cigarette was one of the causes of fire. The trial court entered judgment on special verdict for the homeowners. The Court of Appeal applied the following standard of review to the sufficiency of the evidence:

“Where findings of fact are challenged on appeal, we are bound by the ‘elementary, but often overlooked principle of law, that ... the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. This substantial evidence standard of review applies to the jury's findings on causation.”

(*Garbell, supra*, 193 Cal.App.4th at p. 1569.)

The Court of Appeal in *Garbell* reasoned that, although the expert did not testify that the cigarette belonged to one of the contractor's workers, his investigation revealed that the workers disposed their cigarettes directly into the garbage can. As such, “the jury drew reasonable inferences based upon timing and proximity.” (*Id.*, at p. 1570.) Further, the jury was free to disbelieve that the contractor's worker followed his “routine” on the day of the fire. (*Id.*) Thus, the Court of Appeal held:

“While we might have reached a different conclusion based upon the evidence, we do not second guess the jury. We therefore conclude there was sufficient evidence of causation to support the jury's finding of negligence.”

(*Garbell, supra*, 193 Cal.App.4th at p. 1571.)

In *Fashion 21*, the clothing retailer brought a libel action against workers for distribution of allegedly defamatory flyers. The workers filed an Anti-SLAPP (Strategic Lawsuit Against Public Participation) motion, the trial court denied the motion, and the workers appealed. The key evidence utilized by the clothing retailer to show that it could prevail in the underlying libel action was a videotape which showed that one of the defendant workers was standing outside of one of the clothing retailer's stores, held a stack of the allegedly defamatory green flyers, mingled with by passers, and that some of the public were holding the flyers. The video did not show that the defendant worker handed a flyer to the by passers.

The *Fashion 21* Court provided the following analysis on inference:

“An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.”

Thus, an inference is not evidence but rather the result of reasoning from evidence.

“ ‘An inference of fact must be based upon substantial evidence, not conjecture.... ‘It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists[.]’ ’ ”

(*Fashion 21, supra*, 117 Cal.App.4th at p. 1149, citing Evid. Code, § 600(b) and *Wigodsky v. Southern Pac. Co.* (1969) 270 Cal.App.2d 51, 55.)

The *Fashion 21* Court reasoned that a reasonable juror could infer from the video that the defendant worker distributed some of the flyers to the public. Thus, the Court of Appeal in *Fashion 21* held that even such “slight evidence” in support of the fact to be inferred was sufficient, and that “it is up to the jury to assess the credibility and judge the weight of the evidence proffered in support of and in opposition to the fact it is asked to

infer.” (*Id.*, at p. 1150, citing *Juchert v. California Water Service Co.* (1940) 16 Cal.2d 500, 506.<sup>8</sup>)

Consistent with the well-established approach of this Court described in the cases above, the Court of Appeal in this matter held that each party may adduce other circumstantial evidence tending to establish that the driver had a BAC above or below the legal limit at the time of driving. (Op. 9-11, citing *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 266, fn. 10.) Appellant used the totality of the circumstances to support her rising blood alcohol theory which alleged that her BAC was below 0.08 percent at the time of driving. Respondent appropriately relied on circumstantial evidence, including evidence used to establish the presumption (i.e., valid chemical test results), to show that Appellant’s BAC was above the legal limit at the time of driving. Therefore, Respondent appropriately relied on the totality of the circumstances to show that Appellant’s BAC at the time of driving was equal to or greater than her BAC at the time of her chemical tests.

*Craig, Garbell, and Fashion 21* all stand for the proposition that despite a presumption being rebutted, the trier of fact is free to draw an inference from the same circumstances that gave rise to the presumption in the first place. (See, Evid. Code, §604; *Craig, supra*, 84 Cal.App.4th at p. 421.) Even slight evidence in support of the fact inferred has been held to be sufficient. (*Fashion 21, supra*, 117 Cal.App.4th at p. 1150.) The significance of the presumption, once it is rebutted, is that the foundational facts which led to establishing the presumption withstand the rebuttal.

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<sup>8</sup> In *Juchert*, the trial court directed verdict for defendant. The jury returned verdict against defendant for \$8,000. The Supreme Court concluded that, so long as there is slight evidence to give rise to an inference, the jury is the exclusive judge of the weight and the value of the evidence. (*Juchert, supra*, 16 Cal.2d at p. 506.)

The valid chemical tests revealed a BAC above 0.08 percent within an hour of Appellant's driving. By relying on the totality of the circumstances, the trier of fact will have the tools necessary to arrive at the truth. Hence, circumstantial evidence can still be used to show that, at the time of driving, Appellant had a BAC level consistent with the BAC level at the time of the chemical tests. In other words, here, if this Court finds that the presumption has been rebutted, the results of the chemical test remain. The trier of fact could decide such a case under the applicable burden of proof by simply weighing the evidence.

**D. APPELLANT'S EXPERT'S TESTIMONY DID NOT REBUT THE PRESUMPTION OF THE VEHICLE CODE**

The trial court concluded that Appellant's expert's testimony did not rebut the presumption of the Vehicle Code. (CT 58.) The Court of Appeal decision appears to provide that the statutory presumption was rebutted, but that Appellant's expert's testimony did not rise to the level of substantial evidence to establish that Appellant's BAC was below 0.08 percent at the time of driving. (Op. 7.)<sup>9</sup> As presented below, Respondent takes the position that, consistent with the trial court's conclusion, Appellant's expert's testimony was insufficient to rebut the statutory presumption.

To rebut the presumption under the Vehicle Code, Appellant needed to present credible contrary evidence. Hence, Appellant's expert's testimony needed to meet the substantial evidence standard to overcome the presumption. (See, *Borger v. Department of Motor Vehicles* (2011) 192

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<sup>9</sup> See, *Marriage of Garrity & Bishton* (1986) 181 Cal.App.3d 675, 690 (interwoven issues are considered on appeal).

Cal.App.4th 1118, 1122.)<sup>10</sup> The material upon which the expert's opinion is fashioned, and the reasoning through which the expert's testimony progresses from the materials to the conclusion, is the key for such testimony to rise to the level of substantial evidence. (*Id.*) Otherwise, the expert's testimony does not have evidentiary value, and does not rise to the dignity of substantial evidence. (*Id.* [an expert's "bald" conclusion is speculative, and can't be characterized as substantial evidence].)

Further, "[i]n determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203, citing *People v. Johnson* (1980) 26 Cal.3d 557, 576-78.) "We may not substitute our view of the correct findings for those of the trial court; rather, we must accept any reasonable interpretation of the evidence which supports the trial court's decision." (*Beck Development Co.*, *supra*, 44 Cal.App.4th at p. 1203.)

Nonetheless, the word "substantial" cannot be deemed synonymous with "any" evidence; it must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law

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<sup>10</sup> Appellant cites to *Borger* for the proposition that the standard on whether the statutory presumption of the Vehicle Code was rebutted is "a question of law requiring independent judgment," and not substantial evidence. (AOB 15.) However, in *Borger*, the expert was challenging the reliability of the breath testing device. (*Borger*, *supra*, 192 Cal.App.4th at p. 1121.) The *Borger* Court reasoned that such a challenge is addressed to the court's independent judgment because it "is, in essence, a challenge to the regulation allowing the device to be on the approved list." (*Id.*; *People v. Vangelder* (2013) 58 Cal.4th 1, 22, fn. 28.) Otherwise, the standard is substantial evidence. (*Borger*, *supra*, 192 Cal.App.4th at pp. 1121-1122.)

requires in a particular case.” (*Id.*, citing *Estate of Teed* (1952) 112 Cal.App.2d 638, 644; *Johnson, supra*, 26 Cal.3d at p. 576; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134.) A judgment may be supported by inference, but the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. (*Beck Development Co., supra*, 44 Cal.App.4th at p. 1204, citing *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418.) Thus, an inference cannot stand if it is unreasonable when viewed in light of the whole record. (*Id.*)

Further, the trier of fact is free to disbelieve a witness, even one uncontradicted, if there is any rational ground for doing so. (See *Beck Development Co., supra*, 44 Cal.App.4th at p. 1204, citing *Blank v. Coffin* (1940) 20 Cal.2d 457, 461.) “Consequently, the testimony of a witness which has been rejected by the trier of fact cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved.” (*Id.*)

Appellant’s contention that her expert’s testimony meets the standards of the Evidence Code misses the mark. (See, AOB 18-19, citing Evid. Code, § 801(b).) Appellant does not explain how her expert’s testimony overcomes the trier of fact’s determination that the testimony was too speculative and based on assumptions not supported by the record. Appellant appears to cite to this Court’s decision in *Showalter v. Western Pacific Railroad Co.* (1940) 16 Cal.2d 460, 476, to argue that both parties presented evidence of “equal” value. (AOB 33.) Appellant then relies on *Showalter* to argue that it is unfair to require the driver to use circumstantial evidence to prove that the BAC was below 0.08 percent, while the administrative agency can use circumstantial evidence to prove that the BAC at the time of driving was the same as, or greater than, the driver’s BAC at the time of the valid chemical test. (AOB 35.)

However, *Showalter* is distinguishable because neither the DMV Hearing Officer nor the trial court found that the parties' inferences were supported *equally* by *proven* facts. In *Showalter*, a railroad negligence action, the sentence preceding the language that Appellant quoted provided that "[a] verdict cannot be permitted to stand, which rests upon conjecture, surmise, or speculation, but plaintiff must produce substantial affirmative proof [of defendant's negligence]." (*Showalter, supra*, 16 Cal.2d at p. 476.) Here, both the DMV Hearing Officer and the trial court determined that there was substantial evidence supporting Respondent's position, but did not give the same weight to Appellant's evidence (i.e., finding that Appellant's expert's testimony was too speculative and based on unsupported assumptions). (AR 4; CT 58.).<sup>11</sup>

Indeed, the record lacks key findings necessary for a trier of fact to credit the expert opinion. For example, an expert's testimony in a DUI case to determine BAC at the time of driving should take into account the driver's absorption rate, based on many factors which include her testimony regarding her last drink of alcohol prior to getting behind the wheel, and the driver's elimination rate. (See, *Warlick, supra*, 162 Cal.App.4th Supp. 1, 6 [the expert applied retrograde extrapolation analysis to offer testimony that if the driver's chemical test revealed a BAC of 0.07 percent, he *must* have had a BAC of at least 0.08 percent at the time of driving].)

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<sup>11</sup> Interestingly, *Juchert*, a negligence action which was decided by this Court literally a few days after *Showalter*, empowers the trier of fact to be the exclusive judge of the weight and the value of evidence. (*Juchert, supra*, 16 Cal.2d at p. 506.) Further, *Juchert* supports the proposition that this Court should not substitute its deductions for that of the trier of fact. (*Id.*, at p. 503.) Hence, on appellate review, the determination of the DMV Hearing Officer and the trial court regarding their inferences favoring Respondent are given deference.

Where a test to determine BAC levels, i.e., Widmark's formula, takes into consideration factors such as the driver's pattern of drinking, food intake, weight, total water in the body, absorption rate, and elimination rate, the test suffices for the *Daubert*<sup>12</sup> expert evidence standard. (*State v. Vliet* (2001) 95 Hawai'i 94, 112-115, 19 P.3d 42, 60-63 ["Widmark's formula is widely viewed as reliable"]; also see, *People v. Anstey* (2006) 476 Mich. 436, 454-457, 719 N.W.2d 579, 590-592.) "The United States National Highway Traffic Safety Administration considers Widmark's formula 'the basic formula for estimating a person's blood alcohol concentration.' " (*Vliet, supra*, 95 Hawai'i at p. 112, 19 P.3d at p. 60, citing U.S. Dep't. of Transportation, National Highway Traffic Safety Admin., Office of Program Development and Evaluation (1994) *Computing a BAC Estimate*, at p. 2.) "It has been held that experts are permitted to testify about back calculations using the Widmark formula as long as there is sufficient evidence in the record about variables such as the type of alcohol consumed, the time of last alcohol intake, and the kind of food ingested." (*Vliet, supra*, 95 Hawai'i at p. 113, 19 P.3d at p. 61, citing *State v. Wolf* (Minn.App.1999) 592 N.W.2d 866, 869; *State v. Ingraham* (1998) 290 Mont. 18, 966 P.2d 103, 119-120.) Accordingly, at the least, the driver must be interviewed by the expert to obtain and use such relevant facts in the determination of the BAC levels to constitute substantial evidence.

Here, the DMV Hearing Officer properly rejected Appellant's expert's testimony. The Administrative Record does not contain any information on Appellant's expert taking into account Appellant's pattern of drinking, the type of alcohol consumed, pattern of eating, the kind of food ingested (if any), weight, absorption and elimination rate of alcohol.

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<sup>12</sup> (See, *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 589-90, 113 S.Ct. 2786.)

Further, Appellant does not point to any such evidence in the Administrative Record as material relied upon by her expert. (AOB 21.)

Consequently, the DMV Hearing Officer reasoned that:

- no reliable evidence was found supporting Appellant's expert's opinion;
- the opinion was based on a subjective interpretation of the evidence; and
- the opinion was insufficient to rebut the official duty presumption.

(AR 4; also see, AR 50-57.)

As such, the DMV Hearing Officer established that Appellant's expert's opinion was too speculative. (AR 4.)

Accordingly, where the expert testimony was (1) based on assumptions not supported by the record, (2) matters not relied upon by other experts, or (3) speculative, then the testimony had no evidentiary value. Appellant's expert testimony was simply insufficient to rise to the level of substantial evidence. Hence, the presumption of Vehicle Code section 23152(b) could not have been rebutted with such insufficient expert testimony, which is too speculative and based on assumptions not supported by facts.

For these reasons, the trial court held that "[t]he DMV hearing officer was entitled to reject the uncontradicted testimony of petitioner's expert witness, and the hearing officer set forth reasons for doing so in this case." (CT 58, citing *People v. Engstrom* (2012) 201 Cal.App.4th 174, 187.)<sup>13</sup>

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<sup>13</sup> "Expert opinion is not binding on a jury. The jury is free to reject even the uncontradicted testimony of an expert witness." (*Engstrom, supra*, 201 Cal.App.4th at p. 187, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-32.)

It is presumed on appeal that the trial court found all facts necessary to support the judgment. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 104.) Thereafter, the Court of Appeal should have given deference to the trial court's findings.<sup>14</sup>

As the DMV Hearing Officer and the trial court properly determined, Appellant's expert's testimony was insufficient to meet the substantial evidence standard, and therefore the Vehicle Code presumption was not rebutted. (See, *Security Pac. Nat'l Bank v. Associated Motor Sales* (1980) 106 Cal.App.3d 171, 178-179 [unless sufficient evidence is presented to support a finding contrary to the presumed fact, the court will instruct the jury that it *must* find the presumed fact exists.].) As such, based on the valid chemical test, it is a presumed fact that Appellant's BAC was above the legal limit at the time of driving. (*Id.*)

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<sup>14</sup> As noted above, where the trial court's findings are supported by substantial evidence, the appellate court sustains the findings. (*Lake, supra*, 16 Cal.4th at p. 457.)

## CONCLUSION

Respondent respectfully requests that the Supreme Court affirm the judgment of the Fourth District Court of Appeal, Division Three, in that where there is a valid chemical test, circumstantial evidence in addition to the results of the chemical test can be used to establish that the driver's BAC at the time of driving is the same as, or greater than, the driver's BAC at the time of the chemical test.

Dated: December 31, 2013      Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
ALICIA M. B. FOWLER  
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KEVIN K. HOSN  
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*George Valverde, Director, DMV*

**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 9260 words.

Dated: December 31, 2013

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read 'K. Hohn', with a horizontal line extending to the right.

KEVIN K. HOSN  
Deputy Attorney General  
*Attorneys for Defendant and Respondent  
George Valverde, Director, DMV*



**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

**Case Name: ASHLEY JOURDAN COFFEY v. GEORGE VALVERDE, DIRECTOR, DMV**

**No.: S213545**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On December 31, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with the **Fed Ex Overnight Courier Service**, addressed as follows:

**Chad R. Maddox, Esq.**  
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**5120 East La Palma, Suite 207**  
**Anaheim, CA 92807**  
*Attorney for Appellant*

**Court of Appeal for the State of CA**  
**Fourth Appellate District, Division 3**  
**601 W. Santa Ana Blvd.**  
**Santa Ana, CA 92701**

**Honorable Robert J. Moss**  
**Orange County Superior Court**  
**Central Justice Center**  
**700 Civic Center Drive West**  
**Santa Ana, CA 92702-1994**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 31, 2013, at Los Angeles, California.

\_\_\_\_\_  
Letty Argumedo  
Declarant

\_\_\_\_\_  
*Letty Argumedo*  
Signature