ROBIN MEADOW

SUMMARY JUDGMENT MOTIONS

The abuse-of-discretion standard of review is just plain wrong

It has been almost 20 years since the California Legislature overhauled the summary judgment law and created, as one commentator put it, "new teeth for an old tiger."[1] A major change was the elimination of the discretion that had been part of the summary judgment statute since 1933. In contrast to the earlier version, the 1973 statute required trial courts to grant summary judgment when there was no triable issue of fact.

The courts of appeal seem to have forgotten the message. With increasing frequency in recent years, they have been saying that summary judgment motions are discretionary—meaning that an appellant must bear the heavy burden of showing an abuse of discretion in order to prevail on appeal.

This view of the law is completely wrong. If summary judgment ever really involved discretion (and cases decided under the 1933 statute leave substantial doubt on the question), that discretion disappeared in 1973. Current decisional authority on the subject can invariably be traced to pre-1973 sources, and it practically never includes any substantive analysis of the subject.

Several recent decisions explicitly reject an abuse-of-discretion standard, but they are a minority; new decisions continue to declare their adherence to an obsolete and erroneous standard. The courts should eliminate this confusion by directly acknowledging that summary judgment motions do not call for an exercise of discretion.

STATUTORY HISTORY

California enacted its first comprehensive summary judgment statute in 1933.[2] The remedy was originally available only to plaintiffs, but a 1939 amendment made it bilateral. The pertinent language in that version remained essen-

Robin Meadow is a partner at Loeb and Loeb in Los Angeles, where he specializes in business litigation and appeals. He is a member of the California Academy of Appellate Lawyers.

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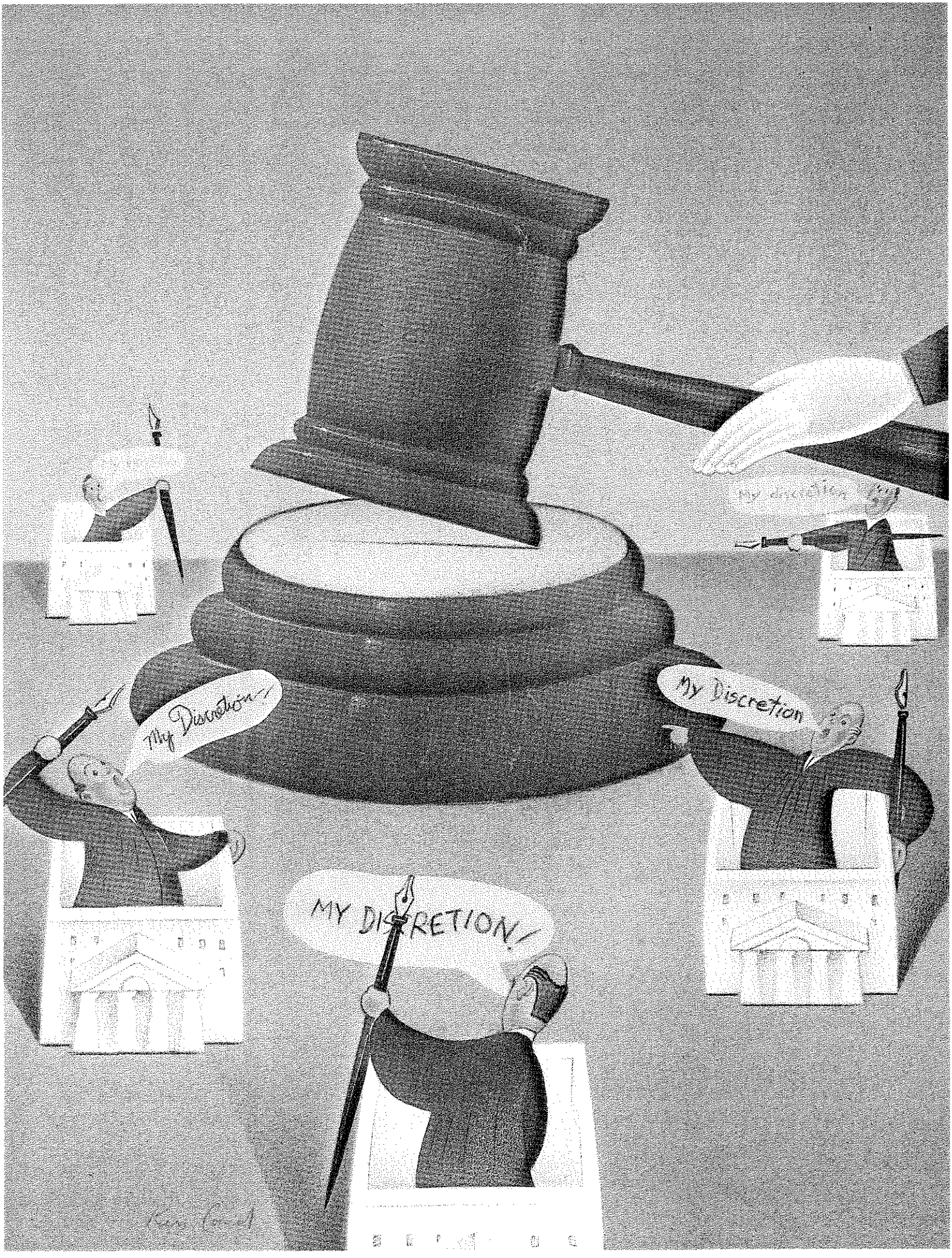
My Discretion
My Discretion
MY DISCRETION!

tially unchanged until 1973:

> *. . . if it is claimed that there is no defense to the action or that the action has no merit . . . the answer may be stricken out or the complaint may be dismissed and judgment may be entered,* in the discretion of the court *unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.*[3]

The bench and bar became increasingly dissatisfied with the statute. One of the vocal advocates of overhauling the law was Judge Ernest J. Zack, who wrote a comprehensive article criticizing the way the statute was being used.[4] He argued that summary judgment should not be discretionary, pointing out that the decisional law had already effectively "remove[d] entirely any discretion of the trial judge in passing on the motion."[5]

The 1973 version of Section 437c eliminated the earlier version's reference to discretion:

> "Such motion *shall be granted* if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6]

Judge Zack emphasized summary judgment's "new teeth" in an article following the 1973 enactment:

> *Under the existing statute the granting of summary judgment, or partial summary judgment, is expressly discretionary with the court . . . The 1973 Act removes the grant of discretion and requires that relief should be granted in all proper cases. It is unlikely that the word "shall" in the new statute will be held merely directory. . . .*[7]

Despite the 1973 statute's clarity and the strong words of one of its foremost proponents, in the last decade the appellate courts have turned the clock back to before 1973 and now routinely state that motions for summary judgment are "addressed to the sound discretion of the trial court."[8] The central problem with this trend is that there has never been, even before 1973, any significant decisional law defining what it means for a trial court to exercise discretion in this context. Close examination of the few efforts in that direction reveals no basis for treating summary judgment motions as discretionary.

There are many ways of defining "discretion," but they all express the idea that the court must make a decision on which reasonable persons could differ. An early California Supreme Court decision noted that "[i]n a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates."[9]

More recently, the supreme court explained:

> *The concept of judicial discretion is difficult to define with precision. In the past we have described it as "the sound judgment of the court, to be exercised according to the rules of law." More recently we have said (quoting from another case) that the term judicial discretion "implies absence of arbitrary determination, capricious disposition or whimsical thinking."*[10]

The essence of these concepts is a weighing process. However, the summary judgment decisional law is notably silent on that subject. The courts rarely mention it, and research has not disclosed a single decision that turned on whether the trial court acted within its discretion in weighing matters in a certain way.

Further complicating the analysis is the fact that many statements about discretion appear in direct appeals from grants of summary judgment, where not even the 1933 statute permitted the exercise of discretion. It provided (as amended in 1939) that "judgment may be entered, in the discretion of the court *unless the other party* . . . shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact."[11] On its face, this language only conferred discretion to deny a motion in a case where the court could properly have granted it.[12] The statute permitted no such discretion in granting a motion; as with the current statute, the existence of a triable issue of fact automatically required denial.[13] The decisions have never mentioned this distinction.

DEFINING DISCRETION

So what do the courts mean when they talk about discretion? The decisions suggest three possible meanings, but none of them supports an abuse-of-discretion standard of review.

Abuse of Discretion as Legal Error. The courts frequently use "abuse of discretion" as a synonym for a legal error, since technically a trial court abuses its discretion whenever it makes a legal error.[14] Perhaps this characterization was once necessary in writ proceedings seeking review of a denial of summary judgment,[15] but under the statutory writ procedure added in 1983[16]—which is in effect a discretionary interlocutory appeal—the characterization is redundant and should have no impact on the substantive review of a summary judgment ruling.

Discretion in Evaluating Materiality. In *Sawyer* v. *First City Financial Corp.*,[17] the court of appeal stated:

> *The trial court is, however, to some extent required to weigh evidence in determining whether the factual issues asserted relate to a "material fact," and must determine what "inferences [are] reasonably deducible from [the] evidence." This is not simply a process of mechanical sifting of affidavits to determine whether a theoretical issue has been uncovered, regardless of how minor or remote. The trial court judge is entitled and required to utilize discretion in viewing and weighing questions of substance and materiality of asserted disputed facts.*[18]

While this may be a reasonable description of the trial court's role in most proceedings, *Sawyer* does not establish that it should apply to summary judgment motions, because *Sawyer* did not in fact turn on the trial court's "weighing questions of substance and materiality."

The appeal in *Sawyer* concerned defenses based on res judicata, estoppel and the effect of a mutual release. The court of appeal addressed these issues almost entirely through an evaluation of undisputed facts—the procedural history of the litigation and the text of the disputed release. Inferences were only involved in the court's evaluation of the release. The plaintiffs claimed that a defendant and its officers had participated in post-release conspiratorial conduct that made them liable for a pre-release conspiracy from which the release would have otherwise discharged them. The court of appeal quoted the trial court's statement that no inferences could be drawn from the declarations that would establish a continuing conspiracy, concluding without discussion that the trial court's "decision was warranted by the evidence."[19]

This conclusion is the only part of the opinion in which the court of appeal might have deferred to trial court discretion, but the opinion does not suggest that it actually did so and there was no reason why it should have. Section 437c requires a trial court to deny summary judgment when "inferences reasonably deducible from the evidence [are] . . . contradicted by other inferences or evidence, which raise a triable issue as to any material fact." This language only comes into play when the facts supporting the inferences are themselves undisputed; otherwise the conflict in the underlying facts would be enough to defeat the motion, and the court would not need to reach the question of whether the inferences conflicted.

It follows that the question to be decided in this situation is whether a particular inference can permissibly be drawn from the undisputed facts. That is a question of law[20]—meaning that the *Sawyer* court, in agreeing with the trial court's conclusion that the permissible inferences did not establish a triable issue, was deciding a legal question rather than deferring to the trial court's discretion.

Sawyer's statement about weighing evidence therefore is unnecessary to the decision. In addition it is analytically mistaken on two points.

First, the language implies that the trial court is better able to "view . . . and weigh . . . questions of substance and materiality of asserted disputed facts" than the court of appeal. While that principle is an article of faith in an appeal after a full trial (mostly because of the trial court's ability to judge witness credibility[21]), in a summary judgment appeal the court of appeal has exactly the same information as the trial court. The task is substantively identical to reviewing the interpretation of a written agreement, where it has long been settled that the appellate court makes an independent determination of the document's meaning.[22]

Second, in a summary judgment motion there is no reason for the trial court to have discretion in deciding the materiality of evidence. While the decisions say that the trial court broad discretion in determining relevancy and materiality,[23] that discretion generally involves decisions made during trial, in which the judge weighs (as Evidence Code Section 352 requires) probative value against consumption of time and prejudice. These considerations do not apply to a summary judgment motion. Evidence that is too remote cannot legally establish the existence of a triable issue of fact; and evidence that would be within the range of a trial judge's discretion is, by definition, evidence that a trier of fact should weigh at trial. It follows that for summary judgment purposes the materiality of a particular piece of evidence should be considered a pure question of law, which the appellate court can review de novo.[24]

Discretion Concerning Conflicts in One Side's Evidence. If a motion is based on a party's deposition testimony and that party opposes the motion by filing a declaration contradicting the deposition, it might seem that the court could exercise discretion in deciding whether to allow the conflict to defeat the motion. However, courts that have addressed this situation do not speak of discretion; rather they impose a strict prohibition against self-contradictory opposition:

> *After-the-fact attempts to reverse prior admissions are impermissible because a party cannot rely on contradictions in his own testimony to create a triable issue of fact. The assertion of facts contrary to prior testimony does not constitute "'substantial evidence of existence of a triable issue of fact.'"*[25]

PRE-1973 DECISIONS

There has, then, never been much room for the exercise of discretion in summary judgment proceedings. But that fact has not kept the courts from describing the trial court's role as discretionary.

The earliest decision that discusses the summary judgment standard of review under the 1933 statute is *Bank of America, Etc.*, v. *Oil Well Supply Co.*[26] In upholding the statute's constitutionality, the court of appeal stated:

> *The only question that can possibly arise from its application is, whether or not the trial court abused its discretion. The determination in this question is to be found from an inspection of the pleadings and the affidavits supporting and opposing the motion.*[27]

The California Supreme Court first mentioned the standard of review in *Walsh* v. *Walsh*.[28] The trial court granted a summary judgment in the defendant's favor in a dispute over his compliance with a property settlement agreement. Reversing the judgment, the Supreme Court said: "The controlling question to be determined upon this appeal is whether or not the trial court abused its discretion by entry of the summary judgment in response to defendant's motion therefor."[29]

The court never discussed the trial court's exercise of discretion as such. Instead, it emphasized the limitations on the trial court's role:

> *Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived. By an unbroken line of decision in this state since the date of the original enactment of Section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns.*[30]

If a trial court is "powerless to proceed" once it finds a triable issue of fact, then it really has no discretion. The courts of appeal nevertheless consistently stated that they were reviewing trial court discretion, even though the opinions reflect that they were actually doing nothing of the sort. Of the vast body of pre-1973 summary judgment decisions, the following are significant because they resurfaced in post-1973 decisions that state an abuse-of-discretion standard of review.

Hicks v. *Bridges*[31] is the starting point for one line of cases. The court stated:

> *Such a motion is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof, the exercise of that discretion will not be disturbed on appeal. Therefore, the issue on appeal is whether the trial court abused its discretion in granting the motion.*[32]

A review of the facts shows that there was no basis for exercising discretion. The issue was whether two debtors who owned property in joint tenancy had agreed that the debt would constitute a lien on the property. The trial court granted summary judgment against both debtors on the basis of a declaration by only one of them, without any evidence establishing that his statements were binding on the other debtor. Calling this showing a "patent failure of proof," the court of appeal held that the statute "clearly prohibits" summary judgment under such facts.[33]

There was no discretionary act by the trial court. Its ruling involved a legal error: the plaintiff simply had not proven his case, because the proof did not measure up to the requirement that a motion be supported by facts "within the personal knowledge of the affiant." *Hicks* therefore does not support an abuse-of-discretion standard. However, it has been cited directly for that standard as recently as 1989[34] and has appeared elsewhere through its progeny.[35]

Another decision that has, mostly through its progeny, found its way repeatedly into post-1973 abuse-of-discretion statements is *Majors* v. *County of Merced*.[36] This wrongful death case alleged that the defendant's conduct caused the decedent's death, but uncontroverted affidavits showed that the plaintiff had murdered the decedent two and a half years later. The court of appeal stated that "[a] summary judgment will not be reversed unless there has been an abuse of legal discretion,"[37] but it cited no authority; and from the court's recital of the evidence there was clearly no factual conflict.

Majors appears in the recent law through two other pre-1973 decisions, *Exchequer Acceptance Corp.* v. *Alexander*[38] and *Brewer* v. *Home Owners Auto Finance Co.*[39] *Exchequer* cited *Majors*, and *Brewer* in turn cited *Exchequer*, for the proposition that an appellate court may not reverse a summary judgment unless the trial court has abused its

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discretion. But neither case involved a true exercise of discretion, and the courts did not suggest otherwise. In *Exchequer*, the court of appeal affirmed a summary judgment where the opposition affidavit did not contradict "material, relevant evidentiary matter" in the moving party's affidavits.[40] And in *Brewer*, the court of appeal affirmed a summary judgment where the defendant filed no counter-affidavits and "the admitted facts permit only one valid and reasonable inference."[41]

There are other pre-1973 decisions that state an abuse-of-discretion standard, but unlike the decisions discussed above they do not seem to have influenced the language of more recent decisions. They typically share several features: they contain no substantive discussion of what it means for a trial court to exercise discretion in ruling on a summary judgment motion; they cite no authority that establishes any reason for an abuse-of-discretion standard; and despite their nominal adherence to an abuse-of-discretion standard, they usually contain a de novo review of the facts.[42] (In one extreme case, the court cited four decisions in support of an abuse-of-discretion standard of review, none of which contained any discussion of the subject.[43])

One might argue that the real issue in most of these cases was whether the trial courts abused their express statutory discretionary power to deny summary judgment motions despite the absence of triable issues of fact, but that is not the approach the appellate courts took. The opinions focus entirely on whether there were triable issues of fact, and they conclude that summary judgment was proper without reaching the question of whether the trial courts could have properly denied the motions.

Significantly, the supreme court never addressed this issue after *Walsh*. In fact, there seems to be only one other supreme court opinion that even mentions trial court discretion, and there the entire discussion is the statement in a footnote that "the [trial] court did not abuse its discretion by granting summary judgment" on a particular issue.[44]

THE CONTINUING ERROR

The courts did not say much about discretion in the early years after the 1973 statute. But in 1981 the First District revived the abuse-of-discretion standard in *Leo F. Piazza Paving Co.* v. *Foundation Constructors, Inc.*:[45]

> *[A] motion for summary judgment is addressed to the sound discretion of the trial court. In the absence of a clear showing of abuse of discretion, the judgment will not be disturbed on appeal.*[46]

The court cited *Brewer* in support of this language, even though *Brewer* is a pre-1973 decision and relies on non-authoritative precedents. But the most significant fact is that *Piazza* did not involve a factual dispute. The only issue was the scope of an indemnity clause in a construction contract. The responding party filed no counter-affidavits, and the court of appeal stated that "there was no conflict in the extrinsic evidence or any indication that there was any ambiguity" in the disputed contract language.[47] The court properly conducted a de novo review of the agreement; its abuse-of-discretion language was pure dictum.

Nevertheless, *Piazza* has been cited nearly a dozen times, usually in formulaic statements that merely reiterate the abuse-of-discretion standard with no substantive discussion. These statements are often self-contradictory, like this one:

> *Because the determination of the trial court is one of law based upon the papers submitted, the appellate court must make its own independent determination of their construction and effect. However, a motion for summary judgment is addressed to the souna discretion of the trial court, so that absent a clear showing of abuse, the judgment will not be disturbed on appeal.*[48]

Some decisions reach *Piazza* through intermediate decisions that relied on it. For example, in *Crocker Nat. Bank* v. *Emerald*,[49] the court cited *Fireman's Fund Ins. Co.* v. *Fibreboard Corp.*[50] for the proposition that "[a]n order of summary judgment will not be reversed in the absence of a clear showing of abuse of discretion."[51] *Fireman's Fund* relied on *Piazza* and *Brewer* for the same proposition, but in the same breath stated that "summary judgment was mandatory if the statutory requirements were met."[52] As in other cases, in *Fireman's Fund* there was no possible basis for reviewing an exercise of discretion: the decision turned on the interpretation of an insurance policy that the court held was unambiguous and unaffected by extrinsic evidence. And *Crocker Bank* itself turned on an interpretation of the Commercial Code.

Additional recent decisions that state an abuse-of-discretion standard are listed in the margin. Some draw on the authorities discussed in this article; others cite none at all, or cite decisions that do not discuss the subject.[53]

TURNING BACK THE TIDE

In the very recent past, several courts recognized that the abuse-of-discretion standard is wrong. For example, in *Bixel Associates* v. *City of Los Angeles*,[54] Division One of the Second District stated:

> *[The] city has argued during these appellate proceedings that summary judgment was awarded below in the exercise of the trial court's*

discretion—which we should not disturb. This does not accurately describe the standard implied below or here. . . . [D]iscretion is not involved; a party who has established a right to summary judgment is entitled to it as a matter of law.[55]

Division Four of the First District came to the same conclusion in *McCorkle v. State Farm Ins. Co.*:[56]

State Farm argues that we must uphold the trial court unless we find that it has abused its discretion. This misstates the standard of review on appeal from a summary judgment. A trial court properly grants a motion for summary judgment if there is no triable issue of material fact and the moving parties are entitled to judgment as a matter of law. The interpretation of an insurance policy presents a question of law. We are not bound by the trial court's interpretation of the policy, but must interpret it anew.[57]

Division Three of the Fourth District has added its voice:

We begin by disabusing both parties of the notion that a motion for summary judgment or summary adjudication of issues involves any form of discretion. Discretion plays no role in determining whether a party is entitled to judgment as a matter of law. If the trial court errs in ruling on either motion, the error is one of law. It is procedurally and legally incorrect to claim a court has abused its discretion under those circumstances.[58]

Most recently, the Sixth District criticized the "misconception" of stating that an appellate court must "defer to the sound discretion of the trial court" in a summary judgment appeal, describing it as an "oft-cited but incorrect rule."[59]

Despite this developing trend, the abuse-of-discretion standard remains the rule elsewhere. Within a month after the *Street* decision, another division of the Fourth District reiterated the classic erroneous formulation: "A motion for summary judgment is addressed to the sound discretion of the trial court and, absent a clear showing of abuse, the judgment will not be disturbed on appeal."[60]

In fairness, it has to be noted that, regardless of what they may say, the courts' actual practice is to review summary judgment rulings de novo. But courts should not say one thing and do another, particularly where the proper standard is so straightforward. No lengthy analysis or discussion is needed. Indeed, many courts—including the supreme court—routinely review summary judgment rulings without even bothering to discuss the standard of review; they simply describe the trial-level procedures and then follow those procedures themselves.[61] But even that effort is not really necessary. A concise statement says everything:

Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, we independently review them on appeal, applying the same three-step analysis required of the trial court.[62]

This approach is analytically and historically correct. More important, it reflects what the courts are now doing and have been doing for decades. The appellate process is complicated enough without the confusion that can arise from inaccurate descriptions of the standard of review. It is not too late to polish the tiger's teeth by articulating the correct standard of review. ◆

[1] Zack, *The 1973 Summary Judgment Act: New Teeth for an Old Tiger*, 48 CAL.ST.B.J. 654 (Nov.–Dec. 1973).

[2] 1933 Cal. Stat. ch. 744, § 27.

[3] 1939 Cal. Stat. ch. 331, at 1671 (emphasis added). The history of the statute is detailed in 6 WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§ 274–77, at 573–78 (3d ed. 1985).

[4] Zack, *California Summary Judgment: The Need for Legislative Reform* 59 CAL.L.REV. 439 (1971). The article contains a detailed review of summary judgment decisions and recommendations for statutory amendments. Judge Zack's role in the enactment of the 1973 statute is described in Beech Aircraft Corp. v. Superior Court (Aanested), 61 Cal.App.3d 501, 514–16 (1976).

[5] Zack, *supra* n. 4 at 469.

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP.