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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JANICE LINGENFELTER, Plaintiff and Appellant, v. COUNTY OF FRESNO et al., Defendants and Respondents.	F050021 (Super. Ct. No. 04CECG03409) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick and Mark W. Snauffer, Judges.†

Janice Lingenfelter, in pro. per., for Plaintiff and Appellant.

Dennis A. Marshall, County Counsel, and David F. Rodriguez, Deputy County Counsel, for Defendants and Respondents.

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this majority opinion and the concurring and dissenting opinion are certified for publication with the exception of part I. and part II.B of the majority opinion.

†Judge Chittick presided over the trial; Judge Snauffer ruled on the motion for summary judgment and the motion for summary adjudication.

SEE CONCURRING AND DISSENTING OPINION

Janice Lingenfelter (plaintiff) appeals after judgment was entered in favor of County of Fresno and its Human Services System, erroneously identified as the Department of Social Services (collectively, defendant). Plaintiff filed the action after her son, Levi, died while in foster care. Plaintiff attributes Levi's death to the allegedly improper treatment he received for his medical conditions.

Plaintiff challenges the order that granted defendant summary adjudication on the first two causes of action in her complaint, as well as the judgment entered after the superior court granted defendant's motion for nonsuit after plaintiff's opening statement at trial on her third cause of action. In the unpublished portion of this opinion, we conclude that the superior court properly granted defendant's motion for summary adjudication, because the claim plaintiff filed for her injuries was not presented in a timely manner. We also hold, however, that the trial court erred in granting defendant's motion for nonsuit, on plaintiff's third cause of action for intentional infliction of emotional distress, because the validity of the third cause of action did not depend, as defendant asserted, on plaintiff's status as guardian of her son at the time the events alleged occurred. Generally, individuals have the right to be free from outrageous conduct by others that is undertaken with the intention of causing, or with reckless disregard of the probability of causing, emotional distress. Contrary to the trial court's holding, plaintiff's right and defendant's corresponding duty not to intentionally inflict emotional distress was not dependent on plaintiff's status as her son's legal guardian.

In the published portion of this opinion, we hold that a motion for nonsuit, pursuant to Code of Civil Procedure section 581c, subdivision (a), does lie in a trial by the court. We publish on this issue because the disagreement of our concurring colleague demonstrates that there is a conflict of authority.

Accordingly, the judgment is reversed and the matter remanded for further proceedings.

FACTUAL AND PROCEDURAL SUMMARY

Plaintiff has two living children, Sarah and Fanny; Levi died on September 15, 2003, while in foster care. Defendant was responsible for removing Levi from plaintiff's care. Plaintiff believes Levi died because his medical condition was diagnosed incorrectly and, consequently, he received improper medical care. Defendant believes Levi died due to a genetic condition, Lowe's Syndrome.[1]

Funeral arrangements for Levi were made by his foster parents, who were his legal guardians at the time of his death.[2] Plaintiff claims she became distressed when, among other things, she was not told of his death in a timely fashion and when she was denied participation in the planning of his funeral services.

Plaintiff's displeasure led to the filing of a complaint in Fresno Superior Court. Plaintiff included her daughters, Sarah and Fanny, as parties plaintiff. The complaint contained three causes of action. The first cause of action alleged defendant's negligence caused Levi's death. The second cause of action alleged plaintiffs suffered severe emotional distress as a result of defendant's negligence in causing Levi's death. The third cause of action alleged that defendant "did not inform or notify plaintiffs of [Levi's] passing"; made funeral arrangements and decisions "independent of and without consulting with plaintiffs"; buried Levi without plaintiffs' consent and without conducting an autopsy requested by them; "actively discouraged plaintiffs from attending Levi's funeral"; compelled plaintiffs, at the

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[1]Lowe's Syndrome, also known as Lowe-Terrey-MacLachlan Syndrome or oculocerebrorenal syndrome, is defined as "a congenital [syndrome] with hydrophthalmia [marked increase of intraocular pressure with enlargement of the eyeball, usually in infancy], cataracts, mental retardation, aminoaciduria [excessive excretion of amino acids in the urine], reduced ammonia production by the kidney, and vitamin D-resistant rickets." (Stedman's Medical Dict. (25th ed. 1990) p. 1533.) According to the Lowe Syndrome Association Web site, the condition is a rare genetic condition that occurs only in males and is caused by a single defective gene. The defect in the gene precludes production of an essential enzyme, causing the resulting medical problems. (<http://www.lowesyndrome.org/Lowe%20Syndrome/whatIsLS.html> [as of August 9, 2007].)

[2]The record indicates that the foster parents were Levi's legal guardians for 13 of the 17 years of his life.

funeral, “to occupy the back portion of the room” and made plaintiffs “to feel … like second-class citizens”; attempted to prevent plaintiffs from viewing Levi’s body and berated them “in an abusive manner” when they requested to do so; dressed Levi inappropriately in his coffin and “contrary to the way [plaintiffs] wanted him presented”; and denied plaintiffs’ request that Levi’s burial plot be located “near that portion in the cemetery near his other family members.” All of these actions were “deeply troubling and offensive to plaintiffs” and were done with malice toward them.

Defendant’s answer admitted Levi died while in foster care and that Levi was placed in foster care as a result of defendant’s actions. The answer denied the remaining charging allegations and asserted the defense of the plaintiffs’ failure to comply with the California Tort Claims Act, along with other affirmative defenses. (Gov. Code, § 900 et seq.)

Defendant filed a motion for summary judgment, which was denied because the motion did not seek to dispose of the entire action, only the first two causes of action. Defendant immediately filed a motion for summary adjudication directed at the first and second causes of action. Defendant asserted it was entitled to judgment because each cause of action was barred by the plaintiffs’ failure to present a timely claim.

The plaintiffs filed an opposition to the motion that admitted the claims were filed untimely, but argued they were entitled to a 30-day “grace period” because of the emotional distress they suffered as a result of Levi’s death. The trial court distinguished the case on which the plaintiffs relied and granted defendant’s motion.

The matter proceeded to trial on the remaining cause of action for intentional infliction of emotional distress related to the events that occurred after Levi died. The trial court first disposed of Fanny’s claims. She admittedly was a minor and, although plaintiff had successfully moved to be appointed her guardian ad litem, no lawyer was retained to represent her. Finding Fanny was a minor and not represented by counsel, the trial court dismissed her claim.

Sarah was an adult. Her claim was dismissed, however, because the trial court determined that she failed to file a claim with defendant in a timely manner.

Next, plaintiff, the only remaining party plaintiff, gave her opening statement. When she was finished, defendant moved for nonsuit, arguing the foster parents had the right to arrange for Levi's burial because they remained his guardians until after his funeral. Thus, in defendant's view, all of plaintiff's claims about mistreatment after Levi's death could not provide a basis for recovery because she did not have the right to request an autopsy or to participate in the planning of the funeral. The trial court granted the motion for nonsuit.

Only plaintiff appeals from the ensuing judgment.

DISCUSSION

Plaintiff continues to represent herself in this court. Her brief is difficult to understand. We believe she is claiming the trial court erroneously granted the motion for summary adjudication and erroneously granted the motion for nonsuit.

I. The Motion for Summary Adjudication*

A. Standard of review

We review an order granting a summary adjudication de novo. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612; *Spears v. Kajima Engineering & Construction, Inc.* (2002) 101 Cal.App.4th 466, 473.) We review the ruling, not the trial court's rationale; we will uphold the order if it is correct on any grounds, regardless of the trial court's reasoning. (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 804-805; *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1074.)

Our review requires us to "assume the role of the trial court and redetermine the merits of the motion." (*Cochran v. Cochran* (2001) 89 Cal.App.4th 283, 287.) In doing so, we

*See footnote, *ante*, page 1.

apply the same three-step analysis as the trial court. (*Inter Mountain Mortgage, Inc. v. Sulimen* (2000) 78 Cal.App.4th 1434, 1439.)

> "The first step of the review begins with an analysis of the pleadings, because '[t]he pleadings define the issues to be considered on a motion for summary judgment.' [Citation.] We next evaluate the moving defendant's effort to meet its burden of showing that plaintiff's cause of action has no merit or that there is a complete defense to it. Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to its complaint. If the filings in opposition raise triable issues of material fact the motion must be denied; if they do not, the motion must be granted[.] [Citations.]" (*Miscione v. Barton Development Co.* (1997) 52 Cal.App.4th 1320, 1325.)

In performing this analysis, we consider all of the *competent* evidence presented by the parties (declarations, judicial admissions, responses to discovery, deposition testimony, and items of which judicial notice may be taken) and the uncontradicted inferences supported by the evidence. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162.)

B. The relevant law and facts

Defendant moved for summary adjudication of the first two causes of action (both related to Levi's death) on the grounds that all three plaintiffs failed to present a claim within the time limits required by the Tort Claims Act. If correct, defendant would establish a complete defense to these claims and would be entitled to judgment as a matter of law. We begin with the law.

The Tort Claims Act requires all claims against a public entity be presented first to that entity. (Gov. Code, §§ 905, 905.2.) A claim for monetary damages must be presented within six months of the accrual of the cause of action. (§ 911.2, subd. (a).) A claimant who fails to file a claim within six months of the accrual of the cause of action may make a written application to the public entity for leave to file a late claim no later than one year after accrual of the cause of action. (§ 911.4, subds. (a), (b).) The public entity is required to act on the

application within 45 days, or at such other time as the parties may agree to, or the application is deemed denied. (§ 911.6, subds. (a), (c).)

Where an application to present a late claim is denied, the plaintiff may petition the court for an order relieving him or her of the claim filing requirement. (Gov. Code, § 946.6, subd. (a).) The petition must be filed within six months of the date that the application for leave to file a late claim was rejected. (*Id.*, subd. (b).) The grounds for granting relief from the claims filing requirement are (1) mistake, inadvertence, surprise, or excusable neglect, unless the public entity establishes prejudice; (2) the person who sustained the injury was a minor; (3) the person who sustained the injury was physically or mentally incapacitated; or (4) the person who sustained the alleged injury died during the statutory time to file the claim. (*Id.*, subd. (c)(1)-(4).)

A party may not bring a suit for money damages against a public entity unless a written claim has been presented to, and rejected by, the public entity. (Gov. Code, § 945.4; *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.) Any such action must be filed within six months from the date the claim was rejected. (§ 945.6, subd. (a)(1).)

Levi died on September 15, 2003.[3] Because the first and second causes of action allege injuries as a result of Levi's death, all applicable time limits began to run on this date. Plaintiff thus had six months from September 15, or until March 15, 2004, to file her claim with defendant.

Attached to the complaint were three separate proofs of claim for damages. The first claim listed plaintiff, Fanny, and Sarah as claimants and sought $2 million for Levi's death. The claim was signed by plaintiff on March 30, 2004, and filed on April 5, 2004. The alleged action of defendant that led to the claim is best described as negligence in the care and treatment of Levi causing his death.

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[3]We grant defendant's unopposed request that we take judicial notice of a certified copy of Levi's certificate of death.

The second claim attached to the complaint listed plaintiff as the only claimant and sought $20,000 in damages. It was dated January 16, 2004, but was not signed by plaintiff. The basis of the claim was (1) the failure to allow plaintiff to participate in the funeral arrangements; (2) the refusal to postpone the funeral when plaintiff made the request; and (3) the treatment plaintiff received when she made the request.

The third claim listed plaintiff as the only claimant and sought $20,000 in damages. It, too, was dated January 16, 2004, but was signed by plaintiff. The basis of the claim was defendant's not timely notifying plaintiff of Levi's death, not allowing plaintiff to participate in making funeral arrangements, and defendant's refusal to conduct an autopsy before the funeral.

C. Defendant's motion

Defendant's motion for summary adjudication sought judgment in its favor on the first (negligence) and second (negligent infliction of emotional distress) causes of action. These causes of action each sought damages attributable to Levi's death.

Defendant sought to establish the affirmative defense of plaintiff's failure to comply with the claims filing statutes described above. Defendant's separate statement of undisputed facts, supported by a competent declaration, alleged that only the claim filed by plaintiff on April 5, 2004, applied to these causes of action, and this claim was rejected as late on April 13, 2004. The rejection letter also advised plaintiff of her right to file an application to file a late claim. Plaintiff filed such an application, which was denied on July 13, 2004. Finally, defendant asserted that plaintiff did not petition the trial court for relief from the claims filing requirements pursuant to Government Code section 946.6, subdivision (a).

Plaintiff filed an opposition to the motion. The trial court issued a tentative ruling granting defendant's motion. Neither party appeared for oral argument, and the tentative ruling was adopted as the order of the court.

D. Our independent analysis

The first two causes of action in the complaint allege Levi died as a result of defendant's negligence, which caused plaintiff to suffer injuries. We agree with defendant that the claim filed on April 5, 2004, is the only claim that applies to these causes of action. Plaintiff argues that the other two claims she presented are broad enough to encompass the negligence cause of action. We have reviewed these claims. They relate only to the events after Levi's death and not to any negligence that may have caused his death.

The competent evidence also established that the claim was rejected as untimely, and the application to present a late claim was rejected. Finally, the competent evidence established that plaintiff failed to petition the trial court for relief pursuant to Government Code section 946.6.

These facts established an affirmative defense to plaintiff's negligence claims because she failed to comply with the claims presentation requirements explained above. The burden of proof, therefore, was shifted to plaintiff to establish that a dispute existed as to a material fact that required a trial.

In her opposition, plaintiff asserted all of defendant's facts were disputed, but she failed to support her arguments with any evidence. The absence of competent evidence establishing a triable issue of material fact left the trial court with no option but to grant the motion.

E. Plaintiff's arguments on appeal

Plaintiff makes several arguments. First, she claims she should be excused from the claims filing requirements because of mistake, inadvertence, or excusable neglect. She argues, in essence, that she could not find an attorney to assist her and she did not know how to obtain relief from the claim filing statutes.

Plaintiff's argument appears to be referring to Government Code section 946.6, subdivision (c)(1). This provision requires the trial court to provide a plaintiff with relief from the claims presentation requirements if the plaintiff files a petition and certain conditions are met. The grounds for granting relief include "[t]he failure to present the claim was through

mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim." (*Ibid.*)

This statute, however, is inapplicable to the present situation. As stated above, Government Code section 946.6 applies when a potential plaintiff seeks relief from the claims presentation requirements. Plaintiff did not file a petition for relief from the claims presentation requirement with the trial court. Instead, she filed a complaint for damages. Her failure to follow the correct procedure to obtain relief causes her to fail here as well. (§ 945.4; *State of California v. Superior Court*, *supra*, 32 Cal.4th at p. 1239.)

Plaintiff also claims the time period for filing a claim did not begin to run until the guardianship for Levi terminated. Since it appears the guardianship terminated approximately one month after Levi's death, plaintiff argues her claim was timely because it was filed within six months of the termination of the guardianship. To support her argument, plaintiff cites Government Code section 911.4.

Government Code section 911.4 does not apply. As explained above, this statute provides a remedy for individuals who failed to file a claim in a timely manner. Nowhere in the statute is the issue of guardianships addressed.

Government Code section 911.2, however, is relevant. This statute provides that a claim relating to a cause of action for injury or death to a person must be presented "not later than six months after the accrual of the cause of action." (*Id.*, subd. (a).) A cause of action accrues for the purposes of section 911.2 on "the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto" if the plaintiff were not required to comply with the claims presentation requirements. (*Id.*, § 901.) The statute of limitations for wrongful death is two years. (Code Civ. Proc., § 335.1.) The date of accrual of a cause of action for wrongful death is the date of death. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404.) The date of Levi's death, September 15, 2003, is the date on which the six-month time period for commencement of the action began to run. The existence of the guardianship was irrelevant.

Plaintiff also cites Government Code section 911, subdivision (b) to support her position. We cannot discern the relevance of this statute. Our independent review reveals it has none. Section 911 (there is no subdivision (b)) provides that a public entity waives any defect in the presentation of a claim unless the claimant is notified of the defect. Here, defendant is not claiming the claim presented by plaintiff was defective; it is claiming it was late. The declaration filed in support of the motion for summary adjudication included a copy of the letter advising plaintiff the claim was filed late and informed her of the options to remedy the defect. There is no issue of waiver.

Next, plaintiff asserts the motion for summary adjudication should not have been granted because it asserted the same grounds and arguments as the motion for summary judgment, which had been denied.

The trial court may grant a motion for summary judgment only if by doing so it will dispose of the entire action and allow judgment to be entered for the moving party. (Code Civ. Proc., § 437c, subds. (a), (c).) Defendant's motion for summary judgment addressed only the first and second causes of action. The trial court denied the motion because, even if all of defendant's arguments were correct, it was not entitled to judgment because the third cause of action was not addressed.[4] In other words, defendant made a procedural error that required the motion be denied.

Plaintiff has cited, and we are aware of, no authority that precludes the filing of a motion for summary adjudication in these circumstances. Code of Civil Procedure section 437c, subdivision (f)(2) provides that once a motion for summary adjudication has been denied, a party may not file a motion for summary judgment on the same grounds, unless there are newly discovered facts or a change in law. This prohibition does not apply to the situation before us, which is the converse of that described in subdivision (f)(2). Defendant's

[4]The trial court denied the motion without prejudice, and essentially invited defendant to file a motion for summary adjudication.

filing of a motion for summary judgment did not preclude the filing of a motion for summary adjudication.

Finally, plaintiff claims summary adjudication should not have been granted because the paralegal who prepared her moving papers failed to cite a case that would have required denial of the motion. The case cited by plaintiff, *Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, does not assist her. The Supreme Court in *Hernandez* reviewed a trial court order denying a petition to be relieved from the claims presentation requirements pursuant to Government Code section 946.6. The Supreme Court held, in essence, that a minor's petition to file an action without presenting a claim should be granted if the late claim was presented within one year of the minor's injury and the failure to file the claim was due to the neglect of a parent or an attorney. (*Hernandez*, at pp. 1030-1031.)

Hernandez does not apply because plaintiff did not file a petition for relief from the claims filing statute pursuant to Government Code section 946.6. Thus, the failure to include that case in her opposition to the motion for summary adjudication was irrelevant. The trial court did not err in granting defendant's motion.

II. The Motion for Nonsuit

As stated earlier, the trial court granted a motion for nonsuit as to plaintiff's cause of action for intentional infliction of emotional distress related to the events that occurred after Levi died. Before we address the propriety of granting nonsuit under the circumstances of this case, we must first address a threshold legal issue—to wit, the question whether nonsuit is available in a court trial. Our concurring colleague believes it is not. We disagree.

A. Nonsuit is available after an opening statement in a court trial

Defendant's motion for nonsuit was made and granted pursuant to Code of Civil Procedure section 581c, subdivision (a) (hereafter § 581c(a)), which permits a defendant to make a motion for nonsuit after the plaintiff has presented an opening statement. The question is whether the availability of this motion is limited to jury trials. The relevant statutory language is as follows:

> "[A]fter … the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant … may move for a judgment of nonsuit."

The nonsuit motion is to be distinguished from a motion for judgment pursuant to Code of Civil Procedure section 631.8. Both motions can be made without waiving the moving party's right to offer evidence in the event the motion is denied. (§§ 581c(a), 631.8, subd. (a).) Unlike a motion for nonsuit, however, a motion for judgment is available only after the party against whom the motion is made has presented his or her evidence. Further, in ruling on a motion for nonsuit, the trial court is required to "assume that all relevant evidence" offered by the plaintiff is true, "and all reasonable inferences or doubts [are] to be resolved in [the] plaintiff's favor. [Citation] In ruling upon the motion, the court [is] not permitted to judge the credibility of the witnesses, or weigh the evidence." (*Estate of Pack* (1965) 233 Cal.App.2d 74, 76-77.) In a motion for judgment, on the other hand, the trial court must decide questions of credibility, must weigh the evidence, and must make findings of fact. (*Ibid.*; compare 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 416, pp. 476-477 and authorities cited therein with *id.* at § 439, pp. 497-499 and authorities cited therein.) Finally, pursuant to the express terms of Code of Civil Procedure section 631.8, a motion for judgment is available only in a trial by the court.

The California Code of Civil Procedure section 631.8 motion for judgment came into being with the enactment of Senate Bill No. 570 (1961 Reg. Sess.) (hereafter Senate Bill No. 570) in 1961. (Stats. 1961, ch. 692, § 2, p. 1927.) The legislation was designed to address criticisms that had been leveled at the use of the nonsuit motion, with its accompanying restrictions on judging the evidence, after presentation of the plaintiff's evidence in court trials. The criticism was directed at the waste of judicial resources inherent in the use of the nonsuit motion in that context.

In *Lasry v. Lederman* (1957) 147 Cal.App.2d 480, for example, the trial court granted nonsuit to the defendant after the plaintiff presented his evidence, based on an inference adverse to the plaintiff drawn from the plaintiff's evidence. The reviewing court was

compelled to reverse. The trial court's inference, while reasonable, was not the only reasonable inference to be drawn from the plaintiff's evidence and, under the restrictions of the nonsuit motion, the lower court was bound to accept all inferences that favored the plaintiff and reject those that did not. (*Id.* at p. 488.) The appellate court recognized the potential for waste of resources:

> "It could well be argued that there is little purpose in requiring a trial judge to listen to a long, drawn-out defense when he is convinced the plaintiff has failed to prove a case. In theory, however, his mind must remain a blank with respect to the credibility of the witnesses and the weight of the evidence and the inferences until the case is submitted. This, of course, is pure fiction. He is not brought to the consciousness of his convictions immediately upon submission of the case. But under the rule he must defer his decision although the evidence of the defendant will probably serve no purpose other than to bury a cause long since dead." (*Id.* at pp. 488-489; see also *Lich v. Carlin* (1960) 184 Cal.App.2d 128, 138-140 [conc. opn. of Duniway, J.]; *White v. Shultis* (1960) 177 Cal.App.2d 641, 647.)

The new Code of Civil Procedure section 631.8 motion for judgment, made available by Senate Bill No. 570, allowed the trial court to avoid the unnecessary deferral of a ruling that otherwise could be made after the plaintiff's evidence. It also allowed the defendant to submit the case on the merits after presentation of the plaintiff's evidence, without being put to the Hobson's choice of presenting unnecessary evidence or taking the chance of losing without it. (*Lich v. Carlin*, *supra*, 184 Cal.App.2d at p. 140 [conc. opn. of Duniway, J.].)

At the same time that the motion for judgment was made available by Senate Bill No. 570, and by the same piece of legislation, section 581c was amended to add the words "in a trial by jury" to the first sentence of the first paragraph: "[A]fter … the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence <u>in a trial by jury ….</u>" (Underscoring added.)

In *Estate of Pack*, the court stated that "[t]he enactment of Code of Civil Procedure section 631.8 effectively abolished motions for nonsuit, where … trial is before the court without a jury." (*Estate of Pack*, *supra*, 233 Cal.App.2d at p. 77.) The court made this statement, however, in the context of a motion for nonsuit made after the plaintiff's

presentation of evidence. (*Id.* at p. 75.) We believe the court did not intend its comment to extend to motions for nonsuit made after the plaintiff's opening statement.[5]

The idea that the motion for nonsuit in court trials was abolished by Senate Bill No. 570 has been stated several times. Each time, however, this has occurred in the context of a motion made after the plaintiff presented his or her evidence. (E.g., *Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196, 1200 ["Initially, we note that although the parties contend the court granted Alpha Beta's motion for nonsuit, in a trial by the court a motion for nonsuit is not recognized. The correct motion is for judgment pursuant to Code of Civil Procedure section 631.8, the purpose of which is to enable the court, after weighing the evidence at the close of the plaintiff's case, to find the plaintiff has failed to sustain the burden of proof, without the need for the defendant to produce evidence"]; *Commonwealth Memorial, Inc. v. Telophase Society of America* (1976) 63 Cal.App.3d 867, 869, fn. 1 [appeal from "nonsuit" granted after close of plaintiff's evidence; "In a trial by the court, which this was, a motion for nonsuit is no longer recognized. The correct motion is a motion for judgment. [Citations.] Accordingly, we treat the order granting defendant's motion for nonsuit as a judgment for defendant pursuant to Code of Civil Procedure section 631.8"]; *Stockton v. Ortiz* (1975) 47 Cal.App.3d 183, 199 [in an appeal from judgment entered pursuant to Code Civ. Proc., § 631.8, court says "Although … section 631.8, enacted in 1961, was probably intended as a substitute for nonsuits in nonjury trials, it is still not a nonsuit" (fn. omitted)]; *East-West Capital Corp. v. Khourie* (1970) 10 Cal.App.3d 553 ["judgment of nonsuit" after plaintiff's

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[5]The authority *Estate of Pack* cited for the proposition that the motion for nonsuit had been "effectively abolished" in court trials—36 State Bar J. 710-711—is a brief article describing Senate Bill No. 570. It states: "It is a question of interpretation whether amended § 581c permits defendant in a trial to the **court** to make a motion for nonsuit at the close of plaintiff's 'opening statement,' as distinguished from plaintiff's 'presentation of evidence.' The wording and punctuation of § 581c and the subject matter of § 631.8 indicate that this may still be done, though in 'court' cases a motion for nonsuit after plaintiff's 'presentation of evidence' will no longer lie." (*Selected 1960-1961 Legislation* (1961) 36 State Bar J. 710, 711.)

presentation of evidence was erroneous because nonsuit not available in court trials and if treated as a judgment per § 631.8 still erroneous because required findings not made].)

In contrast, in *Gonsalves v. City of Dairy Valley* (1968) 265 Cal.App.2d 400 (*Gonsalves*), the appeal was from a judgment of nonsuit granted pursuant to section 581c after the plaintiff's opening statement. (*Id*. at p. 401.) The *Gonsalves* court flatly rejected the appellants' argument that, after Senate Bill No. 570, the motion for nonsuit was not available after the plaintiff's opening statement in court trials. We agree with and adopt the court's reasoning:

> "Appellant's argument is predicated upon an ungrammatical and illogical reading of amended section 581c. Appellants say the words 'in a trial by jury' qualify the phrase 'after the plaintiff has completed his opening statement,' just as they qualify the phrase 'the presentation of evidence,' with the result that the right to a judgment of nonsuit upon completion of the opening statement applies only to jury trials. The argument accords no potency to the use of a comma in the separation of the two phrases, a most significant and efficacious use of this unit of punctuation. Appellants' interpretation is also illogical and unacceptable in that it would mean that a motion for nonsuit upon the completion of the opening statement could be made and granted in a jury case but not in a case tried by the court. This is not the law." (*Gonsalves*, *supra*, 265 Cal.App.2d at p. 403.)

Other opinions of the Courts of Appeal, as well as secondary authorities, agree. (*Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 141 (*Nelson*) ["The motion for dismissal (nonsuit) was properly granted upon the pleadings on which the case went to trial. As we earlier noted, a motion for a nonsuit upon opening statement of counsel is not foreclosed by the 1961 amendment to section 581c … even in a trial to a court sitting without a jury"]; *Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 747, fn. 5 [citing *Gonsalves* and *Nelson*, court rejects plaintiff's contention that a § 581c motion for nonsuit after an opening statement will lie only in a jury trial]; see also *Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1040 & *Walker v. Capistrano Saddle Club* (1970) 12 Cal.App.3d 894, 897 [both opinions assume, without discussion, that nonsuit is available in court trial after plaintiff's opening statement]; see 7 Witkin, Cal. Procedure, *supra*, Trial,

§ 416, p. 477 [“Although procedures for a ‘motion for judgment’ in court trials have been established …, the nonsuit motion remains available in court trials on completion of the plaintiff’s opening statement”]; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2006) ¶ 12.215, p. 12-44 [“A nonsuit may be granted after (but not before) completion of plaintiff’s opening statement in either a jury or nonjury trial”].)

Under the “last antecedent rule” of statutory construction, “[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.” (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) Under the last antecedent rule, if the words “in a trial by jury” in section 581c(a) applied not only to the phrase “after the presentation of his … evidence” but also to the phrase “after … the plaintiff has completed his … opening statement,” there would be a comma before “in a trial by jury.” (*Garcetti v. Superior Court* (2000) 85 Cal.App.4th 1113, 1120.)

We conclude that the words and punctuation used in section 581c(a) produce a plain and unambiguous meaning—specifically, a superior court conducting a court trial has the authority to grant a motion for nonsuit after the plaintiff’s opening statement.

Often, our statutory analysis does not extend beyond identifying a statute’s plain and unambiguous meaning. (*Pratt v. Vencor, Inc.* (2003) 105 Cal.App.4th 905, 909 [“‘“If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs”’”].) The presumption mentioned in *Pratt* is not conclusive. Further analysis is necessary where arguments are raised that the unambiguous language of the statute, when applied, will produce results that frustrate, rather than comport with, the purpose of the statute. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1620; see *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567 [plain meaning of constitutional provision rejected to avoid absurdity].)

Here, our concurring colleague appears concerned that, as a practical matter, our statutory interpretation will produce results that frustrate the statutory purpose of providing parties with a fair procedure that promotes judicial efficiency. We recognize that each statutory interpretation has strengths and weaknesses. For example, our interpretation will avoid the expenditure of court time in taking a plaintiff's evidence where the plaintiff's opening statement unequivocally exposes the inability of the plaintiff to prove a cause of action. The balancing of these strengths and weaknesses of the two interpretations of section 581c(a) is not so one sided as to justify deviating from the plain language of the statute.[6]

In particular, we disagree with the prediction that, because of our ruling, plaintiffs will be required to make "*a substantive opening statement in every court trial*." (Conc. & dis. opn. at p. 3, italics in original.) Instead, plaintiffs in court trials are required to present an opening statement where the defendant makes a motion for nonsuit. Further, under the proper procedures for nonsuit, plaintiffs are required to address only those shortcomings in their case that are explicitly made grounds for the motion. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161 ["'only the grounds specified should be considered by the lower court in its ruling, or by the appellate court on review'"].) Further, plaintiffs must be permitted the opportunity to amend their opening statement in response to a subsequent motion for nonsuit. (*Panico v. Truck Ins. Exchange* (2001) 90 Cal.App.4th 1294, 1299 [nonmoving "party must be given the opportunity to amend the opening statement so as to correct its supposed defects"]; see *John Norton Farms, Inc. v. Todagco*, *supra*, at p. 161 ["since the motion for nonsuit is designed to call attention to correctable defects, granting such a motion after the plaintiff's opening statement can be upheld only where it is clear that counsel has stated all the facts"].) The dire prediction that courts across the state will be

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[6]In other words, the balance struck by the plain language of the Legislature is not unreasonable. When the Legislature has achieved a reasonable balance of potential future consequences, a court should not rewrite or repunctuate the Legislature's enactment to achieve a different balance. To do so would overlook the separation of powers among the three distinct branches of government.

disrupted because of our holding in this case fails to take into account that, though two much-cited practice books have for some time stated that the motion for nonsuit is available as we today rule it is, none of the predicted disruption has thus far occurred.

Our concurring colleague is correct in the view that we could decide this case without deciding the issue whether nonsuit is available in a court trial after the plaintiff's opening statement. Were we to avoid the issue, however, there would still be a potential conflict between the opinions in *Estate of Pack*, *supra*, 233 Cal.App.2d 74 (at least as our colleague reads it) and *Gonsalves, supra,* 265 Cal.App.2d 400. Further, if our holding as to the application of section 581c(a) is incorrect, there would be at least two oft-used secondary authorities—7 Witkin, Cal. Procedure, *supra*, Trial, and Wegner et al., Cal Practice Guide: Civil Trials and Evidence, *supra*, ch. 12B—that would be wrong also but left uncorrected.

For those reasons, and based on the legislative history, case law, secondary authorities, and rule of statutory construction we have discussed, we conclude that superior courts are authorized to grant motions for judgment of nonsuit after a plaintiff's opening statement in a court trial.

We proceed, therefore, to the question whether the nonsuit motion here was properly granted, which we answer in the negative.

B. Nonsuit was not appropriate[*]

1. General principles applicable to nonsuits

The grant of a nonsuit after an opening statement is disfavored. (*Abeyta v. Superior Court*, *supra*, 17 Cal.App.4th at p. 1041.) "It can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action or has inadvertently established uncontrovertible proof of an affirmative defense. [Citations.]" (*Ibid*.; see Wegner et al., Cal.

[*]See footnote, *ante*, page 1.

Practice Guide: Civil Trials and Evidence, *supra*, ¶¶ 12:215.1 to 12:216, p. 12-45; 1A Cal.Jur.3d (2006) Actions, § 612.)

In this case, the trial court determined that plaintiff could not establish an essential element of her cause of action for intentional infliction of emotional distress.

2. Elements of intentional infliction of emotional distress

The California Supreme Court has identified the elements of intentional infliction of emotional distress as follows:

> "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] … [Citations.] Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]'" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.)

Nine years after *Davidson*, the California Supreme Court qualified the first element—outrageous conduct—with the following requirement: "It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

3. Circumstances leading to the grant of nonsuit

Defendant's trial brief asserted that "[c]ertified copies of Juvenile Court records will establish that Levi was made a dependent and placed under guardianship since January 1990 through October 2003, when guardianship was dismissed as a result of his death." Defendant's trial brief argued that the foster parents, as guardians, were "authorized to make funeral arrangements for the deceased minor, through the Human Services System, pursuant to Health & Safety § 1530.6." Consequently, defendant's trial brief concluded that defendant

breached no duty[7] owed to plaintiff in connection with the way Levi's funeral arrangements were handled.

At the trial on the third cause of action, in an opening statement invited by the trial court, plaintiff reiterated the assertions she had made in her pleading. She intended, that is, to prove the failure to provide timely notice of her son's death, the ill-treatment of her after the death and in connection with Levi's funeral, and the refusal to allow an autopsy.

After plaintiff finished her opening statement, defendant made a motion for nonsuit pursuant to section 581c(a) that addressed whether plaintiff's opening statement set forth a prima facie case for intentional infliction of emotional distress.

Contending that the third cause of action was based on the refusal to permit plaintiff to participate in making the funeral arrangements and the rejection of her demand for an autopsy, defendant argued that plaintiff could not prevail because she was not Levi's legal guardian at the time these decisions were made. Plaintiff, according to defendant, had no right to participate in the funeral arrangements or the decision to forgo an autopsy and, thus, *none* of plaintiff's claims about mistreatment after Levi's death could provide a basis for recovery.

After the arguments presented by counsel for defendant, the superior court stated from the bench that it would take the section 581c(a) motion under advisement, would resume the matter at 1:30 p.m., and was "going to consider dismissing this case if in fact [counsel for defendant] is correct that the guardianship had not terminated at the time these decisions were made."

When the hearing was reconvened, the superior court heard additional argument from the parties and then ruled that "plaintiff has failed to state a prima facie case in her opening statement pursuant to [Code of Civil Procedure section 581c]; therefore, a motion for

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[7]Generally, the concept of duty is mentioned in connection with claims for the negligent (rather than intentional) infliction of emotional distress because the existence of a duty and the breach of that duty are essential elements of the negligence claim. (See *Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129 [four elements of negligent infliction of emotional distress are duty, breach of that duty, causation and damages].)

judgment of nonsuit is granted as to … the remaining defendants as to the third claim for relief."

4. Legal right to control funeral arrangements

It appears the superior court determined that plaintiff could only assert a claim for infliction of emotional distress if plaintiff was in fact the guardian of Levi after his death and before the funeral. This determination is based on the legal conclusion that the guardian had the right to control the funeral arrangements and burial of Levi.

Plaintiff has not conceded that she had no rights to control aspects of Levi's funeral. Her appellate brief asserts that, even if the guardianship had not terminated at the time of death, she had "rights and considerations as his family and next of kin" with respect to certain aspects of the funeral. Plaintiff provided no citation for the source of these asserted rights, but Health and Safety Code section 7100, which identifies who holds the "right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided," is an obvious choice. (See *Ross v. Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988, 993-994 [right to control the remains of deceased minor vest in surviving mother under Health & Saf. Code, § 7100].)

Defendant argues that under Health and Safety Code section 1530.6 the guardian had the legal authority to control the funeral and decide whether an autopsy would be conducted. Health and Safety Code section 1530.6 states that persons providing residential foster care and having legal custody of a child "may give the same legal consent for that child as a parent" subject to certain exceptions. Health and Safety Code section 1530.6 does not refer explicitly to the right to arrange the funeral of the dependent minor or control the disposition of the minor's remains. The question whether the rights conferred on the legal guardians of dependent minors under Health and Safety Code section 1530.6 supersede the statutory rights of family members to control the disposition of human remains under Health and Safety Code section 7100 was not addressed by the parties here or in the superior court. We did not request supplemental briefing from the parties pursuant to Government Code section 68081

because the judgment of nonsuit is reversible on other grounds and, therefore, the issue need not be decided to resolve this appeal. As a result, the issue concerning which provision of the Health and Safety Code determines who has the right to control the disposition of the remains must be resolved in the first instance by the superior court on remand.[8]

5. Guardianship is not an essential requirement to recovery

The superior court's determination that plaintiff could not assert a claim for infliction of emotional distress resulted from (1) an interpretation of plaintiff's intentional infliction of emotional distress claim that was too narrow and (2) an incorrect application of the legal principles that define who may recover damages resulting from an intentional infliction of emotional distress.

Plaintiff's claim goes beyond her allegations that defendant infringed her legal rights to control Levi's funeral arrangements and to obtain an autopsy. Plaintiff also claims the right to be provided timely notice of her son's death and not to be ill treated at her son's funeral. For example, plaintiff claimed emotional distress resulting from defendant's acts that (1) strongly attempted to discourage her from attending the funeral, (2) treated her like a second-class citizen when she did attend, (3) berated her in an abusive manner when she requested to view Levi's body, and (4) attempted to keep her from viewing Levi's body.[9]

Based on these assertions, we conclude that both counsel for defendant and the trial court construed plaintiff's position too narrowly. They failed to consider acts by defendant

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[8]We note that whether exercising the right to control the disposition of remains of a minor can be conceptualized as *giving legal consent for that minor* has not been addressed in a published opinion.

[9]This list of alleged actions by defendant is not a complete list of the acts and omissions of ill treatment directed at plaintiff and, on remand, it should not be regarded as an exclusive list. In her pleadings and statements in court, plaintiff has asserted other acts contributed to her emotional distress. Nonetheless, the list illustrates some of defendant's conduct that was directed primarily at plaintiff. (See generally *Christensen v. Superior Court*, *supra*, 54 Cal.3d at pp. 904-905 [discussing tort of infliction of emotional distress and difference between acts directed at child and acts directed at parents].)

that went beyond denying plaintiff the right to control Levi's funeral arrangements and the right to have an autopsy completed.

Furthermore, we are aware of, and defendant has cited, no authority for the proposition that only a parent who is a legal guardian of a deceased minor has the right to recover damages for intentional infliction of emotional distress from ill treatment at the minor's funeral or other ill treatment after the minor's death.[10] Under the basic principles of law that define claims for the intentional infliction of emotional distress, we conclude that a parent's status as a nonguardian of a minor would not abrogate the parent's general right to be free from the infliction of emotional distress resulting from a defendant's intentional and outrageous conduct that is directed at the parent, even if that conduct bears some connection to the minor's funeral and burial. (Cf. *Christensen v. Superior Court*, *supra*, 54 Cal.3d at p. 875 [in negligent infliction of emotional distress case, court ruled that certain close relatives may assert a claim for emotional distress arising from the mishandling of the remains of their deceased relative by a mortuary and crematorium].)

In summary, we conclude that plaintiff's opening statement did not unequivocally expose an inability of plaintiff to prove a cause of action for intentional infliction of emotional distress. Accordingly, the motion for judgment of nonsuit pursuant to section 581c(a) should have been denied.

DISPOSITION[11]

The judgment is reversed and the matter remanded to the superior court with directions to vacate the order granting the motion for judgment of nonsuit as to the third cause of action.

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[10]The same is true if the proposition is phrased in terms of standing to assert a claim, rather than in terms of a plaintiff's rights.

[11]Given our analysis and disposition in this matter, we deny as moot defendant's requests that we (1) grant judicial notice of juvenile court documents to establish the date upon which dependency proceedings and the guardianship over Levi were terminated, and (2) make findings of fact pursuant to Code of Civil Procedure section 909.

The order granting defendant's motion for summary adjudication is affirmed. The parties shall bear their own costs on appeal.

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DAWSON, J.

I CONCUR:

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LEVY, Acting P.J.

CORNELL, J., Concurring and Dissenting.

I concur in the decision of the majority that the judgment must be reversed. Janice Lingenfelter stated facts in her opening statement that could expose the County of Fresno and its Human Services System (collectively, the County) to a judgment for intentional infliction of emotional distress. The trial court therefore erred in granting judgment for the County.

I am writing separately, however, to state my disagreement with (1) the decision of the majority to discuss the propriety of a motion for nonsuit in a court trial, and (2) the analysis of the issue by the majority.

"Appellate courts generally will not address issues whose resolution is unnecessary to disposition of the appeal. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 8:202, p. 8-126.) The majority, in what can be described only as obiter dicta, offers an analysis of an issue that was unnecessary to resolve the dispute presented to us. Since dicta is not binding authority (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 598), this discussion should have been omitted from the majority opinion.

I also believe the majority reaches the wrong conclusion.

The majority recognizes that Code of Civil Procedure section 631.8,[1] the statutory basis for a motion for judgment, was added to the code in 1961 (Stats. 1961, ch. 692, § 2, p. 1927) as a result of the enactment of Senate Bill No. 570 (1961 Reg. Sess.). Section 631.8, which is limited to court trials, permits a defendant to move for judgment only after the plaintiff has presented his or her evidence. The trial court is permitted to "weigh the evidence" in deciding the merits of the motion. (*Id.*, subd. (a).)

Senate Bill No. 570 not only added section 631.8 to the code, however, it also amended section 581c, the statutory basis for a motion for nonsuit. A motion for nonsuit, similar to a demurrer, requires the trial court to accept as true plaintiff's evidence when considering the

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

motion. Prior to the 1961 amendment, section 581c permitted a defendant to make a motion for nonsuit in either a court *or* jury trial after plaintiff had made his or her opening statement, or after the plaintiff had completed his or her presentation of evidence.

Senate Bill No. 570 added the words "in a trial by jury" to the first paragraph of section 581c (Stats. 1961, ch. 692, § 1, p. 1927) (now section 581c, subd. (a)).[2] This section now reads, in pertinent part: "Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant … may move for a judgment of nonsuit." (§ 581c, subd. (a).)

The phrase "in a trial by jury" obviously limits the availability of a motion for nonsuit in a court trial. The issue is whether the Legislature intended the limitation to apply only to a motion for nonsuit made after the presentation of plaintiff's evidence, or also intended the limitation to apply to a motion for nonsuit made after plaintiff's opening statement.

The majority concludes that the limitation inserted by the Legislature applies only to motions for nonsuit made after the presentation of plaintiff's evidence, that is, a defendant in a court trial may make a motion for nonsuit after plaintiff's opening statement, but not after the plaintiff has presented his or her evidence. The majority opinion acknowledges there is a split of authority among the Courts of Appeal on the issue and identifies the various cases that discuss the issue on both sides.

The analysis of the majority would be more persuasive if the statute originally had been drafted as it now reads. Section 581c, however, should be analyzed in the context of the entirety of Senate Bill No. 570. When one considers the 1961 amendment in context, the error in the analysis of the majority is apparent.

Senate Bill No. 570 accomplished two tasks: (1) it limited motions for nonsuit to jury trials, and (2) it created a new motion for judgment in court trials. The most compelling conclusion to be drawn from these two actions is that the Legislature intended to create two

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[2] Senate Bill No. 570 also made other nonsubstantive changes to section 581c.

separate procedures. One procedure is applicable to court trials, where the trial court, as the finder of fact, weighs the evidence (the motion for judgment, § 631.8). The other procedure is applicable to jury trials, where the trial court, who is not the finder of fact, accepts plaintiff's evidence as true and preserves for the jury the duty to weigh the evidence (the motion for nonsuit, § 581c). I believe, therefore, that *Estate of Pack* (1965) 233 Cal.App.2d 74, 77 was correct, and indeed meant what it said: The Legislature through Senate Bill No. 570, intended to abolish motions for nonsuit in court trials.

The adverse practical ramifications of the holding of the majority are even more compelling. That holding requires every petitioner and plaintiff to give *a substantive opening statement in every court trial*. An inadequate opening statement will result in a dismissal before the presentation of any evidence. Surely, that is not what the Legislature intended.

That holding will cause a dramatic change in how court trials are conducted. Now, judges determine what they want to hear in an opening statement, if anything. The parties frequently proceed directly to the evidence and waive opening statements. Trial briefs or a listing of disputed issues frequently replace opening statements. *No more*.

A stark example of the consequences of the holding is in family law. It would be difficult to find one judicial officer in this state who believes that *a substantive opening statement* is required in family law trials. Even one of the publishers cited by the majority to support its analysis indicates that "an opening statement is seldom needed, as the *court* is the trier of fact (no jury) and has already been made aware of these matters in pretrial chambers discussions." (Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2007) ¶ 13:150, p. 13-40.) But, Family Code section 210 makes section 581c, subdivision (a) applicable to family law proceedings unless a statute or court rule states otherwise. None does. The opportunity for mischief, sharp practice and outright abuse is readily apparent. The disruption to an area of law where at least 60 percent of the litigants appear without an attorney is manifest. The goal of giving a litigant his or her day in court would be defeated.

(*Elkins v. Superior Court* (Aug. 6, 2007, S139073) ___ Cal.4th ___ [2007 Cal. LEXIS 8214, p. *59].)

Clearly, the Legislature needs to act to make its interpretation known. Conditions imposed by courts to soften the drastic consequences of failed attempts at an opening statement are not satisfactory. (See *Panico v. Truck Ins. Exchange* (2001) 90 Cal.App.4th 1294, 1299; *John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161.) They certainly did not work here.

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CORNELL, J.