CASE NO. S215990

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FANNIE MARIE GAINES,
Plaintiff/Appellant

v.

JOSHUA TORNBERG, et. al.
Defendants/Respondents.

Appeal from the Superior Court of the State of California,
County of Los Angeles, Case No. BC361768
Hon. Rolf M. Treu

FIDELITY NATIONAL TITLE INSURANCE COMPANY AND BOBBIE JO RYBICKI'S RESPONDENTS' BRIEF

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Defendants/Respondents, Fidelity National Title Insurance Company ("Fidelity") and Bobby Jo Rybicki ("Rybicki") (hereafter collectively referred to as "Respondents") hereby submit this Answer to in response to Petitioner/Appellant, Fannie Marie Gaines' ("Petitioner") Petition to the California Supreme Court.

I. INTRODUCTION

It is often said that something is not a problem unless there is a solution for it. In a forced attempt to fit the underlying Petition within the standard allowed by *California Rule of Court,* § 8.500(b), the Petitioner disingenuously argues that this appeal is about the lack of uniformity with regard to the abuse of discretion standard, and the purportedly resulting havoc in California from the lack of a workable standard. After reading the Petition, however, it is plain enough to see that the Petitioner's argument is a pretext. Clearly, what begins as a claim that the abuse of discretion standard lacks uniformity in the California Courts of Appeal, turns into an overarching indictment of the entire abuse of discretion standard. Then, the Petition turns into a complete re-argument of the underlying appeal based upon the dissent of Judge Rubin.

Without posing a solution to the purported "problem," Petitioner latches on to comments made by the dissenting Justice Rubin, and argues by implication that the Majority (Justice Grimes and Bigelow) was somehow forced into its decision by virtue of an unworkable and

impossible standard. What the Petitioner fails to acknowledge, however, is the Majority in the underlying Appeal engaged in a thorough analysis of the facts of the case, and, applying the purportedly impossible abuse of discretion standard, came to different conclusions with regard to differently situated defendant/respondents. If the abuse of discretion standard was so unworkable and impossible, it is doubtful that the Majority would be able to reverse the Trial Court. What the Petitioner does in this respect, however, is quite interesting. Throughout the entire Petition, the fact that the underlying Trial Court ruling was reversed with respect to the main defendant, Lehman Brothers Holdings ("Lehman"), is hidden in favor of Petitioner's desire to give this Court the impression that the Majority below, having no choice but to apply the purportedly impossible and unworkable abuse of discretion standard, was *forced* to decide against Petitioner. Indeed, even if the Petitioner is correct that the abuse of discretion standard is unworkable and impossible, this case is certainly not the vehicle to challenge it.

To be blunt, and with all due respect to Judge Rubin, the dissenting opinion is the exact reason why the abuse of discretion standard is used; part of the abuse of discretion standard is an acknowledgement that the trial court is in a better position to judge underlying facts and circumstances. The dissenting opinion took as true, not just the facts that the Petitioner presented underlying the case, but also the prejudiced

conclusions drawn by the Petitioner. The Petitioner characterized this case as a case of fraud and elder abuse, in which his client was the victim. Believing these opinions to be irrelevant for the purposes of the underlying appeal, the gratuitous comments made by the Petitioner to tug on the heartstrings of the fact finder went un-responded to by the Respondents. Because the Petitioner's recitation of the facts, and unfair characterization of this case as a case of elder abuse seemed to carry weight, it is only fair that the Respondents mention the other side of the story. The reality is that when one looks at the facts underlying this case, it becomes clear that Fannie Marie Gaines was the least victimized person involved.

The Petitioner's characterization of Fidelity's "improper" distribution of $90,000.00 out of the escrow account was a disputed fact that was left to be determined by the fact-finder. Fidelity was prepared to have the escrow agent testify that Ms. Gaines orally authorized the transfer of the $90,000.00. Therefore, to the extent that these unchecked and unfair characterizations of the case influenced Judge Rubin's desire to have this case tried on the merits,[1] it is only fair that Respondents highlight the fact that Appellant's characterization is disputed, and in fact, was the issue to be

[1] Although Judge Rubin acknowledges that these facts were alleged and to be decided, in reading the dissent, one cannot help but conclude that Judge Rubin's concern for these alleged facts had an effect on his decision.

decided by the fact finder. Again, Respondent's did not spar with Appellant's characterizations on appeal because such facts were not legally relevant to the merits of the appeal.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. FACTS UNDERLYING THE LITIGATION

The Petitioner and her husband applied for a loan in approximately May of 2006, after their previous loan had already gone into default. After a denial from Countrywide, defendant AJ Roop, who worked for Countrywide, informed Gaines that her boyfriend, Josh Tornberg ("Tornberg"), may be able to assist her in finding financing. Tornberg, Johnson and Ray Management agreed to assist Gaines in finding refinancing for her and her husband, but were ultimately unsuccessful due to the fact that Gaines and her husband did not have sufficient income to obtain a loan. Tornberg agreed to purchase the Property from Gaines for $950,000.00 and was going to lease it back to Gaines so they could stay in the Property. As part of the escrow instructions, the seller was to pay for repairs to bring the Property up to code. According to Gaines, it would cost approximately $100,000.00 to bring the Property up to code. The final HUD1 and amendments include an allocation of $90,000.00 to Ray Management for the repairs to the Property, which Plaintiff and her husband agreed to. **[1AA, 1-57]**

Upon closing, Gaines and her husband received $280,555.82 in cash

proceeds, along with $2,500.00 in earnest money that was released prior to closing. $4,221.65 was used to pay off real estate taxes on the Property in 2005/2006. Most importantly, however, Petitioner's Countrywide loan, which was in default, was paid off with $567,995.96 from the sale proceeds. After Petitioner and her husband signed the warranty deed transferring title to the Property to Tornberg, Petitioner changed her mind, and refused to allow any of the defendants in the Property to begin repairs. Petitioner sued Fidelity and the escrow agent, Bobby Jo Rybicki for negligence, breach of fiduciary duty, and assisting financial elder abuse, resulting primarily from the allege transfer of the $90,000.00 in escrow to Ray Management. **[1AA, 58-148]**

B. PROCEDURAL FACTS UNDERLYING THE CURRENT APPEAL

Plaintiff filed suit on November 13, 2006, naming both Fidelity and Rybicki in the original complaint. **[1AA, 1-57]** After approximately one year of litigation, the Petitioner went to court on an ex-parte basis to submit the case to voluntary mediation for 120 days with the consent of the defendants. **[2AA, 278-281]**

In November of 2008, the parties attended a status conference, and the Trial Court set a trial setting conference for December 11, 2008. **[2AA, 303-304]** The case proceeded normally until approximately August of 2009 when it was apparently discovered that one of the Defendants,

Aurora, did not hold the underlying beneficial interest in the note and deed of trust with regard to Plaintiff's quiet title claim. **[3AA, 9]** It was claimed that Lehman was the current beneficial interest holder, and that Lehman needed to be a party to the suit. Trial was originally scheduled for August 24, 2009, but was vacated in order for Petitioner to work with Lehman on obtaining relief from stay.

The trial was continued to January 28, 2010 so the Petitioner could obtain relief from stay from the Lehman Brothers bankruptcy, and add it into the case. From that date forward, the trial date was continued several more times because Petitioner failed to obtain relief from stay with regard to the Lehman bankruptcy. Status conferences regarding Petitioner obtaining relief in the Lehman bankruptcy occurred on November 4, 2009, January 28, 2010, August 20, 2010, November 1, 2010, December 13, 2010, February 25, 2011, and June 20, 2011. **[3AA, 646-662]** Finally, the Court set an Order to Show Cause re Dismissal for Failure to obtain relief from stay on October 26, 2011, whereat Petitioner informed the Court that relief was recently obtained. The Court then continued the status conference again to allow Petitioner to name Lehman, and a trial date of August 6, 2012 was eventually set. Plaintiff did not bring a motion to set the trial date before the five year statute, nor did she attempt to bifurcate the case against Fidelity. **[AAA, 1015-1018]**

Respondents, Fidelity and Rybicki, filed a motion to dismiss the case

under § 583.310, based upon the Petitioner's failure to bring the case to trial within five years of the filing date. **[1AA, 158-191]** The motion was heard on July 25, 2013, and was granted. **[2AA, 429-431]** The case was dismissed in its entirety, and the Petitioner filed a motion for reconsideration, which was ultimately denied. **[4AA, 725-731]** Petitioner filed the instant appeal on December 12, 2013, and the Majority of the Court of Appeal (Justice Bigelow and Grimes) reversed the Trial Court's order with respect to Lehman, but upheld the order dismissing the case as to all other defendants, including Fidelity and Rybicki. (*Gaines v. Fidelity National Title Ins. Co.*, 222 Cal.App.4th 25 (2013))

III. LEGAL DISCUSSION

A. THIS APPEAL DOES NOT MEET THE STANDARDS UNDER RULE OF COURT 8.500(B)

California Rule of Court, Rule 8.500(b) identifies the only grounds upon which this Court may grant review of a Court of Appeal decision. Those grounds are where: (1) the decisions of several courts of appeal are in conflict, or it is necessary to settle an important question of law; (2) the court of appeal lacked jurisdiction over the case; (3) the court of appeal's decision lacked concurrence of a majority of the judges; or (4) for purposes of transferring the matter to the court of appeal for additional proceedings.

As alluded to already, the Petitioner has made a disingenuous attempt to fit a square peg into a round hole by arguing that this appeal falls

under subdivision (1); namely, that the abuse of discretion standard lacks uniformity. While that is the thesis of the Petition, once one begins to read the Petition further, the true intention of the Petitioner becomes clear: the Petitioner wishes to indict the entire abuse of discretion standard as unworkable and impossible.

There are several problems with the Petitioner's argument. First, and most importantly, it does not fit one of the four grounds for a petition for review to this Court. While the Petitioner begins the Petition with the conclusory claim that the abuse of discretion standard lacks uniformity in California, the substance of the Petition does not support such a claim; it supports a complete and total overhaul of the abuse of discretion standard in general.

Second, even if this Petition were the proper vehicle for such a task, the Petitioner never suggests a probable solution to the purported problem; Petitioner simply complains about the unworkability of the standard itself, but proposes no solution for it. Indeed, if a case exists that exposes the purported unworkability of the abuse of discretion standard, this is not that case. Although the Petitioner purposely hides it from his Petition, it is worth noting that the Petitioner won on appeal. While Trial Court's decision to grant Respondent's motion to dismiss under the five year rule was upheld, it was only upheld with respect to Fidelity and the individual defendants in the action. With regard to the most important defendant,

Lehman, the decision was reversed. So, the Court of Appeal had no problems analyzing the record, imposing the abuse of discretion standard, and even coming to two different conclusions based upon differently situated defendants in the action. Clearly, had the Court of Appeal found the abuse of discretion standard to be unworkable or impossible, it would not have been able to engage in such an analysis and come to differing conclusions.

Finally, as argued in more detail, *infra,* there is nothing in the *Gaines* appellate decision that evidences any kind of burden on the Majority to impose the abuse of discretion standard. To the contrary, in reading the *Gaines* decision, it would be reasonable to conclude that the Majority would have come to the same conclusion (or perhaps one where the tolling the Trial Court *did* allow for would not have been upheld) under a *de novo* standard.

B. THE POLICY OF TRYING CASES ON THE MERITS DOES NOT TRUMP THE COUNTERVAILING POLICY TO DILIGENTLY PROSECUTE CASES

California courts acknowledge the fact that the potential consequences of statutes of limitation, and the like, are harsh in nature:

> *"While the bar of the statute of limitations may be considered a harsh result where there is an otherwise meritorious cause of action, as a matter of policy, this defense operates conclusively across the board...That it may bar meritorious causes of action as well as unmeritorious ones is the price of orderly and timely processing of litigation – a price that may be high, but one that must nevertheless be paid."* (*State ex*

rel. Metz v. CCC Information Services, Inc., 149 Cal.App.4th 402, 413 (2007) citing to, *Quiroz v. Seventh Ave. Center*, 140 Cal.App.4th 1256, 1282 (2006)) [Emphasis added]

The five year statute is no different than statutes of limitation in that it encourages timely and diligent prosecution of actions.[2] If the policy (which Respondents fully acknowledge) favoring trying cases on the merits trumped the five year statute, the five year statute would be a nullity. In fact, every case in which a five year motion is meritorious presents a case that will not be tried on the merits, and in every case, the result is disastrous to the plaintiff.

It is either the case that the Petitioner met the five year deadline, or she did not. Neither statutes of limitation, nor § 583.310 preclude the litigation of cases after the deadline, *unless the case happens to present disturbing facts, as alleged by the plaintiff.* The first argument the Petitioner makes is that the policy favoring trial on the merits should allow for a complete reversal of the Trial Court's order granting the motion to dismiss. Petitioner then cites to several cases that hold the well-known rule of law that California Courts have a policy favoring trial on the merits.

The Petitioner seemingly seeks to combine the two arguments that,

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[2] And, in fact, this case presents a perfect example of the need for the policy behind such statutes. Both the plaintiff and her husband died while the lawsuit was pending, and obviously could not participate in the trial; Fidelity's main witness and all other witnesses could barely remember the facts of the case and many employees no longer work for Fidelity. The countervailing policy of the five year statute must also be acknowledged.

(1) she was *sort of* diligent and *almost* met the five year deadline, and (2) the case presents particularly disturbing facts and policy favors trial on the merits. According to the implications of this Petition, the aggregate of the above two arguments should result in a complete reversal of the Trial Court's order dismissing the case. However, these arguments do not supplement one another and do not work in concert. They are disjunctive; with regard to argument (1), Petitioner did not meet the deadline; with regard to argument (2) the underlying facts are irrelevant to the five year statute. While the consequences may be harsh, such harsh consequences, according to *Quiroz,* are necessary and must be paid.

C. CALIFORNIA APPELLATE COURTS ACKNOWLEDGE THAT THE ABUSE OF DISCRETION STANDARD IS NOT UNIFORM – THE NECESSITY FOR DEFERENCE TO THE TRIAL COURT MAKES UNIFORMITY IMPOSSIBLE AND IMPRACTICABLE

At the outset, Respondent will assert the following premises Petitioner cannot successfully counter: (1) it is absolutely necessary in deciding appeals that a standard by which to judge those appeal be available that gives deference to the trial court; (2) any standard that gives deference to the trial court will be: (a) somewhat difficult to impose, and (b) by definition, not uniform. If the above premises are true, a conclusion can be drawn that the abuse of discretion standard is necessary, notwithstanding the fact that it may pose some difficulties in its imposition.

And, in fact, the Court of Appeal has already held the following on this issue:

> *"The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under the review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious."* (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal.App. 4th 853, 882 (2013) citing to, *Cellphone Termination Fee Cases,* 180 Cal.App.4th 1110, 1118 (2009)) [Emphasis added]

There is no "cookie-cutter" application for the abuse of discretion standard. As can be seen from the above citation, far from a lack of uniformity, there is an express acknowledgement in the California Court of Appeal that the abuse of discretion standard *cannot* be unified because it requires the Court of Appeal to first give deference to the trial court before the engagement of any analysis.

And in fact, in this case, not only did the Majority engage in a thorough analysis of the facts and conclude that the Trial Court could reasonably conclude that the five year deadline had not been met for Fidelity, but it is also more than likely that the Majority would have come to the same decision had the appeal been decided under the *de novo* standard.

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D. THE DECISION IN *GAINES v. FIDELITY*

1. The Decision in the Court of Appeal – The Majority had No Difficulty Imposing the Abuse of Discretion Standard and Concluding that the Trial Court was Reasonable in its Conclusions

The Court of Appeal for the Second District held that the decision of the Trial Court with respect to the motion to dismiss under the five year statute should be reversed as to defendant Lehman, but upheld the Trial Court's order dismissing Fidelity and Rybicki, as well as other individual defendants who were not participating in the litigation. (*Gaines v. Fidelity National Title Insurance Company, et al.*, 222 Cal.App.4th 25, 29 (2013))

As alluded to already, the very fact that the Court of Appeal concluded differently with respect to differently situated defendants undermines the Petition to the extent the Petition is based upon the argument that Courts of Appeal in California are somehow faced with an irreconcilably difficult task in application of the abuse of discretion standard. The Majority clearly had no trouble in its analysis of the facts and application to the defendants.

The entire panel, including Judge Rubin, agreed that under Section 583.340(b), the submission of the case to mediation in 2008 did not toll the five year statute because that submission was voluntary, and only resulted in a partial stay. Where the panel parted ways was whether, under subsection (c) of Section 583.340, it was impossible, impracticable or futile

for the Petitioner to bring the case to trial. Because the decision turned on whether subsection (c) applies, the Court of Appeal decided the case under the abuse of discretion standard under *Bruns v. E-Commerce Exchange, Inc.*, 51 Cal.4th 717 (2011).

In relevant part, the Majority concluded that the Trial Court:

> *"...could reasonably conclude plaintiff did not establish a causal connection between the 2008 stay and her failure to satisfy the five-year requirement."* (*Gaines,* at 39) [Emphasis added]

As the Court of Appeal concluded, and the Petitioner failed to acknowledge, under Tamburina v. Combined Ins. Co. of America, 147 Cal.App.4th 323 (2007), a ***circumstance of impracticability alone is not enough to toll the statute****. There must be a causal relation to the circumstance of impracticability and the inability to get the case to trial.*

The very fact that Petitioner, as the Court of Appeal pointed out, *only* cited to circumstances of impracticability without any reference whatsoever to a causal connection to the inability to try the case is alone enough to justify the Majority holding.[3] Even had this Appeal been decided

[3] And in fact, with due respect to Judge Rubin, the dissent makes the same error. Judge Rubin gives a bullet point list of circumstances of impracticability, but there are no citations to the record that would support a causal connection between those circumstances and the inability to bring the case to trial. There is only an *assumption* that events such as the several times the complaint was amended, the death of Ms. Gaines and the bankruptcy of Lehman caused plaintiff's inability to bring the case to trial. In point of fact, the record only supports the Petitioner's lack of diligence in

under the *de novo* standard, it is difficult to comprehend a different decision where the Court of Appeal did not *just* hold that the Trial Court *could have* made the correct decision, but also that the Petitioner failed to satisfy essential elements of tolling under the five year statute.

The Majority went on:

> *"Moreover, even if the plaintiff had satisfied the causal connection requirement, the trial court justifiably concluded she failed to demonstrate she was reasonably diligent in prosecuting the case. Reasonable diligence is required at all states of the proceedings."* (*Gaines,* at 39, citing to *Tamburina, supra,* at 336) *"...even in plaintiff's own timeline, there are multiple lengthy periods for which plaintiff has proffered* ***no argument or evidence*** *to show she was diligently prosecuting the case during that time."* (*Gaines,* at 39-40) [Emphasis added]

The Court of Appeal made light of the fact that the Petitioner's own timeline contained a gap of 16 months from the time of the filing of the complaint to the first purported circumstance of impracticability where no evidence was proffered to show even a circumstance of impracticability, let alone causal connection between the circumstance and the inability to try the case.

Furthermore, notwithstanding that 16 month gap, Respondents proffered evidence in the record to show the Petitioner was clearly *not*

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the form of a two year gap where the Petitioner did nothing to add Lehman to the case despite seven continued status conferences on that subject. Also, as the Majority points out, the record is devoid of any evidence of diligence in the first 18 months of the case. (*Gaines, supra,* at 39-40)

diligent.[4] In their Respondents' brief, the Respondents cited to many portions of the status conferences between August of 2009 and October of 2011, at which the Trial Court expressed frustration that the Petitioner would not add Lehman to the case by requesting relief from the Lehman bankruptcy.

> The Court: *"We've spent six months in limbo on this point and I can't believe that we're downstream now and we're still having this kind of discussion."*
>
> Mr. Garcia: *"Your Honor, we've spent more than six months, I think we've spent almost a year on that point [the Court's recommendation to obtain relief from stay occurred on August 24, 2009, which was well over a year before this hearing]. And in terms of having proof, I don't know what more Mr. Wyatt needs. We submitted a declaration from a representative of Aurora who indicated exactly what I told the Court."* **[1AA, 206]**

At another selected status conference, the Trial Court admonished the Petitioner again:

> The Court: *"Look, we've had, you know, six or seven get-togethers about Lehman Bros. this and all this kind of stuff. I'm getting frustrated about this. Okay? I want you to fish or cut bait. And I might be frustrated at the plaintiff's side for how come you don't sue Lehman Bros. Okay? They're admitting that they own the property."* **[1AA, 174]**

Then in February of 2011, 18 months after the parties learned that Lehman was the real party in interest and was in bankruptcy, the Petitioner finally got *permission* to retain

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[4] This is despite the fact that it is the Petitioner's burden, by preponderance of the evidence, that she was diligent. It is not the Respondent's burden to show lack of diligence.

bankruptcy counsel:

> The Court: *"Okay. So we're all together again. Has the New York situation been worked out?"*
>
> Plaintiff's Counsel: *"Not yet, your Honor. We've got authorization from the client to retain New York counsel to file a petition, and we just have yet to make those arrangements. But we expect to do so soon...."*
>
> The Court: *"I guess I'm a little surprised to hear you say you just got permission."* **[1AA, 185-186]**

The Court of Appeal in *Gaines* went on to note that to the extent the Petitioner argued that Aurora purportedly misrepresented its ownership interest in the Property, the Petitioner did nothing in the way of discovery to confirm or deny the actual real party in interest. (*Gaines, supra,* at 40)

In light of the above findings of the Court of Appeal, the Majority held that the Trial Court was reasonable in its conclusions that the Petitioner, (1) did not account for several large gaps of time during the pendency of the case, and (2) even for the *circumstances of impracticability* that the Petitioner *did* list, the record was devoid of any causal relationship between that circumstance and the Petitioner's inability to bring the case to trial.

There is nothing in the Gaines decision that is indicative of any kind of difficulty or wrestling with the abuse of discretion standard on the part of the Majority; they simply cited to large gaps of unaccounted time during

the pendency of the case, and called the circumstances the Petitioner ***did*** list into question based upon the lack of causation under *Tamburina*. The Court of Appeal held that the Trial Court's decision could have been reasonably concluded based upon the record; there is no underlying implication in the Majority that the panel was hamstrung by the words "whimsical" or "capricious," in its imposition of the abuse of discretion standard.

Respondent will not relive the entire Respondents' brief in this answer (as the rearguing of the appeal is not appropriate under *California Rule of Court*, Rule 8.500(b), but it is sufficient to conclude the following: ***whether the Court of Appeal decided this case under the abuse of discretion standard or the de novo standard, a 16 month gap in the beginning of the case where no circumstances of impracticability are proffered and another nearly two year gap where no causal evidence or arguments of diligence are proffered does not justify tolling under Section 583.340.*** The claims that Petitioner *"extensively litigated"* this case and that the parties did not *"sit on their hands"* **[Pet. 24]** are disingenuous at best and utterly contradicted by the record on appeal.

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2. Judge Rubin's Dissent – Judge Rubin *Did Not* Decide Differently From the Majority Because He Imposed a More Relaxed or Different Form of the Abuse of Discretion Standard – He Decided Differently Because he Disagreed with the Conclusion Drawn by the Majority, Using the Same Facts and Standard

Another impression the Petitioner wants to assert upon this Court that is inaccurate is that perhaps had the Majority in *Gaines* simply looked at the facts of the case through a different and more appropriate lens (the lens Judge Rubin used), they too would have reversed the Trial Court with regard to Fidelity and Rybicki.

However, just as the majority did, Judge Rubin applied the abuse of discretion standard and gave deference to the Trial Court in conformance with *Bruns v. E-Commerce Exchange, Inc.*, 51 Cal.4th 717, 724 (2011)). Judge Rubin simply parted ways with the majority in his decision after reviewing the facts under the same standard; he *did not* impose a different standard and conclude differently than the Majority because of that imposition.

Judge Rubin dissented from the Majority, writing a fourteen page dissent, nearly half of which is devoted to a pejorative description of the abuse of discretion standard. Judge Rubin's dissent is the hook upon which the Petitioner hangs this Petition. However, unlike the Petitioner, Judge

Rubin did not call for a complete overhaul of the standard. Instead, he simply wrote about its abuse and misuse.[5] Then, Judge Rubin wrote that while *some* discretion is owed to the Trial Court in this instance, it should not be much because the underlying facts of the case are not in dispute and the decision did not concern one for which the Trial Court was in a significantly better position. (*Gaines,* at 53)

With due respect to Judge Rubin, however, he seems to be more troubled about the superficial meaning of the words associated with the abuse of discretion standard than the underlying legal principals involved in its imposition. The Majority cut straight through that and simply concluded that the Trial Court's order was reasonable with respect to Fidelity based upon its analysis of the underlying facts, and that the conclusions drawn by the Trial Court *could be* reasonably drawn from the facts.

The Majority also found error on the part of the Trial Court in starting the five year clock on Aurora in the beginning of the case, as opposed to when they were actually added as a defendant. There is nothing in the Majority holding that evidences any difficulty whatsoever in

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[5] And again, there is no express claim or even implication in Judge Rubin's dissent that the Majority wrongfully imposed the abuse of discretion standard, resulting in a wrong decision. While Judge Rubin undoubtedly believes the Majority *did* come to the wrong decision, that purportedly wrong decision was made due to differing conclusions based upon the same facts; not wrongful abuse or misuse of the abuse of discretion standard.

imposition of the abuse of discretion standard because of words like, *"arbitrary," "capricious," or "whimsical."* In fact, the Majority never mentions these words; they simply found error with respect to one Respondent and no error with respect to the others. However, notwithstanding perhaps poorly chosen words like *"whimsical," "arbitrary,"* or *"capricious,"* the Courts of Appeal in California reverse decisions all the time without the same difficulty, and in fact, did so in this case.

Judge Rubin dedicated a whole page in dissent about his dislike of the case law that defines the abuse of discretion standard as a decision that is *arbitrary, capricious and/or whimsical.* Judge Rubin even dislikes the word "abuse" in the abuse of discretion standard. Notwithstanding these labels, which admittedly may be somewhat harsh, Respondents have yet to see a substantive argument either in the dissent or this Petition that calls the actual legal principals underlying the abuse of discretion standard into question. That is probably not a coincidence, as both Judge Rubin and the Petitioner undoubtedly acknowledge the need for an appellate standard that gives due discretion to the trial court where the issue on appeal is one for which the trial court had front row seats.[6]

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[6] Judge Rubin's citation to *People v. Jacobs,* 156 Cal.App.4th 728 (2010) evidences the fact that Courts of Appeal are not hamstrung by the cases that attempt to define an abuse of discretion as *arbitrary, capricious or whimsical.* The Court there clearly found an abuse of discretion, but

Also, there is nothing in the *Gaines* decision that even hints at the possibility that this case would have been decided differently had the majority decided it under a different standard. To the contrary, the lack of any pejorative statements to the contrary in the majority opinion indicates otherwise. Even had this case been decided under the *de novo* standard, it is highly likely that the Trial Court order would have been upheld with respect to Fidelity and Rybicki.[7]

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expressly held that the reversed decision *was not* arbitrary or capricious. These labels are merely, and perhaps ironically, attempts to guide decision making.

[7] In fact, it is possible that the majority could have overturned some of the tolling that *should not* have been included. Under the case of *Sierra Nevada Memorial-Miners Hosp.*, 217 Cal.App.3d 464, 473 (1990), it is difficult, if not impossible, to see how the Trial Court was justified in tolling the statute for 60 days for the death of Ms. Gaines. Under *Sierra,* even the severe illness of the handling attorney close to trial did not toll the statute where there was no causal argument between the illness and inability to get the case to trial. Here Petitioner presented <u>no</u> evidence that Ms. Gaines' death, which occurred two years before the five year statute was to expire, caused any hindrance to the handling of the case. Similar arguments can be made with regard to the Lehman bankruptcy; the Trial Court excluded 125 days that arbitrarily began when the Petitioner retained bankruptcy counsel, despite the fact that the record is clear that the bankruptcy counsel did nothing for three months after retention. The Court of Appeal upheld these tolled times *because of* the abuse of discretion standard.

E. PETITIONER'S ARGUMENT THAT THE ABUSE OF DISCRETION STANDARD RENDERS ALMOST EVERY DISMISSAL ON PROCEDURAL GROUNDS COMPLETELY IMMUNE FROM APPELLATE REVIEW IS UNDERMINED BY THE FACT THAT PETITIONER'S APPEAL WAS SUCCESSFUL

Petitioner first argues that the Abuse of Discretion standard is so amorphous as to be utterly useless to the Courts of Appeal, at one point saying:

> *"...the current characterization of [sic] 'abuse of discretion' standard does not realistically describe judicial decision making. This renders almost every trial court decision to dismiss a case on procedural grounds completely immune from appellate review no matter how much the equities or complicated/impracticable facts of a case scream for trial."* **(Petition, 21)**
> [Emphasis added]

Petitioner's very argument here undermines and ignores the fact that he was predominantly successful in appealing the Trial Court's decision. The *Gaines'* panel engaged in a lengthy and thorough analysis of the underlying facts from the record and using the Abuse of Discretion standard, concluded that the Trial Court did, in fact, abuse its discretion with regard to the dismissal of the case as it pertains to Lehman. (*Gaines, supra,* at 44)

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1. Contrary to Petitioner's Assertions, the Court of Appeal *Did Not* Affirm the Trial Court's Ruling

In an apparent attempt to give this Court the impression that the Petitioner comes to the Court as the down-trodden underdog, the Petitioner has improperly characterized the underlying Court of Appeal decision as an affirmation of the Trial Court's ruling, with the contrary dissenting opinion of Judge Rubin. While Respondent acknowledges that the opinion holds that, *"In all other respects, the decision is affirmed,"* the reversal of the decision as it pertains to Lehman (by far and away the most relevant defendant as far as damages sought) is an enormous victory for the Petitioner.[8]

> Judge Rubin is correct to find that, because the underlying facts are not in dispute (at least as they pertain to the motion to dismiss) that perhaps little or no deference need be given to the Trial Court as a fact finder. However, the next finding of Judge Rubin that *some deference is due for the trial court being in the best position to get a feel for the case,* cannot be overstated enough.

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[8] In fact, all throughout the process of opposing Fidelity's Motion to Dismiss, the Motion for Reconsideration and the Appeal, the Petitioner has alternatively argued that if the Motion should be granted and that decision is upheld on appeal, the dismissal should only apply to Fidelity and Rybicki.

F. WITH DUE RESPECT TO JUDGE RUBIN, IN DISSENT, HE MAKES THE SAME ERROR AS THE PETITIONER IN APPLYING THE IMPOSSIBLE, IMPRACTICABLE AND/OR FUTILE STANDARD – MERE CIRCUMSTANCES OF IMPRACTICABILITY WITHOUT REFERENCE TO A CAUSAL RELATION TO THE DELAY ARE NOT ENOUGH

An argument Respondents made in their briefs that got lost in the shuffle was the argument that where the plaintiff in response to a five year motion is arguing that it was impracticable or impossible for him/her to bring the case to trial, *it is not enough to cite to a mere circumstance of impracticability. The plaintiff must show a (1) circumstance of impracticability; (2) a causal connection between that circumstance and the plaintiff's failure to move the case to trial; and (3) that plaintiff was reasonably diligent in moving the case to trial.* Furthermore, time consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of the "impossible, impracticable, or futile" exceptions to the five-year dismissal statute. (*Jordan v. Superstar Sandcars*, 182 Cal.App.4th 1416 (2010))

Like the Petitioner, Judge Rubin, in his dissent, gave a list of circumstances of impracticability without any reference to (2) a causal connection to the circumstance and the failure to bring the case to trial,

and (3) the Petitioner's diligence. Judge Rubin lists things like the following:

- *The number of times the pleadings were amended and the nature of this financial meltdown case;*
- *Lehman's bankruptcy and Petitioner finding out late in the case of Aurora's interest;*
- *The death of Ms. Gaines;*
- *The Court's admonishment that it would not look favorably on bifurcation.*

While Respondent has no trouble admitting that some of the above may qualify as *circumstances* of impracticability, with regard to every one of the above points, there is no causal relationship to the circumstance and the Petitioner's failure to bring the case to trial. It is also more than noteworthy to point out that most of the above bullet-points do not apply to Fidelity or Rybicki. For Fidelity and Fybicki, the pleadings remained the same from the beginning to the end of the case, and Fidelity and Rybickin were listed as defendants from the original filing of the complaint.

Just to briefly respond to the above, the fact that the pleadings were amended several times is irrelevant. The same theory of liability did not change throughout the entirety of the case, <u>especially with regard to Fidelity</u>. Further, whether Lehman was the proper defendant or Aurora, there is nothing in the record to indicate that the Petitioner was prejudiced in any way. He was able to get all relevant discovery when Aurora was the

defendant, and the Petitioner's theory of the case is the same. Further, as argued in the Respondents' brief, the death of Ms. Gaines, while unfortunate, could not have possibly caused any kind of issue with getting the case to trial. Ms. Gaines died in November of 2009, and the Trial Court approved the appointment of her son as the Plaintiff a mere 60 days later. **[Appellant's Opening Brief, 31]** There is nothing in the record to support a claim of tolling for this arbitrary two month period in the middle of the litigation. Nothing indicates that the Petitioner was unable to conduct discovery or proceed in any way in litigation the case because of Ms. Gaines' death.

If the Court allowed for every circumstance of impracticability to toll the five year statute, then the Petitioner would have a near infinite list of events to add to the tolling time. In its prudence, the Court of Appeal put limits on the impracticability standard because of the potential for abuse. As was stated in the *Jordan* case, *supra,* every case is filled with a litany of *circumstances* of impracticability: illness of parties, the time to answer a complaint, the time in which dispositive motions are pending, vacations, etc. These mere circumstances do not, alone, justify tolling of the five year statute.

IV. CONCLUSION

Based upon the foregoing, the Respondents would respectfully request that this Petition for Review be denied.

Date: February 13, 2014

FIDELITY NATIONAL LAW GROUP

Kevin R. Broersma (A.A.)

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INSURANCE COMPANY AND
BOBBIE JO RYBICKI

CERTIFICATE OF COMPLIANCE

I, Kevin R. Broersma, appellate counsel for Respondents, certify that the foregoing brief is prepared in proportionally spaced Times New Roman 13 point type and, based on the word count of the word processing system to prepare the brief, exclusive of tables the brief is 6584 words long.

Kevin R. Broersma (A.A.)
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Counsel for Fidelity National
Title Insurance Company and
Bobbie Jo Rybicki

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 915 Wilshire Boulevard, Suite 2100, Los Angeles, CA 90017.

On February 13, 2014, I served the foregoing document(s) described as: **FIDELITY NATIONAL TITLE INSURANCE COMPANY AND BOBBIE JO RYBICKI'S RESPONDENTS' BRIEF** on the interested parties in this action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

__XX__ **(BY OVERNIGHT DELIVERY)** I delivered to an authorized driver authorized by Overnite Express to receive documents, in an envelope or package designated by Overnite Express with delivery fees paid or provided for, addressed to the person on who it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; or at that party's place of residence.

_____ **(BY PERSONAL SERVICE)** I delivered such envelope by hand to the office of the addressee.

_____ **(BY ELECTRONIC SERVICE)** Pursuant to California Supreme Court's electronic notification address. Pursuant to Rule 8.212(c)(2), Respondents have submitted an electronic copy of the Respondent's Brief, which satisfies the service requirement of the California Supreme Court.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 13, 2014, at Los Angeles, California.

Arbi Abrami

SERVICE LIST

Gaines v. Tornberg, et al.

Supreme Court of California Case No. S215990
Second Appellate Court of Appeal Case No. B244961
Los Angeles Superior Court Case No. BC361768

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