Filed 12/12/17 Lee v. Yang CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| JOUNG HYEN LEE et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>JUN YANG,<br><br>Defendant and Respondent. | B266853<br><br>Los Angeles County<br>Super. Ct. No. BC543345 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed in part; reversed in part.

Moon & Yang, Kane Moon and Allen Feghali for Plaintiffs and Appellants.

Claremont Law Group, David K. Lee and Shirin R. Delkhah for Defendant and Respondent Jun Yang.

## INTRODUCTION

Plaintiffs and appellants Joung Hyen Lee, Hyen Uk Lee, and Esther Lee (plaintiffs) are former employees of The Christian Herald, Inc. (the Herald), a corporation they allege is solely owned and was managed by their former boss, defendant Jun Yang. Plaintiffs filed suit against Yang and the Herald asserting five wage-and-hour claims. Hyen Uk Lee asserted three additional causes of action (assault and battery and intentional infliction of emotional distress against Yang, and premises liability against the Herald) arising out of alleged physical confrontations with Yang. Plaintiffs appeal from the judgment entered in favor of Yang after the trial court sustained his demurrer to the first amended complaint without leave to amend as to all causes of action asserted against him individually.

We reverse the judgment in part. With respect to the wage-and-hour claims against Yang individually, we conclude the court properly sustained the demurrer without leave to amend because plaintiffs fail to allege sufficient facts to establish Yang was their employer. However, the court erred in concluding that plaintiffs fail to allege sufficient facts to support their alter ego theory against Yang. We also reverse the judgment with respect to Hyen Uk Lee's two tort claims against Yang individually because these claims are not, as the court concluded, within the scope of harms addressed by workers' compensation law.

## FACTS AND PROCEDURAL BACKGROUND

According to the operative complaint, all three plaintiffs worked for the Herald for some period of time prior to September 2012. Joung Hyen Lee was a reporter, while Hyen Uk Lee and Esther Lee were administrative assistants. Plaintiffs allege that

at all times during their employment, Yang was the sole officer and director of the Herald and, in addition, controlled their working conditions and wages.

It is unclear from the complaint exactly when plaintiffs' employment was terminated. Ultimately, plaintiffs filed a complaint against the Herald as well as Yang individually. The operative first amended complaint asserts the following wage-and-hour claims against both defendants: (1) failure to pay regular, overtime, and premium wages (Lab. Code, § 1194)[1]; (2) failure to provide paid 10-minute rest periods (§ 226.7); (3) failure to pay wages owed upon termination of employment (§ 201); (4) failure to maintain accurate wage statements (§ 226); and (5) unfair business practices predicated on the alleged Labor Code violations (Bus. & Prof. Code, § 17200 et seq.).[2] Collectively, plaintiffs sought approximately $136,000 in unpaid wages plus penalties, costs and attorney's fees.

Plaintiff Hyen Uk Lee asserted three additional causes of action: two against Yang (assault and battery, intentional infliction of emotional distress) and one against the Herald (premises liability). As to these claims, Hyen Uk Lee alleged that on two occasions in September 2012, Yang physically attacked her. Specifically, on September 13, 2012, Yang threw a cellular phone at her and grabbed her, causing injury to her arm and body. In addition, on September 20, 2012, Yang pushed Hyen Uk Lee against a door, causing her to hit her head on the corner of the door and lose consciousness. As to the tort claims against

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1 All undesignated statutory references are to the Labor Code.

2 We refer to these five causes of action collectively as the wage-and-hour claims.

Yang, Hyen Uk Lee sought compensatory as well as punitive damages.

Plaintiffs filed the original complaint on April 23, 2014. We gather from the register of actions and the respondent's brief that the court sustained a demurrer to that pleading with leave to amend. Plaintiffs filed an amended complaint (the operative complaint here) on March 5, 2015, and defendants again demurred. With respect to the wage-and-hour claims, Yang[3] argued plaintiffs failed to set forth sufficient facts to establish the two required elements of alter ego: unity of interest between him and the Herald, and injustice or fraud resulting from the recognition of the corporation as a separate entity. In addition, Yang argued the tort causes of action, assault and battery, and intentional infliction of emotional distress, failed to state a claim because workers' compensation is the exclusive remedy for injury sustained in the workplace.

Plaintiffs opposed the demurrer. With respect to Yang's individual liability on the wage-and-hour claims, plaintiffs stated the operative complaint asserted Yang was their employer—a contention sufficiently supported by their allegation that Yang "controlled the[ir] working conditions and wages." Moreover, plaintiffs argued, the operative complaint set forth numerous allegations sufficient to support their alter ego theory of liability against Yang, including that Yang "used the assets of [the Herald] for his personal use, caused assets of the corporation to

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[3] The Herald also demurred to one cause of action (premises liability) contained in the first amended complaint. Because the Herald is not a party to the appeal, we do not discuss the court's ruling to the extent it concerns only the Herald. We note, however, that the employment-related claims remain pending against the Herald.

be transferred to him without adequate consideration, and withdrew funds from [the Herald]'s bank accounts for his personal use," and held himself out as being personally liable for the corporation's debts. The complaint further alleges the corporation was drastically undercapitalized and failed to observe basic corporate formalities.

On August 26, 2015, the court sustained Yang's demurrer without leave to amend. With respect to the wage-and-hour claims, the court noted that in order to establish alter ego liability, a plaintiff must demonstrate a unity of interest between the corporation and another person or entity, and an inequitable result if the acts in questions are considered the actions of the corporation alone. The court found plaintiffs' allegations were legal contentions rather than facts, and concluded plaintiffs failed to state sufficient facts to support their claims against Yang individually. As to the two tort claims, the court noted Hyen Uk Lee alleged both incidents occurred in the workplace and concluded "the alleged facts do not fall outside of the scope of the exclusive remedy of the workers' compensation statute. Nor is there an allegation of lack of workers' compensation insurance as to these causes of action."

## DISCUSSION

Plaintiffs contend the court erred in sustaining Yang's demurrer without leave to amend as to all causes of action against him. We agree the court erred with respect to plaintiffs' alter ego theory and the tort claims asserted by Hyen Uk Lee. Otherwise, we find no error in the court's ruling.

**1. Appealability**

Although neither party addresses appealability, we do so, as it concerns our jurisdiction. (See *Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 [noting "[a] reviewing court must raise the issue [of appealability] on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1"].)

Plaintiffs' notice of appeal, filed on September 14, 2015, purports to appeal from a judgment of dismissal after an order sustaining a demurrer dated August 26, 2015. No judgment of dismissal was entered that day. Instead, the court issued a minute order sustaining Yang's demurrer without leave to amend. "An order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order." (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396, citing *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860.)

The court entered a judgment of dismissal on October 5, 2015, several weeks after plaintiffs filed their notice of appeal. Because a judgment of dismissal has actually been entered, we liberally construe the appeal to have been taken from the judgment of dismissal. (See Cal. Rules of Court, rules 8.100(a)(2), 8.104; *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202–203.)

**2. Standard of Review**

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied

factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid.*) If the trial court has sustained the demurrer [*sic*], we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81, disapproved on another point by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939–941.)

**3. The court properly sustained Yang's demurrer to plaintiffs' wage-and-hour claims without leave to amend.**

Plaintiffs contend the court erred in sustaining Yang's demurrer to their wage-and-hour claims without leave to amend. We disagree to the extent those claims seek to hold Yang individually liable as plaintiffs' employer.

In order to hold Yang individually liable for the wage-and-hour violations stated in the operative complaint, plaintiffs must establish that Yang was their employer within the meaning of the Labor Code. (See § 1194 [action for unpaid wages]; *Martinez v. Combs* (2010) 49 Cal.4th 35, 49 (*Martinez*) ["The Legislature has thus given an employee a cause of action

for unpaid minimum wages [under section 1194] without specifying who is liable. That only an employer can be liable, however, seems logically inevitable as no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages."].) The complaint fails to plead sufficient facts to establish that Yang was their employer and plaintiffs have not proposed any amendment that would cure this fatal defect.

As noted, plaintiffs allege that Yang was the sole officer and director of the Herald and on that basis contend that both Yang and the Herald were their employers. Plaintiffs cite *Martinez v. Combs* as standing for the proposition that, " '[t]o employ … means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.' " Plaintiffs then note they have alleged: "At all times relevant hereto, YANG controlled the working conditions and wages of Plaintiff[s]." Without further analysis, plaintiffs conclude they have sufficiently alleged that Yang was their employer.

The Supreme Court rejected the argument advanced by plaintiffs here in *Reynolds v. Bement* (2005) 36 Cal.4th 1075 (*Reynolds*). There, the court considered whether a corporate employee may properly state a claim for unpaid overtime compensation under section 1194 against officers, directors, and shareholders of the corporation as individuals. The court noted that in the course of promulgating regulations (known as wage orders), the Industrial Welfare Commission[4] has broadly "defined

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[4] " '[W]age and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series

'employer' to include an individual who 'exercises control over the wages, hours, or working conditions of any person.' " (*Id*. at p. 1085.) As in the present case, the plaintiff alleged the corporate officer defendants exercised control over his wages, hours, and working conditions. On that basis, he asserted those defendants should be deemed "employers" subject to liability under section 1194. (*Id*. at pp. 1085–1086.)

After noting that IWC wage orders do not, in and of themselves, subject an employer to liability under section 1194, and further observing that the Labor Code does not define "employer," the court considered whether the Legislature intended to incorporate the IWC's broad definition of "employer" into section 1194. The court found no evidence that the Legislature so intended and therefore applied the common law definition of "employer" to the Labor Code. The court stated, "[u]nder the common law, corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages. [Citations.] This is true regardless of whether a corporation's failure to pay such wages, in particular circumstances, breaches only its employment contract or also breaches a tort duty of care. It is 'well established that corporate agents and employees acting for and

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of 18 wage orders, adopted by the IWC.' (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026 (*Brinker* ).) The IWC, a state agency, was empowered to issue wage orders, which are legislative regulations specifying minimum requirements with respect to wages, hours, and working conditions.[ ] [Citations.]" (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838.) Although the Legislature has since defunded the IWC, its wage orders are still in effect. (*Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1102, fn. 4; § 1182.13, subd. (b).)

on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract.' [Citation.] And '[d]irectors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position[.]' [Citation.]" (*Reynolds, supra,* 36 Cal.4th at p. 1087, abrogated on another point by *Martinez, supra.*) Applying these principles, the court concluded the plaintiff failed to state a claim for liability under section 1194 against the individual corporate officers, directors, and shareholders.

Plaintiffs assert *Reynolds* is no longer good law. As plaintiffs observe, the court subsequently reversed course in *Martinez* by holding "[i]n actions under section 1194 to recover unpaid minimum wages, the IWC's wage orders *do* generally define the employment relationship, and thus who may be liable." (*Martinez, supra,* 49 Cal.4th at p. 52, emphasis added.) The court acknowledged its seemingly contrary holding in *Reynolds* but did not overrule that case in its entirety. Instead, the court limited the scope of the *Reynolds* holding, notably leaving intact that portion of the holding pertinent here: "The opinion in *Reynolds, supra*, 36 Cal.4th 1075, properly holds that the IWC's definition of 'employer' does not impose liability on individual corporate agents acting within the scope of their agency. (*Reynolds*, at p. 1086.) The opinion should not be read more broadly than that." (*Martinez, supra*, at p. 66.) We decline plaintiffs' invitation to depart from the portion of *Reynolds* explicitly ratified by the court in *Martinez,* which teaches that corporate officers, directors, and shareholders acting within the scope of their agency are not individually liable for the wage-and-hour violations of the corporation. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456.)

Plaintiffs also seem to suggest Yang acted outside the scope of his corporate agency, thereby subjecting him to direct liability as a joint employer. But the facts plaintiffs point to—that Yang controlled their wages and hours and had the authority to hire and fire them—are plainly within the scope of corporate agency. Plaintiffs offer no proposed amendment to their complaint (nor did they below) and, as they have already amended their complaint once, we presume no facts exist which would sufficiently cure the defect in the operative complaint. (See, e.g., *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"].)

In sum, plaintiffs' allegations, if proven, would not establish Yang was their employer and therefore plaintiffs cannot state a viable claim against Yang individually with respect to their wage-and-hour claims.

**4. Plaintiffs allege sufficient facts regarding their alter ego theory.**

Although we have concluded plaintiffs did not allege facts sufficient to establish Yang was their employer, Yang may still be held personally liable for the acts of the Herald based on an alter ego theory.

" 'Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.]' [Citation.] '[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice

so require.' [Citation.] Before a corporation's obligations can be recognized as those of a particular person, the requisite unity of interest and inequitable result must be shown. [Citation.] These factors comprise the elements that must be present for liability as an alter ego." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 411 (*Leek*).)

Here, the court concluded plaintiffs failed to allege sufficient facts regarding both elements required for the application of the alter ego doctrine. The court erred.

With respect to the first element, unity of interest, relevant factors include commingling of personal and corporate funds and assets, diversion of corporate assets or funds to personal use, treatment of corporate assets as personal assets, sole ownership of the corporation by one individual, absence of corporate assets, gross undercapitalization, and disregard of corporate formalities. (*Leek, supra*, 194 Cal.App.4th at pp. 417–418.) " 'No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.' [Citation.]" (*Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1198 (*Shaoxing*).) Plaintiffs allege Yang dominated and controlled the Herald; a unity of interest and ownership existed between Yang and the Herald; the Herald was a mere shell and conduit for Yang's affairs; the Herald was inadequately capitalized; the Herald failed to abide by the formalities of corporate existence; and Yang used the Herald's assets as his own. Yang responds that these allegations are legal conclusions, not facts. We disagree, inasmuch as other courts have held that virtually identical allegations are sufficient at the pleading stage. (See *First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d

910, 915–916; see also *Shaoxing, supra*, 191 Cal.App.4th at pp. 1193–1194, 1198.) Further, plaintiffs are "required to allege only 'ultimate rather than evidentiary facts.' " (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236 [finding similar alter ego allegations sufficient to survive demurrer].)

As to the second element of their alter ego theory, plaintiffs allege that recognizing the separate existence of the Herald would sanction fraud and promote injustice. In addition, plaintiffs allege the Herald was so inadequately capitalized that it "did not have, and still does not have, sufficient capitalization to pay its employees." We conclude plaintiffs sufficiently pled an alter ego theory of liability against Yang for all of the wage-and-hour claims.

To provide guidance to the court on remand, we note that the essence of the alter ego doctrine is not that the individual shareholder *becomes* the corporation; rather, the individual shareholder *is liable* for the actions of the corporation. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300–301.) " 'An alter ego defendant has no separate primary liability to the plaintiff. Rather, plaintiff's claim against the alter ego defendant is identical with that claimed by plaintiff against the already-named defendant. [¶] A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice. [Citations.]' [Citation.]" (*Shaoxing, supra,* 191 Cal.App.4th at p. 1198.)

In short, plaintiffs pled sufficient facts to hold Yang liable for the obligations of the Herald—including any judgment subsequently entered in their favor in the present case.

**5. Plaintiff Hyen Uk Lee adequately pled claims for assault and battery and intentional infliction of emotional distress.**

Plaintiff Hyen Uk Lee asserts the court erred by finding that her tort causes of action against Yang are barred by the exclusive remedy provision of workers' compensation. We agree and conclude she alleged sufficient facts to withstand Yang's demurrer.

As noted, Hyen Uk Lee asserted two tort claims (assault and battery, and intentional infliction of emotional distress) against Yang based on alleged incidents that occurred in September 2012. The trial court concluded that because both injuries occurred at the workplace, the exclusive remedy provision of workers' compensation law bars Hyen Uk Lee from bringing a tort action against Yang. The court's rationale is wrong in two respects. First, we have concluded (as the trial court did) that plaintiffs failed to allege sufficient facts to establish Yang was their employer. And because workers' compensation law applies only to the employer-employee relationship, it necessarily follows that the workers' compensation exclusive remedy provision does not insulate Yang from liability here. (§ 3602, subd. (a) [providing that where an employee is injured in the course of employment, "the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents *against the employer*," emphasis added].) Second, and in any event, the

Labor Code provides an employee may sue his or her employer, notwithstanding the exclusive remedy provision of workers' compensation, "[w]here the employee's injury … is proximately caused by a willful physical assault by the employer." (§ 3602, subd. (b)(1); see also *Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1828–1829 [discussing legislative intent].)

Having concluded the court's stated rationale is incorrect, we now consider whether Hyen Uk Lee's allegations are sufficient to state a claim. "The essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm. [Citations.] The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching. [Citations.]" (*So v. Shin* (2013) 212 Cal.App.4th 652, 668–669; CACI Nos. 1301, 1300 [respectively].)

Here, Hyen Uk Lee alleges that on September 13, 2012, Yang threw a cellular phone at her and grabbed her, causing injury to her arm and body. Hyen Uk Lee further alleges that on September 20, 2012, Yang pushed her against a door, causing her to hit her head on the corner of the door and to then lose

consciousness. These allegations are sufficient to survive a demurrer on the cause of action for assault and battery.

As to the claim for intentional infliction of emotional distress, the essential elements are (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. (See, e.g., *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) " ' "[O]utrageous conduct" is conduct that is intentional or reckless and so extreme as to exceed all bounds of decency in a civilized community. [Citation.]' " (*So v. Shin, supra*, 212 Cal.App.4th at p. 671.) " 'There is no bright line standard for judging outrageous conduct and " '... its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical … .' [Citation.]" [Citation.]' Thus, whether conduct is 'outrageous' is usually a question of fact. [Citations.]" (*Id.* at pp. 671–672.) We conclude Hyen Uk Lee's allegations above, together with her allegations that Yang caused her both physical injury and mental distress and aggravation, are sufficient to withstand Yang's demurrer on the claim for intentional infliction of emotional distress.

## DISPOSITION

The judgment of dismissal is reversed and the cause is remanded to the trial court with directions to vacate its order sustaining Yang's demurrer to the first amended complaint without leave to amend. The court shall enter a new order sustaining the demurrer without leave to amend as to causes of action one through five against Yang individually, overruling the demurrer as to causes of action one through five against Yang based on alter ego liability, and overruling the demurrer as to the sixth and seventh causes of action for assault and battery and intentional infliction of emotional distress. The court is instructed to conduct further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.