Appeals, Writs and Post-Trial Motions

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■ Developments in Appellate Law—2007

The following are some of the most noteworthy developments in appellate law and procedure in 2007.

■ An amicus curiae brief in the Court of Appeal must now be filed within 14 days after the last appellant's brief is filed.

Rule 8.200(c)(1) of the California Rules of Court

Previously there had been no time limit for submitting an amicus curiae brief in the Court of Appeal.[1] As of January 1, 2008, however, amended rule 8.200(c)(1) requires a prospective amicus to submit an application to file an *amicus curiae* brief (along with the proposed brief itself) "[w]ithin 14 days after the last appellant's reply brief is filed or could have been filed." The presiding justice may permit a later filing for good cause.

■ Briefs filed in the Court of Appeal may now be served on the Supreme Court electronically.

Rule 8.212(c)(2) of the California Rules of Court

Instead of serving the Supreme Court with four paper copies of a Court of Appeal brief, amended rule 8.212(c)(2)(A) now gives parties the option of sending one electronic copy. The electronic copy must be in a text searchable PDF format and must exactly duplicate the paper copy. The brief can be electronically filed through the Supreme Court's website at http://www.courtinfo.ca.gov/courts/courtsofappeal/terms.cfm.

■ The acceptance of an additur or remittitur now extends the time to appeal a judgment by 30 days.

Rule 8.108(b)(2) of the California Rules of Court

Rule 8.108 now provides another extension period for filing an appeal. Under new subdivision (b)(2), when a party accepts an additur or remittitur, the time to appeal from the judgment will be extended "until 30 days after the date the party serves the acceptance." Subdivision (a) clarifies that this rule will not operate to shorten the time to file an appeal described in rule 8.104.

■ The Court of Appeal is now specifically authorized to impose sanctions for filing a frivolous motion or writ petition.

Rules 8.276(a)(3) and 8.490(n) of the California Rules of Court

Amended rule 8.276(a)(3) now specifically authorizes a Court of Appeal to impose sanctions for a frivolous motion. New rule 8.490(n) also authorizes the Court of Appeal to impose sanctions for filing a frivolous writ petition or for committing an "unreasonable violation" of the provisions of rule 8.490. Sanctions under both of these provisions may be imposed upon the motion of a party or upon a Court of Appeal's own motion.

■ The rule concerning costs on appeal has been renumbered.

Rule 8.278 of the California Rules of Court

The award of costs on appeal is now covered

1. The rule governing the time limit for filing an amicus curiae brief in the Supreme Court remains substantially unchanged. Rule 8.520(f)(2) stipulates that an application to file an amicus curiae brief in the Supreme Court along with the brief itself "must be filed no later than 30 days after all briefs that the parties may file under this rule—other than supplemental briefs—have been filed or were required to be filed."

under rule 8.278. Also, filing fees have been added to the list of recoverable costs.

■ California Supreme Court clarifies standard of review and burden of persuasion on appeal from an order granting a new trial that is not accompanied by the statutorily mandated statement of reasons.

Oakland Raiders v. National Football League, 41 Cal. 4th 624 (2007)

Code of Civil Procedure section 657 requires a trial court, when it grants a motion for new trial, to specify both the ground(s) on which the new trial motion is being granted and the reason(s) for granting a new trial on each ground stated.[2] The statute also provides that "[o]n appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except [in the case of new trial motions granted on the grounds of insufficiency of the evidence or] excessive or inadequate damages . . . ."[3]

In *Oakland Raiders v. National Football League*, the California Supreme Court held that, while abuse of discretion is the appropriate standard of review on appeal from a new trial order that contains the statement of reasons mandated by Code of Civil Procedure section 657, the appellate court should independently review a new trial order that lacks the required statement of reasons.[4] In such a case, "[t]he reviewing court should not . . . defer to the trial court's resolution of conflicts in the evidence, or draw all inferences favorably to the trial court's decision, because in the absence of a statement of reasons, the record does not show whether the trial court resolved those conflicts or drew those inferences."[5] The California Supreme Court also held that, whereas the appellant bears the burden of persuasion in seeking reversal of a new trial order that is supported by the statutorily mandated statement of reasons, the situation is reversed when the trial court fails to file a statement of reasons in support of its order granting a new trial. In that case, the respondent bears the burden of persuasion to convince the appellate court that the new trial order should be upheld on any ground stated in the new trial motion.[6]

In *Oakland Raiders*, the plaintiff moved for a new trial on, among others, the ground of jury misconduct, and both sides submitted juror declarations which conflicted on material points. The trial court granted the new trial motion on the juror misconduct ground, but failed to issue a statement of reasons in support of its determination. The California Supreme Court, independently reviewing the trial court record, concluded that the juror declarations were in sharp conflict and that the plaintiff had therefore failed to carry its burden of persuasion that juror misconduct had occurred warranting a new trial.[7] Justice Baxter, joined by Chief Justice George and Justice Moreno, concurred that independent review was the appropriate standard of review in this case because of the conflicting evidence, but speculated that abuse of discretion review might remain appropriate where, despite the trial court's failure to supply a statement of reasons for its grant of a new trial, "the record leaves no room for doubt as to the trial court's reasons for granting a new trial and its resolution of conflicting evidence supporting those reasons—as may be the case where the motion for new trial alleged only a single, specific instance of juror misconduct."[8]

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2. Cal. Civ. Proc. Code § 657.
3. *Id.*
4. 41 Cal. 4th at 636-40.
5. *Id.* at 640.
6. *Id.* at 640-41.
7. *Id.* at 641-42.
8. *Id.* at 643 (Baxter, J., concurring).

The majority opinion left this issue for another day, stating: "We do not address the situation in which apparently conflicting declarations can be reconciled, so that on close examination it is determined that the crucial allegations of misconduct are not in dispute."[9]

■ To trigger the notice of appeal deadline, a trial court clerk must mail a single document that satisfies the applicable requirements.

Alan v. American Honda Motor Co., 40 Cal. 4th 894 (2007)

California Rule of Court 8.104(a) sets the deadlines for filing a notice of appeal from a judgment or appealable order, and the procedural steps that must be taken to trigger those deadlines. The 60-day period for filing a notice of appeal can be triggered by the court clerk's mailing of notice of entry of judgment to the parties or by a party's service of notice of entry of judgment on the opposing party.[10] In the case of a court clerk's mailing of notice of entry of judgment, the rule states that notice of appeal must be filed on or before "60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed . . . ."[11]

In *Alan v. American Honda Motor Co.*, the trial court denied the plaintiff's motion for class certification, and the court clerk mailed the parties two documents in a single envelope to notify them of the court's ruling.[12] The first document was entitled "Statement of Decision re: Alan's Motion for Class Certification," which contained the trial court's reasons for its ruling and was file-stamped. The second document was a minute order entitled "Ruling on Submitted Matter/Motion for Class Certification," which contained the date that the two documents were mailed to the parties but was not file-stamped.[13] Nineteen days after these two documents were mailed, the defendant filed and served on the plaintiff a document entitled "Notice of Entry of Order and Statement of Decision Denying Class Certification," which all agreed satisfied California Rule of Court 8.104(a)(2). The plaintiff filed his notice of appeal more than 60 days after the court clerk's mailing of the two documents, but within 60 days of the defendant's service of notice of entry.[14]

The California Supreme Court ruled that "rule 8.104(a)(1) . . . require[s] a single document—either a 'Notice of Entry' so entitled or a file-stamped copy of the judgment or appealable order—that is sufficient in itself to satisfy all of the rule's conditions, including the requirement that the document itself show the date on which it was mailed."[15] The court concluded that neither document mailed by the court clerk, standing alone, satisfied rule 8.104(a)(1) (the statement of decision because it did not contain a date of mailing and was not itself an appealable order, and the minute order because it was not file-stamped),[16] and that the two documents could not satisfy the rule's requirements in combination. Hence, the court clerk's mailing did not commence the 60-day notice of appeal period, and the plaintiff's notice of appeal was timely.[17] The Alan court did note, however, that the court clerk could satisfy rule 8.104(a)(1)'s single-document requirement by attaching a certificate of mailing to the file-stamped judgment or appealable order, or to a document entitled "Notice of Entry."[18]

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9. *Id.* at 640.
10 Cal. R. Ct., rule 8.104(a)(1)-(2).
11. Cal. R. Ct., rule 8.104(a)(1).
12. 40 Cal. 4th at 898.
13. *Id.*
14. *Id.* at 899.
15. *Id.* at 905.
16. *Id.* at 901-02.
17. *Id.* at 905.
18. *Id.*

■ California Supreme Court to resolve the Court of Appeal split over whether an evidentiary objection that is not ruled upon is preserved for appellate review.

Demps v. San Francisco Housing Authority, 149 Cal. App. 4th 564 (2007); Reid v. Google, Inc., 155 Cal. App. 4th 1342 (2007), review granted (Jan. 30, 2008) (S158965)

Under *Biljac Associates v. First Interstate Bank of Oregon, N.A.*, 218 Cal. App. 3d 1410 (1990), trial judges inundated with evidentiary objections when considering a motion for summary judgment have avoided ruling on individual objections simply by noting that they had disregarded all inadmissible evidence.[19] According to *Biljac*, such a ruling was sufficient to preserve the record, leaving the parties free to press their admissibility arguments on appeal.[20] However, the First Appellate District, Division Two overruled its own *Biljac* precedent in *Demps v. San Francisco Housing Authority*.[21] Noting that all other published Court of Appeal opinions had rejected *Biljac*, the *Demps* court found that the case had been impliedly overruled by the California Supreme Court in *Ann M. v. Pacific Plaza Shopping Center*[22] and *Sharon P. v. Arman, Ltd.*[23] The *Demps* court, therefore, held that if a trial court failed to rule on an evidentiary objection in a summary judgment setting, "the objections are deemed waived and the objected-to evidence included in the record."[24]

The Sixth District, however, revived the issue in *Reid v. Google, Inc.*[25] The *Reid* court acknowledged that "the weight of current authority is contrary to the holding in *Biljac*."[26] Nonetheless, the court reasoned that "the Biljac decision was substantially correct, and was surely more nearly correct than its critics have been."[27] Following *Biljac*, the *Reid* court held that evidentiary objections that have not been ruled upon are impliedly overruled and may be challenged on appeal.[28]

The Supreme Court has recently granted review of *Reid*, and consequently the Court of Appeal decision has been depublished.[29] According to the statement of issues, the Supreme Court will finally resolve the question of whether "evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion [are] preserved for appeal?"[30]

■ California Supreme Court to determine extent of permissible use of "suggestive Palma notice" by Courts of Appeal.

Brown, Winfield, & Canzoneri, Inc. v. Superior Court, review granted (Dec. 12, 2007) (S156598)

In *Palma v. U.S. Industrial Fasteners, Inc.*[31], the California Supreme Court required the Courts of Appeal, when considering issuance of a peremptory writ of mandate in the first instance, to notify the respondent court and the real party in interest that such a procedure is being considered or requested and to give the real party in interest an opportunity to file a response on the merits, before ordering that the writ issue. In recent years, some Courts of

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19. *See, e.g., Demps*, 149 Cal. App. 4th at 566.
20. *Id.* at 1419.
21. 149 Cal. App. 4th 564 (2007).
22. 6 Cal. 4th 666, 670 n.1 (1993).
23. 21 Cal. 4th 1181, 1186 n.1 (1999).
24. 149 Cal. App. 4th at 578. In the introduction to the opinion, the court used language inconsistent with this holding, however, stating that an objection that is not ruled upon is impliedly overruled. *Id.* at 566. An overruled evidentiary objection may be renewed upon appeal while a waived objection may not.
25. 155 Cal. App. 4th 1342 (2007), *review granted* (Jan. 30, 2008) (S158965).
26. *Id.* at 1356.
27. *Id.*
28. *Id.* at 1358.
29. *Reid v. Google, Inc.* 72 Cal. Rptr. 3d 112 (2008).
30. Summary of Cases Accepted During the Week of January 28, 2008, http://www.courtinfo.ca.gov/courts/supreme/summaries/WS012808.PDF (last visited May 2, 2008).
31. 36 Cal. 3d 171 (1984)

Appeal have begun issuing a so-called "suggestive *Palma* notice"—a notice that discusses the merits of a writ petition with citation to authority, determines that the trial court ruling was erroneous, and gives the trial court the power and jurisdiction to change its order.

On December 12, 2007, the California Supreme Court granted review in *Brown, Winfield, & Canzoneri, Inc. v. Superior Court.*[32] The grant of review was limited to the following questions: "(1) May a Court of Appeal issue a 'suggestive *Palma* notice' (see *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal. 3d 171—that is, a notice that discusses the merits of a writ petition with citation to authority, determines that the trial court ruling was 'erroneous,' and gives the trial court the 'power and jurisdiction' to change its order? (2) If such an order is proper, absent exceptional circumstances, may it be issued without giving the real party in interest an opportunity to file opposition?"[33]

■ Plaintiff is not entitled to a new trial on the issue of punitive damages after reversal of a punitive damages award for insufficient evidence of defendant's financial condition.

Kelly v. Haag, 145 Cal. App. 4th 910 (2006); Baxter v. Peterson, 150 Cal. App. 4th 673 (2007)

In seeking punitive damages at trial, plaintiff has the burden of presenting meaningful evidence of the defendant's financial condition to the trier of fact.[34] In *Kelly v. Haag, and Baxter v. Peterson*, plaintiffs presented spotty evidence of defendants' assets without sufficient evidence of defendants' liabilities.[35] In each case, after reversing the award of punitive damages on the ground that plaintiff had failed to present sufficient meaningful evidence of defendant's financial condition, the Court of Appeal held that when a plaintiff has had a full and fair opportunity at trial to present meaningful evidence of a defendant's financial condition to support a punitive damages award but has failed to do so, the plaintiff is not entitled to a new trial on punitive damages after an appellate reversal of the punitive damages award.[36]

■ No automatic stay of trial court proceedings during pendency of writ proceedings.

In re Brandy R., 150 Cal. App. 4th 607 (2007)

Code of Civil Procedure section 916 provides that, with certain exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."[37] In *In re Brandy R.*, the Court of Appeal held that this automatic stay applies only during the pendency of an appeal, and not during the pendency of a writ proceeding.[38] In that case, a mother appealed from a post-judgment order terminating her parental rights to her daughter and freeing the daughter for adoption. On appeal, the mother contended that the trial court had no power to enter this order because it was entered before the Court of Appeal issued the remittitur after denying an earlier writ petition filed by the mother. The Court of Appeal held that, since the automatic stay of Code of Civil Procedure section 916 does not apply to writ proceedings, the mother's argument failed.[39]

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32. Review granted December 12, 2007, S156598.
33. Summary of Cases Accepted During the Week of December 10, 2007, http://www.courtinfo.ca.gov/courts/supreme/summaries/WS121007.PDF (last visited May. 2, 2008).
34. *Adams v. Murakami*, 54 Cal. 3d 105, 108-09 (1991).
35. *Kelly*, 145 Cal. App. 4th at 916-18; Baxter . 150 Cal. App. 4th at 681.
36. *Kelly*, 145 Cal. App. 4th at 919-20; Baxter, 150 Cal. App. 4th at 681.
37. Cal. Civ. Proc. Code § 916(a).
38. *Id.* at 609-10.
39. *Id.*

■ An order awarding attorney fees to prevailing party on motion to expunge lis pendens, just like the underlying expungement order, is non-appealable and is reviewable solely by way of a petition for writ of mandate.

Shah v. McMahon, 148 Cal. App. 4th 526 (2007)

In this case, plaintiffs sued defendant for damages and specific performance in connection with a purported contract to buy a particular parcel of property from defendant.[40] Plaintiffs recorded three lis pendens against the property.[41] Defendant successfully moved to expunge these lis pendens, and plaintiffs did not appeal or seek writ relief from the expungement order.[42] Defendant then sought, and the court awarded, attorney fees under Code of Civil Procedure section 405.38 as the prevailing party on the motion to expunge.[43] Plaintiffs did not seek writ relief, but did appeal from this attorney fees order.[44]

The Court of Appeal dismissed the appeal, holding that an attorney fee award to the prevailing party on a motion to expunge lis pendens is non-appealable.[45] Motions to expunge, as well as motions for prevailing party attorney fees in connection therewith, are governed by statutory provisions contained in Chapter 3 of Title 4.5 of the Code of Civil Procedure.[46] Code of Civil Procedure section 405.39 provides that orders or other actions of the court under Chapter 3 of Title 4.5 of the Code of Civil Procedure (dealing with motions to expunge lis pendens) are non-appealable and may be reviewed only by way of a petition for writ of mandate.[47] Thus, the plaintiffs' only remedy was to seek writ review of the attorney fees order within the time limits imposed by Code of Civil Procedure section 405.39, which they failed to do.[48]

■ Time limit for filing a motion for prejudgment statutory attorney fees under California Rule of Court 3.1702(b)(1) does not commence to run until entry of final judgment, even where motion seeks attorney fees associated with entry of prejudgment order that was immediately appealable.

Carpenter v. Jack in the Box Corp., 151 Cal. App. 4th 454 (2007)

California Rule of Court 3.1702(b)(1) specifies that "[a] notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court—including attorney's fees on an appeal before the rendition of judgment in the trial court—must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108."[49] In *Carpenter v. Jack in the Box Corp.*, the Court of Appeal held that this time limit does not commence to run upon notice of entry of a pre-final judgment appealable order, but rather upon notice of entry of a final judgment at the end of a case.[50]

In *Carpenter*, plaintiff sued defendants for wrongful termination and employment discrimination and associated causes of action, and defendants interposed an anti-SLAPP motion.[51] The trial court denied defendants' anti-SLAPP motion, defendants immediately appealed that denial, and the Court of Appeal affirmed and

40. *Id.* at 528.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 529.
46. See Cal. Civ. Proc. Code §§ 405.30, 405.38.
47. Cal. Civ. Proc. Code § 405.39.
48. *Shah*, 148 Cal. App. 4th at 529.
49. Cal. R. Ct., rule 3.1702(b)(1).
50. 151 Cal. App. 4th 454, 462-68 (2007).
51. *Id.* at 458-59; see Cal. Civ. Proc. Code § 425.16.

remanded the case to the trial court.[52] Plaintiff then moved for attorney fees and costs associated with litigating the anti-SLAPP motion (in both the trial and appellate courts), which the trial court granted and defendants appealed.[53] On appeal from the attorney fees order, defendants argued that California Rule of Court 3.1702(b)(1), by incorporating the deadlines for filing a notice of appeal in California Rule of Court 8.104, also incorporated that rule's definition of "judgment" to include an immediately appealable order.[54] The Court of Appeal disagreed and held that the drafting history and stated purpose of Rule 3.1702(b)(1) required an interpretation that the deadline for filing a motion for prejudgment statutory attorney fees commences to run only upon entry of final judgment in the case, not upon prejudgment entry of an immediately appealable order.[55] Consequently, the Court of Appeal held that plaintiff's attorney fees motion, filed before entry of final judgment, was timely.[56]

■ Appellate districts split on whether an order denying a section 663 motion to vacate a judgment is separately appealable.

City of Los Angeles v. Glair, 153 Cal. App. 4th 813 (2007)

In *City of Los Angeles v. Glair*, the Second District, Division Seven determined that an order denying a motion to vacate a judgment is not separately appealable.[57] In doing so, the court found that *Clemmer v. Hartford Insurance Co.*[58] impliedly overruled prior California Supreme Court precedent to the contrary.[59] The Glair court recognized, however, that other Court of Appeal opinions have held that such an order is separately appealable.[60] In light of this split in authority, the court suggested that the Supreme Court provide further guidance, but review was denied.

■ A stipulated judgment that does not formally resolve all claims on their merits is not appealable.

Harrington-Wisely v. State, 156 Cal. App. 4th 1488 (2007)

In *Harrington-Wisely v. State*, a plaintiff brought ten causes of action for damages and one cause of action for injunctive relief.[61] The trial court granted summary adjudication against the plaintiff on all ten damages causes of action but not on the injunctive relief cause of action.[62] The parties then filed a stipulation requesting an order for final judgment.[63] The stipulated judgment contained 16 potential issues to be decided by the trial court in reference to the injunction, but recited that the judgment was final and appealable as to the damages claims.[64] The Second District, Division Seven, however, found that the stipulated judgment was not an appealable final judgment because it did not formally resolve all of the plaintiff's claims.[65] The stipulated judgment did not provide for entry of a formal injunction in favor of the plaintiff, nor did it dismiss the cause of action.[66] Instead, the judgment caused the court to retain jurisdiction to decide a number of issues between the parties. Because the stipulated judgment did not

52. *Carpenter*, 151 Cal. App. 4th at 459.
53. *Id.*
54. *Id.* at 462; see Cal. R. Ct., rule 8.104(f).
55 *Carpenter*, 151 Cal. App. 4th at 462-68.
56. *Id.* at 468.
57. 153 Cal. App. 4th 813, 820-823 (2007).
58. 22 Cal. 3d 865, 890 (1978).
59. *Glair*, 153 Cal. App. 4th at 822.
60. E.g., *Gallup v. Board of Trustees* 41 Cal. App. 4th 1571, 1573 n.1 (1996); *Norager v. Nakamura*, 42 Cal.App.4th 1817, 1819 n.1 (1996); *Residents for Adequate Water v. Redwood Valley County Water Dist.*, 34 Cal. App. 4th 1801, 1805 (1995).
61. 156 Cal. App. 4th 1488, 1492-1493 (2007).
62. *Id.* at 1493.
63. *Id.*
64. *Id.*
65. *Id.* at 1494.
66. *Id.*

formally resolve the injunctive relief cause of action, it was not appealable despite the parties' contrary intent and a recitation that the judgment was final.[67]

67. *Id.* at a1495.