Appeals, Writs and Post-Trial Motions

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In the first part of this article, we summarize the most significant recent appellate rule changes. We then examine noteworthy judicial decisions from last year in the areas of appeals, writs and post-trial motions.

Rule Changes

Rule 1 – Taking the Appeal

Rule 1(b)(1) reflects that the filing fee for an appeal has increased to $655.

Rule 12.5 – Sealed Records

Rule 12.5 has undergone several changes that affect the sealing of records.

Subdivision (e)(4) now provides that any party with a copy of the records to be sealed should be served with both redacted and unredacted versions of all papers filed in connection with a motion or application to file records under seal, unless otherwise ordered by the court. If the court denies a party's motion to seal a record, subdivision (e)(7) now provides the moving party with the option of notifying the clerk that the records should be filed. Prior to this revision, the clerk automatically returned the record to the moving party. Subdivision (e)(8) is new and requires an order partially sealing a record to specify which particular documents should be placed under seal. The remaining documents in the record are to be placed in a public file. Subdivision (e)(9) is also new and prohibits parties from disclosing the contents of subsequently sealed materials, unless otherwise provided by court order.

Subdivision (f)(1) now provides that only a court order may unseal a sealed record. If a court proposes to unseal a record on its own motion, subdivision (f)(3) now permits a party to file a response to any opposition to the court's proposal within five days after the opposition is filed. Under new subdivision (f)(5), an order partially unsealing a record must specify which portions are unsealed and the particular persons who may have access to the record.

Rule 25 – Rehearing

Rule 25(b)(2) now prohibits a party from filing an answer to a petition for rehearing unless the court requests an answer. If a court does ask a party to file an answer to a petition for rehearing, the answer must be served and filed within eight days after the order is filed, unless otherwise specified by the court. New subdivision (b)(4) is former rule 45(c). It provides that before a decision is final, the presiding justice may relieve a party from its failure to file a timely petition for rehearing or answer if there is good cause.

Rule 28 – Petition for Review

Rule 28(a)(3) now provides that a party filing a petition for review in the Supreme Court may file a reply to an answer regardless of whether the answer raises additional issues for review. Under rule 28(e)(5) the reply is due ten days after the answer is filed.

Rule 28.2 – Ordering Review

Subdivision (c)(2) now explicitly permits the Supreme Court to review a case on its own motion, even if it denies a party's petition for review of the same case, within certain prescribed time limits. Specifically, the court may order review on its own motion within 60 days (or 90 days with a time extension) after the last petition for review is filed. The rule clarifies that the court may order review of issues not originally raised by the petitioning party.

Rule 29.5 – Rehearing

Rule 29.5(b) now provides that any answer to a petition for rehearing before the Supreme Court must be served and filed within eight days after the petition is filed.

Rule 44.5 – Service on Public Officer or Agency

The former provisions of rule 15(e) are collected in new rule 44.5, with some additions.

Rule 44.5(a) requires a party to serve the Attorney General if the party's brief or petition

questions the constitutionality of a state statute, or is filed on behalf of the state of California, a county, or an officer whom the Attorney General may lawfully represent. Subdivision (b) provides that when a statute or rule requires a party to serve a document on a nonparty public officer or agency, that party must file a proof of service with the document unless the statute or rule permits service after the document is filed. Finally, subdivision (c) provides that when a statute or rule requires a party to serve a document on a nonparty public officer or agency, the cover of that document must contain a brief statement that identifies the particular statute or rule requiring service of the document.

The rule provides a unified approach for complying with the increasing number of statutes that require parties to serve a public officer or agency. For a current list of those statutes, consult Judicial Council form APP-004. This form can be found at: http://www.courtinfo.ca.gov/forms/fillable/app004.pdf.

■ Judicial Council Appellate Forms

The Judicial Council has adopted optional forms that may be used to prepare notice of appeal, designation of record on appeal, application for extension of time, abandonment of appeal and request for dismissal of appeal. The Council has also issued a brief overview of the appellate process entitled "Information on Appeal Procedures." The new forms and information sheet can be downloaded from the California Courts website, http://www.courtinfo.ca.gov/forms/.

■ Noteworthy Decisions

The following were among last year's noteworthy decisions in the area of appeals, writs and post-trial motions.

Palmer v. GTE California, Inc., 30 Cal.4th 1265 (2003) Triggering the Time Limits for New Trial and JNOV Motions

The deadline for filing a new trial or JNOV motion is 15 days after service of notice of entry of judgment. This deadline is jurisdictional. If post-trial motions are not timely filed, the trial court has no authority to rule on them, any ruling it does issue is a nullity, certain issues for appeal will be waived (*e.g.*, excessive damages), and the time for filing a notice of appeal will not be extended under Rule 3. Given these potentially dire consequences, a California Supreme Court opinion on what events trigger this critical filing period is of more than passing interest.

In *Palmer v. GTE California, Inc.*, 30 Cal.4th 1265 (2003), GTE was found liable for workplace harassment and false imprisonment and ordered to pay $790,000. Judgment was entered on February 24, 1999. On February 26, plaintiff's attorney served GTE with a photocopy of the file-stamped, dated judgment. The trial court clerk and GTE advised plaintiff that only a document entitled "Notice of Entry of Judgment," served and filed in the trial court, would satisfy the requirements for giving notice of entry of judgment. Plaintiff, therefore, filed a formal notice of entry of judgment on March 10.

Within 14 days after March 10, but 26 days after plaintiff had served the file-stamped judgment, GTE moved for JNOV and for a new trial. The trial court ruled on the motions, but not until 66 days after service of the file-stamped judgment. Had the post-trial motions been timely, GTE would have benefited handsomely as the trial court had decided to grant JNOV on the harassment claim and a substantial reduction of the damages awarded on the false imprisonment claim. Unfortunately, the post-trial motions were not timely.

GTE argued that a party seeking to trigger the time period for filing post-trial motions must comply with the requirements of *Code of Civil Procedure* section 664.5 (*i.e.*, serve written notice of entry and then file in the trial court the original notice with proof of service). Following an exhaustive analysis of the applicable statutes and their legislative history, the Supreme Court rejected this argument and held that service by a party of a conformed, file-stamped copy of the judgment is notice of entry of the judgment sufficient to trigger the jurisdictional time period for filing post-trial motions. The court explained that the requirements of section 664.5 apply in

the context of post-trial motions only where the *clerk* of the court gives the notice.

The calamity visited upon defendant in *Palmer* can be avoided by following a simple rule: Whenever possible, file a motion for JNOV or notice of intent to move for new trial within 15 days of *entry* of the judgment, rather than wait for notice of entry.

First American Title Co. v. Mirzaian, 108 Cal.App.4th 956 (2003) Premature Notice of Appeal

A notice of appeal is generally interpreted liberally to preserve the right of appeal. However, there are limits.

In *First American Title Co. v. Mirzaian*, 108 Cal.App.4th 956 (2003), plaintiff took defendant's default for failure to answer the complaint. When the trial court refused to set aside the default, defendant appealed from the "Default Judgment entered by Court Clerk" and from the order denying the motion to set aside the default. (*Id.* at 959.)

The Court of Appeal began (and ultimately ended) its review by examining the issue of appealability. (Because the parties had not addressed this issue in their briefs, the court was obliged to notify the parties and give them an opportunity to argue the point pursuant to *Government Code* section 68081.) The court first excused defendant's mistake in appealing to the "Appellate Department of the Superior Court" rather than to the Court of Appeal. (*First American Title, supra*, 108 Cal.App.4th at 959.) Citing the basic rules that "'a notice of appeal must be liberally construed,'" and "[t]he notice need not specify the court to which the appeal is taken," the court disregarded the erroneous reference to the Appellate Department as "surplusage" that did not impair the validity of the notice. (*Ibid.*)

The court next examined the content of the notice, and it is here that things started to fall apart for defendant. Defendant appealed from a December 18, 2001 "Default Judgment," and from a February 8, 2002 order denying relief from default. (*First American Title, supra*, 108 Cal.App.4th at 959.) Unfortunately, no default judgment was entered on December 18, 2001; the actual default judgment was not entered until August 2002, months *after* the notice of appeal was filed. (*Id.* at 960-961.) Only the default had been entered by the time the notice of appeal was filed, and neither the default nor the order denying relief from default was appealable.

In this situation, where the notice of appeal is premature, the appellate court will save the appeal if certain conditions are met. If notice is filed after the judgment is rendered but before it is entered, the notice is automatically deemed timely filed as of the date judgment is entered. (*California Rules of Court*, Rule 2(d).) If notice is filed after the court has announced its intended ruling, but before judgment is rendered, the appellate court has discretion to treat the notice as timely filed. (*Ibid.*)

Defendant's appeal did not satisfy either of these conditions because notice was filed before the court rendered judgment and before the court announced its intended decision. The appellate court, therefore, could not treat defendant's premature notice as timely. So the court dismissed the appeal.

In re Zeth S., 31 Cal.4th 396 (2003) New Evidence on Appeal

Because appellate review is limited to examination of the lower court record for error, appellate courts ordinarily do not consider new evidence and do not make their own findings of fact. In *In re Zeth S.*, 31 Cal.4th 396 (2003), the California Supreme Court reaffirmed this principle.

In *Zeth S.* a mother appealed an order terminating her parental rights and freeing her minor child for adoption. On appeal the minor's counsel submitted a statement describing the minor's current circumstances and argued that the mother's parental rights should not have been terminated. Based on this new post-judgment evidence, the Court of Appeal reevaluated the relationship between the mother and her child and reversed the order terminating parental rights.

A unanimous Supreme Court reversed. The court first restated a basic difference between trial and appellate courts:

> It has long been the general rule and understanding that "an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." [Citation.] This rule reflects an "essential distinction between the trial and the appellate court...that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law...." [Citation.] The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal. "Although appellate courts are authorized to make findings of fact on appeal...the authority should be exercised sparingly. [Citation.] Absent exceptional circumstances, no such findings should be made."

(*In re Zeth S., supra,* 31 Cal.4th at 405.)

Finding no exception to this rule for juvenile dependency proceedings, or for the facts of the particular case before it, the court found no reason to allow the reviewing court to rely on post-judgment evidence outside the record on appeal and never presented to the trial court as the basis for reversing the trial court's judgment.

People v. Pena, 32 Cal.4th 389 (2004) Oral Argument Notice

When the Court of Appeal is ready to hear argument of a case, it sends a notice to the parties. In *People v. Pena,* 32 Cal.4th 389 (2004), the Supreme Court set limits on what the Court of Appeal may say in these notices.

The Riverside Court of Appeal (Fourth Appellate District, Division Two) is the only appellate court in the state that issues a tentative opinion before oral argument. With the tentative opinion, however, the court often sends a notice that states in part:

> "The court has determined that (1) the record and briefs adequately present the facts and legal arguments, (2) oral argument will not aid the decision-making process, and (3) the tentative opinion should be filed as the final opinion without oral argument in the interests of a quicker resolution of the appeal and the conservation of scarce judicial resources."

(*Pena, supra,* 32 Cal.4th at 394.)

Upon receiving this notice, defendant Jose Pena's lawyer did not request oral argument of his client's appeal from a criminal conviction that carried a 13-year prison sentence. When the Court of Appeal then filed its tentative opinion as the final opinion, the defendant sought rehearing, arguing in part that the Court of Appeal's notice discouraging argument denied him due process and infringed upon his right to present argument.

A unanimous Supreme Court agreed "that the notice employed by the Court of Appeal creates a risk of interfering with the right to oral argument that is 'unnecessary and inadvisable to incur....'" (*Pena, supra,* 32 Cal.4th at 398.) "The language of the oral argument waiver notice employed here...strongly suggests that the Court of Appeal's 'tentative' opinion was not in fact tentative.... Given [the] strong language [of the notice], we believe that a litigant or counsel reasonably could doubt whether oral argument would be 'meaningful' [citation] and whether the appellate court would give 'due consideration' to oral argument [citation] were appellate counsel to decline to waive argument." (*Pena, supra,* 32 Cal.4th at 401.) The Supreme Court, therefore, remanded the case to the Court of Appeal with directions to calendar defendant's appeal for oral argument and to then reconsider its decision in light of that argument.

Muccianti v. Willow Creek Care Center, 108 Cal.App.4th 13 (2003), Stipulated Reversals of Judgment

One of the more controversial appellate procedures involves the parties' stipulation to a reversal of the judgment on appeal as a condition to settlement of a case. In 1992 the California Supreme Court approved this procedure in *Neary v. Regents of University of California,* 3

Cal.4th 273 (1992). In 1994 the United States Supreme Court disapproved the procedure for federal cases in *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994); [115 S.Ct. 386, 130 L.Ed.2d 233]. Finally, in 1999, the California Legislature stepped in and regulated the procedure by statute. (*Code of Civil Procedure* section 128, subd. (a)(8).) Under the statute stipulated reversals may be approved only if there is no reasonable possibility that third-party interests will be adversely affected, and the need for a stipulated reversal outweighs "the erosion of public trust" and the disincentive to pretrial settlement that may result from the stipulation. (*Ibid.*)

In *Muccianti v. Willow Creek Care Center*, 108 Cal.App.4th 13 (2003), the court found a settlement could not clear these statutory hurdles.

Margaret Muccianti, a 65-year-old Medicare patient, died within a few days after her discharge from the defendant nursing facility where she had been treated for several weeks. Muccianti's heirs sued the defendant medical facility and recovered a multi-million dollar judgment. On appeal the parties settled, with plaintiffs consenting to an order vacating the judgment against defendant. Defendant then made a motion to vacate in the Court of Appeal.

The court refused to implement the parties' stipulation to vacate the judgment. First, the court found that the interests of nonparties would likely be affected because "[t]he treatment received by Muccianti is an issue relevant to the public in deciding future placement for its citizens," and because "the judgment...may be relevant in future licensing and/or disciplinary proceedings against the facility." (*Muccianti, supra*, 108 Cal.App.4th at 21.) The court also found that preserving the judgment would be of significance to insurers providing coverage for health care facilities. (*Id.* at 22.)

Finally, the court found that "the public trust clearly could be undermined where a nursing facility has findings of negligence and willful misconduct expunged from the public record." (*Muccianti, supra*, 108 Cal.App.4th at 22.)

Muccianti tells us that, while stipulated reversals are available in theory, they may be difficult to obtain under the statutory standards.

State Farm Mut. Auto. Ins. Co. v. Campbell, ____ U.S. ____ (2003); [123 S.Ct. 1513, 155 L.Ed.2d 585] Appellate Review of Punitive Damage Awards

One of the hottest topics in appellate law has been the nature and scope of appellate review of punitive damage awards. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003), the U.S. Supreme Court made a dramatic statement of governing principles.

In *Campbell* State Farm was found liable in a Utah trial court for insurance bad faith. The jury awarded $2.6 million in compensatory damages and $145 million in punitive damages. The trial judge reduced these amounts to $1 million and $25 million, respectively, but the Utah Supreme Court reinstated the full $145 million punitive damage award.

The United States Supreme Court reversed in an opinion that reiterates a number of critically important points made in earlier decisions (*e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); [116 S.Ct. 1589, 134 L.Ed.2d 809]; *Cooper Industries v. Leatherman Tool*, 532 U.S. 424 (2001), and breaks important new ground:

1. **Punishment for Out-of-State Conduct:** A state cannot punish a defendant for conduct that may have been lawful where it occurred. However, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." (*Campbell, supra*, 123 S.Ct. at 1522.) A jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.
2. **Punishment for Dissimilar Acts:** A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. Punitive damages can

only be used to punish and deter conduct that bears a relationship to plaintiff's harm.

3. **Punishment for Being a "Bad Company":** "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." (*Campbell, supra,* 123 S.Ct. at 1523.)
4. **Ratio between Compensatory and Punitive Damages:** Normally, single-digit ratios of compensatory to punitive damages "are more likely to comport with due process."
5. **Permissible Ratio Where Compensatory Damages Are "Substantial":** When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, may be the outer reaches of an award that comports with due process. In *Campbell* the court reasoned that the $1 million compensatory award was substantial because it represented compensation for a year and a half of emotional distress, and the harm arose from a transaction in the economic realm, not from physical assault, trauma or injuries. (*Campbell, supra,* 123 S.Ct. at 1524-1525.) The court made it clear that it expected the Utah Supreme Court on remand to remit the punitive award to an amount "at or near the amount of compensatory damages," or about $1 million.
6. **Reasonableness and Proportionality as the Touchstones of Federal Due Process Analysis; Wealth Takes a Back Seat Where an Award Is Otherwise Unconstitutional:** Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to plaintiff and to the general damages recovered. (*Campbell, supra,* 123 S.Ct. at 1524.) The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award like the one in *Campbell.* (*Id.* at 1525.)
7. **States' Duty to Separately Analyze Constitutionality of Punitive Damage Awards under Federal Due Process:** "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore.*" (*Campbell, supra,* 123 S.Ct. at 1525.)
8. **The Threat of Multiple Punitive Damage Awards for the Same Conduct:** "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." (*Campbell, supra,* 123 S.Ct. at 1523.)
9. **The Role of Comparable Criminal Penalties in Determining the Excessiveness of Punitive Damages Awarded:** Moreover, "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." (*Campbell, supra,* 123 S.Ct. at 1526.)