APPEALS, WRITS AND POST-TRIAL MOTIONS

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In 1995, the California courts issued several decisions of particular interest to appellate litigators. We begin by reviewing three important Supreme Court decisions concerning, respectively, appellate jurisdiction, stipulated dismissals of review, and the California constitutional requirement that appellate courts issue written decisions with reasons stated.

We then review the noteworthy decisions of the Courts of Appeal in the areas of appeals, writs and post-trial motions. We conclude with a recap of recent changes in the rules governing appeals.

SUPREME COURT DECISIONS

APPELLATE JURISDICTION

In Powers v. City of Richmond, 10 Cal. 4th 85 (1995), the court revisited fundamental principles of appellate jurisdiction in considering whether the Legislature may, consistent with the California Constitution, provide that certain final judgments or orders are reviewable only by means of a petition for extraordinary writ. At issue was Government Code section 6259, subdivision (c) (hereafter section 6259(c)), which states that decisions of the superior court in actions for disclosure of documents under the Public Records Act (Gov. Code, § 6250 et seq.) are not reviewable by direct appeal but are "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." The distinction is significant because a litigant proceeding by way of appeal is entitled to oral argument, a decision on the merits, and a written opinion, while a litigant proceeding by way of petition for extraordinary writ is not.

After the superior court denied the plaintiffs' request for an order compelling the defendant to produce certain public documents, the plaintiffs sought review both by appeal and by writ petition. The Court of Appeal denied the petition summarily, that is, without hearing argument or filing an opinion, then granted a motion to dismiss the appeal on the ground section 6259(c) provided for appellate review solely by means of a writ petition. (Powers, 10 Cal. 4th at 90-91.)

In the Supreme Court, the plaintiffs contended section 6259(c) violated article VI, section 11 of the California Constitution, which states that, except in death penalty cases, "'courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.'" (Id. at 91, fn. omitted.) The plaintiffs argued that the constitutional grant of "appellate jurisdiction" to the Courts of Appeal implicitly granted litigants a right of direct appeal from decisions of the superior court and precluded the Legislature from restricting a litigant to review by petition for extraordinary writ. (Id. at 91-92.)

The Supreme Court rejected the plaintiffs' position. A three-member plurality (Justices Kennard, Baxter and Werdegar) ruled the constitution permits the Legislature

to specify cases in which appellate review will be available solely by way of a writ petition. The plurality found the constitution does not guarantee litigants a right to review by way of direct appeal:

> Nothing in the text of this [constitutional] provision conveys an intention to confer on litigants a right of direct appeal in cases within the original jurisdiction of the superior courts. Giving the words their ordinary meaning, the provision serves to establish and allocate judicial authority, not to define or guarantee the rights of litigants. Indeed, the provision nowhere mentions direct appeals or a 'right of appeal.'

(Id. at 91.) The plurality explained that "appellate jurisdiction" refers to "the power of a reviewing court to correct error in a trial court proceeding. By common understanding, a reviewing court may exercise this power in the procedural context of a direct appeal, a writ petition, or otherwise. Thus, a provision conferring 'appellate jurisdiction' does not necessarily or strongly imply a right of litigants to bring direct appeals." (Id. at 93.)

The plurality devoted the bulk of its opinion to an exhaustive examination of the origin and historical antecedents of article VI, section 11, specifically the phrase "appellate jurisdiction." (Id. at 93-110.) The plurality found no support for the plaintiffs' suggestion that the constitutional grant of "appellate jurisdiction" to the Courts of Appeal implicitly granted litigants a right of direct appeal from all final decisions of the superior court. (See id. at 110.)

The plurality cautioned, however, that while the Constitution allows the Legislature to regulate the mode of appellate review, the Legislature may not regulate in a way that impairs or defeats the courts' appellate jurisdiction. "If it could be demonstrated in a given case, or class of cases, that, for whatever reason, the Courts of Appeal or this court could not effectively exercise the constitutionally granted power of appellate review by an extraordinary writ proceeding, then such a proceeding could not constitutionally be made the exclusive mode of appellate review." (Id.) The plurality found section 6259(c) did not impair or defeat the courts' power to exercise their appellate jurisdiction. (Id. at 112.) Indeed, the Legislature's purpose in providing for review by writ rather than by appeal "was to expedite the process and thereby to make the appellate remedy more effective." (Id.)

The plurality rejected the plaintiffs' suggestion that "appellate review by extraordinary writ petition is inherently less effective than a remedy by direct appeal because issuance of the extraordinary writs is discretionary whereas direct appeal guarantees a decision on the merits." (Id. at 113.) The opinion explained, "[t]he discretionary aspect of writ review comes into play primarily when the petitioner has another remedy by appeal and the issue is whether the alternative remedy is adequate." (Id.) In contrast, when the litigant's sole avenue of appellate review is by way of a writ petition, "a reviewing court's discretion is quite restricted." (Id.) Under those circumstances, "an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." (Id. at 114.)

Justice George, joined by Justice Arabian, concurred in the judgment that section 6259(c) is constitutional, but he viewed the lead opinion as unnecessarily broad:

> In my view . . . it is neither necessary nor appropriate to go beyond the Public Records Act provision here at issue to announce a broad constitu-

> tional rule that may be understood to validate virtually all, or at least most, legislative measures that in the future might substitute writ review for direct appeal in contexts not presented by the case now before us. Accordingly, I would limit the holding in this case to the specific Public Records Act provision before the court.

(Id. at 116 [conc. opn. of George, J.].)

Chief Justice Lucas, joined by Justice Mosk, dissented. He countered the lead opinion's historical analysis with an exhaustive analysis of his own (see id. at 129-174 [dis. opn. of Lucas, C.J.]) and concluded: "[T]he lead opinion errs by failing to recognize a litigant's constitutional right of appeal, i.e., a right to review on the merits and a written opinion." (Id. at 173 [dis. opn. of Lucas, C.J.].) The Chief Justice distinguished cases, relied on by the concurring justices, upholding the Legislature's power to prescribe writ review as the sole avenue of relief from certain preliminary or interim rulings unrelated to the merits of the cause of action. (Id. at 174 n. 55, 176 [dis. opn. of Lucas, C.J.].) The order at issue was not preliminary; it disposed "of a cause of action traditionally entitled to review on direct appeal." (Id. at 176.) The Chief Justice concluded "plaintiffs have a constitutional right of appeal Ä i.e., review on the merits and a decision in writing with reasons stated Ä from the judgment of the superior court denying their application for a writ of mandate seeking disclosure of public information under the [Public Records Act]." (Id. at 177 [dis. opn. of Lucas, C.J.].)

To respect the Legislature's objective without destroying the litigant's constitutional right to appeal, the Chief Justice would have construed section 6259(c) to require, as a condition to appeal, that litigants in cases under the Public Records Act first seek relief by way of a writ petition. If the litigant thereby secures a written disposition on the merits, both the constitution and the statute have been satisfied. If, however, the Court of Appeal summarily denies the writ petition, "section 6259(c) cannot constitutionally be applied to bar plaintiffs' subsequent appeal. Both the lead and the concurring opinions err by concluding otherwise." (Id. at 179 [dis. opn. of Lucas, C.J.].)

The practical impact of Powers may be limited because a majority of the court declined to endorse the plurality's conclusion that the constitution allows the Legislature to provide for review other than by direct appeal in all cases and because few statutes currently provide for review of a final judgment or order of the superior court other than by direct appeal. (See id. at 179-180 [dis. opn. of Lucas, C.J.].) The several opinions, however, shed substantial light on the history and theory of appellate jurisdiction in California and should be considered required reading for all appellate practitioners.

STIPULATED DISMISSALS OF REVIEW

In State of Cal. ex rel. State Lands Com. v. Superior Court, 11 Cal. 4th 50 (1995), after the Supreme Court had granted review, the parties settled the case and filed a joint motion to dismiss. Both the settlement and the joint motion were conditioned on the Supreme Court ordering that the Court of Appeal opinion remain unpublished. (Id. at 60.) The Supreme Court denied the motion and proceeded to decide the case, relying on "'the well-established line of judicial authority recognizing an exception to the mootness doctrine, and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties where the appeal raises issues of continuing public importance.'" (Id. at 61, quoting Lundquist v. Reusser, 7 Cal. 4th 1193, 1202 n. 8 (1994).)

Significantly, the court distinguished its decision in Neary v. Regents of University of California, 3 Cal. 4th 273 (1992), which held that where parties settle their dispute pending appeal and as part of the settlement stipulate that the trial court judgment be reversed, the Courts of Appeal should honor parties' stipulation "'absent a showing of extraordinary circumstances that warrant an exception to this general rule.'" (State of Cal. ex rel. State Lands Com., 11 Cal. 4th at 61-62, quoting Neary, 3 Cal. 4th at 284.) The court identified "two critical differences between the stipulated reversal of a trial judgment in Neary and the dismissal motion here." (Id. at 62.) First, settlements in the Court of Appeal promote efficiency by forestalling further litigation. In contrast, after the Court of Appeal has rendered its decision and the Supreme Court has granted review, "more is eradicated by a settlement, and less is gained by the avoidance of further litigation." (Id.) Second, a stipulated reversal of a trial court judgment does not eliminate a binding legal precedent. In contrast, "stipulating that the Court of Appeal opinion not be published and that we not render our own decision would effectively eliminate a precedent-setting appellate decision." (Id.)

The Supreme Court also noted that Neary itself allows appellate courts to refuse to accept stipulated reversals if doing so would further a "'specific, demonstrable, well established, and compelling' public interest." (Id., quoting Neary, 3 Cal. 4th at 283.) Because the case before the court involved a legal issue of continuing public importance and interest, the court refused to honor the parties' stipulated dismissal.

Though the Supreme Court's effort to distinguish Neary was not wholly convincing,[69] the court was on solid footing when it invoked the Neary exception permitting appellate courts to reject stipulated reversals where doing so furthers a compelling public interest. The Supreme Court's appellate jurisdiction over most cases is discretionary. Consequently, many if not most of the cases the court elects to review involve issues of statewide importance and continuing public interest. (See Cal. Rules of Court, rule 29(a).) The same cannot be said for most cases decided in the Courts of Appeal, which have no discretion to refuse to hear proper appeals. The Supreme Court could legitimately invoke the Neary exception in almost any case to justify refusing to accept a stipulated dismissal.

WRITTEN DECISIONS WITH REASONS STATED

In Amwest Surety Ins. Co. v. Wilson, 11 Cal. 4th 1243 (1995), the Supreme Court construed article VI, section 14 of the California Constitution, which states: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." The Court of Appeal had issued an opinion reflecting the views of its author alone. A second justice "concurred in the result"; the third justice dissented. The Supreme Court held the Court of Appeal's decision violated the constitution because it failed to disclose in writing the reasoning of the justices who formed the majority: "Because the reasons that led Justice Kitching to concur in the judgment

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[69] *A stipulated dismissal in the Supreme Court, no less than a stipulated dismissal in the Court of Appeal, promotes efficiency by sparing the Supreme Court the task of reviewing the briefs, hearing argument and writing an opinion. Moreover, the stipulation in State of Cal. ex rel. State Lands Com. did not "eliminate a precedent-setting appellate decision" any more than does a stipulated reversal of a trial court judgment. The Court of Appeal's decision had already been "eliminated" by the Supreme Court's grant of review, before the parties settled. (See Cal. Rules of Court, rule 976(d).) True, a stipulated dismissal would have prevented the Supreme Court from issuing a precedent-setting decision, but a stipulated dismissal in the Court of Appeal has the same effect on that court.*

cannot be determined in the present case, the decision of the Court of Appeal fails to satisfy the constitutional requirement that the reasons for the decision rendered by the appellate court be stated in writing." [70] (Id. at 1267.)

Justice Mosk parted company with the majority on this point. He explained that the mandate of article VI, section 14 "is essentially a prohibition against summary disposition. The [Court of Appeal's] decision here is not in violation." (Id. at 1269 [conc. opn. of Mosk, J.].)

In light of Amwest, any Court of Appeal justice casting a swing vote must henceforth either concur in the reasoning of the lead opinion or explain why he or she rejects that reasoning and concurs only in the result. Where the swing-vote justice concurs in the result alone without explanation, the losing party should file a petition for rehearing raising Amwest. In contrast, where an opinion's reasoning commands the concurrence of two justices, the constitution probably does not require the third justice to explain why he or she concurs in the result only, since the opinion determines the cause regardless of the third justice's reasoning.

COURT OF APPEAL DECISIONS

APPEALABILITY

In Cobb v. University of So. California, 32 Cal. App. 4th 798 (1995), an unusual procedural posture in the trial court spawned an interesting issue of appealability. Plaintiff tried causes of action for race discrimination and breach of contract. The jury failed to reach a verdict on the discrimination claim but awarded plaintiff economic and noneconomic damages on his contract claim. The trial court set the discrimination claim for retrial, granted defendant's motion for judgment notwithstanding the verdict (JNOV) on the contract claim for noneconomic damages, and granted defendant's motion for new trial on the issues of liability for breach of contract and economic damages. (Id. at 800-01.) The plaintiff appealed from the orders granting partial JNOV and granting the new trial.

The defendant moved to dismiss the appeal. It argued (1) the order granting partial JNOV was not appealable, and (2) the appeal from the order granting a partial new trial was improper because the discrimination claim had yet to be retried. For the latter proposition, the defendant relied on Morehart v. County of Santa Barbara, 7 Cal. 4th 725 (1994), in which the Supreme Court held "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (Id. at 743; cf. Stubblefield Construction Co. v. City of San Bernardino, 32 Cal. App. 4th 687, 700-03 (1995) [judgment in one of two actions consolidated for trial was final and appealable where certain causes of action in second action remained to be tried and separate judgment would be entered in second action].)

The Cobb court granted the motion to dismiss the appeal from the order granting partial JNOV. An order granting partial or full JNOV is not appealable; an appeal lies

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[70] *The Court of Appeal's decision did satisfy article VI, section 3 of the California Constitution, which states: "Concurrence of 2 judges present at the argument is necessary for a judgment." (Id. at 1266.)*

from the later-entered judgment. (Cobb, 32 Cal. App. 4th at 804.) In Cobb, the judgment would be entered after the retrial.

The court, however, denied the motion to dismiss the appeal from the order granting a partial new trial. The court explained that Code of Civil Procedure section 904.1, subdivision (a)(4), expressly authorizes an appeal from an order granting a new trial, and the same rule applies to orders granting a partial new trial. (Id. at 802.) The court distinguished Morehart on the ground the Supreme Court was addressing the appealability of a partial judgment under section 904.1, subdivision (a)(1), not the appealability of a partial new trial order under section 904.1, subdivision (a)(4). (Id. at 803.)

The Cobb decision is questionable. The order granting a partial new trial in Cobb, like the partial judgment in Morehart, was interlocutory because other claims unaffected by the appeal remained to be tried. By entertaining the interlocutory appeal, the Cobb court opened the door to multiple appeals Ä one from the partial new trial order, another from the judgment entered after trial of the discrimination claim. This result is inconsistent with the spirit, if not the letter, of Morehart.

The court reached a more defensible result in Belio v. Panorama Optics, Inc., 33 Cal. App. 4th 1096 (1995). The plaintiff alleged three causes of action: for involuntary corporate dissolution, for an accounting, and for an order directing the defendants to maintain the corporate status quo. The trial court granted the defendant's motion for summary adjudication on the claim for dissolution and directed that the adjudication be "'carried into any final judgment subsequently entered in this proceeding.'" (Id. at 1101.) The plaintiff appealed from the order granting summary adjudication. The defendant contended the appeal was improper because the order did not dispose of all causes of action.

Acknowledging that an order disposing of fewer than all causes of action is interlocutory hence nonappealable, the Court of Appeal found the rule inapplicable because the appealed order "'effectively disposed of the case.'" (Id., quoting California Assn. of Psychology Providers v. Rank, 51 Cal. 3d 1, 9 (1990).) The court explained that the plaintiff's second and third causes of action were "purely ancillary to the first cause of action" and were rendered moot when the trial court adjudicated the first cause of action against the plaintiff. (Id. at 1102.)

The Belio court's holding was faithful to the principle that the substance not the form of the order determines whether it is final or interlocutory. Just as an order in the form of a "judgment" may not actually terminate the proceedings (see Morehart, 7 Cal. 4th 725), an order that, in form, adjudicates but one cause of action may actually dispose of the case. Appellate practitioners must be alert to the substantial effect of the orders from which they seek to appeal.

In City and County of San Francisco v. Shers, 38 Cal. App. 4th 1831 (1995), the plaintiff city obtained an order appointing a receiver. The defendants appealed from the order under Code of Civil Procedure section 904.1, subdivision (a)(7), which authorizes an appeal "[f]rom an order appointing a receiver." The Court of Appeal affirmed. After remand, the receiver resigned, and the city obtained an order appointing a successor receiver. The defendants again appealed. (Shers, 38 Cal. App. 4th at 1834-35.) The city moved to dismiss the appeal on the ground an order appointing a successor receiver is not appealable. (Id. at 1835.)

Finding scant authority in California, the Court of Appeal turned to cases from other jurisdictions. The court found those cases generally hold an order appointing a

successor receiver is not appealable under a statute permitting appeals from an order appointing a receiver. The Shers court reached the same conclusion. The right to appeal is wholly statutory, the court explained. Subdivision (a)(7) of section 904.1 authorizes appeals from orders appointing receivers, not orders appointing their successors. (Shers, 38 Cal. App. 4th at 1835.)

The court held, however, the order appointing a successor receiver was appealable under subdivision (a)(2) of section 904.1, which authorizes an appeal "[f]rom an order made after a judgment made appealable by [subdivision (a)(1)]." A postjudgment order is appealable under subdivision (a)(2) if it meets two requirements: (1) the issues involved in the appeal from the order must differ from the issues involved in the appeal from the judgment; and (2) the order must affect or relate to the judgment, i.e., the order must not be preliminary to further proceedings in the superior court. (Shers, 38 Cal. App. 4th at 1838.)

The order appointing a successor receiver satisfied both requirements. First, it involved the identity of the person who would succeed to the receivership, an issue not involved in the appeal from the underlying judgment. Second, the order "relates to the enforcement of the underlying judgment by deciding who will administer the receivership." (Id.) The order was not preliminary to further proceedings but represented "the final determination of who will administer the receivership until that person resigns, the court removes him or her, or the receivership is terminated." (Id. at 1839.)

Significantly, however, the court limited the appellants to "those issues specifically encompassed by the order being appealed from . . . ." (Id. at 1839-40.) The only issue embraced by the order appointing a successor receiver was whether the successor receiver was qualified for the office. (Id. at 1840.) The appellant could not challenge the lower court's decision to impose a receivership: "[T]he issues relating to the appropriateness of the receivership remedy should be raised and decided in the initial appeal from the order appointing a receiver under section 904.1, subdivision (a)(7). Once the deadline for appeal from that order has passed, such issues cannot be resuscitated when a receiver resigns and is replaced." (Id. at 1839.)

In Peltier v. McCloud River R.R. Co., 34 Cal. App. 4th 1809 (1995), the court held an appeal lies from an order denying a motion under Code of Civil Procedure section 473 to set aside a discretionary dismissal where the motion is accompanied by new evidence of mistake, inadvertence, surprise and excusable neglect. (Id. at 1814-15.)

The Peltier court distinguished Rappleyea v. Campbell, 8 Cal. 4th 975 (1994), in which the Supreme Court held a motion under section 473 to vacate a default is not separately appealable. (Id. at 981.) An appeal will not lie from entry of a default because it is a ministerial act that precedes entry of the judgment. (Jade K. v. Viguri, 210 Cal. App. 3d 1459, 1465-66 (1989).) Since the default is not appealable, an order denying a motion to vacate the default is not appealable but is reviewable on appeal from the later-entered default judgment. (Rappleyea, 8 Cal.4th at 981.) Peltier, in contrast, involved an order denying a motion to vacate a dismissal order, which itself is tantamount to an appealable judgment. (See C.C.P. § 581d.)

Counsel should exercise care in identifying the order(s) from which to appeal. On appeal from a dismissal order, the court will not consider a later order denying relief under section 473. Conversely, on appeal from a post-dismissal order denying relief under section 473, the court will not consider whether the trial court properly ordered dismissal in the first place. (See In re Matthew C., 6 Cal. 4th 386, 393 (1993) [on appeal from judgment or order, court will not consider challenge to any prior order that could have been but was not appealed].)

TIME FOR FILING NOTICE OF APPEAL; TOLLING

In Nave v. Taggart, 34 Cal. App. 4th 1173 (1995), the plaintiff filed a motion for reconsideration of an order granting the defendant's motion for summary judgment. Three days later, the court entered judgment for the defendant. The court never ruled on the motion for reconsideration. The defendant served notice of entry of judgment, and the plaintiff filed a notice of appeal more than 60 days later. The Court of Appeal dismissed the appeal as untimely. The court rejected the appellant's argument that the time for filing a notice of appeal was "tolled" pending a ruling on the motion for reconsideration. The court explained that entry of judgment operated as an implied denial of the motion for reconsideration (see id. at 1176) and that a trial court has no power to "reconsider" its rulings once judgment has been entered but may correct error only "in accordance with statutory proceedings" (id. at 1177).

The appellant in Freiberg v. City of Mission Viejo, 33 Cal. App. 4th 1484 (1995), learned the hard way that the deadline for filing a notice of appeal is jurisdictional and that the courts rigidly enforce it. The defendant city obtained a judgment of nonsuit. Notice of entry of judgment was served on October 27, 1992. The plaintiff filed a motion for new trial on November 10. On November 25, other defendants (the Vus) served notice of the automatic stay resulting from a bankruptcy filing. On January 4, 1993, the trial court purported to grant the Vus' motion to stay further proceedings because of the pending bankruptcy. On April 12, the court vacated the stay and denied the plaintiff's motion for new trial. The next day, the plaintiff filed his notice of appeal from the judgment. (Id. at 1486.)

The Court of Appeal granted the city's motion to dismiss the appeal as untimely. The court held the Vus' bankruptcy filing had no effect on the proceedings against the city and did not stay or toll the 60-day period for the trial court to rule on the motion for new trial. (See C.C.P. § 660.) Consequently, the trial court's power expired Ä and the motion was denied by operation of law Ä on December 28, 1992 (the sixtieth day, December 26, having been a holiday). (Freiberg, 33 Cal. App. 4th at 1487 & n. 4.) Moreover, the trial court's order of January 4, 1993 purporting to stay proceedings did not toll the 30-day period for filing a notice of appeal after denial of the new trial motion. "Since the trial court had no jurisdiction to do anything after the new trial motion was deemed denied by operation of law on December 28, it had no proceedings to stay." (Id. at 1489.)

BRIEFING AND ORAL ARGUMENT

Appellate lawyers who bury claims of error in footnotes or in text not marked by a proper heading, take heed: the court may disregard the claims. (See In re Keisha T., 38 Cal. App. 4th 220, 237, n. 7 (1995) ["The minors' argument that section 10850 creates a flat prohibition is made in a footnote, rather than under a separate heading. (See Cal. Rules of Court, rule 15(a).) We interpret this casual treatment as reflecting their lack of reliance on this argument"]; Opdyk v. California Horse Racing Bd., 34 Cal. App. 4th 1826, 1831, n. 4 (1995) ["The failure to head an argument as required by California Rules of Court, rule 15(a), constitutes a waiver"]; see also Ferrari v. Grand Canyon Dories, 32 Cal. App. 4th 248, 257, n. 5 (1995) ["Plaintiff's discussion of product liability in her brief appears at the end of the argument on assumption of risk. It is not set off by a separate heading. California Rules of Court, rule 15(a), requires each point in a brief on appeal to appear separately under an appropriate heading. Although plaintiff has not complied with this rule, defendants have briefed the issue and we shall therefore overlook plaintiff's default and address it"].)

Similarly, "'[a] contention made for the first time in an appellant's reply brief, unaccompanied by any reason for omission from the opening brief, may be disregarded. . . .' [Citations.] Perforce, issues raised at oral argument come too late." (Opdyk, 34 Cal. App. 4th at 1830.)

COSTS ON APPEAL

The party who prevails on appeal is ordinarily entitled to costs. (See Cal. Rules of Court, rule 26(a).) The Court of Appeal may depart from this rule where "the interests of justice require it." (Id.) In Ramirez v. St. Paul Fire & Marine Ins. Co., 35 Cal. App. 4th 473 (1995), the court held a losing party who believes such a departure is warranted must address his request to the Court of Appeal. The request should be presented before the court loses jurisdiction over the appeal, i.e., before the remittitur issues, though the court may recall the remittitur on a showing of mistake, imposition or inadvertence. (Id. at 478.) The trial court has no power to reallocate costs on appeal, even if it believes the Court of Appeal's award is unjust. (Id.)

WRITS

An attorney who files a petition for extraordinary writ in the Court of Appeal may receive an order summarily denying the petition without explanation. Counsel is left to puzzle whether the court denied the petition because it found the arguments meritless, because it believed the petitioner's remedy at law would be adequate, because the petition was procedurally defective, or for some other reason.

In 1995, two courts sought to reassure counsel that writ petitions challenging preliminary or interim rulings receive full and careful consideration.[71]

In James B. v. Superior Court, 35 Cal. App. 4th 1014 (1995), the court "hasten[ed] to dispel the bar's common misperception that a summary denial of a writ petition suggests summary consideration. The Courts of Appeal review and evaluate the hundreds of petitions filed each year in each appellate district. The merits of these petitions are fully examined. Sheer volume prohibits a written decision in every case, and one is not required." (Id. at 1018, n. 3.)

Similarly, in Joyce G. v. Superior Court, 38 Cal. App. 4th 1501 (1995), the court explained that many if not most petitions are denied on the merits: "The 'vast majority' of petitions for extraordinary writ filed in the Courts of Appeal are summarily denied. (Cal. Civil Writs Practice (Cont. Ed. Bar 1987) § 1.13, p. 38.) It is fair to say that many, probably most, of those denials are on the merits after a full examination of the petition, supporting documents and supporting points and authorities [citation] and any opposition that may be filed [citation]. 'The Supreme Court has recognized and implicitly approved as an established practice that writs may be considered on their merits and yet summarily denied without an opinion, oral argument or the issuance of an alternative writ or order to show cause. [Citations.]' [Citation.]" (Id. at 1513.)

These reassurances are not completely satisfactory. Civil appeals that reach decision result in reversal approximately 25 percent of the time. (Judicial Council of Cal., 1994 Annual Report, p. 86.) Writ petitions, in contrast, are successful only approximately 10 percent of the time. (See Omaha Indemnity Co. v. Superior Court, 209 Cal. App. 3d

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[71] *Writ petitions challenging final judgments or orders are discussed above in connection with the Powers case.*

1266, 1271 (1989).) The low percentage of successful writ petitions might lead one to conclude that many writ petitions are denied without regard for the merits. (See id. at 1269 [error by the trial judge does not ensure a writ petition will be successful]; id. at 1273 [if reviewing courts were to treat writ petitions as they do appeals, "these courts would be trapped in an appellate gridlock"].) Indeed, the Courts of Appeal will usually deny a writ petition Ä whatever its merit Ä if the petitioner has an adequate remedy by way of appeal. (Phelan v. Superior Court, 35 Cal. 2d 363, 366 (1950).)

As long as the reviewing courts summarily deny writ petitions without explanation, counsel will continue to wonder whether the merits of their positions have actually been considered.

In those cases where the Court of Appeal issues an alternative writ or an order to show cause, the real party in interest should take care to file an appropriate return, i.e., a demurrer or a verified answer to the petition. Where the real party in interest files only an opposing memorandum of points and authorities, the court will accept as true the facts recited in the petition. "Facts" recited in the opposing memorandum will be ignored. (Shaffer v. Superior Court, 33 Cal. App. 4th 993, 996, n. 2 (1995).)

POST-TRIAL MOTIONS

In Resort Video, Ltd. v. Laser Video, Inc., 35 Cal. App. 4th 1679 (1995), the court considered several procedural challenges to an order granting a motion for new trial. The lower court had granted a new trial on the ground "'that there was insufficient evidence produced at trial to justify the excessive damages awarded by the jury.'" (Id. at 1689.) The appellant claimed the new trial order was invalid "because it contained two statutory grounds, insufficiency of evidence and excessive damages, and it is unclear on which ground the court relied in granting the motion." (Id. at 1692.) The Court of Appeal disagreed. "'[T]he ground for a new trial is adequately specified if the intention of the court is clear.'" (Id.) When a trial court finds the damages excessive, it necessarily finds the evidence is insufficient to support the amount awarded. Accordingly, the Court of Appeal concluded "[t]here can be no doubt the ground upon which the trial court relied was that of excessive damages." (Id.)

Next, the appellant contended the trial court's specification of reasons was untimely because it was filed after expiration of the 60-day jurisdictional period for ruling on the new trial motion. (See C.C.P. § 660.) Again, the Court of Appeal rejected appellant's contention. The court noted that the code distinguishes between the "grounds" and the "reasons" for granting a new trial motion. (See id. § 657.) The trial court must rule on the motion and, if it is granted, specify the *grounds* within the 60-day period. The court, however, may file its specification of reasons after the 60-day period has expired, provided the specification is filed within 10 days after the court files the order granting the motion and setting forth the grounds. (Resort Video, 35 Cal. App. 4th at 1693-94.) The court distinguished Sanchez-Corea v. Bank of America, 38 Cal. 3d 892, 905 (1985), in which the Supreme Court held an order granting a new trial was defective because it failed to state the grounds, and the trial court's attempt to state the grounds after expiration of the 60-day jurisdictional period was ineffective.

RULE CHANGES

The following amendments to the rules of interest to appellate litigators took effect in 1995 or on January 1, 1996:

FAILURE TO PROCURE RECORD; DISMISSAL OF APPEAL (RULE 10(C))

An appellant who fails to perform an act necessary to procure filing of the record within the time allowed receives a notice of default from the superior court clerk. Under former rule 10(c), the appellant was required to seek relief from the default by motion filed in the reviewing court. Effective July 1, 1995, the appellant need not seek relief from the appellate court but may cure the default simply by performing the acts specified in the superior court's notice within 15 days after mailing of the notice. "If the appellant fails to do the act(s) within this time the clerk of the superior court shall notify the reviewing court and the appeal may be dismissed." (Cal. Rules of Court, rule 10(c).)

BRIEF OF AMICUS CURIAE IN SUPREME COURT (RULE 14(B))

Rule 14(b) was amended, effective July 1, 1995, to fix a deadline for seeking leave to file and for filing an amicus curiae brief in the Supreme Court. The rule formerly specified no deadline. Prospective amici were free to seek leave to file briefs at any time during the progress of the case. As a result, briefs would trickle in throughout the proceedings, burdening the court and hampering the parties' efforts to provide a single, consolidated response to the arguments of the amici. The amended rule solves these problems by providing that the Supreme Court must receive the prospective amicus's request for permission to file its brief, accompanied by the proposed brief, "no later than 30 days after the filing of the initial brief of the party whose position the amicus will support or, if in support of neither party, no later than 30 days after filing of the petitioner's or appellant's opening brief." (Cal. Rules of Court, rule 14(b).) The Chief Justice may grant relief from the deadline on a showing of "specific and compelling reasons for the delay." (Id.) The parties may file an answer to any amicus brief "no later than 20 days after the filing of the amicus curiae brief" (id.), which will presumably be construed to mean no later than 20 days after filing of the Supreme Court order granting the amicus's request for permission to file the proposed brief.

PROCEDURE FOR REQUESTING SANCTIONS (RULE 26(E))

Effective January 1, 1995, rule 26(e) prescribed a procedure for a respondent to request sanctions for frivolous appeals, for appeals taken solely for the purpose of delay, or for an unreasonable infraction of the rules governing appeals. Under former practice, the respondent could request sanctions in his or her brief. Under the new rule, the respondent must file a motion for sanctions, accompanied by a declaration supporting the amount sought, within "10 days after the time when the appellant's reply brief is due or at the time of filing a motion to dismiss the appeal." (Cal. Rules of Court, rule 26(e).) The court must notify a party or attorney against whom it is considering imposing sanctions. Absent such notice, "[a]n opposition should not ordinarily be filed." (Id.)

APPLICATIONS ON ROUTINE MATTERS (RULE 43)

Under former rule 43, applications on routine matters (e.g., to extend time for filing the record or the briefs, to shorten time, to exceed page limits) could be presented to the Chief Justice or presiding justice without notice to any other party. Effective July 1, 1995, such applications "shall be served and filed." This requirement is apparently intended to afford other parties an opportunity to oppose the application, though the rule specifies no formal procedure or time for filing an opposition. The

rule continues to empower the Chief Justice or presiding justice alone to rule on routine applications "unless the court otherwise determines." (Cal. Rules of Court, rule 43.) In contrast, formal motions (e.g., a motion to dismiss an appeal), are handled by a three-judge panel. (See Cal. Rules of Court, rule 41.)

FORM AND FILING OF PAPERS (RULE 44)

The Supreme Court formerly required the original and 13 copies of each petition for review, and the original and 14 copies of each brief filed in a pending cause. Effective January 1, 1996, the court requires the original, 9 paper copies and one copy on computer disk of petitions for review and briefs. (Cal. Rules of Court, rule 44(b)(1).) Similarly, the former requirement that a party serve the Supreme Court with 5 copies of each brief filed in the Court of Appeal has been changed. Now, parties need only serve the Supreme Court with one copy of the brief on computer disk. The computer disk requirements are relaxed for attorneys and parties who provide an affidavit that the brief was not prepared on computer. (Id., rule 44(b)(2).)