Appeals, Writs and Post-Trial Motions

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■ Developments in Appellate Law – 2006

As in past years, practitioners saw a number of developments in appellate law and procedure during 2006. We highlight the most noteworthy of these developments.

■ The California Rules of Court have been renumbered and reorganized.

Title 8 of the California Rules of Court

In 2006, the Judicial Council of California approved a comprehensive reorganization and renumbering of the California Rules of Court. Effective January 1, 2007, all of the appellate rules have been codified in Title 8 and the familiar rule numbers from the prior rules have been discarded in favor of a new numbering system. For example, whereas former rule 2 set forth the time within which an appeal could be taken, the time to appeal is now addressed by rule 8.104. Rule 8.120, rather than former rule 5, now governs the procedure for designating the documents to be included in a clerk's transcript, and rule 8.130, rather than former rule 4, sets the procedure for designating a reporter's transcript. Rule 8.204, instead of former rule 14, now enumerates the requirements for the form and contents of appellate briefs, and rule 8.212, not former rule 15, sets the time period within which a brief must be filed. Rule 8.220, rather than former rule 17, now governs the time period within which a brief must be filed after a party fails to timely file an appellant's opening brief or a respondent's brief and the clerk notifies the party by mail that the brief must be filed.

These are a few examples of the manner in which the appellate rules have been reorganized and renumbered. A comprehensive conversion chart that cross-references the new rule numbers with the old rule numbers can be found at: http://www.courtinfo.ca.gov/rules/documents/rules_conversion_table_06_06_06__2_.pdf.

■ Orders denying a motion to strike a SLAPPback claim are reviewable solely by peremptory writ.

Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260 (2006)

In October 2005, the Legislature amended the anti-SLAPP statute to add Code of Civil Procedure section 425.18, a provision that addresses SLAPPback claims.[1] A SLAPPback claim is "any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action" that has been dismissed pursuant to an anti-SLAPP motion to strike.[2] Section 425.18, subdivision (g), provides that, if an order denies a motion to strike a SLAPPback claim, or grants a motion to strike as to some but not all of the causes of action containing a SLAPPback claim, the aggrieved party may seek review of the order by filing a petition for an extraordinary writ within 20 days after service of a written notice of the entry of the order.[3] In *Soukup v. Law Offices of Herbert Hafif*, the California Supreme Court confirmed that an order denying a motion to strike a SLAPPback claim is reviewable solely by writ petition.[4] The Court also held that section 425.18 is a procedural provision which applies to cases that were pending before this statute took effect.[5]

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1. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 268 (2006); Cal. Civ. Proc. Code § 425.18.
2. Cal. Civ. Proc. Code § 425.18, subd. (b)(1).
3. Cal. Civ. Proc. Code § 425.18, subd. (b)(1). Cal. Civ. Proc. Code § 425.18, subd. (g).
4. *Soukup, supra*, 39 Cal. 4th at p. 282.
5. *Id.* at pp. 280-281.

■ When a trial court sustains a demurrer with leave to amend but a plaintiff elects to stand on a particular cause of action, the plaintiff may subsequently challenge the dismissal of that claim even if he or she amends the complaint in other respects.

County of Santa Clara v. Atlantic Richfield Co., 137 Cal. App. 4th 292 (2006)

Generally, when a trial court sustains a demurrer with leave to amend and the plaintiff elects to amend, the plaintiff waives any error involved in the decision to sustain the demurrer. In *County of Santa Clara v. Atlantic Richfield Co.*, the Sixth Appellate District held that this rule applies individually to each cause of action. In that case, a trial court sustained a demurrer with leave to amend on causes of action for private nuisance, public nuisance, and false advertising included in a second amended complaint and overruled a demurrer on another claim. The plaintiffs thereafter filed a third amended complaint in which they chose not to amend their public nuisance claim. On appeal following the subsequent entry of a final judgment, the defendants argued that, because the plaintiffs filed an amended pleading after the demurrer was sustained, the plaintiffs were precluded from challenging the trial court's ruling on their public nuisance claim. The Sixth Appellate District disagreed, holding that, because the plaintiffs had elected to stand on their second amended complaint as to their cause of action for public nuisance, they could challenge the court's decision to sustain the demurrer on that claim on appeal from the subsequent dismissal of their action.[6]

■ A defendant may not appeal from an order granting its motion for a new trial even though the new trial order grants a remittitur for an amount less than that sought by the defendant.

Gober v. Ralphs Grocery Co., 137 Cal. App. 4th 204 (2006)

Any party aggrieved by an order granting a new trial may appeal.[7] In *Gober v. Ralphs Grocery Co.*, the Fourth Appellate District, Division One, addressed whether a party is aggrieved where the trial court grants a new trial but, in doing so, grants a remittitur for less than the amount the defendant requested. The jury in Gober awarded the plaintiffs punitive damages. The defendant subsequently moved for a new trial and a judgment notwithstanding the verdict (JNOV) on the ground the punitive damages were constitutionally excessive. The trial court denied the JNOV motion and conditionally granted a new trial with a remittitur for an amount less than the remittitur requested by the defendant. Even though the trial court did not grant the defendant the remittitur it sought, the Court of Appeal held that the defendant was not a party aggrieved by and therefore could not appeal from the new trial order because the trial court had granted the defendant a new trial.[8] The Court also held that the defendant could challenge the constitutional propriety of the punitive damages award on appeal from the denial of its JNOV motion.[9]

■ Service of a court document containing "notice of entry" language only triggers the 60-day deadline for filing a notice of appeal if that document is literally entitled "Notice of Entry" and this crucial language is not buried several pages therein.

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6. *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 311-312 (2006).
7. *Gober v. Ralphs Grocery Co.*, 137 Cal. App. 4th 204, 211 (2006).
8. *Id.* at pp. 210-211.
9. *Id.* at pp. 210-215.

Sunset Millennium Associates, LLC v. Le Songe, LLC, 138 Cal. App. 4th 256 (2006)

The Second Appellate District, Division Five, recently held that service of a document containing "notice of entry" language triggers the 60-day deadline for filing a notice of appeal only if the document is literally entitled "Notice of Entry" and this crucial language is not buried inside a multi-page document.[10] In *Sunset Millennium Associates, LLC v. Le Songe, LLC*, the trial court granted the defendant's anti-SLAPP motion to strike on November 1, 2005 and the clerk mailed out a 14-page minute order. On page 13 of the minute order was the phrase: "NOTICE OF ENTRY OF ORDER." The following month, a deputy clerk mailed a copy of a signed judgment along with a separate minute order entitled "NOTICE OF ENTRY OF JUDGMENT." The defendant moved to dismiss the plaintiff's subsequent appeal on the ground that the notice of appeal had not been filed within 60 days of the November 1, 2005 order. The Court of Appeal held that the 60-day time frame for filing the notice was triggered by the December 2005 order.[11] The appellate court concluded that the November 1 minute order did not comply with rule 2(a)(1) of the California Rules of Court, which required that the document providing notice of entry be entitled "Notice of Entry."[12] The court held that "[p]lacing the crucial notice of entry language on page 13 of 14 pages of an integrated minute order is not the same as entitling the document 'Notice of Entry' as specified in rule 2(a)(1)."[13]

Practitioners should be aware that, as of January 1, 2007, former rule 2(a)(1) of the California Rules of Court has been renumbered as rule 8.104(a)(1).

■ A notice of an appealable judgment or order that is mailed to an incorrect address does not trigger the 60-day time period for filing a notice of appeal.

Moghaddam v. Bone, 142 Cal. App. 4th 283 (2006)

The 60-day time period for filing a notice of appeal may commence upon service of the notice of entry of judgment.[14] In *Moghaddam v. Bone*, the Fourth Appellate District, Division Three, held that mailing a notice of an appealable judgment or order to an incorrect address does not trigger the 60-day appeal period. In *Moghaddam*, the trial court granted a motion to set aside a default and default judgment. The defendants sent the plaintiff a copy of the order setting aside the default and default judgment but the notice was sent to the wrong zip code. The Court of Appeal held that, "in the absence of proof notice was actually received, the [defendants'] failure to use the correct zip code invalidate[d] what would have otherwise been sufficient notice."[15] The appellate court concluded that, because the plaintiff was never properly served with notice of the court's order and the notice of appeal was filed within 180 days of the trial court's decision granting the motion, the notice of appeal was timely.[16]

■ If a judgment is modified solely to add prejudgment interest, costs, and attorney fees, the time frame for appealing from the original judgment is not affected.

Amwest Surety Ins. Co. v. Patriot Homes, Inc., 135 Cal. App. 4th 82 (2005)

The Second Appellate District, Division One, has indicated that, if a judgment has been modified

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10. *Sunset Millennium Associates, LLC v. Le Songe, LLC*, 138 Cal. App. 4th 256, 259-261 (2006).
11. *Id.* at p. 259.
12. *Id.* at pp. 259-260.
13. *Id.* at p. 260, original emphasis.
14. Cal. Rules of Court, rule 8.104(a)(2).
15. *Moghaddam v. Bone*, 142 Cal. App. 4th 283, 288 (2006).
16. *Ibid.*

solely to add prejudgment interest, costs, and attorney fees to the original judgment, the time frame for appealing from the original judgment is not affected because the modification does not substantively change the earlier judgment.[17]

■ A trial court lacks jurisdiction to rule on a motion for reconsideration following the entry of a judgment.

Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc., 134 Cal. App. 4th 1477 (2006)

Former rule 3(d) of the California Rules of Court extended a party's time to appeal from an order if the party filed a valid motion to reconsider that order. In *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc. (Safeco)*, the Sixth Appellate District held that, when a trial court entered a judgment after a motion for reconsideration had been filed but before the motion had been heard, the trial court lost jurisdiction to rule on the motion for reconsideration. In *Safeco*, the trial court issued an order granting summary judgment and the plaintiff moved for reconsideration of that order. Shortly thereafter, the trial court entered a judgment and a notice of entry of judgment was served on December 1, 2003. Nearly two months later, on January 22, 2004, the trial court denied the motion for reconsideration. The plaintiff filed a notice of appeal on February 5, 2004. The defendants moved to dismiss the appeal as untimely. The Court of Appeal held that the plaintiff could not benefit from a rule 3 extension of time to appeal because entry of the judgment divested the trial court of authority to rule on the motion for reconsideration.[18] The court therefore concluded that the plaintiff's notice of appeal was not timely filed because the plaintiff failed to file it within 60 days of the date of service of notice of entry of judgment.[19]

Practitioners should be aware that, as of January 1, 2007, former rule 3(d) of the California Rules of Court has been renumbered as rule 8.108(d).

■ To preserve an appellate challenge to separate components of a damages award, a plaintiff must request a special verdict form that segregates the elements of damages.

Greer v. Buzgheia, 141 Cal. App. 4th 1150 (2006)

In *Greer v. Buzgheia*, the Third Appellate District reaffirmed that, "[t]o preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages."[20]

■ Court of Appeal may not consider the sufficiency of a superseded pleading when it reviews an order sustaining a demurrer.

Singhania v. Uttarwar, 136 Cal. App. 4th 416 (2006)

In *Singhania v. Uttarwar*, the Sixth Appellate District held that, when an appellate court reviews an order sustaining a demurrer on an appeal from a final judgment, the Court of Appeal may not consider the sufficiency of a superseded pleading. In Singhania, a trial court sustained a demurrer to a fourth amended complaint but granted leave to amend. The plaintiffs then filed a correction to the fourth amended complaint that merely altered an internal paragraph reference. The defendants demurred again, the trial court sustained their demurrer without leave to amend, and the court entered judgment for the defendants. The plaintiffs appealed and sought review of, *inter alia*, the original fourth amended complaint. The Court of Appeal held that it could not consider the sufficiency of an entirely superseded

17. *Amwest Surety Ins. Co. v. Patriot Homes, Inc.*, 135 Cal. App. 4th 82, 84, fn. 1 (2005).
18. *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc.*, 134 Cal. App. 4th 1477, 1481-1482 (2006).
19. *Id.* at p. 1482.
20. *Greer v. Buzgheia*, 141 Cal. App. 4th 1150, 1158 (2006).

pleading and would therefore review only the sufficiency of the corrected fourth amended complaint.[21]

■ When the Court of Appeal reverses a judgment or decision and remands the matter for a new trial, the party who appealed may only exercise one peremptory challenge upon remand.

Casden v. Superior Court, 140 Cal. App. 4th 417 (2006)

Code of Civil Procedure section 170.6 permits each party to file one peremptory challenge to a judge in an action. However, section 170.6, subdivision (a)(2), provides an exception to this rule: when a trial court's decision or final judgment is reversed on appeal and the same trial judge is assigned to conduct a new trial on the matter, the party who appealed may file a peremptory challenge regardless of whether that party had previously done so. In 2006, the Court of Appeal addressed whether a party that files his first peremptory challenge upon remand to the same judge following the reversal of a judgment may thereafter file a second peremptory challenge.

In *Casden v. Superior Court*, both sides appealed from a judgment entered following a jury trial. The Court of Appeal affirmed the judgment in part, reversed the judgment in part, and remanded the matter for a new trial on various claims. On remand, the case was assigned to the same judge who had presided over the trial. The plaintiff filed a peremptory challenge to disqualify the judge under Code of Civil Procedure section 170.6. The trial court granted the motion and the case was assigned to another judge. Subsequently, the case was reassigned two more times for unrelated reasons. The plaintiff then brought a second peremptory challenge to the fourth judge assigned to the case after remand. The trial court denied the motion on the ground that the plaintiff had already used his one available peremptory challenge. The plaintiff filed a petition for a writ of mandate. He argued that a successful appellant was entitled to two peremptory challenges under section 170.6 — both "the post-appeal challenge and the 'one challenge per side'" — and asserted that the order in which these two challenges were exercised was irrelevant.[22] The Second Appellate District, Division Seven, disagreed and denied his petition. The Court of Appeal held that "[a] party may exercise its one peremptory challenge upon remand from an appellate court."[23] The court concluded that this is what the plaintiff had done here and, having done so, the plaintiff did not have another peremptory challenge to use in the action.[24] The appellate court explained that "[t]he fact [he] exercised that challenge after an appeal and upon remand [was] irrelevant. He does not get two challenges simply by virtue of being a successful appellant."[25]

■ Amicus curiae is not liable for attorney fees under Code of Civil Procedure section 1021.5 where it advocates a position based on its own views of what is legally correct and beneficial to the public interest rather than out of a direct interest in the litigation.

Connerly v. State Personnel Board, 37 Cal. 4th 1169 (2006)

The California Supreme Court recently explained that amici curiae traditionally have not been liable for attorney fees.[26] Consistent with this tradition, the Supreme Court held that the amicus curiae in *Connerly v. State Personnel Board* was not liable for attorney fees under

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21. *Singhania v. Uttarwar*, 136 Cal. App. 4th 416, 425 (2006).
22. *Casden v. Superior Court*, 140 Cal. App. 4th 417, 422 (2006).
23. *Id.* at p. 423.
24. *Ibid.*
25. *Id.* at p. 426.
26. *Connerly v. State Personnel Board*, 37 Cal. 4th 1169, 1177 (2006).

Code of Civil Procedure section 1021.5, even though its role in the litigation had been greater than that of the typical amicus curiae, because the basic function of the amicus — to advocate a position based on its owns views of what was legally correct and beneficial to the public interest rather than out of a direct interest in the litigation — was the same as that of the typical amicus curiae.[27]

■ Each party in an appeal must file a Certificate of Interested Entities or Persons at the time the party files its first document in the Court of Appeal.

Rule 8.208 of the California Rules of Court

As of July 1, 2006, each party must serve and file a "Certificate of Interested Entities or Persons" at the time the party files its *first document* in the Court of Appeal.[28] In addition, each party must include a copy of this certificate in its principal brief.[29] The certificate should appear after the cover of the brief and before any tables.[30] The certificate must be signed by appellate counsel (or, if a party is not represented by counsel, by the unrepresented party).[31]

■ The Third Appellate District addresses the procedure for requesting judicial notice of legislative history materials.

Local Rule 4 of the Third Appellate District's Local Rules

In the Third Appellate District, a party that moves to have the Court of Appeal take judicial notice "of legislative history documents must identify each such document as a separate exhibit and must provide legal authority supporting the consideration of each document as cognizable legislative history."[32]

Counsel intending to request judicial notice of legislative history in accordance with this local rule should be aware of the Third Appellate District's opinion in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, in which the court provided a list "of legislative history documents that have been recognized by the California Supreme Court or [by the Third Appellate District] as constituting cognizable legislative history" as well as a list "of documents that do not constitute cognizable legislative history" in the Third Appellate District.[33]

■ The standard for the publication of appellate opinions has been amended and expanded.

Rule 8.1105 of the California Rules of Court

As of April 1, 2007, the California Rules of Court include an amended and expanded standard for the publication of appellate opinions. Rule 8.1105 provides that an appellate opinion "should be certified for publication in the Official Reports if the opinion: [¶] (1) Establishes a new rule of law; [¶] (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions; [¶] (3) Modifies, explains, or criticizes with reasons given, an existing rule of law; [¶] (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule; [¶] (5) Addresses or creates an apparent conflict in the law; [¶] (6) Involves a legal issue of continuing public interest; [¶] (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law; [¶] (8) Invokes a previously over-

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27. *Id.* at pp. 1182-1183.
28. Cal. Rules of Court, rule 8.208(c)(1) (previously Cal. Rules of Court, rule 14.5(c)(1)).
29. *Ibid.*
30. *Ibid.*
31. Cal. Rules of Court, rule 8.208(b)(1).
32. Ct. App., Third Dist., Local Rules, rule 4, Judicial Notice of Legislative History Materials.
33. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 31-39 (2005).

looked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or [¶] (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law."[34] In determining whether to publish an opinion, the appellate courts may not consider the following factors: the workload of the court or the potential embarrassment of a litigant, lawyer, judge, or other person.[35]

■ The Judicial Council of California has revised the Civil Case Information Statement as well as various forms that facilitate navigation through the appellate courts.

The Judicial Council has revised the "Civil Case Information Statement" APP-004 form, which must be filed pursuant to rule 8.100(f) of the California Rules of Court.[36]

The Judicial Council has also revised the following *optional* forms that a party may use to facilitate navigation through the appellate courts:

(a) "Notice of Appeal/Cross-Appeal (Unlimited Civil Case)," APP-002, http://www.courtinfo.ca.gov/forms/documents/app002.pdf.

(b) "Notice Designating Record on Appeal (Unlimited Civil Case)," APP-003, http://www.courtinfo.ca.gov/forms/documents/app003.pdf.

(c) "Abandonment of Appeal (Unlimited Civil Case)," APP-005, http://www.courtinfo.ca.gov/forms/documents/app005.pdf.

(d) "Application for Extension of Time to File Brief (Civil Case)," APP-006, http://www.courtinfo.ca.gov/forms/documents/app006.pdf.

(e) "Request for Dismissal of Appeal (Civil Case)," APP-007, http://www.courtinfo.ca.gov/forms/documents/app007.pdf.

34. Cal. Rules of Court, rule 8.1105(c) (effective April 1, 2007), emphasis added.
35. Cal. Rules of Court, rule 8.1105(d) (effective April 1, 2007).
36. See http://www.courtinfo.ca.gov/forms/documents/app004.pdf.