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NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

Richard A. Derevan*

Todd E. Lundell*

Snell & Wilmer L.L.P.

S T A T E

Appeal—Appealability—Posttrial Order re Expert Fees

Following entry of judgment after a jury trial, the trial court denied defendant's motions for new trial and JNOV and defendant appealed. Defendant's notice of appeal stated that defendant was appealing from the judgment, the [nonappealable] order denying new trial, the order denying JNOV, and "[t]hose pretrial, intermediate and post-trial rulings . . . involving the merits of the . . . action and/or which necessarily affected the judgment." After the defendant filed its notice of appeal, the trial court denied defendant's motion to tax costs, holding that plaintiffs were entitled to receive their expert's fees because plaintiffs obtained a better result than their section 998 offer. One of the questions on appeal was whether the court of appeal could consider defendant's challenge to the expert fees. In *Pfeifer v. John Crane, Inc.*, 220 Cal.App.4th 1270, 164 Cal.Rptr.3d 112 (2013), the court of appeal held that it could not because the trial court's order was separately appealable and defendant had not appealed from that order. The court of appeal pointed out that postjudgment orders are separately appealable and not ordinarily subsumed within an appeal from the judgment.

Appeal—Judgment—Form Over Substance—Timeliness

Frye v. County of Butte, 221 Cal.App.4th 1051, 164 Cal.Rptr.3d 928 (2013) is a good reminder that appealable judgments may not always bear the name "Judgment." In this administrative mandamus action, the

* Certified Specialist, Appellate Law
The State Bar Board of Legal Specialization

trial court signed a statement of decision holding that the administrative findings did not justify the County's election of remedies and remanding to the agency to conduct proper hearings. Following further hearings, the trial court signed a "Judgment." Both the owner and the county appealed from the judgment. The court of appeal dismissed both appeals on the theory that the statement of decision was really a judgment and therefore both appeals—filed much later—were too late. While it is correct that a court of appeal will look at the substance of an order, not its title in determining its effect, this decision is unsatisfying. In a sense every statement of decision could read to conclude proceedings and the court of appeal's decision does not adequately explain—at least to this reader—why this statement of decision should be treated differently than the caption the trial court gave it. (The court did consider an appeal from another judgment entered on the new findings.)

Arbitration—Sanctions—
CCP § 128.7

Section 128.7 of the Code of Civil Procedure authorizes a trial court to impose sanctions where a party or attorney violates that section "by presenting to the court" frivolous contentions. In *Optimal Markets, Inc. v. Salant*, 221 Cal.App.4th 912, 164 Cal.Rptr.3d 901 (2013), the court of appeal held that this section did not vest authority in a trial court to impose sanctions on an attorney who allegedly had presented frivolous arguments to an arbitrator. Besides invoking the statutory language to justify its result, the court said that allowing a trial court to impose sanctions in that situation "would be inconsistent with the limited power the court retains when the judicial action is stayed and the case referred to binding arbitration"

Litigation—Attorney's Civil
Rights

Courts are understandably concerned that jurors' use of the Internet during trial may affect the fairness of the proceedings. But there are limits to what a trial court may do to protect against such use. In *Steiner v. Superior Court*, 220 Cal.App.4th 1479, 164 Cal.Rptr.3d 155 (2013), a plaintiff sued several automobile defendants, and the website for plaintiff's attorney advertised (in provocative language) her recent success in two similar cases. The court admonished the jurors not to "Google" the parties' attorneys, but recognizing that jurors might ignore the admonition, the trial court also ordered

plaintiff's attorney to remove those webpages from her website for the duration of the trial. The court of appeal held that "this was an unlawful prior restraint on the attorney's free speech rights under the First Amendment. . . . Juror admonitions and instructions, such as those given here, were the presumptively adequate means of addressing the threat of jury contamination in this case."

Litigation—Offers to
Compromise—CCP § 998

Code of Civil Procedure section 998 requires that a valid settlement offer must include several provisions, including "a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." Code Civ. Proc. §998(b). Does this mean the settlement offer must include a signature block for acceptance of the offer? In *Rouland v. Pacific Specialty Ins. Co.*, 220 Cal.App.4th 280, 162 Cal.Rptr.3d 887 (2013), the court answered no. In *Rouland*, the 998 offer simply stated, "If you accept this offer, please file an Offer and Notice of Acceptance in the above-entitled action prior to trial or within thirty (30) days after the offer is made." The trial court held that this offer did not meet the statutory requirement because it failed to provide a signature block for acceptance, but the court of appeal reversed. The court held that "no 'magic language' or specific format is required for either an offer or acceptance under section 998." Rather, "[t]he offer's acceptance provision simply must specify the manner in which the offer is to be accepted."

Torts—Fraud—Deceptive
Advertising

Advertising a limited data plan as "unlimited" may be false and deceptive. That was the common-sense holding in *Chapman v. Skype Inc.*, 220 Cal.App.4th 217, 162 Cal.Rptr.3d 864 (2013), in which the court of appeal held that the plaintiff had adequately stated claims for false advertising and unfair competition against Skype for advertising its voice over Internet protocol calling plans as "unlimited" when, in fact, the plans are limited as to the number of minutes per day and month and the number of calls per day. The case was interesting because it was undisputed that the Internet page listing Skype's plans included a footnote with a link to a "Fair Usage Policy" that contained all the details on the limits Skype placed on the "unlimited" plan. The court of appeal held, however, that "the fact that Skype ultimately discloses

the limits in its 'Fair Usage Policy' does not excuse its practice of labeling the plan 'Unlimited' in its initial dealings with potential customers." Moreover, "whether a reasonable consumer would read the 'Fair Usage Policy' and discover the limits on the 'Unlimited' calling plan is a question of fact."

Torts—Malicious Prosecution—
Statute of Limitations

In *Cheong Yu Yee v. Cheung*, 220 Cal.App.4th 184, 162 Cal.Rptr.3d 851 (2013), the court of appeal held that the CCP § 340.6's one-year statute of limitations for an "action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" applies to malicious prosecution actions, not just malpractice. The court of appeal held that "[t]he words of the statute are quite broad, but they are not ambiguous: any time a plaintiff brings an action against an attorney and alleges that attorney engaged in a wrongful act or omission, other than fraud, in the attorney's performance of his or her legal services, that action must be commenced within a year after the plaintiff discovers, or should have discovered, the facts that comprise the wrongful act or omission." Yee's malicious prosecution action necessarily alleged that the attorney had engaged in wrongful acts in the performance of legal services and was, therefore, barred by the statute of limitations.

Trial—Verdict—What
Constitutes

In *Montoya v. Barragan*, 220 Cal.4th 1215, 164 Cal.Rptr.3d 100, the jury informed the court it could not reach a decision and the court declared a mistrial. After declaring a mistrial, the court polled the jury only to find out that the jury voted 9-3 that defendant had not caused the plaintiff's injuries. The trial court then entered judgment for defendant, but later granted a new trial because in the court's view, the evidence did not support the "verdict." The defendant then appealed. The court of appeal affirmed the new trial ruling without delving into the evidence, pointing CCP § 618 requires a verdict to be in writing and all that occurred here was the oral polling of the jury. Therefore, the trial court's entry of judgment in the absence of a verdict was an irregularity in the proceedings requiring a new trial. The court said that the trial court, rather than declaring a mistrial, could have sent the jury back for further deliberations.