February–March 2017

Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

*Richard A. Derevan**
*Todd E. Lundell**
Snell & Wilmer L.L.P.

STATE

Courts—Jurisdiction—Fundamental Jurisdiction—New Trial

The California Supreme Court's decision in *Kabran v. Sharp Memorial Hosp.*, 2 Cal.5th 330, 212 Cal.Rptr.3d 361 (2017) provides a lesson in the difference between fundamental jurisdiction and judicial acts in excess of jurisdiction. The court also addressed forfeiture of issues on appeal. Under CCP § 659a, a party seeking a new trial has 10 days (plus a possible 20-day extension) following the filing of the notice of intent to move for new trial to file supporting declarations. What happens if the declarations are filed late? Can a court still consider them? Yes, at least so long as the opposing party does not object. Here, the opposing party did not object in the trial court to the declarations on grounds of timeliness. On appeal, however, that party argued that the trial court had no jurisdiction to consider them because they were late. The California Supreme Court held that while some deadlines relating to new trial motions affected jurisdiction in the fundamental sense (e.g., time to file the notice of intent; deadline to rule) the time to file declarations was not one of those deadlines. The court explained that "fundamental" jurisdiction is an entire absence of power to hear or determine a case, while a failure to act according to procedural requirements may be called an act in excess of jurisdiction. The time to file declarations fell within the latter situation and since no objection had been made in the trial court, the Supreme Court refused to consider the untimeliness argument.

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

Government—Records—Attorney-Client Privilege

The Public Records Act provides a broad right of access to government information subject to certain exceptions, including the attorney-client privilege. In *Los Angeles County Board of Supervisors v. Superior Court*, 2 Cal.5th 282, 212 Cal.Rptr.3d 107 (2016), the Supreme Court addressed whether invoices for legal work by an outside law firm could be withheld from disclosure as within the scope of the privilege. The court held that although "the attorney-client privilege does not categorically shield everything in a billing invoice from PRA disclosure," the privilege must "protect[] the confidentiality of invoices for work in pending and active legal matters."

Labor and Employment—PAGA Claim—Arbitrability of "Aggrieved Employee"

Under the Private Attorney General Act (PAGA), an "aggrieved employee" may bring an action personally and on behalf of other employees for an employer's Labor Code violations. PAGA claims are not subject to contractual arbitration because the claim is considered a dispute between the employer and the state. Where the employee has agreed to arbitrate "all disputes," however, who decides whether the employee is "aggrieved" by the alleged violations, an arbitrator or a court? In *Hernandez v. Ross Stores, Inc.*, 7 Cal.App.5th 171, 212 Cal.Rptr.3d 485 (2016), the court held that "whether the party bringing the PAGA action is an aggrieved party should not be decided separately by arbitration." The court reasoned a PAGA claim cannot be split into an arbitrable individual claim as to whether the employee was "aggrieved," and a non-arbitrable representative claim.

Legal Services—Statute of Limitations

The limitations period for claims "against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" is one year. The court of appeal's decision in *Foxen v. Carpenter*, 6 Cal.App.5th 284, 211 Cal.Rptr.3d 372 (2016), has a good overview of issues that might arise in applying that limitations period, including (i) whether a claim "aris[es] in the performance of professional services" if the claim is based on nonlegal services (yes, if the nonlegal services are closely associated with the attorney's professional duties), (ii) when the client's claim accrues (when client is on notice of the alleged wrongdoing), and (iii) whether the one-year limitations period applies to a claim like unfair business practices that has its own, longer

limitations period (answer: the one-year limitations applies under the rule that "a specific limitations provision prevails over a more general provision.").

Litigation—Anti-SLAPP Motions—Limitations Period—Amended Complaint

Generally, an anti-SLAPP motion must be filed "within 60 days of the service of the complaint," which has been interpreted to include service of an amended complaint. In *Newport Harbor Ventures, LLC v. Morris Cerullo Evangelism*, 6 Cal.App.5th 1207, 212 Cal.Rptr.3d 216 (2016), however, the court held that the filing of an amended complaint does not restart that clock for challenging causes of action that could have been challenged in the original complaint. "An amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion."

Litigation—Attorneys' Fees—Voluntary Dismissal—Mixed Tort and Contract Action

When a party voluntarily dismisses an action based on contract, Civil Code section 1717(b)(2) states that there is no prevailing party on the contract for the purpose of attorneys' fees. But if the contractual attorneys' fees clause is broad enough to encompass *tort* claims, the defendant may have a right to fees on a dismissed action. *Khan v. Shim,* 7 Cal.App.5th 49, 212 Cal.Rptr.3d 292 (2017), discusses these rules, but perhaps because it was not an issue on that appeal, leaves out one qualification. Under *Santisas v. Goodin*, 17 Cal.4th 599, the defendant who may have a right to fees on the tort claims is not automatically a prevailing party based on the dismissal. Instead, *Santisas* mandates a "practical approach" to determining the prevailing party: "if, as here, the contract allows the prevailing party to recover attorney fees but does not define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise."

Litigation—Complaints—Doe Defendants

McClatchy v. Coblentz, Patch, Duffy & Bass, 247 Cal.App.4th 368, 212 Cal.Rptr.3d 431 (2016) is a reminder that the use of Doe defendants is not a

guarantee that a plaintiff may later add a new party to the case as a Doe. As the court of appeal stated, "this procedure is available only when the plaintiff is actually ignorant of the facts establishing a cause of action against the party to be substituted for a Doe defendant." Whether the plaintiff knew or subjectively believed when he filed the complaint that he had a cause of action based on the facts known is not the test.

Litigation—New Trial Motion—Scope of Authority to Evaluate Evidence

Ryan v. Crown Castle NG Networks, Inc., 6 Cal.App.5th 775, 211 Cal.Rptr.3d 743 offers a thorough discussion of the power and obligation of a trial court to weigh evidence in ruling on a new trial motion. Here, the trial court in ruling on the new trial motion implied that it was powerless to question the adequacy of the jury's award. The court of appeal rejected this notion, holding that "When a trial court rules on a motion for new trial based upon inadequacy of the evidence, it is vested with a 'plenary' power—and burdened with a correlative duty—to independently evaluate the evidence." Failing to do so was an abuse of discretion. The court of appeal said that the error *might* be harmless if the record contained some evidence to support the jury's verdict, but it did not: "the record before us affords *no basis whatsoever* to conclude the damages" were supported by the evidence.

Tort—Negligence—Duty of Escrow to Third Parties

In *Alereza v. Chicago Title Company*, 6 Cal.App.5th 551, 211 Cal.Rptr.3d 469 (2016), the court considered whether an escrow company owes a duty of care to third parties. The facts in *Alereza* were complicated. Succinctly, an employee for Chicago Title negligently listed the wrong name of the insured when securing a certificate of insurance for a newly purchased business, which led Alereza—who participated in the purchase, but was not party to the escrow—to give a personal guarantee to save the business from being evicted. After the business lost money and Alereza had to pay on his guarantee, he sued Chicago Title arguing that the employee's negligence caused his damages. The trial court granted nonsuit, and the court of appeal affirmed holding that Chicago Title owed no duty to Alereza because he "was not a party to the escrow, not mentioned in the escrow instructions as a third party beneficiary, and did not sustain his losses as a direct result of the escrow company's negligence."