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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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Appeals—Liberal Construction of Notice of Appeal

In *K.J. v. Los Angeles Unified School District*, 8 Cal.5th 875 (2020) the Supreme Court addressed a narrow question: "Does a Court of Appeal have jurisdiction to review an order directing an attorney to pay sanctions when the notice of appeal identifies the attorney's client as the appealing party, but other indicia make clear that the attorney was the party seeking review?" The court of appeal had dismissed the appeal, but the Supreme Court reversed, holding "when it is clear from the record that the omitted attorney intended to participate in the appeal and the respondent was not misled or prejudiced by the omission, the rule of liberal construction compels that the notice be construed to include the omitted attorney." The decision recognizes different standards govern the filing of the notice of appeal and the content thereof. Timely filing of a notice of appeal "is an absolute jurisdictional prerequisite" to an appellate court's jurisdiction, but "technical accuracy in the contents of the notice is not." The Supreme Court disapproved the "bright-line rule" adopted by several courts requiring the attorney's name appear in a notice of appeal, regardless whether the record clearly demonstrated the attorney's intent to join the appeal.

Appeals—Requirement of Final Judgment

Warwick California Corp. v. Applied Underwriters, Inc., 44 Cal.App.5th 67 (2020) serves as a reminder that a final judgment is required before an appeal may be filed. There, California and non-California insureds brought an action

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against their insurers, and the insurers filed a cross-complaint. The trial court stayed the action based on inconvenient forum as to the non-California plaintiffs. After a bench trial on the claims between the California plaintiffs and the insurers, the trial court issued a statement of decision finding that neither had proven damages. The insurers appealed, arguing the statement of decision was a final judgment within the meaning of section 904.1(a)(1). The court of appeal dismissed the appeal. The court held that it could treat a statement of decision as an appealable judgment only when it is "signed and filed and does, in fact, constitute the court's final decision on the merits." Because most of this case was stayed, the statement of decision was a limited ruling on a discrete issue and did not pass the test for finality. The court also rejected the insurers' invitation to treat their opening brief as a petition for writ of mandate, finding they made no effort to demonstrate they were entitled to such relief.

Judgment—Res Judicata—Privity Requirement

Under the doctrine of res judicata, a prior judgment may prevent a plaintiff from relitigating a cause of action in a subsequent suit against another defendant, if that defendant is in "privity" with someone who was a party to the original litigation. The Fourth District, Division Two's decision in *Grande v. Eisenhower Medical Center*, 44 Cal.App.5th 1147 (2020) illustrates this privity requirement. FlexCare is a temporary staffing agency that assigned Grande to work at Eisenhower Medical Center. Thereafter, Grande brought a class action against FlexCare for various labor law violations based solely on her work at Eisenhower. After settling that case, Grande brought a separate class action against Eisenhower for the same labor law violations. The court of appeal affirmed the trial court's holding that Eisenhower was not in privity with FlexCare for res judicata purposes because "it is clear the two companies have disparate legal interests in the case and cannot act as each other's virtual representatives." The fact that FlexCare had an agreement to indemnify Eisenhower under some circumstances only highlighted their disparate interests as "FlexCare's incentive is to establish Eisenhower is liable under a theory that doesn't implicate the indemnity clause." Notably, the *Grande* decision conflicts with the Second District's recent decision in *Castillo v. Glenair, Inc.*, 23 Cal.App.5th 262 (2018), which held workers could not settle a lawsuit against a staffing

agency and then sue the company where they had been assigned. The *Castillo* decision focuses its privity analysis on whether the subject matter of the two actions was the same and whether the party and the nonparty "shared the same relationship to the subject matter."

Litigation—Anti-SLAPP Statute—Conduct and Speech Protected Under "Catchall" Provision

In yet another anti-SLAPP opinion, the court of appeal in *Ojjeh v. Brown*, 43 Cal.App.5th 1027 (2020) grappled with the contours of protected conduct. Defendants Brown and Ignite Channel obtained investments from plaintiff Ojjeh to produce a documentary on the Syrian refugee crisis. In a subsequent lawsuit, Ojjeh alleged defendants had completed no "significant" work on the film and used his money for unrelated purposes. Defendants filed an anti-SLAPP motion, claiming the complaint targeted their protected activity in producing the documentary. The trial court denied the motion, but the court of appeal reversed, finding the complaint targeted protected conduct within the meaning of the "catchall" provision, CCP § 425.16(e)(4). The court reasoned the solicitation of money and performance of allegedly unsatisfactory work constituted activity in furtherance of defendant's right of free speech in connection with an issue of public interest. There was no question the Syrian refugee crisis was a matter of public interest or the creation of the proposed documentary was protected. The case turned on whether the complaint targeted defendants' failure to act or affirmative speech and conduct. The court of appeal emphasized the complaint implied some work was undertaken and its allegations concerned affirmative conduct relating to the quality and quantity of performance. The court concluded the allegations of affirmative conduct "appear critical to plaintiff's liability and are not reasonably viewed as merely incidental, collateral, or contextual to plaintiff's claims for relief" and the conduct was "in furtherance of" the right to free speech even if the speech was never completed. The court rejected plaintiff's argument anti-SLAPP law did not apply where plaintiff alleges defendants should have engaged in the promised speech activity, reasoning the purpose of the anti-SLAPP law is advanced where a complaint targets the quality or sufficiency of defendants' actions in preparing to exercise their right to speech on a matter of public significance.

Litigation—Relief from Default for Attorney Mistake—Application Limited to Defaults, Default Judgments, and Dismissals

When lawyers make a mistake that leads to their clients' default, they often turn to CCP section 473(b) for relief. In *Shayan v. Spine Care & Orthopedic Physicians* (2020) 44 Cal.App.5th 167, the court refused to adopt a more "sweeping" application that would expand the wording about "defaults, default judgments, and dismissals" to "analogous" situations. There, attorney Shayan brought an interpleader action against his client and three lienholders after obtaining money for his client in a personal injury matter. The lienholders filed answers and had notice of the trial date, but two did not appear at trial. The trial court proceeded with the trial and rendered judgment. The two lienholders then filed a motion for relief under section 473(b), which the trial court denied because there had been no default, default judgment, or dismissal. The court of appeal affirmed, rejecting older case law supporting the more "sweeping" application and joined with more recent cases limiting the statute's application to its plain language.

Litigation—Standing—Probate

Although we don't usually cover probate cases in this newsletter, the Supreme Court's recent decision in *Barefoot v. Jennings*, 8 Cal.5th 822 (2020) is worth noting. Probate Code section 17200(a) provides a mechanism for "a trustee or beneficiary of a trust" to petition the probate court to determine the validity or existence of a trust. The question in *Barefoot* was whether a former beneficiary who claimed the latest iteration of a trust was invalid due to fraud or undue influence had standing under that section to contest the trust. The court of appeal answered that question "no" based on the plain language of the statute, which appears to allow only current beneficiaries to petition. That decision threatened to upend litigation over trust matters by requiring former beneficiaries to seek relief in civil court, potentially creating dueling litigation. The Supreme Court reversed, holding "claims that trust provisions or amendments are the product of incompetence, undue influence, or fraud . . . should be decided by the probate court, if the invalidity of those provisions or amendments would render the challenger a beneficiary of the trust."

Litigation—Summary Judgment—Motion for Reconsideration

In granting a motion for reconsideration based on new facts under CPP section 1008(a), the trial court must ensure the nonmoving party receives the notice required by the statute governing the original motion. *Torres v. Design Group Facility Solutions, Inc.*, 45 Cal.App.5th 239 (2020). There, the trial court denied defendant Design Group's motion for summary judgment. When Design Group moved for reconsideration based on new evidence, however, the trial court granted both the reconsideration motion and summary judgment, finding the new evidence dispositive of plaintiff's claims. The court of appeal reversed. The court held the motion for reconsideration was "in effect, a renewed motion for summary judgment . . . ." Thus, the plaintiff "was entitled to the procedural protection afforded to parties opposing summary judgment, including 75 days' notice and a separate statement of material facts." The trial court abused its discretion by granting reconsideration and summary judgment at the same time.

Professional Responsibility—Unenforceability of Fee Agreement in Violation of Rules

The decision in *Hance v. Super Store Industries*, 44 Cal.App.5th 676 (2020) illustrates the potentially dire consequences of not carefully following the Rules of Professional Conduct. The case involved a class action that had been handled by several different attorneys, who disputed how the fees resulting from a class settlement should be divided. The trial court enforced an agreement that gave attorney Waisbren 30% of the fees. The court of appeal reversed, however, because the agreement failed to inform the class representatives in writing that, at the time they engaged Waisbren, the attorney had no professional liability insurance. Rule 1.4.2. The court of appeal held that "[t]o allow Waisbren to recover his agreed upon percentage of the attorney fee award, despite noncompliance with the requirements of the rule, would effectively condone that violation, contrary to the purpose behind the rules . . . ." The court held Waisbren could recover in quantum meruit because the violation was "not sufficiently serious to warrant a complete forfeiture of attorney fees" and recovery of some fees would still provide "ample incentive to comply with" the Rules.

Unfair Competition—Covenants Not to Compete During Employment

In *Techno Lite, Inc. v. Emcod, LLC*, 257 Cal.Rptr.3d 643 (2020), the court of appeal addressed whether Business and Professions Code Section 16600 places limits on agreements not to compete made by an employee while he was still employed. Defendants worked for Techno Lite, a company that sold lighting transformers. While employed, defendants started their own company (Emcod) that also sold transformers, which Techno Lite consented to because defendants promised Emcod would not compete with Techno Lite. When Techno Lite discovered Emcod was selling competing products, Techno Lite sued and obtained a judgment for, among other things, false promise. On appeal, defendants argued they could not be held liable for false promise because their promise not to compete was void as contrary to Section 16600. The court of appeal disagreed, holding that while the statute invalidates agreements that unreasonably interfere with an employee's ability to compete *after* his employment, "the statue does not affect limitations on an employee's conduct or duties *while employed*." (Emphasis in original). The public policy behind Section 16600 "is not to immunize employees who undermine their employer by competing with it while still employed," and "no firmly established principle of public policy authorizes an employee to become his employer's competitor while still employed."