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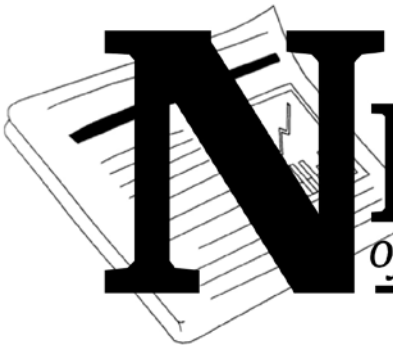

Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

*Todd E. Lundell**
Jenny Hua
Snell & Wilmer L.L.P.

STATE

Appeals—Timing of Appeal—Order Granting Anti-SLAPP Motion Triggers 60-Day Deadline

CCP section 904.1(a)(13) makes appealable an "order granting or denying a special motion to strike under Section 425.16." As two recent cases illustrate, this rule creates a serious trap for the unwary.

In *Reyes v. Kruger*, 55 Cal.App.5th 58 (2020), the court of appeal held the clerk's service of notice of entry of an order titled "Order re Special Motion to Strike" that clearly stated the motion was "GRANTED" triggered the time to appeal. The fact the order did not address the prevailing parties' right to attorneys' fees "did not render the order interim," and the fact that the court later issued a "judgment of dismissal similarly had no effect on the finality of the underlying anti-SLAPP order." Thus, appellants' attempted appeal from the later-issued judgment was untimely, as it was filed after the 60-day deadline to appeal the anti-SLAPP order. Moreover, appellants' filing of a new trial motion after the court issued its formal judgment did not extend the time to appeal under Rule 8.108—which extends the time to appeal when the party files a "valid notice of intention to move for a new trial"—because the order granting the anti-SLAPP motion itself constituted a judgment. That order "disposed of the complaint and operated as the final determination of the rights of the parties" and, therefore, triggered the 15-day deadline for filing a notice of intent to move for new trial under CCP section 659. Because appellant did not file a notice of intent

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

to move for new trial within 15 days after the order granting the anti-SLAPP motion, the notice of intent was not "valid," and appellants could not obtain review of the new trial order. The court dismissed the entire appeal.

The result in *Marshall v. Webster*, 54 Cal.App.5th 275 (2020) was similar, as the court held "the trial court's May 11 order granting defendant's special motion to strike the complaint was a final determination of the rights of the parties, thus constituting a judgment from which plaintiffs failed timely to perfect an appeal." The prevailing defendant's later submission of a proposed order to the trial court in June and service of notice of entry of that order in July did not extend the time for appealing the May 11 order, which the clerk had served on the parties. The court of appeal also held appellants' motion for reconsideration had no effect on the appeal deadlines because the May 11 order constituted a final judgment, which meant the court "lost jurisdiction to entertain or decide a motion for reconsideration." Appellants had not filed their notice of appeal by July 11—60 days from notice of the May 11 order—so the court dismissed the appeal.

Appeals—Timing of Appeal—Effect of Covid-Related Orders

The court of appeal's decision in *Rowan v. Kirkpatrick* (2020) 54 Cal.App.5th 289 (2020) addressed the deadlines for filing a notice of appeal in light of the Covid-related orders closing the courts and extending certain deadlines under the Rules of Court. The opinion is notable for two reasons. First, the court held that, although Rule 8.66 authorizes the Chair of the Judicial Council to "toll" any time periods specified by the rules, the Covid-related general orders "clearly did not provide for tolling," but only extended the deadlines 30 days "from the date of the specified event." Second, the court recognized "the distinct possibility that some litigants may have been denied the right to appeal through no fault of their own." The court indicated that in an appropriate case, it could ensure the right to appeal where an appellant could not have met the deadline for reasons beyond her control. Because the appellant there did not "contend she was prevented in any way from timely filing notices of appeal," however, the court decided to dismiss her appeal as untimely and "leave those concerns for another day."

Arbitration—Scope of Judicial Review for Questions of Law When Authorized by the Contract

The decision in *Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC*, 53 Cal.App.5th 807 (2020), addresses interesting issues that can arise when a contract authorizes independent judicial review of an arbitration award for errors of law. The case concerned the meaning of the word "terminates" in a contract between the Golden State Warriors and the Oakland-Alameda County Coliseum Authority. An arbitrator found that GSW "terminated" the contract by failing to renew it, and was therefore required to continue servicing debt incurred to renovate Oracle Arena. The parties' contract provided for independent judicial review of questions of law, so the question became whether the arbitrator's interpretation of "terminates" was a factual or legal question. The court of appeal first held the "threshold determination" of whether the contract was reasonably susceptible to the interpretations advanced by the parties was a question of law. Based on its own review of the extrinsic evidence, the court agreed with the arbitrator that "it is 'fully plausible' to interpret the word 'terminates' . . . as including a termination by nonrenewal." Second, the court acknowledged the ultimate interpretation of a contract is a question of law if based on the words of the instrument alone or when there is no conflict in the evidence. But because the arbitrator's decision was based on conflicting extrinsic evidence, it resolved a question of fact, not law. The arbitrator's interpretation of the contract was therefore "beyond [the court's] judicial review."

Litigation—Failure to Comply with Pretrial Obligations

Reales Investment, LLC v. Johnson, 55 Cal.App.5th 463 (2020) serves as a warning for litigators to remain diligent in pretrial preparations. Reales Investment brought an action against a lumber supplier. After Reales's counsel withdrew two months prior, Reales did not retain new counsel until a few days before trial. As a result, Reales failed to participate in pretrial proceedings mandated by Riverside County Superior Court Local Rule 3401, which requires parties to exchange certain documents and information 14 days before trial. The trial court denied Reales's oral request for a continuance, made on the first day of trial. The trial court also ruled it would exclude all documents and witnesses not disclosed in the mandatory pretrial conference, which precluded Reales from presenting any evidence or testimony. At the end of a brief bench trial, the trial court granted nonsuit against Reales

and entered judgment for the lumber supplier. The court of appeal affirmed, noting trial continuances are "disfavored" and must be requested by noticed motion or ex parte application with supporting declarations pursuant to Rule 3.1332(b). Reales' oral request was therefore improper. It was also untimely given the opposing party was prepared to proceed. The court also held the trial court was within its discretion to exclude evidence and testimony not disclosed pursuant to Rule 3401, which warns that any party or counsel that fails to comply with its terms without good cause is subject to sanctions, including evidentiary sanctions. Reales's failure to comply with Rule 3401's pretrial requirements, compounded by its failure to meaningfully engage in discovery, left the lumber supplier knowing "next to nothing" about Reales's evidence, witnesses, and arguments before trial. Evidentiary sanctions were therefore appropriate even though they effectively terminated the case.

Litigation—Personal Jurisdiction—Effect of Forum Selection Clause and Choice of Law Provision

T.A.W. Performance, LLC v. Brembo, S.p.A., 53 Cal.App.5th 632 (2020) teaches that a forum selection clause and choice of law provision may prevent California courts from exercising jurisdiction over a foreign defendant. Brembo is a brake systems manufacturer incorporated and headquartered in Italy. TAW, a California LLC with its principal place of business in North Carolina, agreed to be Brembo's distributor for the United States, Canada, and Mexico. The parties consented "to the exclusive jurisdiction of the state and federal courts of the State of New York" and to apply New York law for disputes arising from their agreement. A few years later, TAW sued Brembo in California for wrongful termination and violation of California's Franchise Relations Act. The trial court granted Brembo's motion to quash service of summons. On appeal, there was no dispute the court lacked general jurisdiction, leaving the focus on specific jurisdiction. A court may exercise specific jurisdiction over a nonresident defendant only if, among other things, the defendant has purposely availed himself or herself of the forum benefits. That prong turns on whether the defendant could "reasonably anticipate" litigation in the forum state. The court held Brembo's act of contracting with a California entity was not sufficient to support specific jurisdiction. That TAW had sold more than $2.7 million of Brembo's products in California, which accounted for 28.7% of TAW's US sales of

Brembo products did not change this conclusion. While the choice of law and forum selection clauses were not "dispositive," they reinforced the court's conclusion that Brembo did not have fair warning and could not have reasonably anticipated being brought into a California court to defend against TAW's lawsuit.

Torts—Intentional Tortfeasor—No Reduction in Liability for Noneconomic Damages Based on Comparative Fault

Civil Code section 1431.2(a) provides "[i]n any action for personal injury, property damages, or wrongful death, based on principles of comparative fault," each defendant "shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault . . . ." In *B.B. v. County of Los Angeles*, 10 Cal.5th 1 (2020), the Supreme Court resolved a split in authority over whether an *intentional tortfeasor* is entitled to a reduction of noneconomic damages under that section. In a lengthy decision carefully parsing the statutory language, analyzing the history of comparative fault principles before and after passage of section 1431.2, and discussing several indicia of statutory intent, the court concluded that "section 1431.2, subdivision (a), does not authorize a reduction in the liability of intentional tortfeasors for noneconomic damages based on the extent to which the negligence of other actors—including the plaintiffs, any codefendants, injured parties, and nonparties—contributed to the injuries in question."

Torts—Tortious Interference—Independently Wrongful Act Required with At-Will Contract

California has traditionally recognized two economic relations torts: (1) interference with a contract and (2) interference with a prospective economic relationship. The former does not generally require that defendant's conduct be wrongful apart from the interference with the contract itself, while the latter requires an independently wrongful act. In *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal.5th 1130 (2020), the California Supreme Court resolved a question certified by the Ninth Circuit: Does a claim for interference with an at-will contract require pleading an independently wrongful act? The Court answered "yes," disapproving several earlier cases that suggested otherwise. The court noted the purpose of the independent wrongfulness requirement is to balance between providing a remedy for predatory economic behavior and protecting legitimate business competition. Once an economic relationship cements into a binding

contract, the stability of that relationship takes precedence over business competition. Like parties to a prospective economic relationship, however, parties to at-will contracts have no legal assurance of future economic relations. The court reasoned that allowing interference with at-will contract claims without requiring independent wrongfulness risks chilling legitimate business competition. The court also resolved a second question certified by the Ninth Circuit, holding that contractual restraints on business operations or commercial dealings are subject to a reasonableness standard under Bus. and Prof. Code section 16600, and are not per se void. In so doing, the Court refused to extend its holding in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, which held a noncompetition agreement between a tax manager and his employer to be per se invalid, noting the rationale in that case "focused on policy considerations specific to employment mobility and competition."

Torts—Tortious Interference—Liability for Strangers to Contract Regardless of Economic Interest in Same

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503 (1994), the Supreme Court held that a party to a contract cannot be liable for conspiring to tortuously interfere with its own contract. Language from that decision has led to some confusion over whether a non-party who has a legitimate social or economic interest in the contract is similarly immune from liability for intentional interference with contract. "In a case of first impression in this district," the Fourth District, Division Three joined the majority of courts to hold that "a defendant who is not a party to the contract or an agent of a party to the contract is a noncontracting party or stranger to the contract and, regardless whether the defendant claims a social or economic interest in the contractual relationship, may be liable in tort for intentional interference with contract." *Caliber Paving Company, Inc. v. Rexford Industrial Realty and Management, Inc.*, 54 Cal.App.5th 175 (2020). The court, therefore, reversed a trial court order granting summary judgment to a nonparty defendant that had an economic interest in the contract.