No. S137238

In the Supreme Court of California

Keith Alan,
Plaintiff and Appellant,

vs.

American Honda Motor Co., Inc.,
Defendant and Respondent,

APPLICATION OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

On Review From A Published Opinion Dismissing Appeal
Second Appellate District, Division Three, No. B165756

Appeal From An Order Denying Motion For Class Certification
Los Angeles Superior Court, No. BC195461
Honorable Charles McCoy

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APPLICATION AND STATEMENT OF INTEREST OF AMICUS CURIAE (Cal. R. Ct. 29.2(c)(3))

The California Academy of Appellate Lawyers ("the Academy"), a statewide organization of experienced appellate practitioners, respectfully applies for leave to file the accompanying Amicus Curiae Brief. The Academy is familiar with the contents of the parties' briefs.

Issue Presented

An order denying certification of an "entire class" is an appealable order. *See Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 699 (1967); *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981). This case presents the issue of whether the two documents the trial court issued were sufficient to trigger the 60-day period during which a notice of appeal from such an order needed to be filed under California Rule of Court 2(a)(1). Those two documents were: (1) a filed-stamped document entitled "Statement of Decision" that also stated, on its last page, "Motion for Class Certification is denied" but that did not contain a certificate of mailing, and (2) a clerk's file-stamped certificate of mailing of a "Ruling On Submitted Matter/Motion For Class Certification" that indicated the issuance of the Statement of Decision.

Interest of Amici Curiae

The Academy is a non-profit, statewide organization of experienced appellate practitioners. Its members' common goals include

promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. It has participated as an amicus in many cases before this Court, including, most recently, *Walker v. Los Angeles Metropolitan Transit Authority*, 35 Cal.4th 15 (2005) and *People v. Pena*, 32 Cal. 4th 389 (2004).

The Academy has no interest in or connection to either party before the Court and no position as to which party should prevail. (One member of the Academy is a partner in the firm representing defendant, but he has played no part in the decision to file this amicus brief or in its preparation.) The Academy files this brief as a friend of the Court, out of concern about eliminating ambiguity with respect to the events that trigger the deadline for filing a notice of appeal under California Rule of Court 2(a)(1). Academy members regularly assess potential appeals, and they are familiar with a variety of problems that arise in situations similar to this case.

The Academy believes its views will assist the Court in resolving this case in a way that promotes judicial economy and fairness to all litigants. Therefore, the Academy respectfully requests leave to file the attached brief.

DATED: April 11, 2006.

Respectfully submitted,
CALIFORNIA ACADEMY OF
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AMICUS CURIAE BRIEF

I

INTRODUCTION

The members of the California Academy of Appellate Lawyers ("the Academy") are experienced appellate lawyers who regularly handle appeals for clients. They are often called upon to perfect appeals by filing notices of appeal and, in matters in which a notice has been filed, to evaluate whether the appeal has been perfected, including by the filing of a timely notice of appeal. They are therefore familiar with a variety of problems that arise in determining what trial court documents trigger the deadline for appealing under rule 2.

Although the Academy has no concern over which party prevails in this case, its members have a profound interest in the administration of appellate justice, and in particular in assuring that courts and litigants have a clear and uniform understanding of when a notice of appeal must be filed.

This amicus curiae brief points out problems that arise when litigants must guess whether trial court rulings are intended to be final and whether the documents the court files and serves trigger the time for filing a notice of appeal. The Academy will also discuss the policy issues that necessitate a clearer rule and will propose guidelines this Court might wish to adopt to eliminate current ambiguities.

II

THE COURT OF APPEAL'S HOLDING REQUIRES A WOULD-BE APPELLANT TO GUESS AT WHETHER THE TRIAL COURT INTENDED ITS RULING TO BE FINAL AND THEREFORE APPEALABLE

Rule 2(a) states that "a notice of appeal must be filed on or before the earliest of (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of Judgment or a file-stamped copy of the judgment, showing the date either was mailed." Rule 2(f) makes clear that a "judgment" includes an appealable order, and Rule 40(c) says that "'[j]udgment' includes any judgment or order that may be appealed".

A. The Court Of Appeal's Holding

By dismissing plaintiff's appeal as untimely, the Court of Appeal held that a minute order that was not file-stamped, but showed the date it was mailed, accompanied by a separate file-stamped document entitled "Statement of Decision" that did not show the date it was mailed but that also contained a ruling denying plaintiff's motion for class certification, an appealable order, together constituted sufficient notice to start the 60-day period running for filing a notice of appeal. (Opn. at 10) The Court of Appeal thus rejected plaintiff's argument that to constitute an appealable order there must be a single integrated document that complies with rule 2(a)(1). The Court of Appeal also rejected plaintiff's argument that a document bearing the title "Statement of Decision" cannot constitute an appealable order.

Instead, the Court of Appeal held that it is "established" that a document entitled "Statement of Decision" "may constitute an appealable order or judgment in appropriate circumstances." (Opn. at 10) It held this case presented an appropriate circumstance because the statement of decision "unambiguously indicate[d] that it was an order denying class certification." (*Id.*) The Court of Appeal pointed out that "the minute order clearly stated that the statement of decision was the ruling of the trial court" and "concluded with the sentence: 'Alan's Motion for Class Certification is denied.'" (*Id.*) To the Court of Appeal, the fact that the trial court signed and filed the statement of decision showed that the court "intended that document to be its final ruling on the plaintiff's motion for class certification." (*Id.*)

B. The Confusion That Persists

The Judicial Council amended rule 2(a) in 1990 to "eliminate potential confusion about what constitutes notice of entry of judgment sufficient to trigger the 60-day limit for notices of appeal." Judicial Council of Cal., Ann. Rep. at 66 (1990).[1] Nevertheless, confusion persists.

Plaintiff takes the position that rule 2's plain meaning is that before the 60-day period starts to run, there must be a "single document" that both states the appealable judgment or order and shows the date it

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[1] The 1990 amendment added the provision that the 60-day period for filing a notice of appeal begins when the clerk mails, or a party serves, a document entitled 'notice of entry' or a file-stamped copy of the judgment or appealable order. Before that, the rule provided that "a notice of appeal shall be filed within 60 days after the date of mailing of notice of entry of judgment," and did not refer to a file-stamped copy.

was mailed. Defendant, on the other hand, believes that by referring to a document "showing" the date of mailing, rule 2 did not intend the "showing" to be restricted to a certificate of mailing or proof of service; rather, that "showing" may be accomplished by two documents read together—here, the statement of decision (with its imbedded ruling denying the motion for class certification) and the certificate of mailing of the "Ruling On Submitted Matter/Motion For Class Certification."

The problem with both parties' approaches is that the documents do not fall into either category specified by revised rule 2. There was no document entitled "Notice of Entry of Order." Nor was there a file-stamped copy of a judgment or order, unless one takes the extra step of holding that a document entitled "Statement of Decision" constitutes an "order" because it contained within it the statement, "Motion for Class Certification is Denied."

The Court of Appeal cited three cases for the proposition that a document labeled a "memorandum of decision," a "statement of decision," or a "Decision," may constitute appealable orders sufficient to trigger the notice of appeal clock. (Opn. at 10, citing *MHC Financing Limited Partnership Two v. City of Santee*, 125 Cal. App. 4th 1372, 1392 (2005); *Native Sun/Lyon Communities v. City of Escondido*, 15 Cal. App. 4th 892, 896, n. 1 (1993); *Estate of Lock*, 122 Cal. App. 3d 892, 897 (1981)) But a lawyer reading the relevant rules and statutes would be misled.

Rule 232(c) suggests that a statement of decision is distinct from a judgment:

> If a statement of decision is requested, the court shall . . . prepare and mail a proposed statement of decision *and a proposed judgment* to all parties . . . A party who has been designated or notified to prepare the statement shall . . . prepare, serve and submit to the court a proposed statement of decision *and a proposed judgment*. If the proposed statement of decision *and judgment* are not served and submitted within that time, any other party who appeared at the trial may: (1) prepare, serve and submit to the court a proposed statement of decision *and judgment* . . . . (Emph. added)

Likewise, Code of Civil Procedure section 664 calls for a separate document containing the appealable ruling to issue after a statement of decision. In relevant part, section 664 states:

> If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until entered.

There would be no need to enter a judgment "immediately upon the filing" of a "decision" if the "decision" also served as the "judgment" from which an appeal could be taken. Indeed, section 664 appears to contemplate judgment in a separate document—or, at a minimum, a document that indicates the "decision" has been combined with the "judgment."

The problem with the "substance over form" approach is that it forces litigants to guess whether the trial court intended its statement of constitute a final, appealable ruling, or intended to file a formal judgment or order later. And the problem is not limited to statements of decision that contain possibly dispositive language. It frequently arises in other circumstances, such as orders granting summary judgment and sustaining demurrers without leave to amend. A long line of cases says that such orders are not appealable and that an appeal lies only from a subsequent judgment. *See Allabach v. Santa Clara County Fair Assn.*, 6 Cal. App. 4th 1007, 1010 (1996); *Modica v. Merin,* 234 Cal. App. 3d 1072, 1075 (1991). *See also*, *Hill v. City of Long Beach,* 33 Cal. App. 4th 1684, 1696 (1995); *Saben, Earlix & Associates v. Fillet,* 134 Cal. App. 4th 1024, 1031 (2005) (timing of motion for attorney fees). Yet orders such as one entitled "Order Granting Summary Judgment" often contain language like, "Therefore, plaintiff shall take nothing by his complaint" or "Judgment is hereby entered." Under the Court of Appeal's "substance over form" approach, because such orders include judgment-type language that could be interpreted as the court having entered judgment, a party might be required to file a notice of appeal from the order to eliminate the risk of foregoing his or her appeal. That uncertainty—and an unnecessary expenditure of private and public resources in perfecting an appeal—should be avoided.

Not all appellate courts, moreover, follow this approach. For example, in *In re Marriage of Taschen*, 134 Cal. App. 4th 681, 686 (2005), the court entered a minute order granting a stay on grounds of inconvenient forum; such an order is appealable under Code of Civil

Procedure section 917.1(a)(3). The order showed the clerk had entered it in the minutes, but it was not file-stamped. *Id.* The losing husband filed a notice of appeal, but not by the 60th day following the service of [notice of] that order. *Id.* at 685-86. The Court of Appeal declined to dismiss the appeal, noting that "minute orders are virtually never file stamped"; accordingly even though the order contained the clerk's notation that it had been entered, because it lacked a file stamp it did not trigger Rule 2's 60-day deadline.

Even more recently, in *Sunset Millenium Associates, LLC v. Le Songe, LLC,* __ Cal.App.4th __(No. B188995, Apr. 5, 2006), the Court of Appeal denied a motion to dismiss an appeal filed 92 days after the entry of an appealable order granting a special motion to strike on the ground that the order was contained in a minute order headed "Nature of Proceedings." The words "Clerk's Certificate of Mailing/ [¶] Notice of Entry of Order" appeared on page 13 of the 14-page minute order. The Court of Appeal pointed out that this language "does not comply with the literal requirement [of rule 2] that the document providing notice of entry be so *entitled*" (emphasis by the court), but commented that "if the notice of entry language appeared on page 1 of a separate document . . . the result would potentially be different" (Slip opn. at 5)

The Academy submits that the right to appeal should not turn on such happenstance.

III

A FEW PROPOSED SOLUTIONS

To protect against inadvertent lapse of appeal time, when it is unclear whether the trial court intended a document to be the dispositive ruling in a case, experienced appellate practitioners often file protective notices of appeal that turn out to be premature. This is wasteful because it potentially entails duplicate filings and filing fees, extra paperwork for courts, and extra attorney time—and therefore added cost to clients.

Unfortunately, less experienced lawyers may not realize the need to file a notice of appeal from a seemingly nonappealable statement of decision or order granting summary judgment. By inadvertence, they may end up sacrificing their clients' right to appeal, perhaps spawning new litigation in the form of a malpractice lawsuit. And in cases where the time for filing the appeal is not clear-cut, the parties may be forced to litigate that issue in the context of a motion to dismiss the appeal, consuming further public and private resources.

Public policy is not served by any of these possible scenarios. The Academy submits that there should be a clear and simple way to know whether and when the appellate clock has started to tick. And that "start" should not depend on a trial court's unstated intention that what did not look like an appealable order *was* an appealable order, or an appellate court's *post hoc* interpretation of what the trial court's intention was in that regard. Even requiring that there be a single integrated document to start the appeal time running is not a satisfactory

solution unless it is apparent to all that the particular document is the one that triggers the notice of appeal deadline.

Instead, there should be a method to reliably identify the document that triggers the deadline for filing a notice of appeal.

The Court should therefore move away from a "substance over form" approach and craft a rule that works for trial courts, trial lawyers, appellate courts, and appellate lawyers. It should articulate a rule that decreases reliance on interpretation by requiring that documents deemed to start the clock for filing notices of appeal meet specific criteria.

A. Require Trial Courts To Enter A Judgment Or Appealable Order In A "Separate Document"

One suggestion would be to hold that a trial court must enter an appealable order or judgment on a separate document. This is what the federal courts have done in Federal Rule of Civil Procedure 58. That rule requires that "[e]very judgment and amended judgment must be set forth on a separate document" except for orders on five specified kinds of motions.[2] Rule 58 also specifies that "entry" occurs when the order or

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[2] Federal Rule of Civil Procedure 58 states in relevant part:

(a) Separate Document.
(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:
(A) for judgment under Rule 50(b);
(B) to amend or make additional findings of fact under Rule 52(b);
(C) for attorney fees under Rule 54;

judgment is entered on the court's docket rather than served or mailed. And Federal Rule of Appellate Procedure 4(a)(1) fixes the time for filing a notice of appeal at 30 days after the entry of the judgment or appealable order (with exceptions if a party has made certain post-judgment motions), but specifies that the judgment or order is not considered "entered" within the meaning of that rule unless it complies with FRCP 58's "separate document" requirement.

As the United States Supreme Court has indicated, "[the separate document] rule is designed to simplify and make certain the matter of appealability . . . ." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978) (quoting 9 J. Moore, Federal Practice § 110.08[2], 120 n. 7 (1970)). The Ninth Circuit recently echoed that view, stating that the separate judgment requirement helps parties and courts "know exactly when the judgment has been entered" and when the posttrial motion or notice-of-appeal period commences. *ABF Capital Corp. v. Osley*, 414 F.3d 1061, 1065 (9th Cir. 2005).

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or
(E) for relief under Rule 60.

. . . .

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or
(B) when 150 days have run from entry in the civil docket under Rule 79(a). . . .

A separate judgment (or order) requirement in California would greatly aid parties and courts in establishing certainty as to when an appealable order or judgment as been "entered" and the notice-of-appeal period commences. And because "entry" is a term within the Judicial Council's purview to define—as rule 2(d) shows[3]—the Judicial Council could promulgate a rule like Federal Rule of Civil Procedure 58 to ensure uniformity and provide certainty concerning the commencement of the notice-of-appeal period.

B. Require That A Document Be Entitled "Judgment" Or "Order"

A further protection for would-be appellants would be a requirement that to start the time for appeal running, the document title should state that it is a "Judgment" or an "Order." That would protect against unintentional language in a statement of decision or minute order that the trial court did not intend as its final—and appealable—ruling on the matter in question.

C. Require Any Certificate Of Mailing To Disclose The Mailing Of A Judgment Or Appealable Order

Another suggestion has to do with the certificate of mailing. If a superior court clerk serves notice of a document whose title does not disclose that the court has entered an appealable order or judgment—such as the Statement of Decision here—the time for appeal should not

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[3] Rule 2(d) defines "entry" for purposes of a judgment (rule 2(d)(1)) and an appealable order (rule 2(d)(2)).

start to run unless the clerk's notice identifies any judgment or appealable order contained within the document being served.

For example, a notice of entry of a statement of decision would not constitute notice of entry of an order denying class certification unless the notice specifically identified that such an order was included in the statement of decision. Requiring specificity in the notice of mailing would provide certainty that the clerk is serving notice of a judgment or appealable order rather than some other document, the contents of which must be parsed to determine whether the notice-of-appeal clock has started to run.

IV

CONCLUSION

Litigants should not unwittingly lose their right to appeal. Being asleep at the switch is one thing, but being legitimately confused is another. No rule can capture all the vagaries of litigation, but the Court should not let desire for perfection drive out the good. Whatever result the Court reaches in this case, it should be one that minimizes doubt about when the time for appeal begins to run.

DATED: April 11, 2006.

Respectfully submitted,

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WORD COUNT CERTIFICATE

This brief consists of 3,525 words (including footnotes but excluding this certificate and the tables) as counted by the Word 2003 word processing program used to generate this brief.

Dated: 4/11/06

Wendy Cole Lascher (pt)
Wendy Cole Lascher

PROOF OF SERVICE

Keith Alan v. American Honda Motor Co., Inc.

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, Two Embarcadero Center, Suite 2000, San Francisco, CA 94111-3922. On **April 12, 2006**, I served the following document(s) by the method indicated below:

APPLICATION OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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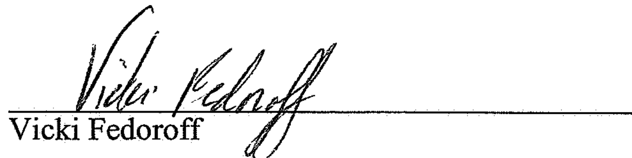
I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on **April 12, 2006**, at San Francisco, California.



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