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April 12, 2004

Via Federal Express

Honorable Ronald M. George, Chief Justice of California
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Walker v. Los Angeles County Metropolitan Transportation Authority; Case No. S123853*

Dear Chief Justice George and Associate Justices:

The California Academy of Appellate Lawyers, a nonprofit statewide organization of experienced appellate practitioners, writes to urge this court to grant plaintiff Renee Walker's petition for review. Academy members' common goals include promoting and encouraging sound appellate procedures designed to ensure fair and effective disposition of cases at the appellate level. This case, involving as it does the gateway to the court of appeal, is just the type of case in which Academy members have an interest. In urging review, however, the Academy does not at this time take a position how this court should decide the issue presented.

The issue, quite simply, is whether a notice of appeal that erroneously specifies that it has been taken from a nonappealable order denying a motion for new trial, should be deemed to have been taken from the underlying appealable judgment. The court of appeal, finding nothing ambiguous about the notice of appeal, declined to invoke rule 1(a)(2)'s admonition that the notice of appeal should be "liberally construed," because in the court's opinion, there was nothing to construe. [Typed Op'n at 4-5.]

The Academy urges this court to grant review because the opinion creates mischief in three ways.

First, it relies on cases that do not address the issue presented here, but rather the issue of whether an order denying a new trial is appealable at all. These cases for the most part arise in the context of an appeal from *both* the judgment and the order denying new trial, so that the appeal proceeds as

a matter of course without any need to construe the notice. *Rodriquez v. Barnett* (1959) 52 Cal.2d 154, 156; *Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1151 n.1; *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 726 n.2; *Jones v. Sieve* (1988) 203 Cal.App.3d 359, 363 n.2; *Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 749. In one case, defendants did not appeal from the judgment, and this court dismissed their purported appeal from the order denying a new trial without being asked to construe the notice of appeal as being from the judgment. *Hamasaki v. Flotho* (1952) 39 Cal.2d 602, 608. In *Hamasaki*, however, defendants also appealed from an order granting a partial new trial, and this court did consider that appeal on the merits.

Second, the opinion creates an express conflict with other cases it cites. The court dismisses as an "anomaly" *Shonkoff v. Dant Investment Co.* (1968) 258 Cal.App.2d 101. In that case, the court construed a notice of appeal specifying that the appeal was taken—as here—solely from the order denying a new trial, "to constitute an appeal from the judgment." 258 Cal.App.2d at 103.

Citing *Rodriquez*, the court also declines to follow *Tillery v. Richland* (1984) 158 Cal.App.3d 957, and *LaCount v. Hensel Phelps Constr. Co.* (1978) 79 Cal.App.3d 754, both of which treat a notice of appeal from an order denying a new trial motion as an appeal from the judgment. *Tillery*, 158 Cal.App.3d at 962; *LaCount*, 79 Cal.App.3d at 761 n.3. But as already stated, *Rodriquez* says nothing about construing a notice of appeal; it simply dismisses an appeal from an order denying a new trial, while at the same time hearing on the merits an appeal from the judgment. Since *Rodriquez* did not discuss construing a notice of appeal, it is hard to see how it is "binding" and "controlling" as the court of appeal states. [Typed Op'n at 5, 8.] *See Styne v. Stevens* (2001) 26 Cal.4th 42, 57 ("An opinion is not authority for a point not raised, considered, or resolved therein.").

The one case the court of appeal discusses at length, *Wilbur v. Cull* (1954) 127 Cal.App.2d 655, holds that a notice and demand for transcripts can be construed as a notice of appeal from the judgment. 127 Cal.App.2d at 657. *Wilbur's* statement that it would not construe a notice of appeal specifying an order denying a new trial as being from a judgment, is therefore dictum, since the court decided the case on another ground.

Third, besides creating an express conflict, the opinion creates an implied one as well, by failing to cite, discuss, or distinguish this court's opinion in *Vibert v. Berger* (1966) 64 Cal.2d 65. In *Vibert*, plaintiff appealed from a nonappealable order sustaining a demurrer without leave to amend, not realizing a judgment of dismissal had been entered. Much later, plaintiff filed a notice of appeal from the judgment, but that notice of appeal was indisputably untimely. This court stated the rule that notices of appeal should be construed "'so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.'" 64 Cal.2d at 68, quoting *Luz v.*

Lopes (1960) 55 Cal.2d 54, 59-60.

Based on this rule, this court in *Vibert* allowed the appeal to go forward even though the timely first notice of appeal did not properly describe the appeal as being taken from the judgment of dismissal, but instead said that it was taken from a (nonappealable) order sustaining a demurrer without leave to amend. *See Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 669 ("*Vibert* is simply one example of the application of the general and well-established rule that a notice of appeal which specifies a nonappealable order but is timely with respect to an existing appealable order or judgment will be deemed to apply to the latter judgment or order."); *Lolli v. County of Orange* (9th Cir. 2003) 351 F.3d 410, 414 ("When, as here, a party seeks to argue the merits of an order that does not appear on the face of the notice of appeal, we generally consider two factors: (1) whether 'the intent to appeal a specific judgment can be fairly inferred' and (2) whether 'the appellee [was] prejudiced by the mistake.'").

The Academy does not take a position *how* this court should ultimately decide the issue presented. But in light of the conflict raised by this opinion, and the indisputable importance of a proper notice of appeal to vest jurisdiction in the court of appeal, this court should grant review to bring consistency to this important area of the law.

Respectfully submitted,

CALIFORNIA ACADEMY OF APPELLATE LAWYERS

Richard A. Derevan

cc: James C. Martin, Esq.
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Service list on proof of service

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 1920 Main Street, Suite 1200, Irvine, California 92614-7230.

On April 12, 2004, I served, in the manner indicated below, the foregoing document described as **Amicus Letter to Honorable Ronald M. George and Associate Justices, Supreme Court of the State of California, dated April 12, 2004,** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Irvine, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Irvine, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)) as indicated on service list.

☐ BY FACSIMILE: (C.C.P. § 1013(e)(f)) as indicated on service list.

☐ BY FEDERAL EXPRESS OR EXPRESS MAIL: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees as indicated on the attached service list. (C.C.P. § 1013(c)(d)).

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)) as indicated on service list.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 12, 2004, at Irvine, California.

Sandy Cairelli

Sandy Cairelli

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For delivery to:
Honorable Morris B. Jones