No. S123853

In the Supreme Court of the State of California

Renee Walker,

Plaintiff and Appellant,

v.

Los Angeles County Metropolitan Transportation Authority, *et al.*,

Defendants and Respondents.

On Review of a decision of the California Court of Appeal
Second Appellate District, Division Three, Case No. B156420

Los Angeles County Superior Court Case No. BC199069
Honorable Morris B. Jones, Judge Presiding

Application of California Academy of Appellate Lawyers For Leave to File Amicus Curiae Brief; Amicus Curiae Brief

---

Michael M. Berger (#43228)
Jay-Allen Eisen (#42788)
Dennis A. Fischer (#37906)
Robert S. Gerstein (#35941)
Wendy Lascher (#58648)
Steven L. Mayer (#62030)
Richard Sherman (#62762)

SNELL & WILMER L.L.P.
Richard A. Derevan (#60960)
1920 Main Street, Suite 1200
Irvine, California 92614-7060
(949) 253-2700
Email: rderevan@swlaw.com

Attorneys for the Amicus Curiae,
The California Academy of Appellate Lawyers

Table of Contents

Table of Authorities

Page

Cases

Statutes

Rules

Application of California Academy of Appellate Lawyers For Leave to File Amicus Curiae Brief

To the Honorable Ronald M. George, Chief Justice of California, and to the Honorable Associate Justices of the California Supreme Court:

Pursuant to rule 29.1(f) of the California Rules of Court, the California Academy of Appellate Lawyers, a nonprofit statewide organization of approximately 100 experienced appellate practitioners, applies for leave to file an amicus curiae brief. Academy members' common goals include advocating sound procedures designed to promote fair consideration and effective disposition of cases at the appellate level. To that end, the Academy has appeared as amicus in other cases decided by this court. *People v. Pena* (2004) 32 Cal.4th 389; *In re Rosenkrantz* (2002) 29 Cal.4th 616; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232.

The issue in this case is whether a notice of appeal which specifies that the appeal has been taken from a nonappealable order denying a new trial can be construed to have been taken from the underlying appealable judgment. The Academy has read the parties' briefs filed in this court and is familiar with the issues presented. The Academy believes that its brief will assist this court by bringing to the court's attention the perspective of experienced appellate practitioners and by proposing a test for determining when a notice of appeal should be construed to apply to an appealable order or judgment not specified in the notice.

The Academy therefore requests that its application to file an amicus curiae brief be granted.

Dated: November 29, 2004

Michael M. Berger
Jay-Allen Eisen
Dennis A. Fischer
Robert S. Gerstein
Wendy Lascher
Steven L. Mayer
Richard Sherman

and

SNELL & WILMER L.L.P.
Richard A. Derevan

By: Richard A Dere
Richard A. Derevan

Attorneys for the Amicus Curiae, the California Academy of Appellate Lawyers

Amicus Curiae Brief of the California Academy of Appellate Lawyers

Introduction

The Academy's view—echoing the rules of court—is that a notice of appeal should be read liberally, not literally. Consistent with this approach, even if a notice of appeal does not explicitly state that it is from a specific appealable judgment or order, the reviewing court should hear the appeal on its merits if: (i) the court can reasonably infer that the party seeks to appeal from a specific appealable order or judgment; (ii) the responding party is not prejudiced by the misdescription; and (iii) the appeal would be timely if the appealable judgment or order had been specified.

Legal Discussion

The filing of a notice of appeal is a jurisdictional event. "The first step, taking of the appeal, is not merely a procedural one; it vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court." *Estate of Hanley* (1943) 23 Cal.2d 120, 123 (because filing notice of appeal is a jurisdictional event, "[i]n strictly adhering to the statutory time for filing a notice of appeal, the courts are not arbitrarily penalizing procedural missteps."). For that reason, the time to file a notice of appeal may not be extended, and if it is not timely, the appeal must be dismissed. Cal. Rules of Court, rules 2(e), 45(c). *See Estate of Hanley, supra,* 23 Cal.2d at 122 ("[T]he requirement as to the time for taking an appeal is mandatory, and the court is without jurisdiction to consider one which has been taken subsequent to the expiration of the statutory period."); *Hollister Convalescent Hosp. v. Rico* (1975) 15 Cal.3d 660, 666 (affirming rule of *Hanley*). This is undeniably a harsh rule.

Once a notice of appeal has been filed, however, courts are authorized to relieve a party from "procedural missteps." *Hollister Convalescent Hosp., supra,* 15 Cal.3d at 666. Such relief can be as simple as relieving a party of "excusable delay in complying with the many provisions in the statutes and rules on appeal . . . ." *Id.* The rules themselves provide safeguards against some procedural missteps. *E.g.,* Cal. Rules of Court, rule 1(a)(3) (failure to serve notice of appeal does not affect its validity); rule 1(b)(3) (clerk must file notice of appeal even if fee not tendered); rule 2(d) (premature notice of appeal is valid).

In determining whether to grant relief for procedural missteps not expressly dealt with by the rules, courts emphasize the fundamental California policy of deciding cases on their merits. As this court has said, "The policy of appellate courts [should be] to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technical grounds." *In re Parker* (1968) 68 Cal.2d 756, 760 (quoting *In re Martin* (1962) 58 Cal.2d 133, 139 (internal quotation marks and citation omitted)). *Accord, e.g., Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853-54; *Warmington Old Town Assocs., L.P. v. Tustin Unified Sch. Dist.* (2002) 101 Cal.App.4th 840, 849.

This court itself has emphasized that this policy favoring disposition on the merits is not unique to appeals, but runs throughout California law. "It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand." *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478. This state policy is manifested in numerous cases in a variety of situations. *E.g., Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111-12 (discovery rule delaying accrual of statute of limitations is "fully consistent with the policy

of deciding cases on the merits"); *Shamblin*, *supra*, 44 Cal.3d at 478 (when a party moves promptly to seek relief from default, very slight evidence is required to justify an order setting it aside); *Bettencourt v. Los Rios Community Coll.* (1986) 42 Cal.3d 270, 276 ("The policy favoring trial on the merits is the primary policy underlying [Government Code] section 946.6," which authorizes relief from the claims presentation statute); *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 (any doubts in applying section 473 of the Code of Civil Procedure must be resolved in favor of the party seeking relief "because the law strongly favors trial and disposition on the merits"); *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1131 (where there is a reasonable possibility of amending to cure defects, it is an abuse of discretion to sustain a demurrer without leave to amend, and a plaintiff may demonstrate a viable amendment on appeal); *Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 549 (1985) ("courts should always 'exercise their discretion and relieve the attorney from tardy opposition filings when his conduct [has been] reasonable . . . .'"); *Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32-33 (court abuses its discretion in failing to read and consider late filed declaration).

Here, petitioner Renee Walker filed a timely notice of appeal.[1] She made a "procedural misstep" in failing to state in her notice of appeal that she was appealing from the judgment, instead stating that she was

---

[1] Following service of notice of entry of judgment on November 13, 2001, Walker timely filed a notice of intent to move for new trial on November 28, 2001. Code Civ. Proc. § 659, subd. 2. [CT 280, 297, 345, 348.] Although its proof of service does not appear to be in the record, the notice of ruling on the new trial motion is dated January 4, 2002. [CT 370.] Presuming the notice of ruling was served no earlier than its date, Walker's notice of appeal, filed February 4, 2002 (a Monday), was timely. [CT 371.] Cal. Rules of Court, rule 3; Code Civ. Proc. §§ 12, 12a.

appealing from the denial of her new trial motion—a nonappealable order.[2] The issue presented is whether this is a procedural misstep from which this court should grant relief.

The Academy starts with the proposition that the rules on appeal protect against the rigidity of *Hanley* by stating that a notice of appeal "must be liberally construed." Cal. Rules of Court, rule 1(a)(2).

Consistent with this rule of liberal construction, this court in 1966 held that, even if an appealable order or judgment is not specified in the notice of appeal, the notice should "be interpreted to apply to an existing appealable order or judgment, if no prejudice would accrue to the respondent." *Vibert v. Berger* (1966) 64 Cal.2d 65, 67-68. The *Vibert* opinion continued: "[N]otices of appeal referring to an 'order' have been interpreted to apply to a 'judgment,' and those referring to a 'judgment' to apply to an 'order,' '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.'" *Id.* at 68 (quoting *Luz v. Lopes* (1960) 55 Cal.2d 54, 59-60).

California is not alone in construing notices of appeal to promote the goal of deciding cases on their merits. In the Ninth Circuit, "[w]here 'a party seeks to argue the merits of an order that does not appear on the face of the notice of appeal,' [the court looks to] (1) whether the intent to appeal a specific judgment can be fairly inferred, and (2) whether the appellee was prejudiced by the mistake." *Shapiro ex rel. Shapiro v. Paradise Valley*

---

[2] Although denials of new trial orders are not appealable, they are reviewable on appeal from the judgment. *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 37 n.1.

Unified Sch. Dist. No. 69 (9th Cir. 2004) 374 F.3d 857, 863 (quoting *Lolli v. County of Orange* (9th Cir. 2003) 351 F.3d 410, 414).

A few examples of how these rules are applied may be instructive. In *Vibert*, where the appellant appealed from a nonappealable order sustaining a demurrer without leave to amend, rather than the judgment of dismissal that already had been entered, this court allowed the appeal to go forward because it was clear what the appellant was trying to appeal and no prejudice accrued to respondent:

> But by incorrectly stating that he was appealing from the order instead of from the judgment, he should not be precluded from securing a review of what all concerned knew he was seeking to have reviewed. No one was misled. No prejudice to the respondent appears. Respondent is simply trying to take advantage of a mistake made by appellant.

Vibert, 64 Cal.2d at 68-69 (emphasis omitted).

Indeed, at least three court of appeal decisions have construed an appeal from the denial of a new trial order to be from the judgment. *Tillery v. Richmond* (1984) 158 Cal.App.3d 957, 962; *LaCount v. Hensel Phillips Constr. Co.* (1978) 79 Cal.App.3d 754, 761 n.3; *Shonkoff v. Dant Inv. Co.* (1968) 258 Cal.App.2d 101. *See also, e.g., Norco Delivery Serv., Inc. v. Owens-Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 960-961 (construing a notice of appeal from an order denying a motion challenging a good faith settlement as an appeal from the order granting a good faith settlement determination); *Helfer v. Hubert* (1962) 208 Cal.App.2d 22, 24-25 (construing a notice of appeal from an order granting summary judgment as appeal from the judgment).

Courts have been less forgiving where the notice of appeal explicitly specifies that the appeal is from only a particular part of a judgment, but the appellant nevertheless seeks to raise on appeal issues pertaining to a different portion of the judgment. *E.g., Glassco v. El Sereno Country Club, Inc.* (1932) 217 Cal. 90, 91-92 (notice of appeal gave "clear and unmistakable" description of portion of judgment from which appeal was taken); *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 625 (same). The same is true where the issue the appellant seeks to raise on appeal is not somehow related to the order or judgment specified in the notice. *Norman I. Krug Real Estate Invs., Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46-47 (notice of appeal from judgment could not be construed to be from separately appealable postjudgment attorneys' fee order).

Although the courts in these examples reached contrary conclusions whether the appeal should be allowed, the Academy suggests that the two lines of cases are not conflicting. Instead, they can be reconciled under the rule that the Academy sets out in the introduction. In those cases where the appeal was permitted to proceed, the court could logically infer what it was the appellant sought to have reviewed. *See* Evid. Code § 600(b). Where the notice refers to an order denying a new trial, it can be inferred that the appellant seeks to overturn the judgment. In the cases where the court did not allow the appeal to proceed, the court had no logical basis for making such an inference because of the lack of a similar connection between the order or part of the judgment specified in the notice of appeal and the matter the party sought to raise on appeal.

Allowing appeals to proceed where there is a logical basis for determining what it is the appellant seeks to have reviewed, and where no legal prejudice will accrue to the respondent, will advance the California

policy favoring a disposition on the merits. In addition, given the sometimes arcane nature of appellate rules and the fact that most lawyers who handle appeals are not specialists, a rule that avoids what could be seen as arbitrary dismissals will engender public confidence that the courts fairly consider the matters before them. Finally, adopting such a rule will assure the public that the error-correction role of the courts of appeal is accessible.

Conclusion

To protect the right of appeal and to be consistent with California's strong public policy that cases should be heard on their merits, this court should adopt the rule set forth the in the introduction to this brief.

Dated: November 29, 2004

Michael M. Berger
Jay-Allen Eisen
Dennis A. Fischer
Robert S. Gerstein
Wendy Lascher
Steven L. Mayer
Richard Sherman

and

SNELL & WILMER L.L.P.
Richard A. Derevan

By: Richard A. Derevan

Richard A. Derevan

Attorneys for the Amicus Curiae, the California Academy of Appellate Lawyers

Certificate of Compliance Under Rule 29.1

The undersigned certify under rule 29.1(c) that pursuant to the word count feature of the word processing program used to prepare this brief, that it contains 1,992 words, exclusive of the matters that may be omitted under rule 29.1(c)(3).

Dated: November 29, 2004

Michael M. Berger
Jay-Allen Eisen
Dennis A. Fischer
Robert S. Gerstein
Wendy Lascher
Steven L. Mayer
Richard Sherman

and

SNELL & WILMER L.L.P.
Richard A. Derevan

By: Richard A Derevan
Richard A. Derevan

Attorneys for the Amicus Curiae, the California Academy of Appellate Lawyers

Derevar\IRV\395608.2

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 November 29, 2004, I served, in the manner indicated below, the foregoing document described as **Application of California Academy of Appellate Lawyers For Leave to File Amicus Curiae Brief; Amicus Curiae Brief** 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)).

☐ BY FACSIMILE: (C.C.P. § 1013(e)(f)).

☐ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (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)).

****

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

Executed on November 29, 2004, at Irvine, California.

Sandy Cairelli

Sandy Cairelli

Service List

Richard L. Knickerbocker, Esq.
Knickerbocker Law Corporation, PC
233 Wilshire Boulevard, Suite 400
Los Angeles, California 90401
Tel: 310-314-1600

Attorneys for Plaintiff and Appellant, Renee Walker

David D. Lawrence, Esq.
Paul B. Beach, Esq.
Franscell, Strickland, Roberts & Lawrence, APC
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Tel: 818-545-1925

Attorneys for Defendant and Respondent, Los Angeles County Metropolitan Transportation Authority

Clerk
Court of Appeal
Second Appellate District, Division Three
300 S. Spring Street, Second Floor
Los Angeles, California 90013

Clerk
Superior Court of the State of California
For the County of Los Angeles
111 N. Hill Street
Los Angeles, California 90012

For delivery to:
Hon. Morris B. Jones