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February 20, 2008

Honorable Ronald M. George, Chief Justice
and the Associate Justices

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Phan v. Nguyen*, No. S160002
Petition For Review filed January 31, 2008

To the Chief Justice and the Associate Justices of the California
Supreme Court:

The California Academy of Appellate Lawyers urges the
Court to grant the petition for review in the above-referenced case.

The California Academy of Appellate lawyers is a non-
profit elective organization of experienced appellate practitioners.
Its 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 amicus curiae in many cases
before this Court, including, most recently, *Silverbrand v. County
of Los Angeles*, No. S143929 (not yet argued) and *Alan v.
American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894.¹

This appeal is from an order granting a partial judgment
notwithstanding the verdict (JNOV) on liability and granting a new
trial limited to damages, after a defense verdict.² The Court of

¹ Petitioner's counsel Rita Gunaserkaran is a member of the California
Academy of Appellate Lawyers but has not been involved in the
decision to submit this letter or in its drafting.

² The answer to the petition argues that the trial court did not grant the
new trial motion (Answer p. 1), but the trial court's minute order plainly
states "[m]otion for new trial granted as to damages only," and the Court
of Appeal's opinion describes the trial court's subsequent signed order
as "granting the motion for JNOV on liability and granting a new trial as
to damages only" (Opn. p. 3).

Appeal dismissed the appeal, concluding that “the order granting JNOV and a new trial on damages is not appealable.” (Opn. p. 1.) In reaching that conclusion, the Court of Appeal relied on the following language in *Cobb v. University of So. California* (1996) 45 Cal.App.4th 1140, 1146 (*Cobb II*): “[W]hen a trial court grants JNOV and a new trial motion as to the same cause of action, the latter is reviewable only after entry of a final judgment in the action.”

That statement in *Cobb II*, while superficially correct, can be misleading when taken out of the context of that case, where the trial court granted both JNOV and a new trial as to a cause of action *in its entirety*. (See *Cobb II, supra*, 45 Cal.App.4th at p. 1145, fn. 4 [“USC sought, and the court granted, a JNOV or, in the alternative, a new trial, as to Cobb’s entire contract cause of action”].) *Cobb II* explained that because the new trial order was effective only upon reversal of the JNOV (see Code Civ. Pro., § 629), the new trial order “is subject to a condition precedent which has not yet occurred,” and thus the order “is not ripe for appeal.” (*Cobb II, supra*, at p. 1146.) That was true in *Cobb II* because the grant of JNOV and a new trial pertained to the cause of action *in its entirety*, which meant there would be no new trial absent reversal of the JNOV. In that context, there cannot be a JNOV and a new trial simultaneously. The new trial order is contingent on reversal of the JNOV.

The situation is different in the present case, where the trial court granted a *partial* JNOV as to liability and a *partial* new trial as to damages, addressing two completely different elements of a single cause of action. In this situation, there *can* be a JNOV and a new trial simultaneously: Liability is established by the JNOV, and the case proceeds to a new trial on damages. Here, the partial new trial order, unlike in *Cobb II*, is *not* contingent on reversal of the JNOV – which means, according to the reasoning in *Cobb II*, the new trial order *is* ripe for appeal.

Thus, there is a latent ambiguity in *Cobb II*’s statement that “when a trial court grants JNOV and a new trial motion as to the same cause of action, the latter is reviewable only after entry of a final judgment in the action.” (*Cobb II, supra*, 45 Cal.App.4th at 1146.) The statement is properly understood in context as referring only to situations where a trial court grants JNOV and a new trial motion as to the same cause of action *in its entirety* – and not where, as here, a trial court grants a partial JNOV and a partial new trial on different elements of a cause of action. The present case demonstrates that *Cobb II* is susceptible to being misunderstood and misapplied.

Another recent case further demonstrates that the latent ambiguity in *Cobb II* has resulted in conflicting decisions by the Courts of Appeal on identical procedural facts. In *Espino v. White Consolidated Industries, Inc.*, No. B164479 (Sept. 27, 2004), 2004 WL 2152343 – where, as here, the trial court granted a partial JNOV and a partial new trial on

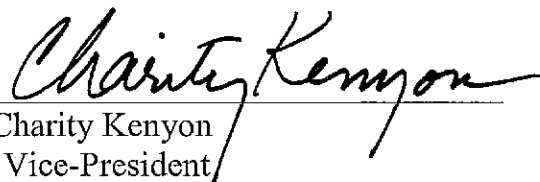
different elements of a single cause of action -- the Court of Appeal held that the order granting a partial new trial *was* appealable, distinguishing that case from *Cobb II* because “the order appealed from is one granting a *partial* new trial as to that cause of action.” (*Id.* at *4, fn. 3, italics added.) That holding is in direct conflict with the Court of Appeal’s decision in the present case.³

Cobb II’s latent ambiguity creates a potential trap for litigants where a trial court grants a partial JNOV and a partial new trial on different elements of a single cause of action: If a litigant interprets *Cobb II* as did the Court of Appeal in the present case and does not immediately appeal the partial new trial order, the right of appellate review will be irrevocably lost if, on a later appeal, the appellate court interprets *Cobb II* differently as did the Court of Appeal in *Espino* and concludes that the order was immediately appealable and thus appellate review was waived.

Rules of appealability should be sufficiently clear to prevent inadvertent waiver of appellate review. This case demonstrates a need for this Court to help prevent such inadvertent waiver in the present procedural posture by addressing the latent ambiguity in *Cobb II* and clarifying whether, upon an order granting a partial JNOV and a partial new trial on different elements of a single cause of action, the partial new trial order is or is not appealable.

Respectfully submitted,

Jon B. Eisenberg
Charity Kenyon



By: Charity Kenyon
First Vice-President
Chair, Amicus Committee

³ We discuss the unpublished *Espino* opinion not in reliance on it (see Cal. Rules of Court, rule 8.1115(a)) but only to demonstrate its conflict with the Court of Appeal’s decision here. (See *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219.)

PROOF OF SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the above-titled action; my business address is 3400 Cottage Way, Suite K, Sacramento, California 95825.

On February 20, 2008, I served a true copy of the foregoing document in the above-captioned matter on each of the persons listed below by United States mail at Sacramento, California addressed as follows:

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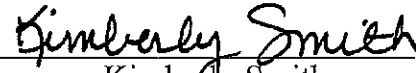
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I certify under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed on February 20, 2008, at Sacramento, California.



Kimberly Smith