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CALIFORNIA ACADEMY OF APPELLATE LAWYERS

March 13, 2020

Hon. Peter J. Siggins, Presiding Justice
Hon. Carin T. Fujisaki, Associate Justice
Hon. Ioana Petrou, Associate Justice
California Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-4712

Re: *Senior and Disability Action v. Padilla*
Docket No. A159540
Application for Leave to File Letter Brief as Amicus Curiae and Letter Brief

Honorable Justices,

The California Academy of Appellate Lawyers applies for leave to file a letter brief as amicus curiae. The thrust of this letter brief supports the petitioners/appellants and their opposition to respondents' motion to dismiss the appeal. This letter brief reviews the issues in ways appellants' papers do not.

1. Interest of the Academy

The Academy's members are more than 100 experienced appellate practitioners whose common goals include promoting and encouraging sound appellate procedures that ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

No party, attorney for a party, or judicial member has played any part in the decision to file this letter or in preparing it. The Academy takes no position on the underlying issues, which are outside its purview.

226294.1

2. Academy Position

This letter addresses whether the Court of Appeal must dismiss this appeal on the grounds that:

(i) the Order Granting in Part and Denying in Part Motion for Peremptory Writ of Mandate (March 29 Order) rendered judgment by expressly or implicitly determining all rights of the parties; and,

(ii) filing the March 29 Order must be treated as entering judgment.

Foundational Principles that Always Apply

We begin with three foundations of appellate practice declared in statutes and rules. Practitioners and parties always engage these foundations when determining whether to appeal.

First, rendition of judgment opens the appellate court door: "A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." (Cal. Rules of Court, rule 8.104(d)(1).[1]) In only one circumstance—"after the superior court has announced its intended ruling"—does a notice of appeal before rendition have any consequence, and that is to vest the Court of Appeal with discretion to "treat a notice of appeal as filed immediately after entry of judgment." (Rule 8.104(d)(2).)

Second, rendition of judgment alone does not require one to perfect an appeal. (Cf. Code Civ. Proc., § 664 ["In no case is a judgment effectual for any purpose until entered"].) Rule 8.104(a) states the "[n]ormal time" to appeal. "Normal" contrasts with automatic extensions of time rule 8.108 details. All the "normal times" rule 8.104(a) addresses are measured from entry of judgment, either directly (Rule 8.104(a)(1)(C)) or as a predicate to a notice of entry of judgment (*id.*, (a)(1)(A), (B)). A notice of entry served before entry (for which filing is a substitute) is invalid. (Code Civ. Proc., § 664; see *Estate of Crabtree* (1992) 4 Cal.App.4th 1119, 1125, fn. 5 [noting, but not deciding, the issue].)

Third, only an appeal taken at a party's first opportunity can preserve the right to appeal. Code of Civil Procedure section 906 provides that when an appeal is

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[1] References to "rules" are to the California Rules of Court.

taken under section 904.1 or section 904.2, the Court of Appeal can review "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party … ." Its last sentence declares: "The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." Because the statute does "not authorize" review when earlier appeal was possible, appellate courts have no power to do so. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761.)

Synthesizing, when a party has a statutory right to appeal, he must do so to preserve review of the appealable judgment or order and all subordinate rulings, but he need not do so until the court enters the judgment or appealable order, even if the court renders judgment earlier.

These three principles should have no exceptions. Appellate jurisdiction is statutory. (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 (*Dana*).) These three principles derive from the jurisdictional statutes, as elucidated by the rules. No lawyer or party should have to read a case or practice guide to know that these three foundational rules are true and safe to follow. Clarity and consistency are imperative for client and counsel because Rule 8.104(b) provides that times to file a notice of appeal cannot be extended, and a late notice vitiates appellate jurisdiction.

Interpreting Finality to Vindicate Appellate Jurisdiction

Finality occurs, and judgment is rendered, when nothing "further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties … ." (*Dana*, *supra*, 51 Cal.4th at p. 5.) Finality depends on substance, not the label applied to a judgment or order. (*Ibid.*; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698 (*Griset*).)

With little explanation, the parties to the appeal at bar cite two classes of cases treating as final appealable judgments orders which do not say so. In the first—we will call it the "express rendition" class—a superior court entered a nonappealable order that expressly and finally determined the parties' rights. For example, in *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 904, the judicial act was a statement of decision that expressly resolved all causes of action. To preserve its jurisdiction and the parties' appeal rights, the Court of Appeal construed the statement to be an appealable judgment.

Laraway v. Pasadena Unified School Dist. (2002) 98 Cal.App.4th 579 (*Laraway*) is the only case Respondents here cite for anything other than general principles. There, the appellate court recited that the order before it expressly decided every form of relief the plaintiff sought. (*Laraway*, 98 Cal.App.4th at pp. 580–581.) It concluded: "That order resolved all issues between the parties, did not direct or contemplate the preparation of any further order or judgment, and was thus an appealable, final order." (*Id.* at p. 581.) More accurately, the order was a judgment because its text and context showed the superior court intended it to be so; if a mere order, it was not appealable. (Cf. Code Civ. Proc., § 904.1(a).)

We are respectfully skeptical of *Laraway*. Arguably, it contradicts the fundamental principle that an appeal is premature before entry of judgment. (Rule 8.104(a)(1); cf. Code Civ. Proc., § 664.) More sensibly, it holds that when an order renders judgment, and the superior court intends it to be the final judgment, the times to appeal and to give notice of entry of the judgment start with entry of the order. Still, that holding forces lawyers, parties, and appellate courts to determine whether a document labeled "order" rendered judgment and whether the superior court intended it to be the one final judgment permissible in a case. In *Laraway*, the first element was obviously true, and the Court of Appeal found the second to be true, as well. (*Laraway*, *supra*, 98 Cal.App.4th at pp. 580–581.) Reading between the lines, the record suggested the parties were gaming appellate jurisdiction. Among other things, the appellant had more than five months to appeal the order rendering judgment when the superior court entered the second judgment and did not appeal until some or two three months thereafter. (*Ibid.*) All this in a dispute over access to public records, a subject the Legislature has indicated is worthy of prompt resolution. (Gov Code, § 6258 ["The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time."].)

Assuming arguendo that *Laraway* correctly declares one possible result of express rendition cases, it should remain unique, or nearly so. *Laraway*'s result should require all of three conditions:

(i) no reasonable attorney could think the order did not render judgment;

(ii) no reasonable attorney could think the superior court did not intend the order to perform the function of a final judgment; and

(iii) the superior court's intent is disclosed on the record such that a reasonable attorney or self-represented party could not reasonably miss it.

Unless this three-part test is satisfied, the trigger for time to appeal an order in an express rendition case, as with a formal judgment case, is entry of a judgment.

This standard is consistent with *Davis v. Superior Court* (2011) 196 Cal.App.4th 669, 673–674, in which the Court of Appeal issued a writ compelling the superior court to enter final judgment so the petitioner could appeal. The underlying summary judgment order disposed of all causes of action, but did not expressly declare the parties' ultimate rights. (*Ibid.*) But those rights consisted only of dismissing the case and awarding costs. (*Ibid.*) *Davis* cited *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, a constructive rendition case (*infra*) to distinguish *Laraway*, but the only point of distinction was that *Swain* preserved jurisdiction while *Laraway* frustrated it. (*Davis*, 196 Cal.App.4th at pp. 673–674.) *Davis'* final words were: "Consistent with the importance of the right to appeal, we conclude that denying Davis his appellate rights requires more than an 'order' (the court's own title for its ruling) dressed up to masquerade as a 'judgment.' " (*Ibid.*) *Davis* rejects *Laraway* without heaping obloquy on it; if the issue were raised, the Academy would argue that *Davis* is correct and *Laraway* is wrong.

We call the second class of cases "constructive rendition" cases. Intuitively, one would think that when a summary adjudication or analogous order leaves pending a "cause of action" in the sense used in Code of Civil Procedure section 437c, subdivision (f)(1), the order does not render judgment. After all, judicial action is essential to determine the rights of the parties as to the remaining cause of action—even if only to determine the order's findings and conclusions dispose of all the parties' rights as to the remaining cause of action as a matter of law.

But that intuition is wrong. In the constructive rendition cases—generally victories for the defendant—appellate courts hold that an order disposing of fewer than all causes of action, but resolving an element essential to every cause of action, **is** a final judgment because it "effectively disposes of the entire case." (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 303 (*Canandaigua*).) For example, a judgment on a lead cause of action for

mandate was final and appealable despite three other unadjudicated causes of action because the judgment resolved an issue essential to all: the constitutionality of a statute all challenged. (*Griset*, *supra*, 25 Cal.4th at pp. 699–700.)

Such searching analysis of the logic of causes of action invariably vindicates appellate jurisdiction and parties' rights to appellate review. For example, in *Griset*, *supra*, 25 Cal.4th at pages 699–700, jurisdiction over a first California Supreme Court review arose in that court's second review of the case. *Canandaigua*, 177 Cal.App.4th at pages 303–304, dismissed an appeal as premature because the remaining causes of action required fact-finding. In *Swain v. California Casualty Ins. Co.*, *supra*, 99 Cal.App.4th at page 6, the Court of Appeal exercised its inherent power to conform a nonfinal judgment to reflect the superior court's clear intent to enter a judgment conclusive of all causes of action in a complaint and a cross-complaint, all to allow immediate review of the merits. And *Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096 at pages 1101–1102 permitted appeal from a summary adjudication order that left two causes of action pending because those causes of action were ancillary to the dismissed lead cause of action and mooted by its summary adjudication.

The constructive rendition class includes mandate cases. *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090 at page 1097 construed an order denying mandate as final—despite its failure to rule on all causes of action—because the mandate ruling effectively decided all the parties' rights; the effect was to preserve appellate jurisdiction. So, too, *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064 at pages 1073–1074, in which a statute of limitations ruling effectively disposed of all causes of action. To the same effect are the terse footnote 6 in *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781 at page 1792, and footnote 2 in *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362 at page 369.

An appeal timely filed after judgment should never be dismissed as untimely because the appellant did not appeal from an underlying order in the constructive rendition class. Here, for example, Appellants faced the same interpretive and strategic problems an aggrieved party faces under an express rendition order, plus two more. Appealing was inconsistent with their argument that the taxpayer cause of action remained viable, and the vitality of their

appeal depended on the discretion of the Court of Appeal. This last calculus was much like deciding whether to petition for a prerogative writ, and dismissing an appeal for failure to take a discretionary appeal is like requiring a party to petition for such a writ as a condition to appeal when no statute so requires. (Cf. *In re Joann E.* (2002) 104 Cal.App.4th 347, 353.) That just is not done. (*Ibid.*; cf. *In re Marriage of Griffin* (1993) 15 Cal.App.4th 685, 689 [no waiver of right to appeal for review of certifiable family law issues by failing to seek discretionary interlocutory review].)

Pragmatic policies support the Academy's "almost never" recommendation against dismissing express rendition appeals as untimely, and its "absolutely never" recommendation for constructive rendition cases. Making dismissals more available would create both classic traps for the unwary and time-consuming ambiguities for knowledgeable lawyers and courts.

Among the inefficiencies is the protective appeal. Trap door rules, Code of Civil Procedure section 906, and the consequences of losing appellate rights would force parties to appeal whenever a court might find an order to be a judgment. Appellate courts would then be required to make jurisdictional rulings that should be unnecessary. And wasteful appellate process is only the beginning. Code of Civil Procedure section 917's stay would bar the superior court to repair or clarify its order, unless failure to enter judgment was ministerial error. If further judicial acts are required, they are barred until the Court of Appeal remands. The delay may be catastrophic for a party who needs a genuine final judgment promptly.

If such dismissals become easily available, trial courts would lose case management discretion or, at least, gain headaches in determining that discretion. When a verdict renders judgment, the trial court has nearly unfettered discretion to postpone entry of judgment. (Code Civ. Proc., § 664.) Could a party preempt discretion by appealing from the rendered judgment instead of bringing the matter to the trial court for final action? (Cf. Code Civ. Proc., § 665.) When a trial court expressly postpones entering judgment against a defendant whose rights have been determined by orders that render judgment, can a party preempt trial court discretion by appealing from the order rendering judgment? (Code Civ. Proc., § 579 [discretion to enter several judgment]; but see *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 [party may appeal order resolving all her rights even though others' claims remain unresolved].) We are sure there

are other questions and additional unintended consequences of the rule we criticize.

Application of These Principles

Respondents contend the March 29 Order rendered final judgment and its filing must be treated as entry of judgment. We are skeptical. **First**, that order is narrowly tailored to decide only appellants' motion for a writ of mandate. (March 29 Order, pp. 1, 21.) *Laraway*, *supra*, 98 Cal.App.4th at pp. 580–581, if correctly decided, does not apply. Further, the parties' papers present no facts suggesting the appropriate test for dismissing express rendition cases under *Laraway* can be met here.

Second, we doubt this case can be shoehorned into the constructive rendition class. The March 29 Order appears to leave at least one of appellants' claims unresolved. According to the order, Appellants' petition claims that Area Agencies on Aging (AAAs) must be designated as Voter Registration Agencies if they deliver meals to beneficiaries' homes and if they provide meals at congregant sites. (March 29 Order, p. 18.) But appellants limited their motion to home delivery. (*Ibid.*) The superior court ruled: "Petitioners have not met their burden to show that all AAAs or their community service provider agencies and organizations providing home-delivered meal services must be designated … ." (*Id.* at p. 19.) The plain language of the March 29 Order thus leaves open for proof in the taxpayer cause of action whether **some** AAAs must be designated, either because of facts specific to their home delivery programs or at their congregant meal sites. Issues of fact defeat finality. (*Canandaigua*, *supra*, 177 Cal.App.4th at pp. 303–304.)

Finally, nothing in the parties' papers suggests a reason this appeal could evade the "never dismiss" rule proposed *supra*.

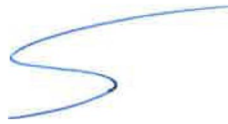
3. Conclusion

The California Supreme Court has worked for decades to make rules of appellate jurisdiction as clear, simple, and obvious as constitutions and statutes allow. (See, e.g., *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743; *Alan v. American Honda Motor Co.* (2007) 40 Cal.4th 894, 905.) The Academy

has supported this trend through amicus curiae briefs, rules proposals, and rules comments. Respondents' arguments here would retard progress toward clarity, simplicity, and access.

Respectfully submitted,

CALIFORNIA ACADEMY OF
APPELLATE LAWYERS
AMICUS CURIAE COMMITTEE



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PROOF OF SERVICE
Senior and Disability Action v. Padilla
First Appellate District Case No. A159540

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On March 13, 2020, I served the document(s) described as **APPLICATION FOR LEAVE TO FILE LETTER BRIEF AS AMICUS CURIAE AND LETTER BRIEF** on the interested parties in this action addressed as follows:

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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.

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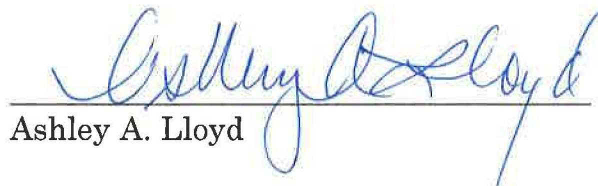

Ashley A. Lloyd

226294.1

SERVICE LIST
Senior and Disability Action v. Padilla
First Appellate District Case No. A159540

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