April 2005 Civil Procedure Column

Construing Notices of Appeal: A Liberalizing Opinion by the California Supreme Court

by Jon R. Williams, Column Editor

Jon R. Williams is partner in Ross, Dixon & Bell, LLP's San Diego office, where he specializes in civil writs and appeals at both the state and federal court levels. Mr. Williams has prepared and argued numerous appeals and writs resulting in published opinions on a wide variety of issues, including civil procedure, professional negligence, insurance coverage, punitive damages, probate procedure and elder abuse liability. Mr. Williams received his Juris Doctor (cum laude) from California Western School of Law in 1992, is a member of the Board of Directors of Consumer Attorneys of San Diego, and has been the Civil Procedure Column Editor for ***Trial Bar News*** *since 1996. He may be contacted by e-mail at:* ***jwilliams@rdblaw.com****.*

Okay, here's a pop quiz. Which of the following is a separately appealable order and which is not: (a) an order denying a motion for new trial, or (b) an order granting a motion for new trial. Both are appealable, right? Wrong. Only the order granting the new trial motion is separately appealable; the order denying a new trial motion is only reviewable from an appeal of the underlying judgment. How about: (a) an order denying a motion for judgment notwithstanding the verdict (JNOV) or (b) an order granting a JNOV? In this case, the former is directly appealable and the latter order is reviewable only from an appeal of the newly-ordered judgment. While I can almost sense your eyes rolling back in your head by now, don't despair. These are trick questions designed to illustrate the point that knowing **what** you are appealing is just as important as knowing **why** you are appealing in the first place.

Indeed, the treacherous waters of appellate procedure have long been littered with the flotsam of failed appeals and confused trial attorneys hoping that the appellate courts will be kind enough to offer a lifeline and save them from an almost certain malpractice lawsuit. Yet while many courts of appeal in this State take a hard-line "jurisdictional" approach and watch as attorneys drop below the surface, the Supreme Court's recent decision in *Walker v. Los Angeles County Metro. Trans. Auth.* (Feb. 2005) 2005 *Daily Journal D.A.R.* 1423, 23 Cal.Rptr.3d 490 throws a life preserver to anyone stuck in the unfortunate position of appealing from something that is not appealable.

Specifically, the High Court in *Walker* allowed the aggrieved plaintiff and appellant to proceed with her appeal of the underlying judgment, even though she only filed an appeal from the trial court's order denying her motion for a new trial (which, as you undoubtedly remember from a few seconds ago, is not appealable). While this may sound like a fact-specific result, remember that the Supreme Court is not in the business of issuing fact-specific results; it is in the business of setting judicial precedent. Thus, it is clear that in taking-up the *Walker* case, the Supremes were not only marking a subtle retreat from their prior decisions, but were also signaling (in a unanimous decision, no less) that the lower courts should err on the side of liberal construction of notices of appeal when it is reasonably clear what the appellant truly intended to appeal from in the first place.

Facts of *Walker*

The underlying dispute in *Walker* involved a secretary employed by the Los Angeles County Metropolitan Transportation District (MTA) who was terminated following her cooperation with an investigation of that entity conducted by the Office of the Inspector General. The secretary alleged that she was terminated in violation of public policy and in violation of Labor Code §1102.5, the "whistleblower" statute. *Walker, supra,* 23 Cal.Rptr.3d at 492.

The case was tried to a jury which returned a defense verdict. After judgment was entered and notice of entry was duly served, the secretary filed a motion for new trial, asserting claims of jury misconduct, insufficient evidence, and legal and instructional error. She also filed a motion for judgment notwithstanding the verdict. Unmoved by those arguments, however, the trial court denied both motions. *Id*.

The secretary then filed a timely notice of appeal, noting specifically that she was appealing "from the following order made in the above-entitled action: [¶] 1) The order denying plaintiff's Motion for a New Trial, which Motion was heard on January 3, 2002, and which ruling was set forth in a Notice of Ruling, dated January 4, 2002." *Id*.

The MTA did not file a motion to dismiss the appeal, but instead raised the issue concerning the viability of the notice of appeal as one of several arguments in its opening brief. The Second District Court of Appeal, in a published opinion, then dismissed the appeal on the ground that the denial of a new trial is not an appealable order. Specifically, the appellate court declined to follow a line of decisions which had treated a notice of appeal from an order denying a new trial as an appeal from the underlying appealable judgment, in favor of another line of decisions which had not. The Supreme Court then granted review "to resolve the conflict." *Id.*

Liberalizing Liberal Construction

The High Court in *Walker* started its analysis where the Court of Appeal had left off: with its prior decision in *Rodriguez v. Barnett* (1959) 52 Cal.2d 154. Specifically, in *Rodriguez v. Barnett*, the Supreme Court had affirmed the dismissal of an appeal from an order denying a new trial, and in so doing, ominously included "an admonition from the Chief Justice to counsel and members of the bar generally to cease appealing from such an obviously nonappealable order." *Id*., 52 Cal.2d at 156. Ouch!

While it is hard to imagine a more direct expression of the High Court's view on such matters, the *Walker* court revisited the *Rodriguez* decision to distinguish its facts and thereby clarify its policies. The *Walker* court noted that the situation was somewhat different in *Rodriguez* because the appellant had filed **both** a notice of appeal from the order denying a new trial and a timely notice of appeal from the underlying judgment. *Walker, supra,* 23 Cal.Rptr.3d at 493. Thus, when the *Rodriguez* court dismissed the appeal from the nonappealable new trial order, this decision did not have the effect of altogether closing the doors to the appellant's appeal. *Id*. Of course, that distinction has subsequently been lost on other appellate courts, which are want to read everything the Supreme Court says as a bright-line gospel and began

routinely dismissing similar appeals even when there was no other avenue of review for the appellant. See, *e.g.*, *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684; *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1117; *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730.

But in *Walker*, the appellant had only appealed from an unappealable order. So taking a cue from a conflicting line of authority in California in which appellate courts had exercised their discretion "to save" an appeal erroneously taken from an order denying a new trial (see, *e.g., Shonkoff v. Dant Inv. Co.* (1968) 258, Cal.App.2d 101; *Zaval v. Arce* (1997) 58 Cal.App.4th 915), the Supreme Court in *Walker* softened the blow for appellants statewide. Indeed, consistent with Rule 1(a) of the Rules of Court (which explains how notices of appeal "must be liberally construed"), and influenced by analogous federal case law which treats a notice of appeal from an order denying a new trial as being an appeal from the underlying judgment (see *Smith v. Barry* (1992) 502 U.S. 244), the *Walker* court explained that when it is reasonably clear an appellant intended to appeal from the underlying judgment, an appeal from denial of a new trial order should be liberally construed consistent with that intention. *Walker, supra,* 23 Cal.Rptr.3d at 495. Thus, because "the law aspires to respect substance over formalism and nomenclature," the High Court in *Walker* remanded the matter back to the court of appeal so that the poor secretary could live to fight another day. *Id.*

CONCLUSION

What is most notable about the *Walker* decision is its apparent and somewhat unexpected compassion. To say that in appellate procedural matters the Court prefers "substance over formalism and nomenclature" is like saying that the IRS would really like you to pay your taxes when you get around to it. Such a rationale could practically turn on its head the entire Rules of Court (which are built almost exclusively on the dual pillars of formalism and nomenclature), and will likely leave some appellate court justices in our fine judicial system scratching their heads. But happily, even in the face of some very heavy jurisdictional consequences for the appellant and her trial attorney, the Supremes got this one right. I can only imagine the plaintiff's attorney's sleepless nights, however, as this case made its way through the system and to the High Court over a period of almost three years.

But to put a finer point on *Walker* is to recognize what it is not. *Walker* is not a license to appeal from all manner of nonappealable orders, hoping that the appellate courts will sort things out in the wash and let you go forward without difficulty. Indeed, the important factor in *Walker* was that along with her nonappealable new trial order, the appellant had an appealable judgment to toss around, too. And so connecting the dots between those two, and allowing one to substitute for the other (despite what her notice of appeal said), was not a huge leap of faith for the *Walker* court to make. It is doubtful that the result would have been the same had the appeal been from a nonappealable interlocutory order alone (say, for example, a discovery order), without any appealable judgment to fall back on. So while *Walker* represents a reaffirmation of the liberal construction of notices of appeal, the obvious lesson here is that **in order for you to secure your client's appellate rights, you should be scrupulously certain that you have evinced an unmistakable intention to appeal from an actual appealable order or judgment in your notice of appeal.**