2d Civil No. B163333

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VERONICA OLIVEROS, et al.,

Plaintiffs and Respondents,

vs.

COUNTY OF LOS ANGELES,

Defendant and Appellant.

Appeal from the Los Angeles County Superior Court
Honorable Josh Fredricks, Judge
Superior Court Case No. TC013770

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal is the product of a collision between competing interests—that of trial courts in controlling their calendars and of litigants in competent representation. In this case, the litigants—the County of Los Angeles and its physicians—were the losers. The attorney whom the County selected to represent it in a very difficult medical malpractice case found himself with more than one case set for trial in the same week, in the same courthouse. He was ordered to trial in the oldest case and sought a continuance in the other—this case. The continuance was denied. The County's dilemma was "not my problem," the judge said (2RT H16), and so the case proceeded to trial *without the County or its attorney present.* The disastrous result was the entry of a $12.5 million malpractice judgment against the County's already over-burdened public health system.

Unfortunately, this is not an isolated incident. (Wood, *Litigants' Rights Take Back Seat To Judicial Need To Move Cases Through System*, L.A. Daily J. (Nov. 12, 2002), p. 6.) As one commentator recently pointed out, when trial courts adhere too rigidly to their schedules, they sacrifice the rights of litigants. It makes no sense "for a court to proclaim that a lawyer who has handled a case for a year or two must withdraw and another lawyer be engaged for trial simply because of a court's scheduling problem." (*Ibid.*) To the contrary: "*A litigant has the right to engage counsel and to have his day in court prepared for trial.* . . . When courts . . . indirectly affect the outcome of litigation by forcing cases to trial . . . without the attorney best equipped to handle that case, the judges and judiciary fail the system and the people they serve." (*Ibid.*) The need for this Court to intervene and bring reason to bear on this pressing issue is obvious.

There is no question that trial courts must have substantial discretion to control their calendars. That discretion is not unbounded, however, and it clearly was abused here, where the trial court's rigid adherence to its

schedule prevented the County and its doctors from defending this case on the merits. For the following reasons and others, the resulting judgment cannot stand.

First, although trial courts have discretion to grant or deny continuances, that discretion is abused when a trial court fails to weigh *all* the relevant interests, including a party's right to be represented by competent counsel prepared to try a case on its behalf. The trial court failed to give *any* weight at all to this right, dismissing the unexpected unavailability of the County's attorney as "not my problem." (2RT H16.) Forcing this case to trial without taking into account the County's right to counsel was a manifest abuse of discretion mandating reversal.

Second, California statutory law is clear that if a party fails to comply with local court rules because of the actions of its attorney, any sanction for noncompliance must be imposed *against the attorney*, not the client. (Code Civ. Proc., § 575.2.) This statute applies equally to local rules implementing delay reduction goals; according to our Supreme Court, which recently addressed exactly this question, the Legislature did not intend 'the policy of expeditious processing of civil cases'" to override "'the strong public policy that litigation be disposed of *on the merits* whenever possible.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 479, 480, emphasis added.) Here, the County's need for a continuance clashed with the fast track rules of the Los Angeles Superior Court. The clash indisputably resulted from its attorney's conduct, not the County's, yet the trial court imposed a heavy sanction—a $12.5 million directed verdict—against the County. That was a clear violation of Code of Civil Procedure section 575.2 and hence was an abuse of discretion.

Third, the trial court committed reversible error by denying the County's motion for relief pursuant to Code of Civil Procedure section 473. Where, as here, the judgment is the procedural equivalent of a default and an application for relief is accompanied by an attorney's affidavit of fault,

relief is mandatory. The County made such application, accompanied by a declaration in which the County's attorney accepted full responsibility for the entry of judgment against the County. Plaintiffs did not dispute the County's attorney's sole responsibility. Nonetheless, the trial court denied relief, under both the mandatory provision and a separate discretionary provision.

In sum, as discussed more fully below, there are multiple grounds for reversal. The County respectfully submits that reversal is the only just result so that the case may proceed to a fair trial on the merits.

STATEMENT OF FACTS AND OF THE CASE

A. Underlying Facts.

Plaintiff Veronica Oliveros ("Mrs. Oliveros") was admitted to Harbor General-UCLA Medical Center in September 1999 for surgery to replace a damaged heart valve. (1AA 6-7; 4RT 328, 5RT 698.) The surgery was performed successfully on September 16. (4RT 312, 328-329, 5RT 699.) Unfortunately, however, she suffered a brain injury the following day that resulted in permanent neurological damage.

B. Plaintiffs File The Present Action.

Mrs. Oliveros and her husband, Jesus Oliveros (collectively, "plaintiffs") filed the present action for medical malpractice, products liability, loss of services, and loss of consortium against the County of Los Angeles and individually named doctors and nurses on September 15,

2000. (1AA 1-15.)[1] They filed the operative First Amended Complaint on April 12, 2001. (1AA 16-30.)

Plaintiffs attribute Mrs. Oliveros' injuries to the County's alleged negligence in failing to promptly replace her respiratory tube after she dislodged it the morning after her surgery. According to plaintiffs, Mrs. Oliveros' blood oxygen level became dangerously low once the respiratory tube was removed, causing permanent brain damage. (4RT 330-331, 345-346.)

The County and its physicians contend that Mrs. Oliveros was already breathing on her own when she dislodged the respiratory tube, and they attribute her brain damage to a different cause. The County's expert witnesses testified at deposition that air microemboli (air bubbles) introduced into her heart during surgery traveled to her brain, causing injury. Air microemboli are a well-recognized risk of open-heart surgery, and the County contends they could not have been prevented here. (1AA 183 [¶ 6].)

Prior to trial, the parties identified 43 trial witnesses. These witnesses included eighteen experts (nine designated by each side), including physicians in different specialties to testify about the applicable standards of care and the causes of Mrs. Oliveros' injuries, specialists to testify about the level of care Mrs. Oliveros will require in the future, and economists to testify to Mrs. Oliveros' past and expected future damages. All of the trial witnesses testified at pretrial depositions, resulting in thousands of pages of deposition testimony. (1AA 183-184 [¶ 7], 194-195.)

Because of the large number of percipient and expert witnesses and the complexity of this case, the parties estimated that trial would last three weeks. (1AA 184 [¶ 8].)

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[1] Plaintiffs dismissed all of the individual defendants prior to trial, with the understanding that the County would assume their liability and make them available at trial. (3RT 25-26.)

C. The County Retains Attorney George Peterson To Represent It.

For more than fifteen years, George Peterson has been one of a small number of attorneys the County of Los Angeles has retained to try its significant medical malpractice cases. (1AA 184-185 [¶ 13], 192 [¶ 2].)[2]

Mr. Peterson has twenty-five years of trial experience, including over a hundred medical malpractice cases, many involving catastrophic injuries. He is a member of the American Board of Trial Advocates and the American College of Trial Advocates, and he has lectured on medical malpractice to the American College of Surgeons and various professional groups nationally. (1AA 184 [¶ 12].)

Because of his skill in handling cases involving devastating injuries and significant damages, the County asked Mr. Peterson to try this case personally when Alexander Cobb, the attorney the County originally retained, retired from practicing law several months before trial. (1AA 192 [¶ 3].)[3] In preparation for trial, Mr. Peterson devoted more than 250 hours to reviewing the voluminous medical records and deposition transcripts, and to meeting with the County's witnesses. (1AA 185 [¶ 14].)

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[2] Those cases recently included *Acosta v. County*, a neurologic injury case with claims virtually identical to those here, in which the plaintiffs were represented by Manuel and Rolando Hidalgo, the plaintiffs' attorneys here; *Nguyen v. County*, which involved pediatric brain damage; and *Estrada v. County*, which involved a birth injury. (1AA 184-185 [¶ 13].)

[3] Alexander Cobb was a senior litigation partner with Bonne, Bridges, Mueller, O'Keefe & Nichols until his retirement in January 2002. (1AA 184 [¶¶ 10-11].) Mr. Cobb was assisted by associate attorney Narbeh Bagdasarian, but Mr. Bagdasarian left the firm in May 2002 to practice patent law. (1AA 184 [¶¶ 10-11], 185 [¶ 14].)

D. Trial Setting And Prior Continuances.

Trial initially was set for January 15, 2002. Deposition discovery was not complete by that date, however, so the County moved for a 45-day continuance (1AA 31-40), to which plaintiffs stipulated (1AA 41-42). The motion was granted, and the trial was continued to March 5, 2002. (1AA 55.)

At a final status conference on February 25, 2002, Mr. Peterson advised the court that he was scheduled to begin trial in San Francisco Superior Court on March 4. (2RT D2.) Accordingly, Mr. Peterson asked that the trial be continued three to four weeks, "no more than that." (2RT D3.) Plaintiffs' counsel did not oppose the continuance; to the contrary, he advised the court that he had become engaged in another matter that would require him to spend "all of March and much of April" in expert depositions. (2RT E3.)

The court's first available trial date was in early July, and so the court continued the trial to July 9. (2RT D5, F2.)

E. The County's Need For An Additional Continuance.

In addition to this case, Mr. Peterson had another case set for trial in Compton Superior Court the week of July 8: *Smith v. Booker*, superior court case number TC013580. *Smith* was filed on July 5, 2000, and therefore was several months older than the present case. (1AA 186 [¶ 17].)[4]

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[4] Mr. Peterson also had several other cases set for trial the month of July, including another case set for July 8 in Compton Superior Court. However, those trials were continued, and so they did not create a conflict with the present case. (1AA 186 [¶¶ 17-18], 188 [¶ 22]; 2RT H4-H12, 3RT 8-9.)

Well before July 8, counsel for the opposing party in *Smith* advised Mr. Peterson that he would be in trial in another matter on that date and would move to continue *Smith*. Mr. Peterson therefore did not anticipate a conflict with the present case. (1AA 186 [¶ 18].)[5] However, on July 3, Mr. Peterson learned that the *Smith* plaintiff had associated a new trial attorney who thought he likely would answer ready for trial on July 8. (1AA 187 [¶ 19].) The attorney did so, and the trial court ordered the parties to return the following day to begin trial. The court was aware of the conflict with *Oliveros*, but stated that *Smith* had priority over *Oliveros* because it was filed first. (1AA 187-188 [¶ 21].)

When he learned of the likely conflict on July 3, Mr. Peterson's colleague immediately called plaintiff's counsel and told him about it. (1AA 187 [¶ 20].) Mr. Peterson called plaintiff's counsel again on July 8 to confirm the start of the *Smith* trial. (1AA 188 [¶ 23].) According to Mr. Peterson, plaintiffs' counsel said that he had "no problem" with a request to continue this trial to the conclusion of *Smith*. (1AA 188 [¶ 23], 2AA 326-327 [¶ 2].) In a post-trial declaration, plaintiffs' counsel denied using that language, stating only that he agreed to "be polite and courteous" at the hearing. (2AA 247 [¶ 12].) However, his declaration did not say that he had voiced any objections to or reservations about another continuance. (*Ibid.*)

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[5] At a Final Status Conference on June 27, Mr. Peterson's colleague, Christopher Marshall, advised the trial court of the potential, but unlikely, conflict between *Smith* and the present case. (2RT G1-2.)

F. The Trial Court Denies The County's Request For A Brief Continuance.

On July 9, Mr. Peterson requested a continuance of the present case. He explained that the conflict between *Oliveros* and *Smith* was unexpected, and he asked the court to continue *Oliveros* to the conclusion of *Smith*. (2RT H4-5, 20.) He told the court that trial had begun in *Smith* and would last about two weeks. (2RT H11.)

Judge Fredricks said that he was not inclined to grant the continuance and suggested that another lawyer in Mr. Peterson's office try *Oliveros*. Mr. Peterson explained that *Oliveros* initially had been handled by one of his partners who had retired several months earlier and no longer was practicing law. (2RT H6.) All but one of his firm's other senior trial attorneys were in trial; the remaining attorney was on vacation in Europe. (2RT H7-8.) None of the firm's other lawyers had experience trying cases of the complexity of *Oliveros*. (*Ibid.*) Moreover, no one other than Mr. Peterson had prepared to try the case. (2RT H8.) Therefore, Mr. Peterson suggested that it would be unfair to the client "to ask [new counsel] to suddenly step into a case cold." (2RT H10.)

Judge Fredricks disagreed, suggesting that an experienced trial lawyer could prepare to try this case in a few days. (2RT H14.) He then ordered: "[Y]ou pick one of [the lawyers in your office] and have them be here at 1:30, and we'll start it." (2RT H15.) Alternatively, he said, he would give the County six days, to July 15, to seek an emergency writ from the Court of Appeal. (2RT H16-19.) He would not do any more because he believed that Mr. Peterson "takes too many cases." (2RT H13.) Although he sympathized with the County, he said that Mr. Peterson's inability to represent it at trial was "not my problem." (2RT H16.)

G. The Court of Appeal Denies The County's Writ Petition.

The County filed a writ petition on July 12, 2002. It asked the Court for an immediate stay and an order requiring the trial court to vacate the trial date. (1AA 61-88.) Over Justice Armstrong's dissent, the Court summarily denied both requests. (1AA 89, 109-110.)[6] The Supreme Court denied review on July 19. (1AA 144.)

H. Judge Fredricks Orders The Case To Trial Without The County Present.

On July 15, Mr. Peterson told the court that the *Smith* trial was ongoing and that he expected it to conclude in about a week. (3RT 3.) There still was no attorney in his office who was available and sufficiently experienced to try *Oliveros*. (3RT 3-4.) He reminded the court of the circumstances that precipitated the conflict in trial dates, saying "It isn't a matter, your Honor, in this case where simply trial dates collided and nobody did anything about it. . . . [I] expected that I was going to be available to try this case in your department on schedule." (3RT 4.)

Mr. Peterson also suggested that, rather than punish the County by forcing it to trial without counsel, the court impose monetary sanctions on his law firm that were severe enough "to constitute a grave threat against this ever occurring again." (3RT 17-18.) That way, he said, "the client's interests would be protected, your Honor would feel that our office has been dealt with in a way that would discourage this behavior from occurring

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[6] Justice Armstrong concluded that the trial court had abused its discretion in refusing to continue or trail the case until Mr. Peterson completed the *Smith* trial. He found the County had established that Mr. Peterson was in trial and that no other attorney in his office was available to try "this complicated medical malpractice case" on short notice. (1AA 110.)

again, and Mr. Hidalgo's clients would have their day in court as well with the witnesses that they prefer." (3RT 18.) Mr. Peterson also offered to "remain uncommitted to any other courtroom except this one until you are ready for me. . . . I'll be sure I won't get into any other courtroom. I won't take a vacation, won't leave town." (3RT 22.)

Gary Miller, principal deputy county counsel, also addressed the court. He said that the County had chosen Mr. Peterson to try *Oliveros* because of his exceptional skill as a trial lawyer. (3RT 10-11.) He emphasized that the County had invested significant resources preparing Mr. Peterson to try the case and that it could not prepare any other attorney to try the case on such short notice. (3RT 12.) Thus, he said, "It is a severe prejudice to us in the enormity of the damages that can be assessed in this case to send us into court without the attorney that we put before this court." (3RT 12.)

Judge Fredricks again said that he was "sympathetic to the client position in this matter" (3RT 10), but he refused to change his mind. According to Judge Fredricks, Mr. Peterson's "management practices . . . cannot become my crisis. . . . Their problems cannot become my problems. I'm afraid, and I'm sorry it's become [the County's] problem." (3RT 7.)

Following the court's ruling, Mr. Peterson asked to be excused to return to the *Smith* trial. (3RT 26-27.) Judge Fredricks granted that request. (*Ibid.*) He then immediately began hearing motions in limine. (3RT 29.) Jury voir dire and trial followed, *both held without the County or its lawyers present.* (See generally 3RT 27-159, 4RT [all], 5RT [all], 6RT [all].)

I. The Trial Court Directs A Verdict Against The County.

After four days of trial during which the County was unable to defend itself, Judge Fredricks directed a verdict for plaintiffs as follows:

Past economic damages (Mrs. Oliveros):	$ 236,578
Past noneconomic damages (Mrs. Oliveros):	$ 250,000
Future economic damages (Mrs. Oliveros):	$ 11,822,274
Loss of consortium (Mr. Oliveros):	$ 250,000
TOTAL:	$ 12,558,852

The Court entered judgment on September 6, 2002. (1AA 145-150.) Notice of Entry of Judgment was mailed September 10, 2002. (1AA 151-160.)

J. The Trial Court Denies The County's Motion For A New Trial and Motion To Vacate The Judgment.

The County timely moved to vacate the judgment and for a new trial (Code Civ. Proc., §§ 473, 657, 659a). (1AA 161-163, 164-197, 198-226.) In support of those motions, the County filed the Declaration of George Peterson, which explained why he unexpectedly could not try *Oliveros* on July 9. (1AA 182-191, 211-220.)[7] Mr. Peterson took complete responsibility for the entry of judgment against the County, acknowledging that the County was not responsible for finding itself unrepresented at trial. (1AA 182 [¶ 2], 189-190 [¶¶ 26-30].)

Judge Fredricks denied both motions. He said that he already had continued the trial once to accommodate Mr. Peterson's schedule and he would not do so again. (7RT 1805-1806.) Moreover, he said,

> "I don't see how this is negligence or neglect. This was a conscious decision, strategic or tactical decision, on the part of Bonne, Bridges to simply thumb its nose and tell this court

[7] The County filed identical declarations in support of its motions to vacate the judgment and for a new trial. For simplicity, subsequent citations are to the declaration attached to the motion for new trial.

that they were going to control the schedule. They made choices all along the line here, and it's not—I don't think this is even close to [*In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438]. . . . I don't think this is the kind of case where [Code of Civil Procedure section] 473(b) applies." (7RT 1811-1812.)

The judge further suggested that the County had "sort of acquiesced to the strategy . . . on the part of Bonne, Bridges to abandon the case." (7RT 1803.) According to the court: "[Mr. Peterson] made a tactical decision and the County seemed to go along with it." (7RT 1810.)

STATEMENT OF APPEALABILITY

The County timely appealed from the Judgment On Directed Verdict, the order denying its Motion To Vacate Judgment, and the order denying in part its Motion To Tax Costs on November 27, 2002. (2AA 446-448.)[8] The judgment, which disposes of all issues between the parties, is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). The order denying the motion to vacate the judgment is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2), as an order made after an appealable judgment. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.) The order denying the motion to tax costs is appealable under the same section. (*Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.)

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[8] The County contends a cost award is premature because a new trial is warranted. It does not otherwise pursue cost issues in this appeal.

STANDARD OF REVIEW

An order granting or denying a continuance is reviewed for abuse of discretion. (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249.)

An order granting or denying relief under Code of Civil Procedure section 473, subdivision (b), generally is also reviewed for abuse of discretion. (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 64.) However, an order granting or denying relief under the mandatory provision of that section is reviewed de novo if it involves the interpretation of the statute or its application to undisputed facts. (See, e.g., *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [construction of regulatory statute subject to independent review]; *Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1641 [applying statute to essentially undisputed facts to determine whether trial court had discretion to relieve plaintiff of statutory time limits is an issue of law subject to de novo review].)

LEGAL ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY FORCING THE COUNTY TO TRIAL WITHOUT COUNSEL.

A. The Trial Court Failed To Strike A Balance Between Judicial Efficiency And The County's Right To A Fair Hearing.

A motion for continuance is addressed to the sound discretion of the trial court. (*Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321.) However, "[t]he trial judge must exercise his discretion with due regard to *all* interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error." (*In re Marriage of*

Hoffmeister (1984) 161 Cal.App.3d 1163, 1169, emphasis added; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 11, p. 37 and cases cited therein.)

Division One of this Court found just such reversible error in *Estate of Meeker* (1993) 13 Cal.App.4th 1099, where the respondent's counsel sought a continuance because he was in trial in another matter. Although the petitioner did not oppose the continuance, the trial court denied it and then dismissed the case because no witnesses were present to testify. (*Id.* at pp. 1102-1103.)

The appellate court reversed with directions to set the case for trial. While it acknowledged the tremendous pressure on courts to manage large caseloads, it noted the equally great pressure on lawyers "to juggle trials in two or more courts, each presided over by a judge who sometimes has to trail cases or otherwise upset the lawyers' efforts to manage their own calendars." (*Id.* at pp. 1105-1106.) The case before it, the court said, "[was] but one example of a problem we see all too often. Trial judges are required to manage increasing caseloads with decreasing resources, disposing of cases as fast as they can. To do this, judges frequently . . . take a forceful position discouraging or forbidding continuances." (*Id.* at p. 1105.) The result was to favor "[e]fficiency . . . over justice," depriving parties of their "day in court." (*Id.* at p. 1106.)

The court said that trial judges must strike "a balance . . . between the trial court's right to run a tight ship and its obligation to provide a meaningful forum for litigants." (*Id.* at p. 1105.) It explained:

> "While it is true that a trial judge must have control of the courtroom and its calendar and must have discretion to deny a request for a continuance when there is no good cause for granting one, it is equally true that, absent circumstances which are not present in this case, *a request for a continuance supported by a showing of good cause usually ought to be granted.*" (*Ibid.*, emphasis added.)

Appellate courts have reversed orders denying continuances in a host of other cases under similar circumstances. (E.g., *Vann v. Shilleh* (1975) 54 Cal.App.3d 192 [abuse of discretion to deny continuance to allow defendant to retain new counsel where defendant's former counsel withdrew three days before trial]; *Link v. Cater*, *supra*, 60 Cal.App.4th 1315 [abuse of discretion to deny additional continuance so that plaintiff could receive medical treatment out of the country]; *Jurado v. Toys "R" Us, Inc.* (1993) 12 Cal.App.4th 1615 [abuse of discretion to deny continuance when plaintiff's treating physician was unavailable on the day set for trial]; *In re Marriage of Hoffmeister*, *supra*, 161 Cal.App.3d 1163 [abuse of discretion to refuse to continue motion to modify spousal support when counsel received opposing party's papers only a short time before the hearing].)

These cases all emphasize the importance of balancing judicial efficiency against the litigants' right to a fair hearing. That didn't happen here. To the contrary, while Judge Fredricks expressed sympathy for the County, he made clear that he did not believe the County's plight was his concern. He said to Mr. Peterson:

> "You're taking your management problem and making it the Court's problem. I don't think that's fair to the Court. I don't think it's fair to the plaintiffs, and it's not fair to your client. . . . [Y]ou want to make it the Court's problem, and you want the Court to be the bad guy. I just don't buy that. *This is your problem. Not my problem.*" (2RT H16, emphasis added.)

When the interests of the parties and the court are properly balanced, it is clear that Judge Fredricks lacked discretion to deny a continuance because the resulting prejudice to the County vastly outweighed any inconvenience to the plaintiffs or the trial court that a brief continuance might have caused.

First, denying the County a continuance denied it the right to be represented by the attorney of its choosing. "In balancing the several competing interests, we start with the proposition that '[t]he right of a party to be represented in litigation by the attorney of his or her choice is a significant right [citation] and ought not to be abrogated in the absence of some indication the integrity of the judicial process will otherwise be injured . . . .'" (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580, quoting *Johnson v. Superior Court* (1984) 159 Cal.App.3d 573, 580.) Here, the County chose to be represented by an extremely experienced, able trial attorney in this complex medical malpractice case. (1AA 192 [¶¶ 2-4].) Prior to July 9, Mr. Peterson had spent more than 250 hours preparing to try this case. (1AA 185 [¶ 14].) The County's interest in being represented by Mr. Peterson therefore was significant. Nonetheless, the trial court apparently gave no weight to this interest, suggesting that *any* attorney associated with Mr. Peterson's firm could try the case. (E.g., 2RT H15 ["You have 80 lawyers. You pick one of them and have them be here at 1:30, and we'll start it (trial)"].)

Second, because only Mr. Peterson had prepared to try the case, the trial court's denial of a continuance effectively denied the County not only the right to be represented by the counsel of its choice, but the right to be represented by anyone at all. "'It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given . . . an opportunity to defend.'" (*In re Marriage of O'Connell* (1992) 8 Cal.App.4th 565, 574.) Here, the County had no such opportunity. Until the day trial was to begin, the County reasonably believed—having been given no indication to the contrary—that Mr. Peterson would represent it.[9]

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[9] Mr. Peterson had never told the County he would not be available because he too expected to try this case. Until just two court days before trial was scheduled to begin, Mr. Peterson believed, based on his opposing counsel's (continued...)

When it learned otherwise on July 9, there simply was not enough time to bring in new counsel to examine more than forty witnesses on multiple issues, including the cause of Mrs. Oliveros' brain damage, the extent of her injuries, the standard of care applicable to physicians in several different disciplines, and plaintiff's expected future damages. (1AA 182 [¶ 2], 183-184 [¶ 7], 189 [¶ 26], 192-193 [¶ 4].) Moreover, even if new counsel could have prepared for trial in the very few days Judge Fredricks allowed (they could not), none of Mr. Peterson's partners with sufficient experience to try a case of this complexity was available on July 9 or 15: All were either in trial in other matters or, in the case of one attorney, out of the country on vacation. (1AA 188-189 [¶ 24]; 2RT H6-8; 3RT 3-4.) As a result, denying the continuance had the practical effect of denying the County and its physicians the opportunity to defend themselves on the merits.

Third, trailing or continuing the trial to permit the County to be competently represented would not have caused the plaintiffs any significant detriment, and they did not argue that it would. Plaintiffs' counsel's only statement in this regard was that one of his experts would be unavailable from July 29 through the end of August, and that he had a ten-day trial and a vacation planned in September. (2RT H18-19.) This statement was plainly offered for planning purposes, not as an objection to a continuance. There was nothing to suggest that this trial could not either have begun before July 29 or have been continued to a date in September

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[9](...continued)
representations, that the *Smith* trial would be continued and would not conflict with the present trial. (1AA 186 [¶¶ 17-18].) Even after he learned on July 3 that *Smith* would not be continued, Mr. Peterson still did not anticipate a conflict because he believed Judge Fredricks would continue the present case to avoid a conflict. His belief was a reasonable one: In twenty-five years of practice, he had never had a request to continue or trail denied when he was in trial on another matter. (1AA 188 [¶ 23], 189 [¶ 28].) He also expected Judge Fredricks would yield to courthouse policy, as described by Judge Kristovich, that older cases—here, *Smith*—take priority. (1AA 187-188 [¶ 21].)

convenient to all parties and the court; indeed, Mr. Peterson specifically offered to make himself available on *any date* convenient to the court and plaintiffs following the conclusion of the *Smith* trial, and he further offered to "remain uncommitted to any courtroom except this one until you are ready for me." (3RT 19, 22.)

Fourth, no lack of diligence on the part of the County justified the failure to give any weight to its right to competent representation. As discussed above, it is undisputed that the County did not know until July 9, the day the case was set to go to trial, that Mr. Peterson could not represent it. (1AA 182 [¶ 2], 189 [¶ 26], 192 [¶ 4].) Recognizing there was no real alternative, it then promptly sought a continuance and, when that was denied, immediately sought writ relief from this Court. When its writ was denied, the County petitioned the Supreme Court for review. (1AA 61-88, 111-143.)

The County acknowledges the enormous pressure on trial courts to resolve cases expeditiously, as well as the necessity for courts to control their calendars. However, there is nothing in the present record to indicate that a brief continuance to allow Mr. Peterson to conclude another trial in any way would have harmed "the integrity of the judicial process." (*Smith, Smith & Kring v. Superior Court*, *supra*, 60 Cal.App.4th at p. 580.) Moreover, in appropriate cases the need for judicial efficiency must give way to the legitimate needs of the parties. This was such a case.

The County urges this Court to reverse the judgment and order a new trial, one in which *both* sides have the opportunity to present the merits of their positions.

B. It Was Reversible Error To Excuse The County's Attorney After Denying A Continuance.

After he denied the County's request to continue, Judge Fredricks excused Mr. Peterson to return to the *Smith* trial. (3RT 26-27.) Doing so after denying the County a continuance was a clear abuse of discretion.

The court so held in *Vann v. Shilleh*, *supra*, 54 Cal.App.3d 192. There, defense counsel filed a request to withdraw three days before trial. (*Id.* at p. 195.) The trial court granted the request. (*Ibid.*) Counsel then requested a continuance to permit the client to retain a new attorney, but the court refused. (*Ibid.*) Defendant tried the case on his own behalf, suffering entry of a $10,000 judgment against him. (*Id.* at p. 196.)

The court of appeal held that denying the continuance after permitting counsel to withdraw was an abuse of discretion. According to the court, "It was the duty of the trial court to see that [the defendant] was protected, so far as possible, from the consequences of [his attorney's] improper abandonment of his client." (*Id.* at p. 197.) Thus, having permitted the attorney to withdraw just a few days before trial, the court lacked discretion to deny the client additional time to retain another lawyer. (*Id.* at pp. 197-200; and cf. *Linn v. Superior Court* (1926) 79 Cal.App. 721 [no abuse of discretion in denying attorney's request to withdraw nine days before trial, where granting request might have required continuing trial].)[10]

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[10] This holding is consistent with the law in many other jurisdictions. (E.g., *Homehealth, Inc. v. Heritage Mut. Ins. Co.* (Ind. App. 1996) 662 N.E.2d 195 [abuse of discretion to deny plaintiff's motion for continuance after allowing plaintiff's attorney to withdraw three weeks before trial]; *Castellanos v. K-Mart Store* (Fla. App. 1994) 632 So.2d 1057 [abuse of discretion to deny plaintiff's motion for continuance after allowing plaintiff's counsel to withdraw on the day of trial]; *Imhoff v. Hammer* (Del. 1973) 305 A.2d 325, 326 [abuse of discretion to deny continuance after permitting attorney to withdraw on day of trial: "(A) last-minute withdrawal of counsel may not deprive a litigant of his day in court. If trial

(continued...)

There is no question that the trial court would have put Mr. Peterson in an extremely difficult position if it had ordered him to remain in the courtroom and try this case. But as *Vann v. Shilleh* recognized, a court's duty is to protect the parties, not their lawyers. By excusing Mr. Peterson to return to the *Smith* trial after denying the County a continuance—particularly after learning that there was no other lawyer who had prepared to try the case—the court failed in that duty. It was an abuse of discretion warranting a new trial.

C. By Ordering The County To Trial Without Counsel, The Trial Court Improperly Sanctioned The County For Its Attorney's Conduct.

The Legislature has recognized the power of trial courts to adopt local rules "to expedite and facilitate the business of the court." (Code Civ. Proc., § 575.1.) However, it has also determined that if a party fails to comply with local court rules because of the actions of its attorney, any sanction for noncompliance must be imposed *against the attorney*, not the client:

> "It is the intent of the Legislature that if a failure to comply with [local rules promulgated pursuant to Code of Civil Procedure section 575.1] is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and

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[10](...continued)
on the appointed day was deemed imperative, leave to withdraw should have been denied, . . . and counsel should have been required to proceed"]; *Smith v. Bryant* (N.C. 1965) 141 S.E.2d 303 [abuse of discretion to grant only one-day continuance after permitting counsel to withdraw]; *Finch v. Wallberg Dredging Co.* (Idaho 1955) 281 P.2d 136 [abuse of discretion to deny continuance after permitting counsel to withdraw three days before trial].)

shall not adversely affect the party's cause of action or defense thereto." (Code Civ. Proc., § 575.2, subd. (b).)

The California Supreme Court considered the interplay of this section and statutory delay reduction goals in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, holding that where a party's noncompliance with local fast track rules is the fault of counsel, not the client, a trial court abuses its discretion by dismissing the party's action as a sanction for violating those rules. In *Garcia*, the plaintiff's counsel repeatedly violated the court's fast track rules: He failed to timely serve the complaint, to file an at-issue memorandum, to file a status conference statement, or to appear at a status conference. (*Id.* at pp. 472-473.) As a consequence, the trial court dismissed the action. (*Id.* at p. 473.)

The court of appeal reversed and the Supreme Court affirmed, holding that section 575.2, subdivision (b), "'sharply limit[s] penalties in instances of attorney negligence.'" (*Id.* at pp. 474-475, 482.) The Court explained that while delay reduction is an important legislative goal, there was no evidence that the Legislature intended "'the policy of expeditious processing of civil cases'" to override "'the strong public policy that litigation be disposed of *on the merits* whenever possible.'" (*Id.* at pp. 479, 480, emphasis added.) Moreover, courts have "numerous other methods for maintaining control of their calendars," such as imposing monetary sanctions against a party's attorney. (*Id.* at pp. 480-481.) Finally, the Court explained, the defendants' interpretation of the statutes "might result in a proliferation of malpractice suits against counsel that would hinder, rather than promote, calendar control." (*Id.* at p. 481.) Accordingly, it held, section 575.2 precluded the trial court from dismissing plaintiff's action as a sanction for his counsel's misconduct. (*Id.* at pp. 471, 481-482.)

Division Three of this Court followed *Garcia* in *Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, where the trial court dismissed the

complaint for violation of a local delay reduction rule requiring plaintiffs to serve the summons and complaint within 60 days. The reviewing court concluded that "service of process is ordinarily within the power of counsel as opposed to the client," and thus that the trial court had violated section 575.2 by dismissing the plaintiff's action. (*Id.* at p. 1056.)

Indeed, in another context this Court itself has applied the principle that judicial efficiency, as manifest in delay-reduction rules, should not trump a party's right to have his case litigated on the merits where the party was without fault. (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795 [reversing terminating sanctions for pro se prisoner's failure to appear at status conference]; see also *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398-399, emphasis added, citations omitted ["When the two policies collide head-on, the *strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency*"].)

In the present case, the strong public policy favoring resolution of cases on the merits collided with Los Angeles County's fast-track rules, which mandate that cases be tried within twelve, eighteen, or twenty-four months. (Super. Co. L.A. County, Local Rules, rule 7.0(d).) That collision was not the result of any wrongdoing by the County. Instead, its need for a continuance was entirely due to *its counsel's* commitments to other clients. (1AA 182 [¶ 2], 186-190 [¶¶ 17-30].) Certainly, the County was not responsible for the fact that Mr. Peterson had more than one trial set to begin the same week. Nor can the County be faulted for failing to prepare another attorney to try this case, as it was not even aware until July 9, the day trial was scheduled to begin, that Mr. Peterson had a conflict that prevented his attendance at trial. (1AA 182 [¶ 2], 189 [¶ 26], 192-193 [¶ 4].)

The trial court repeatedly acknowledged that the County was not responsible for its attorney's commitment to try two cases on the same day. According to the court:

> "I'm not going to get in and tell Mr. Peterson or his firm how to manage their law firm or manage their calendar. But their management practices cannot become my crisis. . . . Their problems cannot become my problems, I'm afraid, *and I'm sorry that it's become [the County's] problem.* . . . I think it's a grave disservice that Mr. Peterson and his firm are perpetrating upon this client in this case. . . . *I sympathize [with the County].*" (3RT 7, 6, emphasis added.)

(See also 2RT H16, emphasis added [Mr. Peterson's actions were "*not fair to your client.*"]

The trial court thus recognized that, as in *Garcia*, the County's need for a continuance was due entirely to the actions of its attorney. Nonetheless, the court imposed a sanction *on the County*, which had the effect of eliminating the County's defense to this action. The court did so, moreover, over counsel's express request that any sanction be applied against him, not the County. On July 15, Mr. Peterson suggested the following:

> "My proposal [is] that the court, balancing the equities, not punish the client by forcing this case out. . . . If the court thinks it's appropriate, then punish me and my law firm . . . by way of sanctions for having gotten into this situation, and schedule the case for a date then when Mr. Hidalgo's witnesses would be available. The sanctions [could be] heavy enough to constitute a grave threat against this ever occurring again. And then the client's interest would be protected, your Honor would feel that our office has been dealt with in a way that would discourage this behavior from occurring again, and Mr. Hidalgo's clients would have their day in court as well with the witnesses that they prefer." (3RT 17-18.)

He continued:

"It seems to me that what your Honor is threatening to do by sending this case out is going to unnecessarily punish a client when it would seem directed more at me and my law firm. So I would suggest that the negative impact of today fall on me and . . . on my law firm and not on the client." (3RT 18.)

The trial court declined to follow counsel's suggestion, and in doing so it failed to heed the Supreme Court's admonishment that where an attorney's conduct causes judicial delay, the proper penalty is a monetary sanction *against the attorney*, not a deprivation of a party's day in court. (*Garcia*, *supra*, 16 Cal.4th at pp. 480, 481.) Ordering the case to trial without the County's counsel present imposed a heavy and undeserved sanction on the County. It was a violation of section 575.2 and, as such, was a clear abuse of the trial court's discretion.

II. THE TRIAL COURT ERRED BY DENYING THE COUNTY'S MOTION FOR RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473.

A. The County Was Entitled To Relief Under The Mandatory Provision Of Section 473.

Code of Civil Procedure section 473, subdivision (b), provides for *mandatory* relief from a default or default judgment if the application for relief is accompanied by an attorney's affidavit of fault. In pertinent part, it states:

"[T]he court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit

> attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Code Civ. Proc., § 473, subd. (b), emphasis added.)

According to our Supreme Court, "The purpose of this provision '[is] to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorney.' [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257, original emphasis.)

That's what happened here: The County lost its day in court. The judgment, while not styled as a default judgment, was exactly that—a judgment entered following a one-sided presentation of evidence by plaintiffs, a "trial" at which the County was neither present nor represented. (See Code Civ. Proc., § 585, subd. (b).) Moreover, Mr. Peterson submitted an attorney affidavit of fault that unambiguously demonstrated that entry of judgment against the County resulted from acts and omissions on his part, for which the County bore no responsibility. Under such circumstances, the trial court had no choice but to grant the County's motion for relief pursuant to the mandatory provision of section 473.

1. The mandatory provision of Code of Civil Procedure section 473(b) applies because the judgment in the present case is the "procedural equivalent" of a default judgment.

This Court and others have made clear that mandatory relief under section 473 is available not only from default judgments, but also from judgments that are the "procedural equivalents" of default judgments. For example, in *In re Marriage of Hock & Gordon-Hock*, *supra*, 80 Cal.App.4th 1438, neither the wife nor her attorney was present for trial. After the trial court entered judgment, the wife filed a motion for relief under the mandatory provision of section 473. (*Id.* at p. 1441.) The trial court denied the motion, and this Court reversed. (*Id.* at pp. 1440-1441.) Among other things, it rejected the husband's contention that section 473 did not apply because the judgment followed an uncontested hearing, not a default. (*Id.* at pp. 1442-1443, 1447.) Citing "highly persuasive" dictum in *Au-Yang v. Barton* (1999) 21 Cal.4th 958, 963—that "'[a] proceeding taken against [a party] in his absence *is in the nature of a default*'" (emphasis added)—the Court explained:

> "[T]he circumstances of this case are more like the procedural equivalent of a default judgment. There has been no litigation on the merits. [The wife] did not appear at the trial, nor was she represented by her attorney . . . . *She has not had her day in court.*" (*Id.* at p. 1444, emphasis added.)

Accordingly, the Court said, mandatory section 473 relief was appropriate.

Division Four of this Court reached a similar result in *Yeap v. Leake* (1997) 60 Cal.App.4th 591. There, when the plaintiff's attorney failed to appear at a judicial arbitration hearing, the arbitrator awarded $0 and judgment was entered on that award. (*Id.* at pp. 594-595.) The trial court

denied the plaintiff's motion to set aside the judgment under the mandatory provision of section 473. (*Id.* at pp. 597-598.) The court of appeal reversed, explaining that the judgment was analogous to a default because it resulted from the plaintiff's nonappearance at the arbitration hearing:

> "[A]ppellant herein never had an opportunity to litigate the merits of her claim. Although the arbitrator purported to issue an 'award' of '$0,' the effect was the same as a dismissal for failure to appear on the first day of trial. Thus, the judgment entered in this matter was analogous to a default because it came about as a result of appellant's failure to appear and litigate at the arbitration hearing. For that reason, we believe that the mandatory provision [of section 473] is applicable." (*Id.* at p. 601, internal citations omitted.)

This Court reached the same result on slightly different facts in *Avila v. Chua* (1997) 57 Cal.App.4th 860. There, the plaintiff's attorney filed late opposition to the defendant's motion for summary judgment because of a calendaring error. (*Id.* at pp. 864-865.) The trial court struck the opposition as untimely and granted the motion for summary judgment. (*Id.* at p. 864.) It then denied the plaintiff's motion for relief under the mandatory provision of section 473. (*Id.* at p. 865.) This Court reversed, concluding that "[t]his case is directly analogous to a default judgment." (*Id.* at p. 868.) It explained: "There has been no 'litigation and adjudication on the merits' . . . . Instead, this case is of the kind which . . . the mandatory provisions were designed for: Appellant lost his day in court due solely to his lawyer's failure to timely act." (*Ibid.*)

The County is aware of only one court that has rejected the analyses of *Marriage of Hock*, *Yeap*, and *Avila*. In *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, the Third Appellate District held that mandatory relief under section 473 was not available to a party who

failed to timely file substantive opposition to a motion for summary judgment because a summary judgment is not a "default" or a "default judgment" within the meaning of section 473. (*Id.* at p. 138.) The court explained that "default" has both a "broad meaning" ("the omission or failure to perform a legal or contractual duty") and a narrow meaning ("a defendant's failure to answer a complaint"). (*Id.* at p. 143.) It concluded that the Legislature intended the narrower meaning to apply to section 473; thus, "the mandatory provision of section 473(b) applies to a 'default' entered by the clerk (or the court) when a defendant fails to answer a complaint, not to every 'omission' or 'failure' in the course of an action that might be characterized as a 'default' under the more general meaning of the word." (*Ibid.*)

This Court's opinions in *In re Marriage of Hock* and *Avila v. Chua*, and Division Four's analysis in *Yeap v. Leake*, articulate a far sounder rule than that articulated in *English*. By its own terms, section 473's mandatory provision applies not only to "defaults" and "default judgments," but also to "*any* . . . dismissal" entered against a party. (Code Civ. Proc., § 473, subd. (b), emphasis added.) Were "default" to be interpreted as narrowly as *English* suggests, much broader relief would be available to plaintiffs than to defendants: A plaintiff whose complaint was dismissed *for any reason* would be entitled to section 473 relief, but a defendant could get comparable relief only if it failed to answer a complaint. Nothing in the statute or its legislative history suggests that the Legislature intended such an unbalanced result.

Moreover, as *Marriage of Hock*, *Avila* and *Yeap* recognized, all parties who lose their day in court because their attorneys fail to act are similarly situated, regardless of the stage of the proceedings at which those failures occurs. (*In re Marriage of Hock*, *supra*, 80 Cal.App.4th at pp. 1443-1444; *Yeap v. Leake*, *supra*, 60 Cal.App.4th at pp. 599-601; *Avila v. Chua*, *supra*, 57 Cal.App.4th at pp. 865-868.) There simply is no reason

to treat an attorney's failure to answer a complaint differently than every other form of attorney inadvertence.

Finally, when the Legislature amended section 473 in 1991, and again in 1992, it did so to overturn decisions that sharply *restricted* the statute's reach. (*English v. IKON Business Solutions, Inc.*, *supra*, 94 Cal.App.4th at pp. 138-140.) In the six years since *Avila* and *Yeap* were decided, the Legislature has made no move to overturn their analysis of the mandatory provision of the statute. Accordingly, "it can be presumed that the Legislature is aware of the [courts'] interpretation *and has acquiesced in that interpretation.*" (*People v. Herrera* (1998) 67 Cal.App.4th 987, 993, emphasis added.)

For all of these reasons, the County may avail itself of the mandatory provision of section 473. Its attorney was unexpectedly ordered to trial in another matter, the County was unrepresented at trial, plaintiffs proved up their damages in a proceeding similar to a default proceeding and, as a result, the County is faced with a $12.5 million judgment. This judgment—"'taken against [the County] in [its] absence'"—is the procedural equivalent of a default judgment. (*In re Marriage of Hock*, *supra*, 80 Cal.App.4th at pp. 1443-1444, quoting *Au-Yang v. Barton*, *supra*, 21 Cal.4th at p. 963.)

2. The judgment should be vacated because it resulted from the mistake, inadvertence, surprise, or neglect of attorney George Peterson.

When there is a proper affidavit of fault, relief under section 473 "is mandatory and the trial court has no discretion." (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32, fn. 4.) "The statute thus sets up one of the great zen paradoxes of the law—to be relieved of one's own malpractice one must first confess it." (*Ibid.*)

This Court has explained that the purpose of the mandatory provision of section 473 is "to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits." (*Avila v. Chua*, *supra*, 57 Cal.App.4th at p. 868, internal quotation marks omitted.) Further,

> "The law strongly favors trial and disposition on the merits. Therefore, any doubts in applying section 473 must be resolved in favor of the party seeking relief." (*Ibid.*, internal quotation marks omitted.)

To obtain relief under the mandatory provision of section 473, "'counsel need not show that his or her mistake, inadvertence, surprise or neglect was excusable. No reason need be given for the existence of one of these circumstances. Attestation that one of these reasons existed is sufficient to obtain relief, unless the trial court finds that the dismissal did not occur because of these reasons. [Citation.]'" (*Yeap v. Leake*, *supra*, 60 Cal.App.4th at p. 601, quoting *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660; see also *In re Marriage of Hock*, *supra*, 80 Cal.App.4th at p. 1442 ["As long as there is an attorney's affidavit of fault, the neglect does not have to be excusable"]; *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 927 [same].)

There can be no doubt in this case that the County is entitled to relief.

a. Undisputed evidence establishes that the $12.5 million judgment against the County resulted from its attorney's "mistake, inadvertence, surprise or neglect."

In his declaration that accompanied the County's motion for section 473 relief, Mr. Peterson acknowledged his responsibility for the entry of an uncontested judgment against the County. His declaration specifically attests to the following acts and omissions:

- He had several cases set for trial the week of July 8, 2002, including the present case and *Smith v. Booker*. (1AA 186 [¶ 17].) Although he was aware of a potential conflict, he did not prepare another lawyer to try any of these cases in the event he could not do so. (1AA 189 [¶ 26].)
- He failed to advise the County until July 9, 2002 that he would not be able to try the present case on its behalf unless trial were either trailed or continued. Accordingly, the County never had an opportunity to associate in new counsel who was sufficiently experienced and prepared to try the case. (1AA 182 [¶ 2], 189 [¶ 26], 192-193 [¶ 4].)
- He assumed that the *Smith* trial would be continued because his opposing counsel had said he would be in trial on July 8 and would seek a continuance. While he had no reason to doubt that he had been given that information in good faith, he acknowledged that he should not have relied on it. (1AA 186 [¶ 18], 189 [¶ 27].) Because he *did* rely on it, he was caught unaware when the *Smith* plaintiff associated in new counsel who answered ready for trial on July 8.

- He assumed that the present trial would be continued or trailed once trial began in *Smith*. He acknowledged that that assumption was unwise in view of the increasing pressure on courts to expedite cases pursuant to the fast-track rules. (1AA 189-190 [¶ 28].)
- Thus, he acknowledged that he was solely responsible for the fact that the County found itself without an attorney prepared to try this case when the court ordered it to trial. (1AA 182 [¶ 2], 189 [¶ 26], 190 [¶ 30].)

Had Mr. Peterson not made these mistakes in judgment, the result would have been different. Certainly, if he had given the County timely notice of his unavailability, the County could have appeared at trial with an attorney prepared to represent it. Mr. Peterson's declaration therefore was sufficient to establish the causation requirement of section 473, and the County was entitled to mandatory relief.

b. The trial court's conclusion that Mr. Peterson made a "strategic or tactical decision" not to appear at trial has no basis in fact or reason.

Although the trial judge acknowledged the mandatory provision of section 473, he concluded that he could deny relief here because Mr. Peterson's nonappearance at trial was "a strategic or tactical decision." (7RT 1811). According to Judge Fredricks:

> "Mr. Peterson had a choice of [which] case to try, and apparently he chose to try [another] case. I guess it must have been more important is all I can guess. He didn't seem to indicate that on that day. He said it was older I think is what

he told me, but it wasn't because it was more important. He made a tactical decision . . . ." (7RT 1809-1810.)

Judge Fredricks' characterization of Mr. Peterson's conduct is simply wrong. The "tactical decision" the court attributed to him was the "decision" to try *Smith* rather than the present case because *Smith* was "more important." (7RT 1809-1810.) However, the only conclusion supported by the record is that Mr. Peterson tried *Smith* because he had no choice in the matter. *Smith* was older than *Oliveros*, and Judge Kristovich, the judge presiding over the *Smith* trial, had advised Mr. Peterson that the Compton Superior Court's policy in the event of conflicting trial dates was to give priority to the oldest case. (2RT H5-6, 3RT 10; 1AA 187-188 [¶ 21].) By July 9, the date trial was scheduled to begin in *Oliveros*, Judge Kristovich had already ordered *Smith* to trial. (*Ibid.*) Mr. Peterson thus did not make a "tactical decision" to try *Smith* rather than *Oliveros*; he simply obeyed Judge Kristovich's order to appear for trial.

Nor was the fact that Mr. Peterson found himself in an untenable position the result of a deliberate strategy. The undisputed record establishes that it was, instead, the result of a number of factual mistakes and errors in judgment—for example, Mr. Peterson's mistaken belief that *Smith* would be continued and his subsequent mistaken belief that Judge Fredricks would yield to the older case. (1AA 186-188 [¶¶ 17-23], 189-190 [¶¶ 26-30].) Indeed, even Judge Fredricks appeared to believe that Mr. Peterson had not anticipated a conflict in trial dates; his failure to anticipate the conflict was the premise of the court's charge of poor case management. (See 3RT 7 ["Mr. Peterson's firm takes more cases than they can handle"].)

Finally, it is difficult to conceive what kind of strategic advantage Mr. Peterson could have expected to gain for the County by failing to appear for trial. After two lengthy hearings on July 9 and 15, it was

apparent that Judge Fredricks would not continue *Oliveros*, but instead would either enter the County's default or force a trial without the County present. Either undeniably was a devastating result for the County. Certainly, the County would have been far better served had Mr. Peterson tried this case on its behalf. The County gained nothing, and lost a great deal, because of Mr. Peterson's absence.

This case thus is analogous to *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481. There, the defendants sought relief under section 473 after the court entered a default against them. (*Id.* at p. 1483-1484.) In support, their attorney filed a declaration stating that he had not been able to timely answer plaintiff's complaint because he "ha[d] been engaged in a pre-trial civil proceeding during the past six (6) weeks . . . [which] has virtually taken every minute of time." (*Id.* at p. 1484.) In other words, the attorney apparently was aware of the deadline, but simply could not meet it. The trial court denied the motion, but the court of appeal reversed. (*Id.* at p. 1486, 1488.) In doing so, the court rejected the plaintiff's contention that mandatory relief was not available because defendants' failure to answer the complaint was "part of a scheme to hinder and delay plaintiff by abusing the judicial process." (*Id.* at p. 1488.) According to the court: "[A]llowing a default to be taken against defendants is not a rational device to hinder and delay the plaintiff." (*Ibid.*)

Similarly here, Mr. Peterson's last minute inability to represent the County at trial was not part of a deliberate scheme to somehow benefit the County at plaintiffs' expense. No rational lawyer could have thought that abandoning his client on the day of trial would be to the client's strategic advantage, especially once he knew that the trial court would not continue the trial. Thus, Mr. Peterson's conduct may have been "deliberate" in the sense that he was aware of the consequences for *Oliveros* when he complied with Judge Kristovich's order to proceed to trial on *Smith*, but it was not strategic—it was not a "rational device" to gain the upper hand in litigation.

(*Ibid.*) It thus was not within any exception to the mandatory provision of section 473.

c. The trial court's belief that the County "sort of acquiesced" to Mr. Peterson's conduct has no basis in fact or reason.

On both July 9 and 15, the trial court recognized that the County was not responsible for Mr. Peterson's inability to appear at trial, and it expressed sympathy for the County, which it recognized was the victim of its counsel's "management problem." (2RT H16; 3RT 6-7.) Nonetheless, at the hearing on the section 473 motion, the court suggested that the County bore some responsibility for the entry of judgment by somehow "acquiesc[ing]" to Mr. Peterson's absence from the case. According to Judge Fredricks: "[T]he County . . . sort of acquiesced to the strategy . . . on the part of Mr. Peterson and Bonnie, Bridges [*sic*] to abandon the case." (7RT 1803; see also 7RT 1810 ["(Mr. Peterson) made a tactical decision and the County seemed to go along with it"].)

To the extent that the ambiguous comments of the trial court were intended to suggest that the County shared responsibility for the judgment because it "agreed" to be unrepresented at trial, the notion is plainly wrong. There can be no acquiescence absent meaningful choice. There was no opportunity for meaningful choice here, because it is undisputed that the County was unaware until July 9, 2002 that Mr. Peterson would not be able to try this case on its behalf unless the trial were trailed or continued. (1AA 182 [¶ 2], 189 [¶ 26], 190 [¶ 30], 192-193 [¶ 4].) On such short notice, the County simply did not have enough time to prepare another attorney for trial. (See pp. 16-17, *ante.*)

Both the trial court and plaintiffs purported to believe that any lawyer could step in to try the case: Judge Fredricks urged Mr. Peterson to

have someone—anyone—in his office try the case (2RT H15), and plaintiffs identified a number of lawyers who had been involved in pretrial motions or discovery, suggesting that any one of them could have represented the County at trial (2AA 233-234). That suggestion—that anyone with some familiarity with this case would be competent to try it—is absurd. Taking a deposition or attending a hearing on a narrow issue does not make one competent to try a case, particularly a case as complex as this one with such significant medical and damages issues. Instead, trying a case such as this one requires knowledge of the expected testimony of *all* the witnesses on both sides—here, 43 witnesses, including 18 experts (1AA 183-184 [¶ 7])—and skill in presenting the defense to the jury. The declarations submitted in support of the County's section 473 motion establish that no one but Mr. Peterson had sufficient knowledge or trial experience to try this case on July 15, and nothing in plaintiffs' opposition papers contradicts that fact. Some division of labor in a case of this magnitude and complexity is to be expected; it does not establish that any lawyer assigned to a discrete task could step in at the last minute and competently defend the County. Plaintiffs' emphasis on the number of attorneys who had some involvement in pretrial matters only underscores the fact that Mr. Peterson alone had the full picture and knew enough about *all* the facts of the case to try it.

The trial court's notion of acquiescence apparently is premised on the sole fact that the County did not appear at trial with new counsel. But to insist that the County should have gone to trial with a lawyer who was *not* prepared to try the case is to suggest that the *merits* of a case—which include a legitimate defense—count for nothing in the administration of justice. The weight of decisional authority is decidedly otherwise.

The trial court made no finding that Mr. Peterson's conduct was *not* in fact the cause of the judgment entered against the County, as the statute requires for a denial of mandatory relief. (Code Civ. Proc., § 473, subd. (b)

["unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect"].) Moreover, the record does not support any conclusion that the County contributed to the situation in which it found itself. Instead, the only conclusion with any basis in reason is that the County did *not* contribute to its predicament. This Court should reverse and order this case to be tried on the merits.

B. The County Was At Least Entitled To Relief Under The Discretionary Provision Of Section 473.

In the unlikely event the mandatory provision of section 473 is inapplicable, the trial court had no choice under the circumstances of this case but to grant the County relief under the discretionary provision of that section.

1. The judgment entered against the County resulted from its attorney's excusable conduct.

In addition to providing for *mandatory* relief when an attorney files an affidavit of fault, section 473, subdivision (b) also provides for *discretionary* relief:

> "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).)

The discretionary relief provision is "applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted." (*Elston v. City of*

Turlock (1985) 38 Cal.3d 227, 233.) In other words, "[b]ecause the law favors disposing of cases on their merits, '*any doubts in applying section 473 must be resolved in favor of the party seeking relief* from default [citations].'" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, emphasis added, quoting *Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233.)

The relief provided by the discretionary provision is both broader and narrower than that provided by the mandatory provision. Because the discretionary provision gives relief from a "judgment, dismissal, order *or other proceeding*" (emphasis added), it applies to "'*any step* taken in a case," not only defaults, default judgments and dismissals. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1106, internal quotation marks and citations omitted.) Accordingly, even if this Court were to conclude that the judgment in this case were not the equivalent of a default, that conclusion would not bar discretionary section 473 relief.

However, while the mandatory provision of section 473 provides relief from excusable *and* inexcusable conduct (*Yeap v. Leake*, *supra*, 60 Cal.App.4th at p. 601), the discretionary provision of section 473 normally provides relief from only *excusable* conduct. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) In determining whether the attorney's mistake, inadvertence, surprise or neglect was excusable,

> "the court inquires whether "a reasonably prudent person under the same or similar circumstances" might have made the same error.' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.]" (*Ibid.*)

Mr. Peterson's actions satisfy the "excusable conduct" standard, because any reasonably prudent person could have made the same mistakes

he did under similar circumstances. For example, opposing counsel in *Smith* had repeatedly assured Mr. Peterson that he would seek a continuance because of his own scheduling problems. (1AA 186 [¶¶ 17-18].) A reasonably prudent attorney would not anticipate that the *Smith* plaintiff would hire new counsel at the last minute and choose to proceed as scheduled.

Moreover, Mr. Peterson believed that should there be an unanticipated conflict between *Smith* and *Oliveros*, one of the cases would be trailed or continued. (1AA 189-190 [¶ 28].) That assumption, too, while ultimately incorrect, was not unreasonable because it was based on Mr. Peterson's experience that trial judges routinely grant continuances if counsel are engaged in trial of other matters; in twenty-five years, Mr. Peterson had never had a request to continue or trail denied under these circumstances. (*Ibid.*) A reasonably prudent person would also rely on a judge's description of courthouse policy as Mr. Peterson did here when he answered ready for trial in *Smith*; he believed that it was the policy of the Compton superior court to give priority to the oldest case because Judge Kristovich, the judge presiding over the *Smith* trial, had told him so. (1AA 187-188 [¶ 21].) In short, while Mr. Peterson's conduct ultimately was extremely prejudicial to the County, it was not inexcusable.

2. The County was diligent in seeking relief.

The discretionary relief provision is "applied liberally where the party in default moves promptly to seek relief . . . ." (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233; see also *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 258 ["The party seeking relief must . . . be diligent"].) Here, the County sought a continuance of trial the very same day it learned that Mr. Peterson could not represent it (1AA 182 [¶ 2], 189 [¶ 26]; 2RT H1-H22), and it filed a petition for writ of

mandate three days later (1AA 61-88). It filed a petition for review on July 17, two days after it learned that the writ petition had been denied. (1AA 109-110, 111-143.) Finally, it filed a motion for relief under section 473 less than a month after judgment was entered. (1AA 198-226.) In short, once the County was aware that Mr. Peterson would not represent it at trial, the County acted diligently to protect its interests.

3. There was no prejudice to plaintiffs.

"Where the mistake is excusable and the party seeking relief has been diligent, courts have often granted relief pursuant to the discretionary relief provision of section 473 if no prejudice to the opposing party will ensue. In such cases, the law 'looks with [particular] disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.'" (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 258, citations omitted.)

Here, a brief continuance would not have prejudiced plaintiffs. At worst, it would have delayed trial by about eight weeks to accommodate the vacation schedules of plaintiffs' experts' and to allow plaintiffs' counsel to conclude another trial. (See p. 18, *ante*.) There is absolutely no showing that a full and fair trial could not have been conducted at that time. Significantly, while plaintiffs' counsel denied saying he had "no problem" with a further continuance, he did not object to a continuance nor did he argue that his clients would be prejudiced in any way. (2AA 247 [¶ 12]; see also 1AA 188 [¶ 23]; 2AA 326-327 [¶ 2].)

In declining to grant discretionary relief in this case, the trial court did not adhere to the "venerable principles" that "'the provisions of [section 473] are to be liberally construed and sound policy favors the determination of actions on their merits.' [Citation.]" (*Zamora v. Clayborn Contracting*

Group, Inc., supra, 28 Cal.4th at pp. 255-256.) Failure to do so here was a clear abuse of discretion that warrants reversal.

CONCLUSION

For all the foregoing reasons, the trial court erred by denying the County's motions to continue the trial and to vacate the judgment pursuant to Code of Civil Procedure section 473. This Court should vacate the judgment and order a new trial so that this difficult case can be fully litigated on the merits.

Dated: September 2, 2003

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 14 (c)(1), the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 13 points and contains 11,809 words.

Dated: September 2, 2003

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