2d Civil No. B163333

Service on the Attorney General required by California Rules of Court, rule 44.5

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 REPLY BRIEF

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INTRODUCTION

The amended Rules of Court, which became effective after the filing of the County's opening brief, are now explicit: civil case management rules are "to be applied in a fair, practical, and flexible manner so as to achieve the ends of justice." (Cal. Rules of Court, rule 204.)[1/] The new case management rules are the Judicial Council's response to inflexibility and the "perceived tendency [of some courts] to overvalue disposition guidelines" embodied in local fast track rules. (*Polibrid Coatings, Inc. v. Superior Court* (2003) 112 Cal.App.4th 920, 924.) This case presents an example of the kind of rigid approach to case management that precipitated the adjustment and clarification of these guidelines: the trial court ordered trial to commence, despite the fact that the County's lawyer had just been ordered to trial in an older case down the hall.

In so doing, Judge Fredricks characterized this case as "extremely old." (3RT 6.) However, in July 2002 when the key events surrounding the County's need for a continuance occurred, the case was still within the guideline that sets 24 months as the goal for disposition of all cases. (Cal. Rules of Court, rule 209(b); see Respondents' Brief ("RB") 3 [setting out case chronology].) It was "old" only in the sense that it had been on the

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[1/] These amendments to the California Rules of Court became effective on January 1, 2004. At the same time, section 9 of the Standards of Judicial Administration, referenced in the Respondents' Brief, was repealed.

books 22 months and thus was approaching the outside limit for disposition of all cases contemplated by the rules. But that limit was and remains a *goal*, not a mandatory deadline. (See *Polibrid Coatings, Inc. v. Superior Court*, *supra*, 112 Cal.App.4th at p. 923 ["the state rule, by its terms, is merely a 'goal' and courts are only directed that they 'should' process all cases within two years of filing"]; Cal. Rules of Court, rule 209; see also Cal. Rules of Court, rule 208 [addressing case management "goals"].) When Judge Fredricks directed a verdict and entered the $12.5 million judgment against the County, despite its absence from trial, he attained the goal of disposing of the case within two years. However, the ends of justice were not served.

In their Respondents' Brief, plaintiffs contend otherwise. Among other things, they argue that to grant a continuance of the trial, or post-trial relief pursuant to Code of Civil Procedure section 473, would have reflected "partiality" toward the County, which in plaintiffs' view has only itself to blame for the judgment, because the County chose a busy litigator to represent it and would not accept a less skilled, unprepared attorney as a last minute substitute. (RB 53, 56.) Belatedly, they also claim that they would have been prejudiced had the trial not gone forward as scheduled, an argument they did not feel compelled to make in the trial court. (RB 31-32.) Indeed, and not unexpectedly, they emphasize the purported right of a

trial court to "insist" on holding to a trial date, *regardless* of the circumstances. (RB 21-23.)

However, when the circumstances of this case are viewed within the framework of legal principles governing the application of fast track rules, it is clear that plaintiffs' arguments do not pass muster. The trial court transgressed the legal boundaries of its discretion, and indeed its obligation after the trial, in the face of an attorney affidavit of fault, to grant relief to the County. This case should be properly decided on the merits. The judgment should be vacated and the case remanded for trial.

ARGUMENT

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

A. The Fact That The Trial Court May Have Had A Reason For Denying A Continuance Does Not Validate The Ruling.

Plaintiffs contend the trial court did not abuse its discretion in this case because the decision to deny a continuance and to proceed with a trial at which the County was unrepresented was not "capricious, whimsical, or arbitrary." (RB 34.) However, as one court has noted, such "pejorative boilerplate" terms do little by way of providing a standard to guide analysis insofar as they suggest that for a ruling to be an abuse of discretion, it must be "utterly irrational." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) "Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion." (*Ibid.*) As the California Supreme Court has explained:

> "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]"

(*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355, citing 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 244.)

Thus,

> The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be "reasonable," i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law.

(*City of Sacramento v. Drew*, *supra*, 207 Cal.App.3d at pp. 1297-1298.)

In this case, the County's attorney could not appear for trial on the day set and so threatened the goal of case disposition within two years. In such context, the principles defining the scope of discretion reside in the guidelines set forth in the Trial Court Delay Reduction Act (Gov. Code, § 68600, et seq.), including a provision that the standards for timely disposition of cases are merely "guidelines" (Gov. Code, § 68603), and in Code of Civil Procedure section 575.2, subdivision (b) which provides,

> It is the intent of the Legislature that if a failure to comply with [local fast track] rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto.

Further, the California Supreme Court has made clear that the policy of reducing litigation delay as manifested in the Trial Court Delay Reduction Act does *not* take precedence either over Code of Civil Procedure section 575.2, subdivision (b), nor over what the Legislature has recognized is "'the strong public policy that litigation be disposed of on the merits wherever possible.' [Citation.]" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478-480; Appellant's Opening Brief ("AOB") 21.)

The decisions of Judge Fredricks exceeded the scope of discretion residing in the legal principles governing the implementation of fast track rules. Plaintiffs have not demonstrated otherwise.

B. Plaintiffs Never Cite, Much Less Distinguish, *Garcia v. McCutchen* In Which The Supreme Court Made Clear That Judicial Efficiency Is Not An End In Itself And May Not Be Used To Destroy A Party's Defense.

In its opening brief, the County established, with reference to multiple authorities, the basic principle that in managing its calendar, a trial court must give due regard to all the interests at stake in order to avoid the risk of favoring efficiency over justice, and that the trial court in this case failed to fulfill this obligation. (AOB 13-15.) In response, plaintiffs have culled the case law for language emphasizing the power of trial judges to control their courtrooms. For example, they rely on *Flynn v. Fink* (1923)

60 Cal.App. 670 in which some eighty years ago this District stated that a court "has a right to demand that there be orderly, prompt, and effective disposition of litigation" and should "vigorously insist upon cases being heard and determined with as great promptness as the exigencies of the case will permit." (*Id.* at pp. 672-673; RB 22-23.) Plaintiffs also rely on *County of San Bernardino v. Doria Mining & Engineering Corp.* (1977) 72 Cal.App.3d 776 ("*Doria Mining*"), in which the reviewing court stated that courts should not "become a sanctuary for chronic procrastination and irresponsibility on the part of either litigants or their attorneys," and pronounced any policy of liberal continuances "obsolete," insisting such continuances should be granted "sparingly, nay grudgingly." (*Id.* at pp. 781-782; RB 28.)

The foregoing dicta in *Doria Mining* was soundly criticized in *Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 16.

> [W]e must respectfully register our disagreement to the sheer relish with which the *Doria Mining* opinion, in dicta, repudiated the idea of the liberality in continuances. . . . [¶] A policy which is absolutely dead set against continuances—which treats them like some precious metal—is not without its own costs to both the legal profession and the legal system.

The court went on to say:

> *Doria Mining* regularly shows up as the centerpiece of points and authorities opposing continuance motions, many of which would go unopposed if opposing counsel had not yielded to the temptation to try to extract some advantage from the other side's misfortune or scheduling problems. [¶] Of course

> continuances should not be used as a dilatory tactic, and of course good cause [citation] should be present. But Justice Gardner's proposed mantra that continuances be granted only "grudgingly" goes too far. . . . Bitterly fought continuance motions are not particularly productive for either the administration of justice generally or the interests of the litigants particularly.

(*Id.* at pp. 16-17, emphasis omitted.)

In any event, it is obvious that, given the different and competing policy concerns involved in bringing a case to trial, there will be cases which emphasize matters from the trial court perspective. The County has repeatedly acknowledged that trial courts must have discretion to control their calendars to keep matters moving. (See, e.g., AOB 1, 18.) However, the Judicial Council rules leave no doubt—courts must always focus on the needs of the individual case (Cal. Rules of Court, rule 209), and thus the need to be firm does not equate with the right to be inflexible in applying standards for disposing of cases to the point where a defense is destroyed and a huge judgment is imposed.

An examination of the circumstances of both *Flynn* and *Doria Mining* only highlights how different the circumstances of this case are and how Judge Fredricks' response to the County's need for a brief continuance was incorrect. Both *Flynn* and *Doria Mining* involved last minute changes of counsel which precipitated requests for trial continuances. In *Flynn*, new counsel substituted into the case actually knowing that he would not be able

to appear for trial on the date assigned because he was involved in another trial. In *Doria Mining*, the attorney requesting the continuance held off substituting in for the defense until he could be sure that there would be a continuance that would allow him to prepare. Both cases stand for the proposition that litigants "have no absolute right to insist upon a change of counsel at the last moment . . . where such change of counsel requires a continuance in order that the case may be properly prepared for trial." (*Flynn v. Fink, supra*, 60 Cal.App. at p. 673.) Here, it was not a party but rather the judge who, in effect, insisted on a change of counsel and allowed virtually *no* time for any new counsel to prepare for this complex trial, preparation that would entail reviewing thousands of pages of deposition testimony, including that of an anticipated 18 experts. (See, e.g., 2RT H15 ["[Y]ou pick one of [the lawyers in your office] and have them be here at 1:30, and we'll start it"].)

Plaintiffs also focus on statutory language which, in isolation, could be read to support the primacy of judicial efficiency; thus, for example, they emphasize language in Government Code section 68607 that it is the responsibility of trial courts to "compel" attorneys and litigants to resolve their cases without delay, as well as to start trials when scheduled. (RB 14, 16.) They argue that any flexibility would "eviscerate" the meaning of the statute and implementing court rules. (RB 43.) But built into that very

statute is legislative recognition that this is not a perfect world. Thus, courts are to utilize a policy against continuances "to the maximum extent possible and reasonable," to adopt trial setting policies which "to the maximum extent possible" set trial within the time standards of Government Code section 68603 and to schedule enough cases "to ensure efficient use of judicial time while minimizing resetting caused by overscheduling." (Gov. Code, § 68607, subds. (e), (g).) This phrasing reflects the practical reality that it is *not* always possible or reasonable to avoid granting a continuance and that in a litigious world even courts may find themselves overbooked.

If there was any doubt before, there is none now that the Trial Court Delay Reduction Act is to be implemented in a "fair, practical, and flexible manner." (Cal. Rules of Court, rule 204.) This mandate was signaled in *Garcia v. McCutchen, supra,* 16 Cal.4th 469. Not surprisingly, plaintiffs nowhere in their brief mention *Garcia* in which the Supreme Court plainly stated that "the policy of expeditious processing of civil matters [does *not*] override, in all situations, the trial court's obligation to hear cases on the merits.'" (*Id.* at p. 480; see AOB 21.)

Instead, plaintiffs turn to an opinion issued long before fast track rules, *Lorraine v. McComb* (1934) 220 Cal. 753, relying on it for the proposition that the action of a party is not "compulsory" upon a trial court.

(RB 19-20.) In *Lorraine*, the issue was whether a written stipulation by parties to continue a trial was binding on the court under the language of a recently amended statute. The Supreme Court determined that it was not. (220 Cal. at p. 757.) The court rested its construction of the statute on the separation of legislative and judicial powers, and the constitutionally recognized inherent power of the court to control its calendar. (*Id.* at pp. 756-757.) Obviously, the County does not contend its need for a brief continuance was "binding" on Judge Fredricks, i.e., that continuances are mandatory, so *Lorraine* holds no significance for this case. Even in *Lorraine*, however, the court noted the following key points not properly grasped in this case:

- Different, potentially conflicting, interests are involved getting a case to trial—"[t]he rights and conveniences of the parties" and the interest of the court in "[t]he orderly and effective dispatch of legal business." (*Id.* at p. 755.) Here, Judge Fredricks treated the trial court's interest as paramount and viewed the County's plight as simply "not [his] problem." (AOB 15.)

- "Ordinarily it should be possible to accommodate the parties in cases where they mutually agree to a postponement." (*Lorraine*, *supra*, 220 Cal. at p. 755.) Here, there was no opposition to a continuance, at least not until after the County's writ was denied. (Compare 2RT H18

[plaintiffs' counsel does not want to argue with the court or the defense on July 9] with 3RT 24 [on July 15, plaintiffs' counsel states the court has made its decision and they are ready to start trial].) And accommodation was never an option in Judge Fredricks' view because of the 24-month goal for case disposition. (See 3RT 6 ["this case is extremely old"].)

Further, the difference in consequences between the denial of a continuance in *Lorraine* and the denial in this case are stunning. The trial court in *Lorraine* simply took the case off calendar "to again be restored" at a later date. (*Lorraine*, *supra*, 220 Cal. at p. 755.) Here, Judge Fredricks directed a $12.5 million verdict against the County. That is, in this case the consequence of denying a continuance was more than merely administrative, as was the case in *Lorraine*, and should have factored into Judge Fredricks' decision-making because it amounted to a sanction against the County for its attorney's case management problems. (AOB 15, citing 2RT H16.) The denial of a continuance effectively destroyed the County's defense despite the Legislature's intent to "'sharply limit[] penalties in instances of attorney negligence.'" (*Garcia v. McCutchen, supra,* 16 Cal.4th at pp. 474-475, 482; AOB 20-24.)

Plaintiffs insist there was no sanction against the County because Judge Fredricks denied he was imposing one. (RB 58.) But actions speak louder than words, and the trial court's course of conduct culminating in a

huge judgment against the County, which it was unable to defend against, was wholly inconsistent with legislative intent and with the clear direction given by the Supreme Court in *Garcia v. McCutchen.* Had the trial court properly examined the circumstances and weighed the interests presented instead of holding onto the 24-month guideline as if it were a mandatory limit, it would have granted the brief continuance needed to allow the case to be disposed of on the merits. Not to do so was a clear abuse of discretion. (See, e.g., *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1169 ["'(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*'"], emphasis added.)

C. Plaintiffs' Argument That The Last Minute Unavailability Of Trial Counsel Was Not Good Cause For A Continuance Is Without Merit.

Under the new guidelines, the fact that trial counsel is engaged in another trial is a factor to consider in deciding whether to grant a continuance. (Cal. Rules of Court, rule 375(d)(8).) The Judicial Council has recognized the practical realities of a litigation practice in a way that plaintiffs do not. In plaintiffs' view, the fact that trial counsel is in trial on another case can only be the result of his or her lack of "reasonable

diligence," and it should be given no weight when determining whether there is good cause for a continuance; being ordered to trial in another case is not an "emergency" like illness or death. (RB 26, 28-29.)

The fact of the matter is that there was "an emergency" and good cause to continue or trail the case: the County's trial attorney, George Peterson had been unexpectedly ordered to trial in an older case where counsel for the plaintiff had represented it would be continued, and no other attorney was available or prepared to try the case on such short notice. (AOB 7, 16-17; 1AA 188 [¶ 24]; see also 1AA 73 [¶ 19].) There was also good cause to continue or trail the case in that to do otherwise amounted to sanctioning the County for its attorney's case management problems, which Judge Fredricks had no discretion to do. (AOB 20-24.)

Plaintiffs contend that the trial court was justified in proceeding with trial because there was no assurance it could rely on Mr. Peterson ever to be available for trial. (RB 33-34.) However, the California Supreme Court has emphasized that "[c]ourts have numerous . . . methods for maintaining control of their calendars" and do not have to resort to dismissal or, as here, to entering the equivalent of a default judgment, in order to dispose of the case. (*Garcia v. McCutchen*, *supra*, 16 Cal.4th at p. 480; see also Cal. Rules of Court, rule 375(d)(4) ["[t]he availability of alternative means to address the problem" giving rise to application for continuance is a factor in

determining whether to grant it].) Mr. Peterson was not looking for a free pass. (See AOB 23, citing 3RT 17-18 [Peterson proposes sanctions "heavy enough to constitute a grave threat against this ever occurring again"].) The trial court could have, for example, granted a continuance conditioned on the payment of substantial sanctions. (See, e.g., *Hansen v. Snap-Tite, Inc.* (1972) 23 Cal.App.3d 208 [condition precedent for denying defendant's motion to dismiss was payment by plaintiff of 1% of the value of the suit to compensate defendant for extra work]; see, e.g., *Baumberger v. Arff* (1892) 96 Cal. 261, 262 [trial court offered to grant continuance if plaintiff paid jury fees for the day and defendant's costs]; see Cal. Rules of Court, rule 375(d)(10) [courts may consider whether "the interests of justice are best served . . . by imposing conditions on the continuance"].)

The point here is that the trial court could have assured itself of a date certain without such fatal consequence to the County. In his zeal to clear his calendar, Judge Fredricks simply refused to consider any methods short of the drastic option he chose. That was an abuse of the discretion.

D. The Only "Prejudice" To Plaintiffs Had The Trial Been Continued Or Trailed Would Have Been The Loss Of A Windfall Opportunity To Secure A Judgment Unhampered By Controverting Evidence.

In the trial court, plaintiffs did not protest that they would be prejudiced by a continuance. (AOB 17-18.) Their counsel said he did not want to argue with the court *or* the defense but simply "to apprise the court" that his main expert would be unavailable in August, and that a trial and vacation plans made September "difficult." (2RT H18-H19.)

Judge Fredricks apparently presumed prejudice, however. (See RB 33, citing 3RT 22-23 [". . . even if it's only six days, how is that not going to prejudice Mr. Hidalgo's case and his clients?"].) In the context of dismissals for lack of diligent prosecution, courts have made clear that it is improper for a court to presume prejudice. For example, in *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, the Supreme Court cautioned that courts should not presume a delay in prosecution is prejudicial to defendant in contexts where the court is required to consider the "total picture." (*Id.* at p. 441.) This is so because in the absence of actual prejudice to the defendant, "the probability of a miscarriage of justice is greater when a trial on the merits is denied than where a plaintiff is permitted to proceed." (*City of Los Angeles v. Gleneagle Dev. Co.* (1976)

62 Cal.App.3d 543, 563.) Here, there was no showing in the trial court of actual prejudice to the plaintiffs if trial were to be continued, a trial on the merits was denied, and the probability of a miscarriage of justice was realized in the imposition of the $12.5 million judgment.

Any additional time and expense that plaintiffs might have faced does not constitute prejudice such as would justify denial of a brief continuance. (Cf. *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 603 [time and expense if a case were tried to jury does not warrant denial of motion for relief from jury waiver].) Rather, prejudice in this context should be defined as a constraint on the ability of plaintiffs to make their case. (Cf. *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1030 [prejudice necessary to warrant dismissal for failure to bring case to trial refers to constraint on defendant's ability to defend] disapproved on another ground in *Shamblin v. Brittain* (1988) 44 Cal.3d 474, 479, fn. 4.) Plaintiffs only now assert that they would have "lost" the experts necessary to establish liability in a medical malpractice case. (RB 53.) However, this is pure hyperbole because there was nothing to prevent a continuance that would accommodate August/September scheduling problems—except perhaps a rigid adherence to the 24-month guideline; there was no *evidence* that the testimony of plaintiffs' experts could not have been rescheduled.

Further delay might well have *inconvenienced* plaintiffs, but mere inconvenience is not synonymous with prejudice, and it could have been mitigated by the payment of appropriate sanctions. In truth, the only conceivable "prejudice" to plaintiffs in the event of a brief continuance would have been the loss of the windfall benefit of an uncontested trial leading to a multimillion dollar judgment.

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

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

In its opening brief the County demonstrated it was entitled to mandatory relief under Code of Civil Procedure section 473, subdivision (b): the judgment against it was tantamount to a default judgment, and it was caused by the conduct of its attorney. (AOB 26-37.) Plaintiffs' efforts to argue the County does not meet the requirements of mandatory relief are without merit.

1. Plaintiffs' arguments that the judgment in this case was not a default judgment miss the mark.

Whether the mandatory relief provision of section 473 is triggered turns on whether there was a "'proceeding taken against [a party] in his

absence,'" that is, whether the party lost his day in court because of attorney neglect. (*In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1443; *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868; *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 601; AOB 26-27.) If so, the resulting judgment is "the procedural equivalent of a default," bringing the matter within the scope of section 473's mandatory relief provision. (*In re Marriage of Hock, supra*, 80 Cal.App.4th at p. 1444.)

In their brief, plaintiffs advance a number of contentions reflecting a literalist approach to this threshold issue. For example, they contend the County incorrectly asserted that Code of Civil Procedure section 585, subdivision (b), "defines" a noncontested trial as a default judgment. (RB 36.) Not so. The County merely noted that the trial here had the attributes of a default proceeding in that the County was not present or represented at a "trial" and that it was conducted on the basis of a one-sided presentation of evidence. (AOB 25.) The resulting judgment was thus the "procedural equivalent" of a default judgment.

Plaintiffs also assert the trial court had no "jurisdiction" to enter a default judgment. (RB 36.) That may be true, but the issue isn't whether the court had the jurisdiction to do what it did but whether it should have done what it did under the circumstances, and having done so, whether it should have undone what it did in the face of an attorney affidavit of fault.

Assuming jurisdiction to direct a verdict and enter a judgment in the absence of the County, such a proceeding taken against the County was "'in the nature of a default.'" (*In re Marriage of Hock, supra*, 80 Cal.App.4th at p. 1443.)

Finally, plaintiffs suggest that the County engaged in conduct inconsistent with a default judgment. For example, they assert that before trial the County stipulated to the dismissal of individual defendants and to the assumption of liability (if any), and after trial the County moved to stay judgment pending an election of a periodic payment judgment under Code of Civil Procedure section 667.7. (RB 38.) Such conduct—removing individuals from the litigation and making the best of a bad result—is irrelevant to the issue of whether the trial itself in the absence of the County and its attorney was "in the nature of a default." Whatever happened before trial and after the trial actually went forward without the County or its representative does not transform the nature of that proceeding taken against the County into something *other than* the procedural equivalent of a default.

2. Plaintiffs' implicit argument that this Court should reject its own prior holdings is unpersuasive.

Plaintiffs' principal argument is that there is no such thing as a procedural equivalent of a default judgment, and, as anticipated, they

invoke *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, in order to urge rejection of case authority adopting a broad enough construction of section 473 to allow mandatory relief under the circumstances of this case. (RB 39-40; AOB 27-29.) In *English*, the Third District expressly disagreed with this Court's construction of the statute in *Avila* and in *In re Marriage of Hock*, among other cases, concluding that the mandatory provision affords relief only from a literal default—the failure to file an answer to a complaint—and not from a summary judgment. (94 Cal.App.4th at pp. 142-143, 147-148.)

Plaintiffs offer no reason why this Court should reverse its previous course and now construe the mandatory provision in so narrow a manner. For the reasons stated in the opening brief, it should not. (AOB 27-29.)

Moreover, to the extent plaintiffs are hoping to circumvent these prior cases by insisting this case *was* litigated on the merits because plaintiffs at least had the opportunity to present their side of the story (RB 58-59), their position hardly comports with our adversarial system of justice and simply is not a way around these prior rulings. "On the merits" includes the merits of the defense as well as the merits of a plaintiff's claim: in *Avila*, "[d]ue to counsel's late filing of crucial documents, the court decided the matter on the other parties' pleadings. There was no litigation on the merits" (*Avila v. Chua, supra*, 57 Cal.App.4th at p. 868,

emphasis added); similarly, in *In re Marriage of Hock* where the wife did not appear at trial nor was she represented at trial, "*[t]here [had] been no litigation on the merits.*" (*In re Marriage of Hock, supra*, 80 Cal.App.4th at p. 1444, emphasis added). Here, due to George Peterson's failure to appear at trial, the court directed a verdict on the basis of only plaintiffs' evidence; there was no litigation on the merits; the County lost its day in court. This was clearly the procedural equivalent of a default within the meaning of section 473.

3. Plaintiffs' reliance on *Leader v. Health Industries of America* is misplaced.

In *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, the plaintiffs had failed to file a fourth amended complaint within the time allowed by the trial court, and the court granted defendants' motion to strike the amended complaint and dismiss the action. Plaintiffs' counsel had filed an affidavit of fault pursuant to section 473 preemptively, hoping to avoid adverse rulings on defendants' motions and his own belated motion for leave to amend. In affirming the judgment of dismissal, the reviewing court determined the mandatory relief provision of section 473 was not available.

Plaintiffs in this case rely on *Leader* for the proposition that an affidavit of fault cannot be used to override a prior discretionary ruling.

(RB 41-42.) Specifically, they contend George Peterson's post-trial declaration of fault cannot be used to undo Judge Fredricks' discretionary decision to deny a continuance and that to hold otherwise would "wreak havoc on litigants" and "eviscerate" case management policies and rules. (RB 43.) Plaintiffs read *Leader* too broadly.

First, *Leader* dealt with the dismissal of a plaintiffs' action, and the *Leader* court faced the specific problem that there are statutes governing the exercise of a court's discretion in rulings leading up to a dismissal for failure to prosecute, which require the court to evaluate a plaintiff's reasons for delay; thus, the section 473 mandatory relief provision as to dismissal had to be harmonized with those other statutes regarding discretionary dismissal and could not be read to repeal them by implication by providing a "perfect escape hatch." (89 Cal.App.4th at pp. 617-618; see *Avila v. Chua, supra*, 57 Cal.App.4th at p. 867, citing *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 990 ["'it has been held [the mandatory 473 provision] does not apply to dismissals under section 583.410 for delay in prosecution of the action because virtually all such dismissals are attorney caused and such a construction would result in a disfavored repeal of the discretionary dismissal statute by implication'"].) In this case, it would not *repeal* any case management policies or rules to undo the consequences of a denial of a continuance once the consequences

become clear (an uncontested $12.5 million judgment) and once there is actual evidence (not simply argument) of attorney fault in the form of a sworn declaration; rather, it would be *consistent* with the overarching and explicit legislative intent that where noncompliance with case management rules is the fault of counsel, any "penalty" imposed should be imposed on counsel and not adversely affect the client's cause of action or defense. (Code Civ. Proc., § 575.2, subd. (b).)

Significantly, in *Avila*, this Court concluded that the client was entitled to mandatory relief *despite* the fact that the trial court had denied a motion to continue, the propriety of which denial this Court declined to reach. (*Avila v. Chua*, *supra*, 57 Cal.App.4th at p. 869.) That the trial court may have exercised its discretion in denying the motion to continue had no bearing on the propriety of mandatory relief under section 473.

Second, *Leader* does not hold that there is no such thing as the procedural equivalent of a default, as plaintiffs appear to suggest. (See RB 41 [citing *Leader* for the proposition that the mandatory provision of section 473 applies only to "'*vacating* a [literal] default which would result in the entry of a default judgment, a default judgment, or an *entered* dismissal,'" 89 Cal.App.4th at p. 616, original emphasis].)[2/] To the

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[2/] In context, the *Leader* court was making the point that it was "inappropriate" to use the mandatory relief provision of section 473 preemptively. (*Leader*, *supra*, 89 Cal.App.4th at p. 616.)

contrary, the *Leader* court *concurred* with those authorities which granted relief from dismissals that were "the procedural equivalent of a default," that is, in cases where dismissal resulted from the failure to oppose a motion to dismiss. (*Leader*, *supra*, 89 Cal.App.4th at p. 620.) Since, in the case before it, the plaintiffs *did* appear and present evidence to oppose a motion to dismiss, there was no "default," and they were not entitled to mandatory relief. (*Id.* at p. 621.)

Here, George Peterson did not appear at trial through no fault of the County. (See AOB 35-37; see *infra*, subsection 5.) This is precisely the type of circumstance when the mandatory provision of section 473 *should* offer an escape hatch. It is the type of circumstance for which the provision was "designed." (*Avila v. Chua*, *supra*, 57 Cal.App.4th at p. 868.) This Court has already determined that the failure of counsel to appear at trial *is* the procedural equivalent of a default. (*In re Marriage of Hock*, *supra*, 80 Cal.App.4th at p. 1440.) Consistent with that decision, this Court should now conclude that the requirements for mandatory relief were satisfied and Judge Fredricks had no discretion to deny it.

4. Plaintiffs' argument that mandatory relief is unavailable because default was not caused by attorney mistake, inadvertence, or neglect is meritless.

Mandatory relief under section 473 is not available if "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).) Plaintiffs contend such was the situation here because, as found by Judge Fredricks, George Peterson's conduct was not "negligence or neglect," but rather deliberate, "a conscious decision, strategic or tactical . . ." to thumb his nose at the court. (RB 44-45.)

The notion that the faultless client is off the hook only if his attorney's conduct was careless, but not if the attorney engaged in deliberate affirmative misconduct that resulted in default, makes little sense. In any event, in its opening brief, the County demonstrated that 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. (AOB 32-35.) The County does not repeat those arguments here; suffice it to say, plaintiffs make *no* attempt to refute them with reference to evidence that Mr. Peterson was deliberately flouting the court with a strategy or tactic to undermine the administration of justice—because there is no such evidence.

5. The notion that the County has only itself to blame for the judgment has no basis in fact.

As a running theme throughout their brief, plaintiffs attempt to lay the blame for events culminating in the $12.5 million judgment against the County on the County itself. If the County was at fault, mandatory relief would presumably not be available because the County would not be the innocent client that the attorney affidavit provision of section 473 is intended to protect. (*In re Marriage of Hock*, *supra*, 80 Cal.App.4th at p. 1446.)

At their most literal, plaintiffs assert that the judgment resulted from the County's motion for a periodic payment judgment. (RB 43.) Obviously, however, the issue is whether there was properly a judgment in the first instance and how that judgment came to be, not what the County subsequently did to lessen the impact of any judgment.

Moving from the literal to the speculative, plaintiffs further contend it is reasonable to infer from its 15-year history with George Peterson that the County knew of his "practice of overlapping trial commitments" and presumably knew it was likely he would be unavailable to try the case on July 9. (RB 54.) Plaintiffs' charge is devoid of evidentiary support and thus cannot be deemed reasonable inference. There is no evidence the County knew anything about Mr. Peterson's trial calendar during the week

of July 9 or any other week; there is no evidence Mr. Peterson had a "practice of overlapping trial commitments" or, if he did, that the County knew of it; there is certainly no evidence to support the conclusion the County knew he would not be available on July 9. To the contrary, the uncontradicted evidence is that the County was *not* aware until July 9 that Mr. Peterson would be unavailable to try the case. (1AA 182 [¶2], 192 [¶4].)

Having faulted the County for retaining a busy litigator in the first instance, plaintiffs also contend the County had only itself to blame for being unrepresented when the trial did go forward on July 15 because it had a plethora of other attorneys to choose from to do the job, including the Principal Deputy County Counsel, Gary N. Miller, or its appellate counsel, or junior counsel from Mr. Peterson's own firm who had conducted some depositions. (RB 54-55, 57.) Given all those lawyers, they charge, the County was not left unrepresented at the ninth hour, but rather made a deliberate choice not to participate in trial. (RB 57; see also RB 18-19.)

It is obvious that plaintiffs share Judge Fredricks' view that litigation skill and preparation were not essential qualifications for trying a case of this complexity and magnitude. (AOB 35-36.) While plaintiffs assert that "[t]he County cannot interfere with the process of justice based on its choice of attorneys" (RB 53), where's the justice in insisting the County

choose an unprepared lawyer or be left with a $12.5 million judgment it could not fairly defend against?

Finally, plaintiffs go so far as to suggest the County was somehow setting the trial court up, "challenging" it with an "ultimatum" to enter a default "knowing [it] was void ab initio, and grounds for automatic reversal." (RB 18-19.)[3/] There is no substance to this charge, as reviewing the remarks cited by plaintiffs in context makes plain. In these remarks, George Peterson references the options of sanctioning him, trailing the case, or "taking a default against the County of Los Angeles which seems to be the only other option." (3RT 19.) Earlier in the hearing, Gary Miller had addressed the case, *Estate of Meeker* (1993) 13 Cal.App.4th 1099, describing it as one "where plaintiffs' counsel didn't show and that court took the default judgment," meaning that the trial court had entered judgment against the plaintiffs when their attorney could not try the case. (3RT 12.) The point being made in each instance was that there was no one to try the case. The County and its counsel were urging the trial court to heed the comments of Justice Vogel in *Estate of Meeker* precisely to *avoid* the situation the parties now find themselves in; there is nothing in the

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[3/] Plaintiffs rely on *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, which held that a trial court lacks power to strike an answer and enter a default against parties who failed to appear for trial, and the judgment was void because, among other things, they received no notice of a continued trial date.

record to suggest the County was laying a trap. Significantly, this Court has itself found that using the term "default" is appropriate where a party and her counsel did not appear at trial. (*In re Marriage of Hock, supra*, 80 Cal.App.4th at p. 1444.)

In fact, plaintiffs are asking this court to make findings of fact that even Judge Fredricks did not make. He believed the County to be a victim of George Peterson's case management problems. (See, e.g., 3RT 6 ["I think it's a grave disservice that Mr. Peterson and his firm are perpetuating upon their client in this case"].) As discussed, after trial, he certainly did not find that George Peterson was *not* the cause of the judgment. (AOB 36.) There was no finding of shared misconduct, and no finding that one of the other lawyers could have tried the case. There was simply the post-trial comment that the County "sort of acquiesced" to Mr. Peterson's conduct. (7RT 1803.) The dictionary meaning of "acquiesce" is to submit without protest, to consent.[4/] That the County did not agree on short notice to place its defense in the hands of an ill-prepared attorney does not equate to submitting without protest, to consenting to the trial going forward without the attorney who was prepared.

[4/] See, e.g., Random House Unabridged Dictionary (2d ed. 1993) p. 18, col. 1, defining "acquiesce" as "to assent tacitly; submit or comply silently or without protest; agree; consent."

In any event, "sort of acquiesced" is a comment too ambiguous and wholly unsupported by evidence to be a finding that George Peterson's conduct was not in fact the cause of the judgment entered against the County, as the statute requires for the denial of mandatory relief. (Code Civ. Proc., § 473, subd. (b).) The uncontradicted evidence of his declaration, in which he assumed full and sole responsibility for the County being unrepresented at trial, establishes that he alone caused the default judgment that should now be vacated. (1AA 189 [¶26].)

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

In its opening brief, the County demonstrated that George Peterson's action satisfied the "excusable conduct" standard for discretionary relief and that at least such relief should have been granted. (AOB 37-41.) In response, plaintiffs contend the County's only remedy for the negligence of their counsel is a malpractice action and, in any case, having conflicting trial dates does not qualify as excusable neglect. (RB 46-48.) Neither argument withstands scrutiny.

First, while generally the rule is that the negligence of an attorney is imputed to the client, it is *not* the rule in the context of the Trial Court Delay Reduction Act and fast track rules. When the Legislature gave courts the power to adopt such rules by enacting Code of Civil Procedure section

575.1 and the power to impose sanctions for their violation under Code of Civil Procedure section 575.2, subdivision (a), it also enacted section 575.2, subdivision (b) to protect the innocent client. (*Garcia v. McCutchen*, *supra*, 16 Cal.4th at p. 475.) As the court explained, "section 575.2 (b) creates an exception to the general rule that the negligence of an attorney is imputed to the client, with the client's only recourse a malpractice action against the negligent attorney." (*Ibid.*, citations and internal quotations marks omitted.) As discussed, forcing the trial to proceed and directing a verdict in the sum of $12.5 million amounted to a sanction against the County for what the trial court perceived to be George Peterson's interference with its ability to dispose of the case within the two-year guideline, and it did not simply adversely affect the County's defense, it destroyed its defense. (AOB 20-24.) Neither of the cases upon which plaintiffs rely, *Kim v. Orellana* (1983) 145 Cal.App.3d 1024, *Zamora v. Claybourne Contracting Group, Inc.* (2002) 28 Cal.4th 249 (RB 46), were decided in the context of procedural violations under fast track rules.

Second, plaintiffs again focus on the purported lack of reasonable diligence that manifests in "committing . . . to a case-load of conflicting trial dates" and now for purposes of post-trial relief under the discretionary provision of section 473, contend such lack of reasonable diligence does not translate into excusable neglect. (RB 47.) They rely on *Ayala v. Southwest*

Leasing & Rental, Inc. (1992) 7 Cal.App.4th 40, 45, for the proposition that "[a]n attorney's undertaking of a large number of cases is not sufficient to show 'excusable neglect.'" (RB 47.) But, plaintiffs misread *Ayala*. In that case, the attorney attempting to prove excusable neglect under section 473 offered evidence that he had missed the deadline for filing a request for trial de novo after an adverse arbitration award because he had recently accepted the case, along with 250-300 other cases, from another firm and had not been informed of the filing deadline. (7 Cal.App.4th at p. 42.) In affirming the trial court's denial of the section 473 motion, the appellate court found his declaration insufficient to demonstrate excusable neglect because it did not explain why former counsel had not requested trial de novo, it did not detail the circumstances under which he had learned he had missed the deadline, and there was no evidence of precautions taken upon assuming the huge caseload. (*Id.* at p. 45.) The court stated that section 473 relief was not available because taking a large number of cases "[was] not, *in and of itself*, sufficient to show excusable neglect." (*Ibid.*, emphasis added.)

Here, in contrast, the evidence in George Peterson's declaration did not rest on the mere fact that he was a busy litigator with many cases, but rather included substantial detail about his precautionary efforts to avoid conflicting trial schedules and his reasons, including reliance on assurances given by others, for believing that either there would be no conflict or that

one case would be trailed or continued. (1AA 186-190; AOB 38-39.) It was the trial court which presumably determined, as plaintiffs now argue, that Mr. Peterson's large caseload that resulted in conflicting trial dates was "in and of itself" the only evidence worth considering. (See 2RT H13 ["How can you take so many cases and then come in here and cry me this river . . ."].) To let the judgment stand would be contrary to the "venerable principles" that the discretionary provisions of section 473 are to be liberally construed so that an action may be determined on its merits. (*Zamora v. Clayborn Contracting Group, Inc., supra,* 28 Cal.4th at pp. 255-256.)

CONCLUSION

For all the reasons set forth above and in the County's opening brief, this Court should vacate the judgment and order a new trial.

DATED: February 17, 2004

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CERTIFICATE OF COMPLIANCE

I, Alison M. Turner, do hereby state and declare as follows:

Pursuant to California Rules of Court, rule 14(c)(1), this Appellant's Reply Brief is proportionately spaced. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 7,715 words.

DATED: February 14, 2004

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