No. 22-752

In The Supreme Court of the United States

BI-RITE AUTO TRANSPORT, INC., MIKAL JONES, and ANGELA ANDERSON,

Petitioners,

vs.

RUSSELL DILDAY, TANNA DILDAY, MARY ANN FERRERO, and PLEASANT VALLEY CANAL COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fifth Appellate District

BRIEF OF RESPONDENTS RUSSELL DILDAY, TANNA DILDAY, AND MARY ANN FERRERO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

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The Tulare County Superior Court (California) decided the underlying matter, issuing judgment on February 26, 2018. (Pet'r App. 5.) Notice of Entry of judgment was served on March 6, 2018. (Pet'r App. 6.) The trial court issued a final statement of decision on May 10, 2018. (Pet'r App. 7–8, 20 et seq.)

The California Fifth District Court of Appeal issued its unpublished opinion on January 12, 2022. (Pet'r App. 1.) It denied a petition for rehearing. (Pet'r App. 19.)

The California Supreme Court issued its order denying review on April 20, 2022. (Pet'r App. 86.)

JURISDICTIONAL STATEMENT

The petition attempts to state a claim that California state law violates the Fourteenth Amendment to the United States Constitution as regards the timing rules for filing state appeals. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

See the Respondents' Appendix for the text of all statutes, rules, and constitutional provisions.

U.S. Const. art. III, § 1
U.S. Const. art. III, § 2
U.S. Const. amend. XIV, § 1
Fed. R. App. P. 3
Fed. R. App. P. 4(a)
28 U.S.C. § 1257
Cal. Const. art. VI, § 11
Cal. Civ. Proc. Code, § 473 (West)
Cal. Civ. Proc. Code, § 629 (West)
Cal. Civ. Proc. Code, § 656 (West)
Cal. Civ. Proc. Code, § 657 (West)
Cal. Civ. Proc. Code, § 659 (West)
Cal. Civ. Proc. Code, § 663 (West)
Cal. Civ. Proc. Code, § 663a (West)
Cal. Civ. Proc. Code, § 901 (West)
Cal. Civ. Proc. Code, § 904.1, subd. (a)(1) (West)
Cal. Rules of Court, Rule 3.1590(a) & (b).
Cal. Rules of Court, Rule 8.104
Cal. Rules of Court, Rule 8.108(a) through (e)

COUNTERSTATEMENT OF THE CASE

Following a bench trial, the trial court granted judgment in favor of the Dildays and Ferrero for intentional torts and awarded various remedies including compensatory and punitive damages. (Pet'r App. 5.) The damages were awarded because the trial court concluded Jones was not credible and further

concluded that he and Anderson were abusive neighbors who used "threats, intimidation, abuse, screaming, vulgarity and physical attack" to disturb the Dildays' and Ferrero's quiet enjoyment of their land, to interfere with their rights to water, and to physically injure them and their animals. (Pet'r App. 46.)

Jones et al. base their issues for this Court on the notion they made a valid motion under Cal. Civ. Proc. Code, § 473 (or that the trial court made a valid decision under § 473). But § 473 does not apply after judgment: no motion under § 473 could be a valid post-trial motion to extend the time to appeal.

Jones et al. identify four "Questions Presented" in their petition for certiorari. The answers to the questions demonstrate there is no need for this Court to grant certiorari.

1. Is California's scheme of procedural due process in its Code of Civil Procedure and Civil Rules of Court satisfactory of constitutionally protected due process rights secured by the XIV Amendment?

> "Yes." Indeed, California's scheme is substantially similar to the federal court's scheme.

2. Does the XIV Amendment require, as a minimum, that California courts adhere to State procedural requirements for disposition of civil cases?

> "Yes," but the question presumes the appellate court did not do so. In fact, the court did adhere to its procedural requirements. It is

> the petitioners who failed to adhere to the procedural requirements, not the court.

3. Where the right to appeal a civil judgment is granted by a state court's settled procedure, does federal due process prohibit denying a litigant that right on grounds not authorized by the state statute?

> Again, "yes," but the question presumes the court failed to follow "settled procedure." Indeed, here, the court dismissed the petitioner's appeal on grounds authorized by California Supreme Court precedent interpreting both the statutory scheme and the court rules.

4. Is it a violation of federal due process requirements for a state appeal court to deny substantial consideration of the appeal when it is presented in accordance with the rules and laws of the forum state?

> Again, "yes," but the question presumes the notice of appeal was timely. It ***was not timely***—it was not "presented in accordance" with the laws of California.

Jones's, Anderson's, and Bi-Rite's counsel blithely filed an unauthorized post-trial motion and engaged in appellate practice without following well-understood California law on when appellate jurisdiction attaches.

The court of appeal followed long-standing and well-known California statutes and rules, and the cases interpreting them, which demonstrated Jones et al.'s appeal was filed too late, and the court of appeal

did not have jurisdiction. The court of appeal did not dismiss the appeal on "contrived grounds." (Pet. 17.)

California's statutes and court rules provide appropriate due process in California's approach to appellate jurisdiction. Jones et al. only arrive at a different conclusion because they continue to misapply and misconstrue California law and the underlying procedural facts. There is nothing for this Court to review.

STATEMENT OF THE FACTS

The Dildays and Ferrero accept, and incorporate by this reference, the facts as stated in the California Court of Appeal's opinion, attached to the Petition for Writ of Certiorari in the appendix. The Statement of Facts begins on page 3 of the appendix.

In representing to this Court that the trial court "reinstated" the February 26 judgment, Jones et al. ask this Court to infer that the trial court revoked or abrogated the February 26, 2018 judgment. (Pet. 18.) This is not true. The trial court never took any action on the judgment after it was entered: it only agreed to re-hear Jones et al.'s objections to the statement of decision. (Pet'r App. 7.)

Had the trial court actually revoked or abrogated the February 26, 2018, judgment, the issues on appeal would have been different: the Dildays and Ferraro likely would have focused on the trial court's error.

Well-understood California law provides that trial courts are powerless to modify a judgment except through specific post-trial procedures or in the case of a clerical error. *E.g.*, *In re Candelario*, 3 Cal. 3d 702, 705 (1970) ("Any attempt by a court, under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted."); *Cnty. of Inyo v. City of Los Angeles*, 160 Cal. App. 3d 1178, 1184 (1984) (statutory remedies to set aside a judgment have strict time limits and procedural requirements).

REASONS FOR DENYING THE PETITION

I. California's statutory scheme and court procedures for invoking appellate jurisdiction do not violate the Fourteenth Amendment. Here, the California Court of Appeal adhered to California rules and statutes and dismissed the appeal as untimely filed.

The California Constitution provides that the California Courts of Appeal have appellate jurisdiction over matters arising in California trial courts. Cal. Const. art. VI, § 11; *see*, *e.g.*, *Powers v. City of Richmond*, 10 Cal. 4th 85, 92 (1995) (explaining that appellate jurisdiction is broader than direct appeal, and citing this Court's various opinions supporting that view, including *Marbury v. Madison*, 5 U.S. 137, 175 (1803) and *Ex parte Watkins*, 32 U.S. 567, 572 (1833).)

While the California Constitution provides which courts have appellate jurisdiction, in general, appeals are statutory in California: a case is appealable only if provided by statute and in accordance with the rules of practice and procedure. Cal. Civ. Proc. Code, § 901. This approach is not unusual. The U.S. Constitution and federal law are in accord: the Constitution provides for general jurisdictional rules of this Court and provides that Congress may establish other such courts and the regulations governing appellate practice. U.S. Const., art. III, §§ 1 & 2; *see*, *e.g.*, Fed. R. App. Proc., Rules 3 & 4.

In California, various statutes invoke appellate jurisdiction—both by direct appeal and extraordinary writ—but the general appellate jurisdiction statute is Cal. Civ. Proc. Code, § 904.1. Section 904.1 provides for direct appeal from a judgment, among other direct appeals.

The California Judicial Council is charged with prescribing the rules for appellate practice. Cal. Civ. Proc. Code, § 901.

A. California's Judicial Council has established strict rules regarding time to file an appeal, which, if not followed, deprive the appellate court of jurisdiction.

The rules for timely appeal—invoking appellate jurisdiction—are well-understood in California. Timely notice of appeal is required for appellate jurisdiction.

Silverbrand v. Cnty. of Los Angeles, 46 Cal. 4th 106, 113 (2009). Indeed, an appellate court must dismiss an appeal that was not timely filed:

> The first step, taking of the appeal, is not a procedural one[.] It vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court. . . . In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune. Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver. If it appears that the [] appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made.

Hollister Convalescent Hosp., Inc. v. Rico, 15 Cal. 3d 660, 666–67 (1975) (internal citations and quotation marks omitted).

Two Rules of Court govern the timing of filing a notice of appeal: Rule 8.104 ("Normal time") and Rule 8.108 ("Extensions of time").

1. California Rules of Court, Rule 8.104, which sets the normal time for filing an appeal, requires a notice of appeal be filed within 60 days of service of a Notice of Entry.

California Rules of Court set forth the time within which an appeal must be filed based on whether a

"Notice of Entry" of the judgment was served. Cal. Rules of Court, Rule 8.104. If a "Notice of Entry" was served, the notice of appeal must be filed within 60 days of the date of service of the "Notice of Entry." *Id*.

Here, the court entered judgment on February 26, 2018. (Pet'r App. 5.) The notice of entry of judgment was served on March 6, 2018. (Pet'r App. 6.)

The document the court entered on February 26 was called a final judgment and it was, indeed, a final judgment under California law because it fully and finally resolved the issues between the parties. *Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 303–04 (1997); *see also Baker v. Castaldi*, 235 Cal. App. 4th 218, 223 (2015) (distinguishing an interlocutory judgment from a final judgment).

The judgment was appealable under § 904.1, so long as the appellant followed the procedures set forth in the rules promulgated by the Judicial Council. The notice of appeal had to be filed within 60 days of March 6, 2018—May 7, 2018. Cal. Rules of Court, Rule 8.104. Jones et al. did not file their notice of appeal within 60 days of the notice of entry of judgment: they filed their notice of appeal on May 24, 2018. (Pet'r App. 8; Pet. 23.)

2. California Rules of Court, Rule 8.108 provides for an extension of the time to appeal in the event a party files one or more valid specified attacks on the judgment in the trial court. Here, Jones et al. filed an unauthorized motion, thus not extending their time to appeal.

The rules provide for an extension of time within which to file an appeal provided one or more parties files a valid post-trial motion. Cal. Rules of Court, Rule 8.108. The rules allow an extension for filing an appeal from a judgment only for ***valid*** motions for new trial (Cal. Civ. Proc. Code, §§ 656 et seq.), ***valid*** motions to vacate (Cal. Civ. Proc. Code, §§ 663 et seq.), and ***valid*** motions for judgment notwithstanding the verdict, also known as JNOV (Cal. Civ. Proc. Code, § 629).

The fact that Jones et al. disagreed with the judgment did not make it "tentative" or "interlocutory" or somehow subject to some other rule: no judgment is "tentative." What can be "tentative" is a statement of decision. *See* Cal. Rules of Court, Rule 3.1590. An interlocutory judgment does not finally resolve all issues. *Baker v. Castaldi*, 235 Cal. App. 4th 218, 223 (2015) (distinguishing an interlocutory judgment from a final judgment). This judgment was final because it disposed of the complaint, cross-complaint, all defenses, and all causes of action.

Jones et al.'s disagreement with the judgment left it open to appeal as a "judgment." Cal. Civ. Proc. Code, § 904.1, subd. (a)(1), and left it open to attack under

one or more of the various provisions of the Cal. Code of Civil Procedure, Part 2 (Of Civil Actions), Title 8 (Of the Trial and Judgment in Civil Actions). Cal. Civ. Proc. Code, § 656 et seq. (new trial), § 663 et seq. (vacate), and § 629 (JNOV). But they filed none of these.

Instead, Jones filed a motion denominated "MOTION TO RECONSIDER/RELIEF FROM DEFAULT." In their petition in this Court, Jones et al. contend this motion was made under Cal. Civ. Proc. Code, § 473, subd. (b). First, it was not so made—it did not invoke any particular statute. The ***trial court*** presumed § 473 and invoked § 473, subd. (b), but that section applies to default judgments, not judgments after trial. *Shayan v. Spine Care & Orthopedic Physicians*, 44 Cal. App. 5th 167, 170 (2020). A judgment after trial on the merits is not subject to attack under § 473. *Id*. ("[T]he plain language of the statute is unambiguous and controlling," and declining to apply § 473, subdivision (b) to a judgment entered after trial.) Section 473 is in Part 2 (Of Civil Actions), Title 6 (Of the Pleadings in Civil Actions) and applies to judgments only to the extent they resulted because of pleading (e.g., a failure to answer). *Id.*

To the extent Jones et al.'s issues for this Court are founded on the notion that they made a valid motion under § 473, or that the trial court made a valid decision under § 473, the arguments fail and render the issues meaningless because neither assertion is true.

The motion was not a valid post-trial motion because it did not comply with the statutory requirements for any recognized post-trial motion. (Cal. Civ. Proc. Code, §§ 656 et seq. (new trial), §§ 663 et seq. (vacate), and § 629 (JNOV).) As such the extension under Rule 8.108 was unavailable: the notice of appeal was required to be filed on or before May 7, 2018. It was filed on May 24, 2018. (Pet'r App. 8; Pet. 23.)

Prudence dictated that counsel file notice of appeal within 60 days regardless of any actions taken by the trial court. *See Ten Eyck v. Industrial Forklifts Co.*, 216 Cal. App. 3d 540, 545 (1989) ("counsel was duty-bound to know the rules of civil procedure, and once he received the notice of entry of judgment he should have abandoned the motion for reconsideration and filed a notice of appeal.") The trial court had no power to modify the judgment after it was entered, except through the specified vehicles. *Cf. Passavanti v. Williams*, 225 Cal. App. 3d 1602, 1606 (1990) (even if counsel is led astray by the trial court's actions, the rules for timely filing appeals apply).

Rule 8.104 states when a notice of appeal must be filed. Rule 8.108 identifies the post-judgment motions that can extend the time to file a notice of appeal. Rules 8.104 and 8.108 are reconcilable and have been the law in California for years. *Cf. People v. Jordan*, 65 Cal. 644, 648 (1884) (recognizing that the Court may establish rules consistent with the legislative authority of modes of invoking appellate jurisdiction).

B. California's rules are not unusual and comport with the Fourteenth Amendment.

Both the California Constitution and the United States Constitution provide that the modes of accessing appellate jurisdiction may be set by statute and rule. U.S. Const., art. III, §§ 1 & 2; Fed. R. App. Proc., Rules 3 & 4; *Ex parte Vallandigham*, 68 U.S. 243, 251 (1863); Cal. Civ. Proc. Code, § 901; *Hollister Convalescent Hosp., Inc. v. Rico*, 15 Cal. 3d 660, 666–67 (1975); *People v. Jordan*, 65 Cal. 644, 648 (1884).

There is nothing procedurally amiss by a court demanding adherence to the rules and dismissing for lack of jurisdiction when the rules are not followed—nor is the dismissal "contrived." (Pet. 17.)

Mathews v. Eldridge, 424 U.S. 319 (1976) (due process requirements before Social Security benefits are terminated) and *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process requirements for parole revocation)—the only authorities cited by the petitioners—concern the requirements for notice and opportunity to be heard before being deprived of a vested property right. But these cases are inapposite. The right to appeal is not unfettered nor is it a vested property right. It is subject to both the legislature's statutes and the courts' inherent power to control its processes. It is not a vested right subject to due process before being revoked—it is a right one must exercise properly to invoke.

CONCLUSION

There is no due process violation here and nothing for this Court to review. There is no fundamental constitutional principle at stake. This Court should deny the petition.

Respectfully submitted,

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