Filed 4/21/06 Silverbrand v. County of Los Angeles CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PETER SILVERBRAND, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B176239 (Los Angeles County Super. Ct. No. MC 014605)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank Y. Jackson, Judge. Dismissed.

Peter Silverbrand, in pro. per., for Plaintiff and Appellant.

Thever & Associates, Ronald A. Chavez; Pollack, Vida & Fisher, Girard Fisher, and Daniel P. Barer for Defendants and Respondents.

* * * * * *

Peter Silverbrand, a state prison inmate, appeals a summary judgment entered in favor of respondents[1] on the ground his medical malpractice claim was barred by the statute of limitations. Appellant delivered his notice of appeal to prison authorities the last day to appeal the judgment, and it was not received by the county clerk until after the last day for appeal had passed. We hold the "prison-delivery" doctrine does not apply to a late filing of a notice to appeal in a civil case and therefore dismiss the appeal as untimely.

FACTS

In May 2001, appellant, an inmate of state prison since 1994, underwent a hemorrhoidectomy at the County's High Desert Hospital. Starting in January 2002, appellant presented four government claims to the County asserting medical malpractice in connection with his hemorrhoidectomy and related treatment. The County denied appellant's claims and, in each instance, informed appellant he had six months in which to file suit after such denial.

PROCEDURAL HISTORY

Appellant filed a complaint against respondents and others on March 27, 2003.[2] Respondents moved for summary judgment based on appellant's failure to timely file his complaint within six months of the County's rejection of his claim.[3] (Gov. Code,

---

[1] Respondents are the County of Los Angeles (County) and its healthcare provider employees, Viswanatham Piratla, M.D., and Cheryl Napier.

[2] Appellant claimed to have first submitted the summons and complaint to the superior court clerk for filing in December 2002.

[3] Actions against a public entity and its employees are governed by the California Tort Claims Act. (Gov. Code, § 900 et seq.) Under the Tort Claims Act, a plaintiff cannot sue a public entity or its employees unless he or she first presents a written claim for money or damages to the entity and the claim has been acted upon or deemed to have been rejected by the entity. (Gov. Code, §§ 905, 945.4.) A claim based on a cause of action for personal injury must be presented within six months of the date the cause of action accrued. (Gov. Code, § 911.2.) If the public entity denies the claim on its merits by sending a notice prescribed by Government Code section 913, the

§ 945.6, subd. (a)(1).) The trial court granted the motion for summary judgment on March 1, 2004, and entered a judgment in respondents' favor on March 23, 2004.[4] Respondents served appellant with notice of the entry of judgment on April 14, 2004.

On April 16, 2004, appellant filed a notice of intention to move and motion to set aside and vacate the judgment under Code of Civil Procedure section 663, arguing the statute of limitations was tolled for 90 days under Code of Civil Procedure section 364, subdivision (d), which sets forth the procedure for suits based upon professional negligence. The court deemed the motion to be one seeking a new trial and denied the motion on May 4, 2004.[5] Respondents served appellant with notice of the court's denial of the motion for new trial on May 4, 2004.

Appellant appealed from the judgment. The notice of appeal filed with the clerk of the superior court indicates the appeal was filed on June 16, 2004. A declaration of service attached to the notice of appeal stated the notice of appeal was placed in the mail at "California State Prison -- Los Angeles County" on June 13, 2004.[6]

---

plaintiff has six months from the date of service of such notice to file suit against the entity or its employees. (Gov. Code, § 945.6, subd. (a)(1).)

[4] The trial court found that appellant failed to timely file his complaint within six months of the denial of his claims by the County, noting that "[e]ven if the Court accepts [appellant's] argument that his complaint should be found to have been filed on [December 9, 2002,] [notwithstanding] the complaint had a filing date of [March 27, 2003,] it was still untimely pursuant to the requirements of a suit against a public entity."

[5] The order stated, "the Court still finds that the evidence shows that [appellant's] [c]omplaint was filed on March 27, 2003[,] and not on December 9, 2002. Thus, [appellant's] [c]omplaint is untimely, even if the Court were to allow the [90-day] tolling pursuant to Code of Civil Procedure Section 364[, subdivision] (d)."

[6] The trial court subsequently granted a motion for summary judgment filed by the State of California and its employees from which appellant has appealed. That appeal is currently pending in this court. (Case No. B179338.)

Respondents moved this court to dismiss the present appeal on the ground it was untimely. We denied the motion on August 4, 2004. Respondents have renewed their motion to dismiss the appeal in their respondents' brief.[7]

CONTENTIONS

Respondents contend that appellant's notice of appeal was untimely because it was filed two days late. Respondents served notice of entry of judgment on April 14, 2004. Under California Rules of Court, rule 2(a)(2),[8] a notice of appeal in a civil case must be filed within 60 days of a notice of entry of judgment given by a party. The Code of Civil Procedure governs the computation of time under the rules. (Rule 45(a).) Sixty days from respondents' notice of entry of judgment was Sunday, June 13, 2004. (Code Civ. Proc., § 12.) Sunday being a holiday, appellant had until Monday, June 14, 2004, to file his notice of appeal with the clerk of the superior court.[9] (Code Civ. Proc., §§ 10, 12, 12a.) The notice of appeal was filed by the clerk on Wednesday, June 16, 2004, two days after the 60-day period expired.

Appellant contends his notice of appeal was timely under two theories. First, he argues that because he delivered the notice of appeal to state prison employees for mailing one day prior to the filing deadline, the notice of appeal must be deemed

---

[7] An appellant's failure to give timely notice of his appeal is jurisdictional, and this court has no power to consider a late appeal on the merits but must dismiss it. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667.) Thus, the prior denial of respondents' motion to dismiss the appeal does not foreclose our reconsideration of the matter as it goes to this court's jurisdiction to proceed.

[8] All further references to rules are to the California Rules of Court unless otherwise indicated.

[9] When a party has filed a valid notice of intention to move for a new trial, the time for appeal may be extended to 30 days after service of notice of entry of an order denying the motion. (Rule 3(a)(1).) In this case, there was no extension of the time to appeal, and appellant does not contend otherwise. The court denied appellant's motion for new trial on May 4, 2004, and respondents served notice of the denial on May 4, 2004. The 30th day after notice of the denial was June 3, 2004, well before the expiration of the 60-day period to appeal.

constructively filed at the time of mailing under the "prison-delivery" doctrine, and it was therefore timely. Alternatively, he contends that because the judgment for respondents was not a final and appealable judgment, his notice of appeal was premature and therefore timely under rule 2(e)(1). We disagree. We hold the "prison-delivery" doctrine does not apply to a notice of appeal in a civil case and the judgment for respondents was final and appealable such that appellant's appeal is untimely.

DISCUSSION

1. The "Prison-Delivery" Doctrine Does Not Apply to Civil Appeals

In opposition to the motion to dismiss the appeal, appellant declared that 60 days after service of notice of entry of judgment, on June 13, 2004, about 8:00 p.m., he handed his notice of appeal and copies to a correctional officer in his prison housing unit. Appellant declared the notice and copies were in correctly addressed envelopes with full postage affixed, in the manner prescribed for sending out legal mail at his prison. He stated he relied on the "prison-delivery" doctrine and constructive filing to ensure timeliness when he placed the notice of appeal in the prison mail one day before the filing deadline.

It is helpful to view the history of the "prison-delivery" doctrine and the development of the "constructive filing" principle in analyzing appellant's contentions.

Under the "constructive filing" doctrine as first articulated, a notice of appeal was deemed timely filed in a *criminal* case when the defendant delivered it to state prison employees for mailing six days prior to the final day allowed for actual filing but, because of the negligent delay of prison employees, the notice was mailed after the appeal period expired.[10] (*People v. Slobodion*, *supra*, 30 Cal.2d at pp. 366-367; see also *People v. Dailey* (1959) 175 Cal.App.2d 101, 107 [constructive filing applied

---

[10] In a concurring opinion, Justice Carter pointed out the majority opinion in *People v. Slobodion* therefore established "one rule for civil cases and another for criminal cases." (*People v. Slobodion* (1947) 30 Cal.2d 362, 368-369, Carter, J., concurring.)

when prisoner handed notice of appeal to prison official within 10-day appeal period].) Subsequently, in the case of *In re Benoit*, the California Supreme Court extended the constructive filing principle to instances when an incarcerated criminal appellant has made arrangements with his attorney for filing a timely appeal and has made diligent efforts to ensure the attorney discharges the responsibility to no avail. (*In re Benoit* (1973) 10 Cal.3d 72, 85-89 (*Benoit*).) The court granted the *Benoit* defendants' petitions for writs of habeas corpus and ordered the county clerk to file their notices of appeal, permitting their criminal appeals to go forward. (*Id.* at p. 89.) In *In re Jordan* (1992) 4 Cal.4th 116, 119, 130 (*Jordan*), the Supreme Court reaffirmed the "prison-delivery" doctrine, holding it remained viable as to a prisoner's notice of appeal delivered to prison authorities within the appeal period even though the time to appeal the judgment had been increased from 10 days to 60 days by former rule 31(a). (See Historical Note, 23 pt. 1 West's Ann. Rules (1981) foll. rule 31, p. 278.) The court reasoned that "prisoners and nonprisoners are entitled to have available an equal period of time in which to pursue their appellate rights" and such a bright-line rule would serve judicial economy. (*In re Jordan*, *supra*, at pp. 129-131 [granting defendant's petition for writ of habeas corpus].)

In 1993, the Judicial Council codified the "prison-delivery" doctrine by adding subdivision (e) to former rule 31, governing appeals in *criminal* cases. (Historical Notes, 23 pt. 1 West's Ann. Rules (1996 supp.) foll. rule 31, p. 67.) The last paragraph of former rule 31(e) provided: "This subdivision is intended to enlarge the authority of the clerk to file a notice of appeal under the stated circumstances. It is not intended to limit the appeal rights of the defendant under the 'prison-delivery rule,' as stated in *In re Jordan* (1992) 4 Cal.4th 116, or under other applicable case law." (Historical Notes, 23 pt. 1 West's Ann. Rules (1996 supp.) foll. rule 31, p. 67.) Importantly, the Council made no corresponding change to the existing rules governing the time to file *civil* appeals. (Historical Notes, 23 pt. 1 West's Ann. Rules (1996 supp.) foll. rule 2, p. 15.)

Effective January 1, 2004, the Judicial Council recodified rule 31(e) as rule 30.1(d) and revised the provision to read: "If the superior court clerk receives a notice of appeal by mail from a custodial institution after the period specified in [subdivision] (a)[[11]] has expired but the envelope shows that the notice was mailed or delivered to custodial officials for mailing within the period specified in (a), the notice is deemed timely. The clerk must retain in the case file the envelope in which the notice was received." The Advisory Committee Comment to rule 30.1(d) explains that the provision "is not intended to limit a *defendant's* appeal rights under the case law of constructive filing. (See, e.g., *In re Jordan* (1992) 4 Cal.4th 116; *In re Benoit* (1973) 10 Cal.3d 72.)" (Advisory Com. com., 23 pt. 1 West's Ann. Ct. Rules (2005 ed.) foll. rule 30.1, p. 537, italics added.)

In contrast to this history, the development of the rules applicable to civil appeals is quite different. When the Judicial Council codified the "prison-delivery" doctrine with respect to criminal appeals, it made no corresponding change to the rules applicable to civil appeals. In 2002, the Judicial Council extensively revised rules 1, 2 and 3, which govern the time to appeal and extensions of time to appeal in civil cases. Yet the Council did not revise the rules for civil appeals to add any equivalent to former rule 31(e) or present rule 30.1(d). Former rule 2(e), which was in effect at the time appellant filed his notice of appeal, stated that "[i]f a notice of appeal is filed late, the reviewing court *must* dismiss the appeal."[12] (Cal. Rules of Court, former rule 2(e), adopted eff. Jan. 1, 2002, italics added.) The Advisory Committee comment to the

---

11 Rule 30.1(a), governing the time to appeal in noncapital criminal cases, provides that a notice of appeal must be filed within 60 days after the rendition of the judgment, "[u]nless otherwise provided by law."

12 In 2004, rule 2(e) was repealed and replaced by rule 2(b). (Historical Notes, 23 pt. 1 West's Ann. Ct. Rules (2005 ed.) foll. rule 2, p. 59.) Effective January 1, 2005, rule 2(b) provides that "[e]xcept as provided in rule 45.1 [governing emergency extensions of time in cases of public calamity], no court may extend the time to file a notice of appeal" and "[i]f a notice of appeal is filed late, the reviewing court must dismiss the appeal."

2002 amendment to rule 2 expressly explained: "New subdivision (e) spells out what is implied in rule 45(c) ('The time for filing a notice of appeal . . . shall not be extended') and (e) (any default may be relieved 'except the failure to give timely notice of appeal'). These provisions are declarative of the case law, which holds that the reviewing court lacks jurisdiction to excuse a late-filed notice of appeal. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-674 [(*Hollister*)]; *Estate of Hanley* (1943) 23 Cal.2d 120, 122-124 [(*Hanley*)].)" (Advisory Com. com., 23 pt. 1 West's Ann. Ct. Rules (2005 ed.) foll. rule 2, p. 59.)

Of central importance to our present analysis, the Advisory Committee specifically noted, "In *criminal* cases, the time for filing a notice of appeal is governed by rule 31 and by the case law of 'constructive filing.' (See, e.g., *In re Jordan* (1992) 4 Cal.4th 116; *In re Benoit* (1973) 10 Cal.3d 72.)" (Advisory Com. com., 23 pt. 1 West's Ann. Ct. Rules (2005 ed.) foll. rule 2, p. 59, italics added.) We find the Advisory Committee comments particularly helpful in ascertaining the Judicial Council's intent in enacting separate rules for civil and criminal appeals. The comments of the Advisory Committee make clear the Council was well aware of the "prison-delivery" doctrine but chose to apply it solely to criminal appeals.

Article VI, section 6, of the California Constitution grants the Judicial Council the authority to adopt rules for court administration, practice and procedure. (*In re Chavez* (2003) 30 Cal.4th 643, 654.) The California Rules of Court serve to "refine and explain the procedure set forth in the statutory scheme [citations], consistently with legislative and constitutional law [citations]." (*Chavez*, *supra*, at p. 654.) We conclude from the history of rules 2 and 30.1 and the Advisory Committee comments accompanying the rules that the Council intended the "prison-delivery" doctrine codified in former rule 31(e) and present rule 30.1(d) to apply only to criminal appeals.

Notwithstanding the "constructive filing" doctrine, the Supreme Court has stated, "we have steadfastly adhered to the fundamental precept that the timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction." (*Hollister*, *supra*, 15 Cal.3d at p. 670.) In

Hollister, the Supreme Court dismissed a civil appeal because the notice of appeal was filed one day late. The court noted that rule 45(e) authorized reviewing courts to grant relief from default for failure to comply with any of the rules "*except the failure to give timely notice of appeal*."[13] (*Hollister*, *supra*, at p. 666, original italics.) The court explained: " 'In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal [citation], even to relieve against mistake, inadvertence, accident, or misfortune [citations]. Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver. [Citations.] 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. [Citations.]' " (*Id.* at pp. 666-667, quoting *Hanley, supra,* 23 Cal.2d at p. 123.) The court in *Hollister* refused to relieve the appellants from their default in filing a timely notice of appeal in a civil case under theories of " 'substantial compliance,' " " 'justifiable reliance' " or " 'quasi-estoppel' " when the court clerk misinformed counsel's office of the date of filing of the order denying the motion for new trial. (*Id.* at pp. 665-670.)

We have no discretion to relieve a civil appellant from tardiness in filing a late notice of appeal. Quoting *Hanley*, the Supreme Court made absolutely clear that although " '[r]elief may be given for excusable delay in complying with many provisions in the statutes and rules on appeal, such as those governing the time within which the record and briefs must be prepared and filed,' " such procedural time provisions become effective " '*after* the appeal is taken. 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*.' " (*Hollister*, *supra*, 15 Cal.3d at p. 666,

---

[13] Rule 45(e) was amended effective January 1, 2005, to provide that "[f]or good cause, a reviewing court may relieve a party from default for any failure to comply with these rules *except the failure to file a timely notice of appeal* . . . ." (Rule 45(e), italics added.)

quoting *Hanley*, *supra*, 23 Cal.2d at p. 123.) In the absence of explicit authorization by statute or rule, therefore, we may not extend the time for appeal.

Merely depositing a notice of appeal in the mail is not a constructive filing. (*In re Gary R.* (1976) 56 Cal.App.3d 850, 852, fn. 2; *Nu-Way Associates, Inc. v. Keefe* (1971) 15 Cal.App.3d 926, 928 [notice of appeal deposited in mail day before expiration of appeal period untimely].) A notice of appeal is not "filed" until it is actually delivered to the clerk of the court during business hours. (*Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1361.)

We have been referred to no case in which the "prison-delivery" doctrine has been applied to a notice of appeal outside of criminal appeals (and related habeas corpus petitions). "[T]he distinction between civil and criminal cases regarding exceptions to late appeals has been rigorously observed." (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1488, citing *People v. Snyder* (1990) 218 Cal.App.3d 480, 493, fn. 8 ["In the civil arena a rule is applied which permits *no* excuses for late-filed appeals"], overruled on another point in *People v. DeLouize* (2004) 32 Cal.4th 1223, 1233, fn. 4.)

The cases upon which appellant relies do not compel a different result. In *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, the petitioner *timely delivered* a petition for writ of review to the appropriate court clerk's office during business hours, but the clerk later rejected it for a mere defect in form. The court held that the clerk's rejection of the petition for a technical defect curable by amendment could not undo a filing that had already occurred. (*Id.* at p. 918.) *Moore v. Twomey* (2004) 120 Cal.App.4th 910, 912, applied the "prison-delivery" doctrine to conclude a prisoner's pro se civil complaint should be deemed filed on the date of proper delivery to prison officials. The *Moore* court reasoned, "[a]dopting this rule will place plaintiff and other pro se prisoner litigants like him on equal footing with litigants who are not impeded by the practical difficulties encountered by incarcerated litigants in meeting filing requirements." (*Id.* at p. 918, citing *In re Jordan*, *supra*, 4 Cal.4th at p. 119.) The court in *Moore*,

however, was not confronted with court rules addressing the timely filing of a notice of appeal.

Were we writing on a clean slate, we might find the "prison-delivery" doctrine applicable to civil as well as criminal appeals. However, we are constrained by the Judicial Council's enactment of separate and distinct rules for appeals in civil and criminal cases and the proviso in the Advisory Committee's comments to rule 2 that the time of filing a notice of appeal "[i]n *criminal* cases . . . is governed . . . by the case law of 'constructive filing.' " (Italics added.) The principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) precludes our interpreting rule 2 in the manner requested by appellant. "Under that canon of statutory construction, 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed,' absent 'a discernible and contrary legislative intent.' [Citations.]" (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1161.) That rule prevents our judicially engrafting a common law exception to the need to timely file a civil appeal under rule 2.

2. The Judgment for Respondents Was Final and Appealable

Appellant requests, if this court finds his notice of appeal to be untimely, that we declare the judgment in favor of respondents is not final, and therefore nonappealable, because other causes of action remained against other defendants in the action. A judgment that disposes of all issues between the parties is final and appealable notwithstanding the action remains pending as to other parties. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, disapproved on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 69, p. 126.) The present judgment determined all of the rights and liabilities between appellant and respondents and was final and appealable.

It is of no consequence that other causes of action against other defendants remained to be determined: "In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to

proceed against the others, whenever a several judgment is proper." (Code Civ. Proc., § 579.) The court had authority to enter a judgment as between appellant and respondents, and it was incumbent upon appellant to file a timely appeal from that judgment.

DISPOSITION

The appeal is dismissed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J.

BOLAND, J.