

IN THE SUPREME COURT OF CALIFORNIA

Kathleen Leonard, Petitioner

vs.

Superior Court for Nevada County,

Retailer's Credit Association Of Grass Valley, Inc.,
Dignity Health, Real Parties In Interest.

PETITION FOR REVIEW

After a Decision Of The Court Of Appeal,
Third Appellate District,
Summarily Denying Petition For Write Of Mandamus
C077597

From the Superior Court for Nevada County,
The Honorable Linda J. Sloven
Civil Case No. CL-78288

URGENT STAY REQUESTED

[Five Motions To Be Heard November 7, 2014, Judge Linda Sloven, Dept. 6]
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November 4, 2014

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ISSUES PRESENTED

The issue raised in this petition is:

1. If the only evidence in the record before a trial court shows that there is a possibility of a party recovering damages in excess of the jurisdictional limit (presently \$25,000), must the case be classified as unlimited?

REQUEST FOR STAY

Cross Complainant Kathleen Leonard (“Petitioner”) requests a stay of all proceedings in the trial court until the case is correctly classified as an unlimited action. The *incorrect classification* has resulted in Petitioner being seriously prejudiced with the loss of: (a) her right to a jury trial; (b) her right to appeal the trial court’s decision granting the anti-slapp motion filed Respondent Retailer’s Credit Association of Gras Valley, Inc. (“RCA”); and (c) her ability to conduct full discovery.

The current trial date is December 16, 2014, with only Petitioner and Respondent Dignity Health (“Dignity”) as parties.¹ There are five pending matters set for hearing on November 7, 2014. Unless the classification of this case is corrected, Petitioner will be forced to trial with no prospect of recovering the amount of damages she might otherwise have been awarded. In addition, Petitioner will have no recovery at all against RCA because she cannot appeal the dismissal of RCA pursuant to its anti-slapp motion.

The following are the five matters pending on November 7, 2104:

1. RCA’s Motion for Attorney’s Fees;
2. Dignity’s demurrer to the SACC;
3. Dignity’s motion to strike portions of the SACC;
4. Petitioner’s motion to continue the trial date; and
5. Petitioner’s motion for additional discovery.

Unless the case is re-classified before these matters are heard, Petitioner will face even more prejudice and there will be further waste of time and resources since the case will end up on appeal on the very same legal, not factual, issues.

¹ RCA has since filed a dismissal of its original complaint.

INTRODUCTION

This is a Petition for Review of the summary denial by the Court of Appeal, Third Appellate District, of Leonard's petition for a writ of mandamus to reverse the decision of the Honorable Linda J. Sloven, Judge of the Nevada County Superior Court, on October 7, 2014, denying Petitioner's Motion To Re-Classify the case as unlimited ("Motion To Re-Classify").

After success on appeal, Petitioner filed, with leave of court, a *verified* first amended cross complaint ("FACC") that alleged damages in excess of the jurisdictional limit of \$25,000. Neither RCA nor Dignity challenged the damage allegations in the FACC or submitted contrary evidence. Petitioner also filed at the same time a case management statement designating the case as unlimited and requesting a jury trial.

Petitioner's counsel was told by the Superior Court clerk's office at the time of filing the motion for leave to file the FACC that nothing further needed to be done to change classification. When Petitioner's counsel subsequently returned to the clerk's office to obtain a summons to serve the FACC, he inquired about the case classification and was told it was unlimited. His understanding of the case being classified as limited is corroborated by the fact that the next file volume in the clerk's office opened after the FACC was denoted as "CU" for unlimited status.

After demurrer and motions to strike the FACC, RCA was dismissed upon the granting of its anti-slapp motion. Petitioner then filed a *verified* second amended cross complaint ("SACC") against Respondent Dignity that alleges damages in excess of the jurisdictional limit of \$25,000. Dignity has never challenged the damage allegations in the SACC or submitted contrary evidence to this verified complaint.

Petitioner filed a notice of appeal of the trial court's granting of RCA's anti-slapp motion. The trial court set aside the notice of appeal because it was filed after the 30 day time period for a limited case (but before the 60 day time period for an unlimited case). This alerted Petitioner to the incorrect classification of the case.

Petitioner immediately filed an ex parte application for an OST to hear the Motion To Re-Classify. The Motion To Re-Classify, if granted, would have allowed Petitioner to timely file her appeal. The trial court granted the OST and heard the Motion To Re-Classify. Again, although both RCA and Dignity opposed the motion, neither submitted any evidence challenging Petitioner's damage allegations in the verified FACC or SACC that damages would exceed the \$25,000 jurisdictional limit.

Petitioner argued that the verified FACC and SACC provided the court with a proper basis for classification of the case as unlimited. See *Walker v. Superior Court* (1991)53 Cal. 3d 257. The trial court, citing *Ytuarte v. Superior Court* (2005) 129 Cal. App. 4th 266, denied the motion to re-classify *because Petitioner had not submitted any new, additional evidence to show that damages over the jurisdictional limit were possible.*

Petitioner filed a petition for a writ of mandamus pursuant to CCP §403.080. The Third District Court of Appeal Summarily denied the petition. This petition for review followed.

BACKGROUND

The Original Classification Of The Case

The case was originally classified as limited when RCA filed an action against Petitioner for collection of a purported medical debt for services provided by Dignity. Petitioner filed a cross complaint against RCA because it had attached copies of Petitioner's protected medical health information ("PHI")² to the complaint without her authorization or a court approved protective order. The cross complaint alleged the violation of the: (a) California Medical Information Act, Civil Code §56 et seq. ("CMIA"); (b) the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); and (c) requested injunctive relief to remove from the trial court's public record the copies of her PHI that were attached to RCA's complaint without her authorization or a suitable protective order.

The case went to trial on June 11, 2012, and the court denied Petitioner's motion to close the court room so that her PHI would be protected and also denied her objection to RCA's introduction of further PHI in open court. The trial court gave RCA judgment on the complaint and found against Petitioner on the cross complaint.

The Appeal

Petitioner timely appealed and also filed a motion with the Appellate Division of Nevada County Superior Court to seal her PHI pending the appeal. The Appellate Division denied the motion to seal pending appeal and Petitioner sought writ relief from the Third District Court of Appeal, but was summarily denied. Petitioner eventually won the appeal with the Appellate

² The term PHI stands for "protected health information" as defined by HIPAA at 45 C.F.R. § 160.103.

Division finding that: (a) CMIA was less stringent than HIPAA, and therefore preempted by HIPAA;³ (b) Petitioner's PHI was protected by HIPAA, but that some of the PHI was subject to a "safe harbor" rule created by the Appellate Division, and therefore, could be publically disclosed in a judicial proceeding without a protective order; and (c) that some of Petitioner's PHI, however, was not subject to the "safe harbor" and should have been kept under seal by the trial court. The Appellate Division ordered certain pages sealed, vacated the judgment for RCA, and remanded for a new trial. Petitioner again sought transfer of the case to the Third District Court of Appeal, but this was summarily denied.

**The Motion For Leave To File An Amended Cross Complaint
And The Second Case Classification**

The case was returned to the trial court in January 2014. On February 28, 2014, Petitioner filed a motion for leave to file the verified FACC ("Motion For Leave To Amend"). The FACC alleged new causes of action against RCA and added Dignity as a new cross defendant with additional causes of action. There were damage allegations against both cross defendants in excess of \$25,000 each. Petitioner also filed a case management statement on February 26, 2014, that designated the case as unlimited and asked for a jury trial. RCA opposed the Motion For Leave To Amend, but did not contest or submit countervailing evidence to Petitioner's verified FACC. Dignity filed a demurrer and motion to strike portions of the FACC, but did not contest the

³ Petitioner argued that CMIA was more stringent than HIPAA and that it required that PHI only be used or disclosed in a judicial tribunal with patient authorization or pursuant to a protective order. This Court's decision in *Brown v. Mortenson* (2011) 51 Cal. 4th 1052, was discussed, but with no authority on point, the Appellate Division found the opposite.

verified FACC damage allegations.

At the time of consideration by the trial court of the Motion For Leave To Amend, the only evidence regarding the amount of damages was Petitioners *verified* FACC with allegations of damage in excess of \$25,000 for both RCA and Dignity. Despite the evidentiary record, the trial court classified the case as limited.

The Misunderstanding About The Case Classification

When Counsel for Leonard personally filed the Motion for Leave to Amend at the clerk's office on February 28, 2014, he told the clerk that the FACC would exceed the jurisdictional amount of damages for a limited action and that the case would need to be re-classified to unlimited. He specifically asked the clerk if anything further was needed to be filed to effect the re-classification. The clerk responded "no" and that she would take care of making the change in classification, subject to the Court's ruling. Counsel also asked about paying fees for the change in classification, but was told by the clerk that she would ask for these fees if the FACC was approved for filing.

Shortly after learning that the Motion For Leave To Amend was granted, counsel for Leonard went to the clerk's office on April 16, 2014, to have a summons issued for service of the FACC. He again inquired about the case classification and was informed that it had been changed to unlimited and that the "78288" number would continue in use.

This misunderstanding about the case classification is corroborated by the fact that the next volume of the court's case file was, in fact, marked with the unlimited classification number of "CU12-078288."

RCA's Anti-Slapp Motion

RCA filed a special motion to strike the FACC against RCA under CCP §425.16 on June 6, 2014. Petitioner filed an opposition on June 25, 2014. RCA filed a reply on July 3, 2014, and the matter was argued on July 11, 2014, and taken under submission. The trial court dated its Ruling On Submitted Matter on August 7, 2014, and RCA served a Notice Of Entry Of Ruling On Submitted Matter on August 13, 2014.

The Notice Of Appeal

The granting of a CCP §425.16 Special Motion to Strike is appealable under CCP §426.16(i) and CCP §904.1(a)(13). The normal 60 day time to appeal, CRC 8.104(a), applies unless it is a limited action, in which case, there is a 30 day time limit. CRC 8.822(a). Counsel for Petitioner, unaware that the case was not classified as unlimited, presumed that there was the normal 60 day period to appeal, and consequently, filed a Notice of Appeal on October 1, 2014.⁴

Later on October 1, 2014, after Petitioner had filed the Notice of Appeal, the trial court issued a minute order setting aside the Notice of Appeal as untimely filed. Counsel for Petitioner obtained the order on

⁴ If the case is reclassified, Petitioner will be able to appeal the decision of the trial court granting RCA's anti-slapp motion. This appeal would concern issues with important statewide significance, including, *inter alia*: (a) does the litigation privilege under CC §47(b) preempt HIPAA and allow PHI to be disclosed in the public domain of a judicial tribunal without a protective order; (b) should CC §47(b) apply when the use and disclosure of PHI was part of a long standing course of tortious conduct by defendant debt collector; and (c) was RCA's anti-slapp motion untimely because CC §47(b) was not raised as a defense to either the original cross complaint or while the case was on appeal.

October 2, 2014.

The Motion To Re-Classify

Counsel for Petitioner did not learn that the case was mis-classified until he learned of the order of the Court setting aside Leonard's Notice of Appeal. Counsel for Petitioner then set a hearing for Ex Parte Application to hear the Motion to Re-Classify. The next available date was October 7, 2014.

On October 7, 2014, the trial court heard and granted Petitioner's Ex Parte Application for an OST. The trial court then heard argument on the Motion To Re-Classify.

After extensive argument on October 7, 2014, the trial court observed that it had been prepared to grant the Motion To Re-Classify, but felt compelled to deny it because Petitioner *had not submitted any additional evidence to support the possibility of obtaining an award of damages in excess of \$25,000*. Petitioner argued that the verified FACC and verified SACC were sufficient, but the trial court ruled that *additional evidence had to be submitted*.

LEGAL ISSUES

I. WHEN THE EVIDENCE BEFORE THE TRIAL COURT SHOWS A POSSIBILITY OF DAMAGES IN EXCESS OF THE JURISDICTIONAL AMOUNT FOR AN UNLIMITED ACTION, THE CASE MUST BE CLASSIFIED AS UNLIMITED

A. The Applicable Law

This Court in *Walker v. Superior Court* (1991) 53 Cal. 3d 257 (“*Walker*”) established the test that a trial court must employ when making a jurisdictional classification. Under the *Walker* test, the trial court must base its classification of the matter upon the evidentiary record before it. If that record shows that there is a *possibility* of an award of damages in excess of the jurisdictional limit (presently \$25,000), the trial court must classify the action as unlimited. This is a jurisdictional requirement. A limited case classification can only be made if the evidentiary record proves that an award of less than \$25,000 is a *legal certainty*. Here is how this Court stated the rule:

The [trial] court may believe it highly unlikely that plaintiff will recover the amount demanded, but this is not enough to defeat jurisdiction, unless it appears to a *legal certainty* that plaintiff cannot recover the amount [of the] demand. [*Emphasis added.*] *Walker* at 270.

This “legal certainty” test was applied recently by the Court of Appeal in *Ytuarte v. Superior Court* (2005) 129 Cal. App. 4th 266 (“*Ytuarte*”). The Court of Appeal summarized the test this way:

The confusion in reclassification proceedings centers on the appropriate legal standard the courts should apply in determining whether a case has been incorrectly classified and more specifically, whether the evidence discloses the amount in controversy in a particular case qualifies the action as an

unlimited civil case. *Ytuarte* at 276.

B. The Case Should Have Been Classified As Unlimited When The FACC Was Approved for filing

The only evidence in the record before the trial court when the Motion To Amend was decided by the trial court, was Petitioner's verified FACC which alleged under oath that the damages would exceed the jurisdictional limit of \$25,000. In addition, Petitioner had also filed at the same time a case management statement that designated the case as unlimited and asked for a jury trial.

1. Verified Complaints As Evidence

A verified complaint has been repeatedly found to constitute an affidavit and to be admissible as evidence. If uncontested by other evidence, it can provide the factual basis for motions concerning such matters as venue, *Hollopeter v. Rogers* (1962) 199 Cal. App. 2d 814, 817, a preliminary injunction, *Coppinger v. Superior Court* (1982) 134 Cal. App. 3d 883, 887 (overruled on other grounds), or for the appointment of a receiver, *Nichols v. Nichols* (1933) 135 Cal. App. 488, 492.

2. The Trial Court's Initial Mis-Classification

At the time that it approved the FACC for filing, the only evidence before the trial court was the verified FACC and Petitioner's case management statement (California Court Form CM-110). RCA opposed the filing of the FACC, but did not challenge the verified damage allegations or argue that the case should not be classified as unlimited.

C. The Evidence In The Record At The Time Of Petitioner's Motion To Re-Classify Had Not Changed And The Case Should Have Been Classified As Unlimited

At the time of Petitioner's Motion (October 7, 2014), there was no additional evidence before the trial court regarding the possible damages in the case other than Petitioner's verified SACC. Neither RCA nor Dignity ever submitted any evidence to the trial court about the damage allegations. Consequently, the only evidence before the trial court at the October 7, 2014, hearing on the Motion was the verified SACC that continued to allege damages in excess of \$25,000.

Based upon the record before the trial court at all times since the Motion To Amend, there was a possibility that Petitioner could be awarded damages in excess of the jurisdictional limit of \$25,000. Therefore, the trial court was obligated to classify the case as unlimited.

II. PETITIONER HAS LOST HER RIGHT TO A JURY TRIAL AND HER RIGHT TO AN APPEAL

A. Loss Of Right to A Jury Trial

The mis-classification of the case is depriving Petitioner of her right to a jury trial. This was, perhaps, the most significant reason for this Court's ruling in *Walker*. This Court found that the denial of a party's right to a jury trial raised serious due process questions. Here is how it phrased the issue:

[I]t has been recognized that when a trial court inquires into the facts of a case in order to determine amount in controversy, the court runs the risk of depriving a plaintiff of the right to a jury trial in the forum of choice. (See, e.g., *Nelson v. Keefer* (3d Cir. 1971) 451 F.2d 289, 295; Comment (1972) 47 N.Y.U.L. Rev. 349, 352.) Because of this potential, courts have imposed a high standard on a trial court's determination that a matter does not meet minimum amount-in-controversy requirements. *Walker* at 270.

Indeed, Petitioner specifically requested a jury trial in this case when

she filed her case management statement filed at the same time that her motion for leave to file the FACC was pending.

B. Loss Of The Right To An Appeal

Even more important in this case, is the loss of Petitioner's right to an appeal of the trial court's ruling granting RCA's anti-slapp motion that caused its dismissal as a cross defendant. The classification of this action as a limited case, gave only 30 days, not 60 days, for an appeal.

As established above under the Background, counsel for Petitioner was told twice by the clerk of the court that the case was unlimited. That the status of the case was unlimited at that time, is corroborated by the copy of the court's next file volume opened in the case after the FACC which has a "CU" (unlimited) designation, not a "CL" (limited) designation.

With this mistaken understanding of the classification in mind, counsel did not file the Notice of Appeal until October 1, 2014, which was after the 30 day period, but before the 60 day period. When the mistake in classification was discovered, on October 2, 2014, counsel for Petitioner immediately arranged the ex parte hearing for an OST to hear the Motion to Re-Classify.

The right to appeal is strongly favored by the courts and they have repeatedly construed the applicable rules of civil procedure to preserve this right. A good illustration of this judicial policy is presented by *In Re Marriage Of Micalizio* (1988) 199 Cal. App. 3d 662, 671, where the Court of Appeal, found that:

Due to its remedial character the right of appeal is favored by the courts and applicable rules are construed to preserve the right as far as possible.

(Hollister Convalescent Hosp., Inc. v. Rico, 15 Cal.3d 660, 674, 125 Cal. Rptr. 757, 542 P.2d 1349 ...)" (Lippert, supra, 60 Cal. App. 3d at p. 779, 131 Cal. Rptr. 730.)

Indeed, a recent Court of Appeal decision, *In Re Marriage Of Lin* (2014) 225 Cal. App. 4th 471, 474, observed that courts go to great lengths to preserve a party's right to appeal and ambiguities are construed in favor thereof:

On numerous occasions, California courts have resolved ambiguities concerning appellate jurisdictional time limits to extend, rather than limit, the right to appeal, even where such interpretations may be considered *hypertechnical* in other contexts. [quoting from] (In re Marriage of Mosley (2010) 190 Cal. App. 4th 1096, 1103, 119 Cal. Rptr. 3d 11 (Mosley). [Emphasis added.]

Petitioner has significant legal issues to argue on appeal regarding the trial court's granting of Respondent's anti-slapp motion (see note 4, *supra*). The policy favoring the right to appeal should applied in this case. See e.g., *In Re E.M.* (2014) 228 Cal. App. 4th 828, 853.

C. **Petitioner Deserve's A Decision On The Merits**

There is a very strong preference in the law for a decision on the merits. *Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (2013) 217 Cal. App. 4th 708, 714. This was clearly enunciated by the Court of Appeal with this pronouncement:

[T]he policy favoring trial ... of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action....' (Section 583.130.) 'Finally, all things being equal, we

deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action.' Quoting from *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 509.

This Court has the power to see that this case will be decided on the merits, rather than on a misunderstanding about the case classification.

D. The Case Should Be Re-Classified *Nunc Pro Tunc*

Petitioner's Motion To Re-Classify asked for an order re-classifying the case as unlimited *nunc pro tunc* as of the date of filing of the FACC. This is the correct approach because the case should have been classified as unlimited when the trial court approved the FACC for filing.

With a *nunc pro tunc* classification, there is no question that the Notice of Appeal filed by Petitioner on October 1, 2014, is timely under CCP §904.1(a)(13); CRC 8.104(a)(1)(A).

However, even if Petitioner's Motion is deemed granted as of the date of the hearing on the Motion To Re-Classify, October 7, 2014, there was still time to file the Notice of Appeal under CRC 8.104(a)(1)(A) until 5:00 pm that day.

III. PETITIONER MET ALL OF THE REQUIREMENTS FOR RE-CLASSIFICATION

A. The Law Controlling Motions For Re-Classification

CCP §403.040 sets out the rules for motions for re-classification of an action, such as Petitioner's Motion. When a motion for re-classification is beyond the time under CCP §403.040(a), then it may still be filed under CCP §403.040(b). Under this subsection, the trial court *must* grant the motion,

provided that the two conditions are met.

1. Correct Classification

The first condition is §403.040(b)(1). This requires a factual determination whether the case is correctly classified. This issue has been thoroughly addressed above and the un-controverted evidence in the trial court record shows that it should have been classified as unlimited from the date when the FACC was allowed to be filed.

2. Good Cause

The second condition is §403.040(b)(2). This requires a finding that the moving party has “good cause” for not having made the motion earlier.⁵

At the hearing on October 7, 2014, the trial court did not make any express finding as to “good cause”. However, the trial court did state that it would have granted the Motion To Re-Classify but for its understanding of the *Ytuarte* decision.

From the trial court’s statement that it would have granted the Motion, it must be presumed that the trial court otherwise found “good cause” to grant the Motion To Re-Classify under §403.040(b)(2). It is a well established rule that “[i]mplicit in every order made in response to a motion is a finding of those facts supported by the evidence which are necessary to sustain it.” *People v. Tannehill* (1961) 193 Cal. App. 2d 701, 706, citing to

⁵ CCP §403.040 does not include a definition of "good cause" as some statutes do. Thus, the term should be construed according to the general judicial understanding of that term and the Court may consider any relevant facts or law. See *Laraway v. Sutro & Co., Inc.* (2002) 96 Cal. App. 4th 266, at 274.

Griffith Co. v. San Diego College for Women (1955) 45 Cal. 2d 501, 507.

CONCLUSION

Petitioner filed the verified FACC and the verified SACC alleging damages in excess of the jurisdictional amount of \$25,000 against each cross defendant. Petitioner also filed a case management statement designating the case as unlimited and asking for a jury trial. There was never any challenge or contrary evidence to the damage allegations by RCA or Dignity. Accordingly, the case should have been classified as unlimited.

When the misunderstanding of the case classification was discovered, Petitioner immediately filed the Motion To Re-Classify. The trial court made an implicit finding that Petitioner acted in good faith and that there was good cause for rec-classification. However, it did not change the case to unlimited because of a mistaken understanding of the law that Petitioner had to submit additional, new evidence of the possibility of being awarded damages in excess of the jurisdictional amount.

Petitioner's right to a jury trial and right to an appeal should not be abridged because of the mis-classification. Petitioner prays that this Court will grant the requested relief.

Respectfully Submitted,

November 4, 2014

Patrick H. Dwyer,
Attorney for Petitioner

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief is approximately 4208.

Patrick H. Dwyer,
Attorney for Petitioner

Date: November 4, 2014

PROOF OF SERVICE

I hereby certify under penalty of perjury that I am at least 18 years of age, not a party to the action, and that a copy of Kathleen Leonard's Petition for Review, in the matter of RCA v. Leonard, Third District Court of Appeal Case No. C077597; Nevada County Superior Court Case No. CL-78288 was served as follows.

By United States express mail, postage pre-paid, to:

1. Jennifer Walters
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4. The Superior Court for the County of Nevada
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Nevada City, California 95959
Tele.: 530-265-1294.
5. The Court of Appeal, Third Appellate District, 914 Capitol Mall,
4th Floor, Sacramento, California 95814.

I declare under penalty of perjury under the laws of the State of California that the foregoing certification of Patrick H. Dwyer is true and correct.

Patrick H. Dwyer

November 4, 2014

Location: Penn Valley, CA 95946