IN THE SUPREME COURT OF CALIFORNIA

Appellate Case No. A103827
Appeal from the Superior Court for Solano County
Franklin R. Taft, Judge
Superior Court Case No. FCS021093

Clyde Terry,
Anne Terry, Plaintiffs and Appellants

v.

Alan Levens,
Karen Levens, Defendants and Respondents

Case No. A106673
Appeal from the Superior Court for Solano County
Harry S. Kinnicutt, Judge
Superior Court Case No. FCS021093

Alan Levens,
Karen Levens,
Cross-Plaintiffs and Appellants,

v.

Clyde Terry,
Anne Terry,
Kenny Wayne Odom,
Patrick H. Dwyer,
Cross-Defendants and Respondents.

PETITION FOR REVIEW

After a Decision by the Court of Appeal
First Appellate District, Division Two
Petition for Rehearing Denied

Patrick H. Dwyer,
Attorney for Plaintiffs and Appellants in A103827
and Appearing Pro Se in A106673

March 4, 2005

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II. Why Review Should Be Granted

This case presents five questions that are at the very heart of California appellate practice and procedure. The actions of the Court of Appeal ignored or nullified statutes and long standing judicial rules governing appellate review that are used daily by every appellate court in this state. First, the ruling of the Court of Appeal ignored the statutory and judicial rules that limited the boundaries of its jurisdiction to the review of judgements or orders from which an appeal has been filed. California Code of Civil Procedure §906 expressly prohibits any appellate court from reviewing a decision or order from which an appeal has not been taken. This statute is, in substantial part, a codification of the long standing and universal judicial rule that a party who has not filed an appeal or cross appeal from the judgement or order may not thereafter raise issues during the appellate process. The Court of Appeal, contrary to the express language of CCP §906, raised issues on appeal *sua sponte* and without briefing by any party that were determinative of its decision to render moot Appeal No. 106673 and allow a cross complaint to be filed upon reversal and remand in Appeal No. A103827.

Second, the Court of Appeal nullified the legislature's expressly stated rule for the timely filing of cross complaints set forth in California Civil Code of Procedure §428.50 by allowing a cross complaint to be filed without leave of court and after entry of final judgement. This decision is in direct conflict with the Court of Appeal, Fifth District decision in City of Hanford v. The Superior Court of Kings County (1989) 208 Cal. App. 3d 580 (hereafter "City of Hanford"), holding that CCP §428.50 forbids the filing of a cross complaint after the entry of final judgment.

Third, the Court of Appeal violated Government Code §68081 by refusing to grant a

rehearing on issues that were never raised on appeal and, consequently, were never briefed. The Court of Appeals in its ruling on Appeal No. 106673 agreed with the trial court's granting of the motion to strike the cross complaint for failure to be timely filed under CCP §428.50, but then without explanation, ruled the decision moot and ordered that the cross complaint be filed upon remand of the original action.

Fourth, the Court of Appeal exceeded its jurisdiction by ignoring the rule enunciated by this Supreme Court prohibiting the consolidation of appellate cases where there are no common issues. Without notice to any party and without opportunity for briefing, the Court of Appeal consolidated two cases that did not have any common issues. The two appellate cases arose and were briefed independently. Appeal No. 103827, the appeal of the original action, dealt with whether the trial court erred by ordering the case to trial without allowing the plaintiffs any opportunity for discovery. Appeal No. 106673 dealt with the dismissal of a cross complaint that was filed after the entry of judgement and after the time for appeal in the original action. These cases had no common issues and should not have been consolidated.

Fifth, the Court of Appeal ignored the clear intent of California Rule of Court 27(a)(1) by failing to award costs to the prevailing party. Without any explanation or finding of any kind, the Court of Appeal simply decided that it would be fair for each party to bear their own costs. No consideration was given to the very large difference in costs between the two cases on appeal, and no consideration was given to the fact that the appellants in Appeal No. 103827 clearly prevailed and that the respondents in Appeal No. 106673 also prevailed on the merits, but that the *sua sponte* rendering of the case moot nullified the award of costs that the respondents would have otherwise received.

III. Background

In April, 2001, the Terrys entered into a commercial lease with the Levens for a certain portion of their property in Dixon, California, for use as a dog kennel and obedience training facility. After over a year and a half of attempting to obtain the Levens' compliance with certain terms of the lease, the Terrys filed suit to terminate the lease in late November, 2002 (hereafter the "Original Action"). In February, 2003, the Terrys received from Solano County a Notice of Violation and Order to Comply concerning electrical wiring and a trailer that the Levens had installed on the leased premises without a permit and in violation of the lease. The County notice and order gave the Terrys just thirty days to have the wiring and trailer removed. Having tried unsuccessfully for nine months to get the electrical wiring and trailer removed, the Terrys had no choice but to file a motion for a temporary restraining order to enforce the Solano County Order.

On March 14, 2003, the trial court conducted the hearing on the TRO Motion. The Terrys presented their evidence respecting the hazardous electrical wiring and the illegal trailer. The Levens did not present any factual evidence to the rebut the presence of the illegal wiring and trailer or the finding of violation by Solano County, but instead, argued that the TRO was barred by laches and unclean hands. The trial court, without explanation, pronounced: "I'm going to set the matter for trial." Reporter's Transcript on Appeal ("RT") March 14, 2003, page 97, line 13. The trial court choose April 11, 2003, for the start of trial, which was less than thirty days away (hereafter "Trial Date Order"). The trial court then denied the TRO motion on the grounds of laches and unclean hands. RT March 14, 2003, page 97, lines 14-23.[1] Counsel for

[1] The Terrys argued that no factual basis for laches and unclean hands existed and that is was improper to bar enforcement of a county Notice of Violation and Order to Comply.

the Levens then mentioned that the Levens contemplated filing a cross complaint. RT March 14, 2003, page 98, lines 25-28. The trial court responded "[a]s to the cross complaint, I'm going to sever it ..." RT March 14, 2003, page 99, lines 1-3 (hereafter "Severance Order).

At the pre-trial conference of April 9, 2003, the Terrys submitted a witness list, exhibits and trial brief as best they could without the benefit of discovery and in the short time allowed. At this hearing the trial court, *sua sponte*, moved the trial date to April 25, 2003. Then again at the April 24, 2003, pre-trial hearing, the trial court, *sua sponte*, re-set trial for July 21, 2003. However, at no time did the trial court allow for discovery.

Trial commenced on July 21, 2003, and at the conclusion of the Terrys' case in chief, the trial court granted the Levens' motion for nonsuit with respect to the First, Second, Sixth and Seventh Causes of Action. The granting of the nonsuit effectively gutted the Terrys' case and the jury returned a verdict in favor of the Levens on the remaining three lesser counts. The Terrys filed a notice of appeal on August 13, 2003. The Levens did not file any cross appeal.

On November 6, 2003, four months after appeal of the Original Action (No. A103827) and without making any motion for leave of court pursuant to CCP §428.50(c), the Levens filed a cross complaint in the Original Action. On December 31, 2003, the Terrys and other cross-defendants filed a Motion to Strike under CCP §435 on the grounds that the cross complaint had been filed without leave of court and four months after entry of final judgement in direct violation of CCP §428.50(c). Judge Kinnicutt, who had replaced the just retired Judge Taft, granted the Motion to Strike without leave to amend on April 28, 2004. The Levens filed an appeal of Judge Kinnicutt's order of dismissal of the cross complaint on May 26, 2004 (hereafter "Cross Complaint Action", case no. A106673). There were only two grounds for appeal in the

Levens' opening brief: (1) the cross complaint was not barred by CCP §428.50; and (2) the decision in City of Hanford, was not applicable. The Levens never argued that the Severance Order was improper or that they had been prejudiced thereby.

The briefing by all parties in both appeals was completed by August 24, 2004. Over the objection of the Terrys in the Original Action and Respondents in the Cross Complaint Action, the two cases were subsequently joined for purposes of oral argument. Oral Argument in the Court of Appeal was heard on December 13, 2004. The Court of Appeal issued its decision on February 3, 2005, reversing and remanding the Original Action. At the same time, the Court of Appeal reviewed Judge Kinnicutt's order of dismissal in the Cross Complaint Action and found the grounds for dismissal under CCP §428.50 were correct and that the decision in City of Hanford was sound, but that the case was moot. The Court of Appeal, without any reasoning other than the unsupported assertion that the Levens "may have been" prejudiced by the Severance Order, directed that the Levens be allowed to file their cross complaint upon remand of the Original Action. The Terrys and respondents in the Cross Complaint Action filed a petition for rehearing on February 18, 2005. The Court of Appeal denied the petition without further argument or hearing on February 23, 2005.

IV. Legal Discussion

A. The Court of Appeal Exceeded its Jurisdiction By Reviewing An Order From Which No Appeal Was Taken.

1. California Code of Civil Procedure §906 Bars Review of Decisions and Orders Not Timely Appealed.

The California Legislature defined the powers of appellate courts and the matters that are reviewable in CCP §906.[2] In the last sentence of this statute the legislature specified that the "provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." In other words, if an aggrieved party does not timely file an appeal from the allegedly offending order or judgement, that party waives its right to appeal any such matter.

No appeal from the Severance Order was ever taken by the Levens in the Original Action. Then in the Cross Complaint Action the Levens never argued whether they had been prejudiced by the Severance Order. Rather, they argued that CCP §428.50 was not a bar to filing the cross complaint and that the City of Hanford decision was not applicable. There were two very good reasons for this approach by the Levens: (1) they had failed to file a cross appeal in the Original Action alleging that they had been prejudiced by the Severance Order as required by CCP §906; and (2) the Levens had over four months to file a cross complaint in the Original Action (about which they were reminded by the trial court on two occasions) but they never did. Thus, it was clear from the record in the Original Action that the Levens had not, in fact, been

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[2] California Code of Civil Procedure §901 is the starting point for determining appellate review. CCP §901 expressly mandates that the "Judicial Council shall prescribe rules for the practice and procedure on appeal not inconsistent with the provisions of this title." Thus, the rules prescribed by the Judicial Council shall be consistent with CCP §906 which defines the powers of the reviewing court and what matters are reviewable.

prejudiced by the Severance Order, and even if they had been, they had failed to timely take any action to correct or appeal from such prejudice.

The only logical explanation for the Levens' conduct in filing the Cross Complaint Action four months after the entry of final judgement in the Original Action is that the Levens never bothered to examine the rules for the filing of a cross complaint, namely CCP §428.50. The failure of a party to research the rules of civil procedure for when and how to file a cross complaint is not grounds for claiming that they had been prejudiced.

The first time that the alleged "issue" of whether the Levens "may have been" prejudiced by the Severance Order was when the Court of Appeal, sua sponte and without any factual or legal foundation, mentioned this new issue in its decision of February 3, 2005. Under the express and unequivocal language of CCP §906, the Court of Appeal had no jurisdiction to raise a new issue that had never been the subject of a timely appeal by the Levens. Therefore, the Court of Appeal's decision to allow the Levens to file the cross complaint upon remand of the Original Action was a judicial nullity that this Court must set aside as a *per se* error.

2. California Judicial Authority Follows The Code of Civil Procedure §906 Bar of Review For Decisions and Orders Not Timely Appealed.

The language of CCP §906 is really a codification of the long standing judicial rule that "a respondent who has not appealed from the judgement may not urge an error on appeal." Estate of Powell (2000) 83 Cal. App. 4th 1434, 1439, quoting from California State Employee's Association v. State Personnel Board (1986) 178 Cal. App. 3d 372, 382, fn. 7.[3] As

[3] See also, Transworld Systems, Inc. v. County of Sonoma (2000) 78 Cal. App. 4th 713, 716, fn. 4; Raymond Kardly et al. v. State Farm Mutual Automobile Insurance Company (1995) 31 Cal. App 4th 1746, 1749, fn.1.

pronounced by the California Supreme Court on multiple occasions, unless a respondent files a cross appeal from any order or judgment that he believes aggrieves or prejudices him, the respondent loses the right to argue that issue on appeal. Alexander S. a Minor, Mark H. et al. v. Tudor G. (1988) 44 Cal. 3d 857, 864-865; Puritan Leasing Company v. August et al. (1976) 16 Cal. 3d 451, 463.

The application of the foregoing judicial counterpart to CCP §906 leads to the same result: the Court of Appeal had no jurisdiction to raise on appeal for the first time an issue that the Levens had never raised in the trial court, in the appeal of the Original Action, or in the appeal of the Cross Complaint Action. The Levens, having taken no action in the trial court and having waived their rights on appeal, cannot now be allowed to file a cross complaint based upon an order from the Court of Appeal that was null and void.

3. California Rules of Court Follow the Code of Civil Procedure §906 Bar of Review For Decisions and Orders Not Timely Appealed.

The structure and language of the California Rules of Court ("CRC") is completely consistent with the express language of CCP §906 and the foregoing line of judicial decisions. CRC 1(e) defines the term "notice of appeal" as including a "notice of cross appeal" and that "appellant" includes a "respondent filing a notice of cross-appeal." Rule 2(a)(1) defines the time for filing an appeal, and hence, cross-appeal. Rule 3(e) expressly provides that a cross-appeal be filed within 20 days after the clerk mails the notice of the first appeal.

These rules of the CRC make perfect sense if, and only if, the foregoing statutory and judicial authority is correct: i.e., that a respondent must file a cross appeal from any order or judgement by which he is aggrieved. If this was not the rule, then there would be no sense

whatsoever in this language of CRC Rule 1, 2, and 3 pertaining to the filing of a "cross-appeal." In other words, if a respondent could raise an issue arising from an order or judgement on appeal for the first time in his opposition brief without having filed a notice of cross-appeal, it would make the subject CRC Rules meaningless. The same reasoning applies to the actions of the Court of Appeal in raising the issue sua sponte, without any opportunity for briefing by the parties, and based solely upon the nebulous assertion that the Levens "may have been" prejudiced. The CRC should be construed in conjunction with CCP §901 and §906 to require the timely filing of a cross-appeal to establish jurisdiction in the Court of Appeals to hear an issue from a respondent.

4. The "Interwoven" Exception to the Rule That A Cross-Appeal Must be Filed By An Aggrieved Party Is Not Applicable Because The Issue of Whether The Levens Were Prejudiced Is Not Inextricably "Interwoven" and "Identical" With The Issues Raised By Petitioners.

In a civil context, there is one notable exception to the judicial rule that a cross-appeal must be filed or the issue is waived.[4] There is a line of California cases that carve out a narrow exception for a non-appealing party where "portions of a judgement adverse to a nonappealing party are inextricably interwoven with the whole judgement." In such case, "a general reversal may be ordered to do complete justice." Witkin, California Procedure, Fourth Edition, Appeal, §325.

The case that best explains the interwoven exception as it would apply to the facts at bar appears to be McDill v. Martin et al. (1975) 14 Cal. 3d 831, where the California Supreme Court held that the fact that one of two nieces did not appeal from an adverse judgement of the trial court erroneously awarding the decedent's estate would not preclude an appellate court from

[4] The Petitioners note that these cases do not discuss the statutory rule CCP §906.

making an equal award to both nieces where "the issue presented by the appealing niece was interwoven with, and identical to, the issue which the nonappealing niece would have presented." McDill at 840.

There are three critical elements necessary to apply the McDill test. These are: (1) that the issue presented by the "appealing" party is "interwoven" with the un-appealed order or portion of a judgement; (2) that the issue raised by the "non-appealing" party is identical with the issue raised by the "appealing" party; and (3) it is not reasonably possible to sever the appealing party's issue from the non-appealing party's issue. In other words, the issue not raised by the non-appealing party must be interwoven and identical with the issue raised by the appealing party and not severable from a determination of the issue(s) presented by the appealing party.

This rule clearly does not apply to the case at bar. First, as discussed above, the issue of whether the Levens were prejudiced by the Severance Order is completely different from any of the issues raised on appeal by the Terrys. Second, the Severance Order is not "interwoven" with the Trial Date Order, the judgement entered in the Original Action, or with any of the issues raised by any of the parties on appeal, including those rased by the Levens. Third, the question of whether the Levens were in any way prejudiced by the Severance Order is clearly independent of any issues raised by the Terrys.

Analysis of the Court of Appeal decision confirms that the "interwoven" exception was not the basis for its decision. The Court of Appeal first dealt with the issues raised by the Terrys regarding the Original Action, primarily whether there were any statutory grounds for the Trial Date Order and whether the Trial Date Order, by accelerating the date of

trial so as to cut off discovery, violated the Terrys' due process rights. The Court of Appeal then reviewed the decision by Judge Kinnicutt dismissing the cross complaint after entry of final judgement. The Court of Appeal reviewed the application of the language of CCP §428.50 to the filing of the cross complaint without leave of court four months after entry of final judgment and then discussed the holding in City of Hanford that a cross complaint may not be filed after entry of judgment. The Court of Appeal concurred with Judge Kinnicutt that these authorities had been correctly applied.

The Court of Appeal never raised the "interwoven" exception. The reason for this was quite simple: there were no interrelated and/or identical issues that affected equally the appealing and non-appealing parties as required by the McDill test. The issues in the two appeals were completely different, they had been raised in separate appeals, and they affected the appealing and non-appealing parties completely differently. Thus, there was no basis for using the "interwoven" exception as the basis for an order to allow the cross complaint to be filed upon remand. Therefore, the interwoven exception cannot support the Court of Appeal decision.

B. The Court of Appeal Nullified California Civil Code of Procedure §428.50 by Allowing a Cross Complaint to be Filed After Entry of Final Judgement.

The only two issues that were raised in the Levens' briefs in Appeal No. 106673 from the order of Judge Kinnicutt dismissing the cross complaint as untimely filed were: (1) that the cross complaint was not barred by CCP §428.50; and (2) that the decision in City of Hanford was not applicable. The only discussion of the Severance Order was the Levens' argument that the cross complaint should be ante-dated to the date of the Severance Order under the *nunc pro tunc* rule of CCP §473(d). There was no argument that the Severance Order had "prejudiced" the Levens or that severance under CCP §1048 was improper or otherwise conflicted with CCP §428.50.

The reason that the Severance Order was never directly challenged by the Levens as "prejudicial" is simple: it was the Levens that requested that the trial court sever the cross complaint. See RT, March 14, 2003, page 97, lines 25-28. Further, as discussed above, the Levens had ample opportunity in the trial court to file a cross complaint (or challenge the Severance Order). They apparently just did not bother to look up the rules of civil procedure.

The Court of Appeal's analysis of the dismissal of the cross complaint tracks the exact reasoning used by Judge Kinnicutt. The Court of Appeal discussed CCP §428.50, and then acknowledged the sound reasoning of City of Hanford in interpreting this statute. Moreover, the Court of Appeal made no factual findings or legal argument to support its nebulous assertion that the Levens "may have been" prejudiced. For the Court of Appeal to then, *sua sponte*, decide to simply ignore all of the legal authority it had just confirmed and rule that the Cross Complaint Action was moot and order that a cross complaint be allowed upon remand, is the most clear example of judicial nullification that can be found.

As stated by the United States Supreme Court in Sorrells v. United States (1932) 287 U.S. 435, 450, 53 S.Ct. 210, 216, 77 L.Ed. 413, it is the duty of the courts in this nation to enforce the laws adopted by the legislature and that *judicial nullification*, for whatever reason that a court may harbor, is not permissible. The California Supreme Court has issued consistent opinions that judicial nullification is not to be tolerated in California Courts. In Santa Clara County Counsel Attorneys Association v. Woodside (1994) 7 Cal. 4th 525, at 540, the California Supreme Court held that:

> It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through normal judicial means. What public policy reasons are there against enforcement of a statutory duty are reasons against the creation of the duty *ab initio*, and should be addressed to the Legislature.

The Court of Appeal was obligated to follow the statutory rule of CCP §428.50 regardless of whether it liked the outcome. Its unsupported and unjustified refusal to do so must be reversed as *per se* error.

C. The Court of Appeal Violated Government Code §68081 By Failing to Grant a Petition for Rehearing On Issues Never Raised on Appeal and Never Briefed.

The issues surrounding the alleged prejudice that the Levens "may have" suffered as a consequence of the Severance Order, were never raised on appeal and were never briefed by the parties. This is a direct violation of Government Code §68081 and is automatic grounds for rehearing. California Casualty Insurance Company v. The Appellate Department of the Superior Court of Los Angeles County (1996) 46 Cal. App. 4th 1145, 1149.

The Petitioners filed a petition for rehearing on February 18, 2005, and the Court of Appeal denied the petition on February 23, 2005, without further argument as required by the statute.

Government Code 68081 is really a statutory expression of the due process requirement that a party be allowed a fair hearing. A fair hearing requires that a party be allowed to present all of its arguments. Obviously, if the Petitioners were never allowed to brief the issue, they were denied a fair hearing. By failing to give the Petitioners an opportunity to be heard on such a critical issue to its decision, the Court of Appeal clearly violated the due process rights of the Petitioners under Article I, Sections 7 & 15 of the California Constitution and the due process clause of the United States Constitution as made applicable by the 14th Amendment.

D. The Court of Appeal Exceeded its Jurisdiction by Ignoring the Judicial Rule Prohibiting Consolidation of Appellate Cases With No Common Issues.

The California Supreme Court has made it clear that two cases on appeal with different

issues should not be consolidated. Instead, there must be commonality of one or more issues. The commonality of parties to separate actions is not sufficient. See Pacific Legal Foundation et al. v. California Coastal Commission et al. (1982) 33 C3d 158, 165, fn3.

A review of the issues in each of the appeals consolidated by this Court reveals no commonality whatsoever. The fact that there were two separate orders from Judge Taft, one for acceleration of the trial date and one for severing the cross complaint, does not meet the test spelled out by the Supreme Court. Consequently, upon rehearing, the two appeals should have been decided independently of each other.

E. The Apportionment of Costs Was Unfair to Plaintiffs and Should be Corrected.

The Court of Appeal ruled that each party bear their own costs in both appeals. This is directly contrary to CRC Rule 27(a)(1) which awards costs to the prevailing party.

Under the Court of Appeal decision in the original action, the Terrys were unquestionably the prevailing party, and thus, under CRC 27(a)(1) the Terrys were entitled to an award of costs.

In the Court of Appeal decision on the dismissal of the cross complaint, the Court agreed with the ruling of Judge Kinnicutt that the cross complaint was not filed in accordance with CCP §428.50 or the City of Hanford decision, but then found the case to be moot. There is little question that, absent the erroneous ruling that the Cross Complaint Action was moot, the Terrys (and other respondents) would have been entitled to an award of costs.[5]

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[5] The costs incurred in the appeal of the original action were not inconsequential. There were numerous complex factual and legal issues that required the Reporter's and Clerk's Transcripts to include the entirety of the extensive file docket and trial proceedings. The costs on the appeal of the dismissal of the cross appeal were far less because there were only the filing fees and the cost of duplicating Judge Kinnicutt's decision and the motions and briefs concerning

The Court's order that the parties bear their own costs in both cases is patently unfair and contrary to the express language of CRC 27(a)(1). The Court of Appeal made no argument whatsoever that there were any reasons for not granting costs under CRC Rule 27(a)(1). Absent some reasonable factual or legal basis that a different award should be made in the interests of justice, the prevailing party rule should have been applied.

V. Conclusion

The decision of the Court of Appeals to allow the Levens to file a cross complaint upon remand violated the California Code of Civil Procedure, the California Government Code, The California Rules of Court, and long established judicial authority, all of which require that an aggrieved party timely file an appeal or waive the right to have the alleged error reviewed on appeal. These rules are premised upon the most fundamental policies concerning the administration of justice.

As the record shows, the Levens never claimed any prejudice from the Severance Order in the trial court, never made a motion for leave to file a cross complaint in four month period between the Severance Order and the entry of final judgment, never raised the issue on a cross appeal from the final judgement in the original action, and never raised the issue in their appeal from the judgement of dismissal of the cross complaint. Consequently, the Court of Appeal was without jurisdiction and had no power to order that the cross complaint be remanded with the Original Action. The only jurisdiction that the Court of Appeal had concerning the cross complaint was over the question as to whether it was timely filed under CCP §428.50. Its decision ignoring this jurisdictional limitation was an act of judicial nullification of the

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the motion to strike. If the Court thought that it was somehow just balancing the costs in one case against the other, it was clearly erroneous reasoning.

applicable statutory and judicial authority.

Even if there had been some basis for the jurisdiction of the Court of Appeal (e.g., by an extreme extension of the "interwoven" rule), the Court of Appeal had to grant the petition for rehearing as required by Government Code §68081 to allow these issues to be properly briefed and argued. Its failure to abide by this statute was another act of judicial nullification and a violation of the due process rights of the Terrys (as appellants in the original action) and of the Terrys, Mr Odom and Mr. Dwyer (as respondents in the dismissal of the cross complaint).

The consolidation of the two appeals without proper notice and a fair opportunity to be heard was improper and ignored contrary judicial authority from the California Supreme Court. Further, it denied the Terrys and respondents in the Cross Complaint Action their due process right for an opportunity to argue the merits of a critical element in the Court of Appeal's decision allowing the filing of a cross complaint upon remand of the Original Action.

Petitioners realize that the underlying subject matter of this case (i.e., a dog kennel lease) is not important in the larger scheme of things. None of the parties wanted this case to go to such lengths or involve such expense of time and judicial resources. However, it was the substitution of the trial court's personal opinion in place of the Terry's due process rights that set this case off in the wrong direction. Although the trial court's *per se* due process violation has been corrected by the Court of Appeal, the case is still off track because the Court of Appeal has now substituted its own idea of a "fair" result in place of the express statutory and judicial rules governing appellate procedure. All that the Petitioners are asking for is that the existing statutory and judicial law be followed. There is no need for new law, novel interpretations, or the like: just the application of the state's existing rules of due process on appeal will get this

case back on track and allow the matter to be settled according to the law.

Based upon the foregoing, Plaintiffs request that this Court grant this Petition for Hearing.

Respectfully Submitted,

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Patrick H. Dwyer,
Attorney for Appellants, Clyde and Anne Terry
In Appeal 103827

March ___, 2005