

S199887

IN THE
CALIFORNIA SUPREME COURT

DANIELLE BOURHIS, ET AL.,
Plaintiffs and Appellants,

SUPREME COURT
FILED

vs.

FEB 24 2012

JOHN LORD, ET AL.,

Frederick K. Ohlrich Clerk

Defendants and Respondents.

Deputy



ON REVIEW FROM FIRST APPELLATE DISTRICT, DIVISION TWO
A132136;
APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY
CASE NO. CIV 060796
HON. JAMES R. RITCHIE, JUDGE

ANSWER TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

When Petitioners leased commercial property in Ross, California, to Danielle Bourhis, et al. (“Bourhis”) for their retail business, Brown Eyed Girl, Inc., Petitioners failed to warn Bourhis of the risk of severe flooding—a risk known to Petitioners but not to Bourhis. As a result, when floods put up to four feet of water in stores in the Ross Valley¹, Bourhis was unprepared, suffering devastating losses for which the business had no insurance.

In Bourhis’s suit against Petitioners, Petitioners prevailed and were awarded costs and attorneys’ fees.

After Bourhis appealed, Petitioners moved to dismiss the appeal on the ground that Brown-Eyed Girl had been suspended by the Secretary of State for failure to pay taxes. Bourhis paid the amount owed and showed the Court of Appeal that Brown-Eyed Girl’s good standing had been revived.

Accordingly, the Court of Appeal denied the motion to dismiss, citing this Court’s decisions in *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, and *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351.

The Petition for Review asks this Court to review—for the third time since 1972—the validity of a notice appeal filed by a suspended corporation that revived its corporate status after filing the notice of appeal.

The Petition should be denied because it fails to demonstrate any substantial reason under Rule 8.500(b)(1) why this issue—settled by this Court 40 years ago—now warrants review.

¹ <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/02/MNGKAGG54E1.DTL&type=printable>.

REASONS TO DENY REVIEW

- A. For decades this Court has retroactively validated a revived corporation’s procedural rights (including appeal) but not its substantive rights (e.g., claims barred by the statute of limitations).**

Since 1967, this Court has three times ruled that, when a suspended corporation pays its taxes and is “revived” by the Secretary of State, the corporation’s *procedural rights*—including the right to appeal—are retroactively restored. *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351 (validating notice of appeal); *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369 (validating notice of appeal); *Traub C. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 370 (validating judgment for corporation that was suspended at the time).

By contrast, this Court has long recognized that a corporation’s substantive rights—including rights subject to the statute of limitations—are not revived when the corporation pays its back taxes and is revived by the Secretary of State. Specifically, in 1967 this Court distinguished *Cleveland v. Gore Bros., Inv.* (1936) 14 Cal.App.2d 681, on the ground it “presented a statute of limitations problem.” *Traub C., supra*, 66 Cal.2d at p. 372.

The retroactive revival of procedural rights under current law is a radical shift from prior law. For example, ninety years ago this Court announced a complete bar on retroactive validation of a suspended corporation’s procedural rights. In *Ransome-Crummy Co. v. Superior Court* (1922) 188 Cal. 393, the defendant corporation was suspended after the entry of judgment but before the corporation filed its notice of intent to move for new trial. At the new trial hearing, the corporation’s suspended status was asserted by the plaintiff as a bar to the new trial proceeding. During a postponement of the hearing, the corporation paid its taxes, was revived, and showed this revival to the court.

Nevertheless, the trial court dismissed the new trial motion without ruling on the merits.

This Court affirmed, ruling that the corporation's revival did not retroactively validate the formerly-suspended corporation's motion for new trial:

[T]he subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by statute. The suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty, and it would tend to deprive the statute of its force and encourage corporation in default to postpone payment of its taxes indefinitely if it were held that by subsequent payment of the delinquent taxes all the benefits of the attempted acts denied to the corporation could be secured.

Id. at p. 398.

This rationale was reiterated by this Court in *Smith v. Lewis* (1930) 211 Cal. 294, 301, to bar execution on a judgment obtained by a suspended corporation that was revived prior to execution. In *Smith* this Court stated that "such revival would not have the effect of validating the acts attempted during the period of suspension." *Id.* at p. 300. But this rationale is no longer the law, as shown below.

B. This Court’s recent decisions severely limit the prior rule and now allow revival to retroactively validate a formerly-suspended corporation’s procedural steps.

In three recent decisions, this Court severely limited *Ransome-Crummy Co.*, most recently ruling that the revival of a suspended corporation retroactively validates the suspended corporation’s procedural steps—including filing a notice of appeal.

1. *Traub C. v. Coffee Break Service, Inc.* retroactively validated procedural rights, but excepted the statute of limitations.

In 1967, this Court ruled in *Traub C. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, allowed retroactive revival of procedural rights, but not rights lost due to the statute of limitations.

In *Traub Co.*, cross-defendants were subject to a judgment in favor of a then-suspended corporation. Cross-defendants then moved to vacate the judgment on the ground that, before entry of the judgment and continuously to the time of a motion to vacate, the corporate powers of cross-complainant had been suspended under section 23301.

This motion to vacate was denied, a ruling that this Court affirmed.

This Court’s holding in *Traub C.* supports the Court of Appeal’s denial herein of Petitioners’ motion to dismiss the appeal. *Traub* stated that the motion, asserting the incapacity of the suspended corporation suspended for nonpayment of taxes, was a “plea in abatement *which is not favored in law*” and “is to be strictly construed” *Id.* at p. 370.

Traub cited with approval three appellate decisions holding “that revival of the corporate powers before trial was sufficient to permit the corporation to maintain the action.” *Ibid.*

Further, *Traub* said:

Since the suspended status of corporate powers at the time of filing of action by a corporation does not affect the jurisdiction of the court to proceed, it follow that such a suspension after the filing of action (or, as here, after the filing of a cross-complaint) but before rendition of judgment likewise does not deprive the court of jurisdiction or render the judgment void and subject to collateral attack after it has become final.

Id. at p. 371.

Finally, *Traub* is significant for expressly excepting from “retroactive revival” *only* the statute of limitations as applied to a complaint filed by a suspended corporation that was revived after the statute of limitations expired. Specifically, *Traub* “distinguished” *Cleveland v. Gore Bros., Inc.* (1936) 14 Cal.App.2d 681, as “present[ing] a statute of limitations problem.” *Traub, supra*, 66 Cal.2d at 371-372.

2. *Peacock Hill Assn.* validated a notice of appeal.

In *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, the defendant’s “powers had been suspended prior to trial and remained in that status until after judgment and the filing of the notice of appeal.” *Id.* at 374.

Yet this Court allowed the defendant corporation, after reviving its status, to proceed with the appeal.

First, this Court recognized that a long line of authority, starting with a decision by this Court, allowed the revival of corporate powers to “validate otherwise invalid prior action,” stating:

In a number of situations the revival of corporate powers by the payment of delinquent taxes has been held to validate otherwise invalid prior action. (*Traub Co. v. Coffee Break Service, Inc.*, 66 Cal.2d 368, 379; *Diverco Constructors, Inc. v. Wilstein* [1970] 4 Cal.App.3d 6, 12;

A.E. Cook Co. v. K S Racing Enterprises, Inc. [1969] 274 Cal.App.2d 499, 500; *Duncan v. Sunset Agricultural Minerals* [1969] 273 Cal.App.2d 489, 493.

Peacock Hill Assn., supra, 8 Cal.3d at 371.

The gist of these appellate decisions is that a corporation's reinstatement before termination of the proceeding in question validates the corporation's prior acts in the proceeding. For example, in *Duncan*, a case had to be determined on its merits because the suspended corporation had filed its certificate of revivor before the entry of judgment. Similarly, in *Diverco Constructors*, a corporation was entitled to proceed to trial where its reinstatement occurred before the case was dismissed. *Peacock Hill Assn., supra*, 8 Cal.3d at 373.

This Court summarized these appellate holdings and applied them to retroactively revive the corporation's notice of appeal:

The foregoing authorities make clear that as to matters occurring prior to judgment the revival of corporate powers has the effect of validating the earlier acts and permitting the corporation to proceed with the action. We are satisfied that the same rule should ordinarily apply with respect to matters occurring subsequent to judgment.

Id. at p. 374.

Accordingly, this Court ruled: "In the instant case, the corporate powers of Construction have been revived by the payment of the taxes, and it may proceed with its appeal." *Id.* at p. 374.

This Court's rationale—limiting the effect of suspension to achieve the payment of the delinquent taxes—is still valid, and Petitioners has offered no reason for this Court now to question its own rationale. Specifically, in *Peacock Hill Assn.* this Court recognized that section 23301's statutory ban exists "to put pressure on the delinquent corporation to pay its taxes, and that the purpose is satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities.

. . . *There is little purpose in imposing additional penalties after the taxes have been paid.*” *Peacock Hill Assn., supra*, at p. 371 (emphasis added).

Accordingly, this Court held that the notice of appeal was validated by the corporation’s subsequent revival of its status

3. *Rooney* validated a notice of appeal.

In 1973 this Court applied *Peacock Hill Assn.* to a retroactively validate notice of appeal. *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351.

In *Rooney*, after a suspended corporation filed its notice of appeal, the corporation later revived its status and so was allowed by this Court to proceed with the appeal. This Court stated:

The revival of corporate powers validated the procedural steps taken on behalf of the corporation while it was under suspension and *permitted it to proceed with the appeal.*

Id. at 359 (emphasis added).

In sum, the rationale and holdings of this Court’s foregoing three cases support the appellate court’s denial of Petitioners’ motion to dismiss, and Petitioners have offered no reason to render this issue worthy of review (as shown below).

C. Petitioners’ reliance on statute of limitations cases does not create an issue worthy of review.

Petitioners cite several cases that involve the statute of limitations, acknowledging the vital distinction that “substantive defenses that accrued during the period of suspension cannot be defeated by corporation revival.” Petition at pp. 9-10. Petitioners assert (without citing authority) that the rule that bars an untimely revival from validating a complaint filed by a suspended corporation should also apply to a notice of appeal: “The same rule should apply to the filing of an appeal while suspended.” Petition at p. 10.

But Petitioners offer no reason for abandoning this Court’s historic recognition that statutes of limitations is a “substantive” defense, whereas the right to appeal is “procedural.”

If this Court had thought that the issue was worthy of review, this Court would have reviewed *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, which squarely questioned the distinction between the procedural steps validated in *Rooney* (i.e., notice of appeal), and not validating a suspended corporation’s complaint where the revival occurred after expiration of the statute of limitations. *Id.* at p. 725, fn 2. There the Court of Appeal pointedly raised the issue and invited this Court’s review, stating:

We question why the timely filing of a notice of appeal, which is jurisdictional and cannot be waived, is a procedural act unaffected by a corporation’s suspension, while the statute of limitations, which is not jurisdictional and can be waived, is a substantive defense fatal to a suspended corporation’s cause of action. However, we leave the resolution of this apparent inconsistency to the Supreme Court.

Id. at p.725.

When the Petition for Review presented this issue to this Court, this Court denied review. *Id.* at p. 727.

D. Petitioners offer no reason to reconsider the rationale that retroactively validates notices of appeal.

Petitioners have offered no substantial reason to question the rationale for retroactively validating a suspended corporation’s notice of appeal.

That rationale was well-summarized in *Cadle Co. v. World Wide Hospitality Furniture, Inc.*(2006) 144 Cal.App.4th 504.

In *Cadle*, the trial court entered judgment against the defendant corporation because it was suspended. Two days after trial, the corporation revived its status.

Accordingly, the Court of Appeal in *Cadle* reversed the judgment that was based on the suspension because the corporation had revived its corporate status after trial.

Cadle explained the many rationales that Petitioners have failed to put in doubt. Specifically, *Cadle* ruled:

1. The plea that a corporation is suspended is not favored: “A claim of lack of corporate capacity to prosecute or defend a civil action because of its suspended status “ ‘is a plea in abatement which is *not favored in law.*” (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 370.)” *Cadle, supra*, at 512 (emphasis added). There is a “*strong public policy disfavoring pleas in abatement.* Suspension of a corporation is intended to encourage them to pay taxes, not to provide a monetary windfall to private parties.” *Id.* at p. 513 (emphasis added).

2. The purpose of suspending a corporation is solely to obtain payment of taxes: “The primary purpose of statutes depriving suspended corporations of privileges enjoyed by a going concern, including the capacity to sue or defend litigation, is to *motivate delinquent corporations to pay back taxes* or file missing statements. (See *id.* at p. 370; *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371 (*Peacock Hill*); *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 561.)” *Cadle, supra*, at p. 512 (emphasis added).

3. Accordingly, no additional penalty other than suspension should be imposed against a suspended corporation: “The suspension statutes are *not intended to be punitive.* Once the statutory goals underlying suspension are met, *no purpose is served by imposing additional penalties.* (*Peacock Hill, supra*, 8 Cal.3d at p. 371; *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 244.)” *Cadle, supra*, at p. 512 (emphasis added).

4. Leniency is favored to allow the payment of taxes and thus secure revivor: “Leniency permits a delinquent corporation to secure a revivor, *even at the time of the hearing*, at the request of the corporation or on the trial court's own motion. (*A.E.*

Cook Co. v. K S Racing Enterprises, Inc. (1969) 274 Cal.App.2d 499, 500; *Peacock Hill, supra*, 8 Cal.3d at p. 372, fn. 2, citing *Schwartz v. Magyar House, Inc.* (1959) 168 Cal.App.2d 182, 335 P.2d 487.)” *Cadle, supra*, at p. 512 (emphasis added).

5. Revival validates all corporate acts “before or after judgment”: “[A]ll acts of a suspended corporation, taken before or after judgment, are validated by revival.” *Id.* at 513 (citing *Peacock Hill, supra*, 8 Cal.3d at pp. 373–374) (emphasis added). *Cadle, supra*, at p. 513.

CONCLUSION

Petitioners have failed to present any review-worthy reason for questioning the distinction between substance and procedure that has governed this Court’s rulings since 1967 and that compelled the court below to retroactively validate appellants’ notice of appeal and therefore to deny Petitioners’ motion to dismiss.

Hence, this Court should deny review.

Dated: February 23, 2012.

Respectfully submitted,

BOURHIS & MANN

SMITH & MCGINTY

By: _____ /s

Daniel U. Smith

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, excluding tables, consists of 2,658 words.

By: _____ /s

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PROOF OF SERVICE BY MAIL

(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is 220 16th Avenue, San Francisco, CA 94118. On this date I served the interested parties in this action the within document: **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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Executed at San Francisco, California on February 23, 2012.

_____/s
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