Civil No. S172684

In the Supreme Court
of the
State of California

DANA BRUNS,
Plaintiff and Appellant

vs.

E-COMMERCE EXCHANGE, INC., et al.,
Defendants and Respondents

REPLY IN SUPPORT OF PETITION FOR REVIEW

From an Order of the Court of Appeal,
Second Appellate District, Division Five, Case No. B201952

Reversing the Judgment of the
Los Angeles County Superior Court
Case No. JCCP 4350
Honorable Carolyn B. Kuhl

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Unfair Competition Case: Service on the Attorney General and the Orange County District Attorney required by Business & Professions Code section 17209

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

I. INTRODUCTION

Review by this Court is appropriate and needed because the Court of Appeal's decision threatens to severely hamper the speedy and efficient resolution of complex and coordinated cases.

With its decision, the Court of Appeal created an entirely new principle of law that has never before been recognized or applied in California jurisprudence: the principle that a partial stay of discovery tolls the five years to bring a case to trial. Every California case that has found tolling during a stay has only done so when there was a complete stay of all trial court activity. No California case has found tolling during periods of partial stays.

The Court of Appeal's decision will affect every complex or coordinated case in the California court system, and every case in which a trial judge exerts meaningful control over case management. The existence of the rule created by the Court of Appeal places a game-changing restriction on trial judges' ability to effectively manage such cases, which will have a detrimental effect on the California judicial system. Through its decision, the Court of Appeal not only insulates plaintiffs from any risk of mandatory dismissal if a trial court exercises its management functions in the way suggested by the Judicial Council's Deskbook, but also bars trial

courts in such managed cases from exercising the statutory remedy of discretionary dismissals when appropriate based on plaintiffs' delay in prosecution.

Moreover, plaintiff's argument on the merits is unpersuasive. Active management of cases should not constitute a stay of "prosecution" that tolls the running of the five-year statute. Such a result forces the five-year statute and case management rules to be at odds with one another, when the law and policy dictate that they should be read in harmony. In addition, a careful reading of precedent demonstrates that only a complete stay is a stay of "prosecution" under the statute.

Plaintiff's efforts to downplay the impact of the Court of Appeal's decision are belied by her admission that: "The importance of active case management in complex and coordinated lawsuits is beyond serious dispute." (Answer, p. 9.) This important tool is seriously threatened by the novel decision reached by the Court of Appeal, and Supreme Court review is appropriate for that reason.

II. THE ISSUE OF WHETHER PARTIAL STAYS TOLL THE FIVE YEARS TO BRING A CASE TO TRIAL PRESENTS AN IMPORTANT QUESTION OF LAW AND IS APPROPRIATE FOR SUPREME COURT REVIEW

A. The Court of Appeal Created a New Principle of Law

Plaintiff would have this Court believe that the Court of Appeal decision did not alter the status of California jurisprudence on this issue.

This is patently false. The Court of Appeal held that all stays – no matter how limited – toll the running of the five-years to bring a case to trial. Prior to the Court of Appeal decision, no California court had held that partial stays are stays of prosecution. As set forth in the Petition for Review, every case that has applied tolling has done so only when there was a complete stay of "prosecution" for the purpose of section 583.340(b). With its decision, the Court of Appeal has charted an entirely new course at odds with decades of California jurisprudence, and this Court should grant review to address whether this significant modification in California law is appropriate and justified.

The significance of this decision is such that it already has led to a change to a leading practice treatise in California – The California Practice Guide: Civil Procedure Before Trial, by Weil and Brown ("Weil & Brown") – illustrating the impact that the Court of Appeal's case has had and will have on California procedure. Where Weil & Brown has previously "reserved" a section after discussing the statutory language of section 583.340, it already has added the following:

> [11:204] **Application—prosecution of action stayed:** A "stay" of proceedings within the meaning of CCP § 583.340 includes a *partial* stay (e.g., discovery stays). Thus, the 5–year period is extended even though other proceedings in the case continued while the partial stay was in effect. [See *Bruns v. E–Commerce Exch., Inc.*, supra, 172 CA4th at , 90 CR3d at 900–901]

This addition exemplifies the change in California law that was made through the Court of Appeal's decision. Moreover, the language in Weil & Brown suggests the counterintuitive nature of the Court of Appeal's decision, by stating the partial stays toll the five year statute "*even though* other proceedings in the case continued while the partial stay was in effect." (Emphasis added.)

The Court of Appeal case represents a significant departure from prior California jurisprudence, and for that reason alone this Court's review is appropriate.

B. This Case Is Not An Anomaly, as These Issues Will Recur, and Will Have a Severely Detrimental Impact on the Way Courts Manage Their Cases

It is misleading for plaintiff to characterize the issues in this case as "unique." Several California counties have developed complex departments, and special rules and procedures have been created to address the many hundreds of complex and coordinated cases that are filed in California courts every year. Most of these complex or coordinated cases will be affected by the Court of Appeal's decision. Every trial judge overseeing a complex or coordinated case will have to make the choice between actively managing their cases through stays, which foregoes the pressure to keep cases moving forward that the five-year statute provides, or keeping the five-year statute intact, which foregoes one of the best tools for actively managing cases (stays).

Counsel for the petitioners have been and are involved in many complex and/or coordinated cases (including in the complex departments of Los Angeles, San Francisco, and Santa Clara counties). In each of those cases, the trial judge has entered partial stays, phased discovery, and otherwise actively managed the cases in an effort to prevent a litigation free-for-all. If the courts had been forced to forgo these meaningful tools in order to preserve the five-year statute, it would have been to the severe detriment of these cases.

The Judicial Council of California's guidelines for judges overseeing complex litigation notes that "[a]ctive judicial involvement in discovery is particularly important in complex litigation," and endorses the use of stays and staging of discovery (which necessarily, but sometimes implicitly, involves staying some discovery):

> The better course is to impose a brief stay with the notice of the initial case management conference and until further order of the Court. The discovery schedule, decisions on the staging of discovery, and other discovery issues should then be included in the case management order that is served at the close of the case management conference. . . . All of this can be on various tracks according to the overall need for the staging of discovery. For example, in some cases where it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery should be staged so that these issues can be determined before other discovery proceeds.

(*See* §8B.4 of the 2008 Update to the Judicial Council of California's "California Judges Benchbook: Civil Proceedings," citing the Deskbook on

the Management of Complex Civil Litigation, prepared in 1999 by the Judicial Council's Complex Civil Litigation Task Force.)

This resource notes concern that "discovery can become unfocused and out of control" and "discovery abuse can be a major problem in complex cases." (*Id.*) Through the above tools (e.g., stays and staging of discovery) "discovery can proceed quickly but not haphazardly." (*Id.*)

Entering partials stays and managing discovery are regularly used tools, and are indeed endorsed by the Judicial Council and the California Court Rules, as discussed in the Petition for Review. The Court of Appeal's decision has widespread repercussions because it will affect the way in which trial judges in complex and coordinated cases manage their cases. Trial judges can no longer actively manage their cases without in effect giving up the important public policy served by the five-year statute. This is not a choice a trial judge should have to make.

While plaintiff claims this dilemma is fictitious, it has become manifest in actual practice. On the one hand, counsel for petitioners have learned that at least one trial judge in a California complex department is foregoing the important tool of partial stays in order to keep the five-year rule intact. On the other hand, counsel for petitioners has seen other judges in complex matters continue the partial stay orders they have always used to manage cases – effectively negating the five-year rule for all cases in their departments. Neither result serves the parties, the trial judges, or the

California judicial system, and this dilemma is not what was intended by either the five-year rule or rules regarding management of complex and coordinated cases.

C. The Court of Appeal's Decision Has Important Implications for Other Statutes

In addition to the mandatory dismissal rules governed by section 583.310 *et seq.*, a trial judge also has the discretion to dismiss a lawsuit for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant. (*See* Code Civ. Pro. §§ 583.410, 583.420(a)(2)(B); Cal. Rules of Court 3.1340.) The calculation of the two years is subject to the same tolling available under section 583.340. (Code Civ. Pro. § 583.420(b).)

The Court of Appeal decision therefore also seems to apply to the discretionary dismissal statute, and likewise will severely hamper a trial court's ability to exercise its discretion in dismissing a case for a plaintiff's delay in prosecution. If the Court of Appeal decision stands, it seems to result in the automatic exclusion of any period where any limited stay was in effect, no matter how egregious plaintiff's delay. This result completely distorts the discretionary nature of this statute, and seems to strip away a trial court's ability in a managed action to decide, in the exercise of its discretion, that a plaintiff has failed to diligently prosecute her case.

Other statutes have similar tolling provisions. (*See, e.g.*, Code Civ. Pro. § 583.240.) The use of discovery stays to manage litigation should not automatically give plaintiffs a free pass under these statutes.

III. PLAINTIFF IS INCORRECT ON THE MERITS

A. Active Case Management Should Not Toll the Five Years to Bring a Case to Trial

As Justice Turner noted in his well-reasoned and lengthy dissent, "Judge Kuhl did not stay or enjoin the action; she managed it." (Dissent, p. 9.) Such management, pursuant to "well established case management practices," should not constitute a stay that tolls the five-year statute. (*Id.* p. 1.)

The five-year rule and the rules and guidelines providing for active case management in cases, especially in complex and/or coordinated cases, are not mutually exclusive. For example: "[W]e conclude the Judicial Council rules governing the coordination of civil actions do not conflict with the statutory five-year rule for bringing civil actions to trial; hence, the statutory rule applies to each of the coordinated actions." (*Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, 1010.) By arguing that application of the coordination and complex rules and guidelines through entering partial stays tolls the five-year statute, the Court of Appeal's decision and plaintiff's argument necessarily makes the five-year statute

inapplicable to coordinated and complex cases – in direct contravention with *Bank of America*'s holding.

These principles – active case management and the resolution of cases within five-years – should work in harmony with one another, and such a result is a logical one. Each seeks to ensure the efficient and cost-effective resolution of cases. Each seeks to ensure that litigants are given the incentive and means to meaningfully advance the case. It is completely incongruous for the Court of Appeal to hold, and plaintiff to argue, that a trial court's exercise of its management duties by permitting appropriate discovery while staying other discovery is to the detriment of the public policy sought to be enforced through the five-year rule.

Plaintiff, moreover, has mischaracterized the arguments set forth in the Petition for Review. The petition advocates a bright-line rule that only complete stays should toll the five-year statute. Such a rule is the best way to serve the policies of both the five-year statute and active management of cases.

Plaintiff suggests that petitioners' argument is at odds with *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, which states that section 583.340 is "unconditional." Petitioners do not disagree with this premise to the extent it is applied in the same situation as existed in the *Ocean Services* case – i.e., in cases involving *complete* stays of trial court activity. *Ocean Services* involved a complete stay of the trial court

action pending an appeal from a preliminary injunction in a related matter. *Ocean Services*' proclamation that the statute is "unconditional" was therefore made in the context of a complete stay, where a bright-line rule makes sense. It is the Court of Appeal decision in *Bruns* that departs from *Ocean Services*.

The petition only argues, *in the alternative,* that if a bright line rule limiting 583.340(b) to complete stays is not created, and if partial stays can trigger tolling under that provision, a superior approach to the new rule of law created by the Court of Appeal would be to find that such a determination should be reviewed for an abuse of the trial court's discretion. It defeats the purpose of the five-year rule to hold that any time a partial stay is entered – no matter how limited – the five-year statute is tolled. (*See* Code Civ. Pro. §583.360(b) (stating that the five-year period is "mandatory" and is "not subject to extension, excuse, or exception *except as expressly provided by statute.*" (emphasis added).) The Court of Appeal's new rule of law leads to preposterous results. For instance, a trial court could stay the production of a single document pending the outcome of a motion for a protective order, and such a procedure would then toll the running of the five-year statute. If such a situation does not automatically fall outside the reach of section 583.340(b) (because it is not a complete stay), petitioners alternatively argue that the trial court should at least have

the discretion to determine whether that single, limited stay prevented meaningful advancement of the case.

Entering partial stays is a regularly used device of case management in cases, especially complex and/or coordinated cases, and should not toll (or at least not automatically toll) the five-year statute.

B. Only a Complete Stay is a Stay of "Prosecution" Under California Law and Precedent

Plaintiff's argument regarding why a stay of "prosecution" includes partial stays is based on red herrings and a mischaracterization of California case law.

Plaintiff challenges petitioners' reliance on *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204 in the Petition for Review because the Law Revision Commission comment to section 583.340(b) stated "see, e.g." prior to citing *Marcus*. The "see, e.g." does not change the fact that *Marcus* was the only named case codified by section 583.340(b), and that *Marcus* involved a complete stay of trial court activity. More importantly, plaintiff did not cite to any cases involving a partial stay of activity that the legislature could have relied on in enacting section 583.340(b) – because she cannot: there are no such prior cases in California jurisprudence.

Plaintiff's reference to *Bank of America*, *supra*, 200 Cal.App.3d 1000 (decided after enactment of section 583.340(b)) is misleading, as that case does not support plaintiff's argument. The language that plaintiff cites

is in a section regarding whether it was "impossible, impracticable, or futile" for plaintiff to bring its case to trial during the relevant time period under section 583.340(c) – not whether there was a stay of "prosecution" under section 583.340(b). (*Id.* at 1013.) No party in *Bank of America* was claiming that any partial stay tolled the running of the five years to bring a case to trial.

In dicta, *Bank of America* stated that a stay of depositions in a parallel case "can be interpreted as requiring a stay of proceedings." That statement, though, focused on "*proceedings*," not "*prosecution*," and is insufficient to fulfill the requirements of section 583.340(b). (*Cf.* Code Civ. Pro. § 583.240(b), which - unlike section 583.340(b) tolling for the stay of "prosecution" - provides for tolling when there is a stay of "prosecution" *or* "proceedings", suggesting that the terms have distinct meanings: the deadline for serving parties is tolled when "prosecution of the action or proceedings in the action was stayed and the stay affected service.")

Moreover, even if proceedings and prosecution could be deemed synonymous terms, the court in *Bank of America* stated only that a stay of depositions "can be interpreted" as requiring a stay of proceedings – not that it necessarily would be. Thus, the *Bank of America* court recognized that discretion would have to be exercised to determine whether a partial stay (of depositions) could be considered a stay of proceedings.

Finally, and importantly, *Bank of America* only found tolling during a *complete* stay of trial court activity, not any partial stay.

Plaintiff tries to ground the Court of Appeal's unprecedented decision in the dicta of *Melancon v. Superior Court* (1954) 42 Cal.2d 698 and *Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, two cases that are 50 years old and 80 years old, respectively, and neither one of which involved an analysis of section 583. *Melancon* involved the application of section 834 of the Corporations Code (regarding posting security) and *Wong* involved the issue of what constitutes malicious prosecution for purposes of venue selection. The quotations from these cases are taken out of context, and the cases do not stand for the proposition asserted; in fact, they support petitioners' position on the correct construction of this provision.

In *Melancon*, the trial court ordered plaintiff to furnish security under former section 834 of the Corporations Code (current section 800). (42 Cal.2d at 701.) The trial court also entered a stay of all activity at the trial court level until 30 days after plaintiff served notice of his compliance with the order for security pursuant to former Corporations Code section 834(c) (current section 800(f)), which provided: "If any such motion [for security] is filed, no pleadings need be filed by the corporation or any other defendant, and the prosecution of such action shall be stayed, until 10 days after such motion shall have been disposed of." (*Id.* at 702.) This Court

described the trial court's order as a stay of "further prosecution of the action until the security was furnished." (*Id.* at 703.)

Plaintiff sought to take depositions before posting security. (*Id.* at 707.) This Court held that plaintiff could not do so because the taking of depositions "would constitute a step in the 'prosecution' of the action and therefore falls within the stay provisions of section 834." (*Id.*)

In *Wong*, the plaintiff filed a malicious prosecution action in San Joaquin County based on an arrest warrant issued in Sacramento and an arrest in San Joaquin County. (*Wong*, 199 Cal.15 at 16.) The court held that venue in San Joaquin County was proper because "prosecution" (as in "malicious prosecution") "is sufficiently comprehensive to include every step in an action from its commencement to its final determination." (*Id.* at 18.) Therefore, because part of the actions that gave rise to a malicious prosecution claim had occurred in San Joaquin County, venue in San Joaquin County was proper. (*Id.* at 18-19.)

Melancon and *Wong* therefore both discussed the outer reaches of what activities are encompassed within the concept of "prosecution," whereas here we are concerned with what the minimum requirement is to constitute a stay of "prosecution." In other words, in these cases, this Court did *not* hold, as plaintiff contends, that a single activity in a case (e.g., discovery) is equal to "prosecution;" rather, it held that a single activity in a case (e.g., discovery) is but one element, or "step," in "prosecution." (*See*

also Barber v. Lewis & Kaufman, Inc. (1954) 125 Cal.App.2d 95, 98 ("The question herein involved is whether the taking of a deposition is part of the prosecution of the action. In our opinion it is. The courts have held that the taking of a deposition is one of the proceedings of an action.").)

This Court's rationale in *Melancon* and *Wong* in fact supports petitioners' argument. Both of these cases stated that "the term 'prosecution' is sufficiently comprehensive to include *every step in an action* from its commencement to its final determination." (*Melancon*, 42 Cal.2d at 707-708 (emphasis added); *Wong*, 199 Cal.15 at 18 (emphasis added).) Inserting this language into section 583.340(b) demonstrates that the Court of Appeal's and plaintiff's position is untenable:

> In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed: . . . (b) [every step in an action] . . . was stayed or enjoined.

A stay of "prosecution" as used in section 583.340(b) means a complete stay of activity, and the Court of Appeal's holding to the contrary creates erroneous precedent. This Court should grant review to correct the Court of Appeal's decision.

IV. THE COURT OF APPEAL'S INCORRECT APPLICATION OF THE STANDARD OF REVIEW IS ALSO APPROPRIATE FOR SUPREME COURT REVIEW

Plaintiff correctly explains that under an abuse of discretion standard the Court of Appeal should have determined "whether, given the

established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." (Answer, p. 15, quoting *Department of Parks & Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 831.) The problem here is that the Court of Appeal looked at the established evidence and made its *own* determination regarding whether it had been "impossible, impracticable, or futile" for plaintiff to bring her case to trial – the court did not determine whether Judge Kuhl's determination fell "within the permissible range of options set by the legal criteria."

In *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, this Court was determining whether "a prosecutor's consulting with the makers of a major motion picture that is based on a criminal defendant's story create[s] a conflict sufficient to require recusal of the prosecutor when the defendant is finally brought to trial." (*Id.* at 724.) This Court held that the *Hollywood* Court of Appeal had incorrectly applied a de novo standard of review to the issue, instead of "grant[ing] appropriate deference to the trial court's ruling . . . based on the presence in the record of evidence sufficient to support the trial court's conclusion that no disqualifying conflict existed and no unlikelihood of a fair trial had been proven." (*Id.* at 725.) This Court found improper that appellate court's independent review of the record, and in this Court's review, it focused on the findings and reasoning of the trial

court in determining there had been no abuse of discretion. (*Id.*) The analysis required by this Court in *Hollywood* clearly did not occur here.

The Court of Appeal here examined the evidence and then held that "plaintiff met her burden" of proving that it had been "impossible, impracticable, or futile" for plaintiff to bring her case to trial. Nowhere in this entire analysis does the Court of Appeal use the word "discretion," consider the trial court's stated reasons for her decision, or analyze whether the trial court abused its discretion. As discussed in the Petition for Review, had the Court of Appeal correctly reviewed the trial court's decision for an abuse of discretion, it would have found that discretion was properly exercised.

The Court of Appeal decision creates confusion in the law and therefore creates bad precedent that should be corrected by this Court, just as it sought to clarify the law in the *Hollywood* decision. This issue is not an "anomaly," as future courts will be analyzing these tolling provisions in the context of section 583.340, and should have a uniform rule of law and an outline of the analysis to follow.

V. CONCLUSION

The Court of Appeal made new California law with its holding, departing significantly from the long line of California jurisprudence on the issue. The decision, moreover, has a severely detrimental impact on trial judges' ability to effectively manage their cases. Active management of

cases should not constitute a stay of prosecution that tolls the running of the five-year statute, forcing trial judges to make an untenable choice between public policies. Only a complete stay of prosecution should automatically toll the five-year statute, and no published decision – except the Court of Appeal's – has held otherwise. This issue is appropriate for the Supreme Court's review, and should be granted to review the questionable precedent created by the Court of Appeal's decision.

Dated: June 1, 2009

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this brief contains approximately 4,154 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, attachments or this certification page.

Dated: June 1, 2009

Max H. Stern

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PROOF OF SERVICE

Bruns v. E-Commerce Exchange, Inc., et al.
Court of Appeal No. B201952

I am a citizen of the United States, over the age of 18 years, and not a party to interested in the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear Tower, Suite 2000, San Francisco, California 94105. I am readily familiar with this firm's practices for collecting and processing correspondence for mailing with the United States Postal Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the following documents:

REPLY IN SUPPORT OF PETITION FOR REVIEW

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

Dated: June 1, 2009

Blanca A. Herrera

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Court of Appeal: B201952

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