

The California Supreme Court (and Court of Appeals) - September 6 - 9, 2022

by Faisal Zubairi, Jill Gutierrez, and Jessica M. Leano

The California Court of Appeal, Fourth District, Division 3, issued the following decision on September 7:

Garg v. Garg, Case No. G061500: This decision serves, perhaps, as both a warning and a consolation to attorneys in the age of e-filings: the Court of Appeal granted respondent's motion to dismiss an appeal, which appellants' counsel erroneously believed had been effectively e-filed in time.

Appellants' trial counsel, who did not regularly handle appeals, timely uploaded a notice of appeal with the firm's e-filing vendor, and believed the e-filing had been completed. Nearly a month later, counsel noticed the notice of appeal was still not showing on the docket. Counsel checked with the e-filing vendor, who had no record of the document being filed. Appellants then filed the notice of appeal, 15 days late. Appellants also filed a motion in the trial court, requesting an order filing the notice of appeal "nunc pro tunc." Respondents moved to dismiss the appeal as untimely.

The Court of Appeal identified two rules of court that might possibly shelter tardy notices of appeal. First, rule 2.259(c) provides that "[i]f a technical problem with a court's electronic filing system prevents the court from accepting an electronic filing ... the court must deem the document as filed on that day." Second, rule 8.77(d) provides that if "good cause" is shown based on "a failure at any point in the electronic transmission and receipt of a document ... the court may enter an order permitting the document to be filed nunc pro tunc."

The court found that both rules potentially applied to tardy notices of appeal. Although the notice of appeal deadlines have been deemed "mandatory and jurisdictional" on "innumerable" occasions, the court noted this is not always "absolute"—for example, in times of emergency, the Chair of the Judicial Council is empowered to toll or extend the deadline to file notices of appeal, and when a court clerk wrongly rejects a timely notice

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of appeal, the absence of a file stamp does not deprive an appellate court of jurisdiction.

The court then examined rule 2.259(c), and concluded it might hypothetically apply to relieve appellants in some instances. Although this rule did not assist appellants, who did not allege a technical problem with the court's e-filing system, but rather, some error with the submission to the e-filing vendor, the Court of Appeal's ruling may well have ramifications in other cases.

The court also examined rule 8.77(d), and concluded that although it was "ambiguous" whether the rule was intended to apply to notices of appeal, "our view is that rule 8.77(d) should be applied to notices of appeal."

The court held that a motion for relief under rule 8.77(d) must be filed in the Court of Appeal—not the trial court. The court further ruled the appellant bears the burden of proving by a preponderance of the evidence that (1) the notice of appeal was not timely because "of a failure at any point in the electronic transmission and receipt" of the notice of appeal; and (2) that the party filed the notice of appeal "as soon thereafter as practicable."

Turning to the evidence before it, the Court of Appeal found that appellant's showing was subject to "many ambiguities and uncertainties." The declarations indicated the notice was "uploaded" with an e-filing vendor on the same day the notice of appeal was served. The declarations further represented that the vendor was instructed to file the notice of appeal. This was enough for appellant to survive the first step of this showing: "[a]bsent evidence disproving this theory, it is a reasonable inference from the record that a failure in the electronic transmission of the notice of appeal caused the lack of a timely notice of appeal." However, turning to the second step, the Court of Appeal found that the delay of nearly a month after the failed filing demonstrated a lack of diligence, precluding relief.

Read the full [opinion](#).