

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

STEPHEN McCARTY,

Plaintiff and Appellant,

v.

DEPARTMENT OF
TRANSPORTATION,

Defendant and Respondent.

E064182

(Super.Ct.No. CIVDS1500544)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Dismissed in part, reversed in part and remanded with directions.

Hollins Law, Andrew S. Hollins, Kathleen Mary Kushi Carter, and Christine R. Arnold for Plaintiff and Appellant.

Jones & Dyer, Gregory F. Dyer, Scott H. Cavanaugh, and Kristen K. Preston for Defendant and Appellant.

At issue in this appeal is \$233,391.60 in interest on a judgment.

In 2002, Stephen McCarty filed the underlying personal injury action against the California Department of Transportation (Caltrans). It resulted in two jury trials, three previous appeals (*McCarty v. State of California Department of Transportation* (Sept. 12, 2014, E055157, E056694) 2014 Cal.App. Unpub. LEXIS 6424 [nonpub. opn.]; *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955), and, finally, a judgment awarding McCarty \$6,674,627.98.

McCarty filed the present mandate proceeding to compel Caltrans to pay the judgment. While it was pending, Caltrans paid most, but not all, of the amount McCarty was seeking. Caltrans argued that, under a statute that came into effect after the judgment was entered but while both sides' appeals from the judgment were still pending, interest does not start to accrue on a judgment against the state until 180 days after the date of the final judgment. The trial court agreed that this statute applied; hence, it denied McCarty any interest for these 180 days.

McCarty appeals. We will hold that the newly enacted statute *could* apply, even though it became effective after the judgment was entered; however, because it did not become effective until after the 180 days had already run, it did not bar McCarty from recovering interest for that period.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Personal Injury Action.*¹

On May 10, 2011, a jury returned a verdict in favor of McCarty and against Caltrans.

On October 3, 2011, the trial court entered judgment on the jury's verdict, awarding McCarty \$6,674,627.98. The judgment also awarded McCarty interest at seven percent per year, starting on May 10, 2011.

On or about December 5, 2011, the trial court granted Caltrans's motion for judgment notwithstanding the verdict (JNOV). Accordingly, on December 12, 2011, the trial court vacated the previous judgment and entered a new judgment against McCarty and in favor of Caltrans.

B. *The Enactment of Government Code Section 965.5, Subdivision (c) While the Appeal Was Pending.*

Both sides appealed.

On June 15, 2012, the Legislature amended Government Code section 965.5 by adding subdivision (c) (section 965.5(c)), which, as relevant here, provides: "Interest on

¹ Both sides have included documents from the underlying personal injury action in their appellate appendices. This is improper, because that action was separate from the present mandate proceeding. (See Cal. Rules of Court, rules 8.122(b)(3)(A), 8.124(b)(1)(B).) However, some of these documents were presented to the trial court in this proceeding as exhibits, and we can consider them as such.

the amount of a judgment . . . for the payment of money against the state shall commence to accrue 180 days from the date of the final judgment or settlement.” (Stats. 2012, ch. 19, § 3, p. 78.) The amendment went into effect immediately as an urgency measure. (*Id.*, § 4, p. 78.)

On September 12, 2014, we filed our opinion in the appeal. In it, we reversed the order granting the motion for JNOV and the resulting December 12, 2011 judgment. We affirmed and reinstated the October 3, 2011 judgment on the jury’s verdict.

Caltrans filed a petition for review, but it was denied. Thus, on December 24, 2014, we issued our remittitur.

C. *The Present Mandate Proceeding.*

On January 29, 2015, McCarty filed a petition for writ of mandate.

On February 3, 2015, Caltrans’s primary insurance carrier paid McCarty \$2,629,417.74. On February 6, 2015, Caltrans’s excess insurance carrier paid McCarty \$5,674,627.98.

McCarty claimed that he was still owed \$240,736.83. On March 6, 2015, he filed a motion for an order requiring Caltrans to pay this amount.

In its opposition, Caltrans argued that \$233,391.60 of this amount represented interest on the judgment for the first 180 days after it was entered, and that under section 965.5(c), McCarty was not entitled to recover such interest. Caltrans also argued that the remaining \$7,345.23 represented interest that accrued after it had already tendered the full amount of the judgment.

In his reply, McCarty argued that: (1) even if the provision of the judgment that interest start on May 10, 2011 was erroneous, it was not subject to collateral attack in this proceeding; (2) Caltrans had forfeited any reliance on section 965.5(c) by failing to object to the provision of the judgment that interest start on May 10, 2011; and (3) as a matter of public policy, section 965.5(c) should not apply to a judgment that was covered by insurance. McCarty did *not* argue that section 965.5(c) did not apply because it did not become effective until after the judgment had already been entered.

On April 30, 2015, after hearing argument, the trial court issued a minute order granting McCarty's motion in part and denying it in part. It declined to award interest on the judgment for the first 180 days after the judgment was entered; however, it did order Caltrans to pay the remaining \$7,345.23.

In its minute order, the trial court pointed out that section 965.5(c) had been enacted after the judgment was entered — the first time any of the participants to the proceeding had mentioned this.²

On May 21, 2015, the trial court entered a formal written order to the same effect.

On June 2, 2015, the trial court issued judgment accordingly.

On June 23, 2015, McCarty filed a motion to vacate the judgment. In it, he argued for the first time that section 965.5(c) did not apply because it did not become effective until after the judgment had already been entered.

² While we applaud the trial court for the thoroughness of its research, we cannot help but be reminded of the adage that “No good deed goes unpunished.”

On July 29, 2015, the trial court denied the motion to vacate.

On August 3, 2015, McCarty filed a notice of appeal from:

1. The trial court's order of May 21, 2015;
2. The June 2, 2015 judgment on the writ; and
3. The July 29, 2015 order denying the motion to vacate.

II

APPEALABILITY AND PRESERVATION OF ISSUES

Caltrans contends that, to the extent that McCarty's contentions relate to the June 2, 2015 judgment in the writ proceeding, he failed to preserve them by raising them below, and to the extent that they relate to the July 29, 2015 order denying the motion to vacate, that order is not appealable.³

Caltrans has also filed a motion to dismiss on these same grounds. We reserved ruling on the motion for consideration with the appeal.

A. *Appeal from the Judgment in the Writ Proceeding.*

Caltrans's attack on the appeal from the judgment does not really go to appealability. It is undisputed that the judgment is appealable. It is also undisputed that McCarty's appeal from the judgment was timely. Rather, this contention goes more to

³ As mentioned, McCarty also appealed from the trial court's order of May 21, 2015 denying his motion to compel payment. That order was not separately appealable; we can review it, if at all, only in McCarty's appeal from the June 2, 2015 judgment. (See Code Civ. Proc., §§ 904.1, 906.)

waiver or forfeiture. Thus, even if Caltrans's contention is well-taken, it would not call for us to dismiss the appeal; it would call for us to affirm the judgment.

McCarty raises two challenges to the judgment in the writ proceeding. First, he argues that the trial court erred by applying section 965.5(c) retroactively. However, he did not raise this argument below at any time before entry of the judgment.

“Appellate courts generally will not consider matters presented for the first time on appeal. [Citations.]” (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143.) “ . . . [I]t is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.’ [Citation.]” (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) While McCarty did raise this argument in his motion to vacate, and thus arguably preserved it for purposes of an appeal *from the order denying the motion to vacate*, that was too late to preserve it for purposes of an appeal *from the judgment*.

“However, an exception to the general rule is recognized where the question presented is one of law. [Citations.] A legal argument may be raised for the first time . . . on appeal “so long as the new theory presents a question of law to be applied to undisputed facts in the record.” [Citation.]” (*Cal Sierra Const., Inc. v. Comerica Bank* (2012) 206 Cal.App.4th 841, 850-851.) McCarty's non-retroactivity contention presents precisely such a question here. Hence, we can consider it.

Second, McCarty also argues that the trial court erred because the judgment on the jury's verdict was not subject to collateral attack. He did raise this argument below. Accordingly, we can consider it on appeal.

In sum, then, to the extent that the appeal is taken from the judgment in the writ proceeding, we conclude that it need not be dismissed and that we can reach McCarty's contentions.

B. *Appeal from the Order Denying the Motion to Vacate.*

Code of Civil Procedure section 904.1, subdivision (b) provides that an order made after an appealable judgment is itself appealable. But “[d]espite the inclusive language of Code of Civil Procedure section 904.1, subdivision (b), not every postjudgment order that follows a final appealable judgment is appealable.” (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.) For one thing, “the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. [Citation.] ‘The reason for this general rule is that to allow the appeal from [an order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment.’ [Citation.]” (*Ibid.*)

It follows that, “[a]s a general rule, orders denying a motion to vacate [a judgment] are not appealable, because any assertions of error can be reviewed on appeal from the judgment itself. To hold otherwise would effectively authorize two appeals from the

same decision. [Citations.]” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 2.169, p. 2117, italics omitted.) McCarty does not claim that there is any applicable exception to this general rule; there is not.

Accordingly, to the extent that the appeal is taken from the order denying the motion to vacate, it must be dismissed.

III

THE APPLICATION OF GOVERNMENT CODE

SECTION 965.5, SUBDIVISION (C) IN THIS CASE

McCarty contends that the trial court erred because it applied section 965.5(c) retroactively.

“[S]tatutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. [Citations.] In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of ““express language of retroactivity or . . . other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application.”” [Citations.]” (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955.)

Section 965.5(c) is not expressly retroactive. Somewhat to the contrary, it provides that “[i]nterest on the amount of a judgment or settlement for the payment of moneys against the state *shall* commence to accrue 180 days from the date of the final judgment or settlement.” (Italics added.) The parties have not called our attention to any

relevant legislative history material,⁴ nor have we found any in our research on the Legislative Counsel’s website. Hence, we conclude that this subdivision operates prospectively only. Indeed, Caltrans does not really argue otherwise.

Caltrans does argue, however, that section 965.5(c) is a remedial statute, and hence it operates according to the following principles:

“[I]f a statute is remedial or procedural in nature, it may be applied in litigation pending when it came into effect, even if the events underlying the cause of action took place before it came into effect, so long as it does not create a new cause of action, deprive a defendant of a defense on the merits, or alter a party’s vested rights. [Citation.]

[¶] . . . [¶]

“ . . . The application of new procedural or remedial statutes to cases still pending on appeal when they become effective is *deemed not to be retroactive* — even though the cause of action arose earlier — because the change in the law affects only the conduct of the litigation and the provision of a remedy going forward, not the rights and duties of the parties in the past. [Citation.] New procedural or remedial laws are consistently applied

⁴ McCarty does point to the urgency provision in the bill adopting section 965.5(c), which provided: “This act . . . shall go into immediate effect.” (Stats. 2012, ch. 19, § 4, p. 78.) However, this sheds no light on whether the statute was intended to be retroactive. A statute necessarily goes into effect sometime on or after the date it is passed, even if it does have retroactive application. Indeed, it is the very definition of retroactivity that a law “attaches new legal consequences to, or increases a party’s liability for, an event, transaction, or conduct that was completed before the law’s effective date. [Citations.]” (*People v. Grant* (1999) 20 Cal.4th 150, 157, italics omitted.)

to cases not yet final when they become effective, unless the Legislature expresses an intent [not] to so apply them. [Citations.]” (*City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469, 1483-1484.)

In the *City of Clovis* case itself, the plaintiffs won a judgment specifically including postjudgment interest at seven percent per year. (*City of Clovis v. County of Fresno, supra*, 222 Cal.App.4th at p. 1474.) While the case was pending on appeal, however, the Legislature enacted an amendment reducing the applicable interest rate. (*Id.* at p. 1475.)

The appellate court held that the amendment could apply, even though the plaintiffs’ cause of action arose before its effective date: “[The amendment] is remedial or procedural within the meaning of the case law on this topic. Plainly, it does not create a new cause of action or eliminate a defense on the merits. It is also clear that it does not alter the [plaintiffs]’ vested rights, for it has been held that no one has a vested right in existing remedies. [Citations.]

“Consequently, the antiretroactivity rule does not apply. The application of new procedural or remedial statutes to cases still pending on appeal when they become effective is *deemed not to be retroactive* — even though the cause of action arose earlier — because the change in the law affects only the conduct of the litigation and the provision of a remedy going forward, not the rights and duties of the parties in the past. [Citation.]” (*City of Clovis v. County of Fresno, supra*, 222 Cal.App.4th at pp. 1483-1484.)

However, the court also held that the amendment applied only to interest that accrued on or after the date of the amendment: “[A]lthough a change in a statutory interest rate applies to a case pending on the effective date of the change, the new rate applies only to interest accruing on and after that date; the former rate applies to interest accruing before that date. [¶] “The liability of the state to pay interest is “purely statutory” [Citation.] ‘While an interest obligation based upon contract may resist change under constitutional guarantees, a statutory interest right for a particular period depends upon the law in effect at that time. This has been the settled law in this state for many years.’ [Citation.]” (*City of Clovis v. County of Fresno, supra*, 222 Cal.App.4th at pp. 1486-1487.)

City of Clovis points the way for us in this case. Indeed, we can discern no relevant distinction. Just as in *City of Clovis*, the amendment here is remedial or procedural because it does not create a new cause of action, eliminate a defense, or alter a vested right. McCarty asserts that he had a vested right to the first 180 days of interest; however, this cannot be squared with *City of Clovis*, which held that a plaintiff has no vested right in postjudgment interest. And because the amendment was procedural, it could properly apply in the underlying case, which was still pending on appeal.

However, also as in *City of Clovis*, the amendment applied only to the period on or after its effective date. A statutory interest right for a particular period depends upon the law in effect at that time, and section 965.5(c) was not in effect during the first 180 days after the judgment on the jury’s verdict. Once it did come into effect, it provided that

“[i]nterest on the amount of a judgment . . . for the payment of moneys against the state *shall* commence to accrue 180 days from the date of the final judgment or settlement.” (Italics added.) The use of the prospective “shall” indicates that the Legislature did not intend to override the rule that interest in the past is governed by the law in effect at that time.⁵

Caltrans argues that, because the trial court granted its motion for JNOV, “the judgment belonged to the State . . . no interest could accrue to Mr. McCarty because he had no judgment.” Thus, in Caltrans’s view, there was no judgment in favor of McCarty until December 24, 2014, when we issued our remittitur. By that time, of course, section 965.5(c) was already in effect.⁶

This overlooks the rule that when an appellate court reverses a JNOV and reinstates the original judgment, the reinstated judgment bears interest from the date it was entered. (*Espinoza v. Rossini* (1967) 257 Cal.App.2d 567, 572-573.) In such a case, “[w]hile the verdict of the jury and the ensuing judgment . . . temporarily lost [their] standing by reason of the erroneous granting by the court below of . . . a judgment notwithstanding the verdict, [an appellate] court thereafter held that such orders of the

⁵ The amendment at issue in *City of Clovis* similarly used “shall.” (*City of Clovis v. County of Fresno, supra*, 222 Cal.App.4th at p. 1475.)

⁶ It would seem that, even under Caltrans’s view, McCarty should at least be entitled to the interest that accrued from October 3, 2011, when the judgment on the jury’s verdict was entered, through December 5, 2011, when the trial court granted the motion for JNOV. Because we resolve the issue on broader grounds, however, we need not decide this point.

trial court were void. Thereby, it was held . . . that the original judgment based on the jury's verdict was sound. As a matter of law, the original judgment has existed from the date on which it was entered . . . , even though temporarily beclouded by the errors of the trial judge in granting . . . the motion[] after judgment. There is no reason to deprive the winning party of the interest to which he has been entitled from the date of original entry of the verdict.” (*Id.* at p. 573.)

In sum, then, we conclude that McCarty was entitled to interest for the first 180 days after the entry of the judgment on the jury's verdict. We will reverse and remand with directions to enter a new judgment consistent with this opinion.

IV

COLLATERAL ATTACK

McCarty also contends that, even assuming the judgment in the underlying action violates section 965.5(c), it is final and therefore not subject to collateral attack in this proceeding.

As we have already held, the judgment in the underlying action can be enforced without violating section 965.5(c). Accordingly, we need not decide this contention, and we do not.

V

DISPOSITION

In McCarty's appeal from the judgment, the order granting the motion to compel payment in part and denying it in part is reversed. The judgment is also reversed. On

remand, the trial court shall enter an order granting the motion to compel payment in full. It shall also enter an appropriate judgment, not inconsistent with this opinion, granting the writ petition. McCarty's appeal from the denial of his motion to vacate is dismissed. McCarty is awarded costs on appeal against Caltrans.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.