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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RHONDA NIELSEN,

Plaintiff and Appellant,

v.

WINTHROP CLARK et al.,

Defendants and Respondents.

G050580

(Super. Ct. No. 30-2008-00105231)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Reversed.

Law Offices of Anthony T. Ditty and Anthony T. Ditty for Plaintiff and Appellant.

Koenig Jacobsen, Randall F. Koenig, Wilfred A. Llauro, and Kim T. Dawley for Defendants and Respondents.

* * *

Plaintiff Rhonda Nielsen appeals from a judgment of dismissal entered because she failed to bring the case to trial within five years as required by Code of Civil Procedure section 583.340. This lawsuit arises out of the purchase of property in May 2005. Plaintiff alleges her real estate broker failed to inform her of an easement agreement between a neighbor and the former owners. The neighbor sued plaintiff when plaintiff refused to be bound by that agreement. Plaintiff successfully defended the neighbor's lawsuit. The present lawsuit, filed in April 2008, is essentially a suit to recover the litigation expenses incurred by plaintiff in defending against the neighbor's lawsuit. For reasons we explain in detail below, we conclude it was impracticable to proceed in the present lawsuit while the neighbor's lawsuit was pending, and thus the five-year statute was tolled during that period. In concluding otherwise, the court erred.

FACTS

Nielsen alleges that in May 2005, she purchased undeveloped real property in Trabuco Canyon (the Property). The sellers were Theodore Carlson and Michael Meacher (the Sellers). According to the operative complaint, defendants Winthrop Clark and Century 21 Beachside Realtors (Century 21) represented Nielsen in the purchase. Thomas and Renee Hafen (the Hafens) owned land adjoining the Property.

In June 2005, the Hafens sued Nielsen, the Sellers, and Clark to enforce an alleged "Exchange and Easement Agreement" between the Hafens and the Sellers (the Hafen Lawsuit). That agreement allegedly provided for an exchange of land, an easement to ensure that the views of the properties would be kept unobstructed, and required the Hafens to install a garden wall and specified vegetation for aesthetic purposes. The Hafens alleged Nielsen had notice of the agreement but repudiated it after the purchase and threatened to destroy the garden wall.

Approximately one year later, in May 2006, the defendants in the Hafen Lawsuit entered into a “standstill agreement,” memorialized in a letter signed by counsel for the parties, which provided, “The Defendants reserve any claims that they have against one another arising from or related to this Lawsuit and its subject matter. In connection with this reservation of claims that the Defendants have against one another, the Defendants also toll the applicable statutes of limitation with regard to such claims, pending the resolution of the Lawsuit by mediation, by arbitration, or by litigation in court.”

The present lawsuit was filed by Nielsen in April 2008, naming Clark and Century 21 as defendants. Nielsen alleged Clark was “a signatory to an easement agreement potentially affecting the use and enjoyment of the plaintiff’s land, yet that agreement was not disclosed to plaintiff while said defendant was acting in the capacity of a dual agent.” Nielsen claimed damages in the form of “[l]itigation expenses in having to defend an action brought by an adjoining land owner seeking to enforce the terms of” the alleged easements, “substantial loss of use of property, [and] development delay damages.”

Nielsen did not immediately serve the defendants, however, explaining to the court, “The parties to that sales transaction [had] agreed to a standstill on their claims — this action was filed when [Century 21] denied the validity of the standstill agreement.” Despite the lack of service, the court found “good cause not to dismiss the case.” Nielsen served Century 21 in April 2009.

The Hafen Lawsuit was tried in September 2009. Judgment was entered in Nielsen’s favor. The Hafens appealed in March 2010.

While the appeal was pending, in June 2010, Nielsen filed a third amended complaint in the present matter that named the Sellers and the Hafens as additional

defendants.¹ In October 2010, the Hafens moved to stay the present suit pending the outcome of the appeal in the Hafen Lawsuit. On October 29, 2010, the court granted the motion, stating, “The issues [in the two cases] are substantially the same and the outcome of the Plaintiffs’ appeal in *Hafen v. Nielsen, et al*, and a possible retrial in *Hafen v. Nielsen et al*, might result in conflicting judgments.” “The court in *Hafen v. Nielsen, et al*, Case No. 05CC07279, has exclusive concurrent jurisdiction and the proceedings [in the present case] should be restrained pending the outcome of Plaintiffs’ appeal in *Hafen v. Nielsen*.”

In June 2011, in an unpublished opinion (*Hafen v. Nielsen* (June 30, 2011, G043337)), this court affirmed the judgment in the Hafen Lawsuit. We found substantial evidence supported the court’s conclusion that Nielsen did not receive a copy of the Exchange and Easement Agreement prior to escrow closing and had no duty to investigate whether such an agreement existed.

On July 29, 2011, the trial court in the present case lifted the stay. In December 2011, having previously omitted service on Clark because of the standstill agreement, and with the Hafen Lawsuit concluded, Nielsen served Clark with the complaint in the present matter.

What followed were two demurrers and a motion for judgment on the pleadings. The result was the operative fifth amended complaint, which was finally answered and at issue on June 29, 2012.

In August 2012, the court referred the parties to the court’s mediation program. During the mediation, in November 2012, Nielsen reached a settlement with the Sellers, which required a good faith determination. Nielsen applied for a good faith determination in January 2013. The court granted the motion in February 2013. Around that same time, Nielsen, Clark, and Century 21 indicated they were still in the mediation

¹ The Second Amended Complaint is not in the record and thus we do not know whether these additional defendants were previously added to the lawsuit.

process. The court's minute order following a case management conference in March 2013, indicates, "Parties to return to JAMS for mediation." The parties did not settle, and on June 24, 2013, the court set a trial date of January 27, 2014.

On January 20, 2014, Clark and Century 21 moved to continue the trial date for three to four months based on Clark having to undergo imminent heart surgery. Clark is described in the motion as "a named defendant" and "a key witness to the defense." In support of the motion the defendants provided a letter from Clark's doctor, dated December 31, 2013, indicating that Clark's pacemaker was malfunctioning, that he would likely need surgery, that he would need as much as six months of recovery, and that the doctor recommended that "all court hearings . . . be extended at least 3 months preferably 4 months before Mr. Clark is required to answer documents from the opposing counsel or any court hearings, deadlines and whatever else is required before the healing time is complete." In a supplemental declaration, Clark's doctor opined, "It is my medical opinion that Mr. Clark should not travel to California prior to his surgery, given the fact that his [pacemaker] has malfunctioned and the stress of preparing and testifying at trial would be adverse to his current heart condition." The doctor again recommended three to four months of recovery before participating in a trial. Based on the doctor's recommendation, the court granted the trial continuance, setting trial for May 5, 2014.

At the hearing on the motion for the continuance, Nielsen's counsel brought up the five-year statute for what is apparently the first time in the entire litigation. Nielsen's counsel did not oppose a brief continuance but worried that with "a four-month continuance, we're going to hit into that five-year statute." The court suggested that the parties meet and confer on the issue and report back at a status conference on February 7, 2014.

At the subsequent status conference, for the first time defendants took the position that the five-year statute had elapsed on January 4, 2014. The court declined to

resolve the issue at the status conference and stated it would address the issue upon the filing of a proper motion.

On March 26, 2014, defendants filed a motion to dismiss. The court granted the motion. It concluded that, after adding the days during which the case was formally stayed, the five-year statute expired on January 2, 2014. The court rejected Nielsen's argument that defendants' January 20, 2014, request to continue the trial revived and extended the five-year statute. The court reasoned, "the facts of this action do *not* demonstrate an intent to 'revive' Plaintiff's right to trial" The court also rejected various time periods during which Nielsen claimed the statute was tolled due to impossibility, impracticability, or futility, such as Clark's inability to attend trial starting on December 31, 2013, and Nielsen's own counsel's illness at the end of 2012 (he had a stroke). The court reasoned that there was no causal connection between those events and Nielsen's failure to timely bring the matter to trial.

With regard to whether the ongoing Hafen Litigation rendered it impossible, impracticable, or futile to bring the matter to trial, the court concluded Nielsen was in "*complete* control of when this action was filed" in 2008 prior to the conclusion of the Hafen Litigation. Additionally, the court held that any delay occasioned by the Hafen Litigation did not cause Nielsen to miss the five year deadline, which was instead caused by Nielsen's counsel's failure to keep track of the expiration of the five year period. Nielsen timely appealed from the ensuing judgment of dismissal.

DISCUSSION

"An action shall be brought to trial within five years after the action is commenced against the defendant." (Code Civ. Proc., § 583.310.) "(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

¶ (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.” (Code Civ. Proc., § 583.360.)

The facial inflexibility of this rule is mitigated by certain tolling provisions: “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: ¶ (a) The jurisdiction of the court to try the action was suspended. ¶ (b) Prosecution or trial of the action was stayed or enjoined. ¶ (c) *Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.*” (Code Civ. Proc., § 583.340.)

The present appeal focuses on subdivision (c). The Law Revision Commission Comments on subdivision (c) counsel a liberal application: “The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. [Citations.] . . . [B]ringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.” (Cal. Law Revision Com. com., 15C West’s Ann. Code of Civ. Proc. (2011 ed.) foll. § 583.340, p. 457, italics added.) The Law Revision Commission Comments further provide that any tolling period must be added to the five year period even if plaintiff reasonably could have brought the case to trial within five years despite the circumstances: “Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial.” (Cal. Law Revision Com. com., 15C West’s Ann. Code of Civ. Proc., *supra*, foll. § 583.340, p. 457; see *Preston v. Kaiser Foundation Hospitals* (1981) 126 Cal.App.3d 402, 409 [five-year period measured by “simply setting the period [aside] during which the . . . “impracticability existed and examining the aggregate ‘free time’ which remains both before and after the exempt period in the light of the various provisions of [former]

section 583 of the Code of Civil Procedure. [¶] Thus, beginning with the filing of the complaint the plaintiff is entitled to consume before and after the “tolling” period an aggregate of two years in bringing his case to trial before risking a discretionary dismissal and an aggregate of five years before a mandatory dismissal”). Accordingly, the period of impossibility, impracticability, or futility need not have actually caused the plaintiff to be unable to bring the case to trial within five years of filing the complaint.

As our high court has explained, the touchstone in determining whether tolling applies due to impossibility, impracticability, or futility, is whether the delay could have been avoided with reasonable diligence: “The purpose of the statute is . . . to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years. . . .’ [Citations.] [¶] What is impossible, impracticable or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citations.] The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case. [¶] The ‘reasonable diligence’ standard is an appropriate guideline for evaluating whether it was impossible, impracticable, or futile for the plaintiff to comply with [former Code of Civil Procedure section 583, subdivision (b)] due to causes beyond his or her control. [Citation.] Section 583[, subdivision (b) of the Code of Civil Procedure] should not be applied to ‘penaliz[e] conduct entirely reasonable’ nor to impose a ‘procedure detrimental to the interest of both court and litigants.’ [Citation.] Neither the courts nor litigants have any legitimate interest in preventing a resolution of the lawsuit on the merits if, through plaintiff’s exercise of reasonable diligence, the goals of [former Code of Civil Procedure section 583, subdivision (b)] have been met.” (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 238.) Impracticability involves excessive and unreasonable difficulty or expense. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 731.) We review a trial court’s

determination on this issue for abuse of discretion. (*Hughes v. Kimble* (1992) 5 Cal.App.4th 59, 71.)

We need not address each of the circumstances Nielsen contends tolled the five-year statute, because we agree with Nielsen that the statute was tolled during the pendency of the Hafen Lawsuit, and after accounting for that tolling period, Nielsen still had ample time to bring the case to trial.

“Futility or impracticability sufficient to extend the time for bringing an action to trial may be created by litigation . . . involving the very basis of the action sought to be dismissed, or in other litigation between the same parties or their privies.” (*Union Bond & Trust Co. v. M & M Wood Working Co.* (1960) 179 Cal.App.2d 673, 676.)

For example, in *Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545 (*Brunzell*), the plaintiff contractor filed suit against Harrah’s Club arising out of the construction of a casino in Reno, Nevada. (*Id.* at p. 548.) The plaintiff also named the architects, the soil and structural engineers, and the surety insurance company as defendants. (*Ibid.*) The complaint was filed in June 1962. (*Id.* at p. 549.) Over the next five years, the plaintiff and Harrah’s Club litigated, both in California and Nevada, and both in the trial courts and Courts of Appeal, whether the lawsuit should proceed in California or Nevada. (*Id.* at p. 549-550.) The final remittitur issued in October 1967, more than five years after the complaint was filed. (*Id.* at p. 550.) The architects and the soil and structural engineers were not party to any of the proceedings to determine the proper jurisdiction. (*Id.* at p. 548, 550.) The court granted their motion to dismiss on the basis five years had elapsed and plaintiff could have proceeded against them while the jurisdictional dispute with Harrah’s Club was ongoing. (*Id.* at p. 550-551.)

Our high court reversed. It explained, “Although this court has not been able to articulate a comprehensive definition of the essentially amorphous ‘impracticability’ concept [citation], we have consistently declared that the applicability

of the exception must be judged ‘in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves.’” (*Brunzell, supra*, 2 Cal.3d at p. 553.) “In many situations in which it is impossible or impracticable to proceed against one codefendant it may be impracticable, in terms of the burden both to the parties and to judicial administration as a whole, to proceed against other defendants in a separate suit. To require a plaintiff to sever causes of action against multiple defendants *whenever* it becomes impossible or impracticable to proceed against one defendant within the five-year period would be to require unproductive duplication of effort, compel the incurrence of excessive expense, and generally undermine all the policies served by modern theories of consolidation in a substantial number of cases. (*Id.* at p. 553-554.) Determining whether proceeding would be impracticable “requires the consideration of a great variety of factors, including, among others, the expense, complexity, and quantity of the evidentiary duplication that severance would entail, the potential problems that inconsistent judicial determinations would produce, and the degree of hardship or prejudice to the defendants occasioned by the delay.” (*Id.* at p. 554, fns. omitted.)

Another relevant example is *Stella v. Great Western Sav. & Loan Assn.* (1970) 13 Cal.App.3d 732 (*Stella*). There, the plaintiffs purchased a home that was later discovered to have a defective foundation. (*Id.* at p. 735.) In May 1964, the plaintiffs sued various parties involved in the construction, including Great Western Savings & Loan Association, which provided the construction financing. (*Ibid.*) Other homeowners did the same, and several of those suits, but not the suit in *Stella*, were consolidated and the issue of Great Western’s liability was tried in the consolidated cases in early 1965. A judgment of nonsuit was granted in Great Western’s favor and the plaintiffs in the consolidated actions appealed. That appeal ultimately made its way to our Supreme Court, which reversed the nonsuit and issued its remittitur in January 1969. (*Ibid.*) In the case before the *Stella* court, the plaintiffs did nothing to bring the case to trial while the

consolidated cases were being resolved. The *Stella* plaintiffs finally sought a trial date five years and two days after filing the complaint. The trial court dismissed the case as beyond the five-year statute. (*Id.* at p. 736.)

The *Stella* court reversed. It noted, “The legal issue crucial to each case is precisely the same: Was Great Western as a lender furnishing the principal financing to a tract developer and home builder for land acquisition, home construction, and ultimate home purchase, liable for the negligent construction of said tract homes?” (*Stella, supra*, 13 Cal.App.3d at p. 738.) It then reasoned that to require the plaintiffs to proceed to trial in 1964 would have required significant, unnecessary expense: “Had plaintiffs proceeded to trial in 1964, unnecessary monetary expense, evidentiary duplication and legal complexity would have resulted, and a substantial amount of litigation might have been rendered meaningless. Additionally there was the possibility of inconsistent judicial determinations with the problems attendant thereto. [Citation.] [¶] Plaintiffs’ forbearance in awaiting the outcome of the [consolidated cases] in our opinion well served the interests of judicial economy.” (*Ibid.*)

Not every related litigation tolls the five-year statute, however. A counterexample to the two cases above is *Reserve Ins. Co. v. Universal Underwriters Ins. Co.* (1975) 51 Cal.App.3d 57 (*Reserve*). *Reserve* arose from an automobile accident where the victim was injured by someone driving a leased vehicle. (*Id.* at p. 59.) The dispute in *Reserve* was between two insurance companies: Reserve Insurance Company (Reserve) admitted its policy covered the driver and the rental agency, but contended it was merely excess over a policy issued by Universal Underwriters Insurance Company (Universal). The latter contended its policy did not cover the driver, only the agency, and thus it was not liable on a judgment against the driver. (*Id.* at pp. 59-60.) Reserve filed a declaratory relief action, naming both Universal and the victim as defendants. The victim cross-complained against Universal, and the trial court issued a summary judgment in favor of the victim on his cross-complaint against Universal, finding its policy covered

the driver. (*Id.* at p. 60.) Universal appealed; the issue ultimately went to our high court, which affirmed. (*Ibid.*) Meanwhile, Reserve had not been prosecuting its declaratory relief action, which was then dismissed under the five-year statute. (*Id.* at pp. 59-60.)

The Court of Appeal affirmed. It distinguished *Brunzell* and *Stella*, stating, “This case involves no disputed or complex facts; a trial would have involved an exchange of paper and arguments concerning the interpretation of conceded insurance policies.” (*Reserve, supra*, 51 Cal.App.3d at p. 62.) Moreover, in contrast to *Stella*, the legal issue on appeal in the victim’s cross-complaint was straightforward: “Reserve was not waiting for a significant legal breakthrough to vitalize its claim. The trial court had made a definitive ruling on the applicability of the Universal policy in granting a motion for summary judgment and — as the [Supreme Court] opinion subsequently proved — the appellate courts did not have to resort to novel doctrine to uphold it.” (*Reserve*, at p. 63.)

These precedents demonstrate that each case must be analyzed in light of its own unique circumstances. In reviewing the trial court’s decision granting a motion to dismiss, we are faced with conflicting directives: on the one hand, we review the trial court’s decision for abuse of discretion, on the other, the Law Revision Commission Comments indicate we should interpret Code of Civil Procedure section 583.340 “liberally, consistent with the policy favoring trial on the merits.” Balancing those factors in light of the unique circumstances of this case, we conclude the Hafen Lawsuit tolled the five year statute. We reach this result for two principal reasons.

First, the Hafen Lawsuit involved the very basis of the present lawsuit. This lawsuit is fundamentally an action to recover litigation expenses from the Hafen Lawsuit. The crux of the complaint is: the brokers breached their duties, and as a result Nielsen had to pay for years of litigation to fix their mistake. The extent of those damages, however, could not be known until the Hafen litigation was complete. Nielsen’s counsel offered the following illustration: “Let me give you an example.

Discovery gets sent to my client. ‘Please state all of your damages. Please set forth how you’ve been damaged.’ She has to say ‘I don’t know. The case isn’t over yet.’ [¶] If I’m saddled with these easements, my damages are going to be this. If I win, my damages are going to be something else.” Also, if Nielsen had been found to be on notice of the easement prior to the purchase of the property, it may have gutted Nielsen’s case entirely. As Nielsen’s counsel explained, “If it was found in the *Hafen* case that my client was on constructive notice of these agreements, and she was bound by those agreements because of this constructive notice, this whole case goes away. The claims my client has are lost.” Indeed, the only time prior to the dismissal that the court considered these contentions, it essentially agreed when it formally stayed this case, stating, “The issues [in the two cases] are substantially the same and the outcome of the Plaintiffs’ appeal in *Hafen v. Nielsen, et al*, and a possible retrial in *Hafen v. Nielsen et al*, might result in conflicting judgments.” “The court in *Hafen v. Nielsen, et al*, Case No. 05CC07279 has exclusive concurrent jurisdiction and the proceedings [in the present case] should be restrained pending the outcome of Plaintiffs’ appeal in *Hafen v. Nielsen.*” In granting the motion to dismiss, the court did not contradict these facts.

The obvious response, and what the trial court ultimately relied on, is, why not wait to file this lawsuit until after the *Hafen* Litigation finished? This brings us to the second, equally important factor supporting our conclusion — a factor rather unique to this case — which is that Nielsen’s timing of filing this lawsuit in April 2008 was essentially forced by Century 21. The court found Nielsen was in “*complete control*” of when she filed this lawsuit, but the record reveals just the opposite is true. The uncontradicted record shows that Nielsen did everything in her power to file this lawsuit as late as possible. She entered into a tolling agreement with the defendants in the *Hafen* Litigation, including Clark, for just that reason (Century 21 was not a defendant in the *Hafen* Lawsuit). It was only when Century 21 refused to be bound by the agreement that Nielsen filed this lawsuit. And even then, Nielsen filed this lawsuit as late as possible:

nearly three years after the purchase of the property, which ran right up to the edge of the statute of limitation for fraud and breach of fiduciary duty claims based on fraud. (Code Civ. Proc., § 338, subd. (d); *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [three year statute of limitations applies where the gravamen of the breach of fiduciary duty claim is fraud].) Century 21 was, of course, free to refuse the tolling agreement, but it left Nielsen with only a Hobson's choice: file now, or suffer the loss of her claims against Century 21 to the statute of limitations.

The combination of Nielsen being forced to file the complaint prematurely, yet being unable to ascertain the extent of her damages until the Hafen Lawsuit concluded, rendered it impracticable to proceed while the Hafen Lawsuit was pending.

Defendants contend that Nielsen could have proved her litigation expenses as an element of future damages (“It is not uncommon as seen in personal injury and other property damage cases that future damages are an item for a trier of fact to determine at trial”). But from the standpoint of judicial efficiency — a consideration that was paramount in *Brunzell, supra*, 2 Cal.3d 545 — it would make little sense to force Nielsen, on pain of dismissal, to hire an expert to essentially speculate on future damages that could be made certain by simply waiting the Hafen Lawsuit out, particularly since the Hafen Lawsuit had already been pending for three years when this lawsuit was filed. Additionally, proceeding to trial in the present lawsuit prior to the conclusion of the Hafen Lawsuit would have vitiated the standstill agreement between the defendants in the Hafen Lawsuit. The defendants’ agreement in that case proved to be a sound strategy for *all* parties to the present lawsuit: Clark and Nielsen prevailed. (*Hafen v. Nielsen, supra*, G043337). It also would have meant duplicating efforts in the two cases to litigate the question of whether Nielsen was on notice of the easement agreement. Both *Brunzell, supra*, 2 Cal.3d 545 and *Stella, supra*, 13 Cal.App.3d 732 counsel against requiring significant duplication of effort. Proceeding ahead of the Hafen Lawsuit is precisely the sort of ““procedure detrimental to the interest of both court and litigants”” that our high

court has said is *not* mandated by section 583.340. (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 238.)

Defendants also argue that because Clark's and Century 21's fiduciary obligations to Nielsen were not at issue in the Hafen Lawsuit, there was no significant overlap between the two cases. But this ignores the reality of the case: If Nielsen had been found to have been on notice of the easement, then Clark's failure to notify Nielsen — the alleged breach in the present case — would not have caused damages since Nielsen already had notice. The issue was nearly dispositive. And had the issue been resolved against Nielsen, she would have been bound here by collateral estoppel. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [listing elements of collateral estoppel].) As in *Stella, supra*, 13 Cal.App.3d “[h]ad plaintiffs proceeded to trial . . . , unnecessary monetary expense, evidentiary duplication and legal complexity would have resulted Additionally there was the possibility of inconsistent judicial determinations with the problems attendant thereto. [Citation.] [¶] Plaintiffs’ forbearance . . . in our opinion well served the interests of judicial economy.” (*Id.* at p. 738.)

In addition to its erroneous conclusion that Nielsen was in complete control of when she filed this suit, the court advanced a second rationale for refusing to toll the five-year statute: “Further, even assuming prosecution was ‘impossible’ during this period [while the Hafen Lawsuit was pending], given the representation of [Nielsen’s] Counsel, in March and June of 2013, that this action was ready to proceed to trial, again, there appears to be no causal connection between the ‘impossibility’ and the failure to meet the 5-year requirement.” As we noted above, however, the Law Revision Commission Comments on section 583.340 reject this position: “Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, *regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial.*” (Cal. Law Revision Com. com., 15C Wes’s Ann.

Code of Civ. Proc., *supra*, foll. § 583.340, p. 457, italics added.) In concluding otherwise, the court cited *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262 (*Sanchez*).

In *Sanchez* the plaintiffs brought suit against the City of Los Angeles and two individuals. (*Sanchez, supra*, 109 Cal.App.4th at p. 1265.) For the first four and a half years, nothing out of the ordinary happened. (*Id.* at pp. 1265-1267.) With approximately six months remaining on the five-year statute, and with a trial date scheduled within that period, one of the individual defendant's attorney died. (*Id.* at p. 1267.) To allow the replacement attorney time to get familiar with the case, the trial court continued the trial date to a date beyond the five-year statute, and, apparently oblivious to the problem, no one raised the issue. (*Ibid.*) The case was dismissed. (*Id.* at p. 1265.) The *Sanchez* court affirmed. The court reasoned the failure to satisfy the five-year statute was not due to impracticability, but due to "counsel's lack of diligence in failing to keep apprised of the case's chronology." (*Id.* at p. 1272.)

We do not disagree with the result in *Sanchez*. There was no showing that new defense counsel was incapable of preparing for a timely trial date. Moreover, nothing was preventing plaintiff from insisting on a timely trial date and shifting the burden to defendants to stipulate to an extension of the five-year period if they wanted more time. In short, *defendant's* attorney's death did not make it impracticable for *plaintiff* to bring the case to trial.

In reaching the conclusion it did, however, the *Sanchez* court made the following statement, which appears to have led the trial court in our case astray: "*The text of section 583.340 impels the view that there must be a causal connection between the circumstance upon which plaintiff relies and the failure to satisfy the five-year requirement. Bringing the action to trial must be impossible, impracticable, or futile for the reason proffered.*" (*Sanchez, supra*, 109 Cal.App.4th at p. 1272.) This quote comes from *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217

Cal.App.3d 464, 473 (*Sierra Nevada*). We can certainly understand why the trial court arrived at the interpretation that it did, but in the context of the development of this area of the law, that interpretation is incorrect.

The Law Revision Commission Comments to section 583.340 state more fully: “Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. *This overrules cases* such as *State of California v. Superior Court*, 98 Cal.App.3d 643, 159 Cal.Rptr. 650 (1979), and *Brown v. Superior Court*, 62 Cal.App.3d 197, 132 Cal.Rptr. 916 (1976).” (Cal. Law Revision Com. com., 15C West’s Ann. Code of Civ. Proc., *supra*, foll. § 583.340, p. 457, *Italics added*.) To understand precisely what was being overruled, we discuss the overruled cases below, and then we explain why *Sierra Nevada*, upon which *Sanchez* relied, does not support the trial court’s position.

In *State of California v. Superior Court* (1979) 98 Cal.App.3d 643 the plaintiffs filed their complaint in May 1974. (*Id.* at p. 645.) In December 1977 the plaintiffs initiated judicial arbitration. (*Id.* at p. 646.) In October 1978, the arbitrator found in favor of the defendants and the plaintiffs requested a trial de novo. (*Ibid.*) This left approximately seven months prior to the expiration of the five-year statute. Plaintiffs, however, were apparently oblivious to the expiration date, and when trial was scheduled shortly after that date (*Ibid.*), plaintiffs did not object. (*Id.* at p. 649.) The trial court denied a motion to dismiss, but the Court of Appeal issued a writ of mandate compelling the court to dismiss the action. (*Id.* at p. 645, 651.) On appeal, plaintiffs cited precedent for the proposition that time spent in judicial arbitration qualifies as being impossible to bring a case to trial for purposes of tolling the five-year statute. The court distinguished that precedent, however, on the ground that, even if bringing the case to trial was impossible during the judicial arbitration, there was ample time to bring the case

to trial afterwards. (*Id.* at p. 649-650.) This result was overruled by the enactment of Code of Civil Procedure section 583.340.

In *Brown v. Superior Court* (1976) 62 Cal.App.3d 197, plaintiff filed suit in May 1971. (*Id.* at p. 198.) Plaintiff was incarcerated from that point until June 1974. (*Id.* at p. 199.) Plaintiff's counsel engaged in pleading and discovery work during the period of incarceration (*Id.* at pp. 198-199), but the matter was not brought to trial within five years. (*Id.* at p. 198.) The trial court denied a motion to dismiss in June 1976 (*Ibid.*), but the Court of Appeal issued a writ of mandate compelling the trial court to grant the motion. (*Id.* at p. 200.) With regard to the period of incarceration, the court noted, "It is true, of course, that during her incarceration it may have been inadvisable as a tactical matter to proceed with the trial in her absence. We do not need to consider whether her unavailability would have rendered it "impractical and futile" [citation] to proceed with the trial, because in May 1974 she had written her counsel that she would be released on work furlough in June 1974 and thereafter would be available to appear at trial at any time. She was released in June 1974, almost two years before the expiration of the five-year period for bringing her cause to trial." (*Id.* at p. 199.) The court also noted the record was "barren of any attempt to obtain an early setting date or advance or accelerate the cause for trial before the expiration of the five-year period." (*Ibid.*) Again, this is the result that was overruled by Code of Civil Procedure section 583.340.

This brings us to the case *Sanchez* relied on, *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, which was decided after the 1984 enactment of Code of Civil Procedure section 583.340. In *Sierra Nevada* the plaintiff filed a case in propria persona in approximately January 1984. (*Sierra Nevada*, at p. 467, 473.) In 1987, the plaintiff found a law firm to substitute in on her behalf. (*Ibid.*) The plaintiff's counsel missed the five year deadline, however, explaining that he mistook the date of service of the complaint for the date of filing. (*Id.* at p. 468.) Nonetheless, the trial court denied a motion to dismiss based on plaintiff's counsel

incapacitation for 60 days for surgeries in August and October 1987, and a two week incapacitation for another surgery in November 1988. (*Id.* at p. 468-469.) The *Sierra Nevada* court issued a writ of mandate directing the court to grant the motion to dismiss. (*Id.* at p. 474.)

The *Sierra Nevada* court discussed the Law Revision Commission Comments to Code of Civil Procedure section 583.340 in some detail, concluding, “The rule which governed the *Brown*, and *State of California v. Superior Court* cases, to which the proscription of the Law Revision Commission comment is directed, is that regardless whether there was a period of impossibility, impracticability, or futility which occurred during the statutory period, if there is a reasonable time within which to bring the matter to trial thereafter the period of impossibility etc. did not toll the five years. The rule which is thereby abrogated is in the nature of an equitable consideration which is evoked after it had been shown that there was a period during which the bringing of the matter to trial was impossible, impracticable or futile. That left as a viable precedent the applications of the existing cases of the test of impossibility, impracticability, or futility.” (*Sierra Nevada, supra*, 217 Cal.App.3d at p. 471.) In other words, the focus is not on whether the period of excuse prevented plaintiff from starting trial within five years of the complaint, but instead whether the excuse actually caused a period of impossibility, impracticability, or futility.

Both *Sierra Nevada* and *Sanchez* dealt with the issue of sickness or death of counsel, which presents a difficult issue because it is expected that counsel will face medical issues over the course of a five year period: “In the course of five years it is reasonable to expect that counsel will suffer a number of days when illness will prevent his attendance to his practice. Similarly, it is reasonable to expect that counsel will have to attend to other business, personal and professional, including, for example, days off and vacations. The five-year period contains an allowance for the time so consumed in the same manner as it allows for the usual and ordinary proceedings attendant to moving

the case to trial. It would render the statute utterly indeterminate, subjective, and unadministerable, and thus absurd, to read an openended sick leave program for counsel into the tolling provisions of [Code of Civil Procedure] section 583.340, subdivision (c).” (*Sierra Nevada, supra*, 217 Cal.App.3d at pp. 472-473.) Accordingly, *Sierra Nevada* articulated the following sound rule with regard to attorney illness: “A bare showing that a counsel was ill does not warrant the attribution of such causation. Two kinds of circumstance occur to us in which it may be appropriate to say that the illness or counsel has *caused* the plaintiff to fail to bring the case to trial in compliance with the five-year requirement. The first is when an illness of counsel occurs at the end of the five-year period in circumstances in which it is likely that counsel, but for the illness, would have become aware of the impending deadline and taken the appropriate action to avert the transgression. The second is an unusually lengthy illness of sole counsel which deprives the plaintiff of a substantial portion of the five-year period for prosecution of the lawsuit, i.e., trial preparation and moving the case to trial.” (*Id.* at p. 473, fn. omitted.) As the second of these circumstances shows, a period of impracticability will toll the five-year statute *even if* there is sufficient time to bring a case to trial afterwards, consistent with the Law Revision Commission Notes to Code of Civil Procedure section 583.340.

In context, therefore, the causation requirement articulated by *Sierra Nevada* and repeated by *Sanchez* is simply that to constitute impossibility, impracticability, or futility, the circumstance at issue must have caused a substantial disruption to the proceedings, such that a reasonably prudent plaintiff could not have proceeded without excessive or unreasonable difficulty or expense during the period of the excuse. Where that test is satisfied, it does not matter that after the period of excuse there was sufficient time within the original five years to bring the case to trial, as the period of excuse tolls the five year statute. In holding otherwise, the trial court erred.

DISPOSITION

The judgment is reversed. Plaintiff shall recover her costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.