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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JENNIFER MARIE WHITE,

Petitioner,

v.

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA FOR THE COUNTY  
OF LOS ANGELES,

Respondent;

DINA A. BARKUS,

Real Party in Interest.

B241749

(Super. Ct. No. MC019871)

ORIGINAL PROCEEDING in mandate. Randolph A. Rogers, Judge.

Petition granted.

Tharpe & Howell, Stephen J. Beaton, Eric B. Kunkel, and Laura J. Becker for  
Petitioner.

No appearance for Respondent.

Law Offices of Olaf Landsgaard and Olaf Arthur Landsgaard for Real Party in  
Interest.

## INTRODUCTION

Petitioner Jennifer Marie White seeks a writ of mandate directing the trial court to vacate its April 2, 2012 order granting real party Dina A. Barkus’s renewed motion for new trial. White contends, among other things, that the trial court had no authority or jurisdiction to grant a new trial. We agree and grant the petition.

## FACTUAL AND PROCEDURAL HISTORY

Barkus sued White for the wrongful death of her son. After a week-long trial and deliberating for two days, the jury found for White. On April 7, 2011, Barkus moved for judgment notwithstanding the verdict (JNOV) and a new trial. On April 28, 2011, the trial court (Judge Randolph Rogers) granted JNOV *and* a new trial on damages.

On June 1, 2011, White filed a petition for writ of mandate challenging the granting of JNOV and a new trial. On December 14, 2011, we issued a 23-page, nonpublished opinion detailing how the trial court erred in granting JNOV and a new trial. (*White v. Superior Court* (B233360).) We ordered the trial court to vacate the April 28, 2011 order granting JNOV *and* a new trial, and to reinstate the jury’s verdict. The remittitur issued on February 16, 2012, making the case final.<sup>1</sup>

On February 27, 2012, Barkus filed a “renewed motion for new trial,” arguing, among other things, that her original April 2011 motion for new trial was actually never heard, and that the trial court could still act on the motion within the 60-day statutory period of section 660 because White’s appeal from the new trial order essentially tolled this period. White opposed the motion.

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<sup>1</sup> At the same time White filed her writ petition, she also appealed the order granting a new trial, which is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(4).) Further code references are to the Code of Civil Procedure. Because our writ opinion in case No. B233360 resolved all issues concerning the order granting a new trial, the appeal was no longer necessary and it was dismissed on March 28, 2012. (Case No. B233560.)

At a hearing on March 29, 2012, the trial court vacated the order granting JNOV and a new trial, and reinstated the jury verdict. Nonetheless, on April 2, 2012, the court issued an order granting the renewed motion for new trial. Ignoring the fact that it had granted Barkus's previous motion for a new trial on damages on April 28, 2011, and that we had reversed the order, the trial court concluded it had jurisdiction to grant the renewed motion because (1) the original new trial motion was filed on April 7, 2011; (2) White filed a notice of appeal on June 1, 2011, tolling the court's jurisdiction until the appeal was dismissed on March 28, 2012 (case No. B233560); and (3) the 60-day statutory period for granting a new trial did not expire until April 2, 2012.

White filed this writ petition challenging the order granting a second new trial. We issued an order giving the parties notice of our intention to grant a peremptory writ in the first instance and giving the trial court the opportunity to vacate its order. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-183 (*Palma*); *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1239.) The court elected not to do so, and Barkus file an opposition to the petition. We now grant the petition.

## **DISCUSSION**

We conclude, for several independent reasons, that the trial court had no authority to grant Barkus's renewed motion for new trial, and that it exceeded its jurisdiction in doing so. First, the order materially varies from the directions we gave in our December 2011 written opinion in case No. B233360. "When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.) A failure to follow appellate directions can be challenged by an immediate petition for writ of prohibition or writ of mandate. (*Ibid.*)

Our opinion ordered the trial court to vacate its order granting JNOV and a new trial, and to reinstate the jury verdict. While the opinion did not expressly state that judgment was to be entered for White, it did not need to. The entire opinion, as a whole, established an intention that is contrary to a retrial. (See *Moore v. City of Orange* (1985) 174 Cal.App.3d 31, 36-37 [there is no retrial after an unqualified reversal if the appellate opinion as a whole establishes a contrary intention].) Therefore, anything other than a judgment for White exceeded the directions given in our opinion.

Second, the trial court had no authority to hear and grant a second motion for new trial because the court had already exhausted its jurisdiction to do so. “It has long been the rule that ‘A final order *granting or denying* [a motion for new trial], regularly made, *exhausts the court’s jurisdiction*, and cannot be set aside or modified by the trial court except to correct clerical error or to give relief from inadvertence under [section] 473.’ [Citation.]” (*Wenzoski v. Central Banking System, Inc.* (1987) 43 Cal.3d 539, 542.)

There is no dispute that Barkus filed her motion for new trial on April 7, 2011, and that the trial court granted it as to damages on April 28, 2011. We held in case No. B233360 that the new trial motion was erroneously granted, and ordered that the ruling be vacated. The trial court clearly exhausted its jurisdiction in April 2011 once it granted a new trial on damages, and therefore had no jurisdiction to grant Barkus’s renewed motion for new trial in April 2012. Barkus’s argument that the trial court never actually ruled on her new trial motion until April 2, 2012, is wholly without merit and belies the record in this case.

Third, if an appellate court reverses JNOV, the prevailing party is entitled to entry of judgment in conformity with the verdict. (*Ferran v. Mulcrevy* (1935) 9 Cal.App.2d 129, 131.) This rule applies even though a judgment was not previously entered on the jury’s verdict. (*Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1367-1368.) We reversed the order granting JNOV and new trial. Therefore, White was entitled to entry of judgment in conformity with the verdict.

Finally, the ruling in our opinion on the motion for new trial in case No. B233360 is law of the case, and the trial court had no authority to deviate from it. Under this doctrine, any principle or rule of law stated in an appellate opinion that is necessary to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on a later appeal. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) The doctrine is applicable to writ proceedings where a written opinion has issued after issuance of an alternative writ of mandate. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.)

We reviewed and decided the issue of whether Barkus's motion for new trial was properly granted in case No. B233360. We determined: (1) that on April 7, 2011, Barkus filed her motion for new trial; (2) the trial court granted a new trial as to damages on April 28, 2011; (3) the order granting a new trial was defective because it did not specify the grounds upon which it was granted or any reason for granting a new trial; and (4) the new trial on damages was rendered moot by our ruling reversing the JNOV.

In addition, we addressed the trial court's attempt, on November 1, 2011, while the writ petition was pending, to correct its error by issuing a nunc pro tunc order granting a JNOV and a new trial. We held the court had no authority to do so because, among other reasons, its jurisdiction to grant a new trial had expired long ago pursuant to sections 657 and 660.

These rulings became law of the case, preventing the trial court from finding it never actually granted Barkus's April 7, 2011 new trial motion or that it had jurisdiction to grant a new trial.

### **DISPOSITION**

We have followed the procedures and given the notice described in *Palma, supra*, 36 Cal.3d 171 at pages 177-183. No factual issues are disputed, the legal error is clear, and the matter should be expedited. Accordingly, a peremptory writ in the first instance is appropriate. (§ 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

The petition is granted. The trial court is ordered to (1) vacate its order of April 2, 2012, granting Barkus's renewed motion for a new trial, and instead (2) issue a new order denying the motion, and enter judgment for White in accordance with the jury's verdict. White is to recover her costs in this writ proceeding.

BIGELOW, P.J.

WE CONCUR:

RUBIN, J.

FLIER, J.