

Case No. S _____

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

XXXXXXXXXXXXXXXXXXXX,
Individual, Trustee, Plaintiff and Appellant,

Vs.

XXXXXXXXXXXXXXXXXXXX and
Does 1-99,
Defendants and Respondents

After a Decision of the Court of Appeal
First Appellate District, Division Two
Case No. xxxxxxxx
San Francisco County Superior Court Case No. xxxxxxxxxx
Honorable Paul H. Alvarado, Judge

PETITION FOR REVIEW

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX, CA XXXXX
Telephone: (650) XXXXXX
Facsimile: (650) XXXXXX

For Plaintiff and Appellant,
XXXXXXXXXXXXXXXXXXXX

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PETITION FOR REVIEW

ISSUES PRESENTED

California Code of Civil Procedure Sections 581(b) (4) provides that a trial court may dismiss an action *without prejudice* pursuant to applicable provisions of Chapter 1.5 commencing with Section 583.110. Does a trial court exceed its jurisdiction when it dismisses an action *with prejudice* pursuant to this statutory regime?

A trial court has statutory and inherent discretion to dismiss an action for unreasonable delay in service of summons. Does a trial court abuse this discretion when it dismisses an action *with prejudice* pursuant to California Code of Civil Procedure Chapter 1.5 commencing with Section 583.110?

GROUNDS FOR REVIEW

This case presents important legal questions of whether a trial court has jurisdiction and discretion to dismiss an action with prejudice for lack of prosecution.

Code of Civil Procedure § 581(b) (4) permits a trial court to dismiss an action without prejudice pursuant to applicable provisions of Chapter 1.5 commencing with § 583.110 (unless otherwise stated, all statutory references are to the Code of Civil Procedure). This statutory regime includes §§ 583.410 and 583.420 which apply specifically to dismissal for failure to serve summons. When ordering dismissal on these grounds, § 581(b) (4) appears to limit a court's jurisdiction and discretion to granting dismissal without prejudice.

This construction of § 581(b) (4) advances California's public policy preference for resolving legal disputes on the merits and avoiding procedural termination of a litigant's substantive rights. While there is a legitimate need to manage a court's docket and foster diligent prosecution of actions, these concerns should not encourage or allow a court to prematurely dismiss a case with prejudice. Dismissal with prejudice is a draconian sanction employed generally to dispose of sham or frivolous actions. Moreover, in enacting § 581(b) (4), the Legislature has declared that lack of prosecution does not warrant such a severe penalty. In view of these public policy implications, § 581(b) (4) should be construed to limit a court's authority under § 583.410 and § 583.420 to granting dismissal without prejudice.

However, the question remains whether § 581(b) (4) actually effects this limitation on a court's dismissal power as a matter of law. In *Gonsalves v. Bank of America Nat. Trust & Savings Ass'n* (1940) 16 Cal.2d 169 this Court affirmed the well-established rule that a dismissal for delay in prosecution is not a judgment on the merits and therefore has no res judicata effect. The Court decided *Gonsalves* nearly seventy years ago, and since that

decision, several of our appellate courts have adhered to this rule. As a result, the weight of authority in California now holds that an involuntary dismissal for delay in prosecution is not a judgment on the merits and, where the applicable limitations statute has not expired, it cannot bar a plaintiff from again filing suit on the same causes of action. The implication of this rule, as codified in § 581(b) (4), is that a trial cannot properly dismiss an action with prejudice for lack of prosecution.

In the instant case, the Court of Appeal took a contrary view and affirmed dismissal of Petitioner's trial court action with prejudice on precisely these grounds. In reaching this conclusion, the Court of Appeal reasoned that § 581(b) (4) does not require a trial court to dismiss an action without prejudice for unreasonable delay in service of summons. The Court of Appeal also found that the trial court had inherent discretion to order dismissal with prejudice for lack of prosecution.

Though *Gonsalves* established that dismissal for lack of prosecution is not a judgment on the merits and cannot have a res judicata effect, the Court decided that case well before § 581 was amended to include § 581(b) (4). The question whether § 581(b) (4) places jurisdictional limits on a trial court's authority to dismiss an action with prejudice is one of first impression for the Court. This Court should grant review to clarify whether this statute requires a court to dismiss an action without prejudice when ordering dismissal for lack of prosecution. Absent such review, and in view of the Court of Appeal's reasoning, California litigants will continue to risk premature termination of their substantive rights on inappropriate procedural grounds.

STATEMENT REGARDING PETITION FOR REHEARING

On March 9, 2009, Petitioner filed a Petition for Rehearing. On March 17, 2009, the Court of Appeal denied this petition. On this same date, the Court of Appeal modified its Opinion in a manner that did not change its judgment.

FACTS AND PROCEDURAL BACKGROUND

On March 1, 2005, appellant and petitioner XXXXXX XXXX (“Petitioner”), filed a complaint in San Francisco County Superior Court against defendants and respondents XXXXXX XXXX (“Respondents”) alleging, inter alia, breach of contract and fraud. On April 25, 2005, Petitioner filed the first of nine (9) requests for extensions of time to serve the complaint on Respondents. The trial court granted eight (8) of these requests over an approximately two-year period. However, on February 28, 2007, the court denied Petitioner’s ninth request for an extension of time to serve his complaint on Respondents. Instead, the court issued an order to show cause and set the hearing for May 7, 2007 to determine whether to dismiss Petitioner’s case and order sanctions against him for failure to serve his complaint.

On April 16, 2007, Petitioner responded to the order show cause and the court, on April 30, 2007, continued the show cause hearing to September 24, 2007. On September 13, 2007, Petitioner filed an amended complaint and served it on Respondents. The trial court then cancelled the show cause hearing that had been set for September 24, 2007 and scheduled a case management conference.

On October 29, 2007, Respondents filed their motion to dismiss Petitioner’s action pursuant to §§ 583.410, 583.420, California Government Code § 68608 and Rules of Court

3.1110, 3.1340 and 3.1342 for unreasonable delay in service of summons. As such, this dismissal motion was subject to the procedural mandates of § 581(b) (4). The court heard Respondents' motion to dismiss on December 14, 2007. Respondents contended that Petitioner had obtained his previous extensions of time to serve his initial complaint through false pretenses and that he had no justification for failing to complete such service. Petitioner argued that he did not intentionally mislead the court, that he had corrected his previously erroneous statements and that his initially delayed service was justified.

The trial court granted Respondents' motion dismiss. On December 26, 2007, the court entered a formal order stating, in pertinent part, the following:

“Plaintiff’s action is hereby dismissed, with prejudice, pursuant to California Code of Civil Procedure Sections 583.410 and 583.420 and California Rules of Court 3.1340 and 3.1342 for failure to serve Defendants or otherwise prosecute his claims for more than two and a half years without justification.”

Petitioner timely appealed this order.

On appeal, Petitioner contented, inter alia, that § 581(b) (4) prohibited the trial court from dismissing his action with prejudice, and that this statute required such dismissal to be without prejudice. Respondents contended that, under the factual circumstances of this case, the trial court had inherent discretion to dismiss Petitioner’s action with prejudice and it had done so without abusing that discretion. On February 20, 2009, the Court of Appeal filed its Unpublished Opinion affirming the trial court’s dismissal order. The Court of Appeal concluded that 1) § 581(b) (4) did not require the trial court to dismiss Petitioner’s action without prejudice, and 2) the trial court did not abuse its discretion in dismissing the case with prejudice. This petition followed.

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LEGAL DISCUSSION

I. THE COURT SHOULD CONSTRUE CODE OF CIVIL PROCEDURE § 581(b) (4) TO REQUIRE DISMISSAL OF AN ACTION WITHOUT PREJUDICE WHEN DISMISSAL OCCURS FOR LACK OF PROSECUTION

In *Abelliera et al. v. District Court of Appeal, Third District* (1941) 17 Cal.2d 280, the Court explained that jurisdiction, in its broader sense, refers to a court's power or authority to act in particular manner. While a court may have jurisdiction over the parties and subject matter of an action, it may still lack the authority to grant certain types of relief.¹ See e.g., *Spreckles Sugar Co. v. Industrial Accident Commission et al.* (1921) 186 Cal. 256 [defendant Commission lacked jurisdiction to order greater workmen's compensation award than the amount authorized by applicable statute]. When a statute requires a court to exercise its jurisdiction in a particular manner or act subject to particular limitations, any act beyond these limits exceeds the court's jurisdiction. *Ibid.*; see also *Burnett v. King* (1949) 33 Cal.2d 805; *Fortenbery v. Superior Court* (1940) 16 Cal.2d 405; *Tabor et al. v. Superior Court of Los Angeles County* (1946) 28 Cal.2d 505. An order or judgment rendered in excess of a court's jurisdiction is void and has no legal effect. *Ibid.*; see also *Ensher v. Ensher* (1960) 187 Cal.App.2d 407; *Granone v. County of Los Angeles* (1965) 231 Cal.App.2d 629.

As the Court explained in *Gonsalves, supra*, dismissal statutes are jurisdictional inasmuch as they prescribe the manner in which a court must act when ordering this relief.

In applying this analysis to § 581a, the Court reasoned as follows:

“The dismissal statute gives a remedy for delay in prosecution of an action, and makes it mandatory upon the court to dismiss it after three years...The statute is ‘jurisdictional’ in the sense that the court has no power to excuse the delay, nor can it refuse to act merely because the party fails to make a motion for dismissal.

¹ The Court of Appeal stated at page 11 of its Opinion that Petitioner had waived this jurisdictional issue because he failed to raise it in the trial court. However, Petitioner properly presented this issue to the Court of Appeal as a jurisdictional challenge raised for the first time on appeal. *Granone v. County of Los Angeles* (1965) 231 Cal.App.2d 629; *Johanson v. City Council of Santa Cruz* (1963) 222 Cal.App.2d. 68.

It has power to act only in a certain way, that is, by ordering dismissal.” See *Gonsalves, supra*, at 172.

Though the *Gonsalves* Court applied this analysis to § 581a, this reasoning has equal application to the procedural requirements for dismissal stated in § 581(b) (4). Specifically, the jurisdictional component of § 581(b) (4) lies in its express and limited authorization for trial courts to dismiss actions without prejudice when dismissal is sought under Code of Civil Procedure Chapter 1.5 commencing with § 583.110. Since this statutory regime includes §§ 583.410 and 583.420, this limitation on the type of dismissal that a trial court may order applies to a dismissal for unjustified delay in service of summons.

As the Court explained in *Spreckles Sugar Co. v. Industrial Accident Commission et al.* (1921) 186 Cal. 256 (“*Spreckles*”), one of the clearest examples of an order that exceeds a court’s jurisdiction occurs when it grants relief that it has no power to award:

“The difficulty arises from the different shades of meaning which the word ‘jurisdiction’ has. As sometimes used, it means simply authority over the subject-matter or question presented. In this sense the Commission undoubtedly had jurisdiction in this case and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means *a want of authority to exercise in a particular manner a power which the board or tribunal has...*

A good illustration of a want of jurisdiction of this latter sort is the imposing by a court upon a person convicted of crime of a sentence in excess of that permitted by the statute. The court had jurisdiction to sentence the convicted person, but it did not have jurisdiction to impose a sentence not permitted by law; that is, it acted in excess of its power in doing so.” See *Spreckles, supra*, at 260 [Emphasis added].

In *Spreckles*, the Court applied the foregoing analysis to nullify a workmen’s compensation death benefit award that exceeded the statutory limit for such relief. In doing so, the Court held that the Industrial Accident Commission exceeded its jurisdiction when it granted more relief than was authorized under the applicable statute. While the Court’s holding in

Spreckles referred directly to an administrative agency, the Court applied its analysis to judicial acts that exceed court jurisdiction – and chief among these was granting relief that exceeds the limit set by an applicable statute. *Ibid.*, at 260-261.

In § 581(b) (4), the Legislature has limited the type of relief a court may award for lack of prosecution to dismissal *without prejudice*. See *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 214-215. This statute is jurisdictional in that it prescribes the manner in which a court may dismiss an action when dismissal occurs pursuant to Code of Civil Procedure Chapter 1.5 commencing with § 583.110. Thus, when presented with a motion seeking dismissal for delayed service of summons under §§ 583.410 and 583.420, the court has no authority to grant this motion by ordering dismissal with prejudice. See *Spreckles, supra*; *Burnett v. King* (1949) 33 Cal.2d 805; *Fortenbery v. Superior Court* (1940) 16 Cal.2d 405; *Tabor et al. v. Superior Court of Los Angeles County* (1946) 28 Cal.2d 505.

In *Gonsalves, supra*, the Court affirmed the long-standing rule that dismissal for lack of prosecution is not a judgment on the merits and therefore has no res judicata effect. See also *Mattern v. Carberry* (1960) 186 Cal.App.2d 570; *Ashworth v. Memorial Hospital of Long Beach* (1988) 206 Cal.App.3d 1046. In an apparent codification of this rule, the Legislature enacted § 581(b) (4) which reflects the public policy preference for resolving disputes on the merits and avoiding procedural termination of litigants' substantive rights.

However, the Court of Appeal's decision demonstrates that confusion remains as to whether § 581(b) (4) requires dismissal of an action without prejudice when ordered for lack of prosecution. In affirming the trial court's dismissal of Petitioner's action with prejudice, the Court of Appeal stated at page 8 of its Opinion "we agree with several other appellate courts that a dismissal with prejudice was not an abuse of discretion in this case." The Court

of Appeal then cited the Third District Court’s decision in *Scarzella v. DeMers* (1993) 17 Cal.App.4th 1762 (“*Scarzella*”) for support of this conclusion. While there is nothing in the *Scarzella* opinion indicating that it involved an appeal from a dismissal with prejudice, the Court of Appeal highlighted *Scarzella* as clear authority for its decision.²

Whether or not the Court of Appeal correctly analyzed *Scarzella*, its Opinion illustrates the need for clear and definitive guidance from this Court regarding the legal effect of § 581(b) (4). Absent such guidance, California litigants will continue to suffer the inequity of disparate judgments and appellate review regarding dismissal of an action for lack of prosecution. The Court should grant review to clarify and ensure uniformity of decision on this issue for all California litigants.

II. DISMISSAL WITH PREJUDICE FOR LACK OF PROSECUTION SHOULD CONSTITUTE ABUSE OF TRIAL COURT DISCRETION

If a court has jurisdiction to dismiss an action with prejudice, the question remains whether the court abuses its discretion by doing so for lack of prosecution. As discussed in Section I above, § 581(b) (4) expressly provides that a court may dismiss an action without prejudice for lack of prosecution, e.g., unjustified delay in service of summons. Judicial discretion to order such dismissal is further codified at §§ 583.410 and 583.420 and California Rule of Court 3.1342.

In addition to this statutory authorization to dismiss stale actions without prejudice, a court has limited, inherent discretion to dismiss an action with prejudice “under certain circumstances.” See *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 915 (“*Lyons*”). The *Lyons*

² The Court of Appeal reasoned at page 11 of its Opinion that “as both *Scarzella* and the other authorities just cited make clear, these dismissals were, quite obviously, all *with prejudice*, as the appeals from them are from judgments entered after the grant of a motion to dismiss” [*Italics in original*]. However, the fact that *Scarzella* was an appeal from final judgment does not necessarily mean that it involved a dismissal with prejudice. Code of Civil Procedure § 581d provides that an order of dismissal, including a dismissal without prejudice, effects a judgment from which a party may appeal. See *Mattern v. Carberry* (1960) 186 Cal.App.2d 570.

Court did not address the issues raised in this petition regarding the jurisdictional implications of § 581(b) (4). Nor did Chief Justice Bird identify or explain the specific “circumstances” that would justify dismissal of an action with prejudice. However, The *Lyons* Court noted that “this power has *in the past* been limited to two types of situations: (1) the plaintiff has failed to prosecute diligently (*Romero v. Snyder* (1914) 167 Cal. 216, 138 P. 1002); or (2) the complaint has been shown to be ‘fictitious or a sham’ such that the plaintiff has no valid cause of action...” [Emphasis added; citation omitted]. See *Lyons, supra*, at 915. The Court then acknowledged that discretion to dismiss an action for lack of prosecution had been “recodified” in § 583.410 and reasoned that discretion to dismiss with prejudice in California was “tightly circumscribed.” *Ibid.*, at 915-917.

In *Romero v. Snyder* (1914) 167 Cal. 216 (“*Romero*”), the Court found no abuse of discretion and upheld dismissal of an action for failure to bring the case to trial within the statutory period. However, there is no discussion in *Romero* of whether the trial court dismissed the action with prejudice. Moreover, *Romero* was decided long before the Legislature enacted § 581(b) (4). If *Romero* affirmed a dismissal *with prejudice* for lack of prosecution based on a court’s inherent discretion, the *Lyons* analysis implies that *Romero* now offers questionable precedent in view of modern dismissal statutes (see §§ 581(b) (4), 583.410 and 583.420).

While courts have inherent discretion to dismiss an action or otherwise control its business, this discretion remains subject to limitation by statute. See e.g., *City of Los Angeles v. Gleneagle Development Company* (1976) 62 Cal.App.3d 543 [“Although discretion is vested in the trial judge, that discretion is not unfettered. It cannot be exercised arbitrarily, but must be...exercised in conformity with the spirit of the law...”]. Indeed the well-established rule provides that the Legislature has constitutional authority

to regulate court procedure. *Rice v. Superior Court* (1982) 136 Cal.App.3d 81 [“The Legislature has broad power to prescribe the procedure under which courts exercise their constitutional or statutory jurisdiction.”]. As applied to discretionary dismissal of an action for lack of prosecution, § 581(b) (4) appears to limit that discretion to dismissal without prejudice. See *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 214-215 (“*Franklin*”). Moreover, as the *Franklin* court expressly stated, this limitation applies irrespective of the nature of the facts justifying dismissal.

In the instant case, the Court of Appeal rejected this view in affirming the trial court’s dismissal with prejudice. As noted in Section I above, the Court of Appeal stated at page 8 of its Opinion “we agree with several other appellate courts that a dismissal with prejudice was not an abuse of discretion in this case.” This conclusion contradicts *Franklin*’s cogent analysis of the discretionary dismissal statutes, and it illustrates the need for this Court’s definitive guidance on their scope and legal effect. Such guidance is particularly necessary on an issue as sensitive and ambiguous as inherent judicial discretion to dismiss an action with prejudice. Without clear direction from this Court regarding the limits, if any, that § 581(b) (4) places on this power, courts will continue to risk abusing their discretion when dismissing cases for lack of prosecution.

CONCLUSION

The issues presented in this petition have important policy implications for all California litigants. Without leadership from this Court, the lower courts will continue to render divergent and erroneous judgments regarding dismissal for lack of prosecution. Such judgments unfairly deprive litigants of access to the courts due to *what should be* avoidable procedural error. *Gonsalves* and its progeny, which includes *Franklin*, have attempted to set clear boundaries for trial court discretion in dismissing actions for lack of prosecution. The

Legislature has effectively codified these boundaries in § 581(b) (4). However, the Court of Appeal's decision demonstrates the judicial confusion that remains regarding a court's power to dismiss an action with prejudice for lack of prosecution. Therefore, the Court should grant review to clarify and ensure uniformity of decision on the issues presented herein for all California litigants.

Dated: Monday, March 09, 2009

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CERTIFICATE OF WORD COUNT

The undersigned Appellant hereby certifies that the word count of the brief, according to the computer program used to prepare the brief is 4,007 words.

Dated: Monday, March 09, 2009

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