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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

QUEST INTERNATIONAL, INC.,	
Plaintiff and Appellant,	G032276
v.	(Super. Ct. No. 01CC02109)
ICODE CORP.,	O P I N I O N
Defendant and Respondent.	

Purported appeal from an order of the Superior Court of Orange County, Dennis S. Choate, Judge. Appeal dismissed.

Ghods Law Firm and Mohammed K. Ghods for Plaintiff and Appellant.

Piper Rudnick, Antony E. Buchignani; Gray Cary Ware & Freidenrich, David F. Gross and Stanley J. Panikowski for Defendant and Respondent.

I. INTRODUCTION

We publish this dismissal of a purported appeal in order to alert the bench and bar to a particularly well-camouflaged trap for the unwary. The trap has been set by the statute which acts as the gatekeeper to the appellate courts in California, section 904.1 of the Code of Civil Procedure, specifically subdivision (a)(3) of section 904.1. That statute governs orders granting motions to dismiss for inconvenient forum.[1]

Here's the trap: Most of the time, *unsigned* minute orders granting a dismissal motion (as happens, for example, when the trial court grants a motion for summary judgment) are not appealable. So adversely affected counsel do not have to worry about the time running on their right to appeal. They can confidently sit back until a formal *signed* order or judgment of dismissal is filed.

Subdivision (a)(3) of section 904.1, however, creates a counterintuitive exception, because it makes even *unsigned* minute orders granting motions to dismiss for inconvenient forum directly appealable. Further, such an order -- *unlike some other appealable orders under section 904.1* -- constitutes a "final judgment" as the term is defined in section 577. But, and here's the real trap -- as a final judgment it cannot be attacked by a motion for reconsideration. In fact, the trial court does not even possess the *authority* to undo or amend it, on its own motion or prompted by a litigant.

These principles will force us, reluctantly, to dismiss this appeal in this most convoluted of cases. Here's a quick synopsis of the facts, which arise out of the complication that in this case there were no less than *two* "reconsiderations" of a defendant's initial motion to dismiss for inconvenient forum:

First came the defendant's motion to dismiss the case based on a forum selection clause requiring any litigation between the parties be conducted in Virginia. The trial court denied that motion. But then, a few weeks later, the trial court -- out of the

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[1] All further statutory references in this opinion will be to the Code of Civil Procedure. All references to any rule will be to the California Rules of Court. All references to any subdivision of a statute or a rule will be obvious from the context.

blue -- reconsidered the matter, changed its mind, and entered an unsigned minute order granting the motion to dismiss.

The disappointed plaintiff soon filed a motion for reconsideration. Then, instead of simply denying the motion, the trial court formally granted the motion to reconsider -- that is, it agreed simply to *reconsider* the matter, not necessarily change its mind. But, after "reconsidering," the trial court re-affirmed its (reconsidered!) decision to grant the motion to dismiss. However, this time it entered not a simple order granting the motion to dismiss, but an order directly "dismissing" case, an order which also specifically required preparation of a formal order of dismissal by defense counsel.

Defense counsel ignored the directive to prepare a formal order, so, eventually (seven and one-half-months later) plaintiff's counsel prepared one himself and submitted it to the court, which the trial judge signed. The notice of appeal in this case was taken some 59 days after *that* particular formal signed notice of appeal, i.e., more than nine months after the initial minute order granting the motion to dismiss for inconvenient forum.[2]

We say "reluctantly" dismiss, because, as anyone who reads this opinion through to the end is about to learn, California's law of appellate jurisdiction is full of fiendishly fine distinctions worthy of the most legalistic of medieval clergy. We have turned this case around like a prism hoping to find the light that might save this appeal. Alas, we have not found it despite any number of quick flashes. On analysis they all turned out to be evanescent.

We are in good company to express such misgivings about the traps and complexity of California's procedure. In a case structurally very much like this one, Justice Tobriner once condemned as "legal pedantry" the dismissal of an appeal where (1) a court clerk told the appellant's counsel on the phone that an order denying his new trial motion had been denied on February 6, (2) the poor attorney had, accordingly,

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[2] The first sentence of appellant's opening brief describes the procedural facts in this case as "unique." But "unique" does not do *these* facts justice. This is the appellate procedural case from hell.

calendared the deadline for filing of the notice of appeal for thirty days from February 6, only (3) to discover to his chagrin that there had been a minute order entered on February 4 denying his motion, and (4) the majority of the Supreme Court would later conclude that it was the minute order of February 4 -- not the formal order of February 6 -- which began the running of the time for appeal. The upshot was that he had filed the actual notice of appeal one day too late. (See *Hollister Convalescent Hosp. Inc. v. Rico* (1975) 15 Cal.3d 660, 677 (dis. opn. of Tobriner, J.).)

Of course, from our point of view as an intermediate appellate court, the most salient lesson to be learned from *Hollister Convalescent* is that the majority of the Supreme Court was quite serious about upholding the prickly rules of appellate procedure, despite Justice Tobriner's eloquent dissent. While this area of the law may indeed, as Justice Tobriner said, entail much in the way of legal pedantry, it is, to paraphrase Churchill, legal pedantry up with which we must put.

As the poor attorney in *Hollister Convalescent* discovered, the fact that some minute orders are appealable when most are not has real world consequences. Counsel for the plaintiff tripped up in exactly the same way here.[3]

II. FACTS

The plaintiff, Quest, is a California firm in the business of selling and repairing computer monitors for the health care industry. Quest hired Cybercore to provide certain accounting software for Quest, and Cybercore was taken over by Icode, a Virginia software firm, who allegedly assumed all obligations of Cybercore. Cybercore,

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[3] In Shakespeare's Henry V, there is an early scene where the Archbishop of Canterbury delivers a long, tedious and virtually incomprehensible speech to the new king (incomprehensible unless you have the text in front of you and you've taken a graduate seminar on the law of royal succession in medieval France) on a topic that even many lawyers would find arcane, choice of law. (The archbishop of Canterbury basically rebuts the idea that the "Salique" law of *Germany* (sometimes also spelt "Salic" or "Sallic"), which bars any female succession at all, applies to preclude *English* Henry's claim to the *French* throne). But upon that fine, pedantic legal distinction would "awake" the "sleeping sword of war," and, as a consequence, later in the play, 10,000 French knights and soldiers would get slaughtered in the mud at Agincourt. In the case before us, by contrast, the worst thing that can happen as a result of the fine pedantic distinctions on which this case turns is that a case which should be otherwise considered by a court in one state will be considered in another, which is not quite the same thing as dying in battle from a gale of Welsh arrows.

however, allegedly failed to provide satisfactory accounting software for Quest, so Quest sued Icode and Cybercore. This appeal concerns only Quest's claims against Icode.

Icode made a motion to dismiss the case on the theory that the licensing agreement by which Quest uses Icode software requires that the "exclusive venue for any litigation" between the parties would be in Virginia.

The motion to dismiss was heard June 27, 2002. The judge denied the motion under the rationale that the licensing agreement was not controlling.

The hearing generated an unsigned minute order stating that the "motion to dismiss is denied without prejudice for counsel to state new facts pursuant to 1008 within 45 days." Quest also filed a notice of ruling the next day. There never was, however, a formal order embodying the June 27 denial of the motion.

But two-and-one half weeks later on July 15, 2002, the judge, on his own, reversed. A minute order was filed, specifically stating that "Defendant Icode's motion to dismiss for improper venue is granted."

Plaintiff Quest filed a motion for reconsideration two weeks later, on July 30, 2002. Ironically, Quest did not present any "new or different facts, circumstances, or law" that had developed in the interim. (See Code Civ. Proc., § 1008, subd. (a).) Rather, Quest argued that the trial judge *himself* had acted outside of his jurisdiction in, sua sponte, reconsidering his prior decision without new circumstances, facts or law in (purported) violation of section 1008. (See *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 383-386 for a discussion of the line of cases supporting the view that compliance with section 1008 is the *exclusive* basis for the reconsideration of an *interim* order.)

The motion for reconsideration was heard August 29, 2002. The court opened the hearing by granting the motion for reconsideration, and then entertained oral argument, most of which centered on the issue of whether Quest had ever really agreed to the licensing contract that provided for Virginia venue. At the end, after complimenting both counsel for their "excellent oral presentation" the court concluded that the case should still be dismissed because Quest had agreed to the forum selection provision in the

licensing agreement. At the end of the hearing, perhaps adumbrating difficulties yet to come, counsel for Quest remarked that the route to the Court of Appeal looked "a little murky." (As the reader will gather from the pages of analysis ahead, counsel was spot on accurate.)

The unsigned minute order from the hearing generated by the clerk on August 29, 2002, provided that the motion to reconsider was granted, but the case was still "ordered dismissed." The order also provided that counsel for the prevailing party, i.e., Icode, was to prepare a formal order and "dispositive judgment of dismissal."[4]

And there the matter sat. And presumably would have kept on sitting unless counsel for Quest would have done something about it. Counsel for Icode, the "prevailing party" who was supposed to prepare a formal order and judgment, did no such thing -- they were apparently quite content to ignore the trial judge's directive and let the case languish in the limbo between the trial and appellate court.

Eventually, though, counsel for Quest caught on to the tactic. And so, on or just before March 14, 2003 -- more than six months after the August 29, 2002 hearing and minute order -- counsel for Quest, the *non*-prevailing party, submitted a formal order of dismissal, which was signed that day by the trial judge. On May 13, 2003 -- just short of sixty days after the filing of the formal order of dismissal -- Quest filed this appeal from that particular order. This court on its own raised the question of lack of jurisdiction in an order filed two weeks later, and pursuant to that order the parties submitted briefing on the issue.

For reader convenience, we will now list the relevant "documents" (we use that phrase so we do not prematurely characterize them) to which we will refer in the main body of our discussion on appealability:

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[4] Here is the entirety of the minute order (but changed from usual all-cap format typically used by Orange County Superior Court clerks): "Motion by plaintiff to reconsider granted. Court heard arguments from counsel. A copy of Exhibit #D to software purchase was marked for identification as plaintiff's exhibit #1. A copy of end user license agreement was marked for identification as plaintiff's exhibit #2. Court ruled case is ordered dismissed. Matter should be transferred to Virginia. Counsel for prevailing party to submit proposed order and dispositive judgment of dismissal for courts [*sic*] signature. Incorporating the ruling by the court this date. All pending hearing dates are ordered vacated."

-- The June 27 unsigned minute order denying the motion to dismiss.

-- The July 15 unsigned minute order granting the motion to dismiss.

-- The August 29 granting of the motion for reconsideration.

-- The August 29 unsigned minute order dismissing the case.

-- The March 14, 2003 formal signed order of dismissal.

-- The May 13, 2003 notice of appeal.

III. DISCUSSION

We may begin our analysis as things stood after the June 27 unsigned minute order denying the motion to dismiss. At that point, the case was in the same posture that any other case would be if a motion to dismiss were denied -- headed for trial. Section 904.1, subdivision (a)(3) does *not* make orders denying motions to dismiss for inconvenient forum appealable; the statute only refers to orders *granting* such motions. And thus there was no need to worry that the time to file a notice of appeal had begun to run; it clearly hadn't. (See *Samuel v. Stevedoring Services* (1994) 24 Cal.App.4th 414, 417 [denial of motion to dismiss held not appealable]; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 118, p. 182 [orders denying motions for dismissal are nonappealable].)

A. *The Trial Court Had the Inherent Power to Correct the June 27 Denial of the Motion to Dismiss*

But with the trial court's sua sponte reconsideration and entry of an unsigned minute order of July 15 explicitly granting the motion to dismiss, things begin to become "murky" indeed. With that action, the case, like Alice, fell into a rabbit hole -- specifically one dug by the Legislature in 1992 when it changed the reconsideration statute, section 1008, to make compliance with it expressly jurisdictional.

Section 1008 had provided prior to 1992, indeed as it still does, that a motion for reconsideration must be supported by new facts. (See *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1008, 1012-1013.) Moreover, making things even tougher for counsel looking to change a trial judge's mind, the case

law had interpreted the statute to require that there had to be a good explanation why the new fact had not previously been brought to the court's attention. (*Id*. at p. 1013.) Even so, the requirement for new facts (circumstances or law) didn't prevent litigants from bringing no-new-facts reconsideration motions to judges anyway, on the theory that the judge simply got it wrong the first time and should have a second chance to see the light. By 1992, it seemed that section 1008 was being honored more in the breach than in the observance.

The 1992 amendments were clearly intended to protect trial judges from such pestering. The amendments may be accurately characterized as "anti-whiner" legislation: "But yore awn-ner, you didn't fully consider the [fill-in-the-blank argument]." Clearly, the Legislature wanted to protect trial judges from being *bothered* by knee-jerk motions for reconsideration by litigants who felt they have nothing to lose by simply trying to wear down the judge into changing his or her mind. (See *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 688-689 [purpose of 1992 amendments was to conserve judicial resources by reducing the sheer number of reconsideration motions].)[5] The telltale giveaway was the inclusion of new provisions punishing violation of the section "with sanctions as allowed by Section 128.7," in *addition* to the (unwieldy) contempt remedy that was already in the statute.

But the Legislature also threw the judiciary, both trial and appellate, a googly in the process. It made section 1008 *jurisdictional*.[6] Now section 1008 became a sticky wicket indeed. Read literally, section 1008 meant that even *trial judges themselves* could not reconsider anything unless a litigant had brought a reconsideration motion in

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[5] But see Luke 18:1-5 [pesky litigant lauded for perseverance in obtaining relief previously denied her]. In contrast with the famous parable, in section 1008 our Legislature has impliedly expressed a somewhat higher opinion of the good faith desire of this state's trial judges to get the result right the first time.

[6] Code of Civil Procedure section 1008, subdivision (e) reads: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

compliance with the statute's requirements of "new or different facts, circumstances or law." (See § 1008, subd. (a).)

A series of (relatively) early cases in the process of interpreting the new amendments took a hard line in light of the newly enacted jurisdictional requirement. (*Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485; *Garcia v. Hejmadi, supra,* 58 Cal.App.4th 674; *Baldwin v. Home Sav.* (1997) 59 Cal.App.4th 1192; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658.)

None of these cases, however, considered the issue of whether a trial court might have *inherent constitutional authority* to correct an interim ruling independent of section 1008. All focused on the task at hand, which was to ascertain whether the new amendments had been complied with. A footnote in the *Baldwin* case, though, recognized that the absolutist anti-reconsideration import of the statute might actually *contradict* the statute's goal of conserving judicial resources: "We are not unmindful of the awkward consequences likely to flow from this holding, which will in some instances bar trial judges from correcting rulings belatedly shown to be erroneous. Judicial inefficiencies may also result from the need for an appeal that would not have been required if correction could have been made by a trial court willing to do so." Even so, the court concluded, "Given the jurisdictional nature of the present statute, these new problems are not amenable to a judicial solution." (*Baldwin, supra,* 59 Cal.App.4th at p. 1200, fn. 10.)

Not amenable to a judicial solution? Yes and no. Perhaps the "new problems" were not amenable to a "judicial" qua *judicial* solution (if by that the *Baldwin* court meant how a court might *interpret* the statute), but other courts were at that very moment articulating a *constitutional* solution to the "[j]udicial inefficiencies" to which the *Baldwin* footnote alluded. A whole new set of cases was about to hold that trial courts had a *constitutionally derived* inherent power to correct interim rulings as part of their core judicial power, a power that could not be abridged by statute.

In fact, with *Pazderka*, the absolutist no-reconsideration line of cases petered out in the published decisions -- it came to a kind of evolutionary dead-end. No

published appellate opinion since *Pazderka* has been willing to say that trial courts *don't* have a constitutionally inherent power to correct *interim* rulings.

Since *Pazderka*, in fact, the appellate courts have been unanimous in concluding that trial courts *do* have the constitutionally inherent power to correct their interim rulings. (See *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1157 ; *Remsen v. Lavacot* (2001) 87 Cal.App.4th 421; *Blake v. Ecker* (2001) 93 Cal.App.4th 728, 739, fn. 10; *Kollander Const. Inc. v. Superior Court* (2002) 98 Cal.App.4th 304; *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172; *Wozniak v. Lucrutz* (2002) 102 Cal.App.4th 1031; *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368; *Scott Co. of California v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197; *Abassi v. Welke* (2004) 118 Cal.App.4th 1353; see also *Bernstein v. Consolidated American Ins. Co.* (1995) 37 Cal.App.4th 763, 774 [not confronting *Morite* but stating power existed], disapproved on other grounds *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn. 13; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450 [relying on *Bernstein* and also not confronting *Morite*]; *People v. Castello* (1998) 65 Cal.App.4th 1242 [while dicta, because section 1008 does not apply to criminal cases, clearly stating that civil courts have inherent power to correct interim rulings].)

While at least one court has attempted to surgically separate motions for reconsideration brought by litigants (not allowed) from reconsiderations initiated sua sponte by the trial court (allowed) (see *Kerns, supra*, 106 Cal.App.4th at p. 391 [litigant-brought consideration motions still jurisdictionally barred]), it appears safe to say that the consensus emergent in the Court of Appeal is that *at the very least* sua sponte reconsiderations of interim orders by trial courts are valid. (See *id*. at p. 388 [while putting litigant inspired reconsiderations in another category, stating "To the extent section 1008 bars trial courts from sua sponte reconsidering their own interim orders and decisions, it clearly hinders the core power of the judiciary to decide and resolve controversies between litigants."].)

A dispositive Supreme Court decision on the controversy about whether the inherent power of trial courts extends to sua sponte reconsiderations of interim orders (the case at bar is perfectly on point) may be forthcoming.[7] In the interim, however, we must decide this case. And in that regard, we have examined the origins of the inherent power doctrine, and have concluded, at least insofar as it extends at least to sua sponte reconsiderations, that it is founded on the rock of a substantial body of Supreme Court jurisprudence -- a body not considered by the *Morite-Garcia-Baldwin-Pazderka* line of cases.

The oldest geological layer that we have unearthed of this Supreme Court jurisprudence is found in *De La Beckwith v. Superior Court of Colusa County* (1905) 146 Cal. 496, a case that first sounded the theme that preclusion of reconsideration of interim orders would cripple the judiciary's ability to do its basic job, which is resolve cases. As against the argument that an order sustaining a demurrer (albeit with leave to amend) could not be changed as "law of the case," our high court rejected the argument, focusing on the impediment to the core purpose of the trial court to efficiently *resolve* the legal proceeding before it: "'We are not prepared to hold that if, during the trial of the issues of an action a court becomes convinced of error, he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain.'" *De La Beckwith v. Superior Court, supra,* 146 Cal. at p. 500, quoting *Richman v. Board of Sup'rs Muscatine County* (1889) 77 Iowa 513, 524.)

Moving up in the strata, the theme of a certain fundamental efficiency next sounded in *Millholen v. Riley* (1930) 211 Cal. 29, a case involving not the process of case decision-making but the administrative operation of the court. (A judicial secretary was suing the state controller to get paid.) Though a step removed from actual case resolution, the high court recognized the existence of certain core inherent powers: "A court set up by the Constitution has within it the power of self-preservation, indeed, the

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[7] On September 15, 2004, the Supreme Court granted review in *Le Francois v. Goel*, S126630, which the high court may use to resolve the matter.

power to remove all obstructions to its successful and convenient operation. . . . [T]he legislature may at all times aid the courts and may even regulate their operation *so long as their efficiency is not thereby impaired*." (*Id*. at pp. 33-34, emphasis added.)

Next came *Harth v. Ten Eyck* (1941) 16 Cal.2d 829, 834, which held that an order of dismissal of one the defendants (who allegedly reneged on the deal that got him dismissed) could be made *without* conformity with section 473, because the court still retained a residual "power to reexamine the evidence and arrive at a different conclusion, if it thought the ends of justice would be best served thereby."

If *De La Beckwith*, *Millholen* and *Harth* had only implicitly endorsed an inherent power to change interim rulings, that power became quite explicit indeed in later Supreme Court cases. Any doubt about the *constitutional* nature of the inherent power of trial courts to correct interim rulings was eliminated in *Walker v. Superior Court* (1991) 53 Cal.3d 257, involving a statute, section 396, governing the (then relevant) transfer of cases from superior to municipal courts. Our high court held that the inherent power of courts "'to insure the orderly administration of justice'" (*id*. at p. 266, quoting *Hays v. Superior Court in and for the County of Los Angeles* (1940) 16 Cal.2d 260, 264) meant that section 396 should not be construed in such a way as to "substantially impair[] the efficiency" of the trial court. (*Id*. at p. 267.) Thus it interpreted the statute to compel transfer not *only* when the absence of jurisdiction appeared from the complaint, but when "it becomes clear that the matter will 'necessarily' result in a verdict below the superior court jurisdictional amount." (*Id*. at p. 262.) Specifically noting the trial court (which had itself appeared in the case) had promulgated local rules under which a pretrial hearing was held in each case to determine whether there should be a transfer to municipal court, the court considered this a "necessary and efficient administrative tool without which it would be less able to effectively dispense justice in the cases that are properly before it." (*Id*. at p. 267.) The Supreme Court also said that a trial "court has inherent authority to conduct a 'hearing' at any time in order to obtain information about whether it should exercise its transfer authority." Thus the high court construed section 396 to allow courts to conduct such a pretrial hearing. (*Id*. at p. 267-268.)

And most recently, in *People v. Bunn* (2002) 27 Cal.4th 1, 14-15, the Supreme Court observed, albeit in holding that separation of powers did not preclude prosecutors from refiling sex crime charges, that the "'core'" of the judiciary's powers was the resolution of "'specific controversies' between the parties."

The appellate courts, building on this bedrock of Supreme Court jurisprudence, have thus reacted in (understandable) horror to the potential in section 1008, subdivision (e) to curb reconsideration of interim orders. In a sense they have told the Legislature, "thanks for the compliment, but we judges aren't as infallible as you must think we are -- we get those interim orders wrong all the time." (See *People v. Castello, supra,* 65 Cal.App.4th at p. 1249 ["A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors . . . ."]; *Case, supra*, 99 Cal.App.4th at p. 185 ["We are hard pressed to conceive of a restriction that goes more directly to the heart of a court's constitutionally mandated functions." Under the disappointed plaintiff's "reading, if a court realizes its mistake 10 minutes or 10 days later, and no matter how obvious its error or how draconian the effects of its misstep"]; see also *Kollander Const., supra,* 98 Cal.App.4th at p. 307 [using *Castello's* infallibility language to make the point that to the degree section 1008 purported to "deprive trial courts of their inherent power to reconsider interim rulings," it was unconstitutional]; *Abassi, supra,* 118 Cal.App.4th at p. 1359 [second summary judgment motion could be brought and granted after a first was denied, largely quoting from *Case* to the effect that section 1008 "usurp[s] an essential function of the courts"].) The issue was drawn in particularly stark relief in *Case*, because there the errant trial judge would later confess the "borderline stupidity" of his previous ruling. (See *Case, supra*, 99 Cal.App.4th at p. 178.)

In short, the idea that trial courts would be under the law of the Medes and Persians (i.e., a rule, once uttered, can never be retracted)[8] has been universally found to be intolerable when it has been actually subjected to judicial scrutiny. In any event, we must conclude that the better rule on the state of the law as it exists today is that the trial court in this case certainly had the authority to, on its own, reconsider the motion to dismiss for inconvenient forum and enter a new order granting the motion. But now we have to ask, what was the effect of the new order?

B. *The July 15 Unsigned Minute Order Granting the Motion to Dismiss Because of the Forum Selection Clause Was Appealable*

Section 904.1 lists the various types of "documents" (again, to use the neutral word) *from which* a party aggrieved by a decision of the trial court may appeal.[9] Besides final judgments (see § 904.1, subd. (a)(1)), section 904.1 states that an appeal may be taken "From an order granting a motion . . . to stay or dismiss the action on the ground of inconvenient forum." (§ 904.1, subd. (a)(3).) Importantly for this opinion, the Legislature has defined "order" in section 1003 to include *mere directions* of a judge in writing -- there is no need that an "order" be actually *signed* by a judge. (See § 1003 ["Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order."]; see also *Passavanti v. Williams* (1990) 225

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[8] See Daniel 6:8. The law of the Medes and Persians is most often used by judges to describe or attack some sort of immutability in the legal process. But it has been used specifically in the reconsideration context too, where it best fits. (See *Oak Forest, Inc. v. U. S.* (Cl.Ct. 1992) 26 Cl.Ct. 1397, 1405 ["Decrees of the United States Claims Court are unlike 'the laws of the Medes and Persians, which altereth not.' They may be reconsidered."].)

[9] Perhaps the single most basic concept in appellate procedure is that in California the only way that a litigant aggrieved by a decision of the trial court can appeal is to appeal *from* something. The operative word in the gatekeeper statute, section 904.1, is "from." The statute is nothing more than a list of the documents "from which" an appeal may be taken. While this may seem like sandbox appellate procedure 101 to most of our readers, it is amazing that appellate courts throughout the state still get briefs (and not just from fumbling pro pers) which speak in terms of "granting" or "denying" the appeal. Properly speaking, we don't do that in California: If you file a timely notice of appeal *from* an appealable document, the appellate court will either *affirm* or *dismiss* that document (or some permutation of the two). If you are too late, the appellate court will *dismiss* your appeal. This terminology is dictated by California's system of appeals as a matter of right. For a discussion of an alternative system in which at least some appeals would be discretionary (in which case "grant" and "deny" might indeed be accurate words), see Rylaarsdam, *The Crisis of Volume in California's Appellate Courts: A Reaction to Justice in the Balance 2020 and a Proposal to Reduce the Number of Nonmeritorious Appeals* (1998) 32 Loyola L.A. L. Rev. 63, 81-99.

Cal.App.3d 1602, 1605 ["Since an application for an order is a motion . . . another way of defining an order is the court's written ruling on a motion."].)

A preliminary question first arises, however: Was the July 15 unsigned minute order granting the motion to dismiss because of the forum selection clause really "a motion to stay or dismiss the action on the ground of inconvenient forum" within the meaning of section 904.1, subdivision (a)(3)?

Intuitively, one might conclude no. After all, the traditional motion to dismiss because a case was brought in an inconvenient forum is tested by the trial court's weighing of some 25 factors. (See *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1675; see also *Berg v. MTC Electronics Technologies* (1998) 61 Cal.App.4th 349, 358 [noting that the issue is tested by application of many factors].) By contrast, mandatory forum selection clauses are given presumptive effect, subject to defeat if unfair or unreasonable. (See *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 494-496; *Berg, supra*, 61 Cal.App.4th at p. 358.)

However, though the substantive analysis (and review thereof) for a traditional motion to dismiss for inconvenient forum and a motion based on a mandatory forum selection clause is different, as our Supreme Court explained in *Smith, Valentino & Smith*, the legal authority for the two kinds of motions to dismiss remains the same -- section 410.30, subdivision (a), which gives a trial court discretionary authority to dismiss for inconvenient forum.[10] In analyzing a motion to dismiss based on a forum selection clause, the *Smith, Valentino & Smith* court was quite clear that a motion based on a mandatory forum selection clause was still within the broad fabric of a trial court's *discretion* as to choice of forums afforded by section 410.30, subdivision (a): "While it is true that the parties may not deprive courts of their jurisdiction over causes by private agreement [citation], it is readily apparent that courts possess discretion to decline to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different

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[10] The statute provides: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

forum." (*Smith, Valentino & Smith*, *supra*, 17 Cal.3d at p. 495.) The evident theory was that the discretionary authority conferred by section 410.30 *subsumes* the mandatory forum selection clause analysis -- if the parties have previously agreed on a choice of forums, then the trial court has the *discretion* to grant a motion for inconvenient forum, but the *scope* of the discretion not to grant the motion may be itself restricted by the clause.[11]

Since Icode's motion was a motion to dismiss for inconvenient forum, it is harder to imagine a tighter semantic fit between statutory language and the facts in this case. We have an "order" and we have a motion to "dismiss on the ground of inconvenient forum" and the order explicitly grants that motion (as distinct from purporting to directly "dismiss" the case). Thus we are forced to conclude that the July 15 order was appealable and at that point the appellate clock began running.

C. *But the July 15 Minute Order*
Could Not Be the Object of a
Motion for Reconsideration
Because It Was a Final Judgment

Now things are about to become even curiouser. Did the August 29 formal grant of the motion to reconsider the July 15 granting of the motion to dismiss impliedly *vacate* the appealable order of July 15, such that the trial court was free to enter a new order, even if the new order was, in substance, the same order as before? Or, given the appealable and seemingly dispositive nature of the July 15 order, did the trial court even have the *authority* to formally reconsider its July 15 order in the first place? As we now discover, if the trial court's sua sponte order of July 15 plunged the case into a rabbit hole, then the trial court's formal grant of reconsideration of that order on August 29 was

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[11] Justice Mosk thought the theory a tad strained, and remarked on its counterintuitive nature in his dissent: He said the six-justice majority in *Smith, Valentino & Smith* "attempt to carve a finely honed dichotomy between a court deprived of jurisdiction by agreement and a court declining to exercise jurisdiction because of an agreement." (*Smith, Valentino & Smith, supra*, 17 Cal.3d at p. 498 (dis. opn. of Mosk, J.).)

the equivalent of Alice finding herself suddenly shrunken and swimming in a pool of her own full-sized tears.

1. The Rule Against Correction of Final Judgments Except by Formally Prescribed Procedures

Here's the problem: Quite independent of the *Morite-Garcia-Baldwin-Pazderka* line of cases precluding reconsideration of *interim* orders, and also independent of the *Darling-Remsen-Kollander-Case-Wozniak-Kerns-Scott-Abassi* line allowing reconsideration of interim orders, there is a body of authority which holds that there can be no reconsideration, *even by the trial court on its own*, of "final judgments," except as prescribed by law. (See *Passavanti v. Williams, supra,* 225 Cal.App.3d 1602.) The theory is that a trial court may only correct its *judgment* -- as distinct from non-judgment appealable orders -- by prescribed "limited procedures" which do *not* include motions for reconsideration. (See *id.* at p. 1606 ["Once judgment has been entered, however, the court may not reconsider it and loses its *unrestricted* power to change the judgment. It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment."].) The difference between "interim order" and "final judgment" it turns out is the difference between lightening and lightening bug (to use Mark Twain's description of the difference between the right word and almost the right word).

We will call this the "*Passavanti* rule," but that is a bit of a misnomer because the rule descends from an ancient lineage that remains quite potent to this present day.

The modern *Passavanti* rule derives from the old common law rule that trial courts could not amend judgments after adjournment of the term in which they were rendered. (See *Wiggin v. Superior Court* (1886) 68 Cal. 398, 401-402 [explaining that rule survived abolishment of terms of court and announcing "Where the judgment of a court has been deliberately exercised in a cause, and a final result reached as a conclusion thereof, there are good reasons why it should not be disturbed except by the formal methods prescribed by statute"]; see also *Bank of U. S. v. Moss* (1848) 47 U.S. 31, 34

["The like general rule is settled in England. During the same term, judgments are amendable at common law, -- being then in paper, *in fieri*, in the breast of the court. Afterwards, they are amendable under the Statutes of Amendments or Jeofails."].)

It is therefore not surprising -- perhaps also because it's only human to have second thoughts about decisions -- that the *Passavanti* rule is one of the oldest procedural rules one finds in California law, having first been applied by our high court in 1852. (*Baldwin v. Kramer* (1852) 2 Cal. 582, 583; see also *Carpentier v. Hart* (1855) 5 Cal. 406.)

The basic principle easily survived the abolition of "terms" of trial courts and continued as a foundational rule in the case law emanating from our state's highest court. (E.g., *Egan v. Egan* (1891) 90 Cal. 15, 21 ["judicial errors can be remedied only through a motion for a new trial, or on appeal"]; *Byrne v. Hoag* (1897) 116 Cal. 1, 5 ["It is quite clear that the court had no jurisdiction to enter this second judgment."]; *Lankton v. Superior Court* (1936) 5 Cal.2d 694, 696 ["if error was committed in rendering the judgment, it was a judicial error which could be remedied only by appeal or motion for a new trial"].)

The underlying basis for the rule, as one might guess, is the need for stability of judgments. No legal system is worth having that does not deliver stable judgments, subject to attack only by certain well-delineated procedures established by law. From the earliest days in the California common law, courts have explicitly recognized that allowing trial courts to change their judgments (again, judgments as distinct from interim orders) would work counter to that needed stability. (See *Baldwin v. Kramer, supra*, 2 Cal. at p. 583 ["There must be a time when the rights of the parties are to be considered as determined, and for litigation to cease; and for this purpose the law has wisely fixed the rule here indicated."]; *Carpentier, supra*, 5 Cal. at p. 407 ["The safety and tranquility of parties require that their interest should not be constantly suspended, and their repose liable to be disturbed at any moment by the discretion of the Court."]; *Byrne, supra*, 116 Cal. at pp. 5-6 ["certainty and stability" are "the main characteristics of final judgments"].)

One of the best explanations why reconsideration of final judgments by the trial court undermines stability is to be found in a case directly cited by our Supreme Court (see *Egan, supra*, 90 Cal. at p. 21), the post-Civil War Wisconsin decision, *Aetna Life Ins. Co. v. McCormick* (1866) 20 Wis. 265, 1866 WL 1300. In essence, as the *Aetna* decision noted, unless attacks on final judgment are restricted to clearly prescribed procedures, trial courts might endlessly flip-flop on their decisions: "And the reason is, that there would never be an end of litigation, if a court could one term render a judgment, and the next change its opinions either on the law or evidence, and set aside the judgment; for at the next term, it might conclude its first judgment was right, and reverse the last, and so on." (*Aetna*, 1866 WL at p. 2.)

In the case before us, for example, if the court had inherent authority to undo what we have now established was its final judgment of July 15 with its formal grant of reconsideration of August 29, there would have been nothing to stand in the way of the court granting reconsideration yet again (presumably via a "renewal" motion, see section 1008, subdivision (b)) after a final judgment was entered, and, as the Wisconsin *Aetna* case adumbrated, "so on." In fact, one can imagine a trial court judge who was so wishy-washy that a case might flounder around indefinitely in the trial court as the judge was swept to and fro by the last party to bring a reconsideration motion. And that is just as intolerable as trying to prevent a trial judge from correcting interim orders: A trial court, as Eliot might have said, is not Prince Hamlet nor was meant to be.

Now, it is true that many of the earliest cases in this area were concerned with judgments on which the time to appeal had already clearly run. (E.g., *Egan, supra*, 90 Cal. 15; *Byrne, supra*, 116 Cal. 1; *Howell v. Howell* (1894) 104 Cal. 45; *O'Brien v. O'Brien* (1899) 124 Cal. 422; *Drinkhouse v. Van Ness* (1927) 202 Cal. 359, 365 ["This case holds the record in this jurisdiction for Rip Van Winkle litigation."].) But no case of which we are aware has ever attempted to frame the rule in such a way as to exempt final judgments on which the time to appeal has *yet* to run. And it is certainly clear that by the 1930s the Supreme Court was articulating the rule so as to clearly include within it final judgments on which the time had not yet run: "While a court has power to correct

mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made, which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend for judicial error." (*Stevens v. Superior Court in and for San Joaquin County* (1936) 7 Cal.2d 110, 112; accord, *Egan, supra*, 90 Cal. at p. 21 ["judicial errors can be remedied only through a motion for a new trial, or on appeal"].)[12]

Of course, there can be no question that *today* the rule applies to final judgments on which the time to appeal has not yet run. (See *Passavanti, supra*, 225 Cal.App.3d 1602 [reconsideration motion filed within three weeks of final judgment]; *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545 [reconsideration motion, ultimately held to be "invalid" because it was "filed after the judgment was signed" was made within one week of signing of judgment]; *Eddy v. Sharp* (1988) 199 Cal.App.3d 858 [reconsideration motion made quickly enough so that appeal could be taken from original judgment].)[13]

Ramon v. Aerospace Corp. (1996) 50 Cal.App.4th 1233 nicely illustrates where the *Passavanti* no-correction-final judgment rule must lead us. There, a formal judgment was filed after summary judgment was granted, notice of entry of the judgment was served, a motion for reconsideration was brought, the court *granted* the motion for reconsideration, reconsidered the matter, but still "re-affirmed the grant of summary judgment," reflected in an order re-affirming the grant of summary judgment. (See

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[12] By the same token Witkin does not state the rule to differentiate judgments that we may describe as "really, really final" by virtue of the time for appeal having elapsed, and judgments that are only "final" in the sense that they qualify to *be* appealed. (See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 67, p. 594 ["*Judicial error*, i.e., an erroneous decision, can only be rectified by the regular procedures for attack on judgment: motion for a new trial, motion to vacate judgment, appeal, or an independent action in equity."].) The rule against amendment or vacation absent prescribed forms of law clearly includes both.

[13] To these authorities let us add this thought: As the 1866 Wisconsin *Aetna* case shows, there is, if anything, even *more* reason to preclude trial courts from vacating or amending final judgments *before* the time to appeal has run (except by the procedures clearly prescribed by law) than there is as regards the "really really final" judgments on which the appellate time period has already run. In the latter case, the judgment will have become res judicata and any attempt to correct judicial error in that judgment will fairly shout the violation of the principle of res judicata from the rooftops. In the former case, as we have explained above, a trial court that continually dithered over the matter could whipsaw the parties by a series of judgments and vacations of judgments via reconsideration motions and there might never be a final judgment that allowed one of the parties to make it to the Court of Appeal.

Ramon, supra, 50 Cal.App.4th at p. 1235.) Relying on *Passavanti* (though it just as easily could have relied on Supreme Court authority as well, e.g., *Stevens*, *supra*, 7 Cal.2d at p. 112), the court in *Ramon* concluded that after entry of the final judgment, the trial court had no further power to rule on a motion for reconsideration. (See *Ramon, supra*, 50 Cal.App.4th at p. 1236, quoting *Passavanti*, *supra*, 225 Cal.App.3d at p. 1606, original emphasis.)[14] Following through with the idea of the powerlessness of the trial court to rule on a reconsideration motion after a final judgment, the *Ramon* court also observed that "if the trial court has *no power* to rule on a reconsideration motion after judgment, such a motion can have no effect on the period within which to file a notice of appeal." (*Ramon, supra*, 50 Cal.App.4th at p. 1238.)

2. The Nature of a Final Judgment for Purposes of the Rule

So the question for us is, was the July 15 unsigned minute order granting the motion to dismiss for inconvenient forum really a "final" judgment such that, under *Ramon*, *Passavanti*, *Stevens* and the rest, it long since became final under the facts of this case? If so, the time to appeal -- 180 days at the outside (see rules 2(a)(3) and 3(d)(3)) -- ran in mid-January 2003, well before the actual notice of appeal in May.

A "judgment," as *Passavanti* explained, tracking the language of the relevant statute (§ 577), is a "final determination of the rights of the parties in an action or proceeding." (See *Passavanti, supra*, 225 Cal.App.3d at p. 1605, citing § 577 [lifting identical language from statute] & § 1064 ["A judgment in a special proceeding is the final determination of the rights of the parties therein."].)

Appealable orders, to the degree that they can be meaningfully differentiated from full-fledged judgments, do *not* finally determine the rights of the parties in the particular proceeding. For example, orders appealable by way of the collateral matter exception (see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal § 60, p.

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[14] This particular formulation of the rule appears to have been ultimately derived from *Passavanti's* use of language from 7 Witkin, California Procedure (3d ed. 1985) Judgments, § 66, p. 500. (The same language now appears in the latest edition, still at volume 7, in Judgments, § 67, p. 594.)

116 [collateral matter is *not* "important and essential to the correct determination of the main issue"]), by definition involve disputes that are fundamentally *separable* from the main event. And many of the "appealable orders" (as distinct from a "final judgment") that one finds in section 904.1 also concern matters that are, by their nature, interlocutory and not dispositive of the rights of the parties in the proceeding. With orders granting new trials (§ 904.1, subd. (a)(4)), or discharging an attachment (§ 904.1, subd. (a)(5)) or granting an injunction (§ 904.1, subd. (a)(6)), or appointing a receiver (§ 904.1, subd. (a)(7)) it is clear that there are still miles to go before the case can be put to rest.

But other appealable orders listed in section 904.1 clearly fit section 577's definition of "judgment" as a final determination of the rights of the parties. Thus there is nothing left to do but appeal (or execute) after an order made after a final judgment (§ 904.1, subd.(a)(2)), or after an order denying a motion for judgment notwithstanding the verdict, and, of course -- and here's the killer for this case -- an order granting a motion to dismiss for inconvenient forum.

Indeed, it is hard to conceive how the July 15 minute order granting the motion for dismissal on the ground of the forum selection clause could *not* be considered "final determination of the rights of the parties in an action or proceeding" under the *Passavanti* rule and section 577. It fits the statutory definition of judgment exactly. The file could have been closed right there, with the July 15 order as the last document. (See *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304 [test for finality for purposes of appeal is whether there is "nothing left to be done but to enforce by execution what has been determined"].) The next stop would have been either a notice of appeal in the California court, a complaint in a Virginia court, or, if there was no appeal and no desire to litigate the claim in Virginia, nothing -- the clerk could box the case up for the dead files.

Even more conclusively, a formal document denominated "judgment" would not only have been superfluous in light of the *immediate appealability* of the July 15 order, such a formal document would necessarily have been *void*. There can only be one final judgment in a case. (See *Passavanti, supra*, 225 Cal.App.3d at p. 1605 ["while

there may be numerous orders made throughout a proceeding, there is only one judgment"].) Since we know the July 15 order was appealable, a formal signed "judgment" following it would have been a nullity, lest Quest have had *two* appeals in which it could attack the same decision, a result which is contrary to the whole appellate scheme that seeks to avoid the piecemeal appeals. (Cf. *id*. at p. 1606.)

3. Three Counterarguments:

None Persuasive

Our conclusion has drastic consequences for Quest's appeal. We test our conclusion by analyzing it in terms of the strongest arguments we can think of to refute it.[15] There are three.

First is an argument from statutory construction: It might be asserted that an order granting a motion to dismiss for inconvenient forum is not really a "final" judgment, subject to the venerable rule of no-correction-of-judicial-error-after-entry-of-judgment-except-as-otherwise-prescribed-by-law. Rather, an order granting a motion to dismiss for inconvenient forum is merely an "appealable order" because such an order is mentioned separately from final judgments in section 904.1. That is, the Legislature is not presumed to put surplus words in statutes. If possible, courts should construe words that might otherwise be surplus to mean something *in addition* to the rest of the text. (E.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 302 ["Statutes, whether enacted by the people or the Legislature, will be construed so as to eliminate surplusage."]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778 ["When two statutes touch upon a common subject, they are to be construed in reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.'"].) Since "final judgments" for purposes of the *Passavanti* rule are *already* in section 904.1 (specifically subdivision (a)(1)), surely if the Legislature considered orders granting motions to dismiss on the ground of inconvenient forum -- appealable as they are -- to be

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[15] What we have already said subsumes the totality of Quest's own argument on the issue, which is simply that nothing was appealable until the March 14 order. Section 904.1, subdivision (a)(3), conclusively refutes that point; the statute was simply ignored (or perhaps was simply missed) in Quest's letter brief.

"final judgments," the Legislature would have seen no need to *specifically mention* such orders later on in the statute, in subdivision (a)(3).

No, that doesn't work. The argument, when subjected to analysis, proves to be a tautology. If section 904.1 had *not* explicitly provided that mere "orders" granting motions to dismiss for inconvenient forum are appealable, lawyers and judges would otherwise conclude that they are *not* appealable. Motions to dismiss for inconvenient forum would thus be in the same category as demurrers and summary judgment motions: The aggrieved party would have no *right* of appeal based on an unsigned minute order granting the motion; rather, a formal signed judgment of dismissal would be required for that right. (See Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003), ¶ 2:69.1 ["an order granting summary judgment is not itself appealable . . .; appeal lies from the judgment entered on the order"].) And while some appellate courts have exercised their *discretion* to save "premature" appeals taken from the minute orders sustaining demurrers without leave to amend and granting summary judgment motions (e.g., *Cohen v. Equitable Life Assurance Society* (1987) 196 Cal.App.3d 669, 671 [explaining that court would deem minute order sustaining demurrer to incorporate judgment of dismissal, but also saying this was the last time -- the court's patience was exhausted]), the Legislature clearly did not want to leave the right to attack a grant of a motion to dismiss for inconvenient forum to the tender mercies of appellate discretion.[16] The Legislature obviously wanted to make orders granting motions to dismiss for inconvenient forum *appealable at the earliest possible moment*, a desire which makes a great deal of sense when one considers that the ultimate import of such an order is to deny the plaintiff the choice of a California forum.

A related, second, line of attack might be developed on the theory that an order granting a motion to dismiss for inconvenient forum is not "final" because such an

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[16] And such mercies are becoming increasing hard to come by. The "trend" as it stands today is for appellate courts to force litigants to go back to the end of the line if they file a (premature) notice of appeal from an unappealable minute order prior to obtaining a final judgment of dismissal. (E.g., *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695-1696 [noting trend "to be less indulgent of parties who fail to perfect their rights of appeal"].)

order contemplates that the "final" resolution of the rights of the parties will be in another forum (in the case before us, for example, Virginia).

No, that doesn't work either, because "the action" referred to in section 577's definition of judgment ("final determination of the rights of the parties *in an action*") is necessarily the California action, where there *has* been a final determination of the rights of the parties, just as in any run-of-the-mill case where there has been a final signed judgment of dismissal on the basis of some procedural law (like the statute of limitations). If we hypothesize a party who only wants to litigate its claim in California, the order granting the motion to dismiss for inconvenient forum, as we pointed out above, will be the absolute end of the line. File closed, case over, just as much as a substantive judgment of dismissal in favor of the defendant had been entered.[17] And if we hypothesize a party determined to fight the case in the next forum (after, say, losing a timely appeal to a California court), the one thing that would be clear is that proceedings in California would be over except, perhaps, the enforcement of the judgment from the other state.

A third line of attack might be mounted from section 581d. That statute provides, in pertinent part, that "All dismissals ordered by the court shall be in the form of a written order *signed by the court* and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case." (Emphasis added.) One might extract from the statute the idea that a mere unsigned minute order involving the dismissal of a case cannot be a "judgment" for purposes of the *Passavanti* rule.

Alas, this line of argument is not persuasive either. It does not follow that because "all dismissals ordered by the court shall be in the form of a written order signed

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[17] We do not address in this case the issue of when a trial court might abuse its discretion by choosing to *dismiss* for inconvenient forum as distinct from *stay* the proceedings. However, a secondary reason for publishing this case is to alert counsel that they may want to consider asking trial courts to *stay* proceedings initially brought in California rather than outright *dismiss* them. If the court in this case had granted a motion to stay the California case, we would not have the substantive final judgment that we have here -- by necessity something else would be required to close the file in addition to the minute order itself.

by the court" that an appealable (albeit unsigned) minute order *granting a motion* to dismiss cannot be a "judgment" for purposes of the *Passavanti* rule. To revisit a major point in the last discussion, the obvious reason is that such a reading of section 581d would mean that a litigant aggrieved by an order granting a motion to dismiss for inconvenient forum would have *two appeals* from the same substantive decision: the one clearly conferred by section 904.1, subdivision (a)(3) when the minute order was entered granting the motion and the one that would be conferred when a formal signed order was entered, which, assuming compliance with section 581d, would be appealable as a final judgment under section 904.1, subdivision (a)(1). The Legislature obviously didn't intend *that* absurd result. The two statutes are easily harmonized by saying that section 581d, which by its terms refers to orders of "dismissal," simply has no relevance to orders *granting motions* to dismiss when such orders are made directly appealable by section 904.1. Both kinds of orders can be final judgments, but not from the same substantive decision.

Finally, as an overall point, any conclusion that the July 15 minute order was not a final judgment for purposes of the *Passavanti* rule cannot be reconciled with either the *Passavanti* itself or rule 40(g). *Passavanti*, in commenting how two prior cases[18] had erred in allowing postjudgment reconsideration motions to extend the time within which to file a notice of appeal[19] noted that the "orders" in both cases were, in effect, judgments. And rule 40(g) declares that the unless the context or subject matter otherwise require, for purposes of the appellate rules of court the term "judgment" includes any "order . . . from which an appeal lies."

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[18] *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151 and *Dockter v. City of Santa Ana* (1968) 261 Cal.App.2d 69.

[19] After 2002, *valid* reconsideration motions attacking *appealable orders* can result in an extension of time to appeal. (See rule 3(d).)

D. *Construal of the Reconsideration Motion As a Motion for New Trial or a Motion to Vacate? That Won't Work Either*

1. The Categorical Reasons

Now we come to the truly Humpty Dumpty part of the case -- literature's most famous egg having become a well-used judicial metaphor[20] for the arbitrary reclassification of things by the fiat of definition. It arises from the temptation -- one which, ironically enough, the court in *Passavanti* itself succumbed -- to save an appeal by waiving the judicial wand and "construing" a reconsideration motion, which is not an approved way of attacking a judgment, as a motion for new trial or a motion to vacate, which are on the approved list. (See *Passavanti, supra*, 225 Cal.App.3d at p. 1608 ["We recognize that there are cases which appear to suggest that *trial* courts may consider a motion regardless of its label."].)

The court in *Passavanti* acted like parents who deliver a long lecture to their teenage children about the evils of an upcoming rock concert and fuss and stamp and put their foot down and say no no no, only to, at the last moment, relent because the kids already have purchased their tickets. After a detailed discussion of why appellate courts have absolutely no business reclassifying reconsideration motions as motions for new trial or motions to vacate (see *id.* at pp. 1608-1610), the *Passavanti* court left the door open a crack saying that "extremely good cause" could justify construing a reconsideration motion as something else, and found such good cause in the court's prior, but erroneous decisions had suggested a reconsideration motion could indeed extend the time for appeal. (See *id*. at p. 1610.)

We should note preliminarily that construing the August 29 reconsideration motion as a motion for new trial or motion to vacate creates the problem of ascertaining just precisely *what* the trial court did if the reconsideration were so construed. For

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[20] E.g., *People v. Hoard* (2002) 103 Cal.App.4th 599, 606-607.

example, if the August 29 grant of reconsideration *combined with* August 29 re-affirmance of the decision to grant the motion to dismiss for inconvenient forum were "deemed" to be a *denial* of a new trial motion or motion to vacate, it would do Quest no good. More than 180 days would have elapsed since the "denial" of the putative motion.

Only if the August 29 grant of reconsideration were held to be a *grant* of a "new trial" motion or motion to vacate, with the August 29 oral argument on reconsideration being that "new trial" (or new trial after vacation of the judgment) could Quest's appeal be saved by such alchemy. (As we show below, this would not be the substance of what happened.) In that hypothetical instance, the August 29 unsigned minute order dismissing the case would not fall under section 904.1, subdivision (a)(3) as appealable (because it dismissed the case, as distinct from granting the motion, but wasn't signed as required under section 581d). In that instance, the case would be postured like many are after a minute order sustains a demurrer without leave to amend or grants a summary judgment motion -- awaiting a formal, signed judgment, and that formal, signed judgment was not forthcoming until March 14, making Quest's appeal timely.

But the attempt to save the appeal this is unavailing, because construal *by an appellate court* of a reconsideration motion as a new trial motion or motion to vacate is an idea that must be strongly rejected. Indeed, to the extent that *Passavanti* may be read for the proposition that an appellate court, as distinct from a trial court, may "construe" a reconsideration motion after a final judgment as something else if there is "extreme good cause," we are forced respectfully, but forcefully, to disagree with it. Ironically, *Passavanti* itself declared that even if a *trial* court may "construe" a reconsideration motion to be a motion for new trial or motion to vacate the judgment, there is no basis in law for the *appellate* court to do so. (*Passavanti, supra*, 225 Cal.App.3d at p. 1609.) (Alas, *Passavanti* would lose the courage of its conviction about six paragraphs later, see *id*. at page 1610.)

There are no less than three categorical reasons why there must be a hard line categorical rule against the kind of "reconstruction" engaged in by the *Passavanti* court.

First categorical reason: Fundamentally, *appellate jurisdiction* cannot be a matter of *appellate discretion*, at least as far as "final judgments" are concerned. True, as alluded to above, there is a well-developed body of law in which both the Court of Appeal[21] and the Supreme Court[22] have saved *premature* appeals by the legal fiction of deeming a judgment to exist where it really doesn't. And that leniency is understandable: There is no harm to the judicial system's (indeed, *any* judicial system's) need to protect the finality of its judgments if some appeals, unlike the old wine commercial, are released before their time. Save a premature appeal[23] and you merely send a message to the bar that a certain kind of sloppy, but otherwise harmless, practice may be tolerated under the peculiar circumstances of a given case. Save a *late* appeal by the arbitrary contrivance of relabeling something and you rip open the fabric of space and time; you might as well repeal the law of gravity for all the effect you have had at undermining the stability of the legal system. California does not have a system of discretionary civil appeals; we have a toggle-switch system: When it comes to late appeals, there is either appellate jurisdiction or there is not. The light is either green or it is red. There is no yellow.

Second categorical reason: Yes, there *are* substantive differences between, on the one hand, motions for reconsideration and, on the other, motions for new trial and motions to vacate. It is not a matter of elevating form over substance. (See *Passavanti, supra*, 225 Cal.App.3d at p. 1608.)

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[21] See *Cohen v. Equitable Life Assurance Society, supra,* 196 Cal.App.3d at page 671.

[22] See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740-741 [noting that amending order from which appeal is taken and converting it into judgment is "consistent with the codification of the one final judgment rule in Code of Civil Procedure section 904.1, subdivision (a)"]; *Shepardson v. McLellan* (1963) 59 Cal.2d 83, 89 [amending judgment on appeal to include dismissal of outstanding cause of action not otherwise included in judgment].

[23] Which can be done both by "deeming" minute orders to "incorporate" final judgments or by construing the appeal as a petition for writ. (E.g., *U.S. Financial v. Sullivan* (1974) 37 Cal.App.3d 5, 12 [construing premature appeal as writ petition].)

One substantive difference: A motion for new trial, or to vacate, channels both the litigants and the trial judge into *consciousness* of the appellate process. There is an appealable judgment or one is about to be entered after a trial, and everybody knows that the next stop, if the result is still going to be attacked, will be the Court of Appeal. The same thing cannot be said for the one-motion-to-correct-them-all that *invalid* reconsideration motions have turned into. Such motions are used promiscuously to attack a wide variety of trial court orders, so they have no inherent focus on the appellate process.

Another substantive difference: "Reconsideration" is not the same thing as changing one's mind, but the formal step of granting reconsideration is necessarily antecedent to changing one's mind. In the case before us, for example, it is evident that the trial court in this case felt compelled to *grant* reconsideration merely in order to hear what counsel had to say. By respecting the label on the motion, i.e., treating it to be what it purported to be, the court took a step that it would not have taken if the motion were one for new trial or to vacate. And in doing so it certainly muddied the waters as to the status of its previous, and quite appealable, order.

Now, that confusion *itself* ought to give us a clue about the differences in the motions. Because of the inherent difference between the process of merely agreeing to reconsider something and actually changing one's mind about it, the Legislature (wisely) did not include motions for reconsideration from the prescribed procedures by which final judgments are attacked. Had the Legislature included reconsideration motions, it would have had to specifically deal with the status of what was being reconsidered, and would have had to construct a whole set of special rules so that litigants could know precisely what could, and could not be, appealed after reconsideration but without a change of mind. Otherwise we would have what this very case presents to us: ambiguity. Cases like the present one where reconsideration is granted but the court does not change its mind would be sent to a kind of *limbus curiae* where they would be condemned to wander the earth, never quite sure whether they could find rest in the Court of Appeal.

Third categorical reason: The Legislature created motions for reconsideration, for new trial, and to vacate judgments as separate procedures, each for its own separate purpose. The rules of appellate procedure articulated by the Judicial Council *show respect* to the Legislature's decision to treat these motions as separate categories. Read rule 3, for example, and note the difference in language between, on the one hand, rules 3(a) and 3(b) addressed to motions for new trial and to vacate, and compare it with, on the other hand, rule 3(d) addressed to motions for reconsideration. The former contemplate judgments; the latter only contemplates orders.

For the appellate court, then, to deliberately scramble these distinctions is to engage in a kind of unseemly antinomianism that is, at root, so at odds with the Legislature's and the Judicial Council's handiwork that the net effect, in current parlance, is to "diss" that handiwork.[24] In *Kerns*, for example, a decent respect for the Legislature's decisions led the court, in the context of the controversy over *interim* orders, to attempt the major surgery of separating motions brought by litigants and sua sponte motions. (See *Kerns, supra*, 106 Cal.App.4th at p. 391.)[25] Here, we are dealing with a final, appealable disposition of the case, an area in which the received text of the Legislature and Judicial Council presumptively commands even more respect.

2. The Case-Specific Reason

Beyond these categorical reasons against "reconstruction" of motions for reconsideration, that is to say, even assuming the "extreme good cause" loophole that a desperate litigant might claw out of *Passavanti*, there is no way that the power should be exercised in the case before us today. To demonstrate, let's take a page out of the

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[24] For the sake of future readers just in case the word goes out of style soon, it is a short verb meaning "to show disrespect to." The problem is that modern English does not have a short verb that conveys the idea of deprecation so directly -- one practically has to go back to the era of King James to find something close. Contemn? Calumniate?

[25] We do not comment in this case as to whether the surgery was successful. As regards *interim* orders, there is currently a split in the appellate courts between *Kerns*, which says there is a meaningful distinction between litigant-brought motions for reconsideration and sua sponte reconsiderations by the trial court itself, and cases which say that the distinction is not meaningful. (E.g., *Remsen*, *supra*, 87 Cal.App.4th 421; *Wozniak, supra*, 102 Cal.App.4th 1031.) Fortunately, because the July 15 order was entered sua sponte and was, under *Passavanti*, a final judgment, making the August 29 non-sua sponte order void, this is one issue that we do not have to deal with in this case. Our decision today is wholly independent of the *Kerns* versus *Remsen-Wozniak* dichotomy.

Passavanti decision itself. That court did not shrink from confronting the ramifications of treating a motion for reconsideration; back to the confusion theme, it noted that sorting out the proper standard of review would be a daunting task. (See *Passavanti, supra*, 225 Cal.App.3d at p. 1609.) And neither shall we shrink.

For example, and as alluded to above, if we were to construe Quest's motion for reconsideration in this case as, in substance, a motion for a new trial under section 657 or a motion to vacate the judgment under section 663, then, to be consistent, we would also have to say that, *in substance*, there was also *no* vacation of the "judgment" (or, correspondingly, that the new trial motion was denied). The grant of the motion to reconsider at the beginning of the hearing was a mere formality so that the judge could hear the counsel's arguments -- he certainly hadn't resolved, at that point, to undo the July 15 minute order.

To carry through the analogy with new trial or vacation motions all the way, since a litigant *already* gets (or should get) a *hearing* when he or she files a motion to vacate the judgment, the formal "grant" of reconsideration at the beginning of the hearing on the reconsideration motion here was nothing more than the court making the necessary pro forma order to provide for that hearing. Hence, in granting the motion to "reconsider" the court was simply putting the putative reconsideration motion on the same footing as a real motion to vacate. The true substance, then, of what the trial court did on August 29 was merely to *deny* the "motion to vacate" aka motion to reconsider. Given that scenario, the time to appeal still expired, at the latest, 180 days after the entry of judgment (see rule 3(b)(3)), i.e., mid-January.

E. *Which Means That the August 29 Order Granting Reconsideration Did Not Impliedly Vacate the July 15 Order*

Intuitively, one might conclude that if a trial court grants a motion for reconsideration, it necessarily and at least impliedly vacates the order reconsidered. And that is indeed the case when the motion for reconsideration is a *valid* one. But if, as in the present case the motion for reconsideration heard August 29 is not valid, and the

subsequent order of the same date ostensibly undoes a final judgment in contravention of the *Passavanti* rule, the prior order of July 15 remains intact.

Ramon, supra, 50 Cal.App.4th 1233, is directly on point. There, in a footnote, the court tackled the problem of whether the *grant* of a motion for reconsideration necessarily vacates a final judgment attacked by an improper motion for reconsideration. Answer: No. (*Id*. at p. 1238, fn. 4.)

The footnote in question concerned *Fryer v. Kaiser Foundation Health Plan, Inc.* (1963) 221 Cal.App.2d 674, a case which would lead a person to think that a motion for reconsideration necessarily vacates a prior judgment. In *Fryer*, the court entered a formal judgment of dismissal, then there was a motion to reconsider, and the motion was *granted*. After further argument, the court entered a minute order which stated that the court re-affirmed its ruling granting a judgment of dismissal. An appeal was taken from the minute order of the proceeding reflecting the re-affirmance, which was timely if the minute order was the operative document, but clearly untimely in relation to the date of the *original* judgment of dismissal. No problem, said the *Fryer* court -- the *grant* of the motion to reconsider impliedly vacated the original judgment of dismissal. "The judgment entered on September 12, 1962, [the original judgment] ceased to exist when the motion to reconsider was granted." (*Fryer, supra*, 221 Cal.App.2d at p. 677.)

Or did it really? The *Fryer* court supported its assertion with only one sentence of support, to wit a statement that the subsequent minute order "had the effect" of a final judgment. ("The minute order of October 11, 1962 [the minute order re-affirming the ruling], has the effect of a final judgment . . . .") For that equation the *Fryer* court cited section 581d and a section from Witkin's (then much smaller) treatise on Civil Procedure at the time (3 Witkin, Cal. Procedure (1st ed. 1954) § 14, p. 1891). But, as the *Ramon* court would notice some 30 years later, neither of the two cited

authorities supported the idea that the minute order re-affirming the ruling had the "effect" of a final judgment.[26]

The *Ramon* court thus rejected *Fryer* as incorrect to the extent that case could be read for the idea that a grant of reconsideration vacates a final judgment. So must we. For our part, the previous material in this opinion about the nature and extent of the *Passavanti* rule establishes that the *Fryer* approach is at odds with the need for stable judgments.

Let us also add now, for what it is worth, that the text of section 581d would certainly not support the *Fryer* court's conclusion, because section 581d only applies to written "dismissal" orders "signed by the court." We may infer that the minute order in *Fryer* was not signed by the court, because the opinion distinguished between judgments and minute orders, and made no attempt to *explain* how the minute order of dismissal complied with section 581d; the opinion just cited the statute and left it up to the reader to figure out whether the statute really did support the proposition.

F. *Therefore the Time to Appeal*

Ran in Mid-September

Time to put all the pieces together:

The July 15 order was a final judgment, ripe for appeal. As such it could not be attacked by a motion for reconsideration, even by the court on its own motion.

The August 29 order granting reconsideration, and the ensuing minute order of the same day dismissing the case, and the subsequent signed order of March 14 dismissing the case, were, under *Ramon*, all void as surplusage. (See also *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1238 [orders after invalid reconsideration motion void].)

While a copy of the appealable minute order of July 15 was served by the clerk by mail July 16, our record does not show the copy to be file-stamped. Nor did the

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[26] Unlike doctors, appellate courts don't bury their mistakes; we leave them embalmed for analysis by future pathologists for the rest of eternity.

clerk mail a document described as "notice of entry" of judgment. (Rule 2(a)(1).) Nor did Icode undertake either of these tasks. (Rule 2(a)(2).) So the deadline was 180 days after the "entry" of the judgment (rule 2(a)(3)), as defined by the date it was entered in the minutes (rule 2(c)(2)). That date was July 15. We don't have to get out the calendar and count exactly to know that 180 days afterwards was about mid-January of the following year.

Counsel for Quest thus went to futile exertions in March when, recognizing that Icode's counsel was deliberately running out the clock, undertook to enter a signed order of dismissal from which he thought he could validly appeal. It was a valiant attempt but, in the end, all too reminiscent of some melancholy song by Stephen Sondheim: "Isn't it rich . . . counsel had nothing to fear . . . a case he thought was still up in mid-air was already dead on the ground . . . down here." Send in the dismissal.

With these conclusions, Quest's California appeal must die its death. Venue was conclusively established to be in Virginia by an order final as of mid-January, though perhaps it is some comfort to realize that Quest should be able to obtain a fair hearing on its claims of lousy software produced by Icode just as much in Virginia as in California. That's certainly a better prospect than history's most famous change-of-venue case, where the losing lawyer got himself arrested for treason because of the venue change.[27]

One final comment: As readers might (hopefully) garner from this opinion, California's law of appellate procedure is *just too complicated*. In cases of subsequent motions and attacks on appealable decisions the chances of innocent miscalendaring are too great. There are too many counterintuitive results (today's is one, as was the result in *Hollister Convalescent Hosp.*), obscure statutes waiting to jump out of the dark, and common law doctrines with all sorts of unexpected implications. (And not to mention the

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[27] When Henry VIII's divorce case was yanked from England to Rome, that was the end of Cardinal Wolsey's (Henry VIII's lawyer for all practical purposes) hopes of obtaining a favorable decree for his client, at least from that particular jurisdiction. The loss would also soon be the end of Wolsey, who died awaiting trial. And talk about ungrateful clients: Shakespeare has Wolsey saying "Had I but served my God with half the zeal I served my [client], he would not in mine age have left me naked to mine enemies."

ostensible splits in decisions of the Court of Appeal that must be carefully analyzed in order to know what is, and is not, common ground.) We therefore call upon the Legislature to consider revising the rules of access to the appellate courts so that, if nothing else, they are simple enough even for those of us encumbered with law degrees to understand.

G. *The Interests of Justice Require an Unusual Disposition of Appellate Costs*

But as to costs, now for something a little different: We have the discretion under rule 27(a)(4) to award costs in the interest of justice. ("If the interests of justice require it, the court may award or deny costs as it deems proper.") In this case the interests of justice require that we award costs to the *losing* party.

There are two reasons. First, counsel for Quest practically would have had to have a PhD in appellate procedure *not* to have made the mistake he did in filing too late. He did what was intuitive: When the trial court entered a minute order requiring his adversary to prepare a formal order, he waited for counsel to do what the trial court had ordered them to do.

Second, and most dispositively, counsel for Icode were quite naughty (we will purposely use a word with less sting in it than might otherwise be appropriate), in obviously deliberately ignoring the trial court's August 29, 2002 minute order requiring them to submit a formal order of dismissal. It is interesting that, given the deadline on the July 15 order was 180 days, a reasonably responsive compliance by Icode's counsel with the trial judge's direct order to them might have saved this appeal. (Say, for example, if the signed order was filed in mid-September, and a notice of appeal was filed any time before mid-January, we'd still have to go through all the analysis but the result would be different and there would be another whole part ahead dealing with the merits.)

True, as we have shown above, the August 29 order was invalid. Even so, counsel did disobey it, and we, for our part, have the power in this little way to express disapproval of their lie-in-wait tactic. Yes, the tactic worked: The case against their

defendant is either going to Virginia or going nowhere, so verily they have their reward. But for that bit of scofflawery they shall pay appellant's costs in this appeal, which is now, rather reluctantly, dismissed.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.