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Resetting the Clock

Resetting the Clock Discovery Timeline Automatically Restarts at New Retrial Date

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When a case is reversed on appeal and remanded for a new trial, do the litigants get to renew discovery? Beginning in 1993, California law appeared to provide an unfettered opportunity to conduct additional discovery after remand, with a new discovery timeline automatically recalibrating based on the date set for retrial. *Beverly Hospital v. Superior Court*, 19 Cal.App.4th 1289 (1993).

However, a later court-of-appeal opinion - *Fairmont Insurance Co. v. Superior Court*, 66 Cal.App.4th 1294 (1998) - threatened to put a substantial crimp in post-appeal discovery by rejecting *Beverly Hospital* and allowing further discovery only after a showing of good cause. The *Beverly Hospital*/*Fairmont* split of authority prompted Supreme Court review, resulting in the recent opinion of *Fairmont Ins. Co. v. Superior Court*, 22 Cal.4th 245 (2000).

The analytical divide between *Beverly Hospital* and *Fairmont* centered on the interpretation of the term "initial trial date" - the anchor date on which discovery deadlines are based. See Code of Civil Procedure Section 2024(a) (discovery deadline is the 30th day before the "date initially set for trial"). *Beverly Hospital* liberally construed the term "initial trial date," ruling that multiple "initial" trial dates could exist where an action restarts after a trial court grants a new trial or declares a mistrial, or after an appellate court reverses a judgment and remands for retrial. Thus, a new "initial trial date" would automatically reinstate the various discovery deadlines.

The *Beverly Hospital* court favored this approach because the opportunity for further discovery would assist the court and parties in preparing for the new trial and would relieve the courts and parties of the burden resulting from motions, oppositions and hearings concerning whether to reopen discovery.

The court of appeal in *Fairmont* took a more literal approach, rejecting *Beverly Hospital*'s theory of multiple "initial trial dates" as a linguistic impossibility. Strictly construing the phrase "initial trial date" under a plain-language analysis, the *Fairmont* court reasoned that there could never be more than one "initial" date. Rather than viewing automatic additional discovery as a convenience to the courts and parties, the court feared that renewed unlimited discovery could result in abuses. Indeed, because the parties should have completed discovery before the first trial, there should be no need to automatically restart discovery. If further discovery was needed, the trial court has discretion to allow it by waiving the discovery cutoff on an appropriate showing of good cause. Code of Civil Procedure Section 2024(e).

This split of authority set the stage for Supreme Court review. And, given the relative merit of both positions, it perhaps is not surprising that the Supreme Court's opinion was divided. A majority of justices sided with *Beverly Hospital*, reversing the court of appeal's ruling in *Fairmont*. But a minority, comprised of Justices Joyce Kennard and Kathryn Werdegar, sided with *Fairmont*.

The majority adopted *Beverly Hospital*'s position part and parcel, stating simply, "*Beverly Hospital* is correct: in the case of a mistrial, order granting a new trial, or remand for a new trial after reversal of a judgment on appeal," discovery deadlines restart based on the date initially set for the new trial. The majority held that the restrictive dictionary definition of "initial" as a "one and only first" should not be applied in this context. Courts and parties could plausibly construe this language as referring to the date set for a retrial, in the sense that that each time an action is tried, the court sets a new "initial" trial date. As the court put it, a case does not have "one everlasting 'initial' trial date, but may have a new 'initial' trial date corresponding to a scheduled retrial or new trial of the action," which "resets" the discovery "time clock."

The majority also explained how the *Beverly Hospital* construction accords with the legislative history of the Discovery Act. See Code of Civil Procedure Sections 2016-2036. The act used the term "initial trial date" to eliminate the intentional and abusive manipulation of discovery deadlines through continuances. Focusing on this issue, the act's drafters apparently did not have retrials or new trials in mind. The majority also noted how Code of Civil Procedure Section 483.320(a)(3) provides for a new trial within three years after reversal on appeal - a lengthy time frame that "readily accommodates" and arguably contemplates additional discovery.

As the majority further pointed out, resetting the discovery clock after a reversal does not necessarily mean that discovery starts all over from scratch. The Discovery Act's limits continue to apply and do not reset. For example, a natural person may be deposed only once during the run of the litigation and parties are limited to 35 special interrogatories and requests for admission. Code of Civil Procedure Sections 2025(t), 2030(c), 2033(c). Finally, if renewed discovery appears to be abusive in any way, the trial court may always restrict it as cumulative or burdensome. Code of Civil Procedure Section 2019(b).

The dissenting opinion, in contrast, gravitated to *Fairmont*'s plain-language approach, reasoning that the "initial trial date" is a "single and unique date." "There is only one date on which an action is initially set for trial, no matter how many continuances, postponements or retrials may ultimately occur." Had the Legislature intended the meaning ascribed by the majority, it could have drafted the statute to read "initial date set for trial or retrial." Moreover, the existing statutory scheme allows a trial court to reopen discovery after setting a "new trial date," thus accounting for discovery after reversal on appeal. See Code of Civil Procedure Section 2024(e).

The dissent also aligned itself with the policy considerations discussed in *Fairmont*. "Discovery before the first trial should be the main event, not just a preliminary bout to be renewed without limit after a reversal on appeal," and no reason exists to give a party dissatisfied with original discovery "another chance" to restart "wide-open discovery all over again" "as a matter of right." Doing so needlessly subjects the parties to the burdens and expense of another round of discovery and wastes judicial resources in inevitable discovery disputes.

Nor was there anything wrong, from the dissent's perspective, with a "good-cause" standard. Because appeals typically concern legal issues, the parties already should have all the facts necessary to retry the case. If an appeal so radically changes the landscape of a case, then good cause will exist to reopen discovery.

Although there is merit in both lines of reasoning, the *Beverly Hospital* rationale is, on balance, the more compelling. The underlying goal of pretrial discovery - and our system of justice generally - is to allow the parties to present the best possible case. For various reasons, all avenues of discovery are not always explored before trial and renewed discovery enhances the litigants' claims and defenses at retrial. Reversals on appeal warranting a new trial are relatively uncommon. But when they happen, given the time it takes a matter to wend its way through the appellate system, the retrial usually does not occur until years after the original trial. During this time, new facts affecting the case may come to light, and it would be unfair to preclude the discovery of such facts.

Nor will automatic recalibration of discovery deadlines after remand necessarily encourage discovery that would not otherwise have occurred. Parties satisfied with the state of discovery after an initial trial will simply bypass the opportunity to spend more time and money pursuing something they do not need. Concomitantly, if litigants renew discovery, there typically will be good reasons to do so.

Retrial need not - and probably should not - be simply a repeat performance of the original trial. Counsel learn valuable lessons after a trial, and will usually see new ways to restructure their cases. Additional discovery can play an important role in this process. In those circumstances where further discovery would be burdensome or unfair, appropriate objections can be made, and any potential abuses mitigated by the protections and limitations in the existing statutory scheme.

Finally, providing for the uniform reopening of discovery creates a clear standard applicable to every litigant. Under *Fairmont*, the fate of further discovery will not turn on the vagaries of applying a good-cause standard. Rather, litigants will be able to count on the opportunity to pursue additional discovery as a matter of course, subject to the ordinary procedural, substantive and time limitations set forth in the code.