Slumming it with facts on appeal, part 2 — going to the 909

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The general rule encapsulating the different focus between trials and appeals is that appeals are about law, not facts. Fifty years ago, Justice Byrl Salsman, who had spent about a dozen years as a trial court judge before his elevation to the 1st District Court of Appeal, invoked Tennyson to poetically and memorably portray these roles: "As intermediate appellate judges we make up the Light Brigade in the army of the judiciary. We look down for the facts and up for the law. Where the rule is explicit, as it is here, it is not ours '... to reason why.'" *Myers v. Carini*, 262 Cal. App. 2d 614, 620 (1968).

This catchy analogy only goes so far, given the many opportunities for intermediate courts to make new law. There is less flexibility on the factual side of things. But as we have seen, sometimes appellate courts do get their hands dirty with facts and will entertain a new fact for the first time on appeal. Judicial notice on appeal is one prosaic example. A more intriguing example is the use of Code of Civil Procedure Section 909.

Section 909 resides in chapter 1 ("Appeals in General") of title 13 governing "Appeals in Civil Actions." This short chapter contains some important yet unremarkable sections that do things like empower the Judicial Council to create rules of appellate practice and procedure, e.g., title 8 of the Rules of Court (Section 901), and helpfully define terms, e.g., "A party appealing is known as an appellant, and an adverse party as a respondent" (Section 902). (Federal interlopers should take special note of that last one -- there is no "appellee" in California appellate practice.) It also contains very important sections, such as 904.1, which allows appeals, and is the reason that California appellate lawyers exist --*glory be to 904.1!*

Section 909's magic language states that a "reviewing court may make factual determinations contrary to or in addition to those made by the trial court" and "may," for the purpose of making factual determinations -- or "for any other purpose in the interests of justice" -- "take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal." *Wow!* Section 909 provides appellate courts amazing discretionary power to shake off their quintessential "appellatey" character and actually re-try issues. (And Rule of Court 8.252 even provides the technical procedures for implementing Section 909.) Many's the client who has stumbled across this treasured statute and cried, "aha, here's my second chance to win on new facts!" But 909 is more pyrite than gold.

Sadly, the stone-faced appellate lawyer must splash cold water on such jubilation. First, by its own terms, Section 909 does not apply to contested factual matters decided by a jury -- an appellate court can make findings only "where trial by jury is not a matter of right or where trial by jury has been waived." *See Diaz v. Prof. Community Management*, 16 Cal. App. 5th 1190,

1213 (2017) ("The obvious purpose of section 909's restriction is to preserve the parties' right to have a jury act as finder of fact in matters where that right applies, and to ensure the appellate court does not engage in any factual finding which might curtail or invade that jury trial right.").

Second, appellate courts abide by Spiderman's credo: With great power comes great responsibility. As applied in this context, "although appellate courts are authorized to make findings of fact on appeal," that "authority should be exercised sparingly," meaning only in "exceptional circumstances." *In re Zeth S.*, 31 Cal. 4th 395, 405 (2003). And courts are strict about interpreting "exceptional" very narrowly.

Further discouragement to would-be fact-based appellants appears in this view: "The power created by the statute is discretionary and should be invoked sparingly, and only to affirm the case." *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 42 (1994). And exceptional circumstances do not include scenarios where the factual fight has already been joined, and the loser simply wants to resuscitate a failed position: "The power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings." *Philippine Export etc. v. Chuidian*, 218 Cal. App. 3d 1058, 1090 (1990).

So what are some truly exceptional circumstances prompting appellate courts to get into the fact-finding game?

As with judicial notice, appellate courts may be inclined to take new evidence to establish facts that to render an appeal moot. *E.g., Center for Biological Diversity v. Dept. of Conservation*, 2018 DJDAR 8171 (Aug. 14, 2018) (specifically accepting additional documentary evidence on appeal solely to examine mootness and not for evaluating the merits); *Speirs v. Bluefire Ethanol Fuels, Inc.*, 243 Cal. App. 4th 969, 980 (2015); *Long v. Hultberg*, 27 Cal. App. 3d 606, 608 (1972); *but see In re Sabrina H.*, 149 Cal. App. 4th 1403, 1416 (2007) (declining postjudgment evidence proffered to support mootness argument: "Making the appellate court the trier of fact is not the solution." *Quoting In re Jennifer A.*, 103 Cal. App. 4th 692, 703-04 (2002)).

Another use of the 909 power is to correct a blatant factual error in the trial court's findings. Thus, in *Green v. Antoine*, 133 Cal. App. 2d 269, 276 (1955), the appellate court exercised its power "to correct and amend" the trial court's erroneous finding that a contract was made in 1951, when facts and evidence were clear that the actual year was 1950. *Quoting Johndrow v. Thomas*, 31 Cal. 2d 202, 207 (1947).

An appellate court may also sometimes take new facts on appeal when the record is missing an important factual determination necessary for an affirmance. Indeed, it is not at all uncommon for an appellate record to omit a key fact. As a result, a court's decision may contain a somewhat "inexact narrative." *See Hong v. Ha*, G054912 (Sept. 7, 2018) ("As an appellate court we write on the record we receive, which is not always a record that fills in all the logical gaps.") If those missing facts are essential to deciding the case, then 909 comes to the fore. *Guardianship of Marino*, 30 Cal. App. 3d 952, 961 (1973) (finding it would be detrimental for minor to be in father's custody). In *Golden West*, for example, the Court of Appeal noted that the litigation expenses "have obviously run into the millions" and "determining the parties' rights" under the contracts at issue "should be finally resolved now." Without "additional findings by this court, further action ... would spur new rounds of litigation." 25 Cal. App. 4th at 42.

Similarly, in *Vance v. Quikrete California, LLC* (C082468, Aug. 14, 2018), n.2, the Court of Appeal expressly invited the parties to stipulate to the receipt of original evidence on appeal "to forestall the need for further litigation." But the parties declined, apparently preferring the option of continuing to litigate back in the trial court -- and the possibility of enjoying another appeal.

Finally, when a court recognizes that a party has engaged in "sharp practices," e.g., unscrupulous conduct or bad faith tactics, then a court may invoke its 909 power to punish a wrongdoer and resolve a matter, rather than remand to the trial court to do so. Thus, in *Diaz*, 16 Cal. App. 5th at 1196, the court invoked its Section 909 power to find that the appellant and its counsel had "acted in bad faith" and to resolve the issues expeditiously, as contemplated by Section 909's last line, which reads, "This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court."

From its inception in 1992, "the 909" (area code) was depicted "a low-class backwater" by the TV show "The O.C." and popular SoCal radio deejays. *See* Matthew Lopas, "New Area Code Lets Some Ditch 'the 909' Scorn," L.A. Times (July 12, 2004). Tarring the Inland Empire was itself classless and in bad taste. But keeping the 909 in mind for appellate practice may one day prove essential in an exceptional case. Appellate courts will sometimes go 909 when taking that trip will moot an appeal, show an appeal lacks merit, or show it should be affirmed -- particularly where such a finding will resolve a case immediately, precluding a remand and potential future appeal. Savvy appellate practitioners know that 909 is out there, but also accept that the times to call on it are exceptionally rare. If factual fights are your thing, stick to trial courts.