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Stray Dancing

When it comes to appeals, it’s best to dance with the one that brung ya

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EXCEPTIONALLY APPEALING

A 1920s country song resonated with Ronald Reagan who popularized its folksy aphorism, "You gotta dance with the one that brung ya." This useful political sentiment about loyalty applies equally to many other contexts, including appellate practice. Appellants labor under the general rule that they've got to stick with the theories advanced in the trial court when up on appeal. Appellants are not supposed to conjure up new arguments during the appellate process. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (appellate courts generally will not "consider an issue not passed upon below"); *Richmond v. Dart Indus., Inc.*, 196 Cal. App. 3d 869, 874 (1987) (cannot raise new liability theory on appeal); *Kantlehner v. Bisceglia*, 102 Cal. App. 2d 1, 6 (1951) (cannot raise new damages theory on appeal); *Bardis v. Oates*, 119 Cal. App. 4th 1, 13 (2004) (cannot raise new theory of defense on appeal).

The reasons requiring fealty to trial court arguments on appeal are judicial economy and fairness. First, by definition, an appeal is intended to review a trial court decision. Allowing new arguments deprives appellate courts of the benefits of a trial judge's original consideration. Second, allowing new arguments on appeal is unfair to both the opposing party and the trial court ("how can I be reversed on an issue that was never presented to me and that I never even decided?!"). Marriage of Nassimi, 3 Cal. App. 5th 667, 695 (2016); "Raising New Issue on Appeal," 64 Harv. L. Rev. 652, 654-55 (1951).

Appellate courts, therefore, routinely and forcefully deny attempts to raise new arguments on appeal, and the prohibition is particularly strong when a new theory "involves controverted questions of fact or mixed questions of law and fact," which are supposed to be decided in trial courts in the first instance. *Panopulos v. Maderis*, 47 Cal. 2d 337, 340-41 (1956).

The general rule against proposing new arguments applies at all stages of an appeal. Thus, new arguments are not welcome in an opening brief. *Estate of Westerman*, 68 Cal. 2d 267, 279 (issues and theories not raised in the trial court cannot be raised for the first time on appeal).

New arguments also will be rejected when raised in a reply brief. *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 295, n.11 (1977); *Hibernia Sav. & Loan v. Farnham*, 153 Cal. 578, 584 (1908). This is true even if appellant has hired new (possibly better) counsel. *Reichardt v. Hoffman*, 52 Cal. App. 4th 754, 766 (1997) ("The mere fact that an appellant chooses to obtain new counsel two months after filing his opening brief cannot justify his contention that it is proper to raise new issues in a reply brief filed six months later.").

New arguments will face hostile disdain at oral argument. *Boydston v. Napa Sanitation Dist.*, 222 Cal. App. 3d 1362, 1370 (1990) (counsel must ensure that all points are properly presented in briefing before a case is submitted); *New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co.*, 7 Cal. App. 4th 1088, 1098 (1992); *Opdyk v. Cal. Horse Racing Bd.*, 34 Cal. App. 4th 1826, 1830 (1995).

New arguments raised in rehearing petitions will swiftly be shown the door. *Reynolds v. Bement*, 36 Cal. 4th 1075, 1092 (2005); *Midland Pac. Building Corp. v. King*, 157 Cal. App. 4th 264, 276 (2007) ("It is much too late to raise an issue for the first time in a petition for rehearing."); *Smith v. Crocker First Nat. Bank*, 152 Cal. App. 2d 832, 837 (1957) (rejecting points not raised during briefing or oral argument, noting appeals cannot be argued in "piecemeal fashion"). This is true even for constitutional issues. *Behr v. Redmond*, 193 Cal. App. 4th 517, 538 (2011). And floating a new argument in a rehearing petition after a Supreme Court opinion is particularly frowned upon. *County of Imperial v. McDougal*, 19 Cal. 3d 505, 513 (1977) ("We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court").

The narrowing of issues and limitation to original theories and arguments as a case ascends the appellate ladder would seem to be a bedrock principle. And yet... We wouldn't be raising this general proposition at all unless there were exceptions.

In "exceptional cases or particular circumstances where injustice might otherwise result," appellate courts have found it acceptable "to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." Id.

Whether to enforce the general rule is left to "the appellate court's discretion." In re Marriage of Priem, 214 Cal. App. 4th 505, 511 (2013) (addressing new issue because it

concerned a matter of statutory interpretation);*Canaan v. Abdelnour*, 40 Cal. 3d 703, 722 (1985).

Courts are most willing to invoke this exception when pure questions of law are "presented on the facts appearing in the record." *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959); *Burdette v. Rollefson Constr. Co.*, 52 Cal. 2d 720, 725-26 (1959); *UFITEC, S.A. v. Carter*, 20 Cal. 3d 238, 249 n.2 (1977) ("Although a party may ordinarily not change his theory on appeal, the rule does not apply when the facts are not disputed and the party merely raises a new question of law."). Put differently, when the facts relating to a new argument on appeal "appear to be undisputed" and "probably no different showing could be made on a new trial," then "it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly." *Panopulos*, 47 Cal. 2d at 341.

New issues can even be raised and decided in the Supreme Court. There too, even after a first appeal, the rule about sticking to prior arguments "does not apply when the facts are not disputed and the party merely raises a new question of law." *Hittle v. Santa Barbara County Employees Retirement Ass'n*, 39 Cal. 3d 374, 391, n.10 (1985). In *Hittle*, the Supreme Court held that an issue first raised in a rehearing petition in the Court of Appeal was "properly before this court," because the evidence relevant to the issue "was fully presented to the trial court" and the pertinent facts were undisputed. *Id.* Therefore, "while the Court of Appeal was not compelled to consider the issue on rehearing," the question of law was fair game for the Supreme Court. Id.

Although a respondent may be unhappy when the court exercises its discretion to hear a new argument, the court's power to do so follows logically from the fact that appellate courts can raise new issues sua sponte, so long as the parties have the ability to brief the issues. *Burns v. Ross*, 190 Cal. 269, 275-76 (1923) ("Although ... matters first raised in a reply brief may be disregarded, this court is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not."); *Tsemetzin v. Coast Fed. Sav. Loan Ass'n*, 57 Cal. App. 4th 1334, 1341 n.6 (1997) ("It makes no difference that the issue was first raised on appeal by the court rather than the parties, as long as the parties have been given a reasonable opportunity to address it."); *see also Japan Line, Ltd. v. County of Los Angeles*, 20 Cal. 3d 180, 184 (1977) (court "waived" the "obvious impropriety" of raising a new issue at oral argument, and requests supplemental briefing).

One classic example of when courts will consider arguments for the first on appeal is when the law changes during the course of an appeal. For instance, in *Meier v. Ross General Hospital*, 69 Cal. 2d 420, 423 n.1 (1968), a decisive Supreme Court opinion issued after briefing had concluded in the Court of Appeal. The Court of Appeal declined

to consider the issue, even though the parties filed supplemental briefs on it. But the Supreme Court concluded that this scenario provided "a satisfactory basis for the unusual practice of considering a point raised for the first time after the opening briefs have been filed." *See also Woodland Hills Residents Ass'n, Inc. v. City Council*, 23 Cal. 3d 917, 932 (1979). For a recent example, see *People v. Robinson*, 2018 WL 1008518, *1 (D072861, Feb. 22, 2018), where a new issue raised in a rehearing petition led to a new sentencing hearing: A relevant statutory amendment took effect just a few days after the Court of Appeal issued its decision, so this change in law justified addressing the new issue on rehearing.

Another unusual exception is when judicial impartiality is attacked on appeal. *In re Marriage of Berry*, 2003 WL 393790, *7 (C040538, Feb. 21, 2003) (addressing argument raised in reply brief accusing the trial judge of bias, because it would be a "disservice to the parties, the accused judge," and the integrity of the legal system if the court "declined to air and resolve this grave charge").

Another acceptable scenario for raising a new argument on appeal is when an appellant wishes to challenge existing precedent that would be finding on a trial court by stare decisis. Because such an attack would be fruitless in the trial court, it is not necessary to make the attempt. *Eisen v. Tavangarian*, 2019 WL 2539296, *6 (B278271, June 20, 2019).

One 19th century Supreme Court case stated that new issues could be raised in reply briefs "in exceptional cases" where a party provides "meritorious reasons why the points were not made in the opening brief," hypothecating that such reasons might include "sickness, inadvertence, or other excusable neglect." *Kahn v. Wilson*, 120 Cal. 643, 644 (1898). But in the dozens of cases that have cited *Kahn* in over a hundred years, not a single one has ever used it to allow these exceptions. Thus any "sickness" exception seems to be dead, if it ever lived at all.

To conclude, the most promising way to inject new points on appeal is to emphasize how the new point is purely a legal question on undisputed facts. But even then, that "does not give a party license to raise" new issues; entertaining a new issue "always rests within the court's discretion." *Farrar v. Direct Commerce, Inc.*, 9 Cal. App. 5th 1257, 1275 n.3 (2017). The smartest move is always to dance with the one that brung ya.