A long time ago (well, actually, today) in a galaxy far, far away (or in Martinez, California)....

THE LAW & MOTION SAGA EPISODE VI: RETURN OF THE MOTION

DISCLAIMER I am happy to take questions during and after the program, time permitting. I am a quasi-judicial court employee bound not only by the Rules of Professional Conduct, but by the Cannons of Judicial Ethics. I cannot answer questions about cases that are pending in the Contra Costa County Superior Court. I cannot answer questions about how particular judges would rule on any issue. Nothing in this seminar should be construed as any indication of how a judge would rule.

• All fact patters, examples and sample forms are fiction.

ABBREVIATIONS

APJ – All-Purpose Judge COA – Cause of Action CoCoCo – Contra Costa County F&S – File & Serve

j/x – Jurisdiction

M&C – Meet & Confer MIL – Motion In Limine

MJOP – Motion for Judgment on

the Pleadings

MPA – Memorandum of Points and Authorities MSJ/MSA - Motion for Summary Judgment/Summary Adjudication MTC - Motion to Compel NOE - Notice of Entry POD - Request for Production of Documents

RFA – Request for Admission

RFJN – Request for Judicial Notice

Rog – Interrogatory (either Special or Form). SOL – Statute of Limitations

THE LAW & MOTION UNIVERSE.

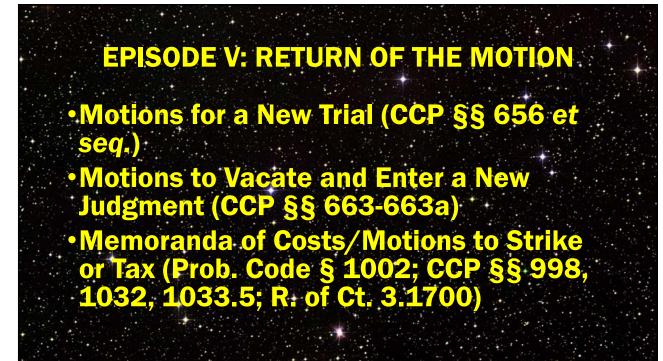
All of the Episodes of the Law & Motion Saga will give examples based on the following set of hypothetical facts:

Darth Vader (fka Annikan Skywalker) died during the Battle of Endor. At the time of his death, Vader was unmarried. His wife, Padme Skywalker (nee Amidala), predeceased him in childbirth. Vader was survived by twin children, Luke Skywalker and Princess Leia Solo (nee Organa).

Approximately two months after Vader's death, Luke and Leia received a Trustee's Notification pursuant to Probate Code § 16061.7. The Trustee's Notification included a copy of The Darth Vader Revocable Living Trust. The Trust provides that the successor trustee following Vader's death is to be Emperor Palpatine or, if he does not survive (he didn't), then "Supreme Leader Snoke" is to serve as successor trustee. Upon Vader's death, all of the assets of the Trust (assumed to be worth approximately 10 million Galactic Credits) are to be distributed to Vader's Grandson, Ben Solo, except that Luke and Leia are to each receive a bantha, if any are assets of the Trust. Shocked, Luke (but not Leia) hired an attorney to file a Petition in the Probate Division of the Contra Costa County Superior Court alleging, among other claims, that the Trust is invalid because (1) Vader lacked the requisite mental capacity to execute the Trust; (2) Vader was unduly influenced by Emperor Palpatine; Ben Solo and/or "Supreme Leader Snoke" into executing the Trust; and (3) Vader was under duress when he executed the Trust.

Assume that CoCoCo has personal and subject matter jurisdiction over this case and that service of the petition was proper and timely.







- Other post-judgment procedures:
 Motion for Reconsideration (CCP § 1008)
 - Motion for Relief from Judgment (CCP § 473(b))
 - Motion for Judgment Notwithstanding the Verdict (JNOV) (CCP § 629)
 - Motion for Entry of *Nunc Pro Tunc* Judgment (CCP § 473(d))









 Grounds for Motions for New Trial (CCP § 657)

Jury misconduct

- Must be made by affidavit. CCP § 658.
- Concealment of bias on voir dire.
- Prejudicial communication by or to juror.
- "Chance" verdicts (e.g., rolling a chance cube).



•Grounds for Motions for New Trial (CCP § 657)

 Accident or surprise which ordinary prudence could not have guarded against.

Must be shown by affidavit. CCP § 658.

 Negligence not sufficient. <u>In re Marriage of Liu</u> (1987) 197 Cal. App. 3d 143, 154-155.











MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

•Grounds for Motions to Set Aside Verdict (CCP § 663)

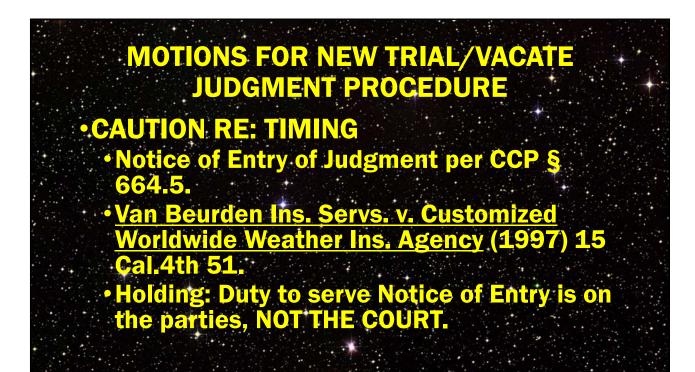
 Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts, and the Statement of Decision must be amended or corrected.

 Legal conclusion that is contrary to an express statutory provision. <u>Gibson v. Hammang</u> (1904) 145 Cal. 454, 456.
 Motion only granted where substantial rights of a party are materially affected.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

Initial Filing:
"Notice of Intention" ONLY (CCP §§ 659(a), 663a(a)) initiates the procedure.
Must designate grounds for the motion.





MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

CAUTION RE: TIMING

• Therefore, unless the proof of the court's service of the judgment or Notice of Entry specifically states that it is served "pursuant to court order" or "pursuant to CCP § 664.5" or similar language, the 15 day deadlines for filing a Notice of Intention at CCP § 659(a)(2) and 663a(a)(2) DO NOT APPLY!!!

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

•CAUTION RE: TIMING

 Practical reality in CoCoCo: The court NEVER includes § 664.5 language! Thus, it is the duty of the prevailing party to a judgment to serve NOE.

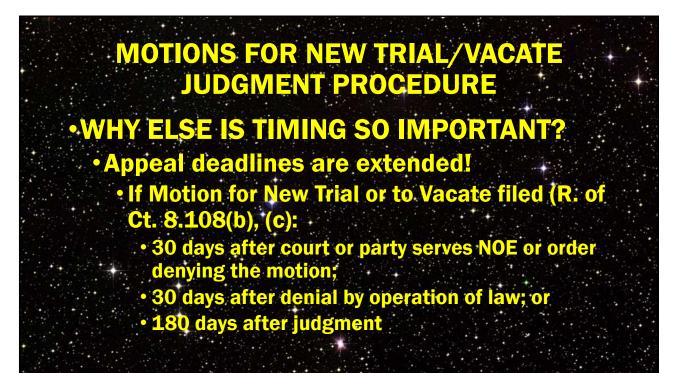
MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE •WHY IS THIS SO IMPORTANT? •Affects deadline to file Notice of Intention. •The court has a jurisdictional time limit by which it must rule! CCP §§ 660(c), 663a(c) •75 days from mailing NOE by the court per CCP § 664.5; •75 days from service of NOE by a party; or •75 days after filling of the first Notice of Intention.



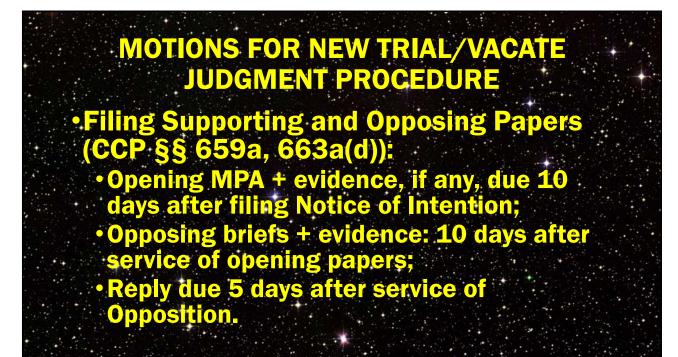
MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

•WHY ELSE IS TIMING SO IMPORTANT?

- Appeal deadlines are extended!
 - General rule (R. of Ct. 8.104(a)):
 - 60 days after NOE or copy of filed-endorsed judgment served by court;
 - 60 days after a party serves NOE or a copy of the filed-endorsed judgment; or
 - 180 days from judgment entry.







MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- •Setting the Hearing (CCP §§ 660, 661, 663a(d)):
 - Trial judge must hear motion, if available.
 - Court must set hearing after deadline to
 - oppose motion, clerk must notify judge that motion was filed and hearing must be set.
 - Clerk must give at least 5 days notice of
 - hearing.



MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE •Ruling on the Motion: • Court may grant alternative relief.

• New Trial Motion: may change or add to statement of decision, modify the judgment in whole or in part, or grant a new trial on less than all of the issues.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE Ruling on the Motion: Order granting new trial vacates the judgment and returns the case to its exact state before trial. Bloomquist v. Haley (1928) 204 Cal 258, 261. Order granting new trial must state the grounds for granting. The Order must also specify the reasons for granting. CCP § 657. Court, not counsel, must prepare the order. Order denying new trial need not state the reasons. CCP § 657.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

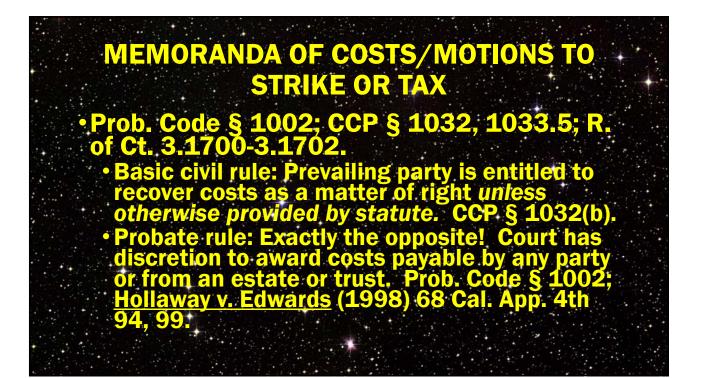
•Ruling on the Motion:

 Motion to vacate: If granted, court must enter a new judgment that supersedes prior judgment. If that doesn't happen, order granting motion is void. <u>Dolan v. Sperior Court</u> (1920) 47 Cal. App. 235, 241.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

Appeal Rights

•Order granting new trial or motion to vacate is appealable. Order denying new trial or motion to vacate is appealable from the judgment. CCP § 904.1(a)(4), 904.2(e).



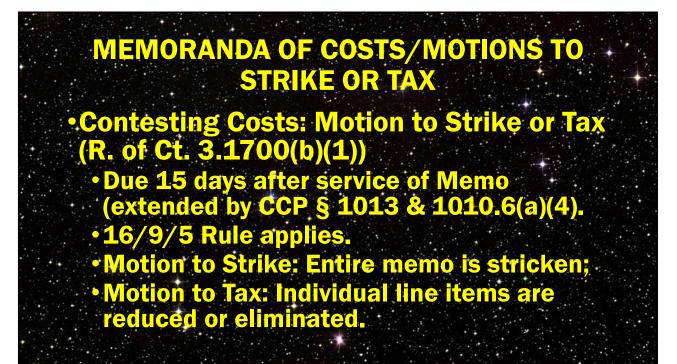


•Claiming Costs:

- Use mandatory Memorandum of Costs (Summary) (Judicial Council Form MC-10) and optional Memorandum of Costs (Worksheet) (Form MC-11).
- Deadline (R. of Ct. 3.1700(a)(1)):
 - 15 days after service of NOE of Judgment per CCP § 664.5 or by party; or
 - - 180 days after entry of judgment, whichever is first.

•Claiming Costs:

- Memorandum of Costs is verified under penalty of perjury, so no evidence is needed to support claim until challenged by motion.
- Must list each cost individually so that the
- parties and the court can evaluate allowability of the claim.



 Contesting Costs: Motion to Strike or Tax (R. of Ct. 3.1700(b)(1))

• Motion to Tax must refer to each item objected to by the same number and same order as claimed in the Memorandum. R. of Ct. 3.1700(b)(2).

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

Allowable Costs (CCP § 1033.5(a))
 Filing fees; depo fees; ordinary witness fees

- service of process, etc.
- Note re: Expert Witness Fees:
 - Only allowable if the expert witness is ordered
 - pursuant to Evid. Code § 730 (Evid. Code § 733; Sanchez v. Bay Shores Medical Group (1999) 75
 - Sanchez V. Bay Shores Medical Group (1999) 7
 - Cal. App. 4th 946, 949-950) or pursuant to
 - statutory offer to compromise under CCP § 998.

Allowable Costs (CCP § 1033.5(a)) Note re: Attorney Fees (CCP § 1033.5(a)(10)):

- Only allowable pursuant to "contract, statute or law".
- Only available by separate motion, not in the Memorandum, unless fees are fixed without the need for court determination., R. of Ct, 3.1702(b), (e).
- Must be filed not later than the deadline to appeal the judgment. R. of Ct. 3.1702(b)(1).

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX Disallowed costs: CCP § 1033.5(b): Expert witness fees not ordered by the court; postage, telephone, and photocopying, except for exhibits; transcripts not ordered by the court. Example: Legal research costs are not allowed. Ladas v. California State Auto. Ass'n (1993) 19 Cal. App. 4th 761, 776.

 Discretionary Costs (CCP § 1033.5(c)(4)):
 Items not mentioned in 1033.5(a) or (b) may be allowed or denied in the court's discretion.

• Example: Mediation fees. <u>Berkeley Cement,</u> <u>Inc. v. Regents of the University of California</u> (2019) 30 Cal. App. 5th 1133, 1143.

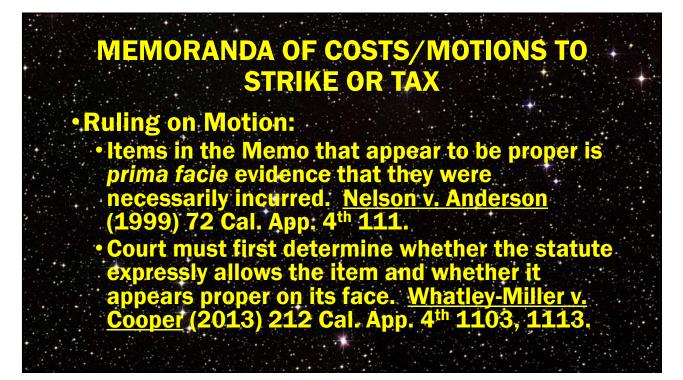
MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX General rules governing amount to be awarded (CCP § 1033.5(c)(1)-(3)): Costs are allowable if incurred, whether or not paid; Allowable costs must be reasonably necessary to the conduct of litigation and not merely

convenient or beneficial to its preparation;

Must be reasonable in amount.

Ruling on Motion:
Items in the Memo that appear to be proper is *prima facie* evidence that they were necessarily incurred. <u>Nelson v.</u> <u>Anderson</u> (1999) 72 Cal. App. 4th 111.
If cost is expressly permitted by §

1033.5(a), burden is on the moving party to show that they are not properly chargeable or are unreasonable. *Id*.



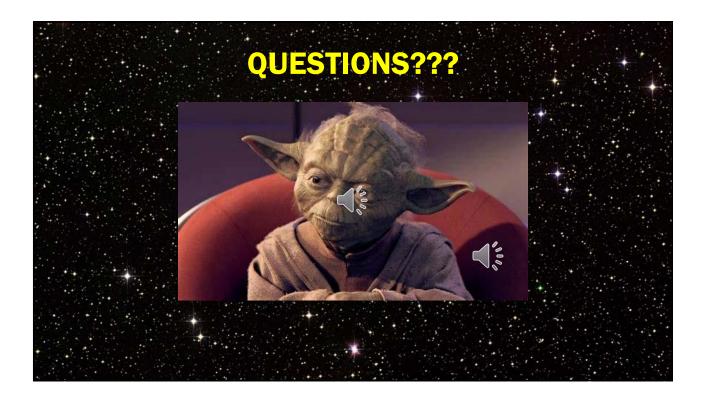
Ruling on Motion:
Burden of proof shifts to party claiming costs where the item is properly objected to. When the party offers no proof of costs beyond the Memo, the trial court has discretion to disallow the costs. Levy v. Toyota Motor Sales, Inc. (1992) 4 Cal. App. 4th 807, 816.



Entry of Costs on Judgment:

• Ordinarily, court will enter a *nunc pro tunc* judgment that includes the amounts of costs awarded, either after the time to move to strike or tax expires, or after the court rules on a motion. R. of Ct. 3.1700(b)(4).

• Costs awards are entitled to a direct appeal. CCP § 904.1(a)(2).



Presented by: Mark Schmuck Probate Research Attorney Contra Costa County Superior Court

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1 2 3 4 5 6 7 8 9 10	Darth Maul, Esq. (SBN K2SO) LAW OFFICE OF DARTH MAUL 1 Sith Road Death Valley, CA 94553 (925) 555-5555 Fax (925) 555-5555 DMaul@thisisntrealeither.com Attorneys for BEN SOLO SUPERIOR COURT OF CALIFORNIA COUNTY OF CONTRA COSTA In re the Case No.: P74-00001		
10 11 12	TRUST.	NOTICE OF INTENTION TO MOVE FOR NEW TRIAL [TO VACATE AND ENTER NEW AND DIFFERENT JUDGMENT]	
 13 14 15 16 17 18 19 20 21 22 23 24 25 	 NOTICE IS HEREBY GIVEN that BEN SOLO intends to move this court, at a time and place to be set by the court, to vacate and set aside the decision of the court rendered in favor of LUKE SKYWALKER and against BEN SOLO, and the judgment entered on that decision and to grant BEN SOLO a new trial on the following grounds: I. Irregularity in the proceedings of the court prevented BEN SOLO from having a fair trial as shown by the declarations of Darth Maul and Bib Fortuna; Z. The evidence is insufficient to justify the decision as shown by the minutes of the court; There was an error in law, occurring at trial and excepted to by the moving party, as shown by the minutes of the court. 		
25 26 27 28	Date: NOTICE OF INTENTION TO MOVE FOR NEW TRIAL [' JUDGMENT] - 1	DARTH MAUL, ESQ. Attorneys for BEN SOLO TO VACATE AND ENTER NEW AND DIFFERENT	