

150 Cal.App.4th 183, 58 Cal.Rptr.3d 466, 07 Cal. Daily Op. Serv. 4577, 2007 Daily Journal D.A.R. 5689
(Cite as: 150 Cal.App.4th 183, 58 Cal.Rptr.3d 466)

▶ Court of Appeal, Second District, Division 2, California.
Ernestine FORREST, Plaintiff and Appellant,
v.
STATE of California DEPARTMENT OF CORPORATIONS et al., Defendants and Respondents.

No. B186670.
April 25, 2007.

Background: Employee filed suit against former employer and other employees, alleging wrongful termination, race and gender discrimination, and other claims. Employee had been designated a vexatious litigant and was subject to a prefiling order that prohibited her from filing suit without counsel or obtaining permission from the presiding judge to proceed unrepresented. After employee's counsel withdrew and she failed to retain new counsel after a number of continuances, the Superior Court, Los Angeles County, No. BC290873, Tricia Ann Bigelow, J., dismissed the case and later denied her motion for reconsideration. Employee appealed.

Holdings: The Court of Appeal, Doi Todd, J., held that:

- (1) trial court had authority to dismiss action for violation of prefiling order even though it was already pending;
- (2) employee was not entitled to further continuances; and
- (3) employee failed to show new facts or circumstances in support of motion for reconsideration.

Affirmed.

Ashmann-Gerst, J., filed a dissenting opinion.

West Headnotes

[1] Appeal and Error 30 ↪949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Appeal and Error 30 ↪973

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k973 k. Dismissal, nonsuit, demurrer to evidence, or direction of verdict. Most Cited Cases

Appeal and Error 30 ↪977(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(5) k. Refusal of new trial.
Most Cited Cases

Court of Appeal reviews under the abuse of discretion standard the trial court's orders: (1) allowing counsel for plaintiff in wrongful termination case to withdraw on the day of trial; (2) dismissing action on the ground that vexatious litigant was not represented by counsel and had not obtained permission from presiding judge to proceed unrepresented; and (3) denying reconsideration based on retention of new counsel.

[2] Appeal and Error 30 ↪946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of discretion. Most Cited Cases

Under an abuse of discretion standard of review, the appellate court determines whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.

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[3] Appeal and Error 30 ↪900

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k900 k. Nature and extent in general.
Most Cited Cases

Appeal and Error 30 ↪931(3)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k931 Findings of Court or Referee
30k931(3) k. Implied findings in general. Most Cited Cases

Under an abuse of discretion standard of review, the appellate court presumes an order is correct and implies findings necessary to support the judgment.

[4] Appeal and Error 30 ↪946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of discretion. Most Cited Cases

Under an abuse of discretion standard of review, an abuse of discretion must be clearly established to merit reversal on appeal.

[5] Appeal and Error 30 ↪893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

To the degree resolution of an appeal requires statutory interpretation, the appellate court undertakes that review de novo.

[6] Appeal and Error 30 ↪635(1)

30 Appeal and Error
30X Record
30X(J) Defects, Objections, Amendments, and Corrections
30k635 Effect of Omissions
30k635(1) k. In general. Most Cited Cases

Employee who sued former employer for wrongful termination failed to establish that trial court's permitting her counsel to withdraw on the day of trial constituted error; employee had the burden to provide an adequate record to the appellate court in order to demonstrate error, but she failed to provide a record of the in camera hearing during which her counsel stated his reasons for seeking withdrawal.

[7] Appeal and Error 30 ↪497(1)

30 Appeal and Error
30X Record
30X(A) Matters to Be Shown
30k497 Grounds of Review
30k497(1) k. In general. Most Cited Cases

Appeal and Error 30 ↪900

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k900 k. Nature and extent in general. Most Cited Cases

Appeal and Error 30 ↪901

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 k. Burden of showing error. Most Cited Cases

Judgments and orders are presumed correct on appeal, and the appellant bears the burden of overcoming that presumption by affirmatively demonstrating, with an adequate record, reversible error.

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[8] Injunction 212 ↪ 223

212 Injunction

212VII Violation and Punishment

212k223 k. Acts or conduct constituting violation. Most Cited Cases

Trial court had authority to dismiss wrongful termination action filed by employee who had been designated as a vexatious litigant, in violation of prefiling order that prohibited employee from filing new litigation in which she was unrepresented and did not obtain permission of court, notwithstanding that lawsuit was already pending; requirements of prefiling order under vexatious litigant statute remained in effect throughout the life of the lawsuit and permitted dismissal at any point when vexatious litigant proceeded without counsel or without the permission of presiding judge. West's Ann.Cal.C.C.P. § 391.7.

See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 339 et seq.

[9] Injunction 212 ↪ 223

212 Injunction

212VII Violation and Punishment

212k223 k. Acts or conduct constituting violation. Most Cited Cases

Vexatious litigant statute authorizing trial court to issue prefiling order prohibiting the filing of "new litigation" without court permission allows for dismissal of a pending action for violation of the order; term "new litigation" does not refer only to an early procedural stage in the lawsuit. West's Ann.Cal.C.C.P. § 391.7.

[10] Statutes 361 ↪ 223.1

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.1 k. In general. Most Cited Cases

Courts do not construe a statute in isolation, but review it in context of the entire statutory

scheme to which it belongs, harmonizing all sections to retain its effectiveness.

[11] Injunction 212 ↪ 223

212 Injunction

212VII Violation and Punishment

212k223 k. Acts or conduct constituting violation. Most Cited Cases

Trial court could dismiss wrongful termination action filed by employee who had been designated as a vexatious litigant, who violated prefiling order prohibiting the filing of new litigation without court permission, notwithstanding that lawsuit had survived demurrer and summary adjudication; vexatious litigant statute provided that lawsuit could be conditioned on representation by counsel or permission from the presiding judge to proceed pro se along with the posting of security, and when those conditions were not met, dismissal could be an appropriate remedy even if lawsuit was meritorious. West's Ann.Cal.C.C.P. § 391.7.

[12] Appeal and Error 30 ↪ 854(5)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k851 Theory and Grounds of Decision of Lower Court

30k854 Reasons for Decision

30k854(5) k. Direction of verdict, dismissal, or nonsuit. Most Cited Cases

Trial court's statement, in order dismissing wrongful termination action brought by employee who had previously been designated a vexatious litigant, which based dismissal, in part, on employee's failure to post a bond "as ordered," did not warrant reversal, even though statement was erroneous because no bond was ever ordered in the case; trial court's order was correct for other reasons, including the fact that employee failed to obtain representation from counsel and failed to obtain permission from presiding judge to maintain her action, as required by prefiling order that prohibited employ-

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ee from filing new litigation in propria persona without court permission. West's Ann.Cal.C.C.P. § 391.7.

[13] Pretrial Procedure 307A ↪726

307A Pretrial Procedure

307AIV Continuance

307Ak726 k. Second or further continuance.

Most Cited Cases

Denial of further continuances in wrongful termination action brought by employee, who had been deemed a vexatious litigant, to allow employee to obtain new counsel after her previous counsel had withdrawn from the case, was not an abuse of discretion; the serious illness of one trial witness necessitated the need to proceed with the case, in addition to the fact that the record failed to establish that employee's efforts to retain substituted counsel were sufficiently diligent. Cal.Rules of Court, Rule 3.1332.

[14] Appeal and Error 30 ↪966(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k963 Proceedings Preliminary to Trial

30k966 Continuance

30k966(1) k. In general. Most Cited

Cases

The appellate court reviews the trial court's determination on a motion for a continuance based on an abuse of discretion standard.

[15] Pretrial Procedure 307A ↪717.1

307A Pretrial Procedure

307AIV Continuance

307Ak717 Absence of Witness or Evidence

307Ak717.1 k. In general. Most Cited

In the context of a motion for a continuance, the prejudice that parties might suffer as a result of the continuance may be shown by loss of material witnesses due to lapse of time.

[16] Motions 267 ↪39

267 Motions

267k39 k. Reargument or rehearing. Most Cited Cases

A motion for reconsideration, which requires the moving party to offer new or different facts, circumstances, or law that could not, with reasonable diligence, have been previously discovered, will be denied absent a strong showing of diligence. West's Ann.Cal.C.C.P. § 1008(a).

[17] Pretrial Procedure 307A ↪698

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak696 Vacating or Setting Aside Dismissal

307Ak698 k. Time for vacation.

Most Cited Cases

The statutory 10-day period for employee to file motion for reconsideration of trial court's dismissal of her wrongful termination complaint began to run on the day employer served written notice of entry of order of dismissal by express mail, rather than 11 days earlier when clerk served the order of dismissal on the parties by mail. West's Ann.Cal.C.C.P. §§ 1008(a), 1019.5(a).

[18] Pretrial Procedure 307A ↪696.1

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak696 Vacating or Setting Aside Dismissal

307Ak696.1 k. In general. Most Cited Cases

Employee who was deemed a vexatious litigant, and whose wrongful termination case was dismissed based on her failure to obtain new counsel after her previous counsel withdrew, failed to show new facts or circumstances in support of her motion

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for reconsideration of dismissal of the case; although employee hired substitute counsel after the dismissal, such postdismissal compliance with trial court's order was not the type of new fact that would support reconsideration. West's Ann.Cal.C.C.P. § 1008.

****469** Dunn Koes, Pamela E. Dunn, Daniel J. Koes, Pasadena, and Mayo Makarczyk for Plaintiff and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Jacob A. Appelsmith, Assistant Attorney General, Silvia M. Diaz and Patricia A. Nevenon, Deputy Attorneys General, for Defendants and Respondents.

DOI TODD, J.

***188** Appellant Ernestine Forrest filed suit against respondents in propria persona. At the time she had been designated a vexatious litigant and was subject to a prefiling order which prohibited her from filing suit without counsel or obtaining permission from the presiding judge to proceed unrepresented. Forrest later retained counsel, but the court permitted counsel to withdraw on the day the case was set for trial. When appellant failed to retain new counsel after a number of continuances, the court dismissed the case and later denied reconsideration of the dismissal when Forrest appeared with counsel.

We hold here that the trial court has authority under Code of Civil Procedure section 391.7 ^{FN1} to dismiss a lawsuit during the pendency of litigation when a vexatious litigant under a prefiling order is not represented by counsel and has not obtained permission from the presiding judge to proceed unrepresented. We find no abuse of discretion and affirm the dismissal.

FN1. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Forrest Declared a Vexatious Litigant

In 1994, Division Five of this court declared Forrest a vexatious litigant and issued a prefiling order pursuant to section 391.7, subdivision (a) that prohibited her from filing any new litigation in propria persona without first obtaining leave of the presiding judge of the court where the litigation was proposed to be filed. (*Forrest v. Sargoy* (Apr. 25, 1994, B077881) ****470** [nonpub. opn.]) That order remained in effect throughout these proceedings.

**189 Forrest's Employment and Termination*

Forrest was employed as an attorney by respondent California Department of Corporations (DOC) between 1989 and 2004. Respondents Brian Thompson and Morton Riff were also DOC employees. While employed by DOC, Forrest made a number of complaints of race and gender discrimination against DOC, alleging wrongful acts and retaliation. She was terminated by DOC in 2000 and then reinstated by the State Personnel Board in 2002.^{FN2}

FN2. Forrest was again terminated by DOC during the pendency of this action.

Forrest Initiates a Lawsuit in Propria Persona, Then Appears With Counsel

On February 24, 2003, Forrest filed this suit against respondents in propria persona alleging wrongful termination, race and gender discrimination, harassment, retaliation and breach of contract. The case was assigned to Judge Thomas L. Willhite, Jr. Forrest was represented by attorney David J. Duchrow at a case management conference held on May 16, 2003. The complaint had not been served on respondents at that time. On June 27, 2003, Duchrow filed and served a first amended complaint (FAC), asserting the same causes of action but including more detail with respect to Forrest's termination and DOC's alleged wrongful acts.

Demurrer, Summary Adjudication, Mistrial

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Respondents demurred and moved to strike portions of the FAC. The trial court sustained the demurrer of the individual defendants to one cause of action and struck the word "age" from the FAC. The demurrer was otherwise overruled and the motion to strike denied. DOC filed an answer and litigation proceeded.

On August 19, 2004, DOC filed a motion for summary adjudication, which the trial court granted in part, deemed moot in part, and denied in part on November 9, 2004.

The case was set for trial in August 2004, and then continued to December 7, 2004. Prior to the December 7 trial date, Duchrow informed Forrest by facsimile that he would be withdrawing as counsel, but he did not in fact withdraw at that time. The December trial date was continued to January 18, 2005, then January 31, and then February 7. On February 4, 2005, Duchrow informed Forrest by letter that he would withdraw on February 7, but filed no motion with the court seeking to withdraw.

A jury trial commenced February 8, 2005. After the first witness began testimony, Judge Willhite declared a mistrial when he was nominated to the *190 Court of Appeal and became unavailable to complete the case. The case was reassigned to Judge Tricia Ann Bigelow on March 28, 2005, and a final status conference and trial were set on June 20, 2005.

Attorney's Motion to be Relieved as Counsel

On June 17, 2005, Duchrow filed a motion on shortened notice to be relieved as counsel. He simultaneously filed an ex parte application to continue the trial for 120 days to allow Forrest to retain new counsel.

At the June 20 hearing, DOC's counsel indicated she did not oppose Duchrow's withdrawal; however, she did oppose the continuance because of witness health issues. The trial court conferred with Duchrow, pointing out that there were two **471 witnesses with significant health problems,

respondent Morton Riff and Susan Wood. The trial court then inquired: "And if there is a need for a continuance in this case, would you stipulate that both of those witnesses can be videotaped for the questions and answers to be used at trial?" Duchrow responded: "I was going to suggest that."

The trial court sealed the reporter's notes of an in camera hearing with Duchrow regarding his motion to withdraw and granted the motion. With respect to DOC's witnesses, the trial court reiterated in open court that Duchrow had "stipulated to the fact that Morton Riff and Susan Wood ... can have their trial testimony reported." DOC's counsel then clarified that it was Wood's testimony that required videotaping. The court's order read: "The court finds good cause and orders the deposition of Wood to proceed." But Forrest argued that if Duchrow was no longer her attorney, he could not stipulate to the videotaping. The trial court rejected this argument: "It was stipulated before he was relieved as counsel but, nevertheless, I will order it, finding good cause in light of the fact that—this is as to Wood, right?" Forrest objected, asking "shouldn't this be a noticed motion? Shouldn't I have a right to respond?" Forrest and the trial court then engaged in a lengthy discussion about whether Duchrow could be permitted to withdraw.

During this discussion, DOC revealed that Forrest had been designated a vexatious litigant. Ultimately, the trial court advised Forrest that she should retain counsel to advise her on her request to waive her privilege as to the matters Duchrow had revealed in camera and to "either agree or not agree as to whether or not [Duchrow's] stipulation is appropriate and then I will hear it then."

The court asked Forrest how much time she needed to hire another attorney. Forrest responded that "attorneys don't like to come into this kind of circumstance." The court then stated: "[I]f there is a necessity for continuance, I am going to have to consider that. So I will give you two weeks." The *191 court then set an OSC hearing for July 7, 2005 "re failure of plaintiff to retain counsel..." In re-

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sponse to Forrest's question about the purpose of the July 7 OSC, the court clarified: "For you to get new counsel; with regard to whether or not you want to disclose and have Mr. Duchrow represent you and potentially for that person being appointed as your trial counsel for all purposes, okay?" With respect to the trial date, the court stated: "Why don't we continue the trial to the 7th, with the understanding if new counsel comes in I, obviously, am not going to make him pick up the paper and have him pick it up and go to trial that same date."

July 7, 2005 OSC

Forrest filed a response to Duchrow's motion to be relieved as counsel, calling it an "unjustified abandonment on the date of trial" and describing her efforts to obtain new counsel. She informed the trial court that when first instituting the lawsuit she had difficulty locating counsel because employment attorneys advised her they did not like litigating with the government. She also stated, "I attempted to initiate contact with a lawyer to consult after the June 20, 2005 proceedings but he was away on vacation. I now have an appointment with that lawyer on Wednesday, July 6, 2005." At the OSC hearing on July 7, Forrest advised that she did not yet have counsel, that she had not yet been able to retrieve the case file from Duchrow, and that she questioned the judge's neutrality given her past working relationship with defense counsel. In response, the court **472 informed Forrest that she would "hear any motion that you have if you have an attorney here in two weeks...."

DOC's counsel raised the issue of the videotaped testimony: "At the last hearing you gave us authorization to videotape the trial testimony of ... Wood, and we were unsure as to the procedure for doing that since ... Forrest is between attorneys. How much notice you think we should give her in fairness of doing that, since she won't be allowed to participate?" The trial court set an OSC regarding dismissal for failure to retain counsel for July 22, 2005 and instructed DOC to set the deposition after July 22, 2005.

July 22, 2005 OSC and DOC's Request for Dismissal

On July 22, 2005, Forrest filed an update regarding her efforts to retain counsel. In her declaration she explained that since the June 20 hearing her only contact with Duchrow had been when he told her to pick up her case file from him, that her courier tried repeatedly to do so, and that the files were obtained on July 15. She stated that she was not certain that she had been given the full file. She stated that the attorney with whom she met on July 6, 2005 could not represent her due to his involvement in another major case. Forrest also met an attorney at a lawyer function on Saturday, July 16, 2005, *192 but was unable to schedule a meeting with him until July 25, 2005. On July 21, she contacted another lawyer, who had been referred to her on July 6, but she learned he could not talk to her until he returned from vacation the following week. Forrest also contacted the attorney who had originally referred her to Duchrow to see if his firm could represent her. She stated that it initially took her three months to find counsel. Forrest argued that the court had no authority to dismiss her action and requested a stay. After conferring with Forrest and counsel, the trial court continued the OSC to August 4, 2005.

On July 28, 2005, DOC filed a request for dismissal pursuant to section 391.7, subdivision (c).^{FN3}

FN3. Section 391.7, subdivision (c) provides in pertinent part: "The clerk may not file any litigation presented by a vexatious litigant subject to a prefilng order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefilng order as set forth in subdivision (a). The filing of the notice shall automat-

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ically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation."

August 4, 2005 OSC

On August 4, 2005, Forrest filed another response to the OSC and responded to DOC's request for dismissal. She explained her further efforts to retain new counsel, which consisted of a conversation with an attorney who declined to represent her due to his relationship with Duchrow and conversations with Patricia Barry who showed an interest in taking the case and agreed to appear at the August 4 hearing. Forrest opposed DOC's request for dismissal, arguing that her case had merit and was ready for trial.

Ms. Barry did appear on August 4 and represented that she and Forrest were in discussions but that she had not been retained. The trial court again continued the OSC, informing Forrest that the case would be dismissed if she did not retain counsel by August 11, 2005.

****473 August 11, 2005 OSC and Dismissal**

Forrest filed another update prior to the August 11, 2005 OSC. Her declaration stated she was out of town on a business trip from August 4 through August 10, that she had spoken with Patricia Barry by telephone on the evenings of August 9 and 10 and that unresolved issues remained with respect to Ms. Barry's representation. Forrest offered to "post security so that *193 this case can proceed to trial..." During the hearing, Forrest requested another judge based on the court's disclosed relationship with defense counsel.

With respect to preserving Wood's testimony, DOC's counsel noted: "I wanted to mention that as we keep straggling this along, you did previously give us permission to videotape the trial testimony of witness ... Wood. But at one point you asked us to wait until after July 22nd, because the case might

be dismissed at that point. We have now learned that ... Wood spent another 12 days in the hospital in July, and she is not currently answering her phone. We're not sure if we're going to be able to even videotape her trial testimony at this point. So I think that dismissal would be the appropriate action today." Forrest again offered to post security.

On August 12, 2005, the trial court issued its ruling, dismissing Forrest's complaint on the grounds that she had failed to retain counsel after several continuances. The trial court served notice of its ruling on all parties by mail on that date. DOC then served notice of entry of the order dismissing the case on Forrest by express mail on August 22, 2005.

Motion for Reconsideration

On August 26, 2005, Forrest filed a substitution of attorney form reflecting that she was represented by attorney Edi M.O. Faal. On August 29, 2005, Forrest filed a motion to reconsider and revoke the order of dismissal pursuant to section 1008. Her new attorney argued that the motion was based upon new facts, namely Forrest's retention of counsel. He also relied on the "basic rule of law that all effort should be made to resolve cases based on the merits."

DOC opposed Forrest's motion, arguing that it was untimely, not based on new facts, and failed to set forth any justification for failing to discover the allegedly new facts prior to the order of dismissal.

The trial court denied Forrest's motion for reconsideration. Forrest timely appealed from both the order of dismissal and the subsequent order denying her motion for reconsideration.

DISCUSSION

I. Contentions on Appeal and Standard of Review

Forrest contends that the trial court erred in (1) allowing Duchrow to withdraw on the day of trial; (2) dismissing the action without a statutory *194 basis to do so; (3) failing to provide an adequate

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continuance to allow Forrest to retain new counsel; and (4) denying reconsideration based on her retention of new counsel.

[1][2][3][4][5] The trial court's orders are reviewed for an abuse of discretion. (See *Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1350, 32 Cal.Rptr.3d 717; *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246, 9 Cal.Rptr.3d 821; *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457, 45 Cal.Rptr.2d 695.) Under that standard, we determine "whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (**474 *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598, 153 Cal.Rptr. 423, 591 P.2d 911.) We presume an order is correct and imply findings necessary to support the judgment. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219, 120 Cal.Rptr.2d 879 (*Bravo*).) An abuse of discretion must be clearly established to merit reversal on appeal. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318, 27 Cal.Rptr.2d 595, 867 P.2d 706.) To the degree resolution of the appeal requires statutory interpretation, we undertake that review de novo. (*Bravo, supra*, at p. 219, 120 Cal.Rptr.2d 879.)

II. No Error Established in Permitting Counsel to Withdraw

[6] Forrest contends that allowing Duchrow to withdraw on the day of trial was an abuse of discretion.

Duchrow filed a declaration in support of his motion to withdraw stating that he had an irreparable conflict with Forrest, continued representation would require him to violate ethical rules, Forrest had breached the fee agreement and continuing would pose an extreme financial hardship on him, Forrest had rendered his continued effective employment on the case unreasonably difficult, and she refused to follow his advice. In order to protect attorney-client privileged matters, the court conducted a hearing with Duchrow in camera with a court reporter present. After the proceedings in chambers,

the court explained in open court that granting Duchrow's motion to be relieved was based on matters discussed in camera.

[7] Judgments and orders are presumed correct on appeal, and the appellant bears the burden of overcoming that presumption by affirmatively demonstrating reversible error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141, 104 Cal.Rptr.2d 377, 17 P.3d 735; *Estate of Davis* (1990) 219 Cal.App.3d 663, 670, fn. 13, 268 Cal.Rptr. 384.) The appellant must provide an adequate record to demonstrate that error. (*Ibid.*) Forrest has failed to do so on this issue. She has not provided a record of the in camera hearing *195 during which Duchrow stated his reasons for seeking withdrawal. Without that transcript, we presume the order permitting Duchrow to withdraw was correct.

III. The Trial Court Had Authority to Dismiss the Action

[8] Forrest contends that the trial court lacked authority to dismiss her action. In particular she argues that section 391.7 applies only to the initial filing of a lawsuit and has no application to a pending action. We disagree with Forrest's interpretation of section 391.7.

A. Section 391.7 Generally

The vexatious litigant provisions provide two general ways in which a vexatious litigant may proceed with a lawsuit. Sections 391.1 through 391.6 outline a procedure for a defendant to move in a pending case to require the posting of security by a plaintiff shown to be a vexatious litigant who does not have reasonable probability of prevailing in the litigation. (§§ 391.1–391.3.) If the plaintiff fails to post the bond, the action must be dismissed as to the moving defendant. (§ 391.4.)

Under section 391.7, "the court may, on its own motion or the motion of any party, enter a pre-filing order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining

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leave of the presiding judge of the court where the litigation is proposed to be filed." Disobedience of a pre-filing order is punishable as contempt. (§ 391.7, subd. (a).)

****475** "The presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay [and] may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3." (§ 391.7, subd. (b).)

Under section 391.7, subdivision (c), the court clerk is not permitted to file any litigation presented by a litigant subject to a pre-filing order unless the vexatious litigant first secures permission to file from the presiding judge. If the litigation is mistakenly filed by the clerk without the order, any party may file a notice that plaintiff is a vexatious litigant which automatically stays the litigation. Unless the plaintiff obtains an order of permission within 10 days of the filing of that notice, the litigation is automatically dismissed. (§ 391.7, subd. (c).)

Section 391.7 has been broadly interpreted. Subdivision (a) has been construed to require a vexatious litigant to obtain permission to litigate even ***196** though represented by an attorney. (*In re Shieh* (1993) 17 Cal.App.4th 1154, 1167, 21 Cal.Rptr.2d 886.) ^{FN4} And an appeal filed in a pending lawsuit has been held to fall within the definition of "new litigation" under section 391.7. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 73 Cal.Rptr.2d 288 (*McColm*).)

FN4. Similarly, in *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838, 840, 16 Cal.Rptr.2d 42 (*Camerado*) the court held that a vexatious litigant could be required to post security under section 391.3 in a pending action even though represented by counsel.

B. "New Litigation"

[9] Forrest argues that section 391.7 can only

support the dismissal of a newly filed, and not a pending, lawsuit. She relies on standard axioms of statutory construction in explaining that the word "new" in the phrase "new litigation" in section 391.7 would be meaningless if it were construed to apply to pending actions.

[10] "[W]e do not construe a statute in isolation, but review it in context of the entire statutory scheme to which it belongs, harmonizing all sections to retain its effectiveness." (*Bravo, supra*, 99 Cal.App.4th at p. 220, 120 Cal.Rptr.2d 879.) Sections 391.1 through 391.6 place no limitation on when in the course of litigation a litigant can be designated "vexatious." "Litigation" is defined in section 391, subdivision (a) to mean "any civil action or proceeding, commenced, maintained or pending in any state or federal court." Section 391.7 was later enacted to broaden the reach of the vexatious litigant statute. (Added by Stats.1990, ch. 621, § 3, p. 3072; ^{FN5} see generally *Camerado, supra*, 12 Cal.App.4th at p. 843, 16 Cal.Rptr.2d 42 ["[a] review of the 1990 amendments demonstrates the Legislature's intent to broaden the reach of the vexatious litigant statute".])

FN5. That bill expanded the scope of the vexatious litigant title in a number of ways: the definition of "vexatious litigant" was expanded to include those previously declared vexatious by any state or federal court in an action based on similar facts or the same transaction or occurrence (§ 391, subd. (b)(4)); the definition of "plaintiff" was clarified to include "an attorney at law acting in propria persona" (§ 391, subd. (d)), and the definition of "defendant" was amended to include a "firm or governmental entity" (§ 391, subd. (e).)

Section 391.7, subdivision (a) enables a court, on its own motion or that of any party, to prohibit the future filing of "any new litigation" by a vexatious litigant in propria persona without first obtaining leave from the presiding judge. (§ 391.7; ****476** *McColm, supra*, 62 Cal.App.4th at p. 1216, 73

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Cal.Rptr.2d 288.) In the context of this statutory scheme, the word “new” plainly refers to a civil lawsuit filed *after* entry of the prefiling order. It does not, as Forrest contends, refer to an early procedural stage in the lawsuit.

We are guided in our interpretation by the broad definitions employed throughout the vexatious litigant sections. As already noted, the definition of *197 “litigation” encompasses lawsuits beyond the initial filing to include those that are maintained or pending.^{FN6} And a litigant may be designated “vexatious” for actions throughout the life of a lawsuit, not merely at its commencement. A vexatious litigant is defined as one who has “commenced, *prosecuted*, or *maintained* in propria persona” at least five litigations meeting certain criteria (§ 391, subd. (b)(1), italics added), or one who “repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.” (§ 391, subd. (b)(3).) It would be anomalous for the statute to permit the entry of a prefiling order based on a litigant's bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency.

FN6. Similarly, the definitions of “plaintiff” and “defendant” encompass the parties' roles during all phases of litigation. A “plaintiff” is one who “commences, institutes or *maintains*” a lawsuit, and “defendant” means a person or entity “against whom a litigation is brought or *maintained* or sought to be brought or *maintained*.” (§ 391, subds.(d) & (e), italics added.)

On the other hand, the statutory scheme as a whole can be reconciled by recognizing that the terms of the prefiling order—representation by counsel or permission to file—pertain throughout the life of the lawsuit.^{FN7} We therefore hold that the requirements of a prefiling order, under section

391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or without the permission of the presiding judge.^{FN8}

FN7. Of course, section 391.7, subdivision (c) anticipates that a dismissal of an action filed without permission will occur early in the litigation. That is so because if the statutory scheme is properly implemented, the issue will typically arise upon filing. It did not arise at that early stage in the present lawsuit only because Forrest did not serve her lawsuit until after she had retained counsel and he filed and served a first amended complaint.

FN8. Because subdivision (c) addresses only a dismissal for failure to procure permission to file, it cannot fairly be read as a limitation on the trial court's inherent power to enforce that provision of the pre-filing order requiring representation and ultimately to dismiss for Forrest's failure to abide the court's orders. (See *In re Shieh* (1993) 17 Cal.App.4th 1154, 1168, 21 Cal.Rptr.2d 886[“[e]very court has the power ‘[t]o compel obedience to its ... orders....’”].)

C. Potential Merit

[11] Forrest contends that a meritorious lawsuit cannot, as a matter of law, be dismissed under section 391.7. We disagree. We acknowledge that a primary purpose underlying the vexatious litigant provisions is curtailing unmeritorious lawsuits. (*Bravo, supra*, 99 Cal.App.4th at p. 221, 120 Cal.Rptr.2d 879.) But the statutes also exist to curtail repetitious and harassing behavior. This is evident in the standard to be employed by a presiding judge in determining whether to permit a filing under section 391.7. That standard is stated in the conjunctive: “[t]he presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit *and* has not been filed for **477 the *198 purposes of harassment or delay.” (§

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391.7, subd. (b), italics added.) The plain language of the statute encompasses the possibility that an otherwise meritorious lawsuit may be disallowed if shown to be harassing or for the purposes of delay.

It has been recognized that substantive merit is not the only concern underlying section 391.7. In *McColm, supra*, 62 Cal.App.4th at page 1216, footnote 4, 73 Cal.Rptr.2d 288, for example, the court explained: "When the litigant is subject to a prefil- ing order, even if the court finds high enough prob- ability of success to allow the litigant to proceed, it may compel the litigant to furnish security as a con- dition to maintaining the action." (See also *id.* at p. 1221, 73 Cal.Rptr.2d 288, fn. 10["[T]he Judicial Council advised the Legislature against authorizing security when presiding judges conclude the new litigation has possible merit. It is clear from the wording of section 391.7, subdivision (b), however, that the Legislature did not follow the Judicial Council's advice".])

"To the extent [section 391.7] keeps vexatious litigants from clogging courts, it is closer to 'licensing or permit systems which are admin- istered pursuant to narrowly drawn, reasonable and definite standards' which represent 'government's only practical means of managing competing uses of public facilities[.]' [Citation.]" (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 60, 61 Cal.Rptr.2d 694.)^{FN9} Granted, "[w]hen a vexa- tious litigant knocks on the courthouse door with a colorable claim, he may enter." (*PBA, LLC v. KPOD, Ltd.* (2003) 112 Cal.App.4th 965, 975, 5 Cal.Rptr.3d 532, fn. omitted.) But that entry may be conditioned on representation by counsel or permis- sion from the presiding judge to proceed pro se along with the posting of security. (§ 391.7, subds.(a) & (b).) When those conditions are not met, dismissal may be an appropriate remedy even if the lawsuit is meritorious. (§ 391.7, subds.(a) & (c).) The fact that Forrest's lawsuit survived demur- rer and summary adjudication did not preclude dis- missal, as a matter of law, under the vexatious litig- ant statutes when the prerequisites to dismissal un-

der those provisions were otherwise met.

FN9. In *In re Whitaker* (1992) 6 Cal.App.4th 54, 57, 8 Cal.Rptr.2d 249, the court recognized that it is not only the op- posing parties that are injured by vexatious litigants but also litigants in other actions, the court system and the taxpayers by vir- tue of wasted resources.

D. Security

[12] Forrest challenges that portion of the trial court's order that bases the dismissal on Forrest's failure to post a bond "as ordered." Forrest is cor- rect that a bond was never ordered in this case and that the order is mistaken in that regard. But a de- cision that is otherwise correct will not be reversed merely because it was based on faulty reasoning. Rather, the order will be sustained if correct on any legal theory supported by the record. (*199*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32, 51 Cal.Rptr.2d 444, 913 P.2d 473.) Because we find the order correct for other reasons, this mistaken ground for dismissal does not warrant reversal.^{FN10}

FN10. Forrest offered during the hearings below to post a bond so that the matter could proceed. But the proper procedure to do so was to seek permission from the presiding judge. Had a bond been warran- ted, the presiding judge would have ordered it before allowing her to proceed in pro. per. (§ 391.7, subd. (b).)

Because she was subject to a prefiling order under section 391.7, subdivision (a), Forrest could maintain her action only if she was represented or if she obtained permission from the presiding judge. Because**478 neither condition was satisfied, the trial court had the authority to dismiss the lawsuit.

FN11

FN11. Having affirmed the dismissal under section 391.7, we need not also address Forrest's arguments against dismissal

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based on section 581.

IV. Denial of Further Continuances Was Not Abuse of Discretion

[13] California Rules of Court, rule 3.1332 provides that “[a]lthough continuances of trials are disfavored,” the unavailability of trial counsel due to “excusable circumstances” or a substitution of counsel that is “required in the interests of justice” can constitute good cause for a continuance. (Cal. Rules of Court, rule 3.1332(c)(3) & (4).) In considering a trial continuance based on the unavailability of counsel, the trial court “(d) ... must consider all the facts and circumstances that are relevant to the determination” including “(3) [t]he length of the continuance requested; [¶] (4)[t]he availability of alternative means to address the problem that gave rise to the motion or application for a continuance; [¶] (5)[t]he prejudice that parties or witnesses will suffer as a result of the continuance; [¶] ... [¶] (10) ... [w]hether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and [¶] (11)[a]ny other fact or circumstance relevant to the fair determination of the motion...” (Cal. Rules of Court, rule 3.1332(d)(3), (4),(5),(10) & (11).)

[14] Duchrow's withdrawal constituted good cause for a continuance under California Rules of Court, rule 3.1332. Furthermore, “the constitutional due process guarantee does embrace” the right of a civil litigant to be represented by retained counsel (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925, 211 Cal.Rptr. 77, 695 P.2d 164).^{FN12} But the right to representation and to a continuance to allow for that representation is not unlimited and must be considered and balanced with any possible detriment to other parties and the efficient administration of justice. (See generally, *200Cal. Rules of Court, rule 3.1332.) There is no specific timeframe within which a litigant has a right to seek counsel, such as the 120 days appellant argues here. (See generally, *Agnew v. Parks* (1963) 219 Cal.App.2d 696, 701, 33 Cal.Rptr. 465.) We review the court's determination based on an abuse of discretion

standard.

FN12. We do not consider here the impact of Forrest's status as a vexatious litigant on her right to a continuance under California Rules of Court, rule 3.1332 or her constitutional right to counsel. (See generally, § 391.7, subd.(c) [court may dismiss on 10-days notice of violation of prefiling order].)

A. Prejudice to DOC and Consideration of Alternative Means

[15] “Prejudice may be shown by loss of material witnesses due to lapse of time.” (*People v. Morris* (1988) 46 Cal.3d 1, 37, 249 Cal.Rptr. 119, 756 P.2d 843.) The obvious exigency here was Wood's serious illness. DOC first presented this concern in opposition to Duchrow's motion for a continuance on June 20. The court suggested a reasonable method to preserve Wood's testimony by videotape in order to accommodate a continuance. But Forrest refused to abide by the stipulation of her former attorney. Preserving Wood's testimony was then further complicated by the revelation that Forrest was a vexatious litigant who could not proceed without counsel or permission from the presiding judge. It became unclear how the deposition could proceed with Forrest unrepresented.**479 Because any delay increased the risk that DOC could be prejudiced by the unavailability of a trial witness, the court proceeded by issuing a series of OSC's in order to be able to proceed with trial or to resolve the issue of the videotaped deposition. While granting these short continuances, the court indicated it would consider further continuances for trial preparation once counsel appeared.

The sequence of the proceedings and the court's considerations are clear from the record. During the hearing on Duchrow's motion to withdraw, the court advised Forrest that she should retain another attorney who could “either agree or not agree as to whether or not [Duchrow's] stipulation is appropriate and then I will hear it then.” Forrest then asked for clarification of what was to transpire

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within the two weeks until the next OSC hearing and the court responded: "For you to get new counsel; with regard to whether or not you want to disclose and have Mr. Duchrow represent you and potentially for that person being appointed as your trial counsel for all purposes, okay?" The court responded to Forrest's concern about finding an attorney willing to take a case so late in the litigation as follows: "[I]f there is a necessity for continuance, I am going to have to consider that." With respect to the trial date, the court stated: "Why don't we continue the trial to the 7th, with the understanding if new counsel comes in I, obviously, am not going to make him pick up the paper and have him pick it up and go to trial that same date."

We see this as a reasonable attempt under California Rules of Court, rule 3.1332(d)(4) to craft "alternative means to address the problem that gave rise to the motion ... for a continuance" while being mindful of the possible prejudice to DOC under rule 3.1332(d)(5).

***201 B. Forrest's Showing**

Nor does the record establish that Forrest's efforts to retain substitute counsel were sufficiently diligent so that denial of further continuances constituted an abuse of discretion in these circumstances. After Duchrow was relieved on June 20 and in the face of a July 7 hearing on the OSC, Forrest attempted to contact only one lawyer who was on vacation and unable to meet with her until the day before the OSC.^{FN13}

FN13. In her declaration, Forrest stated that she immediately tried to obtain a copy of the June 20 transcript and received it on July 1, 2005. The implication was that she did not attempt to find other counsel until after she had received the transcript, a delay that cannot be justified under the circumstances of this case.

After the July 7 hearing and in the face of a July 22 OSC, Forrest let her efforts to find an attorney languish for nine days with no attempt to contact

any lawyer until she ran into a lawyer at a legal function on Saturday, July 16. When she followed up with him on the 19th, he was sick and could not meet with her until July 25. Only then did she contact a lawyer who had been referred to her in early July, but who was on vacation. She subsequently contacted the lawyer who had referred her to Duchrow, without any explanation as to why she did not try to call him earlier.

In response to the August 4, 2005 OSC, Forrest's further efforts to retain new counsel consisted of a conversation with an attorney who declined to represent her due to his relationship with Duchrow and conversations with Patricia Barry who showed an interest in taking the case and agreed to appear at the August 4 OSC. Because Barry and Forrest had not completed their negotiations, the court granted additional time, until August 11, for them to reach an agreement.

****480** Despite the court's urging that Forrest and Barry communicate with each other by telephone and fax while Forrest was out of town on a business trip, Forrest did not speak to Barry again until the evenings of August 9 and 10. Based on those conversations, she reported on August 11 that unresolved issues remained, and Ms. Barry did not appear.

Given the urgency posed by Wood's illness and the impending dismissal of her lawsuit, we cannot conclude that the trial court erred in finding Forrest's efforts to be inadequate. Forrest sought to attribute the lapses in her efforts to awaiting transcripts and files, but those explanations are not persuasive. Under the circumstances, Forrest did not have the luxury of wasting any time in seeking new counsel. Nor was there any evidence that she tried to retain counsel for the limited purpose of addressing the videotaping of Wood's deposition. We also note that there is no evidence that Forrest sought ***202** permission from the presiding judge to proceed without an attorney, pursuant to section 391.7, subdivisions (a) and (b).^{FN14}

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FN14. Section 391.7, subdivisions (a) and (b) provide that the presiding judge may permit the filing of litigation by a vexatious litigant if it appears the litigation has merit and has not been filed for the purposes of harassment or delay. Such relief may be conditioned on the furnishing security for the benefit of the defendant.

Finally, Forrest argues that the fact that she retained counsel 14 days after the entry of dismissal indicates that only a short continuance would have been required. But because we draw all reasonable inferences in support of the court order, we find that her retention of counsel soon after the dismissal just as readily supports the implication that finding counsel was not as difficult nor her efforts as diligent as she previously represented. (See *Bravo*, *supra*, 99 Cal.App.4th at p. 219, 120 Cal.Rptr.2d 879.)

At the fourth OSC hearing on August 11, DOC reported that Wood had spent another 12 days in the hospital in July and was no longer answering her telephone. We find no abuse of discretion or any violation of Forrest's due process right to counsel in the trial court's denial of further continuances at that point to allow Forrest to retain substitute counsel.

V. The Trial Court Correctly Denied Forrest's Motion for Reconsideration

Section 1008, subdivision (a), provides, in relevant part: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." (§ 1008, subd. (a).)

[16] A motion for reconsideration may only be brought if the party moving for reconsideration can

offer "new or different facts, circumstances, or law" which it could not, with reasonable diligence, have discovered and produced at the time of the prior motion. (§ 1008, subd. (a); see *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1467, 258 Cal.Rptr. 907; *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342, 4 Cal.Rptr.2d 195.) A motion for reconsideration will be denied absent a strong showing of diligence. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690, 68 Cal.Rptr.2d 228.)

A. Timeliness

[17] Contrary to DOC's argument, the motion for reconsideration was timely. A **481 motion for reconsideration must be made within 10 days after service of *203 written notice of entry of an order. (§ 1008, subd. (a).) Here, the court dismissed the matter on August 12 and the clerk served the order of dismissal on the parties by mail on that date. DOC then served a written notice of entry of the order by express mail on August 23, 2005. Forrest filed her motion for reconsideration on August 29, 2005.

The 10-day period began from DOC's service of the notice of entry and not from the clerk's service of the dismissal order. Section 1019.5, subdivision (a), provides: "When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order shall be given by the prevailing party to all other parties or their attorneys, in the manner provided in this chapter, unless notice is waived by all parties in open court and is entered in the minutes." (§ 1019.5, subd. (a).) The purpose of such notice is to start the time running on a party's ability to seek reconsideration. (Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2006) ¶ 9:320.1, p. 9(I)-116.) Here, DOC was statutorily mandated to serve notice of the trial court's order; consequently, its service of notice of entry on August 23, 2005, started the running of the 10-day time period. It follows that Forrest's motion for reconsideration was timely filed on August 29, 2005.

B. New Facts or Circumstances

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[18] Forrest contends that her hiring of substitute counsel after the trial court dismissed her case constituted “new or different facts, circumstances, or law” sufficient to support reconsideration under section 1008, subdivision (a). She bases her explanation as to why that fact was not presented earlier on her attorney’s declaration that the new circumstance, namely his retention, did not exist before the entry of dismissal and so could not have been proffered before and on her declarations filed before dismissal as to her ongoing efforts to retain new counsel.

When an action is dismissed for failure to comply with a court order, we do not believe that postdismissal compliance with the order is the type of *204 new fact that will support reconsideration under section 1008. That is particularly so if, as here, timely compliance was of the essence. Thus, a party whose action has been dismissed for failure to comply with a discovery order cannot simply comply later and reconstitute the lawsuit. (See §§ 2025.480, subd. (g); 2025.280, subd. (a); 2023.010, subds. (d) & (g); see generally, *Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 137 Cal.Rptr. 332.) Similarly, Forrest could not reinstate her action simply by her late compliance with the order to retain counsel.

Furthermore, even if the retention of the new attorney qualified as a new fact or circumstance under section 1008, Forrest gave the trial court no satisfactory explanation as to why that fact did not exist prior to dismissal. “[S]ection 1008 gives the court no authority when deciding whether to grant a motion to reconsider to ‘reevaluate’ or ‘reanalyze’ facts and authority already presented in the earlier motion.” (*Crotty v. Trader* (1996) 50 Cal.App.4th 765, 771, 57 Cal.Rptr.2d 818; see also *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500, 38 Cal.Rptr.2d 626.) Thus, Forrest’s earlier efforts to retain new counsel prior to the dismissal could not be offered to prove her diligence for **482 purposes of her motion for reconsideration because those facts had already been offered, considered,

and found deficient.

The only matter properly before the trial court on the reconsideration motion was the bare fact of the attorney’s retention. That the fact did not exist before and, therefore, could not have been presented earlier is not a sufficient explanation under section 1008. That is analogous to offering deposition testimony in support of reconsideration of a summary judgment motion and claiming it is “new” simply because the deposition had not been taken before the ruling on the original motion. Absent some justification for the untimeliness of the deposition, such a showing is clearly deficient under section 1008. (See *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 213, 37 Cal.Rptr.3d 338.)

The trial court did not abuse its discretion in denying Forrest’s motion for reconsideration based on her late hiring of new counsel.

DISPOSITION

The order of dismissal is affirmed. Respondents are entitled to costs on appeal.

I concur: BOREN, P.J.

*205 ASHMANN–GERST, J., Dissenting.
I respectfully dissent.

The majority has rewritten Code of Civil Procedure section 391.7 ^{FN1} to say what it believes the statute should say. But, “[i]n the construction of a statute ..., [our role] is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.” (§ 1858.) Only the Legislature can rewrite a statute. All we can do is faithfully apply the rules of statutory construction.

FN1. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

According to those rules, “ ‘we must ascertain the intent of the drafters so as to effectuate the pur-

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pose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context.' [Citation.]" (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663, 3 Cal.Rptr.3d 390, 74 P.3d 166.) If the language of a statute is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine the legislative intent. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919, 129 Cal.Rptr.2d 811, 62 P.3d 54.) If the statutory language does not yield a plain meaning, we may consider extrinsic evidence of intent. (*Mejia v. Reed, supra*, at p. 663, 3 Cal.Rptr.3d 390, 74 P.3d 166.) In other words, when the statutory language is ambiguous and susceptible to more than one reasonable interpretation, "we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, 14 Cal.Rptr.3d 857, 92 P.3d 350.)

****483** Our work begins with testing the clarity of the statutory language. Section 391.7, subdivision (c), provides, in relevant part: "The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from ***206** the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in ef-

fect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order." (§ 391.7, subd. (c).)

The applicability of section 391.7 to this case is anything but clear. The statute refers to the "fil[ing]" of "litigation." The term "file" is not defined in the vexatious litigant statutory scheme. "File" has been defined as "[t]o deposit in the custody or among the records of a court. To deliver an instrument or other paper to the proper officer or official for the purpose of being kept on file by him as a matter of record and reference in the proper place." (Black's Law Dict. (6th ed.1990) p. 628, col. 1.) "Filing with court" is defined as "[d]elivery of legal document to clerk of court or other proper officer with intent that it be filed with court." (Black's Law Dict., *supra*, p. 628, col. 2.) "Litigation" is defined in section 391, subdivision (a), as "any civil action or proceeding, commenced, maintained or pending in any state or federal court." Simply put, the narrow definition of filing is incongruous with the broad definition of litigation; i.e., "litigation" encompasses much more than things that are filed. But the Legislature referred to the filing of "litigation," a word it defined broadly in section 391. This creates an ambiguity as to whether the Legislature intended a prefiling order to curb just the filing of a new case, or also the continuing litigation of a case.

I note that the vexatious litigant statutes do not appear to have anticipated the situation presented in the instant case, namely when a vexatious litigant subject to a prefiling order is initially represented by counsel and then loses legal representation. Nothing in the statutes indicates that the subsequent retention of counsel cures the defect of appearing in propria persona, which is what the parties, the trial court, and the majority assume. And, nothing in section 391.7 expressly prohibits a vexatious litigant from proceeding in propria persona after his or her complaint has been filed by an attorney then representing the plaintiff.^{FN2} This silence, when ****484** considered with the uncertain ***207** applica-

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tion of the definitions of the key terms in section 391.7, bolsters my conclusion that the statute is, at best, ambiguous. This is where the courts come in. Our job is to resolve this ambiguity in a just and wise manner.

FN2. The legislative history does not expressly address whether section 391.7 was intended to apply to a plaintiff who is subject to a prefiling order and loses her legal representation at some point during the litigation. However, some of the legislative history indicates that a prefiling order prohibits a vexatious litigant from filing, in propria persona, "any further suits." (*Review of Selected 1990 California Legislation* (1990) 22 Pacific L.J. 323, 451.) Similarly, financial reports filed in support of the legislation suggest that prefiling orders restrict "the filing of vexatious lawsuits" (Cal. Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 2675 (1989-1990 Reg. Sess.) Aug. 20, 1990) and "reduce the number of unnecessary, frivolous lawsuits filed against the State." (Cal. Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 2675 (1989-1990 Reg. Sess.) Aug. 21, 1990.) One of the specific findings set forth in the bill report was that the statute would "make it more difficult to file frivolous suits and actions." (Cal. Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 2675, *supra*, Aug. 21, 1990.)

For answers, I turn to public policy.

There are a number of policies implicated, and we must assess their interplay. First, there is the policy behind the vexatious litigant statutes. "Vexatious litigant statutes were created 'to curb misuse of the court system by those acting in propria person[a] who repeatedly relitigate the same issues.' [Citation.]" (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 220-221, 120 Cal.Rptr.2d 879.) "The Legislature first enacted sections 391.1 through 391.6 in 1963, as a means of moderating a

vexatious litigant's tendency to engage in meritless litigation. [Citations.] Under these sections, a defendant may stay pending litigation by moving to require a vexatious litigant to furnish security if the court determines 'there is not a reasonable probability' the plaintiff will prevail. Failure to produce the ordered security results in dismissal of the litigation in favor of the defendant. [Citations.]" (*Bravo v. Ismaj, supra*, at p. 221, 120 Cal.Rptr.2d 879.)

The second public policy is a corollary to the first, and it establishes that one of the best ways to control abusive litigation is with gatekeeping. "In 1990, the Legislature enacted section 391.7 to provide the courts with an additional means to counter misuse of the system by vexatious litigants. Section 391.7 'operates beyond the pending case' and authorizes a court to enter a 'prefiling order' that prohibits a vexatious litigant from filing any new litigation in propria persona without first obtaining permission from the presiding judge. [Citation.] The presiding judge may also condition the filing of the litigation upon furnishing security as provided in section 391.3. [Citation.]" (*Bravo v. Ismaj, supra*, 99 Cal.App.4th at p. 221, 120 Cal.Rptr.2d 879.)

Third, there is a well-established public policy in favor of trials on the merits. (§ 583.130.)

Taken together, these policies compel me to conclude that Forrest's action should not have been dismissed pursuant to section 391.7.^{FN3} Forrest's first *208 amended complaint, the operative pleading, was filed **485 by Forrest through her counsel, a "neutral assessor[]" of her claims. (*In re Shieh* (1993) 17 Cal.App.4th 1154, 1167, 21 Cal.Rptr.2d 886.) That pleading was proven to have merit. It largely withstood respondents' demurrer and motion to strike. Her claims partially survived respondents' motion for summary adjudication. A jury had even been impaneled and trial had commenced on her causes of action. Permitting this litigation to proceed would not have transgressed either the first or second policies because the litigation was not meritless, and the gatekeeping function

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was not implicated by the operative pleading because it was filed by a lawyer. Finally, dismissal contravenes the policy of trial on the merits. That is all the more true here. Through no fault of Forrest, a mistrial was declared. ^{FN4} Based upon these circumstances, dismissal was unjust.^{FN5}

FN3. To the extent the majority contends that pursuant to section 391.7, subdivision (c), the trial court had the discretion to dismiss Forrest's action after granting her several continuances to obtain new counsel, this analysis is flawed. Even if section 391.7, subdivision (c), governed, which I do not believe it does, then dismissal of Forrest's action should have been automatic. (See § 391.7, subd. (c) ["The litigation shall be automatically dismissed"].) The statute does not use the word "may" and is not permissive, as the majority posits. (Maj.Opn., p. 478, fn.12.) Rather, it deliberately uses the words "shall" and "automatic []," establishing the statute's firm mandate. (See, e.g., *People v. Standish* (2006) 38 Cal.4th 858, 869, 43 Cal.Rptr.3d 785, 135 P.3d 32.) It follows that, if section 391.7, subdivision (c), applies beyond the initial filing of a lawsuit, the trial court would have had no discretion to grant Forrest a continuance. She would have had 10 days to obtain the presiding judge's permission to proceed with her litigation once the respondents gave her notice that she was subject to a prefiling order. In the absence of permission, her action would have been automatically dismissed.

FN4. The majority asserts that the trial judge "became unavailable to complete the case." (Maj.Opn., p. 470.) There is no evidence that the trial judge could not have completed the trial prior to his transition to the Court of Appeal or otherwise have obtained permission to finish a trial that had

already commenced.

FN5. Neither did the trial court have the inherent authority to dismiss Forrest's first amended complaint, as suggested by the majority. Aside from the fact that this issue was not briefed by the parties, because litigants may represent themselves, the trial court lacked the inherent authority to order Forrest to retain counsel and then, on its own motion, dismiss Forrest's action for failure to retain counsel if she was not required to be represented by counsel after her attorney withdrew.

I conclude that a prefiling order governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation. (See, e.g., *Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at pp. 221-222, 120 Cal.Rptr.2d 879 [section 391.7 "operates solely to preclude the initiation of meritless lawsuits"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶ 1:914, p. 1-192.6 (rev.# 1, 2000) ["Plaintiffs who litigate in propria persona and repeatedly file frivolous pleadings or motions, or attempt to relitigate issues previously determined against them, may be barred from filing new lawsuits without prior leave of court"].) This interpretation does not leave trial courts without a tool to prevent litigation from getting out of hand. Aside from the protections of other sections contained in the Code of Civil Procedure, such as section 128.7, if a plaintiff loses her counsel midstream, the defendants can *209 move for security pursuant to sections 391.1 and 391.3. ^{FN6} This remedy alleviates the majority's concern of a vexatious litigant engaging in harassing behavior during the prosecution of an action, while also protecting a plaintiff with a valid claim.

FN6. In fact, Forrest did offer to post security.

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