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Appellate Reports

SUPREME COURT HOLDS NO RIGHT TO JURY TRIAL UNDER EITHER UNFAIR COMPETITION LAW OR FALSE ADVERTISING LAW

Unfair Competition Law (UCL) and False Advertising Law (FAL)

Bus. & Prof. Code, §§ 17200, 17500; no right to jury trial: *Nationwide Biweekly Admin., Inc. v. Superior Court* (2020) __ Cal.5th __ (Cal. Supreme)

While it has been settled law that claims for equitable relief under the UCL and FAL are not subject to a jury trial, the law has been less clear on whether there is a right to a jury trial on claims for civil penalties under those statutes. In this case the Supreme Court held that there is neither a statutory nor a constitutional right to a jury trial under either statute.

PAGA

Arbitration; individual versus representative claims: *Brooks v. AmeriHome Mortgage Company, LLC* (2020) 47 Cal.App.5th 624 [260 Cal.Rptr.3d 428], *pet. for review filed (May 11, 2020)* (Second Dist, Div. 6.)

Brooks was an employee of Amerihome. His employment contract included an arbitration clause. Brooks filed a written notice of wage-violation claims with the the Labor and Workforce Development Agency (LWDA) pursuant to the Private Attorneys General Act of 2004 (PAGA). (Lab. Code, § 2698 et seq.) Brooks alleged that he and other AmeriHome employees were "entitled to penalties and wages as allowed under § 2698 et seq." and "will seek them on his own behalf and on behalf of other similarly situated" employees. Amerihome filed a petition to compel arbitration. Brooks then filed a first-amended complaint in the Superior Court, alleging a single violation under PAGA based on Amerihome's failure to pay minimum and overtime wages, provide meal periods and rest breaks, etc. Unlike the LWDA notice, Brooks's first amended complaint did not seek individual recovery for unpaid wages. The "prayer for relief" seeks only "civil penalties," "costs and attorney['s] fees," and "other and further relief the court may deem just and proper."

Brooks filed a motion for a preliminary injunction to enjoin arbitration. AmeriHome filed a motion to stay proceedings pending arbitration. The trial *628 court issued the preliminary injunction and denied the stay request. The court found that "allowing the arbitration to proceed would split a pure PAGA claim between the trial court and an arbitration forum. A PAGA claim is made on behalf of the State and, ... the State cannot be compelled to go to arbitration." The court further stated that whether Brooks is the "proper plaintiff to bring this matter on behalf of the State is a question for this [c]ourt, not an arbitrator." The Court of Appeal affirmed.

Where an employee alleges a single representative cause of action under PAGA, the claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim. Here, Brooks's complaint is, as the trial court described it, a "pure PAGA claim." Brooks alleged a single cause of action under PAGA and did not allege an individual claim for wage recovery in his complaint. His complaint prayed only for "civil penalties," "costs and attorney['s] fees," and "other and further relief the court may deem just and proper." Because he brought a representative claim, he cannot be compelled to separately arbitrate whether he was an aggrieved employee.

Negligence, duty, mortgage-loan modifications:

Lenders who offer loan modifications owe a duty of reasonable care in processing application: *Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 346 [260 Cal.Rptr.3d 712, 714], pet. for review filed (May 6, 2020) (Third District)

Plaintiff Robert Weimer, Jr., purchased real property in Carnelian Bay in 1993. He refinanced the mortgage in 2006 with a loan from defendant Bank of America, N.A. (BANA). After defaulting, plaintiff entered into a loan modification process with BANA. Subsequently, loan servicing was transferred, successively, to defendants Specialized Loan Servicing, LLC (SLS) and Nationstar Mortgage, LLC (Nationstar). According to plaintiff, BANA, SLS, and Nationstar successively each engaged in deliberate and negligent misconduct in the loan modification process. In 2014, BANA transferred beneficial interest in the loan to defendant U.S. Bank, N. A. (U.S. Bank), as trustee for the Certificateholders of Banc of America Funding Corporation Mortgage Pass Through Certificates Series 2007-7. Eventually, Nationstar, acting as U.S. Bank's agent, recorded a notice of trustee's sale and had an agent enter onto the property and change the locks.

Weimer sued BANA, U.S. Bank, and Nationstar asserting causes of action sounding in intentional and negligent misrepresentation, negligence, trespass to land, seeking declaratory relief, and asserting violations of the unfair competition law. The trial court sustained their demurrers, finding that the claim against BANA was time barred and that his claims against the other defendants were not viable. The Court of Appeal affirmed as to BANA, but reversed as to the other defendants, finding that Weimer sufficiently stated causes of action sounding in intentional and negligent misrepresentation and violations of the unfair competition law against them.

[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.

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Additionally, California law generally does not impose a duty of care to avoid causing purely economic losses in negligence cases. But the California Supreme Court has recognized an exception when the plaintiff and defendant have a "special relationship." In this context, "special relationship" means "that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out,"

Determination of the existence of such a duty is based on an application of the factors set forth in n *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650. The *Biakanja* factors are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.

Based on the application of those factors, the court concluded that the trial court erred in concluding that the defendants other than BANA owed Weimer a duty of care.

Civil rights

28 U.S.C. § 1981; "but for" versus "motivating factor" causation – claim under § 1981 requires plaintiff to prove but-for causation: *Comcast Corporation v. National Association of African American-Owned Media* (2020) __ U.S. __, 140 S.Ct. 1009 (U.S. Supreme)

Entertainment Studios Network (ESN), an African-American-owned television-network operator, sought to have cable television conglomerate Comcast Corporation carry its channels. Comcast refused, citing lack of programming demand, bandwidth constraints, and a preference for programming not offered by ESN. ESN and the National Association of African American-Owned Media (collectively, ESN) sued, alleging that Comcast's behavior violated 42 U.S.C. § 1981, which guarantees "[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens." The District Court dismissed the complaint for failing plausibly to show that, but for racial animus, Comcast would have contracted with ESN. The Ninth Circuit reversed, holding that ESN needed only to plead facts plausibly showing that race played "some role" in the defendant's decision-making process and that, under this standard, ESN had pleaded a viable claim. Reversed.

To prevail, a tort plaintiff typically must prove but-for causation. Normally, too, the essential elements of a claim remain constant throughout the lawsuit. ESN suggests that section 1981 creates an exception to one or both of these general principles, either because a section 1981 plaintiff only bears the burden of showing that race was a "motivating factor" in the defendant's challenged decision or because, even when but-for causation applies at trial, a plausible "motivating factor" showing is all that is necessary to overcome a motion to dismiss at the pleading stage. The Court rejected these arguments and held that a section 1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit.

Public entity liability; dangerous condition

City not liable for failure to erect barrier to keep pedestrians from going around guardrail to railroad tracks: *Hedayatzadeh v. City of Del Mar* (2020) 44 Cal.App.5th 555 [257 Cal.Rptr.3d 718] (Fourth District, Div. 1.)

Hedayatzadeh's 19-year-old son was struck by a train on an oceanfront bluff in Del Mar on property owned by North County Transit District (NCTD). Hedayatzadeh filed a wrongful-death lawsuit against the City of Del Mar, based on the City's failure to erect barriers to prevent pedestrians from accessing NCTD's train tracks. The trial court granted summary judgment in favor of the City. Affirmed.

A dangerous condition exists when public property 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself,' or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users."

It is undisputed that the railroad right-of-way, which consists of the train tracks and an area approximately 50 feet to both the west and east of the tracks is owned and controlled by NCTD, not by the City. Although the exact boundaries are not clear from the record, the City's property terminates somewhere near the guardrail that is at end of 13th Street. Hedayatzadeh takes the position that the City's property poses a dangerous condition because (1) it is *adjacent* to NCTD's right-of-way containing the train tracks; (2) the train tracks pose a danger to trespassers; and (3) the City has not taken any action, such as constructing a fence at the location of the guardrail at the end of 13th Street, to prevent pedestrians from walking around the guardrail and trespassing on NCTD's train tracks.

Here, the City is not liable as a matter of law for merely failing to erect a barrier at the site of the guardrail to prevent pedestrians from choosing to enter a hazardous area on NCTD's adjacent right-of-way.

Attorneys; ethics

Fee-split agreement; mandatory disclosures re: malpractice insurance; referral fees; quantum meruit: *Hance v. Super Store Industries* (2020) 44 Cal.App.5th 676 [257 Cal.Rptr.3d 761] (Fifth District).

Attorneys who represented plaintiff class in class action moved for award of attorney fees and division of award among attorneys, which referring attorney and co-counsel disputed. The Superior Court made fee award and divided fees in accordance with written fee division agreement. Co-counsel appealed. Reversed.

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As an issue of apparent first impression, attorney-fee division agreement was unenforceable based on ethical violation of failure to disclose lack of professional liability insurance, but any quantum meruit recovery was not limited to hours reflected in referring attorney's time records, but could include reasonable value of referral.

Settlement

Settlement credit; res judicata; privity between co-defendants: *Shuler v. Capital Agricultural Property Services, Inc.* (2020) __ Cal.App.5th __ (Second Dist., Div. 6.)

The Shulers' horse farm was inundated by a landslide caused by the negligence of its adjoining uphill landowners. The Shulers sued the landowners and their management company for trespass, nuisance, and negligence. Their action in state court was originally dismissed for failure to join an indispensable party, the National Resource Conservation Service (NCRS), a federal agency whose employees worked on the erosion-control permit issued to the uphill landowners. The Shulers refiled in federal court, including the NCRS as a defendant. While the case was pending in federal court, the Shulers accepted a $50,000 settlement from the federal government under FRCP 68, a rule corresponding to Code of Civil Procedure section 998 in California. The settlement was reflected in a consent judgment releasing the federal government and its agents and employees from liability in exchange for the $50,000 payment. The federal court approved a motion for good-faith settlement under Code of Civil Procedure section 877.6 and then dismissed the case because there were no remaining federal claims. The Shulers refiled in state court and won a verdict against the defendants of $1.7 million in economic damages. Each defendant was found to be 10% at fault, and the two NCRS employees who worked on the permits were each held 34% at fault.

When the trial court entered judgment, it ordered that the defendant would be jointly and severally liable to appellants only for their 30 percent share of the negligence: $526,950, less an offset of $66,666.67 for amounts paid by settling tortfeasors. Accordingly, the defendants' joint and several liability for economic damages was reduced from $1,756,499.99 to $460,283.33. (In short, the trial court discounted the defendants' liability by the 2% comparative fault allocated to the Shulers, plus the 68% fault allocated to the federal employees.) Reversed.

In the settlement with the United States, appellants did not waive their right to seek full compensation for their loss from other tortfeasors under the California rule of joint and several liability. They waived their right to seek further compensation from the United States and its employees. Therefore, the incorporation of the settlement into a judgment does not shield respondents from joint and several liability. "'Although a stipulated judgment is no less conclusive than a judgment entered after trial and contest [citations][,] it is axiomatic that its res judicata effect extends only to those issues embraced within the consent judgment....'"

Each of the defendants was held to be independently liable for its own negligence. Hence, they could not claim that they were held "vicariously liable" for the negligent conduct of the federal employees, whose liability had been released in the settlement. Under the doctrine of joint and several liability, which applies to economic damages in California, each of the defendants was jointly and severally liable to the Shulers for the entire amount of the judgment.

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