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Appellate Report

COURT REFINES THE TRIVIAL DEFECT DOCTRINE, REJECTS STRICT TAPE MEASURE APPROACH TO DETERMINE WHETHER A SIDEWALK DEFECT IS TRIVIAL. ALSO, 998 OFFERS AND PEREMPTORY CHALLENGES

Trivial-defect doctrine; summary judgment; sidewalks

Fajardo v. Dailey (2022) __ Cal.App.5th __, Second Dist., Div. 7.

Fajardo filed a negligence action against Dailey after he tripped and fell on an asphalt patch between two adjacent sidewalk slabs in front of Dailey's property. The trial court granted Dailey's motion for summary judgment, ruling the condition of the sidewalk was a trivial defect. Reversed.

In her motion, Dailey submitted Fajardo's deposition testimony that, after he fell, he measured the height differential with his key and described it as "a little over one inch." Fajardo also testified that the weather was sunny, that he had lived nearby for 13 years, and that he had previously walked on the sidewalk in front of Dailey's house.

Dailey also submitted the declaration of an architect, Thomas Parco, who stated the sidewalk complied with applicable codes, statutes, and regulations and presented "no unreasonable safety hazard." Parco stated that the displacement in the concrete slabs where Fajardo fell created a rise of less than one inch and that the defect was trivial. Parco opined that the black asphalt patch made the displacement clearly visible and that, because Fajardo was traveling down the slope rather than up, it was less likely someone like him would trip. Several photographs attached to Parco's declaration of a tape measure placed on the sidewalk suggested the differential was between 10/16 and 13/16 of an inch. The trial court, however, sustained Fajardo's objections to these (unauthenticated) photographs and to Parco's (legal) conclusion the defect was trivial.

In opposition to the motion, Fajardo disputed Parco's measurement of the height differential and argued the height of the displacement, combined with other aggravating factors, made the sidewalk defect nontrivial. Fajardo submitted the declaration of a forensic analyst, Eris J. Barillas, who stated that she visited the site in February 2021 and that, although the asphalt patch had been removed and replaced with concrete, she measured the height differential as approximately one and three-sixteenths inches. Barillas opined that the sidewalk defect had a vertical height differential between one and three-sixteenths and one and one-half inches in December 2018 when Fajardo fell and that the asphalt patch was at least 11 years old. Barillas stated "low lying height differentials often go unnoticed by pedestrians and are likely to pose a significant tripping hazard." She also stated that a photograph Fajardo took two days after his fall showed the asphalt patch was "substantially defective and deteriorated and contains jagged, uneven, and irregularly shaped edges, cracks and loose pieces of asphalt." Barillas opined the asphalt patch was a "tripping hazard" and "not a trivial defect."

The trial court acknowledged that the parties disputed the size of the height differential but concluded that Fajardo's evidence the lift was one and three-sixteenths to one and one-half inches high "does not create a triable issue of material fact, considering courts have found height differentials as big as 1 1/2 inches high to be trivial." The court also rejected Fajardo's contention that "jagged edges and irregular breaks" in the asphalt patch were aggravating circumstances that precluded summary judgment. The court found the "obvious and distinctive nature of the asphalt patch," rather than making the sidewalk defect more dangerous, was "consistent with a determination that the condition of the sidewalk was a trivial defect."

The Court of Appeal explained that, in the sidewalk-walkway context, the decision whether the defect is dangerous as a matter of law does not rest solely on the size of the crack in the walkway, since a tape measure alone cannot be used to determine whether the defect was trivial. Although a defect's size may be one of the most relevant factors to the court's decision, the court also must consider all the circumstances surrounding the accident that might make the defect more dangerous than its size alone would suggest, including "whether the walkway had any broken pieces or jagged edges."

Parco's declaration asserted that the vertical rise was less than an inch but did not state how or why he knew this. He did not say he measured the displacement, nor did he give any other basis for his conclusion. Therefore, it had no evidentiary value and could not support summary judgment.

Moreover, size alone is not determinative of whether a rut presents a dangerous condition. Application of a strict tape measure approach to determine whether a defect is trivial as a matter of law disregards the fact that other factors and circumstances involved in a particular case could very well result in an entirely different conclusion from one arrived at by simply measuring the size of a defect.

Dailey therefore did not meet her initial burden on summary judgment, and even if she had, Fajardo submitted evidence creating triable issues of material fact on the height differential. Barillas stated that, in her opinion, the displacement was one and three-sixteenths to one and one-half inches and that the width of the defect was approximately 30 inches. And unlike Parco, Barillas provided the basis for her conclusion.

Validity of 998 offers; overbroad 998 offers; 998 offers based on releases that extend beyond the claims involved in the litigation

Council for Education and Research on Toxics v. Starbucks Corporation (2022) __ Cal.App.5th __, Second District, Div. 4.

The Council for Education and Research on Toxics (CERT) brought actions under Proposition 65 (Prop. 65) against respondents, dozens of companies that roast, distribute, or sell coffee. CERT claimed that respondents had failed to provide required Prop. 65 warnings for their coffee products based on the presence of acrylamide, which is included in the Prop. 65 list of known carcinogens and is naturally produced in coffee as a result of the roasting and brewing processes.

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While the litigation was pending, the agency charged with implementing Prop. 65, adopted a new regulation providing that "[e]xposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer." (Cal. Code Regs., tit. 27, § 25704; the Coffee Regulation.) This regulation meant that coffee generally did not require Prop. 65 warnings. Respondents then moved for summary judgment, asserting the Coffee Regulation as a defense. After trial court granted the motion, some of the respondents (collectively Starbucks) sought costs under Code Civ. Proc. § 998 based on compromise offers CERT had rejected during the litigation. CERT moved to tax costs, contending, inter alia, that the offers were invalid because they were conditioned on court approval (as required by Prop. 65), and because the releases they included were overbroad. The trial court denied the motion to tax costs and awarded the relevant respondents almost $700,000 in post-offer costs. Reversed.

Because section 998 requires a determination whether the offer's terms were more favorable than the judgment, the offer must not include a release of claims beyond those involved in the litigation. The releases proposed by Starbucks violated this rule because they encompassed claims beyond the scope of this litigation. The releases would have applied to "all Claims ... known or unknown ... arising under Proposition 65 or for an alleged failure to provide warnings for exposures to acrylamide." While the release would have applied only to Prop. 65 claims, the Starbucks points to nothing in their language that would have limited them to the claims involved in CERT's actions, and the court can see no such limitation. Because the releases extended beyond the scope of the litigation, they invalidated the compromise offers.

Peremptory challenges of jurors; *Batson/Wheeler* challenges; challenges to jurors "associated" with someone who has a disability

Unzueta v. Akopian (2022) __ Cal.App.5th __, Second Dist., Div. 7.

Both the state and federal Constitutions prohibit the use of peremptory strikes to remove prospective jurors on the basis of group bias. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) In an issue of first impression, the court considered whether, under California law, an attorney may properly strike a prospective juror based on the disability of the juror's family member.

Historically *Batson/Wheeler* motions have been analyzed, as the trial court did, in terms of whether the justification for excusing a prospective juror is race neutral. However, in 2015 the Legislature expanded the scope of cognizable groups protected under *Batson/Wheeler* by its enactment of Assembly Bill No. 87 (2015-2016 Reg. Sess.) § 1 (Assembly Bill 87), effective January 1, 2017. Assembly Bill 87 amended Code of Civil Procedure section 231.51 to specify by reference to Government Code section 11135 that peremptory challenges cannot be used to excuse prospective jurors on the basis of their sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental and physical disability, medical condition, genetic information, marital status, or sexual orientation. Nor can a peremptory challenge be based on the perception the juror possesses one of these characteristics or because of the juror's association with someone perceived to have one of these characteristics.

During jury selection in this case, defendant's counsel exercised peremptory challenges to six Hispanic prospective jurors. As relevant here, defense counsel explained the basis for the challenges this way: Two of the six were excused because they had a family member who was disabled, and defense counsel feared the family member's disability would cause the jurors to be biased in favor of the plaintiff, who alleged she had become disabled because of the defendant's professional negligence. The trial court found that, because the justifications for excusal were race-neutral, the *Batson/Wheeler* challenge should be denied. The Court of Appeal reversed and ordered a new trial.

A three-step process is used to evaluate a *Batson/Wheeler* motion. First, the party objecting to the strike must establish a prima facie case by showing facts sufficient to support an inference of discriminatory purpose. Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible, nonbiased justification for the strike. Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether impermissible discrimination in fact motivated the strike. The prohibition against the exercise of peremptory challenges to exclude prospective jurors on the basis of group bias applies to civil as well as criminal cases.

Excluding even a single prospective juror for reasons impermissible under *Batson* and *Wheeler* requires reversal.

The United States Supreme Court has extended the reach of *Batson/Wheeler* motions to forbid the exercise of peremptory challenges to those based on gender. And under the California Constitution, use of a peremptory challenge "on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds" is impermissible and the proper subject of a *Batson/Wheeler* motion.

The Court construed section 231.5 and Government Code section 11135 together to prohibit use of peremptory challenges to excuse prospective jurors on the basis a person with whom the juror is associated has a disability. That is precisely what defense did here, requiring reversal.

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