California Case Summaries: Civil Update Quarterly™
2018 Q1: January 1, 2018 to April 6, 2018

By Monty A. McIntyre, Esq.
Mediator, Arbitrator & Referee at ADR Services, Inc.
Trial Lawyer | National ABOTA Board Member | Licensed in California since 1980
For ADR scheduling, contact Christopher Schuster at ADR Services, Inc.
Phone: (619) 233-1323 | Email: christopher@adrservices.com
Monty's Phone: (619) 990-4312 | Monty's Email: monty@montymcintyre.com
Web: www.montymcintyre.com

CALIFORNIA SUPREME COURT

Appeal

Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260, 2018 WL 577716: The California Supreme Court affirmed the Court of Appeal's decision and ruled that unnamed class members do not become parties of record under Code of Civil Procedure section 902 with the right to appeal the class settlement, judgment, or attorney fees award unless they formally intervene in the class litigation before the action is final. (*Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199, 201.) (January 29, 2018.)

Attorneys

Heller Ehrman LLP v. Davis Wright Tremaine LLP (2018) 4 Cal.5th 467, 2018 WL 1146649: The California Supreme Court answered the following question from the Ninth Circuit Court of Appeals: Does a dissolved law firm retain a property interest in such legal matters that are in progress – but not completed – at the time of dissolution? Under California law, a dissolved law firm has no property interest in legal matters handled on an hourly basis, and

therefore, no property interest in the profits generated by its former partners' work on hourly fee matters pending at the time of the firm's dissolution. The partnership has no more than an expectation that it may continue to work on such matters, and that expectation may be dashed at any time by a client's choice to remove its business. As such, the firm's expectation — a mere possibility of unearned, prospective fees — cannot constitute a property interest. To the extent the law firm has a claim, its claim is limited to the work necessary for preserving legal matters so they can be transferred to new counsel of the client's choice (or the client itself), effectuating such a transfer, or collecting on work done pretransfer. (March 5, 2018.)

Civil Code

McMillin Albany LLC v. Superior Court (2018) 4 Cal.5th 241, 2018 WL 456728: The California Supreme Court affirmed the Court of Appeal's decision granting a writ petition and ordering a stay of a common law construction defect claim until completion of the prelitigation process in the Right to Repair Act (Act; Civil Code section 895-945.5.). The California Supreme Court ruled the suit for property damage was subject to the Act's prelitigation procedures. (January 18, 2018.)

Civil Procedure

Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism (2018) 4 Cal.5th 637, 2018 WL 1415578: The California Supreme Court affirmed the decision of the Court of Appeal and ruled that anti-SLAPP motions to strike under Code of Civil Procedure section 425.16 must be filed within 60 days of service of the earliest complaint that contains the cause of action being attacked, subject to the trial court's discretion under section 425.16(f) to permit a late filing. (March 22, 2018.)

Solus Industrial Innovations, LLC v. Superior Court (2018) 4 Cal.5th 316, 2018 WL 771814: The California Supreme Court reversed the Court of Appeal's decision that had ruled that an action by a district attorney for civil penalties under the unfair competition law (UCL; Business & Professions Code, section 17200) and fair advertising law (FAL; Business & Professions Code, section 17500) against an employer was preempted by the federal Occupational Safety and Health Act of 1970 (federal OSHA Act; 29 U.S.C. section 651 et seq.). The Supreme Court ruled that the action was not preempted. The federal act does not preempt unfair competition and consumer protection claims based on workplace safety and health violations when, as in California, there is a state plan approved by the federal Secretary of Labor. The district attorney's use of UCL and FAL causes of action did not encroach on a field fully occupied by federal law, nor did it stand as an obstacle to the accomplishment of the federal objective of ensuring a nationwide minimum standard of workplace protection. Finally, the federal OSHA Act's structure and language does not reflect a clear purpose of Congress to preempt such claims. (February 8, 2018.)

Employment

Alvarado v. Dart Container Corp. of California (2018) 4 Cal.5th 542, 2018 WL 1146645: The California Supreme Court reversed the decision of the Court of Appeal, which had affirmed the trial court's summary judgment for defendant on the basis that there was no valid California law or regulation explaining how to factor a flat sum bonus into an employee's regular rate of pay for purposes of calculating the employee's overtime compensation. The California Supreme Court ruled that the way an employee's overtime pay rate should be calculated when the employee has earned a flat sum bonus during a single pay period

should be as follows: the divisor for purposes of calculating the per-hour value of the bonus should be the number of nonovertime hours the employee worked during the pay period. (March 5, 2018.)

Torts

The Regents of the University of California v. Superior Court (2018) 4 Cal.5th 607, 2018 WL 1415703: The California Supreme Court reversed the Court of Appeal's order granting a writ petition because the Court of Appeal found that petitioner (the defendant university in the underlying action) did not owe a duty to the plaintiff in the underlying action, a student who was stabbed by a fellow student who experienced auditory hallucinations and believed that other students were criticizing him. Before the stabbing, school administrators had learned of the delusions and attempted to provide mental health treatment. The California Supreme Court ruled that universities and colleges have a special relationship with their students and owe students a duty to protect them from foreseeable violence during curricular activities. (March 22, 2018.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Avila v. Southern Cal. Specialty Care, Inc. (2018) 20 Cal.App.5th 835, 2018 WL 1044668: The Court of Appeal affirmed the trial court's order denying a petition to compel arbitration in a case alleging negligence, elder abuse and wrongful death. The trial court properly ruled that the wrongful death claim was not subject to arbitration, and it properly exercised its discretion, under Code of Civil Procedure section 1281.2(c), to refuse to enforce the arbitration agreement as to the remaining claims due to the risk of inconsistent judgments. (C.A. 4th, February 26, 2018.)

Douglass v. Serenivision, Inc. (2018) 20 Cal.App.5th 376, 2018 WL 774085: The Court of Appeal affirmed the trial court's order granting defendant's petition to confirm an arbitration award and denying plaintiff's lawsuit seeking to vacate the arbitration award. The matter was subject to arbitration because plaintiff clearly and unmistakably consented to have an arbitrator decide his own jurisdiction by not objecting to the arbitrator's jurisdiction in his answer to the arbitration petition, by informing the arbitrator that he was voluntarily submitting to the arbitrator's jurisdiction, by appearing at multiple prehearing conferences, and by formally asking the arbitrator to impose a bond requirement on the opposing party. Only after the arbitrator denied the request did plaintiff state that his submission to jurisdiction was conditional on obtaining the bond. The arbitrator did not err in finding that plaintiff was liable as a guarantor. (C.A. 2nd, February 8, 2018.)

EHM Productions, Inc. v. Starline Tours of Hollywood, Inc. (2018) 21 Cal.App.5th 1058, 2018 WL 1516828: The Court of Appeal affirmed the trial court's confirmation of a cost award of $41,429.92 that was granted following the confirmation of the initial arbitration award. Defendant's sole contention on appeal was that the trial court erred by entering two consecutive judgments resulting from the same arbitration. The Court of Appeal ruled that confirmation of the cost award was not precluded by the one final judgment rule or principles of waiver or estoppel. (C.A. 2nd, March 28, 2018.)

Muro v. Cornerstone Staffing Solutions (2018) 20 Cal.App.5th 784, 2018 WL 1024168: The Court of Appeal affirmed the trial court's order denying defendant's motion to compel arbitration in a proposed class action alleging wage and hour and other Labor Code violations. The arbitration agreement included a class action waiver. The trial court properly ruled that, under *Garrido v. Air Liquide Industrial, U.S. LP* (2015) 241 Cal.App.4th 833, the Federal Arbitration Act did not apply because plaintiff was a transportation worker. *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*) (overruled on other grounds in *Iskarian v. CLS Tranportation, Los Angeles, LLC* (2014) 59 Cal.4th 348) provided the framework for evaluating whether the class waiver provision in the contract was enforceable under California law. The Court of Appeal held there was substantial evidence supporting the trial court's factual findings, and the trial court did not abuse its discretion in ruling that the class action waiver was unenforceable under *Gentry*. (C.A. 4th, February 23, 2018.)

Saheli v. White Memorial Medical Center (2018) 21 Cal.App.5th 308, 2018 WL 1312501: The Court of Appeal reversed the trial court's order denying defendants' motion to compel arbitration of plaintiff's claims under the Ralph Act (Civil Code section 51.7) and the Bane Act (Civil Code section 52.1). The Court of Appeal ruled that the trial court erred in its interpretation of the arbitration agreement. It also ruled that the Ralph Act's and Bane Act's special requirements for arbitration agreements are preempted by the Federal Arbitration Act. (C.A. 2nd, March 14, 2018.)

Attorney Fees

Burkhalter Kessler Clement & George, LLP v. Hamilton (2018) 19 Cal.App.5th 38, 2018 WL 316444: The Court of Appeal reversed the trial court's order denying attorney fees to a defendant who was a prevailing party. Plaintiff sued defendant Eclipse Group LLP (Eclipse) for breach of a sublease with an attorney fees clause. Plaintiff also named defendant Jennifer Hamilton (Hamilton), a managing partner of Eclipse, as an alter ego of Eclipse. Plaintiff prevailed against defendant Eclipse when its summary judgment motion was granted. Defendant Hamilton won a motion for dismissal with prejudice of the claims against her. The Court of Appeal ruled that, in some lawsuits involving more than two parties, there may be more than one "prevailing party" entitled to contractual attorney fees under Civil Code section 1717.1. It ruled that both plaintiff and defendant Hamilton were prevailing parties on the contract and directed the trial court to award defendant Hamilton reasonable attorney fees that were incurred by her attorneys solely in her defense. (C.A. 4th, January 8, 2018.)

Bustos v. Global P.E.T., Inc. (2018) 19 Cal.App.5th 558, 2017 WL 6947674: The Court of Appeal affirmed the trial court's order denying plaintiff's motion for attorney fees requesting $454,857.90 pursuant to Government Code section 12965(b) and the Supreme Court's holding in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203. Plaintiff made the fee motion after the jury found that plaintiff's physical condition or perceived physical condition was "a substantial motivating reason" for his termination. The jury, however, also found that defendant's conduct was not a substantial factor in causing harm to plaintiff and returned a defense verdict. The Court of Appeal ruled that the trial court did not abuse its discretion in denying the motion for attorney fees. (C.A. 4th, filed December 22, 2017, published January 16, 2018.)

Garcia v. Mercedes-Benz USA (2018) 21 Cal.App.5th 1259, 2018 WL 1633322: The Court of Appeal affirmed the trial court's order denying plaintiff's motion for attorney fees, but modified the judgment to award plaintiff $750 in costs in an action under the Song-Beverly Consumer Warranty Act (the Act; Civil Code, section 1790 et seq.) There is a split of authority on how to determine the prevailing party in an action under the Act. The Court of Appeal followed the more numerous line of decisions requiring plaintiff to prove they obtained their litigation objectives, not just a monetary recovery. The trial court properly denied fees because plaintiff had filed suit against defendant, not the auto dealership, to recover dealer add-ons that she was not entitled to recover from defendant under the Act. Plaintiff's confidential settlement after the lawsuit was filed also made it impossible for the trial court to determine whether plaintiff had obtained her litigation objectives. Moreover, plaintiff was not the prevailing party if her action under the Act was brought only to recover attorney fees. Plaintiff was, however, entitled to her costs. She was the prevailing party under Code of Civil Procedure section 1032 because she obtained a net monetary recovery. (C.A. 2nd, April 5, 2018.)

Heron Bay Homeowners Assn. v. City of San Leandro (2018) 19 Cal.App.5th 376, 2018 WL 387122: The Court of Appeal affirmed the trial court's partial award of attorney fees of $181,471.70 (out of the $483,321.00 requested) to petitioner under Code of Civil Procedure section 1021.5 after it prevailed in a writ petition that resulted in an order to respondent to set aside its approvals of a wind turbine development project and comply with the California Environmental Quality Act by preparing an environmental impact report (EIR). The Court of Appeal found that petitioner met its burden of proving the financial burden of the litigation transcended the value of its private pecuniary interests, making a partial award appropriate. The fee motion provided detailed information regarding petitioner's litigation costs, and correctly pointed out that petitioner and its members received no "reasonably certain financial benefit" by securing an order directing respondent to prepare an EIR. On appeal, petitioner and real parties in interest, Halus Power Systems and Louis A. Rigaud individually and dba Halus Power Systems, had the burden of proving the trial court abused its discretion in granting the partial fee award but failed to satisfy this burden. (C.A. 1st, January 12, 2018.)

Land Partners, LLC v. County of Orange (2018) 19 Cal.App.5th 741, 2018 WL 345329: The Court of Appeal affirmed the trial court's order denying a motion for attorney fees under Revenue and Taxation Code section 5152 after plaintiff had prevailed on its tax refund lawsuit. A factual finding by the court that the reason the assessor did not apply a particular provision was that he or she believed it to be unconstitutional or invalid is a prerequisite to an attorney fee award under this section, and the trial court made no such finding. (C.A. 4th, filed January 10, 2018, published January 22, 2018.)

Marina Pacifica Homeowners Assn. v. Southern Cal. Financial Corp. (2018) 20 Cal.App.5th 191, 2018 WL 703011: The Court of Appeal affirmed the trial court's order denying both parties fees and costs. If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees. Regarding the costs issue, the case did not simply involve a monetary award,

it also involved declaratory relief in plaintiff's favor. And under those circumstances the court was given the discretion to allow costs or not. (C.A. 2nd, February 5, 2018.)

New Cingular Wireless PCS v. Public Utilities Commission (2018) 21 Cal.App.5th 1197, 2018 WL 1532332: The Court of Appeal granted a writ petition ordering that respondent review its remand decisions, made following the decision in *New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, that awarded all attorney fees claimed by intervenors, The Utility Reform Network (TURN) and the Center for Accessible Technology (CforAT), under Public Utilities Code section 1803. While respondent did make an attempt to identify orders or decisions adopted by respondent and link them to contentions or recommendations advocated by TURN and CforAT, there was no effort to trace the amounts of fees and costs incurred to the specific orders or decisions so identified. If it is not feasible to trace time and costs billed by TURN and CforAT with precision to an order or decision, then respondent must make an effort to discount the claimed amount for that lack of precision. (C.A. 1st, filed March 13, 2018, published March 29, 2018.)

Timed Out LLC v. 13359 Corp. (2018) 21 Cal.App.5th 993, 2018 WL 1514226: The Court of Appeal affirmed the trial court's order awarding plaintiff its attorney fees incurred only before the settlement offer made by defendant under Code of Civil Procedure section 998. Plaintiff sued for the violation of her right of publicity under the common law and Civil Code section 3344. Section 3344 allows the prevailing party to recover attorney fees and costs. Defendant served a 998 offer to pay the total sum of $12,500 "exclusive of reasonable costs and attorney fees, if any." After a bench trial, the trial court awarded plaintiff damages of $4,483.30. Both parties requested attorney fees and costs. The trial court properly ruled that plaintiff did not obtain a result better than the 998 offer, and properly awarded plaintiff her pre-998 offer attorney fees and costs and awarded defendant their post-998 attorney fees and costs. Defendant was awarded net attorney fees of $1,575, plaintiff was awarded preoffer costs of $480, and defendant was awarded postoffer costs of $15,757. (C.A. 2nd, filed February 27, 2018, published March 27, 2018.)

Attorneys

CA Self-Insurers' Security Fund v. Superior Court (2018) 19 Cal.App.5th 1065, 2018 WL 561707: The Court of Appeal granted a writ petition and directed the trial court to vacate its order disqualifying Nixon Peabody LLP (Nixon Peabody) from representing plaintiff in the case. The issue arose after an attorney left Michelman & Robinson, where he had represented some of the defendants in this action, and briefly worked at Nixon Peabody. He did not work on plaintiff’s case while he worked at Nixon Peabody, the Nixon Peabody lawyers working on the case stated they did not obtain confidential information from him, and Nixon Peabody indicated that it put up an “ethical” wall while the lawyer was at the firm. The trial court erred in finding that automatic disqualification was required. The Court of Appeal directed the trial court to determine whether confidential information was transmitted to Nixon Peabody, or whether, in the court’s discretion, other compelling reasons dictated that the firm should be disqualified. (C.A. 4th, January 26, 2018.)