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S T A T E

Appeals—Record on Appeal—Sufficiency—Anti-SLAPP—Attorney Malpractice—Protected Activity

Chodos v. Cole, 210 Cal.App.4th 692, 148 Cal.Rptr.3d 451 (2012) involved both a procedural appellate issue and a substantive anti-SLAPP issue. In this case, a defendant lawyer in a malpractice action sought to lay off some blame on other attorneys by filing a cross-complaint for equitable indemnity. The trial court granted the third party defendants' anti-SLAPP motion and the lawyer appealed. The prevailing anti-SLAPP parties argued that the appeal had to be dismissed because the appellant had not provided a transcript of the motion hearing. The court of appeal held the absence of a reporter's transcript did not require dismissal of the appeal because "[n]one of the parties relies upon the oral argument before the trial court, and we decide a pure legal issue based on the filings before the trial court—as did the trial court." Surprisingly, there was a dissent which argued that a transcript was required because there was the possibility of evidentiary issues or concessions at the hearing. On the merits, the court held that cross-complaint for indemnity did not arise from protected activity on the theory that an attorney-malpractice claim does not arise from protected activity, even though it involves litigation, and thus an equitable indemnity claim arising from a malpractice action similarly should not qualify for anti-SLAPP protection. Again, there was a dissent which argued that the anti-SLAPP motion was properly granted because "The principal thrust of [the lawyer's] equitable

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indemnity cross-complaint is that the advice and negotiations engaged in by [the other] attorneys contributed to [plaintiff's] legal practice damages."

Appeal—Scope of Notice of Appeal

The decision in *Filbin v. Fitzgerald*, 211 Cal.App.4th 154, 149 Cal.Rptr.3d 422 (2012), is an important reminder that while a notice of appeal will be liberally construed, there are limits to that liberality. In *Filbin*, the trial court awarded plaintiffs damages against their former attorneys in a malpractice action, though it also found against the former clients their claim for breach of fiduciary duty. On the lawyer's cross-complaint the trial court gave the lawyer a quantum meruit award for the value of legal services he had provided. For reasons that are not clear in the record, the trial court entered separate judgments on the complaint and cross-complaint. On appeal, the clients sought to overturn the quantum meruit award by arguing that the trial court wrongly found that the lawyer had not violated his fiduciary duty. The court of appeal refused to consider the clients' argument because the fiduciary duty ruling had been made on the complaint and the clients had not appealed from that judgment, but only from the judgment on the cross-complaint for fees. The court of appeal said that "[t]he policy of liberally construing a notice of appeal in favor of its sufficiency does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all." The court never explained the trial court's apparent violation of the "one-judgment rule," but its holding can be reconciled with cases holding that if a notice of appeal specifies one part of an appealable judgment or order, the appellant has forfeited the right to raise on appeal arguments relating to the unspecified balance of the judgment.

Arbitration Agreements—Enforceability

A dispute between an employer and "employee" concerning whether the "employee" has been properly classified as an employee or an independent contractor is not subject to arbitration under a contract provision stating that that parties agree to arbitrate any dispute that "arises with regard to [the agreement's] application or interpretation." *Elijahjuan v. Superior Court*, 147 Cal.Rptr.3d 857, 210 Cal.App.4th 15 (2012). The majority reasoned that the claims did not concern the application or interpretation of the contract, but instead concerned whether plaintiffs were denied wholly separate

rights under the Labor Code. The dissent would have held otherwise, reasoning that because the agreement described the parties' relationship as one of "independent contractors" and set the plaintiffs' compensation, the dispute fell squarely within the arbitration provision.

Business Litigation—Minority Discount in Damages Calculation

The court of appeal's decision in *Maughan v. Correia*, 210 Cal.App.4th 507, 148 Cal.Rptr.3d 593 (2012), shows that arithmetical principles can be confusing to trial judges. There, the trial court was tasked with valuing the a minority interest in a company in the context of a dispute over a stock option agreement in a closely-held company. The trial court found that defendant breached the agreement when he refused to allow the plaintiff to purchase an additional minority interest in the company. In calculating damages, the trial court first valued the interest plaintiff would have acquired absent the breach, subtracted the purchase price specified in the option agreement, and then applied a 40 percent minority discount. The court of appeal found this calculation was erroneous as a matter of law. The court held that "to be consistent with the law, [and] the purpose of the minority discount," the trial court should have applied the 40 percent discount to the interest plaintiff was entitled to purchase *before* subtracting the purchase price. By applying that discount *after*, "the trial court provided [plaintiff] with a windfall of almost $200,000."

Labor and Employment—Agreements Prohibiting Class Arbitration

In 2007, the California Supreme Court in *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), held that class action waivers of wage and overtime claims in arbitration agreements may violate California public policy if the waiver has an exculpatory effect that would undermine enforcement of the statutory right to overtime pay. As we have previously recognized (twice) in this newsletter, courts of appeal have recently questioned the continuing validity of *Gentry* in light of the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S.Ct. 1740 (2011). Those courts have generally concluded that although *Concepcion* suggests *Gentry* is preempted by federal law, they are bound the California Supreme Court's decision until that court revisits the issue. The recent Second District decision in *Franco v. Arakelian Enterprises, Inc.*, 211 Cal.App.4th 314,

149 Cal.Rptr.3d 530 (2012), takes a contrary view. There, the court held that "*Gentry* remains good law because, as required by *Concepcion*, it does not establish a categorical rule against class action waivers but, instead, sets forth several factors to be applied on a case-by-case basis to determine whether a class action waiver precludes employees from vindicating their statutory rights."

Labor and Employment—Arbitration—Standard of Review of Award—Honest Belief Defense

Arbitration awards are generally not reviewable for errors of fact or law. In two cases, however, the Supreme Court has said that where an employee's "unwaivable rights" are in issue, review should be broader. But because of the procedural posture of those two cases, the Supreme Court has not outlined the contours of what the review should be. The court *Richey v. AutoNation, Inc.*, 210 Cal.App.4th 1516, 149 Cal.Rptr.3d 280 (2012), has taken up the task. In that case, the employer terminated an employee who was on medical leave on the theory that the employee was violating company policy by working a second job during the leave. The arbitrator upheld the termination and refused to reinstate the employee on the theory that the employer had an "honest belief" that the employee had been dishonest and had violated company policy. The trial court confirmed the award, but the court of appeal reversed. The court of appeal held that because the employee had an unwaivable right to benefits under the California Family Rights Act, it could and would review the award for legal error. Doing so, the court held that "honest belief" defense should not be recognized. Since that was the foundation of the arbitrator's award, the court of appeal vacated the award. (Full disclosure: the authors of this newsletter represented AutoNation on appeal. A petition for review is pending.)

Labor and Employment—Hours and Wages

In *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 148 Cal.Rptr.3d 690 (2012), the court of appeal held that employers may round employee work time "if the employees are fully compensated over a period of time." The court of appeal found "no California statute or case law specifically authorizing or prohibiting this practice" of time-rounding. Further, "[i]n the absence of controlling or conflicting California law, California courts generally look to federal regulations under the

[Fair Labor Standards Act] for guidance." A federal regulation in turn allows rounding "as long as the employer's rounding policy does not consistently result in a failure to pay employees for time worked." The court of appeal found that "[t]he policies underlying the federal regulation—recognizing that time-rounding is a practical method for calculating work time and can be a neutral calculation tool for providing full payment to employees—apply equally to the employee-protective policies embodied in California labor law."

Litigation—Prevailing Party Attorneys' Fees—Representation by Of Counsel

Can a law firm recover attorney fees under a "prevailing party" clause when the firm is a successful litigant represented by "of counsel"? In *Sands & Associates v. Juknavorian*, 209 Cal.App.4th 1269, 147 Cal.Rptr.3d 725 (2012), the court of appeal answered "no" based on two principles. First, it is well-settled that a law firm may not recover prevailing party attorney's fees when it is represented by one of its partners, members, or associates. Second, as a matter of law, "[w]here an attorney is held out of the public as 'of counsel' to a law firm, the relationship between the two is close, personal, continuous, and regular." Thus, the court concluded that when represented by "of counsel," the law firm in question "was self-represented." The court of appeal "adopt[ed] a bright-line rule regarding attorney fees: When a law firm holds an attorney out to the public as 'of counsel,' the firm cannot recover attorney fees under a prevailing party clause when, as a successful litigant, it is represented by 'of counsel.'"

Summary Judgment—Separate Statement—Golden Rule

Batarse v. Service Employees Intern. Union Local 1000, 147 Cal.Rptr.3d 340, 209 Cal.App.4th 820 (2012), is a cautionary tale regarding the "golden rule" of summary judgment. There, a plaintiff opposing a summary judgment motion filed an opposition and separate statement of disputed facts. The separate statement, however, contained scant references to evidence. Instead, plaintiff included evidence attached to declarations and discussed that evidence in the opposition, but omitted much of it from the separate statement. Citing the golden rule of summary judgment—that matter not in the separate statement does not exist—the trial court granted summary judgment on the basis of the inadequate separate

statement. The court of appeal affirmed, finding no abuse of discretion because plaintiff's error was not a mere procedural error easily fixed by a continuance, but instead went to the substance of the issues in the case.