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U.S. Court of Appeals Rules in *Callahan v. Brookdale Senior Living* That Plaintiff in Overlapping PAGA Case Was Not a Party to the Original Case and Therefore Could Not Appeal the Approval of the PAGA Settlement

Plaintiff Carolyn Callahan ("Callahan") filed an action against Brookdale Senior Living Communities, Inc. ("Brookdale"), her former employer, pursuant to the California Private Attorneys General Act ("PAGA"). The parties attended mediation, after which a settlement was reached and, later, approved by the trial court. Appellant Mishelle Neverson ("Neverson"), a plaintiff in an overlapping PAGA case against Brookdale, filed a motion to intervene in Callahan's action and an appeal of the PAGA settlement approval.

Federal Rule of Civil Procedure 24(a)(2) requires a court to permit intervention of right by a movant who "claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest." Even assuming that Neverson's motion was timely and that she had an interest in recovering penalties pursuant to PAGA, Neverson's motion fails at establishing that her interest was inadequately represented by the parties to the action. Neverson primarily contends that her interests are not adequately represented as the PAGA settlement amount approved in the Callahan case is too small. However, the court held that this ultimately amounts to a disagreement of litigation strategy, and Neverson's assertion that she would not have agreed to this settlement is insufficient to show inadequate representation of her interests.

The court also noted that, while Neverson's case was formally litigated and Callahan's was not, Callahan still received significant informal discovery prior to mediation, including all of Brookdale's relevant policies and procedures, three years' worth of time and payroll data for a group of over 17,000 employees, and copies of related PAGA actions against Brookdale in California. The court was thus not persuaded that the absence of formal litigation left Callahan unable to adequately represent Neverson's interests. The district court's denial of Neverson's motion to intervene was therefore affirmed.

Federal Rule of Civil Procedure 24(b) also provides a trial court with discretion to permit intervention when the movant presents "(1) an independent

ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." (*Freedom from Religion Found, Inc.*, 644 F.3d at 843.) The trial court found that, while the three initial conditions for permissive intervention were met, the discretionary factors governing intervention counseled strongly against intervention. Allowing Neverson to intervene would not significantly contribute to the case since Callahan already had access to all discovery obtained in Neverson's case and other related cases, both Callahan and Neverson were deputized agents of the LWDA and represented the same legal right and interest in the PAGA action, and Neverson provided little factual basis for her determination that Callahan miscalculated the maximum PAGA penalties. The Ninth Circuit therefore affirmed the denial of Neverson's motion to intervene. As Neverson's motion to intervene was properly denied, she never became a party to the PAGA action, and as a non-party to the action, she had no right to appeal the trial court's approval of the PAGA settlement.

The *Callahan* decision makes it more difficult for other PAGA plaintiffs to intervene and disrupt the settlement process. Although the court noted on multiple occasions that Neverson had no factual basis for claiming that Callahan's PAGA calculations were incorrect, leaving some leeway to intervene on distinction, this ruling provides further stability and deference to a court's final approval of a PAGA settlement.

California

California Appellate Court Applies the Overriding Interest Test to Determine Whether a Party Can Proceed as John Doe

In a decision that may have implications on the appearance of filings in employment cases, the California Court of Appeal held in *Department of Fair Employment & Housing v. Superior Court* that retaliatory harm to family members—wherever they may be located—is an interest that may allow a party to litigate under a pseudonym.

The Department of Fair Employment and Housing ("DFEH") brought an action against Cisco Systems, Inc. ("Cisco"), alleging that a Cisco engineer was treated unfavorably by two supervisors because he is from the lowest caste (Dalit) of the traditional caste system of India. The DFEH filed suit under the Fair Employment and Housing Act ("FEHA"), proceeding as the nominal plaintiff, with the employee serving as the real party in interest.

Generally, the names of all parties—including real parties in interest to a civil action—must be included in a complaint, although certain exceptions may apply. Here, an employee expressed concern that he and/or his family would be subject to further mistreatment and/or violence if his lower caste status was publicly revealed, and therefore asked the DFEH not to use his name in legal filings. The DFEH thereafter moved for an order allowing the employee to proceed in the action under a fictitious name, citing the possible violence and social ostracization that could result from publication. The trial court denied the motion. It acknowledged that fictitious names can be used in judicial proceedings when identifying a party would create a risk of retaliatory physical or mental

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harm, but declined to consider evidence that revealing the employee's caste affiliation created a risk of harm to family members in India.

The trial court's decision was reversed on two grounds. First, because the identity of the employee seeking to proceed under a pseudonym was known to the defendant, certain Constitutional issues were not implicated. Second, while no California case had articulated the standard that applies to determine whether a party may proceed anonymously absent statutory authorization, other cases addressed similar issues. In particular, in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, the California Supreme Court held that a trial court cannot close proceedings to the public without first conducting a hearing and expressly finding an overriding interest supporting closure; a substantial probability the overriding interest will be prejudiced absent closure; the proposed closure is narrowly tailored to serve the overriding interest; and no less restrictive means would protect the overriding interest.

The appellate court analogized litigating under a pseudonym to the closure of public court proceedings, as each impacts First Amendment public access rights. In doing so, it held that, before a party to a civil action can be permitted to use a pseudonym, the trial court must conduct a hearing. A party's request for anonymity should be granted only if the court finds that an overriding interest will likely be prejudiced without use of a pseudonym, and that it is not feasible to protect the interest with less impact on the constitutional right of access. Here, the trial court erred in declining to consider the employee's concern about safety for family members in India because "retaliatory harm to family members—wherever they are located—is precisely the kind of interest that may justify allowing a party to litigate under a pseudonym." As a result, the appellate court vacated the trial court's order denying the motion and ordered the trial court to reconsider the motion.

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Court Upholds Collective Bargaining Exemption to PAGA in *Oswald v. Murray Plumbing & Heating Corp.*

In *Oswald v. Murray Plumbing & Heating Corp.*, the California Court of Appeal for the Second Appellate District upheld the collective bargaining exemption from the Private Attorneys General Act of 2004 ("PAGA") pursuant to Labor Code section 2698 *et seq.* for construction workers who provide labor and services under a valid collective bargaining agreement ("CBA").

For PAGA claim exemption to apply, a CBA must cover wages, hours, working conditions, and: (1) have a grievance and arbitration procedure in place to address Labor Code violations; (2) expressly and unequivocally waive PAGA; and (3) authorize the arbitrator to award all remedies available under Labor Code section 2699.6, subdivision (a).

Murray Plumbing and Heating Corporation ("Murray") employed Jerome Oswald ("Oswald") as a journeyman pipefitter in 2019 through 2020. In 2020, Oswald sued Murray for civil penalties under PAGA, alleging Murray failed to provide meal and rest breaks, accurate wage statements, timely payment of wages, and reimbursement of business expenses.

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The parties' employment relationship was governed by a CBA that required the parties to arbitrate all disputes, including PAGA claims, as the sole and exclusive remedy. Murray moved to compel arbitration pursuant to the CBA, which Oswald opposed. The trial court found section 2699.6 did not apply and denied Murray's motion on February 16, 2021.

On April 8, 2021, three days after the trial court's ruling, the parties' collective bargaining representatives signed a "Memorandum of Understanding Waiver of PAGA and Class Action Claims" ("MOU"). The MOU replaced the prior CBA's original arbitration clause and was expressly retroactive to 2017.

Murray's counsel asked Oswald's counsel for the immediate dismissal of Oswald's PAGA action in light of the MOU. Oswald's counsel refused. Notably, while both parties knew of the MOU for 16 months, their appellate briefs failed to address it, and the issue was not raised until Murray's counsel did so at oral argument. In the interest of justice, the appellate court considered the MOU, while simultaneously reprimanding counsel for their gamesmanship and delay.

The appellate court acknowledged public policy favoring contractual arbitration as a speedy and relatively inexpensive means of dispute resolution. Although courts generally enforce arbitration agreements if a party to the agreement refuses to arbitrate under Code of Civil Procedure section 1281.2, the holding in *Iskanian v. CLS Transportation of Los Angeles* found an employee's right to bring a PAGA action to be "unwaivable."

The court then turned its focus to section 2699.6, which carves out an exception to PAGA for employees in the construction industry where a CBA meets the requirements stated above. The court also considered the retroactive MOU that went into effect after the trial court's denial of Murray's motion.

Oswald argued the MOU did not apply because it went into effect after his employment with Murray ended, but the court disagreed. Because Oswald enjoyed the benefits of being a union member and the union's bargaining power, Oswald was also subject to the burdens imposed by the union, including the limitations of his remedy for Labor Code violations to an arbitral forum. The union's agreement to make the MOU retroactive affects Oswald's pending claims.

The MOU also satisfied the requirements under section 2699.6, reinforcing the court's conclusion to uphold the collective bargaining exemption from PAGA. Therefore, the court reversed the trial court's ruling and remanded the matter for further proceedings.

Second District Court of Appeal Clarifies Seating Standards in the Workplace in *Monica Meda v. Autozone, Inc., et al.*

In *Monica Meda v. Autozone, Inc., et al.,* the Second District Court of Appeal reversed a trial court's ruling in favor of AutoZoners, Inc.'s ("AutoZoners") motion for summary judgment, which had held that plaintiff Monica Meda ("Meda") lacked standing to bring a representative action under PAGA because she was not aggrieved by AutoZoners' seating policy. The appellate court disagreed, citing the existence of sufficient disputed facts.

Meda filed a claim under the Private Attorneys General Act of 2004 ("PAGA"), asserting that AutoZoners failed to provide suitable seating to employees at the cashier and parts counter workstations, even despite the fact that all or some of employees' work at those stations can be performed while sitting. AutoZoners moved for summary judgment, arguing that the seating requirement was satisfied because two chairs were made available, even though they were not placed at cashier workstations and Meda was not aware of her ability to use them. The trial court agreed and granted the motion.

Meda appealed to the Second District Court of Appeal, which reversed upon finding that resolution of the PAGA claim at the summary judgment stage was inappropriate, as a triable issue of material fact existed as to whether suitable seating was "provided". The applicable wage order states: "[a]ll working employees shall be *provided* with suitable seats when the nature of the work reasonably permits the use of seats." In its opinion, the court analyzed the word "provided" in relation to suitable seating and recognized a variety of factors that courts might consider. These factors include the nature of an employees' job responsibilities, how frequently an employee changes tasks, the physical layout of the workspace, the number of employees sharing a workstation, and the extent to which the location of a seat at or near a workstation may obstruct employees' tasks or cause congestion in a specific work area. The court also noted that, in order to provide "suitable" seating, an employer must not only permit an employee to have a chair but must also refrain from any practice that might discourage or impede the employee from taking advantage of that access.

The court held that, although chairs were ostensibly available, an employee would need to leave the cashier workstation, proceed down a hallway and around a corner into the manager's work area to locate and move the chair to the location in which it was needed. While an employer need not always place a chair within a specific distance from a workstation, the proximity of the seat is relevant, particularly when employees have not been advised that seats are available (whether directly or via employee handbook).

The court also held that a reasonable trier of fact could conclude AutoZoners intended the chairs to only be used at the workstations in the manager's office area because the chairs were placed at workstations frequented primarily by the store manager. One could also conclude that AutoZoners discouraged employees from using the chairs because they were placed in or just outside the manager's office, causing employees to potentially feel uncomfortable moving the chairs for their own use in another location.

Finally, the court held that a reasonable inference may be made that AutoZoners either prohibited or discouraged the use of seats at the cashier workstation because no other employees ever used a raised chair at the workstation, despite a stated (but uncommunicated) policy of permitting the use of seats.

In light of the *AutoZoners* ruling, California employers should take care, where applicable, to ensure that employees are not only provided with, but are also made aware of the existence of suitable seating. A failure to do so, or an

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appearance of gamesmanship on the part of the employer, could lead to easily avoidable legal headaches.

Conditional Acceptance of a 998 Offer is Not a Binding Acceptance

In *Siri v. Sutter Home Winery, Inc.* ("*Siri*"), the California Court of Appeal reversed the trial court's decision to enforce a settlement agreement pursuant to Code of Civil Procedure section 998 offer to compromise ("998 Offer"). The Court of Appeal held that there was no binding settlement agreement because the plaintiff only conditionally accepted the purported settlement offer.

The plaintiff in *Siri* filed an action against her former employer, Sutter Home Winery, Inc. dba Trinchero Family Estates ("Sutter"), alleging wrongful termination in violation of public policy. Sutter filed a motion for summary judgment, which was granted by the trial court. However, when the plaintiff appealed the trial court's decision, the Court of Appeal reversed and remanded the matter back to the trial court. While on remand, Sutter served the plaintiff with a 998 Offer, by which Sutter offered to pay the plaintiff $500,000 in exchange for her dismissal with prejudice of all claims.

During the 30-day period during which the 998 Offer remained pending, the parties discussed whether the plaintiff's acceptance of the offer would trigger a right to prejudgment interest, as the plaintiff had previously served a 998 Offer on Sutter for $499,999. They expressed her conditional acceptance of the 998 Offer but noted that her acceptance was conditioned upon clarification by the court as to whether such acceptance would result in a judgment in her favor corresponding entitlement to prejudgment interest, given that the "accepted" 998 Offer was for a value higher than that which the plaintiff had made to Sutter.

After serving her conditional acceptance of Sutter's section 998 Offer, the plaintiff filed objections to Sutter's offer as well as a motion asking the court to enter a judgment in her favor that would be consistent with her conditional acceptance and include prejudgment interest. The trial court denied her motion reasoning that if the plaintiff accepted the offer, she was not entitled to an order entering judgment in her favor. Rather, she was obligated to dismiss her claims with prejudice. Following the court's denial of the plaintiff's motion for entry of judgment, Sutter filed a motion to enforce the settlement agreement. The trial court found that the plaintiff's service of her conditional acceptance created a binding settlement because there were no conditions set forth in her "conditional" acceptance. The plaintiff's "conditional" acceptance was not predicated on any particular finding by the court. As such, the motion to enforce the settlement was granted and the plaintiff appealed.

The Court of Appeal disagreed with the trial court's determination that the plaintiff's conditional acceptance was binding. In doing so, it confirmed that, in order to constitute a binding settlement, acceptance of a 998 Offer must be "absolute and unqualified." A conditional or qualified acceptance therefore constitutes a counteroffer, not a binding agreement.

The ruling in *Siri* serves as a reminder to California litigants of the importance of clarity and certainty in 998 Offers. While often useful tools in

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affecting resolution, offer and acceptance must be made clear, lest the potential corresponding benefit not be conferred.

***Sunny Gallo v. Wood Ranch USA, Inc*: Late Payment of Arbitration Fees Amounts to Material Breach**

Sunny Gallo ("Gallo") was hired as a server in 2015 at one of Wood Ranch USA, Inc.'s ("Wood Ranch") California restaurants. As a condition of her employment, Wood Ranch required Gallo to sign an arbitration agreement which governed any employer-employee controversy, dispute, or claim. In 2018, Gallo was discharged.

Gallo filed suit against Wood Ranch seeking compensatory and punitive damages for claims including discrimination, retaliation, wrongful termination, failure to prevent, and intentional infliction of emotional distress. Wood Ranch filed a motion to compel arbitration, which the trial court granted.

Following the parties' mutual selection of an arbitrator, the American Arbitration Association sent a notice to both Wood Ranch and Gallo informing them of the initial fees necessary to proceed with arbitration. While Gallo submitted her payment, Wood Ranch failed to pay their portion until after the due date. Gallo then filed a motion to vacate the trial court's decision, arguing that Wood Ranch's late payment of fees initiating arbitration amounted to a material breach of the arbitration agreement.

Pursuant to California's Code of Civil Procedure ("CCP") 1281.97-1281.99, the party that drafts a consumer or employee arbitration agreement must pay its share of the arbitration fees within 30 days of the date they are due. If there is a material breach of the agreement, the employee may either: (1) proceed in arbitration; or (2) resume litigation in a judicial forum.

The trial court granted Gallo's motion, awarded $2,310 in monetary sanctions, and vacated the earlier order compelling arbitration. In doing so, it held that Wood Ranch lacked a sufficient excuse for its late payment. Further, the court found that the Federal Arbitration Act ("FAA") did not preempt the governing CCP sections. Wood Ranch subsequently appealed this decision.

The California Court of Appeal for the Second District affirmed the decision in Gallo's favor. The ruling confirmed that sections 1281.97 and 1281.99 promote the FAA's goal of preserving arbitration as a speedy, effective, and cost-efficient way to resolve disputes, and serve to help avoid situations in which parties insist on resolution by arbitration, but later stall through refusal of paying fees to initiate.

The *Gallo* decision serves as further confirmation of the importance of timely and appropriately paying arbitration fees. As California courts have now confirmed the consistency of state law with the goals of the FAA, employers that fail to make timely payments are left with no recourse to excuse their error.

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California Court of Appeal Permits Subsequent PAGA Action in *Howitson v. Evans Hotels, LLC*

In *Howitson v. Evans Hotels, LLC*, the Fourth Appellate District Court held that employees that settle individual or class action lawsuits against their employers are not barred by claim preclusion from later bringing a Private Attorneys General Act ("PAGA") civil action for the same alleged Labor Code violations.

Plaintiff Christina Howitson ("Howitson") was employed by Defendants Evans Hotels, LLC and The Lodge at Torrey Pines Partnership, L.P. (collectively, "Evans Hotels") as a room service attendant for approximately one month. Howitson filed a notice of intent to file a PAGA action against Evans Hotels with the California Labor and Workforce Development Agency ("LWDA") in March 2020 (for which the 65-day statutory waiting period ended in June 2020). Howitson filed an individual and putative class action lawsuit against Evans Hotels in May 2020 (the "First Lawsuit").

Evans Hotels served Howitson with an arbitration demand and a 998 Offer of $1,500 plus attorney fees in June 2020, which Howitson accepted. The Superior Court of San Diego entered judgment in Howitson's favor, thereby extinguishing her individual claims. Less than two weeks later, Howitson filed a PAGA lawsuit against Evans Hotels (the "Second Lawsuit") based on the same violations that were the subject of the First Lawsuit. Evans Hotels argued that the Second Lawsuit was barred by claim preclusion.

PAGA was enacted with the stated goal of expanding the state's capacity to remedy labor code violations by deputizing aggrieved employees—those employed by the employers against whom actions are brought and who suffered at least one of the alleged violations—to bring representative claims on the state's behalf. An aggrieved employee "steps into the shoes" of the government to enforce the law and protect the public—not to simply benefit himself or herself. Unlike an individual or class action, where the Plaintiffs may recover statutory damages and penalties, PAGA actions seek to collect civil penalties, 75% of which goes to the LWDA, with the remaining 25% to the aggrieved employees.

Claim preclusion is the procedural doctrine that prevents a party (or third parties in privity with that party) from relitigating a matter already decided. To establish claim preclusion, an adverse party must show: (1) the second lawsuit involves the same cause(s) of action as the first lawsuit; (2) there was a final judgment on the merits in the first lawsuit; and (3) the parties in the second lawsuit are the same or in privity with the parties in the first lawsuit. However, even if all three elements are met, claim preclusion is not applicable "if injustice would result or if the public interest requires that relitigation not be foreclosed."

The appellate court rejected Evans Hotels's argument for claim preclusion on multiple grounds. First, it held that the first element was not met—the causes of action between the lawsuits were not the same. The court reasoned that a cause of action is "based on the harm suffered, not the legal theory asserted or relief sought." While the two lawsuits derived from the same alleged violations, the harm Howitson and the class allegedly suffered was separate and distinct from the

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harm allegedly suffered by the state of California and for which "civil penalties are assessed even if there is no injury to the employees themselves."

The court further concluded that the parties in the actions were not the same. While Howitson was the real party in interest in the First Lawsuit, meaning she was the beneficiary of the action and possessed the substantive right to bring it, the *state* was the real party in interest in the Second Lawsuit. PAGA merely gave Howitson standing to act as the state's representative.

Evans Hotels argued that Howitson became in privity with the state when the 65-day deadline for LDWA to respond to her PAGA notice passed, making her an agent of the state. The appellate court was unconvinced. It stated that privity exists when "the nonparty has an identity of interest with, and adequate representation by, the party in the first action and the nonparty should reasonably expect to be bound by the prior adjudication." Adequate representation can be inferred only if the parties had the same interest. Ultimately, a finding of privity is a policy decision about the fairness of allowing the nonparty to be bound by the results of an action in which they did not participate. Here, the state did not have an interest in the first lawsuit because that lawsuit only brought Howitson's individual and class claims, and the 998 Offer accepted by Howitson solely benefited her, not the state. Therefore, Howitson was *not* the state's representative in the first lawsuit, and privity did not exist.

The court articulated a number of additional bases upon which claim preclusion was inapplicable. First, applying the doctrine would undermine the legislative intent behind PAGA to protect the public from labor code violations. Second, the First Lawsuit lasted less than two months, such that no issues were "actually litigated." Third, while Howitson could have added PAGA claims to the First Lawsuit, she was not statutorily required to do so. Fourth, actually requiring Howitson to have added PAGA claims to her first lawsuit and consequently barring her from bringing those PAGA claims in a second lawsuit would directly contradict applicable law, as Labor Code § 2699(g)(1) states, "nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, *either separately or concurrently* with an action taken under this part."

In light of the decision in *Howitson*, employers defending individual or class action claims should remain particularly reticent of the possibility of tack-on PAGA actions. Settlement agreements should therefore be drafted as broadly as possible, such that the risk for additional litigation can be minimized.

Court of Appeal Rules That Private Arbitration Agreement Cannot Prevent Civil Rights Department from Filing Action in Court

In *Department of Fair Employment and Housing v. Cisco Systems, Inc.*, the California Court of Appeal (Sixth Appellate District) recently ruled that a private arbitration agreement between an employee and employer cannot prevent the California Civil Rights Department ("CRD") (formerly known as the Department of Fair Employment and Housing ("DFEH")) from filing an action in a California court.

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On October 16, 2020, the CRD filed a lawsuit under the Fair Employment and Housing Act ("FEHA") against Cisco Systems, Inc. ("Cisco") and two individual managers for discrimination, harassment, and retaliation. The lawsuit alleged that the defendants discriminated against an engineer that worked at Cisco's San Jose campus on the basis of his religion, ancestry, national origin/ethnicity, and race/color because he is Dalit (belonging to a particular caste in India). More specifically, the Complainant alleged that two supervisors denied him opportunities and disparaged him because, under India's traditional caste system, he is from the lowest caste and they are from the highest. The Complainant also accused Cisco of retaliating when he complained about being treated unfavorably because of his caste. After the case was filed by the CRD in Santa Clara County Superior Court, Cisco filed a motion to compel CRD to arbitration based on the Complainant's individual arbitration agreement. However, the trial court denied Cisco's motion, and Cisco appealed.

The Court of Appeal reaffirmed the denial of the employer's motion to compel arbitration and confirmed that the CRD acts independently when it brings a lawsuit, and that it is not constrained by private arbitration agreements. The court stated, in part: "the Legislature created the Department and gave it broad powers to investigate employment discrimination complaints and bring civil actions against violators when necessary. The Department acts independently when it exercises the power to sue for FEHA violations. As an independent party, the Department cannot be compelled to arbitrate under an agreement it has not entered." In reaching its decision, the court also noted the Supreme Court's recent decision in *Viking River Cruises, Inc. v. Moriana*, pointing out that although that case involved a different issue (whether California's rule invalidating waivers of representative claims under the Private Attorneys General Act is preempted by federal law), but that its reasoning is parallel here—that arbitration is a matter of consent, and a party cannot be compelled to arbitrate absent a contractual basis for concluding the party agreed to do so.

***Musgrove v. Silver* Explains Tests Used to Assess an Employee's Scope of Employment for Purposes of Imposing Vicarious Liability**

In a case with unique factual circumstances but potentially far more broad-reaching applicability, the Second District Court of Appeal in *Musgrove v. Silver* held that the chef was not acting within the scope of his employment under each of the four tests articulated by California law for purposes of imposing vicarious liability.

Joel Silver ("Silver"), a Hollywood movie producer known for producing the *Lethal Weapon* series, treated a group of his family and friends to a vacation at a luxurious resort in Bora Bora, French Polynesia while attending Jennifer Aniston's wedding in August 2015. Silver covered all of the group's expenses, including alcohol. Among the group was his executive assistant, Carmel Musgrove ("Musgrove"), who was legally employed by Silver Pictures Entertainment. Going to Bora Bora was not a requirement of her job; if she went, she would continue to receive her salary, while only about 10% of her time would be spent coordinating meals and activities for the group. Also among the group was his family's personal chef, Martin Herold ("Herold"), who arrived a few days

before the rest of the group in order to purchase groceries for the meals he was to prepare; he had no fixed working hours.

Musgrove tragically drowned during a midnight swim outside her overwater bungalow. Her death was accidental and related to her ingestion of alcohol and cocaine in the hours prior to her drowning. Musgrove's parents brought this wrongful death suit against Silver based on two theories: (1) he was directly liable because he paid all the expenses for the trip, including the alcohol, and caused her to be in a vulnerable state on the night of her death; and (2) he was vicariously liable because he employed Herold, who was negligent when he, acting in the scope of his employment, met with Musgrove earlier in the night when she was drinking and ingesting cocaine.

The trial court granted summary judgment in favor of Silver and ruled that he was not liable under either theory as a matter of law. While the determination of whether an employee acted within the scope of employment is usually a question of fact, it becomes a question of law, and an appropriate basis for a grant of summary judgment, when the facts are undisputed and no conflicting inferences are possible. The trial court found that: (1) Silver was not directly liable because he had no "special relationship" with Musgrove that legally obligated him to assume control of her safety and welfare; and (2) he was not vicariously liable because Herold's conduct was outside the scope of his employment because: (a) it was not an outgrowth of his employment as a chef or inherent in the working environment; (b) it was not typical of or broadly incidental to his employment as a chef or foreseeable from his duties; and (c) it was neither a benefit to the company nor a customary incident of his employment relationship with Silver.

The main issue on appeal was whether Herold was acting within the scope of his employment—thereby rendering Silver vicariously liable—when he met with Musgrove for a nightcap and, by supplying her with alcohol and cocaine while knowing she liked to swim at night, put her in a position of peril from which he failed to protect her. The Second District Court of Appeal first noted that Silver could not be held directly liable because: (1) a private person cannot be held liable in tort for furnishing alcohol to another adult, per the California Legislature; (2) an employee-employer relationship giving rise to a special relationship may not have existed, as Musgrove was not employed by Silver himself; and (3) Musgrove was not "at work" during the time she consumed alcohol, ingested cocaine, and drowned. The court then held that Herold was not acting within the scope of his employment under each of the four tests for assessing the scope of employment for purposes of imposing vicarious liability.

Employers have a special relationship with their employees; thus, California deems employers to be vicariously liable for the torts committed by their employees *only if* they are *acting within the scope of their employment*. California courts have articulated four different tests for assessing whether an employee is acting within the scope of their employment: (1) risk-focused; (2) foreseeability-focused; (3) benefit-and-custom-focused; and (4) public policy-focused. If an employee's tortious acts satisfy one of the tests, they are within the scope of employment, even if the employer did not authorize the conduct, the employee acted without the motive of serving the employer's interest, or the employee engaged in intentional, criminal conduct.

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Under the "Risk-Focused Test," an employee acts within the scope of employment only if conduct is required by, engendered by, or an outgrowth of employment. There must be a nexus between tortious conduct and employment. Here, the court found that Herold's conduct in meeting up with Musgrove at 10 p.m. in one of their private bungalows and supplying her with wine and cocaine was not required by, engendered by, or any outgrowth of his job as Silver's chef.

Under the "Foreseeability-Focused Test," an employee acts within the scope of employment only if: (1) tortious conduct is foreseeable in light of the duties the employee is hired to perform; *and* (2) the injury is the type of injury that is foreseeable in the context of the employer's particular enterprise. Here, the court found that Herold's conduct was not a reasonably foreseeable result, and Musgrove's injury was not a foreseeable consequence, of his employment as Silver's chef.

Under the "Benefit-and-Custom-Focused Test," an employee acts within the scope of employment if tortious conduct either: (1) provided some conceivable benefit to the employer; or (2) has become a customary incident of the employment relationship. Here, the court found that Herold's conduct did not benefit Silver's employment of Herold as his chef, and Herold's conduct was not a customary incident of the employment relationship.

Finally, the "Public Policy-Focused Test" aims to: (1) prevent the reoccurrence of tortious conduct; (2) give greater assurance of compensation to victims; and (3) ensure that losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. The first two rationales will always lean in favor of imposing liability because they will be furthered whenever a defendant is held vicariously liable for a plaintiff's injury. Thus, the critical policy rationale to consider is whether it is equitable to shift losses to the employer, which turns on whether the employer benefitted from the injury-producing activity and whether the losses are sure to occur from the conduct of the enterprise. Here, the court found that it would be inequitable to shift the burden of loss onto Silver because he did not benefit from Herold's injury-producing activity, which was not sure to occur from his employment as Silver's chef. Herold's conduct was too attenuated from his job duties for it to be appropriate to hold Silver liable.

Finding that Herold was not acting within the scope of this employment under any of the four tests, the court affirmed the trial court's grant of summary judgment in favor of Silver.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Brian Jun, Christine Dixon, Jessica O'Malley, Rayne Brown, Nicole Allen, or Haley Murphy at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Rachel Albert, or Enoch Cheung at (310) 649-5772.