



Appellate Reports and Cases in Brief

Court can deny petition to compel arbitration; also, bringing redundant causes of action in defamation suit can lead to anti-SLAPP rulings that open the door to attorney's fees

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Abaya v. Spanish Ranch I, L.P.

(2010) __ Cal.App.4th __, 2010 WL 4540503 (1st Dis., Div. 1.)

Who needs to know about this case:

Lawyers dealing with arbitration provisions

Why it's important:

Affirms trial court refusal to enforce arbitration provisions under Code of Civil Procedure section 1281.2, subd. (c), which gives trial court discretion to deny arbitration where there is a possibility of conflicting rulings on common issues of fact or law.

Synopsis: Numerous residents of a mobile-home park sued the current and former owners of the facility alleging substandard provisions. Roughly 100 plaintiffs had arbitration provisions in their lease agreements with the facility, while approximately 30 did not. All plaintiff residents alleged that various common facilities at the park were inadequately maintained, in violation of statutory provisions and the common law. In support of their multiple legal theories for nuisance, breach of the warranty of habitability and related claims, plaintiffs alleged in their complaint that defendants failed to maintain the park's common areas, facilities, services, and physical improvements in good working order and condition, including the sewer system, water system, drainage system, electrical system and street system, and

that they refused to fix these problems. These presented common factual and legal issues common to all claims asserted.

Section 1281.2 authorizes a trial court to deny a petition to compel arbitration when, "party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of transactions and there is a possibility of conflicting rulings on a common issue of law or fact." The legislative history of the statute explains that "arbitration is unworkable" in situations where there are multiple parties with related claims, some of which are subject to arbitration and others are not. "While there is a strong public policy in favor of arbitration, there is an 'equally compelling argument that the Legislature has also authorized trial courts to refuse enforcement of an arbitration agreement or to stay the arbitration when, as here, there is a possibility of conflicting rulings."

The court rejected the claim by the defendants that, in order to invoke section 1282.2, subd.(c), plaintiffs were required to make an affirmative evidentiary showing that there was a possibility of conflicting rulings. Rather, it was permissible for the trial court to find that the possibility existed based on the allegations of the pleadings. "[C]ourts have routinely relied on the allegations contained in the operative pleading to determine whether there

is the possibility of conflicting rulings within the meaning of section 1281.2, subdivision (c)."

Wong v. Tai Jing

(2010) __ Cal.App.4th __, 2010 WL 4457330 (6th Dist.)

Who needs to know about this case:

Lawyers dealing with anti-SLAPP motions; Lawyers considering filing lawsuits arising from reviews posted on line; lawyers drafting complaints

Why it's important: Shows how the use of redundant causes of action that add nothing to the complaint can become the basis for an anti-SLAPP ruling that will entitle a defendant to recover fees

Synopsis: Tai Jing ("Jing") and his wife, Jia Ma ("Ma") took their son for dental treatment to Wong, a pediatric dentist. She filled several cavities. Jing later posted a very negative review on the Web site Yelp, stating, that Wong should be "avoided like a disease," that she used amalgam fillings that contained mercury, without disclosing this to the patients; that she worked very fast and (by implication) missed cavities; and that she used nitrous oxide on the boy, which Jing characterized as a general anesthetic, which would harm his nervous system. Wong filed suit against Jing, Ma and Yelp, alleging claims for libel, intentional infliction of emotional distress, and negligent infliction of emotional distress. Jing, Ma, and Yelp filed a joint Anti-SLAPP motion



under Code of Civil Procedure section 416.25. The trial court denied the motion. Jing, Ma and Yelp appealed. Reversed.

In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue, as defined in the statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. The trial court found that the review arose from protected conduct, but held that Wong had shown a probability of prevailing on the merits.

Wong dismissed Yelp from her suit before the motion was heard. On appeal, she argued that Yelp had no standing to appeal, because it had been dismissed. The court disagreed, finding that, although the general rule is that once a person has been dismissed from an action he is no longer a party and the court lacks jurisdiction to conduct any further proceedings as to him, that rule has exceptions. One exception is where the party may still have collateral statutory rights that the court must determine and enforce – such as the right to statutory costs and attorney's fees. Here Yelp retained such rights under the anti-SLAPP statute, and accordingly had standing to appeal.

The trial court erred in finding that Wong was likely to prevail on any claim against Ma. There was no evidence whatsoever that Ma had any role in posting the review, or that she knew that Jing would post the review. Wong failed to make any showing that she would be entitled to recover against Ma on any theory. The motion was therefore erroneously denied as to the claims against Ma.

The trial court properly denied the motion as to the claim for libel. Analysis of the review and the showing made by Wong showed that it was likely that she would prevail on the merits of her libel claim. The motion was properly denied as to that claim against Jing. However, Wong failed to make a showing sufficient to justify a probability that she would recover on her claims for intentional infliction of emotional distress, or negligent infliction of emotional distress because she could not show she suffered severe emotional distress as a result of the posting of the review. The motion was accordingly erroneously denied as to these claims.

The court noted that Wong stood to recover greater damages under the libel claim than under the claims for infliction of emotional distress, and that these claims would also require additional proof. The claims for infliction of emotional distress added nothing to Wong's lawsuit; they were wholly redundant of the libel claim. They did, however form the basis for a successful anti-SLAPP motion, which exposed Wong to a claim for attorney's fees and costs.

In Brief

Business & Professions Code section 17200; insurance and health plans; fraudulent concealment. *Levine v. Blue Shield of California* (2010) __ Cal.App.4th __, 2010 WL 4369797 (4th Dist. Div. 1) Levine sued Blue Shield, his health insurer, in a putative class action, claiming that Blue Shield failed to disclose to him that his monthly premiums for health coverage for himself and his family would have been considerably lower if he had designated his wife, who was younger than he was, as the primary insured, and had included his minor children as dependents on the plan, instead of issuing separate plans to them. He asserted claims for violations of the UCL, fraudulent concealment, unjust enrichment, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. The trial court dismissed the

case on demurrer. Affirmed. Blue Shield owed plaintiffs no duty to disclose to them the most cost-effective way to structure their coverage. The implied covenant of good faith and fair dealing does not require an insurer or health plan to disclose to a purchaser of its products the lowest price that the insurer will accept for insurance coverage. Nor is there any statute that obligated Blue Shield to disclose how plaintiffs could have lowered their health-care premiums. Since there was no obligation to disclose, plaintiffs were unable to state a claim under Bus. & Prof. Code section 17200, since there was no unfair, illegal, or fraudulent conduct.

Attorney's fees; Private attorney general; Code of Civil Procedure section 1021.5. *In re Conservatorship of Whitley*, (2010) __ Cal.4th __, 2010 WL 4396434. Section 1021.5 allows a litigant who acts as a private attorney general and is successful in the litigation to recover attorney's fees from the opposing party in certain circumstances. One of the requirements that courts are required to consider in determining eligibility for an award under section 1021.5 is "the necessity and financial burden of financial enforcement." Courts have long construed this language to mean that a litigant who has a financial interest in the litigation may be disqualified from obtaining fees when expected or realized financial gains offset litigation costs. Some courts extended this principle to hold that nonfinancial, nonpecuniary personal interests in the litigation, such as vindicating the best interests of a child or sibling, can also serve to render a litigant ineligible for attorney fees. Here, the plaintiff was the conservator for her brother, who was developmentally disabled. She challenged a decision by the facility where he had lived for 40 years to move him to a different facility. Although her suit succeeded, the Court of Appeal denied her fee application on the ground that her nonpecuniary personal motives disqualified her from an award under section 1021.5. The Supreme Court held that this approach has no basis in the language, legislative history, or evident



purpose of section 1021.5. Accordingly, the Court held that a litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining fees under section 1021.5.

Labor Code civil penalties, *Bright v. 99 cents Only Stores* (2010) __ Cal.App.4th __, 2010 WL 4541798 (2d Dist. Div. 5.) The Labor Code provides that the labor conditions set by the Industrial Welfare Commission ("IWC") shall be the standard labor conditions for employees. An IWC wage order provides that employees shall be provided suitable seating, if reasonable, during the performance of their duties. The Labor Code also establishes the Private Attorneys General Act of 2004 (§ 2698 et seq.), which allows an employee to bring an action for civil penalties for violations of provisions of the Labor Code, except those provisions for which a civil penalty is provided. (§ 2699, subds.(f), (g)(1).)

Bright filed a class action that alleged that she was employed as a cashier at 99 Cents Only Stores, and that the 99 Cents Only Stores did not provide its cashiers with seats, even though the nature of the work reasonably permitted the use of seats. In the complaint's sole cause of action, she alleged that 99 Cents Only Stores violated Labor Code section 1198 by failing to provide her and other

cashiers with a seat in violation of Wage Order No. 7, subdivision 14. She alleged she satisfied all conditions for filing the complaint, including exhaustion of administrative remedies. Bright sought penalties against 99 Cents Only Stores under section 2699, subdivision (f), attorney fees, and costs. The trial court dismissed the case on demurrer, finding that a violation of the seating requirement was not a violation of the Labor Code, because the provision requiring seats was not phrased in prohibitory terms, and that penalties under the Private Attorney General Act were not available, because the relevant IWC provision contains its own civil-penalty provision. Reversed. The Court held that the requirement that seating be provided was an enforceable rule, not simply a suggestion, even though the rule was not phrased in a prohibitory fashion. And the civil-penalty provision in the IWC order relied on by the trial court applied only to failure to pay wages. Hence, there was no other civil-penalty provision available, which made section 2699, subd. (f) penalties available.

Arbitration, refusal to compel arbitration because of possibility of conflicting rulings, Code of Civil Procedure section 1281.2, subd.(c). *Laswell v. AG Seal Beach, LLC* (2010) __ Cal.App.4th __, 2010 WL 4457431 (2d Dist. Div. 1)

Plaintiff Louise Laswell filed an action against defendants AG Seal Beach, LLC; AG Facilities Operations, LLC; and Country Villa Service Corporations ("Defendants"). The defendants moved to compel arbitration. The trial court denied the motion, invoking its discretion under section 1281.2, subd. (c), on the ground that there was the potential for conflicting rulings. Reversed. Laswell's action alleged that all defendants were related entities, and the record showed that this was true. They were, therefore, not "third parties" within the meaning of section 1281.2, subd. (c) – that is, parties not bound by the arbitration agreement. Rather, the arbitration agreement applied to the claims against all defendants. This meant that section 1281.2, subd. (c) did



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not apply, and the trial court had no discretion to deny the petition to compel arbitration.

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