Appellate Reports

Cal Supreme Court rules in Augustus v. ABM *that the* Brinker *standard applies to rest breaks and that "on call" rest breaks are not compliant with the law*

By Jeffrey I. Ehrlich

Augustus v. ABM, Security Services, Inc.

(2016) _ Cal.4th _

Who needs to know about this case? Lawyers handling claims that a California employer failed to give employees a proper rest break.

Why it's important: Reversing the Court of Appeal, the Supreme Court holds that (a) the *Brinker* "relieved of all duty" standard applies to rest breaks, in addition to meal breaks; and (b) that under this standard, so-called "on call" rest breaks are not compliant with California law. The Court reinstated a $90 million judgment in favor of the plaintiff class, which had been entered on summary judgment.

Synopsis: ABM employs thousands of security guards at residential, retail, office, and industrial sites throughout California. Augustus, a former ABM guard, sued ABM in 2005, alleging that it failed to provide her with lawful rest breaks. The trial court subsequently consolidated the matter with similar actions filed by two other ABM guards. Plaintiffs filed a master complaint, which alleged ABM's failure "to consistently provide uninterrupted rest periods" as required by state law. During discovery, ABM acknowledged it did not relieve guards of all duties during rest periods. In particular, ABM required guards to keep their radios and pagers on, remain vigilant, and respond when needs arose, such as escorting tenants to parking lots, notifying building managers of mechanical problems, and responding to emergency situations.

California law governing working conditions stems from two sources, Wage Orders issued by the Industrial Welfare Commission ("IWC") and the Labor Code. As relevant here, Wage Order no. 4, subdivision 12, provides, in relevant part, "Every employer shall authorize and permit all employees to take rest periods.... Authorized rest period time shall be counted, as hours worked for which there shall be no deduction from wages." In addition, Labor Code section 226.7 prohibits employers from "requir[ing] any employee to work during any meal or rest period...."

The Court held that the rest-break provision in Wage Order 4 is most logically construed to forbid on-duty or on-call rest breaks. The Court held that the IWC could have allowed on-duty rest periods, as it did for some meal periods, but declined to do so. The Court held that "during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time."

The Court further held that on-call rest breaks are inconsistent with this rule. "As we explained, a rest period means an interval of time free from labor, work, or any other employment-related duties. And employees must not only be relieved of work duties, but also be freed from employer control over how they spend their time. . . . Given the practical realities of rest periods, an employer cannot satisfy its obligations under Wage Order 4, subdivision 12(A) while requiring that employees remain on call."

The Court explained its holding this way: "Employees forced to remain on call during a 10-minute rest period must fulfill certain duties: carrying a device or otherwise making arrangements so the employer can reach the employee during a break, responding when the employer seeks contact with the employee, and performing other work if the employer so requests. These obligations are irreconcilable with employees' retention of freedom to use rest periods for their own purposes."

Healthsmart Pacific, Inc. v. Kabateck

(2017) _ Cal.App.4th __ (Second Dist., Div. 1)

Who needs to know about this case? Lawyers making statements to the media about litigation.

Why it's important: Shows how the "fair report" privilege in Civil Code section 47, subd. (d) applies to defeat an action against an attorney for making statements to the media about the contents of a complaint that the attorney filed; affirms the use of the anti-SLAPP statute to dismiss the claim.

Synopsis: Plaintiffs Michael Drobot and Healthsmart Pacific, Inc., sued certain lawyers and their law firms for defamation and other claims arising from statements the lawyers made while speaking to the news media about the litigation. The attorney defendants filed an anti-SLAPP motion, which was granted. The order granting the motion was affirmed on appeal.

Drobot owns and operates Healthsmart Pacific, which owned and operated Pacific Hospital of Long Beach from 1995 to 2013. In February 2014, Drobot

pled guilty in federal court to charges of conspiracy to violate certain federal statutes and to paying kickbacks in connection with a federal health-care program. Drobot admitted that he had paid $20 million to $50 million in kickbacks to doctors and others for referring patients to Pacific Hospital and for using medical hardware supplied by another Drobot-owned company, which fraudulently inflated the price of the hardware and then passed the inflated costs on to health insurers. Drobot also agreed that he had bribed a California senator, Ronald S. Calderon, to use his influence to support legislation that allowed hospitals to pass the cost of medical hardware used in spinal surgeries to worker's compensation insurers.

The plea agreement did not refer to anyone making, purchasing, or using counterfeit or non-FDA approved medical hardware, nor did it refer to anyone supplying prostitutes or "adult entertainers" to anyone.

In July 2014 the attorney defendants filed on behalf of their client, Mary Cavalieri, a lawsuit against Drobot, Pacific Hospital, and others, alleging that their client had undergone spinal surgery at the hospital. The complaint referred to the plea agreement and summarized its contents, but added that the kickbacks included "prostitutes and other adult entertainers." It further alleged that in addition to bribing legislators, inflating medical hardware prices, and paying illegal kickbacks, Drobot and his co-conspirators used "counterfeit non-FDA approved knock-off medical hardware" which they implanted in thousands of patients, including the plaintiff.

In July 2014, Kabateck was interviewed on Fox 11 news, in which he discussed the lawsuit. Another attorney, Hutchinson, was interviewed the following month on CBS Radio.

In December 2014, Drobot and his companies sued the attorneys for defamation and related claims, based on their statements to the media. The lawsuit alleged, in essence, that the lawyers had falsely stated or implied that Drobot and his affiliates had been engaged in a scheme to purchase and use cheap counterfeit screws which were implanted in patients instead of FDA-approved hardware, and that the counterfeit-screw scheme was related to the federal charges for which Drobot pleaded guilty.

The trial court granted the attorney defendants' anti-SLAPP motion, and awarded them $64,000 in attorney's fees. Affirmed.

The appellate court first held that the lawyers' statements to the media involved issues of public interest, and so fell within the scope of the anti-SLAPP statute.

Second, the Court held that the motion was properly granted because Drobot and his co-plaintiffs could not establish that they were reasonably likely to prevail on the merits of their claim. This was because the lawyer's statements to the media fell within the absolute privilege provided by Civil Code § 47, subdivision (d) for a "fair report" of the contents of a judicial proceeding.

The Court noted that the media typically relies on the fair-report privilege, but that it also protects those who communicate information to the media. As relevant here, the Court explained that an attorney cannot make defamatory allegations in a complaint and then report the same alleged facts, *as facts*, to the media with impunity. The statements protected by the privilege must be a report about the proceedings themselves, or what was said in those proceedings. Hence, the attorneys would be privileged by the fair-report privilege as long as their statements would be understood by a reasonable viewer or listener to be a description of what had been alleged in the complaint, as opposed to statements of fact.

The Court viewed the news reports at issue and concluded that, "Although some statements, when viewed in isolation, could be understood to communicate the allegedly defamatory matter as facts, not mere allegations of facts, when the media reports are viewed in their entirety, in the context in which they were made, the only reasonable conclusion is that the statements refer to the allegations in the *Cavalieri* complaint."

Short(er) takes:

Anti-SLAPP statute; attorney's fees; lack of subject-matter jurisdiction. *Barry v. State Bar of California* (2017) __ Cal.4th __ (Cal. Supreme.)

Patricia Barry, an attorney, was disciplined by the State Bar. She filed a lawsuit in the Superior Court against the State Bar, alleging that the discipline was retaliatory and discriminatory. The Bar filed an anti-SLAPP motion, which was granted. The trial court's order was reversed on appeal, however, based on Barry's argument that the courts lacked subject matter jurisdiction over her claim against the Bar. The Supreme Court reversed. It held that the absence of subject-matter jurisdiction meant that Barry could not prevail on her claims against the Bar, and that this ruling was sufficient to satisfy a ruling against Barry, including a fee award, under the anti-SLAPP statute.

Code Civ. Proc. § 998 settlement demands; cost shifting; validity of § 998 demands. *Bigler-Engler v. Breg, Inc.* (2017) __ Cal.App.5th __ (4th Dist., Div 1.)

Plaintiff Whitney Engler suffered personal injuries following a knee surgery after using a PolarCare cooling machine. In an earlier published opinion in the case, the Court remitted the damage award as excessive and as the result of inflammatory comments by Engler's trial counsel. On rehearing, the Court affirmed this aspect of its prior decision. Its new decision also includes a published discussion of the requirements of section 998, in which the Court held that, because Engler's 998 demands did not comply with the statutory requirements, she was not entitled to cost shifting under the

statute. The statue provides that an offer under section 998 must include "a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." Engler's offer did not include any acceptance provision. The Court held that the acceptance provision was mandatory, and that the failure of Engler's offers to include any language that satisfied the provision meant that her offer was not valid and therefore could not trigger any cost shifting under section 998.

New trial; trial court obligation to grant where jury verdict is "unmistakably unsound." *Ryan v. Crown Castle NG Networks, Inc.* (2016) __ Cal.App.5th __ (Sixth Dist.)

Ryan sued Crown Castle NG Networks ("Crown") for breaching its agreement to provide him with stock options as a term of employment. The jury was instructed to determine the value of the options if it found for Ryan on any of his contract-related claims, and to award him damages for lost compensation, but only if it ruled on behalf of Ryan on any of his tort claims. The jury's special verdict accepted two of Ryan's contract-based claims, but did not determine the value of his options. It also awarded him $72,522 in damages, but rejected his tort claims. Crown moved for new trial, but the trial court denied the motion, stating that it was unable to substitute its judgment for that of the jury. Reversed. The trial court not only has the power to grant a new trial when one is warranted, but is under a duty to do so when the record shows that the jury's verdict was unmistakably unsound. Here, the court should have granted a new trial because the jury failed to award damages on the contract-based claims it sustained, and awarded damages under the tort claims that it rejected.


Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*