Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Sullivan v. Oracle Corp.

(2011) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case? Lawyers handling overtime-pay cases and UCL cases

Why it's important: Holds that California's overtime-pay laws apply to work done by nonresidents in California, and that the UCL does not reach a failure to pay overtime in other states

Synopsis: Plaintiffs, including Sullivan, were out-of-state residents who worked for Oracle Corporation as "instructors," who trained Oracle customers to use Oracle products. Plaintiffs' jobs required them to travel, although plaintiffs worked mostly in their home states. Between 2001 and 2004 Sullivan worked 74 days in California. Oracle did not pay instructors overtime. Plaintiffs sued making three claims: (1) for overtime compensation under the California Labor Code for time worked entirely in California; (2) the same claim stated as one for restitution under the unfair competition law, Business & Professions Code section 17200 (the "UCL"); (3) for restitution for the amount of overtime due under the federal Fair Labor Standards Act ("FSLA"). Plaintiffs therefore sought to use Oracle's violations of the FLSA in other states as the predicate "unlawful act" for a UCL claim under California law.

Held: (1) California's overtime law applies to work performed here by nonresidents. As a matter of statutory construction, the law applies to all employment in the state, regardless of the employee's place of residence. To exclude nonresidents from overtime-compensation laws would tend to defeat their purpose by encouraging employers to import workers from states with fewer protections. Under California's governmental-interest approach to conflict-of-law issues, the application of California law on the issue is proper. "To permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork."

(2) The Court's analysis above confirms that the failure to pay overtime to nonresidents who work in California is a violation of California law, and therefore will form the predicate for a UCL action.

(3) Plaintiff's UCL claim does not, however, reach claims arising from the FSLA violations in other states. Neither the language of the UCL nor its legislative history suggest any basis to conclude that the Legislature intended the UCL to operate extraterritorially. No basis for applying the UCL in the fashion urged by plaintiffs is shown in the stipulated facts presented to the Court.

Short(er) takes

Vicarious liability; negligent entrustment; comparative fault; Proposition 51: *Diaz v. Carcamo* (2011) __ Cal.4th __ (Cal Supreme)

In *Armenta v. Churchill* (1954) 42 Cal.2d 448, the Court held that if an employer admits vicarious liability for any negligent driving by its employee, the plaintiff cannot maintain a concurrent claim against the employer for negligent entrustment. The trial court allowed plaintiff to proceed to verdict on both theories and the Court of Appeal affirmed, holding that *Armenta* was inconsistent with the current system of comparative fault. Reversed. *Armenta* remains good law. An employer who is vicariously liable for its employee's tort cannot be held to a higher degree of fault than the employee, and is not a "concurrent tortfeasor" whose fault is included in the universe of tortfeasors included in a proposition 51 allocation. It was error for the trial court to admit evidence of the employee's poor driving and other misconduct on the negligent-entrustment claim, and this error was prejudicial.

Preemption; Cal. Confidentiality of Medical Information Act; HIPAA; Fair Credit Reporting Act: *Brown v. Mortensen* (2011) __ Cal.4th __ (Cal. Supreme).

Both state and federal law regulate the mishandling of medical information and credit information. In California, the Confidentiality of Medical Information Act (CMIA), Civil Code section 56, and the Consumer Credit Reporting Agencies Act, Civil Code section 1785.1, et seq, address these concerns. Federal law in the area includes the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 1320d et seq., inter alia) and the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 et seq.) The issue considered in this case was whether the federal statutes preempted the plaintiff's claim under the CMIA. Held:
there was no preemption.

Plaintiff and his children were patients of dentist Reinholds. In July 2000 Reinholds billed plaintiff $600 for a dental crown, which plaintiff never received.

He thus declined to pay the bill. Reinholds referred the debt to Mortensen, who attempted to collect. In the process of his collection efforts Mortensen sent copies of plaintiffs' dental records and those of his children to the national credit reporting companies and other third parties, in violation of the CMIA. The trial court dismissed plaintiffs' claim as preempted under federal law, and the Court of Appeal affirmed. The Supreme Court reversed, holding that Congress did not intend the state remedies in the CMIA to be preempted. The overall statutory scheme and the pertinent legislative history reveals evidence suggesting Congress never intended in the FCRA or HIPAA to preempt state laws regulating medical privacy and thereby to relieve entities otherwise obligated to maintain confidentiality of the duty to do so when reporting credit information.

Wrongful death, hearsay and hearsay exceptions: *Kincaid v. Kincaid* (2011) __ Cal.App.4th __ (2d Dist. Div. 4.)

Deborah Kinkaid sued her former husband, Jeffrey Kinkaid, for wrongful death of her daughter, his stepdaughter, Shannon. Deborah alleged that Jeffrey had sexually abused Shannon for over 13 years, ultimately causing her to commit suicide. The trial court granted summary judgment for Jeffrey, finding that Deborah had no admissible evidence to support her claim. Reversed. The trial court erred in excluding a transcript of a telephone conversation between Deborah and Jeffrey, which the police recorded. In the conversation, Deborah accused Jeffrey of sexually abusing Shannon, and he did not deny it; rather, he stated that he had no memory of doing so, and that based on the recollections of Shannon and Deborah, he must have done so. The trial court erred in excluding this evidence, which was admissible under Evidence Code section 1221 as an adoptive admission. "Although respondent denied knowledge or memory of the abuse, he never denied the allegations themselves. When asked if he was denying the allegations, he answered: – No, I'm not denying. I'm just telling you that I don't . . . remember specifics. – A jury could have found that a reasonable person, when confronted with accusations of sexual abuse of his stepdaughter over an extended period of time, would do more than simply say that he did not remember or might have mentally blocked it out."

A suicide note written by Shannon was not admissible as dying declaration under Evidence Code section 1242. The presumption that one tells the truth in his or her final moments is not as applicable when death is by suicide. "Here, the record shows that decedent suffered from substance abuse problems, depression, and a history of criminal activity. She had a potential motive to portray herself in a more sympathetic light and to blame respondent, whom the evidence shows she disliked, for her situation."

The note was not a declaration against interest under Evidence Code section 1230, because it did not expose Shannon to a risk of hatred, ridicule or social disgrace. "Rather, such a statement may engender sympathy towards her situation which ultimately resulted in her passing."

Nor was the note admissible under the state-of-mind exception to the hearsay rule. (Evid. Code, § 1250, subd. (a)(2).) Shannon's state of mind when she wrote the note is not relevant to the issue of whether the statements in the note actually occurred.

Shannon's treatment records and statements to the police, in which she accused Jeffrey of molesting her, were also inadmissible. The hearsay exception in Evidence Code section 1370 for statements made by an abuse victim describing the injury did not apply because the statements were not made "at or near" the time of the infliction of the injury, as the statute requires.

Personal jurisdiction; minimum contacts; forum selection clauses; venue selection clauses: *Global Packaging, Inc. v. Superior Court (Epicor Software Corp.)* _ Cal.App.4th __ (4th Dist. Div. 3.)

Global is located in Pennsylvania. It licensed some software from Epicor, whose principal place of business is Orange County. Paragraph 11 of Epicor's end-user license agreement states, "Any controversy or claims arising out of or related to this agreement shall be venued only in the state or federal court and Orange County, California, or the jurisdiction in which the Software is located, without regard to their conflict of laws principles. Such venue shall be determined by the choice of plaintiff in bringing the action."

After a dispute developed over payment for the software, Epicor sued Global in Orange County. The trial court denied Global's motion to quash for lack of subject matter jurisdiction, based on the terms of para. 11. The Court granted Global's writ and reversed the ruling.

Paragraph 11 is, at best, a forum selection clause, but it does not contain a consent to be sued in a particular jurisdiction. "Given the crucial role played by limits on jurisdiction in the American legal system, and in particular their importance as a preserver of individual liberty, we cannot agree that consenting to a location in and of itself carries with it a consent to personal jurisdiction." Under California law, contracts are interpreted by an objective standard; the words of the contract control, not one party's subjective intentions. "If Epicor meant "forum," it should have said "forum," not "venue," and it should have specified a state (a forum), not a county (a venue). . . . A court should not be called upon to function as a backstop for sloppy contract drafting. A judge should not have to spend court time sorting out the meanings and applications of common legal terms – "venue," "forum," and "jurisdiction." Failing to pay attention does and should have consequences."

Due process; default judgments; terminating sanctions; statement of damages: *Van Sickle v. Gilbert* (2011) _ Cal.App.4th __ (3rd Dist.)

Van Sickle sued Gilbert for an accounting and breach of fiduciary duty

arising from his mismanagement of certain properties. Her complaint never stated the amount of money she was seeking, and no statement of damages had been served. After Van Sickle failed to respond to discovery, the trial court issued a terminating sanction and ordered his answer stricken. Van Sickle thereafter obtained a default judgment for more than $2 million, half of which consisted of punitive damages. The Court reversed the judgment on the ground that due process requires that a default judgment cannot be taken against a defendant who has not been put on notice of the amount sought by the plaintiff. Even in a case where no statement of damages is required by statute, a plaintiff seeking a default judgment must serve an equivalent to put the defendant on notice, if the complaint does not state the amount of damages sought. Accordingly, the court concluded with a section of the opinion labeled, "some advice": "[W]e pause to advise that, while it is not required by law, it would certainly behoove the trial court – when faced with a request to strike a defendant's answer as a terminating sanction – to determine whether the posture of the case is such that the plaintiff will be able to obtain entry of a valid default and, subsequently, a valid default judgment if the requested sanction is imposed. Otherwise, as in this case, significant judicial resources may be wasted because the default judgment the plaintiff obtains as a result of the terminating sanction (and maybe even the default itself) cannot stand, and the defendant may end up being entitled to simply file a new answer."


Ehrlich

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm *in Encino. His practice emphasizes insurance bad-faith and appellate litigation. A Harvard Law graduate, he is certified by the State Bar of California as an appellate specialist. He has twice been selected as Appellate Lawyer of the Year by the Consumer Attorneys Association of Los Angeles.*