Appellate Reports and cases in brief

Patterson v. Domino's Pizza — *Franchisor tort responsibility where franchisor exhibits traditionally understood characteristics of an "employer"*

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Patterson v. Domino's Pizza, LLC

(2014) _ Cal.4th_ (Cal. Supreme)

Who needs to know about this case: Lawyers attempting to sue franchisors for torts committed by employees of a franchised business.

Why it's important: California Supreme Court limits the scope of franchisor responsibility to cases where the franchisor exhibits traditionally understood characteristics of an "employer" or a "principal," i.e., it has retained or assumed a general right of control over such things as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees.

Synopsis: Sui Juris, LLC, owned by Daniel Poff, acquired an existing Domino's Pizza franchise in Southern California in September 2008. When operations began, it retained the 17 or 18 people who were already staffing the store, including Renee Miranda, an adult male who held the title of Assistant Manager. In November 2008, the store hired Taylor Patterson, a young woman, as a server. In 2009, she filed a lawsuit against Domino's, Sui Juris, and Miranda. She alleged that she had been sexually harassed by Miranda when they shared the same shift. He made lewd comments and gestures, and grabbed her breasts and buttocks. She reported this to Poff and to her father. Her father contacted the police and Domino's "corporate office." She stayed away from work for a week, then soon resigned. Her complaint pleaded claims under the FEHA, and common-law claims for intentional infliction of emotional distress, battery, and constructive termination, and discharge in violation of public policy.

The complaint alleges that Domino's was Miranda's "employer," and each defendant was alleged to be the other defendants' agent, employee, servant, or joint venturer. Domino's moved for summary judgment, arguing that it was not Miranda's employer or a principal and could not be held vicariously liable for Miranda's conduct. Domino's maintained that, although it imposed and enforced strict standards for selling its trademarked pizza brand, Sui Juris, LLC was a separate business run by Poff, who selected, managed, and disciplined its employees. It contended that the internal day-to-day control needed for an employment relationship was lacking. The trial court granted the motion. The Court of Appeal reversed, finding that the evidence created triable issues of fact about the degree of control that Domino's exercised over Sui Juris's employment decisions.

The Supreme Court reversed. It rejected Patterson's arguments that the degree of control exercised by franchisors like Domino's makes each franchisee the agent of the franchisor for all business purposes, and renders each employee of the franchisee an employee of the franchisor in vicarious liability terms. The Court concluded, as follows:

> The 'means and manner' test generally used by the Courts of Appeal cannot stand for the proposition that a comprehensive operating system alone constitutes the 'control' needed to support vicarious liability claims like those raised here. As noted, a franchise contract consists of standards, procedures, and requirements that regulate each store for the benefit of both parties. This approach minimizes chain-wide variations that can affect product quality, customer service, trade name, business methods, public reputation, and commercial image. . . . As we have explained, franchisees are owner-operators who hold a personal and financial stake in the business. A major incentive is the franchisee's right to hire the people who work for him, and to oversee their performance each day. A franchisor enters this arena, and becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. Any other guiding principle would disrupt the franchise relationship.

Applying this rule to the facts before it, the Court concluded that Domino's did not exercise the type of control that would expose it to vicarious liability to Patterson for Miranda's conduct.

Short(er) takes:

Employment, class actions, statistical sampling: *Jiminez v. Allstate Ins. Co.* (9th Cir. 2014).

Court affirms district court's order certifying class of 800 Allstate claims adjusters who claimed that Allstate had an informal policy of requiring them to work unpaid off-the-clock overtime. In challenging certification, Allstate raised two objections: (1) the common questions identified in the certification order would not resolve class-wide liability issues, and therefore the order fails to satisfy the "commonality" requirement in FRCP, Rule 23(a)(2); and (2) the district courts' approval of statistical modeling violated Allstate's due-process rights and conflicted with *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541.

On the first issue, the court noted that the common questions certified for resolution closely paralleled the legal standard that the plaintiffs would have to prove when the case when to trial. Accordingly, those questions "will drive the answer to the plaintiffs' claims on one of the three elements of their claim." This established the requisite commonality.

On the second issue, the court held that the problems with the statistical modeling proposed in *Dukes* or the recent decision in *Comcast Corp. v. Beherend* (2013) 133 S.Ct. 1426, were not present in this case. In *Dukes*, the Supreme Court reversed the certification, holding that employers were entitled to an individualized determination of each employee's eligibility for backpay. This determination rested on two key factors: (1) the class had been certified under FRCP 23(b)(2), which contains fewer procedural safeguards than a class certified under Rule 23(b)(3), and (2) in the statutory context of Title VII suits expressly include affirmative defenses relating to motive and alternative explanations. In *Comcast*, the Court held that a methodology for calculation of damages that could not produce a class-wide result was not sufficient to support certification.

These problems are not present in this case, and this Circuit and others have held after *Dukes* and *Comcast* that statistical sampling and representative testimony are acceptable ways to determine liability, so long as the use of these techniques is not expanded into the realm of damages.

In crafting the certification order in this case, the district court was careful to preserve Allstate's ability to raise any individualized defenses it might have at the damages phase of the proceedings.

Public entities; recovery of defense costs against attorneys for frivolous actions: *Suarez v. City of Corona* (2014) __ Cal.App.4th __ (4th Dist., Div. 1.)

Suarez was injured when a van he was a passenger in exploded during refilling at the City's natural gas filling station. Suarez sued on the theory of dangerous condition of public property. But subsequent investigation showed that the City's equipment was fine; the problem was in the van. The City repeatedly demanded that Suarez dismiss his suit, but he refused. The City moved for summary judgment, arguing that the case was frivolous under Code Civ. Proc., § 1038. The trial court agreed, and awarded the City costs of $135,905, which was later reduced. The award was assessed jointly against Suarez and his attorneys. Reversed in part. Section 1038 allows public entities to recover the cost of defending frivolous lawsuits, but it does not specify against whom the award will run. Because the statute is silent on whether the award can be made against a party's counsel, the court would not construe it to authorize such an award.

Arbitration, Web site terms of use, insufficient notice: *Nguyen v. Barnes & Noble, Inc.* (9th Cir. 2014) _ F.3d _.

Barnes & Noble ("BN") appealed the district court's denial of its motion to compel arbitration of Nguyen's claim against it for failing to honor an Internet sale of two HP Touchpad tablet devices. Affirmed. Nguyen filed a class action claiming that BN had engaged in deceptive business practices and false advertising under California and New York law. BN moved to compel arbitration based on an arbitration agreement contained in its "terms of use" provision on its Web site. The site included a link to the "terms of use" provision on every page. But Nguyen never clicked on the link, or reviewed the terms of use provision. "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract," which include the requirement of mutual manifestation of assent. If the record contained any evidence that Nguyen had received actual notice of the terms of use, or was required to affirmatively acknowledge the terms of use before completing his purchase, the outcome of the case might be different. But where there is no evidence of actual assent, the validity of the "browsewrap agreement" turns on whether the Web site put a reasonably prudent user on inquiry notice of the terms of the contract. Where the link to a Web site's terms of use provision is buried at the bottom of the Web page, or placed in other obscure locations where users are unlikely to see it, courts have refused to enforce the browsewrap agreements. The fact that the link to the provision appears near enough to the "Proceed with Checkout" button that a user must click to complete the order so that it would be within the user's field of vision is not sufficient. The fact that the site did not prompt the users to examine the provision or to demonstrate assent is insufficient to provide constructive notice of the terms of the agreement.

Civil Procedure; timing for demurrer after amended complaint filed: *Carlton v. Dr. Pepper Snapple Group, Inc.* (2014) _ Cal.App.4th _ (4th Dist., Div. 2.)

Carlton filed a first-amended complaint against various defendants in an

employment-related lawsuit. The trial court sustained a demurrer with leave to amend, and Carlton then filed a second-amended complaint. The defendants filed a demurrer within 30 days, but not within 10 days. Carlton objected that the demurrer was untimely because Rule 3.1320(j) of the Rules of Court provides a 10-day period for a responsive pleading to a complaint after a demurrer is overruled, etc. But section 471.5 of the Code of Civil Procedure provides for a 30-day filing period "if the complaint is amended." The Court harmonized the rules by finding that the 10-day period in the Rule applies when there is no amended complaint filed, but that the 30-day period applies when there is. The court therefore affirmed the trial court's ruling on the issue.

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