Appellate Reports

In *Dynamex Operations* Cal. Supreme Court adopts new test for "employee" vs. "independent contractor." In *Pebley v. Santa Clara Organics*, appellate court OK's medical care on a lien, even for plaintiffs with insurance

Dynamex Operations West, Inc. v. Superior Court (*Lee*)

(2018) __ Cal.5th __ (Cal. Supreme)

Who needs to know about this case? Lawyers handling cases in which there is an issue about whether a worker is properly considered an "employee" or an "independent contractor." (This issue is often critical in employment-law cases, but can also be important in tort cases where the issue of vicarious liability is presented.)

Why it's important? A unanimous Supreme Court adopts a new three-part test to determine whether a worker is an employee or an independent contractor, commonly called the "ABC" test. Under this test, a worker is properly considered an independent contractor only if the hiring entity establishes three criteria: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Note part "B" of the test, which cannot be satisfied if the worker is performing the same tasks performed by the employer's core business. This would suggest that workers in the "gig economy" must be considered employees if they provide the same service as the employer. It is therefore difficult to see how, for example, Uber or Lyft drivers could be independent contractors – or how contract lawyers could be, if hired by law firms.

Synopsis: The defendant in the lawsuit is Dynamex, a nationwide package and document-delivery company. Before 2004, Dynamex classified the workers who picked up and delivered packages as employees. But in 2004 Dynamex adopted a new policy and contractual arrangement under which all drivers are considered independent contractors rather than employees. Dynamex maintains that, in light of the current contractual arrangement, the drivers are properly classified as independent contractors.

After the change two Dynamex drivers filed a class action against the company, arguing that they were misclassified, and that this misclassification of its drivers as independent contractors led to Dynamex's violation of the provisions of Industrial Welfare Commission wage order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, that Dynamex had engaged in unfair and unlawful business practices under Business and Professions Code section 17200. (Note, the *Dynamex* decision technically considers only whether workers are properly classified as employees or independent contractors for the purposes of California's Wage Orders. It is possible that different standards may be used for classification under other statutory schemes.)

The trial court granted a motion to certify the plaintiff class. In finding that the relevant common legal and factual issues relating to the proper classification of the drivers as employees or as independent contractors predominated over potential individual issues, the trial court's certification order relied upon the three alternative definitions of "employ" and "employer" set forth in the applicable wage order as discussed in this court's then-recently decided opinion in *Martinez v. Combs* (2010) 49 Cal.4th 35, 64 (*Martinez*). *Martinez* held that to "employ ... under the [wage order], has three alternative definitions. It means: (a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." The trial court rejected Dynamex's contention that in the wage order context, as in most other contexts, the multifactor standard set forth in the Supreme Court's seminal decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) is the only appropriate standard under California law for distinguishing employees and independent contractors.

Dynamex filed a writ proceeding in the Court of Appeal, maintaining that two of the alternative wage order definitions of "employ" relied upon by the

trial court do not apply to the employee or independent contractor issue. Dynamex contended, instead, that those wage order definitions are relevant only to the distinct joint employer question that was directly presented in *Martinez* – namely whether, when a worker is an admitted employee of a primary employer, another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order.

The Court of Appeal rejected Dynamex's contention, concluding that neither the provisions of the wage order itself nor this court's decision in *Martinez* supported the argument that the wage order's definitions of "employ" and "employer" are limited to the joint employer context and are not applicable in determining whether a worker is a covered employee, rather than an excluded independent contractor, for purposes of the obligations imposed by the wage order. The Court of Appeal concluded that the wage order definitions discussed in *Martinez* are applicable to the employee or independent contractor question with respect to obligations arising out of the wage order. The Court of Appeal upheld the trial court's class certification order with respect to all of plaintiffs' claims that are based on alleged violations of the wage order.

At the same time, the Court of Appeal concluded that insofar as the causes of action in the complaint seek reimbursement for business expenses such as fuel and tolls that are not governed by the wage order and are obtainable only under section 2802 of the Labor Code, the *Borello* standard is the applicable standard for determining whether a worker is properly considered an employee or an independent contractor. With respect to plaintiffs' non-wage-order claim under section 2802, the Court of Appeal remanded the matter to the trial court to reconsider its class certification of that claim pursuant to a proper application of the *Borello* standard.

Dynamex filed a petition for review challenging only the Court of Appeal's conclusion that the wage order definitions of "employ" and "employer" discussed in *Martinez* are applicable to the question whether a worker is properly considered an employee or an independent contractor for purposes of the obligations imposed by an applicable wage order. The Supreme Court granted review to consider that issue. The Court summarized its decision this way:

> [W]e agree with the Court of Appeal that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" contained in the wage order may be relied upon in evaluating whether a worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by the wage order. As explained, in light of its history and purpose, we conclude that the wage order's suffer or permit to work definition must be interpreted broadly to treat as "employees," and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business*. At the same time, we conclude that the suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers, like independent plumbers or electricians, who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business.
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> For the reasons explained hereafter, we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Pebley v. Santa Clara Organics, Inc.

(2018) __ Cal.App.5th __ (Second Dist., Div. 6)

Who needs to know about this case? Lawyers bringing or defending personal-injury cases where the plaintiff has access to public or private medical coverage but elects instead to obtain his or her medical treatment on a lien.

Why it's important? Holds that an insured plaintiff who chooses not to use his or her insurance coverage to obtain medical treatment should be considered "uninsured" for the purposes of proving medical expenses, and therefore the rules set forth in *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1330-1331, properly govern the trial of such a case. The Court expressly rejected the defense argument that a plaintiff who elects to treat on a lien instead of using his or her health coverage has failed to mitigate his or her damages. (*Author's brag*: Trial counsel was Sevy Fischer

and Greyson Goody of the Simon Law Group, and Trevor Quirk; appellate counsel was Jeffrey I. Ehrlich.)

Synopsis: Plaintiff David Pebley was a passenger in an RV that was parked along a freeway after suffering a flat tire, and was rear-ended by a fully-loaded semi traveling 55 mph. He suffered neck injuries, and ultimately underwent a three-level surgical fusion. Pebley was enrolled with Kaiser, and at some point after the injury became eligible for Medicare, but he chose to be treated on a lien by Dr. Gerald Alexander.

The parties filed numerous overlapping motions in limine. Pebley sought to exclude evidence of what an insurer would pay for the surgery he underwent, and to exclude the fact that he obtained most of his treatment on a lien. Pebley also sought to preclude one of the defendant's experts, Henry Miller, PhD, from offering opinions on the reasonable cost of professional services, because Miller's opinions were drawn from the Milliman study, which dealt with the amounts the insurers, Medicare, and Medicaid pay and accept for services.

The trial court agreed to preclude Miller from testifying about professional fees, but allowed him to testify about the cost of facilities, such as the hospital where Pebley underwent surgery, because his opinions were based on the facilities' public filings concerning the costs, and Miller's direct inquiries to the facilities.

At trial, Pebley's treating doctors were allowed to testify that the costs for the care that Pebley underwent were reasonable in the community, based on their knowledge and experience. Dr. Miller was allowed to testify that Olympia hospital would accept a "cash payment" of roughly $40,000 for the surgery that Pebley underwent, as opposed to the $85,000 it charged Pebley. The defendants' orthopedic expert was also allowed to testify that in 95 percent of his cases with private-pay patients, he was paid, on average, about 50 percent of his charges.

The jury awarded Pebley past medical expenses of $269,000 (the full amount he requested), future medical expenses of $375,000, past noneconomic damages of $900,000, and future noneconomic damages of $2,100,000.

Defendants moved for a new trial, arguing the damages were excessive and that the award of medical expenses could not stand under *Howell* and its progeny. The trial court summarily denied the motion. Defendants appealed, and the Court of Appeal affirmed in almost all respects.

The Court held that the threshold issue before it was whether Pebley should be classified as insured or uninsured under *Howell* and its progeny. It explained:

> Although Pebley admittedly has health insurance, he chose to receive medical services outside his insurance plan. As defendants concede, Pebley had a right to choose physicians and medical facilities outside his plan, but they maintain he also had a duty to mitigate his damages. They assert he did not meet this duty when he elected to treat with lien providers. Defendants cite no specific authority for this assertion. They reference general authority that every plaintiff has a duty to take reasonable steps to minimize the loss caused by a defendant's actions. [Citations] Defendants maintain Pebley failed to mitigate his medical expenses by opting for the most expensive method to pay for his treatment. They contend that Pebley's unreasonable choice of going outside his insurance plan for treatment resulted in excess medical expenses which constitute avoidable losses Pebley seeks to pass on to defendants.

In rejecting the defense's "mitigation" argument, the *Pebley* court made the following observations:

"Under *Howell*, Pebley is entitled to recover the lesser of (1) the amount incurred or paid for medical services, and (2) the reasonable value of the services rendered. "The fact that Pebley chose to pay for those services out-of-pocket, rather than use his insurance, is irrelevant so long as these requirements are met. We therefore reject defendants' argument that Pebley failed to mitigate his damages.

"A tortfeasor cannot force a plaintiff to use his or her insurance to obtain medical treatment for injuries caused by the tortfeasor. That choice belongs to the plaintiff. If the plaintiff elects to be treated through an insurance carrier, the plaintiff's recovery typically will be limited to the amounts paid by the carrier for the services provided. (*Howell*, at p. 566.) But where, as here, the plaintiff chooses to be treated outside the available insurance plan, the plaintiff is in the same position as an uninsured plaintiff and should be classified as such under the law.

"There are many reasons why an injured plaintiff may elect to treat outside his or her insurance plan. As Pebley points out, plaintiffs generally make their health insurance choices before they are injured. These choices may be based on the plaintiffs' willingness to bear the risk posed by a health maintenance organization (HMO) rationing system because the plaintiff is healthy and requires little care. This decision may appear much different after a serious accident, when the plaintiff suddenly needs complex, extensive care that an HMO is not structured to provide. (See, e.g., *Pegram v. Herdrich* (2000) 530 U.S. 211, 220-221 ["inducement to ration care goes to the very point of any HMO scheme"].) The plaintiff also may wish to choose a physician or surgeon who specializes in treating the specific type of injury involved, but who does not accept the plaintiff's insurance or any other type of insurance. In addition, health care providers that bill through insurance, rather than on a lien basis, may be less willing to participate in the litigation process."

The Court also rejected the contention that unless plaintiffs are required to treat through their available insurance they will be likely to try to run up their medical expenses by treating on a lien. The Court explained, "It is undisputed Pebley required complex surgery to fuse three of his cervical vertebrae. Complications from this type of surgery include paralysis or death. And even absent complications, a poor outcome would leave Pebley with continued pain in his neck and weakness and numbness in his arms and hands. Pebley had the right to seek the best care available and the incentive to do so."


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