Editor-in-Chief
Jeffrey I. Ehrlich
EHRLICH LAW FIRM, APC

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2024

Appellate Reports

RELIEF FROM WAIVER OF JURY TRIAL; ALSO LABOR CODE AND PAY STUBS, HOTELS AND PREMISES LIABILITY

Requests for relief from waiver of jury trial

Extent of trial court discretion; need to show prejudice in appeal from denial of relief from waiver

Tricoast Builders, Inc. v. Fonnegra (2024) 15 Cal.5th 766 (Cal. Supreme Court)

Code of Civil Procedure section 631 sets forth the acts and omissions that will result in a waiver of the right to a jury trial, and also gives the trial court the discretion to grant relief from a waiver. Waiver can occur, inter alia, if a party fails to make a timely demand for a jury trial, or if it fails to timely deposit jury fees. This case presented two issues for the Supreme Court to decide: (1) Must a trial court always grant relief from a waiver if proceeding with a jury would not cause any hardship to the other parties or the trial court? (2) If relief from the waiver is denied and the aggrieved party challenges the denial for the first time in an appeal of the judgment of the trial court, must the appellant show prejudice resulting from the denial of a jury trial?

The answer to the first question is "no." The presence or absence of hardship is always a primary consideration, and it is often dispositive in cases where the litigant has given timely notice that it desires a jury trial and seeks relief from mere technical statutory waiver, such as failure to post the required jury fee at the correct time or in the correct amount. But a request for relief from jury waiver always calls for consideration of multiple factors in addition to hardship, including the timeliness of the request and the reasons supporting the request.

The answer to the second question is "yes." Where the constitutional right of jury trial has been validly waived, prejudice from the denial of section 631(g) relief will not be presumed but must be shown. The California courts allow a denial of relief to be raised in a pretrial writ petition. The cases recognize writ review as the preferred method for securing an erroneously denied jury trial, because writ review permits the issue to be settled before trial ever begins, thus avoiding repetitive litigation and promoting judicial economy.

A litigant may also choose to raise a claim related to the denial of a jury by filing an appeal after judgment. But under article VI, section 13 of the California Constitution, a judgment may not be reversed on appeal ... unless "after an examination of the entire cause, including the evidence, it appears the error caused a 'miscarriage of justice.'" This means that a litigant that might have been able to establish error on interlocutory writ review, and thus secure a writ compelling the trial court to conduct proceedings differently, typically will not be able to secure relief on direct review of the court's judgment without demonstrating *both* error in the conduct of proceedings *and* "prejudice occasioned by the error."

Employment law: Labor Code section 226

Penalties for willful failure to comply with Labor Code section 226; effect of good-faith belief of compliance

Naranjo v. Spectrum Security Services, Inc. (2022) 13 Cal.5th 93 (Cal. Supreme Court)

California law requires employers to provide their employees with written wage statements listing gross and net wages earned, hourly pay rates, hours worked, and other employment-related information. (Lab. Code, § 226.) If a claimant demonstrates that an employer has failed to comply with this requirement, the claimant is entitled to an injunction compelling compliance and an award of costs and reasonable attorney's fees. (*Id.*, subd. (h).) But in the case of a "knowing and intentional failure ... to comply," the law provides for statutory penalties of up to $4,000 or the employee's actual damages, should the employee's damages exceed the statutory penalties. (*Id.*, subd. (e)(1).) The question presented in this decision was whether an employer has knowingly and intentionally failed to comply with section 226's requirements when the employer had a good-faith, yet erroneous, belief that it was in compliance.

The Court holds that, if an employer reasonably and in good faith believed it was providing a complete and accurate wage statement in compliance with the requirements of section 226, then it has not knowingly and intentionally failed to comply with the wage statement law.

Insurance; *Brandt* fees, waiver of attorney-client privilege

Byers v. Superior Court of Contra Costa County (2024) _ Cal.App.5th _ (First Dist. Div. 5.)

In *Brandt v. Superior Court* (1985) 37 Cal.3d 813, the California Supreme Court created an exception to the general rule that each party must ordinarily bear its own attorney fees. Under *Brandt*, an insurer is liable for attorney fees when the insurer's tortious conduct in refusing to pay insurance benefits requires the insured to retain an attorney to obtain the benefits of the policy. "The attorney's fees are an economic loss – damages – proximately caused by the tort," similar to recovery of medical fees as damages in a personal injury action. (*Brandt*, at p. 817.)

To recover *Brandt* fees, the insured is required to plead and prove: (1) the amount the insured was entitled to recover under the policy, (2) that the insurer withheld payment unreasonably or without proper cause, (3) the amount that the insured paid or incurred in legal fees and expenses in establishing the insured's right to contract benefits and (4) the reasonableness of the fees and expenses so incurred. Since the attorney's fees are recoverable as damages, the determination of the

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2024

recoverable fees must be made by the trier of fact unless the parties stipulate otherwise.

In this case, the plaintiff's complaint against its insurer sought *Brandt* fees, and the plaintiff acknowledged in discovery that it was seeking such fees. The defendant insurer then served a document request seeking the production of the plaintiff's fee agreement with counsel and "each and every billing record, fee statement, invoice, receipt and proof of payment from YOUR attorneys in the instant litigation."

Plaintiffs refused to produce any documents, invoking the attorney-client privilege. The insurer brought a motion to compel, which the trial court granted. The trial court's order allowed plaintiff's counsel to redact references that counsel believes reflect attorney work product, i.e., information that may give an indication of counsel's impressions, conclusions, opinions, or legal research or theories, or as to consultants or expert witnesses for which the attorney work product doctrine has not been waived.

The plaintiff sought a writ, arguing that the trial court abused its discretion in forcing them to waive the attorney-client privilege during the litigation as a condition of seeking *Brandt* fees. Writ denied.

The court found that the plaintiffs' admission that they are seeking *Brandt* fees as an element of their damages is an implied waiver of the attorney–client privilege at least as to the attorney fees documents that the plaintiffs plan to rely upon to seek to prove the amount of fees they reasonably incurred to establish their right to benefits under USAA's insurance policy.

Sanctions for discovery misuse

Effect of firm's withdrawal from case before motion seeking sanctions was filed

Masimo Corporation v. Vanderpool Law Firm, Inc. (2024) _ Cal.App.5th _ (Fourth Dist., Div. 3.)

Masimo Corp. filed a lawsuit against three defendants. The defendants were represented by the Vanderpool Law Firm (Vanderpool). Masimo prevailed on a motion to compel responses to interrogatories and document requests and Vanderpool was sanctioned by the trial judge that awarded Masimo $10,000 for discovery misuse. Vanderpool appealed, arguing that it had substituted out of the case as counsel before the motion to compel was filed and was therefore unsanctionable. The court rejected this argument, holding that it is not necessary to be counsel of record to be liable for monetary sanctions for discovery misuse.

The statutory language authorizing monetary sanctions for discovery misuse does not limit their imposition to counsel of record. "Any attorney" advising that conduct can be liable for monetary sanctions. Vanderpool indisputably advised defendants to stonewall Masimo's discovery efforts not once but twice, the second time after promising to provide substantive answers. As the discovery referee held, and the trial court confirmed, Vanderpool's precipitate exit from its representation did not insulate it from these sanctions for its prior discovery misuse.

Premises liability of hotels

Notice of defects/unsafe condition

Howard v. Accor Management US, Inc. (2024) 101 Cal.App.5th 130 (Second Dist., Div. 8.)

Howard stayed at defendant's hotel in March 2017. She showered without incident on the day of her arrival. The next day, after the defendant's housekeeper had cleaned the room, Howard showered again. She tried to take the hand-held shower wand off the shower handle and it came apart, cutting her hand. Howard claimed that the incident also caused her to fall, injuring her tailbone.

Accor moved for summary judgment, arguing Howard could not establish it had actual or constructive notice of any problem with the handheld shower head. The hotel did not contest the shower head came apart while Howard was showering. Nor did it contest a housekeeper had cleaned Howard's room the day before and the day of the incident.

The trial court granted the motion. Howard appealed. Affirmed.

Hotel operators are not strictly liable for flaws in the fixtures in the hotel room. The Supreme Court had held that a property owner must have actual or constructive notice of an unsafe condition before incurring liability. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1203 & 1206-1207.) This notice requirement applies to hotels on negligence and premises-liability claims. Howard claimed that the evidence showed that the housekeeper was the only one to see and use the shower wand after it functioned properly on the first day of Howard's stay, and that the only reasonable inference was that the housekeeper did something to break the wand, or at least noticed its unsafe condition.

"Howard's problem is nothing shows the housekeeper did anything to break the shower wand. The evidence does not show the housekeeper was required to use the wand. There was no evidence from the housekeeper, as Howard decided not to depose her. No evidence suggested this housekeeper used this wand during her cleaning that day." As a result, there is no basis to infer that the defendant had actual or constructive notice of a defect in the shower wand.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, APC, *in Claremont. He is the editor-in-chief of the Advocate magazine, and is certified by the California Board of Legal Specialization as an Appellate Specialist.*