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Appellate Briefs

CONTRACTORS HIRED BY DOD AND REMOVAL OF THEIR COMPLAINTS TO FEDERAL COURT. ALSO, PREMISES LIABILITY AND THE NEGLIGENT UNDERTAKING THEORY; AND, REDUCTION OF ATTORNEY FEES BASED ON INCIVILITY OF COUNSEL

Removal; federal officer removal; private contractors

DeFiore v. SOC LLC (9th Cir. 2023) 85 F.4th 546

Three private contractors providing war-zone security services to the Department of Defense (DOD) appealed a district court order remanding to Nevada state court a lawsuit brought by a group of their employees who guarded DOD bases, equipment, and personnel in Iraq. The Ninth Circuit reversed, finding that the contractors met the limited burden imposed by the federal officer removal statute.

The guards' complaint alleged that the contractors recruited them under false promises with respect to their work schedules and that the contractors required the guards to "work in ultra-hazardous conditions in excess of 12 hours per day without meals or rest periods, seven days per week." The complaint alleged that these working conditions violated the representations that the contractors made when they recruited the guards, but also the relevant contracts between the contractors and the DOC, referred to as the TWISS II contract. In invoking the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), the contractors alleged (1) that they are "persons" for purposes of the statute; (2) that the guards' claims "are connected or associated with" the contractors' "official authority" because the contractors were "acting under federal authority by performing security services according to United States military directives" and because the TWISS II contract required the guards to follow "orders ... issued by the 'Combatant Commander, including those relating to force protection, security, health, [or] safety'"; and (3) that the contractors "expect to [assert] colorable federal defenses, ... including their compliance with federal regulations" incorporated into the TWISS II contract.

As relevant here, section 1442(a)(1) permits removal of a civil action against "any officer (or any person acting under that officer) of the United States or of any agency thereof ... for or relating to any act under color of such office." (28 U.S.C. § 1442(a)(1) (emphasis added).) To satisfy this requirement, a removing private entity must show that "(a) it is a 'person' within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a 'colorable federal defense.'

The first element was not disputed, so the propriety of removal turned on whether there is a causal nexus between the contractors' relevant actions under a federal officer and the guards' claims, and whether the contractors assert a colorable federal defense. To satisfy the first inquiry, the contractors must show (1) that they were acting under a federal officer in performing some act under color of federal office, and (2) that such action is causally connected with the guards' claims against them.

As to the first prong, for a private entity to be "acting under" a federal officer, the private entity must be involved in an effort to assist, or to help carry out, the duties or tasks of the federal superior. The "relationship typically involves subjection, guidance, or control, in which the private entity helps federal officers fulfill basic governmental tasks. Under common-law agency principles, the TWISS II contract's subordination of the contractors to U.S. military command in the performance of their duties in Iraq sufficed to render them DOD agents.

To satisfy the causal-connection requirement, the contractors need show only that the challenged acts occurred because of what they were asked to do by the government. This is a low hurdle, which the contractors can satisfy by showing that the actions they took which gave rise to the guards' claims resulted from their work for DOD. The removal notice plainly establishes this element.

With respect to the issue of whether they have a colorable federal defense, the contractors assert, inter alia, a defense of compliance with federal rules and regulations incorporated into the TWISS II contract.

The allegations of the notice of removal, taken as true and supplemented by record facts in related litigation of which we take judicial notice, establish that the contractors served as DOD's agents in prosecuting the Iraq War, that the guards' claims arise out of the contractors' performance of those federal duties, and that the contractors have asserted a colorable federal defense to at least one of the guards' claims. Removal was therefore proper.

Premises liability; duty; failure of security guards to enforce rules

Irvine Company LLC v. Superior Court of Orange County (2023) 96 Cal.App.5th 858 (Fourth Dist., Div. 3.)

Plaintiff consumed "excessive amounts of alcohol" at a restaurant in the Fashion Island shopping center and then walked through a nearby parking structure while "engaging in displays of nonsensical horseplay." She went to an upper floor of the structure and sat on a 43-inch-tall perimeter wall, lost her balance, and fell backward to the ground several stories below. She sued the Irvine Company (Irvine) which owned the parking structure, for premises liability. When the trial court denied Irvine's motion for summary judgment, it took a writ. Petition granted.

Plaintiff conceded in her opposition to the motion that the parking structure did not have a physical defect or dangerous condition. In the stead of her original theory, she asserted a new theory of liability – that Irvine had *assumed* a duty to her by hiring a security company charged with detecting and stopping horseplay according to the Fashion Island Code of Conduct. She argued Irvine was liable for the security company's negligence in enforcing that code.

This is a negligent-undertaking theory. Because Irvine's retention of security services did not increase any risk to Plaintiff and she did not rely on that

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undertaking to her detriment, her negligent-undertaking claim was deficient. Irvine was therefore entitled to summary judgment because it owed her no duty of care.

Attorney's fees; reduction of fee award based on attorney incivility

Snoeck v. Exaktime Innovations, Inc. (2023) 96 Cal.App.5th 908 (Second Dist., Div. 8.)

Plaintiff Snoeck prevailed on a FEHA claim against his former employer. His attorney filed a motion seeking attorney's fees based on a lodestar of $1,193,870, plus a 1.75 multiplier. The trial court granted the motion, first applying a 1.2 multiplier to the lodestar, generating a figure of $1,144,659. But based on its finding that Snoeck's counsel had consistently exhibited a lack of civility through the entire proceeding, the court then used a negative multiplier of 0.4, resulting in a total fee award of $686,795. Affirmed.

Incivility may not serve as a basis for attorney discipline by the state bar – yet – but all licensed California attorneys are expected to conduct themselves in a civil manner. Since 2014, the oath new attorneys of this state must take requires them to "vow to treat opposing counsel with dignity, courtesy, and integrity." Rather than a new requirement, the "civility oath" added by the rules in 2014 serves as an important reminder to lawyers of their general ethical responsibilities in the pursuit of all their professional affairs, including litigation.

Substantial evidence supports the trial court's finding that Snoeck's counsel was uncivil toward opposing counsel and the court, and his ad hominem attacks were unnecessary for the zealous representation of his client.

The trial court could have found that counsel's repeated accusations against defense counsel of lying, knowingly misrepresenting the law and facts, and engaging in fraud similarly created unnecessary and time-consuming hostilities and distractions, but the trial court was not required to make specific findings concerning how counsel's incivility increased specific costs in the litigation. "Civility is an aspect of skill, and skill is a factor that can be relied on to adjust the lodestar." The trial court thus could have found the lodestar dollar figure here exceeded the fair market value for Smith's legal services given his lack of civility. A downward departure from the lodestar figure is justified where the attorney demonstrates he is less skilled than would be expected of an attorney with comparable expertise or experience, billing at the same rate.

When a trial court applies a substantial negative multiplier to a presumptively accurate lodestar attorney fee amount, the court must clearly explain its case-specific reasons for the percentage reduction. The trial court did so here. It specifically explained it was applying the 0.4 negative multiplier to account for counsel's "repeated and apparently intentional lack of civility throughout the entire course of this litigation."

Arbitration; motions to vacate arbitration awards; linguistic bias

FCM Investments, LLC v. Grove Pham, LLC (2023) 96 Cal.App.5th 545 (Fourth District, Div. 1.)

One of the few grounds for vacating an arbitration award is misconduct on the part of a neutral arbitrator substantially prejudicing the rights of a party. Misconduct includes circumstances creating a reasonable impression of possible arbitrator bias.

"In this high-stakes commercial arbitration over a canceled real estate deal, the arbitrator found the seller in breach based largely on an assessment of witness credibility. In the arbitrator's view, defendant Phuong Pham lacked credibility because she used an interpreter during the arbitration proceedings. Reasoning that she had been in the country for decades, engaged in sophisticated business transactions, and previously functioned in some undisclosed capacity as an interpreter, the arbitrator felt that her use of an interpreter at the arbitration was a tactical ploy to seem less sophisticated."

"Given the exceedingly narrow scope of judicial review of arbitration awards, assuring both the actual and apparent impartiality of a neutral arbitrator is crucial to the legitimacy of arbitration as a dispute resolution mechanism. Courts are empowered to act where that impartiality can reasonably be questioned. Here, the arbitrator's credibility finding rested on unacceptable misconceptions about English proficiency and language acquisition. These misconceptions, in turn, give rise to a reasonable impression of possible bias on the part of the arbitrator requiring reversal of the judgment and vacating the arbitration award."

Attorneys; appellate rules; forfeiture of issues based on misrepresentations to the court

Perry v. Kia Motors America, Inc. (2023) 91 Cal.App.5th 1088 (Fourth Dist., Div. 3.)

Plaintiff Kamiya Perry appealed from a judgment in favor of defendant Kia Motors America, Inc. (Kia) after a jury found in favor of Kia in her automobile defect trial. She raised three contentions on appeal.

First, she contended that the trial court abused its discretion by refusing to instruct the jury that Kia had concealed evidence (certain engineering documents) during discovery. However, while the court rejected Kia's excuses for withholding the documents, it did not find that Kia intentionally concealed them. Thus, it was appropriate to refuse such an instruction. Moreover, despite the court explicitly commenting that it found no concealment, Perry not only failed to bring such comments to the appellate court's attention in her brief, but continued to maintain that the court *did* find concealment. Due to this misrepresentation, the court deemed the issue forfeited on appeal.

Second, Perry contended that the trial court erred by excluding the testimony of Kia's paralegal who verified discovery requests relevant to the engineering documents. No abuse of discretion was found, as the paralegal was simply acting as a corporate agent in her

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verifications and did not have personal knowledge that would have been helpful to the jury.

Finally, Perry contended that she was not given a fair trial because the jurors were required to deliberate in a small room, which, in the midst of the COVID-19 pandemic, incentivized the jury to complete their deliberations quickly. The jury returned a defense verdict after approximately one hour of deliberation. But Perry did not make a timely objection to the size of the jury room and thus waived the objection. Accordingly, the court affirmed in full.

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