U.S. NINTH CIRCUIT COURT OF APPEALS

Romberg v. Nichols, et al.,

48 F.3d 453, 95 D.A.R. 2465, No. 93-56296 (Feb. 24, 1995).

Plaintiffs Awarded $1 Each in Civil Rights Case Are Not Entitled to Attorneys' Fees

In this case, the U.S. Court of Appeals for the Ninth Circuit considered whether a court must award attorneys' fees to a plaintiff in a civil rights case who received a verdict in the amount of $1. Plaintiffs Michael and Debra Romberg filed suit under 42 U.S.C. section 1983 against several Los Angeles Sheriff's deputies and against the County of Los Angeles itself; among other things, the Rombergs alleged that the deputies violated their constitutional rights by not obtaining a search warrant before entering their home in response to a call about a domestic disturbance in 1982. After trial, a jury found in favor of the Rombergs, but awarded only $1 to each of them. Asserting their status as prevailing parties under 42 U.S.C. section 1988, the Rombergs sought an award of attorneys' fees in the amount of $45,000. The U.S. District Court for the Central District of California eventually issued an attorneys' fee award of $29,137.50; the defendants appealed.

Relying on the U.S. Supreme Court's recent holding in *Farrar v. Hobby*, 113 S.Ct. 566 (1992), the Ninth Circuit initially noted that the Rombergs are indeed "prevailing parties" in the suit, stating that even a plaintiff who wins only nominal damages is a prevailing party under section 1988; however, the court noted that status as a prevailing party does not necessarily entitle the Rombergs to attorneys' fees. Citing *Farrar*, the Ninth Circuit noted that the most critical factor in determining the reasonableness of a fee award is the degree of success obtained. Based on *Farrar*, the Ninth Circuit held that the Rombergs are a "perfect example" of plaintiffs who should receive no attorneys' fees at all; according to the court, the Rombergs may have prevailed, but they did not succeed.

The Rombergs attempted to distinguish their case from *Farrar* by claiming that, although they initially sought $2 million in punitive and compensatory damages against each of eight Sheriff's deputies, their attorneys' closing argument suggested that an award in the amount of "one dollar" might be appropriate. The court acknowledged that the Rombergs' attorney did in fact make such a statement to the jury, but found that "such a strategy cannot trump *Farrar*....[a]n attorney cannot avoid *Farrar*'s mandate by waiting until the close of trial and then, when he perceives that his clients have little chance of success, asking for only nominal damages to justify an attorneys' fee award."

Finally, the Ninth Circuit found that the Rombergs failed to identify any non-monetary successes resulting from their litigation efforts. The court noted that it would recognize that if a lawsuit "'achieves other tangible results—such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects—such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees.'" However, the court found such tangible results to be "utterly lacking in the records of this case."

CALIFORNIA SUPREME COURT

Powers, et al., v. City of Richmond,

10 Cal. 4th 85, 95 D.A.R. 5885, No. S039547 (May 8, 1995).

Statute Making Extraordinary Writ Exclusive Mode of Appellate Review Does Not Violate State Constitution's Appellate Jurisdiction Provision

Actions seeking disclosure of documents under the Public Records Act (PRA) (Government Code section 6250 *et seq.*) may be brought and tried in superior court, and thus are within that court's original jurisdiction; pursuant to Government Code section 6259(c), superior court decisions in PRA cases are not appealable but instead are "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." In this proceeding, the California Supreme Court considered whether section 6259(c) violates the state Constitution and, in particular, section 11 of article VI, which states that, except when a judgment of death has been pronounced, the "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction...."

Plaintiffs commenced an action in superior court under the PRA to compel the City of Richmond to prepare and release a computer-generated report containing specific information; after hearing evidence, the superior court ruled for the City. Plaintiffs then sought review in the Court of Appeal both by a petition for writ of mandate and by direct appeal.

After soliciting and considering informal opposition concerning the merits of plaintiffs' PRA request, the First District Court of Appeal denied plaintiffs' writ petition summarily. The City then moved to dismiss plaintiffs' appeal as barred under section 6259(c); the First District issued an opinion granting the motion. In so doing, the First District interpreted the "appellate jurisdiction" provision of the state Constitution as granting the courts of appeal power to review final judgments and orders in all proceedings (except death penalty cases) in which superior courts exercise original jurisdiction, but also as not requiring any particular form or mode of this appellate review. Concluding that extraordinary writ petitions and direct appeals are alternative modes of appellate review, the First District held that the "appellate jurisdiction" provision of the state Constitution does not deprive the legislature of authority to specify that appellate review of superior court orders in PRA cases shall be by means of petition for extraordinary writ rather than by direct appeal.

On appeal, the California Supreme Court affirmed. Among other things, the court found that the legislature's purpose in replacing review by direct appeal with review by extraordinary writ was not to disadvantage litigants seeking review of PRA decisions or to constrict the power of the courts of appeal to correct errors in those decisions; rather, the court found that "the legislative objective was to expedite the process and thereby to make the appellate remedy more effective."

However, the plaintiffs contended that appellate review by extraordinary writ petition is inherently less effective than a remedy by direct appeal because issuance of the extraordinary writs is discretionary whereas direct appeal guarantees a decision on the merits. According to the court, this argument "betrays a serious misunderstanding of the discretionary character of extraordinary writs." The court explained that although appellate review by extraordinary writ petition is said to be discretionary, a court must exercise its discretion "within reasonable bounds and for a proper reason." According to the court, "when writ review is the exclusive means of appellate review of a final order to judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters."

CALIFORNIA COURTS OF APPEAL

Board of Supervisors of the County of Los Angeles, et al., v. Superior Court, et al.,

32 Cal. App. 4th 1616, 95 D.A.R. 3066, No. B085744 (Mar. 7, 1995).

Discovery of Extrinsic Evidence on Legislators' Thought Process Is An Impermissible Judicial Intrusion

In 1993, the Los Angeles County Board of Supervisors decided to consolidate court-related services in the County sheriff instead of in the marshal's office. Government Code section 26639 requires the Board of Supervisors to "take into advisement the recommendation of the judges" as to their preferred agency; by a vote of 298–63, the judges had voted in favor of the marshal providing bailiff services to the courts. Following the supervisors' decision, plaintiffs—including the Municipal Court Judges' Association, Los Angeles County—sued the Board, and subsequently sought discovery concerning whether the supervisors ignored, or even considered, the vote of the Los Angeles municipal and superior court judges.

The Second District Court of Appeal characterized the judges' discovery request as "an attempt to inquire into the supervisors' mental processes in reaching their decision to select the sheriff's office instead of the marshal's office," and concluded that "[l]egal precedent prohibits such an inquiry into the supervisors' mental processes." Among other things, the Second District stated that the "vague nature of legislators' thought processes and motives corresponds to the lack of an objective standard by which a party might establish, or a court might review, whether Board members actually considered the judges' recommendation. The statute sets forth no criteria concerning the length of time, degree of earnestness, or amount of effort or energy necessary for Board members to comply with the statutory requirement that they take the judges' recommendation into advisement. Neither does this court have any means to judge the competing considerations considered by the Board, why those considerations prevailed over the judges' recommendation, or whether that recommendation should have prevailed."

CALIFORNIA SUPERIOR COURTS

American Lung Association v. Wilson and Americans for Nonsmokers' Rights v. State of California,

Nos. 379257 and 379450 (Mar. 30, 1995).

Judge Orders State to Stop Siphoning Money from Tobacco Tax

On March 30, Sacramento County Superior Court Judge Roger Warren issued a decision holding that the state illegally diverted millions of dollars from anti-smoking education and research programs to pay for health care services. Warren held that the diversion of the funds violated provisions of Proposition 99, passed by the voters in 1988; Proposition 99 imposed a tax of $0.25 per pack on cigarettes and required that about a nickel of it be devoted to tobacco control programs. With the approval of Governor Wilson, however, state legislators enacted AB 816 (Isenberg) (Chapter 195, Statutes of 1994), which diverted $128 million from those accounts to medical services. Warren noted that Proposition 99 allows the legislature to amend its provisions only by a four-fifths majority of each house and only in a manner consistent with the measure's purposes; although AB 816 received the requisite four-fifths vote, Warren found that the diversions were inconsistent with the initiative's purposes.

PROPOSITION 187 LEGAL CHALLENGES

The day after California voters approved Proposition 187—the so-called "Save Our State" anti-illegal immigration initiative *[14:4 CRLR 28–29]*—in the November 1994 election, attorneys filed eight separate legal challenges to the measure in state and federal courts; the plaintiffs in those actions include the California League of United Latin American Citizens, the Mexican American Legal Defense and Education Fund, and the Center for Human Rights and Constitutional Law. *[15:1 CRLR 183]* The following is a status update on the challenges to the initiative:

• ***Federal Court***. On January 18, U.S. District Court Judge Mariana Pfaelzer issued a preliminary injunction prohibiting enforcement of the challenged provisions of Proposition 187 until a trial determines their constitutionality; Pfaelzer found that most of the measure will probably be found unconstitutional, and its enforcement would cause many people to suffer irreparable harm because they would go without medical care, be kicked out of public school, or fail to report crimes and abuse to police. *[15:1 CRLR 183]* State attorneys responded by filing motions to have Pfaelzer abstain from or dismiss the federal court challenge to the measure; on March 13, Pfaelzer denied those motions without comment, and set a trial date of September 5. However, state attorneys have appealed Pfaelzer's issuance of the preliminary injunction to the U.S. Ninth Circuit Court of Appeals; at this writing, the appellate court is expected to issue its opinion on the appeal in July.

• ***State Court***. In November 1994, San Francisco Superior Court Judge Stuart Pollak also blocked enforcement of certain aspects of Proposition 187; specifically, Judge Pollak issued a temporary restraining order prohibiting enforcement of the measure's requirement that undocumented immigrants be kicked out of the state's public schools, as well as public colleges and universities. *[15:1 CRLR 183]* On January 26, Judge Pollak tentatively scheduled the underlying trial on the initiative's ban on public education for illegal immigrants, for June. Further, on February 8, Judge Pollak issued a preliminary injunction blocking enforcement of the measure's provisions regarding public education.