Supreme Court Case No: S255262

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DEBORAH SASS.,	)	(Court of Appeal Docket No.: B283122)
Plaintiff and Respondent.	)	Sup. Ct. No. BC554035
vs.	)	
THEODORE L. COHEN	)	
Defendant and Appellant,	)	

From the Published Opinion of the Court of Appeal, On Appeal from the Los Angeles County Superior Court; The Honorable Frederick Shaller, Judge Presiding, Dept. 46

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Contrary to Cohen's claim, there is a substantial conflict among published opinions as to the soundness of *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157 (*Cassel*), and review is therefore required here to "secure uniformity of opinion." Rule of Court 8.500(b)(1).

Nor is it true that *Cassel* is inapplicable to this case, making a

grant of review of the *Cassel* issue inappropriate here. Rather, as the Court of Appeal found, *Cassel* is applicable here, and this case provides an excellent vehicle for review.

This Court should grant review to resolve the conflict *Cassel* has engendered among Court of Appeals over the past 20 years, creating uncertainty in an important area of law about which the trial courts are in particular need of guidance. If this Court does grant review, Sass has no objection to its taking up the additional "aggregate vs. item-by-item" issue raised by Cohen in his Answer.

I. COHEN'S CLAIM THAT THE QUESTION PRESENTED HAS BEEN UNAMBIGUOUSLY RESOLVED IS BELIED BY THE SUBSEQUENT HISTORY OF CASSEL.

Cohen attempts to dismiss the issue raised here by asserting that Code of Civil Procedure section 580 answered it "unambiguously" long ago, by requiring plaintiff to state in the complaint a specific figure beyond which damages cannot be awarded in a default judgment (Ans. 5). If that were the case, however, this case would never have arisen.

The truth is that the *Cassel* court found sufficient ambiguity in the statute – particularly in light of the approach taken in family law property division cases (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160; *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873) to hold that formal notice of a precise figure is not required where, in

partnership dissolution accounting cases as in marital dissolution cases, the defendant is *at least* as capable as plaintiff of calculating the damages due. *Cassel*, 76 Cal.App.4th 1157,1164.

Cohen dismisses *Cassel* as a mere "outlier," because it has never been followed to affirm a judgment beyond the amount stated in the complaint. (Ans. 6-7). However, as Cohen admits (Ans. 8-9), both *Warren v. Warren* (2015) 240 Cal.App.4th 373, 378-79, and *Schwab v. Southern California Gas.Co.* (2004) 114 Cal.App.4th 1308, 1326, cited *Cassel* with approval, and did not follow it only because the difference in facts led to a different result. The *Warren* court, in fact, explicitly subscribed to the principles *Cassel* enunciates, but found that those principles compelled a different result under the circumstances of the case before it. *Warren v. Warren*, *supra*, 240 Cal.App.4th 373, 379.

Further, while both *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 551, and *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1527, roundly denounced *Cassel's* reasoning, they did not put it to rest. After both of those cases were decided, *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 399 (taking account of *Van Sickle*), confirmed that there was a continuing "division of opinion"over *Cassel*. Then, in 2015, the *Warren* court demonstrated the continuing attraction of *Cassel*, by adopting its reasoning as the means of resolving the "conflicting principles" at play when the

defendant defaults in an accounting case such as this, and at least some items of damages are not reduced to a specific sum in the complaint.

The *Warren* court did not merely note "the narrow rule in *Cassel*" and find it distinguishable, as Cohen suggests (Ans. 9). It declared its understanding that *Cassel* depends on the fact that it is generally the defendant, not the plaintiff, who has the information needed to determine damages in accounting actions.

Where that is so, the *Warren* court found, it gives the defaulting defendant an unfair advantage to hold plaintiff to a figure inserted into the complaint based on relative ignorance. 240 Cal.App.4th 373, 378. In the case before it, however, the reverse appeared true. The plaintiff had full access to information about the family corporation at issue, while the defendant presented evidence that plaintiff had locked him out of it entirely. *Id.*, 379.

Here, of course, the trial court found that the plaintiff, Cohen, was in full command of the facts about the value of the business he owned and operated, and that he purposely hid the truth about it from the defendant, Sass. (RT 16-17).

Warren was the last published decision to cite *Cassel* before the Opinion here. Only this Court can definitively resolve the conflict these cases evidence. Until it does so, Courts of Appeal and trial

courts will be free to choose between the opposing views, leaving the law unsettled.

Cohen assumes there is no principled argument in favor of the *Cassel* approach. According to Cohen, requiring a plaintiff such as Sass to give notice of a specific damages figure cannot prevent that plaintiff from receiving what is "justly due," or allow a defendant to profit from his own wrongs. (Ans. 12). Rather, according to Cohen, the *Cassel* reasoning simply allows the plaintiff to "take the defendant to the cleaners on default...." (Ans. 14).

On the contrary, as Sass shows in the Petition (Ptn. 10-11), there is merit on both sides of the argument. Review is warranted here precisely because the issue is one of "conflicting principles" which various courts have resolved in differing ways.

Admittedly, requiring notice of a precise figure that cannot be surpassed in a default judgment provides a measure of protection from unfairness to defendants. But so, arguably, will the *Cassel* approach in cases where it is appropriate, if applied with care. The problem is that strict adherence to the need for a specific figure can in such cases also result in unfairness to the plaintiff.

The instant case is an example. Cohen dissolved the corporation and hid its assets in response to Sass's action, and also failed to provide full discovery. As a result, Sass's expert evaluated

her half of TAG using incomplete records (Aug. 107), which the trial court described as "the only available information." (CT 257). Meanwhile, as the trial court commented, Cohen "...knew what he took" when he hid the corporate assets and was therefore "...in a position to make accounting to Ms. Sass for the amounts." (RT 17).

In such a case, where plaintiff has an incomplete picture of the relevant facts because defendant has kept plaintiff in the dark, it could indeed deprive plaintiff of part of what is "justly due" to limit recovery on default to a sum explicitly claimed in the complaint. That can happen where the figure plaintiff uses in the complaint is an "educated guess" (Ans. 12) based on the incomplete information, and then, after default, manages to gather further information justifying a higher figure.

Such may have been the case here. Cohen defaulted in March, 2016 (CT 217), and Sass's expert provided his declaration on the value of TAG and other matters at the end of September, 2016 (Aug. 109). The expert could well have based his opinions in part on information obtained after the default. If so, holding Sass to a figure in the complaint based on the information available before default did deny her what was "justly due," and allowed Cohen to profit from his wrongs. On the other hand, it is hard to justify the suggestion that Sass took Cohen "to the cleaners."

Of course, a plaintiff in Sass's position could always pick an

inflated figure out of the air to put into the complaint. But, while holding the default judgment to such a figure would provide the defendant with notice of maximum liability in case of default, it would not preclude the plaintiff from "taking the defendant to the cleaners" if the trial judge permitted it.

Further, as noted in the Petition (Ptn. 11), inflated figures can make plaintiffs vulnerable to malicious prosecution actions. See *Citi-Wide Preferred Couriers v. Golden Eagle Insurance Corp.* (2003) 114 Cal.App.4th 906, 201 (malicious prosecution warranted where "most but not all of the amount sought... was claimed without probable cause").

Finally, Cohen ignores the "conundrum" faced by those like Sass who, when seeking an accounting, must on the one hand avoid alleging a "sum certain" in the complaint, but on the other hand must provide a specific sum in order to obtain damages on default. *Cassel*, 242 Cal.App.3d 1257, 1262.

There is a case to be made both for and against *Cassel*, and published opinions on both sides. Both Cohen's Answer and the Opinion make clear the importance of the issue, which will continue to be endemic where there is default in accounting and similar cases. And contrary to Cohen's claim, the issue will continue to create confusion and uncertainty until it is resolved. This Court should resolve it, and this case presents a good opportunity to do so.

II. CONTRARY TO COHEN'S CLAIM, THIS CASE IS A GOOD VEHICLE FOR REVIEW OF THE ISSUE.

Sass demonstrated in the Petition that this case is an apt vehicle for the review of the *Cassel* issue, because it so effectively illustrates the conflicting principles involved. Cohen insists, however, that this is not even a "proper" vehicle for review because, assuming *Cassel* is good law, it does not apply here. (Ans. 10-11).

The distinction which Cohen finds critical is that there is here no such precise formula for calculating damages as there was in the *Cassel* partnership agreement. (Ans. 11).

Cohen's error is in reading *Cassel* too narrowly. That can be seen both from *Warren*, and from the Opinion here.

The Court of Appeal would have had no occasion to consider and reject the *Cassel* reasoning if it had found it inapplicable here. But there is no suggestion of doubt in opinion about *Cassel's* applicability. Rather, it reads *Cassel* broadly as raising this question, which is also clearly raised by the instant case:

> May a default judgment be entered for an amount in excess of the demand in the operative pleadings when the plaintiff seeks an accounting or valuation of a business?
>
> (Opn., p. 2).

As the Court of Appeal understood, *Cassel's* answer to that question is that a default judgment need not be limited to a sum stated in the pleadings where the facts as to the sum or assets at

issue are "within the possession of the defendant." (Opn., p. 8). That is also the answer the *Warren* court gave, though it found that *plaintiff* had the information advantage in the case before it.

Here, however, as shown in the Petition, (1) Cohen wilfully kept the relevant information from Sass (Ptn. 13), and (2) the Court of Appeal, in its determination to find specific numbers in the complaint as limits to the default judgment award, used dubious arithmetic to arrive at the value of a piece of real estate included in the award along with the damages, resulting in a very large reduction in the damages. (Ptn. 14-15).

All of that makes this case an especially apt vehicle for review of *Cassel*.

III. SASS HAS NO OBJECTION TO THIS COURT ALSO GRANTING REVIEW OF THE ADDITIONAL ISSUE PROPOSED BY COHEN.

Cohen asks that, if this Court does grant review, it also decide the question whether, in determining whether the damages awarded on default were within the amount stated in the complaint, the comparison should be made in the aggregate, or item by item. (Ans. 14-18).

The Opinion makes a strong case for aggregating, because defendants make their decisions whether to default based on the bottom line. In the words of the Opinion: "...[T]he grand total is the

price of default." (Opn., p. 17). On the other hand, Cohen argues that aggregating damages denied him the purported due process right not to be held liable for "losses which he was not specifically warned about in the complaint." (Ans. 18).

This appears to be the first published opinion to deal with the aggregate vs. item-by-item issue. As a result, there is no conflict among Courts of Appeal on the question as there is on the *Cassel* issue, and no such need to "secure uniformity of decision" as with *Cassel*. The issue does, however, appear to raise "an important question of law," and therefore to qualify for review.

CONCLUSION

For the reasons stated above and in the Petition, Sass respectfully requests that review be granted.

Dated: May 16, 2019

Respectfully submitted,
LAW OFFICES OF ROBERT S. GERSTEIN
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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the REPLY TO ANSWER TO PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 2138 words.

DATED: May 16, 2019

LAW OFFICES OF ROBERT S. GERSTEIN
By: /s/ Robert S. Gerstein
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Court of Appeal Case No.: 2d Appellate District, No. B283122
Superior Court Case No.: L.A.S.C. Case No. BC554035

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