SUPREME COURT OF CALIFORNIA
ORAL ARGUMENT CALENDAR
SPECIAL SESSION — UC DAVIS SCHOOL OF LAW
OCTOBER 3, 2012

The following cases are placed upon the calendar of the Supreme Court for hearing at its Special Session at the UC Davis School of Law (King Hall), 400 Mrak Hall Drive, Davis, California, on October 3, 2012.

Prior to this Special Session the court will hold oral argument in a number of other cases in its San Francisco courtroom on October 2, 2012. The full calendar for both days will be available at http://www.courts.ca.gov/supremecourt.htm.

The case summaries set forth below have been prepared for the use of students who will view the oral argument sessions.

WEDNESDAY, OCTOBER 3, 2012 — 10:00 A.M.

Opening Remarks: Historic Special Session

(1) S185544 *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*

The United States Constitution's First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The California Constitution, in article I, section 2, states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Under both federal and state Constitutions, public sidewalks and parks are considered "public forums" where peaceful speech activities must be permitted. Under California's Constitution, but not under the federal Constitution, as construed by the highest state and federal courts, shopping centers, although private property, are also public forums.

Both California and federal law provide certain protections for labor union picketing of businesses. California Code of Civil Procedure section 527.3, known as the Moscone Act, which is based on a similar provision of the federal Norris-LaGuardia Act, states that certain speech activities, undertaken to communicate information about an existing labor dispute, are legal and therefore cannot be prohibited by a court injunction. California Labor Code section 1138.1, which was based on a different provision of the

federal Norris-LaGuardia Act, prohibits a court from issuing an injunction during a labor dispute unless, based upon witness testimony in open court, the court makes certain findings, including that an injunction is necessary to prevent "substantial and irreparable injury" to property resulting from the commission of unlawful acts.

Here, a grocery store workers' union began picketing outside the entrance to the nonunion Foods Co. grocery store located in Sacramento's College Square. Ralphs Grocery Company, which owns the store, had adopted its own speech regulations, which prohibited standing within 20 feet of the entrance, distributing literature, and all speech activities during specified hours and for a week before certain holidays. When the union refused to obey the regulations, Ralphs applied to the Sacramento Superior Court for an injunction. In response, the union argued that the Moscone Act and section 1138.1 prohibited issuance of an injunction under the circumstances. In reply, Ralphs argued that the Moscone Act and section 1138.1 are invalid under the federal Constitution's equal protection clause because they give speech about labor disputes greater protection than speech about other topics.

The trial court denied Ralphs's request for injunctive relief. The Court of Appeal reversed, holding that the private sidewalk in front of the store entrance is not a public forum under the state Constitution's liberty-of-speech provision because it is not a place where the public is invited to congregate and socialize. The Court of Appeal also agreed with Ralphs that California's Moscone Act and Labor Code section 1138.1 violate the federal Constitution's equal protection guarantee by giving speech about labor disputes greater protection than speech about other topics.

The California Supreme Court has been asked to decide whether a privately-owned sidewalk in front of the entrance to a supermarket located in a shopping center is a public forum under the California Constitution's liberty-of-speech provision, the extent to which state law protects labor picketing of a targeted business, and whether such protection violates the federal Constitution's equal protection guarantee by giving speech about labor disputes greater protection than speech on other topics.

1:10 P.M.

(2) S195031 *Nalwa (Smriti) v. Cedar Fair, L.P.*

While she was riding in a bumper car at the Great America amusement park (owned and operated by defendant Cedar Fair, L.P.), Dr. Smriti Nalwa's bumper car collided with another car and her wrist was fractured. She claims her injury resulted from Cedar Fair's negligence in operating the ride. Cedar Fair contends that by participating in the bumper car ride she assumed the risk of being injured by bumping. Can Nalwa sue Cedar Fair for her injuries, or is her suit barred under the doctrine known as "primary assumption of the risk?"

Ordinarily, each person has a legal duty to use reasonable care in his or her activities, so as not to cause others an unreasonable risk of harm. But in *Knight v. Jewett* (1992) 3 Cal.4th 296, the California Supreme Court explained that participants, instructors and operators of certain recreational activities, such as sports, owe to other participants only the more limited duty not to unreasonably increase the risk of harm beyond that inherent in the activity. When this "primary assumption of the risk" doctrine applies, there is no legal duty to protect a participant from the types of risks that are inherent in the activity. For example, participants in a touch football game do not have a duty to be careful in how they run and tag each other, and the operator of a ski resort does not have a duty to protect skiers from rocks or trees on the slope. Lawsuits can still be brought over risks that are *not* inherent, such as a poorly-maintained ski chairlift.

The main issue in this case is whether the primary assumption of risk rule applies to riding on bumper cars. Plaintiff contends the rule should be limited to sports, a category not including bumper cars rides. (Most prior decisions have involved sports.) Defendant points to cases that have applied the doctrine to nonsport activities and argues that logically it should apply more generally to avoid chilling participation in recreation, including bumper car rides.

Plaintiff also argues the doctrine should not apply because amusement parks in California are regulated to protect the safety of guests and because the California Supreme Court has previously held a roller coaster ride to be a "common carrier for reward" (like train and bus lines), which under California law means the operator has the duty to use "the utmost care" for riders' safety. Defendant maintains it violated no state regulations in operation of the bumper cars and primary assumption of risk should apply whether or not bumper cars are considered a common carrier.

Finally, plaintiff contends that even if the doctrine applies to bumper cars, it does not apply when the injury is caused by a *head-on* collision because those are not inherent in the activity. (Some bumper car rides have been configured to make all the cars move in the same general direction.) Defendant argues the record does not show plaintiff was injured in a head-on collision and, in any event, all risks from bumping, whatever the direction, are inherent in the activity.

(3) S191550 *Sargon Enterprises, Inc. v. University of Southern California et al.*

Sargon Enterprises, Inc. (Sargon), a dental implant company that had a net profit of about $100,000 in 1998, contracted with the dental school at the University of Southern California (USC) to clinically test a new implant the company had developed. Later, it sued USC, successfully claiming the university had breached the contract. The issue before the Supreme Court concerns the amount of monetary damages Sargon may receive from USC for lost profits.

Sargon sought to present the testimony of an expert, James Skorheim, that Sargon would have become one of the leading companies worldwide in the dental implant

industry if USC had not breached the contract and that, accordingly, it would have earned future profits beginning in 1998 ranging from $200 million to over $1 billion. The exact amount within this range would depend on how innovative the jury found Sargon's new dental implant to have been. After holding an evidentiary hearing, the trial court excluded the proffered testimony, finding it impermissibly speculative. Ultimately, Sargon received a damages award of $433,000 for breach of the contract. Sargon appealed.

By a two-to-one vote, the Court of Appeal reversed the judgment. The majority held that the trial court erred in excluding Skorheim's testimony, finding that it was up to the jury to assess that testimony. The dissent argued that the trial court acted within its discretion to exclude speculative testimony. The Supreme Court granted review to determine under what circumstances, if any, a trial court may exclude expert testimony regarding lost profits, and whether the trial court properly did so in this case.

Sargon argues that it was up to the jury, not the trial court, to decide whether to credit Skorheim's testimony. USC argues the trial court properly acted as a "gatekeeper" to exclude expert testimony it found unreliable.

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