S267576

IN THE SUPREME COURT OF CALIFORNIA

TANIA PULLIAM,
Respondent,

v.

TD AUTO FINANCE, LLC
Petitioner.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B293435

RESPONDENT'S SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

Despite the FTC opinion's clear approval of the Court of Appeal's opinion in this case, Petitioner TDAF argues that the opinion *helps* its stance in this case. It does not.

In its supplemental brief, TDAF skews the reasoning in the FTC's advisory opinion. It side-steps the FTC's unequivocal support of the Court of Appeal's decision and also ignores that California's cost-shifting statutes have long identified statutory attorney fees, like those awarded to Tania Pulliam under the Song-Beverly Consumer Warranty Act, as allowable costs.

Similarly unavailing is TDAF's argument that this Court should leave the question regarding preemption of Civil Code section 1459.5 as an open issue to be decided elsewhere. To leave this issue unaddressed would simply leave California courts and litigants in a state of uncertainty. Having granted review of this case, this Court has the opportunity to decide, after full briefing here and at least four divided appellate opinions[1], how the FTC's Holder Rule applies in relation to our consumer protection statutes and cost-shifting statutes.

Any such decision should include an analysis of the applicability of Civil Code section 1459.5, if it does not, then the current confusion illustrated in the courts of appeal's various opinions will continue. Issuing a decision that holds section 1459.5 is not preempted by any rule or opinion of the FTC would clarify that the consumer protection

[1] See *Melendez v. Westlake Service, LLC* (Jan. 28, 2022, No. B306976) __ Cal.App.5th __ [2022 WL 263215].

measures enacted by the California legislature can and do have the effect that the legislature — and the federal government — intend.

Respondent Tania Pulliam respectfully requests that this Court affirm the decision of the court of appeal in this case and disapprove of the *Lafferty II* and *Spikener* opinions to the degree that they are inconsistent with this Court's decision.

DISCUSSION

I. The FTC's advisory opinion clarifies that in states like California, where statutory attorneys' fees are awarded as mandatory costs to the prevailing party, those fees are not included in the limitation on "recovery."

The Holder Rule and the new FTC opinion (FTC Op.) contemplate that some states allow for the recovery of attorneys' fees as costs of litigation by the prevailing party in a lawsuit and that in those states the Holder Rule permits the recovery of attorney fees over and above what the plaintiff may have lost. (See Black's Law Dictionary (11th ed. 2019) (definition of "litigation costs") ["Some but not all states allow parties to claim attorney's fees as a litigation cost."]) California is one of those states.

The fact that not all states view statutory attorney fees as costs explains the FTC's position that whether the Holder Rule's limitation applies to attorney fees, or not, is a matter of state law. If attorney fees are only available from a seller, as a punitive measure, or if the state law applicable is not fee-shifting or cost-shifting, then the limitation in the Holder clause applies to attorney fees and costs.

The variety in state laws regarding attorneys' fees illustrates why the FTC has consistently opined that state law is determinative of fee recovery under the Holder Rule. If, under the particular

circumstances of a given case, state law permits the awarding of attorney fees against a holder, then the FTC Holder Rule does not place a cap on that award.

In many states, fees are not as readily available as they are in California. For example, in Ohio, the general consumer protection statute, the Consumer Sales Practices Act (CSPA), permits only a *discretionary* award of attorney fees against a seller and only against sellers who intentionally violate the statute. (See *Reagans v. Mountainhigh Coachworks, Inc.* (2008) 117 Ohio St. 3d; 22 Ohio Rev. Code Ann. § 1345.09(F)(1), (2) ["The court *may* award to the prevailing party a reasonable attorney's fee…if either of the following apply: (1) The consumer…maintained an action that is groundless [or] in bad faith…(2) The supplier has *knowingly* committed an act or practice that violates this chapter]", emphasis added.) Further, this discretionary award of attorney fees under the CSPA is viewed by Ohio lower courts as a *penalty* against the seller. (*Hardeman v. Wheels, Inc.* (1988) 56 Ohio App.3d 142, 146.)

In Nebraska, the state's Consumer Protection Act (CPA) and Uniform Deceptive Trade Practices Act (UDTPA) only allow for a *discretionary* award of attorney fees. (*State ex rel. Stenberg v. Consumer's Choice Foods, Inc.* (2008) 276 Neb. 481, 493.) These statutes provide costs *shall* be allowed to the prevailing party, but that attorney fees *may* be allowed. (*Id.*) Under the FTC's Holder Rule, as affirmed in the FTC's January 2022 opinion, whether and in what amount attorney fees may be awarded under the Holder Rule is a function of those provisions. The Holder Rule emphasizes that the key lies in the underlying state law on fees and costs

As a final example, under Colorado's lemon law statute, attorney fees and costs are also merely discretionary. "[T[he court may award reasonable attorney fees and costs to the prevailing party." (Colo. Rev. Stat. Ann. § 42-9-113 (West).) Again, the Holder Rule defers to Colorado law to determine the availability of attorneys' fees and costs above and beyond a purchaser's out of pocket losses. In a state where attorney fees are not available to a prevailing party in a lemon law suit, the Holder Rule does not change that result.

California law, therefore, governs whether attorney fees and costs are available in the present case. Unlike the other states' statutes discussed above, California's CLRA and Song-Beverly Act *mandate* awards of attorney fees, costs, and expenses to the prevailing consumer and do not condition an award of fees on evidence there was a knowing violation. Attorney fees and costs are not a penalty, but rather a *mandatory* statutory remedy available to the prevailing plaintiff and are available as costs. (Civ. Code §§ 1794(d), 1780(e), Code Civ. Proc. § 1033.5(a)(10(B).)

Under the Song-Beverly Act, if the buyer prevails in an action, "the buyer shall be allowed…a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code § 1794.)

Under the CLRA, "the court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to th[at] section." (Civ. Code § 1780(e).)

Further, the California legislature and this Court view statutory attorney awards as incidental to the judgment, not part of the recovery, and *not* punitive in nature. Code of Civil Procedure section 1033.5(a)(10)(B) identifies statutory attorney's fees as an item of allowable costs that may be awarded under Code of Civil Procedure section 1032. "Statutory attorney fees are not of course intended to compensate the 'prevailing party' for damages suffered." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 586.) An award to a party's attorney of statutory attorney fees cannot be considered punitive damages against the defendant because they are not part of the damages awarded to the plaintiff. (*Ibid.*) Statutory attorney fee awards are properly made to plaintiffs' attorneys rather than to plaintiffs themselves. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 47.)

Here, Tania Pulliam, as the prevailing party under the Song-Beverly Act, was entitled to mandatory costs, expenses, and attorney's fees. The trial court correctly awarded these costs of litigation as against both defendants in the litigation, HNL Automotive and TDAF.

Therefore, the FTC's statement that "The holder's obligation to pay costs or fee awards available exclusively against the seller … would be limited to the amount paid by the consumer" is both accurate and irrelevant. (FTC Op. at p. 3.) The Song-Beverly Act does not provide for fees and costs "exclusively against the seller"; it provides for fees and costs against the holder as well. (See Civ. Code § 1794(d) ["If the buyer prevails in an action under this section…"].) As a result, neither California law nor the Holder Rule places an artificial cap on attorney fees in lemon law cases.

II. The Advisory Opinion corrects certain courts' misreading and misapplication of the FTC's 2019 Rule Confirmation; it does not advance a new reading of the Holder Rule.

This Court need not afford particular deference to the FTC's new advisory opinion. That opinion serves as a clarification of the FTC's 2019 statements in its Rule confirmation, and more saliently as a reaffirmation of the original Holder Rule – a clarification which aligns with the Court of Appeal's decision in this case.

There is no need to weigh the *Kisor v. Wilkie* (2019) 139 S.Ct. 2400 deference factors as they apply to the FTC's January 2022 opinion. The opinion is entitled to deference only to the extent of its persuasive value. (*Staub v. Harris* (3d Cir. 1980) 626 F.2d 275, 279 ["Although the FTC informal opinion should be given some weight by this court…it is by no means binding."]; Cf. *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 752 ["an advisory opinion [that] does not discuss relevant precedent or undertake serious legal analysis in the context of the immediate case, [] may be disregarded as not persuasive."].) The opinion here is, however, notably persuasive.

In particular, the FTC explains how its 2019 rule confirmation should be interpreted and emphasizes the primacy of the Holder Rule itself. The FTC does not advance here a new interpretation of the Holder Rule. Rather, the opinion questions the holdings in *Spikener* and *Lafferty II*, and therefore the arguments advanced by TDAF based on those decisions, as a misinterpretation of the Holder Rule. The Holder Rule, the FTC emphasizes, is not meant to supplant or preempt state law that may allow attorneys' fees and costs from the holder. That is, of course, the same conclusion reached by the Court of Appeal in this case.

Because the FTC's opinion focuses on the relevant precedent of this case, and on the conflict at issue here, its logic should be accepted as persuasive.

III. Because this Court's opinion will address the reasoning in *Spikener*, the Court should address the effect of Civil Code section 1459.5.

TDAF argues that this Court should not address Civil Code section 1459.5, but its stated reasons are incomplete at best. TDAF ignores the practical consequences of not deciding the issue. It is true that the Court of Appeal decided the case without relying on section 1459.5; it is also true that section 1459.5 had not been enacted when this case went to trial. But neither of these facts is determinative of whether this Court should address the issue. This Court granted review to resolve a dispute among the courts of appeal – a dispute that will not be fully resolved if the effect of section 1459.5 is not addressed. And TDAF flatly misstates the criterion for applicability of a new state law affecting fees and costs: the relevant question is not whether the case has gone to trial as of the effective date of the statute but rather whether the case has been fully resolved on appeal. To put the matter plainly, this case is not yet fully resolved. TDAF's arguments are not well taken.

First, this Court took this case on review to resolve the conflict among the holdings in *Pulliam, Spikener,* and *Lafferty II*. The *Spikener* court held that section 1459.5 was preempted by the Holder Rule and by FTC's 2019 rule confirmation which it found was owed considerable deference. That court's finding that deference was owed to the 2019 rule confirmation (as interpreted by the court) necessarily informed its reading of the term "recovery" in the holder clause. This Court will

have to address that reasoning. Similarly, section 1459.5 was the Legislature's attempt to abrogate *Lafferty II*, which the Legislature found to be contrary to how most California courts had previously interpreted the Holder Rule's application in consumer protection cases. This Court's analysis of these three cases will only be complete if it also takes a stance on section 1459.5 and whether it is preempted by the Holder Rule. That is the only way to ensure uniformity of decision and prevent future fracturing in the courts of appeal.

Second, section 1459.5 is relevant and applies to this case despite the statute's becoming effective a year and a half after Pulliam's motion for attorneys' fees and costs was filed in the trial court.

This Court and the great majority of our courts of appeal have viewed fee and cost eligibility statutes as a "special category within the general topic of the prospective or retroactive application of statutes." (*USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 219, citing *Quarry v. Doe I* (2012) 53 Cal.4th 945*,* 956.) The relevant question is not the date of trial but rather the date on which the case was fully resolved on appeal. This principle has been established for more than three-quarters of a century. (See *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 477 (*Palermo*).) In *Palermo,* an appeal was taken and a surety bond posted in June 1951. Three months later, a statute took effect which allowed a prevailing party to recover as a litigation cost the premium on a surety bond. When the trial court ruled on costs in 1953, it denied recovery of the premium. The Supreme Court reversed and remanded, holding the new statute should have applied even though the bond had been posted before the new statute

took effect. A rule governing costs, even costs already incurred, can, ruled the court, be changed during the pendency of a proceeding. (*Ibid.*)

The rule has been repeatedly reaffirmed. In *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 925 (*Woodland Hills*), this Court ruled on the applicability of then newly enacted Code of Civil Procedure section 1021.5, authorizing fees for prevailing plaintiffs who enforce an important public right. Just months before the statute's effective date, *Serrano v. Priest* (1977) 20 Cal.3d 25, had recognized courts' inherent equitable authority to award fees to a public interest litigant vindicating a constitutional right, but had expressly left undecided whether fees could similarly be granted for vindicating a statutory right. (*Woodland Hills*, at pp. 924–925, 929.) The issue in *Woodland Hills* was whether fees were recoverable under Code of Civil Procedure section 1021.5 in a "statutory" rights case, even though the order denying fees had already been rendered and was pending on appeal when the new fee statute took effect. (*Woodland Hills, supra*, at pp. 925–926, 929.) *Woodland Hills* concluded the new fee statute was applicable. "Although [Code of Civil Procedure] section 1021.5 was not on the books at the time the trial court denied plaintiffs' motion for attorney fees, the governing authorities establish that the new statute nonetheless applies to this proceeding, which was pending on appeal at the time the legislative enactment became effective." (*Woodland Hills, supra,* 23 Cal.3d at p. 931; see *USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 219–220.)

These cases are directly on point. Section 1459.5, a fees and costs statute, applies to this case because it was passed and enacted during

the pendency of this appeal. There is no reason why this Court should ignore it.

CONCLUSION

Respondent Tania Pulliam respectfully requests that this Court read the FTC's advisory opinion as the FTC clearly intended – as lending support for the affirmance of the Court of Appeal's decision. This Court should affirm that decision, and also make clear that section 1459.5 is not preempted by the Holder Rule itself or by the FTC's 2019 Rule Confirmation.

Dated: February 7, 2022 ROSNER, BARRY & BABBITT, LLP

By: */s/ Arlyn L. Escalante*
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CERTIFICATE OF WORD COUNT

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Dated: February 7, 2022 ROSNER, BARRY & BABBITT, LLP

By: */s/ Arlyn L. Escalante*
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Tania Pulliam v. HNL Automotive, Inc. et al.
Supreme Court Case No. S267576

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