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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHERYL MC CALL, Plaintiff and Appellant, v. SAFETY CONSULTANT SERVICES, INC., Defendant and Appellant.	B207417 (Los Angeles County Super. Ct. No. VC046814)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Patrick T. Meyers, Judge. Affirmed.

Ganz & Gorsline, Philip J. Ganz, Jr. and Laurie Susan Gorsline for Plaintiff and Appellant.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Margaret M. Holm and Nicole E. Wurscher for Defendant and Appellant.

Cheryl McCall sued Alfred Escobar and his employer, Safety Consultant Services, Inc. (SCS), for damages arising from Escobar's sexual misconduct toward McCall. The jury found in favor of McCall, but the trial court granted judgment notwithstanding the verdict (JNOV) in favor of SCS on most of McCall's claims, thereby eliminating SCS's liability for punitive damages and attorney fees. McCall appealed, and SCS filed a protective cross-appeal. We affirm.

BACKGROUND

The trial court's order granting in part SCS's JNOV motion describes the factual background as follows: "Defendant Escobar was an employee of defendant SCS and worked as a group leader, counselor and case manager at its school providing counseling services to the public. In approximately May[] 2004, paying $1800 in tuition, the plaintiff enrolled in a school program as a result of being cited for driving under the influence of alcohol and then being required by court order to complete such a D.U.I. program. Defendant Escobar facilitated some of the weekly group sessions which the plaintiff attended. He shared with group participants, including the plaintiff, the facts that he was a convicted felon and had served time in state prison during various group sessions. He also conducted face-to-face interviews with the plaintiff and others regarding their progress. The plaintiff attended about five group sessions which defendant Escobar led and had about six face-to-face meetings with him.

"Defendant Escobar variously inquired of the plaintiff whether or not she had a boyfriend and subsequently whether she still had a boyfriend, made some sexual overtures toward her, and expressed offensive remarks with sexual connotations about the plaintiff to her and/or to others in her presence. The plaintiff told defendant Escobar that she had a boyfriend to keep him at bay, regardless whether or not she had any boyfriend at the time. The plaintiff did not invite, encourage or respond to any of defendant Escobar's sexual overtures and/or innuendo. Prior to December 7, 2005, the only physical contact between them was an unwelcome hug she received from defendant Escobar when she had completed her final group session. The plaintiff complained to no

one in the school management out of her concern for possible retaliatory consequences, which might affect her completion of the D.U.I. program.

"Having concluded the weekly group sessions that she was required to attend during the program, the plaintiff began to have relatively brief transition appointments beginning in August[] 2005 for the final six months of the program, during which she checked in, paid a fee, [and] filled out and turned in a questionnaire about her current outlook and goal(s). On some occasions, the plaintiff had brief encounters at the school with defendant Escobar, in which he would make passing inquiries or remarks to her about her personal life, which troubled her.

"On Wednesday morning, December 7, 2005, the plaintiff arrived at the school in [the] belief that she had a transition appointment scheduled. The receptionist informed her that her appointment had been scheduled for December 14th, not the 7th, however. The plaintiff decided to pay her $25 fee for the upcoming transition appointment in advance. Defendant Escobar was standing in the immediate vicinity of the receptionist and inquired of the plaintiff whether she was still with her boyfriend. She indicated to him that she and her boyfriend had broken up. Defendant Escobar moved nearer to her and motioned to her to come toward him, saying that he wanted to talk with her about something. The plaintiff followed him and, at his instance, entered one of the internal school rooms used for face-to-face meetings ahead of defendant Escobar.

"He shut the door to the office, walked by the plaintiff and stood in front of her with his back to her for a moment. Then defendant Escobar turned around quickly to face the plaintiff, having already unzipped his pants, and, exposing his erect penis to her, defendant Escobar said, 'Have you ever seen anything this big?' He next grabbed the top of [her] head by gripping her hair and head with his right hand and pulled her head down hard on top of his penis. Describing these movements as happening 'very, very fast,' the plaintiff stated that his penis touched and went into her mouth for three to five seconds, and defendant Escobar told her to 'suck it.' The plaintiff was totally shocked by defendant Escobar's conduct. She pulled away from his grip and ran out the front door of

the school. As she was leaving his immediate presence, the plaintiff heard defendant Escobar call after her that he would be off at eight o'clock if she needed more."

McCall reported the incident to the police the following morning, December 8, 2005. "In an audiotape recording of the plaintiff's telephone call reporting the incident to the [police department], the plaintiff had 'blanked on' defendant Escobar's name, although she did know the name of the person who had sexually assaulted her. She still could not remember his name when the police officer came to prepare a written police report later that day. Within 24 hours, however, the plaintiff did remember defendant Escobar's name and so informed [police department] personnel."

"On January 5, 2006, the plaintiff made a report to SCS through its school site supervisor, Ileana Barragan, about what had happened to her on December 7, 2005. The plaintiff explained that she waited up to that date to report the incident to SCS because she still had transition appointments to complete, and there remained a prospect that she would see defendant Escobar at the school."

On January 10, 2006, SCS terminated Escobar's employment, but not on the basis of the allegations of sexual misconduct. Rather, SCS terminated him for making false statements on his employment application. "Although defendant Escobar had been convicted of felonies in 1991 and 1995 . . . for second degree burglary and possession for sale of cocaine respectively, he denied on his SCS employment application that he had been convicted of any felony. Defendant Escobar variously stated that he had been inaccurate, untruthful, made false statements and concealed his prior felony conviction(s) from SCS when he was hired. He also made a deliberately false statement on the SCS employment application that he had not knowingly withheld information on it. When he was told by Gloria Mullendore, the SCS executive director, that he was being terminated for making these false statements on January 10, 2006, she also informed him that past criminal convictions were not always a reason for SCS to deny employment. At or about that time, defendant Escobar was also informed that allegations of sexual misconduct on December 7, 2005[,] had been made against him by the plaintiff."

On June 14, 2006, McCall filed suit against Escobar and SCS, alleging causes of action for (1) assault, (2) battery, (3) battery in violation of Civil Code section 1708.5, (4) intentional infliction of emotional distress, (5) violation of Civil Code section 51.7, (6) violation of Civil Code section 51.9, (7) violation of Civil Code section 52.1, (8) violation of Civil Code section 52.4, and (9) negligence.

By special verdict, a jury found in favor of McCall on all causes of action. With respect to causes of action 1 through 7, the jury found that Escobar was acting within the course and scope of his employment with SCS. The special verdict form did not contain a question about course and scope of employment with respect to cause of action 8. Cause of action 9, for negligence, was submitted to the jury solely on a theory of negligent supervision and retention against SCS, and the jury found for McCall. The jury further found that Escobar did not act with malice, oppression, or fraud, but that one or more officers, directors, or managing agents of SCS did act with malice, oppression, or fraud. The jury also found that Escobar's conduct was ratified but not authorized by at least one officer, director, or managing agent of SCS.

The jury awarded McCall a total of $95,250 in compensatory damages and also assessed a $25,000 civil penalty against Escobar. After a separate trial on punitive damages, the jury returned a special verdict awarding $90,000 in punitive damages against SCS.

On December 12, 2007, the court entered judgment on the special verdict. SCS timely moved for new trial and JNOV, arguing inter alia that Escobar's sexual misconduct was not within the course and scope of his employment.

On February 8, 2008, the court entered a detailed order granting in part and denying in part SCS's new trial and JNOV motions. The court granted JNOV on causes of action 1 through 7 on the ground that, as a matter of law, Escobar's sexual misconduct was outside the course and scope of his employment. The court further granted JNOV on the punitive damages claim, reasoning that causes of action 1 through 7 "were the only causes of action upon which the punitive damages could have been and were based under

the special verdict." Subject to the ruling on the JNOV motion, the court also granted the motion for new trial as to the punitive damages claim on the ground that the punitive damages award was excessive because it constituted approximately 39 percent of SCS's net worth. In all other respects the JNOV and new trial motions were denied.

After granting in part and denying in part McCall's request for attorney fees and SCS's motion to tax costs (the court denied McCall's request for a fee award against SCS because the JNOV ruling had eliminated SCS's liability under the relevant statute), the court entered an amended judgment on March 27, 2008. McCall timely appealed from the amended judgment and the rulings on the JNOV, new trial, and attorney fees motions. SCS filed a protective cross-appeal, seeking to challenge the original judgment in the event that the rulings on the JNOV and new trial motions were reversed.

STANDARD OF REVIEW

On review of an order granting a motion for JNOV, we determine whether the verdict was supported by substantial evidence and free from prejudicial legal error; if it was, then the motion was erroneously granted and we must reverse. (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72-73; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.) In general, we review the trial court's conclusions of law de novo, and we review findings of fact under the substantial evidence standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

DISCUSSION

I. Course and Scope of Employment

McCall argues that the trial court erred by concluding that as a matter of law Escobar's sexual misconduct was outside the course and scope of his employment. We disagree.

The trial court relied on two cases, *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992 (*Farmers*), and *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565 (*John Y.*). In *Farmers*, the Supreme Court stated that "an

employer may be subject to vicarious liability for injuries caused by an employee's tortious actions resulting or arising from pursuit of the employer's interests. [Citations.]" (*Farmers, supra*, 11 Cal.4th at p. 1005.) But the court added that "vicarious liability is deemed inappropriate where the misconduct does not arise from the conduct of the employer's enterprise but instead arises out of a personal dispute [citation], or is the result of a personal compulsion [citation]. In such cases, the risks are engendered by events unrelated to the employment, so the mere fact that an employee has an opportunity to abuse facilities or authority necessary to the performance of his or her duties does not render the employer vicariously liable. [Citation.]" (*Id.* at p. 1006.) The court went on to survey "several decisions [that] have addressed whether an employee's sexual misconduct directed toward a third party is within the scope of employment for respondeat superior purposes" and stated that "[t]hose cases hold that, except where sexual misconduct by on-duty police officers against members of the public is involved [citations], the employer is not vicariously liable to the third party for such misconduct [citations]." (*Id.* at pp. 1006-1007.) The court also quoted one of its prior opinions as holding that "'the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer.'" (*Id.* at p. 1007, quoting *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 452.)

In *John Y.*, a counselor at a group residential facility for emotionally troubled youth sodomized an 11-year-old boy who had been placed at the facility. (*John Y., supra*, 101 Cal.App.4th at pp. 569-570, 572.) The victim filed suit against the counselor, the facility, and various other defendants. (*Id.* at p. 573.) The plaintiff prevailed at trial, certain defendants prevailed on motions for JNOV and new trial, and the parties appealed and cross-appealed. (*Id.* at pp. 573-574.) On the plaintiff's appeal, the appellate court concluded that the trial court did not err by refusing to instruct the jury on respondeat superior liability, because as a matter of law the counselor's misconduct was outside the

course and scope of his employment. (*Id.* at pp. 574-578.) The court reviewed the relevant case law and noted that in *Farmers* the Supreme Court "observed, in a survey of California cases, that with the exception of cases involving sexual misconduct by on-duty police officers against members of the public, employers have not been held vicariously liable for the sexual wrongdoing of their employees. [Citation.] While that survey was completed in 1995, our own review of subsequent cases reveals that the Supreme Court's observation still holds true. [Citations.]" (*Id.* at p. 575.)

John Y. was decided in 2002. (*John Y., supra*, 101 Cal.App.4th at p. 565.) Our review of subsequent cases reveals that the Supreme Court's observation still holds true, and McCall cites no cases to the contrary.

Instead, McCall attempts to distinguish *Farmers*, *John Y.*, and the related case law on the basis of the facts of this case, and McCall faults the trial court for allegedly failing to engage in such a fact-specific inquiry. In particular, McCall focuses on (1) the power and authority that SCS's counselors exercise over clients like McCall, (2) the presence of legal coercion (for example, McCall was under court order to complete a DUI program), (3) the role of the counselors in helping the clients to explore and address emotional issues, including those relating to sex, and (4) the particular vulnerability of the clients, who are struggling with addiction and consequently make easy targets for sexual predators, who are likely to expect that no one will believe the victims' accusations. McCall reasons that such a combination of circumstances did not merely create the possibility for abuse; rather, it "created the space in which exposure to sexual violence would *inevitably* occur."

We are not persuaded. The power and role of SCS's counselors and the vulnerability of SCS's clients did not make sexual misconduct inevitable, and they do not materially distinguish this case from *John Y.*, in which the court concluded that it was not foreseeable but rather was "both unusual and startling for a residential counselor/teacher's aide to sodomize an emotionally disturbed child whom he supervises." (*John Y., supra*, 101 Cal.App.4th at p. 577.) We therefore conclude that

there is no factual basis for us to depart from the established rule that "for purposes of respondeat superior, employees do not act within the scope of employment when they abuse job-created authority over others for purely personal reasons." (*Farmers, supra*, 11 Cal.4th at p. 1013; see also *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1431.)

For all of the foregoing reasons, we reject McCall's argument that the trial court erred by concluding that Escobar's sexual misconduct was not within the course and scope of his employment with SCS.

II. Other Potential Grounds for Liability

McCall argues that even if SCS is not liable in respondeat superior for Escobar's sexual misconduct, SCS should still be held liable because (1) SCS authorized Escobar's misconduct, (2) SCS ratified Escobar's misconduct, and (3) SCS's own wrongful conduct is sufficient to sustain the award of punitive damages.[1] We disagree.

The jury found that SCS did not authorize Escobar's misconduct. McCall does not argue that the jury's finding is not supported by substantial evidence. SCS therefore cannot be held liable on an authorization theory.

The jury found that SCS ratified Escobar's misconduct. That finding is not supported by substantial evidence, however, so we must reject it. In order for SCS to be held liable on a ratification theory for Escobar's sexual misconduct *toward McCall*, SCS must have ratified Escobar's sexual misconduct *toward McCall* after the misconduct occurred and after SCS became aware of it. (See, e.g., Civ. Code, § 2339; *Shultz Steel Co. v. Hartford Accident & Indemnity Co.* (1986) 187 Cal.App.3d 513, 519; *Busick v. Stoetzl* (1968) 264 Cal.App.2d 736, 740 ["Failure to object to the act of an agent or

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[1] The first and second arguments, if successful, would restore SCS's liability for both punitive damages and attorney fees. The third argument would restore liability for punitive damages only.

manager, after full knowledge of it, may be a ratification of such"].)[2] Indeed, the jury instruction on ratification, requested by McCall, so informed the jury. The record contains no evidence that SCS ratified Escobar's misconduct toward McCall. On the contrary, it is undisputed that SCS did not ratify it. SCS did not learn of Escobar's sexual misconduct toward McCall until McCall reported it on January 5, 2006. SCS fired Escobar five days later. Although Escobar's sexual misconduct was not the stated basis for his termination, there is no evidence that either the termination or anything SCS did during the preceding five days could be construed as ratification of Escobar's sexual misconduct toward McCall.

McCall's arguments in support of the ratification theory do not undermine that reasoning, because they focus entirely on evidence of SCS's handling of reports of Escobar's previous misconduct toward *other* individuals, not toward McCall. Again, SCS knew nothing of Escobar's misconduct toward McCall until McCall reported it on January 5, 2006, and SCS fired him five days later. For all of these reasons, the record does not contain substantial evidence to support the jury's finding of ratification, so SCS cannot be held liable on that theory either.

Finally, the jury also found that (an officer, director, or managing agent of) SCS engaged in conduct constituting malice, oppression, or fraud. But the sole jury instruction on punitive damages, requested by McCall, stated the following: "If you decide that defendant Alfred Escobar's conduct caused plaintiff Cheryl McCall harm, you must decide whether that conduct justifies an award of punitive damages against defendant Alfred Escobar and, *if so*, against defendant Safety Consultant Services, Inc." (Italics added.) Thus, the only theory McCall presented to the jury was that SCS could be

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2 McCall quotes *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1112 (*C.R.*), in a manner suggesting that if an employer ratifies an employee's misconduct toward individuals *other than* the plaintiff, then the employer may be held liable on a ratification theory for similar misconduct toward the plaintiff. *C.R.* did not so hold. Rather, *C.R.* was a class action case, and the employee's allegedly ratified misconduct concerned members of the putative class. (*C.R.*, *supra,* 169 Cal.App.4th at pp. 1097-1099.) Thus, the allegedly ratified misconduct was precisely the misconduct for which the plaintiff sought to hold the employer liable.

liable for punitive damages *only if* Escobar was liable for punitive damages. McCall cannot pursue a new theory of liability on appeal. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.) The jury found that Escobar did not act with malice, oppression, or fraud, and McCall does not argue that the jury's finding is not supported by substantial evidence. Escobar therefore cannot be held liable for punitive damages, so, on the theory McCall presented to the jury, SCS cannot be held liable for punitive damages either, notwithstanding the jury's finding that SCS acted with malice, oppression, or fraud.

For all of the foregoing reasons, we reject McCall's arguments that SCS's vicarious liability for Escobar's sexual misconduct should be upheld on the basis of authorization or ratification, as well as her argument that SCS's liability for punitive damages should upheld on the basis of SCS's own conduct. Our resolution of these issues makes it unnecessary for us to address the remainder of the arguments raised by the parties.

DISPOSITION

The judgment and orders are affirmed. Respondent SCS shall recover its costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.