Filed 10/28/16 Hernandez v. California Pizza Kitchen CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JACOB HERNANDEZ, Plaintiff and Appellant, v. CALIFORNIA PIZZA KITCHEN, Defendant and Respondent.	B263363 (Los Angeles County Super. Ct. No. BC441231)

APPEAL from orders of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Capstone Law, Glenn A. Danas, Melissa Grant, and Katherine W. Kehr for Plaintiff and Appellant.

Jones Day, Matthew J. Silveira, Rick Bergstrom, and Mhairi Whitton for Defendant and Respondent.

Plaintiff and appellant Jacob Hernandez (Hernandez) appeals an order denying his second motion for class certification, as well as an order granting the motion of defendant and respondent California Pizza Kitchen, Inc. (CPK) to strike Hernandez's representative allegations pursuant to the Labor Code Private Attorneys General Act of 2004 or PAGA (Lab. Code, § 2698 et seq.).[1] [2]

The trial court properly denied Hernandez's second motion for class certification because a litigant is precluded from bringing a successive class certification motion on the same cause of action. The trial court also acted within its discretion in striking Hernandez's PAGA representative allegations on the ground of judicial estoppel. The trial court properly found that the PAGA theories on which Hernandez sought to proceed at trial were contrary to the positions he had taken earlier in the litigation.

Accordingly, the orders appealed from are affirmed.

---

[1] All further statutory references are to the Labor Code, unless otherwise specified.

[2] An order denying the certification of a class is appealable under the death knell doctrine because the denial of class certification is "tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699; accord *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757.) The rationale underlying the death knell doctrine applies equally to the striking of PAGA representative claims. (*Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 201.) Accordingly, both orders are appealable.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Earlier proceedings***.**

Hernandez commenced this action in 2010. His complaint pled various statutory violations, including unpaid overtime, unpaid meal period premiums, unpaid rest period premiums, and noncompliant wage statements.

Within each cause of action alleging a substantive Labor Code violation, Hernandez sought damages for himself and the class he sought to represent, as well as civil PAGA penalties for himself and "other aggrieved employees."

Thereafter, Hernandez and plaintiffs in two other related cases (not parties to this appeal) filed a joint motion for class certification, seeking certification of five subclasses of approximately 20,000 current or former CPK employees. Four of the subclasses were the subject of the previous appeal. (*Johnson et al. v. California Pizza Kitchen, Inc.* (Dec. 30, 2013, B234542 c/w B234670) [nonpub. opn.] (hereafter, *Hernandez I*).) (Cal. Rules of Court, rule 8.1115(b).) The four subclasses at issue were an off-the-clock work subclass, a meal period subclass, a rest period subclass, and a wage statement subclass. The trial court (Judge Berle) denied class certification, finding in essence that the claims could not be established by common proof and thus did not lend themselves to class treatment.

In *Hernandez I*, this court affirmed. With respect to the off-the-clock work subclass, we concluded substantial evidence supported the trial court's determination that common issues did not predominate. The evidence showed that CPK's company policy expressly prohibited off-the-clock work, and to the extent there were deviations from CPK's official policy prohibiting off-the-clock work, that would require scrutiny of the off-the-clock

work circumstances of each individual employee. As the lower court stated, " '[t]he variance in evidence leads to the conclusion that this is really an individualized issue based on the employee, the manager, the shift, the restaurant, which will require hundreds, if not thousands, of mini-trials to determine if an employee worked off the clock, and if so, how much time was or was not recorded and whether the employee was paid for this off-the-clock work.' " (*Hernandez I*, *supra*, slip opn., at p. 17, italics omitted.)

As for the meal period subclass, plaintiffs conceded the facial validity of CPK's meal period policies. We concluded that given the lack of uniformity among the putative class members as to how meal breaks were handled, the trial court properly refused to certify the meal period subclass.

Similarly, with respect to the rest period subclass, in seeking class certification, plaintiffs only challenged CPK's rest period *practices,* not CPK's rest period policies. We concluded the trial court properly found that common issues did not predominate with respect to the rest period subclass.

Lastly, with respect to the wage statement subclass, plaintiffs conceded their wage statement claim was *derivative* of their other claims. In other words, plaintiffs contended their wage statements were deficient because of CPK's violations of the off-the-clock work law, the meal break law, and the rest break law. We concluded, "[o]ur decision upholding the denial of certification with respect to the off-the-clock work, meal period and rest period subclasses is dispositive of the wage statement subclass." (*Hernandez I*, *supra*, slip opn., at p. 21.)

2. *Proceedings on remand.*

a. *Hernandez's motion for class certification of a direct wage statement claim.*

On September 8, 2014, Hernandez filed a new motion to certify a wage statement class. Hernandez asserted that until March 26, 2011, CPK issued a uniform wage statement to its employees that violated section 226, subdivision (a), because CPK "failed to include the beginning date for the pay period on employees' wage statements." Thus, Hernandez now was asserting a *direct* wage statement claim, unlike his earlier *derivative* wage statement claim.

CPK opposed the motion for class certification on several grounds. CPK argued the death knell doctrine barred Hernandez's renewed motion for class certification because the order denying the first motion for class certification on the wage statement claim, which had been affirmed on appeal, amounted to a dismissal of the action as to all members of the class. CPK also asserted the second certification motion was barred by res judicata; the new direct wage statement theory could have been raised at the time of the prior certification motion, and res judicata applies not only to matters actually litigated, but also matters that could have been raised in the earlier proceeding. CPK also contended the direct wage statement theory was barred by judicial estoppel, in that until now, Hernandez had taken the position in the litigation that the wage statement claim was wholly derivative of the other claims.

b. *CPK's motion to strike Hernandez's PAGA representative allegations.*

As for CPK, on remand it filed a motion to strike Hernandez's PAGA representative allegations. CPK contended

Hernandez could not proceed with his PAGA claims on a representative basis because the claims would require resolution of a multitude of highly individualized factual issues. "Here, the Court already has ruled that there is no evidence of any unlawful uniform policy or companywide practice at CPK, putative class members did *not* have identical situations, and individual issues predominate over common questions. This presents insurmountable management and control problems for the Plaintiffs, who must 'prove Labor Code violations *with respect to each and every individual* on whose behalf plaintiff seeks to recover civil penalties.' " CPK also contended that Hernandez was barred by judicial estoppel from asserting a direct wage statement claim because throughout the litigation, Hernandez consistently had maintained that the wage statement claim was wholly derivative of the other claims.

In opposition, Hernandez contended that CPK's pretrial motion to strike was procedurally improper. Hernandez also argued judicial estoppel did not bar his direct wage statement claim, because he never argued that the wage statement claim was limited to the derivative violations that he sought to certify in 2010. Hernandez also maintained that a trial of the PAGA claims would be manageable.

c. *Trial court denies second class certification motion and defers ruling on motion to strike PAGA representative allegations.*

On October 6, 2014, the matter came on for hearing. The trial court denied Hernandez's second class certification motion. The trial court noted that during the prior hearing in 2011, plaintiffs' "counsel unconditionally represented that [the wage statement claim] . . . was derivative of the Labor Code violations

alleged. Apparently the appellate court found this sufficiently significant to include plaintiffs' admission of the same in the opinion affirming this court's order. Thus, plaintiffs had ample opportunities to seek certification of a wage statement claim on the same basis they seek to do so now. [¶] . . . There is no dispute that plaintiffs and counsel have possessed the allegedly offending wage statement for several years, and the nine requirements of an accurate wage statement listed in Labor Code section 226 have not substantively changed during this period of time.[3] . . . . [¶] To conclude, [Hernandez's] attempted second bite at the apple through [his] successive motion to certify a wage statement claim is denied." The trial court added, "the motion for class certification is also barred by the doctrine of res judicata and judicial estoppel."

With respect to CPK's motion to strike Hernandez's PAGA representative allegations, the trial court deferred ruling to allow Hernandez to submit a trial management plan for his PAGA claims, and to enable the parties to present evidence on manageability issues.

---

3 During the relevant period leading up to the time the lawsuit was filed, section 226, subdivision (a), required the employer to furnish "an accurate itemized statement in writing showing . . . (6) the inclusive dates of the period for which the employee is paid." (Stats. 2005, ch. 103, § 1, eff. July 21, 2005.) The current statute is identical in this regard; it requires the employer to furnish "an accurate itemized statement in writing showing . . . (6) the inclusive dates of the period for which the employee is paid." (Stats. 2012, ch. 843, § 1; Stats. 2012, ch. 844, § 1.7.)

d. *Hernandez's PAGA trial plan*.

Hernandez filed a trial plan setting forth the four PAGA claims that he intended to present at trial: (1) in violation of statute, CPK furnished its employees through March 28, 2011 with wage statements that did not include the initial date of the applicable pay period and the applicable overtime rates; (2) in violation of statute and an applicable wage order, CPK adopted a written meal period policy that expressly prohibited employees from leaving the premises at any time absent manager approval; (3) in violation of statute and an applicable wage order, CPK adopted written meal policies and discounts pursuant to which employees were offered " 'one discounted or free meal per shift,' " which created incentives for employees to skip legally protected breaks; and (4) in violation of statute and an applicable wage order, CPK adopted a written rest break policy which denied its employees a second rest break when they work shifts between six and seven hours, and a third rest break when they work shifts between 10 and 10.5 hours.

e. *Trial court grants CPK's motion to dismiss Hernandez's PAGA representative allegations*.

On February 9, 2015, the matter came back on for hearing. The trial court granted CPK's motion to strike Hernandez's PAGA representative allegations, stating as follows:

"Defendant does not really need to refute plaintiff's plan that it presents a manageable approach to conducting a PAGA trial. Rather, defendant CPK insists that the PAGA trial will be unmanageable because . . . the four violations plaintiff now describes are newly created claims that contradict plaintiff's ongoing presentation to this court and the appellate court about CPK's purported liability. [¶] Throughout this litigation plaintiff

conceded that CPK's meal and rest period policies were facially compliant, and plaintiffs argued that because of an understaffing theory, plaintiffs were denied breaks, and that the wage statement claim was purely derivative of these contentions. CPK moved to strike the PAGA allegations under the assumption that the claim for PAGA penalties were necessarily based on these theories, and the evidence on the class certification motion already proved that the individualized issues predominated. As such, because the claims were unsuitable for the class action device, neither could the representative PAGA claims be tried manageably according to the defendant.

"Now on this motion, plaintiff Hernandez presents completely new alleged violations, asking permission for breaks, discouraging breaks by providing on-site free meals, no rest breaks for longer shifts, and a direct wage statement claim, that are not pled in the complaint, and are not identified in the PAGA notice letter, and are expressly distinguishable from the Labor Code violations plaintiff has been prosecuting for five years. [¶] . . . . [¶]

"Under these circumstances, CPK argues that plaintiff Hernandez is judicially estopped from reinventing new claims. As stated in the case of *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171: 'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose, to protect the integrity of the judicial process.'

"All of the elements of the doctrine of preclusion of inconsistent positions are met in this case to preclude plaintiff's change of position at this stage of the litigation. First, plaintiff

has taken two positions. Secondly, the positions were taken in judicial proceedings. Third, plaintiff was successful in asserting the first position in this court and . . . the Court of Appeal adopted and accepted plaintiff's representations of the claims alleged, that CPK's meal and rest period policy were facially compliant, but due to a practice of understaffing, employees regularly missed their breaks, and the wage statement claim was derivative of that assertion. The two positions are inconsistent. And finally, there is no indication that plaintiff's new position was not taken before as a result of ignorance, fraud, or mistake. Rather, all the written policies based on the 2009 documents and physical wage statements giving rise to these new allegations have presumably been in counsel's possession for years.

"It is patently inappropriate to allow a party 'to abuse the judicial process by first advocating one position, and later, if it becomes beneficial, to assert the opposite,' . . . . In sum, the court concludes that plaintiff Hernandez is judicially estopped from asserting these entirely new claims for PAGA penalties that are contrary to the positions taken in presenting the Labor Code violations previously throughout this litigation.

"As such, the PAGA penalties sought by plaintiff can be based only on the violations that have always been claimed in this case for the last five years. Namely, that CPK maintained a facially valid meal and rest period policy, but due to understaffing, employees regularly missed breaks, and their wage statements accordingly were derivatively noncompliant."

As for the PAGA claims that had been part of the case from the inception, the trial court ruled "plaintiff has not shown on this motion to strike how a PAGA trial will be manageable where there are thousands of unique experiences."

The trial court concluded, "for all these reasons, the court [grants] defendant's motion to strike the PAGA allegations."

Hernandez filed notice of appeal, specifying both the order denying his second class certification motion and the order granting CPK's motion to strike his PAGA representative allegations.

CONTENTIONS

Hernandez contends: the trial court erred in denying his direct wage statement certification motion; and the trial court erred in striking his PAGA representative claims.

DISCUSSION

1. *Trial court properly denied Hernandez's successive motion for class certification of his wage statement claim.*

a. *General principles.*

As discussed in *Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160 (*Safaie*), governing law does not permit successive motions for class certification. (*Id.* at p. 1169.)

By way of example, in *Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806 (*Stephen*), following the denial of plaintiff's initial motion for class certification, and after the expiration of the time to appeal that order, the plaintiff filed a renewed motion for class certification based on asserted new facts. The trial court denied the motion, plaintiff appealed, and the reviewing court upheld the order.

The *Stephen* court reasoned that the plaintiff's attempt to renew his class certification motion was directly at odds with California's rule providing that a denial of class certification is appealable as a final order. (*Stephen*, *supra*, 235 Cal.App.3d at p. 814.) The court explained: an order denying class certification is appealable because the order has the death knell effect of

making further proceedings in the action impractical; a plaintiff who fails to appeal from such an order loses forever the right to attack it; and therefore a motion to recertify a class is tantamount to an improper and untimely challenge to a final and binding order. (*Id*. at p. 811.) The court reasoned that the rule barring a plaintiff from bringing a renewed class certification motion "is the practical consequence of this state allowing direct appeals of death-knell orders. If the law allowed both those appeals and successive motions to certify, we could have endless appeals violating the state's policy against piecemeal appellate litigation." (*Id*. at p. 814.)

b. *Hernandez's arguments that his second class certification motion was proper are meritless*.

Hernandez cites *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 309, footnote 4 (*Tobacco II*), for the proposition that he was free to bring the second motion for class certification on a theory of liability or claim on which the trial court did not rule at the time it rendered its decision on the first certification motion. The appellant in *Safaie* made the same argument, invoking *Tobacco II*, to no avail. (*Safaie*, *supra*, 192 Cal.App.4th at p. 1172.)

By way of background, in *Tobacco II*, the plaintiff initially sought to certify a class based on a cause of action under the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), the trial court denied the motion, and the plaintiff then brought a new motion for class certification of his causes of action under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and under the false advertising law (Bus. & Prof. Code, § 17500 et seq.). (*Tobacco II*, *supra*, 46 Cal.4th at pp. 308-309, fn. 4.) "[B]ecause the issue of recertification was never

raised in the *Tobacco II* case, it is not authority for the asserted proposition." (*Safaie*, *supra*, 192 Cal.App.4th at p. 1172.)

Further, the initial order denying class certification in *Tobacco II* only addressed the plaintiff's request to certify a class under the CLRA. (*Tobacco II*, *supra*, 46 Cal.4th at p. 309, fn. 4.) "Because the first order denying class certification pertained to only one of the claims alleged in the complaint [the CLRA cause of action], it did not dispose of all claims between the parties, and thus was not a final, binding appealable order. [Citation.] Thus, the plaintiff [in *Tobacco II*] was free to seek certification on other causes of action alleged in the newly amended complaint" (*Safaie*, *supra*, 192 Cal.App.4th at p. 1172), namely, the causes of action for unfair competition and false advertising.

Here, in contrast, *both* the first and second class certification motions sought certification of a class for CPK's alleged violation of its obligation under section 226 to issue a properly itemized wage statement. The only difference between the two motions was that in the initial certification motion, Hernandez's wage statement claim was purely derivative of his other claims, while in the second motion, Hernandez asserted the wage statements were facially unlawful. Although the two motions for class certification asserted different theories as to why CPK's wage statements violated section 226, the two motions involved the same cause of action for violation of section 226. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 [res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory].) Therefore, the trial court properly determined that Hernandez had no right to bring a second motion to certify a wage statement class for CPK's alleged

violation of section 226. (*Safaie*, *supra*, 192 Cal.App.4th at pp. 1169-1171.)

Additionally, as discussed in greater detail in the next section dealing with the motion to strike the PAGA allegations, the trial court properly ruled the second motion to certify a wage statement class also was barred by the doctrine of judicial estoppel. Because Hernandez previously had conceded that his wage statement claim was purely derivative of other claims, the trial court acted within its discretion in concluding Hernandez was judicially estopped to assert a direct wage statement claim at a later time.

For these reasons, the denial of Hernandez's second class certification motion was proper.

2. *Trial court properly dismissed Hernandez's PAGA representative allegations.*

a. *CPK's motion to strike the PAGA representative allegations was procedurally proper.*

Ordinarily, notice of motion to strike a complaint in whole or in part (Code Civ. Proc., § 435) "must be given within the time allowed to plead." (Cal. Rules of Court, rule 3.1322(b).) Thus, the threshold issue is whether CPK's pretrial motion to strike Hernandez's PAGA allegations on the grounds of judicial estoppel and unmanageability was procedurally proper.[4]

In re BCBG Overtime Cases (2008) 163 Cal.App.4th 1293 (*BCBG*) is instructive. There, several years after the lawsuit was filed, the defendant employer filed a motion to strike the

---

[4] Although CPK contends Hernandez never challenged the procedural propriety of CPK's motion to strike in the court below, the record reflects that Hernandez's opposition papers did argue that CPK's pretrial motion to strike was procedurally improper.

plaintiffs' class allegations. (*Id*. at p. 1296.) The trial court granted the motion to strike the class allegations, finding "the motion was properly before it because 'class certification issues may be determined at any time during the litigation.' It [further] found that [the defendant] had met its burden to show that the action is not suitable for class certification[.]" (*Id*. at p. 1297.)

On appeal, the plaintiff contended the motion to strike was improperly granted because the motion was an untimely challenge to class certification before the plaintiffs could make their motion to certify the class. (*BCBG*, *supra*, 163 Cal.App.4th at pp. 1297-1298.) *BCBG* rejected the contention, stating, "[defendant's] 'motion to strike' was not a motion to strike as used during the pleading stage of a lawsuit in both California and federal procedure. (Code Civ. Proc., § 435; Federal Rules Civ. Proc., rule 12(f).) It was a motion seeking to have the class allegations stricken from the complaint by asking the trial court to hold an evidentiary hearing and determine whether Plaintiffs' proposed class should be certified." (*BCBG*, *supra*, 163 Cal.App.4th at p. 1299.)

Guided by *BCBG*, we conclude CPK's motion to strike Hernandez's PAGA representative allegations was not an attack on the pleadings, like a traditional motion to strike. Rather, it was a motion to have the PAGA representative allegations stricken from the complaint on the grounds of unmanageability as well as judicial estoppel. We perceive no procedural impropriety in CPK's bringing a pretrial motion to strike Hernandez's PAGA representative allegations on those grounds.

b. *Trial court acted within its discretion in striking Hernandez's PAGA representative allegations on the ground of judicial estoppel.*

(1) *General principles.*

" ' "The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . . 'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings." ' . . . Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts." ' " ' [Citation.] 'It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.' (Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel--A Doctrine Precluding Inconsistent Positions* (1996) 30 Loyola L.A. L.Rev. 323, 327 (hereafter *You Can't Have It Both Ways*).)" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (*Jackson*); accord, *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 408 (*Regents*).)

" 'The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery.' " (*Jackson*, *supra*, 60 Cal.App.4th at p. 183.)[5] The doctrine most

---

[5] Judicial estoppel " 'obviously contemplates something other than the permissible practice . . . of simultaneously advancing in the same action inconsistent claims or defenses which can then,

appropriately applies when: " '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.)" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

By way of example, in *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917 (*Scripps*), the plaintiffs contended that Code of Civil Procedure section 425.13 [prohibiting inclusion of a claim for punitive damages in an action against a health care provider for professional negligence unless court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed] was inapplicable because the termination of their medical care by defendant was an *administrative* action, rather than an action performed in defendant's role as a health care provider. (108 Cal.App.4th at p. 942.) *Scripps* held "that under the doctrine of judicial estoppel, the [plaintiffs] are

---

under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached.' (*Allen v. Zurich Ins. Co.* (4th Cir. 1982) 667 F.2d 1162, 1167; see *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29 [plaintiff permitted to plead alternative or inconsistent theories in complaint]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1997) ¶¶ 6:242 to 6:247, pp. 6-50 to 6-52 [same].)" (*Jackson*, *supra*, 60 Cal.App.4th at p. 181.)

precluded from relying upon that contention. The [plaintiffs'] position in their opposition to [defendant's] motion for summary judgment claims [defendant] violated a physician's professional duty of care by withdrawing its services from patient litigants. The [plaintiffs] specifically contend that [defendant] as a clinic owed the [plaintiffs] this duty based upon both the Hippocratic Oath and the Ethics and that [defendant's] decision adopting the policy of terminating patient litigants breached that duty. The [plaintiffs] cannot argue at the same time that the decision was not a professional, but an administrative, one." (*Id*. at p. 943.)

Judicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary. (*Regents*, *supra*, 222 Cal.App.4th at p. 408.) The determination of whether judicial estoppel can apply to the facts is a question of law reviewed de novo, but the findings of fact upon which the application of judicial estoppel is based are reviewed under the substantial evidence standard of review. (*Ibid*.) Even if the necessary elements of judicial estoppel are found, because judicial estoppel is an equitable doctrine, whether it should be applied is a matter within the discretion of the trial court. (*Ibid*.) The exercise of discretion for an equitable determination is reviewed under an abuse of discretion standard. (*Ibid*.)

(2) *Trial court properly exercised its discretion to apply judicial estoppel after it determined that all the elements of the doctrine were satisfied*.

(a) *The same party has taken two different positions*.

With respect to the first element of judicial estoppel, the trial court properly found that Hernandez had taken two different positions. (*Regents*, *supra*, 222 Cal.App.4th at p. 408.)

At the outset of the litigation, Hernandez took the position that CPK's written policies were " 'facially compliant,' " but CPK "chronically understaffed its restaurants, resulting in employees regularly missing meal and rest breaks, taking their meal and rest periods late, or having those meal and rest breaks interrupted." (*Hernandez I*, *supra*, slip opn., at p. 4.) Also, Hernandez conceded that the wage statement claim was purely derivative of the other claims, that is to say, the wage statements were deficient because of CPK's violations of the off-the-clock work law, the meal break law and the rest break law. (*Id.* at p. 21.)

Four years later, on remand, Hernandez submitted a PAGA trial plan which asserted CPK's written meal period and rest period policies were facially *noncompliant*, and that the wage statements likewise were facially *noncompliant* because they did not include the initial date of the pay period and applicable overtime rates.

Hernandez denies that he took two different positions. He asserts that in 2010 he merely elected to pursue certain theories of liability and not others, and that in doing so he did not take a "position" for purposes of judicial estoppel. This characterization of the facts is unpersuasive; Hernandez initially conceded CPK's written policies were facially compliant and that the wage statement claim was predicated entirely on his other claims.

Hernandez also contends there is no basis to judicially estop him as the proxy for the State of California from litigating his PAGA theories of liability distinct from those on which he based his 2010 class certification motion. It appears Hernandez is contending he is a different party for purpose of the PAGA allegations, so that judicial estoppel should not apply. However,

Hernandez does not cite any authority to support his position that because he brought the PAGA claims on behalf of the State of California he can avoid the application of the doctrine of judicial estoppel.

Moreover, as a class representative plaintiff and a PAGA representative plaintiff, Hernandez sued for the same alleged wrongs, namely, meal period, rest period, and wage statement violations. The availability of different *remedies* in each context is immaterial. It is the inconsistent positions taken by Hernandez during the course of the litigation that is the basis for applying the doctrine of judicial estoppel.

Therefore, the trial court properly found the first element of judicial estoppel is satisfied.

(b) *The positions were taken in judicial proceedings*.

There is no dispute with respect to the second element of judicial estoppel, i.e., that Hernandez took these varying positions in judicial proceedings. (*Regents*, *supra*, 222 Cal.App.4th at p. 408.)

(c) *The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true).*

The third element is that the party to be judicially estopped was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true). (*Regents*, *supra*, 222 Cal.App.4th at p. 408.) However, judicial estoppel may be applied "even absent proof of success in the earlier litigation." (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 119 (*Thomas*).)

The *Thomas* court stated: "California courts have acknowledged that there is no hard and fast rule which limits application of the doctrine to those situations where the litigant

was successful in asserting the contradictory position. [Citations.] Other courts have concluded that judicial estoppel may be applied without regard to the party's success in the earlier litigation. (See, e.g., *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*. (3d Cir. 1996) 81 F.3d 355, 361 [' "[T]he critical issue is what the [party] contended in the underlying proceeding, rather than what the jury found." ']" (*Thomas*, *supra*, 85 Cal.App.4th at pp. 118-119.)

Here, Hernandez was successful in asserting his earlier positions in the litigation in that on the initial motion for class certification, the trial court accepted Hernandez's representations regarding the nature of his claims. The trial court then scrutinized *those claims* to determine whether they lent themselves to class treatment, and this court in *Hernandez I* went on to review *those claims*. Thus, in granting CPK's motion to strike, the trial court properly found that "plaintiff was successful in asserting the first position in this court and . . . the Court of Appeal adopted and accepted plaintiff's representations of the claims alleged, that CPK's meal and rest period policy were *facially compliant*, but due to a *practice* of understaffing, employees regularly missed their breaks, and the wage statement claim was derivative of that assertion." (Italics added.)

Four years into the litigation, in November 2014, Hernandez submitted a PAGA trial plan that completely changed his theory of the case and put CPK in the position of having to defend against theories other than those that Hernandez previously had articulated. That is, having been unsuccessful in his challenges to CPK's *practices*, Hernandez recast the action as a facial challenge to CPK's written policies and wage statements. This recharacterization of his claims was contrary to Hernandez's

earlier acknowledgement that CPK's meal and rest period policies were facially compliant, and that his wage statement claim was purely derivative. The trial court acted within its discretion in denying Hernandez a second bite of the proverbial apple and precluding him from taking contradictory positions in further pursuit of his PAGA claims.

(d) *The two positions are totally inconsistent*.

The trial court properly found that the fourth element of judicial estoppel, i.e., the party took totally inconsistent positions (*Regents*, *supra*, 222 Cal.App.4th at p. 408), has been satisfied.

Hernandez initially took the position that CPK's written policies were " 'facially compliant,' " but CPK "chronically understaffed its restaurants, resulting in employees regularly missing meal and rest breaks, taking their meal and rest periods late, or having those meal and rest breaks interrupted." (*Hernandez I*, *supra*, slip opn., at p. 4.) Hernandez's earlier position is totally inconsistent with his later position that CPK's written meal period and rest period policies are facially unlawful.

Also, Hernandez previously acknowledged that his wage statement claim was entirely predicated on his other claims, that is to say, CPK's wage statements were deficient because of CPK's violations of the off-the-clock work law, the meal break law and the rest break law. (*Hernandez I*, *supra*, slip opn., at p. 21.) Hernandez's earlier position that his wage statement claim was purely derivative is totally inconsistent with his later assertion of a direct wage statement claim.

The trial court properly found that Hernandez's positions in this regard were inconsistent.

(e) *The first position was not taken as a result of ignorance, fraud, or mistake.*

The fifth and final element of judicial estoppel is that the first position was not taken as a result of ignorance, fraud, or mistake. (*Regents*, *supra*, 222 Cal.App.4th at p. 408.)

Hernandez does not assert ignorance, fraud, or mistake. Rather, he contends the theories of liability he asserted in 2014 were not viable in 2010 because his first class certification motion was prepared and argued before *Brinker Restaurant Corp v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) was decided, and before section 226, subdivision (e), pertaining to wage statements, was amended in 2012. The arguments are unpersuasive.

Brinker states that a class may be certified where it is alleged that "a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws" (*Brinker*, *supra*, 53 Cal.4th at p. 1033), but even before *Brinker*, a class could be certified based on the existence of unlawful policies. (See, e.g. *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1302 (*Jaimez*) [class certification was appropriate based, inter alia, on employer's alleged uniform policy of requiring employees to work overtime, but failing to pay them for their overtime hours].) Therefore, Hernandez's contention that his PAGA claims challenging CPK's written policies were not viable prior to *Brinker* is unpersuasive.

As for section 226 [itemized wage statements], Hernandez relies on a 2012 amendment thereto, which added the following provision: "(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or

more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone" the missing information. (§ 226, subd. (e)(2)(B).) This amendment clarified the injury requirement under section 226, subdivision (e). (*Derum v. Saks & Co.* (2015) 95 F.Supp.3d 1221, 1229.) Previously, "[t]o recover damages under section 226, subdivision (e), an employee must [have] suffer[ed] injury as a result of a knowing and intentional failure by an employer to comply with the statute," and the injury requirement could not be satisfied "simply because one of the nine itemized requirements in section 226, subdivision (a) is missing from a wage statement." (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1142.) However, irrespective of the recent amendment to section 226 clarifying its injury requirement, even prior to the amendment to section 226, subdivision (e), case law had "set a fairly minimal standard for the requisite injury." (*Jaimez*, *supra*, 181 Cal.App.4th at p. 1306.) As discussed at footnote 3, *ante*, at all relevant times, section 226 required the wage statement to specify the inclusive dates of the period for which the employee is paid. With 20,000 allegedly aggrieved current and former CPK employees, we reject Hernandez's contention that his direct wage statement claim was not viable until section 226 was amended in 2012.

Accordingly, the trial court properly found the fifth and final element of judicial estoppel was satisfied.

(f) *Conclusion with respect to judicial estoppel.*

Even where the necessary elements of judicial estoppel are found, because judicial estoppel is an equitable doctrine, whether it should be applied is a matter within the discretion of the trial court. (*Regents*, *supra*, 222 Cal.App.4th at p. 408.) Here, all five

elements of judicial estoppel are satisfied. In view of the discrepancy between the PAGA theories set forth in Hernandez's trial plan and the positions he took earlier, we perceive no abuse of discretion in the trial court's determination that the four PAGA claims set forth in Hernandez's trial plan are barred by the doctrine of judicial estoppel.

c. *Unnecessary to address manageability issues relating to Hernandez's earlier PAGA theories.*

After ruling that the four new PAGA theories enumerated in Hernandez's trial plan were barred by judicial estoppel, the trial court added, "[a]s such, the PAGA penalties sought by plaintiff can be based only on the violations that have always been claimed in this case for the last five years. Namely, that CPK maintained a facially valid meal and rest period policy, but due to understaffing, employees regularly missed breaks, and their wage statements accordingly were derivatively noncompliant." However, for the PAGA claims that had been part of the case from the inception, the trial court ruled "plaintiff has not shown on this motion to strike how a PAGA trial will be manageable where there are thousands of unique experiences." On that basis, the trial court struck the PAGA allegations.

It is unnecessary to address whether Hernandez's original PAGA claims presented insurmountable manageability issues because the earlier PAGA claims are no longer at issue in this case. As indicated, Hernandez submitted a PAGA trial plan setting forth the four PAGA claims that he intended to present at trial. Hernandez's trial plan made it clear that he was no longer proceeding on his earlier PAGA theories. Thus, the trial court's determination that the four PAGA claims contained in Hernandez's trial plan were barred by judicial estoppel fully

disposed of Hernandez's PAGA representative allegations. Therefore, at this juncture, it is unnecessary to address the manageability of Hernandez's earlier PAGA claims.

DISPOSITION

Both the order denying Hernandez's second motion for class certification, and the order granting CPK's motion to strike Hernandez's PAGA representative allegations, are affirmed. CPK shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.