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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROUMEN ANTONOV,

Plaintiff, Cross-defendant, and  
Appellant,

v.

FARHEAP SOLUTIONS, INC., et al.,

Defendants, Cross-complainants, and  
Respondents.

G052275

(Super. Ct. No. 30-2013-00632085)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,  
Peter J. Wilson, Judge. Reversed and remanded.

Brown Wegner McNamara, William J. Brown, Jr., Stephen M. McNamara,  
and Lily Y. Li for Plaintiff, Cross-defendant, and Appellant.

Payne & Fears, Daniel F. Fears, Benjamin A. Nix, Erik M. Andersen, and  
Robert T. Matsuishi; Daniel J. Stanley for Defendants, Cross-complainants, and  
Respondents.

Roumen Antonov appeals from a postjudgment order awarding attorney fees to Farheap Solutions, Inc. (Farheap). Antonov argues the trial court erred by concluding the January 1, 2014, amendment to Labor Code section 218.5 (section 218.5) was not retroactive and did not apply to the pending proceedings. We agree, reverse the postjudgment order, and remand the matter to the trial court.

### FACTS

In February 2013, Antonov, a former employee, sued Farheap and Opensoft Technologies, LLC (Opensoft)<sup>1</sup> for breach of contract, breach of the covenant of good faith and fair dealing, failure to pay wages, and failure to pay waiting time penalties. The complaint included a prayer for attorney fees and costs pursuant to section 218.5. In addition to filing its answer, Farheap filed a cross-complaint for breach of contract and breach of fiduciary duty.

After contentious and lengthy discovery, Farheap filed a motion for summary judgment/adjudication. Antonov filed opposition. In his opposition, Antonov admitted Farheap did not terminate his employment, he quit, and did so without giving any notice. The trial court denied Farheap's motion concerning Antonov's breach of contract and wage contentions and granted the motion as to his breach of the covenant of good faith and fair dealing claim.

Trial commenced in October 2014. The jury ruled in favor of Farheap on Antonov's complaint and in favor of Farheap on its cross-complaint. The jury awarded Farheap \$1 in damages and Opensoft \$2 in damages (finding Antonov acted with "fraud, malice or oppression" as to Opensoft). The trial court ordered the parties to file briefs on the issue of who was the prevailing party. In its brief, Farheap argued section 218.5 was not retroactive and Antonov initiated the action in bad faith. In his brief, Antonov

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<sup>1</sup> Because Opensoft was not a party to the attorney fees award, we will limit our discussion accordingly.

contended section 218.5 was retroactive and there was no evidence he initiated his action in bad faith.

At a hearing, the trial court stated its tentative ruling was the January 1, 2014, amendments to section 218.5 did not apply retroactively. The same day, the court filed a minute order adopting its tentative ruling.

The following month, the trial court entered judgment in favor of Farheap finding it was the prevailing party under section 218.5. The court did not make any finding as to whether Antonov brought the action against Farheap in bad faith. The judgment required Farheap to file a memorandum of costs and request for any attorney fees. Farheap filed a motion seeking \$634,875 in attorney fees. The trial court concluded the hours worked were excessive and reduced the award to \$380,925. In June 2015, the trial court entered an amended judgment awarding Farheap \$380,925 in attorney fees.

#### DISCUSSION

The issue before us is whether the current version of section 218.5, which became effective during the pendency of this litigation, should be applied retroactively. We review de novo the issue of whether an amended statute applies retroactively to a pending case. (*Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1028.)

At the time Antonov filed his action, section 218.5 stated in relevant part as follows: “In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney’s fees and costs to the prevailing party if any party to the action requests attorney’s fees and costs upon the initiation of the action.” This was a reciprocal attorney fee statute that awarded fees to the prevailing party, whether employee or employer.

The California Legislature amended section 218.5 on August 26, 2013. The amendments to section 218.5 became effective on January 1, 2014, and provide in relevant part as follows: “(a) In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney’s fees and costs to the prevailing party if any party to the action requests attorney’s fees and costs upon the initiation of the action. However, if the prevailing party in the court action is not an employee, attorney’s fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith.”<sup>2</sup> Currently, if an employer prevails on an employee’s wage claims, the employer is entitled to attorney fees and costs if the employee initiated the action in bad faith.

*USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197 (*USS-Posco*), which the trial court did not have the benefit of when it ruled on the attorney fees issue, addressed the identical issue before us. *USS-Posco, supra*, 244 Cal.App.4th at pages 216-217, began by providing the following legal principles regarding retroactivity. “The general rule is that absent a clear, contrary indication of legislative intent, we interpret statutes to apply prospectively. [Citation.] In other words, when construing statutes, we presume they do not apply retroactively unless the Legislature has said otherwise expressly or unmistakably. [Citation.] Numerous general statutory provisions are considered to codify or relate to this general rule. [Citations.] [¶] But this general rule and these statutes, while seemingly straightforward, do not address the question of whether a statute, as applied, should be viewed as having only a benign ‘prospective’

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<sup>2</sup> Farheap filed a motion requesting we take judicial notice of various versions of section 218.5, and its legislative history as enacted in 1986. “A motion for judicial notice of published legislative history, such as the Senate analysis here, is unnecessary. [Citation.] ‘Citation to the material is sufficient. [Citation.] We therefore consider the request for judicial notice as a citation to those materials that are published.’ [Citation.]” (*Wittenberg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 665, fn. 4.) Thus, the request for judicial notice is denied.

effect or a possibly troubling ‘retroactive’ effect. [Citations.] ¶ Whether a statute has ‘prospective’ or ‘retroactive’ effect is not easily determined. [Citations.] Courts are to consider the nature and extent of the change the statute brings about, and the relationship between the new rule of law and the relevant past events subject to the rule. They are also to take into account fair notice to, reasonable reliance by, and settled expectations of those subject to the new rule. [Citation.] ¶ Generally, ‘a law has a retroactive effect when it functions to ““change[ ] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct.””’ [Citation.] If preexisting rights or obligations are substantially affected, then application of a statute to preenactment conduct is retroactive and forbidden, absent an express legislative intent to permit such retroactive application. If preexisting rights are not so affected, then application of a statute to preenactment conduct is prospective and therefore permitted. [Citation.] ¶ ‘Changes to the law, however, are not necessarily considered retroactive even if their application “involve[s] the evaluation of civil or criminal conduct occurring before enactment.”’ [Citation.] For instance, changes to rules governing pending litigation, such as those changing procedures to be followed or applicable evidentiary rules, ‘frequently have been designated as prospective, because they affect the future; that is, the future proceedings in a trial. The prospective label applies even though the trial concerns conduct that occurred prior to the enactment of the new law.’ [Citations.] At bottom, we look to the function, not the form, or the new statute. [Citation.]”

The *USS-Posco* court stated section 218.5’s legislative history was silent on its retroactivity and the court had to determine whether its function overcame the presumption favoring prospective application. (*USS-Posco, supra*, 244 Cal.App.4th at p. 217.) The court explained legislative amendments altering when attorney fees are available could be held to change the legal consequences of past conduct and would apply only prospectively. (*Id.* at pp. 217-218.) The court said the Supreme Court of the United States (*Martin v. Hadix* (1999) 527 U.S. 343, 349-350), and federal circuit courts

(*Summers v. Department of Justice* (D.C.Cir. 2009) 569 F.3d 500, 503) had taken this position. (*USS-Posco, supra*, 244 Cal.App.4th at p. 218.) The court added that federal courts in California had taken the same view and refused to apply the current version of section 218.5 to pending cases (*Johnson v. Hewlett-Packard Co.* (N.D.Cal., Mar. 10, 2014, No. C 09–03596 CRB) 2014 WL 988824; *Johnson v. Hewlett-Packard Co.* (9th Cir., July 8, 2014, No. 11-17062) 2014 WL 5280490).<sup>3</sup> (*USS-Posco, supra*, 244 Cal.App.4th at p. 218.)

The *USS-Posco* court rejected defendant employer’s claim federal authority controlled, explaining section 218.5 was a California statute “[a]nd while California courts generally apply the same framework as federal courts to retroactivity questions [citation], it is for California courts, alone, to interpret California statutes, and thus to determine whether those statutes result in or should be given retroactive effect. [Citations.]” (*USS-Posco, supra*, 244 Cal.App.4th at pp. 218-219.) The court stated the Supreme Court and the majority of the Courts of Appeal “have viewed the question of retroactivity of fee and cost eligibility statutes differently than the federal courts.” (*Id.* at p. 219.) Citing to *Quarry v. Doe I* (2012) 53 Cal.4th 945, the court opined “Fee and cost eligibility statutes . . . are a ‘special category within the general topic of the prospective or retroactive application of statutes’ subject to an ‘extensive line of authority.’ [Citation.]” (*USS-Posco, supra*, 244 Cal.App.4th at p. 219.)

The *USS-Posco* court reasoned that extensive line of authority supporting retroactive application included *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469 (*Stockton Theatres*) [new statute authorizing prevailing party to recover surety bond premium as litigation cost applied to actions pending at time of enactment], and *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917 (*Woodland*

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<sup>3</sup> See *Virtusio v. FINRA, Inc.* (N.D.Cal., Mar. 31, 2014) No. 12-CV-00602NC, 2014 WL 1308691.

*Hills*) [new statute authorizing fees for prevailing plaintiffs who enforce important public right applied to action pending on appeal]. (*USS-Posco*, *supra*, 244 Cal.App.4th at pp. 219-220.) The court added the *Woodland Hills* court also cited with approval two Court of Appeal cases (*Kievlan v. Dahlberg Electronics, Inc.* (1978) 78 Cal.App.3d 951 [new Code of Civil Procedure section 1021.5 authorizing fees for prevailing plaintiffs who enforce important public right applicable to pending cases]; *Olson v. Hickman* (1972) 25 Cal.App.3d 920 [new Government Code section 800 permitting attorney fee award in challenges to “‘arbitrary or capricious’” government agency actions procedural rule applicable to pending cases]), that held new procedural rules were applicable to pending cases. (*USS-Posco*, *supra*, 244 Cal.App.4th at p. 220.)

The *USS-Posco* court stated that for decades Courts of Appeal have cited *Stockton Theatres* and/or *Woodland Hills* “for the proposition that they ‘authoritatively held’ that in the absence of express legislative intent to the contrary, ‘a new statute authorizing an award of attorney fees’ or a statute increasing or decreasing litigation costs, including attorneys’ fees applies to actions pending at the time of enactment. [Citations.]” (*USS-Posco*, *supra*, 244 Cal.App.4th at pp. 220-221 [citing cases dating back to 1985].)

The *USS-Posco* court explained that although the weight of California authority has “treated legislation affecting the recovery of costs, including attorney fees, as addressing a ‘procedural’ matter that is ‘prospective’ in character and thus not at odds with the general presumption against retroactivity[.]” the court in *Andreini & Co. v. MacCorkle Ins. Service, Inc.* (2013) 219 Cal.App.4th 1396 (*Andreini*), concluded otherwise regarding an amendment to California Rules of Court, rule 8.278(d)(1)(G), concerning interest expenses and fees to obtain a letter of credit or to supply bond security. (*USS-Posco*, *supra*, 244 Cal.App.4th at p. 221.) The court in *Andreini*, *supra*, 219 Cal.App.4th at p. 1406, held retroactive application would qualify as a new or

different liability because defendant's liability would increase from \$6,553.12 to \$221,324.52.

The *USS-Posco* court did not find *Andreini* persuasive, however, because it did not discuss *Stockton Theatres* and/or *Woodland Hills* or their progeny. (*USS-Posco, supra*, 244 Cal.App.4th at p. 221.) Relying on *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, the *USS-Posco* court concluded it was bound by *Stockton Theatres* and *Woodland Hills* and held “the new version of section 218.5 provides the proper criteria for assessing fee entitlement in this case.” (*USS-Posco, supra*, 244 Cal.App.4th at p. 222.) After reversing the trial court's attorney fee award, the *USS-Posco* court opined that if defendant employer sought attorney fees on remand, the trial court had to determine whether plaintiff employee brought his cross-complaint in bad faith. (*Ibid.*)

We find *USS-Posco* persuasive and controlling here. Farheap's attempt to undermine the reasoning in *USS-Posco* fails. Similarly, its attempt to persuade us *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 369-373 (*Smith*), a case concerning the Supreme Court's new interpretation of Labor Code section 98.2, subdivision (c), and whether the court's new rule applied prospectively or retroactively, is controlling is unpersuasive. Not only did *Smith* concern the issue of whether a judicial decision announcing a new rule of law was prospective only, but a year later the Legislature amended Labor Code section 98.2, subdivision (c), and expressly overruled *Smith*. (Stats. 2003, ch. 93, § 2.)

Farheap's reliance on *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185 (*Sharif*), is also misplaced. The issue in *Sharif* was who was the prevailing party when the trial court awarded plaintiff employee her attorney fees on one cause of action and defendant employer its attorney fees and costs on two causes of action. (*Id.* at p. 188.) In rejecting plaintiff employee's contention she was the sole prevailing party, the *Sharif* court held “that when there are two fee-shifting statutes in separate causes of action, there

can be a prevailing party for one cause of action and a different prevailing party for the other cause of action.” (*Id.* at pp. 188, 191.) In a footnote, the *Sharif* court acknowledged the Legislature’s amendment to section 218.5 effective January 1, 2014. The court added the following: “The trial court ruled that the Legislature did not intend that the amendment apply retroactively—the judgment was entered on August 13, 2013, the hearing on defendant’s attorney fees motion was held on March 20, 2014—and thus did not apply in this case.” (*Sharif, supra*, 241 Cal.App.4th at p. 191, fn. 7.) Although the *Sharif* court held section 218.5 was not retroactive, it did so without discussion or analysis and thus we do not find it persuasive.

Many of the authorities Farheap cites to here were fully discussed in *USS-Posco, supra*, 244 Cal.App.4th 197, and we need not discuss them further. Additional Court of Appeal decisions not concerning section 218.5 do not call into doubt *USS-Posco, supra*, 244 Cal.App.4th 197, and its reasoning. (*City of Monte Sereno v. Padgett* (2007) 149 Cal.App.4th 1530 [city ordinance authorizing fees to abate nuisance not retroactive]; *Estate of Hilton* (1996) 44 Cal.App.4th 890, 908 [statutory probate fees not retroactive].) Nor do federal authorities concerning federal statutes. (*N.Y.C. Apparel F.Z.E. v. US Customs and Border Prot. Bureau* (D.D.C. 2009) 618 F.Supp.2d 75 [federal statute authorizing fees under Freedom of Information Act]; *Taylor P. ex rel. Chris P. v. Missouri Dept. of Elementary & Secondary Education* (W.D.Mo., Aug. 14, 2007) No. 06-4254-CV-C-NKL, 2007 WL 2360061 [federal statute authorizing fees under Individuals with Disabilities Education Act].)

As to the issue of bad faith, we decline Farheap’s invitation to conclude as a matter of law Antonov acted with bad faith based on the trial court’s conclusion Antonov acted with “fraud, malice, or oppression” against Opensoft. Like in *USS-Posco, supra*, 244 Cal.App.4th at page 222, if Farheap seeks attorney fees on remand, the trial court must determine whether Antonov brought his complaint against Farheap in bad faith.

DISPOSITION

The postjudgment order is reversed and remanded. Appellant is awarded his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.