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Opinion on remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANGIE MORIANA, Plaintiff and Respondent, v. VIKING RIVER CRUISES, INC., Defendant and Appellant.	B297327 Los Angeles County Super. Ct. No. BC687325

APPEAL from an order of the Superior Court of Los Angeles County, Richard J. Burdge, Jr., Judge. Reversed and remanded.

Littler Mendelson, Keith A. Jacoby, Douglas A. Wickham, and Ian T. Maher for Defendant and Appellant.

Altshuler Berzon, Michael Rubin, Robin Tholin; Law Offices of Kevin T. Barnes, Kevin T. Barnes, Gregg Lander; Davtyan Law Firm and Emil Davtyan for Plaintiff and Respondent.

INTRODUCTION

This is an appeal of an order denying defendant Viking River Cruises, Inc.'s (Viking) motion to compel arbitration of plaintiff Angie Moriana's claims brought under the California Private Attorneys General Act of 2004, Labor Code[1] section 2698 et seq. (PAGA). The trial court denied the motion. Relying on a rule that predispute agreements to arbitrate PAGA claims are unenforceable, which was followed by many California Courts of Appeal and based on language in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), a panel of this Division affirmed.

In *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179] (*Viking River*), the United States Supreme Court rejected the portion of the California Supreme Court's decision in *Iskanian* that prohibited employers from compelling arbitration of an employee's individual PAGA claims, as distinct from the non-individual claims the employee alleges on behalf of other employees. We therefore reverse and remand with instructions that Moriana's individual PAGA claims be sent to arbitration, and for further proceedings to determine how Moriana's non-individual claims should be resolved.

FACTS AND PROCEDURAL BACKGROUND

Moriana worked for Viking as a sales representative and agreed to submit any dispute arising out of her employment to binding arbitration. The agreement required Moriana to waive any right to bring a class, collective, representative, or private

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[1] All undesignated statutory references are to the Labor Code.

attorney general action. It also provided: "In any case in which (1) the dispute is filed as a . . . representative or private attorney general action and (2) a civil court of competent jurisdiction finds all or part of the Class Action Waiver unenforceable, the . . . representative and/or private attorney general action must be litigated in a court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration."

Moriana sued Viking on behalf of the state and all other similarly situated aggrieved employees, alleging various Labor Code violations in a single cause of action under PAGA. Viking moved to compel Moriana's PAGA claims to arbitration. The trial court denied the motion.

Reviewing the trial court's order de novo, a panel of this Division affirmed in a nonpublished opinion, *Moriana v. Viking River Cruises, Inc.* (Sept. 18, 2020, B297327). The court held that, under *Iskanian*, an arbitration agreement that includes a waiver of an employee's right to bring a representative PAGA action in any forum violates public policy and that federal law does not preempt this rule. The court further concluded that Moriana's individual PAGA claim should not be ordered to arbitration because courts after *Iskanian* have held that a PAGA claim cannot be split into arbitrable individual claims and nonarbitrable representative claims.

Viking's petition for review to the California Supreme Court was denied. (*Moriana v. Viking River Cruises, Inc.* (Dec. 9, 2020, S265257).) However, the United States Supreme Court granted Viking's petition for writ of certiorari and, in *Viking River*, reversed and remanded the case to this Court for further proceedings.

CONTENTIONS

Viking argues that Moriana's individual PAGA claims must be ordered to arbitration following *Viking River*'s holdings that PAGA actions may be divided into individual and non-individual claims and that a plaintiff bound by an agreement to arbitrate her individual PAGA claims must prosecute those claims in arbitration. Viking further contends that *Viking River* correctly concluded that PAGA's standing provisions require that individual and non-individual claims be litigated together in the same action, and that Moriana's non-individual claims must be dismissed for lack of standing under the law of the case doctrine.

Moriana contends that, even if individual PAGA claims may now be subject to arbitration under *Viking River*, the representative action waiver in the arbitration agreement does not distinguish between the individual and non-individual components of her PAGA claim. She therefore argues that the waiver remains unenforceable in its entirety under *Iskanian*, and that the impact, if any, of the severability clause is a question for this court to decide. Moriana further contends that, if her individual PAGA claims are ordered to arbitration, she has statutory standing to pursue her non-individual PAGA claims because she satisfies both requirements for PAGA standing set forth in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73.

DISCUSSION

1. Standard of Review

Because the pertinent facts are undisputed and the denial of Viking's motion was based upon a decision of law, our review is

de novo. (*Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 444.)

2. PAGA

Under the Labor Code, the Labor and Workforce Development Agency (LWDA) and its constituent departments and divisions are authorized to collect civil penalties for specified labor law violations by employers. (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 370 (*Caliber Bodyworks*).) With a stated goal of improving enforcement of existing Labor Code obligations, the Legislature enacted PAGA, which permits an aggrieved employee to initiate a private civil action on behalf of himself or herself and other current or former employees to recover civil penalties if the LWDA does not do so. (*Ibid.*) PAGA permits aggrieved employees to recover civil penalties that previously could be collected only by the LWDA, as well as "default" penalties. (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 335; *Caliber Bodyworks*, at p. 375; Lab. Code, § 2699, subds. (a), (f).)

3. *Iskanian* and Subsequent California Appellate Court Decisions

In *Iskanian*, the court "examined two related questions, namely, whether arbitration agreements obliging employees to waive their right to bring representative PAGA actions in any forum are unenforceable under state law, and whether the [Federal Arbitration Act, 9 U.S.C. § 1 et seq. (FAA)] preempts any state law rule precluding such waivers." (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 867.)

The court explained that an employee suing under PAGA acts as " 'the proxy or agent of the state's labor law enforcement

agencies' " and " 'represents the same legal right and interest as' " those agencies—" 'namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency.' " (*Iskanian*, *supra*, 59 Cal.4th at p. 380.) With respect to the first issue, the court held that waivers made "before any dispute arises" requiring employees as a condition of employment to give up the right to assert a PAGA claim on behalf of other employees are unenforceable, concluding that they "harm the state's interests in enforcing the Labor Code," and are therefore contrary to public policy. (*Id.* at pp. 383–384.) The court recognized that the plaintiff's waiver potentially permitted him to assert an individualized PAGA claim but declined to decide whether such a claim was cognizable, stating that "a prohibition of *representative* claims frustrates the PAGA's objectives." (*Id.* at p. 384.)

Our Supreme Court further concluded that the FAA does not preempt a rule against PAGA waivers. It held that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents—either the [LWDA] or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian*, *supra*, 59 Cal.4th at p. 386.) In other words, "the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement" but "does not aim to promote arbitration of claims belonging to a government agency," including claims "brought by a statutorily designated proxy for the agency." (*Id.* at p. 388.)

Based on the first of these holdings, subsequent California Courts of Appeal applying *Iskanian* have held that an employee's

predispute agreement to arbitrate PAGA claims is unenforceable absent a showing the state also consented to the agreement. (E.g., *Herrera v. Doctors Medical Center of Modesto* (2021) 67 Cal.App.5th 538, 550, fn. 3; *Julian v. Glenair, Inc.*, *supra*, 17 Cal.App.5th at pp. 869–872; *Betancourt v. Prudential Overall Supply*, *supra*, 9 Cal.App.5th at pp. 445–449; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677–680.)

4. *Viking River*

In *Viking River*, the United States Supreme Court rejected certain of the California Supreme Court's holdings in *Iskanian* and reversed this Division's order affirming the trial court's denial of Viking's motion to compel arbitration.[2]

The Supreme Court first considered whether the FAA preempts *Iskanian*'s rule that contractual provisions waiving the right to bring PAGA actions are unenforceable. It concluded that "[n]othing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals." (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1921].)

However, in a footnote, the Supreme Court rejected the *Iskanian* court's reasoning "that a PAGA action lies outside the FAA's coverage entirely because § 2 is limited to controversies

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[2] As the United States Supreme Court observed, PAGA claims are representative in two senses: first, because "they are brought by employees acting as representatives—that is, as agents or proxies—of the State" and second, because "they are predicated on code violations sustained by other employees." (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1916].) We refer to the second category of representative claims as "nonindividual claims."

'*arising out of*' the contract between the parties [citation] and a PAGA action 'is not a dispute between an employer and an employee arising out of their contractual relationship," but 'a dispute between an employer and the state.' [Citation.]" (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1919, fn. 4].) The court concluded that "disputes resolved in PAGA actions satisfy this requirement" because "[t]he contractual relationship between the parties is a but-for cause of any justiciable legal controversy between the parties under PAGA, and 'arising out of' language normally refers to a causal relationship. [Citation.]" (*Ibid.*) Moreover, "nothing in the FAA categorically exempts claims belonging to sovereigns from the scope of § 2." (*Ibid.*)

The Supreme Court further concluded that "a conflict between PAGA's procedural structure and the FAA does exist, and that it derives from the statute's built-in mechanism of claim joinder." (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1923].) Because "that mechanism permits 'aggrieved employees' to use the Labor Code violations they personally suffered as a basis to join to the action any claims that could have been raised by the State in an enforcement proceeding" and "*Iskanian*'s secondary rule prohibits parties from contracting around this joinder device," *Iskanian*'s "prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate,' [citation], and does so in a way that violates the fundamental principle that 'arbitration is a matter of consent,' [citation]." (*Ibid.*)

The Supreme Court explained that "[a] state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to

arbitration," and that, "[w]hen made compulsory by way of *Iskanian*, the joinder rule internal to PAGA functions in exactly this way." (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1924].) Specifically, *Iskanian* limits the parties' ability "to restrict the scope of an arbitration to disputes arising out of a particular ' " 'transaction' " ' or ' "common nucleus of facts" ' " and thus "[t]he only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding." (*Ibid.*) Thus, "[t]he effect of *Iskanian*'s rule mandating this mechanism is to coerce parties into withholding PAGA claims from arbitration." (*Ibid.*) The court therefore held "that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Id.* at p. 1924.)

Although the representative action waiver in the parties' arbitration agreement remained invalid under *Iskanian*, the Supreme Court explained that "the severability clause in the agreement provides that if the waiver provision is invalid in some respect, any 'portion' of the waiver that remains valid must still be 'enforced in arbitration.' " (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1925].) "Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim." (*Ibid.*)

The court went on to briefly address "what the lower courts should have done with Moriana's non-individual claims." (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1925].) It observed that, "[u]nder PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action[,]" and

that, "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. [Citation.]" (*Ibid.*) The Supreme Court therefore stated that "Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (*Ibid.*)

5. *Viking River* compels reversal.

5.1. The Individual PAGA Claims

Considering the foregoing, we reverse and remand with instructions for Moriana's individual PAGA claims to be sent to arbitration. The Supreme Court held that the FAA preempts the rule that PAGA claims cannot be divided into individual and non-individual claims and that Viking is entitled to compel arbitration of Moriana's individual PAGA claims. (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1924].) "The [FAA] is a law of the United States, and [*Viking River*] is an authoritative interpretation of that Act." (*DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 53.)

We reject Moriana's contention that arbitration of her individual PAGA claims is not required under the parties' arbitration agreement because the representative action waiver does not distinguish between individual and non-individual PAGA claims. As the Supreme Court discussed, the waiver contained a severability provision that permitted the waiver to be enforced with respect to Moriana's individual PAGA claims. (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1925].) Even if, as Moriana contends, the application of the severability provision

is a question of contract interpretation and thus of state law, we agree with the Supreme Court's analysis.

5.2. The Non-Individual PAGA Claims

With respect to Moriana's non-individual PAGA claims, we remand for further proceedings in the trial court to determine how those claims should be resolved.

For the benefit of the trial court, we note that we are not persuaded by Viking's contention that the court is bound to follow the Supreme Court's analysis with respect to the non-individual PAGA claims pursuant to the law of the case doctrine, which provides that a decision made by an appellate court in an action binds both trial and appellate courts in subsequent proceedings in that same case. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) Although the Supreme Court weighed in on what the lower courts should have done with Moriana's non-individual claims (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1925]), several of the justices acknowledged that this question was one of state law. (*Id.* at pp. 1925–1926 (conc. opn. of Sotomayor, J.) ["if this Court's understanding of state law is wrong, California courts . . . will have the last word"]; *id.* at p. 1926 (conc. opn. of Barrett, J.) [discussion of non-individual claims was "unnecessary to the result" and "addresses disputed state-law questions"].) In support of its claim, Viking does not cite any California cases that address whether the law of the case doctrine applies to questions of pure state law addressed by a federal court in the same case, but instead relies only on a Ninth Circuit decision that generally

discusses the law of the case doctrine under that circuit's law (*Gonzalez v. Arizona* (9th Cir. 2012) 677 F.3d 383, 389, fn. 4).[3]

With respect to issues of state law, "the holding of the United States Supreme Court . . . 'although entitled to respect and careful consideration, would not be binding or conclusive on the courts of this state' [citation]"; rather, "we are controlled by the decisions of the California Supreme Court." (*Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149, 160–161.) Further, the United States Supreme Court's jurisdiction under 28 United States Code section 1257(a), "is limited to those judgments that concern the validity of a federal treaty or statute, the validity of a state statute under federal law, or a claim arising under federal law." (*Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 775.) In other words, "the high Court does not exercise jurisdiction over purely state-law issues." (*Phelps v. Alameda* (9th Cir. 2004) 366 F.3d 722, 729; see also *International Longshoremen's Ass'n, AFL-CIO v. Davis* (1986) 476

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[3] Moriana does not identify any California decisions addressing this issue, either, but points out that other courts have declined to follow the Supreme Court's analysis of issues of state law on remand. (E.g., *Bell v. State* (1964) 236 Md. 356, 368, on remand from *Bell v. Maryland* (1964) 378 U.S. 226; *Whole Woman's Health v. Jackson* (5th Cir. 2022) 23 F.4th 380, 385–389, on remand from *Whole Woman's Health v. Jackson* (2021) ___ U.S. ___ [142 S.Ct. 522, 211 L.Ed.2d 316].) In *Whole Woman's Health v. Jackson*, *supra*, 23 F.4th 380, the majority certified questions of state law to the Supreme Court of Texas that the United States Supreme Court had addressed (*id.* at pp. 386–389), notwithstanding a dissent arguing that it was barred from doing so by the law of the case doctrine. (*Id.* at pp. 389–393 (dis. opn. of Higginson, J.).)

U.S. 380, 387 [United States Supreme Court has "no authority to review state determinations of purely state law"].)

Adams v. Pacific Bell Directory (2003) 111 Cal.App.4th 93 is instructive on the issue before us. In *Adams*, the Ninth Circuit ruled that the action was not preempted by federal law, but, on remand, the state trial court granted summary judgment on the ground the action *was* preempted. (*Id.* at p. 97.) On appeal from that decision, the California Court of Appeal "recognize[d] that the law of the case doctrine is not absolute" but " 'merely a rule of procedure[,]' " and that California courts are "not required to adhere to decisions by the federal appellate courts, even on questions of federal law." (*Ibid.*) However, it noted that federal decisions are given "great weight," "particularly . . . in the context of their determination of federal law, as happened here." (*Id.* at pp. 97–98.) "[I]n this instance," the *Adams* court "believe[d] it [was] appropriate to apply the principles of the law of the case." (*Id.* at p. 98.)

Although the *Adams* court opted to apply the law of the case doctrine, *Adams* supports that federal decisions that are not binding on California courts are not presumptively law of the case. Unlike in *Adams*, the issue addressed here was one of state law and thus not entitled to deference beyond respectful consideration. Further, as Justice Barrett acknowledged in her concurrence in part, which was joined by Justice Kavanaugh and Chief Justice Roberts, the majority's discussion of Moriana's non-individual PAGA claims "addresse[d] . . . arguments not pressed or passed upon in this case." (*Viking River*, *supra*, 596 U.S. ___ [142 S.Ct. at p. 1926] (conc. opn. of Barrett, J.).) The same cannot be said of *Adams*, where the Ninth Circuit ruled upon a central dispute between the parties. (*Adams v. Pacific Bell Directory*,

supra, 111 Cal.App.4th at pp. 96–97.) Given these differences, we do not believe application of the law of the case doctrine is appropriate here.

Thus, while the trial court should duly consider the United State Supreme Court's analysis in *Viking River* when deciding how to dispose of Moriana's non-individual PAGA claims, we do not believe it is required to dismiss those claims upon remand. Of course, the court may do so. Alternatively, it may conclude that Moriana has standing under *Kim v. Reins Int'l Calif., Inc.*, *supra*, 9 Cal.5th 73 to pursue her non-individual PAGA claims in court, or may stay proceedings as to the non-individual PAGA claims pending the California Supreme Court's ruling on this issue in *Adolph v. Uber Technologies, Inc.*, review granted July 20, 2022, S274671. (See *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 141 [a court has " 'inherent power, in its discretion, to stay proceedings when such a stay will accommodate the ends of justice' "].)

DISPOSITION

The order denying Viking's motion to compel arbitration is reversed and the matter is remanded for further proceedings in accordance with this opinion. Because reversal is the result of an intervening change in the law, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

NGUYEN, (KIM) J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.