S 241655

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAZMINA GERARD, KRISTIANE MCELROY, AND JEFFREY CARL,
Plaintiffs-Appellants

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,
Defendant-Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE,
CASE NO. G048039

FROM THE SUPERIOR COURT, COUNTY OF ORANGE
CASE NO. 30-2008-00096591, ASSIGNED FOR ALL PURPOSES
TO JUDGE NANCY WIEBEN STOCK, DEPT. CX 105

APPELLANTS' ANSWER BRIEF TO AMICUS CURIAE BRIEF FILED BY CALIFORNIA HOSPITAL ASSOCIATION

Unfair Competition Case, Service on Attorney General and District Attorney required by Bus. & Prof. Code § 17209

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I. INTRODUCTION

The California Hospital Association ("CHA") has filed an amicus curiae brief in support of Defendant-Respondent Orange Coast Memorial Medical Center ("OCMMC"). Nothing in CHA's brief assists OCMMC.

First, CHA argues that in enacting Senate Bill 60 ("SB 60"), the Legislature intended to empower the Industrial Welfare Commission ("IWC") with authority to adopt wage orders *inconsistent* with Labor Code Section 512. As the tale goes, when the Legislature enacted Senate Bill 88 ("SB 88") shortly thereafter, as emergency legislation, SB 88 "took away" the authority to adopt wage orders inconsistent with the statute, but only prospectively. As discussed *infra*, the assertion is plainly wrong as it contradicts the language of the Labor Code and its legislative history.

Second, to distract from the real issues, CHA argues that the IWC determined that the meal period waiver in Wage Order 5 section 11(D) was consistent with the health and welfare of workers. It is not disputed that the IWC made such a determination. However, its determination conflicts with the parameters of its authority as conveyed by the Legislature, which had different ideas as to the welfare of workers as is evidenced by Section 512.

Third, CHA presents support for the Court of Appeal's determination that Wage Order 5 was always valid because it was "adopted" before Senate Bill 88 ("SB 88") was effective. As discussed below, the argument is contrary to legislative history,

illogical, and without legal support.

Fourth, CHA argues that a decision invalidating the meal period waiver cannot be given retroactive effect because hospitals relied on the wage order. The argument ignores that this Court's interpretation of the former law – i.e. what the law *was* – is to be given retroactive effect and CHA and its members did not rely on any contrary decision or body of law. Nor are CHA's concerns about "retroactive liability" and "due process" valid. Requiring payment of wages owed does not violate an employer's due process rights.

Finally, CHA argues that it is "permissible and appropriate" to enforce Senate Bill 327 (SB 327) retroactively to wipe away millions of dollars of premium pay owed to thousands of healthcare workers. Obviously, it is not. It is healthcare workers' due process rights that are at jeopardy here, not the hospitals'.

II. ARGUMENT

A. The IWC Never Had Authority to Enact Wage Order 5 Section (D)

In their opening brief, Appellants argue that the IWC's authority to adopt meal period waivers under the Assembly Bill 60 ("AB 60") has *always* been limited and SB 88 *confirmed* that legislative intent. (AOB at pp. 20-26.) Appellants summarized their argument as follows: "the Senate third reading analysis for Senate Bill No. 88 confirmed that it was the Legislature's intent that the IWC *never had authority* to adopt or amend work orders inconsistent with the specific provisions of section 512." (AOB at

p. 26.)[1]

CHA's amicus curiae brief presents three arguments in response. First, CHA argues that the language "notwithstanding any other provision of law" in the original (AB 60) version of section 516 indicates that the Legislature originally intended to authorize the IWC to adopt meal period waivers inconsistent with Section 512 but changed the law in SB 88 after Wage Order 5 was "adopted." (Amicus Br. pp. 14-15, 17.) The argument fails because it is inconsistent with AB 60 and the legislative history of SB 88 clarifies that was not the Legislature's intent when it enacted Sections 512 and 516 in AB 60.

Second, CHA argues that Appellants' position – that the IWC never had authority to adopt wage orders inconsistent with Section 512 – "ignores this Court's guidance in *Brinker*." (Amicus Br. pp. 15-16.) However, no portion of *Brinker* states or implies that this Court found that in enacting AB 60 the Legislature intended to authorize the IWC to adopt or amend work orders inconsistent with the provisions of section 512.

Finally, CHA argues that Appellant's position is "at odds with *Bearden*"[2] because the *Bearden* court supposedly found that

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[1] CHA argues Appellants raised the argument that Wage Order 5 Subdivision 11(D) was "void at its inception" "[f]or the first time in their reply brief." (Amicus Br. pp. 13, 14.) However, Appellants argued "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void ..." (AOB p. 22) and then concluded, as stated above, that "the IWC never had authority to adopt or amend work orders inconsistent with the specific provisions of section 512. (*Id.* p. 26)

[2] *Bearden v. U.S. Borax Inc.* (2006) 138 Cal.App.4th 429 ("*Bearden*").

the IWC originally had authority to adopt wage orders inconsistent with Section 512 and then "lost" that authority as a result of SB 88. (Amicus Br. pp. 15-16.) The argument fails because the issue of the IWC's authority prior to SB 88 was not before the *Bearden* court and the court made no determination that the IWC "lost" any previously-held authority.

1. The "Notwithstanding Any Other Provision of Law" Language in Section 516 as Originally Enacted is Irrelevant Because the Legislature Clarified the Law in SB 88

Labor Code section 516, as originally enacted, provided:

> **Notwithstanding any other provision of law**, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Stats. 1999, ch. 134 § 10, added emphasis.)

In September 2000, Section 516 was amended by SB 88 to read as follows:

> **Except as provided in Section 512**, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Stats. 2000, ch. 492, § 4, eff. Sept. 19, 2000. added emphasis.)

CHA argues that the term "[n]otwithstanding any other provision of law" in former Section 516 establishes that the Legislature intended in enacting AB 60 to authorize the IWC to adopt meal period orders "'despite the existence of' Section 512."

(Amicus Br. p. 15.) According to CHA's theory, SB 88 changed the law, but did not affect wage orders already "adopted" under AB 60. (Amicus Br. pp. 17, 25-30.)[3]

CHA's argument is contradicted in the first instance by the language of AB 60, which only allowed the IWC to "adopt regulations consistent with this measure." The introduction to the bill states:

> Existing wage orders of the commission prohibit an employer from employing an employee for a work period of more than 5 hours per day without providing the employee with a meal period of not less than 30 minutes, with the exception that if the total work period per day of the employee is no more than 6 hours, the meal period may be waived by mutual consent of both the employer and employee.
>
> This bill would codify that prohibition and also would further prohibit an employer from employing an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, **with a specified exception.**

(Stats. 1999, ch. 134, added emphasis.) The "specified exception" referenced in the bill is the prohibition against second meal period waivers in shifts over 12 hours contained in Section 512. AB 60 provides: "... except that if the total hours worked is no more than 12 hours, the second meal period may be waived by

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[3] The IWC "adopted" Wage Order 5 subdivision 11 (D) on June 30, 2000, which the appellate court held was "under the AB 60 version of section 516(a)." (*Gerard v. Orange Coast Memorial Medical Center* (2017) 9 Cal.App.5th 1204, 1211.)

mutual consent of the employer and the employee only if the first meal period was not waived.) (Stats. 1999, ch. 134 § 10.) Thus, just as the Legislature intended AB 60 to prohibit employers from failing to provide first and second meal periods, it also intended to prohibit employers from obtaining waivers of second meal periods from employees on shifts over 12 hours. It did not intend to authorize the IWC to adopt regulations *inconsistent* with that scheme.

CHA argues that this reading of AB 60 would render the "notwithstanding any other provision of law" phrase in Section 516 "superfluous." (Amicus Br. p. 15.) It was not. SB 88 "clarified" that the IWC had authority to adopt working conditions and orders with respect to meal periods notwithstanding other laws *except* Section 512. As Appellants have already explained, SB 88 was passed on September 19, 2000, soon after IWC's improper adoption of Wage Order 5 subdivision 11(D) on June 30, 2000. (See AOB at pp. 25-26. 29, 30; ARB at pp. 12, 13.) Briefly, the Senate third reading analysis for SB 88 states:

> This bill **clarifies** two provisions of the Labor Code enacted in Chapter 134. Labor Code Section 512 codifies the duty of an employer to provide employees with meal periods. Labor Code Section 516 establishes the authority of IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest. This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512. ...

(Stats. 2000, ch. 492, § 5, added emphasis.)

Material changes in language of a statute, such as in the amended Section 516, can simply indicate an effort by the Legislature to clarify the statute's true meaning. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 923, citing *Western Security Bank* (1997) 15 Cal.4th 232, 243.) "One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation[.]" (*Ibid.*) A legislative enactment "which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute ...."

Here, the Legislature moved promptly after Wage Order 5 was "adopted," and even before the wage order was effective, and clarified the true meaning of Section 516. Thus, Section 516 as amended "must be accepted as the legislative declaration of the meaning of the original act."

2. *Brinker* Does Not Support CHA's Position That the Legislature Intended to Authorize the IWC to Adopt Wage Orders Inconsistent with Section 516

CHA next argues that Appellants' position – that the IWC never had authority to adopt wage orders that contradict Section 512 – "ignores this Court's guidance in *Brinker*." (Amicus Br. pp. 15-16, quoting *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038 ("[t]he declared intent in enacting section 512 was not to revise existing meal period rules but to codify them *in part*," emphasis added by CHA.) CHA's cherry-picking of

this sentence and unwarranted stress on the words "in part" does not signal "guidance" supporting CHA's position.

The Court's discussion of the enactment of AB 60 in *Brinker* does not state or in any way imply that when AB 60 was enacted, the Legislature intended that the IWC be authorized to adopt wage orders that contradict the meal period requirements of Section 512. On the contrary, *Brinker* explains that the Legislature was "[t]roubled by [the IWC's] weakening of employee protection" and "[a]s part of its response to the IWC's rollback of employee protections, the Legislature wrote into statute various guarantees that previously had been left to the IWC, including meal break guarantees. (§ 512, subd. (a).)" (*Brinker*, 53 Cal.4th at pp. 1037-1038.) Thus, the legislative history described in *Brinker* supports the position of Plaintiffs.

3. *Bearden* Does Not Support CHA's Position that Prior to SB 88 the IWC Had Authority to Adopt Wage Orders Contrary to Section 512

Finally, CHA argues that Appellants' position that the IWC never had authority to adopt wage orders contrary to section 512 is "at odds with *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429." (Amicus Br. p. 16.) According to CHA, *Bearden* recognized that before SB 88 the IWC had "broad authority to adopt meal period provisions," but "lost the authority to adopt meal period provisions inconsistent with Section 512" after the enactment of SB 88. (*Id.* at pp. 16-17.) *Bearden* made no such determination.

First, *Bearden* simply does not state that the IWC had

authority prior to SB 88 to adopt meal provisions inconsistent with Section 512, or that the IWC "lost" that authority because of SB 88. (See *Bearden*, 138 Cal.App.4th at pp. 437-438.) *Bearden* simply does not contain any such observation.

Second, *Bearden* had no occasion to consider whether the IWC had authority prior to SB 88 to adopt wage orders inconsistent with Section 512 and then "lost" that authority. As CHA itself points out, the wage order in *Bearden* was adopted *after* the enactment of SB 88. (Amicus Br. p. 17 fn.1.)

In fact, *Bearden* simply explained that Borax's reliance on the original version of Section 516 containing the "notwithstanding any other provision of law" language was misplaced because the amended version of the statute with the "[e]xcept as provided in Section 512" language by then applied. (*Bearden*, 138 Cal.App.4th at pp. 437-438.) The issue of the IWC's authority prior to SB 88 simply was not before the *Bearden* court and "it is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

Third, CHA seizes on the statement in *Bearden* that "[t]he impact of the 2000 amendment was significant" to argue that the court's use of the sole word "significant" somehow telegraphs a finding in *Bearden* that the IWC had authority to adopt wage orders inconsistent with Section 512 prior to SB 88. The argument is not persuasive. The 2000 amendment was "significant" because it foreclosed Borax's argument that former Section 516 applied in that case.

In sum, Appellants' position that the IWC never had authority to adopt wage orders inconsistent with Section 512 is well supported by the legislative history and case law. CHA's contrary position lacks any support.

B. The Language of Labor Code Section 516 Regarding the Health and Welfare of Workers is Not Relevant to the Analysis

CHA argues that the IWC was required to adopt only meal period provisions that it determined, after public review and comment, to be consistent with worker health and welfare. It further argues that it the meal period waiver provision was consistent with the health, safety and welfare of employees in the healthcare industry. CHA concludes, "Plaintiffs *do not contest* the IWC's findings. It is, therefore, undisputed that the Waiver Provision is consistent with worker health and welfare." (Amicus Br. p. 19.) CHA then presents a "historical record" of the meal period waiver spanning the period from 1993 to the enactment of SB 327 in 2015. (Amicus Br. pp. 20-25.)

To be clear, Plaintiffs do not contest that the IWC *made* such findings at the behest of health care representatives. (See *Brinker*, 53 Cal.4th at p. 1047 ["health care representatives persuaded the IWC to at least preserve expanded waiver rights for their industry."]) However, those findings directly contradict the Legislature's conflicting determination in enacting AB 60 and SB 88 that employers should not be permitted to obtain second meal period waivers from employees on shifts of more than 12

hours.[4]

The objective truth or falsity of the IWC's findings in June of 2000, however, is a moot point. As already discussed, the Legislature originally intended in enacting section 516 that the IWC not have authority to enact wage orders inconsistent with section 512. Therefore, whether or not the meal period waivers were truly consistent with the health, safety and welfare of employees is irrelevant to the analysis of whether they violated the law prior to the enactment of SB 327.

C. CHA'S Argument That Wage Order 5 Section (D) is Valid Because It Was "Adopted" Prior to the Enactment of SB 88 is Without Merit

1. CHA's Argument is Contrary to the Reasoning in *Lazarin*

CHA presents an argument that because the IWC "adopted" Wage Order 5 on June 30, 2000, before SB 88 amended Section 516 on September 19, 2000 to restrict the IWC's authority to adopt wage orders that conflict with Section 512, the meal period waiver in section 11(D) was within the IWC's authority. (Amicus Br. pp. 25-30.) A similar argument was rejected in *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560.

Lazarin, like *Bearden*, involved the issue of whether the IWC exceeded its authority when it adopted Wage Order 16

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[4] Section 512 provides in pertinent part, "An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

section 10(E). Similar to Wage Order 5 section 11(D), Wage Order 16 section 10(E) contained an additional exception to the meal period provisions in Section 512 by allowing employees under collective bargaining agreements to waive second meal periods on shifts over 12 hours. (*Lazarin*, 188 Cal.App.4th at 1564.) As *Lazarin* explained, the *Bearden* court had already correctly determined that Section 10(E) conflicts with Section 512 and is therefore invalid. (*Id.* at 1575.) The defendant urged the court to reconsider *Bearden* and find that it had erred based on the "adoption" of Section 514. (*Id.*)

The defendant's argument was that Wage Order 16 section 10(E) was valid when it was "adopted" on October 23, 2000, because it was authorized by former Section 514, which exempted employees under collective bargaining agreements from the entire chapter (i.e. the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, Stats. 1999, ch. 134.)[5] Thus, "[f]ar from being an act in excess of its authority, when it adopted wage order 16, section 10(E), the IWC was simply including the identical exemption already contained in former Section 514." Similar to Section 516 in this case, Section 514 was later amended by SB 1208 on December 2, 2002, *after the adoption of*

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[5] Former Section 514 then provided in pertinent part: "[t]his chapter does not apply to an employee covered by a valid collective bargaining agreement ..." Wage Order 16 Section 10(E) provides in pertinent part: "Subsections (A), (B), and (D) of Section 10, Meal Periods, shall not apply to any employee covered by a valid collective bargaining agreement ..." Subsection (B) refers explicitly to the prohibition of second meal periods on shifts over 12 hours in Section 512.

Wage Order 16, to "clarify" that *only* two sections of chapter 134 did not apply to unionized workers, neither of which were Section 512. (See SB 2308 "Sections 510 and 511 do not apply to an employee covered by a valid collective bargaining agreement ...".)

The *Lazarin* court was not persuaded that the "adoption" of Wage Order 16 under the former Section 514 before it was amended in 2002 validated the IWC's wage order allowing second meal period waivers on shifts over 12 hours. First, "even if adoption of the section 10(E) exemption had at one point been within the authority of the IWC, subsequent to January 1, 2002 that provision was invalid because of its conflict with the express provisions of sections 512 and 516." *Lazarin*, 188 Cal.App.4th at 1575.

Second, the court relied on the legislative history of SB 1208. Like the legislative history of SB 88, the third reading analysis of SB 1208 states, "[t]his bill clarifies existing law." The court ultimately found "both the language of [SB 1208] and its legislative history confirm that it had never been the Legislature's intent to exclude union-represented employees from any of the protections of the 1999 Restoration Act other than the overtime and alternative workweek provisions of sections 510 and 511." (*Lazarin*, 188 Cal.App.4th at p. 1575.) Moreover, "[t]hat legislative declaration significantly reinforces the *Bearden* court's conclusion the IWC exceeded its authority when it adopted Wage Order 16, section 10(E), excluding union-represented employees from the protections of section 512." (*Id.* at p. 1576.)

The reasoning in *Lazarin* is persuasive here. Even if Wage Order 5 section 11(D) had at one point been within the authority of the IWC, after SB 88's enactment it was invalid because of its conflict with sections 512 and 516. Moreover, the third reading analysis for Senate Bill No. 88, like the third reading analysis for Senate Bill No. 1208, confirms that the IWC exceeded its authority when it adopted Wage Order 5 section 11(D) in the first place.

2. CHA's Argument is Illogical and Without Legal Support

Because the IWC never had authority to adopt Wage Order 5 section 11(D) to the extent it conflicts with the provisions of Section 512, CHA's attempt to distinguish between when the wage order was "adopted" and when it was supposedly "effective" in order to validate the order is irrelevant. Nonetheless, CHA presents two arguments in support of its position that the IWC had authority to enact the wage order prior to the enactment of SB 88.

CHA's primary argument is that unless the Court finds that the wage order was validly adopted, and that its second meal period waiver provision on shifts over 12 hours survived SB 88, there will be cataclysmic results. Specifically, a decision that the meal period waiver in Wage Order 5 section 11(D) was not valid when it was adopted would "upend California's administrative law scheme," "create an irreconcilable tension in the field of administrative law" and "create[] conflict among rulemaking statutes." (Amicus Br. pp. 25-26, 30.)

The argument defies logic. CHA asks the Court, in

construing the statutes at issue here, to abandon the rules of statutory construction and ignore legislative history based on imaginary dire consequences. Although CHA fails to explain exactly what those consequences are or how a decision in favor of Plaintiffs could lead to such calamities, it appears that CHA is suggesting it would "upend" the California's Administration Procedures Act ("APA"). (Amicus Br. p. 26.) However, IWC regulations (i.e. wage orders) are explicitly exempted from the APA. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569; Labor Code § 1185.)

CHA's other argument appears to be that because the date a statute or ordinance is "adopted" may be different than the date it becomes "effective," the Legislature must have intended that the illegal meal period waiver in Wage Order 5 survive the enactment of SB 88. (Amicus Br. pp. 26-30.) The two cases cited by CHA do not lend any support to this theory. CHA first cites *Ross v. Board of Retirement of Alameda County Emp. Ret. Ass'n* (1949) 92 Cal.App.2d 188, 193 for the bare proposition that the date of "adoption" of a law may be different than the law's "effective date." However, *Ross* simply observed that the date of adoption or passage of an ordinance or statute is not necessarily its effective date. The court made this observation in connection to its analysis of whether the petitioner's right to retirement benefits had vested. (*Id.* at195.) *Ross* is of no assistance in divining the Legislatures intent in enacting AB 60 and SB 88.

Gleason v. City of Santa *Monica* (1962) 207 Cal.App.2d 458 is similarly unavailing. *Gleason* was essentially a declaratory

relief action that sought to invalidate an ordinance approving a redevelopment plan. The date of "adoption" of the plan was significant because an action to challenge such a plan "must be brought within 60 days of the date of adoption" or is barred. Again, CHA does not explain how the case applies here probably because, like *Ross*, it has no application.

Finally, CHA states, "it would be illogical to conclude that the Legislature, in prohibiting the IWC from 'adopting' certain regulations, meant to invalidate already-adopted regulations because they were not 'effective.'" (Amicus Br. p. 30.) However, it is perfectly logical that, in enacting SB 88, the Legislature intended to invalidate any wage orders inconsistent with Section 512, whether they were "effective" or not. As already discussed, the Legislature said as much by indicting that it had "clarified" the law.

D. Any Decision That the Second Meal Period Waiver Provision in Wage Order No. 5 Was Invalid Should Be Given Retroactive Effect

CHA argues that a decision that the IWC lacked authority to adopt the meal period waiver provision should not be given retroactive effect because hospitals reasonably relied on Wage Order 5. (Amicus Br. pp. 30-37.) The argument is contrary to well established law.

1. A Judicial Decision in the First Instance is Given Retroactive Effect

The general rule is that judicial decisions are given retroactive effect. (*Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 318.) "This rests on the theory that the new decision does not

really pronounce 'new' law but rather states what the law always was." (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 796.) "Appellate decisions in *civil* cases are *almost always* given *retroactive* effect and applied to all pending litigation."[6]

Any such exception to the general rule of retroactivity, however, is justified only "when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule." (*Newman v. Emerson Radio Corp* (1989), 48 Cal.3d 973, 983; accord, *Laird v. Blacker* (1992) 2 Cal.4th 606, 620.) However, "***this exception to the principle of retroactivity is inapplicable when the court is deciding a legal question in the first instance***, rather than overturning prior appellate decisions." (*Lazarin*, 188 Cal.App.4th at pp. 1581-1582 [emphasis added].) (See *Brennan,* 25 Cal.4th at p. 318 ["We have not overruled *any* decision predating the [operative events], much less a prior decision of this court. [Citation.] We have certainly not disapproved 'of a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities.' [Citation.] No reason appears not to apply today's decision to this case."]; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 660-661 [same].)

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[6] (Eisenberg et al. Cal. Practice Guide: Civil Writs and Appeals (The Rutter Group 2013) ¶ 14:198 p. 14-82.1 [citing *Grafton Partners LP v. Superior Court* (2005) 36 Cal.4th 944, 967, *Rose v. Hudson* (2007) 153 Cal.App.4th 641, 646, *Grobeson, supra,* and referring to numerous cases where exceptions to the general rule were held not to apply at ¶ 14:198.4 pp. 14-82.5-14-82.8].)

In *Donaldson* v. *Superior Court* (1983) 35 Cal.3d 24, 36-37 this Court explained:

> In determining whether a decision should be given retroactive effect, the California courts undertake first a threshold inquiry, inquiring whether the decision established new standards or a new rule of law. If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises. [Citations.] Neither is there any issue of retroactivity when we resolve a conflict between lower court decisions, or address an issue not previously presented to the courts. In all such cases the ordinary assumption of retrospective operation [citations] takes full effect.

As a threshold matter, the general rule of retroactivity applies where, as here, a court construes a statute to determine its intent. (*People v. Lopez* (1993) 21 Cal.App.4th 225, 229.) Citing *People v. Garcia* (1984) 36 Cal.3d 539, 549, the *Lopez* court stated, "[w]henever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is *essential* to accomplish that aim." (*Lopez, supra,* 21 Cal.App.4th at p. 229 [emphasis added].) This Court further explained in *Garcia,* "[i]f in addition, as in the present case, the decision represents the first authoritative construction of the enactment, no history of extended and justified reliance upon a contrary interpretation will arise to argue against retroactivity." (*Garcia, supra,* 36 Cal.3d at p. 549.) Stated succinctly, "[a] new rule of law is not established when our Supreme Court merely gives 'effect to a statutory rule that the courts had theretofore misconstrued ...'"

(*Lopez, supra,* citing *People* v. *Guerra* (1985) 37 Cal.3d 385, 399, fn. 13.)

Here, a decision reversing the court of appeal's judgment and partially invalidating Wage Order No. 5 will not disturb a "settled rule." The Court's decision would be the first and only authoritative construction of the validity of the Wage Order No. 5 subdivision 11(D) before the enactment of SB 327. If this Court determines that the meal period waiver was invalid under former Section 516, it will not have overruled *any* decision of any court of appeal (other than the decision now under review) or of this Court. Nor will the Court have disapproved "of a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities." *There are no lower court decisions* holding that the meal period waiver provision in the wage order is valid. Moreover, the only case authorities construing the validity of second meal exemptions (*Bearden* and *Lazarin*) in a similar wage order (Wage Order No. 16.) held the wage order to be partially invalid.

2. There Are No Considerations of Fairness or Public Policy That Compel a Departure from the Rule of Retroactivity

The rare departures from the general rule of retroactivity are justified only "when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 983.) The concept of "fairness" implicates (1) reliance on the former rule of law; and (2) the foreseeability of a change in law. (See

Estate of Propst (2010) 50 Cal.3d 448, 463; *Newman, supra,* at pp. 985-86.) Considerations of public policy include the purpose to be served by the new rule and the effect of retroactive application on the administration of justice. (*Newman, supra,* at pp. 983-84.) Here, OCMMC (and by extension other hospitals) did not rely on any judicial decision interpreting Wage Order No. 5 subdivision 11(D) (because there were none), were on notice that their meal period waiver violated the Labor Code, and considerations of public policy favor retroactive application.

(a) OCMMC and Other Hospitals Did Not Rely on a Former Rule of Law

CHA argues that reasonably relied, not on any judicial interpretation, but on the wage order itself. (Amicus Br. p. 33.) The argument fails because the wage order is not a "former rule of law."

The cases cited by CHA all demonstrate "reliance" on anything less than a body of appellate law is not reasonable reliance on a former rule of law. (Amicus Br. p. 31.) (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372 ("[t]he Court of Appeal's construction of section 98.2(c) ... represents a clear break from the *Triad* and *Cardenas* courts' construction of the statute"); *Camper v. Workers Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688 ("our decision should be applied prospectively only, because our holding will result in hardship for all litigants who relied upon the contrary rule announced in *Villa, supra,* 156 Cal.App.3d 1076"); *Woods v. Young* (1991) 53 Cal.3d 315, 330 (seven unanimous appellate opinions "established a settled rule upon which plaintiff could reasonably rely"); *Claxton v. Waters*

(2004) 34 Cal.4th 367 (overruling three court of appeal decisions and changing the law regarding the admissibility of certain extrinsic evidence in workers compensation).[7]

CHA cites *Moradi-Shalal v. Fireman's Find Oms. Cos.* (1988) 46 Cal.3d 287, 305 for the proposition that prospective application is appropriate "where ... a statute has received a given construction by a court of last resort, and contracts have been made or property rights acquired in accordance with the prior decision." (Amicus Br. p. 32.) *Moradi-Shalal*, however, does not hold that retroactive application is inappropriate wherever "property right" or "contracts" are somehow implicated. The Court held that prospective application may be appropriate where "contracts have been made or property rights acquired *in accordance with the prior decision.*" (*Id.* added emphasis.) The Court was referring to its opinion in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880 which held that Insurance Code section 790.03, subdivision (h) created a private cause of action against insurers who commit the unfair practices enumerated in that provision. (*Moradi-Shalal*, 46 Cal.3d at p. 292.) Unlike in *Moradi-Shalal*, CHA cannot point to a Supreme Court decision, or any decision for that matter, on which OCMMC or hospitals relied in utilizing second meal period waivers in shifts over 12 hours. Accordingly, the types of concerns that exited when the Court overruled *Royal Globe* in *Moradi-Shalal* do not exist here.

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[7] CHA also cites *Isaacs v. Bowen* (2d. Cir. 1989) 865 F.2d 468, 473. The case concerns "the doctrine of legislative reenactment" and has no application here.

In sum, CHA cannot establish that OCMMC or any hospital relied on a former rule of law.

(b) OCMMC and Hospitals Were on Notice of the Law

The second factor under "fairness" focuses on whether litigants can "foresee the coming change in the law." (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 153.) Here, it was eminently foreseeable that a court would invalidate Wage Order 5 to the extent it conflicts with section 512. As discussed above, Labor Code § 516 as amended effective September 19, 2000 *expressly* limited the authority of the IWC to issue work orders inconsistent with section 512. Moreover, OCMMC and hospitals had the benefit of case law invalidating the same type of meal period waiver in Wage Order 16.

In *Lazarin*, 188 Cal.App.4th 1560, the court considered the issue of whether the decision in *Bearden*, holding that Wage Order 16 Section 10(E) conflicts with Labor Code Section 512 and is invalid, should be applied retroactively. (*Lazerin*, 188 Cal.App.4th at p. 1580.) The *Lazarin* court found that as a result of the 1999 Restoration Act, the employer was *on notice* that its employees could not be denied statutorily mandated meal periods. It stated:

> [E]mployers in this state have been on clear notice pursuant to § 512, subdivision (a) (as reinforced by the provisions of § 516 limiting the authority of the IWC to adopt or amend wage orders with respect to meal periods), they were required to provide employees with a second uninterrupted 30-minute meal period when they worked more than 10 hours in a day.

(*Lazarin*, 188 Cal.App.4th at p. 1583.)

After determining that the employer "was on notice [that] its failure to provide required meal periods was unlawful" (and therefore unable to establish reasonable reliance), the *Lazarin* court went on to consider the defendant's argument that it was "somehow unfair" to apply the *Bearden* decision retroactively to "punish an employer for conduct apparently excepted from penalties by the IWC." (*Lazarin*, 188 Cal.App.4th at p. 1583.)

While recognizing that the court's retroactive application of a decision subjecting a person to "penalties" could implicate due process concerns, the court nonetheless concluded that it would *not* be unfair to retroactively apply the decision because the remedy that the employees would receive – an additional hour of pay under Labor Code section 226.7 – "is properly understood as compensation to employees for injuries they have suffered." (*Id.* at p. 1584 [citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1111-1113].) "Having received the benefit of its employees working without statutory mandated meal periods, there is nothing unfair about requiring TWI to compensate them in accordance with the formula prescribed by the Legislature." (*Id.*)

The *Lazarin* court concluded:

> In sum, there is no compelling reason of fairness or public policy that warrants an exception to the general rule of retroactivity for a judicial decision invalidating section 10(E) of Wage Order 16. Petitioners are entitled to seek premium pay under section 226.7 for any failure by TWI to provide mandatory second meal periods before the *Bearden* decision that

falls within the governing limitations period.

(*Lazarin, supra*, 188 Cal.App.4th at p. 1584.)

Here too, there are no considerations of fairness or public policy that could weigh against retroactive application of the decision being considered by the Court.

(c) Public Policy Favors Retroactive Application

Public policy also supports retroactive application of a decision invalidating the Wage Order to the extent it conflicts with section 512(a). Considerations of public policy include the purpose to be served by the new rule, and the effect of retrospective application on the administration of justice. (*Newman, supra*, 48 Cal.3d at pp. 983-84.)

Here, the purpose of a decision partially invalidating Wage Order 5 subd. 11(D) would be to vindicate the original meaning of section 516 limiting the authority of the IWC to permit waivers of meal periods that conflict with section 512. What is at stake here is the potential recovery of premium wages owed to employees of OCMMC over a period of years. Retroactive application is essential to accomplishing that aim. (*People v. Garcia, supra*, 36 Cal.3d at p. 549 ["[w]henever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim."])

The administration of justice, moreover, would not be ill-served by retroactive application. This is a case where a particular employer chose to interpret the law in a manner that permitted it to deprive health care employees of the premium

that they are owed – as wages under section 226.7 – for failing to provide a meal period required by section 512. Now that the law has changed, that is not a situation that will likely repeat itself in the future and burden the judicial system.

E. CHA Has Failed to Identify Any Relevant Due Process Concerns

As indicated above, *Lazarin* held that retroactive application of its decision invalidating the meal period waiver in Wage Order 16 ***would not trigger due process concerns*** because defendant was on notice of the law and because premium pay under section 227.6 is not a "penalty." (*Lazarin*, 188 Cal.App.4th at 1583.) That reasoning applies equally here. The few cases cited by CHA on the due process issue do not assist it.

CHA cites *Kreisher v. Mobile Oil Corp.* (1988) 198 Cal.App.3d 389, 402 for the proposition "[t]he announcement of a legal principle ... furnishes notice of what is allowed or prohibited." (Amicus Br. p. 41.) This is essentially the same argument rejected in *Lazarin* when it determined the employer was on notice of the law. (*Lazarin*, 188 Cal.App.4th at 1583.) Moreover, the words omitted by CHA in their ellipsis are "whether by the legislature or the courts." (In *Kreisher*, the court did not retroactively penalize Mobile because it reasonably relied on a prior court opinion. (*Kreisher*, 198 Cal.App.3d at 400.) Here, OCMMC relied on neither in construing Wage Order 5 in a manner inconsistent with Section 512, Section 516 as amended, *Bearden* and *Lazarin*.

CHA next cites *Olszewski v. Scripts Health* (2003) 30 Cal.4th 798, 829. (Amicus Br. p. 41.) Although not explained by

CHA, the cite leads to this quotation in *Olszewski:* "Moreover, 'retroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties, denies due process.'" *Olszewski, supra,* citing *Olszewski* (1998) 17 Cal.4th 396, 429. As already explained, premium pay under Section 227.6 is not a "penalty." Accordingly, *Olszewski* does not assist CHA.

Lastly, CHA cites *Landgraf v. USI Film Products* (1994) 511 U.S. 244 for the proposition that "individuals should have an opportunity to know what the law is and to confirm their conduct accordingly. (Amicus Br. p. 41.) The case raised the question of whether new legislation creating a right to recover compensatory and punitive damages for certain violations of Title VII should apply retroactively. *Id.* at 286. Applying the presumption against statutory retroactivity, the United States Supreme Court found that it should not. *Id.* at 286. *Landgraf* provides no support for CHA's argument hospitals' due process rights would be violated by a decision of this Court determining that the meal period wavier provision in Wage Order 5 was always invalid, thus entitling healthcare workers to payment of premium wages that they are owed.[8]

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[8] CHA also quotes out of context *Castaneda v. Holcomb* (1981) 114 Cal.App.3d 939, 945-946. *Castanda* is a miscellaneous case regarding interpretation of an ordinance. CHA does not explain its application to this case because it has none. For example, this case does not concern applying the rules of statutory interpretation to Wage Order 5 section 11(D).

F. CHA's Argument That it "Permissible and Appropriate" to Retroactively Apply SB 327 to Take Away Healthcare Workers of Vested Wages Lacks Merit

Misapplying *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 189 CHA states simply, and incorrectly, that healthcare workers' due process rights would not be violated if the Court applied SB 327 retroactively and wiped out millions of dollars of premium wages owed to those workers because they did not "rely" on the former law. (Amicus Br. p. 44.) This argument lacks merit.

In fact, *Fellows* states "Even in the face of specific legislative intent, retrospective application is impermissible if it 'impairs a vested ... right without due process of law.'" (*In re Marriage of Fellows* (2006) 39 Cal.4th 179,189 [quoting *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 447]). There can be no doubt that healthcare workers have a vested right in premium wages that they are owed. "Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime." (*Murphy* 40 Cal.4th at 1108.)

Fellows actual states that in evaluating a due process claim, courts consider two groups of factors: (1) the significance of the state interest served by the law and the importance of the retroactive application of the law to the effectuation of that interest; and (2) the extent of reliance upon the former law, the

legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions. (*In re Marriage of Fellows*, 39 Cal.4th 179, 189.)

Here, the state interest served by SB 327 appears on the face of the bill: "(b) Given the uncertainty caused by a recent appellate court decision, *Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285, without immediate clarification, hospitals will alter scheduling practices." (SB 327, section 1(b).) The state interest (that hospitals will not have to alter scheduling practices) is fully effectuated by prospective application of the statute.

CHA does not identify the state interest at issue or explain how retroactive application of SB 327 would effectuate that interest. Indeed, it would not. The purported state interest in maintaining hospital schedules has been served. Retroactive application is not only irrelevant to that interest; it can only serve to harm the rights of healthcare workers. Thus, the "state interests" factor of the analysis weighs against retroactive application of SB 327.

With respect to reliance, CHA's argument is "[e]mployees who *voluntarily* signed a second meal period waiver had no expectation of taking a second meal period or of receiving premium pay for missing that meal period." (Amicus Br. p. 44.) The idea, unfounded, is that hospital employees wanted to waive second meal periods and therefore it would not "violate due process to take away employees 'vested rights' to premium pay."

(*Id.*)

The notion that employees who signed illegal meal period waivers, likely without knowing the waivers violated the Labor Code and entitled them to premium wages, were accomplices to their own Labor Code violations and deserve to have their premium pay taken away is abhorrent. California has a fundamental policy of *protecting* earned wages. (*Vasquez v. Franklin Management Real Estate Find, Inc.* (2013) 222 Cal.App.4th 819, 829-831.) That policy is expressed through the Labor Code, and healthcare employees are *entitled* to rely on the provisions of the Labor Code, including section 512, former section 516 and section 226.7, to protect those wages.

Moreover, healthcare workers reliance on the protections of the Labor Code was *legitimate*. While the extent of healthcare workers' reliance on the former law may be "difficult to pinpoint with accuracy ... the legitimacy of that reliance is clear." (*In re Marriage of Fabian* (1986) 41 Cal.3d 440, 450.) Because healthcare workers' *legitimately* relied on the provisions of the Labor Code at issue here before SB 327, the reliance factors also weigh against retroactive application of SB 327.

Accordingly, depriving healthcare workers of their vested rights to premium wages by retroactive application of SB 327 would violate due process.

III. CONCLUSION

For the foregoing reasons Plaintiffs respectfully submit that the judgement of the court of appeal should be reversed.

Dated: February 5, 2018

Respectfully submitted,

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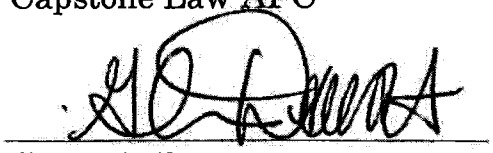
CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed was produced using 13-point Century Schoolbook type style and contains 9,153 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: February 5, 2018

Respectfully submitted,

Capstone Law APC

By 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1875 Century Park East, Suite 1000, Los Angeles, California 90067.

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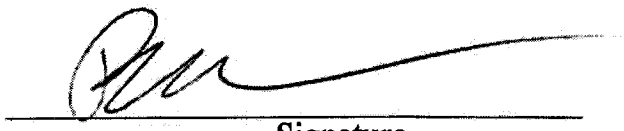

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