S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff / Appellant

vs.

LOEWS HOLLYWOOD HOTEL, LLC

Defendant / Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT CASE NO. B283218
APPEAL From the Superior Court of Los Angeles County. Hon. Kenneth R. Freeman (Los Angeles Super. Ct. Case No. BC586176)

APPELLANT'S SUPPLEMENTAL BRIEF

(Service on Attorney General and District Attorney required by Bus. & Prof. Code §§ 17209, 17536.5)

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INTRODUCTION

This Supplemental Brief is filed pursuant to California Rule of Court 8.520(d) which permits the filing of Supplemental Briefs with post-briefing new authority.

After briefing had otherwise been concluded in this matter, this court decided *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (Jan. 14, 2021) No. S258191, 2021 WL 127201 ("*Jan-Pro*")[1]. The central issue decided in *Jan-Pro* was the retroactivity of this Court's decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903 ("*Dynamex*") in which the Court adopted the ABC test that had been utilized in jurisdictions outside of California to determine "employee" status of a workforce characterized as "independent contractors." Prior to *Dynamex,* the ABC test had not been applied in California, yet the Court held in *Jan-Pro* that the *Dynamex* decision is retroactive.[2] *Jan-Pro*, 2021 WL 127201 at *7.

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[1] Only the Westlaw cite is currently available

[2] The parties in *Dynamex* had not even raised the ABC theory in their original briefing. It was briefed at the request of this Court. See Real Party In Interests Letter Brief at 2018 WL 8060520.

The *Jan-Pro* decision is pertinent to this case because retroactivity has been made an issue by Loews and its amici. See Loews Answer Brief on the Merits at pp. 60-63, and Amicus Brief of Employment Law Counsel, Employers Group, and United States Chamber of Commerce, at pp. 32-36.

ARGUMENT

A. *JAN-PRO* IS THE FINAL PROVERBIAL NAIL IN THE COFFIN FOR LOEWS' ILL-FATED RETROACTIVITY ARGUMENT

The *Jan-Pro* decision is pertinent to the retroactivity issues raised in this case because Loews has made retroactivity an issue, and the decision in *Jan-Pro, supra,* 2021 WL 127201 will necessarily inform this Court's opinion on retroactivity should Appellant prevail on the merits.

This case involves the meaning of the phrase "regular rate of compensation" as it appears in "Wage Orders" of the Industrial Welfare Commission and in Labor Code 226.7(c), not unlike how *Dynamex* involved the meaning of the "suffer or permit" work standard as it appeared in the Wage Orders.

Prior to the Court of Appeal decision in this case, *Ferra v. Loews Hollywood Hotel* (2019) 40 Cal. App. 5th 1239, there had been no California Court of Appeal decision adopting either

Appellant's or Appellee's position, just like there had been no California Court of Appeal decision on the applicability of the ABC test in *Dynamex*.

However, in this case there had been, over a period of many years, several conflicting United States District Court decisions opining on the meaning of "regular rate of compensation" as applied to the issues now pending before this Court. See *Ferra, supra,* 40 Cal. App. 5th at 1250-52. Despite the fact that there had been no similar history of conflicting decisions on the applicability of the ABC test in California over many years in *Dynamex*, this Court decided that *Dynamex* applied retroactively, citing to settled state and federal authority on the retroactivity of high court decisions.

> (*See Newman v. Emerson Radio Corp*. (1989) 48 Cal.3d 973, 978, 258 Cal.Rptr. 592, 772 P.2d 1059 (Newman) ["The general rule that judicial decisions are given retroactive effect is basic in our legal tradition"]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24, 44 Cal.Rptr.2d 370, 900 P.2d 619 (*Waller*) ["[T]he general rule [is] that judicial decisions are to be applied retroactively"].) As the United States Supreme Court observed in *Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312–313, 114 S.Ct. 1510, 128 L.Ed.2d 274: "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." In *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 474, 20

> Cal.Rptr.3d 428, 99 P.3d 1015, this court, after quoting the foregoing passage from *Rivers v. Roadway Express, Inc.*, observed: "This is why a judicial decision [interpreting a legislative measure] generally applies retroactively." (See *Woosley v. State of California* (1992) 3 Cal.4th 758, 794, 13 Cal.Rptr.2d 30, 838 P.2d 758 (*Woosley*) [" 'Whenever 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' "].)
>
> As past cases have explained, the rule affirming the retroactive effect of an authoritative judicial decision interpreting a legislative measure generally applies even when the statutory language in question previously had been given a different interpretation by a lower appellate court decision. Indeed, the United States Supreme Court's decision in *Rivers v. Roadway Express, Inc., supra*, 511 U.S. 298, 114 S.Ct. 1510, quoted above, involved just such a circumstance. In that case, the high court held that its interpretation of a statutory term contained in the 1866 Civil Rights Act applied retroactively, notwithstanding the fact that a line of prior federal appellate court decisions had set forth a contrary interpretation.

Jan-Pro, supra, 2021 WL 127201 at *3.

Jan-Pro then went on to point out how decisions of this Court have, similar to the above cited United States Supreme Court precedent, applied decisions retroactively even in the face of previously decided Court of Appeal decisions that go the other way. *Id.*

This Court's Opinion went on to point out that *Dynamex* presented a question of first impression concerning how a Wage

Order's suffer or permit to work standard should apply in the employee or independent contractor context, and then held:

> In resolving that issue, our decision in *Dynamex* did not overrule any prior California Supreme Court decision or disapprove any prior California Court of Appeal decision. Thus, the well-established general principle affirming the retroactive application of judicial decisions interpreting legislative measures supports the retroactive application of *Dynamex*.

Jan-Pro, supra, 2021 WL 127201 at *4.

Similarly, a reversal of the Court of Appeal decision herein would not be overruling a prior California Supreme Court decision or disapprove any prior Court of Appeal precedent.

This Court in *Jan-Pro* then rejected exceptions to retroactivity asserted by the Defendant that were tied to previous decisions of this Court on what constituted *employment*. *Id*. at *4. No similar arguments can be made here, This Court has not previously ruled on the meaning of "regular rate of compensation" or "compensation" and, if anything, rendered decisions that support reversal by expounding on "regular rate" in *Alvarado v. Dart* (2018) 4 Cal. 5th 542 by acknowledging the synonymous nature of "pay" and "compensation" in *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal. 4th 1094, 1104 n.6, and by using "regular rate of compensation" interchangeably with

"regular rate of pay" in an overtime context in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, where this Court stated:

> Labor Code section 510, subdivision (a) requires payment at a rate of no less than time and one half the **regular rate of compensation** for any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.

47 Cal. 4th at 730 n.1 (emphasis added). This Court used "regular rate of compensation" in the above quotation when, in fact, Labor Code § 510(a) provides that overtime be paid at one and one-half times **the "regular rate of pay."** In doing so, the Court tacitly acknowledged that "regular rate of pay" and "regular rate of compensation" are interchangeable.

In *Jan-Pro's* discussion of exceptions to the basic retroactivity rule, the Court noted an exception grounded in fairness and public policy when those factors are so compelling that they outweigh the basic rule. The Opinion then points out that this recognized exception arises "when a judicial decision changes a settled rule on which the parties below have relied." *Jan-Pro, supra,* 2021 WL 127201 at *4.

Here, that exception does not apply. There was nothing close to a settled rule that supports the position that Loews

advocates.

As set forth in *Jan-Pro*, this Court's view is that retroactivity is appropriate even if one views an opinion as breaking new and unexpected ground, as long as it does so in an indisputably unsettled area. *Id.*

Finally, this Court has routinely applied its decisions interpreting Wage Orders retroactively, even when the parties did not anticipate the precise interpretation of such orders. See, e.g., *Frlekin v. Apple* (2020) 8 Cal. 5th 1038, 1057; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833, 848, n. 18; *Jan-Pro, supra,* 2021 WL 127201, *passim*.

CONCLUSION

Jan-Pro, supra clearly buttresses the argument that should the Court reverse the Court of Appeal decision herein, there are no compelling and unusual circumstances justifying departure from the general rule of retroactivity.

Dated: January 25, 2021

Respectfully Submitted,

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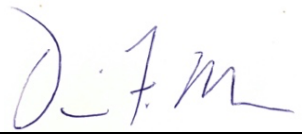
RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Century Schoolbook type including footnotes and contains approximately 1,429 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 25, 2021



Dennis F. Moss

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on January 25, 2021 declarant served **APPELLANT'S SUPPLEMENTAL BRIEF** by VIA TrueFiling.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of January, 2021 at Sherman Oaks, California.

Lea Garbe