Case Number S185827

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ANTHONY KIRBY et al.

Plaintiffs and Appellants,

vs.

IMMOOS FIRE PROTECTION, INC.,

Defendant and Respondent,

Petition for Review of a Decision of the Court of Appeal

Third Appellate District Case Number C062306

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Robert L. Rediger, Esq. (CA State Bar No. 109392)
Laura C. McHugh, Esq. (CA State Bar No. 180930)
Jimmie E. Johnson, Esq. (CA State Bar No. 223344)
Rediger, McHugh & Owensby, LLP
555 Capitol Mall, Suite 1240
Sacramento, California 95814
Telephone: (916) 442-0033
Facsimile: (916) 498-1246

Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

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Sacramento, California 95814
Telephone: (916) 442-0033
Facsimile: (916) 498-1246

Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

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INTRODUCTION

Labor Code section 218.5 (hereinafter "Section 218.5") was enacted by the California State Legislature in 1986. It provides that the prevailing party in a cause of action concerning "wages" is entitled to an award of attorneys' fees, regardless of whether that party is a plaintiff or a defendant. In 2000, the State Legislature amended Section 218.5 to create an exception for causes of action concerning "minimum wage" and "overtime compensation" claims (hereinafter "the 2000 Amendment"). Pursuant to the new exception, if an action concerns "wages," but does so by way of a "minimum wage" or "overtime compensation" claim, only a prevailing plaintiff is entitled to an award of attorneys' fees – a prevailing defendant is not.

In their attempt to have this Court review the decision of the Third District Court of Appeal below, which affirmed an award of attorneys' fees to the Respondent Immoos Fire Protection, Inc. (hereinafter "Respondent") for prevailing on a "missed rest periods" action, Petitioners Anthony Kirby and Rick Leech (collectively, hereinafter "Petitioners") argue that a successful defendant is never entitled to an award of attorneys' fees under Section 218.5. In doing so, Petitioners claim that every statutorily-mandated wage is a type of "minimum wage" – thus invoking the exception set forth in Section 218.5 – and essentially argue that the exception has swallowed the rule.

Petitioners characterize the appellate court's rejection of their argument as establishing new legal precedent; however, it is actually their own new theory that every statutorily-mandated wage is a form of a "minimum wage" which attempts to establish new legal precedent. The argument has never been considered or adopted by any other appellate court. The Petitioners' new theory that the "minimum wage" exception to Section 218.5 has swallowed the rule should not be reviewed by the Supreme Court until it has had time for sufficient review at the appellate court level, and any split in authority on the question has developed. Accordingly, the Supreme Court should deny the Petitioner's Petition for Review and their request to de-publish the appellate court decision.

ARGUMENT

POINT I

THE PETITIONERS HAVE FAILED TO SHOW THAT THE THIRD DISTRICT COURT OF APPEAL DECISION IS AN IMPORTANT QUESTION OF LAW THE LEGAL COMMUNITY NEEDS ANSWERED

California Rule of Court 8.500, subdivision (b)(1) provides that Supreme Court review is only appropriate when (1) necessary to secure uniformity of decision or to settle an important question of law; (2) the Court of Appeal lacked jurisdiction; (3) the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the

Supreme Court may order. In their petition, Petitioners only cite the "important question of law" category as their proposed basis for review. (Petition for Review, p. 7.)

In the first question presented, the Petitioners claim that their new theory of every statutorily-mandated wage being a type of "minimum wage" is an important legal question requiring Supreme Court review. They are wrong. Labor Code section 218.5 provides that any party which prevails in a cause of action concerning "wages" is entitled to an award of attorneys' fees. The 2000 Amendment added the following language to the end of Section 218.5: "This section does not apply to any action for which attorney's fees are recoverable under [Labor Code] Section 1194." (Stats. 2000, ch. 876, § 4.) In turn, Labor Code section 1194 (hereinafter "Section 1194") provides attorneys' fees awards exclusively to plaintiffs in claims concerning "the legal minimum wage or the legal overtime compensation." (Lab. Code, § 1194.) Accordingly, after the 2000 Amendment, a prevailing defendant is entitled to attorneys' fees in wage actions unless those actions concern minimum wage or overtime compensation claims.

Ten years after the State Legislature enacted the 2000 Amendment, Petitioners now present a new legal theory that every statutorily-mandated wage is a type of "minimum wage," and therefore the exception is invoked against prevailing defendants in every wage case. However, the flaw in their theory is that while "overtime compensation" is a statutorily-mandated

wage, the State Legislature did not consider "overtime compensation" to be "a minimum wage" when it specifically exempted both "minimum wages" *and* "overtime compensation" claims from Section 218.5. (Lab. Code, § 218.5 [exempting actions subject to Section 1194 which in turn defines such actions as those concerning both "minimum wages" *and* "overtime compensation"].) Thus, the State Legislature did not intend every statutorily-mandated wage claim to be considered a "minimum wage" claim under Section 218.5, but rather only those claims regarding the minimum wage rate.

Both the trial court and the Third District Court of Appeal correctly understood the error in Petitioners' argument and rejected it. No other appellate court has had the opportunity to consider this new legal question as of yet; and therefore, there is no support for Petitioner's theory to date. Having garnered no legal support for their theory, nor having provided the appellate courts adequate time to consider the new legal question as a whole, the first question presented does not proffer an "important question of law" the Supreme Court should review. (Cal. R. Court, § 8.500, subd. (b)(1).)

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POINT II

THE PETITIONERS FAILED TO ARGUE IN THE COURT OF APPEAL THAT THE RESPONDENT DID NOT REQUEST AN AWARD OF ATTORNEYS' FEES AT THE OUTSET OF THIS LITIGATION, AND IN ANY EVENT, THE RESPONDENT DID MAKE SUCH A REQUEST

"As a policy matter, on petition for review, the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. R. Court, § 8.500, subd. (c).) The Petitioners did not timely raise at the Court of Appeal any issue regarding an alleged failure by the Respondent to request its attorneys' fees. (See generally, Respondent's Request For Judicial Notice, Exhibit B [Petitioners' opening appellate brief].) Accordingly, Supreme Court review of this question of law is unwarranted. (Cal. R. Court, § 8.500, subd. (c).)

In addition, the Petitioners do not divulge in their Petition for Review that the Respondent did in fact request an award of attorneys' fees in its Answer. The prayer of the Answer Respondent filed and served stated: "WHEREFORE, the Defendant prays for judgment as follows ... The Defendant be awarded their [sic] reasonable fees and costs...." (Respondent's Request For Judicial Notice, Exhibit A [Respondent's Answer to underlying complaint].) The Petitioners disingenuous argument that the Respondent did not request an award of attorneys' fees at the outset of this litigation is without merit. In short, Petitioners' argument lacks any

factual basis, which weighs against any "importance" for Supreme Court review. (Cal. R. Court, § 8.500, subd. (b)(1).)

POINT III

THE PETITIONERS FAILED TO ARGUE IN THE COURT OF APPEAL THAT THE RESPONDENT WAS NOT THE PREVAILING PARTY, AND THE ARGUMENT IS TOO FACT-INTESIVE TO PROVIDE HELPFUL PRECEDENT IN THE FUTURE

The Petitioners did not timely raise any issue at the Court of Appeal regarding which party "prevailed" in the matter. (Respondent's Request For Judicial Notice, Exhibit B [Petitioners' opening appellate brief].) Accordingly, Supreme Court review of this question of law is unwarranted. (Cal. R. Court, § 8.500, subd. (c).) In addition, the question posed by the Petitioners is fact-sensitive and not likely to provide helpful precedent for future cases.

Based on the following specific set of facts presented in this case, the trial court found that Respondent was the prevailing party (3 JA 418):

On or about January 3, 2007, Petitioners and Robert Saphore, on behalf of themselves and others similarly situated, filed a Complaint alleging unfair business practices, failure to pay wages and overtime, failure to provide meal periods, failure to provide rest breaks, failure to provide itemized wage statements, and related violations of the Business and Professions Code, the Labor Code, and California Industrial Welfare Commission Wage Order No. 16-2001. (1 JA 1-16.) The Complaint

named Respondent and 750 unidentified "Doe" Vendor Defendants as defendants in the action. On or about August 29, 2007, a first amended Complaint was filed in the matter, naming only Petitioners as plaintiff parties. (1 JA 17-34.)

On or about August 11, 2008, Petitioners again amended the Complaint to identify four of the Vendor Defendants. (1 JA 35–42.) Between October 1, 2009 and February 27, 2009, Petitioners dismissed the identified Vendor Defendants from the case. (1 JA 43-63.) In the instant petition, Petitioners allege that they "obtained the wages they were owed by settlement with the 2810 Defendants." (Petition for Review, p. 19.) However, there is no evidence in the record to support said allegation, nor do Petitioners cite to any. (Petition for Review, p. 19.) Accordingly, this allegation should be entirely ignored.

On or about November 21, 2008, Petitioners moved for class certification of their Complaint against Respondent and the remaining unidentified Vendor Defendants. (1 JA 51-53.) On or about January 13, 2009, the trial court denied the class certification motion. (RA 1-9.)

On or about February 27, 2009, the Plaintiffs filed and served a voluntary request for dismissal of the entire action with prejudice; and on or about that same day, the clerk of the court entered said dismissal as requested. (1 JA 62-63.)

Petitioners ask the Supreme Court to review the foregoing record *de novo* and re-determine whether the Respondent was the prevailing party in this case. Such a highly, fact-sensitive question, unlikely to bear any precedential value for future cases, does not satisfy the "importance" prong of California Rule of Court 8.500, and renders Supreme Court review unwarranted. (Cal. R. Court, § 8.500, subd. (b)(1).)

POINT IV

PETITIONERS' ARGUMENT THAT THE TERM "ACTION" IN LABOR CODE SECTION 218.5 REFERS TO AN ENTIRE "CASE" RATHER THAN A SINGLE CAUSE OF ACTION IS BASELESS AND DOES NOT MERIT REVIEW

Section 218.5 reads, in pertinent part:

> 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 section does not apply to any *action* for which attorney's fees are recoverable under Section 1194.

(Lab. Code, § 218.5 [emphasis added].)

Accordingly, the text of Section 218.5 provides that the prevailing party in any wage "action" is entitled to recover reasonable attorneys' fees except in wage "actions" subject to Section 1194 – *i.e.,* actions concerning "minimum wage" and "overtime compensation" claims. In their effort to absolve themselves of the attorneys' fee award, the Petitioners assert that

the term "action" in Section 218.5 refers to the entire case, not the single cause of action where the wage claim is asserted. (Petition for Review, pp. 20-22.) In other words, the Petitioners argue that if one single cause of action within a complaint asserts a "minimum wage" or "overtime compensation" claim subject to Section 1194, then a prevailing defendant cannot seek attorneys' fees for prevailing on any other causes of action asserted within the complaint because the 2000 Amendment specifically exempted the use of Section 218.5 in "any *action* for which fees are recoverable under Section 1194." (Petition for Review, pp. 20-22.)

First, this Court has already determined that the term "action" does not refer to an entire lawsuit, but rather the obligation from which a cause of action arises. "Although an 'action' is sometimes used to denote the suit in which the action is enforced, 'An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one which is but to say, an obligation. . . .'" (*Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387 [quoting *Frost v. Witter* (1901) 132 Cal. 421, 426].)

Second, the Petitioners' proffered interpretation could actually become a sword against employees who file complaints containing causes of action for minimum wages and/or overtime compensation in combination with causes of action for health and welfare or pension fund contributions. Section 218.5 applies to a wide-ranging set of claims not covered by Section 1194, including "fringe benefits, or health and welfare

or pension fund contributions." (Compare, Lab. Code, §§ 218.5, 1194.) Pursuant to Petitioners' argument, if a plaintiff files a complaint containing causes of action for overtime compensation, fringe benefits, and pension fund contributions, that plaintiff could not seek attorneys' fees for its efforts in the fringe benefits and pension fund claims (which are only provided in Section 218.5) because the overtime compensation claim is subject to Section 1194. Since the overtime compensation claim is subject to Section 1194, a plaintiff would be foreclosed from seeking attorneys' fees pursuant to Section 218.5 for any other claim within the entire case.

Similarly, following the Petitioners' argument that the term "action" means the entire case, a prevailing defendant could seek attorneys' fees under Section 218.5 for all of the claims asserted within a complaint so long as one cause of action concerned wages other than the "minimum wage" and "overtime compensation."

The Third District Court of Appeal correctly understood the error in Petitioners' argument and rejected it. Whereas this question lacks any legal or logical basis, it fails to satisfy the "important question of law" requirement, and Supreme Court review is unwarranted. (Cal. R. Court, § 8.500, subd. (b)(1).)

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CONCLUSION

For the reasons set forth above, the Court should deny the Petitioners' petition for review and their request to depublish the decision of the Third Appellate District Court of Appeal.

DATED: September 15, 2010.

Respectfully submitted,

REDIGER, McHUGH & OWENSBY, LLP

By _____
JIMMIE E. JOHNSON
Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.504(d)(1)]

The text of the Respondent's Answer to Petition for Review consists of 2,250 words as counted by the Microsoft Word program used to generate this Answer.

DATED: September 15, 2010.

REDIGER, McHUGH & OWENSBY, LLP

By _____
JIMMIE E. JOHNSON
Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On September 15, 2010, I served the within **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** in *Anthony Kirby et al. v. Immoos Fire Protection, Inc*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Ellyn Moscowitz, Esq.
Jennifer Lai, Esq.
Law Offices of Ellyn Moscowitz, P.C.
1629 Telegraph Avenue, 4th Floor
Oakland, CA 94612

Attorneys for Plaintiffs and Appellants, ANTHONY KIRBY and RICK LEECH, JR.

Clerk
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

Appellate Coordinator
Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013

XXXX by placing a true copy thereof in a Federal Express envelope/box for overnight delivery in the receptacle located at 555 Capitol Mall, Sacramento, California 95814.

Clerk
Third Appellate District Court of Appeal
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

XXXX By personal service at address above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 15th day of September 2010, at Sacramento, California.

LORRAINE L. RENFROE