Case Number S185827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Anthony Kirby et al.,

Plaintiffs and Petitioners

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

PETITIONERS' REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The published Opinion must be reviewed. No previous case holds, as this Court of Appeal now holds, that a prevailing employer is entitled to attorney's fees in a statutory meal and rest period claim. If the Opinion is allowed to stand, Californian workers who suffer violations of their right to meal and rest periods will be discouraged from seeking redress. Indeed, workers would face the manifestly unjust situation Petitioners presently face. Here, after recovering their *full claimed wages* in settlements with other defendants, Petitioners were found personally liable for attorney's fees exceeding *eight times their recovered wages*. Workers' diminished ability to enforce mandatory meal and rest periods will affect the health and safety of workers statewide. (See *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094, 1113 ("Health and safety considerations (rather than purely economic injuries) are what motivated the [Industrial Welfare Commission] to adopt mandatory meal and rest periods in the first place.").) Review is necessary to avoid this result.

Moreover, in holding that prevailing employers may demand attorney's fees from meal and rest period claimants, the Court of Appeal set new precedent that ignores or misinterprets existing legal standards. In a few short paragraphs, and without the support of a single published case,

the Opinion disposes of ten years of settled California law, beginning with *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, which the Legislature codified in an amendment in 2000. Review is necessary to constrain this outlier Opinion and uphold established rules of law and public policy.

Immoos's Answer to the Petition for Review ("Answer") does not compel a different result. Remarkably, the Answer fails to address any public policy issues or any case law upon which Petitioners base their Petition for Review ("Petition"). Instead, Immoos characterizes Petitioners, not the Opinion, as the outlier. (Answer, 2-4.) Based on this mischaracterization, Immoos then argues that review of Petitioners' "new legal theory" is unwarranted until a future case directly conflicts with the Opinion. (*Ibid.*) According to Immoos, the issue presented is not sufficiently "important" for the purposes of California Rule of Court 8.500, subdivision (b)(1), and the Court should wait. (*Id.* at 4.)

The Court should not wait. The "importance" of a legal issue is not measured simply by whether there is direct conflicting authority. The Court routinely grants review of cases where no direct conflict exists. Moreover, in arguing the Court should delay review to another day, Immoos ignores the millions of workers, particularly low-wage workers,

for whom this issue is of everyday importance. Accordingly, this Court should grant review.

ARGUMENT

I. REVIEW IS NECESSARY TO BRING STATUTORY MEAL AND REST PERIOD CLAIMS FIRMLY UNDER LABOR CODE SECTION 1194.

The Court of Appeal's Opinion addresses a question of first impression: Does the bilateral fee-shifting provision of Labor Code[1] section 218.5 or the unilateral fee-shifting provision of section 1194 apply to statutory meal and rest period claims? In holding that section 218.5 controls, the Court of Appeal ignores or misinterprets the well-settled legal standard in *Earley* for determining the applicability of section 1194 and departs from long-standing public policy, including the public policy supported by the decisions of this Court and the courts of appeal that wage laws should be construed in the manner that protects workers. (See *Murphy*, 40 Cal.4th at 1103; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 318, 340; *Martinez v. Combs* (2010) 49 Cal.4th 35, 61.)

Contrary to Immoos's assertions, under these circumstances, review is necessary to constrain this lone decision that conflicts with established rules of law and public policy. These purposes are fully within scope of

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[1] All references are to the Labor Code unless otherwise indicated.

California Rule of Court 8.500, subdivision (b)(1). Indeed, as this Court stated over a century ago in *People v. Davis* (1905) 147 Cal. 346:

> [T]he purpose of review is to enable [the Supreme Court], in its discretion, to supervise and control the opinions of the several district courts of appeal . . . and by such supervision to endeavor to secure harmony and uniformity in the decisions, *their conformity to the settled rules and principles of law* . . . and in some instances, a final decision by the court of last resort of some doubtful or disputed question of law.

(147 Cal. at 348 (emphasis added).) Given this supervisory role and the Court's power of decision, review is routinely granted where there is no direct conflicting authority. (See e.g. *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 114 Cal.Rptr.3d 280, 293 (review granted without direct conflict and decision reversed for refusing to follow settled California law); *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1099 (review granted without direct conflict); *Murphy*, 40 Cal.4th at 895 (same); see Cal. Rules of Court, Rule 8.516 (b).)

Additionally, Immoos misconstrues the Petition. According to Immoos, Petitioners' "new theory" is "every statutorily-mandated wage is a type of 'minimum wage,' and therefore [section 1194] is invoked against prevailing defendants in *every wage case*." (Answer, 3 (emphasis added).) This is not so. Petitioners argue that the *Earley* test for the applicability of section 1194 should apply here. (Petition, 5-11, 13.) If the Court of Appeal

had properly applied *Earley* and its progeny to Petitioners' meal and rest period claims, the Court of Appeal would have held that such claims easily fall under the one-way fee shifting statute of section 1194 because: (1) the duty to pay the meal and rest period "wage" is *mandated by statute*; and (2) the right to meal and rest periods is *based on important public policy*. (*Earley*, 79 Cal.App.4th at 1430-1431; *Road Sprinkler Fitters Local Union v. G&G Fire Sprinklers* ("*Road Sprinkler Fitters*") (2002) 102 Cal.App.4th 765, 778-79; see also *Murphy*, 40 Cal.4th at 1105, 1111-1113; Petition, 8-13.)

Instead of addressing *Earley*, Immoos argues that because the Legislature wrote "legal overtime compensation" into section 1194 *and* overtime is statutorily-mandated, the Legislature could *not* have intended every claim for a statutorily-mandated wage to be a claim to recover the "legal minimum wage." (Answer, 4.) Immoos thus concludes the Legislature intended section 1194 to include only claims regarding the "minimum wage *rate*." (*Ibid.* (emphasis added).)

Immoos is mistaken. First, Immoos's avoidance of *Earley* in its discussion of Legislature's intent is telling. The Legislature explicitly codified the holding of *Earley* in section 218.5.[2] Moreover, the *Earley*

[2] The Legislature's intent could not be clearer with respect to *Earley*: "The amendments to Section 218.5 of the Labor Code made by Section 4 of this

court was the first to confront a purported "conflict" between sections 218.5 and 1194. (79 Cal.App.4th at 1426-1431.) Most significantly, *Earley* first recognized the Legislature's intent to insulate *statutory* rights from bilateral fee-shifting in section 218.5 based on the public policy underlying section 1194 and other Labor Code sections. (*Id.* at 1430-31.) As the *Earley* court stated:

> There can be no doubt that [section 1194] was meant to 'encourage injured parties to seek redress—and thus simultaneously enforce [the minimum wage and overtime laws]—in situations where they otherwise would not find it economical to sue.' To allow employers to invoke section 218.5 in an overtime case would defeat the legislative intent and create a chilling effect on workers who have had their *statutory* rights violated. Such a result would undermine statutorily-established public policy. That policy can only be properly enforced by the recognition that section 1194 alone applies to overtime compensation claims.

(*Ibid.* (emphasis in original) (citations omitted).) Thus, Immoos's conclusion that the Legislature intended to include only claims for the "minimum wage *rate*" under section 1194 is plainly contradicted by *Earley*. There is no mention of (much less reliance on) any "minimum wage *rate*" in the *Earley* court's reasoning.[3]

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act *do not constitute a change in, but are declaratory of, the existing law, and these amendments are intended to reflect the holding of the Court of Appeal in Earley v. Superior Court* (2000) 79 Cal.App.4th 1420." (Stats. 2000, ch. 876, §11 (emphasis added).)

[3] For over ten years, California courts have steadily followed *Earley* and its codification in section 218.5. In *Road Sprinkler Fitters*, the Court of

The Opinion's reasoning is similarly in conflict with *Earley* as well as other decisions of this Court and the courts of appeal and statutory law. (Petition, 2-3, 5-14.) Like the Answer, the Opinion conspicuously omits *Earley* when evaluating Petitioners' meal and rest claims. (See Opinion ("Op.") at 10-18.) (discussing *Earley* only in analyzing "action" and "cause of action.").)[4] Moreover, the Opinion conflicts with *Murphy* in its interpretation of "premium wage."[5] It also leads to absurd results where

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Appeal applied *Earley*'s reasoning to hold that the "prevailing wage" is a "legal minimum wage" covered under section 1194. (102 Cal.App.4th at 778-79.) As in *Earley*, the court in *Road Sprinkler Fitters* evaluated whether the "duty to pay the prevailing wages is mandated by statute" and whether prevailing wage "serves important public policy goals of protecting employees on public works projects, competing union contractors and the public." (*Ibid.*) Until the instant case, courts have steadfastly relied upon *Fitters* and *Earley.* (See e.g. *Eicher v. Advanced Business Integrators* (2007) 151 Cal.App.4th 1363, 1383; *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 612.) None of these cases discuss any "minimum wage rate."

[4] Notably, the Opinion's construction of terms including, "action," "cause of action," and "legal minimum wage" are all similarly narrow. (Op. at 10-18.)

[5] In *Murphy*, this Court held that the section 226.7 "wage" is not a penalty, but a "premium wage intended to compensate employees" for working during mandatory meal and rest periods. (40 Cal.4th at 1109-1110, 1114.) *Murphy* established that the section 226.7 "wage" is a statutorily-mandated "minimum wage" and set the floor – the "premium pay" – due to workers for working (instead of resting) during meal and rest periods. (*Id.* at 1109–1111.) In rejecting Petitioners' attempts to apply *Murphy*, the Court of Appeal found that *Murphy's* use of "premium pay" actually *justified* the exclusion of section 226.7 claims from section 1194. (Op., 20-21.) According to the Court of Appeal, the "premium pay" in *Murphy* means "a

any statutory wage claim that references a "contractual rate of compensation," including claims for overtime and reporting time and split shift wages, would fall outside of section 1194. (Op., 19-20; see *Murphy*, 40 Cal.4th at 1109-1112, 1114; Petition, 9-10.) Most significantly, the Opinion fails to consider any of the important public policies underlying California's worker protection statutory framework. (See *Murphy*, 40 Cal.4th at 1105 (observing that meal and rest periods have "long been viewed as part of the remedial worker protection framework"); Petition, 6, 11-14.)

As a result, the analysis in the Opinion is a disruptive and unsupported departure from existing law that severely diminishes the rights of workers in California. The Petition thus raises "significant issue[s]of widespread importance" where it is "in the public interest's interest to decide [the issues presented] at this time." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6.) Therefore, this Court's review is necessary and should be granted here.

According to the Court of Appeal, the "premium pay" in *Murphy* means "a sum over and above regular pay." (*Ibid.*) In other words, any money paid by an employer for a section 226.7 violation is *more* than what that employer would pay to restore a worker to the statutory minimum wage, (*Ibid.*) Thus, the section 226.7 wage is *not* a claim to recover the "legal minimum wage." The Opinion fundamentally misconstrues and conflicts with this Court's reasoning and holding in *Murphy*.

II. THE QUESTION OF WHETHER SECTION 218.5 APPLIES WHERE NEITHER PARTY SPECIFICALLY REQUESTED FEES "UPON INITIATION OF THE ACTION" AS REQUIRED BY THE PLAIN LANGUAGE OF SECTION 218.5 IS PROPERLY BEFORE THE COURT AND MERITS REVIEW.

Immoos contends that review of the second issue presented should be denied because Petitioners did not raise the issue before the Court of Appeal. (Answer, 5.) However, Immoos fails to mention that Petitioners raised and briefed this issue extensively on a Petition for Rehearing at the Court of Appeal. (See Petition for Rehearing, Appellants' Opening Brief ("PH Brief," 9-10.) When an issue has been omitted at the Court of Appeal, "a petition for rehearing is normally a prerequisite to [Supreme Court] consideration of omitted issues." (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ("Eisenberg") ¶ 13:15, p. 13-5 (rev.# 1, 2009); see also *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2. Moreover, the Supreme Court's power of decision extends to "any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, Rule 8.516 (b) (2).) "[H]ence, whether new issues will be considered lies completely within [the Supreme Court's] discretion." (Eisenberg, ¶ 13:14, p. 13-5.) The second issue presented is therefore properly before this Court.

Immoos then directs this Court to Immoos's prayer for "reasonable fees" in its "Answer to the underlying complaint," which Immoos finds dispositive on this issue. (Answer, 5.) Immoos has missed the point. Its general prayer for "reasonable fees" is irrelevant. Petitioners' allegation has been and remains that *neither* party *specifically* requested fees under section 218.5 by Labor Code subsection number or name. (See Petition, 15 ("Respondent did not specifically include a request for Section 218.5 fees."); see also PH Brief, 9 (arguing there is no "evidence on the record that [Immoos] requested Labor Code section 218.5 fees.").) Throughout this litigation, Petitioners certainly did not specifically request section 218.5 fees, even though Petitioners made requests under other subsections of the Labor Code. (See Complaint, 1JA0016 ("Plaintiffs pray judgment as follows: ... [f]or an award of reasonable attorney's fees as provided by Labor Code §§ 1194, 226, 2810, 2699.") and 1JA0013 ("Plaintiffs seek attorneys fees per Labor Code Section 2699."); and First Amended Complaint, 1JA0029 ("Plaintiffs seek attorneys fees per Labor Code Section 2699.") and 1JA0032 ("Plaintiffs pray judgment as follows: ... [f]or an award of reasonable attorney's fees as provided by Labor Code §§ 1194, 226, 2810, 2699.").)

Because section 218.5 fees were not specifically invoked at the onset of the litigation as required by the statute, Petitioners were blindsided by the trial court's imposition of section 218.5 fees and deprived of their status as the "masters" of their Complaint. The Court of Appeal disregarded the *plain language* of section 218.5 by awarding fees without an explicit request from any party "upon initiation of the action." (Lab. Code § 218.5) Accordingly, this Court should grant review on this issue and prevent future wage and hour claimants from being similarly blindsided by an employer's demand for attorney's fees.

III. THE QUESTION OF WHETHER THE "PREVAILING PARTY" DETERMINATION CONTRAVENES THE PUBLIC POLICY OF ENCOURAGING SETTLEMENTS IS PROPERLY BEFORE THIS COURT AND MERITS REVIEW.

Immoos advances several arguments against this Court's review of the third issue presented, but none are availing. First, Immoos again argues that because Petitioners did not raise this issue at the Court of Appeal, review is unwarranted. (Answer, 6.) Although Petitioners did not brief the issue at the Court of Appeal, the key fact of this issue – that Petitioners have received their full claimed wages – was discussed at every stage of this litigation, in the initial trial court briefing, and again in the fact section of the Court of Appeal briefing. Immoos also fails to mention that Petitioners also raised and briefed this issue in their Petition for

Rehearing. (PH Brief, 5-8). For the reasons explained previously, the issue presented is properly before the Court. (See, supra, Section II, p. 10.)

Second, Immoos argues that determining the prevailing party in the case at bar is too "fact-sensitive" and would not provide "helpful precedent." (Answer, 6.) Again, Immoos misses the point. Petitioners do not seek review to determine the prevailing party in this case. Rather, Petitioners seek review of whether the "prevailing party" determination here is sufficient to sustain an award of attorney's fees in favor of the employer in a wage action where the workers recovered their full wages owed from settlements with other defendants. (Petition, 16-20.) The case at bar concluded with settlements with Immoos's general contractors ("2810 Defendants") for all the monies owed to Petitioners. (See RJN, Ex. J.) By imposing liability for attorney's fees against workers on these facts, the Court of Appeal has contravened California's long-standing public policy of encouraging the settlement of disputes. (See *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1338 ("The law favors the resolution of disputes."); *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 369 ("The courts are empowered to encourage settlements, thereby discouraging needless litigation and its attendant expense.").) Review on this question is not fact-

intensive and would set precedent that upholds the public policies of protecting workers and promoting settlements.

Next, Immoos suggests *for the first time in this litigation* that the settlements with the 2810 Defendants did not occur because they are not part of the record in this case. (Answer, 7.) Immoos is misleading this Court. Immoos received notice of the existence of such agreements on or around July 1, 2009, after they were lodged with the trial court. (See Proof of Service, Notice of Lodgment in Support of Plaintiffs' Appeal, RJN, Ex. J.) Equally important, those documents demonstrate that Petitioners recovered the full amount in wages owed to them individually. (RJN, Ex. J.) The total amount in attorney's fees imposed by the trial court on Petitioners exceeds these recovered sums by *eight times.* (Ruling on Motion for Attorney's Fees, 3JA0413.) Protecting other workers from facing this unjust situation – where Petitioners' hard-earned unpaid wages recovered only through court action will go directly back to Immoos and its lawyers – necessitates this Court's review.

IV. THE COURT OF APPEAL ERRED BY NOT ADDRESSING THE DIFFERENCE BETWEEN "ACTION" AND "CAUSE OF ACTION.

The second paragraph of section 218.5 means what it plainly says: that entire section is inapplicable to any action in which attorneys' fees are

recoverable under section 1194. "Action" means what Code of Civil Procedure section 22 says it means: "an ordinary proceeding in a court of justice . . . ." (Cod. Civ. Proc. § 22.) This Court recently confirmed that when it stated as follows in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592: "Strictly speaking, the term 'action' is not interchangeable with 'cause of action.' While 'action' refers to the judicial remedy to enforce an obligation, 'cause of action' refers to the obligation itself." (50 Cal.4th at 597 (citation omitted).) This distinction is important because the Court of Appeal reversed on six out of the seven causes of action where Immoos sought fees. The "action" or the Complaint must be viewed in its entirety because it is purely subjective to determine how much of the total amount of fees incurred in this case related to the sixth cause of action only (the rest period claim) when all the other causes of action do not warrant fees at all. This is why it only makes sense to award fees when the entire "action" is lost.

Despite this clear statement, Immoos claims that *Palmer v. Agee* (1978) 87 Cal.App.3d 377 supports its position that "action" means "cause of action." Immoos is incorrect. *Palmer v. Agee* involved a mobile home park landlord-tenant dispute in which the prevailing tenants sought attorney's fees. The tenants' right to attorney's fees did not turn on a

holding that "action" meant "cause of action," and indeed there was no such holding. (87 Cal.App.3d at 387.) Rather, after quoting Black's Law Dictionary for the proposition that the terms "action" and "suit" are nearly synonymous, the *Palmer* court stated that "[t]he action therefore springs from the obligation, and hence the cause of action is simply the obligation." (*Ibid.)*

Thus, the terms "action" and "cause of action" clearly are not synonymous. Indeed, the *Palmer* court concluded as follows: "An 'action' thus includes all proceedings, at least to the time of judgment, which are required to perfect the rights." (*Ibid.*) *Palmer* therefore supports the broad and correct interpretation of "action" as meaning the entire lawsuit, including, in that case, the tenants' successful defenses. There, the result was that the prevailing tenants were entitled to their attorney's fees. Here, it means that an "action for which attorney's fees are recoverable under section 1194" is the entire lawsuit. Any lawsuit that includes a cause of action under section 1194 is such a lawsuit, and section 218.5 by its own terms "does not apply."

Immoos posits a scenario in which a worker suing for statutory minimum wage or overtime compensation under section 1194 would be unable to seek attorney's fees in connection with causes of action for fringe

benefits and pension contributions. What Immoos does not point out is that an employer in that scenario would be similarly unable. In other words, the "American rule" would apply to those causes of action in such a case.

That is appropriate. Wage suits subject to section 218.5 can involve the full spectrum of employees from minimum wage workers to CEOs. But suits under section 1194 by definition involve only hourly wage earners. It is entirely appropriate that those workers should be protected from being forced into a game of chicken with a litigant that has resources exponentially greater than their own. The sum spent on defense by such a litigant could easily be many times the amount of the worker's claim, and the threat to so spend should not be available to intimidate the worker out of seeking his or her pay. An hourly wage earner with a claim for the "legal minimum wage" or "legal overtime compensation" never should face the possibility of financial ruin to recover those wages, and a wrongdoer should not be able to dispose of the case and keep the ill-gotten gain by simply making the threat.

Immoos next argues that interpreting "action" to mean an entire case would mean that a prevailing defendant would be able to seek fees under section 218.5 for all claims asserted in the case "so long as at least one cause of action concerned wages other than "legal minimum wage" or

"legal overtime compensation." First, to the extent that the action in Immoos's hypothetical included a cause of action for "legal minimum wage" or "legal overtime compensation," Immoos's statement is simply untrue. Second, to the extent that it did not, Immoos is asserting that "reasonable attorney's fees to the prevailing party" would include fees in connection with non-wage-related causes of action. But sauce for the goose is sauce for the gander, and if Immoos is correct, then a successful plaintiff in Immoos's first hypothetical could seek the same broad sweep of fees under section 1194 – something Immoos's first example impliedly denied was possible.

Immoos's proposed equating of "action" with "cause of action" leads to linguistic absurdities that demonstrate that its proposed equality must not be real. An action is "an ordinary proceeding in a court of justice," yet one never would say that a complaint with twelve causes of action contained "twelve proceedings." The terms simply are not interchangeable, as the Supreme Court recently recognized. The Supreme Court should grant review so that the plain meaning of the second paragraph of section 218.5 can be upheld and the employee protections inherent in that meaning can be vindicated.

CONCLUSION

For the reasons set forth above, the Court should grant review of the Petition.

Dated: September 27, 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1).)

The text of this brief consists of 3,900 words as counted by the Microsoft Word (Version 2010) word processing program used to generate the Reply.

Dated: September 27, 2010

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CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1629 Telegraph Avenue, Fourth Floor, Oakland, California 95612. I am employed by the Law Offices of Ellyn Moscowitz, P.C.

On September 27, 2010, I served the within **PETITIONERS' REPLY TO 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] upon the following:

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XXXX: BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE. I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or diver authorized by the express carrier to receive documents.

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

XXXX: BY MESSENGER SERVICE. I served the documents by placing them in an envelope or package addressed to the persons at the addresses I listed above and providing them to a professional messenger service.

I certify under penalty of perjury that the above is true and correct. Executed at Oakland, California on September 27, 2010.

Maria Anderson