SUPREME COURT COPY

No. S170758

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JORGE A. PINEDA,

Plaintiff, Appellant and Petitioner,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

Court of Appeal Case No. A122022,
First Appellate District, Division Three

San Francisco Superior Court Case No. 468417,
The Honorable Harold E. Kahn, Presiding

ANSWER TO PETITION FOR REVIEW

Service on Attorney General and San Francisco County District Attorney
Required by California Business & Professions Code Section 17209

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OTHER AUTHORITIES

I. INTRODUCTION

The petition obscures what this case is about. Petitioner Jorge Pineda (and the class he seeks to represent) was paid every dollar of wages owed. Yet the petition warns of "dire ramifications" unless review is granted (Pet. at 12), because the decision supposedly "undermined the fundamental public policy in favor of prompt payment of wages" (Pet. at 3).

The decision did nothing of the sort. The case has nothing to do with the entitlement to wages. The case also has nothing to do with the entitlement to a penalty for late payment. The case only deals with whether employees, once wages are paid, may be dilatory in seeking that penalty. The court of appeal held only that an employee, if he or she would seek a penalty after being wholly paid, should act reasonably promptly and sue within one year.

Review should be denied. There is no conflict in the published decisions to be resolved, so any review by this Court should await further developments in the lower courts. Moreover, the court of appeal correctly resolved the legal issues, so there should be no warrant in the end for this Court to have to take up the issues at all.

Bank of America explains below.

II. THE UNFAIR COMPETITION ACT ISSUE IS NOT WORTHY OF THIS COURT'S REVIEW

The court of appeal held that a Labor Code section 203 penalty is not something that can be subject to a *restitution* action under the Unfair Competition Law, Business & Professions Code section 17203. Unpaid *wages*, of course, belong to the employee, and their recovery is restitutionary in nature. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000). But, as the court of appeal held, "[p]enalties under section 203 . . . are not imposed as compensation for the labor of the employee, but are triggered by the employer's willful failure to timely pay the wages." Slip op. at 9.

There is, accordingly, no claim for "restitution" of penalties that were never earned. *Id.* The question presented is unworthy of review, for the reasons set forth below.

A. The Question Under The Unfair Competition Law Is One Of First Impression In The Appellate Courts; Review Now Would Be Premature.

There is no conflict in appellate authority on the questions presented. The court of appeal correctly cited and relied on three federal-court cases that had held that Labor Code section 203 penalty lawsuits are not cognizable under section 17203. *Id.*, *citing Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 891, 895

(C.D. Cal. 2005); *Montecino v. Spherion Corp.*, 427 F. Supp. 2d 965, 967 (C.D. Cal. 2006); *and In re Wal-Mart Stores, Inc., Wage & Hour Litigation*, 505 F. Supp. 2d 609, 619 (N.D. Cal. 2007). The petition cites no appellate case holding to the contrary.

Thus, there is no warrant for this Court to take up the issue now. No conflict in the court of appeal cases exists; none may emerge; and if a conflict does emerge, there will be ample time to review the issue at that point, fully informed by the views of the other courts which by then will have opined on the question presented.

The petition suggests that review should be granted because several *amici* suggested that the court of appeal publish its opinion. That is a *non sequitur*. That the legal community may benefit from *published* authority on a proposition of law does not mean that there must be *Supreme Court* authority on that same proposition. Construing statutes and setting rules of law under them is what the courts of appeal are for. Only in a limited set of circumstances does this Court need to become involved, *see* Cal. R. Ct. 8.500(b). Those circumstances are not present where, as here, a reasoned court of appeal decision stands alone, uncontradicted by other appellate authority.[1]

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[1] The petition cites one unpublished trial court order from Orange County. (Pet. at 18-19.) Such an order is not a proper ground for review, particularly given that it

(*Continued* . . .)

B. The Court Of Appeal Correctly Analyzed The Issue.

A conflict in the lower-court decisions is unlikely to arise because the court of appeal correctly resolved the issue.

Section 203 penalties are not vested entitlements. In order to obtain a section 203 penalty, an employee must first bring an enforcement action against the employer. *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1108 (2007) ("The right to a penalty . . . does not vest until someone has taken action to enforce it.") (citing *People v. Durbin*, 64 Cal. 2d 474, 479 (1966)).

Even upon bringing a penalty action, recovery is not automatic. An employee must establish that the employer "willfully" failed to timely pay wages due. *See* 8 CAL. CODE REGS. § 13520 (2007) ("[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under section 203."); *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765, 781, 782 (2002) ("[S]ection 203 requires the payment of an additional penalty if the employer *willfully* fails to comply with s 202."; "An employer's good faith mistaken belief that wages are not owed may negate a finding of willfulness.") (emphasis added); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 8-9 (1981) (plaintiff was not entitled to section 203 penalties

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preceded the First District's decision here. If another *appellate district* were to take a different view, that would present a plausible reason for this Court's intervention. The existence of a single, outlier trial-court decision does not.

because the employer had a good faith belief that it had the right to offset the final wages owed by the employee's debt to it).

In sum, section 203 penalties do not even arise, much less vest, until (i) a former employee takes action to enforce them, and (ii) a tribunal finds that the employer willfully did not pay final wages owed and enters a final judgment to that effect. Simply put, "'[a] statutory remedy does not vest until final judgment.'" *County of San Bernardino v. Ranger Ins. Co.*, 34 Cal. App. 4th 1140, 1149 (1995) (citation omitted; alteration in original).

Pineda therefore cannot claim that he has a vested interest in section 203 penalties. At most he had an "expectancy" or a "contingent interest." *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149-50 (2003) (finding the plaintiff's sales commission was "merely a contingent interest" and "[s]uch an attenuated expectancy cannot, as [plaintiff] contends, be likened to 'property' converted by [defendant] that can now be the subject of a constructive trust"). Pineda thus has overlooked the basic principle that "no person has a vested right in an unenforced penalty." *Anderson v. Byrnes*, 122 Cal. 272, 274 (1898); *accord Durbin*, 64 Cal. 2d at 479 (same) (citing *People v. One 1953 Buick 2-Door*, 57 Cal. 2d 358, 365-66 (1962)); *Ranger Insurance*, 34 Cal. App. 4th at 1149 (same).

The court of appeal correctly applied that rule, and there is no reason for this Court to revisit its analysis.

III. THE STATUTE OF LIMITATIONS ISSUE ALSO NEED NOT BE REVIEWED; THE DECISION IN THIS RESPECT IS UNPUBLISHED, THE COURT ALREADY DENIED REVIEW IN THE SEMINAL CASE, *McCOY V. SUPERIOR COURT*, AND THERE IS NO CONFLICT IN THE PUBLISHED COURT OF APPEAL CASES

The petition separately seeks review of the unpublished portion of the court of appeal opinion, applying the rule that a one-year limitations period applies to cases that solely seek section 203 penalties. Here again, review should be denied.

First, this portion of the opinion is not published, making it a weak candidate for review.

Second, the court of appeal did no more than apply *McCoy v. Superior Court*, 157 Cal. App. 4th 225 (2007), which this Court last year declined to review (No. S159505, *review denied,* February 13, 2008). There is no more reason to review the issue now than there was then.

Third, no conflict in the published cases exists. The petition alludes to an *un*published decision. (Pet. at 20 n.3; *but see* Cal. R. Ct. 8.1115(a)

(prohibiting "cit[ing]" or "rel[ying] on" such decisions).) Any such decision is just that — unpublished — and not a reason for review. If and when a panel disagrees in a published decision with *McCoy*, that might be an appropriate time to grant review. Until then review is premature, as no conflict in the published decisions exists.

Finally, no conflict likely will emerge because *McCoy* was correctly decided. The *McCoy* court evaluated the plain language of section 203, its context, the policy underlying the law, and the legislative history and concluded:

> [F]or suits seeking penalties alone, the objective of section 203, the legislative intent, and the common sense meaning of the section's language persuade us defendant's interpretation [that Civil Procedure Code section 340(a), the usual statute of limitations for statutory penalties, applies in an action where only penalties are sought] is correct. . . . [¶] [T]he language of the statute, i.e., that suit for penalties may be filed before expiration of the statute of limitations "on *an action for the wages* from which the penalties arise" . . . and its intent make clear that the concurrent statute of limitations for wages and penalties was enacted more for an employee's convenience than for the purpose of establishing a time to independently recover a penalty without regard to whether and when the back wages were paid.

157 Cal. App. 4th at 229-30 (emphasis in original).

As *McCoy* recognized, its construction of section 203 furthers the legislative purpose of the law: to secure the prompt payment of wages. Indeed, it is plaintiff's theory that is anomalous. Plaintiff asserts that while employers must

pay wages promptly, an employee should be able to sit back after being correctly paid and wait years to assert a claim for a penalty on the (correct) payment. *McCoy* explained:

> Assume an employer paid wages five days or even 31 days after they were due. It is not reasonable to assume the Legislature intended an employee would be able to wait for three or four years to sue for the associated waiting time penalty instead of within one year pursuant to section 340(a). Our construction reflects the public policy of statutes of limitations to ensure "prompt assertion of known claims."

Id. at 231 (citations omitted).

This Court saw no reason to review *McCoy* (a published decision), and there is even less reason to review the instant case (an unpublished decision applying that one).

IV. CONCLUSION

Even if a review-worthy question potentially existed, this case is the wrong one in which to consider it. The Court should await further developments in the court of appeal cases before considering either question presented here.

Respectfully submitted,

DATED: March 16, 2009

PAUL, HASTINGS, JANOFSKY & WALKER LLP

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this brief uses a proportionately spaced Times New Roman 14 point typeface, and that the text of this brief consists of 1,794 words as counted by the word processing program used to generate it.

DATED: March 16, 2009

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Jorge A. Pineda v. Bank of America, N.A.
Supreme Court Case No. S170758

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ANSWER TO PETITION FOR REVIEW

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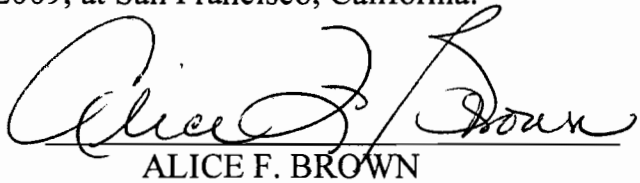

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