

SUPREME COURT COPY

No. S170758

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

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JORGE A. PINEDA

Plaintiff and Appellant,

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
Honorable Harold E. Kahn, Judge

=====

REPLY TO ANSWER TO PETITION FOR REVIEW

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Service on Attorney General and San Francisco County District
Attorney Required By Bus. & Professions Code § 17209

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INTRODUCTION

Unable to contradict its earlier admission that this case involves important questions of law, Defendant focuses solely on uniformity of decision. Defendant contends that the restitution issue is one of first impression and that, with respect to the statute of limitations issue, there is no conflict in published court of appeal opinions. Defendant's limited arguments against review have no merit because both prongs of Rule 8.500(b) need not be satisfied for this Court to order review. The undeniable importance of the issues raised by Plaintiff alone warrants review.

In addition, review is warranted to secure uniformity with this Court's precedential decisions. With respect to the statute of limitations issue, Defendant ignores the irreconcilable conflict between the court of appeal's ruling, that the one year limitations period in Section 340(a) of the Code of Civil Procedure applies to claims under Labor Code Section 203, and this Court's explication in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, that the Legislature did not intend the one year limitations period in Section 340(a) to apply to claims under Section 203.

With respect to the restitution issue, Defendant ignores the irrefutable fact that the court of appeal's application of the statutory repeal rule to define the scope of restitution under the UCL would necessarily preclude recovery of statutorily owed overtime wages in contravention of this Court's decision, in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, that overtime wages can be recovered as restitution under the UCL.

Trying to make this case seem unimportant, Defendant suggests that employees paid their wages late need not be given more than one year to vindicate their rights to prompt payment of wages because they have already been paid their wages. Defendant is wrong because how long an employee has to seek recovery of waiting time penalties does not depend on the amount of the employee's damages, but turns solely on what the Legislature intended. Moreover, Defendant gives unduly short shrift to the importance of paying wages in a timely manner. This Court understands that "California has long regarded the timely payment of employee wage claims as indispensable to the public welfare." *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82. The consequences of the court of appeal's erroneous decision are too

important for this Court to “await further developments” (Answer p. 8). Review now is imperative to ensure that employees in California can seek justice for late payment of wages in accordance with all the statutory remedies made available to them by the Legislature.

ARGUMENT

I. Review Is Warranted To Decide Important Legal Issues, Even Of First Impression, Especially When They Involve The Fundamental Right To Prompt Payment Of Wages

Defendant cannot cite any authority for the proposition that review of an important question of law should be denied just because review would involve an issue of first impression. No such authority exists. On countless occasions, this Court has granted review to decide issues of first impression because of their importance alone.

Cases involving the fundamental right to prompt payment of wages demonstrate how this Court does not wait for conflicts between published appellate court opinions before granting review to settle important questions of law. For example, in *Smith v. Superior Court* (2006) 39 Cal.4th 77, the Court granted review to decide an issue of first impression involving claims under Labor Code Section 203. The Court elaborated on the important public policies at stake:

The public policy in favor of the full and prompt payment of an employee's earned wages is fundamental and well established: "Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and in many cases may make the wage-earner a charge upon the public." [citation omitted]. California has long recognized the timely payment of employee wage claims as indispensable to the public welfare: "It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when due. [Citations.] An employer who knows that wages are due, has ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does an act which prejudices the rights of his employee." [Citation omitted].

Smith, 39 Cal.4th at 82.

In *Cuadra v. Millan* (1988) 17 Cal.4th 855, the Court expressly invoked the fundamental right to prompt payment of wages as the rationale for deciding an issue of first impression involving administrative claims for unpaid wages. The Court, which affirmed the court of appeal's decision as correct (further demonstrating that the importance of the issue alone dictated review), explained why it granted review to decide the merits of the issue:

Avoidance of delay is all the more important when, as here, the issue affects a substantial segment of the workforce so that its prompt resolution is clearly in the public interest. “Public policy has long favored ‘the full and prompt payment of wages due an employee.’” [Citation omitted].

Cuadra, 17 Cal.4th at 871.

Both the statute of limitations issue and the restitution issue involve how long an employee has to sue to vindicate his or her right to prompt payment of wages. Defendant does not, because it cannot, dispute that determining the proper claims period in actions seeking recovery of waiting time penalties owed under Labor Code Section 203 will affect a substantial segment of the California workforce. The undeniable importance of the fundamental public policy at stake in this case, whose enforcement requires correct resolution of the issues raised by Plaintiff, makes both of them worthy of review.

II. Defendant Ignores The Conflict Between The Appellate Court’s Decision And This Court’s Precedents

In his petition for review, Plaintiff explained how the court of appeal’s decision on the statute of limitations issue, which follows the ruling in *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, conflicts with this Court’s decision in *Murphy*. Defendant does not

even address this conflict, let alone resolve it. Defendant cannot, because the erroneous reasoning in *McCoy* cannot be squared with this Court's express explication in *Murphy* that the Legislature did not intend the one year limitations period to apply in suits to recover waiting time penalties under Labor Code Section 203.

Defendant suggests that *McCoy* was decided correctly because this Court denied the plaintiff's petition for review in *McCoy*. But, denial of review does not constitute a ruling by this Court that the court of appeal rendered a decision free from error. *Cole v. Rush* (1955) 45 Cal.2d 345, 351, n.3. Moreover, prior to the petition for review in *McCoy*, the parties reached a settlement. It therefore seems most likely that the Court agreed with the defendant in *McCoy* who argued that review was not warranted because the case was moot. Whatever the reason for denial of review, the fact remains that neither *McCoy* nor the opinion in this case can be squared with *Murphy* and review is still needed to secure uniformity of decision.

With respect to the restitution issue, Plaintiff explained in his petition for review how the statutory repeal rule cannot be used to determine the scope of restitution under the UCL without, in

contravention of this Court's decision in *Cortez*, necessarily precluding restitution of money owed by statute. Unable to come to grips with this irreconcilable conflict, Defendant ignores it altogether and instead just relies on additional cases applying the statutory repeal rule in irrelevant cases not involving the UCL.

Defendant also ignores the conflict between the court of appeal's decision and the requirement that, on appeal from an order granting a motion for judgment on the pleadings, the plaintiff's allegations must be deemed true. Defendant utterly fails to explain how the court of appeal's ruling on the restitution issue, which turns on the simplistic truism that relief is never awarded until proven, can be reconciled with all the precedents governing the legal standard for determining whether allegations state a viable cause of action.

Ultimately, the mere fact that a court of appeal decides a matter of first impression, or does not render a decision in conflict with another court of appeal opinion, does not mean that review is not needed to secure uniformity of decision. This Court long ago recognized that review is necessary to ensure that decisions by the courts of appeal conform "to the settled rules and principles of law."

People v. Davis (1905) 147 Cal. 346, 348. This means that review is properly granted “when error appears on the face of the opinion of the appellate court.” *People v. Groves* (1935) 9 Cal.App.2d 317, 322. The court of appeal’s erroneous deviation from the rules of law established by this Court’s precedential decisions warrants review.

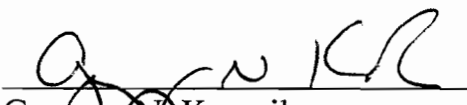
CONCLUSION

The case presents two issues of extreme importance. Both the restitution issue and the statute of limitations issue raise pure questions of law whose determination is vitally important to preserve the ability of employees to vindicate their rights to prompt payment of final wages. Review of the restitution issue is also needed to prevent misapplication of the statutory repeal rule from eviscerating the UCL. Plaintiff respectfully requests the Court to grant review.

Dated: March 24, 2009

SPIRO MOSS LLP

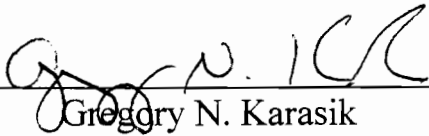
By:


Gregory N. Karasik
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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this petition for review uses a proportionately spaced Times New Roman 14-point typeface and consists of 1,646 words as counted by the word processing program used to generate this petition for review.

Dated: March 24, 2009



Gregory N. Karasik

DECLARATION OF SERVICE BY MAIL

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 11377 W. Olympic Boulevard, Fifth Floor, Los Angeles, California 90064-1683.

2. That on March 24, 2009 declarant served the **REPLY TO ANSWER TO PETITION FOR REVIEW** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of March, 2009 at Los Angeles, California.



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