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SUPREME COURT COPY

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

o

MIGUEL MARTINEZ, et al.,
Plaintiffs and Petitioners,

vs.

CORKY N. COMBS and LARRY D. COMBS
d/b/a COMBS DISTRIBUTION CO.;
JUAN RUIZ;
APIO, INC., a Delaware Corporation,
Defendants and Respondents

o

After a Decision by the Court of Appeal,
Second Appellate District, Division Six
Case No. B161773

o

ANSWER TO PETITION FOR REVIEW

O

JANE E. BEDNAR (SBN 138626)
Anastassiou & Associates
242 Capitol Street
Post Office Box 2210
Salinas, California 93902
(831) 754-2501

Attorneys for Defendant/Respondent
APIO, INC.

Unfair Competition case
(*See* Bus. & Prof. Code, §17209, and Cal. Rule of Court 15(e)(2).)

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I. INTRODUCTION

In this case, appellants – agricultural field workers who had the misfortune to work for a successful strawberry grower who chose not to pay their wages (and instead used the money he received from the sale of strawberries for other purposes) – urge the Court to redress their plight by imposing *strict liability* for those wages upon unrelated and independent third parties (including respondent, Apio, Inc. ["Apio"]) who contracted with their direct employer to purchase and market the strawberries. Appellants want the Court to rule that a party to an arm's length contract who knows or should know that the other party will use labor to perform its contractual duties, should unconditionally guarantee that the labor is paid their wages.

Such a rule would radically alter the way business is done in California, resulting in a chilling effect on the state's business climate generally. Moreover, under the facts of this case, such a ruling would, *ex post facto*, drastically increase the risk of Apio's enterprise in a way that was neither contemplated nor bargained for. The retroactive, automatic liability sought by appellants thus would unconstitutionally interfere with Apio's freedom to contract. It also would result in a forfeiture and a taking without due process, because Apio, and others similarly situated, could never dispute liability, since liability would not depend on the *degree of control* Apio exercised over

appellants' wages, hours, or working conditions. For a myriad of reasons, the rule urged by appellants is simply not supported by statute or current case law and would require this Court to legislate new law.

II. FACTS OF THE CASE

Defendant, Isidro Munoz (hereinafter, "Munoz"), and Apio entered into a written agreement for Munoz to grow and harvest fresh-market strawberries on two fields in San Luis Obispo County leased by Munoz (the "Oceano field" and the "Zenon Ranch field"), and for Apio to cool, market and sell the fresh strawberries harvested from those two fields in exchange for payment of commissions by Munoz to Apio (hereinafter, "the Farmer Agreement"). (APP 129:7-114; 136-151)[1] Munoz retained full legal and beneficial title to the crops until Apio sold them to third parties. (APP 136) Apio was only one of several marketers who sold fresh-market strawberries for Munoz; the others included respondent Combs Distribution Co. In addition, Munoz sold freezer-market berries to Frozsun from the Oceano and Zenon fields where Munoz grew and harvested fresh-market berries for Apio. Apio had no business relationships with any of these other entities. However, Apio had marketing agreements similar to the one with Munoz with many other independent

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1 /Throughout respondent Apio's brief, references to Appellants' Appendix In Lieu of Clerk's Transcript will be styled as "APP ___."

produce growers in 2000. (APP 132, Murphy Decl. ¶20)

Under two separate, written sublease agreements, Apio subleased the Oceano field and the Zenon Ranch field to Munoz. (APP 129:15-26; 153-164) The subleases gave Munoz the exclusive right to occupy and farm the leased land. Munoz also grew strawberries on at least two other fields that were not subleased by Apio to Munoz.

In connection with the Farmer Agreement, Apio loaned Munoz a total of $163,000 to be repaid to Apio by deductions from monies to be remitted by Apio to Munoz from the sale of Munoz's strawberries. The $163,000 loan by Apio was only a small part of the financing required by Munoz for his farming operations, and was evidenced by a secured promissory note. (APP 166) Munoz invested $500,000 of his own money for the 2000 season, or obtained credit from other sources, including Ford Motor Credit, to finance his strawberry growing operations. (APP 186; 195; 201) Munoz paid all the expenses of his business including fumigation, pre-planting and planting costs, and purchases or leases of trucks, tractors and fuel, and provided and paid for his own equipment, seed and supplies. (APP 200, 210:9-211:4) Apio did not own any of the equipment required by Munoz to harvest strawberries or haul them to Apio's cooler. (APP 131:10-13)

Under the express terms of the Farmer Agreement, Munoz was

responsible for providing all labor, equipment, and packing materials required to harvest, grade and pack the berries and haul them to Apio's cooler. (APP 130; 136; 138-139) In fact, the Farmer Agreement expressly provided:

> All persons performing work in connection with the operations or services performed by Farmer [Munoz] shall be employees, contractors or agents of Farmer. Farmer shall determine the method, means, and manner of performance of work of Farmer's employees, agents or contractors. [¶] Farmer shall be solely responsible for the selection, hiring, firing, supervision, assignment, direction, setting of wages, hours, and working conditions, and adjustment of grievances of Farmer's employees. With respect to its employees, Farmer shall be solely responsible for preparing and making payroll records, preparing and issuing paychecks, paying payroll taxes, providing workers' compensation insurance, providing field sanitation facilities, providing transportation, and providing the tools, equipment and materials required for the job. Neither Apio nor any of Apio's quality control agents or employees shall have any right to direct or control those persons in any respect whatsoever, including but not limited to, hiring, firing, disciplining, directing, supervising, setting wages

and working conditions, and adjusting grievances.

(APP 138-139) Apio never entered into any written or oral employment agreements with any of Munoz's employees. (APP 131:26-132: 1) Moreover, Apio had no involvement whatsoever in the hiring, firing, or supervision of workers; the determination or payment of wages; or the working conditions of Munoz's employees.

Apio had the right under the Farmer Agreement to send its personnel to Munoz's Oceano and Zenon Ranch strawberry fields at harvest time, in order to confirm the quantity and quality of the fresh market strawberries to be delivered to Apio, so that Apio could make appropriate arrangements to market the crops. (APP 130; 139) However, there was no evidence that Apio's personnel ever directed or controlled the activities of Munoz's workers, or had the right to do so. Apio's personnel did consult with Munoz regarding his planting schedules in order to properly coordinate delivery and marketing of the strawberries (APP 139, ¶3.). Apio's personnel also consulted with Munoz concerning the quality and maturity of the harvested strawberries in order to ensure that the strawberries met the specifications required by Apio's customers. (APP 141, ¶8.A.). In all other respects, Munoz had complete authority to grow and to "harvest, grade and pack the Crops in accordance with the standards and practices prevailing in the industry". (APP138, ¶¶1.A. & B.)

In late May, after Munoz had stopped providing fresh strawberries to Apio for marketing and sale, the California Department of Labor Standards Enforcement ("DSLE") notified Apio that Munoz had failed to pay his workers. DSLE asked Apio not to make any further payments to Munoz under the Farmer Agreement, but instead to directly pay Munoz's workers. Apio initially declined because it had no contractual authority to make such payments without Munoz's consent, but subsequently reached a three party agreement with DSLE and Munoz, whereby Apio agreed to pay Munoz for strawberries, with Munoz in turn paying various workers through the DSLE. At Apio's request, Munoz provided Apio with a list of unpaid workers for the week of May 8-14, but none of the appellants' names was on the list. (APP 132:18-133:10; 171-172.) The unpaid workers on the list were subsequently paid by the DSLE with the funds provided by Apio.

III. ISSUES PRESENTED

Appellants argue that Apio should be liable for their wages because Apio "required a contract 'grower' to hire employees to cultivate and harvest plants in the broker/dealers' fields for exclusive delivery to the broker/dealers." In short, appellants want to hold Apio strictly liable for wages owed by another employer to his workers, by interpreting "suffer or permit to work," as used in various Industrial Wage Orders, as conferring employer

status on anyone who knows that an independent contractor will use employee labor to perform the contract. (Petition for Review ["Petition"], at p. 1.)

Alternatively, appellants want this Court to decide whether anyone who allegedly breaches a contract to pay money[2] is automatically liable to pay the wages of the non-breaching party's employees, on the grounds that non-payment constitutes a "decision" to withhold cash presumably known to be needed for payroll, and thus as sufficient "control" over the workers to confer employer status on the breaching party. (Petition, at p. 2.)

Finally, appellants argue that they were third-party beneficiaries of the Apio-Munoz agreements – an argument that both the trial court and the court below more or less summarily rejected. (Petition, at p. 2.)

Appellants' insistence on a limitless definition of "employer" finds no support in any of the historical materials or case law they cite. Appellants point to no policy or interest sufficiently compelling for the Court to abrogate the sovereignty of private contracts by retroactively making Apio the guarantor of Munoz's compliance with wage laws. Nor do appellants explain why the federal multi-factor and "economic reality" tests – both of which have been used to find secondary liability for wages by third parties in a wide variety of

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Apio disputes that it breached a contract to pay money to Munoz. In fact, Munoz failed to repay Apio in full for its grower loan.

situations – are not sufficiently broad to protect unpaid workers under proper facts where joint liability is justified.

No important question is law is presented for review because, as the two lower courts correctly recognized, the facts of the instant case fall far short of the type and degree of control over appellants required for Apio to be deemed a joint employer of Munoz's workers. The lower courts saw the Apio-Munoz relationship clearly for what it was: an arm's length strawberry marketing agreement between two separate, independently operated businesses. These courts saw no reason to superimpose a social agenda on this set of facts, or, under these unambiguous circumstances, to rush to fill any alleged void in California labor law, which would be the duty of the Legislature. This Court should likewise resist appellants' urging to expand employer liability to absurd lengths, by denying the instant petition for review.

IV. ARGUMENT

A. THE COURTS BELOW CORRECTLY APPLIED AN "ECONOMIC REALITY" TEST AND CONCLUDED THAT APIO WAS NOT APPELLANTS' EMPLOYER.

Appellants contend Apio, together with Munoz, Combs, and others, was their joint employer under Wage Order 14 of the Industrial Welfare Commission, which governs wages for agricultural workers. Wage Order 14 defines "employer" as "any person ... who directly or indirectly, or through an

agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." Cal. Code of Regulations, Title 8, §11140(2)(F). Wage Order 14 defines "employ" as "to engage, suffer, or permit to work." Cal. Code of Regulations, Title 8, §11140(2)(D).

1. **Suffer or Permit to Work**

Appellants labor to convince the Court that the multi-factor or economic reality tests used by federal courts to determine joint-employer status are narrower than the definition of "suffer or permit to work," which has never been interpreted by a California court. In support of this proposition, appellants speculate on the Industrial Welfare Commission's ("IWC's") "original intent" in adopting its original order – which arose out of horrific abuses of child workers in the early 20th Century – and argue that this alleged intent should be applied to adult farm workers.

The context from which Wage Order 14 arose – and that of contemporaneous cases from other states interpreting "suffer or permit to work" that are relied on by appellants – is distinguishable from the instant facts on at least two important grounds. First, and most obvious, appellants are not children and this case does not arise from substandard working conditions that caused terrible injury, as was the case in ***Lehigh Valley Coal Co. v. Yennsavage*** (2nd Cir. 1914) 218 Fed. Rptr. 547; ***Commonwealth v. Hong***

(Mass. 1927) 158 N.E. 759; and ***Gorczynski v. Nugent*** (Ill. Sup.Ct. 1948) 83 N.E.2d 495. In these cases, the court imposed liability on the "employer" for injuries to the child or for child labor law violations, based on the strong public policy requiring the prevention of harm to children.

Second, in each of the cases appellants cite, the de facto employer derived a direct economic benefit (i.e., the child worker was furthering the employer's enterprise; see, e.g., ***Daly v. Swift & Co.*** (Mont. 1931) 300 P.265), and/or the child was working on premises controlled by the employer – both of which factors are absent from the instant case.

Appellants also ignore modern case law from other states interpreting "suffer or permit to work" as requiring some economic nexus between the purported employer and the claimed employee, consistent with the federal multi-factor balancing test and the economic reality test. For example, in ***Garcia v. American Furniture*** (1984) 101 N.M. 785, 789, the court interpreted a New Mexico labor statute that used "suffer or permit to work", holding:

> The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. ... If one has not hired another expressly, nor suffered or permitted him to work under circumstances

> where an obligation to pay him will be implied, they are not employer and employee under the Act.

Similarly, in ***Laborers' Int'l Union of North America, AFL-CIO, et al. v. Case Farms*** (1997) 127 N.C.App. 312, 314, the Court interpreted "suffer or permit to work" as used in the North Carolina Wage and Hour Act to "'protect[ ] those who, as a matter of economic reality, are dependent upon the business to which they render service.'" (Emphasis added.) The Second Appellate District found this line of cases persuasive. (See Opinion at p. 9.)

Appellants' claim that the federal economic reality test somehow is ineffectual to protect agricultural field workers is not supported or adequately explained. The Federal Labor Standards Act (FLSA) also uses "suffer or permit to work" to define "employ." As the trial court observed, the U.S. Supreme Court in ***Nationwide Mut. Ins. Co. v. Darden*** (1992) 503 U.S. 318, 326, has noted the expansiveness and "striking breadth" of the FLSA definition. (APP 1497-1498; Ruling, pp. 8-9) The Ninth Circuit, in ***Torres-Lopez v. May*** (1997) 111 F.3d 633, 638, called the FLSA's definition of "employer""the broadest ... that has ever been included in any one act." Appellants don't explain how, in light of these observations, the federal standard is inadequate.

Appellants also gloss over extensive federal case law interpreting

"suffer or permit to work" in the context of the federal Migrant and Seasonal Agricultural Worker Protection Act ("MSAWPA") (***29 U.S.C. §§1801*** *et seq.*), which relates specifically to agricultural workers and which incorporates the FLSA's definition of "employ" at §1802 subd. (5).

The lower courts applied the correct test to determine whether Apio employed appellants. They concluded that, as a matter of economic reality, Apio was not appellants' employer. Even under the FLSA's broad definition of "employer," appellants failed to demonstrate a triable issue of fact as to whether Apio was their employer. The instant facts do not provide a platform from which to launch new policy regarding the joint employment of agricultural workers. Therefore, the petition should be denied.

2. Control Over Wages, Hours, or Working Conditions

Appellants advance what might be termed a Newtonian theory of Apio's alleged control over their employment. Apio's alleged breach of the payment terms of the contract with Munoz, they argue, resulted in Munoz's inability to pay appellants. Therefore, Apio exercised control over appellants' wages. While Apio's alleged "(in)action" arguably produced a "reaction," the causal connection is too remote to charge Apio with paying appellants' wages. Were it otherwise, principles of causation and foreseeability would be turned on end. Also under such rationale, any person who allegedly failed to timely

pay a third party under a contract would become liable for the wages of the third party's employees.

Under a more rational standard, Apio showed in the lower court that Apio had no right to control any of Munoz's growing or harvesting operations other than certain limited, enumerated inspections for the sole purpose of obtaining information about the quantity and quality of the strawberries Munoz provided to Apio for marketing and sale to Apio's customers. Such information was essential because, without knowledge of the quality or quantity of strawberries available for sale, Apio could not make the necessary arrangements to sell and ship this highly perishable product.

Further, Apio established that the businesses of Apio and Munoz were separate and distinct: Munoz was in the business of growing and harvesting strawberries, while Apio is in the business of marketing and selling strawberries. Munoz alone, and not Apio, made decisions about financing and operating his strawberry growing business; provided all of the equipment, materials, and supplies necessary for appellants to perform their work; performed all payroll functions; and directly paid his workers. Munoz alone determined the composition of work crews, where the crews would work, what tasks to assign, how much to pay, and when to stop picking fresh market strawberries and when to start picking strawberries for processed products.

Taken in context, none of Apio's limited quality assurance activities rises to the level of "control" necessary to find that Apio was appellants' employer.

Further, contrary to appellants' arguments, Apio did not exert direct *or* indirect financial control over the operations of Munoz. Because the average cost of growing fresh market berries is $7,000 to $8,000 per acre (APP 130), Munoz's growing costs for farming the total 72 acres leased from Apio would have exceeded $500,000 a year (or more than $1,700,000 using the $23,833 per acre cost for the Santa Maria Valley area; APP 377). Thus Apio's $163,000 advance – which works out to about $2,200 per leased acre farmed by Munoz – comprised a very small to insignificant percentage of Munoz's growing costs. There is no evidence that Apio's advance was anything other than an arm's length loan, evidenced by a promissory note. It was not an "investment."

The "Pick Pack" advances by Apio also were arm's length and a bargained-for benefit to Munoz of the Farmer Agreement. Marketing agents often make such advances to growers during harvest, when growers' payroll expenses comprise the lion's share of operating costs. The advances were intended to, and did, benefit Munoz (and by extension, Apio) by ensuring adequate cash flow for Munoz to conduct an orderly harvest of the strawberries. Appellants have not demonstrated or even suggested how Apio

would benefit by manipulating the amount or timing of Pick Pack advances. To the contrary, such conduct would harm Apio's financial interests as well as Munoz's, because if Munoz became unable to pay his workers, no strawberries could be harvested. Any alleged wrongful withholding of monies by Apio (of which there is no justifiable inference) would have constituted a breach of an arm's length contract, not an instance of Apio's right to control Munoz's strawberry growing business.[3]

Most importantly, Apio did not have the right to select, hire or fire Munoz's workers – the most significant factor in determining the "control" element in an employment relationship (***S.G. Borello & Sons, Inc. v. Dept. of Indust. Rel.*** (1989) 48 Cal.3d 341, 350-351, and cases following it). Appellants' reliance on Apio's gratuitous payment through the DSLE of monies owed to Munoz was found by the Second District to be insufficient to support any inference that Apio controlled Munoz's workers.

B. APPELLANTS WERE NOT THIRD-PARTY BENEFICIARIES OF THE APIO-MUNOZ CONTRACT

Both the trial court and the Second District were unimpressed by

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There was no need for the trial court to determine the existence of a triable issue of material fact as to whether Apio breached the Farmer Agreement, because the court found that as a matter of law, appellants were not third-party beneficiaries of the Agreement (see discussion *infra*).

appellants' theory that they were third-party beneficiaries of the Farmer Agreement between Munoz and Apio. Of course, it is axiomatic that a third party has standing to enforce a contract only if the parties to the contract expressly intended to benefit such party, or the class of persons to whom he or she belongs. See BAJI 10.59; Civil Code §1559. An incidental beneficiary of a contract is not entitled to enforce its terms. ***Shell v. Schmidt*** (1954) 126 Cal.App.2d 279, 290.

The courts below based their conclusion on evidence of lack of intent by the contracting parties to directly benefit the appellants. The courts also reasonably inferred that Munoz's promise to obey all labor and wage laws was intended by Apio to protect itself from litigation arising from Munoz's actions, and concluded that appellants were only incidental beneficiaries of the Farmer Agreement. Appellants have failed to demonstrate how the courts' conclusion was erroneous.

V. CONCLUSION

Appellants argue that the Court should review this case because of the evils inherent in a farm-labor system that is heavily reliant on fly-by-night farm labor contractors, who appellants claim growers use to insulate themselves from wage liability. This is not such a case. There is no evidence that Munoz was a farm labor contractor. There is ample evidence that he was a strawberry

grower investing his own monies in his business and making hundreds of thousands of dollars a year. The reason appellants did not get paid was that Munoz chose not to pay them, or was unable to do so because of the way he ran his business. That is not Apio's fault, and these facts don't justify impairing the parties' freedom to contract, guaranteed under Article I, §9 of the California Constitution.

It is a shame that workers such as appellants go unpaid for their honest labor. However, the supposed difficulty faced by these workers in proving joint-employer status is no reason to erase the legal distinction between true employers, and independent contractors. The failure of appellants' hopes to create new law in this case stems from the fact that any way one looks at it, Apio did not exert sufficient control over appellants to be deemed their employer. Unfortunately for appellants, they have picked the wrong case to argue.

Under these facts, any conclusion other than that reached by both the trial court and the Second District would violate this Court's own interdiction, in ***Morillion v. Royal Packing Co.*** (2000) 22 Cal. 4th 575, 585, against engaging in "needless policy determinations regarding wage orders." There is no need for the Court to even enter that territory, because there is no important question of law to be settled. The Court should deny the petition

for review.

DATE: January 15, 2004

Respectfully submitted,

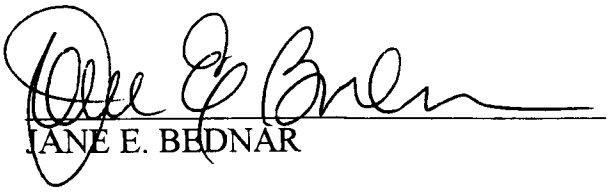
ANASTASSIOU & ASSOCIATES

By _____
EFFIE F. ANASTASSIOU
JANE E. BEDNAR
Attorneys for Respondent
Apio, Inc.

RULE 14(c)(1) CERTIFICATION

I, JANE E. BEDNAR, certify that I am Defendants/Respondent APIO, INC.'s counsel in the instant matter; that I have prepared the foregoing Respondent's Brief in this matter using WordPerfect version 11.0, and that the word count for this brief including footnotes is 3,763, as generated by the appropriate word-count command to the Word Perfect program.

DATED: January 15, 2004



JANE E. BEDNAR

PROOF OF SERVICE BY MAIL

I am a legal resident of the United States, residing and employed in the County of Monterey, State of California. I am over the age of eighteen years and not a party to the aforementioned action. My business address is 242 Capitol Street, Salinas, California, 93901.

On January 16, 2004, I served the following:

OPPOSITION TO PETITION FOR REVIEW

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and placing same for collection and mailing in the mail room of Anastassiou & Associates, 242 Capitol Street, Salinas, California, addressed as follows:

Mark Talamantes, Esq.
Talamantes, Villegas & Carrera, LLP
1550 Bryant Street, Ste. 725
San Francisco, CA 94103

Attorneys for Petitioners
Miguel Martinez, Hilda Martinez,
Antonio Perez Cortes, Otilio Cortes
and Asuncion Cruz

William Hoeger, Esq.
California Rural Legal Assistance, Inc.
631 Howard Street, Suite 300
San Francisco, CA 94105

Attorneys for Petitioners
Antonio Perez Cortes, Otilio Cortes
and Asuncion Cruz

Terrence R. O'Connor, Esq.
Noland, Hammerly, Etienne & Hoss
333 Salinas Street, Post Office Box 2510
Salinas, CA 93902-2510

Attorneys for Defendants/Respondents
Corky N. Combs, Larry D. Combs,
Combs Distribution Co. and Juan Ruiz, Jr.

Bill Lockyer
Attorney General of the State of California
Consumer Law Section
Ronald Reagan Building
300 S. Spring Street
Los Angeles, CA 90013

Court of Appeal of the State of California
Second Appellate District, Division Six
200 E. Santa Clara Street
Ventura, CA 93001

Gerald T. Shea
District Attorney of San Luis Obispo County
Consumer Law Section
County Government Center, Room 450
San Luis Obispo, CA 93408

Superior Court of California
San Luis Obispo County
Honorable E. Jeffrey Burke, Judge
1035 Palm Street, Room 385
San Luis Obispo, CA 93408

I am readily familiar with the business practice of the within named office for collection and processing of correspondence for mailing with the United States Postal Service and the above-referenced correspondence will be deposited with the United States Postal Service on the same date as first stated above, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if a postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this affidavit.

I, Sandra Lee Divens, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 16, 2004, at Salinas, California.

Sandra Lee Divens

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