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Case No. S ~~S 185827~~ 185827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Anthony Kirby et al.,

Plaintiffs, Appellant and Petitioners

vs.

Immoos Fire Protection, Inc.,

Defendant and Respondents

Petition for Review of a Decision of the Court of Appeal,
Third Appellate District Case No. C062306

PETITION FOR REVIEW

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ANTHONY KIRBY AND RICK LEECH, JR.

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To the Honorable Chief Justice of the California Supreme Court and the Honorable Associate Justices of the California Supreme Court:

Plaintiffs and Petitioners Anthony Kirby and Rick Leech, Jr. ("Petitioners") respectfully petition for review of the published decision of the Court of Appeal, Third Appellate District, filed on July 27, 2010 ("Opinion"). Review is necessary to settle important issues of law and public policy relating to the recoverability of attorneys' fees by prevailing employers in meal and rest period litigation.

I. ISSUES PRESENTED FOR REVIEW

(1) Did the Court of Appeal err by concluding the statutorily-mandated Labor Code Section[1] 226.7 "wage" for missed meal and rest periods is subject to the two-way fee shifting statute of Section 218.5?

(2) Did the Court of Appeal err by awarding fees to the employer under Section 218.5 where no parties made a specific demand for Section 218.5 attorneys' fees "upon initiation of the lawsuit" as required by the statute?

(3) Did the Court of Appeal err by finding the employer the "prevailing party" entitled to an award of attorneys' fees pursuant to Section 218.5 when the employees recovered all wages due to them?

(4) Did the Court of Appeal err by holding that the term "action" in the second paragraph of Section 218.5 means "cause of action" and that an employee seeking minimum wage or overtime

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

compensation under Section 1194 must forego his or her additional claim for straight pay or face the risk of potentially ruinous liability for the employer's attorneys' fees?

II. WHY REVIEW SHOULD BE GRANTED

This case must be reviewed because for the first time a Court of Appeal has held that a non-prevailing[2] employee in a meal or rest period lawsuit can be liable to their employer for the employer's attorneys' fees under Section 218.5. This fee section is the only "two-way" fee shifting statute in the Labor Code; all others, most notably Section 1194, make it clear an employee's right to pursue statutorily-mandated wages should not be chilled for fear of owing their employer an attorneys' fee. Here, this is an especially incorrect decision with an egregious result because the employees *did* recover all wages owed by the employer's co-defendants, never requested Section 218.5 fees at the inception of the lawsuit (as required by statute), and were still told their employer could seek fees for a failed "rest period" cause of action. If this result stands, no employee would seek their additional hour's wage under Section 226.7 as a remedy for meal and rest period violations for fear of being liable for the attorneys' fees of their employer, something the Legislature never contemplated. This Court must review to correct this serious

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[2] Although Petitioners assert and later make an argument that Plaintiffs were the prevailing party, the more important issue is that even if they were not, Section 218.5 cannot award fees to an employer on a meal or rest period claim.

misinterpretation of the Labor Code affecting millions of workers in California.

III. PROCEDURAL HISTORY

Petitioners were sprinklerfitters employed by Defendant and Respondent Immoos Fire Protection, Inc. ("Respondent" or "Immoos"), a provider of fire protection services on construction sites throughout California. On January 3, 2007, Petitioners filed a class action lawsuit against Respondent for widespread wage and hour violations, alleging a total of six causes of action against Respondent, and a seventh cause of action against various General Contractors who entered into construction contracts with Immoos for construction labor services pursuant to Section 2810 ("2810 Defendants"). (1 JA 0001-0016.) On June 20, 2007, Respondent filed an amended answer to the complaint. (2 JA 0097-0101.) On August 30, 2007, Petitioners filed a first amended complaint. (1 JA 0017-0032.) On September 18, 2007, Respondent answered the first amended complaint. (2 JA 0201-0205.) Neither the Complaints nor the Answers ever invoked Section 218.5 fees.

Petitioners filed a motion for class certification, which was first noticed for December 19, 2008. (1 JA 0051.) On October 1, 2008, Petitioners entered into a conditional settlement with one of the 2810 Defendants. (1 JA 0043.) On October 14, 2008, Petitioners entered into a conditional settlement with another 2810 Defendant. (1 JA 0046.) On November 21, 2008, Petitioners entered into a conditional settlement with a third 2810 Defendant. (1 JA 0049.) On December 2, 2008, Petitioners finally entered into a conditional settlement with

the last identified 2810 Defendant. (1 JA 0054). *These settlements totaling $6,000 amounted to the full wages the two named plaintiffs were owed which has never been disputed in any of the briefs by Respondent.*

Thereafter, on January 13, 2009, the trial court denied the motion for class certification. (2 JA 0207.) After execution of those conditional settlements, Petitioners filed dismissal of the Complaint against each of the 2810 Defendants on January 26, 2009 (1 JA 0056), January 26, 2009 (1 JA 0058), January 29, 2009 (1 JA 0060) and February 9, 2009 (1 JA 0061). It was not until receiving all the monies due to Petitioners that they filed a request for dismissal against Respondent on February 27, 2009. (1 JA 0062.) On April 24, 2009, Respondent filed a motion for attorneys' fees and costs (1 JA 0064 – 3 JA 347), arguing they were the prevailing party, and on June 24, 2009, the trial court awarded Respondent *$46,846.05* for its defense against all causes of action. (3 JA0411-0414.) Petitioners appealed the trial court's decision.

On July 27, 2010, the Court of Appeal issued its Opinion, reversing the trial court's decision to award attorneys' fee awards to Respondent for six out of the seven causes of action. Op. at 2. However, the Court of Appeal concluded, that the trial court properly granted an attorneys' fee award for the sixth cause of action related to missed rest periods – the sole and remaining cause of action at issue in this litigation. This sixth cause of action alleges Respondent failed to provide second rest periods in violation of Section 226.7 and Industrial Wage Order No. 16-2001. As such, Appellants were owed

Section 226.7 wages, or, specifically, "one additional hour of pay at the employee's regular rate of compensation for each work day that the . . . rest period is not provided." § 226.7(b).

In affirming the trial court's fee award for Section 226.7 claims, the Court of Appeal rejected Petitioners' contention that Section 226.7 claims fell squarely within the one-way fee provision of Section 1194, which precludes employers from recovering attorneys' fees in claims for nonpayment of wages considered to be "legal minimum wage" or "legal overtime compensation." § 1194. Instead, the Court of Appeal held that Section 218.5, California's bilateral fee-shifting provision, applied to Section 226.7 claims. Op. at 18-21. The Court of Appeal explained that because the Section 226.7 wage is calculated using the "employee's regular rate of compensation," which it considered a "contractual rate of compensation" and not the "legal minimum wage," Section 226.7 claims are not "premised on the failure to pay the minimum wage," rendering such claims outside the purview of Section 1194. *Id.* at 10-20.

The Court of Appeal has it wrong, and the analysis in its published Opinion represents an unprecedented and radical departure from the well-established standards California courts have long used to determine whether a wage claim falls within Section 1194. Moreover, the Court of Appeal's decision is incompatible with *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1112 (2007) ("Similarly, the Labor Code mandates the payment of a minimum wage and makes the payment of a lesser amount 'unlawful.' Nonetheless, this prohibition does not convert the remedy of

recovering the unpaid balance of the full amount of the minimum wage (§ 1194, subd. (a)) into something other than a wage subject to a three-year statute of limitations.").

The Opinion also violates long-standing California public policy that the wage laws should be construed in a manner most favorable to the employee and that of protecting workers, particularly low-wage workers. *Martinez v. Combs*, 49 Cal. 4th 35, 61 (Cal. 2010) ("`[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.'") (citation omitted). Workers who bring unsuccessful claims for violations of fundamental worker protections such as statutorily-mandated wages for rest periods and overtime should not have to fend off employer demands for attorneys' fees, which may, as they have in this instance, exceed the total amount recovered in a wage and hour action alleging multiple causes of action against multiple defendants. The Court must grant this Petition and dispose of this Opinion.

IV. ARGUMENT

A. REVIEW IS NECESSARY TO ESTABLISH THAT THE STATUTORILY-MANDATED SECTION 226.7 WAGE IS A "LEGAL MINIMUM WAGE" PROTECTED UNDER SECTION 1194.

Pursuant to California Rules of Court, Rule 8.500(b)(1), the California Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. Cal. Rules of Court, Rule 8.500(b)(1). The Supreme Court is an "institutional overseer" and "decides cases involving important public policy questions." Eisenberg, Horvitz and Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶13:1, p. 13-1 (rev. #1, 2009). Review should granted here to settle important questions of law regarding the applicability of Section 1194 to the Section 226.7 wage and to clarify important public policy issues. A grant of review is also timely given the Court's recent review of *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (2008).

In publishing its decision in this case, the Third District Court of Appeal is making clear it is setting *new precedent* in regards to attorneys' fees in meal and rest period cases, and in direct conflict with *Murphy*.[3] A decision with such devastating consequences to

[3] The Opinion has generated significant press and activity on employer legal blogs suggesting the Opinion has become a harassing tool for employers. *See* RJN, Ex. A (an employers' lawyer stating workers no longer get a "free whack" as employers can now "credibly threaten to obtain a sizable judgment against employees" even though

millions of California workers must be reviewed by this Supreme Court.

B. THE COURT OF APPEAL'S ANALYSIS DISREGARDS THE LONG-ESTABLISHED LEGAL STANDARD, CAUSES CONFUSION AND CONFLICT, AND SHOULD BE REJECTED.

A wage constitutes a "legal minimum wage" or "legal overtime compensation" under Section 1194 when (1) the employer's duty to pay the wage is mandated by statute and "enforceable independent of an express contractual agreement;" and (2) the employee's entitlement to the wage is based on important public policy. *Road Sprinkler Fitters Local Union v. G&G Fire Sprinkers*, 102 Cal. App. 4th 765, 778-779 (2002); *see also Earley v. Superior Court of Los Angeles County*, 79 Cal. App. 4th 1420, 1430 (2000); *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 612 (2007). California courts have applied this standard to establish the prevailing wage as a "legal minimum wage" under Section 1194. *Road Sprinkler Fitters*, 102 Cal. App. 4th at 779; *Reyes*, 148 Cal. App. 4th at 612. Courts have also held that overtime compensation falls exclusively within Section 1194. *Earley*, 79 Cal. App. 4th at 1430; *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal. App. 4th 1363, 1378 (2007).

"many such awards may not ultimately become collectible in full"); Ex. B (an employers' lawyer stating a worker who brings an unsuccessful claim is "potentially facing a judgment lien on property" or a "black mark in credit"). This legal "precedent" is exactly why the Supreme Court must grant review.

Inexplicably, the Court of Appeal disregarded this legal standard in its analysis of the Section 226.7 wage. Op. at 18-21. Citing *no authority*, the Court of Appeal instead embarked on an analysis of the "employee's regular rate of compensation," the measure of pay employers are required to use to compensate employees for violations of Section 226.7. *Id.* at 19-20. The Court of Appeal concluded that because the "employee's rate of compensation" referred to a "contractual rate of compensation" and not the "legal minimum wage," a claim for Section 226.7 wages "is not one premised on failure to pay the minimum wage." *Id.* at 20.

The Court of Appeal's analysis is dangerously wrong. First, the employer and employees here, working under a contractural employment relationship where they agree on a wage rate, does not affect the test for Section 1194 applicability. The test hinges on *whether the duty to pay the wage is mandated by statute* and enforceable independent of an express contractual agreement. *Road Sprinkler Fitters Local Union*, 102 Cal. App. 4th at 779 ("[W]hile the obligation to pay [the wage] arises from an employment relationship which gives rise to contractual obligations and claims, the duty to pay [the wage]" must be statutory in order for Section 1194 to apply.) As such, an agreement concerning whether the employer pays the Section 226.7 wage would be relevant, but an agreement on the "regular rate of compensation" – the rate at which the employer would pay – is simply not. The Court of Appeal's reliance on the "regular rate of compensation" as a basis for finding that the Section 226.7 wage falls outside of Section 1194 is flawed.

Second, if mere reference to a "regular rate of compensation" is sufficient to exclude Section 226.7 from Section 1194, then overtime compensation would be excluded as well. Section 510 governing overtime compensation also refers to an "employee's regular rate of pay." § 510. Overtime compensation, however, is not excluded from Section 1194. Indeed, it is explicitly included in Section 1194. The Court of Appeal's analysis thus leads to conflicting decisions of law.

Moreover, by characterizing the Section 226.7 wage as a "sum over and above the regular pay" and through repeated use of "minimum wage," the Court of Appeal appears to conflate "legal minimum wage" under Section 1194 with the actual federal or California state minimum wage amount, which is incorrect, confusing, and bound to confuse other courts and practitioners, and most importantly renders meal and rest period claims a potential nightmare for any employee to pursue. Op. at 19-21.

The Court of Appeal also hurries past the *Murphy* decision distinguishing it on its facts and in some places disagrees with *Murphy* outright. Op. at 20-21. *Murphy*, however, is applicable and highly instructive here. Indeed, the "premium pay" discussed in *Murphy* is the "legal minimum wage" at issue in this action and analogous to the "premium pay" provided by overtime compensation laws. 40 Cal. 4th at 1108-14, 1120 (2007) ("Under the amended version of Section 226.7 an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to Section 226.7 is akin to an employee's immediate entitlement to payment of wages or for

overtime.") The Court of Appeal, however, fundamentally misunderstands, and more importantly, "disagrees" with *Murphy,* and this Court should grant review to correct the "precedent" they seek to make. *See* RJN, Ex. C.

C. THE *MURPHY* DECISION CLEARLY ESTABLISHES THAT THE SECTION 226.7 WAGE IS A "LEGAL MINIMUM WAGE" FOR PURPOSES OF SECTION 1194.

The Court of Appeal has found that Section 226.7 remedies are *not* a statutorily mandated minimum wage, despite this Court's opposite conclusion in *Murphy*. Again, comparing it to overtime laws covered by Section 1194, the Court said:

> As has been recognized, in providing for overtime pay, the Legislature simultaneously created a premium pay to compensate employees for working in excess of eight hours while also creating a device 'for enforcing limitation on the maximum number of hours of work..., to wit, it is a maximum hour enforcement device...."
>
> *Murphy*, 40 Cal. 4th at 1109.

That the duty to pay the Section 226.7 wage is mandated by statute cannot be contested seriously after *Murphy*. *Id.* at 1108-14. As explained by this Court, an employee who is forced to work during statutorily-mandated [meal or] rest periods is entitled to the Section 226.7 wage – the additional one hour of pay – for the time period he or she worked. *Id.* at 1108. This entitlement is immediate and similar to the entitlement to payment for wages and for overtime compensation. *Id.* The multiple comparisons of Section 226.7 to overtime compensation in *Murphy* further confirm that the duty to pay

the Section 226.7 wage is conferred *by statute*. *Id.* at 1110, 1113-14 (both are considered "premium pay"); *Id.* at 1112-1113 (damages in both overtime and meal and rest period claims are obscure and difficult to prove). If overtime claims are governed by Section 1194 for fees, so must Section 226.7 be governed by Section 1194.

Moreover, the plain language of Section 226.7(b) explicitly mandates *when* the employer pays. *See* § 226.7(b) ("If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer *shall* pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.") (emphasis added).

In addition, other courts have long held that statutory minimum rest periods are non-waivable, minimum labor standards. *Zavala v. Scott Bros. Dairy, Inc.*, 143 Cal. App. 4th 585, 596 (2006); *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 1294-1295 (2009) (meal and rest period laws cannot be waived); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1066, n.14 (9th Cir. 2007) ("'the substantive provisions . . . mandating meal periods . . . [cannot] in any way be contravened or set aside by a private agreement, whether written, oral, or implied'") (citation omitted). An employee's entitlement to wage compensation for missed rest periods is not a matter of private contract between employer and employee. Therefore, the Section 226.7 wage is a *mandatory wage* imposed by statute.

Murphy also confirms the important public policy behind meal and rest period requirements. Protecting the millions of workers, particularly low-wage workers, from the potential health hazards and injuries resulting from missed breaks, lies at the policy core of Section 226.7. *See Murphy*, 40 Cal. 4th at 1113 ("Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor."); *Naranjo v. Spectrum Security Services, Inc.*, 172 Cal. App. 4th 654, 666-667 (2009); *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 1295 (2009) ("[M]eal period provisions address some of 'the most basic demands of an employee's health and welfare.'").

Murphy confirms that the Section 226.7 wage is indeed statutorily mandated, and the entitlement to this wage is based on important public policy. Therefore, Section 1194 should apply, and the Court should take review to reverse the conclusion of the Court of Appeal to the contrary.

D. THE OPINION ALSO CONFLICTS WITH THE HOLDING IN *MURPHY* THAT 226.7 IS WAGE AND NOT A PENALTY.

In *Murphy*, this Court held the additional hour's wage compensation in Section 226.7 is not a penalty, but a "premium wage intended to compensate employees" for potential health hazards and other injuries arising from the denial of rest and meal breaks. 40 Cal. 4th at 1102–1111, 1115. In addition to compensating employees,

Section 226.7 "also has a corollary purpose of shaping employer conduct." *Id.* at 1111. As the Court in *Murphy* provided:

> This meal and rest pay provision applies to an employer who says, 'You do not get lunch today, you do not get your rest break, you must work now.' That is-that is the intent.... And, of course, the courts have long construed overtime as a penalty, in effect, on employers for working people more than full-you know, that is how it's been construed, as more than the-the daily normal workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. *So, it is in the same authority that we provide overtime pay that we provide this extra hour of pay.*" The IWC intended that, like overtime pay provisions, payment for missed meal and rest periods be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards.

Id. at 1110.

Both of these objectives are frustrated – if not undermined – if the Court of Appeal's decision is not reviewed and reversed as employees who seek redress for their Section 226.7 violations presently face the risk of adverse fee awards, a risk which severely discourages private enforcement and reporting. *See Earley*, 79 Cal. App. 4th at 1430-1431 (refusing to allow employers to invoke Section 218.5 in overtime cases due to its "chilling effect on workers who have had their statutory rights violated"). The Opinion and *Murphy* simply cannot be reconciled.

E. THE TRIAL COURT ERRED BY AWARDING FEES UNDER SECTION 218.5 BECAUSE SUCH FEES

WERE NOT REQUESTED BY EITHER PARTY AT THE "INITIATION OF THE LAWSUIT"AS REQUIRED BY SECTION 218.5.

To seek fees under Section 218.5, a party must specifically request them in the Complaint or Answer:

> § 218.5. Attorney's fees and costs
>
> 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 shall not apply to an action brought by the Labor Commissioner. This section shall not apply to a surety issuing a bond pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code or to an action to enforce a mechanics lien brought under Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code. *This section does not apply to any action for which attorney's fees are recoverable under Section 1194.*

§ 218.5 (emphasis added).

Petitioners specifically excluded Section 218.5 from their Complaints, and Respondent did not specifically include Section 218.5 in their Answers. Nor has Respondent disputed that neither party requested Section 218.5 fees upon the initiation of the action. By awarding fees without an explicit request from any party at the start of the action, the Court of Appeal impermissibly disregarded the *plain language* of Section 218.5. *See Kimmel v. Goland*, 51 Cal. 3d 202, 208 (1990) (courts must apply plain language of statute).

Further, Section 218.5 specifically says such fees cannot even be requested if Section 1194 applies – which was Plaintiffs position at the "inception of the lawsuit."

Review is necessary because if employees can be penalized for seeking their Section 226.7 remedies even where fees are not requested under Section 218.5, it would have a further chilling effect on employees seeking to redress employer wrongs under the Labor Code. Employee must have notice of their total potential exposure at the initiation of the civil action. Facing an attorneys' fees award is a critical part of this assessment. Petitioners were deprived of this notice and information. Additionally, Petitioners here have been deprived of their status as "masters" of their Complaints. *See Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 650 (1989) (stating that "a plaintiff is the "master" of his complaint).

F. NEITHER THE TRIAL COURT NOR THE COURT OF APPEAL EVER EXPLAINED WHY THE EMPLOYER WAS CONSIDERED THE PREVAILING PARTY IN THIS CASE.

The Court of Appeal in its decision has stated that Immoos successfully defended against allegations of labor law violations, implicitly finding it was the prevailing party entitled to fees under Section 218.5. Op. at 1. That is inaccurate. Rather, Petitioners voluntarily dismissed the claims with prejudice after receiving all wages sought through settlements with 2810 Defendants. Therefore, Respondent was not the prevailing party. Petitioners sought their wages and obtained them. While it was not the employer who paid them, in a sense, both were successful on their action.

It creates bad public policy in discouraging settlements if a plaintiff cannot dismiss a complaint after settling for what is owed by co-defendants, just to avoid being considered the non-prevailing party. While the 2810 Defendants could have cross-complained against Respondent, they did not. Yet the Petitioners could not have obtained anything further from Respondent after their settlement with 2810 Defendants. Instead, Petitioners were punished for settling their case. This makes no sense.

Further, neither the trial court nor the Court of Appeal expressly found that such voluntary dismissal renders the dismissed party the "prevailing party" for purposes of the fee-shifting statute. Any award of fees under Section 218.5 thus is improper. Statutory provisions authorizing attorneys' fees to the "prevailing party" are not subject to the definition of "prevailing party" in the general costs statute. Cal. Civ. Pro. § 1032; Civil Code § 1717; *Galan v. Wolfriver Holding Corp.*, 80 Cal. App. 4th 1124, 1128–1129 (2000); *Parrott v. Mooring Townhomes Ass'n, Inc.*, 112 Cal. App. 4th 873, 879 (2003); *Zuehlsdorf v. Simi Valley Unified School Dist.*, 148 Cal. App. 4th 249, 257 (2007). Normally, the prevailing party is the one in whose favor a net judgment is entered. *See Smith v. Rae–Venter Law Group,* 29 Cal. 4th 345, 365 (2002) (employee not prevailing party when judgment was not more than award in administrative proceeding).

Here, there was no judgment for any party including Respondent; the case ended with a voluntary dismissal. Thus, for purposes of Section 218.5, Immoos did not establish that it was the

prevailing party by defending the action to judgment in its favor, and the award of fees on the sixth cause of action is incorrect.

Further, although Petitioners moved for class certification against Respondent and the 2810 Defendants, and class certification was denied, neither Respondent's successful opposition to class certification nor the dismissal against it thereafter render it the prevailing party for purposes of a fee award. Class certification is a procedural motion, and not an adjudication on the merits. *Linder v. Thrifty Oil Co.,* 23 Cal. 4th 429, 439-440 (2000); *see also Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004).

The Court of Appeal also imprecisely stated that dismissed the case after the trial court denied class certification. Op. at 2, 6. The motion for class certification, against Immoos and the 2810 Defendants, was noticed on November 21, 2008 (1 JA 0051) and conditional settlements were noticed on October 1, 2008 (1 JA 0043), October 14, 2008 (1 JA 0046), November 21, 2008 (1 JA 0049) and December 2, 2008 (1 JA 0054). The record also shows that dismissals against the 2810 Defendants, on the satisfactory completion of the specified terms of the conditional settlements, were to be entered before January 31, 2008, *i.e.*, after class certification denial, and not before. (1 JA 0043-55.) Respondent does not dispute that settlement of their wages with the 2810 Defendants, and *not* the denial of class certification, was the reason of the dismissal of the case against Immoos.

Petitioners argued that Respondent was not entitled to recover attorneys' fees in this case because Immoos is not the prevailing party for purposes of attorneys' fees. *See* Opp. to Attys' Fees (3 JA0353 and 0355-6.) This issue was also raised upon oral argument before the Court of Appeal. Petitioners also maintain that by virtue of the fact that they fully recovered the wages sought in the action from the 2810 Defendants, the non-settling defendant who was voluntarily dismissed form the action cannot be a prevailing party. As argued to the Court of Appeal, Petitioners demanded wages owed to them, and they were successful in recovering the full amount of money owed. Not only are these facts as recited uncontradicted, but Respondent lends support by its implicit admission of their accuracy.

Under California Rules of Court 8.500 (c)(2), "as a policy matter, the Supreme Court will accept the Court of Appeal's statement unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." In order to make the record clear for this Court, Petitioners point to the Court of Appeal's misstatement of a factual issue, *i.e.*, that Immoos did *not* successfully defend the claims, because Petitioners obtained the wages they were owed by settlement with the 2810 Defendants.

Furthermore, "this Court has the inherent power to decide any issue deemed necessary for a proper disposition of the case whether or not it was originally presented or briefed by the parties." *Canal-Randolph Anaheim, Inc. v. Wilkoski et al.,* 78 Cal. App. 3d 477, 495 (1978) (citation omitted) (regarding a determination of the rights of

the parties to recovery of attorneys' fees). Petitioners raised this issue during oral argument and undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not.

Since Petitioners achieved their primary litigation aims of recovering wages owed, if Section 218.5 is what this Court is relying on, Immoos cannot be considered the "prevailing party on a wage claim." Thus, the Court of Appeal's finding that Immoos is entitled to attorneys' fees is erroneous.

G. THE COURT OF APPEAL MISCONSTRUED "ACTION" IN THE SECOND PARAGRAPH OF SECTION 218.5, SUBJECTING WAGE EARNERS TO A RUINOUS RISK THAT THE LEGISLATURE NEVER CONTEMPLATED.

Section 218.5 states plainly that the danger of liability for an employer's attorneys' fees never should deter an employee who is seeking minimum wages or overtime pay from seeking other unpaid wages in the same action. The second paragraph of Section 218.5 states as follows:

> This section does not apply to any action for which attorneys' fees are recoverable under Section 1194.

§ 218.5.

The Court of Appeal interpreted the term "action" in that paragraph to mean "cause of action." The decision therefore imposes on wage earners seeking minimum wage or overtime pay a harsh choice: (a) seek *only* the minimum wage or overtime pay and allow the employer to retain as ill-gotten gains all other straight-time pay

that the employee is owed; or (b) include a claim for the unpaid regular wages and risk potentially ruinous liability to the employer for its attorneys' fees. Wage earners making a claim for unpaid minimum wages or overtime pay never should face that choice.

The Court of Appeal's decision could not be more contrary to the plain language of the statute. The legislature must be presumed to be fully conversant with the terms "action" and "cause of action," as it uses both on multiple occasions in the both the Labor Code and the Code of Civil Procedure. In fact, it defined "action" in Section 22 of the Code of Civil Procedure:

> 22. *An action is an ordinary proceeding in a court of justice* by which one party prosecutes another for the declaration, enforcement, or protection of a right, a redress or prevention of a wrong, or the punishment of a public offense. (emphasis added.)
>
> Cod. Civ. Proc. § 22

It is difficult to imagine that a legislature that so clearly defined "action" could be taken to have allowed for the possibility that the terms "action" and "cause of action" could be interchangeable. The casual vernacular of lawyers is one thing, and the precise wording of statutes is quite another.

The two cases that the Court of Appeal cited in support of its conclusion that "action" in the second paragraph of Section 218.5 means "cause of action" – *Palmer v. Agee*, 87 Cal. App. 3d 377, 387, (1978) and *Nassif v. Municipal Court*, 214 Cal. App. 3d 1294, 1298 (1989) – do not support the Court of Appeal's conclusion. Instead, the California Supreme Court had it right two weeks ago when it said

the following in *Lu v. Hawaiian Gardens*, No. S171442, 2010 Cal. LEXIS 7623 (August 9, 2010) at *8, n.3:

> 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."

(*Nassif v. Municipal Court* 214 Cal.App.3d 1294, 1298 (1989)).

The Supreme Court should protect both workers' rights to seek their pay without the threat of financial ruin and the legislature's ability to secure those rights by making it clear that the second paragraph of Section 218.5 means what it plainly says.

V. CONCLUSION

For the foregoing reasons, the Court should grant this Petition for review.

Dated: August 26, 2010.

Respectfully submitted,
LAW OFFICES OF
ELLYN MOSCOWITZ, P.C.

ELLYN MOSCOWITZ
JENNIFER LAI
Attorneys for Petitioners/Plaintiffs

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 8.204, 8.490)

The text of this petition consists of 5484 words as counted by the Microsoft Word (version 2007) word processing program used to generate the brief.

Dated: August 26, 2010.

Respectfully submitted,

LAW OFFICES OF ELLYN MOSCOWITZ, P.C.

Ellyn Moscowitz
Jennifer Lai
Attorneys for Petitioners/Plaintiffs

ATTACHMENT 1

Filed 7/27/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ANTHONY KIRBY et al., Plaintiffs and Appellants, v. IMMOOS FIRE PROTECTION, INC., Defendant and Respondent.	C062306 (Super. Ct. No. 07AS00032)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster, Judge. Reversed with directions.

Law Offices of Ellyn Moscowitz, Ellyn Moscowitz and Enrique Gallardo for Plaintiffs and Appellants.

Rediger, McHugh & Hubbert, Rediger, McHugh & Owensby, Robert L. Rediger, Laura C. McHugh and Jimmie E. Johnson for Defendant and Respondent.

This appeal challenges an award of attorney's fees to an employer who successfully defended against allegations of labor law violations brought by two former employees. Appellants Anthony Kirby and Rick Leech, Jr. (collectively Kirby) sued respondent Immoos Fire Protection, Inc. (Immoos) as well as 750

Doe defendants for violating various labor laws as well as the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Kirby dismissed the case after the trial court denied class certification. The court subsequently awarded $49,846.05 in attorney's fees to Immoos for its defense of the first, sixth and seventh causes of action.

For reasons that follow, we shall reverse the award of attorney's fees and remand to the trial court with directions to award Immoos reasonable fees for its defense of the sixth cause of action only.

PROCEDURAL HISTORY

Kirby's First Amended Complaint

We begin by setting forth the allegations in the operative complaint. In August 2007, Kirby filed an amended complaint that alleged six causes of action against Immoos, and a seventh that named 750 Doe defendants but omitted Immoos as a party.

The first cause of action alleged that Immoos engaged in 12 enumerated instances of unlawful and unfair business practices in violation of the unfair competition law as set forth in Business and Professions Code section 17200 et seq.[1]

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[1] Section 17200 of the Business and Professions Code declares that the unfair competition law's purview includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

The second cause of action alleged that Immoos failed to pay Kirby all wages at each pay period and at Kirby's discharge, as required by Labor Code[2] sections 201,[3] 203,[4] and 204.[5]

The third cause of action alleged that Immoos failed to pay overtime compensation, as required by sections 204.3,[6] 510,[7] and

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[2] Undesignated statutory references are to the Labor Code.

[3] Section 201, subdivision (a), provides in pertinent part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

[4] Section 203, subdivision (a), provides in pertinent part: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced . . . ."

[5] Section 204, subdivision (a), provides in pertinent part: "All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays."

[6] Section 204.3, subdivision (a), provides in pertinent part: "An employee may receive, in lieu of overtime compensation, compensating time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by law."

[7] Section 510, subdivision (a), provides in pertinent part: "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice

Industrial Wage Commission Order No. 16-2001 (Order No. 16-2001).[8]

The fourth cause of action alleged that Immoos secretly paid Kirby wages less than that required by statute, regulation, and contract, a violation of section 223.[9]

The fifth cause of action alleged that Immoos failed to provide accurate itemized wage statements to Kirby, as required by section 226.[10]

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the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee."

[8] Order No. 16-2001 provides in pertinent part: "11. REST PERIODS [¶] (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. . . . The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time for every four (4) hours worked, or major fraction thereof. [¶] . . . [¶] (D) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's rate of compensation for each workday that the rest period is not provided."

[9] Section 223 provides: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."

[10] Section 226, subdivision (a), provides in pertinent part: "Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a

The sixth cause of action alleged that Immoos failed to provide Kirby with rest periods as required by Order No. 16-2001.[11]

The seventh cause of action alleged that 750 Doe defendants violated section 2810[12] by entering into contracts with Immoos

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salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee."

[11] See footnote 8, *ante*.

[12] Section 2810 provides in pertinent part: "(a) A person or entity may not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided. [¶] . . . [¶] (g)(1) *An employee* aggrieved by a violation of subdivision (a) may file an action for damages to recover the greater of all of his or her actual damages or two hundred fifty dollars ($250) per employee per violation for an initial violation and one thousand dollars ($1,000) per employee for each subsequent violation, and, *upon prevailing in an action brought pursuant to this section, may recover costs and reasonable attorney's fees.* [¶] (2) *An employee* aggrieved by a violation of subdivision (a) may also bring an action for injunctive relief and, *upon*

while knowing that the contracts did not provide sufficient funds to allow Immoos to comply with all applicable labor and wage laws. Kirby later amended this cause of action to identify defendants Shea Homes, Inc., Hilbert Homes, Inc., Meritage Homes of California, Inc., and D.R. Horton, Inc.

Kirby subsequently settled with Shea Homes, Inc., Hilbert Homes, Inc., Meritage Homes of California, Inc., and D.R. Horton, Inc., in agreements not made part of the court record.

In November 2008, Kirby moved for certification of class action. The motion was denied in January 2009.

In February 2009, Kirby dismissed with prejudice his complaint as to all causes of action and all parties.

Award of Attorney's Fees to Immoos

In April 2009, Immoos moved to recover attorney's fees from Kirby pursuant to section 218.5.[13] Kirby opposed the motion arguing, in part, that the unilateral fee-shifting provision in favor of plaintiffs provided by section 1194[14] barred an award of fees to Immoos.

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prevailing, may recover costs and reasonable attorney's fees." (Italics added.)

[13] Section 218.5 provides 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."* (Italics added.)

[14] Section 1194 provides in relevant part: "Notwithstanding any agreement to work for a lesser wage, any employee receiving

In June 2009, the trial court awarded Immoos attorney's fees "for [its] defense of the [first, sixth] and [seventh] causes of action." In granting attorney's fees for a portion of Immoos's defense against the unfair competition claim, the court explained that "the [first] cause of action also incorporated allegations of failure to provide rest periods (sixth cause of action) and for the parallel allegations from the seventh cause of action, pursuant to [section] 2810."

The trial court explained its award of fees to Immoos for the sixth cause of action as follows: "The [sixth] cause of action is not subject to section 1194,[15] but only to . . . section 2699.[16] No showing has been made that Plaintiffs

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less than the legal minimum wage or the legal overtime compensation applicable to *the employee is entitled to recover* in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, *reasonable attorney's fees*, and costs of suit." (Italics added.)

15 See footnote 14, *ante*.

16 Section 2699 provides in pertinent part: "(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions . . . . [¶] . . . [¶] (g)(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. *Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs.* . . . [¶] (2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except

complied with the private attorney general requirements. Further, it is apparent from the express language of . . . section 218.5,[17] that only section 1194 can defeat a prevailing party employer's entitlement to attorneys' fees under that statute, under the rule of statutory construction, *expressio unius est exclusio alterius* - the expression of one thing is the exclusion of another. As only [section] 1194 is named as an exception to 218.5, no other Labor Code sections may be implied to defeat a prevailing party employer's entitlement to attorneys' fees under that section."

The trial court granted Immoos fees for the seventh cause of action, explaining: "Defendant Immoos was united in interest with the Doe defendant's in the [seventh] cause of action. However, Immoos defended that cause of action alone, until the Does were added by amendment after the filing of the First Amended Complaint. Further, although [Kirby] asserts they fully recovered damages by way of settlement with the Doe defendants, they only settled with four of the 750 defendants, and continued to prosecute the [seventh] cause of action. Thus, Immoos is entitled to the attorneys' fees spent in defending this cause of action."

In addition to the fees allowed for defense against the complaint, the trial court awarded Immoos fees for bringing the

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where the filing or reporting requirement involves mandatory payroll or workplace injury reporting." (Italics added.)

17 See footnote 13, *ante*.

motion for attorney's fees. Altogether, attorney's fees were awarded to Immoos in the amount of $49,846.05.

Kirby filed a notice of appeal on June 25, 2009. A formal order was subsequently entered on July 9, 2009.[18]

ISSUES ON APPEAL

Kirby contends the trial court erred in awarding attorney's fees to Immoos because (1) section 1194 prevents a prevailing defendant from recovering fees in any case involving a claim for unpaid minimum or overtime wages, (2) Kirby's claim for unpaid statutorily-mandated wages in the sixth cause of action was subject to section 1194's unilateral fee-shifting provision in favor of plaintiffs, (3) Immoos cannot recover attorney's fees for the seventh cause of action, to which it was not a party, (4) a prevailing defendant may not recover attorney's fees for defense against alleged violations of the unfair competition law, (5) even if attorney's fees are recoverable by a defendant who prevails against allegations of unpaid wages, Immoos's defense of the sixth cause of action was duplicative of work on other causes of action subject to unilateral fee-shifting provisions. Immoos requests that we award it attorney's fees on appeal.

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[18] Although the parties do not address the point, a premature notice of appeal is deemed operative upon subsequent entry of a formal judgment or appealable order. (Cal. Rules of Court, rule 8.104(e); *Webb v. Webb* (1970) 12 Cal.App.3d 259, 262, fn. 1.) Consistent with rule 8.104(e), Kirby's notice of appeal is deemed to be filed immediately after entry of the formal order awarding attorney's fees to Immoos.

We shall conclude that the trial court did not err in awarding fees to Immoos for the sixth cause of action. However, the court erred in awarding attorney's fees for defense against claimed violations of section 2810 as set forth in the first and seventh causes of action. Accordingly, we remand the case for determination of reasonable attorney's fees for Immoos's defense against the sixth cause of action. In doing so, we decline to award fees on appeal to Immoos.

DISCUSSION

I

Labor Code sections 218.5 and 1194

Kirby contends the trial court erred in awarding any attorney's fees to Immoos because some of the causes of action were subject to the unilateral fee-shifting provision in favor of plaintiffs provided by section 1194.[19] Kirby points out that section 218.5[20] includes an express exception to its bilateral fee-shifting provision, which states: "This section does not apply to any *action* for which attorney's fees are recoverable under Section 1194." (Italics added) Arguing that an "action" refers to an entire case, Kirby concludes that the inclusion of causes of action subject to section 1194 bars Immoos's recovery of any attorney's fees in this case. We disagree.

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19 See footnote 14, *ante*.

20 See footnote 13, *ante*.

A

We review questions of law without deference to the trial court's ruling. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) "The determination of the applicable Labor Code section governing [a] claimant's rights and obligations regarding an award of attorney's fees involves settled principles of statutory construction. . . . These are questions of law subject to our independent review." (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426 (*Earley*).)

Resolution of this issue requires us to ascertain the meaning of the second paragraph in section 218.5, where it creates an exception to bilateral attorney's fee awards for "actions" governed by section 1194. In approaching questions of statutory interpretation, we follow the California Supreme Court's admonition that "[t]he rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208; *California Teachers Assn. v. San Diego Community College Dist.* [(1981)] 28 Cal.3d [692,] 698.) 'In determining intent, we look first to the language of the statute, giving effect to its "plain meaning."' (*Kimmel, supra*, 51 Cal.3d at pp. 208-209, citing *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218-219; *California Teachers Assn., supra*, 28 Cal.3d at p. 698.) Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the

Legislature. (*California Teachers Assn., supra*, 28 Cal.3d at p. 698.) Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Ibid.*)" (*Burden v. Snowden, supra*, 2 Cal.4th at p. 562.)

When considering the interplay between potentially overlapping statutory provisions, we remain mindful that "it is a matter of the proper interpretation of both sections so as to harmonize their provisions." (*Earley, supra*, 79 Cal.App.4th at p. 1427.) It is a "'cardinal rule of statutory construction that statutes relating to the same subject matter are to be read together and reconciled whenever possible to avoid nullification of one statute by another.'" (*Davis v. Ford Motor Credit Co.* (2009) 179 Cal.App.4th 581, 601, quoting *Brown v. West Covina Toyota* (1994) 26 Cal.App.4th 555, 565.) Thus, we strive for a reasonable statutory construction that avoids creating conflicts among Labor Code sections.

B

Generally, a party may recover attorney's fees only when a statute or agreement of the parties provides for fee shifting. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.) Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits. As we have already noted, section 218.5 provides: "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."

The second paragraph of section 218.5 was added by the Legislature in 2000 to codify the holding of *Earley, supra,* 79 Cal.App.4th 1420. As the Legislature declared, "The amendments to Section 218.5 of the Labor Code made by Section 4 of this 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.)

Earley involved a class action by employees of Washington Mutual Bank to recover unpaid overtime wages from their employer. (*Earley, supra,* 79 Cal.App.4th at p. 1423.) As part of the class certification process, the trial court required the named plaintiffs to mail to absent class members a notice allowing them to opt out of the class action. (*Ibid.*) The named plaintiffs sought appellate writ relief, contending that the trial court erred in requiring the notice to advise absent class members that they might be liable for attorney's fees if the employer were to prevail. (*Id.* at pp. 1423-1424.) Plaintiffs argued that section 218.5's bilateral fee-shifting provision did not apply because the class action was governed by section 1194's provision for attorney's fees to prevailing plaintiffs. (*Earley, supra,* at p. 1425.)

The *Earley* court surveyed the legislative history of section 218.5 in order to conclude that "the Legislature did not regard the general provisions of section 218.5 as applicable to overtime claims. If we were to hold otherwise, we would, by such conclusion, create the very type of statutory conflict which we are enjoined to avoid. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569 [there is a strong presumption against the implied repeal of one statute by another with apparently conflicting language and the '"'"courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together"'"'].)" (*Earley, supra,* 79 Cal.App.4th at pp. 1428-1429.)

The goal of harmonization of the potentially conflicting Labor Code sections led the *Earley* court to conclude that "[t]he only reasonable interpretation which would avoid nullification of section 1194 would be one which bars employers from relying on section 218.5 to recover fees in any action for *minimum* wages or *overtime* compensation. Section 218.5 would still be available for an action brought to recover nonpayment of contractually agreed-upon or bargained-for 'wages, fringe benefits, or health and welfare or pension fund contributions.' [¶] Such a harmonization of these two sections is fully justified. An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is

based on an important public policy." (*Earley, supra,* 79 Cal.App.4th at p. 1430, footnote omitted.) The *Earley* court granted the writ because section 1194 disallows successful defendants from recovering attorney's fees from plaintiffs who seek to recover unpaid overtime wages. (*Earley, supra,* at pp. 1426-1429.)

Kirby relies on *Earley* to argue that a claim for unpaid minimum wages invokes the unilateral fee-shifting provision of section 1194 in order to defeat a defendant's right to recover attorney's fees for any other cause of action - even if unrelated and subject to a bilateral fee-shifting statute. In so arguing, Kirby points out the ambiguity arising out of the Legislature's use of the term "action" in the exception to section 218.5's fee-shifting provision. (See § 218.5 [providing exception for "any *action* for which attorney's fees are recoverable under Section 1194"], italics added.)

As Kirby notes, "action" can mean a single cause of action, or it can refer to the entirety of a case. (See, e.g., *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387 [noting that "an 'action' is *sometimes* used to denote the suit in which the action is enforced"], italics added; *Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298 ["The courts have *generally* used the word 'action' to refer to the proceeding or suit and not to the cause of action"], italics added.)

In support of the argument, Kirby relies on two bill analyses prepared while the amendment to section 218.5 was pending in 2000. Both committee reports implicitly equate

actions for unpaid minimum and overtime wages with the cases themselves. In relevant part, the report prepared by the Assembly Committee on Labor and Employment explained the purpose of the 2000 amendment as follows: "Clarifies that . . . section 1194, which provides for an award of attorneys fees for an employee *in cases involving failure to pay minimum wage and overtime wages*, is separate from, and not controlled by . . . Section 218.5, which provides for prevailing party attorneys fees in other wage cases." (Assem. Com. on Labor & Employment, Rep. on Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Apr. 12, 2000, p. 2, italics added.)

Similarly, the Senate Judiciary Committee report described the aim of the 2000 legislation, in relevant part, as: "Clarify that . . . Section 1194, which provides for an award of attorney's fees for an employee *in cases* involving failure to pay minimum wage and overtime wages, is separate from, and not controlled by . . . Section 218.5, which provides for prevailing party attorney's fees *in other wage cases*." (Sen. Judiciary Com., Rep. on Assem. Bill No. 2509 (1999-2000 reg. sess.) as amended Aug. 7, 2000, p. 2, italics changed.)

Although Kirby advances a plausible reading of the legislative history, we reject it in favor of construing the section 1194 exception as applying only to causes of action for unpaid minimum and overtime wages. (Accord *Earley, supra*, 79 Cal.App.4th at p. 1430.) To adopt Kirby's statutory construction would allow the exception of section 1194's unilateral fee shifting to eviscerate the rule of section 218.5.

We harmonize sections 218.5 and 1194 by holding that section 218.5 applies to causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds. If, in the same case, a plaintiff adds a cause of action for nonpayment of minimum wages or overtime, a defendant cannot recover attorney's fees for work in defending against the minimum wage or overtime claims. Nonetheless, the addition of a claim for unpaid minimum wages or overtime does not preclude recovery by a prevailing defendant for a cause of action unrelated to the minimum wage or overtime claim so long as a statute or contract provides for fee shifting in favor of the defendant.

As the Legislative Counsel's Digest for Assembly Bill No. 2509 indicates, the Legislature intended section 1194 to remain the exception to the bilateral fee-shifting rule set forth in section 218.5: "Under existing law, the prevailing party, with certain exceptions, is entitled to an award of attorney's fees in an action brought for nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. [¶] This bill would add an express *exception* for employee actions to recover underpayment of the minimum wage or specified overtime wages, in which a prevailing employee but not the employer is expressly authorized to recover attorney's fees." (Legis. Counsel's Dig., Assem. Bill No. 2509 (1999-2000 reg. sess.) Summary Dig., pp. 1-2, italics added.)

Kirby's approach conflicts with the legislative intent underlying the second paragraph of section 281.5 in that it

would allow plaintiffs to insulate non-wage claims against employers from otherwise applicable bilateral fee-shifting provisions by simply adding a cause of action for unpaid minimum or overtime wages. Such a statutory construction would be absurd and contrary to the clear intent to create a specific exception to rule 218.5. (Legis. Counsel's Dig., Assem. Bill No. 2509, *supra*, at pp. 1-2.) Thus, we conclude that the inclusion of a claim subject to section 1194 does not preclude attorney's fees to be awarded to a prevailing defendant for unrelated claims subject to the bilateral fee-shifting provision of section 218.5.

The trial court did not err in ruling that section 1194 did not impose a complete bar on Immoos's recovery of attorney's fees in this case.

II

Sixth Cause of Action - Failure to Provide Rest Periods

Kirby next contends that the trial court erred in awarding attorney's fees for defense against the sixth cause of action, which alleged Immoos violated Order No. 16-2001[21] by failing to provide a second rest period during an eight-hour workday. Characterizing the cause of action as one for unpaid minimum wages, Kirby contends the unilateral fee-shifting provision of

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[21] See footnote 8, *ante*.

section 1194[22] bars the award of fees to Immoos. We are not persuaded.

Kirby's sixth cause of action alleged that Kirby was "owed an additional one hour of wages per day per missed rest period."[23] As a claim seeking additional wages, the sixth cause of action was subject to section 218.5's provision of attorney's fees for "any action brought for the nonpayment of *wages*, fringe benefits, or health and welfare or pension fund contributions . . . ."[24] (Italics added.)

Kirby does not dispute that the sixth cause of action sought payment of wages. Instead, Kirby asserts that any unpaid wage is necessarily less than statutorily mandated wages and therefore subject to section 1194. Not so.

Kirby's claim was not based on a failure to pay the statutory minimum wage for hours he actually worked. Instead, the cause of action was one for failure to provide rest periods. If his claim had succeeded, Kirby would have been entitled to an *additional* wage "at the employee's rate of compensation." (See fn. 25, *ante*.) The "employee's rate of compensation" refers to

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[22] See footnote 14, *ante*.

[23] See footnote 8, *ante*, setting forth Order No. 16-2001, which provides in section 11(D): "If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's rate of compensation for each workday that the rest period is not provided."

[24] See footnote 13, *ante*

the contractual rate of compensation, not the legal minimum wage. Consequently, the claim is not one premised on failure to pay the minimum wage.

Kirby's cited case of *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (*Murphy*) does not compel a different conclusion. In *Murphy*, the California Supreme Court considered whether the additional hour of compensation provided by section 226.7[25] for a missed rest break constituted a penalty or wage for purposes of determining whether plaintiffs' claims were timely filed. (*Id.* at p. 1099.) If the remedy were a penalty, a one-year statute of limitations applied and plaintiffs' claim would have been untimely. (*Id.* at pp. 1099, 1101.) However, if the additional hour of pay constituted a wage, the plaintiffs could proceed with their action. (*Ibid.*)

The *Murphy* court concluded that the extra hour of pay provided for a missed rest was more akin to a wage than a penalty. (*Murphy, supra,* 40 Cal.4th at p. 1099.) Although *Murphy* did not involve the question of entitlement to attorney's fees, the decision offers us guidance where it notes that the

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[25] Subdivision (b) of section 226.7 provides: "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Kirby contends that the provisions of section 226.7 and Order No. 16-2001 are "interchangeable." For purposes of discussion, we shall assume without deciding that Kirby correctly asserts that the *Murphy* analysis of section 226.7 applies to Order No. 16-2001.

remedy is one for "a wage or *premium pay.*" (*Id.* at p. 1099, italics added.) In describing the remedy of the remedial hour of compensation as premium pay, the *Murphy* court indicated that the wage is a sum over and above the regular pay. (*Ibid.*) As an addition to regular pay, the remedy is not one for failure to pay the minimum wage. Accordingly, *Murphy* does not assist Kirby's attempt to establish that section 1194 applies to the sixth cause of action.

The trial court did not err in awarding attorney's fees to Immoos for its defense against the sixth cause of action.

III

Seventh Cause of Action - Labor Code section 2810

Kirby argues that the trial court erred in awarding attorney's fees to Immoos for its defense against the seventh cause of action, which alleged a violation of section 2810[26] for entry into contracts by parties who knew that the contracts failed to provide sufficient funds for payment of all required wages. Kirby argues that this cause of action is subject to a unilateral fee-shifting provision in favor of plaintiffs.

A

The original complaint alleged, as its seventh cause of action, that 750 Doe defendants unlawfully entered into contracts with Immoos while knowing that the contracts did not provide sufficient funds to allow Immoos to comply with all

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26 See footnote 12, *ante*.

applicable labor and wage laws. Kirby's first amended complaint realleged the same claim against the Doe defendants in its seventh cause of action. Kirby subsequently amended the seventh cause of action to identify Shea Homes, Inc., Hilbert Homes, Inc., Meritage Homes of California, Inc., and D.R. Horton, Inc., as defendants. Immoos was *never* named as a defendant in this cause of action.

After Kirby dismissed the complaint in its entirety, Immoos sought attorney's fees including those incurred for defense of the seventh cause of action. Kirby countered that Immoos was not named as one of the 750 defendants for this cause of action, and that the cause of action was based on a statute with a unilateral fee-shifting provision in favor of plaintiffs. The trial court granted attorney's fees to Immoos including fees for the seventh cause of action.

We do not have to decide if Immoos could recover fees even though it was not named as a party, because section 2810[27] is a unilateral fee-shifting statute that disallows an award of fees to defendants. By providing that "[a]n *employee . . . may recover costs and reasonable attorney's fees*" upon prevailing, section 2810 does not authorize fee shifting in favor of employers. "'[S]tatutes expressly permitting fees for only a particular prevailing party have been interpreted as denying fees for the other party, even if it prevailed.'" (*Earley*,

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[27] See footnote 12, *ante*.

supra, 79 Cal.App.4th at p. 1429, quoting *Brown v. West Covina Toyota, supra,* 26 Cal.App.4th 555, 561.) Section 2810 does not authorize Immoos to recover fees.

The trial court erred in awarding attorney's fees to Immoos for its defense against the seventh cause of action.

IV

First Cause of Action - Unfair Practices Act (Bus. & Prof. Code, § 17000 et seq.)

Kirby asserts that "[i]t is settled law that the [Unfair Practices Act] does not provide attorney fees for a defendant." Thus, Kirby contends the trial court erred in awarding attorney's fees to Immoos for defending against the unfair competition law cause of action. Immoos counters that the trial court properly awarded fees for defending against alleged specific instances of unlawful conduct subject to fee shifting in favor of prevailing defendants. Immoos further argues that the trial court properly excluded fees for claims subject to fee-shifting in favor of plaintiffs only.

For reasons that follow, we conclude that the trial court erred in awarding fees for the first cause of action.

A

Kirby's first cause of action alleged that Immoos violated the Unfair Practices Act when it "engaged in unlawful and unfair business practices including, but not limited to, violations of" sections 203 (wages at discharge), 204 (payment of wages), 204.3 (overtime pay), 223 (secret payment of lower wages), 226 (itemization of wage statements), 510 and 512 (eight-hour

workday), 1174 and 1174.5 (failure to maintain accurate records), 221 and 2802 (tools, safety equipment, and use of employee vehicle), 2810 (contracting with entity known to have insufficient funds to pay employees), Order No. 16-2001, and workers' compensation rules.

Kirby alleged that these 12 enumerated practices "serve as unlawful predicate acts result[ing] in economic harm and injury in fact to [Kirby] for purposes of Business and Professions Code § 17200 . . . ." After Kirby dismissed the case, the trial court granted fees for part of Immoos's defense against the unfair competition claim insofar as this cause of action "also incorporated allegations of failure to provide rest periods ([also set forth in the sixth] cause of action) and for the parallel allegations from the [seventh] cause of action, pursuant to [section] 2810."

B

It is settled that the Unfair Practices Act (Bus. & Prof. Code, § 17000 et seq.) does not provide for an award of attorney's fees to any party. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179; *Walker v. Countrywide Home Loans* (2002) 98 Cal.App.4th 1158, 1179.) We do not have to decide whether attorney's fees can be recovered by dissecting an Unfair Practices Act lawsuit into its constituent statutory violations, because Immoos has shown no entitlement to fees on that theory.

C

As we explained in part IIIB, *ante*, Immoos was not entitled to recover for its defense against alleged violations of section 2810,[28] which prohibits entry into contracts lacking funds sufficient to comply with all wage and labor laws. Even though Immoos was a party to the first cause of action, its status as an employer disallowed it from receiving fees under section 2810. As with the seventh cause of action, the trial court erred in awarding fees for the claim (in the first cause of action) that was subject to section 2810.

The trial court also awarded fees for the first cause of action insofar as it alleged Immoos wrongfully denied Kirby the 10-minute rest breaks required by Order No. 16-2001.[29] Immoos received attorney's fees for defending this claim as separately alleged in the sixth cause of action. A party may not recover attorney's fees redundantly for the same work. (See *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 161; *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 840.) Consequently, Immoos's recovery of fees for the sixth cause of action precluded the rest-period claim from serving as a basis for the fees awarded for the first cause of action.

Immoos attempts to find an additional basis to justify the award of fees for the first cause of action. Immoos relies on

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[28] See footnote 12, *ante*.

[29] See footnote 8, *ante*.

its defense against a claimed violation of section 2802,[30] i.e., for failing to indemnify employees for necessary work-related expenditures. This argument is without merit.

As Kirby correctly points out, section 2802 allows for unilateral fee shifting only in favor of employees. (Cf. *Earley, supra,* 79 Cal.App.4th at p. 1429 [statutory language authorizing attorney's fees for prevailing employees disallows employers from recovering fees under the same provision].) As an employer, Immoos was not entitled to fees under section 2802. Immoos provides no other basis for affirming the fees awarded for its defense against the first cause of action.

The trial court erred in awarding attorney's fees to Immoos for the first cause of action.

V

Overlapping Work

Kirby contends the trial court erred by awarding redundant attorney's fees for overlapping work on the first, sixth, and seventh causes of action. Our determination that Immoos may recover only for its defense against the allegation of wrongly

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[30] Section 2802 provides in pertinent part: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful. [¶] . . . [¶] (c) For purposes of this section, the term 'necessary expenditures or losses' shall *include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section.*" (Italics added.)

denied rest periods (as specifically alleged in the sixth cause of action) requires us to remand for redetermination of reasonable attorney's fees. This disposition obviates our need to address Kirby's contention that the trial court awarded duplicative fees for overlapping causes of action.

VI

Immoos's Request for Attorney's Fees on Appeal

Immoos requests that we award it attorney's fees for this appeal. "'[I]t is established that fees, if recoverable at all - pursuant either to statute or parties' agreement - are available for services at trial *and on appeal*.'" (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927, quoting *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) Were Immoos the prevailing party on appeal, it would be entitled to attorney's fees - at least for its work with respect to the sixth cause of action. However, there is no prevailing party in this appeal, in which we affirm entitlement to fees awarded for the rest-period claim but reverse as to fees for defense against the section 2810 claims. The parties shall bear their own attorney's fees on appeal relative to one another.

DISPOSITION

The order granting attorney's fees to Immoos is reversed. The matter is remanded to the trial court to conduct a hearing to determine the reasonable amount of attorney's fees to be awarded to Immoos for its defense of the sixth cause of action

only. Each party shall bear its own costs and attorney's fees on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SIMS, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee 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, 4th Floor, Oakland, California 94612. On August 27, 2010, I served upon the following parties in this action:

Robert Rediger
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Honorable Loren E. McMaster
Sacramento Superior Court
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Los Angeles, CA 90013

BY FEDERAL EXPERSS

California Court of Appeal
Third Appellate District
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Sacramento, CA 95814

BY FEDERAL EXPRESS

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

BY MESSENGER

copies of the document(s) described as:

PETITION FOR REVIEW

[X] (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 driver authorized by the express carrier to receive documents.

[X] **BY MESSENGER SERVICE.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses 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 August 27, 2010.

Maria Anderson