S258966

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GUSTAVO NARANJO,
on behalf of himself and all others similarly situated,
Plaintiff and Respondent,

v.

SPECTRUM SECURITY SERVICES, INC.,
Defendants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Four, Case No. B256232

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF; AND BRIEF

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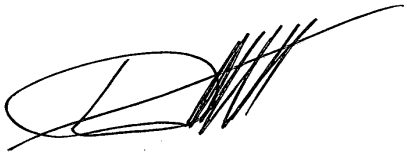
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Cal. Rules of Ct., rule 8.208, the Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. CAOC and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that CAOC and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: August 7, 2020

Respectfully submitted,

ARBOGAST LAW



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APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California (CAOC) seeks permission to file the accompanying brief as a friend of the Court. (Cal. Rules of Court, rule 8.520 subd. (f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual matters affecting such individuals and entities such as claims for personal injuries and property damage. CAOC has taken a leading role in advancing and protecting the rights of employees, and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions shaping California law. (*See, e.g.*, *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348; *Duran v. U.S. Bank Nat'l Assoc.* (2014) 59 Cal.4th 1; and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)

CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177. The briefs submitted by Plaintiff and Respondent, Gustavo Naranjo, fully address the issues presented, namely, the importance of careful interpretation of the statutes so

as to not lead to unintended consequences or do violence to their stated Legislative purposes.[1]

CAOC voices its opinion to ensure that California's wage and hour statutes, such as Labor Code §§ 226.7 (meal and rest periods), 203 (waiting time penalties) and 226 (timely and accurate wage statements), are interpreted broadly in favor of protecting employees and enforced according to the Legislature's intent and purpose of these statutes, for the benefit and protection of workers.

Dated: August 7, 2020

Respectfully submitted,

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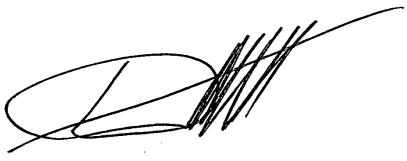

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[1] No party or its counsel authored any part of this brief. Except for CAOC and its counsel here, no one made a monetary contribution, or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520 subd. (f)(4).)

I. INTRODUCTION

This case presents the following questions: 1) Does violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims under Labor Code sections 203 and 226 when the employer does not pay the premium wages at any time or include the premium wages in the employee's wage statements?; and 2) What is the applicable prejudgment interest rate for unpaid premium wages owed pursuant to Labor Code section 226.7?

This Court in *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 ("*Kirby*") has already answered the Court's first question in the affirmative. The holdings in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 and *Kirby* are "not at odds." (*Kirby*, *supra*, 53 Cal.4th at 1257.) Premium wages are wages. Meal and rest period violations under Labor Code § 226.7 are separate and distinct from waiting time and timely and accurate wage statement violations pursuant to Labor Code §§ 203 and 226. The Legislature designed each of these states to accomplish worker protection and thus, they are not "derivative" of each other, as found by the Court of Appeal. But rather, to effectuate the legislative intent of each of these statutes, each statute must be interpreted and enforced in favor of protecting employees.

In order to effectuate the legislative intent and purpose of each of these statutes, and under the maxim, for every wrong there is remedy, an employer who violates each of these statutes should be held accountable, for each and every violation of them. Absent

enforcement of each of these statutes, as designed and intended by the Legislature, employers will be incentivized to violate these statutes because, under the Court of Appeal's flawed interpretation, at most, an employer can only be held accountable for meal and rest period violations under Labor Code § 226.7 and will be insulated from liability for violations of Labor code §§ 203 and 226, an absurd result.

Because of the contractual nature of the employee - employer dichotomy, just as in all other contract related cases, the proper prejudgment interest rate is 10%.

II. DISCUSSION

A. "Premium Wages" Are Wages and Not a Penalty.

The payment for work performed without breaks is a premium wage under Labor Code § 226.7, just like work performed over 8 hours in a day under Labor Code § 1194. As designed by the Legislature, the payment of "premium wages" are a premium for a condition of employment. This statutory interpretation is consistent with and fits neatly into Labor Code § 200's definitions for "wages" and "labor."

Labor Code § 200 (a) defines " 'Wages' to include all amounts for *labor performed by employees of every description*, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Italics added.) Similarly, Labor Code § 200 (b) defines " 'Labor' to include labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the

labor to be paid for is performed personally by the person demanding payment."

As this Court found in *Murphy*, "health and safety considerations … are what motivated the IWC to adopt mandatory meal and rest periods in the first place." (*Murphy, supra*, 40 Cal.4th at 1113, citations omitted; *accord, Kirby, supra*, 53 Cal.4th at 1255.) Not for "purely economic injuries." (*Id.*) Rather, the "premium wage" the Legislature designed to provide to employees (and made mandatory upon employers) for having to suffer and labor at their job for more than 5 hours, without an uninterrupted 30-minute meal period, is to compensate workers for the condition of their employment, the difficulty added to their work as a result of having to forego basic human needs, rest and nutrition. This Court in *Murphy* made clear that "employees suffer from being forced to work through rest and meal periods," and that "[e]mployees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers…" because of the nature of their work. (*Id.*) This Court in *Murphy* also made clear that the Legislature enacted Labor Code § 226.7 in order to effectuate its purpose, to mandate meal and rest periods in order to protect employees' health and well-being, and the premium wages for each missed meal and rest period is to compensate the employee for that condition of employment, laboring through and suffering without meal and rest breaks. Thus, the premium wage compensates these employees, not based on time they spend on-the-job, but rather,

compensation for the condition of employment, the suffering caused by the missed rest and meal periods.

At its core, under Labor Code §226.7, the premium wages earned as a result of the condition of employment, laboring without meal and rest periods, are wages. And, nothing in *Kirby* upsets this Court's decision in *Murphy*. (*Ibid*.) As this Court in *Kirby* keenly observed, "[s]ection 226.7 is not aimed at protecting or providing employees' wages. Instead, the statute is primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the IWC." (*Kirby*, *supra,* at 53 Cal.4th at 1255, citing *Murphy*, *supra*, 40 Cal.4th at 1105–1106, 1113, citing Sen. Rules Com., third reading analysis of Assem. Bill No. 2509 (1999–2000 Reg. Sess.) (Bill No. 2509) as amended Aug. 25, 2000, at 2 [provision was in response to employers who "work their employees long hours without rest breaks"].)

The Court of Appeal misapprehended this Court's distinction between the Legislature providing compensation (premium wages) for the condition of employment, the added suffering for each missed meal and rest period under § 226.7 and protecting minimum and overtime wages under section 1194. As a result, the Court of Appeal mistakenly concluded that "[s]ection 226.7's premium wage is a statutory remedy for an employer's conduct, not an amount 'earned' for 'labor, work, or service … performed personally by the [employee.]' (§ 200, subd. (b).)."

In *Murphy*, this Court made it absolutely clear that "premium wages" are wages. (*Murphy*, *supra*, 40 Cal.4th at 1102

("**Section 226.7's 'Additional Hour of Pay' Constitutes Wages**," [bold in original]), and at 1114 ["We conclude that neither the behavior-shaping function of section 226.7 nor the lack of a perfect fit between the pay remedy and the injury compel classifying the remedy as a penalty.") This Court also made it absolutely clear that the premium wages are owed to the employee immediately. (*Id*. at 1108 ["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."].)

B. Waiting Time and Itemized Wage Statement Violations Are Each Separate and Distinct Wrongs for Which the Legislature Has Provided a Remedy.

Civil Code § 3523 provides the maxim: "[f]or every wrong, there is a remedy." CAOC believes that, while this maxim of jurisprudence is not intended to qualify any statutory provision, it does provide helpful guidance along with the well-settled rules of statutory construction. Namely, the Court's fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of each of the statutes at issue. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

In enacting Labor Code § 203 (payment of wages on separation) and Labor Code § 226 (timely and accurate wages statements), the Legislature has declared separate distinct legal

wrongs that are entirely distinct and not "derivative" of the meal and rest period violations under Labor Code § 226.7, as the Court of Appeal mistakenly concluded.

As discussed above, §I(A), premium wages under Labor Code § 226.7 are intended to compensate the employee for the condition of employment, the laboring through or suffering work without a statutorily mandated meal and rest period. The failure to pay those wages earned because of this condition of employment upon separation (discharge or the employee quits) provides a distinctly separate wrong and a remedy for not paying those premium wages when they are due, immediately and, at the very latest, within 72 hours of termination. (See Labor Code § 203.) For that distinct wrong, the Legislature mandates "the wages of the employee shall continue as a penalty" from the date of separation for up to 30 days.

Separately and distinctly, for the failure of an employer to provide the employee with a timely and accurate, itemized, wage statements, Labor Code § 226(e)(1) provides a distinct remedy:

> An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

As discussed above in §I(A), the premium wages due under Labor Code § 226.7 flow from and are rooted in the employer's

failure to provide or, the "nonprovision of," the legislatively mandated meal and rest periods. (*Kirby*, *supra*, 53 Cal.4th at 1255.) Under Labor Code § 203, the separate and distinct, legislatively mandated, penalty flows from and is based upon the employer's failure to pay all wages due and owing on separation. And, separately and distinctly, the penalties provided under Labor Code § 226(e)(1) flows from and are based upon the employer's failure to timely and accurately provide the employee with wage statements.

The Court of Appeal swept each of these separate and distinct, legislatively created, wrongs, into a single lot, casting the §§ 203 and 226 violations as allegedly "derivative" of the § 226.7, meal and rest period, claim. This was error. Not only was this error, the Court of Appeal completely disregarded each of the separate wrongs the Legislature intended to redress when it passed each of these labor statutes. In doing so, the Court of Appeal frustrated and did great violence to the Legislature's intent and purpose of these important worker protection statutes.

Without enforcement, these statutes will be rendered meaningless. Employers will be incentivized toward non-compliance. If §§ 203 and 226 violations are "derivative" of Labor Code § 226.7, which they are not, unscrupulous employers will evade the remedial purpose of these statutes by committing all of the violations, and many others, as the Court of Appeal below would deem them "derivative" and then wait for litigation because, at the end of the day, all that an employer could be held responsible for is a single violation. An absurd result.

Only by respecting the intent of the Legislature and giving full respect to each of these laws, as was intended, will employers be incentivized towards compliance.

The Court of Appeal's misreading and misunderstanding of this Court's decisions in *Murphy* and *Kirby,* and its flawed perception that because the Legislature addressed "section 218.5-post *Kirby,* the Legislature's silence was, in and of itself, meaningful and "a considered one." (*Naranjo*, *supra*, 40 Cal.App. at 473, citing *People v. Tingcungco* (2015) 237 Cal.App.4th 249, 247.) The Court of Appeal, again, was misguided. As this Court has made clear, "[s]omething more than legislative silence, however, is necessary to justify an interpretation inconsistent with the statutory scheme and legislative history…" (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983; see also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 563 ["legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval."].)

As the Court of Appeal's decision cited but did not follow, "*Kirby* concluded the holdings [in *Kirby* and *Murphy* are] "not at odds." (*Naranjo*, *supra*, 40 Cal.App. at 467, citing *Kirby*, *supra*, at 1257.) *Kirby* is and was correct. The Court of Appeal got it wrong.

Moreover, had the Court of Appeal correctly read the Court's decisions in *Murphy* and *Kirby*, it would have concluded, that the Legislature did not need to fix or do anything. CAOC agrees. Each of the separate and distinct, legislatively identified, wrongs, and

their remedies, should be enforced, as designed and created by the Legislature.

C. Because of the Contractual Nature of the Employee - Employer Dichotomy, Just as in All Other Contract Related Cases, the Proper Prejudgment Interest Rate Should Be 10%.

The foundation of the employer-employee relationship is contractual in nature. (See Labor Code § 2750 ["The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."].)

Predicated upon its mistaken conclusion that "a section 226.7 lawsuit is not an action for nonpayment of wages … ," the Court of Appeal reversed the trial court and held: "section 218.6 does not authorize prejudgment interest at that rate," 10%. The Court of Appeal, again, was wrong.

Labor Code § 218.6, citing Civil Code § 3289 (b) unequivocally provides: "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear **interest at a rate of 10 percent** per annum after a breach." (Bold added.)

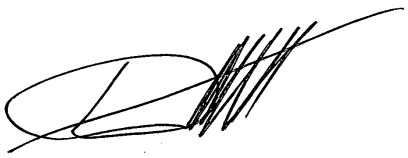
III. CONCLUSION

For all of the reasons discussed above and in the Plaintiff's briefing, CAOC strongly urges this Court to reverse the Court of Appeal.

Dated: August 7, 2020

Respectfully submitted,

ARBOGAST LAW



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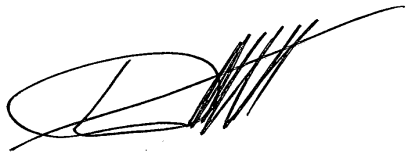
CERTIFICATE OF COMPLIANCE

Pursuant to Cal. Rules of Ct., rule 8.204, subd. (c)(1), counsel of record certifies that this Application to File and Amicus Brief of Consumer Attorneys of California is produced using 13-point Times New Roman type, including footnotes, and contains 2,261 words. Counsel relies on the word count provided by Microsoft Word word processing software.

DATED: August 7, 2020



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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 7777 Fay Avenue, Suite 202, La Jolla, CA 92037-4324.

2. That on August 7, 2020, declarant served this **APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF; AND BRIEF** via Truefiling electronic service or, as noted below, by depositing a true copy as shown below with the U.S. Post Office – Priority Mail, for delivery overnight on the next business day as to those so designated. The copies were placed in sealed envelopes with postage fully prepaid, addressed to the following interested parties and courts:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 7th day of August, 2020, at La Jolla, California.

THALIA TENARIO

SERVICE LIST
Gustavo Naranjo, et al., v. Spectrum Security Services, Inc.
Supreme Court Case No. S258966

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