Case No. S238941

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARMALEE GOONEWARDENE, an individual,

Plaintiff and Appellant,

vs.

ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC,
Defendants and Respondents.

On Review of a Decision of the California Court of Appeal,
Second Appellate District, Division Four, No. B267010

On Appeal from the Superior Court of California,
County of Los Angeles
The Hon. William Barry, Judge
Civil Case No. TC026406

REPLY TO ANSWER TO PETITION FOR REVIEW

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The four-page text of the Answer filed by plaintiff-appellant Goonewardene only underscores why this Court's review is necessary.

Goonewardene concedes not only "the well-established rule that an employer may not delegate its responsibilities under the Labor Code," Answer ("Answ.")-2, but also that employers retain in all events liability when their employees do not receive proper wages and wage statements, Answ.-3 ("[N]o one is claiming the employer is not liable.")

Those concessions buttress ADP's submission that the court of appeal decision marks an unprecedented and improvident departure from existing law because it imposes liabilities on payroll service providers that are singularly linked to, and entirely derivative of, an employment relationship to which the payroll service providers are not parties. Fastening such new liabilities on non-employers is also unnecessary. It does nothing to protect "the economic position of the average worker," Answ.-5, who may look to the employer for redress, as California law has always envisioned.

Goonewardene claims this Court has already recognized the concept of imposing third-party breach of contract liability for unpaid wages on non-employers, but found that legal basis for liability factually inapplicable on the record of *Martinez v. Combs* (2010) 49 Cal.4th 35. Answ.-3. Not so. *Martinez* holds that "no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages." *Id.* at 49. That holding does not endorse non-employer liability for wage-paying obligations under *any* legal theory.

Goonewardene attributes to ADP an argument it has never made, and does not endorse. No one claims that an employee's Labor Code remedies for unpaid wages or noncompliant wage statements preempt an employee's ability to pursue other causes of action for such wage-paying violations. Answ.-2-3. In addition to their Labor Code remedies, employees may pursue other causes of action, *i.e.*, for breach of an employment contract. The significance of the Labor Code and the employer's non-delegable duties with regard to wages is that wage-paying duties derive from and depend on the employment relationship. That is what *Martinez* and the Labor Code both recognize. As those wage-paying duties cannot transfer to persons outside of the employment relationship, the court of appeal errs in allowing non-employers to be sued on claims that employer wage-paying duties were not fulfilled.

Goonewardene describes non-delegable duties as a means to impose vicarious liability and dragoon additional, financially-solvent defendants to compensate those injured by negligent acts. Answ.-3-4, citing *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727. Goonewardene's invocation of the non-delegable duty doctrine (insofar as relevant at all) bolsters ADP's case for review.

Srithong is a premises liability case that invokes the rule that "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is non-delegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor...." *Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260. In other words, the principal obligor (the landowner) is responsible

regardless of the fact that he enlists expert assistance in fulfilling his duty. That liability extends to acts of the expert assistant that create or exacerbate a dangerous condition on the premises. The landowner (principal obligor) is vicariously liable even for the negligent acts of the third-party assistant he hires.

Turning to this case, unlike in *Srithong*, the duties here are contractual (the employer duty to pay wages; ADP's contract to provide the employer payroll assistance) and statutory (the Labor Code duties imposed on the employer as to wage payments). Imposing vicarious liability on non-contracting third parties for breach of contract or breach of non-delegable statutory duties held by others would be unprecedented. It would undermine the fundamental tenet of contract law that the parties ordinarily contract only as to their rights *inter se*. It would also frustrate the Legislature's authority to define the extent of those statutory obligations that it imposes.

More importantly, however, if non-delegable duty cases like *Srithong* and *Pepperdine* are applied by analogy here, they favor ADP, not Goonewardene. The non-delegable duty doctrine establishes that, despite a landowner engaging a third party's expert assistance to assure the safety of premises, the landowner remains responsible. Applying that conceptual framework here, the employer's use of a payroll service provider does not change the employer's continuing, non-delegable obligations when paying employees. The whole focus of the non-delegable duty doctrine is that engaging third-party assistance does not change the obligation of the principal obligor, because the law holds the principal obligor vicariously liable even

for the negligent acts of the third-party assistant it engaged. These principles support enforcement of the employer's continuing, non-delegable wage-paying obligations, not imposition of liability on those third parties whom the employer hires to assist.

Goonewardene concedes that the court of appeal decision spawns from a single wage-and-hour lawsuit additional layers of litigation that are, ultimately, pointlessly circular. The first layer is the new involvement of the payroll service provider in the employee's wage-and-hour suit where it stands to be found "co-extensive[ly]" liable with the employer. The second layer is the additional litigation generated when a payroll service provider that is found "co-extensive[ly]" liable "could perhaps sue the employer seeking equitable indemnity."[1] Answ.-4. Therefore, even Goonewardene recognizes that the court of appeal decision creates additional litigation that is senselessly circular.

Goonewardene mischaracterizes the court of appeal decision by suggesting it holds that "payroll service providers are not immune for their negligent conduct." Answ.-2. But payroll service providers have never asserted that they are "immune" for their negligent conduct. To the contrary, the employers that hire payroll service providers have recourse against payroll services providers under the terms of their contracts. The problem with the court of appeal decision is that it exposes payroll

[1] Goonewardene suggests the service provider's indemnity claim "would presumably be met with a cross-complaint for breach of contract," Answ.-4, thereby adding yet a third layer of additional litigation. However, an employer would never be entitled to recover as damages from a payroll service provider the wages the employer promised to pay its employee because those are compensation for services the employee furnished to the employer. The employer received the benefit of those services and must pay for them regardless of who was responsible for preparing paychecks.

service providers to redundant and pointless liability. And recognition of payroll service provider liability does not "encourag[e] accurate payment of wages." Answ.-5. Indeed, making payroll service providers "co-liable" would only encourage employers to become less diligent in fulfilling their duties under the Labor Code to accurately pay workers.

While the economic loss rule is subject to an exception when a "special relationship is present," Answ.-4, the court of appeal found such a special relationship based on its erroneous application of third-party beneficiary contract principles. M.-Op.-2-3 (added footnote). Once that error is corrected, there is no basis to depart from the economic loss rule, which operates to undermine the tort liability the court of appeal decision recognized.

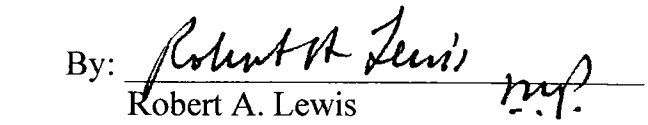
Finally, Goonewardene wholly ignores the inevitable, adverse effects the court of appeal decision will have on an entire industry that for more than sixty years has provided payroll services to employers. Payroll service providers can now expect to be added to lawsuits brought by employees who dispute their employer's compliance with wage-paying obligations. That litigation burden will be significant and particularly damaging for those individuals and small businesses that provide payroll services and can ill-afford costly entanglement in wage-and-hour litigation.

* * *

Review is fully warranted.

Dated: January 6, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: 

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CERTIFICATION OF WORD COUNT

I certify that the attached brief is proportionately spaced, uses Microsoft Word 2010, is set in Times New Roman Font, has a typeface of 13 points or more, and contains 1,250 words.

Dated: January 6, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: Robert A Lewis pro hac

Robert A. Lewis
Attorneys for Defendants, Respondents and Petitioners ADP, LLC; ADP PAYROLL SERVICES, INC.; AD PROCESSING, LLC

CERTIFICATE OF SERVICE

I, Davace Chin, declare that I am a resident of the State of California, County of San Francisco. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On January 6, 2017, I caused the following document to be served:

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California Court of Appeal,
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Honorable William Barry
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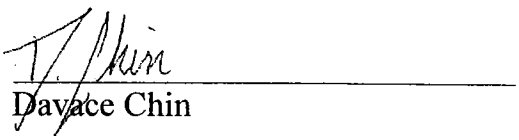
200 West Compton Boulevard
Compton, CA 90220

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on January 6, 2017, at San Francisco, California.

By: 
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