S241655

IN THE
SUPREME COURT OF CALIFORNIA

JAZMINA GERARD, KRISTIANE MCELROY,
AND JEFFREY CARL,
Plaintiffs-Appellants

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,
Defendant-Respondent.

AFTER DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G048039

FROM THE SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE NANCY WIEBEN STOCK, PRESIDING
CASE NO. 30-2008-00096591, DEPT. CX 105, (657) 622-5305

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Gerard v. Orange Coast Memorial Medical Center (2015) 234 Cal.App.4th 285, 290 ("*Gerard I*") held that Industrial Welfare Commission ("IWC") Wage Order 5 section 11(D) ("section 11(D)") was invalid to the extent it allowed healthcare workers to waive second meal periods on shifts longer than 12 hours. The decision, however, raised howls of protest from Orange Coast Memorial Medical Center ("OCMMC") and other hospitals that had allegedly been violating the law for *years* by using illegal meal period waivers.

Unfortunately for healthcare workers, OCMMC and other hospitals were able to convince the Legislature that these illegal meal period waivers should be retroactively validated. The Legislature was persuaded to declare that the hospitals' taking of wages from October 1, 2000 until the present is legal even though the Court of Appeal had already decided that it was not. The resulting legislation is Senate Bill No. 327 ("SB 327").

After granting a petition for review in *Gerard I*, this Court, on August 17, 2016, transferred the case back to the Court of Appeal with the following instructions:

> The above-captioned matter is transferred to the Court of Appeal, Fourth Appellate District, Division Three, with directions to vacate its decision and to reconsider the cause in light of the enactment of Statutes 2015, chapter 505 (Sen. Bill No. 327 (2015-2016 Reg. Sess.))

In response to this mandate, the Court of Appeal reversed itself in *Gerard v. Orange Coast Memorial Medical Center* (2017) 9 Cal.App.5th 1204 (*Gerard II*). Plaintiffs Jazmina Gerard,

Kristiane McElroy and Jeffrey Carl ("Petitioners") have petitioned this Court for review because the Legislature cannot dictate to the courts what the law was the past. Nor can it wipe out healthcare workers' vested rights to millions of dollars of premium pay without due process of law.

OCMMC, in its Answer to Petition for Review, seeks to play down these significant constitutional concerns. At the core of its analysis is the contention that although the Court of Appeal was instructed to reconsider this matter in light of SB 327, its decision in *Gerard II* – holding that the meal period waiver in section 11(D) *was* valid – "did not depend on SB 327." (Answer Pet p. 5.)

Instead, OCMMC argues that the court's newfound "subtle but critical distinction in administrative law" between when a regulation is "adopted" and when it is "effective" was the basis for the court's holding. (*Id*). As pointed out by Petitioners, the Court of Appeal's determination that the IWC *did not* exceed its authority in adopting section 11(D) did lay the groundwork for court's surprising and erroneous conclusions that SB 327 "clarified," rather than "changed" the law. (Pet. Pp.9-10.)[1]

From the premise that the Court of Appeal correctly determined that section 11(D) was always valid, OCMMC easily concludes that there are no issues for review here – that the Legislature did not "dictate" the law to the courts in enacting SB

[1] The court essentially held that because Wage Order 5 was "adopted" before Senate Bell No. 88 ("SB 88") "took away" the IWC's authority to "adopt" meal period waivers inconsistent with section 516(a), SB 88 had no effect on section 11(D). (*Gerard II*, 9 Cal.App.5th at 1211.)

327 and that no unconstitutional taking of vested wages occurred.

OCMMC's argument does not circumvent the important issues of the separation of powers and the retroactive taking of wages that will go unaddressed if this Petition is not granted, As pointed out by Petitioners, the "valid when adopted" argument overlooks the legislative history of SB 88 which *itself* was a clarification of the IWC's lack of authority to adopt wage orders inconsistent with section 516. (Pet. pp. 13-14.) That legislative history cannot be swept away or ignored, permitting the current Legislature to dictate that section 11(D) was valid in 2000 and thereby deprive healthcare workers of their vested rights to premium wages without due process.

II. ARGUMENT

The Court of Appeal's "subtle but critical distinction" seems to have eluded the Legislature. Labor Code section 516, as amended by SB 327, states in pertinent part:

> (b) Notwithstanding subdivision (a), or any other law, including Section 512, the health care employee meal period waiver provisions in Section 11(D) of Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, and continue to be valid and enforceable. This subdivision is declarative of, and clarifies, existing law.

(Lab. Code § 516, effective October 5, 2015.)

Wage Order No. 5 was adopted on June 30, 2000 and became effective on October 1, 2000. (*Gerard II*, 9 Cal.App.5th at 1209.) Thus, in SB 327 the Legislature attempts to legislate that

section 11(D) was valid on October 1, 2000, when it became "effective." SB 327 does not attempt to legislate that section 11(D) was valid when it was "adopted."

In contrast, SB 88 concerns the law on and after January 1, 2000. The Senate third reading analysis for Senate Bill No. 88 states:

> This bill **clarifies** two provisions of the Labor Code enacted in Chapter 134. Labor Code Section 512 codifies the duty of an employer to provide employees with meal periods. Labor Code Section 516 establishes the authority of IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest. *This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512.*
> ...

(*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438 [emphasis added, italics added by the *Bearden* court].)

Section 512 was enacted as part of Assembly Bill 60 ("AB 60"). AB 60 became effective on January 1, 2000. (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 226.) Thus, AB 60 clarifies that the IWC's authority to adopt or amend working conditions was restricted on and after January 1, 2000 – a date before both the date Wage Order No. 5 was adopted (June 30, 2000) and the date it became effective (October 1, 2000).

Because the IWC did not have the authority to adopt wage orders on and after January 2000 that conflicted with section 512, the Court of Appeal's fine distinction between the "adoption" and "effective date" of section 11(D) is irrelevant. Wage Order 5

subsection 11(D) was *not* valid when adopted *and SB 327 does not state otherwise.* SB 327 therefore changed the law, however viewed.

Because SB 327 changed the law, the important questions posed by Petitioners' Petition for Review remain:

1. Can the Legislature dictate to the Judiciary what the laws regarding meal period requirements were in 2000 forcing courts to conclude that healthcare workers' vested rights to millions of dollars of premium pay under Labor Code section 226.7 were never owed?

2. Can the Legislature retroactively deprive healthcare workers of their vested rights to millions of dollars of premium pay under Labor Code section 226.7 without due process of law?

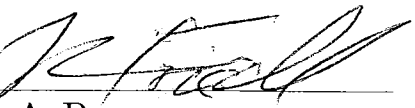
Respectfully, the answer these questions is "no" and review of *Gerard II* should be granted to analyze and resolve these critically important issues.

III. CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court grant plenary review of the Court of Appeal's decision.

Dated: May 25, 2017

Respectfully submitted,
Capstone Law APC

By: 

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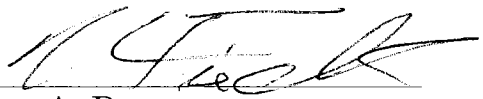
CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to California Rules of Court, rule 8.504(d)(1), the enclosed Appellants' Petition For Review was produced using 13-point Century Schoolbook type font and contains 1,190 words, in accordance with the 8,400-word maximum. In arriving at this number, counsel has relied on the word count function of Microsoft® Office Word 2010, which was used to prepare the document.

Dated: May 25, 2017

Respectfully submitted,

Capstone Law APC

By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1875 Century Park East, Suite 1000, Los Angeles, California 90067.

On **May 25, 2017**, I served the document described as:

REPLY TO ANSWER TO PETITION FOR REVIEW

on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof to interested parties as follows [or] as stated on the attached service list:

SEE ATTACHED SERVICE LIST.

[☐] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[☐] **BY PERSONAL SERVICE:** I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

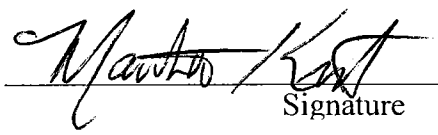
[☒] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

[☐] **ELECTRONIC SERVICE:** I caused the above-referenced document(s) to be transmitted electronically via TrueFiling to the email addresses of the individuals listed.

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

Executed this **May 25, 2017**, at Los Angeles, California.

Matthew Krout
Type or Print Name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