S253574

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.,
Plaintiffs and Appellants,

v.

FONSECA MCELROY GRINDING, INC., ET AL.,
Defendants and Respondents.

AFTER A DECISION BY THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, CASE NO. 17-15221
JUDGE WILLIAM H. ORRICK, CASE NO. 3-15-CV-05143-WHO

APPELLANTS' REPLY BRIEF ON THE MERITS

JUSTICE AT WORK LAW GROUP
Tomas E. Margain, SBN 193555
84 West Santa Clara Street, Suite 790
San Jose, California 95113
Telephone: (408) 317-1100
Email: Tomas@jawlawgroup.com

ESNER, CHANG & BOYER
Stuart B. Esner, SBN 105666
Holly N. Boyer, SBN 221788
234 East Colorado Boulevard, Suite 975
Pasadena, California 91101
Telephone: (626) 535-9860
Email: sesner@ecbappeal.com
hboyer@ecbappeal.com

Attorneys for Plaintiffs and Appellants

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Telephone: (626) 535-9860
Email: sesner@ecbappeal.com
hboyer@ecbappeal.com

Attorneys for Plaintiffs and Appellants

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I. NOTHING DEFENDANT ARGUES NEGATES THAT THE MOBILIZATION WORK THESE PLAINTIFFS WERE PERFORMING WAS IN EXECUTION OF A CONTRACT UPON PUBLIC WORK AND THEREFORE PLAINTIFFS WERE ENTITLED TO A PREVAILING WAGE FOR THAT MOBILIZATION WORK.

As explained in the opening brief on the merits, under Labor Code section 1772, "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Under controlling case law, this determination turns on whether the subcontract was "integral" to the general contract. Employees who perform work at a construction site for which they are unquestionably entitled to a prevailing wage, are also entitled to a prevailing work for the "mobilization work" they performed away from the construction site. In this case, that mobilization work primarily consisted of transporting heavy equipment (milling machines) to the work site so that these same employees could then use those machines in their construction work. The employees performing this mobilization work – such as plaintiffs – are employees of a contractor or subcontractor and their work is in execution of a contract for public work. Thus, under the direct terms of section 1772, plaintiffs are entitled to a prevailing wage for their mobilization work.

Thus, plaintiffs urge the Court to adopt the following bright line rule: When a worker performs on-site construction entitling him or her to a prevailing wage for that work, then that worker is also entitled to a prevailing wage for his or her "mobilization work" away from the construction site which is necessary for the worker to be able to perform work at the construction site after he or she arrives there. This includes the mobilization work transporting machinery or equipment the worker must use at the work site which cannot be stored there. Under this standard, these plaintiffs were entitled to be paid a prevailing wage for their off-site mobilization work as well as for their work at the construction site.

As now explained, nothing defendant argues in its answer brief negates the application of section 1772. Therefore, plaintiffs are "deemed to be employed upon public work" and are entitled to a prevailing wage.

A. Just Because Section 1772 Is Contained In Article 2 Of The Prevailing Wage Law Statutes, Does Not Justify Rendering That Statute A Nullity As Defendant Argues.

In its Answer Brief, defendant first argues that because section 1772 is in Article 2 of California's prevailing wage laws contained in the Labor Code (and not Article 1), that section cannot be used to define the scope of the prevailing wage law. (ABM 14-18.) The fact that this is defendant's lead argument is tantamount to an acknowledgement that defendant cannot reason around the language of section 1772. Defendant's argument is meritless for a number of reasons:

First, defendant ignores the plain language of section 1772 which, on its face describes employees who are "deemed to be employed upon public work." The use of "are deemed" in section 1772 indicates that the Legislature intended that, even if the work being performed under a subcontract would not be a "public works" standing alone, it could still be "deemed" a public work, if the terms of that statute were satisfied. (See *People v. McCall* (2004) 32 Cal.4th 175, 188 ["[T]he definitional phrase 'shall be deemed' is a legislative staple that appears in thousands of California statutes. . . . . to define one thing in terms of another."].) This section therefore must be read in connection with section 1771, which provides that workers on a public work "shall be paid to all workers employed on public works." Reading these two sections together evinces a clear legislative intent that workers satisfying the terms of section 1772 (and therefore deemed to be employed on a public work) are entitled to be paid a prevailing wage.

The clear language of this section cannot be ignored just because, according to defendant, it would have been more logical for it to be included in a different Article of

the Labor Code. (See *People v. Arias* (2008) 45 Cal.4th 169, 177 ["We must look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 601, 7 Cal.Rptr.2d 238, 828 P.2d 140.) The statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Green v. State of California* (2007) 42 Cal.4th 254, 260, 64 Cal.Rptr.3d 390, 165 P.3d 118; see also *Gattuso v. Harte–Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567, 67 Cal.Rptr.3d 468, 169 P.3d 889.)"].)

In any event, there is no rhyme or reason offered by defendant as to why section 1772 should be interpreted to mean something other than its plain language because it is contained in an article describing wages. That is precisely where section 1772 belongs and defendant offers no explanation as to what section 1772 means if it does not describe when an employee of a contractor or subcontractor is deemed to be employed on a public work.

In *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 795–796, the Court rejected a similar argument with respect to a claim that a prevailing wage was owed under section 1771, explaining that "the scope of the Prevailing Wage Law is not to be ascertained solely from the words of section 1720, subdivision (a)(1).[Fn.] Section 1771 is also a part of the Prevailing Wage Law, and its language must also be taken into account. (E.g., *Arntz v. Superior Court* (2010) 187 Cal.App.4th 1082, 1092, 114 Cal.Rptr.3d 561; *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1546, 108 Cal.Rptr.3d 429; *In re Kenneth J.* (2008) 158 Cal.App.4th 973, 979, 70 Cal.Rptr.3d 352.)"

Second, defendant never actually explains the purpose of section 1772 if its position were accepted. If section 1772 plays no role in determining whether an employee performing particular work is entitled to a prevailing wage then what is the purpose of that section? The reason for this absence of analysis is obvious. If defendant's position were accepted then section 1772 would be a nullity and would serve no true purpose contravening fundamental rules of statutory construction. (See *Tuolumne Jobs & Small Business All. v. Superior Court* (2014) 59 Cal.4th 1029, 1039 ["'An interpretation that renders statutory language a nullity is obviously to be avoided.'

(*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357, 19 Cal.Rptr.2d 882, 852 P.2d 377.)"].)

Third, defendant ignores the longstanding body of California case law and DIR decisions explaining that a contractor or subcontractor on a public works project is entitled to a prevailing wage by virtue of the application of section 1772. These decisions distinguish between material suppliers and public works subcontractors and have formulated a test for determining when workers making deliveries to a public work site are actually subcontractors and not merely material suppliers. (See *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 442; *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 197.) Defendant's analysis would render these decisions meaningless. Under its analysis, a worker could only be entitled to a prevailing wage if he or she were actually working at the public work job site. Defendant cites no case supporting such a rule which is contrary to terms of section 1772.

In nevertheless arguing that section 1772 should not be read to expand the scope of when a prevailing wage is owed, defendant focuses on the fact that the Legislature has enacted sections in Article 1 that specify certain types of work that constitute a "public work" including section 1720.3 (concerning the hauling of refuse) and 1720.9 (concerning hauling or delivery of ready mix concrete). But, just because the Legislature has singled out certain type of offsite work as constituting a public work, does not mean that it intended these sections to constitute the entire universe of off-work-site activity for which a prevailing wage is owed. Nothing in the text or history of these sections suggests that the Legislature intended them to constitute the only off-work-site activity justifying a prevailing wage.

Indeed, the legislative history leading to the enactment of section 1720.9 (concerning the delivery of ready mix concrete) proves that just the opposite is true. The Assembly Committee Labor and Employment summary leading to the enactment of section 1720.9 first summarizes a 1999 DIR opinion concerning whether ready mix concrete drivers delivering to the Alameda corridor railroad project were entitled to a

prevailing wage. (See file:///C:/Users/ECB/AppData/Local/Microsoft/Windows/INetCache/IE/1U84KWAI/20151520160AB219_Assembly%20Labor%20And%20Employment_.pdf; ER 119-20.)[1]

In concluding that these drivers were not entitled to a prevailing wage, the DIR framed the issue as whether the drivers delivering the concrete were subcontractors – in which case they would be entitled to a prevailing wage under section 1772 – or whether they were bona fide material suppliers – in which case they would be excluded from receiving a prevailing wage under controlling case law. The DIR cited to, among other authorities, *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 442, concerning the application of section 1772. (ER 44.)

The DIR then proceeded to analyze the issue under the standard set forth in case law which distinguishes between subcontractors (entitled to a prevailing wage) and material suppliers (not entitled to a prevailing wage) and concluded that under this standard, the drivers delivering concrete were material suppliers. (ER 50-58.)

What is important for purposes of the present issue is that the Legislature was clearly aware of and embraced the case law distinguishing between subcontractors who would be entitled to a prevailing wage under section 1772 and material suppliers who would not be a owed a prevailing wage. The Legislature did nothing to change this standard when it enacted section 1720.9. Instead, it simply enacted a narrow statute targeting drivers delivering ready mix concrete only, concluding that their work should be considered to be a public work regardless whether they fit within section 1772.[2] In other words, the Legislature endorsed the analysis proposed by plaintiffs here. So long as

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[1] As the legislative history cited is publicly available, a separate motion for judicial notice is not required. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 fn. 9; *Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 665, fn. 4.)

[2] Section 1720.9 provides: "For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling and delivery of ready-mixed concrete to carry out a public works contract, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state."

plaintiffs are employees of contractor or subcontractors (they are) and so long as the mobilization work they are performing is in execution of a public work (it is) then they are entitled to be paid a prevailing wage for that mobilization work. Under defendant's analysis the enactment of this section responding to and overturning a specific DIR ruling finding that a prevailing wage was not owed based upon the conclusion that the worker was not a subcontractor, would have the perverse effect of depriving all other workers a prevailing wage for their off-work-site activity even if they were indisputably an employee of a contractor or subcontractor performing a public work. Nothing in logic or law supports such a result.

Defendant proclaims: "'Courts will liberally construe prevailing wage statutes [citations], but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act [citation].' (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950. . ." (ABM 18.) But, defendant does not explain just where the Legislature has made "clear" that, with respect to offsite mobilization work, a prevailing wage is not owed even when the clear terms of section 1772 are met.

Defendant argues that the legislative history of the prevailing wage law "confirms that off-site mobilization work is not within the law's scope." (ABM 19.) However, once again nothing defendant references comes close to supporting this sweeping statement.

First, defendant repeats its charge that the definition of "public work" in Article I controls the scope of prevailing wage laws. (ABM 19.) Defendant again references the fact that the Legislature over the years has enacted several statutes specifying that certain work constitutes a public work entitled to a prevailing wage while there has been no substantive amendment to section 1772 itself. But, once again, defendant offers no explanation of what section 1772 actually means if it does not define conduct that is "deemed" to be a public work as that statute expressly states. As already explained, the Legislature was expressly aware of case law applying section 1772 to entitle certain off-site workers to a prevailing wage. Rather than amending section 1772 or enacting other

statutes indicating that the Legislature disagreed with these cases, the Legislature enacted statutes extending the payment of a prevailing wage even where the courts or the DIR have concluded that the standard under section 1772 has not been met.

Thus, the Legislative history and the enactment of other statutes on which defendant relies, proves just the opposite of what defendant argues. As already explained, the history of section 1720.9 on which defendant relies, makes it abundantly clear that when that section was enacted the Legislature was well aware of the case law construing section 1772 to entitle a prevailing wage to offsite work when the terms of that statute are met. Thus, there is no need to simply rely upon the presumption that the Legislature is aware of existing case law. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735 ["In light of the legislative history noted above, this principle of construction particularly applies to the instant case for here we need not simply presume that the Legislature knew of this court's interpretation of section 51 in *Cox* at the time of the 1974 amendment; the legislative documents establish beyond question that the Legislature was well aware of *Cox*'s construction of section 51. Had the Legislature disagreed with the *Cox* interpretation, or had it desired to constrict the reach of section 51 in a manner incompatible with *Cox*, it presumably would have altered the preexisting language of the statute so to indicate. (See, e.g., *Estate of McDill* (1975) 14 Cal.3d 831, 840, 122 Cal.Rptr. 754, 537 P.2d 874.)"].)

Accordingly, the fact that the Legislature has not amended section 1772 demonstrates that it has endorsed the interpretation of that section – just the opposite of what defendant argues.

Next, defendant argues that "[t]he Legislature has refused to extend prevailing wage law to cover off-site work generally." (ABM 20.) Defendant overreaches. First, plaintiffs are not asserting that all off-site work generally is entitled to a prevailing wage. Rather, plaintiffs are only claiming that the offsite mobilization work that fits within section 1772 is entitled to a prevailing age. Next, just because the Legislature may have declined certain amendments which would have extended a prevailing wage to other types of work (such as architectural, engineering and inspection services) does not

establish that the Legislature expressly rejected the payment of a prevailing wage as to other types of work that was not expressly considered.

Further, defendant's reliance on the fact that, when the Legislature enacted section 1720.9, it removed reference to delivery of asphaltic concrete and limited it to read-mixed concrete (ABM 21), proves nothing for present purposes. As already explained, when the Legislature enacted section 1720.9 it was reacting to a determination that ready mix concrete drivers were not entitled to a prevailing wage because they were not employees of contractors or subcontractors under section 1772. No principle of statutory construction comes close to establishing that, just because the Legislature elected not to afford asphaltic concrete the same treatment as ready mix concrete drivers when it extended the scope of the prevailing wage law to cover them, means that it intended to strip all other off-site work from the protections of the prevailing wage laws -- even when the express terms of section 1772 are met.

Next, in the opening brief plaintiffs explained that the "site or work" standard contained in the federal Davis Bacon Act should not be applied to California's prevailing wage law because, unlike the federal Act, California's Act contains no express geographic restriction. (OBM 25-27.) Contrary to what defendant argues, plaintiffs were not claiming that all off-site work is automatically entitled to the payment of a prevailing wage. Rather, plaintiffs were simply urging that, when the terms of section 1772 are met, then the fact that the work in question was off-site work should not play a role in the analysis of whether a prevailing wage is owed. Accordingly, defendant's argument that because the Legislature has enacted statutes affording certain off-site workers a prevailing wage (ABM 22-23), again misses the point. These statutes were enacted to afford a prevailing wage to certain limited work that would not otherwise be entitled to a prevailing wage under section 1772 (or any other existing statute).

In sum, nothing defendant argues establishes that section 1772 plays no role whatsoever in determining whether a prevailing wage is owed to employees of a contractor or subcontractor who performs work in execution of a public work, contrary to

its express terms. As now explained, defendant's argument that the mobilization work plaintiffs were performing was not in execution of a public work, also fails.

B. Plaintiffs' Mobilization Work Was Necessarily In The "Execution" Of A Contract For Public Work.

Defendant next argues that plaintiffs' work was not "in the execution" of a contract for public work under section 1772 because, in order for that standard to be satisfied, it was necessary for the mobilization work to be "integrated into the flow process of construction." (ABM 23.) Defendant then launches into a discussion from hauling or off-site fabrication cases.

As already explained, the standard used in these cases was borrowed from the federal Davis-Bacon Act and was designed to distinguish between material suppliers (not entitled to a prevailing wage) and contractors or subcontractors (entitled to a prevailing wage under section 1772). As explained in *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 204:

> In *Sansone*, *the court addressed whether drivers who hauled materials onto a public works site should be treated as subcontractors and therefore subject to the prevailing wage law*. (*Sansone*, *supra*, 55 Cal.App.3d at p. 441, 127 Cal.Rptr. 799.) In determining that the drivers were entitled to prevailing wages, the court was guided by the reasoning applied in the context of the Davis-Bacon Act by the United States Court of Claims in *H.B. Zachry Co. v. U.S.* (Ct.Cl.1965) 344 F.2d 352 (*Zachry*). (*Sansone*, *supra*, at p. 442, 127 Cal.Rptr. 799.) The court in *Zachry* noted that bona fide material suppliers (also referred to as "materialmen") that sell building materials to a contractor engaged in a public works project had long been excluded from coverage under the Davis-Bacon Act. (*Zachry*, *supra*, at p. 359.) To qualify for this material supplier exemption, the material suppliers had to be selling supplies to the general public, the plant could not be established specially for the particular public works contract, and the plant could not be located at the project site. (Ibid.) The *Zachry* court concluded that a trucker's employees that delivered building materials to a project site were not covered by the Davis-Bacon Act because the function the trucking company performed—the delivery of standard materials—was a "function which is performed independently of the contract construction activities." (*Zachry*, at p. 361.)

> The court reasoned that its decision was a "logical extension" of the congressional intent to exclude material suppliers from coverage under the Davis-Bacon Act. (*Zachry*, at p. 361.)

(*Ibid.*, italics added.)

The analysis whether or not a worker whose only role is to deliver materials to a job site, remove debris from a job site or fabricate materials to be used at the job site, is not a subcontractor or contractor has no application to the mobilization work here. There is no question but that these plaintiffs were employees of a contractor or subcontractor working on a publics work project. Defendant does not even try to argue to the contrary and instead simply focuses on the "in the execution" prong of section 1772.

Williams v. SnSands Corp. (2007) 156 Cal.App.4th 742, 754, does not aid defendant. There, the Court concluded: "In this case, there was no evidence that the terms of the public works contracts governing the projects from which S&S Trucking did the off-haul jobs required the prime contractor to off-haul generic building materials. Nor was there evidence of the nature of the public works projects from which S&S Trucking's off-hauling occurred. Consequently, there was no evidence from which a determination could be made that the off-hauling was "an integrated aspect of the 'flow' process" (*Sansone*, *supra*, 55 Cal.App.3d at p. 444, 127 Cal.Rptr. 799) of the project. *Thus, there was no evidence that Williams was a subcontractor entitled to prevailing wages.* (*Ibid.*, italics added.)

In the course of the *Williams* decision, although it does not appear to be the basis for the Court's conclusion, there was a discussion of the meaning of "in the execution," as that term is used in section 1772. However, that discussion (which appears to be dicta) supports and certainly does not undermine plaintiff's position. First, however, sight should not be lost of the fact that *Williams* is another example of a case interpreting section 1772 in determining whether a prevailing wage should be paid to certain off-site activity – directly contravening defendant's lead argument here that section 1772 plays no role in that analysis. Next, in *Williams* the employees drove trucks to off-haul materials from a public works site to a remote location. The Court described that "[t]he

familiar meaning of 'execution' is 'the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment' (5 Oxford English Dict. (2d ed.1989) p. 521); 'the act of carrying out or putting into effect' (Black's Law Dict. (8th ed.2004) p. 405, col. 1); 'the act of carrying out fully or putting completely into effect, doing what is provided or required.' (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of 'execution' in the phrase 'in the execution of any contract for public work,' plainly means the carrying out and completion of all provisions of the contract." (*Id.* at p. 750.)

The Court then explained that "[t]he analysis in *O.G. Sansone Co. v. Department of Transportation*, *supra*, 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*), *of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law* also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)" (*Ibid.*, italics added.) However, the analysis in *Sansone* related solely to whether the employees in that case were or were not employed by a subcontractor. The Court did not analyze whether the work being performed was "in the execution" of a public works contract. In *Williams*, *supra*, the Court "[f]ollowing *Sansone*, *supra*, 55 Cal.App.3d 434" explained that "we consider: whether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract." (*Williams*, *supra*, 156 Cal.App.4th at p. 752.) This standard derived from *Sansome* –thus concerned only whether the workers were employed by contractors or subcontractors, the singular issue involved in *Sansome*.

Accordingly, it is not necessary to engage in the analysis employed in the offsite hauling or fabrication cases for purposes of determining whether those workers are employed by a contractor or subcontractor for purposes of section 1772. Here, plaintiffs were unquestionably so employed.

When the definitions of "execution" that were used in *Williams* are viewed, it is evident that the offsite mobilization work here was in fact in "execution of a public work" under section 1772. Here, plaintiffs seek a prevailing wage for their mobilization work hauling the heavy equipment necessary for them to use at the prevailing work site so they could perform their job there. As explained in the opening brief, there is no question that plaintiffs were entitled to be paid a wage of some amount for their "mobilization work." (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582–583 [Agricultural workers entitled to pay for travel time while on employer supplied buses.]; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840–841 [Security guards entitled to be paid for their on-call hours].) The only question is whether they were entitled to a *prevailing* wage for that work.

Since, the very nature of the mobilization work being performed was essential to the ability of these employees to be able to perform their jobs at the public works site, there could be no serious debate about whether that mobilization work was "in execution" of the work plaintiffs were to perform at the work-site. Indeed, as explained, if section 1772 is to have any vitality then it must mean that it entitles an employee to be paid a prevailing wage for work as to which he or she would otherwise not be entitled to a prevailing wage if that section did not exist. Under section 1772, work which on its own is not a public work, is nevertheless "deemed" to be a public work entitling employees to a prevailing wage. If that is the case, then it is difficult to conjure just what work would be "in execution" of a public work if the mobilization work here does not satisfy that standard.

In attempting to avoid this truth, defendant urges this Court to apply the standard employed by the Courts in determining whether a worker performing off-site work is employed by a contractor or subcontractor. (ABM 27.) As already explained, since it beyond question that plaintiffs were employees of a contractor or subcontractor on a public work, that standard has no general application. But, as now explained, even if some aspects of that standard have some relevance to the determination whether the

mobilization work plaintiffs were performing was in "execution" of a public work, defendant's argument still fails.

Initially, defendant asserts that plaintiffs' mobilization work was not in execution because the off-site yard and storage facility were permanent and therefore was not "integral part or aspect of the construction at the site of the public work." (ABM 27.) This aspect of the "material supplier" standard has nothing to do with whether the work being performed was in execution of the particular public works contract in question. If that public works contract required the use of a milling machine at the site (and there is no question that the subject public works contract required this), then the use of that milling machine would be in execution of that contract regardless whether it was stored at a permanent facility, at a facility that was created just for the particular job in question or was stored at the job site. Under defendant's interpretation, an employee of contractor using equipment stored at a facility created for the particular job would be entitled to a prevailing wage for mobilization work while another employee at the same site using an identical piece of equipment that happened to be stored at a permanent facility would not. Nothing in the meaning of the word "execution" allows drawing such an arbitrary distinction.

Defendant next argues that "there no evidence that the work performed by Plaintiffs at the permanent yard was necessary to fulfill any requirements or provisions of the public works contract." (ABM 27-28.) Of course there is. The issue here is whether plaintiffs were entitled to a prevailing wage for performing *mobilization work* at that separate facility. Mobilization work is generally defined as "Activation of a contractor's physical and manpower resources for transfer to a construction site until the completion of the contract." (http://www.businessdictionary.com/definition/mobilization.html.) Under this general definition, mobilization work by its very nature is exclusively dedicated to the performance of construction work at the construction site and is undertaken to ensure that resources and manpower are transferred to a construction site for the completion of the work being performed there. In other words, absent the construction work at the job site, there is no mobilization work to begin with.

Defendant asserts that there is "no California case law or administrative opinion extending prevailing wage coverage to work performed at a material supplier's or contractor's permanent yard." (ABM 28.) But defendant simply ignores the nature of the mobilization work performed here and simply seeks to lump all off-site work together. The DIR's official Public Works Policy and Procedures Manual states the following:

> Compensable Travel Time. Travel time related to a public works project constitutes "hours worked" on the project, which is payable at not less than the prevailing rate based on the worker's classification, unless the Director's wage determination for that classification specifically includes a lesser travel time rate. (See Director's Decision in *In the Matter of Kern Asphalt Paving & Sealing Co., Inc.* (March 28, 2008), Case No. 04-0117-PWH. (See also *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575).) *Travel time required by an employer after a worker reports to the first place at which his or her presence is required by the employer is compensable travel time, and includes travel to a public work site, whether from the contractor's yard, shop, another public work site, or a private job site. All such compensable travel time must be paid at the same prevailing wage rate required for the work actually performed by the worker at the public works site. No additional facts, such as whether tools or supplies are being delivered by the worker to the site, need be present.*

(ER Vol II at 168, italics added.)

Defendant next argues that "[t]he transporting of the milling machines to and from the public works construction site is not integral to the flow and process of construction." (ABM 29.) This argument is based on the claimed absence of the public works contract under which plaintiffs were employed or evidence of industry custom and practice. (ABM 29.) But the issue being resolved here is whether employees of a contractor on a public works site are entitled to be paid a prevailing wage for their "mobilization work." As already explained, by its nature mobilization work is necessary in order for the worker to be able to perform his or her work at the job site. This argument by defendant is therefore really whether the work in question was or was not mobilization work. It is not necessary to review the contracts or to review evidence of industry custom to conclude that it was.

It is undisputed that it was necessary for these plaintiffs to use the milling machines at the public job site constructing a road. Thus, in order to perform their work at the job site these plaintiffs needed access to a milling machine. It was therefore necessary for the milling machines to be at the job site. If they were not there, then these plaintiffs would not have been able to perform their job. Accordingly, the acts of loading the milling machine and driving it to the jobsite was a classic illustration of "mobilization work," i.e. activation of a contractor's physical and manpower resources for transfer to a construction site until the completion of the contract."

Thus, to the extent it is appropriate to even consider whether a worker who is unquestionably an employee of a contractor or subcontractor was performing work "integral to the flow of construction" for purposes of determining whether that work was "in execution" of a public works contract under section 1772, that factor is necessarily met with respect to the mobilization work here.

Defendant next argues that there is "no evidence that the transport of the milling machine to and from the construction site can only be performed by the same workers who operate the machine at the site." (ABM 30.) However, the fact that in this case the workers who were hauling the milling machines to the job site were the same workers using that equipment there, is relevant to a determination of whether that mobilization work was "in execution" of the work they were performing at the public work site. It does not mean that this fact was absolutely necessary for an employee performing mobilization work to be entitled to a prevailing wage. So long as the workers in question were employed by the contractor or subcontractor on a public work site then it should still be the case that, if their work hauling equipment to a job site for daily use there was "in execution" of a public work, then they should be entitled to a prevailing wage under section 1772. Of course, the amount of that prevailing wage would be based upon their job classification as modified by any language contained in the published travel and subsistence determination for that particular craft. However, if they were in fact not direct employees of a contractor or subcontractor then the analysis employed in the material supplier cases should be used to make that determination.

Next, defendant next make a "proverbial floodgates" argument claiming that plaintiffs' interpretation would "sweep[] in to [sic] the prevailing wage law's coverage all preconstruction and preliminary activity required so that work can be performed on a public work site, no matter how remote the activity is to the performance of the public works contract." (ABM 32.) That is not what plaintiffs are arguing. Rather, the work in question must be performed by an employee of a contractor or subcontractor performing a public works contract and the work in question must be "in execution" of that public works contract. Both of these requirements – which are expressly contained in section 1772 -- significantly circumscribe the work which is "deemed" to be a public work. Defendant's reliance on the cautionary language it plucks from *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, is off base. As already explained, the analysis employed in that case principally concerned whether the workers involved were employees of a contractor or subcontractor. The manner in which the Court analyzed the issue therefore demonstrates that, applying section 1772 by its terms so that a prevailing wage must be paid for off-site activity only if the worker establishes both that he or she is employed by a contractor or subcontractor and the work was "in execution" of a public work, serves to significantly restrict when a prevailing wage must be paid.

Finally, defendant seeks to deflect plaintiffs' reference to the fact that the DIR has not issued separate travel and substance rates for the work involved here, unlike other tasks. (ABM 33.) However, nothing defendant argues negates the fact that if this Court agrees that the subject work is deemed to be a public work under section 1772 and therefore that plaintiffs are entitled to a prevailing wage, the DIR could set a separate prevailing wage rate for the mobilization work being performed by plaintiffs. In fact, this is precisely what the DIR did for "Traffic Control Laborers" who, based on the published Travel and Substance Determination from 2010 through 2012, were paid $12.00 an hour for mobilization and travel and rates of three times that amount for work at the

construction site. (ER 115.)[3] This blunts the argument that a finding that plaintiffs are entitled to a prevailing wage would necessarily mean that anytime a worker performs mobilization work he or she must be paid the same rate as what is owed for what might be highly specialized work at the job site.

[3] The determination lists the wage as $8.00 an hour and the overtime rate of $12.00 and also lists different travel rates for highway and road stripers. (ER 116.) From 2014 through 2019, Laborers had compensable travel or mobilization rates as published by the DIR of $15.93 per hour for drivers transporting employees, equipment and/or supplies." (ER 276.)

CONCLUSION

For the foregoing reasons and for the reasons explained in the opening brief, plaintiffs urge this Court to conclude that plaintiffs' offsite "mobilization work"—including the transportation to and from a public works site of roadwork grinding equipment—performed is "in the execution of [a] contract for public work," Cal. Lab. Code § 1772, such that it entitles them to "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" pursuant to section 1771 of the California Labor Code.

Dated: October 30, 2019

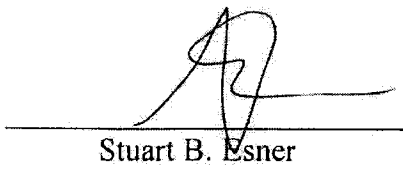
JUSTICE AT WORK LAW GROUP

ESNER, CHANG & BOYER

By: _____
Stuart B. Esner
Attorneys for Plaintiffs and Appellants LEOPOLDO PENA MENDOZA, ELVIZ SANCHEZ and JOSE ARMANDO CORTES

CERTIFICATE OF WORD COUNT

This reply brief on the merits contains 6,091 words per a computer generated word count.



Stuart B. Esner

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **APPELLANTS' REPLY BRIEF ON THE MERITS**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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Paul V. Simpson, Esq. SIMPSON GARRITY & INNES, PC 601 Gateway Boulevard, Suite 950 South San Francisco, CA 94080 Email: psimpson@sgilaw.com	***Attorneys for Defendant and Respondents*** Fonseca McElroy Grinding Co., Inc. and Granite Rock Company
Tomas E. Margain, Esq. JUSTICE AT WORK LAW GROUP 84 West Santa Clara Street, Ste. 790 San Jose, CA 95113 Telephone: (408) 317-1100 Email: Tomas@jawlawgroup.com	***Attorneys for Plaintiffs and Appellants*** Leopoldo Pena Mendoza, Elviz Sanchez and Jose Armando Cortes
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT The James R. Browning Courthouse 95 7th Street San Francisco, CA 94103	***Appellate Court (Via Mail)***
Hon. William H. Orrick UNITED STATE DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA 450 Golden Gate Avenue San Francisco, CA 94102	***Trial Court (Via Mail)***
Hon. Xavier Becerra Attorney General CALIFORNIA DEPARTMENT OF JUSTICE P.O. Box 944255 Sacramento, CA 94244-2550 *(Pursuant to CRC, Rule 8.548(f)(4)*	***Attorney General (Via Mail)***