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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MATTHEW ZELASKO-BARRETT,

Plaintiff and Appellant,

v.

BRAYTON-PURCELL, LLP,

Defendant and Respondent.

A131601

(Marin County  
Super. Ct. No. CIV-095856)

Plaintiff Matthew Zelasko-Barrett unsuccessfully brought a civil action against his former employer, Brayton-Purcell, LLP (Brayton), alleging that Brayton failed to pay him overtime wages and provide other benefits required by California law. Following summary judgment in Brayton's favor, the trial court awarded Brayton attorney fees and costs under Labor Code<sup>1</sup> section 218.5. In a prior appeal, this court affirmed the judgment in favor of Brayton. In the present appeal, plaintiff contends that the trial court erred in awarding attorney fees to Brayton because under section 1194 fees may be awarded only to a prevailing plaintiff despite the inclusion in plaintiff's complaint of additional causes of action that are not explicitly covered by section 1194. Pending Supreme Court

<sup>1</sup> All statutory references are to the Labor Code unless otherwise noted.

resolution of an issue that has divided the Courts of Appeal, we conclude Brayton is not entitled to recover statutory attorney fees in this action.<sup>2</sup>

### **Background**

Plaintiff's complaint against Brayton alleged causes of action for failure to compensate for all hours worked, failure to pay overtime compensation, failure to maintain accurate records and provide an itemized wage statement, failure to provide meal and rest breaks, a common count for indebtedness and a claim for waiting time penalties. Each cause of action was premised on plaintiff's allegation that Brayton incorrectly classified him as employed in a professional capacity, exempting the law firm from the obligation to pay him overtime wages and provide other benefits.

Brayton's motion for summary judgment was granted on the ground that plaintiff was properly classified as an exempt employee. The court found that "each and every one of plaintiff's stated causes of action, which are dependent on plaintiff's alleged misclassification, fail." Thereafter, judgment was entered in favor of Brayton and this court affirmed the judgment. (*Zelasko-Barrett v. Brayton-Purcell, LLP* (2011) 198 Cal.App.4th 582 .)

In the meantime, Brayton moved for and was awarded attorney fees under section 218.5 in the amount of \$120,000. Plaintiff filed a timely notice of appeal from the attorney fee order.

### **Discussion**

Section 218.5 provides in relevant 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

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<sup>2</sup> In light of this conclusion we do not reach plaintiff's alternative argument that if some fees were properly awarded, the court erred in apportioning and fixing the amount of the award.

Plaintiff notes in his opening brief that the court "erroneously applied \$7,495.00 in costs of suit to the Judgment." The order appealed from, however, awarded Brayton only its attorney fees. We express no opinion concerning the propriety of any costs of suit awarded to Brayton.

action requests attorney's fees and costs upon the initiation of the action.” Section 218.5 adds, however, “This section does not apply to any action for which attorney’s fees are recoverable under Section 1194.” Section 1194, subdivision (a) provides, “Notwithstanding any agreement to work for a lesser wage, any employee receiving 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.” The unilateral fee-shifting provision is intended to “ ‘encourage injured parties to seek redress—and thus simultaneously enforce [the minimum wage and overtime laws]—in situations where they otherwise would not find it economical to sue.’ ” (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430-1431.)

Plaintiff contends that the entirety of his “overtime compensation action” falls within the scope of section 1194, under which only a prevailing employee may recover attorney fees. Brayton acknowledges that it is not entitled to recover attorney fees on plaintiff’s claim for unpaid overtime wages, but argues that it was properly awarded some fees because it prevailed on plaintiff’s non-overtime causes of action, including plaintiff’s claim for missed meal and rest breaks.

Whether a prevailing employer may be awarded attorney fees under section 218.5 when the plaintiff joins in a single complaint a claim under section 1194 and other causes of action is currently pending before the California Supreme Court. (*Kirby v. Immoos Fire Protection, Inc.* (2010) 186 Cal.App.4th 1361, review granted Nov. 17, 2010, S185287 [2010 Cal. Lexis 11722] (*Kirby*); see also *United Parcel Service Wage & Hour Cases* (2011) 192 Cal.App.4th 1425, review granted May 11, 2011, S191908 [2011 Cal. Lexis 4410].)

In *Kirby* the court held that section 1194 does not impose a complete bar against an employer’s recovery of attorney fees when a section 1194 claim and other claims are alleged in a single action. (*Kirby, supra*, 186 Cal.App.4th 1361, review granted Nov. 17, 2010, S185287 [2010 Cal. Lexis 11722].) The court harmonized the two statutes “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." Analyzing the individual causes of action alleged in the employee's complaint, the court concluded that section 1194 did not bar the employer's recovery of fees on an employee's claim for missed meal and rest breaks. The court explained that the employee's claim that he was "owed an additional one hour of wages per day per missed rest period" was a claim seeking additional wages within the meaning of section 218.5 but not a claim for "unpaid minimum wages" within the meaning of section 1194. The California Supreme Court granted review noting, "The issues to be briefed and argued are limited to the following: (1) Does Labor Code section 1194 apply to a cause of action alleging meal and rest period violations (Lab. Code, § 226.7) or may attorney's fees be awarded under Labor Code section 218.5? (2) Is our analysis affected by whether the claims for meal and rest periods are brought alone or are accompanied by claims for minimum wage and overtime?" (*Kirby v. Immoos Fire Protection, Inc.*, Supreme Ct. Mins, Nov. 17, 2010 [2010 Cal. Lexis 11722].)

In *United Parcel Service Wage & Hour Cases*, *supra*, 192 Cal.App.4th 1425, review granted May 11, 2011, S191908 [2011 Cal. Lexis 4410], the court also rejected the argument that an employer could never recover fees in a mixed action. However, the court held that the employer in that case was not entitled to fees on plaintiff's claim that it failed to properly itemize wage statements pursuant to section 226 because subdivision (e) of that section "contains a unilateral fee provision favorable to employee-plaintiffs, similar to Labor Code section 1194." The court held that the employer was not entitled to fees on the cause of action for common law conversion because it was primarily based on the allegedly wrongful withholding of overtime compensation. Finally, in contrast to the decision in *Kirby*, the court held that a claim for missed meal

and rest breaks does not trigger the reciprocal fee recovery provisions of section 218.5. The court distinguished between an action for contractual unpaid wages, which would fall within the scope of section 218.5, and an action for wages that are mandated by statute and based on an important public policy, which falls within the protection of section 1194. The court explained that “Like the statutory protections against working in excess of an eight-hour day or for less than the minimum wage, the provisions mandating meal and rest breaks are part of the core remedial employee protections embodied in the Labor Code and the implementing wage orders promulgated by the Industrial Welfare Commission, such as Wage Order 9. Like overtime compensation, the obligation to provide meal and rest periods is imposed by statute, and the statutory remedy for breach of that obligation is not akin to the types of compensation that have traditionally been encompassed within the definition of ‘wages.’ ” The Supreme Court granted review noting, “Further action in this matter is deferred pending consideration and disposition of a related issue in *Kirby v. Immoos Fire Protection, Inc.*, S185827 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court.” (*United Parcel Service Wage & Hour Cases*, Supreme Ct. Mins, May 11, 2011 [2011 Cal. Lexis 4410].)

In our view section 1194 does not pose a complete bar to an award of attorney fees in an action that includes both claims for nonpayment of overtime wages under section 1194 and any other claims. With regard to the specific causes of action alleged in this action, however, we conclude that Brayton is not entitled to fees because each is primarily based on the allegedly wrongful withholding of overtime compensation.<sup>3</sup> (See *Lopez v. U.P.S.* (N.D.Cal. 2010.) 2010 U.S. Dist. Lexis 136352,\*4 [employer is not entitled to attorney fees where non-section 1194 claims “were inextricably linked with the issue of whether he was entitled to overtime”].)

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<sup>3</sup> Brayton contends that it is entitled to fees on the following claims: “(1) failure to pay all wages due in violation of various Labor Code provisions; (2) missed meal and rest periods in violation of section [226.7]; (3) inaccurate wage statements in violation of section 226(e); (4) waiting time penalty wages under Labor Code section 203; and (5) indebtedness because of Brayton’s alleged failure to fulfill its promise to pay Appellant all wages due.”

Since this issue is currently pending before our Supreme Court, we see no reason to repeat the analysis articulated by the Court of Appeal in *United Parcel Service Wage & Hour Cases, supra*, 192 Cal.App.4th 1425, review granted May 11, 2011, S191908 [2011 Cal. Lexis 4410]. Although we implicitly incorporate its analysis as our own, we do not rely on that decision as authority, awaiting resolution of the cases now pending before the Supreme Court. Accordingly, we reverse the order awarding attorney fees to Brayton.

**Disposition**

The order awarding attorney fees is reversed. Plaintiff shall recover his costs on appeal.

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Pollak, Acting P. J.

We concur:

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Siggins, J.

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Jenkins, J.