

William Turley
David Mara
Grace Campbell
Jamie Serb
Taylor Hanks
Jill Vecchi
Joann Bussayabuntoon
Katie Shank
Matthew Crawford
Tony Roberts
Nikki Ousdahl



THE TURLEY & MARA LAW FIRM
TRIAL LAWYERS
A P L C

7428 Trade Street
San Diego, CA 92121
Telephone: (619) 234-2833
Facsimile: (619) 234-4048

Offices also in:
Los Angeles
San Francisco
Oakland
Bakersfield

www.turleylawfirm.com

September 27, 2017

Honorable Chief Justice and Associate Justices of the
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Depublication Request on behalf of Consumer Attorneys of California
Esparza v. KS Industries L.P. 13 Cal.App.5th 1228 (August 2, 2017).

May It Please the Court:

Statement of Interest

The Consumer Attorneys of California (CAOC), a voluntary membership organization, represents approximately 6,000 attorneys practicing throughout California. The organization was founded in 1962. Its membership is comprised of attorneys who represent plaintiffs in employment matters and fight to protect landmark employment legislation. CAOC has taken a leading role in advancing and advocating the rights of injured Californians in both the Courts and the Legislature.

Timeliness of Request

Any person can request depublication of a decision within thirty days of the date the decision was final in the Court of Appeal.¹ The Court of Appeal in *Esparza v. KS Industries L.P.* (13 Cal.App.5th 1228, filed its decision on August 2, 2017, which, pursuant to California Rules of Court No. 8.264(b), became final on September 1, 2017. Thus, as the deadline is October 1, 2017, this request for depublication is timely.

Summary Grounds for Depublication

CAOC respectfully requests this Court depublish *Esparza v. KS Industries L.P.* 13 Cal.App.5th 1228 (August 2, 2017) (*Esparza*). *Esparza* should be depublished because its analysis and conclusions as to the penalties in California Labor Code §558 are totally erroneous, conflict with this

¹ Cal.R.Ct. 8.1125(a)(4).

Court's established precedent, and, if not depublished, would threaten to eviscerate one of California's greatest wage theft deterrents under the Private Attorneys General Act ("PAGA").

Esparza is a PAGA action on behalf of non-exempt current and former employees of K.S. Industries ("KSI"), alleging 16 underlying violations of the California Labor Code stemming from KSI's failure to pay minimum and overtime wages, provide meal and rest periods, wages in a timely manner, accurate itemized wage statements, and reimburse business expenses. Defendant KSI filed a motion to compel arbitration, which the plaintiff opposed on the grounds of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.² KSI countered that the relief sought in the complaint, which included penalties in the form of wages owed under Labor Code section 558, was more akin to the recovery of wages and individual damages, which is not an action for the recovery of civil penalties and thus not exempted from the Federal Arbitration Act ("FAA") under *Iskanian*. Plaintiff argued that the wages recoverable in section 558 are part of the civil penalties permitted therein and recoverable through PAGA, which, under *Iskanian*, exempts them from the FAA and cannot be compelled to arbitration. The trial court agreed and denied the motion.

Defendant appealed to the Fifth Appellate District, which issued an opinion affirming in part and denying in part the trial court's order. The Court of Appeals reasoned that *Iskanian's* "rule of nonarbitrability...is limited to claims 'that can *only* be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers.'" *Esparza, supra*, 13 Cal.App.5th at 1246, citing *Iskanian, supra*, 59 Cal.4th at 388. The Court of Appeals held that claims for unpaid wages in Labor Code §558 do not fall under *Iskanian's* rule of non-arbitrability, because (1) the aggrieved employees "could pursue recovery of the unpaid wages in their own right and (2) the unpaid wages recovered would not go to state coffers." *Id.* Based on this, the Court of Appeals directed the trial court to conduct further proceedings to inquire as to whether the plaintiff intended to seek recovery of the unpaid wages provision of §558, which, if Plaintiff so intended, would require the trial court to grant the motion to compel arbitration as to the claims under §558.

The Court of Appeals decision should be depublished for three key reasons: One, the aggrieved employees cannot pursue recovery under §558 in their own right. There is no direct private right of action under §558, and the only mode of recovery thereunder is through PAGA. Two, because §558 can only be pursued under PAGA, which mandates 75% of all recoveries go to the state, unpaid wages recovered under §558 through a PAGA action would, contrary to the Court of Appeals decision, "largely go to state coffers." Finally, the Court of Appeals decision rests on the false premise that the unpaid wage portion of §558 is not a civil penalty, which directly conflicts with this Court's characterization of the unpaid wage provision of §558. Because its underlying reasoning is entirely false and rests on a premise that conflicts with this Court's prior precedence, and because allowing the Court of Appeals decision to remain published would take a powerful

² Court held: "We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." *Iskanian, supra*, 59 Cal.4th at 384.

wage theft deterrent away from the state through PAGA actions, it is respectfully requested the Court of Appeals decision be depublished.

Discussion

Esparza Should Be Depublished Because, But For PAGA, Aggrieved Employees Cannot Pursue Claims Under Labor Code §558 And Therefore The Court Of Appeals Incorrectly Ruled That Section 558 Penalties “Would Not Go To State Coffers”

Under Labor Code §558, subsection (a), “Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

- (1) For any violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
- (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
- (3) Wages recovered pursuant to this section shall be paid to the affected employee.

The Court of Appeals argued that §558 permits the recovery of wages, which is not a civil penalty and therefore is not a remedy *only* recoverable by the state or its representative for purposes of the *Iskanian* exemption from arbitration. Also, because section 558 requires “wages recovered pursuant to this section shall be paid to the affected employee,” the Court of Appeals held that it is not the type of representative claims exempted under *Iskanian*, which the Court of Appeals ruled are those that are paid out mostly to the state under the PAGA.

The Court of Appeals holding is plainly wrong, because there is no private right of action under §558, *but for PAGA*, which mandates that 75% of all recoveries be paid to the State. The only way to obtain recovery under §558 is through PAGA and, more specifically, Labor Code Section 2699, subdivision (a), which reads:

Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

Subdivision (h) of Section 2699 mandates that “civil penalties recovered by aggrieved employees shall be distributed as follows: 75% to the Labor and Workforce Development Agency...and 25 percent to the aggrieved employees.”

The Court of Appeals was therefore entirely incorrect in stating employees had a private right of action under §558 and that any civil penalties recovered thereunder, including those in the form of unpaid wages, “would not go to state coffers.” The only mode of recovery for employees under §558 is through PAGA, and, as a consequence, 75% of the penalties recovered would be paid out to the state.

The disconnect seems to stem from the language of §558, which states “[w]ages recovered pursuant to this section shall be paid to the affected employee.” If the state initiated and successfully litigated to judgment a §558 claim against an employer, 100% of the unpaid wages recovered would “be paid to the affected employee[s],” pursuant to Section 558(a)(3). However, the deputized employee has no such direct recourse to section 558. He or she can only recover under Section 558 indirectly through Section 2699, which mandates a 75/25 split between the state and the aggrieved employee, respectively. As its underlying reasoning is entirely false, the Court of Appeals decision should be depublished.

***Esparza* Should Be Depublished Because It Conflicts With This Court’s Decision In
Reynolds V. Bement, Wherein The Court Reasoned That An Aggrieved Employee Can
Recover Unpaid Wages From A Corporate Agent Or Officer As A “Civil Penalty”
Through PAGA Under Labor Code Section 558**

The Court of Appeals was also wrong in its assessment that §558 is really a claim for wages and not civil penalties. The underpaid wages recoverable under §558 are part of the penalty, which is exactly how this Court interpreted the statute in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, wherein the Court reasoned that an employee can recover unpaid wages from a corporate agent or officer as a “civil penalty” through PAGA under Labor Code Section 558:

Moreover, pursuant to section 558, subdivision (a), any ‘person acting on behalf of an employer who violates, or causes to be violated’ a statute or wage order relating to working hours is subject to a **civil penalty**, payable to the affected employee, **equal to the amount of any underpaid wages.**” *Reynolds, supra*, 36 Cal.4th at 1089.

Thus, to interpret §558 as providing anything but a civil penalty as a remedy would be contrary to how this Court has interpreted the statute.

Conclusion

Enforcing the entirety of Section 558 through PAGA actions is an extremely powerful deterrent against wage theft, which is the major purpose behind the enactment of PAGA. If *Esparza* stands,

Honorable Chief Justice and Associate Justices of the
Supreme Court of California
September 27, 2017
Page 5

this powerful deterrent will fall to the way side. In these days where arbitration agreements severely limit employees' ability to recoup unpaid wages and deter employer practices that violate the rights of numerous employees, allowing *Esparza* to remain published and to limit the reach of PAGA would prove to be a devastating blow to California's fight against wage theft. It is respectfully requested the Court depublish *Esparza* and prevent this injustice from happening, and prevent its erroneous and conflicting analysis from being relied on in future cases.

Respectfully Submitted,

THE TURLEY & MARA LAW FIRM, APLC



William Turley, Esq.
David Mara, Esq.

Enclosure

cc: See attached proof of service

1 Case Name: Esparza v. KS Industries, L.P.
2 Court: California Court of Appeal, 5th Appellate District
3 Case Number: F072597

4 **PROOF OF SERVICE**

5 STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

6 I am employed in the County of: San Diego, State of California.

7 I am over the age of 18 and not a party to the within action; my business address is:
8 7428 Trade Street San Diego, CA 92121

9 On September 27, 2017, I served the foregoing document(s) described as:

10 **REQUEST FOR DEPUBLICATION**


11 On interested parties in this action by placing a true copy thereof enclosed in a sealed envelope
12 addressed as follows:

13 Supreme Court of California 14 Office of the Clerk of the Court 15 350 McAllister Street 16 San Francisco, CA 94102-4797	Douglas Han Shunt Tatavos-Gharajeh Daniel J. Park Justice Law Corporation 411 North Central Avenue, Suite 500 Glendale, CA 91203 <i>Attorneys for Plaintiff Richard Esparza</i>
17 Hon. Lorna H. Brumfield: Respondent 18 Kern County Superior Court 19 2100 College Ave 20 Bakersfield, CA 93305	John T. Egley Jamin S. Soderstrom Call & Jensen 610 Newport Center Drive, Suite 700 Newport Beach, CA 92660 <i>Attorneys for Defendant KS Industries, L.P.</i>
21 Court of Appeal of the State of California 22 Fifth Appellate District 23 2424 Ventura Street 24 Fresno, CA 93721	
25 Judge Thomas S. Clark 26 Superior Court of Kern County 27 1415 Truxtun Avenue; Dept. 17 28 Bakersfield, CA 93301 <i>Respondent</i>	

1 [XX] **(BY UPS OVERNIGHT DELIVERY)** On September 27, 2017, I enclosed the documents
2 in an envelope or package provided by an overnight delivery carrier and addressed to the
3 persons at the addresses named above. I placed the envelope or package for collection and
4 overnight delivery at an office or a regularly utilized drop box of the overnight delivery
5 carrier.

6 [XX] **(DECLARATION)** I declare under penalty of perjury under the laws of the State of
7 California that the above is true and correct.

8 Dated: September 27, 2017

9 
10 _____
11 Mathew Adame
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28