

VICENTE SALAS, Petitioner and Appellant, v. SIERRA CHEMICAL CO., Defendant
and Respondent.

S196568

SUPREME COURT OF CALIFORNIA

2011 CA S. Ct. Briefs 96568; 2011 CA S. Ct. Briefs LEXIS 1425

September 19, 2011

Appeal from the Court of Appeal. Third Appellate District, Case No. C064627. Superior
Court of California, County of San Joaquin. Superior Court Case No. CV033425.

Petition for Appeal

VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: CA Supreme Court: Brief(s)

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TITLE: Petition for Review

TEXT: INTRODUCTION

Petitioner Vicente Salas seeks review of a lower court decision that, if left to stand, would seriously undermine California's strong employment protections for workers, particularly including undocumented immigrant workers, notwithstanding contrary U.S. Supreme Court precedent and the Legislature's enactment of SB 1818.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeal properly applied the after-acquired evidence and unclean hands doctrines to deny Petitioner any legal recourse for Respondent's discriminatory actions.

2. Whether the Court of Appeal correctly interpreted the Legislature's intent in enacting SB 1818, which declared that "[a]ll protections, rights and remedies available under state law are available to all individuals who have applied for employment, or are or who have been employed, in this state, regardless of immigration status."

3. Whether the Court of Appeal erred [*2] in affirming the entry of summary judgment against Petitioner despite the existence of numerous significant disputes of material fact, and in affirming or failing to affirm the admission of certain testimonial evidence by the trial court.

4. Whether the trial court properly sustained Respondent's defenses of unclean hands and equitable estoppel based on the allegation that Petitioner had misrepresented whether his doctor had cleared him to return to work.

GROUNDS FOR REVIEW ARE PRESENT

Review of a decision of the Court of Appeal is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Cal. Rules of Court 8.500(b)(1).

As set forth herein, the opinion of the court below warrants review for several significant reasons. First, it applies the after-acquired evidence and unclean hand doctrines to defeat the civil rights protections of the Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.*, a result squarely at odds with the decision of the U.S. Supreme Court in *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352. Second, it interprets SB 1818, a landmark remedial statute [*3] enacted in response to an adverse decision of the U.S. Supreme Court, in a manner inconsistent both with the statute's plain language as well as the Legislature's express intent. Lastly, the decision below seriously misapplied well-established standards applicable to summary judgment which, if followed by other courts, would create confusion in the lower courts over the applicable burdens of proof.

STATEMENT OF THE FACTS

A. FACTUAL BACKGROUND

This Petition arises from a lawsuit commenced in San Joaquin County Superior Court by Petitioner Vicente Salas ("Salas") against his former employer, Respondent Sierra Chemical Company ("Sierra"). Salas was first hired by Sierra in 2003 as a production worker, and was consistently recalled to work after seasonal layoffs. Eventually, Salas accrued seniority status, and he became a permanent Sierra employee in 2006. The first amended complaint alleges that Salas became disabled as a result of a back injury sustained on the job in 2006, and that Sierra refused to reasonably accommodate his disability in violation of the FEHA. The amended complaint also alleged that subsequently, in 2007, Sierra ultimately refused to recall Salas from [*4] layoff because of his disability and for his filing of a workers' compensation claim, constituting a wrongful denial of employment in violation of public policy. Salas seeks compensatory, general, and punitive damages, prejudgment interest, and his reasonable attorneys' fees and costs of suit; he seeks no prospective remedies such as reinstatement or front pay.

B. PROCEEDINGS IN THE TRIAL COURT

Sierra moved for summary judgment, filing a motion based almost exclusively on a half-page declaration purporting to be executed by someone in North Carolina who stated that the Social Security number Salas provided Sierra was also the declarant's own number. Sierra also produced a declaration from its president asserting that it had a "long-standing policy that precludes [the] hiring of any job applicant who is prohibited by federal immigration law from working in the United States." Sierra asserted that the foregoing declarations conclusively established both that Salas had used a false Social Security number in order to get his job, and that Sierra would not have hired him had it known of Salas's alleged undocumented status.

Based on those "undisputed facts," Sierra argued that [*5] Salas had neither rights against nor remedies for Sierra's discriminatory actions. It relied, first, on *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, a case in which plaintiffs' breach of contract and wrongful termination claims (for whistleblowing) were held barred by the "after-acquired evidence" doctrine because they failed to disclose their criminal records despite a government-imposed requirement that employees not have been convicted of felonies. Sierra asserted that Salas's claims were similarly barred, claiming that it would never have hired him had it known of his alleged lack of employment

authorization. In particular, Sierra cited *Camp* for the proposition that notwithstanding the U.S. Supreme Court's holding in *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352 that the after-acquired evidence doctrine could not act as a total bar to a federal age discrimination claim, such a complete bar was justified "where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications." *Camp*, 35 Cal.App.4th at 638. [*6]

Sierra further opined that *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, which in *dicta* found a claim of wrongful termination brought by an undocumented plaintiff to be barred by the unclean hands doctrine inasmuch she was not eligible to be hired in the first place (while allowing her sexual harassment claims to proceed), also compelled the dismissal of all of Salas's claims. Sierra so argued even though Salas's complaint alleged discrimination that occurred during his employment, similar to the sexual harassment in *Murillo*. n1

n1 Sierra also argued that it had no duty to refrain from discriminating against Salas because of his disability since, at the time of its refusal to recall him from layoff, he was not a Sierra employee. Sierra waived this argument on appeal, evidently understanding that the FEHA protects all persons from employment discrimination, not simply current employees.

The trial court denied Sierra's motion, finding that numerous disputed issues of material [*7] fact precluded entry of summary judgment. Among the triable issues precluding summary judgment on Sierra's after-acquired evidence and unclean hands defenses, the court found, were whether the documentation Salas presented to show his work authorization was valid and whether he was entitled to work in the United States.

Sierra subsequently sought a writ of mandate from the Third Appellate District directing the trial court to reverse its denial of summary judgment. The Court of Appeal issued an alternative writ directing the trial court to enter judgment for Sierra or to show cause why reversal was not warranted. The trial court thereupon vacated its prior order and entered judgment for Sierra.

C. PROCEEDINGS IN THE COURT OF APPEAL

Salas appealed from the judgment in Sierra's favor, arguing: *inter alia*: 1) that nothing in the record demonstrated that Salas was unauthorized to work in the United States; 2) that, in any event, Salas's immigration status was irrelevant to his claims in light of the Legislature's 2002 enactment of SB 1818, n2 which provides that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited [*8] by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."; n3 and 3) that the trial court improperly overlooked numerous disputes of material fact in entering summary judgment.

n2 Codified at Cal. Civ. Code § 3339, Cal. Gov't Code § 7285, Cal. Health & Safety Code § 24000, and Labor Code 1171.5.

n3 Labor Code § 1171.5(a).

In its response, Sierra reiterated its arguments that Salas was barred by the after-acquired evidence and unclean hands doctrines from seeking any relief, again relying on *Camp* and *Murillo*. As to Salas's argument that SB 1818 made his immigration status irrelevant to his failure to accommodate and discriminatory denial of employment claims, Sierra responded only that its focus on the validity of his Social Security number had nothing to do with Salas's immigration status but, instead, only with his "ineligibility for employment."

The Court of Appeal affirmed the entry [*9] of summary judgment for Sierra. *Salas v. Sierra Chemical Co.* (August 9, 2011) 198 Cal.App.4th 29, 2011 WL 3518264. n4 It held that Salas had not raised a triable issue of material fact to counter either of the declarations offered by Sierra. First, it concluded that the declaration ostensibly procured from the individual in North Carolina, without more, was evidence sufficient to infer that the number used by Salas was not his. *Id.* at *8. Next, the Court of Appeal found the declaration of Sierra's president to be conclusive proof of a policy against hiring undocumented workers, disregarding conflicting evidence of a supervisor's statement that as long as he was happy with his employees' work, he would not fire them due to Social Security number discrepancies, and Salas's personal knowledge of Sierra's hiring of undocumented workers. *Id.* at *9.

n4 A true and correct copy of the Court of Appeal's opinion is bound at the back of this Petition.

Stating that "[t]his case is a failure [*10] to hire case," *id.* at *5, the Court of Appeal determined that *Camp* required dismissal of Salas's denial of employment claim on after-acquired evidence grounds in that the federal Immigration Reform and Control Act of 1986 ("IRCA") made it unlawful for aliens to use false documents to obtain employment, and required employers to report their employees' Social Security numbers via the 1-9 form. *Id.* at *7. The Court of Appeal further concluded that "unlike the sexual harassment claim in *Murillo*, Salas's discrimination claims are tied to the failure to hire", *id.* at *8 (internal citation omitted), because Salas was denied employment allegedly in retaliation for his disability - thus dismissing those non-termination claims as well. It reasoned that *Murillo* was distinguishable in that "this is not a case of pervasive discriminatory conduct that caused injuries during the term of employment", *id.* - even though Sierra's failure to accommodate Salas's back injury required him to work through pain and, indeed, resulted in yet another injury after his supervisors told him "to stop complaining and get back to work." *Appellant's Appendix (hereinafter "AA")*, vol. 2, 345 P 3 [*11] & 366 PP 5-6. n5 Again relying on *Camp* and *Murillo*, the court also upheld Sierra's after-acquired evidence and unclean hands defenses, reasoning simply that "[b]ecause Salas was not lawfully qualified for the job, he cannot be heard to complain that he was not hired." *Id.* at * 10.

n5 Citations to Appellant's Appendix refer to the Appendix filed with the Court of Appeal and direct the Court to the volume and page number of that Appendix.

Finally, the Court of Appeal rejected Salas's argument that SB 1818 precluded the use of the after-acquired evidence and unclean hands defenses to deny Salas the protections of California law. The court acknowledged that SB 1818 reaffirmed "the irrelevance of immigration status in enforcement of state, labor, employment, civil rights, and employee housing laws," *id.* at *12. Despite that, however, it concluded that subsection d) of SB 1818, n6 which stated that "[t]he provisions of this bill are declaratory of existing law", was nonetheless intended by the Legislature [*12] to keep in place *Camp* and *Murillo* even where they could operate to make immigration status relevant to, indeed if not dispositive of, the ability of immigrant workers to seek the protections of California employment and civil rights laws against unlawful workplace practices. n7

n6 The quoted language appears at Labor Code § 1171.5(c).

n7 A petition for rehearing was not filed with the Court of Appeal.

ARGUMENT

A. Review Should be Granted to Correct the Derogation of Civil Rights Caused by the Misapplication of the After-Acquired Evidence and Unclean Hands Doctrines.

The Court of Appeal's use of the after-acquired evidence and unclean hands defenses to bar all of Salas's claims as a matter of law seriously threatens to derail California civil rights protections. This is so because *Salas* applied those doctrines to entirely eviscerate potentially meritorious civil rights claims solely on the basis of wholly unrelated wrongdoing by the employee, n8 and did so in the face of well-established [*13] U.S. Supreme Court authority unequivocally rejecting that absolutist approach. n9 More importantly, though, allowing those defenses to preclude the pursuit of an employment discrimination claim leaves hollow the paramount public purpose of FEHA: rooting out invidious discrimination in employment.

n8 Petitioner in no way concedes that Sierra has discovered any wrongdoing by Salas, nor that there was sufficient evidence in the record for the Court of Appeal to have concluded that Salas utilized a Social Security number that did not belong to him. *See infra* sec. D.

n9 FEHA is interpreted by reference to federal anti-discrimination statutes because of the similarities between the statutes. *See, e.g., Pantoja v Anton* (2011) 198 Cal.App.4th 87 (quoting *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 278); *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 379; *Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167, 1172. Indeed, it often "offers greater protection and relief to employees than [federal law]." *Murillo*, 65 Cal.App.4th at 842; *see also Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1215 (deviating from federal law to allow a worker's cause of action against a supervisor in their individual capacity because Legislature intended FEHA to be more protective).

[*14]

In *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, the U.S. Supreme Court considered the implications of precluding civil rights claims on the basis of employee misconduct that would have resulted in the employee's termination. *Id.* at 356-59. Noting the public and remedial purposes of the federal Age Discrimination in Employment Act ("ADEA"), the Court unanimously ruled that the unclean hands defense has no application in discrimination cases "where a private suit serves public purposes." *Id.* at 360 (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.* (1968) 392 U.S. 134, 138). It further concluded that while the after-acquired evidence doctrine should serve to limit the remedies that a plaintiff might recover, "an absolute rule barring backpay . . . would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from [impermissible] discrimination." *Id.* at 362. In so holding, the Court struck a balance between giving full effect to the societal condemnation of invidious bias embodied in the civil [*15] rights protections contained in the ADEA and the legitimate interests of an employer in light of misconduct discovered since the employee's termination.

Accordingly, federal courts in California have since applied *McKennon* to limit the remedies available under FEHA to victims of employment discrimination who are discovered to have engaged in conduct that would have resulted in their termination. n10 But by barring all of Petitioner's claims as a matter of law, *Salas* impermissibly strikes at the heart of FEHA, following a dangerous path paved in large part by *Camp* and *Murillo* - two cases that misapplied *McKennon*.

n10 *See, e.g., Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1069-70 (concluding that evidence of plaintiffs' immigration status might affect damages, but had no bearing on questions of liability for violating plaintiffs' civil rights); *Ashman v. Solectron, Inc.* (N.D. Cal. Aug. 4, 2010) No. CV 08-1430 JF, 2010 WL 3069314, *8-9 (concluding that after-acquired evidence affects only remedies available to plaintiff under both FEHA and federal employment discrimination law).

[*16]

Camp largely disregarded *McKennon* as well as relevant case law presaging *McKennon*. *See Cooper v.*

Rykoff-Sexton, Inc. (1994) 24 Cal.App.4th 614. With scant reasoning, *Camp* announced a rule wholly precluding wrongful termination claims by plaintiffs who had exposed their former employers to potential liability by lying on their job applications. *See Camp, 35 Cal.App.4th at 639*. *Camp's* holding might be somewhat less problematic if limited to its facts or to the types of claims that were before the court - breach of contract and the wrongful termination of a whistleblower and her husband. n11 *See id. at 627-28 & 633 n.9*. But *Murillo* questionably construed *Camp's* deviation from *McKennon* as establishing a rule for discriminatory termination claims under FEHA n12 and, in *dicta*, opined that plaintiff's claims for wrongful termination would be foreclosed by unclean hands resulting from her lack of work authorization. n13 *See 65 Cal.App.4th at 845*.

n11 *Camp* misconstrued Mr. Camp's allegations that he was fired because of his wife's actions, *see 35 Cal.App.4th at 635 n.13*, as a claim "for marital status discrimination" under FEHA. *See id. at 632 n.8*. Such a construction is plainly mistaken and should be extended no deference, given that the source of Mrs. Camp's claims were statutory protections for whistleblowers and in no way implicate FEHA. *See id. at 627-28*. Moreover, *Camp* later made clear that it has given little, if any, consideration to the nature of any FEHA claim or the implications of applying the after-acquired evidence and unclean hands defenses to such civil rights claims. *See id. at 635 n. 13*.

[*17]

n12 The wrongful termination claims in *Murillo* are properly understood as asserting the plaintiff's civil rights under FEHA, as her termination was alleged to have resulted from her report of a supervisor's sexual harassment. *See 65 Cal.App.4th at 840*.

n13 The application of the unclean hands and after-acquired evidence defenses on the plaintiff's wrongful termination claims were not before the court, as the plaintiff had long before dismissed them. *See 65 Cal.App.4th at 841*.

The court below, however, took *Camp* and *Murillo* a step further in the wrong direction - *i.e.*, by allowing the after-acquired evidence and unclean hands doctrines to extinguish *any* claim in its entirety so long as it could somehow be "tied to" a termination claim, however tenuously. n14 *Salas, 2011 WL 3518264 at *8*. Thus, in any case where a worker's immigration status might (with or without a valid basis) be called into question, n15 as happened here, *Salas* creates the specter of countless meritorious claims being dismissed outright or, [*18] perhaps worse, not brought at all, because of its clear deterrent effect.

n14 The "tied to" standard announced by the court below would be unworkable because of the difficulty in arriving at a bright-line rule for determining what claims were "tied to" a termination. For example, potentially any workplace violation that a worker complained about to her employer could readily be "tied to" a termination where the employer, as here, then fired or refused to hire her in reprisal for her complaint. Any claim arising from the initial violation, under *Salas*, would thereby have enough of a nexus with the denial of employment to be extinguished along with it. *See infra* n.21. Among other things, this could lead to the perverse result in similar cases that employers would have an incentive to claim that any denial of employment was in retaliation for an assertion of rights regarding other workplace abuses. Conversely, plaintiffs would have the burden of demonstrating that a non-termination claim for which they sought relief was not connected in any way to a subsequent termination - exactly the reverse of the burden of proof in retaliation claims, where the plaintiff must demonstrate a causal nexus between the protected act (e.g., a complaint about working conditions) and the alleged retaliatory action.

[*19]

n15 Seizing on *Camp's* conclusion that the "potential detrimental impact" plaintiffs' misconduct would cause the employer merited a departure from *McKennon, Camp, 35 Cal.App.4th at 636*, the court below drew several erroneous conclusions regarding the harm that could flow to Sierra had Salas actually used a Social Security number that did not belong to him. In fact, while IRCA requires an employer to review the documents proffered by an employee to confirm her identity and work authorization, it need only affirm that it *reviewed* those documents, *see* 8 C.F.R. § 274a.2(a)(3), and does not attest to the validity of the documents presented. *See* 8 C.F.R. § 274a.4 (establishing a rebuttable presumption for good faith compliance). Similarly, while the IRS may fine employers who submit inaccurate returns regarding the payment of wages, *see* 26 U.S.C. § 6721, that penalty is waived where the failure to provide accurate information results from a misrepresentation by the employee. *See* 26 C.F.R. § 301.6724-1 (c)(6)(ii). Contrary to *Salas's* conclusion, unless an employer pays a role in the misrepresentation, it is exposed to no liability.

[*20]

Salas's unprecedented extension of the after-acquired evidence and unclean hands defenses, as questionably articulated in *Camp* and *Murillo*, to wholly deprive Petitioner of any legal recourse for *any* of Sierra's discriminatory actions would therefore have enormous negative consequences for the ability of immigrant workers to enforce California's civil rights laws. n16 It would plainly frustrate the Legislature's purposes in enacting SB 1818, discussed *infra*. It would also represent a sharp break with analogous Title VII precedent which has held uniformly that undocumented workers are, in almost all instances, entitled to exactly the same rights and remedies against workplace exploitation as legally authorized workers are. n17

n16 In fact, one Court of Appeal has previously disapproved of a central tenet of those cases as applied to SB 1818. *Farmers Brothers Coffee v. Workers' Compensation Appeals Board (2005) 133 Cal.App.4th 533, 542-43* (rejecting suggestion that "one who obtains employment in a manner contrary to federal law should not benefit from that illegal employment relationship" and "declin[ing] petitioner's suggestion that we insert such a policy into [Labor Code § 1171.5].").

[*21]

n17 *See, e.g., Rivera, 364 F.3d at 1070* ("[O]verriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases."); *Avila-Blum v. Casa De Cambio Delgado, Inc. (S.D.N.Y. 2006) 236 F.R.D. 190, 192* (holding magistrate judge did not err in concluding that *Hoffman Plastic Compounds, Inc. v. NLRB (2002) 535 U.S. 137*, which concluded that an undocumented worker was not entitled to back pay remedies for termination in violation of the National Labor Relations Act, was limited to actions under the NLRA); *EEOC v. Bice of Chicago (N.D. Ill. 2005) 229 F.R.D. 581, 583* (finding immigration status irrelevant to claims or defenses in an employment discrimination case); *Escobar v. Spartan Security Services (S.D.Tex. 2003) 281 F.Supp.2d 895, 897* (opining that *Hoffman* is inapplicable to Title VII claims); *De La Rosa v. N. Harvest Furniture (C.D.Ill. 2002) 210 F.R.D. 237, 238* (same); *see also* EEOC Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, *available at*: <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (last visited Sept. 15, 2011) (stating that *Hoffman* "in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes[.]")

[*22]

Review should be granted to correct the Court of Appeal's extreme and unreasonable application of the after-acquired evidence and unclean hands doctrines, and to prevent the backsliding on California's civil rights protections that *Salas* invites.

B. SB 1818 Cannot Sensibly be Understood to Preserve Contrary Case Law That Would Eviscerate its Plain Intent.

In affirming the grant of summary judgment, the Court of Appeal adopted a nonsensical construction of SB 1818 that would in fact *undo* existing protections for all workers regardless of their immigration status. It not only ignored the plain language of that statute; it also subverted the Legislature's expressly stated purposes in enacting it.

In 2002, following the decision of the U.S. Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, the Legislature enacted SB 1818 out of a concern that *Hoffman's* withdrawal of back pay remedies to undocumented workers fired in violation of the National Labor Relations Act might be interpreted to have a limiting effect on California protections for all employees irrespective of their immigration status. In its bill analysis, the Senate [*23] Committee on Labor and Industrial Relations discussed *Hoffman* at length, and noted the concern of the bill's proponents that "the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' [sic] remedies intact, and enhance compliance."
n18

n18 A true and correct copy of this bill analysis of SB 1818 is appended hereto as Attachment A for the convenience of the Court. It is also available online at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020514_164726_sen_comm.html. This Court has looked to committee analyses as an aid to discerning the Legislature's intent in enacting legislation, *see, e.g., In re J. W. (2002) 29 Cal.4th 200, 211-12.*

Accordingly, SB 1818, as codified in Labor Code § 1171.5, provides as follows:

The Legislature finds and declares the following:

- a) All protections, rights, and remedies available under state law, [*24] except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
- (b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.
- (c) The provisions of this section are declaratory of existing law.
- (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

As one Court of Appeal previously observed, "These statutes leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, [*25] civil rights, and employee housing laws. Thus, if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws." *Hernandez v. Paicius* (2003) 109

Cal.App.4th 452, 460, disapproved on other grounds, People v. Freeman (2010) 47 Cal.4th 933; see also Reyes v. Van Elk, Ltd. (2007) 148 Cal.App.4th 604, 615 (citing Hernandez with approval). Indeed, every previous published decision by a California court concerning SB 1818 has understood it to mean exactly what it says. It would be nonsensical at best to read into that statute's broad language, as did the court below, a *sub silentio* carve-out that would exclude from coverage precisely those workers the Legislature sought to protect from *Hoffman's* potential consequences.

Quite to the contrary, as a remedial statute Labor Code § 1171.5 should be construed broadly so as to effectuate its purposes, *see, e.g., Murphy v. Kenneth Cole Productions (2007) 20 Cal.4th 1094, 1103* ("statutes governing conditions of employment are to be construed broadly in favor of protecting [*26] employees."). In fact, earlier this year, this Court, affirming the Legislature's intent in passing SB 1818 to "protect undocumented workers from sharp practices in the wake of *Hoffman*", interpreted Labor Code § 1171.5 broadly to extend its protections to work performed in California by nonresidents. *Sullivan v. Oracle Corporation (2011)51 Cal.4th 1191, 1197 n.3.*

Notwithstanding the above, and ignoring SB 1818's plain language, the Court of Appeal read into the bill's "declaratory of existing law" language an intent on the part of the Legislature to leave all contrary prior law, including the decisions in *Camp* and *Murillo*, untouched. *Salas, 2011 WL 3518264 at *12.* But even leaving aside the bill's stated purposes, this argument fails on independent grounds, as an examination of SB 1818's legislative history makes clear.

In the Senate's third reading analysis of SB 1818, n19 the text of the bill is first set forth, including subsection d), which states that "[t]he provisions of this bill are declaratory of existing law." n20 It is then followed immediately by the following section:

n19 A true and correct copy of the third reading analysis of SB 1818 is appended hereto as Attachment B for the convenience of the Court. It is also available online at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020823_000220_asm_floor.html. This Court has looked to third reading analyses as an aid to discerning the Legislature's intent in enacting legislation. *See, e.g., Sharon S. v. Superior Court (2003) 31 Cal.4th 417, 459.*

[*27]

n20 This language appears in subsection c) of Labor Code § 1171.5.

EXISTING LA W provides:

- 1) *A framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations.*
- 2) *Authority to various state agencies to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law.*
- 3) *For remedies such as reinstatement and back pay awards for monies due the employee in order to make them whole.*

It is in this context that SB 1818's "declaratory of existing law" language is properly understood. Far from constituting a wholesale ratification of the entire body of pre-existing California law, including decisions such as *Camp* and *Murillo* that are directly at odds with SB 1818, the Legislature was simply indicating that nothing in the bill was meant to disturb the existing legal framework established for the protection of workers who had been unlawfully treated. Any other understanding [*28] of subsection d) would render SB 1818 an empty letter inasmuch as it would

leave standing case law that would thwart the statute's plain remedial purpose, that of ensuring that all persons in California would enjoy equal rights and remedies in the workplace irrespective of immigration status.

The Court of Appeal's nullification of SB 1818 must be corrected. In *Shoemaker v. Myers (1990) 52 Cal.3d 1*, for example, this Court held that an employee's claim under a "whistleblower" statute was not pre-empted by the Workers' Compensation Act. *Shoemaker* noted that had the Legislature considered existing workers' compensation remedies adequate to address the problem of retaliation against whistleblowing public employees, it would not have enacted the statute:

We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous. The whistle-blower statute was a legislative expression intended to encourage and protect the reporting of unlawful governmental activities, and to effectively deter retaliation for such reporting. The Legislature clearly intended to afford an additional remedy to those already granted [*29] under other provisions of the law; otherwise [former Government Code] section 19683 [the whistleblower statute] would be rendered meaningless.

Id. at 22.

So it is here. It cannot be coherently argued that the Legislature, when it plainly sought to eliminate distinctions between California workers based on their immigration status for purposes of state law protections, instead engaged in the "idle act" of drafting a statute that left in place contrary case law that defeated that very purpose. *See Hernandez, 109 Cal.App.4th at 459* ("[W]e observe the Legislature apparently felt strongly enough about the sensitive subject of immigration status to put essentially identical language in three separate statutes."). Yet that is the interpretation the Court of Appeal imposed on the statute when it incorrectly construed a single sentence in the bill as swallowing the whole. n21 This Court should correct the error of the court below in reading SB 1818 out of existence by its very own terms.

n21 The Court of Appeal justified its strained construction of the bill by contending that "it does not frustrate the purposes of SB 1818 because it allows undocumented immigrants to bring a wide variety of claims against their employers as long as these claims are not tied to the wrongful discharge or failure to hire." *Solas, 2011 WL 3518264* at *12. The court's attempt to reconcile its implausible reading of SB 1818 with the Legislature's deeply stated concerns is, however, unpersuasive. *Hoffman* arose in the context of an employer's firing of an undocumented worker in retaliation for his union organizing activities. Far from concluding that the employee had no right to be protected from unlawful termination, however, *Hoffman* held only that he was ineligible to receive his lost wages as one of the remedies for that termination, and left other remedies in place. *Hoffman, 535 U.S. at 152*. It would be difficult indeed to assert that in enacting SB 1818 due to its concerns over *Hoffman*, the Legislature actually intended to go even further than *Hoffman* in depriving undocumented workers of pre-existing legal protections.

In any event, the Court of Appeal's proffered distinction between termination or non-hire claims and claims regarding other forms of workplace abuses would result in little if any benefit to undocumented workers. Indeed, the linkage drawn by the court below between Sierra's failure to accommodate Salas's back injury, which occurred prior to and apart from his termination, is an apt illustration of how employers could readily circumvent any arguably surviving portions of SB 1818. Following this example, employers could avoid liability for any unlawful acts against undocumented workers simply by retaliatorily terminating them once they sought to assert their rights. *See supra* n. 14.

[*30]

C. Summary Judgment was Improper Because Sierra Failed to Meet its Burden as the Moving Party and the

Court of Appeal Failed to Draw Reasonable Inferences in Favor of the Non-Moving Party.

Review should be granted to correct the Court of Appeal's clear misapplications of established summary judgment standards. The court below incorrectly shifted the burden of production to Salas when Sierra failed to meet its initial burden of presenting admissible and undisputed evidence that it was entitled to judgment. *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1342-43 (reversing summary judgment for moving party's failure to meet burden under Cal. Code Civ. Proc. § 437c(p)(2)). Additionally, it failed to draw all reasonable inferences in favor of Salas, the non-moving party. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (reaffirming standard on summary judgment for viewing evidence in light most favorable to the nonmoving party). Because of the numerous triable issues of material fact in this case, the Court of Appeal erred in granting summary judgment.

1. Sierra Failed to Prove That the Social Security Number Salas [*31] Used Was Not His.

As the moving party, Sierra had the burden of establishing an affirmative defense through undisputed admissible evidence. *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162. As a foundation for its unclean hands and after-acquired evidence defenses, Sierra contended that Salas's Social Security card was "fake" and that Salas had fraudulently used "someone else's number in order to obtain employment with Sierra Chemical." AA, vol.1, 59. Despite the numerous material factual disputes that remained, the Court of Appeal concluded that Salas was required to offer additional evidence to prove that the Social Security number belonged to him. n22 This was clear error that merits correction to provide guidance to lower courts about the proper application of summary judgment standards.

n22 *Salas*, 2011 WL 3 518264, * 8 ("[W]hile Salas could have disputed this evidence with evidence of his own, he chose not to do so.").

In support of its motion for summary judgment, [*32] Sierra proffered a photocopy of Salas's Social Security card, n23 documents relevant to his employment on which the Social Security number had been written, n24 and copies of documents related to Salas's employment with RO-Lab American Rubber Co., Inc., where Salas worked in 2007, and to whom he provided the same Social Security card and number. n25 Sierra also presented the declaration of one Kelley R. Tenney, an individual ostensibly residing in North Carolina. n26 Contrary to Sierra's assertions - and the Court of Appeal's conclusions - these items do not establish that the Social Security number Salas used was "fake", nor do they prove that the Social Security number does not belong to him.

n23 AA, vol.1, 120-21 & 127-28.

n24 *Id.* at 119, 122, 126, 129, 132, 150 & 164.

n25 *Id.* at 223-228.

n26 *Id.* at 344-46.

To the contrary, the documents demonstrate that Salas consistently used the same Social Security card and number between 2003 and 2007 in applying for employment and filling out [*33] his W-4 federal tax withholding forms. Further, because these employment forms required Salas to state under oath that the information he provided, including his Social Security number, was true, they provide a basis for finding that the Social Security number in question indeed belonged to him. Similarly, while Tenney's declaration asserted a claim to the Social Security number and stated that he did not know Salas and did not give him permission to use his Social Security number, that testimony alone scarcely establishes that the number was Tenney's. There is no evidence as to when and where Tenney obtained his Social Security number, nor a photocopy of Tenney's Social Security card, nor of any other possible indicia of its authenticity

as to Tenney as its sole and valid holder. As such, Tenney's declaration supports only his *belief* the number belonged to him. This is plainly insufficient to prove the Social Security Administration ("SSA") issued the number to him alone, and the court below erred in finding otherwise. Consequently, disputed issues of fact existed as to who the Social Security number belongs to and whether Salas's use of the Social Security number was improper. [*34] n27 The court's insistence that Salas put forth additional evidence, *see Salas, 2011 WL 3528264, *8* (stating a current declaration was necessary from Salas), would only have been appropriate once the burden of production had shifted, and was not merited here because, at best, Sierra's evidence contradicted Salas's claim to the number; it neither established that the number did not belong to him nor that he fraudulently used the number.

n27 But even assuming *arguendo* the court below correctly determined the number was Tenney's based on the declaration alone, Sierra failed to advance undisputed evidence that Salas fraudulently used the number or that his Social Security card was a "fake". Finding that Salas had fraudulent intent and falsified records based on solely on the fact that they number belonged to someone else, turns the summary judgment standard on its head by drawing inferences in the light most favorable to the moving party.

2. Questions of Material Fact Remain Regarding Whether [*35] Sierra Would Have Hired or Recalled Salas had it Known that he was Using Another Person's Social Security Number.

The Court of Appeal wrongly determined that Salas failed to establish a triable issue of fact as to whether Sierra had a policy of refusing to employ persons unauthorized to work in the United States. The evidence indicates that Salas informed his supervisor, Leo Huizar, that Salas and several other employees had received letters from the SSA stating its records indicated that their names did not match their Social Security numbers, n28 that Sierra affirmatively reassured Salas that he and his co-workers need not worry about any discrepancies with their Social Security numbers, and that Sierra would not terminate them over such discrepancies. AA, vol.2, 346 P 8. Additionally, Salas offered evidence that he knew of several undocumented immigrants who worked at Sierra. Salas also testified that he did not know of any instance in which Sierra had ever discharged a person based on a lack of work authorization. *Id. at P 9*. Viewing these facts in the light most favorable to Salas as the non-moving party, this evidence would allow a reasonable [*36] trier of fact to find that Sierra did not consistently implement its policy of not employing unauthorized workers, as necessary to the after-acquired-evidence defense. The court below erred in concluding otherwise.

n28 Sierra argued that the trial court erred in admitting Huizar's statements. In its opinion, the Court of Appeal states that it did not address this issue, and it is therefore not at issue for review. *Salas, 2011 WL 3518264, at *9 n.3*.

3. Whether Salas Made Intentional Misrepresentations Was a Question of Fact for the Jury That Precluded Summary Judgment.

The Court of Appeal failed to recognize the unique role of triers of fact in resolving questions of intent and erred by resolving attendant questions of fact in Sierra's favor. Sierra's unfounded assertion that Salas intentionally deceived the company by misrepresenting his Social Security number required Sierra to prove that Salas *intended* to commit fraud. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 482* [*37] ("It is the element of intent which makes fraud actionable."). Such questions of intent are uniquely unsuited to summary adjudication. *See Hunter v. Up-Right, Inc. (1993) 6 Cal.4th 1174, 1185* ("Fraud is easily pleaded, and in all likelihood it would be a rare wrongful termination complaint that omitted to do so. Much harder, however, is the defense of such claims and their resolution at the summary judgment or demurrer stage of litigation.").

Sierra's motion rests on the baseless contention that Salas intentionally misrepresented his Social Security number. But the evidence of signed employment forms by Salas and conversations with management about discrepancies in

Social Security numbers in fact support the contrary notion - that Salas had no intent whatsoever to defraud Sierra. Especially given the risks associated with notifying his employer of the potential problem with his Social Security number, Salas acted with integrity by notifying Sierra of this potential problem. Thus, there were triable issues of fact regarding Petitioner's intentions which should have been submitted to a jury. The court below erred in finding otherwise.

D. The Court of Appeal Erred [*38] in Inferring Salas's Lack of Employment Authorization From The Purported Discrepancy Regarding His Social Security Number.

The Tenney declaration hardly proves that the Social Security number used by Salas belonged to Tenney, *see supra*. But even leaving that aside, the Court of Appeal also erred in concluding that Salas's proffer of the same Social Security number was indisputable proof that he was not authorized to work in the United States, that he could permissibly have been fired by Sierra on that basis, and that his claims are thus barred by the after-acquired evidence and unclean hands doctrines.

To begin with, the determination of an individual's immigration status is within the expertise of the appropriate federal agencies, not that of the judiciary. *See, e.g., NLRB v. Apollo Tire Co., Inc. (9th Cir. 1979) 604 F.2d 1180, 1183* ("Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service."). n29 And even if Salas's number were the same as that issued to another person, Sierra would hardly be able to claim that this constituted "constructive knowledge" within the meaning [*39] of IRCA that Salas was undocumented. n30 Such knowledge is a prerequisite to any defense that Sierra had information sufficient to compel Salas's termination for purposes of the after-acquired evidence doctrine. It is well established, however, that the threshold for "constructive knowledge" is not met simply on the basis of an allegedly discrepant Social Security number. n31 For example, in a case involving an employer's termination of employees who had been listed in "no-match letters" issued by the SSA, the U.S. Court of Appeals for the Ninth Circuit recently held:

[A]n SSN discrepancy does not automatically mean that an employee is undocumented or lacks proper work authorization. In fact, the SSA tells employers that the information it provides them "does not make any statement about. . . immigration status" and "is not a basis, in and of itself, to take any adverse action against the employee."

Aramark Facility Services v. Service Employees International Union, Local 1877, AFL-CIO (9th Cir. 2008) 530 F.3d 817, 826.

n29 Requiring judicial bodies to determine the immigration status of plaintiffs appearing before them would be an impossible if not nightmarish undertaking. As one Court of Appeal observed, "[i]f compensation benefits were to depend upon an alien employee's federal work authorization, the Workers' Compensation Appeals Board would be thrust into the role of determining employers' compliance with the IRCA and whether such compliance was in good faith, as well as determining the immigration status of each injured employee, and whether any alien employees used false documents." *Farmers Brothers Coffee, 133 Cal.App.4th at 540-41* (noting further that "[t]hus, the remedial purpose of workers' compensation would take on an enforcement purpose, in direct conflict with the IRCA.>").

[*40]

n30 IRCA makes unlawful the knowing employment of undocumented workers. *8 U.S.C. § 1324a(a)(1)(A), (a)(2)*. IRCA's regulations define "knowing" as including not only actual knowledge but also "constructive knowledge." *8 C.F.R. § 271a.1(1)(1)*.

n31 Similarly, courts have found the "constructive knowledge" needed to justify an employee's termination

present only where the employer was directly informed by federal immigration authorities of an employee's lack of status. *See, e.g., New El Rey Sausage Co. v. INS (9th Cir. 1991) 925 F.2d 1153, 1158* ("New El Rey was provided with specific, detailed information. The INS told it whom it considered unauthorized and why. Under these circumstances, the ALJ properly found that a constructive notice standard was appropriate."); *Mester Mfg. Co. v. INS (9th Cir. 1989) 879 F.2d 561, 566-67* (finding "knowledge" within the meaning of 8 U.S.C. § 1324a(a)(2) where employer was presented by INS, after audit of its 1-9 forms, with names of seven particular employees who lacked authorization to work in the U.S.). Other decisions, not involving direct information from immigration authorities, are in accord. *See, e.g., Mountain High Knitting, Inc. v. Reno (9th Cir. 1995) 51 F.3d 216, 220* (holding that even information from the INS regarding Social Security number discrepancies was insufficient to create "knowledge" on the employer's part); *Collins Foods Int'l, Inc. v. INS (9th Cir. 1991) 948 F.2d 549, 555* (holding that neither discrepancies in employee's Social Security card nor different spellings of his name gave rise to constructive knowledge, and characterizing the standard established by *Mester* and *New El Rey* as one of "willful blindness").

[*41]

In upholding the trial court's denial of legal recourse to Salas on the sole basis that the Social Security number he provided was claimed by another person, therefore, the Court of Appeal ignored applicable federal immigration law. Its error must be rectified.

E. The Court of Appeal Erred In Other Respects.

The Court of Appeal erred in affirming the admission of Tenney's testimony because the testimony is mere conclusion, unsupported by fact, and was offered to show that the SSA issued Tenney the Social Security number. Furthermore, because the Court of Appeal incorrectly determined that Huizar's statements did not create a triable issue of fact, it failed to affirm the trial court's determination that the statements were in fact admissible.

Sierra's claims regarding the defenses of unclean hands and equitable estoppel based on the allegation that Salas had misrepresented whether his doctor had cleared him to return to work were not addressed by the Court of Appeal. Had it done so, however, it should have rejected those defenses. Sierra failed to establish Salas's deceit based upon the conversations between Salas and Huizar. Sierra also failed to show undisputed facts necessary [*42] for a summary judgment ruling based on these defenses.

CONCLUSION

For the foregoing reasons, Petitioner Vicente Salas respectfully requests that the Court order review of the decision below.

Dated: September 16, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this Petition for Review contains 7,733 words, exclusive of the caption page, tables of contents and authorities, signature blocks, this Certificate and that appearing on the page following, and the attachments hereto.

Dated: September 16, 2011

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CERTIFICATE OF SERVICE

I, DJUNA GRAY, declare:

I am a citizen of the United States, over [*43] 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

On September 16, 2011, I served the within:

PETITION FOR REVIEW

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I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct. Executed on September 16, 2011.

/s/ [Signature]
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[SEE ATTACHMENT A IN ORIGINAL]

[SEE ATTACHMENT B IN ORIGINAL]