

19-7926

No. _____

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ORIGINIAL

IN THE SUPREME COURT OF THE UNITED STATES

Lin Ouyang,

RECEIVED, U.S.
SUPREME COURT

Feb 08 2009

OFFICE OF THE CLERK

Petitioner-Appellant,

v.

Achem Industry America, Inc.

Respondent-Appellee

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
APPEAL OF CALIFORNIA**

PETITION FOR WRIT OF CERTIORARI

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PETITIONER IN PRO SE

QUESTION PRESENTED

Question Presented No. 1

California Court of Appeal held that attorney misrepresentations that prevented the other party from fully presenting her claim at trial did not constitute misconduct because the attorney bore a burden to prove a defense to another claim.

The first question presented is:

Whether refusal of California Court of Appeal to vacate a judgment procured by fraud upon the court violated the right to due process of law of the party who was prevented from fully presenting her claim by the fraud.

Question Presented No. 2

California Court of Appeal, based on numerous mistakes of significant facts, rejected, without reaching their merit, most of petitioner's arguments raised in her brief. The appellate court found that "appellant's arguments are generally undeveloped and difficult to follow", also indicated that the record was complicated, however in oral argument, which was provided as a matter of right by the rules of the state court, the court told petitioner that it did not have any questions for her.

The second question presented is:

Where rules of the court provides that oral argument is an indispensable part of a hearing of an appeal, whether there is a violation of due process of law when such oral argument is not provided by the virtue of

no effort from the court to hear the arguments and the parties to the appeal
are not notified.

PARTIES TO THE PROCEEDINGS BELOW

[X] All parties appear in the caption of the case on the cover page.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Achem Industry America, Inc. is a wholly owned subsidiary of Achem Technology Corporation. Achem Technology Corporation 's stock is publicly traded. No publicly held entity owns 10% or more of the stock of Achem Technology Corporation. Yem Chio Corporation Ltd. holds controlling shares of Achem Technology Corporation's stock. Yem Chio Corporation Ltd. 's stock is publicly traded. No publicly held entity owns 10% or more of the stock of Yem Chio Corporation Ltd.

RELATED CASES

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Judgment entered March 30, 2015.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Order entered September 28, 2015.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Order entered September 30, 2015.

Ouyang v. Achem Industry America, Inc., No. B267217, California Court of Appeal, Judgment entered June 28, 2019.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Judgment entered November 23, 2015.

Ouyang v. Achem Industry America, Inc., No. B268195, consolidated with appeal No. B267127, California Court of Appeal, Judgment entered June 28, 2019.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Order entered December 2, 2015.

Ouyang v. Achem Industry America, Inc., No. B269209, consolidated with appeal No. B267127, California Court of Appeal, Judgment entered June 28, 2019.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Judgment entered January 13, 2016.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Order entered January 14, 2016.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Order entered February 10, 2016.

Ouyang v. Achem Industry America, Inc., No. B270026, consolidated with appeal No. B267127, California Court of Appeal, Judgment entered June 28, 2019.

Ouyang v. Achem Industry America, Inc., No. BC468795, Los Angeles Superior Court, Order entered April 6, 2016.

Ouyang v. Achem Industry America, Inc., No. B271357, consolidated with appeal No. B267127, California Court of Appeal, Judgment entered June 28, 2019.

Ouyang v. Achem Industry America, Inc., No. BC556293, Los Angeles Superior Court, Judgment entered June 19, 2018.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lin Ouyang respectfully petition for a writ of certiorari to review the judgment of California Court of Appeal, Second Appellate District.

OPINION BELOW

The opinion of California Court of *Appeal* in *Ouyang v. Achem Industry America, Inc.* is not published in the official report, but is available to public at https://scholar.google.com/scholar_case?case=9179425776678311219&q=ouyang+v.+Achem&hl=en&as_sdt=2006. App. 1a.

JURISDICTION

The judgment of the California Court of Appeal was entered on June 28, 2019. App. 1a. California Supreme Court denied petition for review on September 11, 2019. App. 38a. This Court granted petitioner's application to extend time, up to and including February 8, 2020, to file her petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

- I. **California Court of Appeal held that because an attorney had a burden to prove, the attorney 's misrepresentations that prevented the other party from fully presenting her case did not constitute misconduct.**

Petitioner appealed to California Court of Appeal a judgment in an employment lawsuit brought by petitioner against respondent Achem Industry America, Inc. ("Achem" or "respondent") in Los Angeles Superior Court in August 2011. In her appellate brief, petitioner contended that the judgment of a fraud cause of action had been obtained by fraud conducted by respondent attorney: because of respondent attorney's misrepresentations to the court and to petitioner, petitioner did not discover before trial the fraud that petitioner's cousin Allen Tang, then general

manager of respondent, credited petitioner's job duties of computer information system manager to someone else, as a result, petitioner did not have a fair opportunity to present her fraud claim at trial that respondent falsely promised to increase her wage upon approval of her employment based immigration petition, respondent only intended to pay her as a purchasing clerk, even though petitioner performed the job duties of a computer information system manager. Respondent, in whose favor the challenged judgment had been entered, did not dispute that its attorney made material misrepresentations to the court and to petitioner, but argued that petitioner failed to understand its attorney's legal positions. App. 175a. California Court of Appeal agreed with respondent. App. 22a-23a.

The following facts were shown by the record without dispute.

When petitioner conducted discovery before trial, respondent attorney wrote to petitioner that respondent did not dispute that petitioner performed the job duties of a computer information system manager and developed software applications at respondent. In addition, about two weeks before trial, when trial court asked respondent attorney what job duties petitioner performed at respondent, respondent attorney responded that “[Petitioner] was basically maintaining the computer system and designing all of the software programs of the company.” Achem also admitted in its discovery response that “[petitioner] was in charge of creating and customizing reports.” Term “reports” in the response refers a type of software application.

About four days before trial, petitioner discovered that respondent intended to dispute that petitioner performed the job duties of a computer information system manager or a position of computer professional when respondent refused to stipulate that petitioner performed the job duties of a computer professional. App. 22a. Petitioner immediately moved trial court to continue the trial date so that she could conduct discovery of her job duties. Supported her motion with affidavit, petitioner represented to the

court that because of respondent attorney's misrepresentations she was not prepared to defend her job duties at trial. Respondent attorney opposed the motion misrepresenting to the trial court that petitioner testified that she did not do computer programming, while no record shows that petitioner ever gave such testimony. Trial judge, who did not participate in pretrial hearings, denied petitioner's motion, which should have been granted absent of the misrepresentations made by respondent attorney.

At trial, respondent attorney stated to the jury in the opening statement that petitioner's cousins Joe Tang and Allen Tang would testify that petitioner lied on her immigration petition. Joe Tang, then president of respondent testified at trial that petitioner made a false representation of her job duties on her employment based immigration petition, he did not offer her a position of computer information system manager, nor promised to increase petitioner 's wage and respondent was not involved in her employment based immigration petition. Joe Tang testified that petitioner 's job duties were purchasing. Joe Tang's brother, Allen Tang, then general manager of respondent, testified that "We did hire a computer programmer to generate the reports, and all [petitioner] did was to print out the reports...We do hire somebody from outside to be in charge of all the programs." App. 124a-125a.

The allegations of Tang brothers were contradicted by respondent's own discovery response, respondent's other witness' testimony or by petitioner's testimony. Specifically, Achem's discovery response was read into evidence, "[petitioner] was in charge of creating and customizing reports", App. 129a; Allen Tang's successor, Richard Du, former general manager of respondent, revealed that petitioner performed the job duties of a computer information system manager when he testified why he gave petitioner a negative review, Du testified that primarily petitioner was responsible for providing reports and was responsible for the data integrity of respondent's computer information system. App. 53a. Petitioner testified

that she performed the job duties of a computer information system manager, general manager Allen Tang was her supervisor, but Allen Tang told her because they were cousins he requested her to report to purchasing manager Annie Sung. Petitioner also testified that while she was interviewing for a high paid job with a big tech company, Joe Tang persuaded her to stay with the low paid job at respondent by offering to sponsor her an employment-based immigration petition and promised to increase petitioner's wage once her immigration petition was granted, Joe Tang also asked petitioner to prepay the fees incurred in the petition and promised to reimburse the fees upon the approval of the petition.

In the closing argument at trial, respondent attorney argued to the jury that petitioner did not meet her burden to prove her fraud claim because she failed to show how she was duped, and how her cousins duped her. App. 132a. Jury verdict was for respondent. App. 24a.

Petitioner claimed in her appellate brief that absence of the deceit practiced by respondent attorney upon the court and upon petitioner, petitioner could have discovered the fraud before trial and presented the issue to the jury that Allen Tang credited petitioner's job duties to someone else, thus the Tang brothers had a motive to lie, and jury verdict could have been in petitioner's favor.

Respondent, in its brief, admitted that respondent disputed at all time that petitioner performed the job duties of a computer professional, App. 175a, even though respondent's discovery response and respondent's witness at trial stated otherwise, App. 53a, 129a. Respondent also did not dispute that its attorney made misrepresentations to the court in petitioner's motion to continue trial hearing and to petitioner before trial when petitioner was conducting discovery about her job duties. App. 137a-139a,

175a-176a. However, respondent argued that “simply because [petitioner] failed to understand Respondent’s former counsel’s legal position on and before trial, that does not mean [petitioner] was entitled to a continuance”, App. 175a, respondent also argued since the evidence had been presented to the jury, the outcome of jury verdict should not have been affected. App. 176a. California Court of Appeal held that petitioner failed to understand that respondent bore the burden to prove that petitioner was an exempt employee, thus respondent attorney’s false representations to the court and to petitioner that respondent did not dispute that petitioner performed the job duties of a computer information system manager and developed software application did not constitute misconduct. App. 22a-23a. The opinion did not mention respondent attorney’s misrepresentation to the trial court at the motion to continue trial date hearing that petitioner testified that she did not do computer programming, apparently the holding is the same that the misrepresentation did not constitute misconduct. App. 22a-23a.

II. Had California Court of Appeal discussed the issues of the case in oral argument, the mistakes in the court’s opinion could have been avoided.

A. California Court of Appeal, based on numerous mistakes of significant facts, rejected most of arguments in petitioner’s brief, without reaching their merit.

California Court of Appeal, based on numerous mistakes of significant facts, rejected, without reaching their merit, most of arguments in petitioner’s brief. The following are a few instances of misstatements selected from the opinion of California Court of Appeal (“the opinion”).

The opinion stated that petitioner made only one sentence argument and failed to provide any citations to support her claim of erroneous exclusion of almost all exhibits related to her retaliation cause of action

alleging that respondent retaliated petitioner because she refused general manager Richard Du and controller Sue Ting's request to conceal respondent's material accounting misstatement. App. 18a. The record shows that petitioner devoted five pages in statement of facts section and four pages in legal argument section in her opening brief with citations to the record and authorities explaining why exclusion of relevant exhibits as a result of respondent attorney's misrepresentation is prejudicial erroneous. App. 146a – 150a, 160a-163a. As a result of the appellate court's misstatement of record, the opinion erroneously held that petitioner forfeited the claim that judgment of retaliation cause of action should be reversed because of the erroneous exclusion of relevant evidence and rejected the claim without reaching its merit. App. 18a.

The opinion omitted a significant fact that there was no evidence in the record to support jury finding that petitioner worked under only general supervision, as a result of the omission, the appellate court erroneously denied petitioner's argument that the record does not contain substantial evidence to support jury verdict that petitioner was an administrative exempt employee for the relevant period. App. 12a, 158a -159a. Respondent did not dispute petitioner's allegations that there was no evidence in the record that petitioner worked under only general supervision. App. 180a -181a.

The opinion stated that jury did not address petitioner's claim of rest break violation, App. 5a, 22a, while the record shows that jury addressed

petitioner's claim of rest break violation and made a jury verdict of the claim. App. 37a. Respondent did not dispute that petitioner was a non-exempt employee after September 2010 when petitioner was put on payroll as a non-exempt employee. App. 52a. Trial court did not submit the issue whether petitioner was paid a salary to the jury. App. 34a. As a result of the appellate court's misstatement of record, the opinion erroneously held that there was no need to rule petitioner's claim that the judgment of rest break violation should be reversed because of erroneous jury instructions, and the claim was rejected without reaching its merit. App. 5a, 22a.

The opinion stated that “[petitioner] expressly agreed with the trial court's decision to read [CACI No. 2512] to the jury”, App. 15a, while no record shows petitioner agreed with the trial court's decision to give CACI No. 2512 to the jury. The record shows what petitioner agreed to is a change of a term in the instruction not the trial court's decision to give the instruction, the trial judge had read the instruction to the jury when he asked petitioner whether she agreed to change the term. App. 133a-134a. As a result of the appellate court's misstatement of record, the opinion rejected, without reaching its merit, petitioner's claim that it was a violation of due process of law to give jury instruction CACI No. 2512 while respondent did not plead a same decision affirmative defense or a similar defense. App.15a.

The opinion stated that petitioner did not lodge an objection when respondent attorney attacked petitioner's character and motive for pursuing

this litigation, App. 15a-16a, 19a, while the record shows that petitioner lodged objections and cited the record in her opening brief. App. 43a, 48a-49a, 152a, 156a-157a. As a result of the appellate court's misstatement of record, the opinion erroneously held that petitioner waived the claim that she was denied a fair trial because of respondent attorney's personal attacks and rejected the claim without reaching its merit. App. 15a-16a, 19a.

The opinion stated that, "Only when we examine appellant's record citations does it become apparent that [petitioner] contends certain documents produced by respondent in discovery, including appellant's time sheets, were forged", App. 16a, while the record shows that petitioner's contention is that petitioner was denied a fair trial because respondent attorney concealed half of petitioner's time records and misrepresented to the trial judge at the hearing of petitioner's motion to compel that there was no additional time record to produce and the discrepancies between the time sheets and the time records both produced by respondent were caused by understatement of petitioner's overtime hours on her time sheets, while petitioner did not agree that she understated her work hours on her timesheets, and alleged that certain handwritings on the timesheets were not hers, and the attorney only disclosed at trial before a different trial judge that there were additional time records relating to petitioner's work hours during daylight saving time and falsely alleged that petitioner intentionally overstated her overtime hours by one hour each day using the one hour difference between the timestamps of a same file during summer time and

winter time. App. 140a-145a. As a result of the appellate court's misstatement of petitioner's contention, the opinion erroneously held that because jury found petitioner was an administrative exempt employee "[petitioner] could not have been prejudiced by the time sheet evidence" and the court rejected petitioner's claim, without reaching its merit, that petitioner was denied a fair trial because her credibility was unfairly impaired as a result of respondent bad faith false allegation that petitioner intentionally overstated her overtime hours. App. 16a.

The opinion stated that, "Appellant's claim of misconduct during opening statement lacks merit, as respondent's trial counsel did not misstate the evidence that was eventually admitted without objection", App. 17a, while the record shows that petitioner's contention is not misstatement of evidence, but is that respondent attorney violated trial court's order withdrawing the psychiatric examination report of an expert witness Dr. Greenberg ("the report") on the ground of privilege and petitioner was denied due process of law because she was not prepared to defend the report at trial. App. 39a, 154a-155a, 164a-166a. In addition, the record also shows that petitioner objected and requested to approach the bench when the attorney introduced the content of the report without a court order in the opening statement, due to the surprise, petitioner was not able to give an appropriate ground of the objection, trial court overruled objection and denied petitioner's request to reach the bar. App. 44a. Petitioner also objected to introduce the content of the report to the jury at the section 402

hearing held in the middle of trial, App. 63a-73a, and petitioner objected to admit the report into evidence after the expert witness testified on the ground of privilege, trial court responded “what's been published has been published, and what's been testified has been testified to. The only issue is whether the report will be received in evidence, and that will be decided at a later time.” App. 122a-123a. The report was not admitted in evidence. As result of the appellate court 's misstatement of the record, the court denied, without reaching its merit, petitioner's claim that judgment should be reversed because petitioner was denied her right to due process of law when respondent attorney introduced at trial the expert's report which trial court had ordered to withdraw at the request of respondent and petitioner was not prepared to defend the report at trial. App. 17a

The opinion stated that the issues of agency were not raised in the trial court, App. 14a, while the record shows that petitioner raised the issue of agency in the trial court and it was in petitioner's motion for partial judgment notwithstanding the jury verdict of the fraud cause of action. App. 40a-41a. In addition, the record also shows respondent did not dispute the factual allegation in petitioner's agency claim, and respondent did not contend it was prejudiced as well. App. 179a-180a. As result of the appellate court 's misstatement of the record, the court erroneously held that petitioner's agency claim was forfeited, and it was fundamentally unfair to respondent and the trial court to consider the new challenge for the first time on appeal. App. 14a.

Many more misstatements of records are in the opinion. The total instances of mistakes are so numerous that a petition for rehearing with the standard brief length is insufficient to cover all misstatements. California Court of Appeal denied petitioner's application to file petition for rehearing in excess length limit. App. 195a-197a.

B. Petitioner filed a complaint with the presiding justice of the appellate court and was not notified that any misconduct was involved.

Because the instances of material misstatements in the opinion are extremely numerous, petitioner filed a complaint on July 22, 2019 with the presiding justice of California Court of Appeal, Second Appellate District. Petitioner was not notified that any misconduct was involved.

C. California Court of Appeal stated in its opinion that petitioner's arguments were difficult to follow, however the court told petitioner that it did not have any questions in oral argument. California Court of Appeal stated in its opinion, "appellant's arguments are generally undeveloped and difficult to follow", App. 9a, and also indicated that the record is complicated, App. 6a., however at the oral argument on appeal, none of the three justice, who decided this case, discussed any issues with the parties, and petitioner specifically asked the court: "So do the justices, Your Honors, have any questions for me?" The presiding justice responded: "Apparently not". App. 190a-194a. Had

California Court of Appeal provided petitioner a real opportunity to oral argue the case, the mistakes in the court's opinion could have been avoided.

REASON FOR GRANTING THE PETITION

- I. This Court should decide whether petitioner 's right to due process of law is violated when California Court of Appeal refused to vacate a judgment procured by fraud upon the court that prevented petitioner from fully presenting her claim.**
 - A. California Court of Appeal's opinion holding that deceit upon the court does not constitute misconduct conflicts with this court's precedent.**

For the first time, a court in this country held that because an attorney had a burden to prove, the attorney 's misrepresentations to the court did not constitute misconduct, even though the fraud prevented the other party from fully presenting her case at trial. Even worse, California Court of Appeal accused petitioner of not understanding that the law placed the burden of proof on respondent to prove a defense to another claim of petitioner and refused to vacate the judgment obtained by respondent through fraud. App. 22a-23a. The appellate court's decision is contrary to this Court's holding in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) that "the historic power of equity to set aside fraudulently begotten judgments," *Id.* at 245, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner. . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.*, at 246.

Petitioner has found no precedent holding that deceit upon the court did not constitute misconduct if the party bore a burden to prove its claim or defense.

B. California Court of Appeal's opinion holding that deceit upon the court does not constitute misconduct violates due process law.

The decision below raises the significant constitutional question of whether refusing to vacate a judgement procured by fraud upon the court violates procedural due process.

The Fourteenth Amendment provides that "No state shall ... deprive any person of life, liberty, or property, without due process of law." (U.S. Const. Amend. 14; *Shelley v. Kramer* (1948) 334 U.S. 1, 13) "[A] cause of action is a species of a property protected by the Fourteenth Amendment's Due Process Clause." (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)) Thus, petitioner's cause of action in this case is a property protected by the Fourteenth Amendment's Due Process Clause. *Ibid.*

In *Mooney v. Holohan*, 294 U.S. 103 (1935), this Court held that due process "is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction ... through a deliberate deception of court and jury by the presentation of testimony known to be perjured ... Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." *Id.* at 113. In this case, because of respondent attorney's false representations that respondent did not dispute that petitioner performed the job duties of a computer information system manager, the fraud that petitioner's cousin Allen Tang credited petitioner's job duties of a computer information system manager to someone else was not discovered before trial and was never presented at trial, thus there was in fact no adversary trial of the issue in the case. The effect of the deceit practiced here is the same as the effect of deceit that prevented a party from appearing at the hearing. Therefore, due process requirement cannot be deemed satisfied in this case. *Ibid.*

Evidence that contradicted Tang brothers' testimony that petitioner did not perform the job duties of a computer information system manager was presented at trial. However, except petitioner's own testimony that she performed the job duties of a computer information system manager, those evidence was presented either by respondent's attorney or by respondent's witness for the purpose to

prove respondent's defense that respondent did not retaliate petitioner. Petitioner did not have an opportunity to impeach the truthfulness of witnesses Tang brothers' testimonies about petitioner's job duties or to question their motive in testifying against petitioner because petitioner was not prepared to defend her job duties at trial and did not discover that respondent alleged someone else perform the job duties of a computer information system manager due to respondent attorney 's false representation before trial that respondent did not dispute petitioner perform the job duties of a computer information system manager. Thus, due to the deceit practiced by respondent attorney, petitioner was denied an opportunity to adequately cross examine witnesses Joe Tang and Allen Tang, as this Court held in *Davis v. Alaska*, 415 US 308 (1974) that "[t]he opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (*Id.* at 315)

Petitioner's inability to adequately cross examine witnesses Joe Tang and Allen Tang is prejudicial to her in this case. Respondent attorney raised the issue to the jury that the Tang brothers had no motive to lie because they were no longer with respondent, especially Joe Tang who left respondent at a very bad term and the truthfulness of Tang brothers' testimony were key elements in respondent 's defense that respondent did not make a promise to raise petitioner's wages because petitioner did not perform the job duties, the wage of which petitioner claimed respondent promised to pay. Jury, as sole judge of the credibility of a witness, was entitled to have the benefit of petitioner's theory that the Tang brothers had a motive to lie because they wanted to conceal their wrongdoings of crediting petitioner's job duties to someone else, apparently for personal gain, so that the jury could make an informed judgment as to the weight to place on the Tang brothers' testimony which provided a crucial link in the proof of petition's fraud case alleging respondent falsely promised to increase petitioner's wage, while it only intended to pay petitioner the wage of a purchasing clerk for petitioner's work of a computer information system manager. (*Id.* at 317) "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" (*Id.* at 316), accordingly,

petitioner's inability to cross-examine Tang brothers' as to their statement about petitioner's job duties denied petitioner the right of cross-examination secured by the Due Process Clause of the Fourteenth Amendment. (*Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) [“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses.”])

C. The question presented is exceptionally important to the preservation of public confidence in our judicial systems and this case presents an ideal vehicle for deciding it.

The conflicting positions in the opinion - accusing petitioner not understanding that the law placed the burden on respondent, an employer, to prove exempt status and at the same time acknowledging that petitioner claimed that respondent did not meet its burden to prove petitioner was an exempt employee, App 9a, 22a, suggest what the opinion really accused petitioner failed to understand is an unspoken rule that deceit upon the court is a practice accepted by the court. The author of the opinion is a retired judge of Orange County Superior Court with over twenty years of bench experience. The opinion very likely admits a unspoken truth in the state court system that deceit upon the court is practically accepted even though published opinions state otherwise.

Even though the opinion in this case is unpublished, it cannot be treated by courts as if it does not exist because under the current technology unpublished opinions are readily accessible to all lawyers, as well as to the public over the internet. The opinion in the present case, is available at https://scholar.google.com/scholar_case?case=9179425776678311219&q=ouyan_g+v.+Achem&hl=en&as_sdt=2006.

Where a court openly announces that corruption of its own processes is tolerable, it demeans itself and undermines the public confidence in the judicial system. Media shows such concern as well. Most recently, Alan Alda's Marriage Story character Bert Spitz, Charlie's first lawyer, stated to Charlie in the movie: “No. No, we don't want to go to court. Courts in California are a disaster ...” We always claim that the U.S. is the greatest country on earth. But when it comes to the rule of law, rarely there is such a claim. According to the World Justice

Project's 2019 Rule of Law Index, U.S. ranks 20th among 126 countries in terms of how the rule of law is experienced by citizens. App. 199a-201a [world justice project report]. The bold admission in the opinion that fraud upon court is an accepted practice somehow explains the ranking that was based on the citizen's experience of the US judicial system. The situation merits this Court's attention.

This case presents an ideal vehicle for the Court's review. The proceedings and decision below precisely frame the question of law for the Court: respondent attorney intentionally misrepresented to the trial court and to petitioner before trial that respondent did not dispute that petitioner performed the job duties of computer information system manager and developed software applications, and intentionally misrepresented to the trial court before a different judge that petitioner herself testified she did not do computer programming to mislead the trial court into denying petitioner's application to continue trial and to reopen discovery, which should have been granted, as a result petitioner did not discover before trial that petitioner 's cousin, respondent's then general manager, credited petitioner 's job duties to someone else, and petitioner did not have a fair opportunity to represent her fraud claim at trial. California court of appeal held that the fraud upon the court conducted by respondent attorney did not constitute misconduct because respondent bore the burden to prove that petitioner was an administratively exempt employee. App. 22a-23a.

The issue in the case has been fully developed through extensive briefing by the parties, as well as through the judicial opinion below. Even though, the person, whom petitioner's cousin credited her job duties to, was not identified at trial or in the parties' briefs, it does not affect the factual allegation of petitioner 's fraud claim that respondent falsely promised to increase petitioner's wage without an intent to perform it because respondent already credited her job duties to someone else.

It is critical that this Court consider the question presented to preserve public confidence in our judicial systems. The existence of the opinion finding fraud upon court an acceptable practice is a damage to the integrity of the court systems and is an encouragement to use deceit upon the court as a method to obtain unethical gain.

II. This Court should decide whether California's procedures to hear an appeal violates procedure due process.

A. California 's procedures to hear an appeal violate procedure due process

To decide whether the Due Process Clause is violated, at the outset, there is a two-part inquiry: whether petitioner was deprived of a protected interest, and, if so, what process was her due. *Logan v. Zimmerman Brush Co.*, 455 US 422, 428.

California Code of Civil Procedure sections 901 – 904.5 and California Penal Code sections 1235-1246, 1466-1469 provide a right to appeal a final civil judgment or a criminal conviction. While there is no constitutional right to appeal, once a state chooses to create such a right, the property rights they create are entitled to due process protection. (*Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)) Accordingly, petitioner 's property right in her appeal in California Court of Appeal is entitled to due process protection. (*Ibid.*)

California provides opportunities for the parties in an appeal to submit written arguments, which are generally subjected to the length limit provided by the court rules. App. 184a-187a. (Cal. Rules of Court, rule 8.204.) At the same time, California allows oral argument as a matter of right in any appeal (civil or criminal) considered on the merits and decided by a written opinion. App. 188a-189a (Cal. Rules of Court, rule 8.256; *Moles v. Regents of Univ. of Calif.* (1982) 32 C3d 867, 871-872, 187 CR 557, 559-560; *People v. Brigham* (1979) 25 Cal. 3d 283, 285-289). Cal. Rules of Court, rule 8.256 requires that "... (b)The clerk/executive officer of the Court of Appeal must send a notice of the time and place of oral argument to all parties at least 20 days before the argument date... (c) ...(2) Each side is allowed 30 minutes for argument..." App. 188a – 189a. (CRC RULE 8.256)

However, no procedure requires that an appellate court must discuss issues in the appeal with the parties in oral argument and it happens that appellate court does not discuss any issues in the appeal with the parties in oral argument even though the court does not understand the facts and laws of the case and no

procedure requires the court to notify the parties earlier in such a situation. Because the purpose of an oral argument is, among other matters, to assist the court to understand the facts and laws of the case and to avoid mistakes and misunderstandings, *Moles v. Regents of Univ. of Calif.* (1982) 32 C3d 867, 872, the parties in an appeal generally expect that the court will ask questions in oral argument if they do not understand the written arguments submitted by the parties. In the present case, when petitioner prepared her written brief which had a length limit set by the court, petition decided how detailed to make each argument based on her assessment how difficult it was to clarify the issue if the court got misunderstandings. For example, in petitioner's written argument that there was no substantial evidence to support a jury verdict that petitioner was an administrative exempt employee, petitioner did not discuss why the following testimony did not constitute substantial evidence to support jury finding that petitioner exercised discretion and independent judgment with respect to matters of significance:

“Q: You agree that your work in your mind is important work; isn't that true?

A: I agreed in my mind my work is important work.”

App. 47a.

And the reason petitioner did not discuss the above testimony is that she took into the consideration that if the court did not understand why it did constitute substantial evidence, the court would raise the issue in oral argument and it could be easily clarified by pointing to the argument on petitioner's opening brief “"Substantial" implies the evidence must be of ponderable legal significance... Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry. The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee.” In addition, it does not appear to be an appropriate argument in a brief at appellate level with a length

limit to discuss why the above testimony does not constitute substantial evidence because almost everyone of us tends to consider our jobs import no matter what we do and apparently the testimony above is of no legal significance. Respondent did not argue that the above testimony constituted substantial evidence. Had the appellate court raised the issue in oral argument, it could have voided to make the mistake in the opinion holding the above testimony constituted substantial evidence supportive of finding of administrative exempt employee. App. 11a. [“Appellant testified her job was “important” to respondent’s operations”].

It is beyond petitioner’s control that the appellate court disposed petitioner’s appeal without reaching the merit of most of her arguments based on mistakes of significant facts and laws. The appellate court told petitioner that it did not have questions for petitioner in oral argument when the court did not understand her written arguments. App. 9a, 190a-194a. A hearing is “a judicial session, usu. open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying. (Black’s Law Dict. (8th ed. 2004) p. 2108.) Given the plain language meaning of the word “hearing,” the hearing petitioner had in this case is nothing but an empty ritual, and in fact no hearing is provided to petitioner when the court did not try to decide issues of fact or law of the case while there was an opportunity to do so, and the record shows nothing preventing the court from doing so. Accordingly, petitioner’s right to a hearing at a meaningful time and in a meaningful manner as required by due process clause is violated. (*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972))

This Court acknowledged that “the timing and nature of the required hearing “will depend on appropriate accommodation of the competing interests involved.” [citation]. These include the importance of the private interest and the length or finality of the deprivation, [citation]; the likelihood of governmental error, [citation]; and the magnitude of the governmental interests involved, [citation].” (*Logan v. Zimmerman Brush Co.*, 455 US 422, 432) In *Logan*, a case determining whether a State may terminate a complainant’s cause of action because a state official, for reasons beyond the complainant’s control, failed to comply with a statutorily mandated procedure, this Court concluded that the complainant is entitled to have the State consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to

terminate his claim and conclude that the State's interest in refusing the complainant 's procedural request is, on the record, insubstantial. This case is analogous to *Logan*, all three factors indicate that California's procedure is inconsistent with due process.

First, petitioner has a property interest in her appeal as California Code of Civil Procedure sections 901 – 904.5 provides a right to appeal a final civil judgment. (*Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)) At the same time, the deprivation here is final. Even though there is a procedure to file a petition for rehearing, it is not adjudicated on its merit as well, as the court denied petitioner's petition for rehearing the next day it received it and it is apparent from the record the opinion's misstatements are significant and necessitate corrections, such as the misstatement of jury verdict on rest break violation in the opinion which leads to the court's rejection without reaching the merit of petitioner's claim of prejudicial erroneous rest break violation jury instruction given by the trial court. App. 5a, 22a, 37a, 52a. Also see discussion in section II A under Statement of the Case.

Second, California 's procedure provides no safeguard to secure appeals are adjudicated on their merit. The analysis here is the same to the analysis in *Logan*, such a procedure necessarily presents an unjustifiably high risk that meritorious claims will be rejected. *Logan v. Zimmerman Brush Co.*, 455 US 422, 435.

Third, State's interest in refusing to make effort to decide the facts and laws of appeal in oral argument is insubstantial as the record shows no hardship for the court to ask questions about the case in oral argument when there is sufficient time available to do so. In addition, State's interest in refusing to give notice to parties that the court will not provide real oral argument should not be substantial as well because Federal Rules of Appellate Procedure provides such a request, (Federal Rules of Appellate Procedure Rule 34), and it does not appear that there is any hardship on the State to provide a similar procedure.

Therefore, California 's procedure is inconsistent with the due process of law.

B. This case presents an ideal vehicle for addressing the question.

The proceedings and decision below precisely frame the question of law for the Court: where rules of the court provides that oral argument is an indispensable part of a hearing of an appeal, whether there is a violation of due process of law when such oral argument is not provided by the virtue of no effort from the court to hear the arguments and the parties to the appeal are not notified.

The question presented is important. No data is available to show how many appeals are in the same situation as petitioner's appeal. However, the record does not indicate that petitioner's appeal is an extreme case that rarely happens in the appellate court. The appellate court alleged that the record in this case is complexed and petitioner 's arguments were difficult to follow, while generally most of the issues presented to the appellate court involve complexed facts or laws or both. Thus what happened to petitioner's appeal can happen to most appeals in the state appellate court. This Court should make clear that once a state provides a right to appeal, due process right requires a scheme from the state to secure a hearing before the appeal is disposed.

This case also provides this Court a good opportunity to review due process clause focusing on the procedures required to secure the claims or defenses presented by the property owner be heard before private property is deprived. Review of the question presented not only will help prevent arbitrary, unreasonable decisions, but also will help the state to improve its procedures to provide an open and just judicial system to the public.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectively submitted,


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Petitioner in pro se

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