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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CARLOS GARCES et al., Plaintiffs and Appellants, v. CANNON PACIFIC SERVICES, LLC, Defendant and Respondent.	D044540 (Super. Ct. No. GIN022993)

APPEAL from a judgment of the Superior Court of San Diego County, Michael N. Anello, Judge. Reversed and remanded with directions.

Plaintiffs Carlos Garces, Sinapati Salanoa and Lance Cottington appeal from a judgment entered in favor of defendant Cannon Pacific Services, LLC (CPS) after a bench trial on their consolidated causes of action under Labor Code[1] section 1194 for violation of overtime laws. Plaintiffs contend the trial court erred in concluding they

1 All statutory references are to the Labor Code unless otherwise specified.

were "independent contractors" and not "employees" of CPS. We agree and reverse and remand the matter for further proceedings as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

Patrick J. Cannon owns CPS, a company that has been providing street sweeping services to municipalities and private entities for approximately 35 years. Essentially, CPS owned different types of sweeping machines and hired drivers to operate them for contracts CPS had bid on and received from various private and governmental entities.

In October 1997, Cannon hired Cottington to work for CPS as a street sweeper. Cannon subsequently hired Garces in mid-1998, and Salanoa in April 2000 as street sweepers for CPS. As a condition of their employment, each man was required to fill out a "Sub-Contractor's Application," sign a "Subcontract Sweeping Service Agreement (the Agreement)," have a current Class A or B driver's license, obtain a business license and pay premiums for a $1 million liability insurance policy and a Nextel telephone.

The Agreement explained that CPS had contracted to perform street sweeping for others, that the plaintiffs would act as a "subcontractor" to perform these services, and "that the particular method and manner of performance shall be under the exclusive control of SUBCONTRACTOR." Although the Agreement identified each plaintiff as "the Lessee of equipment from CPS at an agreed, written rate," there was no agreed upon written rate and none of the plaintiffs paid rent to use the street sweepers or equipment. The Agreement also contained provisions permitting CPS to terminate the Agreement with cause in its discretion if it determined the plaintiff was "not performing the agreed upon work or not operating the leased equipment with due care. . . ," or had failed to

correct any deficiency once noticed of a breach of any of the terms and conditions of the Agreement. CPS could terminate without cause any one or more of the accounts assigned a plaintiff "subcontractor" under the Agreement upon five days written notice. A plaintiff could terminate the Agreement with 30 days written notice.

In addition, before a plaintiff could work on contracts between the County of San Diego (County) and CPS, he had to sign a separate agreement entitled, "Subcontractor Agreement-County of San Diego Contract Work" which set the hourly rate at $39.06 per hour, provided no overtime pay above that rate would be paid, required the "subcontractor" to provide his own transportation to and from the sweeping sites, and reiterated that all subcontractors had to have current general liability insurance in the amount of $1 million and a current business license. The plaintiffs were also required to sign a confidentiality agreement prohibiting them from disclosing "any information which is disclosed to or discovered by [him] while rendering services under the contract" without written permission. Any violation of this provision was subject to liquidated damages of $20,000.

None of the plaintiffs had been street sweepers before being hired by Cannon for CPS. Kenneth "KC" Paul (Paul), who worked for CPS for nearly 25 years before his death in the latter part of 2002, was the plaintiffs' immediate supervisor and trained them for several weeks on the various expensive street sweeping machines, equipment and work required for each government or private contract. Because Garces and Salanoa each had a Class B driver's license, Paul trained them how to drive and use the equipment

on several different sweepers. Without a Class B driver's license, Cottington was trained by Paul to run some of the older sweeping machines that did not require that type license.

CPS provided the plaintiffs with the sweeper truck, a blower and a set of hand tools used for minor repairs on the sweepers. The plaintiffs were required to fuel, grease, and clean their assigned street sweeping vehicles daily at a defined facility, or they would be subject to a fine of either $30 or $100. If they failed to leave the area at the facility where they cleaned the sweepers in good order they would be subject to a $150 fine.

Plaintiffs' hours and routes were generally dictated by the CPS contract with a particular private or governmental customer which they were assigned by Paul on a "first come, first serve" basis when they called the office in the morning. The requirements of each street sweeping job were set forth in each entity's contract with CPS. Although CPS did not impose hourly requirements on the plaintiffs, Paul told them to be at a specific job at a specific time according to the contract they were assigned. When the plaintiffs respectively finished their assigned job under a certain contract between CPS and the private or governmental entity, they were required to call the office and Paul would tell them what their next route would be and when they could stop working. The plaintiffs were fined $75 if they did not call in when they finished a job, and could face termination. Further, if the plaintiffs did not notify CPS they could not start or complete contract work, CPS would impose a $30 fine for the first "breach," and consider termination for subsequent breaches.

While on their sweeping routes, the plaintiffs were on their own to utilize their CPS trained skills on the sweepers and were not subject to immediate or direct

supervision. CPS, however, monitored the plaintiffs by requiring them to call into the office at various times throughout their assigned jobs and by installing GPS locators on the sweepers which showed the location of the trucks, the truck's speed, position of the broom and "lots of significant factors that help in day-to-day business." The Nextel phones issued the plaintiffs would not dial out for personal calls, and CPS charged the plaintiffs for incoming calls in addition to $10 a month for insurance on the phone. Cottington and Garces were required to wear uniforms for some of their assigned routes and were charged $20 per month for their rental by CPS.

Pursuant to their agreements with CPS, the plaintiffs were paid biweekly by the hour for the time they recorded on daily timesheets for each job which they turned in to CPS twice a month. Their normal hourly rate varied depending on the contract they were assigned to work. Usually they were paid between $7 per hour and $12 per hour for private contract work, the prevailing wage of $39.06 per hour for County work, and $30.02 per hour for City of Santee (Santee) work. For the County and Santee work, the plaintiffs were paid from when they turned the sweeper truck on until it was turned off. Except for a few contract jobs with the County or Santee on a Saturday, CPS did not pay the plaintiffs one and a half times or two times their regular pay rate when they worked more than eight hours per day or 40 hours per week. The plaintiffs were instructed not to discuss their pay with anyone else.

CPS did not withhold federal or state taxes from the plaintiffs' paychecks and sent them 1099 forms yearly, not W-2 forms. Cottington and Garces reported their income on their tax returns as self-employment income every year they worked for CPS. Salanoa

reported his pay from CPS as income on line 7 (wages, salaries, tips, etc.) and filed a supplemental information tax form, stating, "Spouse [Salanoa] by all tests was an employee. The income is therefore reported on Line 7 of Form 1040. . . . [¶] [CPS] sets his hours and schedules, collects the money and lines up the jobs."

Before leaving CPS and commencing this litigation, Cottington had worked with CPS for four or five years, Garces had worked for CPS for three years, and Salanoa had worked for CPS for almost two years. Cottington left after he had three minor accidents with a sweeper and his insurance through the insurer for CPS was cancelled. Garces stopped sweeping for CPS when CPS would not assign him to any more County contracts after receiving a request he no longer be assigned to work a particular County route. Salanoa stopped working for CPS after a dispute about a letter his wife wrote to CPS regarding being treated unfairly when Salanoa took time off for his daughter's birthday in 2001, and CPS failed to pay a fine issued when Salanoa took water from a fire hydrant without using a water meter.

Initially each plaintiff filed a separate civil action against CPS for wages and hours owed in addition to other causes of action. The matters were consolidated with a fourth case filed by another CPS sweeper driver, Michael Mellott, whose claims were dismissed before trial. Having had their other causes of action dismissed, plaintiffs proceeded to trial on their cause of action alleging CPS violated section 1194 by failing to pay them for working in excess of eight hours a day and 40 hours per week while employed by CPS as street sweepers. CPS defended on the affirmative defense the plaintiffs were "independent contractors" who were not entitled to bring a lawsuit under section 1194 for

any unpaid overtime wages, and alternatively, on the ground that even if they were "employees," they had not established any entitlement to any unpaid overtime wages.

At trial the above facts were presented via testimony and documentary evidence. In addition each plaintiff testified he was aware that CPS considered him a subcontractor, that he never thought much about the subcontractor agreements, and that he only signed the various agreements to be able to work for CPS. None of the plaintiffs had ever seen the contracts between CPS and any entity regarding street sweeping. Each of the plaintiffs had previous experience driving trucks and had worked at some time as an independent contractor, or had owned his own business. During the time Cottington worked for CPS, he also sometimes worked for a friend in his flower business.

Each plaintiff agreed there was no issue as to the number of days and hours he worked for CPS, that he had been paid for all hours worked according to his time sheets, and that the only issue was his right to additional wages for overtime pay. Cottington kept track of his hours worked daily on his own forms, while Garces and Salanoa used prepared CPS sweeper daily reports. Although each plaintiff signed a "bid" release when he picked up his paycheck, the release forms did not show any bids. At different times Cottington and Garces each had his pay docked for damages to the sweepers.

Each plaintiff often worked more than 10 hours in one day and more than 40 hours per week. The plaintiffs believed CPS owed them substantial amounts in overtime as evidenced by summaries of the hours each worked and charts breaking down those hours under the different contract rates with the various entities.

Cannon's deposition testimony was entered into evidence, and he testified both in the plaintiffs' case and in defense, stating he considered the drivers of the CPS sweepers independent contractors or subcontractors. A person could not work for CPS if he or she did not sign a subcontract agreement. CPS had no employees, only subcontractors. None of the plaintiffs or other subcontractors signed any of the contracts with the governmental entities or other customers, only CPS. Moreover, CPS had never terminated an independent contractor, it just did not call the person back to work another assignment.

Cannon further considered Paul a subcontractor and consultant for CPS who sometimes drove the sweepers with the other subcontractors so they could learn the jobs for which CPS contracted. Sometimes Paul would sign contracts on Cannon's behalf for CPS and generally handled all the outside work and operations of CPS, including the work involving the subcontractors hired by CPS. Although Cannon wrote the checks for plaintiffs and other subcontractors, he had nothing to do with their timesheets. Paul and a woman who worked for CPS reviewed the plaintiffs' timesheets as well as the other subcontractors' forms. CPS would pay the plaintiffs and other subcontractors the prevailing wage and overtime only if such were "dictated . . . in the contract." Cannon testified that each plaintiff was paid everything for which he had billed CPS.

Cannon claimed CPS was merely a broker for sweeping cities' and businesses' streets and areas, and was not in the street sweeping business. CPS merely provided the equipment for street sweeping and obtained contracts for the work which it then subcontracted out. Although the subcontractors hired by CPS were trained on the equipment by Paul, they were not directly supervised. Cannon thought Paul passed out

the contract jobs on a first come, first serve basis and then whoever finished would call in and get the next job. Because all the subcontractors wanted the higher paying jobs with the County and Santee, Paul would rotate the subcontractors in and out of such work and the other entities' work; the subcontractors were "put wherever they had to be put." Cannon never knew where any of the subcontractors were because Paul handled that end of CPS's business. Paul "was like a Quasimodo operations manager for [Cannon], and . . . helped [Cannon] guide and steer the outside work [of CPS]." Cannon conceded the plaintiffs were even required to call Paul on rainy days to see if they needed to sweep that day.

When Cannon was asked whether all of the other street-sweeping services in San Diego County have drivers that are subcontractors, plaintiffs' attorney objected on grounds the question called for expert testimony. After some discussion, the question was withdrawn before the court ruled on the objection or Cannon answered.

After hearing arguments of counsel, in which CPS's counsel claimed the standard in the industry was to use independent contractors, not employees, as street sweepers, the court took the matter under submission, inviting the parties to submit additional written argument. After the court issued a tentative decision and reviewed further comments of counsel, it issued its statement of decision on March 17, 2004, finding the plaintiffs had not sustained their burden of showing they were employees of CPS entitling them to unpaid overtime wages under section 1194. Although the court acknowledged plaintiffs had "presented substantial evidence tending to support several of the traditional 'employee' factors, [it] determine[d] that the two most persuasive and most significant

factors here are: (1) the Plaintiffs' informed and express agreement to work as independent contractors (thereby knowingly foregoing certain 'employee' benefits and protections); and (2) the long-standing custom and practice in this particular business of treating street sweepers as independent contractors." In light of this conclusion, the court found the issue of entitlement to unpaid overtime wages "moot." Judgment was entered in favor of CPS on April 8, 2004. Plaintiffs timely appealed.

DISCUSSION

As a threshold matter, the parties dispute our standard of review on appeal. Plaintiffs submit that because the "basic, primary or historical facts" are undisputed, the issue is one of law and subject to de novo review. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 872 (*Toyota*).) CPS maintains our review of the trial court's determination plaintiffs were independent contractors and not employees of CPS who would then have standing to allege a violation of section 1194 is under the substantial evidence test involving deference to the trial court's judgment because the facts at trial to show the employment relationship were conflicting.

Ordinarily the question of whether a party is an independent contractor or an employee is one of fact which will be upheld if supported by substantial credible evidence unless only one inference may be drawn from all the facts making the employment relationship a question of law. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*); *Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081; *Rodondi v. Harbor Engineers* (1961) 191 Cal.App.2d 560, 562.) In other words, "if the essential facts are not in conflict the

question of the legal relations arising therefrom is a question of law." (*Isenberg v. California Employment Stabilization Commission* (1947) 30 Cal.2d 34, 41 (*Isenberg*).) Because the plaintiffs do not dispute on appeal the trial court's finding that they intended to enter into the subcontractor agreements with CPS, and the other basic, historic facts pertinent to the determination of their relationship with CPS are essentially undisputed, the issue is purely a legal one we review independently. (*Gonzalez v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1584, 1593 (*Gonzalez*); *Toyota*, *supra*, 220 Cal.App.3d at p. 872.)

Our de novo review is conducted in light of the following pertinent law. The California Legislature has mandated that unless statutorily exempt, "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (§§ 510, subd. (a), 515, subd. (a).) If an employer fails to pay such overtime compensation, an employee may file a civil action under section 1194, which provides in relevant part that an "employee is entitled to recover in a civil action the unpaid balance of the full amount of . . . overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." Section 1194 applies to "men, women and minors employed in any occupation, trade, or industry, whether compensation is measured by time, piece, or otherwise . . . ." (§ 1171.) Because entitlement to overtime compensation is mandated by statute and is based on important public policies to protect not only the health and welfare of workers, but also the public health and general welfare (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire*

Sprinklers, Inc. (2002) 102 Cal.App.4th 765, 778; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430), California's overtime laws for employees have been held to be "remedial and are to be construed so as to promote employee protection. [Citation.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.)

In this regard, employment is defined as service performed "by an employee for wages or under any contract of hire . . . ." (Unemp. Ins. Code, § 601), but does not include an independent contractor, who is defined as a "person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (§ 3353; see *Gonzalez, supra,* 46 Cal.App.4th at p. 1589.)

Although the courts and Legislature have found numerous factors to consider in determining proof of independent contractor status, the traditional and key test of such status and the employment relationship is whether the principal "has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for." (§ 2750.5, subd. (a)[2]; *Gonzalez, supra,* 46 Cal.App.4th at p. 1593, citing *Borello, supra,* 48

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2 Section 2750.5, which applies to contracts of employment and supplements existing definitions of employee and independent contractor in Divisions 4 and 5 of the Labor Code regarding workers' compensation law (§§ 2700-2750.5), provides in part:

"There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

Cal.3d at p. 349; *Tieberg v. Unemployment Ins. App. Bd*. (1970) 2 Cal.3d 943, 946 (*Tieberg*).) "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. [Citation.]" (*Id.* at pp. 946-947.) Although relevant, even in the absence of fraud or mistake, the label placed on the relationship by the parties or the recitals in any contract or agreement of hire signed by the parties is not dispositive of the actual relationship (*id*. at p. 952; *Gonzalez, supra*, 46 Cal.App.4th at p. 1594) and the party seeking to avoid a determination of employment usually has the burden of establishing an independent contractor relationship. (*Borello, supra*, 48 Cal.3d at p. 349; *Isenberg, supra*, 30 Cal.2d at p. 38.)

When considering the primary factor of right of control in determining whether an employer-employee relationship exists (*Isenberg, supra*, 30 Cal.2d at p. 39; *Gonzalez, supra*,

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"(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

"(b) That the individual is customarily engaged in an independently established business.

"(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

46 Cal.App.4th at p. 1593), "[t]he real test has been said to be 'whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.' [Citations.]" (*Burlingham v. Gray* (1943) 22 Cal.2d 87, 99-100 (*Burlingham*).)

Other tests secondary in importance to the right of control, include: " '(a) whether or not the one performing service is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or workman supplies the instrumentalities, tools, and the place of work for the persons doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by time or by the job; (g) whether or not the work is a part of the regular business of the principal; [and] (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citation.]' " (*Isenberg*, *supra*, 30 Cal.2d at p. 39; see also *Borello*, *supra*, 48 Cal.3d at p. 351.)

Moreover, the right to control and these secondary factors are generally intertwined and should not be applied in isolation or mechanically as separate tests. (*Borello*, *supra*, 48 Cal.3d at pp. 350-351.) Any determination of the employment relationship should also take

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"In addition to the [above] factors . . . , any person performing any function or activity for which a license is required . . . shall hold a valid contractor's license as a

into consideration the fundamental purpose of section 1194 noted above to protect employees from working beyond maximum hours without appropriate compensation. (*Id.* at p. 359.)

Here, the undisputed evidence not only shows the primary factor in determining whether the plaintiffs were employees of CPS was present in the relationship between CPS and plaintiffs, but also shows six of the eight secondary factors noted above support such finding. The facts clearly reveal that CPS had the right to control the means of the plaintiffs' work. Not only was CPS interested in the plaintiffs' performance in obtaining the results required by the contracts CPS had with the different entities for street sweeping, it controlled all important details of the plaintiffs' work under those contracts. CPS provided the equipment and training for street sweeping, requiring each plaintiff to use the equipment in the manner trained at a specific location and time according to the contract on which he was assigned. Each plaintiff was required to keep his time daily to turn in for payment at an hourly rate determined by which contract he was assigned to work on by CPS. Although no direct supervision was provided while the plaintiffs actually did the work, CPS monitored the plaintiffs while they were sweeping by GPS locators installed on the sweepers. Plaintiffs were required to wear uniforms they rented from CPS when called for under an assigned contract. They also were required to fuel, grease and clean the sweepers used daily, use tools that were provided to perform minor repairs on the sweepers, and to call into CPS on Nextel telephones they were supplied for a minimal fee when they finished a job to obtain their next assignment. CPS's rules and

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condition of having independent contractor status."

regulations were written and acknowledged by the plaintiffs. These documents also contained provisions unilaterally imposing fines and possible termination for violation of CPS's rules and regulations.

Although Cannon claimed plaintiffs, like other drivers for CPS, could pick their own assignments and work their own hours, he conceded they needed to work the number of hours dictated by the specific contract CPS had with the individual customer. In fact, each of the plaintiffs had signed documents agreeing to start and complete his work based on CPS's contract with the customer. CPS, not the plaintiffs, bid on those contracts. The plaintiffs did not "bid" on jobs, but were assigned their routes to sweep on a first come first serve basis. The facts the plaintiffs had some freedom in performing their jobs within the limits set by the assigned contract work and paid for certain costs passed on to them for uniforms, phones and insurance, does not change the fact the plaintiffs were subject to the orders and control of CPS and were "liable to be discharged for disobedience or misconduct." (*Burlingham, supra,* 22 Cal.2d at pp. 99-100; *Toyota, supra,* 220 Cal.App.3d at p. 875.)

Moreover, even though each of the plaintiffs was required to obtain business licenses as a condition for working for CPS, none of them held himself out to be in business as a street sweeper separate and distinct from his work for CPS. Rather it was CPS who was in the regular business of providing street sweeper services for various customers. Although the Agreements characterized plaintiffs as subcontractors and leasees of the street sweeping equipment or trucks, the uncontroverted evidence shows no true leasing relationship existed. None of the plaintiffs ever made lease payments for the

sweepers they used. Nor did CPS ever assign any of the contracts, many of which provided street sweeping services for numerous years, to any of the plaintiffs to independently perform that contract. CPS assigned the on-going work under those contracts to the various drivers like plaintiffs whom it had hired and trained as street sweepers on CPS's equipment. When it received a complaint about Garces's work on a particular County route under a contract, CPS stopped assigning any County contract work to Garces.

Contrary to CPS's claim it was only a broker which supplied equipment and contracts for subcontractor street sweeper drivers, the evidence shows otherwise. Similar to the response the court gave the taxi company in *Yellow Cab Cooperative, Inc. v. Workers' Compensation Appeals Board* (1991) 226 Cal.App.3d 1288 (*Yellow Cab*) which argued it was not in the taxi driving business because it leased taxis to the drivers who did the driving, "[a]s the foregoing evidence indicates, the parties relationship contemplated more than the performance of their formal agreement. If [CPS, like *Yellow Cab*] were only contracting for the 'particular result' set out in the [Agreement to lease the sweepers], it would be concerned with little more than collecting rent and protecting the leased property. Instead, it had an obvious interest in the drivers' performance *as drivers*. To protect that interest, it treated them as employees." (*Id*. at p. 1299.) Like the taxi company in *Yellow Cab*, CPS had a broad interest in plaintiffs' performance and its conduct shows it treated them as employees by monitoring them and generally controlling their work.

Further, although the plaintiffs did possess some skills to drive trucks, none had been street sweepers before being hired and trained by CPS. Driving the expensive sweepers provided by CPS and using the tools CPS provided did not require any specialized skills or knowledge other than those obtained during their relatively short two to three week training by CPS. The place of work was dictated by the work under the contracts which CPS assigned to each plaintiff or sweeper driver. Similarly, the length of time for which the sweeping services were to be performed was also dictated by the contracts between CPS and a customer. Despite the fact Cottington sometimes also worked for a friend in a flower shop, all plaintiffs essentially worked full time for several years for CPS and they were paid by the hour as dictated by the particular contract work they were assigned. All of these secondary factors favor finding plaintiffs were treated as employees of CPS.

Concededly, the plaintiffs signed numerous documents prepared by CPS stating they were independent contractors or subcontractors, and this factor ostensibly weighs against classifying plaintiffs as "employees." However, as noted earlier, "[t]he label placed by the parties on their relationship is not dispositive. . . ." (*Borello, supra*, 48 Cal.3d at p. 349.) "[T]erminology used in an agreement is not conclusive . . . even in the absence of fraud or mistake." (*Tieberg, supra*, 2 Cal.3d at p. 952; *Yellow Cab, supra*, 226 Cal.App.3d at p. 1297.) Generally, the characterization of a subcontractor or independent-contractor relationship in a document "will be ignored if the parties, by their actual conduct, act like 'employer-employee.' [Citations.]" (*Toyota, supra*, 220 Cal.App.3d at p. 877.)

Although the plaintiffs understood they were considered independent contractors by CPS and, except for Salanoa, reported their income from CPS as business or self-employment income for which CPS had given them 1099 forms for their tax returns instead of W-2 forms, such actions are "merely the legal consequences of an independent contractor status not the means of proving it. An employer cannot change the status of employee to one of independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer." (*Toyota, supra,* 220 Cal.App.3d at p. 877.)

In this case all the relevant conduct shows CPS not only controlled all the details of plaintiffs' work, but had the right to fine or discharge the plaintiffs in its discretion for disobeying any of its rules or for misconduct. Under such circumstances, the fact the parties entered into subcontractor agreements to work for CPS and signed other documents referring to plaintiffs as subcontractors is self-serving and equivocal and has little value on the issue of whether plaintiffs were employees of CPS.

Moreover, according to well-established rules of construction, the written agreements and other documents which were prepared entirely by CPS must be construed in favor of the plaintiffs and against CPS (*Pacific Lumber Co. v. Industrial Acc. Commission* (1943) 22 Cal.2d 410, 422), and "the provisions of the Labor Code are to be liberally construed . . . with the purpose of extending their benefits for the protection of persons [like plaintiffs] in the course of their employment. [Citations.]" (*Ibid.*) Essentially, it is the substance and not the form of the relationship between CPS and plaintiffs that controls our determination. (See *Bemis v. People* (1952) 109 Cal.App.2d

253, 267.) Here, as noted above, the substance of the relationship showed it was "impregnated with factors of control." (*Ibid*.)

The trial court downplayed the pertinent law in the employment area reasoning this was a civil case and placed the contractual rights of CPS above the recognized right of control factor reasoning plaintiffs were all experienced businessmen who willingly entered into the subcontractor agreements with CPS. Although the evidence showed each plaintiff had driven a truck before or had previously worked as an independent contractor, it also revealed each plaintiff applied for an advertised position with CPS which would train them as street sweepers because they needed work. Cannon testified that CPS would not have hired a plaintiff if he had not signed the Agreement. In light of the overwhelming evidence of CPS's right to control and actual control of the means as well as the result of the work it contracted with the plaintiffs to perform, the court's reliance on the secondary factor that the parties had contracted the employment relationship as independent contractors and its reliance on the secondary factor of custom and usage in the industry, which is not supported by the evidence at trial, as a matter of law do not show plaintiffs were not employees.

As the plaintiffs correctly point out, there was no evidence admitted at trial about the usage and custom in the street sweeping industry. Contrary to CPS's argument on appeal, the custom and usage in the industry cannot be established by Cannon's testimony of how CPS habitually treated the people it hired over its 35 years of doing business. The court specifically stated in its statement of decision that Cannon had "testified persuasively that treating street sweepers as independent contractors is a long-standing

custom and practice in the industry." "The statement of decision provides the trial court's reasoning on disputed issues and is our touchstone to determine whether or not the trial court's decision is supported by the facts and the law." (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.) The court did not state it was inferring custom and usage in the industry from Cannon's testimony about his own long-term business practices and we will not imply such inference or finding. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Further, contrary to CPS's reliance on the contracts between itself and County and Santee, which were presented to this court under seal, a review of the language of those documents shows CPS could use either employees or legitimate subcontractors to fulfill the work required under those entity contracts.

In sum, after reviewing the evidence in this case de novo, we believe the only reasonable inference that can be drawn is that plaintiffs were employees of CPS as a matter of law and that the trial court's finding they had not met their burden of showing they were employees is erroneous. Further, we would come to the same result even if the issue were treated as one of substantial evidence. Although the significance of the various factors regarding employment status generally varies depending on the circumstances of each case, the factors of the right to control were overwhelming in this case and the factors relied upon by the trial court were not, as discussed above, supported by credible, substantial evidence.

Therefore, we hold as a matter of law that plaintiffs showed by a preponderance of the evidence they were employees of CPS for purposes of bringing a civil action under

section 1194 and that CPS failed to demonstrate its affirmative defense the plaintiffs were independent contractors. We therefore reverse the decision of the trial court and remand with directions to find plaintiffs to be employees and to take such further actions to determine whether they are owed unpaid overtime wages and interest, and if so, to calculate the damages, if any, to which they are entitled.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. The plaintiffs are to recover costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.