No. 99954-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82060-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MICHAEL E. COAKER & MARILEE B. COAKER & the martial community composed thereof,

Petitioners,

v.

THE WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Ian C. Cairns
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A. Identity of Petitioners.

The petitioners are Michael Coaker & Marilee Coaker, appellants in the Court of Appeals.

B. Court of Appeals Decision.

Petitioners seek review of the Court of Appeals' March 29, 2021, decision affirming a decision from the Board of Industrial Insurance Appeals imposing liability on the Coakers for a $580,000 assessment against their former company. A copy of the decision is attached as Appendix A. The Court of Appeals issued an order publishing its decision on April 8, 2021 (App. B) and denied petitioners' motion for reconsideration on June 3, 2021. (App. C)

C. Issues Presented for Review.

The Court of Appeals decision raises two novel issues of first impression:

1. RCW 51.48.055(4) provides that a corporate "officer . . . is not liable [for assessments against a corporation] if all of the assets of the corporation . . . have been applied to its debts through bankruptcy." The Court of Appeals interpreted RCW 51.48.055(4) as shielding a corporate officer from liability only if its assets have been applied to its debts in bankruptcy before the corporation dissolves. Did the Court of Appeals erroneously ignore the tense of the statute

and render it effectively meaningless because most corporations have no reason to file for bankruptcy instead of simply dissolving?

2. As the Court of Appeals acknowledged, it is undisputed "the Coakers did not deliberately fail to pay any assessment due" between 2009 and 2012, the period covered by the Department of Labor and Industries' audit of their former corporation. (App. A at 5) Did the Court of Appeals erroneously hold the Coakers "willfully" failed to pay premiums between 2009 and 2012 because they "made no attempt to pay any part of the assessment and refused to discuss a payment plan for the additional premiums" in 2015, after their corporation went out of business? (App. A at 13)

D. Statement of the Case.

Michael and Marilee Coaker founded Mike's Roofing, Inc., in 1988. (CR 382-83) Started as a roofing company, Mike's Roofing evolved into a general construction company that performed residential, commercial, and public works projects. (CR 383-84, 386) As with many other companies, Mike's Roofing prospered in the years before the Great Recession and then struggled to find work between 2008 and 2012. (CR 388, 395-96)

Mr. Coaker was the President of Mike's Roofing and Ms. Coaker its Vice President; both were responsible for the payment of

industrial insurance premiums and associated reporting to the Department of Labor and Industries ("the Department"). (FF 6, CR 10; CR 100) Prior to 2012, the Department audited Mike's Roofing's payment of premiums three times—two of the audits found Mike's Roofing had fully paid its premiums; the third found that Mike's Roofing had overpaid its premiums. (CR 100, 413-14) The last of these audits was resolved in February 2012. (CR 415, 630-31)

Less than three months later, in May 2012, the Department audited Mike's Roofing a fourth time, this time reviewing its payment of premiums from the third quarter of 2009 through the second quarter of 2012. (FF 2, CR 9-10; CR 412-13, 419-20) Frustrated, Mr. Coaker asked the Department why his company was being audited so quickly after the last audit. (CR 419-20) After the Department falsely told Mr. Coaker the audit was random, Mr. Coaker refused to comply with the Department's request for records. (CR 247, 261, 419-20)[1]

The Department then conducted an audit that assumed Mike's Roofing's workers did nothing but roofing for every hour of every day, and determined that it owed $480,474.61 in additional premiums for the third quarter of 2009 through the second quarter

[1] The audit was in fact triggered by a Washington Industrial Safety and Health Act inspection report alleging Mike's Roofing used the wrong risk classification to report its workers' hours. (CR 247)

of 2012. (CR 250; *see also* CR 261)[2] After adding penalties and interest, the Department sent Mike's Roofing a notice of assessment ordering it to pay $579,586.87. (CR 9, 242)

Mike's Roofing appealed the assessment and provided the Department records responsive to the audit, but the Department refused to consider them. (CR 242, 259) The Board of Industrial Insurance Appeals ("the Board") affirmed the assessment on April 13, 2015. (CR 242-64) The Board concluded Mike's Roofing violated RCW 51.48.030 and RCW 51.48.040 "by failing to keep adequate records of worker hours and by refusing to provide any records to the Department auditor in this case." (CR 262) The Board did not find that Mike's Roofing violated RCW 51.48.020 by underreporting the hours worked by its employees.

Mike's Roofing exhausted its resources fighting the Department's nearly $600,000 assessment and could not afford to pay it when it became final in April 2015. (CR 83, 436, 489) Mike's Roofing thus stopped seeking new work, dissolved on October 22,

[2] Roofing is one of the most hazardous jobs and thus has one of the highest industrial insurance premiums, a fact underscored by the Department's audit, which imputed as much as $76,625 in premiums to Mike's Roofing for a single quarter, 166% of what it paid for *all* of 2007 when it was at the height of its success. (*Compare* CR 630, *with* CR 660)

2015, and ultimately filed for Chapter 7 bankruptcy on March 9, 2017. (CR 83, 267-69, 436, 489, 670)

On February 1, 2016, the Department issued an order under RCW 51.48.055 imposing liability on the Coakers for the assessment against Mike's Roofing based on its allegation they "willfully" failed to pay the premiums owed by Mike's Roofing. (CR 9, 271-73) After the Coakers appealed, an industrial appeals judge ("IAJ") found that "[b]etween July 2009 and June 2012, [the Coakers] did not deliberately fail to pay any assessment due, under report, or report incorrect risk classifications" and that "[i]n April 2015, [Mike's Roofing] had no or very little cash, because it was spent on legal fees" disputing the assessment. (CR 83) The IAJ nonetheless affirmed the Department's order and found "willfulness is demonstrated" because the Coakers "made no attempt to pay the assessment upon the issuance of the Board's April 13, 2015 order" and "refused to discuss a payment plan" with the Department. (CR 93)

The IAJ also rejected the Coakers' reliance on RCW 51.48.055(4), which states an individual cannot be personally liable for an assessment "if all of the assets of the [business] have been applied to its debts through bankruptcy." The IAJ reasoned the statute requires the business's bankruptcy to be "resolved" before the

defense can apply and that because Mike's Roofing's bankruptcy was still pending the Coakers were not protected by the statute. (CR 96)

The Coakers appealed the IAJ's decision to the Board. (CR 24-40) The Board affirmed the IAJ's decision, adopting her findings and conclusions verbatim. (CR 6-12) Although Mike's Roofing's bankruptcy had by now been closed based on the bankruptcy trustee's finding after "diligent inquiry . . . that there is no property available for distribution" (CR 72-73), the Board rejected the Coakers renewed reliance on RCW 51.48.055(4). (CR 5-8, 38-40)

The Board also found the "uncontroverted facts demonstrate that the basis for the underlying assessment against Mike's Roofing was the company was under-reporting employee hours," as revealed by the Department audit that "discover[ed] [a] discrepancy" between reports to the Department and "Employment Security filings that reported far higher hours." (CR 9) The Board reasoned that "[w]e cannot accept the Coakers' argument that as long as a company pays any premium, even though they are aware they are under-reporting

the hours, they are in compliance with the law." (CR 9)[3] The Coakers appealed to the superior court, which affirmed the Board's decision. (CP 86-87)

The Court of Appeals again affirmed the Board in a March 29, 2021, decision that it published on April 8, 2021. (App. A-B) The Court of Appeals held that for the defense in RCW 51.48.055(4) to apply the "application of assets to debts must have already been completed at the time the officer's liability is assessed," *i.e.*, "'[u]pon termination, dissolution, or abandonment'" of the company. (App. A at 10-11 (quoting RCW 51.48.055(1)) The Court of Appeals also affirmed the finding the Coakers willfully failed to pay premiums that became due between 2009 and 2012, adopting the IAJ's reasoning they did so because they "made no attempt to pay any part of the assessment and refused to discuss a payment plan" after the assessment became final in April 2015. (App. A at 13)

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[3] Contrary to the Board's finding, the Coakers did not report "far higher hours" to the Employment Security Department. As discussed above, "the basis for the underlying assessment" was the failure to cooperate with an audit, not underreporting. (*See* CR 262) The Court of Appeals did not address the Coakers' argument the Board's decision rested on "a basic misunderstanding of why the Department imposed the underlying assessment" and a non-existent "discrepancy." (App. Br. 34-35) For the twelve quarters covered by the audit, the third-party payroll manager for Mike's Roofing reported 22,706 hours to the Employment Security Department and 22,626 hours to the Department, an 80 hour (.3%) difference amounting to $148 in premiums. (*See* Reply in Support of Appellant's Motion for Reconsideration 2-5)

E. Argument Why This Court Should Grant Review.

1. The Court of Appeals decision misinterprets RCW 51.48.055(4), renders the statute meaningless, and creates absurd results that will negatively affect Washington businesses.

The Court of Appeals affirmed the imposition of liability on the Coakers for a nearly $600,000 assessment against their former business based on its holding that RCW 51.48.055(4) only protects business officers if a bankruptcy court has applied the business's assets to its debts *before* it is dissolved, terminated, or abandoned. That holding, on an issue of first impression, misinterprets the language and purpose of the statute, conflicts with Washington precedent, and will adversely affect Washington businesses and their officers. This Court should grant review. RAP 13.4(b)(1)-(2), (4).

a. The Court of Appeals misinterpreted the plain language of RCW 51.48.055(4) by ignoring its verb tense.

RCW 51.48.055(1) allows the Department to impose personal liability on any officer, member, or manager of a corporation or LLC for an unpaid assessment "[u]pon termination, dissolution, or abandonment" of the corporation or LLC if the officer or other person "willfully fails to pay . . . any premiums due":

> Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, manager, or other person having

> control or supervision of payment and/or reporting of industrial insurance, or who is charged with the responsibility for the filing of returns, is personally liable for any unpaid premiums and interest and penalties on those premiums if such officer or other person willfully fails to pay or to cause to be paid any premiums due . . .

RCW 51.48.055(4) then provides that an "officer, member, manager, or other person ***is not*** liable if all of the assets of the corporation or limited liability company have been applied to its debts through bankruptcy or receivership." (emphasis added)

The Court of Appeals ignored the plain language of RCW 51.48.055(4) in holding a corporate officer is not liable for assessments only if the "application of assets to debts [has] already been completed at the time the officer's liability is assessed," *i.e.*, "[u]pon termination, dissolution, or abandonment" of the company. (App. A at 10-11) In particular, the Court of Appeals overlooked that by using the present tense of "to be" ("is not liable") the Legislature made clear that the defense in 51.48.055(4) applies if the business's assets have been applied to its debts in bankruptcy at the time the defense is raised and ruled upon. As this Court has previously held, when the Legislature uses the present tense to direct courts to consider the existence or nonexistence of a particular fact, "the 'pertinent time point' is the point at which the court makes the

[relevant] determination." *Dependency of D.L.B.*, 186 Wn.2d 103, 117, ¶ 34, 376 P.3d 1099 (2016).

The Court of Appeals also ignored that the phrase "have been applied" in RCW 51.48.055(4) is present perfect tense, which this Court has stressed "'denotes an act, state, or condition that is *now completed or continues up to the present*.'" *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 433-34, ¶ 14, 275 P.3d 1119 (2012) (quoting The Chicago Manual of Style 5.126, at 237 (16th ed. 2010)) (emphasis added). In other words, the present perfect tense describes a completed or continuing action from the perspective *of the present*, confirming RCW 51.48.055(4) applies so long as the corporation's assets "have been applied to its debts" when an officer—in the present—asserts the statute as a defense. While the Court of Appeals purported to analyze the statute's "plain language," it entirely ignored its tense, in conflict with *D.L.B.* and *Bunch*. RAP 13.4(b)(1); *see also U.S. v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1354, 117 L. Ed. 2d 593 (1992) ("Congress' use of a verb tense is significant in construing statutes.").

The Court of Appeals instead reasoned the facts supporting the defense in RCW 51.48.055(4) must be "assessed at the same time as specified in subsection (1)," "[b]ecause [it] is an exception to the

general rule" of liability in RCW 51.48.055(1). (Op. 10 (internal quotation omitted)) But numerous defenses are based on facts that arise *after* those supporting liability, including laches, waiver, and the statute of limitations. *See generally* CR 8(c). By their very nature, affirmative defenses do not "negate[] an element of the action which the plaintiff must prove," but instead seek to avoid liability based on facts distinct from those supporting the underlying claim. *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 493, 859 P.2d 26 (1993), *amended*, 122 Wn.2d 483 (1994).

b. The Court of Appeals decision ignores the purpose of RCW 51.48.055(4) and bedrock principles of corporate law.

The Court of Appeals decision also conflicts with the purpose of RCW 51.48.055. As the Department's Director explained to the Legislature when it first adopted RCW 51.48.055, the statute was intended to "prevent[] an officer from taking all the money out of a company, closing it down, and avoiding its legitimate obligations." *See* House Commerce & Labor Committee Hearing on ESHB 3059, February 3, 2004.[4] RCW 51.48.055(4) achieves this purpose by

[4] ESHB 3059 was incorporated into ESHB 3188, the bill that eventually passed and became RCW 51.48.055. The audio for the hearing is available at https://www.tvw.org/watch/?eventID=2004021377 (last visited July 6, 2021) and the relevant testimony begins at 1:21:07.

requiring businesses to confirm through a judicial proceeding, either bankruptcy or receivership, that its assets "have been applied to its debts" and not wrongfully diverted to its officers.

That purpose was indisputably served here—Mike's Roofing's bankruptcy trustee confirmed after "diligent inquiry . . . that there is no property available for distribution." (CR 72) The fact that neither the Department nor the trustee alleged wrongdoing by the Coakers confirms none occurred. The Court of Appeals' draconian interpretation of RCW 51.48.055(4) does not further its purpose, but instead creates the absurd results discussed below. (*See* § E.1.c)

The Court of Appeals decision also conflicts with the bedrock principle that corporate officers cannot be liable for the debts of a corporation unless "the corporation has been intentionally used to violate or evade a duty owed to another." *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980); *see also Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 131, ¶ 43, 325 P.3d 327 (2014) ("Absent some kind of fraud or abuse of the corporate form, we respect [its] separate existence"). RAP 13.4(b)(1)-(2). Far from requiring the Department to show an abuse of the corporate form, the Court of Appeals decision allows it to impose liability on corporate officers merely because they did not—or could not—

compel the corporation to file a bankruptcy that in almost all cases will provide no benefit to the corporation. (*See* § E.1.c)

Since more than half of the thousands of small businesses opened in Washington each year fail within four years, the Court of Appeals decision will deter entrepreneurship and burden countless business officers with personal liability despite no wrongdoing on their part. *See* U.S. Bureau of Labor Statistics, Table 7: Survival of private sector establishments by opening year (45.2% of Washington small businesses started in 2016 remained in business by 2020).[5] This Court should grant review to prevent this erroneous imposition of liability on Washington entrepreneurs. RAP 13.4(b)(4).

c. The decision below renders RCW 51.48.055(4) meaningless and forces businesses to file pointless bankruptcies.

Because the Court of Appeals interpreted RCW 51.48.055(4) to require application of a business's assets to its debts *before* it is dissolved, terminated, or abandoned, the only way RCW 51.48.055(4) could ever prevent an officer's liability is if the business filed for bankruptcy prior to its dissolution. But there is little reason for corporations or LLCs to file for Chapter 7 bankruptcy because,

[5] Available at https://www.bls.gov/bdm/wa_age_total_table7.txt (last visited July 6, 2021).

unlike individuals, a "discharge cannot be granted to a corporation." Marjorie Rombauer, 28 Wash. Prac., § 9.38 (September 2020 update) (citing 11 U.S.C. § 727(a)(1)).[6] Instead, "most business failures involve no attempt to reorganize" and "the company simply ceases to exist as a going concern, and creditors are left to attempt collection efforts under state law or write off losses." Brook Gotberg, *Optimal Deterrence and the Preference Gap*, 2018 B.Y.U. L. Rev. 559, 591 n.117 (2018); *see also* Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. Legal Stud. 255, 255, 259 (2009) ("[f]ederal bankruptcy law is rarely used by distressed small businesses" because under state law "[a] corporation can discharge its debts . . . simply by dissolving").

That is precisely what happened here—the Coakers dissolved Mike's Roofing without filing a bankruptcy that would have been pointless because the business had no assets to distribute to creditors. The Court of Appeals decision fails to recognize that, absent extraordinary circumstances, corporations and LLCs have no reason to file for bankruptcy. The Court of Appeals recited, but then

[6] Unlike Chapter 7 of the bankruptcy code, which focuses on liquidation of a debtor's assets to pay creditors, Chapter 11 allows businesses to reorganize with the intent of remaining a going concern. *See* Rombauer, *supra*, 28 Wash. Prac., §§ 9.1, 9.97.

failed to apply, the maxim that courts should not interpret statutes in a vacuum but should instead consider "the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." (App. A at 8-9 (quoting *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007)))

Having ignored the reality that most businesses will dissolve without filing for bankruptcy, the Court of Appeals adopted an interpretation of RCW 51.48.055(4) that effectively renders it meaningless. Most businesses, like Mike's Roofing, will only learn there was in fact a reason to file for bankruptcy—to allow its officers to avail themselves of RCW 51.48.055(4)—when the Department imposes liability on its officers, which the Department can only do *after* the corporation has dissolved and it is already too late to file for bankruptcy under the Court of Appeals decision. An interpretation that imposes liability unless one can predict the Department's actions is absurd because "clairvoyance about future governmental actions is beyond any mortal." *Felt v. McCarthy*, 130 Wn.2d 203, 214, 922 P.2d 90 (1996) (Sanders, J., concurring); *see also Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 783, ¶ 27, 249 P.3d 1044 (rejecting interpretation of RCW 49.60.040 that "would create a liability trap . . . that the statute does not intend"), *rev. denied*, 172 Wn.2d 1013 (2011).

The Court of Appeals decision creates a perverse incentive because businesses that wish to protect their officers will be forced to file for bankruptcy simply because the Department *might* impose liability on their officers. Rather than forcing businesses to file costly and potentially pointless bankruptcies, it makes far more sense to interpret RCW 51.48.055(4) as applying if, at the time an officer relies on the statute, the corporation's assets have been applied to its debts. (*See* § E.1.a) Doing so would give businesses a reasonable, but not indefinite, period to pursue bankruptcy and avoid burdening bankruptcy courts with meaningless petitions intended to prevent personal liability the Department never imposes.

The Court of Appeals' interpretation is especially absurd because even if a business files for bankruptcy prior to dissolving, its assets still may not be applied to its debts in time to protect its officers. Bankruptcy is not a quick process, as underscored here: Mike's Roofing's bankruptcy took eight months to complete despite it having no assets. (CR 73, 267-69) The financial ruin caused by making individuals liable for a business's debts should not turn on how quickly a bankruptcy court—which the corporation and its officers have no control over—can inventory a business's assets and apply them to its debts. *Cf. Matter of Swanson*, 115 Wn.2d 21, 31,

804 P.2d 1 (1990) (rejecting interpretation because it made the application of the statute "turn on the vagaries of scheduling").

The Department argued below that failing businesses should delay their dissolutions to buy time for bankruptcy (CP 36), but that ignores a corporation can be dissolved by a court if "[t]he corporation has ceased all business activity and has failed, within a reasonable time, to dissolve, to liquidate its assets, or to distribute its remaining assets among its shareholders." RCW 23B.14.300(2)(e). The Court of Appeals has also previously held that RCW 51.48.055 should not be interpreted in a manner that incentivizes businesses "to avoid dissolution or abandonment of the corporate form." *Hopkins v. Wash. State Dep't of Lab. & Indus.*, 11 Wn. App.2d 349, 356, ¶ 24, 453 P.3d 755 (2019). The Court of Appeals published decision thus conflicts with its own precedent. RAP 13.4(b)(2).

2. The Court of Appeals erroneously held the Coakers willfully failed to pay premiums between 2009 and 2012 based on their conduct in 2015.

The Court of Appeals' holding that the Coakers "willfully" failed to pay premiums (App. A at 11-14) also conflicts with settled precedent and erroneously subjects business officers to liability even where, as here, they never knew additional premiums were due at a time when the business could pay them. RAP 13.4(b)(1)-(2), (4).

RCW 51.48.055(1) states that "'willfully fails to pay or to cause to be paid' means that the failure was the result of an intentional, conscious, and voluntary course of action." No appellate court has interpreted RCW 51.48.055(1). However, consistent both with the common understanding of the term and established precedent, the Board has interpreted "willfully" as "entail[ing] more than simple nonpayment." *In re Shawn A. Campbel & Spouse DBA & E Acoustics LLC*, No. 13 12674, 2014 WL 1398630, at *8 (March 27, 2014) (unpublished, cited pursuant to GR 14.1).[7] *See, e.g.*, *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 491, 852 P.2d 1055 (1993) (university did not act willfully under RCW 49.52.050(2) because there was no evidence it acted "with the intent to deprive employees of their wages"), *amended*, 871 P.2d 590 (1994); *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 553, ¶ 29, 389 P.3d 731 (defining "willful" as "done deliberately . . . done of one's own free

[7] Addressing an issue of substantial public interest, RAP 13.4(b)(4), the Court of Appeals decision directly conflicts with *Campbel*, which reversed the imposition of personal liability on a corporate officer because he "paid what he believed the company owed at the time" even though "a Department audit established, after the company ceased operation, that additional premiums were owed," and—unlike here—refused to impute "[k]nowledge of [a] [later] resolution of the dispute regarding the amount owed . . . back to [the officer] during the time when the company was still in business." 2014 WL 1398630, at *8.

will: not compulsory.") (quoting Webster's Third New International Dictionary 2617 (1993)), *rev. denied*, 188 Wn.2d 1009 (2017).

Acknowledging "the Coakers did not *deliberately* fail to pay any assessment due," the Court of Appeals then erred in holding they willfully failed to pay premiums that became due between 2009 and 2012 because after the assessment against Mike's Roofing became final in April 2015, they "made no attempt to pay any part of the assessment and refused to discuss a payment plan for the additional premiums." (App. A at 5, 13 (emphasis added)) As the IAJ found, Mike's Roofing undisputedly could not pay the nearly $600,000 assessment as of April 2015—even with a payment plan—because by then "the company had no or very little cash." (CR 83)[8] The Court of Appeals thus interpreted "willfully" in a manner that conflicts with the plain language of RCW 51.48.055(1) and Washington precedent because the Coakers could not have intentionally failed to pay premiums when they either did not know those premiums were due or had no corporate assets to allocate to their payment.

[8] The Court of Appeals purported to affirm a finding "Mike's Roofing could have paid the Department" in April 2015. (App. A at 12) But neither the IAJ nor Board found Mike's Roofing had $580,000 it could have used to pay the assessment in April 2015. As discussed above, the IAJ—whose findings were adopted verbatim by the Board—found Mike's Roofing had no cash left as of April 2015 and found the Coakers "willfully" failed to pay the assessment based on their conduct in 2015.

A court cannot disregard the corporate form based on the "mere fact" a corporation is unable to pay its debts because doing so "would undermine the very foundation of the entity concept." *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644, 618 P.2d 1017 (1980); *Meisel v. M & N Mod. Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982) ("corporate entities should not be disregarded solely because one cannot meet its obligations."). The Court of Appeals decision conflicts with this precedent and involves an issue of substantial public interest because it imposes liability where, as here, there was nothing corporate officers could have or should have done differently when their business failed. (*See* § E.1.c)

F. Conclusion.

This Court should accept review to address the proper interpretation of RCW 51.48.055.

Dated this 6th day of July, 2021.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 6, 2021, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail __x__ E-File
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DATED at Seattle, Washington this 6th day of July, 2021.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

FILED
3/29/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL E. COAKER and MARILEE B. COAKER, and the marital community composed thereof, Appellants, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 82060-5-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Michael and Marilee Coaker seek reversal of a decision by the Board of Industrial Insurance Appeals (BIIA) affirming personal liability for unpaid premiums owed to the Department of Labor and Industries by their former business, Mike's Roofing, Inc. They challenge several of the BIIA's findings of fact and argue that the BIIA erred in interpreting the bankruptcy exception to personal liability in RCW 51.48.055(4) to apply only after the bankruptcy proceeding is completed. Because the plain language of RCW 51.48.055 supports the BIIA's interpretation and the BIIA's findings of fact are supported by substantial evidence in the record, we affirm.

FACTS

Michael and Marilee Coaker[1] founded Mike's Roofing, Inc. in 1988. Mike's Roofing performed roofing and other construction work on residential, commercial, and public works projects. At all times, Michael owned at least fifty percent of the company. When the company dissolved, Michael and Marilee each owned fifty percent of the business and served as president and vice president, respectively. Both spouses were responsible for paying industrial insurance premiums and associated reporting to the Washington State Department of Labor and Industries. Starting in 2007, Mike's Roofing used a third party company to manage its payroll and payment of industrial insurance premiums.

Before 2012, Mike's Roofing was audited by the Department three times for the periods of 1997 to 1999, 2003 to 2005, and 2006 to 2007. In May 2012, three months after the third audit became final, the Department audited Mike's Roofing regarding premiums owed from 2009 to 2012. Michael felt that it was unreasonable that Mike's Roofing was being audited again after such a short time. Mike's Roofing did not provide the Department with any records in response to the audit. Because the Department did not have the records, it estimated the premiums due and concluded that Mike's Roofing owed $480,474.61 in additional premiums for that period. The Department sent Mike's Roofing a notice of assessment on November 14, 2012 ordering it to pay the additional premiums plus penalties and interest for a total of $700,161.95. After reconsideration, the Department reduced the assessment to $579,586.87.

[1] For clarity, we will refer to the Coakers individually by their first names. We intend no disrespect.

Mike's Roofing appealed the assessment to the Board of Industrial Insurance Appeals (BIIA). An Industrial Appeals Judge (IAJ) issued a proposed decision and order affirming the Department's assessment. Mike's Roofing did not petition for review from the proposed decision. The BIIA adopted the proposed decision as its final decision on April 13, 2015. Mike's Roofing did not appeal.

After the BIIA's decision became final, the Department assigned Jessica Rubin, a revenue agent, to collect the monies that Mike's Roofing owed to the Department. Rubin contacted Michael in May 2015 and asked if he intended to appeal the BIIA's decision. He responded that he did not and informed Rubin that he would be closing the business. Rubin contacted Michael again and asked if he was interested in a payment plan that would give him more time to pay the assessment. Michael responded, "[D]o you think I am going to pay this?" Rubin took this to mean that he did not intend to pay the assessment. She then filed a lien on Mike's Roofing's bank account and levied $377.63. Because Michael had indicated that he would close the business and did not intend to pay the assessment, the Department issued an order revoking Mike's Roofing's certificate of industrial insurance, meaning that the company could no longer lawfully employ workers. Mike's Roofing did not challenge the revocation of the certificate.

Rubin later learned that Michael had applied for a new business with the Secretary of State. The application listed Michael as the only member of the new company. The Department issued an order charging the new business with successor liability for Mike's Roofing. Michael asserted that he had accidentally listed himself as a member of the new company by signing the wrong line of the

document. He explained that he was trying to help his mother start a new business of which he was not a member. He filed an amended application with the Secretary of State that did not list him as a member of the company. The Department rescinded the order charging the new business with successor liability. Michael performed work for the new business for a year and a half until he sustained an injury.

On January 22, 2016, the Department sent the Coakers a letter informing them that they could be held personally liable for the unpaid premiums owed by Mike's Roofing. The letter requested that they pay the premiums or contact the Department by January 31, 2016. The Coakers did not respond to the letter. The Department then issued a notice of assessment on February 1, 2016 that found the Coakers personally liable for the unpaid premiums, penalties, and interest owed by Mike's Roofing. Through counsel, the Coakers sent a letter to the Department challenging the assessment of personal liability. The Department affirmed the assessment on June 16, 2016. The Coakers appealed the Department's order to the BIIA the next month. Mike's Roofing then filed for Chapter 7 bankruptcy on March 9, 2017.

On September 21, 2017, IAJ Marnie Sheeran heard testimony and argument on the appeal. The Coakers argued that they always paid the premiums they believed were owed, as calculated by the third party company, and therefore did not willfully fail to pay any premiums. They also argued that the exception to personal liability in RCW 51.48.055(4) applied because all of the assets of the corporation had been applied to its debts through bankruptcy. Michael testified

that he did not believe the Department should have audited him in 2012 and that he disagreed with the audit's findings. He denied that he ever deliberately underreported hours, misclassified staff, or underpaid premiums during the audit period. He testified that he understood the BIIA's decision on the 2012 audit to mean that Mike's Roofing owed the Department about $500,000 and that the BIIA's decision became final on April 13, 2015.

On October 27, 2017, Judge Sheeran issued a proposed decision and order finding that the Coakers did not deliberately fail to pay any assessment due, underreport, or report incorrect risk classifications between July 2009 and June 2012. However, Judge Sheeran found that the Coakers had willfully failed to pay premiums owed for the audit period because they made no attempt to pay the assessment after the BIIA's April 2015 order affirming the assessment. The IAJ found that "willfulness is demonstrated" by the Coakers' choice to stop seeking work and close the company and by their refusal to discuss a payment plan with the Department. The IAJ also rejected the Coakers' bankruptcy argument, finding that RCW 51.48.055(4) required the bankruptcy to be fully resolved for the exception to apply.

The Coakers petitioned for review of the proposed decision and order with the BIIA. They attached a declaration from their bankruptcy attorney dated November 23, 2017 stating that the bankruptcy court had issued an order on November 14, 2017 closing Mike's Roofing's bankruptcy based on a bankruptcy trustee's finding that there was no property available for distribution. The petition

for review argued that the exception to personal liability in RCW 51.48.055(4) now applied because the bankruptcy proceeding was finalized.

The BIIA granted review and issued a final decision and order affirming the assessment of personal liability against the Coakers. The BIIA declined to reopen the record to include the bankruptcy attorney's declaration, concluding that the evidence would not affect its decision because it interpreted RCW 51.48.055(4) to require completion of the bankruptcy proceeding before the Department issued the notice of assessment. The BIIA entered findings of fact, including the following:

> 4. At least as of April 13, 2015, there was no bona fide dispute between Mike's Roofing and the Department concerning whether Mike's Roofing owed a substantial amount of money in unpaid premiums, interest, and penalties.
>
> . . .
>
> 8. Mike's Roofing ceased operations in April 2015 and dissolved as a corporation on November 9, 2015. The choice to cease operations was a conscious, intentional, and voluntary choice by Mr. and Mrs. Coaker.
>
> 9. Between July 1, 2009, and April 2015, Mike's Roofing had in its possession and control sufficient funds that could have been used to pay the amount owed to the Department in full.
>
> 10. Michael Coaker and Marilee Coaker had actual knowledge of the debt owed to the Department and made an intentional, conscious, and voluntary choice to pay other obligations with the firm's funds, and not pay the amount due to the Department for the assessment against Mike's Roofing.
>
> . . .
>
> 12. Michael Coaker and Marilee Coaker's failure to pay the assessment owed against Mike's Roofing was willful.
>
> 13. The completion of Mike's Roofing's Chapter 7 bankruptcy action did not occur prior to the Department's assessment of personal liability, nor in conjunction with the dissolution of the corporation.

The Coakers appealed the BIIA's decision to the Thurston County Superior Court. The court affirmed the BIIA's decision, ruling that substantial evidence

supported the BIIA's findings and that it did not commit an error of law in interpreting RCW 51.48.055. The Coakers appealed.

ANALYSIS

I. Determination of Personal Liability

The Department may charge the officers of a company with personal liability for unpaid premiums remaining after a business dissolves if the officers willfully failed to pay the premiums. RCW 51.48.055(1). Failure to pay is willful if it is "the result of an intentional, conscious, and voluntary course of action." Id. The statute also contains an exception: the officer "is not liable if all of the assets of the corporation or limited liability company have been applied to its debts through bankruptcy or receivership." RCW 51.48.055(4). An individual can appeal a notice of assessment imposing personal liability to the BIIA. RCW 51.48.055(5), .131. The individual bears the burden of proof to show that the Department's notice of assessment is incorrect. RCW 51.48.131. The BIIA's review of the issues raised in the notice of appeal is de novo. RCW 51.52.100, .102.

Further appeals from the final decision of the BIIA are governed by the Administrative Procedure Act (APA).[2] RCW 51.48.131; Probst v. Dep't of Labor & Indus., 155 Wn. App. 908, 915, 230 P.3d 271 (2010). Appellate courts review the assessment based on the record before the BIIA. Probst, 155 Wn. App. at 915. Under the APA, the party asserting that an agency action is invalid bears the burden of demonstrating invalidity. RCW 34.05.570(1)(a). The reviewing court shall grant relief from an agency order if it determines that the agency has

[2] Chap. 34.05 RCW.

erroneously interpreted or applied the law or if the order is not supported by evidence that is substantial when viewed in light of the whole record before the court. RCW 34.05.570(3)(e).

Courts review challenged findings of fact for substantial evidence, defined as "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" King County v. Cent. Puget Sound Growth Mgmt. Hr'g Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (quoting Callecod v. Wash. State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). The court views the evidence in the light most favorable to the party that prevailed before the BIIA. Kittitas County v. Kittitas County Conserv., 176 Wn. App. 38, 48, 308 P.3d 745 (2013). Accordingly, we do not reweigh the evidence, and we accept the factfinder's credibility determinations and assessment of the weight to be given to reasonable but competing inferences. Id.

We review the BIIA's legal conclusions, such as construction of statutes, de novo. Probst, 155 Wn. App. at 915. But we give substantial weight to the BIIA's interpretation of the statutes it administers. Id. When interpreting a statute, our goal is to ascertain and carry out the legislature's intent. Gorre v. City of Tacoma, 184 Wn.2d 30, 37, 357 P.3d 625 (2015). To do so, we begin with the plain language of the statute. Id. at 36–37. We do not read individual terms in isolation:

> The meaning of words in a statute is not gleaned from those words alone but from "all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another."

Burns v. City of Seattle, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (internal quotation marks omitted) (quoting State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)). We assume that the legislature does not intend to create inconsistent statutes, and we read statutes together "to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.'" Filo Foods, LLC v. City of SeaTac, 183 Wn.2d 770, 792–93, 357 P.3d 1040 (2015) (alteration in original) (quoting Am. Legion Post No. 149 v. Dep't of Health, 164 Wn.2d 570, 588, 192 P.3d 306 (2008)).

A. Application of RCW 51.48.055

The Coakers contend that the BIIA misinterpreted RCW 51.48.055. Subsections (1), (2), and (4) of the statute set out the general principles governing the imposition of personal liability for unpaid industrial insurance premiums:

> (1) Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, manager, or other person having control or supervision of payment and/or reporting of industrial insurance, or who is charged with the responsibility for the filing of returns, is personally liable for any unpaid premiums and interest and penalties on those premiums if such officer or other person willfully fails to pay or to cause to be paid any premiums due the department under chapter 51.16 RCW.
>
> For purposes of this subsection "willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action.
>
> (2) The officer, member, manager, or other person is liable only for premiums that became due during the period he or she had the control, supervision, responsibility, or duty to act for the corporation described in subsection (1) of this section, plus interest and penalties on those premiums.
>
> . . .

> (4) The officer, member, manager, or other person is not liable if all of the assets of the corporation or limited liability company have been applied to its debts through bankruptcy or receivership.

RCW 51.48.055.

The parties disagree on the point in time at which the officer's personal liability is determined. The Coakers argue that the language of subsection (4) stating that the officer "is not liable" if the company's assets "have been applied to its debts through bankruptcy" indicates that the bankruptcy exception applies if the company's assets have been distributed to creditors through a bankruptcy action at the time the officer asserts the defense. The Department argues that the first clause of subsection (1) indicates that "it is the corporation's dissolution (or abandonment or termination) that triggers the corporate officer having liability for the corporation's unpaid premiums, penalties, and interest."

Here, the plain language of the statute when read as a whole supports the Department's reading. The language of subsection (1) shows that an officer's personal liability for unpaid premiums is determined "[u]pon termination, dissolution, or abandonment" of the company. Subsection (2) limits the officer's liability as described in subsection (1) by stating that the officer is responsible for the premiums that became due under the officer's tenure. Subsection (4) then creates an exception to subsection (1), stating that the officer "is not liable" if the company's assets "have been applied" to its debts. Because this is an exception to the general rule detailed in subsection (1), it follows that the officer's liability, or lack thereof, is assessed at the same time as specified in subsection (1): "[u]pon termination, dissolution, or abandonment" of the company. The specification that

this exception applies only if the company's assets "have been applied to its debts" indicates that this application of assets to debts must have already been completed at the time the officer's liability is assessed. Because the BIIA's interpretation of RCW 51.48.055 comports with the plain language of the statute and we give substantial weight to this interpretation, the Coakers have not shown that the BIIA erroneously interpreted the law.

B. Findings of Fact

The Coakers specifically assign error to six of the BIIA's findings of fact. First, they challenge the finding that the there was no bona fide dispute that Mike's Roofing owed a substantial amount in unpaid premiums, interest, and penalties as of April 13, 2015. As the Department points out, the BIIA's April 2015 decision was final on the date of issue because the Coakers did not petition for review of the proposed decision and order, therefore giving up their right to appeal the decision. See RCW 51.48.055; RCW 51.48.131; RCW 51.52.104. The Coakers appear to concede this point in their reply brief, stating:

> Although the Department is correct its assessment against Mike's Roofing became final when the Board issued its April 13, 2015, order adopting the unappealed proposed decision and order (Resp. Br. 36), both the Board and the Department treated the April 13 decision as appealable. (See FF 2, CR 10 (noting "Mike's Roofing did not appeal" the April 13 order); CR 555 (Department asked Mr. Coaker "on May 6, 2015. . . . if he [was] going to appeal the Board decision"))[.] In any event, a one-month difference in finality is immaterial given Mike's Roofing could not have paid the nearly $600,000 assessment in either April or May of 2015.

The Coakers state that they "have always acknowledged that, as of April 2015, Mike's Roofing owed additional premiums." Their argument appears to concern

the BIIA's willfulness conclusion rather than this finding of fact. Substantial evidence supports this finding.

Next, they dispute the BIIA's finding that Mike's Roofing ceased operations and dissolved on November 9, 2015 by the Coakers' conscious, intentional, and voluntary choice. The Coakers argue that their decision was not voluntary because they were unable to pay the assessment and knew that they would not be able to continue operating. Again, this argument goes to the court's determination of willfulness rather than a genuine dispute of fact. Despite their assertion that they felt they had no other option, substantial evidence supports the finding that the Coakers made the choice to wind down Mike's Roofing.

The Coakers also challenge the finding that Mike's Roofing had sufficient funds in its possession and control between July 1, 2009 and April 2015 to pay the amount owed to the Department in full. The records submitted by the Department showed substantial revenue from 2009 to early 2015. There is no indication that Mike's Roofing could not have paid the additional premiums required for that time period. Although Michael testified that the company did not have cash reserves in April 2015, the Coakers produced no accounting of the disposition of the company's revenue up to that point that would explain the lack of funds. There was substantial evidence from which the BIIA could find that Mike's Roofing could have paid the Department.

The Coakers assign error to the BIIA's finding that they had actual knowledge of the debt owed to the Department and made "an intentional, conscious, and voluntary choice" to pay other obligations rather than the amount

owed to the Department. Michael testified that he knew about the debt owed to the Department. Rubin testified that she had reviewed documents from the Department of Revenue showing that Mike's Roofing had income in 2015 and 2016 and indicating no outstanding balance due to the Department of Revenue and the Employment Security Department, despite the outstanding premiums due to the Department. Substantial evidence supports the finding that the Coakers knew of the debt owed to the Department and chose to pay other obligations.

Next, they challenge the BIIA's finding that their failure to pay the assessment owed to the Department by Mike's Roofing was willful. As noted above, willful failure to pay is defined in RCW 51.48.055(1) as "the result of an intentional, conscious, and voluntary course of action." The Coakers argue that their failure to pay could not have been willful because they paid the premiums that they believed were due at the time and did not have the funds to pay the assessment in April 2015. However, this argument ignores the evidence from Rubin that the Coakers made no attempt to pay any part of the assessment and refused to discuss a payment plan for the additional premiums. Willful failure to pay does not require malice or bad faith, only intentional, voluntary action. Substantial evidence supports this finding.

Finally, the Coakers dispute the BIIA's finding that Mike's Roofing's Chapter 7 bankruptcy action was not completed before the Department's assessment of personal liability, nor did it occur in conjunction with the company's dissolution. Again, the facts of this timeline do not appear to be disputed, but rather the interpretation of the point at which personal liability is assessed. In accordance

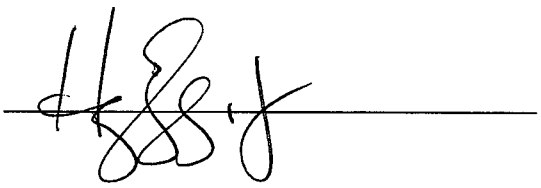
with the conclusion above that the Department's assessment of personal liability is determined at the time of dissolution, substantial evidence supports the finding that the bankruptcy action was not completed before the assessment or in conjunction with the company's dissolution.

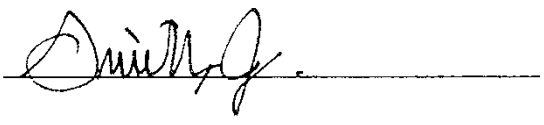
II. Attorney Fees on Appeal

The Coakers request an award of attorney fees under the equal access to justice act (EAJA), RCW 4.84.340-.360. The EAJA provides that "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). A party prevails if they obtained relief on a significant issue that achieves some benefit that they sought. Id. Because the Coakers have not prevailed in this action, we decline their request for an award of attorney fees.

Affirmed.

WE CONCUR:





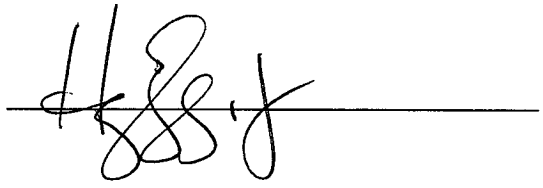
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL E. COAKER and MARILEE B. COAKER, and the marital community composed thereof, Appellants, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 82060-5-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH

The respondent, Washington State Department of Labor and Industries, filed a motion to publish the opinion filed on March 29, 2021. The appellants, Michael and Marilee Coaker, filed a joinder to the respondent's motion. A panel of the court has determined that the motion should be granted. Now, therefore, it is hereby

ORDERED that the motion to publish the opinion filed on March 29, 2021 is granted.

For the Court:



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL E. COAKER and MARILEE B. COAKER, and the marital community composed thereof, Appellants, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 82060-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Michael and Marilee Coaker, filed a motion for reconsideration of the opinion filed on March 29, 2021. The respondent filed a response to the motion. The appellants filed a reply. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Judge

SMITH GOODFRIEND, PS

July 06, 2021 - 1:55 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82060-5
Appellate Court Case Title:	Michael Coaker, et al, Apps v. Dept. of Labor and Industries, Resp
Superior Court Case Number:	18-2-02991-8

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