

No. 43620-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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RUBY JUMAMIL,

Appellant,

vs.

NOEL COON and DOUGLAS WEST,

Respondents.

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BRIEF OF APPELLANT

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## KEY ISSUES PRESENTED

1. The Legislature has evidenced a strong policy favoring payment of wages—allowing aggrieved employees to recover not only from their company, but the company’s controlling members who willfully withhold wages. Here, a casino unlawfully required dealers to gamble—without compensation and with their own money. The owner, Noel Coon, delegated his sole managerial authority to agents who implemented the policy. May Coon evade personal liability by claiming ignorance of the misconduct from which he benefited?
2. Under Washington’s wage and hour laws, a supervisor shall be personally liable for unlawfully rebating wages on his employer’s behalf. Here, poker room manager Doug West designed and implemented the policy requiring dealers to gamble six hours per week—without compensation and with their own money—to retain their hours. Did the trial court err in holding that Mr. West could not be held personally liable?

## I. Introduction

Freddie's Club Casino of Fife required its poker dealers to gamble as a condition of employment. Dealers would lose "seniority" and in turn, their hours, if they failed to gamble at Freddie's for six hours each week—on their own time, and inevitably losing their own money.

Ruby Jumamil was an outspoken opponent of this policy, even complaining to the Washington State Gambling Commission. CP at 246. She just had a baby and was losing more money gambling than she was earning. She pleaded with poker room manager Doug West, explaining that she could not put in the six hours. His response: "Well, then you're not going to have a job." True to Mr. West's promise, Ms. Jumamil was terminated just days after she ceased gambling.

Following a two-week trial, a jury concluded that the gambling policy constituted both an unlawful rebating and willful withholding of Ms. Jumamil's minimum wages. But Noel Coon, the casino's owner—who enjoyed the fruits of his employees' free labor and lost earnings—bore no personal responsibility. Nor did Mr. West, the architect of this unlawful policy. Both were incorrectly dismissed on summary judgment months earlier.

Washington's remedial wage and hour laws impose personal liability upon corporate officers and agents who rebate or withhold wages. Dismissal of the individual defendants was error and should be reversed.

## II. Assignments of Error

### *Assignments of Error*

- No. 1: The trial court erred in dismissing Ms. Jumamil's wage rebating and wage withholding claims against Mr. Coon on summary judgment.
- No. 2: The trial court erred in dismissing Ms. Jumamil's wage rebating claim against Mr. West on summary judgment.

### *Issues Pertaining to Assignments of Error*

- No.1. In *Ellerman v. Centerpoint Prepress, Inc.*, our Supreme Court held that subordinate employees may only be personally liable for withholding wages if they have authority to make decisions regarding wages. The Court's concern was imposing liability on "agents" having no direct control over finances. Here, Coon is the owner and sole manager with authority over all aspects of his business. Did the trial court err in applying *Ellerman* where Coon's financial authority is indisputable?
- No. 2 Even if *Ellerman* is extended to controlling owners, this Court has held that summary judgment is inappropriate where one asserts he is merely a "silent investor." Such claims are subject to dispute where one signs documents seizing broad authority over a business. Here, Coon claims he is an "absentee owner" despite signing documents declaring himself the casino's "sole Manager." Did the trial court err in finding no issue of fact as to Coon's involvement?

No. 3 Under Washington's wage and hour laws, employers and their agents shall be personally liable for "collecting or receiving" unlawfully rebated wages. Here, West collected additional revenues by requiring dealers to gamble their wages back to the casino. Coon—the owner—received the benefits of the increased revenues. Did the trial court err in dismissing the rebating claims against West and Coon?

### III. Statement of the Case

Lakeside Casino, L.L.C. d/b/a Freddie's Club Casino of Fife ("Freddies") and poker room manager Doug West imposed a policy on Freddies employees requiring them to gamble as a condition of employment. *E.g.*, CP at 243. Poker dealers who failed to gamble at the casino for six hours per week—on their own time and with their own money—were punished with a loss of "seniority" and a reduction in hours. *E.g.*, CP at 243.

Following a two-week trial, a jury concluded that this policy constituted both an unlawful rebating and willful withholding of Ruby Jumamil's minimum wages. CP 612–13. Neither Lakeside, its owner Noel Coon, nor Mr. West has appealed. Nor have they challenged the trial court's rejection of their various alternative defense theories—raised over the course of three separate summary judgment motions. *See* CP at 81–92, 378–86, 389–412, 575–92. Regardless, these defenses were necessarily rejected by the jury. Thus, for the purposes of review,

the facts are largely uncontested.<sup>1</sup> See *Chandler v. State Office of Ins. Comm'r*, 141 Wn. App. 639, 648, 173 P.3d 275 (2007) (“Findings of fact to which no error has been assigned are verities on appeal”).

**A. Freddie’s Club Casino and poker room supervisor Doug West require employees to gamble six hours per week as a condition of employment.**

In early May of 2010 Mr. West announced at an employee meeting that Freddie’s would begin tracking what it termed “dealer support” hours. CP at 418. Time was recorded by Mr. West and others in a “Dealer Tracking Log,”—used to document employee gambling time to the quarter hour. CP at 190–241. As Mr. West declared: “Dealers who provided Dealer Support to their fellow Dealers for six (6) hours or more per week would retain their seniority. . . .” CP at 416–17.

“Seniority” was important at Freddie’s because it was directly related to the hours a dealer received. CP at 256, 270, 326–27. When dealers lost seniority, they lost hours and income. CP at 327. The casino referred to gambling by the dealers as “keeping [their] stars.” CP at 272.

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<sup>1</sup> As discussed below, there is a factual dispute over the extent of Mr. Coon’s involvement with the casino’s daily operations. But that dispute is immaterial when the proper legal standard is applied.

Mr. West designed and implemented the gambling policy and was designated as the casino's CR 30(b)(6) corporate designee as a result. CP at 280. He also authored a detailed memo describing just how detrimental refusing to gamble could be for dealers. CP at 243 (the "West memo"). The West memo, among other things, explains "[a] dealer maintaining only the minimum will find themselves on the bottom instantly if they fail one week to maintain a 6 hour average." *Id.* Dealers were thus advised to "be cautious" and "protect" themselves from a reduction of hours. *Id.*

**B. Even if dealers did not actively gamble, it was inevitable that they would lose money during the six hours because they were required to make forced bets.**

As one might suspect, it is virtually impossible to spend six hours in a casino without losing money (unless a player happens to be winning). The game that dealers were required to play, "Texas hold 'em" poker, requires all players to make forced bets, known as "blinds," each round. CP at 276. At Freddie's, the typical blind structure was a \$2 "small blind" and a \$4 "big blind." *Id.*

The blinds made it impossible for players to simply sit at the table for six hours and "fold" their hands without placing bets. Multiple dealers confirmed this:

Q. If you sat at a table at Freddie's and never played a hand for six hours, is it inevitable that he would lose money?

A. Yes.

Q. Why is that inevitable?

A. Because when the blinds come around, you're forced to put that into the pot . . . . it's just impossible, so yes, you would lose money.

CP at 330; *see also* CP at 276, 343. The blinds cannot be avoided by walking away from the table before a player is required to bet. CP at 276–77, 341. Mr. West conceded that it was not “likely” that a player could avoid losing money to the blinds. CP at 283.

These losses imposed significant hardships on dealers—both financially and on their time. Depending on the number of players at a table, a dealer posting only the blinds would lose between \$24 and \$72 per hour, without ever playing a hand! *See* CP at 525, 571–72. One dealer testified that under the gambling requirement, “\$500 or \$600 was the swing in negative to what [he] normally would make.” CP at 329. Another dealer, who had a child, observed that six hours “was almost an extra shift a week.” CP at 275.

Ms. Jumamil, who had a new daughter herself, explained the difficulties the gambling requirement imposed to Mr. West:

Q. Okay, and what did you do about it after Doug said that to you?

A. Well, what I said is, “Well, I can’t do it. I can [sic] do it again. I can’t do six hours a week,” and he said, “**Well, then you’re not going to have a job,**” and then I said, “Well, I just had a baby and I can’t do this,” and then he said, “Well, you’re not the [only: sic] one that just had a baby[.]”

CP at 263 (emphasis added). Unable to bear the financial and time burden, August 6, 2010 was the last day Ms. Jumamil gambled at Freddies. CP at 222. True to his promise, Mr. West created a paper trail and carried out her termination 11 days later on August 17, 2010.<sup>2</sup> CP at 419, 433, 437.

**C. The casino enjoyed increased revenues by requiring its dealers to gamble.**

The West memo notes that “[t]he spike in recent business is due largely” to the dealers’ gambling. CP at 243. As Mr. West explained

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<sup>2</sup> Ms. Jumamil was an excellent dealer, contrary to the casino’s contrived justifications for her termination. In fact, on her last evaluation before being terminated, she received top marks on 38 of 60 criteria. CP at 248–49. She was rated satisfactory on 20 criteria. *Id.* On this evaluation Ms. Jumamil was admonished for providing an “absolutely unacceptable” amount of dealer support. *See* CP at 287, 249. Her dealing speed was also consistent with the casino’s expectation of 17 hands per half hour, CP at 393,—while she was eight months pregnant! CP at 249.

We have no idea how Ms. Jumamil’s evaluation compared to other 30-plus dealers at Freddies because Mr. West disposed of those records (among many others) before trial—an act that resulted in the trial court issuing a spoliation instruction to the jury. Regardless, the jury rejected the casino’s claims that Ms. Jumamil was terminated for performance issues.

during his CR 30(b)(6) deposition, one reason for having dealers gamble is to give the tables the appearance of being full and busy. CP at 284. This attracts customers who feel that they are sitting at a full table. *Id.* And this makes it easier to keep customers in the casino. *Id.*

**D. Coon is Lakeside Casino, L.L.C.’s owner and “sole Manager,” with authority over all aspects of the casino’s operations.**

Noel Coon is the 51 percent owner of Lakeside Casino, L.L.C. CP 362. The only other member of Lakeside, Susan Mudarri, filed for bankruptcy in 2009 and has no control over Lakeside. *In re Mudarri*, 09-15804-MLB (Bankr. Ct. W.D. Wash. June 12, 2009).

In 2008, Mr. Coon and Ms. Mudarri signed an agreement modifying Lakeside’s operating agreement. CP at 364–66. That agreement provides in part:

**Mr. Coon and Ms. Mudarri hereby agree that Mr. Coon shall be the Company’s sole Manager, with all rights, authority, and responsibility as provided in the Company’s Operating Agreement.** Without limiting the foregoing, Mr. Coon shall have **sole authority** to decide whether and when to sell the Company, its assets and/or business. Mr. Coon agrees the **he shall oversee** the Company’s business with the goal of making it profitable and attractive for sale.

CP at 364 (emphasis added). The agreement further provides that Mr. Coon, who had previously owned just two percent of Lakeside, would purchase a 48 percent share for \$1.00—also agreeing to infuse

\$200,000 into the casino. CP at 364–65. Upon sale of the casino and “the land and improvements leased by the Company indirectly from Mr. Coon,” Mr. Coon would be entitled to the first \$5,000,000 in proceeds. CP at 365.

Mr. Coon is listed with the Washington Secretary of State as the managing member of Lakeside Casino, L.C.C. CP at 359. In Freddie’s license renewal applications to the Washington State Gambling Commission, he confirms under oath that his is Lakeside’s “Highest Ranking Individual.” CP at 369. Those applications bear Mr. Coon’s signature as the LLC’s “Managing Member.” CP at 373.

Coon also identifies himself as the “Managing Member” on promissory notes purporting to amend the terms of earlier notes from the Noel T. Coon Living Trust to “pay to the order of Hana Hou Wailea.” CP at 376–77. Noel Coon is the sole member and manager of Hana Hou Wailea, L.L.C. (“HHW”), which owns the lot and building where Freddie’s operated.<sup>3</sup> This is the real estate that the casino is leasing “indirectly from Mr. Coon.” CP at 365.

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<sup>3</sup> This information is publicly available through the Washington Secretary of State’s website, [www.sos.wa.gov](http://www.sos.wa.gov) (last visited Oct. 14, 2012) and the Pierce County Assessor’s website, [www.co.pierce.wa.us](http://www.co.pierce.wa.us) (last visited Oct. 14, 2012) (Parcel No. 0320111067). The Court may take judicial notice of these facts, which are readily identifiable by

**E. Ms. Jumamil has been unable to collect from Lakeside Casino, L.L.C. because it filed bankruptcy.**

On May 4, 2012, a jury found that Lakeside Casino, L.L.C. had unlawfully rebated and willfully withheld Ms. Jumamil's wages. CP at 613-13. Lakeside filed for bankruptcy to avoid paying on Ms. Jumamil's judgment. *In re Lakeside Casino, L.L.C.*, 12-44552-BDL (Bankr. Ct. W.D. Wash. June 28, 2012). Because the trial court dismissed Mr. Coon and Mr. West, Ms. Jumamil has been forced to pursue her judgment by alternative means, in bankruptcy court and beyond.

Ms. Jumamil has also initiated an "alter ego" claim against Mr. Coon, HHW, and Lakeside in Pierce County Superior Court, alleging they are the same enterprise and thus liable for the casino's judgment. *Jumamil v. Coon et. al.*, No. 12-2-10502-8 (Pierce Cy. Sup. Ct. July 2, 2012). Recovery is expected to take years.

Notice of appeal in the instant case was timely filed in this case on June 19, 2012.

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sources whose accuracy cannot reasonably be questioned. *See* ER 201(b)(2).

#### **IV. Authority and Argument**

The Legislature has evidenced a strong policy favoring payment of wages—allowing generous avenues for aggrieved employees to recover from their employers. Liberally construing these statutes to ensure adequate means of recovery, courts have broadly defined the class of “employers” and other agents who may be held personally liable for a corporation or LLC’s actions. Liability is not merely limited to the corporation or LLC, but the owners who possess the authority and financial wherewithal to compensate workers.

Here, the trial court erred by adopting the respondents’ unduly narrow reading of the law. That Mr. Coon delegated his managerial role to others does not grant him a defense of ignorance. The willful acts of his delegates are imputed to him. That Mr. West claims to have received none of the funds lost by his subordinates is of no consequence. The act of collecting wages—even if on behalf of one’s superiors—all that the anti-kickback statute requires.

Summary judgment was improper and should be reversed.

##### **A. Standard of review.**

An order granting summary judgment is reviewed de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary

judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” *Id.* (quoting CR 56(c)). “A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. v. Pierce County*, 168 Wn.2d 545, 552, 192 P.3d 886 (2008). Said differently, “summary judgment should only be granted if a reasonable person would reach but one conclusion.” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186 (2002).

**B. Receipt of wages due is of paramount importance—controlling owners and their agents may therefore be personally liable for the unlawful rebating or willful withholding of wages.**

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)). “The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including [RCW 49.52.050 and .070.]” *Shilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). The so-called “anti-kickback statute” provides in pertinent part:

Any employer or officer, vice principal or agent of any employer . . . who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Willfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute . . . ;

. . . .

Shall be guilty of a misdemeanor.

RCW 49.52.050. “RCW 49.52.070 provides a corresponding civil remedy against the employer, its officers and agents.” *Schilling*, 136

Wn.2d at 158.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050(1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney’s fees:

RCW 49.52.070.

Our supreme court has long stated that “the fundamental purpose of the [anti-kickback] legislation . . . is to protect the *wages* of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such

wages.” *Shilling*, 136 Wn.2d at 159 (quoting *State v. Carter*, 18 Wn.2d 590, 621, 140 P.2d 403 (1943)) (italics in original). Said differently

“The aim or purpose of the act is to see that the employee shall realize the full amount of the wages which . . . [s]he is entitled to receive from [her] employer, and which the employer is obligated to pay, and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation[.]”

*Id.* (quoting *Carter*, 18 Wn.2d at 621).

As the receipt of wages due is of vital importance—particularly for minimum wage workers—“[t]he statute must be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.” *Id.*

**C. Coon is personally liable for the casino’s withholding of wages because he is the controlling owner and thus, an “employer” within the meaning of the statute.**

“The legislature intended, under RCW 49.52.070, to impose personal liability on the officers . . . because the officers control the financial decisions of the corporation.” *Morgan v. Kingen*, 166 Wn.2d 526, 536, 210 P.3d 995 (2009). Consistent with the liberal interpretation of the anti-kickback statute, “[o]ur courts broadly apply liability to persons who could be considered an employer under the statute.” *Dickens v. Alliance Analytical Labs., L.L.C.*, 127 Wn. App. 433, 440, 111 P.3d 889 (2005) (citing *Shilling*, 136 Wn.2d 152; *Ellerman v.*

*Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.2d 795 (2001)). Thus, “employer” has been held to include not only an LLC or corporation, but its owners. *See id*; *Shilling*, 136 Wn.2d 152; *Ellerman*, 143 Wn.2d 514. The reason for doing so is to expand opportunities for recovery of unpaid wages from financially able owners—holding liable those who ultimately benefit from mismanagement.

In *Dickens*, unpaid employees of Alliance Analytical Laboratories, L.L.C. (“AAL”) sued. *Id.* at 437. AAL had two members, Anita Cote and RSRT, L.L.C. (“RSRT”). *Id.* Gary Lukehart created RSRT for the sole purpose of acting as a member of AAL. *Id.* The ultimate issue was whether the employees could reach Mr. Lukehart personally by piercing the corporate veil of RSRT. *Id.* at 440. However, as part of its analysis, the court necessarily concluded “RSRT, L.L.C. as an AAL member-manager-director is *clearly* an employer” subject to liability under RCW 49.52.070. *Id.* (emphasis added); *see also id.* at 442 (“We have concluded RSRT is an employer.”).

Our Supreme Court has similarly focused on LLC or corporate stakeholders as sources for recovery—expressly citing their financial ability to reimburse unpaid wages. After noting that “[t]he legislature intended, under RCW 49.52.070, to impose personal liability on the officers” the Court in *Morgan* explained that the financial solvency of

an *owner* counsels in favor of including them as an “employer.” 166 Wn.2d at 536–37. The Court made the following observation of its prior holding in *Shilling*: “We responded, ‘Bingham has never specifically proved *he or Radio Holdings* were insolvent or financially unable to pay.’” *Morgan*, 166 Wn.2d at 537 (quoting *Shilling*, 136 Wn.2d at 164, n. 5) (italics added in *Morgan*). According to the Supreme Court, “the footnote suggests that a corporation’s insolvency does not negate a finding of willfulness, **especially where the corporate officer is financially solvent.**” *Id.* (emphasis added).

Here, Mr. Coon—and not just Lakeside Casino, L.L.C.—is an “employer” from whom the anti-kickback statute contemplates recovery. In fact, Mr. Coon, who did not create a separate LLC (like RSRT) to manage Lakeside, is less removed from liability than Mr. Lukehart was in *Dickens*. Moreover, Mr. Coon—who owns a stake in the casino and its real estate (valued in excess of \$5 million, CP at 365), to which he was able to loan hundreds of thousands of the dollars, CP at 365, 376–77—appears to be well-heeled to pay Ms. Jumamil the wages she is owed due to his failure to manage his business.

**D. A controlling owner who delegates his absolute managerial authority and fails to supervise should be liable for his company's willful withholding of wages.**

Mr. Coon contends that he is not personally liable for his LLC's willful failure to pay minimum wages because he was an "absentee owner." He makes the disputed claim that he had no knowledge that his casino was enjoying increased revenues by coercing its employees to gamble off-the-clock. Accordingly, he asserts he bears no responsibility because *his* actions were not "willful"—that is, "the result of knowing and intentional action." *See Lilig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 7171 P.2d 1371 (1986)). This suggestion offends the very policies underlying the anti-kickback statute.

**1. *Ellerman v. Centerpoint Prepress, Inc.* limits the liability of low-level employees responsible for payroll—it has no application to controlling owners.**

No published decision has addressed the degree of culpability required to impose personal liability on a controlling *owner* for violation of RCW 49.52.070(2)—the willful withholding provision. Mr. Coon relies heavily on *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.2d 795 (2001) for the proposition that an unpaid worker must prove that a controlling owner "exercised control over the non-payment of wages." *See* CP at 85–87, 384–85. But *Ellerman* is

inapposite as it concerns policy considerations unique to low-level employees responsible for payroll.

At issue in *Ellerman* was whether one who “managed the company’s business activities and was paid \$16.50 per hour” was a “vice principal” or “agent” under RCW 49.52.050(2). 143 Wn.2d at 516–17. The Court agreed with the Court of Appeal’s reasoning, holding that “[t]he ‘agency’ contemplated by the statute requires some power and/or authority of the alleged agent **to make decisions regarding wages**, or the payment or withholding of wages before the possibility of personal liability can attach.” *Id.* at 522 (emphasis added); *see id.* at 521 (“a vice principal cannot be said to have *willfully* withheld wages unless he or she exercised control over the direct payment of the funds”).

Key to the Court’s analysis was its concern over the “substantial unfairness” that would result from a rigid reading of the statute—“imposing personal liability on managers or supervisors who had no direct control over the payment of wages.” *Id.* at 522. No similar considerations of fairness suggest that a controlling owner who simply ignores the misconduct occurring at his business should be excused.

The Court of Appeals has declined to rule on whether an *agent* must actually exercise their authority over wages to be personally

liable. *Dickens*, 127 Wn. App. at 442 . However, no court has had an opportunity to hold that willful ignorance on the part of a controlling *owner* is not a defense for the withholding of wages—until now. Ms. Jumamil submits that the court should clarify the following standard for cases such as this:

Where a controlling owner delegates his absolute managerial authority and then fails to supervise, his agent’s willful withholding of wages should be imputed to the owner.

Alternatively, one could conclude that the withholding of Ms. Jumamil’s wages was “the *result* of knowing and intentional action” *Lilig*, 105 Wn.2d at 659 (emphasis added). Mr. Coon knowingly and intentionally delegated his managerial authority, *resulting* in the imposition of the unlawful gambling policy.

Though never expressly stated by Washington’s appellate courts, the standard suggested by Ms. Jumamil finds ample support in Washington’s legislative and public policies, as well as the decisions of its courts.

**2. Imputing an artificial entity’s willful acts to the controlling owner promotes proper wage payments by encouraging active involvement and monitoring.**

“If the failure to pay wages owed was willful” as the jury here has already concluded, “the party responsible for the payment of wages

may be personally liable in accord with RCW 49.52.070.” *Morgan*, 166 Wn.2d at 536. Here, the individual who holds ultimate responsibility is Mr. Coon. The policy favoring full compensation of workers is best served by (1) limiting impediments to recovery of misappropriated wages; and (2) incentivizing employers to monitor their payroll practices.

First, the Legislature and courts recognize the necessity of lowering barriers to recover unpaid wages. For instance, Washington’s wage and hour laws mandate the recovery of attorneys’ fees and costs to a successful plaintiff. *See* RCW 49.46.090(1); 49.48.030; 49.52.070. “[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights.” *Int’l Ass’n of Fire Fighters, Local 46*, 146 Wn.2d at 35. This is a particularly important mechanism for low-wage workers who otherwise could not afford representation. *See Shilling*, 136 Wn.2d at 159. And as noted, courts also read the statutes at issue broadly to increase the availability of funds to compensate workers.

Mr. Coon’s suggestion that he be held to the generous standard afforded to vice principals or agents is antithetical to the notion of remedial recovery. He asks the Court to erect procedural barriers, without justification, to his benefit and his employees’ detriment. The

legislative incentives are frustrated if plaintiffs must confront pleas of ignorance with further litigation. Indeed, in light of the trial court's dismissal in this very case, Ms. Jumamil has been forced to pursue Lakeside into bankruptcy and file a separate "alter ego" lawsuit to reach the comingled assets of Mr. Coon, Lakeside, and HHW. All of this is necessary only if courts allow controlling owners to escape liability by pleading ignorance of abuses they failed to oversee.

Second, removing the ignorance defense incentivizes controlling owners to ensure that their companies are in full compliance with wage and hour laws. The lesson is simple: employer beware. Hire scrupulous managers and continue to monitor their conduct.

While a controlling owner is certainly free to delegate his authority to a manager or other agents, the *owner*—**not** his employees—should bear the risk of unscrupulous management practices. Similarly, if a controlling owner learns that his delegate has engaged in misconduct that creates liability, the burden should fall to the willfully blind *owner* to seek contribution through separate actions against his agents.

Holding controlling owners liable for the willful misconduct of their delegates serves the public policy favoring full compensation. Permitting a willful ignorance defense does not. The Court should reject Mr. Coon's "absentee owner" defense.

**3. This Court should find Coon liable as a matter of law because the casino was already found to have acted willfully.**

“Ordinarily, the issue of whether an employer acts ‘willfully’ for purposes of RCW 49.52.070 is a question of fact.” *Shilling*, 136 Wn.2d at 160. “However, where, as here, there is no dispute as to the material facts, [an appellate court] will resolve the case on summary judgment.” *Id.* (citing CR 56(c)). In the interests of judicial economy, Ms. Jumamil requests that this Court apply the standard addressed above to find that Mr. Coon is personally liable for the casino’s willful withholding of wages.

Rejecting Mr. Coon’s “absentee owner” defense, there remain no genuine issue of material fact precluding summary judgment. A jury has already concluded that Lakeside Casino, L.L.C. acted “willfully” in withholding Ms. Jumamil’s wages. CP at 613. Those facts are verities on appeal. *Chandler*, 41 Wn. App. at 648.

Of course a casino, like any business, can only act through its agents. *See, e.g., Marina Condo. Homeowner’s Ass’n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 263, 254 P.3d 827 (2011) (“LLCs, like corporations, are artificial entities that act only through member/agents”). An artificial entity certainly cannot exercise free will on its own. Mr. Coon does not dispute that he was the casino’s

“sole manager” or that he had “all the rights, authority, and responsibility” to manage the same. CP at 364. He is therefore personally liable for the judgment as a matter of law.

**E. Even under the erroneously applied *Ellerman* standard, summary judgment was inappropriate because there are factual disputes regarding Coon’s involvement in the casino.**

As noted, *Ellerman* established that lower-level “*vice principals*” and “*agents*” can only be held liable for willful withholding if they have direct control or authority over the payment of wages. *Ellerman*, 143 Wn.2d at 521–22. Even if there was some basis to extend this standard to controlling *owners* like Mr. Coon, summary judgment would still be inappropriate because Mr. Coon’s exclusive authority over the casino raises genuine factual issues refuting his self-serving declaration.

Summary judgment is inappropriate where the parties dispute a purported “silent investor’s” role in an LLC. *Dickens*, 127 Wn. App. at 441. As noted, *Dickens* involved a wage claim against Alliance Analytical Laboratories, L.L.C. *Id.* at 437. AAL had two members, Ms. Cote and RSRT, L.L.C.—created by Mr. Lukehart for the sole purpose of acting as a member of AAL. *Id.*

Ms. Cote was AAL’s day-to-day operator. *Id.* at 438. The extent of RSRT’s management, via Mr. Lukehart, was disputed—Mr. Lukehart asserting that he “merely played the role of a silent investor[.]” *Id.*

RSRT did, however, loan AAL approximately \$120,000 over the course of a year in several installments. *Id.* Unfortunately for RSRT, Ms. Cote was diverting the funds to herself, without paying employees or AAL's creditors. *Id.*

There were disputes regarding the extent of Mr. Lukehart and RSRT's involvement, including "the inferences to be drawn from his personal infusion of funds" and RSRT's "sketchy" corporate picture. This, the court said, "undermine[d] the potential for summary judgment. *Id.* at 441. The court explained: "While Mr. Lukehart casts himself as a silent partner and minimizes his director's role in AAL, the *AAL limited liability agreement shows his authority to act in wage matters.*" *Id.* (emphasis added). It further noted that, "solely a limited partner in a limited partnership is protected as a silent investor." *Id.* (citing RCW 25.10.190). Ultimately, the court viewed "the parties' remaining dispute over alleged willful and intentional actions by Mr. Lukehart or RSRT to be surrounded by material facts precluding summary judgment." *Id.*

Here, Mr. Coon claims to be an "absentee owner"—akin to the "silent investor" in *Dickens*. Mr. Coon, like RSRT, proclaims he delegated day-to-day operations to others—individuals who were also engaged in misconduct pertaining to wages. Mr. Coon, like RSRT,

made significant cash infusions into the L.L.C. CP at 376–77. Mr. Coon, like RSRT, signed an LLC agreement giving himself significant authority and control. Mr. Coon, like RSRT, is not part of a limited partnership and thus does not enjoy the protections afforded silent investors. And Mr. Coon, like RSRT, is not entitled to summary judgment.

Given the documentation that Mr. Coon himself signed, under oath no less, there are abundant issues of disputed facts as to what Mr. Coon *actually* knew about the operations of a casino he had owned and controlled for five years and been affiliated with long before. Even under the erroneously applied *Ellerman* standard, the trial court erred in granting summary judgment.

**F. Both Coon and West violated the anti-kickback statute’s rebating provision—West “collected” and Coon “received” rebated wages.**

Section 1, the wage-rebating provision of the anti-kickback statute, prohibits two distinct acts: (a) unlawfully “collecting” wages; and (b) “receiving” wages collected unlawfully. RCW 49.52.050(1). The wage-rebating prohibition was intended to apply “to a situation where the employee gives up or cedes a portion of [her] . . . wage to or *in favor of* or at the instance of the employer **or** *one acting for or on behalf of the employer.*” *Carter*, 18 Wn.2d at 593 (quoting *United States v. Laudani*,

134 F.2d 847, 849 (3rd Cir. 1943)) (emphasis added). Section 1 does not require a finding of willfulness, though the jury in this case did expressly find that the casino had willfully rebated Ms. Jumamil’s wages. CP at 613.

Here, Mr. West “collected” Ms. Jumamil’s wages on his employer’s behalf and Mr. Coon “received” the same in turn. Said differently, Ms. Jumamil “cede[d] a portion of her wages . . . at the insistence of . . . one acting for or on behalf of the employer”—Mr. West. Those wages were ceded “in favor of” Mr. Coon. Both are individually liable.

**1. West collected rebated wages on the casino’s behalf by designing and implementing the coerced gambling requirement.**

The jury’s verdict confirms that Freddie’s rebated Ms. Jumamil’s wages. It did so via the poker tables under the coerced gambling requirement. This necessarily means that her wages were “collect[ed]” within the meaning of RCW 49.52.050(1). But since an LLC cannot willfully act without the actions of its agents, *Marina Condo. Homeowner’s Ass’n*, 161 Wn. App. at 263, the question RCW 49.52.050(1) asks is *Which* agent bears responsibility for carrying out the employer’s bad acts?

Here, overwhelming evidence establishes that Mr. West is that agent. Perhaps most compelling is the memorandum he drafted setting forth the policy, its mechanics, and the ramifications for non-compliance. CP at 243. He also told Ms. Jumamil that she would not have a job if she refused to gamble. Once she refused to do so, he made the determination to terminate her. Mr. West even created the pretextual documentation to legitimize Ms. Jumamil's wrongful discharge (documents the jury rejected). This evidence conclusively shows that Mr. West was one of the Freddie's agents who collected the wages that the jury found had been unlawfully rebated. At an absolute minimum, there is a factual issue as to whether he did.

Below, Mr. West seemed to suggest that Ms. Jumamil's wages had not been collected by anyone because "no money was ever taken from her paycheck" by the Freddie's or Mr. West. CP at 404. This understanding is unjustifiably narrow and inconsistent with the policies underlying the anti-kickback statute. Nowhere in the plain language of the statute is there any limitation that a rebate only occurs when performed by an accountant in an orderly payroll process. Such would make it far too easy for unscrupulous employers to evade scrutiny.

In the context of unfair trade practices, our supreme court has favorably quoted Congress on the difficulty of cornering creative misconduct:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort . . . .

*Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009) (citations omitted).

This rationale applies with equal force to the anti-kickback statute. The Legislature appropriately made no effort to define the infinite ways in which an ill-intentioned employer may rebate wages. It certainly did not contemplate casinos requiring dealers to gamble back their wages. But this does not mean that Mr. West was not collecting wages on the casino's behalf merely because dealers were not literally handing him money.

Regardless of the mechanism by which the rebating occurred, the fact that it did occur is established and uncontested on appeal. Mr. West unlawfully collected wages on behalf of his employer and is personally liable as a result.

**2. There is no requirement that an “agent” control wage payments to be liable for *rebating*—regardless, West is an agent and *did* have authority regarding wages.**

In his summary judgment reply brief, Mr. West argued that although he was an agent of Freddies, he was not an “agent” for the purposes of personal liability. CP at 583. This, according to Mr. West, is because he “had no authority over the payment or non-payment of wages.” *Id.* But that conclusion is based on a misreading of *Ellerman*, a case concerning *willful withholding* of wages, not wage *rebating*. Regardless, even under his erroneous standard, Mr. West is liable.

*Ellerman*, a case Mr. West describes as one of “first impression,” CP at 583, only establishes the agent-liability standard for wage *withholding* cases—Section 2 of the anti-kickback statute.<sup>4</sup> RCW 49.52.050(2). Key to the Court’s analysis was that the wage *withholding* provision requires conduct that is “[w]illful and with intent to deprive the employee.” *Id.* at 521 (quoting RCW 49.52.050(2)). It was this enhanced willfulness requirement that led the Court to limit liability against agents who had no authority over the payment of wages. *Id.* at 522; *see* discussion above.

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<sup>4</sup> Mr. Coon noted that “[t]he *rebating of wages portion* of RCW 49.52.050 has rarely been applied or interpreted since the ‘anti-kickback’ statute was enacted in 1939.” CP at 89 (emphasis added). It was not interpreted in *Ellerman* either.

But unlike Section 2 of the anti-kickback statute, Section 1 contains no willfulness requirement—the very basis for requiring agent control over wage *payments*. See RCW 49.52.050(1). While it is unclear whether Mr. West accepts this distinction, it has been acknowledged by Mr. Coon. See CP at 85 (citing *Ellerman*) (“Because RCW 49.52.050 includes the element of willfulness . . . a claimant must prove that the . . . agent willfully exercised control over *the non-payment*”) (Emphasis added.) By the statute’s plain language, the act of unlawfully collecting rebated wages alone is sufficient to impose personal liability. Because willfulness is not required, neither is a degree of control over the direct payment of funds.

Even if *Ellerman*’s heightened willfulness standard were applied to a section with no willfulness requirement, Mr. West would still qualify as an agent because he meets the applicable definition in *willful withholding* cases. Though undefined by RCW 49.52, “agent” has been defined “generally as a ‘person authorized by another to act for him.’” *Ellerman*, 143 Wn.2d at 522 (quoting BLACK’S LAW DICTIONARY 85 (4th ed. 1951)). Where willfulness is an element, not just any agency relationship will confer personal liability. *Id.* As noted, “[t]he ‘agency’ contemplated by the statute requires some power and/or authority of the alleged agent to make decisions regarding wages, **or** the payment

or withholding of wages before the possibility of personal liability can attach.” *Id.* (emphasis added).

Here, Mr. West—even under an inapplicable standard—ignores the first half of the preceding sentence. Mr. West indisputably had “some” power to make decisions regarding wages. To wit, he implemented the gambling requirement. As detailed in Mr. West’s own memo, this meant he could (and did) coerce dealers to gamble their earnings away. When dealers failed to meet the six-hour requirement, Mr. West could (and did) reduce their hours and, in turn, their wages. And Mr. West could (and did) have dealers—like Ms. Jumamil—terminated when they refused to gamble. All of this constitutes significant authority vested in Mr. West regarding wages—even under the inapplicable standard.

No published opinion has interposed any additional meaning upon the plain language of RCW 49.52.050(1)—the wage *rebating* provision. As discussed in the next section, the Legislature had ample justification to draw distinctions between rebated and *willfully* withheld wages—requiring a degree of control in the latter, but not the former. As mentioned, it would certainly be unfair to penalize office assistants who could not issue payroll because their employers mismanaged funds. But there is no similar notion of fairness supporting safe harbor

for those who actively participate in the fleecing of their co-workers or subordinates.

**3. That West did not personally receive the wages he rebated is of no consequence—unlawful collection is sufficient.**

Though Section 1 sanctions those who either “collect **or** receive” unlawfully rebated wages, Mr. West conflated the distinction below—treating the actions as one and the same. *See* CP at 404 (arguing only that Mr. West never *received* wages rebated from Ms. Jumamil), 583 (same), 582 (noting that in *Carter*, the *recipient* of employees’ wages was charged); RP (Vol. II) at 4:24–6:12, 18:23–19:21. The trial court erred in adopting Mr. West’s reasoning that he could only be individually liable if he personally *received* Ms. Jumamil’s rebated wages:

[Mr. West] may have assisted in implementing this policy that was approved by the management and the casino, but I don’t have any evidence that he was personally involved in collecting or *benefitting from any of these alleged rebates* that may have occurred. . . . He *did not have an ownership interest in the casino* and, quite frankly, he may have been very enthusiastic and supportive of the plan and may have had a voice in it.

RP (Vol. II) at 20:9–18.

Both Mr. West and the trial court read the disjunctive “or” out of the statute—drawing no distinction between the collection of wages and receipt of the same. But meaning must be accorded to every word in a statute and courts must presume that the drafters of the legislation

used no superfluous language. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1033 (2000).

Here, the Legislature used the word “or” to extend the anti-kickback statute’s reach not just to those who directly receive rebated wages, but to those who assist them. Whether Mr. West ultimately *received* rebated wages is irrelevant. His individual liability stems from the unlawful collection scheme that he architected.

The Legislature’s reasoning in extending liability beyond employers to the instruments of their wrongdoing is readily apparent. Given the abundant policies favoring wage retention, those simply taking part should find no reprieve. Individuals down the chain of command must have skin in the game—that is, they too must be dissuaded from enriching their superiors at the expense of their subordinates. The desire of middle managers to be viewed with favor or increase revenues—as the coerced gambling certainly did—must be counterbalanced with clear limitations. Ambition is no excuse for misdoings. Washington’s public policy is best served when *no one* can conspire to misappropriate earned wages.

**4. Coon is the sole stakeholder in Lakeside Casino, L.L.C. and therefore “received” the rebated wages collected by West.**

As noted, the wage-rebating prohibition was intended to apply “to a situation where the employee gives up or cedes a portion of [her] . . . wage to or *in favor of* . . . the employer. . . .” *Carter*, 18 Wn.2d at 593 (quoting *Laudani*, 134 F.2d at 849) (emphasis added).

Ms. Jumamil ceded her wages “in favor of” Mr. Coon—the sole non-bankrupt member of Lakeside Casino, L.L.C. It is indisputable that the casino enjoyed increased revenues as a direct result of the coerced gambling policy. *See* CP 243 (“spike in recent business” due to dealers gambling). Again, Mr. Coon should not be permitted to delegate his authority, enjoy the ultimate benefits, and then disclaim all responsibility based on absenteeism.

Even a business in financial distress enjoys the benefits of increased revenue—as do its owners. It can stay in business longer and buy time to engineer a turnaround. It can report to the Gambling Commission that it is adequately capitalized. And increased revenues can increase the sales prospects of the business. On this last point, it should not be understated that Mr. Coon contractually agreed to “oversee the Company’s business with the goal of making it profitable and attractive for sale.” CP at 364. Upon such a sale, Mr. Coon would

enjoy the first \$5,000,000 of net proceeds. CP at 365. Mr. Coon had much to gain by inflating Lakeside's balance sheets.

Yet Mr. Coon argues he never "received" rebated wages because he never personally met Ms. Jumamil and took no owner distributions from the casino. *See* CP at 87–88. This narrow reading of the statute—apparently requiring the literal, face-to-face transfer of funds to Mr. Coon—does not comport with the liberal interpretation required by our courts. The jury found that Ms. Jumamil's wages were rebated—willfully at that. The ultimate beneficiary should bear ultimate responsibility.

#### **G. Attorneys' Fees and Expenses.**

Attorneys' fees and costs are available to a prevailing plaintiff establishing either an unlawful rebating of wages or willful withholding of wages. RCW 49.52.070. The same is true where a violation of the Minimum Wage Act is established. RCW 49.46.090(1). The award of fees is mandatory. RCW 49.52.070 (defendants "shall be liable"); RCW 49.46.090(1) (same). Plaintiff therefore requests an award of reasonable attorneys' fees and expenses should the Court rule in her favor. *See* RAP 18.1.

## V. Conclusion

The exploitation that occurred in this case is appalling. No sooner can a casino require its dealers to gamble than a restaurant can require its wait staff to buy and consume alcohol. Both are vices with substantial potential for harm. Compliance cannot be coerced by employers—no matter how profitable.

Mr. Coon harmed his employees, Ms. Jumamil among them. His proclamation that he bears no fault because he willfully blinded himself to the misconduct of the very agents he hired offends Washington's place as a champion of workers' rights. So too does Mr. West's narrow reading of the wage rebating prohibition. Neither respondent is absolved of liability simply because Ms. Jumamil never literally cashed her paycheck and handed them cash.

Ms. Jumamil respectfully asks this Court to:

- (1) Reverse the trial court's summary judgment dismissal of Mr. Coon on *both* her wage rebating *and* willful withholding claims;
- (2) Hold Mr. Coon liable for the casino's rebating *and* willful withholding of Ms. Jumamil's wages as a matter of law;
- (3) Reverse the trial court's summary judgment dismissal of Mr. West on her wage rebating claims;

- (4) Award attorney fees and expenses on appeal as permitted by law; and
- (5) Grant any further relief that may be necessary to achieve justice.

Respectfully submitted,

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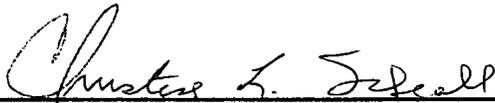
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 18th day of October 2012, I did serve via email, a true and correct copy of the foregoing by addressing and directing for delivery to the following:

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