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STATE OF WASHINGTON

No. 81202-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GERALD ROBERT KINGEN and KATHRYN KINGEN, Husband and Wife, and the Marital Community Comprised Thereof,

and

SCOTT G. SWITZER and CHERI SWITZER, Husband and Wife, and the Marital Community Comprised Thereof,

Petitioners,

v.

EUFEMIA "EMMA" MORGAN, NANCY PITCHFORD, and DANIEL McGILLIVRAY, Individually and on Behalf of all the Members of the Class of Persons Similarly Situated,

Respondents.

AMICI CURIAE MEMORANDUM OF SEVEN STATEWIDE BUSINESS GROUPS SUPPORTING THE PETITION FOR REVIEW: THE ASSOCIATION OF WASHINGTON BUSINESS, THE NATIONAL FEDERATION OF INDEPENENT BUSINESS LEGAL FOUNDATION, THE WASHINGTON RETAIL ASSOCIATION, THE WASHINGTON FOOD INDUSTRY, THE WASHINGTON STATE FARM BUREAU FEDERATION, THE RECREATIONAL GAMING ASSOCIATION OF WASHINGTON, AND THE WASHINGTON CONTRACT LOGGERS ASSOCIATION

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Kristopher I. Tefft, WSBA #29366
ASSOCIATION OF WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
(360) 943-1600
Attorney for Amici Curiae

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I. INTRODUCTION

This case raises an issue of first impression concerning the meaning of "willfulness" under our state's statutory scheme providing for double damages and personal liability as a penalty against employers for the "willful" withholding of wages, RCW 49.52.050-070. Specifically, can an employer be held to have acted "willfully" and "with intent to deprive the employee of any part of his wages" when its failure to pay claimed wages was the result of a legally imposed, rather than financial or simply volitional, inability to pay?

The seven statewide business organizations set forth in Section II of this memorandum urge the court to grant this petition for review and reverse the published decision of the Court of Appeals. Amici believe the lower court's analysis extends this court's holding in *Schilling v. Radio Holdings, Inc.,* 136 Wn.2d 152, 961 P.2d 371 (1998) well beyond its reasonable scope and thereby misconstrues the underlying statute. Because the matter concerns the proper enforcement of our state's laws governing the payment of wages between employer and employee, it involves an issue of substantial public importance, as reflected in the diversity of employer interests represented herein. Accordingly, the petition merits review under RAP 14.4(b)(1) and (4) respectively.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Although diverse in size, structure, membership, and industry representation, the seven statewide business organizations set forth below share a common interest in the issue presented in this review because these organizations represent tens of thousands of Washington companies that employ over one million Washington workers. These companies are subject to the wage payment enforcement provisions of chapter 49.52 RCW. Unfortunately, some of these companies may face periods of operating or closing operations under the protection of federal bankruptcy law. These companies therefore have a direct interest, mediated through their membership in these organizations, in the interpretation and application of statutes allowing for the extra-corporate imposition of exemplary damages in wage payment disputes when there is a supervening legal inability to pay wages.

A. THE ASSOCIATION OF WASHINGTON BUSINESS

The Association of Washington Business ("AWB"), founded in 1904, is the state's oldest and largest general business trade association. AWB represents over 6,500 member businesses, of whom 85 percent are small businesses employing fewer than 50 workers, and who are engaged in all aspects of commerce in Washington. In total, AWB members employ over 650,000 individuals in Washington. Acting as the state's

chamber of commerce, AWB is an umbrella organization representing the interests of 114 trade and business associations engaged in industry-specific activities as well as 56 local and regional chambers of commerce across Washington.

B. THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation") is a nonprofit public interest law firm established to protect the rights of America's small-business owners. It is the legal arm of the National Federation of Independent Business ("NFIB"), the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. NFIB has over 300,000 members, including over 8,000 in Washington. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files amicus briefs in courts throughout the country in cases that will impact small businesses.

C. THE WASHINGTON RETAIL ASSOCIATION

The Washington Retail Association ("WRA") represents retailers' interests before state and federal government agencies. WRA has

approximately 2800 storefront member companies who employ thousands of workers in our state.

D. THE WASHINGTON FOOD INDUSTRY

Since 1899, the Washington Food Industry (WFI) has been representing the interests of the independent grocery industry in Washington state. WFI has approximately 600 member companies spanning from growers to grocers.

E. THE WASHINGTON STATE FARM BUREAU FEDERATION

The Washington State Farm Bureau Federation ("WSFB") represents family farms and ranches in our state. WSFB has approximately 35,000 member families, with 25 local chapters representing residents of every county in Washington.

F. THE RECREATIONAL GAMING ASSOCIATION OF WASHINGTON

The Recreational Gaming Association of Washington ("RGA") incorporated in 1998 as a non-profit 501(c)(6) trade association and represents over half of the 83 licensees that operate non-tribal card rooms across Washington. It also provides associate membership to vendors and/or service suppliers that provided goods and services to the card room industry. RGA members and non-members employ over 10,000 Washington workers and, from time to time, are forced to declare

bankruptcy. In fact, prior to filing bankruptcy, the employer in this case was a member of the RGA. It follows that other licensees would be potentially subject to the penalties assessed against the employer in the case at issue.

G. THE WASHINGTON CONTRACT LOGGERS ASSOCIATION

The Washington Contract Loggers Association ("WCLA") serves independent logging companies and represents their interests before state and federal government. Formed in 1970, WCLA has over 1,000 member companies.

III. ISSUE OF CONCERN TO AMICUS CURIAE

Does an employer who fails to pay wages owed to an employee act "willfully" and with "intent to deprive the employee" for purposes of RCW 49.52.050, meriting a penalty including exemplary damages under RCW 49.52.070, when the employer was under a legal inability to pay due to proceedings under federal bankruptcy law? *Cf. Pet. for Review* at 1-3 (Issue 1-5).

IV. STATEMENT OF THE CASE

For brevity's sake, amici adopt, as if set forth herein, the Statement of the Case provided by petitioners Kingen and Switzer in their *Petition for Review* at pages 7-14.

V. REASONS TO ACCEPT REVIEW

A. *SCHILLING* IS DISTINGUISHABLE AND DOES NOT CONTROL.

This case turns on the proper definition of the statutory term "willful" in the wage payment context. The Court of Appeals correctly set forth the recognized gloss on this term: "Willful means 'merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Morgan v. Kingen*, 141 Wn. App. 143, 152-53, 169 P.3d 487 (2007) (quoting *Schilling*, 136 Wn.2d at 159-60). But the Court of Appeals erred, significantly, by resolving the case as if it were controlled by *Schilling*'s "financial inability" holding.

Schilling presented a fairly unsympathetic set of facts whereby employees went unpaid for over a year during which time the employer began facing financial difficulties, stopped issuing paychecks, began issuing essentially IOUs, devised a scheme whereby unmet payroll would be covered by the proceeds of selling the company, created a set-aside wage payment fund, and then used the majority of the fund to settle a sexual harassment allegation against the employer. *Schilling*, 141 Wn.2d at 155-56. The sale fell through, proceeds never materialized, the set-aside fund was inadequate, and the employer deliberately offered

employees settlement offers amounting to a fraction of their owed wages. *Id.*

On these facts, this court held[1] that, since the employer's financial troubles fell short of bankruptcy, "[i]n the absence of a clearly demarcated test for financial inability to pay, we cannot conclude Bingham's failure to pay Schilling was anything but willful under our cases." *Id.* at 164.

B. LEGAL INABILITY TO PAY IS NOT INTENTIONAL REFUSAL TO PAY.

This case, by contrast, provides the common-sense demarcation. As soon as the United States Bankruptcy Court, on motion of the bankruptcy trustee, issued an order involuntary converting the petitioners' operation to a liquidation under Chapter 7 of the Bankruptcy Code, petitioners' assets were seized and they lost any legal control over the funds from which employees could have been paid. This was not a mere "financial inability" to pay. This was now a legally imposed inability. At this point, the failure to pay was not volitional.

[1] Whether the *Schilling* holding, even on these facts, represents the thinking of the current court is also in some doubt. Five members of the *Schilling* majority, including its author, are no longer members of the court while all three dissenting justices, who would find financial inability to pay is a defense to willfulness, remain members of the court. Given the clear demarcation between the facts in this case and *Schilling*, this case provides a suitable vehicle for employers and employees to obtain updated guidance on the proper boundaries of "willfulness" under RCW 49.52.050-.070.

Notably, despite petitioners' lobbying efforts, (Clerk's Papers ("CP") at 469; 474; 490) the bankruptcy court, as the Court of Appeals itself noted, "was unwilling to allow the distribution of any of the seized funds to pay wages in view of the Bankruptcy Code's specification of administrative priorities." *Morgan*, 141 Wn. App. at 151. This was not a volitional failure to pay.

The source of the Court of Appeals' error may lie here:

> As of the time of the conversion, the employees had earned unpaid wages for two pay periods: March 10 to 23, 2003 and March 24 to April 6, 2003. The total unpaid wages for these two periods was then estimated to be over $179,000. When the bankruptcy trustee seized the assets of Funsters on April 7, the date the bankruptcy court converted the case to a Chapter 7 liquidation, there was only $85,823.23 in cash. This amount was insufficient to pay the earned wages of the employees.

Morgan, 141 Wn. App. at 151. The implication is that even if the liquidation order divested petitioners from legal control over their assets, the failure to pay occurred for two pay periods prior to conversion. But this view confuses the end of a pay period with pay day. It is common for a brief interval to pass between the end of a pay period and the issuance of a paycheck. *See* WAC 296-126-023; *see also Champagne v. Thurston County*, ___ Wn.2d ___, ___ P.3d ___ (Feb. 14, 2008), Slip Op. at 16 (finding no willful withholding of wages in lag time between end of pay period and pay day).

In this case, pay day for the pay period ending April 6th was April 11th. (CP at 488-89). The remaining outstanding liability from the prior pay period ending March 23, with pay day on March 28, included paychecks issued but not cashed. (CP at 121; 387; 489; 1584; 2525). Even if there were pre-conversion liability for unpaid wages from the earlier pay period, it would appear to be less than 15% of the overall amount claimed -- $23,000. *Morgan*, 141 Wn. App. at 157. Assuming that fact, it does not by itself dictate a finding of willfulness for either that claim or for the later pay period claim, nor does it justify the imposition of double damages on either claim. Especially unfounded is the Court of Appeals imposition of double damages on the claimed amount not due until after the post-conversion pay day.

C. THE COURT OF APPEALS DECISION SETS A PRECEDENT HARMFUL TO OUR STATE'S BUSINESS CLIMATE.

The Court of Appeals decision seems to suggest that continuing to operate a business "despite its financial difficulties" is somehow improper, *Morgan*, 141 Wn. App. at 155-56, and therefore that if operators are unable to get it back on track, the "penalty" for this failure will be personal liability for double damages. The court seems to suggest that if a business fails to voluntarily terminate its operations when a reviewing court, substituting its business judgment for that of the owner, thinks it

should have, then RCW 49.52.050-.070 operates as a kind of personal guarantee statute to "ensure wages are paid if the employer files for bankruptcy." *Id.* at 156. There is simply no support in the law, legislative intent, or public policy for reaching that conclusion.

Indeed, the transformation of RCW 59.52.050-.070 from a penalty to deter intentional misconduct to a personal guarantee statute even when an employer is faced with the legal inability to make payroll has significant ramifications for entrepreneurship in Washington. It would have a chilling effect on the development of new business in the state when an automatic legal penalty for the failure of that business is personal liability for double damages on a potential wage claim against assets over which the business has lost legal control. This burden would obviously fall disproportionately on the state's small businesses.

A purpose of the corporate veil is to protect risk-taking. A purpose of the bankruptcy system is to allow a fresh start amidst a failure. Both policies are thwarted, and entrepreneurship suffers, under a precedent that too quickly disregards the corporate form and misapprehends the effect of a bankruptcy divestiture on an employer's ability to pay wages.

For these reasons, amici encourage the court to accept review and reverse the decision of the Court of Appeals.

Respectfully submitted this 7th day of March, 2008.

Kristopher I. Tefft, WSBA #29366
Attorney for Amici Curiae Business Organizations