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No. 57938-0-I

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,

vs.

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

Respondents.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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PETITION FOR REVIEW

ORIGINAL

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COURT RULES

RAP 13(b)

I. IDENTITY OF PETITIONER AND DECISION FOR WHICH REVIEW IS SOUGHT

Gerald and Kathryn Kingen and Scott and Cheri Switzer, defendants and appellants below, hereby petition the Supreme Court for review of (1) the Court of Appeals' final decision in this action filed October 8, 2007, and (2) the Court of Appeals' order denying Petitioners' Motion for Reconsideration, filed December 7, 2007. Copies of that decision and order are attached hereto as Appendices A and B.

II. ISSUES PRESENTED FOR REVIEW

1. Where statutes (in this case the Washington "Anti-Kickback" Act) expressly require that personal liability of an officer or agent for unpaid wages and a double damage penalty must be premised on findings by the court of "*wilful*" and "*intentional*" misconduct, can those express elements be ignored by the court and personal liability nevertheless imposed?

2. Should this Court's decision in *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998), be construed so as to permit the imposition of liability without the need for a factual finding that the defendant acted "wilfully" and with the "intent to deprive" employees of wages, and so as to *mandate* the imposition of liability in any case involving something other than inadvertence or a bona fide dispute over the obligation to pay wages?

3. Can an officer of a corporate employer be reasonably deemed, as a matter of law, to have acted "wilfully" and with the "intent to deprive" employees of wages where (1) the nonpayment of wages did not occur until

after the corporation was ordered into Chapter 7 bankruptcy and a court-appointed Trustee immediately assumed exclusive control over the company's operations and assets (including all funds to pay wages), (2) the decision to deny the payment of wages was made solely by the Bankruptcy Court, (3) the defendant officers were both practically *and legally* divested of any and all control over the conduct of the business and the payment of wages, and (4) the trial court expressly declined to find that the defendants had the intent to deprive employees of wages?

4. Can a defendant officer be reasonably deemed, as a matter of law, to have acted "wilfully" and with an "intent to deprive" employees of wages based solely upon his good faith decision to continue operating a business in the face of financial difficulty, where (1) no expert testimony was offered to establish that the defendant acted unreasonably by keeping the business up and running, (2) the Bankruptcy Court had implicitly acknowledged the reasonableness of the defendant's reorganization effort by authorizing the continued operation of the business, and (3) there was no evidence to suggest that shutting the business down prior to the seizure of all assets by the bankruptcy court would have made any material difference in the outcome to employees?

5. As a matter of public policy, should an officer of a corporate employer which fails in its efforts to reorganize be held strictly liable for double the amount of unpaid wages for making a good faith attempt to both (1) save a financially distressed business from liquidation and (2) continue to employ and pay its workers?

6. Can an officer or agent of an employer be deemed, under RCW 49.52.050 and .070, to have unlawfully withheld from an employee that part of his wages which the employer is required by law to withhold for the payment of federal and state taxes?

III. INTRODUCTION

In *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998) the Washington Supreme Court established a new and far-reaching interpretation of Washington's wage withholding statutes, RCW 49.52.050 and .070. These statutes clearly provide that liability of an employer for double damages based on failure to pay wages is dependent on the following express findings:

- RCW 49.52.050 - a criminal statute: an employer cannot be held liable unless he "***wilfully and with intent to deprive*** the employee of any part of his wages, shall pay an employee a lower wage than the wage such employer is obligated to pay..."¹

- RCW 49.52.070 - the accompanying civil statute - provides that an employer will be held civilly liable for "twice the amount of the wages unlawfully rebated or withheld" upon a determination of violation of the above criminal statute; i.e. a finding that the employer acted "***wilfully and with intent to deprive the employee of any part of his wages...***"

Schilling was a startling departure from existing Supreme Court precedent. More important, it patently derogated from the express terms of

¹This statute was passed in 1936 and was known as the "Anti-Kickback" Law referring to a point in history when employers required employees to "kick back" part of their wages to obtain employment.

RCW 49.52.050 and .070. In the case at bar, *Schilling* has been interpreted by the Court of Appeals to hold that an officer or agent of an employer could be held personally liable for twice the employer's unpaid wages without the need for a finding of either "wilful" or "intentional" conduct--the expressly required elements for liability under the statutes. In short, *Schilling* implied that those legislatively mandated elements of "**wilful**" conduct and "**intent** to deprive" an employee of wages would be *imputed* to an officer or agent as a matter of law. Only two isolated instances could relieve an employer from strict liability: (1) where the nonpayment arises as a result of carelessness and (2) where there is a bona fide dispute over the obligation to pay wages. Those are rare circumstances. *See* Appendix D.²

In a compelling and well-reasoned dissenting opinion, Justice Alexander condemned the majority's overt disregard of the express prerequisites to liability set forth in the text of RCW 49.52.050-- "**wilful**" and "**intentional**" conduct by the employer. He opposed the intellectual sleight of hand by which the *Schilling* court had attempted to transform statutes requiring the highest level of intentional wrongdoing into a rule of absolute liability subject only to the two rare and arbitrarily picked "exceptions." In the view of Justice Alexander, the *Schilling* opinion usurped the legislative authority to expressly require a finding of "wilful" and "intentional" conduct by the employer as a prerequisite to an employer's liability for unpaid wages and a draconian penalty-- double the unpaid wages.

For the last decade, the Court of Appeals of this state has interpreted

²"Bona fide dispute" appears to be limited to instances such as where the employer believes the work was not done by the employee.

the Supreme Court's opinion in *Schilling* to have virtually excised from RCW 49.52.050 the legislatively-mandated elements of "wilful" and "intentional" wrongdoing by an employer. The appellate court reads this case to have *mandated* the imposition of personal liability for exemplary damages in each and every case except those falling neatly within one of two discrete exceptions recognized by the Court. We suggest that the Washington Supreme Court in *Schilling* never intended the drastic result spawned by the opinion based on the wholesale judicial rewriting of the statutes at issue.

Up until now, the Supreme Court has had no occasion to review the Court of Appeals' interpretation of *Schilling* made in this case. It has not considered, it appears, the far-reaching and detrimental consequences of a policy that would make the officers and agents of a financially distressed employer virtually the insurers of a company's wage obligations. To date, the decided cases have either fallen safely within the two arbitrary exceptions of "carelessness" or "bona fide dispute" or they have involved clear-cut instances of "wilful" and "intentional" conduct.

The case at bar is one of first impression. It presents, for the first time, a set of facts that addresses head-on the question of whether this Court, in *Schilling*, really intended to literally excise from RCW 49.52.050 the legislatively-enacted requirements of "wilful" and "intentional" employer wrongdoing. It also addresses the question of whether this court really intended to substitute a judicially-created rule of absolute liability (subject only to two arbitrary exceptions) for the express statutory mandates.

This case presents no facts from which it can reasonably be concluded that the defendant officers acted "wilfully" and with the "intent to deprive"

employees of wages. The circumstances, moreover, do not fall neatly within either of the two narrow "exceptions" arbitrarily endorsed by *Schilling*. What distinguishes this case so profoundly from those that have come before it is the fact that here, the nonpayment of wages was entirely beyond the control of the employer/defendants. Inability to pay occurred only after the company had been ordered involuntarily into Chapter 7 bankruptcy, and all of its monies immediately seized by order of the bankruptcy court. Non-payment happened after the defendant officers were both practically *and legally* divested of all control over the company and the payment of any debts--including payroll. Had the employer touched one dollar of the seized funds, it would have been in serious contempt of the bankruptcy court.

This case brings into stark relief the disjointed state of the law that has evolved out of this Court's decision in *Schilling*. By applying the judiciously created fiction of "imputed intent" to an employer who, as a matter of law, had neither the control nor the authority to prevent the nonpayment of wages, the Court of Appeals has taken *Schilling* to the snapping point-- both legally and logically. As a result of its published decision, an officer or agent of a financially distressed business in this state can now expect to be held *per se* liable for whatever wage obligations have been incurred if his attempts to salvage the business fail. That hammer falls regardless of the absence of "wilful" and "intentional" conduct on his part *and regardless of the fact that, practically and legally, he has not a jot of control, including the power to pay wages under a bankruptcy court order.*

The inevitable consequence of the Court of Appeals' decision is clear: The decision-makers for businesses in financial distress will be justifiably

deterred from attempting to prevent liquidation or preserve the jobs of their employees. The personal price of failing to achieve that objective is way too high. We respectfully submit that it is time for this Court to reconsider or clarify its decision in *Schilling*. Judicial interpretation should not make the express legislative requirements for liability under RCW 49.57.050-070-- “wilful” and “intentional” wrongdoing-- nonexistent or meaningless.

IV. STATEMENT OF THE CASE

The class action under review was instituted by the former employees of Funsters Grand Casino, Inc. (“Funsters”) against two of the corporation’s officers and shareholders, Gerald Kingen (“Kingen”) and Scott Switzer (“Switzer”). The plaintiff employees sought to hold Kingen and Switzer personally liable, under RCW 49.52.050 and .070, for the amount of wages owed by the company at the time of its Chapter 7 bankruptcy. Liability was sought by the employees despite the fact that all monies available to pay the wages were immediately seized. Plaintiffs also sought an award of punitive “double damages” and attorney fees pursuant to the statute. (CP 121.)

Kingen and Switzer were officers of “Funsters,” a restaurant and mini-casino business that employed between 160 and 300 workers. (CP 358.) For most of the two-year lifespan of the business, the company experienced significant financial difficulties. (CP 477, 479-82.) As a result, in late September 2001, Funsters entered Chapter 11 bankruptcy. (CP 469.)

For the next six months, Kingen and Switzer, together with their co-owners, continued to operate the business as debtors in possession. (CP 469.) They pumped a lot more of their own money into the company in hopes of getting it on its feet. Employee wages were paid as a top priority during the

Chapter 11 and Kingen and Swtizer took no compensation of any nature.³

On April 7, 2003, the Chapter 11 proceeding was precipitously, and *involuntarily*, converted to a Chapter 7 liquidation. (CP 469, 486-487.) At the time of the conversion, the employees' wages for the previous two-week pay period ending April 11 had not yet been paid. Notably, those wages had not even come due to be paid when the Chapter 7 bankruptcy was imposed. (CP 488-489.) In addition, there remained a smattering of paychecks outstanding from the previous pay period ending March 28 that had not yet been cashed. (CP 121, 397, 489, 1584, 2525.)

Immediately upon entry of the April 7, 2003 order of liquidation, the Chapter 7 Trustee seized all of the company's assets and assumed exclusive control of the business. That happened *within an hour* of the bankruptcy judge's inking of the order converting the proceeding to Chapter 7. Even before the doors of Funsters opened for that day's business, the bankruptcy judge wrested all power of the Funsters owners to do anything. All of the business' bank accounts--including its payroll account--were immediately closed. (CP 469, 474, 490.) From that point forward, Kingen and Switzer were both practically *and legally* divested of any and all control and authority over the business and payment of wages. (CP 371, 387, 393, 475, 488-89.)

Although Kingen, Switzer *and* the bankruptcy trustee aggressively lobbied the Bankruptcy Court to use the cash assets of the business to pay the employees (as would have been done but for the conversion to Chapter 7), their efforts were unavailing. (CP 469, 474, 490.) The Bankruptcy Court

³The defendants never got paid one cent for managing Funsters from its birth to its demise.

determined that under federal law, wages incurred during a Chapter 11 proceeding were an “administrative expense” not entitled to any special priority. As a result of that surprising order, the employees’ wages were never paid. (CP 352-53, 385-86, 470.)

The material facts of this case are largely undisputed. *First*, no issue exists that the decision to deny the payment of wages was made entirely by the Bankruptcy Court. *Second*, Kingen and Switzer resisted that decision every step of the way. They went so far as to agree to subordinate their own “superpriority” liens for repayment of their debtor-in-possession cash influges to get the employees paid. (CP 316-19, 366, 372, 385-86, 469, 474, 490.)

Third, it is also undisputed that, well before the time the vast majority of the subject wages came due, all of the company’s monies had been seized by the Chapter 7 Trustee and were within the exclusive control of the Trustee in Bankruptcy. (CP 488.) That occurred immediately after the Chapter 7 conversion was ordered.

Fourth, it is undisputed that with the conversion to Chapter 7, Kingen and Switzer were both practically *and legally* prevented from exercising any control at all over the business. They did not have the authority to so much as write a check.

Fifth, during the entire two-year period of time that Kingen and Switzer did have control of the business, *never once* did the employees *not* get paid. (CP 366, 370-72, 400, 473-74, 480-81, 485, 488-89, 1585.) A number of other pressing obligations of the business--including obligations for which Kingen and Switzer stood to be personally liable--went unpaid so that payroll was met as the highest priority. (CP 485.)

Sixth, it is also undisputed that Kingen and Switzer never themselves profited as a result of their operation of the business. They walked away from the bankruptcy empty-handed. They lost the entirety of their multi-million dollar investment. They were left personally liable for several million dollars worth of tax liabilities and personally guaranteed debt. (CP 522-23.) *Never once* during the entire life of the business did Kingen and Switzer ever receive so much as a dime of return on their investment or take any compensation at all for their nearly full-time efforts to salvage the business. (CP 475, 493.) Not one time was there so much as an *allegation* that Kingen and Switzer took money from the venture. They paid the employees, however, as long as they legally could. No finding of “*wilful*” and “*intentional*” conduct on their parts could possibly be made. And none was made-- although required by law.

In arguing their case to the trial court, the plaintiff employees made no serious attempt to establish “wilfulness” and “intent to deprive” employees of wages as expressly required by the statute. (CP 115-32.) Instead, they dodged the clear wording of the statute. The class plaintiffs argued that because the facts of the case did not fit squarely within either of the two narrow “exceptions” to liability recognized by *Schilling*, Kingen and Switzer should *as a matter of law* be held liable for the employees’ unpaid wages-- together with statutory penalties amounting to twice the amount of the unpaid wages. (CP 126-31, 2526-33.) They asked the court to just ignore the words “wilful” and “intent” as being at all relevant to analysis of the case - citing *Schilling* as the basis for turning a blind eye.

Shortly after the action began, the plaintiff employees moved for

summary judgment on the issue of liability. (CP 115-32.) The trial court, also citing *Schilling* as the applicable authority, agreed with the plaintiffs. The trial court held that it was constrained to forgo any actual inquiry into whether Kingen and Switzer acted “wilfully” and “intentionally.” Rather, the trial court *imputed* to them, as a matter of law, those elements which must be found support liability. (CP 1577-62, 1639-54.) In a nutshell, the trial court effectively treated the words “wilful” and “intentional” as either nonexistent or surplusage. The trial court proceeded--despite the lack of any actual evidence of wilfulness or intent--to grant the employees’ motion for summary judgment. (CP 551-52.) Significantly, the trial court expressly premised its ruling on the “assumption” that Kingen and Switzer did not have any actual, or subjective, intent to deprive Funsters’ employees of wages. (CP 1651.)

From there, the trial court proceeded to adjudicate the issue of damages, ultimately finding Kingen and Switzer to be liable to plaintiffs for \$120,714 in unpaid wages and employment taxes, and *another* \$291,624 in punitive damages, interest, and attorney fees. (CP 1681.)

The Court of Appeals upheld the trial court’s entry of summary judgment. It found Kingen and Switzer personally liable as a matter of law for the wages that the Bankruptcy Court had refused--over defendants’ objection--to pay from the company’s cash assets. *See* Appendix A. The Court of Appeals’ decision was also premised squarely on the Supreme Court’s opinion in *Schilling*. It interpreted that case as having created a rule of absolute liability subject to only the two judicially-created defenses set forth in *Schilling*. It gave short shrift to the defendants’ lack of any control

over the company and the legally-imposed “inability to pay.” Accordingly, it made no difference, in the Court of Appeals’ view, that Kingen and Switzer never “**wilfully**” or “**intentionally**” failed to pay wages. It gave no importance to the fact that they lacked the practical and *legal* ability to pay them. It paid no mind to the trial court’s determination that the express requisites for liability, wilful and intentional conduct were *assumed to not exist*.

The Court of Appeals went even further. In a sweeping extension of existing law, it held that where an officer or agent opts to keep a financially distressed business up and running, he may *by that act alone* be deemed to have acted “wilfully” and “intentionally” to deprive employees of wages if the company ends up in a Chapter 7 bankruptcy and it legally can’t pay wages, even if it wanted. It held that in such a circumstance, liability could be determined as a matter of law--without the need for so much as a word of testimony from a businessperson or other competent witness regarding the reasonableness or prudence of the defendant’s decision. Put simply, the Court of Appeals said *it* could decide the quintessential business decision, “should we close the doors,” without any input from any businessperson.

Following entry of the Court of Appeals’ decision, Kingen and Switzer filed a motion for reconsideration addressed to a number of serious factual errors material to the Court of Appeals’ analysis.⁴ The motion was summarily denied.

⁴ Most significantly, the Court of Appeals’ conclusion that there would have been insufficient funds, regardless of the conversion to Chapter 7, to pay Funsters’ employees, was patently contradicted by the evidence. As pointed out in Appellants’ Motion for Reconsideration, the Court of Appeals simply got the numbers wrong, relying upon the unsupported allegations contained in the plaintiffs’ early pleadings rather than the evidence and the trial court’s findings. *See* Appellants’ Motion for Reconsideration.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review by the Washington Supreme Court is warranted in the present case because it presents issues of substantial public importance. Also, the Court of Appeals' decision is in serious conflict with previous decisions of this Court. RAP 13(b)(1), (4).

A. The Court of Appeals' Decision Presents Issues of Substantial Public Importance Because It Is an Affront to the Power of the Legislature to Make Law.

RCW 49.52.050 and .070 together define the one circumstance in which an "officer, vice principal or agent" may be held personally liable for an employer's unpaid wage obligations. RCW 49.52.050 is a criminal statute providing:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or with elected public office, who. . . (2) *wilfully and with intent to deprive the employee of any part of his wages*, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee. . . shall be guilty of a misdemeanor. [Emphasis added.]⁵

RCW 49.52.070 provides a corresponding--and directly linked--civil remedy for violation of that section:

Any employer and any officer, vice principal or agent of any employer *who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050* shall be liable in a civil action by the aggrieved employee or his 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: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

⁵The statute was passed in 1936 and was known as the "Anti-Kickback" Law, referring to a period when employers required employees to "kick-back" part of their wages to keep their jobs.

See Appendix C. Under the express terms of these companion statutes, therefore, there can be no liability for the wrongful withholding of wages absent a finding that the defendant acted both "*wilfully*" and with the specific "*intent to deprive*" employees of wages. Those are the defining elements of liability under the statute. The legislature expressly said so.

The Washington Legislature made civil liability under RCW 49.52.070 contingent upon guilt under RCW 49.52.050--a penal statute. Therefore, it required a finding of *specific intent*, an extremely significant consideration. It precludes any possible inference that the Legislature intended for the mental state which supplies the foundation for criminal liability under RCW 49.52.050 be ignored under RCW 49.52.070 and disregarded as mere surplusage. It further shows that the law was not designed to impose strict liability on an employer by the mere fact that wages were unpaid.

Even a broad and liberal construction of RCW 49.52.050-070 cannot negate or diminish the import of these essential, and highly specific, elements of liability. The term "*wilful*," as used in RCW 49.52.050 requires that the failure to pay was "volitional." It must be found that the person "knows what he is doing, intends to do what he is doing, and is a free agent." *Schilling*, 136 Wn.2d at 159-60. The word "*intent*," as in the term "*intent to deprive*," requires that the person have acted with the *objective or purpose* of bringing about a particular result. RCW 9A.08.010(a).⁶ Both of these elements require a subjective, individualized assessment of the actor's mental state and

⁶ RCW 9A.08.010(a) provides that "[a] person acts with intent or intentionality when he acts with the objective or purpose to accomplish a result which constitutes a crime."

a *factual finding* of the requisite elements of “*wilful*” and “*intentional*” conduct. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

Notwithstanding the clear and unambiguous language of RCW 49.52.050 and .070, the Court of Appeals in this case simply disregarded the clear wording of the statute. From the confusing and rather ambiguous wording set forth in *Schilling*, it fashioned, for the first time, an unequivocal rule that personal liability under RCW 49.52.070 no longer requires a finding that the defendant “*intended to deprive*” employees of wages. It held that the element of “*wilfulness*” will be *imputed* to defendants as a matter of law in all cases except those involving carelessness or a bona fide dispute.

Going one more unprecedented stride, the Court of Appeals turned the legislatively-prescribed burden of proof on its head: No longer, stated the court, is it incumbent upon the plaintiff to establish any of the requisite elements of proof; liability will be *presumed* unless the defendant proves that it qualifies for one of the two arbitrary “defenses.” Those “defenses,” tellingly, are not stated in the statutes. They are also judicially manufactured. The court excised the important statutory language and inserted other language, simply putting the language of the statute aside.

By effectively abandoning the legislatively-mandated elements of “*wilfulness*” and “*intent*,” the Court of Appeals’ decision thumbs its nose at one of the most well entrenched and oft-cited principles of law in Washington: that where a statute is plain and unambiguous on its face, it is not subject to judicial “interpretation.” Its meaning must be derived solely from the express language of the statute itself. *Cerillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn.

App. 351, 358, 115 P.3d (2005). Notably (and ironically), this well settled rule of construction was specifically embraced by the Washington Supreme Court in *Schilling* when it refused to countenance a “rewriting” of the very statute at issue. In that case, the court refused to create a generalized “insolvency” exception to liability under the statute.⁷ 136 Wn.2d at 164-65.

As explained by the Court in *Schilling*,

The Legislature is, of course, free to add a further exception to the double damages provision of RCW 49.52.070 if it so chooses. However, we are not free to engraft such an exception to the statute where the plain language of the statute is to the contrary.

136 Wn.2d at 164-65 [emphasis added]. We wholeheartedly agree. In the same vein, the court is barred from *erasing* language from the statute-- in this case the words “wilful” and “intent.” Those elements are stated clearly, without ambiguity, and must be found by the court to exist as a prerequisite to liability.

Quite aside from ignoring legislative authority manifest in the Court of Appeals’ decision, an equally troubling intrusion into the traditional province of the jury as the ultimate finder of fact is sanctioned. The question of what does, and does not, constitute “wilful” and “intentional” conduct is undeniably an issue of fact which cannot, except in the most clear-cut instances, be determined as a matter of law. The Court of Appeals has simply

⁷ At issue was the defendant Bingham’s argument that *despite the existence of facts found by the trial court to have demonstrated wilful, intentional conduct* (namely, a raiding of the employee payroll account to settle a sexual harassment suit that threatened to cause substantial embarrassment to him and his wife), the court should recognize an across-the-board “insolvency” exception to liability. The *Schilling* court rejected the argument, observing that the Washington Legislature has provided for only one exception to liability for wilful and intentional withholding of wages under RCW 49.52.050 and .070, and that is where the employee knowingly assents to the violation of the statutes. 136 Wn.2d at 164-65.

decreed that liability *will* be imposed unless non-payment of wages arises from carelessness or a bona fide dispute. That amounts to a glaring and unwarranted departure from one of the most basic principles of American jurisprudence. The *jury* must decide if conduct is “wilful” and “intentional.” The jury can’t be told to simply ignore those words in the statute.

B. The Court of Appeals’ Decision is in Overt Conflict With Prior Decisions of the Washington Supreme Court.

In one breath, the Washington Supreme Court affirmed in *Schilling* its adherence to the terms of RCW 49.52.050 and .070 *as written*, holding unequivocally that it would not “graft” on the statute wording not expressly set out by the legislature. Notwithstanding that correct recitation of an elemental principal of statutory construction, the *Schilling* court seemed to turn 180 degrees. It effectively stated that *strict liability* applied to nonpayment of wages absent two narrow exceptions. It “un-grafted” language which *did* expressly exist in the statute. 136 Wn.2d 164-65. It was that inconsistency that puzzled and bothered Justice Alexander.

Both the *Schilling* decision and the Court of Appeals’ decision in this case (piggybacking on *Schilling*) stand in sharp conflict with the Washington Supreme Court’s decision in *Pope v. Univ. of Washington*, 121 Wn.2d 479, 852 P.2d 1055 (1993), *amended*, 871 P.2d 590 (1994). In *Pope*, the Supreme Court established that the determination of whether a particular defendant acted “wilfully” and with an “intent to deprive” employees of wages is a quintessential issue of fact which must be supported by substantial evidence. Notably, the Court in *Pope* specifically rejected the proposition that RCW 49.52.050 permits the imposition of liability without fault. It held that while

lack of intent may be established by a finding of either carelessness or a bona fide dispute, a finding of "*affirmative evidence*" of intent to deprive an employee of wages is necessary to establish liability. 121 Wn.2d at 490-91. Accordingly, the Court of Appeals' reliance in the present case on the concepts of *imputed intent*, *presumed liability*, and *strict liability* flies directly in the face of well-reasoned Supreme Court precedent.

The conflict of authority is magnified by the decision in *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001), a case decided three years after *Schilling*. There, the Supreme Court held that the element of intent required to support liability under RCW 49.52.050 and .070 could, as a matter of law, be found to exist *only* where an agent "*exercises control over the direct payment*" of the particular funds at issue, and where the agent "acts pursuant to that authority." 143 Wn.2d at 521-22. Therefore, *Ellerman* rejected the strict liability approach which *Schilling* apparently espoused. It held that where an officer or agent has neither the control nor authority to have paid the wages, he simply cannot have "**wilfully**" and "**intentionally**" deprived the employees of their pay.

Ellerman speaks directly to the situation presented by the instant case. Here, the only "withholding of wages" was the Bankruptcy Court's refusal to allow payment of the employees from the seized assets of the bankruptcy estate. At the time of the alleged "withholding," Kingen and Switzer had been legally divested of any and all control and authority over the business. They no longer had the *legal right* to control the payment of wages or make any decisions of the business. Under existing Supreme Court precedent and as a matter of common sense, Kingen and Switzer could not be deemed to

have wilfully and intentionally deprived Funsters' employees of wages.

C. An Issue of Substantial Public Importance Is Presented in this Case Because of the Tremendously Negative Effect the Ruling Will Have on Business in this State.

The practical consequences of the rule of law established by the Court of Appeals in this case will be devastating to both businesses and employees alike. By making the officers and agents of an employer personally liable for the wage obligations of their companies--regardless of fault and regardless of their inability to control the payment of wages-- businesses facing potential bankruptcy will be significantly deterred from attempting to reorganize or to otherwise avoid liquidation. The safer bet (and the *only* reasonable course of action for a prudent officer or manager) will be to let employees go at the first sign of trouble and close up shop.

The public policy ramifications of the Court of Appeals' decision are serious and far-reaching. Our state courts have long recognized the importance of the principle of limited officer and shareholder liability which serves to encourage productive business activity and make it possible for individual businesses to assume the risks necessary to compete in today's economy. That objective has been effectively undercut by the Court of Appeals in this case. The Court of Appeals decision we ask be reviewed gives business owners one more reason to believe that the state of Washington is not a good place to do business.

In addition, the Court of Appeals' decision threatens to put an immediate and significant chill on the willingness of financially distressed businesses to reorganize. Even where those efforts are likely to succeed and where the jobs of employees can reasonably be preserved, the personal risk

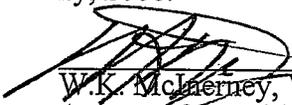
is too great for the persons who might have a modicum of control over the business's affairs. The decision, in this case, flatly undermines the most fundamental and well-recognized of policies underlying Chapter 11 of the Bankruptcy Code, which "strongly favors the reorganization and rehabilitation of troubled companies and the concomitant preservation of jobs and going concern values." *In re Northwest Airlines Corp.*, 349 B.R. 338, 380 (Bkrcty. S.D.N.Y. 2006), citing *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bkrcty. S.D.N.Y. 1996).

Sadly, the Court of Appeals' decision in this case sends a powerful message that will have a major and discernable impact on business in the state of Washington. The inevitable consequence of the Court of Appeals' decision will be to immediately deter the most capable and fiscally responsible managers from assuming control of businesses in financial distress. Control persons will be wary to do anything other than to abandon ship at the first sign of trouble. To do otherwise would expose those persons and their families to unacceptable personal risk. Employees, moreover, will find themselves no longer able to choose whether to remain with a struggling business. Their jobs will quite simply be terminated in order for the business managers to avoid the type of unacceptable result reached in this case.

VI. CONCLUSION

Based on the foregoing, Petitioners respectfully request that the Court accept review.

DATED this 7 day of January, 2008.


W.K. McInerney, WSBA 4809
Attorney for Petitioners

A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EUFEMIA "EMMA" MORGAN, NANCY
PITCHFORD, and DANIEL
McGILLIVRAY, individually and on
behalf of all the members of the class of
persons similarly situated,

Respondents,

v.

GERALD KINGEN and JANE DOE
KINGEN, husband and wife and the
marital community comprised thereof,
and SCOTT SWITZER and JANE DOE
SWITZER, husband and wife and the
marital community comprised thereof,

Appellants.

No. 57938-0-1

DIVISION ONE

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COX, J. — A critical test in an action for unpaid wages under RCW 49.52.070 is whether the employer's failure to pay wages is "willful."¹ Whether the failure to pay wages is "willful" turns on whether the employer's refusal to pay is volitional: whether "the [employer] knows what he is doing, intends to do what he is doing, and is a free agent."² A failure to pay wages for financial reasons is not recognized as a basis to show a lack of willfulness under RCW 49.52.070.³

¹ Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159, 961 P.2d 371 (1998).

² Id. at 159-60.

³ Id. at 163-65; id. at 166 (Alexander, J., dissenting).

Here, Gerald Kingen and Scott Switzer were both officers of Funsters Grand Casino, Inc., a company they operated before and after it filed for protection under Chapter 11 of the U.S. Bankruptcy Code. The trial court correctly granted summary judgment to Funsters' employees because their earned wages were not paid either by the company or by Kingen and Switzer. Moreover, the measure of exemplary damages in this case – the doubling of total wages without deductions – was correct. Finally, the trial court did not abuse its discretion in deciding the amount of attorney fees awarded to the successful employees in this suit. However, the absence of findings and conclusions for a portion of the fee award prevents our review of that portion of the award. We affirm the summary judgment order and remand to the trial court with directions concerning the award of attorney fees below and on appeal.

In the summer of 2001, Kingen and Switzer established Funsters Grand Casino, Inc., a mini-casino in SeaTac, Washington. Kingen owned a 31 percent ownership interest in Funsters, and Switzer held a 7 percent ownership interest.

As CFO, Switzer managed the casino's finances. He also acted as the company's general manager. As CEO and president, Kingen set compensation for senior employees and had authority to hire and fire employees. Both Kingen and Switzer controlled the payment of employees. They also had authority to prioritize the payment of wages and the other obligations of the company.

Funsters opened for business in August 2001 in poor financial condition. Renovation costs exceeded its estimates. Soon after the opening, the company experienced further losses from severe reduction in air traffic and hotel

occupancy in the SeaTac area due to the 9/11 terrorist attacks. More specifically, payroll checks were being returned by the company's bank to employees due to insufficient funds. Kingen, Switzer, and other owners of Funsters made capital contributions to the company in order to allow it to meet its obligations.

In August 2002, Funsters filed for protection under Chapter 11 of the Bankruptcy Code. While the company operated under Chapter 11, Kingen and Switzer hoped that the casino would turn a profit. This was based, in part, on the hope that the Washington Legislature would allow non-tribal casinos to have slot machines. This never materialized, business continued to decline, and the U.S. Trustee in the bankruptcy proceeding moved to convert or dismiss the Chapter 11 proceeding. During a hearing on the motion, the owners of Funsters were unwilling to make additional capital contributions to the company, and the bankruptcy court converted the case to a Chapter 7 liquidation on April 7, 2003.

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 \$179,000.⁴ 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. And the bankruptcy court was unwilling to allow

⁴ Clerk's Papers at 65, 121.

the distribution of any of the seized funds to pay wages in view of the Bankruptcy Code's specification of administrative priorities.⁵

Eufemia Morgan, Nancy Pitchford, and Daniel McGillivray (collectively "Morgan") filed this class action on behalf of themselves and over 180 other former employees to recover their unpaid wages. Based on RCW 49.52.050 and RCW 49.52.070, they sought personal liability for exemplary damages for the unpaid wage claims against Kingen and Switzer, the officers of Funsters. The trial court granted summary judgment to Morgan as to liability. Thereafter, following submission of additional evidence regarding exemplary damages, prejudgment interest, fees, and costs, the court entered an amended judgment against Kingen and Switzer.

Kingen and Switzer appeal. Morgan cross-appeals the award of attorney fees.

WAGE CLAIM

Kingen and Switzer argue that the trial court erred in granting Morgan's motion for summary judgment, concluding that they are personally liable for the employees' unpaid wages under RCW 49.52.070. Specifically, they argue that Morgan never established that they violated RCW 49.52.050 by "willfully and with intent to deprive" failing to pay wages. We disagree.

A motion for summary judgment may be granted when there is "no genuine issue as to any material fact and . . . the moving party is entitled to

⁵ Clerk's Papers at 352.

judgment as a matter of law.”⁶ A material fact is one on which the outcome of the litigation depends.⁷

The state legislature has shown a strong policy in favor of ensuring payment of wages by enacting criminal and civil penalties for the willful failure to pay employees the wages they have earned.⁸ In a proper case, the officers, vice principals, and agents of an employer are personally liable for exemplary damages and attorney fees for the employer's failure to pay earned wages.⁹

The purpose of these statutes is to see that employees realize the full amount of the wages to which they are entitled.¹⁰ The cases also establish that these statutes must be liberally construed to advance the legislature's intent to protect employee wages and assure payment.¹¹

“The critical determination in a case under RCW 49.52.070 for double damages is whether the employer's failure to pay wages was ‘willful.’”¹² The supreme court's test for “willful” failure to pay is simple: “the employer's refusal to

⁶ CR 56(c).

⁷ Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

⁸ Schilling, 136 Wn.2d at 157.

⁹ Id. at 158-59.

¹⁰ Id. at 159.

¹¹ Id.

¹² Id.

pay must be volitional. Willful means 'merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.'"¹³

Whether an employer acts "willfully" for purposes of the statute is a question of fact.¹⁴ But where there is no dispute as to the material facts, summary judgment is proper.¹⁵

The cases establish two instances when an employer's failure to pay wages is not willful: "the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and employee regarding the payment of wages."¹⁶

RCW 49.52.070 provides a civil remedy against the employer, its officers and agents:

Any employer and **any officer**, vice principal or agent of any employer who shall violate any of the provisions of subdivisions [RCW 49.52.050(2)] shall be liable in a civil action by the aggrieved employee or his 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**: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.^[17]

¹³ Id. at 159-60 (quoting Brandt v. Impero, 1 Wn. App. 678, 681, 463 P.2d 197 (1969) (internal quotations omitted).

¹⁴ Id. at 160.

¹⁵ Id.

¹⁶ Id.

¹⁷ (Emphasis added.)

RCW 49.52.050, to which the above statute refers, states:

(2) Wilfully [sic] and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract;

No one argues that any employee knowingly submitted to the alleged violations at issue here. Thus, the provision in the first of the two above statutes is not before us. Likewise, Kingen and Switzer do not argue that either employer carelessness or error or a "bona fide" dispute exists.

Rather, Kingen and Switzer argue that Morgan failed to establish the absence of a genuine issue of material fact whether Funsters, the employer, "willfully and with intent to deprive the employee" failed to pay wages.

Specifically, they contend that the conversion of Funsters' Chapter 11 proceeding to a Chapter 7 liquidation relieved the company (and them) of any ability to willfully deprive the employees of their wages.

This case is largely controlled by Schilling v. Radio Holdings.¹⁸ That case is very similar to this one in terms of its facts.

There, Robert Bingham, was the president and shareholder of Radio Holdings, Inc. The company began experiencing financial difficulties and stopped issuing regular paychecks to its employees. Instead of paychecks, Radio Holdings issued "advances on payroll due," which were varying cash amounts representing a portion of each employee's earned wages. The balances of the earned wages were to be paid at a later date.

¹⁸ 136 Wn.2d 152, 961 P.2d 371 (1998).

The terms of a sale of Radio Holdings to Children's Media Network (CMN) referenced the unpaid wages of employees by requiring Radio Holdings to pay them. To the extent they were unpaid as of closing, CMN was to be allowed a credit to permit CMN to pay them. CMN never paid the wages, and Bingham set aside \$25,000 to pay the wages. Because the sale did not timely close, wages continued to accrue and exceeded this \$25,000 amount. Moreover, Bingham withdrew \$13,000 from this fund to pay a former employee who threatened to sue Radio Holdings for sexual harassment.

Sarah Schilling was among the employees whose wages were unpaid. Schilling had worked without payment for a year. After the closing of the sale, CMN only paid Schilling a small portion of her back wages.

She sued Bingham for unpaid wages under RCW 49.52.070, and the trial court granted her motion for summary judgment, awarding her exemplary damages plus attorney fees and costs.¹⁹ The supreme court granted direct review.

According to that court, the critical issue in a case under the statutes before us is whether the employer's failure to pay wages was "willful." The court articulated the test as whether the employer's failure to pay was volitional: "that the person knows what he is doing, intends to do what he is doing, and is a free agent."²⁰

¹⁹ Id. at 157.

²⁰ Id. at 159.

It was undisputed that Radio Holdings paid Schilling less than what she was owed, and that Bingham was aware of this.²¹ The court determined that neither carelessness nor a bona fide dispute was at issue.

Importantly, the court expressly rejected Bingham's "financial inability" argument, noting that there is no published Washington decision that has held that an employer's financial status renders refusal to pay nonvolitional.²² The court held that the actions were knowing and intentional, and thus "willful" for purposes of liability under RCW 49.52.070.

Here, Kingen and Switzer, both of whom were officers of Funsters, continued to operate the company before and after bankruptcy proceedings. They did so despite its financial difficulties. They made decisions about payroll, controlling payments to employees and other creditors based on their decisions about which Funsters' competing creditors would be paid. They permitted unpaid wages for two pay periods to accrue to over \$179,000 as of early April 2003. Their hope that business would improve due to legislative enactments concerning gambling never materialized. The bankruptcy court ultimately converted the Chapter 11 debtor-in-possession proceeding to a Chapter 7 liquidation in light of the financial realities of the situation. This record fully supports the grant of summary judgment on the basis that nonpayment of wages was willful.

²¹ Id. at 161.

²² Id. at 164; id. at 166-67 (Alexander, J., dissenting) (acknowledging that no case had indicated that a failure to pay wages for financial reasons shows a lack of willfulness, and stating that such a test should apply).

There is no assertion and no proof that either carelessness or any bona fide dispute existed between the company and its employees over wages. Thus, we need not address those potential defenses to the employees' claims.

The supreme court expressly rejected the financial inability of an employer to pay as a defense to personal liability of its officers in Schilling. The legislature has left undisturbed that reading of the wage claim statute.²³ Thus, we conclude the bankruptcy proceeding of Funsters does not relieve Kingen or Switzer from personal liability under the statute. As Morgan argues, such a defense to personal liability for officers, vice principals, and agents of employers would severely undercut the strong legislative policy to ensure wages are paid if the employer files for bankruptcy.

Kingen and Switzer argue they have no personal liability for the unpaid wages of employees because they had no control over the payment of earned wages once the bankruptcy trustee seized Funsters' assets on conversion to Chapter 7 liquidation on April 7, 2003. They stress employees were not due to be paid until April 11, four days after the conversion. They rest this argument principally on Ellerman v. Centerpoint Prepress.²⁴

²³ See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 789, 719 P.2d 531 (1986) (legislative inaction after judicial interpretation of a statute indicates legislative approval of the court's construction of the statute).

²⁴ 143 Wn.2d 514, 22 P.3d 795 (2001).

First, they overlook the fact that two pay periods for earned wages are at issue: March 10 to 23, 2003 and March 24 to April 6, 2003. The conversion and seizure of assets were on April 7, 2003, after the last of these two periods.

Unpaid wages for the first of these periods exceeded \$23,000.²⁵ These wages were incurred and due to be paid on March 28. Significantly, this was at a time when Kingen and Switzer were operating Funsters as a debtor-in-possession under Chapter 11. The record is clear that Kingen and Switzer were in control of payments by Funsters during March 2003. In short, they cannot rely on events subsequent to March to relieve them from personal liability for unpaid wages earned during that time.

Second, Ellerman is distinguishable. There, the issue was whether Centerpoint's business manager, Betty Handly, was a "vice principal" or "agent" of the company for purposes of liability under RCW 49.52.070.²⁶ The supreme court held that Handly was not a "vice principal" or "agent" of Centerpoint for purposes of the statute because she had no authority to sign checks and had no control over the payment of its employees.²⁷ Thus, the purpose of the court's analysis was to define "vice principal" and "agent" under the statute.

Unlike Ellerman, both Kingen and Switzer were directly involved in the payment decisions regarding employees. Kingen was the CEO and president of the company, and Switzer was the CFO. They both had authority to determine

²⁵ Clerk's Papers at 65, 68.

²⁶ Ellerman, 143 Wn.2d at 519.

²⁷ Id. at 521, 523.

whether or not the employees were issued paychecks and they exercised that authority before and during the bankruptcy proceedings.

As we have stated above, they specifically exercised this authority during the Chapter 11 proceedings while Funsters was operating as a debtor-in-possession. They had control during that period of time. Thus, to that extent, Ellerman is of no help to them, even under their theory.

Third, even if we agreed that Ellerman stands for the proposition that lack of control over payment of earned wages relieves either a bankrupt employer or its officers from liability under RCW 49.52.050 or RCW 49.52.070, that would not change our conclusion in this case. Funsters had only \$85,000 in cash to pay wages exceeding \$179,000 on the date of conversion to Chapter 7. Payday was four days later. Control over the payment of wages was irrelevant, given the fact there was insufficient cash to pay the wages. This is so regardless of whether the Bankruptcy Code permitted payment on payday. The bankruptcy trustee for Funsters had insufficient funds to pay wages on payday. But, as Schilling teaches, the financial inability of Funsters to pay the earned wages on payday is not a defense to personal liability of its officers under RCW 49.52.050 and RCW 49.52.070.

Kingen and Switzer also cite two federal appellate cases, Belcufine v. Aloe,²⁸ and DeBreceni v. Graf Brothers Leasing, Inc.²⁹ Neither case controls here.

²⁸ 112 F.3d 633 (3d Cir. 1997).

²⁹ 828 F.2d 877 (1st Cir. 1987).

In Belcufine, a divided panel of the Third Circuit Court of Appeals held that officers of a corporation are not liable for employees' unpaid vacation and retirement benefits that were earned pre-petition, but that were due after the corporation filed for protection under Chapter 11 of the Bankruptcy Code.³⁰ The court reasoned that under the Pennsylvania Wage Payment and Collection Law ("WPCL"), a corporate manager's liability is contingent on the corporation's failure to pay debts that it owes.³¹ The court reasoned that once a corporation files for Chapter 11, it is obligated to pay wages and benefits only to the extent required by bankruptcy law. "Hence, when a corporation under Chapter 11 fails to make payments that the Bankruptcy Code does not permit, the contingency needed to trigger the liability of corporate managers under Pennsylvania WPCL never occurs."³²

The dissent disagreed with the majority's analysis. The dissent noted that in the absence of bankruptcy, the WPCL mandated that the company's officers would be personally liable for the unpaid benefits.³³ It then stated that whether the liability of company officers under the WPCL was properly characterized as either contingent or primary, made no difference. Analogizing the statutory framework to an ordinary guaranty, the dissent concluded that personal liability of

³⁰ 112 F.3d at 639.

³¹ Id.

³² Id.

³³ Id. at 642 (Greenberg, J., dissenting).

the individuals arose by operation of law if an employer fails to pay the obligation.³⁴ Moreover, the dissent also noted that the majority's analysis amounted to rewriting the WPCL to include a bankruptcy exception for corporate officers that was not stated in the statute.³⁵

We first note that the Pennsylvania statute³⁶ is worded differently from the Washington statute before us. Thus, it is unclear whether the legislative intents of the two statutes are the same.

Moreover, although Belcufine dealt expressly with nonpayment of benefits during Chapter 11 bankruptcy, our supreme court in Schilling specifically declined to engraft a "financial inability to pay" exception into the wage claim statute without the legislature having done so. Since that case, the Washington Legislature has not taken any steps to modify the law in response to Schilling. We decline to read into our state law a bankruptcy exception that the legislature has not enacted.

Finally, the dissent's view in Belcufine analogizes the statutory framework in that case to a guaranty by designated corporate officers of the benefits obligation of the corporation. Arguably, that analogy may also be applicable to our wage claim statute. However, we need not decide in this case whether that

³⁴ Id. at 644.

³⁵ Id. at 644-45.

³⁶ "[A]ny group of employees, labor organization or party to whom any type of wages is payable may institute actions provided under this act." Id. at 639 (quoting 43 Pa.S.A. § 260.9a(a)).

analogy is applicable to our wage claim statute because of this state's strong public policy in favor of ensuring that earned wages are paid.

DeBreceni is not applicable. The issue in that case was whether a controlling shareholder or officer is an "employer" and thus personally liable for withdrawal liability under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). Unlike ERISA, the Washington wage statutes expressly state that an "officer, vice principal or agent of any employer" shall be liable under the proper circumstances.

EXEMPLARY DAMAGES

Next, Kingen and Switzer argue that the trial court erred in calculating damages because the court awarded the employees double the gross amount of wages, without deduction for withholding taxes (federal income tax, social security, and Medicare). We disagree.

We interpret a statute to ascertain and give effect to the legislature's intent.³⁷ If the statute's meaning is plain on its face, we give effect to that plain meaning.³⁸ Plain meaning is derived "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."³⁹ If the legislature does not define a word, we give it its plain and

³⁷ In re Detention of A.S., 138 Wn.2d 898, 911, 982 P.2d 1156 (1999).

³⁸ State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

³⁹ Id. at 11.

ordinary meaning.⁴⁰ An unambiguous statute is not open to judicial interpretation.⁴¹ Statutory interpretation is a question of law that we review de novo.⁴²

RCW 49.52.070 provides that any employer or officer or agent of any employer shall be liable for “twice the amount of the **wages** unlawfully rebated or withheld by way of exemplary damages.”⁴³ This statute does not define “wages.” Accordingly, we look to a dictionary for that word’s ordinary meaning.

The American Heritage dictionary defines “wages” as:

Payment for labor or services to a worker, especially remuneration on an hourly, daily, or weekly basis or by the piece.^[44]

Noticeably absent from the definition is any mention of deductions.

Rather, wages are defined as the “payment of labor or services to a worker on an hourly, daily, or weekly basis” This means the gross amount of wages, not the net after deductions for taxes, social security, or other matters, is the proper measure of damages in this case.

Kingen and Switzer also argue that the employees are only entitled to their net wages because 26 U.S.C. §§ 3102 and 3402 require employers to deduct

⁴⁰ State v. Riofta, 134 Wn. App. 669, 683, 142 P.3d 193 (2006).

⁴¹ Harmon v. DSHS, 134 Wn.2d 523, 530, 951 P.2d 770 (1998).

⁴² Rettkowski v. Dep’t of Ecology, 128 Wn.2d 508, 515, 910 P.2d 462 (1996).

⁴³ (Emphasis added.)

⁴⁴ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992).

taxes before payment of wages. That is irrelevant to defining wages because the damages are exemplary damages, not merely compensatory.⁴⁵ As exemplary damages, they are intended to punish and deter blameworthy conduct.⁴⁶ Moreover, it is unclear to us that Kingen and Switzer have standing to assert the obligations of Funsters, the employer, to deduct taxes before payment of wages.

Because the statute is unambiguous and the damages are exemplary, the trial court correctly doubled the total wages in calculating the penalty against Kingen and Switzer.

ATTORNEY FEES

Morgan cross-appeals and argues that the trial court abused its discretion by not awarding the full amount of the fee request. Specifically, Morgan argues that the court erred by deducting certain amounts in calculating the lodestar and in not awarding a multiplier. We hold that the trial court properly exercised its discretion in awarding fees for the interim request. We remand for entry of findings and conclusions with respect to the supplemental fee award.

Lodestar Amount

RCW 49.52.070 provides for reasonable attorney fees and costs to employees who prevail in wage claim litigation. When calculating attorney fees, the court first begins with the lodestar figure, which is the total number of hours

⁴⁵ See Schilling, 136 Wn.2d at 158.

⁴⁶ See BLACK'S LAW DICTIONARY 418-19 (8th ed. 2004).

reasonably expended multiplied by the reasonable hourly rate of compensation.⁴⁷ In determining the number of hours reasonably expended, the attorneys must provide reasonable documentation of their work performed, the number of hours worked, and the category of attorney who performed it.⁴⁸ “The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.”⁴⁹

We review the reasonableness of an attorney fee award for an abuse of discretion.⁵⁰ We are mindful that it is the trial judge who watches a case unfold and who is in the best position to determine the proper lodestar amount.⁵¹

Here, Morgan requested a total of \$194,133.75 in attorney fees in two requests: an initial and a supplemental. The trial court deducted \$37,654.89 from the initial fee request, writing a detailed description of its reasoning for the deduction.⁵² For example, the court observed that while some of the work

⁴⁷ Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 666, 989 P.2d 1111 (1999).

⁵¹ Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 540, 151 P.3d 976 (2007).

⁵² The \$37,654.89 deduction was comprised of the following: (1) \$8,394.50 for work unrelated to the claim of unpaid wages; (2) \$2,598.00 for time spent to oppose the motion to vacate a default judgment, finding the amount of

included in one of the categories of deductions was proper in representing the clients, that work had no bearing on the liability of the individual defendants against whom this action for unpaid wages was brought.⁵³ The court was within its discretion to make these deductions for excessive time spent in litigating this case.

Morgan also challenges the trial court's reduction of the hourly rate of the paralegal who updated the class list from \$145 to \$70 and the number of hours reasonably spent by that paralegal. The record indicates that the court considered the number of hours spent excessive, given the size of the class.⁵⁴ This determination was well within the discretion of the judge to decide. The court also appears to have concluded that a portion of the work that the paralegal performed, specifically "maintaining the class list," did not merit compensation at an hourly rate of \$145. It further appears that the court allowed compensation at that rate for the other work the paralegal performed.

time spent was excessive; (3) \$3,546.60 for the amount of time spent to calculate attorney fees, finding it was excessive; (4) \$2,882.37 to update and revise the class list, finding there was a lot of unexplained time to update a list that does not include a very big class; (5) \$17,744.42, deducting two-thirds of the requested fees for summary judgment because the case was straightforward; and (6) \$2,489.00 of excessive miscellaneous time. Clerk's Papers at 1400-11.

⁵³ Clerk's Papers at 1403.

⁵⁴ Clerk's Papers at 1407.

A party is entitled to compensation for a paralegal's services for legal work performed as long as the rate reflects a reasonable hourly rate.⁵⁵ We cannot say that the trial court abused its discretion by disallowing compensation for "maintaining the class list," where there was no other explanation for this charge and the court otherwise allowed compensation for legal work falling within the criteria established by the cases.

Morgan also argues that the trial court abused its discretion in reducing the supplemental fee request, which was part of the total request for \$194,133.75 in fees. Morgan requested additional attorney fees in the amount of \$44,761.50, and \$2,235.97 in costs. Kingen and Switzer objected to the fees incurred, arguing they were not related to the recovery of unpaid wages, that many of the fees were a result of unnecessary litigation, and the time entries were not specific. The court awarded the full requested amount in costs and \$26,856.90 in attorney fees. But nowhere in the record before us is there any explanation of the court's rationale for reducing the supplemental portion of the fee request. As case authority makes clear, findings and conclusions are generally required to support an award of fees.⁵⁶

Each side argues that the other side waived the entry of findings and conclusions for the case. As a consequence, the trial court did not enter any.

⁵⁵ Absher Constr. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995) (applying criteria for allowing compensation for paralegal work and disallowing compensation for certain work not falling within the criteria).

⁵⁶ Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

Whether one side or the other waived entry of findings, including those with respect to the award of attorney fees, is irrelevant. We simply cannot perform our duty to review fee awards without an adequate record. Because there is nothing in the record to allow us to review the reasons for the court's decision on the supplemental fee award, we remand for entry of appropriate findings and conclusions regarding that award.

Contingency Adjustment

Next, Morgan argues that the trial court abused its discretion by failing to award an upward adjustment of 50 percent for the fee award. We disagree.

After the trial court calculates the lodestar, it may consider adjusting the award to reflect additional factors.⁵⁷ The party requesting a deviation from the lodestar bears the burden of justifying it.⁵⁸ "Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed."⁵⁹ The contingency adjustment is based on the belief that attorneys generally will not take high risk contingency cases where there is a risk of absolutely no recovery for their services, unless they can receive a premium for taking that risk.⁶⁰ But among the most important of the guiding principles a court should follow is whether the litigation would be unsuccessful

⁵⁷ Chuong Van Pham, 159 Wn.2d at 541.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

and no fee would be obtained.⁶¹ Moreover, the risk factor should only be applied to time before recovery is assured.⁶²

In adjusting the lodestar for the risk factor, the trial court should consider the contingent nature of success at the outset of the litigation.⁶³ "This is necessarily an imprecise calculation and must largely be a matter of the trial court's discretion."⁶⁴

The quality of work performed criterion is extremely limited because the reasonable hourly rate determined by the court generally reflects that consideration.⁶⁵

Here, Morgan sought a fee multiplier based both on the contingent nature of success as well as the quality of work performed. In exercising its discretion, the court declined to award a multiplier, concluding that this wage collection case did not involve the usual risk of contingent fee cases:

[T]his was a law suit [sic] in which the basic core fact of unpaid wages was clear, in some amount, and the defendants being pursued for this statutory remedy were easily determined **(plaintiffs' counsel checked their financial status out) to be well capable of collecting a judgment from in terms of their personal wealth.** It would seem **the usual risk factor of a contingent fee** as in a personal injury or medical malpractice **is**

⁶¹ Bowers, 100 Wn.2d at 598-99.

⁶² Id. at 599.

⁶³ Chuong Van Pham, 159 Wn.2d at 542.

⁶⁴ Id. (emphasis omitted).

⁶⁵ Bowers, 100 Wn.2d at 599.

absent in this case.^[66]

Viewing this case from the outset of the litigation, as the trial court did, we agree that it was essentially an undisputed fact that Funsters and its principals failed to pay some amount of wages. Moreover, the potential statutory liability of the defendants in this case was not a highly risky contingent claim, as the court indicated. Finally, to the extent “risk” existed, it was substantially reduced once recovery was assured by entry of the summary judgment order in favor of Morgan.⁶⁷ Thus, no contingency would have been awardable for the activities after entry of that order. In short, the trial court properly exercised its discretion with respect to the first of the two factors for awarding a contingency.

The second prong of the test addresses the quality of the work performed. Implicit in the trial court’s decision in this case is the determination that the hourly rates for the legal work were sufficient to compensate for this factor. We see nothing in the record to support overturning the trial court’s exercise of discretion in this respect.

Morgan contends that the likelihood of collectability of a judgment against the defendant principals of Funsters is an irrelevant factor in assessing risk. We agree that Bowers and the other cases do not expressly address risk in this respect. But we also conclude that it is counterintuitive to exclude from the risk assessment whether a judgment, once obtained, may be satisfied. The court found Morgan’s counsel included collectability of a judgment as part of its

⁶⁶ Clerk’s Papers at 1410 (emphasis added).

⁶⁷ Bowers, 100 Wn.2d at 599.

B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EUFEMIA "EMMA" MORGAN, NANCY
PITCHFORD, and DANIEL MCGILLIVRAY,
individually and on behalf of all the
members of the class of persons similarly
situated,

Respondents,

v.

GERALD KINGEN and JANE DOE
KINGEN, husband and wife and the
marital community comprised thereof, and
SCOTT SWITZER and JANE DOE
SWITZER, husband and wife and the
marital community comprised thereof,

Appellants.

No. 57938-0-1

ORDER DENYING
MOTION FOR
RECONSIDERATION

RECEIVED
DEC 10 2007
W. K. McInerney. PLLC

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2007 DEC - 7 AM 9:00

Appellants, Gerald Kingen et al., have moved for reconsideration of the opinion filed in this case on October 8, 2007. The panel hearing the case called for an answer from Respondents, Eufemia Morgan et al., who also requested attorney fees they incurred to respond to the motion. The court having considered the motion and Respondents' answer has determined that the motion for reconsideration should be denied. This court hereby

ORDERS that the motion for reconsideration is denied. Respondents' request for fees to respond to this motion shall be decided by the trial court as part of this court's prior directive for the trial court to "determine the amount of fees on appeal."

Dated this 7th day of December 2007.

FOR THE PANEL:

COX, J.

Judge

C

West's RCWA 49.52.050

C West's Revised Code of Washington Annotated Currentness
Title 49. Labor Regulations (Refs & Annos)



Chapter 49.5 2. Wages--Deductions--Contributions--Rebates (Refs & Annos)



49.52.050. Rebates of wages--False records--Penalty

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, 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) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or
- (3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or
- (4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or
- (5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

CREDIT(S)

[1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

HISTORICAL AND STATUTORY NOTES

Severability--1939 c 195: "If any section, subsection, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional." [1939 c 195 § 5; RRS § 7612-25.] This applies to RCW

West's RCWA 49.52.050

49.52.050 through 49.52.080.

Source:

RRS § 7612-21.

West's RCWA 49.52.050, WA ST 49.52.050

Current with all 2007 legislation including 1st Special Session and Initiative Measure No. 960

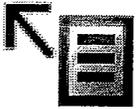
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END OF DOCUMENT

West's RCWA 49.52.070



West's Revised Code of Washington Annotated Currentness
Title 49. Labor Regulations (Refs & Annos)



Chapter 49.5 2. Wages--Deductions--Contributions--Rebates (Refs & Annos)



49.52.070. Civil liability for double damages

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his 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: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

CREDIT(S)

[1939 c 195 § 3; RRS § 7612-23.]

HISTORICAL AND STATUTORY NOTES

Source:

RRS § 7612-23.

West's RCWA 49.52.070, WA ST 49.52.070

Current with all 2007 legislation including 1st Special Session and Initiative Measure No. 960

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D



Schilling v. Radio Holdings, Inc.
Wash.,1998.

Supreme Court of Washington, En Banc.
Sarah K. SCHILLING, an individual, Respondent,
v.

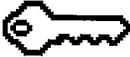
RADIO HOLDINGS, INC., a Washington corporation; Jerome C. Knoll, an individual; Jerome C. Knoll and Jane Doe Knoll and the marital community thereof; Michael O. Barry, an individual; Michael O. Barry and Jane Doe Barry and the marital community thereof; and CMN Broadcasting, Inc., a Washington corporation, Defendants,
Robert R. Bingham, an individual; and Robert T. Bingham and Jane Doe Bingham, and the marital community thereof, Appellants.
No. 63730-0.

Argued June 18, 1997.
Decided Sept. 3, 1998.

Employee sued, inter alia, employer and successor company on variety of legal theories, including alleged liability under wage statute for employer's willful withholding of wages. Employee moved for summary judgment. The Superior Court granted motion, and direct review was granted. The Supreme Court, Talmadge, J., held that: (1) employer's failure to pay employee wages she was owed did not result from mere carelessness; (2) employer's alleged belief that successor company would pay balance of wages due employee did not constitute bona fide dispute as to his general obligation to pay such wages; and (3) employer, who failed to pay employee's back wages due to its alleged financial inability to do so, willfully withheld such wages within meaning of wage statute.

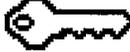
Affirmed.

Alexander, J., filed a dissenting opinion.
West Headnotes

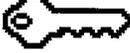
[1] Labor and Employment 231H  2178

231H Labor and Employment

231HXIII Wages and Hours
231HXIII(A) In General
231Hk2178 k. Payment of Wages in General. Most Cited Cases
(Formerly 255k79 Master and Servant)
Wage statute should be liberally construed to advance the legislature's intent to protect employee wages and assure payment. West's RCWA 49.52.050, 49.52.070.

[2] Labor and Employment 231H
 2203(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most Cited Cases
(Formerly 255k79 Master and Servant)
Critical determination in a case under statute which provides for double damages when employer willfully withholds wages due employee is whether employer's failure to pay wages was "willful." West's RCWA 49.52.070.

[3] Labor and Employment 231H
 2203(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most Cited Cases
(Formerly 255k79 Master and Servant)
The term "willful," for purposes of statute which provides for double damages when employer willfully withholds wages due employee, means merely that person knows what he is doing, intends to do what he is doing, and is a free agent. West's RCWA 49.52.070.

[4] Labor and Employment 231H



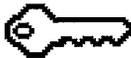
2203(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

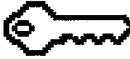
(Formerly 255k79 Master and Servant)

The nonpayment of wages is "willful" when it is the result of a knowing and intentional action, under statute which provides for double damages when employer willfully withholds wages due employee. West's RCWA 49.52.070.



[5] Judgment 228 181(21)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(21) k. Employees, Cases
Involving. Most Cited Cases

Labor and Employment 231H  **2203(1)**

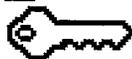
231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

Ordinarily, the issue of whether an employer acts "willfully," for purposes of statute which provides for double damages when employer willfully withholds wages due employee, is a question of fact; however, where there is no dispute as to the material facts, Supreme Court resolves case on summary judgment. West's RCWA 49.52.070; CR 56(c).

[6] Labor and Employment 231H



2203(1)

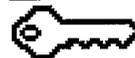
231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

Carelessness or inadvertence negates willfulness necessary to invoke double damages under wage statute when employer's failure to pay wages involves legitimate error or inadvertence. West's RCWA 49.52.070.

[7] Labor and Employment 231H



2203(1)

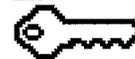
231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

Employer's failure to pay employee wages she was owed did not result from mere carelessness, and thus, its failure did not negate statutory willfulness necessary to invoke double damages under statute which provides for such damages when employer willfully withholds wages due employee. West's RCWA 49.52.070.

[8] Labor and Employment 231H



2203(1)

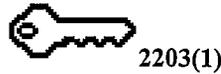
231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

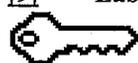
Cited Cases

(Formerly 255k79 Master and Servant)

In order for a dispute to be sufficient to preclude finding of willfulness, under statute which provides for double damages when employer willfully withholds wages due employee, dispute must be "bona fide," i.e., fairly debatable dispute over whether an employment relationship exists, or

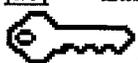
whether all or a portion of the wages must be paid.
West's RCWA 49.52.070.



[9] Labor and Employment 231H
 2203(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases
(Formerly 255k79 Master and Servant)
Employer's alleged belief that successor company would pay balance of wages due employee did not constitute bona fide dispute as to his general obligation to pay such wages, so as to preclude finding of willfulness under statute which provides for double damages when employer willfully withholds wages due employee, where at point which employer attempted to withhold portion of wages owed employee, it requested that employee sign release which would have released both employer and successor company from liability, and based on that, employer should have known successor company was not going to pay balance. West's RCWA 49.52.070.

[10] Labor and Employment 231H
 2203(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases
(Formerly 255k79 Master and Servant)
Employer, who failed to pay employee's back wages due to its alleged financial inability to do so, willfully withheld such wages within meaning of statute which provides for double damages when employer willfully withholds wages due employee. West's RCWA 49.52.070.

[11] Labor and Employment 231H

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases
(Formerly 255k79 Master and Servant)
Supreme Court was not free to engraft exception to wage statute's double damages provision for employer's financial inability to pay. West's RCWA 49.52.070.

****372*154** Jeffrey G. Poole, Seattle, for appellant.
Bart R. Anderson, Bellevue, for respondent.
TALMADGE, Justice.
Radio Holdings, Inc., and its president, Robert Bingham, failed to pay wages due Sarah Schilling. Bingham does not dispute Radio Holdings employed Schilling, Schilling is owed back wages, or she was not paid, but alleges Radio Holding's financial problems prevented payment of Schilling, precluding a finding he or the corporation willfully withheld the wages. The King County Superior Court granted summary judgment to Schilling on her claim for double damages pursuant to RCW 49.52.070, which provides for such damages when an employer willfully withholds wages due an employee. As Bingham's refusal to pay wages is willful under a long line of Washington cases and we decline to engraft a "financial inability" defense onto RCW 49.52.070, in the absence of express legislative direction, we affirm the trial court's judgment.

ISSUE

Does an employer who fails to pay an employee's back wages, because of alleged financial inability to do so, willfully withhold such wages within the meaning of RCW 49.52.070?

FACTS

Robert Bingham was president of Radio Holdings, Inc. *155 Radio Holdings); he and his spouse were sole shareholders of the corporation. Until March 1993, Radio Holdings owned KKFX radio station where Schilling worked as an office manager from January 1991 to March 1993.

In April 1992, Radio Holdings began experiencing financial difficulties and stopped issuing regular paychecks to KKFX employees. Instead, employees were issued "advances on payroll due," which were variable cash amounts representing a portion of each employee's wages due; the balance of the wages would be paid at a later date. These advances were issued so that Radio Holdings could pay other bills to stay in **373 business. Schilling and the other KKFX employees were aware of Radio Holdings' financial problems.

At some point during 1992, Children's Media Network (CMN) agreed to purchase KKFX from Radio Holdings. Bingham asserted the sale was controlled by U.S. Bank, Radio Holdings' secured creditor, but he tried to negotiate payment of employee wages out of the sale proceeds. Bingham later stated, "After negotiating on behalf of the employees for their compensation out of the closing proceeds, I believed that I had come to a binding agreement that required the purchaser of the radio station KKFX to pay the employees' wages." Clerk's Papers at 243. The purchase agreement actually stated in pertinent part:

All wages and salaries of Seller's employees shall be paid and discharged by Seller to and including 11:59 P.M. on the Closing date, but to the extent, for reasons beyond Seller's control, Seller shall be unable to discharge its obligations in full as to any employee or employees, Buyer shall be allowed a credit therefor to permit payment thereof by Buyer.

Clerk's Papers at 196.

Bingham wrote to Schilling on August 28, 1992, expressly assuring her she would be paid in full: I have made arrangements with the bank that *all past due monies owed employees will be paid* out of the closing proceeds upon completion of the sale.

*156 Clerk's Papers at 195 (emphasis added). Bingham also assured Schilling orally she would be paid in full. Schilling received assurances as well from a person she believed was working for CMN. Schilling averred that she worked for a year without contemporaneous payment of wages because she believed she would be paid in full upon the sale of KKFX: "Because I thought I was going to be paid in full when the radio station was sold, I continued to work for Mr. Bingham and Radio Holdings." Clerk's

Papers at 220.

In August 1992, despite Bingham's apparent belief CMN would pay the back wages of KKFX employees, he set aside \$25,000 to pay wages due to employees. He believed the \$25,000 fund would be sufficient to pay all of the wages that would accrue up until the sale. The sale did not close when scheduled, however, and the wages continued to accrue beyond the \$25,000. In addition, Bingham paid \$13,000 out of the fund to a former employee who had threatened to sue Radio Holdings and one of its employees for sexual harassment. The \$13,000 represented the back wages of the potential defendant, and was allegedly paid at that employee's request. As a result of the \$13,000 payment and the delayed closing, the \$25,000 fund was insufficient to pay all KKFX employees their back wages when the sale finally closed.

On March 24, 1993, a Radio Holdings accountant offered Schilling \$3,241.34 in compensation for her back wages, although she was owed nearly \$14,000, provided she sign a release form absolving Radio Holdings, U.S. Bank, CMN, and related parties of any claims arising from her employment at KKFX. According to Schilling, the accountant also told her "that Bingham wanted to simply give [the employees their] checks, but CMN insisted that he obtain [the employees'] signatures or he they [sic] would not release the funds." Clerk's Papers at 241. Schilling refused to sign the release.

Schilling then filed suit against Bingham, Radio Holdings, CMN, and several other defendants, on a variety of theories including RCW 49.52.070 for Bingham's willful *157 withholding of wages. Bingham denied liability because he did not receive anything out of the closing proceeds and his failure to pay wages was not intentional. Bingham moved for summary judgment, alleging a lack of willful conduct for purposes of the statute. The motion was denied and the Court of Appeals denied discretionary review. Ultimately, Schilling filed a motion for summary judgment, which the trial court granted, directing that a judgment be entered in her favor in the amount of \$13,955, with an additional punitive award of \$13,955, and her attorney fees and costs. We granted direct review. RAP 4.2(a).

ANALYSIS

In reviewing a summary judgment, we engage in the same inquiry under CR 56 as the **374 trial court. Schaaf v. Highfield, 127 Wash.2d 17, 21, 896 P.2d 665 (1995). We must determine if there are any genuine issues of material fact and whether Schilling was entitled to judgment as a matter of law. CR 56(c).

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 the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages. See United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., 84 Wash.App. 47, 51-52, 925 P.2d 212 (1996) (citing from RCW Chapters 49.46, 49.48, and noting RCW 49.52.050 in discussing the statutory scheme of state laws granting employees nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages). In RCW 49.48, the Legislature mandated that employers pay employees all wages due upon the conclusion of the employment relationship and banned all withholding or diversion of wages by employers unless specifically approved by statute. RCW 49.48.010. The Legislature allowed recovery of attorney fees in actions to recover wages due. *158RCW 49.48.030. The Department of Labor and Industries was given concurrent administrative enforcement powers for claims of failure to pay wages. RCW 49.48.040-.070.^{FN1}

^{FN1}. In addition, for more than 100 years, the Legislature has recognized a preference for certain wage claims in the event of employer insolvency, RCW 49.56.010, or death of the employer, RCW 49.56.020.

The Legislature also established a remedy of exemplary damages if an employer willfully refuses to pay wages. RCW 49.52.050 provides, in pertinent part, that “[a]ny employer or officer, vice principal or agent of any employer” is guilty of a misdemeanor if that entity “[w]ilfully and with intent to deprive the employee of any part of his wages, [pays] any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract[.]” RCW 49.52.050(2).^{FN2}RCW 49.52.070 provides a corresponding civil remedy against the employer, its officers and agents:

^{FN2}. Although this argument was never made by Bingham in his briefing, the dissent attempts to analogize the “constitutional prohibition against imprisonment for debt” with “civil liability under the statute” (see Dissenting op. at 380-381), but the comparison is far from apt. Const. art. I, § 17 prohibits *imprisonment* for debt, it does not prohibit the civil remedy of double damages. The fact that RCW 49.52.050 provides a misdemeanor penalty for its violation does not somehow act as a defense to civil liability imposed under RCW 49.52.070. Incarceration does not necessarily follow a violation of the statute, and is not even an issue here.

Likewise, the dissent's reliance on State v. Curry, 118 Wash.2d 911, 829 P.2d 166 (1992) (see Dissenting op. at 380-381) as supporting its view on this matter is equally mystifying. Therein we upheld the constitutionality of RCW 7.68.035(1)'s mandatory victim penalty assessments, adopting federal pronouncements on the matter as follows:

[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments “at a time when [the defendant is] unable, through no fault of his own, to comply.” ...

...It is at the point of enforced collection ..., where an indigent may be faced with the alternatives of payment or imprisonment, that he “may assert a constitutional objection on the ground of his indigency.”

Curry, 118 Wash.2d at 917, 829 P.2d 166 (emphasis added) (alterations in original) (citations omitted). The requisite threat of imprisonment for nonpayment is not present here. Thus, the dissent's discussion of Const. art. I, § 17 protections is simply irrelevant.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions*159 [RCW 49.52.050 (2)] shall be liable in a civil action by the aggrieved employee or his 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: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who

has knowingly submitted to such violations.

[1] By providing for costs and attorney fees, the Legislature has provided an effective mechanism for recovery even where wage amounts wrongfully withheld may be small. See **375Brandt v. Impero, 1 Wash.App. 678, 682, 463 P.2d 197 (1969). This comprehensive legislative system with respect to wages indicates a strong legislative intent to assure payment to employees of wages they have earned. As we stated in *State v. Carter*, 18 Wash.2d 590, 621, 140 P.2d 298, 142 P.2d 403 (1943), with respect to RCW 49.52.050 (under its prior designation as Rem.Rev.Stat. § 7612-21 (Supp.1941)):

[T]he fundamental purpose of the legislation, as expressed in both the title and body of the act, 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. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his 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, by a withholding of a part of the wages ...

The statute must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment. See Brandt v. Impero, 1 Wash.App. 678, 682, 463 P.2d 197 (1969).

[2][3][4] The critical determination in a case under RCW 49.52.070 for double damages is whether the employer's failure to pay wages was "willful." In the past, our test for "willful" failure to pay has not been stringent: the employer's refusal to pay must be volitional. Willful means *160 "merely that the 'person knows what he is doing, intends to do what he is doing, and is a free agent.'" Brandt, 1 Wash.App. at 681, 463 P.2d 197. Ebling v. Gove's Cove, Inc., 34 Wash.App. 495, 500, 663 P.2d 132 (1983) ("Under RCW 49.52.050(2), a non-payment of wages is willful when it is not a matter of mere carelessness, but the result of knowing and intentional action."). The nonpayment of wages is willful "when it is the result of a knowing and intentional action[.]" Lillig v. Becton-Dickinson, 105 Wash.2d 653, 659, 717 P.2d 1371 (1986).

[5] Ordinarily, the issue of whether an employer acts "willfully" for purposes of RCW 49.52.070 is a question of fact. *Pope v. University of Wash.*, 121 Wash.2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993), cert. denied, 510 U.S. 1115, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994); Lillig, 105 Wash.2d at 660, 717 P.2d 1371. However, where, as here, there is no dispute as to the material facts, we will resolve the case on summary judgment. CR 56(c); *State v. Clark*, 129 Wash.2d 211, 225, 916 P.2d 384 (1996) (when reasonable minds could reach but one conclusion from the evidence presented, questions of fact may be determined as a matter of law); *Kadoranian by Peach v. Bellingham Police Dept.*, 119 Wash.2d 178, 190, 829 P.2d 1061 (1992); *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wash.2d 346, 353, 779 P.2d 697 (1989). See also *Reichelt v. Johns-Manville Corp.*, 107 Wash.2d 761, 770, 733 P.2d 530 (1987) (if no genuine issue of material fact is presented when the motion for summary judgment is heard, the issue may be summarily resolved); *Lundgren v. Kieren*, 64 Wash.2d 672, 677-78, 393 P.2d 625 (1964).

Our prior cases indicate that there are two instances when an employer's failure to pay wages is not willful: the employer was careless or erred in failing to pay, or a "bona fide" dispute existed between the employer and employee regarding the payment of wages. "Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute." *Pope*, 121 Wash.2d at 491 n. 4, 852 P.2d 1055. Neither of these circumstances obtains here.

[6] Our cases have recognized "mere carelessness" as *161 an excuse to willfulness under RCW 49.52.070, but these cases have not discussed this concept in any great detail. See, e.g., Brandt, 1 Wash.App. at 681, 463 P.2d 197; Ebling, 34 Wash.App. at 500, 663 P.2d 132. The concept of carelessness or inadvertence suggests errors in bookkeeping or other conduct of an accidental character. Carelessness or inadvertence negates the willfulness necessary to invoke double damages under RCW 49.52.070 when the employer's**376 failure to pay wages involves a legitimate error or inadvertence.

[7] Bingham has not alleged that he inadvertently offered Schilling less than she was owed. Bingham does not dispute that Schilling is owed \$13,955 in back wages,^{FN3} or that Radio Holdings was

contractually liable to Schilling. Bingham does not dispute that Radio Holdings attempted to pay Schilling less than she was owed, he was aware of this, and Schilling had not been paid. Indeed, the letter that accompanied Schilling's partial wage payment explained the problems resulting from the delayed closing and acknowledged that the check was for less than "100% of the amount due." Clerk's Papers at 223. Thus, Bingham's failure to pay Schilling the wages she was owed did not result from mere "carelessness."

FN3. THE COURT: There isn't any real dispute but that Sarah Schilling was owed "X" dollars-

MR. GAUTSCHI [Counsel for Bingham]: That's correct.

THE COURT: Right? I mean nobody is really arguing anything about that.

MR. GAUTSCHI: No one is arguing that. Report of Proceedings (12/15/95) at 9.

[8] In contrast to the law on the inadvertence defense, our case law on the existence of a bona fide dispute sufficient to preclude a finding of willfulness under the statute is well developed. The dispute must be "bona fide," i.e., a "fairly debatable" dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. See Brandt, 1 Wash.App. at 680-81, 463 P.2d 197 (no bona fide dispute where employer failed to pay logger wages because of economic reverses and falsified tax records); Simon v. Riblet Tramway Co., 8 Wash.App. 289, 293, 505 P.2d 1291*162 dispute over bonus-no double damages), review denied, 82 Wash.2d 1004 (1973), cert. denied, 414 U.S. 975, 94 S.Ct. 289, 38 L.Ed.2d 218 (1973); Ebling, 34 Wash.App. at 500-02, 663 P.2d 132 (no bona fide dispute regarding commission amounts actually owed sailboat salesman-double damages upheld); Cannon v. City of Moses Lake, 35 Wash.App. 120, 663 P.2d 865 (dispute over accumulated sick/vacation leave fairly debatable-no double damages), review denied, 100 Wash.2d 1010 (1983); Cameron v. Neon Sky, Inc., 41 Wash.App. 219, 703 P.2d 315 (deduction by employer of a disputed debt from wages owed-no double damages), review denied, 104 Wash.2d 1026 (1985); Moran v. Stowell, 45 Wash.App. 70, 81, 724 P.2d 396 (sick leave dispute-no double damages), review denied, 107 Wash.2d 1014 (1986); Lillig, 105 Wash.2d at 659-60, 717 P.2d 1371 (conflict over incentive bonuses, dispute over actual amount owing-no double damages); Chelan

County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wash.2d 282, 300-303, 745 P.2d 1 (1987) (dispute over deputy on-call time payments-no double damages); Yates v. State Bd. for Community College Educ., 54 Wash.App. 170, 176-77, 773 P.2d 89 (dispute over professional improvement credits-no double damages), review denied, 113 Wash.2d 1005, 777 P.2d 1050 (1989); Pope, 121 Wash.2d at 489-91, 852 P.2d 1055 (University withheld disputed social security taxes from wages of student employees ineligible for retirement system-no double damages). In Department of Labor and Indus. v. Overnite Transp. Co., 67 Wash.App. 24, 34-36, 834 P.2d 638 (1992), review denied, 120 Wash.2d 1030, 847 P.2d 481 (1993), the Court of Appeals emphasized the need for a "bona fide" dispute when it held an employer's explanation for refusing to pay its truck drivers overtime wages-the alleged preemption of state overtime wage laws by the federal Motor Carriers Act-was not fairly debatable.

Bingham's failure to pay Schilling in this case was not because of a "bona fide dispute" in light of the foregoing authorities. Although Bingham claims he thought CMN would pay Schilling's back wages, he does not dispute she is owed \$13,955. Thus, no bona fide dispute exists regarding the amount of back wages.

[9]*163 Bingham apparently argues, however, because he thought CMN would pay the balance of the employees' wages, there was a bona fide dispute as to his general obligation to pay. This is supported, Bingham argues, by his declaration, in which he stated, "I told [the KKFX employees] that I was negotiating for a clause in the sale agreement that would require the seller to pay the employee's wages as part of the sale **377 between the two companies." Clerk's Papers at 40. Bingham claims his negotiations with CMN, as well as the clause in the purchase agreement, led him to the reasonable conclusion CMN would pay the balance of any back wages owed KKFX employees, and he therefor lacked the requisite intent to establish liability under RCW 49.52.070. Bingham argues Schilling's own declaration evidences a lack of willfulness on his part. Schilling stated: "To this day, I believe that [Bingham] had a concern for our back pay and also believe that he honestly believed that we were covered and that he was speaking for both CMN and Radio [H]olding." Clerk's Papers at 53.

Regardless of what Bingham may have believed

earlier, when his company tried to pay Schilling \$3,241.34 instead of the nearly \$14,000 she was owed, Bingham should have realized Schilling was not being paid her full wages. According to the letter accompanying Schilling's check, CMN required employees to sign the release form in exchange for receiving their checks. The release absolves not only Radio Holdings, but also CMN. Thus, although Bingham may have believed at one time that CMN would pay the balance of the KKFX wages due, at the point in time when Radio Holdings withheld wages it owed to Schilling, Bingham should have known CMN was not going to pay the balance. Given this, Bingham could not have legitimately disputed his obligation to pay.

[10] The principal contention advanced by Bingham as a defense to double damages is that his failure to pay wages was not willful because of the precarious financial status of Radio Holdings. Bingham also argues he did not willfully withhold Schilling's wages because he set aside \$25,000 in *164 an effort to pay the employees' back wages. Bingham notes he did not receive any of the funds from the closing, and claims that if he had declared bankruptcy, the employees would not have received any back wages. Apparently, Bingham's argument is he could not have willfully withheld Schilling's wages if his failure to pay was caused by Radio Holdings' insolvency.

The most troublesome issue with respect to Bingham's "financial inability" argument is his failure to articulate any standard for such "financial inability." No published Washington appellate decision has held an employer's financial status renders refusal to pay wages nonvolitional, and the facts of this case illustrate why this is so.^{FN4} Bingham offers no test by which we can adequately measure his or Radio Holdings' inability to pay Schilling. Must the employer be insolvent to the point of being eligible for bankruptcy to meet the test? If the standard is a lesser one, where should the line be drawn between inability and a financial choice not to pay? For example, if a company's accountants decide shareholders should be paid a dividend to continue investor interest in the company's stock, and the dividend is financed by withholding wages to certain employees, is the employer financially unable to pay wages? If the employer continues to pay vendors, other creditors, or even management of the company, but does not pay employee wages, is the employer financially unable to pay? In 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.^{FN5}

FN4. In *Brandt*-the only reported Washington decision mentioning financial hardship in this context-the Court of Appeals' rejection in dicta of defendant's assertion of financial inability based on insufficient evidence does not amount to judicial recognition of financial hardship as a defense to nonpayment of wages. 1 Wash.App. at 680-81, 463 P.2d 197

FN5. Even if we were to recognize "financial inability" as a defense to an employee's claim for unpaid wages under RCW 49.52, we do not have proof in this record, apart from general claims of losses by Bingham on the sale of KKFX or Radio Holdings' precarious financial status, that either Bingham or Radio Holdings were unable to pay Schilling. Bingham has never specifically proved he or Radio Holdings were insolvent or financially unable to pay Schilling. Indeed, the company and/or Bingham had the financial wherewithal to set up a \$25,000 wage fund, and to take steps for a significant period of time to stay in business. Bingham made choices to pay other creditors before Schilling. Moreover, Bingham made a decision to invade the \$25,000 wage fund to pay a sexual harassment settlement against another employee and Radio Holdings rather than pay Schilling. Where he and his wife were sole shareholders of Radio Holdings, Bingham personally benefited from this invasion of the wage fund to settle a potentially embarrassing and expensive claim against the corporation. These financial decisions would appear to belie the financial inability of Bingham and the corporation to pay Schilling. Instead, they demonstrate Bingham and Radio Holdings made volitional financial choices not to pay Schilling, violating RCW 49.52.070.

****378[11]** The Legislature is, of course, free to add a further *165 exception to the double damages provisions of RCW 49.52.070 if it so chooses.^{FN6} However, we are not free to engraft such an exception to the statute where the plain language of the statute is to the contrary. See State v. McNichols,

136 Wash.2d 152, 961 P.2d 371, 137 Lab.Cas. P 58,506, 4 Wage & Hour Cas.2d (BNA) 1641
(Cite as: 136 Wash.2d 152, 961 P.2d 371)

128 Wash.2d 242, 249, 906 P.2d 329 (1995) (the court may not graft onto the implied consent statute any additional warnings not contained in the plain language of that statute); State v. Bostrom, 127 Wash.2d 580, 586-87, 902 P.2d 157 (1995) (when the language of a statute is unambiguous, courts may not alter the statute's plain meaning by construction).

FN6.RCW 49.52.070 provides a specific exception to the double damages requirement of the statute for an "employee who has knowingly submitted to such violations." This exception evidences the Legislature's understanding of its ability to carve out exceptions to the double damages provision of the statute. It did not do so for an employer's precarious financial status.

This statutory exception was not argued by Bingham below, RAP 2.5(a), and is not supported where Schilling was repeatedly promised full payment of her wages, albeit not on a timely basis.

CONCLUSION

An employer or agent of an employer who fails to pay an employee's wages withholds such employee's wages "willfully and with intent to deprive" if the employer volitionally fails to pay the employee. While inadvertence or the existence of a bona fide dispute over the obligation to pay or the amount of the wages may effectively negate the necessary statutory willfulness, neither defense is proven in this case. In the absence of an express legislative exception to the double damages provision of RCW 49.52.070 for an *166 employer who alleges a financial inability to pay wages due, we decline to create such an exception judicially.

We affirm the trial court's judgment in favor of Schilling and award her attorney fees on appeal. RCW 49.52.070; RAP 18.1.

DURHAM, C.J., and DOLLIVER, SMITH, GUY and MADSEN, JJ., concur.
ALEXANDER, Justice, dissenting.

I agree with the majority's recitation of the facts and its conclusion that when Radio Holdings' accountant attempted to tender \$3,241.34 to Schilling in exchange for her release of Radio Holdings and the Children's Media Network, Bingham was aware that Schilling had not been paid and, indeed, was not

going to be paid, all of the wages she was owed. I also agree that the cases that have addressed RCW 49.52.070 thus far have not indicated that a failure to pay wages for financial reasons shows a lack of willfulness. See Pope v. University of Washington, 121 Wash.2d 479, 491 n. 4, 852 P.2d 1055 (1993) (absence of willfulness "may be established either by a finding of carelessness or by the existence of a bona fide dispute") (citing Yates v. State Bd. for Community College Educ., 54 Wash.App. 170, 176-77, 773 P.2d 89, review denied, 113 Wash.2d 1005, 777 P.2d 1050 (1989); Brandt v. Impero, 1 Wash.App. 678, 681, 463 P.2d 197 (1969); Ebling v. Gove's Cove, Inc., 34 Wash.App. 495, 501, 663 P.2d 132, review denied, 100 Wash.2d 1005 (1983)).^{FN1} I disagree, however, that these prior cases dictate a holding that an employer who withholds an employee's wages for some reason other than carelessness or the existence of a bona fide dispute necessarily withholds the wages "willfully." The question has simply not arisen before this court. Faced squarely with it now, however, precedent does not require us to mechanically conclude that an employer acts willfully in every *other* situation where wages are withheld. Rather, the prior *167 opinions represented rules of law promulgated in response to specific facts. Where, as here, the court has not yet addressed whether an employer acts willfully under a particular set of facts, the absence of a case on point should not **379 prevent us from considering whether one has acted willfully. It is my view that an employer or its agent does not act willfully, for purposes of RCW 49.52.050 and .070, if that employer or agent pays an employee less wages than he or she is owed due to the employer's inability to pay the full wages. Because under the facts of this case "reasonable minds" could conclude that Bingham was financially unable to pay Schilling, in which case he would not have acted willfully, I dissent.

FN1. There is no argument here that Schilling's wages were withheld due to carelessness or any dispute over the amount owed.

We may affirm a trial court's order granting summary judgment only if we are satisfied, after considering the facts in the light most favorable to the nonmoving party, that "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Barnes v. McLendon, 128 Wash.2d 563, 569, 910 P.2d 469 (1996) (citing In re Estates of

136 Wash.2d 152, 961 P.2d 371, 137 Lab.Cas. P 58,506, 4 Wage & Hour Cas.2d (BNA) 1641
(Cite as: 136 Wash.2d 152, 961 P.2d 371)

Hibbard, 118 Wash.2d 737, 744, 826 P.2d 690 (1992)). All questions of law are reviewed de novo. Mountain Park Homeowners Ass'n v. Tydings, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994) (citing Srovoy v. Alpine Resources, Inc., 122 Wash.2d 544, 548 n. 3, 859 P.2d 51 (1993)). The nonpayment of wages is willful "when it is the result of a knowing and intentional action." Lillig v. Becton-Dickinson, 105 Wash.2d 653, 659, 717 P.2d 1371 (1986) (citing Ebling, 34 Wash.App. 495, 663 P.2d 132). Willful means "merely that the 'person knows what he is doing, intends to do what he is doing, and is a free agent.'" Brandt, 1 Wash.App. at 681, 463 P.2d 197 (quoting Davis v. Morris, 37 Cal.App.2d 269, 99 P.2d 345 (1940)).

Whether an employer acts "[w]illfully and with intent" for purposes of RCW 49.52.050(2) is a question of fact to be reviewed under the substantial evidence standard. Pope, 121 Wash.2d at 490, 852 P.2d 1055 (citing Lillig, 105 Wash.2d at 660, 717 P.2d 1371). Nevertheless, "when reasonable minds could reach but one conclusion" from the evidence accompanying a summary *168 judgment motion, such "questions of fact may be determined as a matter of law." Central Washington Bank v. Mendelson-Zeller, Inc., 113 Wash.2d 346, 353, 779 P.2d 697 (1989). We must bear in mind, however, that "[s]ummary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial." Babcock v. State, 116 Wash.2d 596, 599, 809 P.2d 143 (1991). Therefore, it is only if reasonable minds could reach the sole conclusion that Bingham willfully withheld Schilling's wages that this case may be decided as a matter of law.

Construing the facts in the light most favorable to Bingham, as we must, it is apparent from the record that Radio Holdings, not Bingham, employed Schilling, and that Bingham never represented to Schilling that he would pay her out of his own pocket. Thus, Bingham was never personally liable to pay Schilling's wages. Moreover, reasonable minds could conclude that Radio Holdings lacked funds to pay Schilling more than the \$3,241.34 it offered her. See CP at 39 ("there was little or no money in [Radio Holdings]"); CP at 40 ("U.S. Bank was ... able to capture 100% of the funds out of the closing."); CP at 197 ("[check for \$3,241.34] represents [Schilling's] pro-rata share of the monies the bank was willing to release for past due payroll."). If reasonable minds could conclude that Radio Holdings lacked funds to

pay Schilling, and Bingham was not required to pay Schilling out of his own pocket, then they could also conclude that Bingham did not *willfully* withhold her wages.

That this case presents a triable issue is also manifested by the page of rhetorical questions that the majority poses about what constitutes a "financial inability" to pay. See Majority op. at 377. "In the absence of a clearly demarcated test for financial inability to pay," the majority reasons, the court must conclude that Bingham's actions were willful. Majority op. at 377. I disagree. It is precisely because we are unable to determine what factually constitutes an inability to pay that we must remand this case for trial. Deciding a factual question such as this simply because we *169 cannot define a standard to be applied improperly invades the province of the jury.

I also disagree with the majority's assertion that remanding this case for trial would require us to graft an additional exception to liability onto RCW 49.52.070. See Majority **380 op. at 378 ("The Legislature is, of course, free to add a further exception to the double damages provisions of RCW 49.52.070 if it so chooses."). Remanding this case for trial does not require the creation of some "exception" to liability under RCW 49.52.070, it merely requires us to interpret the word "willfully." In deferring in this way to the Legislature, the majority evades the most fundamental of the court's duties—interpreting statutes. See, e.g., Ashenbrenner v. Department of Labor & Indus., 62 Wash.2d 22, 26, 380 P.2d 730 (1963) ("It is obviously the duty of this court to interpret the statute in question.").

Simon v. Riblet Tramway Co., 8 Wash.App. 289, 505 P.2d 1291, 66 A.L.R.3d 1069, review denied, 82 Wash.2d 1004 (1973), is illustrative of this point. There, an employer withheld an employee's bonus on grounds that payment of it was discretionary. The only defense to an action brought under RCW 49.52.070, according to the case law up to that time, was when an employer withheld an employee's wages through carelessness. Nevertheless, the Court of Appeals proceeded, without citation, to recognize another defense: RCW 49.52.050(2) and .070 are not meant to apply to this factual situation; herein, there was a bona fide disagreement between employer and employee with regard to ... a discretionary bonus. This situation evidences no intentional deprivation of wages as required to sustain a claim under RCW 49.52.050.

Simon, 8 Wash.App. at 293, 505 P.2d 1291. Like the Court of Appeals in Simon, we should apply RCW 49.52.050(2) and .070 to the facts before us in a commonsense manner, uninhibited by prior decisions applying the term “willfully” in distinguishable factual circumstances.

Also instructive is a California court's interpretation of *170 the term “willful” in a similar context. In People v. Alves, 155 Cal.App.2d Supp. 870, 320 P.2d 623 (1957), the Appellate Division of the California Superior Court considered whether a statute that criminalizes an employer's willful failure to make payments to a health and welfare fund violated a provision in the California Constitution forbidding imprisonment for debt except in cases of fraud. Noting that “wages are not ordinary debts,” the court concluded that a failure to pay wages “amounts to a ‘case of fraud’ ” and that the statute therefore did not violate the constitutional provision. Alves, 320 P.2d at 624 (quoting In re Trombley, 31 Cal.2d 801, 193 P.2d 734, 740 (1948)). In so holding, the court stated that the term “ ‘wilful’ implies that the employer has the ability to pay, for if he lacks the ability to pay there is no wilful failure on his part.... Although the words ‘having the ability to pay’ do not appear in [the statute], the prosecution must prove such ability.” Alves, 320 P.2d at 625.

Alves is helpful not only because it involved the interpretation of a term similar to the one at issue here, but also because the Washington Constitution, like its California counterpart, prohibits incarceration for failure to pay a debt. See Const. art. I, § 17. Although the statute under which Schilling sued, RCW 49.52.070, provides only for civil damages, liability is premised on a preliminary determination that the employer violated RCW 49.52.050(2). The latter statute makes it a misdemeanor to willfully withhold an employee's wages, and thus presumably subjects the violator to imprisonment. See RCW 9A.20.010(2) (defining misdemeanor as an offense for which “imprisonment in a county jail” is possible).^{FN2} While we have not directly addressed in Washington the constitutional issue confronted in Alves, it is reasonable to assume that because of our similar constitutional provision, an employer in Washington could not be held criminally liable under RCW 49.52.050 if the employer is financially unable to pay the employee. I *171 fail to see why that statute should receive a different construction in assessing an employer's civil liability under RCW

49.52.070.

^{FN2}. There are no reported cases involving a criminal prosecution for violation of RCW 49.52.050.

Language in State v. Curry, 118 Wash.2d 911, 829 P.2d 166 (1992), is consonant with the notion that an employer's financial ability to pay is prerequisite to a finding that the employer acted willfully. In that case, we rejected the defendants' claim that the imposition of a mandatory victim penalty assessment**381 was unconstitutional on its face. Noting that article I, section 17 would preclude imprisonment solely for inability to pay, we concluded that “no defendant [would] be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.” Curry, 118 Wash.2d at 918, 829 P.2d 166.

In short, the previously noted defenses to a finding of willful failure to pay wages were not carved into the granite of the statute, as one would perhaps believe from a cursory reading of the majority opinion. Rather, they resulted from courts construing what constitutes acting “[w]ilfully and with intent to deprive the employee of any part of his wages.” RCW 49.52.050(2). The majority acknowledges this fact, albeit begrudgingly, observing on the one hand that “[i]n the absence of an express legislative exception ... for an employer who alleges a financial inability to pay wages due, we decline to create such an exception judicially,” Majority op. at 378, and on the other hand conceding that it is actually prior “cases”—not the statute itself—that “indicate that there are two instances when an employer's failure to pay wages is not willful.” Majority op. at 375.

It is unclear why the majority concludes that *this* court should be precluded from developing any further case law in this area upon being confronted with a case which calls upon us to construe whether activity is forbidden by RCW 49.52.050(2) under facts clearly distinguishable from cases decided before. The majority is apparently content to put its seal of approval upon the two previously found defenses, and yet closes the door to further interpretation. The fact *172 that the majority disapproves of a “financial inability to pay wages” defense should not allow it to reminisce about inapposite cases in order to avoid the exercise of considering the literal meaning, under the *present* facts, of the requirement that an employer act “wilfully and with intent to deprive” to incur liability.

“[A]n interpretation of a statute producing ... strained consequences must be avoided.” Griffin v. Eller, 130 Wash.2d 58, 80, 922 P.2d 788 (1996) (Talmadge, J., dissenting) (citations omitted). Yet, despite the obvious meaning of the words used in the statute, the majority strains to find here the “[a]ffirmative evidence of *intent to deprive* an employee of wages ... is necessary to establish liability under RCW 49.52.050.” Pope, 121 Wash.2d at 491 n. 4, 852 P.2d 1055 (emphasis added). In my view, it is far better to heed the wisdom of another court: “[W]e take ‘willfully’ to mean voluntarily, with knowledge of the obligation *and despite the financial ability to pay it*.” Ives v. Manchester Subaru, Inc., 126 N.H. 796, 498 A.2d 297, 302 (1985) (emphasis added) (interpreting a New Hampshire wage statute).

Construing the facts of this case in favor of Bingham, I am satisfied that “reasonable minds” could conclude that Radio Holdings lacked the financial resources to pay more than the \$3,241.34 it offered Schilling and, thus, did not act willfully in failing to pay full wages owed. Accordingly, I would reverse the trial court and remand this case for trial. Thus, I dissent.

JOHNSON and SANDERS, JJ., concur.
Wash., 1998.

Schilling v. Radio Holdings, Inc.
136 Wash.2d 152, 961 P.2d 371, 137 Lab.Cas. P
58,506, 4 Wage & Hour Cas.2d (BNA) 1641

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Ellerman v. Centerpoint Prepress, Inc.
Wash.,2001.

Supreme Court of Washington, En Banc.
Michael J. ELLERMAN, Petitioner,
v.
CENTERPOINT PREPRESS, INC., a Washington
Corporation; Rosemary Widener, Defendants,
and Betty Handy, Respondent.
No. 68632-7.

Argued Sept. 21, 2000.
Decided May 10, 2001.

Former employee sued former employer, its principal, and its business manager, seeking wages owed and exemplary damages. After employee settled with employer and principal, the Superior Court, King County, Maurice Epstein, J. pro tem., entered judgment for business manager, and the Court of Appeals affirmed. On remand for reconsideration, the Court of Appeals, Grosse, J., affirmed again. On grant of employee's petition for review, the Supreme Court, Alexander, C.J., held that business manager was not a "vice principal" or an "agent" who could be held personally liable for wilfully withholding an employee's wages.

Affirmed.

Talmadge, J. pro tem., filed a dissenting opinion.
West Headnotes

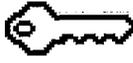
[1] Statutes 361  181(1)

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most

Cited Cases

When interpreting statutory language, the goal of the court is to carry out the intent of the Legislature.

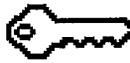
[2] Statutes 361  205

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic
Aids to Construction
361k205 k. In General. Most Cited

Cases

In ascertaining the intent of the Legislature, the language at issue must be evaluated in the context of the entire statute.

[3] Labor and Employment 231H  965

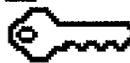
231H Labor and Employment

231HXII Labor Relations
231HXII(A) In General
231Hk963 Constitutional and Statutory
Provisions
231Hk965 k. Purpose. Most Cited

Cases

(Formerly 232Ak7.1 Labor Relations)
"Anti-Kickback" statutes, which prohibit employer from wilfully withholding wages and provide for double damages, were enacted to prevent abuses by employers in a labor-management setting, such as coercing rebates from employees in order to circumvent collective bargaining agreements. West's RCWA 49.52.050(2).

[4] Labor and Employment 231H

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231H Labor and Employment

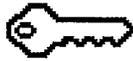
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2202 Damages
231Hk2202(3) k. Double or Treble

Damages; Liquidated Damages. Most Cited Cases
(Formerly 255k79 Master and Servant)

For purposes of statute providing for double damages

when a vice principal wilfully withholds an employee's wages, a "vice principal" cannot be said to have willfully withheld wages unless he or she exercised control over the direct payment of the funds and acted pursuant to that authority. West's RCWA 49.52.050(2), 49.52.070.

[5] Labor and Employment 231H



2202(3)

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

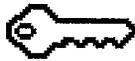
231Hk2202 Damages

231Hk2202(3) k. Double or Treble

Damages; Liquidated Damages. Most Cited Cases
(Formerly 255k79 Master and Servant)

For purposes of statute providing for double damages when an "agent" wilfully withholds an employee's wages, more than the establishment of an agency relationship must be shown, and there must be a showing that an agent had some control over the payment of wages before personal liability attaches to the agent of an employer for the employer's nonpayment of wages to an employee. West's RCWA 49.52.050, 49.52.070.

[6] Labor and Employment 231H



2180

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2179 Time of Payment

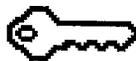
231Hk2180 k. In General. Most Cited

Cases

(Formerly 255k79 Master and Servant)

Business manager was not a "vice principal" or an "agent" of employer, and thus she had no personal liability for payment of employee's wages, as sole principal of corporate employer was the only person authorized to sign checks and was the only person who did so, and principal only signed checks when she determined there were sufficient funds, which was not a decision done by business manager. West's RCWA 49.52.050, 49.52.070.

[7] Trial 388



404(1)

388 Trial

388X Trial by Court

388X(B) Findings of Fact and Conclusions of Law

388k404 Construction and Operation

388k404(1) k. In General. Most Cited

Cases

Memorandum opinion may be considered as supplementation of formal findings of fact and conclusions of law.

[8] Appeal and Error 30



846(5)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k844 Review Dependent on Mode of Trial in Lower Court

30k846 Trial by Court in General

30k846(5) k. Necessity of Finding

Facts. Most Cited Cases

Where the plaintiff had the burden of proof at trial, the absence of a finding of fact is to be interpreted as a finding against him on appeal.

****796*516** Edwards, Sieh, Smith & Goodfriend, Howard Mark Goodfriend, Seattle, Law Offices of J. David Smith, J. David Smith, Edmonds, for petitioner.

Margaret E. Harris, Seattle, James M. Cleland, Jr., Mount Vernon, for respondent.

ALEXANDER, C.J.

We granted Michael Ellerman's petition to review a Court of Appeals' decision affirming a judgment in favor of Betty Handly and against Michael J. Ellerman in Ellerman's action for "wages owed and exemplary damages." The issue that was before the Court of Appeals and is now before us is whether Handly is liable for Ellerman's unpaid wages as a "vice principal" or "agent" of Ellerman's ****797** employer, Centerpoint Prepress, Inc. We hold that the Court of Appeals correctly determined that Handly ****517** was neither a "vice principal" nor "agent" personally liable in damages for the willful withholding of wages. Accordingly, we affirm the Court of Appeals.

I.

The basic facts of this case are not in dispute. For several years, Michael J. Ellerman worked for a typesetting business, the "Type Gallery." That business was owned by Betty Handy. Type Gallery subsequently failed and went into bankruptcy proceedings in October 1992.

In November 1992, a new typesetting business was started called Centerpoint Prepress, Inc. (Centerpoint). The only investor in this business, Rosemary Widener, became the new corporation's sole stockholder, board member, and president. By virtue of her position, Widener was the only person authorized to sign checks on behalf of the corporation and the only person who actually did so. Betty Handy managed the company's business activities and was paid \$16.50 per hour for her services.

Michael Ellerman also began working at Centerpoint in November 1992 at an agreed upon wage of \$13.50 per hour. Unfortunately, Centerpoint soon ran into financial difficulties. As a consequence, Ellerman, Handy, and other employees were not paid all of the wages that were due them for the period May 1 through June 18, 1993.^{FN1}

^{FN1}. During this time, Ellerman received a partial payment of wages in the amount of \$400.00.

Centerpoint eventually ceased operation. Ellerman then brought suit against Centerpoint, Widener, and Handy for \$2,782.94 in unpaid wages. He also sought exemplary damages, pursuant to RCW 49.52.070, in an amount equal to twice the amount of the wages he alleged were willfully and intentionally withheld from him. Ellerman obtained a default judgment against Centerpoint. Ellerman eventually settled with Widener, leaving Handy as the only defendant for trial.

The case proceeded to trial. At its conclusion a King *518 County court commissioner, acting as a judge pro tempore, determined that Handy had no liability for unpaid wages on the basis that she was not an "employer" liable for wages and had not violated any statutory provisions.

Ellerman appealed the trial court's decision to the Court of Appeals. That court affirmed the trial court, holding that Ellerman's wages were not willfully and intentionally withheld because the company simply

lacked the financial ability to pay the wages.

Ellerman then petitioned this court for review. We granted his petition and remanded to the Court of Appeals for reconsideration in light of our decision in Schilling v. Radio Holdings, Inc., 136 Wash.2d 152, 961 P.2d 371 (1998), a case in which we held that financial inability to pay wages is not a defense to a claim of willful and intentional withholding of wages. On remand, the Court of Appeals again affirmed the judgment in favor of Handy. Although it acknowledged our holding in Schilling, it nonetheless concluded that Handy was not personally liable because she was neither Ellerman's "employee" nor "an officer, vice principal or agent" of his employer responsible for the payment of wages. RCW 49.52.050; .070. Ellerman again petitioned for review and we granted his petition.

II. ANALYSIS

Because there is no dispute that Ellerman is owed unpaid wages, the issue before us is whether Handy, an employee of Centerpoint, who functioned as the company's business manager, has personal liability for payment of Ellerman's wages. Ellerman claims that she has liability, pursuant to statutes, as a vice principal or agent of Centerpoint. Handy contends that she has no liability under applicable statutes because she was not Ellerman's employer and had no authority to make decisions regarding wages or payment of wages.

*519 A.

When an employee is discharged or otherwise ceases to work for an employer, "the wages due him on account of his employment shall be paid to him at the end of the established**798 pay period." RCW 49.52.010. Any "employer or officer, vice principal or agent of any employer" is guilty of a misdemeanor if he or she "[w]ilfully and with intent to deprive the employee of any part of his wages" pays the employee less than the wage to which the employee is entitled. RCW 49.52.050(2). Any "officer, vice principal or agent of any employer" who shall violate RCW 49.52.050(2) shall be liable to the unpaid employee "for twice the amount of the wages unlawfully ... withheld" and attorney fees. RCW 49.52.070.

Ellerman does not contend that the trial court erred in

holding that Handly was not Ellerman's "employer."^{FN2} Rather, he asserts that Handly was a "vice principal" or "agent" of Centerpoint and, therefore, liable for the withholding of wages. Thus, the issue before us is whether Handly falls within the aforementioned statutes as a "vice principal" or an "agent" of Centerpoint who had liability for the withholding of Ellerman's wages.

FN2. In its memorandum opinion, in letter form, the trial judge indicated that Handly was not an "employer, director, partner nor de factor [sic] debtor or sole entrepreneur concerning the activities of Center Point Prepress." Clerk's Papers at 84.

[1][2] When interpreting statutory language, the goal of the court is to carry out the intent of the Legislature. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wash.2d 1, 6, 721 P.2d 1 (1986). In ascertaining this intent, the language at issue must be evaluated in the context of the entire statute. In re Sehome Park Care Ctr., Inc., 127 Wash.2d 774, 778, 903 P.2d 443 (1995).

[3] The Legislature enacted the statutes at issue here in 1939. Sometimes referred to as the "Anti-Kickback" statutes, they were enacted to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from *520 employees in order to circumvent collective bargaining agreements. See Cameron v. Neon Sky, Inc., 41 Wash.App. 219, 222, 703 P.2d 315 (citing McDonald v. Wockner, 44 Wash.2d 261, 269-71, 267 P.2d 97 (1954)), review denied, 104 Wash.2d 1026 (1985). This court recently stated in Schilling, 136 Wash.2d at 159, 961 P.2d 371 (quoting State v. Carter, 18 Wash.2d 590, 621, 140 P.2d 298 (1943)), with respect to these statutes:

"[T]he fundamental purpose of the legislation, as expressed in both the title and body of the act, 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. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his 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, by a withholding of a part of the

wages ..."

We held that these statutes should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment. Schilling, 136 Wash.2d at 159, 961 P.2d 371.

[4] Ellerman's primary contention is that Handly falls under RCW 49.52.070 as a "vice principal." More specifically, he argues that since the statute does not define "vice principal," that term should be given its common law meaning. State v. Pacheco, 125 Wash.2d 150, 154, 882 P.2d 183 (1994) (Legislature is presumed to intend undefined terms to mean what they did at common law). Under the common law, the concept of "vice principal" was used primarily in the context of fellow-servant law to determine whether an employee could be held liable when one employee inflicted injury on another employee. Under that theory of liability, an employee is considered a vice principal of the employer if he or she has the authority to direct and supervise the work of the other employee. *521 Allend v. Spokane Falls & N. Ry. Co., 21 Wash. 324, 338, 58 P. 244 (1899). In such circumstances, the "vice principal" is the employer's "alter ego" with respect to the work being done. Carlson v. P.F. Collier & Son Corp., 190 Wash. 301, 310-11, 67 P.2d 842 (1937). We have held that the ultimate test for determining**799 whether an employee is a vice principal is the power of superintendence and control. *Id.*

Clearly under the common law, the term "vice principal" is broad and could include a manager or supervisor such as Handly who the trial court found was the "manager of the corporation's business affairs, and overseeing the activities of the other employees." Clerk's Papers (CP) at 68. It does not, however, follow that Handly is personally liable for the wages that were not paid to Ellerman or for exemplary damages. We say that because, in our view, the statute requires more than a finding that the putative vice principal is managing the employer's business. It requires the vice principal to withhold wages "[w]ilfully and with intent to deprive the employee" of his wages. RCW 49.52.050(2). Thus, we conclude that a vice principal cannot be said to have willfully withheld wages unless he or she exercised control over the direct payment of the funds and acted pursuant to that authority. Although the dissent suggests that our determination is inconsistent with the common law definition of "vice principal," we are satisfied that it accords with a

sensible interpretation of the meaning of the statutes in question. If we reached the conclusion advanced by Ellerman, then any supervisor or manager of an employee might have personal liability if the company did not pay the employee, regardless of whether the manager or supervisor had any control over how and when the company paid its employees. Such a result would be inconsistent with the plain language of the above mentioned statutes.

Ellerman argues that personal liability should be imposed on any manager under the statute because their managerial decisions may affect the company's financial ability to pay wages. Although the wage withholding statutes, as we have noted above, are to be liberally construed *522 to protect wages of employees and to assure payment, holding any person who manages the daily operations of a business liable under the statute, even if they do not have the individual authority to pay the actual wages, does not appear to us to further the intent of the Legislature. We think it is reasonable to conclude it intended to impose personal liability only on vice principals who directly supervise or control the payment of wages. In sum, the liberal construction of the term "vice principal" that Ellerman maintains could result in substantial unfairness by imposing personal liability on managers or supervisors who had no direct control over the payment of wages.

[5] Ellerman argues, alternatively, that even if Handly was not a "vice principal" of Centerpoint, she was an "agent" under the statute. Although the term "agent," as used in RCW 49.52.050 and RCW 49.52.070 has not been interpreted by any Washington court, the term has been defined generally as a "person authorized by another to act for him." BLACK'S LAW DICTIONARY 85 (4th ed.1951).

The Court of Appeals rejected Ellerman's argument that Handly was an agent under the statute. In doing so it concluded that in order to be an agent, the person must have some power and authority to make decisions regarding wages or the payment of wages. Specifically, it noted:

Although the statute is to be liberally construed to protect employee wages and assure payment, it would be incongruous to hold that any possible agency relationship between an employer and an employee can make that employee personally liable for the wages of other employees. The '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.

Ellerman v. Centerpoint Prepress, Inc., No. 35932-1-1, slip op. at 6, 1999 WL 694012 at *3 (Wash.Ct.App. Sept. 7, 1999) (footnote omitted). We find the reasoning of the Court of Appeals persuasive. In our judgment, the statutes in question require more than the establishment of an agency relationship. Rather, there *523 must be a showing that an agent had some control over the payment of wages before personal liability attaches to the agent of an employer for the **800 employer's nonpayment of wages to an employee.

B.

[6] In light of our determination of the meaning of the terms "vice principal" and "agent," the next question is whether the trial court correctly determined, based on the evidence presented, that Handly was not personally liable for the unpaid wages under the statutory provisions. Unfortunately, the trial judge made no express findings as to whether Handly was an "agent" or a "vice principal." It did, however, issue a lengthy memorandum opinion, in letter form, in which it set forth its reasoning. It, thereafter, entered findings of fact and conclusions of law, which the Court of Appeals properly characterized as a "substantially truncated version of the letter opinion." Ellerman, slip op. at 5 n. 3, 1999 WL 694012 at *3.

[7] After reviewing the findings, in light of the letter opinion,^{FN3} we are satisfied that they fully support the trial judge's implicit, if not explicit, conclusion of law that Handly was not an "agent" or "vice principal" of Centerpoint with liability to Ellerman for wages unpaid to Ellerman by Centerpoint. Although the dissent disagrees and asserts that "[t]here is considerable evidence on the record that Handly was an agent or vice principal," we conclude a remand to determine Handly's status is unwarranted. Dissent at 801. As the trial court found, Rosemary Widener, not Betty Handly, was the sole principal of the corporation and was the only person authorized to sign checks and was the only person who did so. The trial judge also observed that Widener only signed checks when she determined there were sufficient funds and that "[t]his was not a decision done by Mrs. Handly." CP at 86.

FN3. A memorandum opinion may be considered as supplementation of formal findings of fact and conclusions of law. *See In re Marriage of Griffin*, 114 Wash.2d 772, 777, 791 P.2d 519 (1990).

[8]*524 Although the trial court's findings say little about Handy's involvement, if any, in decision making over payment of wages, we observe that Ellerman, the plaintiff, had the burden of proof at trial. That being the case, the absence of a finding of fact is to be interpreted as a finding against him. *See In re Marriage of Olivares*, 69 Wash.App. 324, 334, 848 P.2d 1281 ("the absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue"), *review denied*, 122 Wash.2d 1009, 863 P.2d 72 (1993).

III.

In conclusion, for reasons stated above, we agree with the result reached by the Court of Appeals.

Affirmed.

SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, BRIDGE, JJ., GUY, J.P.T., concur.
TALMADGE, J.^{FN*} (dissenting).

FN* Justice Philip Talmadge is serving as a justice pro tempore of the Supreme Court pursuant to Const. art. IV, § 2(a) (amend.38).

RCW 49.52.050 is Washington's statute forbidding employers and their surrogates from withholding wages legitimately due to employees; the majority interprets the statute in a fashion inconsistent with the meaning of long-standing common law terminology. The majority's approach will diminish protection for employees from the unlawful withholding of wages due. For these reasons, I respectfully dissent.

As we noted in *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 157, 961 P.2d 371 (1998):

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 the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages.

As part of this policy, the Legislature enacted *525RCW 49.52.050 and RCW 49.52.070 providing for exemplary damages where "[a]ny employer or officer, vice principal or agent of any employer" "[w]ilfully and with intent to deprive the employee of any part of his wages, [pays] any employee a lower wage than the wage such employer is obligated to **801 pay such employee by ... contract[.]" RCW 49.52.050(2), .070. The purpose of the statutory scheme is remedial-to protect the employee's earned wages. *Schilling*, 136 Wash.2d at 159, 961 P.2d 371. The statutes are to be liberally construed. *Schilling*, 136 Wash.2d at 159, 961 P.2d 371; *Brandt v. Impero*, 1 Wash.App. 678, 682, 463 P.2d 197 (1969).

While the terms "vice principal" and "agent" have no statutory definition, they have well-understood common law meanings. The majority discusses the common law heritage of the terms "vice principal" and "agent," majority at 798-99, but then proceeds to add an additional requirement to the traditional definition-the vice principal or agent must exercise direct control over the wage decisions or the payment of wages-before the statute applies. This requirement is found nowhere in the language of the statute. It is contrary to the common law definitions and our statutory interpretation canon that the Legislature is presumed to intend a common law usage when it uses common law terms. *State v. Pacheco*, 125 Wash.2d 150, 154, 882 P.2d 183 (1994). Finally, the majority's interpretation certainly does not provide the liberal construction of these statutes we have previously mandated. Plainly, the majority today acts in a legislative mode, restricting the remedy of employees to recover wages they earned. I would interpret the terms "vice principal" and "agent" as understood at common law.

Once the proper legal standard is applied, Betty Handy's status should be decided by the trier of fact. Michael Ellerman was originally employed by Type Gallery, a business owned by Betty Handy. When that company went bankrupt, Handley tried to set up a new business with Type Gallery's employees. She was specifically advised she could not take the lead on the new business because of the bankruptcy. She did, however, set up Centerpoint with *526 Rosemary Widener, another former Type Gallery employee.

Handly managed the business as its chief operating

officer. While Widener had check writing authority, Handly presented blank checks for her signature. The trial court found that she was "manager of the company's business activities," and "over[saw] the activities of the employees and the corporation [.]" Clerk's Papers at 82-82. It is evident she had the type of supervisory authority necessary to make her the "alter ego" of the company in terms of her relationship with other employees (a status required to meet the common law definition of vice principal). In fact, it was Handly who leased equipment for the business and gave her personal guaranty for the lease. She urged Ellerman to work without compensation and to illegally take unemployment compensation.

Most significantly, Handly had a role in wage issues. Widener testified she was "part of the decision-making in terms of ... paying employees," and that "we," meaning Handly and Widener, made the decision to pay Ellerman only part of his wages. Report of Proceedings (RP) at 43-44. Widener also answered "yes" to the question of whether Handly was "involved in the process of which employees to pay and not to pay[.]" RP at 80.

There is considerable evidence on the record that Handly was an agent or vice principal. This case should be reversed and remanded to determine her status.

The purpose of RCW 49.52.050 and .070 was to give a real remedy to employees who suffered a wrongful loss of wages at the hands of an employer or any key person acting on the employer's behalf. Michael Ellerman earned his wages and he is entitled to recover them from the entities and individuals that wrongfully withheld them from him. The majority's restrictive interpretation of the statutory remedy is inconsistent with the legislative purpose and our case law interpreting the legislative remedy. I would reverse the trial court's judgment and remand for trial.

Wash.,2001.
Ellerman v. Centerpoint Prepress, Inc.
143 Wash.2d 514, 22 P.3d 795, 143 Lab.Cas. P 59,282

END OF DOCUMENT

H



Pope v. University of Washington
Wash., 1993.

Supreme Court of Washington, En Banc.
Richard L. POPE, Jr., on behalf of himself and the
class of all persons similarly situated, Respondent,

v.

UNIVERSITY OF WASHINGTON, an
instrumentality of the State of Washington,
Appellant.

No. 58938-1.

May 20, 1993.

As Amended Sept. 21, 1993.

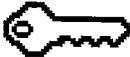
As Amended March 30, 1994.

Editor's Note: Opinion Amended by 871 P.2d 590.

University employee who was not eligible for retirement system coverage, but from whose wages university had withheld social security taxes, brought class action against university alleging breach of contract, statutory violations, breach of fiduciary duty, misrepresentation, and nondisclosure. Parties cross-moved for summary judgment. The Superior Court, King County, Mary Wicks Brucker, J., granted summary judgment for employees on breach of contract and statutory violation claims and granted summary judgment for university on remaining claims. University appealed and students cross-appealed. The Supreme Court, Utter, J., held that: (1) university did not violate statute prohibiting employer from willfully paying lower wage than required by withholding social security taxes from employees' wages; (2) fiduciary relationship did not exist between university and employees regarding calculation and payment of wages; and (3) university was not liable to employees on basis of misrepresentation or nondisclosure.

Affirmed in part and reversed in part.

West Headnotes

[1] Labor and Employment 231H  210

231H Labor and Employment

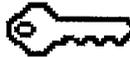
231HIV Compensation and Benefits
231HIV(A) In General
231Hk209 Deductions, Fines, and
Forfeitures

231Hk210 k. In General. Most Cited

Cases

(Formerly 255k79 Master and Servant)

University did not violate statute governing deductions or withholdings respecting employee ceasing work by withholding social security taxes from wages of university employees who were not eligible for retirement system coverage; employees were not claiming that university made improper deductions to wages due at termination of employment and, thus, statute and its limitation on deductions were inapplicable. West's RCWA 49.48.010.

[2] Statutes 361  205

361 Statutes

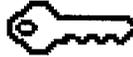
361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic
Aids to Construction

361k205 k. In General. Most Cited

Cases

Statutes 361  208

361 Statutes

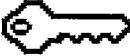
361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic
Aids to Construction

361k208 k. Context and Related
Clauses. Most Cited Cases

Statutory limitation of lawful deductions from employee's wages had to be read in context of statute as a whole in action alleging violation of statute due to withholding of social security taxes from wages of university employees who were not eligible for retirement system coverage. West's RCWA 49.48.010.

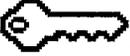
[3] Labor and Employment 231H  **2187**

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2186 Deduction and Forfeiture
231Hk2187 k. In General. Most Cited

Cases

(Formerly 255k79 Master and Servant)

University's deduction of social security taxes from wages of university employees who were not eligible for retirement system did not violate statute prohibiting employer from willfully paying employee lower wage than employer is obligated to pay by statute, ordinance, or contract with intent to deprive employee of any part of his wages; deduction was not "willful withholding of wages," there was no evidence to support finding that university acted willfully and with intent to deprive employees of their wages, and there was no evidence that university reached consensus as to whether specific job positions were ineligible for social security. West's RCWA 49.52.050(2).

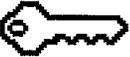
[4] Labor and Employment 231H **2203(1)**

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

For purposes of statute prohibiting employer from willfully paying employee lower wage than employer is obligated to pay by statute, ordinance, or contract with intent to deprive employee of any part of his wages, nonpayment of wages is willful and made with intent when it is result of knowing and intentional action and not bona fide dispute as to obligation of payment. West's RCWA 49.52.050(2).

[5] Labor and Employment 231H **2203(1)**231H Labor and Employment

231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

For purposes of statute prohibiting employer from willfully paying employee lower wage than employer is obligated to pay by statute, ordinance, or contract with intent to deprive employee of any part of his wages, lack of intent may be established either by finding of carelessness or by existence of bona fide dispute. West's RCWA 49.52.050(2).

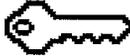
[6] Labor and Employment 231H **2203(1)**

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

Affirmative evidence of intent to deprive employee of wages is necessary to establish liability under statute prohibiting employer from willfully paying employee lower wage than employer is obligated to pay by statute, ordinance, or contract with intent to deprive employee of any part of his wages. West's RCWA 49.52.050(2).

[7] Labor and Employment 231H **2203(1)**

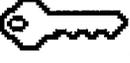
231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2192 Actions
231Hk2203 Penalties
231Hk2203(1) k. In General. Most

Cited Cases

(Formerly 255k79 Master and Servant)

For purposes of statute prohibiting employer from willfully paying employee lower wage than employer is obligated to pay by statute, ordinance, or contract with intent to deprive employee of any part of his wages, finding of intentional nonpayment by party

who is not individual requires organization to reach consensus regarding action taken. West's RCWA 49.52.050(2).

[8] Appeal and Error 30  863

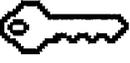
30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases

Appeal and Error 30  934(1)

30 Appeal and Error

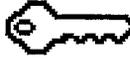
30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) k. In General. Most Cited Cases

Granting of summary judgment is reviewed to ascertain whether nonmoving party raises genuine issue of material fact after viewing facts and reasonable inferences therefrom in light most favorable to nonmoving party.

[9] Fraud 184  7

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k5 Elements of Constructive Fraud

184k7 k. Fiduciary or Confidential Relations. Most Cited Cases

Fiduciary relationship did not exist between university and university employees, who were not eligible for retirement system coverage, regarding calculation and payment of wages so as to render university's withholding of social security taxes from employees' wages breach of fiduciary duty, despite possibility that university may have had superior knowledge as to applicable federal and state laws governing calculation and payment of wages; university was not shown to have used its position to induce reliance in employees.

[10] Fraud 184  7

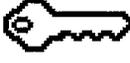
184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k5 Elements of Constructive Fraud

184k7 k. Fiduciary or Confidential Relations. Most Cited Cases

Facts may create fiduciary relationship between contracting parties.

[11] Fraud 184  16

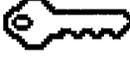
184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. Most Cited Cases

University was not liable to university employees who were not eligible for retirement system coverage and from whose wages university withheld social security taxes on basis of nondisclosure by allegedly concealing or failing to disclose that only employees in positions eligible for retirement systems coverage were subject to social security and that employees were not in retirement eligible positions, in absence of showing that university reached consensus or "knew" which specific employee job positions were ineligible for retirement and social security coverage.

[12] Fraud 184  16

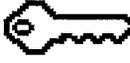
184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. Most Cited Cases

Precondition for finding liability on basis of nondisclosure is knowledge of facts alleged to have been concealed or not disclosed.

[13] Fraud 184  28

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k28 k. Fraud in Particular Transactions or for Particular Purposes. Most Cited Cases

University was not liable to university employees who were not eligible for retirement system coverage and from whose wages university withheld social security taxes on basis of misrepresentation; university did not have pecuniary interest in deducting social security because it was required to pay matching employer contributions for every deduction made.

****1057*481** Christine O. Gregoire, Atty. Gen., William B. Collins, Div. Chief, Olympia, for appellant.

Helsell, Fetterman, Martin, Todd & Hokanson, Phillip D. Noble, Seattle, for respondent.

Patrick E. McBride, Seattle, amicus curiae, on behalf of the Dept. of Health and Human Services.

UTTER, Justice.

This class action concerns whether the defendant, the University of Washington (University), properly withheld social security taxes from the classemployees, of *482 which plaintiff, Richard Pope, is a member. The University appeals from the trial court's grant of partial summary judgment in favor of the class for breach of contract and violation of RCW 49.48.010. It also appeals the trial court's ruling, after a bench trial, that it intentionally withheld wages in violation of RCW 49.52.050 resulting in an award of double damages, attorney fees, and costs. The University further appeals the trial court's grant of the class' post-judgment motion to include temporary, part-time, and student employees in the class and its denial of their motion for reconsideration on this issue. The class cross-appeals the trial court's grant of partial summary judgment in favor of the University on the breach of fiduciary duty, misrepresentation, and nondisclosure claims only if the trial court's ruling on liability is not upheld.

We reverse the trial court and hold the University did not violate either RCW 49.48.010 or RCW 49.52.050. This ruling disposes of the issues relating to the scope of the class. The trial court's rulings regarding the claims of breach of fiduciary duty, misrepresentation, and nondisclosure are affirmed.

Resolution of this case necessitates review of the 40-year history of social security coverage implementation at the University and the different views regarding coverage taken by the University, the Employment Security Department (EMS), and the

****1058** Social Security Administration (SSA) during that time span.

The opportunity for states to enroll public employees in social security became available in 1950 when Congress amended the Social Security Act to allow voluntary enrollment of public employees who were not otherwise covered by a retirement system. See Social Security Act Amendments of 1950, Pub.L. No. 81-734, § 218, 64 Stat. 477, 514-15 (1950) (codified in 42 U.S.C. § 418). In 1951, the Washington Legislature authorized the Governor to enter into a voluntary agreement with the federal government to provide social security coverage for public employees. Laws of 1951, ch. 184, § 3(a), p. 532; RCW 41.48.030(1). In that year, EMS, the agency designated to administer the program, entered into an agreement *483 with the SSA, (the "Basic Agreement"). The Basic Agreement extended social security coverage to

all services performed by individuals as employees of the State and as employees of those political subdivisions listed in the Appendix attached hereto, other than services expressly excluded therein and except the following:

(1) Any service performed by an employee in a position covered by a retirement system on the date the agreement is made applicable to the coverage group in which such employee is included.

Clerk's Papers, at 229. The University was not listed in the attached appendix.

In 1954, Congress lifted the prohibition against enrollment of employees covered by a retirement system. Pub.L. No. 83-761, § 101, 68 Stat. 1052, 1055 (1954) (codified in 42 U.S.C. § 418(d)). The next year, the University applied to EMS to extend social security coverage to all services performed by each of the eligible employees of the Applicant for whom coverage is requested, except the following:

.....
(e) Services in positions which are not covered by the T.I.A.A. Retirement System of the University of Washington.

(f) Services in positions which are covered by the State Employees' Retirement System.

Clerk's Papers, at 240 ("Application and Agreement"). Based upon the Application and

Agreement, the State and federal government agreed in 1956 to Modification No. 81, which extended coverage to Services by individuals as employees of the following school of higher learning of the State, as members of a coverage group ... of the University of Washington Teachers' Insurance and Annuity Association Retirement System [TIAA].

Clerk's Papers, at 244. The modification contained the exclusions listed in the Application and Agreement. In 1957, Modification No. 156 further extended social security coverage to employees covered by the Washington State Public Employees Retirement System (PERS).

Due to coverage inequities cited by the University's retirement and insurance officer and the recommendation of the Controller, the Provost, in 1962, extended social security *484 coverage to all faculty and staff except hourly paid students and certain nonresident aliens. In 1969, the University requested EMS to investigate whether monthly paid student employees were subject to social security. EMS sent this request to the SSA who replied that the Provost's 1962 action brought monthly paid student employees within the scope of Modification No. 81.

Subsequently in 1978, EMS requested an opinion from SSA as to whether the Basic Agreement established a retirement systems coverage group or an absolute coverage group, that is, a coverage group of state employees not in retirement systems positions. The SSA regional attorney concluded that state employees were covered as an absolute coverage group.

The SSA then requested EMS to investigate whether the University was properly not reporting wages for hourly paid student employees. In January 1979, EMS informed the University that its failure to report the wages of all hourly paid student employees was considered a "group error", and the University would be billed for its matching contribution on the unreported wages. The University, however, maintained its position that hourly paid student employees were not covered, although there were interdepartmental communications**1059 questioning this position. Between 1978 and 1980, the Attorney General and EMS were attempting to resolve whether coverage existed for student employees. Finally, in May 1981, the Provost announced that all student employees, whether paid monthly or hourly, would be covered under social

security beginning July 1, 1981.

Before this practice was implemented, however, the regional attorney reversed the earlier position and concluded the Basic Agreement established a retirement systems coverage group. As a result, the SSA determined the University's deduction of social security from hourly paid student employees was proper, thus resolving the group error. The University then rescinded its decision to begin withholding social security from all student employees.

*485 In March 1983, EMS informed the University that the SSA had determined only employees in retirement systems eligible positions were covered by social security. EMS advised the University it was in the process of considering whether individuals could retain social security wage credits which were erroneously reported and requested the University withhold any action to exclude employees working on a part-time or temporary basis until it was notified by EMS. In October 1983, EMS notified all state agencies, including the University, on the correct method for determining retirement eligibility, for making the appropriate adjustments, and for deleting wage credits. The University was directed to determine which positions were ineligible for retirement systems coverage and to forward this list and the necessary adjustment reports to EMS.

On November 17, 1983, the University determined that 12 graduate student positions were ineligible for social security coverage and requested EMS to concur in this determination before processing the refunds. EMS responded it was unclear whether the Board of Regents had authorized the Provost's extension of retirement system coverage to these positions in 1962 and that this issue needed to be resolved. The University requested the Attorney General review this matter, and on January 3, 1984, the Attorney General responded that the Board of Regents had never authorized the Provost to extend retirement systems coverage to graduate students or degree candidates.

To challenge the SSA's position that graduate students were covered by social security, EMS and the University decided to use the request for a refund from one graduate student assistant as a "test case". This request was forwarded to the SSA which, after an initial denial in April 1985, reversed its position and approved the refund in August 1987 because it found the Board of Regents had never extended

retirement systems coverage to graduate students. The University limited the refunds to graduate student research assistants (RA) and teacher assistants (TA).

*486 On July 22, 1988, Richard Pope requested the University cease withholding social security from student employees holding positions with the Associated Students of the University of Washington (ASUW) and the Graduate and Professional Student Senate (GPSS) on the basis that these students were also ineligible for retirement systems coverage. Pope was a law student enrolled at the University and in 1988 was elected as a student government representative. Pope was appointed on a temporary and part-time basis to the position of ASUW appointee (job class 0890), which is a monthly paid position. Pope alleges the University originally responded to him by offering retroactive refunds through January 1, 1989, on the condition that the ASUW convert the student positions from monthly to hourly paid positions.

In May 1989, the University determined that 52 job classes, in addition to the RA's and TA's, were not eligible for TIAA or PERS, but were having social security withheld. The payroll manager advised the Controller in July 1989 that under the terms of the Basic Agreement, only those positions that were eligible for TIAA or PERS were eligible for social security. Then, on December 12, 1989, the University announced it would discontinue social security coverage beginning January 1, 1990, for certain faculty and academic staff positions**1060 which were ineligible to participate in TIAA or PERS. On December 29, 1989, the University also exempted ASUW Appointees from social security beginning January 1, 1990.^{FN1} The University then informed Pope of the changes occurring as of January and provided him with the necessary information to seek a refund.

^{FN1} Effective July 1, 1991, all employees of the state except student employees must be covered by social security. Omnibus Budget Reconciliation Act of 1990, Pub.L. 101-508, 104 Stat. 1388 (1990). Social security for student employees remains an option for states. Internal Rev. Serv., Publication 15, *Circular E, Employer's Tax Guide* (Rev. January 1993), p. 22.

Pope filed this action on June 28, 1990, in the King

County Superior Court alleging breach of contract, violation of RCW 49.52.050, violation of RCW 49.48.010, breach of fiduciary duty, misrepresentation, and nondisclosure. The trial court *487 certified the class as including all persons employed by the University between March 14, 1983, through February 1, 1991, in positions which were not eligible for retirement system coverage but from whom the University withheld social security. The parties filed cross motions for summary judgment.

On August 1, 1991, the trial court granted summary judgment in favor of the class on the breach of contract and violation of RCW 49.48.010 claims; granted summary judgment in favor of the University on the misrepresentation, nondisclosure, and breach of fiduciary duty claims; and denied the University's motion to redefine the class based upon the 3-year statute of limitation. On December 5, 1991, after a bench trial on the class' claim for violation of RCW 49.52.050, the trial court awarded double damages, attorney fees, and costs to the class. The University's motion for a new trial and for reconsideration was denied.

The University appealed to this court and the class cross-appealed. The class made a post-judgment motion to the trial court to compel the University to include all temporary, part-time, and student employees in the class. The trial court granted this motion and denied the University's motion for reconsideration. The University appealed these two post-judgment orders. On December 2, 1992, this court accepted review of the case.

On appeal, the parties' arguments focus largely upon whether the Basic Agreement, as modified, authorized the University to withhold social security from the class. The University argues the Basic Agreement established an absolute coverage group which covered all state employees who were not members of a retirement system, which included the class members. The class and the United States Department of Health and Human Services, as amicus curiae, contend retirement systems coverage was established. The class, however, does not claim standing to challenge whether the University breached the Basic Agreement; rather, the class asserts the University breached its employment contracts with the class members. Consequently, the interpretation*488 of the Basic Agreement is relevant to the class' breach of contract claim only to the extent there is a term in the employment contracts

which prohibits withholding social security unless authorized. Without such a term, the breach of contract claim must fail.

[1] The trial court found the employment contracts at issue were formed by the University promising to pay a gross wage and the class employees accepting by performance. See Haugen v. Central Lutheran Church, 58 Wash.2d 166, 361 P.2d 637 (1961) (the relationship between an employer and an employee is based on contract). The class argued the University was not authorized to withhold social security and, therefore, failed to meet its contractual duty to pay the gross wage. The issue, then, is whether the employment contracts contained a term obligating the University to refrain from withholding social security from the gross wage unless authorized.^{FN2}

FN2. We do not suggest an employer breaches an employment contract only when he or she violates an express term of the contract; instead, we merely assume an employment contract authorizes the deduction of Social Security withholding in good faith unless the contract or an implied statutory term specifies otherwise. If an employer made deductions from an employee's wages due to dissatisfaction with the employee's work, for example, it would generally be unnecessary for the employee to show an express contract term prohibiting such deductions.

****1061** The class did not present any evidence that such a contract term was contained, expressly or by implication, in the employment contracts. It argues statutes which affect the subject matter of a contract and which exist at the time of a contract's execution are incorporated therein and become a part of the contract. Rones v. Safeco Ins. Co. of Am., 119 Wash.2d 650, 656, 835 P.2d 1036 (1992); Wagner v. Wagner, 95 Wash.2d 94, 621 P.2d 1279 (1980); In re Marriage of Rufener, 52 Wash.App. 788, 791, 764 P.2d 655 (1988), review denied, 112 Wash.2d 1008 (1989). Both parties agree the wage statutes, RCW 49.48 and RCW 49.52, are incorporated into the employment contracts. Thus, a determination of liability under either RCW 49.48.010 or RCW 49.52.050(2) also determines whether the University breached its employment contract with each class member.

***489[2]** The trial court ruled on summary judgment

that the University violated RCW 49.48.010 based on the following language:

It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:

(1) Required by state or federal law....

This limitation on lawful deductions, however, must be read in the context of the statute as a whole. See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 789, 719 P.2d 531 (1986). RCW 49.48.010 governs deductions made from wages at the termination of employment: When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period....

See Cameron v. Neon Sky, Inc., 41 Wash.App. 219, 703 P.2d 315, review denied, 104 Wash.2d 1026 (1985); Brown v. Suburban Obstetrics & Gynecology, P.S., 35 Wash.App. 880, 670 P.2d 1077 (1983). The statute has not been applied in nontermination cases. Because the class is not claiming the University made improper deductions to wages due at the termination of employment, the statute and the limitation on deductions are inapplicable. For this reason, the trial court erred in granting summary judgment in favor of the class.

The trial court also found, after a bench trial, the University violated RCW 49.52.050(2), which makes it a misdemeanor for any employer to:

Wilfully and with intent to deprive the employee of any part of his wages, ... pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract....

RCW 49.52.070 creates civil liability for violation of RCW 49.52.050, including double damages, costs, and attorney fees.

We have previously interpreted and applied RCW 49.52.050. See Chelan Cy. Deputy Sheriffs' Ass'n v. County of Chelan, 109 Wash.2d 282, 745 P.2d 1 (1987); Lillis v. Becton-Dickinson, 105 Wash.2d 653, 717 P.2d 1371 (1986); *490 Yates v. State Bd. for Comm'ty College Educ., 54 Wash.App. 170, 773 P.2d 89, review denied, 113 Wash.2d 1005, 777 P.2d 1050 (1989); Cameron v. Neon Sky, Inc., supra; Ebling v.

121 Wash.2d 479, 852 P.2d 1055, Unempl.Ins.Rep. (CCH) P 17673A, 1 Wage & Hour Cas.2d (BNA) 846
(Cite as: 121 Wash.2d 479, 852 P.2d 1055)

Gove's Cove, Inc., 34 Wash.App. 495, 663 P.2d 132, review denied, 100 Wash.2d 1005 (1983); McAnulty v. Snohomish Sch. Dist. 201, 9 Wash.App. 834, 515 P.2d 523 (1973); Brandt v. Impero, 1 Wash.App. 678, 463 P.2d 197 (1969). Cameron, however, is the only case concerning a disputed deduction from wages.

In Cameron, the employee, the managing officer of a restaurant, unilaterally increased his salary. When the owners learned of this they terminated him and deducted the "overpayment" from his last paycheck. The employee sued. The court held, as a matter of law, that the deduction of a disputed debt from "wages admittedly owed" was not a willful withholding of wages. Cameron, 41 Wash.App. at 222, 703 P.2d 315.

[3] We hold the University's deduction of social security was not a willful withholding of wages as a matter of law based on Cameron. Here, the University was **1062 "deducting the amount of an alleged debt from wages admittedly owed". Cameron, 41 Wash.App. at 222, 703 P.2d 315. The disputed "debt" is the employees' disputed social security deduction. Federal law dictates that such deductions are "considered to have been paid to the employee at the time of such deduction." 26 U.S.C. § 3123. By making the deduction, the University is not disputing the amount of the wage, but actually paying the wage to the employee. Consequently, the University was deducting the amount of a disputed employee debt from wages admittedly owed. This does not deprive the employee of wages under RCW 49.52.050. Cameron, 41 Wash.App. at 222, 703 P.2d 315.

[4][5][6][7] Further, there is no substantial evidence in the record to support the trial court's conclusion that the University acted willfully and with the intent to deprive the employees of their wages. See Lillig v. Becton-Dickinson, supra, 105 Wash.2d at 660, 717 P.2d 1371 (whether an employer acts "[w]illfully and with intent" is a question of fact reviewed under the substantial evidence standard).^{FN3} Nonpayment of wages is willful and made with intent

^{FN3}. We review the record in light of the University's obligation to pay matching contributions for social security deductions made from the class' wages.

when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment...

*491 Chelan, 109 Wash.2d at 300, 745 P.2d 1.^{FN4} A finding of intentional nonpayment by a party who is not an individual requires the organization to reach a consensus regarding the action taken. See Chelan Cy. Deputy Sheriffs' Ass'n, 109 Wash.2d at 302-03, 745 P.2d 1.

^{FN4}. The class' argument that RCW 49.52.050 establishes liability without fault is not persuasive. Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute. See Yates v. State Bd. for Comm'ty College Educ., 54 Wash.App. 170, 176-77, 773 P.2d 89, review denied, 113 Wash.2d 1005, 777 P.2d 1050 (1989); Brandt v. Impero, 1 Wash.App. 678, 681, 463 P.2d 197 (1969); Ebling v. Gove's Cove, Inc., 34 Wash.App. 495, 501, 663 P.2d 132, review denied, 100 Wash.2d 1005 (1983). Affirmative evidence of intent to deprive an employee of wages, however, is necessary to establish liability under RCW 49.52.050.

The record contains testimony and supporting documentation regarding the many letters, memoranda, notices, and recommendations sent between the various University departments discussing whether specific classes of employees or employee job positions were covered by a retirement system or by social security. There is no evidence in the record, however, that the University reached a consensus as to whether specific job positions, other than RA's and TA's, were ineligible for social security until December 1989 when they announced the withholding would cease as of January 1, 1990.^{FN5} Although the trial court found the University's delay in making a decision was, itself, a decision, there is no substantial evidence in the record this was a University decision made with the intent to deprive employees of their wages. Therefore, the trial court's determination there was a consensus within the University is not supported by substantial evidence.

^{FN5}. Because the Attorney General's office is not part of the University, it is inappropriate to rely, as did the trial court, on the correspondence from that office in

determining whether the University reached a consensus on the social security eligibility of the class members.

The University did not violate RCW 49.52.050(2) or RCW 49.48.010. Consequently, the terms of the employment contracts were not breached by the University's deduction of social security from the class' wages. Our resolution of the liability issues makes it unnecessary to reach the questions regarding the proper scope of the class.^{FN6}

FN6. We note the United States Department of Health and Human Services supported the University's deduction of social security from part-time, temporary, and student employees occupying positions under a state retirement system.

*492[8] We turn to the class' cross appeal of the trial court's grant of summary judgment in favor of the University on the breach of fiduciary duty, misrepresentation, and nondisclosure claims. The granting of summary judgment is reviewed to **1063 ascertain whether the class raises a genuine issue of material fact after viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Hansen v. Friend, 118 Wash.2d 476, 485, 824 P.2d 483 (1992).

[9][10] The class argues a fiduciary relationship existed between the University and the class regarding the calculation and payment of wages. The law recognizes that facts may create a fiduciary relationship between contracting parties. See Liebergessell v. Evans, 93 Wash.2d 881, 889-90, 613 P.2d 1170 (1980). Such relationships have been found where one party has superior knowledge and thereby induces reliance in the other party. See Liebergessell, 93 Wash.2d at 890-91, 613 P.2d 1170 (citing Salter v. Heiser, 36 Wash.2d 536, 219 P.2d 574 (1950); Graff v. Geisel, 39 Wash.2d 131, 234 P.2d 884 (1951); Gray v. Reeves, 69 Wash. 374, 125 P. 162 (1912)). See also Boonstra v. Stevens-Norton, Inc., 64 Wash.2d 621, 625, 393 P.2d 287 (1964).

For example, in Liebergessell, a widowed schoolteacher became friends with Mr. Kotowski, a state auditor, through the friendship of their daughters. Kotowski encouraged Liebergessell to regard him as a financial counselor, was aware of her reliance on him, and urged her to invest in his

business. The court held these facts created an issue of fact whether a fiduciary relationship existed. Liebergessell, 93 Wash.2d at 891, 613 P.2d 1170.

Here, the class asserts it was justified in relying on the University's calculation and payment of wages because the University was in a position of superior knowledge. Although the University may have had superior knowledge as to the applicable federal and state laws governing the calculation and payment of wages, the class fails to raise a genuine issue of fact that the University used this position to induce reliance*493 in the class. The trial court properly granted summary judgment in favor of the University on the breach of fiduciary duty claim.

[11][12] The class also asserts the University concealed or failed to disclose only employees in positions eligible for retirement systems coverage were subject to social security, and the class employees were not in retirement eligible positions. A precondition for finding liability is knowledge of the facts alleged to have been concealed or not disclosed. See Restatement (Second) of Torts § 551 (1977); Haberman v. WPPSS, 109 Wash.2d 107, 168, 744 P.2d 1032, 750 P.2d 254 (1987), appeal dismissed, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988); Liebergessell, 93 Wash.2d at 891-92, 613 P.2d 1170.

In this case, the class fails to raise a genuine issue of material fact that the University reached a consensus or "knew", prior to December 1989, which specific employee job positions were ineligible for retirement and social security coverage. The record does contain University interdepartmental memoranda and memoranda from the Attorney General's office discussing this issue, but, again there is no evidence of a consensus.

[13] Lastly, the class contends the trial court erred in granting summary judgment on its misrepresentation claim. We disagree. The class fails to raise a genuine issue of material fact that the University had a pecuniary interest in withholding social security from the class' wages. See Restatement (Second) of Torts § 552(1) and (2) (1977) (misrepresentation requires that false information be provided by one who "has a pecuniary interest"); Haberman, 109 Wash.2d at 161-62, 744 P.2d 1032. Here, the University does not have a pecuniary interest in deducting social security because it was required to pay matching employer contributions for every deduction made.

We affirm the trial court's grant of summary judgment in favor of the University on the breach of fiduciary duty, nondisclosure, and misrepresentation claims. We reverse the summary judgment in favor of the class for breach of contract*494 and violation of RCW 49.48.010 and direct summary judgment be issued in favor of the University on these claims. We also reverse the trial court's ruling that the University violated**1064RCW 49.52.050(2) and reverse the award of double damages, attorney fees, and costs. We need not address the prejudgment interest issue raised by the University.

ANDERSEN, C.J., and BRACHTENBACH,
DURHAM, GUY, JOHNSON and MADSEN, JJ.,
concur.

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