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No. 57938-0-I

IN THE COURT OF APPEALS, DIVISION I
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,

Appellants,

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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REPLY BRIEF OF APPELLANTS
AND RESPONSE TO CROSS-APPEAL

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ORIGINAL

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I. INTRODUCTION

The respondent employees, far from demonstrating their entitlement to summary judgment, have gone to extraordinary lengths to urge a massive retroactive overhaul of existing law--one that would for the first time make officers and agents *de facto* sureties of an employer's wage obligations. In particular, Respondents urge that the plain and unambiguous language of RCW 49.52.050 and .070 be entirely discarded in favor of a new, judicially-created, standard under which an individual officer or agent would be *per se* liable for unpaid wages in all but two limited circumstances. Alternatively, Respondents urge that the standard of specific intent which is the *sine qua non* of liability under RCW 49.52.050 be replaced by a standard of mere negligence, and that such negligence be imputed to individual officers and agents as a matter of law in any case where a company is unfortunate enough to end up in bankruptcy.

The sweeping changes in the law advocated by Respondents have no root in the statutes themselves. Despite several decades of political ebb and flow in the arena of employment relations, the Legislature has never seen fit to expand the liability of officers and agents in the manner suggested by Respondents. Although the respondent employees may disagree with the Legislature about what constitutes sound public policy, the fact is that the "new and improved" versions of RCW 49.52.050 and .070 envisioned by Respondents are *not* the law. They do not even *resemble* the law.

Respondents' call for what amounts to a complete judicial rewriting of RCW 49.52.050 and .070 contravenes the most basic principles of

statutory construction and constitutes a head-on affront to the authority of the Washington Legislature. Because existing law is crystal clear in providing that liability under RCW 49.52.070 cannot exist absent proof of a *specific intent to deprive employees of wages*, Respondents cannot possibly be said to have established their entitlement to judgment as a matter of law. Accordingly, the Court of Appeals should reverse the summary judgment granted in favor of the employees and direct the entry of judgment in favor of Appellants.

II. ARGUMENT

A. The Respondent Employees Failed to Establish, as a Matter of Law and Beyond Any Genuine Issue of Material Fact, the Essential Elements of Liability.

1. The Plain and Unambiguous Language of RCW 49.52.050 and .070 is Dispositive of This Appeal.

An individual officer or agent of an employer ordinarily has no personal liability for the employer's unpaid wage obligations. *See Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001); *Dickens v. Alliance Analytical Laboratories*, 127 Wn. App. 433, 111 P.3d 889 (2005). RCW 49.52.070 carves out a limited exception to that rule, providing that an officer or agent may be held personally liable for an employer's unpaid wage obligations only in the event that he is found to have "violated" one of two specified subsections of RCW 49.52.050. RCW 49.52.050, in turn, provides that

[a]ny employer or officer, vice principal or agent of any employer, . . . who . . . (2) *willfully 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.]

That the Washington Legislature made civil liability under RCW 49.52.070 contingent upon the “violation” of RCW 49.52.050--a criminal statute expressly requiring a finding of *specific intent*--is extremely significant. It precludes any possible inference that the Legislature intended for the mental state which supplies the very basis of liability under RCW 49.52.050 to be disregarded as mere surplusage, or that it be presumed from the mere fact that wages are owed.

The simple and straightforward language of RCW 49.52.050 and .070 is dispositive of this appeal. Quite simply, the Washington Legislature has not, in over 60 years of legislative history, seen fit to impose liability on the individual officers and agents of an employer except in the case of *willful conduct specifically intended to deprive employees of wages*. This critically important point is one that Respondents would prefer to avoid, as evidenced by the fact that they have consistently sidestepped the actual text of the statutes upon which they predicate their claim for damages and have proceeded as though the words “*and with intent to deprive the employee of wages*” do not even exist.

Respondents’ consistent evasion of the actual text of the statutes upon which their claim relies is no accident, since there has never been so much as a hint of evidence that Kingen or Switzer did anything even remotely intended to deprive Funsters’ employees of wages. Not surprisingly, the focus of Respondents’ argument has been upon convincing the Court that

through some extraordinary feat of judicial “interpretation,” RCW 49.52.050 means something other than what it says.

The principal issue in this appeal, therefore, is whether it is the prerogative of the courts to simply “rewrite” a statute specifically designed by the Legislature to create liability only in the event of a finding of specific intent, and to substitute in its place a rule of absolute liability subject to two judicially-created “exceptions.” We submit that there is no precept of statutory construction, nor any case in the annals of law or equity, that can possibly support such a result.

2. Nothing in the Washington Supreme Court’s Holding in *Schilling* Even Purports to Have Created a *Per Se* Rule of Liability Subject to Two Judicially-Created “Exceptions.”

The respondent employees seriously distort the Washington Supreme Court’s holding in *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1988), by suggesting that the *Schilling* Court “interpreted” RCW 49.52.050 so as to excise from the statute the expressly stated requirement of specific intent and to substitute in its place an irrebuttable presumption of liability subject to two isolated “defenses.” *Schilling* cannot, by any conceivable stretch, be regarded as having embarked upon such an unprecedentedly ambitious and constitutionally unsanctioned detour into the province of the Legislature.

As discussed in Appellants’ opening brief, the Washington courts have consistently adhered to the rule that when a statute is clear 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. *Cerrillo 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). This well settled rule of construction was specifically embraced by the Court in *Schilling* when it refused to countenance a “rewriting” of the very statutes at issue--in that case, for the purpose of creating a generalized “insolvency” exception to liability for conduct otherwise found to be willful and intended to deprive employees of wages.¹ 136 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]. Having flatly declared its unwillingness to deviate from the plain language of RCW 49.52.050, it is unreasonable to assume that the Court proceeded, within the course of very same opinion, to do exactly that.

Further belying the premise that the *Schilling* court sought by its decision to effect a sweeping judicial overhaul of RCW 49.52.050 and .070 is the simple fact that *it did not have to*. The *Schilling* court established, as a purely factual matter, that the defendant in that case had made a *conscious*,

¹ At issue was the defendant Bingham’s argument that *despite the existence of facts found by the trial court to have demonstrated willful, 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 ought to 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 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.

volitional choice not to pay the plaintiff her wages.² 136 Wn.2d at 164 n. 5. Accordingly, it did not need to do anything more than apply the statute as written to uphold the trial court's finding of liability. That, we submit, is exactly what the *Schilling* court did. Its purely gratuitous comments about the factual circumstances in which prior courts have found the absence of willfulness was, at most, loosely conceived dicta.³

More importantly, the Court of Appeals should appreciate that the novel and expansive propositions of law attributed to *Schilling* by the respondent employees are not even remotely supported by a fair and conscientious reading of the case. Most salient in this regard is Respondents' principal contention that *Schilling* created a *per se* rule of liability subject to two judicially-created exceptions.

In a less than candid attempt to support that premise, Respondents point first to that portion of the *Schilling* court's opinion in which the Court noted that in "prior cases" the element of willfulness had been found absent

² The Court observed: "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 benefitted 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.* 136 Wn.2d at 164 n.5.

³ The *Schilling* decision, which is a study in contradictions, was undoubtedly the less-than-coherent product of a "pull and tug" between Supreme Court factions. As aptly observed by the trial court in the present case, the composition of the Court has, since the time of *Schilling*, undergone a significant change. The justices which composed the majority in *Schilling* are no longer on the Court, and the author of the dissent is now the Chief Justice. (CP 1646-47.) Undoubtedly the decision in *Schilling* is due for some cleaning up.

in only two circumstances--those involving inadvertence or the existence of a bona fide dispute over the obligation for wages. Respondents then attempt to directly link the Court's observation to an entirely separate portion of the decision in which the Court refused to sanction the creation of any "further exceptions."⁴ Respondents' Brief at 26-27. Thus Respondents would have the Court of Appeals believe that the *Schilling* court was intending to characterize the circumstances of inadvertence and bona fide dispute as *existing* exceptions to some generalized, and otherwise absolute, rule of liability. It most definitely was not.

In fact, by referring to a "further exception" to liability, the *Schilling* court was not even talking about the concepts of inadvertence or bona fide dispute. The "exception" to which the Court was referring was the single exception to liability actually embedded in the text of RCW 49.52.070--i.e., where an employee knowingly submits to a violation of the statute. 136 Wn.2d at 164-65. That exception pertains *only after* there has been a factual finding of willful conduct intended to deprive employees of wages. When read in context, therefore, it is clear that the *Schilling* court's refusal to sanction a second, judicially created, exception to liability under RCW 49.52.070 did nothing more than reaffirm its commitment to enforcing the terms of the statute as written.

Significantly, at no point in the *Schilling* opinion did the Court ever

⁴ At Pages 26-27 of their Brief, Respondents represent to the Court that "The Supreme Court has decided that the meaning of the words 'willfully and with intent to deprive' means failure to pay that is not the result of inadvertence or bona fide mistake, and there are no 'exceptions' to this rule." This is a flagrant distortion of the Supreme Court's actual meaning.

announce the creation of a new and more expansive rule of liability at odds with the plain and unambiguous terms of RCW 49.52.050 and .070. While the Court noted the potential breadth of the concept of “willful” conduct, it did absolutely nothing to construe--much less alter--the more exacting requirement of specific intent which is the *sine qua non* of liability under RCW 49.52.050. As previously noted, RCW 49.52.050 is a criminal statute, and therefore the phrase “intent to deprive the employee of any part of his wages” must be construed consistent with the Legislature’s definition of “intent” in RCW 9A.08.010(a). That section provides that “[a] person acts with intent or intentionality when he acts with the *objective or purpose* to accomplish a result . . .” Significantly, the meaning of the term “intent” was never discussed--much less questioned--in *Schilling*.

In sum, absolutely nothing in the Washington Supreme Court’s decision in *Schilling* even purport to have created a *per se* rule of liability subject to two judicially-created “exceptions.” To the contrary, the Court went out of its way to declare its unwillingness to legislate social policy from the bench and to affirm its commitment to the plain meaning of the statutes as written.

3. Respondents’ Contention That Kingen and Switzer Have “No Defense” to Liability Constitutes an Unjustified and Misleading Attempt to Confuse the Burden of Proof.

Just as the decision in *Schilling* is lacking in any indication that the Court intended to replace the legislatively ordained requirement of specific intent with a *per se* rule of liability subject to two judicially-created “exceptions,” the decision is likewise devoid of any indication that the Court

set out to reverse the burden of proof. This is a critical point inasmuch as Respondents have consistently, and without any authority, attempted to characterize the evidence of Kingen's and Switzer consistent resolve to keep Funsters' employees paid as a matter of priority as nothing more than a "defense"--and an unrecognized one at that. In actuality, the absence of willful conduct intended to deprive employees of wages has nothing to do with a "defense," since the elements of willfulness and intentionality are *essential elements of liability* under RCW 49.52.050. Thus it was incumbent upon the *respondent employees* to prove, by way of affirmative evidence, that Kingen and Switzer took willful action specifically intended to deprive them of wages.

Respondents argue, in particular, that there is no "insolvency defense" to liability under RCW 49.52.070, and point to the holding in *Schilling* as authority for that proposition. However, unlike the defendant Bingham in the *Schilling* case (who was specifically found by the Court to have engaged in willful conduct intended to deprive employees of wages), Kingen and Switzer have never had any need to resort to a judicially-created "defense." They never engaged in willful and intentional conduct to begin with.⁵ Accordingly they have contested their liability on grounds that an *essential element of proof*--namely, the existence of willful conduct intended to deprive employees of wages--has not, and cannot, be established.

Thus, the evidence of Kingen's and Switzer's consistent efforts to

⁵ In fact, the trial court specifically premised its summary judgment on the assumption that Kingen and Switzer *had not* had any subjective or conscious intent to deny the employees their wages. (CP 1651.)

keep Funsters' employees paid as a "top priority"--and the fact that they consistently managed to achieve that goal despite a formidable set of obstacles--goes not to some "novel good faith defense," but rather to the fact that there was not even a *prima facie* showing of willful conduct specifically intended to deprive employees of wages. Likewise, the evidence of Funsters' bankruptcy goes not to some ephemeral "bankruptcy defense," but rather to the fact that an officer or agent cannot reasonably be said to have willfully and intentionally acted to deprive employees of wages when he had no control or authority over the decision that caused the employees not to be paid.⁶ That commonsense proposition was at the very heart of the Washington Supreme Court's holding in *Ellerman*, where the Court established that the elements of control and authority are natural and indispensable prerequisites to liability under RCW 49.52.070.

4. Respondents' Contention That No Particular "Mens Rea" is Required in Order to Establish Liability Under RCW 49.52.050 and .070 Is Belied by the Express Language of the Statutes Themselves.

Respondents take the truly astounding position that civil liability under RCW 49.52.070 is not dependent upon a finding of mens rea, and that there is no authority to justify this "heightened standard of proof." The authority, of course, inheres in the very language of the statute itself, which expressly conditions civil liability under RCW 49.52.070 upon a finding that the defendant "violated" one of two specified subsections of RCW 49.52.050.

⁶ As an aside, Respondents' assertion that the *Schilling* court "had the opportunity to consider the bankruptcy defense and rejected it" is flatly false. The company in *Schilling* was not in bankruptcy, and so the issue never even arose.

RCW 49.52.050, it has already been observed, is a criminal statute the violation of which requires that the defendant have paid an employee a lower wage than that to which he was entitled *and* that he have acted “willfully and with intent to deprive the employee of any part of his wages.” Thus it is not even debatable that the very crux of liability under RCW 49.52.070 is the element of mens rea, and that the required mental state is one of specific intent--the highest standard of intent known in law.

Respondents urge that the Court of Appeals view RCW 49.52.050 and its specific requirement of specific intent as having no bearing on the statute’s civil counterpart, RCW 49.52.070. According to Respondents, this is only one of many instances under the law “where both criminal and civil liability result from the exact same conduct.” Respondent’s Brief at 36. That contention, the Court of Appeals will observe, is diametrically at odds with the very language and structure of the statutes themselves. Civil liability under RCW 49.52.070 is not simply coexistent with liability under RCW 49.52.050; it is expressly and specifically dependent upon a finding that the latter statute was “violated.” Because RCW 49.52.070 cannot even *possibly* be applied without importing the substantive provisions of RCW 49.52.050, it cannot seriously be maintained that specific intent is not an indispensable prerequisite to civil liability under RCW 49.52.070.

5. Respondents’ Characterization of Kingen and Switzer as “Jointly Liable” Together With Funsters for the Latter’s Unpaid Wage Obligations is Erroneous and Misleading.

Respondents argue at some length that while Funsters’ bankruptcy

may have relieved the *corporation* of its unpaid wage obligations, the bankruptcy did nothing to absolve the company's individual officers and agents of their "joint" liability for wages. This is a seriously misleading statement, since it is clear that Kingen and Switzer never were "jointly" liable for Funsters' unpaid wage obligations. Whereas the corporation's liability derived from a consensual contractual undertaking, the *only potential* source of liability on the part of Kingen and Switzer personally was RCW 49.52.070 which, as we have seen, requires an independent unlawful act--namely, a willful withholding of wages specifically intended to deprive employees of wages. *See Dickens*, 127 Wn. App. 433.

The flatly inaccurate characterization of Kingen and Switzer as "jointly liable" for Funsters' unpaid wage obligations is made all the more misleading by the fact that it provides the springboard for one of the principal arguments put forth by Respondents: that Kingen and Switzer "willfully and intentionally withheld" wages by declining to pay Funsters' employees out of their own pockets. The latter argument, upon which Respondents place substantial reliance, is an exercise in sheer sophistry in that it attempts to create liability out of thin air.

6. Respondents Have Offered Nothing to Contradict or Detract from the Well Settled Principle That the Elements of Control and Authority are Indispensable Prerequisites to Liability Under RCW 49.52.050 and .070.

In *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d

795 (2001) (a case decided by the Washington Supreme Court three years *post-Schilling*), it was held that the essential element of scienter required to establish liability under RCW 49.52.070 could logically 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. Under *Ellerman*, Kingen and Switzer could not possibly have acted willfully and with the intent to deprive Funsters’ employees of wages because the “withholding” at issue was occasioned entirely by circumstances that did not even come into existence until Kingen and Switzer had been divested of all control and authority over the business and no longer had the *legal right* to control the payment of wages.

Notably, Respondents have offered nothing to contradict or detract from the holding in *Ellerman* or to demonstrate why its soundly reasoned holding is not dispositive of the present case. Respondents point vainly to the fact that the defendant in *Ellerman* was not an “officer” and that the Court’s analysis in that case therefore revolved around her putative liability as an “agent” or “vice principal.” But that factual distinction is wholly inconsequential to the holding in *Ellerman*. RCW 49.52.050 and .070 impose personal liability upon all three classes of persons--officers, agents, and vice-principals--based upon an identical standard of conduct and an identical standard of specific intent.

Moreover, the *legal principle* established by *Ellerman* is one that transcends any superficial distinction between officers and non-officer agents. Quite simply, that principle holds that an individual who lacks the *very ability*

to control the payment of wages cannot possibly be said to have engaged in willful conduct intended to deprive employees of wages. Even Respondents concede that “[o]fficers, by definition, are those individuals running the company *who have authority over the payment of employee wages.*” Respondent’s Brief at 29. It stands to reason that when an officer has been legally divested of all such authority, he ceases to be among the class of individuals intended by the Legislature to be potentially subject to liability under RCW 49.52.050 and .070.

As previously discussed in Appellants’ opening brief, the courts throughout the jurisdictions have recognized in a variety of analogous statutory contexts that a corporation’s bankruptcy necessarily divests officers and agents of the control and authority that are logical and indispensable prerequisites to liability for willful and intentional withholding of wages. *Belcufine v. Aloe*, 112 F.3d 633 (3d Cir. 1997); *DeBrecini v. Graf Bros. Leasing, Inc.*, 828 F.2d 877 (1st Cir. 1987). Respondents offer only the most fleeting and insubstantial of responses to those authorities, asserting that they involve “different statutory schemes” and have “a different purpose and different language” than Washington’s.⁷ However, Respondents fail to cite even one distinguishing feature that is remotely material to the legal principle at issue: that a bankruptcy divests individual officers and agents of the very

⁷ For example, Respondents cite the fact that the Pennsylvania statute at issue in *Belcufine* created liability for failure to pay only those wages that are “due and payable.” We fail to comprehend what possible significance that fact might have to the legal principle at issue or, for that matter, to the ultimate disposition of this case. Kingen and Switzer could not, under any interpretation of RCW 49.52.050 and .070, be liable for failure to pay wages that had not yet become due and payable.

ability to choose whether or not to pay wages, and that there can be no justification for holding officers and agents liable for a withholding of wages that they did not, and could not, control. Even more telling is the fact that Respondents have been unable to cite even one case--from any jurisdiction--in which a court has proceeded to impose personal liability upon a defendant who, as a matter of law, had no right to control the payment of wages.

In sum, the respondent employees have shown no reason for disregarding the Washington Supreme Court's holding in *Ellerman* or for deviating from the commonsense proposition of law for which it stands.

7. There is No Merit to Respondents' Contention That Officer Liability is Incurred at the Time Wages Are Earned.

The respondent employees appear to concede--at least with respect to the final pay period ending April 11, 2003--that by the time the wages at issue were due to be paid, Kingen and Switzer had been divested of their role as managers of the business and had neither the practical ability nor the legal authority to act on behalf of Funsters. Faced with the *legal fact* that Kingen and Switzer did not have the authority after April 7, 2003 to decide whether employees should be paid, Respondents have resorted to the entirely novel and unsupported argument that an officer or agent's liability under RCW 49.52.070 should be determined as of the time the wages at issue were *earned*.

This entirely unprecedented and self-serving view of when liability is incurred has absolutely nothing in the way of authority to support it. Indeed, it runs directly counter to the express terms of the very statutes upon which Respondents rely. RCW 49.52.050 is not a vicarious liability statute

that causes liability to attach to an officer or agent when the employer's contractual liability for wages first arises. To the contrary, RCW 49.52.050 is a *penal* statute that requires, by its terms, an independent act or omission in derogation of law--namely, a willful and intentional withholding of wages. Obviously there can be no wrongful withholding of wages until such time as those wages are due to be paid:

Thus, Respondents' pained attempt to establish that wages are "earned" when the work is performed is entirely beside the point. Regardless of when the wages at issue were "earned," the respondent employees were not entitled to receive payment of those wages until the next regularly scheduled payday, which in this case was April 11, 2003.⁸

Respondents' citation to WAC 296-128-035 does nothing to detract from that fact. Far from requiring wages to be paid immediately upon being earned, the regulation provides that "an employer may implement a regular payroll system in which wages from up to seven days before payday may be withheld from the pay period covered and included in the next pay period." Accordingly, WAC 296-128-035 simply reinforces the commonsense proposition that the wages at issue could not possibly have been wrongfully withheld prior to April 11, 2003--the next regularly scheduled payday.

Similarly, Respondents' attempted invocation of RCW 49.48.010

⁸ The authorities cited by Respondents--namely, *Bowles v. Washington Dep't of Retirement Systems*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993) and 29 C.F.R. § 1620.10 (1986)--are directed to the entirely inconsequential question of when compensation is "earned." Neither authority addresses the entirely separate question of when wages are due to be *paid*, although both expressly recognize the fact that wages "earned" at one time may be "payable" at another.

does nothing to advance their cause. RCW 49.48.010 merely provides that when an employee ceases to work for an employer, wages “due” shall be paid at the end of the established pay period. Notably, the term “at the end of the established pay period,” as used in RCW 49.48.010, has been interpreted by the Washington State Department of Labor and Industries to mean that “all wages earned and owing are due no later than *the next regularly scheduled pay date* following the date of the employee’s discharge or voluntary withdrawal.”⁹ Furthermore, RCW 49.48.010, by its terms, does not even apply until such time as an employee has ceased employment. *Id.*; *Pope v. University of Washington*, 121 Wn.2d 479, 489, 852 P.2d 1055 (1993). Because the respondent employees did not cease work for Funsters until April 7, 2003--precisely coincident with the conversion to Chapter 7, the statute simply reaffirms that the “withholding” of wages alleged in this action did not occur, and could not have occurred, until after Kingen and Switzer had been divested of all control and authority over the business.

8. There is No Evidence to Support Respondents’ Contention That the Wages Outstanding from the Second-to-Last Pay Period Were Unpaid as a Result of Conduct Attributable to Kingen and Switzer.

Respondents argue that even if Kingen and Switzer could not be held liable for the final wages due April 11, 2003 by virtue of their legal incapacity

⁹ See Administrative Policy on Payment of Final Wages and Deductions Upon Termination, State of Washington Department of Labor & Industries Employment Standards, No. E.S.B. 1 (January 2, 2002); see also *Brown v. Suburban Obstetrics & Gynecology*, P.S., 35 Wn. App. 880, 886-87, 670 P.2d 1077 (1983) (observing that the Legislature rejected a previous draft of RCW 49.48.010 providing for the payment of wages “forthwith” and observing that “the Legislature was aware of a variety of circumstances under which an employee’s pay period is determined”).

to control their payment and the fact that they were no longer officers or agents of an employer, they could still be held liable for the wages deriving from the previous pay period ending March 28, 2003 (at which time they were managing the business as Chapter 11 debtors-in-possession). As the Court will recall, it was readily acknowledged by Kingen and Switzer that approximately 25 percent of the paychecks issued for that second-to-last pay period (consisting of a total of \$10,274.20¹⁰) were returned for insufficient funds when, on April 7, 2003, the company's bank accounts were emptied and closed by the Chapter 7 Trustee. (CP 360, 367.)

Respondents assert, for the first time in this appeal, that a number of the payroll checks issued on March 28, 2003 were dishonored *prior* to the time the account was closed by the Chapter 7 Trustee--thus insinuating that it was the inadequate funding of the payroll account, and not the action of the Chapter 7 Trustee, that was the proximate cause of those checks going unpaid. In support of that assertion, Respondents ask the Court of Appeals to consider a payroll account statement from AEA Bank dated April 30, 2003 (CP 1783-86), as unilaterally construed by Respondents' counsel. Before going any further, we would have the Court of Appeals appreciate that this bank statement was never considered--or even offered--in connection with the summary judgment proceeding below. In fact, it was not put into evidence until approximately *one year* after the trial court's order granting summary

¹⁰ See CP 68. Note that the \$23,266.11 figure repeatedly cited by the respondent employees represents the amount of *gross* wages reportable to the IRS--over half of which represented cash tips already received by employees, as well as federal income tax, social security and other legally mandated withholdings.

judgment, and then for the limited purpose of establishing the quantum of damages. (CP 1780-86.) Accordingly it is not properly raised in this appeal. *See* RAP 9.12.

Without engaging Respondents' wholly improper attempt to introduce previously unseen evidence on the issue of liability, we would simply state that had the April 30 bank statement been offered in connection with the summary judgment proceeding, Appellants would have had plenty to say about it. Appellants would have promptly pointed out that as a result of an account linking arrangement with AEA Bank, a majority of the payroll checks only later identified as "NSF" continued to be processed by the bank *and paid*. From the April 30 bank statement it can readily be seen that between April 1 and April 7, 2003, Funsters' payroll account was actually running a *negative balance* of between \$28,000 and \$37,000--meaning that checks continued to be paid and debited against Funsters' account despite the temporary shortfall of funds. (CP 1786.)

Furthermore, even assuming *arguendo* that payroll checks had been dishonored at some point prior to April 7 (a proposition for which there never has been any evidence), that fact alone would not have been enough to establish liability under RCW 49.52.050 and .070. It still would have been incumbent upon Respondents to prove that any glitch in the execution of payroll was the result of willful conduct specifically intended to deprive the employees of wages.

In this regard, it should be appreciated that while Kingen and Switzer had no personal knowledge of *any* checks bouncing prior to April 7 (CP 149,

366-67), it was their longstanding policy to immediately exchange any dishonored payroll checks for cash from the cage (the casino's internal bank). (CP 722; *see also* CP 370, 368, 381, 388.) In fact, class representative and cage manager Nancy Pitchford testified that it was *part of her job* to assure that any paycheck that had been returned NSF was paid in cash from the cage.¹¹ (CP 722.)

While Respondents assert that it was "obvious" from the amount of the bank funds marshaled by the Chapter 7 Trustee on April 7, 2003 (approximately \$15,000) that Funsters did not have sufficient funds to cover the payroll checks outstanding as of that date, the evidence simply does not bear that out. *First*, the *net* amount of the checks outstanding from the March 28 payroll was just over \$10,000, not \$23,268.11 as represented by Respondents. (CP 68, 1804.) The larger amount represented the *gross* payroll outstanding, over half of which consisted of mandatory withholdings and cash tips already received by the employees. (*Id.*) As later acknowledged by the Chapter 7 Trustee, it was necessary only for Funsters to come up with the *net* amount of the employees' paychecks in order to meet

¹¹ Moreover, it can be seen that each of the checks listed on the statement as "insufficient funds" were initially posted as "debits," only later to be *reversed* through the posting of corresponding "credits." (CP 1783.) This would seem to suggest that on April 7, with the precipitous closing of Funsters' accounts by the Chapter 7 Trustee, AEA Bank scrambled to recover a portion of the funds that it had advanced to Funsters through electronic chargebacks. Because the statement does not indicate exactly when those chargebacks occurred, it simply cannot be determined without further discovery whether the presentation dates shown for each of the checks listed as "insufficient funds" bear any relation to when AEA Bank actually decided to dishonor them.

its immediate payroll obligation.¹² (CP 340-41.)

Second, it was well established from the testimony of Respondents themselves that as a convenience to employees (many of whom did not have their own bank accounts), Funsters routinely allowed paychecks to be cashed at the cage. (CP 371.) What this meant was that it was impossible to anticipate in advance the exact amount of funds that would need to be deposited to the payroll account to meet a particular payroll obligation.

Third, it is undisputed that as of April 7, 2003 Funsters had more than sufficient funds between its various bank accounts and cash on site to cover the entire \$10,274.20 obligation outstanding from the March 28 pay period--as well as the vast majority of what it would take to cover the upcoming April 11 payroll obligation of approximately \$110,000 (CP 370, 340.) It was well documented that on April 7, 2003 the Chapter 7 Trustee walked away from the casino with approximately \$85,000 in cash funds and proceeded to extract another \$15,000 from the company's bank accounts. (CP 149 at 43; CP 198.) Those funds, together with the substantial revenues that would have been generated throughout the remainder of the week,¹³ would have been more than sufficient to cover the final payroll. (CP 317, 367, 370, 381, 397, 400.)

In short, there was nothing other than pure surmised and conjecture on the part of Respondents to support their contention that the 28 paychecks

¹² The amounts withheld for federal taxes and other governmentally mandated withholdings were due to be remitted on a quarterly basis. In the meantime, Funsters had no legal obligation to segregate the funds withheld. *See Slodov v. IRS*, 436 U.S. 238, 243, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978).

¹³ The Chapter 7 Trustee noted that there were two events scheduled for the upcoming weekend that alone would have generated about \$20,000 in profit. (CP 317.)

outstanding from the March 28, 2003 payroll were unpaid as the result of conduct on the part of Kingen and Switzer--much less willful and intentional conduct.

9. Kingen's and Switzer's Decision to Continue Operating the Business Cannot Reasonably Be Regarded as Tantamount to a Choice to Deprive Funsters' Employees of Wages.

As a fallback to their argument that the specific intent necessary to support liability under RCW 49.52.070 should be imputed to Kingen and Switzer as a matter of law, Respondents alternatively assert that Kingen's and Switzer's decision to continue operating the business in the face of significant financial obstacles was, in effect, a choice to deprive Funsters' employees of wages. By so arguing, Respondents stretch the concept of specific intent to the breaking point.

There never was--nor can there be--any doubt about the fact that Kingen and Switzer were completely, unequivocally, committed to the success of Funsters, and that their attempt to steer the business through a maze of financial crises was motivated a genuine, good faith belief that the business could be saved. (CP 441, 420.) The record reveals that the owners' decision to keep the casino open was made with the full expectation that there would be enough money to keep the employees fully paid. (CP 381.)

Indeed, the decision to keep the business up and running was questioned by the employees only in retrospect.¹⁴ At the time, even the Bankruptcy Court recognized the reasonableness of Kingen's and Switzer's

¹⁴ One of the three class representatives, Daniel McGillivray, testified that toward the end it appeared as though the business had turned around and that it would finally be able to pay its own way. (CP 421.)

decision to keep the business up and running, as evidenced by the fact that it authorized, just six months before, an attempt to reorganize under the protection of Chapter 11. Even after the conversion to Chapter 7, the record reveals that the Trustee was actively exploring the prospect of continuing to operate the business as a means of preserving some value for the benefit of its creditors--including the employees. (CP 317, 337.) In short, Respondents' suggestion that Kingen and Switzer proceeded unreasonably by continuing to operate the business amounts to sheer speculation and "Monday morning quarterbacking."

However, even if the Court were to take Respondents' allegations at face value and assume *arguendo* that it was "reasonably foreseeable that continued operation of the company would risk non-payment of employees' wages" (Response Brief at 20), *at most* this would raise the specter of negligence--a far cry from the specific intent to deprive employees of wages required to create liability under RCW 49.52.050 and .070. Furthermore, Respondents never did attempt to establish *any* breach of the standard of reasonable business judgment on the part of Kingen and Switzer. For Respondents to even *begin* to establish such a thing, they undoubtedly would have needed to come forward with expert testimony on the matter. It was not enough for Respondents' counsel to simply proclaim that because Funsters had liabilities in excess of \$2 million and was generating a negative cash flow that the business was obviously doomed and should have been immediately

shut down.¹⁵

In this regard it must not be forgotten that Kingen's and Switzer's liability to Funsters' employees was adjudicated in the context of a *summary judgment* proceeding. Accordingly, even if Respondents had been able to adduce competent and admissible evidence of some error in judgment (and assuming that such evidence was so compelling as to raise an inference of deliberate conduct), *the most* it could have done is to raise a genuine issue of material fact for trial.¹⁶

10. Personal Liability Under RCW 49.52.070 Cannot Logically Be Premised Upon the Failure of an Officer or Agent to Voluntarily Assume an Employer's Obligation for Wages.

Throughout their brief, Respondents repeatedly intone that the ultimate proof of Kingen's and Switzer's willful and intentional withholding of wages from Funsters' employees lies in Kingen's and Switzer's failure to step up and personally pay the employees' wages out of their own pockets.

¹⁵ To put the matter in perspective, appreciate that at the end of the fiscal year 2004, the Ford Motor Company was reported to have had total liabilities of \$175.8 billion and a deficit working capital position of \$10.3 billion. It had 35 cents of cash and marketable securities for every dollar of current liabilities, and its total liabilities-to-equity ratio stood at 20:1. In November 2006, the company announced a plan to obtain another \$18 billion in financing in order to address its negative operating-related cash flow and to fund its restructuring. The point is not to compare one business to another, but rather to emphasize the utter insanity of a lay person's attempt to evaluate from a handful of balance sheets whether a distressed business is being properly managed and to identify the point at which it has no reasonable prospect of recovery.

¹⁶ Respondents' representation to the Court that Appellants agreed the case should be decided as a matter of law is more than a little misleading. Kingen and Switzer asserted their own entitlement to judgment as a matter of law based upon the fact that Respondents had failed to establish even *prima facie* an essential element of their case (namely, the existence of willful and intentional conduct intended to deprive employees of wages, and of the control and authority necessary to even allow for such a finding). They consistently maintained, however, that there was *at the very least* a genuine issue of fact that would preclude the entry of summary judgment in Respondents' favor.

This is an entirely syllogistic argument, since it purports to make the proof of liability depend upon the presumption of liability itself. Under Respondent's reasoning, an officer or agent could never *not* be liable: His failure to voluntarily assume personal liability would, without anything more, justify the imposition of personal liability.

The logical fallacy of Respondent's argument is not hard to see. RCW 49.52.050 and .070 contemplate a withholding of wages by someone having a *duty* to pay wages, or by one acting on behalf of someone having a duty to pay. If that were not the case, any one of us--whether an attorney, judge, or court watcher--could be charged with liability under RCW 49.52.050 and .070 for failure to step up and pay Funsters' employees' wages. Though it was the duty of Kingen and Switzer in their capacity *as officers and agents of the corporation* to provide for the payment of the employees' wages (at least during such time as they retained control of the business), at no time did that obligation extend to them personally. Accordingly, Kingen's and Switzer's failure to pay the employees out of their own pockets could not possibly supply the evidence of willful, intentional conduct necessary to support liability under RCW 49.52.070.

Repeatedly throughout their brief, Respondents have cited various instances when, in connection with Funsters' bankruptcy proceedings and afterward, Kingen and Switzer purportedly "refused" to pay the employees' wages. It is important for the Court of Appeals to realize that in *each and every instance* where it is asserted that Kingen and Switzer declined an opportunity to pay the employees' wages, what is really being said is that

Kingen and Switzer declined the opportunity to pay them *out of their own pockets*.

For example, Respondents assert that “Mr. McCarty [the Chapter 7 Trustee] informed the Court at the April 7, 2003 hearing that he had tried to get the principals to pay the wages, but none of them agreed to do so.” Respondent’s Brief at 22. What Mr. McCarty was saying is that none of the owners had personally come forward and paid the employees’ wages with funds of their own.¹⁷ (CP 371.) Elsewhere Respondents assert that the Bankruptcy Court gave Kingen and Switzer the opportunity to prevent the conversion to Chapter 7 by coming up with additional funding for the business. Respondent’s Brief at 27, 28. However, that “opportunity” not only involved a commitment to fund future operating expenses out of their own pockets, it required an open-ended, *unconditional* commitment to do so—regardless of whatever the cost might be. (CP 309.) Although Kingen and Switzer had, at the time of the hearing, committed to personally funding the business to the extent of an additional \$450,000 (CP 371), they were in no position to make an open-ended promise required by the Bankruptcy Court.¹⁸

Respondents’ assertion that these “opportunities” demonstrated that

¹⁷ In reality, however, Kingen and Switzer had expressed their commitment to infuse an additional \$450,000 of *personal* funds into the business if the reorganization effort were allowed to continue. (CP 366, 371, 309-10.) Following the conversion, Kingen and Switzer committed to make up the difference in the wages owed to the employees if Funsters’ cash assets were first used to meet payroll. (CP 373.)

¹⁸ The Court should appreciate that none of the owners had received a penny out of the bankruptcy, and that they had been left with approximately \$12 million in personal liabilities. (CP 522-23, 360.) Thus, Respondents’ assertion that Kingen and Switzer were not financially impacted at all by the failure of the business is ludicrous.

Kingen and Switzer continued to have control and authority over the disposition of business funds and the payment of wages is nonsensical. None of these “opportunities” had anything to do with the use of company funds. Although Kingen and Switzer vigorously advocated the use of every dime of Funsters’ cash assets to pay the employees, the record reveals that they had absolutely no say in the matter. (CP 371-72; CP 351-53.)

As detailed in Appellants’ opening brief, Kingen and Switzer did everything within their control and authority as officers and agents of Funsters to cause the company’s employees to be paid. However, at no time were Kingen or Switzer ever personally liable for the payment of those wages. (CP 374, 393.) Therefore, the fact that they declined to foot the bill out of their own pockets cannot possibly serve as the basis for liability under RCW 49.52.070.

B. Even Assuming, *Arguendo*, the Validity of the Trial Court’s Judgment as to the Issue of Liability, Its Award of Damages Should Not Have Included the Value of Employment Taxes to Which Respondents Would Not Have Been Entitled Had They Received Their Wages in the Normal Course.

Respondents maintain that the trial court was justified in awarding Respondents not only the net amount of wages to which they would have been entitled had they received their paychecks in the normal course, but also those additional sums required by law to be withheld by an employer

(consisting of federal income tax, Social Security and Medicare contributions, and Labor & Industries premiums). Respondents further maintain that the trial court was correct in doubling this *gross*, rather than net, amount for purposes of computing exemplary damages under RCW 49.52.070.

Respondents' position that the damages award contemplated by RCW 49.52.070 includes amounts properly withheld for employment taxes and other governmentally mandated deductions is contrary to all authority. First and foremost, RCW 49.52.070 itself provides that in the event of a violation of RCW 49.52.050(1) or (2), an employee is entitled to recover as damages "twice the amount of the wages unlawfully rebated or withheld." That the damages authorized by RCW 49.52.070 are based upon the amount "unlawfully withheld," rather than the amount of "wages earned" or some other measure, leaves no doubt about the Legislature's intent to limit the amount of an employee's actual damages to only that portion of his wages which he was entitled to receive to begin with. Furthermore, because an employer is required by law to withhold a portion of the employee's wages for federal income taxes and other governmentally mandated contributions, that portion of the employee's wages cannot possibly be deemed "unlawfully withheld" within the meaning of RCW 49.52.070.

The limited federal case law on point corroborates that result. For example, in *Longstreth v. Copple*, 101 F. Supp.2d 776 (N.D. Iowa, 2000), an employee brought an action against her former employer and her former supervisor for lost wages and other compensation due under the Family and Medical Leave Act (FMLA). Following the employee's acceptance of an

offer of judgment from the defendants jointly, defendants tendered the amount of the offer less the amount of employment withholding taxes due on the judgment. The employee thereafter moved for an order compelling payment of the entire amount of the offer of judgment, without any deduction for employment taxes. The district court ordered payment of the judgment in full, *but only because it had no way of ascertaining from the offer of judgment whether it represented taxable wages. The court concurred however, with the employer's position that a judgment for wages, if such were established, would properly be reduced by an amount representing employment withholding taxes.* 101 F. Supp. at 778-79.

In *East Cascade Women's Group, P.C. v. Tuthill*, 216 F. Supp.2d 1159 (2002), another federal district court was faced with the same issue. There, an employee had been awarded a partial judgment for three months' severance pay against her former employer. It was the employer's position that the judgment constituted "wages" from which he was required to withhold state and federal taxes, and he thus proposed to satisfy the judgment by deducting the amount of the withholding taxes due. The employee objected, thereby precipitating the employer's filing of an interpleader action to decide the matter. The court dismissed the case on grounds that the Internal Revenue Service was not a party, and that an interpleader action was not the proper procedural vehicle for obtaining what was effectively a declaratory judgment. Of significance to the present case, however, was the court's observation that "[The employer] may have a legitimate concern that either the ODR or the IRS may later determine that [the employer] should

have paid employer-based taxes on the Partial Judgment. . ." 216 F. Supp. at 1163.

Notably, not a one of the cases cited by Respondents with respect to the question whether RCW 49.52.070 contemplates an award of "net" versus "gross" wages provides authority for subverting the federally-mandated scheme of requiring the employer to deduct employment taxes from wages and of making the employer solely liable for the payment of those taxes.¹⁹ While Respondents assert that in *Chelsius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 681, 27 P.3d 681 (2001) the Court of Appeals "recognized that the plaintiffs were entitled to unpaid Social Security and Medicare taxes," the court in *Chelsius* actually had nothing to say about the matter. The one and only reference in that case to Medicare and Social Security taxes was in the prefatory statement of facts, where it was stated that at the time of the plaintiffs' termination plaintiffs were "owed" back wages, Medicare and Social Security taxes. This was, at most, the *trial court's* finding--and one upon which the Court of Appeals was never called upon to comment, let alone render an opinion.

Respondents cite the Tenth Circuit case of *Blim v. Western Elec. Co., Inc.*, 731 F.2d 1473, 1480 (10th Cir. 1984) for the proposition that a back pay

¹⁹ Respondents' reference to an "unpublished Washington case" on this point is thoroughly improper. See Respondent's Brief at 43, note 2. If the Court of Appeals wishes to inquire into the substance of that case (which we do *not at all* regard as supporting Respondents' position), Appellants would request an opportunity to separately brief the issue and to have the Court consider, in addition, what the case says about the issue of liability under RCW 49.52.070. In the meantime, Respondents' back-door attempt to bring to the Court's attention a case having no precedential value is not well taken.

award for damages occasioned by the discriminatory termination of employment should include the value of social security benefits to which the plaintiff would have been entitled had his employment continued. In *Blim*, however, the issue was not whether the plaintiff was entitled to recover the value of taxes withheld from his gross earnings (there were no earnings following his termination), but whether he was entitled to the value of the Social Security contributions that would have been credited to him had he continued to earn wages and to pay taxes on them.²⁰ Accordingly, the holding in *Blim* was directed to an entirely different issue than is presently before the Court.

Respondents go on to cite a Louisiana case, *Keiser v. Catholic Diocese of Shreveport, Inc.*, 880 So. 2d 230, 235-36, n. 1 (2004), for its conclusion that the plaintiff was “entitled to the gross amount of her wages withheld.” Aside from being self-acknowledged dicta, the court in *Keiser* specifically premised its conclusion the fact (1) the plaintiff’s W-2 established that the employer had made no deductions for taxes, and (2) that on the basis of the W-2, the plaintiff had actually paid the taxes at issue.

Finally, Respondents cite the South Carolina case of *Bennett v. Lambroukos*, 303 S.C. 481, 483-84, 401 S.E.2d 428 (1991) for its holding that the lower court “did not err in trebling the gross wages due.” Contrary to Respondents’ suggestion, this case did not involve any issue of mandatory

²⁰ In the present case, there is no question that Respondents are entitled to the benefit of their Social Security and federal income tax contributions. The question is whether Respondents are entitled to “double dip”—i.e., receive their employment taxes once as “damages,” and *also* receive the benefit of the fact that the employer is deemed to have withheld (and is therefore liable for the payment of) those taxes.

tax withholding. It involved the question whether an employer was entitled to deduct from a dishwasher's gross wages a stipulated amount for breakage.

Paradoxically, after citing to each of these thoroughly inapposite cases, Respondents go on to discuss a Ninth Circuit holding which they acknowledge *requires* a defendant to withhold federal income and employment taxes from a settlement award for back wages. *See Rivera v. Baker West, Inc.*, 430 F.3d 1253, 1258 (9th Cir. 2005) (cited in Respondent's Brief at 45). This case, which is authoritative in Washington, resoundingly affirms that Respondents are *not* entitled to recover the gross amount of their wages.

Respondents argue, for the first time in this appeal, that it is *they* who stand to be liable for any unpaid income and employment taxes resulting from a net award of damages.²¹ In this regard, Respondents cite *Edwards v. Commissioner*, 39 TC 78, 84 (1962), *aff'd*, 323 F.2d 751 (9th Cir. 1963) for the proposition that there must be an *actual withholding* of income and employment taxes in order for an employee to receive a credit for their payment and to be absolved of any potential liability. Respondent's argument is purely specious, since it is Kingen and Switzer who are advocating that the required withholdings occur. In *Edwards*, it was *precisely because* the plaintiff received the gross, rather than net, amount of wages owed that he became liable to the IRS for the payment of income and employment taxes on the award.

²¹ In the action below, Respondents took no position as to who would ultimately be liable for the payment of employment taxes, stating only that "This is a matter for plaintiffs' tax advisors." (CP 705.)

So what's wrong with the employees being liable for their own taxes? What is troubling about that prospect from the standpoint of Kingen and Switzer is that they would be jointly liable together with the employees for the resulting obligation. *Navarro v. U.S.*, 72 A.F.T.R.2d 93-5424 (W.D. Tx. 1993) (cited in Respondent's Brief at 47). It is not difficult to predict which of the parties--as between Kingen and Switzer and 180-plus restaurant workers--the IRS would go after in the event of a deficiency.

Furthermore, with respect to the March 28, 2003 payroll for which paychecks were actually issued, there is no question that the required withholdings have already occurred.²² *See Begier v. IRS*, 496 U.S. 53, 110 S.Ct. 2258, 2263-64, 110 L.Ed.2d 46 (1990) (observing that a "withholding" is deemed to have occurred when payment is made in an amount less than the amount of gross wages, regardless of whether the funds are segregated from the employer's general funds and regardless of whether they are subsequently remitted to the IRS); *In re Sunrise Paving, Inc.*, 204 B.R. 691, 695 (D. Md. 1996) (noting that the mere writing of a payroll check from which a deduction has been made--whether or not the check is ever cashed--is sufficient to identify the amount deducted as the property of the IRS). Accordingly, the employees already have been given full credit for the payment of those taxes, and the liability has shifted entirely to Funsters (and hence to Kingen and Switzer as "responsible persons" under 26 U.S.C. §6672). *See Slodov v. United States*, 436 U.S. 238, 243, 98 S.Ct. 1778, 56

²² *See* CP 68, consisting of a chart prepared by Respondents' counsel showing that the paychecks issued on March 28, 2003 consisted of *net* wages.

L.Ed.2d 251 (1978); *Kinnie v. U.S.*, 949 F.2d 279, 283 (6th Cir. 1993).

Respondents argue that, as a purely practical matter, it would be impossible to determine the amount of the deductions that should be subtracted from Respondents' gross wages to yield an appropriate net award. Yet plaintiffs have, for all other purposes, accepted the accuracy of Funsters' payroll register, which set forth for each employee the exact amount of each type of payroll deduction (federal income taxes, Social Security, Medicare, etc.) for each of the two pay periods at issue. (CP 1959-64; CP 690-94.) The only even slightly ambiguous entry on the payroll register was a column entitled "Other Deductions," which, as the evidence revealed, consisted predominately of deductions for employment taxes required to be paid *by Funsters* on the employees' substantial tip income. (CP 780-81.) Respondents have argued that those "other deductions" *might* have included additional, wholly discretionary, deductions such as 401K or United Way contributions. But Respondents never offered even an iota of evidence to contradict the sworn testimony of Funsters' payroll manager, who clarified that *there were no voluntary deductions*.²³ (CP 780; CP 1069-72; CP 1800-01.)

More important, Respondents seem to miss the critical point that if there was any doubt about Respondents' right to the gross versus net amount

²³ Even more troubling is the fact that for a number of employees, the tax liability actually *exceeded* the amount of their gross wages because a majority of those wages was contemporaneously received in the form of cash tips. The result was a so-called "negative check," meaning that an additional amount would need to be withheld from the employee's next paycheck. (CP 1071.) Because for these employees the "withholding" was a mere accounting fiction, it would be ludicrous to award them that amount.

of their wages, or about the nature or amount of particular withholdings--or, for that matter, about who would ultimately be liable for the taxes--it was not the prerogative of the trial court to simply "play it safe" and award plaintiffs everything. If these issues could not be determined as a matter of law, without implicating any issue of material fact, it was incumbent upon the court to allow a trial to go forward on the issue of damages.

C. The Trial Court Did Not Abuse Its Discretion in Limiting the Amount of Attorney Fees Awarded to a Sum Which It Independently Determined to Be Reasonable Under the Circumstances.

Respondents have asserted an entirely meritless cross-appeal of the trial court's judgment insofar as it awarded them \$118,624.51 in attorney fees and \$10,387.62 in litigation expenses. (CP 1681.) Dissatisfied with the amount of the attorney fee award, Respondents take the patently untenable position that the trial court had no authority to exercise independent judgment over what would constitute a "reasonable sum for attorney's fees" and was duty bound to award them no less than the entire sum demanded.

1. Standard of Review

It is well established that a trial court enjoys broad discretion in fixing the amount of a "reasonable" attorney fee in cases involving statutory fee awards. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993); *Xieng v. Peoples Nat. Bank of Washington*, 63 Wn. App. 572, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 894 P.2d 389 (1993). It is equally well established that the trial court's judgment with respect to the matter of attorney fees will not be

disturbed on appeal absent a clear showing of abuse of discretion. *Dice v. City of Montesano*, 131 Wn. App. 675, 688, 128 P.3d 1253 (2006); *Fisons*, 122 Wn.2d at 335. A trial court abuses its discretion only when the award is “manifestly unreasonable” or “based upon untenable grounds or reasons.” *Boeing Co. v. Heidy*, 147 Wn.2d 78, 90-91, 51 P.3d 793 (2002). In the present case, that standard clearly has not been met.

2. Respondents’ Contention That the Trial Court Had No Authority to Award Them Anything Less Than the Amount of Attorney Fees Claimed is Patently Lacking in Merit.

Respondents contend that the trial court is constrained in an action for unpaid wages to award a prevailing plaintiff no less than the entire amount of attorney fees requested by his counsel. That contention, which finds not a shred of support in Washington law, is patently lacking in merit. Although Respondents cite *Hume v. American Disposal Co.*, 124 Wn.2d 656, 675, 880 P.2d 988 (1994) and *Steele v. Lundgren*, 96 Wn. App. 773, 784-85, 982 P.2d 619 (1999) for the proposition that courts “must” award whatever fees are claimed to have been earned by the prevailing party’s counsel, neither *Hume* nor *Steele* even come close to suggesting such a thing.²⁴ In fact, the court in *Steele* went to some length to express its adherence to the principle that it is the trial court’s duty to undertake an *independent assessment* of an attorney’s

²⁴ It should also be noted that both *Hume* and *Steele* were employment discrimination cases brought under the state’s anti-discrimination law. It is well settled that discrimination claims in Washington are governed by a unique body of law (largely modeled after their federal statutory counterpart), and that the award of attorney fees in such actions involves unique public policy considerations not applicable to other areas of employment law. *See Steele*, 96 Wn. App. at 784. Notably, the court in *Hume* expressly rejected the proposition that the same policies which allow for the broader recovery of costs in discrimination-based civil rights actions ought to be extended by analogy to other types of statutory employment-based claims. 124 Wn.2d at 674-75.

charges and to exercise discretion, in light of the particular circumstances of the case, as to what constitutes a reasonable fee. *Steele*, 96 Wn. App. at 780-87; *see also Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). A trial court is not at liberty, as Respondents maintain, to simply take a prevailing plaintiff's fee affidavit at face value. *Scott Fetzer Co. v. Weeks*, 112 Wn.2d 141, 151, 859 P.2d 1210 (1993); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

Similarly, Respondents' contention that the law "mandates" the upward adjustment of attorney fees otherwise determined by the trial court to be reasonable constitutes a serious misstatement of the law. Not a one of the cases cited by the Respondents for that proposition comes close to suggesting such a thing.²⁵ To the contrary, the Washington courts have uniformly emphasized the broad discretion of the trial court in determining not only what constitutes a reasonable fee, but whether extenuating circumstances warrant an adjustment of that amount. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847-48, 9 P.3d 948 (2000).

3. Washington Law Affords the Trial Court Broad Discretion in

²⁵ For example, in *Pham v. City of Seattle*, 124 Wn. App. 716, 103 P.3d 827 (2004), the Court of Appeals *did not* hold that an upward adjustment of the lodestar fee was required, but only that the trial court had relied upon irrelevant considerations in coming to the conclusion that such an adjustment was not warranted. *That* was the abuse of discretion, not the fact that the adjustment was denied. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) was similarly unique in that it was a "common fund" case in which the use of a risk multiplier was justified precisely because it was the non-objecting plaintiff class, and not the defendant, who would have borne the burden of an increased award. *Id.* at 1008. The balance of the Washington cases cited by Respondents (most of which involve discrimination claims and which are made inapposite by that fact alone) do nothing more than illustrate the existence of isolated situations in which the appellate courts have upheld the discretion of a trial court to apply the use of a multiplier. Nothing in those cases even suggests that a trial court abuses its discretion by finding to the contrary.

Fashioning an Award of Attorney Fees That is Reasonable
Under the Circumstances.

In Washington, the preferred method for fixing the amount of a reasonable attorney fee is the “lodestar” method. *Henningsen*, 102 Wn. App. 847. The lodestar method requires the court to first determine the number of hours reasonably expended on the lawsuit, and to assign a reasonable hourly rate to each timekeeper depending, in part, upon the nature of the work performed. The number of hours reasonably expended and the reasonable hourly rate are then multiplied to arrive at the so-called “lodestar fee.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593, 597, 675 P.2d 193 (1983). *The lodestar fee thus determined is presumed to constitute a reasonable attorney fee.* *Henningsen*, 102 Wn. App. at 847; *Carlson v. Lake Chelan Comm. Hosp.*, 116 Wn. App. 718, 742, 75 P.3d 533 (2003).

In determining the number of hours “reasonably expended,” the court may consider only that amount of time essential to prosecuting the particular claims the success of which allowed for the award of attorney fees. *Boeing Co. v. Serracin Corp.*, 108 Wn.2d 38, 64-65, 738 P.2d 665 (1987); *Nordstrom*, 107 Wn.2d at 744. Furthermore, the court must necessarily exclude from the calculus any time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Bowers*, 100 Wn.2d at 597; *Absher*, 79 Wn. App. at 847. In these respects, the burden, as always, remains upon the fee applicant to prove the reasonableness of his efforts. *Absher*, 79 Wn. App. at 847; *Scott Fetzer*, 122 Wn.2d at 150.

In “rare” and “exceptional” cases, the court may adjust the lodestar fee up or down to take account of the quality of the work performed and/or the

contingent nature of the representation--provided that these considerations have not already been factored into the lodestar. The reported cases in Washington reveal that such adjustments are disfavored, and that they constitute the exception, rather than the norm. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998); *Fisons*, 122 Wn.2d at 334.

The Washington courts have observed, in particular, that a quality of work adjustment is "seldom sanctioned" and applies in only "extremely limited" situations because this factor is ordinarily reflected in the attorney's reasonable hourly rate and because the quality of representation must be judged from the standpoint of what is normally expected from attorneys commanding a comparable hourly rate. *Bowers*, 100 Wn.2d at 599; *Carlson*, 116 Wn. App. at 742; *Fisons*, 122 Wn.2d at 335-36. Similarly, the Washington courts disfavor adjustments for contingent risk and have reserved their application for those truly "exceptional" cases in which the lodestar fee would not, in the trial court's judgment, be sufficient to compensate the attorney for the uncertainty of a particularly risky case. *See Xieng*, 63 Wn. App. at 587.

Furthermore, there are a number of additional factors that may, and should, be considered by the trial court to *limit* the amount of a fee award. One such consideration is the degree of success obtained by the prevailing party. *Steele*, 96 Wn. App. at 783-84. Another is the terms of the actual fee agreement existing between the prevailing party and its counsel. *Allard v. First Interstate Bank*, 112 Wn.2d 145, 149-50, 153, 768 P.2d 998, 773 P.2d 420 (1989). Finally, a court should consider the relationship between the

amount in controversy and the amount of the fee requested. *Scott Fetzer*, 122 Wn.2d at 150; *Absher*, 79 Wn. App. at 847; *Mahler*, 135 Wn.2d at 433. As observed by the Washington Supreme Court:

A lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment. . . While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness.

Scott Fetzer, 122 Wn.2d at 150.

4. The Trial Court Acted Entirely Within its Discretion in Awarding Respondents Something Less Than the Full Amount of Fees Requested and in Declining to Apply a Multiplier to the Amount That It Had Already Determined to Be a Reasonable Attorney Fee.

The \$131,248.10 in attorney fees and costs granted the respondent employees was hardly an insubstantial award. While that amount constituted something less than the jaw-dropping sum demanded by Respondents' counsel,²⁶ the trial court appropriately found Respondents' statement of fees to be excessive and otherwise unreasonable considering the requirements of the case and the nature and extent of the work actually performed. The court was well within its discretion to limit the amount of attorney fees recoverable by Respondents to that sum which it determined to be reasonable.

Notably, the trial court's determination with respect to the matter of attorney fees was anything but perfunctory. It was the result of a detailed--even painstaking--analysis of the individual fee entries of Respondents' counsel in light of its first-hand knowledge of the requirements of the case

²⁶ All in all, Respondents requested over \$260,000 in attorney fees, not including the litigation costs claimed (CP 557, 1220, 1422-23.)

and the manner in which it had actually been litigated. The court's methodology and reasoning with regard to each and every dollar denied is set forth in detail in the record. (CP 1564-75.)

Among the trial court's specific findings were the following:

- The time expended by Respondents' counsel was excessive and unjustified in a number of instances. (CP 1569-72.) These included the \$26,616.65 incurred (by four different timekeepers) to produce a fairly perfunctory motion for summary judgment which by Respondents' own admission was "quite simple" and which involved the citation of very few authorities. (CP 1572-74.) Also cited by the court was the 25 hours purportedly expended by non-attorney staff (and billed at the rate of \$145 per hour) on the single task of "updating" the relatively modest class list (CP 1571-72) and the 1.5 hours of time billed for producing a three-line pre-trial report. (CP 1574.)

- A significant amount of the time was expended by Respondents' counsel on claims and potential claims having nothing at all to do with the liability of the individual defendants Kingen and Switzer or, for that matter, with the recovery of wages. (CP 1566.)

- There was a good deal of unwarranted and duplicated effort. One example cited by the court was the attendance of two senior attorneys at depositions--including the depositions of their own clients. (CP 1574.) Another example was the inordinate amount of time spent "calculating attorney fees." (CP 1750-51.)

These were just a few of the excesses that permeated the fee statement

submitted by Respondents' counsel. We would respectfully request that the Court of Appeals review Appellants' detailed analysis of Respondents' fee statement submitted by Appellants in opposition to Respondents' request for attorney fees. (CP 842-850, 792-803, 1476-85). That submittal, which was utilized by the trial court as the roadmap for its award, leaves no doubt about the extent to which the court went, despite an extensive pattern of extremely questionable charges, to give Respondents every benefit of the doubt.

In particular, we would draw the Court of Appeals' attention to a number of especially salient facts:

- This case was resolved on summary judgment. It was the position of Respondents themselves that there were no material facts in dispute. According to Respondents, liability turned on a single legal issue and was established by the open-and-shut application of a single reported case. (CP 115-33; 2520-2548.)

- The attorney fees and costs awarded to Respondents by the trial court actually *exceeded* the \$120,714.48 in gross wages ultimately found to be owing to the employee class. This disproportionality, according to the Washington Supreme Court, was a "vital" factor weighing heavily in favor of a substantial *reduction* of the lodestar. *Scott Fetzer*, 122 Wn.2d at 150.

- The actual fee agreement between Respondents and their counsel provided for a 33 percent contingent fee. (CP 1730-31.) Computed on the principal judgment amount of \$241,428.96 (CP 2412), the amount of fees which Respondents' counsel had agreed at the outset to take as full compensation in the event of recovery was \$80,476.32. Under *Allard*, 112

Wn.2d at 153, that amount (which, as in the case of all contingent fees, already had *built into it* a premium for risk) was yet another consideration militating in favor of a substantial reduction.

- Respondents failed to prevail on a substantial portion of their original damage claim representing the value of cash tips *already received* by the respondent employees.²⁷ (CP 1390 (documenting the trial court’s finding that Kingen and Switzer “prevailed to the extent of reducing the requested amount”); CP 1563; 779-81; 1069-72; 1076-77, 1365-88.) Those cash tips accounted for approximately \$100,000 (\$50,000 doubled) of Respondents’ original wage claim, and reduced by more than *40 percent* of the gross wages ultimately found to be owing to the plaintiff class. (CP 1365-88, 1076-77.)

- A quick thumb-through of the pleadings filed in this case reveals that as much as one-half of the appreciable volume of paper generated by Respondents in this action related directly and solely to the effort to obtain attorney fees. As time went on, the attorney fees requested by Respondents became increasingly disproportionate to the actual time expended in prosecuting the employees’ wage claim as Respondents sought attorney fees for work expended on the recovery of attorney fees--a self-perpetuating (and

²⁷ A good deal of the attorney time expended in this case was devoted to a game of cat-and-mouse over Kingen’s and Switzer’s attempt to discover what part of the gross wages claimed by the respondents had, and had not, already been received. (*See, e.g.*, CP 1074-77.) Kingen’s and Switzer’s ability to access that information directly was stymied by the fact that the Chapter 7 Trustee had taken possession of, and then purportedly lost track of, all of Funsters’ accounting and payroll records, and it was the position of the respondent employees that it was not incumbent upon them to provide any information as to what they had, and had not, received. (CP 728-29.) It was not until Respondents were faced with the prospect of a trial on the matter that they ultimately conceded that approximately \$50,000 of the base wages claimed had represented tips that had, in fact, been received by the employees. (CP 1360; CP 1181.)

extremely lucrative, we might add) proposition. We submit that there is something terribly wrong when the objective of procuring a substantial attorney fee award overtakes the recovery of wages as the primary impetus of the litigation.

Although the last four of these five factors were not expressly considered by the trial court (and may not have been considered at all), they nonetheless reinforce the legitimacy of limiting the amount of fees recoverable by Respondents and would serve, in the event of a remand, as grounds for additional reduction.

5. Respondents Have Failed to Even Articulate a Cognizable Basis for Review.

Considering the conscientious and deliberate manner in which the trial court dealt with the issue of attorney fees, it comes as no surprise that Respondent's cross-appeal fails to articulate with any specificity what the trial court did, or did not do, to abuse its discretion. *See* Respondent's Brief at 49. Respondents have not asserted that the trial court failed to take account of a relevant factor in arriving at the amount of the fees award, or that the court was swayed by irrelevant or inappropriate considerations. To the contrary, Respondents have relied upon nothing more than their generic, and entirely subjective, displeasure with the outcome of the award as the basis of their cross-appeal. Obviously, Respondents' mere disagreement with the amount of the award falls woefully short of establishing even a potentially cognizable basis for review.

Furthermore, Respondents' charge that trial court lacked any rational basis for finding that the firm's hourly rates were not consistent with industry

standards is devoid of any good faith basis in fact. The trial court specifically stated in its ruling *that it had not deviated from the hourly rates claimed by Respondents' counsel* except in a single, isolated instance--i.e., in reducing the hourly rate of a non-attorney staff member from \$140 to \$70 for time spent on the single ministerial task of updating the class list. At issue was less than *12 hours'* time. (CP 1572, 1575.)

Finally, Respondents' complaint that the trial court deducted \$17,904.60 from its supplemental fee request²⁸ "with no explanation" is without merit. Respondents' initial supplemental fee request was submitted to the court without any documentation at all, it being Respondents' position that it was enough for its counsel to simply *represent* to the court that in her professional opinion the fees were "reasonably incurred." The actual fee detail, Respondents maintained, was "privileged." (CP 1220, 1234-35.) Appellants strenuously objected to this entirely undocumented request, upon which the trial court appropriately withheld judgment. (CP 1229-33.)

When Respondents finally consented to disclose an itemized fee detail in connection with a second supplemental request filed some six months later, it quickly became apparent that an overwhelming majority of the time for which compensation was sought was either uncompensable or duplicative of the very same excesses that had previously been admonished by the trial

²⁸ Respondents made two supplemental requests for attorney fees following the trial court's initial award of \$91,761.61 in attorney fees in April 2005 (reduced to judgment in March 2006). (CP 1393-94.) The first supplemental request, made on September 6, 2005, was for \$16,247.00. (CP 1219-21.) The second supplemental request, made six months later on March 23, 2006, was for \$44,761.50. (CP 1421-24.) Appreciate that these fees were being generated almost a year and a half after the summary judgment was heard in November 2004.

court. (CP 1508-43.) These included patently excessive and unexplained charges, time spent on uncompensable activities such as extended collection efforts,²⁹ *more* post-judgment work on the recovery of attorney fees, extended (and patently unreasonable) efforts to oppose *any* trial or other fact-finding hearing on the issue of damages,³⁰ drafting of Findings of Fact and Conclusions of Law (something which the trial court had specifically directed Respondents *not* to do),³¹ and extended efforts to oppose the vacation of a judgment presented *ex parte* by Respondents without any notice to

²⁹ Respondents had previously represented to the court, in connection with their initial (undocumented) request, that their efforts “did not involve any collection work.” (CP 1235.) That representation, which was made on September 23, 2005, was later shown by counsel’s fee statement to be flatly false. (CP 1436-68.) For example, on August 23, 2005, 1.2 hours of time was spent in an attempt to obtain photographs of Kingen and Switzer and discussing how to serve them notice of supplemental proceedings. This was just one of many such entries that permeate the fee statement of Respondents’ counsel.

³⁰ The only issue in dispute at this point (the issue of liability having been long resolved) concerned the amount of wages which had purportedly been “withheld” from the employee class. Given the nearly complete inaccessibility of Funsters’ accounting and payroll records to both sides, this was an entirely murky and thoroughly debated question of fact. Accordingly, Kingen and Switzer were clearly entitled to a trial (or at least a fact-finding hearing) on the issue of damages. (CP 1356-61; CP 1389-91.) The obviousness of that fact notwithstanding, Respondents fought the prospect of a fact-finding hearing tooth and nail, (e.g., CP 1074-77; CP 1131-34; CP 1193-98, CP 1959-67) while simultaneously refusing to voluntarily come forward with information about what they had, and had not, been paid. (e.g., CP 1197; 1200-01.)

Recall that it was not until very late in the game that Respondents finally conceded that nearly a third of the gross wages which they claimed to have been wrongfully withheld had actually been contemporaneously received by the employees in the form of cash tips. (CP 1181; 1390; CP 1075-76.) Even after that issue was resolved, Respondents continued to debate the nature of the payroll deductions taken from the employees’ gross wages (which amounted to approximately 50 percent of gross wages), arguing that they “could have been” something other than governmentally mandated withholdings. (CP 1075.)

³¹ See CP 1530, CP 1532, and CP 1259.

Appellants' counsel.³² (CP 1436-68.)

By this time the trial court had made more than clear not only the rationale, but the specific criteria and methodology that would be applied to any supplemental fee request. It was not incumbent upon the court to once again go item-by-item through yet *another* 32-page fee detail, adding up each tenth of an hour that constituted time spent doing the very things for which the court had denied compensation the first time around.

It was abundantly clear, for example, that the trial court had disapproved the award of attorney fees for time spent on matters extraneous to the wage action, such as collection efforts (CP 1525), a "medical claim" (CP 1451), and "legal analysis of appeal issues" (CP 1524)). It went without saying that Respondents were not entitled to recover for time expended in connection with issues on which they had not prevailed, such as the issue of tips (*e.g.*, CP 1516) and the vacation of judgment (*e.g.*, CP 1527-28)--nor for doing what the trial court had specifically instructed them *not* to do (*e.g.*, drafting and revising findings of fact and conclusions of law (*e.g.*, CP 1530)). The trial court had already made clear that it had disapproved the "doubling up" of attorney time, and that it regarded the time already spent "updating the

³² See CP 1528-29. At a certain point, Respondents apparently became impatient with the process and, without any notice to opposing counsel, presented a proposed judgment to the court--which the court reasonably interpreted to be the product of the joint effort to resolve the issue of damages in which it had directed the parties to engage. (CP 1357-58; 1389-91, 1817-22, 1872-75.) Despite overwhelming evidence of a glaring procedural irregularity (bolstered by the trial court's candid acknowledgment of a major snafu), Respondents vigorously--and unreasonably--objected to the vacation of the judgment. (CP 1528-29.) Not surprisingly, the judgment was ultimately set aside. (CP 2058-59.) Amazingly, that did not dissuade Respondents from claiming all of their attorney fees incurred in pursuit of the judgment, or in resisting its subsequent vacation.

class list” and making “class charts” as excessive and billed at an unreasonable rate (*e.g.*, CP 1526; 1512.) Nevertheless, precisely the same excesses continued, as revealed by the following thoroughly audacious entry taken directly from the supplemental fee detail submitted by Respondents’ counsel: “*Glue spreadsheet documents together and fold pages.*” The charge? A whopping \$150.00. (CP 1510.)

It should be noted that while Respondents now complain about the purported “lack of explanation” for the trial court’s supplemental award of fees, Respondents specifically *waived* (as did Appellants) the entry of findings of fact and conclusions of law in the interest of getting on with a judgment and appeal. *See* Appendix A. Thus, if there was any error to be found in the trial court’s omitting to provide a detailed accounting of its supplemental order on attorney fees, it was clearly “invited.”

Finally, with respect to Respondents’ contention that the trial court erred in not supplementing what it had already determined to be a reasonable fee award by the use of a fee-enhancing multiplier, the record reveals that the trial court specifically considered the prospect of such an enhancement but determined that under the circumstances none was appropriate. The court specifically found that the case involved very little complexity from the standpoint of the plaintiffs, the clear inference being that it took no great feat of lawyering to successfully litigate.³³ (CP 1575.) The court also specifically found that there was little risk involved in the case because “the basic core

³³ By this we mean no slight to Respondents’ counsel, Ms. Kilbreath, whom we genuinely regard as a very fine attorney.

fact of unpaid wages was clear, in some amount” and because the collectability of the judgment was never in doubt. Thus, the court concluded that the unusual risk factor present in other contingent fee cases simply did not exist. (CP 1575.)

In closing, we would briefly address Respondents’ repeated contention that the policy objectives underlying our state’s wage enforcement statutes can be effectuated only by awarding prevailing plaintiffs nothing less than the full amount of attorney fees requested by their counsel. The recognized need to provide attorneys with a reasonable incentive to litigate wage cases is only half the equation. To allow a plaintiff’s attorneys the equivalent of a blank check drawn against a defendant’s bank account would, as our Supreme Court has observed, provide a dangerous incentive to litigate cases without restraint and without regard for the normal accountability that pertains when there is a client scrutinizing the monthly bill. *Nordstrom*, 107 Wn.2d at 744. In short, the goal of providing adequate compensation to attorneys is appropriately balanced, in the case of statutory fee actions, by the need for an independent assessment of the reasonableness of an attorney’s billing and depends for its integrity upon appropriate deference to the trial court’s exercise of discretion.

III. CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Court of Appeals reverse the trial court’s judgment on the issue of liability and enter summary judgment in favor of Appellants. Appellants further request that the Court dismiss Respondents’ cross-appeal with respect to the

issue of attorney fees.

Finally, Appellant requests an award of attorneys fees expended in the appeal to the extent they relate to Respondents' cross-appeal. That the *amount* of an award of attorneys fees and costs is solely within the discretion of the trial court is so well established as to permit no serious debate. Respondents' arguments do not raise the cross-appeal beyond the level of frivolous.

RESPECTFULLY SUBMITTED this 3 day of January, 2007



W.K. McInerney, WSBA #4809
Attorney for Appellants

APPENDIX A

Briana Content

From: Claudia Kilbreath [ckilbreath@scblaw.com]
Sent: Friday, March 24, 2006 4:07 PM
To: Zimnisky, Lisa; W. K. McInerney; Mattson, George
Cc: Cheryl Rody; Margaret Moynan; Michael Crisera
Subject: RE: Clarification of Plaintiffs' position

Lisa:

At this point, Plaintiffs do not want any further hearings on the issue. So, therefore, if the alternative to a hearing is to attach the oral decision to the Judgment, that is the process that Plaintiffs agree to.

Plaintiffs re-filed yesterday a motion for supplemental attorney fees based on the original motion filed in September (which was never ruled on) and the additional fees incurred since then. We included a Proposed Order and a Proposed Judgment that has the Principal Judgment amount and the Prejudgment interest (that are both identical to the figured in the March 10 judgment entered), but with the attorney fees and costs line blank (so that Judge Mattson can add the total attorney fees awarded and total costs awarded and insert those at lines 6 and 7 and then insert the total judgment amount at line 8). We will also send down to you the entire transcript of the summary judgment hearing, so that Judge Mattson can attach the portion of it that he believes represents his oral decision. A copy of the transcript has already been made available to defense counsel.

Sincerely,

Claudia Kilbreath
Plaintiffs' counsel

-----Original Message-----

From: Zimnisky, Lisa [mailto:Lisa.Zimnisky@METROKC.GOV]
Sent: Friday, March 24, 2006 1:31 PM
To: Claudia Kilbreath; W. K. McInerney; Mattson, George
Cc: Cheryl Rody; Margaret Moynan; Michael Crisera
Subject: RE: Clarification of Plaintiffs' position

Counsel,

Around February 14th, or thereabouts, I had contacted both counsel (either directly or through their assistants) to relay Judge Mattson's proposition to enter the Judgment and attach the court's oral decision in lieu of further argument over the proposed Findings of Fact and Conclusions of Law (as proposed by Mr. McInerney)– if that is what the parties would agree to. I believed that this agreement was clearly made to the court and the pending hearing was stricken. The whole point of the hearing was to finalize the Findings of Fact and Conclusions of Law so that the Judgment could be entered. The hearing became unnecessary because it was understood that counsel had agreed to Mr. McInerney's proposal that the court's oral decision could take the place of the Findings and Conclusions and there was no disagreement over the Judgment. Mr. McInerney understood that communication but it appears that Ms. Kilbreath did not. Though I feel that it was very definite that the parties relayed agreement to attachment of the oral decision to the agreed proposed judgment I recognize that misunderstandings can happen. If there was indeed a misunderstanding, and in fact no agreement, Judge Mattson will require proper motions to the court regarding any disputes over the Judgment and the attachment. He does not want argument made via email.

Also, to be clear, the Judgment has been filed with the attachment of the Letter Regarding Interim Ruling. Even though the court now recognizes that this was not the correct document to be attached, the court fully intended to attach the oral decision because it understood that the parties had agreed to this procedure.

STATE OF WASHINGTON
THE COURT OF APPEALS
DIVISION ONE

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2007 FEB - 1 PM 2:28

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

Appellants,

v.

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

Respondent

NO. 57938-0-I

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of
Washington that on the 1st day of February, 2007, true and correct
copies of the following documents:

1. Reply Brief of Appellants and Response to Cross-Appeal
2. Certificate of Service

CERTIFICATE OF SERVICE - 1

W.K. McInerney, PLLC
1000 Second Avenue, Suite 1760
Seattle, WA 98104
(206) 624-4404 Fax (206) 624-1744

ORIGINAL

were served on the persons hereinafter named via facsimile:

Claudia Kilbreath
SHORT CRESSMAN & BURGESS
999 Third Avenue, Suite 3000
Seattle, WA 98104
Fax: (206) 340-8856

DATED this 1st day of February, 2007.

A handwritten signature in black ink, appearing to read 'Briana Content', written over a horizontal line.

Briana Content, Legal Assistant