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BY RONALD R. CARPENTER

Division 1, Cause No. 57938-0-1
Supreme Court No. _____

CLERK

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Defendants/Appellants,

v.

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

Plaintiffs/Respondents.

ANSWER TO DEFENDANTS' PETITION FOR REVIEW

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I. SUMMARY

Defendants Kingen and Switzer have not established any of the grounds required for Supreme Court review. The case was squarely decided based upon long-standing Supreme Court precedent that the legislature has never attempted to modify and embodies the strong public policy to ensure the payment of employee wages for services rendered. Defendants' request for Supreme Court review should be denied.

II. FACTS

A. Defendants Kingen and Switzer

Gerald Kingen ("Kingen") and Scott Switzer ("Switzer") were both officers of Funsters Grand Casino, Inc. (the "Casino"). Kingen was the Casino's President and Chief Executive Officer, while Switzer was the Casino's Chief Financial Operator. *CP 144, 27:16-25; CP 154, 81:23-82:9; CP 174, 59:17-21; CP 181*¹. Both Defendants were also owners of the Casino. Switzer held a 7% ownership interest while Kingen's ownership interest was 31%. *CP 140, 8:2-14.*

As CFO, Switzer managed the Casino's finances. *CP 141, 11:2-10.* In addition to his CFO duties, Switzer also acted as the Casino's General Manager during the last two months it remained in operation.

¹ Deposition page and line references appear directly after CP cites, e.g., 27:16-25 refers to page 27, lines 16-25.

CP 141, 11:24-12:2. In this capacity, Switzer operated the Casino.
CP 142, 14:3-5.

As Casino President and CEO, Kingen had authority to hire and terminate employees, and he set compensation for senior employees. *CP 175, 65:20-CP 176, 68:25.* Kingen worked closely with Switzer concerning casino operations and, according to the Company's policy manual, no employee could enter into an employment contract or make agreements inconsistent with written company policies unless Kingen signed these agreements. *CP 177, 71:5-8; CP 181.* In addition, Kingen attended ownership meetings and regularly attended management meetings. *CP 141, 11:11-17; CP 143, 22:22-23:12.*

Most significantly, as owner/officers, Kingen and Switzer controlled the payment of wages to employees, *CP 162, 161:23-162:6,* and they were "always concerned" with the company's ability to meet its payroll obligations. *CP 171, 26:24-27:2.* Switzer and Kingen had the authority to prioritize the Casino's expenditures and pay employee wages.

B. Funsters Grand Casino

In August of 2001, Kingen and Switzer opened the Funsters Grand Casino in Sea-Tac. From the beginning, the Casino was in poor financial condition. The Casino opened late, its renovation cost more than expected, and, soon after its opening, it suffered significant losses due to

the September 11, 2001, terrorist attacks. *CP 147, 38:10-CP 148, 41:6.* As early as September of 2001, a month after the casino opened, Kingen was aware that payroll checks totaling **\$95,658.73** were returned by the bank to employees for insufficient funds. *CP 168, 17:15-CP 169, 18:14.* And again in October, November, and December of 2001, Kingen knew that payroll checks continued to bounce, and that the total amount of checks returned for insufficient funds ("NSF") were increasing each month. *CP 169, 20:17-21:13; CP 170, 24:13-25:7.* Thus, from its inception, the company had a history of inability to timely meet its payroll obligations.

After operating for just over one year, the Casino filed for Chapter 11 bankruptcy on September 17, 2002. *CP 147, 37:5-6.* The company's owners, Gerald Kingen, Paul Merlino, and Scott Switzer, made the decision to file Chapter 11 bankruptcy. *CP 177, 73:6-13.*

The Casino's losses continued to mount even after it filed for bankruptcy. Throughout late 2002 and early 2003, the Defendants met each month to go over the monthly financial statements required by the Chapter 11 bankruptcy, and each month the Defendants elected to keep the casino open in the face of continuing, severe cash flow problems. *CP 149, 56:22-CP 150, 57:15; CP 150, 58:17-59:2.* Even vendors were not paid during this timeframe. *CP 159, 128:17-CP 160, 132:6; CP 161,*

134:19-135:6. By November 22, 2002, the Casino's year-to-date net loss totaled 2.2 million dollars. *CP 156, 94:9-95:4*. Ultimately, the Casino suffered a 2.41 million dollar net loss for all of 2002. *CP 156, 96:13-CP 157, 97:2*.

Despite these enormous losses, Kingen and Switzer chose to keep operating. *CP 157, 97:7-12*. They based this decision upon speculation and hope that the Washington Legislature would allow non-tribal casinos to have slot machines and upon the belief that Casino business would pick up in the fall. *CP 146, 36:20-CP 147, 37:17*. In the hopes of realizing a profit, the owners were willing to finance the casino with their own personal funds: Kingen estimated he loaned between \$150,000 and \$200,000 to the casino during the time frame of the Chapter 11 Bankruptcy. *CP 171, 29:12-19*. They did so because of their belief that they could create a "profitable" company for themselves because they had a "good shot" at getting slot machines for non-tribal casinos approved by the legislature. *CP 171, 28:25-29:3; CP 163, 166:24-167:6*.

Ultimately, the owners' rosy predictions did not come to fruition, and the Casino continued to lose money at the beginning of 2003. Switzer testified that as early as the spring of 2003, payroll checks from the casino were bouncing and Kingen was aware of this fact. *CP 151, 72:2-CP 152,*

73:12; CP 168, 16:1-25. Despite its mounting losses, by April 2003, the Casino continued to employ 189 employees. CP 66, ¶ 5.

C. **Conversion to Chapter 7 Bankruptcy**

On March 7, 2003, the U.S. Trustee overseeing the Casino's Chapter 11 bankruptcy moved to convert the Chapter 11 bankruptcy to a Chapter 7 liquidation based on the Casino's delinquency in providing monthly financial reports, its continued significant losses, and its inability to effectuate a Chapter 11 reorganization plan. CP 183-186. On March 13, 2003, the U.S. Attorney's office moved to dismiss the bankruptcy entirely because the Casino owed \$244,310 in post-petition tax obligations and \$1,656,715.32 in pre-Petition tax obligations. CP 188-190. Defendants opposed this motion. CP 270-277.

One *month* after the U.S. Trustee moved to liquidate the Company, on Monday, April 7, 2003, the bankruptcy court converted the Casino's Chapter 11 bankruptcy to a Chapter 7 liquidation. At the hearing, the Court gave the Casino's principals an opportunity to avoid Chapter 7 if they were willing to unequivocally pledge to provide the Casino with sufficient funds to satisfy its post-petition arrearages and continue on an ongoing basis. CP 309, 11-310, 20. But because Kingen, Switzer, and the other owners were not willing to make this commitment, the Court ordered the Casino into a Chapter 7 liquidation. CP 194, 9-20 and CP 280-281.

The court-appointed Chapter 7 Trustee, Michael McCarty, then closed the Casino.²

D. Defendants' Failure to Pay Wages for Last Two Pay Periods

Employees were paid every other Friday for work performed in the prior two week period ending on the preceding Sunday. *CP 145, 32:15-CP 146, 33:3*. Happy Guests International ("HGI"), a separate entity, processed payroll for Funsters' Grand Casino. *CP 780, ¶ 1*.

There are only two "payroll" periods at issue in the lawsuit: (1) the March 28, 2003, payroll; and (2) the April 11, 2003, payroll. The unpaid portion of the March 28, 2003, payroll was \$23,268.11. *CP 65, 11-12; CP 68; CP 102; CP 143, 21:16-22; CP 146, 33:10-14*. Total payroll for the April 11, 2003, payroll was \$157,704.59.³ *CP 317, 2:3-4*.

Employees who worked anytime between Monday, March 10, 2003, and Sunday, March 23, 2003, were entitled to receive a payroll check on Friday, March 28, 2003. The Defendants admit that although payroll checks were issued, about 25% of them bounced. *CP 146, 33:10-14*. Specifically, 26 employee wage checks totaling \$23,268.11 (referred to by the defendants as a mere "smattering" of paychecks) were

² Defendants were aware that they had the option to convert the Chapter 11 to a Chapter 7 bankruptcy at any time. *CP 153, 78:24-79:24; CP 178, 88:18-89:2*.

³ One employee on this payroll chose to "opt out" of the class, which brings the amount due to \$156,366.78. *CP 65 ¶ 3 and CP 102*.

returned because of insufficient funds ("NSF"). CP 68.⁴ During this time, the company was in Chapter 11 bankruptcy under the direction and control of the Defendants.⁵

Employees who worked anytime between Monday, March 24, 2003, and Sunday, April 6, 2003, were entitled to a payroll check on Friday, April 11, 2003. During this time (*i.e.*, when the work was performed up to and including the last day of the payroll period on April 6, 2003), the company was in Chapter 11 bankruptcy. It was not until Monday, April 7, 2003, that the company was converted to a Chapter 7 liquidation. Although some employees worked on the morning of April 7, none of them made any claim for wages for services rendered on that day. No employees worked on any subsequent days.

On April 11, 2003, the regularly scheduled payroll was not issued. Therefore, none of the casino employees (almost 200) received any wages on April 11, 2003, for work performed prior to the closure, *i.e.*, the period from March 28, 2003, through April 6, 2003. The payroll for this period was **\$156,366.78**. CP 143, 21:23-22:12; CP 167, 11:3-10; CP 317, 1-5.

⁴ Contrary to Defendants' statements, there is no evidence that those employees waited until April 7, 2003, to cash their checks, and that they bounced because the Trustee had cleared out the bank accounts on April 7, 2003. The evidence from AEA Bank records establishes the exact opposite. CP 1780-1790.

⁵ Defendants' statements that "inability" to pay occurred only after the company had been ordered involuntarily into Chapter 7 bankruptcy is patently false. Defendants' Petition at page 6.

According to the declaration of Michael McCarty, the funds seized from *Funsters premises* were approximately \$85,000. CP 317, 1-5. An additional \$15,000 was seized from *Funsters' bank accounts*. CP 469, 8-14, CP 1290, 14-16.⁶ This would not have covered even the last payroll.⁷

Based on the non-payments for the last two pay periods, the total gross wages owed to the class of former Casino employees was \$179,634.89. CP 65, ¶ 3; CP 102. After deducting tips already paid out, that amount is \$120,714.48. CP 2376, ¶ 21 and 22. The employees earned all of these wages during the period of time that Kingen and Switzer were owners and officers operating and running the Casino.

E. Kingen and Switzer Refuse to Pay Employee Wages

After the Casino ended its operations, neither Kingen nor Switzer paid, or attempted to pay, the wages owed the Casino employees.

On April 10, 2003, Mr. McCarty brought a motion seeking to subordinate the priority lien that owner Paul Merlino had on the Casino's

⁶ This fact is undisputed. CP 1290.

⁷ Even if the seized funds had been used to meet their payroll obligations, Michael McCarty, the Trustee, admits that the employees would only have received approximately 46% of their owed wages. CP 318, 19-CP 319, 3. Defendants speculate that the additional funds generated between April 7 and April 10 would have been sufficient to cover the entire payroll, but there is no evidence to support that claim, and their manipulation of the facts in a motion for reconsideration to suggest otherwise was plainly transparent to the Court of Appeals. See, Respondents' Opposition to Motion for Reconsideration filed on November 21, 2007.

available funds in order to use these funds to pay some of the outstanding wages owed the Casino employees. *CP 196-200*.⁸ Through his motion, Mr. McCarty sought to invalidate Mr. Merlino's priority rights to the Casino's funds in order to pay at least a portion of employee wages due and owing. *Id.* In response, Mr. Merlino pointed out that Mr. McCarty lacked any legal basis for subordinating his priority rights to the Casino's available funds. *CP 208-212*. Additionally, the U.S. Trustee objected to Mr. McCarty's request by noting that Mr. McCarty lacked authority to pay wage claims ahead of other Ch. 11 administrative claims. *CP 214-215*.

On April 11, 2003, when arguing his motion to subordinate Mr. Merlino's lien on the Casino funds to pay employees, Mr. McCarty, the Ch. 7 Trustee, represented to the Court that all of the Casino's principals had *refused* his request to pay employee wages. *CP 338, 25-CP 339, 3*. This is consistent with Kingen's testimony:

Q: After that point in time did you personally and/or your partners, Mr. Switzer, Mr. Merlino, offer to put capital in to pay the last payroll, or the portion of it, the difference between the \$85,000 that was left in the company and the \$159,000?

A: No.

CP 172, 46:17-24. And see, CP 391, 3:16.

⁸ On November 14, 2002, the bankruptcy court had granted a super priority lien to persons who provided the Casino with Debtor In Possession financing necessary to continue its operations. *CP 202-206*. Following this, Paul Merlino advanced the Casino \$225,000 to continue its operations. *CP 209, 6-7*.

Ultimately, the Court denied the Chapter 7 Trustee's motion because it lacked legal authority to grant his request and could not modify its prior November 14, 2003, order granting Mr. Merlino priority. *CP 352, 5-CP 353, 2*. Thus, the employees were not paid any wages out of Casino funds.

F. Kingen and Switzer Have the Financial Ability to Pay

Although financial *inability* to pay is not a defense, Kingen and Switzer are both extremely wealthy with more than enough assets to pay the employees. While choosing not to pay their former employees, Kingen and Switzer had the resources to subsequently purchase the property upon which the Casino formerly operated. In September of 2003, just five months after Funsters was liquidated for failure to pay employment taxes to the IRS, a company owned by Kingen and Switzer, K&S Development, LLC, purchased the building complex in which the Casino formerly operated for **\$5.25 million**. *CP 158, 112:4-13*. They, through K&S, also purchased the Casino's furniture, fixtures, and equipment for approximately \$250,000. *CP 172, 49:17-CP 173, 50:8*. Despite these expenditures, Kingen and Switzer have continued to refuse to pay the employees their unpaid wages because Kingen believes it is not his responsibility.

- A: . . . our feelings were that the corporation that owed the liability, if liquidated in an orderly manner, there would be plenty of capital there to take care of its responsibility.
- Q: One year later the employees have still not been paid. Is it still your position that is not your responsibility?
- A: Correct.

CP 172, 47:1-8.

Mr. Kingen and Mr. Switzer could afford to pursue a risky business venture because they had other businesses and assets. According to Kingen's September 1, 2002, personal financial statement, he has a net worth of \$32,096,300. *CP 230.* His West Seattle residence is worth \$5,750,000, and his Sun Valley residence is worth \$950,000. *CP 231.* Kingen's total stock ownership is worth \$13,190,000. *CP 230 and 234.* This includes his 100% ownership of three Salty's Restaurants (Alki, Redondo, and on the Columbia River, in Oregon). *Id.* The estimated 2000 sales for these three restaurants totaled \$19,138,383. *CP 234.* Kingen's total investment real estate holdings amount to another \$22,580,000.⁹ *CP 233.*

⁹ This includes, but is not limited to, his 100% ownership of a Delridge Commercial/Office Facility worth \$1,500,000, a 5,000 square foot warehouse worth \$400,000, the "Embers Property" worth \$1,950,000, the Happy Guests International Office building/Thai on Alki Restaurant, worth \$600,000, and the Harbor Avenue Alki Tavern, worth \$650,000. *CP 232-233.*

III. ARGUMENT

The Supreme Court accepts a petition for review only if one of four criteria is established. RAP 13.4(b). Defendants do not allege that the decision raises any important constitutional issues or that it conflicts with other appellate decisions. Defendants rely solely on a perceived conflict with a Supreme Court case that pre-dated the 1998 *Schilling v. Radio Holdings* case by four years and ostensible "public interest" in not holding wealthy officers liable for the non-payment of their employees. Defendants' rhetoric in their Petition for Review fails to even remotely establish any of the necessary criteria. The Petition should be denied.

A. The Court of Appeals Decision Is Not In Conflict With a Supreme Court Decision

The *Morgan* decision is consistent with all prior Appellate and Supreme Court decisions on this issue.¹⁰

1. Defendants Admit the Case Was Decided Consistent With *Schilling v. Radio Holdings*.

In a unanimous decision, Division 1 upheld the trial court's ruling. Both Division 1 and the trial court held, appropriately, that the case is controlled by the Supreme Court precedent of *Schilling v. Radio*

¹⁰ The defendants bury the conflict argument between two unconvincing policy arguments. The fact is that since the statute was enacted 67 years ago, there have been a plethora of cases, both before and after *Schilling*, that all reiterate the exact same standard of willfulness.

*Holdings.*¹¹ Defendants admit that the trial and appellate courts decided the issue consistent with the *Schilling* decision. "The Court of Appeals decision was also premised squarely on the Supreme Court's opinion in *Schilling*." Defendants' Petition at page 11. The central issue in this case, whether financial inability to pay renders the withholding "not willful" was addressed head on and quite clearly by the *Schilling* court. The answer was "certainly not," and the legislature has ratified the *Schilling* holding by its inaction.

Defendants want the Supreme Court to reconsider its prior decision, ten years after the fact, and revise the *Schilling* holding. Clearly, the Court cannot do so because *stare decisis* "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Davis v. Baugh Indus. Contractors*, 159 Wn.2d 413, 423, 150 P.3d 545 (2007). Because the decision does not conflict with Supreme Court precedent, the Petition must be denied.

2. The Decision Is Consistent With *Pope v. University of Washington* and *Ellerman v. Centerpoint Prepress*.

a. *Ellerman v. Centerpoint Prepress*

In *Ellerman v. Centerpoint Prepress*, 143 Wn.2d 514, 22 P.3d 795

¹¹ In *Schilling v. Radio Holdings*, 136 Wn.2d 152, 961 P.2d 371 (1998), the Supreme Court decided, as a matter of law, that the defendant was liable under RCW 49.52.070. Although a fact finding hearing might be necessary in some instances, it was not in either *Schilling* or here, where the material facts were not in dispute.

(2001), the issue involved whether the defendant was a vice-principal within the meaning of the statute that subjects officers, vice-principals, and agents to liability (she was not an officer of the company). *See, Ellerman*, 143 Wn.2d at 519:

Thus, the issue before us is whether Handley falls within the aforementioned statutes as a vice-principal or an agent of Centerpoint who had liability for the withholding of Ellerman's wages.

In analyzing the issue of whether Handley was a vice-principal, the Court reverted to common law principles and held that a "vice principal" is not just anyone involved in business, but, rather, a vice-principal who exercised control over the payment of the funds and acted pursuant to that authority. *Ellerman*, 143 Wn.2d at 521. Similarly, the court held that an "agent" subject to liability under the statute is one who had "some" control over the payment of wages. *Ellerman*, 143 Wn.2d at 523. The Court was describing the class of people subject to the Act and not the basis for liability under it. The Court concluded that if the person's job involved authority over payment of funds, they are subject to the Act.

Here, Kingen, the President and Chief Executive Officer of the company, and Switzer, the Chief Financial Officer, were officers.¹²

Division 1 correctly held that, as officers, the analysis applicable to agents

¹² Defendants have never contended that they were not running the Company or named some other culpable person.

and vice-principles, limiting their common law liability, was not applicable to them. Officers, by definition, are those individuals running the company who have authority over the payment of employee wages.¹³ Furthermore, their testimony repeatedly established that their job descriptions included the payment of wages, they did control the payment of wages, and they maintained that responsibility throughout the period of time the wages subject to this lawsuit were earned (March 10 through April 6).¹⁴

b. *Pope v. University of Washington*

In *Pope v. University of Washington*, 121 Wn.2d 479, 852 P.2d 1055 (1994), the Supreme Court held that the University did not willfully withhold wages, as a matter of law, when it deducted social security taxes from the employees' wages. The plaintiffs alleged that the University was obligated to refrain from withholding social security from the gross wage unless authorized to do so. *Pope*, 121 Wn.2d at 488. Because there was a "bona fide dispute" as to the obligation of payment, the court held that the

¹³ An officer is "a person charged with important functions of management such as a president, vice president, treasurer, etc." *Richards v. First Union Securities, Inc.*, 290 Wis. 2d 620, 639, 714 N.W.2d 913 (2006); a person who occupies "a high position within the corporation making him active in setting overall corporate policy or performing other important executive duties." *In re NMI Systems, Inc.*, 179 B.R. 357, 369 (Bkrcty. D. Col. 1995); "a person charged with important functions of management such as a president, vice president, treasurer, etc." *CSFM Corp. v. Elbert & McKee Co.*, 870 F. Supp. 819, 833 (N.D. Ill. 1994).

¹⁴ Mr. Merlino was not an officer of the company or active in the management of the company. His role was solely that of financier. *CP 346, 15-CP 347, 11*.

deductions were not willful.¹⁵ Under these facts, the court held that there was no evidence of intent to deprive an employee of wages.

Pope recited the exact same rule enunciated by the *Schilling* court:

Nonpayment of wages is willful and made with intent when it is the result of knowing and intentional action and not the result of a bona fide dispute as to obligation of payment.

Pope, 121 Wn.2d at 490; *and see*, *Schilling*, 136 Wn.2d at 160 ("the nonpayment of wages is willful when it is the result of a knowing and intentional action," citing *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986)). In fact, the *Schilling* court recognized a long line of cases, including *Pope*, when acknowledging the two recognized instances where an employer's failure to pay wages is not willful. *Schilling*, 136 Wn.2d at 160, citing *Pope*, 121 Wn.2d at 491, n.4, 852 P.2d 1055; *Brandt v. Impero*, 1 Wn. App. 678, 681, 463 P.2d 197 (1969); *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 500, 663 P.2d 132 (1983). The Court seeks to harmonize any perceived conflicts and reconciles its holding with previous interpretations. *Berrocal v. Fernandez*, 155 Wn.2d 585, 595, 121 P.3d 82 (2005); *Long v. McAvoy*, 133 Wash. 472, 480, 233

¹⁵ "The record contains testimony and supporting documentation regarding the many letters, memoranda, notices, and recommendations sent between the various University departments discussing whether specific classes of employees or employee job positions were covered by a retirement system or by social security. There is no evidence in the record, however, that the University reached a consensus as to whether specific job positions, other than RA's and TA's, were ineligible for social security until December 1989 when they announced the withholding would cease as of January 1, 1990." *Pope*, 121 Wn.2d at 491.

P. 930 (1925). Clearly, the *Schilling* decision is consistent with *Pope* when it cited to, and relied upon, the very holding Defendants claim is inconsistent.¹⁶

B. The Petition Does Not Involve An Issue of Substantial Public Interest That The Supreme Court Needs to Address

Defendants set forth two alleged "public interest" themes. First, the Defendants claim that the decision "is an affront" to the powers of the legislature to make law. This argument is, on its face, specious. The Court of Appeals based its decision on the Washington Supreme Court opinion in *Schilling*, interpreting the exact same issue under nearly identical facts. The Washington legislature did not, and has not, amended the wage statute since the *Schilling* decision of ten years ago. Thus, by the legislature's inaction, it clearly agrees with the Supreme Court's well reasoned decision in that case. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986) (legislative inaction after judicial interpretation of a statute indicates legislative approval of the court's construction of the statute). For example, the Washington legislature amended RCW 49.60.040 regarding the definition of "disability" and reversed this Court's decision in

¹⁶ To the extent "affirmative" evidence of intent to deprive an employee of wages means something different than a showing that the withholding was not inadvertent or a bona fide dispute, there was ample evidence here to establish Mr. Kingen and Mr. Switzer's liability. *Morgan v. Kingen*, 141 Wn. App. 143, 155-158, 169 P.3d 487 (2007).

McClarty v. Totem Electric, 157 Wn.2d 214, 137 P.3d 844 (2006), within six months of the decision.

Second, Defendants claim that the Washington statute imposing individual liability upon officers and a limited group of vice-principals and agents for the nonpayment of their employees' wages will result in businesses opting not to operate in the state. Yet, in the 67 years since the statute was enacted, Washington businesses have fared just fine. Some of the nation's largest businesses (Microsoft, Boeing, Weyerhaeuser, Nordstrom, and Starbucks) are incorporated here. If *Schilling* was such a radical decision, the impact upon businesses would have manifested itself a long time ago.

The *Morgan* decision, premised on decades of precedent, will hardly have the monumental impact Mr. Kingen and Mr. Switzer predict. The irony of their argument is underscored by the fact that almost every single state has a similar statute imposing individual liability for the nonpayment of wages.¹⁷ In any event, the argument that the statute undercuts the principle of limited officer and shareholder liability is not an issue for the courts. Mr. Kingen and Mr. Switzer will have to lobby the legislature in the same way they lobbied, unsuccessfully, to allow slot machines for non-tribal casinos.

¹⁷ See, e.g., N.Y. Bus. Corp. Article 6, Section 630(a); ORS 652.150; ORS 652.310; *In re Humana*, 182 B.R. 757 (E.D. Mich. 1995) (interpreting Mich. Corp. Laws § 408.471).

C. **The Class Is Entitled to Its Attorney Fees and Costs for Responding to Defendants' Petition for Review**

Under RCW 49.46.090(1), 49.48.030, and 49.52.070, the class is entitled to its attorney fees and costs for responding to this Petition for Review.

IV. CONCLUSION

Given that the Court of Appeals followed the Supreme Court precedent on point, and there is no claim that the decision conflicts with other appellate decisions, there is no serious argument for review of this case. For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' Petition for Review and grant Plaintiffs' fees and costs incurred in responding to the petition.¹⁸

RESPECTFULLY SUBMITTED this 5th day of February, 2008.

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By 

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¹⁸ If the Supreme Court does grant the Petition for Review, then the Class requests that the Court review the decision denying an award of a multiplier to the Class.