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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

ON CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE GUADALUPE PEREZ-FARIAS, *et al.*,

Plaintiffs-Appellants,

v.

GLOBAL HORIZONS, INC., *et al.*,

Defendants-Appellees.

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BRIEF OF *AMICUS CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS

Kristopher I. Tefft, WSBA #29366
General Counsel
Association of Washington Business
1414 Cherry Street SE
Olympia, WA 98507
KrisT@AWB.org
Attorney for *Amicus Curiae*

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I. INTRODUCTION

This brief is submitted by *amicus curiae* Association of Washington Business (“AWB”), the principal institutional representative of the business community in Washington. The court’s answers to at least two of the certified questions promise to have broad applicability in Washington in contexts beyond the Farm Labor Contractor Act (“FLCA”), RCW ch. 19.30, and are of interest to Washington companies.

Specifically, AWB is interested in the court’s development of an analytical framework to determine the excessiveness of statutory damages awards for merely technical violations, or violations where the complaining party suffers no, or disproportionately little, harm. Further, AWB is interested in the court’s treatment of what it means to be “aggrieved” by a statutory violation. In other words, can a party be “aggrieved” by a statutory violation without suffering any harm?

In response to certified question two, AWB urges the court to deploy the framework developed by the U.S. Supreme

Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) and its progeny to the issue of excessive statutory damages and hold that a flat \$500 award per plaintiff per violation without evidence of harm violates due process and Washington’s strong public policy against punitive damages. Further, in response to certified question three, AWB urges the court to hold that a person must be shown to be “aggrieved” to obtain a statutory damage award.

As the Ninth Circuit correctly observed in its order certifying the case, these unsettled questions of law raise “significant policy implications” for the State of Washington. *Perez-Farias v. Global Horizons, Inc.*, 668 F.3d 588, 593 (9th Cir. 2011).

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWB is Washington State’s Chamber of Commerce and the state’s oldest and largest general business membership federation, representing the interests of approximately 8,000

Washington companies who in turn employ over 650,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, iconic, Washington-based corporations who do business across the country and around the world.

AWB represents these interests in the legislative, regulatory, and judicial fora of the state, and frequently appears as amicus curiae before this court in legal and policy issues of importance to its membership.

As commercial entities, employers, and market participants, AWB members can be subject to allegations of violating the requirements of statutory schemes that impose statutory damage awards. The organization thus holds a deep interest on behalf of its membership on rules governing the fair and predictable imposition of statutory damages.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

Of the three legal questions posed by the Ninth Circuit, AWB is interested in two:

If FLCA provides that a court, choosing to award statutory damages, must award statutory damages of \$500 per plaintiff per violation, does it violate Washington’s public policy or its constitutional guarantees of due process? (Certified Question (2))

Does FLCA provide for awarding statutory damages to persons who have not been shown to have been “aggrieved” by a particular violation? (Certified Question (3))

IV. STATEMENT OF THE CASE

For the sake of brevity, AWB adopts the statement of the case set forth by the Ninth Circuit in its order on certification. *Global Horizons*, 668 F.3d at 590-93.

V. ARGUMENT

A. PUBLIC POLICY AND DUE PROCESS REQUIRE RATIONAL LIMITS ON THE AWARD OF STATUTORY DAMAGES.

In response to the Ninth Circuit's second certified question, AWB urges the court to answer that blanket awards of statutory damages violate Washington's public policy and constitutional guarantees of due process when application of the damages provision aggregated across a large class of plaintiffs amounts to grossly excessive punishment considering the actual harm to the plaintiffs.

1. Public Policy

With due respect to the position of the farm workers, their contentions about public policy are incomplete. To be sure, FLCA, and various other provisions of state law, can be construed as public policy promoting worker rights. *Br. of Plaintiffs-Appellants* at 22-25. But for purposes of answering the second certified question, the farm workers are missing entirely Washington State's most relevant public policy.

While it has been developed in the context of the common law, Washington has an historic, unbroken, and unequivocal public policy against punitive damages. The court has rejected punitive damages from the very first years of statehood as “unsound in principle and unfair and dangerous in practice.” *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 56, 25 P. 1072 (1891). In *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996), the court noted in a workplace rights case punitive damages “not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation.” This policy has held despite numerous legislative efforts over the last century to change it. See *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 428 n. 3, 635 P.2d 708 (1981) (citing cases). Most recently at the court, the vitality of this public policy against punitive damages was one area of common ground between the majority and dissenting

opinions in *Farmer v. Farmer*, 172 Wn.2d 633 n. 8, 259 P.3d 256 (2011); 172 Wn.2d at 641 (Wiggins, J., dissenting).

To be sure, the Legislature has provided on occasion for exemplary damages or, like the case here, something more akin to statutory damages. Defendants in certain contexts can be liable for exemplary damages such as double the amount of wages willfully withheld from workers, RCW 49.52.070; treble the amount of actual damages for a consumer protection violation, up to a cap of \$25,000, RCW 19.86.090; treble the amount of actual damages for a timber trespass, RCW 64.12.030; or treble the amount of actual damages for an unreasonable denial of insurance coverage or benefits. RCW 48.30.015(2). But these statutes must be viewed in context.

What is important from a public policy perspective about even these instances of legislatively-authorized punitive damages is the fact that they uniformly require injury and actual damages, and are only measured by a limited multiplier of a party's actual damages. For example, the Washington

Consumer Protection Act expressly requires that a plaintiff seeking to assert a CPA claim must have been “injured in his or her business or property,” and the only damages available to the plaintiff are “the actual damages sustained by him or her.” RCW 19.86.090; *see Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792, 719 P.2d 531 (1986). While a court has discretion to increase the damages award, it may not exceed “three times the actual damages sustained.” *Id.*

The lesson from even these rare occasions where the Legislature has authorized an award of exemplary damages is that Washington public policy does not support monetary punishment that is mathematically unrelated to the actual harm suffered by a plaintiff.

2. Due Process

In addition to Washington’s longstanding public policy, due process limitations also apply to statutory damage awards. As framed by the parties, the question with respect to due

process boils down to whether the standard for analyzing the due process limitations on statutory damages is the *Lochner*-era “wholly disproportionate ... and obviously unreasonable” standard of *St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S. Ct. 71, 64 L. Ed. 139 (1919), the more recently evolved multi-factor analysis of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), some combination of the two, or something else entirely. AWB urges application of the *BMW/Campbell* framework to claims that statutory damage awards are so excessive as to violate due process.

As the parties’ briefing makes clear, there is no uniformity around the country on which standard applies, either in the states or in the federal circuits. And to the extent there is scholarly commentary, the parties each cite exactly one authority on the question. See Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and*

Class Actions, 74 Mo. L. Rev. 103 (2009) (article cited by the growers, in which Professor Scheuerman concludes that the *BMW/Campbell* framework should apply to statutory damages, particularly in class actions); Daniel R. LeCours, *Steering Clear of the "Road to Nowhere": Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 Rutgers L. Rev. 327 (2010) (student note cited by the farm workers, in which Mr. LeCours argues against application of the *BMW/Campbell* framework).

Notwithstanding the unsettled state of the law nationwide, this court appears to have implicitly adopted the *BMW/Campbell* framework. In *State v. WWJ Corp.*, 138 Wn.2d 595, 606 n.8, 980 P.2d 1257 (1999), the court “decline[d] to decide at this time whether *BMW* applies to statutorily imposed civil penalties.” Nevertheless, the court went on to apply, for the sake of a different argument, the *BMW* guideposts (reprehensibility; ratio of punitive award to actual harm; and penalties in comparable cases) to the statutory

penalty levied against the defendant in *WWJ*, finding it reasonable after *applying the guideposts*, and thus constitutional. The different argument this discussion occasioned was whether the issue could be raised for the first time on appeal under RAP 2.5(a)(3). *WWJ*, 138 Wn.2d at 607. The court's handling of the matter provoked a dissenting opinion in which three justices would have applied the *BMW* framework and found the statutory penalty grossly excessive and contrary to due process. *WWJ*, 138 Wn.2d at 610 (Alexander, J., dissenting). Thus while the court split on whether the constitutional issue was reviewable for the first time on appeal under RAP 2.5(a)(3), and on the merits of the constitutional issue, the court was unanimous in looking to the *BMW* framework for deciding the issue.

The farm workers argue that the court should stray from its use of the *BMW* framework in *WWJ*, and instead analyze the due process issue here under the U.S. Supreme Court's 1919 decision in *Williams*. As an initial matter, it is important to

eschew the formalism that seems to underlie some of the case law that rigidly applies *Williams* only to statutory damages, and *BMW/Campbell* only to punitive damages. See, e.g., *Zomba Enterprises, Inc. v. Panorama Records*, 491 F.3d 574, 586-88 (6th Cir. 2007); *Sony BMG Entertainment v. Tenenbaum*, 660 F.3d 487, 512-13 (1st Cir. 2011). There is very little analytical difference between the two when it comes to excessiveness, as the U.S. Supreme Court noted in *BMW*, citing to *Williams* several times in support of the guideposts framework. *BMW*, 517 U.S. at 575-76. In many ways, the *BMW* guideposts arose out of, and refined, the *Williams* standard. This court's discussion in *WWJ* implicitly recognizes the conceptual similarities, analyzing a statutory penalty under the *BMW* standard without any reference to *Williams*. See also *Parker v. Time Warner Ent't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting concern that statutory damages in a class action could implicate due process problem under *BMW* and *Campbell*); *id.*

at 26 (concurring opinion acknowledging potential due process problem, citing both *BMW/Campbell* and *Williams*).

Which standard the court uses to answer the second certified question is of more interest to AWB than how it may apply in this particular case. The growers have already briefed the application of the *BMW/Campbell* framework to the FLCA statutory damages. *See Br. of Appellees* at 34-39.

It is notable, however, in this regard that perhaps the most critical refinement of the *Williams* standard through the *BMW/Campbell* framework has been the focus in the second guidepost on the relationship between the penalty award and the harm to the actual plaintiff, as opposed to the public at large. *State Farm*, 538 U.S. at 426 (“[T]he measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”). *See also Philip Morris USA v. Williams*, 549 U.S. 346, 354, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007).

Here, the court is faced with a plaintiff class that has proven no (or very little) actual damages from the various violations of the FLCA. As Judge Whaley observed below, the farm workers chose to seek nearly two million dollars in statutory damages rather than actual damages, where the “primary justification for the large award is [plaintiffs’] insistence that such an award is necessary to punish and deter future violations.” *Perez-Farias v. Global Horizons, Inc.*, 2009 WL 1011180 (E.D. Wash. 2009) at *5. Yet, as Judge Whaley further noted, the claim for damages included a number of merely “technical violations [that] are in no way proportional to the harm that the Washington statute intended to prevent.” *Id.* at *6. Further: “To say that the Court has absolutely no discretion but to award such exorbitant amounts of statutory damages would violate all notions of fairness inherent in our judicial system.” *Id.* Applying the crux of the *BMW/Campbell* standard to the proposed aggregate classwide award, it is

difficult to see how such a disproportionate award would not violate the growers' due process rights.¹

¹ In addition to guaranteeing due process, Washington's Constitution, like the U.S. Constitution, also bars imposition of "excessive fines." Const. Art. I, § 14. In *WWJ*, the court recognized that an argument based on the constitutional prohibition on excessive fines might apply to a civil penalty imposed against a defendant, but declined to decide the merits of the excessive fines issue because the defendant had failed to make the argument and develop a supporting record before the trial court. *WWJ*, 138 Wn.2d at 602-06. The court assumed, however, that the test under the constitutional prohibition on excessive fines would be whether the civil penalty "is grossly disproportional to the gravity of the defendant's offense," quoting the U.S. Supreme Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998). *WWJ*, 138 Wn.2d at 603-04; *id.* at 609 (Alexander, J., dissenting) (also quoting *Bajakajian*). The *Bajakajian* proportionality test remains the touchstone of determining whether a civil penalty is unconstitutionally excessive. As one federal court recently explained:

Courts have recognized a variety of factors to consider when evaluating whether a fine is excessive under the Eighth Amendment. Among those generally recognized are (1) the extent of the harm caused; (2) the gravity of the offense relative to the fine; (3) whether the violation was related to other illegal activity, and the nature and extent of that activity; and (4) the availability of other penalties and the maximum penalties which could have been imposed.

U.S. v. Birkart Globistics GMBH & Co., 2012 WL 488256, at *4 (Feb. 14, 2012 E.D. Va.) (citing *U.S. v. 3814 NW Thurman St., Portland, Or.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999)). In *Birkart*, the court applied the *Bajakajian* proportionality test to a statutory civil penalty and found it unconstitutionally excessive under the Eighth Amendment.

Thus, the constitutional prohibition on "excessive fines," and the framework for determining whether a civil penalty is unconstitutionally excessive, both presents a separate and distinct limitation on disproportionate statutory damages, and provides additional support for applying the *BMW/Campbell* framework to assess due process limitations on statutory damages because the "excessive fines" proportionality test echoes the *BMW/Campbell* due process framework.

B. IN ORDER TO OBTAIN STATUTORY DAMAGES, A PARTY MUST BE “AGGRIEVED” BY A VIOLATION OF THE STATUTE.

In the third certified question, the Ninth Circuit asks whether the FLCA allows a statutory damages award to persons who have not been “aggrieved” by a violation of the statute. In other words, can a plaintiff, class or not, who cannot demonstrate having been negatively affected by a violation of the statute nevertheless recover statutory damages?

On this question, the farm workers and growers are like ships passing in the night. The farm workers contend the “aggrieved by a violation” provision of FLCA, RCW 19.30.170(1), is a simple standing provision allowing suit by anyone within the zone of interests the statute was created to protect. *Br. of Plaintiffs-Appellants* at 35. The growers read the same provision as requiring a plaintiff show he or she was negatively affected by a violation of the statute as a prerequisite to damages. *Br. of Appellees* at 42. As with the previous certified question, this issue also raises significant public policy

concerns. While no one is contesting the farm workers' ability to *seek* redress under FLCA, AWB urges the court to answer that members of the plaintiff class must show how a violation affected them prior to obtaining an award of damages.

To resolve the question, the court need not go much farther, as the growers contend, than adopt the Ninth Circuit's resolution of essentially the same question under the comparable federal law, the then-effective Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2055,² in *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). The federal FLCRA had (and, through its successor statute, continues to have) a provision functionally identical to RCW 19.30.170(1) authorizing a lawsuit by an aggrieved person: "Any person aggrieved by a violation of this chapter or any regulation under this chapter...". 29 U.S.C. § 1854(a). In *Six (6) Mexican Workers*, the Ninth Circuit readily

² The FLCRA has since been repealed and replaced by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1856.

understood this to mean that, within the context of a class action for statutory damages, each person awarded damages would have to prove “the claimant was qualified as a member of the class and was affected by the particular violation.” *Six (6) Mexican Workers*, 904 F.2d at 1306 n. 3. The court should hold RCW 19.30.170(1) requires the same thing.

Such a resolution makes the most sense as a matter of public policy. The consequence of holding that parties may recover statutory damages without any proof of having been aggrieved by a violation of the statute would broadly encourage the kind of “no injury” class actions that bedevil other jurisdictions.³ Washington law and public policy should not encourage and empower private counsel to act as roving attorneys general seeking to deter and punish Washington businesses for even technical statutory violations through the

³ Indeed, the question whether a plaintiff may seek statutory damages in federal court under U.S. Const. Art. III, § 2 without having suffered an “injury in fact” is awaiting resolution by the U.S. Supreme Court this term. *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted in part, First American Financial v. Edwards*, --- U.S. ---, 131 S. Ct. 3022, 180 L. Ed. 2d 843 (2011).

mechanism of class-wide aggregate statutory damages. Yet liberating such suits from the requirement that plaintiffs show how a statutory violation has affected them before obtaining statutory damages would do just that.

VI. CONCLUSION

This matter raises significant public policy issues in an area of state law that is thus far unsettled. As regards the second and third certified questions, AWB respectfully urges the court to answer “Yes” and “No”: Yes, it would violate Washington’s public policy and due process to award blanket \$500 per plaintiff per violation when, under the standards of *BMW* and its progeny, such awards are grossly excessive; and No, the FLCA does not provide for statutory damages to persons not shown to be “aggrieved” by a particular violation.

Respectfully submitted this 10th day of April, 2012.

ASSOCIATION OF
WASHINGTON BUSINESS

[Filed Electronically]

/s/

Kristopher I. Tefft, WSBA
#29366
Attorney for *Amicus Curiae*
AWB