S241812

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**BRETT VORIS**
*Plaintiff & Appellant,*

vs.

**GREG LAMPERT**
*Defendant & Respondent.*

AFTER AN UNPUBLISHED DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE, APPEAL NO. B265747
ON APPEAL FROM JUDGMENT OF LOS ANGELES SUPERIOR COURT
CASE NO. BC 408562, HONORABLE MICHAEL L. STERN, TRIAL JUDGE

## RESPONDENT'S ANSWER TO AMICUS BRIEF FILED BY WAGE JUSTICE CENTER, ET AL.

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## INTRODUCTION

Amici seek to justify the expansion of tort liability by arguing that a conversion claim would allow employees to obtain satisfaction of judgments that would otherwise go unpaid. Amici, however, cannot articulate any logical basis to establish their assumption that there is something inherently talismanic about a conversion-based judgment that somehow renders an insolvent employer capable of satisfying such a judgment. Under their illogical view, an employer's inability to satisfy a judgment would magically disappear if the judgment is labeled as one for conversion (as opposed to one for statutory wages).

Amici's only plausible counter-argument is that if a conversion claim is allowed, the employee can reach *third parties* besides the employer. The fallacy of this argument is that a plaintiff's ability to prevail on a claim depends on the elements of the cause of action, not the third party's relationship to the target defendant.

The fundamental flaws in amici's view can be illustrated by other cases. Under their view, because certain drivers have no auto insurance – thereby precluding injured plaintiffs from obtaining tort recovery from the uninsured public – *all* drivers should be subject to punitive damages liability in auto accident cases. Likewise, because certain members of the public fail to pay their taxes, under amici's theory, taxes should be raised on every one. While there is no question that certain drivers (or employers) are judgment-proof, that does not justify expanding the liability of the remaining members – and presumably the majority – of the public in any of these contexts. Because amici's arguments are logically flawed, the Court should summarily reject their attempt to turn this labor law dispute into a judgment enforcement case.

## DISCUSSION

### A. The Resolution of the Substantive Issue Regarding the Availability of a Cause of Action for Conversion Has Nothing to Do with the Separate, Procedural Issue Regarding Judgment Enforcement.

Even if we assume that all of amici's assertions about judgment enforcement issues are correct (Amicus Br. 15-18), they cannot possibly justify the substantive remedy they seek: the creation of a brand new cause of action for unpaid wages.

If the mere inability to satisfy a judgment were recognized as a valid basis for recognition of a new cause of action every time a particular category of litigants faced judgment enforcement problems, the substantive law would be infinitely stretched to fit new fact patterns. Adoption of this approach in shaping the law would magnify the volume of litigation. Here, for example, while it is undisputed that defendant Greg Lampert defeated plaintiff Voris's alter ego claims (ABOM 5; 2 AA 286), Voris seeks to resurrect such a claim by creating a conversion theory of liability. Given the current budget cuts, there is no reason to increase the burdens on the judiciary based on amici's flawed arguments.

To be sure, the law recognizes that some litigants may try to render judgments futile by engaging in procedural shenanigans (e.g., hiding assets, etc.). Consequently, California has implemented various mechanisms to combat this scenario. Besides enacting Code of Civil Procedure section 187 as a basis to amend a judgment to reflect additional judgment debtors, California has enacted a robust statutory scheme governing fraudulent transfers. Under the Uniform Voidable Transactions Act (Civ. Code, § 3439, et seq.), defrauded creditors may reach property in the hands of a

transferee. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [interpreting predecessor statutory law under Uniform Fraudulent Transfer Act].) Setting aside the powerful contempt remedies for violating judgment enforcement orders, this statutory cause of action renders moot amici's erroneous suggestion that "none of the available remedies contemplate separate acts by persons outside the employer-debtor context." (Amicus Br. 10.)

To summarize, amici have conflated the substantive issue presented here (regarding the causes of action that should be available as of the time an employment lawsuit is filed) with distinct, procedural issues that may be presented in select cases after the judgment is entered (in terms of post-judgment difficulties in enforcement).

### B. In Any Event, the Legislature Has Already Enacted Numerous Safeguards to Eliminate or Reduce the Judgment Enforcement Problems Discussed by the Amici.

While the availability of judgment enforcement remedies is irrelevant in deciding whether a cause of action should exist, the concerns raised by amici do not justify reversal here for additional reasons. First, the legislature has implemented numerous remedies recently to address amici's practical concerns regarding the inability of certain employees to collect their judgments.

For example, once a judgment for unpaid wages is entered against an employer (regardless of the industry involved), the employer must post a bond in order to continue conducting business in California until "all judgments for nonpayment of wages" are satisfied. (Lab. Code, § 238,

subd. (a).) [1] Taking into account amici's concern that an employer may form a new entity to evade payment of the judgment, subdivision (e) of this statute further imposes liability on successor (sham) employers. Other judgment enforcement remedies, in addition to civil and criminal penalties, are designed to ensure that employers actually pay such judgments. (See § 238, subd. (f) [civil penalties]; § 238.1, subd. (b) [misdemeanor penalties/imprisonment for violators that continue conducting business]; §§ 238.2-238.3 [imposition of real property and personal property liens by the Labor Commissioner].) In addition, certain employers can lose their license by failing to satisfy employees' judgments. (See § 238.4 [long term care industry employers' license].)

Another particularly potent weapon in the judgment enforcement battle is the statutory imposition of joint and several liability on the employer's customer as the proverbial deep pocket. Rather than chasing an insolvent employer in the key service industries where minimum wage is often the norm, the employee can simply collect the judgment from the employer's customer if the employee provided janitorial, security guard, valet parking, landscaping or gardening services. (§ 238.5, subds. (a)(1) & (e)(1).) For example, an unpaid security guard can collect the judgment from the bank where he was stationed; a valet employee can collect from the restaurant, etc.—assuming the statutorily-required notice was provided to the employer's customer. (§ 238.5, subd. (a)(1).)

Likewise, in the construction industry, direct (general) contractors are liable for unpaid wages owed to the employees of subcontractors for private works projects. (§ 218.7, subd. (a)(1).) The Labor Commissioner may file a civil action to obtain such recovery. (§ 218.7, subd. (b)(1).) In

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[1] Unless noted otherwise, all statutory references below pertain to the Labor Code.

sum, while these laws may be new, they undercut amici's attempts to turn this employment case into a judgment enforcement case.

Targeting the industries where judgment enforcement issues may potentially create practical problems for unpaid employees, the legislature has enacted numerous other laws requiring those employers to post a bond to ensure satisfaction of judgments held by employees for unpaid wages. For example, under existing law, employers must post the following bonds, where applicable:

- public works contractors must post a bond to cover wages and civil penalty assessments (§ 1741, subd. (a); § 1742.1, subd. (a));

- to operate as a contractor, anyone engaged in construction must post a bond. (See Bus. & Prof. Code, § 7071.5, subd. (d) [contractors' license bond]; *id*, § 7071.17, subd. (a) [additional bond for judgment debtors]; *id*, § 7071.6.5, subds. (a) & (c) [six-figure bond to protect employees of contractors operating as limited liability companies]; see also *Pacific Caisson & Shoring, Inc. v. Bernards Bros. Inc.* (2015) 236 Cal.App.4th 1246, 1254 ["The payment of employee wages is a condition of a contractor's license"]);

- to operate a car wash, such employers must post a bond (Lab. Code, § 2055, subd. (b));

- to operate as a garment manufacturer, such employers may have to post a bond "as a condition of continued registration" where appropriate (§ 2679, subd. (a)); § 2675, subd. (a)(3)); see also § 273, subd. (g) [automatic suspension for failure to maintain statutory bond]);

- to operate as a farm labor contractor, such employers must post a bond to cover violations of the Labor Code chapter governing such

employers (§ 1684, subd. (a)(3)(A) & (D); see also § 273, subd. (g) [automatic suspension for failure to maintain statutory bond]);

- to operate as a *foreign* labor contractor, such employers must post a bond to cover "a violation of law" – including interest on wages owed – if an adverse judgment is entered against them. (Bus. & Prof. Code, § 9998.1.5, subd. (b)(3)(B).) This is on top of the initial bond required to obtain registration. (*Id.*, § 9998.1.5, subd. (b)(3)(A));

- to operate a sawmill or to engage in logging, such employers must post a bond, based on work duration or wage-payment frequency (Lab. Code, § 270.5, subd. (a)(1));

- to obtain a horse owner's license, such employers must post a bond to cover their employees' wages (Bus. & Prof. Code, § 19464, subd. (b)); and

- to operate a door-to-door or telephone marketing company, such employers must post a bond to cover "the payment of all wages." (Lab. Code, § 270.6, subd. (a)(2)).

Judging by these various statutes, employees in traditionally low-wage industries – those most susceptible to abuse – have alternative means for enforcing their judgments against insolvent employers. Therefore, the notion that employees cannot satisfy their judgments, particularly in low-income industries, is simply inaccurate. Therefore, the justification for creating a conversion claim against additional parties is flawed.

### C. The Remaining Arguments Presented by Amici Should Be Rejected As Well.

Amici raise various other arguments, each of which should be summarily dismissed as follows.

Ignoring the various criminal penalties imposed by the Labor Code on individual employers that fail to pay their employees' wages (ABOM 23), amici assume that a civil monetary judgment would be a more effective deterrent. But if an individual is willing to risk the possibility of incarceration (ABOM 12 [listing criminal penalties for wage violations]), there is certainly no reason to believe that such an employer would be more likely to pay wages if threatened with monetary/punitive damages.

Amici alternatively argue that this Court should "leave it to future courts to determinate [the] proper scope and application" of conversion law as another option in deciding this case. (Amicus Br. 2.) But there is no reason to engender or perpetuate further litigation in the lower courts over the precise parameters of conversion claims. The Court should simply eliminate such a claim in the employment context rather than inviting further confusion and additional conflicts in the lower courts.

Amici also rely extensively on *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, claiming that this case should govern the employment issue presented here. (Amicus Br. 2-5.) Addressing the conversion of a net operating loss (as opposed to that of wages), that case merely held that one can convert intangible property even where no document embodies the plaintiff's right to the intangible property. Because Lampert is not advancing a categorical ban against the conversion of *all* forms of intangible property, this case does not help Voris.

Furthermore, *Fremont* adopted one line of authority over another, as the court "decline[d] to follow" two other intermediate courts. (*Id.* at p. 125.) The *Fremont* court rejected *Olschewski v. Hudson* (1927) 87 Cal.App. 282 and *Thrifty–Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559. *Olschewski* had rejected the conversion of an unwritten "laundry route" involving a laundry's customers. *Thrifty–Tel* held in dicta that "[c]ourts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible." (*Thrifty–Tel*, at p. 1565.) Amici do not claim that this Court has resolved this split of authority. In sum, *Fremont* has no relevance in this employment case.

Amici also claim that "Voris has already pled a cause of action for conversion of unpaid wages, since there is no dispute that unpaid wages are vested property rights." (Amicus Br. 3.) While an employer's failure to pay wages establishes the breach element, that does not address the remedy question or any of the remaining elements for a conversion claim. (See, e.g., *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 485 [no conversion claim against banks where money was allegedly misappropriated "over time, in various sums, without any indication that it was held *in trust* for [plaintiff]"]; emphasis added].)

As for amici's suggestion that shaping labor laws does not entail "complex policy decisions" (Amicus Br. 7 [internal citation omitted]), a cursory look at the Labor Code, reflecting literally thousands of statutes, refutes this point. Delineating the parameters of liability – in terms of who should be liable for a particular form of labor law violation and, more importantly, to what extent – entails inherently complex line-drawing, thus justifying judicial deference to the legislature. (ABOM 13 [citation omitted].)

Finally, amici seek to have their cake and eat it too. On the one hand, their theory is based on the premise that "as an officer or director of the corporate entities, Lampert could be held individually liable for *intentional* torts, without regard to whether the corporate veil should be pierced." (*Voris v. Lampert* (March 28, 2017, B265747) 2017 WL 1153334 at *3 [emphasis added].) On the other hand, because "conversion is a strict liability tort" (*Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, 144), Voris and his amici seek to use the conversion theory to bypass the intent requirement. The Court should reject this creative use of two mutually exclusive theories of liability.

## CONCLUSION

The Court should reject amici's attempts to create a brand new cause of action against employers.

Respectfully submitted,

Dated: April 19, 2018

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