No. S241812

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRETT VORIS,
Plaintiff and Appellant,

v.

GREG LAMPERT,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B265747

Appeal from the Superior Court for the County of Los Angeles, Case No. BC408562, The Honorable Michael L. Stern Presiding

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. Is conversion of earned but unpaid wages a valid cause of action?

2. Even if not a valid cause of action in every context, is conversion of earned but unpaid wages a valid cause of action by a former employee plaintiff against an individual defendant who was a managing officer and controlling principal of the closely held corporate former employers?

II. SUMMARY OF ARGUMENT

The majority opinion of the Court of Appeal held that conversion of earned but unpaid wages is not a valid cause of action by a current or former employee under any circumstances. The majority reasoned that neither statutes nor prior decisions of this Court suggest that such a cause of action is cognizable, but more fundamentally, even if they did, that the tort cannot be recognized as a matter of policy, because the risk of expanding the already fertile field of employee wage litigation ultimately outweighs all other concerns. In an articulate concurring and dissenting opinion, Justice Lavin disagreed on both prongs, reasoning that recognition of the conversion tort is consistent with existing wage and conversion law in this state, and that the public policy importance of protecting worker's wages outweighs fears of expanded wage and hour litigation. Justice Lavin's concurrence and dissent is respectfully the better-reasoned opinion and more accurately reflects California public policy. This Court should reverse the majority's opinion and recognize the conversion tort in the wage context, either as a general matter, or, at the very

least, in the context of an action against a controlling principal of a closely held corporate employer, as here.

Contrary to the main pillar of the majority opinion, the policy arguments in favor of recognizing the conversion tort are exceptionally strong and outweigh fears of expanded employment litigation. California has long recognized the protection of worker's wages as a fundamental public policy of this state. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82, *superseded by statute on other grounds, as recognized by Elliot v. Spherion Pacific Work LLC* (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1176.) "[W]ages are not ordinary debts . . . " (*In re Trombley* (1948) 31 Cal.2d 801, 809.) "[B]ecause of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*Ibid.*)

This policy is reflected in the statutes enacted for the general protection of California workers, from the Legislature's first enactment of a statute enabling an employee to recover wages due under minimum wage and overtime laws in 1913 (Lab. Code § 1194; *see also Martinez v. Combs* (2010) 49 Cal.4th 35, 50, *as modified* (June 9, 2010) [examining Lab. Code § 1194]), to the recent passage of A Fair Day's Pay Act, SB 588, including Lab. Code §§ 96.8, 98, 238, 238.1 (imposing criminal liability on controlling persons of corporate employers for certain conduct in connection with failure to pay wages) and 558.1 (making controlling persons of corporate employers personally liable for non-payment of wages by statute), effective January 1, 2016. It is also reflected in the rulings

and remedies that courts have recognized for the recovery of wages: "California courts have long recognized that wage and hour laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (Court of Appeal Opinion ("Op."), concurring and dissenting op., Lavin, J. at 4 (internal citations omitted)); *see also Wilson v. Cnty. of Santa Clara* (1977) 68 Cal.App.3d 78, 86 [recognizing that a common law cause of action may exist for the recovery of wages for mandatory trainings attended outside normal working hours].)

In this case, Plaintiff-Appellant Brett Voris ("Plaintiff" or "Voris") asks this Court to recognize another remedy for an unpaid wage claim: a claim for conversion against an employer (and specifically here, an individual controlling principal and executive of a corporate employer). While the viability of wage conversion claims against employers has been analyzed by several federal district courts interpreting California law (and reaching conflicting decisions), there is no binding decision of this Court or the Court of Appeal addressing the issue. Voris respectfully submits that recognizing the cause of action would be consistent with the existing law and trends in the courts on interpreting conversion and employment law, and also crucial to address employer misconduct more robustly than other remedies currently provide.

In 2007, Voris, a shareholder and/or employee of three startup companies that he had helped form, was ousted by his co-founders. With his employment terminated, Voris asked Greg Lampert, a controlling principal of each of these closely held companies, for payment of his earned but unpaid wages and for the share certificates

representing his equity interests. Under the control and personal direction of Lampert, the companies refused, and in 2009, Voris sued. After six years of protracted litigation, Voris eventually obtained judgments against all three startups, but Voris's conversion claims against Lampert individually were dismissed by the trial court. The dismissal of the wage conversion claims against Lampert were on the grounds that California does not recognize wages as a proper basis for a conversion claim. This ruling was affirmed by a divided panel in the Court of Appeal in 2017.

The majority opinion of the Court of Appeal determined that, *inter alia,* "if Voris's approach were credited, any claimed wage and hour violation would give rise to tort liability for conversion as well as the potential for punitive damages." (Op. at 13.) In so reasoning, however, the majority opinion failed to recognize or apply well-settled principles of tort law to the allegations of Voris's case, and it also improperly underweighted California's crucial policy of protecting employee wages. In his better-reasoned concurring and dissenting opinion, Justice Lavin noted that the law of conversion in California has evolved to recognize new forms of property, and " 'if the law of conversion can be adapted to particular types of intangible property . . . it may be appropriate to do so.' " (Op., concurring and dissenting opinion of Lavin, J. at 5 (citing *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124).) Justice Lavin then concluded that applying conversion to earned but unpaid wage claims would be appropriate.

Especially when considering *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 and *Cortez v. Purolator Air Filtration*

Products Co., (2000) 23 Cal.4th 163, among other modern cases in which this Court has recognized that employees have property interests in their earned but unpaid wages, this Court should hold that an action for conversion may be brought to recover such wages. With respect to Voris specifically, as argued by Lampert himself, without this determination, Voris will likely never recover his unpaid wages, despite having successfully obtained judgments against the two startups that employed him (and also against the third of which he was an equity holder but not an employee), because Lampert managed the employer startups into insolvency. (*See, e.g.,* Respondent's Brief in the Court of Appeal at 7, 9, 26, 31.) Beyond Voris, with respect to the broader context of employee protections in California, to refuse to recognize conversion of wages as a cause of action would essentially shield even bad actors who acted intentionally from established principles of common law, and do so in favor of a policy concern over the potential for proliferating litigation. This too is against California policy, a fundamental principle of which is to hold an intentional bad actor accountable, including specifically in the context of conversion. (*See, e.g., Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1036 ["[T]he common law does not stand idle while people give away the property of others") (interpreting California law on conversion].)

III. STATEMENT OF THE CASE

A. Standard of Review and Facts

The issue before the Court of Appeal was the propriety of the trial court's judgment on an order granting a motion for judgment on the pleadings on the conversion of wages issue, which is reviewed *de*

novo. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) Thus, the Court here has even broader discretion than otherwise to draw from the entire appellate record in considering the issues here, including facts in the appellate record not specifically recited in the Court of Appeal's opinion. (Cal. Rules of Court, rule 8.500 (c)(2); *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, 206 [summary judgment context]; *Miller v. Dep't of Corrections* (2005) 36 Cal.4th 446, 452, n. 3 [same]; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 [same].)

The facts as discussed in the Court of Appeal's opinion are enough to decide the issues if the Court here so chooses. (Cal. Rules of Court, rule 8.500 (c)(2).) However, part of the value of this particular case as a vehicle to examine the potentially competing policy concerns is in the non-hypothetical and stark facts as developed in a record of a complaint with allegations of specific bad conduct, fleshed out by six years of litigation and two trials. This record provides the Court with an opportunity to paint a clear picture: for example, that even on these facts, for policy reasons or otherwise, the Court is not going to recognize a conversion of wages tort, or, on the other hand, that these facts help show why the Court needs to do so to protect California's policy of sanctity of an employee's entitlement to earned wages, and why doing so is consistent with existing principles of California law. Thus, this Statement of the Case discusses some facts more specifically than discussed in the Court of Appeal's opinion, with citations to the underlying appellate record, should the Court find more specific facts helpful. (*Lonicki*, 43 Cal.4th at 206; *Miller*, 36 Cal.4th at 452, n. 3; *Merrill*, 26 Cal.4th at 476.)

B. Voris and Lampert's Business Relationships

This case arises out of the business relationship between Voris and Lampert and certain other defendants, including Ryan Bristol ("Bristol"), which defendants other than Lampert are no longer parties to the case. (Op. at 2.) In November 2005, Voris joined with Bristol and Lampert to form defendant Premier Ten Thirty-One Capital Corp. dba PropPoint ("PropPoint"), a real estate investment company. (*Id.*) Voris was an employee of PropPoint and was also supposed to be an equity holder, based on both promises of sweat equity and investment of substantial amounts of his cash savings in the entity. (*Id.* at 2-3, 16, concurring and dissenting opinion at 1-2.) Voris, Lampert, and Bristol also formed two other entities, defendants Sportfolio, Inc. ("Sportfolio") and Liquiddium Capital Partners, LLC ("Liquiddium"). (Op. at 2-3.) Voris was an employee of Sportfolio and promised equity in it as well. (Op. at 2-4, n. 2, concurring and dissenting opinion at 1-2.) Voris was to be an equity holder of Liquiddium (Op. at 2-3, n. 2), but does not allege that he was a Liquiddium employee. (1 Appellant's Appendix ("AA") 69:18-26.)

The companies here were not large corporate employers with hundreds of employees, where a high level corporate principal or managing executive might or might not have personal knowledge or responsibilities for the payment (or non-payment) of an employee's wages. (1 AA 66:24-67:2, 69:6-11, 70:21-72:9.) Rather, the entities were small, closely held companies, all three of which were controlled in whole or in part by Lampert. (1 AA 66:24-67:2, 69:6-11, 70:21-72:9, 247; 4 AA 1083:1-7.) The companies had overlapping personnel and shared the same office space, which was also Voris's

apartment. (1 AA 66:24-67:2, 69:6-11, 70:21-72:9; 4 AA 1083-1084, 1098.)

In the fall of 2006, Voris discovered financial improprieties by Bristol and Lampert, including commingling of the funds of PropPoint, Sportfolio, Liquiddium, and other companies for the individual defendants' personal benefit, as well as use of company funds to pay individual defendants' personal expenses. (Op. at 3.)

Among the specific misconduct was an intentionally false "deferred wage" scheme, whereby Voris agreed to work and did work for wages to be paid later after corporate finances allowed, based on false representations by Bristol and Lampert that the two men were also working on the same or a similar deferred wage basis, when in fact they were not but rather were paying themselves. (1 AA 68:1-28, 72:18-73:9, 76:7-13; 80:8-20; 89:19-90:17; 91:1-28; 92:10-93:15; 95:26-96:23; 100:17-101:22; 4 AA 1100-1101, 1104:11-1105:13.)

This general concept of an employee of a startup riskily providing labor for deferred wages or compensation is not limited to Voris and is recognized as a phenomenon in this state, with some history of associated mischief by corporate employers, at least worthy of both mainstream journalistic reporting and also legal writing by practitioners that regularly service the startup community. (*See, e.g.*, Appellant's Request for Judicial Notice ("RJN") filed concurrently herewith; O'Neill, Casey and Hanley Chew, *WrkRiot: Rite Of Passage Or Federal Offense?*, Law360.com, June 16, 2017, *available at* https://www.law360.com/articles/935203; Kendall, Marissa, *When startups fail: what happens when the cash runs out,* THE MERCURY NEWS, Oct. 2, 2016, *available at*

http://www.mercurynews.com/2016/10/02/when-startups-fail-what-happens-when-the-cash-runs-out/.)

Voris confronted Bristol and Lampert in the fall of 2006, the parties had a falling out, and Voris was terminated from all three companies in 2007, without recognition of or compensation for his promised equity interests in all three entities, and with substantial earned but unpaid wages owing from PropPoint and Sportfolio (specifically, $157,000). (Op. at 3.)

Lampert was not an apex corporate executive without personal involvement in Voris's termination and the affirmative decision not to pay Voris his earned wages and vested equity interests, but rather was intimately personally involved in that corporate conduct. (*See, e.g.*, 1 AA 66:24-67:2, 69:6-11, 70:21-72:9, 247; 4 AA 1083:1-7, 1082-84, 1090-92, 1094, 1098, 1100-1101, 1106-1107, 1104, 1112-1116, 1120; 6 AA 1405-1422, 1521-22.) Lampert personally participated in the negotiation of Voris's wages and equity terms (4 AA 1100-1101, 1104); Lampert was the individual who communicated and executed Voris's termination (4 AA 1112); and Lampert hovered over Voris and gloated at Voris's physical exit from the company and afterward (4 AA 1112).

C. Voris Obtains Judgments against Liquiddium and Sportfolio and files an Appeal on his Dismissed Claims Against Lampert

Voris filed suit in 2009 and the case was litigated for several years, yielding a complex procedural history. (*See* Op. at 3-6.) That history includes a prior nonpublished appellate opinion, *Voris v. Lampert*, No. B234116 (Cal. Ct. App. May 22, 2014) 2014 WL

2119993 ("*Voris I*") (affirming the trial court's grant of summary adjudication on Voris's alter ego theories, but reversing the trial court's summary judgment dismissal of Voris's conversion claims against Lampert).

The operative pleading with respect to Lampert is the First Amended Complaint ("FAC"). (1 AA 63-114.)

With respect to Voris's claim for conversion of wages, the FAC specifically alleges that Lampert intentionally prevented Voris from receiving earned but unpaid wages in the specific amounts of $91,000 from PropPoint, and $66,000 from Sportfolio. (Op., concurring and dissenting opinion of Lavin, J. at 1-2.) More specifically, the allegations include that Lampert personally participated in causing the company to hold Voris's wages and equity, both as a punitive retaliatory measure for Voris's identification of Bristol and Lampert's improper conduct, and specifically as leverage to attempt to extract a settlement and release from Voris (which Voris never gave). (1 AA 74:16-75:24, 95:26-96:23, 100:17-101:22, 102:14-20.)

On October 19, 2011, Voris obtained a judgment following jury trial, which determined that Sportfolio and Liquiddium were liable for the conversion of his equity interests in the amounts of $55,599.32 and $52,631.58, respectively. (Op. at 3-4, n. 2.) Voris's claims against Lampert, including his wage and stock conversion claims, were not tried in the October 2011 proceedings, because they were the subject of the then-still-pending appeal in *Voris I*. (Op. at 3-4; *Voris I*.)

D. Voris's Conversion Claims are Remanded to the Trial Court but then Dismissed a Second Time, and Voris Appeals

Voris tried to pursue an alter ego theory against Lampert in addition to direct intentional tort claims, but the Court of Appeal in *Voris I* upheld the trial court's determination that Voris did not have sufficient evidence to proceed against Lampert on an alter ego theory. Thus, Voris here attempted pursuit of alter ego theories and they did not help him reach Lampert.

The *Voris I* opinion, however, held that Voris might have intentional tort claims (for conversion of wages and stock) against Lampert that were not dependent on alter ego, and remanded the case to allow Voris to pursue those claims further. On remand following *Voris I*, Lampert moved for judgment on the pleadings on Voris's stock conversion and wage conversion claims. (Op. at 5.) On January 15, 2015, the trial court granted both motions as to the conversion claims against Lampert, finding neither was validly pled. (*Id.*) Voris appealed the rulings on both motions for judgment on the pleadings.

Later in 2015, Voris obtained a judgment following bench trial against PropPoint and was awarded damages of $171,951.02 plus $126,795.84 in prejudgment interest. (Op. at 5.)

Lampert represented to the Court of Appeal that all three corporate entities are insolvent, and that Voris is unlikely ever to obtain satisfaction of the judgments against the corporate entities unless Voris can also reach Lampert as an individual. (*See, e.g.*, Respondent's Brief in the Court of Appeal at 7, 9, 26, 31.) Voris argued and offered to prove that at least one of the entities,

Liquiddium (the entity in which Voris was an equity holder but not an employee), had sufficient funds to pay Voris's perfected judgment against it, but that Lampert caused Liquiddium to make disbursements in violation of Voris's judgment liens, frustrating collection. (*See* Appellant's Reply Brief in the Court of Appeal at 1-2; 2 AA 428:18-25, 463-465; 4 AA 928-929, 1107:18-27; 8 AA 1773:25-1776:22, 1874-1911, esp. at 1902-1907.) Thus, while the parties have some disagreement as to exactly why Voris's judgments against the corporate entities have not been satisfied, both sides appear to agree that if Voris is unable to reach Lampert as an individual, Voris is unlikely ever to recover his earned wages. On the other hand, by the governing allegations of the pleadings, Lampert will have paid himself wages or other distributions from the same entities, despite (and perhaps contributing to) their alleged insolvency.

On March 28, 2017, the Court of Appeal held unanimously that Voris had validly pled conversion of stock claims against Lampert and remanded those claims for further proceedings. (Op. at 16-19 and concurring and dissenting opinion of Lavin, J. at 1.) But as to Voris's wage conversion claims against Lampert, the panel was divided. The panel's majority opinion affirmed the trial court's ruling, holding that no cause of action for conversion of earned but unpaid wages exists under California law. (Op. at 8-16.)

In a concurring and dissenting opinion, Justice Lavin conducted a detailed examination of the relevant law and arguments, and stated that he would find that conversion of unpaid wages *is* a valid cause of action under California law, and that Voris has validly pled such a cause of action against Lampert. (Op., concurring and dissenting

opinion of Lavin, J.) As Justice Lavin observed, the true thrust of difference between the majority and the concurrence and dissent appears to be rooted in policy concerns: the majority is concerned that to allow a cause of action for conversion of wages would potentially lead to an increase in the intensity and complexity of wage and hour litigation in other cases, unrelated to Voris and Lampert, whereas the concurrence and dissent finds these policy fears to be unpersuasive. (*Id.* at 3.)

On May 8, 2017, Voris filed his Petition for Review to this Court on whether conversion of wages exists under California law generally and specifically against an individual controlling principal and executive in the context of a closely held corporation. On July 12, 2017, this Court unanimously granted review on the issues raised in the Petition.

IV. ARGUMENT

A. This Court Should Approve a Claim for Conversion of Earned but Unpaid Wages

The tort of conversion is an "act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 278; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) To establish conversion, the plaintiff must allege the plaintiff's right of ownership to the personal property, defendant's control of the property in a manner inconsistent with the plaintiff's rights, and damages. (*Fremont*, 148 Cal.App.4th at 119.) "Money cannot be the subject of a cause of action for

conversion unless there is a specific, identifiable sum involved[.]" *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.

To date, there has been no controlling decision of this Court or a California Court of Appeal directly addressing the question of whether wages is a proper subject of conversion. However, authority under California law and from decisions by this Court have found that employees have a vested property interest in the wages that they earn, and failure to pay them is a legal wrong that interferes with the employee's title in those wages. This Court should therefore recognize wages as the proper subject of a conversion claim.

1. California Employees Have Vested Property Interests in the Wages They Earn

In California, wages are deemed the property of the employee and the entitlement to that property right is earned *as the labor is performed.* (*Loehr v. Ventura County Community College District* (1983) 147 Cal.App.3d 1071, 1080.) Accordingly, in this state, when an employer fails to pay wages, more than mere money is withheld; the employer has also violated a property interest in which an employee has legal title.

Cases have drawn upon this premise of wages as a property interest to allow employees to recover their earned pay beyond the remedies provided in the Labor Code. In *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, this Court analyzed whether a claim for unpaid wages may be brought under California's Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200, *et seq.* This Court held that unpaid wages *could* be awarded as restitution for