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

REPLY BRIEF ON THE MERITS

ANDERSON YEH PC
EDWARD M. ANDERSON (SBN 198183)
REGINA YEH (SBN 266019)
401 Wilshire Boulevard, 12th Floor
Santa Monica, CA 90401
(310) 496-4270
edward@andersonyehlaw.com
regina@andersonyehlaw.com

Attorneys for Plaintiff and Appellant

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

---

REPLY BRIEF ON THE MERITS

ANDERSON YEH PC
EDWARD M. ANDERSON (SBN 198183)
REGINA YEH (SBN 266019)
401 Wilshire Boulevard, 12th Floor
Santa Monica, CA 90401
(310) 496-4270
edward@andersonyehlaw.com
regina@andersonyehlaw.com

Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Constitutional Provisions

I. INTRODUCTION

In his Answering Brief on the Merits ("AB"), Respondent Greg Lampert argues that this Court's express recognition of a wage conversion claim would be creating a "brand new remedy" in tort from "fundamentally contractual obligations" (AB at 17); one "incompatible" with existing California law (*id.* at 8); and that would have a "significant, negative" impact on employment litigation (*id.* at 14).

These arguments are legally incorrect and overlook longstanding California policy, including as reaffirmed by recent legislation expressly expanding the definition of "employer" in the unpaid wage context to include individual corporate owners and managing agents, like Respondent was here – the A Fair Day's Pay Act,[1] which the Answering Brief never mentions once.

Many of Respondent's arguments are also drawn from factual situations not at issue here, including Respondent's lead argument against the purported "tortification" of contractual relationships. This is not a case where an employee is seeking to make tortious an employer's breach of an as-yet-mutually-unperformed set of promises, such as for continued future employment. This case is about work already fully performed by the employee that the employer intentionally did not pay for, and specifically here as part of a designed scheme by the Respondent to profit individually by shedding

---

[1] S.B. 588, 2015-2016 Reg. Sess. (Cal. 2015), 2015 Cal. State. Ch. 803, *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588.

the unpaid wage obligations in corporate bankruptcy or other insolvency.

Even aside from such intentional nefariousness, the law is already clear that where the employee's side of the contract is no longer executory (where the employee has already done the work), the employer's obligation to pay the wages goes beyond mere contract: the employee enjoys a vested property right in the unpaid wages as the employee performs the work. It is thus already the law that the employee's right to have earned wages delivered is a property right beyond mere contractual expectation, and the protection of which is a prime California public policy. The real question here is: does California truly recognize it as a full-fledged property interest capable of being stolen (converted) by the employer or the employer's individual owners or managing agents?

Unless the answer is "yes," earned wages will not truly be employee property in the full or even ordinary sense of the meaning of "property," and California's strong public policy of protecting employees' earned wages will be undermined.

Beyond being consistent with existing law and policy, the remedy is sorely needed. Nowhere in his Answering Brief does Lampert, or the majority opinion of the Court of Appeal, ever contest that wage theft is a pervasive problem in California, despite a variety of existing remedies. Indeed, it is not an unreasonable stretch to say that the fundamental concern of the appellate majority, and that Lampert plays on heavily, is essentially that wage theft by employers is <u>so</u> widespread that if employees actually had the simplest, most

direct tool available to address it themselves – a common law cause of action for conversion – the judicial system would be overwhelmed.

But Lampert's Answering Brief itself strongly suggests that the result might be the opposite and actually reduce the burden on the judicial system, by reducing the incidence of employer wage theft in the first place. Lampert's "due process" argument strongly implies that he engaged in his conscious management strategy of not paying Voris for earned wages because Lampert (mistakenly) believed that the law would allow this conduct – that California would see it as a fair policy bargain to let Lampert intentionally manage his companies by not paying employees for labor already performed and then leave the mess to corporate insolvency, with Lampert individually untouchable by a private cause of action by the employee in tort.

No one looking at California's policy history could truly believe California would favor allowing corporate employers to manage their financial affairs by planning not to pay employees their earned wages and then to declare bankruptcy. Lampert's real argument is that he exploited a loophole, fair and square. But common law torts exist in parallel to statutory remedies in part exactly for such situations: to give courts the tools and flexibility to address schemes like Lampert's, which seek to take advantage of statutory loopholes faster than the Legislature can close them. Common law torts have always served this function, and there is no reason to exempt Lampert from common law conversion liability and every reason not to do so – including the deterrent effect it might very well provide and that might reduce employment litigation, not expand it.

II. ARGUMENT

A. Recognizing a Conversion Claim for the Recovery of Earned but Unpaid Wages Would be Fully Consistent with California Public Policy and Principles of Tort Law

Initially, the Answering Brief relies on *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 and *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 to argue against providing any tort remedy to claims arising from an employment relationship, as a disfavored "tortification" of a contractual relationship. The Answering Brief misapplies both *Foley* and *Applied Equipment Corp.* on multiple grounds.

1. The Distinctions Between Tort and Contract Law

In *Foley*, this Court examined, *inter alia,* the differences between tort and contract law:

> The distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate "social policy."

(*Id.* at 683 [citing to PROSSER, LAW OF TORTS (4th ed. 1971) p. 613].) In other words, where contract law concerns only the interests of the parties to the contract, tort law seeks to promote society's interests, which often go well beyond – and may even be unrelated to – any agreement between the parties. (*See* Christopher W. Arledge, *When Does a Contract Breach Also Give Rise to a Tort Claim? A Primer for Practitioners* (July 2006) ORANGE COUNTY LAWYER, at p. 42.)

Where the defendant breaches a duty only based on the parties' contract, the duty is limited to the parties' private interests, and therefore the plaintiff only has only contract remedies. But where the contractual breach also violates fundamental principles of public policy, then that breach also constitutes a tort. (*Ibid.*; *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515 ["Conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law."]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176 ["The duties of conduct which give rise to them are imposed by law, and are based primarily on social policy, and not necessarily based upon the will or intention of the parties . . ."].)

With these distinctions in mind, the *Foley* Court examined, among other issues: (1) whether the plaintiff had a tort claim for wrongful termination against his former employer, who allegedly fired him for reporting that another employee was under criminal investigation; and (2) whether the plaintiff had a tort claim for breach of the implied covenant of good faith and fair dealing, for firing the employee without cause. In other words, as to both claims, the obligations that the employee was seeking to enforce in *Foley* were about the parties' mutual *future* conduct: that the employer would allow the employee to work *in the future*; the employee would do the work *in the future*; and the employee would then be paid for that *future* work.

After analyzing the history and nature of those claims and the policy implications in recognizing the employee's requested remedies regarding such alleged mutually executory (future) obligations, the

majority opinion held that (1) "there was no substantial public policy prohibiting an employer from discharging an employee for [reporting information relevant to the employer's interest]" to support the employee's claim for tortious discharge in contravention of public policy (*Foley, supra,* 47 Cal.3d at 380); and (2) "tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant" (*id.* at 239-40). In other words, the *Foley* court found no California social policy supporting imposition of tort liability for the employer cutting off the contractual *future* of the relationship: there was no policy interest in employees having permanent employment, for example (and indeed, the baseline California policy is to the contrary, that employment is presumptively "at will", *see* Cal. Lab. Code § 2922).

Here, the Court is addressing an altogether different tort claim, and for a different duty: whether an employee may assert a conversion claim against an employer who fails to pay the employee's *already earned* wages. Unlike alleged permanent or continued employment, which is fundamentally against established California policy, the duty to pay employees for earned wages is an exceptionally strong one.

2. The Duty to Pay Earned Wages is a Fundamental Public Policy in this State

California courts have long recognized that wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (*California Grape Etc. League v. Industrial Welfare Com.* (1969) 268

Cal.App.2d 692, 703.) Courts have accordingly recognized tort remedies where there is a violation of this duty.

Gould v. Maryland Sound Indus., Inc. (1995) 31 Cal.App.4th 1137 discusses the duty to pay wages in the context of a wrongful termination, and like the facts here and again different from *Foley*, *where the work at issue had already been performed.* In *Gould*, the plaintiff employee alleged that his employer terminated him to avoid paying him his accrued wages – wages for work the employee had already performed -- and also in retaliation for reporting to management that the employer was violating overtime wage laws with other workers (again, violations of the duty to pay employees for *work already performed*).

In discussing whether the plaintiff in *Gould* was wrongfully discharged in violation of public policy, the Court of Appeal stated:

> [T]he prompt payment of wages due an employee is a *fundamental public policy of this state.* "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Lab.Code, § 201.) . . . In *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837, 187 Cal.Rptr. 449, 654 P.2d 219, the court stated, "Public policy has long favored the 'full and prompt payment of wages due an employee.' . . . (Italics added; citations omitted.) Thus, the prompt payment of wages serves "society's *interests ... through a more stable job market, in which its most important policies are safeguarded.*"

(*Id.* at 1147 (emphasis added).)

After this analysis, the *Gould* Court addressed the allegations before it: "From the foregoing statutes and case law we conclude if [employer] MSI discharged Gould in order to avoid paying him the

commissions, vacation pay, and other amounts he had earned [*i.e.*, for work that the employee had already performed], *it violated a fundamental public policy of this state*." (*Id.* at 1148 (emphasis added).) It therefore reversed the trial court's dismissal of the wrongful discharge tort claim, expressly recognizing the policy importance of paying employees for work they have already done.

The *Gould* Court also rejected the defendant employer's arguments that *Foley* required a different result: "The present case has public policy implications which were not present in *Foley* . . . Gould informed MSI about ongoing conduct [specifically, failure to pay employees for work already performed] which was not only inimical to the public health and general welfare but also illegal" (*Id.* at 725.) Cases following *Gould* have likewise affirmed the existence of tort remedies stemming from an employer's failure to pay wages for labor already performed (or, similarly, for reimbursement of employer expenses already incurred by the employee).[2] Such recognition is wholly consistent with the policy objectives of tort law, and with the policy primacy that California places on paying employees for labor already performed.

---

[2] *See, e.g., Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 830 (employer's refusal to reimburse work expenses can support tortious wrongful discharge claim). *See also In re Jercich* (9th Cir. 2001) 238 F.3d 1202 (Debtor-employer's deliberate breach of contract, in electing not to pay wages owed to his employee even though he had funds to do so, violated fundamental policy of California law and rose to level of tort, thereby making such a debt non-dischargeable).

Given that the failure to pay earned wages is recognized as a violation of public policy and a basis for tort claims, it should also be directly actionable through a common law conversion claim. (*See also Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 105 (Mosk, J., concurring and dissenting opinion) [in analyzing the tortious breaches of contract outside the insurance context, but within "the malleable and continuously evolving nature of tort law," Judge Mosk stated that such tortious breaches "may be found when . . . the breach is accompanied by a traditional common law tort, *such as fraud or conversion. . .*" (emphasis added)].)

3. Employees Have Vested Property Interests in their Unpaid Wages

Respondent simply ignores the already established principle of California law that property interests in wages are conferred to employees when and as they perform labor. As set forth in the Opening Brief on the Merits ("OB"), statutes and case law recognize the premise of wages as property. (*See, e.g., Loehr v. Ventura County Community College District* (1983) 147 Cal.App.3d 1071, 1080 ["Earned but unpaid salary or wages are vested property rights"]; Cal. Lab. Code § 351 ["Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for."].) *Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 178 expressly recognized wages as the property of the employee: "[E]arned wages that are due and payable pursuant to section 200 *et seq.* of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange

for that property as is property a person surrenders through an unfair business practice."[3]

For the notion of wages as property to be truly meaningful, the Court should recognize wages as a basis for a conversion claim – what would be the meaning of recognizing earned wages as a property interest if it were property that essentially was legally incapable of being stolen? The tort of conversion itself is intended to recognize property rights as well as remedy the violation of such rights. (*See Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 120 [Conversion "has been developed into a remedy for the conversion of every species of personal property"].)

Nevertheless, Respondent argues that because the employment relationship is "fundamentally contractual," employees should not be able to assert conversion claims against their employers. (AB at 9.) But that a contractual employment relationship may exist in no way fundamentally prohibits the assertion of tort claims that may arise in that relationship. (*See Lazar v. Superior Court* (1996) 12 Cal.4th 631, 646 [rejecting employer's argument that "we restricted or abandoned traditional tort remedies in the employment context."].)

Courts have long recognized conversion claims with other forms of property in the employment context. (*See, e.g., Dep't of Indus. Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084

---

[3] *See also Pineda v. Bank of Am., N.A.* (2010) 50 Cal.4th 1389, 1402 (recognizing employees' vested property interest in unpaid wages arises out of *the employees'* action, *i.e.,* their labor – in contrast to section 203 penalties).

[employee reimbursement checks]; *Haro v. Ibarra* (2009) 180 Cal.4th 823 [shares of stocks]; *Angelica Textile Servs., Inc. v. Park* (2013) 220 Cal.App.4th 495, as modified (Oct. 29, 2013), as modified on denial of reh'g (Nov. 7, 2013) [trade secrets].)

4. That Property Interests Were Created by Contract Does Not Inherently Limit the Property Owner to Contract Remedies

Finally, Respondent's argument also depends on the fallacy that the way a property interest was initially created limits whether the property can ever be converted, at least if a contract was involved at some point in the transaction. Many forms of property interests are created pursuant to a contractual relationship. For instance, a corporate stock can be the subject of common law conversion claims, even though the promise to deliver the stock in exchange for some consideration begins as contractual. The purchase of a new automobile almost always involves a written contract between the automobile buyer and the dealer. But, as soon as the promisee has earned that stock, or as soon as the buyer has paid the purchase price and acquired title in the vehicle, the property can be legally converted – stolen. That the owner in such circumstances might also be able to sue the promisor for breach of contract does not in any way lessen the law's recognition that if a property interest has vested in the plaintiff, regardless of whether the property interest was created pursuant to a contract or not, the plaintiff can sue for conversion.

B. The Existence of Remedies under the Labor Code and the Potential Impact on Existing Employment Litigation Do Not Outweigh the Need for a Tort Remedy for Earned but Unpaid Wages

1. Wage Theft is a Pervasive Problem in California

After inaccurately dismissing the obligation to pay wages for work already performed as a mere contractual obligation, the Answering Brief then sets forth a laundry list of Labor Code sections to argue that existing statutory remedies are sufficient to protect California employees. (*See* AB at 11-13.) Thereafter, Respondent describes a parade of horribles in the event employees may reach beyond those statutory remedies. (*Id.* at 14-15.) These arguments are also unpersuasive.

In *Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, this Court addressed whether a patient may have a conversion claim in his human cell samples that were later used for research and to produce a patented cell line. In its analysis, the Court made clear that its decision, a matter of first impression, required careful balancing of policy considerations: "[I]t is especially important to face those concerns and address them openly." (*Id.* at 135.)

Respondent cites to *Moore*, but then fails to conduct the analysis that *Moore* teaches: whether a policy of "overriding importance" is implicated. (*Moore,* 51 Cal.3d at 160.) The answer here is clearly yes.

The Opening Brief discusses the problem of earned but unpaid wages, *inter alia,* in the context of Silicon Valley startups (*see, e.g.,* OB at 42); but such misconduct is a far wider ranging issue than just in the startup landscape. "[W]age theft is incredibly pervasive, highly damaging, and inadequately addressed by existing enforcement mechanisms. It occurs in every industry and in every state, affecting millions of people of all job types, incomes, education levels, races,

and origins." (Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers* (2016) 20 EMP. RTS. & EMP. POL'Y J. 71, 73).[4]

In *Lofty Laws, Broken Promises,* Fritz-Mauer explores California's history of the failure to pay wages (using the term "wage theft"), as well as the wide "gap" between the intention of written employment laws and the realities of what California employees (and low-wage employees in particular) face in attempting to collect on their unpaid wages. Among other findings, Fritz-Mauer notes that while California has a history of progressive labor laws, in practice, those laws do not necessarily result in meaningful justice for workers:

> [T]he practical application of California law does not favor employees who suffer from wage theft, but instead provides a distinct advantage to unscrupulous employers who would steal from their workers. The end result is that California law fails to adequately help and protect workers.

(*Id.* at 116.)

Accordingly, that protective legislation already exists does not necessarily demonstrate that existing remedies for workers are

---

[4] *See also* Appellant's Request for Judicial Notice ("RJN") filed concurrently herewith; Dominic Fracassa, *Why wage theft is a serious problem in California*, S.F. CHRONICLE (May 26, 2017), http://www.sfchronicle.com/business/article/Wage-theft-costs-low-paid-California-workers-2-11177052.php ["Each year, minimum-wage violations by California employers sap the state's workforce of nearly $2 billion in earnings, increasing the financial vulnerability of already at-risk populations and creating a drag on the state's overall economic health."].)

sufficient.[5] For example, while the Wage Theft Protections Act of 2011[6] empowers the California Labor Commission to impose criminal sanctions on abusive employers, "[e]xamples of the government criminally prosecuting wage violators are relatively rare" and "sometimes the employers are punished lightly considering the gravity of their crimes." (*Lofty Laws, Broken Promises, supra* at 107.) Another example is that, despite the existence of statutory penalties for wage and hour violations, "modest" failure-to-pay penalties have been found to not actually reduce the incidence of wage theft. (*Id.* at 117.[7])

Perhaps the most compelling demonstration of the limitations to existing legislative remedies, however, is that California workers and the Division of Labor Standards Enforcement ("DLSE"), the agency designated to enforce labor law compliance, are often unable to

---

[5] As discussed further *infra,* California did recently pass the A Fair Day's Pay Act of 2016, a bill which, *inter alia,* extends liability to certain individual employer agents. A Fair Day's Pay Act, S.B. 588, 2015-2016 Reg. Sess. (Cal. 2015), 2015 Cal. State. Ch. 803, *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588.

[6] Wage Theft Prevention Act of 2011, A.B. 469, 2011-12 Reg. Sess. (Cal. 2011), 2011 Cal. Stat. ch. 655.

[7] Citing Daniel J. Galvin, *How to Get Paid What You're Owed, in Three Easy Steps. (Okay, Maybe Not so Easy.)*, WASH. POST (Sept. 6, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/09/06/how-to-get-paid-what-youre-owed-in-three-easy-steps-okay-maybe-not-so-easy/; *see* RJN.

collect on the judgments they do receive. In a 2013 study entitled *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers*, researchers analyzed data from the DLSE from 2008 to 2011.[8] The study found that during that period, claimants received judgments or settlements totaling over $390 million but were only able to collect on $165 million, or 42%. When excluding settlements (in which the likelihood of an employer voluntarily paying is much higher) from those figures, the collection amount drops to $42 million, or a mere 15%.

The "shocking percentage of workers" who are unable to collect on their unpaid wages illustrates the challenges that employees face. (*Lofty Laws, Broken Promises, supra* at pp. 103-04.) Fritz-Mauer explains plainly why the recovery percentage is so low: "recalcitrant employers are able to evade responsibility for their actions with relative ease, and both the DLSE and successful claimants have lacked effective enforcement tools." (*Id.* at 104-05.) (*See also* Section II, Part C, *infra* [addressing potential liability of individuals].)

2. A Clearly Recognized Wage Conversion Claim Would Provide a Much-Needed Cumulative Remedy for Wage Theft

California courts have frequently rejected the "contention that the rule permitting the maintenance of the action would be impractical

---

[8] Eunice Hyunhye Cho, et al., Nat'l Emp't Law Project, *Hollow Victories: The Crisis In Collecting Unpaid Wages For California's Workers* (2013), http://ccaucla-laborcenter.electricembers.net/wp-content/uploads/downloads/2014/04/HollowVictories.pdf; *see* RJN.