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

PLAINTIFF AND APPELLANT BRETT VORIS'S ANSWER TO *AMICI CURIAE* BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

I. INTRODUCTION

"Thou shalt not steal" is one of the most fundamental social covenants. This case puts to the Court the question of whether a bad-intentioned, willfully acting individual who controls an employee's corporate employer can be held accountable under this, one of the oldest and most basic of rules, the simplest expression of which, in the context of civil law, is the common law tort of conversion.

As discussed in prior briefing, while the question is an open one, the long-building weave of California law and policy overwhelmingly teaches that the answer to the question should be "yes," unless the Court agrees to a special hole in California's legal and social tapestry, to give the individuals who control corporate employers broad immunity from common law accountability, even for the most conscious and malicious acts of employee wage theft.

The brief from amici curiae Employers Group and California Employment Law Council (collectively the "Employers" and their brief the "Employers' Brief" or "EB") does not even attempt to defend the unquestionably egregious conduct of the thieving defendant here. Instead, the Employers essentially ask the Court to look away from that conduct, and also from the simple and ancient prohibition on stealing by providing a "backdrop" – an alternative tapestry – where employer-employee wage relations are too complicated for this Court to be allowed to touch without risking larger economic doomsdays: where earned wages are mere debts and not property at all; that regardless, the Legislature has the issue well in hand with a myriad of statutes and other codified remedies directed at the wage theft problem; and that adding common law conversion would not be meaningful to employees or positively influence employer wage conduct.

The Employers' alternative tapestry "backdrop" is so far removed from the actual legal, policy and social situation with respect to wage theft that it repeatedly gets tangled in its own inconsistencies:

The argument that a conversion remedy would be superfluous is strongly belied by the several pages that the Employers' Brief spend arguing against conversion exactly because it would provide, among other things, the remedy of punitive damages. What the Employers' Brief obviously avoids addressing is that, if individuals controlling corporate employers faced a punitive damages possibility, they might actually cause the corporate employers to pay the employees' earned wages in the first place, such that litigations and settlements would arise less frequently.

That the existing legal and policy weave does not already provide potential inherent limits on possible abuse is also belied by the Employers' own arguments. For instance, the argument that conversion should not apply to wage and hour claims for minimum wage, overtime and rest and meal break claims (because those particular rights are new under the Labor Code and thus subject to a different analysis under the "new right—exclusive remedy" test) actually demonstrates one possible set of limiting principles if the Court were looking for any, and the case before this Court is *not* a wage and hour case. The Court has room here if it wants it to recognize a conversion tort for failure to pay earned wages *not* based on minimum wage, overtime or rest and meal break statutes, and leave the question of conversion for wage and hour claims to another day (although Voris argues below that, at least where the wage and hour amounts are undisputed, conversion *should* still apply under such circumstances, as the earned and undisputed wages in such circumstances are still the property of the employee immediately upon being earned).

At the end of the day, the Employers' real argument is that the Court here should assume that the Legislature has the State's endemic wage theft problem handled; that the Legislature will be able to legislate new remedies for the endless innovation of bad acting employers seeking to evade effective enforcement of statutory remedies; and that the Legislature has commanded that the courts stay out of it. But none of these premises are true. The Legislature keeps enacting new laws because the wage theft problem nonetheless persists; it has always been part of the role of the courts to use the common law to close the statutory loopholes that creative or extreme tortfeasors find and expose faster than the Legislature can address them; and the Legislature could easily say that it does not want any help from the courts at common law on wage theft by expressly making the statutory scheme exclusive, but it never has. While this case provides just one example of a bad-acting employer intentionally trying to take advantage of statutory loopholes (some of which the Legislature has since tried to close), there will doubtless be others who find new and creative ways to steal workers' wages, and it is unlikely that the Legislature will ever be able to keep up without the help of the courts at common law. Especially when bad actors have shown a propensity to innovate around the specificity required in statutory rules, our state's social, legal and policy tapestry has not hesitated to recognize and welcome the common law's ability to apply simpler and more flexible rules, which sometimes work the best as a tool for a judge to decide disputes. Indeed, our jurisprudence is clear that parallel common law causes of action are welcome even in the heavily legislated area of employer-employee relations.

In *Tameny v. Atl. Richfield Co.* (1980) 27 Cal.3d 167, this Court held that a common law tort action for wrongful discharge may lie if an employer conditions employment upon participation in unlawful conduct. An employer's obligation to refrain from discharging an employee "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes [,] . . . a wrongful discharge suit exhibits the classic elements of a tort cause of action." (*Id.* at 176.) In so holding, the *Tameny* Court stated:

> In the last half century the rights of employees have not only been proclaimed by a mass of legislation touching upon almost every aspect of the employer-employee relationship, but *the courts have likewise evolved certain additional protections at common law*. The courts have been sensitive to the need to protect the individual employee from discriminatory exclusion from the opportunity of employment whether it be by the all-powerful union or employer. . . . *This development at common law* shows that the employer is not so absolute a sovereign of the job that there are not limits to his prerogative. One such limit at least is the present case.

(*Id.* at 178 (emphasis added, internal citations omitted).)

Not unlike the wrongful termination and wrongful retaliation claims at issue in *Tameny*, recognizing a common law claim would *not* "contravene" the Legislature's intent in enacting the Labor Code.

As had been done in *Tameny,* this Court can and should recognize a tort claim as an "additional protection[] at common law" where a fundamental social policy of this state has been violated. (*Ibid.*) Such a remedy is also sorely needed to address the very real and rampant problem of wage theft in California, and to recognize the well-established notion of wages as the duly earned property of the employee. The tort of conversion, which has been effectively applied and adapted by our courts to recognize such property interests and provide remedies for them, should be likewise approved for wages.

The Court should therefore reject the Employers' Brief arguments and recognize a wage conversion claim.

II. ARGUMENT

A. This Court Can and Should Recognize a Common Law Remedy for Earned but Unpaid Wages

The Employers' Brief begins its analysis by identifying how significant employment law is for the livelihood of California workers and indeed, for the general welfare of our state (EB at 3). It also emphasizes the difficulty of developing appropriate regulations for employment: it is "mind-bogglingly difficult" (*id.* at 4); "[t]his is hard stuff" (*ibid.*); and "the inquiry raises a lot of hard questions" (*id.* at 5).

Voris agrees on the wide-ranging significance of employment laws, and that the Legislature faces complex decisions in crafting such legislation. But the Employers' Brief's conclusions – that (1) this Court would be "contraven[ing]" the Labor Code in recognizing a common law claim for wages (EAB at 3); and (2) that "[t]ort remedies—including punitive damages—do not extend to the employment relationship" (*id.* at 10) – are demonstrably flawed.

1. Employees are Not Limited to Remedies Available under the Labor Code

It is the role of the courts, and not the Legislature, to recognize common law claims.[1] This Court has done so where there exists a violation of a fundamental public policy of this state and where statutes have not precluded other remedies.

In *Tameny v. Atl. Richfield Co* (1980) 27 Cal.3d 167, 176, this Court recognized that, despite the existence and applicability of Lab. Code §§ 2856[2] and 2922,[3] that "an employee's action for wrongful discharge . . . subjects an employer to tort liability." This liability does not stem from any employment contract or from those relevant Labor Code provisions, but instead "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." (*Ibid.*) In other

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[1] *See, e.g., Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304 ("[T]he courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions…").

[2] *Lab. Code* § 2856 declares that "(a)n employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful . . . ."

"While this statute does not specifically refer to an employer's authority to discharge an employee, the statute does reflect direct legislative approval of the basic proposition that an employer enjoys no authority to direct an employee to engage in unlawful conduct." (*Tameny,* 27 Cal.3d at 174, n.8.)

[3] "Under the traditional common law rule, codified in Labor Code section 2922, an employment contract of indefinite duration is in general terminable at 'the will' of either party." (*Tameny,* 27 Cal.3d at 172.)

words, a tort remedy was recognized to vindicate the policy that employers cannot require criminal participation as a condition to employment.

In *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1155, this Court recognized that disability discrimination could form a basis of a common law wrongful discharge claim, and despite the existence of statutory schemes governing disability discrimination under the Labor Code[4] and the Fair Employment and Housing Act (FEHA).[5] In rejecting contrary rulings made by Courts of Appeal, this Court provided:

> [T]he Legislature sometimes enacts a new remedy, intending to *supplement* other remedies. (*See, e.g., Rojo, supra,* 52 Cal.3d at pp. 75, 82, 276 Cal.Rptr. 130, 801 P.2d 373 [the FEHA does not preempt common law remedies].) When courts enforce a common law remedy despite the existence of a statutory remedy, they are not "say[ing] that a different rule for the particular facts should have been written by the Legislature." (*Portillo, supra,* 131 Cal.App.3d at p. 290, 182 Cal.Rptr. 291.) They are simply saying that the common law "rule" coexists with the statutory "rule."

(*City of Moorpark*, 18 Cal.4th at 1156 (emphasis in original). *See also Stevenson v. Superior Court* (1997) 16 Cal.4th 880 [recognizing tortious wrongful discharge for age discrimination].) *City of*

[4] *Lab. Code* § 132a prohibits employers from discriminating against employees "who are injured in the course and scope of their employment."

[5] The FEHA, at *Gov. Code* § 12900 *et seq.,* prohibits various types of employment discrimination, including discrimination based on a disability (Gov. Code § 12921).

Moorpark and other cases therefore confirm that common law tort claims can and should be recognized alongside statutory remedies for employment-related claims.

Finally, and as more thoroughly discussed in Voris's briefs on the merits, in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178, this Court held that an employee could bring a *Bus. & Prof. Code* § 17203 claim for restitution of unpaid wages. In so holding, the Court stated:

> [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.*

(Emphases added.) Accordingly, this Court recognized that the Labor Code does *not* provide the exclusive remedies for unpaid wage claims for California employees.

Later in the brief, and in an attempt to discount *Cortez's* teachings, the Employers suggest that the failure to pay wages here supported a UCL claim specifically because the UCL is also a part of "California's statutory framework" and that the right to equitable remedies under the CL "must be predicated on an underlying statutory violation" (EB 19) – presumably reasoning that *Cortez* would not apply for common law wage claims. But even to make this argument, the Employers' Brief materially misstates the operation of the UCL by representing that only violations of codified legal rules such as statutes and regulations may support a UCL claim for "unlawful" business practices. This is false. Common law torts and other violations recognized in published court decisions that have not been codified *have* been recognized as supporting those types of claims. (*See, e.g., Bondanza v. Peninsula Hosp. & Med. Ctr.* (1979) 23 Cal.3d 260, 266-268 [holding that the hospital's 33% surcharge on delinquent accounts was "unlawful" under rule previously adopted in *Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n* (1973) 9 Cal.3d 731]; *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.* (9th Cir. 2007) 479 F.3d 1099, 1107 [claims of employee-raiding, which stated a claim for intentional interference with contract, adequately alleged the predicate for a UCL "unlawful" act claim].)

The Court has not been careless or logically inconsistent in the tapestry it has already woven with respect to earned wages as property and its openness to recognizing that a common law claim for wage theft would not "contravene" or "displace" an applicable statute (much less constitute a "judicial fiat" (EB at 2)). This Court has recognized tort remedies even where Labor Code remedies exist, to provide a dual common law and statutory scheme for harmed employees; therefore, a tort remedy, including for wage theft, is wholly appropriate to provide "certain additional protections at common law" in an employment relationship. (*Tameny,* 27 Cal.3d at 178.)

2. The Employers' Brief Misapplies the "New Right—Exclusive Remedy" Test

In the brief, the Employers nevertheless argue that the Labor Code is the exclusive remedy to wage and hour claims, such as claims for minimum wage, overtime, and meal and rest break claims.

But as a threshold matter, the wage conversion claim at issue in Voris's case is *not* a wage and hour claim, and so the analysis is inapposite to the facts of this case. Therefore, to the extent that the Employers are arguing that the Labor Code is the exclusive remedy for wage theft claims of the type Voris makes here – the straightforward and intentional failure to pay him at all for work that he had already performed – that is clearly not the law: the basic right to wages for work performed is not a "new" right and so the Labor Code clearly does not provide the exclusive remedy.

Nevertheless, and citing to *Rojo v. Kliger* (1990) 52 Cal.3d 65 for the "new right—exclusive remedy" test or rule, the Employers suggest that the Labor Code was meant to displace any common law remedy for any form of wage claim (EB at 16). However, an application of the test proves the opposite.

Again, an employee's right to his or her earned wages existed at common law long before the Labor Code's first enactment in 1913. "Prior to 1913, actions existed to recover unpaid wages and overtime wages at common law. Under the common law, an employee could recover unpaid wages through an action in contract or, if the contract was legally void, in quantum meruit for the value of services rendered." (*Sims v. AT & T Mobility Servs. LLC* (E.D. Cal. 2013) 955 F.Supp.2d 1110, 1116 (citing *Brown v. Crown Gold Milling Co.* (1907) 150 Cal.376, 383-84 [discussing actions for breach of an employment contract and actions in quantum meruit for recovery of the value of services rendered in employment]).) "Where an employee performed work outside of the normal scope of the employment agreement, the employee could recover in quantum meruit the value of that work in addition to his regular salary." (*Ibid.* (citing *Brown,* 150 Cal.376 at 389).)

The Employers' Brief avoids acknowledging that on this basis alone, Voris should have a common law claim. Instead, Employers argue that "[t]he right to earn wages *at a specific wage rate* is statutory" (EB 17 (emphasis added)), and that "[t]he same is true for the right to receive premium payments for short, late, or missed meal periods or rest breaks" (*ibid.*). But even assuming *arguendo* that Voris's claims were based on rights arising from wage and hour laws, the right analyzed under the new right—exclusive remedy test must be *purely* statutory creations, not in part based on rights already existing in common law: "The Labor Code's minimum wage and overtime provisions simply defined what that reasonable amount was, but *they did not create the underlying right of an employee to be paid* at a fair rate for his labor or the right of that employee to sue for reasonable compensation if he was not." (*Sims,* 955 F.Supp.2d at 1117 (emphasis added)[6]; *see also Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara Cty. Transit Dist.* (1976) 65 Cal.App.3d 121, 131 ["Where a right is given by statute it may be enforced by any appropriate method, legal or equitable." (Citation omitted.)].)

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[6] The *Sims* Court disagreed with *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243 in its holding that the regulations under the Labor Code on pay stubs, minimum wage, and meal and rest breaks created wholly new rights. *Cf. Ward v. Severance* (1857) 7 Cal. 126, 127 [Court finding that new right, exclusive remedy rule applied for rights created "purely" from statute: "These ferries are *purely creations of the statute*, and the only penalty to which a party is subject on their infringement, is that provided by statute."].) Moreover, again, Voris's wage claims are not based on minimum wages or overtime violations. Voris alleges that he was not paid for his labor whatsoever.

If a right exists at common law, then a statutory remedy is generally cumulative, *even if the remedy is comprehensive.* (*Rojo*, 52 Cal.3d at 79-80 [holding that despite the comprehensive statutory scheme in FEHA, that statute did not preempt common law tort actions for discrimination].) Further, *Cortez* already demonstrates that the Labor Code is *not* the exclusive remedy for all types of claims arising in the employment context – including specifically with respect to wages.

As briefly discussed above, the Employers attempt to distinguish *Cortez,* arguing that its holding – that unpaid wages may also support an Unfair Competition Law ("UCL") claim – does not undermine the Labor Code's exclusivity because the UCL is also a statute. But the rule does not work this way. The "new right—exclusive remedy" rule is that:

> [W]here a new right,—one not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is *exclusive of all others*.

(*Hentzel v. Singer Co.* (1982) 138 Cal.App. 3d 290, 301 (citing *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 112 (emphasis added)). *See also Monterey Cty. v. Abbott* (1888) 77 Cal. 541 ["Where a right is given and a remedy provided by statute, (or ordinance, if valid,) the remedy so provided must be pursued."].) In other words, "*exclusive of all others*" means *exclusive of other statutory remedies.* (*See, e.g., K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.* (2009) 171 Cal.App.4th 939, 961 [On the Uniform Trade Secrets Act, "[a] claim for common law or even statutory unfair competition may be preempted under CC [ ] § 3426.7 if it relies on the same facts as the misappropriation claim."].) The Employers also "apparently misunderstood" the new right—exclusive remedy rule in *Stevenson,* 16 Cal.4th at 901, prompting the Court to explain the rule more fully there. Voris submits that the Employers here should not further strain the rule in this case.

In short, the Employers' Brief purports to offer the "appropriate backdrop" (EB at 1) for Voris's appeal, but the Employers' alternative tapestry is deeply flawed and inconsistent, failing to acknowledge such basic principles including that the Labor Code is *not* the exclusive remedy for wage violations, as indicated in *Cortez*; it misstates that "[t]ort remedies—including punitive damages—do not extend to the employment relationship" (*id.* at 10), overlooking *Tameny* and other cases[7]; and also presumes that recognition of a tort remedy would inherently disrupt a statutory scheme, an argument rejected in *City of Moorpark.*[8]

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[7] *Alcorn v. Anbro Eng'g, Inc.* (1970) 2 Cal.3d 493 (Intentional infliction of emotional distress when supervisor disparaged employee on his race); *Kouff v. Bethlehem-Alameda Shipyard* (1949) 90 Cal.App.2d 322 (an employee improperly discharged from his job for acting as an election poll official could maintain a tort cause of action against his employer for compensatory and punitive damages).

[8] *City of Moorpark*, 18 Cal.4th at 1156:

> When courts enforce a common law remedy despite the existence of a statutory remedy, they are not "say[ing] that a different rule for the particular facts should have been written by the Legislature." (*Portillo, supra,* 131 Cal.App.3d at p. 290, 182 Cal.Rptr. 291.) They are simply saying that the common law "rule" coexists with the statutory "rule."

Any conclusions drawn from these flawed arguments should therefore be rejected.

3. The Availability of Tort Remedies – Including Punitive Damages – Would Promote the Fundamental Policy of Protecting Workers' Wages

On punitive damages specifically, the Employers' Brief argues that the availability of such damages in and of itself would contravene the intent of the Legislature in its enactment of the Labor Code. But there are at least three problems with this argument.

First, this argument again relies on the assumption that the Legislature intended for the Labor Code to supplant all other available remedies to employees. As discussed above, that is not the case. *Tameny* expressly indicated that certain types of conduct in an employment relationship warrant the recovery of both compensatory and punitive damages: "Indeed, our court has sanctioned the imposition of punitive damages in an employee's tort action against his employer . . . in [this context and] other contexts." (*Id.*, n. 10 (emphasis added).)

Second, this argument – that the availability of punitive damage liability should weigh against imposing any tort liability whatsoever – was also made in *Tameny,* and was rejected: "[employer] cites no instance in which tort liability has been denied in an entire class of cases on the ground that punitive damages would be available in aggravated circumstances." (*Tameny*, 27 Cal.3d at 176, n. 10.)

Third, the argument entirely discounts that tort law actually has a purpose, and that the imposition of tort liability, including liability for punitive damages, on unpaid wage claims could serve the aims of the Legislature in enacting the Labor Code.

The purpose of tort law is to vindicate "social policy." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683 (citing Prosser, LAW OF TORTS (4th ed. 1971) p. 613).) The fundamental social policy of protecting workers' wages in California, which significant portions of the Labor Code seek to protect, would overwhelmingly be served by recognition of a tort claim for a violation of workers' rights in their wages, especially one that would place direct accountability on the individuals controlling the decisions leading to the wage theft, if their conduct was so clearly and convincingly intentionally egregious to warrant punitive damages. In so following, the damages available for a tort remedy would promote the fundamental policy interest that employees should be paid for their work already performed, including above other mere contractual debts.

"In tort law, a goal of awarding compensatory damages is to *deter harmful conduct* by making the wrongdoer compensate the person harmed." (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1055 (citing 1 Dobbs, THE LAW OF TORTS (2001) § 10, p. 17) (emphasis added).) With respect to punitive damages, available for cases involving reprehensible conduct, the goal "is a public one—to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers." (*Bardis v. Oates* (2004) 119 Cal. App.4th 1, 25.)[9] "It should be presumed a

[9] *See also State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 416 ("[P]unitive damages serve a

plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1691 (internal citation omitted).)

The Employers' Brief waxes long on the significance of employment laws on our state, but it fails to mention at all this overwhelming policy interest in protecting workers' wages, which is embedded in the Labor Code and expressly acknowledged in case law. (*See, e.g., Kerr's Catering Serv. v. Dep't of Indus. Relations* (1962) 57 Cal.2d 319, 325 ["Wages of workers in California have long been accorded a special status generally beyond the reach of claims by creditors including those of an employer. This public policy has been expressed in the *numerous statutes regulating the payment, assignment, exemption and priority of wages*. (emphasis added)"].) This fundamental policy interest should not be overlooked when assessing whether to recognize a tort remedy on it.

In *Kerr's Catering Serv. v. Dep't of Indus. Relations*, this Court analyzed whether the Industrial Welfare Commission had the authority to prohibit employers from deductions from employee wages due to cash shortages. There, the Court engaged in a

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broader function; they are aimed at deterrence and retribution"); *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition").