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Tina Kuang

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# TOO MANY REMEDIES OR NOT ENOUGH: BALANCING WAGE THEFT AND OTHER PUBLIC POLICY CONCERNS IN *VORIS V. LAMPERT*

Tina Kuang\*

## I. INTRODUCTION

The term “wage theft” refers to an employer’s failure to pay its employees their earned wages.<sup>1</sup> It includes a variety of different pay violations—including paying employees less than minimum wage, failing to pay overtime, making improper deductions, and refusing to pay employees altogether.<sup>2</sup> Despite strong protections in the Labor Code, wage theft is a widespread problem in California.<sup>3</sup> Even with regulations in place, “the probability of being caught for wage theft is so low that it makes economic sense for employers to commit wage theft on a massive scale.”<sup>4</sup> A 2013 report from the National

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\* J.D. Candidate, May 2021, Loyola Law School, Los Angeles; B.A., English, University of Oregon, 2018. Thank you to Professor Bryan Hull for his invaluable feedback and guidance, Alex Hider for being my sounding board and second pair of eyes, and my mom for her endless love and support.

1. Eunice Hyunhye Cho et al., *Hollow Victories: The Crisis in Collecting Unpaid Wages for California’s Workers*, NAT’L EMP. L. PROJECT, 4 (2013), <https://www.labor.ucla.edu/wp-content/uploads/2018/06/HollowVictories.pdf>. See generally KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT* 7 (2009) (Bobo’s book popularized the term “wage theft,” which she defined as “when an employer violates the law and deprives a worker of legally mandated wages”).

2. Cho et al., *supra* note 1, at 4; see Eli Wolfe, *‘We’re Being Robbed’: Wage Theft in California Often Goes Unpunished by State*, KQED (Oct. 16, 2019), <https://www.kqed.org/news/11780059/were-being-robbed-california-employers-who-cheat-workers-often-not-held-accountable-by-state>.

3. Cho et al., *supra* note 1, at 4; Wolfe, *supra* note 2.

4. Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93, 97 (2018); *id.* at 103 (“Economists have long sought to explain non-compliance with wage and hour laws as a rational profit-maximizing decision employers make in response to low enforcement rates and weak penalties. In their seminal 1979 article, *Compliance with the Minimum Wage Law*, Orley Ashenfelter and Robert Smith theorized that an employer’s decision to pay less than the minimum wage involves a cost-benefit analysis that takes into account the probability of detection, the expected penalties that would occur if detected, and the profit the employer expects to make by violating the law.” (citing Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 335–36 (1979))); see, e.g., Kate Taylor, *McDonald’s Is Paying Out \$26 Million to Thousands of Workers After Settling a Wage-Theft Lawsuit, with Employees*

Employment Law Project (“NELP Report”)<sup>5</sup> estimates that “654,914 workers in Los Angeles face one pay-related violation” in any given week.<sup>6</sup> In fact, “[w]age theft is a far bigger problem than bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined.”<sup>7</sup> Yet, despite its prevalence, wage theft receives very little national political attention; “[i]t is a crisis unfolding largely outside of public view.”<sup>8</sup>

The two main ways employees recover stolen wages in California are by (1) pursuing a claim with the California Labor Commissioner (also called the Division of Labor Standards Enforcement); or (2) filing a lawsuit.<sup>9</sup> However, even when employees successfully pursue their wage claims, winning a judgment is often just a “hollow victory.”<sup>10</sup> Many employers who are found liable for wage violations have no intention to pay their employees the stolen wages, going so far as to abandon, transfer, or sell their businesses—sometimes even before the judgment is delivered.<sup>11</sup> By doing so, employers no longer have to worry about their assets being seized to satisfy the judgment.<sup>12</sup>

Although pay violations, and the subsequent difficulty collecting stolen wages, are “shockingly high” in low-wage industries,<sup>13</sup> another

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*Getting Checks for as Much as \$3,900 in Lost Wages*, BUS. INSIDER (Oct. 7, 2020, 2:45 PM), <https://www.businessinsider.com/mcdonalds-to-pay-26-million-after-settling-wage-theft-lawsuit-2020-10> (“Roughly 34,000 McDonald’s employees at corporate-owned locations across California will receive checks as part of [a \$26 million settlement to a wage theft lawsuit]. Workers will receive checks for an average of \$333.52, with some receiving as much as \$3,927.91 . . .”).

5. The NELP Report is based on a comprehensive review of records released by the Labor Commissioner between 2008 and 2011. Cho et al., *supra* note 1, at 1.

6. *Id.* at 4; see CAL. LAB. COMM’R’S OFF., 2017–2018 FISCAL YEAR REPORT ON THE EFFECTIVENESS OF THE BUREAU OF FIELD ENFORCEMENT 2 (2018), [https://www.dir.ca.gov/dlse/BOFE\\_LegReport2018.pdf](https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf) (“The US Department of Labor reported in 2014 that the minimum wage law is violated in California 372,000 times per week and that more than one in 10 workers in California is paid less than the minimum wage. An often-cited 2010 study by the UCLA Labor Center found that frontline workers in Los Angeles County lose \$26.2 million per week in stolen wages.”).

7. Ross Eisenbrey, *Wage Theft Is a Bigger Problem than Other Theft—But Not Enough Is Done to Protect Workers*, ECON. POL’Y INST. (Apr. 2, 2014), <https://www.epi.org/publication/wage-theft-bigger-problem-theft-protect/>.

8. Hallett, *supra* note 4, at 102.

9. Cho et al., *supra* note 1, at 7.

10. *Id.* at 15.

11. *Id.* at 14; Wolfe, *supra* note 2.

12. Cho et al., *supra* note 1, at 14, 17.

13. *Id.* at 4.

industry faces the same problem: startups.<sup>14</sup> The opportunity to create the next big thing has “long lured ambitious entrepreneurs into shiny co-working spaces and startup accelerators” in Silicon Valley, but the reality is that most startups fail.<sup>15</sup> These failures can be crushing for all those involved.<sup>16</sup> Not only does the death of a startup mean the loss of a job and the death of a dream, it also means a lack of funds to compensate employees for work they have already put in.<sup>17</sup> Although the practice of withholding wages is illegal, it is a rather common problem when startup founders “put off paying employees as they wait out their next round of funding.”<sup>18</sup> If the funding falls through, there is often no money left to pay employees the wages they have already earned.<sup>19</sup>

That is what happened to plaintiff Brett Voris (“Voris”) in *Voris v. Lampert*.<sup>20</sup> Voris helped defendant Greg Lampert (“Lampert”) launch three startup ventures with the promise of receiving payment of wages and stock at a later date.<sup>21</sup> Voris was eventually fired from all three companies and never received those wages, so he sued his former employers.<sup>22</sup> Voris prevailed against all three companies, but he was unable to collect on the judgments because the startups lacked funds and assets.<sup>23</sup> Thereafter, Voris focused his efforts on Lampert and sought to hold him personally responsible for the unpaid wages under the theory of common law conversion.<sup>24</sup>

In a five to two decision, the California Supreme Court held there could be no tort conversion claim based on the nonpayment of wages.<sup>25</sup> In doing so, the majority opinion distinguished the conversion of unpaid wages from other cases involving the conversion of money, opining that (1) employees do not have a property interest in their unpaid wages; and (2) unpaid wages do not involve “a specific

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14. Marisa Kendall, *When Startups Fail: What Happens When the Cash Runs Out*, MERCURY NEWS (Oct. 3, 2016, 8:41 AM), <https://www.mercurynews.com/2016/10/02/when-startups-fail-what-happens-when-the-cash-runs-out/>.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 446 P.3d 284 (Cal. 2019).

21. *Id.* at 286.

22. *Id.* at 286–87.

23. *Id.* at 287.

24. *Id.*

25. *Id.* at 286, 299.

sum capable of identification,” a requirement for the conversion of money.<sup>26</sup> However, the dissenting opinion found precedent to be indistinguishable and reached the opposite conclusion: that (1) employees do have a property interest in their unpaid wages; and (2) unpaid wages can, and do, involve a “specific sum capable of identification.”<sup>27</sup>

Based on the majority and the dissent’s conflicting interpretations of the same cases, this Comment argues that both opinions were driven by public policy concerns instead of the sound application of precedent. Part II presents the facts and procedural history of the case, and Part III explores the majority and dissent’s reasoning as to why a conversion claim is or is not the appropriate remedy to address wage theft. In Part IV, Sections IV.A and IV.B contend that both opinions are rooted in public policy concerns because the distinction between this case and precedent seems rather arbitrary. Section IV.C observes that while Voris can recover under the existing remedies, not all victims of wage theft can recover their stolen wages without maintaining a conversion claim. Finally, Section IV.D argues that conversion based on the nonpayment of wages should not be categorically barred and offers two elements to limit the scope of a conversion claim for unpaid wages that address the majority’s policy concerns described in Section IV.B.

## II. STATEMENT OF THE CASE

### *A. Voris Prevails in His Lawsuits Against All Three Companies*

In November 2005, Voris joined Lampert and Ryan Bristol (“Bristol”) to launch a real estate investment company, Premier Ten Thirty One Capital (“PropPoint”).<sup>28</sup> Voris provided both marketing and advertising services to PropPoint.<sup>29</sup> Lampert and Bristol later recruited Voris to do similar work for two other startup ventures, Liquiddium Capital Partners, LLC (“Liquiddium”) and Sportfolio, Inc. (“Sportfolio”).<sup>30</sup> In exchange for his work at all three companies, Lampert and Bristol promised Voris later payment of wages, stock, or

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26. *Id.* at 290–94.

27. *See id.* at 300–03 (Cuéllar, J., dissenting).

28. *Id.* at 286 (majority opinion).

29. *Id.*

30. *Id.*

both.<sup>31</sup> In exchange for additional equity, Voris also invested money in PropPoint and Liquiddium.<sup>32</sup>

In fall 2006, Voris discovered alleged financial improprieties by Lampert and Bristol.<sup>33</sup> When Voris voiced his concerns, Bristol and Lampert criticized his work performance and accused him of stealing company money.<sup>34</sup> Voris was eventually terminated from all three companies.<sup>35</sup> The startups never paid Voris the wages or stock they owed him, except for a portion of compensation from PropPoint during his employment.<sup>36</sup>

Voris sued the three companies, Lampert, and Bristol.<sup>37</sup> He alleged twenty-four causes of action in the operative complaint, “including breach of oral contract, quantum meruit, fraud, failure to pay wages in violation of the Labor Code, conversion, breach of the implied covenant of good faith, and breach of fiduciary duty.”<sup>38</sup> The relief sought by Voris included “\$91,000 in unpaid wages from PropPoint, \$66,000 from Sportfolio, and various percentages of equity in all three companies.”<sup>39</sup> In addition, he “sought to hold both Lampert and Bristol personally liable on all counts based on [the] theory of alter ego liability.”<sup>40</sup>

“[O]n the claims against Sportfolio for breach of contract, failure to pay wages, failure to pay for services rendered, and conversion of

31. *Id.*

32. *Id.*

33. *Id.*

34. Voris v. Lampert, No. B265747, 2017 WL 1153334, at \*1 (Cal. Ct. App. Mar. 28, 2017), *aff'd*, 446 P.3d 284 (Cal. 2019).

35. *Lampert*, 446 P.3d at 286.

36. *Id.*

37. *Id.* at 287.

38. *Id.*

39. *Id.*

40. *Id.* Alter ego liability allows for the injured party to hold shareholders personally responsible for the debts or actions of a corporation but requires the plaintiff to “pierce the corporate veil.” *Sonora Diamond Corp. v. Superior Ct.*, 99 Cal. Rptr. 2d 824, 836 (Ct. App. 2000) (“Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. A corporate identity may be disregarded—the ‘corporate veil’ pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation’s acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds.” (citations omitted)).

stock,” the jury found in Voris’s favor and awarded him \$70,782 in damages.<sup>41</sup> On the claims against Liquiddium for breach of contract and conversion of stock, the jury also found for Voris and awarded him \$100,218.<sup>42</sup> This amount included “\$2,500 in punitive damages on the stock conversion claim.”<sup>43</sup> In a bench trial against PropPoint, who did not enter an appearance, “the court ruled in Voris’s favor on the claims for breach of contract, quantum meruit, failure to pay wages in violation of the Labor Code, and conversion of stock and wages” and “awarded Voris \$171,951 in damages, plus prejudgment interest, costs, and attorney fees.”<sup>44</sup>

*B. Unable to Collect on the Judgments Because the Companies Lacked Funds and Assets, Voris Focuses on His Action Against Lampert*

Despite prevailing against all three companies, Voris was unable to collect on the judgments.<sup>45</sup> PropPoint, Liquiddium, and Sportfollio all lacked funds and assets, so instead, Voris turned his efforts toward Lampert, who “allegedly ran down the companies’ accounts and mismanaged the startups into insolvency.”<sup>46</sup>

At the start of litigation, Lampert “successfully demurred to the claims of fraud and breach of the implied covenant of good faith.”<sup>47</sup> The trial court then granted Lampert’s motion for summary judgment on the remaining claims because Voris failed to adequately support his alter ego liability allegations.<sup>48</sup> The court noted that “[i]n an unpublished decision, the Court of Appeal affirmed in part and reversed in part”; it upheld the ruling that Voris’s claims of alter ego liability were insufficient because he failed to “identify supporting facts,” but reversed with respect to the conversion claims because “individual officers may be held personally liable for their intentional torts ‘without any need to pierce the corporate veil.’”<sup>49</sup>

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41. *Lampert*, 446 P.3d at 287.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*; *id.* at 299 (Cuéllar, J., dissenting).

47. *Id.* at 287 (majority opinion).

48. *Id.*

49. *Id.*; *see also* Voris v. Lampert, No. B234116, 2014 WL 2119993, at \*1 (Cal. Ct. App. May 22, 2014).

On remand before the trial court, Lampert moved for judgment on the pleadings on the stock and wage conversion claims, “argu[ing] that Voris failed to allege a sufficient deprivation of ownership interest in the stocks and that California law does not recognize a claim for the conversion of wages.”<sup>50</sup> The trial court granted the motions, and again, the court of appeal affirmed in part and reversed in part.<sup>51</sup>

In a second unpublished decision, all three justices agreed that the “stock conversion claims should be permitted to proceed,” relying on a “uniform rule of law that shares of stock in a company are subject to an action in conversion.”<sup>52</sup> However, “the justices were divided on whether Voris had pleaded a cognizable claim” for wage conversion.<sup>53</sup> The majority concluded that a conversion tort claim based on the nonpayment of wages was not warranted by existing case law or policy considerations; “the Labor Code already requires prompt payment of a discharged employee and authorizes penalties for noncompliance.”<sup>54</sup> The majority worried that if Voris’s claim were allowed to continue, “any claimed wage and hour violation would give rise to tort liability for conversion as well as the potential for punitive damages.”<sup>55</sup> In contrast, the concurring and dissenting justice “opined that ‘employees have a vested property interest in their earned wages, that failure to pay them is a legal wrong that interferes with this property interest, and that an action for conversion may therefore be brought to recover unpaid wages.’”<sup>56</sup>

The California Supreme Court granted *de novo* review to address the disagreement.<sup>57</sup>

### III. REASONING OF THE CALIFORNIA SUPREME COURT

The sole issue before the court was whether a terminated employee could bring an action against his employer’s part-owner to hold the part-owner personally responsible for improperly withholding the employee’s wages under the common law theory of

50. *Lampert*, 446 P.3d at 287.

51. *Id.*

52. *Id.*; *see also* Voris v. Lampert, No. B265747, 2017 WL 1153334, at \*1 (Cal. Ct. App. Mar. 28, 2017), *aff’d*, 446 P.3d 284 (Cal. 2019).

53. *Lampert*, 446 P.3d at 287.

54. *Id.* at 288 (citation omitted); *see* CAL. LAB. CODE §§ 201, 203 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

55. *Lampert*, 446 P.3d at 288.

56. *Id.*

57. *Id.*

conversion.<sup>58</sup> Justice Kruger wrote the majority opinion, which affirmed the judgment of the court of appeal; Chief Justice Cantil-Sakauye and Justices Chin, Corrigan, and Groban concurred.<sup>59</sup> Justice Cuéllar wrote the dissenting opinion, and Justice Liu concurred.<sup>60</sup>

### A. *The Majority Opinion*

The majority opinion held that “[t]he conversion tort is not the right fit for the wrong that Voris alleges, nor is it the right fix for the deficiencies Voris perceives in the existing system of remedies for wage nonpayment.”<sup>61</sup> It found that precedent did not support allowing a conversion claim for the nonpayment of wages.<sup>62</sup> Further, because extensive remedies already existed to combat wage theft in California, the majority opinion did not want to “duplicate [those] remedies” with conversion.<sup>63</sup>

#### 1. The Existing Remedial Scheme

The majority began its analysis with an “overview of existing law governing the payment of [employee] wages.”<sup>64</sup> First, the majority emphasized that the employment relationship is “‘fundamentally contractual,’ meaning it is governed in the first instance by the mutual promises made between employer and employee.”<sup>65</sup> An action for breach of contract is the “usual remedy” for when a promise is broken.<sup>66</sup> Accordingly, an action for breach of contract is also the “usual remedy” for when an employer breaches the promise to pay its employee for services rendered.<sup>67</sup> Even if there is no “explicit promise for payment, the law will imply one” and authorize recovery if it is clear the parties “understood the employee was not volunteering [their] services free of charge.”<sup>68</sup>

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58. *See id.* at 286.

59. *Id.* at 286, 299.

60. *Id.* at 285.

61. *Id.* at 286.

62. *Id.* at 290–94.

63. *Id.* at 295.

64. *Id.* at 288.

65. *Id.* (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 398 (Cal. 1988)).

66. *Id.* (quoting *Glendale City Emps.’ Ass’n v. City of Glendale*, 540 P.2d 609, 619 (Cal. 1975)).

67. *Id.*

68. *Id.*

To supplement those contract remedies with additional worker protections, the Legislature enacted several statutory remedies “to ensure employees receive prompt and full compensation for their labor.”<sup>69</sup> That resulted in “a mass of legislation touching upon almost every aspect of the employer-employee relationship.”<sup>70</sup>

The majority noted that Voris relied on these existing contract and statutory remedies to obtain judgments against PropPoint, Liquidium, and Sportfolio.<sup>71</sup> However, Voris was ultimately unable to collect on the judgments because Lampert deliberately managed the startups into insolvency.<sup>72</sup> Therefore, he wanted the court to supplement existing remedies “with a common law cause of action for conversion of unpaid wages.”<sup>73</sup> And despite the fact that the obligation to pay those wages belonged to his employers (the three startups), Voris also wanted the court to recognize a claim against “individual officers who have either directed or participated in the employer’s failure to pay.”<sup>74</sup> Specifically, Voris wanted to hold Lampert personally liable under tort law for withholding his earned wages.<sup>75</sup> The majority, and Voris, acknowledged that no precedential California decision has recognized a conversion claim based on the nonpayment of wages before.<sup>76</sup>

## 2. Applying Precedent

Next, the majority addressed precedent, beginning with an overview of the conversion tort.<sup>77</sup> Conversion is “the wrongful exercise of dominion over personal property of another.”<sup>78</sup> The elements are: “(a) plaintiff’s ownership or right to possession of personal property, (b) defendant’s disposition of property in a manner inconsistent with plaintiff’s property rights, and (c) resulting damages.”<sup>79</sup> The majority noted that “absent from this formula is any

69. *Id.* at 289.

70. *Id.* (quoting *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980)).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 289–90.

78. *Id.* at 290 (quoting 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW: TORTS § 810 (11th ed. 2017)).

79. *Id.* (quoting 5 B.E. WITKIN, 5 B.E. WITKIN, *supra* note 78, § 810).

element of wrongful intent or motive; in California, conversion is a ‘strict liability tort.’”<sup>80</sup> Furthermore, “[p]unitive damages are recoverable upon a showing of malice, fraud, or oppression.”<sup>81</sup> In appropriate circumstances, emotional distress damages are also recoverable.<sup>82</sup>

With that foundation laid out, the majority applied conversion to the nonpayment of wages.<sup>83</sup> Although it was once contested, “California law now holds that property subject to a conversion claim need not be tangible in form,” and money can be the subject of a conversion claim if “a specific sum capable of identification is involved.”<sup>84</sup> However—as explored in Section IV.A—the majority differentiated between Voris’s case and other cases involving the conversion of money, holding that (1) employees do not have a property interest in their unpaid wages; and (2) unpaid wages do not involve “a specific sum capable of identification.”<sup>85</sup>

### 3. Rejecting Conversion as Another Remedy

Along with opining that a conversion claim for unpaid wages is unsupported by precedent, the majority declined to expand the scope of conversion because there are already “extensive remedies” to address the issue:

An employee seeking recovery of a contractual right to payment of wages is, of course, entitled to sue for breach of contract or, absent a written agreement, for quantum meruit. But that is far from all. The Legislature has repeatedly acted to supplement these common law remedies with statutory remedies.<sup>86</sup>

The majority noted that presently, the Labor Code is the greatest defense against the nonpayment of wages and “secures an employee’s right to the full and prompt payment of final wages,” regardless of whether the employee is terminated or voluntarily quits.<sup>87</sup> Under the Labor Code, employers who willfully fail to comply with its

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80. *Id.* (quoting *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 494 (Cal. 1990)).

81. *Id.*

82. *Id.*

83. *Id.* at 290–94.

84. *Id.* at 290–91.

85. *Id.* at 290–94; *see infra* Section IV.A.

86. *Lampert*, 446 P.3d at 294–95.

87. *Id.* at 295.

requirements are subject to civil penalties.<sup>88</sup> The Labor Commissioner can require an employer who fails to satisfy a wage judgment or is convicted of violating wage laws “to post a bond with the state in order to continue doing business in California.”<sup>89</sup> If the Labor Commissioner fails to “take action despite repeat violations by an employer, private individuals can seek a temporary restraining order to halt the employer’s business without waiting for the Commissioner to enjoin it first.”<sup>90</sup> Further, the willful failure to pay wages and the denial of valid wage claims are criminal offenses, punishable as misdemeanors under the Labor Code.<sup>91</sup>

The majority believed the “Labor Code provisions illustrate[how] the Legislature can craft rights and remedies that target those employers and individual officers who withhold wages willfully and repeatedly, and who strategically evade wage judgments.”<sup>92</sup> In fact, after Voris filed suit, the Legislature enacted Senate Bill No. 588 (“Senate Bill 588”) in 2015 to address the exact problem that Voris alleged: “‘Irresponsible employers [that] may have hidden their cash assets, declared bankruptcy, or otherwise become judgment-proof’ to avoid adverse wage judgments.”<sup>93</sup>

Senate Bill 588 “enact[ed] special provisions for the enforcement of judgments against an employer arising from the employer’s nonpayment of wages for work performed in [California]” and empowered the Labor Commissioner to use “existing remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment pursuant to a writ of execution.”<sup>94</sup> Most importantly, Senate Bill 588 added section 558.1 to the Labor Code, which allows “[a]ny employer or other person acting on behalf of an employer” to be held liable *as the employer* for their willful conduct relating to wage nonpayment.<sup>95</sup> Voris’s goal was to directly reach “individual officers who are responsible for their companies’ evasion

88. *Id.*

89. *Id.* at 297 (citing CAL. LAB. CODE § 240 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.)).

90. *Id.* (citing CAL. LAB. CODE § 243).

91. *Id.* at 295 (citing CAL. LAB. CODE § 216).

92. *Id.* at 297.

93. *Id.* (alteration in original).

94. S.B. 588, 2015–2016 Reg. Sess. (Cal. 2015). *See generally* CAL. LAB. CODE §§ 96.8, 98, 238, 238.1, 238.2, 238.3, 238.4, 238.5, 558.1 (Senate Bill 588 amended Labor Code section 98 and added Labor Code sections 96.8, 238, 238.1, 238.2, 238.3, 238.4, 238.5, and 558.1).

95. CAL. LAB. CODE § 588.1.

of their established wage obligations”—i.e., Lampert.<sup>96</sup> Under Labor Code section 558.1, he could do so without alleging Lampert converted his unpaid wages.<sup>97</sup> Therefore, the majority believed “a conversion claim for unpaid wages would largely duplicate [existing] remedies” and “serve little purpose.”<sup>98</sup>

The majority noted that while the legislative solutions may not be perfect, the history of wage-payment regulation in California shows that the Legislature has been attentive to the problem of wage theft and is working to provide “appropriately tailored relief.”<sup>99</sup> A conversion claim for unpaid wages is just not the appropriate relief; it would “transform a category of contract claims into torts”<sup>100</sup> and “pile additional measures of tort damages on top of statutory recovery, even in cases of good-faith mistake.”<sup>101</sup> Because of extensive remedies that already exist to combat wage theft in California, the majority declined to also allow a conversion claim for the nonpayment of wages.<sup>102</sup>

Nevertheless, the majority agreed that “[t]he full and prompt payment of wages is of fundamental importance to the welfare of both workers and the State of California.”<sup>103</sup>

### B. *The Dissenting Opinion*

The dissenting opinion, on the other hand, believed that “[t]he doctrinal basis for invoking conversion here is as solid as California’s longstanding concern about wage theft.”<sup>104</sup> It criticized the majority for “acknowledg[ing] but then sidestep[ing]” the fact that “numerous plaintiffs have successfully sought compensation for their labor through the tort of conversion.”<sup>105</sup> The dissent addressed the same precedent involving the conversion of money that the majority did, but it reached the opposite conclusion: that (1) employees do have a property interest in their unpaid wages; and (2) unpaid wages can, and

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96. *Lampert*, 446 P.3d at 296.

97. CAL. LAB. CODE § 558.1; *see Lampert*, 446 P.3d at 296–98.

98. *Lampert*, 446 P.3d at 295.

99. *Id.* at 298.

100. *Cf.* GRANT GILMORE, *THE DEATH OF CONTRACT* 87–99 (1974) (asserting that contract law is not as neat and tidy as it appears in casebooks because those cases are selected and reported to fit preexisting categories of contract law).

101. *Lampert*, 446 P.3d at 298–99.

102. *Id.* at 299.

103. *Id.*

104. *Id.* at 300 (Cuéllar, J., dissenting).

105. *Id.* at 299.

do, involve a “specific sum capable of identification.”<sup>106</sup> Section IV.A contrasts the difference between the majority and the dissent’s treatment of those same cases.<sup>107</sup> While “[t]he majority [found] it ‘notable’ that no precedential California decision has yet recognized a conversion claim based on withholding of wages,” the dissent found it more conspicuous that there is no precedential decision refusing to recognize such a claim.<sup>108</sup>

The dissent disagreed with the majority that conversion was not “the right fit for the wrong,” nor “an appropriate remedy,” because regardless of how or why the wage theft happened, the financial hit to the worker’s income is a heavy burden, and the worker should be able to recover their stolen wages.<sup>109</sup> “Despite ‘the considerable body of statutory law that is specifically designed to directly punish and deter employers that fail to satisfy wage judgments,’” the remedies in existence at the time Voris filed suit were indisputably inadequate.<sup>110</sup> Therefore, the dissent believed the tort of conversion should be available to employees “as a complement to the legislative scheme,” which is “consistent with the tort’s broad scope under California law and with the manner in which state legislative remedies and the common law traditionally interact.”<sup>111</sup> A conversion claim for the nonpayment of wages would supplement existing legislative remedies “to give employees the maximum opportunity to vindicate their . . . rights.”<sup>112</sup>

#### IV. ANALYSIS

While the majority did not want to duplicate existing remedies, the dissent wanted to provide employees with *additional* remedies to combat wage theft.<sup>113</sup> Nevertheless, both the majority and the dissenting opinions were driven by public policy concerns instead of

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106. *See id.* at 300–02.

107. *See infra* Section IV.A.

108. *Lampert*, 446 P.3d at 302 (Cuéllar, J., dissenting).

109. *Id.* at 303.

110. *Id.* at 302.

111. *Id.* at 304.

112. *Id.* (omission in original) (citing *Rojo v. Kliger*, 801 P.2d 373, 378 (Cal. 1990)).

113. *Compare id.* at 295 (majority opinion) (“[A] conversion claim for unpaid wages would largely duplicate these remedies and, to that extent, would serve little purpose.”), *with id.* at 304 (Cuéllar, J., dissenting) (arguing that the tort claim of conversion should complement the existing legislative scheme).

the sound application of precedent.<sup>114</sup> Despite addressing the very same cases, the majority and the dissent reached opposite conclusions on whether (1) employees had a property interest in their unpaid wages; and (2) unpaid wages involved a “specific sum capable of identification.”<sup>115</sup> As a result, the distinction between this case and other cases involving the conversion of money seems rather arbitrary. Instead, other factors influenced the majority and the dissent. While the dissent was focused on combatting wage theft, the majority’s primary concern was that a conversion claim for unpaid wages would essentially duplicate existing remedies while “blurring the common law distinction between contract and tort” law and bringing forth undesirable features, like strict liability and punitive damages.<sup>116</sup>

With the enactment of Senate Bill 588, the majority is correct that Voris would be able to hold Lampert personally liable for his stolen wages without relying on the conversion tort.<sup>117</sup> However, the majority failed to consider situations beyond this case where the ability to maintain a conversion claim for the nonpayment of wages may be crucial for an employee to recover their stolen wages.<sup>118</sup> To help all victims of wage theft, not just Voris, a conversion cause of action should be available to recover unpaid wages when (1) the court can ascertain the specific sum of money that is owed; and (2) the employee can show by clear and convincing evidence that the defendant (the employer, employer’s officers, or a third party) acted with malice, oppression, or fraud in withholding the employee’s wages.<sup>119</sup>

### *A. The Majority and the Dissent Reached Opposite Conclusions Despite Applying the Same Precedent*

#### 1. Precedent Involving the Conversion of Money

Although the majority held that employees cannot bring a conversion claim for the nonpayment of wages, precedent establishes that money can be the subject of a conversion claim if a “specific sum

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114. See *infra* Sections IV.A, IV.B.

115. See *Lampert*, 446 P.3d at 290–94 (majority opinion); *id.* at 299–302 (Cuéllar, J., dissenting).

116. *Id.* at 300; see *infra* Section IV.B.

117. See *Lampert*, 446 P.3d at 297–98 (majority opinion); S.B. 588, 2015–2016 Reg. Sess. (Cal. 2015); *infra* Section IV.C.1.

118. See *infra* Section IV.C.2.

119. See *infra* Section IV.D.

capable of identification is involved.”<sup>120</sup> For example, “a real estate agent may be liable for conversion where he had accepted commissions on behalf of himself and a business partner, but refused to give the partner his share”;<sup>121</sup> “a sales agent may be liable for the conversion of proceeds from a consignment sale where the agent did not remit any portion of the proceeds to the principal seller”;<sup>122</sup> and “a client may be liable to an attorney for conversion of attorney fees received as part of a settlement, where a lien established the attorney’s ownership of the fees in question.”<sup>123</sup> To support his argument that conversion should be allowed to recover unpaid wages, Voris also cited two California cases that involved the conversion of earned wages: *Lu v. Hawaiian Gardens Casino, Inc.*<sup>124</sup> and *Department of Industrial Relations v. UI Video Stores, Inc.*<sup>125</sup>

*Lu v. Hawaiian Gardens Casino, Inc.* held that while Labor Code section 351 does not provide a private right of action for an employee to recover gratuities withheld by the employer, a common law claim such as conversion could potentially be brought against an employer who misappropriates gratuities left for its employees.<sup>126</sup> The majority in *Voris v. Lampert* agreed that conversion was appropriate in that instance because “[w]hen a patron leaves a gratuity for an employee (or employees), it arguably qualifies as a specific sum of money, belonging to the employee, that is capable of identification.”<sup>127</sup>

In *UI Video Stores*, the court approved a conversion claim brought by the Labor Commissioner on behalf of Blockbuster employees to recover money unlawfully deducted from their paychecks to pay for uniforms.<sup>128</sup> After the parties settled, Blockbuster mailed individual checks to the employees in the amount of the wrongful deductions.<sup>129</sup> When a number of checks were returned as “undeliverable,” the Labor Commissioner told Blockbuster to deposit

120. *Lampert*, 446 P.3d at 291 (citing Haigler v. Donnelly, 117 P.2d 331, 335 (Cal. 1941)).

121. *Id.* (citing Sanowicz v. Bacal, 184 Cal. Rptr. 3d 517, 529 (Ct. App. 2015)).

122. *Id.* (citing Fischer v. Machado, 58 Cal. Rptr. 2d 213, 215–16 (Ct. App. 1996)).

123. *Id.* at 291–92 (citing Weiss v. Marcus, 124 Cal. Rptr. 297, 303 (Ct. App. 1975)).

124. 236 P.3d 346 (Cal. 2010).

125. 64 Cal. Rptr. 2d 457 (Ct. App. 1997); see also *Lampert*, 446 P.3d at 293–94.

126. *Lu*, 236 P.3d at 353 (noting that other remedies, such as common law conversion, may be available; however, the court never actually decided the issue).

127. *Lampert*, 446 P.3d at 293.

128. *UI Video Stores*, 64 Cal. Rptr. 2d at 459.

129. *Id.*

those checks in California's unpaid wages fund.<sup>130</sup> Blockbuster refused, and the Labor Commissioner filed a second complaint, alleging that the refusal was an unlawful conversion of the checks for Blockbuster's own use.<sup>131</sup> The court of appeal reversed summary judgment in Blockbuster's favor, accepting the Labor Commissioner's contention that it had the right to immediate possession of the checks as the agent of the state and trustee for the employees.<sup>132</sup> The majority in *Voris v. Lampert* noted that "[a]lthough *UI Video Stores* involved a conversion action related to *wrongfully withheld wages*, it did not concern a conversion claim for the *nonpayment of wages*."<sup>133</sup> The majority also stated that at the time of the action in *UI Video Stores* the checks themselves were "arguably" the property of the employees because Blockbuster had already cut and mailed the checks to the employees.<sup>134</sup>

The claim for conversion of checks addressed in *UI Video Stores* is also authorized by statute: California Uniform Commercial Code (UCC) section 3420 states that "[t]he law applicable to conversion of personal property applies to instruments," including checks.<sup>135</sup> The UCC also authorizes claims for the conversion of money in other circumstances. UCC section 9315, subdivision (a)(1) contains the general rule that a security interest survives disposition of the collateral, and a person who sells property that is subject to a security interest may be liable to the secured party for conversion.<sup>136</sup> Often, a plaintiff suing under UCC section 3420 or section 9315, subdivision

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130. *Id.*

131. *Id.*

132. *Id.* at 463–64 (“[T]he [Labor Commissioner] need not possess legal title to the property at issue to support a cause of action for conversion. A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property.”).

133. *Voris v. Lampert*, 446 P.3d 284, 294 (Cal. 2019) (emphasis added and omitted).

134. *Id.*

135. CAL. COM. CODE § 3420 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.). However, “[t]here can be no conversion action until the check is delivered to the payee because until delivery, the payee is not a holder and has no property interest in the check.” *Software Design & Application, Ltd. v. Hoefler & Arnett, Inc.*, 56 Cal. Rptr. 2d 756, 764–65 (Ct. App. 1996) (citing CAL. COM. CODE § 3420(a)); *cf.* *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 709 (Cal. 2000) (“Once earned, . . . unpaid wages became property to which the employees were entitled.”).

136. CAL. COM. CODE § 9315(a)(1), cmt. 2 (“[A] secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion.”).

(a)(1) is seeking money, not the check or the collateral itself.<sup>137</sup> Thus, in both instances, the plaintiff is essentially bringing a conversion claim for money under the applicable statute.

## 2. The Majority's Application of Precedent

But despite case law and statutory law allowing conversion claims for money, the majority held that Voris could not bring a conversion claim for unpaid wages because unpaid wages (1) do not involve “a specific sum capable of identification is involved”; and (2) are not inherently the property of the employee.<sup>138</sup> In the majority's view, past cases that allowed for conversion based on money and compensation differ because “specific sums” were involved, and unpaid wages do not involve a “specific sum.”<sup>139</sup> Thus, employees do not have a property interest in their unpaid wages.<sup>140</sup>

According to the majority, an employee's claim to unpaid wages differs from other claims involving the conversion of money because the “employee's claim is not that the employer has wrongfully exercised dominion over a specifically identifiable pot of money that already belongs to the employee.”<sup>141</sup> Instead, the employee is claiming the employer, or the employer's officer, “failed to reach into its own funds to satisfy [the] debt.”<sup>142</sup> The majority noted that in some cases of wage nonpayment, the money that the employee would have been paid out of may have never existed in the first place, giving an all-too-familiar example:

[A] failed start-up that generates no income and thus finds itself unable to pay its employees. Because the business accounts are empty, there would not be any identifiable monies for the employer to convert. No one would dispute that the start-up is *indebted* to its employees. But only in the realm of fiction could a court conclude that the business, by

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137. *Id.* (“In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceeds.”). But in some cases, a secured party might actually seek non-cash collateral for the purpose of foreclosing on it. *Id.*

138. *Lampert*, 446 P.3d at 290–94.

139. *See id.* at 291–92.

140. *Id.*

141. *Id.* at 292.

142. *Id.*

failing to earn the money needed to pay wages, has somehow converted that nonexistent money to its own use.<sup>143</sup>

What distinguishes the conversion of unpaid wages from other cases involving the conversion of money is the fact that the money “may never have existed in the first place.”<sup>144</sup>

The majority also rejected the argument that unpaid wages are the property of the employee, and therefore, the nonpayment of wages should simply be treated as conversion of property.<sup>145</sup> To support this contention, Voris relied on language found in *Cortez v. Purolator Air Filtration Products Co.*,<sup>146</sup> which stated that “earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are . . . the property of the employee who has given his or her labor to the employer in exchange for that property.”<sup>147</sup> Despite the fact that the court in *Cortez* explicitly says earned wages are the property of the employee, the majority held that the language “concerned the availability of a restitutionary remedy under the Unfair Competition Law (UCL)” and only applied in that specific context.<sup>148</sup> Further, UCL awards “encompass quantifiable sums one person owes to another” while there was no identifiable sum in Voris’s case.<sup>149</sup>

Because unpaid wages are not a “specific sum capable of identification,” nor the property of the employee, the majority held that Voris did not have a property interest in the money and could not maintain a conversion claim for his unpaid wages.<sup>150</sup>

### 3. The Dissent’s Application of Precedent

Although the dissent analyzed the same cases as the majority, it reached the opposite conclusion: that (1) employees do have a property interest in their unpaid wages; and (2) unpaid wages can, and do, involve a “specific sum capable of identification.”<sup>151</sup> The majority faulted the dissent for seeing the other cases involving the conversion of money as “functionally indistinguishable from this one” because

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143. *Id.*

144. *Id.*

145. *Id.* at 292–93.

146. 999 P.2d 706 (Cal. 2000).

147. *Id.* at 715 (emphasis added).

148. *Lampert*, 446 P.3d at 292.

149. *Id.*

150. *See id.* at 291–92.

151. *Id.* at 300–02 (Cuéllar, J., dissenting).

“all of [the] cases involve, at some level, a claim to money earned as compensation for performing a service.”<sup>152</sup> However, even if the past cases can be distinguished to a certain degree, the dissent highlights just how arbitrary the distinctions are.

The dissent observed that Voris could properly maintain a conversion claim to recover his money if Lampert had exercised dominion over his real estate commissions,<sup>153</sup> if Lampert were his agent and failed to pay him proceeds from the sale of cosigned goods,<sup>154</sup> or if Voris were an attorney seeking to recover fees from a client’s award.<sup>155</sup> The dissent also noted that “Voris successfully invoked conversion in this case to recover the [part] of his compensation that consist[ed] of stock.”<sup>156</sup> It was only with respect to his unpaid wages that the majority decided conversion was no longer the right fit.<sup>157</sup>

Citing *Cortez*, the dissent agreed with Voris that unpaid wages are the employee’s property: “[o]nce earned, those unpaid wages became property to which the employees were entitled.’ Indeed, they 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.’”<sup>158</sup> The latter type of property could surely be subject to a conversion action.<sup>159</sup> The dissent argued that the exchange of labor for money is what causes “unpaid wages to become the worker’s property[,] even when those funds are still [possessed by] the employer[.]”<sup>160</sup> Refuting the majority’s argument that the funds may not have existed in the first place, the dissent urged that even if “the unpaid wages [are] commingled with the employer’s general funds,” it “does not disqualify them as property that may be converted, so long as the sum owed is specific and definite.”<sup>161</sup> And to establish the first element of

152. *Id.* at 292 (majority opinion).

153. *Id.* at 299 (Cuéllar, J., dissenting) (citing *Sanowicz v. Bacal*, 184 Cal. Rptr. 3d 517, 529 (Ct. App. 2015)).

154. *Id.* (citing *Fischer v. Machado*, 58 Cal. Rptr. 2d 213, 215–16 (Ct. App. 1996)).

155. *Id.* (citing *Weiss v. Marcus*, 124 Cal. Rptr. 297, 303 (Ct. App. 1975)).

156. *Id.*

157. *Id.*

158. *Id.* at 300 (citing *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 709, 715 (Cal. 2000)).

159. *Id.*

160. *Id.*

161. *Id.* at 301.

the conversion tort,<sup>162</sup> it is enough for a plaintiff “to show [their] ownership or right to possession of personal property”; “[n]o extensive discourse on its nature as ‘property’ is required.”<sup>163</sup>

An action for unpaid wages is not just an “action[] for a particular amount of money owed in exchange for contractual performance,” as the majority would suggest.<sup>164</sup> After all, “wages *are not ordinary debts*.”<sup>165</sup> The court explained that “because 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.”<sup>166</sup> With that in mind, the dissent opined that employees have a property interest in their wages and the right to bring a conversion action to recover them.<sup>167</sup> Although “Voris’s plight does not precisely resemble the kind of wage theft too often afflicting lower-income workers, Voris has not been paid what the courts have determined he is owed—and no one disputes this.”<sup>168</sup> In that sense, there is a “specific sum” involved—\$70,782 from the judgment against Sportfolio, \$100,218 from Liquididium, and \$171,951 from PropPoint.<sup>169</sup> The dissent also refuted the majority’s analysis of *UI Video Stores*, which stated that “the [Labor Commissioner] could have brought a conversion action for unpaid wages because it was empowered to collect such sums on behalf of the affected employees.”<sup>170</sup> The dissent did not understand “why a state agency [could] sue for conversion of unpaid wages on behalf of the workers who earned those wages, but” the workers themselves are “barred from asserting that conversion cause of action directly.”<sup>171</sup>

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162. *Id.* at 290 (majority opinion) (“As it has developed in California, the tort comprises three elements: ‘(a) plaintiff’s ownership or right to possession of personal property, (b) defendant’s disposition of property in a manner inconsistent with plaintiff’s property rights, and (c) resulting damages.’” (quoting WITKIN, *supra* note 78, § 810)).

163. *Id.* at 301 (Cuéllar, J., dissenting) (citing WITKIN, *supra* note 78, § 810).

164. *Id.* at 300 (alteration in original).

165. *Id.* (alteration in original) (quoting *In re Trombley*, 193 P.2d 734, 740 (Cal. 1948)).

166. *Id.* (quoting *In re Trombley*, 193 P.2d at 740).

167. *Id.* at 300–01.

168. *Id.* at 300.

169. *See id.* at 287 (majority opinion).

170. *Id.* at 301 (Cuéllar, J., dissenting) (emphasis omitted).

171. *Id.*

In wage cases, plaintiffs “have routinely included a claim for conversion”<sup>172</sup> and other jurisdictions have recognized wage conversion claims.<sup>173</sup> In the dissent’s view, there was no reason to distinguish this case from other cases involving the conversion of money, especially when earned wages are the property of the employee.<sup>174</sup>

*B. Instead of the Sound Application of Precedent, Both Opinions Were Heavily Influenced by Different Public Policy Concerns*

Despite addressing the same cases, the majority and the dissent reached opposite conclusions.<sup>175</sup> Instead, other factors influenced the opposing opinions more than the sound application of precedent. The dissent’s clear focus was combatting wage theft by giving workers access to as many remedies as possible.<sup>176</sup> But for the majority, it was the concern that allowing a conversion claim for unpaid wages would largely duplicate existing remedies, while opening the door to undesirable features inherent to the conversion tort.<sup>177</sup>

### 1. Wage Theft

Along with the legal analysis, the dissenting opinion expressed clear concern for workers who have had, or will have, their wages stolen.<sup>178</sup> For example, the dissent noted that:

A recent study estimated that minimum wage violations alone cost California workers nearly \$2 billion per year.

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172. *Id.* at 302; *see, e.g.*, *Gentry v. Superior Ct.*, 165 P.3d 556, 562 n.3 (Cal. 2007) (conversion claim for unpaid overtime); *Falk v. Child.’s Hosp. L.A.*, 188 Cal. Rptr. 3d 686, 688 (Ct. App. 2015) (claim for “[c]onversion and theft of labor” for failure to timely pay wages); *On-Line Power, Inc. v. Mazur*, 57 Cal. Rptr. 3d 698, 699 (Ct. App. 2007) (conversion claim for unpaid wages); *Dunlap v. Superior Ct.*, 47 Cal. Rptr. 3d 614, 615 (Ct. App. 2006) (claim for “conversion and theft of labor”).

173. *See Lampert*, 446 P.3d at 302 (Cuéllar, J., dissenting); *Sims v. AT&T Mobility Servs. LLC*, 955 F. Supp. 2d 1110, 1119–20 (E.D. Cal. 2013) (“[T]here is clear authority under California law that employees have a vested property interest in the wages that they earn, failure to pay them is a legal wrong that interferes with the employee’s title in the wages, and an action for conversion can therefore be brought to recover unpaid wages.”); *see also Lampert*, 446 P.3d at 289 n.6 (majority opinion) (majority recognizing that other jurisdictions have allowed a cause of action for conversion based on unpaid wages).

174. *Lampert*, 446 P.3d at 301–02 (Cuéllar, J., dissenting).

175. *See id.* at 290–94 (majority opinion); *id.* at 300–02 (Cuéllar, J., dissenting).

176. *See id.* at 304.

177. *See id.* at 295–96 (majority opinion).

178. *See generally id.* at 299–304 (Cuéllar, J., dissenting) (discussing the economic and societal harm done to workers that have or will have their wages stolen).

When workers cannot collect wages they are owed, they are unable to pay for food, housing, or other bills. They spend less overall, slowing local economies and decreasing tax revenue for state and local governments. And employers who fail to pay wages in full and on time create an uneven playing field in which law-abiding businesses are unable to compete. What happened to Voris, in effect, leads to a badly distorted and fundamentally unfair marketplace for both labor and consumers. Even if Voris's plight does not precisely resemble the kind of wage theft too often afflicting lower-income workers, Voris has not been paid what the courts have determined he is owed—and no one disputes this.<sup>179</sup>

Rather than focusing on Voris's specific situation, the dissent considered broadly the issue of wage theft in California and all its potential victims.<sup>180</sup> After all, most victims of wage theft do not look like Voris. They are often workers in low-wage industries, such as “retail, restaurant and grocery stores; domestic work and homecare; manufacturing, construction, and janitorial services; car washes, and beauty and nail salons.”<sup>181</sup> In fact, “[m]ost low-wage workers will become victims of wage theft at some point in their careers.”<sup>182</sup>

Low-wage workers are also much more likely to feel the effects of wage theft<sup>183</sup> and much less likely to have the same resources as Voris to recover their stolen wages.<sup>184</sup> Because of the lengthy duration of the wage claim and collections process, many workers suffer serious economic harm as a result.<sup>185</sup> Several victims interviewed for the NELP Report reported going without food or medicine, or being

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179. *Id.* at 300 (citing David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. 10, tbl.1 (May 10, 2017), <https://www.epi.org/files/pdf/125116.pdf>) (other citation omitted).

180. *See generally* Lampert, 446 P.3d at 299–304 (Cuéllar, J., dissenting) (discussing the plight of wage theft that many California workers experience).

181. Cho et al., *supra* note 1, at 4.

182. Hallett, *supra* note 4, at 99. “[W]omen, minorities, and those without legal authorization to work in the United States are particularly vulnerable.” *Id.*; *see, e.g.*, Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 656 (2014) (“Like other day laborers, Nemelio Martinez waits at a parking lot every morning seeking work. One day he is hired to perform some landscaping work, to cut lawns for eight hours. At the end of the day, Martinez approaches the employer to receive his eighty dollars in payment. The employer begs off and promises to return the next day to hire him again. He will pay him then, he promises. Martinez never sees him again. . . . This is wage theft.”).

183. *See* Cho et al., *supra* note 1, at 6.

184. *See id.*

185. *Id.*

unable to pay their bills or rent.<sup>186</sup> And in many instances, “workers face[] retaliation from their employers after filing wage claims.”<sup>187</sup> Employers have “lowered wages, fired [workers], or threatened to call the police or immigration enforcement after learning that workers had filed a wage claim or lawsuit.”<sup>188</sup> Worse yet, even if workers are able to obtain judgments against their employers, it is often another uphill battle to collect on those judgments.<sup>189</sup>

Take van driver, Bin Wu, for example.<sup>190</sup> In April 2012, Bin Wu and five other employees filed claims with the California Labor Commissioner, accusing their employer, American Airporter Shuttle Inc. (“American Airporter”), of numerous wage violations.<sup>191</sup> In 2016, the Labor Commissioner ordered American Airporter and its CEO, Phillip Achilles (“Achilles”), to pay \$220,457 for those violations: \$212,407 for stolen wages to the employees, plus \$8,050 in civil penalties to the state.<sup>192</sup> American Airporter and Achilles contested the findings in San Francisco Superior Court but did nothing to advance

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.* at 4 (“N.P., a janitorial worker who earned \$8.00 per hour” was unable to collect “\$5,000 in unpaid wages . . . from her employer” despite winning a judgment. As a result, she explained: “I fell behind on rent. I borrowed money. I was unable to give my kids everything they needed. I had to leave my place and rent a smaller unit. I had to get another job. I felt upset and powerless not to collect the wages I was owed.”).

190. *See Wolfe, supra* note 2.

191. *Id.* These violations included failure to pay California’s minimum wage, failure to pay overtime wages, failure to provide meal breaks, and failure to provide itemized wage statements. Findings and Order at 2, *In re Am. Airporter Shuttle, Inc.*, Case No. 35-123104-T-565 (Cal. Dep’t Indus. Rels. May 3, 2016) [hereinafter Findings and Order *In re American Airporter*]. According to Wu’s testimony, American Airporter would encourage him to work through thirteen-hour days with no meal break. Instead, the company asked him to eat his lunch while he waited for passengers. *See id.* at 14. No one at the company told Wu he was entitled to a thirty-minute meal period before the end of the fifth hour and a second meal period if he worked more than ten hours in a day. *Id.* The airport shuttle company also classified Wu as an independent contractor—which exempted them from wage regulations—even though Wu was not allowed to refuse assignments. *Id.* at 15. Wu confirmed he signed an Independent Contractor agreement, but he did not understand what that meant because the contract was in English and Wu only speaks Mandarin Chinese. *Id.*; Wolfe, *supra* note 2.

192. Findings and Order *In re American Airporter*, *supra* note 191, at 44; *see* Letter from Melvin Yee, Att’y, Cal. Lab. Comm’r, to Thomas Murphy, The Murphy Tr. et al. (Nov. 16, 2017), <https://www.fairwarning.org/wp-content/uploads/2019/08/Achilles-Demand-Letter-Fraudulent-Transfer.pdf> [hereinafter Achilles Demand Letter].

the plea for the next two years.<sup>193</sup> During this period, Achilles “worked secretly to hide his assets.”<sup>194</sup>

In 2017, “the Labor Commissioner discovered that Achilles was trying to sell a building he owned in downtown San Francisco”—allegedly worth over five million dollars—to evade payment of the Labor Code violations.<sup>195</sup> When the state tried to put a lien on the property, Achilles transferred the building to a shell company for no value and encumbered the property with significant debt.<sup>196</sup> By doing so, Achilles rendered himself insolvent and unable to pay the wages he stole from Bin Wu and the other American Airporter employees.<sup>197</sup>

The Labor Commissioner sued Achilles in 2018 to undo the fraudulent transfer.<sup>198</sup> After the parties came to a settlement agreement that Achilles soon breached, the court granted the Labor Commissioner’s motion to enforce the settlement through a sheriff’s sale, or public auction, of the property and entered judgment in April 2020.<sup>199</sup> Achilles timely appealed.<sup>200</sup> As of December 2020—over eight years after he first filed his claim against American Airporter—Bin Wu has not recovered his stolen wages.<sup>201</sup>

According to the NELP Report, only 17 percent of California workers who prevailed in their wage claims before the Labor Commissioner and received judgments between 2008 and 2011 were able to recover any payment at all.<sup>202</sup> During that same period, the

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193. Wolfe, *supra* note 2; see Verified Petition for Writ of Mandate at 1, *Am. Airporter Shuttle, Inc. v. Cal. Dep’t of Indus. Rels.*, No. CPF-16-515101 (Cal. Super. Ct. June 16, 2016), <https://www.fairwarning.org/wp-content/uploads/2019/08/Achilles-Writ-of-Mandate.pdf>.

194. Wolfe, *supra* note 2.

195. *Id.*; see Achilles Demand Letter, *supra* note 192; Complaint at 7, *Lab. Comm’r of California v. Achilles*, No. CGC-18-571050 (Cal. Super. Ct. Mar. 27, 2020) [hereinafter Achilles Complaint].

196. Wolfe, *supra* note 2; Achilles Complaint, *supra* note 195, at 7–8.

197. Wolfe, *supra* note 2.

198. *Id.*; Achilles Complaint, *supra* note 195, at 1.

199. Achilles, No. CGC-18-571050, at 1–2; Order Granting Motion to Enforce Settlement Agreement at 1, Achilles, No. CGC-18-571050.

200. See Notice of Appeal at 1, Achilles, CGC-18-571050.

201. *Register of Actions, Labor Commissioner of the State of California v. Phillip Achilles et al.*, SUPERIOR CT. OF CAL., CNTY. OF S.F., <https://webapps.sftc.org/ci/CaseInfo.dll?CaseNum=CGC18571050&SessionID=746079C205D0492F704CCACFBE8B162CAEF49A4B> (last visited Feb. 21, 2021). The last update in the “Register of Actions” on the County of San Francisco’s Superior Court website is that on September 24, 2020, the appeal record was certified to the court of appeal. *Id.*

202. Cho et al., *supra* note 1, at 13–14 (“Between 2008 and 2011, 18,683 workers prevailed in their claims for unpaid wages before the [Labor Commissioner]. Only 3,084, or 17 percent—less than 1 in 5 recovered any money at all.”).

Labor Commissioner issued awards for “unpaid wages of more than \$282 million . . . , [but] workers were able to collect [only] \$42 million [from their employer]—roughly 15 percent.”<sup>203</sup> Several workers interviewed by NELP “expressed regret for [even] invest[ing] time in the wage claim process.”<sup>204</sup> One worker said, “although I won, I ended up losing, because I spent a lot of time and money on my wage claim, but walked away with nothing.”<sup>205</sup>

Wage theft causes severe economic distress on workers and their families, but it also imposes significant costs on California’s economy.<sup>206</sup> When employers fail to pay their employees, the state loses revenue in payroll taxes, and fewer dollars circulate to local businesses.<sup>207</sup> Consequently, wage theft hurts communities by “stunting economic recovery, . . . limiting local sales tax collections, and diminishing opportunities for local economic development.”<sup>208</sup> While it certainly hurts individuals who have their wages stolen, wage theft also hurts the entire community.<sup>209</sup>

The dissent’s priority was providing all workers, not just Voris, with adequate remedies to combat wage theft—and rightfully so.<sup>210</sup> Low-wage workers are often the ones impacted most by wage theft, and the road to recovering their stolen wages is long and difficult.<sup>211</sup> While there is no promise that allowing a conversion claim for the nonpayment of wages would speed up the process or guarantee recovery, it would equip workers with another remedy at their disposal to combat wage theft.<sup>212</sup> Further, it “may also help victims of wage theft and society as a whole by better aligning employers’ incentives

203. *Id.* at 2.

204. *Id.* at 6.

205. *Id.*

206. *See id.* at 5.

207. *Id.*

208. *Id.*

209. *See id.*

210. *See generally* Voris v. Lampert, 446 P.3d 284, 299–304 (Cal. 2019) (Cuéllar, J., dissenting) (“This may also help victims of wage theft and society as a whole by better aligning employers’ incentives with the full extent of the individual and social costs associated with the conversion of unpaid wages.”).

211. *See* Cho et al., *supra* note 1, at 6.

212. *See* Lampert, 446 P.3d at 304 (Cuéllar, J., dissenting) (“The most reasonable inference is that these legislative remedies ‘were meant to supplement, not supplant . . . , existing . . . remedies, in order to give employees the maximum opportunity to vindicate their . . . rights.’” (omissions in original) (quoting Rojo v. Kliger, 801 P.2d 373, 378 (Cal. 1990))).

with the full extent of the individual and social costs associated with the conversion of unpaid wages.”<sup>213</sup>

## 2. Duplicating Existing Remedies

While the majority acknowledged the issue of wage theft and how important it was for employees to receive prompt compensation,<sup>214</sup> it was more concerned with duplicating existing legislative remedies.<sup>215</sup> Its reluctance to duplicate remedies is in part because a conversion claim for the nonpayment of wages does not “fit[] well with the traditional understanding of the tort.”<sup>216</sup> Moreover, while the majority believed conversion would not add anything new to the remedial scheme, a conversion claim would still come with certain features inherent to the tort—i.e., strict liability and punitive damages.<sup>217</sup> The majority was concerned those features would punish not only the unscrupulous employers, but also employers who made a good-faith mistake.<sup>218</sup>

Conversion is a strict liability tort and “does not require bad faith, knowledge, or even negligence; it requires only that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession.”<sup>219</sup> As a result, “conversion liability for unpaid wages would not only reach those who act[ed] in bad faith, but also those who made good-faith mistakes—for example, an employer who fails to pay the correct amount in wages because of a glitch in the payroll system or a clerical error.”<sup>220</sup> The majority believed it was important to distinguish between employers who acted in bad faith and employers who made a good-faith mistake.<sup>221</sup> However, it is difficult to make that distinction when the conversion tort does not require a finding of fault to impose liability.<sup>222</sup>

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213. *Id.*

214. *See id.* at 299 (majority opinion) (“The full and prompt payment of wages is of fundamental importance to the welfare of both workers and the State of California.”).

215. *See id.* at 295.

216. *Id.* at 298.

217. *See id.* at 295–96.

218. *Id.* at 296.

219. *Id.*

220. *Id.*

221. *See id.*

222. *See id.*; *see also id.* at 290 (“Notably absent from [the elements of conversion] is any element of wrongful intent or motive; in California, conversion is a ‘strict liability tort.’”).

Conversion also “authoriz[es] the recovery of consequential, emotional distress, and, most importantly, punitive damages.”<sup>223</sup> While Voris viewed those possible awards as advantages that would “enhance deterrence of intentional wage nonpayment,” the majority opined that conversion is an “awfully blunt tool” to deter intentional misconduct because of how difficult it would be to limit conversion liability to only certain bad actors.<sup>224</sup> Even though punitive damages may only be imposed if there is clear and convincing evidence that the defendant acted with oppression, fraud, or malice, the majority contended that “it is not unusual for juries to find malice supporting punitive damage awards in run-of-the-mill wage suits.”<sup>225</sup> Further, even if a defendant is not held liable for punitive damages, “they could still be held to pay for the value of the converted property and interest, plus the value of the plaintiff’s time and money expended in pursuit of the unpaid wages.”<sup>226</sup>

The majority feared that given the nature of the conversion tort, a conversion claim for unpaid wages “would reach well beyond those individual corporate officers who withhold wages to punish disfavored employees or who deliberately run down corporate coffers to evade wage judgments” and punish employers acting in good faith.<sup>227</sup> Understandably so—the term “wage theft” itself already comes with a negative connotation.<sup>228</sup> Critics believe that the term unfairly vilifies business owners because “wage and hours laws are a complicated morass that are difficult for even the savviest employer to understand, and that technical violations of the law can lead to harsh penalties.”<sup>229</sup> And of course, not every instance of wage theft is intentional or unscrupulous.<sup>230</sup> Indeed, there is a difference between a company owner who misappropriated funds or deliberately evaded an adverse judgment and a company owner who was also wiped out when the company went under—and perhaps that distinction should be

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223. *Id.* at 295.

224. *Id.* at 295–96.

225. *Id.* at 296.

226. *Id.*

227. *Id.* at 298–99.

228. Hallett, *supra* note 4, at 99.

229. *Id.*

230. *Id.*

recognized.<sup>231</sup> However, the traditional application of the conversion tort would not recognize such a distinction.<sup>232</sup>

Because a conversion claim for unpaid wages would come with undesirable features inherent to the conversion tort, like strict liability and punitive damages, the majority found “no sufficient justification for layering tort liability on top of the extensive existing remedies.”<sup>233</sup>

### *C. Not All Victims Can Recover Their Stolen Wages Under the Existing Remedial Scheme*

Unlike the dissent, which considered victims of wage theft collectively, the majority took an arguably narrower approach and focused only on the present case. The majority is correct that the existing provisions in the Labor Code provides sufficient remedies for Voris, especially after the enactment of Senate Bill 588.<sup>234</sup> However, the majority opinion overlooked situations beyond this case where the ability to maintain a conversion claim for the nonpayment of wages is crucial for an employee to recover their stolen wages.<sup>235</sup>

#### 1. Voris Can Recover Without Maintaining a Conversion Claim for His Unpaid Wages

While the remedies in existence were inadequate when Voris first filed suit, that was no longer true by the time his case reached the California Supreme Court.<sup>236</sup> At the time of the court’s ruling, allowing a conversion claim for unpaid wages would largely duplicate existing remedies for Voris; his conversion claim against Lampert, an individual who is “responsible for their companies’ evasion of their established wage obligations,” would likely provide no better restitution than a contract claim or the Labor Code.<sup>237</sup>

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231. See *infra* Section IV.D.

232. *Lampert*, 446 P.3d at 295–96.

233. *Id.*

234. See *infra* Section IV.C.1; S.B. 588, 2015–2016 Reg. Sess. (Cal. 2015); *Lampert*, 446 P.3d at 297–98.

235. See *infra* Section IV.C.2.

236. See *Lampert*, 446 P.3d at 297 (“[A]fter Voris filed this suit, the Legislature enacted Senate Bill No. 588 (Senate Bill 588) to address the precise problem Voris alleges.”); *id.* at 302 (Cuéllar, J., dissenting) (“[T]he nonconversion remedies in existence at the time Voris filed suit were inadequate.”).

237. See *id.* at 296; Cal. S.B. 588.

As mentioned, Senate Bill 588 added section 588.1 to the Labor Code in 2015.<sup>238</sup> Under Labor Code section 558.1,

[a]ny employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.<sup>239</sup>

The code clarifies that another “‘person acting on behalf of an employer’ is limited to a natural person who is an owner, director, officer, or managing agent of the employer.”<sup>240</sup> Individual officers are also subject to civil and criminal penalties for failing to observe Senate Bill 588’s enforcement laws.<sup>241</sup>

If Senate Bill 588 were in effect at the time of his initial lawsuit, Voris could have gone after Lampert personally to satisfy the judgments against the startups under Labor Code section 558.1.<sup>242</sup> He would not have needed to allege Lampert converted his unpaid wages because even without alter ego liability, Voris could hold Lampert liable in place of PropPoint, Liquiddium, and Sportfolio for the wage violations.<sup>243</sup> Although Senate Bill 588 does not apply retroactively, its enforcement-related provisions do apply to Voris’s existing judgments against the startups.<sup>244</sup>

238. Cal. S.B. 588; CAL. LAB. CODE § 558.1 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.); see *supra* Section III.A.3.

239. CAL. LAB. CODE § 558.1(a).

240. *Id.* § 558.1(b).

241. *Lampert*, 446 P.3d at 298; Cal. S.B. 588; CAL. LAB. CODE § 558.1. Senate Bill 588 also added Labor Code section 238, which requires companies to post a bond with the state to satisfy unpaid judgments or halt all business in California; if an employer were continue doing business without posting required bond, any “‘person acting on behalf of [the] employer” is subject to a civil penalty of \$2,500. *Lampert*, 446 P.3d at 298 (quoting CAL. LAB. CODE § 238(f)). Further, if an “‘owner, director, officer, or managing agent of the employer’ fails to observe a stop order issued by the [Labor] Commissioner,” the individual is guilty of a misdemeanor and can face up to 60 days in jail and a fine of up to \$10,000. *Lampert*, 446 P.3d at 298 (quoting CAL. LAB. CODE § 238.1(b)).

242. See CAL. LAB. CODE § 558.1.

243. See *Lampert*, 446 P.3d at 296–97.

244. See *id.* at 298 n.18.

## 2. However, Victims of Wage Theft Caused by Third-Party Bad Actors Cannot Recover Under the Existing Remedial Scheme

The Labor Code enables Voris to go after Lampert personally for his unpaid wages without maintaining a conversion claim, but not all victims of wage theft can recover under the existing remedial scheme. In an amicus curiae brief filed in support of Voris, a group of non-profit legal services and public policy organizations dedicated to representing victims of wage theft<sup>245</sup> noted that workers have “only a patchwork of remedies” available to recover their stolen wages, and “[r]emedies are particularly scarce and ineffective when actions by third parties interfere with workers’ ability to collect unpaid wages.”<sup>246</sup> Although Labor Code section 558.1 holds some individuals liable, it is “only for underlying wage and hour violations” and “only by [those] acting on behalf of the employer.”<sup>247</sup> The available remedies do not consider “separate acts by persons outside the employer-debtor context” that could “deprive employers of funds to pay wages, or otherwise render collection impossible.”<sup>248</sup>

Take, for example, an employee who has her wages improperly garnished by a third-party payroll processor.<sup>249</sup> The employee cannot go after her employer because her employer is not the one withholding her wages. However, the employee would also be unable to go after the third-party payroll processor under Labor Code section 558.1 because it is not an “other person acting on behalf of an employer.”<sup>250</sup> The payroll processor is not “a natural person who is an owner,

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245. Proposed Brief of Amici Curiae in Support of Plaintiff and Appellant at 1, *Lampert*, 446 P.3d 284 (No. S241812) [hereinafter Brief of Amicus Curiae in Support of Voris].

246. *Id.* at 10.

247. *Id.*

248. *Id.*

249. *See, e.g., McGown v. Silverman & Borenstein, PLLC*, No. 13-cv-748-RGA/MPT, 2014 WL 545903, at \*4 (D. Del. Feb. 7, 2014) (upholding conversion claim against third-party collection agency for improperly garnishing an employee’s wages but dismissing the case for lack of jurisdiction).

250. Michaela Goldstein & Michael Campbell, *Managers Beware: Can You Be Held Personally Liable for Wage and Hour Violations?*, LAB. & EMP. L. BLOG (Dec. 21, 2018), <https://www.laboremploymentlawblog.com/2018/12/articles/california-employment-legislation/managers-personally-liable-wage-hour-violations/> (discussing the application of the “other person” language of section 558.1 to managing agents of the employer (not third parties)); CAL. LAB. CODE § 558.1(a) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) (“Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.”).

director, officer, or managing agent of the employer.”<sup>251</sup> It is simply a third-party entity, but it still plays a major role in depriving the employee of her earned wages.<sup>252</sup>

The majority opinion briefly acknowledged such situations in a footnote: “Many of the jurisdictions that have recognized conversion claims involving wages have done so in meaningfully different contexts, for instance where an employee’s wages were garnished or assigned to a third party.”<sup>253</sup> Although the majority recognized that situations involving third-parties were “different” than the present case, it did not suggest that a conversion claim should remain available to address “different contexts.”<sup>254</sup> Rather, the majority opinion may undermine the availability of conversion in those instances because it broadly holds that in California, an individual cannot maintain a conversion claim based on the nonpayment of wages.<sup>255</sup> As a result, workers do not have a remedy to recover their stolen wages in situations where the nonpayment is caused by persons outside the employer-debtor context because those actors “remain outside the purview of the remedial scheme.”<sup>256</sup>

#### *D. A Conversion Claim for Unpaid Wages Should Be Available in Limited Circumstances When Two Elements Are Met*

To help all victims of wage theft, not just Voris, a conversion claim for unpaid wages should not be categorically barred. Instead, it should be available to workers in limited circumstances to help recover their stolen wages. Voris made his own attempt to narrow the liability of a conversion claim for unpaid wages, arguing for a “‘case by case consideration’ of factors that inform th[e] court’s recognition of tort duties, such as the foreseeability of harm and the nexus between the defendant’s conduct and the plaintiff’s injury.”<sup>257</sup> However, the majority rejected those factors because Voris “fail[ed] to explain how the[] factors would impose any meaningful limits in the context of a claim for wage nonpayment, which invariably and directly injures

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251. CAL. LAB. CODE § 558.1(b) (“For purposes of this section, the term ‘other person acting on behalf of an employer’ is limited to a natural person who is an owner, director, officer, or managing agent of the employer.”).

252. See *McGown*, 2014 WL 545903, at \*1.

253. *Voris v. Lampert*, 446 P.3d 284, 289 n.6 (Cal. 2019).

254. *Id.*

255. *Id.* at 286.

256. Brief of Amicus Curiae in Support of Voris, *supra* note 245, at 10.

257. *Lampert*, 446 P.3d at 296 (citing *J’Aire Corp. v. Gregory*, 598 P.2d 60, 65–66 (Cal. 1979)).

employees.”<sup>258</sup> The majority believed “it would be difficult if not impossible to formulate a rule that would assure that only ‘deserving’ cases give rise to tort relief.”<sup>259</sup> Nevertheless, this Section attempts to do so anyway.

Instead of looking at the foreseeability of harm or nexus between the conduct and the injury, a conversion claim for unpaid wages should be limited to situations where (1) the court can ascertain the specific sum of money that is owed; and (2) the employee can show by clear and convincing evidence that the defendant (the employer, employer’s officers, or a third party) acted with malice, oppression, or fraud in withholding the employee’s wages. Unlike the factors Voris suggested, the two elements proposed here address the majority’s concerns about the conversion tort head on; those concerns are what influenced the majority to hold that conversion is not the appropriate fit to address wage nonpayment.<sup>260</sup>

### 1. An Ascertainable, Specific Sum of Money

The first element—situations where the court can ascertain the specific sum of money that is owed—is similar to the existing rule that “money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved.”<sup>261</sup> In fact, it is the dissent’s interpretation of what that rule means: “That the unpaid wages may be commingled with the employer’s general funds does not disqualify them as property that may be converted, so long as the sum owed is specific and definite.”<sup>262</sup> As long as the court can ascertain the specific sum of money that is owed, it should not matter if the unpaid wages are still in the employer’s possession or commingled with the employer’s funds; the wages are “a specific sum capable of identification.”<sup>263</sup>

### 2. Clear and Convincing Evidence That the Defendant Acted with Malice, Oppression, or Fraud in Withholding the Employee’s Wages

The second element—situations where the employee can show by clear and convincing evidence that the defendant acted with malice,

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258. *Id.* (citing *In re Trombley*, 193 P.2d 734, 740 (Cal. 1948)).

259. *Id.* (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 399 (Cal. 1988)).

260. *See supra* Section IV.B.2.

261. *Lampert*, 446 P.3d at 291 (quoting *Haigler v. Donnelly*, 117 P.2d 331, 335 (Cal. 1941)).

262. *Id.* at 301 (Cuéllar, J., dissenting).

263. *See id.* at 291 (majority opinion) (quoting *Haigler*, 117 P.2d at 335).

oppression, or fraud in withholding their wages—addresses the majority’s concerns that as a strict liability tort, a conversion claim for unpaid wages could potentially reach defendants acting in good faith and allow for punitive damages.<sup>264</sup> By requiring the employee to show that the defendant acted with malice, oppression, or fraud in withholding the wages, this element effectively eliminates the strict liability aspect of the tort.<sup>265</sup> The heightened “clear and convincing evidence” standard<sup>266</sup> would further minimize the chances that conversion liability would reach employers, officers, or third parties “who make good-faith mistakes” because the standard “requires a high probability, such that the evidence is so clear as to leave no substantial doubt.”<sup>267</sup>

Moreover, this additional hurdle ensures that only bad actors are faced with punitive damages. Punitive damages also require a showing by clear and convincing evidence that the defendant acted with oppression, fraud, or malice.<sup>268</sup> By requiring the *same* showing to even maintain an action for the conversion of unpaid wages and recover compensatory damages, defendants who acted in good faith would not be liable for punitive damages because they would not be liable under conversion at all. The majority worried that it was not uncommon for juries to award punitive damages, even in “run-of-the-mill wage suits,” but adopting this second element would mean there will no longer be “run-of-the-mill” suits for the conversion of unpaid wages.<sup>269</sup> Even if the same concern with the jury remains, in California, jurors are presumed to follow the court’s instructions.<sup>270</sup>

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264. See *supra* Section IV.B.2.

265. See *Lampert*, 446 P.3d at 296 (“[C]onversion is a strict liability tort . . . [that] does not require bad faith, knowledge, or even negligence; it requires only that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession.”).

266. See Jerald M. Montoya, Note, *Requiring Clear and Convincing Proof in Tort Claims Involving Recently Recovered Repressed Memories*, 25 SW. U. L. REV. 173, 198 (1995) (“Although the burden of proof in most cases is a preponderance of the evidence, many jurisdictions require a party to prove the elements of certain civil claims with clear and convincing proof.”).

267. *Lampert*, 446 P.3d at 296; *In re John M.*, 47 Cal. Rptr. 3d 281, 284 (Ct. App. 2006) (quoting *In re Luke M.*, 132 Cal. Rptr. 2d 907, 917 (Ct. App. 2003)).

268. *Lampert*, 446 P.3d at 290 (“Punitive damages are recoverable upon a showing of malice, fraud, or oppression.”); CAL. CIV. CODE § 3294(a) (Deering 2021) (“In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”).

269. *Lampert*, 446 P.3d at 295–96.

270. *People v. Sanchez*, 29 P.3d 209, 220–21 (Cal. 2001) (citing *People v. Scott*, 246 Cal. Rptr. 406, 408 (Ct. App. 1988)).

The majority was also concerned that even if the defendants are not held liable for punitive damages, they could still be forced to pay for the converted wages, interest, and the value of the plaintiff's time and money in pursuing the wages.<sup>271</sup> That would no longer be an issue if the employee can show by clear and convincing evidence that the defendant acted with malice, oppression, or fraud in withholding their wages. If the defendant did act unscrupulously, he should be liable for interest and the value of the plaintiff's time and money, on top of the stolen wages. In fact, he should also be liable for punitive damages.<sup>272</sup> The second element distinguishes between defendants acting in good faith and those who deliberately commit wage theft—what the majority worried a conversion claim based on the nonpayment of wages would be unable to do.<sup>273</sup>

Finally, allowing a conversion claim for unpaid wages would not “collapse the well-established distinction between a contractual obligation to pay and the tortious conversion of monetary interests.”<sup>274</sup> There is already so much overlap between contract and tort law,<sup>275</sup> and, as the dissent noted, other jurisdictions have recognized wage conversion claims without any adverse effects.<sup>276</sup> Therefore, a conversion claim for unpaid wages should not be categorically barred, especially when it does not “duplicate [existing] remedies” for victims of wage theft that cannot recover under those existing remedies.<sup>277</sup> Instead, conversion should be available, with limitations, to supplement the legislative scheme.<sup>278</sup>

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271. *Lampert*, 446 P.3d at 296.

272. *See id.* at 290 (“Punitive damages are recoverable upon a showing of malice, fraud, or oppression.”); CAL. CIV. CODE § 3294(a) (“In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”).

273. *See supra* Section IV.B.2.

274. *See Lampert*, 446 P.3d at 292.

275. *See, e.g.,* GILMORE, *supra* note 100, at 87–94 (discussing how when a party to a contract is wronged, courts are now much less inclined to follow traditional contract law, and more likely to just apply tort principles to address the wrongdoing); *id.* at 87 (“[T]he theory of tort into which contract is being reabsorbed is itself a much more expansive theory of liability than was the theory of tort from which contract was artificially separated a hundred years ago.”).

276. *Lampert*, 446 P.3d at 302 (Cuéllar, J., dissenting).

277. *Id.* at 295 (majority opinion); *see supra* Section IV.C.2.

278. *Lampert*, 446 P.3d at 304 (Cuéllar, J., dissenting).

## V. CONCLUSION

*Voris v. Lampert* held that an individual cannot maintain a conversion claim for the nonpayment of wages.<sup>279</sup> Instead of the sound application of precedent, both the majority and the dissent were heavily influenced by different public policy concerns.<sup>280</sup> The dissenting opinion addressed the issue of wage theft and wanted to give victims a variety of options to recover their stolen wages by allowing conversion to supplement existing legislative remedies.<sup>281</sup> The majority opinion, however, was concerned that a conversion claim would add nothing to existing remedies, except for undesirable features inherent to the conversion tort.<sup>282</sup> While the majority is correct that *Voris* would be able to reach *Lampert* without maintaining a conversion claim, it overlooked instances of wage theft where the bad actor is not covered under the existing remedial scheme.<sup>283</sup> To address the majority's concerns about the conversion tort, and to protect all victims of wage theft, a conversion claim for unpaid wages should be available to employees in situations where (1) the court can ascertain the specific sum of money that is owed; and (2) the employee can show by clear and convincing evidence that the defendant acted with malice, oppression, or fraud in withholding the employee's wages.<sup>284</sup>

Alternatively, the Legislature should expand on the Labor Code and address the issue of third-party actors outside the employer-debtor context who cannot be held liable under the existing remedial scheme. After all, the California Supreme Court recognizes and upholds “the Legislature’s authority to adopt new solutions to combat [wage theft],” and “various Labor Code provisions illustrate [how] the Legislature can craft rights and remedies that target those . . . who withhold wages willfully and repeatedly, and who strategically evade wage judgments.”<sup>285</sup> But, regardless of whether the courts or the Legislature

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279. *Id.* at 286 (majority opinion).

280. *See supra* Sections IV.A, IV.B.

281. *See supra* Section IV.B.1.

282. *See supra* Section IV.B.2.

283. *See supra* Section IV.C.

284. *See supra* Section IV.D.

285. *Voris v. Lampert*, 446 P.3d 284, 297, 299 (Cal. 2019). That has also proven true in other areas of labor and employment law, such as Assembly Bill 5, which expanded on landmark case *Dynamex Operations West, Inc. v. Superior Court.*, 416 P.3d 1 (Cal. 2018) (holding workers are presumptively employees and the burden is on the employer to establish that a worker is an independent contractor who is not subject to California’s wage protections); Assemb. B. 5, 2019–

undertake the duty, all victims of wage theft should be able to recover their stolen wages in a timely manner. After all, “[t]he full and prompt payment of wages is of fundamental importance to the welfare of both workers and the State of California.”<sup>286</sup>

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2020 Reg. Sess. (Cal. 2019) (“This bill would state the intent of the Legislature to codify the decision in the *Dynamex* case and clarify its application.” (emphasis added)); *see also* Cal. Sec’y of State, *Proposition 22*, OFF. VOTER INFO. GUIDE FOR 2020 GEN. ELECTION, <https://voterguide.sos.ca.gov/propositions/22/index.htm> (last visited Feb. 21, 2021) (an exemption from A.B. 5 for app-based drivers that passed in California in November 2020).

286. *Lampert*, 446 P.3d at 297, 299.