NO. 86793-3

SUPREME COURT OF THE STATE OF WASHINGTON

JOE GUADALUPE PEREZ-FARIAS *et al,*

Plaintiffs/Appellants,

v.

GLOBAL HORIZONS, INC *et al.,*

Defendants/Appellees.

On Certified Questions from the United States Court of Appeals from the Ninth Circuit
No. 10-35397

On Appeal from the United States District Court for the Eastern District of Washington
No. 2:05-cv-03061-RHW

Amicus Curiae Brief by Washington Employment Lawyers Association

---

Joseph R. Shaeffer
Email: josephs@mhb.com
McDonald, Hoge, & Bayless
705 Second Ave Suite 1500
Seattle, Washington 98104
Telephone: 206-622-1604

Jeffrey L. Needle
Email: jneedlel@wolfenet.com
Law Offices of Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, Washington 98104
Telephone 206.447-1560

TABLE OF CONTENTS

I. Introduction and Interest of Amicus 1

II. Statement of the Case 1

III. Summary of Argument 4

IV. Argument of Counsel 6

A. The *Williams* Standard Applies When Assessing a Due Process Challenge to a Civil Penalty 7

B. The Court Should Consider the Totality of the Circumstances ... 8

C. The *BMW* Guideposts Do Not Apply When Assessing a Due Process Challenge to a Civil Penalty 11

1. The Growers Had Fair Notice of the Penalty to Be Assessed 13

2. The Ratio of Harm to Punitive Damages Is Not a Factor 13

3. Penalties in Comparable Cases 14

D. Federal Statutes Reject the BMW Guideposts 15

1. The Telephone Consumer Protection Act – *BMW* Guideposts Do Not Apply to Statutory Damages 15

2. Copyright Act - Federal Courts Have Held That the *BMW* Guideposts Do Not Apply To Statutory Damages 16

V. Conclusion 18

Table of Authorities

United States Supreme Court

BMW of North America, Inc. v. *Gore*,
517 U.S. 559 (1996) 5,6,11,12,13,15,17

F.W. Woolworth Co. v. Contemporary Arts,
344 U.S. 228, 73 S.Ct. 222, 97 L.Ed. 276 (1952)........................17

Griffin v. *Oceanic Contractors, Inc.*,
458 U.S. 564 (1982)..7

Moran v. Burbine,
475 US 412 (1986)..9

St. Louis, IM & S. *Ry. Co.* v. *Williams*,
251 U.S. 63 (1919)..1,3,5,7,18

State Farm Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003)..6,13,15

Tennessee v. Garner,
471 U. S. 1 (1985)..9

TXO Production Corp. v. Alliance Resources Corp.,
509 US 443, 460 (1993)...14

United States v. Arvizu,
534 US 266 (2002)..9

<u>Federal Cases</u>

Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, LP,
329 F. Supp. 2d 789, 809 (M.D. La. 2004) 15

Arrez v. Kelly Services, Inc.,
522 F. Supp. 2d 997 (N.D. Ill. 2007) 16

Centerline Equip. Corp. v. Banner Personnel Serv.,
545 F. Supp. 2d 768 (N.D. Ill. 2008) 16

Green v. Anthony Clark Int'l Ins. Brokers, Ltd.,
No. 09 C 1541, 2010 WL 431673, at *5-6 (N.D. Ill. Feb. 1, 2010) . . 16

Kenro, Inc. v. Fax Daily, Inc.,
962 F. Supp. 1162 (S.D. Ind. 1997) 16

Lowry's Reports, Inc. v. Legg Mason, Inc.,
302 F. Supp. 2d 455 (D. Maryland 2004) 17

Texas v. American Blastfax, Inc.,
121 F. Supp. 2d 1085, 1090 (W.D. Tex. 2000) 16

United States v. Citrin,
972 F. 2d 1044, 1051 (9th Cir. 1992) 16

Zomba Enterprises, Inc. v. Panorama Records, Inc.,
491 F.3d 574 (6th Cir. 2007) 17,18

<u>State of Washington</u>

Dunlap v. Wayne,
105 Wn.2d 529, 716 P.2d 842 (1986) 9

Glasgow, v. Georgia-Pacific Corporation,
103 Wn.2d 401, 693 P.2d 708 (1985) 9

State v. Ladson,
138 Wn.2d 343, 979 P.2d 833, 843 (1999) 9

State v. McCormick,
166 Wn.2d 689, 213 P.3d 32 (2009) 1

State v. Morgan,
163 Wn. App. 341, 261 P. 3d 167 (2011) 1

State v. *WWJ Corp.*,
138 Wn.2d 595, 980 P.2d 1257 (1999) 6

Statutes and Regulations

Federal Copyright Act...16,17

Washington Farm Labor Contractors Act (FLCA) . . . . *passim*

Federal Migrant and Seasonal Agricultural Worker Protection Act 1

Federal Telephone Consumer Protection Act (TCPA) 15

I. Introduction and Interest of Amicus

This case comes to the Washington State Supreme Court after certification of three questions from the Ninth Circuit Court of Appeals. WELA only addresses the second question posed by the Ninth Circuit: "If FLCA provides that a court, choosing to award statutory damages, must award statutory damages of $500 per plaintiff per violation, does that violate Washington's public policy or its constitutional guarantees of due process?" In response to that question, WELA argues that *St. Louis, IM & S. Ry. Co.* v. *Williams,* 251 U.S. 63 (1919), provides the proper standard to be applied to a due process challenge to a statutory minimum penalty under the Farm Labor Contractors Act (FLCA). [1]

WELA is an association of lawyers advocating in favor of employee rights, in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA has appeared as amicus curiae numerous times before this court. *See* WELA Motion for Leave to Appear as Amicus Curiae.

II. Statement of the Case

Columbia Legal Services brought a class action on behalf of 650 farm workers alleging multiple violations of the Washington's Farm Labor

[1] Washington Courts have consistently held that "[i]n analyzing challenges under the state and federal due process clauses, . . . Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution." *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). *See also State v. Morgan,* 163 Wn. App. 341, 352, 261 P. 3d 167 (2011)(*citing McCormick*).

Contractors Act (FLCA), RCW 19.30.110 *et. seq*., and the Federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA). They brought suit against three Growers and Global Horizons, Inc., a farm labor contractor. In relevant part, the workers allege that Global committed numerous violations of the FLCA, including that it was not registered as required with the Washington State Department of Labor (DOL), employed guest workers in amounts and during times that were not authorized by DOL, and omitted the contractor's name, address and telephone number from the workers' pay stubs. Plaintiffs further allege that the Growers learned that the contractor, Global, was not registered and is therefore jointly and severally liable for all damages. The trial court certified three subclasses. *See* Attached Certification Order, slip Opinion at 20663.

The federal District Court originally found joint and several liability and awarded statutory damages of $500 per violation, which equaled $1,875,000. *Id.* at 20664. The Growers moved for reconsideration. The Growers argued that the amount of damages, if any, was completely discretionary with the Court, and could range from $0 "up to" $500 per violation. They argued that in this case the statutory damages of $500 per violation were wholly disproportionate to the harm that was done, and was a violation of due process of law. The Plaintiffs, who claimed no actual damages, argued that $500 was the statutory minimum

and that the trial court had no discretion to reduce the amount awarded per violation.

The trial court agreed with the Growers and vacated that portion of the award imposing automatic statutory damages. After a bench trial, the trial court ruled the FLCA allowed discretion to award statutory damages from $0 to $500 per violation, and that an award of $500 per violation would "'violate due process by mandating an award of 'exorbitant amounts of statutory damages,'" and "'violate all notions of fairness inherent in our judicial system.'" *Id.* at 20665. The Court distinguished between what it considered "technical" and "substantive" violations and awarded statutory damages of $228,150. *Id.* The district court declined to award $500 for any single violation, and instead awarded damages ranging from $0 - $150 per violation. The workers appealed to the Ninth Circuit.

The Ninth Circuit initially ruled that the amount of statutory damages was not discretionary, and that the trial court erred when it did not award $500 per violation; the full amount of statutory damages authorized by the statute. The Court relied upon *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919), and ruled that the amount did not violate due process; it was not "so severe and oppressive as to be wholly disproportioned [sic] to the offense and obviously unreasonable." Judge Clifton concurred in part and dissented in part. He would have affirmed the trial court's interpretation of the statute and affirmed the judgment of

$235,000 in statutory damages. He did not reach the argument that $500 was not proportionate and therefore a violation of due process.

The Ninth Circuit then withdrew its opinion and certified three questions to the Washington State Supreme Court.[2]

III. Summary of Argument

The purpose of the FLCA is to protect farm workers from unscrupulous growers and farm labor contractors. The Washington Legislature has determined that purpose is best achieved by authorizing the recovery of actual damages *or* statutory damages. The gravity of a violation of the FLCA is not necessarily related to the amount of provable actual damages. It was for that reason that the Legislature created a minimum statutory penalty of $500 per violation, intending to deter *all* violations of the statute, even in the absence of provable damages.

The doctrine of separation of powers forecloses the Court from substituting its judgment for that of the legislature by awarding smaller amounts based upon its assessment that some violations are "technical" and others are "substantive." The legislature did not create a hierarchy of

[2] The three certified questions are: (1) Does FLCA, and in particular Washington Revised Code § 19.30.170(2), provide that a court choosing to award statutory damages: (a) must award statutory damages of $500 per plaintiff per violation; or (b) has discretion to determine the appropriate amount to award in damages from among a range of amounts, up to and including statutory damages of $500 per plaintiff per violation? (2) If FLCA provides that a court, choosing to award statutory damages, must award statutory damages of $500 per plaintiff per violation, does that violate Washington's public policy or its constitutional guarantees of due process? (3) Does FLCA provide for awarding statutory damages to persons who have not been shown to have been "aggrieved" by a particular violation? *See* Attached.

violations; instead, it set a *minimum* penalty for any and all violations. The same reasoning applies to a substantial number of statutes under both state and federal law where civil penalties are available. *See* Plaintiffs Brief at 31.

An award of statutory damages is excessive and violates due process only when the amount is "so severe and oppressive as to be wholly disproportioned [sic] to the offense and obviously unreasonable." *St. Louis, IM & S. Ry. Co. v. Williams,* 251 U.S. 63 (1919). Whether the penalty of $500 per violation authorized by FLCA is disproportionate to the offense is unrelated to the actual provable harm or damages. In other words, the nature of the offense is the focus, *not the actual harm caused by the offense.* It is for that reason that the Washington State Legislature determined a Plaintiff need not prove actual harm to recover a civil penalty. In assessing the gravity of the offense, the Court should consider the "totality of the circumstances," and not the gravity of each violation in isolation. When viewed under the totality of the circumstance, the combination of statutory violations demonstrates a rather extensive effort to circumvent the purpose of the statute directed at replacing American farm workers with workers from Thailand. In this case, the gravity of the offense is not disproportionate to the civil penalty.

An award of minimum statutory damages is not analogous to a jury award of punitive damages. Federal courts have rejected the application of the punitive damages standard for assessing whether an award is so

excessive as to violate due process. The guidelines articulated under *BMW of North America, Inc.* v. *Gore,* 517 U.S. 559 (1996) simply do not apply. The Court in *BMW* was principally concerned with the unpredictability of punitive damage awards and that defendants lacked fair notice of what punishment could be imposed. Neither consideration applies to statutory civil penalties. To the contrary, statutory damages are fixed and certain, and fair notice is indisputable.

IV. Argument of Counsel

Plaintiffs rely principally upon *St. Louis, IM & S. Ry. Co. v. Williams,* 251 U.S. 63 (1919) and its progeny to argue that the statutory damages provision of the FLCA does not violate due process. The Growers argue that legislatively determined statutory damages are subject to the same due process standards as jury-awarded punitive damages analyzed under *BMW of North America, Inc.* v. *Gore,* 517 U.S. 559 (1996), which prohibits "grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003). In essence, the Growers argue that *Williams* has been overruled by *BMW.* The Growers are wrong.

In *State* v. *WWJ Corp.,* 138 Wn.2d 595, 980 P.2d 1257 (1999), this Court considered a due process challenge to a $2,000 civil penalty per violation pursuant to the remedies provision of the Consumer Protection Act and the Mortgage Broker Practices Act, with a total civil penalty of $500,000. The Court specifically "decline[d] to decide whether the *BMW*

standard applies to statutorily imposed civil penalties." *Id.* at 606, n8. The Court stated that even applying the *BMW* standard, the fine was not unconstitutional. *Id.* at 607. In the case at bar, the Court should rule that the *Williams* standard applies.

A. The *Williams* Standard Applies When Assessing a Due Process Challenge to a Civil Penalty.

In *Williams,* a railway carrier overcharged two railroad passengers 66 cents each on their purchases of rail tickets. 251 U.S. at 64. To prevent such overcharges, the Arkansas Legislature had authorized a private right of action with an award of statutory damages of "not less than fifty dollars nor more than three hundred dollars." *Id.* at 64. The trial court awarded each passenger the minimum statutory damage of $75 (before 1918), the equivalent of $936.84 in 2010 dollars. The rail carrier appealed, contending that the award violated due process and was grossly disproportionate *to the suffered injury. Id.* In making a legislative judgment about the amount of a civil penalty, the Court ruled that States "possess a wide latitude of discretion." *Id.* at 66. The Court further ruled that the penalty need not be proportionate to the harm. In order to violate due process, the penalty must be "so severe and oppressive as to be wholly disproportioned (sic) *to the offense and* obviously unreasonable." *Id.* at 67 (emphasis added). This is the correct standard to be applied when assessing a due process challenge to a civil penalty.

In *Williams*, the nature of the statutory violation was overcharging consumers who paid for railroad tickets. The amount overcharged relates

to the actual harm done. But the actual harm (whether $0.66 or $66.00) is irrelevant to the due process analysis. To survive a due process challenge, the civil penalty need not be proportionate to the actual harm. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("It is in the nature of punitive remedies to authorize awards that may be out of proportion to actual injury; such remedies typically are established to deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter."). Regardless of the actual harm, the *nature of the offense* to be deterred remains the same; in *Williams,* the overcharging for railroad tickets. So long as the statutory damages award is not "so severe and oppressive" as to be "wholly disproportioned to the offense" (overcharging consumers for railroad tickets), the award comports with due process.

B. The Court Should Consider the Totality of the Circumstances.

In this case, the Washington State legislature determined that a civil penalty of $500 per violation was required to deter any and all violations of the statute. In its certification order, the Ninth Circuit listed ten different types of violations of the FLCA which the district court applied in varying degrees to three subclasses of farm workers. *See* Certifying Order, Part III at pages 20665-20668. The district court Balkanized the violations into those which are "technical" and "substantive," and then, allegedly compelled by due process, awarded damages it considered appropriate to its perception of the severity of the

violation. This was error, and caused a result that was never intended by the legislature. The gravity of the offense must be considered under the "totality of circumstances." [1]

If the only statutory provision violated in this case were the failure to include the contractor's name, address and phone number on the workers' pay stub, and damages were calculated based upon the number of violations multiplied by the number of workers multiplied by $500 per violation, the result *might* violate due process under the *Williams* standard. But that is not this case. In this case, there is a wide variety of ten different statutory violations that, when viewed as a whole, reflect an egregious abrogation of the intent of the statute.

---

[1] The "totality of the circumstances" standard is one repeatedly endorsed by both state and federal courts. *E.g., United States v. Arvizu,* 534 US 266, 274 (2002) ("The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase"); *Moran v. Burbine,* 475 US 412, 421 (1986) ('Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived"); *Tennessee v. Garner*, 471 U. S. 1, 8-9 (1985) (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure"); *Glasgow, v. Georgia-Pacific Corporation,* 103 Wn.2d 401, 406-407, 693 P.2d 708 (1985) ("Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances"); *Dunlap v. Wayne,* 105 Wn.2d 529, 539, 716 P.2d 842 (1986) ("We agree that examining a statement in the totality of the circumstances in which it was made is the best means to determine whether a statement should be characterized as nonactionable opinion"); *State v. Ladson,* 138 Wn.2d 343, 358-59, 979 P.2d 833, 843 (1999) ("When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior").

The workers' concerns are summarized by the Ninth Circuit as follows:

> The Workers' allegations arose from the Growers' decision to use Global to supply the Growers with guest workers for the 2004 growing season under the H-2A program. Global allegedly recruited and hired some guest workers before obtaining approval from the Department of Labor and without first obtaining a farm labor contractor's license from Washington State. The Workers also alleged that Global and the Growers either fired local workers or withdrew offers to hire local workers in an effort to make room for the guest workers.

Order of Certification, at 20663. In this case, the defendants engaged in a pattern of misconduct intended to violate both the letter and spirit of the statute. This conduct, *inter alia,* included: providing false information about production standards; failing to employ workers; laying off workers in violation of a Clearance Order; and failure to pay wages due. *Id.* All of the statutory violations must be considered as component parts of a concerted effort to avoid the requirements of the statute. For due process purposes, the gravity of the offense must be considered by the totality of circumstances. Measured by that standard, the gravity of the offense is not "obviously unreasonable" and easily justifies a statutory penalty of $500 per violation, which equals a total of $1,875,000.

Moreover, the actual harm based upon provable damages by each statutory violation is irrelevant. Whether taken individually or as a whole, the Court's task is not to determine the harm done to any Plaintiff or class of Plaintiffs (actual damages), but whether the statutory damages amount of $500 per violation is proportionate to the gravity of offense(s). In

making that judgment, states "possess a wide latitude of discretion." *Williams,* at 66.

C. The *BMW* Guideposts Do Not Apply When Assessing a Due Process Challenge to a Civil Penalty.

In *BMW v. Gore, supra,* the Court established three guideposts for assessing whether a jury award of punitive damages is excessive. The application of those guideposts is required to assure that the defendant had fair notice of the severity of the penalty which might be imposed. In this case, the statute made explicitly clear that a minimum penalty of $500 per violation could be assessed. As a result, there can be no reasonable dispute about whether the defendant had fair notice, and the guideposts do not apply. Moreover, the guideposts concerning the ratio of the harm to the penalty and the penalty in comparisons to other penalties simply make no sense within this context.

In *BMW,* Dr. Ira Gore, Jr. purchased a black BMW sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, Dr. Gore discovered that the car had been repainted. Convinced that he had been cheated, Dr. Gore brought suit against BMW of North America (BMW), and alleged, *inter alia,* that the failure to disclose that the car had been repainted constituted suppression of a material fact, and that the car was worth less than if it had not been repainted. *Id.* at 563. He claimed actual damages of $4,000. *Id.* at 564. Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars

for more than they were worth. *Id.* The jury returned a verdict finding BMW liable for compensatory damages of $4,000. In addition, the jury assessed $4 million in punitive damages, based on a determination that the non-disclosure policy constituted "gross, oppressive or malicious" fraud. *Id.* at 565. The award was later remitted to $2,000,000. *Id.* at 567.

In assessing whether the punitive award was excessive, the Court acknowledged that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* 568. "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests [State's legitimate interests] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. To determine whether a defendant received adequate notice, the Supreme Court adopted three guideposts: (1) the degree of the defendant's reprehensibility; (2) the ratio between the plaintiffs' actual or potential harm and punitive damages awarded; and (3) relevant measures of damages and penalties in comparable cases. *Id.* at 575.

1. The Growers Had Fair Notice of the Penalty to Be Assessed.

The stated purpose of the *BMW* guidelines is to insure that the defendant has "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. The "elementary notions of fairness" that gave rise to the guideposts in *BMW* are not applicable when statutory civil penalties are assessed. In this case, the defendants had statutory notice of exactly what minimum penalty would be imposed, and that an award of actual damages could have been even more. Where a due process challenge is made to a statutory penalty, the fair notice foundation for consideration of the *BMW* guideposts simply does not exist - - the statute itself provides fair notice to employers that violations will lead to a minimum penalty of $500 per violation.

2. The Ratio of Harm to Punitive Damages Is Not a Factor.

The Court in *BMW* established "the ratio between the plaintiffs' actual or potential harm and punitive damages awarded" as one guidepost. 517 U.S. at 575. In *State Farm v. Campbell,* the Court declined to impose a bright-line ratio which a punitive damages award cannot exceed, but did state that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. Generally, in cases involving statutory damages, it is impossible or impractical to calculate the ratio between compensatory damages (reflecting actual harm) and a statutory penalty.

That impossibility often explains Plaintiffs' decision to seek civil penalties in lieu of actual damages.

The FLCA provides that upon the violation of *"any rule adopted under this chapter"* the Court may award the greater of the amount of actual damages *or* a mimimum statutory penalty of $500. RCW 19.30.170(2)(emphasis added). Plaintiffs proceeding under this statute need offer no proof of actual damages in order to recover minimum statutory damages. But if the ratio of actual harm to the civil penalty were a consideration, Plaintiffs would necessarily be required to prove actual harm even though that is not required by the statute. This Court should reject the Defendants' invitation to speculate about the actual harm suffered by any of the Plaintiffs; actual harm is simply irrelevant.[3]

3. Penalties in Comparable Cases.

Under *BMW,* the Court must compare a jury's award of punitive damages to other civil or criminal sanctions involving similar conduct. In this case, the most closely comparable sanction involves a criminal sanction for violations of FLCA. RCW 19.30.150 provides that "any

[3] Moreover, actual harm is not the only consideration under the *BMW* guideposts. The Court may also consider *potential* harm to the Plaintiff. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 US 443, 460 (1993)("Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, ..."). In this case, the potential harm (the failure to hire, terminating from employment and cheating farm workers of their wages) is easily discerned and readily justifies the civil penalty authorized by the legislature.

person who violates any provisions of this chapter . . . shall be guilty of a gross misdemeanor punishable by a fine of not more than five thousand dollars, . . ." A civil penalty of $500 is modest by comparison. Moreover, this guidepost is based upon the premise that legislative determinations of a civil penalty are entitled to deference when comparing them to a jury award of punitive damages. While not conceding the premise, a mandatory minimum statutory damage amount *is* a legislative determination. It simply makes to no sense to compare one legislatively determined civil penalty to another.

For all of the above reasons, the *BMW* guideposts are ill-suited for a due process evaluation of a civil penalty.

D. The *BMW* Guideposts Do Not Apply to Statutory Penalties under Federal Statutes.

1. The Telephone Consumer Protection Act - *BMW* Guideposts Do Not Apply to Statutory Damages.

The Telephone Consumer Protection Act (TCPA) imposes actual damages or $500 (for inadvertent violations) to $1500 (for knowing or willful violations) per each violation, whichever is greater. 47 U.S.C. §227(b)(3). Many defendants have argued that the statutory penalties are excessive damages and violate the Due Process Clause of the Fifth Amendment, relying upon *BMW* and *Campbell.* Federal courts have routinely rejected that argument and applied the *Williams* standard. *See Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, LP,* 329 F. Supp. 2d 789, 809 (M.D. La. 2004) (relying

upon *Williams* and distinguishing *BMW* and *Campbell* - "At the heart of the Court's rulings in those cases was the concern that persons receive fair notice regarding the nature and severity of the punishment inflicted upon them"); *Arrez v. Kelly Services,* Inc., 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (distinguishing *BMW* and *Campbell* on the basis that they are not relevant to awards of statutory damages for violation of day laborer's rights).[4]

2. Copyright Act - Federal Courts Have Held That the *BMW* Guideposts Do Not Apply To Statutory Damages.

Under 17 U.S.C. § 504(a) (c), a copyright owner may elect to recover statutory damages instead of actual damages and any additional profits. Plaintiff copyright owners whose copyrights actually have been infringed may elect between receiving: (1) their actual damages plus the infringer's profits attributable to its infringement, or (2) statutory damages. *Id.* § 504(b) (c). In the standard copyright-infringement case, the district

[4] Numerous other courts have upheld a civil penalty under TCPA against a due process challenge relying upon *Williams. See, e.g. United States v. Citrin,* 972 F. 2d 1044, 1051 (9th Cir. 1992)("A statutorily prescribed penalty violates due process rights 'only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."); *Green v. Anthony Clark Int'l Ins. Brokers, Ltd., No. 09 C 1541,* 2010 WL 431673, at *5-6 (N.D. Ill. Feb. 1, 2010) ("The Court finds that the $500 to $1,500 per fax violation is not 'so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.'"); *Centerline Equip. Corp. v. Banner Personnel Serv.,* 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) ("Statutory penalties violate due process rights "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1090 (W.D. Tex. 2000) (same); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1165 (S.D. Ind. 1997) (same).

court has discretion to award statutory damages of any amount between $750 and $30,000 for each copyright infringed. *Id.* § 504(c)(1). However, if the plaintiff proves that the infringement is willful, the statutory-damage ceiling rises to $150,000 per violation. *Id.* § 504(c)(2). Conversely, if the defendant establishes that infringement is innocent, the statutory-damage floor falls to $200. *Id.*

In *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455 (D. Maryland 2004), the Plaintiff alleged a copyright violation and was awarded by a jury statutory damages in the amount of $19,725,270. The Defendant argued that the verdict was excessive in violation of due process. *Id.* at 458. In response the Court specifically ruled that the guideposts under *BMW v. Gore* do not apply. *Id.* at 459. "Because statutory damages are an alternative to actual damages, there has never been a requirement that statutory damages must be strictly related to actual injury." *Id.*, (citing *F.W. Woolworth Co. v. Contemporary Arts,* 344 U.S. 228, 233, 73 S.Ct. 222, 97 L.Ed. 276 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy")). "The *Gore* guideposts do not limit the statutory damages here because of the difficulties in assessing compensatory damages in this case." *Legg Mason*, 302 F.Supp. 2d at 460.

In *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586-88 (6th Cir. 2007), the district court concluded that Panorama's

copyright infringement was willful, and accordingly awarded Zomba $31,000 for each of the twenty-six infringements at issue, for a total of $806,000. *Id.* at 580. The defendants appealed and argued that applying the *BMW* standard the award violated due process. *Id.* at 586.

The Court of appeals upheld the award and applied the standard under *Williams.*[1] "Williams is instructive, and leads us to conclude that the statutory-damage award against Panorama was not sufficiently oppressive to constitute a deprivation of due process." *Id.* at 588.

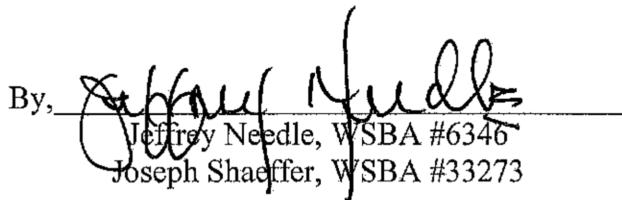
V. Conclusion

The due process standard for assessing civil penalties provided by *St. Louis, IM & S. Ry. Co. v. Williams,* applies in this case. The purpose of the FLCA is to protect farm workers from unscrupulous growers and farm labor contractors. The statute achieves that purpose by providing for the recovery of actual damages *or* civil penalties of $500 per violation. In assessing the gravity of the offense, the Court must consider the totality of the circumstances. The gravity of the offense is severe, and is not disproportionate to the civil penalty. The application of the statute in this case comports with due process.

[1] The Court in *Zomba* knew of no case invalidating a statutory award using the *BMW* standards, but recognized that the U.S. Supreme Court has not specifically addressed the issue. *Id.* at 587.

Respectfully submitted this 10th day of April, 2012.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, 

Jeffrey Needle, WSBA #6346
Joseph Shaeffer, WSBA #33273

CERTIFICATE OF SERVICE

I certify that on the 10th day of April, 2012, I caused a true and correct copy of the Motion for Leave to File and Amicus Brief of the Washington Employment Lawyers to be served on the following persons by legal messenger and/or First Class U.S. Mail:

Counsel for Jose Guadalupe Perez-Farias, Jose Sanchez, & Ricardo Betancourt

Lori Jordan Isley
Columbia Legal Services
6 South Second Street, Suite 600
Yakima, WA 98901

Joe Morrison
Columbia Legal Services
300 Okanogan Avenue, Suite 2A
Wenatchee, WA 98801

Matthew Geyman
PHILLIPS LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104

Richard W. Kuhling,
PAINE HAMBLEN LLP
717 West Sprague Ave., Suite 1200
Spokane, WA 99201

Counsel for Green Acre Farms, Inc. & Valley Fruit Orchards, LLC

Brendan V. Monahan
Stokes Lawrence Velikanje Moore & Shore
120 N. Naches Avenue
Yakima, WA 98901-2757

Justo Gonzalez
Stokes Lawrence PS
800 5th Avenue, Suite 4000
Seattle, WA 98104-3180

Unrepresented Parties, Global Horizons, Inc., Mordechai Orian & Yun Ru

Mordechai Orian & Yun Ru
Global Horizons, Inc.
23458 West Moon Shadows Drive
Malibu, CA 90264

Previous Counsel for Global Horizons, Inc., Mordechai Orian & Yun Ru, & Platte River Insurance Company

Matthew S. Gibbs
137 North Larchmont Boulevard, Suite 193
Los Angeles, CA 90004

Counsel for *Amicus Curiae*:

Washington State Horticultural Association, Yakima Valley Growers-Shippers Association, Wenatchee Valley Traffic Association, Washington Farm Labor Association, and Washington Growers League

James Elliot
Velikanje Halverson
405 East Lincoln Ave.
Yakima, WA 98901

Pineros y Campesinos Unidos del Noroeste ("PCUN"), National Employment Law Project ("NELP"), and California Rural Legal Assistance Foundation ("CRLAF")

Cynthia L. Rice
California Rural Legal Assistance Foundation
2210 K Street, Suite 200
Sacramento, CA 95816

DATED THIS 10th day of April, 2010

Kathleen Kindberg

ATTACHMENT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE GUADALUPE PEREZ-FARIAS; JOSE F. SANCHEZ; RICARDO BETANCOURT, and all other similarly situated persons, *Plaintiffs-Appellants,* v. GLOBAL HORIZONS, INC; JANE DOE ORIAN; PLATTE RIVER INSURANCE COMPANY; VALLEY FRUIT ORCHARDS, LLC; GREEN ACRE FARMS, INC.; MORDECHAI ORIAN, *Defendants-Appellees.*	No. 10-35397 D.C. No. 2:05-cv-03061-RHW Eastern District of Washington, Spokane ORDER

Filed December 5, 2011

Before: Richard R. Clifton and N. Randy Smith, Circuit Judges, and Edward R. Korman, Senior District Judge.*

ORDER

We certify to the Washington Supreme Court the questions set forth in Part III of this order.

Further proceedings in this court are stayed pending receipt of the answer to the certified questions. This case is withdrawn from submission until further order of this court or an order declining to accept the certified questions. If the Wash-

*The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for Eastern New York, sitting by designation.

ington Supreme Court accepts the certified questions, the parties will file a joint report six months after the date of acceptance, and every six months thereafter, advising us of the status of the proceeding.

I.

Pursuant to Washington Revised Code § 2.60.020, a panel of the United States Court of Appeals for the Ninth Circuit (before which this appeal is pending) certifies to the Washington Supreme Court questions of law regarding the proper interpretation of the Washington Farm Labor Contractor Act (FLCA), in particular Washington Revised Code § 19.30.170(2). No published decision of either the Washington Supreme Court or the Washington appellate courts has interpreted the relevant provisions of this statute to date, and the answers to the certified questions are "necessary . . . to dispose of" this appeal. Wash. Rev. Code § 2.60.020. We respectfully request that the Washington Supreme Court answer the certified questions presented in part III of this order. Our phrasing of the issues is not meant to restrict the court's consideration of the case, and "[w]e acknowledge that the Washington Supreme Court may, in its discretion, reformulate the question[s]." *Parents Involved in Community Schools v. Seattle School Dist, No. 1*, 294 F.3d 1085, 1087 (9th Cir. 2002) (internal quotation marks omitted). Should the Washington Supreme Court decline certification, "we will resolve the issue[s] according to our perception of Washington law." *Id.*

II.

Jose Guadalupe Perez-Farias, Jose F. Sanchez, and Ricardo Betancourt (Workers) are deemed the petitioners in this request because the Workers appeal the district court's findings on these issues. The caption of the case is:

JOSE GUADALUPE PEREZ-FARIAS; JOSE F. SANCHEZ; RICARDO BETANCOURT, and all other similarly situated persons, Plaintiffs-Appellants,

v.

GLOBAL HORIZONS, INC.; JANE DOE ORIAN; PLATTE RIVER INSURANCE COMPANY; VALLEY FRUIT ORCHARDS, LLC; GREEN ACRE FARMS, INC.; MORDECHAI ORIAN, Defendants-Appellees.

The names and addresses of counsel for the parties are as follows:

Matthew Geyman, Phillips Law Group PLLC, Seattle, WA; Lori Jordan Isley, Amy Crewdson, and Joachim Morrison, Columbia Legal Services, Yakima, WA, for Plaintiffs-Appellants.

Brendan V. Monahan and Justo G. Gonzalez, Stokes Lawrence Velikanje Moore & Shore, Yakima, WA, for Defendants-Appellees Valley Fruit Orchards, LLC and Green Acre Farms, Inc.

Matthew S. Gibbs, Los Angeles, CA, for Defendant-Appellee Mordechai Orian.

Cynthia Louise Rice, California Legal Assistance Foundation, Sacramento, CA, for amici curiae California Rural Legal Assistance Foundation, National Employment Labor Project, and Pineros y Campesinos Unidos del Noroeste.

James S. Elliott, Velikanje Halverson, Yakima, WA, for amici curiae Washington State Horticultural Association, Yakima Valley Growers-Shippers Association, Wenatchee Valley Traffic Association, Washington Farm Labor Association, and Washington Growers League.

III.

The questions of law to be answered are:

(1) Does the FLCA, in particular Washington Revised Code § 19.30.170(2), provide that a court choosing to award statutory damages: (a) must award statutory damages of $500 per plaintiff per violation; or (b) has discretion to determine the appropriate amount to award in damages from among a range of amounts, up to and including statutory damages of $500 per plaintiff per violation?

(2) If the FLCA provides that a court, choosing to award statutory damages, must award statutory damages of $500 per plaintiff per violation, does that violate Washington's public policy or its constitutional guarantees of due process?

(3) Does the FLCA provide for awarding statutory damages to persons who have not been shown to have been "aggrieved" by a particular violation?

IV.

The statement of facts is as follows:

The Workers brought this action, as class representatives, against Global Horizons, Inc. (Global), Green Acre Farms, Inc., Valley Fruit Orchards, LLC (collectively Growers) and the Platte River Insurance Company on July 12, 2005. In their third amended complaint, the Workers alleged that the Growers and Global: (1) violated the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), 29 U.S.C. §§ 1801-1872; (2) violated the FLCA, Washington Revised Code §§ 19.30.10 to 19.30.902; (3) wrongfully withheld wages under Washington Revised Code § 49.52.050; and (4) discriminated against the Workers based on race, in violation of 42 U.S.C. § 1981 and the Washington Law Against Discrimination, Washington Revised Code §§ 49.60.010 to 49.60.505.

The district court ultimately certified three subclasses, represented by the Workers, to pursue this action: (1) the Denied Work Subclass (397 local workers denied employment by Global in 2004); (2) the Valley Fruit Subclass (146 local workers hired by Global to work at Valley Fruit's orchards in 2004); and (3) the Green Acre Subclass (107 local workers hired by Global to work at Green Acre's orchards).[1]

The federal H-2A temporary agricultural program allows employers to hire nonimmigrant foreign workers (guest workers) to perform agricultural labor, but only if there are not enough local workers to do the work.[2] *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii), 1188; 20 C.F.R. §§ 655.100 to 655.185. The Workers' allegations arose from the Growers' decision to use Global to supply the Growers with guest workers for the 2004 growing season under the H-2A program. Global allegedly recruited and hired some guest workers before obtaining approval from the Department of Labor and without first obtaining a farm labor contractor's license from Washington State. The Workers also alleged that Global and the Growers either fired local workers or withdrew offers to hire local workers in an effort to make room for the guest workers.

The Workers requested partial summary judgment on the FLCA and AWPA claims on May 25, 2007. The district court granted the motion for partial summary judgment, finding

[1]The district court based its final statutory damages award of approximately $235,000 on these revised class member numbers. For the initial statutory damages award of $1,857,000, the class member numbers were different.

[2]Agricultural employers may bring in guest workers under the H-2A program if the United States Department of Labor certifies that a labor shortage exists and that the wages of local workers will not be adversely affected. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. §§ 655.100 to 655.185. Guest workers may not be employed in the United States unless the employer has obtained prior certification from the Department of Labor. *See* 8 U.S.C. § 1188(a)(1).

Global and the Growers had violated the FLCA and AWPA, and set the other claims for trial. Because Global and the Growers did not file responsive briefs to the Workers' motion for partial summary judgment, the court awarded the Workers statutory damages of $500 per violation under the FLCA. The total amount awarded was $1,857,000. The district court calculated the amount of statutory damages awarded as follows:

U.S. Resident Workers Denied Work – 423 workers x 4 violations x $500 = $846,000.00;

Valley Fruit – 169 workers x 7 violations x $500 = $591,500.00;

Valley Fruit – 115 workers x 1 violation x $500 = $57,500.00;

Valley Fruit – 24 workers x 1 violation x $500 = $12,000.00; and

Green Acre – 100 workers x 7 violations x $500 – $350,000.00.

The Growers requested reconsideration of damages. The Growers admitted liability but challenged whether statutory damages of $500 should be given for each violation. The district court granted reconsideration and vacated the imposition of statutory damages for the FLCA claim.[3] The court set a date for a bench trial to determine the issue of damages as to that claim. In the same order, the court found Global's discovery abuses warranted entering case dispositive sanctions against it as to certain discrimination claims. Thereafter, a jury found Global liable for discrimination on the basis of race and national origin and awarded damages.

The district court then held a bench trial on the damages question. The court held that it had discretion under the FLCA

[3]The presiding judge died before considering the motions for reconsideration. The new presiding judge granted the motions.

to award no damages or to award an amount between $0 and $500 per violation. The court also stated that an award of $500 per violation could be construed to (1) violate the Growers' due process rights by mandating an award of "exorbitant amounts of statutory damages," and (2) "violate all notions of fairness inherent in our judicial system." In discussing its due process and fairness concerns, the court distinguished between technical violations of the FLCA, such as failing to put contact information of the employer on pay stubs, and substantive violations, which result in actual harm to the worker.

The district court also rejected the Growers' argument that statutory damages were not warranted for some violations, because the Workers could not show they were aggrieved. The court had previously concluded that "class members were aggrieved," and the Workers were asking "for liquidated statutory damages for class-wide claims." Citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1310 (9th Cir. 1990), the court determined that it did not "need to make specific factual calculations of actual injury."

Based on the factors outlined in *Six (6) Mexican Workers*, the district court determined that an appropriate amount of statutory damages was approximately $235,000.00. The district court (using the revised class member numbers) calculated the amount of statutory damages awarded as follows:

Denied Work Subclass Violation	**No. of Members**	**Individual Award**	**Total**
Failure to Provide Required Disclosures	397	$100	$39,700
Providing False and Misleading Information: transportation benefits and	397	$100	$39,700

production standards			
Employing H2-A Workers	397	0	0
Failing to Employ	397	$150	$59,550
Total	397	$350	$138,950

Green Acre Subclass Violation	**No. of Members**	**Individual Award**	**Total**
Failure to Provide Required Disclosures	107	$100	$10,700
Providing False and Misleading Information: transportation benefits and production standards	107	$100	$10,700
Employing H2-A Workers	107	0	0
Laying Off in violation of Clearance Order	107	$150	$16,050
Failure to Provide Written Reprimands	107	$10	$1,070
Failure to Provide Adequate Pay Statements – name and address	107	$10	$1,070
Failure to Pay Wages Due – Deducting Washington Sales Tax	72	[ ]	[total of $8,773.02 to Green Acre and Valley Fruit subclass members]
Total	107	$370	$39,590 [plus

			share of Deducting Sales Tax award]
Valley Fruit Subclass Violation	**No. of Members**	**Individual Award**	**Total**
Failure to Provide Required Disclosures	146	$100	$10,700
Providing False and Misleading Information: transportation benefits and production standards	146	$100	$10,700
Employing H2-A Workers	146	0	0
Laying Off in violation of Clearance Order	146	$150	$21,900
Failure to Provide Written Reprimands	146	$10	$1,460
Failure to Provide Adequate Pay Statements – name and address	146	$10	$1,460
Failure to Provide Adequate Pay Statements – itemization	99	$10	$990
Failure to Pay Wages Due – Deducting Washington Sales Tax	49	[ ]	[total of $8,773.02 to Green Acre and Valley Fruit subclass members]

Failure to Pay Wages Due – Not paying Approved Bin Rate of $19 in Pear Harvest	24	$100	$2,400
Total		$480	$49,610 [plus share of Deducting Sales Tax award]

Global and the Growers again requested reconsideration, arguing that damages should be awarded only to class members actually aggrieved. The district court denied the motion for reconsideration. This appeal timely followed.

V.

Because of the complexity of these state law issues and because of their significant policy implications, we believe that the Washington Supreme Court, which has not yet interpreted the relevant provisions of the FLCA, "is better qualified to answer the certified question[s] in the first instance." *See Parents Involved*, 294 F.3d at 1092. Additionally, the Washington Supreme Court's authoritative answers are "necessary . . . in order to dispose of [this] proceeding." Wash. Rev. Code § 2.60.020.

VI.

The Clerk of the Court is hereby directed to immediately transmit to the Washington Supreme Court, under official seal of the Ninth Circuit, a copy of this order and request for certification and all relevant briefs and excerpts of record pursuant to Washington Revised Code §§ 2.60.010 and 2.60.030.

IT IS SO ORDERED.