[ORAL ARGUMENT NOT YET SCHEDULED]

No. 22-7072

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARTIN DOHERTY,
Appellant,

v.

TURNER BROADCASTING SYSTEMS, INC.,
Appellee.

Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF OF APPOINTED AMICUS CURIAE IN SUPPORT OF APPELLANT

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DC Workers' Compensation Act.....DC WCA

Internal Revenue Service.....IRS

Short-Term Disability ..... STD

STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in Amicus's Opening Brief In Support of Appellant.

26 U.S.C. § 6663

(a) **Imposition of penalty**. If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

(b) **Determination of portion attributable to fraud**. If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes (by a preponderance of the evidence) is not attributable to fraud.

(c) **Special rule for joint returns**. In the case of a joint return, this section shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse.

26 C.F.R. § 1.104-1

(a) **In general**. Section 104(a) provides an exclusion from gross income with respect to certain amounts described in paragraphs (b), (c), (d) and (e) of this section, which are received for personal injuries or sickness, except to the extent that such amounts are attributable to (but not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year. See section 213 and the regulations thereunder.

(b) **Amounts received under workmen's compensation acts**. Section 104(a)(1) excludes from gross income amounts which are received by an employee under a workmen's compensation act (such as the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., c. 18), or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment. Section 104(a)(1) also applies to compensation which is paid under a workmen's compensation act to the survivor or survivors of a deceased employee. However, section 104(a)(1) does not apply to a retirement pension or annuity to the extent that it is determined by reference to the employee's age or length of service, or the employee's prior contributions, even though the employee's retirement is occasioned by an occupational injury or sickness. Section 104(a)(1) also does not apply to amounts which are received as compensation for a nonoccupational injury or sickness nor to amounts received as compensation for an occupational injury or sickness to the extent that they are in excess of the amount provided in the applicable workmen's compensation act or acts. See, however, §§ 1.105–1 through 1.105–5 for rules relating to exclusion of such amounts from gross income.

(c) **Damages received on account of personal physical injuries or physical sickness**.

(1) In general. Section 104(a)(2) excludes from gross income the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. Emotional distress is not considered a physical injury or physical sickness. However,

damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2). Section 104(a)(2) also excludes damages not in excess of the amount paid for medical care (described in section 213(d)(1)(A) or (B)) for emotional distress. For purposes of this paragraph (c), the term damages means an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution.

(2) Cause of action and remedies. The section 104(a)(2) exclusion may apply to damages recovered for a personal physical injury or physical sickness under a statute, even if that statute does not provide for a broad range of remedies. The injury need not be defined as a tort under state or common law.

(3) Effective/applicability date. This paragraph (c) applies to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after January 23, 2012. Taxpayers also may apply these final regulations to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after August 20, 1996. If applying these final regulations to damages received after August 20, 1996, results in an overpayment of tax, the taxpayer may file a claim for refund before the period of limitations under section 6511 expires. To qualify for a refund of tax on damages paid after August 20, 1996, under a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, a taxpayer must meet the requirements of section 1605 of the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1838).

(d) **Accident or health insurance**. Section 104(a)(3) excludes from gross income amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent that such amounts (1) are attributable to contributions of the employer which were not includible in the gross income of the employee, or (2) are paid by the employer). Similar treatment is also accorded to amounts received

under accident or health plans and amounts received from sickness or disability funds. See section 105(e) and § 1.105–5. If, therefore, an individual purchases a policy accident or health insurance out of his own funds, amounts received thereunder for personal injuries or sickness are excludable from his gross income under section 104(a)(3). See, however, section 213 and the regulations thereunder as to the inclusion in gross income of amounts attributable to deductions allowed under section 213 for any prior taxable year. Section 104(a)(3) also applies to amounts received by an employee for personal injuries or sickness from a fund which is maintained exclusively by employee contributions. Conversely, if an employer is either the sole contributor to such a fund, or is the sole purchaser of a policy of accident or health insurance for his employees (on either a group or individual basis), the exclusion provided under section 104(a)(3) does not apply to any amounts received by his employees through such fund or insurance. If the employer and his employees contribute to a fund or purchase insurance which pays accident or health benefits to employees, section 104(a)(3) does not apply to amounts received thereunder by employees to the extent that such amounts are attributable to the employer's contributions. See § 1.105–1 for rules relating to the determination of the amount attributable to employer contributions. Although amounts paid by or on behalf of an employer to an employee for personal injuries or sickness are not excludable from the employee's gross income under section 104(a)(3), they may be excludable therefrom under section 105. See §§ 1.105–1 through 1.105–5, inclusive. For treatment of accident or health benefits paid to or on behalf of a self-employed individual by a trust described in section 401(a) which is exempt under section 501(a) or under a plan described in section 403(a), see paragraph (g) of § 1.72–15.

(e) **Amounts received as pensions, etc., for certain personal injuries or sickness**.

(1) Section 104(a)(4) excludes from gross income amounts which are received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country, or in the Coast and Geodetic Survey, or the Public Health Service. For purposes of this section, that part of the retired pay of a member of an armed

force, computed under formula No. 1 or 2 of 10 U.S.C. 1401, or under 10 U.S.C. 1402(d), on the basis of years of service, which exceeds the retired pay that he would receive if it were computed on the basis of percentage of disability is not considered as a pension, annuity, or similar allowance for personal injury or sickness, resulting from active service in the armed forces of any country, or in the Coast and Geodetic Survey, or the Public Health Service (see 10 U.S.C. 1403 (formerly 37 U.S.C. 272(h), section 402(h) of the Career Compensation Act of 1949)). See paragraph (a)(3)(i)(a) of § 1.105–4 for the treatment of retired pay in excess of the part computed on the basis of percentage of disability as amounts received through a wage continuation plan. For the rules relating to certain reduced uniformed services retirement pay, see paragraph (c)(2) of § 1.122–1. For rules relating to a waiver by a member or former member of the uniformed services of a portion of disability retired pay in favor of a pension or compensation receivable under the laws administered by the Veterans Administration (38 U.S.C. 3105), see § 1.122–1(c)(3). For rules relating to a reduction of the disability retired pay of a member or former member of the uniformed services under the Dual Compensation Act of 1964 (5 U.S.C. 5531) by reason of Federal employment, see § 1.122–1(c)(4).

(2) Section 104(a)(4) excludes from gross income amounts which are received by a participant in the Foreign Service Retirement and Disability System in a taxable year of such participant ending after September 8, 1960, as a disability annuity payable under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021). However, if any amount is received by a survivor of a disabled or incapacitated participant, such amount is not excluded from gross income by reason of the provisions of section 104(a)(4).

D.C. Code § 32-1504

(a) The liability of an employer prescribed in § 32-1503 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, spouse or domestic partner, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(b) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer, or any collective-bargaining agent of the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his employment) for any illness, injury, or death arising out of and in the course of his employment; provided, that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. In such action the defendant may not plead as a defense that injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

(c) The furnishing of, or failure to furnish, insurance consultation services related to, in connection with or incidental to an applicable policy of insurance shall not subject the insurer, its agent or employees undertaking to perform such services to liability for damages from injury, death or loss occurring as a result of any act of omission in the course of such services.

(d) This section shall not apply:

(1) If the injury, loss or death occurred during the actual performance of consultation services and was caused by the active negligence of the carrier, its agent or employees which was the proximate cause of the injury, death or loss; or

(2) To any consultation services required to be performed under the provisions of a written service contract not incidental to an applicable policy of insurance.

SUMMARY OF THE ARGUMENT

Turner's brief is silent on an essential, undisputed fact: that over several years, it gained a tax deduction by including the compensation it provided to Mr. Doherty for his work-related injury in the gross income it reported on his W-2s. *See* Amicus Br. 36 (citing JA781 n.6). The arguments that Turner does raise are belied by the record evidence. Turner's characterization of these payments as short-term disability (STD) rather than workers' compensation is unpersuasive, as is the company's attempt to portray its behavior as "mere error" at most. *See* Appellee Br. 25.

Turner is wrong that the DC Workers' Compensation Act, D.C. Code § 32-1501, *et seq.* ("DC WCA"), is irrelevant to this case. One central issue is whether the payments for Mr. Doherty's work-related injury, which resulted in years of pain that required surgery, constituted nontaxable workers' compensation that was misreported as taxable STD payments in his gross income. Turner ignores the centrality of the DC WCA to this issue, and it disregards the record evidence demonstrating Mr. Doherty's eligibility for—and receipt of—workers' compensation. Turner's misrepresentation of Mr. Doherty's gross income on his W-2s

therefore renders the information returns fraudulent under 26 U.S.C. § 7434(a).

Together, the terms "fraudulent" and "willfully" define the behavior that violates § 7434(a): filing materially false information returns with reckless disregard for their truth, as Turner has. Turner incorrectly asserts that fraudulence in this statute requires both knowledge of falsity and an intent to deceive—an argument it did not raise in the district court. *See* JA342–43 (stating that fraudulence hinges on the "accur[acy]" of the W-2s). Reading an intent requirement into the term "fraudulent" improperly nullifies the mens rea inherent in the word "willfully." *See* 26 U.S.C. § 7434(a). But by any standard of willfulness—Turner's "knowledge" and "intent" standard, the *Cheek* standard, or *Safeco*'s recklessness standard—the record establishes genuine disputes of material fact that preclude summary judgment. Turner's conduct falls squarely within the range of behavior that § 7434(a) prohibits.

ARGUMENT

Mr. Doherty need not prove his § 7434(a) claim by "clear and convincing" evidence at this stage. *See* Appellee Br. 11, 14, 19 (emphasis omitted). There need only be a genuine dispute of material fact to survive summary judgment. *Thompson v. District of Columbia*, 967 F.3d 804, 813 (D.C. Cir. 2020). And Mr. Doherty has pointed to record evidence that would easily allow a jury to conclude that Turner willfully filed materially false W-2s to gain an unwarranted tax advantage. Regardless of which willfulness standard applies, the district court erred in granting summary judgment in Turner's favor.

I. A REASONABLE JURY COULD FIND THAT TURNER MISREPRESENTED MR. DOHERTY'S GROSS INCOME.

Turner, for all its efforts to describe the DC WCA as "irrelevant," cannot escape the Act's centrality to this case. *See* Appellee Br. 1, 2, 11, 22, 25. Turner first argues that the W-2s cannot be fraudulent because they accurately reflected the total amount of money that Mr. Doherty received while on leave. Appellee Br. 14–16. This argument misunderstands Mr. Doherty's claim that the disputed payments constituted non-taxable workers' compensation under the DC WCA. *See* 26 U.S.C. § 104(a)(1) (exempting amounts received "under workmen's

compensation acts" from gross—i.e., taxable—income). Notably, Turner never disputes that the DC WCA is a § 104(a)(1) workmen's compensation act. Amicus Br. 20 & n.7. By wrongly including non-taxable DC WCA payments in Mr. Doherty's taxable income, Turner inaccurately reported his gross income on his W-2s. This false representation is sufficient to render the W-2s fraudulent under § 7434(a). *See Butler v. Enter. Integration Corp.*, 459 F. Supp. 3d 78, 106–07 (D.D.C. 2020).

Faced with abundant record evidence that could lead a reasonable jury to conclude that the disputed payments were workers' compensation, Turner tries to muddle the record with irrelevant arguments. But the record is clear. Turner does not dispute that Mr. Doherty's injury was work-related. Appellee Br. 5. And Turner knew that it was internally coding Mr. Doherty's payments as workers' compensation, JA501; that the DC OWC deemed Mr. Doherty eligible for workers' compensation, JA463–68; and that its payments to Mr. Doherty fulfilled its obligations under the DC WCA, JA388, JA463–68.

Turner asserts it could not exclude STD payments from Mr. Doherty's gross income because doing so would violate 26 U.S.C.

§ 104(a)(3), which states that employer-paid compensation for "personal injuries or sickness" is not excludable from gross income. *See* Appellee Br. 16 n.6, 26–27. But this ignores the undisputed fact that Mr. Doherty's injury was "incurred in the course of employment." 26 C.F.R. § 1.104-1(b). And it evades § 104(a)(1)'s mandate that compensation for work-related injuries must be excluded from gross income. Indeed, Turner's recognition of the differences between workers' compensation and STD demonstrates that the former is distinct from—and cannot be satisfied by—the latter. *See* Appellee Br. 3–4. It would be unreasonable to allow an employer like Turner to select when it can bypass its obligations under the Act, especially given that the DC WCA is an employee's "exclusive remedy" to obtain compensation for a workplace injury. *See* D.C. Code § 32-1504(b).

Turner next argues that any payments to Mr. Doherty before the DC OWC's workers' compensation "determinations" in December 2014 and June 2016 could not have been workers' compensation. *See* Appellee Br. 21–22. But employees need not receive any "determination" from the DC OWC to be eligible for workers' compensation. *See* JA461 (DC OWC form explaining that an employer must "begin voluntary payments of

workers' compensation" within 14 days of receiving a claim application); JA388 (Turner's policy requiring notice of a work-related injury within 24 hours to begin the workers' compensation process). Mr. Doherty informed his supervisor of his work-related injury the night it happened in December 2012. *See* JA349. As early as March 2013, Turner employees recognized that Mr. Doherty's pay was workers' compensation. JA501. This record evidence contradicts Turner's suggestion that it first learned of Mr. Doherty's eligibility for workers' compensation from the DC OWC "determinations." S*ee* Appellee Br. 21–22. The orders simply confirmed Mr. Doherty's eligibility and explained how Turner's prior nonpayment or under-payment violated the DC WCA. *See* JA463–68.

Continuing to presume that it can sidestep the record and its obligations under the DC WCA, Turner claims there is "no authority expressly stating that STD benefit payments for workplace injuries must be treated as non-taxable income." Appellee Br. 23 (emphasis omitted). Turner again disregards 26 U.S.C. § 104(a)(1)'s instruction to exclude payments for work-related injuries from an employee's gross income. And it ignores *Felder v. D.C. Department of Employment Services*, which held that payments for a work-related injury provided under an

employer-funded STD policy can nonetheless constitute "advance payments of compensation" under the DC WCA. 97 A.3d 86, 88–90 (D.C. 2014).

Turner insists that even if taxes were improperly withheld, Mr. Doherty needed to "seek refunds from the appropriate taxing authorities" rather than Turner. *See* Appellee Br. 26–27 n.11 (citation omitted). But this would eliminate the very purpose of § 7434(a), which is to empower taxpayers to recoup monetary losses incurred from materially false information returns. *See* H.R. Rep. 104-506, at 35 (1996). And Turner ignores the fact that Mr. Doherty *did* attempt to seek relief from the IRS in 2015 before filing suit. *See* JA470.

In an effort to portray the W-2s as accurate, Turner claims that the IRS itself "confirmed" or "verified" the gross income in the 2015 W-2. Appellee Br. 7, 15. Not so. All that Turner points to is its own self-verification to Mr. Doherty about the W-2's accuracy by checking a box on a letter sent by the IRS. JA470. The form directed Turner to return the letter to Mr. Doherty (which it did), not to the IRS. JA470. The IRS sent the letter so that *Turner* could correct the problem. This is not an

independent "determination" or "verifi[cation]" by the IRS. *See* Appellee Br. 7, 15.

II. TURNER ACTED WILLFULLY WHEN IT FILED FRAUDULENT INFORMATION RETURNS ON MR. DOHERTY'S BEHALF.

Attempting to refute the applicability of *Safeco*'s willfulness standard to Mr. Doherty's claim, Turner maintains that § 7434(a) requires a "higher standard of proof" than recklessness. Appellee Br. 29. Focusing on the word "fraudulent" in the statute, Turner appears to make two related arguments—neither of which it raised in the district court. *See* JA342–43. First, despite its previous assertion that the fraudulence of an information return turns on whether it is "accurate," JA342, Turner now claims that "fraudulent" requires actual "knowledge of [the] falsity" of the W-2s and an "inten[t] to deceive the IRS" independent from the willfulness that is explicitly required by the statute. Appellee Br. 18, 22–25, 32. Turner also argues that "fraudulent" modifies the meaning of "willfully" to demand a heightened mens rea. Appellee Br. 27–32. Because Turner's brief does not once mention *Cheek v. United States*, 498 U.S. 192 (1991), it is unclear whether Turner perceives its newly-introduced interpretation of "fraudulent" to be equivalent to *Cheek*'s willfulness standard (the "intentional violation of a

known legal duty") or if it means to depart from *Cheek* and advocate for a new standard.

This civil statute's language, legislative history, and related case law demonstrate that *Safeco*'s recklessness standard should govern willfulness. But regardless of which standard this Court applies, record evidence demonstrates Turner's willfulness.

A. A False Representation Made with Reckless Disregard for its Truth Establishes Liability Under § 7434(a).

The words "willfully" and "fraudulent" together define the behavior that constitutes a violation of § 7434(a). Information returns are "fraudulent" when they include a material "false representation," as the district court properly concluded. *See* JA780; *see also Butler*, 459 F. Supp. 3d at 106–07 (analyzing whether the defendant misrepresented the amount of reported corporate gains and losses); *Ganpat v. Aventure Inv. Realty, Inc.*, No. 0:20-cv-60816-WPD, 2021 WL 6926409, at *3 (S.D. Fla. Dec. 30, 2021) (a "willful misstatement" can create § 7434(a) liability); *Chin Hui Hood v. JeJe Enter., Inc.*, 207 F. Supp. 3d 1363, 1379 (N.D. Ga. 2016) (a misrepresentation can constitute § 7434(a) fraudulence). And under the appropriate civil standard of willfulness, which encompasses

reckless disregard, a company has filed fraudulent returns "willfully" when it "clearly ought to have known" of a "grave risk" that it was reporting false information. *See Bedrosian v. U.S. Dep't of the Treasury*, 912 F.3d 144, 152–53 (3d Cir. 2018); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 68 (2007). Indeed, contrary to Turner's claims, courts have held that reckless disregard suffices to establish civil fraud. *See McMullen v. Synchrony Bank*, 300 F. Supp. 3d 292, 305–06 (D.D.C. 2018) (reasoning that both knowledge and intent for civil fraud can be inferred from a "false representation" made "recklessly without knowing its veracity" (internal quotation omitted)); *Orix Credit All., Inc. v. Taylor Mach. Works, Inc.*, 125 F.3d 468, 478–79 (7th Cir. 1997) (same).

The high threshold required to establish a violation of the statute belies Turner's apparent concern that "mere error" will give rise to liability. Appellee Br. 17, 25. Read in tandem, "fraudulent" and "willfully" create a demanding standard that safeguards taxpayers from false returns while also adequately protecting the entities that prepare these returns. A company's good-faith or negligent mistake does not fall within the ambit of the statute.

The sole mens rea contemplated in § 7434(a) is willfulness. Turner's erroneous interpretation of the word "fraudulent" as requiring actual knowledge of falsity and intent to deceive the IRS imputes a *second* mens rea requirement to the same civil cause of action. And this reading of "fraudulent" would eclipse the state of mind already provided for in the statute, rendering the term "willfully" surplusage. *See Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477–78 (2017) (directing courts to presume that "each word Congress uses is there for a reason" and "give effect . . . to every clause and word of a statute").

Turner cites § 7434's legislative history to support its claim that willfulness must incorporate both actual knowledge and intent, rather than a showing of recklessness. Appellee Br. 29–30. True, a House Committee Report identifies the statute's purpose as remedying "significant personal loss and inconvenience" to taxpayers by persons "intent on either defrauding the IRS or harassing taxpayers." H.R. Rep. 104-506, at 35 (1996). But "intent" is "an ambiguous term that can encompass objectively defined levels of blameworthiness." *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). Courts have thus held that a "showing of reckless conduct" can satisfy a "requirement of wrongful

intent." *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1126 (7th Cir. 1990). In any event, courts should not use legislative history to "muddy" the meaning of a statute where its "text is clear," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 350 (D.C. Cir. 2019), and § 7434(a) unambiguously refers to "willful[ness]" as the requisite mens rea.

Turner's claim that courts "overwhelmingly agree that willfulness requires evidence of knowledge and intent" under § 7434(a) is unsupported by case law. *See* Appellee Br. 30. Turner's use of *Chedick v. Nash*, 151 F.3d 1077 (D.C. Cir. 1998), to support this proposition is unavailing because *Chedick* concerns an unrelated D.C. common law claim for promissory misrepresentation. *Id.* at 1081. Turner's reliance on cases interpreting a civil fraud statute, 26 U.S.C. § 6663, is likewise misplaced because that statute, unlike § 7434(a), does not specify the "willful[ness]" mens rea. *See* Appellee Br. 17 (citing *Zell v. Comm'r*, 763 F.2d 1139, 1143–44 (10th Cir. 1985); *Maciel v. Comm'r*, 489 F.3d 1018, 1026 (9th Cir. 2007); *Douge v. Comm'r*, 899 F.2d 164, 165 (2d Cir. 1990); *Granado v. Comm'r*, 792 F.2d 91, 93 (7th Cir. 1986)). Turner's other cases fare no better. The cited district court cases and unpublished circuit court cases that apply a heightened willfulness standard to § 7434(a) do

so without explanation as to the propriety of this standard and are thus unpersuasive.[2] *See* Appellee Br. 16-17 (citing *Vandenheede v. Vecchio*, 541 F. App'x 577, 580 (6th Cir. 2013); *Crespo v. Midland Credit Management Inc.*, 689 F. App'x 944, 946 (11th Cir. 2017); *Mould v. NJG Food Serv., Inc.*, 37 F. Supp. 3d 762, 776–77 (D. Md. 2014); *Sigurdsson v. Dicarlantonio*, 6:12-cv-920, 2013 WL 12121866, at *10 (M.D. Fla. Dec. 11, 2013)).

None of the opinions that Turner cites justifies the use, in this civil statute, of a heightened willfulness standard that is designed to provide "special treatment" for *criminal* tax laws. *See Cheek*, 498 U.S. at 200. Nor do they contend with the civil "common law usage" and policy concerns that point in the opposite direction. *See Safeco*, 551 U.S. at 57–58. *Cheek*'s aim to be more protective of unwary individuals against the risk of criminal punishment and the government's coercive power is unnecessary for the civil enforcement of § 7434(a). *See id.* at 60.

[2] Nor does *Katzman v. Essex Waterfront Owners LLC*, No. 09-cv-7541, 2010 WL 3958819, at *4 (S.D.N.Y. Sept. 29, 2010), help Turner because, as the Second Circuit recognized, this case held that the alleged *failure* to file an information return was not covered by § 7434(a). *See Katzman v. Essex Waterfront Owners LLC*, 660 F.3d 565, 568–69 (2d Cir. 2011).

Turner's argument also fails to consider the judicial consensus that recklessness is sufficient to establish willfulness in civil statutes. *See, e.g.*, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (Fair Labor Standards Act); *Safeco*, 551 U.S. at 57 (Fair Credit Reporting Act); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (Age Discrimination in Employment Act); *Bedrosian*, 912 F.3d at 152 (Report of Foreign Bank and Financial Accounts); *Keller v. Macon Cnty. Greyhound Park, Inc.*, 464 F. App'x 824, 824 (11th Cir. 2012) (Fair and Accurate Credit Transaction Act); *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1271–72 (11th Cir. 2015) (Copyright Act).

B. Summary Judgment in Favor of Turner Was Erroneous Under Any Standard of Willfulness.

Although recklessness is the appropriate framework to analyze § 7434(a) mens rea, this Court need not decide which standard to apply. There is ample record evidence to preclude summary judgment under any standard.

Turner is incorrect that Amicus's opening brief does not mention the company's knowledge of falsity or its intent to deceive. *See* Appellee Br. 20, 24. The brief noted Turner's knowledge that Mr. Doherty was entitled to, and was in fact receiving, workers' compensation payments.

See Amicus Br. 23–24 (citing JA463–68, the DC OWC's findings that Mr. Doherty was entitled to workers' compensation); Amicus Br. 27, 32 (citing JA501, Mr. Doherty's pay being "coded" as workers' compensation). And the brief pointed to an email in which Turner's employee expressed knowledge that workers' compensation is non-taxable. Amicus Br. 32 (citing JA458).

Amicus's brief also highlighted Turner's intent. Amicus Br. 36–37. Turner does not once acknowledge (or dispute) the motivation identified in Amicus's brief: that it earned a tax deduction for including Mr. Doherty's workers' compensation payments in his gross income. Amicus Br. 32, 36 (citing JA508, JA781 n.6). And Turner has had ample notice that Mr. Doherty's W-2s were incorrect, not only because of his repeated exhortations to the company, Amicus Br. 32–33, 36–37 (citing JA482, JA459, JA487, JA518), but also by his alert to the IRS that the W-2s were erroneous, of which Turner had notice, Amicus Br. 32 (citing JA429). Turner's refusal to change its challenged behavior despite these repeated entreaties belies its current attempt to characterize the filing of the fraudulent W-2s as "mere error." *See* Appellee Br. 25. These numerous disputes of material fact preclude summary judgment on the issue of

intent, which is, in any event, a question for the jury that is "ill-suited for summary judgment." *See United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 82, 86 n.5 (D.D.C. 2004) (quoting *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707, 711 (2d Cir.1991)).

Turner attempts to disclaim knowledge by asserting that the DC OWC's determinations made "no mention of the taxability" of Mr. Doherty's workers' compensation payments. Appellee Br. 33 (emphasis omitted). But Turner knew that workers' compensation payments are, by law, non-taxable. JA458. It also argues that, considered alone, this email showing "antecedent knowledge" of the non-taxable nature of workers' compensation is insufficient to establish the company's knowledge. Appellee Br. 33. But on summary judgment, courts consider the "entire record" in its totality. *Williams v. Mordkofsky*, 901 F.2d 158, 161 (D.C. Cir. 1990). Viewing these emails in the context of the DC OWC's determinations, Turner's own workers' compensation policy, and Turner's communications regarding the payments establishes at least a genuine dispute of material fact of Turner's knowledge—particularly because this Court must construe the facts in the light most favorable to Mr. Doherty. *See Wilson v. Cox*, 753 F.3d 244, 245–46 (D.C. Cir. 2014).

Trying to minimize the import of an email recognizing that Mr. Doherty's payments would be "coded" as workers' compensation, Turner argues that the same message explains that Mr. Doherty's "normal deductions" would nonetheless be taken out of his pay. Appellee Br. 23 (citing JA501). But this additional context only strengthens Mr. Doherty's argument. It demonstrates Turner's knowledge that Mr. Doherty was entitled to non-taxable workers' compensation *and* its intent to nonetheless designate those payments as taxable income. That is precisely the type of behavior that § 7434(a) prohibits.

Turner asserts that Mr. Doherty's repeated emails to Turner regarding the impropriety of taxing his workers' compensation payments cannot establish knowledge or intent because Mr. Doherty was "merely stat[ing] his personal opinion." Appellee Br. 33. But notice can establish willfulness, *Blanton v. Off. of the Comptroller of the Currency*, 909 F.3d 1162, 1173–74 (D.C. Cir. 2018), and Mr. Doherty's emails constituted just that. Turner also appears to argue that Mr. Doherty's emails were inapposite because his "opinion" about the inaccuracy of his W-2s was in "contravention of the tax treatment of all other Turner employees." Appellee Br. 33 (emphasis omitted). But the present case pertains only

to Mr. Doherty and his individualized entitlement to "special assistance" for his work-related injury. JA388. In any event, Turner's potential malfeasance in filing false information returns for other employees cannot absolve it of liability here.

Turner also tries to mitigate its liability by claiming that Mr. Doherty "testified that no Turner employee" told him of their awareness that the company's STD policy violated workers' compensation law. Appellee Br. 18. As an initial matter, this mischaracterizes Mr. Doherty's testimony: Mr. Doherty did not "recall" whether any employee told him of the policy's illegality. JA692. It also misses the point. The issue is not whether Turner employees knew about the legality of the *STD* policy as a whole, but rather whether Turner knew that Mr. Doherty was entitled to—and was in fact receiving—*workers' compensation* payments that were improperly taxed. The record evidence creates a genuine dispute that it did.

Also futile is Turner's attempt to deny knowledge because the company never received "professional or official guidance" that Mr. Doherty's payments should be treated as non-taxable income. *See* Appellee Br. 33. Nowhere in the language of § 7434(a), nor in the cases

that Turner itself cites, is there a requirement that knowledge be supplied by "professional" or "official" sources. A sophisticated company like Turner cannot protect itself from liability by ignoring a legal obligation so obvious that it is confirmed by Turner's own staff. *See* JA458 (explaining that workers' compensation is non-taxable).

Finally, Turner attempts to redirect blame by arguing that Mr. Doherty must demonstrate that the particular employee who prepared his W-2s knew of their fraudulence. Appellee Br. 20. Such a showing of individual liability is not required. Section 7434(a) imposes liability on "any person" who "willfully files a fraudulent information return," and "any person" includes the company or entity filing the return. *See, e.g.*, *Angelopoulos v. Keystone Orthopedic Specialists*, No. 12-cv-05836, 2015 WL 2375225, at *3–4 (N.D. Ill. May 15, 2015); *Pitcher v. Waldman*, No. 1:11-cv-148-HJW, 2014 WL 1302551, at *9 (S.D. Ohio Mar. 28, 2014).

Because the record creates a genuine dispute that Turner acted knowingly and intentionally, there is also ample evidence to establish Turner's willfulness under the *Cheek* or *Safeco* standards. Notably, Turner's silence regarding *Cheek* means it has failed to refute Amicus's argument that summary judgment was improper even under the *Cheek*

standard. *See* Amicus Br. 35–37. Furthermore, because the record demonstrates that Turner was aware of both the taxability of Mr. Doherty's workers' compensation payments and the risks of its behavior, summary judgment was also erroneous under *Safeco*'s recklessness standard. *See* Amicus Br. 31–33.

A reasonable jury could therefore find that Turner violated § 7434(a) by making a false representation with reckless disregard for its truth.[3]

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment and remand.

Respectfully Submitted,

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[3] This Court directed Amicus to address whether summary judgment was improperly granted as to Mr. Doherty's § 7434(a) claim. Turner asserts that by doing so, Amicus "agree[s]" that the other issues Mr. Doherty raises in his brief are not ripe. *See* Appellee Br. 37 n.13. Turner is wrong.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,865 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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I, Tiffany Yang, certify that on February 7, 2023, I electronically filed the foregoing Reply Brief of Amicus Curiae via this Court's CM/ECF system, which will send notice of such filing to counsel of record and Appellant Mr. Doherty in the above-captioned case.

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