NO. 97853-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM SORNSIN, an individual; MARC T. BECK, an individual; ROBERT GOREE, an individual; AARTI VARMA, an individual; EVAN W. LEWIS, an individual; BENJAMIN G. JOLDERSMA, an individual; BRIAN N. KU, an individual; DAMIEN JOLDERSMA, an individual; DONALD J. CLORE, an individual; and JOSEPH C. WRIGHT, an individual,

Appellants,

v.

SCOUT MEDIA, INC., a Delaware corporation; CRAIG and JANE DOE MALLITZ, and their marital community; CRAIG AMAZEEN, an individual; JOE and JANE DOE ROBINSON, and their marital community; TAMMER and JANE DOE FAHMY, and their marital community; PILOT GROUP GP, LLC, a Delaware corporation; and JOHN and JANE DOES 1 through 8,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellants' Petition for Discretionary Review fails to satisfy any provision of RAP 13.4(b) and should be denied. The Court of Appeals decision does not conflict with a decision of this Court nor does it conflict with any published decision of the Court of Appeals.[1] Likewise, neither the Court of Appeals decision nor the Petition presents any constitutional question. Finally, there is no issue of substantial public interest.

In short, Washington employers are not required to pay employees for unused vacation time or PTO unless the employer agrees to do so. There is no statutory right to PTO or to the payment of accrued PTO. Instead, any such right is a matter of contract or reliance. And if an employer chooses to offer payments of accrued PTO, it may also reasonably condition any such entitlement.

This is why, during all relevant times—and, as the Court of Appeals noted, as of October 7, 2019—the Washington State Department of Labor & Industries ("DLI") expressly advised employees and the public at large that "[p]aid vacation, holiday, and severance pay are considered voluntary benefits that a business may choose to offer workers" and

[1] The Court of Appeals decision ("Op.") is Appendix A to the Petition for Review. *See also Sornsin v. Scout Media, Inc.*, __ Wn.App. __, 450 P.3d 193 (2019).

"Washington State law does not require a business to provide these benefits."[2]

In this case, it is undisputed that Scout had a written Employee Manual that stated a specific policy regarding payment of accrued PTO. The Employee Manual provides that Scout will pay employees for PTO accrued at employment end, subject to and conditioned upon an employee's giving the company two weeks' notice of termination. Appellants admittedly failed to satisfy this express condition.

Scout had an express policy regarding the condition precedent to an employee's entitlement to payment of accrued PTO. The Appellants failed to comport with the straight-forward requirement of that policy. Under the applicable law, and given the undisputed facts, Appellants' claims for accrued PTO were properly dismissed by the trial court and the Court of Appeals affirmed. The Petition should be denied.

II. COUNTERSTATEMENT OF CASE

A. The Scout Employee Manual.

Appellants are former employees of Defendant Scout Media, Inc. ("Scout").[3] CP 2 at ¶¶ 1-11, CP 126, 128, 129, 132.

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[2] Op. at 7-8; *Sornsin*, 450 P.3d at 196 and n.22.

[3] Scout is a defunct corporate entity that entered bankruptcy prior to the filing of the underlying Complaint. *See In re: Scout Media, Inc.*, No. 16-

During Appellants' employment tenure with Scout, the company had an Employee Manual, which addressed a variety of employment-related topics, including "Paid Time Off" ("PTO"). CP 187 at ¶¶ 2-4 and CP 192-232; CP 234 at ¶¶ 2-4 and CP 238-273.[4]

The Employee Manual specifically addresses "PTO Pay Upon Termination." CP 187 at ¶ 4 and CP 220; CP 23 at ¶ 4 and CP 266. In relevant part, it states that (a) "Employees will be paid out 70% of PTO they have accrued at employment end;" and (b) "Scout reserves the right to withhold any and all PTO time if an employee neglects to give a two week notice of termination regardless of position or length of service." *Id.*

B. The Employees Resigned Without Notice.

On Sunday, July 10, 2016, the bulk of Scout's technology team resigned *en masse* and without notice, including the Appellants in this case. CP 187 at ¶ 7; CP 234 at ¶ 5; CP 301-311.

C. Scout Paid All Accrued Wages.

Following Appellants' resignation from Scout, company management took steps to ensure that the former employees were paid all

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13369-MEW, United States Bankruptcy Court for the Southern District of New York. Scout is a named defendant but never appeared in this action.

[4] *See also* CP 278 at ¶ 4; CP 282 at ¶ 4; and CP 289 at ¶ 5. The Scout Employee Manual was updated in April 2014 and was not revised or modified thereafter. CP 187 at ¶ 5; CP 235 at ¶ 4.

wages earned as of the date of resignation—and Appellants were, in fact, paid. CP 234 at ¶ 7; *see also* CP 293 at ¶ 6 and CP 316-321.

Scout did not pay any of the Appellants accrued PTO upon their resignation from Scout because these employees resigned without notice. CP 187 at ¶ 7; CP 234 at ¶ 5; RP 6:6-15. As a result, they failed to satisfy the payment requirement stated in the Employee Manual—*i.e.*, they failed to give Scout two weeks' notice. CP 189 at ¶ 14 and CP 220; CP 235. at ¶ 12 and CP 266. No accrued PTO was due. *Id.*

D. The Lawsuit.

The Complaint alleged wage claims and a claim for unjust enrichment against Scout for: unpaid bonuses ostensibly due Plaintiffs William Sornsin and Marc Beck; and unpaid accrued PTO ostensibly due to all Plaintiffs.[5] CP 5-7 at ¶¶ 36-46. Plaintiffs dismissed with prejudice their claims arising from alleged unpaid bonuses. CP 295 at ¶ 21.

E. The Dispositive Motions.

In February 2918, Plaintiffs and Defendants Craig Mallitz, Craig Amazeen, Joe Robinson, Tammer Fahmy, and Pilot Group GP, LLC filed

[5] The Plaintiffs sought to impose derivative liability under the wage statutes against (a) Craig Amazeen (the former President of Scout); (b) Craig Mallitz, Joe Robinson and Tammer Fahmy (former Directors of Scout Media Holdings, Inc., the parent of Scout); and (c) Pilot GP, LLC (a former investor in Scout Media Holdings, Inc.). CP 1-8.

cross-motions for summary judgment. CP 144-150; CP 166-181. The motions were briefed and argued to the trial court on March 9, 2018. *Id*., CP 615-625; CP 627-636; CP 644-648; CP 650-657; CP 663; RP 4-14.

The Court granted Defendants' motion and denied Plaintiffs' motion. CP 664-665; CP 666-667.

F. The Court of Appeals Decision.

The Court of Appeals affirmed the trial court. In relevant part, the Court of Appeals held as follows:

- The Washington cases that that Appellants rely upon regarding a purported statutory entitlement to payment of accrued PTO do not stand for this proposition.[6]
- This Court's opinion in *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 93 P.3d 108 (2004) does not concern accrued PTO or a statutory right to PTO.[7]
- "Appellants cite no case, treatise or other authority directly supporting their claim that they have an affirmative statutory entitlement to payment for their accrued PTO."[8]
- "Appellants cite no authority to counter the proposition that in Washington an employee's right to payment for accrued PTO is only contractual."[9]

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[6] Op. at 4; *Sornsin*, 450 P.3d at 194-95 (discussing *Naches Valley Sch. Dist. No. 3 v. Cruzen*, 54 Wn.App. 388, 775 P.2d 960 (1989) and *McGinnity v. AutoNation, Inc.*, 149 Wn.App. 277, 202 P.3d (2009)).

[7] Op. at 5-6; *Sornsin*, 450 P.3d at 195.

[8] Op. at 6; *Sornsin*, 450 P.3d at 195.

[9] Op. at 7; *Sornsin*, 450 P.3d at 196 (emphasis supplied).

III. ARGUMENT

A. There Is No Statutory Entitlement to Payment of Accrued PTO under Washington Law.

Appellants previously argued that "Washington law has long recognized accrued PTO for both sick and vacation wages under RCW 49.8.030."[10] But, as noted above, the Court of Appeals squarely rejected this argument and ruled that the cases Appellants relied upon did not support them. Op. at 4; *Sornsin*, 450 P.3d at 194-95.[11] Simply put, there is no statutory or other legal requirement for a Washington employer to pay accrued PTO to its employees.

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[10] *See* Appellants' Opening Brief in the Court of Appeals at 5.

[11] Consistent with black-letter contract law, *Cruzen* holds that teachers are entitled to payment for unused sick leave if their employment contract—a collective bargaining agreement (CBA) with the school district—provides such a benefit. 54 Wn. App. at 396. The entitlement in *Cruzen* was contractual, not statutory. Once embodied by contract, the entitlement can be deemed a form of "wages" for purposes of RCW 49.48.030, which provides for an award of attorneys' fees. *Id.* at 399. But this is a separate issue from whether payment of accrued PTO is mandated by the wage statutes in the first instance. *McGinnity*, the other case Appellants rely upon, is of a piece with *Cruzen—i.e.*, the right at issue was contractual not statutory—and the Court of Appeals declined to review the arbitrators finding that "vacation time does not constitute wages under Washington law." 149 Wn.App. at 280-283. *See also Teamsters, Local 117 v. Northwest Beverages, Inc.*, 95 Wn.App. 767, 769, 976 P.2d 1262 (1999) (sick leave under collective bargaining agreement did not constitute vested compensation, but was contingent benefit; and "a legislative purpose to convert contingent benefits into wages due is simply not found in RCW 49.48.010 or in the Minimum Wage Act, RCW 49.46[.]").

Under Washington law, an employee's right to PTO or to the payment of accrued PTO is contractual, and subject to the employer's discretion. *See, e.g., Walters v. Ctr. Elec. Inc.*, 8 Wn. App. 322, 327, 506 P.2d 883 (1973) (holding that the right to receive accrued vacation pay is "obtainable contractually through the employment contract," and reversing trial court judgment for accrued vacation pay).[12]

In an effort to avoid Scout's stated policy—and the clear notice requirement that is the condition precedent to receiving payment for accrued PTO—Appellants now argue that the Scout Employee Manual "created a statutory right to payment for accrued PTO because such payments are 'directly tied to hours worked.'" Pet. at 6 (citing *Hisle*, 151 Wn.2d at 163). This novel argument has no support in the law.

In relevant part, *Hisle* holds that a retroactive payment provision in a collective bargaining agreement is subject to Washington's Minimum

[12] This is consistent with other jurisdictions. *See, e.g., Chipman v. Northwest Healthcare Corporation, Applied Health Services, Inc.*, 317 P.3d 182 (Mont. 2014) ("[t]he right to earn compensation for personal time may be subject to reasonable restrictions and conditions precedent;" affirming summary judgment dismissing employee claims for payment of accrued sick-leave); *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117 (Minn. 2007) (Minnesota law does not require PTO and employers are permitted to set conditions on the right to PTO, including payment of accrued PTO; reversing court of appeals and reinstating summary judgment in favor of employer regarding employee claim for payment of accrued vacation time).

Wage Act, RCW 49.46, *et seq.* (MWA). 151 Wn.2d at 857.[13] The CBA at issue in *Hisl*e provided for "[r]etroactive payments of $.60 for each non-Washington State Ferry Project attendance hour from August 1, 1996 until the execution date of the contract[.]" *Id.* at 858. That is, as in *Cruzen* and *McGinnity*, the "wage" entitlement in *Hisle* was a function of a specific contractual right.

The particular "wage" claim in *Hisle* concerned an asserted entitlement to overtime under RCW 49.46.130(1). 151 Wn.2d at 861. And because the contractual payment provision in the CBA was "tied to hours worked," the court held that it was "subject to the overtime provisions of the MWA." *Id.* at 862-63.

This outcome is both unsurprising and irrelevant to this case. *Hisle* does not concern accrued PTO, much less a contingent right to PTO, and its factual context is entirely distinguishable. Nor does *Hisle* stand for the proposition that a contractual benefit that is somehow "tied to hours worked" automatically becomes a "wage" with statutory entitlement. Neither the statutory definition of "wage" in RCW 49.46.010 nor the

[13] The CBA provided for "[r]etroactive payments of $.60 for each non-Washington State Ferry Project attendance hour from August 1, 1996 until the execution date of the contract[.]"

holding of *Hisle,* which concerns a statutory entitlement to overtime wages, has any bearing on the facts to this case.

B. Whether Washington' Statutory Scheme Should Be Altered to Provide Additional Employee Benefits is a Legislative Matter.

Appellants argue that Washington statutory framework should be altered so that accrued PTO is a vested benefit and statutory right because "on this issue, Washington is several decades behind other westerns states as well as a number of other states." Pet. at 7.

In this respect, Appellants assert that Louisiana and Nebraska both "mandate the payment of accrued PTO by express statutory language." Pet. at 7. Appellants also assert that courts in Idaho, Oregon and California have interpreted those states' respective statutes to provide for payment of accrued PTO. *Pet.* at 8-10. Appellants thus argue that the Scout Employee Manual's "arbitrary denial of full compensation for accrued PTO would be precluded in all of the above-mentioned states." *Id.* at 10.

The statutory schemes of other states have no bearing on Washington' statutory scheme and do not create a matter of "substantial public interest" for Washington citizens that requires resolution by this

Court.[14] The question of whether Washington's statutory scheme should be altered in the future is a matter properly delegated to the Legislature.

IV. CONCLUSION

Under applicable Washington law, there is no unconditional statutory entitlement to payment of accrued PTO when an employee terminates his or her employment. The trial court correctly dismissed Appellants' Complaint and the Court of Appeals affirmed. This Court should deny the Petition.

DATED: December 13, 2019.

SAVITT BRUCE & WILLEY LLP

By: */s/ Stephen C. Willey*
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Attorneys for Respondents Craig Mallitz, Craig Amazeen, Joe Robinson, Tammer Fahmy, and Pilot Group GP, LLC

[14] *Cf.*, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) ("This case presents a prime example of an issue of substantial public interest" because "the Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue."); *In re Marriage of Ortiz*, 108 Wn.2d 643, 644–46, 740 P.2d 843 (1987) (discretionary review granted because case involved issue of substantial public interest—*i.e.*, "whether a custodial parent, or that parent's assignee, must repay the noncustodial parent for all payments made by the noncustodial parent pursuant to an invalid escalation clause in a child support decree").

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of the foregoing document to be served on the following in the manner(s) indicated:

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DATED this 13th day of December, 2019 at Seattle, Washington.

Gabriella Sanders
Gabriella Sanders

SAVITT BRUCE & WILLEY LLP

December 13, 2019 - 12:42 PM

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