

Court of Appeals, Division III No. 347150
Benton County Superior Court No. 13-2-02946-1

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

CHARLES PEIFFER,

Respondent / Cross-Appellant,

v.

PRO-CUT CONCRETE CUTTING AND BREAKING, INC. (UBI No.
602427891); KELLY R. SILVERS and ERIN SILVERS, husband and
wife and the marital community comprised thereof,

Appellants / Cross-Respondents.

APPELLANTS/CROSS-RESPONDENTS' OPENING BRIEF

George E. Telquist, *WSBA 27203*
Jillian A. Harlington, *WSBA 48136*
TELQUIST McMILLEN CLARE, PLLC
1321 Columbia Park Trail
Richland, WA 99352
George@tzmlaw.com
Jillian@tzmlaw.com
Attorneys for Appellants / Cross-Respondents

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I. ASSIGNMENTS OF ERROR

A. Tolling of the Three-Year Statute of Limitations.

Defendants assign error to the trial court's ruling that the three-year statute of limitations pertaining to Plaintiff's wage claim was tolled pending the Department of Labor and Industries Investigation. Defendants respectfully request that this Court dismiss the Plaintiff's claims prior to November 22, 2010 on the basis that substantial evidence does not support the tolling of the statute of limitations relative to Plaintiff's wage claim.

B. Award of Attorney Fees.

Defendants further assign error to the trial court's award of attorney fees. Since Plaintiff is not entitled to recover wages prior to November 22, 2010, and because Defendants stipulated to Plaintiff's calculation of the wages owed from November 22, 2010 on, Plaintiff is not entitled to attorney fees.

C. Award of Tax Consequences.

Defendants also assign error to the trial court's award of tax consequences. Plaintiff is not entitled to recover funds from the Defendants to cover his tax obligations with respect to the wages owed. In the alternative, since Plaintiff is not entitled to recover wages prior to

November 22, 2010, the trial court's calculation of Plaintiff's tax consequences is inaccurate.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Tolling of the Three-Year Statute of Limitations.

Whether employees may benefit from the tolling provision in RCW 49.48.083(5) when:

1. The employee withdraws his claim from the Department prior to the issuance of a preliminary citation and notice of assessment, in derogation of RCW 49.48.085(1); and
2. The employee withdraws the claim from the Department prior to the Department notifying the employer that the claim has been otherwise resolved.

B. Award of Attorney Fees.

Whether the exception to the award of attorney fees provided for in RCW 49.48.030 prohibits Plaintiff from recovering attorney fees when Defendants admitted to the amount owed to the Plaintiff from November 22, 2010 on.

C. Award of Tax Consequences.

Whether tax consequences are a recoverable element of damages in wage disputes.

III. STATEMENT OF THE CASE

Plaintiff Charles Peiffer, (“Mr. Peiffer”) was employed as a slab-saw operator for Defendant Pro-Cut Concrete Cutting and Breaking, Inc. (“Pro-Cut”) and its owners Kelly Silvers (“Mr. Silvers”) and Erin Silvers (“Mrs. Silvers”), (collectively referred to herein as “Defendants”). RP 19:8-15; 215:9-16. Mr. Peiffer worked off and on for Pro-Cut, at times being fired, and other times resigning, from approximately 1989 until June 9, 2012, when he resigned for the final time. RP 233:1-234:25; 237:18-20. Mr. Silvers and Mr. Peiffer worked with one another as employees at Pro-Cut from approximately 1992 (when Mr. Silvers was hired) until Mr. Silvers obtained ownership of the company in 2004. RP 19:11-12; 54:1-18; 233:5-10.

Mr. Peiffer’s claims in this matter arise predominantly out of two wage disputes: (1) Pro-Cut’s travel policy which did not allow employees to receive pay for the first ½ hour and last ½ hour of drive time to job sites outside the Tri-Cities community, which Mr. Silvers had himself been subject to as an employee since 1992, and (2) Pro-Cut’s alteration of Mr. Peiffer’s time cards, which occurred when dispatch believed Mr. Peiffer was being dishonest or inaccurate in his reporting. RP 29:8-30:2; 32:5-17. Rather than dispute either of these claims, Pro-Cut took the position that it indeed owed Mr. Peiffer back wages, however, it was not known what

amount. *See* CP at 122 (Exhibits 4-8, Defendants' Stipulations on Amounts Owed).

Mr. Peiffer filed a claim with the Department of Labor and Industries ("Department") on approximately July 3, 2012. RP 173:13-18. It is the Department's goal to have wage claims resolved within 60 days after their initiation. RP 175:11-18. This timeframe is for the purpose of protecting employer's right to a quick adjudication. RP 188:2-3. At the initiation of the Department's investigation of the present claims, Mr. Peiffer supplied the Department with a box full of invoices, time cards, and pay stubs. RP 175:1-7. The Department informed Mr. Peiffer repeatedly over the course of 11 months that he needed to provide a calculation of the wages he believed he was owed. RP 196:14-201:2. In response, Mr. Peiffer repeatedly requested that the Department employees come up with a number and he will just agree to it, reiterating that he just wanted to get paid but didn't want to do any of the calculations. *Id.*

Ultimately, Mr. Peiffer withdrew his claim from the Department on November 26, 2013, 16 months after it was initiated, without ever having calculated what he believed he was owed. RP 188:22-189:12. This withdrawal was not a termination, which is a term of art used by the Department. *Id.* In fact, the Department sends employees a form letter notifying them that in order to retain their right to file a lawsuit, the

employee must opt out within 10 days after the issuance of the citation.
RP 186:1-187:9.

At the time the claim was withdrawn, Defendants still had not ever been notified that Mr. Peiffer had made a claim to the Department. RP 179:7-9. The Department never issued a citation and notice of assessment. RP 187:10-12. Thereafter, Mr. Peiffer filed this lawsuit.

On February 3, 2015, Defendants submitted a stipulation to the Court of the amount of wages they believed they owed Mr. Peiffer. CP 122. Mr. Peiffer did not accept this amount, and also did not provide the amount he believed he was owed. Thus, on October 27, 2015, with the first trial nearing, Defendants assumed their calculation had been in error and upped their stipulation to \$25,000 in an attempt to guess the amount owed. *Id.*

Following Defendants' second stipulation, and with the first trial date nearing, Mr. Peiffer finally sent his calculation to the Defendants, and on November 5, 2015, the Defendant filed with the Court a stipulation admitting to the entire sum claimed by Mr. Peiffer at that time-- \$42,517.28. Mr. Peiffer did not accept this amount and the trial was continued to May 2016. In the days leading up to the May 2016 trial, Mr. Peiffer, through his counsel Alicia Berry, provided an updated ledger of the amount due and owing, which included interest calculations that had

increased since the November stipulation. CP 50-51. Days later, Defendants again stipulated to the amount Mr. Peiffer asserted he was owed, and incorporated Mr. Peiffer's new interest calculation. CP 122. Mr. Peiffer once again did not accept this stipulation and the parties proceeded to trial. In preparing for trial, Defendants discovered Mr. Peiffer had not properly tolled the statute of limitations, at which time Defendants recalculated wages due and owing based on the 3-year statute of limitations, and stipulated to that amount--\$19,964.84. *Id.*

IV. ARGUMENT

A. The Applicable Three-Year Statute of Limitations for Plaintiff's Wage Claim Did Not Toll During the Department of Labor and Industries Investigation and thus, Plaintiff's Wage Claims Only Relate Back to November 2010.

Mr. Peiffer withdrew his wage claim from the Department of Labor and Industries ("The Department") investigation prior to the issuance of the Department's assessment and citation, and prior to the matter being resolved by alternate means. Consequently, the three-year statute of limitations did not toll during the pendency of the investigation and Plaintiff's wage claims prior to November 22, 2010 must be dismissed.

1. The applicable statute of limitations in wage claims is three years.

A statute of limitations defense is an affirmative defense for which the defendant bears the burden of proof. *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 172, 252 P.3d 909 (2011). The Washington State Supreme Court has made clear that wage violation claims are limited by a three-year statute of limitations. *Seattle Professional Engineering Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000) (stating “employees are in essence seeking recovery under an obligation imposed by law ... As such, the employees’ claims are subject to the three-year statute of limitations ...”).

The present lawsuit was filed on November 22, 2013. Consequently, the application of the three-year statute of limitations confines Mr. Peiffer’s recovery in this wage dispute to sums allegedly unpaid from November 22, 2010 until the filing of the lawsuit in 2013. Any alleged wage violations which occurred prior to November 22, 2010 are outside the three-year statute of limitations and cannot be pursued by Mr. Peiffer. The Defendants have met their initial burden for this affirmative defense and Mr. Peiffer’s claims must be limited to the three years preceding the filing of this lawsuit.

2. Mr. Peiffer failed to allow the Department to complete its investigation, and as such, he cannot assert the application of the statutory tolling period.

Mr. Peiffer asserts that a tolling statute applies to his wage claims. Tolling statutes “are in tension with policies supporting a strict application of the statute of limitations. Exceptions are strictly construed and courts are reluctant to read into a statute of limitation an exception not clearly articulated. [The court] cannot read into the tolling statute a broader exception than is expressly granted.” *Bennett v. Dalton*, 120 Wn. App. 74, 85-86, 84 P.3d 265 (2004) (internal citations omitted). A plaintiff asserting an exception to the statute of limitations bears the burden of proving that the tolling provision applies. *Cortez-Kloehn*, 162 Wn. App. at 172.

In the present matter, the trial court erred in interpreting the requirements of the tolling provision contained in RCW 49.48.083(5). Issues of statutory interpretation are reviewed *de novo*. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The courts' fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Id.* If a statute's meaning is plain on its face, then the courts give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). A statute's plain meaning is discerned not

only from the provision in question, but also from closely related statutes and the underlying legislative purposes. *Id.* at 242. If a statute is susceptible to more than one reasonable interpretation after this inquiry, then the statute is ambiguous and the court may resort to additional canons of statutory construction or legislative history. *Campbell & Gwinn*, 146 Wn.2d at 12.

Plaintiff invokes RCW 49.48.083(5), which provides that the statute of limitations for wage claims is tolled during the pendency of the Department's investigation into an employee's claim. However, it is clear from the plain language of the statute and its legislative history that when the Department does not conclude an investigation due to the employee's actions, the statute of limitations does not toll.

The wage claim tolling statute reads, in pertinent part, as follows:

The applicable statute of limitations for civil actions is tolled during the department's investigation of an employee's wage complaint against an employer. For the purposes of this subsection, the department's investigation begins on the date the employee files the wage complaint with the department and ends when: (a) The wage complaint is finally determined through a final and binding citation and notice of assessment or determination of compliance; or (b) the department notifies the employer and the employee in writing that the wage complaint has been otherwise resolved or that the employee has elected to terminate the department's administrative action under RCW 49.48.085.

RCW 49.48.083(5).

Thus, by the plain language of the statute, the tolling period is the definite period of time from when the Department first receives the employee's complaint, until the investigation results in: (1) a final and binding citation and notice of assessment, (2) a determination of compliance, (3) the Department's notice that the matter has been otherwise resolved, or (4) the employee following the procedure in RCW 49.48.085 for termination. *Id.* Mr. Peiffer, who has the burden of proof as to tolling, cannot show that any of these four instances occurred. This is significant, considering the court "cannot read into the tolling statute a broader exception than is expressly granted." *Bennett*, 120 Wn. App. at 85-86. In the present case, the Department's investigation never "ended" pursuant to the terms of the statute. Thus, Mr. Peiffer cannot avail himself of the tolling provision.

a. The Department did not issue a final and binding citation and notice of assessment, did not issue a determination of compliance, and did not issue a notice that the matter was otherwise resolved.

First, it is undisputed that a determination of compliance was never issued. Similarly, there was never final and binding citation and notice of assessment as is required under RCW 49.48.083(5)(a). In fact, pursuant to RCW 49.48.084(4) and (5), preliminary citations and notices of assessment issued by the Department do not become final and binding

until either the time for appeal expires or after appeal is taken and a final order is issued.

In Mr. Peiffer's case, the Department never made even a preliminary determination, nor did it issue a preliminary citation or notice of assessment. The Department's actions in this case fall well short of final and binding. As a result, RCW 49.48.083(5)(a) does not apply.

It is also undisputed that the Department never "notified the employer [Defendants] and the employee [Mr. Peiffer] in writing that the wage complaint had been otherwise resolved", as required by RCW 49.48.083(5)(b).

b. Mr. Peiffer did not terminate the Department's investigation pursuant to RCW 49.48.085.

It is anticipated that Mr. Peiffer will argue that he terminated the Department's investigation. Although it is true that Mr. Peiffer withdrew his complaint from the Department, such withdrawal does not satisfy the "termination" requirement under RCW 49.48.085, as incorporated by RCW 49.48.083(5)(b). RCW 49.48.085 reads in relevant part as follows:

An employee who has filed a wage complaint with the department may elect to terminate the department's administrative action, thereby preserving any private right of action, by providing written notice to the department within ten business days after the employee's receipt of the department's citation and notice of assessment.

RCW 49.48.085(1) (emphasis added).

It is undisputed that Mr. Peiffer never received a citation and notice of assessment because one was never issued by the Department. Thus, not a single instance constituting the “end” of the Department’s investigation ever occurred. So, the question becomes, what did the legislature intend if the “end” of the tolling period is never triggered?

In its wisdom, the legislature designed the specificities of the tolling statute with the purpose of encouraging employees to see the Department’s investigation through to the end. Otherwise, employees could simply initiate the Department’s investigation, fail to meaningfully assist in the investigation, thereby artificially tolling the statute of limitations indefinitely. This result encourages employees to abuse the resources of the Department to their own strategic advantage, and deprives employers of the finality of a Department decision they can act upon to remedy their mistake.

In this matter, the only reason the Department was unable to make a preliminary finding, which would trigger the procedural finality of the investigation, is because Mr. Peiffer failed to participate in the investigation and withdrew his claim from the Department before any such determination could be made. As explained in the following pages, the legislature intended to avoid allowing employees such as Mr. Peiffer from availing themselves of the tolling provision without giving the employer

the benefit of the Department's findings. Thus, because he did not allow the Department to reach a conclusion, Mr. Peiffer cannot now take advantage of the tolling of the statute of limitations in this matter.

c. The Legislature did not intend for tolling to apply unless the Department completed its investigation and rendered a finding.

Ultimately, there is nothing ambiguous in the language of RCW 49.48.085(1). An employee who wishes to pursue a private right of action after initiating a Department investigation can either, (1) wait until a citation and notice of assessment is issued and terminate his or her claim "within 10 days after" the receipt of the same; or (2) lose their ability to preserve the portion of the right of action that tolls during the investigation. It is anticipated that Mr. Peiffer will argue that statutory interpretation is required to ascertain the legislature's intent. The legislative history of this statute provides a clear view into that intent, and the result is both logical and reasonable, and in line with the plain meaning of these provisions.

In promulgating RCWs 49.48.085(1) and 49.48.083(5), the legislature chose its words with specificity. An employee may only preserve their private right of action by terminating "the department's administrative action ... by providing written notice to the department

within ten business days after the employee's receipt of the department's citation and notice of assessment. RCW 49.48.085(1) (emphasis added).

Notably, prior drafts of the termination provision omit the word "after" when referring to termination of the Department's action. *See* Wa. H.R. B. Rep., 2006 Reg. Sess. H.B. 3158. In other words, the legislature ensured that the finality of the Department's determination was required in every instance under the tolling provision.

The court has the following options under the tolling statute in this instance:

1. Find that Mr. Peiffer did not adhere to RCW 49.48.085(1) and thus the statute of limitations is still tolling to this day;
2. Give no effect to the legislature's intent to include the word "after" in RCW 49.48.085(1); or
3. Find that the Plaintiff cannot avail himself of the tolling allowed under RCW 49.48.083(5) for cases that have been fully adjudicated by the Department.

The only reasonable result is that Plaintiff has not met the requirements of RCW 49.48.083(5), and thus cannot avail himself of the tolling of the statute of limitations provided for therein. In providing an avenue for the Department to intervene in wage complaints, the legislature sought to give individuals with limited means a voice against employers even if they couldn't hire counsel. To allow employees to toll the statute

of limitations indefinitely is both unjust and in stark contrast to the courts' preference for strict adherence to the limitation of actions.

This logical conclusion is well known within the Department. In fact, on July 3, 2012, the Department specifically notified Plaintiff that in order to preserve his claims, he would be required to withdraw only during this 10-day period:

Important note about your rights: *If you choose to opt out, you are required to notify L&I in writing within 10 days of the date on the citation. If you don't opt out within this 10-day period, you will lose the right to withdraw your complaint and file a private lawsuit – even if L&I is unable to collect your money.*

This case serves as a perfect example of why the legislature requires employees to see the investigation through to its conclusion rather than allowing an employee to benefit from misusing the Department's resources. Not only did Mr. Peiffer withdraw his claim from the Department prior to any conclusion being reached, he also failed to meaningfully participate in the Department's investigation. For months on end, Mr. Peiffer refused to participate in a calculation of the wages he believed he was owed, and demanded that Department staff make up a number for him. Mr. Peiffer now argues that he can create a self-serving situation by obstructing the investigation of a claim he asserted.

If Mr. Peiffer's position is correct, employees could simply initiate the Department's investigation, fail to meaningfully assist in the investigation, thus tolling the statute of limitations indefinitely. This result would fundamentally change wage litigation to benefit attorneys (not employees), to the detriment of well-meaning employers. Attorneys hired to represent employees with potential wage claims would be able to have their clients initiate a Department investigation, reap the benefits of the Department's investment of its limited resources into that investigation, and withdraw short of a final determination. This deprives the employer of the opportunity to know the validity and of and the amount due under an employee's wage claim. Because a final determination is never reached, the employer is then subjected to the sort of hide-the-ball tactics present in this case, where the employer attempts to guess at what is owed to the employee and the employee stays silent until essentially the eve of trial, racking up attorney fees unnecessarily. This is nothing more than a thinly veiled money grab for attorney fees, which does not benefit the employer or the employee.

Because Plaintiff filed this case on November 22, 2013, his recovery is limited to wages earned from November 22, 2010 and later. Plaintiff's claim for wages owed prior to November 2010 must be dismissed.

B. Defendants Stipulated to Mr. Peiffer's Calculation of Wages Due from November 22, 2010 on and thus, Mr. Peiffer is Not Entitled to Any Attorney Fees.

Many Washington statutes give a trial court the authority to assess attorney fees as taxable costs in wage disputes. Another statute, RCW 49.48.030, takes away the trial court's authority under certain circumstances. These circumstances are present in this case, and as such, the trial court erred in awarding Mr. Peiffer's attorney fees.

RCW 49.48.030 reads as follows:

In any action in which a person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

RCW 49.48.030 (emphasis added).

In the present case, Defendants admitted that Mr. Peiffer is entitled to \$31,631.69. This number represents Mr. Peiffer's own calculation of back wages and interest due from November 22 2010 forward. Because the trial court applied the tolling provisions of RCW 49.48.083(5), wages were awarded as far back as July 3, 2009. Thus, the provision found in RCW 49.48.030 which limits attorney fees to those cases where an employer does not admit to owing the amount recovered was not applied

at the trial court level. However, because the trial court erred in misinterpreting the legislature's intent and applying the tolling statute, RCW 49.48.030 applies to the present case and prohibits an award of attorney fees to Mr. Peiffer.

Further, by virtue of refusing to participate in quantifying the amount he believes he is owed Mr. Peiffer has waived his right to attorney fees, or alternatively should be estopped from being able to recover these fees. Throughout the course of the Department's 16-month investigation, Mr. Peiffer refused to participate. The initial burden is on the employee to establish what is owed. Instead of assisting in the investigation, Mr. Peiffer demanded that Department staff "come up with a number" for him to agree to. If the Department had finished its investigation, Defendants would have known what they needed to pay Mr. Peiffer to not be liable for attorney fees. However, Mr. Peiffer withdrew his claim before this happened, thereby depriving Defendants of a meaningful opportunity to admit what they owed.

Once Mr. Peiffer brought his grievances to the Court, he continued to hide the ball. By February 2015, Mr. Peiffer had refused to provide the Defendants with an amount he believed he was owed. In an effort to admit what was owing, Defendants went through Mr. Peiffer's paystubs and records and on February 4, 2015 made an admission for the amount

they believed was owed—\$17,316.83. Defendants have always sought to pay what wages were owed, but Mr. Peiffer has refused to participate in the hopes of obtaining his attorney fees and double damages.

Once Mr. Peiffer finally submitted a number to the Defendants in October 2015, they immediately admitted to the entire \$42,517.28 Mr. Peiffer claimed to be owed, and included pre-judgment interest in this calculation (which is not required under the statute, but explains the significant change). Notably, this admission was never acted upon by Mr. Peiffer. Presumably, Mr. Peiffer wanted to recover attorney fees, and only proceeded to trial in order to obtain them. Upon discovering that Mr. Peiffer failed to properly toll the statute of limitations, Defendants decreased this number to reflect claims from November 22, 2010 until the Plaintiff quit—\$31,631.69.

Mr. Peiffer is not entitled to attorney fees due to Defendants' admission of the amount in controversy. Alternatively, Mr. Peiffer should be estopped from benefitting from his refusal to clearly delineate with either the Department or Defendants what he was owed. Defendants never disputed the amount Mr. Peiffer presented them with, except on statute of limitations grounds. They have at all times accepted Mr. Peiffer's calculations and have offered judgment consistent with the same. Mr. Peiffer's award for attorney fees must be overturned.

C. Mr. Peiffer Cannot Recover His Tax Burden as Damages under the Wage Statutes.

The trial court erred in awarding Mr. Peiffer an additional \$8,784.00, to cover the tax consequences Mr. Peiffer would realize as a result of his recovery of wages in this case. The trial court had no basis to cause Defendants to pay Mr. Peiffer's tax liabilities.

Washington's wage statutes are specific as to the types of damages recoverable, and the broad category of "actual damages" are not authorized by any of them. Under the Minimum Wage Act, RCW 49.46.090, states that employees are only entitled to "the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs such as reasonable attorney's fees as may be allowed by the court." RCW 49.46.090.

Under the wage rebate statutes, the same is true. RCW 49.52.070 specifically states the recovery employees are entitled to for violations under the chapter. RCW 49.52.070 ("Any employer ... who shall violate [the withholding and rebating statute] shall be liable ... for twice the amount of wages unlawfully rebated or withheld by way of exemplary damages, together with the costs of suit and a reasonable sum for attorney's fees."). The fact that "actual damages" as a category is not

authorized by statute as an element of an employee's damages is pivotal to this analysis.

In *Blaney*, the court examined the Washington Law Against Discrimination ("WLAD") statutes to determine whether the plaintiff was entitled to receive compensation for the adverse tax consequences of his award at trial. *Blaney v. International Assn. of Machinists and Aerospace Workers Dist. No. 160.*, 11 Wn. App. 80, 94, 55 P.3d 1208 (2002). The Court began by distinguishing "actual damages" (which are recoverable under the WLAD, but not under the wage statutes), from itemized damages that are specific in nature such as nominal, exemplary, and punitive damages. *Id.* Ultimately, the Court concluded that in order to be able to recover damages relative to the adverse tax consequences of a money award, the cause of action which the Plaintiff prevailed on must specifically provide for recovery of "actual damages." *Id.* at 98.

As discussed above, the wage claims asserted by Mr. Peiffer offer very specific types of damages by statute. None of the wage statutes authorize recovery of "actual damages" and instead allow recovery only of the money owed to the employee and, in special circumstances, exemplary damages and attorney fees. Mr. Peiffer is not entitled to damages relative to his tax burden as a result of his wage withholding claims.

V. CONCLUSION

Based on the foregoing reasons and argument of counsel, the Court should determine that the statute of limitations was not tolled, and thus Mr. Peiffer is not entitled to attorney fees, and should further find that adverse tax consequences were not recoverable.

RESPECTFULLY SUBMITTED this 6th day of September, 2017.

TELQUIST McMILLEN CLARE, PLLC

By: _____


GEORGE E. TELQUIST, WSBA #27203

JILLIAN A. HARLINGTON, WSBA #48136

Attorneys for Appellants

1321 Columbia Park Trail

Richland, WA 99352

(509) 737-8500

(509) 737-9500 – fax

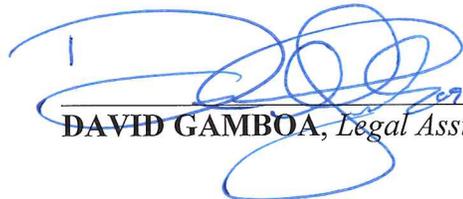
george@tzmlaw.com

jillian@tzmlaw.com

CERTIFICATE OF SERVICE

On the 6th day of September, 2017, I caused to be served a true and correct copy of the within document described as OPENING BRIEF to be served on all interested parties to this action as follows:

Alicia Berry Liebler, Connor, Berry & St. Hilaire The Edison Professional Building 1141 North Edison, Suite C P.O. Box 6125 Kennewick, WA 99336 Facsimile: (509) 735-3585 E-Mail: aberry@licbs.com <i>Co-Counsel for Respondent</i>	Via United States Mail [] Via Legal Messenger Service [] Via Hand Delivery [X] Via Facsimile [] Via Electronic Mail []
Brian G. Davis Leavy, Schultz, Davis, P.S. 2415 West Falls Avenue Kennewick, WA 99336 Facsimile: (509) 736-1580 E-Mail: bdavis@tricitylaw.com <i>Co-Counsel for Respondent</i>	Via United States Mail [] Via Legal Messenger Service [] Via Hand Delivery [X] Via Facsimile [] Via Electronic Mail []



DAVID GAMBOA, *Legal Assistant*

TELQUIST MCMILLEN CLARE, PLLC

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Comments:

Sender Name: Carla Gonzales - Email: carla@tzmlaw.com

Filing on Behalf of: Jillian Cook - Email: jillian@tzmlaw.com (Alternate Email:)

Address:
1321 Columbia Park Trail
Richland, WA, 99352
Phone: (509) 737-8500

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