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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 347150

IN THE COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

CHARLES PEIFFER,

Respondent / Cross Appellant,
v.

PRO-CUT CONCRETE CUTTING AND BREAKING, INC.; KELLY R.
SILVERS and ERIN SILVERS,

Appellants / Cross Respondents.

BRIEF OF RESPONDENT / CROSS APPELLANTS

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I. INTRODUCTION

Wage Laws are designed to protect the health and welfare of citizens, and encourages employment opportunities. More than 90% of all countries have some kind of minimum wage legislation. Early wage laws in the United States only protected women and children; but, these were ruled unconstitutional once women gained the right to vote and contract. However, with the worsening of the great depression, in 1938 the United States nationally adopted a minimum wage law as part of the "New Deal" designed to stimulate the economy. Now nearly every state has a minimum wage law or is bound by the federal minimum wage to protect workers. Overtime wage laws were equally designed to protect workers from forced slavery and to increase employment opportunities.

Under Washington Wage Laws, employees must be paid for each hour worked, and must receive at least the minimum wage for each hour worked. For any hours over 40 worked in a week, the employee must be paid one and a half times the regular rate.

This case involves an employer with a written policy to not pay employees for all hours worked and to change employee time cards deleting all evidence of overtime work. The employer challenges the lower court's interpretation of the tolling statute as a method to avoid

having to pay their employee for his work and seeks to avoid having to pay the tax consequence from paying wages in a lump sum. The employee seeks review of the lower court's decision to deny him double damages and award him full fees and costs. At issue will be the employer's admission of owing wages, yet continual refusal to pay the wages and verbal abuse designed to silence employees; and threats to induce employees to accept whatever the employer chose to pay them. The employee also challenges the lower court's dismissal of his wrongful termination claim. At issue will be the employer's decision to terminate employment after years of verbal abuse by the employer after he complained about not getting his full wages.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Defendants' Motion to Dismiss Plaintiff's Claim for wrongful termination – constructive discharge in violation of public policy as a matter of law. CP 128
2. The trial court erred in denying Plaintiff's claim for double damages. CP 126
3. The trial court erred in denying Plaintiff all of his costs. CP 127
4. The trial court erred in denying Plaintiff all of his attorney fees and failing to apply a multiplier. CP 127.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court erred in determining that there were no material issues of fact on Plaintiff's claim for wrongful termination – constructive discharge in violation of public policy?
2. Whether there was sufficient evidence to find that Plaintiff knowingly submitted to the withholding of wages?
3. Whether all of the costs sought by Plaintiff were recoverable?
4. Whether the costs incurred by the Plaintiff were reasonable and necessary?
5. Whether the attorney fees sought by Plaintiff were recoverable?
6. Whether the attorney fees sought by Plaintiff were reasonable and necessary?
7. Whether there were sufficient facts to warrant a multiplier?
8. Whether Respondent/Cross-Appellant is entitled to attorney fees and costs on appeal pursuant to RAP 18.1?

IV. STATEMENT OF THE CASE

Mr. Peiffer is a 46 year old man with an 8th grade education. RP 208:15-16, 209:5-10 Mr. Peiffer and his wife, Michelle, have two children. RP 80:17-22, 208:17-24 Mr. Peiffer was the bread winner for his family, and for nearly 20 years worked as a slab saw operator for Pro-Cut Concrete Cutting and Breaking, Inc. ("Pro-Cut"). RP 80:23 – 81:5, 210:12-16, 220:16-18 In 2004, Kelly Silvers became the owner of Pro-

Cut. RP 19:11-12

Pro-Cut employees report to the company facilities each morning to pick up the equipment and vehicle they need at their assigned job sites. RP 28:24-29:4. Employees then drive or ride in the company vehicle to the job site. RP 29:5-7. Pro-Cut had a written policy of not paying employees for the first and last ½ hour of travel time to and from job sites. RP 29:8-24. The rationale for withholding wages was that if Pro-Cut was not getting paid while employees are not on the job sites, then the employee should not get paid. RP 27:5-12. Pro-Cut had an unwritten policy to alter employee time cards to reflect the amount paid, rather than the actual hours worked. RP 34:14-35:4. Kelly Silvers gave Monte Sainsbury authority to approve payroll and make changes to employee time cards as he saw fit. RP 65:16-18

Mr. Peiffer became aware that Pro-Cut was changing his time card in approximately 2008. RP 218:2-13. Mr. Peiffer complained several times to Monte Sainsbury and Mr. Silvers that he was not being paid the wages due to him. In fact, he began complaining on a daily basis. RP 31:4-23, 32:5-14, 220:8-15, 365:9-15. Mr. Peiffer's complaints were met with obscenities, accusations that he was lying and cheating on his time cards, and the ultimatum to quit if he didn't like it. RP 32:12-17, 87:21-88:5, 218:14-21, 219:24-220:7 Mr. Peiffer was also accused of not knowing

how to complete accurate timecards. RP 32:9-33:15. On one occasion when Mr. Peiffer complained, he and Mr. Sainsbury even scuffled over the issue. RP 218:22-219:18. Calling employees liars when they challenged the docking of pay was a pattern and practice of Pro-Cut. RP 70:5-15. So too was name calling and claiming the employee didn't complete their timecard correctly. RP 69:23-25, 70:12-18, 70:21-71:5, 155:7-25, 32:9-33:15.

On June 8, 2012, when Mr. Peiffer picked up his check and realized his pay had been docked again, he notified Mr. Sainsbury that he would not be returning to work until he had been paid his full wages for the time period. Mr. Peiffer complaint was met again with hostility, insults and threats. RP 232:4-19. But Mr. Peiffer had enough of having his wages stolen. RP 33:16-23, 84:16-25; 85:6-20, 220:21 - 221:15, 237:18-23. Leaving Pro-Cut was one of the hardest decisions Mr. Peiffer ever made. RP 83:2-4, 85:21-86:21

Mr. Peiffer was financially unable to hire an attorney to advise him. RP 236:15-237:4. On July 3, 2012, Mr. Peiffer filed a complaint with the Department of Labor and Industries who thereafter began investigating the claim. RP 173:13-18; Ex. 15. The Department lacked adequate resources to promptly investigate Mr. Peiffer's claim and never completed the investigation was still not complete. RP 174:6 - 179:6,

201:9 – 205:11. After a year and a half, Mr. Peiffer was able to retain private counsel who agreed to accept the case on a contingency fee. Mr. Peiffer filed suit against Pro-Cut on November 26, 2013. CP 1-10, 247-278. Mr. Peiffer's counsel notified Labor and Industries of his decision to file a civil lawsuit against his former employer on November 26, 2013. The next day, Labor and Industries made the decision to close its investigation. RP 182:19 - 183:19; Ex. 17.

After litigation began, Mr. Silvers contacted Mr. Peiffer and offered to pay him what he was owed and to bring him back to work. Mr. Peiffer responded that would have to figure out the amount owed before that could happen. RP 225:7-25. Pro-Cut provided no assistance in calculating the wages owed Mr. Peiffer. RP 34:3-13, 49:2-21 10 Mr. Peiffer was unable to calculate his wages so his wife, Michelle Peiffer did her best to do so for her husband. RP 82:1-17, 226:1-20.

After providing his calculations to Pro-Cut, the Defendants refused to pay. Thereafter, the defendants filed with the court a series of stipulations admitting that they owed Mr. Peiffer various amounts of wages. CP 231-233, 224-226, 142-144; Ex. 4, 5, 6, 7, 8. Contrary to Appellants' argument on page 5 of their brief that Mr. Peiffer did not accept the wages offered, the defendants admitted at trial that they never tried or even offered to pay the wages they admitted were owing. There

was also no evidence that Mr. Peiffer refused to accept any payment of wages. Instead, the record shows that the Defendants repeatedly filed stipulations admitting that they owed Mr. Peiffer wages but never actually tried to pay Mr. Peiffer his wages. CP 39:8 – 44:19. Instead, the record shows that rather than paying any portion of the amount they admitted owing, the Defendants made threats of bankruptcy in an attempt to force Mr. Peiffer to settle for less money than he was owed and to try to scare Mr. Peiffer's attorney's into believing they were not likely to recover any legal fees for their efforts to protect Mr. Peiffer's rights. CP 247-306.

A bench trial was held on May 23 and 24, 2016. RP 1. At trial, Mr. Peiffer asserted claims for minimum wage act violation; failure to pay wages at termination; willful withholding, wrongful termination - constructive discharge; breach of contract; consumer protection act; and for an award of attorney fees and costs. CP 121-128. Mr. Peiffer sought recovery of his unpaid wages with interest and back wages after his wrongful termination - constructive discharge. He also sought double damage; an award of the taxable consequences of receiving his wages in a lump sum rather than when they were due; attorney fees and costs.

Defendants brought a motion in limine at the start of trial asserting that the Plaintiff could not prove that the statute of limitations had been tolled during the pendency of the department's investigation. In essence

Defendants argued that the statute could not be tolled if there was not a proper end to department's the investigation. RP 13:11-18. Defendants argued that Mr. Peiffer had withdrawn his claim prior to the administrative action so none of the investigation termination events in RCW 49.48.085 had occurred. The evidence at trial did not show that Mr. Peiffer had withdrawn his claim, instead it showed that the department chose to terminate its investigation once it received notice that Mr. Peiffer had filed a civil lawsuit. RP 182:19 - 183:19; Ex. 17. The trial court found that the statute of limitations had been tolled from the time Mr. Peiffer filed his claim with the Department until he filed suit. CP 122

At the close of Plaintiff's case, the Defendants brought a motion for directed verdict, which was clarified to the court as a motion for involuntary dismissal under CR 41. RP 257:18-22. This motion sought to dismiss Plaintiff's claims as a matter of law and to dismiss Defendant Sainsbury on the grounds that he was not a manger. CP 18-38. The trial court granted the Defendants' motion to dismiss Plaintiff's claims for breach of contract, consumer protection act, and wrongful termination-constructive discharge. The court found that the Pro-Cut willfully withheld Mr. Peiffer's wages and granted an award of wages but found that Mr. Peiffer knowingly submitted to the withholding and denied an award for double damages. The trial court awarded Plaintiff partial

attorney fees and costs and denied Plaintiff's motion for a multiplier. CP 121-128; RP 315:1-3

Respondent / Cross Appellant, Mr. Peiffer, appeals the court's decision to deny an award for double damages; deny a multiplier for attorney fees; reducing the award of attorney fees and costs; and dismissing the claim for wrongful termination- constructive discharge in violation of public policy.

V. CROSS-APPELLANT'S ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF

A. The trial court correctly found that the statute of limitations for Mr. Peiffer's wage claim tolled under RCW 49.48.083.

Appellants correctly state that the applicable statute of limitations for a wage claim arising out of an oral contract is three years. RCW 4.16.080(3). However, if the Department of Labor and Industries (the "Department") investigates a wage claim, then the applicable statute of limitations is tolled during the pendency of such investigation. RCW 49.48.083(5). Appellants argue that a wage claim's statute of limitations is only tolled under RCW 49.48.083 if the Department completes its investigation or the employee terminates the Department's investigation during the administrative action phase. These arguments simply are not supported by the plain language of RCW 49.48.083 and associated statutes.

1) Under the plain language of RCW 49.48.083, the wage claim statute of limitations begins tolling when an employee files a wage complaint with the Department.

Filing a wage complaint with Department is not mandatory; but, if an employee does so, a complaint compels the Department to begin an investigation. RCW 49.48.083(1). The filing of a wage complaint with the Department tolls the running of the statute of limitations on that wage claim. RCW 49.48.083(5) provides, “[t]he applicable statute of limitations for civil actions is tolled during the department’s investigation of an employee’s wage complaint against an employer.”

The next section of RCW 49.48.083(5) defines when the Department’s investigation begins and ends:

“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 selected to terminate the department’s administrative action under RCW 49.48.085.”

RCW 49.48.083(5). This language is clear and unambiguous—the act of filing a wage complaint with the Department is sufficient to toll the statute. *Id.* The statute of limitations then continues tolling during the pendency of the Department’s investigation. *Id.*

In this case, it is undisputed that Mr. Peiffer filed his wage complaint with the Department on July 3, 2012. Under the plain language of RCW 49.48.083(5), the Department's investigation of Mr. Peiffer's wage complaint began on July 3, 2012. Under the plain language of RCW 49.48.083(5), the statute of limitations on Mr. Peiffer's wage claims began tolling on July 3, 2012, when the Department's investigation began. The Department's investigation continued until November 27, 2013 when the Department decided to close its investigation and notified Mr. Peiffer that his claims had been "otherwise resolved."

Thus, under the plain language of RCW 49.48.083(5), the statute of limitations for Mr. Peiffer's wage claims began tolling on July 3, 2012 and continued tolling until November 27, 2013. Because Mr. Peiffer filed suit against Appellants on November 22, 2013, all of Mr. Peiffer's wage claims were brought within the applicable statute of limitations. Accordingly, the lower court's decision should be upheld.

2) For purposes of tolling a wage claim statute of limitations, under the plain language of RCW 49.48.083, it is irrelevant whether or not the Department ends its investigation or takes administrative action.

Appellants urge this Court to find that the tolling statute is only applicable to Mr. Peiffer's wage claim if he can show the Department's investigation was properly terminated under RCW 49.48.083 or that the

Department took administrative action. However, RCW 49.48.083 clearly places no such burden on Mr. Peiffer nor does it contain any language that requires proof of termination or administrative action before the tolling statute can apply..

First, there is no language in RCW 49.48.083 that requires an employee who files a wage complaint, and later files a lawsuit, to prove that the Department properly terminated its investigation for the tolling statute to apply. *See* RCW 49.48.083. To expect a claimant to be able to police the department's actions as proposed by appellants would be both unreasonable and irrational.

Second, no language in RCW 49.48.083 requires the Department to take administrative action for the tolling statute to apply. Appellants claim that under 49.48.085(1), the statute of limitations is not tolled unless an employee waits for the Department to finish its investigation and take administrative action. However, RCW 49.48.083(1) only requires administrative action if the matter is not "otherwise resolved." If the Department's investigations can be "otherwise resolved," then an employee cannot be required to wait for an administrative action before falling under the protections of the tolling statute. *See* RCW 49.48.083(1). Furthermore, the statute states, "[n]othing in this section shall be construed to limit or affect: (a) The right of an employee to pursue any judicial,

administrative, or other action available with respect to an employer....”

RCW 49.48.085(3).

Considering how burdened the Department could be with claims, it is irrational to assume that the legislature intended to force the Department to finish every investigation regardless of the merit or the presence of other remedies available to the employee. It is also clear from the statutory language that the legislature never intended for employees to surrender their rights to a civil action while the Department investigates a wage claim. Instead the legislature encouraged private litigation by providing broad financial incentives including double damages, legal fees and expanded costs to encourage private litigation. *See* RCW 49.46.090; 49.48.030; 49.52.070.

Third, no language in RCW 49.48.083 indicates that there must be a beginning and an end to the investigation for the statute to apply. The statute provides simply that “the statute of limitations is tolled **during** the department’s investigation....” RCW 49.48.083(5) (emphasis added). Accordingly, RCW 49.48.083 only requires that an employee file a complaint with the Department for the statute of limitations on their wage claims to begin tolling. Once the complaint is filed, an investigation is automatically triggered and the statute of limitations continues tolling **until** the investigation ends. RCW 49.48.083. Thus, the inclusion of this

language serves only to guide the parties involved on when the Department's investigation into a wage complaint begins and ends.

Contrary to Appellants' claim, RCW 49.48.083 does not require the Department's investigation to be completed nor does it require the Department to take administrative action before the tolling statute can apply. This is evidenced by a lack of any language in RCW 49.48.083 stating that the tolling statute only applies if these conditions are met. *See* RCW 49.48.083. Thus, the lower court's decision should be affirmed.

3) Even if this Court found that RCW 49.48.083 requires the Department to take administrative action or for their investigation to end, it is clear that the Department's investigation ended pursuant to RCW 49.48.083 without the need for administrative action.

Appellants argue that the Department failed to properly terminate the investigation under RCW 49.48.083. Accordingly, Appellants claim that the statute of limitations on Mr. Peiffer's wage claims did not toll. RCW 48.49.083(5) provides:

"The applicable state 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.” (emphasis added)

The inclusion of “otherwise resolved,” clearly shows that the legislature intended to allow the Department to end an investigation without any official determination or administrative action. RCW 49.48.083(5)(b). Because the term “otherwise resolved,” is not defined by the statute, the Department could end an investigation by termination for any of the following reasons: (1) the employee files a civil suit; (2) the employee fails to meaningfully cooperate with the department; or (3) the employer has gone out of business.

Here, contrary to Appellants’ contention, the Department did in fact terminate Mr. Peiffer’s wage complaint. On November 27, 2013, the Department sent Mr. Peiffer a letter that stated his complaint had been “otherwise resolved” because he filed a civil suit and that the Department was terminating their investigation. Furthermore, Appellants were not entitled to written notice of such termination from the Department because it is the Department’s practice to not send such notices if an employer was not notified of an investigation. RP 205:15—206:9. Accordingly, even if the Court finds the Department’s investigation must end for the tolling statute to apply, the tolling statute applies to Mr. Peiffer’s wage claims because the Department’s investigation ended pursuant to RCW 49.48.083

without the need for administrative action. Thus, the lower court's decision should be affirmed.

4) Even if this Court found that the Department did not properly terminate its investigation, then the statute of limitations for Mr. Peiffer's wage claims continues to toll.

The evidence presented at trial unequivocally showed that Mr. Peiffer filed a complaint that the Department investigated from July 3, 2012 to November 27, 2013. If the Appellants position is accepted and this Court determines that the Department did not properly terminate its investigation, then the investigation is still ongoing and the statute continues to toll. Since the Department has authority to pursue its own action regardless of the civil suit, it is possible that both could be occurring simultaneously.. RCW 49.48.085(3). Accordingly, Appellants' arguments are moot and the lower court's decisions should be affirmed.

5) Appellants' advocated interpretation of RCW 49.48.083 is contrary to public policy.

Ultimately, the Appellants' assertion that the court should narrowly construe RCW 49.48.083 against Mr. Peiffer is contrary to public policy. The legislature's stated position has always been that wages are a "subject of vital and imminent concern to the people of this state." RCW 49.46.005. In fact, Washington Courts have regularly held that wage claim statutes are to be liberally construed to advance the legislature's

intent “to assure payment to employees of wages they have earned.” *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 158, 961 P.2d 371 (1998). Accordingly, the provisions of RCW 49.48.083 should be construed liberally in favor of Mr. Peiffer.

B. The trial court correctly found that Mr. Peiffer was entitled to an award of attorney’s fees despite Appellants’ stipulation.

Appellants filed three stipulations with the trial court admitting to owing Mr. Peiffer. On February 4, 2015 they stipulated to owing \$17,316.83. On November 5, 2015 they stipulated owing \$66,322.06. On May 25, 2016, the first day of trial, they filed a final stipulation admitting to owing \$31,631.69. Despite repeatedly admitting they owed wages over the course of 15 months, they made no offer or attempt to pay Mr. Peiffer. As a consequence, Mr. Peiffer was forced to take the matter to trial. Appellants now claim that their admission that they owed the wages allows them to avoid liability to pay Mr. Peiffer’s attorney fees and costs under RCW 49.48.030. The defendants actions are similar to the employer’s in *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 685–86, 319 P.3d 868, 879 (2014). The employer stipulated that they owed wages, yet failed to pay the amount stipulated while the matter was tried. The court found the continued withholding of wages that the employer admitted owing as knowing and intentional.

An award of attorney fees and costs is mandatory and expansive under the wage statutes. The Minimum Wage Act reads:

“Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate..., and for costs and such reasonable attorney’s fees as may be allowed by the court.”

RCW 49.46.090(1). In RCW 49.48.030, the legislature broadened the award of fees and costs by providing that in any action where a Plaintiff is successful in recovering wages, “reasonable attorney’s fees..., shall be assessed against said employer or former employer...” Other wage statutes making an award of fees and costs mandatory include the wage rebate statute, RCW 49.52.070. RCW 49.46.090 provides:

“(1) Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney fees as may be allowed by the court. Any agreement between the employee and the employer to work for less than such wage rate shall be no defense to such action.”

The wage statutes are remedial in nature and should therefore be liberally construed to effectuate their purpose. Thus, any exceptions must be viewed narrowly. *Dautel v. Heritage Home Center, Inc.*, 89 Wash.App. 148, 152, 948 P.2d 397 (Div. 1, 1997), *rev. denied* 135 Wash.2d 1003, 959 P.2d 126 (1998). Even unsuccessful claims should not

defeat an award of fees and costs. *Steele v. Lundgren*, 96 Wash. App. 773, 783 (1999) (citations omitted).

Given the purpose behind the wage statutes, it is not possible to find that the words of RCW 49.48.030 are meant as a shield to allow employers to admit to owing wages, but not pay until the employee has expended thousands of dollars in legal fees and costs to get a court order. Yet this is the interpretation Appellant asks this Court to find.

Even if the court were to make such a finding, Mr. Peiffer's total recovery exceeded the amounts Appellants stipulated to owing. Accordingly, Mr. Peiffer is entitled to a full award of fees and costs.

In *Dautel v. Heritage Home Center, Inc.*, the trial court declined to make a full award of fees and costs exempting fees for the damages stipulated to by the parties prior to trial under RCW 49.48.030. On appeal, Division I reversed noting that "RCW 49.48.030 is a remedial statute entitled to liberal construction to effect its purpose. Liberal construction requires that any statutory exceptions be narrowly confined." *Dautel v. Heritage Home Center, Inc.*, 89 Wash.App. 148, 152, 948 P.2d 397 (Div. I, 1997). Under the language of the statute, a Plaintiff is entitled to a full award of fees and costs unless the amount recovered is less than or equal to the amount admitted owing. Thus if the Plaintiff's recovery is

greater than the amount admitted, then he is entitled to a full award of fees and costs.

Mr. Peiffer's recovery of taxable consequences is also grounds for finding that his recovery exceeded the stipulated amount. Equitable wage recoveries are a basis for awarding fees and costs. *Miller v. Paul M. Wolff Co.*, 178 Wash.App. 957, 968, 316 P.3d 1113 (Div. III, 2014). The interpretation of wages and salary owed has been very broadly interpreted to effectuate the legislature's intent. Thus it can include back pay, front pay, sick leave, commissions, etc. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash.App. 571, 595, 271 P.3d 899 (Div. II, 2012); *McGinnity v. AutoNation, Inc.*, 149 Wash.App. 277, 284, 202 P.3d 1009 (Div. III, 2009).

Appellants' last argument is that Mr. Peiffer failed to timely calculate his damages. Since all of their stipulations were based on the calculations that Mr. Peiffer provided, this argument is clearly false and lacks merit. Mr. Peiffer is a person with an 8th grade education. Appellants have an entire payroll department whose job it is to calculate wages owed to employees. This court has already found that the employer has an affirmative duty to calculate the wages owed to employees and the failure to calculate those wages can be an indication of willfulness. *Allstot v. Edwards*, 114 Wash.App. 625, 634, 60 P.3d 601 (Div. III, 2002).

C. The trial court correctly found that Mr. Peiffer must be compensated for tax consequences to fulfill the purpose of the Wage Act, RCW 49.48.010, et. seq.

Appellants next argue that Mr. Peiffer is not entitled to recover the taxable consequences of receiving his wages in a lump sum rather than over the course of three years. The term wages or salary owed for purposes of RCW 49.48.030 has been broadly interpreted to effectuate the legislature's purpose of "deter[ing] employers from withholding wages." *Lietz v. Hanson Law Offices, P.S.C.* 166 Wash.App. 571, 593, 271 P.3d 899 (Div. 2, 2012). Thus courts have interpreted it to include back pay, front pay, sick leave reimbursement, vacation pay, commissions, etc. *Id.*

In addressing the issue of taxable consequences in employment cases, the Washington Supreme Court has been very receptive to taxable consequences awards in employment cases. In one case, the court noted that, "where the plaintiff is awarded back pay and/or front pay and the plaintiff's recovery is received in a lump sum, the plaintiff is subject to marginal tax rates higher than if the plaintiff had earned the same amount of money in due course." *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 533, 151 P.3d 976 (2007). The term "taxable consequences" is not listed as a recoverable damage in any employment statute; however, neither is sick leave, vacation pay, or commissions. Yet, courts have regularly held that these are a benefit of employment and thus

recoverable. *Backman v. Nw. Publ'g Ctr., LLC*, 147 Wn. App. 791, 197 P.3d 1187 (2008).

The Supreme Court has also recognized that the fundamental purpose of the wage act is,

“[t]o protect the wages of any employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that an employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation by withholding of part of the wages....”

Schilling v. Radio Holdings, Inc., 136 Wash.2d 152, 159, 961 P.2d 371, (1998) (citation omitted). The unopposed testimony of Michelle Peiffer established that the taxable consequences for receiving Charlie’s wages in a lump sum as opposed to when they were originally due would result in a significant tax increase. RP 76:11-18, 77:12 – 79:4. This tax increase would deprive Mr. Peiffer of the opportunity to realize and enjoy the full amount of his wages. In addition, it would fail to advance the other purpose of the act—to dissuade employers from withholding wages.

Furthermore, wage claims fall under the statute of limitations for contracts because they are fundamentally the breach of either an oral or

written contract. Hence in his complaint, Mr. Peiffer alleged breach of contract and is entitled to an award of actual damages associated with the breach including taxable consequences. WPI 303.02. Finally, should the court reverse the lower court's dismissal of Plaintiff's wrongful discharge claim, an award of taxable consequences is clearly allowed. *Id.*

VI. CROSS-APPELLANT'S ARGUMENT

A. The trial court erred in dismissing Mr. Peiffer's claim for wrongful termination.

At the close of Plaintiff's case, the Defendants brought a motion for directed verdict on Plaintiff's claim for wrongful termination, constructive discharge in contravention to public policy. Defense counsel clarified their motion as one brought under CR 41 for involuntary dismissal. RP 257:18-22; CP 18-38. The court granted this motion. CP 121-128.

"The standard for dismissal under CR 41 is the same for the standard of dismissal for directed verdicts in jury trials. *DGHI Enters. v. Pacific Cities, Inc.*, 137 Wn.2d 933, f. 79, 977 P.2d 1231 (1999). Review of a ruling on a motion for directed verdict is de novo. *Wilcox v. Basehore*, 187 Wn.2d 772, 782, 389 P.3d 531, (2017) (hereinafter *Wilcox*). "A motion for a directed verdict admits the truth of the evidence of the party against whom the motion is made and all inferences that reasonably can be

drawn therefrom.” *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn.App. 268, 275, 996 P.2d 1103, (Div. III. 2000) (internal citations omitted). “A directed verdict is proper if, so viewed, there is no substantial evidence or reasonable inferences that would sustain a jury verdict for [the nonmoving party].” *Id.* “Substantial evidence exists ‘if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.’” *Wilcox*, 187 Wn.2d at 783 (quoting *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306, 632 P.2d 887 (1980)).

1) There is substantial evidence sufficient to persuade a fair-minded, rational person to conclude that Mr. Peiffer was constructively discharged in violation of public policy.

“A cause of action for wrongful discharge in violation of public policy may be based on ‘either express or constructive’ discharge.” *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn.App. 34, 43, 181 P.3d 864 (Div. I. 2008) (citing *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001); see also *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177 n.1, 125 P.3d 119 (2005), overruled on other grounds by *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015)).

To establish constructive discharge, the Plaintiff must show (1) the employer deliberately made the working conditions intolerable for the employee; (2) a reasonable person would be forced to resign; (3) the

employee resigned solely because of the intolerable conditions; and (4) the employee suffered damages. *Campbell v. State*, 129 Wn.App. 10, 22, 118 P.3d 888 (Div III, 2005) (hereinafter *Campbell*) (citations omitted).

Once constructive discharge is established, it must then relate to the elements of wrongful termination in violation of public policy. To establish this claim, the Plaintiff must show (1) the existence of a clear public policy, the clarity element; (2) whether the employer's actions would jeopardize the public policy, the jeopardy element; and (3) whether the public-policy linked conduct caused the dismissal, the causation element. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268,277, 358 P.3d 1139 (2015).

a) The evidence creates issues of fact as to whether Mr. Peiffer was constructively discharged.

Again, to support a claim for constructive discharge, Mr. Peiffer must show (1) the employer deliberately made the working conditions intolerable for the employee; (2) a reasonable person would be forced to resign; (3) the employee resigned solely because of the intolerable conditions; and (4) the employee suffered damages. *Campbell*, 129 Wn.App. at 10. First, the only evidence on the record explaining why Mr. Peiffer left employment was due to the ongoing issues related to Pro-Cut's deliberate withholding of wages and subsequent retaliation after Mr.

Peiffer demanded his wages. He resigned solely for these reasons. Second, the defendants admitted that Mr. Peiffer has suffered damages, at least to the extent of being owed back wages. Thus, the only elements to be evaluated are elements one (1) and two (2).

To succeed, Mr. Peiffer must show that “the employer engaged in a deliberate act that made working conditions so intolerable that a reasonable person would have felt compelled to resign.” *Sneed v. Barna*, 80 Wn.App. 843, 849, 912 P.2d 1035, *rev. den.*, 129 Wn.2d 1023 (1996). “It is the act, not the result, that must be deliberate.” *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn.App. 630, 637, 700 P.2d 338 (1985). “A claimant may show conditions are intolerable by demonstrating aggravating circumstances or a continuous pattern of discriminatory treatment. Whether working conditions are intolerable is a question of fact and is not subject to summary judgment unless there is no competent evidence to establish the claim.” *Allstot v. Edwards*, 116 Wn.App. 424, 433, 65 P.3d 696, (Div. III. 2003) (citations omitted).

The evidence is clear that Pro-Cut deliberately made Mr. Peiffer’s working conditions so intolerable that Mr. Peiffer was forced to leave. Pro-Cut insisted on withholding wages despite Mr. Peiffer’s multiple complaints and objections. It did so under the rationale that if the company did not get paid, then the employee did not get paid. The

evidence is undisputed that Pro-Cut deliberately withheld the first and last ½ hour of work performed as a matter of policy. In addition, it was common, and deliberate, for Pro-Cut to whiteout Mr. Peiffer's timecards to withhold wages.

Upon discovery of the withholding in 2008, Mr. Peiffer began to complain and demand his wages. It is undisputed that toward the end of his employment he was making daily complaints. In response, Pro-Cut repeatedly told him it was company policy and offered him ultimatums to either deal with it or quit. Mr. Peiffer, and others employees, were continually met with verbal attacks or insults toward their character. They were accused of cooking the books, failing to document time correctly, and of being liars. This pattern of deliberate behavior continued and even escalated to actual violence when, after complaining about his time being reduced, Mr. Peiffer was confronted by Monte Sainsbury in a manner that resulted in a fist fight; clearly an aggravating circumstance.

In the end, Mr. Peiffer quit his job because he was not getting paid for his work and endured a pattern of retaliatory behavior after demanding his wages. He had enough.

In *Allstot v. Edwards*, 116, Wn.App. 424, 65 P.3d 696 (Div. III, 2003), this court specifically considered whether evidence of intolerable work conditions were enough to survive the employers summary judgment

motion dismissing an employee's constructive discharge claim. Cameron Allstot was a police officer terminated in 1991 for allegedly leaking investigative information. Mr. Allstot successfully appealed the termination and was subsequently reinstated. Mr. Allstot demanded back wages, which were denied by the city police department.

Soon after, Mr. Allstot experienced treatment he alleged to be deliberate and intolerable that resulted in him being constructive discharged. Specifically, he relied on three facts to establish his working conditions were intolerable. First, in 1994, during a training exercise with the use of pepper-spray, he was sprayed more than the other trainees at the discretion of the police chief. Second, the police department continued to deny him of his back wages. Finally, the police chief, as a policy, intentionally withheld information regarding ongoing drug cases from Mr. Allstot. *Allstot*, at 433—34.

The court held that the first two facts in and of themselves did not constitute intolerable or aggravating circumstances. *Id.* But the court found that the third fact “arguably create[d] a factual question regarding whether the policy was an aggravating circumstance that made his continued employment intolerable.” *Id.* at 424. The court went on and stated, “while each of the three facts individually may not demonstrate intolerable working conditions, together they may establish a pattern of

discriminatory treatment that was intolerable.” *Id.* The court reversed the granting of summary judgment in favor of the employer and remanded it for a trial on the merits. *Id.*

In this case, it is undisputed that Pro-Cut deliberately withheld wages pursuant to written and established policy. Furthermore, when employees complained about the policy, Pro-Cut deliberately engaged in a pattern of calling employee liars or incompetent. For Mr. Peiffer, Pro-Cut gave him ultimatums to quit or deal with working for free. In addition to attacking his character and competency, Mr. Peiffer was confronted with physical violence. This evidence, individually or taken together, “may establish a pattern of discriminatory treatment that was intolerable” which is ultimately a question of fact.

Evidence, taken as true with inferences taken in the light most favorable to Mr. Peiffer’s claim for constructive discharge exists and the trial court erred in dismissing the claim upon Defendants’ motion for directed verdict.

b) The evidence creates issues of fact as to whether Mr. Peiffer’s constructive discharge was in violation of a public policy.

Again, to establish a claim for wrongful discharge in violation of public policy, Mr. Peiffer must show (1) the existence of a clear public policy, the clarity element; (2) whether the employer’s actions would

jeopardize the public policy, the jeopardy element; and (3) whether the public-policy linked conduct caused the dismissal, the causation element. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268,277, 358 P.3d 1139 (2015). Our Supreme court has recognized a tort action for wrongful termination in violation of public policy in four general areas when a termination resulted from an employee's: (1) refusal to commit an illegal act, *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002); (2) performance of a public duty or obligation, *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996); (3) exercise of a legal right or privilege, *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000); and (4) whistleblowing activity, *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989). In this case, Mr. Peiffer's actions fall into the third category—the exercise of a legal right or privilege to demand wages due.

Protecting workers rights and their ability to secure payment for their labor is an established **public policy**. RCW 49.46.005. The Supreme Court described Washington as a "pioneer" in assuring payment of wages due an employee. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35 42 P.3d 1265 (2002) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)). Further, the Supreme Court has taken the strong position that the comprehensive scheme protecting employee's wages demonstrates

Washington's strong policy in favor of payment of wages due employees. *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 830, 991 P.2d 1126 (2000) (referencing chapters 49.46, 49.48, and 49.52 RCW); *see also Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157—58, 961 P.2d 371 (1998); *United Food & Commercial Workers Union Local 1001 v. Mut. Benefit Life Ins. Co.*, 84 Wn.App. 47, 51—52, 925 P.2d 212 (1996), *rev. denied*, 133 Wn.2d 1021, 950 P.2d 478 (1997), *overruled on other grounds by Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wash.2d 824, 991 P.2d 1126 (2000).

The legal protections for workers' wages are one of the most powerful legislative schemes in the state. Employers in Washington are required to pay minimum wage (one of the highest in the country), including compensation of 1.5 times the regular hourly rate for work performed after 40 hours in a weekly period. RCW 49.46.020; 49.46.130(1). It is also illegal for an employer to withhold any portion of an employee's wages absent the employee's consent or as required by law. RCW 49.48.010. Further, an employer may not willfully or intentionally pay an employee less than agreed nor can they collect any portion of an employee's wages as a rebate. RCW 49.52.050(1) and (2). If an employer fails to adhere to any of these statutes, they are criminally liable. RCW 49.46.100(2), RCW 49.48.020, RCW 49.48.050. Finally, should an

employee seek a civil remedy for the withholding of wages, which is in addition to remedies provided by the Department, the employee is entitled to attorney fees and costs plus punitive or exemplary damages. RCW 49.46.090(1), RCW 49.48.030, RCW 49.52.070, RCW 29.52.050.

It is equally clear under common law that an employer who violates the statutory scheme protecting wages resulting in termination is liable for the tort of wrongful discharge in violation of public policy. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 905, 130 L. Ed. 2d 788 (1995) (recognizing a clear mandate of public policy to pay an employee wages); *Young v. Ferrellgas, L.Cp.*, 106 Wn.App. 524, 531, 21 P.3d 334 (2001) (holding employee may pursue a wrongful discharge suit against because the employer failed to pay overtime, which contravenes “a substantive, nonnegotiable, statutorily-guaranteed right.”). Thus, it is clear that the payment of wages, and exercising your legal right to demand wages, is a public policy recognized by the court.

Next, whether a Plaintiff establishes the **jeopardy element** is a question of fact. *Hubbard v. Spokane County*, 146 Wn.2d 699, 715, 50 P.3d 602 (2002). A Plaintiff establishes the jeopardy element by “demonstrating that his or her conduct was either directly related to the public policy or necessary for effective enforcement.” *Rose v. Anderson*

Hay & Grain Co., 184 Wn.2d 268, 284, 358 P.3d 1139 (2015). “[W]here there is a direct relationship between the employee’s conduct and the public policy, the employer’s discharge of the employee for engaging in that conduct inherently implicates the public policy.” *Id.*

It is clear that Mr. Peiffer’s continued complaints and demands for payment of wages are related to the very fact that he is entitled to those wages as a matter of law. Mr. Peiffer began to photocopy his timecards to verify his wages were being withheld all the while objecting to the policy and practice of Pro-Cut. There can be no other explanation other than Mr. Peiffer’s protests and demands for his rightful wages were directly related to Pro-Cuts intentional withholding of those wages; a clearly stated public policy.

Finally, whether a plaintiff has satisfied the **causation element** is also question of fact. *Hubbard v. Spokane County*, 146 Wn.2d 699, 718, 50 P.3d 602 (2002). Issues of fact exists if the Plaintiff “presents sufficient evidence of a nexus between his discharge and alleged public policy violation.” *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 179, 876 P.2d 435 (1994). In terms of a constructive discharge claim, facts must be presented “that would permit a jury to find an [employer’s] retaliation caused his constructive discharge.” *Korshund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn.App. 295, 321—22, 88 P.3d 966 (Div. III. 2004), *aff’d in*

part and rev'd in part by Korlund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 125 P.3d 119 (2005), *overruled on other grounds by Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015).

There is substantial evidence here that would permit a jury to find that the Pro-Cut's retaliation in response to Mr. Peiffer's demands for his wages caused his constructive discharge. Pro-Cut would insult the character of those who objected to the changed timecards. Pro-Cut would also attack the competency of the employees claiming they did not know how to complete the timecard correctly. For Mr. Peiffer, he was provided ultimatums to quit or submit to working for free. In response to his continued complaints and demands, he was faced with actual violence. Finally, Mr. Peiffer left employment due to the continued acts of wage withholding and the retaliation that ensued from his demands for payment.

An illustrative case can be found in *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 905, 130 L. Ed. 2d 788 (1995) In *Hume*, four (4) Plaintiffs worked as route drivers for Defendants, collecting commercial and residential waste. The Defendants maintained a policy that drivers would get paid 40 hours a week, regardless of the amount of hours they actually worked. *Hume*, at 660. Plaintiffs, upon learning they were entitled overtime wages under state law, began to record and turn in overtime hours demanding payment.

Id. Around the same time, the Department began investigating the Defendant's failure to pay wages even though none of the named Plaintiffs actually filed a complaint. *Id.*

Although the Plaintiffs did not file a complaint with the Department, they were still subject to retaliation for asserting their rights to wages directly to their employer. Specifically, their employer verbally abused and threatened them. They received unwarranted warning letters, some threatening termination if they did not complete their routes within the scheduled 40 hours. The harassment continued until the Plaintiffs eventually left their employment and brought suit claiming constructive discharge in violation of public policy. *Id.*

At trial, the Plaintiffs relied on the acts of retaliation to support their claim of harassment and constructive discharge. The jury agreed that the Plaintiffs were wronged and returned a verdict in favor of all four Plaintiffs on their wrongful harassment claim and in favor of three Plaintiffs on their constructive discharge in violation of public policy claim. *Id.*

On appeal, the Supreme Court upheld the verdict and stated, "RCW 49.46.100 prohibits employer retaliation against employees who assert wage claims, and we have held employers who engage in such retaliation liable in tort for violation of public policy under this provision."

Id at 662 (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984)). The Court went on and stated, “[t]he Plaintiffs’ claims are based upon a statute which reflects a legitimate local concern rooted in a strong and clearly articulated public policy.” *Hume*, at 665. The Court held “[t]he record contain[ed] ample evidence from which the jury could infer harassment and constructive discharge, including the testimony of each Plaintiff.” *Hume*, at 993-94.

Just as in *Hume*, Mr. Peiffer is entitled to demand his statutory protected wages; a clear public policy. When he discovered he was not being afforded his wages, he objected and demanded his wages to be paid; conduct directly related to the public policy of protecting workers’ wages. Unfortunately, his conduct was met with verbal abuse and ultimatums to quit or submit to the withholding of his wages, direct insults to his character and competency, and violence. This retaliation made the working conditions intolerable, forcing him, and any other reasonable person, to resign.

Admitting the truth of the evidence presented by Mr. Peiffer and making all reasonable inferences therefrom, the directed verdict was improper because the substantial evidence would to support a verdict in favor of Mr. Peiffer’s claim for constructive discharge in violation of

public policy. The trial court's directed verdict in this regard should be reversed and the matter remanded for a trial on the merits.

B. Double damages are recoverable when withholding is willful and there is no substantial evidence to support a finding that Mr. Peiffer “knowingly submitted” to the withholding of wages.

At trial, Mr. Peiffer sought recovery of double damages under RCW 49.52. The trial court found that the Defendants willfully withheld \$42,768.12 of wages but determined that Mr. Peiffer knowingly submitted to the withholding and was thus was not entitled to double damages under RCW 49.52.070.

To knowingly submit to an unlawful wage withholding, the employer must show that an employee “deliberately and intentionally deferred to [the employer] decision of whether they would *ever* be paid.” *Chalius v. Questar Microsystems, Inc.*, 107 Wash.App. 678, 682, 27 P.3d 681 (Div. I. 2001) (emphasis added). “An employee does not ‘knowingly submit’ to unlawful withholding of wages by staying on the job even after the employer fails to pay.” *Durand v. HIMC Corp.*, 151 Wash.App. 818, 837, 214 P.3d 189 (Div. II. 2009) (citing, *Chalius v. Questar Microsystems, Inc.*, 107 Wash.App. 678, 683, 27 P.3d 681 (Div. I. 2001)). Nor does an employee knowingly submit to wage withholding by deferring payment to a later date. *Durand*, at 837. Further, an employer

may not avoid exemplary damages by issuing a rule or policy that a worker's time will not be paid, even if the worker submits to the policy. *See Jumamil v. Lakeside Casino, LLC*, 179 Wn.App. 665, 319 P.3d 868 (Div. II. 2013) (holding managers who knowingly participated in company policy of withholding wages liable for exemplary damages as well as attorney fees and costs). Finally, if an employer is to withhold wages, it must be for a legal purpose and agreed upon with the employee. RCW 49.48.010; RCW 49.52.060. Absent a legal right or agreement, an employee is entitled to all wages due when they cease to work for an employer. RCW 49.48.010.

There were no facts presented at trial that supported a finding that Mr. Peiffer knowingly submitted to the withholding of his wages. Mr. Peiffer was never asked or agreed to accept fewer wages than were due. While it is true that he remained on the job for a period of time, this does not constitute a known submission. Neither does fact that Mr. Peiffer was subject to Pro-Cut established written policy of withholding wages. There is also no evidence that Mr. Peiffer deliberately and intentionally agreed to defer the decision to Pro-Cut as to whether he would ever be paid. On the contrary, the evidence conclusively demonstrates that Mr. Peiffer disagreed to the withholding and vehemently protested the practice until he could no longer tolerate the situation.

Pro-Cut, Silvers and Sainsbury began filing stipulations in February 2015 admitting that they owed Mr. Peiffer wages but continued to refuse to pay making them liable for double damages. In *Jumamil*, the court found that the owner who was unaware of the dealer support policy did not exercise his authority to withhold wages and was therefore not personally liable. But once the owner learned of the dealer support policy and still failed to pay the wages owed, he then “became a knowing participant,” and the “subsequent failure to compensate Jumamil for the wages already withheld was knowing and intentional, and thus willful under RCW 49.52.070.” *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 685–86, 319 P.3d 868, 879 (2014). Here, once Pro-Cut began stipulating that they owed wages, yet refused to pay, the withholding became knowing and intentional. It became willful.

Mr. Peiffer did not submit to his wages being withheld, rather, he fought the notion at every turn. The employer knew they owed Mr. Peiffer wages, yet refused to pay. The case should be remanded with directions for the lower court to award double damages based on the employer’s willful withholding of wages.

C. The court erred in denying full recovery of fees and costs.

Review of an award for costs and fees is under the abuse of discretion standard. *McConnell v. Mothers Work, Inc.*, 131 Wash.App.

525, 535, 128 P.3d 128 (Div. III. 2006). A trial court's award should be reversed if the court determines that the trial court "exercised its discretion on untenable grounds or for untenable reasons." *Collins v. Clark County Fire Dis. No. 5*, 155 Wash.App. 48, 99, 231 P.3d 1211 (Div. II. 2010) (citing *Pham v. City of Seattle*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007)).

The requirement to award fees and costs was part of the legislature's comprehensive plan to provide an incentive for employees and lawyers to pursue unpaid wages even though the amount of recovery may be small. Consequently, an award of attorney fees and costs is not discretionary. The court is required by the statute to award fees and costs when a Plaintiff recovers unpaid wages. *Wise v. City of Chelan*, 133 Wash.App. 167, 174, 135 P.3d 951 (Div. III. 2006); RCW 49.46.090(1); RCW 49.48.030; 49.52.070; RCW 49.46.090. The wage statutes are to be liberally construed in favor of the worker. *Arnold v. City of Seattle*, 186 Wash.App. 653, 657, 345 P.3d 1285 (Div. I. 2015); *Corey v. Pierce County*, 154 Wash.App. 752, 773, 225 P.3d 367 (Div. I. 2010); *Wise v. City of Chelan*, 133 Wash.App. 167, 174, 135 P.3d 951 (Div. III. 2006) citing *Bates v. City of Richland*, 112 Wash.App. 919, 939, 51 P.3d 816 (2002). The amount of fees that are appropriate is not based on the amount in controversy. *Target National Bank v. Higgins*, 180 Wash.App.

165, 187-88, 321 P.3d 1215 (Div. III. 2014) (citing *Fiore v. PPGT Industries, Inc.*, 169 Wash.App. 325, 279 P.3d 972 (Div. I. 2012)).

1) Travel costs sought by Mr. Peiffer are recoverable.

The trial court erroneously and arbitrarily denied Mr. Peiffer travel costs. The remedial nature of cases involving the minimum wage act should include awards of expanded costs beyond those normally allowed such as travel expenses, telephone bills and even ordinary office expenses. *McConnell v. Mothers Work, Inc.*, 131 Wash.App. 525, 531-33, 128 P.3d 128 (Div. III. 2006) (comparing the application of the Fair Labor Standard Act of 1938 as the parallel law to Washington's Minimum Wage Act). The travel costs incurred in this matter were crucial to securing payment of Mr. Peiffer's wages.

At the time Plaintiff brought this suit, attorney Alicia Berry was one of the few attorneys in the greater Tri-City area that actively accepted wage claims. CP 247-278, 279-306. At the time she became involved, Mr. Peiffer's claim had languished in the Department of Labor and Industries for approximately 1 ½ years. As noted by Ms. Sanchez, the case was fraught with problems including the need for extensive calculations which she could not provide and Mr. Peiffer could not afford. In addition, the passage of time had resulted in evidence spoliation. CP 247-278. Absent Ms. Berry's decision to accept the case on a contingency fee and advance

costs, Mr. Peiffer may never have recovered, especially considering his financial inability to hire counsel and pay costs. CP 121-128, 247-278

Suit was filed in November 2013 and counsel moved quickly to conduct discovery to obtain the evidence needed to prove damages. CP 247-278. Over Plaintiff's objection, the trial date was continued at Defendant's request from June 2014 to February 2015. CP 107-111.

In September 2014, Ms. Berry's family relocated to the east coast for her husband's job making it difficult for her to be in Washington on a regular basis. It was necessary to find another attorney who would handle hearings and urgent matters on a contingency fee. CP 121-128, 247-278. Mr. Davis agreed to associate as counsel and thereafter, Ms. Berry and Mr. Davis were careful to not duplicate efforts to keep fees reasonable. CP 121-128, 247-278.

Unfortunately, Defendants were not forthcoming with discovery and delivered approximately 4,300 pages of documents to Mr. Davis' office 45 days before trial. CP 164-223. Ms. Berry traveled from the east coast to review the documents and discovered the answers were incomplete. The trial was continued a second time to obtain additional discovery and to allow a more complete review of the untimely produced documents. CP 247-278.

The new trial date was August 31, 2015. CP 247-278. On the eve of trial, Ms. Sanchez notified Plaintiff's counsel that she would be unable to testify due to a personal conflict and the trial was continued again to November 9, 2015. CP 247-278.

Ms. Berry flew from the east coast for the November trial but was notified by the court late Friday afternoon that the Monday trial date was stricken. CP 247-278. A new trial date in May 2016 was set. Ms. Berry flew out again to try the case in May 2016. CP 247-278.

Ms. Berry's decision to advance travel costs was critical to securing Mr. Peiffer's wages. These travel costs were necessary to secure recovery of Plaintiff's wages. Had the Defendants paid the wages they repeatedly admitted owing, the travel costs would never have been incurred. Ms. Berry requested \$4,275.69 in travel costs for three trips from the east to west coast of the United States. CP 247-278. The amount was necessary to protect Mr. Peiffer's interests and was incurred in large part due to continuances caused by the Defendants behavior.

Without any stated reason, the trial court denied the travel costs. Such denial is reversible error and this court should remand with instructions to award travel costs as requested.

2) Attorney fees, including legal assistant fees, are recoverable.

After trial, Plaintiff sought \$66,850.50 in Attorney fees and \$6,545.00 in legal assistant time expended in prosecuting this case. CP 235-246. Without explanation, the trial court found that only \$50,000.00 of the \$73,395.50 sought was reasonable and necessary to prosecute the case. CP 121-128.

To arrive at a reasonable fee, the trial court should employ the lodestar method of multiplying a reasonable hourly rate by the number of hours reasonably expended. *Id.* at 535 (citing *Bowers v. Transamerica Title Ins. Co.* 100 Wn.2d 581, 593-602, 675 P.2d 193 (1983)). The court also factors in variables such as the difficulty of the issues, the skill involved, the prevailing rate for similar work, the dollar amount at issue, the contingent nature of the case, and degree of success achieved. *Id.* (citing *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990)). The court must make a record of the process and failure to do so is an abuse of discretion. *Id.*

In *Bostain v. Food Express, Inc.*, 159 Wash.2d 700, 153 P.3d 846 (2007) an employee successfully sued for unpaid wages and was awarded attorney fees and costs. The trial court calculated the request for attorney fees to be \$22,977 but reduced the amount to \$15,000. The trial court based this decision on the fact that there was a bona fide dispute as to whether the employer was liable for overtime wages. *Id.* at 722. The

Supreme Court, however, disagreed and stated that “the reasons given by the trial court are not factors that support a reduction in the lodestar amount under the facts of this case.” *Id.*

In this case, the trial court gave no explanation as to why it deviated from the lodestar method to reduce the amount of attorney fees expended in this case. The court ignored the discovery abuses by the Defendants and the need for two attorneys in this case warranted the fees requested. Even Defendants had two or more attorneys working on the case at all times. CP 46-69, 137-141. Furthermore, the amount of fees sought for prosecuting this matter over the course of 2 ½ years was extremely reasonable; Ms. Berry claiming 170.35 hours and Mr. Davis claiming 123.80. Finally, both counsels’ billable hourly rate was reasonable. Mr. Davis charged \$195 an hour while Ms. Berry charged \$250. CP 279-306, CP 247-278. *See Collins v. Clark County Fire Distr. No. 5*, 155 Wash.App. 48, 100-1, 231 P.3d 1211 (Div. II, 2010) (applying an hourly rate of \$280 as reasonable despite the average hourly rate for an attorney in Clark County being \$250).

Perhaps the reduction in the legal fees is related to the legal assistants, however this too would be in error. Use of legal assistant time to reduce the strain on attorney’s who are basically volunteering their time in hopes of getting paid is compensable. The Washington Supreme Court

has made it clear that “reasonable attorney fees” includes reasonably necessary litigation expenses. *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wash.2d 130, 142, 26 P.3d 910 (2001); *Louisiana-Pac. Corp. v. Asarco, Inc.*, 131 Wash.2d 587, 605, 934 P.2d 685 (1997). There has been no express decision on whether secretarial work can be included in calculating an attorney fee award but the wage statutes are to be liberally construed and use of non-lawyer personnel decreases the expense of litigation. Consequently, the use of non-lawyer personnel should be encouraged and rewarded as a method of controlling legal fees. *Absher Construction Co. v. Kent School Dist. No. 415*, 79 Wash.App. 841, 844, 917 P.2d 1086 (Divs. I. 1995).

Last, the court found that the facts presented were applicable to all claims such that no segregation of unsuccessful claims should occur. Thus, the court’s decision to reduce the fees awarded could not be based on the claims it dismissed.

Given the round figure awarded by the court and the lack of any factual basis for the reduction in the award, it appears that the court determined that the fee award should be reduced to something less than the damages and did so arbitrarily. As demonstrated in the Tri-Cities, finding counsel willing to risk their own income and resources to represent victims of wage theft is difficult. The effect of denying a full award of

fees and costs incurred will chill any incentive for lawyers to risk their resources to protect workers' rights which is contrary to the intent of the legislature.

The courts reduction of attorney fees and costs was in error and the issue should be remanded with instructions to award fees and costs as requested by Plaintiff.

D. Sufficient facts exist to warrant a multiplier where employer repeatedly admits owing wages yet engages in a pattern of threats and lies forcing the employee to try the case rather than pay the wages.

The trial court should employ the lodestar method of multiplying a reasonable hourly rate by the number of hours reasonably expended. *Bowers v. Transamerica Title Ins. Co.* 100 Wn.2d 581, 593-602, 675 P.2d 193 (1983). The court may also adjust the lodestar to reflect factors that are not taken into account when calculating the lodestar such as the contingent nature of the work, the skill of the legal repetition, the difficulty of the issues, the prevailing rate for similar work, the dollar amount at issue, and the degree of success achieved. *McConnell v. Mothers Work, Inc.*, 131 Wash.App. 525, 535, 128 P.3d 128 (Div. III, 2006). These adjustments are called multipliers. *Hill v. Garda CL Nw., Inc.*, 198 Wn.App. 326, 366-67, 394 P.3d 390 (Div. I. 2017). In this case, the trial court failed to consider any factors which warranted a multiplier.

In *Hill v. Garda CLNw., Inc.*, the court upheld a 1.5 multiplier in awarding a Plaintiff \$1,127,734.50 in a successful wage withholding suit. The court did so because the Plaintiff's attorneys were working on a contingency fee basis and the case presented a high level of risk. The court also considered the fact that the case presented novel legal issues. *Id.* at 368.

This case is similar to *Hill* in that Mr. Peiffer's attorneys were working on a contingency fee, the case presented a high level of risk, and submission of multiple stipulations of wages owed, together with a statute of limitation argument, created novel legal issue. First, the court found that Mr. Peiffer was unable to pay attorney fees and costs to hire counsel to prosecute this matter. CP 121-128. Mr. Peiffer's rights could only be secured if he could find counsel willing to advance fees and costs on a contingency fee. Second, the court found that the Defendants had continued to threaten bankruptcy. CP 121-128. These threats were clearly designed to strong arm Mr. Peiffer to accept less than what he was entitled and, as the court found, presented Mr. Peiffer's counsel a risk of non-payment to advocate for Mr. Peiffer's rights. CP 121-128. Finally, Defendants continued to put forth stipulations of amounts owed. See, Ex. 4, 5, 6, 7, 8. These were done in an ill-fated attempt to circumvent a finding of willfulness, presenting Mr. Peiffer's counsel a novel legal issue

upon receipt of each stipulation. Finally, Defendants put forth a statute of limitation argument that is now subject to this appeal, which presents an issue of first impression. These, plus other factors including discovery abuses, multiple trial continuances, and frivolous CR 11 motions, warrant a multiplier to the fees as requested. CP 162-163; 135-136; RP 16:24-18:9; RP 313:18-314:7

Despite the findings and evidence, the court not only reduced the fee award but refused to apply a multiplier. Denying the right to recover a premium for attorneys bearing all the risk is a discouragement for any attorney to take wage claims on a contingency fee. This is opposite to the intentions of the legislature in enacting wage protection laws and, if allowed, will dissuade attorneys to fight for the protections of workers.

E. Mr. Peiffer should be awarded attorney fees and costs on appeal.

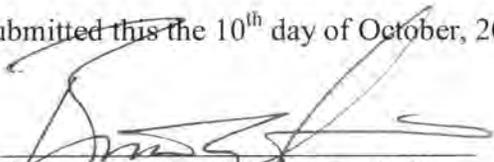
Plaintiff was entitled to an awarded attorney fees and costs for unpaid wages under various portions of RCW 49 including RCW 49.46.090; RCW 49.48.030, and RCW 49.52.070. As applicable law grants Plaintiff the right to recovery attorney fees and costs, Plaintiff asks this court to likewise award fees and costs pursuant to RAP 18.1.

VII. CONCLUSION

This court should reverse the following: (1) the dismissal of Mr.

Peiffer's constructive discharge in violation of public policy and remand the matter for a trial on the merits; (2) the trial court's finding that Mr. Peiffer knowingly submitted to the withholding of his wages and remand the issue to the trial court with instructions to award exemplary (double) damages for the amount of wages withheld; (3) the trial court's reduction of attorney fees and costs and remand the issue to the trial court with instructions to award attorney fees in the amount of \$73,395.50 and cost in the amount of \$9,778.82 as billed and incurred by Plaintiff. CP 121-128; and (4) the trial court's denial of a multiplier and remand the issue to the trial court with instructions to multiple the amount of fees awarded by 1.5

Respectfully submitted this the 10th day of October, 2017.



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CERTIFICATE OF SERVICE

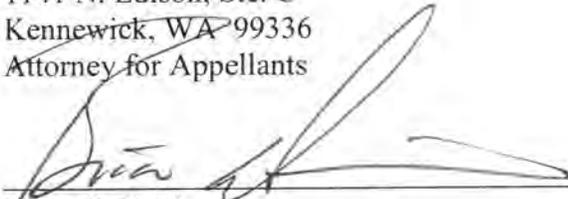
On October 10th, 2017, I served the Brief of Respondent/ Cross

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