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

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

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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.

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**APPELLANTS/CROSS-RESPONDENTS' REPLY  
AND RESPONSE BRIEF**

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## I. INTRODUCTION

The parties have each identified assignments of error and submitted arguments in support thereof. For purposes of this response and reply, the appellants/cross-appellants/defendants shall be referred to herein collectively as “Pro-Cut” unless otherwise referenced individually. Likewise, the respondent/cross-appellant/plaintiff shall be referred to as “Mr. Peiffer” for clarity.

## II. PRO-CUT’S REPLY

### A. The Superior Court and Mr. Peiffer Have Erroneously Expanded the Applicable Three-Year Statute of Limitations for Wage Claims Beyond the Period Contemplated by the Legislature.

Contrary to Mr. Peiffer’s responsive arguments and misleading factual assertions, there is no evidence the Department closed its investigation on November 26, 2013 claiming Mr. Peiffer’s wage complaint was ‘otherwise resolved’. In fact, his claim had not resolved at all. Rather, Mr. Peiffer elected to pursue a private right of action and when his attorney advised the Department that she filed a lawsuit, the Department elected to close its file. No notice was provided to Pro-Cut whatsoever. Peiffer argues in his responsive brief that the “end” of the Department’s investigation was effectuated by the Department notifying Mr. Peiffer that his wage complaint was no longer being investigated due to the filing of this lawsuit, and therefore application of the tolling period

was appropriate. In other words, Mr. Peiffer suggests that in the absence of an event triggering the end of the Department's investigation, the Legislature potentially intended the Statute of Limitations to run indefinitely. The argument is absurd and ignores the Court's duty to not render statutory language meaningless.

**1. The statute identifies only three (3) methods to effectively end the tolling period without which there can be no tolling.**

The Court's "primary duty in interpreting any statute is to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn. 2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn. 2d 9, 19, 978 P.2d 481 (1999)). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, courts "give effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). "In ascertaining legislative purpose, statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v Wright*, 84 Wn.2d 645, 650 (1974).

For this reason, when asked to determine “the plain meaning of a provision, courts look to the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting *State v. Jacobs*, 154 Wn. 2d 596, 600, 115 P.3d 281 (2005)). In the present case, the statutory language is plain on its face. Per RCW 49.48.083(5), the statute of limitations *for civil actions* is tolled during the department’s investigation of an employee’s wage complaint against an employer beginning on the date the employee files the wage complaint and ending when one of the following three (3) events occur:

“(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).

It is undisputed that the wage complaint had not been finally determined through a citation, assessment, or determination of compliance. It is likewise undisputed that Pro-Cut was never notified by the Department that the wage complaint was ‘otherwise resolved’. Thus, in order to qualify and benefit from the statute of limitations tolling provision under

RCW 48.49.083(5), Mr. Peiffer would have had to elect to terminate the Department's administrative action under RCW 49.48.085.

Another well-settled principle of statutory construction is that “each word of a statute is to be accorded meaning.” *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). “[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.” *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep't of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). “[W]e may not delete language from an unambiguous statute: ‘Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). According to RCW 49.48.085(1), an employee who has filed a wage complaint with the department may elect to terminate the department's administrative action by providing written notice after receipt of the department's citation and notice of assessment. Specifically, an opt-out provision to be exercised within ten (10) days. However, in the present case, the department's investigation had not yet produced any decision so subsection (1) is inapplicable. Under subsection (2), if and when the employee elects to terminate the

department's administrative action the department shall immediately discontinue its action against the employer, vacate its decision, and any related findings, payments, or offers to pay shall not be admissible in any court action or other judicial proceeding. See RCW 49.48.085(2). In the instant case, Mr. Peiffer's wage complaint and investigation had not yet resulted in any administrative action. In other words, the Department had not rendered any decisions relative to the wage complaint. Hence, subsection (2) is likewise inapplicable.

Reading the statute as a whole and giving effect to each provision requires the court to appreciate subsection (3) which provides "[n]othing in this section shall be construed to limit or affect: (a) The right of any employee to pursue any judicial, administrative, or other action available with respect to an employer..." RCW 49.48.085(3). Along these lines, Mr. Peiffer could always resort to judicial remedies outside the administrative process. Indeed, utilizing the Department's resources and allowing it to make a determination or reaching an agreement therein would toll the SOL but failing to follow the department's process exposes the employee to the three (3) year SOL. In other words, the legislature bestowed the tolling benefit to employees who partake in the department's administrative action, not those that grow tired of waiting for a conclusion and file a lawsuit. In such cases, an employee has an

absolute right to opt out of the department's determination process prior to it rendering a decision.

**2. Since the Department had not yet taken administrative action relative to the complaint, Mr. Peiffer's ability to pursue litigation was not limited or affected by the investigation.**

In *Jama v GCA Services Group, Inc.*, 2017WL 4758722, the defendant employer argued that the named plaintiffs had a conflict with other class members who had filed a Department of Labor and Industries ('DLI') claim as such a claim would deprive the Department claimants of the administrative forum they chose to pursue their wage claim. In response, the United States District Court of Western Washington indicated that state law authorized employees to file a wage complaint with the department regarding any wage violations that occurred within the past three (3) years. *Id. citing* RCW 49.48.083(1). The court found that the filing of an administrative complaint tolls the statute of limitation and, if DLI assesses wages and interest against the employer and the employee accepts payment, the employee is barred from pursuing relief in court for that violation. *Id. citing* RCW 49.48.083(4) and (5). Further, "[t]he Court has not found, and the defendants have not identified, any provision that would automatically terminate a pending administrative investigation upon the filing of a lawsuit. Although the

statute specifically authorizes employees who have filed wage complaints with the DLI to terminate the administrative action in order to pursue litigation, it expressly states that the “right of any employee to pursue any judicial administrative, or other action available with respect to an employer” is not limited or affected by this section. *Id. citing* RCW 49.48.085(1) and (3). To this end, Mr. Peiffer’s election to file suit against Pro-Cut was unaffected by his inconclusive wage complaint investigated by the Department. Had he completed the Department’s process, he would have had an opportunity, *at the end*, to opt out and pursue judicial remedies having preserved the tolling provision. Unfortunately, Mr. Peiffer’s counsel elected not to complete such process.

**3. Mr. Peiffer’s logic represents a strained interpretation of the statute’s tolling provision that allows him to expand the SOL without an ‘end’ whatsoever.**

In his response, Mr. Peiffer suggests the statute could be still tolling if the department failed to properly terminate its investigation. *See Respondent’s Brief, p. 16.* He naively states that once the investigation begins, tolling is triggered and the onerous is on the Department to declare its ‘end’ to the investigation thereby stopping the SOL clock. First, this argument underscores Mr. Peiffer’s position that he need not take any affirmative steps on his wage complaint, and may

reap a benefit for being dilatory. Apparently, Mr. Peiffer's tolling period would exist into perpetuity had the department not closed its investigation unilaterally and if not closed properly, the SOL continues indefinitely. Clearly, the legislature didn't intend such a consequence and burden on the Department in its role assisting claimants.

Secondly, the department is limited by state law to only investigate an alleged violation going back for three (3) period prior to the wage complaint. RCW 49.48.083(1) (applicable three (3) year SOL). Thus, under Mr. Peiffer's SOL theory, he not only stands to benefit for being dilatory, he is rewarded for being dilatory as this lawsuit achieved a payment for past wages representing a period longer than that which the department could achieve for him. More importantly, why should Mr. Peiffer benefit at all when he uses state resources (i.e. the Department) solely for the purpose of tolling his claim and maximizing his recovery beyond which the Department could have ever awarded him? Yet without legal authority, Mr. Peiffer seeks this Court read him a favorable loop-hole into the law citing public policy. Yet the very same 'public policies' the Department was advancing according to its statutory process, Mr. Peiffer quits, files suit and demands a benefit greater than the department could have provided.

**4. Statutes of Limitations are not to be liberally construed.**

Any exceptions to tolling statutes are in tension with policies supporting a strict application of the statute of limitations. *Janicki Logging and Constr. Co, Inc. v Schwabe, Williamson & Wyatt, P.C.*, 109 Wn.App.655, 662 (2001). Exceptions are strictly construed and courts are reluctant to read into a statute of limitations an exception not clearly articulated. *O'Neal v Estate of Murtha*, 89 Wn.App. 67, 73-74 (1997). This Court cannot read into the tolling statute a broader exception than is expressly granted. *Bennett. V Dalton*, 120 Wn.App.74, 86 (2004). Thus, despite Mr. Peiffer's suggestion to favorably review the lower court's mistake with a 'liberal' interpretation, this court must note that statutes of limitations are to be strictly construed.

**B. Pro-Cut's Admission to Owing Mr. Peiffer Wages Due from November 22, 2010 Restricts Entitlement to Attorney Fees.**

The law in Washington provides for mandatory attorney fees and costs in any civil action in which an employee recovers **more** in withheld wages **than** what the **employer admits to owing**. RCW 49.48.030. (Emphasis added.) Contrary to Mr. Peiffer's statement that Pro-Cut filed stipulations admitting amounts due but did not 'offer or attempt to pay', Pro-Cut's stipulations were in fact offers to pay. *See Brief of Respondent, p. 17*. The stipulations were issued pursuant to

RCW 49.48.030 as Pro-Cut learned of the various amounts claimed by Mr. Peiffer. Washington encourages employers to make admissions in regards to wage disputes thus, narrowing the issues for trial and resolving disputes without litigation expenses.

Indeed, entitlement to an award of attorney fees under RCW 49.48.030 in an employee's action for wages owed is based upon comparison of the amount recovered and the amount the employer may have admitted to owing. Under the statute, an employee is entitled to an award of attorney fees if the amount of recovery is greater than the amount the employer admitted to owing. *Dautel v Heritage Home Center, Inc.*, 89 Wn.App.148, 151 (1997). The statute expressly provides:

“In any action in which any person is successful in recovering judgment for wages or salary owed to him, 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 the 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).

Of course, RCW 49.48.030 is a remedial statute that must be liberally construed to effectuate its purpose. *Int'l Ass'n of Fire Fighters, Local 46 v City of Everett*, 146 Wn.2d 29, 41-43 (2002). In

*Fire Fighters*, 146 Wn.2d at 43-44, the Supreme Court reiterated that RCW 49.48.030 requires a court to award attorney fees in any action where an employee receives wages or salary owed (as long as those wages are more than the employer offered). Thus, should the court rule in favor of Pro-Cut relative to the SOL issue, Mr. Peiffer's resulting award would be equal to the amount admitted by the employer and therefore any fee award becomes erroneous.

C. The Court Lacked Authority to Make an Award for Tax Consequences.

The federal civil rights act has been interpreted as providing an award for tax consequences as an **equitable remedy**. *Blaney v International Ass'n of Machinists*, 151 Wn.2d 203, 215-16 (2004). Likewise, as pointed out by Mr. Peiffer, the WLAD incorporates remedies authorized by federal law, and therefore an offset for additional federal income tax consequences of a discrimination award falls into the category of "any other appropriate remedy", the "catchall remedy provision" of RCW 49.60.030(2). *Blaney*, 151 Wn.2d at 214. However, the inquiry into how much should be awarded cannot even begin until the plaintiff achieves entry of judgment in a particular amount. *Pham v City of Seattle*, 124 Wn.App. 716, 729 (2004). The case Mr. Peiffer advanced was for unlawful withholding of wages, not discrimination, which may entitle him

to additional equitable damages. Mr. Peiffer is well aware there can be no recovery of such tax consequences as awarded. *See Brief of Respondent, p. 21.* In his response, Mr. Peiffer cites ‘employment cases’ which are in fact employment discrimination cases as support for this mistaken award. Without authority to provide such remedies at law, the court erred. For this reason, Mr. Peiffer’s tax consequences were not allowable and must be vacated.

D. The Court Properly Dismissed Peiffer’s Constructive Discharge Claim.

This Court is reviewing a judgment in a bench trial whereby the court granted a dismissal of plaintiff’s claims at the close of plaintiff’s case. See CR 41(b)(3). When reviewing a motion to dismiss in this context, a trial court may either (1) accept plaintiff’s evidence as true and rule as a matter of law on the motion, or (2) weigh the evidence and enter findings of fact, conclusions of law, and judgment of dismissal. *Seattle-First Nat’l Bank v Hawk*, 17 Wn.App.251, 253 (1977). In other words, the trial court may grant the motion as a matter of law or a matter of fact. *McLanahan v Farmers Ins. Co.*, 66 Wn.App. 36, 39 (1992); See also CR 41(b)(3). Here, the trial court’s decision could be upheld under either standard.

When the court weighs the evidence and enters findings, the court makes ‘a factual determination that plaintiff has failed to establish a prima facie case by credible evidence, or that the credible evidence establishes facts which preclude plaintiff’s recovery. *N. Fiority Co. v State*, 69 Wn.2d 616, 618 (1966). The trial court’s findings of fact are reviewed to determine whether they are supported by substantial evidence. *Miller v City of Tacoma*, 138 Wn.2d 318, 323 (1999). Substantial evidence is evidence of sufficient quantity to persuade a reasonable fact finder of the truth of the declared premises. *Holland v Boeing Co*, 90 Wn.2d 384, 390-91 (1978). This Court reviews a trial court’s conclusions of law de novo. *Carlstrom v Hanline*, 98 Wn.App 780, 784 (2000).

“Constructive discharge occurs where an employer deliberately makes an employee’s working conditions intolerable thereby forcing the employee to resign.” *Micone v Steilacoom Civil Ser. Comm’n*, 44 Wn. App. 636, 643 (1986). A claim for wrongful discharge in violation of a public policy arises when an employer discharges an employee for reasons that contravene a clear mandate of public policy. *Gardner v Loomis Armored, Inc.*, 128 Wn.2d 931, 936 (1996). The cases addressing the claim generally involve situations where employees are fired for refusing to commit an illegal act, for performing a public duty or obligation, for exercising a legal right or privilege, or for engaging in whistleblowing

activity. *Id.* at 938; *Dicomess v State*, 113 Wn.2d 612, 618 (1989). The cause of action was first recognized in this state as an exception to the rule that employment contracts that are indefinite in duration may be terminated at will by either the employer or the employee. *Thompson v St. Regis Paper Co.*, 102 Wn.2d 219, 231-233 (1984).

The claim of wrongful discharge in violation of public policy is a claim of an intentional tort – the plaintiff must prove (1) the existence of a clear public policy (clarity element); (2) that discouraging the conduct in which [he or she] engaged would jeopardize the public policy (jeopardy element); and (3) that the public-policy-linked conduct caused the dismissal (causation element).” *Hubbard v Spokane County*, 146 Wn.2d 699, 707-08 (2002). The Court of Appeals held that the tort of wrongful discharge in violation of a public policy is available to a worker if the employer makes working conditions so intolerable that the employee is forced to leave the workplace for medical reasons rather than quit or resign. *Id.* The facts found by the lower court fail to give rise to a prima facie case of constructive discharge or wrongful discharge in violation of a public policy. See CP 123-125. The court properly dismissed the claims. Mr. Peiffer has not even attempted to demonstrate otherwise.

E. The Court Properly Denied Peiffer's Request for Double Damages.

Under RCW 49.52.070, an employer who unlawfully withholds wages shall be liable to the employee for twice the amount of wages, together with costs. However, the benefits under such section shall not be available to any employee who has knowingly submitted to such violations. Id. A person 'knowingly submits' to the withholding of wages, precluding an award of double damages for employer's violation of wrongful wage-withholding statute, when he or she intentionally defers to his or her employer the decision as to whether, if ever, he or she will be paid. *Durand v HIMC Corp.*, 151 Wn.App. 818, 837 (2009).

Substantial evidence exists and shows that Mr. Peiffer was aware of the adjustment to his and other's time-cards since 1989 as the practice had been in place. CP 123. Mr. Peiffer complained about the adjustment to another employee several times. CP 124. Mr. Peiffer became violent with the employee altering the cards. Id. Mr. Peiffer complained to Mr. Silvers about the adjustment of time cards. Id. Nevertheless, Mr. Peiffer continued employment until he ultimately quit on June 8, 2012. Id. Nothing prevented Mr. Peiffer from filing a wage complaint or seeking legal assistance prior to quitting. For over a decade, Mr. Peiffer submitted to a policy of discounting travel commutes to the work site. His ongoing complaints show he knowingly submitted to a policy he disagreed with but

did nothing about other than complain to other employees and engage in a fist fight. Only after he quit did he seek relief. Consequently, the court properly denied double damages.

F. The Court Properly Assessed and Awarded Reasonable Attorney Fees and Costs.

An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. *Berryman v Metcalf*, 177 Wn.App. 644, 656 (2013). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Chuong Van Pham v City of Seattle*, 159 Wn.2d 527, 538 (2007). The burden of demonstrating that an attorney fee award is reasonable is on the fee applicant. *Scott Fetzer Co. v Weeks*, 122 Wn.2d 141 (1993). “Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.” *Mahler v Szucs*, 135 Wn.2d 398, 434-35 (1998).

Counsel for Mr. Peiffer doesn’t appreciate the court’s ruling as to what constituted reasonable attorney fees and costs. Provided an appeal as a matter of right was available to him, Peiffer’s counsel opted to take a shot at the court’s ruling which reduced their request by one-third approximately. Both arguments suggesting the court erred fail to

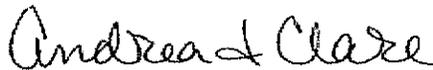
demonstrate a manifest abuse of discretion. The arguments likewise fail to show how the court exercised its discretion on untenable grounds or for untenable reasons. The burden was on Mr. Peiffer to establish reasonableness of the fees and costs. The fact that the court disagreed with their requested amount does not constitute an abuse of discretion. Their arguments in favor of such readjustments are unpersuasive on appeal as well.

### III. 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, find that adverse tax consequences were not recoverable, and deny Mr. Peiffer's assignments of error.

**RESPECTFULLY SUBMITTED** this 20th day of December,  
2017.

TELQUIST McMILLEN CLARE, PLLC



By: \_\_\_\_\_

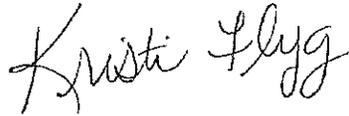
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**CERTIFICATE OF SERVICE**

On the 20th day of December, 2017, I caused to be served a true and correct copy of the within document described as REPLY AND RESPONSE BRIEF to be served on all interested parties to this action as follows:

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DATED this 20<sup>th</sup> day of December, 2017.



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**TELQUIST MCMILLEN CLARE, PLLC**

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**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34715-0  
**Appellate Court Case Title:** Charles Peiffer v Pro-Cut Concrete Cutting and Breaking, Inc., et al  
**Superior Court Case Number:** 13-2-02946-1

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