

JAN 23 2018

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.

RESPONDENT / CROSS APPELLANT'S REPLY BRIEF

Alicia M. Berry
WSBA No. 28849
LIEBLER, CONNOR, BERRY & ST.
HILAIRE, P.S.
1141 N. Edison, Ste. C
Kennewick, WA 99336
aberry@licbs.com
Attorney for Respondent / Cross
Appellant

Brian G. Davis
WSBA No. 43521
LEAVY SCHULTZ DAVIS, P.S.
2415 W. Falls Ave.
Kennewick, WA 99336
bdavis@tricitylaw.com
Attorney for Respondent / Cross
Appellant

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I. INTRODUCTION

Each party has identified assignments of error and submitted arguments in support thereof. For purposes of this reply, the appellants/cross-appellants/defendants shall be referred to herein collectively as “Pro-Cut.” The respondent/cross-appellant/plaintiff shall be referred to herein as “Mr. Peiffer.”

II. ARGUMENT

A. The lower court erred in dismissing Mr. Peiffer’s claim for wrongful termination because Mr. Peiffer presented substantial evidence to establish a prima facie case.

Contrary to Pro-Cut’s unsupported claim, Mr. Peiffer did present sufficient facts to the lower court to establish a prima facie case for wrongful termination in violation of a public policy. Mr. Peiffer’s opening brief demonstrated that those facts constituted substantial evidence sufficient to survive Pro-Cut’s motion for directed verdict.

1) The facts before the lower court were substantial evidence to persuade a fair-minded, rational person to conclude that Mr. Peiffer was wrongfully terminated via constructive discharge.¹

To establish constructive discharge, Mr. Peiffer must show: (1) Pro-Cut deliberately made the working conditions intolerable for Mr.

¹ “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) (internal citations omitted).

Peiffer; (2) a reasonable person would be forced to resign; (3) Mr. Peiffer resigned solely because of the intolerable conditions; and (4) Mr. Peiffer suffered damages. *Campbell v. State*, 129 Wn.App. 10, 22, 118 P.3d 888 (Div III. 2005) (citations omitted).

The record establishes the third and fourth elements. Mr. Peiffer clearly left his employment with Pro-Cut solely because Pro-Cut withheld his wages and retaliated against him when he demanded payment. Pro-Cut admitted that Mr. Peiffer has suffered damages as a result of their illegal withholding of his wages. Accordingly, the lower court only needed to evaluate the first two elements of Mr. Peiffer's constructive discharge claim.

To prevail, 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). "A claimant may show conditions are intolerable by demonstrating aggravating circumstances or a continuous pattern of discriminatory treatment." *Allstot v. Edwards*, 116 Wn.App. 424, 433, 65 P.3d 696, (Div. III. 2003) (citations omitted). Individual facts can demonstrate intolerable working conditions or all facts taken together can establish a pattern of intolerable working conditions. *Id.* at 424. "Whether working conditions

are intolerable is a question of fact not subject to summary judgment unless there is no competent evidence to establish the claim.” *Id.* at 433.

The undisputed evidence was that Pro-Cut deliberately engaged in a pattern of depriving employees of their full wages and then bullying and threatening them when they sought payment. Pro-Cut deliberately withheld the first and last ½ hour of work performed as a matter of policy. Pro-Cut also deliberately altered Mr. Peiffer’s timecards to ensure that he would not get overtime pay. When Mr. Peiffer complained about Pro-Cut withholding his wages, Pro-Cut responded with accusing Mr. Peiffer of cooking the books, lying and failing to document his time correctly.

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

Each of these facts was undisputed in the lower court and in Pro-Cut’s response brief submitted to this Court. This evidence, individually or taken together is sufficient to establish a pattern of treatment that created intolerable working conditions, 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 lower court erred in dismissing the claim upon Defendants’ motion for directed verdict.

2) The facts before the lower court were substantial evidence to persuade a fair-minded, rational person to conclude that Mr. Peiffer was wrongfully terminated in violation of public policy.

To establish a claim for wrongful discharge in violation of public policy, Mr. Peiffer must show (1) the existence of a clear public policy; (2) whether the employer's actions would jeopardize the public policy; and (3) whether the public-policy linked conduct caused the dismissal. *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 when an employee is terminated for exercising a legal right or privilege. *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000). Here, Mr. Peiffer was terminated for exercising his legal right and privilege to demand wages due – a clearly recognized public policy. *Id.*; see also *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 830, 991 P.2d 1126 (2000); see also *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).

Second, to establish that an employer's actions would jeopardize public policy, the employee must demonstrate "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 undisputed by Pro-Cut, 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. This is further undisputed evidence that 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, 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.” *Korlund 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 and attack the competency of those who objected to the illegal withholding of their pay. Pro-Cut provided Mr. Peiffer with ultimatums to quit or submit to working for free. In response to his continued complaints and demands, Mr. Peiffer was faced with actual violence. There was no other evidence than Mr. Peiffer left employment due to the continued acts of wage withholding and the retaliation that ensued from his demands for payment.

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. Mr. Peiffer respectfully requests that this Court reverse the lower court's directed verdict remand for a trial on the merits.

B. The lower court erred in denying double damages because Pro-Cut willfully withheld Mr. Peiffer's wages and there is no substantial evidence to support a finding that Mr. Peiffer "knowingly submitted" to the withholding.

At trial, Mr. Peiffer sought recovery of double damages under RCW 49.52. The lower 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. The lower court's ruling that Mr. Peiffer knowingly submitted to the withholding of his wages was made in error because the uncontroverted evidence showed that Mr. Peiffer vehemently opposed and repeatedly objected to Pro-Cut's practice of willfully withholding his wages.

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, *if ever*, he or she would 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)) (emphasis added).

An employee does not knowingly submit to wage withholding by deferring payment to a later date. *Durand*, at 837. Furthermore, an employer cannot avoid double 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 does withhold wages, it must be: (1) for a legal purpose; and (2) agreed upon with the employee. RCW 49.48.010; RCW 49.52.060.

Pro-Cut presented no evidence at trial or in its Response Brief that supported a finding that Mr. Peiffer knowingly submitted to the withholding of his wages, but admitted that he objected. First, 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. *Durand*, at 837.

Second, even though Mr. Peiffer was subject to Pro-Cut's established written policy of withholding wages, this policy was not for a legal purpose, nor agreed to by Mr. Peiffer. RCW 49.48.010; RCW

49.52.060. 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 presented no evidence that Mr. Peiffer deliberately and intentionally agreed to defer the decision to Pro-Cut as to whether, if ever, he would be paid. *Chalius*, at 682.

Third, Pro-Cut, Silvers, and Sainsbury cannot escape double damages by stipulating to owing Mr. Peiffer wages yet continuing to refuse to pay. If an employer learns of its failure to pay wages owed, but still fails to pay the wages owed, the withholding becomes “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, but continued to withhold payment, the withholding became knowing and intentional. Under RCW 49.52.070, it became willful. *Id.*

Mr. Peiffer did not submit to his wages being withheld, rather, he fought the notion at every turn. Pro-Cut’s “response” demonstrates as such. Pro-Cut knew it owed Mr. Peiffer wages, but didn’t 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 lower court erred in denying full recovery of fees and costs to Mr. Peiffer because its determination was an abuse of discretion.

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 *Chuong Van Pham v. City of Seattle, Seattle City Lights*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007)). Here, the lower court exercised its discretion on untenable grounds for untenable reasons because it failed to apply the lodestar method, as required, in its determination of whether Mr. Peiffer's attorneys' fees and costs were reasonable and recoverable.

To arrive at a reasonable fee, the lower court should employ the lodestar method of multiplying a reasonable hourly rate by the number of hours reasonably expended. *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007) (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.*

It is clear that the lower court abused its discretion in determining whether Mr. Peiffer's attorneys' fees and costs were reasonable. The lower court failed to make a record of its application of the lodestar method. *Id.* Instead, the lower court, without any explanation, arbitrarily found that only \$50,000.00 of the \$73,395.50 in attorneys' fees sought by Mr. Peiffer was reasonable and necessary to prosecute the case. CP 121-128. The lower court's ruling is seemingly random because it is not supported by a demonstrated application of the lodestar method, as required.

Furthermore, had the lower court applied the lodestar method it would have properly found that the \$73,395.50 in attorneys' fees sought by Mr. Peiffer was reasonable and necessary to prosecute the case. First, Mrs. Berry's travel expenses were not only reasonable, but also necessitated in part by Pro-Cut's delayed discovery and multiple continued trial dates. CP 164-223; CP 247-278. Such travel costs are awardable in wage withholding cases. *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).

Second, 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.

Third, 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).

Given the round figure awarded by the court and the lack of any factual basis or explanation 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. Accordingly, Mr. Peiffer respectfully requests that this Court find that the lower court's reduction of attorney fees and costs was in error and remand the issue with instructions to award fees and costs as requested by Mr. Peiffer.

D. The lower court also erred in reducing Mr. Peiffer's attorneys' fees and costs because sufficient facts supported the application of a multiplier.

The lower court should have applied the lodestar method in making its ruling on Mr. Peiffer's attorneys' fees and costs. *See Chuong*, at 538. The lower court also should have considered and applied multipliers in its decision. Such failure to do so was a further abuse of the lower court's discretion.

A court may 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 lower court failed to consider any factors that 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 because the Plaintiff's attorneys were working on a contingency fee basis, the case presented a high level of risk, and the case presented novel legal issues. *Id.* at 368. Here, Mr. Peiffer's case is similar to *Hill* and also

warrants the application of a multiplier because Mr. Peiffer's attorneys were working on a contingency fee, the case presented a high level of risk that the attorneys might never get paid, 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 financially 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 Pro-Cut 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. Third, Pro-Cut continued to put forth stipulations of amounts owed without actually paying any wages. See, Ex. 4, 5, 6, 7, 8. These were done in an ill-fated attempt to circumvent a finding of willfulness and avoid paying attorney fees. This presented Mr. Peiffer's counsel with a *novel legal issue* upon receipt of each stipulation. Finally, Pro-Cut put forth a statute of limitation argument that is now subject to this appeal, which presents an additional 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 lower court abused its discretion by not only arbitrarily reducing the fee award, but also refusing to apply a multiplier. Mr. Peiffer respectfully requests that this Court find that the lower court's reduction of attorney fees and costs was an abuse of discretion and remand with instructions to apply a multiplier to the award fees and costs as requested by Mr. Peiffer.

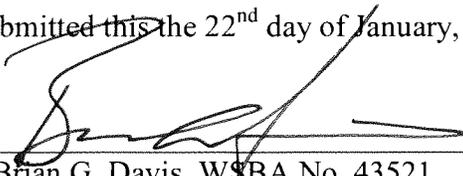
It is important to note that Pro-Cut failed to present any rebuttal argument concerning why a multiplier for Mr. Peiffer's attorneys' fees and costs should not be applied in this case. Accordingly, Pro-Cut should be estopped from raising any such argument in further proceedings.

III. 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 lower court's finding that Mr. Peiffer knowingly submitted to the withholding of his wages and remand the issue to the lower court with instructions to award exemplary (double) damages for the amount of wages withheld; (3) the lower court's reduction of attorney fees and costs and remand the issue to the lower 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 Mr. Peiffer. CP 121-128; and (4) the lower court's denial of a multiplier and remand the issue to the lower court with instructions to multiply the amount of fees awarded by 1.5.

Respectfully submitted this the 22nd day of January, 2018.



Brian G. Davis, WSBA No. 43521
LEAVY SCHULTZ DAVIS, P.S.
2415 W. FALLS AVE.
KENNEWICK, WA 99336
Attorney for Appellants

CERTIFICATE OF SERVICE

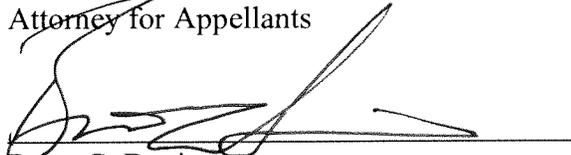
On January 22nd, 2018, I served the Cross Appellant's Reply Brief

with Appendix via first class mail, postage pre-paid to:

Mr. George E. Telquist
Mr. Allen Benson
1321 Columbia Park Trail
Richland, WA 99352

Renee Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

Alicia Berry
1141 N. Edison, Ste. C
Kennewick, WA 99336
Attorney for Appellants



Brian G. Davis