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SUPREME COURT NO. 96267-7
(Court of Appeals No. 36258-2-III)
(Yakima County Superior Court Cause No. 16-2-03417-8)

SUPREME COURT OF THE STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS and PATRICIA AGUILAR, individually
and on behalf of all others similarly situated,

Plaintiffs-Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC., GENEVA S. DERUYTER, and
JACOBUS N. DERUYTER,

Defendants-Respondents,

and

WASHINGTON STATE DAIRY FEDERATION and WASHINGTON
FARM BUREAU,

Intervenors-Respondents.

**DEFENDANTS-RESPONDENTS' ANSWER TO MOTION FOR
DISCRETIONARY REVIEW**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants-Respondents DeRuyter Brothers Dairy, Inc., Geneva S. DeRuyter and Jacobus N. DeRuyter (“DeRuyter”), respectfully submit this Answer to the Plaintiff-Petitioners’ Motion for Discretionary Review.

The trial court’s order granting and denying the parties’ cross motions for summary judgment should be immediately reviewed by the Court of Appeals. Discretionary review of the order is appropriate for the reasons set forth in DeRuyter’s Motion for Discretionary Review, filed with Division III on August 17, 2018. Those reasons are repeated here for the Court’s convenience.

II. DISCUSSION

RAP 2.3(b)(4) allows discretionary appellate review of a trial court’s interlocutory order if (1) the order involves a controlling question of law; (2) there is a substantial ground for a difference of opinion regarding the order; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. These requirements were derived from the parallel requirements of a federal statute, 28 U.S.C. § 1292(b). The Court may look to the analysis of federal rules similar to our state rules to the extent it finds federal reasoning persuasive.¹

¹ See 2A Karl B. Tegland, *Washington Practice: Rules Practice*, at 161 (6th ed.2004); and *Am. Mobile Homes of Wash., Inc. v. Seattle–First Nat’l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1296 (1990).

The trial court’s summary judgment order satisfies the RAP 2.3(b)(4) requirements. Plaintiffs’ Complaint alleges that R.C.W. 49.46.130(2)(g) violates article I, section 12 of the Washington Constitution. RCW 49.46.130(2)(g) exempts agricultural employees from the general statutory right to overtime pay under RCW 49.46.130(1). The trial court granted partial summary judgment that “RCW 49.46.130(2) grants a privilege or immunity in contravention of Article 1, Section 12.” That decision is based on the trial court’s conclusion of law that there is a “fundamental right of state citizenship” to work – to “sell your labor and earn a wage.” The court concluded that RCW 49.46.130(2)(g) grants a “privilege or immunity” under article I, section 12, because the statute treats agricultural employees differently than other wage earners regarding the purported “fundamental right to work and earn a wage.” The order involves a controlling question of law, there is a substantial ground for a difference of opinion regarding the order, and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

A. The Trial Court’s Decision Involves a Controlling Question of Law.

A “controlling question of law” is one that deeply affects the ongoing process of the litigation.² A legal question is considered

² *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.), *appeal dismissed*, 459 U.S. 961 (1982).

“controlling” if an appellate court would be required to reverse a judgment if it determines the legal question was wrongly decided.³

The application of article I, section 12 to challenged legislation requires a two-part test. *Schroeder v. Weighall*, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014). First, the Court must determine whether the legislation grants a “privilege or immunity.” If so, the Court must then determine whether the legislature had a reasonable basis for granting the privilege.⁴

The first part of the *Schroeder* two-part test is a controlling question of law, because “if there is no privilege or immunity involved, then article I, section 12 is not implicated.” *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014) (citing *Grant County FPD No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004); accord, *Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 363, 340 P.3d 849 (2015) (“[b]ecause this case does not involve a constitutional privilege, we need not analyze the second prong of our article I, section 12 test”). Consequently, if the appellate court were to determine that the statutory entitlement to overtime pay does not involve a “fundamental right of state citizenship,” the order granting plaintiffs’ motion and denying defendant/

³ *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

⁴ The trial court’s Order cites *Schroeder* for this test at page 2, line 14-17.

intervenors' motion for summary judgment on this claim must be reversed.⁵

B. There Is Substantial Ground for Disagreement

There is a substantial ground for difference of opinion regarding the trial court's conclusion that the statutorily created entitlement to overtime pay involves a fundamental right of state citizenship. "[N]ot every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article I, section 12." *Ockletree*, 179 Wn.2d at 778 (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant II)*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004)); accord *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008) ("[a] privilege is not necessarily created every time a statute allows a particular group to do or obtain something"). Instead, article I, section 12 "applies only where a law implicates a 'privilege' or 'immunity' as defined in [this Court's] early cases

⁵ Plaintiffs also claimed that the agricultural exemption from overtime pay violates the equal protection guarantee of the privileges and immunities clause. Amended Complaint, ¶¶ 108-114. The trial court did not address that argument in its letter decision or its order, effectively denying plaintiffs' motion on that claim. However, reversal of the trial court's conclusion that RCW 49.46.130(2) implicates a "fundamental right" will effectively compel judgment against the equal protection claim as well, because if the statute does not affect a fundamental right, the court employs the lowest level, "rational basis" review of the statute's purpose as an economic regulation. See *Sanchez v. Dep't of Labor & Indus.*, 39 Wn.App. 80, 89, 692 P.2d 192 (1984); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998).

distinguishing the ‘fundamental rights’ of state citizenship.” *Schroeder v. Weighall*, 179 Wn.2d 566, 572, 316 P.3d 482, 485-86 (2014) (quoting *Grant II*, 150 Wn.2d at 812-13). The Washington Supreme Court’s early cases defined the “fundamental rights of state citizenship” specifically, and quite narrowly, as

“the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.”

Am. Legion, 164 Wn.2d at 607 (quoting *Grant II*). If RCW 49.46.130 does not implicate a fundamental right of state citizenship, it does not involve a privilege or immunity within the ambit of article I, section 12, and the trial court’s order must be reversed.

Motion briefing to the trial court proved that the parties have widely disparate opinions about the issue. The parties sharply disputed plaintiffs’ argument that R.C.W. 49.46.130 implicates a purported fundamental right to worker health and safety. Notably, neither plaintiffs’ Amended Complaint nor their motion for summary judgment suggested that Washington law recognized a fundamental right “to work and earn a wage” – the trial court reached that result *sua sponte*. The trial court’s reasoning in reaching that result is also curious—its letter opinion mis-cites *Hays v. Terr. of Wash.*, 2 Wash. Terr. 286, 5 P. 927 (1884), as holding that “a law barring hunting of deer with dogs in certain counties was found

not to implicate a ‘fundamental right,’ ”⁶ and incorrectly identifies *Schroeder, supra*, as “the most recent incarnation” of the Washington Supreme Court’s “fundamental rights” analysis, ignoring this Court’s subsequent decision in *Ockletree. Ex. A to Order, p. 2*. Notably, *Ockletree* involves employment rights and reiterates the established Washington rule that “rights left to the discretion of the legislature have not been considered fundamental.” 179 Wn.2d at 778 (citing *Grant II*, 150 Wn.2d at 814). Indeed, on this point *all* justices agreed: “a right granted only at the discretion of the legislature is not a “privilege” any citizen can assert.” 179 Wn.2d at 795 (Sevens, J, dissenting). The statutorily created entitlement to overtime pay is similarly “a right granted at the discretion of the legislature,” but the trial court’s order ignores this clear conflict with controlling precedent.

Finally, one could disagree with the trial court’s order because no Washington appellate court has ever identified a “fundamental right” to “work and earn a wage,” and the trial court did not even address the requirement that a prohibited “privilege” favor one class of citizens to the disadvantage of another. Even if there were a fundamental right “to earn a wage,” RCW 49.46.130(2) does not deprive any employees of *that* right-- it merely exempts some employees from the statutory entitlement to “time and a half.” In short, the trial court’s decision manufactured a fundamental

⁶ In fact, *Hays* held only that the law did not create a special privilege because it applied equally to all citizens of the Territory. 5 P. at 927.

right where none exists, then manufactured a violation of that right. Especially given that the Order involves several issues of first impression, petitioners respectfully submit that there is substantial ground for difference of opinion regarding the trial court's order. Accordingly, this criterion of RAP 2.3(b) is satisfied.

C. Immediate Appeal May Materially Advance Disposition of the Litigation.

The third criterion of RAP 2.3(b)(4), "that an appeal may materially advance the ultimate termination of the litigation," is closely tied to the requirement that the order involve a controlling question of law.⁷ Thus, if the controlling questions of law might avoid or simplify further proceedings before the trial court, this criterion is satisfied. Reversal of the trial court's conclusion that RCW 49.46.130(2)(g) implicates a fundamental right, or that it otherwise grants agricultural employers a privilege or immunity within the ambit of article 1, section 12, readily meets this standard, because it will dispose of this case.

As the trial court noted in granting DeRutyer's Motion to Certify for Interlocutory Appeal, trial of the remaining issues in this action is expected to be complex, time consuming and costly (or "messy," as the trial court put it), both in terms of attorney fees and imposition on the resources of the Court, parties, and witnesses. Interlocutory review at this

⁷ Wright, Miller, & Cooper, 16 Federal Practice and Procedure, § 3930, at 432 (2d ed. 1996).

juncture will likely avoid a waste of those resources. This factor should be given particular weight for the DeRuyters, who are the hapless victims of this costly litigation simply because they followed a decades old statute according to its unambiguous terms, in accordance with industry practice and 80 years of American tradition.

III. CONCLUSION

This Court should order discretionary review of the trial court's summary judgment order by Division III of the Washington State Court of Appeals.

Respectfully submitted this 20th day of November, 2018.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury and in accordance with the laws of the State of Washington that on November 20, 2018, I caused a true and correct copy of the foregoing **DEFENDANTS-RESPONDENTS' ANSWER TO MOTION FOR DISCRETIONARY REVIEW** to be served on the following persons by electronic mail:

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DATED this 20th day November, 2018, at Spokane, Washington.

/s/ Pam McCain
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