

FILED
SUPREME COURT
STATE OF WASHINGTON
11/27/2018 3:09 PM
BY SUSAN L. CARLSON
CLERK

No. 96267-7

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.

PETITIONERS' REPLY ON MOTION FOR DISCRETIONARY REVIEW

Lori Jordan Isley, WSBA # 21724
Joachim Morrison, WSBA # 23094
Andrea Schmitt, WSBA # 39759
COLUMBIA LEGAL SERVICES
6 South Second Street, Suite 600
Yakima, WA 98901
(509) 575-5593
lori.isley@columbialegal.org
joe.morrison@columbialegal.org
andrea.schmitt@columbialegal.org

Marc Cote, WSBA # 39824
Anne Silver, WSBA # 51695
FRANK FREED SUBIT &
THOMAS LLP
705 Second Avenue, Suite 1200
Seattle, WA 98104-1798
(206) 682-6711
mcote@frankfreed.com
asilver@frankfreed.com

Attorneys for Plaintiffs-Petitioners

I. INTRODUCTION

Farmworkers in Washington currently are deprived of overtime protections afforded to most other workers in the state. In this case, farmworkers challenge the constitutionality of the agricultural exemption from state-law overtime protections. This question is one of considerable public import, affecting thousands of workers who work long hours in a highly dangerous industry.

The Commissioner's October 26, 2018 ruling in this matter indicated that answers on Petitioners' motion for discretionary review would assist him in determining whether discretionary review is justified. Commissioner's Ruling at 2. The answers filed by Defendants and Intervenors¹ confirm that all parties agree that discretionary review is appropriate in this case. The only disagreements are regarding the scope of discretionary review and which court should undertake that review. The overtime exemption, which incorporates the structural vestiges of our racially inequitable history, should be examined fully and directly by this Court.

¹ Hereinafter "DeRuyter and the Industry Groups."

II. ARGUMENT

A. Review of all issues related to Petitioners' constitutional claims is necessary to advance the ultimate termination of this litigation and to conserve judicial resources.

All parties agree that appellate review is warranted on the issue of whether the overtime exemption from the Minimum Wage Act is a “privilege or immunity” within the meaning of article I, section 12 of the Washington Constitution. But, as is evident from the trial court’s letter ruling, the trial court also made a number of other reversible legal errors related to its determination that all other aspects of Petitioners’ constitutional claims contained issues of fact for trial. Absent discretionary review of all of these aspects of the trial judge’s ruling, the trial court’s ruling will require a futile, and potentially impossible, trial on issues of legislative history and other issues of law.

In addition to the first prong of the “privileges or immunities” test, Petitioners ask this Court to review the following issues:

1. Did the trial court err by conflating the test for “reasonable grounds” (the second element of the “privileges and immunities” analysis) with the test for an “equal protection” claim?
2. Did the trial court err in misstating the standard for

determining whether the legislature had “reasonable grounds” for granting a privilege or immunity?

3. Did the trial court err in concluding that the “reasonable grounds” test presented an issue of disputed fact for trial?

4. Did the trial court err in concluding that the entire equal protection claim presented issues of fact?²

5. Did the trial court err in failing to grant the Workers’ motion for summary judgment because the agricultural exemption from overtime violates article I, section 12 of the Washington State Constitution?

If this Court agrees with the Workers that its constitutional claims are justiciable without a trial, the Court’s ruling will dispose of the *entire case*, regardless of which party prevails on the merits. *See* Petitioners’ Motion for Discretionary Review at 12-13. This result would avoid substantial use of judicial resources, including in an attempted trial on legislative history, and in subsequent appeals.

² Contrary to the Industry Groups’ argument, *see* Intervenors’ Answer to Motion for Discretionary Review at 7 n.3, a ruling that the overtime exemption does not implicate a “fundamental right” would not dispose of the Workers’ equal protection claims. In one of the cases cited, *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 150, 960 P.2d 919, 926 (1998), this Court invalidated the statute at issue on a “rational basis” standard, without having found a “fundamental right” was implicated.

B. This Court should perform the requested review.

As the Industry Groups point out, Intervenors' Answer at 11-12, the parties have addressed the grounds for direct review in other briefing, *see* Petitioners' Statement of Grounds for Direct Review. Review by this Court is appropriate and preferable because this case raises an issue of first impression as to the nature of the Washington Constitution's article II, section 35 guarantee of protections for workers in dangerous occupations.³ Contrary to the Industry Groups' assertion, *see* Intervenors' Answer to Motion for Discretionary Review at 10, this question does not implicate controlling precedent, easily applied by the Court of Appeals.⁴ Instead, it requires the Court to determine whether this right, enshrined in the Constitution, creates a "privilege or immunity" for article I, section 12 purposes. *See Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 778, 317 P.3d 1009, 1015 (2014). This and

³ "The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same." Const. art. II, § 35.

⁴ On the same page of their answer, contrary to their assertion the Court of Appeals would simply be required to apply "controlling precedent," the Industry Groups concede that this case "involves several issues of first impression." Intervenors' Answer to Motion for Discretionary Review at 10.

related constitutional issues of first impression should be resolved by the state's highest court. *See generally, Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 688 P.2d 1278 (1983) (reversing trial court and holding exclusion of farm workers from workers' compensation was unconstitutional).

Whatever the result in a lower court, the losing party is likely to seek review from this Court. In making a determination to grant direct discretionary review, this Court has previously considered "that it is reasonably likely that any decision by the Court of Appeals on these important issues of first impression will be reviewed by this court." Ruling Granting Direct Discretionary Review, *Associated Press, et al. v. Washington State Legislature, et al.*, May 29, 2018, <https://www.courts.wa.gov/content/public/Upload/Supreme%20Court%20Orders/954411AssociatedPress.pdf> at 3. This Court should review all constitutional issues in this case in the first instance.

III. CONCLUSION

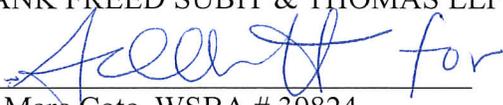
For the reasons stated above this Court should accept review of this case on all aspects of the Workers' constitutional claims.

DATED this 27th day of November, 2018.

COLUMBIA LEGAL SERVICES

By: 
Andrea Schmitt, WSBA #39759

FRANK FREED SUBIT & THOMAS LLP

By:  for
Marc Cote, WSBA # 39824

Attorneys for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

I certify under penalty of perjury and in accordance with the laws of the State of Washington that on November 27, 2018, I electronically filed the foregoing **Reply on Motion for Discretionary Review** with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to the following:

John Ray Nelson
Milton G. Rowland
FOSTER PEPPER PLLC
618 W. Riverside Ave., Ste 300
Spokane, WA 99201
john.nelson@foster.com
milt.rowland@foster.com
Counsel for Defendants-Respondents

Timothy J. O'Connell
Ryan R. Jones
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
tim.oconnell@stoel.com
ryan.jones@stoel.com
Counsel for Intervenors-Respondents

DATED this 27th day of November, 2018 at Yakima, Washington.


Elvia F. Bueno

COLUMBIA LEGAL SERVICES

November 27, 2018 - 3:09 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96267-7
Appellate Court Case Title: Jose Martinez-Cuevas, et al. v. Deruyter Brothers Dairy, Inc., et al.
Superior Court Case Number: 16-2-03417-8

The following documents have been uploaded:

- 962677_Answer_Reply_20181127150533SC458149_9386.pdf
This File Contains:
Answer/Reply - Reply to Answer to Motion for Discretionary Review
The Original File Name was 18 1127 Reply to Dfs and Intervs Answers on Disc Review.pdf

A copy of the uploaded files will be sent to:

- asilver@frankfreed.com
- cheli.bueno@columbialegal.org
- debbie.dern@stoel.com
- hohaus@frankfreed.com
- joe.morrison@columbialegal.org
- john.nelson@foster.com
- litdocket@foster.com
- lori.isley@columbialegal.org
- mcote@frankfreed.com
- milt.rowland@foster.com
- ryan.jones@stoel.com
- tim.oconnell@stoel.com

Comments:

Sender Name: Elvia Bueno - Email: elvia.bueno@columbialegal.org

Filing on Behalf of: Andrea L Schmitt - Email: andrea.schmitt@columbialegal.org (Alternate Email:)

Address:
300 Okanogan Ave Ste 2A
Wenatchee, WA, 98801
Phone: (509) 662-9681 EXT 123

Note: The Filing Id is 20181127150533SC458149