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SUPREME COURT
STATE OF WASHINGTON
2/19/2019 4:04 PM
BY SUSAN L. CARLSON
CLERK

No. 96762-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CHARLES PEIFFER,

Respondent / Cross-Petitioner,

v.

PRO-CUT CONCRETE CUTTING AND BREAKING, INC. (UBI No.
602427981); KELLY R. SILVERS and ERIN SILVERS, husband and
wife and the marital community compromised thereof,

Petitioners / Cross-Respondent.

CHARLES PEIFFER'S ANSWER TO PRO-CUT'S PETITION FOR
REVIEW AND CROSS-PETITION FOR REVIEW

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I. IDENTITY OF CROSS-PETITIONER

Charles Peiffer, by and through his attorneys of record, hereby requests the Supreme Court to accept review of the Court of Appeals, Division III's decision identified in Section IV herein.

II. COURT OF APPEALS DECISION

The decision of the Court of Appeals, Division III (hereinafter "Division III") dated December 18, 2018 should be reviewed as briefed in Section VII in this Answer and Cross-Petition for Review. A copy of the decision is attached hereto as "Appendix A."

III. RESTATEMENT OF PRO-CUT'S ISSUE

Petitioners 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 (collectively "Pro-Cut"), presented review for the following:

Did the Court of Appeals, Division III, commit error when it affirmed the Trial Court's ruling that the statute of limitations where the Plaintiff, Charles Peiffer's, wage claim was tolled during the period his wage complaint was under investigation by the Department, although the Department ended its investigation upon Mr. Peiffer filing his lawsuit?

IV. STATEMENT OF MR. PEIFFER'S ISSUE

Mr. Peiffer respectfully presents the following issue for review:

Did Division III commit error when it reversed the Trial Court's award of \$8,784 to offset Mr. Peiffer's taxable consequences of receiving his unpaid wages in a lump sum?

V. RESTATEMENT OF THE CASE

Mr. Peiffer worked as a slab saw operator for Pro-Cut Concrete Cutting and Breaking, Inc. ("Pro-Cut") for nearly 20 years. 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 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.

Mr. Peiffer was financially unable to hire an attorney to advise him of his legal options. RP 236:15-237:4. On July 3, 2012, Mr. Peiffer filed a complaint with the Department of Labor and Industries (hereinafter the "Department") 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. 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 the Department of his decision to file a civil lawsuit against his former employer on November 26, 2013. The next day, the Department 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, Pro-Cut still refused to pay Mr. Peiffer his owed wages. Pro-Cut then 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. Although Pro-Cut stipulated to various amounts, it never paid any portion of the amount admitted owing to Mr. Peiffer. CP 39:8 – 44:19.

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.

Pro-Cut brought a motion in limine at the start of trial asserting that Mr. Peiffer could not prove that the statute of limitations had been tolled during the pendency of the Department's investigation. In essence Pro-Cut argued that the statute could not be tolled if there was not a proper end to Department's investigation. RP 13:11-18. Pro-Cut 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 Mr. Peiffer's statute of limitations had been tolled from the time he filed his claim with the Department until he

filed suit. CP 122. The Trial Court then awarded Mr. Peiffer his unpaid wages, attorneys fees and costs, and \$8,784 to offset his taxable consequences of receiving his unpaid wages in a lump sum.

On appeal, Division III affirmed the Trial Court's finding that Mr. Peiffer's statute of limitations tolled from the time he filed his claim with the Department until he filed suit and the Department ended its investigation. Division III, however, reversed the Trial Court's award of \$8,784 to Mr. Peiffer to offset his taxable consequences.

VI. ARGUMENT ON WHY REVIEW OF PRO-CUT'S ISSUE SHOULD BE DENIED

Pro-Cut alleges that Division III erred in affirming that the statute of limitations for Mr. Peiffer's wage withholding claim was tolled during the period Mr. Peiffer's wage complaint was investigated by the Department. Pro-Cut seeks discretionary review of this decision pursuant to RAP 13.4(b)(4).

Under RAP 13.4(b)(4), a petition for review will be accepted by the Supreme Court only "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Pro-Cut offers four reasons why Division III's interpretation and application of RCW 49.48.083 involves matters of substantial public interest; however,

none of these reasons are persuasive. As such, the Supreme Court should deny review.

A. Division III correctly found that Mr. Peiffer’s statute of limitations tolled under RCW 49.48.083.

If an employee files a wage complaint with the Department, then the Department shall investigate the complaint. RCW 49.48.083(1). The Department “shall issue either a citation and notice of assessment or a determination of compliance” unless the wage complaint is “otherwise resolved.” *Id.* (emphasis added). Once the complaint is filed, “[t]he applicable statute of limitations for civil actions is tolled during the [D]epartment’s investigation of [the] employee’s wage complaint against [their] employer.” RCW 49.48.083(5) (emphasis added). The Legislature specifically defines the beginning and the end of the statute of limitations tolling period as follows:

“For purposes of this subsection, the [D]epartment’s investigation *begins* on the date the employee files the wage complaint with the [D]epartment 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 [D]epartment 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 [D]epartment’s administrative action under RCW 49.48.085.” RCW 49.48.083(5) (emphasis added).

In this case, “the Department had an open investigation of Mr. Peiffer’s wage complaint against Pro-Cut from July 3, 2012, until [the Department] terminated the investigation on November 27, 2013.” *Peiffer v. Pro-Cut Concrete Cutting & Breaking, Inc.*, 431 P.3d 1018, 14, 2018 Wash App. LEXIS 2849 (2018). The Department did not issue Pro-Cut a final or binding citation or a notice of assessment. *Id.* The Department did not notify Pro-Cut in writing that Mr. Peiffer’s wage complaint had been otherwise resolved. *Id.* Mr. Peiffer did not elect to terminate the Department’s administrative action, as one did not occur. *Id.* at 15—16; RCW 49.48.083(5); RCW 49.48.085(1). Applying this plain meaning of RCW 49.48.083(5), Mr. Peiffer’s statute of limitations tolled under RCW 49.48.083(1) and has not yet ended. *Peiffer*, 431 P.3d at 22—23; *see also* RCW 49.48.083(5).

Despite this plain language, Pro-Cut has twice argued, unsuccessfully, that the statute of limitations tolls under RCW 49.48.083 only if the employee allows the Department to complete its investigation before filing suit. As Division III aptly noted, the plain language of RCW 49.48.083 and associated statutes do not support this argument. *Peiffer*, 431 P.3d at 1027.

To adopt the interpretation advanced by Pro-Cut places an improper burden on the employee to police the activities of an already

overburdened and underfunded department to ensure that they are doing their job or risk losing the ability to collect his wages.

B. The Supreme Court should deny review because RCW 49.48.083 does not condition tolling upon the Department finalizing a wage complaint investigation.

Pro-Cut first offers the following arguments and “public interests” in support of its petition for review: (1) there is a “strong public interest in allowing employers to rely on the three-year statute of limitations for wage claims if the employee commences a Department investigation but terminates prior to the Department’s completion;” and (2) there is a “substantial public interest in requiring the employee to follow the statute and allow the Department to complete its investigation in order for an employee to have the benefit of tolling.” Pro-Cut’s Petition, p. 4—9. Pro-Cut cites no case law to establish these public interests and these arguments, are once again premised on Pro-Cut’s incorrect reading of the applicable statutes.

Instead, RCW 49.48 is clearly designed to protect employees, not employers. Furthermore, the plain language of RCW 49.48.083(5) unambiguously states that the act of filing a wage complaint with the Department tolls the statute of limitations, but does not condition tolling upon the Department finalizing its investigation. *See* RCW 49.48.083(5). In fact, no provision, not even RCW 49.48.085, conditions tolling upon

the Department finalizing its investigation. Rather, RCW 49.48.085 specifically allows, if not encourages, employees to seek judicial action against their employers. *See* RCW 49.48.085(3)(a).

While the Department is statutorily required to investigate every wage complaint, the Department does not have to issue a citation and notice of assessment or a determination of compliance if the wage complaint is “otherwise resolved.” RCW 49.48.083(1). Therefore, RCW 49.48.083 also envisions and allows an employee to resolve their wage complaint through other means, such as judicial action. *See id.*

An employee is not required to see the investigation “to the end” as Pro-Cut claims. *See* RCW 49.48.083; 49.48.085; *Jama v. GCA Services Group, Inc.*, No. C16-0331RSL, 2017 WL 4758722 ¶ 3 (W.D. Wash. Oct. 20, 2017). Nothing prevents an employee from filing a complaint with the Department and later filing suit while the Department’s investigation is still pending. *Id.*

Employers like Pro-Cut have no legal basis on which to form a reliance or belief that the statute of limitations only tolls during an investigation if the Department completes that investigation. Additionally, there is no “substantial interest” to deprive employees the benefit of tolling when the Department does not finalize its investigation because RCW 49.48.083 does not condition tolling on the Department finalizing its

investigation. As such, these are not true matters of substantial public interest for this Court to consider.

C. The Supreme Court should deny review because Division III's interpretation of RCW 49.48.083 does not deprive employers of the ability to participate in Department investigations.

Pro-Cut next argues that review is warranted because Division III “created a societal gap whereby employees are granted tolling by virtue of seeking a [Department] investigation. However, employers who are unaware of the investigation and the tolling would be deprived of fundamental rights to avoid litigation and the penalties and remedies associated with wage claims.” Pro-Cut’s Petition p. 10. Pro-Cut’s allegation is clearly unsupported by both the record and the plain statutory language.

Although Pro-Cut did not receive notice of the Department’s investigation into Mr. Peiffer’s wage complaint, the fact is irrelevant to the tolling of Mr. Peiffer’s statute of limitations. Again, under the plain language of RCW 49.48.083, filing a wage complaint tolls the statute of limitations during the Department’s investigation. There is no provision in RCW 49.48.083, 0.85, or any other statute that places additional requirements or conditions that the employee must satisfy for the statute of

limitations to toll. A finalized investigation is plainly not a requirement or condition to tolling or to file suit.

Neither Mr. Peiffer nor the tolling deprived Pro-Cut of the ability to participate in the Department's investigation, the Department did. Consequently, Division III's ruling will not deprive other employers of their ability to participate in Department investigations because the matter of tolling has no bearing on whether or not the Department will communicate its investigation with the employer. Because Pro-Cut's argument is unsupported by the record and plain language of RCW 49.48.083 and because this argument does not comport with RAP 13.4, the Supreme Court should deny review.

D. The Supreme Court should deny review because the Legislature did not intend to condition tolling upon the Department finalizing an investigation.

Pro-Cut argues that under RCW 49.48.085(1), "an employee who wishes to pursue a private right of action after initiating a Department investigation can either (1) wait until a citation and notice of assessment is assessed and terminate his or her claim 'within 10 days' after the receipt of the same; or (2) lose their ability to preserve the portion of the right of action that tolls during the investigation." This interpretation of RCW 49.48.085 is not supported by the plain and unambiguous meaning of the statute.

RCW 49.48.085(1) states:

“An employee who has filed a wage complaint with the [D]epartment may elect to terminate the [D]epartment’s administrative action, thereby preserving any private right of action, by providing written notice to the [D]epartment within ten business days after the employee’s receipt of the [D]epartment’s citation and notice of assessment.”

As Division III noted, Pro-Cut reads “thereby preserving any private right of action” as if it said “thereby preserving the benefit of tolling. The provision does not speak to tolling at all.” *Peiffer*, 431 P.3d at 2017. It is therefore clear that the Legislature did not intend for RCW 49.48.085(1), or any other section of RCW 49.48, to condition tolling upon the Department finalizing its investigation.

Furthermore, RCW 49.48.083(1) states that the statute of limitations for a wage complaint begins tolling upon filing a Department complaint and continues until events codified in RCW 49.48.083(5) occur. To reiterate, the Legislature’s use of the word “until” in RCW 49.48.083(5) rather than “unless” clearly evidences the Legislature’s intent to not condition tolling upon the events listed in RCW 49.48.083(5). *See* RCW 49.48.083(5); *see also Overlake Hosp. Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010) (where the meaning of the statute is plain and unambiguous, we give effect to that plain meaning). Had the Legislature intended to condition tolling upon the Department finalizing

its investigation, it could have easily done so. Because the plain and unambiguous language of RCW 49.48.083 and 0.85 does not condition tolling upon the Department finalizing its investigation, the Supreme Court should deny review.

VII. ARGUMENT ON WHY REVIEW OF MR. PEIFFER'S ISSUE SHOULD BE GRANTED

Under RAP 13.4(b)(4), a petition for review will be accepted by the Supreme Court only “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” “A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue.” *In re Pers. Restraint of Flippo*, 380 P.3d 413, 414—15 (2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903(2005)).

Here, Mr. Peiffer seeks review of Division III’s decision to reverse Mr. Peiffer’s award of \$8,784 to offset his increased tax liability suffered as a result of Pro-Cut’s wrongful withholding of his wages. The issue of whether taxable consequences is a damage that can be collected under RCW 49.48 is a matter of first impression and involves a substantial matter of public interest.

A. In Washington state, there is clearly a substantial public interest in ensuring employees are paid all wages that are due and owing.

The Washington Legislature “has evidenced a strong policy in favor of payment of wage due to employees by enacting a comprehensive scheme to ensure payment of wages, including statutes...which provide both criminal and civil penalties for the willful failure of an employer to pay wages.” *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998) (citing *United Food & Comm. Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51—52, 925 P.2d 212 (1996)). In codifying RCW 49.48, “the Legislature mandated that that employers pay employees all wages due upon the conclusion of the employment relationship and banned all withholding or diversion of wages by employers unless specifically approved by statute.” *Id.*; RCW 49.48.010.

Washington courts have recognized the Legislature’s public interest in protecting employee wages and have liberally construed RCW 49.48 “to advance the Legislature’s intent to protect employee wages and assure payment.” *Id.* at 160; *see also Brandt v. Impero*, 1 Wn. App. 678, 682, 463 P.2d 197 (1969). Further, the Supreme Court has 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 at 159 (citation omitted).

As is clearly evidenced by RCW 49.48 and recognized by this Court, the Washington Legislature has taken a firm stance on wage withholding to promote and advance a matter of substantial public interest.

B. Allowing employees like Mr. Peiffer to collect taxable consequences as a wage claim damage will advance Washington state’s substantial public interest in ensuring employees are paid all wages due.

In Washington, the “aim or purpose of the [wage] 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....” *Schilling*, 136 Wash.2d at 159. As such, the terms 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 (2012).

For example, courts have interpreted the term “wages” to include back pay, front pay, sick leave reimbursement, vacation pay, commissions, etc. even though these forms of wages are not specifically provided for in the language of RCW 49.48. *Id.*; *see also Backman v. Nw. Publ’g Ctr., LLC*, 147 Wn. App. 791, 197 P.3d 1187 (2008). Although the term “taxable consequences” is not listed as a recoverable damage in any employment statute, case law clearly supports such an award if the taxable consequence deprives an employee the full amount of wages he is entitled to receive from his employer. *See Schilling* 136 Wash.2d a52 (1998); *see also Backman*, 147 Wn. App. 791 (2008).


The Trial Court properly awarded Mr. Peiffer \$8,784 to offset his increased tax liability. Mr. Peiffer will suffer from an increased tax liability because he will receive three years worth of wrongfully withheld wages in a lump sum. RP 76:11-18, 77:12 – 79:4. This taxable consequence is the direct result of Pro-Cut wrongfully withholding Mr. Peiffer’s wages. Had Pro-Cut not wrongfully withheld Mr. Peiffer’s wages, then Mr. Peiffer would not have to pay a \$8,784 tax consequence. It follows then, without an award to cover his taxable consequence, Mr. Peiffer will not be made whole because he will not receive all of his wages that Pro-Cut wrongfully withheld.


Employees like Mr. Peiffer must be allowed to collect tax consequences that are caused by an employer's wrongful deprivation or withholding of wages. Denying employees the ability to collect tax consequences flies in the face of the Legislature's intent and the purpose of RCW 49.48 to "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...." *Schilling*, 136 Wash.2d at 159. The Supreme Court has the opportunity to decide this matter of first impression that will greatly advance the Legislature's purpose in enacting RCW 49.48 and a matter of public interest.

VIII. CONCLUSION

For the reasons stated in Mr. Peiffer's Answer and the lack of any substantial public interest to be advanced by Pro-Cut's interpretation of RCW 49.48, the Supreme Court should deny discretionary review of Pro-Cut's Petition. However, to properly advance the Legislature's purpose in promulgating RCW 49.48 and to protect a substantial matter of public interest, employee wages, the Supreme Court should grant review of Mr. Peiffer's petition.

Respectfully submitted this the ¹⁷20th day of February, 2019.


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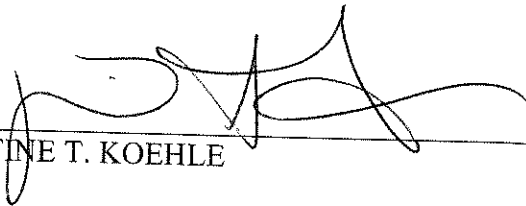
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing document to be served via hand-delivery upon the following:

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DATED this 19th day of February,
2019.



JUSTINE T. KOEHLE

LEAVY SCHULTZ DAVIS, P.S.

February 19, 2019 - 4:04 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96762-8
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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