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Court of Appeals No. _____
(Yakima County Superior Court Cause No. 16-2-03417-39)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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

Plaintiffs-Respondents

v.

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

Defendants-Petitioners,

and

WASHINGTON STATE DAIRY FEDERATION and WASHINGTON
FARM BUREAU,

Intervenors-Petitioners.

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITIES OF PETITIONERS

DeRuyter Brothers Dairy, Inc., Geneva S. DeRuyter, and Jacobus N. DeRuyter (“DeRuyter”), and the Washington Dairy Federation and Washington Farm Bureau (“Intervenors”), jointly ask this Court to accept review of the decision designated in Part B of this motion.

B. DECISIONS

Petitioners seek discretionary review of the trial court’s Order granting partial summary judgment to plaintiffs, and denying summary judgment to DeRuyter and Intervenors, on plaintiffs’ claims that RCW 49.46.130(2)(g)¹ violates article I, section 12² of the Washington State

¹ RCW 49.46.130 provides, in relevant part:

(1) Except as otherwise provided in this section, no employer shall employ any of his or her employees for a workweek longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

(2) This section does not apply to:

(g) Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any

Constitution. A copy of the Order, entered July 27, 2018, is attached hereto as Exhibit A. In the Order, the trial court certified that the Order involved a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the litigation.

RCW 49.46.130(2)(g) exempts agricultural employees from the overtime pay requirement of 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.”

agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

² Article I, section 12 of the Washington Constitution provides:
SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

C. ISSUES PRESENTED FOR REVIEW

1. Does the statutory right to overtime pay created by RCW 49.46.130(1) involve a “fundamental right of state citizenship” within the ambit of the Washington State Constitution “privileges and immunities” clause, article I, section 12?

2. Does RCW 49.46.130(2)(g), which exempts agricultural labor from the overtime pay provisions of RCW 49.46.130(1), grant agricultural employers a “privilege or immunity” within the scope of legislation prohibited by article I, section 12 of the Washington State Constitution?

D. STATEMENT OF THE CASE

Plaintiffs’ Claims and Initial Procedural History

Plaintiffs filed this action in December 2016 as a putative class action against the DeRuyter Brothers Dairy, Inc., on behalf of a class of persons previously employed as “milkers” at the DeRuyter Brothers Dairy.³ Plaintiffs alleged that they worked more than 40 hours a week at the Dairy, but were not paid “time and a half” for overtime. Plaintiffs admit that they were agricultural employees, exempt from entitlement to overtime pay by RCW 49.46.130(2)(g).

³ The DeRuyters sold the dairy in May 2017 and no longer employ “milkers” or other dairy workers, directly or indirectly.

An Amended Complaint was filed on October 10, 2017.⁴ The Amended Complaint asserts that RCW 49.46.130(2)(g) grants agricultural employers an unconstitutional privilege or immunity from a requirement necessary for protection of workers' health and safety, in violation of the Washington State Constitution, article I, section 12. Amended Complaint, pp. 15, 17. RCW 49.46.130(2)(g) exempts agricultural employees from the statutory entitlement to overtime pay that was created in 1959 by RCW 49.46.130(1). The Amended Complaint's sixth claim for relief seeks declaratory relief that the statute is invalid. The fifth claim for relief seeks money damages against DeRuyter for failure to pay overtime compensation.⁵

On February 2, 2018, the court granted the Washington State Dairy Federation's and the Washington Farm Bureau's motion to intervene as Defendants in the action.

The Trial Court's Decision, Order and Certification for Interlocutory Review

Following discovery, plaintiffs moved for summary judgment on their claims for damages and declaratory relief. Plaintiffs were explicit as

⁴ The amendment was allowed by stipulation. The amendments corrected several factual errors in the initial pleading, and added Mr. and Mrs. DeRuyter as individual defendants.

⁵ The Complaint's first through fourth claims for relief alleged other violations of Washington wage and hour laws. Those claims were resolved by agreement of the parties, and are not at issue.

to the nature of their claim; they alleged that RCW 49.46.130(2)(g) violated Article 1, Section 12

Because it grants a privilege or immunity to the agriculture industry from a law that implicates a fundamental right of state citizenship--the right of all workers in dangerous industries to receive the protections of workplace health and safety laws.

Plaintiffs' Motion for Summary judgment and Statement of Points and Authorities, at 1. Plaintiffs did not argue that the statute involved a fundamental right "to work and earn a wage."

The DeRuyters and Intervenor-Defendants opposed the motion, moved to strike portions of the declarations plaintiffs filed in support of the motion, and submitted evidence in opposition to the motion.

Intervenor-Defendants filed a cross-motion for summary judgment, and DeRuyter's Opposition Memorandum requested summary judgment dismissing the Amended Complaint and all remaining claims therein.

The Hon. Michael G. McCarthy heard oral argument of the cross motions for summary judgment on May 14, 2018. On May 31, 2018, the trial court issued a letter decision regarding the cross motions. The letter decision did not address the plaintiffs' summary judgment argument that RCW 49.46.130(2)(g) implicates a purported "fundamental right to worker health and safety in dangerous occupations." Instead, the court found that RCW 49.46.130(2)(g) burdens a "fundamental right" to "work and earn a wage," because it "treats a class of workers in a significantly different fashion than other wage earners engaged in the business of selling their labor." Consequently, the court found that RCW 49.46.130(2)(g) grants a

privilege or immunity within the ambit of Washington State Constitution article I, section 12. However, the court also held that disputed facts precluded summary judgment as to whether the legislature had reasonable grounds for exempting agricultural labor from the statutory entitlement to overtime pay. Therefore, the trial court denied summary judgment on plaintiffs' claims for declaratory relief and damages.

The trial court entered an Order on Plaintiffs' Motion for Summary Judgment and Intervenors' Cross Motion for Summary Judgment and Motion to Strike on July 27, 2018. The Order concludes that RCW 49.46.130(2)(g) grants a privilege or immunity in contravention of article I, section 12 of the Washington Constitution, denies all motions to strike portions of the declarations submitted in support of plaintiffs' motion, and reserves all other aspects of plaintiffs' claims for trial. Upon timely motion, the court also certified its Order as appropriate for interlocutory review under RAP 2.3(b)(4), recognizing that it involves a controlling question of law as to which there is substantial ground for difference of opinion, and immediate review may materially advance the ultimate determination of the action.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 2.3(b)(4) allows the Court of Appeals to accept discretionary 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.⁶ The trial court’s summary judgment Order satisfies these requirements.

1. Controlling Question of Law.

A “controlling question of law” is one that deeply affects the ongoing process of the litigation.⁷ A legal question is considered “controlling” if an appellate court would be required to reverse a judgment if it determines the legal question was wrongly decided.⁸

As explained in *Schroeder v. Weighall*, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014), the application of article I, section 12 to challenged legislation requires a two-part test. 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.⁹

⁶ 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).

⁷ *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.), *appeal dismissed*, 459 U.S. 961 (1982).

⁸ *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974).

⁹ The Court’s Order cites *Schroeder* for this test at page 2, line 14-17.

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 this 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/intervenors’ motion for summary judgment on this claim would have to be reversed.¹⁰

¹⁰ 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).

2. Substantial Ground for Disagreement

There is a substantial ground for difference of opinion regarding the Order'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 our early cases 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). Washington's "early cases" defined the "fundamental rights of state citizenship" 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 the challenged statute 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.

Motion briefing to the trial court revealed that the parties have widely disparate opinions about the issue. Notably, plaintiffs' Amended Complaint and their motion for summary judgment *did not even argue* that Washington law recognized a fundamental right "to work and earn a wage" – the trial court reached that result without the benefit of briefing or argument *by any party*. The Court's reasoning in reaching that result is also questionable – 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.'" Ex. A to Order, p. 2.¹¹ The trial court also incorrectly identified *Schroeder, supra*, as "the most recent incarnation" of the Washington Supreme Court's "fundamental rights" analysis, omitting any discussion or analysis of the Supreme Court's subsequent decision in *Ockletree*. Notably, *Ockletree* involved a challenge to the Washington Law Against Discrimination in Employment and states, point blank, 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 involved in the fractured *Ockletree* decision were in agreement: "a right granted only at the discretion of the legislature is not a "privilege" any citizen can assert." 179 Wn.2d at 795

¹¹ 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.

(Sevens, J, dissenting). The statutorily created entitlement to overtime pay is clearly “a right granted at the discretion of the legislature,” but the Order does not address this clear conflict with controlling precedent.

Finally, 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. Moreover, even if there is a fundamental right “to earn a wage,” RCW 49.46.130(2) does not deprive employees of *that right*, it merely exempts some employees from the statutory entitlement to “time and a half” for work beyond forty hours in a week. 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 conclusion. Accordingly, this criterion of RAP 2.3(b) is satisfied.

3. 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.”¹² 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 there is a fundamental right to

¹² Wright, Miller, & Cooper, 16 Federal Practice and Procedure, § 3930, at 432 (2d ed. 1996).

overtime pay, or that RCW 49.46.130(2)(g) 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 the 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 fees and imposition on the resources of the Court, parties, and witnesses. Interlocutory review at this juncture may well avoid a waste of those resources. This factor should be given particular weight for the DeRuyters, who are now embroiled in this costly litigation simply because they followed a decades old statute according to its unambiguous terms, in accordance with industry practice and more than 80 years of American tradition.

F. CONCLUSION

This Court should accept discretionary review of the trial court’s summary judgment order, reverse the order, and remand with a mandate to grant summary judgment to DeRuyter and Intervenor-Defendants against the Amended Complaint and all remaining claims therein.

Respectfully submitted this 17th day of August, 2018.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of August, 2018 at Spokane, Washington.

/s/ Pam McCain
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Filing Motion for Discretionary Review

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