

FILED
SUPREME COURT
STATE OF WASHINGTON
11/20/2018 4:28 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 962677

**IN THE 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

v.

WASHINGTON STATE DAIRY FEDERATION and WASHINGTON
FARM BUREAU,
Intervenors-Respondents.

**INTERVENORS' ANSWER TO MOTION FOR DISCRETIONARY
REVIEW**

Timothy O'Connell, WSBA #15372
Ryan R. Jones, WSBA #52566
STOEL RIVES LLP
600 University Street, Ste. 3600
Seattle, Washington 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
Email: Tim.oconnell@stoel.com
Ryan.jones@stoel.com
Attorneys for Intervenors-
Respondents

I. INTRODUCTION

As called for by the October 26, 2018, ruling by this Court's Commissioner (the "Ruling"), Intervenor-Respondents Washington State Dairy Federation and the Washington Farm Bureau ("Intervenors") hereby answer the Motion for Discretionary Review (the "Motion") filed by Plaintiffs-Petitioners ("Plaintiffs") in this case. Albeit for entirely different reasons than those advanced by Plaintiffs, Intervenors agree that discretionary review should be granted, although the case should be heard in the first instance in the Court of Appeals.

II. IDENTITIES OF INTERVENORS

Intervenor Washington State Dairy Federation is the oldest dairy trade association in the United States, and represents the interests of all Washington dairy farmers. Intervenor Washington Farm Bureau has more than 46,000 member farming families and represents farmers of every variety throughout the state.

III. DECISION BELOW

Intervenors agree that discretionary review should be granted of the trial court's Order granting partial summary judgment to plaintiffs, and denying summary judgment to Intervenors, on Plaintiffs' claims that RCW 49.46.130(2)(g) violates article I, section 12 of the Washington State Constitution (the "Order"). A copy of the Order, entered July 27, 2018,

was included as Exhibit 1 to Plaintiffs' Appendix in Support of the Motion for Discretionary Review. 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 "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."

IV. ISSUES PRESENTED FOR REVIEW

Intervenors submit that the issues presented by this case are more appropriately phrased as:

1. Does the statutory right to overtime pay created by RCW 49.46.130(1) involve a "fundamental right of state citizenship" within the

meaning of the Washington State Constitution “privileges and immunities” clause, article I, section 12?

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

3. Did the trial court err by denying Intervenors’ cross motion for summary judgment?

V. STATEMENT OF THE CASE

A. Plaintiffs’ Claims and Initial Procedural History

Plaintiffs originally filed this action in December 2016 as a putative class action against the DeRuyter Brothers Dairy, Inc., on behalf of a class of persons employed at the DeRuyter Brothers Dairy. 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). Plaintiffs later amended their complaint to expressly assert 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. RCW 49.46.130(2)(g) has expressly exempted agricultural employees from the statutory requirement

of overtime pay since that obligation was created in 1959 by the Washington Minimum Wage Act (“WMWA”), RCW 49.46.130(1). Plaintiffs sought declaratory relief that the statute is invalid, as well as money damages against Defendants for failure to pay overtime.

On January 2, 2018, the court granted the Intervenors’ motion to intervene as Defendants in the action.

B. 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 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. At no time did Plaintiffs argue that the WMWA’s overtime obligation involved a fundamental right “to work and earn a wage.”

Intervenors opposed the motion and filed a cross-motion for summary judgment; Defendant 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 concluded that RCW 49.46.130(2)(g) implicates 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 meaning 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 July 27, 2018. The Order concluded that RCW 49.46.130(2)(g) grants a privilege or immunity in contravention of article I, section 12 of the Washington Constitution, denied all motions to strike portions of the declarations submitted in support of plaintiffs' motion, and reserved all other aspects of plaintiffs' claims for trial. 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.

VI. ARGUMENT WHY DISCRETIONARY REVIEW SHOULD BE ACCEPTED, BUT HEARD IN THE COURT OF APPEALS

RAP 2.3(b)(4) allows the appellate courts 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. The trial court's summary judgment Order readily satisfies these requirements.

A. The Order Involves Controlling Question of Law.

A "controlling question of law" is one that deeply affects the ongoing process of the litigation.¹ 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.²

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

¹ *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.), *appeal dismissed*, 459 U.S. 961 (1982). Analysis of federal rules similar RAP 2.3(b) may be helpful and persuasive. 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).

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

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.

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 Intervenor’s motion for summary judgment on this claim would have to be reversed.³

³ Plaintiffs also argued in their summary judgement motion that RCW 49.46.130(2)(g) violates the equal protection guarantee of the constitution. The trial court did not address that argument in its letter decision or its Order. Reversal of the trial court’s conclusion that RCW 49.46.130(2) implicates a “fundamental right” will effectively compel judgment against plaintiffs’ equal protection claim as well, because if the statute does not affect a fundamental right, the court employs the appropriately deferential “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).

B. There Are Substantial Grounds for Disagreement with the Order

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 involve a fundamental right of state citizenship, it does not involve a privilege or immunity within the ambit of article I, section 12.

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 in error – 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. 2.⁴ 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 claim under the Washington Law Against Discrimination in Employment and expressly concludes 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 (Sevens, J, dissenting).

⁴ 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.

The statutorily created entitlement to overtime pay is clearly a right granted at the discretion of the legislature and defined by those policy makers: every aspect of the entitlement to overtime pay (should it be due after eight hours in a day, forty hours in a week, or some greater or lesser amount?) as well as its calculation (should the premium for overtime work be a specified dollar amount per hour, one and one half times the regular rate of pay, or double time, or some greater or lesser amount?) reflects a series of policy decisions as to the proper way to regulate these economic relationships. 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.

C. Immediate Appeal Will Materially Advance the 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.”⁵ 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 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 and “messy,” as the trial court put it. The trial court appears to contemplate fact-finding as to the intent of the Legislature is enacting the WMWA in 1959, because the agricultural exemption was contained within the statute on its original enactment. Interlocutory review at this juncture may well avoid a waste of those resources.

D. Discretionary Review Should be Heard, in the First Instance, in the Court of Appeals

Thus, Intervenors agree with Plaintiffs that discretionary review should be granted because this case readily satisfies the requirements of RAP 2.3(b). However, because as set forth above the Order plainly failed to follow controlling authority from our Supreme Court, review by the

⁵ Wright, Miller, & Cooper, 16 Federal Practice and Procedure, § 3930, at 432 (2d ed. 1996).

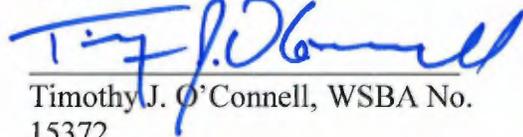
Supreme Court, as opposed to the Court of Appeals, is not necessary. Thus, for all the reasons set forth above, as well as those identified by Intervenor in the Answer to Statement of Grounds for Direct Review, filed with this court on September 17, 2018, and Defendants' Memorandum in Response to the Plaintiff-Petitioners' Statement of Grounds for Direct Review, filed October 4, 2018, discretionary review should be granted and the case heard in the first instance in the Court of Appeals, wherein Intervenor and Defendants first filed their Petition for Direct Review.

VI. CONCLUSION

All parties agree that the trial court committed reversible error in its Order. While Plaintiffs continue to err in their attempt to override the judgment of the Legislature on the quintessentially economic regulation enacted in the Washington Minimum Wage Act, immediate resolution of these issues will manifestly advance the efficient resolution of this litigation.

DATED: November 20, 2018.

STOEL RIVES LLP



Timothy J. O'Connell, WSBA No.
15372

Attorneys for Intervenor-Respondents

CERTIFICATE OF SERVICE

I certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of 18 years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101.

On November 20, 2018, I caused a true and correct copy of the foregoing document to be served upon the following parties via email:

Lori Jordan Isley
Joachim Morrison
Andrea Schmitt
Columbia Legal Services
6 South Second Street, Suite 600
Yakima, WA 98901
Tel: (509) 575-5593
Fax: (509) 575-4404
Email: lori.isley@columbialegal.org
Email: joe.morrison@columbialegal.org
Email: andrea.schmitt@columbialegal.org
Attorney for Plaintiffs

Marc Cote
Anne Silver
Frank Freed Subit & Thomas LLP
705 2nd Avenue, Suite 1200
Seattle, WA 98104-1798
Tel: (206) 682-6711
Fax: (206) 682-0401
Email: mcote@frankfreed.com
Email: asilver@frankfreed.com
Attorney for Plaintiffs

John Ray Nelson
Milton G. Rowland
Foster Pepper PLLC
618 W. Riverside Avenue, Suite 300
Spokane, WA 99201
Tel: (509) 777-1600
Fax: (509) 777-1616
Email: john.nelson@foster.com
Email: milton.rowland@foster.com
*Attorney for Defendant DeRuyter Brothers
Dairy, Inc.*

DATED at Seattle, Washington, this 20th day of November, 2018.



Debbie Dern, Legal Practice
Assistant

STOEL RIVES LLP

November 20, 2018 - 4:28 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_20181120162700SC946853_4460.pdf
This File Contains:
Answer/Reply - Answer to Motion for Discretionary Review
The Original File Name was 2018 11 20 Intervenors Answer to Motion for Discretionary Review.PDF

A copy of the uploaded files will be sent to:

- andrea.schmitt@columbialegal.org
- asilver@frankfreed.com
- cheli.bueno@columbialegal.org
- 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

Comments:

Sender Name: Timothy O'Connell - Email: tim.oconnell@stoel.com

Address:

600 UNIVERSITY ST STE 3600

SEATTLE, WA, 98101-3197

Phone: 206-624-0900 - Extension 7562

Note: The Filing Id is 20181120162700SC946853