

FILED
SUPREME COURT
STATE OF WASHINGTON
10/10/2019 12:07 PM
BY SUSAN L. CARLSON
CLERK

NO. 97604-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEIU 775,
Petitioner

v.

FREEDOM FOUNDATION,
Respondent

**PETITIONER SEIU 775's REPLY IN SUPPORT OF MOTION FOR
DISCRETIONARY REVIEW**

Dmitri Iglitzin, WSBA No. 17673
Darin M. Dalmat, WSBA No. 51384
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The Foundation fails to rebut SEIU 775's grounds for discretionary review. It mistakenly tries to distinguish SEIU 775's lead authority, *Sound Transit*, by arguing that discretionary review of an interlocutory case is not appropriate where the Court has accepted review of related cases with final judgments presenting the same issue. In fact, this Court did just that in *Sound Transit*, where it granted review of an interlocutory case and stayed it pending review of final judgments in the related cases. The Court should do so again here.

The Foundation also fails to address, much less refute, SEIU 775's showings that the lower courts obviously misconstrued the FCPA.

I. As in *Sound Transit*, the Court should accept discretionary review of this interlocutory case and stay it pending review of the same issues presented in the consolidated *Local 117* appeal.

The Foundation tries, but fails, to distinguish *Centr. Puget Sound Reg. Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 232, 422 P.3d 891 (2018) (*Sound Transit*). It simply misreads the case, arguing that the Court granted review of a fifth case that was “in the *same procedural posture*” as four appeals already pending before the Court. Opp. at 17 (original emphasis). Not so. In *Sound Transit*, the Court had accepted review of four cases that had been adjudicated to final judgment and then “granted review of [a] fifth case and stayed it pending” a decision in the consolidated appeal of the four cases already pending for review. *Sound*

Transit, 191 Wn.2d at 232. As of that grant of review, the fifth case was “pending before the trial court.” *Id.* In other words, it was interlocutory and in a completely different posture than the other four cases that had been adjudicated to final judgment and consolidated for appeal. Yet this Court properly accepted review of the fifth, interlocutory case and stayed it pending disposition of the consolidated appeal.

The disposition of *Sound Transit* fully effectuates RAP 13.4(b)(4), which provides for discretionary review of petitions that involve “an issue of substantial public interest that should be determined by the Supreme Court.” The *Sound Transit* Court had already made that determination with respect to the four cases consolidated for review; so, simple logic dictated that the fifth case presenting the same question already accepted for review also warranted discretionary review.

Sound Transit applies with full force here. By accepting review of the three consolidated appeals in *Local 117*, the Court has already determined that the proper interpretation of Section 765 presents an issue of substantial public importance that should be determined by this Court. This case presents the same legal issues as in *Local 117* appeal. Indeed, this case involves the same parties as in *Local 117*, as the Foundation named SEIU 775 as a necessary party in Case No. 97394-6. Accordingly, under RAP 13.4.(b)(4) and *Sound Transit*, this Court should accept

discretionary review and stay trial court proceedings in this case pending resolution of the *Local 117* appeal.¹

II. The Foundation fails to rebut SEIU 775’s showing that discretionary review is appropriate under RAP 13.3.

A. Appellate courts may properly exercise discretionary review over questions of first impression.

The Foundation wrongly contends SEIU 775 can establish obvious or probable error only by citing authority expressly resolving the legal question at issue, inaccurately implying that questions of first impression are inappropriate for discretionary review. Opp. at 7, 9.

But appellate courts routinely exercise discretionary review in cases presenting issues of first impression. For instance, in *Glass v. Stahl Specialty Co.*, this Court held that a trial court “committed obvious or probable error” in denying an employer’s third party motion to dismiss a manufacturer’s claim for contribution in a products liability suit, even though this presented a “novel legal question.” 97 Wn.2d 880, 882-83, 652 P.2d 948 (1982). *Accord City of Seattle v. Erickson*, 188 Wn.2d 721, 726, 728, 398 P.3d 1124 (2017) (exercising discretionary review in case of first impression); *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d

¹ The Foundation points to the trial court’s current stay as grounds to deny discretionary review. Opp. at 19 n.7. But the trial court invited further discussion over the length of the stay shortly after the ruling on this motion. Supp. App. at 2. This Court should avoid further waste of litigant and judicial resources over continued litigation in the trial court stay by issuing the same relief it issued in *Sound Transit*: a complete stay of this case pending resolution of the *Local 117* consolidated appeal.

421, 424, 431–33, 395 P.3d 1031 (2017) (same). Likewise, obvious error can rest on statutory interpretation alone, without the assistance of case law. *See Shannon v. State*, 110 Wn. App. 366, 368-70, 40 P.3d 1200 (2002) (trial court obviously erred in denying summary judgment, based on reading relying on rule against surplusage).

B. The Foundation has failed to overcome SEIU 775’s showing of error.

SEIU 775 previously showed clear error by establishing that the plain language of Section 765 requires, as a precondition of suit, a would-be citizen complainant to promise to file suit “within ten days” of State officers’ failure to act. Mot. at 8–13. That mandatory promise, SEIU 775 showed, unequivocally implied a duty to act in accordance with the promise. Mot. at 13–17.

Neither the trial court, appellate commissioner, nor the Foundation disputes that Section 765(4)(a)(ii) in fact requires would-be citizen suitors to expressly inform the public officials that the citizen “will commence a citizen’s action within ten days” of the officials’ failure to do so. *Cf.* App. 120–21, 228–230; Opp. at 9–14. But they give no meaning or effect to that language, arguing that simply serves as a “formality” or a “reminder” to the officials. *Id.* In their view, the Legislature had to add express words to Section 765 commanded would-be citizen suitors to act in accordance with their representations before those representations had any legal effect. *Id.*

Yet, the Foundation, like the lower courts, cannot explain why the Legislature required citizens to make such a specific representation to public officials as a precondition of suit. Absent such an explanation, the specific representation that the would-be citizen suitor “will commence a citizen’s action within ten days” is mere surplusage that inevitably leads to the absurdity that Citizen A, who makes and breaks the statutorily compelled promise, is equally entitled to bring suit as Citizen B, who makes and fulfills it. Mot. at 14. Under their reading, Paragraph 4(a)(ii) simply is not the precondition to suit that it purports to be.

The only way to avoid rendering the phrase “will commence a citizen’s action within ten days” meaningless is to give it its obvious meaning: if a citizen wants the privilege of filing a citizen action, he must both issue a notice making the very specific statutorily required promise *and* act in accordance with it. Judge Price made this very point in dismissing two other of the Foundation’s untimely actions. Mot. at 14–15. The Commissioner erred by ignoring this sound reasoning, without giving any effect to the plain language of Section 765(4)(a)(ii), and the Court of Appeals erred by affirming the Commissioner without comment.

Unable to avoid Section 765(4)(a)(ii)’s plain text compelling a specific representation, the Foundation next misconstrues basic principles of implied waiver: i.e., that a party who acts inconsistently with the

conditions for a privilege impliedly waives the privilege. *Cf.*, Opp. at 13–14. The Foundation argues that waiver requires “an affirmative act.” Opp. at 13. Not so. Inaction, as much as action, can trigger implied waiver. *See State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015) (“If a trial has begun in the defendant’s presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present.”); *Wynn v. Earin*, 163 Wn.2d 361, 381, 385, 181 P.3d 806 (2008) (“statutory rights can be waived” and waiver occurred where litigant failed to object to testimony as violation of statutory rights).²

The Foundation would also avoid the doctrine entirely by arguing that common-law laches yields in the face of a statute of limitations. Opp. at 13. But SEIU 775 does not contend that common-law laches bars the Foundation’s suit.³ Rather, it contends that by making an express representation (that it will bring suit within 10 days) and then acting inconsistently with that representation (by failing to do so), the Foundation impliedly waived its right to bring suit. *See Matter of Estate of Lindsay*, 91 Wn. App. 944, 951, 957 P.2d 818 (1998) (implied waiver involves a “voluntary act which implies a choice ... to dispense with something of

² The Foundation entirely ignores *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003), which held a party forfeited statutory rights by failing to comply with the terms of statutorily required notice.

³ Laches involves a plaintiff’s “unreasonable delay” in enforcing its rights, regardless of compliance with any relevant statutory prerequisites. *See, e.g., Carillo v. Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004).

value or to forego some advantage.”). The interaction of laches and statutes of limitation is of no moment.

Finally, the Foundation’s cited authority is irrelevant because it does not construe the pertinent language of Section 765(4)(a)(ii). *State ex rel. Evergreen Freedom Found. v. Nat’l Educ. Ass’n (EFF II)*, merely clarified that the AG’s referral of a complaint to the PDC does not preclude a citizen suit. 119 Wn. App. 445, 452–53, 81 P.3d 911 (2003). But it did not address whether Section 765 requires *citizens* to act in accordance with the statutorily mandated notice as a precondition for citizen suits.

III. SEIU 775 satisfies the “effects” prong of RAP 2.3.

A. Further proceedings would be useless.

Under RAP 2.3(b)(1), obvious errors warrant discretionary review when they render further proceedings useless. SEIU 775 showed that is the case here because the error at issue on appeal goes to whether the Foundation has satisfied the statutory prerequisites to maintaining this action. Mot. at 17–19 (citing *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985); *Douchette v. Bethel Sch. Distr. No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991); *Shannon v. State*, 110 Wn. App. 366, 40 P.3d 1200 (2002)). The Foundation contends these authorities are inapposite. It is mistaken.

The Foundation claims SEIU 775 mischaracterizes *Hartley v.*

State, 103 Wn.2d 768, 698 P.2d 77 (1985) as a case where further proceedings were deemed “useless” when they presented important issues with “wide implications” that need not otherwise be reached. Opp. at 14–15. But that is exactly what *Hartley* held. That case involved a “new statute with wide implications for governmental liability.” *Id.* at 773. The plaintiff had alleged that State and County officials were legally responsible for the wrongful death of his wife because they failed to bring proceedings to revoke the driver’s license of the driver who killed them in an intoxicated crash. *Id.* at 770. The Court held that the denial of summary judgment for the State and County was appropriate for discretionary review because a “useless lawsuit would be prevented by a decision in favor of dismissing the State and County as defendants.” *Id.* at 774.

So, too, here. Although Section 765 is not a new statute, the question presented is. If, as SEIU 775 contends, the Foundation has waived or forfeited its ability to bring this suit at all, then the entire course of proceedings against SEIU 775 is as useless as the trial in *Hartley*.

The Foundation also tries to distinguish *Douchette* on the basis that “the appellate court granted discretionary review not to avoid a useless trial on issues of fact, but to address a fundamental question of law as to when ... claims for age discrimination begin to run and whether equitable tolling would apply” to them.” Opp. at 15–16. But the Court expressly

noted that review may “be granted to avoid a useless trial,” which was possible in that case because “there is no material question of fact present [to] precluded our determination of whether Douchette’s claims are barred by the applicable statutes of limitation.” *Id.* at 808–09. Whether characterized as addressing the availability of equitable tolling or the applicable limitation period, *Douchette* fundamentally held that proceedings are “useless” where procedurally barred. That is precisely the case here. *See also Shannon*, 110 Wn. App. 366 (finding further proceedings “useless” in light of trial court’s “obvious error” on a procedural question).

B. The decisions below limit SEIU 775’s freedom to act.

The Foundation also contends that SEIU 775 has not adequately explained “why it, like all other litigants, should not be subject to the uncertainty that inheres in litigation” *Opp.* at 19. In fact, SEIU 775 showed that the prosecution of this case—which the PDC and attorney general have already found to lack merit—would chill SEIU 775’s First Amendment rights to engage in political speech. *Mot.* at 19–20 (discussing *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 266, 4 P.3d 808 (2000)).

The Foundation has not answered the point. In particular, it does not contest that it intends to propound discovery that would seek to invade

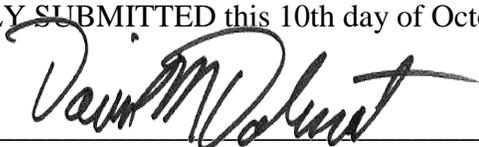
SEIU 775's associational and expressive rights, chilling both. *Compare* Mot. 19–20 *with* Opp. 19–20. Instead, it simply notes that the FCPA's disclosure requirements have been found facially constitutional. But the facial constitutionality of the statute says nothing about the Foundation's specific claims or approach to litigation (which is itself a subject of claims for attorney's fees and a § 1983 counterclaim for unconstitutional viewpoint discrimination in the *Local 117* appeal). By leaving unanswered SEIU 775's showing, the Foundation effectively concedes that the particular claims it has asserted against SEIU 775 and the particular manner in which it intends to prove those claims will chill SEIU 775's First Amendment rights. The lower courts' error thus substantially threatens SEIU 775's constitutionally protected freedoms to act.

CONCLUSION

As in *Sound Transit*, the Court should accept discretionary review and stay further proceedings pending resolution of the consolidated *Local 117* appeal.

RESPECTFULLY SUBMITTED this 10th day of October, 2019.

By: _____


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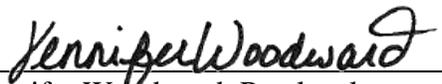
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DECLARATION OF SERVICE

I hereby certify that on this 10th day of October, 2019, I caused the foregoing document to be filed via the Appellate Court E-filing System, which will provide notice of such filing to all required parties.

Signed in Seattle, Washington, this 10th day of October, 2019



Jennifer Woodward, Paralegal

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NO. 97604-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEIU 775,
Petitioner

v.

FREEDOM FOUNDATION,
Respondent

**PETITIONER SEIU 775's SUPPLEMENTAL APPENDIX IN
SUPPORT OF MOTION FOR DISCRETIONARY REVIEW**

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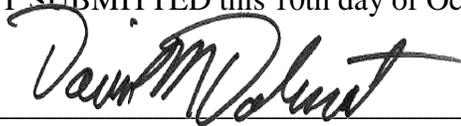
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APPENDIX PAGE #	DESCRIPTION
1-3	Trial court Order Denying Plaintiff's Motion to Lift Stay, filed 9/5/19

RESPECTFULLY SUBMITTED this 10th day of October, 2019.

By: _____



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Signed in Seattle, Washington, this 10th day of October, 2019


Jennifer Woodward, Paralegal

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SEP 05 2019

Superior Court
Linda Myhre Enlow
Thurston County Clerk

EXPEDITE
 No hearing set
 Hearing is set
Date: 9/6/19
Time: 9:00 am
Judge/Calendar: Dixon

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

FREEDOM FOUNDATION, a Washington
nonprofit organization, in the name of the State
of Washington,

No. 18-2-00454-34

Plaintiff,

BB
**[PROPOSED] ORDER DENYING
PLAINTIFF'S MOTION TO LIFT
STAY**

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION 775, a labor organization,
Defendant.

THIS MATTER came before the undersigned Judge of the above-entitled Court on Plaintiff Freedom Foundation's motion to lift the stay imposed by this court on June, 28, 2019. The Court heard argument on the matter on September 6, 2019, and considered the pleadings filed in this matter, including the following when reaching its decision:

1. Plaintiff's Motion to Lift Stay Following Denial of Discretionary Review By Division II Court of Appeals;
2. Defendant's Opposition to Motion to Lift Stay, Etc.;
3. Declaration of Darin M. Dalmat in Support of Defendant's Opposition to Motion to Lift Stay, and there exhibits attached thereto;
4. Plaintiff's Reply in Support of Motion to Lift Stay.
5. _____

BB BB
~~IT IS HEREBY ORDERED that Plaintiff's Motion to lift the stay is hereby DENIED and~~

~~that stay issued by this Court on June 28, 2019 shall remain in effect until the Washington~~

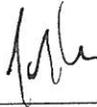
ORDER DENYING MOTION TO LIFT STAY - 1
Case No. 18-2-00454-34

18 WEST MERCER ST., STE. 400 **BARNARD**
SEATTLE, WASHINGTON 98119 **IGLITZIN &**
TEL 800.238.4231 | FAX 206.378.4132 **LAVITT LLP**

1 ~~Supreme Court issues its mandate in the consolidated appeal captioned *Freedom Foundation v.*~~
2 ~~*Teamsters Local 117, et al., Case No. 97109-9.*~~

3 ~~[Alternative Order: IT IS HEREBY ORDERED that Plaintiff's Motion to lift the stay is~~
4 hereby DENIED, and that the stay issued by this Court on June 28, 2019, shall remain in effect
5 until 14 days after the Washington Supreme Court rules on Plaintiff's petition to that court for
6 discretionary review in this case. The parties shall confer with one another during that 14 day
7 period about how this case should proceed in light of the Washington Supreme Court's ruling
8 and, if unable to agree, may request a status conference with the Court. If the Court is unable to
9 hold a status conference within 14 days of the Washington Supreme Court's ruling, the stay shall
10 remain in effect until such time as the status conference occurs.]

11 DATED this 6 day of September, 2019.

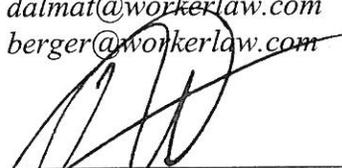


12
13
14 The Honorable James Dixon
Thurston County Superior Court Judge

15 Presented by:



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24 ORDER DENYING MOTION TO LIFT STAY - 2
Case No. 18-2-00454-34

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ST
without prejudice
AB
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BARNARD IGLITZIN & LAVITT

October 10, 2019 - 12:07 PM

Transmittal Information

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Appellate Court Case Number: 97604-0
Appellate Court Case Title: SEIU 775 v. Freedom Foundation
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