

FILED
SUPREME COURT
STATE OF WASHINGTON
12/13/2024 1:37 PM
BY ERIN L. LENNON
CLERK

NO. 1035543

SUPREME COURT OF THE STATE OF WASHINGTON

Ramiro Cortes,

Petitioner-Defendant,

v.

Marijke Deutscher and Allen Deutscher

Respondents-Plaintiffs.

BRIEF OF AMICUS CURIAE FAIR WORK CENTER AND
WORKING WASHINGTON.

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I. IDENTITIES AND INTERESTS OF AMICUS

The identities and interests of *amicus* are set out in the accompanying motion for leave to file this brief. The Fair Work Center and Working Washington (FWC/WW) are statewide, nonprofit, nonpartisan organizations dedicated to raising and enforcing workplace standards in Washington. These organizations have extensive experience applying labor laws in wage-theft litigation on behalf of low-wage workers. FWC/WW have direct experience with the most common ways that employers engage in wage theft and understand the challenges that low-wage workers face in recovering those wages; especially when critical legislation and legal precedent intended to protect their rights is undermined. These organizations have a substantial interest in this case because the Court of Appeal's decision could undermine wage theft protections in Washington.

II. STATEMENT OF THE CASE

Amicus adopts Petitioner-Defendant's Statement of the Case.

III. ARGUMENT

In addition to Petitioner-Defendant's grounds for review, this Court should hear this appeal because it "involves an issue of substantial public interest that should be determined by the Supreme Court."¹

A. Review is proper under RAP 13.4(b)(4) because there is a substantial public interest in reinforcing the essential protections of Washington labor standards.

1. Wage theft is rampant, especially for low-wage workers.

Low-wage workers are frequently exploited by their employers. A landmark study surveying more than 4,000 workers across 3 major U.S. cities found that 26% of workers were not paid the applicable minimum wage, 76% were not paid overtime, and 70% suffered from "off-the-clock" violations by not being compensated for all hours worked, among other violations.² Another study updating and extrapolating this data

¹ Washington Rule of Appellate Procedure (RAP) 13.4(b)(4).

² ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN*

nationwide found that workers lost more than \$50 billion in wage theft nationwide in 2016.³ And Latinx low-wage workers in industries, like landscaping, are frequently the target of wage theft.⁴

Wage theft in Washington State follows national trends. In fiscal year 2023 alone, wage complaints comprised 61% of the 8,827 complaints received by the Washington Department of Labor and Industries (L&I).⁵ In the complaints closed by L&I

AMERICA'S CITIES 2-3 (2009),
<https://www.nelp.org/app/uploads/2015/03/BrokenLawsReport2009.pdf>.

³ CELINE McNICHOLAS, ZANE MOKHIBER, & ADAM CHAIKOF, TWO BILLION DOLLARS IN STOLEN WAGES WERE RECOVERED FOR WORKERS IN 2015 AND 2016—AND THAT'S JUST A DROP IN THE BUCKET 3 (2017), <https://files.epi.org/pdf/138995.pdf>.

⁴ Nate Berg, *This \$105 billion design industry is built on the backs of underpaid labor*, Fast Company (October 28, 2021), <https://www.fastcompany.com/90690895/this-105-billion-design-industry-is-built-on-the-backs-of-underpaid-labor>; Alyson Kay, *Stolen paychecks: how immigrant workers get ripped off*, CAPITAL NEWS SERVICE (May 18, 2017), <https://cnsmaryland.org/2017/05/18/stolen-paychecks-how-immigrant-workers-get-ripped-off/>

⁵ WA DEP'T OF LABOR & INDUSTRIES, WORKPLACE RIGHTS INVESTIGATION REPORT: FISCAL YEAR (FY) 2023 ANNUAL REPORT TO THE GOVERNOR, 8-9 (2023),

that year, L&I found that over \$3,700,000 was owed to workers.⁶ Further, a report by *amicus* from 2022 found that 30% of low wage workers in King County suffered wage theft, depriving them of one sixth of their wages on average.⁷ And immigrants, women, and people of color are much more likely to be affected by wage theft.⁸

In FWC/WW's experience, employers of low-wage workers often steal wages from employees by routinely

https://lni.wa.gov/agency/_docs/2023WorkplaceRightsInvestigationsReport.pdf.

⁶ *Id.*, Note, this amount includes cases that were opened in previous fiscal years.

⁷ NEIL DAMRON, MARTIN GARFINKEL, DANIELLE ALVARADO, & DANIEL GALVIN, PH.D., WAGE THEFT IN KING COUNTY: ANALYSIS AND RECOMMENDATIONS FOR IMPROVING LABOR STANDARDS ENFORCEMENT 4 (2022), <https://www.fairworkcenter.org/wp-content/uploads/2024/07/FWC-King-County-Wage-Theft-Study.pdf>.

⁸ *Id.* at 10-11. *See also* BERNHARDT ET AL., *supra* note 2 at 43-48, (U.S.-born workers had substantially lower rates of wage theft than foreign-born workers. Further, “[i]mmigrants who speak English ‘well’ or ‘very well’ (as self-reported) had significantly lower minimum wage violation rates than those who speak ‘not well’ or ‘not at all’.”)

underpaying workers for all hours worked, paying them in cash to evade paper trails, or by making unlawful deductions from workers' wages.

For example, FWC's client, a household cleaner for a Seattle cleaning company, had unlawful deductions from her paycheck for unsubstantiated "customer complaints" and had her tips stolen. Further, her employer simply didn't pay her for multiple workweeks and went silent when she demanded her wages. She never received a paystub or other employment records. Washington's strong labor standards empowering workers to recover their wages and placing record-keeping burdens on the employer will be essential to recovering wages due.

In another case, FWC represents a group of baristas who had their tips stolen, were only paid in cash (when they were paid at all), and never received paystubs showing deductions and rate of pay. Sometimes, these workers were compensated in the "opportunity to be scheduled" for the best shifts. Washington's

labor protections for low wage workers are essential to these workers recovering their stolen wages.

Finally, another FWC client, hired as a live-in cook for an elderly couple, had a verbal agreement with her employers that she would receive room and board in exchange for her work. She was paid no wages for her labor. Her employer relied on this verbal contract to justify underpayment of wages owed over several years. These cases represent just a few of the many ways that employers steal their employees' wages and labor. Mr. Cortes' case is no different.

2. Mr. Cortes' wages and labor were stolen by Respondents-Plaintiffs.

For the purposes of summary judgment, the trial court and the Court of Appeals were required to take all facts alleged in the light most favorable to Mr. Cortes.⁹ Mr. Cortes worked for Respondents-Plaintiffs, both through their company, Your

⁹*See, e.g. Deutscher v. Cortes*, 31 Wn. App. 2d 1040 (2024) (unreported, decision below, at Appendix A to Petitioner's Petition for Review, A-005) (citing, *inter alia*, *Berry v. King County*, 19 Wn. App. 2d 583 (2021)).

Landscape Company LLC, and through working on the 9040 property owned by Respondents-Plaintiffs. While working for Your Landscape Company LLC, Mr. Cortes regularly worked over 40 hours per a week and received paystubs that under-reported his hours worked by 10-20 hours per week.¹⁰ He was told by Respondents-Plaintiffs that these illegal under-payments were credited towards his “rent-to-own” purchase of the 9040 property.¹¹

Mr. Cortes’ experience is a textbook example of wage theft. Here, Respondents-Plaintiffs violated Mr. Cortes right to the premium payment for overtime hours worked,¹² violated Washington law by giving him paystubs that under-reported his hours worked,¹³ and unlawfully deducted tens of thousands of

¹⁰ Petitioner-Defendant’s Petition for Review, pp. 6.

¹¹ Petitioner-Defendant’s Petition for Review, pp. 2-8.

¹² *See* RCW 49.46.130(1) (employers must pay employees “at a rate not less than one and one-half times [their] regular rate” of pay for hours worked in excess of 40 in a workweek).

¹³ *See* WAC 296-128-010(6) (“employers shall be required to keep and preserve payroll or other records containing... Hours worked each workday and total hours worked each workweek).

dollars from Mr. Cortes' pay.¹⁴ If Mr. Cortes' eviction and dispossession of the 9040 property stands, the numerous underpayments and deductions will have been without any benefit to Mr. Cortes, and in fact, will have been an extreme detriment to him.

Additionally, Mr. Cortes did substantial work on the 9040 property in the form of landscaping and home improvements.¹⁵ This work went uncompensated by Respondents-Plaintiffs, resulting in a substantial benefit to them and theft of Mr. Cortes' labor.

3. Contracts, and contract law, must not be a shield for wage theft.

Washington has a "long and proud history of being a pioneer in the protection of employee rights."¹⁶ In the early part

¹⁴ Petitioner-Defendant's Petition for Review, pp. 2-8; Deductions from wages are only lawful in a narrow set of circumstances and are 1) required to be in writing and 2) must benefit the employee. *See* WAC 296-126-028(2).

¹⁵ *Deutscher v. Cortes*, 31 Wn. App. 2d 1040 (2024).

¹⁶ *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 760, 426 P.3d 703 (2018).

of the 20th Century, Washington's minimum wage law (predating the Minimum Wage Requirements and Labor Standards Act, (MWA)) was upheld by the United States Supreme Court as a valid attempt by the state to protect the health, safety, and general welfare of its people.¹⁷

In so doing, the Court was cognizant of the inherent imbalance in bargaining power between employee and employer: because workers depend on employers for their ability to live, they are at an extreme disadvantage in bargaining for a fair contract or price for their labor.¹⁸ Indeed, low wage workers are routinely stripped of their wages by employers who occupy positions of power over their workforce.¹⁹

¹⁷ *Parrish v. W. Coast Hotel Co.*, 185 Wn. 581, 587, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379, 57 S. Ct. 578 (1937) (overturning, *inter alia*, *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905)).

¹⁸ *Parrish*, 300 U.S. at 393; *see Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 307, 103 P.3d 753 (2004) (acknowledging that unequal bargaining power between employers and employees is commonplace, distorting the basis for contracts between them).

¹⁹ *See* Section III.A.1., *supra*.

Accordingly, statutory entitlements to minimum labor standards cannot be trumped by private agreements between employers and employees. The state's police power to restrict "contracts between employer and employee [through legislation] is undeniable."²⁰

Allowing Respondents-Plaintiffs to use their superior bargaining position to enter into an agreement with Mr. Cortes on which they later renege, taking Mr. Cortes' labor without paying for it, offends the basic principle of Washington's labor laws. Technicalities in the execution of a contract for real property cannot suffice to end Mr. Cortes' right to fair pay.

B. Review is proper under RAP 13.4(b)(4) due to substantial public interest in resolving the tension between the Court of Appeals decision and wage theft protections in Washington.

²⁰ See *Parrish*, 300 U.S. at 392. These same principles underly Washington's current suite of employment laws, including the Minimum Wage Requirements and Labor Standards Act, RCW 49.46. *Peterson v. Hagan*, 56 Wn.2d 48, 54, 351 P.2d 127 (1960).

1. The Court of Appeals decision incorrectly punishes Mr. Cortes for not keeping detailed records of his employment.

The Court of Appeals held that Mr. Cortes' lack of documentation regarding his contract with Respondents-Plaintiffs exchanging his labor for real estate doomed his claim to the property.²¹ This is in tension with the rule that employers, not employees, must document the conditions of employment.²²

Employer record-keeping requirements are fundamental to the enforcement of wage laws, since employers are in the best position “to know and produce the most probative facts concerning the nature of the amount of work performed” by their employees.²³ This recordkeeping duty is especially vital in

²¹ A-007-008 (discussing the requirements for “specific performance” of the agreement between Mr. Cortes and Plaintiffs-Respondents).

²² WAC 296-128-010.

²³ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187 (1946), *see Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 584, 397 P.3d 120 (2017) (providing wage and hour evidence “should not be an onerous burden on the employer, who is already keeping track of the employee’s time for payroll purposes....”).

workplaces with low-wage workers who may be paid off-the-books in cash or, as in this case, through non-monetary means.²⁴ Aggrieved workers should not be penalized by an employer's failure – or outright refusal – to comply with their recordkeeping duties. “[S]uch a result would place a premium on an employer’s failure to keep proper records ...; it would allow the employer to keep the benefits of an employee’s labors without paying due compensation....”²⁵

Here, the Court of Appeals ended Mr. Cortes’ opposition to his eviction and some of his counterclaims based on his failure to produce “clear, cogent and convincing” evidence of the terms of his employment with Respondents-Plaintiffs.²⁶ Under the Court of Appeals rule, Mr. Cortes would have had to produce “evidence that is clear and unequivocal and which leave no doubt

²⁴ See, e.g. BERNHARDT ET AL., *supra* note 2 at 3 (finding that 57% of low-wage workers did not receive pay stubs with basic information).

²⁵ *Anderson*, 328 U.S. at 687.

²⁶ A-008.

as to” the hours he worked, the wages he was paid, and the amount that was deducted to prove his case.²⁷ This stands in sharp contrast to the requirement that employees need only “produce[] sufficient evidence to show the amount and extent of work as a matter of just and reasonable inference.”²⁸ Any other rule, like the Court of Appeals rule here, would create an “impossible hurdle for the employee”²⁹ in establishing their right to compensation. This Court should accept review of this case to reaffirm the proper placement of burdens for recordkeeping between employer and employee.

2. The Court of Appeals decision is in tension with the principle that employees may acquire property interest in real property through their labor alone.

²⁷ *Id.* at 007.

²⁸ *Anderson*, 328 U.S. at 687. *See also Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 368, 312 P.3d 665 (2013) (citing *Anderson*, 328 U.S. at 687). Mr. Cortes submitted extensive evidence about hours worked and wages owed. *See generally* Petitioner-Defendant’s Petition for Review, pp. 2-8. And the Court of Appeals acknowledged that Mr. Cortes had provided sufficient evidence of his work on the 9040 property for his unjust enrichment claim to survive summary judgment, A-0014.

²⁹ *Anderson*, 328 U.S. at 687.

The Court of Appeals failed to fully credit Mr. Cortes' work for Your Landscape Company LLC and work on Plaintiffs-Respondents' 9040 property as a basis for recovering wages owed to him. Merely allowing Mr. Cortes' unjust enrichment claim to proceed³⁰ fails to fully account for the wage theft suffered by Mr. Cortes, particularly considering the property interests workers may obtain through their work alone.

It has long been established that workers have the right to a lien on real property from their labor for the owner of the property. Liens of this sort are an interest in specific property and arise solely because of a person's work.³¹

For example, Washington has codified the common law mechanics' lien,³² liens earned by orchard workers,³³ and liens earned by restaurant workers.³⁴ Indeed, the principle that workers

³⁰ A012-014.

³¹ *See generally Swanson v. Graham*, 27 Wn.2d 590, 179 P.2d 288 (1947).

³² RCW 60.04.

³³ RCW 60.16.

³⁴ RCW 60.34.

have a right to a lien on the real property of their employers because of their labor has recently been expanded and reinforced in Washington. In 2021, the state legislature passed the Washington Wage Recovery Act.³⁵ Among other provisions, the law provides that “[a]n employee...has a wage lien for wage claims on: ...[a]ny real property in the state of Washington that is owned or subsequently acquired by the employee’s employer....”³⁶

The Court of Appeals’ rule that certain specific contractual language was required to establish Mr. Cortes’ interest in Respondents-Plaintiffs’ 9040 property is at odds with Washington labor lien structures. This Court should accept review of the Court of Appeals decision to resolve this tension.

IV. CONCLUSION

The Court should grant the petition for review.

³⁵ RCW 60.90.

³⁶ RCW 60.90.020(1)(a)(i).

This document contains 2,460 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 13th day of December 2024,

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December 13, 2024 - 1:37 PM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: Marijke and Allen Deutscher v. Ramiro Cortes
Superior Court Case Number: 21-2-01955-6

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