DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal Nos. 20-CV-287 & 20-CV-288
(D.C. Super. Ct. Case No. CAB4445-18)

CHRISTOPHER STEINKE,

Appellant/Cross-Appellee,

v.

P5 SOLUTIONS, INC.,

Appellee/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Matthew K. Handley (Bar No. 489946)
HANDLEY FARAH
& ANDERSON PLLC
777 6th Street, NW—11th Floor
Washington, D.C. 20001
Phone: (202) 559-2411
mhandley@hfajustice.com
Counsel for Amicus Curiae

Matthew B. Kaplan (Bar No. 484760)
THE KAPLAN LAW FIRM
1100 N Glebe Rd
Suite 1010
Arlington, Virginia 22201
Phone: (703) 665-9529
mbkaplan@thekaplanlawfirm.com
Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) *Parties and Amici*. All parties appearing before the Superior Court and in this Court are listed in the Appellant's Brief.

(B) *Rulings Under Review.* References to the rulings at issue appear in the Appellants' Brief.

(C) *Related Cases.* There are no related cases.

RULE 29(c) STATEMENT OF *AMICUS*

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *amicus*.

RULE 29 (c)(3) STATEMENT OF INTEREST OF *AMICUS*

The Metropolitan Washington Employment Lawyers Association ("MWELA"), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 300 members, including an annual day-long conference which usually features

one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice.

MWELA's members and their clients have an important interest in the proper interpretation of the D.C. wage theft laws as a substantial portion of MWELA members' practices are devoted to enforcing these laws, and a substantial portion of MWELA members' clients are impacted by the protections afforded by these laws. The definition of "employer" under the D.C. Wage Payment and Collection Law presented in this wage theft case is likely to arise, in one form or another, in litigation brought by MWELA members, making it all the more important that the questions presented here be resolved clearly and correctly.

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STATEMENT OF FACTS

Amicus adopts the appellant's statement of the case, Brief of Appellant/Cross Appellee at 1, and statement of facts, Brief of Appellant/Cross Appellee at 2.

INTRODUCTION AND SUMMARY OF ARGUMENT

When passing the D.C. Wage Payment and Collection Law (WPCL), the D.C. Council recognized that the withholding by employers of pay earned by their workers—especially low-wage workers—is alarmingly prevalent in the American workplace generally, and in the nation's capital in particular. We live in an increasingly globalized world, particularly in the greater Washington, D.C. area, where people may live in one state and work in another, or may work in states separate and apart from the location of the headquarters or corporate offices of their employer. The WPCL was designed to ensure that people who work in D.C., or employers who operate out of D.C., are covered by the rights and responsibilities the Council determined should apply to such employers and employees. Interpreting the WPCL to cover work performed in D.C. is particularly important when many out-of-state employers (given the small geographic footprint of the District and other incentives they may have to locate outside of D.C. even though they perform operations in D.C.) have employees performing

essential work within the District.[1] To exclude such employers from coverage under the WPCL will allow and further incentivize employers to set up shop outside the District so that they can evade the protections guaranteed by D.C. law.

The plain language of the WPCL, its legislative intent, and the practical implications of excluding employers from its coverage in the manner prescribed by the trial court, all show that the trial court erred in excluding the Appellee P5 from the WPCL's coverage.

ARGUMENT

I. The Plain Language of the WPCL Provides that It Covers All Work Suffered or Permitted to Be Performed in D.C.

The WPCL was enacted by Congress in 1956 to "provide for the payment and collection of wages in the District of Columbia," Act of Aug. 3, 1956, 70 Stat. 976. It was amended in 2014 to establish the current definition of "employers" to include "every individual, partnership, firm, general contractor, subcontractor, association, corporation, the legal representative of a deceased individual, or the receiver, trustee, or successor

[1] Indeed, an investigation by the D.C. attorney general has shown that some of the most vulnerable communities, such as immigrant construction workers, are especially susceptible to theft of their wages by fly-by-night companies that may not have business licenses in D.C., but are nonetheless performing essential work in the District. *See* https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf.

of an individual, firm, partnership, general contractor, subcontractor, association, or corporation, *employing any person in the District of Columbia*." D.C. Code § 32-1301(1B) (emphasis added), and protects "any person *suffered or permitted to work by*" such an employer, *id.* § 32-1301(2) (emphasis added).

The plain and most straight-forward reading of the definition of "employer" is that "in the District of Columbia" modifies "any person," the noun most immediately preceding it. Reasonable rules of construction dictate that an adjectival phrase modifies the noun immediately preceding it, unless doing so would lead to a non-sensical result. *See, e.g.*, *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020).

The reasoning in *Babb* is applicable here. In *Babb*, the Supreme Court interpreted the Age Discrimination and Employment Act's provision that states: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." *Id.* The Court reasoned that "the phrase 'based on age' is an adjectival phrase that modifies the noun 'discrimination,' . . . [and] does not modify "personnel actions." *Id.*

Here, too, there is no reason to divert from the plain reading of the WPCL's definition of employer, which makes clear that entities which employ persons in the District of Columbia are covered by its provisions.

The definition of "employee" further supports this reading, and ensures that the definition of "employer" would not lead to inequitable results. "Employee" is defined as "any person suffered or permitted to work by an employer." D.C. Code § 32-1301(2). Accordingly, any person who was not allowed by their employer to work in the District of Columbia would not be covered. That is not the case for Appellant Steinke, where the undisputed facts indicate that Appellee P5 permitted, sanctioned and benefitted from Steinke's work in the District of Columbia.

In rejecting the application of the WPCL here, the trial court applied a non-intuitive and strange interpretation of the statute, that contradicts its remedial purpose, by reference to non-binding authority. That language cannot be reconciled with the plain language of the statute. *See* JA 279-280 (citing *Lincoln-Odumu v. Medical Faculty Assocs*., Civil Action No. 15-1306, 2016 U.S. Dist. LEXIS 88659, *19-20 (D.D.C. July 6, 2016)). Indeed, the trial court appears to have misread that authority. There, the U.S. District Court for District of Columbia wrote that the "plain terms" of "the WPCL permits any individual 'suffered or permitted to work' by a

corporation 'employing any person in the District of Columbia' to bring an action to collect wrongfully withheld wages," and reasoned that it applies anytime a company operates within the borders of the District. *Id at* *20, 37. In this case, Appellee P5 permitted Appellant Steinke to perform 90% of his work in the District of Columbia, with half of his client-site work being done in the District. *See* JA 219.

While the federal court in *Lincoln-Odumu* applied a broad reading to the definition of "employer," the trial court in this case misread the same decision to apply a narrow definition, while ignoring the definition of "employee" in the Act, by requiring that the employer be physically located in the District in order to be covered. *See* JA 280 ("It is undisputed that the defendant did not compel the plaintiff to conduct work in the District of Columbia, and there are no other facts alleged by the plaintiff that would demonstrate that the defendant possessed intentional or substantial ties to the District of Columbia."). The trial court misreads the statute, however, as there is no such requirement in the statute. Indeed, P5 knew that Steinke worked in the District and performed work for P5 in the District. *See, e.g.,* JA 263. P5 "suffered or permitted" Steinke's work in this jurisdiction. The trial court's suggestion that an employer of D.C. employees is exempt from the WPCL so long as it lacks "intentional or substantial ties to the District of

Columbia," finds no support in the statute. Moreover, the trial court did not find—and could not have reasonably found—that the fact that Steinke largely worked from home was to Steinke's exclusive benefit. P5 had no permanent offices of its own and it presumably also benefited from this arrangement by not having to pay for office space for Steinke. JA 119.

II. The Legislative Intent of the Council Was for the WPCL to Cover D.C. Work.

The Wage Theft Prevention Act of 2014 is a powerful remedial statute that was "designed to combat wage theft by increasing the accountability of employers and strengthening the District's worker protection laws." *See* Committee Report on Bill No. 20-671, "Wage Theft Prevention Amendments Act of 2014," D.C. Council Committee on Business, Consumer and Regulatory Affairs.[2] In passing the legislation, the Committee held that:

> Beyond causing individual workers to suffer economic losses, wage theft also impacts the economy as a whole. Underpaying or stealing wages from workers lowers tax revenues, which can depress consumer spending and stunt economic growth because less disposable income translates into less money spent at local businesses. In addition, ethical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs. Furthermore, dishonest employers steal from taxpayers when they do not pay their fair share of payroll taxes.

[2] https://lims.dccouncil.us/downloads/LIMS/31203/Committee_Report/B20-0671-CommitteeReport1.pdf

Id.

In enacting a series of changes to the 1956 statute "for the payment and collection of wages in the District of Columbia." Pub. L. No. 953, 70 Stat. 976 (1956), the overall goal of the amendments was to greatly strengthen the rights of employees in the District of Columbia:

> The [WPCL] provides basic guarantees to ensure that employers pay their workers and do so in a timely fashion. Its provisions dictate how often employers must pay their employees, D.C. Code § 32-1302 (generally, "at least twice during each calendar month"), how quickly they must do so after discharge or resignation, D.C. Code § 32-1303, and provide that the WPCL's various substantive protections cannot be waived via "private agreement," D.C. Code § 32-1305. In addition to those guarantees, the WPCL contains robust enforcement mechanisms, including criminal and administrative penalties. *See, e.g.*, D.C. Code § 32-1307(a)(2)(B) (repeated willful violations punishable by up to "$10,000 per affected employee" and up to "90 days" imprisonment).

Sivaraman v. Guizzetti & Assocs., 228 A.3d 1066, 1071-1072 (D.C. 2020). The amendments further increased liquidated damages to three times the unpaid wage, with language that is mandatory, not permissive, and further provided for mandatory attorneys' fees at so-called "*Salazar*" rates at a favorable standard of proof, along with other relief. *Id*. at 1072; D.C. Code §§ 32-1308 (a)(1)(A), (b). The amendments further strengthened the statute by removing from its exemptions executive, administrative, and professional employees.

Increasing the penalties for violating the statute, and bringing into its ambit whole classes of previously-exempted employees, evinced a broad remedial purpose in passing the WPCL and its amendments "designed to correct what the Council plainly viewed as an unjust status quo." *See Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1234 (1990) (interpreting the Uniform Disposition of Unclaimed Property Act of 1980). "'Remedial statutes are liberally construed to suppress the evil and advance the remedy.'" *Id*. (citing 3 N. SINGER, SUTHERLAND, STATUTORY CONSTRUCTION § 60.01, at 55 (4th ed. 1986)); *Tenants of 738 Longfellow St., N. W. v. District of Columbia Rental Hous. Comm'n*, 575 A.2d 1205, 1211 (D.C. 1990)). *See also Cruz v. District of Columbia Dep't of Employment Servs.*, 633 A.2d 66, 69 (D.C. 1993) (applying broad construction to unemployment compensation statute); *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732-33 (D.C. 2000) (according broad standing principles to District of Columbia Human Rights Act to individuals not directly targeted by discrimination, in light of the broad remedial purposes of the Act).

In this case, the intent of the Council in enacting the Wage Theft Act amendments was to expand the rights of District of Columbia employees in order to ensure that they are appropriately compensated for work performed

here. Rather than give a natural reading to the definition of employer as any entity "employing any person in the District of Columbia" D.C. Code § 32-1301(1B), to mean that a company is covered if it "employ[s] a person in the District of Columbia," the trial court instead gave the phrase the narrowest possible reading, at odds with both the plain meaning as well as the overall purpose of this remedial statute. The trial court erred by ignoring both the plain language and the broad purposes of the statute, and failed, as it was so required, to interpret the statute in a manner that would "suppress the evil and advance the remedy" intended by the Council. *See Riggs*, 581 A.2d at 1234.

III. The Practical Impact of the Trial Court's Holding Would Be Detrimental to The District's Most Vulnerable Workers.

Wage theft has grown to epidemic levels in D.C., and this epidemic has been particularly devastating to the wages of low-paid workers. *See* Brady Meixell and Ross Eisenbrey, "An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year," Economic Policy Institute Issue Brief No. 385 (Sept. 11, 2014), https://files.epi.org/2014/wage-theft.pdf; Annette Bernhardt et al., "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," National Employment Law Project et al. (2009) (landmark survey of unpaid wages among thousands of low-wage workers in New York, Chicago and Los

Angeles), https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.

The District of Columbia has been particularly impacted by wage theft. *See* Tim Judson & Cristina Francisco-McGuire, "Where Theft is Legal: Mapping Wage Theft Laws in the 50 States," Progressive States Network, June 2012, at 24, www.researchgate.net/publication/326678129_Where_Theft_is_Legal_Mapping_Wage_Theft_Laws_in_the_50_States (giving D.C. a grade of F for pre-2014 wage theft enforcement); Employment Justice Center, Lawyers' Committee for Civil Rights Under Law, and Washington Lawyers' Committee for Civil Rights and Urban Affairs, Report, "Stolen Wages in the Nation's Capital," Feb. 6, 2014, www.washlaw.org/pdf/ stolen_wages_in_the_nations_capital.pdf; Committee Report on Bill No. 20-671, "Wage Theft Prevention Amendments Act of 2014," D.C. Council Committee on Business, Consumer and Regulatory Affairs, at 13 (summarizing testimony of Thomas Luparello, Interim Director, D.C. Dept. of Employment Services) ("Mr. Luparello . . . stated that the Department is aware of the increase in inciden[ts] of wage theft" under existing "antiquated statutes" and supported the "additional protections" added by the 2014 legislation),

https://lims.dccouncil.us/downloads/LIMS/31203/Committee_Report/B20-0671-CommitteeReport1.pdf.

As noted in a recent report by the District of Columbia's Office of the Attorney General, wage theft is rampant in the District of Columbia. *See* "Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry," Issue Brief and Economic Report, D.C. Office of the Attorney General, at 1, (Sept 2019) *available at* https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf.

One way in which wage theft is perpetrated by companies is through the use of subcontractors or labor brokers, often unscrupulous companies incorporated outside the District and/or with no business license in the District, who fail to follow the District's wage and misclassification laws. *Id.* At 6. If the WPCL is interpreted to only cover those companies that are themselves located in the District, a huge swath of the District workforce, many of which are some of the District's most vulnerable and exploited members, would find themselves without the protections of D.C. law.

Any interpretation of the WPCL that excludes employers who suffer or permit their employees to work in the District would facilitate the exploitation of persons who work in the district while perversely incentivizing employers such as remote customer service companies to keep

their offices outside this jurisdiction so as to evade the obligations of District of Columbia law. An affirmance of the trial court's holding would harm law-abiding D.C. employers as well as employees. For example, two employees may be in D.C., engaged in the same type of task, but the one employed by a Virginia company would not be covered and the one employed by a D.C. company would be covered. The cost of employing someone working for a D.C. company would be higher, and this would incentivize project managers to use non-D.C. companies to do their work in D.C., driving D.C. employers out of business.

As the Committee on Business, Consumer and Regulatory Affairs pointed out when the Wage Theft Amendment Act of 2014 was passed, "ethical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs."[3] Allowing a company to evade D.C. wage and hour laws by merely setting up an office outside of the District will undermine the primary motivation behind the WPCL and its amendments. Such interpretation would be unjust and contrary to the plain language of the statute and the intent of the legislature.

[3] *See* Committee Report on Bill No. 20-671, "Wage Theft Prevention Amendments Act of 2014," D.C. Council Committee on Business, Consumer and Regulatory Affairs.

CONCLUSION

The plain reading of the WPCL's definition of "employer," the legislative intent behind this definition, and the practical implications of an unreasonable narrowing of this definition demonstrate that the trial court erred in finding that Appellee P5 is not subject to the WPCL. MWELA respectfully urges this Court to reverse that decision.

Respectfully submitted,

/s/ *Matthew B. Kaplan*
Matthew B. Kaplan (Bar No. 484760)
THE KAPLAN LAW FIRM
1100 N Glebe Rd
Suite 1010
Arlington, Virginia 22201
Phone: (703) 665-9529
mbkaplan@thekaplanlawfirm.com

Matthew K. Handley (Bar No. 489946)
HANDLEY FARAH
& ANDERSON PLLC
777 6th Street, NW
Eleventh Floor
Washington, D.C. 20001
Phone: (202) 559-2411
mhandley@hfajustice.com

Counsel to Amicus Curiae
Metropolitan Washington
Employment Lawyers' Association

October 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on the date that that shall be affixed by the clerk to the first page of this document in the course of the electronic filing process as the date of filing, that this document (including any appendix or other accompanying documents) was served on Mitchell I. Batt, counsel for Appellant/Cross-Appellee and Denise M. Clark and Jeremy Greenberg counsel for Appellee/Cross-Appellant, by this court's electronic filing system.

/s/ Matthew B. Kaplan
Matthew B. Kaplan