No. 96267-7

JOHNSON, J. (separate dissent)—I write separately to address the separate, equitable argument raised whether to apply the court's holding prospectively only. Based on the majority's holding and the circumstances of this case, principles of fairness and equity require prospective application.[1]

While a presumption exists that generally a decision applies retroactively, cases recognize a court in equity may apply a decision prospectively to only future cases. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271, 208 P.3d 1092 (2009). Although prospective application is rare, it is nonetheless warranted where we find retroactive application is inequitable. *See McDevitt v. Harborview Med.*

[1] The *petitioners* argue that retroactive application was not an issue properly before the court. Pet'rs' Reply and Resp. to Cross-Appeal at 40-41. But DeRuyter explicitly argued this point in its briefing. Opening Br. of Resp'ts/Cross-Appellants at 44-49. Prospective application is an argument that arises only from the invalidation of the statutory exemption and can be resolved only by this court. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 279, 208 P.3d 1092 (2009) ("By its very nature, the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law. It is at that point—when we are engaged in weighing the relative harms of affirming or overruling precedent—that courts are in the best position to determine whether a new rule should apply retroactively or prospectively only.").

*Ctr.*, 179 Wn.2d 59, 75-76, 316 P.3d 469 (2013) (plurality opinion). In our cases, we have sometimes applied three factors developed in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), when considering the equities of retroactive application, asking whether "'(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result.'" *McDevitt*, 179 Wn.2d at 75 (quoting *Lunsford*, 166 Wn.2d at 272).

In applying those factors, I would find first the majority's decision in this case invalidates an exemption that has been the law and been relied on for more than 60 years. The presumptive constitutionality of this law led farm employers to rely on and follow the statutory wage requirements, and they should not be punished for that reliance. Moreover, no case during the past 60 years questioned the exemption's validity. Farm employers had no reason to foresee the need to change their practice of not paying overtime. Creating a liability would be inequitable to the farm employers here.

Additionally, regarding the third factor, retroactive application of this decision could produce a substantially inequitable result for many farm employers. Applying a decision prospectively only is "a logical and integral part of stare

decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected." *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 666, 384 P.2d 833 (1963). The cost of paying overtime for hours worked in the past could have a devastating impact on farm employers broadly. The far-reaching impact of retroactive application inflicts more injustice than is necessary to give effect to the decision. No expectation of overtime pay existed when farm employees entered into employment contracts. Plus, the primary goal in this case from the employees' perspective is invalidation of the exemption, which the majority grants. Based on the majority's ruling, farm workers will now be entitled to future overtime pay, a substantial benefit. So, while some inequity to workers exists by prospective application, this inequity is tempered by the future benefits created under the majority's holding. Thus, applying today's decision only prospectively does not undermine the benefit to farm employees of invalidating the exemption.

Farm employers should not bear the overwhelming risk of financial devastation because they paid what the law required of them at the time. The balancing of the equities in this case requires the court to apply today's decision only prospectively to future cases.

Johnson, J.

Stephens, C.J.

Fairhurst, J.P.T.

Owens, J.