96990-6

NO. 51823-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

NICOLE BEDNARCZYK and CATHERINE SELIN, individually and on behalf of all others similarly situated,

Appellants/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

PETITION FOR REVIEW

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I. Introduction and Identity of Petitioner

Plaintiffs Nicole Bednarczyk and Catherine Selin seek discretionary review by the Washington Supreme Court pursuant to RAP 13.4.

Plaintiffs are prospective jurors who allege that King County is violating the Juror Rights Statute, RCW 2.36.080(3), and the Minimum Wage Act, RCW 49.46.020(1), by refusing to pay minimum wages for each hour of jury service. Plaintiffs filed this proposed class action to remedy the systemic exclusion of King County jurors based on economic status and to require King County to pay minimum wages to those who do not otherwise receive compensation from an employer while performing jury service.

The preservation and revitalization of American democratic ideals and institutions has never been more important. Trial by jury is a basic and indispensable ingredient of American justice. It is rooted in both state and federal constitutions. Unfortunately, King County's jury system is badly broken. It systemically excludes King County residents from jury service based on their economic status. This systemic exclusion is caused by King County's failure to compensate residents for the time they spend performing jury service. This failure denies low-income citizens their statutory right to participate as jurors, and the resulting lack of economic and racial diversity in Washington's jury venires threatens the viability and legitimacy of our system of justice.

Whether citizens must be paid for their time while serving as jurors is a decision only this Court can make. It invokes this Court's responsibility

to supervise the administration of justice and requires a policy decision compelled by the rule of law. This Court should reverse the Court of Appeals and remand to the trial court for further proceedings.

II. Court of Appeals Decision

On February 21, 2019, the Court of Appeals ruled that "[j]urors are not entitled to compensation for their service. Instead, jurors are entitled only to what compensation is granted to them by [RCW 2.36.150]," which limits reimbursement for expenses to no more than $25 nor less than $10 per day of service. *Rocha v. King County*, No. 51823-6-II (Wash. Ct. App. Feb. 21, 2019) ("Slip Opinion") at 4 n.3.[1]

The Court of Appeals also ruled that RCW 2.36.080(3) does not create an implied cause of action for jurors, maintaining the relief Plaintiffs seek—compensation for jury service—is inconsistent with the underlying purpose of the statute. *Id*. at 6-8. Even assuming an implied cause of action, the Court of Appeals held that Plaintiffs failed to establish "some conduct by King County that excluded them from the opportunity to be considered for jury service based upon their economic status." *Id*. at 8. The Court of Appeals reasoned that "the legislature intended to protect the opportunity for people to be considered for jury service and to impose the obligation to serve as a juror when summoned." *Id*. at 8. The Court of Appeals concluded that because people of low economic status are "included in the master jury list," they are provided this opportunity and there is no violation of RCW

[1] The Slip Opinion is attached as Appendix A.

2.36.080(3) even though they are routinely unable to serve because they cannot afford to do so. *Id*. at 5, 8.

In reference to the Minimum Wage Act (MWA), the Court of Appeals ruled that Plaintiffs are not employees because "[j]ury service is service performed as a civic duty." *Id*. at 10. The Court of Appeals distinguished *Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990), on the ground that this Court held jurors are "employees" under the Industrial Insurance Act and not the MWA. *Id*. at 11-12.

Lastly, the Court of Appeals ruled that Plaintiffs lack standing under the Declaratory Judgment Act, chapter 7.24 RCW, on the ground they lack an injury in fact. *Id.* at 12. The Court of Appeals reasoned that Plaintiffs are on the master jury list and will be paid the statutory expense reimbursement rate if summoned, and any exclusion for economic hardship will be due to their request and not because of King County's actions. *Id*. at 12. The Court of Appeals also ruled that Plaintiffs lack standing under the MWA because jurors are not employees and therefore Plaintiffs' interests are not within the zone protected by the MWA. *Id*.

Judge Bjorgen dissented. He opined that "[t]he low rates of juror remuneration afforded by King County . . . make jury service economically impossible as a practical matter for many low income citizens, thus placing many already near the margins of society even further from the sense of belonging to it." *Id*. at 25 (Bjorgen, J., dissenting). Recognizing "jury

service is a full time job that can extend from less than a day to weeks," Judge Bjorgen wrote:

> The low rates of remuneration create a structural incentive to self-exclusion from this dignity of citizenship on the part of those who cannot afford to serve with those rates. In some cases, they create the unequivocal need to exclude oneself from this eminent privilege. In the face of this, to say that the opportunity to be considered for jury service is preserved by the opportunity to be in the jury pool leaves little of logic and even less of RCW 2.36.080(3).

Id. at 19, 23. Thus, "this catalyst to self-exclusion violates the mandate of RCW 2.36.080(3)." *Id*. at 14.

Judge Bjorgen reasoned that RCW 2.36.150 is limited to reimbursement for expenses, and the 2004 amendment to the statute clearly reflected the legislature's intent "not to cap all types of compensation or payment, but simply to confine reimbursement for expenses." *Id*. at 17. "This cap on expense payments," he continued, "in no way licenses the effective exclusion of low income citizens from jury service through the absence of other reasonable compensation." *Id*. He concluded that RCW 2.36.150 and RCW 2.36.080(3) can be easily harmonized: "the former caps the reimbursement of expenses and the latter prohibits the effective exclusion of citizens on account of low income or assets." *Id*. at 18.

Judge Bjorgen also concluded that an implied cause of action under RCW 2.36.080 is consistent with the legislature's intent in adopting the statute. *Id*. at 21-23. Among other things, the legislature wanted to "maximize the availability of residents of the state for jury service," and "[t]his policy . . . is directly served by the prohibition of exclusion on

account of economic status found in RCW 2.36.080(3)." *Id.* at 21 (quoting RCW 2.36.080(2)). Moreover, simply summoning jurors without regard to economic status does not satisfy the prohibition against exclusion on the basis of a protected classification, he wrote. If it did, "a subsequent express, de jure exclusion on account of poverty from actually serving on a jury would not violate RCW 2.36.080(3). That, of course, would bluntly contradict the plain words of RCW 2.36.080(3)." *Id*. at 22. "The opportunity to be in a jury pool is not the opportunity to be considered for jury service for those from whom the law itself exacts a severe economic penalty for that service." *Id*. at 23.

Finally, Judge Bjorgen concluded that Plaintiffs have standing under the Declaratory Judgment Act. *Id*. at 24.

III. Issues Presented for Review

A. Did the trial court err when it granted King County's motion for summary judgment?

B. Does King County's failure to compensate jurors for their service result in the unlawful exclusion of prospective jurors based on "economic status" in violation of the Juror Rights Statute, RCW 2.36.080(3)?

C. Does there exist an implied cause of action under the Juror Rights Statute, RCW 2.36.080(3)?

D. Are jurors "employees" for purposes of the Washington Minimum Wage Act, RCW 49.46.020, and therefore entitled to be paid at least the minimum wage for each hour of service?

E. Does the expense reimbursement provision in RCW 2.36.150 foreclose the payment of compensation to jurors for the time they spend performing jury service?

F. Do Plaintiffs have standing to bring claims under the Juror Rights Statute, RCW 2.36.080(3), and the Washington Minimum Wage Act, RCW 49.46.020?

IV. Statement of the Case

A. Statement of Facts.

Since 1959, individuals performing jury service in the courts of King County have received nothing more for their attendance than an expense payment of $10 per day plus mileage or travel fare. CP 23, ¶ 5.56 & CP 50, ¶ 5.56; CP 330; CP 616. In 1999, the Board for Judicial Administration established the Washington State Jury Commission to "conduct a broad inquiry" into issues such as the "adequacy of juror reimbursement" and "improving juror participation at trials." CP 292. The Commission made numerous recommendations for achieving this goal, but the "highest priority" was increasing compensation for jurors. CP 292, 299, 310-311. In no uncertain terms, the Commission deemed it "unacceptable that this state's citizens are required to perform one of the most important civic duties at a rate that does not remotely approach minimum wage." CP 330. The Commission concluded that "[i]ncreased fees will not only address the current inequity in juror compensation, but will also contribute to more

economically and ethnically diverse juries by enabling a broader segment of the population to serve." CP 292.[2]

In accordance with RCW 2.36.100(1) and GR 28, King County has a policy and practice of excusing individuals who have been summonsed for jury service if they "are not being paid for jury service by their employer" and "will be unable to meet the[ir] basic needs [or those of their] family." CP 416, CP 418.[3] King County staff members authorize and record administrative grants of financial hardship excusal requests. CP 416-525. But once jurors "are placed on the court list and provided to the court location," staff members may not excuse jurors "unless authorized by a Judge to do so." CP 418; *see also* CP 416. At that point, it is up to the judge to decide whether to grant a request for economic excusal. CP 530. Most if not all judicial economic excusals go unrecorded.

King County exempts a substantial number of prospective jurors because they cannot meet their basic needs. At the administrative level alone, King County excused more than 5,100 prospective jurors on account of financial hardship between 2011 and 2016. CP 420. A sample of emails from judges and staff underscores the scope of the problem. *See* CP 526-542. As one judge wrote, "I think we have all been experiencing the 50% +

[2] People of color, who are more likely to be of low economic status, are substantially underrepresented in King County's jury venires. *See* CP 543-96, 598, 601-04.

[3] A prospective juror can request an economic hardship exemption, but King County ultimately decides whether to grant the exemption. If King County denies a requested economic hardship exemption, the citizen is compelled to serve as a juror or face criminal sanctions for failing to do so. RCW 2.36.170 ("A person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor.").

hardship requests from a panel for a case that is going to last 2+ weeks." CP 537. For longer trials, it can be necessary to have as many as 200 prospective jurors appear in order to seat a jury of twelve with two alternates, given the number of financial hardship excusals that will be sought. CP 534, CP 541. In the words of former Presiding Judge Susan Craighead: "we are spending a lot of money bringing in jurors who just cannot sit for more than two days because of their economic situations, yet I can't remember the last time I presided over a two or three day trial." CP 527. Many civil trials, which have a lower priority than criminal trials, are continued or delayed "due to an inability to seat enough jurors." CP 532.

Excusals for financial hardship are only the "tip of the iceberg." It is likely that most people of low economic status simply refuse to respond to summonses for fear that they will not receive a hardship exemption. CP 532. Of the 510,681 people King County summonsed for jury service between 2011 and 2016, only 147,743 appeared—a yield rate of less than 29 percent. CP 198 ¶ 5. The other 362,938 did not respond. *See id*.

King County has admitted numerous facts that demonstrate jurors satisfy the "economic dependence" test and are therefore "employees" within the meaning of the MWA. These admitted facts include the following: King County instructs jurors on the time and location of their service, their roles and responsibilities, and the completion of forms. CP 54-55 ¶¶ 5.24, 5.26; CP 606-608, Nos. 1, 3. King County has the authority to excuse individuals from jury service and to dismiss them once their service

is complete. CP 55 ¶ 5.27; CP 608, No. 4. King County maintains records regarding those persons called to serve, those dismissed, those assigned to specific courtrooms, those paid reimbursements and mileage, and those who request accommodations. CP 55 ¶ 5.29; CP 609, No. 6. King County provides the premises on which jurors perform their service. CP 260 ¶ 5.30; CP 609-610, No. 7. The work of jurors is not specialized and does not require particular knowledge or ability. CP 56 ¶¶ 5.31, 5.32; CP 610, No. 8. Jurors perform a vital service for the County. CP 56 ¶ 5.34; CP 610, No. 9.

B. Considerations Governing Review

Jury service is one of the most significant forms of citizen participation in a free society. *See Powers v. Ohio,* 499 U.S. 400, 407 (1991). The jury system allows randomly selected citizens to dispense social and criminal justice unfiltered by elections, politicians, bureaucrats, or lobbyists. Jurors guard against governmental abuses of power and hold the most powerful interests in society accountable to the rule of law. Jurors reflect the conscience of the community and are an indispensable component of American democracy. This Court has never had occasion to construe the Juror Rights Statute, RCW 2.36.080. The lack of economic and racial diversity in King County juries "involves an issue of substantial public interest that should be determined by the Supreme Court." *See* RAP 13.4(b)(4).

In addition, the decision of the Court of Appeals conflicts with *Bolin v. Kitsap County*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990), in which this

Court held that "[j]urors are employees of the county by virtue of their responsibility to the superior court." *See* RAP 13.4(b)(1).

V. Argument

A. The Supreme Court Has Responsibility for Supervising the Administration of Justice.

The power to mandate compensation for low-income jurors derives directly from this Court's supervisory powers over the administration of justice. The U.S. Supreme Court has held that "exclusion [from jury service] of all those who earn a daily wage cannot be justified by federal or state law." *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224-25 (1946). The Court in *Thiel* did not base its holding on a statutory or constitutional provision. Rather, as explained in *Ballard v. United States*, 329 US 187 (1946), the Court relied on its supervisory authority over the administration of justice.

In *Ballard*, the Court reversed a criminal conviction because of the systematic exclusion of women from the jury. The Court wrote:

> We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts to correct an error which permeated this proceeding.

Ballard, 329 U.S. at 192-93 (citation omitted); *see also Peters v. Kiff*, 407 U.S. 493, 500 n.1 (1972) ("[I]n the exercise of its supervisory power over federal courts, this Court extended the principle to permit any defendant to challenge the arbitrary exclusion from jury service of his own or any other class.") (citing *Glasser v. United States,* 315 U.S. 60, 83-87 (1942); *Thiel*,

supra; and *Ballard*, *supra*); *Taylor v. Louisiana,* 419 U.S. 522, 526-27 (1975) ("Both in the course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community."). The Court in *Ballard* explained: "[t]he injury [in excluding a class of people from jury service] is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 196.

Low-income residents of King County are systemically excluded from participating in jury service based on their economic status. This exclusion directly affects the administration of justice. As in *Thiel* and *Ballard*, this Court has the power and responsibility to fashion a remedy.

B. The Failure to Compensate Jurors for Their Service Has a Disparate Impact on the Basis of Economic Status.

RCW 2.36.080(3) prohibits exclusion "from jury service in this state on account of membership in a protected class recognized in RCW 49.60.030, *or on account of economic status.*" (Emphasis added). *See* Appendix B. "Economic status" is a protected classification under the statute.[4] Plaintiffs claim that the failure to pay minimum wages to jurors has

[4] King County has argued, and the trial court ruled, that "economic status" is not a "protected classification" under the Washington Law Against Discrimination ("WLAD"), and "therefore, there is no cognizable disparate impact claim under 2.36.080." RP 18:9-13. The Court of Appeals did not directly address this issue.

a disparate impact on people of low economic status and causes them to be excluded in disproportionate numbers.[5]

In order to prove disparate impact under Washington law, a plaintiff must establish (1) a facially neutral practice (2) that falls more harshly on a protected class. *Shannon v. Pay'N Save*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985). The facially neutral practice at issue here is King County's failure to compensate jurors beyond the expenses authorized by RCW 2.36.150. It is undisputed this practice falls more harshly on people of low economic status. Slip Opinion at 5. Significantly, a discriminatory motive is not required to prove disparate impact. *Shannon,* 104 Wn. 2d at 727.[6]

1. Systemic exclusion based on economic status violates RCW 2.36.080(3) regardless of the opportunity to serve.

The Court of Appeals rejected Plaintiffs' claim under RCW 2.36.080(3) principally on the ground that King County has given low-income citizens an "opportunity to serve." Slip Opinion at 7-8. This opportunity to serve also formed the basis for the Court of Appeals' conclusion that RCW 2.36.080(3) does not create an implied cause of

[5] Generally, there are two different types of discrimination claims: disparate *treatment* and disparate *impact*. *Oliver v. Pac. Nw. Bell Tele. Co.*, 106 Wn.2d 675, 677, 724 P.2d 1003 (1986). Disparate treatment is demonstrated when the [defendant] simply treats some people less favorably than others because of [a protected characteristic]." *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 811 (9th Cir. 2004). This type of claim requires the plaintiff to prove that an illegal reason was a "substantial factor" in the decision to take adverse action. *Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). The prospective jurors do not allege disparate treatment here.

[6] "Under Washington law, as under federal law, "business necessity" is a defense to a disparate impact claim. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 499, 325 P.3d 193 (2014). But King County has not claimed the exclusion of low-income jurors is a business necessity.

action. *Id*. at 6-7. But to harmonize the different sections of the statute, the "opportunity to be considered for jury service" provided for in section .080(1) must be informed by the prohibition against exclusion from jury service provided for in section .080(3). The opportunity to be considered is insufficient where, as here, the jury system systemically excludes prospective jurors based on any protected classification, including economic status.

In *Taylor v. Louisiana,* the Court considered state statutory and constitutional provisions that provided "a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service." 419 U.S. at 523. The Court found "[t]he Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded *systematic impact* is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service." *Id*. at 525 (emphasis added). Despite the fact that women had an *opportunity to serve*, the Court held: "If the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be *systematically excluded* from jury panels from which petit juries are drawn." *Id*. at 533 (emphasis added).

In Louisiana, women were not *per se* disqualified. Indeed, they were given the opportunity to serve, but to do so they had to *opt in* to jury service. This opportunity to serve as jurors did not prevent a violation of the Sixth

Amendment's fair-cross-section rule because a substantial number of women were systemically excluded.

In King County, low-income citizens are also not *per se* disqualified. Similar to the women of Louisiana, these citizens have an opportunity to serve as jurors but can request to *opt out* of such service. But neither the opportunity to serve nor the ability to opt out prevents a violation of the Juror Rights Act's fair-cross-section rule, which guarantees "that all persons selected for jury service be selected at random from a fair cross section of the population . . . ." RCW 2.36.080(1). As with the Sixth Amendment, the Juror Rights Statute is violated by the systemic exclusion of people on account of economic status. The proper focus of the analysis is on the *systemic exclusion* of low-income citizens and not the *opportunity to serve.*

Moreover, the opportunity to serve is meaningless when the choice is between jury service and meeting basic family needs.

> For those with low paying jobs without leave for this purpose, the cost of jury service may be a missed rent payment or skipped meals. For those without understanding employers, jury service may come at the cost of a job. Faced with such risk, the choice to exclude oneself is hardly voluntary.

Slip Opinion at 18-19 (Bjorgen, J., dissenting). In short, this Hobson's choice is no choice at all.

> [T]he absence of compensation beyond the allowed reimbursement for expenses, makes jury service untenable for many lower income citizens. To say that one voluntarily excludes oneself by declining jury service instead of risking, say, eviction or loan default, is to search the law with blinders. The lack of reasonable compensation compels their self-exclusion from this high privilege of citizenship. The

> justice system itself excludes many low income citizens on account of economic status in violation of RCW 2.36.080(3).

Id. at 19.

C. There Exists an Implied Cause of Action Under the Jurors' Rights Act, RCW 2.36.080(3).

For every right there must be a remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The prospective jurors allege RCW 2.36.080(3) creates an implied cause of action. *See* CP 211 ¶ 4.3.1.c. To recognize such a cause of action, the Court "must determine first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 507 (1990).

The Court of Appeals erred when it ruled that RCW 2.36.080(3) does not create an implied cause of action. Slip Opinion at 5.[7] The Court of Appeals refused to recognize an implied cause of action based on the conclusion that "[t]he legislature did not intend to guarantee jurors be able to serve by providing adequate financial compensation. Therefore, it would be inconsistent with the legislative intent to imply a remedy based on jurors' financial compensation for alleged violations of RCW 2.36.080(3)." *Id*.

The Court of Appeals is wrong. The Juror Rights Statute provides that "[i]t is the policy of this state to maximize the availability of residents

[7] Plaintiffs' claim under the MWA is unaffected by the refusal of the Court of Appeals to recognize an implied cause of action under RCW 2.36.080.

of the state for jury service" and "to minimize the burden on the prospective jurors, [and] their families . . . ." RCW 2.36.080(2). The legislature recognized that one way of achieving these policies is to limit the term of jury service when possible. *Id.* That recognition, however, does not foreclose other ways of achieving these policies, including the payment of compensation. More significantly, the legislative policy to maximize the availability of jury service and minimize the burden on jurors must be harmonized with the statutory prohibition of exclusion on the basis of "economic status." RCW 2.36.080(3). *See King County v. Central Puget Sound,* 142 Wn.2d 543, 560, 14 P.3d 133 (2000) ("Effect should be given to all of the language used, and the provisions must be considered in relation to each other, and harmonized to ensure proper construction"). Contrary to the Court of Appeals' conclusion, compensation for jurors is consistent with all of these statutory policies; it will maximize the availability, minimize the burden, and prevent the systemic exclusion of jurors on the basis of economic status. Indeed, compensation for jurors is not only consistent with the legislative purpose but also necessary to achieve the legislative purpose.

D. Jurors Are Employees Under the Minimum Wage Act, RCW 49.46.020.

In *Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990), this Court ruled that "[j]urors are employees of the county by virtue of their responsibility to the superior court." *Id.* at 75. It arrived at this conclusion by applying the "right to control" test. *Id.* at 73. The Court of Appeals distinguished *Bolin* on the ground that the Court did not apply the

economic-dependence test, Slip Opinion at 11, which was adopted after *Bolin* and "provides *broader* coverage than does the right-to-control test." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (emphasis added). But if jurors satisfy the right-to-control test, they necessarily satisfy the economic-dependence test.

Although the Court of Appeals concedes that the economic dependence test applies to determine whether a worker is an employee under the MWA, the court dismisses the test's application in this case on the ground that "[j]ury service is service performed as a civic duty" and therefore "jurors are not entitled to compensation for their service." *Id*. at 9-11. This is not a legal argument. Moreover, if jury service were merely a civic duty, jurors would be ineligible for workers compensation.

The Court of Appeals also distinguished *Bolin* on the ground that the case was decided under the Industrial Insurance Act (IIA) and not the MWA. *Id.* at 11. The Court of Appeals reasoned that jurors are employees under the IIA because they are not excluded from that statute. *Id*. But jurors are not excluded under the MWA either. Thus, as the Court held in *Bolin*, "[j]urors are employees of the county by virtue of their responsibility to the superior court." 114 Wn.2d at 75.

E. RCW 2.36.150 Requires the Reimbursement of Expenses and Does Not Foreclose Additional Compensation.

RCW 2.36.150 is titled in relevant part: "Juror expense payments—Reimbursement by state." It requires King County to pay jurors "for each day's attendance" both a "mileage" allowance and an "expense payment[]"

or "per diem" of "up to twenty-five dollars but in no case less than ten dollars." RCW 2.36.150. The statute does not foreclose compensation beyond reimbursement for expenses. The plain language of RCW 2.36.150 supports this conclusion. *See State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010)(noting the "first step" of statutory interpretation "is to examine [the] plain language").[8]

RCW 2.36.150 does *not* address whether jurors are entitled to receive wage payments for hours worked; rather, it only addresses what jurors are entitled to receive by way of expense or reimbursement payments. "If [a] statute is unambiguous after a review of the plain meaning [of its terms], the court's inquiry is at an end." *See Gonzalez,* 168 Wn.2d at 263. The Court of Appeals erred in holding that RCW 2.36.150 forecloses the right of jurors to be compensated for their time. Slip Opinion at 4 n.3.[9]

[8] The statute's operative terms are "expense," "reimbursement," and "per diem," all of which are undefined. "When a statutory term is undefined, the words of a statute are given their ordinary meaning, and a court may look to a dictionary for such meaning." *Gonzales*, 168 Wn.2d at 263. An "expense" is a "financial burden or outlay," a "cost." https://www.merriam-webster/dictionary/expense. To "reimburse" is "to pay back to someone." https://www.merriam-webster/ dictrionary/ reimburse. And a "per diem" is "[a] monetary daily allowance, usu. to cover expenses." Black's Law Dictionary 1157 (7th ed. 1999).

[9] In the Court of Appeals decision below, the majority writes: "Appellants argue that the amount jurors are paid under the jury pay statute (RCW 2.36.150) creates a disparate impact based on economic status . . . ." Slip Opinion at 4-5. This assertion reflects a misunderstanding of Plaintiffs' claim. Plaintiffs assert it is King County's *failure* to separately pay jurors for the *time* they spend performing jury service that has a disparate impact on people of low economic status and results in their systemic exclusion in violation of RCW 2.36.080(3). In other words, Plaintiffs are not seeking to increase the amount of *expense* reimbursements required by RCW 2.36.150. As explained above, compensation for the *time* spent in jury service is neither addressed nor foreclosed by RCW 2.36.150.

F. Plaintiffs' Have Standing Under the Declaratory Judgment Act.

"In order to have standing, a party must demonstrate (1) that [she] falls within the zone of interests that a statute or ordinance protects or regulates and (2) that [she] has or will suffer an injury in fact, economic or otherwise, from the proposed action." *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33, 260 P.3d 245 (2011). "The injury in fact test is not meant to be a demanding requirement." *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 869, 351 P.3d 875 (2015). "Typically, if a litigant can show that a potential injury is real, that injury is sufficient for standing." *Id.* "Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the [operation of governmental systems] generally, questions of standing to maintain an action should be given less rigid and more liberal answer." *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (citation omitted).

Under the Declaratory Judgment Act, a person whose rights "are affected by a statute [or] ordinance" may have determined "any question of construction or validity arising under" the statute or ordinance and may also obtain a declaration of his or her rights. RCW 7.24.020 (emphasis added; internal marks omitted). The Act is "remedial" and thus "is to be liberally construed and administered." RCW 7.24.120.

Ms. Bednarczyk and Ms. Selin are eligible to serve as jurors; indeed, King County has summonsed both for jury service, and Ms. Selin served in

the fall of 2015. CP 655-656 ¶¶ 2, 7-8; CP 653-654 ¶¶ 2-6; CP 644. The injuries these prospective jurors will suffer are not speculative. King County's practice of failing to pay minimum wages to jurors has already caused Ms. Bednarczyk to be excluded from participating in jury service on account of her economic status. *See* CP 655-656 ¶¶ 2-6; CP 646. And King County has already failed to pay minimum wages to Ms. Selin for the time she spent performing jury service. *See* CP 653 ¶ 4.

The Court of Appeals ruled that Plaintiffs lack standing for a declaratory judgment under both RCW 2.36.080(3) and RCW 49.46.020, reasoning they have suffered no injury in fact. The Court premised its ruling on its earlier conclusions that the failure to pay jurors for their service was not required and that jurors are not employees of the county in which they serve. Slip Opinion at 12. Because the Court's premises are wrong, its conclusions are also wrong. *Id*. at 24 ("When the government causes a citizen, in this manner, to forego a right guaranteed by law, that citizen has suffered an injury in fact") (Bjorgen, J., dissenting).

VI. Conclusion

The Court should grant Plaintiffs' petition for review, reverse the trial court and the Court of Appeals, and remand for further proceedings.

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Respectfully submitted this 22nd day of March 2019.

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Appendix A

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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RYAN ROCHA, NICOLE BEDNARCZYK, and CATHERINE SELIN, individually and on behalf of all others similarly situated, Appellants, v. KING COUNTY, a municipal corporation, Respondent.	No. 51823-6-II PUBLISHED OPINION

Lee, A.C.J. — Nicole Bednarczyk and Catherine Selin appeal the superior court's order granting King County's motion for summary judgment and dismissing their disparate impact claim based on economic status and a claim for minimum wage related to jury service in King County. We affirm.

FACTS

Bednarczyk and Selin (collectively the Appellants) were both summoned for jury duty in King County. Selin served 11 days of jury duty. Bednarczyk obtained a letter from her employer explaining that Bednarczyk would not be able to work or be paid during her jury service and that jury service would create a hardship for both Bednarczyk and her employer. Bednarczyk requested an economic hardship excusal from the court. The court granted Bednarczyk's request.

The Appellants filed a complaint against King County, alleging that King County's jury pay disparately excluded jurors from service based on economic status and that jurors were entitled to be paid minimum wage for their service.[1] The Appellants also sought a declaratory judgment ruling that (1) King County's current jury compensation was causing jurors to be disparately excluded based on economic status and (2) King County was violating wage and hour laws by failing to pay jurors minimum wage.[2]

King County filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on the disparate impact and wage claims and that the Appellants did not have standing for their declaratory judgment action. The superior court granted King County's motion for summary judgment and dismissed the Appellants' disparate impact and wage claims. The superior court did not specifically address the Appellants' standing to bring their declaratory judgment actions.

The Appellants appeal the superior court's order granting summary judgment and dismissing their disparate impact and minimum wage claims.

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[1] The appellants filed a class action complaint against King County. However, no classes were certified in this case.

[2] Ryan Rocha also filed additional claims based on racial discrimination under the Washington Law Against Discrimination. Appellants assert that Rocha has moved to Florida and his claims have been voluntarily dismissed. There is no record of a voluntary dismissal in the record before this court. However, because the Appellants do not make any arguments in support of Rocha's claims based racial discrimination, we do not address them. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

ANALYSIS

A. LEGAL PRINCIPLES

We review the superior court's order granting summary judgment de novo. *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016). Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file show the absence of any genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). We may affirm the superior court's order granting summary judgment "on any basis supported by the record." *Bavand*, 196 Wn. App. at 825.

B. DISPARATE IMPACT

The Appellants argue that the superior court erred by granting summary judgment in favor of King County on the disparate impact claim because RCW 2.36.080(3) allows for a disparate impact claim based on economic status. We hold that the superior court properly granted summary judgment on the Appellants' disparate impact claim.

1. Disparate Impact Claim Based on Economic Status

There are two types of disparate impact claims: disparate impact under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and disparate impact under constitutional equal protection principles. The Appellants may not bring a disparate impact claim under the WLAD because the WLAD does not include economic status as a protected class for the purposes of WLAD claims, and the Appellants did not bring an equal protection claim.

Economic status is not recognized as a protected class under the WLAD. RCW 49.60.030(1). WLAD only protects the "right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual

orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability." RCW 49.60.030(1). Protection from discrimination based on economic status is not enumerated in the WLAD. Therefore, as a matter of law, Appellants cannot bring a disparate impact claim based on economic status under the WLAD.

Disparate impact claims may be brought under the equal protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. *State v. Johnson*, 194 Wn. App. 304, 307-08, 374 P.3d 1206 (2016). The Appellants did not plead a disparate impact claim under the equal protection clause in the superior court nor do they argue a constitutional disparate impact claim on appeal. Instead, the Appellants merely cite to a voting case addressing a constitutional equal protection claim. Therefore, we decline to address whether the Appellants established a constitutional disparate impact claim. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Thus, as a matter of law, the Appellants have failed to show they can bring a disparate impact claim based on economic status under the WLAD or as an equal protection claim.

2. Implied Disparate Impact Cause of Action under RCW 2.36.080(3)

Appellants argue that the amount jurors are paid under the jury pay statute (RCW 2.36.150)[3] creates a disparate impact based on economic status and violates the no juror exclusion

[3] Jurors are not entitled to compensation for their service. *State ex rel. Hastie v. Lamping*, 25 Wash. 278, 282, 65 P. 537 (1901). Instead, jurors are entitled only to what compensation is granted to them by statute. *Id.*. The legislature has established an amount jurors may be paid under RCW 2.36.150, which states:

statute (RCW 2.36.080(3)). But Appellants did not bring a disparate impact claim under the juror pay statute. Instead, Appellants' disparate impact claim seems to be rooted in the no juror exclusion statute.

The underlying premise of the Appellants' argument is that the amount jurors are paid causes jurors of lower economic status to not be able to serve, and, therefore, the amount jurors are paid has a disparate impact on people of lower economic status. This premise is not disputed. But this premise does not give rise to an implied disparate impact claim under RCW 2.36.080(3).

RCW 2.36.080(3) provides, "A citizen shall not be excluded from jury service in this state on account of . . . economic status." However, RCW 2.36.080 does not provide a remedy for alleged violations of this provision. Therefore, the Appellants must show that RCW 2.36.080(3) creates an implied cause of action under the test set out by the Supreme Court in *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

> Jurors shall receive for each day's attendance, besides mileage at the rate determined under RCW 43.03.060, the following expense payments:
>
> (1) Grand jurors may receive up to twenty-five dollars but in no case less than ten dollars;
>
> (2) Petit jurors may receive up to twenty-five dollars but in no case less than ten dollars;
>
> (3) Coroner's jurors may receive up to twenty-five dollars but in no case less than ten dollars;
>
> (4) District court jurors may receive up to twenty-five dollars but in no case less than ten dollars.

RCW 2.36.150 applies to grand and petit juries empaneled in superior courts. RCW 2.36.010(5), (6).

A cause of action may be implied when a statute "provides protection to a specified class of persons but creates no remedy." *Bennett*, 113 Wn.2d at 920. To determine if an implied cause of action exists, we engage in a three-part inquiry,

> first, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Id. at 920-21.

With regard to the first part of the inquiry, the plain language of the statute protects people from being excluded from jury service based on economic status. Therefore, the plaintiffs would be within the class for whose benefit RCW 2.36.080(3) was enacted. Accordingly, the first part of the *Bennett* inquiry is satisfied.

As to the second part of the inquiry, the legislative intent expressed in RCW 2.36.080(1) and RCW 2.36.080(2) shows that implying a remedy based on juror pay is not consistent with legislative intent. RCW 2.36.080(1) protects the opportunity and obligation for jury service:

> It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens *have the opportunity . . . to be considered for jury service* in this state and *have an obligation to serve as jurors when summoned* for that purpose.

(emphasis added). RCW 2.36.080(1) demonstrates that the legislature intended to protect the opportunity to be considered for jury service and to impose the obligation to serve as a juror when summoned, not guarantee the right to actually serve on a jury when summoned.

And RCW 2.36.080(2) specifically expresses the legislature's intent to minimize the burden of jury service—notably without reference to financial considerations. RCW 2.36.080(2) provides,

> It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal jury service is one day or one trial, whichever is longer.

RCW 2.36.080(2) demonstrates the legislature's intent to minimize the burden to jurors by limiting the length of jury service, not by focusing on compensating jurors for potential financial burdens.

Read together, the legislature's intent is to ensure that state residents have the opportunity to be considered for jury service, that state residents have an obligation to serve as a juror when summoned, and that any burden is minimized by limiting the amount of time that must be spent in jury service. The legislature did not intend to guarantee jurors be able to serve by providing adequate financial compensation. Therefore, it would be inconsistent with the legislative intent to imply a remedy based on jurors' financial compensation for alleged violations of RCW 2.36.080(3). The second part of the *Bennett* inquiry is not satisfied.

As to the third part of the inquiry under *Bennett*, the underlying purpose of the legislation relied on by Appellants is to ensure that state residents have the opportunity to be considered for jury service and the obligation to serve when summoned for jury service. The implied cause of action and remedy sought here—increase in juror pay—is not consistent with the underlying purpose of RCW 2.36.080(3). It is undisputed that the Appellants were included in the master jury

pool and continue to be eligible to be summoned for jury service. Therefore, the third part of the *Bennett* inquiry is not satisfied.

Because an implied cause of action and remedy of increased juror pay is not consistent with the legislative intent or the underlying purpose of the statute, the Appellants have failed to demonstrate that RCW 2.36.080(3) creates an implied disparate impact cause of action based on jury pay. Moreover, RCW 2.36.080(3) prohibits conduct that excludes persons from the opportunity to be considered for jury service based on economic status. Therefore, even if RCW 2.36.080(3) allows for an implied cause of action, which we hold it does not, the Appellants must establish some conduct by King County that excluded them from the opportunity to be considered for jury service based on their economic status.

Here, the Appellants assert that King County's jury pay caused them to ask for an economic hardship excusal, which the court granted. But economic hardship excusals are not exclusions for the purpose of the protections provided by RCW 2.36.080(3). As discussed above, RCW 2.36.080(1) clarifies that the legislature intended to protect the opportunity for people to be considered for jury service and to impose the obligation to serve as a juror when summoned. It is undisputed that the Appellants were, and continue to be, included in the master jury list, and, therefore, the Appellants continue to have the opportunity to be considered for jury service.[4] Because economic hardship excusals do not prevent potential jurors from being summonsed for

[4] In fact, Selin actually served on a jury and Bednarczyk did not serve on any jury because she requested that the court excuse her from jury service.

jury duty or from being included in the master jury list, they are not exclusions for the purposes of RCW 2.36.080(3).[5]

Therefore, King County was entitled to judgment as a matter of law and the superior court properly granted King County's motion for summary judgment dismissing the Appellants' disparate impact claim.

C. MINIMUM WAGE

The Appellants also argue that the superior court erred by granting summary judgment on their claim that King County violated the Washington Minimum Wage Act (MWA), chapter 49.46 RCW. We disagree.

The MWA requires employers to pay certain minimum amounts of compensation to their employees. RCW 49.46.020. An " '[e]mployee' includes any individual employed by an employer." RCW 49.46.010(3). And " '[e]mploy' includes to permit to work." RCW 49.46.010(2). "Taken together, these statutes establish that, under the MWA, an employee includes any individual permitted to work by an employer." *Afinson v. FedEx Ground Package Sys. Inc.*, 174 Wn.2d 851, 867, 281 P.3d 289 (2012).

Our Supreme Court has held that the MWA definition of employee incorporates the economic-dependence test to determine whether a worker is an employee. *Id.* at 871. Under the

[5] We note that, even if we accepted the Appellants premise that economic hardship excusals should be characterized as exclusions that violate RCW 2.36.080(3), the appropriate remedy would be to prohibit economic hardship excusals—it would not be to increase the rate of juror pay. But prohibiting the superior court from exercising its discretion to grant economic hardship excusals is not consistent with legislative intent or sound policy. *See* RCW 2.36.100(1) (allowing persons to be excused from jury service based on "undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court.").

economic-dependence (also referred to as the economic realities) test, the "relevant inquiry is 'whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.'" *Id.* (quoting *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008), *cert. denied*, 556 U.S. 1129 (2009)). Although there are 13 nonexclusive factors[6] that are considered when applying the economic-dependence test, " '[t]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.' " *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 198, 332 P.3d 415 (2014) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)) (alteration in original).

Here, the Appellants focus on the degree of control the King County exercises over jurors during jury service, as well as other specific aspects of jury service. However, the Appellants fail to address the fundamental nature of jury service.

Jury service is service performed as a civic duty. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) ("Jury service is a duty as well as a privilege of

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[6] The 13 nonexclusive factors are: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (5) preparation of payroll and the payment of wages; (6) whether the work was a specialty job; (7) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes; (8) whether the premises and equipment of the employer are used for the work; (9) whether the employees have a business organization that shifts as a unit from one worksite to another; (10) whether the work was piecework and not work that required initiative, judgment, or foresight; (11) whether the employee's opportunity for profit or loss resulted from the employee's managerial skills; (12) whether there was permanence in the working relationship; and (13) whether the service rendered is an integral part of the employer's business. *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 196-97 332 P.3d 415 (2014).

citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power."). As such, jurors are not entitled to compensation for their service. *State ex rel. Hastie v. Lamping*, 25 Wash. 278. 282, 65 P. 537 (1901). Instead, jurors are entitled only to what compensation is granted to them by statute. *Id.*. The MWA definition of employee, even considering the economic-dependence test, does not transform the fundamental nature of jury service as a civic duty. Thus, jurors are not employees under the MWA.

The Appellants also rely on the holding in *Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990), which established jurors as employees for the purposes of worker's compensation under the Industrial Insurance Act (IIA), Title 51 RCW. However, *Bolin* interpreted the status of jurors as employees under the IIA, not the MWA, and is inapplicable.

In *Bolin*, the holding that jurors are covered under the IIA as employees was based primarily on the fact that the IIA did not exclude jury service from the act. *Bolin*, 114 Wn.2d at 72. The *Bolin* court explained,

> The liberality of Washington's worker's compensation statute forces the conclusion that jury service is employment under the act.
>
> . . . .
>
> Unlike many states which list or define employments *included*, our act lists only employments *excluded*. *See* RCW 51.12.020. Jury service is not within the list of those employments excluded.

Id. The *Bolin* court did not apply the economic-dependence test to determine whether jurors were employees under the IIA. Because *Bolin* addressed the treatment of jurors under the IIA and did not apply the economic-dependence test, its holding does not determine whether jurors are employees under the MWA.

Because jurors are not employees under the MWA, King County was entitled to judgment as a matter of law. Therefore, the superior court properly granted summary judgment dismissing Appellants' MWA claim.

D. STANDING UNDER THE DECLARATORY JUDGMENT ACT

King County argues that the Appellants do not have standing to seek declaratory judgment. . We agree.

To establish standing under the declaratory judgment act, chapter. 7.24 RCW, the plaintiff must meet a two part test. *Grant Cy. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). First, the plaintiff's interest must be within the zone of interest protected by the statute in question. *Id.* Second, the plaintiff must show an injury in fact resulting from the challenged action. *Id.*

The Appellants are seeking a declaratory judgment under both RCW 2.36.080(3) and the MWA. The Appellants lack standing to seek declaratory judgment under both statutes.

Here, it is undisputed that the Appellants are on the master jury service list and may be summoned for jury duty. If they are selected to serve, they will be paid the statutory jury service fee. However, if they seek to be excused from jury duty due to economic hardship, they will have been excused from jury service due to their request, not because of King County's actions. Thus, Appellants cannot show injury in fact resulting from King County's actions.

And, as explained above, jury service is not employment and jurors are not employees for the purposes of the MWA. Therefore, the Appellants' interests are not within the zone of interests protected by the MWA.

Accordingly, we hold that the Appellants lack standing to seek a declaratory judgment.

CONCLUSION

Appellants' disparate impact claim based on economic status under RCW 2.36.080(3) fails. Because jury service is a civic duty and not employment, jurors are not employees under the MWA, and Appellant's MWA claim fails as well. Also, Appellants lack standing to seek a declaratory judgment under both RCW 2.36.080(3) and the MWA. Therefore, we affirm the superior court's order dismissing Appellants' claims.

Lee, A.C.J.

I concur:

Sutton, J.

BJORGEN, J.P.T.* (dissenting) — However characterized, the only remuneration King County affords for jury service is $10 a day in per diem plus reimbursement for mileage or travel costs. Neither King County nor the majority opinion dispute that such a low amount makes jury service a hardship for citizens of lower means, creating the need on the part of many to request they be excused from service. According to the evidence summarized in the appellant's amended brief, at pages 5-6, many such requests are granted. Neither the County nor the majority opinion dispute that the lower a citizen's income, the greater the economic hardship caused by these low rates. Neither dispute that the lower a citizen's income, the greater the incentive to self-exclusion from jury service to avoid that economic hardship. Neither dispute that this hardship and this incentive to exclusion fall more heavily on those of little means than on those of greater.

In my view, this catalyst to self-exclusion violates the mandate of RCW 2.36.080(3), which states:

> A citizen shall not be excluded from jury service in this state on account of . . . economic status.

Therefore, I dissent.

I. THE NATURE OF JURY SERVICE

Jury service is one of the adornments of citizenship. It

> affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. *Duncan* [*v. Louisiana*,] 391 U.S. [145,] 187, 88 S. Ct. [1444, 20 L. Ed. 2d 491 (1968)] (Harlan, J., dissenting). Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

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* Judge Bjorgen is serving as a judge pro tempore for the Court of Appeals, pursuant to RCW 2.06.150.

Powers v. Ohio, 499 U.S. 400, 407, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (internal quotation marks omitted). As such,

> [t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.

Id. at 406.

The jury system, in the words of the high court,

> "postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."

Id. (alteration in original) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310, 42 S. Ct. 343, 66 L. Ed. 627 (1922)). The Court turned also to Alexis de Tocqueville for words to match the gravity of its point:

> The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.

Powers, 499 U.S. at 407 (alteration in original). Our state Supreme Court subscribes to this view with equal vigor, stating, "We have juries for many reasons, not the least of which is that it is a ground level exercise of democratic values." *State v. Saintcalle*, 178 Wn.2d 34, 50, 309 P.3d 326 (2013).

Befitting the luster of these values, the Supreme Court has left no doubt as to the damage left by their decline. In *Peters v. Kiff*, the Court held:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and

> varieties of human experience, the range of which is unknown and perhaps unknowable.

407 U.S. 493, 503, 92 S. Ct. 2163, 33 L. Ed.2d 83 (1972). More specifically, the Court has held that

> The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84 [(1940)], or an economic or social class, *Thiel v. Southern Pacific Co.*, [328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946)], deprives the jury system of the broad base it was designed by Congress to have in our democratic society. . . . As well stated in *United States v. Roemig*, 52 F.Supp. 857, 862[(N.D. Iowa 1943)], "Such action is operative to destroy the basic democracy and classlessness of jury personnel." . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

Ballard v. United States, 329 U.S. 187, 195, 67 S. Ct. 261, 91 L. Ed. 181 (1946).

The evils of excluding lower income citizens from jury service were specifically recognized in *Thiel*, 328 U.S. at 222. The trial court's exclusion of daily wage earners from the jury lists, the Court held,

> would encour[a]ge whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

Thiel, 328 U.S. at 223-24.

Through its perverse incentive to those of low income to excuse themselves from jury service, the low rates paid by King County surrender this civic capital to the short-term dictates of the balance sheet.

II. THE MINUSCULE REMUNERATION FOR JURY SERVICE AFFORDED BY KING COUNTY EXCLUDES CITIZENS FROM JURY SERVICE ON ACCOUNT OF ECONOMIC STATUS

Neither the County nor the majority opinion dispute that the low levels of juror remuneration impose an economic hardship on low income citizens that leads many to exclude themselves from jury service. Instead, the positions of the County and the majority rest on legal arguments that this incentive to self-exclusion does not violate RCW 2.36.080(3) or, if it did, that those excluded have no right of action to vindicate their rights. This Part II address the first of these arguments. The right of action is discussed in Part III.

A. Compliance with the Expense Reimbursement Levels Authorized by RCW 2.36.150 Does Not Save Violations of RCW 2.36.080(3)

The County argues that RCW 2.36.150(2) unambiguously sets juror pay at $10 to $25 per day and that RCW 2.36.080(3) must be read not to require anything greater than that.

The flaw in this argument is that RCW 2.36.150 expressly deals only with "expense payments." In fact, through Laws of 2004, chapter 207, the legislature amended the statute's prior reference to "compensation" to read "expense payment," showing that the intent behind RCW 2.36.150 is not to cap all types of compensation or payment, but simply to confine reimbursement for expenses. This cap on expense payments in no way licenses the effective exclusion of low income citizens from jury service through the absence of other reasonable compensation.

The County and the majority counter with the holding in *State ex rel. Hastie v. Lamping*, 25 Wn. 278, 282, 65 P. 537 (1901), that juror compensation is prescribed by statute. This 1901 decision, however, is robbed of any precedential value by the fact that the prohibition of

exclusion on account of economic status of RCW 2.36.080(3) was not then in effect. In fact, that prohibition was not enacted until 1979. *See* LAWS OF 1979, ch. 135, § 2.

We read statutory provisions together in order to determine legislative intent. *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998). We do so in order to

> determine the legislative intent underlying the entire statutory scheme and read the provisions "as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes."

Id. (quoting *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980)).

RCW 2.36.150 establishes the range of expense reimbursement afforded jurors. RCW 2.36.080(3) prohibits excluding jurors on account of economic status. These two provisions are most easily harmonized by reading each by their plain language: the former caps the reimbursement of expenses and the latter prohibits the effective exclusion of citizens on account of low income or assets. Where, as here, exclusion is caused by the absence of any compensation beyond the allowed expense reimbursement, the cap on expenses does not somehow take the prohibition of exclusion out of effect. Each can be given full effect by requiring reasonable compensation beyond the reimbursement of expenses.

B. The Low Rates of Remuneration Effectively and Directly Exclude Low-Income Citizens from Jury Service.

The County argues that there can be no exclusion under RCW 2.36.080(3), because the economically distressed jurors asked to be excused.

The law is meant to apply to human conduct, not in a linguistic vacuum removed from the realities of that conduct. As Justice Holmes said, "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, THE COMMON LAW 1 (1881). Jury service is a

full time job that can extend from less than a day to weeks. For those with low paying jobs without leave for this purpose, the cost of jury service may be a missed rent payment or skipped meals. For those without understanding employers, jury service may come at the cost of a job. Faced with such risk, the choice to exclude oneself is hardly voluntary.

The source of these Hobson's choices, it must be stressed, is the choice by the County to afford such negligible remuneration for jury service. That structural element of the justice system, the absence of compensation beyond the allowed reimbursement for expenses, makes jury service untenable for many lower income citizens. To say that one voluntarily excludes oneself by declining jury service instead of risking, say, eviction or loan default, is to search the law with blinders. The lack of reasonable compensation compels their self-exclusion from this high privilege of citizenship. The justice system itself excludes many low income citizens on account of economic status in violation of RCW 2.36.080(3).

III. THE LAW IMPLIES A CAUSE OF ACTION TO ENFORCE THE RIGHT ESTABLISHED BY RCW 2.36.080(3) NOT TO BE EXCLUDED FROM JURY SERVICE ON ACCOUNT OF ECONOMIC STATUS

It seems odd even to ask whether one deprived of a central right of citizenship guaranteed by statute may enforce that right in the courts. We presume, after all, that the legislature does not intend to engage in futile actions. *See Davis v. Wash. Toll Bridge Auth.*, 57 Wn.2d 428, 439, 357 P.2d 710 (1960). Further, "[c]ourts have consistently held that when a statute gives a new right and no specific remedy, the common law will provide a remedy." *State ex rel. Phillips v. Wash. State Liquor Control Bd.*, 59 Wn.2d 565, 570, 369 P.2d 844 (1962). These considerations should demand that courts heavily favor the presence of an implied cause of action in any inquiry into whether one exists.

The case law prescribes a three-part inquiry to determine if an implied cause of action exists:

> [F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990) (quoting *In re WPPSS Sec. Litig.*, 823 F.2d 1349, 1353 (9th Cir. 1987)).

Turning to the first consideration in *Bennett*, the County argues that "[t]here is no indication" that RCW 2.36.080(3) was intended to confer an especial benefit on jurors. Br. of Resp't at 13. Rather, the County urges, it is more likely the statute was intended to benefit litigants.

This argument is belied by the expressly stated policy behind RCW 2.36.080(3):

> It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity . . . to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.

RCW 2.36.080(1) (citation omitted). The second clause of this provision expresses the legislative design that "all qualified citizens" are to have the opportunity for jury service. Qualified, prospective jurors, therefore, are within the class for whose especial benefit RCW 2.36.080(3) was enacted. The majority is correct in concluding that the first element of the *Bennett* inquiry is satisfied.

The second *Bennett* inquiry is "whether legislative intent, explicitly or implicitly, supports creating or denying a remedy." *Bennett*, 113 Wn.2d at 920. The majority concludes this inquiry is not satisfied for a number of reasons.

First, the majority argues that RCW 2.36.080(2) demonstrates that the legislature's intent in adopting RCW 2.36.080(3) is to minimize the burden to jurors by limiting the length of jury service, not by focusing on compensating jurors for potential financial burdens. The minimization of juror burdens from long trials, though, is not the only purpose of RCW 2.36.080(3) expressly identified by the legislature. As already noted, RCW 2.36.080(1) observes the core policy of ensuring that all qualified citizens have the opportunity for jury service. More to the point, RCW 2.36.080(2) expressly identifies a policy other than minimization of burden. It states:

> It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal jury service is one day or one trial, whichever is longer.

Thus, just before "also" noting the policy of minimizing the burden, the legislature expressly identified the policy of maximizing the availability of residents of the state for jury service. This policy comprehends much more than concern about the length of trials. It, along with the policy of ensuring all qualified citizens the opportunity to serve, is directly served by the prohibition of exclusion on account of economic status found in RCW 2.36.080(3).

Second, the majority contends the second *Bennett* consideration is not satisfied because the legislature intended to protect the opportunity to be considered for jury

service, rather than guarantee the right to actually serve on a jury when summoned. The majority would thus conclude that RCW 2.36.080(3) is met as long as the individual is summoned for jury service, even though financial straits would prevent actual service. In support, the majority draws on the statement of policy in RCW 2.36.080(1) that "all qualified citizens *have the opportunity* . . . to be considered for jury service." (Emphasis added.)

This contention fails for several reasons. To begin with, the appellants are not demanding a guarantee that they will actually serve on a jury. They ask, rather, that they have the same opportunity to serve as those for whom service does not pose an economic threat.

My principal disagreement, though, lies in the meaning of the phrase "opportunity to be considered" in RCW 2.36.080(1). The key language, again, is "have the opportunity . . . to be considered for jury service." If this policy is met simply by summoning potential jurors without regard to economic status, then a subsequent express, de jure exclusion on account of poverty from actually serving on a jury would not violate RCW 2.36.080(3). That, of course, would bluntly contradict the plain words of RCW 2.36.080(3) that "[a] citizen shall not be excluded from jury service in this state on account of . . . economic status." The essence of this guarantee would be subverted if it is deemed merely a rule of summoning.

The corollary argument is that one is "considered" for jury service by being summoned and by being part of the jury pool. Any surface sheen to this argument is lost once the world outside the covers of the dictionary is examined. The policy of RCW 2.36.080(1) is to protect the "opportunity . . . to be considered for jury service." Presence in a jury pool is not jury

service. The opportunity to be in a jury pool is not the opportunity to sit on a jury when one cannot afford to do so. The opportunity to be in a jury pool is not the opportunity to be considered for jury service for those from whom the law itself exacts a severe economic penalty for that service.

The low rates of remuneration create a structural incentive to self-exclusion from this dignity of citizenship on the part of those who cannot afford to serve with those rates. In some cases, they create the unequivocal need to exclude oneself from this eminent privilege. In the face of this, to say that the opportunity to be considered for jury service is preserved by the opportunity to be in the jury pool leaves little of logic and even less of RCW 2.36.080(3). That argument should be spurned.

The policies of RCW 2.36.080(1) and (2) and the terms of RCW 2.36.080(3) show that the latter is violated by the low rates afforded jurors in King County. Without a right of action, those deprived of the right and privilege guaranteed by RCW 2.36.080(3) are left without recourse. The second *Bennett* inquiry is met.

The third *Bennett* inquiry is whether implying a remedy is consistent with the underlying purpose of the legislation. The majority contends this is not met based on the same "opportunity to be considered" argument presented above. That argument should not prevail for the reasons set out above. For the same reasons the second *Bennett* inquiry is satisfied, so is the third.

Each of the considerations in *Bennett* speak strongly in favor of an implied cause of action. To keep the right established by RCW 2.36.080(3) something more than a hollow linguistic exercise, those deprived of that right must have the ability to vindicate it through legal action.

IV. THE APPELLANTS HAVE STANDING

The majority argues the appellants have not shown the injury in fact needed to have standing to seek a declaratory judgment that the County is violating RCW 2.36.080(3). This follows, the majority argues, because if the appellants seek to be excused from jury duty due to economic hardship, they will have been excused due to their own request, not because of the County's actions. Thus, appellants cannot show injury in fact resulting from King County's actions.

This argument fails for the reasons set out above. For those with low paying jobs lacking leave for this purpose, serving on a jury with such minute payment may come at the cost of missed payments or a lost job. Excluding oneself from jury service may be the only way to shelter oneself or one's family from these sobering risks. With such realities, the decision to exclude oneself cannot be called voluntary. That decision, rather, is the product of the County's choice to afford such negligible remuneration for jury service. The justice system itself excludes those in such straits on account of their economic status.

When the government causes a citizen, in this manner, to forego a right guaranteed by law, that citizen has suffered an injury in fact. That injury, especially to a right as elemental as jury service, is more than sufficient to warrant recourse to the courts to protect the integrity of the right. The appellants have standing.

V. CONCLUSION

Neither the United States nor the Washington constitution announces an economic system. Rather, they prescribe a system of governance and of rights under law. Even in our compromised democracy, the ultimate sovereignty in that system rests with the people. That, in

turn, demands a sense of civic engagement and responsibility by the citizenry. The more those are lost, the fainter is that ultimate sovereignty. Jury service nurtures those civic values. It allows the citizen to don an invisible robe and for a time take his or her place in the judicial system, affording a profound source of civic engagement and, one may hope, the lessons that come from it.

RCW 2.36.080(3) means that no one shall be denied that invisible robe due to economic status. The low rates of juror remuneration afforded by King County do just that. They make jury service economically impossible as a practical matter for many low income citizens, thus placing many already near the margins of society even further from the sense of belonging to it. Just as damaging, this failure also robs juries of the perspective of the struggling and the outcast, allowing the interests of the privileged even more purchase in a system we claim is one of equal justice under the law.

The low remuneration by King County excludes citizens from jury service in violation of RCW 2.36.080(3). Those injured by this exclusion have recourse to the courts to vindicate their rights under that statute.[7] Therefore, I dissent.

Bjorgen, J.T.

[7] The more difficult issue of the amount of juror compensation needed to avoid such exclusions is not within the scope of this appeal.

Appendix B

RCW 2.36.080

Selection of jurors—State policy—Exclusion on account of membership in a protected class or economic status prohibited.

(1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with chapter 135, Laws of 1979 ex. sess. to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.

(2) It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is one week or less. Optimal juror service is one day or one trial, whichever is longer.

(3) A citizen shall not be excluded from jury service in this state on account of membership in a protected class recognized in RCW **49.60.030**, or on account of economic status.

(4) This section does not affect the right to peremptory challenges under RCW **4.44.130**, the right to general causes of challenge under RCW **4.44.160**, the right to particular causes of challenge under RCW **4.44.170**, or a judge's duty to excuse a juror under RCW **2.36.110**.

[**2018 c 23 § 1; 2015 c 7 § 3; 1992 c 93 § 2; 1979 ex.s. c 135 § 2; 1967 c 39 § 1; 1911 c 57 § 2;** RRS § 95. Prior: **1909 c 73 § 2.**]

NOTES:

Severability—1979 ex.s. c 135: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1979 ex.s. c 135 § 12.**]

RCW 2.36.150

Juror expense payments—Reimbursement by state—Pilot projects.

Jurors shall receive for each day's attendance, besides mileage at the rate determined under RCW **43.03.060**, the following expense payments:

(1) Grand jurors may receive up to twenty-five dollars but in no case less than ten dollars;

(2) Petit jurors may receive up to twenty-five dollars but in no case less than ten dollars;

(3) Coroner's jurors may receive up to twenty-five dollars but in no case less than ten dollars;

(4) District court jurors may receive up to twenty-five dollars but in no case less than ten dollars:

PROVIDED, That a person excused from jury service at his or her own request shall be allowed not more than a per diem and such mileage, if any, as to the court shall seem just and equitable under all circumstances: PROVIDED FURTHER, That the state shall fully reimburse the county in which trial is held for all jury fees and witness fees related to criminal cases which result from incidents occurring within an adult or juvenile correctional institution: PROVIDED FURTHER, That the expense payments paid to jurors shall be determined by the county legislative authority and shall be uniformly applied within the county.

For the fiscal year ending June 30, 2007, jurors participating in pilot projects in superior, district, and municipal courts may receive juror fees of up to sixty-two dollars for each day of attendance in addition to mileage reimbursement at the rate determined under RCW **43.03.060**.

[**2006 c 372 § 903; 2004 c 127 § 1; 1987 c 202 § 105; 1979 ex.s. c 135 § 7; 1975 1st ex.s. c 76 § 1; 1959 c 73 § 1; 1951 c 51 § 2; 1943 c 188 § 1; 1933 c 52 § 1; 1927 c 171 § 1;** 1907 c 56 § 1, part; Rem. Supp. 1943 § 4229. Prior: 1903 c 151 § 1, part; 1893 p 421 § 1, part; Code 1881 § 2086, part.]

NOTES:

Severability—Effective date—2006 c 372: See notes following RCW **73.04.135**.

Intent—1987 c 202: See note following RCW **2.04.190**.

Severability—1979 ex.s. c 135: See note following RCW **2.36.080**.

*Travel expense in lieu of mileage in certain cases: RCW **2.40.030**.*

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