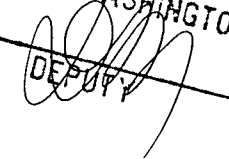


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

Cause No. 42332-4-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MICHAEL SCHATZ, ET AL,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
AND DEPARTMENT OF PERSONNEL,

Appellants.

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REPLY BRIEF OF RESPONDENTS ON CROSS APPEAL

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## **I. INTRODUCTION**

Respondents are Psychiatric Security Nurses (“PSNs”) and Psychiatric Security Attendants (“PSAs”)<sup>1</sup> seeking to correct pay inequities arising from the State’s ongoing refusal to recognize the scope of their duties and responsibilities. The Workers are paid a substantially lower wage rates than workers performing comparable duties, without the unique burdens of working in State mental hospitals’<sup>2</sup> forensic wards. On cross-appeal, the Workers assert that the wages awarded for the underpayment should be doubled pursuant to RCW 49.52.070 as this underpayment was a willful act.

## **II. ARGUMENT.**

The Workers’ pay inequities violate the equal protection provisions of the Washington and United States Constitutions, RCW 41.06.133(10), and RCW 41.06.155 (comparable worth statutes) and are arbitrary and capricious State conduct. The trial court found that the State’s action

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<sup>1</sup> (“the Workers”)

<sup>2</sup> The class was certified for the Workers at Western State Hospital and Eastern State Hospital. CP 429-432.

violated the Workers' rights under equal protection, RCW 41.06.133(10), and RCW 41.06.155 (comparable worth statutes), and were arbitrary and capricious State conduct which caused them damages by reducing their pay for their work compared to the Workers' non-forensic counterparts.

RP-June 6, 2011, 1-47; CP 2214-31, based on its oral ruling. RP 1265-76

*Washington Public Employees Association v. State*, 127 Wn. App. 254, 110 P.3d 1154 (2005) ("*WPEA*") held that "wage disparities between state employees who performed essentially the same jobs violated federal equal protection guarantees." An employer under RCW 49.52.050 is liable for double damages under RCW 49.52.070 if the employer willfully, and with intent to deprive, withholds wages the it is obligated to pay. Whether an employer's withholding is willful is ordinarily a question of fact.

*Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn.App. 52, 78-79, 199 P.3d 9 (2008).

The State cites to a case<sup>3</sup> in which the employees did not prevail for the sweeping proposition RCW 49.52.050 & 070 do not apply to this case because the dispute was over their salary alignment and not an unlawful withholding or failure to pay wages. Whatever that case stated on the issue of willfulness under RCW 49.52.050 & 070 is dicta as the

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<sup>3</sup> *Baumgartner v. Dep.t of Corrections*, 124 Wn. App. 738, 100 P.3d 827 (2004)

employees there did not prevail on the merits. Nor did those employees properly raise constitutional and comparable worth concerns or properly brief the issue of certiorari. The employees in that case were not entitled to any damages, let alone double damages.

Paying the Workers less than their non-forensic counterparts is a willful failure to pay wages when the Court examines the history of the State's interaction with the Workers and the State's ongoing refusal to appropriately compensate the Workers, unless directed to do so by a court. In 1973, Department of Social and Health Services ("DSHS") proposed, and the Department of Personnel ("DOP") adopted, the Workers' new job classes PSN and PSA. Ex. 40. Ex. 27.

That was the last time the State voluntarily acknowledged the unique burdens imposed upon the Workers from their responsibilities associated with looking after patients the courts have determined are, or may be, mentally incompetent for their criminal actions.

DSHS' Secretary noted:

The particular issue that's being addressed here is probably one of the most critical ones in the whole criminal justice process, and that has to do with the care and security and treatment of some of the most difficult individuals in our entire public life, the people that fail in that very vague area between sickness and sin, the mentally disturbed offender. This is probably one of the most difficult jobs that anybody in public or private service can have. It requires a degree

of sensitivity and skill and exposure to danger of almost any job there is.

Ex. 40

A DSHS representative “explained that the persons now performing the work described for these classes are classified as Hospital Attendant II and Licensed Practical Nurse III.”<sup>4</sup> Ex. 40. The Workers were “charged with both the care and security of the residents [in the program...and] because of the added danger involved in dealing with felons and the criminally insane,” the State increased the pay for these Workers above that of the LPN3s and HA2s, aligning pay with Correctional Sergeants and Correctional Officers, respectively.<sup>5</sup> Ex. 40. PSNs now paid at salary range 41, Ex. 191, lagging ten salary ranges behind Correctional and Custody Officer 3 at salary range 51, Ex. 8; PSAs now paid at salary range 37, Ex. 191, lagging ten salary ranges behind Correctional and Custody Officer 2 at salary range 47. Ex. 8.

When the State attempted to move the Workers back into the LNP 3 and HA classifications, the State acknowledged the comparability of the Workers core duties to the non-forensic workers at the hospitals. Ex. 27.

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<sup>4</sup> Hospital Attendant was later reclassified as Mental Health Technician, Exhibit 1 RP 545; Ex. 33 (Licensed Practical Nurse 3 was later replaced by Licensed Practical Nurse 4.).

<sup>5</sup> Correctional Sergeant is now called Corrections and Custody Officer 3 and “Correctional Officer was revised to Corrections and Custody Officer 2” and is now called Corrections and Custody Officer 2. CP 472; 411.



However, the State sought to evade the additional compensation to which the Workers were entitled to because of the more onerous safety and security concerns associated with the patients housed in the forensic unit. The Workers brought suit and had that aspect of their compensation adjusted following years of litigation. Ex. 3,4,5 & 27.

The Workers have the most dangerous job in Washington State. [http://seattletimes.nwsourc.com/html/localnews/2015584122\\_apwaworkplacesafety1stld.html](http://seattletimes.nwsourc.com/html/localnews/2015584122_apwaworkplacesafety1stld.html) Ex. 85, 147, 148. Forensic patient attacks on staff are frequent, serious and often predatory. RP 941-42; Ex. 147, 148.

The State not only allowed the Workers to lose the pay incentive provided to them for the “more onerous and exacting” nature of their duties, Ex. 27, but the it allowed the Workers’ pay to fall behind the pay given to the Workers’ non-forensic counterparts, the LPN4s and MHT3s who performed essentially the same duties. CP 2214-31.

Nonpayment of wages is willful in the context of RCW 49.52.050 RCW 49.52.050 & 070 (the Wage Rebate Act) “when it is the result of knowing and intentional action [as opposed to inadvertent] and not the result of a *bona fide* dispute as to the obligation of payment.” *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987). The Wage Rebate Act is construed liberally “ ‘to see that the employee shall realize the full amount of the wages which by statute,

ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay... “ *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001). The Washington Supreme Court has described Washington as a “ ‘pioneer’ ” in assuring payment of wages due an employee. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002).

In *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn.App. 401, 428, 54 P.3d 687, 701 (2002), aff'd, 151 Wn.2d 853, 93 P.3d 108 (2004) the Court remanded to determine if doubling was required when payment of a settlement was pegged to hours worked, but did not consider overtime payments where the hours worked included some hours subject to the time and one half overtime premium. Although there was a *bona fide* dispute over the application of the Fair Labor Standards Act to the settlement payments, it was not such that the Court could say double damages were not appropriate. *Hisle* demonstrates the mere existence of a dispute does not necessarily preclude the application of RCW 49.52.050 & .070. If the threshold were so low it would render the protections for employees meaningless in all but the rare case in which the employer admits they owe the wages but are simply refusing to pay them.

In *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998), our Supreme Court addressed the purpose of these two statutes as being to protect employee wages and ensure payment from employers:

[T]he fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the *wages* of an employee against any diminution or deduction there from by rebating, underpayment, or false showing of overpayment of any part of such wages. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages.

The *Shilling* court observed “that there are two instances when an employer's failure to pay wages is not willful: the employer was careless or erred in failing to pay, or a ‘*bona fide*’ dispute existed between the employer and employee regarding the payment of wages.” *Id.* at 160. A “*bona fide*” dispute is a “ ‘fairly debatable’ dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid.” *Id.* at 161.

A legal argument must have merit to be *bona fide*. *Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wn.App. 24, 34-36, 834 P.2d 638

(1992) *review denied*, 120 Wn.2d 1030 (1993). Determining willfulness is a question of fact. *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993)

The State also argues the second instance for a *bona fide* dispute existed here because the Workers were paid according to their union contract. However, where that payment resulted in an equal protection or a comparable worth violation or was arbitrary and capricious, the State's argument loses traction.

The State did not even address the holding of *WPEA*, in its reply brief, beyond a passing reference to that case's discussion of civil service laws. *See Overnite Transp.*, 67 Wn.App. at 35-36 (no *bona fide* dispute where employer took position unsupported by authority). The Workers' pay may be adjusted to address the equal protection violations and comparable worth, and to correct the State's arbitrary and capricious conduct. When the underpayment was the product of willful actions, double damages should be awarded.

Lyle Quasim, the Secretary of DSHS yelled at the Union Representative, Christina Peterson regarding the 1984 Order to properly pay PSNs and PSAs Ex. 4, RP 630; 661-62 and vowed those employees would never ever have an increase in their pay RP 660-662. Ms. Peterson testified that it was the only time in many years of working with Secretary

Quasim that he ever raised his voice to her. RP 630-33; 660-62. He was very angry about being ordered to give PSNs and PSAs back pay. RP 633, 660-662.

During implementation of comparable worth, the PSNs and PSAs did not receive any adjustment in their pay. RP 477-78. The LPNs and MHTs did receive an adjustment which pushed the compensation of LPN4s and MHT3s above the PSNs and PSAs. RP 479-80. As a result, Dani Kendal, a named class representative who had been an LPN4 while the dispute over the reclassification was pending, found herself being paid less than LPN4s as a PSN notwithstanding the Court's Order that found the PSNs duties were more onerous and exacting entitling her to be paid more. Ex. 27; RP 241, 246-48, 321-22. The same is true for other PSNs. RP 157. The Workers' positions were never studied. RP 503-04; Ex. 228. RP 503-4; Ex.228; RP 503-4; Ex.228. The PSNs and PSAs perform all of the duties of LPN4s and MHT3s who received significant increases. CP 2008.

The trial court held that the PSNs jobs were essentially the same as the LPN4s and that the PSAs jobs were essentially the same as the MHT3s. CP 2216. This assessment was concurred with by the psychiatric nurse executive at Western State. RP 548, 564-67.

RCW 41.06.020(5) provides, “‘Comparable worth’ means the provision of similar salaries for positions that require or impose similar responsibilities, judgments, skills, and working conditions.” RCW 41.06.133(10)<sup>6</sup> requires “the rates in the salary schedules or plans shall be increased if necessary to attain comparable worth under an implementation plan under RCW 41.06.155.” And under RCW 41.06.155, “Increases in salaries and compensation solely for the purpose of achieving comparable worth shall be made at least annually.” The effect of this decision to disregard the undervalued nursing and care responsibilities of PSNs and PSAs from comparable worth adjustment caused the pay inequities that continue to this day. RP 479-89.

The State’s decision to pay the Workers less than the wage to which they are entitled is a willful violation that justifies applying double damages.

### **III. CONCLUSION**

The Workers have had to fight continuously to be paid wages that take into account the unique burdens associated with managing patients whom the courts have directed to the Workers care and custody because


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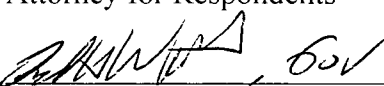
<sup>6</sup> RCW 41.06.155 has been amended several times since this lawsuit was filed. In 2009 RCW 41.06.155(10) was re-codified as RCW 41.06.155(j) 2009 Wash. Legis. Serv. Ch. 534 (S.H.B. 2049).

the patients are not guilty by reason of insanity, incompetent to stand trial, or are under review to determine their competency to stand trial. The Workers are entitled to be paid wages equivalent to their non-forensic counterparts under equal protection, comparable worth theories, and the courts' inherent power to address arbitrary and capricious state action and afford a remedy. In light of the State's treatment of the Workers, the State's refusal to pay them the pay to which they are entitled triggers the double damage provisions of the Wage Rebate Act.

The Workers should be awarded their costs and attorneys fees on appeal as provided by RAP 18.1 and as more fully discussed in their opening brief.

Respectfully submitted this 23<sup>rd</sup> day of May 2012.

  
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\_\_\_\_\_  
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Attorney for Respondents

APPENDIX

1. RCW 49.52.050 and RCW 49.52.070



# APPENDIX

51.16.170], and acts amendatory thereto, which priority and lien rights shall be enforced in the same manner and under the same conditions as provided in said section 7682 [RCW 51.16.150 through 51.16.170]: PROVIDED, HOWEVER, That the said claims for physicians, surgeons, hospitals and hospital associations and others shall be secondary and inferior to any claims of the state and to any claims for labor. Such right of action shall be in addition to any other right of action or remedy. [1929 c 136 § 2; RRS § 7713-2.]

**49.52.050 Rebates of wages—False records—Penalty.** Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor. [1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

**Severability—1939 c 195:** "If any section, subsection, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional." [1939 c 195 § 5; RRS § 7612-25.] This applies to RCW 49.52.050 through 49.52.080.

**49.52.060 Authorized withholding.** The provisions of RCW 49.52.050 shall not make it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee nor shall the provisions of RCW 49.52.050 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation: PROVIDED, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books. [1939 c 195 § 2; RRS § 7612-22.]

*Penalty for coercion as to purchase of goods, meals, etc.:* RCW 49.48.020.

*Public employment, payroll deductions:* RCW 41.04.020, 41.04.030, 41.04.035, and 41.04.036.

*Wages to be paid in lawful money or negotiable order, penalty:* RCW 49.48.010.

**49.52.070 Civil liability for double damages.** Any employer and any officer, vice principal or agent of any

employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations. [1939 c 195 § 3; RRS § 7612-23.]

**49.52.080 Presumption as to intent.** The violations by an employer or any officer, vice principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of RCW 49.52.050 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful. [1939 c 195 § 4; RRS § 7612-24.]

**49.52.090 Rebates of wages on public works—Penalty.** Every person, whether as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes or receives, or conspires with another to take or receive, for his own use or the use of any other person acting with him any part or portion of the wages paid to any laborer, workman or mechanic, including a piece worker and working subcontractor, in connection with services rendered upon any public work within this state, whether such work is done directly for the state, or public body or officer thereof, or county, city and county, city, town, township, district or other political subdivision of the said state or for any contractor or subcontractor engaged in such public work for such an awarding or public body or officer, shall be guilty of a gross misdemeanor. [1935 c 29 § 1; RRS § 10320-1.]

*Prevailing wages must be paid on public works:* RCW 39.12.020.

**Chapter 49.56 RCW  
WAGES—PRIORITIES—PREFERENCES**

Sections

- 49.56.010 Priority of wages in insolvency.
- 49.56.020 Preference on death of employer.
- 49.56.030 Priority in executions, attachments, etc.
- 49.56.040 Labor claims paramount to claims by state agencies.

*Chattel liens:* Chapter 60.08 RCW.

*Mechanics' and materialmen's liens:* Chapter 60.04 RCW.

**49.56.010 Priority of wages in insolvency.** In all assignments of property made by any person to trustees or assignees on account of the inability of the person at the time of the assignment to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers employed by such persons to the amount of one hundred dollars, each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. [Code 1881 § 1974, 1877 p 223 § 34; RRS § 1204.]

**Construction—1877 p 224:** "In construing the provisions of this act words used in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural the singular." (Act 1877 Ed.)

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, DEPARTMENT )  
OF SOCIAL AND HEALTH SERVICES, )  
DEPARTMENT OF PERSONNEL, and EVA )  
SANTOS and CARY RANDOW and LISA )  
SKRILETZ and ARTHUR STRATTON and )  
JOHN BLACK and LYNNE GLAD and PAM )  
PELTON and ROBERT SWANSON and )  
LLOYD HOAGE and ELLEN ANDREWS, in )  
Their Official Capacities, )  
 )  
Appellants, )  
v. )  
 )  
MICHAEL SCHATZ, DANI KENDALL, and )  
JOSEPH MINOR as Individuals and as Class )  
Representatives for All Others Similarly )  
Situated, )  
Respondents. )

Cause No. 42332-4-II  
**DECLARATION OF SERVICE**

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY  
*[Signature]*  
DENNY

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 23rd day of May, 2012 I sent via electronic mail and via ABC Legal Messenger a copy of the following documents:

1. Reply Brief of Respondents on Cross Appeal;

3. This Declaration of Service;

properly addressed to the following person:

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7141 Cleanwater Drive SW  
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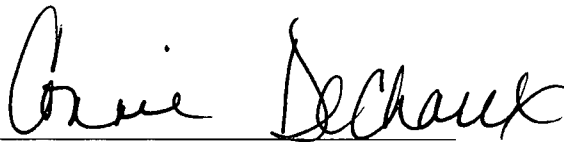
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ORIGINALS to the following:

Court of Appeals Division II  
950 Broadway Ste 300  
Tacoma WA 98402

I declare under penalty of perjury under the laws of the State of  
Washington and of the United States that the foregoing is true and correct.

Signed at Tacoma, Pierce County, Washington this 23rd day of  
May, 2012.



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