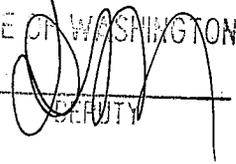


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DIVISION II

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STATE OF WASHINGTON

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No. 34039-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

GENE CHAMPAGNE, CARY BROWN, ROLAND KNORR,
and CHRISTOPHER SCANLON, Appellants,

v.

THURSTON COUNTY, Respondent.

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

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Architectural Woods, Inc. v. State, 92 Wn.2d 521, 598 P.2d 1372 (1979).....15

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Issues Pertaining to Assignments of Error

1. Does Washington’s Tort Claim Act require the filing of a notice with the county prior to bringing suit for statutory causes of action based on alleged wage and hour violations under state law?
2. Did the trial court too broadly interpret “all claims for damages” under Washington’s Tort Claims Act to include state statutory wage and hour claims?
3. Is *Harberd*’s extension of Washington’s Tort Claims Act to claims arising on a contract relevant to deciding whether a tort claim notice is a mandatory prerequisite for asserting claims based on Washington’s Minimum Wage Act, RCW Ch. 49.46, Wage Payment Act, RCW Ch. 49.48, and Wage Rebate Act, RCW Ch. 49.52?

STATEMENT OF THE CASE

Procedural History

Plaintiff-Appellants are four corrections officers for the Thurston County Sheriff’s Office in Thurston County, Washington. (Complaint, ¶ 1.1, CP 4). On September 29, 2004, Plaintiffs, individually and on behalf of similarly situated individuals, filed this action against Defendant-Respondent Thurston County (“Defendant” or “County”). (Complaint, CP 3-8).

Plaintiffs’ complaint alleges violations of Washington’s Minimum Wage Act, RCW Ch. 49.46, as interpreted by the Department of Labor and Industry in WAC 296-128-035. Plaintiffs

1 assert that Defendant has a practice of failing to make timely payment
2 of overtime compensation, compensatory time, specialty pay,
3 supervisor pay and holiday pay in accordance with the time-of-
4 payment provisions set forth in WAC 296-128-035. Plaintiffs'
5 Complaint seeks damages, costs, and attorneys' fees in accordance
6 with the civil enforcement provisions in both the Minimum Wage Act,
7 RCW 49.46.090, Wage Payment Act, RCW 49.48.030, and Wage
8 Rebate Act, RCW 49.52.070. (CP 7). Because the challenged payroll
9 practice violations impact all other overtime-eligible employees of the
10 County, Plaintiffs also seek to represent a class of similarly-situated
11 employees of the County¹. (CP 4-5).

12 Subsequent to the filing of Plaintiffs' Complaint, the Thurston
13 County bench recused itself from the case and on March 23, 2005, the
14 Honorable Vicki L. Hogan was assigned as a visiting judge. (CP 41).

15 On September 30, 2005, Defendant moved for summary judgment
16 on Plaintiff's Complaint asserting that Washington's Tort Claims Act
17 precluded Plaintiffs from bringing suit without first filing a claim for
18 damages with the County. (CP 42-69). It is undisputed that Plaintiffs
19 did not file a tort claim notice with the County. (Complaint, ¶ 1.4, CP

20

21

22 ¹ The trial court granted Defendant's motion for summary judgment prior to
ruling on Plaintiffs' motion for class certification.

23

1 4). Defendant's motion presented a single legal issue: "whether
2 plaintiffs' Complaint must be dismissed because plaintiffs have failed
3 to comply with the statutory prerequisites of RCW 36.45.010, RCW
4 4.96.010(1) and RCW 4.96.020(1)-(2)." (CP 42). A large part of the
5 County's motion was devoted to application of the holding in *Harberd*
6 *v. City of Kettle Falls*, 120 Wn. App. 498, 84 P.3d 1241 (2004),
7 wherein the court held that "the applicable claim filing provisions [in
8 Washington's Tort Claims Act] apply to both tort and breach of
9 contract claims." *Id.* at 510. The County argued both that Washington's
10 Tort Claims Act applies generally to any and all "claims for damages,"
11 including statutory causes of action, and it applies specifically to
12 Plaintiffs' statutory wage and hour claims because such claims,
13 according to Defendant, are "based upon a contract." (CP 42, 47 n.3).

14 In opposition, Plaintiffs noted that Washington's Tort Claims Act
15 has never been interpreted by Washington courts to apply outside the
16 context of common law tort and breach of contract claims and,
17 therefore, cannot be read to apply to Plaintiffs' statutory causes of
18 action. (CP 84-86). Further, Plaintiffs asserted that independent
19 violations of Washington's wage and hour laws clearly are not claims
20 based on a contract and, as a result, the holding in *Harberd* was
21 inopposite to the issue at summary judgment. (CP 86-87).

22 On October 31, 2005, the trial court entered an order granting
23 Defendant's motion for summary judgment "due to plaintiffs' failure

1 to comply with the statutory prerequisites for filing suit against
2 Thurston County as provided in RCW 36.05.010 [sic], RCW
3 4.96.010(1) and RCW 4.96.020(1)-(2). (CP 282-83). At the October
4 28, 2005, hearing the trial court ruled that "RCW 36.45 and 4.96 apply
5 to all claims." Plaintiffs' Complaint was dismissed without prejudice.²

6 **Factual History**

7 Plaintiffs' statutory claims are premised on Defendant's payroll
8 practices; practices which Plaintiffs allege result in the systematic and
9 unlawful delay in the payment of wages. The named Plaintiffs are
10 corrections officers within the Thurston County Sheriff's Office. For
11 Sheriff's Office employees, a group which collectively includes the
12 County's deputy sheriffs, administrative staff, and corrections officers,
13 Defendant's payroll system is set up on a monthly basis. (CP 243). That
14

15 ² Following the trial court's order on summary judgment, on October 31, 2005,
16 Plaintiffs filed Notices of Claims with Thurston County in order to preserve their
17 rights. The potential of Plaintiffs to proceed with a second suit pursuant to the
18 procedures outlined in RCW 4.92.020 does not resolve the issues on appeal nor detract
19 from Plaintiffs' right to file this appeal. Plaintiffs' original Complaint was filed on
20 September 29, 2004 and alleges that defendant's practice of unlawfully delaying and
21 withholding the payment of wages is ongoing. (Complaint, ¶ 3.4, CP 5). Because the
22 statute of limitations on claims brought under Washington wage and hour statutes is
23 three years, see *Bennett v. Computer Task Group, Inc.*, 112 Wn. App. 102, 47 P.3d 594
(2002), and because Plaintiffs plead a continuing violation, the potential time period
covered by Plaintiffs' original complaint extended from September 29, 2001 through
trial. See Civil Rule 15(d). The effect of the trial court's summary judgment order was
to cut off approximately a year's worth of potential damages (September 29, 2001
through October 31, 2002). See *Blair v. Washington State Univ.*, 108 Wn.2d 558, 575-
76, 740 P.2d 1379 (1987).

1 is, Sheriff's Office employees are paid monthly and, in this case, on the
2 last day of the month. (*Id.*; CP 78).

3 Employees submit timesheets for a pay period running from the
4 first of the month to the last of the month, and are, generally, paid their
5 regularly reoccurring salary on the last day of the same month. (CP 78-
6 79). However, the time sheets also reflect when an employee worked
7 overtime or a specialty assignment during the course of the month which
8 would entitle the employee to overtime compensation, compensatory
9 time, specialty pay, supervisor pay and/or holiday pay (collectively
10 "wage payments"). Assuming an employee works, *e.g.*, a specialty
11 assignment during the month, varying forms of "specialty pay" are
12 called for by the collective bargaining agreement between Plaintiffs'
13 bargaining representative and the County. (*E.g.*, CP 146). Similarly, the
14 collective bargaining agreement calls for the payment of the remaining
15 wage payments at issue. (CP 135, 146, 149).³ It is this combination of
16 wage payments that are at issue in this suit. Because employees turn in a
17
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20 ³ Plaintiffs do not contend that they are entitled to overtime pay under the terms
21 of their employment contracts. They rely solely on the rights given to them under
22 WAC 296-128-035 and the statutory enforcement provisions in the Minimum Wage
23 Act and Wage Rebate Act. Moreover, plaintiffs do not argue that they were induced to
accept employment based on the understanding that they would receive overtime
compensation within a certain time frame.

1 timecard reflecting wage payments earned during the previous pay
2 period on or around the end of the current month, the wage payments are
3 made at the end of the *following* month. (CP 78-79). If, for example, a
4 Sheriff's Office employee earned overtime on March 3, 2004, he would
5 not be compensated for that time until April 30, 2005 – almost two
6 months later – despite the passage of the intervening May 31, 2004 pay
7 day.

8 With respect to the timing of Plaintiffs' wage payments,
9 Washington's Department of Labor and Industries ("DLI"), the agency
10 entrusted with interpreting and enforcing the provisions of the Minimum
11 Wage Act, requires as follows:

12 All wages due shall be paid at no longer than monthly
13 intervals to each employee on established regular pay
14 days. To facilitate bookkeeping, an employer may
15 implement a regular payroll system in which wages
16 from up to seven days before pay day may be
17 withheld from the pay period covered and included in
18 the next pay period.

19 WAC 296-128-035. Because WAC 296-128-035 provides that an
20 employer may implement a payroll system in which wages from "up to
21 seven days before pay day" may be held over until the next pay period,
22 to comply with the law, Defendant was required to calculate and pay the
23 wage payments in a timelier manner that it has chosen to. Because the
County has adopted a payroll system in which it begins processing a
month's payroll sometime *after* that month's payday, rather during the
seven intervening days allowed for by the regulation, Plaintiffs claim

1 that the systematic delay built into Defendant's payroll system fails to
2 comply with the law. Plaintiffs' claims are in no way based on the
3 collective bargaining agreement, which calls for the payment of wages,
4 but does not track WAC 296-128-035's time-of-payment requirements.

5 SUMMARY OF THE ARGUMENT

6 Plaintiffs' claims are based on independent statutory and
7 regulatory violations under state law. Washington's Tort Claims Act
8 has never, prior to the trial court's ruling at summary judgment, been
9 held to encompass anything other than common law causes of action
10 sounding in tort and, only after the 2004 holding in *Harberd*, contract
11 claims. The lack of any such authority is not happenstance. The State's
12 historical waiver of sovereign immunity, codified at RCW 4.96.010, is
13 limited to common law claims. Plaintiffs' claims arise on wage and
14 hour statutes; statutes which constitute an independent waiver of the
15 State's immunity from suit and which do not contain the same pre-
16 filing conditions and restrictions as those found in the Tort Claims Act.
17 Because neither Washington's Minimum Wage Act, RCW Ch. 49.46,
18 Wage Payment Act, RCW Ch. 49.48, nor Wage Rebate Act, RCW Ch.
19 49.52, require a claim notice to be filed with the County, the trial court
20 erred in granting Defendant's motion for summary judgment.

21 ///

22 ///

23 ///

1 Argument And Authority

2 A. **Washington's Tort Claims Act's Claim-Filing**
3 **Requirements Apply Only to Common Law Tort and**
4 **Contract Claims.**

5 1. **The Statutes At Issue.**

6 The propriety of the trial court's order granting summary
7 judgment turns on whether Plaintiffs' claims are barred by a failure to
8 properly serve the County with their claims for statutory damages. The
9 statutes at issue indicate, at times, that "all claims for damages"
10 against the County are subject to the claim filing procedures in the
11 Tort Claims Act. *See Harberd*, 120 Wn. App. at 510 (noting statutes'
12 three references to "damages" without qualification and three
13 references to the narrower category of "damages arising out of tortious
14 conduct"). The trial court concluded that the Legislature's use of the
15 phrase "all claims for damages" in RCW 36.45.010 and intermittent
16 use of the same in RCW Ch. 4.96 extends the Tort Claims Act's claim
17 filing procedures to not only common law tort claims, but statutory
18 causes of action as well. The starting point in determining the
19 propriety of the trial court's order is the language of the statutes
20 themselves and an evaluation of what the Legislature meant when it
21 used the phrase "all claims for damages" in RCW Ch. 4.96. *See*
22 *Margetan*, 92 Wn. App. at 245.

23 RCW 36.45.010 provides that "[a]ll claims for damages against
any county shall be filed in the manner set forth in chapter 4.96

1 RCW.” The referenced statute, RCW Chapter 4.96, commonly
2 referred to as Washington’s Tort Claims Act, provides as follows:

3 (1) All local governmental entities, whether acting in a
4 governmental or proprietary capacity, shall be liable for
5 damages arising out of their tortious conduct, or the tortious
6 conduct of their past or present officers, employees, or
7 volunteers while performing or in good faith purporting to
8 perform their official duties, to the same extent as if they
9 were a private person or corporation. Filing a claim for
10 damages within the time allowed by law shall be a
11 condition precedent to the commencement of any action
12 claiming damages. The laws specifying the content for such
13 claims shall be liberally construed so that substantial
14 compliance therewith will be deemed satisfactory.

15 (2) Unless the context clearly requires otherwise, for the
16 purposes of this chapter, “local governmental entity” means
17 a county, city, town, special district, municipal corporation
18 as defined in RCW 39.50.010, quasi-municipal corporation,
19 or pubic hospital.

20 A second statute, which sets forth specific content and
21 procedural requirements⁴, states in relevant part:

22 (1) The provisions of this section apply to claims for
23 damages against all local government entities.

(2) The governing body of each local government entity
shall appoint an agent to receive any claim for damages
made under this chapter. * * * All claims for damages
against a local governmental entity shall be presented to the

20 ⁴ In construing an earlier version of RCW 4.96.020, former RCW 35.31.020, the
21 court in *Wilson v. City of Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993), held that
22 former 35.31.020 “is a procedural statute specifying the *time period* for filing claims. It
23 is not the statute which affirmatively authorizes cities to continue requiring the filing of
claims. That authorization is provided by RCW 4.96.010.” *Id.* at 821 (first emphasis
added; second emphasis in original).

1 agent within the applicable period of limitations within
2 which an action must be commenced.

3 (3) All claims for damages arising out of tortious conduct
4 must locate and describe the conduct and circumstances
5 which brought about the injury or damage, describe the
6 injury or damage, state the time and place the injury or
7 damage occurred, state the names of all persons involved, if
known, and shall contain the amount of damages claimed,
together with a statement of the actual residence of the
claimant at the time of presenting and filing the claim and
for a period of six months immediately prior to the time the
claim arose. * * *

8 (4) No action shall be commenced against any local
9 governmental entity for damages arising out of tortious
10 conduct until sixty days have elapsed after the claim has
11 first been presented to and filed with the governing body
thereof. The applicable period of limitations within which
an action must be commenced shall be tolled during the
sixty-day period.

12 RCW 4.96.020.

13
14 **2. The Statutory Purpose Underlying Washington's
Tort Claims Act.**

15 Important to understanding the applicability of Washington's
16 Tort Claims Act's claim filing procedures to any particular cause of
17 action and the scope of the Act's intermittent references to "all claims
18 for damages" is the historical concept of sovereign immunity. Up until
19 1961, Washington followed the common law tradition of sovereign
20 immunity. Under the common law, "there can be no legal right as
21 against the authority that makes the law on which the right depends."
22 *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). Sovereign
23 immunity was written into the state constitution, creating legislative

1 power to decide when and how the state may be sued. *See* Washington
2 Constitution, Article 2, Section 26. Over the years, the Washington
3 Legislature has exercised its constitutional powers to waive sovereign
4 immunity in a number of different ways.⁵

5 One commonly cited statutory waiver of sovereign immunity,
6 and the bases for imposition of the claim filing procedures urged by
7 Defendant in this case, is set forth in the Tort Claims Act, RCW Ch.
8 4.96. In 1961 the State Legislature abolished common law sovereign
9 immunity and enacted RCW 4.92.090 allowing the State to be sued in
10 tort to the same extent as a person or corporation. Thereafter, in 1967,
11 the Legislature explicitly abrogated sovereign immunity as it relates to
12 political subdivisions of the State. Laws of 1967, ch. 164, § 1, codified
13 at RCW 4.96.010. The Legislature waived sovereign immunity “to
14 discourage tortious governmental conduct, and to hold government
15 responsible for its acts.” *Haberman v. Washington Public Power*
16 *Supply Syst.*, 109 Wn.2d 107, 160, 744 P.2d 1032 (1987).

17 The Tort Claims Act thus represents a partial waiver of the
18 State’s immunity. Rather than waive immunity entirely, in the Tort
19

20 ⁵ The waiver of sovereign immunity is now a mandatory prerequisite to
21 legislative action involving the State and its political subdivisions. “Blanket grants of
22 immunity . . . immunizing the granting body from actions for its own negligence [] are
23 not allowed.” *Howe v. Douglas County*, 146 Wn.2d 183, 190-91, 43 P.3d 1240 (2002).

1 Claims Act the Legislature has placed conditions and restrictions on
2 bringing claims against the State and its political subdivisions for
3 those claims to which the partial waiver applies. *See* RCW
4 4.96.020(2), (3); *O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258
5 (1965). Those conditions and restrictions are set forth in RCW
6 4.96.020 and Plaintiffs agree that if a claim otherwise subject to the
7 State's sovereign immunity is waived pursuant to RCW 4.96.010, the
8 statute clearly requires compliance with the notice requirements of the
9 Act in order to take advantage of the partial waiver of sovereign
10 immunity.

11 While the Tort Claims Act presents perhaps the most commonly
12 cited waiver of sovereign immunity, the Legislature, pursuant to
13 Article 2, Section 26, of the Washington Constitution is free to express
14 its intent through other language as well. For instance, *Wilson v. City*
15 *of Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993), recognized that the
16 Legislature's enactment of a statutory cause of action for damages to
17 property rights caused by governmental actions in processing permit
18 applications acts as an abrogation of sovereign immunity as to the
19 particular cause of action. *Id.* at 823-824 (citing *Lutheran Day Care v.*
20 *Snohomish County*, 119 Wn.2d 103, 829 P.2d 746 (1992)). The *Wilson*
21 court recognized that inclusion of Washington "cities" in the statutory
22 definition of "agency," where the statute at issue, RCW 64.40.020,
23 provides for a private cause of action against "an *agency* [for acts that

1 are] arbitrary, capricious, unlawful, or exceed lawful authority,”
2 amounted to a statutory waiver of sovereign immunity. *Id.* at 823-824;
3 *see also H.S. v. Board of Regents, Southeast Mo. State Univ.*, 967
4 S.W.2d 665, 673 (Mo. App. 1998) (In making Missouri Human Rights
5 Act applicable to state employers, the legislature expressly waived
6 sovereign immunity; “Had the legislature intended for the state and its
7 political or civil subdivisions to be immune from liability, the statute
8 would reflect that intent.”).

9 As illustrated in *Wilson*, the enactment of a specific statute
10 providing for a private right of *action* constitutes a second method by
11 which the Legislature has opted to waive its sovereign immunity.⁶ A
12 second example of this is the Legislature’s treatment of awards of
13 postjudgment interest in Washington. Sovereign immunity was first
14 used in this State as a bar to the award of postjudgment interest in a
15 case involving a workers’ compensation claim. *See Spier v.*
16 *Department of Labor & Indus.*, 176 Wn. 374, 29 P.2d 679 (1934). The

17
18 ⁶ A third method of waiving sovereign immunity to suit may be by way of
19 contract. *See Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 526-27, 598 P.2d 1372
20 (1979) (“[T]he act of entering into an authorized contract with a private party, the
21 State, absent a contractual provision to the contrary, thereby waives its sovereign
22 immunity in regard to the transaction . . .”). *See also Thorgaard Plumbing & Heating*
23 *Co. v. King County*, 71 Wn.2d 126, 130, 133, 426 P.2d 828 (1967) (“[Claim filing
statutes are] not intended to control the settlement of controversies in which a valid
contract to arbitrate is in force”; such statutes have “nothing to do with a statutory
arbitration proceeding”).

1 *Spier* court stated the general rule that “the state cannot, without its
2 consent, be held to interest on its debts.” *Id.* at 376-377. After *Spier*
3 was decided, the Legislature passed a statute to specifically allow for
4 the recovery of interest from the State in workers’ compensation cases.
5 See RCW 51.32.080. Thus, while the Tort Claims Act does not
6 address or purport to waive immunity from postjudgment interest, the
7 Legislature has in fact expressed such a waiver through the enactment
8 of a claim-specific statute. A claim-specific statute allowing for a
9 cause of action against the government is no less a waiver of sovereign
10 immunity than the Tort Claims Act itself, despite the fact that the
11 claim-specific statute is entirely independent of and distinct from the
12 Tort Claims Act. See generally *Loeffler v. Frank*, 486 U.S. 549, 559
13 (1988) (“[I]n enacting § 717 [Title VII], Congress simultaneously
14 provided federal employees with a cause of action under Title VII and
15 effected a waiver of the Government’s immunity from suit.”).

16 **3. The State’s Method of Waiving Sovereign**
17 **Immunity Determines the Applicable Conditions**
and Restrictions on the Waiver.

18 The applicable procedural hurdles to bringing a claim against the
19 State or a political subdivision are determined by examining when and
20 how the government consented to be sued. For example, a plaintiff’s
21 ability to sue the State, and the limitations on such, for its tortious
22 conduct is set forth in the Tort Claims Act. In *Harberd v. City of Kettle*
23 *Falls*, Division Three examined the plain language and legislative

1 history of the Tort Claims Act and concluded that the Tort Claims
2 Act's claim filing provisions apply not only to tort claims, but also
3 common law breach of contract claims. 120 Wn. App. at 510.⁷

4 In contrast to the Tort Claims Act, where the Legislature (or
5 Congress⁸) has abolished sovereign immunity through the enactment
6 of a statute which expressly extends its coverage to the State and its
7 political subdivisions, the Tort Claim Act's conditions and restrictions
8 are no longer applicable. *See Wilson*, 122 Wn.2d at 824. *Compare*
9 *Blair v. Washington State Univ.*, 108 Wn.2d 558, 576, 740 P.2d 1379
10 (1987) (statutory cause of action sounding in tort). The Legislature
11 remains free to condition the waiver of immunity as to specific claims
12 on whatever procedural requirements it sees fit, but in the absence of,
13 for example, a claim filing requirement, a statutory cause of action is

15 ⁷ Because the Supreme Court has held that grants of immunity to the State and
16 governing bodies are not allowed, *see Howe*, 146 Wn.2d at 190-91, and because no
17 specific statute provides for a private cause of action in contract against the State, the
18 *Harberd* court's extension of the Tort Claims Act to contract claims, and the implicit
acknowledgment that immunity on contracts has been waived, is consistent with the
public policy of this State.

19 ⁸ Under federal law, where Congress has expressed an intent to create a cause
20 that applies to public employers, notice-claim statutes are inapplicable. *Felder v.*
21 *Casey*, 487 U.S. 131, 147 (1988). "A state law that immunizes government conduct
22 otherwise subject to suit under [42 U.S.C.] § 1983 is preempted, even where the federal
23 civil rights litigation takes place in state court, because the application of the state
immunity law would thwart the congressional remedy." *Id.* at 139. Similarly, state
notice-claim statutes are inconsistent with and preempted by wage and hour claims
brought under the Fair Labor Standards Act. *Middleton v. Hartman*, 45 P.3d 721,
733 (Colo. 2002).

1 not limited by the same procedural obstacles as a tort or contract claim
2 arising under the Tort Claims Act. *Id.* The waiver of immunity is
3 derived from distinct statutory provisions and, therefore, civil
4 remedies and pre-filing procedures under the respective statutes may
5 in fact differ. In discussing a statutory cause of action under RCW
6 64.40.020, the *Wilson* court stated:

7 Nothing in the plain language of the statute [RCW
8 64.40.020] expressly permits a municipality to bar or
9 qualify this statutory cause of action by imposing a claims-
10 filing requirement. The Legislature is presumed to know
11 the theory upon which municipal corporations of the State,
12 including cities, have previously been granted immunity
13 under the existing law. Presumably the Legislature knew
14 that cities still retain the authority to impose a claim-filing
15 requirement under RCW 4.96.010 for damages for tortious
16 conduct. If the Legislature intended to preserve the same
17 claims-filing requirements for causes of action under RCW
18 64.40.020, then it could have expressly included such a
19 provision in the statute, just as it did in RCW 4.96.010.

14 *Id.* at 824. Because the Legislature chose not to impose claim-filing
15 requirements on plaintiffs bringing a statutory cause of action under
16 RCW 64.40.020, the *Wilson* court found that the plaintiff was entitled to
17 proceed with his claim against the City of Seattle. The Court in *Wilson*
18 stated that it was not prepared to read into RCW 64.50.020 a qualified
19 immunity not expressly provided by the Legislature. Doing so,
20 according to the Court, “would be inconsistent with the purpose of the
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1 statute.” *Id.* at 825.⁹ *Compare Blair*, 108 Wn.2d at 576 (purpose of Law
2 Against Discrimination, RCW Ch. 49.60, and enforcement of plaintiff’s
3 claims, which sounded in tort, not inconsistent with Tort Claim Act’s
4 notice requirements).

5 Since the Legislature has opted to waive sovereign immunity in a
6 number of different ways, the Tort Claims Act’s reference to “all
7 claims for damages” is therefore not as broad as Defendant asserts. If a
8 claim against the State is not authorized by the Tort Claims Act, and
9 does not otherwise sound in tort, but is instead authorized by another
10 act of the Legislature, the statutory cause of action is subject to a
11 claim-filing requirement only if the underlying statute requires as
12 much. *Wilson*, 122 Wn.2d at 824. Each statutory waiver of sovereign
13 immunity is made on its own terms and subject to its own conditions.
14 Therefore, when the Legislature used the term “all claims for
15 damages” in the Tort Claims Act it meant only those damages
16 recoverable by virtue of the Tort Claims Act; namely, tort and contract
17 damages.

21 ⁹ In a footnote, the *Wilson* court noted the above-stated analysis “is also
22 consistent with the Legislature’s recent consolidation of these statutes into one set of
23 procedures for filing claims.” *Id.* at 821 n.2 (citing Laws of 1993, ch. 449, § 3).

1 **B. Washington's Wage and Hour Laws Are Not Subject**
2 **to Claim Filing Requirements.**

3 **1. The State Has Waived Immunity For Statutory**
4 **Wage and Hour Claims By Enactment of The**
5 **Wage and Hour Statutes.**

6 Washington's wage and hour laws, which include the Minimum
7 Wage Act, RCW Ch. 49.46, Wage Payment Act, RCW Ch. 49.48,
8 Wage Rebate Act, RCW Ch. 49.52, and those regulations of the DLI
9 interpreting and effectuating the statutes constitute the Legislature's
10 recognition of the "vital and imminent concern to the people of this
11 state [regarding] minimum standards of employment within the state
12 of Washington." RCW 49.46.005. The collective wage and hour laws
13 reflect Washington's "long and proud history of being a pioneer in the
14 protection of employee rights." They also constitute the Legislature's
15 waiver of immunity from suit on behalf of the State and political
16 subdivisions, including Defendant. The waiver of sovereign immunity
17 is accomplished by way of the procedures discussed in *Wilson*, 122
18 Wn.2d at 822-23. That is, the statutes extend their coverage to
19 governmental employers, making the government liable to employees
20 to the same extent as private employers.

21 In the Minimum Wage Act, governmental coverage is
22 effectuated by RCW 49.46.010, wherein the Legislature included in
23 the definition of "employer," *inter alia*, "any person or group of
 persons acting directly or indirectly in the interests of an employer in

1 relation to an employee,” RCW 49.46.010(4), and excluded from the
2 definition of “employee,” *inter alia*, only those individuals employed
3 by any state or local governmental body to the extent they are
4 providing voluntary services. RCW 49.46.010(5)(e). Courts have
5 consistently interpreted these provisions as specifically including
6 government employers in the Minimum Wage Act’s coverage. *E.g.*,
7 *Clawson v. Grays Harbor College Dist. No. 2*, 109 Wn. App. 379, 35
8 P.3d 1176 (2001); *Chelan County Deputy Sheriffs’ Ass’n v. Chelan*
9 *County*, 45 Wn. App. 812, 815-16, 725 P.2d 1001 (1986), *rev’d on*
10 *other grounds*, 109 Wn.2d 282, 745 P.2d 1 (1987).

11 Similarly, in the Wage Payment Act the Legislature has
12 expressly made its terms applicable to the State and all municipal
13 corporations. RCW 49.48.115. *See, e.g., International Assoc. of Fire*
14 *Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265
15 (2002); *see also* RCW 49.48.080. In the Wage Rebate Act, the
16 Legislature included within its terms “any employer . . . whether said
17 employer be in private business or an elected public official”
18 RCW 49.52.050. Taken together each of these statutes reflect the
19 Legislature’s intent to waive immunity and include the State and
20 political subdivisions within their terms.

21 A plaintiff need not look to the Tort Claims Act in order to find
22 the Legislature’s waiver of sovereign immunity in the wage and hour
23 context. Each statute independently includes the State and local

1 governments within its coverage, thereby waiving any immunity from
2 suit. *Accord Wilson*, 122 Wn.2d at 822-23.

3 **2. The Wage and Hour Statutes Do Not Contain A**
4 **Notice Requirement.**

5 Because the Tort Claims Act is immaterial with respect to claims
6 under Washington's wage and hour laws, the limitations on claims
7 waived pursuant to the Tort Claims Act are similarly irrelevant. The
8 claim-notice requirement under the Tort Claims Act does not apply
9 because a plaintiff bringing a wage and hour claim against his
10 governmental employer need not look to the waiver of sovereign
11 immunity contained in the Tort Claims Act. The only applicable
12 statute is that on which the wage and hour claim is based. As noted
13 above, only if the underlying statute contains a limitation on the
14 State's waiver of sovereign immunity do procedures such as claim-
15 notices become a bar to suit.

16 Neither the Minimum Wage Act, Wage Payment Act, nor the
17 Wage Rebate Act contain any procedural limitations on Plaintiffs in
18 this case. The trial court incorrectly concluded that the Tort Claim
19 Act's filing procedures applied to wage and hour causes of action and
20 on that basis should be reversed.

21 **C. Plaintiffs' Claims Are Not Based On a Contract.**

22 At summary judgment, Defendant asserted that the reasoning in
23 *Harberd v. City of Kettle Falls* controlled. According to Defendant,

1 Plaintiffs' claims under the wage and hour statutes should be
2 categorized as claims based upon a contract. (CP 47, n.3). The
3 problem with labeling Plaintiffs' claims as contract claims is that
4 Plaintiffs do not contend that the County has breached a contract of
5 employment (the collective bargaining agreement) with Plaintiffs.
6 Nothing in the parties' contract controls the outcome of this case. (See
7 CP 124-166). Plaintiffs rely solely on the rights given to them under
8 WAC 296-128-035 and the statutory enforcement provisions in the
9 Minimum Wage Act, Wage Payment Act, and Wage Rebate Act. As
10 such, even if *Harberd's* analysis is correct, its holding is irrelevant to
11 Plaintiffs' statutory claims.

12 CONCLUSION

13 Based on the foregoing, this Court should reverse the trial court's
14 finding that Washington's Tort Claims Act applies to statutory causes
15 of action based on wage and hour violations. This court should find
16 that the sole procedural requirement for bringing a claim under the
17 Minimum Wage Act, Wage Payment Act, and Wage Rebate Act is
18 compliance with the requirements contained within the respective Acts
19 and remand to the trial court for further proceedings consistent with
20 this appellate Court's direction.

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Dated this 26th day of January, 2006.

Respectfully submitted,



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Case No. 34039-9-II

STATE OF WASHINGTON

BY _____

[Signature]
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

7 **GENE CHAMPAGNE, CARY BROWN,)**
8 **ROLAND KNORR, and CHRISTOPHER) Thurston County No. 04-2-01990-4**
9 **SCANLON, individually and as)**
10 **representative of a class,)**

11 **Appellants,) CERTIFICATE OF SERVICE**

12 **v.)**

13 **THURSTON COUNTY, a political)**
14 **subdivision of the State of Washington,)**

15 **Respondent.)**

16 I hereby declare under penalty of perjury according to the laws of the State of
17 Washington that on this date I have caused a true and correct copy of Appellants'
18 Brief by depositing the same in the United States mail properly stamped and
19 addressed, on the following:

20 Douglas E. Smith
21 Michael King
22 Lane Powell Spears Lubersky LLP
1420 5th Ave., Ste. 4100
Seattle, WA 98101

23 Executed in Portland, Oregon this 26th day of January, 2006.

24 *Carol Green*
25 _____
Carol Green