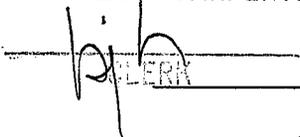


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SUPREME COURT
STATE OF WASHINGTON

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No. 79209-7

BY RONALD R. CARPENTER



SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs/Petitioners

v.

THURSTON COUNTY, a political
subdivision of the State of Washington,

Defendant/Respondent

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION II

SUPPLEMENTAL BRIEF OF RESPONDENT

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I.

INTRODUCTION

In its prior briefing before the trial court, the Court of Appeals, and this Court, Defendant/Respondent Thurston County ("Respondent") established that:

1. The trial court properly dismissed Petitioners' claims on summary judgment because Petitioners failed to comply with the statutory prerequisites for asserting a "claim for damages" against Thurston County, as required by RCW 36.45.010 and RCW 4.96.010-.020. *See* Defendant's Motion for Summary Judgment re Plaintiffs' Failure to Comply with Chapter 4.96 RCW, and supporting materials (CP 42-74); Defendant's Reply in Support of Motion for Summary Judgment re Plaintiffs' Failure to Comply with Chapter 4.96 RCW, and supporting materials (CP 93-279); Respondent Thurston County's Brief to Court of Appeals; Respondent's Answer to Petition for Review, at 7-8.

2. The Court of Appeals properly affirmed the dismissal of Petitioners' claims under RCW 49.52.050(2) and RCW 49.52.070 on alternative grounds because, as confirmed by this Court's prior precedents, Petitioners cannot state an actionable claim for exemplary damages in a case in which, by Petitioners' own admission, Thurston County has already paid all regular and additional wages owed to Petitioners in

accordance with the terms of the applicable collective bargaining agreement. *See* Respondent's Answer to Petition for Review, at 6, 9-11.

3. Petitioners' purported claims for damages under Chapters 49.46 and 49.48 RCW were properly dismissed because, in fact, Petitioners' Complaint did not assert any claims for unpaid wages or other damages under Chapters 49.46 and 49.48 RCW. Instead, Petitioners' Complaint referenced Chapters 49.46 and 49.48 RCW solely as a basis for allowing Petitioners to recover their "costs and reasonable attorneys' fees." *See* Complaint at ¶¶ 4.3, 5.3, and Prayer for Relief ¶ 4 (CP 6 and 8). Apart from costs and attorneys' fees, Petitioners' Complaint sought no other relief under Chapters 49.46 or 49.48 RCW. *Id.* Having failed to assert any claims below for unpaid wages or other damages under Chapters 49.46 and 49.48 RCW, Petitioners may not rely upon such claims as a basis for supporting the present appeal. *See* Respondent's Answer to Petition for Review, at 7, 9-12.

4. Even if Petitioners had asserted claims below for compensatory damages under Chapters 49.46 and 49.48 RCW, such claims were properly dismissed because, as recognized by the Court of Appeals, "neither chapter 49.46 RCW nor chapter 49.48 RCW provide for monetary awards when an employer has in fact paid the employees their due wages, as the County did here." *Champagne v. Thurston County*, 134

Wn. App. 515, 520 n. 5, 141 P.3d 72 (2006), *rev. granted*, 160 Wn.2d 1010 (2007). *See* Respondent's Answer to Petition for Review, at 12-14.

5. In their Complaint below, Petitioners did not assert an independent private right of action for damages (either express or implied) directly under the payment interval regulation. As a consequence, such a claim is not properly before this Court and may not be used by Petitioners as a basis for seeking relief on appeal. *See* Respondent's Answer to Petition for Review, at 12 n. 1.

6. The Washington State Department of Labor & Industries' recent clarification and amendment of the payment interval regulation confirms that Respondent's pay practices are proper and lawful based on the undisputed facts of this case. *See* Respondent's Answer to Petition for Review, at 15-18.

Respondent will not repeat its prior arguments and authorities in support of the points summarized above. Instead, Respondent respectfully refers the Court to Respondent's earlier memoranda (as cited above), and reasserts and incorporates such arguments and authorities here. The Court should affirm the dismissal of Petitioners' Complaint for all of the above reasons, including the original grounds relied upon by the trial court in granting summary judgment to Respondent under RCW 36.45.010 and RCW 4.96.010-.020.

After Respondent filed its Answer to Petition for Review, Petitioners filed a Reply in Support of Petition for Review¹ that asserted two primary arguments.² First, Petitioners attempted to cure the absence of any claims for damages in their Complaint under Chapters 49.46 and 49.48 RCW by arguing that “notice” pleading rules and a general prayer for “such other relief as the Court deems just and equitable” are sufficient to create such claims. Reply in Support of Petition for Review, at 4-6. Second, assuming the existence of such claims, Petitioners argued that they should be permitted to proceed with this case on the basis of “statutory claims arising under RCW Ch. 49.46 and RCW Ch. 49.48,” even if their claims for double damages under RCW 49.52.070 are legally

¹Under RAP 13.4(d), a party may file a reply to a petition for review “only if the answering party seeks review of issues not raised in the petition for review.” Respondent’s Answer to Petition for Review did not seek review of any new issues that were not raised in Petitioners’ Petition for Review.

²Petitioners also argued that the Washington State Department of Labor & Industries’ 2007 amendments to the payment interval regulation, WAC 296-128-035, should not be given retroactive effect. Reply in Support of Petition for Review, at 10-13. However, as Petitioners acknowledged in making this argument, a “regulation may be given retroactive effect where its purpose is to clarify rather than change the law.” *Id.* at 11 (citing *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997)). Such is the case here. The stated purpose of the Department’s revised payment interval regulation is to incorporate current agency policy into rule and clarify the meaning and application of existing payment interval requirements. Wash. St. Reg. 07-03-145 (January 23, 2007).

defective. *Id.* at 6-10. Respondent offers the following supplemental arguments and authorities in response to the issues raised in Petitioners' Answer to Petition for Review.

II.

SUPPLEMENTAL ARGUMENT

A. Petitioners May Not Base Their Appeal in This Matter on Claims for Damages Under Chapters 49.46 and 49.48 RCW That Were Never Asserted Below.

In its decision affirming the dismissal of Petitioners' Complaint, the Court of Appeals correctly recognized that Petitioners "alleged in their complaint *only* that they were entitled to double damages under RCW 49.52.070." *Champagne*, 134 Wn. App. at 519 (emphasis added). Recognizing the infirmity of their claim for double damages under RCW 49.52.070, Petitioners have now attempted to salvage their appeal in this matter by claiming that they have asserted a "claim for civil damages under not only RCW 49.52.070, but also under alternative theories of liability arising under RCW 49.46.090 and RCW 49.48.010." Petitioners' Reply in Support of Petition for Review, at 5. In support of this contention, Petitioners point to case law discussing the "notice" pleading rules in Washington, and to their generic prayer for "such other relief as the Court deems just and equitable." *Id.*

Petitioners' arguments on this issue must be rejected for several reasons. First and foremost, Petitioners' arguments ignore the actual language of Petitioners' Complaint, in which Petitioners expressly asserted a claim for damages under RCW 49.52.070, but consciously chose *not* to assert such a claim under Chapters 49.46 and 49.48 RCW. Petitioners' allegations concerning Respondent's alleged violation of RCW 49.52.050(2) and RCW 49.52.070 are set forth in Paragraphs 6.1 through 6.4 of the Complaint. After describing the alleged violation in Paragraphs 6.1 to 6.3, Petitioners then requested the following relief in Paragraph 6.4:

6.4 Defendant Thurston County's action in willfully failing to pay the due and payable wage payments entitles each of the Plaintiffs to judgment for twice the amount of the wages wrongfully withheld from them, together with their joint costs of suit and reasonable attorneys' fees under RCW 49.52.070 and applicable law.

(CP 7.)

Petitioners' allegations concerning Chapters 49.46 and 49.48 RCW are set forth in the Complaint in Paragraphs 4.1 through 4.3 (Chapter 49.46 RCW), and 5.1 through 5.3 (Chapter 49.48 RCW). In contrast to the language of Paragraph 6.4, which contains an affirmative request for damages, Paragraphs 4.3 and 5.3 make no mention of any claim for unpaid wages or other damages. Instead, Paragraphs 4.3 and 5.3 assert only that:

4.3 Defendant Thurston County's action in willfully failing to pay the due and payable wage payments on a timely basis entitles the Plaintiffs to their costs and reasonable attorneys' fees under RCW 49.46.090 and applicable law.

* * *

5.3 Defendant Thurston County's action in failing to pay the due and payable wage payments entitles the Plaintiffs to their reasonable attorneys' fees under RCW 49.48.030 and applicable law.

(CP 6.)

Confirmation of the fact that Petitioners' sole claim for damages in this case is a claim for double damages under RCW 49.52.070, and that Petitioners intentionally limited their request for relief under Chapters 49.46 and 49.48 RCW to a claim for costs and attorneys' fees (not damages), is provided by the Prayer for Relief set forth at the end of Petitioners' Complaint. In clear and unmistakable language, Petitioners' Prayer for Relief asks:

1. *For the award of twice the amount of the wages payments wrongfully withheld, pursuant to RCW 49.52.070;*
2. For an order confirming that Thurston County overtime eligible employees be treated as a class for the purposes of CR 23 in these proceedings;
3. For an order confirming that Gene Champagne, Cary Brown, Roland Knorr, and Christopher Scanlon are qualified and shall act as representatives of the certified class;
4. *For the Plaintiffs' attorneys' fees and costs under applicable law, RCW 49.46.090, 49.48.030, and*

49.52.070 as well as under the Court's equitable power;

5. For an award of prejudgment interest as allowed by law; and
6. For such other relief as the Court deems just and equitable.

(Emphasis added). (CP 7-8.) Having made the deliberate and strategic decision below to limit their request for relief under Chapters 49.46 and 49.48 RCW to “attorneys’ fees and costs,” Petitioners must be bound by that decision here. Petitioners may not base their appeal in this matter on claims that were never presented to the trial court and, in fact, were intentionally omitted from Petitioners’ Complaint.

Petitioners’ attempt to inject new damages claims under Chapters 49.46 and 49.48 RCW must also be rejected as a matter of law. In *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), this Court recognized that “[e]ven our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff’s claim.” *Berge*, 88 Wn.2d at 762. Where it is clear from the language of the complaint that the claimed relief has not been requested or asserted, and in fact has been intentionally omitted, dismissal of claims purporting to seek such relief is proper. *Id.* at 759 (“where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper”).

Having failed to assert any claims below for unpaid wages or other damages under Chapters 49.46 or 49.48 RCW, it is axiomatic that Petitioners may not assert such claims for the first time in this appeal. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240-41, 588 P.2d 1308 (1978). Instead, Petitioners' appeal must proceed on the basis of the actual claims and record below, and may not depend on new claims for relief that were never asserted before the trial court.

Petitioners likewise may not rely on their generic prayer for "such other relief as the Court deems just and proper" as a basis for asserting that the Complaint includes specific claims for damages under Chapters 49.46 and 49.48 RCW. *See, e.g., Fox v. Board of Trustees of State Univ. of New York*, 148 F.R.D. 474, 480 (N.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2nd Cir. 1994), *cert. denied*, 515 U.S. 1169 (1995) (plaintiffs may not use general prayer for "such other relief as the Court deems just and proper" as a means of reading a damage claim into a complaint where none exists). Such amorphous language in a general prayer for relief may not be used to override the specific language contained in Paragraphs 4.3 and 5.3 of the Complaint, which expressly limits Petitioners' claims under Chapters 49.46 and 49.48 RCW to claims for "costs and reasonable attorneys' fees."

B. Even if Petitioners Had Asserted Claims Below for Damages Under Chapters 49.46 and 49.48 RCW, Numerous Grounds Exist on Which This Court Should Affirm the Dismissal of Such Claims.

As discussed by the Court of Appeals in its opinion, and in Respondent's prior briefing, even if Petitioners had asserted claims below for compensatory damages under Chapters 49.46 and 49.48 RCW (which they did not), this Court would be required to affirm the dismissal of such claims on numerous alternative grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (dismissal may be affirmed on any basis supported by the record and pleadings, even if not considered below).

By its express terms, RCW 49.46.090(1) precludes an employee from asserting a claim for wages if those wages have been "actually paid to such employee by the employer." Here, it is undisputed that Thurston County has "actually paid" Petitioners all wages at issue -- Petitioners "concede that the wages at issue where [sic] eventually paid" by Thurston County. Petition for Review, at 10. Given this admitted fact, Petitioners have no legal basis for asserting any claims for damages under RCW 49.46.090. Accordingly, this Court should affirm the dismissal of such claims (to the extent they even exist).

Petitioners' purported claims for unpaid wages under Chapter 49.48 RCW are similarly defective as a matter of law. RCW 49.48.010

requires that when an employee ceases to work for an employer “the wages due him on account of his employment shall be paid to him at the end of the established pay period.” However, later in the same section, the statute specifically states that this “duty to pay an employee forthwith shall not apply if the labor-management agreement under which the employee has been employed provides otherwise.” It is undisputed that such is the case here. Paragraph 5.5 of Petitioners’ collective bargaining agreement expressly provides that it “shall normally be the practice to pay overtime in money during the pay period following the pay period in which overtime is worked.” (CP 135, 188.) Consistent with this provision, the County includes overtime and other categories of specialty pay in the paycheck issued at the end of the following pay period. Such a recognized and long-established custom and practice is specifically permitted and approved under RCW 49.48.010. Accordingly, the Court should affirm the dismissal of any purported claims for damages asserted by Petitioners under chapter 49.48 RCW as a matter of law and undisputed fact.

The dismissal of such claims must also be affirmed because, as confirmed by this Court’s holding in *Pope v. Univ. of Washington*, 121 Wn.2d 479, 489, 852 P.2d 1055 (1993), *opinion amended*, 571 P.2d 590, *cert. denied*, 510 U.S. 1115 (1994), RCW 49.48.010 only applies to cases

in which an employer has "made improper deductions to wages due at the termination of employment" -- it does *not* apply to cases involving *current* employees. Here, it is undisputed that Petitioners were current employees at all times relevant to this appeal. (CP 234, 243, 245.) Accordingly, the Court should affirm the dismissal of any claims asserted by Petitioners under chapter 49.48 RCW.

C. As a Practical Matter, this Court Should Affirm the Dismissal of Petitioners' Claims Because No Claims Remain for Petitioners to Pursue on Remand.

As a corollary to the discussion above, there is an additional practical reason why the dismissal of Petitioners' claims must be affirmed: Even if this case were remanded to the Court of Appeals or the trial court, no claims remain for Petitioners to pursue against Thurston County. Simply put, there would be nothing for the Court of Appeals or the trial court to do on remand because all of the claims and issues in this case -- both those concerning Thurston County's past pay practices and those concerning Thurston County's ongoing payment of wages to Petitioners -- have already been extinguished through a combination of Thurston County's acknowledged payment of all past wages owed to Petitioners, and through L&I's recent adoption of clarified and revised payment interval regulations that confirm the propriety of Thurston County's current payroll practices.

With respect to Thurston County's past pay practices, Petitioners admit that all of the wages that form the basis for their original Complaint and their subsequent appeals have long since been paid by Thurston County as required under the applicable collective bargaining agreement. *See, e.g.*, Petition for Review, at 10. As a consequence, regardless of whatever theoretical basis Petitioners may have had for their claims when they first filed their Complaint, that basis has now been eliminated through the payment and receipt of all wages at issue. This practical effect is confirmed by the language of the statutes upon which Petitioners rely. As discussed in detail above, RCW 49.46.090(1) only authorizes claims for specified *unpaid* wages, and expressly precludes an employee from pursuing claims for "any amount actually paid to such employee by the employer." This is exactly the case here – *all* of the wages in question were "actually paid" by Thurston County to Petitioners months or even years ago. Given this undisputed fact, there is no possible legal basis upon which Petitioners can continue to pursue a claim before the Court of Appeals or the trial court under chapter 49.46 RCW.

As noted above and in Respondent's prior briefing, the same thing is also true of Petitioners' claims under RCW 49.48.010 and RCW 49.52.070. Petitioners have no claims to pursue under RCW 49.48.010 because the statute only governs wage payments at the termination of

employment (not wage payments to current employees), and does not apply to employees covered by collective bargaining agreements such as the agreement between Petitioners' union and Thurston County. As a consequence, if this Court were to remand Petitioners' RCW 49.48.010 claim to the Court of Appeals or the trial court for further consideration, there would be nothing for those courts to do -- no factual or legal basis currently exists for Petitioners to pursue such a claim.

The Court of Appeals and the trial court would be faced with the same problem if this Court were to remand Petitioners' claims under RCW 49.52.050(2) and RCW 49.52.070. It is undisputed that Thurston County has already paid Petitioners all "wage[s] such employer is obligated to pay such employee[s] by any statute, ordinance, or contract." RCW 49.52.050(2). As a consequence, there is no basis for Petitioners to continue to pursue a claim before the Court of Appeals or the trial court under RCW 49.52.070 for "twice the amount of wages unlawfully rebated or withheld by way of exemplary damages." Once again, those courts would be left with nothing to do on remand other than to dismiss Petitioners' claims as a matter of law and undisputed fact.

With respect to Thurston County's ongoing payment of wages to Petitioners, the revised payment interval regulations adopted by L&I on January 23, 2007 (which became effective on March 1, 2007) eliminate

any possible basis for Petitioners to continue to challenge the propriety of the County's current pay practices. As explained in Respondent's Answer to the Petition for Review, Sections (6) and (8) of the amended payment interval regulations, *see, e.g.*, WAC 296-128-035(6) and (8), expressly authorize the County to continue its regular practice of paying overtime and certain other categories of specialty pay as part of the paycheck issued at the end of the following pay period. *See Answer to Petition for Review*, at 15-18. Petitioners acknowledged as much in their Reply in Support of Petition for Review, and admitted that Thurston County's payroll practices are "proper and lawful" on a going-forward basis. Reply in Support of Petition for Review, at 12.

In summary, the practical realities of the current case status and the undisputed record in this matter mandate that the Court affirm the dismissal of Petitioners' Complaint as a matter of law. No purpose would be served by remanding the case to the Court of Appeals or the trial court for consideration of claims that no longer exist (and, for the reasons previously argued by Respondent, never existed in the first place).

III.

CONCLUSION

This Court may affirm the dismissal of Petitioners' claims on any basis supported by the record and pleadings, even if such basis was not

considered by the trial court or the Court of Appeals. *LaMon*, 112 Wn.2d at 200-01. As summarized above, there are multiple grounds for affirming the dismissal of Petitioners' claims in addition to those cited by the trial court and the Court of Appeals. Given the indisputable defects in Petitioners' claims, which are confirmed by established law and the uncontroverted evidence and pleadings in this case, Respondent respectfully requests that this Court affirm the decisions of the trial court and the Court of Appeals on all grounds discussed above and in Respondent's prior briefing, whether or not such grounds were considered or relied upon by the courts below.

RESPECTFULLY SUBMITTED this 20th day of August, 2007.

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I, Anna Robertson, declare under penalty of perjury as follows:

1. I am now, and have been at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Littler Mendelson, P.C., 701 Fifth Avenue, Suite 6500, Seattle, Washington, 98104.

3. On August 20, 2007, I caused to be served a true and correct copy of the following documents:

Supplemental Brief of Respondent

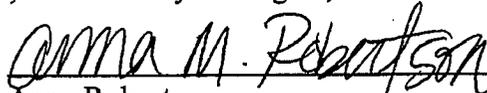
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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 20th day of August, 2007.


Anna Robertson

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FILED AS ATTACHMENT
TO E-MAIL