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STATE OF WASHINGTON

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No. 79209-7

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

BRIEF OF RESPONDENT IN RESPONSE
TO BRIEF OF *AMICI CURIAE*

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I.

INTRODUCTION

On September 7, 2007, the Court granted permission for the Washington Employment Lawyers Association, the Centro de Ayuda Solidaria a los Amigos Latina, the King County Bar Association's Newcomer's Wage Claim Project, and the National Employment Law Project, to file a joint *amicus curiae* brief in this matter. Defendant/Respondent Thurston County ("Respondent") submits the following brief response to the issues and arguments raised by such *amici curiae*.

II.

ARGUMENT

A. The Arguments Asserted by Amici Curiae Are Based on Hypothetical Scenarios That Ignore, and Are Directly Contrary to, the Specific Facts of This Case.

The issues relevant to this appeal have already been briefed and exhaustively argued in the numerous memoranda previously submitted by Respondent to this Court, the Court of Appeals, and the trial court. Respondent will not repeat those arguments and authorities here. Instead, Respondent respectfully refers the Court to such earlier memoranda and reasserts and incorporates such arguments and authorities here.

Rather than address the specific facts and legal issues relevant to this appeal (as discussed in Respondent's prior memoranda), the brief filed by *amici curiae* focuses on hypothetical scenarios that have no basis in the record before the Court. Indeed, the scenarios posited by *amici* are directly contrary to the particular facts and circumstances of this case.

As an example, *amici* speculate about whether "an unscrupulous employer could 'delay' the payment of wages until, forced to defend litigation, the employer pays up, rendering the lawsuit moot." Brief of *Amici Curiae*, at 17. However, such facts are not present here. To the contrary, the Court of Appeals' decision in this case is based upon the *admitted and undisputed fact* that Thurston County paid Petitioners "all wages, both regular and additional, due under [their] collective bargaining agreement." *Champagne v. Thurston County*, 134 Wn. App. 515, 517, 141 P.3d 72 (2006), *rev. granted*, 160 Wn.2d 1010 (2007).

Thus, unlike the hypothetical scenarios described in *amici's* brief, this is not a case that involves an "unscrupulous employer" that has attempted to delay the payment of wages to its employees on an indefinite basis "in the hopes that some employees will not seek to enforce their rights under the wage laws." Brief of *Amici Curiae*, at 17. To the contrary, Petitioners have always been paid, and continue to be paid, every penny of their wages on known and established pay days, consistent with

the express terms of, and long-established custom and practice under, their collective bargaining agreement. Petitioners “concede” as much, and acknowledge that their claims in this action are concerned with “the timing of the payment, not the fact of the payment.” Petition for Review, at 10.

When properly limited to the specific facts of this case, the Court of Appeals’ decision stands for no more than the common-sense proposition that, as a matter of law, an employer which pays employees all wages on known and established pay days in accordance with the employees’ collective bargaining agreement has not acted “willfully and with intent to deprive” its employees of their wages. RCW 49.52.050(2). Whether different facts involving other employers may give rise to such a claim was not considered by the Court of Appeals, and is not an issue before this Court. Accordingly, the Court should decline *amici*’s invitation to enter into the realm of speculation and issue an advisory opinion that has no basis in the actual facts and record applicable to this appeal. See *Cummins v. Lewis County*, 156 Wn.2d 844, 850 n. 4, 133 P.3d 458 (2006) (en banc) (improper to consider theories and claims “made solely by amici” that have nothing to do with petitioner’s case); *Obert v. Environmental Research and Development Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989) (“To decide this case on neither the facts presented

nor the applicable law would constitute an advisory opinion. This court has repeatedly refused to issue such opinions”); *Hutchinson v. Port of Benton*, 62 Wn.2d 451, 456, 383 P.2d 500 (1963) (“We do not give advisory opinions...Our decision must be limited to the facts of the instant case”).

B. The Arguments Asserted by Amici Curiae Ignore the Key Language of the Controlling Statutes and Court Decisions.

In addition to ignoring the facts of this case, the brief filed by *amici curiae* similarly ignores the controlling language of the key statutes and court decisions.¹ As an example, at page 7 of their brief, *amici* quote from a section of RCW 49.46.090, but fail to mention that the language that appears in the statute *immediately after* the quoted section expressly precludes an employee from pursuing a claim for “any amount actually paid to such employee by the employer....” RCW 49.46.090(1). Here, it is undisputed that Thurston County has “actually paid” Petitioners all wages at issue -- Petitioners “concede that the wages at issue where [sic]

¹*Amici*’s brief cites to an unpublished summary judgment order issued by the King County Superior Court in the case of *Backman v. Northwest Publishing Ctr. LLC*, Case No. 06-2-34405-7 SEA. See Brief of *Amici Curiae*, at 18. Such a citation to an unpublished Superior Court decision is improper and should not be considered by the Court. See RAP 10.4(h) (prohibiting citation to unpublished opinions); *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n. 11, 16 P.3d 701, *rev. denied*, 144 Wn.2d 1021 (2001) (“Unpublished opinions have no precedential value and should not be cited or relied upon in any manner”).

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 49.46.090.² The arguments asserted by *amici curiae* do not, and cannot, change that result, which is mandated by the particular facts of this case and the express language of the statute.

Amici's discussion of RCW 49.48.010 (at page 8 of their brief) is similarly incomplete, and omits any discussion of the key section of the statute. Although *amici* are correct that RCW 49.48.010 generally requires an employer to pay wages owed to a terminated employee³ “at the end of the established pay period,” they fail to mention that the statute specifically recognizes that “the duty to pay an employee forthwith shall not apply if the labor-management agreement under which the employee has been employed provides otherwise.” As explained in Respondent's prior memoranda, this is exactly the case here -- Paragraph 5.5 of

²As explained in Respondent's earlier memoranda, Petitioners have never even asserted claims for unpaid wages under Chapters 49.46 or 49.48 RCW, and therefore it is unnecessary for the Court to address such claims. *See, e.g.*, Respondent's Supplemental Brief at 5-9. The brief filed by *amici curiae* does not address this point. Instead, it focuses on theoretical legal arguments that have nothing to do with the particular facts and circumstances of this case.

³*Amici*'s brief also ignores the undisputed fact that Petitioners were *current* employees at all times relevant to this appeal, and therefore had no basis for asserting any claims under RCW 49.48.010. (CP 234, 243, 245.)

Petitioners' collective bargaining agreement expressly states 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. Once again, *amici* have simply ignored the critical facts and controlling law in this case.

Amici's arguments concerning Petitioners' claims under RCW 49.52.050(2) and 49.52.070 are equally without merit, and ignore this Court's prior guidance on the proper parameters of such claims. Although *amici's* brief generally cites to the Court's decisions in the *Schilling* and *S.P.E.E.A.* cases, *amici* fail to quote or discuss the key holdings from those decisions. As explained by the Court in *Schilling*, the Legislature only authorized the recovery of exemplary damages under RCW 49.52.070 (based upon a violation of RCW 49.52.050(2)) in cases in which the "employer willfully *refuses to pay wages.*" *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 158, 961 P.2d 371 (1998) (emphasis added). As a consequence, the extraordinary remedy of double damages is only available "in circumstances where an employer paid no compensation

whatsoever to an employee" *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 831, 991 P.2d 1126 (2000). In other words, the evidence must show that the employer acted "willfully and with intent to deprive the employee" of the wages at issue. RCW 49.52.050(2).

Here, it is undisputed that there is no "failure to pay" or "refusal to pay" wages by the County. *S.P.E.E.A.*, 139 Wn.2d at 831. To the contrary, Petitioners admit that the County has consistently paid them the full amount of all wages, both regular and additional, on a fixed and regular schedule in compliance with the terms of their collective bargaining agreement. Having already received all wages to which they are entitled, Petitioners have no basis for asserting a claim that they are entitled to be paid *twice* the amount of those wages under RCW 49.52.070. Such an assertion defies both common sense and the plain meaning of the statute, and is directly contrary to this Court's holdings in *Schilling* and *S.P.E.E.A.* As the Court of Appeals correctly concluded, the Legislature did not intend RCW 49.52.070 to create such a windfall. Instead, double damages are only available under RCW 49.52.070 in those cases in which the employer willfully intended to pay "*no* compensation to an employee." *Champagne*, 134 Wn. App. at 519 (emphasis in original). Given the absence of such circumstances here, and the clear directives provided by this Court's prior holdings in the *Schilling* and *S.P.E.E.A.*

cases, the Court should affirm the dismissal of Petitioners' claims in this matter.

III.

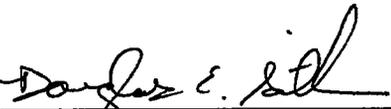
CONCLUSION

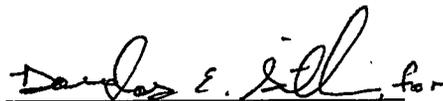
For the reasons set forth above, as well as those contained in Respondent's prior briefing, Respondent respectfully requests that the Court affirm the decisions of the courts below.

RESPECTFULLY SUBMITTED this 17th day of September, 2007.

LITTLER MENDELSON P.C.

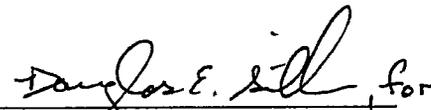
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I, Anna Robertson, declare under penalty of perjury as follows:

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 September 17, 2007, I caused to be served a true and correct copy of the following documents:

Supplemental Brief of Respondent

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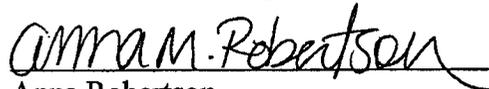
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The foregoing statements are made under penalty of perjury under
the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 17th day of September, 2007.


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TO E-MAIL