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(Consolidated with No. 79878-8)

BY RONALD R. CARPENTER

IN THE SUPREME COURT
CLERK OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant,

v.

KUSUM L. BATEY,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE LEGISLATURE

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I. INTRODUCTION

The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington. . .

Const., art. II, § 1.

The legislature is entrusted with the task of drafting bills, debating them, and enacting them. The constitution and the legislature's own rules provide a formal process for lawmaking, designed to ensure due consideration by legislators and participation by citizens. One of the formalities is the requirement in Art. II, § 19 that the subject of a bill "be expressed in the title." This requirement affects every bill that is drafted and comes into play every time a bill is amended. The Court's interpretation of this requirement is of great concern to the legislature because of its impact on both the procedural requirements of lawmaking and the legislature's broader constitutional duty to give notice to its members and the public of the subject matter of pending legislation.

The legislature's arguments herein, while addressing the validity of EHB 3278, the 2006 reenactment of RCW 50.20.050, are not designed to advocate for or against that piece of legislation, but to aid the Court in construing Art. II, § 19 to provide the legislature with a clear and workable title test.

II. ARGUMENT

A. The Title of EHB 3278 Does Not Violate Article II, Section 19.

1. Article II, Section 19 Requires a Subject Matter Statement Sufficient to Provide Inquiry Notice.

Article II, § 19 of the state Constitution states: “No bill shall embrace more than one subject, and that shall be expressed in the title.” This provision has been interpreted by the Supreme Court as requiring a bill’s title to give concise information about the subject of the bill.¹ A few well chosen words, suggesting the general subject stated, is all that is necessary to comply with the constitutional provision. *Washington Fed’n of State Employees (“WFSE”) v. State*, 127 Wn.2d 544, 554, 901 P.2d 1028 (1995) (citing *State ex rel. Scofield v. Easterday*, 182 Wash. 209, 212, 46 P.2d 1052 (1935); *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 322, 68 P. 957 (1902)).

The purposes of this constitutional mandate are threefold: (1) to protect and enlighten the members of the legislature against provisions in bills of which the titles give no intimation; (2) to apprise the people, through such publication of legislative proceedings as is usually made, concerning the subjects of legislation that are being considered; and (3) to prevent hodgepodge or logrolling legislation. *State ex rel. Toll Bridge*

¹ Art. II, § 19 also requires that bills contain a single subject, but that requirement is not at issue here.

Auth. v. Yelle, 32 Wn.2d 13, 24, 200 P.2d 467 (1948). “[A] title complies with the constitution if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law.” *YMCA v. State*, 62 Wn.2d 504, 506, 383 P.2d 497 (1963); *Treffry v. Taylor*, 67 Wn.2d 487, 491, 408 P.2d 269 (1965). Thus, inquiry notice is the rule.

In applying this rule, the courts first decide whether a title is general or restrictive. *WFSE*, 127 Wn.2d at 555 (quoting *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 22, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)). Where the title is general, “any subject reasonably germane to such title may be embraced within the body of the bill.” *De Cano v. State*, 7 Wn.2d 613, 627, 110 P.2d 627 (1941); *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 523, 304 P.2d 676 (1956).

2. The Title of EHB 3278 Was Constitutionally Sufficient.

When EHB 3278 is judged by these standards, it is clearly constitutional. The title is “AN ACT Relating to making adjustments in the unemployment insurance system to enhance tax and benefit equity; reenacting RCW 50.20.050; and creating a new section.” The contents of the bill make changes in benefit eligibility for workers who voluntarily

quit. "Making adjustments in the unemployment insurance system" is undeniably a general subject under which changes in benefit eligibility standards fit.

a. **The Phrase, "To Enhance Benefit and Tax Equity" Does Not Make the Title Restrictive.**

The Court of Appeals in *Batey* apparently thought that the phrase "to enhance benefit and tax equity" not only made the title restrictive but that the phrase did not encompass the changed criteria for collecting benefits. Neither is true.

The phrase, as with all language in titles, must be judged by its plain meaning. See *Washington State Grange v. Locke*, 153 Wn.2d 475, 491-92, 105 P.3d 9 (2005). Plain meaning is meaning that a typical reader would attach to the words articulated in the title. *Id.* at 492. The plain meaning of "to enhance benefit and tax equity" is not restrictive because the meaning is simply "changing taxes/benefits in a way that the legislature believes is equitable." This title may be slightly more restrictive than "making adjustments in the unemployment compensation system," but the title still encompasses any kind of change affecting either taxes or benefits, which subjects constitute much of the law regarding unemployment compensation.

The phrase represents a value judgment by the legislature that its changes produce greater equity—a better balance between taxes and benefits. These value judgments are not uncommon in bill titles which promise to “enhance,” “promote,” or “improve” particular programs. All suggest a beneficial change. Separated from the concept of value (i.e. whether the change is beneficial), these words simply indicate “change.” As such, they do not *substantively* limit the subject matter of the bill or amendments thereto.

The use of the word “improve” or “enhance” cannot be deemed inaccurate or restrictive without making a value judgment of one’s own. Almost any kind of change in unemployment compensation is an improvement to *somebody*—employers, employees, or both. The Court of Appeals could only invalidate EHB 3278 by making a value judgment that the particular change did not “enhance” equity. In so doing, it was substituting its judgment for that of the legislature as to the wisdom of the bill—not merely whether the subject was reflected in the title.

Courts are not authorized to change the legislature’s value judgments in the guise of matching subjects and titles in legislation. To do so would invite wholesale re-writing of legislation. For example, a bill has been offered in this session of the legislature, which is titled “AN ACT Relating to improving the operation of the trial courts.” The bill (1)

increases the jurisdictional dollar limit on district court and small claims court and increases the optional ceiling on superior court mandatory arbitration; (2) authorizes cities to enter into interlocal agreements with other cities for court services, (3) limits the authority of district and municipal court commissioners, (4) creates a task force to increase access to courts of limited jurisdiction for victims of domestic violence, and (5) eliminates the municipal department court structure. *See Bill Analysis, 2007-08 HB 2557, available at www.leg.wa.gov/billinfo.* Presumably, many judges have strong opinions on whether all of these changes “improve” the operation of the courts, but the bill title clearly gives inquiry notice that it deals with courts. Were the Court of Appeals reasoning in *Batey* to be adopted and applied to this bill, judges could pick and choose the parts of the bill they liked, while invalidating those they did not, in effect giving the courts a veto much like the governor’s.

To avoid this outcome, the Court should read “enhance” as simply an indication of “change,” rendering the title “an act relating to making adjustments in the unemployment compensation system to change tax and benefit equity.”

b. The Title of EHB 3278 Declared the Subject Matter and Was Not Misleading.

The changes to benefit eligibility contained in EHB 3278 clearly are within the subject of adjustments to unemployment compensation to

change tax and benefit equity. There was no need to restrict the title to changes in benefit eligibility. If the title of a statute indicates a subject or single purpose, the bill may constitutionally include all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated. *Amalgamated Transit Union v. State*, 142 Wn.2d 183, 209, 11 P.3d 762 (2000).

The Legislature is free to make the subject as broad as it wishes. Legislators may have strategic reasons in choosing a title for their bill. Because Art. II, § 38 and legislative rules² restrict amendments to those that are within the “scope and object” of the bill, a legislator may want a narrow title that will restrict amendments. Another legislator might want to make multiple changes to existing law and therefore choose a very broad title that will cover all of the subparts of a comprehensive bill. The legislature, in examining titles, recognizes that the language of the title, like the language of the bill itself, expresses the judgment of the drafter:

Often, there are many options available for titles to a particular measure, and the President is mindful that there are legal, policy, and even political reasons for preferring one set of language to another. The President will give great deference to the title chosen by a member or the body for a bill. The challenge for the President is to adequately recognize the title protection afforded by Rule 25 while refraining from simply substituting his judgment for that of the drafters.

² See Wash. State Senate Rule 66 and Wash. State House Rule 11(E).

Senate Journal 455 (2006) (ruling on a subject-in-title challenge under Senate Rule 25, which incorporates Art. II, § 19).

A title is not misleading merely because it is broad. “The title to a bill need not be an index to its contents; nor is the title expected to give the details contained in the bill.” *Treffry*, 67 Wn.2d at 491 (citing cases); *see also Marston v. Humes*, 3 Wash. 267, 276, 28 P. 520 (1891) (“The generality of a title is no objection to it, so long as it is not made a cover to legislation incongruous in itself and which by no fair intendment can be considered as having a necessary or proper connection.”)

It is the subject matter statement, not the contents, that provides inquiry notice. For instance, in *Vasey v. Snohomish County*, 44 Wn. App. 83, 97-98, 721 P.2d 524 (1986), the court approved “An act relating to civil procedure” as a title for a bill dealing with imputed negligence because imputed negligence is a matter of civil procedure as it relates to tort actions. *Id.* at 532. There was no need to be more specific. Similarly, in *In re Boot*, 130 Wn.2d 553, 566, 925 P.2d 964 (1996), “violence prevention” was held to encompass changes to the statutes dealing with public health, community networks, firearms and other weapons, public safety, education, employment, and media. *See also Amalgamated Transit*, 142 Wn.2d at 208 (citing examples of broad titles).

Courts void legislation only where the title of a bill fails to give even inquiry notice to the public or to lawmakers. In *Patrice v. Murphy*, 136 Wn.2d 845, 854, 966 P.2d 1271 (1998), for example, the court struck down a requirement that law enforcement agencies provide interpreters to deaf persons because the bill title, “AN ACT Relating to court costs,” failed to give notice, calling the interpreter requirement a “hidden effect.”

The Court of Appeals in *Batey* picked up the latter phrase to support its conclusion that the title of EHB 3278, “making adjustments to the unemployment compensation system to enhance benefit and tax equity” failed to give notice of the voluntary quit provision. 136 Wn. App. at 513. However, the two cases are quite different. In *Patrice*, the subject of the bill—court costs—was unconnected with the provision for interpreters for deaf persons. The title of EHB 3278, on the other hand, specifically references “unemployment” and “benefit.” Contrary to the conclusion of the Court of Appeals, a legislator or citizen who was interested in changes in unemployment compensation eligibility would know to look more carefully at the bill.

3. The Court of Appeals Erred in Considering the Legislative History of EHB 3278.

The Court of Appeals also erred by considering the fact that the text of the bill at issue here changed when a striking amendment was

adopted. In evaluating a subject-in-title challenge, courts can only compare the title of a bill against its text. *Washington State Grange*, 153 Wn.2d at 495. The enrolled bill doctrine³ prohibits courts from going behind the enrolled bill and thus forbids an inquiry into whether the legislature would have actually been misled by an amendment that changes the text but not the title of a bill. *Id.* at n. 11, *see also Brower v. State*, 137 Wn.2d 44, 71, 969 P.2d 42 (1998).

The enrolled bill doctrine comports with Art. II, § 19, which references only the title and text of the bill itself:

The text of this section does not invite the court to speculate on whether a late-breaking amendment added material outside the bill's title, or whether a striking amendment with different content relating to a bill's subject matter belatedly hijacked a conveniently broad title. Instead, the court must focus on the text of the constitutional requirement: does the bill contain material not embraced by the title's subject matter statement, regardless of whether the material was added by last-minute amendment or was present from the first draft of the bill? Article II, section 19 places the focus on the bill's text and title. The enrolled bill doctrine correctly forces the court to scrutinize the final legislative product without speculating on prior legislation, the politics, or processes that led to the end result.

Fraser, Kristen, *Original Acts, "Meager Offspring," and Titles in a Bill's Family Tree: A Legislative Drafter's Perspective on City of Fircrest v.*

³ The enrolled bill doctrine was first enunciated a mere four years after statehood in *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 P. 201 (1893), an opinion by Justice Hoyt, who had served as president of the Constitutional Convention. The fact that the Justice was himself a framer of the state constitution has persuaded subsequent courts of the framers' intent. *State ex rel. Washington Toll Bridge Authority v. Yelle*, 61 Wn. 2d 28, 34, 377 P. 2d 466 (1962).

Jensen, 31 SEATTLE U. L. REV. 1 at 67 (2007). While it may be tempting for a court to second guess the legislature's frankly, at times, political decision-making, separation of powers requires that courts defer to the legislature with regard to the conduct of its own business. *Citizen's Council Against Crime v. Bjork*, 84 Wn.2d 891, 897-98 & n. 1, 529 P.2d 1072 (1975).

B. *City of Fircrest v. Jensen* Conflicts with the Purposes of Article II, Section 19, and This Court's Precedents.

This Court has asked for supplemental briefing regarding the effect of *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006). The Legislature believes that the plurality's holding in that case conflicts with the body of case law under Art. II, § 19, invites improper speculation in contravention of the enrolled bill doctrine, and does not provide a practical framework for legislative drafting and amendment. The legislature therefore respectfully asks the Court to revisit the issue, overrule *Fircrest*, and make clear that the title of the challenged act is the title to be analyzed and that the title must be sufficient to place citizens and legislators on notice of the general subject matter of the bill.

In *Fircrest*, a plurality of this Court held that the title of an "original act" may be used to determine whether a subsequent amendatory act complies with Art. II, § 19. Under *Fircrest*, the title of the amendatory

act is irrelevant if (1) the amendatory act explicitly identifies what sections of the original act it is purporting to amend, and (2) the current amendment could have been included in the original act. *Id.* at 391. The Court's decision was based on *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 243 P.2d 474 (1952).

1. *Fircrest* Conflicts With This Court's Prior Cases.

The plurality holding in *Fircrest* conflicts with Art. II, § 19 jurisprudence in three ways: first, it ignores the narrative portion of the challenged bill's title; second, it elevates the numerical code references in a bill's title and makes them more important than the narrative portion of the title; and third, these numerical references do not comport with the subject-in-title rule's purpose of giving notice of the subjects of the legislature's work.

a. *Fircrest* Ignores the Narrative Portion of the Challenged Title.

Washington courts have long relied on the narrative portion of a bill's title in judging constitutional sufficiency. *See State v. Thomas*, 103 Wn. App. 800, 808-09, 14 P.3d 854 (2000) (title is "narrative description" in the phrase following "AN ACT Relating To" and preceding the first semicolon, not "ministerial" recitation of bill sections which is "surplusage"); *Patrice*, 136 Wn.2d at 853-55 (analyzing phrase before the

first semicolon); *Bennett v. State*, 117 Wn. App. 483, 488-90, 70 P.3d 147 (2003) (analyzing phrase before the first semicolon).

Under the plurality's holding in *Fircrest*, this narrative would not receive any scrutiny. Instead, one would look at the "ministerial" references to code sections to point the way to the "original act" and only the latter would be analyzed.

b. *Fircrest* Requires the Court to Judge the Sufficiency of the Numerical Code Section References That Are Not Part of the Bill's Title.

A corollary of the importance of the narrative section under prior case law is that the portion of the bill title containing code section references was not part of the title for Art. II, § 19 purposes. *See, e.g., Harland v. Territory*, 3 Wash. Terr. 131, 146, 13 P.453 (1887) ("The expression of a purpose to amend a particular section of the Code gives it to be understood that the law is to be changed; but what the law that is to be changed, and in what respect it is to be changed, is a matter left entirely in the dark"); *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 325-26, 68 P.957 (1902) (mere reference to a code section does not state a subject); *Fray v. Spokane County*, 134 Wn.2d 637, 654-55, 952 P.2d 601 (1998) (reference to section number in title does not state a subject).

Fircrest turns this longstanding precedent on its head by looking at whether the amendatory act explicitly identifies what sections of the original act it is purporting to amend. *See id.*, 158 Wn.2d at 391. Under the *Fircrest* test, the narrative title, heretofore paramount, is to be ignored in favor of the code reference.

c. *Fircrest* Ignores the Purpose of Article II, Section 19.

As the cases under Art. II, § 19 make clear, the purpose of the provision is to ensure notice to lawmakers and the public of the subject matter of pending legislation. See Section A.1, *supra*. Allowing the title of the “original act” to serve as title of a later amendatory act frustrates this purpose because the title of the original act is not known to legislators or the public, only the title of the current act.⁴

2. *Fircrest* Invites Violation of the Enrolled Bill Doctrine.

As Section A.3, *supra*, explains, the enrolled bill doctrine prohibits courts from going behind an enrolled bill to determine “the method, the procedure, the means or the manner by which it was passed in both houses of the legislature.” *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 840-41, 232 P.2d 833 (1951). The “original act” relied upon by the *Fircrest*

⁴ It would be impossible for the legislature to add the “original” title to each bill because the various sections may have completely different origins. Any given current bill could lead to any number of original bills depending on how many different, but related subparts were in the bill.

plurality is not within the four corners of the challenged bill and invites an examination of the history of the challenged provision. While such a history may be relevant to determining legislative intent for a statutory construction case, it is prohibited by the enrolled bill doctrine in an Art. II, § 19 challenge. *Id.*

3. The *Fircrest* Test is Not Workable.

Under the *Fircrest* test, the legislature would have to compare the contents of amendatory bills with all prior titles containing those code sections. This would be a time-consuming and ultimately imprecise endeavor for two reasons. First, it is nearly impossible to determine what bill constituted the “original act.” And second, a bill with related but discrete subparts may have multiple “family trees.”

The first point is illustrated by EHB 3278. It is titled “AN ACT Relating to making adjustments in the unemployment insurance system to enhance benefit and tax equity; reenacting RCW 50.20.050; and creating a new section. While it mentions unemployment compensation, it does not in any way specify the “original act” to be analyzed.

The unemployment compensation system was enacted in 1937 as SSB 113. The title was:

An Act providing for relief from involuntary unemployment; declaring the public policy of the state; providing for contributions by employers and for an

unemployment compensation fund; defining conditions of eligibility for and regulating benefits; establishing a procedure for the settlement of new benefit claims and providing for court review thereof; creating the office of director and defining his powers and duties; accepting the provisions of the Wagner-Peyser Act of the Congress of the United States; permitting reciprocal benefit arrangements with the states; providing penalties; making appropriations for the payment of expenses in the administration thereof; providing for the receipt of Federal monies for the administration thereof; and for the payment of claims out the special funds established herein and for purposes specified or to be specified in certain acts of Congress, and declaring that this act shall take effect immediately.

Laws of 1937, ch. 162. Section 5 of the bill dealt with disqualification, providing that an individual who left work voluntarily without good cause was not eligible to receive benefits for a period of time. *Id.* Good cause was not defined but the program director was given authority to determine it. *Id.* This provision appears to be described in the title as “defining conditions of eligibility for and regulating benefits,” and thus, if this is the “original act,” *Fircrest* appears satisfied.

It is not clear that this chapter is the only valid reference point for judging the sufficiency of the title. EHB 3278 certainly dealt with unemployment compensation, which was originally enacted in 1937, but more specifically, the bill dealt with criteria which were to be considered good cause. The 1937 act did not contain any such directives to the department administering the program. Specific directives regarding good

cause first made an appearance in Laws of 1977, ex. sess. ch. 33, § 4, and the most recent was the addition of stalking and domestic violence avoidance to the list of good causes in Laws of 2002, ch. 8, § 1. Logically, those enactments are just as direct antecedents as the 1937 statute.

Fircrest also does not pinpoint the relevant enactment when a code section has been reenacted. According to *Morin v. Harrell*, 161 Wn.2d 226, 164 P.3d 495 (2007), subsequent enactments can cure any problems in the title of an earlier bill. Reading the cases together suggests that, even if there is a problem with the original act, one can simply work forward in time until finding a general title.

For example, the title of the 1937 act is restrictive, although it contains a variety of related subparts. Were a bill to be proposed that would implement some new federal directive, it is not clear that “accepting the provisions of the Wagner-Peyser Act of the Congress of the United States” from the 1937 title would adequately state the subject of the new bill. However, the unemployment compensation scheme was amended two years later in SSB 219, Laws of 1939, ch. 214, § 3. That title was:

An Act relating to unemployment compensation, amending chapter 162 of the Laws of 1937, providing for the transfer of certain funds to the railroad unemployment insurance

account in the United States Treasury, making an appropriation.

This is a general title that could easily accommodate modern federal changes, so perhaps it would be a more suitable “original act” for some unemployment compensation subjects. Moreover, the particular section at issue was amended 17 more times between 1939 and 2006, and it is probably safe to say that many of those titles were broad and could accommodate almost any change to the unemployment compensation system—if one could determine which of these was the original title.⁵

Not only is it impossible to point with certainty to the “original act” in a single “line” of bills, but some bills will have multiple lines of ancestors. An omnibus act may contain amendatory sections drawn from many different parts of the statutes, but that have a unifying theme. The statutory antecedents of the different parts will be very different. If, for example, the legislature were considering a bill to raise an existing tax to pay for social services intended to reduce certain types of crimes, which were also redefined in the same bill, the number of possible antecedent bills is raised exponentially.

⁵ These are only the bills containing the voluntary quit section. There are likely hundreds of other enactments dealing with other aspects of unemployment compensation. In *City of Fircrest*, the Court used the creation of the Motor Vehicle Code as the original enactment, though it did not indicate whether that bill contained any sections dealing with blood alcohol tests.

The legislature, in a 60 or 105-day session, lacks the time to examine the pedigree of each bill and each amendment that is proposed.⁶ More importantly, the extreme imprecision involved in choosing the “original act” and the number of antecedents could lead to very sloppy lawmaking.

III. CONCLUSION

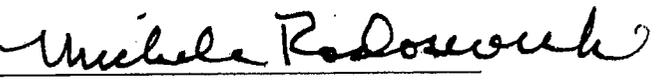
Despite the complex underpinnings of Constitutional law with respect to bill title requirements, the heart of the matter is remarkably straightforward: simply put, the test should be whether a legislator or citizen could discern from the title of a bill that a policy in which he or she is interested might be affected by that bill. It should not, as *Fircrest* invites, require a reader to conduct full-scale legal or legislative research to determine all of the antecedents of that bill; such an exercise is unreasonable, impractical, and would lead to confounding results. Instead, the reader of a bill should be able to determine from the title of that bill whether further review of the bill is necessary, and a court should be able to tell from that title and the four-corners of the bill whether the subject-in-title requirement of the Constitution is properly met. This is a form of inquiry notice, it is not perfect notice; the Constitution does not require

⁶ In the 2005-06 biennium, legislators drafted 12,728 bills, memorials, and resolutions. Of those 4671 received some consideration, and 891 were passed. Source: Office of the Code Reviser.

that all of the bill's contents be set forth in the title. The legislature believes the acts at issue in this case meet the inquiry notice test that has been historically articulated by this court prior to *Fircrest* and are therefore constitutionally sufficient. Under the Constitution, the primary duty to draft and adopt bill titles is conferred upon the legislature. Consequently, the legislature's primary motivation in appearing as an amicus curiae to this matter is to ensure that it is left with clear instructions as to title requirements from this Court that are workable from both a legal and a practical standpoint.

RESPECTFULLY SUBMITTED this 25th day of January, 2008.

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**FILED AS ATTACHMENT
TO E-MAIL**