

No. 79971-7

SUPREME COURT OF THE STATE OF WASHINGTON

MELANIE MORIN,

Appellant,

v.

CLARENCE HARRELL and HAZEL HARRELL, husband and wife,
and their marital community,

Respondents.

**Respondents' Supplemental Brief re this Court's Holding in
Pierce County v. State, 159 Wn.2d 16, 148 P.3d 1002 (2006)**

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I. INTRODUCTION

The parties have been asked to provide supplemental briefs addressing the following issue and its applicability to this case:

In *Pierce County v. State*, 159 Wn.2d 16, 41, 148 P.3d 1002 (2006) this court held that when a statute is challenged on the basis that the title violated article II, section 19, later reenactment of the statute supersedes and cures any defect in the earlier legislation.

Both Amici assert that this was the Court's holding in *Pierce County*.

The assertion is without merit. The reasons why were briefly addressed in Respondents' Answer to the Amici briefs, and they will be expanded upon here. In summary, *Pierce County* does not support Appellant for the following reasons:

(1) The language in *Pierce County* relied upon by Amici is obiter dictum;

(2) Even if it were construed as the Court's holding, the holding would be limited to the following proposition: When the legislature enacts legislation that violates article II, section 19, it may remedy the defect by reenacting the legislation without the constitutional infirmity; and

(3) The constitutional infirmity in this case has not been remedied by subsequent legislation; thus, its impact remains.

II. ARGUMENT

A. *Pierce County v. State* Did Not Hold that When a Statute is Challenged on the Basis that the Title Violated Article II, Section 19, Later Reenactment of the Statute Supersedes and Cures Any Defect in the Earlier Legislation.

This Court's 2003 decision in *Pierce County v. State*, 150 Wn.2d 422, 78 P.3d 640 (2003), specifically decided the issue of whether Initiative 776 violated article II, section 19. In its 2006 *Pierce County* decision, the specific issue before the Court was whether Initiative 776 conflicts with article I, section 23, the impairment of contracts clause of the Washington Constitution. 159 Wn.2d at 21, 51. Thus, not only was the article II, section 19 issue not before the Court, its passing comments on the issue, at pages 40-41, were neither part of nor necessary to its holding on the impairment of contracts issue. *Id.* at 51. Accordingly, the Court's comments constitute obiter dictum, not its holding. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 442, n. 11, 120 P.3d 46 (2005).

B. At Best, *Pierce County* Stands for the Proposition that the Legislature May Remedy an Article II, Section 19 Violation by Reenacting Legislation that Actually Cures the Constitutional Infirmity.

1. The Relevant Facts and Legal Analysis in *Pierce County*.

“Sound Transit was created to address traffic congestion in the Cen-

tral Puget Sound region. Pursuant to statute, Sound Transit was authorized to collect a motor vehicle excise tax (MVET) to finance a transportation system.” *Pierce County*, 159 Wn.2d at 21. In 1999, pursuant to RCW 81.112 and 81.104, Sound Transit issued bonds to finance a portion of the initial construction of the transportation system, selling the bonds to private investors through the public bond market. Sound Transit pledged the revenue from the MVET and sales tax as security for its bonds. *Id.* at 24.

In November 2002, Initiative 776 was passed. “Section 6 of the initiative amended former RCW 81.104.160 (1998), *deleting* RCW 81.104.160(1), which authorized Sound Transit to levy and collect the MVET.” *Id.* at 25. Section 6 of I-776 also included new statutory language that repealed Sound Transit’s authority to collect the MVET. *Id.*

In challenging the formation of Sound Transit and the terms of the bond contract,

the intervenors claim[ed] the voters were not entitled to rely on RCW 81.112.030(8), part of the enabling statute effective in 1996, because they allege that prior amendments to the statute were improper. First, the intervenors claim that the legislature’s amendments in 1993 to RCW 81.112.030, which in part removed the requirement that voters ratify the formation of Sound Transit, violated Washington Constitution article II, section 19 because the amendment was part of an appropriations bill. Thus, the intervenors argue that the ratification requirement remained in force.

Id. at 39-40. In rejecting this argument, the Court stated:

Intervenors fail to recognize that the legislature's 1994 amendment to RCW 81.112.030 superseded the 1993 act. ***'[W]here a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defects by reenactment with the proper formalities.'*** *Henry v. Town of Oakville*, 30 Wn. App. 240, 246-47, 633 P.2d 892 (1981). In *Henry* itself, the Court of Appeals allowed a town to reenact and ratify an ordinance, originally passed without proper notice under the open meetings laws, authorizing a bond issue. *See also Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002) (holding that a procedural challenge to the validity of a city ordinance was moot since the ordinance had subsequently been properly enacted).

Id. at 40 (emphasis added).

At this point in its discussion, the Court has simply articulated the principle that, where the legislature takes an otherwise proper action, later invalidated *for procedural reasons only*, the legislature may remedy the procedural defects by reenactment with the proper formalities. Immediately following the above-quoted passage, the Court briefly discussed the application of this principle to claims arising out of article II, section 19. In its two paragraph discussion, the Court stated:

Although our courts have not had occasion to apply this principle to claims arising out of article II, section 19 of the constitution, other jurisdictions have applied it in this constitutional context. In *Mispagel v. Missouri Highway & Transportation Commission*, 785 S.W.2d 279 (Mo. 1990), a Missouri statute was challenged on the ground that the bill dealt with

more than one subject. The Missouri Supreme Court rejected this challenge, holding that since the reenacting bill was not subject to the alleged infirmity asserted in the 1985 bill '[a]ny defect in the enactment, therefore, had been cured.' *Id.* at 281. In *Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13 (Tenn. App. 1982), the Tennessee Court of Appeals ruled moot a challenge to a Tennessee statute on the basis that the subsequent reenactment and recodification of the statute cured any constitutional defect. In *Honchell v. State*, 257 So.2d 889 (Fla. 1971), the Florida Supreme Court rejected a claim that a statute defining criminal activity was invalid because its original enactment violated 'double subject' provisions of the Florida Constitution because the statute in question had been reenacted. And in another case, the Florida Supreme Court held that any defect in the title of the original act creating a Turnpike Authority had been cured by the adoption of the revised statutes, including the act. *Spangler v. Fla. State Turnpike Auth.*, 106 So.2d 421 (Fla. 1958).

We conclude that even if the 1993 amendments to RCW 81.112.030(8) were not properly included in the 1993 transportation appropriations bill, ***in 1994 the legislature reenacted the statute in a bill***, which the interveners do not challenge as violating Washington constitution article II, section 19. ***And the 1994 amendments, like the 1993 amendments, removed any reference to a requirement that the public vote on ratification of the formation of a regional transit authority. The 1994 amendments, therefore, ratified and cured any defect in the 1993 enactment.***

159 Wn.2d at 40-41 (emphasis added).¹

¹Although the Court began its discussion by stating the principle that, where the legislature takes an otherwise proper action later invalidated for procedural reasons only, the legislature may retrace its steps and remedy the procedural defects by reenactment with the proper formalities, and then purported to discuss the application of this principle to claims arising out of article II, section 19, it is unclear whether the Court actually applied this principle in reaching its conclusion. It is respectfully submitted that a violation of article II, section 19 of the constitution is substantive in nature, not merely procedural, and that an unconstitutionally enacted law cannot be made constitutional simply by a re-

2. The Court's Article II, Section 19 Discussion in *Pierce County* Establishes that a Statute's Subsequent Reenactment Must Actually Cure the Underlying Constitutional Infirmity.

Assuming *arguendo* that the last-quoted paragraph above could be construed as the Court's holding in *Pierce County*, it does not stand for overbroad proposition that, by itself, a "later reenactment of the statute supersedes and cures any [article II, section 19] defect in the earlier legislation." To the contrary, *Pierce County* stands for the much narrower proposition that when a law is enacted in violation of article II, section 19, it remains open to a constitutional challenge unless a subsequent reenactment actually cures the underlying constitutional infirmity. Such is not the case here. The language embodied in the 1989 amendment to RCW 49.46.010(5)(b) has remained unchanged since its enactment pursuant to Initiative 518; there has been no reenactment that cured the underlying article II, section 19 violations.

The Missouri case cited in *Pierce County*, at page 40, is in accord. In *Mispagel*, 785 S.W.2d 279, the Missouri Supreme Court stated, at p. 281:

Most of the briefing and argument treats of the question whether § 537.600, as enacted in 1985, was included in a bill that dealt with more than one subject, and therefore was in violation of art. III, §23, of the Missouri Constitution. Inasmuch as this section was reenacted in 1989, ***we do not need to reach this interesting question. The reenacting bill was not subject to the alleged infirmity asserted in the 1985 bill.***

enactment that it does not itself cure the underlying constitutional infirmity. Accordingly, reenactment alone should be sufficient only to cure procedural defects.

Any defect in the enactment, therefore, has been cured.
(Emphasis added.)

The Tennessee and Florida cases cited in *Pierce County*, at pages 40-41, appear to stand for the proposition, not applicable here, that a defective title in the original act of the legislature may be remedied by its reenactment and codification in a general revision of the laws. In *Spangler*, 106 So.2d at 422-23, the Florida Supreme Court addressed the issue as follows:

By order dismissing the amended complaint, the trial judge appeared to be of the view that the title to Chapter 28128, Laws of Florida, 1953, which created the Turnpike Authority, was not sufficiently definite to comprehend within its scope any provision in the body of the act which could be construed as a waiver of immunity. *We think it unnecessary to delve into this aspect of the problem. This is so for the reason that Chapter 28128, supra, was incorporated in the 1955 and 1957 revisions of the Laws of Florida and has become Chapter 340, Florida Statutes, F.S.A. Any defect in the title of the original act as it passed the Legislature has been cured by the inclusion of the act in the revised statutes and the subsequent adoption of the revisions by the Legislature.* We have held that under these circumstances this court will not undertake to explore alleged defects in the title to the original act. (Emphasis added.)

Spangler was cited in *Honchell*, 257 So.2d at 890, where the Florida Supreme Court stated:

Upon consideration we find the statute does not contain more than one subject and meets the constitutional test. Any defect in its original enactment in 1868 was removed by subsequent reenactments of this statute, by virtue of the long line of Florida cases holding that infirmities or defects in the title of a re-

enacted statute are cured by the reenactment. (Italics original.)

Both *Spangler* and *Honchell* cited *Rodriguez v. Jones*, 64 So.2d 278

(Fla. 1953), where the Florida Supreme Court stated, at page 280-81:

It is also contended on behalf of the appellant that the title of the amendatory act which added to Section 551.12 the statutory provision with which we are here concerned, being Chapter 22614, Laws of Florida, Acts of 1945, was insufficient to meet the requirements of Section 16 of Article III of our Constitution, F.S.A. But even if the title of the amendatory act was at the time of its enactment subject to the infirmity contended for by appellant (which we do not decide, since it is unnecessary), any infirmity in this respect has long since been cured. Section 551.12, as amended by the 1945 act, has been re-enacted by the Legislature in its various Acts adopting the general revisions of the laws. Chapter 24337, Laws of Florida, Acts of 1947; Chapter 25035, Laws of Florida, Acts of 1949; Chapter 26484, Laws of Florida, Acts of 1951. *It is well settled that where a statute is re-enacted in a general revision of the laws, an original imperfection in title is cured by such re-enactment.* (Emphasis added.)²

In *Nichols*, the Tennessee Court of Appeals based its decision on the fact that the constitutional challenge had become moot because the act in question had been superseded by a subsequent legislative reenactment of the act as codified. In rejecting the contention that the body of the act, later codified as T.C.A. §§13-24-100 – 13-24-104, was broader than its caption, the

² See, also, *State v. Lee*, 156 Fla. 291, 296, 22 So.2d 804 (1945) (“we have decided that defective titles of acts of the Legislature are remedied by general revision of the laws...It is certain that all laws may be grouped under one title and passed by the Legislature without violation of Section 16 of Article III”).

Nichols Court quoted the following passage in *Harmon v. Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522, 523 (Tenn. 1981), which reiterated the rule:

‘We do not deem it necessary to analyze the caption of the statute as originally enacted, ***because the statute was reenacted in its entirety as part of Tennessee Code Annotated.*** It is well settled in this state that the subsequent reenactment and codification of the statutes eliminated any question concerning the original caption.’ (Emphasis added.)

Nichols, 640 S.W. 2d at 16.

The Florida and Tennessee authorities are inapposite here. RCW 49.46.010 has not been reenacted in a general revision of the Minimum Wage Act, or otherwise, since it was amended in 1989 pursuant to Initiative 518. To hold that the article II, section 19 violations of Initiative 518 have been “cured” by the three subsequent amendments to RCW 49.46.010, none of which involved subsection (5)(b), would constitute a legal fiction and impermissible judicial legislation. It is the province of the legislature, not the courts, to remedy a constitutionally invalid act. *State ex rel. Arnold v. Mitchell*, 55 Wn. 513, 516, 104 P. 791 (1909).³

³ The Florida and Tennessee authorities are also inconsistent with this Court’s decision in *City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006), where the Court stated, at page 391, that “[a]ny original act passed by the legislature is subject to traditional article II, section 19 challenges”, from which it logically follows that an amendatory act

C. An Overbroad Application of *Pierce County* Would Run Afoul of this Court's Prior Decisions.

In *Amalgamated Transit v. State*, 142 Wn.2d 183, 200-201, 11 P.3d 762 (2000), this Court found that an article II, section 19 challenge to an unconstitutional initiative was not rendered moot by a partially superseding enactment by the legislature if the initiative has a continuing impact. Here, Initiative 518 has a continuing impact; thus, it remains open to an article II, section 19 challenge.

In *City of Fircrest*, 158 Wn.2d at 391, this Court upheld the *St. Paul* rule as follows:

Any original act passed by the legislature is subject to traditional article II, section 19 challenges, ensuring compliance with our constitution and adherence to the goals stated above. When amending an original act, it is unnecessary to examine the amendatory title for strict compliance with article II, section 19 because the underlying act has already passed such scrutiny. In these cases, we need only inquire if the amendatory act explicitly identifies what section of the original act it is purporting to amend and that the amendments proposed could have been included in the original act. If the answer to both questions is yes, the amendatory title passes constitutional scrutiny. We take this opportunity to explicitly reaffirm the *St. Paul* cases and hold that, for the purposes of article II, section 19 challenges, the title of an amendatory act is sufficient if the title identifies and purports to amend the original act, and the subject matter of the amendatory act is within the purview of the title of the original act.

alone is insufficient to cure an original act that fails to pass article II, section 19 scrutiny.

City of Fircrest applied the *St. Paul* rule to acts passed by legislature. It did not address its application in the context of initiatives. Because “[a]n exercise of the initiative power is an exercise of the reserved power of the people to legislate”, *Amalgamated Transit*, 142 Wn.2d at 204, and because Initiative 518 was the original act taken by the people affecting RCW 49.46.010, the initiative itself should arguably be deemed “the original act” in applying the *St. Paul* rule. If so, then it remains subject to traditional article II, section 19 challenges. Since “[a]ny original act passed by the legislature is subject to traditional article II, section 19 challenges”, *City of Fircrest*, 158 Wn.2d at 391, the same should hold true for an original act of the people.

Even if Initiative 518 is treated as an amendatory act, it nonetheless remains the proper focus of the constitutional inquiry under the *St. Paul* rule, for two reasons. The first reason is that the ballot title of Initiative 518 did not explicitly identify that it was amending RCW 49.46.010. The second reason is that none of the three post-1989 amendments to RCW 49.46.010 involved subsection (5)(b), which is the only subsection enacted pursuant to Initiative 518 that is subject to the instant constitutional challenge; thus, the subject matters of those amendments are not relevant to the inquiry.

To broadly interpret *Pierce County* to hold that any reenactment of a

statute supersedes and cures a prior constitutional defect, even though the defect itself remains, is not only inconsistent with what this Court actually said in *Pierce County*, it is also inconsistent with the Court's decisions in *Amalgamated Transit* and *City of Fircrest*. Such a holding would also undercut the fundamental constitutional mandate of article II, section 19 itself, which this Court has previously described as “[p]erhaps the most salutary provision in our state constitution”. *State ex rel. Arnold v. Mitchell*, 55 Wn. 513, 516, 104 P. 791 (1909).

III. CONCLUSION

Pierce County v. State, 159 Wn.2d 16, 41, 148 P.3d 1002 (2006) at most stands for the proposition that the later reenactment of a statute supersedes and cures any constitutional defect in the earlier legislation *only if* the defect itself has actually been remedied in the process. Here, there has been no reenactment that cured the constitutional defects underlying Initiative 518, which became embodied in RCW 49.46.010(5)(b). The three subsequent amendments to RCW 49.46.010 did not in any way involve subsection (5)(b). In short, the constitutional infirmity remains unremedied and continues to have an impact.

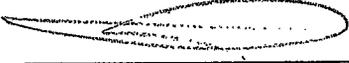
If a law is unconstitutional, the courts should not hesitate to declare it

void, and neither the passage of time, nor any other consideration that fails to cure the constitutional defect, should stand in the way of doing so. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24, 200 P.3d 467 (1948); *Sears v. Treasurer & Receiver General*, 327 Mass. 310, 326-27, 98 N.E.2d 621 (1951).

DATED this 21st day of May, 2007.

Respectfully submitted,

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