

Jun 27, 2016, 4:44 pm

RECEIVED ELECTRONICALLY

No. 92912-2

SUPREME COURT OF THE STATE OF WASHINGTON

MIRANDA THORPE, an Individual Provider of Washington,
Appellant,

v.

JAY INSLEE, in his official capacity as Governor of Washington,
Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES ("DSHS"),
Respondent,

and

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE 775NW ("SEIU 775"),
Respondent.

**APPELLANT MIRANDA THORPE'S
OPENING BRIEF**

Attorneys for Appellant Miranda Thorpe

David M. S. Dewhirst, WSBA #48229
Greg Overstreet, WSBA #26682
Stephanie D. Olson, WSBA # 50100
James G. Abernathy, WSBA #48801
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
DDewhirst@myfreedomfoundation.com
GOverstreet@myfreedomfoundation.com

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. APPELLANT’S ASSIGNMENTS OF ERROR..... 3

III. STATEMENT OF THE CASE..... 4

 A. Appellant Miranda Thorpe and Washington’s Individual Providers..... 4

 B. The collective bargaining agreements and the State’s deduction of union dues and/or fees..... 5

 C. The trial court’s decision below..... 11

IV. ARGUMENT 13

 A. RCW 41.56.113(1)’s specific statutory scheme only allows the suspension of IPs’ right to withhold authorization for union deductions when a union security provision exists in the IP CBA that imposes a mandatory financial obligation upon every IP. 14

 1. *RCW 41.56.122 may authorize many types of union security provisions, but all authorized provisions must impose a mandatory financial obligation upon every bargaining unit member.*..... 17

 2. *RCW 41.56.113(1)(b)(i) requires a union security provision that imposes a financial obligation on every bargaining unit member.* 21

 B. The trial court erred by concluding that Article 4.1 of the CBA satisfies the RCW 41.56.113(1). 24

 1. *The opt-out scheme in Article 4.1 of the IP CBA does not satisfy the requirements of RCW 41.56.113(1)(b)(i).*..... 27

 2. *The State’s obligation to honor the terms and conditions of IPs’ signed membership cards does not satisfy the requirements of RCW 41.56.113(1)(b)(i).*..... 30

V. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Chicago Teachers Union v. Hudson,
475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986)26

Davenport Washington Educ. Ass'n,
551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007)20

Harris v. Quinn,
134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014)3, 7

Local 2916, IAFF v. Pub. Employment Relations Comm'n,
128 Wn.2d 375, 907 P.2d 1204 (1995), amended (Jan. 26, 1996)19

Matter of Myers,
105 Wn.2d 257, 714 P.2d 303 (1986)34

Nollette v. Christianson,
115 Wn.2d 594, 800 P.2d 359 (1990)15

Ralph v. State Dep't of Nat. Res.,
182 Wn.2d 242 (2014)15

State v. Ervin,
169 Wn.2d 815, 239 P.3d 354 (2010)23, 33

Wagg v. Estate of Dunham,
146 Wn.2d 63, 42 P.3d 968 (2002)15

Statutes & Administrative Regulations

RCW 41.56.113(1)*passim*

RCW 41.56.122*passim*

RCW 74.39A.240(3)5

RCW 74.39A.2705, 8

WAC 388-106-00105

Administrative Decisions

Pierce Cnty., Decision 1840-A,
1985 WL 635617 (PECB, 1985)32

In re: Service Employees International Union, Local 775, Decision 8241
Case 17799-E-03-2876 (PECB, 2003)5

Spokane County, Decision 4882-A,
1995 WL 853393 (PECB, 1995)16

I. INTRODUCTION

Miranda Thorpe is an individual provider who takes care of her disabled daughter and receives money from the State for doing so. In this case, she challenges the violation of her rights by her exclusive bargaining representative, Service Employees International Union 775 (“SEIU” or “Union”), and the State of Washington’s (“DSHS” or “State”) accession to that law-breaking. Her challenge requires the Court to interpret RCW 41.56.113(1) and examine Article 4.1 of the current Collective Bargaining Agreement between the State and SEIU. Only one statutory interpretation produces a harmonious and sensible reading of the statute. However, the trial court adopted a different interpretation—one that clearly frustrates basic statutory construction rules, the legislative intent, and the rights of the very workers the law is designed to protect. The trial court erred in so deciding.

This case involves a labor law term of art: “union security provision.” Union security provisions provide security *to the union*, and operate by forcing workers to join and financially support the union.

The State and the Union may only deduct union monies from IPs’ wages, absent their written authorization, if a union security provision in the operative Collective Bargaining Agreement imposes a mandatory financial obligation on *every IP in the bargaining unit*. No such union

security provision has existed since September 26, 2014, when the State and Union removed their old agency shop provision after it was rendered unconstitutional as a result of the U.S. Supreme Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

The CBA's current dues-collection scheme simply ignores RCW 41.56.113(1)(b)(i)'s requirements, and proceeds to deduct union dues from every IP, regardless of the fact that many thousands of IPs have withheld written authorization for such deductions. In the trial court below, DSHS and SEIU succeeded largely by injecting massive confusion into the arguments. But the statutory rubric is simple. IPs' right to provide written authorization *before* union dues are deducted from their wages may only be suspended if the governing CBA contains a union security provision that deprives that right from *every* IP by imposing a mandatory financial obligation on every IP. Period. To interpret RCW 41.56.113(1) differently is to either (1) ignore substantive portions of the statute or (2) impose absurd results upon it. The trial court erred by doing one or both of these things.

Ms. Thorpe never signed a union membership or dues deduction authorization form, but nevertheless the State deducted union dues from her paycheck until she filed this suit. Thus, the State and SEIU flouted her clear right under RCW 41.56.113(1)(a). Phrased differently, the State and

Union concede that Ms. Thorpe never assented to union deductions under § 113(1)(a) and nothing in the governing CBA complies with the requirements of § 113(1)(b)(i). Thus, Ms. Thorpe is entitled to the repayment, plus interest, of all union deductions ever taken from her wages without her prior written authorization. It is that simple.

II. APPELLANT'S ASSIGNMENTS OF ERROR

The issue presented for direct review is whether the “opt-out” dues deduction scheme in Article 4.1 of the Collective Bargaining Agreement violates RCW 41.56.113(1) and is thus null and void.

This issue presents two assignments of error. The trial court erred when it held:

1. The union security provision contemplated by RCW 41.56.113(1)(b)(i) is not required to impose a mandatory financial obligation upon every IP in the bargaining unit in order to suspend the right of prior written authorization protected in RCW 41.56.113(1)(a).
2. Article 4.1 of the CBA is or contains a union security provision that permits the State and Union to deduct union dues or fees from IPs absent their prior, written authorization.

III. STATEMENT OF THE CASE

A. Appellant Miranda Thorpe and Washington's Individual Providers

Individual Providers ("IPs") provide "personal care or respite care services," to persons who qualify for care assistance from the Department of Social and Health Services ("DSHS"). RCW 74.39A.240(3). Clients or consumers are elderly or disabled persons who have applied or are currently receiving services from DSHS. WAC 388-106-0010. Personal care services include "physical or verbal assistance with activities of daily living and instrumental activities of daily living due to... functional limitations." *Id.* DSHS pays IPs for the services they provide to the clients. IPs are public employees "solely for the purposes of collective bargaining" and have been organized into a single statewide bargaining unit. RCW 74.39A.270. Service Employees International Union Local 775NW ("SEIU" or "Union") is the exclusive representative of the IP bargaining unit. *See In re: Service Employees International Union, Local 775*, Decision 8241 Case 17799-E-03-2876 (PECB, 2003).¹

Appellant Miranda Thorpe began working as an IP in February 2015 to care for her daughter. CP 19. Like thousands of her fellow IPs, Ms. Thorpe never provided written authorization for union deductions. CP 19.

¹ Available at http://www.perc.wa.gov/databases/rep_uc/08241.htm (last visited on June 25, 2015).

Notwithstanding her refusal to do so, the State nonetheless deducted union monies from her wages until the commencement of this suit. *See* Declaration of Adam Glickman, ¶ 11, Appendix (“App.”) at 4. Ms. Thorpe is not alone. SEIU admits that several thousand IPs have also never provided written authorization but have had dues deducted from their pay. *Id.* The State ceased taking Ms. Thorpe’s money when she filed suit, but it continues to seize union deductions from thousands of other nonauthorizing IPs. *Id.* at 4-5.

B. The collective bargaining agreements and the State’s deduction of union dues and/or fees

As stated above, SEIU unionized the bargaining unit of IPs in 2003. Until September 26, 2014, the CBA contained an “agency shop” provision, which required every IP to, “*as a condition of employment and continued eligibility to receive payment for services provided, become and remain a member of the Union paying the periodic dues, or for nonmembers of the Union, the fees uniformly required.*” 2013-2015 CBA Art. 4.1 (emphasis added) CP 46.² The “fees uniformly required” were equivalent to the full union membership dues. CP 49. (“In accordance with RCW 41.56.113, the Employer shall cause the appropriate entity or agency to deduct the amount of dues or, *for non-members of the Union, a*

² Available at http://www.ofm.wa.gov/labor/agreements/13-15/nse_hc.pdf (last visited June 25, 2016).

fee equivalent to the dues from each home care worker's monthly payment for services...") (emphasis added). Every prior IP CBA contained this agency shop union security provision.³

On June 30, 2014, the U.S. Supreme Court issued its decision in *Harris v. Quinn*, declaring that the First Amendment prohibited the imposition of a mandatory financial obligation on non-union home healthcare providers, who are only quasi-public employees. 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014). The case arose from Illinois, and the workers to whom the Court granted relief are substantially identical to Washington's IPs. As SEIU indicated, *Harris* at least introduced a question as to whether its existing agency shop arrangement was constitutional. App. 3. The State and Union both shared this concern, because they entered negotiations to amend the CBA soon after the *Harris* decision.

In these negotiations, the State initially proposed that the CBA be

³ See 2013-2015 CBA, available at http://www.ofm.wa.gov/labor/agreements/13-15/nse_hc.pdf (last visited Nov. 4, 2015); see also 2011-2013 CBA, available at <http://www.ofm.wa.gov/labor/agreements/11-13/homecare.pdf> (last visited Nov. 4, 2015); see also 2009-2011 CBA, available at <https://web.archive.org/web/20091031021123/http://www.ofm.wa.gov/labor/agreements/09-11/homecare/homecare.pdf> (last visited Nov. 4, 2015); see also 2007-2009 CBA, available at <https://web.archive.org/web/20091031021504/http://www.ofm.wa.gov/labor/agreements/07-09/homecare/homecare.pdf> (last visited Nov. 4, 2015); see also 2005-2007 CBA, available at <https://web.archive.org/web/20091009061331/http://www.ofm.wa.gov/labor/agreements/05-07/homecare/homecare.pdf> (last visited Nov. 4, 2015).

amended to require the written authorization of every IP before deducting union monies from their wages, in compliance with RCW 41.56.113(1)(a).⁴ Indeed, the unions representing the three other *Harris*-affected bargaining units (Child Care Providers, Language Access Providers, and Adult Family Home Providers) accepted this proposal.⁵ In the amended IP CBA—like the other similarly affected CBAs—the parties removed the words “union security” altogether. *See* September 26, 2014 Memorandum of Understanding (“MOU”), CP 74-75.⁶

However, SEIU was treated differently. These contract negotiations between SEIU and the Governor were conducted in secret. *See* RCW 74.39A.270.⁷ Perhaps that is why, instead of adopting (like its coordinate

⁴ *See* State’s original bargaining position, *available at* [http://www.myfreedomfoundation.com/sites/default/files/documents/Article 4 Union Membership and Union Security EIP 0.pdf](http://www.myfreedomfoundation.com/sites/default/files/documents/Article%204%20Union%20Membership%20and%20Union%20Security%20EIP%200.pdf) (last visited June 25, 2016).

⁵ *See* *September 12, 2014 Memorandum of Understanding, 2013-2015 CBA BETWEEN THE STATE OF WASHINGTON AND SEIU 925* (representing Child Care Providers), at Appendix 10-12, *available at* http://www.ofm.wa.gov/labor/agreements/13-15/nse_cc.pdf (last visited June 25, 2016); *see also* *Memorandum of Understanding, 2013-2015 CBA BETWEEN THE STATE OF WASHINGTON AND WASHINGTON FEDERATION OF STATE EMPLOYEES* (representing Language Access Providers), at Appendix M-5, M-6, *available at* http://www.ofm.wa.gov/labor/agreements/13-15/nse_lap.pdf (last visited June 25, 2016). Adult Family Home Providers have always enjoyed the right to provide written authorization before they assume any union-related financial obligation. *See* Membership Information Form for the Adult Family Home Council of Washington State, *available at* <http://www.adultfamilyhomecouncil.org/wp-content/uploads/2016/06/AFHC-Member-Info-Form2016-2017.pdf> (last visited June 25, 2016).

⁶ The MPU is housed in the appendix of the 2013-2015 CBA, *available at* http://www.ofm.wa.gov/labor/agreements/13-15/nse_cc.pdf (last visited June 25, 2016).

⁷ Private contract negotiations are especially troubling because the Governor negotiates against unions whose campaign finance support he simultaneously seeks. *See* Seattle Times Ed. Bd., *More Transparency Needed in State Contract Negotiations*, WWW.SEATTLETIMES.COM (June 13, 2016), *available at*

unions did) the clear requirement set forth in RCW 41.56.113(1)(a) that a provider affirmatively authorize union payments *before* they are administered, SEIU 775 convinced the State to adopt a very different arrangement.

This arrangement, the “opt-out” scheme, compels the State to administer union deductions from all IPs’ wages—even those IPs who never authorized union deductions. CP 74. From the very first state payment an IP receives, her wages are diminished by union fees equivalent to membership dues. *Id.* Although IPs may object to and stop this seizure of their money by “inform[ing] the Union that they do not wish to join or financially support the Union,” the opt-out scheme deprives IPs of their right to provide written authorization *before* union monies are deducted from their wages. *Id.* An IP who objects within a short amount of time may receive a refund of the previously deducted union monies. *Id.* But Appellant Thorpe—like many thousands of her fellow IPs—only learned of the opt-out scheme after they unknowingly paid union fees for several months or years. CP 19, 276. App. 4. The new CBA provision allows these IPs to stop all prospective union deductions, but does not entitle them to *retrieve* the wrongfully collected monies already paid. Art. 4.1(C). CP 74.

<http://www.seattletimes.com/opinion/editorials/more-transparency-needed-in-state-contract-negotiations/> (last visited June 25, 2016).

As SEIU admits, the opt-out scheme allows it to continue capturing dues-equivalent fees from many thousands of IPs who have not first authorized union deductions from their wages. *See* App. 4. The Union claims that these IPs

enjoy all the rights and privileges of membership, including the right to run for office, to vote in officer elections, to vote on amendments to the constitution and bylaws, to vote to ratify or reject the proposed collective bargaining agreement and determine the dues rate of the Union. If the Court orders cessation of deductions for members who have not signed membership cards, these individuals will be harmed because they will lose all of the rights and privileges of membership unless and until they resume paying monthly dues.

App. 4-5. While the Union claims that the non-authorizing IPs “enjoy all the rights and privileges of membership,” only card-signing IPs receive the “exclusive benefit” of the “SEIU 775 Membership Plus Program,” which includes various membership perks.⁸ Nothing in the amended CBA requires that State and Union to deduct union monies from the wages of IPs who affirmatively authorize such deductions; it merely requires the State and Union to stop taking money from IPs who affirmatively *object* to union support.

Additionally, the amended CBA provision makes the unremarkable observation that

⁸ *See* <http://www.seiu775plus.org/> (last visited June 25, 2016) (“The SEIU 775 Membership Plus Program is an exclusive benefit for the members in good standing of SEIU 775 who have signed a membership form.”) (emphasis added).

the Union reserves the right to enforce the terms and conditions of each home care worker's signed membership card with regard to when authorizations for deductions may be revoked. The Employer shall honor the terms and conditions of each home care worker's signed membership card.

CP 74. This provision accomplishes one thing: it compels IPs who provide written authorization for union membership and payments to abide by the terms of that written authorization. There are various iterations of these SEIU membership cards, but every iteration purports to require a card-signing IP to pay union dues, administered by the State, for a specified period of time.⁹ The membership cards may constitute an agreement between card-signing IPs and SEIU (discussed more below), but they do not constitute an agreement between the State and the entire bargaining unit. In other words, the State only has an obligation to administer union deductions from those IPs who first sign membership cards (provide written authorization) and agree to union deductions.

The now-effective 2015-2017 IP CBA¹⁰ contains substantially identical language to the provisions negotiated and adopted in the September 26, 2014 Memorandum at issue in this case. CP 95. Since September 26, 2014, neither the 2013-2015 CBA nor the 2015-2017 CBA have contained a union security provision that imposes a mandatory

⁹ SEIU began to use an updated membership card during the latter part of 2015. App. 8.

¹⁰ Available at http://www.ofm.wa.gov/labor/agreements/15-17/nse_homecare.pdf (last visited June 25, 2015).

financial obligation upon every bargaining unit member. CP 74, 95. But both direct the State to withhold union dues and/or fees from IPs who have not provided written authorization for union deductions. *Id.*

C. The trial court's decision below

The trial court below ruled that Article 4.1 of the CBA is not inconsistent with RCW 41.56.113(1). *See* RP 2/26/16 at 39. The court arrived at this conclusion by placing overriding emphasis on § 113(1)(b)(i)'s reference to RCW 41.56.122 and then ascribing a diminutive interpretation to the remaining provision in § 113(1)(b)(i). *See id.* at 39-40.

The trial court failed to recognize that RCW 41.56.113(1)(b)(i) discusses the type of union security provision that can waive an IP's right to authorize union deductions before they are deducted from her wages. The statute provides that if the governing CBA "[i]ncludes a union security provision authorized in RCW 41.56.122, the state... shall... enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues." RCW 41.56.113(1)(b)(i).

The trial court understood the reference to RCW 41.56.122 as an acknowledgement that § 122 is the legislative authorization of union

security provisions in CBAs negotiated under Ch. 41.56. *See* RP 2/26/16 at 38. In the trial court's view, RCW 41.56.122 contained the universe of security provisions that could "potentially come in." *See id.* Essentially, because § 122, by itself, permits the adoption of many different types of union security provisions, the trial court concluded that any of those various types of union security provisions could satisfy the criteria set forth in RCW 41.56.113(1)(b)(i).

The court then interpreted the final provision of RCW 41.56.113(1)(b)(i) as a merely formulaic method of administering dues deductions. *See* RP 38-39. If, it reasoned, the IP CBA contained any type of union security provision authorized by RCW 41.56.122, then the State must enforce that agreement by deducting dues from union members and dues-equivalent fees from union nonmembers. *Id.* The trial court ruled that § 113(1)(b)(i) is satisfied if any type of union security provision authorized by § 122 is present in the CBA, despite the fact that many type of union security agreement authorized in § 122 could not be enforced in the manner § 113(1)(b)(i) prescribes. *See* RP 38-40. Furthermore, because union dues and fees were deducted from the wages of members and nonmembers under both the old agency shop provision and the new opt-out scheme, the trial court understood § 113(1)(b)(i) to functioning precisely as the statute intended. *See id.* (the final clause in § 113(1)(b)(i))

“fairly characterize[s] both what was done before and what is being done at this time.”).

The trial court then concluded that Article 4.1, “in its entirety,” RP 2/26/16 at 41, “is in fact a form of a union security agreement.” *Id.* at 40. The trial court did not adequately define the character or contours of the union security provision it found in the IP CBA, except to “find that the form contained in the current collective bargaining agreement is a form of maintenance-of-membership combination of agency shop.” The trial court also remarked that Article 4.1 was a “milder form” of a maintenance of membership union security provision. *Id.* at 40. While “less protective” “of the union security,” Article 4.1 still “encourages membership and predictability on the amount of dues and financing,” and therefore “support[s] the traditional goals of a union security provision.” *Id.*

Under this analysis, the trial court ultimately ruled that the opt-out scheme in Article 4.1 of the CBA did not violate RCW 41.56.113(1)(a) because it contained a union security provision of some sort, which satisfied § 113(1)(b)(i), thereby suspending each and every IP’s right to choose whether they will financially support the Union.

IV. ARGUMENT

The trial court erred by ruling that the amended CBA provision adopted by the State and DSHS on September 26, 2014 satisfies the

framework created by RCW 41.56.113(1) to bypass the written authorization requirement of § 113(1)(a). Appellant is entitled to declaratory judgment that the opt-out scheme attempted in Article 4.1 of the CBA violates RCW 41.56.113(1)(a). This Court reviews denial of requested declaratory relief de novo. *Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359 (1990) (“[I]n the context of appellate review of a trial court’s denial of the requested declaratory relief... Conclusions of law involving the interpretation of statutes... are reviewed de novo.”). Under the facts of this case, this Court must engage in statutory construction to determine whether Ms. Thorpe is entitled to the relief she seeks. RP 2/26/16 at 36 (“And this really is a question of statutory interpretation, a question of law for the court.”). This too, allows this Court to review the trial court’s order de novo. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 68, 42 P.3d 968 (2002).

A. RCW 41.56.113(1)’s specific statutory scheme only allows the suspension of IPs’ right to withhold authorization for union deductions when a union security provision exists in the IP CBA that imposes a mandatory financial obligation upon each and every IP.

A statute’s plain words—all of them—must be enforced. *See Ralph v. State Dep’t of Nat. Res.*, 182 Wn.2d 242, 248 (2014) (“In [construing a statute], we cannot ‘simply ignore’ express terms... We must interpret a statute as a whole so that, if possible, ‘no clause, sentence, or word shall

be superfluous, void, or insignificant.”). RCW 41.56.113(1) establishes a simple framework that governs the process by which union dues may be deducted from IPs’ wages. RCW 41.56.113(1)(a) provides:

Upon the written authorization of an individual provider... within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative [the union], the state... shall... deduct from the payments to an individual provider... the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and shall transmit the same to the treasurer of the exclusive bargaining representative.

RCW 41.56.113(1)(a). Thus, § 113(1)(a) establishes a default status. The State may only deduct union dues from an IP’s wages if the IP has provided prior, written authorization. This limitation imposed upon the State and Union creates a corresponding substantive right for IPs—the right to choose whether or not they will accept the financial obligation of union dues. Washington’s Public Employment Relations Commission (“PERC”) has described this right as highly important:

The right of employees to “authorize” is inherently accompanied by the right to refrain from authorizing a payroll deduction. An employee covered by Chapter 41.56 RCW cannot be compelled to utilize payroll deduction, as opposed to making payments by cash or check directly to the union.

Spokane County, Decision 4882-A, 1995 WL 853393 at *6 (PECB, 1995) (emphasis added). Section 113(1)(a) creates the threshold presumption that the State and Union may only take union dues from the wages of IPs

who have *first* given their permission for union deductions. If § 113(1)(a) controls, Ms. Thorpe wins the case, because she never provided written authorization for union deductions but was subjected to them for many months.

This default presumption favoring IP choice created by RCW 41.56.113(1)(a) may only be suspended under the specific circumstances set forth in RCW 41.56.113(1)(b)(i). Section 113(1)(b)(i) provides

(b) If the governor and the exclusive bargaining representative of a bargaining unit of individual providers... enter into a collective bargaining agreement that:

(i) Includes a union security provision authorized in RCW 41.56.122, the state... shall... enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues;

RCW 41.56.113(1)(b)(i). For the same reasons described below, if the governing CBA contains a union security provision that meets § 113(1)(b)(i)'s criteria, then the State may enforce that agreement by deducting dues or fees from the *entire* bargaining unit. Thus, the statute provides the only exception to the default presumption that IPs may choose whether or not they will financially support the Union—the inclusion in the CBA of a union security provision that meets the requirements of § (1)(b)(i). The parties sharply disagree on the appropriate interpretation of § 113(1)(b)(1) and the type of union security provision

that must exist to waive the written authorization right in § 113(1)(a).

1. ***RCW 41.56.122 may authorize many types of union security provisions, but all authorized provisions must impose a mandatory financial obligation upon every bargaining unit member.***

RCW 41.56.113(1)(b)(i)'s first criteria for a qualifying union security provision is that it (the union security provision) appear in the CBA negotiated by the Governor and the SEIU. *See* § 113(1)(b). The next requirement is that a qualifying union security provision must be authorized in RCW 41.56.122. *See id.* at § 113(1)(b)(i). Section 122 provides, in pertinent part:

A collective bargaining agreement may:

(1) Contain union security provisions: PROVIDED, That *nothing in this section shall authorize a closed shop provision*: PROVIDED FURTHER, That *agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member*. Such public employee shall pay an amount of money equivalent to regular union dues and initiation fee to a nonreligious charity or to another charitable organization mutually agreed upon by the public employee affected and the bargaining representative to which such public employee would otherwise pay the dues and initiation fee.

RCW 41.56.122(1) (emphasis added). Section 122 allows for “union security provisions” in CBAs, with certain limitations. First, closed shop provisions are prohibited. Second, § 122 requires that any “union security provisions” must also safeguard the rights of religious objectors by

providing a method whereby objectors meet their financial obligation by paying due-equivalent amounts to a charity, rather than the union.

This religious objector protection, in particular, provide at least two reasons why all “union security provisions” contemplated by RCW 41.56.122 require the imposition of a mandatory financial obligation on every bargaining unit member. First, this protection is unnecessary where an employee labors under a CBA that does not impose a mandatory financial obligation upon her. If she bears no financial obligation to the union as a condition of employment, then she requires no special protection shielding her from financially supporting the union. Second, the protection provided to a bona fide religious objector remains a mandatory financial obligation—but to a non-union charity recipient. Thus, § 122 refers to the very “union security provisions” it authorizes as provisions which require the imposition of a mandatory financial obligation upon every bargaining unit member—even religious objectors. *See Local 2916, IAFF v. Pub. Employment Relations Comm'n*, 128 Wn.2d 375, 380, 907 P.2d 1204 (1995), *amended* (Jan. 26, 1996) (“Insofar as union security provisions, or “agency fees,” are concerned, RCW 41.56.122(1) defines the right of employees that must be safeguarded in collective bargaining agreements[,]” referring to the religious objector protection).

Indeed, the Washington Supreme Court in *Local 2916* interpreted RCW 41.56.122 in a way that compels this result:

An agency fee is a provision generally found in an “agency shop” clause, or “union security provision,” of a collective bargaining agreement. Under *such a clause or provision, which is specifically permitted, but not required under RCW 41.56.122(1)*, employees in a bargaining unit are required to either join the union or pay to the union an “agency fee,” which is equivalent to union dues. The purpose of such a provision is to compensate the union for its efforts in representing nonunion employees in collective bargaining, contract administration and grievance processes. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–26, 97 S.Ct. 1782, 1794–95, 52 L.Ed.2d 261 (1977) (agency shop provision held constitutional, insofar as union uses charges for collective bargaining purposes and not political purposes).

Id. at 377, n. 1 (emphasis added). *Local 2916* stands for the proposition that § 122 permits (but does not require) a CBA to include a union security provision *that imposes a mandatory financial obligation on every employee covered by the CBA*. *Id.* *See also Davenport Washington Educ. Ass'n*, 551 U.S. 177, 181-82, 127 S. Ct. 2372, 2377, 168 L. Ed. 2d 71 (2007) (“The State of Washington *has authorized public-sector unions to negotiate agency-shop agreements*. Where such agreements are in effect, Washington law allows the union to charge nonmembers an agency fee equivalent to the full membership dues of the union and to have this fee collected by the employer through payroll deductions. *See, e.g., Wash. Rev. Code §§ 41.56.122(1)*”) (emphasis added). Obviously, if a union

security provision that imposed a mandatory financial obligation on every IP existed in the IP CBA—as it did until September 26, 2014—it would have to provide § 122’s religious objector accommodation. However, if the CBA contained a “milder” union security provision (as the trial court suggested) that did not impose such an obligation on every IP—then § 122’s religious objector protection would be unnecessary. Thus, § 122 authorizes union security provisions that impose mandatory financial obligations on every bargaining unit member, regardless of their other characteristics.¹¹

But even if RCW 41.56.122 could be read to authorize union security provisions that lack that crucial feature, RCW 41.56.113(1)(b)(i) reinforces the fact that only a union security provision imposing a mandatory financial obligation on every bargaining unit member is

¹¹ The trial court correctly suggested, there may be some types of hybrid union security provisions other than a traditional agency shop provision that do not run afoul of § 122 or the U.S. Constitution. This concession does not change the fact that RCW 41.56.113(1)(b)(i) clearly requires a union security provision that imposes a mandatory financial obligation on every IP in the IP bargaining unit. See § 113(1)(b)(i) (“the state... *shall... enforce the agreement* by deducting from the payments *to bargaining unit members* the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues[.]”). It is nonsensical to suggest that the State should or could enforce a union security provision that does not impose a mandatory financial burden on every bargaining unit member in a manner that exacts a mandatory financial obligation from every bargaining unit member. Thus, reasonable statutory construction rules dictate that the type of union security provision permitted to be enforced in a very particular way must be a union security that requires enforcement in *that* very particular way.

adequate to suspend the presumption favoring prior written authorization in § 113(1)(a).

2. RCW 41.56.113(1)(b)(i) requires a union security provision that imposes a financial obligation on every bargaining unit member.

RCW 41.56.113(1)(b)(i)'s third requirement is that the union security provision *shall* be enforced "by deducting from the payments to bargaining unit members the dues required for membership in the [Union], or, for nonmembers thereof, a fee equivalent to the dues." *See* § 113(1)(b)(i). In other words, because the union security provision *must* be enforced by exacting a mandatory financial obligation from every IP, the union security agreement *must*, by its own terms, impose this mandatory financial obligation on every IP in the bargaining unit. Otherwise, a CBA could contain the mildest form of security provision and it would still have to be enforced like the most robust form of security provision. For example, if a CBA contained a single union security provision that required an employee who signs a union membership card to pay dues until the employee revokes her membership card, which the employee can do at any time. This would truly be a union security provision of minimal security. Indeed, a provision allowing members to leave the Union could rightly be termed a union *insecurity* provision. But if it were authorized under RCW 41.56.122 and it satisfied § 113(1)(b)(i), the State would have

to exact from every employee mandatory union dues or dues-equivalent fees for the duration of the contract. That is a nonsensical interpretation because the enforcement clause in § 113(1)(b)(i) would entirely subsume the CBA provision by forcing payment from the *entire* bargaining unit where the security provision, by its own terms, compels payment from only a mere *portion* of the bargaining unit. *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010) (“It is true that we presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity.”). Reading § 113(1)(b)(i) to permit a union security provision that does not at least impose a mandatory financial obligation on every IP leads to an unavoidably absurd result. Clearly, § 113(1)(b)(i) requires a particular type of union security—one that can be enforced according to its explicit terms.

In short, RCW 41.56.113(1)(b)(i) allows the State and Union to suspend IPs’ right to choose *only* when there is a union security provision that categorically eliminates every single IP’s right to choose. Such an arrangement existed before September 26, 2014. Under the old CBA’s agency shop provision, CP 46, every IP bore a mandatory financial obligation, which suspended their right to provide written authorization under § 113(1)(a). Reading § 113(1)(b)(i) as Appellant suggests honors both statutes, as sound construction must.

Below, the trial court adopted a construction that both necessitates an absurd result and fails to read the totality of both statutes—RCW 41.56.113(1)(b)(i) and RCW 41.56.122—in harmony. It found, correctly, that RCW 41.56.122(1) is a source for authorized union security provisions that could “*potentially*” appear in IP CBAs. *See* RP 2/26/16 at 38. But it erred in concluding that any security provision authorized in § 122 may satisfy the requirements of § 113(1) so long as the method of collection, deducting dues from members and dues equivalent from nonmembers, is at least facially accomplished. RP 2/26/16 at 39. Section 113(1) requires more than simple form following. As shown above, to waive the written authorization requirement/right, § 113(1)(b)(i) requires a union security provision that imposes a mandatory financial obligation on the entire bargaining unit. Read together, § 113(1)(b)(i) and § 122 require the following union security characteristics: (1) If an IP is a card-signing union member, she has a mandatory financial obligation. If an IP is a union nonmember she has a mandatory financial obligation. Even if an IP is a religious objector, she still has a financial obligation. Only when those three characteristics are present under the terms of a current union security provision does § 113(1)(b)(i) suspend the default presumption favoring prior, written authorization. The statute simply does not contemplate any union security provision that does not, at the very least, place a mandatory

financial obligation on all parties.

In conclusion, the trial court erred in adopting a construction that misapprehends RCW 41.56.113(1)'s basic scheme. Ms. Thorpe still offers the only interpretation that enables § 113(1) to function according to its design and to harmonize with § 122. In order to waive the written authorization requirement/right in § 113(1)(a), there must exist in the governing CBA a union security provision that imposes a mandatory financial burden on every IP in the bargaining unit. If such a union security provision does not exist, then the State and Union must procure each IP's written authorization before administering union deductions from their wages. No such provision has existed in the IP CBA since September 26, 2014. Thus, the seizure of union deductions from Ms. Thorpe's wages without her prior authorization violated RCW 41.56.113(1)(a).

B. The trial court erred by concluding that Article 4.1 of the CBA satisfies the RCW 41.56.113(1).

Only a union security provision that places a mandatory financial obligation on every IP is adequate to suspend the IPs' right to authorize union deductions before they occur. RCW 41.56.113(1). An agency shop provision would satisfy the scheme. *See Local 2916*, 128 Wn.2d at 377 n.1 (defining an agency fee as a provision that permits an employee to choose

solely between either joining the union or paying a dues-equivalent fee). Until September 26, 2014, every IP CBA contained a traditional agency shop union security provision.¹² For instance, the 2013-2015 CBA included the following:

[E]very home care worker covered by this Agreement shall, as a condition of employment and continued eligibility to receive payment for services provided, become and remain a member of the Union paying the periodic dues, or for nonmembers of the Union, the fees uniformly required.

CP 46. This language is mandatory. It applies to every IP in the bargaining unit. And, it could be enforced in the manner prescribed by RCW 41.56.113(1)(b)(i). Notably, other types of union security provisions—even hybrids—would satisfy § 113(1)(b)(i), so long as they imposed a mandatory financial obligation on the entire bargaining unit. For instance, many “hybrid” agency shop provisions specifically provide for the payment of a reduced union fee by union nonmembers. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305-06, 106 S. Ct. 1066, 1075, 89 L. Ed. 2d 232 (1986) (allowing nonmembers to pay a reduced fee because “a

¹² See 2013-2015 CBA, available at http://www.ofm.wa.gov/labor/agreements/13-15/nse_hc.pdf; see also 2011-2013 CBA, available at <http://www.ofm.wa.gov/labor/agreements/11-13/homecare.pdf>; see also 2009-2011 CBA, available at <https://web.archive.org/web/20091031021123/http://www.ofm.wa.gov/labor/agreements/09-11/homecare/homecare.pdf>; see also 2007-2009 CBA, available at <https://web.archive.org/web/20091031021504/http://www.ofm.wa.gov/labor/agreements/07-09/homecare/homecare.pdf>; see also 2005-2007 CBA, available at <https://web.archive.org/web/20091009061331/http://www.ofm.wa.gov/labor/agreements/05-07/homecare/homecare.pdf> (last visited Apr. 1, 2016).

forced exaction [of dues-equivalent fees] followed by a rebate equal to the amount improperly expended [on political/ideological causes] is thus not a permissible response to the nonunion employees' objections.”). Conceivably, any type of union security provision that eliminates all IPs' choice to voluntarily pay the union enables the State and Union to bypass the written authorization requirement in § 113(1)(a).

In the present case, the trial court ruled that Article 4.1 of the current CBA—in its entirety—is a hybrid union security provision combining elements of maintenance of membership and agency shop provisions. The court further concluded that this hybrid union security provision worked to trigger § 113(1)(b)(i)'s suspension of § 113(1)(a)'s written authorization requirement. *See* RP 2/26/16 at 39. Though the trial court failed to identify the so-called "hybrid" provision with specificity, *see id.* at 41, this Court can examine Article 4.1 and determine that it lacks the basic requirement the statute requires.

Article 4.1 contains two key provisions, the opt-out scheme and the single sentence that reads: “The Employer shall honor the terms and conditions of each home care worker’s signed membership card.” CP 74. Neither provision, working independently or together, is a union security provision that imposes a mandatory financial obligation on every IP in the bargaining unit. As such, Article 4.1 is not an “adequate” union security

provision under RCW 41.56.113(1)(b)(i).

1. *The opt-out scheme in Article 4.1 of the IP CBA does not satisfy the requirements of RCW 41.56.113(1)(b)(i).*

The opt-out scheme is not a union security provision that satisfies the requirements of RCW 41.56.113(1). It certainly is a method whereby the Union has continued to capture millions of dollars from IPs' wages, without consent, even in the aftermath of *Harris v. Quinn*, App. 4.¹³ But the Union's cunning is not an acceptable substitute for statutory adherence. The opt-out scheme begins with the automatic seizure of union dues, the very behavior precipitating this lawsuit. CP 74. Several notable features distinguish it, however, from the type of union security provision that must exist before the State and Union may seize union dues from nonauthorizing IPs.

First, the opt-out scheme does not impose a *mandatory* financial obligation on anyone. Article 4.1 provides at least two methods of "opting out" of union payments, *altogether*. Article 4.1(B) contains the first method:

The union shall notify each home care worker covered by this Agreement that he or she is not required to join or financially support the Union. New home care workers will be notified as soon as possible, but no later than fourteen (14) days from the Union receiving the home care worker's contact information.

¹³ If, as SEIU suggests, the opt-out scheme allows it to capture \$200,000 per month in union dues from nonauthorizing IPs, that means it is capturing approximately \$2.4 million per year through this scheme.

The Union shall escrow the fee paid by a new home care worker in an interest-bearing account. The fee shall remain in this account until the home care worker is notified of the opportunity to opt-out and given thirty (30) calendar days to do so. If the home care worker objects to paying the fee within thirty (30) days of the notification from the Union, the Union shall, within twenty (20) days of receiving the notice from the home care worker, refund the fee with interest (at the rate of interest it has received). The Union will notify the Employer to cease further deductions in accordance with the Subsection 4.1C below.

CP 74, 95. Under this scenario, if an IP opts out within the designated amount of time, the Union returns all of the IP's wrongfully deducted money. IPs who exercise this option never financially support SEIU at all.

The second "opt-out" avenue is even broader:

Home care workers covered by this Agreement who inform the Union that they do not wish to join or financially support the Union will not have any fee deducted from the payments made to them by the State and will suffer no penalty as a result of their failure to pay such a fee to the Union.

CP 74, 95. Under this language any IP in the bargaining unit may opt out of union membership and financial support at any time, regardless of how long the State and Union have been seizing union dues from her. Opting out of union financial support incurs "no penalty." If, under the CBA, the financial burden is entirely optional, then how can the State enforce the CBA by forcibly extracting dues from every bargaining unit member? *See* § 113(1)(b)(i) (the state... *shall... enforce the agreement* by deducting from the payments *to bargaining unit members* the dues required for

membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues[.]” (emphasis added). The opt-out scheme clearly does not impose a *mandatory* financial obligation.

Second, the opt-out scheme does not impose a mandatory financial obligation *on the entire bargaining unit*. By its own terms, IPs may cease all union financial support and suffer no penalty. CP 74, 95. Additionally, SEIU admits that it has never even enforced the opt-out scheme upon several bargaining unit members who were already objectors when *Harris* was decided. CP 244 (“The day after the U.S. Supreme Court decided *Harris v. Quinn*, SEIU 775 asked the State of Washington to cease agency fee or religious objector deductions for the 0.5% of the IP bargaining unit who had objected to paying dues.”). Where some members of the bargaining unit are able to cease financially supporting the Union altogether, the CBA lacks a fundamental characteristic that RCW 41.56.113(1)(b)(i) requires. The opt-out scheme lacks vital characteristics that would allow it to be sensibly enforced the way § 113(1) demands. Therefore, it is not a union security provision, the enforcement of which suspends IPs’ right to provide written authorization *before* union dues are

deducted from their wages.¹⁴

2. *The State's obligation to honor the terms and conditions of IPs' signed membership cards does not satisfy the requirements of RCW 41.56.113(1)(b)(i).*

The State and Union characterized the one sentence in Article 4.1(C) obliging the State to honor the terms of card-signing membership cards as a “maintenance of membership” union security provision. PERC explains that these provisions are “designed to protect the security of the union by providing that individuals who were members of the union or who subsequently joined the union would continue to maintain their membership for the duration of the contract.” *Pierce Cnty.*, Decision 1840-A, 1985 WL 635617, at *7-8 (PECB, 1985) (quoting from Roberts’ Dictionary of Industrial Relations). The State and Union argued that because card-signing IPs have to follow a specified process¹⁵ for opting-out of future union dues, the membership card constitutes a maintenance of membership. Even assuming, arguendo, that such a characterization is colorable, the State’s obligation to continue deducting union dues until an IP opts out of further payments by following a specified process contained on the membership card does not transform this circumstance into a union

¹⁴ Moreover, it is an incomplete and naïve view of the statute to suggest that the right to prior authorization may be waived by simply including a CBA provision that directly contradicts the right to prior authorization. RCW 41.56.113(1) requires more.

¹⁵ Under the terms of the card, a card-signing IP agrees to pay dues for a period of at least one year. If the IP desires to opt-out of union payments and membership, she must send a letter requesting cessation of deductions during an annual 15-day window. CP 8.

security provision that impose a mandatory financial obligation upon every IP in the bargaining unit member and thus is inadequate under RCW 41.56.113(1)(b)(i).

If the State's "honor" provision constitutes a "maintenance of membership" union security provision that satisfies RCW 41.56.113(1)(b)(i), then it forces the State to deduct union dues or fees from every IP in the bargaining unit even if one, single IP signs a membership card. That is precisely the type of absurd result statutory construction should avoid. It also clearly defeats the statute's plain intent.

But the State and Union clung to this faulty reasoning below. RP 2/26/16 at 38 ("The State and the union argue that the cross-reference to 122 captures all legal forms of union security agreements and that the provisions of the 113 statute that require authorization of the individual provider govern a scenario where a collective bargaining agreement does not include any form of union security clause."). Essentially, the State and Union argued that the inclusion of *any* union security provision in the CBA—even provisions which, according to their own terms, do not apply to the entire bargaining unit, e.g. opt-out schemes and/or membership card terms—automatically triggers RCW 41.56.113(1)(b)(i)'s requirement that obligates to exact financial obligations from every bargaining unit member. In other words, because SEIU has membership cards containing

a requirement that *the card-signer* continue paying dues for a certain amount of time, the State **must** deduct union monies from **all** bargaining unit members. This argument forces an entirely unreasonable construction upon § 113(1): *The State and union may deduct dues from IPs who have not given written authorization if the State and union agree to deduct dues from IPs who have given written authorization.* The Court should assume the Legislature did not intend an absurd result. *Ervin*, 169 Wn.2d at 823-24.

A simple hypothetical highlights the absurdity of the interpretation urged by the State and Union. Imagine an employer and union agreed to a union security provision that stated, “the employer **will** deduct union dues from the wages of union members who sign membership cards **but will not** deduct union dues from the wages of union nonmembers who do not sign membership cards.” Under the State’s and Union’s interpretation of RCW 41.56.113(b), the presence of this “union security clause,” as minimally protective as it is, would nonetheless trigger the State’s mandatory duty to deduct union dues from the entire bargaining unit—not merely union members within the bargaining unit. Such a result obviously and fundamentally alters and subsumes the negotiated union security provision. It also renders § 113(1)(a) a nullity. The hypothetical union security clause merely protected the right to prior written authorization,

but its presence compels the State, under § 113(1)(b)(i), to extract union monies from every IP, regardless of authorization. The State's and Union's strained reading of the statute produces exactly this absurd result. The alleged "maintenance of membership" provision housed in the terms of the Union's membership cards binds *only* those individuals who voluntarily authorize its obligations by signing the cards. This arrangement, in fact, showcases § 113(1)(a) functioning exactly as it was designed to do. *See* § 113(1)(a) ("Upon the written authorization of an individual provider... the state... shall... deduct [union dues or fees] from the payments to an individual provider").

Again, if this alleged maintenance of membership constituted a union security provision satisfying § 113(1)(b)(i), then the State must extract money from every bargaining unit member. *See Matter of Myers*, 105 Wn.2d 257, 262, 714 P.2d 303 (1986) ("[t]he use of *the word 'shall' creates an imperative obligation unless a different legislative intent can be discerned.*") (emphasis added). Thus, if the State and Union are right that the CBA contains a union security clause that applies to *a portion* of the bargaining unit, the State nevertheless has the "imperative obligation" to deduct union monies from *everyone* in the bargaining unit. *Id.*

The right of every IP to provide written authorization *before* the State deducts union dues or fees from her wages may *only* be waived when a

union security provision housed in the governing CBA imposes a mandatory financial obligation on every IP in the bargaining unit. I.e., every IP gets to choose, unless a CBA union security provision eliminates every IP's choice. Nothing in Article 4.1 of the CBA, after September 26, 2014, meets that standard.

The State and SEIU broke the law when they automatically seized union dues from Ms. Thorpe's wages. The law entitles her to *first* provide written authorization, and she never did.

V. CONCLUSION

For the foregoing reasons, Appellant Miranda Thorpe respectfully requests that this Court reverse the decision of the trial court below and declare that the opt-out scheme in Article 4.1 of the governing CBA violates her right under RCW 41.56.113(1)(a).

RESPECTFULLY SUBMITTED on June 27, 2016.

By: 

DAVID M. S. DEWHIRST, WSBA #48229

GREG OVERSTREET, WSBA #26682

STEPHANIE D. OLSON, WSBA # 50100

JAMES G. ABERNATHY, WSBA #48801

c/o Freedom Foundation

PO Box 552

Olympia, WA 98507

p. 360.956.3482

DDewhirst@myfreedomfoundation.com

GOverstreet@myfreedomfoundation.com

JAbernathy@myfreedomfoundation.com
SOlson@myfreedomfoundation.com

Counsel for Appellant Miranda Thorpe

DECLARATION OF SERVICE

I declare that on June 27, 2016, I filed with Clerk and served a copy of the foregoing Appellant Miranda Thorpe's Opening Brief and the Appendix to Appellant Miranda Thorpe's Opening Brief by email pursuant to agreement on the following:

Dmitri Iglitzin, WSBA # 17673
Jennifer Robbins, WSBA # 40861
Schwerin Campbell Barnard Iglitzin
& Lavitt LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
iglitzin@workerlaw.com
robbins@workerlaw.com

Michael Subit, WSBA # 29189
Frank Freed Subit & Thomas LLP
705 2nd Ave Ste. 1200
Seattle, WA 98104
msubit@frankfreed.com

Attorneys for SEIU 775

Susan S. DanPullo, WSBA # 24249
Shane Esquibel, WSBA # 38032
Albert Wang, WSBA # 45557
Office of Attorney General
1125 Washington Street SE
Olympia, WA 98501
susand1@atg.wa.gov
ShaneE@atg.wa.gov
AlbertW@atg.wa.gov

Attorneys for State Defendants

Dated this 27th day of June, 2016, at Olympia, Washington.


Kirsten Nelsen

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, June 27, 2016 4:46 PM
To: 'Kirsten Nelsen'
Subject: RE: Case No. 92912-2: Appellant Miranda Thorpe's Opening Brief and Appendix

Received 6/27/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kirsten Nelsen [mailto:KNelsen@myfreedomfoundation.com]
Sent: Monday, June 27, 2016 4:43 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Case No. 92912-2: Appellant Miranda Thorpe's Opening Brief and Appendix

Good afternoon,

Please find attached for filing today in Case No. 92912-2, Miranda Thorpe v. Jay Inslee, State of Washington, Department of Social and Health Services, and Service Employees International Union Healthcare 775NW, Appellant Miranda Thorpe's Opening Brief and Appendix in Support of Miranda Thorpe's Opening Brief.

Notify me immediately if you are unable to open the attachments.

Best,

Kirsten Nelsen

Paralegal | Freedom Foundation

knelsen@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

NOTICE: This e-mail (including attachments) is confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply to the sender that you have received the message in error, then permanently delete it.

No. 92912-2

SUPREME COURT OF THE STATE OF WASHINGTON

MIRANDA THORPE, an Individual Provider of Washington,
Appellant,

v.

JAY INSLEE, in his official capacity as Governor of Washington,
Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES
("DSHS"),
Respondent,

and

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE 775NW ("SEIU 775"),
Respondent.

APPENDIX TO APPELLANT MIRANDA THORPE'S
OPENING BRIEF

Attorneys for Appellant Miranda Thorpe

David M. S. Dewhirst, WSBA #48229
Greg Overstreet, WSBA #26682
Stephanie D. Olson, WSBA # 50100
James G. Abernathy, WSBA #48801
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
DDewhirst@myfreedomfoundation.com
GOverstreet@myfreedomfoundation.com

| APPENDIX PAGE NUMBER | DESCRIPTION |
|--|-------------|
| Declaration of Adam Glickman Filed with Thurston County Superior Court on November 3, 2015 | |

RESPECTFULLY SUBMITTED this 27th day of June, 2016:

FREEDOM FOUNDATION



DAVID M. S. DEWHIRST, WSBA #48229
PO Box 552, Olympia, WA 98507
PH: 360.956.3482
DDewhirst@myfreedomfoundation.com

Expedite
 No hearing set
 Hearing is set
 Date: November 6, 2015
 Time: 9:00 a.m.
 Judge/Calendar: Mary Wilson

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF THURSTON

MIRANDA THORPE, an Individual
 Provider of Washington,

No. 15-2-01909-8

Plaintiff,

**DECLARATION OF ADAM
GLICKMAN**

v.

GOVERNOR JAY INSLEE, in His Official
 Capacity as Governor of the State of
 Washington; WASHINGTON
 DEPARTMENT OF SOCIAL AND
 HEALTH SERVICES ("DSHS"), SERVICE
 EMPLOYEES INTERNATIONAL UNION
 HEALTHCARE 775NW ("SEIU 775"), a
 labor organization,

Defendants.

I, Adam Glickman, declare as follows based on personal knowledge:

1. I am the Secretary-Treasurer and Director of Public Affairs at SEIU 775
 ("SEIU 775" or "Union"). I have been working with Washington state home care workers
 since 2001, when I was hired by the Service Employees International Union ("SEIU") to
 help run a legislative and ballot measure campaign to establish the Washington State Home
 Care Quality Authority. I remained on SEIU's staff until 2004 when I joined the staff of the

DECLARATION OF ADAM GLICKMAN - 1
 CASE NO. 15-2-01909-8

LAW OFFICES OF
 SCHWORN CAMPBELL
 BARNARD IGLITZIN & LAVITT, LLP
 18 WEST MERCER STREET SUITE 400
 SEATTLE, WASHINGTON 98119-3971
 (206) 285-2828

1 newly formed SEIU 775. I served as the elected Vice President of the Union from 2007
2 through July 2012.

3 2. As the Secretary-Treasurer, I am an elected, constitutional officer of the
4 Union. Some of my primary duties are maintaining the books and records of the Union,
5 including membership data, ensuring an accurate record of all dues payments and other
6 revenue, overseeing our annual audit reports and monthly financial reports.

7 3. As Director of Public Affairs, my work includes directing the Union's
8 political and lobbying activities.

9 4. On November 6, 2001, the People of Washington approved the Washington
10 In-Home Care Services Initiative, Initiative Measure 775 ("Initiative 775"). Initiative 775
11 established a single statewide IP bargaining unit that now bargains directly with the
12 Governor through the Office of Financial Management.

13 5. In August 2002 the IP bargaining unit voted 84% for union representation.
14 The first IP collective bargaining agreement ("CBA") between SEIU 775 and the State was
15 signed in January 2003.

16 6. Prior to the U.S. Supreme Court's decision in *Harris v. Quinn*, IPs who did
17 not wish to be Union members had three choices. They could (1) pay an agency fee that was
18 the equivalent of full monthly membership dues but decline membership; (2) object to paying
19 the full agency fee equivalent of dues and instead pay the reduced Hudson agency fee
20 objector rate; or (3) object to paying an agency fee on religious grounds and pay the
21 equivalent of full member dues to a charity of his or her choice. On June 30, 2014, the
22 Supreme Court decided *Harris v. Quinn*. The next day, SEIU 775 asked the State to cease
23
24
25

1 paycheck deductions for the 0.5% of the IP bargaining unit who had previously declined
2 membership or objected to paying full Union dues.

3 7. Because the applicability of *Harris* to IPs in Washington was (and remains) an
4 open question, on September 26, 2014, the State and SEIU 775 entered into a Memorandum
5 of Understanding (“MOU”) that modified article 4 of the operative 2013-2015 CBA and a
6 Tentative Agreement (“TA”) with respect to article 4 for the 2015-2017 CBA. Both the
7 MOU and the TA, which ultimately became what is now the current CBA, maintained the
8 State’s obligation to deduct dues from IP paychecks. The new CBA between the State and
9 SEIU 775 took effect on July 1, 2015, and includes the language set forth in the TA.

11 8. Since June 30, 2014, the State and SEIU 775 have promptly ceased dues
12 deductions for any IP who declines membership or raises an objection to financially
13 supporting the Union.

14 9. SEIU 775 represents approximately 34,000 Individual Providers. Many
15 bargaining unit members have chosen to sign membership cards authorizing their employer
16 to deduct union dues from their wages and remit those amounts to the Union. The
17 membership card is irrevocable “for a period of one year from the date of execution and from
18 year to year thereafter” unless the employee who signed the card notifies the Union and his
19 or her employer in writing of their desire to revoke this authorization within the time period
20 specified in the authorization card. A true and correct copy of the current membership card
21 that is provided to IPs upon hire is attached hereto as **Exhibit A**.

22 10. When the Union is notified that a new home care worker has been hired, SEIU
23 775 sends the worker a notice informing the worker of his or her right to choose not to join or
24
25

1 financially support the Union. Upon notice of her hire by the State, the Union sent Miranda
2 Thorpe a notice of her right to opt-out of Union dues on May 27, 2015. A true and correct
3 copy of that notice is attached hereto as **Exhibit B**.

4 11. Ms. Thorpe did not opt out upon receiving notice of her right to do so. At
5 10:40 a.m. on Monday, October 12, 2015, SEIU 775 was served with the Complaint and a
6 Motion for Preliminary Injunction in this case. On October 13, 2015, I notified DSHS that it
7 should immediately stop deducting fees from Ms. Thorpe's individual provider payments.
8 Attached hereto as **Exhibit C** is a true and correct copy of that request. On October 13,
9 2015, I was informed by DSHS that Ms. Thorpe's provider status had been updated.
10 Consistent with the CBA, no further dues deductions will be made from payments made to
11 Ms. Thorpe absent her express authorization.
12

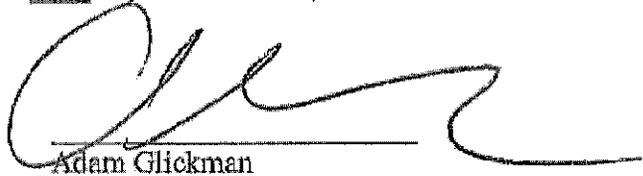
13 12. Pursuant to RCW 41.56.113(1)(b), and Article 4.1 of the collective bargaining
14 agreement between SEIU 775 and the State of Washington, SEIU 775 receives union dues
15 from a percentage of Individual Providers who have not signed union membership cards. If a
16 preliminary injunction were issued enjoining the Washington State Department of Social and
17 Health Services from deducting union dues from all Individual Providers who have not
18 signed membership cards affirmatively consenting to such deductions, SEIU 775 would
19 suffer significant financial harm, which I estimate to be approximately \$200,000 per month.
20

21 13. Since October 2008, under the SEIU 775 Constitution and Bylaws, an
22 individual provider who has not signed a membership application and has not opted out of
23 membership is treated as a member in good standing of SEIU 775 as long as he or she pays
24 dues. As members in good standing, these individuals enjoy all of the rights and privileges of
25

1 membership, including the right to run for office, to vote in officer elections, to vote on
2 amendments to the constitution and bylaws, to vote to ratify or reject the proposed collective
3 bargaining agreement and determine the dues rate of the Union. If the Court orders the
4 cessation of deductions for members who have not signed membership cards, these
5 individuals will be harmed because they will lose all of the rights and privileges of
6 membership unless and until they resume paying monthly dues.

7
8 I declare under penalty of perjury that the foregoing is true and correct to the best of
9 my knowledge.

10 Signed in Seattle, Washington, this 3 day of November, 2015.

11
12 
13 Adam Glickman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on November 4, 2015, I caused the foregoing Declaration of Adam Glickman to be filed with the Clerk of the Court, and caused a true and correct copy of the same to be sent via electronic mail, per agreement of counsel, to the following:

David Dewhirst
James G. Abernathy
Freedom Foundation
PO Box 552
Olympia, WA 98507
ddewhirst@myfreedomfoundation.com
jabernathy@myfreedomfoundation.com

Shane Esquibel
Susan Sackett Danpullo
Office of Attorney General
1125 Washington Street SE
Olympia, WA 98501
SusanDI@atg.wa.gov
ShaneE@atg.wa.gov

SIGNED this 4th day of November, 2015 at Seattle, WA.



Jennifer Woodward
Paralegal

Exhibit A



We're Stronger Together

Join together for a stronger voice for living wages, good benefits and quality care

App. 008

1 Yes, I want to join with other long-term care workers for a stronger voice for quality care, living wages and good benefits.

| | | | |
|----------------------|--------------|--|----|
| FIRST NAME/LAST NAME | GENDER (M/F) | EMPLOYER | |
| E-MAIL ADDRESS | | CELL PHONE <input type="checkbox"/> It's OK to send text messages (Std data/msg rates may apply) | |
| PHONE (DAY) | PHONE (EVE) | BIRTHDATE | |
| HOME ADDRESS | CITY | STATE/ZIP | |
| SOCIAL SECURITY# | HIRE DATE | REGISTERED VOTER | LD |

I want to join with other long-term care workers for a stronger voice for quality care, living wages and good benefits. I hereby request and accept membership in SEIU 775. I authorize 775 to act as my exclusive representative in collective bargaining over wages, hours and other terms and conditions of employment with my employer(s). I authorize my employer(s) to deduct from my wages all Union dues and other fees or assessments as shall be certified by 775 under its Constitution and Bylaws and to remit those amounts to 775. This authorization is irrevocable for a period of one year from the date of execution and from year to year thereafter unless not less than thirty (30) and not more than forty-five (45) days prior to the annual anniversary date of this authorization or the termination of the contract between my employer and the Union, whichever occurs first, I notify the Union and my employer in writing, with my valid signature, of my desire to revoke this authorization. I am authorized to use this authorization with my current employer(s) and with any other employer(s) in the event I change employers or obtain additional employment.

I believe all workers represented by the Union should pay their fair share to support the Union's activities. In addition, in order to build a more powerful Union, and in exchange for obtaining the rights and privileges of becoming a member of SEIU 775, I hereby knowingly release both SEIU 775 and the State of Washington from any future legal claims or liability related to the State's past collection of agency fees from me pursuant to CBA Sec. 4.1 and/or RCW 41.56.113.

Contributions or gifts to 775NW are not tax deductible as charitable contributions for Federal income tax purposes. However, they may be tax deductible under other provisions of the Internal Revenue Code.

The invalidity or unenforceability of any particular provision hereof shall not affect the other provisions, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted. My signature shows that I agree with the terms above.

| | |
|-----------|------|
| | |
| SIGNATURE | DATE |

2 Hold Politicians Accountable to Working Families

Yes! I want to hold politicians accountable to working families and I know we can only do that if we stand together. I hereby authorize my employer to withhold the indicated amount per month to forward to SEIU 775 as a contribution to SEIU Committee on Political Education (SEIU COPE). My signature shows that I agree with the terms below.

\$20 \$15 \$10

| | |
|----------------------------|----------|
| | |
| SIGNATURE | DATE |
| | |
| PRINT FIRST NAME/LAST NAME | EMPLOYER |

I understand that: 1) No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for contributing or not contributing to a political committee, or supporting or opposing a candidate, ballot measure or political party; 2) Contributions are not required as a condition of employment or union membership and I may refuse to contribute without any penalty; 3) The amount of \$20, \$15 or \$10 per month are merely suggested guidelines, and I am free to contribute more or less than those amounts by some other means; 4) SEIU COPE will use the money I contribute to make political expenditures including addressing issues important to working families and contributing to and spending money in connection with federal, state, and local elections; 5) Only union members and staff who are U.S. citizens or lawful permanent residents are eligible to contribute to SEIU COPE. Contributions to SEIU COPE are not deductible as charitable contributions for federal income tax purposes. This authorization shall remain in effect until revoked by me in writing.

3 Yes! I want to get active in my union!

Yes! I want to join the fight to ill caregivers out of poverty and volunteer my time to MY UNION!

LANGUAGE PREFERENCE:
 ENG SPA RUS WIE
 KOR Other: _____

BT PPT HV CE PCPU
 NEO MCOI Name _____ 0003

Exhibit B



David Rolf / President
Adam Glickman / Secretary-Treasurer
Sterling Harders / Vice President

App. 010

[Date]

Dear [First Name],

Welcome to SEIU 775 and to your new job as a union-represented Individual Provider. Our Union represents 43,000 caregivers who are dedicated to improving the lives of all long-term care workers and our clients.

Over and over again, we have proven that we are stronger together—winning wage increases, healthcare and paid time off, stopping cuts to our critical programs, and standing up for our clients.

Please sign an SEIU 775 membership card today by mailing back the enclosed membership application form.

When we founded our Union in 2001, we were literally invisible. We didn't have health, dental and vision insurance. We didn't have workers' compensation. We didn't have paid time off. We only made minimum wage. We didn't have a voice in Olympia.

Our Union has changed this for tens of thousands of home care workers across the state. That's what our Union is all about—standing up for caregivers and winning when no one thought we could!

How our union benefits caregivers and clients:

- ♥ We won the best home care contract in the country;
- ♥ Our starting pay is \$11/hour and a wage scale of up to \$15/hour;
- ♥ We won annual training that improves our skills, enables us to provide even higher quality care for our clients and gives us a path for career advancement;
- ♥ We won affordable healthcare, dental care and vision coverage;
- ♥ We won paid time off;
- ♥ We won L&I coverage for all homecare workers; and
- ♥ We won a new and improved process for clients to appeal to win back hours.

But our work has just begun. We need to have a strong voice in advocacy until long-term care workers earn the wages and benefits we need and until the people we care for get the quality care they deserve. To do that, we need your help. Politicians and managers only listen when we are united together, raising our voices to hold them accountable and to demand change. There are two ways you can help today:

- ♥ **Sign a Membership Card.** Long-term care workers have a stronger voice if we are united together. By signing a SEIU 775 membership card, you state your commitment to thousands of your fellow caregivers who want not only to be treated fairly, but want to advocate for the people they care for. Each member who signs a card makes us stronger and more effective in bargaining and in the Legislature as we fight for dignity for our clients and respect for the critical work we do. Enclosed is a membership form for you to fill out, sign and return to SEIU 775.

- ♥ **Register to Vote.** Politicians decide how much funding to provide to home care and programs for the elderly and people with disabilities. We can help hold politicians accountable if we register to vote. Please send your voter registration form to the Secretary of State's office.

Membership in SEIU 775 is valuable. Only members have the right to participate fully in the internal affairs of the Union, vote for Union officers, run for Union office, be involved in collective bargaining and vote to reject or ratify the collective bargaining agreement for your bargaining unit. Only members are entitled to receive the union member-only benefits package at www.seiu.org/a/members/benefits.php. You are not required to sign a membership card. To be a member in good standing, you need only meet the financial obligations established by the Union's Constitution and Bylaws for membership.

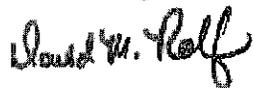
In light of the legal uncertainty created by the United States Supreme Court's June 30, 2014, decision in *Harris v. Quinn*, the Union is not at this time requiring that you provide any financial support for the Union. If you do not wish to provide financial support to the Union, please inform us by sending a letter with your name, address, and telephone number and stating that you do not wish to financially support the Union. You may use the enclosed postage prepaid return envelope to do so, or you may use your own envelope addressed to: Secretary-Treasurer, SEIU 775, 215 Columbia Street, Seattle, WA 98104. If you tell us you don't want to support the Union financially, you will not be charged any Union dues or fees, but you will lose your membership in the Union. Losing membership means you will lose all rights to vote for your employment contract, for or against dues increases, and in Union officer elections. A very small fraction of caregivers have chosen to give up their rights and withdraw from membership. If you do not respond to this notice, we will take it to mean you wish to provide financial support to the Union and will be charged through a payroll deduction.

In order to assist you in making the decision whether to financially support the Union, enclosed is a copy of the Union's most recent fee notice and supporting materials that disclose the nature of the Union's activities. To support these Union activities, you need not take any action. If you do not wish to support these Union activities, all you need to do is send the Union the letter described in the preceding paragraph. Whatever you decide, the Union will continue to represent you fairly, as your collective bargaining agent.

If you have questions about SEIU 775, or want to know how you can help build a strong voice for long-term care workers, call our Member Resource Center toll-free at (866) 371-3200, send us an email at mrc@seiu775.org. MRC representatives speak English, Russian, Spanish, Korean, and Vietnamese are available 8 am to 6 pm PST. Translation is also available in other languages. If you call, give the representative your Member ID number: [Member ID]. Or visit our website at www.seiu775.org. You can also like us on Facebook at www.facebook.com/775nw.

Welcome to SEIU 775. Together, we're stronger for ourselves, for our families and communities, and for the people for whom we provide care.

In solidarity,



David Rolf, President

Exhibit C

From: Adam Glickman [<mailto:Adam.Glickman@seiu775.org>]
Sent: Tuesday, October 13, 2015 12:31 PM
To: Lutz, Diane (OFM)
Subject: Provider Number 053157

Diane:

Yesterday we were served the attached lawsuit brought by an individual provider with the Provider Number 053157. The Union is requesting that the State no longer collect fees from this individual and that you withhold any such fees that you might have already collected, but not yet have transmitted to the Union, from the next payment you make to the Union. We will also communicate this request through the normal payroll channels. Please let me know if you have any questions. Thanks.

Adam Glickman
Secretary-Treasurer

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, June 27, 2016 4:46 PM
To: 'Kirsten Nelsen'
Subject: RE: Case No. 92912-2: Appellant Miranda Thorpe's Opening Brief and Appendix

Received 6/27/3016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kirsten Nelsen [mailto:KNelsen@myfreedomfoundation.com]
Sent: Monday, June 27, 2016 4:43 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Case No. 92912-2: Appellant Miranda Thorpe's Opening Brief and Appendix

Good afternoon,

Please find attached for filing today in Case No. 92912-2, Miranda Thorpe v. Jay Inslee, State of Washington, Department of Social and Health Services, and Service Employees International Union Healthcare 775NW, Appellant Miranda Thorpe's Opening Brief and Appendix in Support of Miranda Thorpe's Opening Brief.

Notify me immediately if you are unable to open the attachments.

Best,

Kirsten Nelsen
Paralegal | Freedom Foundation

knelsen@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

NOTICE: This e-mail (including attachments) is confidential and may be legally privileged. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution, or copying of this communication is strictly prohibited. Please reply to the sender that you have received the message in error, then permanently delete it.