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No. 94593-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,  
on behalf of themselves and all persons similarly situated,

Plaintiffs/Respondents/Cross-Petitioners,

v.

GARDA CL NORTHWEST, INC. f/k/a AT SYSTEMS INC.,  
a Washington Corporation,

Defendant/Petitioner/Cross-Respondent.

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**AMICUS CURIAE BRIEF OF KING COUNTY**

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## **I. IDENTITY AND INTEREST OF MOVING PARTY**

King County is a municipality with an estimated population in 2016 of 2,149,970, and is the most populous county in Washington State. The County provides critical local and regional services to millions of people, with a two-year budget of \$11.3 billion, nearly 60 lines of business, and 14,000 employees.

Most of the County's non-exempt employees are represented by labor unions that bargain over the employees' terms and conditions of employment. Because King County provides essential services to the public that often involve unique schedules and demands on its employees and also may require great flexibility, the County and its unions often search for and agree on innovative approaches in the workplace. In addition, the proper interpretation of RCW 49.12.187 has been and is an issue in litigation for the State and its counties, including King County. King County thus has a strong interest in assuring that statutes addressing the bargaining rights of public employees and employers such as RCW 49.12.187 are fully and accurately portrayed and addressed.

## **II. ISSUES ADDRESSED**

In this brief, King County focuses its discussion on the distinct public-employee provision in RCW 49.12.187 and addresses the parties' inaccurate discussion of the public-employee and construction provisions in RCW 49.12.187 as well as the distinct adoption, different wording, and unique legislative history of the two provisions.

### III. ARGUMENT

RCW 49.12.187 states (bracketed labels added):

This chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment.

[construction provision]

However, rules adopted under this chapter regarding appropriate rest and meal periods as applied to employees in the construction trades may be superseded by a collective bargaining agreement negotiated under the national labor relations act, 29 U.S.C. Sec. 151 et seq., if the terms of the collective bargaining agreement covering such employees specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods.

[public employee provision]

Employees of public employers may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.

To date, this Court has not addressed the meaning or interpretation of the construction or public-employee provisions.

**A. Both parties inaccurately describe the construction and public-employee provisions in RCW 49.12. 187 as being the same or a single exemption**

In the Supplemental Brief of Petitioner/Cross Respondent Garda CL Northwest, Inc. f/k/a AT SYSTEMS, INC. (“Garda”), Garda focuses a substantial portion of its argument in relation to willfulness and double damages under RCW 49.52.070 on the distinction between “waiver” and the construction and public-employee provisions in RCW 49.12.187. King County agrees that these concepts are distinct. RCW 49.12.187 addresses whether groups of employees are covered by the rest and meal period rules

in WAC 296-126-092 whereas the issue of waiver addresses whether employees covered by the meal break rules have voluntarily relinquished their right to take meal breaks in writing, orally, or through implication (at least until any waiver is revoked).<sup>1</sup> Unfortunately, Garda's representations regarding RCW 49.12.187 are not accurate. For example:

- Page 11 quotes “specifically vary from or supersede” language from the public-employee provision, but represents that this language applies to both provisions;
- Page 11 uses a singular term (“amendment”) when the two provisions were adopted through separate amendments to RCW 49.12.187;
- Page 11 then discusses the conditions arising from the construction provision, but suggests that they apply to “employees in the public or construction sector;”
- Page 11-12, footnote 31, then discusses the Legislative history of the construction provision and asserts that “this statute was passed to ensure that construction and public employers could use CBAs.”
- Page 12 states that public employees and construction employers can negotiate CBAs that provide for meal periods “different from” WAC 296-126-092.

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<sup>1</sup> Compare *McGinnis v. State*, 152 Wn.2d 639, 644-45 & n.4 (2004) (discussing adoption of the public-employee provision and distinguishing private company cases like *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841 (2002)) with *Brady v. AutoZone Stores, Inc.*, 188 Wn.2d 576, 581-82 (2017) (recognizing the validity of a waiver defense in a private-employee case). Plaintiffs erroneously state that “[t]he only authority that meal breaks can ever be waived is” DLI Admin. Policy ES.C.6, ignoring the waiver holdings of this and other courts. *E.g.*, *Brady*, 188 Wn.2d at 581.

Similarly, the representations regarding RCW 49.12.187 in the Plaintiffs’/Cross-Petitioners’ Supplemental Brief (“Plaintiffs”) are not accurate. For example:

- Page 7 repeatedly references “an exception” in RCW 49.12.187 even though there are distinct public-employee and construction provisions dealing with the threshold question of whether WAC 296-126-092 covers (or applies to) certain groups of employees;
- Page 7 inaccurately represents that both provisions were adopted in response to the *Wingert* decision;
- Page 8 treats the public employee and construction provisions as one, and then applies the “vary or supersede” language to construction even though that language is used solely in the public employee section.

Neither party explains why they have attempted to conflate the construction and public employee provisions and have failed to discuss their distinct language or origin. Regardless, a careful review of the language and legislative history makes clear that the two provisions need to be considered and treated distinctly.

**B. The construction and public-employee provisions in RCW 49.12.187 were adopted independently through distinct legislative enactments**

Although the parties suggest that the Legislature adopted a single “exemption” in 2003, that is not the case. Instead, as the Reviser’s note to RCW 49.12.187 explains:

This section was amended by 2003 c 146 § 1 and by 2003 c 401 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

RCW 49.12.187 Notes. In order to incorporate both amendments pursuant to RCW 1.12.025(2), the statute law committee had to determine that the amendments were made without any reference to each other, but did not conflict in purpose or effect.

**C. The unique wording in RCW 49.12.187 demonstrates that the construction and public-employee provisions are distinct**

The construction and public-employee provisions in RCW 49.12.187 are placed in separate paragraphs and contain different language. The wording and requirements are clearly distinct.

The public-employee provision allows public employees to enter into collective bargaining agreements and other mutually agreed to employment agreements “that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding rest and meal periods.” As used here, vary appears to mean “to change in a specific way” and supersede appears to mean “to replace.” Because meal periods can be changed or replaced, there is no requirement that a CBA provide for any rest or meal periods, state an intention to supersede the regulation, or use any specific language as long as it specifically varies or supersedes.

In contrast, the construction provision uses different, more onerous language requiring a CBA negotiated under federal law to “specifically require rest and meal periods and prescribe requirements concerning those

rest and meal periods.” Notably, the requirement to “require” and “prescribe requirements concerning” meal periods is not imposed on public employees, thus providing public employees and employers with greater flexibility to bargain for agreements that specifically vary from or supersede WAC 296-126-092.

As this Court has frequently recognized, it would be improper to apply specific language requirements (as used for construction employees) to public employees when RCW 49.12.187 does not impose them for public employees. *E.g.*, *Cerrillo v. Esparza*, 158 Wn.2d 194, 200-04 (2006).

**D. The legislative histories for the construction and public-employee provisions demonstrate the provisions are unique**

The parties’ Supplemental Briefs set forth the legislative history for the construction provision, but have no discussion of the legislative history for the public-employee provision.

The statutory language used for the public-employee provision is best understood in the context of the historical practices and major event that lead to that amendment of RCW 49.12.187. As explained in the House Bill Report for SSB 6054 at 4 (April 24, 2003) (“Bill Report”) (available at <http://apps.leg.wa.gov/documents/billdocs/2003-04/Pdf/Bill%20Reports/House/6054-S/HBR.pdf>):

The bill deals with a long-time practice involving state and local institutional employees (e.g., employees at state mental health, developmental disability, and correctional facilities, and at local correctional facilities). State law required these employees to earn overtime for hours worked beyond eight hours in a day, and 40 hours in a week. Because of practical considerations and awkward

staffing configurations, especially at transition times, state and local governments and unions negotiated collective bargaining and union-management agreements that allowed these employees to work “straight eights.” Employees could eat and take breaks during their “straight eight” shifts, but had to be on site and available to respond in case of emergencies.

For many decades before the change in the law, the State and other government entities understood that the rest and meal break requirements in WAC 296-126-092 did not apply to them, they made no attempt to comply with those requirements and, instead, focused on compliance with their bargaining agreements. *Id.* at 3.

In January 2002, state employees filed a class action lawsuit in Pierce County Superior Court claiming that the State’s practice of bargaining for and paying its employees for “straight eight” shifts that did not include any defined rest or meal breaks violated WAC 296-126-092. *McGinnis*, 152 Wn.2d at 641. The parties brought cross-motions for summary judgment on the applicability of WAC 296-126-092 to public employers, and the superior court granted summary judgment in favor of the employees. *Id.* at 641, 646. This created “the risk of an award of retroactive salary and benefits of \$229.4 million to certain state employees.” Bill Report at 4. There were also serious concerns about the potential substantial costs for future compliance. *Id.*

The Legislature then took up the matter, negotiated over versions of the bill, and unanimously adopted legislation that amended RCW 49.12.187 with the public-employee provision. Substitute Senate Bill 6054 (signed, filed, and effective May 20, 2003) (SSB 6054) (available at

<http://apps.leg.wa.gov/documents/billdocs/2003-04/Pdf/Bills/Sessions%20Laws/Senate/6054-S/SL.pdf>). SSB 6054 clarified that the meal and rest period rules in the Industrial Welfare Act (“IWA”), RCW Chapter 49.12, did not apply to public employers in the past, but also expressly applied the IWA to public employers in the future, with the exception created in RCW 49.12.187. *Id.*; *McGinnis*, 152 Wn.2d at 641; Bill Report at 3-5. The legislative history makes clear that the intent behind the amendment to add the public-employee provision in RCW 49.12.187 was to reaffirm that public employees and employers have the “ability to negotiate different terms” and “to seek innovative solutions,” such as the straight-eight shifts at issue in the *McGinnis* case. Bill Report at 4. Thus, the public-employee exemption allowed employees and employers to bargain for different rest and meal break arrangements or an arrangement that did not allow for any designated rest or meal breaks at all.

As the House Report explained, this Court’s decision in *Wingert* created issues for private-sector employers and a different bill would address complications for the private-sector construction industry; however, the public-employee provision adopted in SSB 6054 addressed “the public sector by immunizing public employers and allowing mutual employment agreements to continue to control rest and meal break arrangements.” Bill Report at 4-5.

#### **IV. CONCLUSION**

King County takes no position on the ultimate resolution of the disputes before the Court, but respectfully requests that the Court disregard the parties' inaccurate descriptions of the public-employee and construction provisions included in RCW 49.12.187. Instead, the Court should recognize and carefully consider the distinctions between the public-employee and construction provisions in RCW 49.12.187 before issuing a determination on the parties' dispute.

RESPECTFULLY SUBMITTED this 12th day of January, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Supreme Court for the State of Washington by using the Supreme Court's electronic filing system on January 12, 2018.

I further certify that all participants in the case are registered users and that service will be accomplished by the Supreme Court electronic filing system.

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**January 12, 2018 - 2:48 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94593-4  
**Appellate Court Case Title:** Lawrence Hill, et al. v. Garda CL Northwest, Inc.  
**Superior Court Case Number:** 09-2-07360-1

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