

FILED
SUPREME COURT
STATE OF WASHINGTON
2/26/2018 2:22 PM
BY SUSAN L. CARLSON
CLERK

No. 96990-6

NO. 94955-7

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

NICOLE BEDNARCZYK and CATHERINE SELIN, individually and on
behalf of all others similarly situated,

Appellants/Plaintiffs,

v.

KING COUNTY,

Respondent/Defendant.

APPELLANTS' REPLY BRIEF

Toby J. Marshall, WSBA #32726
TERRELL MARSHALL
LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF
JEFFREY L. NEEDLE
119 First Avenue South, Suite 200
Seattle, Washington 98104
Telephone: (206) 447-1560
Facsimile: (206) 447-1523

Attorneys for Appellants/Plaintiffs

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ARGUMENT.....	2
A. The Supreme Court Has Responsibility for Supervising the Administration of Justice.....	2
B. RCW 2.36.150 Does Not Prohibit Counties from Paying Jurors Minimum Wage for Time Spent Performing Jury Service.....	4
C. Economic Status is a Protected Classification Under the Juror Rights Statute.....	7
D. The Juror Rights Statute Allows a Claim for Disparate Impact Based on Low Economic Status.....	8
E. Unlawful Exclusion is a Violation of the Juror Rights Statute Despite an “Opportunity to be Considered” for Jury Service.....	11
F. The Juror Rights Statute Creates an Implied Cause of Action.....	15
G. Jurors Are Employees of the County Where They Serve and Entitled to Minimum Wage.....	16
1. Jurors are within the MWA’s definition of “employee”.....	16
2. King County relies on inapposite non-Washington cases.....	19
3. Policy considerations favor paying minimum wage.....	20
H. Plaintiffs can assert their claims under the UDJA.....	21
1. Plaintiffs have standing.....	21
2. Plaintiffs have demonstrated a justiciable controversy.....	23
III. CONCLUSION.....	25

TABLE OF AUTHORITIES

WASHINGTON CASES

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851,
281 P.3d 289 (2012).....17-19

ATU Leg. Council of Wash. v. State, 145 Wn.2d 544, 40 P.3d 656
(2002).....6

Becerra v. Expert Janitorial, LLC, 181 Wn.2d 186, 332 P.3d 415
(2014).....17

Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 507 (1990).....16

Blondheim v. State, 84 Wn.2d 874, 529 P.2d 1096 (1975).....22

Bolin v. Kitsap County, 114 Wn.2d 70, 785 P.2d 805 (1990).....passim

City of Burlington v. Wash. State Liquor Control Bd., 187 Wn.
App. 853, 351 P.3d 875 (2015).....23

Coble v. Hollister, 57 Wn. App. 304, 788 P.2d 3 (1990).....5

Doty v. Town of South Prairie, 155 Wn.2d 527, 120 P.3d 941 (2005).....6

Fahn v. Cowlitz County, 93 Wn.2d 368, 610 P. 2d 857 (1980).....9

Five Corners Family Farmers v. State, 173 Wn.2d 296, 268 P.3d 892
(2011).....21

Grant County Fire Protection Dist. No. 5 v. City of Moses Lake,
150 Wn.2d 791, 83 P.3d 419 (2004).....21

King County v. Central Puget Sound, 142 Wn.2d 543, 14 P.3d 133
(2000).....12

Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014).....9

Lee v. State, 185 Wn.2d 608, 374 P.3d 157 (2016).....23

McGee Guest Home, Inc. v. Dept. of Soc. & Health Servs., 142
Wn.2d 316, 12 P.3d 144 (2000).....5

<i>Overton v. Wash. State Econ. Assistance Auth.</i> , 96 Wn.2d 552, 637 P.2d 652 (1981).....	5
<i>Shannon v. Pay’N Save</i> , 104 Wn.2d 722, 709 P.2d 799 (1985).....	9
<i>Spokane Research & Defense Fund v. Spokane County</i> , 139 Wn. App. 450, 160 P.3d 1096 (2007).....	19
<i>State v. Johnson</i> , 42 Wn. App. 425, 712 P.2d 301 (1985).....	21
<i>State v. Lamping</i> , 25 Wn. 278, 65 P. 537 (1901).....	4
<i>State v. Lazcano</i> , 198 Wn. App. 1016, 2017 WL 1030735 (2017).....	11
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	24
<i>Tyner v. DSHS, Child Protective Serv.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	15

OTHER STATE CASES

<i>North Carolina v. Setzer</i> , 256 S.E.2d 485 (N.C. 1979).....	20
<i>Patierno v. State</i> , 391 So.2d 391 (Fla. Ct. App. 1980).....	21
<i>St. Clair v. Commonwealth</i> , 451 S.W.3d 597 (Ky. 2014).....	21

FEDERAL CASES

<i>Ballard v. United States</i> , 329 US 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946).....	3-4
<i>Brouwer v. Metropolitan Dade County</i> , 139 F.3d 817 (11th Cir. 1998).....	19
<i>Carter v. Jury Commission of Greene County</i> , 396 U.S. 320 (1970).....	24
<i>Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners</i> , 622 F.2d 807 (5th Cir. 1980).....	24
<i>Glasser v. United States</i> , 315 US 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942).....	3

<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966).....	8, 13
<i>Peters v. Kiff</i> , 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).....	3
<i>Powers v. Ohio</i> , 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).....	22
<i>Taylor v. Louisiana</i> , 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).....	3, 13-14
<i>Thiel v. S. Pac. Co.</i> , 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946).....	3-4
<i>Torres-Lopez v. May</i> , 111 F.3d 633 (9th Cir. 1997).....	17
<i>United States v. Cannady</i> , 54 F.3d 544 (9th Cir. 1995).....	13
<i>United States v. Flores-Rivera</i> , 56 F.3d 319 (1st Cir. 1995).....	13

WASHINGTON STATUTES

RCW 2.36.080 (Juror Rights Statute).....	passim
RCW 2.36.140.....	6
RCW 2.36.150.....	passim
RCW 2.36.165.....	19
RCW 2.36.170.....	12
RCW 41.32.010(11)(a)(i).....	5
RCW 49.46 (Washington Minimum Wage Act).....	passim
RCW 49.60 (Washington Law Against Discrimination).....	8, 10-11

SEATTLE STATUTES

SMC 14.19.030.....	6-7
--------------------	-----

FEDERAL STATUTES

29 U.S.C. § 201 (Fair Labor Standards Act).....19-20

COURT RULES

CR 45(a)(4).....18
CR 45(f)(2).....18
RAP 2.5(a).....10
RAP 9.12.....10

ATTORNEY GENERAL OPINIONS

Wash. Att’y Gen. Op. 1957-58 No. 87-A (1957).....6

OTHER SOURCES

Am. Bar Ass’n Formal Ethics Op. 96-402 (1996).....19
Douglas R. Richmond, *Compensating Fact Witnesses: The Price
Is Sometimes Right*, 42 Hofstra L. Rev. 905 (2014).....19
Letter from Assistant Attorney General Trautman to State Senator
Rasmussen (April 2, 1990).....19
Wash. State Bar Ass’n Op. 1908 (2000).....18-19

I. INTRODUCTION

A healthy justice system is central to the vindication of all rights and is deeply rooted in American democratic values. A properly functioning justice system depends upon juries that reflect a fair cross-section of the community. The lack of economic and racial diversity in King County courts is a conspicuous problem and compromises the justice system's vitality. The payment of minimum wages to jurors will ameliorate the lack of jury diversity and revitalize the most fundamental American democratic values.

It is the function of the Washington Supreme Court to supervise the administration of justice. The exercise of this responsibility mandates a decision that eliminates the systemic exclusion of jurors on account of economic status in the Courts of King County.

RCW 2.36.150 requires King County to reimburse jurors for expenses with no less than \$10 nor more than \$25 for each day of service. Since 1959 King County has *chosen* to pay jurors the bare minimum of the statutory requirement, \$10 a day. King County's minimal compliance with RCW 2.36.150 does not excuse its failure to comply with either the Juror Rights Statute, RCW 2.36.080, or the Minimum Wage Act, RCW 49.46.090. Each statutory provision serves a different purpose that can be easily harmonized with the other. The plain language of RCW 2.36.150 limits its reach to the payment of "expenses" and does not foreclose compensation for work performed.

The purpose of the Juror Rights Statute is to prevent the systemic exclusion of jurors on account of race, color, religion, sex, national origin, or economic status. RCW 2.36.080(3). These are protected classifications. The Juror Rights Statute is violated by either disparate treatment or disparate impact in relation to one or more of these classifications. Under a disparate impact theory, even the *unintentional* exclusion of eligible jurors on account of economic status is unlawful. The disparate impact of King County’s neutral practice of failing to compensate jurors for their work is well documented and results in the systemic exclusion of citizens from jury service on account of their economic status. Exclusion on the basis of economic status is factually related to the lack of racial diversity.

In *Bolin v. Kitsap County*, the Supreme Court ruled that jurors are “employees” within the meaning of the Industrial Insurance Act (“IIA”). 114 Wn.2d 70, 75, 785 P.2d 805 (1990). The test for determining whether jurors are employees under the Minimum Wage Act (“MWA”) is more favorable to employees than the test applied in *Bolin*. King County has admitted complete control over nearly every aspect of juror service. Under the economic dependence test, the County’s admissions are sufficient to establish that jurors are “employees” within the meaning of the MWA.

II. ARGUMENT

A. The Supreme Court Has Responsibility for Supervising the Administration of Justice.

The power to mandate compensation for low-income jurors is derived directly from the Court’s supervisory powers over the

administration of justice. The U.S. Supreme Court has held that “exclusion [from jury service] of all those who earn a daily wage cannot be justified by federal or state law.” *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224-45, 66 S. Ct. 984, 90 L. Ed. 1181 (1946). The Court in *Thiel* did not base its holding on a statutory or constitutional provision. As explained in *Ballard v. United States*, 329 US 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946), the Court relied on its supervisory authority over the administration of justice.

In *Ballard*, the Court reversed a criminal conviction because of the systematic exclusion of women from the jury. The Court again relied upon its supervisory authority over the administration of justice:

We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts to correct an error which permeated this proceeding.

Ballard, 329 U.S. at 192-93 (citation omitted); *see also Peters v. Kiff*, 407 U.S. 493, 500 n.1, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972) (“[I]n the exercise of its supervisory power over federal courts, this Court extended the principle to permit any defendant to challenge the arbitrary exclusion from jury service of his own or any other class.”) (citing *Glasser v. United States*, 315 U.S. 60, 83-87, 62 S. Ct. 457, 86 L. Ed. 680 (1942); *Thiel*, *supra*; and *Ballard*, *supra*); *Taylor v. Louisiana*, 419 U.S. 522, 526-27, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (“Both in the course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept

of the jury trial contemplates a jury drawn from a fair cross section of the community.”). The Court in *Ballard* explained that “[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.” 329 U.S. at 196.

Jurors in King County are being systemically excluded on the basis of their economic status. This exclusion directly affects the administration of justice. As in *Thiel* and *Ballard*, this Court has the power and responsibility to fashion a remedy even in the absence of constitutional or statutory authority.

B. RCW 2.36.150 Does Not Prohibit Counties from Paying Jurors Minimum Wages for Time Spent Performing Jury Service.

As Plaintiffs explained in their opening brief, the plain language of RCW 2.36.150 governs only “expense payments” and thus does not prohibit counties from paying minimum wages to jurors for their service. King County nevertheless asserts that the legislature intended to cover something more than expenses because the Supreme Court used the word “compensation” when interpreting an earlier version of RCW 2.36.150. Resp. Br. at 9. King County is wrong.

In *State v. Lamping*, the Court held that jurors were not entitled to receive payments for days on which they were not in “attendance.” 25 Wash. 278, 280-81, 65 P. 537 (1901). The *Lamping* Court likely used the term “compensation” to refer to payments made under RCW 2.36.150

because that was the language of the original statute.¹ But the legislature amended RCW 2.36.150 in 2004 “to clarify” that such payments are “expense payments, rather than compensation” for services performed. Final Bill Report, 2004 Reg. Sess. S.S.B. 6261 (CP 648) (recognizing “[j]uror compensation received by federal employee must be credited against the employee’s pay,” whereas “payments made to reimburse jurors for their out-of-pocket expenses need not be [so] credited”).²

Washington’s appellate courts have rejected the notion that an expense reimbursement is the equivalent of a payment for services performed. *In Coble v. Hollister*, for example, the court considered whether “reimbursement payments” to an employee were “earnable compensation” for purposes of a retirement benefits statute. 57 Wn. App. 304, 307-08, 788 P.2d 3 (1990). The statute at issue defined “[e]arnable compensation” as “[a]ll salaries and wages paid by an employer to an employee ... *for personal services rendered* during a fiscal year.” RCW 41.32.010(11)(a)(i) (emphasis added). Because the payment “constituted ‘reimbursement for authorized travel and other *expenses*,’ not personal services,” the court concluded the payment “cannot be considered earnable compensation.” *Coble*, 57 Wn. App. at 308 (emphasis added).

¹ The Court did not identify the statute, but RCW 2.36.150 was enacted in 1881. *See* <http://apps.leg.wa.gov/rcw/default.aspx?cite=2.36.150>.

² The amendment was “‘curative’ in nature” because it “clarifie[d] or technically corrected an ambiguous statute ... after controversies arose as to the interpretation of the original act.” *McGee Guest Home, Inc. v. Dept. of Soc. & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (citations omitted). The clarification expressed the legislature’s original intent. *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 557, 637 P.2d 652 (1981).

Similarly, in *Doty v. Town of South Prairie*, the Supreme Court considered whether “stipend” payments to volunteer firefighters of “\$6 per call and \$10 per drill” were “wages” for purposes of the IIA. 155 Wn.2d 527, 542, 120 P.3d 941 (2005). The Court held they were *not* wages:

In light of our Minimum Wage Act, chapter 49.46 RCW, it is highly unlikely that our legislature would consider the stipend the Town paid Doty as constituting remuneration for the fire fighting services she performed. Doty received the same small stipend amount regardless of the duration of the call and the extent of the services performed. This is not remuneration for her services, but more reasonably, maintenance and reimbursement for *expenses* incurred in performing her assigned duties, such as reimbursement for travel and food *expenses* a volunteer inevitably incurs in responding to calls.

Id. at 542 (emphasis added).

King County next relies on a 1957 attorney general opinion that concluded grand jurors’ lunches could not be paid from funds appropriated for the expenses of the grand jury. Wash. Att’y Gen. Op. 1957-58 No. 87-A at 1 (1957). Courts give “little deference to attorney general opinions on issues of statutory construction.” *ATU Leg. Council of Wash. v. State*, 145 Wn.2d 544, 554, 40 P.3d 656 (2002).³

³ The attorney general applied the “rule of statutory construction” to two statutes: (1) RCW 2.36.150, which provided that “[e]ach grand and petit juror shall receive for each day’s attendance upon the superior court, beside mileage, five dollars”; and (2) RCW 2.36.140 (since repealed), which provided that “[w]henver the jury are kept together in custody of the officers when the trial is not in progress, they shall be supplied with meals at regular hours” *Id.* at 5-6. The opinion actually supports Plaintiffs’ position because the attorney general recognized that RCW 2.36.150 governs the payment of jury “expenses.” *Id.* at 6. The statutes under review provided both that such expenses must be paid (RCW 2.36.150) and that meals must be also be supplied (RCW 2.36.140). *Id.* at 5. The attorney general refused to allow meal costs to be deducted from per diem amounts otherwise owing to jurors, concluding the county must separately pay for the meals. *See id.* Similarly, because RCW 2.36.150 addresses the payment of “expenses” and RCW

The legislature’s amendment of RCW 2.36.150 in 2006 to increase expense payments for jurors participating in pilot projects also does not support King County. The amendment neither changed the nature of the payments nor prohibited counties from paying minimum wages to jurors.

Finally, King County takes issue with Plaintiffs’ citation of *Bolin v. Kitsap County*. Although the workers’ compensation payments at issue in *Bolin* are paid by the state rather than the county, the Supreme Court unequivocally held that jurors are employees and that they may be entitled to payments beyond those authorized by RCW 2.36.150. King County misses the point in arguing a juror’s eligibility for workers’ compensation “does not mean that the per diem established in RCW 2.36.150 can be increased” Resp. Br. at 11. Plaintiffs are not seeking to increase the per diem—they are seeking payment of an hourly minimum wage *in addition to* the expense payment authorized by the statute.

C. Economic Status is a Protected Classification Under the Juror Rights Statute.

Plaintiffs have always asserted that “economic status” is a protected classification under RCW 2.36.080(3). CP 186.⁴ Plaintiffs

49.46.020 and SMC 14.19.030 address the payment of “minimum wage,” the payments do not overlap and must be made separately.

⁴ King County confuses the protected classification at issue with the class definition that Plaintiffs propose for purposes of CR 23 certification. Resp. Br. at 31. The protected classification at issue under the Juror Rights Statute is “economic status.” The class definition that Plaintiffs have proposed for certification is “low-income individuals who are eligible to perform jury service in the courts of King County and who do not work for an employer that compensates employees for such service.” CP 5. The Juror Rights Statute, and not the language of the complaint, determines the classifications protected under the law. Any objection to Plaintiffs’ proposed class definition is properly made in response to a motion to certify under CR 23.

originally claimed discrimination on account of race under the Washington Law Against Discrimination (“WLAD”), but that claim was dismissed because former Plaintiff Ryan Rocha, who is African American, moved from King County and was no longer eligible to serve on a jury. Thus, the WLAD has no relevance to Plaintiffs’ claims except insofar as the statute recognizes it is not the exclusive source for civil rights. *See* RCW 49.60.020.

To be a protected classification, the designation need not be codified in RCW 49.60. King County offers no principled argument to the contrary. The clear language of RCW 2.36.080(3) evinces a legislative intent to protect jurors on the basis of “economic status.” That classification must be treated the same as any other category designated in the Juror Rights Statute. *See Harper v. Virginia Bd. of Elections*, 383 US 663, 667-68, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (recognizing “economic status” as protected class under Equal Protection Clause).

D. The Juror Rights Statute Allows a Claim for Disparate Impact Based on Low Economic Status.

A key purpose of the Juror Rights Statute is to eliminate the systemic exclusion of jurors on account of the listed protected classifications, including “economic status.” RCW 2.36.080(3). King County argues that the statute is not violated by the systemic exclusion of citizens on account of economic status *unless* the exclusion is intentional and the product of an affirmative act. Resp. Br. at 15. King County is wrong. Claimants establish a prima facie case of disparate impact simply

by showing that a facially neutral policy or practice falls more harshly on them based on a protected classification. *See, e.g., Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 498-99, 325 P.3d 193 (2014) (employees stated claim for disparate impact where they alleged facially neutral meal policy fell more harshly on them based on religion); *Fahn v. Cowlitz County*, 93 Wn.2d 368, 376, 610 P. 2d 857 (1980) (Washington Human Rights Commission may restrict pre-employment inquiries regarding height and weight because they have a disparate impact on women and those of certain national origins). The exclusion need not be intentional. *Shannon v. Pay 'N Save*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985).

King County has a facially neutral practice of failing to compensate jurors beyond the expense payments authorized by RCW 2.36.150. The record before this Court amply demonstrates that King County's neutral practice results in the systemic exclusion of a disproportionate number of low-income jurors. At the administrative level alone, King County excused 5,100 prospective jurors for financial hardship between 2011 and 2016. CP 420. All of these jurors were unable to participate because they could not meet their basic needs while also serving on a jury. CP 416, 418. Thus, they were excluded on account of their economic status.

The email communications from King County judges demonstrate that juror hardship exemptions are significantly impacting the ability of King County courts to properly function. According to former Presiding

Judge Susan Craighead: “[W]e are spending a lot of money bringing in jurors who just cannot sit for more than two days because of their economic situations, yet I can’t remember the last time I presided over a two or three-day trial.” CP 527; *see also* App. Br. at 5-6. This systemic exclusion on the basis of economic status can be avoided only if King County compensates jurors for the time spent performing jury service.

King County challenges whether Plaintiffs have provided sufficient statistical evidence to support a disparate impact claim. Resp. Br. at 37. King County also argues that “there is insufficient evidence that increased jury compensation will improve jury summons-response rates.” *Id.* at 28. These factual issues, however, were never raised by King County in the court below. CP 85-89; *see also* CP 184 (“[T]he subject of whether the failure to pay minimum wages has a disproportionate impact on the basis of economic status is never addressed by the County.”). Accordingly, the trial court made no ruling on these factual issues. CP 675-78. Plaintiffs have no obligation to present evidence on issues of fact that were never raised at summary judgment, and King County is foreclosed from raising such issues on appeal. *See* RAP 2.5(a); RAP 9.12.

King County disingenuously argues that Plaintiffs’ claim should be dismissed because King County courts are not places of public resort or accommodation as required under the WLAD. Resp. Br. at 33. In its answer to the complaint, however, King County “admits that the Superior Courts and District Courts in King County are places of public

accommodation.” CP 43, ¶¶ 1.8, 10.7. Moreover, Plaintiffs no longer allege a violation of the WLAD. RCW 2.36.080(3) prohibits the exclusion of protected classes of jurors without qualification.⁵

King County argues that because RCW 2.36.150 is a law of general applicability, it is not unconstitutional on the grounds of disparate impact. Resp. Br. at 36. Plaintiffs, however, are not challenging the constitutionality or enforcement of RCW 2.36.150. Insofar as the statute is limited to the “reimbursement” of “expenses,” it is not compromised by paying jurors compensation for their work in addition to the reimbursement of expenses. A requirement that King County pay minimum wages to jurors will not relieve King County of its responsibility to pay jurors at least \$10 and no more than \$25 per day in expenses; it will supplement that responsibility. The payment of minimum wages to jurors and full compliance with RCW 2.36.150 do not conflict.

E. Unlawful Exclusion is a Violation of the Juror Rights Statute Despite an “Opportunity to be Considered” for Jury Service.

RCW 2.36.080(1) provides it is the policy of Washington that “all qualified citizens have the opportunity . . . to be considered for jury

⁵ King County relies on an unpublished opinion in support of its position that only intentional discrimination is actionable under the Juror Rights Statute. *See* Resp. Br. at 16 (citing *State v. Lazcano*, 198 Wn. App. 1016, 2017 WL 1030735 (2017)). The Court in *Lazcano*, however, merely held that granting an exemption to a juror based on economic hardship does not violate the Juror Rights Statute. Plaintiffs do not challenge the granting of economic hardship exemptions. Low-income citizens should not be required to sacrifice basic family needs in order to serve on a jury. Plaintiffs challenge the neutral practice of failing to compensate jurors for their time, which causes people of low income to be disproportionately and systemically excluded from jury service on account of their economic status. If jurors were paid minimum wages, basic family needs would be satisfied, King County would grant far fewer economic hardship exemptions, and a greater number of low-income citizens would participate as jurors.

service in this state and have an obligation to serve as jurors when summoned for that purpose.” RCW 2.36.080(3) prohibits exclusion from jury service “on account of race, color, religion, sex, national origin, or economic status.” These two different sections of the statutory scheme must be harmonized. *See King County v. Central Puget Sound*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000) (“Effect should be given to all of the language used, and the provisions must be considered in relation to each other, and harmonized to ensure proper construction.”).

King County has an obligation to do more than simply give citizens “an opportunity to be considered for jury service” as provided in section .080(1). That opportunity must be informed by the prohibition against exclusion from jury service on the basis of the protected classifications listed in section .080(3). Once citizens receive an opportunity to be considered under section .080(1), their exclusion on account of a protected classification is prohibited under section .080(3).

King County argues that prospective jurors make a “choice” to be excused for economic hardship. King County is wrong. A prospective juror can request an economic hardship exemption, but King County makes the “choice” of whether to grant the exemption. If King County denies the requested economic hardship exemption, the citizen is compelled to serve as a juror or she faces criminal sanctions. RCW 2.36.170 (“A person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor.”). By contrast, voting

is voluntary. Unlike jurors, voters are given a choice to vote. Yet a poll tax is unconstitutional despite that choice because it creates an impermissible economic burden on the right to vote. *See Harper, supra*.

Whether the right to participate in jury service is derived from a constitution or a statute is immaterial.⁶ Either way, the right is violated if it is hampered by an undue financial burden on account of a protected classification. Participation on a jury is not voluntary but even if it were, the failure to compensate jurors for their service creates a far greater burden on the statutory right to participate in jury service than does the poll tax on the constitutional right to vote. The result is the systemic exclusion of jurors on account of economic status, which is unaffected by an “opportunity to be considered” for jury service. Moreover, the choice between requesting an economic hardship exemption and jury service is not a meaningful choice and, by definition, not a choice that more affluent citizens are required to make.

In *Taylor v. Louisiana*, the Court considered state statutory and constitutional provisions that provided “a woman should not be selected for jury service unless she had previously filed a written declaration of her

⁶ King County attempts to distinguish the poll tax on the basis that, unlike the right to vote, there is no constitutional right to serve on a jury. Resp. Br. at 38. Both of the cases cited by King County are attempts to invalidate a criminal conviction, and they are entirely silent about whether eligible citizens have a fundamental constitutional right to participate in jury service. *See United States v. Cannady*, 54 F.3d 544, 548 (9th Cir. 1995) (“Potential jurors have no right, pursuant to either the Sixth Amendment or § 1861, to participate in a jury selection plan in the division or district of their choice.”); *United States v. Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995) (holding “English only” eligibility requirement of jury selection system did not violate Fifth or Sixth Amendment rights). Moreover, Plaintiffs are not raising a constitutional right to serve as a juror. They are claiming a statutory right not to be excluded on the basis of “economic status.”

desire to be subject to jury service.” 419 U.S. at 523. The Court found “[t]he Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded *systematic impact* is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service.” *Id.* at 525 (emphasis added). Despite giving women an opportunity to serve, the Court held: “If the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be *systematically excluded* from jury panels from which petit juries are drawn.” *Id.* at 533 (emphasis added).

In Louisiana, women were not disqualified; rather, they were given the choice to *opt in* to jury service. But neither that choice nor the opportunity to serve as jurors prevented a violation of the Sixth Amendment’s fair-cross-section rule because a substantial number of women were being systematically excluded. In King County, low-income citizens are also not disqualified; rather they are given the opportunity to serve and can *opt out* of jury service. But neither the opportunity to serve nor the ability to opt out prevents a violation of the Juror Rights Statute’s fair-cross-section rule, which guarantees “that all persons selected for jury service be selected at random from a fair cross section of the population” RCW 2.36.080(1). The guarantee of the Juror Rights Statute’s fair-cross-section rule is realized by the prohibition against exclusion on account of the protected classifications listed in section

.080(3). As with the Sixth Amendment, the Juror Rights Statute is violated by the systemic exclusion of a substantial number of people on account of economic status. The proper focus is on the systemic exclusion of low-income citizens and not the opportunity to serve.

F. The Juror Rights Statute Creates an Implied Cause of Action.

Although litigants and society generally have an interest in economically and racially diverse juries, that does not prevent Plaintiffs and other prospective jurors from being within the class for whose “especial” benefit the Juror Rights Statute was enacted. Resp. Br. at 13. In *Tyner v. DSHS, Child Protective Serv.*, the plaintiff claimed that RCW 26.44.050, which imposed on DSHS a duty to investigate a report of child abuse, created an implied cause of action in favor of the father who was wrongfully deprived of the custody of his children. 141 Wn.2d 68, 71, 1 P.3d 1148 (2000). The State argued that a parent does not “fall[] within the class for whose ‘especial’ benefit the statute was enacted” because the statute was “solely for the benefit of the children.” *Tyner*, 141 Wn.2d at 78. The Court disagreed, holding that an implied tort remedy for the father was consistent with the underlying statutory purpose of protecting children and the integrity of the family, in addition to providing greater public accountability. *Id.* at 80-81.

The purpose of the Juror Rights Statute is to protect the integrity of the justice system by prohibiting the exclusion of qualified citizens on the basis of listed protected classifications. That purpose is consistent with

recognizing an implied cause of action for jurors even if protecting jurors is not the exclusive purpose. The legislative intent supports creating a remedy. *See Bennett v. Hardy*, 113 Wn.2d 912, 921, 784 P.2d 1258 (1990) (“we may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights”).

Lastly, recognition of an implied cause of action under RCW 2.36.080(3) will not serve to nullify RCW 2.36.150. Resp. Br. at 14. As stated previously, the two statutes are perfectly compatible; the first serves to prevent eligible jurors from being excluded on the basis of protected classifications, and the second serves to assure that jurors are paid for “expenses.” King County can and should continue to pay jurors’ expenses as required by RCW 2.36.150. To prevent the systemic exclusion of jurors on the basis of economic status, however, the Juror Rights Statute requires that jurors *also* be compensated for their services.

G. Jurors Are Employees of the County Where They Serve and Entitled to Minimum Wages.

The Supreme Court has held that “[j]urors are employees of the county” in which they serve. *Bolin v. Kitsap County*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990). King County makes several unavailing arguments in an effort to evade this unequivocal holding.

1. Jurors are within the MWA’s definition of “employee.”

Plaintiffs explained in their opening brief why jurors fall within the MWA’s broad definition of “employee.” RCW 49.46.010(3). *See App. Br.*

at 15. The MWA’s “economic-dependence” test for determining employee status “provides broader coverage than does the right-to-control test” at issue in *Bolin*. See *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012). Consideration of the factors courts typically use when applying the economic-dependence test, see *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 196-97, 332 P.3d 415 (2014), compels the conclusion that jurors are the County’s employees.

King County ignores its many admissions that establish an employee-employer relationship between jurors and the County.⁷ King County says *Anfinson* is inapposite because the Court did not consider exceptions to the MWA’s definition of employee, but the holding in *Bolin* that jurors are “employees of the county” and “involuntary workers” confirms that the “no employer-employee relationship” exception is inapplicable. 114 Wn.2d at 72, 75. And while the issue in *Anfinson* was whether FedEx drivers were employees or independent contractors, the economic-dependence test is not limited to that issue.⁸

⁷ King County claims that it does not supervise jurors’ work but has admitted that it dictates jurors’ schedule and that its jury supervisors or clerks instruct jurors on their roles and duties. CP 258 ¶ 5.24; CP 606-07, No. 1; 259 ¶ 5.26; CP 607-08, No. 3. King County says it does not have authority to hire or fire jurors but has admitted it can and does excuse and dismiss jurors. CP 259 ¶ 5.27; CP 608, No. 4. King County also contends that jury service does not require any special skill and that jurors are not entitled to profit or loss, but those factors support a finding that jurors *are* employees. See *Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997) (farm workers were held to be employees in part because they had no opportunity for profit or loss and were not required to use special skill).

⁸ See, e.g., *Becerra*, 181 Wn.2d at 421-22 (holding the trial court erred by not applying the 13-factor economic-dependence test to determine whether janitors were jointly employed). King County contends that independent contractor status was also at issue in *Becerra*, but the Court was “*not* asked to review the subcontractor’s characterization of the plaintiffs as independent contractors.” *Id.* at 420 n.6 (emphasis added).

King County also misreads the “relevant inquiry” in *Anfinson*, which distinguishes a worker who is “economically dependent upon the alleged employer” from one who is “in business for himself.” 174 Wn.2d at 871 (citation omitted). As the Court explained, “[t]his articulation is particularly helpful because the inclusion of the phrase ‘in business for himself’ clarifies the otherwise-vague term ‘economically-dependent.’” *Id.* Jurors are not in business for themselves when performing jury service. And jurors *are* economically dependent on the County when they perform jury service, as evidenced by the many jurors who are exempted from service due to economic hardship. *See* CP 420, 526-42.

King County argues that requiring the payment of minimum wages to jurors would render RCW 2.36.150 superfluous. But again the expense payments required by RCW 2.36.150 are different from the minimum wage payments required by the MWA. Because both are required by law, jurors are entitled to receive minimum wages *and* expense payments.

Contrary to King County’s argument, requiring King County to pay minimum wages to jurors for their service will not transform subpoenaed witnesses into County employees because jurors play a different role than witnesses in our justice system. The County compels jurors to serve, whereas the parties decide what witnesses to subpoena and when. *See* CR 45(a)(4). Witnesses are generally required to attend only during their testimony, CR 45(f)(2), while jurors must be present for the duration of the trial. And parties can and regularly do pay “the reasonable

value of the witness’s time in connection with testifying.” Wash. State Bar Ass’n Op. 1908 (2000).⁹

Finally, that RCW 2.36.165 requires employers to provide employees with sufficient leave to perform jury duty has no impact on whether King County must pay jurors minimum wages. The purpose of RCW 2.36.165 is to ensure employers neither hinder the availability of employees for jury service nor punish employees for serving as jurors. These concerns are inapplicable to King County as an employer of jurors.¹⁰

2. King County relies on inapposite non-Washington cases.

King County argues that courts outside of Washington have rejected minimum wage claims as to jurors, relying on cases that are distinguishable and ultimately inapposite. In *Brouwer v. Metropolitan Dade County*, the court provided no meaningful analysis to support its determination that jurors are not employees under the Fair Labor

⁹ See also Am. Bar Ass’n Formal Ethics Op. 96-402 (1996) (“As long as it is made clear to the witness that the payment . . . is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony . . . such payments do not violate the Model Rules.”); Douglas R. Richmond, *Compensating Fact Witnesses: The Price Is Sometimes Right*, 42 Hofstra L. Rev. 905 (2014) (“Compensating fact witnesses beyond statutory witness fees and expenses to which they are entitled is now a common practice, and has been for some time.”).

¹⁰ King County relies on a 1990 informal letter opinion written by an assistant attorney general, which must be “accorded little, if any, weight.” *Spokane Research & Defense Fund v. Spokane County*, 139 Wn. App. 450, 459, 160 P.3d 1096 (2007). The author says that “jurors are nowhere expressly covered under the minimum wage statute” and distinguishes *Bolin* on the grounds that the Industrial Insurance Act is “liberally construed” and jurors would otherwise “be without a remedy.” Letter from Gregory J. Trautman to A.L. Rasmussen (Apr. 2, 1990). But the Supreme Court noted in *Bolin* that jurors are not expressly covered by the IIA yet concluded they are employees of the county. 114 Wn.2d at 72. And the MWA is likewise liberally construed. *Anfinson*, 174 Wn.2d at 870.

Standards Act, 29 U.S.C. § 201. 139 F.3d 817, 819 (11th Cir. 1998).

Instead of discussing the factors typically used to determine employee status, the court's cursory opinion merely adopted the district court's superficial conclusion that no employment relationship exists because jurors do not apply, are not interviewed, cannot be fired for poor performance, and do not receive salaries or other employee benefits. *Id.*¹¹

3. Policy considerations favor paying jurors minimum wages.

King County asserts, without evidentiary support, that paying minimum wages to jurors will result in criminal juries that are biased in favor of the State. Resp. Br. at 29. But a juror's interest in receiving minimum wages is neither related to the interest the State is advancing as

¹¹ *North Carolina v. Setzer* was also decided with little analysis because the criminal defendant who was convicted of murder "requested that the jurors and witnesses be paid their weekly wages" but "cite[d] no authority for his position" and "made no attempt to show that any actual prejudice resulted from the denial of [his] motion." 256 S.E.2d 485, 488 (N.C. 1979). The court did not analyze minimum wage law and instead summarily rejected the claim, remarking "that jury duty is not a form of employment, but a responsibility owed by a citizen to the State." *Id.*

In *St. Clair v. Commonwealth*, another defendant convicted of murder "claim[ed] that his rights to due process and to a fair and impartial jury were violated because the jurors were paid less than minimum wage." 451 S.W.3d 597, 622 (Ky. 2014). The court summarily dismissed the claim because there was no showing that the lack of pay directly affected whether the jury was "legally constituted." *Id.* While the court added that no employer-employee relationship between the state and jurors exists, *id.*, the law in Washington differs. *Bolin*, 114 Wn.2d at 75.

Finally, in *Patierno v. State*, the court considered whether "an employer's refusal to pay an employee's salary while the employee serves as a juror furnish[es] a proper basis for holding the employer in contempt." 391 So.2d 391, 392 (Fla. Ct. App. 1980). The trial court found that an employer's refusal to pay its employee's salary during jury service was "tantamount to a 'threat of dismissal'" and thus violated a statute prohibiting retaliation against employees in jury service. *Id.* The appellate court reversed, finding "no evidence" the employer actually threatened the employee. *Id.* The court added: "We sympathize with the plight of jurors ... To receive far less than the federal minimum wage, particularly in an extended trial situation, undoubtedly imposes a severe financial hardship on many jurors." *Id.* Nevertheless, contempt was unwarranted where the employer did not violate a law. *Id.* at 392-93.

a litigant nor affected by the State’s success or failure in prosecuting the case. *See State v. Johnson*, 42 Wn. App. 425, 429-30, 712 P.2d 301 (1985) (“[I]n Washington, state employees are not per se disqualified from serving as jurors in a criminal proceeding.”). Moreover, paying minimum wages to all jurors who are not compensated by their employers for jury service ensures fairness because it will allow jurors of limited economic means to participate. King County’s failure to pay jurors for their service has resulted in juries that lack of economic and racial diversity, which impacts the quality and impartiality of a jury’s decision-making.

H. Plaintiffs can assert their claims under the UDJA.

King County contends that Plaintiffs lack standing to bring their claims and have not established that there is a justiciable controversy under the UDJA. King County is wrong.¹²

1. Plaintiffs have standing.

Plaintiffs are within the zone of interests protected by the statutes at issue. “In ascertaining the zone of interests protected by a statute, it is appropriate to look both to the operation of the statute and to the statute’s general purpose.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 304-05, 268 P.3d 892 (2011) (citations omitted). If a statute is “designed to protect the[] interests” of a particular group, members of that group will satisfy the zone-of-interest element. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004).

¹² Plaintiffs do not assert claims under the Sixth Amendment, so King County’s argument that they lack standing to do so can be disregarded.

The general purpose of the Juror Rights Statute is to protect the interests of jurors. King County does not dispute that Plaintiff Bednarczyk is a prospective juror, as she is on the master list and may be summonsed for jury duty. Resp. Br. at 40. Instead, King County contends that she lacks standing because she has the opportunity to be considered for jury service even if she is excused due to her economic status. But the opportunity for a citizen to be considered for jury service does not insulate King County from violating the Juror Rights Statute.

The purpose of the MWA is to “protect[] the immediate and future health, safety and welfare of the people of this state” by “the establishment of a minimum wage for employees” RCW 49.46.005(1). The statute requires employers to pay employees no less than the minimum wage rate. RCW 49.46.020(1)(a). Plaintiffs are eligible to serve as jurors, King County has summonsed both for jury service, and Ms. Selin served in the fall of 2015. CP 644, 653-656. King County argues that jurors are not employees, but “[t]he question of standing is different [from the merits].” *Blondheim v. State*, 84 Wn.2d 874, 876-77, 529 P.2d 1096 (1975) (citation omitted). And the Supreme Court recognizes that jurors are employees of the county in which they serve. *Bolin*, 114 Wn.2d at 75.

As Plaintiffs explained in their opening brief, they also satisfy the injury-in-fact requirement. If Ms. Bednarczyk is excluded from jury service because of her economic status, she will be denied the ability to participate in the democratic process. *See Powers v. Ohio*, 499 U.S. 400,

407, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). King County argues that Ms. Bednarczyk will not be deprived of the *opportunity* to participate in jury service even if she is excluded because of her economic status, but once again this argument ignores the systemic exclusion that violates the Juror Rights Statute.

King County argues there is no guarantee that Plaintiffs will be called for jury service in the future, but no such guarantee is necessary. “The injury in fact test is not meant to be a demanding requirement,” and it is sufficient to show “that a potential injury is real.” *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 869, 351 P.3d 875 (2015) (addressing standing under nearly identical test in Administrative Procedure Act). King County has already failed to pay minimum wages to Ms. Selin for time she spent performing jury service. *See* CP 653.

2. Plaintiffs have demonstrated a justiciable controversy.

King County argues that Plaintiffs have not demonstrated a justiciable controversy because there is no present dispute. Resp. Br. at 42-43. But Plaintiffs are eligible to serve as jurors, and King County does not pay jurors minimum wages for their time. These facts give rise to a legitimate controversy over whether King County’s failure to pay minimum wages has a disparate impact on the ability of people of low-economic status to participate as jurors and deprives those who do serve of wages. *See Lee v. State*, 185 Wn.2d 608, 616, 374 P.3d 157 (2016) (“The focus is ‘whether the question sought to be adjudicated is appropriate for the court to address.’”) (citation omitted)). The parties’ dispute is not

theoretical. If Plaintiffs are prohibited from pursuing these claims, no prospective juror will be able to do so. There is simply insufficient time to obtain a ruling between the date a summons is received and the date service (or excusal) occurs.¹³

King County argues that a judicial determination would not be final because Plaintiffs did not sue all counties in the state, but it would be final as to the parties to this lawsuit. King County cites no authority for its suggestion that something more is required. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (“[T]he four justiciability factors must ‘coalesce’ to ensure that the court will be rendering a final judgment on an actual dispute *between opposing parties* with a genuine stake in the resolution.” (emphasis added)).

¹³ Two federal cases brought by prospective jurors demonstrate the justiciable nature of Plaintiffs’ claims. In *Carter v. Jury Commission of Greene County*, the plaintiffs were Black citizens who “were fully qualified to serve as jurors and desired to serve, but had never been summoned for jury service.” 396 U.S. 320, 321-22 (1970). They alleged the defendants “had effected a discriminatory exclusion of [Blacks] from grand and petit juries in Greene County.” *Id.* at 322. Black people comprised 65 percent of the county’s population but only 32 percent of the potential jury pool. *Id.* at 327-28. The United States Supreme Court found the plaintiffs had a “cognizable legal interest in nondiscriminatory jury selection.” *Id.* at 329. “Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here.” *Id.* at 330. “Whether jury service is deemed a right, a privilege, or a duty, the [government] may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.” *Id.* The same reasoning applies to Plaintiffs’ claims.

Justiciability was also found to be satisfied in *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners*, where the plaintiffs filed a class action suit to redress “the systematic exclusion or underrepresentation” of Mexican-American, female, young, and low-income citizens. 622 F.2d 807, 812 (5th Cir. 1980). The Fifth Circuit held that the plaintiffs had standing because “the threat of future injury [was] palpable.” *Id.* at 814, 820. The court noted that the plaintiffs alleged a history of unlawful exclusion from jury service and a continuing course of conduct. *Id.* at 821-23. The court concluded that under the circumstances, these allegations were “sufficient to give rise to a strong inference that the injury will be repeated in the future.” *Id.* at 820-21.

III. CONCLUSION

The Court should reverse the trial court's order granting summary judgment and remand the case for further proceedings.

Respectfully submitted this ____ day of February, 2018.

/s/ Jeffrey Needle
Jeffrey L. Needle, WSBA #6346
Law Offices of Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, WA 98104
Telephone: (206) 447-1560
jneedle@wolfenet.com

/s/ Toby Marshall
Toby J. Marshall, WSBA #32726
Terrell Marshall Law Group PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
tmarshall@terrellmarshall.com

LAW OFFICE OF JEFFREY NEEDLE

February 26, 2018 - 2:22 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94955-7
Appellate Court Case Title: Ryan Rocha et al v. King County
Superior Court Case Number: 16-2-10105-0

The following documents have been uploaded:

- 949557_Briefs_20180226141800SC963277_9699.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants Reply Brief - Rocha.pdf

A copy of the uploaded files will be sent to:

- Heidi.Jacobsen-Watts@KingCounty.gov
- Karen.pool-norby@kingcounty.gov
- anita.khandelwal@kingcounty.gov
- janine.joly@kingcounty.gov
- lorinda.youngcourt@kingcounty.gov
- pfvernon@gmail.com
- tmarshall@terrellmarshall.com

Comments:

Sender Name: Jeffrey Needle - Email: jneedle1@wolfenet.com
Address:
705 2ND AVE STE 1050
SEATTLE, WA, 98104-1759
Phone: 206-447-1560

Note: The Filing Id is 20180226141800SC963277