Judge John Ruhl
November 17, 2017
10:00 a.m.

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

S. MICHAEL KUNATH, Plaintiff, v. CITY OF SEATTLE, Defendant.	NO. 17-2-18848-4 SEA KUNATH'S REPLY TO EOI'S RESPONSE RE: CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

At this point, no word other than frivolous accurately describes EOI's case. EOI does not deny that the title of SSB 4313 as it proceeded through the Legislature was "An Act relating to local government." It does not deny that Enrolled Bill signed by Governor Spellman had the same title. It does not deny that the words "entitled "City-County Municipal Corporations ----- Clarification" were added by the Code Reviser when the 1984 Session Laws were prepared after the legislative session ended. Instead, EOI just blithely maintains that the "whole title" of the Bill includes the Code Reviser's heading.

EOI's fundamental premise has been proven wrong, but it won't give an inch. Its assertion that the title of a bill includes the Code Reviser's heading to the Session Law is not well grounded in fact, is not warranted by existing law or a good faith argument for the modification or reversal of existing law, and is interposed for the improper purpose of deceiving the Court. The Court should grant Kunath's Cross Motion for Summary Judgment and impose sanctions pursuant to CR 11.

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II. DISUCSSION

A. The Title of SSB 4313 Is "An Act Relating to Local Government."

Washington courts have left no doubt what constitutes the title of a Bill for Article II, Section 19 purposes, down to the point of specifying exactly where to start and where to stop.

> The title relevant to the article II, section 19 inquiry is the word, phrase, or phrases following 'AN ACT Relating to . . .' and preceding the first semicolon." *State v. Thomas*, 103 Wn.App. 800, 808, 14 P.3d 854 (2000) (citing *Fray v. Spokane County*, 134 Wn.2d 637, 655, 952 P.2d 601 (1998); *Patrice*, 136 Wn.2d at 853, 966 P.2d 1271).

City of Fircrest v. Jensen, 158 Wn.2d 384, 414, 143 P.3d 776(2006)

> The title relevant to the art. II, § 19 inquiry is the word, phrase, or phrases following "AN ACT Relating to ..." and preceding the first semicolon. *See, e.g., Fray*, 134 Wash.2d at 655, 952 P.2d 601; *Patrice*, 136 Wash.2d at 853, 966 P.2d 1271. In other words, for purposes of our inquiry, we look to the narrative description, "AN ACT Relating to insurance fraud[,]" not to the ministerial recital of the sections of the bill. *See Sorenson v. Kittitas Reclamation Dist.*, 70 Wash. 528, 531, 127 P. 102 (1912) (stating "[t]he enumeration of the numbers of the sections in the title of the amendatory act is unnecessary and may be treated as surplusage").

State v. Thomas, 103 Wn.App. 800, 808-09, 14 P.3d 854(Div. 2 2000). Under these authorities, the title of SSB 4313 is limited to "An Act relating to local government."

Article II, Section 19 is short and to the point: "No **bill** shall embrace more than one subject, and that shall be expressed in the title." Section 19 concerns the subject and title of bills, not session laws. EOI admits this fact when it alleges that the words "City-County Municipal Corporations ---- Clarification" are part of the title **of the Bill.** EOI Intervention Complaint at ¶ 38 ("The Senate Bill embodying Chapter 36.65 RCW, Substitute Senate Bill No. 4313, is entitled 'City-County Municipal Corporations ----- Clarification - An Act Relating to local government; and adding a new chapter to Title 36 RCW.'"); EOI Motion at 5 ("Substitute Senate Bill 4313 ('SSB 4313') was entitled 'CITY-COUNTY MUNICIPAL CORPORATIONS ---- CLARIFICATION AN ACT Relating to local government; and adding a new chapter to Title 36 RCW.'"); EOI's Summary Judgment Response and Reply at 5 ("the first half of Substitute Senate Bill 4313's title, which reads 'CITYCOUNTY MUNICIPAL CORPORATIONS ---- CLARIFICATION.'"). EOI keeps saying that "City-County Municipal Corporations ----- Clarification" is part of the Bill's title because it knows that only the title of the Bill itself matters.

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The Session Law, and the Code Reviser's headings for the Session Law, however are not the Bill. The First Edition of Black's Law Dictionary, which was published just two years after the adoption of Washington's Constitution, defines "Bill" as

> A draft of an act presented to the legislature, but not enacted. An act is the appropriate term for it, after it has been acted on by, and passed by, the legislature."

Black, Henry, *A Dictionary of Law*, at "Bill" (1st Ed., 1891) (attached as Exhibit A). The term "bill" is used many times in the Constitution in contexts that confirm this definition. *E.g.* Wash. Const. Art. II, § 20 ("Any bill may originate in either house of the legislature"); Art. II, § 22 ("No bill shall become a law unless on its final passage the vote be taken by yeas and nays . . ."); Art. II, § 32 ("No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses.").

SSB 4313 was a Bill when it was first proposed, when it passed the Senate, when it passed the House, and even when it was presented to the Governor for his signature. The actual form of the document through every step of that process is attached as Exhibits 4-6 of Kunath's Cross Motion for Summary Judgment, and they all bear the same title: "An Act relating to local government; and adding a new chapter to Title 36 RCW." That was the title, and the only title, of SSB 4313 up to the moment when Governor Spellman signed it, and it became an Act. The Code Reviser did not add his heading until after the end of the entire legislative session, and he added that heading to the Act, not to a Bill.

The entire purpose of Article II, Section 19 would be defeated if the title of a Bill could be changed after it was enacted.

> Article 2, section 19 of our state constitution has a dual purpose: (1) to prevent 'logrolling', or **pushing legislation through** by attaching it to other necessary or desirable legislation, and (2) to assure that the members of the legislature and the public are generally aware of what is contained in **proposed new laws**. In *State ex rel. Washington Toll Bridge Authority v. Yelle*, 54 Wash.2d 545, 550--51, 342 P.2d 588, 591 (1959), we quoted language which explains the need for this constitutional provision:
>
> > '. . . there had crept into our system of legislation a practice of engrafting upon measures of great public importance foreign matters for local or selfish purposes, and the members of the legislature were often constrained to vote for such foreign provisions to avoid jeopardizing the main subject or to secure new strength for it, whereas if these provisions had been offered as independent measures they would not have received such support.'
>
> Without the protection created by the constitutional requirement . . . appropriation bills would be peculiarly vulnerable to this legislative evil.

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Flanders v. Morris, 88 Wn.2d 183, 558 P.2d 769(1977). The evils and concerns mentioned by the court only matter before a Bill is enacted.

Without exception, every Washington court to address whether Code Reviser headings are relevant to Article I, Section 19 analysis has emphatically answered with "no."

> Although RCW 7.21.030 is entitled "Remedial sanctions-Payment for losses," this label is devised by the Washington Code Reviser after the passage of the legislative enactment and is therefore of little use in determining legislative intent. While such labels are meant to be helpful, they cannot change the meaning of the statute in question. Only a title or section heading that is part of the legislative enactment itself, as opposed to a caption or label added later by the Code Reviser, may have any legal import in determining the legislative intent.

State v. T.A.W., 144 Wn.App. 22, 186 P.3d 1076(Div. 1 2008)

> Judd correctly notes that the heading "legislative finding," applied to RCW 80.36.510 by the Code Reviser, has no legal effect.

Judd v. American Tel. and Tel. Co., 152 Wn.2d 195, 203, 95 P.3d 337(2004)

> In contrast to captions generated by the Washington State Code Reviser, section headings which are adopted as part of a statute may be referred to as a source of legislative intent. Covell v. City of Seattle, 127 Wash.2d 874, 887-88, 905 P.2d 324 (1995); State v. Lundell, 7 Wash.App. 779, 782 n.1, 503 P.2d 774 (1972).

State v. Chhom, 162 Wn.2d 451, 173 P.3d 234(2007)

> The County incorrectly claims that the title to the bill includes "State Retirement Systems--Technical Amendments to Recodification of Provisions Relating To." *See* Laws of 1992, ch. 72. That caption is apparently inserted as a means of referencing and indexing the session law.

Fray v. Spokane County, 85 Wn.App. 150, 158 n. 10, 931 P.2d 918(Div. 3 1997).

> The City erroneously asserts that the caption, "State Retirement Systems--Technical Amendments to Recodification of Provisions Relating To," is part of the title. This is not the case.

Elford v. City of Battle Ground, 87 Wn.App. 229, 236 n. 3, 941 P.2d 678(Div. 2 1997)

> On appeal, the county took the position that RCW 4.12.020(3) established the court's "jurisdiction", while former RCW 36.01.050 was only a venue statute. To show that RCW 36.01.050 was only a venue statute, the county pointed to its caption in the Revised Code of Washington: "Venue of actions by or against counties". The Supreme Court rejected this argument because "headings are generated by the code reviser, and do not change the meaning of the law unless specifically adopted by the Legislature."

Shoop v. Kittitas County, 108 Wn.App. 388, 393, 30 P.3d 529(Div. 1 2001).

EOI has not presented a single authority of any kind that a Code Reviser's heading to a Session Law is part of the title of the Bill that preceded it. EOI claims, however, that Washington courts "regularly

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look to" Code Reviser headings "to assess compliance with Article II, section 19 of the Constitution." EOI Response at 5. Once again, EOI could not possibly be more wrong.

EOI cites the Supreme Court's decision in *Patrice v. Murphy*, 136 Wn.2d 845, 966 P.2d 1271 (1998) as one of three examples. In *Patrice*, the court considered the constitutionality of subsections (4) and (5) of RCW 2.42.120. Early in that decision, the court said that the "final title" of the act was

> COURT COSTS--COLLECTION AND REMITTANCE
>
> AN ACT Relating to court costs; amending RCW 10.01.160, 27.24.070, 3.46.120, 3.50.100, 3.62.010, 3.62.040, 10.82.070, 35.20.220, 36.18.025, and 2.42.050; adding new sections to chapter 2.42 RCW; providing an effective date; and declaring an emergency.

Id. at 851. The court included the Code Reviser's heading because it cited the Session Laws for the substance of the Bill. *Id.* Later in the opinion when the court analyzed the Bill for compliance with Article II, Section 19, it correctly identified the actual title of the Bill:

> The title of the bill begins merely with these words, "AN ACT Relating to court costs ...," failing to mention anything about the inclusion of provisions relating to qualified ASL interpreters, legal proceedings, police investigations, or arrests.

Id. at 853.

Patrice left the constitutionality of other parts of RCW 2.42.120 unresolved (*Id.* at 855), and the next year, Division One took up a challenge to subsection (3) of the statute in *State v. Harris*, 97 Wn.App. 647, 985 P.2d 417 (1999). Like *Patrice*, the court began by reciting the title with the Code Reviser heading and citing to the Session Laws, but then concluded that "Nothing in the title of chapter 389, "AN ACT Relating to court costs," gave notice to the Legislature or the public that the Act pertained to providing signing interpreters." *Id.* at 655. Like *Patrice*, *Harris* was decided on the actual title of the Bill, not Code Reviser heading.

EOI does identify one case that erroneously treated the Code Reviser's heading as the title, *Washington Citizen Action v. Office of Ins. Com'r*, 94 Wn.App. 64, 971 P.2d 527 (1999), and in candor to the Court, a smattering of such decisions by the Courts of Appeals do exist. These cases appear to be the result of situations where counsel on both sides were mistaken about the actual title because none of those cases acknowledge that they are relying on the Coder Reviser's heading. In any event, a handful of erroneous cases do not change substantive law or overrule the Supreme Court cases cited above.

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The title of SSB 4313 is "An Act relating to local government," and EOI's argument that the title includes the Code Reviser heading is both incorrect and frivolous.

B. <u>RCW 36.65.030 Is Constitutional</u>.

The subject of the Act is the same as the Bill's title: local government. Division One of the Court of Appeals has already held that the subject of a bill with an identical title was "local government." *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wn.App. 165, 181, 936 P.2d 1148 (1997). The title of the Bill in *Mount Spokane* was "'AN ACT Relating to Local Government: amending RCW 35.21.730, 35.21.745 ... 35.21.755... and repealing RCW 35.21.725.'" *Id.* at 181-82. The Bill contained provisions that "amended the public corporations act, which added to the municipal services to new cities and towns," "provided for short-term obligations of municipal corporations," and created an Authority to operate a Ski Park.

The plaintiff was an established ski resort, and it raised arguments that are indistinguishable from those EOI makes here. The *Mount Spokane* decision dealt with both Article II, Section 19 arguments together because they are related.

> Spokane Skiing states the varied subjects in the amendatory act do not deal with local government. Rather, the varied subjects include new cities and towns, along with short-term obligations of municipal corporations. The amendatory act was amended during the course of the legislation and other subjects were added to it that had nothing to do with the title. Accordingly, Spokane Skiing believes this act addressed multiple subjects, and it should be found unconstitutional.

Id. at 182. EOI's complaint that the Act deals with counties and cities as well as city-counties is exactly the same argument that was made in *Mount Spokane*. The *Mount Spokane* court summarily rejected those arguments.

> It is well established that the title of an act need not be an index to the contents, nor express every detail contained therein. *Rourke v. Department of Labor & Indus.*, 41 Wash.2d 310, 312, 249 P.2d 236 (1952). The test of sufficiency is whether the title gives notice of its object so as to lead to a reasonable inquiry of the content. *State v. Lounsbery*, 74 Wash.2d 659, 664, 445 P.2d 1017 (1968). "All that is required is that there be some 'rational unity' between the general subject and the incidental subdivisions. If this nexus can be found, the act will survive the light of constitutional inspection." *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wash.2d 392, 403, 418 P.2d 443 (1966). The Laws of 1985, ch. 332 describe the legislation as relating to local government. While the subdivisions within the act deal with different aspects of the power of local government, all sections relate to the general subject matter of local government as it pertains to cities and towns. Because the contents of the bill are encompassed within the general subject matter of the title, the act does not violate the prohibition against multiple subjects. RCW 35.21.730 is constitutional.

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Id. at 182-83. The Supreme Court denied review of the case. 133 Wn.2d 1021, 948 P.2d 389 (1997).

Mount Spokane is the coup de grâce for EOI's case. The title "An Act relating to local government is general, not restrictive. *Id.* at 182. All of the subjects in SSB 4313 concern local government, which is all that is required. *Id.* ("Because the contents of the bill are encompassed within the general subject matter of the title, the act does not violate the prohibition against multiple subjects.") *Id.* at 182-83.

EOI's obligation was to prove beyond a reasonable doubt that RCW 36.65.030 is unconstitutional. Instead, it has seen its case wither on the vine and blow away. The Court should grant Kunath's Cross Motion for Summary Judgment and dismiss EOI's Complaint.

C. <u>EOI's Remaining Arguments Are Superfluous and Irrelevant</u>.

The Court granted EOI leave to intervene and to file its Complaint in Intervention in the form attached to its motion. That Complaint asserts two causes of action; first, to declare RCW 36.65.030 unconstitutional under Article II, Section 19; and second, "whether the City possesses the legal authority and power under the Washington Constitution, the laws of Washington, and the City Charter, to impose the tax set forth in the Ordinance." Intervention Complaint at ¶¶ 47-48, 52. EOI never sought leave to intervene with respect to other questions such as whether the Ordinance taxes net income, whether the Ordinance is a property tax, or whether the Ordinance is an excise tax. Those arguments are devoid of merit, but the Court should not even entertain them because they are outside the scope of EOI's intervention.

1. The Ordinance Taxes Net Income.

The parties have agreed to the same definition of net income. In its motion, the City cites Webster's Third New International Dictionary for its definition, "the balance of gross income remaining after deducting related costs and expenses [usually] for a given period and losses allocable to the period." City's Motion at 6 (citing Webster's Third New Int'l Dict. (1993)). The plaintiffs agreed to that definition. Kunath Response at 7; Levine/Burke Response at 22. Now EOI cites a Texas Court of Appeals case, *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d 138, 143 (Tx. App. 2015), as its authority. EOI neglects to mention that *Graphic Packaging* expressly defined the term "net income."

> " [N]et income" is the " excess of all revenues and gains for a period over all expenses and losses of the period." *INOVA Diagnostics, Inc. v. Strayhorn*, 166 S.W.3d 394, 401 n.7

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(Tex.App.--Austin 2005, *pet. denied*) (quoting Black's Law Dictionary 1040 (6th ed. 1990)); see also Webster's Third Int'l Dictionary 1519-20 (2002) (defining " net" as " remaining after the deduction of all charges, outlay, or loss" and " net income" as " balance of gross income remaining after deducting related costs and expenses usu[ally] for a given period and losses allocable to that period").

All of the parties are in agreement that the Court should use Webster's definition of "the balance of gross income remaining after deducting related costs and expenses [usually] for a given period and losses allocable to the period."

2. The Legislature Did Not Silently Adopt a 50-Year Old Definition of Net Income.

EOI alternatively claims that when the Legislature enacted RCW 36.65.030 in 1984, it secretly adopted a fifty-year old statutory definition from the Net Income Tax Act of 1935. Its argument is hard to follow but basically goes like this:

1. In 1972, city-counties were created by Amendment 58 to the Washington Constitution.
2. In a 1975 Opinion about city-county income taxes, the attorney general referred to "a graduated net income tax."
3. The Legislature was motivated in party by the 1975 Opinion to enact RCW Chapter 36.65.
4. This history suggests that the Legislature meant "net income" to have the same meaning as "net income" discussed in the Attorney General Opinion that directly prompted the Legislature to enact RCW 36.65.
5. The "Attorney General Opinion discusses 'net income' as the term is used in *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936) to the extent that the Legislature must have intended to adopt the meaning of "net income" from Jensen.
6. The "net income tax" statute in *Jensen v. Henneford* distinguished gross income from net income.
7. Gross income" under the statute "included gains, profits, salaries, wages, and compensation, and excluded insurance payouts, gifts, inheritances, interest from federal obligations, the value of a housing furnished to a minister as part of his compensation, federal salaries and pensions, and stock dividends." "Net income," on the other hand, was "calculated by deducting certain business expenses, interest on debt, taxes, and ten other deductions from "gross income."
8. It therefore follows *ipso facto* that the Legislature intended only to prohibit taxes on net income as defined by the 1935 statute at issue in *Jensen*.

The problems with EOI's theory are legion. The most prominent are probably that the Attorney General Opinion did not discuss "net income" or *Jensen* at all. It mentions "a graduated net income tax" twice, and "net income" not at all. It cites *Jensen* in a string cite of three cases and never mentions the case again. To simplify matters, the Attorney General's entire Opinion is set forth here:

Question (8):

Next you have asked:

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> May a consolidated city-county impose an income tax?
>
> Answer:
>
> This question arises by reason of so much of the final paragraph of Amendment 58 as provides that:
>
> "The authority conferred on the city-county government shall not be restricted by the second sentence of Article 7, section 1, or by Article 8, section 6 of this Constitution."
>
> That sentence in turn, contains the so-called "uniformity" clause which has caused our court, in past, to invalidate various legislative efforts to establish a graduated net income tax in this state. See, Culliton v. Chase, 174 Wash. 363, 25 P.2d 81 (1933); Jensen v. Henneford, 185 Wash. 209, 53 P.2d 607 (1936); and Power, Inc. v. Huntley, 39 Wn.2d 191, 235 P.2d 173 (1951), all holding that income is a form of property for the purposes of our constitutional limitations upon property taxation. With the elimination of this clause of Article VII, § 1 in the case of city-counties formed under Amendment 58, it thus follows that such governmental bodies, in the exercise of their legislative authority, could provide for a city-county graduated net income tax.
>
> In so advising you, however, we should hasten to add that this possibility is far more theoretical than practical. Even though not subject to the uniformity clause of Article VII, § 1, any such tax would be subject to the one percent rate limitation (without voter approval) of Article VII, § 2 (Amendment 55) since this constitutional limitation upon property taxation, unlike the "uniformity" clause has not been rendered inapplicable to charter city-counties by the terms of the provision of the constitution under which they are authorized to be formed.

1975 AGO 2 at 15. EOI's argument does not even rise to the level of nonsense.

D. <u>The Ordinance Levies a Property Tax</u>.

Kunath has responded to the City's arguments on the question whether income is property, and he responds here only to some of EOI's more blatantly false arguments.

1. *Supply Laundry Did Not Approve an Income Tax.*

EOI is equally deceptive in its discussion of *Supply Laundry Co. v. Jenner*, 178 Wn. 72, 78 (1934). EOI claims that in *Supply Laundry*, the Supreme Court upheld a "tax that included a tax on individual income of government employees above a certain threshold as an excise tax." *Id.* EOI further asserts that "these employees are not business owners or shareholders, and their income is not derived from an interest in a business." *Id.* According to EOI, the court "held that the income tax was appropriate because it only taxed employees who made over $200 a month and therefore their income was 'in a general way, certain during the period of the life of the act.'" EOI Response at 9.

That tax in question merely extended the B&O tax to services. *Supply Laundry*, 178 Wash. at 74. The plaintiffs in the case included a laundry corporation, an attorney and an insurance agent. *Id.* at 75. Contrary to EOI's contention that the statute "taxed employees," the statute provided that it did not "apply to persons acting solely in the capacity of employee or servant who received a fixed wage or

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salary or a compensation." *Id. at* 74. It applied to self-employed professionals who beforehand were exempt from the B&O tax.

2. *Cary* Bars an Excise Tax on the Right to Earn a Living.

Lastly, EOI's attempt to distinguish *Cary* is wholly ineffective. EOI points out that the Court said that the City could have imposed its tax "on business owners and those with a say in the business or a share in a business's returns," but it misses the significance of that point. Such a tax would be a B&O tax, which courts have held valid. The Ordinance is not a B&O tax.

EOI likewise is less than honest when it says that *Cary* merely held that the plaintiff "stated a claim that the city lacked the authority to "control the right to work for wages." EOI Response at 11. *Cary* first quoted *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1936) for its statement that "'It needs no argument to demonstrate that the wage-earner is properly excluded and that upon no theory can he be classed with those engaged in business," and then added its own ruling that the Ordinance "is, in effect, a license based upon the assumed power of the municipality to control the right to work for wages. The municipality has no such power and hence no right to levy an excise tax upon such right." *Cary*, 41 Wn.2d at 471. *Cary* and *Stiner* bar any attempt to convert the City of Seattle's income tax into an excise tax.

III. CONCLUSION

EOI treats this case as a game or an occasion to try out clever arguments to see what will fly. Lawsuits are never games, and this action has a particular seriousness to it because of the number of people whose lives will be affected by the outcome. The parties have a shared duty to respect the state Constitution and to present measured and considered arguments. The Court should limit its consideration to the law and should dismiss EOI's Complaint on summary judgment.

Dated this 12th day of November, 2017.

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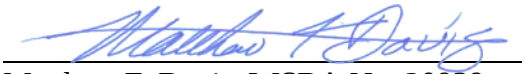

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