

Feb 13, 2017, 3:08 pm

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NO. 94046-1

Court of Appeals No. 47812-9-II

SUPREME COURT OF THE
STATE OF WASHINGTON

DREW OTA, CRAIG GARDNER, et al., Petitioners

v.

PIERCE COUNTY, Respondent

ANSWER TO PETITION FOR REVIEW

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Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT	2
1. The Court of Appeals Decision is not in Conflict with any decision of this Court.	3
2. This Decision is Entirely Consistent with all other Court of Appeals Precedent.	5
3. Federal Law Supports this Decision.	7
4. This Decision does not involve a significant question of law under the Constitution of the State of Washington or the United States.	7
IV. CONCLUSION.....	8

Table of Authorities

	<u>Page</u>
Cases	
<i>Champagne v. Thurston County</i> , 163 Wn.2d, 69, 83, 178 P.3d 936 (2008).....	3
<i>Chelan County Deputy Sheriffs Ass'n v. Chelan County</i> , 109 Wash.2d 282, 301, 745 P.2d 1 (1987).....	3
<i>Davis v. State Department of Transportation</i> , 138 Wash App 811, 159 P.3d 427 (2007).....	5, 6
<i>Lew v. Seattle School Dist.</i> , 47 Wash. App 575, 736 P.2d 690 (1987).....	5, 6, 7
<i>Schlling v. Radio Holdings, Inc.</i> , 136 Wash.2d 152, 161-62, 961 P.2d 371 (1998)	3
<i>Swinford v. Russ Dunmire Oldsmobile, Inc.</i> , 82 Wn. App 401, 918 P.2d 186 (1996).....	6, 7
Statutes	
RCW 49.52	5
RCW 49.52.070	1, 3, 4
Other Authorities	
Section 301 of the Labor Management Act (LMRA) of 1947.....	7
Rules	
29 U.S.C. § 185(a)	7
RAP 13.4 (b).....	2

I. INTRODUCTION

This matter presents no issue of law or equity compelling any further review of this meritless lawsuit.

II. STATEMENT OF THE CASE

This lawsuit was a belated collateral attack on a lawful collective bargaining agreement (hereinafter CBA) executed between Pierce County and its jail employees' labor union. This lawsuit was brought by a purported class of employees, all members of the same labor unions, who sought to circumvent, or set-aside, the wage step increase pay structure set forth in successive CBA's dating back to 2007. Neither the existing Corrections Guild nor any predecessor union joined this lawsuit nor has any of these unions ever alleged any violation of the CBA in relation to the wage step increases.

Plaintiffs argued below that the trial court erred by granting summary judgment because the dispute was not a grievance as defined by the CBA. The court disagreed and ruled that because the claim was in fact a grievance and because Appellants did not exhaust their remedies under the CBA their lawsuit must fail as a matter of law.

This lawsuit is premised upon an independent claim for civil liability, double damages, costs and attorney fees pursuant to the general wage claim statute, RCW 49.52.070. But, there were no wages, statutory or otherwise,

owing to any of the purported class members other than those wages explicitly established under the CBA. The CBA governs these employees' wages and any claim regarding these wages. At least one of these employees belatedly tried to get his union to accept his, and his like-minded plaintiffs', contrarian interpretation of the CBA, but the union did not regard these individual contrarian interpretations as meritorious, and declined to assert a grievance. None of these employees ever initiated any unfair labor practice complaint or lawsuit against the successive unions regarding this refusal to advance their individual claims.

III. ARGUMENT

This Court has determined by its adoption of RAP 13.4 (b) that a petition for review to this Court will only be accepted if:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or

(4) If the Petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals Decision is not in Conflict with any decision of this Court.

The decision of the Court of Appeals is not in conflict, in any degree or under any reading, with any decision of this Court. As below, Petitioners erroneously suggest to this Court that the general state wage claim statute, RCW 49.52.070, is an independent basis to overturn a lawful wage established under a lawful CBA. But, RCW 49.52.070, does not establish an independent cause of action to dispute the amount of an employee's wage, this statute establishes the right to pursue a claim, and receive double damages, costs, and fees, upon a showing of a willful refusal by an employer to pay a lawfully owing wage.

In *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wash.2d 282, 301, 745 P.2d 1 (1987) this Court ruled that nonpayment of wages is willful only when it is the result of knowing and intentional action and not the result of a bona fide dispute. This Court further held in *Schlling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 161-62, 961 P.2d 371 (1998) that a bona fide dispute is any fairly debatable dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. This Court again held in *Champagne v. Thurston County*, 163 Wn.2d, 69, 83, 178 P.3d 936 (2008), where a county deliberately withheld wages during a wage dispute surrounding the interpretation of certain administrative

codes, that RCW 49.52.070's willfulness requirement is not met if there is a bona fide dispute over the amount of the wages. This Court has never held that RCW 49.52.070 bestows an independent statutory means to determine what an otherwise established legal wage ought to be.

In this matter the Court of Appeals declined to embrace Petitioners' argument that RCW 49.52.070 could be utilized as an independent statutory cause of action to set aside a lawful CBA separate from that CBA's grievance procedures. That CBA set forth the wages of all represented employees. The parties to the CBA were Pierce County and the union(s) representing all corrections employees. That CBA bound each of those employees as third party beneficiaries to that CBA and determined their wages. Each and every CBA included a mandatory arbitration grievance process controlling all disputes arising under the CBA.

As conceded below, some independent statutory rights may give rise to legal claims that are not preempted by the CBA mandatory arbitration grievance procedures. Civil rights emanating from state or federal constitutional provisions, or other affirmative state or federal statutory rights that accrue to individuals separately and distinctly from the CBA, might, arguably, not be preempted by the CBA grievance procedures. But, the wages owed to these employees, and the structure of their wage step increases, are entirely established and controlled by the language of the

CBA as agreed to between their employer and their labor union. No independent right nor any independent cause of action exists in relation to any particular wage amount (other than an applicable lawful minimum wage), and this Court has never ruled otherwise.

This Court has never explicitly ruled upon the precise relationship between CBA mandatory arbitration exhaustion requirements and RCW 49.52, *per se*, but all other Court of Appeals precedent is exactly on point and entirely consistent with the ruling in this case.

Petitioners have not cited to this Court in their Petition any Supreme Court precedent in conflict with the decision of the Court of Appeals below.

2. This Decision is Entirely Consistent with all other Court of Appeals Precedent.

The controlling state law is explicitly and entirely set forth in *Lew v. Seattle School Dist.*, 47 Wash. App 575, 736 P.2d 690 (1987) and *Davis v. State Department of Transportation*, 138 Wash App 811, 159 P.3d 427 (2007).

The Court of Appeals in its unpublished decision below, quoting in part directly from *Lew* precedent, ruled that: "where a grievance procedure has not been exhausted due to a union's refusal to press the matter on to arbitration, the courts have generally held that a prerequisite to maintaining a lawsuit against the [the employer] is an allegation that the union acted

arbitrarily, discriminatorily, or in bad faith in failing to exhaust the contractual procedures for settling disputes. " (citing *Lew* at 578).

And the Court of Appeals noted that this prerequisite arises because the union is the agent of the employee and its decision to forego exhaustion of grievance procedures binds the employee and forecloses judicial action” Citing *Lew* at 578; and *Swinford v. Russ Dunmire Oldsmobile, Inc.* 82 Wn. App 401, 918 P.2d 186 (1996).

The court below further stated the indisputable rule that in construing a CBA a court must follow these rules: (1) the intent of the parties control; (2) the intent of the CBA is ascertained from reading the contract as a whole; (3) ambiguity is not to be read into the contract (citing *Davis*, 138 Wn. App 811 at 818).

Applying these rules in construing a CBA the Court of Appeals correctly determined that this wage dispute was governed by the applicable CBA and management's application of the CBA's terms as they related to wages. The Court determined this dispute was unquestionably governed by the mandatory arbitration provision of the CBA. This conclusion led to the Court of Appeals inescapable ruling that because this dispute was a grievance under the CBA, failure to exhaust the grievance procedures precluded judicial action and supported the trial court's summary judgment ruling.

Petitioners have cited to this Court no case law in their Petition other than that case law explicitly considered and applied by the court below and the Court of Appeals decision in this case is entirely consistent with that precedent.

3. Federal Law Supports this Decision.

As the Court of Appeals noted in its unpublished decision below, Section 301 of the Labor Management Act (LMRA) of 1947 (as codified at 29 U.S.C. § 185(a)), grants federal courts jurisdiction over claims arising from CBA's but state courts have concurrent jurisdiction, but even in state courts federal law must be applied to such claims (again citing to *Swinford, supra.*, 82 Wn. App 401 at 408). State courts exercising this concurrent jurisdiction are bound to rule consistent with federal law. Federal labor law requires the exhaustion of grievance procedures before resorting to the courts. (Citing *Swinford, Id.*, and *Lew, supra*, 47 Wash. App 575 at 577.) Federal Law Supports this Decision.

4. This Decision does not involve a significant question of law under the Constitution of the State of Washington or the United States.

Except for liberty to contract precepts embodied in substantive due process law, labor law and labor regulations are not generally considered to present significant questions of constitutional law. Petitioners have asserted no issues either below or in this Petition involving significant questions of

law under the either the federal or state constitutions. This case is a contract case. This is a collective bargaining grievance clause case. As the Court of Appeals so succinctly ruled: "[u]nder the 2007-09 CBA the 'grievance' is defined as 'a management interpretation or application of the provisions of this agreement which adversely affects the employee's...conditions of employment...[t]he grievance and arbitration procedures provided for in the CBA was the 'sole and exclusive method of adjusting all complaints or disputes...and which relate to or concern the employee and the Employer.'" (Citing to Clerks Papers at 332).

IV. CONCLUSION

This Petition should be denied under any reasonable consideration of judicial economy. This lawsuit was without merit to begin with; the Plaintiffs have had their day in court. The decision below is not in conflict with a decision of this Court or other decisions of the Court of Appeals; neither the complaint filed with the trial court nor the decisions issued below raise any significant question of law under the Constitution of the State of Washington or the United States; and, to the extent this Petition

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involves an issue of substantial public interest, that interest has been definitively and correctly resolved.

DATED: February 13, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer to Petition for Review was filed with the clerk of the court and delivered this 13th day of February, 2017, via electronic delivery pursuant to the agreement of parties to:

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