

No. 676130-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE WASHINGTON STATE COMMUNICATION ACCESS PROJECT,

Plaintiff/Respondent,

v.

REGAL CINEMAS, INC., et al.,

Defendants/Appellants

Appeal From the Superior Court for King County
Hon. Regina S. Cahan

BRIEF OF RESPONDENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Going to the movies with friends and family is one of America's favorite nights out. But since the advent of "talkies" in 1927,¹ people with significant hearing loss have been unable to participate fully and equally in that form of entertainment because they cannot understand the dialogue.

For at least the last 15 years, technology to change that situation has existed. Captions converting the dialogue and other aural information to written form are prepared by the studios, put on a computer disc or in a digital file, and furnished at no charge to the theaters. Captions are prepared for the vast majority, albeit not all, of the movies that these defendants show. The theaters must acquire, install and use the equipment needed to display the captions to the entire audience for some showings (open captions), or only to those patrons who request and use individual viewing devices (closed captions). The factor limiting the ability of people with hearing loss to enjoy movies in the past has been the theaters' failure to provide the display equipment, not the absence of captions for movies.

Plaintiff Washington State Communication Access Project (Wash-CAP) is a 501(c)(3) non-profit corporation whose almost 200 members are

¹ The Oscar-nominated silent movie "The Artist" provides contemporary audiences with a glimpse of movie-going during the silent era. That film was the story of an actor who was left behind in the transition to "talkies" because he could not speak. This case is about the audience left behind because we cannot hear.

Washington residents with significant hearing loss. In 2009, when this case was filed, only eight of more than 200 theater auditoriums operated by the Defendants in King County were equipped to show captioned movies, giving Wash-CAP's members and other individuals with significant hearing losses far fewer movie-going options than were available to the general public. Wash-CAP claimed that the theaters could provide much more accessibility by installing captioning equipment at far more of their auditoriums, which Wash-CAP claimed they were required to do by the Washington Law against Discrimination (WLAD).

After denying the allegations in the Complaint, the theaters filed a motion for summary judgment, asking the Court to rule that WLAD does not require any captioning. Wash-CAP filed a cross-motion for partial summary judgment, asking the court to rule that WLAD requires theaters to make the movie soundtracks understandable through captioning to the extent it is reasonably possible for them to do so. The court granted Wash-CAP's motion, denied the theaters' motion and scheduled a trial to ascertain what each defendant theater could reasonably do.

After the court's ruling on the cross-motions but prior to trial, Regal and Cinemark completed their conversion from traditional film to digital projection at their King County theaters. Fully aware that they would have to justify doing less, those theaters equipped enough of their

auditoriums with captioning equipment so that all movies for which captions are available can be shown in captioned form. They then moved to dismiss the entire case as moot.²

Wash-CAP agreed that those theaters' apparent compliance with its requests rendered its claim for injunctive relief moot. But that concession was conditioned upon the court's entry of a declaratory order that captioning is a legal requirement under WLAD and not a voluntary action. Wash-CAP argued that if either defendant ceased providing captions, a declaratory order would enable Wash-CAP or others similarly situated to seek redress without needing to re-litigate the question of whether defendants have any legal obligation to would-be patrons with hearing loss. The court agreed, and denied the motion to dismiss.

AMC continued to fight. It declined to commit to any specific quantum of captioning. It took the position that providing full captioning capability was not reasonably possible, and that some lesser quantum of captioning, in an amount it would unilaterally determine, would be legally sufficient. After considering the stipulated facts, the court ruled that it was reasonably possible for AMC to do as Regal and Cinemark had done, and ordered AMC to install enough equipment within 90 days of digital

² Cinemark was first to provide full captioning, and initially, was the only theater to ask for dismissal on mootness grounds. Regal provided full captioning later, and made a similar dismissal motion at trial.

conversion to display captions for all movies for which captions had been prepared. Rather than comply, AMC sought and received a stay from this Court pending appeal.

This brief is divided into two main sections. The first section deals with the Court's substantive decisions, corresponding to the theaters' Arguments A through G. The second section addresses the Court's ruling that Wash-CAP is the prevailing party in this case, and the award of attorneys' fees, corresponding to the theaters' Arguments H and I. Wash-CAP also seeks fees and costs on appeal pursuant to RAP 18.1.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

For reasons set forth in this brief, Wash-CAP submits that the trial court's ruling was correct, and that it should be affirmed in its entirety.

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The trial court correctly interpreted the WLAD and its implementing regulations as requiring theaters to display captions, which make their movies accessible but do not alter their content.

2. Displaying movie captions is not an "excess" service, but merely a means of delivering the theaters' regular service in a manner that makes the service comparable to that enjoyed by hearing patrons.

3. The WLAD and its implementing regulations as applied are not impermissibly vague because Wash-CAP sought and the trial court ordered a specific and available remedy, and no defendant's due-process rights were infringed because no defendant was held liable for a past failure.

4. Notwithstanding the power of the Human Rights Commission to promulgate rules implementing the WLAD, the trial court had the power to determine the theaters' legal obligations and to order AMC to meet those obligations.

5. The theaters were not entitled to fact-finding on the hypothetical issue of whether their pre-conversion behavior violated the WLAD.

6. The trial court correctly entered a declaratory order even though Regal and Cinemark mooted the claim for injunctive relief by providing captioning display prior to trial.

7. The trial court correctly rejected AMC's belated argument that the claim for injunctive relief was unripe because all relevant facts were known and AMC fully litigated all issues.

8. The trial court correctly ruled that the remedies incorporated into the WLAD permit entry of a declaratory order, and such an order furthers the purposes of the WLAD.

9. The trial court correctly awarded attorneys' fees to Wash-CAP, without a finding of a past violation because (1) the declaratory judgment gives Wash-CAP significant rights against all defendants, irrespective of the statutory basis under which it was entered, and (2) the entry of an injunction entitles Wash-CAP to fees against AMC apart from any questions about declaratory relief.

10. The trial court did not abuse its discretion in the amount of the fee award because (1) the parties stipulated to the lodestar amount; (2) Wash-CAP secured all of the relief it sought, justifying the trial court's refusal to reduce the lodestar, and (3) the highly contingent nature of the case when it was filed and the results obtained justified a fee multiplier.

IV. STATEMENT OF THE CASE.

A. The Trial Court's Statement of Facts Is Accurate, and the Theaters Do Not Assign Error to Any of It.

Defendants have not assigned error to any of the trial court's Findings of Fact, all of which become verities on appeal. Those facts are set out in full in the Final Order of July 22, 2011. CP 1516-27. This statement is a recapitulation of those lower-court Findings.

Wash-CAP filed suit under the WLAD asking Defendants to purchase, install and operate equipment necessary to display captions for those movies for which captions area available, which Wash-CAP claimed

would be a reasonable accommodation for its members. CP 1516. The theaters denied having any legal obligations, and filed a motion for summary judgment to that effect. CP 457-489. Wash-CAP filed a cross-motion for partial summary judgment asking the court to determine that the theaters were obligated under the WLAD to take steps “reasonably possible in the circumstances” to make their soundtracks understandable through caption display. CP 490-519. The trial court granted Wash-CAP’s motion, and stated that trial would be limited to determining what it was “reasonably possible” for each theater defendant to do. CP 635-638.

After the case was filed, Defendant theaters began converting their movie theaters in King County to digital projection from traditional 35 mm film. CP 1520. A number of technologies permit captions to be displayed with digital projection. CP 1520-21. After the court ruled that WLAD requires theaters to take those actions “reasonably possible in the circumstances” to display movie captions, and with knowledge that they would have to justify doing any less, Regal and Cinemark equipped enough auditoriums with captioning equipment so that they could show captions for all movies for which captions are available, CP 1522. They then moved to dismiss the case in its entirety as moot. CP 1517.

Wash-CAP agreed that the claims for injunctive relief were mooted by Regal and Cinemark’s actions, but that concession was

conditioned upon entry of a declaratory order to the effect that theaters do have legal obligations to display captioning. The court did so. CP 1526.

AMC continued to fight. At the time of trial, it had converted some but not all of its King County theaters to digital projection. It stated that it intended to complete digital conversion in King County by the end of 2011. CP 1522. AMC stated that when it did so, it would equip one or two auditoriums at each of its King County multiplexes to show captions. *Id.*

The trial was on stipulated factual submissions. The one-time cost of providing full captioning capability was stipulated to be approximately \$4,500 per auditorium, compared to AMC's net cash flow for 2010 of over \$57,000 per auditorium. The court concluded that AMC had the financial resources to provide complete captioning capability, and that AMC had not refuted that evidence. CP 1525.

AMC argued that it would be unreasonable to require it to provide full captioning capability even though it could afford to do so. CP 1522. It argued that because use of the captioning equipment at Cinemark's theaters had been modest, the benefits to providing full captioning capability would not outweigh the costs, and was therefore unreasonable. CP 1525. The court rejected that argument. It held that because WLAD is a civil-rights law, "the issue is not how many patrons have used the technology provided, but rather, whether an individual with a sensory

disability has the legal right to have access to the movies when technology is now present to allow that access without impeding on other patron's experience and it is feasible for the defendant to provide it." Id.

Tellingly, AMC does not assign as error any of those Findings or Conclusions. Like the other theater defendants, AMC claims that the WLAD cannot be construed as requiring caption display, and that the court should have deferred to administrative rule-making. It claims that the matter was not ripe. But it does not claim that the trial court erred in finding that it can afford to provide caption display, nor does it claim that the court erred in declining to apply a cost-benefit analysis.

The Court determined that because Wash-CAP had obtained a declaratory order "applicable in the future as to all defendants," and had obtained injunctive relief against AMC, it was the prevailing party entitled to attorneys' fees and costs pursuant to RCW 49.60.030(2). CP 1526-27.

Undersigned counsel then submitted a detailed fee application. After some negotiations, the parties stipulated to the lodestar amount – a reasonable number of hours and a reasonable hourly rate – and also stipulated to reasonable costs. CP 1726. The application separated out the time spent on work applicable to all defendants, and the time spent on work attributable to each individual defendant. The trial court entered judgment holding all defendants jointly and severally liable for the fees

arising from work attributable to all defendants, and adjudged each defendant individually liable for the work attributable only to that defendant. CP 1727. The theaters do not assign error to that allocation.

The issue with respect to fees was not and is not the lodestar amount, or the apportionment, but whether the lodestar should have been adjusted up or down. The theaters claimed the lodestar should be reduced for what it argued was a limited degree of success. Wash-CAP asked for and received an enhancement of the lodestar because of the contingent nature of the case at the outset, and because of the exceptional results achieved. The trial court denied the theaters' motion to reduce the lodestar, and granted Wash-CAP's motion in part, awarding a 1.5 contingency multiplier rather than the requested 2.0 multiplier. This appeal followed.

B. The Theaters Could Have Ended this Litigation at Any Time if, as They Now Claim, They Have Always Intended to Provide Full Captioning.

The underlying theme permeating the theaters' brief is that this litigation was unnecessary because the theaters were planning all along to do what Wash-CAP asked, and so informed counsel. This argument is highly misleading in a number of ways.

First, defendants are trying to sweep AMC into that argument despite the fact that AMC to this day continues to resist displaying captions.

Second, neither Regal nor Cinemark gave *the court* any indication that they were intending to provide full captioning until very late in the game. The record citations on which Regal and Cinemark rely, CP 878 et seq., all come from the non-stipulated portion of the Appendix of Facts in Support of Defendants' Opening Trial Brief, which was not filed until April 26 of 2011, CP 895, long after the trial court's declaratory order and denial of Cinemark's motion to dismiss as moot.

Third, and particularly offensive, is the assertion that undersigned counsel knew from the outset that defendant theaters all planned on providing full captioning capability, but persisted in the litigation anyway. Brief at 1, 48-49. The only citation to the record is a self-serving claim from Regal – not from Cinemark or AMC – that Regal “advised Plaintiff’s counsel of [a commitment to captioning] immediately after suit was filed.” CP 883. A close reading of that citation shows that it does not support the argument. The “commitment” referred to is a generalized commitment to “increase access for the deaf and hard of hearing,” and not a specific commitment to do anything, much less to provide full captioning capability. CP 883.

While defendants no doubt regret having spent substantial sums of money to achieve a result that they find unsatisfactory, it was their actions, not the actions of Wash-CAP that drove the case. Had the theaters genuinely intended to do what they now claim, they could have ended or at least limited this litigation at any time, in a number of ways.

First and most obviously, the theaters could have made a CR 68 offer of judgment to the effect that they would provide full captioning capability upon conversion to digital projection.

Second, the theaters could have gone into court and asked for entry of a consent decree to the same effect.

Third, the theaters could have offered an immediate settlement.

Fourth, the theaters could have asked the trial court to stay the litigation pending the resolution of financial and technical uncertainties.

In fact, the theaters did none of those things, nor do they offer any credible explanation for their failure to do so.³ Defendants first tried to argue that they had no legal obligation to Wash-CAP's members or other individuals with hearing loss. They all lost. Then after doing what was being requested, Regal and Cinemark asked the court not only to dismiss

³ The theaters assert that they "refused to capitulate to what they believe in good faith to be unreasonable claims and attorneys' fees demands," Brief at 49. They fail to explain how a demand that the theaters do only what the theaters now claim was always their intent can be "unreasonable."

the claim for further injunctive relief – a request to which Wash-CAP stipulated – but asked the court to dismiss the entire case, thus essentially vacating the declaration that they owe legal obligations to individuals with hearing loss. They lost again. Now, they argue that none of that mattered.

If Regal and Cinemark have always intended to provide full captioning, one wonders why they have spent and continue to spend hundreds of hours of attorney time to fight this case. Whatever the motive, the legal battlefield has been and continues to be one that the defendants chose. Having lost the fights *that they chose to undertake*, they should not be heard to complain about the costs or the consequences.⁴

Nor is there any merit to the assertion that Wash-CAP “abandoned” any claims. Prior to the theaters’ digital conversion, the argument was about whether defendants had any legal obligation to make their soundtracks understandable. Afterwards, the argument was about what it was reasonably possible for each theater to do “under the circumstances.” The circumstances changed. The arguments did not.

⁴ The “we were going to do it anyway” argument has a relatively limited impact on the overall litigation, especially the attorneys’ fee award, because AMC cannot even arguably claim the benefit of it. The great bulk of the fee award was assessed against all the defendant theaters, jointly and severally. Should Regal or Cinemark reduce or even eliminate their liability for fees, doing so would shift more of the impact onto AMC, but would reduce the overall award only modestly

V. SUBSTANTIVE ARGUMENT

Even though the theaters claim that they will do everything Wash-CAP has asked and the trial court has ordered, they claim that the court erred in directing them to do so. For the reasons set forth in the ensuing Sections A through G, the trial court's rulings were correct in all respects.

A. **The Trial Court Correctly Interpreted the WLAD and Its Implementing Regulations as Requiring Theaters to Display Captions, Which Make the Theaters' Movies Accessible But Do Not Alter Their Content.**

In arguing that the WLAD cannot be interpreted as requiring caption display, the theaters make three fundamental errors. First, they ignore the operative provisions of the implementing regulations that effectively mandate caption display. Second, they construe displaying movie captions as a different "service" from non-captioned movies, rather than simply being a different way to deliver the service of movies. Third, they claim that "analogous" federal law supports their interpretation, when in fact federal case law does exactly the opposite.

1. **The WLAD and Its Regulations Require Aural Access to Services, Not Just Physical Access to Facilities.**

The WLAD right to be free from discrimination because of sensory disability includes "[t]he right to the full enjoyment of" any place of

public accommodation. RCW 49.60.030(1)(b). As the trial court found, theaters are places of public accommodation. CP 637.

The implementing regulations state that their “overall objective” is that “people with disabilities must be afforded the full enjoyment of places of public accommodation to the greatest extent practical.” WAC 162-26-060(3). The regulations note that full enjoyment is sometimes best achieved by treating disabled individuals in the same manner as other patrons, referred to as “same service,” WAC 162-26-060(1). But the regulations further state that where “same service” would prevent a disabled individual from “fully enjoying the place of public accommodation,” then the facility must instead offer “reasonable accommodation.” WAC 162-26-080(1). It is self-evident – and the trial court so found – that individuals who cannot understand movie dialogue because of their hearing losses cannot fully enjoy a movie. CP 1523. So the theaters must consider “reasonable accommodation.” CP 1524.

“Reasonable accommodation” is defined in the regulations as “action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person's sensory, mental, or physical disability,” WAC 162-26-040. “Accessible” is

defined as “usable or *understandable* by a person with a disability.” WAC 162-26-040 (emphasis added).

As the emphasized word makes clear, “accessibility” under the WLAD and its regulations is not limited to physical access. Aural access – understandability – is required as well, whenever providing that aural access is “reasonably possible in the circumstances.” And what must be made accessible is not the physical venue, but rather, the services of the business. Because captioning makes movie soundtracks understandable to Wash-CAP’s members, it is a reasonable accommodation, and is therefore required to the extent that doing so is reasonably possible.

Contrary to the theaters’ arguments, requiring caption display does not alter the mix of services that the theaters provide.⁵ Not all movies come with captions, and neither Wash-CAP nor the trial court is suggesting that the theaters cannot show movies without captions. What Wash-CAP sought, and the trial court ordered, is that when captions are freely available, the theaters actually display them to requesting patrons.

⁵ The theaters trot out the argument that requiring them to show movie captions is tantamount to declaring that a bookstore must stock Braille books. The theater defendants raised the same argument in the *Harkins* case, *infra*, brought under the Americans with Disabilities Act. As the United States Department of Justice noted in its *amicus* brief in *Harkins*, much of a movie theaters’ “stock” is, in fact, movies for which captions have been provided, and a refusal to provide equipment needed to display those captions is analogous to a bookstore that actually does carry Braille books but refuses to bring them out of storage and sell them.

2. Modern Movie Captioning Does Not Alter the Services that the Theaters Provide.

The pervasive and fatal flaw in the theaters' argument is the notion that a captioned movie and a non-captioned movie are two physically different things. They are not. As the trial court found, captions, which display spoken dialogue and other aural information in written form, are prepared by the studios, and are furnished without charge to the theaters. CP 1520-21. The role of the theaters is to install the equipment needed to display the captions. *Id.*

The captions do not change the content of the movie – they merely put the aural content into visual form. Nor do closed captions alter the experience for anyone else. As the trial court found and the theaters do not dispute, closed captions are not visible to anyone other than the patrons who use the viewing equipment, CP 1520, and do not affect the movie-going experience for other patrons. CP 1525.

3. Contrary to the Theaters' Argument, "Analogous" Federal Law Requires Caption Display, and Supports the Trial Court's Ruling.

The theaters attempt to bolster their argument that captioned movies are a different service from non-captioned movies by citing a number of cases interpreting the federal Americans with Disabilities Act (ADA). Because the ADA is explicitly non pre-emptive, and gives way

state or local laws that provide “greater or equal protection for the rights of individuals with disabilities than are afforded by this Act,” 42 U.S.C. § 12201(b), those cases are of dubious value. But more to the point, the theaters simply misstate current federal law.

The critical case is *Arizona ex. rel. Goddard v. Harkins Amusement Ent., Inc.*, 603 F.3d 666 (9th Cir. 2010). Reversing in part a trial court decision to the effect that captioned movies are a different service from non-captioned movies, and hence not required under ADA, the court held that ADA *does* require theaters to display closed captions to the extent that doing so does not constitute an “undue burden.”⁶ The court pointed to the ADA requirement that businesses like movie theaters furnish “auxiliary aids and services,” 42 U.S.C. § 12182(b)(2)(A)(iii), defined as “effective methods of making aurally delivered materials available to individuals with hearing impairments,” 42 U.S.C. § 12102(1)(A). The *Harkins* opinion discusses the cases that the theaters cite in their brief, but says that construing captioned movies as a different service from non-captioned movies would negate the specific ADA requirement to furnish “auxiliary aids and services.” 603 F.3d 666, 672.

⁶ The theaters assert, and Wash-CAP agrees, that the ADA “undue burden” defense involves essentially the same inquiry as the WLAD’s “reasonably possible” test. Brief at p. 33 & n. 20.

The theaters attempt to relegate *Harkins* to a footnote, Brief at p. 23 & n. 11, by stating that WLAD lacks the “auxiliary aids and services” provision of ADA. It is true that WLAD does not use those exact words. However, WLAD and its regulations accomplish precisely the same thing in far fewer words by requiring that *services*, and not simply physical venues, be made “understandable,” a requirement that would be rendered a nullity if the use of captioning equipment were construed to be a separate service from non-captioned movies. Far from being “not instructive,” as the Defendants assert, *Harkins* directly supports the trial court’s ruling.

B. Displaying Movie Captions Is Not an “Excess” Service, but Merely A Means of Delivering the Theater’s Regular Service in a Manner That Makes the Service Comparable to That Enjoyed by Hearing Patrons.

The theaters next claim that captioned movies are an “excess” service, not required by WLAD. As authority, they cite the case of *Fell v. Spokane Transit*, 128 Wn.2d 618 (1996), in which the Supreme Court declared that WLAD entitles disabled individuals only to comparable services, but not to services in excess of those provided to everyone else. The theaters assert, without any analysis, that captioned movies are an “excess” service.

This Court directly addressed the question of how *Fell* applies to people with hearing loss in *Negron v. Snoqualmie Valley Hospital*, 86

Wash.App 579 (1997), in which a hospital failed to provide a sign-language interpreter to a deaf individual. The hospital cited *Fell* for the proposition that it satisfied its WLAD obligations by treating the plaintiff in the same way as it treated everyone else. This Court disagreed. It said:

“Comparable” does not mean identical. ... [P]laces of public accommodation may be required to reasonably accommodate disabled patrons in order to provide them with treatment comparable to the treatment received by non-disabled persons

86 Wash.App. 579, 585-86. Like the hospital, the theaters failed to satisfy their WLAD obligations by offering only identical “same service” rather than “reasonable accommodations” in the form of captioning.

While the theaters cite the language in *Fell*, they ignore the facts. The question there was whether individuals with mobility impairments were entitled to paratransit service in areas of Spokane County where regular bus service was not offered.⁷ The Court said that nothing in WLAD entitled disabled individuals to a service not provided to others. Here, though, Wash-CAP is not asking for services not provided to others – it is simply asking that the regular services of exhibiting a movie be delivered in a manner that makes those services accessible to its members.

⁷ This case would be like *Fell* if Wash-CAP’s member who lives in McCleary, where there is no movie theater at all, claimed that WLAD entitles her to a theater with captioned movies simply because she has a hearing loss and the theater companies can afford to provide a theater there. No such claim is being made.

C. The WLAD and Its Implementing Regulations Are Not Impermissibly Vague as Applied Because Wash-CAP Suggested and the Trial Court Ordered a Specific and Available Remedy, and No Defendant's Due-Process Rights Were Infringed Because No Defendant Was Held Liable for a Past Failure.

The theaters argue that the WLAD and its regulations are void for vagueness, then claim that due process “requires that Defendants receive clear, prospective instruction on what they must do to comply with the law.” Appellant’s Brief at 27. But Defendants received exactly that.

Washington law measures vagueness against “the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the [statute’s] scope,” *Am. Legion Post 149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 612 (2008). Wash-CAP’s complaint asked specifically for captioning display capability and use. Two defendants are in fact providing it, and a third has been ordered to do so. Wash-CAP and the trial court agree that displaying captions makes movie soundtracks understandable. There is nothing vague about the WLAD and its regulations as applied to this situation.

Nor is there any merit to the notion that defendants have somehow been deprived of any due-process rights. Defendants were not held liable for a failure to take actions in the past, when arguably they might not have been able to anticipate a caption display requirement. They are only being

directed to display captions in the future. This was all done in open court – the essence of due process.

The case of *United States v. AMC Entertainment*, 549 F.3d 760 (9th Cir. 2008), is very different from this case. There, the issue was whether theaters needed to structurally retrofit their theaters to comply with a new and different interpretation of a regulation about wheelchair seating. Because the structural retrofit would be quite expensive and the theaters had detrimentally relied on the prior interpretation, the court said the theaters only had to retrofit those facilities built after they had notice of the new interpretation.

That is not the situation here. To the extent that the theaters are scrapping caption-display equipment, they are doing so as part of their voluntary conversion to digital projection, not because of anything Wash-CAP requested or the trial court ordered. There has been no detrimental reliance on any prior regulations.

D. Notwithstanding the Power of the Human Rights Commission to Promulgate Rules Implementing the WLAD, the Trial Court Had the Power to Determine the Existence of the Theaters' Legal Obligations and to Order AMC to Meet Those Obligations.

The theaters argue that the trial court should have deferred to rule-making by the Human Rights Commission, which does have the authority to implement the WLAD. Washington law rejects that argument.

The superior court unquestionably has jurisdiction over Wash-CAP's complaint. The WLAD declares unambiguously and unmistakably that "[a]ny person deeming himself or herself injured by any act in violation of this chapter *shall have* a civil action in a court of competent jurisdiction." RCW 49.60.030(2).⁸ Because the superior court unquestionably had the power to hear Wash-CAP's complaint, the theaters are essentially invoking the theory of primary jurisdiction, which holds that in some instances, courts with jurisdiction should prudentially abstain in favor of administrative agencies. But controlling case law teaches that where, as here, the facts are uncontroverted, and the only question is the legal significance of those facts, the issue is one for the courts and not for an administrative agency. *State ex. rel. Graham v. Northshore School Dist. No. 417*, 99 Wn.2d 232, 242 (1983). That is particularly true when the statute or regulation involved uses language in the ordinary sense rather than in any specialized or technical sense. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 6 (1991).

⁸ The prior section, RCW 49.60.020, titled "election of other remedies," states that nothing "contained herein shall be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights." "Person" includes "one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons." RCW 49.60.040(1). Wash-CAP and its members are both "persons" within the meaning of WLAD

The theaters cite (and attach) the federal Department of Justice’s Advanced Notice of Proposed Rulemaking on movie captioning as authority for the proposition that movie captioning is especially suited for prudential deference to agency rulemaking. Yet the federal court most directly involved did not think so. The ANPRM was issued after the Ninth Circuit remanded the *Harkins* case for a determination on the merits of the extent, if any, to which caption display would constitute an “undue burden.” Upon promulgation of the ANPRM, the defendants moved to dismiss or stay pending the outcome of the rulemaking process, which remains ongoing. The Arizona court denied the motion. It said:

Referral to the DOJ will not resolve the question presented in this case: to what extent, if at all, the ADA and AzDA required *these Defendants* install captioning and video description devices in *their* movie theaters. If and when the DOJ issues a final rule, the Court must still determine at what point, if at all, installing captions and videos description devices imposes an undue burden on *these Defendants*.

Arizona ex. rel. Goddard v. Harkins Administrative Services, Inc. 2011

U.S. Dist. LEXIS 127682 at 5 (emphasis in original).

Nor are the cases concerning “numerical standards” or “engineering determinations” on point. A given theater auditorium is either capable of displaying captions or it is not. While there may be many auditoriums in a given multiplex, the accessibility of each auditorium is a

binary yes-or-no decision. The trial court was capable of determining whether AMC could justify partial rather than total access, and it rightly ruled that AMC could not do so.

E. The Theaters Were Not Entitled to Fact-Finding on the Hypothetical Issue of Whether Their Pre-Conversion Behavior Violated WLAD.

The theaters argue that the trial court erred by not entering a finding of fact stating that their pre-conversion offerings of captioning satisfied their obligations under the WLAD. The theaters “supported” their argument with the self-serving and wholly conclusory claims that the limited levels of captioning they provided – four auditoriums for Regal, two locations (plus Cinerama) for AMC and occasional showings of etched prints for Cinemark – constituted everything “reasonably possible in the circumstances.” While Wash-CAP’s complaint obviously indicated that it disagreed, Wash-CAP also said that because those pre-conversion circumstances no longer existed, or, in the case of AMC, would soon cease to exist, the question of what may have been “reasonably possible” prior to digital conversion was moot, and could not be litigated.

This is another after-the-fact argument that was never raised prior to the scheduled trial on the merits in May of 2011, well after the trial court had entered its declaratory order, after it had denied Cinemark’s motion to dismiss as moot, after Wash-CAP and AMC had agreed on

stipulated facts for the trial on the merits, and after any opportunity for discovery had lapsed. Plainly, this issue was never litigated below, and facts and legal conclusions that were never litigated below cannot be the basis of an appellate decision.

Should this Court determine, for whatever reason, that the question of whether the theaters' pre-conversion offerings of captioning were sufficient to meet their WLAD obligations, the matter would have to be remanded for discovery and trial. But note the "trap" that the theaters are trying to set. Their claim is that it would have been "unreasonable" to direct them to spend any more money on equipment to caption 35 mm film given the imminent conversion to digital projection. (Appellant's Brief at 34 & n. 21). But as the theaters also asserted, financing to convert to digital was not secured until 2010. (CP 881, 886). So when the case was filed and when the parties made their cross-motions for total or partial summary judgment, the theaters had not finalized their financing, had not actually begun the conversion to digital, and did not have a specific date for doing so. From what perspective are the parties and court supposed to determine what was "reasonably possible in the circumstances"? What are they allowed to "know" when trying to determine what was reasonable?

As this conundrum shows, litigating the question of what might have been possible in circumstances that have ceased to exist is the

essence of a hypothetical dispute, which Washington case law squarely teaches is not justiciable. *Pasado's Safe Haven v. State*, 162 Wash.App. 742, 761 (2011). The trial court did not err in failing to enter Findings of Fact about an issue that was not and should not have been tried.

F. The Trial Court Correctly Entered a Declaratory Order Even Though Regal and Cinemark Mooted the Claim for Injunctive Relief by Providing Captioning Display Capability Prior to Trial.

After the trial court entered an interlocutory declaratory order setting forth the legal standard against which the theaters' conduct would be measured, Cinemark completed digital conversion and installed captioning equipment in all of its auditoriums. It then moved to dismiss the entire case against it as moot. Wash-CAP conceded that any argument about the adequacy of its pre-conversion captioning was moot, and further conceded that no injunction was necessary if, but only if, the court entered a declaratory order. The trial court agreed. That decision is supported by both state law and analogous federal law that recognize a number of instances in which declaratory relief should be awarded even if the conduct of the defendant is no longer at issue.

The first such instance is when the defendant offers the requested relief but refuses to acknowledge the plaintiff's legal right to that relief,

because “future violations were possible.” *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 101, (2005).

The second instance is when the situation might arise again, and the decision may benefit other similarly situated individuals. In *Thomas v. Lehman*, 138 Wash.App. 618, 622 (2008), a prison inmate asked to use a savings account intended for use upon release to hire an attorney for a parole hearing. Prison officials denied the request, and the inmate used other funds. The appellate court held that even though the inmate’s use of other funds mooted his request for an injunction, the request for declaratory relief remained alive because if granted, that declaratory relief would “benefit other similarly situated inmates.”

A third instance – closely related to the second – is a public-interest exception, which states that even if the underlying controversy has been resolved, the court may still proceed if the case “presents issues of continuing and substantial public interest.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 796 (2009)(interpretation of arbitration clause a matter of substantial public interest even though underlying dispute resolved).

A fourth instance is where the declaratory order in and of itself provides the plaintiff with meaningful benefits. As the Ninth Circuit has stated:

We have repeatedly held that where, like here, both injunctive and declaratory relief are sought but the request for an injunction is rendered moot during litigation, if a declaratory judgment would nevertheless provide effective relief the action is not moot.

Forest Guardians v. Johanns, 450 F.3d 455, 462 (9th Cir. 2006). In such a case, the court said, the decision was not “propounding on hypothetical questions of law,” but was rather “resolving a dispute with present and future consequences.” Id.

This case fits within all four of those situations. The theaters refuse to recognize any legal obligation to provide caption display equipment, leaving them free to discontinue doing so at any time. There are other theater owners in King County and theaters in other areas, and both those theaters and individuals similarly situated to Wash-CAP’s members may benefit from this ruling. The case is obviously one of considerable public interest, affecting a substantial number of people with hearing loss and a very popular form of entertainment. And a declaratory judgment gives Wash-CAP and others significant rights to ensure that the theaters continue providing caption display.

The trial court noted those points. It stated that because Regal and Cinemark’s actions “have fulfilled their present legal obligations under WLAD,” the claims for injunctive relief should be dismissed as moot. But the Court also said:

Should circumstances materially change in the future, such as by development of new technologies, or should Regal or Cinemark cease offering captions for every available movie, nothing in this Order prevents Plaintiff or any other party from seeking relief that it would then be possible for Regal or Cinemark to provide.

CP 1526.

The case of *Feldman v. Pro Football Inc.*, 579 F.Supp.2d 697 (S.D. Md. 2008), *aff'd* 2011 WL 1097549 (4th Cir., March 25, 2011) is directly on point. There, deaf football fans sued the Washington Redskins, claiming that the team was violating the ADA by failing to provide captioning of the public-address announcements and other aural information provided to hearing patrons. Shortly after the suit was filed, the Redskins installed two ribbon boards, and began captioning all of the public-address announcements. (Like the theaters, the Redskins claimed they had been planning all along to do so). The Redskins then moved to dismiss the case as moot. The court there did just what the trial court in this case did. It dismissed the claim for injunctive relief as moot, but entered a declaratory order stating that the ADA does indeed require captioning of all aurally delivered information.⁹

⁹ The trial court pointedly observed that there, as here, the defendants were not complaining about what they were being told to do, “but in effect, do not want to be told they are required to do so.” 579 F.Supp.2d 697, 708 (S.D. Md. 2008).

On appeal, the historically conservative Fourth Circuit affirmed. It noted that “the voluntary discontinuance of challenged activities by a defendant does not necessarily moot a lawsuit.” 2011 WL 1097549 at *5. The court said that in order to moot the case in its entirety, the defendant bears a “heavy burden” of demonstrating that the complained-of conduct **cannot** recur. The court ruled that the Redskins had failed to meet that burden. In a passage from the decision is worth quoting at some length, because the question there was precisely the same as here, the court said:

While we commend defendants for providing most of the relief that plaintiffs requested and for engaging with plaintiffs on the benefits and burdens of particular auxiliary aids, we agree with the district court that defendants have not discharged their heavy burden of showing no reasonable expectation that they will repeat their alleged wrongs. Although defendants were investigating possible auxiliary aids years before plaintiffs' lawsuit, they did not actually provide captioning until after plaintiffs filed their complaint. Further, this is not a case in which plaintiffs “control[] [their] own fate.” Defendants maintain complete control over the captioning. ... Given the ease with which defendants could stop providing captioning, we simply cannot say that they have made an affirmative showing that the continuation of their alleged ADA violations is “nearly impossible.”

Id., (internal citations omitted).

The factors that persuaded the *Feldman* court that the case was not moot also exist here. Despite their present protestations, the fact is that the theaters neither provided nor committed on the record to providing any

additional quantum of captioning until after they were sued. Rather than agreeing that the WLAD imposes any obligation on them, they fervently resisted at the trial-court level, and continue to do so. Captioning is not self-activating – the theaters must maintain and engage the equipment and continue to publicize the availability of captioning. Those matters are totally within their control. So even though today’s decision-makers may presently intend in good faith to continue providing captioning, new managers or new directors would be free to change that policy in the absence of a declaratory order.

G. The Trial Court Correctly Rejected AMC’s Belated Argument that the Claim for Injunctive Relief Was Unripe Because the Relevant Facts Were Known and AMC Fully Litigated All Issues.

AMC argues that the claim for injunctive relief was unripe, and should have been dismissed. This is nothing more than a request for a do-over on an issue that was fully litigated, and should be summarily rejected.

After ruling in 2010 that all theater defendants must do what is reasonably possible in the circumstances to make their movie soundtracks accessible and understandable, the court set a trial on the limited issue of what, precisely, it was reasonably possible for each theater company to do. AMC and Wash-CAP’s counsel agreed that the trial would be submitted on a written record, and worked out a set of stipulated facts. CP 873-878.

The stipulated facts included a statement that AMC intended to convert all of its King County theaters (except for its Factoria complex) to digital projection by the end of 2011. CP 876. Other stipulated facts set out the cost of providing captioning equipment, and AMC's financial ability to do so. Based on those facts, the trial court found that it was reasonably possible for AMC to provide full captioning capability, CP 1525, and rejected AMC's contention that the court should have applied a cost-benefit analysis, which AMC argued would demonstrate the unreasonableness of requiring full captioning capability. Id.

AMC raised the ripeness claim¹⁰ for the first time in oral argument, then made its first written motion for dismissal on ripeness grounds in its post-trial written submission. CP 1461-64. The trial court rightly rejected that motion. It noted that the parties had previously agreed that the matter was ripe for decision. CP 1523, that AMC had fully litigated the issue, and that the Court did not need any additional facts. Id.

¹⁰ The case AMC cites in arguing ripeness, *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63 (1st Cir. 2003) is totally inapposite. In that case, the trial court dismissed the case for lack of standing, and the appellate decision simply affirmed that dismissal. That is not a case, like this one, in which the parties had gone through trial and received a decision. Moreover, one of the principal contingencies making that case unripe lay in the control of the plaintiff – whether or not a pregnancy would occur. Here, the only outstanding contingency is that AMC might have changed its mind and provided all the requested captioning capability, a contingency exclusively within its control. Since decisions of a corporate board of directors cannot bind future boards, corporations can always change their “minds.” Under AMC's logic, no claim for injunctive relief could ever become ripe.

The only “contingency” that AMC now says made the case unripe is that it its stated commitment to equip “a minimum of one or two auditoriums per multiplex” with captioning equipment, *id.*, left enough wiggle room that it *might* have decided, unprompted, to do more. Yet AMC fully argued its case to the effect that providing the full captioning capability that Wash-CAP requested and the trial court ordered would be unreasonable. It took its best shot, and it lost. While it asserts that the court erred in its interpretation of the WLAD, it notably does not challenge the court’s finding of fact to the effect that it is reasonably possible for AMC to provide full captioning capability.

Litigation is not a friendly golf game in which the losing party may be able to ask for a mulligan. AMC tried its case. After losing, it cannot ask for a do-over.

VI. FEES ARGUMENT – Liberal Construction of WLAD’s Fee-Shifting Provision Is Necessary to Enable Private Attorney-General Actions.

In addition to the substantive arguments, which appear to be motivated by a desire to avoid paying fees, the theaters raise a number of arguments that relate directly to the fee issue itself. Wash-CAP responds to those in the following sections.

As an introductory matter, it is worth noting that the intent of the WLAD is not simply to root out discrimination, but to encourage private

parties as private attorneys general to do so.¹¹ The fee-shifting provision is an integral and critical tool to effectuate that purpose. As the Supreme Court has said, the WLAD's fee-shifting provision is designed:

[t]o make it financially feasible to litigate civil rights violations, to enable vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy, to compensate fully attorneys whose service has benefited the public interest, and to encourage them to accept these cases where the litigants are often poor and the judicial remedies are often nonmonetary.

Blair v. Washington State University, 108 Wn.2d 558, 573 (1987). To further those objectives, the fee-shifting provision, like the substantive provisions of the statute, is to be construed liberally. *Blair*, 108 Wn.2d at 570. Consistent with that mandate, it is not enough for the theaters to argue that the WLAD *could* be construed in a way that would prevent fee recovery. Rather, they have to show that the WLAD *must* be so construed.

H. The Trial Court Correctly Ruled that the Remedies Incorporated Into the WLAD Permit Entry of a Declaratory Order, and Such an Order Furthers the Purposes of the WLAD.

As the theaters note, RCW 49.60.030(2) does not reference declaratory relief – it neither specifically authorizes nor forbids it.

¹¹ Private attorney general actions may be particularly useful in the context of disability discrimination, because people like Wash-CAP's members not only have the incentive to seek changes, but perhaps more importantly, the personal knowledge of what accommodations will actually be effective.

However, the WLAD does permit “any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988.” RCW 49.60.030(2). Both of those federal statutes authorize unspecified “other orders” in lawsuits filed by private citizens in addition to injunctive relief. 42 U.S.C. § 2000-a(3)(A); 42 U.S.C. § 3613(c)(1). The trial court ruled that the “other order” authorization in those incorporated statutes was sufficient to support a declaratory award, particularly where, as here, such an award furthers the purpose of the WLAD. CP 1523.

The trial court’s ruling was correct. A plaintiff may obtain declaratory relief under the Fair Housing Act, *Williams v. Matthews Co.*, 499 F.2d 819, 829 (8th Cir. 1974), *cert. denied* 419 U.S. 1021 (plaintiff entitled to “a declaratory judgment of his rights” together with fees and costs); *NAACP v. Kemp*, 721 F.Supp. 361, 366 (D. Mass. 1989) (declaratory judgment entered against federal agency, but injunctive relief denied).¹²

¹² Those cases the theaters cite for the proposition that only injunctive relief is permitted under the Civil Rights Act are not persuasive, because they involved the question of whether monetary damages as opposed to injunctive relief may be awarded to a private litigant. The case specifically stating that declaratory relief is not permitted, *United States v. York Obstetrics & Gynecology, P.A.*, No. 00-8-P-DMC, 2000 WL 1221625 at *6 (D.Me. Aug. 25, 2000), is *dicta*, because the court said that “no demand for declaratory relief under the ADA is before the Court.”

Like the WLAD, the remedies provision of the federal ADA also incorporates the remedies available under the Civil Rights Act of 1964. 42 U.S.C. § 12188(a)(1). The court in *Feldman* used that authority to grant a declaratory judgment against the Washington Redskins, and that remedy was affirmed on appeal. *Feldman v. Pro Football Inc.*, 579 F.Supp.2d 697 (S.D. Md. 2008), *aff'd* 2011 WL 1097549 (4th Cir., March 25, 2011).

Without binding authority on point, the trial court properly looked to the purposes and policies behind the WLAD. Wash-CAP's individual members could have pled a case for *de minimis* damages, which are explicitly available under WLAD. *Negron v. Snoqualmie Valley Hospital*, 86 Wash.App. 579, 587-88 (1997)(assault on dignity from acts of discrimination inherently damaging); RCW 49.60.030(3) (violation of WLAD is also violation of Consumer Protection Act, RCW 19.86 *et seq.*, which allows trebled recovery of out-of-pocket losses; e.g., gas, baby sitters, parking). But Wash-CAP believed that pleading a case for those damages would trivialize the serious access issues being raised. So Wash-CAP asked for exactly what its members really want – enforceable access to the movies – and it achieved that objective, all at no cost to the taxpayers. This is exactly the kind of outcome the WLAD envisions.

The theaters do not make any argument as to why the WLAD *should not* permit declaratory relief. Who would gain if future plaintiffs

could only preserve their right to recover fees by adding make-weight damage claims to an access case? The theaters don't suggest an answer.

I. The Award of Fees, and the Amounts Awarded, Were Proper and Should Be Affirmed.

The theaters object to the fee award on several grounds. First, they assert that no award should have been entered because Wash-CAP did not show a violation of WLAD. Second, they argue that a declaratory judgment can only be entered under the authority of the Uniform Declaratory Judgment Act, RCW 7.24, which, they contend, cannot support a fee award. Finally, they argue that the trial court failed to reduce the award to account for Wash-CAP's alleged lack of success, and argue that the court should not have awarded a contingency enhancement to the stipulated lodestar amount.

1. Fees Were Properly Awarded Without a Finding of Past Violation.

The theaters contend that in order to recover fees, Wash-CAP needs to have secured "a final order recognizing an actual statutory violation," which they take to mean a past violation. But that argument cannot be reconciled with the specific entitlement to injunctive relief.

The WLAD violation in question was the effective exclusion of Wash-CAP's members from defendants' theaters. When the theaters actually secured their financing and undertook digital conversion, the

operative question ceased being how much caption-display capability the theaters could have provided when they were using film projection, and became how much capability they could provide using digital projection. Wash-CAP sought a determination of how much captioning capability could be provided post-conversion, a determination that would take the form of an injunction, clearly permitted by RCW 49.60.030(2). Wash-CAP secured that order against AMC. While AMC argues that the matter was unripe, it does not assign error to the entry of the injunction itself, and plainly if the injunction was properly entered, AMC is liable for fees.

Regal and Cinemark argue that they are entitled to avoid fees because after litigating and losing on the question of whether the WLAD confers any rights on people with hearing loss, they provided full captioning capability rather than trying to defend doing any less. They are essentially trying to argue a pre-trial surrender after extensive litigation lets them avoid paying fees. Washington law does not support that position.¹³ *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104 (2005). There, the Supreme Court said that a defendant

¹³ Federal case law does allow surrendering defendants to avoid paying fees in an ADA case. *Buckhannon Board and Care Home, Inc., v. West Virginia Dept. of Health & Human Services*, 538 U.S. 591 (2001). While the theaters appear to be trying to position themselves to make a *Buckhannon* argument, they did not do so below, have not done so in their opening brief, and should not be permitted to do so for the first time in their reply.

could not avoid fee obligation in Public Records Act by post-litigation compliance, because doing so would “undercut the policies of the Act.”

The case law defendants cite is unpersuasive. *Dezell v. Day Island Yacht Club*, 796 F.2d 324 (9th Cir. 1986) dealt with the question of whether a prevailing *defendant* could recover fees in a WLAD case, but said nothing about what a *plaintiff* must establish to recover fees.

O’Neill v. City of Shoreline, 170 Wn.2d 138 (2010) is inapposite because of that case’s procedural posture. The question there was whether “metadata” covertly attached to electronic records were public records. This Court ruled that they were, and awarded fees. The Supreme Court affirmed the declaratory order, but said that order was insufficient to support a fee award because there had been no finding that the metadata actually existed. In this case, though, there are no facts left to be found – the trial court has properly determined that it is reasonably possible for the defendants to offer full caption-display capability.

2. Even if the Declaratory Order Was Entered Under the Auspices of the UDJA, Fees Are Properly Awarded Because the Court Construed the Rights of the Parties Under a Statute That Provides for an Award of Fees.

The theaters contend that if the court were to enter an order construing Wash-CAP’s member’s rights under WLAD, it could do so only under the aegis of the Uniform Declaratory Judgment Act, RCW

7.24. They then argue that because the UDJA does not have a fee-shifting provision, entry of a declaratory award under UDJA cannot support an award of attorneys' fees.

It is true that in Washington, the UDJA does not provide a separate and free-standing basis for an award of fees. Nor, on the other hand, does the UDJA prohibit a fee award. But the very case that the theaters cite strongly suggests that fees may be awarded in a case seeking declaratory relief *when the underlying statute being construed permits an award of fees*.

The case is *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476 (1978). The Court said the provision of RCW 7.24.100 authorizing the recovery of "costs" is not a sufficient statutory basis for a fee award. Then it added:

The court was without power under the Declaratory Judgment Act to award fees. ... [R]espondents have not directed our attention to *any other statutory basis* upon which reasonable attorneys' fees can be awarded.

Id. at 541 (emphasis supplied).

The import of those statements is clear. While the UDJA, in and of itself, does not provide a basis for an award of fees, fees may be awarded in a UDJA action if there is some other statutory basis. The WLAD provides just such a statutory basis.

3. The Amount of Fees Awarded Was Fully Supported by the Evidence, Including the Parties' Stipulation to a Lodestar Amount, and the Theaters Fail to Show that the Court Abused Its Discretion in Adjusting the Lodestar Upwards but Not Downwards.

A fee award under the WLAD is a matter within the sound discretion of the trial court, and should be overturned only for an abuse of that discretion. *Pham v. Seattle City Light*, 129 Wn.2d 529, 538 (2007). An abuse of discretion occurs only if the court “exercised its discretion on untenable grounds or for untenable reasons.” *Id.* Here it did not.

The theaters make a global claim that the fee award was “excessive,” Brief at 47, perhaps hoping that the size of the award, in and of itself, demonstrates unreasonableness.¹⁴ But they fail to note that they themselves stipulated to the lodestar amount – reasonable hours times a reasonable rate – which is the starting point for any fee computation. CP 1726.

Because of that stipulation, the only issue, both before the trial court and here, is whether that stipulated amount should be adjusted¹⁵ downward or upward to take into account factors not accounted for by the

¹⁴ Not surprisingly, the theaters do not indicate how much they have spent to defend this case.

¹⁵ Trial courts are directed to exclude “unproductive” or “unnecessary” time, but that directive deals with computation of the lodestar amount, *Pham v. City of Seattle*, 124 Wash.App. 716, 725 (2004) *aff'd in part*, 129 Wn.2d 529 (2007), and is resolved by the parties' stipulation.

lodestar. *Bowers v. Transamerica Title Ins., Co.*, 100 Wn.2d 581, 593-94 (1983). The party requesting either adjustment bears the burden of showing why it is justified, *Pham, supra*, 129 Wn.2d 529, 541 (2007).

- a. **The trial court correctly declined to reduce the lodestar amount because Wash-CAP achieved all the results it sought.**

The theaters claim that because Wash-CAP allegedly secured only “a small subset” of the relief originally sought, the trial court abused its discretion by not reducing the lodestar amount. They base their assertion “limited” success on the fact that Wash-CAP settled with some defendants¹⁶ and dismissed certain claims as moot. But degree of success is not determined by a mechanical counting of legal theories or causes of action asserted vs. the terms of the judgment.

The theaters rely on but misapply the U.S. Supreme Court case of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which the Washington Supreme Court continues to quote approvingly. *Pham v. Seattle City Light*, 159 Wn.2d 527, 540 (2007). *Hensley* did direct courts to focus on “the overall results achieved,” 424 U.S. 424, 434 (1983). But it then specifically warned against gauging success in the manner for which the theaters are arguing, saying that success cannot be measured by

¹⁶ Since settlements obviously require a resolution satisfactory to both parties, it would seem that if settlements are to be included in any reckoning as to degree of success, they should count in favor of the plaintiff.

a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.

461 U.S. 424, 435 & n.11. What matters, the Court said, is the overall result achieved, adding, “[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.” 461 U.S. 424, 434. The test for success is whether the plaintiff achieved “the total accomplishment of the aims of the suit” even if they did not prevail on some minor issue. 461 U.S. 424, 431.

Washington courts similarly reject the notion that success is measured by a mechanical comparison of the complaint to the court’s conclusions. Under Washington law, where different claims all involve a “common core of facts and related legal theories, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.” *Martinez v. City of Tacoma*, 81 Wash.App. 228, 243 (1997), citing *Hensley*, 461 U.S. 424, 440.

In this case, it is simply fatuous to suggest that Wash-CAP did not prevail. Wash-CAP set out to achieve a significant increase in the quantity of captioned movies available to people in King County with hearing loss, and Wash-CAP succeeded beyond all expectations or precedent. Regal and Cinemark have equipped all of their auditoriums to show captioned movies, as has Lincoln Square, one of the settling defendants, and the declaratory judgment gives Wash-CAP a powerful tool to ensure that those measures stay in place. AMC has been ordered to provide total captioning. As AMC pointed out in its trial statement of facts, this relief greatly exceeds the quantity of captioning provided by any prior settlement or by the federal Department of Justice's proposed rule. CP 893-94. Wash-CAP totally accomplished what it set out to achieve.

The theaters claim, without any substantiation, that the work performed prior to digital conversion was "unrelated" and therefore should be deducted. That work went towards establishing a legal duty. The fact that the specific circumstances changed during the middle of the litigation did not change the legal question decided prior to conversion. Indeed, this kind of argument about what was and was not "related" is precisely why fee awards are committed to the sound discretion of the trial court and are reversed only for an abuse of that discretion – the trial court was clearly

aware of the progress of the case, and was in a position to know that the work performed was not unrelated. *Hensley, supra*, 461 U.S. 424, 438.

b. The trial court’s upward enhancement of the lodestar amount for the contingent nature of the case and quality of work was proper because the court considered and applied appropriate factors.

Washington courts permit an upward adjustment in the lodestar rate to account for the contingent nature of a case, where success is not assured and where the plaintiff’s attorney has no means of obtaining any compensation if the case is not successful, particularly in a case such as this where no monetary recovery is sought. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598-99 (1983). The risk of failure and thus of non-recovery is to be measured “at the outset of the litigation,” *Id.*

In this case, as the trial court found, CP 1726, the prospects for success at the outset were far from certain. Three of four federal cases involving movie captioning decided under the ADA had found that no captioning requirement existed. *Arizona ex. rel. Goddard v. Harkins Amusement Ent., Inc.*, 548 F.Supp.2d 723 (D. Ariz. 2008), *Todd v. American Multi-Cinema, Inc.*, 2004 WL 1764686 (S.D. Tex. 2004), *Cornilles v. Regal Cinemas, Inc.* 2002 WL 31440885 (D. Or. 2002). The Washington Supreme Court had looked to ADA case law to interpret the WLAD, *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 544 (2003), and had

suggested that compliance with ADA might be a relevant defense to a WLAD accommodation claim. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 642 (1996). So at the outset, Wash-CAP faced the possibility of needing to persuade the court that three of four cases to have addressed the specific issue of movie captioning were wrongly decided, and/or that ADA interpretations were not persuasive in a WLAD case.

Moreover, there was no avenue for attorney compensation other than the fee-shifting provision of RCW 49.60.030(2). This was not a case that could create a fund from which compensation could be drawn – Wash-CAP did not ask for money. As the Washington courts have noted, experience teaches that competent attorneys are unlikely to accept a risky case where no financial compensation will be obtained absent success unless they receive a monetary premium for doing so. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598 (1983).

The trial court also stated that this was one of the “admittedly rare” cases in which the quality of work and degree of success obtained warrants an upward adjustment. As the trial court noted

The case has resulted in an exponential expansion of the availability of captioned movies in King County, which has benefitted not only Plaintiff’s members, but a very significant number of similarly situated individuals in the community.

CP 1727. The theaters have not assigned error to that Finding of Fact. To the contrary, the theaters essentially agree,¹⁷ claiming that the relief Wash-CAP obtained was both “unprecedented,” Brief at 3, and far greater than had been achieved through any prior litigation or settlement. CP 893-94.

A reviewing court can overturn a trial court’s fee award only if it finds that the trial court “manifestly abused its discretion” by ruling “on untenable grounds or for untenable reasons.” *Pham v. Seattle City Light*, 129 Wn.2d 527, 538 (2007). In this case, the trial court based its lodestar enhancement on two grounds long recognized in Washington law – the contingent nature of the case and the degree of success. The theaters do not claim that those grounds are untenable, but only disagree with the trial court’s application of the facts to the law in reaching its decision. Such a disagreement cannot constitute abuse of discretion.

VI. WASH-CAP IS ENTITLED TO FEES ON APPEAL

Pursuant to RAP 18.1, Wash-CAP requests attorneys fees and costs incurred on appeal. Such fees and costs are recoverable in a case brought under the WLAD, and should Wash-CAP substantially prevail on

¹⁷ The theaters’ assert that the trial court’s fee award “rested on the premise that Wash-CAP was the ‘prevailing party’ on all claims.” Brief at 47. They appear to have mis-read the Court’s order, which struck out proposed language to the effect that Wash-CAP prevailed on “every material claim” and simply stated that Plaintiff “succeeded.” CP 1725.

this appeal, it would be entitled to such fees and costs. *Pham, supra*, 129 Wn.2d at 544.

VII. SUMMARY AND CONCLUSION

The court properly interpreted the WLAD and its regulations to require theaters to make movie captioning available, a decision that is entirely consistent with federal law. The court also rightly rejected the potpourri of arguments basically aimed at the court's competence to make a decision rather than the substance of the decision itself. Notably, defendant theaters do not assign error to any of the trial court's fact-findings. And other than making easily dismissed arguments that the court mis-construed the WLAD and its regulations, the defendants do not assign error to any of the court's legal conclusions, but only argue that the court should not have ruled at all.

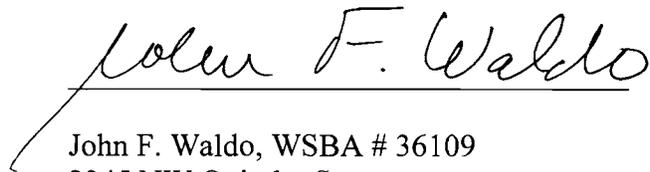
The award of attorneys' fees to Wash-CAP was proper. The defendants stipulated to the lodestar amount. The only questions are whether the lodestar should be adjusted up or down. The theaters asked for a downward adjustment based on a "limited" degree of success, but the trial court found instead that Wash-CAP achieved "unprecedented access" to captioned movies, and that the case has resulted in an "exponential expansion of the availability of captioned movies in King County, which has benefitted not only Plaintiff's members, but a very significant number

of similarly situated individuals in the community,” CP 1727, fact-
findings that the theaters do not challenge.

Because of the degree of success and the contingent nature of the case at the time of filing, the trial court granted an upward multiple of the lodestar. Those factors have long been recognized as appropriate grounds for an upward adjustment under Washington law, and a mere assertion by the defendants that they disagree with the court’s conclusion falls far short of demonstrating an abuse of discretion.

The trial court’s judgment should be affirmed in its entirety. This Court should also award Wash-CAP its fees on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 15th day of February, 2012.

A handwritten signature in cursive script that reads "John F. Waldo". The signature is written in black ink and is positioned above a horizontal line.

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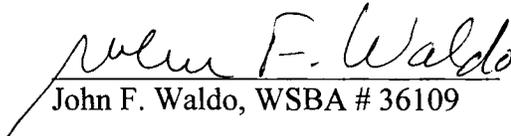
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2012, I caused the attached Brief of Plaintiff/Respondent Washington State Communication Access Project to be delivered by email attachment to the following counsel of record for Defendants/Appellants:

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