

NO. 35461-6-II

ORIGINAL

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CASCADE FLORAL PRODUCTS, INC.;
CONTINENTAL WHOLESALE FLORISTS, INC., d/b/a
CONTINENTAL FLORAL GREENS; HIAWATHA, INC.;
HOOD CANAL EVERGREENS; PACIFIC COAST
EVERGREENS, INC.; PUGET SOUND EVERGREENS, INC.;
MT. ST. HELENS EVERGREEN, INC.;
OLYMPIC EVERGREEN, INC.,

Respondents,

v.

DEPARTMENT OF LABOR & INDUSTRIES,
an agency of the State of Washington,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 JUL -6 PM 4:15
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BRIEF OF RESPONDENTS

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A. INTRODUCTION

This case is but one facet of the Department of Labor and Industries' (Department) ongoing harassment of the specialty forest products (SFP) industry, an industry specifically regulated by the Specialty Forest Products Act, RCW 76.48.

The respondents all own packinghouses or "sheds" where they buy and sell products like evergreen foliage, salal, cascara bark and other products that grow naturally in the forest without cultivation. They lease land from timber landowners like the U.S. Forest Service, the Department of Natural Resources (DNR), and large timber companies. In turn, they allow independent contractors known as brush pickers to pick the naturally-growing materials on the leased land. The packinghouses, at the landowners' direction, purchase premises liability insurance naming themselves and the landowners as named insureds. The packinghouses do not control the brush pickers; instead the brush pickers set their own hours and places of work, bring their own tools to the job, and transport themselves to work. The brush pickers are not obligated to sell product to any particular packinghouse and, in fact, there are financial incentives for them not to sell to the packinghouse from whom they lease.

The Department contends the packinghouses are subject to the Farm Labor Contractor Act, RCW 19.30 (the Act), but the definition of

agricultural activities there contemplates cultivation; the materials gathered by the brush pickers in the forest grow there naturally without cultivation by the brush pickers, the packinghouses, or anyone else. The trial court correctly determined the packinghouses are not subject to the Act.

B. ASSIGNMENTS OF ERROR

The packinghouses acknowledge the Department's assignment of error,¹ but believe the issue before this Court is more appropriately formulated as follows:

Was the trial court correct in determining that the Farm Labor Contractor Act did not apply to forest activities that did not involve cultivation where the Legislature expressly confined the reach of that Act in RCW 19.30.010(4) to agricultural activities involving cultivation?

C. STATEMENT OF THE CASE

The Department's statement of the case is replete with argumentative material in violation of RAP 10.3(a)(4) and assertions for which it provides no citations to the record in violation of RAP 10.3(a)(5).² This Court should disregard these materials. The

¹ The Department did not assign error to the trial court's decision at the summary judgment hearing to strike the Department's reply to the packinghouses' reply and the attendant materials that accompanied its reply. RP 1-3. Nevertheless, the Department designated its reply to a reply and the attached declarations as part of the record here. CP 308-493.

² The Department's statement of the case is replete with argumentative claims for which it offers no citations to the record. First, the Department's captions for its

packinghouses provide this more complete discussion of the facts and procedure in this case.

The packinghouses provide a statement of the case that puts the present case in context; the Department has undertaken a ruthless and arrogant effort to compel the SFP industry to submit to its pervasive regulation, when such regulation is not, in fact, permitted by law.

The SFP industry is involved in the picking and marketing of products found in the forests of Washington like evergreen foliage, salal, moss, and cascara bark (generally referred to as “brush” or “greens”) for floral displays and certain industrial needs. RCW 76.48.020(17). CP 267, 1295, 1300. It has long been a part of Washington forestry. CP 1191-95.

statement of the case are plainly argumentative. *See, e.g.*, Br. of Appellant at 7 (“Evergreen Foliage Harvesting Workers Are Vulnerable to Abusive Working Conditions”).

Moreover, the Department tries to slip facts into the statement of the case for which there is no support in the record. *See, e.g.*, Br. of Appellant at 7 (“abusive working conditions and exploitative farm labor contractors”). The Department’s assertion, in effect, that “crew leaders” control the brush picking process, *id.* at 8-9, is particularly disingenuous. The Department offers no record citation for the claim that brush pickers are paid by “crew leaders,” *id.* at 9, fees for “crew leaders” are “deducted,” *id.*, or that “crew leaders” impose additional charges for rubber bands or rope. *Id.* In fact, much of the Department’s statement of the case for how the industry functions is found in a report the Department itself prepared in July 2005, CP 919-40, when it worked with one of the packinghouses’ competitors to have it request that the Department to prepare such a report. CP 160-61, 1358-62.

Finally, some of the overheated rhetoric in the statement of the case is plainly argumentative. For example, the last sentence in the paragraph on page 11 of the Department’s brief (“These tragic accidents demonstrate. . .”) is not a statement of facts or procedure without argument, but a plea for relief.

The packinghouses are part of this industry; each respondent owns and operates a packinghouse, commonly referred to as a “shed.” CP 267. The packinghouses purchase greens from a variety of sources, including other packinghouses and individuals who harvest and sell greens found growing naturally in the forest (commonly referred to as “brush pickers”). *Id.* The packinghouses then package and sell the greens they have purchased to various wholesalers and distributors. *Id.* The packinghouses are not in the greens harvesting business. *Id.* Their sheds, which include packing, loading, and business offices, are not located in the forest. *Id.*

Most packinghouses enter into annual or multi-year leases (“full leases”) with various timber landowners like the U.S. Forest Service, DNR and other large, private timber companies. *Id.*; CP 1296. These full leases give the packinghouses the right to harvest greens from the leased land. CP 267, 296. The packinghouses do not harvest the greens found on the leased land. *Id.* Instead, they sell short-term subleases to brush pickers who harvest the greens. *Id.*³ With the purchase of a permit, a brush picker acquires the right to harvest greens from the leased land. *Id.* Permits are sold for a fee, which is collected in one of two ways: either the fee is prepaid at the time the permit is sold (a “flat fee”) or it is paid after the

³ These short-term leases are referred to as “permits” within the industry. CP 267.

greens are harvested and sold to the packinghouse (a “stumpage fee”). CP 268. A stumpage fee is a percentage of the total value of the greens harvested and is calculated based on the market price of the greens at the time of sale. *Id.* A stumpage fee is only collected at the time the greens are sold. *Id.*

By industry custom, and in fact, brush pickers are independent contractors and not employees of the sheds. *Id.* While the packinghouses employ individuals to perform packing and office operations at their sheds, they do not hire individuals to harvest greens from the forest on their behalf. *Id.* The packinghouses, at the landowner’s direction, purchase premises liability insurance naming the packinghouses and the landowner as the insureds. CP 267.⁴

⁴ Ironically, the packinghouses would only pay for such insurance if brush pickers are, in fact, independent contractors not covered under Title 51 RCW. If brush pickers are covered workers, then the packinghouses would be immune from any lawsuit filed by the brush pickers under Title 51 RCW. RCW 51.04.010; *Judy v. Hanford Envtl. Health Found.*, 106 Wn. App. 26, 31, 22 P.3d 810, *review denied*, 144 Wn.2d 1020 (2001). Premises liability insurance would be unnecessary.

Sarah Stevens testified below that Department auditors contacted her insurance carrier and provide it a Department memo claiming the brush pickers were employees, hoping to scare the carriers into dropping coverage for packinghouses. CP 1262-63. Without such premises liability insurance coverage, landowners would not lease their premises to a packinghouse. Such a tactic is only further evidence of the Department’s “ends justify the means” approach to the SFP industry.

The packinghouses' connection with brush pickers bears none of the attributes of an employer-employee relationship. The packinghouses do not hire or fire brush pickers. CP 268. They have no control over brush pickers or the means and methods used to harvest greens. CP 269. They do not direct where brush pickers will work, except to limit the area where brush pickers may legally harvest greens to the area described in the original land lease. *Id.* The packinghouses do not set work hours for the brush pickers. *Id.* Instead, the brush pickers control their own schedules, unless the terms of the underlying land lease dictate the hours during which harvesting is not permitted. *Id.* The packinghouses do not supply the brush pickers with tools to harvest greens. *Id.* They do not specify what is to be harvested or how it is to be harvested. *Id.* Instead, what is harvested often depends on what brush pickers find naturally growing in the forest at the time of harvest. CP 268. This decision is often market-driven by the posted price for specific greens. *Id.* The packinghouses, in compliance with the law and their underlying lease obligations, often document drivers' licenses and copy evidence of vehicle insurance. CP 269. The packinghouses do not transport brush pickers to or from the area being harvested, nor do they transport harvested products from the forest to their sheds. *Id.* Brush pickers make their own transportation

arrangements and some even drive their own private vehicles to the site where they choose to pick brush. *Id.*

In her deposition in a case before the Board of Industrial Insurance Appeals (Board), the Department's Marcia Holt agreed that many of these factors listed above go directly to whether the sheds exercise "direction and control" over brush pickers. CP 35-36.

Richard White, a Department employee who was assigned the task of investigating Olympic Evergreen, one of the respondents here, at the request of Ms. Holt and senior management at the Department in an Act/WISHA enforcement case that lasted months, testified in his Board deposition about the evidence he developed in that investigation. He had no knowledge that Olympic directed brush pickers to any specific areas in the forest, other than the general leasehold area. CP 119. White further testified the harvesters pick what is naturally growing in the forest, CP 133, and that he had no evidence brush pickers had been told where specifically to go on leased land or what products to pick, what methods or tools to use, or that any tools were supplied by Olympic. CP 133-34. He also testified Olympic did not provide transportation for the harvesters, nor did it transport the picked product out of the forest. CP 134. None of the investigated vehicles carrying brush pickers belonged to Olympic. CP 119.

The packinghouses do not require brush pickers buying permits to sell the greens harvested under the permit back to them. CP 268. Instead, brush pickers are free to sell the harvested greens to whomever they choose. *Id.* Many brush pickers to whom the packinghouses have sold permits for a stumpage fee will sell the greens harvested under the permit to another packinghouse, which creates a financial advantage for the brush pickers. CP 268, 1296-97. If a brush picker purchases a permit from a packinghouse for a stumpage fee, the fee is collected only when the packinghouse buying the product is also the packinghouse selling the permit. CP 268. In most cases, the stumpage fee cannot be collected when another packinghouse purchases the product instead of the packinghouse that sold the permit. *Id.*

Many of the packinghouses regularly buy greens from brush pickers harvesting greens under permits issued by another packinghouse. CP 269. A brush picker could also obtain a permit to harvest greens on DNR land directly from DNR, or a permit to harvest greens on private property directly from the landowner. *Id.* Additionally, some packinghouses purchase greens from other packinghouses. *Id.* The packinghouses are simply interested in buying the best product available at market price.

In an earlier dispute between the SFP industry, including the present respondents, and the Department,⁵ after extensive audits in 2002-03 by the Department designed to find the packinghouses were responsible for the coverage of brush pickers under Title 51 RCW, the Mason County Superior Court entered a declaratory judgment and order on April 25, 2003 holding the brush pickers were not covered employees/independent contractors of the packinghouses. CP 1256-57. The court found:

1. The Greens Companies contended, and L&I ultimately did not controvert, that vendor-pickers own the greens they harvest as their personal property.

2. The uncontroverted evidence in the case shows the Greens Companies:

- a. Operate almost identically as the company in *In re: V. A. Kitzmiller* (Board of Industrial Insurance Appeals) (No. 94-5539);
- b. Do not direct or control the work of vendor-pickers;
- c. Do not consent to being “employers” of vendor-pickers;
- d. Buy greens from vendor-pickers who did not buy a permit from the purchasing company for the greens; and

⁵ *Cascade Floral Products, Inc. v. Dep't of Labor & Industries* (Mason County Cause No. 01-2-00877-7). The Honorable James Sawyer was the trial court judge in that case, as well as in the present case.

- e. Do not require vendor-pickers to sell harvested material back to whomever they obtained the right to harvest from.

3. The Greens Companies are not in the picking business but rather are in the buying and packing business.

CP 1256. The Department did not appeal from the court's order.

The process of brush picking does not involve cultivation of the specialty forest products, as is true of other "agricultural" activities in the forest such as reforestation or the growing of Christmas trees. The landowners, the packinghouses, and the brush pickers do not plant specialty forest products in any particular place; the products are not weeded or pruned as they grow. CP 268. The brush pickers merely pick what they find growing naturally in the woods. *Id.*

In the *Cascade Floral Products* case, the court determined that brush pickers would not be covered under the Act if a packinghouse:

1. Sells a permit to a vendor-picker;
2. Does not, in contract or in practice, require the vendor-picker to sell the product back to the company;
3. Does not direct or otherwise control the work of the vendor-picker;
4. Is not in the picking business but rather is in the buying and packing business; and

5. Requires a vendor-picker to be solely responsible for his or her own taxes and complying with all other business regulations.

CP 1257.

Around the time of the court's decision in *Cascade Floral Products*, the Department sent packets of material to packinghouse owners suggesting they were subject to the Act. CP 1034-79. As indicated in the Department's own business records and staff emails, the Department's Patrick Woods had serious questions about whether that Act applied to the packinghouses, and he queried the Attorney General in 2000 about whether the Act applied to the packinghouses. CP 1345-46 ("Is this proposed expansion to include 'sheds' or 'lease holder' what the Legislature intended when the law was passed in 1985 under SHB 199? Which by the way was sponsored by then Representative Locke.").

Nevertheless, the Department sought to enforce the Act against the packinghouses even though it knew the Act was not applicable to the SFP industry. In 2005, the Department again undertook intrusive audits of virtually the entire industry, except those packinghouses that agreed with the Department for business reasons that brush pickers should be covered

under Title 51 RCW. CP 157-58, 175, 178. These audits and related efforts were unusually intrusive.⁶

As part of their effort to resist the Department's actions, the packinghouses filed the present action in the Mason County Superior Court on March 16, 2006 seeking a declaratory judgment that they are not subject to the Act. CP 1389-94. The packinghouses subsequently amended their complaint, CP 1385-88, and the Department answered, arguing the Act applied to packinghouses. CP 1382-84. The packinghouses initially moved for summary judgment on April 11, 2006. CP 1373-81. After nearly 100 days of delays requested by the

⁶ Despite audits in the 2002-03 period that prompted the *Cascade Floral Products* action, the Department again audited the packinghouses. CP 25, 108-118. It surreptitiously videotaped brush pickers for hours on public roads. CP 59-61, 184-88. It set up illegal checkpoints outside the property of packinghouses. CP 37-64, 110-14, 167-70, 270. See *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) (holding sobriety checkpoints violated article I, § 7 of the Washington Constitution). The SFP industry is not a pervasively regulated industry; the Fourth Amendment applies to alleged violators of RCW 76.48. *State v. Thorp*, 71 Wn. App. 175, 856 P.2d 1123 (1993), *review denied*, 123 Wn.2d 1009 (1994). It followed brush pickers to their homes. CP 1308-10. The Department's auditors showed up at brush pickers' doors in teams with the intent of intimidating the pickers, many of whom come from countries like Guatemala or Cambodia where governments are often hostile to citizens' safety. CP 73-74, 199. It even secured false translations from individuals after these activities. CP 99-100, 141-42.

In recent weeks, the Department issued notices of assessment to packinghouses claiming hundreds of thousands of dollars in back industrial insurance premiums due because it alleges the pickers are covered workers of the packinghouses under the Industrial Insurance Act.

In the past, it cited packinghouses for WISHA violations claiming the pickers were employees of a packinghouse. *In re Olympic Evergreens*, (BIIA Docket No. 05 W2010). CP 220-38, 270. That WISHA case was largely abandoned by the Department.

Department, the trial court heard the packinghouses' motion and granted it on September 11, 2006. CP 284-87. The trial court observed:

And this is what I kept going back to. Am I misreading this statute? Is it saying something more than what I have here? Is it ambiguous in some way, shape or form? And every time I read it, every time I re-read it, I thought, I don't believe that it is. I believe that this statute is absolutely unambiguous on its face because the words – and I know that the Department has caught on, and other related activities. But, and other related activities refers back to the specific words at the beginning of that, forestation or reforestation. It doesn't say, and other related forestry practices. It doesn't say, and forestry practices in general. It says, and other related forestation and reforestation activities, is what we're really dealing with there.

RP 25.

The trial court also excluded the Department's last minute effort to file a "reply to the packinghouses' reply" to insert additional material into the record. RP 1-3.⁷ This appeal followed. CP 6-11.

D. SUMMARY OF ARGUMENT

⁷ Although the trial court granted the respondents' motion to strike the Department's "reply to a reply," the Department has included this pleading in the record. CP 480-93. In connection with that motion, the Department offered declarations by Marcia Holt, Peter Minshall, Diana Cartright, and Roxanne Yaconetti. CP 308-479. Those declarations were also offered to respond to the packinghouses' reply on summary and were stricken. CP 286. They are not referenced in the trial court's order on summary judgment as materials on which the court relied. CP 285-86. Nevertheless, the Department also included these improper materials in the record, *although it did not assign error to their exclusion*. Br. of Appellant at 4. That evidence was excluded and is not properly used before this Court on review, as the record on appeal consists only of evidence specifically considered by the trial court. RAP 9.12. This Court should sanction the Department for this grossly improper conduct. RAP 18.9.

By its plain terms, the Act does not apply to activities that do not involve cultivation on the farm or in the forest. RCW 19.30.010(4) defines agricultural activities subject to the Act and that definition does not include brushpicking.

If the Court believes there is an ambiguity in the language of the statute and goes beyond its terms, all of the tools of statutory construction should lead the Court to interpret RCW 19.30.010(4) as the trial court did here. The doctrine of *expressio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of others) indicates that the Legislature did not include brushpicking, given the listing of activities in the statute. Moreover, the Department's own regulations, other statutes involving agriculture, and counterpart federal statutes all indicate agriculture, as defined in the Act, is confined to cultivation.

The trial court was correct in ruling RCW 19.30.010(4) applied only to actions involving cultivation.

The packinghouses should be awarded their attorney fees and costs on appeal because the Department's actions are in bad faith.

E. ARGUMENT

(1) Standard of Review on Summary Judgment

Appellate court review of a summary judgment is de novo. *Morton v. McFall*, 128 Wn. App. 245, 252, 115 P.3d 1023 (2005). When

reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291, 100 P.3d 310 (2004). This Court must consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Id.* Summary judgment is properly granted where the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

(2) Principles for Statutory Interpretation in Washington

This case is essentially one of statutory interpretation. “The primary goal of statutory construction is to carry out legislative intent.” *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington’s traditional process of statutory interpretation, this analysis begins by looking at the words of the statute. “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* The Court must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep't of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the Court’s role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

If, however, the language of a statute is ambiguous, the courts must then construe the statutory language, but the object of such construction is still to effectuate the Legislature's intent. *Dep't of Ecology*, 146 Wn.2d at 9-10, 11-12. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). In undertaking the construction of a statute, the courts must construe it in a manner that best fulfills the legislative intent. *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). But the Court should not read language into a statute even if it believes the Legislature *might* have intended it. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

A court may resort to "principles of statutory construction, legislative history, and relevant case law" to assist it in discerning legislative intent only if the statute's language is ambiguous. *Cerrillo*, 158 Wn.2d at 202; *Cockle*, 142 Wn.2d at 809. Useful legislative history materials may include bill reports on the legislation, *Young v. Estate of Snell*, 134 Wn.2d 267, 280, 948 P.2d 1291 (1997), or fiscal notes on the legislation, *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 923, 91 P.3d 903 (2004).

In this case, however, the language of RCW 19.30.010(4) is plain. The Act applies only to agricultural activities as there defined. Even if the

statutory definitional language were ambiguous (which it is not), the Legislature intended the Act to apply to *agricultural* activities, activities pertaining to cultivation and husbandry.

(3) Regulatory Scheme for the SFP Industry

The packinghouses are part of the SFP industry which is regulated in RCW 76.48. The SPF statute defines specialized forest products, RCW 76.48.020(17), and provides that no one may harvest such products without a permit. RCW 76.48.030. Persons may not even transport such products without a permit or evidence of legal authority to possess such products. RCW 76.48.070. The Department is *not* among the agencies entrusted with the enforcement of the SPF statute. RCW 76.48.040.

The SPF statute has been in place since 1967. Laws of 1967, ex. sess., ch. 67. It was amended in 1977 and 1979, before the 1985 amendments to the Act at issue in this case. The 1985 Legislature is charged with knowledge of existing statutes affecting the matter upon which it is legislating. *State v. Conte*, 159 Wn.2d 797, 808, 154 P.3d 194 (2007). It did not add the harvest of SFP to the activities covered under RCW 19.30.010(4) in 1985 or any time thereafter.

In the 2005 legislative session, legislation was offered to make the Department an official agency charged with enforcement power for the SPF statute, but the Legislature refused to enact it. CP 164-65. The

Department attempted to distance itself from this legislative rebuke by arguing it had nothing to do with that failed legislative effort, apart from “some internal agency discussion” of the legislation, CP 533, but those internal Department communications, in fact, evidence the Department’s desire to be added to the list of agencies that may enforce RCW 76.48. CP 240 (“... we would like to see the bill add the Department of Labor & Industries to Chapter 76.48.040, the section of the act that lists the agencies that may enforce the provisions.”).

(4) By Its Plain Terms, the Act Does Not Apply to Brush Picking

A party may be subject to the Act in one of two ways: the party gathers farm laborers for employment in agricultural activities, RCW 19.30.010(3); RCW 19.30.030, or it knowingly uses products that are the result of such agricultural activities. RCW 19.30.200.⁸ The Department

⁸ In essence, the Act applies to companies selling the services of agricultural workers to farmers – the agricultural equivalent of a temp service. For example, farm labor contractors might contract with an apple orchard to supply a 100-person picking crew for a one-week period when the crop is ripe. The contractor must pay the crew and comply with all employment laws; the orchard pays the farm labor contractor an hourly rate multiplied by the number of hours and workers. The farm labor contractor must register with the Department so it can make sure the contractor pays the crew and complies with various employment laws.

If a person knowingly “uses” the “services” of a person who is an unregistered farm labor contractor, that person could be held liable to the crew for any unpaid wages and other costs. RCW 19.30.200. In the apple orchard example, if a shady farm labor contractor did not register with the Department (so he could cheat the crew out of their wages) and the orchard hired the shady contractor, the crew could sue the orchard because it “used” the “services” of an unregistered farm labor contractor.

below that *both* aspects of the Act applied to packinghouses, CP 596-601, but in its brief, in a footnote, it attempts to confine the reach of the trial court's opinion to only those circumstances where the packinghouses actually gathered farm laborers to perform work. Br. of Appellant at 12 n.6. The Department's argument is not only disingenuous in light of its argument to the trial court, it is wrong because either aspect of the Act returns to the requirement that *agricultural activity* is the necessary predicate for responsibility under the Act.⁹

In this case, the packinghouses are not farm labor contractors because they do not hire crews of workers. Neither are they subject to the Act indirectly by "using" the "services" of the pickers. By merely subleasing, or issuing a permit to allow pickers to brush on property the packinghouses leased, they are not like the orchard in the example above that hired a crew.

⁹ The Department's arbitrary interpretation of the user portion Act leads to absurd results, a goal to be avoided in statutory interpretation. *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007) ("A reading that produces absurd results must be avoided because 'it will not be presumed that the legislature intended absurd results.'").

Although RCW 19.30.200 applies to the packinghouses only if they "knowingly" bought the product of unregistered farm labor contractors, the Department has arbitrarily decided how much a brush picker can pick in a day, and purchasing more than that amount according to the Department, constitutes "knowingly" purchasing from an unlicensed farm labor contractor. CP 28, 598. The Department also asserts that even purchasing once a week from a brush picker could subject a shed to liability. *Id.* The Department then says that the determination of whether such a relationship exists depends on the facts of each case. *Id.* But, a shed might purchase from hundreds of vendors a year. Therefore, if the Department believes a person is an unlicensed farm labor contractor, it can assess penalties long after the fact during some audit, forcing each packinghouse to litigate hundreds, perhaps thousands, of transactions through the appeals process. Under the Department's strained interpretation of the Act, mere volume of product purchased controls; Safeway would be subject to audit for Act violations for every shipload of vegetables purchased to see if it bought more lettuce or carrots than one person could conceivably pick in a day.

In arbitrarily setting the allowable amount which can be bought by a packinghouse from a brush picker to make that brush picker a covered worker, the

RCW 19.30.010 defines a farm labor contractor as “any person, or his or her agent or subcontractor, who, for a fee, performs any *farm labor contracting activity*.” (emphasis added). Farm labor contracting activity is defined by the statute as “recruiting, soliciting, employing, supplying, transporting, or hiring *agricultural employees*.” RCW 19.30.010(3) (emphasis added). An agricultural employee is also defined under the statute as “any person who renders personal services to, or under the direction of, an *agricultural employer* in connection with the *employer’s agricultural activity*.” RCW 19.30.010(5) (emphasis added). A person may also be liable under RCW 19.30.200, if such person “knowingly” uses the services of an unlicensed farm labor contractor.

The statutory scheme is quite clear. In order to use the services of a farm labor contractor, the person has to be engaged in farm labor contracting. In order to be engaged in farm labor contracting, that person must deal with agricultural employees. To be an agricultural employee, an employee must provide personal services to, or work under the direction of, an agricultural employer.

Department has obviously promulgated a rule. Yet, it has not followed the procedures of the Administrative Procedures Act to do so. See RCW 34.05.010(16) (rule is “any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction ... (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law”). See, e.g., *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 2 P.3d 1022 (2000), *review denied*, 142 Wn.2d 1021 (2001) (University “policy” re: tuition waiver for veterans was invalid as it had not been adopted under APA as a rule).

Thus, the critical predicate to the Act's application, either for a person alleged to be a farm labor contractor or "using" the services of a farm labor contractor, is that the conduct at issue must pertain to agricultural activities. RCW 19.30.010(4) describes an agricultural employer as:

any person engaged in agricultural activity, including the growing, producing, or harvesting of farm or nursery products, or engaged in the forestation or reforestation of lands, which includes but is not limited to the planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings, the clearing, piling, and disposal of brush and slash, the harvest of Christmas trees, and other related activities.

From a factual standpoint, brush picking does not share the essential characteristics associated with agriculture. It does not occur on farms, but in the forest. More significantly, it does not involve cultivation; instead, what is harvested grows naturally. The commodity is not planted, weeded, pruned or watered, as is true of other "agricultural" activities conducted in the forest like reforestation or the growing of Christmas trees. Brush pickers merely harvest what they find growing naturally. The harvesting of evergreen foliage, salal, cascara bark and the like are not specifically mentioned, nor are they related to the activities covered in the statute. The harvesting of brush does not involve cultivation, the essence of agriculture.

The Department relies upon the language “and other related activities” to assert brush picking is covered under the Act and falls under this definition.” Br. of Appellant at 23. But that language clearly modifies “forestation or reforestation of lands,” activities plainly involving cultivation, i.e., planting, fertilizing, weeding, etc. The Department faults the trial court for reading the statute this way, *id.* at 21, but Patrick Woods, the Department’s key staff person on Act enforcement, *conceded* that the language in question modified “forestation or reforestation of lands:”

Q. If you know.

A. It references and related activities.

Q. And that would be related to forestation and reforestation, would it not?

A. Correct.

CP 152. Brush picking may occur in the forest, but it is not forestation or reforestation, the planting and cutting of trees. Clearly, on the face of the statute, brush picking is excluded because it does not involve cultivation of the brush in any sense.

The Legislature, in enacting RCW 76.48, was aware of the SFP industry and its practices, but did not see fit to include such activities within the definition of RCW 19.30.010(4). The Act is plain on its face, as the trial court here noted. This Court need go no farther in its analysis. The Act does not apply to the packinghouses.

(5) Supplementary Materials, Including the Department's Own Regulations and Legislative History, Indicate the Act Does Not Apply to the Packinghouses

If this Court were to determine the plain language of RCW 19.30.010(4) is somehow ambiguous, it could resort to other materials to interpret the Act's provisions. These other materials only lend credence to the packinghouses' argument that the Act requires cultivation.

(a) Canons of Statutory Interpretation

Washington courts have employed canons of statutory interpretation to assist them in construing statutes.¹⁰ One of the most commonly used canons is *expressio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of others). *Cerrillo*, 158 Wn.2d at 207. This Court, too, adheres to this canon of statutory interpretation. *Kitsap County v. Central Puget Sound Growth Mgmt. Hearings Board*, ___ Wn. App. ___, 158 P.3d 638 (2007).

Notwithstanding this canon, the Department argues the Court should read the listing of activities in RCW 19.30.010(4) expansively, to include activities that do not include cultivation or husbandry, the essence of "agriculture." Br. of Appellant at 22-27. This argument is plainly flawed.

¹⁰ See Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 *Sea. U. L. Rev.* 179, 193-203 (2001).

Each one of these activities listed in RCW 19.30.010(4) involves either cultivation or husbandry. Even the raising of Christmas trees or reforestation activities involve cultivation. A person must cultivate Christmas trees on that person's land, *i.e.*, plant seedlings, fertilize, weed, thin the trees, and harvest them. Similarly, in reforestation, a person must engage in cultivation by planting seedlings, fertilizing, and thinning them on land the person owns or leases. *Nothing* in the harvesting of brush involves anything resembling cultivation. No one plants, fertilizes, weeds, or thins anything. Brush grows naturally in the forest and is gathered by pickers. The Legislature, by employing the definitional language in RCW 19.30.010(14), excluded non-cultivation, non-husbandry activities like brushing from the Act.

The Department apparently argues for the first time on appeal that, in effect, a new canon should be adopted. Br. of Appellant at 27-28. It contends that ambiguities in the statute should be construed *in favor* of coverage. It offers no authority for this proposition, because there is none. If the statute is ambiguous, the courts must construe the statute to effectuate the Legislature's intent, not what the Department wants the outcome to be.

The Department also asserts the Act is remedial and should be construed liberally to cover brush pickers, Br. of Appellant at 32-33, citing

Silverstreak v. Dep't of Labor & Industries, 159 Wn.2d 868, 154 P.3d 891 (2007) for this proposition. The flaw in the Department's argument is that even if the statute is remedial in nature, that does not overcome the fact that a statute is inapplicable to a party. For example, Washington's industrial insurance statute is remedial in nature, but that does not overcome the fact that it is inapplicable to a particular injured worker under a given set of facts. In fact, such a remedial purpose in Title 51 does not overcome requirement that a person strictly prove the right to recovery under the statute, *Kirk v. Department of Labor & Industries*, 192 Wash. 671, 674, 74 P.2d 227 (1937), or that the specific statutory language denying recovery must be enforced. *Lowry v. Department of Labor & Industries*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944).

Finally, the Department falls back on the old agency contention that an administrative agency's interpretation of a statute is entitled to deference. Br. of Appellant at 33-34. But the Department points to no regulation or long-standing policy that put the public on notice that it was construing RCW 19.30.010(4) in the manner it now advocates. Courts, *not* administrative agencies, are the final word on the interpretation of a statute; an erroneous agency interpretation of a statute is entitled to no deference whatsoever. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715-16, 153 P.3d 846 (2007).

(b) Washington Law

The Department asserts the legislative history of RCW 19.30.010(4) indicates the Legislature intended brush pickers to be covered. Br. of Appellant at 28-32. For all the information discussed in its brief, the Department cannot point to a single place in the 1985 legislative history where the Legislature indicated an intent to cover brush pickers. The Department offers the misleading analysis that the 1985 amendments to the Act were designed to address *harvesting* in the forest. *Id.* at 30-31. But the one legislative reference to harvesting in the forest cited by the Department for its argument was the testimony of a legal services attorney who mentioned harvesting *only* in connection with other *cultivation* like planting, thinning and the like. CP 870.

Although the Legislature used great specificity in its 1985 amendments to the Act, it again did not include brush picking. The Department conceded this fact below: "... brush picking activity was not specifically mentioned in the 1985 amendments to the FLCA..." CP 581.

Moreover, for years, the Department's own regulations relating to industrial insurance coverage recognized the packinghouses were not agricultural employers. WAC 296-17-643 provides in classification 4802-06, ("Picking of forest products, N.O.C."), the industrial insurance classification applicable generally to the industry, as follows:

Applies to establishments engaged exclusively in picking forest products that are not covered by another classification (NOC) such as, but not limited to, holly, ferns, cones, cedar boughs, mushrooms, wild flowers, wild berries, moss and tree bark.

Work contemplated by this classification is limited to hand-picking operations and is often accomplished through the aid of hand-held cutting devices such as pruning shears or saws. Properties from which products are harvested from [sic] may be owned or leased. Operations not described above are to be reported separately in a classification applicable to the work being performed.

Special Note: *The farm labor contractor provision, is described in the general reporting rules, is not applicable to this classification as such establishments are not engaged in a farming operation.*

(emphasis added). Other sub-classifications within the main classification 4802 of WAC 296-17-643 also indicate the term “farm labor contractor” applies to specialty contractors who supply laborers to “a farm operation” for specified services such as “weeding, planting, irrigating and fertilizing.” No evidence exists that the packinghouses are involved in the weeding, planting, irrigating or fertilizing of brush. Neither are the brush pickers, for that matter.

Frank Romero, a Department manager for 25 years, personally wrote the special note to classification 4802-06 of WAC 296-17-643. *Id.*, CP 1248. He wrote similar notes for egg grading, candling and packing, potato sorting, and custom hay baling. CP 1249. He testified that the

Department *never* considered brush picking to be an agricultural activity. *Id.* Instead, a classification or activity was only specified as “agricultural” if it involved active planting, husbandry and harvest. *Id.* Romero testified the special note was “consistent with the definitions of ‘agriculture’ and ‘farm labor contractor’ contained in RCW 19.30.010, as employers and pickers engaged in this type of business operation are not engaged in a farming operation and therefore, were not to be considered farm labor contractors.” *Id.*

In a revealing internal email on April 20, 2003, the Department’s John Blomstrand admitted to Patrick Woods and Richard Ervin that the Department’s Classification Services section was of the opinion brush picking is not a farming operation:

The position of Classification Services is that brush picking is not a farming operation, but should be viewed in the context of a harvesting/picking classification. I do not believe that what is known of the brush picking process constitutes a farming operation as defined in the other farming classifications though the agricultural component is certain. However there may be other applicable statutes outside of our domain which address the brush picking issues with greater clarity.

CP 1352.

The Department proposed regulations to delete the special notes in December 2005. CP 273, 276-77. The proposed regulations were

withdrawn in the face of aggressive opposition to such an effort by the agricultural community. CP 276-77, 1244-47.

When the Legislature enacted the amendments to the FLCA in 1985, WAC 296-17-643 was in place. The Legislature was aware of this provision and did not change it over the many years it has been there in numerous classifications, either in the IIA, or when it amended the FLCA. It acquiesced in the Department's own understanding of the meaning of "agriculture." *Soproni v. Polygon Apartments Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999).

In sum, the legislative history of RCW 19.30 simply does not support the Department's interpretation of RCW 19.30.010(4).

Not only has the Department never sought legislative approval to specifically authorize what it claims was the intent of the Legislature, since the Act was amended in 1985, the Legislature has passed other acts relating to agriculture which have not provided that brush picking is an agricultural activity. Other statutory provisions relating to agricultural activities support the packinghouses' interpretation of RCW 19.30.010(4). For example, WISHA is consistent with the packinghouses' interpretation.

The key statutory definition is found in RCW 49.17.020(1),¹¹ which states that “agriculture” means farming and includes, but is not limited to:

- (a) The cultivation and tillage of the soil;
- (b) Dairying;
- (c) The production, cultivation, growing, and harvesting of an agricultural or horticultural commodity;
- (d) The raising of livestock, bees, fur-bearing animals, or poultry; and
- (e) Any practices performed by a farmer or on a farm, incident to or in connection with such farming operations, including but not limited to preparation for market and delivery to:
 - (i) Storage;
 - (ii) Market; or
 - (iii) Carriers for transportation to market.

The term “agriculture” does not mean a farmer’s processing for sale or handling for sale a commodity or product grown or produced by a person other than the farmer or the farmer’s employees.

The Legislature clearly indicated how the Department should interpret RCW 49.17.020(1), stating: “[i]t is the intent of the legislature that activities performed by a farmer as incident to or in conjunction with his

¹¹ WAC 296-307-006 defines “agricultural operations” in a similar manner. The only distinction between the statutory definition and the administrative definition is that the administrative definition expands the subsection relating to carriers for transportation to market. *Compare* RCW 49.17.020(1)(e)(iii) *with* WAC 296-307-006(e)(iii).

or her farming activities be regulated as agricultural activities.” RCW 49.17.022. In reaching this conclusion, the Legislature also noted the Department needed “guidance” in determining when activities related to agricultural products should be regulated as agricultural activities and when they should be regulated as other activities.

Similarly, Washington’s farm nuisance law, the so-called Right-to-Farm Act, RCW 7.48.300 *et seq.*, exempts agricultural activity from nuisance laws. *Vicwood Meridian P’ship v. Skagit Sand & Gravel*, 123 Wn. App. 877, 882-83, 98 P.3d 1277 (2004). RCW 7.48.310(1) defines agricultural activities to include:

[a] condition or activity which occurs on a farm in connection with the commercial production of farm products and includes, but is not limited to, marketing produce at roadside stands or farm markets; noise; odors; dust; fumes; operation of machinery and irrigation pumps; movement, including but not limited to, use of current country road ditches, streams, rivers, canals, and drains, and use of water for agricultural activities; ground and aerial application of seed, fertilizers, conditioners, and plant protection products; employment and use of labor; roadway movement of equipment and livestock; protection from damage by wildlife; prevention of trespass; construction and maintenance of buildings, fences, roads, bridges, ponds, drains, waterways, and similar features and maintenance of streambanks and watercourses; and conversion from one agricultural activity to another.

For purposes of the Right-to-Farm Act, the agricultural activity must occur on a farm.

While the statute also covers forest practices, RCW 7.48.305, “forest practices” includes the activities defined in RCW 76.09.200. RCW 7.48.310(5). Those activities include any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber, including, but not limited to:

- (a) Road and trail construction;
- (b) Harvesting, final and intermediate;
- (c) Precommercial thinning;
- (d) Reforestation;
- (e) Fertilization;
- (f) Prevention and suppression of diseases and insects;
- (g) Salvage of trees; and
- (h) Brush control.

RCW 76.09.020(1). That statute exempts activities not involving cultivation in the forest:

“Forest practice” shall not include preparatory work such as tree marking, surveying and road flagging, and removal or harvesting of incidental vegetation from forest lands such as berries, ferns, greenery, mistletoe, herbs, mushrooms, and other products which cannot normally be expected to result in damage to forest soil; timber, or public resources.

Id. (emphasis added). Thus, it is clear that brush picking is neither a forest practice nor an agricultural activity covered by the Right-to-Farm Act.

Finally, Washington's minimum and overtime wage law addresses agricultural employment. RCW 49.46.130(2)(g) exempts agricultural employment from Washington minimum and overtime wage laws:

Any individual employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment;

That definition requires cultivation or husbandry before agricultural activities are present.

In *Cerrillo*, our Supreme Court found RCW 49.46.130(2)(g) excluded truck drivers who transported agricultural commodities to shippers from overtime wages. Ironically, the Department appeared as an amicus curiae in the case. CP 1102-40. It argued to the Supreme Court that its interpretive guideline defining "agricultural workers" for the exemption should be applied. CP 1116-20. That guideline is consistent with the packinghouses' interpretation of agriculture here:

Workers who work on a farm for any person in connection with cultivation of the soil raising or harvesting any agricultural or horticultural commodity (including raising, shearing, feeding, caring for, training and management of livestock, bees, poultry, furbearing animals and wildlife) or in the employ of the owner or tenant or other operator of a

farm in connection with the operation, management, conservation, improvement or maintenance of such farm and its tools and equipment.

CP 1130.

Finally, although not a definition having the force of law, the Washington State Farm Bureau, an organization plainly interested in a *broad* definition of “agriculture” so as to enhance its membership recruitment, roots its definition in cultivation and husbandry:

We define agriculture to be the science, art or business involved in the preparation of soil for crop production, the cultivation of crops, the production and culture of animal products and fiber for human consumption, feed and/or sale as articles of trade or commerce, to include forestry, apiculture, aquaculture and commercial greenhouse operations.

CP 1088.

The packinghouses are simply not engaged in agricultural activities under Washington law. They are not farmers, nor are they involved in the cultivation, tillage, production, or growing of any forest product. Brush pickers harvest what grows naturally in the forest; they do not harvest product grown on a farm. As defined, “agriculture” does not include processing or handling for sale a commodity grown or produced by some one else, except if that other person is the farmer’s employee.

(c) Federal Law

Finding no support for its argument in the Act's express language, its legislative history, or analogous Washington cases on agricultural activities, the Department resorts to the argument that cases arising under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA) compel the conclusion brush picking is a agricultural activity. Br. of Appellant at 34-38. The Department is wrong.

First, the MSPA definition of agricultural activities in 29 U.S.C. § 1802(3) is different from that found in RCW 19.30.010(4). The federal statute extends to processing of agricultural commodities. However, at its most basic, the MSPA definition requires cultivation, husbandry, or processing of farm commodities.

Second, contrary to the Department's assertion that federal courts have interpreted MSPA to cover brush pickers, Br. of Appellant at 36, no federal case it cites so holds. Each of the cases cited by the Department involves *forest cultivation*. *Escobar v. Baker*, 814 F. Supp. 1491 (W.D. Wash. 1993) (case does not even involve forest workers; plaintiffs worked on berry farms); *Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987) (in split decision, court ruled workers who raise trees as crop for harvest are engaged in agriculture; MSPA applies to planting, thinning trees); *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir. 1988), *cert. denied*, 488 U.S. 854 (1988) (MSPA applicable to workers who plant

seedlings in tree farms; MSPA applies to *cultivation* of forests). *See also*, *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003) (workers involved in *cultivation* of pine straw covered by provisions of MSPA); *Donovan v. Frezzo Bros., Inc.*, 678 F.2d 1166 (3rd Cir. 1982) (mushroom compost is not agricultural commodity).

The closest the Department comes to a case on point is *Colunga v. Young*, 722 F. Supp. 1479 (W.D. Mich. 1989), *aff'd*, 914 F.2d 255 (6th Cir. 1990). In that case, workers were involved in the cutting and gathering of evergreen boughs. The district court noted this was not agricultural employment for minimum wage purposes of the Fair Labor Standards Act, but covered under the MSPA as *handling* of agricultural commodities. RCW 19.30.010(4) has no similar “handling” provision; Washington’s definition is confined to “growing, producing, and harvesting” of farm or nursery products—focusing the Act specifically on cultivation. The *Colunga* decision has also been criticized for its paucity of analysis. *Salazar v. Brown*, 940 F. Supp. 160, 165 n.1 (W.D. Mich. 1996). It is “especially unreliable precedent.” *Rogers v. Savings First Mortgage, LLC*, 263 F.Supp.2d 624, 639 n.8 (D. Md. 2005).

In sum, the federal authorities do not help the Department. The federal cases cannot import language into the Act that our Legislature specifically declined to include.

(6) The Packinghouses Are Entitled to Their Attorney Fees under the Bad Faith Exception to the American Rule on Attorney Fees

A party may be awarded its attorney fees on appeal if law supports an award of fees. RAP 18.1(a). An award of fees on appeal is justified even if fees were not requested in the trial court. *Mutual of Enumclaw v. Jerome*, 66 Wn. App. 756, 766, 833 P.2d 429 (1992), *rev'd on other grounds*, 122 Wn.2d 157, 856 P.2d 1095 (1993).

Washington courts have recognized an equitable exception to the American Rule on attorney fees where a party engages in bad faith conduct in the course of litigation. *See, e.g., In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 783-84, 10 P.3d 1034 (2000) (attorney fees could be awarded against party who files “intentionally frivolous recall petitions brought for the purpose of harassment”); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999), *review denied*, 140 Wn.2d 1010 (2000). In *Rogerson Hiller Corp.*, this Court recognized three types of bad faith meeting the equitable exception. *Id.* at 927-29. Here, the Department’s vexatious conduct against the packinghouses is in the nature of prelitigation misconduct and substantive bad faith.

In the present case, the Department has engaged in a series of enforcement activities under Title 51 RCW, WISHA, and the Act against the SFP industry. The Department has employed illegal checkpoints in its

enforcement activities, as well as surreptitious surveillance, and then its Marsha Holt lied about the use of the checkpoints. CP 507-08. These activities have compelled the industry generally, and these respondents, to incur extraordinary expenses and legal fees to resist the Department's efforts. The Department sought to enforce the Act against the respondents and the SFP industry knowing it had no basis to do so under the Act. In fact, the Department's Patrick Woods, a key figure in the Department's enforcement of the Act against the industry *conceded* in his deposition that the very interpretation of RCW 19.30.010(4) the Department now advances to support application of the Act to the respondents is wrong. The Department tried below to submit a "reply to a reply" and annexed declarations, which the trial court prevented. Now, however, the Department makes these excluded pleadings part of the appellate record despite failing to assign error to their exclusion.

This Court should award the packinghouses their attorney fees on appeal.

F. CONCLUSION

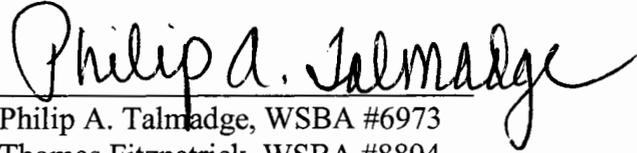
The packinghouses lease land in the forest where naturally-occurring forest vegetation grows and sell permits to brush pickers who harvest those greens. The brush pickers in turn sell what has been harvested to the packinghouses; the packinghouses purchase what they

wish to buy, at the market rate. The packinghouses do not control brush pickers. They do not set brush pickers' hours of work. They do not dictate what should be harvested. They do not provide transportation for the brush pickers. The packinghouses have no control over the physical condition of the forest or the means and methods by which the brush pickers harvest the greens, nor do they provide the tools by which the greens are harvested. The Department wants to create a fictional employment relationship between the packinghouses and the brush pickers so it can more readily impose its regulations under Title 51 RCW, WISHA, and the Act upon the SFP industry. It is more convenient for the Department to go after the sheds than the peripatetic brush pickers. But the law does not support the Department.

Here, the Act does not apply to the packinghouses, as the trial court ruled. The packinghouses are not engaged in agricultural activities for the purpose of the Act. The Department's own regulations, and analogous Washington statutes, have recognized that brush picking is not an agricultural activity. Gathering what grows naturally in the forest is not the type of cultivation or husbandry required for agriculture. This Court should affirm the trial court's judgment and award costs on appeal, including reasonable attorney fees, to the packinghouses.

DATED this 6~~th~~ day of July, 2007.

Respectfully submitted,

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

Philip A. Talmadge, WSBA #6973
Thomas Fitzpatrick, WSBA #8894
Emmelyn Hart-Biberfeld, WSBA #28820
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661
Attorneys for Respondents

APPENDIX

RECEIVED & FILED
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PAT SWARTOS, Clerk of the
Superior Court of Mason Co. Wash.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

CASCADE FLORAL PRODUCTS, INC.;
CONTINENTAL WHOLESALE
FLORISTS, INC., d/b/a CONTINENTAL
FLORAL GREENS; HIAWATHA, INC.;
HOOD CANAL EVERGREENS; PACIFIC
COAST EVERGREENS, INC.; PUGET
SOUND EVERGREENS CO., INC.; MT.
ST. HELENS EVERGREEN, INC.;
OLYMPIC EVERGREEN, INC.,

Plaintiffs.

v.

DEPARTMENT OF LABOR &
INDUSTRIES, an agency of the State of
Washington,

Defendant.

NO. 06-2-00218-4

ORDER ON
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT,
DEFENDANT'S
MOTION TO STRIKE
REPLY, MOTION OF
FARM BUREAU FOR
AMICUS STATUS, AND
DEFENDANT'S
MOTION TO STRIKE
PORTIONS OF FARM
BUREAU'S BRIEF

PROPOSED

THIS MATTER having come on regularly for hearing before the undersigned judge of the Mason County Superior Court on the plaintiffs' motion for summary judgment, the defendant's motion to strike portions of plaintiffs' reply brief, the Washington Farm Bureau's motion for leave to file amicus brief, and the defendant's motion to strike portions of the Farm Bureau's amicus brief, and the plaintiffs having been represented by Philip A. Talmadge of the Talmadge Law Group PLLC, 18010

Order on Motions - 1

Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
-1397 Fax

PT
and the
plaintiffs'
motion to
strike the
Department
reply to the
reply brief
and the
Farm Bureau's

Southcenter Parkway, Tukwila, Washington 98188, (206) 574-6661, the defendant having been represented by Diana Cartwright of the Office of Attorney General, and the Washington Farm Bureau having been represented by David Ducharme, 17790 SE 58th Place, Bellevue, WA 98006, (425) 644-4047, and the Court having considered the following pleadings:

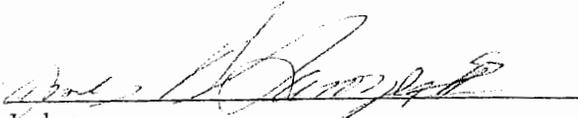
- Motion for summary judgment;
- Declaration of Philip A. Talmadge;
- Declaration of David Ducharme;
- Response to plaintiffs' motion for summary judgment;
- Declaration of Marcia Holt;
- Declaration of Patrick Woods;
- Declaration of Fred Reed;
- Reply in support of plaintiffs' motion for summary judgment;
- Declaration of George Dhooge;
- Supplemental declaration of David Ducharme;
- Declaration of Thomas M. Fitzpatrick;
- Department's motion to strike portions of plaintiffs' reply brief;
- Affidavit of Diana S. Cartwright;
- Plaintiffs' response to the Department's motion to strike;
- Washington Farm Bureau's motion for leave to file amicus curiae brief in support of plaintiffs;
- Declaration of Angela Schauer;
- Declaration of Dan Fazio;

- Department's motion to strike portions of the amicus curiae brief of Washington Farm Bureau;
- Affidavit of Diana S. Cartwright;
- Washington Farm Bureau response in opposition to the Department's motion to strike;
- Declaration of Philip A. Talmadge in support of Washington Farm Bureau's response;
- Declaration of Philip A. Talmadge.

and the Court being fully advised as to the premises for the motion, now, therefore, the Court rules as follows:

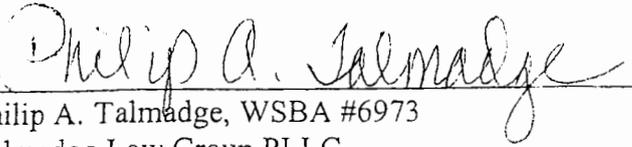
1. The Department's motion to strike portions of the Farm Bureau's amicus brief is DENIED.
2. The Farm Bureau's motion for leave to file an amicus brief is GRANTED.
3. The Department's motion to strike portions of plaintiffs' reply brief is DENIED.
4. The plaintiffs' motion for a summary judgment declaring that they are not subject to RCW 19.30 because they are not agricultural employers is GRANTED.

DONE IN OPEN COURT this 11th day of September, 2006.


 Judge

5 The plaintiffs' motion to strike the Department's reply to the plaintiffs' reply on summary judgment was denied.
 Order on Motions - 3

Presented by:



Philip A. Talmadge, WSBA #6973
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661
Attorneys for Plaintiffs

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THE HONORABLE JAMES B. SAWYER, II

OK

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

CASCADE FLORAL PRODUCTS, INC.;
CONTINENTAL WHOLESALE FLORISTS,
INC., d/b/a CONTINENTAL FLORAL
GREENS; HIAWATHA, INC.; HOOD CANAL
EVERGREENS; PACIFIC COAST
EVERGREENS, INC.; PUGET SOUND
EVERGREENS CO., INC.,

Plaintiffs,

v.

DEPARTMENT OF LABOR & INDUSTRIES,
an agency of the State of Washington,

Defendant.

NO. 01-2-00877-7

03-9-410-2

DECLARATORY JUDGMENT AND
ORDER

(Clerk's Action Required)

DECLARATORY JUDGMENT AND
ORDER - 1

[37453-0001/SL030970.296]

PERKINS COIE LLP
111 Market Street N.E., Suite 200
Olympia, Washington 98501
(360) 956-3300

JUDGMENT SUMMARY

1. Judgment Creditors: Cascade Floral Products, Inc.; Continental Wholesale Florists, Inc. d/b/a Continental Floral Greens; Hiawatha, Inc.; Hood Canal Evergreens; Pacific Coast Evergreens; and Puget Sound Evergreens

2. Judgment Debtor: Department of Labor and Industries of the State of Washington

3. Principal Amounts of Judgment: \$ -0-

4. Interest to Date of Judgment: \$ -0-

5. Costs (including statutory attorneys' fees): \$1,349.10

6. Other Recovery Amounts: \$ -0-

7. Principal Judgment Amount shall bear interest at 12% per annum.

8. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

9. Attorneys for Judgment Creditors: Perkins Coie LLP
By: Greg Overstreet
111 Market Street N.E. Suite 200
Olympia, WA 98501
(360) 956-3300

10. Attorney for Judgment Debtor: Christine O. Gregoire
Attorney General
By: James S. Johnson
Office of the Attorney General
P.O. Box 40121
Olympia, WA 98504-0121
(360) 459-6563

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I. INTRODUCTION

Plaintiffs ("Greens Companies") brought this declaratory judgment action to obtain a ruling providing criteria under which they were not employers of vendor-pickers of greens under the Industrial Insurance Act ("Act"), RCW Title 51. Defendant ("L&I") is the state agency administering the Act.

On November 4, 2002, the Court issued an oral ruling that the Greens Companies are not employers when they comply with a five-part test ("Five-Part Test").

II. FINDINGS OF FACT

The Court makes the following findings of fact based on evidence presented by the Greens Companies that L&I did not controvert.

1. The Greens Companies contended, and L&I ultimately did not controvert, that vendor-pickers¹ own the greens they harvest as their personal property.

2. The uncontroverted evidence in the case shows the Greens Companies:

- a. Operate almost identically as the company in In re: V. A. Kitzmiller (Board of Industrial Insurance Appeals) (No. 94-5539).
- b. Do not direct or control the work of vendor-pickers;
- c. Do not consent to being "employers" of vendor-pickers;
- d. Buy greens from vendor-pickers who did not buy a permit from the purchasing company for the greens; and
- e. Do not require vendor-pickers to sell harvested material back to whomever they obtained the right to harvest from.

3. The Greens Companies are not in the picking business but rather are in the buying and packing business.

¹ The term "vendor-picker" was used throughout the case. It means any picker who harvests greens.

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III. CONCLUSIONS OF LAW

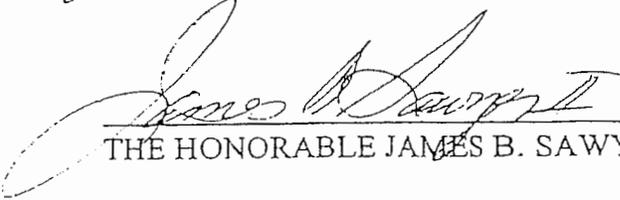
The Court hereby enters a declaratory judgment that a company or other entity is not liable for premiums under RCW Title 51 when a company:

1. Sells a permit to a vendor-picker;
2. Does not, in contract or in practice, require the vendor-picker to sell the product back to the company;
3. Does not direct or otherwise control the work of the vendor-picker;
4. Is not in the picking business but rather is in the buying and packing business; and
5. Requires a vendor-picker to be solely responsible for his or her own taxes and complying with all other business regulations.

IV. ORDER

For the reasons stated on the record at the hearing on November 4, 2002, L&I's motion for summary judgment, which asked this Court to decline to enter a declaratory judgment in this matter, is denied. For the reasons stated in this Declaratory Judgment, the Greens Companies' motion for summary judgment is granted.

DATED this 25th day of April, 2003.


THE HONORABLE JAMES B. SAWYER, II

1
2 Presented by:

3
4 PERKINS COIE LLP

5
6
7 By Greg Overstreet

8
9 Greg Overstreet, WSBA #26682

10 Attorneys for Plaintiffs

11
12 Approved as to Form; and
13 Notice of Presentation Waived:

14
15
16 CHRISTINE O. GREGOIRE

17 Attorney General

18
19
20
21 By James S. Johnson

22 James S. Johnson, WSBA #23093

23 Assistant Attorney General

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34 The document to which this certificate is attached is a full, true and
35 correct copy of the original on file and of record in my office.

36
37 IN WITNESS WHEREOF, I have hereunto set my hand and affixed
38 the seal of said court this 14 day of May 20 03

39 PAT SWARTOS

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41
42 County Clerk and Clerk of the Superior
43 Court of the State of Washington, in
44 and for the County of Mason.

45 By Maria Chubbell Deputy

46
47
DECLARATORY JUDGMENT AND
ORDER - 5

[37453-0001/SL030970.296]

PERKINS COIE LLP
111 Market Street N.E., Suite 200
Olympia, Washington 98501
(360) 956-3300

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DECLARATION OF SERVICE

On said day below I deposited in the U.S. mail a true and accurate copy of the following document: Brief of Respondents, Cause No. 35461-6-II, to the following:

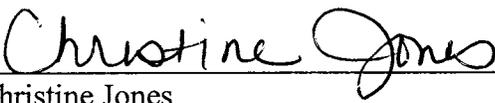
Diana Cartwright
Assistant Attorney General
Attorney General of Washington
Labor and Industries Division
900 Fourth Avenue, Ste. 2000
MS TB-14
Seattle, WA 98164-1012

FILED
COURT OF APPEALS
DIVISION II
07 JUL -6 PM 4:16
STATE OF WASHINGTON
BY _____
DEPUTY

Original filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 6, 2007, at Tukwila, Washington.



Christine Jones
Legal Assistant
Talmadge Law Group PLLC