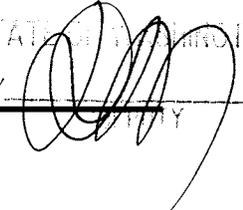


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COURT OF APPEALS

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STATE OF WASHINGTON

BY 

NO. 40019-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

BEN DAVIS, FLOYD FULMER, ROY HYETT, DICK OLSON, et al.,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondents seek attorney's fees for this unsuccessful lawsuit because a different party, represented by different legal counsel, brought a grievance before the Marine Employees' Commission (MEC) and succeeded in obtaining a favorable decision. Respondents are trying to ride on the coattails of a different party and a different legal counsel to benefit from the outcome that the other party and lawyer obtained in a different proceeding before an administrative tribunal. The gist of Respondents' argument is that this unsuccessful lawsuit should be lumped together with the successful grievance and called one "action" for purposes of RCW 49.48.030. Respondents should not succeed in this corruption of the statute and the concept of prevailing party.

This Court ruled in favor of the Department of Transportation (DOT) in this case. *Davis v. Dep't of Transp.*, 138 Wn. App. 811, 159 P.3d 427 (2007), *review denied*, 163 Wn.2d 1019, 180 P.3d 1291 (2008). That makes DOT the prevailing party in this lawsuit. As the losing party, Respondents are not entitled to attorney's fees.

II. ARGUMENT

A. **The Court Ruled In Favor Of DOT And Issued A Mandate That Ended The Case, So There Is No Basis For The Instant Proceedings**

Respondents argue that this Court intentionally left open the attorney's fees issue until after the MEC proceeding by using the phrase "at this time" when it denied their request for attorney's fees and costs. *Davis*, 138 Wn. App. at 825. However, the Court also remanded the case

to the superior court to enter judgment on behalf of DOT. *Id.* at 826. After the Supreme Court denied review, this Court issued its mandate to the superior court for further proceedings in accordance with its opinion. The mandate directs the superior court, not counsel, to act. The mandate did not require any action on the part of counsel to ensure judgment was entered in favor of DOT. Once the mandate issues, entry of judgment is a formality. Failure of the clerk of the superior court to perform the ministerial act of entering a judgment does not mean that the case remained open for further proceedings. Once the mandate issued, this case ended.

Not only did the Court make clear that DOT was the prevailing party by ordering entry of judgment in its favor, thereby foreclosing any argument that Respondents were the prevailing party and entitled to any attorney's fees or costs, but the mandate closed the case to any further proceedings under this cause number. Thus, it was improper for Respondents to even bring the motion for attorney's fees and costs at issue here.

B. Respondents Are Not Entitled To Attorney's Fees Under RCW 49.48.030

Respondents' reading of RCW 49.48.030 is absolutely procrustean as they attempt to make this case conform to the requirements of the statute. RCW 49.48.030 allows reasonable attorney's fees to a person who brings an action and is successful (*i.e.*, is the prevailing party) in obtaining a judgment for wages or salary owed.

1. **Respondents are not entitled to attorney's fees under RCW 49.48.030 because there were two separate proceedings, two different parties, and two different lawyers.**

Respondents are a class of employees who work in the engine rooms of ferries operated by DOT and are represented by a labor union. Rather than utilize the administrative process for redress required by RCW 47.64 and their collective bargaining agreements, they brought a lawsuit. On appeal, this Court held that the employees were “precluded from bringing this action” and should have sought relief through their collective bargaining agreements or the MEC. *Davis*, 138 Wn. App. at 825. Subsequently, the union that represents the Respondents filed a grievance with the MEC. The union was represented at the MEC by its own legal counsel, not the Respondents’ legal counsel in this case. Thus, there have been two separate proceedings regarding watch change, involving two different parties seeking relief, and two different lawyers representing the two different parties.

Nevertheless, Respondents argue that these two different proceedings should be considered one “action” in which the Respondents were successful in recovering back wages. This argument should hardly merit a response. Although the two proceedings involved the same issue, they cannot be considered part of one “action” under RCW 49.48.030. The cases cited by Respondents are inapposite because they involve situations where there was one action establishing the right to recover back wages and the second action was brought to recover attorney’s fees.

Here, there was one action that resulted in a judgment in favor of DOT and no recovery of back wages. Then, there was a proceeding before the MEC that resulted in a decision in favor of the union and an award of back wages. There is no case that can be construed to support the proposition that employees can lose in court, but get attorney's fees simply because another party pursued the same claim in an entirely different forum with more success than the employees.

Moreover, Respondents were not the "person" that recovered back wages. Although the MEC proceeding resulted in a decision that benefited Respondents, it was the union that was the "person" that recovered back wages.

Yet, Respondents argue that without this action, the result the union achieved at the MEC would not have been possible. It is the converse that is true — this action should not have been brought in the first place and the Respondents were required to seek a remedy solely through their union in front of the MEC. Respondents misconstrue this Court's dicta regarding whether watch change required additional compensation under the collective bargaining agreements.¹ By opining on the meaning of the collective bargaining agreements, the Court inadvertently gave Respondents the idea that this action was the first step

¹ Respondents failed to exhaust their administrative remedies, which is a prerequisite to judicial review. *Stanzel v. City of Puyallup*, 150 Wn. App. 835, 846, 209 P.3d 534 (2009). Thus, Respondents had no standing and the superior court and Court of Appeals did not attain jurisdiction over the merits of the matter. *Harrington v. Spokane Cy.*, 128 Wn. App. 202, 209-10, 114 P.3d 1233 (2005). Accordingly, any ruling on the merits would be outside the court's jurisdiction to make and constitutes dicta.

in a multi-step action for recovery of back wages.² The Court should disabuse Respondents of this notion and clarify that its previous denial of attorney's fees was not an invitation to revisit the issue after the MEC proceeding, but was an outright denial of attorney's fees because the Respondents were not properly before the Court.

2. Respondents are not entitled to attorney's fees under RCW 49.48.030 because the MEC proceeding was not an "action" and no "judgment" was entered.

Respondents' claim for attorney's fees is dependent upon the view that what occurred before the MEC constituted an "action" within the meaning of RCW 49.48.030 and that the MEC decision was a "judgment" for salary or wages owed within the meaning of RCW 49.48.030.

What is now RCW 49.48.030 was originally passed by the Legislature as Section 7596 of the Session Laws of 1888. Its original language read as follows:

Section 7596. Attorney's fee and damages allowed in actions on checks, etc. Whenever any person or persons . . . is compelled *to sue* . . . for the payment of wages for labor . . . if *judgment* should be granted the plaintiff, the court shall tax the attorney's fee . . . as damages to the plaintiff, suffered by the plaintiff by reason of being compelled *to sue* the said claim: Provided, that no plaintiff shall recover more than the face value of his said claim where the payment is refused by reason of a dispute as to the ownership of the said claim, or where it appears

² Ironically, Respondents admit that both their union (which was not a party to this litigation) and DOT did not consider watch change to require additional compensation under the terms of the collective bargaining agreements they negotiated. See Brief of Respondents (Br. Resp'ts) at 3, 8, 19. Nevertheless, this Court, *sua sponte*, determined that the collective bargaining agreements meant something other than the parties to the agreements intended them to mean.

satisfactorily to the court or jury that the defendant had a sufficient excuse for refusal of the payment of said claim

Session Laws of Wash., 1888, § 7596. (emphasis added in bold italics).

In 1971 the Legislature amended RCW 49.48.030. Since 1971, RCW 49.48.030 has read as follows:

In any *action* in which any person is successful in recovering *judgment* for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

(emphasis added in bold italics).

The 1971 Legislature revised the language of RCW 49.48.030 from "suit" to "action" and maintained the strict requirement that the employee obtain a "judgment for wages" before being eligible for attorney's fees.

The change from "suit" to "action" was a reflection of the current nomenclature. Historically, a "suit" referred to a proceeding in a court of equity, while an "action" referred to a proceeding in a court of law. Over time, the distinction disappeared and all judicial proceedings became known as actions. See Black's Law Dictionary, "action" (8th ed. 2004); Civil Rule 2. Thus, the terms suit and action are nearly synonymous.³

³ Note also that the words "action" and "suit" are listed in thesauri as synonyms of each other in the legal context. See, e.g., Merriam-Webster OnLine Thesaurus, available at <http://www.merriam-webster.com/thesaurus/> (visited May 25, 2010).

The Legislature is presumed to be aware of its own enactments. *Terry v. City of Tacoma*, 109 Wn. App. 448, 457, 36 P.3d 553 (2001), citing *State v. Peterson*, 100 Wn.2d 788, 791, 674 P.2d 1251 (1984). Furthermore, the Court must assume the Legislature means what it says. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

Nevertheless, the 1971 Legislature did *not* broaden the language of RCW 49.48.030 to include a proceeding before an administrative body (which is neither a “suit” nor an “action”). Additionally, the Legislature maintained the requirement that an employee must obtain a “judgment for wages.”

A court’s primary duty in interpreting any statute is to discern and implement the intent of the Legislature. *Nat’l Elec. Contractors Assn. v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). The starting point must always be “the statute's plain language and ordinary meaning.” *Id.* When the plain language is unambiguous — that is, when the statutory language admits of only one meaning — the legislative intent is apparent, and the Court will not construe the statute otherwise. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). If a statute is plain and unambiguous, its meaning must be derived solely from its language. *Harmon v. Dep’t of Soc. & Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998).

When construing a statute, a court looks to the plain meaning of the terms used therein. Where a term is not defined, the ordinary meaning of the word is used and it is presumed the Legislature intended it to mean

what it did at common law. *State ex rel. Munroe v. Poulsbo*, 109 Wn. App. 672, 677-78, 37 P.3d 319 (2002). The common law definition of action is “a prosecution *in a court* for the enforcement or protection of private rights and the redress of private wrongs.” *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 130, 426 P.2d 828 (emphasis added). In *Thorgaard*, the Court addressed the issue of whether an arbitration proceeding was an “action” within the meaning of the non-claim statute, RCW 36.45.010. The Court held that it was not. The Court stated that in using the term “action” in the non-claim statute, the Legislature clearly had a lawsuit in mind. *Id.* The Court found this interpretation consistent with RCW 4.04.020, which provides for one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is a civil action.⁴

Thorgaard construed the term “action” to mean only lawsuits before the 1971 amendment of RCW 49.48.030. The Legislature is presumed to know prior judicial interpretations of terms when it enacts legislation. *Gimlett v. Gimlett*, 95 Wn.2d 699, 701-02, 629 P.2d 450 (1981); *State v. McKinley*, 84 Wn. App. 677, 684, 929 P.2d 1145 (1997); *State v. Roby*, 67 Wn. App. 741, 746, 840 P.2d 218 (1992). Thus, when it amended RCW 49.48.030 and changed “suit” to “action,” the Legislature was aware of the Court’s construction of the term “action” and

⁴ See also Merriam-Webster OnLine Dictionary, “action” (1: the initiating of a proceeding in a court of justice by which one demands or enforces one's right; also : the proceeding itself). Merriam-Webster OnLine Dictionary, available at <http://www.merriam-webster.com/dictionary/> (visited May 25, 2010).

consequently intended “action” to carry the common law meaning as pronounced by the Court in *Thorgaard*.

In *Int’l Ass’n of Fire Fighters, Local 46 v. Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002) (hereinafter *IAFF*), the Court distinguished *Thorgaard* in finding that an arbitration proceeding is an “action” within the meaning of RCW 49.48.030. The Court found that *Thorgaard* addressed a different statutory scheme, namely an apparent conflict between the former county non-claim statute, RCW 36.45.010, and the arbitration statute, RCW 7.04, and therefore the meaning ascribed to action there could not be imported to the labor grievance arbitration context. *IAFF*, 146 Wn.2d at 39-40.

While the Court determined that labor arbitrations can be actions within the meaning of RCW 49.48.030, MEC proceedings should not be. The Court in *IAFF* focused on whether the labor arbitration is judicial in nature to determine whether it is an action. However, many types of proceedings have judicial aspects but that alone does not make them actions. The MEC holds hearings and receives evidence but are not bound by the rules of evidence. WAC 316-02-410. The members of the MEC are not judges (nor even required to be lawyers, for that matter) and are not held to the same standards of judicial conduct as judicial officers. *See N. State Constr. Co. v. Banchemo*, 63 Wn.2d 245, 248, 386 P.2d 625 (1964). The MEC has limited authority in grievance arbitrations.

See WAC 316-65-560.⁵ The limited purpose and nature of an MEC proceeding should preclude such proceedings from being deemed “actions” for purposes of RCW 49.48.030. *See Trachtenberg v. Dep’t of Corr.*, 122 Wn. App. 491, 497, 93 P.3d 217, *review denied* 103 P.3d 801 (2004) (administrative agencies do not have authority to determine issues outside of their delegated functions).

The *IAFF* Court’s reference to judicial “in nature” does not mean actually judicial; it means quasi-judicial. Quasi-judicial proceedings substitute for judicial proceedings. Quasi, Latin for “as if”, means a resemblance between two things but that there are also intrinsic and material differences between them. *See* Black’s Law Dictionary, “quasi” (8th ed. 2004). Quasi-judicial proceedings are analogous but not identical to judicial proceedings. Thus, focusing on the judicial nature of a proceeding does not make the proceeding an action, which is specifically a judicial proceeding.

The Court in *IAFF* noted that had that underlying case been brought in superior court, attorney’s fees would have been available. *IAFF*, 146 Wn.2d at 41. That is precisely the point here, though. Because of RCW 47.64.150, Respondents were precluded from bringing this case in superior court. *Davis*, 138 Wn. App. at 824-25. Further, MEC proceedings are administrative and governed by RCW 47.64 and

⁵ For instance, under MEC rules, each party bears their own attorney’s fees and costs. *See* WAC 316-65-150 (“Each party shall pay the expenses of presenting its own case . . .”). Thus, the MEC has no authority to award attorney’s fees in grievance arbitrations.

WAC Title 316. Consequently, a statute that addresses attorney's fees in judicial proceedings in a court should not be expanded to apply to proceedings before legislatively created administrative bodies.

The *IAFF* Court also cited to Black's Law Dictionary definition of action, one definition of which is "any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree." See Black's Law Dictionary, "action" (8th ed. 2004). An MEC decision is not a judgment or decree. Thus, an MEC proceeding cannot be an action because it does not result in a judgment or decree.

An MEC proceeding culminates in a decision, not a judgment. WAC 316-65-545. The terms "decision" and "judgment" are not synonymous. In the context of an administrative proceeding in particular, the document that relays the decision of the administrative tribunal cannot be deemed a judgment, which refers specifically to the decision of a court. See Black's Law Dictionary, "judgment" (8th ed. 2004). See also Merriam-Webster OnLine Dictionary, "judgment" (2a: a formal decision given by a court).

While MEC proceedings may be adjudicative in nature and the MEC issues a final decision, it is not the same as a judgment issued by a court. Only a court can enter a judgment. See *Larsen v. Farmers Ins. Co.*, 80 Wn. App. 259, 265-66, 909 P.2d 935 (1996); RCW 7.04.190. Given the different legal meanings of the terms, if the Legislature had intended administrative decisions to trigger attorney's fees under RCW 49.48.030,

the Legislature would have included such decisions in the language of the statute.

A court cannot add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. The Court must assume the legislature means exactly what it says. *Delgado*, 148 Wn.2d at 727; *Davis*, 137 Wn.2d at 964. Under the *expressio unius est exclusio alterius* canon of statutory construction, to express one thing in a statute implies the exclusion of the other. *Delgado*, 148 Wn.2d at 729; *In re Personal Restraint of Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (under the rule of *expressio unius est exclusio alterius*, the express inclusion in a statute of matters upon which it operates implies that other matters are omitted intentionally). Where a statute specifically lists the things upon which it operates, there is a presumption that the legislative body intended the omissions. *Washington Republican Party v. Washington Public Disclosure Commission*, 141 Wn.2d 245, 280, 4 P.2d 808 (2000). The Legislature has amended RCW 49.48.030 and never changed the requirement of a judgment. By limiting the statute to judgments, the Legislature intended to exclude administrative decisions and the court may not add MEC decisions to the statutory language.

Accordingly, there has been no judgment for salary or wages owed for purposes of RCW 49.48.030.

C. The Superior Court Abused Its Discretion When It Awarded Respondents The Full Amount Of Attorney's Fees And Costs Requested Because The Award Is Based On Obvious Errors In Fact And Law

Contrary to Respondents' assertions, the superior court clearly did not give the matter of the amount of fees and costs the thorough and independent review required, and therefore abused its discretion. This is illustrated by the court's obvious errors, such as finding that defense counsel was present at the observation and filming of watch changes by Respondents' expert. *See* Finding of Fact No. 3, Clerk's Papers at 1326.

Respondents spend two pages of their brief talking about the filming of watch changes in the engine rooms of the ferries. Br. Resp'ts at 42-44. Notwithstanding Respondents' unsubstantiated insistence that counsel for DOT were present at the observation and filming, that is simply not true and there is no evidence in the record to support this. Neither Stewart Johnston nor Kara Larsen, attorneys of record on this case, nor their paralegal, Kathy Bilhimer, attended any of the watch changes that were observed and filmed. Where Respondents got this idea is unknown, but the fact that they claim this and perpetuate this falsehood so vociferously is baffling, to say the least. That the superior court made a finding on this without any evidence illustrates that the superior court did not give this matter the thorough consideration it was due and, therefore, abused its discretion.

Further, Respondents' only argument that they are entitled to costs beyond those allowed in RCW 4.84.010 is that DOT somehow waived this

argument. Respondents cite no authority that would allow them to recover costs other than as permitted by RCW 4.84.010. Because the motion for attorney's fees and costs was bifurcated into whether Respondents were entitled to any attorney's fees and/or costs and, if so, in what amount, DOT addressed only the entitlement issue at the first hearing. Defense counsel's statement at oral argument at the first hearing that the standards for an award of attorney's fees and costs are the same referred to the need for Respondents to prove that they were the prevailing party in order to be eligible for either attorney's fees or costs. The amount of fees and costs were set aside for a separate hearing and DOT appropriately argued RCW 4.84.010 in the briefing for the second hearing. This was not untimely nor a waiver. The superior court's obvious error in finding that DOT's argument was an untimely and inappropriate motion for reconsideration and that DOT did not submit any specific opposition to the costs requested demonstrates abuse of discretion. Further, the superior court's obvious error in awarding costs when there is no authority to award costs in excess of the statutory costs demonstrates abuse of discretion.

Respondents also argue, and the superior court found, that this litigation was in the public interest. Just because it involved public employees does not turn it into a public interest lawsuit. This was a private dispute over wages between employees and their employer. Respondents have not cited to the superior court or this Court any authority for this wage dispute to be considered public interest litigation or

for their attorneys to be considered public interest attorneys. The superior court's obvious error in awarding attorney's fees based on a standard applicable to public interest litigation also illustrates its abuse of discretion.

Even if Respondents could somehow be considered the prevailing party and entitled to reasonable attorney's fees under RCW 49.48.030, the amount awarded by the superior court was not reasonable and constituted an abuse of discretion.

III. CONCLUSION

Based on the foregoing, DOT respectfully requests that the Court reverse the superior court's findings of fact, conclusions of law and orders awarding attorney's fees and costs to Respondents, and deny their motion for attorney's fees and costs with prejudice.

RESPECTFULLY SUBMITTED this 27th day of May, 2010.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 40019-7-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

BY _____
DEPUTY

STATE OF WASHINGTON,
DEPARTMENT OF
TRANSPORTATION,

Appellant,

v.

BEN DAVIS, et al.,

Respondents.

CERTIFICATE OF
SERVICE

I certify that I served a copy of the Reply Brief of Appellant on all parties or their counsel of record on May 27, 2010 as follows:

US Mail Postage Prepaid

TO:

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Tacoma, WA 98401-1157

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

Dated this 27th day of May, 2010 at Olympia, WA.


ERICA EDDINGS