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No. 53620-0-II

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

KRIS BARRY KILBOURNE and BRIGETTE
LYNN KILBOURNE, and the community thereof,
Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
RETIREMENT SYSTEMS,
Respondent.

ON APPEAL FROM THE SUPERIOR
COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY,
CAUSE NO. 18-2-03935-34

REPLY BRIEF OF
APPELLANTS

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ARGUMENT

- A. The standard for a CR 12(b)(6) motion applies because this is an appeal of an Order granting a 12(b)(6) motion, not a motion for summary judgment.**

The standard for a 12(b)(6) motion is whether a plaintiff states a claim upon which relief can be granted. CR 12(b)(6). Such motions are only appropriate if it is “beyond doubt” that no set of facts can be proven that would justify recovery. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wash.App. 214, 151 P.3d 1079 (2007).

Although the Department’s motion was brought as a motion to dismiss and for summary judgment, the lower court did not rule on the summary judgment since the lower court determined the matter was dismissed via the CR 12(b)(6) motion. The Order states “pursuant to CR 12(b)(6),” that Mr. Kilbourne “failed to state a claim upon which relief can be granted.” CP 133-134 Because the lower court cites the standard for a CR 12(b)(6) dismissal, and because the lower court specifically cites to CR 12(b)(6) as the basis for the ruling, which means the lower court did not consider the issue of summary judgment, the appeal here must also be based on the CR 12(b)(6) standard and not summary judgment.

B. The only issue before this court is whether RCW 41.26.470(2) requires the Department to notify public agency employers of the Department's determination as to whether a member is no longer entitled to disability benefits.

A Notice of Appeal must "designate the decision or part of the decision which the party wants reviewed . . .". RAP 5.3(a). After a decision or part of a decision has been identified, the assignments of error and substantive arguments further determine which claims and issues the parties have brought before the court for appellate review. *Clark County v. Western Washington Growth Management Hearings Review Bd.*, 177 Wash.2d 136, 298 P.3d 704 (2013). If an action has two judgments but the appeal is regarding just one of the two judgments without mentioning the other in the Notice of Appeal, the unmentioned issue cannot be considered on appeal. *Winton Motor Carriage Co. v. Bloomberg*, 84 Wash. 451, 147 P. 21 (1915).

Documents and other evidence called to the attention of the trial court but not designated in the Order can be made part of the record only by a supplemental order of the trial court or by stipulation of counsel. RAP 9.12. An appellate court may permit an amendment of a Notice of Appeal to include additional parts of a trial court decision but this requires the court to take the initiative, or

a party to file a motion to permit an amendment, at which point the record must be formally supplemented. RAP 5.3(h). Such an amendment extends the time allowed to seek review of the additional parts of the decision and such notice seeking the review must be filed within a specific time period under the Rules of Appellate Procedure in order to provide sufficient notice. RAP 5.3(h).

Here, the Department filed a Motion to Dismiss and a Motion for Summary Judgment in which the Department argued, among other things, that Mr. Kilbourne's claim should be dismissed because the claim was time barred by a three-year instead of a six-year statute of limitations, to which Mr. Kilbourne argued a six-year statute of limitations applied. The lower court then decided the applicable statute in question did not require the Department to give notice to the public employer agency, Verbatim Report Pg. 26, Lines 15-17, and the lower court did not directly rule on the issue involving the statute of limitations, although it was reviewed and considered. CP 132-133.

Although appellate courts may sustain a trial court on what the appellate court perceives to be a correct ground even though

that ground “was not considered by the trial court,” *Gamboa v. Clark*, 180 Wn. App. 256, 283, 321 P.3d 1236, 1249 (2014), *aff’d*, 183 Wn.2d 38, 348 P.3d 1214 (2015), citing to *J–U–B Eng’rs, Inc. v. Routsen*, 69 Wash.App. 148, 150, 848 P.2d 733 (1993), here the trial court did consider the issue involving the statute of limitations but simply did not base the ruling on that issue. The Notice of Appeal also states that only the Order of Dismissal was being appealed and that Order was based only on the issue involving the Department’s duty to notify the employer of the Department’s decision, and the Order did not include the issue questioning the statute of limitations. CP 135-138. Appellants therefore have not been given proper notice of any issue other than the Department’s decision process being considered on appeal and so Appellants would be prejudiced if that issue were considered now.

Because the lower court considered but did not render a decision on the issue involving the statute of limitations or laches, and because those issues were not included in the Notice of Appeal or in the lower court’s Order, Appellants and this Court do not have notice of any other issues currently on appeal and therefore this Court lacks jurisdiction to hear any other issues.

C. The plain language of the applicable statutes necessitate the Department to notify employers of the Department's determinations.

Appellants agree courts must give effect to a statute's meaning if the meaning is plain on its face. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 405, 377 P.3d 199 (2016).

Here, the plain language demonstrates the legislature specifically delegated "all powers, duties and functions of the LEOFF program" to the Department. RCW 41.50.030(1). These duties include "administering LEOFF" as well as adopting "rules and regulations" for the administration of the program. RCW 41.50.055. The legislature also required the Department to perform "such other functions as are required for the execution of the provisions of chapter 41.26 RCW," which is the statute and program involving this appeal.

Although RCW 41.26.470 does not specifically indicate what functions are "required for the execution" of the program, the plain reading of RCW 41.50.055 does not require this Court to expand or read into definitions and requirements that are not in the statute since the plain reading of RCW 41.50.055 establishes the Department is charged with ensuring the program carries out the

intended functions, which didn't happen here. We are merely asking the Court to uphold what is in the statute, i.e., that the Department must ensure functions required for execution of the program are in place.

Furthermore, although several additional statutes do provide specificity as to what the functions should be in order to carry out the purpose of the statute, it's not possible for the legislature to include an all-inclusive list of every action that needs to take place, which is in part what administrative rules are for. It is possible, however, to ensure the overall intent and goal of the program and statute involved in this matter are accomplished, i.e., to have members reinstated to their positions once the Department has rendered its determination. The other statutes and rules related to this issue also illustrate that other than giving notice to the member directly, nearly all of the actions and communications are between the Department and the employer. It therefore stands to reason that the Department's determination should also be communicated to the employer, and members likely assume that is happening.

It's also important to note that the provision of the statute related to giving notice to the employee is so the member can

challenge the Department's decision, not so the member can communicate the Department's decision to the employer. The notice in the form of a letter to Mr. Kilbourne states the Department determined Mr. Kilbourne's condition beyond June 30, 2012 did not meet the requirements for a duty disability retirement since his doctor had released him back to full LEOFF eligible employment. CP 76. The letter then states Mr. Kilbourne had the right to petition the decision if he disagreed and if he had any questions about the decision then he should contact the Department. Nowhere in the letter did it also indicate that unless Mr. Kilbourne forwarded the Department's letter to his employer that the employer would not be aware of the Department's decision and would therefore not reinstate him. It's also unreasonable and cumbersome to expect members to know they must forward the Department's decision, especially given the fact that Mr. Kilbourne was a police officer, not a human resources manager, and especially because even if Mr. Kilbourne had read the statutes and rules, he would still not have realized that he must forward the decision to the employer.

Further confusing the situation, contrary to the Department's contention in the Response Brief that Mr. Kilbourne was not

working for six (6) years, Response Brief at 4, Mr. Kilbourne was treated and returned to work and worked for several years prior to needing additional treatment. This created more procedural questions and hurdles for Mr. Kilbourne to sift through, which is something the Department should have assisted in clarifying.

Because the Department cannot effectively carry out the functions and duties that are “required for the execution” of the LEOFF program unless the Department properly communicates and notifies employers of the Department’s determinations as to whether a member qualifies under the program, the Department has failed to meet a statutorily imposed duty to ensure the functions of the program are being carried out.

D. The Department cannot shift the Department’s duty.

The plain reading of RCW 41.26.470(2) is that once the Department determines a LEOFF II member has recovered from a disability and no longer entitled to benefits, the member “shall be restored to duty,” i.e., the member must get his or her job back once recovered. RCW 41.26.470(2).

Despite being obligated to ensure the program and statute are carried out, the Department appears to contend that once the

Department has made its determination and notifies the LEOFF II member that the Department's duty to execute and perform the program's functions ends. In other words, the Department argues that the duty to execute and perform the program's functions is shifted from the Department to either the employer or to the LEOFF II member once the member is aware of the Department's determination, but this is not what the statutes say. The statutes say the member "shall be reinstated" once the determination has been made, and RCW 41.50.055 imposes a duty on the Department to ensure it happens in order to carry out the program. This didn't happen here. Instead, the Department walked away once Mr. Kilbourne was notified of the Department's decision, and the Department left Mr. Kilbourne to his own devices to ensure the statute was carried out.

E. Even if this Court has jurisdiction to hear the issue involving summary judgment which is not in the Notice of Appeal or lower court's Order, a six-year statute of limitations applies.

A statute may be treated as a contract when the statutory language and the circumstances establish a legislative intent to create contractual rights which are enforceable against the State. *Washington Fed'n of State Employees Coun., 28 v. State, 101*

Wash.2d 536, 539, 682 P.2d 869 (1984), cited by *Noah v. State by Gardner*, 112 Wash.2d 841 (1989).

Here, Mr. Kilbourne's right to be reinstated is established by statute, which states the member "shall be" restored to duty if DRS determines the member has recovered and is able to be reinstated. RCW 41.26.470(2). Due to the Department's failure to ensure the functions for executing this statutory right and program were implemented, Mr. Kilbourne was denied a vested interest in his job which he was automatically entitled to under the statute.

Unlike the plaintiffs in *Noah* who attempted to argue a breach of contract based on the legislature passing a bill that would have denied accrued vacation pay, i.e., a financial benefit to which they were not automatically entitled to, Mr. Kilbourne was denied a vested interest in his job which he was automatically entitled to under the statute. In other words, the statutory language and the circumstances surrounding this case demonstrates the legislature intended to, and did, create a contractual promise to reinstate a disabled worker in Mr. Kilbourne's situation once it was determined the worker has recovered.

The standard in *Noah* also doesn't apply because unlike *Noah* where the Court did not find a contractual right involving

pension rights, this matter involves a job and public employment which already has a statute in place requiring automatic reinstatement in these types of cases. Pension rights with little or no statutory entitlement are very different from a statutory right to be reinstated to a job in public employment.

Because the legislature intended to create rights that are contractual in nature based on the circumstances and mandatory statutory language, i.e., a promise which Mr. Kilbourne relied on and gave consideration to by accepting the position, Mr. Kilbourne's rights are enforceable against the State as a contract, and a six-year statute of limitations applies.

F. Even if a three-year statute of limitations applies, the doctrine of equitable tolling or the discovery rule can apply.

1. Equitable Tolling.

The doctrine of equitable tolling permits a court to allow an action to proceed even though a statutory time limit has passed. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 318, 16 P.3d 35, 40 (2000) (Jan. 19, 2001); *Millay v. Cam*, 135 Wash.2d 193, 206, 955 P.2d 791 (1998). The predicates for equitable tolling generally include deception or false assurances by a defendant, as well as diligence demonstrated by the plaintiff. *Id.* Statutory

deadlines may also be extended if, for example, a delay in filing was caused by a defendant's "failure to follow proper procedures" and if the defendant took other actions that "misled or confused the petitioner." *Danzer*, 104 Wn.App. at 318–19, citing *Sec'y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 399 (1st Cir.1987).

Here, LEOFF II plan members have an automatic right to reinstatement but because the Department failed to implement or follow necessary procedures the Department's actions misled and confused Mr. Kilbourne. Even though Mr. Kilbourne's employer was the entity charged with reinstating Mr. Kilbourne, the Department's letter to Mr. Kilbourne giving him an opportunity to appeal the Department's decision confused and misled Mr. Kilbourne into thinking the only action he had to take was to appeal the decision, which he didn't want to do. However, because the Department did not communicate the determination to Mr. Kilbourne's employer, Mr. Kilbourne actually had to do much more than simply decide whether he wished to appeal the decision:

Because the Department did not communicate the decision to Mr. Kilbourne's employer, the only way Mr. Kilbourne would have been reinstated was if Mr. Kilbourne: 1) researched and interpreted

the applicable rules and statute; 2) confirmed if the Department communicated the decision to the employer; and 3) ensure the employer was aware of the statutory requirement for automatic reinstatement even though the Department is charged with the obligation of ensuring the program and statute are fully implemented. Assuming the employer was aware of this statutory requirement, Mr. Kilbourne would then need to hope the employer complied. These measures would not have been necessary had the Department simply notified Mr. Kilbourne's employer of the decision but the failure to follow proper procedures misled and confused Mr. Kilbourne, and apparently Mr. Kilbourne's employer, and so the doctrine of equitable tolling tolls the statute of limitations, if any.

2. Discovery Rule.

Under the discovery rule, a cause of action does not accrue until an individual "knows or should have known" of all the essential elements of a cause of action. *Matter of Estates of Hibbard*, 118 Wash.2d 737, 826 P.2d 690 (1992). Application of the discovery rule to determine when an action accrues includes claims in which an individual could not have immediately known of an injury due to

factors such as professional malpractice, self-reporting, or concealment of information by a defendant. *Id.*

Here, due to the Department's concealment of information regarding not communicating the decision to the employer, Mr. Kilbourne did not discover the underlying elements of this claim until Mr. Kilbourne discovered the Department failed to notify his employer. Mr. Kilbourne also exercised reasonable diligence to discover what had occurred by writing to letters to his employer and also filing a lawsuits, but this did not result in Mr. Kilbourne discovering the communication issue until a public records request was made in late 2018 during the course of this current litigation.

Because Mr. Kilbourne was not aware of the essential elements to his cause of action until well within any statute of limitations period, the discovery rule should apply and a statute of limitations should not bar Mr. Kilbourne from pursuing the current claim.

G. Parties may raise errors for the first time on appeal if the errors involve constitutional rights such as due process.

Although not raising an issue before the trial court may generally preclude a party from raising the issue on appeal, if an issue raised for the first time on appeal is related to issues raised in

the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wash.App. 334, 160 P.3d 1089 (2017), reconsideration denied, review granted 163 Wash.2d 1039, 187 P.3d 270, affirmed 166 Wash.2d 264, 208 P.3d 1092.

It is also consistent with RAP 2.5(a) for appellate courts to consider issues of due process in a civil case even if the issue is being raised for the first time on appeal. *Conner v. Universal Utilities*, 105 Wash.2d 168, 712 P.2d 849 (1986), citing *Esmieu v. Schrag*, 88 Wash.2d 490, 497, 563 P.2d 203 (1977).

Here, the issue involving the denial of Mr. Kilbourne's due process is directly related to the issue involving the Department's failure to communicate the Department's decision to Mr. Kilbourne's employer since it resulted in Mr. Kilbourne being denied due process. Even if these issues are not related, this Court has discretion to hear the issue since it is consistent with RAP 2.5(a) for appellate courts to consider issues of due process in civil cases even if the issue is being raised for the first time.

CONCLUSION

Based on the foregoing, Mr. Kilbourne requests this Court to overturn the lower court's ruling and issue a remand.

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