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NO. 80874-1

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES

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I. INTRODUCTION

The amount of attorneys' fees available to a qualified prevailing party under the Equal Access to Justice Act, RCW 4.84.340 - .360, "shall not exceed twenty-five thousand dollars". RCW 4.84.350(2). The Court of Appeals Commissioner's award of \$46,239 in attorney fees exceeded the statutory maximum amount of fees. At the first time the Court of Appeals could address this issue, it properly modified the award, limiting the amount awarded to a total of \$25,000 for attorneys' fees at all levels of judicial review. The statutory language, does not support the Appellant's argument that a higher award is permissible, and therefore the Court of Appeals should be affirmed.

II. STATEMENT OF THE CASE

A. The Equal Access To Justice Act

In 1995, the Washington Legislature enacted the Equal Access to Justice Act (EAJA), RCW 4.84.340 - .360. The legislation was adopted "to ensure that these parties [certain individuals, smaller partnerships, smaller corporations, and other organizations] have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights." Laws of Washington 1995, ch. 403 § 901. The EAJA consists of three statutory provisions.

RCW 4.84.340 defines five specific terms used in the EAJA. Notably, RCW 4.84.340(4) states that “[j]udicial review’ means a judicial review as defined by chapter 34.05 RCW.” See *Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus.*, 157 Wn.2d 90, 135 P.3d 913 (2006)

RCW 4.84.350 has two parts. RCW 4.84.350(1) addresses the circumstances under which a party is entitled to an award of fees and other expenses, including reasonable attorneys’ fees. RCW 4.84.350(2) limits the amount awarded in several ways. First, and the most significant for this case, “[t]he amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars.” Second, the award “shall not apply unless all parties challenging the agency action are qualified parties.” Third, “[i]f two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars.” Fourth, the court has discretion to reduce the amount awarded, or to deny any award, “to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy”. RCW 4.84.350(2).

Finally, RCW 4.84.360 states that the agency over which the party prevailed should pay the award and report such payment to the Office of Financial Management.

B. Factual Background

The Department of Social and Health Services (Department) investigated allegations against Kathie Costanich regarding her treatment of foster children in her care. Following an investigation, the Department revoked Ms. Costanich's foster care license. Administrative Record (AR) 3359-76. Ms. Costanich sought administrative review of the license revocation. An Administrative Law Judge reversed the Department's revocation, and the Department sought further administrative review from the DSHS Board of Appeals. AR 224-48. *See* WAC 388-02-0560 *et seq.* (Board of Appeals review of initial orders). A DSHS Board of Appeals Review Judge determined that revocation of the foster care license was supported by the record and should be upheld. AR 1-80.

Ms. Costanich then filed a petition for judicial review in superior court. The superior court reversed the Department's license revocation and awarded Ms. Costanich attorneys' fees of \$25,000 under the EAJA.

The Department appealed the superior court decision, arguing that the final administrative decision of the agency was supported by substantial evidence. The Department also appealed the award of attorneys' fees, arguing that, regardless of the final decision, RCW 4.84.350(1) precludes an award of attorneys' fees under the EAJA where the court finds that the agency action was substantially justified. On

January 29, 2007, the Court of Appeals affirmed the superior court's reinstatement of the foster care license, but reversed the award of attorneys' fees. Following a motion for reconsideration by Ms. Costanich, on May 3, 2007, the Court of Appeals amended its opinion to affirm the superior court's award of attorneys' fees under RCW 4.84.350.

On June 22, 2007, a Court of Appeals Commissioner awarded Ms. Costanich \$46,239 in attorneys' fees. On July 12, 2007, the Department moved to modify the award because the statutory cap of \$25,000 had already been met. The Court of Appeals granted the motion. Ms. Costanich sought review by this Court, which was granted.

III. ARGUMENT

A. **The Plain Language Of RCW 4.84.350(2) Limits Attorney Fee Awards To \$25,000**

Under the American Rule regarding attorney's fees, each party bears his or her own litigation costs. *See Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). Washington follows the American rule; therefore, attorney's fees are not generally recoverable absent specific statutory authority, contractual provision, or recognized ground in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). *Rettkowski v. Dep't of Ecology*, 76 Wn.

App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part*, 128 Wn.2d 508, 910 P.2d 462 (1996).

The only basis for Ms. Costanich's attorneys' fees award is Washington's EAJA, RCW 4.84.340 - .360. The Department does not contest the assertion that Ms. Costanich is entitled to an award under the EAJA. The only question before this Court concerns the application of the EAJA's award limitation of twenty-five thousand dollars.

Among the several limitations to any EAJA award contained in RCW 4.84.350(2) is the clear statement that "[t]he amount awarded a qualified party . . . shall not exceed twenty-five thousand dollars." There is no exception to this plainly stated limitation. A court must give effect to a statute's plain meaning. *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). No statutory construction by this Court is necessary unless the statutory language is ambiguous. Where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn.2d 748, 750, 675 P.2d 592 (1984), *cert. denied*, 471 U.S. 1015 (1985). The statute caps awards at \$25,000 without qualification, and this Court should "assume that the legislature means exactly what it says." *Davis v. Dep't. of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

Ms. Costanich has argued that because the limitation in RCW 4.84.350(2) applies to “[t]he amount awarded a qualified party under subsection (1),” and subsection (1) states that “a court shall award [attorneys’ fees to] a qualified party that prevails in a judicial review of an agency action . . .”, then the legislature intended the cap to apply only to superior court. *See Reply in Support of Discretionary Review* at 5, 7. Such a reading would double, or in this case triple, the specific limitation set by the legislature.

Ms. Costanich’s argument that the statutory attorneys’ fees cap applies only to superior court review is premised on a definition of “judicial review” under RCW 4.84.340(4) that is limited to the initial filing of a judicial review petition in superior court. *See Petition for Review* at 7. However, RCW 4.84.340(4) states that “[j]udicial review” means a judicial review as defined by chapter 34.05 RCW.” The term judicial review is not defined in the definitions section of chapter 34.05 RCW, the Administrative Procedures Act. Rather, chapter 34.05 RCW includes the procedures for initiating a petition for judicial review in superior court (RCW 34.05.514), and for appellate review of a superior court decision (RCW 34.05.526). The legislature used the term “judicial review” numerous times in multiple parts of the Administrative Procedures Act, including all levels of review by the judiciary. *See, e.g.,*

RCW 34.05.510; RCW 34.05.530; RCW 34.05.534; RCW 35.04.550; RCW 34.05.590. The reference in the EAJA is to the entire chapter and thus all levels of review of an administrative action, collectively called judicial review.

Even when a case might be appealed beyond the superior court, the party challenging an agency action only prevails once in a judicial review. Whether a party prevails is determined by the final ruling in the case, whether that be made by the superior court or an appellate court. The term “judicial review” in RCW 4.84.340(4) and chapter 34.05 RCW, does not define a stage of proceedings, but rather a type of legal action. There is no new proceeding for judicial review of the agency action merely because a decision of a superior court is appealed. Rather, the appeal is part of the same judicial review of the agency action. RCW 34.05.570(3).

In addition to improperly narrowing the term “judicial review,” the argument that the statutory limitation only applies to a superior court award is logically flawed. Ms. Costanich relies on the EAJA as the only basis upon which she is entitled to an award of attorneys’ fees. The language authorizing the awarding of fees in the EAJA is contained in RCW 4.84.350(1). The next provision, RCW 4.84.350(2), states that “[t]he amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars.” Subsection RCW

4.84.350(2) also contains other limitations. If Ms. Costanich is correct that the limitation applies only to judicial review at the superior court level, then it logically follows that the authorization of attorneys' fees would apply only to judicial review at the superior court level as well. The statute must be read so that to the extent attorneys' fees are authorized by the statute, they are also limited.

The Department does not intend to absolve itself from liability for reasonable fees, as suggested by Ms. Costanich. *See Reply in Support of Discretionary Review* at 6. Rather, the Department is simply seeking to carry out the intention of the legislature to allow qualified parties that prevail in judicial review of administrative decisions to receive limited reimbursement for attorneys' fees when the agency's action is not substantially justified. RCW 4.84.350. A plain reading of the statute unambiguously limits awards of attorneys' fees. This reading is congruent with the legislative findings supporting some financial compensation for certain prevailing parties, while recognizing the limits contained in the statutory language. The legislature explicitly limited the liability of agencies when providing for attorney fee awards under the EAJA, evidenced by the several limitations in RCW 4.84.350(2). For example, multiple prevailing parties must share in the \$25,000 cap. Although splitting the award among several litigants may not completely reimburse

the parties for their attorneys' fees, it certainly carries out the legislature's intentional limitation.

A plain reading of the statute limits attorneys' fees awards under the EAJA to \$25,000. That limitation is inclusive of all levels of judicial review. Because the language is not ambiguous, there is no legal basis to insert language to allow for multiple awards of attorneys' fees under the EAJA. The legislature meant what it said.

B. If This Court Finds The Limitation On Attorneys' Fees Awards In RCW 4.84.350(2) Ambiguous, Then The Statute Should Be Construed To Limit Attorneys' Fees Awards In Any Specific Action To \$25,000

If this Court finds that the twenty-five thousand dollar limitation in RCW 4.84.350(2) is ambiguous, the surrounding statutory language and history, as well as cases addressing the EAJA and similar statutes, support the legislature's intent to cap EAJA awards at \$25,000 for all levels of judicial review of an agency action collectively. When interpreting a statute, the court must discern and implement the legislature's intent. *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 894, 83 P.3d 999 (2004). The language in the three statutory provisions that comprise the EAJA reflect a balance between providing for the costs of defending against inappropriate state actions and fiscal restraint in reimbursing for

those costs. Specifically, the legislature capped the award at twenty-five thousand dollars.¹

Prior to the adoption of the EAJA, there was no opportunity to obtain attorneys' fees when a litigant successfully challenged an agency action through judicial review. Prior to 1994, the legislature considered several alternatives for providing some compensation to successful litigants. In 1994, the legislature passed a regulatory reform bill, E2SHB 2510. Laws of Washington 1994, ch. 249. Two amendments were proposed but not incorporated into the final bill. The first proposal would have authorized a party prevailing in a judicial review of an agency action to be awarded fees and other expenses not to exceed \$10,000. 2SHB 2510 H. Amd. 107 (Feb. 15, 1994). The second proposal would have permitted attorneys fees and costs to be awarded up to \$50,000 to a party prevailing in a rule challenge where the rule was found invalid. E2SHB 2510 S. Comm. Amd. (adopted March 2, 1994, but not included in final bill). Under this second proposal, when two or more parties challenged the rule, the total award could not exceed \$50,000.

In 1995, the legislature passed the EAJA in its current form. Laws of Washington 1995, ch. 403. The original proposal, HB 1010, stated that,

¹ Under Ms. Costanich's argument, that compromise would be meaningless. Although the legislature intended to provide "a *greater* opportunity to defend themselves from inappropriate state agency actions," (Laws of Washington 1995, ch. 403 § 901), the legislature clearly intended such opportunity to have a limit.

“[i]f upon judicial review a rule is declared invalid and the party that challenged the rule is a qualified party, the party shall be awarded fees and other expenses not to exceed ten thousand dollars.” Proposed changes to the bill included increasing the amount from \$10,000 to \$25,000 and allowing recovery to a prevailing party in “a judicial review of an agency action.” SHB 1010 H. Amd. (Feb. 1, 1995). Those proposals were defeated. However, the bill then went to the Senate where it was amended to permit a qualified party prevailing in a judicial review of an agency action to recover attorneys’ fees and costs in an amount not to exceed \$25,000. ESHB AMS SHEL (Adopted April 13, 1995). A proposed amendment to increase that amount to \$35,000 failed. ESHB 1010 GO Comm. Amd. (April 13, 1995).

Other bills considered at the same time as the passage of the EAJA failed. One was HB 1044, which would have permitted a recovery of reasonable attorneys’ fees, costs, and other expenses of litigation in any successful action against the state or a political subdivision. The bill was amended to clarify that it included actions for judicial review of agency action. Another was HB 1045, which would have permitted reasonable fees against the state in any civil action, including proceedings for judicial review.

Finally, following passage of the EAJA in 1995, a bill was proposed in 1996, HB 2747, which would have modified the maximum amount awarded under the EAJA as follows:

Sec. 9 . . .

(2) The amount awarded . . . shall not exceed:

(a) For cases involving rule validity:

(i) Twenty-five thousand dollars for superior court cases; and

(ii) Fifteen thousand dollars for appeals to the court of appeals and the supreme court; and

(b) For cases involving other agency action:

(i) Fifty thousand dollars for superior court cases; and

(ii) Fifteen thousand dollars for appeals to the court of appeals and supreme court.

The legislative history reflects a purposeful decision to limit agency liability for attorneys' fees to twenty-five thousand dollars per case. The legislature was aware of different kinds of challenges to governmental actions and the various levels at which the cases are litigated and appealed. It was aware of many options to provide for attorneys' fees and to limit attorneys' fee awards. The legislature chose to allow recovery beyond rule challenges; it chose not to expand liability to political subdivisions of the State; it rejected proposed recovery caps of \$10,000 and \$35,000 and settled on the cap of \$25,000. Significantly, a bill proposed the year following passage of the EAJA would have increased the attorneys' fee awards cap in other agency action (such as this

case) to \$50,000 for superior court cases and \$15,000 for appeals. That proposal was not adopted by the legislature. This Court should not expand the EAJA attorneys' fees cap beyond the statutory language adopted by the legislature after full consideration of various options.

Only one published case has interpreted the attorneys' fees cap in the EAJA; *Alpine Lakes v. Dep't. of Natural Res.*, 102 Wn. App. 1, 979 P.2d 929 (1999). Although the issue in the case was whether Alpine Lakes was a prevailing party, not whether the cap applied to all levels of judicial review, the court ruled that the total attorneys' fees for the trial court and appellate levels could not exceed the statutory cap of \$25,000. *Id.* at 20. No other appellate decisions directly address the statutory cap of attorneys' fees.²

Other states also have Equal Access to Justice Acts that reimburse certain litigants that prevail in challenges to government action. A statute

² Other cases have interpreted and applied other terms of the EAJA. *See, e.g., Aponte v. Dep't. of Soc. & Health Servs.*, 92 Wn. App. 604, 965 P.2d 626 (1998); *Edison v. Dep't. of Licensing*, 108 Wn. App. 712, 32 P.3d 1039 (2001).

The *Aponte* court said:

According to the affidavit of Mr. Aponte's counsel, as of the time of oral argument before the Superior Court, the total fees incurred in connection with this matter were \$94,981, of which \$58,186 were attributable to the proceedings before the Superior Court. On appeal, DSHS has not disputed these calculations. Of the fees associated with judicial review, over \$50,000 were incurred before DSHS withdrew the employment issue from consideration. Thus, we are satisfied that the attorneys' fees reasonably incurred with respect to the employment issue prior to DSHS's concession on the matter exceeded the maximum amount awardable under the EAJA (\$25,000), and we uphold the award of fees. *See RCW 4.84.350(2).*" 92 Wn. App. at 623-24.

similar to Washington's EAJA in Arizona allows parties prevailing by adjudication on the merits in an action challenging a tax an award of fees not to exceed twenty thousand dollars. The Arizona Court of Appeals found that the statutory limit on the fee award encompassed all court proceedings in a case as they are all part of the same action. *Southwest Airlines Company v. Arizona Dep't. of Rev.*, 197 Ariz. 475, 477, 4 P.3d 1018 (2000). The California Court of Appeals has interpreted a \$1,500 statutory fee cap, concluding that "a reasonable construction of the statute limits recovery in any one civil action to which [the statute] applies and of which the appeal is a part of total sum of \$1,500." *Reeves v. City of Burbank*, 94 Cal. App. 3d 770, 780, 156 Cal. Rptr. 667 (1979). The court went on to add that "[a]ny expansion of awards pursuant to the section is a matter for consideration by the Legislature." *Id.* Years later, the same statutory cap of fees was increased to \$7,500. Another California Court of Appeals panel ruled "[s]ince respondent has already been awarded the statutory maximum [by the trial court], it is not possible to award additional attorney's fees for this appeal." *Wang v. Division of Labor Standards*, 219 Cal. App. 3d 1152, 1161, 268 Cal. Rptr. 669 (1990).³

³ The EAJA also has a federal counterpart, also called the EAJA, authorizing the award of fees and other expenses to prevailing parties in certain civil actions, "including proceedings for judicial review of agency action." 28 U.S.C. § 2412(d)(1)(A). Because there is no federal statutory cap, the case law interpreting the federal EAJA does not assist this Court. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375

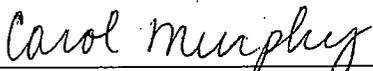
Thus, if this Court finds it necessary to construe the twenty-five thousand dollar limitation in RCW 4.84.350(2), the statutory language, read as a whole, as well as the legislative history, show that the legislature intended to limit the total award under the EAJA to \$25,000.

IV. CONCLUSION

Because the legislature limited awards of attorneys' fees under the EAJA to twenty-five thousand dollars; the Court of Appeals' decision to deny an award of additional attorneys' fees beyond the twenty-five thousand dollars already awarded to Ms. Costanich should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of April, 2008.

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(1992). Significantly, however, the federal EAJA allows for an award that includes attorneys' fees in civil proceedings including judicial review at both district court and appellate court levels. *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990).

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