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DIVISION II

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STATE OF WASHINGTON
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NO. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
JAN 16 2009

WASHINGTON EDUCATION ASSOCIATION,

Petitioner/Appellant

v.

CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH
SIMPSON, AND TRACY WOLCOT

Respondents

**WEA'S PETITION TO REVIEW A DECISION OF
THE COURT OF APPEALS, DIVISION II
IN CASE NO. 28375-1-II**

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A. IDENTITY OF PETITIONER

Washington Education Association (“WEA”), Petitioner, respectfully seeks Supreme Court review of the decision of the Court of Appeals, designated in Part B of this motion pursuant to RAP 13.4(b)(1)(2) and (4).

B. COURT OF APPEALS DECISION

The Petitioner requests that this Court review the decision of the Court of Appeals, Division Two. The decision was entered or filed on December 12, 2008. A copy of the decision is in the Appendix at pages A-1 through A-49; the majority opinion is at A-1 through A-35; the dissent is at A-36 through A-49.

C. ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Whether the appellate court’s creation of an unjust enrichment claim conflicts with *Crisman v. Pierce County* and the public policy inherent in the remedies provided for violations of Chapter 42.17 RCW;
2. Whether the appellate court erred in implicitly creating a private right of action through the guise of a restitution cause of action, despite its determination that RCW 42.17.760 did not create such a private right.

3. Whether, given the undisputed conclusion that WEA was lawfully in possession of agency fees, the appellate court's creation of an restitution claim conflicts with decisions of this Court in *Nelson v. Appleway* and *PDC v. WEA*;
4. Whether, given this Court's decision in *PDC v. WEA*, WEA's compliance with *Hudson*¹ procedures and the Legislature's amendment to RCW 42.17.760, the appellate court erred in ruling that WEA was "unjustly" enriched;
5. Whether the court below erroneously disregarded WEA's affirmative defense that plaintiffs' acquiescence to WEA's expenditures estops a claim for restitution, as this Court held in *Nugget Properties v. County of Kittitas*.

D. STATEMENT OF THE CASE

1. COURT PROCEEDINGS

This case began nearly eight (8) years ago, in March 2001, when a class action lawsuit was filed against WEA on behalf of present or former public school employees, alleging a private right of action under Chapter 42.17 RCW, and three tort claims: conversion, breach of fiduciary duty, and fraudulent concealment. The Complaint made no claim for unjust

¹ *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066 (1986).

enrichment or restitution.² WEA filed a CR 12(c) motion for judgment on the pleadings, alleging, *inter alia*: (1) that there is no private right of action under the Public Disclosure Act (Chapter 42.17 RCW) (hereinafter referred to as the “PDA”); and (2) that there can be no conversion because agency fees by statute belong to the union.

On November 2, 2001, the trial court dismissed the breach of fiduciary duty claim, but otherwise denied WEA’s CR 12(c) motion, ruling that there is an implied private right of action under Chapter 42.17 RCW, that the statute of limitations was three years,³ and that the conversion claim could proceed.⁴ The court also certified the case as a class action.⁵ WEA filed a timely motion for discretionary review which the appellate court granted. Trial court proceedings were stayed pending disposition of the appeal. Because the appeal was interlocutory, there is no factual record and no findings of fact by the trial court.⁶

In 2003, considering an enforcement action brought against the WEA by the Public Disclosure Commission, (“PDC”), the Court of Appeals held RCW 42.17.760 to be unconstitutional but did not reach any

² See Amended Complaint at A-50 – A- 59.

³ After ruling that the appropriate statute of limitations was three (3) years, on December 7, 2001, the trial court ruled that it was a five (5) year statute of limitations (CP 82, 160-164, R.P. 12/7/01, pp. 9-11).

⁴ The trial court’s ruling is set forth in the Appendix. See A- 60 through A- 64.

⁵ The trial court granted class action status to the implied private right of action and conversion claims, but not to the fraudulent concealment claim.

⁶ No court has ever made findings of fact in *Davenport*.

other issues raised on appeal.⁷ The PDC appealed. *Davenport* was then consolidated with the *PDC* case. The Washington Supreme Court determined only that RCW 42.17.760 was unconstitutional but did not reach either Davenport's claim that chapter 42.17 RCW implies a private right of action or any of Davenport's tort claims. The PDC and Davenport appealed and the U.S. Supreme Court reversed, on narrow grounds, remanding the cases to the Washington Supreme Court.

In the interim, in 2007, the Washington Legislature expressly adopted the approach advocated by the experts in the *PDC* case by amending RCW 42.17.760 as follows:

A labor organization does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures (Laws of 2007, ch. 438 § 1).

The *Davenport* case was remanded to the Court of Appeals for Division Two for reconsideration in light of the U.S. Supreme Court's decision. The appellate court heard oral re-argument on February 25, 2008, and subsequently requested briefing on two issues: 1) whether the undisputed facts support a claim for restitution; and 2) whether *Nelson v. Appleway*, 160 Wn.2d 173, 175 P.3d 847 (2007) applied to this case.

⁷ *State ex rel. PDC v. WEA*, 117 Wn. App. 625, 71 P.3d 244 (Div. II, 2003), *aff'd*, 156 Wn.2d 543, 130 P.3d 352 (2006), *rev. sub nom. Davenport et al., v. WEA, et al.*, ___ U.S. ___, 127 S. Ct. 2372 (2007).

The Court issued its decision on December 12, 2008,⁸ holding that there is no private right of action pursuant to RCW 42.17.760, and that plaintiffs did not have a claim for conversion, the only claims left in the case.⁹ Nonetheless, the court upheld the trial court's denial of WEA's CR 12(c) motion to dismiss by creating, *sua sponte*, a cause of action of restitution that had neither been pleaded in the complaint nor addressed by the trial court in the motion to dismiss.¹⁰

2. STATEMENT OF FACTS

The facts forming the background on which this case is brought are set forth in sufficient detail in this Court's decision in the *PDC* case and will not be repeated here.¹¹

⁸ The decision was 2-1, with a lengthy, well-reasoned dissent by Judge Bridgewater.

⁹ In its interlocutory appeal in *Davenport*, WEA contended that the trial court's denial of its 12 (c) motion was erroneous. Anomalously, the appellate court agreed that none of the causes of action in the *Davenport* plaintiffs' Amended Complaint could survive such a motion, but then created whole-cloth a new cause of action neither pled nor argued to the court below. Judgment on the pleadings is reviewed de novo and an appellate court must determine whether the plaintiff can prove any set of facts, consistent with the complaint, that would entitle the plaintiff to relief. *N. Coast Enters., Inc. v. Factoria P'ship*, 984 Wn.App. 855, 974 P.2d 1257, *rev. denied*, 138 Wn.2d 1022(1999). The rule does not allow for amending of the complaint to comply with an appellate court decision. *Davenport* has already amended his complaint once as of right. CR 15(a). A-50- A-59. The role of the appellate court is to review issues raised by the pleadings, not to craft a new pleading for the plaintiffs.

¹⁰ Neither *Davenport's* Complaint nor Amended Complaint asserts an unjust enrichment, or a restitution claim. None of their pleadings even mentions restitution (A-50-A-59).

¹¹ For the Court's convenience, the applicable factual discussion in this Court's decision in the *PDC* case is included in the Appendix at A-65 through A- 69.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Appellate Court's Creation of a Claim of Restitution Conflicts With *Crisman* and Involves an Issue of Substantial Public Interest.

Central to this case is what remedy is appropriate, assuming a violation of former RCW 42.17.760. The enforcement mechanisms provided for in Chapter 42.17 RCW, including specifically RCW 42.17.390 and .400, provide the appropriate remedies for violations of the state's campaign finance laws. *Crisman v. Pierce County*, 115 Wn.App. 16, 60 P.3d 652 (2002). On remand in this case, Division Two expressly held that the *Davenport* plaintiffs have no private right of action to collect fees paid to WEA in violation of § 760 in part because such a remedy was not consistent with the legislative purpose of Initiative 134.¹² A- 15. This Court, citing *Crisman*, noted that the intent of the statute was intended to protect the public, not individuals. *PDC, supra* at 556.

Chapter RCW 42.17 (hereinafter the "PDA") sets out a complete array of enforcement procedures and provides for both legal and equitable remedies. *See: Crisman, supra* at 24, wherein, the court explained its rationale. The *Crisman* court stated [115 Wn.App. 16, 24]:

[T]he basic purpose and policy of chapter 42.17 RCW is to allow public scrutiny of government, rather than to promote public scrutiny of particular individuals who are unrelated

¹² The majority appropriately relied on *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) in determining that no private right of action exists. A-11, fn 32.

to any governmental operation). ...The statute also consistently refers to the "public" or "people," thereby expressing its goal of protecting the public rather than any individual candidate. Furthermore, unlike statutes that provide no remedy, chapter 42.17 RCW, authorizes enforcement by the attorney general or county prosecutor and finally by a citizen in the name of the state. *RCW 42.17.400*. This remedy also points to the statutory goal of public disclosure. And a private cause of action for damages would provide no additional public disclosure over and above the statute's express remedies.

In concluding that there is no private cause of action under Chapter 42.17, the court appropriately recognized that the legislature's intent to give to the attorney general, county prosecutor, or citizen enforcer considerable latitude in seeking the appropriate relief, including damages.¹³

Despite determining that the omission of a private right of action implies the absence of an intent of the voters, Division Two erroneously went to great lengths to find that the *Davenport* plaintiffs have a common law cause of action for restitution, thereby empowering them to seek the very same relief they had improperly sought to achieve by bringing a private action under § 760. The majority cites no cases where an appellate court has denied a private right of action but then grants a right to restitution.¹⁴ It was error for that court to conjure up a cause of action

¹³ It was within the proper purview of the trial court in *PDC v. WEA* to grant restitution to the fee payers. The attorney general had the latitude to see this relief but chose not to do so. *RCW 42.17.390*.

¹⁴ In *Nelson, supra*, the court determines that there is a right to restitution but does not address whether or not a private statutory right of action exists. *Id.* at 188.

which accomplishes indirectly that to which this Court has determined the Davenport plaintiffs are not entitled directly. The majority's decision in *Davenport* undermines *Crisman*.¹⁵

If it is inconsistent with the legislative purpose of the PDA to allow a private cause of action, it is also inconsistent with the same legislative purpose to *sua sponte* create a cause of action for restitution when the public enforcer has a full array of remedies available.¹⁶ This court should accept review to resolve the conflict between *Crisman* and *Davenport*.

2. The Majority's Decision That WEA Has Been Unjustly Enriched Conflicts With This Court's Decision in *Nelson v. Appleway*. (RAP 13.4(b)(1)).

Division Two also relied heavily upon *Nelson v. Appleway Chevrolet, Inc.*¹⁷ The facts in *Nelson* are inapposite to this case and its holding does not provide a legal basis for restitution in this matter. By misinterpreting the case, the appellate court has issued an opinion which is in conflict with that case. *Nelson* involved a situation where a car dealer unlawfully charged and collected a tax from an individual who brought a private cause of action against the dealer for unjust enrichment. The consumer, Nelson, had no choice but to pay the tax and was not offered a

¹⁵ See also: *Vance v. Thurston Cnty Comm'rs.*, 117 Wn.App. 660, 71 P.3d 680 (2003).

¹⁶ By creating a private restitution cause of action, Division Two may have opened the floodgates of potential litigation seeking damages for ostensible violations of the PDA.

¹⁷ 160 Wn.2d 173, 175 P.3d 847 (2007).

rebate at any time by the dealer.

This case is clearly factually distinguishable from *Nelson* because, as this Court and Division Two clearly acknowledge, WEA is statutorily empowered to collect and possess agency fees, and specifically, the disputed fees herein were lawfully collected and legally in the union's possession. 156 Wn.2d at 569. A- 17.¹⁸

The majority erred when it applied to *Davenport* the rationale from *Nelson* pertaining to the conclusive nature of the transaction at issue, as stated at 160 Wn.2d at 187-88 [citations omitted]:

[A]ny transaction not adequately supported by law is voidable. ("Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights."). Because Appleway illegally charged Nelson the B&O tax as an additional cost to the final purchase price, Appleway has been unjustly enriched with money properly belonging to Nelson.

There is simply no transaction in *Davenport* that is comparable to the transaction in *Nelson*. As this court held, WEA properly received the funds from the *Davenport* plaintiffs. Thus, the transaction was adequately supported in law and not voidable. There was no ineffective transfer of possessory interest as existed in *Nelson*. As a result, the majority's

¹⁸ It is for this reason that the majority denied Davenport's cause of action for conversion. A-18.

opinion expands *Nelson* far beyond this court's holding therein. Accordingly, this Court should accept review.

3. The Davenport Majority Opinion Conflicts with This Court's Decision in the *PDC* Case. (RAP 13.4(b)(1).

The decision of the court below that the *Davenport* plaintiffs are entitled to pursue a cause of action for restitution also conflicts with this Court's decision in the *PDC* case. This Court determined, as a matter of law, that WEA had lawful possession of the agency fees. 156 Wn.2d at 568-69.

Two aspects of the agency fee process were described when this Court discussed RCW 42.17.760: receipt of fees and use of general treasury dollars.¹⁹ As to receipt, this Court determined that WEA lawfully collected and held agency fees in its possession, completed of the *Hudson* process and lawfully placed in WEA's general fund. *Id.* Thus, the only issue remaining in contention then was the "use," *i.e.*, the expenditure of funds in violation of RCW 42.17.760. No court has determined that WEA had used those fees in violation of the statute.²⁰

WEA did not violate former RCW 42.17.760 as a matter of law. Given the testimony of the expert accountants in the *PDC* trial and the subsequent amendment of §760 by the Legislature, it cannot be presumed

¹⁹ In the *PDC* decision, at 551, this Court correctly observed that "[p]olitical expenditures were made from [WEA's general account] pursuant to a 1996 agreement with the *PDC*."

that use of treasury money for political expenditures constitutes use of agency fees for such purpose. The simplest, least restrictive interpretation of RCW 42.17.760 is that the statute requires a labor organization to have sufficient revenues to ensure that political expenditures were made from non-agency fee revenues.²¹ WEA has had sufficient revenues to ensure that its political expenditures were not made from agency fees 117 Wn. App. at 630. The legislature's 2007 amendment did not change the meaning of the statute; it merely clarified its meaning.

Even assuming *arguendo* that WEA violated the statute, it cannot be said that the expenditure of funds – whereby the WEA divests itself of its revenue – results in “enrichment” to WEA. The only way in which WEA becomes “enriched” is through the receipt of agency fees into its general treasury. In other words, the only way WEA could have been unjustly enriched is if it had received fees that it was unlawful for WEA to receive. Since this Court acknowledges that WEA's receipt of fees is lawful, it cannot be liable for unjust enrichment. Given that WEA lawfully

²⁰ The trial court in the *PDC* case made such a finding, but later vacated that finding.

²¹ Due to its impact on political speech, this court must interpret RCW 42.17.760 in a manner that is the least restrictive manner to achieve its purpose. *Republican Committee v. PDC*, 133 Wn.2d 229, 244-245, 943 P.2d 1358 (1997); *State v. 119 Vote No! Comm.*, 135 Wn.2d 618, 957 P.2d 691 (1998).

receives such funds, and scrupulously complies with the *Hudson* process, its expenditures cannot result in “enrichment” that is “unjust.”²²

Moreover, since restitution is also an equitable remedy, it was error for the court below to disregard the equities of allowing WEA to retain the disputed fees due, among other reasons, to the uncertainty of the law at the time. When WEA received the funds, there had been no interpretation of the meaning or validity of RCW 42.17.760. Since then, courts have obviously differed as to its constitutionality.²³ *PDC*, 156 Wn.2d 543; *Davenport*, 127 S. Ct. 2372.

Nor can WEA’s lawful possession of the agency fees be considered “unjust” given the fact that the *Davenport* plaintiffs were repeatedly given notice and opportunity for rebates in the *Hudson* process. While the *Hudson* process does not change the union’s statutory obligations under former RCW 42.17.760 as to its expenditures, it is undeniable that the *Hudson* process clearly affects the union’s equitable entitlement to the fees. Since fee payers are given the right to request a refund, which the

²² As discussed *infra*, at p. 13, the fact of enrichment alone does not trigger the doctrine of unjust enrichment. See: *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007).

²³ As dissenting Judge Hunt said in Division Two’s decision in the *PDC* case: “The record shows that the WEA had a good faith basis for relying on its interpretation of the statute and for requiring nonmembers to request rebates following collection of agency fees. Clearly, the WEA read and interpreted the Supreme Court cases in a manner consistent with my learned colleagues’ reading--as rendering the “opt in” collection method unconstitutional.” 117 Wn. App. 625, 646; 71 P.3d 244 (2003)

Davenport plaintiffs chose not to exercise, how then can they legitimately claim that WEA's retention of the fees is "unjust"?

Nonetheless, the appellate court created for the *Davenport* plaintiffs a new cause of action for unjust enrichment to permit restitution of monies that are lawfully in the union's possession.²⁴ In justifying this invention of a claim for plaintiffs, the court below assumed that WEA had used agency fees for political purposes. See A-31-32. As noted above, no court has made such a determination in this case. Any finding made to the contrary in the PDC case has been vacated. The decision of Division Two to the contrary is squarely at odds with the decision of this Court. This Court should grant review to resolve the apparent conflict.

4. The Majority Erred In Determining that Plaintiffs Have A Claim for Restitution—a Determination that Conflicts With *Nugget Properties v. County of Kittitas*. (RAP 13.4(b)(1)).

a. The Majority's Holding Conflicts with *Nugget*.

Enrichment alone is not sufficient to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the circumstances and as between the two parties to the transaction.²⁵ Thus, assuming the facts as pled by the *Davenport* plaintiffs and even assuming

²⁴ Even the U.S. Supreme Court begrudgingly acknowledged that the agency fees are "within the union's lawful possession under Washington law" *Davenport*, 127 S. Ct. at 2380; see also: A-41-42.

²⁵ *Farwest Steel Corp. v. Mainline Metal Works*, 48 Wn. App. 71, 741 P.2d 58 (1987).

arguendo that WEA violated RCW 42.17.760 by using the disputed fees for political purposes without affirmative authorization,²⁶ restitution is not a legal claim or a remedy available to the *Davenport* plaintiffs due to their silence and failure to act when they were offered the opportunity have a portion of their agency fees rebated to them.

Division Two's majority opinion to the contrary conflicts with longstanding precedent of the Washington Supreme Court. *See: Nugget Properties v. County of Kittitas*, 71 Wn.2d 760, 431 P.2d 580 (1967) which holds that a party is estopped from equitable relief when they remain silent after having been given the opportunity to receive the funds at issue. As this Court noted [*Id.* at 767]:

Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. ...All instances of this class, in equity, rest upon the principle: If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like.

The *Davenport* plaintiffs could easily have objected to the union's

²⁶ Whether WEA violated 42.17.760, as it then existed, is not relevant at this time. The enforcement action has been concluded.

expenditure of the funds on non-chargeable activities, which include political expenditures. Each plaintiff annually received detailed notices informing them of this opportunity to object to these expenditure. No proper *Davenport* plaintiff objected and consequently, each acquiesced to the expenditure of funds.

In *PDC, supra* at 554, this Court stated that “[f]ailure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement.” However, this Court should now determine, as a matter of law, that this acquiescence is a bar to a claim for restitution.

Division Two’s determination to grant restitution to the *Davenport* plaintiffs conflicts with *Nugget*. They do not own the property at issue. The property is lawfully in the hands of the WEA. *PDC, supra* at 568. The *Davenport* plaintiffs stood by and allowed WEA to make expenditures as though they were rightfully making these expenditures and as if they had no objections. This court should accept review and determine that this acquiescence, which here consisted of silence, after notice, operates as a true estoppel in equity to preclude the *Davenport* plaintiffs from asserting any claim to the funds at issue.

b. The Court Below Erroneously Ignored the Estoppel Affirmative Defense Raised in WEA's Answer.

In a CR 12 (c) motion, the court must rule on the pleadings. Division Two erred by failing to consider WEA's Answer wherein it pled an affirmative defense of equitable estoppel. For reasons stated above, as a matter of law, the Davenport plaintiffs are equitably estopped from making a claim for restitution.

The elements of estoppel are: 1) an admission, statement, or act inconsistent with the claim afterwards asserted; 2) action by the other party on the faith of such admission, statement, or act; and 3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.²⁷ By failing timely to object to the WEA's retention of agency fees, *Davenport* plaintiffs took an action inconsistent with their premise in this lawsuit: that WEA somehow concealed that it was making political expenditures from its general treasury. Simply put, *Davenport* plaintiffs first failed to object, and subsequently made this claim, which is clearly inconsistent with their failure to object. Second, WEA retained the fees "on the faith" that its agency fee payers did not object. Finally, any order of restitution would

²⁷ *Budget Rent A Car v. Licensing*, 144 Wn.2d 889, 31 P.3d 1174 (2001).

constitute an injury to WEA. Thus, the *Davenport* plaintiffs should be estopped from receiving an award of restitution.

c. The Cases Relied Upon Below Are Factually Distinct.

Division Two considered numerous Washington appellate decisions that discuss restitution (A-24 – A-27). None of these cases contains facts comparable to the undisputed facts in this case. In none of those cases did the plaintiff refuse the opportunity for reimbursement nor did the plaintiff sit on an opportunity to receive the funds and later come into court pleading a right to restitution. For example, in *Puget Sound Realty Co. v. King County*, 50 Wash. 349; 97 P. 226 (1908), plaintiff's only recourse to receive the funds mistakenly paid was to go to court to seek restitution.²⁸ Neither does *Seekamp v. Small*²⁹ address the situation where the plaintiff repeatedly refused the opportunity to have the property at issue returned and subsequently, sought restitution (A-18). Rather, in *Seekamp*, restitution was the only legal remedy available to the plaintiff.

Equally inapposite is *Nelson, supra*, since the court therein did not address whether acquiescence is an estoppel to a claim for restitution (A-21). Unlike the *Davenport* plaintiffs, Nelson did not sit silent after having

²⁸ Similarly, in *Bosworth v. Wolfe*, 146 Wash. 615, 264 P. 413 (1928) where the court also recognized an action for restitution, it stated: "The main principle by which to test the matter is whether in equity and good conscience, in view of the special facts of the case, defendant is entitled to retain the money as against plaintiff ..."

²⁹ 39 Wn.2d 578, 237 P.2d 489 (1951).

been offered an opportunity for a rebate. Nelson paid because he had to do so and filed an action for restitution soon thereafter. While the court correctly determined that it would have constituted unjust enrichment for the defendant to retain the funds unlawfully collected from Nelson, it would not be unjust for WEA to retain the fees paid by the *Davenport* plaintiffs due to their repeated rejection of WEA's offer to reimburse them for the portion attributable to non-chargeable activities.³⁰

Division Two's analogy to the circumstances present in RAP 12.8, citing *Karpierz v. Easley*,³¹ and *Wareham Ed. Ass'n. v. Labor Relations Comm'n*,³² is equally misplaced (A-28). The appellate court disregards key distinctions between these cases and *Davenport*. See: A-32 at fn. 102.

³⁰ Neither do the cases from other jurisdictions cited by the majority address a situation where the plaintiff who may have initially paid the funds under a "legal compulsion" subsequently declined an offer for reimbursement (A-25). Consequently, those cases do not support Division Two's conclusion. For example, in *Broward County v. Mattel*, 397 So.2d 457 (Fla.App. 1981), the court considered the lawyers' failure to protest the illegal fee to be inconsequential because the fee was paid under duress. In *Rosen v. Village of Downers Grove*, 167 N.E.2d 230 (1960), the plaintiff paid under duress, was never offered an opportunity for a refund, made its protest continuous and sent its payment with a letter of protest. Similarly, in *Investor's Title Co. v. Hammonds*, 217 S.W.3d 288 (Mo. 2007), the title company was unknowingly overcharged for several years by the County. Thus, the County received money to which it was not legally entitled. *New Jersey Board of Dentistry*, 423 A.2d 640 (N.J. 1980), also involves funds that were collected in violation of a statute under a fee schedule that the plaintiff contested continually. Finally, in *Five Boro Elec. Contractors Ass'n. v. City of New York*, 187 N.E. 774 (N.Y. 1962), the court ordered restitution where excessive fees were charged, holding that fees were paid under duress and that protest was not required.

³¹ 68 S.W.3d 565 (Mo.App. W.D. 2002). (The City lawfully seized funds but then violated a statute in handling the money and Karpierz did not acquiesce to the City's retention of the money).

³² 713 N.E.2d 363 (Mass. 1999). (The union failed to perform its audit as required by the Hudson process as a precondition to lawful collection of fees. Thus, the fees were not lawfully collected).

In none of these cases did the payee offer return of the money prior to the court ordering restitution, nor did the plaintiff have a legal remedy apart from restitution. Neither did a court even consider that acquiescence acts as a bar to a claim for restitution. And, neither does the court award restitution to an individual who has declined an offer of reimbursement.

In contrast to each of the cases cited by Division Two, in the case at bar, WEA collected fees to which it was lawfully entitled and each plaintiff had an alternative means to recover the disputed portion of the fee but remained silent. While arguably, the agency shop arrangement requires nonmembers to pay full fees when they would rather not, the entire *Hudson* process is in place to give nonmembers a simple and straightforward opportunity to a refund of the portion of the fees that are greater than what is necessary to cover the cost of collective bargaining and other chargeable expenses. The *Davenport* plaintiffs admit that they received *Hudson* notices. (A-55). Division Two's decision rewards the acquiescence of the fee payer and penalizes WEA even though timely detailed and extensive offers for reimbursement were made.

In *Davenport*, plaintiffs had a legal remedy aside from restitution. They were repeatedly offered the opportunity to have the funds at issue (and more) refunded to them. The *Davenport* plaintiffs sat on those rights and did not exercise them. After failing to act on the opportunity for a

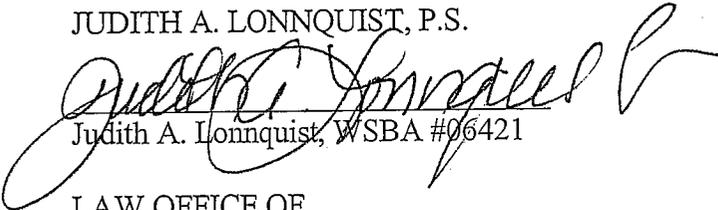
rebate, they came to court alleging a private right of action under Chapter 42.17, conversion, breach of fiduciary duty and fraudulent concealment. Division Two, despite determining that there was no cause of action under any of those legal theories, failed to reverse the trial court's denial of WEA's CR 12(c), instead grafted onto an otherwise failed complaint a claim of restitution. As a matter of equity and good conscience, given all the circumstances of the case as well the allegations in Davenport's complaint, this case should not be remanded to determine whether the plaintiffs have a cause of action for restitution.

F. CONCLUSION

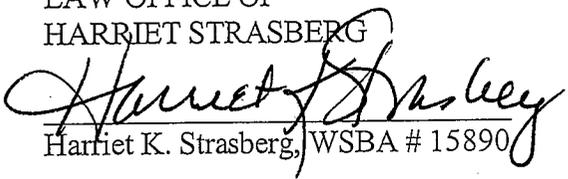
For the foregoing reasons, Petitioner respectfully requests that this Court accept review, reverse the decision of the Court of Appeals, and dismiss this case.

Dated this 12th day of January, 2009.

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
and TRACY WOLCOT,

Respondents,

v.

WASHINGTON EDUCATION
ASSOCIATION,

Appellant.

No. 28375-1-II

PUBLISHED OPINION

MORGAN, J.P.T.¹ — After filing this case as a class action, the plaintiffs alleged that each of them is a representative nonmember of the Washington Education Association (WEA); that each one's employer deducted an agency shop fee from his or her salary and paid it to WEA under RCW 41.59.100 and .060(2); and that WEA later spent the money in violation of former RCW 42.17.760.² The trial court denied WEA's CR 12 motion for judgment on the pleadings,

¹ Judge J. Dean Morgan is serving under CAR 21(c), having retired from this court in 2005.

² LAWS OF 1993, ch. 2 § 16. Effective May 11, 2007, the Washington legislature amended the former statute by re-designating it as subsection (1) and adding subsection (2). LAWS OF 2007, ch. 438. Because the trial court entered the judgment we are reviewing on January 18, 2002, more than five years earlier, nothing herein deals with the 2007 amendment.

ruled that the statute of limitations on one of plaintiffs' claims was five years, and granted the plaintiffs' motion to certify a class. On this remand from the United States Supreme Court and the Washington Supreme Court, we hold that the plaintiffs do not have a private statutory cause of action for violating former RCW 42.17.760 or a common law cause of action for conversion, but that they do have a common law cause of action for restitution. Accordingly, we affirm, except for holding that the statute of limitations is three rather than five years.

Since 1975, the Educational Employment Relations Act (EERA)³ has recognized the right of public school employees⁴ to form, by majority vote,⁵ a union to bargain collectively⁶ with their school-district employers.⁷ The EERA, however, does not require that the union must be joined by every employee who benefits from its collective bargaining activity.⁸ Instead, it mandates, if the union and the employer so provide in a collective bargaining agreement (CBA), that each benefited employee who opts to join must pay union dues, and that each benefited

³ Chapter 41.59 RCW; RCW 41.59.900 (short title).

⁴ RCW 41.59.020(4).

⁵ RCW 41.59.070(3).

⁶ RCW 41.59.010, .020(1).

⁷ RCW 41.59.020(5).

⁸ See RCW 41.59.060(1) (employees have not only the rights to self-organize and bargain collectively through representatives of their own choosing, but also "the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter").

employee who opts not to join must pay an "agency shop fee" equivalent to such dues.⁹ It further mandates, by virtue of RCW 41.59.060(2) and .100, that the employing school district deduct dues or the equivalent "agency shop fee" from the employee's salary. RCW 41.59.060(2) states in part:

If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100 . . . the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit.

And RCW 41.59.100 reiterates, subject to an exception not pertinent here:

If an agency shop provision is agreed to [in the CBA], the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.

From 1975 until December 1992, Washington law did not restrict the manner in which a union could later spend agency shop fees after receiving them. Effective December 3, 1992, however, Washington voters enacted Initiative 134 (I-134). In Section 16 of I-134, the voters stated:

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

⁹ RCW 41.59.100 ("A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop.").

The voters also directed in Section 33 of I-134 that Section 16 be codified in chapter 42.17 RCW, and the code reviser designated Section 16 as former RCW 42.17.760. For convenience, we refer interchangeably to Section 16 as "Section 16" or "former RCW 42.17.760."

In August 2000, the Evergreen Freedom Foundation (EFF) complained to the Washington State Public Disclosure Commission (PDC) that WEA had used agency shop fees for political purposes without affirmative authorization from its fee-paying nonmembers. On September 25, 2000, WEA stipulated in writing, at a hearing before the PDC, that it had received and deposited agency shop fees into its general fund, that it had expended money from that fund for political purposes without its nonmembers' authorization, and that it had "committed multiple violations of former RCW 42.17.760."¹⁰

In October 2000, following a referral of EFF's complaint to the Washington State Attorney General (AG), the AG filed an action (hereafter "the AG's case") related to but different from the one that we are now reviewing. The AG alleged that *the public* was entitled to relief in the nature of fines and penalties, but *not* that individual nonmembers should recover money that WEA might have spent for political purposes without their affirmative authorization. As the AG stated in a contemporaneous press release, "The lawsuit is aimed at enforcing the law on behalf of the citizens of Washington and is not intended to recover fees paid by individuals to the WEA."¹¹

¹⁰ Clerk's Papers (CP) at 70.

¹¹ CP at 337.

In the summer or fall of 2001, the trial court held a bench trial in the AG's case. Finding that WEA had received an agency shop fee from each of about 4,000 nonmembers, and applying RCW 42.17.400(1) and .390(3), the trial court multiplied the estimated number of nonmembers by \$25 and assessed a penalty in favor of the State.¹² Finding that WEA had acted intentionally, and applying RCW 42.17.400(5), the trial court doubled the penalty and awarded costs and fees to the State, for a total judgment of more than half-a-million dollars.¹³

Meanwhile, on March 19, 2001, Gary Davenport and four other nonmembers of WEA (hereafter "the Davenport plaintiffs") commenced the action that we are now reviewing (hereafter "the Davenport case"). The Davenport plaintiffs alleged in their complaint, as later amended, that WEA was a labor organization to which they had "paid mandatory agency fees in amounts equivalent to union dues," that WEA had "used their fees to influence elections and to support political committees," and that they had not authorized this use.¹⁴ The Davenport plaintiffs also alleged that WEA had so many nonmembers during the relevant time period that it was not practical to join all of the others, that their claims were typical of the others' claims, and that they would fairly and adequately protect the interests of the class. Attaching a copy of the

¹² See *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n.*, 156 Wn.2d 543, 552, 130 P.3d 352 (2006) (*PDC II*), *rev'd sub nom., Davenport v. Wash. Educ. Ass'n.*, ___ U.S. ___, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

¹³ *State ex rel. Wash. State Pub. Disclosure Comm'n v. Washington*, 117 Wn. App. 625, 631, 71 P.3d 244 (2003) (*PDC I*), *aff'd*, *PDC II*, 156 Wn.2d at 552.

¹⁴ CP at 60.

written stipulation that WEA had presented to the PDC, the Davenport plaintiffs asserted that WEA had violated former RCW 42.17.760, that they had a private statutory cause of action and a common law cause of action for conversion, that the case should be certified as a class action, and that they and the class should receive judgment.

In the summer of 2001, WEA moved to dismiss the Davenport case under CR 12, and the Davenport plaintiffs moved for an order certifying a class. In January 2002, the trial court denied WEA's motion to dismiss because, in its view, the Davenport plaintiffs had adequately alleged a private statutory cause of action based on former RCW 42.17.760 and a common law cause of action for conversion. Ruling that the statutory cause was subject to the five-year statute of limitations set forth in RCW 42.17.410, and recognizing that the plaintiffs had filed their complaint on March 19, 2001, the trial court also granted the plaintiffs' motion to certify a "class of all public school employees who, between March 19, 1996 and August 31, 2001 (inclusive), were nonmembers paying agency shop fees to Defendant WEA."¹⁵ Finally, the trial court recommended that the parties seek interlocutory review and made other rulings not pertinent here.¹⁶

WEA appealed the AG's case as a matter of right and sought discretionary review in the Davenport case. We granted discretionary review in the Davenport case, with the result that both cases came before us at the same time. The main issue raised in both cases was whether former

¹⁵ CP at 174-75.

¹⁶ The trial court dismissed the plaintiffs' claim for breach of fiduciary duty and denied class certification on the claim for fraudulent concealment. No one has sought review of either ruling.

RCW 42.17.760 was unconstitutional, and hence unenforceable, because it violated the First Amendment. A majority of the panel answered yes,¹⁷ so we dismissed both cases without reaching any other issues.¹⁸

The AG in her case and the Davenport plaintiffs in theirs asked the Washington Supreme Court to review our decision. After granting review, a majority of the court¹⁹ held that former RCW 42.17.760 violated the First Amendment, and affirmed our judgments of dismissal.²⁰

The AG in her case and the Davenport plaintiffs in theirs asked the United States Supreme Court to review the Washington Supreme Court's decision. After granting review, the high Court held that former RCW 42.17.760 did not violate the First Amendment, vacated both judgments, and remanded both cases to the Washington Supreme Court.²¹

When the Washington Supreme Court received the two cases back on remand, it decided to retain jurisdiction over the AG's case, but to transfer the Davenport case to us for further proceedings. We heard additional oral argument and invoked RAP 12.1(b) as the basis for requesting supplemental briefs on whether the Davenport plaintiffs had stated a common law cause of action for restitution.

¹⁷ Judge Hunt dissented.

¹⁸ *PDC I*, 117 Wn. App. 625; *Davenport v. Wash. Educ. Ass'n*, noted at 117 Wn. App. 1035 (2003), *aff'd*, *PDC II*, 156 Wn.2d at 552, *rev'd*, *Davenport*, 127 S. Ct. 2372.

¹⁹ Justice Sanders dissented, and two other justices concurred in his dissent.

²⁰ *PDC II*, 156 Wn.2d 543.

²¹ *Davenport*, 127 S. Ct. 2372.

Having now received and reviewed the parties' supplemental briefs, we are met at the outset by WEA's reminder that the trial court has not yet made any findings of fact.²² That is true—and immaterial to this appeal.²³ When reviewing a trial court's ruling on a motion for judgment on the pleadings brought under CR 12(c), we must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party.²⁴ Here then, we review questions of fact by taking the facts and inferences, both real and hypothetical, in the light most favorable to the plaintiffs.²⁵ In contrast, we review

²² WEA's Suppl. Br. at 3.

²³ "The function of a summary judgment proceeding, or a judgment on the pleadings, is to determine whether or not a genuine issue of fact exists, not to determine issues of fact." *Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962). As a result, the Washington Supreme Court has "held on numerous occasions that findings of fact and conclusions of law are superfluous in both summary judgment and judgment on the pleadings proceedings." *Wash. Optometric Ass'n v. Pierce County*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). See also *Zempel*, 59 Wn.2d at 425 (holding that findings are unnecessary).

²⁴ CR 12(c); see also *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 122, 11 P.3d 726 (2000); *Bravo v. Dolson Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). We need not address the United States Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Although *Twombly* dismissed a complaint because the facts relied on were not plausible as well as conceivable, the facts relied on here are both plausible and conceivable. Moreover, *Twombly* was supervisory rather than constitutional, and the Washington Supreme Court has not yet adopted it. See *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wn. App. 900, 904, 193 P.3d 155 (2008) (declining to apply *Twombly* standard because Washington court rule and Supreme Court precedent, not the United States Supreme Court's interpretation of a federal court rule, provides mandatory authority for this court).

²⁵ We express no opinion on whether the trial court, on remand after this appeal, might use judicial estoppel as a basis for concluding that WEA's stipulation of September 25, 2000, established real rather than hypothetical facts. For a recent discussion of judicial estoppel, see *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352, 357 (2008).

questions of law de novo (i.e., without deferring to the trial court's reasoning or result).²⁶

With this understanding of our task on appeal, we turn now to three questions in the Davenport case: First, did the trial court properly deny WEA's motion for judgment on the pleadings? Second, did the trial court properly rule that the applicable statute of limitations was five years? Third, did the trial court properly certify a class? Throughout this opinion, we assume, in compliance with the United States Supreme Court's ruling, that former RCW 42.17.760 does not violate the United States Constitution.

I.

The main issue is whether the trial court properly denied WEA's CR 12 motion for judgment on the pleadings. WEA claimed that the plaintiffs had failed to plead a cause of action recognized by Washington law. The plaintiffs responded that they had successfully pled a statutory cause of action based on Section 16 of I-134, as well as a common law cause of action for conversion. Coupling this history with our request for supplemental briefs, we now must decide whether the plaintiffs have stated (A) a private statutory cause of action under Section 16; (B) a common law cause of action for conversion; and/or (C) a common law cause of action for restitution.

A.

Whether the plaintiffs have stated a *statutory* cause of action subdivides into two questions: (1) Does former RCW 42.17.760 expressly or impliedly create a private (as opposed

²⁶ *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996).

to a public) statutory cause of action for damages; and (2) if so, have the plaintiffs properly pled such an action here? We review the first question de novo (i.e., without deference to the trial court's reasoning or result), because it involves an issue of law.²⁷ We do not reach the second question because we answer the first question negatively.

We begin our analysis of the first question by examining the rules of statutory construction. Those rules govern initiatives as well as statutes,²⁸ and whether a statute should be construed as creating a statutory cause of action.²⁹ They require that we read I-134 as an informed lay voter would have read it,³⁰ and in this way discern whether the 1992 voters collectively intended to create a statutory cause of action.³¹ The voters' intent may appear

²⁷ *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 880; *Rettkowski*, 128 Wn.2d at 515.

²⁸ *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 532 n.6, 936 P.2d 1123 (1997), *cert. denied*, 522 U.S. 866 (1997); *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981); *Wash. Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973).

²⁹ See *Marquis v. City of Spokane*, 130 Wn.2d 97, 108-09, 922 P.2d 43 (1996); *Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 607, 54 P.3d 225 (2002).

³⁰ *W. Petroleum Imps., Inc. v. Friedt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995).

³¹ *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2001) (“[I]n determining the meaning of a statute enacted through the initiative process, the court’s purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure.”).

expressly on the face of the statute itself, or it may be implied from other sources,³² but it may not be implied from a silent record.³³

Applying these rules here, we first inquire whether the voters who enacted I-134 had an *express* intent that Section 16 be the basis for a private statutory cause of action. Section 16 clearly expresses the rule that a labor organization cannot spend a nonmember's agency shop fee for political purposes without the nonmember's affirmative authorization, but it says nothing about whether the nonmember has (or lacks) a cause of action to recover money spent in violation of its provisions. Accordingly, the voters who enacted Section 16 did not *expressly* exhibit intent that Section 16 be the basis for a private statutory cause of action.

We next ask whether the voters who enacted Section 16 had an *implied* intent that Section 16 be the basis for a private statutory cause of action. Believing that the 1992 voters implied the absence, not the presence, of such intent, we answer no.

When the 1992 voters enacted Section 16, they omitted to state whether they intended Section 16 to be the basis for a private statutory cause of action (i.e., a statutory cause of action that permits a nonmember to recover, in his own name and for his own account, an agency shop

³² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003) (when attempting to discern voters' intent, court may consider the official voters' pamphlet); *see also Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990) (intent will be implied when (1) the plaintiff is within the class for whose benefit the statute was enacted; (2) legislative intent, explicitly or implicitly, supports such a remedy; and (3) implying a remedy is consistent with the underlying legislative purpose); *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 22, 60 P.3d 652 (2002).

³³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

fee spent in violation of Section 16). Section 16 itself, its legislative history,³⁴ and the underlying 1992 voters' pamphlet³⁵ are all completely silent on the point. Believing that the voters (or, perhaps more accurately, those who drafted and put the initiative before the voters for approval) would not have made such an obvious and glaring omission inadvertently, and noting the ease with which the voters (or drafters) could have expressed a private statutory cause of action,³⁶ we think that the omission implies the *absence*, not the presence, of intent to create a private statutory cause of action.

We buttress this implication by contrasting the 1992 voters' expression of a *public* statutory cause of action with their omission of a *private* one. Since 1972, chapter 42.17 RCW has expressed a public statutory cause of action under which either the AG or the prosecuting attorney (or, if they both decline to act, a private citizen) can bring a civil action "in the name of the state for any appropriate civil remedy"³⁷—provided that any judgment "shall escheat to the

³⁴ Documents available as legislative history for Senate Bill 5864 and Substitute Senate Bill 5864, 52d Leg., Reg. Sess. (Wash. 1991), include (1) the senate bill and substitute senate bill in original and amended forms, (2) the senate bill reports, and (3) the senate bill digests. See <http://dlr.leg.wa.gov/tld/results.aspx?params=1991-92,5864> (last visited Nov. 14, 2008).

³⁵ STATE OF WASHINGTON VOTERS PAMPHLET, GENERAL ELECTION at 8-23 (Nov. 3, 1992).

³⁶ The drafters of former RCW 42.17.760 could have done that simply by adding a second sentence to the statute, stating that if a labor organization violates former RCW 42.17.760 by using all or part of an agency shop fee for political purposes without affirmative authorization, the individual from whose salary the fee was deducted may sue to recover the fee (or that part of the fee that was spent improperly).

³⁷ RCW 42.17.400(1); see also RCW 42.17.400(4).

state,” and not to the plaintiff.³⁸ When the 1992 voters directed in Section 33 of I-134 that Section 16 be codified as part of chapter 42.17 RCW, they manifested their intent that Section 16 be the basis of a *public* statutory cause of action—while simultaneously *omitting* to express an intent that Section 16 be the basis for a *private* statutory cause of action. Hence, to apply the maxim *expressio unius est exclusio alterius*³⁹ (to express one thing is to exclude another) is again to conclude that the 1992 voters implied the *absence*, not the presence, of intent that Section 16 be the basis for a *private* statutory cause of action.

We further buttress the 1992 voters’ absence of intent by noting our own decision in *Crisman v. Pierce County Fire Protection District No. 21*.⁴⁰ In that case, we held in effect that by expressing a public but not a private remedy, the 1992 voters had demonstrated a “goal of protecting the public rather than any individual.”⁴¹

Lastly, we buttress the 1992 voters’ absence of intent by noting that for many years before 1992, the Washington courts had recognized a *common law* cause of action for restitution that the

³⁸ RCW 42.17.400(4)(b).

³⁹ *State v. Modica*, 164 Wn.2d 83, 93, 186 P.3d 1062 (2008); *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); *State v. Roadhs*, 71 Wn.2d 705, 707, 430 P.2d 586 (1967); *Kitsap Co. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 878, 158 P.3d 638 (2007).

⁴⁰ *Crisman*, 115 Wn. App. at 23; see also *Vance v. Offices of Thurston County Comm’rs.*, 117 Wn. App. 660, 71 P.3d 680 (2003) (following *Crisman*), review denied, 151 Wn.2d 1013 (2004).

⁴¹ *Crisman*, 115 Wn. App. at 23.

1992 voters would have duplicated by creating a private statutory cause of action.⁴² Given that the common law action already permitted an individual to recover money that he or she had transferred under circumstances constituting unjust enrichment, and that a new statutory cause of action would have had the same effect under narrower circumstances (i.e., only where the unjust enrichment was due to having violated former RCW 42.17.760), the 1992 voters (or drafters) may well have believed that a new private statutory cause of action was unnecessary.⁴³

We reject for several reasons the plaintiffs' reliance on *Nelson v. McClatchy Newspapers, Inc.*,⁴⁴ a case in which the Washington Supreme Court seems not to have addressed, but rather to have assumed, that Section 8 of I-134,⁴⁵ a section very different from Section 16, implied a

⁴² See, e.g., *Puget Realty Co. v. King County*, 50 Wash. 349, 97 P. 226 (1908) (appellant entitled to restitution after county assessor mistakenly assessed \$13,000 in taxes against appellant's property); cf. *Bosworth v. Wolfe*, 146 Wash. 615, 623-24, 264 P. 413 (1928) (recognizing action for restitution, which the case terms an action "for money had and received").

⁴³ In *Bennett*, 113 Wn.2d 912, the Washington Supreme Court recognized that civil relief for a violation of statute can come *either* from a newly created statutory cause of action or from an already-existing common law cause of action. The *Bennett* court quoted from the *Restatement (Second) of Torts* § 874A (1979) as follows:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, *using a suitable existing tort action or a new cause of action analogous to an existing tort action.*

Bennett, 113 Wn.2d at 920 (emphasis added).

⁴⁴ *Nelson*, 131 Wn.2d at 534.

⁴⁵ Section 8 is codified as RCW 42.17.680(2).

private statutory cause of action. First, we cannot tell whether the issue in *Nelson* was the same as the issue here; the *Nelson* opinion simply does not say whether Nelson was bringing a *private* or a *public* statutory cause of action.⁴⁶ Second, even if the issue was the same as the issue here, the *Nelson* opinion does not show that the court *decided* rather than *assumed* that Section 8 implied a private statutory cause of action. And third, even if the *Nelson* court decided that Section 8 implied a private statutory cause of action, the *Nelson* court most certainly did *not* decide that any *other* section of I-134, including but not limited to Section 16, also implied a private statutory cause of action.

In sum, when the 1992 voters enacted Section 16, they neither expressly nor impliedly manifested an intent that Section 16 serve as the basis for a new private statutory cause of action. Necessarily then, we hold that Section 16 does not furnish such a basis.

B.

The next issue here is whether the plaintiffs have a common law cause of action for the tort of conversion. Rooted in the common law action of trover,⁴⁷ that tort occurs when, without lawful justification, one willfully interferes with, and thereby deprives another of, the other's

⁴⁶ The opinion's silence being dispositive, we need not resolve WEA's assertion that Nelson was actually alleging a public cause of action. See WEA's Reply Brief at 4, n.4.

⁴⁷ *Eggert v. Vincent*, 44 Wn. App. 851, 855, 723 P.2d 527 (1986), *review denied*, 107 Wn.2d 1034 (1987).

right to a chattel.⁴⁸ It requires that the plaintiff have a possessory or other “property interest” in the chattel,⁴⁹ and it treats money as a chattel only if the defendant “wrongfully received” the money or “was under obligation to return the specific money to the party claiming it.”⁵⁰ Absent a “property interest” of the required type, an action for conversion will not lie, for at most the defendant has only failed to pay an unsecured debt.⁵¹

Taking the plaintiffs’ allegations in the light most favorable to them, we begin by observing that WEA might have converted the Davenport plaintiffs’ money at either or both of

⁴⁸ *In re Marriage of Langham*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005) (quoting *Meyers Way Dev. Ltd. P’ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 674-75, 910 P.2d 1308, *review denied*, 130 Wn.2d 1015 (1996)); *W. Farm Serv., Inc. v. Olsen*, 151 Wn.2d 645, 648 n.1, 90 P.3d 1053 (2004) (citing *Paris Am. Corp. v. McCausland*, 52 Wn. App. 434, 443, 759 P.2d 1210 (1988)); *Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985); *Judkins v. Sadler-MacNeil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962); *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001) (citing *Wash. State Bank v. Medalia Healthcare L.L.C.*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999), *review denied*, 140 Wn.2d 1007 (2000)), *review denied*, 145 Wn.2d 1003 (2001); *Eggert*, 44 Wn. App. at 854 (citing *Olin v. Goehler*, 39 Wn. App. 688, 693, 694 P.2d 1129, *review denied*, 103 Wn.2d 1036 (1985)); 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 13.33, at 410 (3d ed. 2006).

⁴⁹ *In re Langham*, 153 Wn.2d at 565 (quoting *Meyers Way Dev.*, 80 Wn. App. at 675); *In re Marriage of Bureta*, 140 Wn. App. 119, 123, 164 P.3d 534 (2007) (quoting *In re Langham*, 153 Wn.2d at 565).

⁵⁰ *Public Util. Dist. No. 1*, 104 Wn.2d at 378; *Seekamp v. Small*, 39 Wn.2d 578, 583, 237 P.2d 489 (1951) (quoting *Davin v. Dowling*, 146 Wash. 137, 140-41, 262 P. 123 (1927)); *see also* H. D. Warren, Annotation, *Nature of Property or Rights Other Than Tangible Chattels Which May be Subject of Conversion*, 44 A.L.R.2d 927 (1955); 16 DEWOLF & ALLEN, *supra*, § 13.33, at 410.

⁵¹ *See Seekamp v. Small*, 39 Wn.2d 578; Warren, *supra*, 44 A.L.R.2d 927 at § 7(c) (general rule is that “action for conversion will not lie for money represented by a general debt”); *cf. Meyers Way Dev.*, 80 Wn. App. at 675 (secured creditor’s interest in proceeds from the sale of sand was type of “property interest” in money needed to support conversion).

two different times. The earlier time was when WEA received the money from each plaintiff's employer. The later time was when WEA used the money for political purposes.

To determine whether WEA committed the tort of conversion when it initially received money from each plaintiff's employer, we must ascertain whether WEA initially received the money "wrongfully" or "with lawful justification." When the legislature enacted RCW 41.59.100 and .060(2), it authorized each nonmember's employer to deduct from the plaintiff's salary, and pay to WEA (or other labor organization), money that had been earned by the nonmember. Necessarily, it also authorized WEA (or other labor organization) to receive that same money. Having received the money with lawful justification, WEA did not commit the tort of conversion at that time.

To determine whether WEA committed the tort of conversion when it later used the money for political purposes, we must ascertain whether each plaintiff had a "property interest" in the money when WEA later used it. Before former RCW 42.17.760 took effect (i.e., before December 3, 1992), RCW 41.59.100 and .060(2) mandated that each nonmember's employer transfer to WEA money that otherwise would have belonged to the nonmember. Because nothing in the Washington law that existed at that time restricted the manner in which WEA could later use the money, the transfer was unconditional, WEA became the sole owner and possessor of the money transferred, and the nonmember did not obtain the "property right" necessary for conversion.

When former RCW 42.17.760 was enacted in 1992, it unquestionably restricted (conditioned) WEA's ability to use the transferred money for political purposes. But did it also

create or resurrect in each nonmember the kind of “property interest” that he or she must show in order to sue for conversion? We think not. Reading the former statute according to its plain terms, we see nothing that speaks to the existence of such an “interest.” The statute is simply silent on that point, and we are not willing to infer the creation of such an interest from its silence. Accordingly, we conclude that the plaintiffs do not have the kind of “property interest” that they need to sue for conversion, and that they have not stated a cause of action for that tort.

C.

That the plaintiffs lack a common law cause of action for conversion does not necessarily mean that they cannot recover in this case. In *Seekamp v. Small*,⁵² the trial court granted a new trial because the plaintiff had not proved a common law cause of action for conversion. On appeal, the Washington Supreme Court held that even though the plaintiff had not proved a common law cause of action for conversion,⁵³ the plaintiff had proved a common law action for restitution (which the court termed “[a]n action for money had and received”⁵⁴). The court explained:

[T]he failure of [the plaintiff] to prove a cause of action in conversion does not of itself justify the granting of a new trial. The complaint contained allegations sufficient to state a cause of action for money had and received and the record is

⁵² *Seekamp*, 39 Wn.2d 578.

⁵³ The court noted that “there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it;” that “[t]he only reasonable inference from the evidence was that [the defendant] was not required to deliver specific money to [the plaintiff];” and thus that “an action in conversion was inappropriate in this case.” *Seekamp*, 39 Wn.2d at 583.

⁵⁴ *Seekamp*, 39 Wn.2d at 584.

replete with evidence, admitted without objection, entitling [the plaintiff] to recover on that cause of action

In *Bosworth v. Wolfe*, 146 Wash. 615, 264 P. 413, 417, 56 A.L.R. 1117, we said: "The action for money had and received was invented by the common-law judges to secure relief from the narrower restrictions of the common-law procedure, which afforded no remedy in too many cases of merit. The action is a modified form of assumpsit. It has gone through various transformations; first from tort, then from contract, and afterwards into a remedy where there was technically neither tort nor contract. It is founded on the principle that no one ought unjustly to enrich himself at the expense of another, and the gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay it over."^{55]}

Accordingly, the next issue here is whether the Davenport plaintiffs have alleged the facts needed for a common law cause of action for restitution.

Sometimes termed a cause of action for "a contract implied in law"⁵⁶

⁵⁵ *Seekamp*, 39 Wn.2d at 583-84; see also *Cone v. Ariss*, 13 Wn.2d 650, 654, 126 P.2d 591 (1942) (although trial court did not adopt plaintiff's conversion theory, plaintiff "was nevertheless entitled to recover what he had paid on the purchase price, as money had and received by appellant, under the principle that 'no one ought unjustly to enrich himself at the expense of another'").

⁵⁶ See, e.g., *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 600, 137 P.2d 97 (1943); *Pierce County v. State*, 144 Wn. App. 783, 828-30, 185 P.3d 594 (2008); *Auburn Mech., Inc. v. Lydig Constr., Inc.*, 89 Wn. App. 893, 903-04, 951 P.2d 311 (quoting *Bill v. Gattavara*, 34 Wn.2d 645, 650, 209 P.2d 457 (1949)), review denied, 136 Wn.2d 1009 (1998); 66 AM. JUR. 2D *Restitution and Implied Contracts*, § 2 (2001) ("Contracts implied in law are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. A contract will be . . . implied in law whenever necessary to account for a relation found to exist between the parties where no contract in fact exists. An agreement 'implied in law' is a fiction of law"). For a brief description of the evolution of these terms, see RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS at 5-9 (introductory note) (1937) and 66 AM. JUR. 2D, supra, § 169 (2001).

“quasi contract,”⁵⁷ or “money had and received,”⁵⁸ the common law action for restitution employs unjust enrichment as an independent basis of substantive liability.⁵⁹ *The Restatement of Restitution and Unjust Enrichment (Third)* states:

A more important misconception is that restitution is essentially *a remedy*, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution’s own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.^[60]

⁵⁷ See, e.g., *Chandler*, 17 Wn.2d at 600; *Pierce County*, 144 Wn. App. at 828; *Auburn Mech., Inc.*, 89 Wn. App. at 905 (citing GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.2, at 9 (1978)); *RESTATEMENT, FIRST*, at 1 (general scope note) (law of restitution includes but is not limited to common law actions for quasi-contract).

⁵⁸ *Bosworth v. Wolfe*, 146 Wash. 615, 624, 264 P. 413 (1928); *Seekamp*, 39 Wn.2d at 583-84; *Karpierz v. Easley*, 68 S.W.3d 565, 570 (Mo. App. 2002) (“suit for money had and received is an action at law founded upon an implied contract created by law,” the principal function of which “is to prevent unjust enrichment”).

⁵⁹ *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007) (rather than being a simple contract remedy, the law of restitution is “itself a source of obligations, analogous in this respect to tort or contract”) (quoting *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 1 cmt. h at 12-13 (Discussion Draft 2000)); *Chandler*, 17 Wn.2d at 602 (“[T]he essence of quasi contractual obligation [is] that the retention of the benefit received by the defendant would be unjust.”); *Pierce County*, 144 Wn. App. at 829 (“[C]ontract implied in law is based on the principle that no one should be unjustly enriched at the expense of another.”); *RESTATEMENT (THIRD)* § 1 cmt. h at 13 (Discussion Draft) (“The identification of unjust enrichment as an independent basis of substantive liability in common-law legal systems was the central achievement of the first Restatement of Restitution.”); HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* at 11 (2004).

⁶⁰ *RESTATEMENT (THIRD)* § 1 cmt. h at 12-13 (Discussion Draft). As two commentators visualize it, “the common law coach” runs on four, not three, “substantive wheels”—torts, contracts, property, and unjust enrichment. DAGAN, *supra*, at 3 (quoting Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1370-71 (1994)).

Unlike the law of conversion, which requires that the transferee have *wrongfully* received the property of another,⁶¹ the law of restitution requires only that the transferee have received the property of another under circumstances that result in the transferee's "unjust enrichment."⁶²

The Washington Supreme Court embraced or re-embraced these general principles in *Nelson v. Appleway Chevrolet, Inc.*⁶³ Nelson wanted to buy a car from a car dealer. Nelson and the dealer's representative agreed on the price Nelson would pay for a car—which the dealer then refused to deliver unless Nelson paid an additional "\$79.23 for business and occupation (B&O) tax."⁶⁴ Nelson transferred (paid) the \$79.23 under protest⁶⁵ and filed a class action lawsuit in which the parties debated whether a statute, RCW 82.04.500, permitted B&O tax to be passed through to the customer. Answering no, our Supreme Court held that because Nelson had "brought an independent claim of restitution" under the common law, there was no need to

⁶¹ RESTATEMENT (FIRST) at 523.

⁶² RESTATEMENT (FIRST) at 523 (in contrast to a tort action, which "is based primarily on [the defendant's] wrongdoing," the only wrongdoing in a quasi-contractual action is "incidental to [the defendant's] unjust enrichment"); cf. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989) ("Quasi contracts are founded on the equitable principle of unjust enrichment which simply states that one should not be 'unjustly enriched at the expense of another.'") (quoting *Milone v. Tucci, Inc. v. Bona Fide Buildings, Inc.*, 49 Wn.2d 363, 301 P.2d 759 (1956)); *Trane Co. v. Randolph Plumbing & Heating*, 44 Wn. App. 438, 442, 722 P.2d 1325 (1986) (elements of a quasi contract are (1) the enrichment of the defendant must be unjust and (2) the plaintiff cannot be a mere volunteer); DAGAN, *supra*, at 11-12.

⁶³ *Nelson*, 160 Wn.2d 173.

⁶⁴ *Nelson*, 160 Wn.2d at 178.

⁶⁵ *Nelson*, 160 Wn.2d at 178-79 n.3.

address “whether RCW 82.04.500 implies a private right of action.”⁶⁶ Explaining Nelson’s right to bring “an independent claim of restitution,” the court said:

The new *RESTATEMENT (THIRD) OF RESTITUTION* addresses the confusion surrounding unjust enrichment claims. While historically understood as an equity action, restitution has roots in both equity and the law. See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT*, § 1 cmt. b (Discussion Draft 2000). The original justification, dating back to Lord Mansfield’s decision in *Moses v. Macferlan* has given way to a modern understanding, based on a transaction’s legal validity. Specifically, any transaction not adequately supported by law is voidable. See *RESTATEMENT (THIRD) OF RESTITUTION*, *supra*, § 1 cmt. b at 3 (“Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights.”). Because Appleway illegally charged Nelson the B&O tax as an additional cost to the final purchase price, Appleway has been unjustly enriched with money properly belonging to Nelson. In effect, Appleway has made Nelson pay Appleway’s taxes. Furthermore, restitution is more than a simple contract remedy. It is “itself a source of obligations, analogous in this respect to tort or contract.” *Id.*, § 1, cmt. h at 12-13.^[67]

Although “enrichment” is easy to define, it will not by itself support restitution. One person “enriches” another merely by transferring money or other benefit to the other.⁶⁸ But a transferee who receives money or other benefit is not liable for restitution unless “the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for

⁶⁶ *Nelson*, 160 Wn.2d at 188.

⁶⁷ *Nelson*, 160 Wn.2d at 187-88 (footnote omitted) (quoting *RESTATEMENT (THIRD)* § 1 cmt. b at 3) (Discussion Draft).

⁶⁸ *RESTATEMENT (FIRST)* § 1 at 12.

him [or her] to retain it.”⁶⁹

In contrast, “unjust” enrichment is quite difficult to define. According to both the *Restatement (Third)* and *Nelson v. Appleway*, it “results from a transfer that the law treats as ineffective to work a conclusive alteration of ownership rights.”⁷⁰ According to the *Restatement (Third)*, one type of transfer that will be ineffective for this purpose is the one “subject to avoidance,” and one type of transfer that will be subject to avoidance is the one “made under legal compulsion”⁷¹—“if it can subsequently be established that the legal compulsion has been

⁶⁹ *Chandler*, 17 Wn.2d at 601; *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), *review denied*, 163 Wn.2d 1042 (2008) (“[E]nrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties.”); *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 732, 741 P.2d 58 (“[E]nrichment alone will not suffice . . . [i]t is critical that the enrichment be unjust both under the circumstances and as between the two parties to the transaction.”) (citing *McGrath v. Hilding*, 41 N.Y.2d 625, 363 N.E.2d 328, 331 (1977)), *review denied*, 109 Wn.2d 1009 (1987); RESTATEMENT (FIRST) § 1 at 13.

⁷⁰ *Nelson*, 160 Wn.2d at 188 (quoting RESTATEMENT (THIRD) § 1 cmt. b at 3) (Discussion Draft). This formulation encompasses such a “wide variety,” RESTATEMENT (FIRST) at 1, of situations that it may be equivalent to stating that one person enriches another *unjustly* when the facts and circumstances of the particular case so indicate. See *Dragt*, 139 Wn. App. at 576 (“[E]nrichment must be unjust under the circumstances.”); *Farwest Steel Corp.*, 48 Wn. App. at 732 (“[E]nrichment [must] be unjust both under the circumstances and as between the two parties to the transaction.”); 66 AM. JUR. 2D, *supra*, § 2 (when ruling on implied-in-law contract, court should “consider[] all of the factors in light of the surrounding circumstances”).

⁷¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 2 introductory note at 3) (Tentative Draft No. 1, 2001).

misapplied, inducing a transfer that was not justified in terms of the underlying rights and obligations of the parties.”⁷² As the *Restatement (Third)* explains:

[T]he use of legal compulsion to effect a transfer presupposes a conclusion about the distribution of property between transferor and transferee—the conclusion being that justice (whether embodied in the law of civil obligations or the tax code) requires a transfer from one to the other. If that conclusion about the parties’ proper entitlements is subsequently revealed to be erroneous, the effect of the legal compulsion will have been to create an improper distribution, rather than to redress one. Restitution in such a case is supported not merely by considerations of private justice between the parties, but by recognition of the fact that the misapplication of the state’s coercive means deprives them of their ordinary justification as legalized coercion.^[73]

The law of Washington has long been in agreement.⁷⁴

As the following authorities show, a transfer made under compulsion of law creates rather than redresses “an improper distribution” in at least two instances. In one, the initial transfer is compelled, either in whole or in part, by an unlawful or mistaken view of the law. In the other, the initial transfer is lawfully compelled *ab initio*, subject to a condition the later failure of which deprives it of its initially lawful justification and makes retention of its benefits *currently* unjustifiable.

⁷² RESTATEMENT (THIRD) topic 3 introductory note at 281 (Tentative Draft No. 1); RESTATEMENT (THIRD) topic 3 introductory note at 280-81 (Discussion Draft).

⁷³ RESTATEMENT (THIRD) topic 3 introductory note at 281 (Tentative Draft No. 1); RESTATEMENT (THIRD) topic 3 introductory note at 288 (Discussion Draft).

⁷⁴ See, e.g., *Puget Realty*, 50 Wash. 349 (appellant entitled to restitution after county assessor mistakenly assessed \$13,000 in taxes against appellant’s property).

Transfers of the first kind are exemplified in *Broward County v. Mattel*,⁷⁵ *Rosen v. Village of Downers Grove*,⁷⁶ *Investors Title Company, Inc. v. Hammonds*,⁷⁷ *In re Increase in Fees by the New Jersey Board of Dentistry*,⁷⁸ and *Five Boro Electrical Contractors Association, Inc. v. City of New York*.⁷⁹ In *Broward County v. Mattel*,⁸⁰ the lawyers practicing in Broward County continued to pay (transfer) license fees to the county without protest—apparently not realizing that the statute authorizing the county to exact such fees had been repealed. When the lawyers belatedly discovered the repeal, they sued for restitution. The Florida Court of Appeals held that the lawyers had paid involuntarily (i.e., under “coercion and duress”) despite their failure to protest; that “if the payment of a tax is deemed involuntary, a tax which was unlawfully collected may be recovered back by appropriate action,”⁸¹ and hence that the lawyers were entitled to restitution.

⁷⁵ *Broward County v. Mattel*, 397 So.2d 457 (Fla. App. 1981).

⁷⁶ *Rosen v. Vill. of Downers Grove*, 167 N.E.2d 230 (Ill. 1960).

⁷⁷ *Investors Title Co. v. Hammonds*, 217 S.W.3d 288 (Mo. 2007).

⁷⁸ *In re Increase in Fees by the N.J. Bd. of Dentistry*, 423 A.2d 640 (N.J. 1980).

⁷⁹ *Five Boro Elec. Contractors Ass'n v. City of New York*, 187 N.E.2d 774 (N.Y. 1962).

⁸⁰ *Broward County*, 397 So.2d 457.

⁸¹ *Broward County*, 397 So.2d at 460.

In *Rosen*,⁸² a plaintiff named Firestone believed that it had to comply with a local ordinance before it could receive the permits that it needed for a proposed subdivision. To comply, it paid (transferred) more than \$7,000 to the local school district. A court later declared the ordinance invalid, and Firestone sought restitution. Finding that Firestone had paid “not voluntarily but under compulsion and duress,”⁸³ the trial court ordered restitution, and the Illinois Supreme Court affirmed.

In *Investors Title*,⁸⁴ a county recorder of deeds employed a fraudulent head cashier who routinely charged fees for recording documents that were higher than the applicable statute allowed. The plaintiff title company did not discover the overcharges for six years, but when it did, it sued the county for restitution. Holding that the county’s “acceptance and retention of the overcharged fees was unjust,”⁸⁵ the Missouri Supreme Court ordered restitution of the overcharged amounts.

In *New Jersey Board of Dentistry*,⁸⁶ a statute authorized the New Jersey Board of Dentistry to adopt a rule that would base the license fees for dentists on the amounts required by the Board to meet its expenses—provided that such fees “not be fixed at a level that will raise

⁸² *Rosen*, 167 N.E.2d 230.

⁸³ *Rosen*, 167 N.E.2d at 235.

⁸⁴ *Investors Title Co.*, 217 S.W.3d 288.

⁸⁵ *Investors Title Co.*, 217 S.W.3d at 297.

⁸⁶ *In re N.J. Bd. of Dentistry*, 423 A.2d 640.

amounts in excess of the amount estimated to be so required.”⁸⁷ Claiming that the Board had adopted a new fee schedule that generated “amounts in excess of the amount estimated to be so required,” the New Jersey Dental Association sought review by the Appellate Division, apparently on two grounds: (1) that the Board had exceeded its authority by adopting the new fee schedule, and (2) that the Association’s members were entitled to restitution of amounts collected under it. The Appellate Division ruled for the Association on the first ground, but neglected to rule on the second. Neither party timely sought further review, prompting some appellate churning, but the case nevertheless wound up before the New Jersey Supreme Court. Apparently declining to review the first issue due to the parties’ failure to timely appeal from the Appellate Division, the Supreme Court reviewed the second issue, granted restitution, and remanded “for the calculation and distribution of a refund based on the difference between the fees collected during the years in question and the Board’s actual expenses during those years.”⁸⁸

In *Five Boro*,⁸⁹ the city charged license fees in amounts later ruled “excessive” because they lacked a “reasonable relationship to the costs of the services involved in issuing the licenses.”⁹⁰ Licensees who had paid without protest obtained a trial court judgment “representing the excess over \$25 apiece,”⁹¹ and the city appealed. Holding that the plaintiffs

⁸⁷ *In re N.J. Bd. of Dentistry*, 423 A.2d at 641.

⁸⁸ *In re N.J. Bd. of Dentistry*, 423 A.2d at 642.

⁸⁹ *Five Boro Elec. Contractors Ass’n*, 187 N.E.2d 774.

⁹⁰ *Five Boro Elec. Contractors Ass’n*, 187 N.E.2d at 774.

⁹¹ *Five Boro Elec. Contractors Ass’n*, 187 N.E.2d at 775.

had paid under compulsion despite the absence of any protest, the New York Court of Appeals ordered restitution of the excess amounts.

Transfers of the second type are exemplified by RAP 12.8, *Karpierz v. Easley*,⁹² and *Wareham Education Association v. Labor Relations Commission*.⁹³ RAP 12.8 provides that if a judgment debtor pays rather than supersedes all or part of a judgment pending appeal, but the judgment is later reversed or modified before becoming final, the trial court must “restore to the [judgment debtor] any property taken from [the judgment debtor], the value of the property, or in appropriate circumstances, provide restitution.”⁹⁴ Both Restatements provide likewise.⁹⁵ In effect, these authorities recognize that a judgment debtor initially pays not because he wants to, but because of the judgment’s *lawful* coercive effect—an effect that is entirely justifiable while the judgment is presumed valid and enforceable pending appeal, but which ceases to be justifiable once the judgment has been reversed or modified. In alternative terms, these

⁹² *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. App. W.D. 2002).

⁹³ *Wareham Educ. Ass’n v. Labor Relations Comm’n*, 713 N.E.2d 363 (Mass. 1999).

⁹⁴ RAP 12.8; *Ehsani v. McCullough Family P’ship*, 160 Wn.2d 586, 590, 159 P.3d 407 (2007); *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 44, 802 P.2d 1353 (1991); see also RAP 7.2(c), (e), (h).

⁹⁵ RESTATEMENT (FIRST) § 74 at 302-03, provides that “[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.” RESTATEMENT (THIRD) § 18 at 281-82 (Tentative Draft No. 1), provides that “[a] transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution to the extent necessary to avoid unjust enrichment.” (Embolding deleted.)

authorities recognize that even though the initial transfer (the judgment debtor's payment of the judgment pending appeal) was *lawfully* coerced when first made, it was subject to a condition subsequent (the judgment being affirmed on appeal) that later failed (when the judgment was reversed or modified on appeal). This failure strips the transfer of its initial justification and renders "unjust" the transferee's (the judgment creditor's) present retention of the judgment debtor's property. Hence, restitution is warranted.

In *Karpierz*,⁹⁶ Kansas City police officers searched Karpierz' house and *lawfully* seized over \$34,000 in cash. The officers were required by state law to follow certain statutory procedures before making the cash available for federal forfeiture proceedings, but they neglected to do that, leading Karpierz to sue for restitution. Concluding that restitution was required, the Missouri Court of Appeals held that even though the officers had acted lawfully in initially seizing the money, they later "had an obligation to handle the seized money in the manner prescribed by statute"; that the officers had violated their later obligation by "*unlawfully* transfer[ing] the money to federal authorities"; and that "allowing [the officers] to benefit from ignoring the requisite statutory procedures would constitute unjust enrichment."⁹⁷ Stated alternatively, the court held that even though the initial transfer (the officers' lawful seizure of the \$34,000) was completely lawful, the transfer remained subject to a statutory condition

⁹⁶ *Karpierz*, 68 S.W.3d 565.

⁹⁷ *Karpierz*, 68 S.W.3d at 571 (emphasis added).

(compliance with state statutory procedures before turning the money over for federal forfeiture), the later failure of which deprived the initial transfer of its justification and warranted restitution.

In *Wareham*,⁹⁸ the plaintiffs were teachers who had opted not to join a teacher's union. They complained to the Massachusetts Labor Relations Commission that they had been required to pay agency shop fees even though they had never received, when they paid or later, independently audited statements of revenues and expenses as mandated by the United States Supreme Court in *Chicago Teachers Union v. Hudson*.⁹⁹ The Commission sustained the complaint and ordered restitution. The Supreme Judicial Court of Massachusetts affirmed, subject to the unions' right "to renew their demands for any fees to which they may be entitled once they comply with the requirements of [*Hudson*, 475 U.S. 292]."¹⁰⁰ As in *Karpierz*, the court seems to have said that even if the initial transfer (the deduction of money from the

⁹⁸ *Wareham Educ. Ass'n*, 713 N.E.2d 363.

⁹⁹ *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

¹⁰⁰ *Wareham Educ. Ass'n*, 713 N.E.2d at 368. Although essentially the same situation is described in *Elvin v. Oregon Public Employees' Union*, 313 Or. 165, 832 P.2d 36 (1992), we omit that case from the text. A teachers' union spent a portion of its agency shop fees for political purposes without giving its affected nonmembers an opportunity to opt out under *Hudson*. Nonmember teachers complained to the State Employee Relations Board, which found an unfair labor practice and ordered restitution of the portion spent for political purposes. The Oregon Supreme Court affirmed, stating that ORS 243.676(2)(c) gave the Board authority to order "such affirmative action . . . as necessary," including "the authority to order restitution as a remedy for an unfair labor practice." *Elvin*, 832 P.2d at 43. Accordingly, we cannot tell whether the *Elvin* court was finding the legislative intent needed to imply a statutory cause of action, or whether it was relying on its own authority to develop and declare the common law of restitution. Assuming the latter, *Elvin* is on point here to the same extent as *Wareham*.

plaintiffs' salaries) was lawful, it remained subject to a condition (the availability of independently audited statements of revenues and expenses), the later failure of which deprived the transfer of justification and warranted restitution.¹⁰¹

In this case, the significant circumstances are similar to those in RAP 12.8, *Karpierz*, and *Wareham*. The initial transfer of money occurred when, just before issuing each plaintiff's paycheck, each plaintiff's employer deducted an agency shop fee that it then paid to WEA. Although this initial transfer was compelled by law (RCW 41.59.060, RCW 41.59.100, and the applicable CBA), so that it was lawful when made, it was also subject to the statutory condition, embodied in former RCW 42.17.760, that WEA not later spend the money for political purposes without each plaintiff's affirmative authorization. Assuming the statutory condition later failed, it deprived the initial transfer of its justification and rendered unjust WEA's retention of its

¹⁰¹ We note in passing, though we need not consider it here, that at least one court has extended the effect of a condition's failure to a situation in which the initial transfer was voluntary rather than compelled by law. In *Central Baptist Theological Seminary v. Entertainment Communications, Inc.*, 356 N.W.2d 785 (Minn. App. 1984), the Seminary and Entercom each operated a radio station. In 1963, Central conveyed land to Entercom in exchange for \$26,000 plus Entercom's promise to build a radio transmission tower, in the use of which the Seminary would share for the next 99 years without additional cost. Although Entercom initially constructed the tower as agreed, after only 17 years the tower was destroyed in a 1980 windstorm. Entercom was not contractually obligated to re-build the tower, and it opted not to do so, causing the Seminary to lose the use of the tower for 82 years of the 99-year lease. The Seminary sued for restitution, and the trial court granted summary judgment to Entercom. The Minnesota Court of Appeals reversed and remanded for trial, apparently reasoning that even though the initial transfer was voluntary rather than compelled by law, it was deprived of its initial justification when a material condition subsequent (the Seminary's use of the tower for 99 years) failed.

benefits. Taking the real and hypothetical facts in the light most favorable to the Davenport plaintiffs, we hold they have a common law cause of action for restitution.¹⁰²

Citing *Hawkinson v. Conniff*,¹⁰³ WEA claims that “the voluntary payment doctrine constitutes a complete affirmative defense to any claim for restitution based upon unjust enrichment.”¹⁰⁴ *Hawkinson* provides:

[M]oney voluntarily paid under a claim of right to the payment, and with knowledge by the payor of the facts on which the claim is based, cannot be recovered on the ground that the claim was illegal, or that there was no liability to pay in the first instance.^[105]

¹⁰² We have no quarrel with most of the dissent. As Section I-B makes clear, we agree that WEA has been “the sole owner and possessor of the money” since receiving it, subject to any interest that RCW 42.17.760 vests in the plaintiffs. Concomitantly, we agree that RCW 42.17.760 does not vest the plaintiffs with a post-transfer property interest in the money, or, if it does, that the interest is so limited that it is best described as contingent or inchoate, but not possessory. We agree that the United States Supreme Court’s comment about “other people’s property” was non-binding dictum. None of these propositions is material here, because a claim for common law restitution, unlike a claim for common law conversion, does not require that the plaintiffs have a property interest in the money at the time of trial. We materially disagree with the dissent only on whether WEA will be unjustly enriched if permitted to retain the money that plaintiffs are seeking to recover. In our view, WEA was unjustly enriched despite its willingness to rebate money to the plaintiffs at their request. For purposes of unjust enrichment, the issue is not whether the plaintiffs requested their money back, but whether they affirmatively consented to WEA’s expenditure of it for political purposes.

¹⁰³ *Hawkinson v. Conniff*, 53 Wn.2d 454, 459, 334 P.2d 540 (1959). The other case cited by WEA is Order of U.S. District Court, *Riensch v. Cingular Wireless LLC*, No. C06-1325Z, 2007 WL 3407137 (W.D. Wash., Nov. 9, 2007). Neither case is on point here, because neither involved a transfer compelled by law.

¹⁰⁴ WEA’s Suppl. Br. at 9.

¹⁰⁵ *Hawkinson*, 53 Wn.2d at 458 (citing *Speckert v. Bunker Hill Ariz. Mining Co.*, 6 Wn.2d 39, 106 P.2d 602 (1940)).

“The voluntary payment doctrine” does not apply in this appeal because nothing shows that the plaintiffs paid voluntarily.¹⁰⁶ On the contrary, the record shows that money was transferred by each plaintiff’s employer to WEA not because the plaintiff was voluntarily agreeing to pay, but because the transfer was compelled by RCW 41.59.100 and .060(2).

WEA argues that the plaintiffs paid voluntarily because they were offered but did not take an opportunity to opt out. We cannot agree. Former RCW 42.17.760 conditioned WEA’s retention of benefits on the plaintiffs’ affirmative authorization, not merely on their silence in the face of an opportunity to opt out. Moreover, it appears that the opportunity to opt out was offered *after* the initial transfer (deduction), and thus that it cannot have affected the voluntariness of the plaintiff’s conduct when the transfer took place. Concluding again that the

¹⁰⁶ In making this statement we are assuming—but not holding—that the doctrine is sometimes applicable in this type of case. Our assumption may be incorrect, however, because the problem with a transfer compelled by law is arguably unlike the problem with other types of transfers. According to the *Restatement (Third)*, the problem with a transfer compelled by law generally “is not the lack of effective consent on the part of the transferor, but the fact that the transfer sought to be avoided (usually a payment) does not correspond to a proper legal liability.” RESTATEMENT (THIRD) ch. 2 introductory note at 3-4 (Tentative Draft No. 1); *see also Cent. Baptist Theological Seminary v. Entm’t Commc’ns, Inc.*, 356 N.W.2d 785 (Minn. App. 1984), described in note 105, *supra*. The Reporter for the *Restatement (Third)* has even gone so far as to characterize the voluntary payment doctrine as “fallacious” when used to defeat recovery of an illegally collected tax. RESTATEMENT (THIRD) § 19, reporter’s note f at 327 (Tentative Draft No. 1); *see also* reporter’s note h, at 330 (“The more candid modern decisions acknowledge that describing a payment of an illegal tax as ‘voluntary’ merely designates a payment that is irrecoverable; in other words, that the determination of ‘voluntariness’ is a function, not of the payor’s state of mind, but of policy considerations.”). These statements suggest that compulsion and voluntariness are antitheses, so that to find that a transfer was compelled (by law or otherwise) is generally also to find that it was *not* made voluntarily. Perhaps for that reason, the authorities, including some of those discussed above, seem inclined to find that a transfer compelled by law is “involuntary” rather than “voluntary.” *See* RAP 12.8; *Broward County v. Mattel*, 397 So.2d 457; *Five Boro Elec. Contractors Ass’n*, 187 N.E.2d 146; *Rosen*, 167 N.E.2d 230.

plaintiffs have stated a common law action for restitution, we hold that WEA's CR 12 motion to dismiss was properly denied.

II

The next issue is whether the trial court applied the correct statute of limitations. As the plaintiffs correctly point out,¹⁰⁷ the statute of limitations applicable to a private statutory cause of action brought under chapter 42.17 RCW is five years.¹⁰⁸ As WEA correctly points out,¹⁰⁹ the statute of limitations applicable to a common law cause of action for unjust enrichment (which, as noted above, is equivalent to a cause of action for restitution or implied in law contract) is three years.¹¹⁰ Having held that the plaintiffs have a cause of action for restitution and unjust enrichment, but not a private statutory action under chapter 42.17 RCW, we conclude that the

¹⁰⁷ Resp't Br. at 31 (citing RCW 42.17.410).

¹⁰⁸ RCW 42.17.410 states that "[e]xcept as provided in RCW 42.17.400(4)(a)(iv), any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred." The exception is not pertinent here because this case does not involve a public or "citizen's" statutory action for a judgment that will escheat to the state under RCW 42.17.400. Rather, this case involves a private common law action for a judgment that will benefit the individual plaintiffs.

¹⁰⁹ WEA's Supp. Br. at 16 (citing *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 850, 583 P.2d 1239 (1978)).

¹¹⁰ RCW 4.16.080(3); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000). Insofar as pertinent here, RCW 4.16.080(3) requires that an action be commenced within three years if it is "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

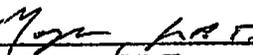
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three-year statute of limitations applies here, and we direct the trial court to modify its class certification accordingly.¹¹¹

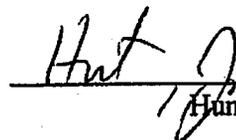
III.

The last issue for today is whether the trial court erred by certifying a class. We review its action only for abuse of discretion,¹¹² and we perceive no abuse here.

For all of the foregoing reasons, we affirm and remand for further proceedings, except that on remand the trial court shall modify its class certification to reflect a three rather than a five-year statute of limitations.


Morgan, J.P.T.

I concur:


Hunt, J.

¹¹¹ In other words, on remand the trial court shall certify “a class of all public school employees who, between March 19, 1998 and August 31, 2001 (inclusive), were nonmembers paying agency shop fees to defendant WEA.” See CP at 174-75.

¹¹² *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995).

BRIDGEWATER, J. (dissenting in part) — I agree with the majority that the Davenport plaintiffs do not have a private cause of action for WEA's alleged violations of former RCW 42.17.760 (Laws of 1993, ch. 2, § 16). I also agree that the plaintiffs do not have a conversion claim for the nonmember fees at issue. However, to the extent the majority provides the plaintiffs with a restitution cause of action, which the plaintiffs did not seek in their complaint and which is not available to them in any event, I respectfully dissent.

As a threshold matter, I note that following oral argument in this remanded case, we asked the parties for supplemental briefing regarding whether “the undisputed facts support a claim for restitution.” Order Requesting Additional Briefing (May 13, 2008). In responding, the Davenport plaintiffs acknowledged that restitution is both a substantive cause of action based on unjust enrichment, and a remedy for a contract or tort claim. As to any substantive claim, the Davenport plaintiffs admit that their amended complaint does not assert a cause of action for unjust enrichment. And indeed, the amended complaint does not mention restitution at all. They contend, however, that because CR 15(a) permits liberal amendment of pleadings,¹¹³ this court has the discretion to remand and permit the plaintiffs to add the unjust enrichment claim, which was broached for the first time on appeal. They further argue, however, that adding a new claim is not necessary, because restitution is an appropriate remedy for the causes of action that were presented in their amended complaint.

¹¹³ This superior court rule provides that a trial court's discretionary leave to amend the pleadings “shall be freely given when justice so requires.” CR 15(a).

Given the present procedural posture of this case, the Davenport plaintiffs' amendment contention is both inappropriate and irrelevant. We are now reviewing whether the trial court properly denied WEA's CR 12(c) motion for judgment on the pleadings. Accordingly, our present inquiry concerns what assertions and facts were before the trial court when the motion was denied. Judgment on the pleadings is reviewed de novo, and "we examine the pleadings to determine whether the claimant can prove any set of facts, *consistent with the complaint*, which would entitle the claimant to relief." *N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 858-59, 974 P.2d 1257, *review denied*, 138 Wn.2d 1022 (1999) (emphasis added); *cf. Roth v. Bell*, 24 Wn. App. 92, 94, 600 P.2d 602 (1979) ("In making the essentially legal determination [under CR 12(b)(6)] of whether there is any state of facts that the plaintiffs could prove entitling them to relief *under their claim*, we accept as true the factual allegations of the complaint and, where necessary, those facts raised for the first time on appeal." (Emphasis added.)). While we may consider hypothetical facts when reviewing a decision on a CR 12(c) motion, we are nevertheless constrained by what claims were made to the trial court. Accordingly, consideration of claims that were not before the court below is inappropriate.

Regarding restitution as a remedy, the Davenport plaintiffs argue in essence that such a remedy would be appropriate because each of their claims is based on WEA's misuse of the plaintiffs' money. Similarly, the majority holds that WEA's subsequent failure to comply with

former RCW 42.17.760's requirements make the agency fees at issue available to the plaintiffs under a restitution theory. *See* majority at 31-32.¹¹⁴

In my view the Washington Supreme Court's prior opinion in this case resolves the matter of whose money is at issue. In the prior treatment of this case, our state Supreme Court analyzed the provisions and effect of former RCW 42.17.760, its interplay with other portions of chapter 42.17 RCW, and other relevant legislation. The court also determined that former RCW 42.17.760 violated the First Amendment. *See State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n.*, 156 Wn.2d 543, 568-71, 130 P.3d 352 (2006), *rev'd sub nom., Davenport v. Wash. Educ. Ass'n.*, ___ U.S. ___, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007). The United States Supreme Court reversed on the federal constitutional question and remanded. *Davenport*, 127 S. Ct. 2383. But the reversal on the federal constitutional issue does not otherwise affect our state Supreme Court's interpretation of chapter 42.17 RCW, and we are bound by our state Supreme Court's interpretation of state law. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court"). I now turn to that decision.

Under RCW 41.59.060(2) and RCW 41.59.100, WEA is authorized to collect fees and dues from union members and to collect *equivalent* agency fees from nonunion

¹¹⁴ The majority so holds relying on foreign cases, and by analogizing to RAP 12.8, which provides for return of property or money paid pursuant to a judgment that is later reversed or modified on appeal.

members. Accordingly, WEA is statutorily empowered to collect and possess agency fees. Former RCW 42.17.760 provides that a labor organization “may not use” agency shop fees for political expenditures “unless affirmatively authorized by the individual” who paid the fees. By its terms, former RCW 42.17.760 limits the union’s *use* of the fees, but not its right to collect or possess them. As our state Supreme Court has determined, former RCW 42.17.760 “acknowledges that the fees are in the union’s possession but places restrictions on the *use* of the *union’s funds* for political speech.” *See State ex rel. Wash. State Pub. Disclosure Comm’n*, 156 Wn.2d at 569 (second emphasis added).

I acknowledge the United States Supreme Court’s subsequent remark in *Davenport v. Washington Education Association*, describing former RCW 42.17.760 as a “condition placed upon the union’s extraordinary *state* entitlement to acquire and spend *other people’s* money.” *See Davenport*, 127 S. Ct. at 2380. I also recognize, as explained below, that the comment is dicta and is not binding. *See State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992) (dicta is language not necessary to the decision in a particular case); *see also Blackburn v. Safeco Ins. Co.*, 49 Wn. App. 423, 425, 744 P.2d 347 (1987), *aff’d*, 115 Wn.2d 82 (1990) (dicta is not binding).

In *Davenport*, Justice Scalia writing for the Supreme Court framed the issue as follows:

The State of Washington prohibits labor unions from using the agency-shop fees of a nonmember for election-related purposes unless the nonmember affirmatively consents. *We decide whether this restriction, as applied to public-sector labor unions, violates the First Amendment.*

Davenport, 127 S. Ct. at 2376 (emphasis added). The Supreme Court concluded as follows:

“We hold that it does not violate the *First Amendment* for a State to require that its public-sector

unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes." *Davenport*, 127 S. Ct. at 2383 (emphasis added).

In the course of its analysis, the Supreme Court stated, "As applied to public-sector unions, [former RCW 42.17.760] is not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport*, 127 S. Ct. at 2380. This comment was made in the context of the Supreme Court's rejecting WEA's attempt to apply in this circumstance Supreme Court cases that directed rigorous First Amendment scrutiny. *See Davenport*, 127 S. Ct. at 2380. WEA's argument built upon "the Washington Supreme Court's description of [former RCW 42.17.760] as encumbering funds that are lawfully within a union's possession." *Davenport*, 127 S. Ct. at 2380. WEA then argued that "[former RCW 42.17.760] is a limitation on how the union may spend 'its' money," and relied on the First Amendment rigorous scrutiny cases to argue that former RCW 42.17.760 was unconstitutional because it applied to ballot propositions and did not limit equivalent election-related expenditures by corporations. *Davenport*, 127 S. Ct. at 2380. In rejecting WEA's attempt to apply federal First Amendment cases in this context, the Supreme Court stated:

The Supreme Court of Washington's description of [former RCW 42.17.760] notwithstanding, *our campaign-finance cases are not on point. For purposes of the First Amendment, it is entirely immaterial that [former RCW 42.17.760] restricts a union's use of funds only after those funds are already within the union's lawful possession under Washington law. What matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees. The cases upon which respondent relies deal with governmental restrictions on how a regulated entity may spend money that has come into its possession without the assistance of governmental coercion of its employees. As*

applied to public-sector unions, [former RCW 42.17.760] is not fairly described as a restriction on how the union can spend "its" money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money.

Davenport, 127 S. Ct. at 2380 (first italics added) (citations omitted).

As can be seen, the Supreme Court was rejecting the application of its First Amendment cases as WEA was trying to apply them. The Supreme Court did not, however, reject the notion that the money was lawfully in WEA's possession. Although the Supreme Court throughout the opinion describes WEA's collection of agency fees as extraordinary, it also acknowledged the propriety of that circumstance under state law. The Supreme Court recognized that:

The State of Washington has authorized public-sector unions to negotiate agency-shop agreements. Where such agreements are in effect, Washington law allows the union to charge nonmembers an agency fee equivalent to the full membership dues of the union and to have this fee collected by the employer through payroll deductions.

Davenport, 127 S. Ct. at 2377 (citing RCW 41.56.122(1), 41.59.060(2), 41.59.100). The

Supreme Court further stated:

The public-sector agency-shop arrangement authorizes a union to levy fees on government employees who do not wish to join the union. Regardless of one's views as to the desirability of agency-shop agreements, it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees. As applied to agency-shop agreements with public-sector unions like respondent, [former RCW 42.17.760] is simply a *condition* on the union's exercise of this extraordinary power, prohibiting *expenditure* of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents.

Davenport, 127 S. Ct. at 2378 (emphasis added) (citation omitted). The Supreme Court went on to conclude that former RCW 42.17.760's affirmative authorization requirement does not offend the First Amendment. *Davenport*, 127 S. Ct. at 2383.

As these passages demonstrate, the Supreme Court simply decided a narrow constitutional issue. A careful reading of the decision reveals that the Supreme Court did not disapprove or contradict the notion that the agency fees were lawfully collected by WEA. Accordingly, we are bound by the Washington Supreme Court's determination that WEA lawfully collected and held the agency fees in its possession, and that former RCW 42.17.760 places "restrictions upon the *use of the union's funds.*" See *State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 569 (second emphasis added). The majority agrees that the WEA became "the sole owner and possessor of the money transferred." Majority at 18 (see its discussion regarding "conversion").

I disagree with the majority that restitution is available in any event under the circumstances of this case. Restitution is available where one person is unjustly enriched at the expense of another. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1042 (2008). Unjust enrichment is an equitable principle. *Dragt*, 139 Wn. App. at 576. "A person has been unjustly enriched when he has profited or enriched himself at the expense of another *contrary to equity.*" *Dragt*, 139 Wn. App. at 576 (emphasis added).

Enrichment alone will not trigger the doctrine; "the enrichment must be *unjust under the circumstances* and as between the two parties to the transaction." *Dragt*, 139 Wn. App. at 576 (emphasis added). "Three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another, (2) the party receiving the benefit must have an appreciation or knowledge of the benefit, and (3) the receiving party must accept or retain the

benefit *under circumstances that make it inequitable* for the receiving party to retain the benefit without paying its value.” *Dragt*, 139 Wn. App. at 576 (emphasis added).

The majority holds that assuming WEA violated former RCW 42.17.760’s preauthorization requirements, such violation rendered its retention of the agency fees unjust, thereby triggering the availability of restitution. *See* majority at 31-32. This approach fails for two reasons. First, the nature of the interest arising under RCW 42.17.760 and devolving to nonmember payers of agency fees is a limited interest. WEA could have used the money in question for any expenditure apart from political purposes—e.g. negotiation expenses, travel, meals, lodging, conference expenses. As noted, former RCW 42.17.760 places an additional burden on the union to first seek affirmative authorization from the individual payer of the fee before the union may *use* for political purposes the fee that is lawfully in the union’s possession. Accordingly, the interest devolving to the payer under former RCW 42.17.760 is essentially a veto power on the use of the fee, and does not arise until and unless the union seeks to *use* the fee for political purposes. Thus, the limited interest arising from the statute may best be described as contingent or inchoate, but not possessory.¹¹⁵

¹¹⁵ Notably, that interest has been substantially eroded by a recent amendment to the statute. Effective May 2007, a second section was added to RCW 42.17.760, which reads: “[a] labor organization does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures.” *See* RCW 42.17.760(2) (LAWS OF 2007, ch. 438, § 1). The amendment redefines the triggering event for the union’s duty to seek affirmative authorization and limits the payer’s limited veto power to those instances where the union cannot show sufficient other funds to cover the campaign contribution.

Secondly, a prerequisite for restitution is not met here. WEA's retention of the agency fees is not contrary to equity under the circumstances. "Equity seeks fairly to protect all parties who act fairly." *Chambers v. Cranston*, 16 Wn. App. 543, 546, 558 P.2d 271 (1976), *review denied*, 89 Wn.2d 1006 (1977). Moreover, as explained in *Nugget Properties, Inc. v. Kittitas County*, 71 Wn.2d 760, 767, 431 P.2d 580 (1967):

Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. . . . A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.

(Quotation marks and citation omitted.). In my view, when weighing equities in this case, the Davenport plaintiffs' silence and failure to act when they were invited to get their agency fees rebated weighs heavily against them.

Here, a sufficient avenue was available to ensure nonmembers' rights not to participate in the union's political activities, and included a nonjudicial procedure to obtain rebates of that portion of the agency fees that would go to support the union's political activities. A process by which the union notifies the nonmember of its political activities and provides for rebates of fees to dissenting nonmembers was established by the United States Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986). As the Washington Supreme Court determined, those procedures were followed here. *See State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 549-51.

During the relevant time period (1996 to 2000) WEA sent a "Hudson packet" twice each year to each nonmember. The packet provided financial information about WEA and its

activities. The packet also included a letter notifying the employee of his or her right to object to paying fees for the union's political expenditures (nonchargeable expenditures). The packet gave the nonmember three choices: (1) pay agency shop fees equivalent to 100 percent of dues; (2) object to paying 100 percent and receive a rebate of nonchargeable expenditures, as calculated by WEA; or (3) object to paying 100 percent and challenge WEA's calculations of nonchargeable expenditures. *See State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 550.

When a nonmember challenged WEA's calculation of nonchargeable expenditures, an arbitrator determined the amount of the nonmember's fees that should be rebated. Pending the outcome of the arbitration, WEA escrowed any fees that were reasonably in dispute. WEA rebated to the employee the amount determined by the arbitrator, and transferred the remainder to WEA's general account. During the years 1996 to 2000, the rebates ranged from \$44 to \$76. *See State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 550-51. Nonmembers who did not object and did not request rebates did not receive rebates. Their fees were transferred from escrow to WEA's general account from which political expenditures were made. *See State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 551.

As can be seen, the *Hudson* procedures followed here notify nonmembers of the union's political activities and essentially invite nonmembers to obtain rebates through a convenient, nonjudicial procedure in instances where they do not agree with the union's political activities. As the Washington Supreme Court determined, these procedures "protect dissenters' rights not to

participate in the union's political speech." *State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 569.¹¹⁶

To summarize, our Supreme Court has determined that the agency funds at issue are WEA's funds, and that the *Hudson* procedures employed by WEA protect the plaintiffs' rights. Also, any interest devolving to agency fee payers under former RCW 42.17.760 is contingent and limited. Moreover, the plaintiffs here failed to use the simple, non-judicial rebate mechanism available to them under the *Hudson* procedures. Under these circumstances, balancing the equities, it cannot be said that WEA's retention of the agency fees is unjust. Accordingly, restitution is not triggered. *Dragt*, 139 Wn. App. at 576.

I additionally observe that *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007), upon which the majority relies to bolster its decision to provide a cause of action for restitution, is inapposite.¹¹⁷ First, the case is factually distinguishable in several ways: (1) it dealt with a sales transaction, (2) the defendant car dealership took money from its customers in

¹¹⁶ Notably, the plaintiffs point to no instance of the union's failure to provide fee rebates under the *Hudson* procedures. Further, while the plaintiffs contended that the *Hudson* procedures did not adequately protect their rights, the Washington Supreme Court rejected that notion holding that "[t]he union's *Hudson* procedures protect dissenter's rights." *State ex rel. Pub. Disclosure Comm'n*, 156 Wn.2d at 569.

¹¹⁷ In calling for supplemental briefing, we also asked the parties to address whether *Nelson* applied to this case.

violation of a statute,¹¹⁸ and (3) the customer plaintiffs asserted a claim for unjust enrichment. None of those circumstances is present here. Also, in *Nelson* a claim for unjust enrichment was the only means that plaintiffs had to recover money that had been improperly taken from them by the dealership. Again, that is not the case here because the Davenport plaintiffs have a nonjudicial means of recovery (i.e. the *Hudson* procedures) as to the agency fees in question; but plaintiffs here failed to utilize that process. Moreover, in light of the facts of *Nelson*, application of restitution as an equitable remedy makes more sense in that case than in the *Davenport* case.

Aside from being factually distinguishable, the rationale utilized in *Nelson* is not applicable here. Relying on a tentative draft of the *Restatement (Third) of Restitution*, *Nelson* explained that:

The original justification [for restitution] . . . has given way to a modern understanding, based on a transaction's legal validity. Specifically, any *transaction* not adequately supported by law is voidable. See [Restatement (Third) Of Restitution And Unjust Enrichment § 1 cmt. b at 3 (Discussion Draft 2000)] ("Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from *a transfer* that the law treats as *ineffective to work a conclusive alteration in ownership rights*."). Because Appleway illegally charged Nelson the B & O tax as an additional cost to the final purchase price, Appleway has been unjustly enriched with money *properly belonging to Nelson*.

Nelson, 160 Wn.2d at 187-88 (emphasis added). As noted, there is no similar "transaction" in the present case. As previously discussed, the union properly obtained the agency fees from the plaintiffs as authorized by statute. Accordingly, the union legally possessed the funds, our Supreme Court has so held, and we are bound by that determination. Thus, the present case does

¹¹⁸ The *Nelson* court held that the dealership's practice of adding on the business's B & O tax to car sales after the parties had negotiated a final sale price was "explicitly forbidden by [RCW 82.04.500]." *Nelson*, 160 Wn.2d at 181.

not concern an improper transfer of possessory interest as was the case in *Nelson*, and for that reason *Nelson* is simply not helpful here.

Finally, at its heart, this case is about what remedy is appropriate for a violation of former RCW 42.17.760. In my view, the enforcement mechanisms provided in chapter 42.17 RCW¹¹⁹ provide the appropriate remedies for violation of that chapter's provisions, as we have previously recognized in *Crisman v. Pierce County Fire Protection Dist. No. 21*, 115 Wn. App. 16, 60 P.3d 652 (2002).¹²⁰

In *Crisman*, the appellant argued that chapter 42.17 RCW's enforcement mechanisms compensated only the public for chapter violations, and that private tort claims for such violations would enhance enforcement of chapter prohibitions and provide compensation for individual victims. We rejected appellant's argument that private claims were available, noting that chapter 42.17 RCW "authorizes enforcement by the attorney general or county prosecutor and finally by a citizen in the name of the state. RCW 42.17.400." *Crisman*, 115 Wn. App. at 23. We further held:

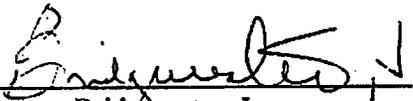
Chapter 42.17 RCW sets out various enforcement procedures and provides for both legal and equitable remedies. But the various remedies RCW 42.17.390 authorize suggest that the legislature intended not to create private causes of action to enforce the code, but to give the attorney general, county prosecutor, or citizen enforcer considerable latitude in seeking the appropriate relief. We conclude that chapter 42.17 RCW does not imply a private cause of action.

¹¹⁹ See RCW 42.17.390 (designating civil remedies and sanctions); see also RCW 42.17.400 (providing for enforcement by the attorney general, local prosecutor, or by a citizen's action in the name of the state).

¹²⁰ The trial court did not have the benefit of our decision in *Crisman*, which was published after the order now under review.

Crisman, 115 Wn. App. at 24; see also *Vance v. Thurston County Comm'rs*, 117 Wn. App. 660, 670, 71 P.3d 680 (2003), review denied, 151 Wn.2d 1013 (2004) ("RCW 42.17.400 provides the remedy for violations of chapter 42.17 RCW and specifies that the attorney general or the local prosecuting attorney may bring an action to enforce this chapter."¹²¹ Consistent with *Crisman*, I would hold that none of the Davenport plaintiffs' claims asserted in their amended complaint is available.

In sum, this court's sua sponte provision of a new cause of action for restitution is neither warranted nor appropriate. The newly imposed cause of action for restitution is the only basis found by the majority for affirming the trial court's denial of WEA's motion for judgment on the pleadings. Because I do not believe restitution is available, I would reverse the trial court's denial of WEA's CR 12(c) motion and remand for dismissal.¹²²


Bridgewater, J.

¹²¹ Moreover, under RCW 42.17.400, the plaintiffs can bring an action (a citizen's action in the name of the state) only if the attorney general or the prosecuting attorney fails to act after receiving notice of possible violations. See *State ex rel. Evergreen Freedom Found. v. Nat'l Educ. Ass'n.*, 119 Wn. App. 445, 452-53, 81 P.3d 911 (2003); *Vance*, 117 Wn. App. at 670; *Crisman*, 115 Wn. App. at 22.

¹²² Because I would dismiss, it is not necessary to address the statute of limitations or class certification issues.



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON, and
TRACY WOLCOTT,

NO. 01-2-00519-4

Plaintiffs, individually and
on behalf of all other
nonmembers similarly
situated

AMENDED COMPLAINT- CLASS ACTION

vs.

WASHINGTON EDUCATION ASSOCIATION,

Defendant.

INTRODUCTION

This is a class action seeking damages to redress the violations of the class members' rights under RCW 42.17.760. Plaintiff class members are not members of Defendant Washington Education Association (WEA), but are represented by Defendant for collective bargaining purposes and pay compulsory agency shop fees to the WEA. Defendant WEA has violated Plaintiff class members' rights, willfully interfered with their paychecks, and breached its fiduciary duty by using Plaintiff class members' fees to make political contributions and expenditures without their affirmative authorization. all in violation of RCW 42.17.760.

AMENDED COMPLAINT - CLASS ACTION - 1

ELLIS, LI & MCKINSTRY, P.L.L.C.
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1 PARTIES

2 1. Gary Davenport was employed in the public schools and paid an agency shop fee in an
3 amount equal to union dues from September 1998 to March 2000 to Defendant WEA and its affiliates.

4 2. Martha Lofgren has been employed in the public schools and has paid an agency shop
5 fee in an amount equal to union dues prior to and including from September 1996 to the present to
6 Defendant WEA and its affiliates.

7 3. Walt Pierson has been employed in the public schools and has paid an agency shop fee
8 in an amount equal to union dues prior to and including from September 1995 through August 2000 to
9 Defendant WEA and its affiliates.

10 4. Susannah Simpson was employed in the public schools and paid an agency shop fee in
11 an amount equal to union dues from September 1996 to December 1999 to Defendant WEA and its
12 affiliates.

13 5. Tracy Wolcott has been employed in the public schools and paid an agency shop fee in
14 an amount equal to union dues prior to and including from September 1995 to early 2000 to Defendant
15 WEA and its affiliates.

16 6. Plaintiffs, who are suing on their own behalf and on behalf of all others similarly
17 situated, are nonmembers of Defendant WEA and for the years indicated, paid mandatory agency fees
18 in amounts equivalent to union dues, without receiving refunds, to Defendant WEA, which used their
19 fees to influence elections and to support political committees without their authorization.

20 7. Defendant Washington Education Association is a labor organization representing
21 public school employees in the State of Washington, including plaintiffs, for purposes of collective
22 bargaining. Defendant is a non-profit corporation organized under the laws of Washington State with
23

1 its principal office is in Federal Way, Washington, and additional offices in Olympia and Spokane,
2 Washington.

3 STATEMENT OF LAW

4 8. Pursuant to RCW 41.59.100 a public employer and labor organization may include a
5 security provision in the collective bargaining agreement which requires agency fee payers to pay a fee
6 equivalent to full union dues.

7 9. RCW 42.17.760 prohibits a labor organization from using the funds of agency fee
8 payers for contributions or expenditures to influence an election or operate a political committee,
9 unless affirmatively authorized by the agency fee payer. Thus, only those agency fee payers who
10 authorize the use of their fees for the stated political purposes, or "opt-in," pay full union dues.

11 10. In effect, RCW 42.17.760 reduces the amount of the fee labor organizations may
12 require of agency fee payers under RCW 41.59.100, unless they "opt-in" by affirmatively authorizing
13 the use of their funds for elections and political committees.

14 CLASS ACTION ALLEGATIONS

15 11. This is a class action brought by Plaintiffs on their own behalf and on behalf of all other
16 nonmembers similarly situated pursuant to CR 23. The class Plaintiffs seek to represent consists of all
17 public school employees since September 1995 to the present and who are or were nonmembers
18 paying an agency shop fee to Defendant WEA without receiving a reduction or refund for the amount
19 the union spent on political contributions and expenditures, without their authorization.

20 12. On information and belief, the number of nonmembers in the class has ranged from
21 2,500 in the 1995-96 school year to 4,200 in the 2000-01 school year. On information and belief the
22 actual number of individuals of this class is higher than 4,200 due to the retirement of nonmembers
23 during the last five years. In 1998, Defendant WEA disclosed to the federal district court that it

1 represented 8,789 nonmembers during the period 1994-98. These persons are therefore so numerous
2 that individual joinder would be impracticable.

3 13. There are questions of law and fact common to all members of the class, such as the
4 amount of Plaintiff class members' agency fees Defendant WEA used for contributions or
5 expenditures to influence an election or operate a political committee; whether Plaintiff class members
6 have the right to reimbursement for such contributions and expenditures; whether Plaintiff class
7 members are entitled to damages for Defendant's unauthorized use of their fees for political
8 contributions or expenditures; and the amount to be returned to Plaintiff class members.

9 14. Plaintiffs' individual claims are typical of other members of the Plaintiff class, who
10 have been subject to the same deprivation of their rights through Defendant's use of their agency fees
11 for political purposes without their authorization.

12 15. Plaintiffs can adequately represent the interests of other members of the class. Plaintiffs
13 have no interest antagonistic to nonmember agency fee payers whose fees have been used for political
14 contributions or expenditures without their consent. Plaintiffs' attorneys are experienced in
15 representing the interests of nonmember employees in litigation, including class actions, involving
16 similar issues.

17 16. Defendant WEA is prohibited under RCW 42.17.760 from collecting and expending the
18 fees of each class member to influence an election or operate a political committee without their
19 consent. Thus, the prosecution of separate actions would create a risk of inconsistent or varying
20 adjudications establishing incompatible standards of conduct for the Defendant WEA.

21 17. The questions of law and fact common to the members of Plaintiff class predominate
22 over any questions affecting only individual members. The important and controlling issues in this
23

1 action, delineated above (paragraph 13), are common to all members of the class. Any factual
2 distinctions among class members, if they exist, are peripheral to these core questions.

3 18. A class action is superior to other available methods of fair and efficient adjudication of
4 the controversy, as the Plaintiff class members have been deprived of the same rights through the
5 Defendant WEA's use of their agency fees for political purposes without authorization. Separate
6 actions by individual class members to vindicate their rights are not a viable alternative due to the
7 limited amount of money involved in any individual claim. Moreover, the large number of claimants
8 would result in a multiplicity of actions and a substantial waste of judicial resources.

9 19. By making contributions and expenditures to influence elections or operate a political
10 committee with monies collected from the Plaintiff class, without their consent, Defendant has acted
11 on grounds generally applicable to the Plaintiff class as a whole.

12 STATEMENT OF FACTS

13 20. WEA and its affiliated labor organizations are paid dues from members, and agency
14 fees from nonmembers, through an automatic payroll deduction system administered by public school
15 employers. Based on instructions from the WEA, public school employers deduct dues and their
16 equivalent in fees and pay them in monthly lump sums to an intermediary, Blue Cross of Washington
17 or the WEA's local association affiliate, which in turn transmits to the WEA its share. WEA deposits
18 the monthly lump sums into its general treasury.

19 21. Pursuant to RCW 41.59.100 and contractual agreements between Defendant and
20 Plaintiffs' employers, Plaintiff class members are charged mandatory agency shop fees as a condition
21 of employment.

1 22. WEA expends funds from its general treasury for all of its program activities, including
2 for contributions and expenditures to influence elections and to operate its own political action
3 committee, WEA-PAC.

4 23. From year to year, WEA concedes approximately 25% of its total expenditures are for
5 political contributions, to further its ideology, and for other expenditures that under federal
6 constitutional law may not be charged nonmembers who timely object to supporting activities
7 unrelated to WEA's representational functions. If a nonmember does not timely object she pays the
8 equivalent of full union dues.

9 24. Under federal law, WEA is required to provide to all agency fee payers a detailed
10 disclosure of the use made of the WEA's expenditures, verified by an independent auditor. This
11 information is commonly known as the "Hudson Notice," named after the case *Chicago Teachers*
12 *Union v. Hudson*, 475 U.S. 292 (1986). In WEA's annual Hudson Notice, it discloses, *inter alia*, that
13 it uses a portion of the agency shop fee for "activities to influence an election" and "[o]peration of
14 political committees".

15 25. The Hudson Notice also sets forth the following options to agency fee payers:

16 You have three options: (1) you may pay the full amount equal to dues paid by members; (2)
17 you may object to use of your agency fee for nonchargeable activities but accept the
18 Association's determination of the amount of the fee that is chargeable as is set forth in this
19 letter; or (3) you may choose to object to the use of your agency fee for nonchargeable
activities and challenge the Association's calculation of the amounts that are chargeable and
nonchargeable.

20 26. Defendant WEA's Hudson Notice misrepresents the legal options available to agency
21 fee payers. Under RCW 42.17.760 an agency fee may not be used to influence an election or operate
22 a political committee unless the nonmember specifically authorizes such use. However, WEA
23 misleads nonmembers to believe they must object annually by an arbitrary deadline set by the WEA

1 as a condition for receiving a reduction in the amount WEA spends to influence an election and
2 operate a political committee.

3 27. On information and belief, WEA reported to the Public Disclosure Commission
4 contributions and expenditures to influence elections and support political committees from the general
5 treasury as follows:

6 1996: \$1,000,417

7 1997: \$275,744

8 1998: \$266,784

9 1999: \$407,776

10 2000: \$1,089,380

11 28. WEA did not obtain the affirmative authorization required by RCW 42.17.760 prior to
12 using the agency fees of Plaintiff class members in any of these years.

13 29. WEA's actual political contributions and expenditures from year to year exceed its
14 reported contributions and expenditures. For example, in 1997 the Public Disclosure Commission
15 (PDC) brought an enforcement action against the WEA for failing to fully report its political
16 contributions and expenditures during the 1996 election cycle. As part of a settlement, WEA agreed
17 to pay sanctions and reimburse public school employees \$425,000.

18 30. On September 25, 2000, Defendant WEA, through its legal counsel, signed a
19 Stipulation of Facts, Violations and Penalty, *In the Matter of the Enforcement Action Against the*
20 *Washington Education Association*, PDC Case No. 01-002 (Public Disclosure Commission, 2000). A
21 true and correct copy of this Stipulation is attached hereto. Therein, Defendant admitted that it had
22 committed multiple violations of RCW 42.17.760. The PDC referred the matter to the Washington
23 State Attorney General under RCW 42.17.395.

AMENDED COMPLAINT - CLASS ACTION -

A-56

ELLIS, LI & MCKINSTRY PLLC
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1 31. On behalf of the PDC, the Attorney General commenced an enforcement action in
2 Thurston County Superior Court, No. 00-2-01837-9. The Attorney General sought penalties,
3 injunctive relief and attorneys fees and costs. It did not seek the damages sustained by agency fee
4 payers arising out of the WEA's violation of RCW 42.17.760. After a bench trial to the Honorable
5 Gary Tabor in May 2001, Judge Tabor awarded the State \$200,000 in penalties and doubled the
6 amount to \$400,000 based on the WEA's willful violation of the laws. The court indicated in its July
7 31, 2000 written decision that it will rule on injunctive relief and award the PDC its attorney fees and
8 costs. (A copy of the July 31, 2000 Letter Opinion is attached)

9 **FIRST CAUSE OF ACTION- VIOLATION OF RCW 42.17.760**

10 32. Defendant WEA deprived Plaintiff class members of their rights secured by RCW
11 42.17.760 by using their agency fees for contributions and expenditures to influence elections or
12 support political committees without their affirmative authorization. Plaintiff class members are
13 entitled to damages and prejudgment interest in an amount to be established at trial.

14 **SECOND CAUSE OF ACTION- CONVERSION**

15 33. Plaintiff class members reallege paragraphs 1 through 29 as if fully set forth herein.

16 34. Defendant WEA willfully interfered with the paychecks of Plaintiff class members,
17 without legal justification, and deprived them of their own funds in an amount that corresponds to
18 Defendant WEA's contributions and expenditures to influence elections and support political
19 committees. Plaintiff class members are entitled to damages and prejudgment interest in an amount to
20 be established at trial.

21 **THIRD CAUSE OF ACTION-BREACH OF FIDUCIARY DUTY**

22 34. Plaintiff class members reallege paragraphs 1 through 29 as if fully set forth herein.
23

1 35. Defendant WEA breached its common law fiduciary duty to Plaintiff class members by
2 misusing their funds without their authorization to influence elections and support political
3 contributions. Plaintiff class members are entitled to damages and prejudgment interest in an amount
4 to be established at trial.

5 **FOURTH CAUSE OF ACTION-FRAUDULENT CONCEALMENT**

6 36. Plaintiff class members reallege paragraphs 1 through 29 as if fully set
7 forth herein.

8 37. Defendant WEA owed Plaintiff class members the affirmative duty to disclose all
9 material facts relating to WEA's use of their agency shop fees and breached that duty. Plaintiff class
10 members are entitled to damages and prejudgment interest in an amount to be established at trial.

11 **PRAYER FOR RELIEF**

12 Plaintiff class members pray for the following relief:

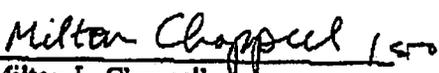
- 13 1. Judgment declaring that this action be maintained as a Class Action under Court Rule 23;
14 2. Judgment against Defendant WEA on each of the causes of action in an amount to be
15 established at trial;
16 3. For an award of Plaintiff class members' attorneys fees and costs; and
17 4. For other relief deemed just and equitable by the court.

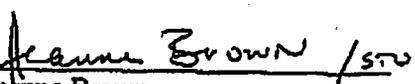
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DATED this 26th day of September, 2001

ELLIS, LI & MCKINSTRY PLLC

By: 
Steven T. O'Ban
WSBA No. 17265

By: 
Milton L. Chappell
c/o National Right to Work
8001 Braddock Road, Suite 600
Springfield, VA 22160

By: 
Jeanne Brown
WSBA No. 24630
Evergreen Freedom Foundation
PO BOX 552
Olympia, WA 98507



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FILED
JAN 18 2002
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

Judge Daniel J. Berschauer
Hearing date: January 17, 2002

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNA SIMPSON, and
TRACY WOLCOTT,

Plaintiffs, individually
and on behalf of all other
nonmembers similarly
situated,

v.

WASHINGTON EDUCATION ASSOCIATION,

Defendant.

NO. 01-2-00519-4

CONSOLIDATED ORDER
ON PENDING MOTIONS

This matter coming on to be heard upon several motions: Defendant's Motion to Dismiss Claims, Plaintiffs' Motion for Class Certification, and Defendant's Motion To Stay Proceedings, the Court having considered and ruled orally on each of said Motions, and the Court having encouraged the parties to seek interlocutory appeal of said issues, for purposes of such appeal, the Court hereby enters this Consolidated Order disposing of all said Motions.

CONSOLIDATED ORDER ON
CERTAIN MOTIONS - I

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LAW OFFICES OF
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1218 THIRD AVENUE, SUITE 1300
SEATTLE, WA 98101-3021
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1 With regard to Defendant's Motion to Dismiss, the Court considered the
2 following:

- 3 1. Defendant's CR 12(c) Motion to Dismiss Claims;
- 4 2. Plaintiffs' Response to Motion to Dismiss Claims;
- 5 3. Declaration of Jeanne Brown and attached exhibits.
- 6 4. Defendant's Reply in Support of Motion To Dismiss Claims;
- 7 5. Declaration of Aimee S. Iverson and exhibits thereto.

8 With regard to Plaintiffs' Motion for Class Certification pursuant to CR 23, the
9 Court considered the following:

- 10 1. Plaintiffs' Motion for Class Certification;
- 11 2. Declaration of Milton L. Chappell and exhibits thereto;
- 12 3. Defendant's Response to Plaintiffs' Motion for Class Certification;
- 13 4. Declaration of Judith A. Lonnquist and exhibits thereto;
- 14 5. Declaration of Aimee Iverson and exhibits thereto;
- 15 6. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Class
16 Certification;
- 17 7. Declaration of Milton L. Chappell in Support of Plaintiffs' Reply to
18 Defendant's Response to Plaintiffs' Motion for Class Certification and
19 exhibits thereto;
- 20 8. Plaintiffs' Supplemental Motion for Class Certification;
- 21 9. Defendant's Response to Plaintiffs' Supplemental Motion for Class
22 Certification;
- 23 10. Declaration of Judith A. Lonnquist and exhibits thereto; and
- 24 11. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Supplemental
25 Motion for Class Certification.

1 With regard to Defendant's Motion To Stay of Proceedings, the Court considered
2 the following:

- 3
- 4 1. Defendant's Motion To Stay Proceedings;
 - 5 2. Declaration of Harriet K. Strasberg and exhibits thereto;
 - 6 3. Plaintiffs' Response to Defendant's Motion to Stay Proceedings and
7 exhibits attached;
 - 8 4. Defendant's Reply in Support of Motion To Stay Proceedings.

9 The Court heard oral argument on the Motion to Dismiss Claims and the Class
10 Certification motion on October 12, November 2 and December 7, 2001, respectively,
11 and declined oral argument on the Motion to Stay. The Court has considered the above-
12 described submissions as well as the argument of counsel, and makes the following
13 rulings:
14

15 IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Claims is
16 DENIED, except as to Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty
17 which is hereby DISMISSED, with prejudice; and

18 IT IS FURTHER ORDERED that the applicable statute of limitations for
19 Plaintiffs' claim under RCW 42.17.760 is five years, pursuant to RCW 42.17.410, and for
20 the remaining claims is three years, pursuant to RCW 4.16.080.

21 IT IS FURTHER ORDERED that:

- 22
- 23 1. As to the first cause of action - violation of RCW 42.17.760 - and the
24 second cause of action - conversion - the Court certifies under CR 23(b)(3) a plaintiff
25 class of all public school employees who, between March 19, 1996 and August 31, 2001
26 (inclusive), were nonmembers paying agency shop fees to Defendant WEA without
27

1 receiving a reduction or refund for the amount WEA used to influence an election or to
2 operate a political committee, for which the nonmembers had not given authorization.

3
4 2. As to the fourth cause of action – fraudulent concealment – the Court
5 denies certification of a plaintiff class because the Court has found that the individual
6 claims of reliance predominate over the common claims.

7 3. Pursuant to CR 23(c)(2), Defendant shall distribute an individual “opt-out”
8 class notice, approved by the Court, to each member of the class who can be identified
9 through reasonable effort.

10
11 IT IS FURTHER ORDERED THAT: all proceedings before this Court, including
12 the class notice distribution referenced in paragraph 3 above, are stayed ^{until 2/12/02} ~~for sixty days~~
13 ~~to~~ to allow either party to seek an interlocutory appeal, at the end of which time the
14 stay shall expire, unless it is extended by the Court upon motion of either party, or by the
15 Court *sua sponte*.

16
17 IT IS FURTHER ORDERED THAT: this Consolidated Order supersedes any
18 previous order entered by this Court with respect to the issues addressed herein.

19
20 THE COURT takes judicial notice of the fact that a decision has been rendered in
21 *State of Washington ex rel. PDC v. WEA*, Thurston County Cause No. 00-2-01837-9,
22 which may affect the outcome of certain issues herein. The Court has been advised that
23 an appeal thereof has been filed. The Court finds that it would conserve resources of the
24 court and the parties if the issues determined herein were reviewed at the same time as
25 the issues in the *PDC* case.

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while the DC case is appealed

THE COURT FINDS THAT pursuit of this case, especially as a class action, would be costly to the parties, drain public resources, and that an interlocutory appeal would be appropriate herein.

ACCORDINGLY, THE COURT HEREBY CERTIFIES THAT this Consolidated Order involves controlling questions of law as to which there are substantial grounds for differences of opinion and that immediate review of this Consolidated Order would materially advance the ultimate termination of the litigation.

DONE IN OPEN COURT this 18 day of January, 2002.

Daniel J. Berschauer

Judge Daniel J. Berschauer

Presented by:

Judith A. Lonquist

Judith A. Lonquist, WSBA #0621

Harriet K. Strasberg

Harriet K. Strasberg, WSBA #15890

Aimee Iverson

Aimee Iverson, WSBA #28610

Attorneys for Defendant WEA

Approved as to form; notice of presentation waived:

Steven T. O'Ban, WSBA #17265

Milton L. Chappell, *Pro Haec Vice*

Attorneys for Plaintiffs



LEXSEE 156 WN.2D 543



Warning
As of: Jan 06, 2009

THE STATE OF WASHINGTON *on the Relation of the Public Disclosure Commission, Petitioner, v. WASHINGTON EDUCATION ASSOCIATION, Respondent.*
GARY DAVENPORT ET AL., Individually and on Behalf of All Other Nonmembers Similarly Situated, Petitioners, v. WASHINGTON EDUCATION ASSOCIATION, Respondent.

No. 74268-5, No. 74316-9

SUPREME COURT OF WASHINGTON

156 Wn.2d 543; 130 P.3d 352; 2006 Wash. LEXIS 260; 179 L.R.R.M. 2518; 153 Lab. L. Rep. (CCH) 60276

May 27, 2004.

March 16, 2006, Filed

SUBSEQUENT HISTORY: [***1]

US Supreme Court certiorari granted by *Davenport v. Wash. Educ. Ass'n*, 548 U.S. 942, 127 S. Ct. 35, 165 L. Ed. 2d 1014, 2006 U.S. LEXIS 5417 (2006)

US Supreme Court certiorari granted by *Washington v. Wash. Educ. Ass'n*, 548 U.S. 942, 127 S. Ct. 35, 165 L. Ed. 2d 1014, 2006 U.S. LEXIS 5418 (2006)

Vacated by, Remanded by *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 168 L. Ed. 2d 71, 2007 U.S. LEXIS 7722 (U.S., 2007)

Appeal after remand at, Remanded by *Davenport v. Wash. Educ. Ass'n*, 2008 Wash. App. LEXIS 2915 (Wash. Ct. App., Dec. 12, 2008)

PRIOR HISTORY: State ex rel. PDC v. WEA, 117 Wn. App. 625, 71 P.3d 244, 2003 Wash. App. LEXIS 1225 (2003)

Davenport v. Wash. State Educ. Ass'n, 117 Wn. App. 1035, 2003 Wash. App. LEXIS 1947 (2003)

DISPOSITION: The court affirmed the decisions of the court of appeals.

SUMMARY:

Nature of Action: The Public Disclosure Commission sought to enforce a provision of the Fair Campaign Practices Act governing when a labor union may use agency shop fees paid by nonmembers for nonchargeable

political activities, claiming that a teacher's union unlawfully applied agency fees collected from nonmembers to political expenditures without the nonmembers' affirmative authorization. In a separate action, several individual nonmembers of the union sought (1) a refund of agency fees used for political expenditures by the union, claiming a private right of action under the Fair Campaign Practices Act, and (2) damages in tort, claiming breach of fiduciary duty, conversion, and fraudulent concealment.

Superior Court: In the first action, after granting partial summary judgment in favor of the plaintiff upon a ruling that the statutory provision is constitutional and that the union is required by law to obtain affirmative authorization from nonmembers before the union may either collect or use nonmember agency fees for political expenditures, the Superior Court for Thurston County, No. 00-2-01837-9, Gary Tabor, J., on December 3, 2001, entered a judgment in favor of the plaintiff, awarding a statutory penalty, attorney fees, and costs, and permanently enjoining the union from collecting agency fees from nonmembers that are equivalent to member dues without first obtaining the nonmembers' affirmative consent. In the second action, the Superior Court for Thurston County, No. 01-2-00519-4, Daniel J. Berschauer, J., on January 18, 2002, dismissed the breach of fiduciary duty claim but denied dismissal of the other claims. The court also ruled that the Fair Campaign Practices Act provided a right of action. Further proceedings

on the action were stayed by the court while the parties sought interlocutory review.

Court of Appeals: In the first action, the court *reversed* the judgment at 117 Wn. App. 625, 71 P.3d 244 (2003), holding that the statutory "opt in" requirement, by prohibiting a union from using nonmember agency fees for political purposes unless the nonmember has first granted affirmative authorization to do so, is unconstitutional because it is unduly burdensome on unions. By an unpublished opinion noted at 117 Wn. App. 1035 (2003), the court *remanded* the second action for dismissal based on its invalidation of the statute in the first action.

Supreme Court: Holding that the "opt out" procedure employed by the union did not satisfy the statutory requirement but that the "opt in" procedure required by the statute is unconstitutional, the court *affirms* the decisions of the Court of Appeals.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Statutes -- Initiatives -- Construction -- In General

When interpreting legislation enacted by an initiative to the people, a court considers the voters' intent and the language of the measure as it would be interpreted by the average informed lay voter. Words are given their ordinary meaning. The measure is ambiguous if its language is fairly susceptible to more than one interpretation. Where there is an ambiguity, the intent of the electorate may be ascertained from the language of the initiative and from the official voters' pamphlet.

[2] Statutes -- Construction -- Legislative Intent -- Difference in Language Where different language is used in different places within a statute, it is presumed that there is a difference in intent.

[3] Labor Relations -- Union Membership -- Exclusive Bargaining Agent -- Nonmember Participation -- Agency Fees -- Nonrepresentational Activities -- Statutory "Opt In" Requirement -- Written Authority -- Necessity Under RCW 42.17.760, which restricts a labor union from using any portion of a nonmember's agency shop fee for political purposes unless the nonmember has affirmatively authorized such use, written authorization is neither required nor intended.

[4] Open Government -- Elections -- Fair Campaign Practices Act -- Purpose The purpose of the Fair Campaign Practices Act (chapter 42.17 RCW) is to protect the integrity of the election process from the perception that elected officials are improperly influenced by mone-

tary contributions and the perception that individuals have an insignificant role to play. The intent of the statute is to protect the public, not individuals.

[5] Labor Relations -- Union Membership -- Exclusive Bargaining Agent -- Nonmember Participation -- Agency Fees -- Nonrepresentational Activities -- Statutory "Opt In" Requirement -- What Constitutes -- "Opt Out" Rebate Procedure The "affirmative authorization" required by RCW 42.17.760 before a labor union may use any portion of a nonmember's agency shop fee for nonrepresentational political purposes is not satisfied by a labor union's procedure of providing nonmembers financial information about itself and its activities, advising nonmembers that a portion of the agency shop fees they pay will be put to nonchargeable political expenditures if no objection is raised thereto, and giving nonmembers the option of (1) paying the agency shop fee in full without objection, (2) objecting to full payment and receiving a rebate of that portion of the fee used for political expenditures as calculated by the union, or (3) objecting to full payment with the rebate determined by an impartial decision maker while the disputed amount is in escrow pending the outcome of the challenge.

[6] Statutes -- Validity -- Burden and Degree of Proof -- In General A party claiming that a statute is unconstitutional has the burden of overcoming the presumption of constitutionality by proving that it is unconstitutional beyond a reasonable doubt.

[7] Constitutional Law -- Freedom of Association -- Federal Protection The first and fourteenth amendments to the United States Constitution protect the freedom of individuals to associate for the purpose of advancing beliefs and ideas.

[8] Constitutional Law -- Freedom of Association -- Scope -- Support for Political Activities -- Voluntary Participation The freedom to associate as protected by the first and fourteenth amendments to the United States Constitution encompasses the freedom to contribute financially to an organization for the purpose of spreading a political message. The freedom to make financial contributions enables like-minded persons to pool their resources in furtherance of common political goals. Restrictions on expenditures in political campaigning implicate fundamental First Amendment interests.

[9] Constitutional Law -- Freedom of Association -- Scope -- Support for Political Activities -- Freedom From Compulsion The freedom to associate as protected by the first and fourteenth amendments to the United States Constitution encompasses the freedom not

to be compelled to support political and ideological causes with which one disagrees; i.e., the freedom of association includes the converse right not to be compelled to associate. The First Amendment freedom of speech correspondingly includes the freedom not to speak or to have one's money used to advocate ideas one opposes.

[10] Labor Relations -- Union Membership -- Exclusive Bargaining Agent -- Nonmember Participation -- Agency Fees -- Nonrepresentational Activities -- "Opt Out" Procedure -- In General An employee who is required to pay an agency shop fee to a labor union the employee has chosen not to join has a constitutional right not to contribute to the union's nonrepresentational activities, such as political and ideological advocacy, which the employee may exercise by affirmatively objecting thereto. By objecting to the union's nonrepresentational activities, the nonmember employee asserts his or her First Amendment rights and cannot be compelled to pay more than his or her fair share of the union's chargeable expenditures. The burden is on the employee to "opt out" of the union's political activities. The obligation placed on the employee to affirmatively opt out of the union's political activities serves to protect the right of association of the union and its members who support its political causes. So long as an objecting employee is given a simple and convenient method of registering dissent, the employee is not compelled to support a political cause and does not suffer a violation of First Amendment rights.

[11] Constitutional Law -- Freedom of Speech -- Political Speech -- Government Restriction -- Validity -- Test A governmental regulation of First Amendment rights is subject to exacting judicial scrutiny. The restriction will be invalidated if the government fails to meet its burden of demonstrating that the restriction is narrowly tailored to achieve a compelling governmental interest.

[12] Constitutional Law -- First Amendment -- Restriction by State. The State has no greater power to restrain the individual freedoms protected by the First Amendment than does Congress.

[13] Statutes -- Initiatives -- Validity -- Constitutional Limitations -- In General The voters may not do through an initiative what is constitutionally prohibited. Legislation is subject to the same constitutional limitations whether it is enacted by the legislature or by an initiative of the people.

[14] Constitutional Law -- Construction -- Federal Constitution -- Greater Protection by State -- Validity -- Expense of Others' Rights While a state may pro-

vide greater protection to its citizens than is provided by the federal constitution, it may not do so at the expense of the rights of other citizens.

[15] Appeal -- Assignments of Error -- Argument -- Authority -- Absence -- Effect An appellate court may consider a precedent bearing on an argument that the proponent of the argument failed to cite.

[16] Appeal -- Disposition of Cause -- Basis for Decision -- Issues Raised by Court -- Authority An appellate court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision.

[17] Appeal -- Disposition of Cause -- Basis for Decision -- Issues Raised by Court -- In General An appellate court is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent.

[18] Labor Relations -- Union Membership -- Exclusive Bargaining Agent -- Nonmember Participation -- Agency Fees -- Nonrepresentational Activities -- "Opt Out" Procedure -- Sufficiency Where an employee is required by law to pay an agency shop fee to a labor union the employee has chosen not to join and the employee does not want to support the union's nonrepresentational political activities, a proper constitutional balance is struck by a procedure whereby the nonmember is given a reasonable opportunity to object to the use of the nonmember's agency fee for nonrepresentational political activities and is afforded the option of (1) receiving a rebate of that portion of the fee used for political expenditures as calculated by the union or (2) receiving a rebate determined by an impartial decision maker while the disputed amount is in escrow pending the outcome of the challenge.

[19] Labor Relations -- Union Membership -- Exclusive Bargaining Agent -- Nonmember Participation -- Agency Fees -- Nonrepresentational Activities -- Statutory "Opt In" Requirement -- Validity RCW 42.17.760, which prevents a union from spending any portion of a nonmember's agency fees for political causes without the nonmember's affirmative authorization, is unconstitutional because it unnecessarily and significantly inhibits the First Amendment free speech and association rights of the union, its members, and those nonmembers who support the union's political activities. The affirmative authorization requirement amounts to an impermissible presumption that all nonmembers object to the union's use of their agency shop fees for political purposes, upsets the balance of members' and nonmembers' constitutional rights in the context of a union's ex-

penditures for political activities, and impermissibly shifts to the union the burden of the dissenting nonmembers' rights. This has the practical effect of inhibiting one group's political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers). Dissenters may not silence the majority by the creation of too heavy an administrative burden. Union members and nonmembers are entitled to at least as much protection as the First Amendment provides.

COUNSEL: *Robert M. McKenna, Attorney General, Linda A. Dalton, Senior Assistant, and D. Thomas Wendel, Assistant; and Steven T. O'Ban and Chad Allred (of Ellis Li & McKinstry, P.L.L.C.), for petitioners.*

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James D. Oswald on behalf of Washington State Labor Council, amicus curiae.

Robert H. Chanin, Donald E Clocksin, and Richard B. Wilkof on behalf of National Education Association, amicus curiae.

*Russell Clayton Brooks and Deborah J. La Fetra on behalf [***2] of Pacific Legal Foundation, amicus curiae.*

Edward E. Younglove III on behalf of Washington Federation of State Employees, amicus curiae.

JUDGES: Authored by Faith Ireland. Concurring: Barbara A. Madsen, Bobbe J. Bridge, Charles W. Johnson, Susan Owens, Tom Chambers. Dissenting: Gerry L. Alexander, Richard B. Sanders, Mary Fairhurst.

OPINION BY: IRELAND

OPINION

[*549] [**354] P1 IRELAND, J. * -- In these consolidated cases, we review RCW 42.17.760, which governs a labor union's ability to use agency shop fees, the fees paid by educational employees who are not union members. Both cases stem from an Evergreen Freedom Foundation (Evergreen) complaint with the Public Disclosure Commission (PDC) that the Washington Educational Association (WEA) violated RCW 42.17.760 (hereafter § 760).

* Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

P2 In the first consolidated [***3] case, the trial court found that WEA had intentionally violated § 760 and assessed \$ 590,375 in penalties and costs. The Court of Appeals reversed, holding that § 760 is unconstitutional. We affirm the Court of Appeals.

P3 In the second consolidated case, plaintiffs contend that chapter 42.17 RCW provides them a private right of action to recover for violations of § 760. Plaintiffs also assert tort claims based on violations of § 760. The trial court agreed that § 760 provides a private right of action, but the Court of Appeals reversed because it had held § 760 unconstitutional. The Court of Appeals remanded the case for dismissal. We affirm the Court of Appeals.

FACTUAL BACKGROUND

P4 WEA is the exclusive bargaining agent for approximately 70,000 Washington State educational employees. Membership in WEA is voluntary. However, both members and nonmembers must contribute to WEA for the costs related to collective bargaining.¹ Per statute, members pay dues to the union; nonmembers pay agency shop fees, which [*550] are equivalent to member dues. RCW 41.59.100² RCW 41.56.122.

¹ It is well settled that a union, which is obliged to act on behalf of all employees in the bargaining unit, may charge nonunion employees to bear their fair share of the costs of the representation. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 118 S. Ct. 1761, 140 L. Ed. 2d 1070 (1998). The dissent takes pains to point out that many states have passed so called "right to work laws" which have not been held unconstitutional. This argument is irrelevant to the issue in this case and inconsistent with "Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

[***4]

² RCW 41.59.100 provides, in part: "If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues."

P5 A portion of members' dues goes to support political and ideological causes, which are unrelated to the union's collective bargaining activities on behalf of all employees. These expenses are typically called nonchargeable expenses. Nonmembers who do not wish to support these nonchargeable activities may obtain a rebate of that portion of their fees that was used for non-

chargeable activities. The process by which the union rebates this amount to dissenting nonmembers was established by the United States Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

P6 Twice each year, WEA sends a "Hudson packet" to each nonmember. The Hudson packet includes a letter notifying the employee of his or her right to object to paying fees [***5] for nonchargeable expenditures. The packet gives the nonmember three choices: (1) pay agency shop fees equivalent to 100 percent of dues; (2) object to paying 100 percent and receive a rebate of nonchargeable expenditures, as calculated by WEA; or (3) object to paying 100 percent and challenge WEA's calculations of nonchargeable expenditures. The packet also provides financial information about WEA and its activities. During the years 1996 to 2000, WEA had approximately 3,500 nonmembers per year, which is approximately 5 percent of the total number of persons represented by WEA.

P7 When a nonmember challenges WEA's calculation of nonchargeable expenditures, an arbitrator determines the amount of the nonmember's fees that should be rebated. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably [**355] in dispute. The WEA rebates to the employee the amount determined by the arbitrator, and transfers the remainder to the WEA general account. During [*551] the years 1996 to 2000 the rebates ranged from \$ 44 to \$ 76. Clerk's Papers (CP) at 839. Nonmembers who did not object and did not request rebates did not receive rebates. Their fees were transferred [***6] from escrow to WEA's general account. Political expenditures were made from this account pursuant to a 1996 agreement with the PDC. At issue are the fees paid by the nonobjecting nonmembers.

PROCEDURAL BACKGROUND

P8 This is the latest in a series of actions by Evergreen against WEA. These cases include *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n*, 140 Wn.2d 615, 999 P.2d 602 (2000) and *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n*, 111 Wn. App. 586, 49 P.3d 894 (2002).

P9 The current action began in August 2000, when Evergreen filed a complaint with the PDC, alleging that WEA had violated § 760. The complaint asserted that WEA failed to get the affirmative authorization of all nonmembers before using the nonmembers' fees for political purposes, as required by the statute. In order to avoid yet another lawsuit, WEA entered into a stipulation with the PDC. In that stipulation, WEA acknowledged that it had violated § 760 during the 1999-2000 fiscal

year. The PDC referred the case to the attorney general for prosecution.

P10 The State filed suit against WEA in October 2000, alleging WEA had violated § 760 [***7] during the previous five years, 1996 to 2000. Both parties moved for summary judgment. The trial court granted the PDC's motion for partial summary judgment, ruling § 760 is constitutional and it "requires affirmative authorization from agency fee payers . . . and defendant's Hudson procedures do not satisfy this requirement." CP at 349-50. The court ruled that it was a question of fact whether WEA had "used" those agency fees for political purposes. The case proceeded to a bench trial on the issue of whether the WEA had "used" for political purposes the fees of nonmembers who had failed to [*552] object by completing and returning the form contained in the Hudson packet.

P11 At trial, three experts testified concerning WEA's accounting procedures and whether WEA had used the fees of the nonobjecting nonmembers. Two of the three experts, including the parties' jointly retained expert, testified that WEA had not used the fees of the nonobjecting nonmembers for political expenditures.

P12 However, the trial court concluded that WEA had used those fees. The court assessed a sanction of \$ 200,000, calculated by multiplying \$ 25 by the approximately 4,000 nonmembers who had [***8] failed to respond to the Hudson packet. The court then doubled the fine to \$ 400,000, as allowed by RCW 42.17.400(5). The court awarded the PDC costs and fees of \$ 190,375 for a total judgment against WEA of \$ 590,375. The trial court also issued a permanent injunction, precluding WEA from collecting the full amount of agency fees mandated by RCW 41.59.100 and requiring WEA to institute new procedures for segregating the amounts collected from members and the amounts collected from nonmembers.

P13 WEA appealed. On appeal, Division Two of the Court of Appeals held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." *State ex rel. Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 117 Wn. App. 625, 640, 71 P.3d 244 (2003). The State sought review in this court.

P14 The other consolidated case arose in March 2001, when several educational employees, Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott (collectively Davenport), who are not members of the union, filed a class action against WEA on behalf of present or former public school employees. Davenport claims a private right of action under the public disclosure [***9] act (PDA). Davenport seeks a refund of that portion of agency shop fees used for political expenditures. Davenport also alleges tort claims for