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Supreme Court Case No. 88323-8
Court of Appeals No. 68343-8-I

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

DUANE STORTI, and a class of faculty members,

Appellant,

v.

UNIVERSITY OF WASHINGTON

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Following the global recession and a dramatic decrease in state funding, the University made a prudent decision in 2009 to suspend annual two percent raises for faculty. The University's Board of Regents, President, and Faculty Senate all participated in the process to suspend the raises, and the suspension complied with the terms of the University's faculty handbook. The Chair of the Faculty Senate praised the process as an example of the University's procedures working the way they should.

Two faculty members filed separate class action lawsuits challenging that decision. Both lawsuits were dismissed by summary judgment at the trial court level. Both dismissals were upheld by the Court of Appeals. *Nye v. Univ. of Wash.*, 163 Wn. App. 875, 260 P.3d 1000 (2011), *review denied*, 173 Wn.2d 1018 (2012); *Storti v. Univ. of Wash.*, No. 68343-8-I, 2012 WL 6554827 (Dec. 17, 2012).¹ This Court has already denied review in both cases. *Nye*, 173 Wn.2d at 1018 (2012) (denying discretionary review); *Storti v. Univ. of Wash.*, No. 86310-5 (Feb. 8, 2012) (denying direct review).

¹ The Court of Appeals decision in this case is attached as an Appendix to the Petition for Review. In this brief, the University will cite to that opinion as "Op."

The same result is appropriate here. This case turns on a straightforward application of the unambiguous terms of the University Handbook. Those terms allow the University to suspend the raises, and they provide the timeline for doing so. The questions raised by Petitioner have been thoroughly considered by two Superior Court judges and two appellate panels, and have been correctly decided in favor of the University. This is not a case that merits additional review. The Court should deny the petition for discretionary review of the unpublished decision of the Court of Appeals.

II. FACTUAL BACKGROUND

A. The University Handbook Authorizes the President and Board of Regents to Change Policies Regarding Faculty Salaries.

The University is a state agency governed by a Board of Regents appointed by the governor. RCW 28B.20.100(1). The Board of Regents has full control over the University and its property. RCW 28B.20.130(1). Although the Board of Regents has delegated some of its authority to the President of the University, the Board retains the “right to intervene and modify any rule, regulation, or executive order formulated by the President or the faculty, the right to amend or rescind any existing rule, regulation, or executive order, and

the right to enact such rules, regulations, and orders as it deems proper for the government of the University.” CP 1229 (University of Washington Handbook (“Handbook”) § 12-12(A)).

The President is the chief executive officer of the University. He has the authority to issue rules, regulations, and executive orders for the governance of the University, including executive orders concerning utilization of available resources. *Id.* (Handbook § 12-12(B)). Before issuing an executive order, the President must send it to the Faculty Senate for review. CP 1234 (Handbook § 12-21(B)(1)). The review by the Faculty Senate must take place “within a reasonable time, but in any event **no longer than sixty days** after receipt of such request for review.” *Id.* (emphasis added). If the Faculty Senate suggests revisions to the proposed order, the President must consult with the Chair of the Faculty Senate to seek to resolve those differences. *Id.* “Following such consultations, the decision of the President is final.” *Id.*

The Handbook specifically addresses the timeline for implementation of executive orders. Executive orders “**become effective on the day signed by the President...**” CP 1234 (Handbook § 12-21(B)(1)) (emphasis added).

B. The Faculty Raises at Issue Were Implemented by Executive Order.

In 2000, then-President Richard McCormick issued Executive Order No. 64, which contained a faculty salary policy. CP 1241-43. The provision of Executive Order No. 64 at issue in this case called for an annual two percent salary increase for qualifying faculty members. *Id.* The executive order included an express “Funding Cautions” section, which stated:

This Faculty Salary Policy is based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can only be rewarded at the expense of the size of the University faculty. **Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.**

CP 1243 (emphasis added). The University funded salary increases of at least two percent from 2000-01 through 2008-09, except for one year. CP 1226.

C. The University Did Not Fund The Faculty Raises in 2002-03.

Faced with a budget cut in 2002, the University passed a budget that did not include funding for the two percent raises for 2002-

03. The University did not change or suspend Executive Order No. 64 at that time.

Duane Storti, who is also the Petitioner in this case, filed a class action lawsuit and obtained a summary judgment ruling in favor of University faculty. The Superior Court reasoned that, although the University retained the right to change Executive Order No. 64, it could not leave the policy on the books and simply fail to fund salary increases. CP 1255-60. The Superior Court found that “the word ‘reevaluation’ reserves the right of the University to change the policy at some future date,” CP 1259, but expressly did “not reach the question of what process would have been utilized to repeal, evaluate, or modify the Faculty Salary Policy.” CP 1260. Because the University had not changed the policy, the Superior Court also never reached the question of *when* a policy change would be effective. That case settled, and no final judgment on this issue was entered by the trial court. CP 709-11 ¶¶ 2, 8.

D. The University Reevaluated and Changed Executive Order No. 64 in 2009.

Against the backdrop of difficult budget cuts, President Emmert found it necessary to reevaluate Executive Order No. 64 in 2009. CP 1226-27 ¶ 8. President Emmert and Faculty Senate Chair

David Lovell appointed a Committee to Re-Evaluate Executive Order No. 64, which included faculty and administration members. *Id.* The outcome of the reevaluation was a proposed new executive order, which President Emmert submitted to the Faculty Senate for review in accordance with the procedures outlined in the University Handbook. CP 1234 (Handbook § 12-21(B)(1)); CP 1249-50 ¶ 2; CP 1226-27 ¶ 8. Storti conceded in his complaint the University has the authority to suspend the raises, and followed the proper procedures for doing so in this case. CP 5 ¶ 26.

On March 31, 2009, the President issued Executive Order No. 29. CP 1226-27 ¶ 8. The new Executive Order modified Executive Order No. 64 by partially suspending certain provisions, including the two percent faculty raises at issue in this case. CP 1244-45. Pursuant to the terms of the Handbook, the President's Executive Order became effective immediately upon signing.

In April 2009, the Board of Regents reviewed the President's new Executive Order. Before passing a resolution endorsing the order, the Regents invited Faculty Senate Chair David Lovell to speak.² He

² The chair of the Faculty Senate is the Senate's sole spokesperson "[o]n all matters concerning the publication or public explanation of Senate actions." CP 1240 (University Handbook § 22-54).

informed the Board that comments from the faculty review process had been incorporated into the order, and said:

We were very pleased to see that our advisory role—not only did we advise but we were listened to and in fact our advice was taken. So we believe the process—it’s a cliché—**but we believe that the process worked in this case.** And appreciate the Regent’s [sic] respect for that process.

CP 1250-51 (emphasis added).

In its resolution, the Regents recognized that Executive Order No. 29 was a result of “extensive review and consultation with the Faculty Senate in accordance with the Faculty Code,” and that the President was compelled by financial necessity to issue the new order. CP 1246-47 (Board of Regents Resolution Regarding Faculty Salaries, April 16, 2009). The Regents resolved that the new Order “will prevail over any University policies, rules, or codes or regulation to the extent they may be inconsistent.” *Id.*

E. Professor Peter Nye’s Challenge to the Suspension Was Dismissed by the Trial Court, the Dismissal Was Affirmed on Appeal, and this Court Denied Review.

After the raises were suspended, two faculty members—Petitioner Storti and Professor Peter Nye—filed separate class actions

against the University.³ Nye filed first, in October 2009. *Nye*, 163 Wn. App. at 881. Nye argued both that the University lacked the authority to suspend the raises, and that even if it had the authority, the University acted too late because faculty members had already worked meritoriously for part of the year, and had therefore already earned the raises. *E.g.*, *id* at 884-85, 887; CP 104-05 (Nye’s Court of Appeals Brief). The Superior Court found the University was legally entitled to suspend the raises, and granted summary judgment in favor of the University. *Nye*, 163 Wn. App. at 882.

Nye appealed the decision, and the Court of Appeals affirmed the trial court’s dismissal. *Id.* at 888. “[T]he evidence in the record clearly demonstrates that the university acted pursuant to its statutory and contractual authority when it suspended the faculty merit raises.” *Id.* The *Nye* Court applied rules of contract interpretation, and agreed with the University that “the express terms of the handbook allowed for modification of the contract.” *Id.* at 883. The *Nye* Court also considered and rejected Nye’s argument that the raises were “wages earned” because the faculty had already earned the raises by working the prior year. *Id.* at 887. The Court made clear that raises are not

³ Summary judgment for the University was entered in *Nye* before class certification. *Nye*, 163 Wn. App. at 881 n.4. A class was certified in Storti’s case before the trial court entered summary judgment. CP 1483-89.

wages already earned: “[A] raise compensates for the performance of future work. Here, before Nye performed that future work during the 2009-2010 academic year, the merit raise had been properly suspended by the university.” *Id.*

Nye sought discretionary review of that opinion. This Court denied review. *Nye*, 173 Wn.2d at 1018.

F. Professor Storti’s Challenge to the Suspension Was Also Dismissed by the Trial Court and the Dismissal Was Affirmed on Appeal.

While Nye’s case was pending in the Court of Appeals, Storti filed this case. Storti did not pursue Nye’s argument that the University lacked authority to change the policy, and instead admitted the University had followed the proper procedures. CP 5 ¶ 26. However, Storti reasserted Nye’s argument that the raises could not be suspended because faculty members had already earned them by working the previous year. *Id.* ¶ 28. As with *Nye*, Storti’s claim was dismissed on summary judgment. CP 1487-89.

After this Court denied Storti’s request for direct review, *Storti v. Univ. of Wash.*, No. 86310-5 (Feb. 8, 2012), the Court of Appeals affirmed summary judgment for the University. Recognizing the University’s salary policy must be interpreted according to its terms, the Court of Appeals correctly held that “[t]he Handbook

plainly and expressly cautioned faculty that the salary policy, including the raise provision, was subject to change and that any changes, if imposed by executive order, would be effective when the order was signed.” Op. at 2. The court also explained that *Storti* “involves substantially the same facts and the same legal claim” as *Nye*, and that *Storti*’s arguments for “a different result” were “not well taken.” Op. at 13-14.

III. ARGUMENT

A. There is No Conflict with Existing Law.

1. The Court of Appeals correctly applied existing case law requiring contracts and policies to be interpreted based on their specific terms.

Storti contends review should be accepted pursuant to RAP 13.4(b)(1) and (2). But this is not a case in which the Court of Appeals decision conflicts with another Court of Appeals decision or a decision of this Court. Quite to the contrary, to reach its decision, the Court of Appeals simply applied existing case law requiring contracts or policies to be interpreted according to their terms. Op. at 7-8. There is no new law being created here. The Court of Appeals decision in this case is entirely consistent with the Court of Appeals

decision in *Nye*, and with this Court's decisions not to accept discretionary review in *Nye* or direct review in this case.

The Court of Appeals decision in this case rested on a routine application of the express terms of the University's Handbook. Op. at 2. Executive Order No. 64 specifically says the policy may be reevaluated if state funding is decreased, which is precisely what happened here. CP 1243 (Executive Order No. 64). The University Handbook expressly authorizes the President to issue new executive orders, and spells out the procedures and timeline for doing so. CP 1234 (Handbook § 12-21(B)). Those procedures were undisputedly followed in this case. CP 5 (Compl. ¶ 26). These express terms unequivocally allow the University to suspend the raises, and that authority was upheld by the Court of Appeals here and in *Nye*. Op. at 2; *Nye*, 163 Wn. App. at 886-88.

Storti's only complaint is that the suspension should not have been effective until the following academic year. There is no support for that argument in the Handbook. The Court of Appeals correctly found "no language in the salary policy or elsewhere in the Handbook that suggests that changes to the policy would not be effective until the following academic year. To the contrary, the Handbook states that an

executive order ‘become[s] effective on the day signed by the President...’” Op. at 9 (citing CP 1234).

2. The cases cited by Storti contain different terms, and do not change the outcome here.

Storti claims the Court of Appeals “misapplied the law” and strains to find cases he claims are in conflict. But there is no conflict with existing case law. Each of the cases Storti points to involved significantly different terms.

For example, Storti claims this case is inconsistent with *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 (1985), but the facts in *Carlstrom* were significantly different. In *Carlstrom*, a contract between a community college and its faculty generally stated that it was “subject to all present and future acts of the legislature.” *Carlstrom*, 103 Wn.2d at 393. The State later tried to rely on that general statement to rescind faculty raises during a severe economic downturn. The Court held that the more specific contractual provisions relating to the raises, which contained no funding conditions and which were negotiated *after* the economic emergency was already apparent, showed “the parties did not intend to make the salary increases contingent on the availability of legislative appropriations.” *Id.* at 395. Other cases cited by *Storti* are similarly

distinguishable because they contain very different provisions than the University Handbook, which expressly warns faculty members the raises may be reconsidered, and that any new executive orders will be effective immediately upon signing. Op. at 11; CP 1229, 1243.

B. There is no issue of substantial public importance.

Storti also claims this case is subject to review pursuant to RAP 13.4(b)(4), but there is no issue of substantial public importance attached to the unpublished Court of Appeals decision. Although Storti claims this case has “implications for other public employment contracts,” it does not. Pet. for Review at 20.

This case turns on the application of the express terms of the University’s Handbook. The provisions at issue apply only to University faculty members, and Storti has only challenged the application of those provisions for one academic year (2009-10). This case involves a one-time interpretation issue and is not likely to happen again because the Handbook has changed (and Storti agrees the change was proper for subsequent years). Because the provision at issue here is no longer on the books, there is no further implication for University faculty, let alone other public employers.

C. Res Judicata Does Not Apply.

Storti also argues this Court should not even consider the current facts, and should simply rule for Storti based on the settlement of a different case, with different facts and issues, brought years ago by Storti. Pet. for Review at 15-20. Despite twice arguing—and losing—this issue before other courts, Storti still misunderstands the application of res judicata.

Claim preclusion “does not bar claims which arise out of a transaction separate and apart from the issue previously litigated.” *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986). Consequently, application of claim preclusion requires that two cases have **identical** causes of action, among other requirements.⁴ *Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 731, 31 P.3d 694 (2001). To determine whether two causes of action are identical, a court should examine the following four criteria:

(1) Whether rights or interests established in the prior judgment would be destroyed or impaired by

⁴ Res judicata also requires a final judgment. By deciding to settle the 2004 action, the University did not admit liability. As noted by the Court of Appeals, the Class Action Settlement Agreement of the 2004 case (which was given the effect of a court order) “provided that the agreement could not be used to establish liability in any subsequent proceeding.” Op. at 4 n.3; CP 709. Storti claims he is not relying on the Settlement Agreement, and that he relies instead on the preceding summary judgment order. See Pet. for Review at 16 n.16. However, a summary judgment decision is an interlocutory order without binding effect. Thus, Storti would need to rely on the Settlement Agreement, which he is prohibited by its terms from doing. None of the cases cited by Storti involves a similar situation.

prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) **whether the two suits arise out of the same transactional nucleus of facts.**

Kuhlman v. Thomas, 78 Wn. App. 115, 122, 897 P.2d 365 (1995)

(quoting *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983))

(emphasis added). There is no dispute about these criteria. Storti quotes them in his brief (Pet. for Review at 17), and the same criteria were applied by the Court of Appeals. Op. at 14-15. Applying these criteria, the Court of Appeals rejected Storti's res judicata argument because this case arises out of markedly different facts than the 2004 lawsuit. Op. at 15.

Storti tries to manufacture a conflict with previous Washington Court of Appeals decisions, but there is none. Both cases Storti cites rely on the same test, and one case has already been denied review by the Court. *Marshall v. Thurston County*, 165 Wn. App. 346, 354, 267 P.3d 491 (2011) (applying res judicata where factual nucleus was the same); *Spokane County v. Miotke*, 158 Wn. App. 62, 67, 240 P.3d 811 (2010), review denied, 171 Wn.2d 1013 (2011) (same). Storti disingenuously suggests “[t]he fact that this case [*Storti*] and *Marshall* both provoked dissents suggests a need for clarification by this Court of the identical causes of action facet of the test for res judicata.” Pet.

for Review at 18 n.17. In fact, the *Storti* dissent did not address res judicata at all, nor did it cite a single case. Op. at 18-19 (Appelwick, J., dissenting).

The reason res judicata does not apply in this case is simple: the facts are different. The 2004 decision challenged the University's decision to keep the policy on the books but not fund the raises. The current lawsuit challenges the University's decision to change the policy, and the date that change became effective.⁵ The trial court in the 2004 lawsuit did not reach those questions, because they were not at issue in the 2004 case. The trial court specifically stated: "[T]he court need not reach the question of what process would have been utilized to repeal, evaluate or modify the Faculty Salary Policy." CP 1260. Because the two cases do not arise from the same nucleus of facts and the evidence presented in the cases is materially different, the causes of action are not identical, and claim preclusion cannot apply.⁶

⁵ The facts present in this case, and not present in the 2004 case, include: the joint appointment of a faculty-administration committee to review the policy, review of a draft policy by the Faculty Senate, issuance of a new executive order by the University President, and a Board of Regents resolution endorsing the executive order and declaring it will prevail over all other University policies.

⁶ Issue preclusion, also known as collateral estoppel, does not apply either. Issue preclusion also requires an identity of issues and a final judgment on the merits of that issue. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993). It does not apply in this case because the issues in the 2004 lawsuit were different and the trial court did not rule on the legal questions at issue in this case.

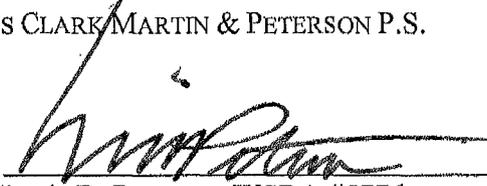
IV. CONCLUSION

The proper resolution of this case requires nothing more than a straightforward application of the University's Handbook provisions. Every court to consider the issues in this case has correctly determined that the Handbook and Washington law authorized the University to suspend the two percent raises. The Petitioner has not met the standard for discretionary review. This Court has denied review of these issues two other times, and should deny review again.

RESPECTFULLY SUBMITTED this 13th day of February, 2013.

HILLIS CLARK MARTIN & PETERSON P.S.

By

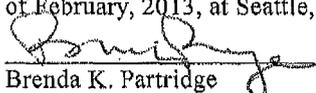

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CERTIFICATE OF SERVICE

On the date indicated below, I, Brenda K. Partridge, legal assistant, hereby certify that I caused to be served upon all counsel of record, via U.S. Mail, postage pre-paid, a true and correct copy of the foregoing document.

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

DATED this 13th day of February, 2013, at Seattle, Washington.


Brenda K. Partridge

2/13/13

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Subject: Case No. 88323-8 - Duane Storti v. University of Washington - Answer to Petition for Review

Re: Duane Storti v. University of Washington, Supreme Court Case No. 88323-8

Attached is a copy of the Answer to Petition for Review, with Certificate of Service, in the above-referenced matter.

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This Answer is being served on all counsel of record by email and U.S. mail.

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