IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 330621

MICHAEL F. CRONIN

Appellant/Cross-Respondent

vs.

CENTRAL VALLEY SCHOOL DISTRICT

Respondent/Cross-Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff Michael F. Cronin ("Cronin"), was employed as a teacher at Central Valley School District ("District") for seven years. (CP 31). He was terminated from employment when the District refused to accept his union representative's timely served request for a statutory hearing on the merits of his termination. (CP 1-2; 76; 95). The District ignored the union representative's request for a statutory hearing, claiming that she was not an employee of the District and had no authority to request a hearing on Cronin's behalf. (*Id.*) As a consequence, the District refused to appoint a nominee for the selection of a hearing officer, which is the first step required by RCW 28A.405.310(4) after a teacher has been terminated. Cronin thereupon filed a declaratory judgment action to force the District to proceed to a statutory hearing and to pay his wages and benefits pending the outcome of the merits of his termination. (CP 29-30; 42-69).

On cross motions for summary judgment, the District claimed that the Trial Court lacked subject matter jurisdiction because Cronin failed to timely file his declaratory judgment action under RCW 28A.645.010, to force the District to appoint it's nominee for selection of the statutory hearing officer. (CP 20-28).

The Trial Court, per the Honorable Jerome Leveque, granted the District's Motion for Summary Judgment for lack of subject matter jurisdiction and entered an order on December 17, 2012, denying Plaintiff's Motion for Reconsideration. (*Id.*) On appeal to the Washington State Court of Appeals, Division III, on March 13, 2014, the court filed an unpublished opinion remanding this matter back to the Trial Court holding that the Trial Court erred in granting the District's Motion for Summary Judgment and not reaching the merits of Cronin's declaratory judgment action. (*Id.*)

The District filed a Motion for Reconsideration with the Court of Appeals, Division III, which was denied on April 10, 2014. (App. 1) The District thereupon filed a Petition for Discretionary Review with the Washington State Supreme Court, which was also denied on August 6, 2014. (App. 2)

Upon remand, the Trial Court, per the Honorable Kathleen O'Connor, heard cross motions for summary judgment. (CP 29-30; 109-110). The Trial Court granted Cronin's motion in part, finding 1) that his union representative, Sally McNair ("McNair), had the capacity and authority to file an appeal with the District on behalf of Cronin and request a statutory hearing; and 2) McNair's January 11, 2012, letter of appeal to Cronin's termination that was delivered to the District Superintendent that

day was actual notice to the District. (CP 309-311; RP 5:3-13). The Trial Court granted the District's Motion for Summary Judgment finding that Cronin failed to timely elect a remedy (grievance or statutory hearing) and thereupon dismissed his case by order dated December 19, 2014. (*Id.;* RP 5-8) Cronin appeals the dismissal of his case.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in dismissing plaintiff's claims against the District for failing to elect a remedy, when plaintiff, through his union representative, did request a statutory hearing on the merits of plaintiff's termination.

2. The Trial Court erred in holding that the union representative's request for statutory hearing was not an election of a remedy.

3. The Trial Court erred in considering or failing to strike from consideration inadmissible evidence in the Declaration of Paul Clay.

III. STATEMENT OF THE CASE

This matter was previously before this Court after the Trial Court dismissed Cronin's case for lack of subject matter jurisdiction. It is once again before this Court because the Trial Court dismissed Cronin's case adopting the District's position that he did not timely elect his remedy. Cronin did elect his remedy and the merits of his termination should be determined by a statutory hearing officer.

In January 2012, Cronin was employed with the Central Valley School District as a teacher. (CP 31). He had good performance evaluations and his classroom performance was never an issue. (CP 31; 73). Although he had an alcohol problem outside of school, he was never under the influence at school or while teaching. (CP 31-33; 73).

On September 30, 2011, Cronin voluntarily entered an alcohol treatment program at Sundown M Ranch near Yakima with knowledge and notice to the District. (CP 32-33). After discharge from treatment on October 27, 2011, he reported to Geiger Correctional Facility to serve out a 120-day sentence on the previous DUI/Physical Control charge. (CP 33). While at Geiger he was granted work release privileges and could have worked at the District if asked. (CP 33; 73).

On January 6, 2012, 10 days before his release and while still incarcerated, Cronin received a certified letter from the District terminating his employment. (CP 34; 40-41). Since he was still incarcerated, he had his union representative, Sally McNair, (McNair) timely file a Request for a Statutory Hearing with the Superintendent of Central Valley District on January 11, 2012. (CP 34-35; 74-76; 93).

On February 21, 2012, Cronin's attorney faxed a letter to the District's attorney inquiring about Cronin's paycheck and requesting reinstatement of his benefits pending the requested statutory hearing. (CP 98-101). On February 22, 2012, The District's attorney responded by e-mail stating that he was out of the office but would try to contact the District that day and get back to Cronin's counsel as soon as possible. (CP 102). Cronin's counsel heard nothing from the District's attorney. (CP 99).

Six days later on February 28, 2012, Cronin's union representative, Sally McNair, received a certified letter from the District. (CP 95). In that letter the Superintendent stated that the District did not consider McNair's request for statutory hearing on behalf of Cronin to have been properly presented since she was not an employee of the District and had not been authorized by

Cronin to file the request. (*Id.*) As a result, the District claimed that Cronin had waived his right to a statutory hearing. (*Id.*)

On March 23, 2012, Cronin filed an action for declaratory relief and summary judgment to enforce his request for a statutory hearing and for payment of wages and benefits pending a decision on the merits by a statutory hearing officer. (CP 29-30). The District also moved for summary judgment claiming that the Trial Court lacked subject matter jurisdiction because pursuant to RCW 28A.645.010: 1) Cronin failed to file his declaratory action within 30 days of the superintendent's uncommunicated decision not to give effect to McNair's letter requesting a statutory hearing on behalf of Cronin; and 2) Cronin had failed to file his action within 30 days after the 15 days had expired from when the District failed and refused to appoint a nominee to select a hearing officer. (CP 20-28).

On November 15, 2012, oral argument occurred before the Honorable Jerome Leveque, and on November 29, 2012, the Trial Court entered an Order Granting the defense Motion for Summary Judgment holding that the Court lacked subject matter jurisdiction. (*Id.*) Cronin moved for reconsideration on November 20, 2012. The court denied reconsideration on December 17,

2012. Cronin's Notice of Appeal to Division III was filed on December 21, 2012.

Oral argument occurred before Division III on February 5, 2014 and an unpublished opinion in favor of Cronin was issued on March 13, 2014. (CP 20-28). The District requested reconsideration of Division III's decision, which was denied. Thereupon the District petitioned the Washington State Supreme Court for discretionary review, which was also denied.

Having reversed the Trial Court and determining that subject matter jurisdiction existed, this Court remanded the matter to the Trial Court finding,

> ...the court erred in granting the District's request for summary judgment and not reaching the merits of Cronin's declaratory suit.
>
> The parties briefed whether Ms. McNair was a proper representative of Mr. Cronin and whether the District improperly withheld wages from Mr. Cronin. Because we hold the summary dismissal of Mr. Cronin's request for declaratory relief was improper and remand for a determination on the merits, we leave these matters for trial court resolution.
>
> (CP 28).

On remand this matter was assigned to the Honorable Kathleen M. O'Connor. Oral argument occurred on December 12, 2014, and on December 19, 2014, Judge O'Connor entered an Order granting the defense Motion for Summary Judgment

dismissing Cronin's appeal on the basis that he had failed to timely elect a remedy. (CP 309-312; RP 5-8). Cronin's Notice of Appeal followed, that was timely filed on January 5, 2015.

IV. STANDARD OF REVIEW

The appellate court applies de novo review to an appeal from summary judgment, engaging in the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004; *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is only appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Kirby v. City of Tacoma*, 124 Wn.App. 454, 463, 98 P.3d 827 (2004). All facts and all reasonable inferences from those facts are construed in a light most favorable to the non-moving party. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

V. ARGUMENT

The Trial Court improperly dismissed Cronin's claims against the District based on the failure to elect a remedy. The

Trial Court incorrectly held that plaintiff did not elect his remedy until February 8, 2012, which was too late to pursue a statutory hearing or grievance and that such failure was fatal to his action.

A. This action is not barred because Cronin elected a remedy when his request for a statutory hearing was properly presented to the District.

In order to appeal his termination, all Cronin was legally obligated to do was notify the District of his intent to request a statutory hearing. RCW 28A.405.210; RCW 28A.405.300. He was not required to notify the District of his intent to elect a remedy. A request for hearing simply has to place the District on notice that a teacher is disputing his/her termination. No magical language is required. There is no prescribed form or required language. McNair notified the District in her letter of January 11, 2012, of Cronin's intent to request a hearing because he was disputing his termination. (CP 93). She specifically requested a closed statutory hearing. (*Id.*); RCW 28A.405.310(2). She identified herself as Cronin's nominee to select a hearing officer. (*Id.*); RCW 28A.405.310(4). Cronin did, in fact, elect a remedy when Sally McNair filed his request for statutory hearing. That request was timely served before ten days elapsed as required by statute. RCW 28A.405.210; RCW 28A.405.300. The District received actual

notice of Cronin's request and McNair had authority to file his request with the District. (CP 309-312).

The District is subject to a Collective Bargaining Agreement, which was negotiated between the District and the union. (CP 2; 4-19). The Collective Bargaining Agreement requires an election of remedy:

> **Section E – Right to Due Process**
>
> No certificated employee shall be reprimanded, disciplined, or reduced in rank or compensation without just cause. Any such reprimand, discipline or reduction in rank or compensation shall be subject to the grievance procedure hereinafter set forth, PROVIDED, however, that in cases of nonrenewal, discharge, or actions which adversely affect the employee's contract status, the employee shall select the statutory procedures or the grievance procedure. In the event the employee serves notice to the Board that he/she is appealing the Board's decision according to the statutory provisions, such cases shall be specifically exempted from the grievance procedure.

(CP 5).

Based on the foregoing provision, if a teacher elects to proceed with a statutory hearing, then he/she may not pursue a grievance. In order to elect a statutory hearing procedure, a request must be made within ten days of receipt of a notice of termination. RCW 28A.405.210; RCW 28A.405.300. Cronin's request was timely made and received by the Superintendent. (CP 93; 309-312). On the other hand, in order to elect the grievance procedure, a grievance must be filed within 20 business days (30

calendar days) of the date of receipt of a Notice of Termination. (CP 16). In reality, the Collective Bargaining Agreement provision for an election of remedies is really a ten day election because once a teacher elects a statutory hearing (which is required within ten days) he/she is foreclosed from pursuing a grievance. (CP 16). So a teacher has to decide within ten days to elect either a statutory hearing or a grievance, or the statutory hearing procedure is foreclosed. In this case, Sally McNair filed a statutory hearing request within the ten days and did not elect a grievance after that. (CP 260-261). Her request for a statutory hearing was binding on the District. And once having filed a request for statutory hearing, an election has occurred no matter what may have been intended.

The District cannot in good faith now argue it was confused and didn't know what was happening. The District knew exactly what was happening. The District negotiated the Collective Bargaining Agreement and knew its provisions. It knew that a teacher termination case appealed according to the statutory hearing procedure was specifically exempted from the grievance procedure. (CP 5). The District knew exactly what it was doing when it chose to ignore McNair's request for statutory hearing. (CP 95). The District personnel weren't confused. They didn't claim

they were uncertain which remedy Cronin was seeking. They didn't claim he failed to elect a remedy or timely request a statutory hearing. The District chose to wait to respond until after the 30 days had expired to file a grievance.[1] The District then took the position that McNair was not an employee of the District and, therefore, had no authority to request a hearing on his behalf. (CP 95)

Cronin had 30 days to elect a grievance. (CP 5). He could have waived his right to a statutory hearing and pursued a grievance. He did not. (CP 260-261). McNair elected a statutory hearing and preserved Cronin's right to that hearing in the event he decided he wanted to waive that right and pursue a grievance. (CP 93). There is nothing illegal or untoward about that. While Cronin could have requested a grievance and waived the statutory hearing, he could not wait 30 days, waive the grievance and file a request for statutory hearing because his request for statutory hearing had to be made within ten days of the notice of termination. RCW 28A.405.210; RCW 28A.405.300.

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[1] If McNair had elected to file a grievance, it had to be filed by February 6, 2014, which was 30 days after Cronin received the District's notice of termination. (CP 34; 91). The District ignored McNair's request for a statutory hearing until it responded on February 21, 2014, which was not faxed to McNair until February 28, 2014. (CP 76; 95).

There is no requirement under either the law or the Collective Bargaining Agreement that a teacher has to give notice of an election of remedy. The District knew from the Collective Bargaining Agreement that once a statutory hearing was filed, no grievance could be elected. (CP 5). The District claims it needed to know what to do and how to proceed, but in reality they ignored McNair's letter. Since Cronin could always waive his right to a statutory hearing and pursue a grievance, the District knew it had to wait at least 30 days under the Collective Bargaining Agreement to determine whether Cronin might elect to proceed with filing a grievance during the 30 day window. If the teacher failed to waive his right to statutory hearing and then grieve the termination, then the District knew after 30 days that the teacher was pursuing the statutory hearing procedure. This is not a case where the teacher first elected to pursue a grievance and then attempted to waive that remedy in order to pursue a statutory hearing. Arguably, after he requested the statutory hearing procedure, the grievance was still available to Cronin. But when he failed to grieve within the 30 days, the District knew his choice. Cronin was pursuing his request for statutory hearing.

Sally McNair's letter requesting a statutory hearing was not an attempt to give notice of an election of remedies because no

notice of an election is required to be given under the law or a Collective Bargaining Agreement. McNair requested a statutory hearing that excluded the grievance process since the Collective Bargaining Agreement already excludes the grievance procedure once a request for hearing has been made.

The trial court erred in holding that McNair failed to elect a remedy claiming that her letter of January 11, 2012 was not an election since she was preserving the grievance procedure as well. (CP 93; 309-312) McNair did not have to "preserve" the grievance process since, under the Collective Bargaining Agreement, the parties had already bargained for a 30 day window to grieve a termination. Under the circumstances, all Sally McNair had to do was make her intention known to the District that she was requesting a statutory hearing. This she did. A discharged or non-renewed teacher is granted the opportunity for a hearing pursuant to RCW 28A.405.310 when a timely request is made to the Superintendent within ten days of receipt of such notice. RCW 28A.405.300; RCW 28A.405.210. The only step necessary for Cronin to invoke jurisdiction of the trial court, was to serve his request for a statutory hearing on the Superintendent within ten days of receipt of a Notice of Probable Cause for discharge or non-renewal. Once having done so, Cronin perfected his appeal for all

issues related to his employment including the failure to pay wages and benefits.

In addition to requesting a statutory hearing, all McNair did was leave open Cronin's right to file a grievance over the next 30 days. Whether she set in motion a timely request for grievance is irrelevant. In her letter to the District, McNair could have said nothing about contemplating filing a grievance. Then at some point during the 30 day window, she had every right to waive the request for a statutory hearing and file a grievance. This would have timely implemented the grievance procedure under the Collective Bargaining Agreement. The fact remains that the District didn't object to McNair's letter requesting a hearing, never made known its concerns, and never filed suit or otherwise forced Cronin to clarify or elect one remedy over the other. There was nothing vague or evasive about her request for hearing. She clearly states that she was "requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action". Her letter was direct, clear and unequivocal to preserve a statutory hearing.

B. Under the Collective Bargaining Agreement, the election of remedies does not occur until 30 days has passed.

Cronin had ten days to file a request for statutory hearing and 30 calendar days to file a grievance on his termination. RCW 28A.405.210; RCW 28A.405.300; (CP 5). Under the parties Collective Bargaining Agreement, Cronin could elect either the statutory hearing or grievance procedure, but not both. Once he elected a statutory hearing, he could not pursue a grievance in tandem with a hearing. (*Id.*) Cronin took all necessary and required steps to preserve his request for a statutory hearing. (CP 93). It was not an ambiguous request or merely a statement of "intention".

Cronin is not required to give notice of an election so McNair's email of February 8, 2012 advising the District that Cronin elected to pursue his statutory remedy is superfluous. The District already knew that by virtue of the fact that no grievance had been filed under the Collective Bargaining Agreement within 30 days of termination. To suggest that after invoking the statutory hearing procedure Cronin had an additional obligation to give notice to the District of his intention to pursue one remedy over the other is not supported in fact or law. Judge O'Connor found that Cronin did not elect his remedy until McNair's email to

the District dated February 8, 2012. (CP 94; RP 5-8). This is erroneous. That email was only to notify the District that Cronin was still pursuing his earlier timely elected request for statutory hearing. (CP 76). Judge O'Connor found that the February 8, 2012, notification to the District that Cronin was pursuing the statutory hearing was the election of his remedy which came too late because it was beyond the 10 days required by statute to pursue a statutory procedure. (RP 5-8) RCW 28A.405.210; RCW 28A.405.300. However, this totally ignores McNair's efforts on January 11, 2011 (well within the ten days required by statute) when she hand delivered the request for hearing to the District, perfecting the request for a closed statutory hearing to determine the merits of Cronin's termination. (CP 74-76; 93). To hold otherwise would ignore McNair's January 11, 2012, request for hearing and the Collective Bargaining Agreement between the parties that once "...the employee serves notice to the Board that he/she is appealing the Board's decision according to the statutory provisions, such cases shall be specifically exempted from the grievance procedure." (CP 5). Otherwise, the decision by Judge O'Connor places an additional burden on Cronin to notify the District of his election, a requirement that is not required by law or the Collective Bargaining Agreement. The only remedy left

after the 30 days expired to file a grievance was the timely elected statutory hearing process remedy, invoked by Cronin when McNair appealed and requested a hearing on January 8, 2012. (CP 74-76; 93).

The District ignored McNair's letter of January 11, 2012 and did not rely upon it for any decision. (CP 95). Leaving open the possibility to pursue a grievance is not unusual since under the Collective Bargaining Agreement, a teacher can waive one and elect the other. All McNair did was notify the District that she was requesting a statutory hearing, but until she had the chance to speak with him, was also preserving his right for the grievance procedure. Under the terms of the Collective Bargaining Agreement between the parties, this is acceptable. McNair timely informed the District that she was not going to pursue a grievance and did not waive Cronin's right to a statutory hearing. (CP 94-95). The District intentionally ignored McNair's letter and subsequent e-mail. If The District objected to McNair's failure to elect, it could have filed an action to force Cronin to elect his remedy. But his election to pursue a statutory hearing was already made and preserved.

Furthermore, the District never objected to Cronin's election for a statutory hearing until after his declaratory action was filed

to compel the District to proceed to a hearing. The Superintendent never objected to McNair's request for a hearing, just that she was not the proper party to sign the request. (CP 95). The Superintendent never objected to any election of remedies in his letter dated February 21, 2012, to McNair. (CP 95). The District has waived any claim that Cronin's request for hearing was somehow equivocal. If the statutory appeal had been withdrawn, it could not be revived since the ten day period in which to file a request for statutory hearing would have run. RCW 28A.405.300. The parties have already bargained through the Collective Bargaining Agreement that a grievance was another mechanism available to challenge the termination.

The parties recognized through the Collective Bargaining Agreement process that failure to file a request for a statutory hearing or withdrawal of a timely filed request for statutory hearing would not end the teacher's right to challenge the proposed termination except with respect to the statutory appeal procedure under RCW 28A.405.300. This was precisely the issue determined in *Oak Harbor Educ. Assn. v. Oak Harbor School Dist.*, 162 Wn.App. 254, 259 P.3rd 274 (2011). In that case the teacher initially pursued a statutory appeal from his termination and the union pursued a grievance. The teacher then elected to withdraw

the statutory appeal and pursue the grievance. The trial court dismissed the teacher's claim holding that the teacher's initial pursuit of the statutory hearing procedure constituted an election of remedies barring arbitration under the contract grievance process. Division I reversed the trial court and remanded the matter to compel arbitration. The Court stated:

> ...neither the language of the statute nor the CBA supports the District's contention that withdrawal of the request to proceed with the statutory appeal has any effect on the grievance process, and case law allows Pruss to challenge his termination under both the statute and the CBA. (Citations omitted).

162 Wn.App. at 266, fn. 4.

While the Collective Bargaining Agreement in *Oak Harbor* was silent on electing either remedy, the fact remains that in this case, Cronin did everything he was required to do in order to request and preserve a statutory hearing. The fact that Cronin elected not to pursue his grievance had no bearing on the fact that his request for statutory hearing was timely elected. If under *Oak Harbor* a teacher can withdraw the statutory hearing procedure in favor of the grievance procedure, then how can the Trial Court dismiss Cronin's case claiming that he failed to select the statutory hearing procedure in a timely fashion?

Here Cronin made an express demand for a statutory hearing. There was no waiver of that right. A waiver requires the

"voluntary and intentional relinquishment of a known right". *Lake Wash. School Dist. 414 v. Mobile Modules N.W., Inc.*, 28 Wn.App. 59, 61, 621 P.2d 791 (1980). Waiver will not be found "absent conduct inconsistent with any other intention but to forego that right". *Shoreline Sch. Dist. No. 412 v. Shoreline Ass'n. of Educ. Office Employees*, 29 Wn.App. 956, 958, 631 P.2d 996 (1981). McNair never withdrew or abandoned the request for statutory hearing. What she was attempting to preserve was the possibility that the statutory hearing procedure would be waived in favor of the grievance procedure for a determination on the merits of his termination. She did not waive the express request for a statutory hearing by simply informing the District that he may pursue a grievance and if so, would withdraw the request for a statutory hearing. No grievance was filed in this case. (CP 260-261).

C. The doctrine of election of remedies does not bar the request for statutory hearing.

The doctrine of election of remedies is "a rule of narrow scope" and its "sole purpose" is to prevent a plaintiff from recovering twice for the same wrong. *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). It may apply to bar a subsequent or parallel action on the same set of facts. *See E.G. State ex rel. Barb Restaurants, Inc. v. Wash. State Bd. Against Discrimination*, 73 Wn.2d 870, 878-879, 441 P.2d 526 (1968) (to

prohibit a litigant from taking inconsistent positions in the same action, such as by alleging mutually inconsistent causes of action in the same complaint). *See, E.G. McKown v. Driver*, 54 Wn.2d 46, 337 P.2d 1068 (1959). But in either situation, the following elements must be established before the doctrine will apply:

> 1. The existence of two or more remedies at the time of the election;
> 2. Inconsistency between such remedies; and
> 3. A choice of one of them . . . . The prosecution to final judgment of any one of the remedies constitutes a bar to the others.

Stryken v. Panell, Wn.App. 566, 832 P.2d 890 (1992) (citing *McKown*, 54 Wn.2d at 55). None of these elements were met in this case. Therefore, reliance and application of the doctrine by the Trial Court was in error.

1. Final judgment is a necessary element.

Here, the trial court held that Cronin's initial pursuit of the request for a statutory hearing was not an election. This conclusion is not supported by law, or the terms of the applicable Collective Bargaining Agreement.

Contrary to the trial court's ruling, a final judgment is a required element for the doctrine of election of remedies to become operative. *See e.g., Stryken*, 66Wn.App. at 571 (including "prosecution to final judgment" as an element of the doctrine). *McKown v. Driver*, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959)

(holding that the "prosecution to final judgment of any one of the remedies constitutes a bar to the others".) *See also* 18 Washington Practice, § 21.29 (a party must have actually obtained one remedy before he is barred from having other inconsistent remedies.) Even withdrawal is not equivalent to a "final judgment" regardless of its finality as to that specific method of achieving a remedy.

Federal law is in accord with the state authority cited above. In fact, the Ninth Circuit has expressly held that "the doctrine of election of remedies applies only after a judgment on one of the causes of action is entered". *Haphey v. Linn County*, 824 F.2d 1512 (9th Cir. 1986) (citing *Taylor v. Burlington N.R.R.*, 787 F.2d 1309, 1317 (9th Cir. 1986). In *Taylor*, a case from Washington state, Mr. Taylor was a railroad worker terminated by Burlington Northern. His union initially challenged his discharge by filing suit under the Federal Railway Labor Act (RLA). The union argued that Taylor was fit to work and had been wrongfully discharged. In conjunction with the union's lawsuit, Taylor independently filed suit in Federal District Court alleging that the abuse he suffered at work had caused a mental breakdown rendering him incapable of performing his job duties.

Thereafter, upon the union's voluntary withdrawal of the RLA suit, Burlington Northern argued that Taylor was precluded under the election of remedies doctrine from seeking different relief than he had sought in the RLA suit. The District Court rejected this argument and the 9th Circuit affirmed, stating:

> A plaintiff may prosecute actions on the same set of facts against the same defendant in different courts, even though the remedies the plaintiff seeks may be inconsistent. But as soon as one of those actions reaches judgment, the other cases must be dismissed.

Taylor, 787 F.2d at 1317 (internal citations omitted).

The Ninth Circuit further concluded that the withdrawal of the RLA suit did not trigger application of the election of remedies defense as "[N]o judgment was rendered in that case". *Id.*

D. There is no prejudice to the District.

The District can show no prejudice from allowing this matter to proceed to a statutory hearing. It has suffered no loss if this matter proceeds to a statutory hearing on the merits to determine whether the District can prove the vague and general allegations set forth in its notice of termination. (CP 91-92).

The District should not be permitted to argue that it will be prejudiced when it ignored McNair's request for statutory hearing and only raised the election of remedies issue after the declaratory

action had been filed. At no time prior to that did it consider or address any election of remedies claim.

The District claims it was confused by Cronin's efforts and considered it Cronin's "shell game". The fact remains that the District did not rely whatsoever on the communications by Sally McNair since it did not consider her request a proper appeal to the termination. (CP 93-94).

E. The Declaration of Paul Clay considered by the Trial Court is unsupported by admissible evidence.

As part of its cross motion for summary judgment, the District submitted a Declaration of Paul Clay with supporting exhibits. (CP 136-158) Affidavits supporting or opposing summary judgment are to be made on personal knowledge, set forth admissible facts, and show affirmatively that the affiant is competent to testify to the matters stated therein. (CR 56(e)) Mr. Clay's declaration is an attempt to offer testimony that is not based on personal knowledge, containing facts which are not admissible in evidence, and should not have been considered by the Trial Court. Portions of his Declaration are argument, hearsay, without foundation and an attempt to inject into the record irrelevant information.

By way of specific objection, paragraph 3 is in the form of expert opinion testimony and not admissible under ER 702 or ER

703. Mr. Clay's "good faith memory" of not seeing a statutory hearing request by a union representative is irrelevant, hearsay and without foundation under ER 802, ER 403 and ER 901. Mr. Clay is not a witness in this matter and would have to withdraw as counsel should he intend to act as a witness or offer expert testimony. RPC 3.7(a).

Paragraph 4 referencing Exhibit A to his declaration are representative examples of statutory hearing requests. They are irrelevant and hearsay under ER 403 and ER 802. Mr. Clay's self-serving remark that the "court might take particular notice" that the examples of statutory hearing requests are employees being "represented by the very same law firm that represents plaintiff here" is irrelevant and hearsay under ER 403 and ER 802.

Paragraph 5 referencing Exhibit B, which is a copy of the publication from the Washington Education Association Office of General Counsel relating to reduction in force and lay off assistance, is irrelevant. There is no foundation for this publication per ER 901, and the publication is hearsay under ER 802. There is no evidence that Cronin reviewed this document or considered it. This is an effort to have the court speculate. It is irrelevant under ER 403 and constitutes argument, not facts.

Paragraph 6 should be struck as irrelevant under ER 403. This paragraph is ambiguous. It is not a statement of fact. It is argument, an opinion, and has no foundation under ER 901.

Mr. Clay should not be permitted to provide the court with argument, legal analysis, opinion and quasi expert testimony by way of a Declaration. CR 56(e) requires that supporting and opposing affidavits must be made on personal knowledge with facts that would be admissible in evidence. Mr. Clay has not recited admissible facts that are relevant in this case. The Trial Court should not have considered his proffered evidence when ruling on any issue in this matter. Plaintiff respectfully requests that the Court find the above-referenced portions of Mr. Clay's Declaration inadmissible and should not have been considered.

VI. CONCLUSION

The important issue for this court to determine is whether or not Cronin will be allowed to pursue a determination of the merits of his claim before a statutory hearing officer and whether or not he is entitled to his wages and benefits that were wrongfully withheld pending a statutory hearing. The Superior Court's ruling undermines the public policy favoring a determination of cases on the merits. Cronin requests that this court reverse the lower court

and direct the matter to proceed to a determination of the merits before a statutory hearing officer.

Dated this 12th day of June, 2015.

Respectfully submitted,

POWELL, KUZNETZ & PARKER, P.S.

By _____
Larry J. Kuznetz, WSBA #8697
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Michael F. Cronin

APPENDICES

FILED
APRIL 10, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

MICHAEL F. CRONIN, Appellant, v. CENTRAL VALLEY SCHOOL DISTRICT, Respondent.	)	No. 31360-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration of this court's decision of March 13, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: April 10, 2014

PANEL: Jj. Brown, Siddoway, Fearing

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

THE SUPREME COURT OF WASHINGTON

MICHAEL F. CRONIN, Respondent, v. CENTRAL VALLEY SCHOOL DISTRICT, Petitioner.	)	NO. 90256-9 **ORDER** C/A NO. 31360-3-III

A Special Department of the Court, composed of Chief Justice Madsen and Justices Fairhurst, Stephens, Wiggins and Yu, considered at its August 5, 2014, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of August, 2014.

For the Court

Madsen, C.J.
CHIEF JUSTICE