NO. 93551-3

IN THE SUPREME COURT OF WASHINGTON STATE

THOMAS MCLAREN et al.

Petitioner

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

Respondent

PETITION FOR REVIEW

Appeal from Division One

Case No. 72512-2-1

The Honorable ACJ Trickey

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A. IDENTITY OF PETITIONER

Petitioners are brothers Thomas and Alexander McLaren.

B. DECISION APPEALED

Petitioners appeal Division 1's Denial of their Motion for Reconsideration entered on July 20, 2016, and its Opinion entered on June 20, 2016, for which reconsideration was sought.

C. ISSUES

1. Division 1's decision conflicts with decisions of the Supreme Court regarding the finality of an order as a prerequisite for appeal.

2. Division 1's decision confuses"costs" and "damages" and thereby conflicts with Supreme Court decisions safeguarding the due process right of notice and fair opportunity to be heard and rebut evidence.

D. STATEMENT OF THE CASE

The Department of Natural Resources (DNR) seized vessels belonging to brothers Thomas and Alexander McLaren for trespass on state waters (not for physical condition[1]) under the Derelict Vessel Act.

They appealed the seizure and an administrative hearing was set.

The McLarens' attorney (unbeknownst to them) agreed to DNR's request to bifurcate the case so the hearing on liability

[1] The vessels were impeccably maintained former Navy ships nearing completion as long-range expedition yachts. At hearing DNR valued each ship at $5 million. The McLarens valued them higher.

would be followed by a second later hearing on damages. Orders and pleadings in the case reflect the bifurcation arrangement and refer to a future hearing on damages. (They do not suggest in any way that the case would be "final" upon finding liability only without a determination of damages.)

The McLarens discharged their attorney for this and other problems.

After hearing only the liability aspect of the case, the admin court sent a letter informing McLarens its decision was "final" for purpose of appeal to superior court. CP 3.

Believing the admin court's advice to be correct, the McLarens *pro se* prepared and mailed copies of their petition for review to all parties in sufficient time to be received by the 30-day statutory deadline.

DNR subsequently moved the superior court to dismiss review for lack of jurisdiction on the grounds the admin board had not received a copy. DNR also moved for additional relief of dismissing Alexander McLaren as an appellant. CP45-108

The superior court granted DNR's motion and entered an order dismissing the McLarens' petition for review with prejudice for lack of jurisdiction on the technical grounds that the admin board had not been served with a copy of the petition for review. The superior court also granted the additional relief requested. CP

152-5. The McLarens then moved for reconsideration which the superior court also denied. CP 156-165.

Researching this area of law, the McLarens learned the admin order failed to meet the Final Judgment Rule – a ubiquitous standard that is in force throughout the nation. Under this rule, the proper test of whether an administrative decision is final is whether it "ends litigation and leaves nothing to do but execute on the judgment". Under this rule the admin court's decision could not be final because it could not execute on damages that have not yet been heard and determined due to bifurcation of the case. Thus, because the decision was not final, it was not eligible for review by the superior court and the attempt by the McLarens to lodge review at superior court was premature and ineffective.

The McLarens then appealed the superior court order to Division 1. Their appeal argued that without a determination of damages, the admin decision was not final and, therefore, not eligible for superior court review.

Division 1 affirmed the superior court's dismissal of review of the admin order. It found that the admin order was final and eligible for review and that the McLarens failed to serve a copy of the petition for review on the admin board within the 30-day statutory deadline to vest jurisdiction in superior court.

However, in apparent contradiction, Division 1 also affirmed that "the administrative **proceeding was bifurcated** . . . and the Board's order resolved only liability issues . . . and the amount of **costs . . . is to be determined at a future hearing**. In a footnote Division 1 affirmed "**There is no dispute that the issues of liability and costs [*sic* damages] were bifurcated.**"

As of the date of this petition for review to the Supreme Court, an award of damages has not been determined and remains to be determined at a future hearing. In a letter, a copy of which is enclosed herewith, DNR billed the McLarens $1.4 million in damages.

Damages in this case are unique, complicated and will be hotly disputed. They involve the cost of demolishing two ships. There are no commonly-available tables for calculating the costs of ship-breaking that a court can consult to calculate damages in a ministerial manner. The ships have steel hulls, aluminum super-structures, and operational engines, gears, and equipment. The costs to break the ships will be off-set by revenue from the sales of the high-priced commodity metals aboard and sales of the operational engines, gears, and equipment. As a result, the amount of damages are unique, complex, and not readily determinable from an external standard. They will be decided by the administrative court only after much further litigation.

This petition for review to the Supreme Court followed.

F. ARGUMENT

1. Division 1's decision conflicts with decisions of the Supreme Court regarding the finality of an order as a prerequisite for appeal.

In this case Division 1 properly asserts that review of administrative orders is limited to final orders. But Division 1 has its own test for determining "finality" which conflicts with guidance given by the Washington Supreme Court.

The Division 1 decision asserts the admin order in this case was the "consummation" of the admin process because it accomplished certain things: it followed a five-day hearing, it established DNR's right to take possession of the vessels, and it established liability for future costs [*sic* damages]. (Division 1's decision confuses costs with damages as explained below.)

In *Department of Ecology v City of Kirkland*, 84 Wn.2d 25, 523 P.2d 1181 (1974) the Supreme Court of Washington, en banc, considered the issue of "whether a petitioner seeking judicial review has prematurely resorted to the courts" under the Washington Administrative Procedure Act. "What is sometimes called the 'final order doctrine' prevents review of an order which is not final." *Federal Power Comm'n v. Metropolitan Edison Co.*, 304 U.S. 375, 82 L.Ed 1408 58 S.Ct. 963 (1938). The Court cautioned that "whether or not the statutory requirements of finality are

satisfied in any given case depends **not upon the label affixed** to its action by the administrative agency, **but rather upon a realistic appraisal of the consequences of such action**. *Isbrandtsen Co. V. United States*, 211 F.2d 51, 55 (D.C. Cir. 1954). After failing to find Washington cases discussing what was meant by a "final decision" under RCW 34.04.130, the Court then felt obliged to "**look to the federal realm**" for guidance in this area.

In the federal realm, the finality doctrine is known as the Final Judgment Rule – a ubiquitous standard that is firmly in force in every district and circuit of the federal judicial system. **Under this rule, the proper test of whether an administrative order is "final" and the "consummation of the process" is whether the order constitutes the "end of litigation on the merits between the parties and leaves nothing for the court to do but execute on the judgment".**

Federal cases upholding the Final Judgment Rule are legion: *Ray Haluch Gravel Co. v Central Pension Fund of Int'l Union of Operating eng'rs*, __ U.S. __, 134 S. Ct 773, 187 L. Ed. 669 (2014) ("final" decision is one that ends litigation on the merits and leaves nothing left but to execute on judgment); *Catlin v United States*, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945) (decision ending litigation on the merits leaving court only to execute on judgment is final); *Leftbridge v Connecticut State*

Trooper Officer #1283, 640 F.3d 62 (2d Cir. 2011) (quoting *Catlin*); *Giles v Campbell*, 698 F.3d 153, (3d Cir. 2012) ("final" decision ends litigation and leaves nothing for court to do but execute on judgment); *Dickens v Aetna Life Ins. Co.*, 677 F.3d 633 (4 th Cir. 2012) (quoting *Catlin*); *United States v Branham*, 690 F.3d 633 (5 th Cir. 2012) (order is only final when it ends litigation on the merits and leaves nothing to do but execute on judgment); *Armistad v State Farm Mutual Auto. Ins. Co.*, 675 F.3d 989 (6 th Cir. 2012) (no final decision until litigation on the merits has ended leaving nothing for court to do but execute on judgment); *Palka v City of Chi.*, 662 F.3d 428 (7 th Cir. 2012) (for order to be final, it must end litigation on merits and leave nothing for court to do but execute on judgment); *Gannon Int'l Ltd. V Blocker*, 684 F.3d 785 (8 th Cir. 2012) (for order to be final, it must end litigation on merits and leave nothing for court to do but execute on judgment); *United States v Guerrero*, 693 F.3d 990 (9 th Cir. 2012) (appellate jurisdiction depends on decision ending litigation on the merits leaving nothing to do but execute on judgment); *United States v F & M Schaefer Brewing Co.*, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 721 (1958); *Calderon v GEICO Gen. Ins. Co.*, 754 F.3d 210 (4 th Cir. 2014) (**judgment not final because court had not found all facts necessary to compute damages**); *Accord Zinc v United States*, 929 F.2d 1015 (5 th Cir. 1991) (**judgment that did not**

specify damages amount held not final); *Minnesota Dep't of Revenue v United States*, 184 F.3d 725 (8 th Cir. 1999) (**amount of money essential element of judgment,** but sufficient if judgment specifies means to determine amount due); *Franklin v District of Columbia*, 163 F.3d 625 (D.C. Cir. 1998) (in damages and injunction action, **final judgment must declare not only liability but also specify damages and consequences of liability**).

In summary, then, in *Ecology v Kirkland* the Court said (1) any "final" label affixed by an admin agency could be wrong, so (2) look to federal law for guidance in determining whether an order is truly final under the Final Judgment Rule.

Division 1's decision in this case conflicts with the federal approach adopted by the Supreme Court in *Ecology v Kirkland.* The admin order affirmed by Division 1 fails the "finality test" because it covers only liability and leaves damages undetermined. The admin order fails to include an award of damages because the case was bifurcated and damages have not yet been litigated even as of the date of this brief. Contrary to Division 1's opinion, the admin order is not yet the "end" or "consummation" of the case between the parties so as to leave nothing to do but execute on the judgment.

Under the Supreme Court's *Ecology v Kirkland* decision, a realistic appraisal of the status of this admin case to date is that the

admin court cannot execute on a judgment for damages that have not yet been determined. As a result, the "final" label affixed by the admin court to its order is erroneous, and misled the McLarens into believing the order was ripe for appeal when it was not.

Even if the order accomplished certain aspects (mentioned above), it nevertheless failed the finality test because it did not specify the *amount* of damages which amount is integral to a final judgment. The legion of cases cited above require that damages be specified as an integral part of a final judgment "so that nothing remains for the court to do but execute on the judgment." *Calderon v GEICO Gen. Ins. Co.*, 754 F.3d 210 (4 th Cir. 2014) (**judgment not final because court had not found all facts necessary to compute damages**); *Accord Zinc v United States*, 929 F.2d 1015 (5 th Cir. 1991) (**judgment that did not specify damages amount held not final**); *Minnesota Dep't of Revenue v United States*, 184 F.3d 725 (8 th Cir. 1999) (**amount of money essential element of judgment,** but sufficient if judgment specifies means to determine amount due); *Franklin v District of Columbia*, 163 F.3d 625 (D.C. Cir. 1998) (in damages and injunction action, **final judgment must declare not only liability but also specify damages and consequences of liability**).

2. Division 1's decision confuses "costs" and "damages" and thereby conflicts with Supreme Court decisions safeguarding the due process right of notice and fair opportunity to be heard and rebut evidence.

As stated above, under the Final Judgment Rule an award of damages is integral to the merits of a case.

A limited exception to the Final Judgment Rule exists where a question that is collateral to the merits remains to be decided. Attorney fees are such a collateral matter. *Budinich v Becton Dickinson & Co.*, 486 U.S. 196, 108 S. St. 1717, 100 L. Ed. 2d 178 (!998) (decision leaving award of attorney fees undecided is appealable).; *Barrow v Falck*, 977 F.2d 1100 (7 th Cir. 1992) (lingering dispute about attorney fees did not affect finality of judgment on merits); *United States ex rel. Shutt v Community Home & Health Care Svrs. Inc.*, 550 F.3d 764 (9 th Cir. 2008) (judgment on merits is final and appealable even if court retains collateral issue of awarding attorney fees).

The admin order affirmed by Division 1 indicates that the respondent will be entitled to attorney fees and damages. But neither the amount of attorney fees or damages is specified.

If the admin order had solely omitted the amount of attorney fees, the order would fall within the collateral question exception to the Final Judgment Rule because the award of attorney fees is collateral, not integral, to the merits of the case.

Although under the Final Judgment Rule an award of damages is integral to the merits of the case, a very limited

exception exists where the damages are readily determinable in a straightforward ministerial manner by direct resort to an external standard. This exception has been applied only in welfare and social security cases where commonly-available financial tables are used to calculate recipients' benefits.

But even this very small exception is not available because in this case damages are not readily determinable in a ministerial manner from an external standard. In this case damages are unique, complicated and disputed. Damages in this case involve the cost of demolishing two ships. There are no commonly-available tables for calculating the costs involved in ship-breaking. There are no commonly-available tables for ship-breaking that a court can consult to calculate damages in a ministerial manner.

Damages in this case will be complex and highly disputed. The vessels have steel hulls, aluminum superstructures, and operational engines, gears, and equipment. The costs to break the ships will be off-set by revenue from the sales of the high-priced metals aboard and sales of the functioning engines, gears, and equipment. As a result, the amount of damages is not readily determinable from an external standard (as such tables do not exist), but are unique and complex and will be decided by the admin court only after further litigation.

Division 1's decision conflates "costs" with "damages"; it speaks of costs when it really means damages.

Black's Law Dictionary defines final judgment as "a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for award of **costs** and, sometimes, attorney's fees, and enforcement of the judgment." Black's Law Dictionary, 847 (7th ed.1999).

Black's defines costs differently from damages. **Costs are "charges or fees taxed by the court,** such as filing fees, jury fees, courthouse fees, and reporter fees: the expenses of litigation, prosecution, or other legal transaction. *Id.*

In contrast, **Damages are "money claimed by, or ordered to be paid to, a person as compensation for loss or injury**." *Id.*

Division 1's decision frequently uses the term "costs" when it actually means "damages" and thereby conflicts with Supreme Court decisions safeguarding the due process right of notice and fair opportunity to be heard and rebut evidence.

In this case the costs (as correctly defined by Black's) of litigating this administrative case will amount to a few hundred dollars. But damages (as defined by Black's) could amount to $1.4 million as asserted in the DNR letter to the McLarens.

If Division 1's decision is allowed to stand, the McLarens will be in the paradoxical position of still being able to litigate the

amount of damages at the admin level pursuant to the bifurcation arrangement in effect, but being unable to appeal any outcome because under Division 1's decision, the McLarens' right to appeal has been lost and exhausted. Such a paradox is nonsense. Neither the legal definition of the "Final Judgment Rule" nor the common definition of the word "final" contemplates more than a *single* final event. In other words, the Final Judgment Rule does not allow multiple events to be "tied" for first place.

Due process generally requires that a state provide a person with notice and an opportunity to be heard before it can deprive him of life, liberty, or property. *Zimmerman v Burch*, 494 U.S 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); *Mullane v Cent. Hanover Bank & Trust Co.*, 339 U.S. 70 S. Ct. 652, 94 L. Ed. 865 (1950). Such opportunity to be heard should include the right appellate review. If Division 1's decision is upheld, it denies the McLarens the right to future appellate review of the future admin determination of damages. Thus, it denies them due process.

G. CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Petition be accepted for Review.

Alexander McLaren Thomas A.F. McLaren

Declaration of Service, and Incorporation by Reference.

Petitioners declare they have mailed a copy of this Petition to opposing counsel. Petitioners hereby incorporate in this Petition their Appellant's Brief and Reply Brief on file in Division One.

Alexander McLaren Thomas A.F. McLaren

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

THOMAS MCLAREN, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, Respondent.	No. 72512-2-I ORDER DENYING MOTION FOR RECUSAL AND TRANSFER, AND MOTIONS FOR RECONSIDERATION AND PUBLICATION

The appellant, Thomas McLaren, has filed a "motion for reconsideration and publication of opinion" and a "motion for recusal of signatories and transference of this appeal to another division." The court has taken the matters under consideration and has determined that the motions should be denied.

Now, therefore, it is hereby

ORDERED that the motion for recusal of signatories and to transfer to another division is denied; and, it is further

ORDERED that the motions for reconsideration and opinion publication are denied.

Done this 20th day of July, 2016.

FOR THE COURT:

Trickey, J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THOMAS MCLAREN, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, Respondent.	No. 72512-2-I DIVISION ONE UNPUBLISHED OPINION FILED: June 20, 2016

TRICKEY, A.C.J. — Thomas McLaren appeals the trial court's dismissal of his petition seeking judicial review of an adverse decision of the Pollution Control Hearings Board. Because McLaren did not serve the Board within the time required by statute, RCW 34.05.542, we affirm.

FACTS

In 2013, the Washington State Department of Natural Resources (DNR) deemed two vessels owned by Thomas McLaren to be derelict under the derelict vessel act, chapter 79.100 RCW, and took custody of them. Following a five-day administrative hearing, the Pollution Control Hearings Board (Board) issued detailed findings of fact, conclusions of law, and an order affirming DNR's actions. Both parties were represented by counsel at the hearing before the Board.

Some 29 days after the Board issued its order, McLaren, acting pro se, filed a petition for judicial review of the Board's order in King County Superior Court. On May 27, 2014, the deadline for appealing the Board's decision to the superior court, DNR

received a copy of McLaren's petition for review in the mail. McLaren did not deliver a copy of the petition to the Board.

DNR filed a motion to dismiss. Because McLaren failed to serve the Board, the agency that issued the decision being appealed, within 30 days as required by Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, the superior court granted the motion and dismissed the petition for review. The court later denied McLaren's motion for reconsideration.

ANALYSIS

McLaren claims that the superior court erred in dismissing his petition for review with prejudice. We disagree.

The APA generally provides the "exclusive means of judicial review of agency action." RCW 34.05.510. The APA requires that a petition for judicial review of an agency order shall be filed with the court and served on the agency that rendered the decision of which review is sought and all parties of record within 30 days after service of the final order. RCW 34.05.542(2). A party serves the agency by delivering a copy of the petition to the director's office at the agency's principal office or by serving the agency's attorney of record. RCW 34.05.542(4), (6). "Timely service of a copy of the petition for [judicial] review on the Board, the agency whose order is the subject of the petition, is required." Sprint Spectrum, LP v. Dep't of Revenue, 156 Wn. App. 949, 955, 235 P.3d 849 (2010).

A petition for review is subject to dismissal if the APA's procedural service and filing requirements are not followed. See, e.g., Sprint, 156 Wn. App. at 952-54 (where Sprint served copies of its petition for review on the Department of Revenue but did not

serve the Board of Tax Appeals, the court dismissed the petition due to noncompliance with service requirements of the statute), review denied, 170 Wn.2d 1023 (2011); Muckleshoot Indian Tribe v. Dep't of Ecology, 112 Wn. App. 712, 727-28, 50 P.3d 668 (2002); Cheek v. Emp't Sec. Dep't, 107 Wn. App. 79, 84-85, 25 P.3d 481 (2001). We review de novo a superior court's order of dismissal for failure to comply with the service requirements of the APA. Ricketts v. Bd. of Accountancy, 111 Wn. App. 113, 116, 43 P.3d 548 (2002).

McLaren does not challenge the superior court's determination that he was required to serve the Board within 30 days under RCW 34.05.542(2) in order to obtain judicial review of the Board's order and that he failed to do so. Instead, McLaren contends that that the Board's order was not final, his petition for judicial review was "premature," and therefore, the superior court should have dismissed the petition without prejudice.[1] Specifically, McLaren points out that the administrative proceeding was bifurcated by agreement and the Board's order resolved only liability issues.[2] At the time of the administrative proceeding, in December 2013 and March 2014, DNR had yet to make a final determination of costs, and the amount of costs to be assessed against McLaren was to be determined at a future hearing. McLaren claims that only a comprehensive decision on both liability and costs would be a final agency order subject to judicial review under the APA.

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[1] Appellant's Br. at 1.

[2] Although a commissioner of this court denied his motion to supplement the record, McLaren relies upon documents outside the record to establish that the proceeding was bifurcated. Nevertheless, the procedural posture is evident from the transcript of the hearing on the motion to dismiss. There is no dispute that the issues of liability and costs were bifurcated.

As DNR notes, McLaren did not file a response to its motion to dismiss in the superior court.[3] But even if we assume that McLaren properly preserved the claim of error, he fails to identify any authority supporting his position that the Board's order was not final merely because the issue of costs was segregated and reserved for a future determination.

Only final agency actions are subject to judicial review. Wells Fargo Bank, NA v. Dep't of Revenue, 166 Wn. App. 342, 356, 271 P.3d 268 (2012). "An agency action is 'final' when it 'imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.'" Wells Fargo Bank, 166 Wn. App. at 356 (internal quotation marks omitted) (quoting Bock v. State Bd. of Pilotage Comm'rs, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978)).

The Board's order was the consummation of the five-day administrative hearing. The order establishes DNR's right to take possession of the derelict vessels based on the standards set forth in the derelict vessel act. The order further establishes McLaren's liability for the costs associated with DNR's actions based on his ownership of the vessels. McLaren does not assert that the Board failed to resolve any legal or factual issues that were presented at the hearing. The Board's order was a final order.

Alternatively, McLaren contends that even if the Board's order was a final agency action subject to judicial review, dismissal of the petition for review was improper because he substantially complied with the service requirements of RCW 34.05.542(2). Substantial compliance means that a "'statute has been followed sufficiently so as to

[3] McLaren described the Board's decision as a final order in his petition for review. [CP 1] Nevertheless, counsel who appeared on McLaren's behalf at the hearing on DNR's motion to dismiss argued that the matter should be remanded to the Board to issue a final order encompassing both liability and costs, which would then be subject to judicial review.

carry out the intent for which the statute was adopted.'" Banner Realty, Inc. v. Dep't of Revenue, 48 Wn. App. 274, 278, 738 P.2d 279 (1987) (quoting In re Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)).

Even if the doctrine of substantial compliance is applicable, McLaren's belated attempt to show that he mailed a copy of the petition to the Board within the statutory time limit does not satisfy it. McLaren did not raise the issue of substantial compliance until he filed a motion for reconsideration. And then, apart from his declaration stating that he mailed a copy of his petition to the Board on May 22, 2014, he supplied only a receipt showing the purchase of a single first-class stamp on that date and copies purporting to show envelopes addressed to the King County Superior Court, the Assistant Attorney General, and the Board, without postmarks or other indication of mailing or dates. This is insufficient to show substantial compliance.

Because the Board's order was final and McLaren failed to serve the Board with his petition within the time required by statute, the superior court did not err in dismissing his petition for review.

Affirmed.

Trickey, ACJ

WE CONCUR:

Leach, J.

Cox, J.