Case No. 93655-2

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Roland Killian & Dennis Bailey, Appellants

v.

International Union of Local Operating Engineers, Local 609-A,
Defendant.

PETITION FOR REVIEW

DIVISION ONE,
WASHINGTON COURT OF APPEALS
CASE NO. 74024-5-I

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IDENTITY OF PETITIONER

The petitioners are Roland Killian and Dennis Bailey.

COURT OF APPEALS DECISION

Mr. Killian and Mr. Bailey seek review of the Court of Appeals' published opinion, Killian et. al. v. International Union of Operating Engineers Local 690-A, et. al., no. 74024-5-1 (August 22, 2016) (Appendix (App.) A), which affirmed the King County Superior Court's order granting Local 690-A's motion for summary judgment. (App. B).

ISSUES PRESENTED FOR REVIEW

1. Whether a union who engages in the unauthorized practice of law by conduct admittedly outside of the scope of their authority under any CBA be allowed the advantage of a restricted six month statute of limitations when a three year statute of limitations is applied to all other persons and/or entities.

2. Whether a Consumer Protection Act claim based upon unlawful conduct associated with the unauthorized practice of law by a union relating to conduct engaged in outside of the scope of the CBA is subject to the same four year statute of limitations as set out in RCW 19.86.120 that applies to all other persons and/or entities.

3. Whether RCW 4.16.130 applies and establishes a two year

statute of limitations to Washington state claims for Breach of Duty of Fair Representation brought against a labor union.

STATEMENT OF THE CASE

A. Local 609-A acts outside of the scope of its' authority under the CBA and negotiates a specific amount for resolution of Mr. Killian's and Mr. Bailey's non-union civil claims.

In its' decision, the Court of Appeal left out crucial facts as follows:

Mr. McBee, the union representative for Local 609-A during a mediation that was to address the union claim only, worked to settle Mr. Killian's and Mr. Bailey's non-union civil claims. *See* CP 164, 166-170 & 194; *See also* CP 386-387 (Dep. McBee, pgs. 199:13-201:10). Mr. McBee did this knowing that both were represented by counsel. *Id.* Mr. McBee did this knowing that the CBA did not provide him with authority to settle those claims. *See* CP 370 (Dep. McBee, pg. 136:9-23); CP 372 (Dep McBee, pgs. 143:9-10, *see also* 142:6-143:11) & CP 386 (Dep. McBee, pg. 200:1-22). Mr. McBee negotiated a specific amount with Seattle Public Schools (SPS) for resolutions of those claims including an amount for attorney fees. CP 386 (Dep. McBee, pg. 200:1-22). The negotiated settlement agreement included the following provision,

> 2. Consideration. In exchange for Killian withdrawing his grievance and fully releasing all known and unknown claims against the District, and the other promises contained in this Agreement, the District agrees to the following:

2.1 Gross Settlement Amount. The District will pay Killian the gross sum ofone hundred thousand dollars ($100,000) ("Total Settlement Amount") in full settlement of his grievance and all known and unknown claims by or before October 18, 2013.

2.2 Settlement Characterization. Forty-nine thousand five hundred dollars ($49,500) of this Total Settlement Amount will be considered a settlement of disputed) wage claims ("Back Wages Settlement Amount").Fifty thousand five hundred dollars ($50,500) of this Total Settlement Amount will be considered a settlement of (disputed) non-wage claims for general/compensatory damages, including emotional distress, etc., and for Killian's costs ("General Damages Settlement Amount").

CP 164 & 171-175 & CP 381-383 (Dep. McBee, pgs. 180:6-185:2). During his deposition Mr. McBee acknowledged that the amount of $50,000 listed above was for non-union civil claims and the cost to be covered were attorney fees. CP 386 (Dep. McBee, pg. 200:1-22); *See also* CP 370 (Dep. McBee, pg. 136:9-23). This is not the typical case wherein an employer requests a union obtain a vague general waiver from a grievant. Mr. McBee worked to reach a settlement of claims outside of the CBA, including an amount for counsel's attorney fees, then presented that to Mr. Killian and Mr. Bailey advising them that the amount was a fair settlement of their claims. *Id.*, & CP 164 & CP 194-195.

B. A brief summary of what led to the grievance.

In or about May 1999, Petitioner Roland Killian began his

employment with Seattle Public Schools ("SPS"). CP 209 (Dep. Killian, pg. 14:2-3). Petitioner Dennis Bailey began employment with SPS in May, 2006. CP 280 (Dep. Bailey, pgs. 14:24-15:1; 16:2-10). Mr. Killian was employed at SPS for approximately 13 1/2 years working his way up from an apprentice to a gardener to a grounds foreman. *Id.* (pg. 42:18-24). Prior to September 2011, Mr. Killian had never received any disciplinary action during his employment with SPS. CP 161. There were several gardeners under his lead including Petitioner Dennis Bailey and Susan Wicker. *Id.* (pg. 47:25-48:6).

What happened to Mr. Killian and Mr. Bailey that led to their termination is not directly relevant to this appeal. In summary, Mr. Bailey lodged a complaint of sexual harassment against a co-worker, Susan Wicker. Ms. Wicker in turn lodged several complaints that were unfounded and ultimately a complaint against Mr. Bailey and Mr. Killian that resulted in both men being placed on administrative leave for over a year and then terminated. CP 292 -294 (pgs. 59:5-10; 60:4-19; 64:15-65:12); CP 291 (pgs. 55:18-58:19); CP 192-193 & 201; CP 232 (pg. 108:11-24); CP 222 (Dep. Killian, pgs. 65:7-66:9); CP 287(Dep. Bailey pgs. 39:17-40:3); CP 211 (Dep. Killian, pg. 23:1-5); CP 296 (Dep. Bailey, pg. 73:9-12). The allegations raised by Ms. Wicker were false. CP 226 (Dep. Killian, pg. 84:15-21) & CP

287 (Dep. Bailey, pgs. 39:17-40:3); *See also* CP 162 & CP 192-193.

C. The grievance process & mediation.

1. Local 609-A concludes the investigation was faulty and agrees to pursue a grievance on behalf of Mr. Killian and Mr. Bailey.

Local 609-A is the collective bargaining unit for classified employees of SPS including grounds employees. CP 216 (Dep. Killian, pgs. 42:20-43:2). Both Mr. Killian and Mr. Bailey were members of Local 609-A and sought advice from the union when they were notified of the investigation. CP 222 (Dep. Killian, pgs. 66:17-67:11); CP 290 (Dep. Bailey, pg. 51:11-21). Local 609-A assigned union representative Michael McBee to assist Mr. Killian and Mr. Bailey in the process. CP 357 (Dep. McBee, pg. 84:7-13).

When Mr. Killian and Mr. Bailey received notice of their termination in December 2012, both notified Local 609-A and requested that a grievance be pursued. CP 222 (Dep. Killian, pgs. 66:17-67:11) & CP 296 (Dep. Bailey, pg. 74:5-7). They were told by Mr. McBee that he would represent them through the grievance process. CP364 (Dep. McBee, pgs.111:22 -112:22). Unfortunately Mr. Killian and Mr. Bailey were confused with the process as they rarely met with Mr. McBee to discuss their cases. CP 162-163; CP 193. Both Mr. Killian and Mr. Bailey met with Mr. McBee only during times they were to be at SPS for hearings. *Id.* While they were generally aware of what the grievance process entailed, they were frequently lost as to what was

occurring and what the outcome of each step was. *Id.* Both Mr. Killian and Mr. Bailey voiced their frustrations to Mr. McBee. *Id.* Believing they had been wronged and may have other civil claims, in March 2013 Mr. Killian and Mr. Bailey sought the help of outside counsel and retained an attorney to pursue their non-union civil claims. CP 163 & CP 193-194. Finally, they were eventually told by Mr. McBee that the initial steps were concluded and that the next step would be to proceed to arbitration. *Id., See also* CP 370 (Dep. McBee, pgs. 133:16-134:5). Mr. McBee also explained that Local 609 -A would be requesting the parties agree to first submit the grievances to mediation with a Public Employees Relations Commission ("PERC") mediator. *Id.*

2. Local 609 -A works to settle all Mr. Killian's and Mr. Bailey's claims, all claims including non-union civil claims that are outside of the scope of the CBA, without Mr. Killian's and Mr. Bailey's knowledge or consent.

Both Mr. Killian and Mr. Bailey were initially confused by Mr. McBee's recommendation that they participate in a PERCs mediation. CP 163 & CP P193-194. Because they had concerns, they had signed a fee agreement with their private counsel indicating they would not attempt to settle their claims without counsel's involvement, they did not want to participate in a mediation that would include resolutions of all their claims

without the involvement of counsel. *Id.*, CP 238-239 (Dep. Killian, pgs. 132:20-133:1),CP 306 (Dep. Bailey, pg. 114:2-9), CP 372 (Dep. McBee, pgs. 142:6-143:11). After Mr. Killian and Mr. Bailey raised these concerns, they were told by Mr. McBee and the attorney representing Local 609 -A, that the mediation was intended to address only the union claims. CP 372 (Dep. McBee, pgs. 142:6-143:11) & CP 431-433.

There were two mediation sessions held between SPS, Local 609 -A, with Mr. Killian and Mr. Bailey participating, and a PERCs mediator. CP 372 (Dep. McBee, pgs. 149:23-150:22). The first session occurred in August 2013. *Id.* During that session the parties discussed the matter but no agreement was reached. *Id.* Mr. Killian and Mr. Bailey did have concerns as it appeared to them that there were attempts by SPS to include a discussion of resolution of all of their claims, including their non-union civil claims. CP 163 & 194. When this came up, Mr. Killian and Mr. Bailey again reminded Mr. McBee and SPS that it had retained private counsel and they could not resolve those claims as they would be responsible for attorney fees and it would result in a breach of their contract. *Id., See also* CP 370-371 & 387-388 (Dep. McBee, pgs. 137:24 - 139:5 & 200:6-201:10. However, the discussion did not progress very far and the mediation was rescheduled to September 9, 2013. CP 374 (Dep. McBee, pgs. 149:23-150:22).

During the September 9th mediation, SPS made an offer to settle and provided a copy of a proposed settlement agreement. CP 164 & 166-170; *See also* CP 386-387 (Dep. McBee, pgs. 199:13-201:10). The settlement agreement was not complete, in that the figures were not filled in, however, it contained the following provision:

> 2. Consideration. In exchange for Killian withdrawing his grievance and fully releasing all known and unknown claims against the District, and the other promises contained in this Agreement, the District agrees to the following:
>
> 2.1 Gross Settlement Amount. The District will pay Killian the gross sum of _____($_____) ("Total Settlement Amount") in full settlement of his grievance and all known and unknown claims by or before April 19, 2013.
>
> 2.2 Settlement Characterization. _____($_____) of this Total Settlement Amount will be considered a settlement of 9disputed) wage claims ("Back Wages Settlement Amount"). _____($)_____) of this Total Settlement Amount will be considered a settlement of (disputed non-wage claims for general/compensatory damages, including emotional distress, etc., and for Killian's costs ("General Damages Settlemetn Amount").

CP 164 & 166-170.; *See also* CP 375 (Dep McBee, pgs. 153:7-155:1). When Mr. Killian and Mr. Bailey received this during the mediation they were again concerned. CP 164 & 194. When the discussions began regarding the

settlement of all claims, Mr. Killian and Mr. Bailey again reminded Mr. McBee and the others involved that they had a private attorney and could not resolve the non-union claims without her involvement as it would be contrary to the contract they signed and they would be required to pay attorney fees. *Id.*; *See also* CP 370-371, 377 & 386-387 (Dep. McBee, pgs. 136:9-136:23; 137:24-139:5; 161:10-162:13 & 200:6-201:10). Mr. McBee responded indicating that their counsel could not participate in the PERCs mediation. *Id.* However, in looking at the proposed settlement, it included a provision for general damages and payment of costs. *Id.* Mr. Killian and Mr. Bailey were confused, not sure of what this meant but knew the only costs they had incurred at the time and discussed were private counsel's attorney fees. CP 164 & 194. Mr. Killian and Mr. Bailey were told that the provision was intended to cover their attorney fees. *Id.* Regardless, because they could not reach a settlement amount that was acceptable to anyone, the mediation ended. CP 164 & 194; CP 375 (Dep. McBee, pgs. 153:7-156:22). Mr. Killian and Mr. Bailey were told by Mr. McBee that Local 609 -A would continue to represent them and they would be moving to arbitration. *Id.*,*See also* CP 377-378 (Dep. McBee, pgs. 164:11-165:2).

D. After mediation in September 2015, Local 609 -A votes to pursue arbitration on behalf of Mr. Killian and Mr. Bailey.

Local 609 -A held regular meetings for its members monthly. CP 340 (Dep McBee, pgs. 15:24-16:16). After the mediation on September 9, 2013, the Local 609 -A Board met and voted to pursue arbitration on behalf of the Mr. Killian and Mr. Bailey. CP 361-362 (Dep. Of McBee, pgs. 100:3-101:22). Both Plaintiff Killian and Plaintiff Bailey were told that the Board had voted and their arbitrations would be pursued. CP 164 & 194.

E. After the vote to pursue arbitration, without Mr. Killian's or Mr. Bailey's knowledge or consent, Local 609 -A negotiates a settlement with SPS, including a settlement of Mr. Killian's and Mr. Bailey's non-union civil claims.

Unknown to Mr. Killian and Mr. Bailey, Mr. McBee continued negotiations with SPS after the Board had voted to pursue the arbitration. CP 164, CP 194-195 & CP 240 (Dep. Killian, pg. 137:14-21); *See also* CP 382-384 (Dep McBee, pgs. 181:3-191:7). This includes the facts set out above, those facts not included in the Court of Appeals decision. From what Mr. Killian and Mr. Bailey have been able to ascertain, SPS extended an offer to Local 609 -A, through Mr. McBee that included the provision outlined above, that is with figures inserted for general damages and costs intended to compensate them for their non-union civil claims and attorney fees. *See* CP 164 & 171-175 & CP 381-383 (Dep. McBee, pgs. 180:6-185:2). On September 17, 2013, Mr. McBee called the Mr. Killian and Mr. Bailey and

told them the offer had been extended, that it was a "good" offer and that they should accept it. CP 164 & CP 194-195.

According to records received from Local 609 -A, Mr. McBee notified the Board by email and an email vote regarding acceptance of the offer began on September 17, 2013. CP 387 (Dep. McBee, pgs. 204:12-22 CP 424-430. Records produced by Local 609 -A show that a settlement agreement was signed by Local 609 -A on, Friday, September 20, 2013. CP 424-430 (Dep. McBee, Exhibit 12), *See also* CP 385-386 (Dep. McBee, pgs. 195:10-196:19; 198:15-21). The settlement agreement was altered in that the provisions outlined above dividing the payments into categories was omitted and a lump settlement sum was included in its place. *Id.*

F. Procedural Background - Court of Appeals affirms trial court orders.

Originally, this case was filed as two separate cases on May 29, 2014. CP 1-12 & 974-985. The complaints raise claims against Defendant International Union of Operating Engineers, Local 609-A ("Local 609 -A") for Breach of Contract, Breach of Duty of Fair Representation and Negligent Unauthorized Practice of Law. CP 1-12 & 974-985.

The cases were consolidated by Court order on January, 23, 2015. CP 27-28. The initial complaints included claims against Seattle Public Schools

("SPS"). CP 1-12 & 974-985. SPS was later dismissed as a defendant. CP 29-31.

On August 3, 2015, the trial court entered orders granting Local 609 - A's Motion for Summary Judgment based upon statute of limitations. CP 966-968. The same day the trial court entered an order denying Petitioners' Motion to Amend the Complaint to include a claim for violation of Washington's Consumer Protection Act. CP 971-973. As set out in Petitioners' initial Motion to Amend, "[t]he allegations supporting the unauthorized practice of law claims raised also support a CPA claim by the Plaintiffs." CPA 826. In denying Mr. Killian's and Mr. Bailey's motion the trial court explained, "[a]ny CPA claim would in substance be a Duty of Fair Representation claim, and barred by the applicable statute of limitations." CP 972. Petitioners filed a Notice of Appeal of both of these orders on September 2, 2015.

On August 22, 2016, Washington Court of Appeals Division One affirmed the trial court's orders adopting a statute of limitations of 6 months to claims brought against a union for engaging in the unauthorized practice of law and for the associated consumer protection act violations. App. A.

ARGUMENT

I. Allowing a very restrictive statute of limitations to be applied to a union for engaging in the unauthorized practice of law outside of the scope of its authority under a CBA, than is applied to any other person or entity is contrary to Washington law and public policy. RAP 13(b)(1)(2) & (4).

A. Under Washington Law the applicable statute of limitations on claims for the unauthorized practice of law is 3 years.

The negligent and unauthorized practice of law carries a statute of limitation of three years. RCW 4.16.080(2). Local 609-A has never raised an argument that Mr. Killian and Mr. Bailey do not have a claim for the unauthorized practice of law but only argue that this Court should apply a six month statute of limitations to the claims. RCW 41.56.160(1).

In *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 371 (1994), the Court held civil claims for discrimination, that is non-union civil claims, are outside the scope of a CBA. The issue in that case was whether the statute of limitations on a discrimination claim was tolled during the grievance process invoked by the CBA. *Id.* The Court held it was not, as it was an action independent of the plaintiff's rights under the CBA. *Id.* The Court noted that *International Union of Electrical, Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976) ". . . held that the independent origins of the contractual rights under a CBA and the statutory rights under Title VII foreclose any argument for tolling of the statute. *Id.*, at 372. Further, the Washington Supreme Court has explained, "[i]t is our duty to protect the public from the activity of those who, because of lack of

professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar. *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 61 (1978) (citation omitted).

In this case Mr. McBee acknowledged that he had no authority represent Mr. Killian and Mr. Bailey in their non-union civil claims. There is no issue here that his actions in negotiating a specific amount for settlement of Mr. Killian and Mr. Bailey' non-union civil claims, including costs or attorney fees, was outside of the scope of the CBA. Defendant has argued that *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985) applies. This argument is in error. Plaintiff's claims for the unauthorized practice of law do not arise out of Mr. McBee's actions in pursuing the grievances. To clarify the point, if Mr. McBee had walked into the mediation and shot one of the Mr. Killian and Mr. Bailey, there would be no issue that his actions had nothing to do with the grievances pursued under the CBA. While the example may be a bit extreme, it is equally applicable in this case. Mr. McBee did something he had no authority to do under the CBA, he negotiated a specific amount for resolution of Mr. Killian and Mr. Bailey' non-union civil claims. He presented that amount, along with the amount negotiated to resolve the grievance, to Local 609 -A Board for approval. The

Board approved it, both the sums for resolution of the grievance, or back pay and the sums for resolution of Mr. Killian and Mr. Bailey' non-union civil claims. Local 609 -A had no authority to settle Mr. Killian and Mr. Bailey' non-union civil claims. There is no issue regarding this fact.

Further, there are strong policy arguments against adopting such a short limitation period. There is no reason why Local 609 -A should be provided a shorter statute than any other party violating this law. The Washington Supreme Court is taxed with the responsibility of assuring that the public is protected and to limit the statute of limitations would impact their ability to do so. Mr. Killian and Mr. Bailey' claims for the unauthorized practice of law carry a three year statute and there is no reason for the Court to adopt a different statutory period.

B. Even under the federal law Mr. McBee's conduct in resolving Mr. Killian's and Mr. Bailey's non-union civil claims was outside of the scope of the CBA and a 6 month statute of limitations should not apply.

Case law cited relied upon by Local 609-A and referenced in the published opinion of the Court of Appeals arguing that the duty of fair representation (DFR) consumes all claims for legal malpractice is not applicable to this case. Local 609 -A cites to a number of cases that have held a legal malpractice claim brought against a union attorney for representation

of a union member in a grievance was in fact a DFR claim. *See Weiner v. Beatty*, 121 Nev. 243, 249-50 (2005); *Brown v. Maine State Employees Ass'n,* 690 A.2d 956, 960 (1997); *Peterson v. Kennedy*, 771 F.2d 1244, 1255 (9th Cir. 1985), *cert. denied* 475 U.S. 112 (1986) (holding an attorney hired by a union was immune from suit pursuant to the Atkinson Rule barring individual claims against union officials for acts undertaken on behalf of the union). All of these cases involved suits against licensed practicing attorneys who were hired by a union to represent a member. *Id.* None of these cases involved a lay person engaging in the unauthorized practice of law. Local 609 -A's argument would allow any union representative to engage in legal malpractice and be provided the shield of the application of a 6 month statute of limitations. No other individual or institution is afforded this type of benefit and the law in the state of Washington provides for a three year statute of limitations on claims for the unauthorized practice of law. RCW 4.16.080(2). The unauthorized practice of law is a crime. RCW 2.48.180(3). It is not simply a negligence claim. Defendant Union's conduct was a violation of the law and, as admitted by Mr. McBee, outside of the scope of the CBA.

Further *Peterson v. Kennedy,* 771 F.2d 1244 (1985) is not applicable in this case. Peterson involved the application of the National Labor Relations Act (NLRA). *Id.* at 1251. Finding the claim predated the application of the six

month statute of limitations imposed by the federal statute, the Court applied the state statute of limitations of three years. *Id.* at 1251-1252. In addressing the issue of whether the attorney hired by the union could be sued individually for malpractice, the Court explained, ". . . attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services the attorneys perform constitute a part of the collective bargaining process." *Id.*, at 1256. The Court goes on to explain that the holding in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), "that union officers and employees are not individually liable to third parties for acts performed as representatives of the union in the collective bargaining process." *Id.* at 1256. That is not the issue before this court.

As explained in *Canez v. Hinkle*, 2000 U.S. App. Lexis 13228, *3 (2000), ". . . a union attorney is immune form a malpractice action when the attorney's advice is in connection with the collective bargaining process and thus within the scope of the national labor relations laws." *citing Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985); (*Canez* is an unpublished opinion, copy attached pursuant to FRAP 32.1 & RAP 14.1(b) as App. 3). In *Hinkle* the court found the attorneys actions were wholly unrelated to the collective bargaining process when the attorney gave *Hinkle* advice about taking a loan from the union. *Id.* While the conduct alleged in this case may have occurred in part during a mediation, it had nothing to do with actions taken within the

scope of the applicable collective bargaining process because the actions were outside of the authority granted by the CBA. Separate and distinct from Mr. Killian and Mr. Bailey' claims for violation of the duty of fair representation that relate to the processing of their grievance under the CBA, Mr. Killian and Mr. Bailey have a cause of action for conduct taken outside the scope of the CBA and not subject to a limited statute of limitations. Further, *Peterson* recognizes that DFR claims arising under state law have different applicable statute of limitations. In this case Washington has adopted an applicable two year statute of limitations as argued below.

C. Applying a 6 month statute of limitations on claims against a union for violation of Washington's Consumer Protection Act based upon conduct outside of the scope of the CBA, is contrary to Washington law and public policy.

For the same reasons set out above relating to the claim for the unauthorized practice of law, a claim brought under the Washington Consumer Protection Act should not be found as subsumed into a DFR claim. Mr. Killian and Mr. Bailey' CPA claims are based upon and founded in the same facts that give rise to their unauthorized practice of law claims. It is for unlawful conduct engaged in that is outside of the scope of the CBA. RCW 19.86.120 provides for a four statute of limitations on claims for damages brought under Washington's CPA.

D. There is no evidence that the legislature intended to apply

a 6 month statute of limitations to a DFR claim filed under state laws.

When the legislature expresses one thing in a statute, "[o]mission are deemed to be exclusions." *In re Det. Of Williams* 147 Wn.2d 476, 491 (2002). Had the legislature intended to apply a six month statute of limitations to all civil claims for violation of a union's duty of fair representation brought in state court, it would have done so within the applicable statute. Washington has adopted a catch all provision providing for a two year statute of limitation on claims brought where no specific statutory limit applies. RCW 4.16.130. As explained by the Court in *Faber v. City of Paterson*, 440 F.3d 131, 144 (2006), ". . . we cannot circumvent a state legislature's decision to provide a general catch-all statute of limitations for a tort claims, and thus may not borrow the six-month limitations period." RCW 4.16.130 applies to Washington state claims of breach of duty of fair representation.

Division One in its current opinion adopts the argument set out by Division III, however that decision was in error and contrary to Washington law. In *Imperato v. Wenatchee Valley Coll.*, 160 Wn. App. 353, 358-364 (Div. III, 2011), Division III of the Court of Appeals relied upon federal law as set out in *DelCostello v. Int'l Bhd. Of Teamsters*, 462 U.S. 151 (1983) in large part, in holding that a six month statute of limitation applied to claims of breach of duty of fair representation. The issue of the applicable statute of

limitations in DelCostello arose in part because the Court could not find an appropriate state statute of limitation to apply to breach of duty of fair representation claims. *Id.,* at 165 (finding the claim had no close analogy in ordinary state law from which a statute of limitation could be drawn). *Imperato* drew upon this reasoning at least in part, in adopting the six month statute of limitation. However, there is an applicable state statute that sets a statute of limitations on claims where one is not explicitly provided for in other statutes. RCW 4.16.130 provides for a two year statute of limitations on claims that are not provided with an applicable statute of limitations by statute. Had the legislature intended a union should be provided the benefit of a lesser statute of limitations than what was already set out in statute, it could have done so. In addition, sound policy reasons support application of the 2 year statute of limitations. Mr. Killian and Mr. Bailey believe the 2 year statute of limitations is the most appropriate and argues that *Imperato* decision and Division I's adoption of it is in error.

CONCLUSION

For the reasons stated above, Plaintiff requests the Washington Supreme Court grant this petition for review.

Dated this 21st day of September, 2016.

Respectfully submitted,

Chellie M. Hammack, WSBA #31796
Attorney for Petitioners

Certificate of Service

I, Chellie Hammack, attorney for Petitioners certify that on September 21, 2016, I placed a true and correct copy of this Petition for Review and this Certificate of Service for hand delivery via legal messenger service to:

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DATED this 21st day of September, 2016

Chellie Hammack

Chellie M. Hammack, WSBA #31796
Attorney for Petitioners

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROLAND KILLIAN; DENNIS BAILEY and DEBRA BAILEY,	)	No. 74024-5-I
Appellants,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 609-A,	)	
Respondent,	)	
SEATTLE PUBLIC SCHOOLS, a municipal corporation,	)	
Defendant.	)	FILED: August 22, 2016

APPELWICK, J. — The trial court dismissed Killian and Bailey's lawsuit against Local 609 for breach of the duty of fair representation and the unauthorized practice of law as time barred. It denied their motion to amend the pleadings to add a Consumer Protection Act[1] claim. Killian and Bailey's claims against Local 609 all flow from conduct of the union representative in the course of the grievance procedure provided in their collective bargaining agreement.

[1] Chapter 19.86 RCW.

These claims are subsumed in the duty of fair representation. The claims were not timely filed. We affirm.

FACTS

Roland Killian and Dennis Bailey (appellants) were employed by Seattle Public Schools (SPS). Killian worked as a grounds foreman, overseeing school grounds personnel and other gardeners. Bailey was a grounds worker and gardener. The appellants were both members of the International Union of Operating Engineers, Local 609-A (Local 609). Local 609 is the collective bargaining unit for employees of SPS, including grounds employees.

On September 7, 2011, SPS sent the appellants letters informing them they were being placed on administrative leave because of allegations that they were misusing SPS resources. On December 18, 2012, SPS informed the appellants that it concluded there was proper cause to terminate their employment for misconduct. It told the appellants that their employment would be terminated effective December 27, 2012. SPS noted that the appellants could appeal the termination decision through the grievance procedure provided in the collective bargaining agreement (CBA).[2]

Local 609 filed grievances on behalf of the appellants, alleging they were disciplined without just cause and progressive discipline in violation of the CBA.

[2] Article XVIII of Local 609's CBA outlines the grievance procedure. The grievance process is divided into steps—Step 1, Step 2, Step 3, and Step 4. If a grievant remains unsatisfied and reaches Step 4, the grievant may request mediation or alternative dispute resolution. If the grievance is not settled to the grievant's satisfaction, the grievance may then be submitted to final and binding arbitration. The arbitration is conducted by an arbitrator under the rules of the Public Employment Relations Commission.

Local 609 representative Mike McBee represented the appellants during the CBA grievance process. In March 2013, the appellants sought the assistance of outside counsel to pursue individual civil claims against SPS. SPS denied the grievances at Steps 1 through 3. After SPS denied the grievances at Step 3, McBee proposed mediation. The appellants expressed concern to McBee about how the mediation would affect their individual civil claims. McBee told the appellants that the mediation was intended to address only the union claims. He also told them that their outside counsel was not allowed to participate in the mediation.

On June 13, 2013, SPS and Local 609 filed a joint grievance mediation request with the Washington Public Employment Relations Commission (PERC). The parties proceeded to mediation with PERC. McBee was present at the mediations. Mediation began on August 5, 2013. The first day of mediation ended without settlement after SPS offered a monetary settlement much lower than what was sought. On September 9, 2013, the second day of mediation, SPS made higher monetary offers to the appellants, but the appellants rejected them. That same day, McBee presented SPS's monetary offers to settle the grievances to Local 609's executive board. At this time, the board voted to move the grievances to arbitration, but it reserved the right to rescind that decision if SPS improved its settlement offer. McBee informed the appellants that the board had voted to proceed to arbitration, but that Local 609 would consider accepting a higher settlement offer from SPS in the future.

On September 17, 2013, after the two unsuccessful mediation attempts, SPS offered to settle Local 609's grievances and pay $100,000 to Killian and $75,000 to Bailey if each of them would agree to release all legal claims against SPS. That day, McBee suggested to board members that Local 609 should accept SPS's offer and not proceed to arbitration. He noted that the settlement offer was the largest offer he had seen from SPS for one of its members. McBee's e-mail also stated:

> I have calls into both grievants but remember, the grievance belongs to the union and we decide to proceed or not. I will be recommending to both of them that they consult their attorney before deciding to accept o[]r reject their individual offers. If they reject, and it's up to them, they can pursue their claims in court.

The board voted to settle the grievances and not proceed to arbitration in exchange for SPS extending the offer to the appellants.

That same day, outside counsel for the appellants, Chellie Hammack, wrote to counsel for Local 609, Kathleen Phair Barnard, summarizing various conversations that the two attorneys had in the past regarding the appellants' claims. Hammack also summarized conversations she had with her clients. Hammack stated that she had previously expressed concern that SPS might attempt to engage the appellants in a discussion that included settlement of all of their claims during the mediation process. She noted that she reviewed a draft settlement agreement after one of the mediation sessions, and it was clear that SPS was attempting to resolve the appellants' individual civil claims. Hammack stated that McBee never told her clients to notify her when the issue of waiver of civil claims arose at the mediation. She further stated that McBee had informed

her clients that if they did not accept the settlement offer from SPS, Local 609 would decline to represent them further and would not pursue arbitration on their behalf. And, that the appellants felt pressured to accept the offers. She stated she believed that Local 609's conduct was inappropriate, and that she had the right to be contacted if and when her clients' individual civil claims were involved in the settlement discussions.

Local 609 and SPS entered into a settlement agreement on September 24, 2013. The appellants refused SPS's final settlement offers. When Hammack contacted SPS to discuss the possible settlement of the appellants' individual civil claims, SPS indicated that it had already extended an offer of resolution of those claims to Local 609, and it was not interested in pursuing further discussions.

On May 29, 2014, Bailey and Killian filed complaints against both Local 609 and SPS, and the cases were later consolidated. The appellants brought a claim of unlawful discrimination[3] and a claim of breach of contract against SPS. And, they alleged that Local 609 had breached its duty of fair representation (DFR) and had negligently engaged in the unauthorized practice of law. On May 29, 2015, Local 609 moved for summary judgment, alleging that all of the appellants' causes of action were encompassed by Local 609's DFR claim. It asserted that the statute of limitations period for DFR claims is six months and that the appellants' claims were consequently time barred. On June 29, 2015, the appellants moved to amend their complaint to include a Consumer Protection

[3] Bailey's complaint also included a claim of retaliation against SPS.

Act[4] (CPA) claim. On August 4, 2015, the trial court granted Local 609's motion for summary judgment. The trial court also denied the appellants' motion to amend, reasoning that any CPA claim would in substance be a DFR claim that would be barred by the applicable statute of limitations.

The appellants appeal.

DISCUSSION

The appellants argue that the trial court erred when it granted Local 609's motion for summary judgment based on the statute of limitations. They assert that even if their claims are all effectively DFR claims, the statute of limitations for those claims is two years, rendering their lawsuit timely. Finally, they contend that even if the statute of limitations period is six months, summary judgment is improper. They maintain this is so, because there are genuine issues of material fact about whether the appellants failed to file their action within the statute of limitations period.

The trial court granted Local 609's summary judgment motion as to all of the appellants' claims on the basis of the statute of limitations. Therefore, it was presumably persuaded by Local 609's argument that the appellants' unauthorized practice of law claims were subsumed by their DFR claims as a matter of law and that a six month statute of limitations applied to all of the claims.

This court reviews summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate

[4] Chapter 19.86 RCW.

only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). When considering the evidence, the court draws reasonable inferences in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

I. Unauthorized Practice of Law and CPA Claims

The appellants argue that their unauthorized practice of law and CPA claims are not subsumed in their DFR claims, because those causes of action are separate and distinct from their DFR claims. Consequently, they argue that applying the statute of limitations for a DFR claim is not appropriate. Instead, the appellants cite to RCW 4.16.080(2) and contend that the statute of limitations for their negligent and unauthorized practice of law claim is three years. And, they cite to RCW 19.86.120 and claim that the statute of limitations for their CPA claim is four years. Thus, whether the appellants' other claims are subsumed in their DFR claim determines which statute of limitations applies and whether the appellants' claims are time barred.

In Washington, the Public Employees' Collective Bargaining Act (PECBA), chapter 41.56 RCW, governs CBAs with state public employers. Navlet v. Port of Seattle, 164 Wn.2d 818, 828, 194 P.3d 221 (2008). Unions have a duty under Washington state law to fairly represent their members—the duty of fair representation (DFR). Lindsey v. Mun. of Metro. Seattle, 49 Wn. App. 145, 148, 741 P.2d 575 (1987). In the context of grievance processing, the DFR prohibits a union from ignoring a meritorious grievance or processing that grievance

perfunctorily. Id., at 149. A union must exercise special care in handling a grievance that concerns a discharge, because it is the most serious sanction an employer can impose. Id. However, unions need not arbitrate every case. Id. Courts should accord substantial deference to a union's decisions regarding grievance processing, because a union must balance collective and individual interests in making these decisions. Id. The collective bargaining system by its very nature subordinates the interest of an individual employee to the collective interests of all the employees in the bargaining unit. Id. The DFR is breached when a union's conduct is discriminatory, arbitrary, or in bad faith. Id. at 148.

While federal law generally preempts the field of labor law, it does not govern over CBAs with state public employers. Navlet, 164 Wn.2d at 828. But, this court may look to the interpretation of federal labor law where the law is similar to state law. Id. at 828-29; Allen v. Seattle Police Officers' Guild, 100 Wn.2d 361, 372, 670 P.2d 246 (1983). Here, the parties rely predominantly on federal case law.

Local 609 cites to the Ninth Circuit case, Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), to support its assertion that the appellants' claims are subsumed in their DFR claims. Peterson concerned a legal malpractice claim against a union-employed attorney. Id. at 1251. The plaintiff-employee claimed that the union attorney remained subject to liability for professional malpractice independent of the union's potential liability for breach of its DFR. Id. at 1256. The Peterson court rejected this argument, and held that legal malpractice claims against union attorneys were subsumed as DFR claims against the union. Id.

In holding that the plaintiff's legal malpractice claims against the union attorney were subsumed, the Peterson court began with a discussion of the Atkinson[5] rule. Id. In Atkinson, the United States Supreme Court held that individual damage claims may not be maintained against union officials for acts that are undertaken on behalf of the union. Peterson, 771 F.2d at 1256. The basis of the rule is that historically, only the union was to respond for union wrongs. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247-48, 82 S. Ct. 1318, 8 L. Ed. 2d 462 (1962). And, in Peterson, the court stated that the Atkinson rule applies to and bars malpractice claims against attorneys representing the union. Id. at 1258. The court reasoned that where the attorney performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives, the rationale behind the Atkinson rule is applicable. Id.

The appellants claim that Peterson is not applicable in this case, because the issue before the court in that case was different. In Peterson, the plaintiff-employee brought DFR claims against the union, but the legal malpractice claims against only the union attorney in his individual capacity. See id. at 1251, 1256. Therefore, the Peterson court's discussion and reasoning surrounding whether the plaintiff's legal malpractice claim was subsumed was in response to a different question. The court was considering whether a legal malpractice claim against an individual union attorney is subsumed in a DFR claim against a union

[5] Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82 S. Ct. 1318, 8 L. Ed. 2d 462 (1962).

that alleges the union, through its representatives, gave erroneous advice. Id. at 1251.

We acknowledge that Peterson is factually distinguishable in this regard. Here, the appellants' lawsuit was filed against the union itself rather than an individual union employee. Still, we find the Peterson court's reasoning instructive here. The Peterson court specifically based the rule it was adopting—that a union attorney is not subject to individual liability for acts performed on behalf of the union in the collective bargaining process—on a functional assessment of the attorney's role as a union representative within the collective bargaining process. Id. at 1259. Notably, the court went on to say:

> Our decision does not mean that union members are necessarily without a remedy when attorneys employed by the union fail to process grievances adequately. If an attorney's conduct falls within the "arbitrary, discriminatory or bad faith" test . . . the union member may sue the union for breach of the duty of fair representation.

Id. at 1259. Thus, when the union attorney is performing acts on behalf of the union in the collective bargaining process, the plaintiff's cause of action lies against the union itself and it is a DFR claim.

The appellants also attempt to distinguish Peterson, by claiming that Local 609's actions were not within the scope of the collective bargaining process, because they were not authorized by the CBA.[6] In a light most favorable to the

[6] The only authority the appellants cite to support this assertion is an unpublished Ninth Circuit opinion issued in 2000. Therefore, we do not consider it. See GR 14.1(b) (a party may cite an unpublished opinion as authority only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court); FRAP 36.3 (stating that unpublished dispositions in the Ninth Circuit

appellants, the allegations for the unauthorized practice of law claim amount to the following: Local 609 engaged in the unlawful practice of law when it negotiated a settlement of the appellants' civil claims, advised the appellants that the amount offered for resolution of those claims was fair and reasonable, advised the appellants to accept the settlement offer, and participated in and/or approved the drafting of the settlement agreement that provided for resolution of all of the appellants' claims and set out an amount of damages and costs associated with their individual civil claims. The basis of the appellants' CPA claim is that the allegations supporting the unauthorized practice of law claim also support a CPA claim.

Like in Peterson, McBee represented the union. All of the allegedly improper acts by Local 609 occurred within the collective bargaining mediation process between the appellants and SPS. Any alleged harm flowed from Local 609's settlement with SPS and the termination of the grievance process. The unauthorized practice of law claim is a legal negligence claim as was the claim in Peterson. What is different is that McBee was not an attorney. We hold that when a nonattorney union representative is alleged to have engaged in the unauthorized practice of law in the course of the grievance process under the CBA, the Peterson rule applies.

Therefore, any unauthorized practice of law claim arising in the course of the grievance procedure is subsumed in a DFR claim against the union. And,

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issued before January 1, 2007 may not be cited except in limited circumstances that do not apply here).

because the appellants' CPA claim is based on the appellants' unauthorized practice of law claim, we conclude that their CPA claims are also subsumed in the DFR claim against the union.[7] All of the appellants' claims are subject to the statute of limitations for DFR claims.

II. DFR Statute of Limitations

The appellants cite to RCW 4.16.130[8] and assert that the proper statute of limitations period for DFR claims is two years. By contrast, Local 609 cites to Imperato v. Wenatchee Valley College, 160 Wn. App. 353, 247 P.3d 816 (2011) and contends that the applicable statute of limitations period is six months.

In Imperato, Imperato filed an action in superior court almost eight months after he was discharged, alleging breach of contract against his employer and a DFR claim against his former union. Id. at 356. The defendants filed a motion for summary judgment, claiming that Imperato's action was barred by the statute of limitations. Id. at 357. The trial court granted summary judgment in favor of the defendants. Id.

In determining the applicable statute of limitations for Imperato's claims, the Imperato court noted that the DFR claims should be treated as unfair labor claims under Washington law. Id. at 360. It noted that unfair labor practice

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[7] Because we reach this conclusion, the trial court did not abuse its discretion when it denied the appellants' motion to amend their complaint to add CPA claims. See Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997) (stating that a trial court does not abuse its discretion when it denies a motion to amend because the new claim is futile or untimely).

[8] RCW 4.16.030 is a catch-all provision that provides a two year statute of limitations for those claims not referenced elsewhere by the legislature. Imperato v. Wenatchee Valley College, 160 Wn. App. 353, 360, 247 P.3d 816 (2011).

claims are addressed by a six month statute of limitations set forth in RCW 41.56.160(1) and RCW 41.80.120(1). Id. at 360-61. But, that those statutes only establish the statute of limitations for unfair labor practice claims that are specifically filed with PERC. Id. at 355-56, 361. Thus, the Imperato court was tasked with deciding which statute of limitations applies when a union employee files directly in superior court instead of with PERC. Id. at 361.

The court noted that the statutes were silent as to whether unfair labor practice claims filed in superior court were subject to the statute of limitations contained in RCW 41.56.160(1) and RCW 41.80.120(1). Id. at 362. But, the Imperato court ultimately held that the six month statute of limitations applies to DFR claims filed directly in superior court. Id. at 364. It reasoned that application of the six month statute of limitation period to DFR claims would serve several important policies: (1) It would prevent piecemeal litigation; (2) Applying a different statute of limitations to DFR claims filed in superior court would frustrate the role of PERC in promptly resolving labor disputes; and (3) It would provide consistency, because federal law also establishes a six month statute of limitations. Id. In so holding, the Imperato court rejected the argument that it should apply the three year statute of limitations in RCW 4.16.080, the six year statute of limitations for breach of a written agreement in RCW 4.16.040, or the two year statute of limitations in RCW 4.16.130. Id. at 362, 364.

The appellants do not attempt to distinguish Imperato. Instead, they merely argue that "the two year statute of limitations [in RCW 4.16.130] is the most appropriate and . . . [the] Imperato decision is in error." They argue that

had the legislature intended DFR claims to be subject to the six month statute of limitations, it would have done so explicitly by statute. We adhere to Imperato. To the extent the appellants' claims are considered DFR claims, they are subject to a six month statute of limitations period.

III. Expiration of the Statute of Limitations

The appellants argue that even accepting the six month statute of limitations period, there are issues of material fact surrounding when the statute of limitations period began. They assert that a discovery rule applies and when they knew or reasonably should have known of all the essential elements of their causes of action is a question of fact for the jury.

The appellants cite to Ninth Circuit case law to support their assertion. Federal law dictates that the statute of limitations begins to run when an employee knows or should know of the alleged breach of DFR. Harris v. Alumax Mill Prod., Inc., 897 F.2d 400, 404 (9th Cir. 1990). In Harris, the court determined that this date for a federal DFR claim was no later than the date on which the employee was informed by a union representative that the union would not be pursuing a grievance on his behalf. Id. The appellants do not cite to any Washington state cases explicitly discussing when state DFR causes of action accrue. But, they assert that under Washington law, the common law discovery rule applies to all statutes of limitations in the absence of legislation limiting the application of the rule. Under Washington's common law discovery rule, a cause of action accrues when a claimant knows, or in the exercise of due diligence, should have known all the essential elements of the cause of action. Funkhouser

v. Wilson, 89 Wn. App. 644, 666-67, 950 P.2d 501 (1998), affirmed by C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999).

The appellants emphasize that there are issues of material fact surrounding when they had reasonable notice that Local 609 was no longer pursuing their grievances and when they knew of all essential elements of the cause of action. The appellants point the court to several facts in the record that they claim show they were confused about whether Local 609 was going to advance the grievances to arbitration.

Local 609 responds that Hammack's September 17, 2013 letter to Barnard illustrates that the appellants and Hammack knew on that date. In that letter, Hammack stated,

> Today, after meeting with both my clients to discuss the issues, and after our discussion, Mr. McBee called my clients again extending an offer made by SPS. Further, Mr. McBee told both of my clients that if they did not accept the offers extended the union would decline to represent them further and would not pursue an arbitration on their behalf.

But, Hammack also noted that McBee was trying to pressure the appellants into settling their civil claims without the benefit of counsel. And, she noted that Barnard had promised to make sure that Hammack was notified if settlement of the civil claims was involved. Consequently, she concluded the letter by stating that she needed clarification of the union's position. Local 609 maintains that even if the September 17 letter is insufficient to establish knowledge, October 12, 2013 would be the next appropriate date—when Bailey heard the final announcement that Local 609 would not be advancing their claims to arbitration.

But, the appellants claim that, to date, they have not received a written notice about the status of their grievance. The appellants cite to no legal authority to support their implicit assertion that only written notice triggers the knowledge required for the statute of limitations to run. And, even if written notice was required, on October 18, 2013, Barnard wrote to Hammack and stated,

> In my letter of October 16, 2013, I detail the two communications[9] you sent me on September 17, 2013, acknowledging that you knew that Local 609 had decided not to proceed to arbitration. Your assertions establish your knowledge. Your latest letter asks that the Union put its position in writing. My October 16[10] letter did that already.

This written communication left no room for doubt about notice of the union's position.

Therefore, even assuming the statute of limitations did not begin to run until Local 609 provided the appellants with written notice, and even assuming that written notice was not adequately provided until October 18, 2013, the appellants' action is still untimely. The appellants filed their complaints on May 29, 2014. At the very least, the appellants' complaints were filed over a month after the expiration of the six month statute of limitations period.[11]

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[9] The second September 17 communication referenced in the October 16 letter is a voicemail from Hammack.

[10] This letter told Hammack that she had known since September 17, 2013 that Local 609 had decided to accept SPS's offer to settle the two grievances. And, that the appellants were notified on that date that whether or not they agreed with the settlement, Local 609 had agreed to the settlement and would not proceed to arbitration.

[11] By October 18, 2013, Local 609 had already engaged in all of the allegedly improper legal advice. Therefore, to the extent the appellants had viable DFR causes of action against the union based on earlier "unauthorized"

Finally, the appellants assert that the statute of limitations is subject to tolling based on a provision in the CBA. And, the appellants assert that even if the statute of limitations in this case ran, equitable tolling and/or estoppel applies here. The appellants base these arguments on the contention that Local 609's actions in pursuing their grievances were contradictory. And, that they were never provided with any written notices of any deadlines or the outcome of their grievances despite repeated requests. Again, the appellants cite to no authority to support the proposition that Local 609 had to provide written notice of its decision about the grievances. And, Barnard's October 18 letter unequivocally reiterated that Local 609 would not be pursuing arbitration. Therefore, we reject the appellants' arguments regarding tolling.

We affirm.

WE CONCUR:

legal advice, the statute of limitations for those claims would also have certainly expired prior to the filing of the appellants' complaints.

Appendix B

THE HONORABLE LAURA INVEEN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ROLAND KILLIAN,

Plaintiff,

v.

SEATTLE PUBLIC SCHOOLS, a municipal corporation, and the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609-A,

Defendants.

DENNIS BAILEY and DEBRA BAILEY,

Plaintiffs,

v.

SEATTLE PUBLIC SCHOOLS, a municipal corporation, and the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609-A,

Defendants.

Consolidated Case No. 14-2-15136-5 SEA

~~[PROPOSED]~~ **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON STATUTE OF LIMITATIONS**

CLERK'S ACTION

This matter came before the Court on Defendant International Union of Operating Engineers Local 609's Motion for Summary Judgment. The Court heard the oral argument of counsel and considered the following when reaching its decision:

1. Defendant's International Union of Operating Engineers Local 609's Motion for Summary Judgment Based on Statute of Limitations;

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2. The Declaration of Kathleen Phair Barnard In Support of Defendant's International Union of Operating Engineers Local 609-A's Motion for Summary Judgment Based on Statute of Limitations;

3. Praecipe Re: Plaintiffs' Response in Opposition, Plaintiffs' Response (Corrected)

4. Declaration (Corrected) of Chellie Hammack in Support of Opposition,

5. Defendants Reply in Support of Its Motion, c) Third Declaration of Kathleen Phair Barnard (a) Plaintiffs objections to Exhibits Attached to Third Declaration; b) motion to strike Exhibits B-L to Dec. of Barnard; a) Local 609's Opposition to Motion to strike Exhibits, b) Dec. of McBee d) Plaintiffs Reply in Support of Motion to Strike

Being fully advised on the matter, there Court hereby ORDERS as follows:

1. Defendant International Union of Operating Engineers Local 609's Motion for Summary Judgment Based on Statue of Limitations is hereby GRANTED;

2. All claims against Defendant International Union of Operating Engineers Local 609 are hereby dismissed. In so ruling, the Court 1) denies Plaintiffs' Motion to strike Exhibits B-L of Barnard Declaration, noting Ex D is allowed for notice, not for truth of matter, 2) Denies motion to strike overlength portion of Defendants Reply, noting Plaintiff violated Local rules in filing Motion to strike (LCR 56(g)), sustains plaintiffs objection to Exhibits E-H of Barnard Third Declaration (authentication)

It is so ORDERED this 3 day of August, 2015.

Laura C. Inveen
The Honorable Laura Inveen
King County Superior Court Judge

Presented by:
s/Kathleen Phair Barnard
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The Honorable Laura Inveen
Hearing: July 8, 2015 w/o oral argument

IN SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

ROLAND KILLIAN,

Plaintiff,

v.

SEATTLE PUBLIC SCHOOLS, a municipal corporation, and the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609-A,

Defendants.

DENNIS BAILEY and DEBRA BAILEY,

Plaintiffs,

v.

SEATTLE PUBLIC SCHOOLS, a municipal corporation, and the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609-A,

Defendants.

Consolidated Case No.
No. 14-2-15136-5 SEA

~~[PROPOSED]~~ ORDER DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT

THIS MATTER having come on regularly before the undersigned judge of the above entitled Court upon Plaintiffs' Motion to Amend Complaint to Raise Claim of

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Violation of the Consumer Protection Act, and the Court, having considered the same, the records and files herein, including the following:

1) Plaintiffs' Motion to Amend Complaint to Raise Claim of Violation of Consumer Protection Act;

2) Declaration of Chellie Hammack and Attached Exhibits;

3) Defendant's Response Objecting to Plaintiffs' Motion to Amend the Complaint;

4) Declaration of Angela Hunt and Attached Exhibits;

5) Plaintiffs' Reply, ~~if any~~;

6) _____;

and

7) _____.

It is NOW, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion Amend the Complaint is DENIED. Any CPA claim would in substance be a Duty of Fair Representation claim, and barred by the applicable statute of limitations.

DATED this 3 day of ~~July~~ August, 2015.

_____
Honorable Laura Inveen

Presented by:
FALLON & MCKINLEY, PLLC

By: _____
R. Scott Fallon, WSBA # 2574
Angela Hunt, WSBA # 39303
Attorneys for Defendant Local 609

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Approved as to form:

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By: _____
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CM HAMMACK LAW FIRM

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Appendix C

Canez v. Hinkle

United States Court of Appeals for the Ninth Circuit

November 1, 1999; January 28, 2000, Filed

No. 98-16602

Reporter
2000 U.S. App. LEXIS 1391

FRANK CANEZ, Plaintiff - Appellant, v. BARRY E. HINKLE; VAN BOURG, WEINBERG, ROGER & ROSENFELD, A California legal partnership and a professional corporation, Defendants - Appellees.

Notice: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *2000 U.S. App. LEXIS 13228.*

Prior History: Appeal from the United States District Court for the District of Arizona. D.C. No. CV-96-00131-ROS. Roslyn O. Silver, District Judge, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

attorney-client, advice, malpractice, district court, national labor, relations law, immune

Case Summary

Procedural Posture
Plaintiff appealed from the United States District Court for the District of Arizona, which granted a motion for summary judgment in favor of defendants, an attorney and a legal partnership, and refused to certify to the Arizona Supreme Court the issue whether there was an attorney-client relationship.

Overview
Plaintiff sued defendant attorney and his law firm for legal malpractice, summary judgment was granted in favor of defendants, and this appeal followed. Defendant attorney's advice was unrelated to collective bargaining process, thus plaintiff's claim was not within scope of national labor relations laws and defendants were not immune from suit. Because Arizona law was clear, and because question whether there was an attorney-client relationship depended on factual determination, district court did not err in denying certification. However, a factual issue existed regarding whether defendant attorney acted as plaintiff's attorney. There was a genuine issue of material fact as to issue regarding whether plaintiff's failure to sign an IOU was an unforeseeable, extraordinary, intervening force that broke chain of causation between defendant's alleged malpractice and plaintiff's termination. Summary judgment was therefore improper.

Outcome
Judgment reversed and remanded. Proximate cause issue presented a question of fact to be resolved by the factfinder. Summary judgment was improper because defendant attorney was not immune from suit and there were genuine issues of material fact. Denial of certification was not error.

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN1 When a claim is within the scope of national labor relations laws, individual union members are immune from suit pursuant to *29 U.S.C.S. § 185(b)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Torts > Malpractice & Professional Liability > Attorneys

HN2 A union attorney is immune from a malpractice action when the attorney's advice is in connection with the collective bargaining process and thus within the scope of national labor relations laws.

Torts > Procedural Matters > Attorney-Client Relationships

HN3 Under Arizona law, in determining whether there was an attorney-client relationship, a factfinder looks at the nature of the services rendered, the circumstances under which the individual divulges confidences, and the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice. The client's belief that an attorney-client relationship existed is an important factor.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN4 We review for abuse of discretion a district court's decision to deny certification to the highest state court.

Torts > Malpractice & Professional Liability > General Overview

Torts > Malpractice & Professional Liability > Attorneys

HN5 Arizona law provides as a matter of public policy that a third party may sue an attorney for malpractice to the attorney's client when that malpractice injures a third party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN6 Appellate courts review for abuse of discretion a district court's decision to exclude evidence.

Torts > ... > Causation > Proximate Cause > General Overview

HN7 Under Arizona law, proximate cause exists even if defendant's conduct contributes only a little to plaintiff's damages, if the damages would not have occurred but for that conduct.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > Intervening Causation

HN8 A superseding cause may relieve the defendant of liability only when an intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary.

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For BARRY E. HINKLE, VAN BOURG, WEINBERG, ROGER & ROSENFELD, Defendants - Appellees: D. Samuel Coffman, Michael S. Rubin, Esq., MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, Phoenix, AZ.

Judges: Before: CANBY, THOMPSON, and GRABER, Circuit Judges.

Opinion

MEMORANDUM [1]

Frank Canez sued Attorney Barry E. Hinkle and the law firm that employed him, Van Bourg, Weinberg, Roger & Rosenfeld, for legal malpractice. [*2] The district court granted the defendants' motion for summary judgment, holding that (1) Hinkle was immune from suit under § 301 of the National Labor-Management Relations Act, (2) there was no attorney-client relationship between Hinkle and Canez under Arizona state law, (3) Hinkle could not be liable for negligence if there was no attorney-client relationship, (4) a hearing panel's findings were inadmissible hearsay, and (5) there was no proximate cause between Hinkle's alleged bad advice and Canez's firing. The district court also refused to certify to the Arizona Supreme Court the issue whether there was an attorney-client relationship. Canez appeals. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse and remand for further proceedings.

DISCUSSION

I. Section 301 of The National Labor-Management Relations Act

In *Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962), overruled on other grounds, Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970)*, the Supreme Court held that ***HN1*** when a claim is within the scope of national [*3] labor relations laws, individual union members are immune from suit pursuant to *29 U.S.C. § 185(b)*. *See id. at 246*. After *Atkinson*, we held that ***HN2*** a union attorney is immune from a malpractice action when the attorney's advice is in connection with the collective bargaining process and thus within the scope of national labor relations

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

laws. *See Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985)*.

Unlike the present case, the attorney's services in *Peterson* were in connection with negotiations between the plaintiff/employee and his employer and therefore were part of the collective bargaining process that national labor relations laws control. By contrast, Hinkle's advice was "wholly unrelated to the collective bargaining process." It concerned whether Canez could take a personal loan from the union. As a result, Canez's claim for malpractice is not within the scope of national labor relations laws and Hinkle is not immune from suit on that ground. *See id. at 1259*.

II. Attorney-Client Relationship

HN3 Under Arizona law, in determining whether there was an attorney-client relationship, a factfinder [*4] looks at "the nature of the services rendered, the circumstances under which the individual divulges confidences, and 'the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'" *Foulke v. Knuck, 162 Ariz. 517, 784 P.2d 723, 726 (Ariz. Ct. App. 1989)* (citations omitted). The client's belief that an attorney-client relationship existed is an important factor. *See In re Petrie, 154 Ariz. 295, 742 P.2d 796, 801 (Ariz. 1987)*.

In the instant case, because Hinkle told Canez it would be legal for him to borrow money from the union, the nature of Hinkle's services was legal. In addition, Canez stated in his affidavit that he believed he and Hinkle had an attorney-client relationship because they had a long-standing personal relationship, Hinkle had represented Canez personally when he was sued as a Trustee, and Hinkle was available to union members who needed personal legal advice. Whether Canez is telling the truth and whether his belief was objectively reasonable are determinations properly left for the trier of fact.[3]

[*5] III. Certification to Arizona Supreme Court

HN4 We review for abuse of discretion a district court's decision to deny certification to the highest state court. *See Louie v. United States, 776 F.2d 819, 824 (9th Cir. 1985)*. Because Arizona law concerning the elements of an attorney-client relationship is clear, and because the question whether there was an attorney-client relationship in this case depends on a factual determination, the district court did not err in denying certification to the Arizona Supreme Court.

IV. Third-Party Liability

HN5 Arizona law provides as a matter of public policy that a third party may sue an attorney for malpractice to the attorney's client when that malpractice injures a third party. *See Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (Ariz. Ct. App. 1976)*. Here, a foundational question was in dispute: whether Hinkle acted as the union's attorney or Canez's attorney, or perhaps both, when he gave the advice to Hinkle. If the trier of fact should find that Hinkle acted as the union's attorney in giving the advice, then Arizona's public policy permitting suit by a third party (Canez) may apply [*6] if the trier of fact also finds causation of injury.

V. Admissibility of the Hearing Panel's Decision

HN6 We review for abuse of discretion a district court's decision to exclude evidence. *See Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir. 1999)*. Canez contends that the hearing panel's statement that, "under the constitutional practice of this Union, it is improper for a union officer to loan himself or herself union funds," is not inadmissible hearsay because it is a statement of law and not a statement of fact and thus was not offered to prove the truth of the matter asserted. Alternatively, Canez argues that *Federal Rule of Evidence 801(b)* does not apply to the statement because it is the statement of a panel and not a "person." Canez's arguments are unpersuasive.

Canez offered the statement to prove that the union's constitution prohibited an officer from taking a loan without prior approval. The statement, therefore, was offered to prove the truth of the matter asserted. Moreover, the statement was a statement by people who constituted a panel and thus *Federal Rule of Evidence 801(b)* applies. Because the statement was inadmissible hearsay, [*7] the district court did not err in excluding it.

VI. Causation

The district court held that Canez's refusal to sign an IOU was "an unforeseeable, independent supervening force that produced an unforeseeable result," thereby breaking the "causal connection between Hinkle's alleged negligent act [the bad advice about the loan] and the ultimate injury."

HN7 Under Arizona law, proximate cause exists "even if defendant's conduct contributes 'only a little' to plaintiff's damages, . . . if the damages would not have occurred but

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[3] Canez asserts that Arizona law does not require that his belief be objectively reasonable. In *Alexander v. Superior Court*, 141 Ariz. 157, 685 P.2d 1309 (Ariz. 1984), however, the Arizona Supreme Court, in holding that there was an attorney-client relationship, held that "it would have been *reasonable* for [the clients] to believe [the lawyer] was their attorney." 685 P.2d at 1314 (emphasis added).

for that conduct." *Robertson v. Sixpence Inns of Am., Inc., 163 Ariz. 539, 789 P.2d 1040, 1047 (Ariz. 1990)*. *HN8* A "superseding cause" may relieve the defendant of liability "only when an intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary." *Id.*

Canez asserts it was Hinkle's malpractice in giving bad advice about the loan that caused Canez not to seek Executive Board and membership approval before obtaining the loan. The union stated, however, it did not fire Canez because he failed to get Board and membership approval; rather, it stated, it fired him because he refused to sign an IOU.

[*8] The question is whether we can say as a matter of law that the failure to sign an IOU was an unforeseeable, extraordinary, intervening force that broke the chain of causation between Hinkle's alleged malpractice and Canez's termination. We conclude there is a genuine issue of material fact as to this issue. Hinkle told Canez that it would be legal to take the loan. He did not tell Canez what he should do to document the loan. A reasonable jury could conclude that Hinkle reasonably thought it was unnecessary to sign an IOU for a loan that he had cleared with Hinkle. Although the union stated that it was Canez's refusal to sign an IOU, rather than his failure to get Board and membership approval, that caused his firing, it is not clear that if Canez had obtained Board and membership approval for the loan, his refusal to sign an IOU would have warranted his termination, especially in the absence of any evidence that a signed IOU was a necessary document in this kind of a loan transaction. In these circumstances, the proximate cause issue presents a question of fact to be resolved by the factfinder.

CONCLUSION

Summary judgment was improper because (1) Hinkle is not immune from [*9] suit pursuant to national labor relations laws, and (2) there are genuine issues of material fact.

REVERSED and REMANDED.