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**ORIGINAL**

NO. 62505-5-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BARBARA COREY, individually,

Respondent,

v.

PIERCE COUNTY; PIERCE COUNTY  
PROSECUTING ATTORNEY'S OFFICE,

Appellants.

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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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A. INTRODUCTION

The powerful remedial purpose of RCW 49.48.030 is to make employees whole when they have been mistreated by their employers. That purpose was unjustly circumscribed here.

Barbara Corey prevailed in her wrongful termination claim against her former employer, Pierce County (“County”). The County and the court had timely notice of her intent to seek attorney fees, and Corey’s counsel relied on Supreme Court precedent stating that fee requests may be made at any time. Yet the trial court refused even to consider her fee request, stating that it was untimely under CR 54(d)(2).

Given the applicable Supreme Court precedent and this Court’s own holdings in similar cases, the trial court erred in striking Corey’s fee request under RCW 49.48.030 pursuant to CR 54(d)(2). The statute provides a longer period of time to file a fee request than the court rule.

B. SUMMARY OF ARGUMENT

Corey established in her brief on cross-appeal that an action for attorney fees under RCW 49.48.030 may be brought in a separate action filed long after 10 days from the date of judgment. Br. of Resp’t at 61. She also argued that the remedial purpose of RCW 49.48.030 should be respected, particularly when there was no prejudice to the trial court or the County because notice of an attorney fee request was timely.

The County contends that CR 54(d)(2) impliedly superseded the common law. Now, the County avers, if a fee request is not filed pursuant to the court rule's 10-day deadline, then a separate action is no longer permitted and attorney fees must be borne by the employee. Reply Br. of Appellant at 46.

The trial court incorrectly ruled that Corey's attorney fee request was time-barred. RCW 49.48.030 must be liberally construed as a remedial enactment, and, by its terms, it allows a fee request by the prevailing plaintiff at any time. The statute establishes its own time frames, making the 10-day provision of CR 54(d)(2) inapplicable.

C. ARGUMENT

Corey requested attorney fees below under the Washington Law Against Discrimination ("WLAD"), which provides in relevant part:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer....

RCW 49.48.030. Under the mandatory "shall" language in this rule, the trial court does not have discretion regarding whether to award fees. *Id.* This is in contrast to other statutes leaving the decision to award of fees to the sound discretion of the trial court. *See, e.g.*, RCW 59.18.290(2) (in unlawful detainer action fee award left to trial court discretion); RCW

4.84.350 (under Equal Access to Justice Act trial court shall award fees “unless the court finds that the agency action was substantially justified or that circumstances make an award unjust”).

The critical language of CR 54(d)(2) states, “*Unless otherwise provided by statute or order of the court*, the motion must be filed no later than 10 days after entry of judgment.” Thus, the rule’s time limits give way if a fee provision has its own time frame for presentation of fee requests.

(1) The Holding of *Fire Fighters* That an Employee May Bring an Independent Action for Fees Is In No Way Limited to Arbitration Actions

By statute, as interpreted by our Supreme Court, RCW 49.48.030 has its own time frame for presentation of fee requests. Under that statute, a plaintiff can file an independent action for fees *at any time*. *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002). This rule fulfills the remedial purpose of RCW 49.48.030. Therefore, the statute allows for a longer time period than the 10 days permitted under CR 54(d)(2). *Id.*

The County responds that *Fire Fighters* is distinguishable on its facts. Reply Br. of Appellant at 47-48. Specifically, the County argues that the independent action rule set forth in *Fire Fighters* only applies in labor arbitration cases. *Id.* at 49.

While it is true that *Fire Fighters* was a labor arbitration case, and did not originate in the superior court, the language of the Supreme Court's holding does not restrict independent actions for fees under RCW 49.48.030 only to labor arbitration cases. In fact, the Court's holding is general and is based upon its interpretation of the plain language of the statute, not in an "as applied" analysis as the County suggests:

We therefore hold that RCW 49.48.030 does not require that for attorney fees to be awarded in *any* action, that action must be the "same action" in which wages or salary owed are recovered.

*Fire Fighters*, 146 Wn.2d at 44. Nowhere in this clear holding did the Supreme Court suggest that the separate action rule applied only to labor arbitrations or other "non-court" actions.

In fact, the plaintiffs in *Fire Fighters* did not first raise their attorney fee claim to the arbitrator within the context of the arbitration action, before filing a separate action. *Id.* at 32. Yet that fact did not persuade the Supreme Court that the *Fire Fighters* plaintiffs had waived their right to ask for attorney fees. Therefore, the trial court and the County err in suggesting that this case is distinguishable from *Fire Fighters* because attorney fees were unavailable in the arbitration proceeding.

Had the Supreme Court intended to restrict its holding and rule that successful plaintiffs could recover attorney fees in an independent action *only if* the original action was not a superior court action, it certainly would have so stated. It did not. Therefore, even employees whose original “action” was in superior court action are entitled to the benefit of the *Fire Fighters* rule.

The County fails to squarely address the holding of *Fire Fighters*, which is not as narrowly drawn as the County suggests.<sup>1</sup> The *Fire Fighters* rule is not restricted to labor arbitrations or other non-court actions. Any successful plaintiff, regardless of where his or her action originated, has an equitable right under RCW 49.48.030 as interpreted in *Fire Fighters* to bring an independent action for attorney fees at any time.

Next, the County argues that *Fire Fighters* “does not address” the time allowed for filing attorney fee requests, and is therefore irrelevant. Reply Br. of Appellant at 47. The County claims that the phrase “otherwise provided by statute” only refers to statutes that explicitly state a different time period governing attorney fee requests. *Id.*

In arguing that *Fire Fighters* does not apply because it does not explicitly state a time deadline for presenting fee requests that extends the

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<sup>1</sup> Instead, the County focuses on the language of the Court of Appeals opinion. Reply Br. of Appellant at 48.

rule of CR 54(d)(2), the County has the analysis backward. Rather than looking to see if *Fire Fighters* addresses the court rule – a futile task, since it was decided 5 years before the court rule – the operative question is whether the court rule shows express intent to supersede the holding of *Fire Fighters*.

The phrase “provided by statute” in CR 54(d)(2) cannot be read simply to mean that a longer time period must be expressly written into the statute itself. Instead, common law interpretations of the rule must also be consulted, as is true for new statutory enactments:

Whether [a new] statute affirms the rule of the common law on the same point, or whether it supplements it, supersedes it, or annuls it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law.

*In re Tyler's Estate*, 140 Wash. 679, 689, 250 P. 456, 51 A.L.R. 1088 (1926). An enactment cannot be construed in derogation of the common law unless the body enacting it has clearly expressed that purpose. *Staats v. Brown*, 139 Wn.2d 757, 766, 991 P.2d 615 (2000). See also, *Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994). The Supreme Court like legislators, is presumed to know the common law when drafting a new rule. *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994).

There is no indication that *Fire Fighters* has been superseded by court rule. The County points to no evidence, express or implied, of any intent to overturn the *Fire Fighters* principle in the language or history of CR 54(d)(2). There is no language banning independent actions for fees, no reference to *Fire Fighters* or RCW 49.48.030, and no suggestion of any disagreement on the part of the common law.<sup>2</sup>

Furthermore, this Court cannot presume that *Fire Fighters* is overruled by CR 54(d)(2) unless there is an express statement of intent to do so:

The legislature ‘is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.’

*In re Impoundment of Chevrolet Truck, WA License No. A00125A By and Through Its Registered Owner*, 148 Wn.2d 145, 164, 60 P.3d 53 (2002).

The County’s argument that *Fire Fighters* was superseded by court rule is unsustainable. There is no language in the history of CR 54(d)(2) suggesting that it overruled the *Fire Fighters* separate action rule. In fact, the express language of rule acknowledges that existing law, whether

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<sup>2</sup> The County cannot point to any intent on the part of the rule drafters in 2007 to supersede RCW 49.48.030, as interpreted by the *Fire Fighters* court. Karl B. Tegland, *4 Wash. Prac.* (pocket part) at 32. The purpose of the rule was ostensibly to prevent fee requests from being made “very late in the appellate process, sometimes after one or all appellate briefs have been submitted.” *Id.* Plainly, that was not true here.

statutory or otherwise, *supersedes* the court rule. That existing law includes *Fire Fighters*.

The County next claims that Corey “clearly” does not believe that an independent action was available to her because she brought her fee motion within the context of her wrongful termination lawsuit. Reply Br. of Appellant at 49.

The County’s claim that Corey has conceded the unavailability of an independent action is perplexing. Bringing a motion for fees within the context of the same action was not an admission that Corey could not bring an independent action. It was simply an effort to streamline the administrative process of obtaining the award of attorney fees to which she is entitled. Corey could have brought an independent action for fees under *Fire Fighters*, in which case the County would likely argue that she should have simplified matters by bringing the motion with the context of the original action. There is no waiver here.

(2) Courts Have, In the Past, Refused to Strictly Interpret Court Rules When Doing So Would Deny a Party the “Substantial Right” to Have the Losing Party Pay Attorney Fees

Corey also argued that she met the notification requirement which is the purpose of CR 54(d)(2). Br. of Resp’t at 57. She also argued that the administrative function of the rule having been fulfilled, the remedial purpose of the attorney fee provision of the employment discrimination

statutes should prevail, citing *Scully v. Employment Security Dep't*, 42 Wn. App. 596, 712 P.2d 870 (1986). *Id.*

The County responds that the court rule precludes an award of attorney fees regardless of the circumstances because Corey's failure to comply with the 10-day rule is not "excusable neglect." Reply Br. of Appellant at 43. The County does not address the holding or reasoning of *Scully*. *Id.* at 42-49.

The simple reasoning of *Scully* is that even when counsel fails to follow court rules to the letter, forcing an innocent party to pay attorney fees that should by rights be paid by his or her opponent is a "harsh result." 42 Wn. App. at 606. Therefore, the court should consider alternative sanctions that do not deprive a party of a statutorily defined right. *Id.*

This Court has addressed the unjust situation that arises when counsel fails to follow court rules to the letter and deprives the client of the statutory right to have attorney fees paid by the opposing party. In *Simonson v. Fendell*, 34 Wn. App. 324, 330-31, 662 P.2d 54 (1983), *overruled on other grounds*, 101 Wn.2d 88, 675 P.2d 1218 (1984), a prevailing party was entitled to attorney fees, but counsel had failed to fully comply with RAP 18.1, which required a party seeking a fee recovery to, *inter alia*, devote a section of his or her brief to a request for

attorney fees and raise the issue at oral argument. *Id.* at 329. This Court acknowledged the rule violation, but said that the correct sanction is not, in all cases, a denial of attorney fees. *Id.* Instead, courts must evaluate the purpose of the rule and the nature of the violation, and balance it with the affect on the prevailing party and the remedial purpose of the fee provision:

The client possesses the right to recover attorney's fees. Considering the probable magnitude of attorney's fees, this is a substantial right. The primary consequence of denying attorney's fees because an attorney did not fully comply with RAP 18.1 is to place the monetary loss upon the client, not the attorney. If attorney's fees are denied because his attorney failed to fully comply with RAP 18.1, it is the client who must pay his attorney instead of the fees being rightfully paid by the opposing party. *Bearing in mind the rules on appeal are to be liberally construed to promote justice, RAP 1.2(a), it is inappropriate that the intent of RAP 18.1 be to deny a client his right to reasonable attorney's fees due to his attorney's failure to fully comply with the procedural rules.*

*Simonson*, 34 Wn. App. at 330-31 (citations omitted; emphasis added).

All of the factors that were present in *Simonson* and *Scully* are present here, and the injustice is manifest. Corey has a statutory right to recover her attorney fees from the County. Corey's counsel timely notified the court and opposing counsel of the intent to seek fees, so there was no prejudice. Even if this Court concludes that *Fire Fighters* has been superseded, Corey's counsel operated under the reasonable belief that *Fire*

*Fighters* was still the law, and that the 10-day rule of CR 54(d)(2) did not apply. The short delay in filing the motion in no way prejudiced the County. The trial court abused its discretion in denying Corey attorney fees.

(3) Corey Is Entitled to Her Attorney Fees on Appeal

Corey is entitled to her attorney fees on appeal pursuant to RCW 49.48.030 for the reasons enumerated *supra*, and she provides this separate section of her brief in support of her appellate fee request. RCW 49.48.030 has supported an award of fees on appeal in a wrongful discharge case. *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830, *review denied*, 111 Wn.2d 1015 (1988).

Corey has a right to fees on appeal even where fees were not awarded to her at trial. *Mutual of Enumclaw Ins. Co. v. Jerome*, 66 Wn. App. 756, 766, 833 P.2d 429 (1992), *rev'd on other grounds*, 122 Wn.2d 157, 856 P.2d 1095 (1993).

This Court should award Corey her attorney fees on appeal.

D. CONCLUSION

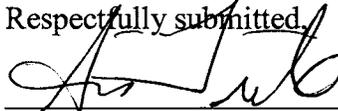
Pierce County's brief offers no reason why this Court should overturn the judgment on the verdict of the jury after a lengthy trial in which the jury was properly instructed on the law and the trial court did not abuse its discretion in admitting the testimony of Professor Larry

Echohawk on prosecutorial ethics. The County owed Corey a duty not to leak false information to the media, invading her privacy. Moreover, ample evidence supported the jury's verdict on defamation, false light, outrage, and promissory estoppel.

The Court should affirm the judgment on the verdict of the jury. The Court should reverse the trial court's order striking Corey's request for fees and remand the case to the trial court for entry of a fee award in Corey's favor. Costs on appeal, including reasonable attorney fees, should be awarded to Corey.

DATED this 20<sup>th</sup> day of October, 2009.

~~Respectfully submitted,~~



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DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of the following document: Reply Brief of Respondent/Cross-Appellant in Court of Appeals Cause No. 62505-5-I, to the following:

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

DATED: October 21, 2009, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
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DECLARATION