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No. 63251-5-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ROZANNA CAROSELLA, NATALIE PRET, et al.

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
Introduction	1
The Determinative Issues in <i>Storti</i> and This Case Are Identical	1
Extension Lecturers Are Not Materially Different from Other University “Faculty” in the Non-Professorial Ranks	11
The University Misperceives the Subcategory of Academic Personnel into Which Extension Lecturers Fit	16
Ms. Carosella and Ms. Pret Have Not “Admitted” that They Are Not “Faculty”	17
Members of the Class Relied on a Promise of Merit Raises in Exchange for Undergoing Merit Reviews	18
The Complaint in this Case Alleged that Extension Lecturers Are Treated as “Faculty” for Several Purposes	21
Conclusion	24

TABLE OF AUTHORITIES

	Page Number(s)
Cases:	
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187(1977)	23
<i>Bulman v. Safeway</i> , 144 Wn.2d 335, 27 P.3d 1172 (2001)	19
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 178 P.3d 936 (2008)	23
<i>Channel v. Mills</i> , 61 Wn. App. 295, 810 P.2d 67 (1991)	9
<i>Dougherty v. Nationwide Ins. Co., Inc.</i> , 58 Wn. App. 843, 795 P.2d 166 (1990)	9
<i>Escude v. King Cty. Hosp. Dist. No. 2</i> , 117 Wn. App. 183, 69 P.3d 895 (2003)	22, 23
<i>Paradise Orchards Gen'l Partnership v. Fearing</i> , 122 Wn. App. 507, 94 P.3d 372 (2004)	9, 10, 11
<i>Stewart v. Chevron Chemical Co.</i> , 111 Wn.2d 609, 762 P.2d 1143 (1988)	20
<i>Swanson v. Liquid Air Corp.</i> , 118 Wn.2d 512, 826 P.2d 664 (1992)	20
Statute:	
RCW 28.B.20.130(1)	5

ARGUMENT

Introduction

After one strips away the verbiage in the briefs of the parties in this appeal several undisputed facts remain: Subsequent to the advent of the Faculty Salary Policy (FSP) members of the Plaintiff Class, meritorious Extension Lecturers at the University, have always received merit raises of at least two percent, just as have the University's other "faculty," when the Legislature appropriated funds for such increases. The Legislature did not appropriate the funds for 2002-2003. The University did not pay merit increases to meritorious Extension Lecturers or to other University faculty that year. Other than a lack of funds from the Legislature, the University offered no explanation for its failure to pay merit increases to Extension Lecturers that year. Only within the context of this litigation has the University concocted another justification for not paying meritorious Extension Lecturers in 2002-2003: just like Lecturers, Part-Time, Extension Lecturers are not "regular" faculty. As a supplement to their opening brief in this appeal, Ms. Carosella and Ms. Pret address below additional arguments in the Respondent's Brief.

The Determinative Issues in *Storti* and in this Appeal are Identical

The University contends that *Storti v. University of Washington* and *Helf v. University of Washington* bear essentially no resemblance to

the matter that is the subject of this appeal. The supporting argument rests on two lines of reasoning. First, the issue on which *Storti* turned was whether the University's president had "reevaluated" the FSP in 2002 when he decided not to pay merit increases to meritorious faculty in the 2002-2003 academic year. In contrast, Ms. Carosella and Ms. Pret alleged that the University breached a contractual obligation under the FSP by not paying merit increases to meritorious Extension Lecturers during the 2002-2003 academic year.

As to *Helf*, the University "explains" that the issue in that case was whether Lecturers, Part-Time, who were not reviewed for merit were eligible for annual merit increases. Again, under the University's framing, that issue does match what Ms. Carosella and Ms. Pret alleged.

Finally, the University contends that even if the record does not support the arguments above, the trial court's decision on summary judgment in *Storti* has no application here because that decision was not a final judgment. As support for the argument the University claims that ten Washington cases, to which it cites, stand for the proposition that only a decision that has been reduced to a judgment is "final" for collateral estoppel purposes.

Ms. Carosella and Ms. Pret submit that for the reasons set forth below, the alleged differences between their claim and those at issue in

Storti and *Helf* do not exist. In fact, the current case is in essence “*Storti Part Three*.” To begin, the University’s rendition of what happened in *Storti* is as follows:

The issue in the litigation was the meaning and significance of the “Funding Caution” included in [the FSP], which reserved the President’s ability to “reevaluate the [FSP] if funds were not appropriated by the Legislature for pay raises. The superior court issued a partial summary judgment ruling, holding that the President’s 2002 decision not to grant raises to meritorious faculty did not constitute a “reevaluation” of the policy. . . .

Resp.’s Br. at 33 – 34.

What the trial court actually said is, however, more germane to the matter before this Court:

The relevant word in the [Funding Caution] is “reevaluation” and the critical issue is whether the President retained discretion to recommend implementation of the [FSP] on an annual basis.

. . .

The funding caution also must be read in the context of the entire salary policy document, especially allocation priorities and the commitment to all resources other than legislative appropriations to support the policy. **After such review, the court is persuaded by Plaintiff’s argument that the word “reevaluation” reserves the right of the University to change the policy at some future date** (emphasis supplied).

CP 783, l. 11-13; l. 20-25.

Contrary to the University’s representation here, the issue in *Storti* was whether unless “changed” the FSP creates a contractual obligation to

pay meritorious faculty annual merit raises of at least 2%. The trial court answered that question affirmatively. Thus, the University breached a contractual obligation to pay those raises in 2002-2003.

In its motion for summary judgment in this litigation the University asserted that the order on summary judgment in *Storti* did not really establish that the University had breached a contractual obligation under the FSP in 2002-2003. CP 563, l. 17-26; CP 564, l. 1-5. In this appeal the University advances a similar representation:

[T]he ruling in *Storti* was not a final decision on the plaintiff's claims; it only addressed one issue in the case – whether the President of the University had engaged in a sufficient re-evaluation of the FSP. The *Storti* ruling did not address whether the Regents had independent authority to modify the FSP or any of the University's other defenses. CP 779-784.

Resp.'s Br. at 35 – 36.

Under this version of events, had the University decided to proceed to trial rather than settle with Prof. Storti after the entry of summary judgment, the trial would have focused on both the University's alleged liability for breach of contract and the damages arising from the breach. Ms. Carosella and Ms. Pret are baffled by this re-casting of what the trial court ruled in *Storti*. There would have been no trial on the liability issue, as the trial court's pellucid language demonstrates:

After viewing all of the relevant portions of the Faculty Salary Policy, the court concludes that the plain language creates a mandatory duty that requires the University to provide meritorious faculty an annual increase of at least 2%. The court cannot find any language that makes the merit salary increase contingent on funding.

CP 782, 1. 22-26. That is, unless changed, the FSP constitutes a “mandatory duty” of the University to pay annual merit increases.

Further, whether the University’s Regents have authority to modify the FSP is irrelevant to the question of what the FSP represents. Under RCW 28.B.20.130(1), the Regents have “full control” of the University. Thus, they have authority to, for example, change or eliminate the FSP, abolish faculty tenure, or rescind the Faculty Code in its entirety. In 2002 the Regents did not change the FSP. Consequently, what they could have done was irrelevant to the question whether they or anyone else had changed the FSP in 2002.

In *Helf* the plaintiff alleged that for a period of five years, beginning in 2001-2002, the University had breached a contractual obligation, under the FSP, to pay annual merit increases to its Lecturers, Part-Time. That is, Ms. Helf advanced the exact same claim, albeit for a period of several years, that Prof. Storti articulated. Ms. Helf filed her lawsuit in part because Lecturers, Part-Time, were not included in the *Storti* settlement. As Ms. Carosella and Ms. Pret explained in their

opening brief in this appeal, Ms. Helf moved to intervene in *Storti* because she was concerned that the settlement agreement might bar her from litigating her claim against the University. The University opposed her attempt to intervene.

The University claims that its opposition to the attempt derived from the “fact” that Lecturers, Part-Time were not subject to merit reviews. In order to receive an annual merit increase, so the University’s story goes, under the terms of the FSP a faculty member must undergo a merit review. Thus, because Lecturers, Part-Time, did not undergo merit reviews, they could not receive merit increases. Resp.’s Br. at 20.

At least three infirmities attend this “story.” First, in its opposition to Ms. Helf’s motion the University cited to several sections of the Faculty Code in support of the proposition that Lecturers, Part-Time, are not “regular” faculty. According to the University only “regular” faculty are eligible for merit raises. CP 829, I. 4 – 14. The term “regular” faculty is defined nowhere in the Faculty Code. It is clear that just as in opposing Ms. Helf’s motion in *Storti* by claiming that Lecturers, Part-Time, are not “regular” faculty, the University now classifies Extension Lecturers as other than “regular” faculty.

Second, the FSP mandates that

[a]ll faculty shall be evaluated annually for merit and for progress towards reappointment, promotion and tenure, as appropriate (emphasis supplied).

CP 691. Nothing in the FSP or anywhere else in the Faculty Code even remotely suggests that “all faculty” in the quoted portion above includes none other than “regular” faculty.

Third, the FSP’s “default” position regarding merit reviews is clear, as the definition of the *Storti* class reflects. Specifically, any continuing faculty “employee” who “was not found unmeritorious in the 2001-2002 academic year” was included in the class. CP 824. This language is telling as to the “requirement” of a review prior to receipt of a merit increase. Specifically, there are two possible routes to one’s not being found unmeritorious. First, the faculty “employee,” another term not found in the Faculty Code, is found to be meritorious after a merit review. Second, the faculty “employee’s” unit does not conduct the formally required merit review. Were the second circumstance a null set, there would have been no need to have the “not found unmeritorious” language in the definition of the *Storti* class.

That, as it now claims, the University allegedly decided to settle in *Help* because some of its academic units had conducted merit reviews of Lecturers, Part-Time, has no evidentiary support in the record of this or any other case to which the University can point. What is clear in the

record in this case is that the University maintained that “faculty” in the FSP is not coextensive with “faculty” in Sec. 21-31 of the Faculty Code.

Lecturers, Part-Time, were not the only “faculty” excluded from the final definition of the *Storti* class. Extension Lecturers, Full- and Part-Time, were not included. In their complaint Ms. Carosella and Ms. Pret alleged that as meritorious “faculty,” they, and members of the class, were entitled also to receive at least two percent merit increases in 2002-2003. CP 8, l. 28-30. Their claim of breach of contract matched that of Prof. Storti and Ms. Helf.

In its motion for summary judgment in this litigation the University claimed that *Storti* did not “finally” decide the breach of contract issue as to the FSP in 21002-2003. CP 563, l. 17-26; CP 564, l. 1-5. Thus, were Ms. Carosella and Ms. Pret to proceed to trial, they would have to litigate the question whether the FSP constituted a contractual obligation to pay meritorious faculty an annual merit increase of two percent in 2002-2003. In their opening brief in this appeal, Ms. Carosella and Ms. Pret addressed the effect of *Storti* precisely because of that contention. The University’s contention is correct only if *Storti* “finally” decided nothing.

According to the University, the ruling on the breach of contract issue in *Storti* cannot have collateral estoppel effect because the order on

summary judgment there was not a final judgment, by implication pursuant to CR 58. Ostensibly, the ten Washington cases to which the University cites support that contention. A review of the ten reveals that not one of them conditions the application of collateral estoppel on the entry of a “final” judgment pursuant to CR 58. Particularly noteworthy on the list is *Channel v. Mills*, 61 Wn. App. 295, 810 P.2d 67 (1991), where, as the University notes, the Court ruled that an arbitration award is not a final judgment.

What the University omits in its citation to *Channel* is mention of the controlling case law in Division One, case law to which the Division Two *Channel* court adverted and with which it disagreed at page 299. Specifically, in *Dougherty v. Nationwide Ins. Co., Inc.*, 58 Wn. App. 843, 849, 795 P.2d 166 (1990), this Court held as follows:

While the word “award” is not defined in our arbitration statutes, it is apparent from the manner in which it is used that the Legislature was treating it as a final, complete and binding decision resolving the dispute. Consistent with the authorities cited above, in its completeness and finality, it is the equivalent of a final judgment entered by a court.

Similarly somewhat less than complete is the University’s citing to *Paradise Orchards Gen’l Partnership v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004). That case involved a lawsuit against the former lawyer of the seller in a real estate transaction that did not come to fruition. After

the buyer failed to perform the seller sued the buyer. The seller's lawyer was to be a witness in the proceeding. At issue was the meaning of the "remedies" paragraph in an earnest money agreement. The parties settled after summary judgment dismissal of the seller's claims. Then, in a different court, the seller sued its lawyer in the transaction. The second court ruled that the first court's interpretation of the earnest money agreement did not have collateral estoppel effect in the second proceeding. *Id.* at 511-516. The University's abbreviated version of the Court's rationale on appeal is that "final judgment requirement was not met where, after summary judgment ruling, case was settled before entry of final order[.]" Resp.'s Br. at 36.

Actually, the appellate court began its analysis of the collateral estoppel issue by citing to language in two Washington Supreme Court cases:

"Collateral estoppel, also known as issue preclusion, 'prevents litigation of an issue after the party estopped has had a full and fair opportunity to present its case.'" *Barr v. Day*, 124 Wn.2d 318, 324-325, 879 P.2d 912 (1994) (quoting *Hanson v. City of Snohomish*, 121 Wn.2d 552, 661, 852 P.2d 295 (1993).

Id. at 514. Thus, a determinative question was whether the lawyer "had a full and fair opportunity," in the first lawsuit, to litigate the meaning of the

remedies paragraph in the earnest money agreement. The Court concluded that

[f]or collateral estoppel purposes, the ruling [on the meaning of the remedies paragraph in the first lawsuit] was not a final judgment. Mr. Fearing was not a party or in privity with Paradise.

Id. at 515. In fact, there is nothing in the Court’s discussion of the collateral estoppel issue that supports a summary that the lack of a “final order” explains the Court’s ruling on the issue.

**Extension Lecturers Are Not Materially Different from Other
University “Faculty” in the Non-Professorial Ranks**

From the outset in this litigation, the University has persisted in defining an employee who holds a “faculty” position as someone who is accountable for performing three functions: conducting research/engaging in scholarship, teaching, and performing service to the University. As the University notes in its brief, Sec. 24-55 of the Faculty Code sets forth the performance review requirements for “faculty” members on the three functions set forth above. Resp.’s Br. at 10. What the University continues to ignore is the fact that only persons who occupy “faculty” positions in the professorial ranks must perform those three functions. The University’s “lecturers,” whether appointed on a full- or part-time basis, are employed to perform only one of those functions: they teach.

Thus, any performance review that those “lecturers” undergo does not include an assessment of their research or service records. Consequently, under the University’s own reasoning “lecturers” do not undergo the annual review for merit required by the FSP. It must follow then that “lecturers” are not “faculty” for purposes of the FSP.

In *Storti*, however, the University agreed to include “lecturers,” except those with the prefix “Extension,” on full-time appointments as part of the class. Subsequently, in *Help*, the University agreed to compensate Lecturers, who held part-time appointments, for its failure to pay annual merit increases to those persons. The inconvenient fact for the University is that, in any given academic year, it employs several hundred persons who perform only the teaching function and who, if evaluated on their performance, have an evaluation focused solely on teaching. Those persons comprise University employees who hold the following titles: Principal Lecturer, Senior Lecturer, Lecturer, and Extension Lecturer.

Even if all of the above is true, the University seems to imply, Extension Lecturers are different from other “lecturers” for several reasons: Extension Lecturers are not part of an academic department; the hiring process for Extension Lecturers is less involved than the process for hiring “lecturers” in academic departments; and according to Sections 21-

31 and 24-36 of the University Handbook, persons who teach extension courses are not “faculty.”

As to the first of these reasons, it is true that Extension Lecturers do not reside in an academic department. As the history of English Language Programs, set forth in the opening brief in this appeal, should make clear, those programs and the persons who teach in the programs migrated from one academic department to another and finally found what appears to be a permanent “home” in Educational Outreach. More significantly, from the outset an academic department has always had authority to approve the courses in ELP and the persons who teach those courses. Further, the University employs to teach those courses only persons who hold specialized degree credentials in teaching English as a second language.

Second, as to the formal hiring process for Extension Lecturers, while the Senior Director of ELP has authority to make the appointment, that authority is not plenary. The appointment process, detailed in the opening brief in this appeal, requires approval by other institutional actors: the Vice Provost for Educational Outreach, the University’s Office of Academic Human Resources (Academic HR), and, typically, the English Department. Of course, departmental faculty, department chairs, and deans are not formally involved: Extension Lecturers do not reside in an

academic unit. Of particular significance, however, is Academic HR's approval authority. That office has approval authority over appointments to "academic" positions at the University.

Interestingly, appointment to a Lecturer, Part-Time, position in an academic unit does not require Academic HR's approval.

www.washington.edu/admin/acadpers/jcc_requirement.html. CP 915, l. 9-

16. Thus, such an appointment has fewer steps than appointment to an Extension Lecturer position. Regardless, contrary to what the University would like this Court to believe, ELP's Senior Director has no unbridled authority to hire anyone he pleases into the academic position of Extension Lecturer.¹

Third, according to the University Sec. 21-31 of the Faculty Code excludes Extension Lecturers from the definition of "faculty." That section lists twelve titles but contains no language that specifically excludes other titles. The University's initial interpretation of Sec. 21-31 in this litigation was that anyone holding a title that did not appear on the list in that section is not a "faculty" member for any purpose of the Faculty

¹ As Ms. Carosella explained in a declaration in this case, "ordinarily both the University's English Department and the College of Arts and Sciences had approval authority over the courses taught in ELP and who would teach them. Thus, Mr. Szatmary's decisions to appoint persons as Extension Lecturers were subject to approval by the English Department and the College of Arts and Sciences. Further, those decisions to appoint always required approval by the University's Office of Academic Human Resources." CP 871, l. 3-9.

Code. If the University is correct, as Ms. Carosella and Ms. Pret noted, persons who held the position of Principal Lecturer until sometime in 2007 were not “faculty” because that title did not appear in Sec. 21-31 until that year. Now the University asserts that only a rigid application of Sec. 21-31 would have Principal Lecturers not included as “faculty” prior to 2007. Despite embracing a flexible interpretation of Sec. 21-31 in order to include Principal Lecturers, the University advocates a rigid interpretation of the section in the case of Extension Lecturers. What decision rule tells one when to apply a rigid versus a flexible understanding of the section the University does not provide.

The other apparent definitive section of the Handbook as to the status of Extension Lecturers is 24-36:

Handbook § 24-36 (adopted in 1956 as an original part of the Faculty Code) separately references “[p]ersons giving instruction in extension classes,” and states that when such persons teach classes offered for academic credit, they shall have “scholarly and professional qualifications equivalent to those required for the teaching of regular University classes.” Thus, the Handbook specifically categorizes “persons giving instruction in extension classes” (i.e. the appellants) as other than “faculty” for purposes of the Handbook, and states that, when teaching courses for academic credit, “qualifications equivalent” to regular faculty [a]re required, but not an actual appointment to the faculty.

Resp.’s Br. at 8-9.

That position is at odds with reality. The University's "extension" course offerings for Fall Quarter 2009, accessible at www.outreach.washington.edu/ext/courses, include, for example, Biostatistics I, taught by Jim Hughes, Professor of Biostatistics; English Novel: Early and Middle 19th Century, taught by Joseph Butwin, Associate Professor of English; Introduction to Communications II, taught by Gerry Phillipsen, Professor of Communications; and Introduction to Accounting and Financial Reporting, taught by William Wells, Senior Lecturer in Accounting. Thus, Sec. 24-36, by itself, does not exclude from the "faculty" umbrella persons who teach extension courses.

**The University Misperceives the Subcategory of Academic Personnel
into Which Extension Lecturers Must Fit**

The University claims that Ms. Carosella and Ms. Pret ignore several categories of employees who come under the rubric "academic personnel" in Vol. 4, Part IV, Ch. 1, Sec. 1 of the Handbook. Also, according to the University, what appears in that section has no bearing on provisions in the Faculty Code. As to the second point, the Faculty Code is part of the Handbook. Surely, the entire Handbook must display internal consistency. Otherwise, the Handbook could not serve as a meaningful guide for the University's faculty members.

The University is simply incorrect that in the opening brief Ms. Carosella and Ms. Pret ignore other categories of academic personnel, specifically, librarians, graduate teaching and research assistants, medical school interns and residents, and post-doctoral fellows who do not appear in Sec. 21-31. To be clear, Vol. 4, Part IV, Ch. 1, Sec. 1, lists several categories of University “employees.” One of those is “academic employees.” Under “academic employees” the Handbook lists several subcategories. Included explicitly in those subcategories are librarians, graduate assistants, medical residents, and post-doctoral fellows. Extension Lecturers are not librarians, graduate assistants, medical residents, or post-doctoral fellows. They are academic personnel who perform one function: they teach. Thus, within the “academic personnel” rubric in Vol. 4, Part IV, Ch. 1, Sec. 1 of the Handbook, they fit the “teaching,” faculty subcategory. There is simply no other subcategory into which they can fit.

**Ms. Carosella and Ms. Pret Have Not “Admitted” that They Are Not
“Faculty”**

The University persists in claiming that Extension Lecturers, particularly Ms. Carosella and Ms. Pret, have admitted that they are not faculty. Rather than repeat what they explained in their opening brief in this appeal, Ms. Carosella and Ms. Pret submit that a summary should

suffice. Various agents of the University, including, for example, the Vice Provost for Educational Outreach, the Director/Senior Director for ELP, and Academic HR, have always treated Extension Lecturers as “faculty” for some purposes but not for others. As a result, as Ms. Carosella put it when addressing the Faculty Senate’s Committee on Educational Outreach, “we [Extension Lecturers] are neither fish nor fowl.” CP 451. What she hoped to do was obtain formal voting rights for Extension Lecturers in the University’s governance system. *Id.* Doing so would require legislative action on the part of the Faculty Senate. Never once has Ms. Carosella stated that she does not consider herself or other Extension Lecturers “faculty.” She has always believed otherwise. CP 505, l. 9-10. The University neglects to mention that the argument it advances in this appeal is identical to that which the trial court rejected in granting class certification. The thrust of the argument was that Ms. Carosella and Ms. Pret were not adequate class representatives because, among other things, they had admitted that they were not “faculty.” CP 105, l. 11-26; CP 106, l.1-26; CP 107, l. 1-26; CP 108, l. 1-7; CP 123-126.

**Members of the Class Relied on a Promise of Merit Raises in
Exchange for Undergoing Merit Reviews**

There is no dispute that the members of the class underwent successful merit reviews every academic year from at least 2000-2001

through 2006-2007; that, with the exception of 2002-2003 in each academic year following successful merit reviews, members of the class received merit raises of at least two percent; and that the English Language Programs Operations Manual (OPMAN) sets forth the requirement that Extension Lecturers undergo annual merit reviews, which focus on teaching performance just as do reviews of the University's other "lecturers." Regardless, the University claims that members of the class did not rely on promises of specific treatment in the form of promises of merit raises. To get to this conclusion the University (a) makes much of Ms. Carosella's admission that she did not know of something labeled the "Faculty Salary Policy" until after the 2002-2003 academic year and (b) engages in a rather elaborate dissection of the "merit raise" provision of the OPMAN.

As to the effect of Ms. Carosella's admission, the University cites to several Washington cases for the rule that an employee cannot not rely on an employer's promise of which the employee is unaware. For example, in *Bulman v. Safeway*, 144 Wn.2d 335, 27 P.3d 1172 (2001), a discharged employee, who had already been suspended and had cleared out his office, could not have relied on the employer's "promise" of placing an employee with a substandard performance rating on a performance improvement plan prior to termination. The employee could

not have relied because he received a substandard rating on the same day that he was terminated. *Id.* at 347-348.

In *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 762 P.2d 1143 (1988), a discharged employee who conceded that he did not know the employer had a layoff policy until after he was discharged could not have relied on that policy prior to the termination. *Id.* at 614. Finally, the University's citation to language in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522, 826 P.2d 664 (1992), a case in which the Court sided with the employee's contention that the employer had made a promise of specific treatment, is to the Court's recitation of events in *Stewart*. Thus, *Swanson* adds nothing to the University's argument.

Although Ms. Carosella did not know, until after 2002-2003, the name of the University policy that governed the awarding of merit raises to "faculty," she and other members of the class knew about the merit raise section of the OPMAN well before that year. They knew that the merit raise section indicated that Extension Lecturers typically got merit raises that matched what other University faculty received. Further, they knew that in performing annual merit reviews of Extension Lecturers ELP followed what the University's academic units did. Regardless, the University claims that these facts do not add up to reliance. Under the University's reasoning, however, any Lecturer at the University who is

evaluated for merit, but cannot name the “policy” that mandates the review cannot have relied on that policy. Such reasoning “elevates form above substance.”

As to the University’s grammatical/syntactical gymnastics concerning the language of the merit raise section of the OPMAN, one cannot escape a simple reality: members of the class knew that in order to get merit raises, they had to undergo successful, required, merit reviews. They upheld their part of the bargain. The University upheld its part as well in the years prior and subsequent to 2002-2003. Thus, irrespective of any creative reading of the OPMAN, how one might even suggest that Extension Lecturers who underwent successful merit reviews did not rely on a “promise” that they would receive merit raises as a result escapes Ms. Carosella, Ms. Pret and the other members of the class who submitted declarations in this litigation. CP 465-526.

The Complaint in this Case Alleged that Extension Lecturers Are Treated as Faculty for Several Purposes

If Ms. Carosella and Ms. Pret did rely on a promise of specific treatment set forth in the OPMAN, the University contends that their complaint contained no such claim. Thus, so the argument goes, the claim was not properly raised at the trial court. Consequently, it cannot be part

of this appeal. Ostensibly, Washington case law supports this argument. For the reasons set forth below, we disagree.

First, Ms. Carosella and Ms. Pret advanced a single claim in their complaint: the University breached a contractual obligation, encompassed in the FSP, to pay merit increases to them during the 2003-2003 academic year. Again, that same claim was at the heart of *Storti*. The argument supporting that claim is simple: the OPMAN sets forth a promise of merit raises in exchange for Extension Lecturers' undergoing successful merit reviews. The merit raise section of the OPMAN ties those merit raises to merit raises that other University faculty receive when the Legislature appropriates moneys for such raises. The merit review process for Extension Lecturers changed subsequent to the adoption of the Faculty Salary System that includes the FSP. Thus, although the OPMAN does not mention it, the merit raise section incorporates the FSP to the extent possible for a unit with no persons in the professorial ranks.

Second, despite the breach of contract claim's being in the complaint in this case, the University implicitly asserts that it did not have notice of a breach of contract claim that implicated the OPMAN. Thus, *Escude v. King Cty. Hosp. Dist. No. 2*, 117 Wn. App. 183, 192, n. 8, 69 P.3d 895 (2003), teaches that this Court should not entertain the OPMAN argument: "theory not contained in complaint and not argued below will

not be considered on appeal.” Resp.’s Br. at 28. In contrast to what presented in *Escude*, Ms. Carosella’s and Ms. Pret’s allegedly “new” argument, as opposed to new claim, was argued to the trial court. CP 536, l. 9-25; CP 537, l. 1-25; CP 538, l. 1-25; CP 539, l. 1-25; CP 540, l. 1-3. In, for example, its reply to the Plaintiffs’ Opposition to the Motion for Summary Judgment, the University contended that the OPMAN does not “contain specific promise of an annual pay raise or any reference to the FSP.” CP 963. Thus, the teaching of *Escude* does not apply here.

The relevant question as to the “OPMAN argument” is whether its inclusion comports with the liberal notice pleading rule that Washington courts embrace. The most recent Washington Supreme Court case on the matter is *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008). There the Court cited to *Berge v. Gorton*, 88 Wn.2d 756, 762, 567 P.2d 187 (1977), for the rule that sets the limits on notice pleading:

“[e]ven our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff’s claim.”

Champagne v. Thurston County, 163 Wn.2d at 85. In assessing whether the complaint gives such notice a court must consider the “totality” of the complaint. *Id.* at 85-86. The complaint in this litigation alleges various ways in which the University has treated Extension Lecturers as “faculty.”

14-17; CP 5, 1. 9-24; CP 6, 1-10. In fact, that treatment is at the heart of the breach of contract claim.

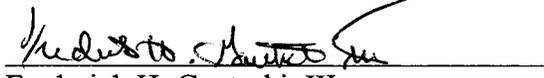
Application of the OPMAN's merit raise provisions that tell Extension Lecturers they can expect to receive merit raises that match those for other University faculty constitutes that manner in which the University has treated Extension Lecturers as "faculty" for purposes of the FSP. Ms. Carosella and Ms. Pret submit, therefore, that viewed in its totality, the complaint in this case gave adequate notice to the trial court and the University of the breach of contract claim and the basic argument in support of that claim. Because the FSP does not define "faculty," or cite to any other provision in the Handbook for a definition, Ms. Carosella and Ms. Pret had to allege some factual basis for the inclusion of Extension Lecturers within the meaning of "faculty" in the FSP. They did so in the complaint. Provisions in the OPMAN fit within the "story" of those allegations.

Conclusion

For the reasons set forth in their briefs in this appeal, Ms. Carosella and Ms. Pret respectfully request that this Court reverse the trial court and direct summary judgment for the class.

Respectfully submitted this 4th day of September, 2009.

CONNELL, CORDOVA, HUNTER & GAUTSCHI, PLLC

A handwritten signature in cursive script, appearing to read "Frederick H. Gautschi, III", written over a horizontal line.

Frederick H. Gautschi, III

George T. Hunter

Attorneys for the Plaintiff Class