

NO. 35461-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CASCADE FLORAL PRODUCTS, INC.; CONTINENTAL
WHOLESALE FLORISTS, INC., DBA CONTINENTAL FLORAL
GREENS; HIAWATHA, INC.; HOOD CANAL EVERGREENS;
PACIFIC COAST EVERGREENS, INC.; PUGET SOUND
EVERGREENS CO., INC; MT. ST. HELENS EVERGREEN, INC.;
OLYMPIC EVERGREEN, INC.,

Respondents,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant.

REPLY BRIEF OF APPELLANT

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6/5/01 10:00

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I. INTRODUCTION

The Department of Labor and Industries asks this Court to reverse the superior court's decision that the Farm Labor Contractors Act, RCW 19.30, does not apply to the harvesting of evergreen foliage in the forest. RP 25-27. The Department seeks this reversal so the harvesters of evergreen boughs, bark, salal, and other commercial forest products may receive the protections (i.e., working with bonded and licensed farm labor contractors) and the remedies of the Act (i.e., obtaining payment for unpaid wages from unlicensed and licensed farm labor contractors or from any person who knowingly uses the services of an unlicensed contractor). RCW 19.30.020, .040, .110, .170, .200.

The superior court declared that several floral green companies (the Companies) are not subject to the Act on the sole ground that they were not "agricultural employers." CP 286. An agricultural employer is "*any person engaged in agricultural activity, including the growing, producing, or harvesting of farm or nursery products, or engaged in the forestation or reforestation of lands, which includes but is not limited to [a non-exhaustive list of activities].*" RCW 19.30.010(4).

Two types of agricultural employers exist under the plain language of the statute; one who engages in agricultural activities and one who engages in forestation activities. The Companies focus on the

“agricultural activities” part of the definition to assert the statute requires cultivation. Brief of Respondents (RB) at 2. RCW 19.30.010(4), however, does not limit agricultural employers to those engaged in “agricultural activities,” nor does it require cultivation. *See* Part A.

This case concerns the meaning of “forestation” activities and the pivotal issue is whether the harvesting of evergreen foliage or the picking of brush constitutes a “forestation” activity. This work is encompassed by the plain language of RCW 19.30.010(4), which uses *inclusive* terms (“includes but is not limited to” and “and other related activities”) to give a broad meaning to forestation. *See* Part A; Brief of Appellant at 21-27.

The Farm Labor Contractors Act’s provisions, RCW 19.30.010-.902, read as a whole, indicate that the Legislature intended to include workers who harvest evergreen foliage under the terms of this remedial Act. *See* Part B; Brief of Appellant at 17-33. Any ambiguity in RCW 19.30.010(4) should be resolved in favor of an expansive reading of “forestation” to include harvesting evergreen foliage because this interpretation promotes the legislative purpose of the Act, namely to protect farm and forest workers. *See* Part B; Brief of Appellant at 27-38.

The Companies rely on testimony and definitions under irrelevant statutory schemes, including the Washington Industrial Safety and Health

Act (WISHA), RCW 49.17, and the Industrial Insurance Act, RCW 51.¹ These statutory schemes and this testimony do not apply to the analysis under RCW 19.30.010(4). *See* Parts C-D. The Companies also make several unsubstantiated allegations about the Department to support their request for attorney fees. These allegations are meritless and the Court should deny the fee request. *See* Part E.

II. REPLY

A. **The Broad Definition of “Forestation” in RCW 19.30.010(4) Covers Harvesting Evergreen Foliage and Does Not Include a Hidden Cultivation Requirement**

The central issue here is whether the harvesting of evergreen foliage or picking brush constitutes a forestation activity, such that someone who engages in such an activity is an agricultural employer for the purposes of the Farm Labor Contractors Act. An agricultural employer “means [1] *any person engaged* in agricultural activity, including the growing, producing, or harvesting of farm or nursery products, *or* [[2] *any person*] *engaged in the forestation* or reforestation of lands, which includes but is not limited to the planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings, the clearing, piling, and disposal of brush and slash, the harvest of Christmas

¹ *See, e.g.*, RB 7-8, 12 (citing testimony from a WISHA citation case); RB 9-12 (citing industrial insurance premium audits and declaratory action regarding industrial insurance premiums); RB Appendix (attaching CP 1254-58, which contains declaratory judgment in industrial insurance case).

trees, and other related activities.” RCW 19.30.010(4) (emphasis added).

The Companies argue that the harvesting of evergreen foliage is not an “agricultural activity.” RB 2, 21, 24. The Companies posit that the statute has a “litmus test” of *cultivation* as the “essence of agriculture.” RB 21. The word “cultivation,” however, is not included in the plain language of RCW 19.30.010(4). The statute also does not require work on a farm. RCW 19.30.010(4) more broadly includes forestation activities.²

The Companies assert, without authority, that forestation is defined as the “planting and cutting of trees” and maintain that “forestation” requires cultivation activities like “planting, fertilizing, weeding.” RB 22. But the statute’s *forestation*-based activities encompass more than

² The Companies appear to focus the phrase “*agricultural* activities” to the exclusion of *forestation* activities because of an incongruity in a related statute. RB 20. RCW 19.30.010(3) defines a farm labor contractor activity as “recruiting, soliciting, employing, supplying, transporting, or hiring *agricultural employees*.” RCW 19.30.010(5) (defines an *agricultural employee* as “any person who renders personal services to, or under the direction of, an *agricultural employer* in connection with the employers’ *agricultural activity*.” RCW 19.30.010(5) (emphasis added). Reading the statute literally it would appear that no forestation work would be covered under the Farm Labor Contractors Act despite the express language in RCW 19.30.010(4), which provides that it does. Such an interpretation would render meaningless the forestation language, contrary to legislative intent. In any event, the question here is whether the Companies are “*agricultural employers*” not who is an “*agricultural employee*.” CP 286.

the Companies' limiting *cultivation*-based interpretation.³

RCW 19.30.010(4)'s broad scope is shown in three ways. First, the Legislature expanded the statute to cover more than the agricultural activities of "growing, producing, or harvesting" of farm products. The Legislature explicitly expanded the Act to include non-farm activities in the forest, and the statute now covers "forestation" activities. See Laws of 1985, ch. 280 § 1; CP 641, 849-850. The original definition included only the "growing, producing, or harvesting" of farm products. Laws of 1955, ch. 392 § 1.

The 1985 addition of forestation activities to the statute shows the Legislature's intent not to confine covered activities to "growing" or "producing" or to the *cultivation* of products. Laws of 1985, ch. 280 § 1. The Legislature did not use the phrase, "growing, producing, or

³ The claim that harvesting evergreen foliage or brush picking (e.g. RB 24) does not have an aspect of cultivation or husbandry is incorrect. Indeed, RCW 76.48.200 encourages the teaching of effective picking techniques and the protecting of resources. Conscientious management of commercial forest products resources like salal is required for sustainability and to foster continued growth of the salal. The farther down into the woody stem that salal is cut, the less likely the plant will be able to generate new growth the next year. Heidi Ballard et al., *Harvesting Floral Greens in Western Washington as Value-Addition: Labor Issues and Globalization* at 11, 16. (Proceedings of the Int'l Ass'n for the Study of Common Property, Victoria Falls, Zimbabwe, June 2002), available at <http://dlc.dlib.indiana.edu/archive/00001077/>, cited at CP 942. Heidi L Ballard & Lynn Huntsinger, *Salal Harvester Local Ecological Knowledge, Harvest Practices and Understory Management on the Olympic Peninsula, Washington*, 34 *Human Ecology* 529, 540-43 (2006); Heidi Ballard, *Local Ecological Knowledge and Management of Salal (Gaultheria shallon) by Mobile Forest Workers in Olympic Peninsula, Washington, USA* (Proceedings of the Int'l Ass'n for the Study of Common Property, Oaxaca, Mexico, August 2004), available at <http://dlc.dlib.indiana.edu/archive/00001339/>.

harvesting” in conjunction with forestation activities (unlike in the definition of the agricultural activities), and this must be viewed as a conscious choice. *Cf. State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (legislature deemed to intend a different meaning when it uses different terms).

Second, RCW 19.30.010(4) also includes any person who has “engaged in the forestation . . . of lands” and broadly defines forestation as *including* “but . . . *not limited to*” a wide range of work and “*other* related activities.” RCW 19.30.010(4). The Companies invoke the maxim of *expressio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of others), essentially arguing that by not including the term “picking brush,” the Legislature did not intend to include this work. *See* RB 23-24. But *expressio unius est exclusio alterius* “is to be used only as a means of ascertaining the legislative intent where it is doubtful, and not as a means of defeating the apparent intent of the legislature.” *State v. Williams*, 94 Wn.2d 531, 537-38, 617 P.2d 1012 (1980) (declining to apply maxim because the term “any individual” evinced an intention to apply the statutory requirements broadly) (internal quotations omitted).

By using the term “include,” the legislative intent is to include other items not mentioned. The statutory phrase “includes but is not limited to” has an expansive effect. *See Wheeler v. Dep’t of Licensing*,

86 Wn. App. 83, 88, 936 P.2d 17 (1997) (“Generally, the term ‘include’ is construed as a term of enlargement, not as a term of limitation.”); 2A Norman J. Singer and J.D. Shambie Singer, *Statutes & Statutory Construction* § 47.23, at 417 (7th ed. 2007) (“When ‘include’ is utilized it is generally improper to conclude that entities not specifically enumerated are excluded.”). The inclusion of several different examples of work shows legislative intent to include a range of activities and to not exclude unnamed ones. And by using the phrase “other related activities,” the word “other” includes items not previously mentioned. *See Webster’s Third New International Dictionary* 1598 (2002).

Third, the statute provides that it “includes but is not limited to” the non-exhaustive examples of “planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings, the clearing, piling, and disposal of brush and slash, the harvest of Christmas trees, and other related activities.” These examples help define forestation. *Cf. Roggenkamp*, 153 Wn.2d at 622-23 (court interprets statutory term in context of surrounding terms and not in isolation). They show the broad scope of forestation by including illustrations of harvesting the natural bounty of the forest. Harvesting evergreen foliage is similar to harvesting Christmas trees and thinning trees—the removal of forest products that have commercial and/or ornamental value. And it is similar to the

clearing, piling and disposal of brush—the removal of plants or part of plants from the forest. *See* Brief of Appellant at 24-27.

The Companies assert, without citation to authority, that the Christmas trees and other forest products contemplated by RCW 19.30.010(4) must be cultivated by planting seedlings, fertilizing, and weeding. RB 21; *see also* RB 24 (asserting brush picking not included because brush grows naturally in forest).⁴ Nothing in RCW 19.30.010(4) limits “Christmas trees” to planted trees or the “thinned” trees to planted trees, or the “cleared brush” to planted brush.

Little meaningful distinction exists between harvesting a Christmas tree and harvesting an evergreen bough for ornamental purposes during the Christmas and holiday season. Although harvesting evergreen boughs and foliage is not listed in the non-exhaustive list of “forestation” activities in RCW 19.30.010(4), it is sufficiently like the activities listed (harvesting Christmas trees; thinning trees; and clearing, piling, and disposal of brush) to constitute “forestation” under the statute.

⁴ This “grows naturally” distinction is not found in the statute. Moreover, harvesting evergreen foliage possesses an aspect of cultivation. *See* discussion *supra* n.3. If plants are not picked correctly then they are not a sustainable forest resource. *Id.* Harvesting products like salal incorrectly affects the plant’s ability to regenerate. Ballard & Huntsinger, 34 Human Ecology at 540-43.

B. Extrinsic Aids Support Reading the Word “Forestation” Broadly to Include Harvesting Evergreen Foliage

As a remedial statute, the Farm Labor Contractors Act is entitled to a liberal construction to determine and carry out its purpose. *Cf. Everett Concrete Prod., Inc. v. Dep’t of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988).⁵ The Companies do not deny that the statute is a remedial one. RB 25. Consistent with its statutory language and a liberal interpretation of the statute, the Court should interpret the list of forestation activities in RCW 19.30.010(4) to be a non-exhaustive list of activities that include the harvesting of evergreen foliage.

The Department’s interpretation that the Farm Labor Contractors Act applies to the specialized forest products industry should be given deference (*see* Brief of Appellant at 33-34) because the Department is the agency charged with administration and enforcement of the Act. *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). The Companies argue that application of this principle is

⁵ The Companies argue that these principles do not apply, relying on cases that stand for the proposition that a person must qualify under the statutory terms to obtain benefits. *See* RB 25 (citing *inter alia Kirk v. Dep’t of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937)). Such cases do not apply, however, to determining what statutory terms mean. In the area of wages and conditions of employment, the courts interpret statutory terms broadly to include workers under a statute. *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (interpreting remedial wage statute in a manner consistent with “Washington’s long and proud history of being a pioneer in the protection of employee rights”); *Everett Concrete*, 109 Wn.2d at 823-24 (interpreting remedial prevailing wage statute in favor of workers, the statutory beneficiaries, to interpret the term “upon all public works” to include certain work performed offsite for the public work project).

dependent on notice from the Department of its position (RB 25), however they knew the Department's enforcement position as evidenced by their declaratory judgment to contest it. CP 1386.

The Companies also assert that the legislative history does not show any intent to protect workers who harvest evergreen foliage. RB 26. The legislative history of the 1985 amendments reveals the Legislature's intent to protect forest laborers from the same kind of abuses that were present in the agricultural industry, including unpaid wages, unfair deductions by labor contractors, as well as sub-standard living conditions. CP 650-52, 654-60, 664-74, 869-76, 641-48. The legislative history shows no intent by the Legislature to exclude workers harvesting evergreen foliage from the protections it added for forestation workers because workers harvesting evergreen foliage are the kind of workers the Legislature intended to protect. The record specifically notes "harvest work" in the forest, which the testimony distinguished from other forest activities like thinning. CP 870.

Consistent with the legislative history, federal law interpreting a substantially similar statute also favors interpreting the word "forestation" broadly to include harvesting evergreen foliage. Although not identical, the remedial Washington Farm Labor Contractors Act "substantially parallels" in "scope and purpose" the federal Farm Labor Contractor

Registration Act, now known as the Migrant and Seasonal Agricultural Workers Protection Act (MSPA), 29 U.S.C. §§ 1801-72. *Escobar v. Baker*, 814 F. Supp. 1491, 1501 (W.D. Wash. 1993). “Agricultural employment” under MSPA includes the “handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of an agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802(3).

Unlike Washington’s Act, the federal MSPA does not mention “forestation.” MSPA only generally describes “planting,” “handling,” and “processing” of agricultural and horticultural commodities. The language of MSPA is thus in many ways narrower than Washington’s Farm Labor Contractors Act. Nonetheless, even under this narrower language, MSPA applies to the harvesting of evergreen foliage. Brief of Appellant at 34-38.

The Companies claim that the federal law does not apply to the harvesting of evergreen foliage. RB 35. The Companies’ argument fails to address the Wage-Hour Administrator Opinion Letter cited at Brief of Appellant at 38, which clearly states the federal Department of Labor’s interpretation that MSPA applies to harvesting of evergreen foliage. This letter was also cited in *Morante-Navarro v. T & Y Pine-Straw, Inc.*, 350 F.3d 1163, 1170 (11th Cir. 2003), in which the court stated:

[T]he DOL’s Wage and Hour Administrator has issued an

opinion letter consistent with our conclusion. The DOL issued the opinion letter in response to an inquiry regarding whether “agricultural employment” under [MSPA] included “such activities as handling of wild, small plants growing in the forest . . . trimming and harvesting of evergreen boughs, harvesting of yew bark and harvesting of ferns.” Wage-Hour Administrator Opinion Letter No. 1732 (WH-541), 1994 WL 975108 (Dec. 1, 1994). The DOL’s position is that . . . “issues such as whether employees who work on forest products are subject to [MSPA] are guided by the criteria delineated in the *Bresgal* decision. That decision makes it clear that Congress intended that agricultural employment includes forestry operations of the type . . . described. Therefore . . . [MSPA] applies to all of the activities about which you inquired if done with predominantly manual labor within a forest.”

Morante-Navarro, 350 F.3d at 1170 (MSPA covered harvesting pine straw).

Morante-Navarro relied on *Colunga v. Young*, 722 F. Supp. 1479, 1486 (W.D. Mich. 1989), *aff’d*, 914 F.2d 255 (6th Cir. 1990), which held that workers engaged in the cutting, gathering, tying and loading of evergreen boughs were “agricultural workers” within the meaning of MSPA because they were engaged in the handling of horticultural commodities.⁶

⁶ *Colunga* remains good law on this point, contrary to the suggestion at RB 36 (citing *Salazar v. Brown*, 940 F. Supp. 160, 165 n.1 (W.D. Mich. 1996); *Rogers v. Sav. First Mortgage, LLC.*, 362 F. Supp. 2d 624, 639 n.8 (W.D. Mich. 2005)). The *Salazar* court, which questioned *Colunga*, was not deciding whether workers were covered under MSPA, rather the court decided a different issue also discussed by *Colunga*, namely whether a private right of action exists under the Federal Insurance Contributions Act. *Salazar*, 940 F. Supp. at 165 n.1; *see also Rogers*, 362 F. Supp. 2d at 639 n.8 (not deciding MSPA question, but issue regarding compensation for mortgage loan officers).

C. Other Statutes Do Not Control Over the Specific Provisions of the Farm Labor Contractors Act

RCW 19.30.010(4) expressly provides that engaging in forestation activities means that a person is an agricultural employer. This express statutory language controls over the non-Farm Labor Contractors Act statutes cited by the Companies that discuss “agricultural” work. Courts interpret statutory language in a manner consistent with its language and its legislative purpose, even if similar language in another statute would result in a different outcome. *See Roggenkamp*, 153 Wn.2d at 623 (“reckless driving” in one statute and “in a reckless manner” in another had two different meanings as shown by the different contexts); *Marler v. Dep’t of Retirement Sys.*, 100 Wn. App. 494, 503-504, 997 P.2d 966 (2000) (different results followed from different standards for L&I permanent total disability and PERS I total incapacity).

The Companies primarily rely on industrial insurance regulations promulgated to assess risk for the purposes of assessing premiums upon employers for industrial insurance purposes. RB 26-29. Under RCW 51, workers who pick brush or harvest evergreen foliage are covered under WAC 296-17A-4802-06, and they are not considered to be engaged in a farming operation. For the purpose of setting industrial insurance premium rates, farm labor contractors are those who work on a farm.

WAC 296-17A-4802. These classifications are based on the risk to the worker in performing the tasks and the likelihood of injury with the purpose of setting adequate amounts of money aside to fund the accident and medical aid funds administered under the Industrial Insurance Act. RCW 51.16.035; WAC 296-17-31011. These industrial insurance regulations do not interpret the Farm Labor Contractors Act, which has the different purpose of regulating farm labor contracting. *See Marler*, 100 Wn. App. at 503-504.

Moreover, unlike the industrial insurance regulations cited by the Companies, RCW 19.30.010(4) specifically provides for work involving “forestation and reforestation of lands,” and thus by its very terms is not limited to work on a farm.⁷ The other non-Farm Labor Contractors Act laws cited by the Companies regarding *agricultural* work (WISHA, RCW 49.17.020; Right-to-Farm Act, RCW 7.48.300; and the Minimum Wage Act, RCW 49.46.130(2)(g)) also do not matter here because RCW 19.30.010(4) specifically covers a wide range of *forestation* work.

The Companies also argue that because the Legislature did not

⁷ The Companies rely on a declaration from a former Department employee who worked in the premium section of the Department (CP 782, 1248), not Employment Standards, the section that enforces the Farm Labor Contractors Act. CP 148-49. A declaration from a former Department employee who worked interpreting different laws does not represent the official position of the Department regarding the Farm Labor Contractor Act. As noted by the classification services, there may be other statutes “outside our domain” that address the brush picking issue. CP 1352, *cited at* RB 28.

cross-reference the specialized forest products statute, RCW 76.48.020, this shows intent not to include these products under RCW 19.30.010(4). RB 17, 22. Similarly, they argue that the definition of forest practice in RCW 76.09.020, which is different than RCW 19.30.010(4), applies. RB 32. These statutes are part of different statutory schemes, with different regulatory purposes, and they do not apply to limit the terms of RCW 19.30.010.

The Companies also note at RB 17 that the Legislature did not pass a proposed bill that would have made the Department an agency that enforces RCW 76.48. Nothing can be inferred from legislative inaction. *State v. Conte*, 159 Wn.2d 797, 813, 154 P.3d 194 (2007) (“legislative intent cannot be gleaned from the failure to enact a measure”). Failed legislation and laws from other statutory schemes are not only irrelevant, using them to narrow the construction of RCW 19.30.010(4) would defeat the Legislature’s remedial purposes in the Farm Labor Contractors Act.

D. The Companies Raise Issues and Allege Facts Beyond the Scope of the Summary Judgment Ruling

The superior court’s decision that the Companies were not “agricultural employers,” as a matter of law, was based on the conclusion that harvesting evergreen foliage, in which the Companies were involved, does not constitute an “agricultural” or “forestation” activity under

RCW 19.30.010(4). RP 25-27; *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963) (“[I]f the court’s oral decision is consistent with the findings and judgment, it may be used to interpret them.”).

The sole question on this appeal is, thus, whether harvesting evergreen foliage (i.e., evergreen boughs, bark, salal, or ferns) by various means (cutting, picking, or gathering) under the uncontested facts constitutes “forestation . . . of lands” under RCW 19.30.010(4).

The Companies do not directly argue that they are not agricultural employers because individual employee-employer relationships are not established under the Act. However, in their Statement of the Case, they assert that by “industry custom, and in fact, brush pickers are independent contractors and not employees of the sheds.” RB 5 (citing shed owner declaration); *see also* RB 1. This claim was not decided by the trial court, nor has it been established on summary judgment, where the evidence is viewed in the light most favorable to nonmoving party. CR 56(c).

In any event, their view of the facts is incorrect. The Companies obtain the labor to harvest the evergreen foliage by issuing permits from land leases to individual forest workers or to middle persons who hire the harvesters. *See* CP 920, 922-23. A permit specifies where the harvesters are allowed to harvest brush. CP 922. Contrary to the Companies’ claim of lack of control (RB 1), the sheds control the harvest of brush through

the permits, which specify the type, location, and amount of brush harvested. *See* RCW 76.48.050 (4)-(7). *See* CP 608, 922-23; Brief of Appellant at 5-10. Also, contrary to the suggestion at RB 1, the record shows that harvesters and middle person contractors provide the evergreen foliage to the company that issued the permit to them. CP 925-26, 611, 932; *see also* CP 922 (sheds also obtain foliage from other sources).

RCW 19.30.010(4) provides that an “agricultural employer” includes “any person . . . engaged in the forestation or reforestation of lands” This statute defines who is an agricultural employer, not a control test such as that used in the case under the Industrial Insurance Act relied upon by the Companies. RB Appendix (judgment in industrial insurance case); RB 9-10. Assuming that harvesting of evergreen foliage constitutes a forestation activity, then genuine issues of material fact remain for the trial court to decide regarding whether the Companies are agricultural employers under RCW 19.30.010(4).

The Companies also suggest that the issue of whether they are “users” of unlicensed farm labor contractors under RCW 19.30.200 is an issue upon appeal. RB 18-19. This is not at issue on appeal. The superior court did not reach it and the companies have not assigned error to this decision. CP 286; RB 2. However, assuming that the harvesting of evergreen foliage is covered by the Act, RCW 19.30.200 applies to anyone

who knowingly uses the services of an unlicensed farm labor contractor.⁸

E. The Companies Are Not Entitled To Attorney Fees

The Companies are not entitled to attorney fees under RAP 18.1, even assuming that they prevail upon appeal. The Companies seek attorney fees for litigation-related issues, for the Department's allegedly bad investigation techniques, and for the Companies' purported need to bring this action. With one limited exception, the Companies did not raise such claims below and have waived these issues on appeal.

The Companies ask for attorney fees because the Department filed a response to a reply brief below. RB 38. The circumstances show no basis for fees. The Companies' reply brief to the Department's response against summary judgment (CP 242-65) contained several new arguments not raised in their motion for summary judgment (CP 1373-81) and the Department moved to strike the newly raised arguments and evidence, and, in the alternative, moved to offer additional documents, with responsive briefing to the new arguments. RP 1-2, CP 286.

⁸ Related to the "user" portion of the Act, the Companies assert the Department improperly promulgated a rule by "setting the allowable amount which can be brought by a packinghouse from a brush picker." RB 19-20 n.9. The Companies cite a checklist the Department used to identify amounts of foliage that would indicate that the individuals with the foliage did not harvest it by themselves. *See* CP 946, 954-55. The Department shared this checklist with businesses as an aid to them. CP 155, 946, 954. This is not a rule, at most this is an agency policy. An agency may express its expertise about an issue (CP 946) or its investigative approach (CP 28) without issuing a rule. *Cf. Lang v. Dep't of Health*, 138 Wn. App. 235, 252, 156 P.3d 919 (2007) (agency may have advisory policy statement).

The trial court denied the Department's motion, striking the documents. CP 286; RP 2. In their briefing, the Companies requested attorney fees for the Department's motion. CP 513.⁹ However, the trial court did not award fees (CP 286), a decision from which from which the Companies have not appealed or assigned error. Thus, they have waived this argument. RAP 2.4(a); RAP 10.3(a)(3); *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 700, 915 P.2d 1146 (1996) (failure to cross appeal ruling precludes court from granting affirmative relief in the form of an attorney fee award).

The Companies also claim they should be awarded attorney fees because the clerk's papers contain the documents stricken by the trial court. RB 38. Designating the clerk's papers occurs before filing of the appellant's brief. RAP 9.6(a) "encourages" parties to designate only the clerk's papers needed for review of the issues. To have the ability to later assign error to an issue, the Department needed to designate documents relevant to that issue. The Companies can hardly claim intentional misconduct by the Department's ultimate decision to narrow the issues on appeal. RB 37 (citing *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App 918, 928-29, 982 P.2d 131 (1999)). Having decided not to

⁹ Related to this request, the Companies also alleged below that Ms. Holt's declaration attached to the Department's motion was not accurate. CP 513-14. This contention has no merit.

assign error to the trial court's exclusion of the documents, the Department has not cited to them in its briefing. *See* Brief of Appellant; Reply Brief.¹⁰

For the first time on appeal, the Companies argue that they are entitled to attorney fees for the purported bad faith of the Department for alleged prelitigation misconduct and substantive bad faith. RB 37. No such finding was made by the trial court, nor does the record show a request for attorney fees on this basis.¹¹ CP 286; RP 2. This Court should decline to consider the issue because it was not raised below. RAP 2.5(a); *Bentzen v. Demmons*, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993) (court would not review bad faith conduct attorney fee claim because claim was not raised at trial court); *see Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 362-63, 110 P.3d 1145 (2005) (court did not consider alleged bad faith litigation as basis for

¹⁰ The Companies cite RAP 18.9 to argue that the Court should sanction the Department for including Clerk's Papers that it later decided not to use. RB 13 n.7. This is hardly "grossly improper conduct" as the Companies argue. The Court should disregard this improperly brought motion. *See* RAP 10.4(d). Moreover, even assuming there was a violation of the RAPs, given that the Department has not cited to the substance of the documents in its appellate briefing, the Companies fail to show the necessary prejudice to support a sanction request. *See Barnes v. Wash. Natural Gas Co.*, 22 Wn. App. 576, 577 n. 1, 591 P.2d 461 (1979) (sanctions are appropriate only if the requesting party can show prejudiced by the other party's violation of the RAPs).

¹¹ The Companies alleged Department bad faith conduct to the trial court, but not to support the attorney fee claim they now raise. The trial court declined to address their allegations of bad conduct. *See* RP 25. "Now, I know that the plaintiffs in this case want to yell loud and hard that I have a rogue agency before me that is out to get everybody in his employ, at least in this user group. And that I'm not dealing with, and I'm not going to deal with that issue because, very frankly, it just isn't what is asked to be decided here." RP 25.

attorney fees because the trial court did not address claim); *see also Burns v. McClinton*, 135 Wn. App. 285, 311, 143 P.3d 630 (2006) (on appeal party waived attorney fee claim because he did not show he asked the trial court to award fees on an equitable basis and because he raised claim for first time in reply), *review denied*, 166 P.3d 718 (2007).

The Companies rely on *Mutual of Enumclaw v. Jerome*, 66 Wn. App. 756, 766, 833 P.2d 429 (1992), *rev'd on other grounds*, 122 Wn.2d 157, 857 P.2d 1095 (1993), to argue that they may request attorney fees even though they did not raise this argument at the trial court. RB 37. In *Mutual*, there was a clearly recognized right to fees based on the issues presented at the appellate level. 66 Wn. App. at 766. In contrast, the Companies' fee claim is primarily based on conduct claims that occurred either before the litigation or at the superior court. These were issues for the trial court to decide and it was within the control of the Companies to pursue a fee claim at superior court. *See Burns*, 135 Wn. App. at 311; *Blueberry Place*; 126 Wn. App. at 362-63; *Bentzen*, 68 Wn. App. at 349 n.8.

No evidence supports the Companies' claim that the Department engaged in misconduct, bad faith, or had an improper motive in its outreach efforts regarding the Farm Labor Contractors Act or in its appeal of the trial court's ruling. Viewing the evidence in the light most

favorable to the non-moving party, the Companies have not proven intentional bad faith conduct by the Department. Prelitigation misconduct refers to “obdurate or obstinate conduct that necessitates legal action” to enforce a clearly valid claim. *Rogerson Hiller*, 96 Wn. App at 927. Substantive bad faith occurs when “a party intentionally brings a frivolous claim, counterclaim, or defense with an improper motive.” *Rogerson Hiller*, 96 Wn. App. at 929. The party seeking fees must prove not only a frivolous claim, but an “intentionally frivolous [claim] brought for the purpose of harassment.” *Rogerson Hiller*, 96 Wn. App. at 929 (quoting *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 783-84, 10 P.3d 1034 (2000)). The record reveals no such conduct.

The Companies claim as the basis for attorney fees that “[i]n the present case, the Department has engaged in a series of enforcement activities under RCW Title 51, WISHA, and the Act against the SFP industry” that are somehow improper. RB 37. This case is only about the Farm Labor Contractors Act, not actions taken under the Industrial Insurance Act or WISHA. CP 286 (summary judgment order that RCW 19.30 does not apply).

The Companies also rely on would-be evidence of allegedly improper checkpoints. RB 37. The testimony cited by the Companies arose out of a WISHA hearing before the Board of Industrial Insurance

Appeals (RB 12 n.6), where the WISHA specialist testified about questioning drivers of vehicles filled with brush as they left forested areas. CP 16, 33, 39. Any concern with investigation techniques underlying the WISHA citation should have been brought up in that forum, not collaterally here in this farm labor contractor case to claim attorney fees. No specific enforcement action under the Farm Labor Contractors Act arose out of asking the drivers questions as they exited the forested areas with brush. CP 82. The Department also did not cite the drivers and information was not used against workers who harvested brush. CP 170. Thus, there can be no prelitigation misconduct or substantive bad faith.

The Companies also allege that the Department sought to enforce the Act “knowing it had no basis to do so under the Act,” alleging that Department representative Patrick Woods conceded that the Department’s interpretation is wrong. RB 38. Their allegations are incorrect. Mr. Woods’ expressed view of the statute is consistent with the arguments made by the Department on appeal. *Compare* Brief of Appellant at 14, 21-27 *with* RB 22. The Department has based its enforcement position on its interpretation of the statute and its statutory duty to enforce the Act.

As discussed in this brief and in the Brief of Appellant, the Farm Labor Contractors Act includes the harvesting of evergreen foliage under a plain language analysis and under other aids to construction such as a

liberal interpretation of a remedial statute, the legislative history, similar federal case law, and deference to the Department's interpretation of the statute it enforces. "Includes but is not limited to" and "other related activities" relate to forestation under RCW 19.30.010(4). The Department has an ample basis for pursuing this appeal. As the agency charged with investigating claims of violation of workers' rights (RCW 19.30.130), the Department acted in good faith in maintaining this appeal and in its position that the Act applies to workers who harvest evergreen foliage.

III. CONCLUSION

For the above-stated reasons, the Department requests that the Court hold that harvesting evergreen foliage is a "forestation" activity within the meaning of RCW 19.30.010(4) and reverse the superior court's judgment, with remand to the superior court for further proceedings consistent with the holding.

SUBMITTED this 5th day of October, 2007.

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NO. 35461-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR &
INDUSTRIES,

Appellant,

v.

CASCADE FLORAL PRODUCTS,
INC.; CONTINENTAL WHOLESALE
FLORISTS, INC., d/b/a
CONTINENTAL FLORAL GREENS;
HIAWATHA, INC.; HOOD CANAL
EVERGREENS; PACIFIC SOUND
COAST EVERGREENS, INC.; PUGET
SOUND EVERGREENS, INC.; MT.
ST. HELENS EVERGREEN, INC.;
OLYMPIC EVERGREEN, INC.,

Respondents.

CERTIFICATE OF
SERVICE

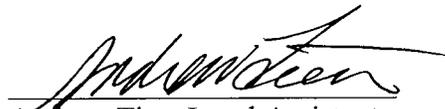
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STATE OF WASHINGTON
BY _____
COURT OF APPEALS, DIVISION II

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on October 5, 2007, he caused to be mailed, postage prepaid, via U.S. Mail, the Reply Brief of Appellant and this Certificate of Service to:

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