FILED
COURT OF APPEALS
DIVISION II

10 MAR 18 PM 12:29

STATE OF WASHINGTON
BY
DEPUTY

NO. 40019-7-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

BEN DAVIS, FLOYD FULMER, ROY HYETT, DICK OLSON, et al.,

Respondents.

BRIEF OF APPELLANT

ROBERT M. McKENNA
Attorney General

Stewart A. Johnston, WSBA No. 8774
Senior Counsel
Kara A. Larsen, WSBA No. 19247
Assistant Attorney General
Labor & Personnel Division
P.O. Box 40145
Olympia, WA 98504-0145
(360) 664-4167

P. M 3-17-2010

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

A. Assignments Pertaining To The Superior Court's Order Entered On October 23, 2009. 1

1. The superior court erred in determining that it had jurisdiction to hear and decide plaintiffs' motion for an award of attorney's fees and costs, over 17 months after plaintiffs' case had been ordered dismissed by the Court of Appeals, and after the Court of Appeals had denied plaintiffs' request for attorney's fees. 1

2. The superior court erred in granting plaintiffs' motion for attorney's fees and costs, because the plaintiff class was not the prevailing party in this action. 2

3. The superior court erred in entering an order granting plaintiffs' motion for attorney's fees and costs, despite uncontroverted evidence showing that plaintiffs' were contractually barred by the terms of their collective bargaining agreements from seeking an award of attorney's fees and costs. 2

B. Assignments Pertaining To The Superior Court's Findings Of Fact, Conclusions Of Law And Order Entered On January 26, 2010. 2

1. The superior court erred in issuing its Finding of Fact No. 1, that the reasonable hourly rate for class counsel is $350 per hour, and that the hourly rates requested for other timekeepers are reasonable and consistent with market rates. 2

2. The superior court erred in Finding of Fact No. 2, wherein the court found it appropriate to use current market rates, rather than historical rates, in making the lodestar calculation. 2

3. The superior court erred in Finding of Fact No. 3, wherein the court found that the hours expended by counsel were reasonable, necessary and properly documented, and that hours expended by counsel in watch change observations "were reasonable and necessary to the success of the litigation." Further, the superior court erred in finding that defense counsel attended the same watch change observations. 2

4. The superior court erred in Finding of Fact No. 4, wherein the court found that "no segregation can reasonably be made" between time expended on unsuccessful theories and time spent on successful legal claims, and that "no such segregation would be appropriate." 2

5. The superior court erred in Finding of Fact No. 5, wherein the court found that "no adjustment to the lodestar amount is appropriate." 3

6. The superior court erred in Finding of Fact No. 6, wherein the court found that DOT's argument – submitted on December 2, 2009, in response to plaintiffs' application for attorney's fees and costs – that the plaintiffs were only entitled to recover statutory costs under RCW 4.84.010, "was an untimely and inappropriate motion for reconsideration." 3

7. The superior court erred in Finding of Fact No. 7, wherein the court found that plaintiffs have requested $72,273.09 in costs, and that "[d]efendants have not submitted any specific opposition to any of the costs requested." The superior court further

erred in finding "the costs submitted to be reasonable and necessary to the litigation.".....3

8. The superior court erred in Finding of Fact No. 8, wherein the court found that the plaintiff class is entitled to an award of attorney's fees in connection with the fee application. 3

9. The superior court erred in Conclusion of Law No. 1, wherein the court concluded that the plaintiff class is entitled to an award of attorney's fees and costs.....3

10. The superior court erred in Conclusion of Law No. 2, wherein the court calculated the lodestar amount of attorney's fees to be $224,927.50.....3

11. The superior court erred in Conclusions of Law Nos. 3 and 4, wherein the court concluded that "[a]ny contention that the class was only entitled to statutory costs under RCW 4.84 has been waived by defendant," and awarded costs in the amount of $72,273.09. 3

12. The superior court erred in its Conclusion of Law No. 5, concluding that the class is entitled to an award of attorney's fees for time expended with the fee application in the amount of $9,645.00. 3

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 4

1. After the Court of Appeals dismissed plaintiffs' case, denied their request for attorney's fees, and issued a mandate terminating review, did the superior court err in deciding it had jurisdiction and authority to consider plaintiffs' motion for attorney's fees and costs filed well over a year later? 4

2. The Court of Appeals held that the plaintiffs failed to pursue their administrative remedies, dismissed their case and granted summary judgment for DOT, but opined *in dicta* regarding the validity of the

argument it determined plaintiffs were required to pursue administratively. Did the superior court err in holding that the plaintiffs were the prevailing party?.....4

3. The collective bargaining agreements entered into by the plaintiffs' union and DOT require that in the event of a grievance, each side must bear its own costs and fees. Did the superior court err when it awarded attorney's fees and costs to the plaintiffs based on the outcome of a later grievance action brought by their union. 4

4. The Washington Supreme Court has consistently held that attorney's fees may be awarded only for successful claims, based on the customary historic rates, and in an amount, supported by invoices, showing the legal work performed. Did the superior court err in awarding attorney's fees for work performed on unsuccessful claims, at a current hourly rate exceeding the customary rate, without excluding time spent on unsuccessful claims, in duplicated or wasted efforts, unproductive activities, and non-legal clerical activities? 4

5. RCW 4.84.010 does not allow recovery of expenses other than filing fees, service of process fees, statutory witness and attorney fees, and expenses for records and transcripts used at trial. Did the superior court err in awarding costs that are not recoverable under RCW 4.84.010? 4

IV. STATEMENT OF THE CASE 4

A. Trial Court Orders.....5

B. The Court Of Appeals Decision.....7

C. Mandate To Superior Court. 9

D. Plaintiffs' Union Grievances And Arbitration Award. 9

E. The Former Plaintiffs' Motion For Award of Attorney's Fees And Costs In the Dismissed Lawsuit.....11

V. ARGUMENT 14

A. Standard Of Review.....14

B. The Former Trial Court Had No Authority To Rule On Plaintiffs' Motion For Attorney's Fees And Costs.....15

C. Plaintiffs Are Not Entitled To Attorney's Fees Because They Did Not Prevail In This Action.....17

D. Plaintiffs Contractually Waived Their Right To Recover Attorney's Fees And Costs. 21

E. Plaintiffs Did Not Actually Incur Any Fees Or Costs. 23

F. The Ruling in *McIntyre v. Washington State Patrol* Is Inapplicable.....24

G. Plaintiffs' Disagreement With Their Union Over The Viability Of Their Wage Claim May State A Claim Against Their Union, But Does Not Entitle Them To Attorney's Fees Against DOT. 25

H. If Attorney's Fees And Costs Are Permitted, The Award Is Incorrect. 26

1. The court abused its discretion when it did not independently determine reasonable fees and costs. 26

2. The hourly rate awarded by the court was unreasonable. 29

3. The court had no basis for using current market rates rather than actual rates, in calculating the lodestar.....30

4. The court abused its discretion in failing to segregate hours incurred on unsuccessful claims, and failing to exclude wasteful and duplicative time. 31

5. Hours billed for clerical work should have been excluded, but were not.....36

6. Plaintiffs' right to recover costs and expenses was governed by, and limited by, RCW 4.84.010. The trial court abused its discretion in awarding costs beyond those allowed by RCW 4.84.010.....37

7. DOT did not "waive" its cost argument.....39

I. Even If The Former Trial Court Had Authority To Consider Plaintiffs' Motion For Attorney's Fees And Costs Related To The Superior Court Proceedings, It Did Not Have Authority To Consider Attorney's Fees And Costs Incurred On Appeal.....41

VI. CONCLUSION.....42

TABLE OF AUTHORITIES

Cases

Absher Constr. Co. v. Kent Sch. Dist. No. 415,
79 Wn. App. 841, 917 P.2d 1086 (1995) 35

Beckman v. Wilcox,
96 Wn. App. 355, 979 P.2d 890 (1999) 26

Blair v. Wash. State Univ.,
108 Wn.2d 558, 740 P.2d 1379 (1987) 27

Bowers v. Transamerica Title Ins. Co.,
100 Wn.2d 581, 675 P.2d 193 (1983) 26, 27

Bowles v. Dep't of Ret. Sys.,
121 Wn.2d 52, 847 P.2d 440 (1993) 18

Brand v. Dep't of Labor & Indus.,
139 Wn.2d 659, 989 P.2d 1111 (2000) 27

Chuong Van Pham v. Seattle City Light,
159 Wn. 2d 527, 151 P.3d 976 (2007) ..... passim

Corey v. Pierce Cy.,
___ P.3d ___, 2010 WL 255956 *11 (Div. 1, 1/25/10) 15

Davis v. Dep't of Transp.,
138 Wn. App. 811, 159 P.3d 427 (2007), *review denied,* 163
Wn.2d 1019 (2008) ..... passim

Dempere v. Nelson,
76 Wn. App. 403, 886 P.2d 219 (1994) 18

Fisher Properties, Inc. v. Arden Mayfair, Inc.,
115 Wn.2d 364, 798 P.2d 799 (1990) 30

Henningsen v. WorldCom,
102 Wn. App. 828, 9 P.3d 948 (2000) 27

Hensley v. Eckerhart,
461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)..... 26, 27

Hertz v. Riebe,
86 Wn. App. 102, 936 P.2d 24 (1997)..... 18

Hitter v. Bellevue Sch. Dist.,
66 Wn. App. 391, 832 P.2d 130, *review denied*, 120 Wn.2d 1013 (1992)..... 10, 21, 22

Hume v. American Disposal Co.,
124 Wn.2d 656, 880 P.2d 988 (1994)..... 38

In re Washington Public Power Supply Sys. Litig., 19 F.3d 1291 (9th Cir. 1994)..... 30

Int'l Ass'n of Firefighters, Local 46 v. City of Everett,
146 Wn.2d 29, 42 P.3d 1265 (2002)..... 20, 21

Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) . 26, 27, 28, 30

McConnell v. Mothers Work Inc.,
131 Wn. App. 525, 128 P.3d 128 (2006)..... 37

McIntyre v. Washington State Patrol,
135 Wn. App. 594, 141 P.3d 75 (2006)..... 24

Nordstrom v. Tampourlos,
107 Wn.2d 735, 733 P.2d 208 (1987)..... 31, 37

Rorvig v. Douglas,
123 Wn.2d 854, 873 P.2d 492 (1994)..... 17

Sardam v. Morford,
51 Wn. App. 908, 756 P.2d 174 (1988)..... 18

Scott Fetzer Co. v. Weeks,
122 Wn.2d 141, 859 P.2d 1210 (1993)..... 26, 27

Simpson v. Thorslund,
151 Wn. App. 276, 211 P.3d 469 (2009)..... 37

Smith v. Behr Processing Corp.,
113 Wn. App. 306, 54 P.3d 665 (2002) 31

Snider v. Wright,
112 Wash. 536, 192 P. 923 (1920) 18

Steel v. Lundgren,
96 Wn. App. 773, 982 P.2d 619 (1999) 30

Thompson v. Lennox,
151 Wn. App. 479, 212 P.3d 597 (2009) 40

Tradewell Group, Inc. v. Mavis,
71 Wn. App. 120, 857 P.2d 1053 (1993) 14

Vaca v. Sipes,
386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967) 25

West v. Port of Olympia,
146 Wn. App. 108, 192 P.3d 926 (2008) 29

Womble v. Local Union 73 Of the Int'l B'hood of Elec. Workers, AFL-CIO,
64 Wn. App. 698, 826 P.2d 224 (1992) 25

Statutes

RCW 4.72 15

RCW 4.72.030 16

RCW 4.84 3

RCW 4.84.010 ..... passim

RCW 4.84.030 17

RCW 4.84.330 18

RCW 47.64 6

RCW 49.46.090 37

RCW 49.48.030 ..... passim

RCW 49.52.050 ..... 6, 8, 19

RCW 49.52.070 ..... 6, 8, 19, 37, 38

Other Authorities

Tegland, Wash. Prac., "Civil Procedure" § 36:3 18

Rules

(RAP) 12.2 14

CR 54(a) 17

CR 54(d)(2) 15

CR 60 15

CR 60(b) 16

RAP 12.2 ..... 14, 16

RAP 12.3(a) 14

RAP 18.1 ..... 11, 16, 18, 33

RAP 18.1(a) 33

RAP 18.1(i) 9, 16, 40

I. INTRODUCTION

This is an appeal of the superior court's orders, entered on October 23, 2009 and January 26, 2010, requiring the Department of Transportation (DOT) to pay the plaintiffs' attorney's fees and costs incurred in a lawsuit that was dismissed by the Court of Appeals in *Davis v. Dep't of Transp.*, 138 Wn. App. 811, 159 P.3d 427 (2007), *review denied,* 163 Wn.2d 1019 (2008). This Court should reverse the lower court's orders, for several reasons. First, the superior court no longer had jurisdiction over the parties or the subject matter of this action after the Court of Appeals issued its mandate ordering the superior court to dismiss the plaintiffs' case. Second, the plaintiffs did not prevail in this lawsuit, and are therefore not entitled to recover attorney's fees and costs. Third, the plaintiffs are precluded by the terms of their collective bargaining agreements from recovering attorney's fees and costs. Fourth, even if the superior court did not err in finding that the plaintiffs are entitled to an award of attorney's fees and costs, the court abused its discretion in calculating the amount of recoverable attorney's fees, and committed error in awarding costs beyond those allowed under RCW 4.84.010.

II. ASSIGNMENTS OF ERROR

A. Assignments Pertaining To The Superior Court's Order Entered On October 23, 2009.

1. The superior court erred in determining that it had jurisdiction to hear and decide plaintiffs' motion for an award of attorney's fees and costs, over 17 months after plaintiffs' case had been ordered

dismissed by the Court of Appeals, and after the Court of Appeals had denied plaintiffs' request for attorney's fees.

2. The superior court erred in granting plaintiffs' motion for attorney's fees and costs, because the plaintiff class was not the prevailing party in this action.

3. The superior court erred in entering an order granting plaintiffs' motion for attorney's fees and costs, despite uncontroverted evidence showing that plaintiffs' were contractually barred by the terms of their collective bargaining agreements from seeking an award of attorney's fees and costs.

B. Assignments Pertaining To The Superior Court's Findings Of Fact, Conclusions Of Law And Order Entered On January 26, 2010.

1. The superior court erred in issuing its Finding of Fact No. 1, that the reasonable hourly rate for class counsel is $350 per hour, and that the hourly rates requested for other timekeepers are reasonable and consistent with market rates.

2. The superior court erred in Finding of Fact No. 2, wherein the court found it appropriate to use current market rates, rather than historical rates, in making the lodestar calculation.

3. The superior court erred in Finding of Fact No. 3, wherein the court found that the hours expended by counsel were reasonable, necessary and properly documented, and that hours expended by counsel in watch change observations "were reasonable and necessary to the success of the litigation." Further, the superior court erred in finding that defense counsel attended the same watch change observations.

4. The superior court erred in Finding of Fact No. 4, wherein the court found that "no segregation can reasonably be made" between time expended on unsuccessful theories and time spent on successful legal claims, and that "no such segregation would be appropriate."

5. The superior court erred in Finding of Fact No. 5, wherein the court found that "no adjustment to the lodestar amount is appropriate."

6. The superior court erred in Finding of Fact No. 6, wherein the court found that DOT's argument – submitted on December 2, 2009, in response to plaintiffs' application for attorney's fees and costs – that the plaintiffs were only entitled to recover statutory costs under RCW 4.84.010, "was an untimely and inappropriate motion for reconsideration."

7. The superior court erred in Finding of Fact No. 7, wherein the court found that plaintiffs have requested $72,273.09 in costs, and that "[d]efendants have not submitted any specific opposition to any of the costs requested." The superior court further erred in finding "the costs submitted to be reasonable and necessary to the litigation."

8. The superior court erred in Finding of Fact No. 8, wherein the court found that the plaintiff class is entitled to an award of attorney's fees in connection with the fee application.

9. The superior court erred in Conclusion of Law No. 1, wherein the court concluded that the plaintiff class is entitled to an award of attorney's fees and costs.

10. The superior court erred in Conclusion of Law No. 2, wherein the court calculated the lodestar amount of attorney's fees to be $224,927.50.

11. The superior court erred in Conclusions of Law Nos. 3 and 4, wherein the court concluded that "[a]ny contention that the class was only entitled to statutory costs under RCW 4.84 has been waived by defendant," and awarded costs in the amount of $72,273.09.

12. The superior court erred in its Conclusion of Law No. 5, concluding that the class is entitled to an award of attorney's fees for time expended with the fee application in the amount of $9,645.00.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. After the Court of Appeals dismissed plaintiffs' case, denied their request for attorney's fees, and issued a mandate terminating review, did the superior court err in deciding it had jurisdiction and authority to consider plaintiffs' motion for attorney's fees and costs filed well over a year later?

2. The Court of Appeals held that the plaintiffs failed to pursue their administrative remedies, dismissed their case and granted summary judgment for DOT, but opined *in dicta* regarding the validity of the argument it determined plaintiffs were required to pursue administratively. Did the superior court err in holding that the plaintiffs were the prevailing party?

3. The collective bargaining agreements entered into by the plaintiffs' union and DOT require that in the event of a grievance, each side must bear its own costs and fees. Did the superior court err when it awarded attorney's fees and costs to the plaintiffs based on the outcome of a later grievance action brought by their union.

4. The Washington Supreme Court has consistently held that attorney's fees may be awarded only for successful claims, based on the customary historic rates, and in an amount, supported by invoices, showing the legal work performed. Did the superior court err in awarding attorney's fees for work performed on unsuccessful claims, at a current hourly rate exceeding the customary rate, without excluding time spent on unsuccessful claims, in duplicated or wasted efforts, unproductive activities, and non-legal clerical activities?

5. RCW 4.84.010 does not allow recovery of expenses other than filing fees, service of process fees, statutory witness and attorney fees, and expenses for records and transcripts used at trial. Did the superior court err in awarding costs that are not recoverable under RCW 4.84.010?

IV. STATEMENT OF THE CASE

This lawsuit was originally filed in 2004. The class plaintiffs (hereinafter plaintiffs) were engine room employees of the Washington

State Ferry System. *See* Amended Complaint for Back Wages, Declaratory Judgment and Statutory Penalties, Clerks Paper's (CP) at 32-38. The plaintiffs complained that at the end of each work shift, or "watch," they were required to inform the person starting the next watch of any pertinent information regarding operation of the vessel. The plaintiffs contended that the discussion during the watch change required them to perform uncompensated work.

DOT's Answer disagreed with the plaintiffs' claims and their theory of liability. DOT further asserted, as an affirmative defense, that if this class of employees had any claims for unpaid wages, their claims must be pursued as a grievance under the terms of their collective bargaining agreements, and were not properly before this court because the plaintiffs had not exhausted their administrative remedies. DOT also asserted, as an affirmative defense, that the plaintiffs' claims were barred by the terms of the collective bargaining agreements to which the employees were bound. *See* Defendant's Answer to Plaintiff's Amended Complaint for Back Wages, Declaratory Judgment and Statuory Penalties, Affirmative Defenses, Nos. 3, 6, and 11; CP at 42.

A. Trial Court Orders.

On January 27, 2005, DOT filed its first motion for summary judgment, asserting that the lawsuit should be dismissed on the grounds that plaintiffs' collective bargaining agreements provide the exclusive remedy for their wage claims, and those claims must be litigated before,

and decided by, the Marine Employees' Commission (Commission) pursuant to RCW 47.64. CP at 49-51, 57-61. In response to DOT's argument, the plaintiffs asserted that their case should be heard in superior court, and did not involve the interpretation or application of any provision of the collective bargaining agreement. CP at 323. DOT's first motion for summary judgment was denied by the trial court on February 25, 2005. CP at 371-73.

Following pretrial discovery, the parties filed cross-motions for summary judgment. DOT's motion for summary judgment again asserted that the lawsuit should be dismissed because plaintiffs failed to exhaust their administrative remedies. CP at 634-36. Plaintiffs' motion asserted that they were entitled to recover under RCW 49.52.050 and .070.

The trial court granted summary judgment for the plaintiffs. Judgment for Plaintiffs on Motion for Summary Judgment; CP at 991-94. The Judgment awarded attorney's fees, based on a common fund theory, after reviewing the attorney's application for fees and the contingency fee agreement, and costs in the amount of $54,726.29. CP at 991-94. The contingency fee agreement provided that the attorneys would be entitled to one-third of recovery achieved through "settlement or judgment," but the plaintiffs would not otherwise be liable for attorney fees if there was no

recovery. CP at 946-57. The cost award was based on the cost bill attached to the declaration of Warren Martin. CP at 958.[1]

B. The Court Of Appeals Decision.

On appeal, DOT argued for reversal of summary judgment and for dismissal of plaintiffs' case, on the grounds asserted in DOT's answer to the complaint and argued on summary judgment in January 2005, long before either side incurred significant costs or attorney's fees: plaintiffs had failed to follow grievance procedures contained in their collective bargaining agreements, and were "short circuiting" the agreed-upon grievance procedure by resorting to the court system. CP at 1152-56. The plaintiffs again responded that their claims had nothing to do with the collective bargaining agreement, and therefore a grievance proceeding would be futile and an arbitrator would have no jurisdiction. CP at 1162.

The Court of Appeals agreed with DOT's argument that plaintiffs' case should be dismissed. In its decision, the Court reversed the trial court order, and ordered that summary judgment be entered in favor of DOT. *Davis v. Dep't of Transp.*, 138 Wn. App. 811, 814, 159 P.3d 427 (2007), *review denied,* 163 Wn.2d 1019 (2008). The Court held that the plaintiffs had failed to exhaust their contractual remedies under their collective bargaining agreements and their administrative remedies available before the Commission, and therefore summary judgment should be entered in

[1] It is unclear why the original cost bill, submitted at the close of the superior court litigation in January 2006, prior to the first appeal, was $17,546.80 less than the costs awarded by the court in 2010, which totaled $72,273.09.

favor of DOT. *Id.* The Court's decision was based on the same legal argument originally raised by DOT as an affirmative defense and briefed and argued in DOT's motions for summary judgment filed before the trial court.

The Court also expressly rejected plaintiffs' claims that they were entitled to a statutory remedy under RCW 49.52.050 and RCW 49.52.070. *Davis,* 138 Wn. App. at 821.

In its opinion the Court concluded, *sua sponte*, that watch change activities were compensable under the terms of the plaintiffs' collective bargaining agreements. *Davis*, 138 Wn. App. at 814, 818-20. Again, in the context of the current appeal, it should be emphasized that the Court's conclusion was not based on any legal arguments raised by plaintiffs. Indeed, the plaintiffs had consistently argued that the agreements did *not* provide any avenue for relief, and their only recourse for relief was an action in superior court under RCW 49.52.050 and RCW 49.52.070.

The Court of Appeals expressly declined to award attorney's fees to plaintiffs, under either RCW 49.48.030 or RAP 18.1. *Davis*, 138 Wn. App. at 826. Plaintiffs did not request any costs. The Court's opinion and order granting summary judgment in favor of DOT made no allowance for a later award of attorney's fees or costs after remand.

Both sides moved for reconsideration. Plaintiffs' motion included an argument for an award of attorney's fees, on the same grounds asserted in their present motion filed before this Court. CP at 1142-45. Both motions were denied.

Plaintiffs filed a petition for review with the State Supreme Court. Plaintiffs' petition again included a request for attorney's fees, arguing that the Court of Appeals erred when it declined to award attorney's fees. CP at 1148-49. Their petition was denied.

C. Mandate To Superior Court.

On April 23, 2008, the Court of Appeals certified that its decision had become the final decision, and mandated this action back to the trial court for further proceedings in accordance with its decision granting summary judgment in favor of DOT and dismissing plaintiffs' lawsuit. CP at 1002-18. RAP 18.1(i) provides that the appellate court "may direct that the amount of fees and expenses may be determined by the trial court after remand." The Court's mandate and opinion did not contain any such direction to the trial court.

D. Plaintiffs' Union Grievances And Arbitration Award.

On March 14, 2008, the plaintiffs' union, the Marine Engineers' Beneficial Association (hereinafter Union) filed a request for grievance arbitration with the Commission on behalf of the engine room employees, seeking wages for time spent on watch turnover. CP at 1103. On July 24, 2009, the Commission issued Decision No 563-MEC (2009) sustaining the Union's grievance and awarding back pay for watch change activities by engine room employees, to be calculated from April 9, 2007, 60 days prior to the filing of the union's grievances. CP at 1110. In its decision, the Commission observed that "[i]t is the view of the

Commission that the State of Washington Court of Appeals overstepped its bounds and directed us, in advance of arbitration, as to what our findings should be. We strongly believe it was inappropriate for the [Court of Appeals] to have given advance instructions to the Commission on the interpretation of the collective bargaining agreement." CP at 1109. However, the Commission further observed that *"[i]t is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift."* CP at 1109. (Emphasis added) The Commission then found that "the Court properly concluded that the contract requires watch turnover pay is owed to engine room employees at WSF." CP at 1109.

In its post-hearing brief to the Commission, the Union asked the Commission to award attorney's fees to plaintiffs' attorneys ("the law firm that initially filed the class action lawsuit . . ."). CP at 1131-32. The Commission's Decision and Award denied the Union's request. CP at 1111. The Commission did, however, order Washington State

Ferries to reimburse the Union for attorney's fees incurred in bringing the grievance.[2] CP at 1110.

E. The Former Plaintiffs' Motion For Award of Attorney's Fees And Costs In the Dismissed Lawsuit.

On October 1, 2009, the former plaintiffs from the dismissed superior court action filed a motion before the former trial court judge, seeking an award of attorney's fees in the sum of $224,927.50 and costs in the amount of $72,273.29. CP at 1020-30. Plaintiffs simultaneously filed an alternative motion, seeking to re-open the case solely for consideration of an award of attorney's fees, but not costs. CP at 1035-36. The plaintiffs' alternative motions were based on the theory that their lawsuit was still alive, and that the Court of Appeals had left open the possibility that attorney's fees could be awarded after the grievance arbitration proceeding. Plaintiffs' assumption regarding the intent of the Court of Appeals was based on the Court's statement that "[b]ecause the employees at this time have not recovered any wages owed, we do not award attorney's fees under either RCW 49.48.030 or RAP 18.1." *Davis,* 138 Wn. App. at 825.

DOT vigorously opposed plaintiffs' motion on several grounds. *See* Defendant's Response in Opposition to its Class Motion for

---

[2] The Commission's decision awarding attorney's fees has been challenged by an action for Writ of Certiorari filed in the Thurston County Superior Court. The State's writ is based on the language in the applicable collective bargaining agreements, in which the parties agreed that each side will bear its own fees and costs incurred in pursuing grievance arbitrations. There is no allowance under the agreements for fee or cost shifting. See *Hitter v. Bellevue Sch. Dist.*, 66 Wn. App. 391, 397-99, 832 P.2d 130, *review denied*, 120 Wn.2d 1013 (1992), discussed *infra* at 21-22.

Attorney's Fees and Costs, CP at 1176-90; and attached declaration, CP at 1138-75. The parties agreed to defer argument over the reasonableness of the requested attorney's fees, and over the itemized listing of fees and costs attached to plaintiffs' motion, pending a decision from the superior court on the threshold procedural question of whether the court had authority to hear plaintiffs' motion in light of the Court of Appeals decision, and if so, whether the plaintiffs had established a legal entitlement to attorney's fees. CP at 1177.[3]

On October 23, 2009, the superior court granted plaintiffs' motion for attorney's fees and costs, but further ruled that "[p]ursuant to the parties' agreement . . . the amount of the award is reserved until further motion regarding the amount of the monetary award of fees and costs is brought before this Court at a later date." CP at 1222-23.

On November 25, 2009, plaintiffs submitted their application for attorney's fees and costs, with supporting declarations, including a declaration from attorney Richard Wooster attesting to the reasonableness of the attorney's fees requested. CP at 1238-53. Plaintiffs applied for $224,927.50 in attorney's fees, $72,273.29 in costs, and approximately $9,645.00 in additional fees and costs related to their application.

---

[3] Contrary to plaintiffs' assertions below, and contrary to the superior court's findings of fact and conclusions of law, DOT's response on October 20, 2009, made it clear that DOT did not waive its right to argue over plaintiffs' cost bill in addition to the lodestar amount for attorney's fees, in the event the superior court decided that: a) it had authority to consider plaintiffs' motion, and b) that plaintiffs were the prevailing party for purposes of recovering attorney's fees and costs.

On December 2, 2009, DOT filed its response in opposition to plaintiffs' application; including a supporting declaration from attorney Philip Talmadge challenging the adequacy of the attorney's fees application on several fronts, and also challenging the amount of reimbursable costs. CP at 1257-87.

On December 4, 2009, the superior court heard argument regarding the proper amount of fees and costs to be awarded. The court then directed each party to submit proposed findings of fact and conclusions of law, for the court's consideration, by December 11, 2009. DOT's proposed Findings of Fact and Conclusions of Law, submitted to the superior court on December 11, 2009, are attached hereto as Appendix A.[4] DOT also submitted a memorandum in support of its proposed findings and conclusions. As DOT's memorandum explained, DOT's Proposed Findings of Fact and Conclusions of Law were based on the superior court's earlier ruling that plaintiffs' were entitled to attorney's fees and costs. DOT therefore proposed a lodestar that would reflect the plaintiffs' "success" while also taking into account that their lawsuit should have been dismissed on summary judgment on February 25, 2005, before the parties engaged in extensive pretrial discovery activities. CP at 1302-04; Appendix A, at 1-15. On December 6, 2009, plaintiffs' submitted a second declaration from their counsel, seeking a total of $9,645.00 in

[4] The proposed Findings of Fact and Conclusions of Law submitted to the court by DOT are not included in the certified Clerk's papers, because the Pierce County Court Clerk's office would not accept filing of proposed orders.

additional fees and costs related to their fee application. CP at 1320.

On January 26, 2010, the superior court adopted plaintiffs' proposed Findings of Fact, Conclusions of Law and Order Granting Application for Attorney's Fees and Costs, awarding the plaintiffs exactly the amounts they requested, without modification. CP at 1324-29. This appeal followed.

V. ARGUMENT

A. Standard Of Review.

The appellate court engages in a two-step process when reviewing an attorney fee award. First the court determines whether the party is entitled to an award of attorney's fees and costs. Second, if the answer to the first question is yes, the court decides whether the award of fees is reasonable. The superior court's decision whether to award attorney's fees is a legal question reviewed *de novo*; while the superior court's decision on the reasonableness of the attorney's fee award is reviewed under an abuse of discretion standard. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). The superior court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *Chuong Van Pham v. Seattle City Light*, 159 Wn. 2d 527, 538, 151 P.3d 976 (2007).

B. The Former Trial Court Had No Authority To Rule On Plaintiffs' Motion For Attorney's Fees And Costs.

The Court of Appeals decision terminating review and requiring entry of judgment in favor of DOT was an unconditional decision on the merits, as defined in RAP 12.3(a). Thus, with the issuance of the mandate, plaintiffs' lawsuit was, for all purposes, dismissed with prejudice.

Rule of Appellate Procedure (RAP) 12.2 provides:

> DISPOSITION ON REVIEW
>
> The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, *the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court*, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)2. After the mandate is issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

(Emphasis added).

Plaintiffs cited no statute or rule authorizing their post-judgment motion for attorney's fees. That is because there is no statute or rule authorizing it.[5] Plaintiffs' motion was filed with the former trial court on or about October 1, 2009, over 17 months after the Court of Appeals

---

[5] CR 54(d)(2) permits recovery of attorney's fees and expenses by motion no later than 10 days after entry of judgment. Plaintiffs' motion was untimely under this rule. *See Corey v. Pierce Cy.*, ___ P.3d ___, 2010 WL 255956 *11 (Div. 1, 1/25/10).

issued its mandate directing entry of judgment for DOT. Superior Court Civil Rule (CR) 60 and RCW 4.72 govern actions for vacation or modification of judgments. Plaintiffs did not contend that they would be entitled to relief under CR 60 or RCW 4.72, but even if it is assumed that plaintiffs established grounds for modification or vacation of the judgment ordered by the Court of Appeals, their action was not timely, because any motion for relief under CR 60 and RCW 4.72 must be made within one year after the judgment, order or proceeding was entered or taken. CR 60(b); RCW 4.72.030.

Moreover, the plaintiffs' request for attorney's fees was already decided by the Court of Appeals, and the Court of Appeals denied their request. *Davis,* 138 Wn. App at 826. Plaintiffs' motion thus directly challenged an issue explicitly decided by the Court of Appeals, and therefore, under the provisions of RAP 12.2, it could not be entertained by any court, even if it had been a timely motion authorized by rule or statute.

The plaintiffs seized upon the language of the *Davis* court's denial of their request for attorney's fees, and argued that the Court of Appeals must have contemplated an award of attorney's fees and costs sometime down the road, after the Commission decided whether engine room employees were entitled to be compensated for watch turnover activities. Plaintiffs' contention is unsupported by the words and actions of the Court of Appeals. Had the Court of Appeals intended to leave open the question of attorney's fees, the Court could have exercised its authority under RAP 18.1, which governs all procedures under which attorney's fees and

expenses may be requested and awarded. RAP 18.1(i) provides that the Court "may direct that the amount of fees and expenses be determined by the trial court after remand." Here, the Court did not so direct, but instead explicitly denied attorney's fees under RAP 18.1 and RCW 49.48.030. The Court of Appeals' mandate unconditionally directed the superior court to enter judgment in favor of DOT.

The plaintiffs' lawsuit was dismissed well over one year ago, when the Court of Appeals mandated entry of judgment in favor of DOT. "A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." CR 54(a). The Court of Appeals did not retain jurisdiction over this lawsuit, nor did the Court of Appeals authorize the former trial court to retain jurisdiction and keep this case alive while the parties awaited further action in a separate forum. The plaintiffs' lawsuit under this cause was over and done, and could not be revived for any purpose.

Because the former trial court lacked the authority and jurisdiction to consider plaintiffs' motion for attorney's fees and costs, and lacked jurisdiction over the putative parties to this action, its orders granting plaintiffs' motion and awarding attorney's fees and costs must be reversed.

C. Plaintiffs Are Not Entitled To Attorney's Fees Because They Did Not Prevail In This Action.

To recover attorney's fees or costs, the requestor must be the prevailing party. *See* RCW 4.84.030. Moreover, Washington follows the

"American rule" with respect to attorney's fees, *i.e.*, the prevailing party normally does not recover its attorney's fees. *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994). Thus, as to attorney's fees, merely being the prevailing party is not enough. The prevailing party is only entitled to attorney's fees if there is a specific basis in contract, statute, or a recognized equitable ground. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993); *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). *See also* RCW 4.84.010 ("The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties...").

The plaintiffs were not, and are not, the prevailing party in this action. The prevailing party is the party in whose favor final judgment is rendered. *See Snider v. Wright,* 112 Wash. 536, 192 P. 923 (1920); *Sardam v. Morford*, 51 Wn. App. 908, 756 P.2d 174 (1988); Tegland, Wash. Prac., "Civil Procedure" § 36:3; RCW 4.84.330. The Court of Appeals ruled in favor of DOT and directed entry of judgment on behalf of DOT. *Davis,* 138 Wn. App. at 826. The Court also specifically denied plaintiffs' request for attorney's fees under RCW 49.48.030 and RAP 18.1. *Davis,* 138 Wn. App. at 826. There is no conceivable way for plaintiffs to be construed as the prevailing party when final judgment was rendered in favor of DOT. Thus, plaintiffs are not entitled to a recovery of attorney's fees.

Even for the prevailing party, attorney's fees can only be recovered if allowed by a contract, a special statute, or one of the four following

equitable grounds: bad faith conduct of the losing party; preservation of a common fund; protection of constitutional principles; or private attorney general actions. *See Dempere v. Nelson*, 76 Wn. App. 403, 406-07, 886 P.2d 219 (1994).[6]

None of the above prerequisites for recovery are present in this case. First, there is no agreement that might provide for attorney's fees in an action between DOT and plaintiffs. There are collective bargaining agreements between DOT and the Union that represents engine room employees of the Washington State Ferry System in labor matters, and to the extent those agreements are relevant, they provide that each party bears its own fees and costs from arbitration. CP at 1166-67 (Collective Bargaining Agreement for Licensed Engine Room Employees, Sec. 23 (f)); CP at 1172-74 (Collective Bargaining Agreement for Unlicensed Engine Room Employees, Rule 16). Accordingly, there is no contract that would support an exception to the "American rule" of attorney's fees in this case.

Second, plaintiffs are not entitled to attorney's fees under any statute. In their motion, plaintiffs cited RCW 49.48.030 and RCW 49.52.070.[7] RCW 49.48.030 requires an "action" resulting in a "judgment" for wages. In this action, there was no judgment for wages. Thus, there can be no attorney's fees awarded in this action. A different

---

[6] Plaintiffs have not asserted any equitable grounds for attorney's fees.

[7] Although plaintiffs cited to RCW 49.52.070, they provided no argument with respect to that statute. Nevertheless, the Court of Appeals specifically rejected plaintiffs' claim that they were entitled to the statutory remedies in RCW 49.52.050 and .070. *Davis*, 138 Wn. App. at 821.

plaintiff, the Union, brought a different action in a different forum – an arbitration proceeding before the Commission – pursuant to the terms of the collective bargaining agreements. However, that action cannot be conflated with this one, and the recovery of any attorney's fees in the arbitration action is governed by the collective bargaining agreements between the Union and DOT, and the Commission's regulations. Plaintiffs argued that the actions should be considered as one with multiple steps. But the two actions were brought by different plaintiffs in different jurisdictions. The plaintiffs in this case did not recover a judgment for wages or salary owed in any action. A different plaintiff, the Union, recovered an award for wages or salary owed in a grievance action decided by the Commission. And it must be emphasized, that the Commission expressly found that its decision on the merits of the Union's grievance under the collective bargaining agreements was unaffected by the Court of Appeals opinion in *Davis*. CP at 1109. This finding belies plaintiffs' theory that their unsuccessful lawsuit influenced the outcome of the grievance arbitration.

Plaintiffs who recover a judgment for wages or salary owed are not required to seek recovery of attorney's fees in the same action that resulted in the judgment, but may bring a new action for attorney's fees under RCW 49.48.030. *Int'l Ass'n of Firefighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002). However, this does not mean that a plaintiff may seek wages and attorney's fees in an action, be denied both on the grounds that the case was brought before the wrong tribunal, and

over a year later bring a motion in that same action for attorney's fees, on the basis of the outcome of a different action. Under the plaintiffs' logic, a plaintiff could lose a wage claim, but a few years later recover attorney's fees for the losing case if someone else brought a different action and prevailed to the benefit of the first plaintiff. Another litigant's success does not entitle a party to attorney's fees for a failed cause of action.

D. Plaintiffs Contractually Waived Their Right To Recover Attorney's Fees And Costs.

As mentioned above, a party is permitted to bring a separate action for the recovery of attorney's fees under RCW 49.48.030. *Firefighters,* 146 Wn.2d at 49. However, *Firefighter's* explicitly recognized that the union was allowed to proceed and recover in a separate action only because the collective bargaining agreement was silent as to the apportionment of attorney's fees and costs. *Firefighters,* 146 Wn.2d at 49. The Court recognized that parties to a collective bargaining agreement can avoid awards of attorney's fees, even under RCW 49.48.030, by specifically providing in the agreement that each side pay their own fees and costs, and cited with approval the Court of Appeals decision in *Hitter v. Bellevue Sch. Dist.*, 66 Wn. App. 391, 397-99, 832 P.2d 130, *review denied*, 120 Wn.2d 1013 (1992).

In *Hitter*, a union member grieved his termination from employment, and his termination was overturned by an arbitrator following a grievance arbitration hearing. Following his reinstatement, Mr. Hitter filed a lawsuit against the District seeking, *inter alia*, attorney's

fees as authorized under the wage recovery statute, RCW 49.48.030. The District argued that the collective bargaining agreement precluded recovery of attorney's fees. The terms of that collective bargaining agreement provided, in relevant part:

> The fees and expenses of the arbitrator shall be shared equally by the District and the Union. All other expenses shall be born by the party incurring them, and neither party shall be responsible for the expenses of witnesses called by the other.

Hitter, 66 Wn. App. at 397.

The Court rejected Mr. Hitter's argument for attorney's fees, finding that the contractual language negotiated between Mr. Hitter's union and the District – which is nearly identical to the language contained in the two collective bargaining agreements between DOT and the Union in the present action – precluded Mr. Hitter from recovering attorney's fees for amounts incurred during his arbitration or on appeal. *Id.* at 399. Just as in *Hitter*, the collective bargaining agreements implicated in this case specifically provide that each side pay its own fees and costs and, therefore, preclude application of RCW 49.48.030. *See* Collective Bargaining Agreement provisions at CP at 1166-67 (Licensed Engine

Room Employees, Sec. 23 (f));[8] CP at 1172-74 (Unlicensed Engine Room Employees, Rule 16).[9]

Under the courts' decisions, plaintiffs are not entitled to attorney's fees or costs, because their right to attorney's fees and costs was expressly waived by their exclusive bargaining representative. Under *Hitter*, if the engine room employees had properly brought their original wage claim as a Union-sponsored grievance before the Commission, they would not be entitled to recover attorney's fees and costs in a subsequent action in superior court. It was, therefore, utterly illogical for the superior court to award these plaintiffs their attorney's fees and costs accrued during their unsuccessful court action. In effect, the superior court rewarded the plaintiffs for bringing their action in the wrong forum, and for attempting to short-circuit the terms of their collective bargaining agreements by improperly pursuing their wage claims directly in superior court. The superior court's order awarding attorney's fees and costs should be reversed.

E. Plaintiffs Did Not Actually Incur Any Fees Or Costs.

The plaintiffs in this case have not incurred attorney's fees or costs for this action. CP at 946-57. The agreement between the law firm and

---

[8] Section 23(f) provides: "All costs, fees and expenses charged by the arbitrator will be shared equally by the Employer and the Union. All other costs incurred by a party resulting from an arbitration hearing will be paid by the party incurring them." CP at 1167.

[9] Rule 16 Step III(f) provides: "All costs, fees and expenses charged by the arbitrator will be shared equally by the Parties. All other costs incurred by a Party resulting from an arbitration hearing will be paid by the Party incurring them." CP at 1174.

the plaintiffs in this case is a contingent fee arrangement. According to that agreement, the plaintiffs only incur attorney's fees if they are successful in recovering money damages and, in that event, the fees are one-third of the recovery. CP at 946-57. No money was recovered in this action and under the agreement with the law firm, plaintiffs have no responsibility to the law firm for any fees. Nor do the plaintiffs have any attorney's fees from the arbitration proceeding. It is undisputed that the Union was represented by a different law firm and that law firm's fees were paid by the Union. Thus, they are seeking a windfall.

F. The Ruling in *McIntyre v. Washington State Patrol* Is Inapplicable.

Plaintiffs' reliance in the superior court proceeding on *McIntyre v. Washington State Patrol*, 135 Wn. App. 594, 141 P.3d 75 (2006), was misplaced. In their motion below, plaintiffs claimed that, like Ms. McIntyre, they had no method to recover wages without seeking relief from the court. However, the Court of Appeals specifically ruled that plaintiffs did have a method to recover wages and they were not entitled to be in court. The avenue plaintiffs were required to follow was the contractual grievance process. They never should have been in court and never should have incurred any attorney's fees for a civil action. Unlike Ms. McIntyre, the plaintiffs here were not forced to seek relief through the courts in order to recover wages owed.

G. Plaintiffs' Disagreement With Their Union Over The Viability Of Their Wage Claim May State A Claim Against Their Union, But Does Not Entitle Them To Attorney's Fees Against DOT.

The fact that one of the plaintiffs states in a declaration he tried to get the Union to bring a grievance and the Union declined, does not mean that they were forced to go to court, nor does it justify an award of attorney's fees against DOT. *See* Declaration of Ben Davis (Davis Decl.), CP at 1031-32. If the plaintiffs felt they were required to seek relief in court because the Union did not advocate their interests, their dispute is with their Union, not with DOT.

A union member can recover damages against a union if it breaches its duty of fair representation. *Womble v. Local Union 73 Of the Int'l B'hood of Elec. Workers, AFL-CIO*, 64 Wn. App. 698, 826 P.2d 224 (1992). "A union breaches this duty when it arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion." *Id.* at 701 (*citing Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)).

DOT should not have to pay a private law firm's fees because the Union and some of its members disagreed on the merits of a grievance. If anything, there was a dispute between the Union and its members that caused the members to attempt to circumvent the relationship. Here, however, the Court of Appeals ruled that the employees could not circumvent their collective bargaining agreement. If, as plaintiffs appeared to imply in their arguments below, the lawsuit was brought to force the Union to comply with its duty of fair representation, then the

issue of attorney's fees should be between them and should not involve DOT.

H. If Attorney's Fees And Costs Are Permitted, The Award Is Incorrect.

1. The court abused its discretion when it did not independently determine reasonable fees and costs.

Even if it is assumed that the trial court did not commit reversible error in ruling that plaintiffs are entitled to recover attorney's fees and costs, the trial court did abuse its discretion in determining the appropriate amount of attorney's fees and costs, and also committed errors of law by expanding the categories of recoverable costs beyond those allowed under RCW 4.84.010. The trial court utterly disregarded plaintiffs' complete lack of success in prosecuting their case in superior court, when it "rubber-stamped" the plaintiffs' application for fees and costs. It is axiomatic that an award of attorney's fees and costs be based on the successful prosecution of the legal theories propounded by the requesting party. Here, all of the liability theories advocated by the plaintiffs were rejected by the Court of Appeals, which formulated its own theory of possible recovery that was never raised nor argued by the plaintiffs.

The fee applicant has the burden of proving the reasonableness of the fee request and "must provide reasonable documentation of the work performed." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). "This documentation need not be exhaustive or in

minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.,* senior partner, associate, etc.);" *Beckman v. Wilcox*, 96 Wn. App. 355, 368, 979 P.2d 890 (1999), citing *Bowers*, 100 Wn.2d at 597. The documentation must be as detailed as it would be if it were submitted to the requesting party's own client, and must clearly and convincingly demonstrate that the time and effort expended was necessary to achieve the result obtained. *Hensley v. Eckerhart*, 461 U.S. 424, 440, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983) (Burger, concurring). The request must be documented by the contemporaneous billings of counsel. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

The trial court must independently determine a reasonable fee. *Mahler v. Szucs*, 135 Wn.2d at 435; *Scott Fetzer Co.*, 122 Wn.2d at 147. To make that determination, the court begins by calculating a lodestar fee. *Bowers*, 100 Wn.2d at 597.

A lodestar is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the successful claim. *Henningsen v. WorldCom*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000), citing *Bowers*, 100 Wn.2d at 593-94. The lodestar should not include time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Pham v. City of Seattle,* 159 Wn.2d 527, 540, 151 P.3d 976 (2007).

The court must also segregate hours incurred on unsuccessful theories and theories for which fees may not be recovered. *Id.* The court must segregate those hours from the hours spent on the successful claims.

Id.; *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (2000); *Hensley*, 461 U.S. at 435. If the court cannot identify specific hours that should be eliminated, it may simply reduce the award. *Hensley*, 461 U.S. at 436-37.

In *Blair v. Washington State University*, the Washington Supreme Court adopted the reasoning in *Hensley*, which held that the "extent of the plaintiff's success is a crucial factor in determining the proper amount of attorney's fees . . . ." *Blair v. Wash. State Univ.,* 108 Wn.2d 558, 572, 740 P.2d 1379 (1987).

In sum, where the plaintiff is deemed the prevailing party, the court must calculate the lodestar based upon the clearly documented, reasonable attorney hours that contributed to the successful result. Where the documentation of hours is inadequate, the court may reduce the award accordingly. The court should exclude hours not reasonably necessary to the result obtained. Where only partial success is obtained, the court may adjust the lodestar downward based upon the degree of success. The burden of documenting the fee award rests entirely with the party seeking an award of attorney fees. *Mahler,* 135 Wn.2d at 434.

As attested to by attorney Philip Talmadge, the records submitted by class counsel to the superior court in support of fees are inadequate in several respects. First, the invoices contain a number of "block" entries mixing various tasks such as telephone calls, conferences, research, and writing. As such, it was impossible for the court to segregate the time involved with the various tasks listed. CP at 1277.

Second, the descriptions in the invoices are, as characterized by Mr. Talmadge, "cryptic" to the point that it is not possible to determine if the task was reasonable. For example, some entries cited by Mr. Talmadge state "legal research," "cause of action issues," "discovery issues," or "expert witness issues." These entries cover a broad spectrum of possible activities, and do not reveal whether the research was necessary or was of any utility to the courts in deciding this case. CP at 1277. Mr. Talmadge concluded:

> In my opinion, the documentation of fees by class counsel was inadequate. I could not determine from the amorphous time entries, what the hours spent by the class lawyers addressed. For example, it was entirely impossible to discern if the research related to issues upon which the class prevailed.

CP at 1277.

2. **The hourly rate awarded by the court was unreasonable.**

The basic hourly rate of $350.00 per hour claimed by plaintiffs' counsel was not a reasonable rate. Significantly, class counsel's application did not include any references to relevant market rates in Pierce County for trial or appellate attorneys who handle employment or wage claims. As attested by Mr. Talmadge, this type of information is "essential." CP at 1278. *See, e.g., West v. Port of Olympia,* 146 Wn. App. 108, 123, 192 P.3d 926 (2008) (Court upheld trial court's limitation on an attorney's hourly rate to $250.00 per hour, for work in Thurston

County.)[10] Neither Mr. Martin's nor Mr. Wooster's declarations addressed hourly rates in Pierce County on employment law trial work, nor did they speak to customary rates for appellate practitioners.[11] Lacking the required information, the trial court abused its discretion in finding that plaintiffs' counsel should be reimbursed at an hourly rate of $350.00.

3. **The court had no basis for using current market rates rather than actual rates, in calculating the lodestar.**

The trial court also abused its discretion in finding that the attorney's fees for every hour billed, dating back to 2004, should be calculated based on current rates, rather than on the actual rates they charged throughout the course of this case. This ruling is not supported by the case decisions. Indeed, plaintiffs did not cite any controlling authority supporting their assertion that current rates should be used to calculate attorney's fees under fee-shifting statutes in non-civil rights cases. *Steel v. Lundgren,* 96 Wn. App. 773, 982 P.2d 619 (1999), cited by plaintiffs in their application, was an employment discrimination (i.e. civil rights) case, while *In re Washington Public Power Supply Sys. Litig.*, 19 F.3d 1291 (9th Cir. 1994) was a "common fund" case, wherein various attorneys were applying to the federal court for a bigger slice of the common fund settlement proceeds, rather than applying for an assessment of attorney's fees against the opposing party. As the Supreme Court held

[10] Mr. Talmadge's current general hourly rate is $325.00 per hour. CP at 1277.

[11] It should be noted, however, that Mr. Wooster's current hourly rate is $310.00 per hour, which is significantly lower than class counsel's rate. Declaration of Richard Wooster Regarding Attorney's Fees at 3; CP at 1250.

in *Mahler,* contemporaneous rates actually billed, not current rates, must be used to calculate the lodestar. *Mahler,* 135 Wn.2d at 434. In *Fisher Properties, Inc. v. Arden Mayfair, Inc.,* 115 Wn.2d 364, 375-78, 798 P.2d 799 (1990), a case relied on by plaintiffs in support of historical rates, the Supreme Court specifically declined to allow current rates, stating:

> The purpose for basing attorney fee awards on current rates or adjusted historical rates in public interest litigation makes the authority Fisher relies on inapposite. Fisher makes no claim that important public policies are involved or that its attorneys have suffered from any delay in payment. *We will not extend fee enhancement beyond civil rights litigation.*

Id. at 377 (emphasis added). This action was a wage case, not a civil rights case. Plaintiffs failed to justify their use of current, rather than contemporaneous, rates, and the trial court abused its discretion in finding that current market rates should be used in making the lodestar calculation. *See* Finding of Fact No. 2, CP at 1333.

4. **The court abused its discretion in failing to segregate hours incurred on unsuccessful claims, and failing to exclude wasteful and duplicative time.**

In determining whether the hours spent by counsel on appeal are reasonable, the court must exclude wasteful and duplicative time. *Nordstrom v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987); *Pham,* 159 Wn.2d at 539. The court must also segregate hours incurred on unsuccessful theories and theories for which fees may not be recovered. *Id.* Plaintiffs claimed there was no need to segregate wasteful and duplicative time because the facts and the law in the case were

"intertwined." This was a preposterous assertion, because it ignored the ultimate outcome of plaintiffs' case. Each and every legal theory of liability propounded by the plaintiffs was rejected and dismissed on appeal. The Court of Appeals did conclude, in the course of dismissing this lawsuit, that the engine room employees' collective bargaining agreements required extra pay for watch changeover activities; but the Court's legal rationale in support of its conclusion was not influenced in any meaningful way by plaintiffs' arguments or legal theories.

The plaintiffs and the superior court had an obligation to segregate the time spent in pursuit of claims that did not contribute to the success of the Union's grievances that resulted in a recovery of back wages. In *Smith v. Behr Processing Corp.,* 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002), the Court of Appeals made it crystal clear that segregating wasteful hours, and hours devoted to unsuccessful claims, is a required task that cannot be sidestepped or ignored. This requirement was endorsed by the Supreme Court in *Pham v. City of Seattle*, where the Court upheld the trial court's decision to exclude time spent on an unsuccessful cross-motion summary judgment, settlement discussions, a complaint never filed, media relations, and unsuccessful actions on appeal including a motion on the merits. *Pham,* 159 Wn.2d at 540. As the Supreme Court acknowledged in *Pham*, the party requesting fees and the trial court are obliged to excise time

spent on unsuccessful theories and theories for which fees were not recoverable.[12]

In the present case, a substantial percentage of the total hours claimed were devoted to pursuing unsuccessful theories. As Mr. Talmadge observed:

> The hours spent by attorneys in this case on the class's behalf were excessive for the result that was actually achieved in this case. First, class counsel does not excise time spent on unsuccessful theories or theories on which it was not entitled to recover fees. As the case law mandates, class counsel was obliged to excise time spent on unsuccessful theories and theories for which fees were not recoverable. Although it is almost impossible to discern from the invoices submitted by class counsel, time was spent on unsuccessful theories. For example, on attorney fees alone, the class sought recovery in this Court on the basis of the common fund theory. *It has now abandoned that approach.* More significantly, the class counsel tried a civil action in this Court and obtained a judgment. The Court of Appeals reversed that judgment because the class pursued a judicial remedy improperly when it should have sought the swifter, less expensive administrative remedy of the Marine Employees Commission. Plainly, much of the time spent in error by class counsel in the litigation was unnecessary or excessive.

CP at 1280.

In addition, a substantial component of the class counsel's time appears to have been devoted to damages-related issues. All of this time

---

[12] It is noteworthy that in *Pham,* the trial court "took care to enter 35 findings of fact justifying his reasonable fee calculation." *Pham*, 159 Wn.2d at 540. Obviously the trial court expended significant time and effort in reviewing the attorneys' hours to determine which hours should be excluded from the lodestar calculation. Here, in contrast, the superior court did not adjust the plaintiffs' application for attorney's fees and costs by a single penny. This fact alone suggests that the superior court fell short of meeting its obligation to undertake an independent and rigorous review of the plaintiffs' application.

was ultimately unproductive time and, therefore, not compensable. CP at 1281.

Plaintiffs' time spent attempting to sustain the judgment on appeal was also unproductive. The plaintiffs lost on appeal, and although they sought fees from both the Court of Appeals and Supreme Court under RAP 18.1, their fee requests were denied. Thus, all of the class counsel time spent on appeal was unproductive and should not be recovered. Alternatively, as argued supra, plaintiffs are barred from seeking fees and costs related to the appeal because they did not prevail on appeal and the Court of Appeals already declined to award fees under RAP 18.1(a).

Lastly, as discussed by Mr. Talmadge in his declaration, although it is difficult to discern from many of the time entries whether the time actually spent on the case by class counsel was reasonable, certain entries are plainly not recoverable. As Mr. Talmadge noted:

> Emblematic of the excessive time entries by class counsel are the dozens of hours spent by Lewis Ellsworth and Warren Martin riding the ferries. In October and November, 2005 Mr. Ellsworth "conferred" with videographers and Mr. Ellsworth and Mr. Martin attended videotaping of watch changes on board the ferries. The need for attorneys spending time observing videographers filming watch changes is nowhere explained in the class motion or fee application, particularly when a paralegal, Ms. Gibson, was also in attendance. Class counsel billed literally dozens of hours for such filming in October-November 2005.

> In summary, it is my opinion that the hours requested by class counsel are excessive.

CP at 1281.[13]

In response to the argument that the attorneys' time observing watch changes was unnecessary and excessive, plaintiffs' claimed, without offering any competent evidentiary support, that defense counsel and their paralegals attended the "very same" observations. Plaintiffs' Reply in Support of Application for Attorney's Fees and Costs, CP at 1294. This allegation was untrue; neither defense counsel nor their paralegals attended any of the watch changes. Yet, the superior court, based on nothing other than an unsupported allegation in plaintiffs' reply brief, entered Finding of Fact No. 3, finding "that defense counsel attended the same watch change observations that the defendant now challenges in the fee application." CP at 1334. This finding is yet another example of the superior court's failure to engage in a thorough review of the plaintiffs' application. More importantly, however, even if it were true that defense counsel observed those watch changes, that circumstance does not compel the conclusion that this time should be included in the lodestar calculation. The lodestar should not include time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Pham,* 159 Wn.2d at 540. Plaintiffs' never explained – nor did the superior court ask them to explain – why it was reasonable and necessary to the "success of the

[13] The attorney and paralegal hours spent observing watch changes are documented in plaintiffs' application, at CP at 1057.

litigation" for two of their attorneys to join a paralegal and a camera crew as the camera crew filmed watch changes.

In short, there was abundant evidence of excessive or unproductive time spent by the attorneys on activities that bore no relationship to the Commission arbitration award in favor of the employees' Union.[14] The trial court abused its discretion by failing to perform its duty to independently review the attorneys' timekeeping records, and by opting to endorse without question the plaintiffs' proposed findings, conclusions and order finding that no segregation would be appropriate, and no downward adjustment to the lodestar amount was required. *See* Finding of Fact No. 4, and Finding of Fact No. 5; CP at 1334-36.

5. **Hours billed for clerical work should have been excluded, but were not.**

Paralegal hours that are merely clerical in nature are not recoverable as part of the lodestar. *Absher Constr. Co. v. Kent Sch. Dist. No. 415,* 79 Wn. App. 841, 844-45, 917 P.2d 1086 (1995). The invoices submitted by class counsel seek recovery of the time of paralegal Pamela Gibson, but nowhere indicate that Ms. Gibson's time was "legal" rather than "clerical." As previously noted, Ms. Gibson was present for the filming of watch changes, a non-legal service. Ms. Gibson's earlier time entries in October contained numerous entries relating to the "camera crew schedule." CP at 1055-56. Scheduling is a clerical function. CP at 1282.

[14] In addition to the activities noted in Mr. Talmadge's declaration, DOT's proposed findings of fact recited numerous timekeeping entries that should have been deducted from the total hours forming the lodestar amount. *See* Appendix A at 7-13.

Similarly, Ms. Gibson's time entries show that significant time was spent doing clerical work, such as scheduling, making copies, and obtaining documents. CP at 1039-63. This clerical work should not have been assessed against DOT at a rate of $100.00 per hour. CP at 1039-63.[15] The superior court abused its discretion in failing to deduct clerical work from the lodestar amount.

6. **Plaintiffs' right to recover costs and expenses was governed by, and limited by, RCW 4.84.010. The trial court abused its discretion in awarding costs beyond those allowed by RCW 4.84.010.**

The plaintiffs requested costs beyond those allowed by RCW 4.84.010. They sought recovery of court link charges (CP at 1065-66); photocopying (CP at 1074-82); meal expenses, travel, lodging, and additional unidentified "expenses incurred to observe ferry watch changes" (CP at 1069, 1071-73); long distance charges (CP at 1070); and even postage (CP at 1082). In addition, the plaintiffs sought recovery of $831.66 in Amtrak fares for Mr. Lewis Ellsworth to travel to Madison, Wisconsin to interview an expert. CP at 1082. The plaintiffs also sought reimbursement for the fees charged by its expert Ken Mericle, in the amount of over $28,000.00, and nearly $27,000.00 charged by Dock Street Litigation to calculate damages. CP at 1068-69.

In support of their application for the above costs, plaintiffs cited several cases where Washington courts allowed the recovery of such legal

[15] Inexplicably, plaintiffs' application included fees for a legal secretary's time, as detailed in DOT's proposed findings, Appendix A at 12-13; and in the firm's billing worksheet at CP at 1039-43. Yet, the trial court failed to deduct even that time.

expenses as part of the successful party's reasonable fees. These case decisions, however, are based on particular statutes that allow costs beyond those in RCW 4.84.010. For example, in *McConnell v. Mothers Work Inc.,* 131 Wn. App. 525, 128 P.3d 128 (2006), the plaintiff brought an action under the Washington Minimum Wage Act. The court allowed an award of costs beyond those authorized under RCW 4.84.010, based on specific language in RCW 49.46.090 allowing costs to be awarded "in an amount to be determined by the court." *Id.* at 531-32.

In the present case, the plaintiffs relied on RCW 49.52.070.[16] In contrast to the more expansive language of the Minimum Wage Act, RCW 49.52.070 only authorizes a successful party to recover "costs of suit." This exact language ("costs of suit") was interpreted by the Supreme Court in *Nordstrom,* 107 Wn.2d at 743 (an action brought under the Consumer Protection Act), as allowing a successful plaintiff to recover only those costs set forth in RCW 4.84.010. Significantly, in *Simpson v. Thorslund,* 151 Wn. App. 276, 289, 211 P.3d 469 (2009), the court held that the prevailing party in an action under RCW 49.52.070 was entitled to recover costs of suit *as determined* by RCW 4.84.010.

RCW 4.84.010 does not allow recovery of expenses other than filing fees, service of process fees, statutory witness and attorney fees, expenses for records admitted into evidence, and expenses for deposition transcripts used at trial. Thus, even if plaintiffs are deemed the prevailing

---

[16] As discussed *supra*, the Court of Appeals ruled that plaintiffs' had no right to recover under RCW 49.52.070.

party, RCW 49.52.070 only authorizes recovery of costs under RCW 4.84.010, and under that statute plaintiffs cannot recover any of the extraordinary costs, such as their expert's fees, listed in their application.

Similarly, our Supreme Court has clearly stated that under RCW 49.48.030, costs are limited to those permitted under RCW 4.84.010. *Hume v. American Disposal Co.,* 124 Wn.2d 656, 675, 880 P.2d 988 (1994) ("We refuse now, however, to extend our reasoning in *Blair* to make expanded costs available outside the civil rights context.")

The plaintiffs' unsuccessful lawsuit was not a civil rights case. The plaintiffs were not entitled to costs at all, as they did not prevail. However, if they are allowed costs, recoverable costs must be limited to those set forth in RCW 4.84.010. Plaintiffs would be entitled at most to filing fees, service of process fees, statutory witness and attorney's fees, expenses for records admitted into evidence, and expenses for deposition transcripts used at trial.

7. **DOT did not "waive" its cost argument.**

The above arguments relating to recoverable costs were fully briefed for the superior court in DOT's response to plaintiffs' application for attorney's fees and costs, which was filed with the trial court on December 2, 2009. Plaintiffs were unable to generate a straight-faced legal argument in rebuttal, and instead contended that DOT had "waived" its challenge to their request for costs. This argument, which had no facts

to support it, and was flatly contradicted by the pleadings filed with the court, was accepted by the trial court in Finding of Fact No. 6, wherein the trial court found that DOT's argument regarding costs was "untimely" because it was not argued in DOT's October 20, 2009, response to plaintiffs' initial motion.

In fact, as DOT noted in its October 20, 2009 response, DOT and plaintiffs had stipulated that "[t]he parties have agreed to defer submitting briefing and argument over the reasonableness of the requested attorney's fees, and over the itemized listing of fees and costs attached to plaintiffs' motion, pending a decision from this Court on whether plaintiffs are entitled to attorney's fees." CP at 1177. That reservation is also reflected in the trial court's order of October 23, 2009, in which the trial court granted the plaintiffs' motion for attorney's fees and costs, but also stated that "[p]ursuant to the parties agreement, however, the amount of the award is reserved until further motion regarding the amount of the monetary award of fees and costs is brought before this Court at a later date." CP at 1223. In light of the clear understanding between the parties reserving argument on the amount of fees and costs for a later motion, which was incorporated into its October 23, 2009 order, it is bewildering that the trial court would enter a finding that DOT "waived" its right to contest plaintiffs' application for costs before that application was even filed with the court on November 25, 2009. The trial court committed flagrant error in finding that DOT "waived" its right to contest costs, and

committed a clear error of law in finding that plaintiffs were entitled to recover costs beyond those allowed under RCW 4.84.010.

I. Even If The Former Trial Court Had Authority To Consider Plaintiffs' Motion For Attorney's Fees And Costs Related To The Superior Court Proceedings, It Did Not Have Authority To Consider Attorney's Fees And Costs Incurred On Appeal.

The mandate from the Court of Appeals did not include a fee award or a cost award, nor did it authorize the trial court to address attorney's fees or costs upon remand, pursuant to RAP 18.1(i). In *Thompson v. Lennox*, 151 Wn. App. 479, 488, 212 P.3d 597 (2009), the Court held:

> While the appellate court may expressly delegate the authority to determine the amount of appellate fee awards to the trial court on remand, *see* RAP 18.1(i), absent such express delegation, the appellate court retains its authority over the award of such fees in the appellate court and parties must seek such fees in the appellate court.

Clearly, under applicable rules, and under the case authority cited in *Thompson,* the former trial court had no authority to decide plaintiffs' application for appellate fees and costs.[17] Plaintiffs' application, which was granted in full by the trial court, included the sum of $33,794.00 in appellate fees and $945.73 in appellate expenses. CP at 1084-88. These amounts, at minimum, must be deducted from the trial court's award even if the Court upholds every other aspect of the trial court's findings of fact, conclusions of law and orders.

[17] DOT raised this argument to the superior court. CP at 1264-65.

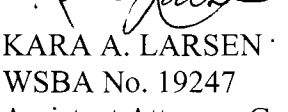
VI. CONCLUSION

Based on the foregoing, DOT respectfully requests that the Court reverse the trial court's findings of fact, conclusions of law and orders awarding attorney's fees and costs to plaintiffs, and deny plaintiffs' motion for attorney's fees and costs with prejudice.

RESPECTFULLY SUBMITTED this 17th day of March, 2010.

ROBERT M. McKENNA
Attorney General

STEWART A. JOHNSTON
WSBA No. 8774
Senior Counsel



KARA A. LARSEN
WSBA No. 19247
Assistant Attorney General

Attorneys for Appellant
Department of Transportation

Appendix A

RECEIVED BY
09 DEC 11 PM 3:52
SUPERIOR COURT
ADMINISTRATION

2009 DEC 11

FILED
IN COUNTY CLERK'S OFFICE
A.M. DEC 11 2009 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

BEN DAVIS, et al., Plaintiffs, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Defendant.	NO. 04-2-10585-0 FINDINGS OF FACT AND CONCLUSIONS OF LAW [PROPOSED BY DEFENDANT] Assigned Judge: Rosanne Buckner

This matter came before the Court on December 4, 2009, on Class Plaintiffs' application for an award of reasonable attorneys' fees and costs against the Defendant, Washington State Department of Transportation (WSDOT). On October 23, 2009, the Court ordered that the Class is the prevailing party in the above-entitled action, based on the Marine Employees' Commission (MEC) arbitration decision and award entered on July 24, 2009, and ordered that the amount of fees and costs would be determined upon future motion.

I. EVIDENCE

The Court heard oral arguments by counsel for the Class and counsel for Defendant, WSDOT. The Court considered the pleadings filed in this action and the following documents:

1. Class Motion for Attorney's Fees and Costs;

COPY

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

2. Declaration of Ben Davis in Support of Class Motion for Attorney's Fees and Costs;
3. Declaration of Warren E. Martin in Support of Class Motion for Attorney's Fees and Costs;
4. Declaration of Lewis Ellsworth in Support of Class Motion for Attorney's Fees and Costs;
5. Special Notice of Appearance;
6. Defendant's Response in Opposition to Plaintiffs' Class Motion for Attorney's Fees and Costs;
7. Declaration of Stewart Johnston in Support of Defendant's Response to Plaintiffs' Class Motion for Attorney's Fees;
8. Reply in Support of Class Motion for Attorney's Fees and Costs;
9. Application for Attorney's Fees and Costs;
10. Declaration of Warren E. Martin Regarding Attorney's Fees and Costs;
11. Declaration of Richard H. Wooster Regarding Attorney's Fees;
12. [Proposed] Order Granting Application for Attorney's Fees and Costs;
13. Defendant's Response in Opposition to Plaintiffs' Application for Attorney's Fees and Costs;
14. Declaration of Phillip A. Talmadge;
15. Declaration of Stewart Johnston;
16. Plaintiffs' Reply in Support of Application for Attorney's Fees and Costs; and
17. Supplemental Declaration of Warren E. Martin in Support of Application for Attorney's Fees and Costs.

In addition, the Court has reviewed the court file, and the pleadings filed by the parties during the course of this litigation, prior orders entered by the Court, and the Court of Appeals

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

decision in *Davis v. Dep't of Transportation,* 138 Wn. App. 811, 159 P.3d 427 (2007), *review denied,* 163 Wn.2d 1019, 180 P.3d 1291 (2008).

II. FINDINGS

Based on the argument of the parties and the evidence presented, and upon the Court's independent review of the history of proceedings in this matter, the Court finds as follows:

1. On August 11, 2004, Plaintiffs filed their complaint for back wages and statutory penalties against Defendant WSDOT.

2. On September 2, 2004, Defendant WSDOT filed its answer and affirmative defenses. Defendant's affirmative defenses included Defendant's assertion that "Plaintiffs have failed to exhaust administrative or contractual remedies, or Plaintiffs' remedy is administrative rather than judicial and therefore the action will not lie."

3. On December 14, 2004, Plaintiffs filed an amended complaint for back wages, declaratory judgment and statutory penalties.

4. On December 23, 2004, Defendant filed its answer to Plaintiffs' amended complaint, with affirmative defenses, and Defendant's answer again included the affirmative defense that Plaintiffs' had failed to pursue their administrative remedies.

5. On January 27, 2005, Defendant filed its first motion for summary judgment. Defendant's motion argued, *inter alia*, that Plaintiffs' complaint should be dismissed on the grounds that Plaintiffs' collective bargaining agreements (CBAs) provide the exclusive remedy for their wage claims, and those claims should be litigated and decided by the MEC pursuant to RCW 47.64.

6. On February 25, 2005, the Court entered an order denying Defendant's motion for summary judgment.

7. On November 10, 2005, the Court entered an order granting partial summary judgment in favor of Plaintiffs, finding watch change time to be compensable time.

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

8. On January 6, 2006, the Court entered an order granting Plaintiffs' motion for summary judgment under RCW 49.52, and also entered an order denying Defendant's cross-motion for summary judgment.

9. On January 27, 2006, Defendant filed a notice of appeal to the Court of Appeals.

10. On May 30, 2007, the Court of Appeals issued a decision reversing summary judgment in favor of the Plaintiffs. The Court of Appeals ordered the case remanded to the Pierce County Superior Court, and further ordered that summary judgment be entered in favor of the Defendant. *Davis,* 138 Wn. App. at 814.

11. In its opinion, the Court of Appeals held that the Plaintiffs had failed to exhaust their contractual remedies under their CBAs or their administrative remedies available before the MEC, and therefore summary judgment should be entered in favor of Defendant. *Davis,* 138 Wn. App. at 825. The Court of Appeals decision was based on the same legal argument originally raised by Defendant as an affirmative defense, and briefed and argued in Defendant's first motion for summary judgment, filed before this Court on January 25, 2005. Defendant's motion was denied by this Court on February 25, 2005.

12. Although the Court of Appeals reversed summary judgment and ordered this case dismissed, the Court of Appeals also held that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA." *Id.*

13. The Court of Appeals denied Plaintiffs' request for attorney's fees, sought under either RCW 49.48.030 or RAP 18.1. *Davis,* 138 Wn. App. at 826. Plaintiffs' motion for reconsideration of the Court of Appeals' decision was denied on July 2, 2007. Plaintiffs' Petition for Review, which also included a request for attorney's fees, was denied by the Supreme Court on April 2, 2008.

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

14. Following denial of Plaintiffs' Petition for Review, on April 23, 2008, the Court of Appeals issued a Mandate to the parties and to the Pierce County Superior Court, terminating review in accordance with RAP 12.5.

15. Shortly after the Court of Appeals issued its decision on May 30, 2007, the Marine Engineers Beneficial Association (MEBA), the exclusive bargaining representative for licensed and unlicensed engine room employees employed by Defendant WSDOT, filed grievances on behalf of the employees, seeking compensation in the form of lost wages for unpaid watch turnover activities.

16. On July 24, 2009, the MEC issued Decision No. 563-MEC (2009), sustaining MEBA's grievance and awarding back pay for watch turnover activities by engine room employees, to be calculated from April 9, 2007, 60 days prior to the filing of the grievances.

17. In its decision, the MEC observed that "[i]t is the view of the Commission that the State of Washington Court of Appeals overstepped its bounds and directed us, in advance of arbitration, as to what our findings should be. We strongly believe it was inappropriate for the [Court of Appeals] to have given advance instructions to the Commission on the interpretation of the collective bargaining agreement." MEC decision, at 7.

18. The MEC's decision further observed that "[i]t is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift." *Id.*

19. Counsel for Defendant has confirmed that the Defendant WSDOT is in the process of paying back pay to engine room employees, in accordance with the MEC decision and award, although the attorney fee award set forth of the MEC decision remains in litigation.

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

20. The Plaintiff class in the present case filed its motion for an award of attorney's fees and costs on October 2, 2009. On October 23, 2009, the Court entered an order granting the class' motion, but reserving ruling on the amount of the monetary award of fees and costs.

21. On December 4, 2009, the Court heard argument regarding the proper amount of fees and costs to be awarded. After hearing argument, the Court directed each party to submit proposed findings of fact and conclusions of law, for the Court's consideration.

22. Plaintiffs have applied for $224,927.50 in attorney's fees, $72,273.29 in costs, and approximately $7,925.00 additional fees and costs related to their application.

23. The Plaintiffs' attorney fee application and application for costs does not contain any deductions for time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

24. The Plaintiffs' attorney fee application and application for costs does not contain any deductions for fees and costs incurred in connection with the appeal to the Court of Appeals.

25. The Plaintiffs' application for costs does not itemize specific costs that would be recoverable under RCW 4.84.010, other than a $110.00 filing fee.

26. Based on the reasoning set forth by the Court of Appeals in dismissing Plaintiffs' lawsuit, this Court finds that Defendant's first summary judgment motion, filed on January 27, 2005, which sought dismissal of the complaint based on Plaintiffs' failure to exhaust their contractual or administrative remedies, should have been granted by this Court when the Court heard the motion on February 25, 2005.

27. Based on the Court of Appeals decision, this Court finds that all attorney hours and paralegal hours expended after February 25, 2005, were unproductive and unsuccessful because they were expended in pursuit of legal theories of liability brought before the wrong forum, which were rejected and dismissed by the Court of Appeals.

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

28. All attorney and paralegal hours expended on behalf of Plaintiffs in their effort to sustain the Court's order granting summary judgment in favor of the Plaintiff class were unproductive, because they were entirely unsuccessful before the Court of Appeals.

29. The Court of Appeals holding that engine room employees were entitled to compensation for watch changes under their CBA was not the result of any arguments raised by the Plaintiff class. Indeed, throughout this lawsuit and throughout the appeal process, the Plaintiffs argued that the terms of the CBA did *not* provide a remedy for the class members.

30. The Court has reviewed the attorney and paralegal hours from July 22, 2004 through February 25, 2005, the date summary judgment in favor of Defendant should have been granted.

31. The Court finds there were productive attorney and paralegal hours expended on behalf of Plaintiffs from July 22, 2004 to February 25, 2005 that contributed to the chain of events that ultimately led to the MEC award of back pay for watch turnover activities. However, of those hours, the Court has identified attorney hours that should be excluded because they were expended on activities that did not contribute, directly or indirectly, to the MEC decision and award of back wages on behalf of licensed and unlicensed engine room employees employed by Defendant. The Court has also identified clerical hours that should be excluded because clerical hours are not recoverable.

32. The below listed hours attributed to Attorney Ellsworth, listed by date, hours, activity, and cost, are excluded:

DATE	HOURS	DESCRIPTION	TOTAL	COURT DETERMINATION
7/22/04	**2.50**	**Preemption/Legislative history research**	**$875.00**	Preemption work non-productive (no issue of preemption raised in this lawsuit); legislative history not a factor in Court of Appeals

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

DATE	HOURS	DESCRIPTION	TOTAL	COURT DETERMINATION
				decision or in MEC decision.
8/9/04	1.0	Preemption research	$350.00	No preemption issue, deducted one hour
8/18/04	1.0	49.60 discovery issues	$350.00	No 49.60 claim raised in this lawsuit for wages.
8/19/04	1.0	Review civil litigation 49.60 issues	$350.00	Unproductive time. No 49.60 claim raised in this lawsuit.
9/1/04	.7	Review DOT's answer to 49.60 Complaint	$245.00	Unproductive time. No 49.60 claim raised in this lawsuit.
9/2/04	2.0	Preemption research issues	$700.00	Unproductive time. No preemption issues raised in this lawsuit.
11/1/04	1.0	Review SPEAA/Hisle case; L&I briefing in SPEAA case	$350.00	One hour deducted from total of 2.6 hours, because SPEAA time unproductive; SPEAA-based theories rejected by the Court of Appeals and unrelated to MEC decision.
11/5/04	1.0	Review AG briefs from Boeing case	$350	Unproductive time. SPEAA (Boeing) issues rejected by Court of Appeals, and unrelated to MEC decision.
12/9/04	.5	HIV discrimination case issues	$175	Unproductive time; no HIV discrimination issues raised in this lawsuit.
1/11/05	2.0	Legislative research history	$700	Unproductive time; legislative history not a factor in Court of Appeals decision, or in MEC decision.
1/12/05	3.0	Travel to State Archives and review Legislative History	1,050	Unproductive time; legislative history not a factor in Court of Appeals decision, or in MEC decision
1/25/05	2.0	Legislative history research	$700	Unproductive time; legislative history not a factor in Court of Appeals decision, or in

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

DATE	HOURS	DESCRIPTION	TOTAL	COURT DETERMINATION
				MEC decision
1/27/05	**3.0**	**Response motion research**	**$1,050**	Unproductive time, because legal arguments in response were ultimately unsuccessful, and had no bearing on MEC decision.
1/28/05	**5.0**	**Response brief issues**	**1,750**	Unproductive time, because legal arguments in response were ultimately unsuccessful, and had no bearing on MEC decision
1/31/05	**5.70**	**Response brief issues**	**$1,995**	Unproductive time, because legal arguments in response were ultimately unsuccessful, and had no bearing on MEC decision.
2/1/05	**4.30**	**Response brief.**	**$1,505**	Unproductive time, because legal arguments in response were ultimately unsuccessful, and had no bearing on MEC decision.
2/2/05	**4.5**	**Work on summary judgment response brief**	**$1,575**	Unproductive time, because legal arguments in response were ultimately unsuccessful, and had no bearing on MEC decision.
2/4/05	**1.8**	**Response brief**	**$630**	Unproductive time, because legal arguments in response were ultimately unsuccessful, and had no bearing on MEC decision

33. The below listed hours attributed to Attorney Martin, listed by date, hours, activity, and cost, are excluded:

DATE	HOURS	DESCRIPTION	TOTAL	COURT DETERMINATION
10/29/04	**.5**	**Review cases**	**$175**	Unproductive time; none

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

DATE	HOURS	DESCRIPTION	TOTAL	COURT DETERMINATION
		regarding legal theories and conferences regarding same		of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decision.
1/27/05	**1.5**	**Review State summary judgment motion; review cases cited by State; conferences regarding response.**	**$525**	Unproductive time; none of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decision
2/1/05	**.5**	**Review response to summary judgment motion**	**$175**	Unproductive time; none of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decisio
2/3/05	**2.0**	**Work on summary judgment response**	**$700**	Unproductive time; none of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decision
2/4/05	**2.0**	**Work on summary judgment response**	**$700**	Unproductive time; none of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decision
2/10/05	**2.0**	**Work on summary judgment response**	**$700**	Unproductive time; none of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decision
2/11/05	**1.0**	**Finalize summary judgment response**	**$350**	Unproductive time; none of plaintiffs legal theories were successful in this action, nor did those legal theories have any bearing on the MEC decision

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

34. The below listed hours attributed to Paralegal Gibson, listed by date, hours, activity, and cost, are excluded:

DATE	HOURS	DESCRIPTION	TOTAL	REASON FOR EXCLUSION
8/31/04	**.5**	**Calendar dates from scheduling order**	**$50**	Clerical work, not paralegal work
10/29/04	**.10**	**Telephone call from class member re available dates for deposition**	**$10**	Clerical work, not paralegal work
11/1/04	**1.0**	**Telephone calls and email communications with plaintiffs to set up a meeting. Telephone calls to Supreme Court to obtain briefing.**	**$100**	Clerical work, mixed with paralegal work. Deduction of 1 hour for clerical work.
11/2/04	**.2**	**Phone calls to and from Supreme Court re copies of briefing on a case.**	**$20**	Clerical work, not paralegal work.
12/7/04	**.4**	**Phone calls to class representatives re deposition dates**	**$40**	Clerical work, not paralegal work.
1/11/05	**2.3**	**Legislative history research**	**$230**	Unproductive time; legislative history not a factor in Court of Appeals decision, or in MEC decision.
1/12/04	**.4**	**Research State Ferry case re HIV. Telephone call to court clerk re case**	**$40**	Unproductive time; no HIV discrimination issues raised in this lawsuit
1/13/05	**3.2**	**Travel to and from Kent Justice Center to review case file**	**$320**	Unproductive time; no King County case issues raised in this lawsuit; activity had no bearing on MEC decision.
1/14/05	**2.9**	**Travel to and from Kent Justice Center to review case file. Call to attorney Mary Ruth Mann**	**$290**	Unproductive time; activity had no bearing on discovery in this lawsuit nor did it have any bearing on MEC decision.
1/21/05	**.2**	**Telephone call to**	**$20**	Clerical work, not

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

DATE	HOURS	DESCRIPTION	TOTAL	REASON FOR EXCLUSION
		Mary Ruth Mann's office re Gruber case		paralegal work; and unproductive insofar as work was unrelated to MEC decision.

35. The below listed hours attributed to law firm employee Vowe, and co-workers identified on billing worksheet as "PATTL" and "MILSJ", listed by date, hours, activity, and cost, are excluded:

DATE	HOURS	DESCRIPTION	TOTAL	REASON FOR EXCLUSION
8/25/04	**.5**	**Telephone call from ABC regarding status of Order, clarify from which court documents are to be obtained. Inquire as to archived documents.**	**$20**	Clerical work; not recoverable
8/27/04	**.5**	**Review of records from King County, check on status of records from Kitstap County, telephone call to ABC**	**$20**	Clerical work; not recoverable
9/3/04	**.2**	**Phone call to ABC regarding documents from Kitsap County**	**$8**	Clerical work; not recoverable
9/22/04	**.4**	**Telephone call and return call to ABC re archivedAnswer**	**$16**	Clerical work; not recoverable
11/01/04	**.4**	**"PATTL"Retrieved dockets and briefing re SPEEA case**	**$40**	Clerical work; not recoverable
1/2/05	**2.0**	**"MILSJ" made revisions to motion for class certification and**	**$50**	Clerical work; not recoverable

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

DATE	HOURS	DESCRIPTION	TOTAL	REASON FOR EXCLUSION
		transcribed dictation for attorney		
1/11/05	**.3**	**"PATTL"Requested copies of bill files from State Archive**	**$30**	Clerical work; not recoverable

36. The Declaration of attorney Richard H. Wooster, an experienced employment lawyer practicing in Pierce County, attests that his rate is $310 per hour on new cases in which he represents plaintiffs.

37. The Declaration of Warren Martin attests that his hourly rate of $350 is the rate he charges in defending employment cases.

38. Attorneys Martin and Ellsworth each claim a current hourly rate of $350. Neither attorney has presented the Court with testimony regarding their hourly rate as it existed in 2004 or in 2005, although Attorney Martin has attested that the *time* records submitted were prepared contemporaneously.

39. Attorney Martin has submitted two declarations attesting to fees incurred in connection with Plaintiffs' fee application. The amount requested is $9,645.00. This amount includes time spent by a law firm employee identified on billings statements as "WASHR", in preparation for a PowerPoint presentation for a Court of Appeals matter. This time, billed at $1,187.50 must be deducted because it is unrelated to this action. In addition $400.00 in fees is sought for time in conference with Attorney Bill Rutzick, presumably for the purpose of obtaining a declaration from Mr. Rutzick. No such declaration was presented to this Court. Accordingly this time should be deducted.

II. CONCLUSIONS OF LAW

1. The Court has previously ruled that Plaintiff class is the prevailing party in this action, and is therefore entitled to attorney's fees and costs as allowed by statute.

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

2. The lodestar method is a reasonable and acceptable approach for calculating attorneys' fees in this case. A lodestar is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the successful claim. *Henningsen v. WorldCom*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000), citing *Bowers*, 100 Wn.2d at 593-94. The lodestar should not include time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Pham v. City of Seattle,* 159 Wn.2d 527, 540, 151 P.3d 976 (2007)

3. For purposes of calculating the lodestar in this matter a reasonable hourly rate for the Plaintiffs' attorneys is $310 per hour.

4. All time expended by counsel in pursuit of the class claims after February 25, 2005 is excluded from the lodestar calculation, because it was, in light of the Court of Appeals decision dismissing Plaintiffs' lawsuit, unproductive time spent on unsuccessful claims brought forward in the wrong forum.

5. Time spent by Plaintiffs' counsel in defending against Defendant's motion for summary judgment filed on January 27, 2005 and heard by the Court on February 25, 2005, was, in light of the Court of Appeals decision dismissing Plaintiffs' lawsuit based on the same legal argument raised by Defendant it its motion, unproductive time spent in the prosecution of unsuccessful legal theories, and is therefore excluded from the Court's lodestar calculation.

6. The Court of Appeals denied Plaintiffs' request for attorney's fees and costs related to the appeal, and this Court lacks authority to disturb the Court of Appeals ruling.

7. Paralegal hours that are merely clerical in nature are not recoverable as part of the lodestar. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 844–45, 917 P.2d 1086 (1996). The Court has excluded such hours from the Court's lodestar amount.

8. Having reviewed the Plaintiffs' billing instruction worksheet detailing work performed between the dates of July 22, 2004 and February 25, 2005, the Court concludes that 51.5 hours claimed by Mr. Martin and Mr. Ellsworth must be excluded as unproductive time.

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

The Court has also determined that $ 1,304.00 in paralegal and/or legal support time should be excluded as either unproductive time, or unrecoverable clerical work.

9. The appropriate lodestar amount, after applying the reductions listed herein and calculated at an hourly rate of $310 per hour for the attorneys, for 97.2 hours of work (totaling $30,132.00) and calculated at the requested rate for paralegal time (totaling $1,552.00), for the time period described above, is $31,684.00.

10. Plaintiffs' are entitled to recover costs only as allowed pursuant to RCW 4.84.010, in the amount of $110.00 as reimbursement for the superior court filing fee.

11. Plaintiffs are entitled to reasonable attorney's fees related to their motion for fees and costs, as attested to in the Declaration of Warren Martin, in the sum of $8,057.50.

//

//

//

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

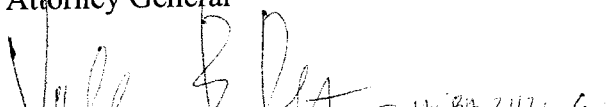
III. ENTRY OF ORDER AND JUDGMENT

Counsel is hereby instructed to submit a proposed order and judgment consistent with the above findings of fact and conclusions of law.

Dated this _____ day of December, 2009.

_____
THE HONORABLE ROSEANNE BUCKNER
Judge, Pierce County Superior Court

Presented by:
ROBERT M. MCKENNA
Attorney General



_____ DATED
STEWART JOHNSTON,
WSBA No. 8774
Senior Counsel

_____ DATED
KARA LARSEN
WSBA No. 19247
Assistant Attorney General
Attorneys for Defendant
Washington State Department of Transportation

Copy Received;
Approved as to Form:

_____ _____ DATED
WARREN E. MARTIN
WSBA No. 17235
Attorney for Plaintiffs

OFFICE OF THE ATTORNEY GENERAL
1019 Pacific Avenue, 3rd Floor
Tacoma, WA 98402-4411
(253) 593-5243

FILED
COURT OF APPEALS
DIVISION II
10 MAR 18 PM 12:29
STATE OF WASHINGTON
BY DEPUTY

NO. 40019-7-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Appellant, v. BEN DAVIS, et al., Respondents.	CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Appellant on all parties or their counsel of record on March 17, 2010 as follows:

X US Mail Postage Prepaid

TO:

Warren E. Martin
Gordon Thomas Honeywell LLP
1201 Pacific Ave, Suite 2100
Tacoma, WA 98401-1157

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

Dated this 17th day of March, 2010 at Olympia, WA.

Erica Eddings
ERICA EDDINGS