

No. 40019-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

GORDON THOMAS HONEYWELL LLP
Warren E. Martin
Attorneys for Respondents

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 17235

FILED
COURT OF APPEALS
10 APR 26 PM 4:38
STATE OF WASHINGTON
BY [Signature]

ORIGINAL

[1463238 v10.doc]

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES..... iii

I. INTRODUCTION..... 1

II. STATEMENT OF ISSUES..... 1

III. STATEMENT OF THE CASE..... 2

 A. The Underlying Lawsuit Awarded Wages to the Class..... 2

 B. This Court’s Decision Held That Wages Were Owed But That an Arbitration Was Required to Set the Amount. 4

 C. The MEC Determined the Amount of Wages Owed. 6

 D. The Lawsuit Was Necessary to Recover Wages Owed. 8

 E. The Superior Court Awards the Class Attorney’s Fees.10

IV. ARGUMENT..... 13

 A. The Request for Fees and Costs Was Properly Before the Superior Court..... 13

 B. The Employees Are Entitled to Attorney’s Fees and Costs Under RCW 49.48.030..... 15

 1. There is “An Action.” 17

 2. The Class (A Person) Was Successful in Recovering Wages Owed.....20

 C. The Policy Behind RCW 49.48.030 Supports the Fee Request Here. 23

 D. Response to the State’s Argument Regarding Right to Attorney’s Fees..... 24

 1. Prevailing Party Is Not The Proper Standard Under RCW 49.48.030..... 24

 2. An Award of Wages by the MEC Triggers Attorney’s Fees Under RCW 49.48.030. 26

 3. The Right to Attorney’s Fees Is Not Limited to Proceedings Before the MEC. 27

4.	The Language in the CBA Does Not Waive the Class' Right to Attorney's Fees.....	27
5.	The Contingent Fee Agreements Are Irrelevant to the Calculation of Reasonable Attorney's Fees.	29
E.	The Trial Court Properly Calculated the Lodestar Amount Setting a Reasonable Attorney's Fee.....	31
1.	Legal standards Applicable to Fee Awards	31
2.	The Trial Court Considered the Appropriate Factors in Setting the Lodestar Amount.....	32
3.	The Time records are Sufficient.....	33
4.	The Awarded Hourly Rates Are Reasonable.....	35
5.	The Rate Awarded Was Appropriate on Either a Current or Historical basis.....	37
F.	No Segregation of Fees is Required.	40
G.	Paralegal Time is Compensable.....	43
H.	The State Waived Its Argument that the Class is Limited to Recovering Only Statutory Costs.....	44
V.	ATTORNEY'S FEES ON APPEAL.....	47
VI.	CONCLUSION.....	47

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Farmers Inc. Co. of Washington</i> , 83 Wash. App. 725, 923 P.2d 713 (Div. 2 1996)	46
<i>August v. U.S. Bancorp</i> , 146 Wash. App. 328, 190 P.3d 86 (Div. 3 2008), <i>as amended</i> , (Sept. 4, 2008) and <i>review denied</i> , 165 Wash. 2d 1034, 203 P.3d 380 (2009).	46
<i>Bates v. City of Richland</i> , 112 Wn. App. 919, 51 P.3d 816 (2002)	16, 22, 23
<i>Beckman v. Wilcox</i> , 96 Wn. App. 355, 368, 979 P. 2d 890 (1999).....	34
<i>Blair v. Washington State University</i> , 108 Wn.2d 558, 570, 740 P.2d 1379 (1987)	13, 33, 35
<i>Bowers v. TransAmerica Title Ins. Co.</i> , 100 Wn.2d 581, 598, 675 P.2d 193 (1983)	13, 33, 36
<i>Broyles v. Thurston County</i> , 147 Wn. App. 409, 195 P.3d 985 (2008).....	31, 36
<i>Collins v. Clark County Fire Dist. No. 5</i> , ___ Wn. App. ___; ___ P.3d ___ 2010 WL 820039 (March 11, 2010)	31, 34, 35
<i>Concerned Coupeville Citizens v. Town of Coupeville</i> , 62 Wn. App. 408, 413, 814 P.2d 243 (1991)	46
<i>Davis v. Dept. of Transp.</i> , 138 Wn. App. 811, 159 P.2d 427, <i>rev. denied</i> 163 Wn.2d 1019 (2008)	4, 5, 10, 14
<i>Dice v. City of Montesano</i> , 131 Wn. App. 675, 128 P.3d 1253 (2006).....	31, 47
<i>Fisher Properties, Inc. v. Arden-Mayfair Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990)	38, 40
<i>Hume v. American Disposal Co.</i> , 124 Wn.2d 656, 673, 880 P.2d 988 (1994)	41

<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 34, 42 P.3d 1265 (2002)	16, 17, 20, 24, 40
<i>Kaech v. Lewis County Public Utility Dist. No. 1</i> , 106 Wash. App. 260, 23 P.3d 529, 91 A.L.R.5 th 727 (Div. 2 2001).....	45
<i>Mahler v. Szucs</i> , 135 Wn.2d 398 (1998)	38
<i>Martinez v. City of Tacoma</i> , 81 Wn. App. 228, 914 P.2d 86 (1996).....	30
<i>McGinnity v. Autonation, Inc.</i> , 149 Wn. App. 277, 284 (2009)...	20, 21, 23
<i>McIntyre v. State Patrol</i> , 135 Wn. App. 594, 141 P.3d 75 (2006)	18, 19, 20, 24
<i>Moore v. Wentz</i> , 11 Wash. App. 796, 525 P.2d 290 (Div. 3 1974).	45
<i>Pannel v. Food Services of America</i> , 61 Wn. App. 418, 447, 810 P.2d 952 (1991)	40
<i>Schaefco, Inc. v. Columbia River Gorge Com'n</i> , 121 Wash.2d 366, 849 P.2d 1225 (1993).....	45
<i>Steele v. Lundgren</i> , 96 Wn. App. 773, 785-86, 982 P.2d 619 (1999) <i>rev denied</i> 139 Wn.2d 1026 (2000)	38
<i>Vizcaino v. Microsoft</i> , 142 F. Supp. 2d 1299, 1305 (W.D. Wa. 2001), <i>aff'd</i> 290 F.3d 1043, 1051 (9 th Cir. 2002)	36, 37, 40
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 289, 840 P.2d 860 (1992);	46
<i>Wingert v. Yellow Freight Systems, Inc.</i> , 146 Wn.2d 841 (2002), 50 P.3d 256	27, 28
<u>Statutes</u>	
RCW 1.16.080	21
RCW 4.84.010	1, 2

RCW 4.84.030	24
RCW 49.48.030	Passim
RCW 49.52.070	5

Rules

CR 54(d)(2)	26
RAP 18.1.....	5, 14, 47
RAP 18.1(b).....	47
RAP 12.2.....	13, 15

I. INTRODUCTION

RCW 49.48.030 authorizes an award of attorney's fees upon satisfaction of three conditions: that there is (1) an action in which (2) any person is (3) successful in recovering wages owed. In this case, through a combination of litigation and arbitration (collectively an action), a Class of ferry system employees (persons) recovered over \$2,000,000 in wages owed. These wages would never have been recovered without the result in the underlying litigation. Therefore, all the conditions in RCW 49.48.030 are met, and the Superior Court properly awarded attorney's fees to the employees.

After deciding the employees were entitled to fees, the Superior Court had broad discretion to determine the "lodestar" amount. The Superior Court considered the relevant factors and did not abuse its discretion. The State waived any argument that the employees are limited to statutory costs under RCW 4.84.010 by failing to make such an argument in a timely manner.

II. STATEMENT OF ISSUES

1. When the underlying litigation determines that the Class was to be paid for performing watch change, a determination that then resulted in the recovery of \$2,000,000 in wages to the Class, is the Class entitled to attorney's fees pursuant to RCW 49.48.030 after the wages have been recovered?

2. When this Court wrote that “[b]ecause the employees have not at this time recovered any wages owed, we do not award attorney’s fees ...” did the Court contemplate a later proceeding to determine attorney’s fees once the employees had recovered the wages this Court had found they were owed?

3. When the Superior Court heard oral argument, considered written submissions and entered detailed findings of fact and conclusions of law, did the Superior Court abuse its discretion in setting the lodestar amount of attorney’s fees and/or costs awarded to Class counsel?

4. Did the State waive any argument that the Class was only entitled to statutory costs under RCW 4.84.010 by not making such argument in a timely basis?

III. STATEMENT OF THE CASE

This case has had a complicated procedural history that has now resulted in a substantial wage recovery for the plaintiff Class. That background is summarized below to demonstrate the Class’ entitlement to attorney’s fees and costs.

A. The Underlying Lawsuit Awarded Wages to the Class.

On August 11, 2004, the individual employees commenced this lawsuit seeking to recover compensation for performing watch change activities. CP 5-10. Prior to filing this action, lead plaintiff Ben Davis

attempted to file a grievance under the collective bargaining agreement ("CBA"). Declaration of Ben Davis in Support of Class Motion for Attorneys' Fees and Costs, ¶ 2, Supplemental Clerk's Papers _____. The union declined to process that grievance believing that compensation for watch change was not addressed in the CBA. *Id.* Davis could not challenge the union's view of the CBA. The employees were therefore left with no option but to pursue litigation to recover wages owed for what was unmistakably work time. *Id.* ¶ 3.

As the Court may recall, watch change is a process by which an oncoming shift relieves an off-going shift in the engine room on a Washington State ferry. The process is required by the employer and both shifts must be present at the same time. Despite the fact the employees on both shifts were performing the same tasks and clearly working, only the employees on one shift were being paid for this time. The employees on the other shift were not being paid although they were also performing work tasks that were required by the Ferry System. The Class contended that watch change was work time for which compensation was owed.

Following Class certification on February 25, 2005, the Superior Court agreed with the Class plaintiffs and found that watch change was work time. On January 27, 2006 Judgment was entered in the Class' favor. CP 993-96.

B. This Court's Decision Held That Wages Were Owed But That an Arbitration Was Required to Set the Amount.

The Ferry System then appealed. On May 30, 2007, this Court issued its opinion in this case. *Davis v. Dept. of Transp.*, 138 Wn. App. 811, 159 P.2d 427, rev. denied 163 Wn.2d 1019 (2008) ("Davis I"). Davis I first found that watch change was work time for which the employees must be paid. The Court wrote:

We hold that, under the collective bargaining agreement, watch changes are a work activity for which the State must compensate employees.

Davis, 138 Wn. App. at 814. The Court continued:

We hold that the CBA unambiguously addresses compensation for watch changes ..." [T]he only reasonable interpretation of the CBA provision addressing the definition of wages is unambiguous and clear: the State must compensate employees for watch changes.

Id. 818-20. Having found watch change was work time for which wages were owed, this Court then held that the employees' proper forum to recover such wages was in a proceeding before the Marine Employees Commission ("MEC"). But, this Court made it crystal clear that whether the employees were owed wages for watch change was decided in the lawsuit and was not an issue before the MEC. The Court wrote:

We emphasize that watch changes are a regular, essential, and required work activity for which the state must compensate under the CBA. And

whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.

Davis, 138 Wn. App. at 825-26.

The Superior Court had awarded the Class attorney's fees and costs¹ under RCW 49.48.030 and RCW 49.52.070. The Class also sought fees on appeal. In Davis I, the Court wrote that "[b]ecause the employees at this time have not received any wages owed, we do not award attorney's fees under either RCW 49.48.030 or RAP 18.1." *Id.* at 826 (emphasis added.)

In this way, Davis I set up the following outcome. First, the employees would receive back pay for watch changes and would be paid for such work in the future. Second, the amount of back pay would be decided before the MEC but the liability for back pay was already determined.² Third, because it was inevitable that the employees would receive back pay in the MEC proceeding, a decision on the Class' request for attorney's fees and costs was deferred until after the employees recovered the wages this Court held were owed.

¹ The State did not oppose the request for costs.

² In its brief before the MEC, the union framed the case as follows: "The Court of Appeals unambiguously held that the issue before the Arbitrator is how much money the State owes its engine room employees (as the Union proposes) not whether it owes any money at all (as the State proposes)."

C. The MEC Determined the Amount of Wages Owed.

As contemplated by Davis I, an arbitration proceeding was brought before the MEC. Before the MEC, the State sought to re-litigate this Court's determination that watch change was work time for which employees must be paid. The State asserted that the issue for arbitration was: "Did Washington State Ferries violate the collective bargaining agreement (CBA) between WSF and MEBA by not paying overtime compensation for routine watch turnover performed by engine room employees?" Declaration of Warren E. Martin in Support of Class Motion for Attorneys' Fees and Costs, Ex. C, p. 2, Supp. Clerk's Papers _____. The State argued that "The Commission should look at this grievance as though it had been filed before the Class action suit." *Id.* p. 4. Consistent with the State's decision to ignore Davis I, the MEC found that: "There was no evidence that WSF made any attempt to calculate backpay for watch turnover to determine liability, even after the Court of Appeals issued its decision." *Id.* p. 5.

The MEC issued its decision and award on July 24, 2009. *Id.* The award makes it clear that the question of whether wages were owed for watch changes was decided in Davis I. Finding of Fact No. 5 cited the above quoted portion of Davis I finding watch change to be

compensable work.³ *Id.* p. 5. In Conclusion of Law No. 3, the MEC wrote: “The Washington State Court of Appeals has ruled that engine room employees are to be compensated under the collective bargaining agreement for time spent on watch turnover.” *Id.* p. 6. In the discussion section, the MEC concluded: “We therefore concede to the directive of the Court and find that the matter of whether or not watch changeover is ‘work’ within the meaning of the statutes of the State of Washington has already been determined, and our challenge is to determine the proper remedy.” *Id.* p. 7.

The MEC then considered evidence as to the amount of wages owed, evidence that was developed in the underlying lawsuit and which the State did not contest.⁴ *Id.*, pp. 7-8. The MEC then awarded the employee Class backpay of \$1,921,526.81 plus interest plus any additional watch turnover wages accrued from March 31, 2009 until the award was implemented. *Id.* p. 8.

³ The MEC wrote: “And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.” (Emphasis added). Declaration of Warren E. Martin, Ex. C, p. 5, Supplemental Clerk’s Papers at _____.

⁴ The MEC noted that “the WSF ignored the directive of the Court at its peril,” that “the WSF should have begun a method of record keeping to track the amount of time worked by employees” and that “the only evidence in the record about the amount of time employees worked and should be compensated for is that presented by the Union.” Declaration of Warren E. Martin, Ex. C, p. 7, Supplemental Clerk’s Papers at _____.

D. The Lawsuit Was Necessary to Recover Wages Owed.

This award, which exceeds \$2,000,000, would not have been received by the employee Class but for the lawsuit commenced in this case. First, lead plaintiff Ben Davis approached his union and sought to file a grievance asserting that watch change was work time. *Declaration of Ben Davis*, ¶ 2, Supplemental Clerk's Papers at ____.

The union, however, declined to pursue this grievance believing that the CBA did not address this issue. Davis could not, in good faith, dispute the Union's position. *Id.* Having no other avenue, Davis and the other named plaintiffs filed the underlying lawsuit. *Id.* Even when the lawsuit was filed, however, the union and its counsel expressed doubts about the merits of the case. *Declaration of Lewis L. Ellsworth*, ¶ 2, Supplemental Clerk's Papers at ____.

The employees' lawsuit established that Class members were to be paid for watch change time. Had the Class not initiated this lawsuit, the Class never would have been paid for this time. *Davis Dec.*, ¶ 3., Supplemental Clerk's Papers at _____.

In the initial action, the State argued that the CBA did not address payment for watch change time. Before the Superior Court, the State contended that: "The collective bargaining agreement currently in effect does not provide for additional compensation for watch relief." CP 613. This argument was supported by a Declaration

from Paul Brodeur, Port Engineer, who testified that “[t]ime spent by Engineers, Oilers, and Wipers engaging in watch relief is not compensable under the collective bargaining agreements.” CP 46 (Brodeur Dec. ¶ 10).

The State reiterated this position in its briefing in Davis I. First, the State argued that “no compensation is payable unless provided for in the collective bargaining agreement.” Davis I, Appellant’s Brief at 20. But the State also claimed that “the issue of compensation for watch time is not addressed in the collective bargaining agreements ...” *Id.* at 27.

In this way, the State sought dismissal of the lawsuit claiming that the only remedy was under the CBA, but that the CBA provided no remedy at all. The employees argued that compensation for watch change was not addressed in the CBA and therefore sought access to the courts to determine that they were entitled to be paid for watch change. This Court agreed that the employees must be paid for watch change, but sent them to the MEC to determine the amount owed. The substantive work establishing the Class’ entitlement to be paid for watch change time occurred in the underlying lawsuit, as the MEC subsequently determined.

Given the result in Davis I, the Class would not be paid back wages until the MEC proceeding was concluded. Davis I made it

crystal clear, however, that the employees would receive wages in that proceeding, as the proceeding was only to determine the amount owed, not whether wages were owed in the first place. Sequentially, the employees had not yet recovered any wages owed when the Davis I opinion was issued. Because the third condition to an award of attorney's fees under RCW 49.48.030 had therefore not yet been met, Davis I declined to award attorney's fees "at that time." *Davis*, 138 Wn. App. at 826.

E. The Superior Court Awards the Class Attorney's Fees.

The Class thereafter received over \$2,000,000 in unpaid wages through the MEC proceeding. Declaration of Warren E. Martin, Ex. C, Supplemental Clerk's Papers at _____. The Class then sought an award of attorney's fees and costs, as Davis I envisioned. CP 1238-44.

Procedurally, the parties agreed to divide the issues into two parts; the first issue addressed was to determine whether the Class was entitled to attorney's fees and/or costs and the second, to decide the lodestar amount, if the first issue was decided in the Class' favor.⁵

⁵ Reply in Support of Class Motion for Attorney's Fees and Costs, p. 2, n. 1, Supplemental Clerk's Papers _____.

The Superior Court granted the first motion finding the Class was entitled to fees under RCW 49.48.030. Following oral argument, the Superior Court ruled:

I'm looking at the Court of Appeals decision under attorney's fees. And because it says, "Because employees have not at this time have not acquired any wages owed, we do not award attorney's fees." It's clear at this time that plaintiffs, because they pursued arbitration with the CBA at the direction of the Court of Appeals, did receive them [wages]. And I believe the attorney's fees are warranted for having brought this action under the statute, RCW 49.48.030.

Report of Proceedings at 22.

In oral argument on this motion, the State conceded that the standards for the Class to recover attorney's fees and for the Class to recover costs are identical. Defense counsel began his argument by noting that the State was "opposing the motion for attorney's fees and expenses." *Id.* at 8. Counsel continued:

I should make it clear that we are opposing the motion for attorney's fees and expenses. We argued against attorney's fees, and analysis is the same. If they are entitled to attorney's fees, they are entitled to costs and vice-versa. And I'm only bringing it up because it was in Mr. Martin's reply, but the analysis is the same and I just want to make it clear that we are talking about both fees and expenses. RP at 8.

The State's opposition to this motion did not contend that the Class was limited to statutory costs. Defendant's Response in

Opposition to Plaintiff's Motion for Attorneys' Fees and costs, Filed 10/20/09, Supplemental Clerk's Papers at _____. The omission was noted in the Class' Reply. Reply in Support of Class Motion for Attorneys' Fees and Costs, filed 10/23/09 at 9, Supplemental Clerk's Papers at _____. As counsel conceded at oral argument, the State's briefing did not articulate a limit on the recovery of costs separate from the entitlement to attorney's fees.

Following argument, the Court entered an Order Granting the "Class Motion for Attorney's Fees and Costs." CP 1326. The State did not seek reconsideration of this Order.

The parties then briefed a second motion to determine the lodestar amount. In its opposition to this second motion, the State argued for the first time that the Class was only entitled to statutory costs. The Superior Court found that argument had been waived in the following finding of fact:

Regarding costs, on October 23, 2009 the Court entered an order granting the Class' motion for attorneys' fees and costs. The Court finds that in defendant's response in opposition to plaintiff's Class motion for attorney's fees and costs dated October 16, 2009, the defendants did not specifically respond to whether the Class was or was not entitled to the costs requested. At oral argument on that motion, counsel for the defendants acknowledged that the same legal standards applied to the Class' request for costs as for the Class' request for attorneys' fees. In

particular, the defendant did not argue in its October 20, 2009 response that the Class was only entitled to statutory costs under RCW 4.84.010. The Court therefore finds defendant's argument in its December 2, 2009 response that the Class is only entitled to statutory costs to be an untimely and inappropriate motion for reconsideration.

CP at 1326-27.

The Superior Court also entered detailed findings of fact and conclusions of law supporting the award of attorney's fees. CP 1324-29. The Superior Court considered each of the factors set forth in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) and *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987). CP 1327. After considering all applicable factors, the Court awarded attorney's fees of \$235,570.59 and costs of \$72,273.09. The State then appealed.

IV. ARGUMENT

A. The Request for Fees and Costs Was Properly Before the Superior Court.

Defendants first argue that this matter was not properly before the Superior Court. Yet, a careful review of Davis I, the Mandate and RAP 12.2 demonstrates to the contrary.

First, Davis I did not make a final decision on the Class' request for attorney's fees. Instead, the Court wrote, "Because 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 826 (emphasis added). Had the Court intended to simply deny plaintiffs' request for attorney's fees, the Court presumably would have so stated. By adding the language "because the employees at this time have not recovered any wages owed," particularly given that the Court's decision ensures that wages will subsequently be recovered, *Davis I* indicates that it contemplated a later proceeding for attorney's fees.

In this way, the proceeding before the Superior Court is consistent with the Mandate. The Mandate returned the case to the Superior Court "for further proceedings in accordance with the attached true copy of the Opinion." There were no further proceedings prior to the Class' recovering wages before the MEC and then seeking attorney's fees and costs. No dismissal order was ever entered. Under the language in *Davis I*, the Class could not seek attorney's fees until wages had been recovered through the MEC process. If the State believed that a final judgment of dismissal should have been entered following the issuance of the Mandate, the State could have filed such a motion. The State did not do so. Thus, the case remained in a neutral posture until the Class sought fees and costs, a motion brought in accordance with *Davis I*.

Moreover, RAP 12.2, on which the State relies, supports the Class' motion for fees and costs. The final sentence of RAP 12.2 provides, "After the Mandate is issued, the trial court may, however, hear and decide post-judgment motions otherwise authorized by statute or rule so long as those motions do not challenge issues already decided by the appellate court." Davis I did not decide whether the Class would ever be entitled to attorney's fees, but instead deferred that issue until when wages were actually recovered. Wages were recovered through the MEC. The Class' motion for attorney's fees could only be presented after that award was issued. RAP 12.2 authorized the Superior Court to decide the Class' application for attorneys' fees on an issue left open by the Davis I opinion.

B. The Employees Are Entitled to Attorney's Fees and Costs Under RCW 49.48.030.

RCW 49.48.030 provides that "in any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the Court, shall be assessed against said employer or former employer.⁶" There are three conditions to recovery of wages under RCW 49.48.030: There must be (1) an action that is (2) successful in

⁶ RCW 49.48.030 has since been amended to use the phrase "him or her." Substitute Senate bill 6239. This amendment does not affect the issue in this case.

recovering (3) wages or salary owed. As shown below, these three conditions are met here.

In analyzing the three conditions to an award of attorney's fees under RCW 49.48.030, it is important to remember that the statute is remedial and must be construed liberally to effectuate its purpose. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002). The purpose of RCW 49.48.030 is to ensure that employees are paid for all hours worked. *Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (2002). To effectuate its purpose, RCW 49.48.030 provides an incentive for counsel to pursue claims for unpaid wages. Without a fee shifting provision, employees would be adversely impacted in the ability to effectively pursue claims for unpaid wages. As applicable to this case, without the incentives provided by RCW 49.48.030, the Class would have continued to lose millions of dollars in wages they were rightfully entitled to receive.

In *Fire Fighters*, the Supreme Court explained the policy behind the fee shifting provisions in RCW 49.48.030 as follows:

We have previously recognized Washington's "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). The Legislature "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payments of wages." *Schilling v. Radio*

Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (referencing RCW 49.48.030). “[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights ...” *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673 880 P.2d 988 (1994). Furthermore, remedial statutes “should be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.” *Ellerman*, 143 Wn.2d at 520. Therefore, the terms of RCW 49.48.030 must be interpreted to effectuate this purpose.

The Class shows below why it meets the three elements to recover attorney’s fees under RCW 49.48.030.

1. There is “An Action.”

First, the course of this litigation is “an action” under RCW 49.48.030. In *Fire Fighters*, the Supreme Court held that an arbitration was “an action” as to which RCW 49.48.030 applies. *Fire Fighters* also rejected the argument that “attorney’s fees are recoverable under RCW 49.48.030 only in the same action in which the employee recovers wages or salary owed.” *Fire Fighters*, 146 Wn.2d at 41. Instead, *Fire Fighters* held that “RCW 49.48.030 does not require that for attorney’s fees to be awarded in *any* action, that action must be the “same action” in which wages or salary owed are recovered.” *Id.* at 44 (emphasis in original).

Here, the lawsuit established the right to be paid and the MEC proceeding established how much was owed. *Fire Fighters* holds that

fees are recoverable for work in multiple forums or actions, so long as the work in each forum establishes an employee's right to recover wages owed.

The decision in *McIntyre v. State Patrol*, 135 Wn. App. 594, 141 P.3d 75 (2006) further confirms that the combined litigation and MEC proceedings is “an action” under RCW 49.48.030. In *McIntyre*, a State Patrol Lieutenant went through an administrative appeal, a lawsuit and then an appellate process to challenge a proposed disciplinary action. She prevailed in the Court of Appeals, which found the proposed disciplinary action violated the collective bargaining agreement (“CBA”). The Court of Appeals decision, therefore, found McIntyre was entitled to back pay because her employer violated the CBA. Actual wages were not, however, awarded at that stage but were instead determined following the court’s decision.

McIntyre then commenced an additional action in Superior Court to recover attorney’s fees. The State opposed this request arguing that McIntyre did not recover a judgment for wages owed and the various proceedings were not “actions” under RCW 49.48.030. *Id.* at 604.

This Court rejected this argument. First, the Court found that “McIntyre was forced to seek relief through the courts in order to recover wages owed.” *Id.* The Court also held that the employer

violated the CBA which triggered a liability for wages. The Court concluded that “McIntyre successfully established her right to recover her lost salary and McIntyre is entitled to her reasonable attorney’s fees under RCW 49.48.030.” *Id.* at 605.

The logic in *McIntyre* further demonstrates why the entire course of this litigation is “an action” under RCW 49.48.030. As in *McIntyre*, the Class had no method to recover wages for watch change without seeking relief from the Court. Their efforts to file a grievance had been unsuccessful. Both the Union and the Employer believed that the CBA did not address compensation for watch change and the employees could not, in good faith, dispute that conclusion. The employees, therefore had no option but to pursue litigation.⁷

As in *McIntyre*, *Davis I* held that the ferry system violated the CBA. This finding established the Class’ right to recover lost wages. As the MEC decision notes, the Class’ entitlement to wages was determined in the litigation with only the amount of wages owed being left for arbitration.

⁷ The State responds that the employee’s remedy should have been to file a duty of fair representation (“DFR”) lawsuit against the union. But given the circumstances at the time the wage claim lawsuit was filed, the employees could not have filed a DFR action consistent with the requirements of CR 11. At the time the underlying lawsuit was filed, the Employer, the Union and the employees all believed that the CBA did not address payment for watch turnover. To sue the union, the employees would be required to plead and prove that the CBA did provide for payment for watch turnover. Given that prior to the decision in *Davis I*, the employees did not believe this to be true, they could not, in good faith, assert such a claim in litigation.

Like *McIntyre*, the Class here was forced to seek relief through the courts in order to recover wages owed. Like *McIntyre*, the employer violated the CBA, which violation resulted in wages earned not being paid to employees. Like *McIntyre*, Davis I determined that wages were owed, with the amount owing to be determined in a later proceeding. Following *McIntyre*, the Class is entitled to fees and costs under RCW 49.48.030.

McIntyre and *Fire Fighters* establish that a series of different litigation steps can collectively constitute “an action” under RCW 49.48.030. When RCW 49.48.030 refers to “any action,” that term includes the various stages of litigation in which the right to recover wages owed is established. *See, also, McGinnity v. Autonation, Inc.*, 149 Wn. App. 277 P.3d (2004) (private arbitration to recover wages is an action under RCW 49.48.030). In this case, the litigation established that the Class was owed wages. The MEC proceeding determined the amount owed. But *McIntyre* and *Fire Fighters* establish that this series of proceedings in multiple forums is “an action” under RCW 49.48.030.

2. The Class (A Person) Was Successful in Recovering Wages Owed.

Having shown that there was “an action” under RCW 49.48.030, the Class must next show that “any person” was

successful in recovering wages owed. There can be no dispute that a Class of employees is a “person.” See RCW 1.16.080 (defining “person”). Thus, the Class shows next that it was successful in recovering wages owed.

In Davis I, the Class established the entitlement to be paid for watch change. This Court went out of its way to emphasize that engine room employees were to be paid for performing watch turnover. This Court wrote: “under the collective bargaining agreement, watch changes are a work activity for which the State must compensate employees,” “the State must compensate employees for watch changes,” and “watch changes are a regular, essential, and required work activity for which the state must compensate. . .” With these holdings, Davis I established that the Class was entitled to be paid for this watch change time.

The term ‘wages’ in RCW 49.48.030 is broadly defined and includes any compensation due an employee by reason of employment. *McGinnity v. Autonation, Inc.*, 149 Wn. App. 277, 284 (2009). “Awards for attorney’s fees under RCW 49.48.030 are not limited to judgments for wages or salary earned for work performed, but, rather, that attorney’s fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by

reason of employment.” *Bates v. City of Richland*, 112 Wn. App. 919, 511 P.3d 1265 (2002).

Applying this standard, Davis I determined that the Class was owed compensation due by reason of employment. The opinion directed that the Class be paid for watch change time. A judgment would, therefore, inevitably be obtained for wages owed. When that judgment was obtained, then all of the conditions would be met for an award of attorney’s fees under RCW 49.48.030.

Davis I then sent the case to the MEC, but only to decide the amount of wages owed. Applying the language in RCW 49.48.030, while the Class had established the right to be paid for watch change time, the Class had to proceed in a separate forum to establish the amount of wages owed. The Class would not receive a “judgment” for the actual wages owed until after the MEC proceeding. But the right to attorney’s fees under RCW 49.48.030 is triggered only when there is a “judgment” recovering wages owed. As a result, Davis I held that the Class would not be awarded attorney’s fees “at this time.” The inclusion of the phrase “at this time” in the context of an opinion that established that the Class would recover wages in the future reserved the issue of attorney’s fees for a later proceeding after the MEC awarded the wages owed.

Thus, there was an action (the lawsuit followed by the MEC proceeding) in which a person (the Class) recovered wages (compensation due by reason of employment) owed. This is all that is required for an award of attorney's fees under RCW 49.48.030.

C. The Policy Behind RCW 49.48.030 Supports the Fee Request Here.

As noted above, RCW 49.48 is part of a comprehensive statutory scheme to ensure payment of wages. RCW 49.48.030 is a remedial statute. *McGinnity*, 149 Wn. App. at 284. The statute "should be liberally construed to advance the Legislature's intent to protect employee wages and ensure payment." *Bates*, 112 Wn. App. at 939.

These policies can be met only if the Class is awarded its attorney's fees. The Class vindicated important rights by ensuring that they would now be paid for watch change time. This furthered the Legislative policy "to protect employee wages and to ensure payment." *Bates, supra*. If there is no compensation for the litigation that entitled the Class to over \$2,000,000 in unpaid wages, then access to the courts would certainly be limited for employees seeking to ensure that they are paid for all time worked. That is particularly true in this case, where the employee's initial efforts to work through their union were wholly unsuccessful, leaving the employees with no choice but to pursue litigation.

Denying attorney's fees in this case would be contrary to the intent and policy behind RCW 49.48.030. It would also be contrary to the logic in *McIntyre* and *Fire Fighters*. Denying attorney's fees would provide a disincentive for employees who seek to secure payment for wages legitimately owed. From a policy perspective, therefore, the award of attorney's fees under RCW 49.48.030 is necessary to support the purpose and policy of that statute.

D. Response to the State's Argument Regarding Right to Attorney's Fees.

The State offers several objections to the Class' request for attorney's fees which are discussed below.

1. Prevailing Party Is Not The Proper Standard Under RCW 49.48.030.

The State first argues that plaintiffs must be a "prevailing party" to recover fees and costs under RCW 49.48.030. The State relies on RCW 4.84.030 for this argument.⁸ The term "prevailing party" does not appear in RCW 49.48.030. RCW 4.84.030 defines which party is entitled to statutory costs. RCW 4.84.030 does not limit, modify or amend RCW 49.48.030. Instead, RCW 49.48.030 authorizes an award of attorney's fees if the three conditions listed in the statute are

⁸ In its brief, the State argues "To recover attorney's fees or costs, the requestor must be the prevailing party. *See* RCW 4.84.030.

met. If those three conditions are met, as they are here, then the employees are entitled to an award of attorney's fees.

Admittedly, this case is in a unique procedural posture following this Court's opinion in Davis I. If, as the State suggests, Davis I meant to simply dismiss the Class' claims, this Court would have said so. But that is not what the Davis I opinion states. Instead, Davis I ensures that the Class will be paid for watch change time and that the Class will recover both past and future wages. Consistent with this result, Davis I denied the Class' request for attorney's fees "at this time" but left open a subsequent request once the Class recovered wages in the MEC proceeding.

The part of the Davis I opinion finding that the Class must be paid for watch change is akin to a declaratory judgment. If a declaratory judgment action found wages to be owed, then once those wages were recovered, all conditions to an award of attorney's fees under RCW 49.48.030 would be met. This is the same situation as is present here.

The Class submits that the language in RCW 49.48.030 must be applied to this sequence of events. As described above, each of the conditions in the statute are satisfied in this case. A "prevailing party" analysis does not apply to the language in RCW 49.48.030.

2. An Award of Wages by the MEC Triggers Attorney's Fees Under RCW 49.48.030.

Next, the State argues that because there was no "judgment" for wages, RCW 49.48.030 is not applicable. This argument fails for two reasons. First, the cases are clear that an award of wages in arbitration is sufficient to trigger the right to attorney's fees under RCW 49.48.030. In both *Firefighters, supra*, and *McGinnty, supra*, wages were recovered in an arbitration proceeding and attorney's fees were awarded under RCW 49.48.030. Given that *Firefighters* was in an arbitration under a collective bargaining agreement and *McGinnty* arose in an arbitration under a private employment contract, there is no reasonable basis to distinguish proceedings under the MEC. Thus, the award from the MEC is a "judgment" as that term is used in RCW 49.48.030.

As a corollary, the State argues that CR 54(d)(2) required the motion for attorney's fees to be made within 10 days after the MEC decision. *See* State Brief at 15 footnote 5. But CR 54(d)(2) is not applicable to proceedings before the MEC. Moreover, neither *Firefighters* nor *McGinnty* applied CR 54(d)(2) to attorney's fees requests following a successful non-judicial arbitration award. The State cites no authority (because there is none) holding that CR 54(d)(2) would apply to a request for attorney's fees following the recovery of wages in an arbitration proceeding.

3. The Right to Attorney's Fees Is Not Limited to Proceedings Before the MEC.

Third, the State argues that any right to attorney's fees must be limited to proceedings before the MEC. This argument is not consistent with the facts of this case.

As set forth above, Davis I determined that the Class was entitled to be paid for watch change time. The proceedings before the MEC were only to determine the amount of wages owed. But RCW 49.48.030 provides for attorney's fees in "any action" which successfully results in wages being recovered. In this case, Davis I made the determination that wages were owed. It would be inconsistent with the language and purpose of RCW 49.48.030 to exclude attorney's fees for the portion of the action that determined the employer's liability for wages owed and limit attorney's fees to only that portion of the proceeding that determined the amount of wages owed.

4. The Language in the CBA Does Not Waive the Class' Right to Attorney's Fees.

Next, the State argues that the language in the CBA waives the Class' right to attorney's fees in litigation. This argument fails for three reasons.

First, the Class is not a party to the CBA and a union cannot waive the statutory rights of the employees it represents. *Wingert v.*

Yellow Freight Systems, Inc., 146 Wn.2d 841 (2002), 50 P.3d 256. In *Wingert*, the Supreme Court held that a CBA could not waive the employees' statutory right to meal and rest periods. *Id.* at 851-52. The parties were free to bargain for greater benefits than provided by law, but could not waive minimum statutory requirements. Moreover, it has long been the law that a contract cannot waive rights held by a person not party to the contract.

Second, the language in the CBA is not as broad as the State argues. Section 23(f) of the CBA (the Section the State claims constitute the waiver) does not include a waiver of attorney's fees. Section 23(f) provides in relevant part that "All ... costs incurred by a party resulting from an arbitration hearing will be paid by the party incurring them." CP 1172-74. This language only involves "costs." "Costs" and "attorney's fees" are not the same thing.⁹

Finally, the arbitration decision awarded attorney's fees to the union, necessarily finding that Section 23(f) did not waive the statutory right to attorney's fees.¹⁰ Declaration of Warren E. Martin in Support of Class Motion for Attorney' Fees and Costs, Ex. C, p. 8, Supplemental

⁹ Moreover, Section 23(f) applies only to "costs" "resulting from an arbitration hearing." The attorney's fees here arose in litigation in which the Court of Appeals held that watch change was paid time. Section 23(f) also relates to a "party." The "parties" to the CBA are the State and the union. The Class is not a "party" to the CBA.

¹⁰ The union was awarded fees for the arbitration proceeding. This is different from the Class' fees in litigation.

Clerk's Papers at _____. In this way, the arbitration award is directly contrary to the position advanced by the State that the CBA waives the right to attorney's fees under RCW 49.48.030. But, the proper interpretation of Section 23(f) is reserved for an arbitrator, whose decision "shall be final and binding on the Employer." CBA, Section 23(d). CP 1172-74. The holding in the arbitration decision that Section 23(f) does not waive the right to attorney's fees precludes the waiver argument in the State's Response.

For all these reasons, the CBA does not waive the Class' statutory right to attorney's fees.

5. The Contingent Fee Agreements Are Irrelevant to the Calculation of Reasonable Attorney's Fees.

Finally, the State opposes the fee request claiming that the Class has incurred no attorney's fees because of the contingent nature of the representation. A contingent fee agreement, however, is irrelevant to the determination of reasonable attorney's fees.

RCW 49.48.030 authorizes an award of "reasonable attorney's fees" when the conditions in the statute are met. An award of "reasonable attorney's fees" is calculated under the lodestar method – hours reasonably expended multiplied by reasonable hourly rates. The contingent nature of representation is not an element of the lodestar

calculation. *Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86 (1996).

In *Martinez*, a trial court based its calculation of a reasonable attorney's fee largely on the contingent fee agreement between a plaintiff and his counsel. In reversing this decision, this Court noted that the proper method to calculate reasonable attorney's fees was under the lodestar approach. This Court concluded that "The trial court abused its discretion in placing undue emphasis on *Martinez's* contingent fee agreement when determining a reasonable attorney fee for this case." *Id.*, 81 Wn. App. at 241. This Court then reversed the calculation of attorney's fees based on the contingent nature of representation and remanded "for computation of a reasonable fee" using the lodestar approach. *Id.* at 244.

In this case, the State asks this Court to do just what *Martinez* forbids. The State argues that because of the contingent nature of the representation, the Class incurred no attorney's fees and therefore under the contingent fee agreement, a reasonable attorney's fee would be zero. But this argument is completely contrary to the teachings of *Martinez*. The contingent nature of representation is not a relevant factor under the lodestar approach. Instead, if the conditions to an award of attorney's fees under RCW 49.48.030 are met (as they are

here) then the reasonable fee is calculated under the lodestar approach. The Class now turns to the lodestar calculation.

E. The Trial Court Properly Calculated the Lodestar Amount Setting a Reasonable Attorney's Fee.

The State next challenges the trial court's calculation of the lodestar amount. This Court reviews "... a trial court's attorney's fee award for manifest abuse of discretion; we reverse an award only if the trial court exercised its discretion on untenable grounds or for untenable reasons." *Collins v. Clark County Fire Dist. No. 5*, ___ Wn. App. ___; ___ P.3d ___ 2010 WL 820039 (March 11, 2010). "The award of attorney's fees under a statute or contract is a matter of trial court discretion that we will not disturb absent a clear showing of an abuse of that discretion." *Dice v. City of Montesano*, 131 Wn. App. 675, 688, 128 P.3d 1253 (2006). The Superior Court carefully considered all appropriate factors and entered detailed findings of fact and conclusions of law supporting its award. CP 1324-29. The Class responds below to the State's specific arguments to show why there is no abuse of discretion.

1. Legal standards Applicable to Fee Awards

The standards for determining reasonable attorney's fees were set out in *Broyles v. Thurston County*, 147 Wn. App. 409, 452, 195 P.3d 985 (2008). This Court wrote:

Washington follows the lodestar method of determining reasonable attorney fees. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983). The lodestar approach involves two steps. First, the trial court multiplies “a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1983); *Bowers*, 100 Wn.2d at 597. Second, the trial court adjusts the award “either upward or downward to reflect factors not already taken into consideration.” *Ross v. State Farm Mut. Auto Ins. Co.*, 82 Wn. App. 787, 800, 919 P.2d 1268 (1996), *rev’d on other grounds*, 132 Wn.2d 507, 940 P.2d 252 (1997); *Bowers*, 100 Wn.2d at 598-99. We review a trial court’s decision to apply a multiplier to a lodestar attorney fee for abuse of discretion. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 90-91, 51 P.3d 793 (2002).

Id. at 452.

2. The Trial Court Considered the Appropriate Factors in Setting the Lodestar Amount.

The State first contends that the Superior Court “rubber stamped” the Class’ fee request. The State does not explain what facts show this to be true. Apparently, the logic of this argument is that because the Superior Court found against the State on key points, the Court must have not independently considered the applicable facts and must not have followed the law.

But this argument is neither logically nor factually supported. The Superior Court read the parties’ memoranda, heard oral argument and then asked the parties for proposed findings of fact and

conclusions of law. The Superior Court considered the parties' respective proposed findings and conclusions for approximately six weeks. The Superior Court states that it "considered each of the factors set forth in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 518, 675 P.2d 193 (1983) and *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987) to set the lodestar amount." CP 1326. The Superior Court made handwritten interlineations in the proposed findings, further demonstrating that the Superior Court considered the proposed findings and applicable factors. CP 1324-29. There is no jurisdiction or support for the argument that because the Superior Court did not accept the State's arguments, it "did not independently determine reasonable fees and costs."

3. The Time records are Sufficient

Defendant next challenges the adequacy of the fee records submitted because their retained expert would like more detail in the billing entries. These entries, however, contain the same detail that Class counsel has used to bill defense clients on an hourly basis for over 20 years. CP 1245-46. The level of detail contained in the billing records has been sufficient for that purpose. *Id.* There is no basis to suggest that it is insufficient for this Fee Application.

The Superior Court found that the hours expended were "reasonable, necessary and properly documented." CP 1320. In so

finding, the Superior Court essentially disagreed with the opinion of the State's expert witness. In its brief to this Court, the States re-argues its expert's opinion. The Superior Court was not required to accept this opinion and plainly did not find it to be persuasive. It is not an abuse of discretion to disagree with the expert witness offered by one party or the other.

Finally, the State cites absolutely no authority supporting its contention that the level of detail provided is inadequate. The primary authority cited by the State is *Beckman v. Wilcox*, 96 Wn. App. 355, 368, 979 P. 2d 890 (1999). But *Beckman* held that a trial court did not abuse its discretion in finding that billing records with certain redactions contained sufficient detail for the court to determine that fees were necessary and properly documented. Indeed, the State cites no authority holding that a trial court abused its discretion in concluding that billing records similar to those submitted here were sufficiently detailed. This Court rejected a similar contention in *Collins, supra* ("Defendants contend ... plaintiffs failed to prove the reasonableness of their fee because Boothe's 'block-billing' method 'combined numerous tasks into a single time entry' which prevents the 'effective segregation' of unsuccessful claims ... These arguments fail."). This contention should be summarily rejected.

4. The Awarded Hourly Rates Are Reasonable.

The State next challenges the \$350 per hour rate awarded to lead Class counsel. Again, the State argues that the trial court was required to follow its expert's opinion¹¹. Again, the Superior Court plainly disagreed with the state expert. The Superior Court found that "the reasonable hourly rate for counsel with skill and experience comparable to lead Class counsel . . . is \$350 per hour." CP 1325.

This finding is amply supported by the record. Tacoma attorney Richard Wooster testified that "[a]ttorney's representing plaintiffs in the Seattle - Tacoma - Olympia market are currently charging between \$250.00 and \$350.00 per hour for their time." CP 1250. Wooster concluded that the "fee request at \$350.00 is solidly within the range of reasonable fees. . ." *Id.* This evidence plainly supports the Superior Court's findings. The court was not required to accept the testimony of the State's expert. *See Collins, supra.*

Moreover, the Washington courts recognize the need for an enhanced fee award based on the contingent nature of the representation because such enhancement is necessary to encourage attorneys to represent worthy litigants and ensure their access to the courts. *Blair v. Washington State University*, 108 Wn.2d 558, 570,

¹¹ The State's expert charged \$325 per hour for hourly work. In this fashion, the State essentially concedes that the reasonable hourly rate for work billed on an hourly basis is at least \$325 per hour

740 P.2d 1379 (1987). As the Supreme Court noted in *Bowers v. TransAmerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983):

Unless an attorney has some agreement with the client guaranteeing compensation regardless of the outcome, the attorney will receive no fee in the event the suit does not succeed in some manner. In these cases, counsel bear the risk that they will not be compensated for all their time and effort.

Therefore, the Washington courts have consistently adopted an enhanced fee award for representations undertaken on a contingent basis. *See also, Broyles v. Thurston County*, 147 Wn. App. 409 (2008).

In this case, the awarded rate of \$350 per hour is supported by four facts set forth in the record. First, \$350 is an appropriate market rate for the relevant type of work. This rate is supported by the Wooster declaration and was accepted almost ten years ago as the market rate for Class counsel doing work on a contingent basis in a Class wage and hour case. *Vizcaino v. Microsoft*, 142 F. Supp. 2d 1299, 1305 (W.D. Wa. 2001), *aff'd* 290 F.3d 1043, 1051 (9th Cir. 2002). Second, to the extent that the State argues that the market rates for hourly work on this case is at least \$325 per hour (and the State's expert charged this rate, CP 1277), then the contingent nature of this representation supports a market adjustment to \$350 an hour. Third, the \$350 hourly rate is consistent with what Class counsel

charges clients on an hourly basis for similar work. CP 1245-46. Finally, the State offered no evidence to establish an alternative rate for the Pierce County market in a Class action wage and hour case undertaken on a contingent fee basis. The State merely complained that the rate requested is “too high” but offered no evidence supporting any other market rate for this type of representation.

The Superior Court did not abuse its discretion in setting market rate of \$350 per hour.

5. The Rate Awarded Was Appropriate on Either a Current or Historical basis

The State next contends that the Superior Court erred in using current rates to calculate the fee award. But that is not what the Superior Court did. The Court made two findings: (1) that the use of current rates was appropriate given the nature of this case and (2) that even if historical rates were used, following *Vizcaino*, \$350 per hour was an appropriate market rate for lead counsel in wage and hour Class litigation. CP 1325. The State does not address the second finding. Thus, even if historical rates were appropriate (and they are not) the rate awarded still would not change.

But the Superior Court was correct in using contemporaneous market rates in calculating the lodestar in this case. The cases are clear that current market rates are to be used in cases involving the

public interest. *Steele v. Lundgren*, 96 Wn. App. 773, 785-86, 982 P.2d 619 (1999) *rev denied* 139 Wn.2d 1026 (2000). On the other hand, if the case involves a purely private dispute, in which counsel is compensated on an hourly basis, then historical rates are to be used as there is no risk of non-payment. *E.g., Mahler v. Szucs*, 135 Wn.2d 398 (1998) (insurance dispute).

Both parties rely on *Fisher Properties, Inc. v. Arden-Mayfair Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990). *Fisher* involved a lease dispute with an attorney's fee clause in the lease. The matter was not handled on a contingent basis and involved no public interest or statutory fee shifting provision. *Fisher* explains the difference between public interest cases handled on a contingent basis and private litigation as follows:

The legislative purpose of fee shifting is to provide an incentive for private enforcement of congressional statutory policy.

...

Such awards encourage attorneys to take potentially risky case with clients who frequently cannot afford to pay an attorney. The goal is to attract competent counsel without producing a windfall to attorneys.

The reasoning behind using current rates or adjusting historic rates to account for inflation is to compensate the attorney for delay in payment or the risks of losing and not getting paid at all. The

assumption is that attorneys who take these cases do not get paid until a final judgment in their favor is rendered.

...

The situation at bar does not involve the same public policy considerations. This is not public interest litigation, but rather a dispute between two private parties over a lease affecting only the parties. Fisher has paid its attorney fees all along so its attorneys have not been deprived of the use of the money. Fisher would be liable for its attorney fees regardless of the outcome of the case.

The public interest cases make an effort to approximate the result that would occur in private litigation. *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) (“We think that awarding compensation at current rates will roughly approximate periodic compensation adjusted for inflation and interest and will obviate the necessity of guessing when periodic billings would have been made and paid in an analogous private practice situation.”). Accordingly, the cases exclude application of their methodology in the private litigation arena because they are attempting to give public interest attorneys the benefits of private practice. The presumption underlying the cases in that attorney fees in private litigation need no court created enhancement.

Id. at 376-77 (internal cites omitted).

Following these cases, the Superior Court found that this litigation involves a public interest; namely, a right of employees to be paid for all hours worked. CP 1326. RCW 49.48.030 is a remedial statute which should be construed liberally to effectuate its purpose.

Fire Fighters v. City of Everett, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002). The express purpose of RCW 49.48.030 is to provide an incentive for counsel to prosecute cases in which employees have not been paid all wages owed. The Class was not paying for attorney time and the use of current rates will “roughly approximate periodic compensation adjusted for inflation and interest.” *Fisher*, 45 Wn.2d at 377. Therefore, current market rates for contingent Class action litigation should be used to calculate the lodestar. But even if this Court concludes that historic rates should be used, the Superior Court also properly found that \$350 rate was an appropriate historic rate based on *Vizcaino*. There is no abuse of discretion.

F. No Segregation of Fees is Required.

Next, the State argues that the fees expended must be segregated and disallowed in some unspecified way. The complaint in this case, however, had a single focus; recovering compensation for watch change time. Where, as here, the case involves a “common core of facts and related legal theories” no segregation of time and expense is required even if the plaintiff was not successful on all claims. *Pannel v. Food Services of America*, 61 Wn. App. 418, 447, 810 P.2d 952 (1991). “Where ... the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of

attorney's fees." *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994).

The Superior Court found that "this litigation presented a common core of facts; namely whether payment was required for watch change time." CP 1326. The court considered the State's segregation argument but concluded: "[h]aving reviewed the billing records and being familiar with the issues in this litigation, the Court finds that no such segregation can reasonably be made and no such segregation would be appropriate." CP 1326.

The State also contends that work to calculate damages should be excluded from the lodestar amount. The damages calculations in the litigation were (1) necessary work in the case and (2) formed the basis for the MEC award of wages owed. Notably, the only damage evidence submitted to the MEC was from the union who followed the framework and process developed by the Class. The State chose to submit no contrary evidence. Declaration of Warren E. Martin in Support of Class Motion for Attorneys' Fees and Costs, Ex. C, Supplemental Clerk's Papers _____. Thus, the work on damages contributed to the successful recovery of wages. The Superior Court did not abuse its discretion in declining to segregate this amount.

Given the facts and history of this case, such findings are not an abuse of discretion. All of plaintiffs' claims were clearly related and

involve the same common core of operative facts. Indeed, all the claims advanced in this case sought compensation for watch change time. The Class has now recovered \$2,000,000 in compensation for watch change time. Therefore, no segregation of fees is required, or is indeed even possible.

Next, the State challenges the time expended working with expert witnesses to videotape watch change activities in order to compute the amount of compensable time. The State's expert argues that Class counsel or paralegals observing these activities was "excessive" or "wasteful." The Superior Court found that the facts did not support this argument.

One of the principle issues in this case was the amount of work time expended during watch change which the defendant contended was "de minimis." Thus, both parties hired expert witnesses to observe and evaluate watch change activities. The State's counsel and their paralegals attended the very same observations that they now contend were "excessive" or "wasteful." At the time, neither the State nor its counsel considered this time to be "excessive" or "wasteful" as the State's counsel engaged in exactly the same activities and indeed hired their own expert to also monitor these observations.

It is hard to understand how time expended on a central issue in the litigation could be deemed “excessive” or “wasteful” especially when defense counsel engaged in exactly the same legal work. Clearly, this challenge is “revisionist history” when a task seemed sufficiently important by the defendant to send its own attorneys and hire its own experts to attend is now re-characterized as “excessive” and “wasteful” when Class counsel seeks compensation for this work.

Again, the Superior Court addressed this issue in its findings and conclusions. The court found that “defense counsel attended the same watch change observations that the defendant now challenges in the fee application. The Court finds that both parties understood that this work was necessary to develop relevant facts at the time these legal services were performed.” CP 1326. The Superior Court had the benefit of the pleadings and argument on the motions in Davis I at the time this work was done. This finding is amply supported in the record and is not an abuse of discretion.

G. Paralegal Time is Compensable.

The State next characterizes the work by Class counsel's paralegal, Pam Gibson, to coordinate and attend these expert evaluations as “clerical” and challenges the requested time on that basis. In fact, Ms. Gibson was working with Class experts on the monitoring and evaluation of watch change activities in order to

calculate the work time involved. Working with expert witnesses is a fundamental paralegal function. Defendant offers no showing to the contrary. Indeed, the State hired its own expert. The State's paralegal attended some of the watch change observations. Presumably, the defense paralegals performed similar coordination tasks with the State's experts.

With respect to the challenge for observing the filming of watch change activities and the claim that this was a "non-legal service," it is again important to note that the State's counsel engaged in exactly the same "non-legal activities." Plainly, the State's lawyers viewed this work as a "legal activity" at the time as both parties had lead counsel attend these observations. Again, the Superior Court had the benefit of knowing the case at the time this work was performed and heaving the arguments about these observations in Davis I.

H. The State Waived Its Argument that the Class is Limited to Recovering Only Statutory Costs.

The parties agreed to split the motion for fees and costs into two parts – the first to decide whether the Class was entitled to fees and/or costs and the second to decide the amount, if the first motion was granted. In the first motion, the Class sought actual costs, as were awarded in the first judgment. The State did not argue that the Class was limited to statutory costs. Defendant's Response in Opposition to

Plaintiffs' Motion for Attorneys' Fees and Costs, Supplemental Clerk's Papers _____. At oral argument on the underlying motion, the State's counsel conceded that the standards for recovering attorney's fees and costs under RCW 49.48.030 are the same. RP at 8. Based on the information submitted, the Court awarded actual costs to the Class. The State did not seek reconsideration of this Order.

In the second motion, the State then tried to argue that the Class was limited to actual costs. In finding No. 6, the Superior Court determined "Defendant's argument on its December 2, 2009 response that the Class is only entitled to statutory costs to be an untimely and inappropriate motion for reconsideration." CP 1320. The Superior Court did not abuse its discretion in making that finding.

In essence, the State's argument raised for the first time on the second motion asked the Superior Court to reconsider the order on the first motion. A motion for reconsideration is timely only if the moving party files the motion within ten days of entry of the order or decision. *Schaefco, Inc. v. Columbia River Gorge Com'n*, 121 Wash.2d 366, 849 P.2d 1225 (1993). A trial court may not extend the time period for filing a motion for reconsideration. *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wash. App. 260, 23 P.3d 529, 91 A.L.R.5th 727 (Div. 2 2001); *Moore v. Wentz*, 11 Wash. App. 796, 525 P.2d 290 (Div. 3 1974). The order granting costs to the Class was entered on October

23, 2009. To seek reconsideration of that order, the State had to file a motion by November 2, 2009. The State did not do so.

Even if the State had filed a timely motion, the Superior Court was not required to consider new arguments. A motion for reconsideration does not provide litigants with an opportunity for a second bite at the apple. *Anderson v. Farmers Inc. Co. of Washington*, 83 Wash. App. 725, 923 P.2d 713 (Div. 2 1996). The Superior Court may decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier. *August v. U.S. Bancorp*, 146 Wash. App. 328, 190 P.3d 86 (Div. 3 2008), *as amended*, (Sept. 4, 2008) and *review denied*, 165 Wash. 2d 1034, 203 P.3d 380 (2009).

This Court need not consider arguments not timely presented to the Superior Court. *E.g. Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 289, 840 P.2d 860 (1992); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (contentions not made to the trial court ... need not be considered on appeal). The Superior Court found that the State failed to timely object to the award of costs and failed to timely seek reconsideration of the Order granting costs. Indeed, counsel for the State maintained at oral argument that the standards for an award of attorney's fees and costs were the same. RP at 8. The Superior Court did not abuse its

discretion in finding that the State failed to make this argument on a timely basis. Because this argument was not preserved in the Superior Court, this Court need not consider it here.

The State was given an opportunity to submit whatever arguments it wished to prior to the November 23, 2009 Order being entered. For whatever reason, the State did not argue that the Class was limited to statutory costs. The State did not seek reconsideration of the November 23 Order. The Superior Court did not abuse its discretion in entering Finding No. 6 concluding that the State waived any argument that the Class was limited to statutory costs.

V. ATTORNEY'S FEES ON APPEAL

As noted above, RCW 49.48.030 authorizes an award of attorney's fees to the Class because the Class has recovered wages owed. This statute also authorizes attorney's fees on appeal. *Dice v. City of Montesano*, 131 Wn. App. 675, 693, 128 P.3d 1253 (2006). Pursuant to RAP 18.1, including RAP 18.1(b), the Class requests an award of attorney's fees on appeal.

VI. CONCLUSION

The Class has recovered over \$2,000,000 in unpaid wages. The right to recover those wages was determined in Davis I with the amount of wages owed determined by the MEC. Through these two processes, the conditions for an award of attorney's fees under RCW

49.48.030 were met. This was the scenario envisioned in Davis I when the Class' fee request was deferred because the Class "at this time have not recovered any wages ..." The Superior Court properly awarded attorney's fees to the Class and properly determined the lodestar amount. The determination of the Superior Court should be affirmed.

Dated this 26 day of April, 2010.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

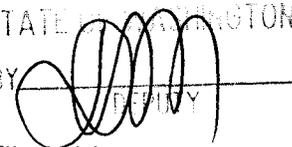
By 

Warren E. Martin
Attorneys for Respondents
WSBA No. 17235

FILED
COURT OF APPEALS
DIVISION II

10 APR 26 PM 4:39

STATE OF WASHINGTON

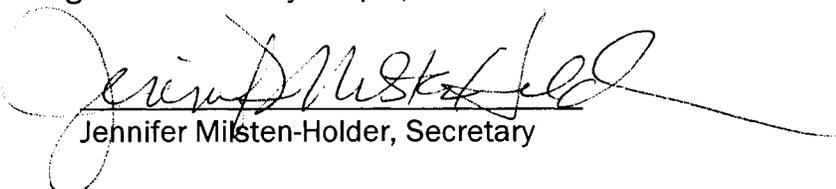
BY  DEPUTY

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2010, I filed this Brief of Respondent with the Court of Appeals Division II along with a copy of the Supplemental Designation of Clerk's Papers; and caused to be delivered via email on April 26 2010, a copy of this Brief of Respondent and copy of the Supplemental Designation of Clerk's Papers also via U.S. mail to:

Attorney for Petitioner: Stewart Johnston
Office of the Attorney General
Labor and Personnel Division
7141 Cleanwater Drive SW
P.O. Box 40145
Olympia, WA 98504-0145
Email: StewartJ@ATG.WA.GOV

Dated in Tacoma, Washington this 26th day of April, 2010.


Jennifer Milsten-Holder, Secretary