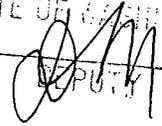


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 42139-9

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

ED BRICKER,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Defendants/Respondents in this lawsuit and on appeal are the State of Washington, Department of Health and Mary Selecky, Secretary of the Department of Health. The Respondents will be referred to collectively as “the State,” or “DOH.” No claims against the DOH Secretary, individually, were ever articulated or advanced in the case.

II. NATURE OF THE CASE

In 2002, Ed Bricker, a former employee of DOH at the Hanford Nuclear Reservation, brought an employment-related lawsuit against DOH, and some of its employees and officials. In 2005, that case was settled by written agreement (the “Settlement Agreement” or “Agreement”). A copy of the Settlement Agreement is attached hereto as Appendix (App.) A. CP at 28-34. Among other things, the Agreement provided for the payment of significant sums of money to Mr. Bricker, in exchange for his agreement to resign from state employment, to never seek state employment again, and “not to have any further professional or official contact with the Department of Health.” CP at 28-34; App. A. In accordance with this Settlement Agreement, judgment was entered in the federal lawsuit reflecting the settlement, setting forth the payment terms of the Agreement as a judgment, and concluding the lawsuit (a copy of this judgment is attached to hereto as App. B). CP at 35-40.

In late 2006, Mr. Bricker submitted an application and documentation to the DOH seeking certification in the field of clandestine drug lab cleanup (CDL), which requires both DOH certification and heavy regulation by DOH. CP at 46-47. The Department declined to process the application and returned the documents to Mr. Bricker, asserting that he was in violation of the Settlement Agreement by seeking “professional and official contact” with DOH, which was specifically precluded by the terms of that agreement. CP at 28-34; App. A.

Mr. Bricker did not thereafter seek the remedies available under the Agreement by going to court for specific performance or asking for declaratory relief. Instead, he waited nearly three years after the rejection of his CDL certification to bring this lawsuit. CP at 8-16. He asserted various tort claims, including damages for “lost income” for the three years that had passed since the rejection of his CDL application. The trial court dismissed the case on summary judgment, ruling that Mr. Bricker was bound by the plain meaning of the Settlement Agreement. CP at 195-96. He now appeals. CP at 197-99.

It is the State’s position that the Settlement Agreement governs and required dismissal of Mr. Bricker’s lawsuit as a matter of law. In addition, it is the State’s position that, independently, the plaintiff failed to raise any cognizable tort claims.

III. STATEMENT OF FACTS

Ed Bricker worked for DOH at the Hanford Nuclear Reservation, for DOH's Office of Radiation Protection, a part of its Division of Environmental Health, from 1991 until 2005. CP at 9-10. In 2002, Mr. Bricker filed a lawsuit against the DOH and a number of its employees and officials, in United States District Court, Western District of Washington. CP at 10, 28. This was an employment action in which Mr. Bricker made various employment discrimination claims, based on state and federal statutes, as well as "whistleblower" claims under state law, and federal civil rights claims under 42 U.S.C. § 1983. CP at 141, 146-47.

That lawsuit was settled in 2005. As part of the settlement, Mr. Bricker resigned his employment, and signed a detailed written Agreement. CP at 10, 28-34; App. A. He received \$240,000 (including attorneys fees), much of which funded an annuity which continues to pay Mr. Bricker. CP at 35-38. As part of the Settlement Agreement, Mr. Bricker agreed not to ever seek employment with the State of Washington, or thereafter interact with the DOH, and, specifically, that "he will not have any further professional or official contact with the Department of Health." CP at 31; App. A at 4, paragraph 10.

This Agreement, taken in its entirety, shows that it is a comprehensive undertaking intended to settle the entire federal lawsuit and all claims asserted therein, as well as all “misunderstandings and disputes” and is drafted specifically to reflect the “unique” facts of the disputes between the parties:

This agreement is entered into for the purpose of resolving the *full range of misunderstandings, disputes, and potential claims* that have arisen between the parties in connection with Edwin Bricker’s employment at the Washington State Department of Health. Based upon the terms and conditions set forth in this agreement, the parties intend to resolve and settle any and all disputes that have arisen or may arise out of the circumstances referred to above, or surrounding circumstances, that may have occurred through the effective date of this agreement, **and to end any disputes or interaction between the employee and the department.** This agreement reflects **the unique circumstances of this case**; no precedent is set by this agreement of any part thereof.

CP at 28; App. A at 1, first paragraph (emphasis added).

With respect to future professional or official contacts or interactions between Mr. Bricker and DOH, the Settlement Agreement is explicit:

10. Resignation, Agreement not to Seek Further State Employment or Interact with the Department. As part of this agreement, Mr. Bricker agrees not to seek or accept at any time employment with the Department of Health or the State of Washington. *He further agrees that he will not have any further professional or official contact with the Department of Health*

CP at 31; App. A at 4 (emphasis added).

The Settlement Agreement led to the entry of a judgment of dismissal of the federal court case on April 25, 2005, which included a judgment against the State concerning the payment terms of the agreement. CP at 35-40; App. B.

In September 2006, Mr. Bricker submitted an application and extensive documents to DOH seeking clandestine drug lab (CDL) cleanup certification, a field regulated by the Division of Environmental Health of DOH. CP at 83-85. As discussed below, the CDL field requires not only DOH certification, but extensive regulation of CDL certificate holders.

The DOH returned Mr. Bricker's application materials to him, through its lawyers, and advised him that they would not be processed, pursuant to his undertaking in the Settlement Agreement to have no further "professional or official contact with the Department of Health." CP at 31; App. A at 4, paragraph 10.

Mr. Bricker did not invoke the dispute resolution provisions of the Agreement for this refusal. He did not seek specific performance relief in superior court, the specific remedy provided by the agreement, nor declaratory judgment concerning DOH's determination that the plain meaning of the Agreement precluded his seeking of a CDL certification. *See* CP at 32; App. A at 5, paragraph 16, which provides as follows:

16. **Dispute resolution.** In the event of a dispute between the parties hereto with respect to the validity, interpretation or enforcement of the agreement, it shall be construed and interpreted in accordance with the laws of the state of Washington. The sole remedy for any violation of this Agreement is to seek specific performance in Thurston County Superior Court. The predominantly prevailing party shall be entitled to reasonable attorneys fees as determined by the court.

App. A at 5, paragraph 16.

Instead, nearly three years after the refusal of his application, he, along with two of his brothers, brought the present tort lawsuit arising out of DOH's "refusal." CP at 8-16

The Complaint is not a model of clarity, but alleges as causes of action intentional interference with business expectancy, "retaliation and discrimination" including "improper rejection of his effort to get certified without right of appeal," "extreme and outrageous conduct," with emotional distress intentionally and negligently inflicted. CP at 12-14.

Notably, Mr. Bricker, in this lawsuit, never expressly pled breach of contract, nor did he specifically request a declaratory judgment or specific performance regarding the interpretation of the contract. Essentially, Mr. Bricker attempted to assert tort claims on the basis that DOH had refused his CDL certification paperwork based upon the language of the contract. Yet never in this litigation, including on appeal, has he ever clearly articulated how the State's assertion of its contract

rights against him could give rise to any tort. Nor does he anywhere explain why he did not seek judicial relief under the dispute resolution provisions of the Agreement if he believed the DOH's position to be unwarranted.

Accordingly, as might be expected, the State's motion for summary judgment of dismissal was based primarily upon the Settlement Agreement language in issue.¹ CP at 41-50.

Mr. Bricker's arguments in opposition to the State's motion for summary judgment were based upon his position that the "no professional or official contact" provision of the Settlement Agreement was "unintended," unconscionable, and unenforceable. CP at 129-40.

The superior court granted the State's motion for summary judgment on April 22, 2011, and Ed Bricker appeals from this order.² CP at 195-99.

IV. RESPONDENTS' POSITON

1. The Settlement Agreement is, as a matter of law, dispositive of Mr. Bricker's claims.

¹ The claims of Mr. Bricker's brothers asserted in the complaint clearly failed to state claims upon which relief could be granted, and they plainly lacked standing to litigate anything with regard to Ed Bricker's settlement agreement with the State. CP at 45-49. Ultimately, no objection was raised to the dismissal of their claims, and no appeal has been taken from the order dismissing them. CP at 127-28.

² Mr. Bricker's claim that the trial court should have entered "findings of fact" in a summary judgment proceeding is meritless. *Kitsap County Bank v. Lewis*, 24 Wn. App. 757, n.23, 603 P.2d 855 (1979); *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 197 P.3d 686 (2008).

2. Mr. Bricker created no disputed issue of any material fact which supports any claim in this lawsuit.

V. ARGUMENT

A. Summary Judgment Standard

The State's motion was brought pursuant to the familiar rule of *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), whereby a defendant may bring a summary judgment motion, with or without declarations, making an initial showing of non-liability, requiring the plaintiff in turn to show with evidence that there are issues of material fact as to every element of his claim. A failure of such proof concerning an essential element of plaintiff's case makes all other facts immaterial. *Young*, 112 Wn.2d at 225.

The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues are present. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

B. The Department Of Health Breached No Duty To Plaintiff Ed Bricker

1. The *Settlement Agreement* Prohibited Plaintiff From Seeking A CDL Certificate

The words used in a contract should be given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Commc'n, Inc. v. Seattle Times Co.*, 154 Wn. 2d 493, 115 P.3d 262 (2005).

Here, the ordinary meaning of no “professional or official contact” with DOH bars Ed Bricker from seeking a CDL certification from DOH. CP at 31; App. A at 4, paragraph 10. The entirety of the Settlement Agreement clearly demonstrates Plaintiff and DOH were “to go their separate ways,” resolving not only disputes and misunderstandings, but protecting against the possibility of “disputes and misunderstandings” arising in the future, not only from an employment standpoint, but as regard to any official or professional contact whatever. CP at 31; App. A at 4, paragraph 10.

In addition, if for the sake of argument, there were some actionable basis to dispute the interpretation of the Settlement Agreement, “the sole remedy for any violation of this Agreement is to seek specific performance in Thurston County Superior Court.” *See* CP at 32; App. A at 5. Plaintiff never sought this judicial interpretation of the contract with respect to his CDL application.

2. A CDL Certificate Requires Professional And Official Contact With DOH

DOH is statutorily empowered to protect the public's health, safety, and welfare regarding contaminated properties. RCW 64.44.005; 64.44.010. These certifications are regulated by DOH and that regulation includes the entire gamut of certification including denials, suspensions, and revocations. RCW 64.44.060. This understandably highly regulated field requires specific numbers of CDL certificated personnel with specific levels of experience to be on a particular job site. RCW 64.44.070; *see also* WAC 246-205. DOH also requires specific re-training and continuing education. *Id.* DOH regulates every conceivable aspect of decontamination to protect the public given the incredibly dangerous compounds that are regularly present in this field.

Thus, every step of drug lab decontamination is regulated by DOH, from the initial certification throughout the lifetime of a valid certification. There is simply no way for a CDL certificate holder to avoid professional and official contact with the DOH and maintain a valid certification. Mr. Bricker in the proceedings below, as on appeal, never contests this point.³

³ Mr. Bricker states that he was allowed by DOH to register as a counselor with the agency. (Note that this was mere registration, not licensure.) It was undisputed, however, that this was inadvertent, and moreover, Mr. Bricker has never explained how it might be material. *See* Report of Proceedings (RP) at 18-21.

3. The Contract Language Is Unambiguous And Binding On Plaintiff

The plaintiff received a very substantial sum of money from the State in exchange for the express terms of the 2005 Settlement Agreement. App. A. An examination of the agreement will review its detail, and demonstrates on its face that it is carefully and thoroughly prepared to accomplish its ends. App. A. It is clear in the Settlement Agreement from the beginning that, in addition to requiring Mr. Bricker to resign from State employment and to not seek such employment in the future, that he was to have **no interaction** with the DOH in any professional or official capacity thenceforward. CP at 31; App. A at 4 (emphasis added).

Thus, the Settlement Agreement states its purposes at its very beginning, as follows:

Based upon the terms and conditions set forth in this agreement, the parties intend to resolve and settle any and all disputes that have arisen or may arise out of the circumstances referred to above, or surrounding circumstances, that may have occurred through the effective date of this agreement, **and to end any disputes or interaction between the employee and the department.**

App. A at 1, first paragraph (emphasis added).

In the Agreement, this purpose was again clearly stated, “10. Resignation, Agreement not to Seek Further State Employment or Interact with the Department.” CP at 31; App. A at 4, paragraph 10

(emphasis added). It is in this paragraph, of course, that “[Mr. Bricker] **further agrees that he will not have any further professional or official contact with the Department of Health.**” CP at 31; App. A at 4, paragraph 10 (emphasis added).

In short, the Agreement contains not only the express prohibition which Mr. Bricker challenges, but twice clearly states that one of its purposes is to end **any interaction** with the Department of Health. CP at 28, 34; App. A at 1, 7 (Attachment A to Agreement) (emphasis added).

It must be borne in mind throughout that Mr. Bricker was at all times represented by his legal counsel during the negotiations and drafting of this contract language, the same counsel that represents him in this litigation. Moreover, the Agreement came at the end of months of mediation. CP at 141-44.

Neither at the trial court level nor on appeal does Mr. Bricker muster any genuine arguments that the language of the Settlement Agreement is not plain and straightforward. In essence, he argues (in addition to “unconscionability,” which will be discussed below) that “he didn’t realize” that the language had such a broad scope, and that his unilateral, unexpressed understandings should be taken into account so as to create an issue of fact as to the intent of the Agreement. CP at 129-40.

To this end Mr. Bricker submitted three declarations in opposition to the State's motion: his own, that of his wife, Cindy Bricker, and that of Chris Bawn, his lawyer. CP at 75-126, 141-76. (While Cindy Bricker was a party to the Settlement Agreement along with Mr. Bricker, she was not named as a plaintiff in this lawsuit.) These declarations were utterly replete with testimony inadmissible in a summary judgment proceeding, including: hearsay, speculation, "forensic indignation," irrelevant material, and much more. The State objected to most of the content of these declarations. CP at 190-93. The State's objections were detailed in specific pleadings before the trial court and will not be recounted here so as to detract from the issues in the case. CP at 190-93. It is clear that the trial court did not consider the inadmissible matters. RP at 18-21; *see generally Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990) (Attorney declarations must be based on personal knowledge to be admissible).

But in fact, the most truly notable thing about these declarations is the following statement found in that of Mr. Bricker:

It was my understanding . . . that I was resigning my employment with the Department of Health and the State of Washington, and that I would not have any further professional or official contact with the employees of the Department of Health, because I had, in the past, kept in regular contact- particularly with colleagues in the Division of Radiation Protection

CP at 79 (emphasis added).

Here, Mr. Bricker plainly states that he **knew** he was not to have any further professional contact with the employees of the Department of Health; even he does not say that it was in his understanding that it was *restricted* to the Division of Radiation Protection—*any more than the Settlement Agreement is restricted*. This admission alone eviscerated his asserted opposition to the State’s interpretation of the clear meaning of the contract.

Mr. Bricker himself thus admitted that he recognized the existence and broad impact of the “no professional or official contact” language in the Settlement Agreement; he merely stated his view that it only related to contacts with those with nuclear regulatory responsibilities. And yet, he never did anything during the negotiations to incorporate this wholly unexpressed “intention” that this language be so limited, and the language contains no such limitation.

Nor did the plaintiff contest that the CDL field is a highly-regulated activity on an ongoing basis between DOH and a certificate holder, as pointed out earlier herein. Indeed, the DOH Division of Environmental Health encompasses both the Office of Environmental Health, Safety, and Toxicology (which regulates CDL certificate holders) and the Office of Radiation Protection. CP at 184-86.

The Settlement Agreement not only settled the disputes and misunderstandings between the parties at the time thereof, but specifically contemplated that Mr. Bricker would have no more professional or official contact at all with DOH thenceforward, and thus no new arenas for disputes, controversies, or “misunderstandings” to arise. One need not seek far for the reasons; indeed, this very lawsuit reflects his capacity for such disputes.

It must also be kept in mind that, in connection with the Settlement Agreement, the U.S. District Court entered its judgment approving and establishing present and future payments of very substantial monetary consideration for this Agreement. Mr. Bricker has sought in state court to have the benefit of his agreement without the burden of obeying its express requirements.

4. There Are No Material Issues Regarding Contractual Intent

By filing declarations as to his supposed “intent,” Mr. Bricker appeared to have hoped to elicit controverting declarations, so as to attempt to create an issue of fact. But, where the language of an agreement is crystal clear, particularly an agreement settling litigation, the usual rules of contract construction apply. When interpreting a contract, courts do not interpret what “was intended to be written,” they interpret

“what was written.” *Hearst Comm’n, Inc.*, 154 Wn.2d at 493. These rules require that, in construing a written contract, the court ascertains the intent from reading the contract as a whole, and will not read an ambiguity into a contract that is otherwise clear and unambiguous. *Dice v. City of Montesano*, 131 Wn. App. 675, 128 P.3d 1253 (2006). And, in the context of a settlement agreement, as said in *Paopao v. State, Dep’t of Soc. & Health Servs.*, 145 Wn. App. 40, 185 P.3d 640 (2008), only testimony so clear and convincing as can free the court of **all doubt** as to the intent of the parties could ever be regarded. (Emphasis added.) Here, instead, what we have is Mr. Bricker’s own recognition of what the contract expressly says, together with what he says are his unexpressed intention of what the unambiguous language should mean.

5. Washington Law Favors Settlement Of Litigation And Enforcement Of Settlement Agreements

Washington law strongly supports the policy of the settlement of litigated disputes, and thus requires that full force be given to the provisions of agreements which settle and terminate litigation. *See, e.g., Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007) (“Once the parties have agreed to settle a tort claim, the foundation for the judgment is their written contract” *Jackson*, 142 Wn. App. at

146); *Hanson Indus. Inc. v. Kutschkau*, 158 Wn. App. 278, 239 P.3d 367 (2010).

In *Paopao*,, Division I of the Court of Appeals upheld the express language of a settlement agreement entered into by the State, against attack by the plaintiff on several grounds, including claims of mutual mistake, public policy, and that the State acted *ultra vires*. In regard to agreements settling litigation, the court made the following very strong statement:

An accord and satisfaction is a new contract- a contract complete in itself **A strong presumption attaches that the parties have considered and settled every existing difference. To overcome this strong presumption requires “testimony so clear and convincing that the court can free the transaction from all doubt as to the intent of the parties.”**

Paopao, 145 Wn. App. at 46 (emphasis added and citations omitted).

This powerful rule defeats Mr. Bricker’s position on its face. Thus, his citation of non-competition agreements in employment contracts is wholly beside the point. The underlying case here was a hotly-litigated federal court lawsuit, settled well into the case, with a detailed Settlement Agreement, utterly plain in its terms, approved by the U.S. District Judge. App. A. All parties were represented by counsel. No party had to settle. No party had to pay or accept money, except by express agreement. No party can escape the plain language of the agreement.

In Brief of Appellant (Br. of Appellant), Mr. Bricker cites *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968) and *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004) (these are cases involving covenants not to compete in contracts of employment); Br. of Appellant at 9-12. These cases simply have no application to a case involving an agreement arising out of the settlement of a lawsuit. As stated by Division I of the Court of Appeals in *Paopao*, 145 Wn. App. at 40, a settlement agreement extinguishes all antecedent matters subject to the litigation, both in contract and tort. Mr. Bricker did not get employment that had a non-compete provision; he got a large amount of money for the settlement of a case, in consideration not only of the ending of his employment, but the ending of any future occasion of interaction with the Department of Health. He cannot have the benefit of his Agreement without its burdens. He cites no case that would let him do so.

C. Remaining Issues

Any remaining issues can be summarily addressed; all are entirely without merit.

1. “Unconscionability”

Mr. Bricker’s entire “unconscionability” claim is related to his assertion that the State’s interpretation of the Agreement is “overbroad” and that it would prevent him from entering numerous occupations.

See Br. of Appellant at 11-14. However, he cites no cases on point, relying instead on cases interpreting “covenants not to compete” in employment agreements, as previously discussed herein. Br. of Appellant at 11-14.

The trial court’s disposition of this argument is to the point and well worth quoting:

THE COURT: Right. Both sides were represented by counsel. This was not an employment agreement where the Court would review it for unconscionability. The lawsuit was pending. I assume there was a trial date pending. This was a settlement of the lawsuit.

Whether the parties agreed to agree in settlement of that lawsuit is the agreement they are stuck with. I don’t find it to be unconscionable.

RP at 21, ll. 10-18.

There is nothing “unconscionable” about an agreement to settle a litigated case where substantial money changes hands, both parties are represented by counsel, and the defendant receives a release, dismissal, and provisions designed to forestall ongoing disputes and litigation.

Moreover, an agreement cannot be considered unconscionable where it provides a dispute mechanism before the superior court, allowing for interpretation and enforcement, but where the aggrieved party does not avail himself of it, choosing instead to concoct a tort lawsuit years after

becoming aware of the other party's interpretation of the plain terms of the agreement.

2. "Wrongful Bad References"

Mr. Bricker contends, among his claims in the lawsuit, that the State somehow violated the Agreement in its handling of references, a subject directly provided for by the terms of the settlement. *See* CP at 30, App. A at 4, paragraph 8. At the trial court level, he provided (objected-to) hearsay information concerning a supposed violation. CP at 112-13. The complete answer to this is that Mr. Bricker's own declaration shows that he violated the term of the Agreement himself, and the record, of course, further makes clear that Mr. Bricker sought no relief as provided for by the dispute resolution provisions of the Agreement if he believed there to be a violation.

3. "Intentional Interference," "Retaliation" And "Infliction Of Emotional Distress"

Of course, all of these claims asserted by Mr. Bricker are mooted by the clear provisions of the Agreement itself—the State had a clear right to assert its contractual rights when Mr. Bricker made his CDL application. *See* RP at 20.

But, apart from this, Mr. Bricker made no attempt at all before the trial court to present evidence to establish any of the elements of a tortious

interference with business expectancies claim. *See Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

As for “retaliation” for “whistleblowing” (Br. of Appellant at 9), RCW 49.60.210 provides remedies for employees. Mr. Bricker was not an employee of the State. He was when he engaged in his “whistleblowing” activities; that was in part what his original lawsuit was about.

Lastly, Mr. Bricker fails to make any showing whatsoever that the State’s assertion of its contractual rights, contested or not, can give rise to an emotional distress claim. This is merely a further indication of Mr. Bricker’s attempt to “backdoor” what is a matter of contract into a claim of tort.

VI. RESPONDENTS’ REQUEST FOR ATTORNEYS’ FEES PURSUANT TO RAP 18.1.

Pursuant to RAP 18.1 and paragraph 16 of the Settlement Agreement, the State requests the award of attorneys fees by this Court for the case on appeal. App. A at 5.

Paragraph 16 of the Settlement Agreement, its “dispute resolution” provision, provides that “[t]he predominantly prevailing party shall be entitled to reasonable attorneys fees as determined by the court.” CP at 5; App. A at 5.

This entire action turns upon the interpretation and effect of the Settlement Agreement. Although Mr. Bricker, notwithstanding the plain language of the Agreement, did not seek specific performance (or declaratory judgment), but instead crafted a complaint sounding in tort, this lawsuit is based entirely upon an argument that the State “wrongfully” interpreted and enforced its contract, this cannot allow Mr. Bricker to circumvent the attorneys fees provision of the contract. The court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements. See *Hemenway v. Miller*, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991); *Seattle First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence claim when duty breached was created by parties' agreement); *W. Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 299, 716 P.2d 959 (1986) (contract-related tortious interference claim justified awarding of contract-based fees); 25 David K. Dewolf et al., *Washington Practice: Contract Law & Practice* § 14:18 at 357 (2d ed. 2007) (even in cases

where plaintiff's claims are founded in tort or another legal theory, award of contract attorney fees may be appropriate).

These cases are directly applicable here, and the State is entitled to its attorneys fees as a "predominantly prevailing party."

VII. CONCLUSION

Mr. Bricker's entire lawsuit is misconceived. He entered into a contract with very clear terms, in exchange for a large sum of money, to settle a federal court lawsuit. He was represented throughout by counsel. In exchange for the money (which he continues to receive and will for some years to come), he agreed not only to resign state employment, but to release his claims, end his lawsuit, and never in the future interact with or contact the Department of Health in any professional or official way. He himself concedes at the end of the day that this is what the language says, and in effect he concedes that he knew it at the time he signed it. He doesn't even try to dispute that the CDL application, certification and inspection scheme requires "professional or official contact" with DOH.

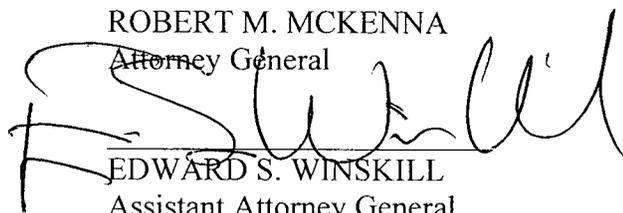
He never cites a case invalidating such a provision in any settlement agreement. His analogy to "covenants not to compete" fails. He cannot escape the effect of this agreement, which by its own terms arose out of unique circumstances.

Above all, Mr. Bricker's filing of a purported tort lawsuit, nearly three years after the return of his CDL application by the Department, utterly ignores and violates the dispute resolution terms of the Settlement Agreement. Indeed, this fact, together with the way the complaint is crafted and the way in which Mr. Bricker has argued the case, itself provides insight into the reasons why such a provision was included in the Agreement in the first place. Proceeding in such a way, instead of seeking a quick remedy pursuant to the Agreement at the time of the claimed "wrongful conduct," flouts the Agreement and the entire process which led to it, and which led to the payment of substantial benefits to Mr. Bricker.

This is a tort lawsuit, and there is, as a matter of law, no tort. The resolution of the case turns upon a contract, the contract is valid, the trial court's judgment of dismissal should be upheld, and the State should have its actual costs and actual attorney fees in accordance with the Agreement of the parties.

RESPECTFULLY SUBMITTED this 13 day of March, 2012.

ROBERT M. MCKENNA
Attorney General



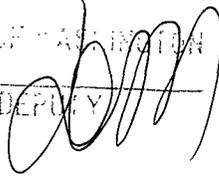
EDWARD S. WINSKILL
Assistant Attorney General
WSBA No. 5406
Attorney General's Office
1741 Cleanwater Dr SW
PO Box 40126
Olympia, WA 98504

COURT OF APPEALS
DIVISION II

NO. 42139-9-II

12 MAR 13 PM 12:14

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

STATE OF WASHINGTON
BY 
DEPUTY

ED BRICKER,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

NO. 67749-7-I

(Thurston County Cause
No. 09-2-02260-4)

PROOF OF SERVICE

I, Amanda Chandler-Easley, hereby certify that on March 12, 2012, I caused to be served a copy of the following document:

RESPONDENTS' BRIEF

on the attorney for Appellant, as set forth below:

Attorneys for Plaintiff:

Christopher Bawn United States Mail
1700 Cooper Point Rd #A-3 Hand Delivered by Legal Messenger
Olympia, WA 98502 UPS Overnight Mail
 Email

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

DATED this 12th day of March, 2012, at Tumwater, WA.


AMANDA CHANDLER-EASLEY

APPENDICES

A. Settlement Agreement

B. Stipulation & Judgment dated 4/22/05

C. The following Statutes:

- **RCW 49.60.210**
- **RCW 64.44.005**
- **RCW 64.44.010**
- **RCW 64.44.060**
- **RCW 64.44.070**
- **WAC 246-205**

APPENDIX

A

SETTLEMENT AGREEMENT, RELEASE OF CLAIMS, AND AGREEMENT TO HOLD HARMLESS

This agreement is entered into for the purpose of resolving the full range of misunderstandings, disputes, and potential claims that have arisen between the parties in connection with Edwin Bricker's employment at the Washington State Department of Health. Based upon the terms and conditions set forth in this agreement, the parties intend to resolve and settle any and all disputes that have arisen or may arise out of the circumstances referred to above, or surrounding circumstances, that may have occurred through the effective date of this agreement, and to end any disputes or interaction between the employee and the department. This agreement reflects the unique circumstances of this case; no precedent is set by this agreement or any part thereof. The effective date of this agreement is April 13, 2005.

FOR AND IN CONSIDERATION of the terms and conditions set forth below, Edwin Bricker and Cynthia Bricker (also referred to as "plaintiffs"), their heirs, assigns, or other successors in interest, do hereby release and forever discharge the STATE OF WASHINGTON and its officers, agents, employees, agencies and departments, including Al Conklin, John Erickson, Nancy Ellison, Bill White (also referred to as "defendants") and their respective marital communities, from any and all existing and future claims, costs, attorneys fees, damages and causes of action of any nature whatsoever arising out of Mr. Bricker's employment with the Washington State Department of Health to the present date, including the incidents alleged in complaint filed in the United States District Court for the Western District of Washington, Cause No. C02-5626FDB, filed November 2002, including any public disclosure requests, and which are related to or could be considered to have arisen out of the allegations or circumstances surrounding the conflicts and complaints that were at issue during his employment, and the related tensions and disagreements in or from the workplace as a result of this range of conflicts. However, under RCW 51.04.060, this agreement does not modify or otherwise interfere with rights the employee may have under workers' compensation laws of the STATE OF WASHINGTON.

In making this agreement and settling this matter, the defendants, the State and its agencies and employees make no admission of liability. Plaintiffs further covenant not to sue or make further claims based on these incidents and circumstances based on events prior to and including the date of this agreement and the plaintiffs warrant that no rights of any kind have been assigned to any person or entity. The defendants, the State and its agencies and employees affirm that they have no further claims against the employee based on his period of employment. However, neither party is prohibited from any defense or counterclaim against a third party concerning these issues, should that become necessary. FURTHER, the undersigned plaintiffs represent, warrant and agree that:

1. This is a final, conclusive and complete release of all unknown and unanticipated damages arising from or alleged to arise from or which might later be alleged to have occurred during the period of his employment with the department up to the effective date of this agreement.

2. Mr. and Ms. Bricker acknowledge and agree that all liabilities, financial obligations, liens, or subrogated claims, including but not limited to bills for medical, hospital, nursing or related services, arising out of the above stated claims are the plaintiffs' sole and separate obligation. Therefore, Mr. and Ms. Bricker will indemnify and save harmless the STATE OF WASHINGTON and its officers, agents, employees, agencies, defendants, and departments herein released from all loss, damage and expense of any kind or character arising out of the injury, damage or loss sustained by Mr. and Mrs. Bricker relating to the above described claims.

3. **Tax Consequences.** This settlement agreement, release of claims, and hold harmless includes any adverse tax consequences caused to Edwin Bricker and Cynthia Bricker by the settlement of this matter; any such consequences are solely the responsibilities, liabilities, and obligations of Edwin Bricker and Cynthia Bricker.

4. **Annuity Purchase.** Within ten (10) days following the entry of an order of dismissal set forth below, the State of Washington will fund the future periodic payments set forth below for a total present value of One Hundred Ninety Thousand and no/100 Dollars (\$190,000.00).

4.1. PAYMENTS

In consideration of the settlement agreement and release set forth above, the State of Washington (the Assignor) agrees to pay to the individual named below ("Payee") the sums outlined in Paragraph 4.1.b below:

4.1.a. Payments due at the time of settlement as follows:

4.1.b. Periodic payments made according to the schedule as follows (the "Periodic Payments"):

PAYABLE TO ED BRICKER:

\$1,000 per month, guaranteed 15 years, beginning 07-01-2005 and ending 06-01-2020.

\$123,223.39 guaranteed lump sum payable 07-01-2020.

All sums set forth herein constitute damages on account of personal injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

4.2. PAYEE'S RIGHTS TO PAYMENTS

Plaintiffs acknowledge that the Periodic Payments cannot be accelerated, deferred, increased or decreased by the Plaintiffs or any payee; nor shall the Plaintiffs or any Payee have the power to sell, mortgage, encumber, or anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.

4.3. PAYEE'S BENEFICIARY

Any payments to be made after the death of any Payee pursuant to the terms of this Settlement Agreement shall be made to such person or entity as shall be designated in writing by Payee to the State of Washington or its Assignee. If no person or entity is so designated by Payee, or if the person designated is not living at the time of the Payee's death, such payments shall be made to the estate of the Payee. No such designation, nor any revocation thereof, shall be effective unless it is in writing and delivered to the State of Washington or its Assignee. The designation must be in a form acceptable to the State of Washington or its Assignee before such payments are made.

4.4. CONSENT TO QUALIFIED ASSIGNMENT

4.4.a. Plaintiffs acknowledge and agree that the State of Washington may make a "qualified assignment", within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as amended, of the State of Washington's liability to make the Periodic Payments set forth in Section 4.2.b to Allstate Assignment Company ("the Assignee"). The Assignee's obligation for payment of the Periodic Payments shall be no greater than that of State of Washington (whether by judgment or agreement) immediately preceding the assignment of the Periodic Payments obligation.

4.4.b. Any such assignment, if made, shall be accepted by the Plaintiffs without right of rejection and shall completely release and discharge the State of Washington from the Periodic Payments obligation assigned to the Assignee. The Plaintiffs recognize that, in the event of such an assignment, the Assignee shall be the sole obligor with respect to the Periodic Payments obligation, and that all other releases with respect to the Periodic Payments obligation that pertain to the liability of the State of Washington shall thereupon become final, irrevocable and absolute. Plaintiffs hereby consent to such an assignment and agree that plaintiffs' rights to the Periodic Payments and against Assignee shall be no greater than those of a general creditor, that Assignee is not required to set aside specific assets to secure such Periodic Payments, and Assignee's obligation to make Periodic Payments shall be no greater than those of Assignor immediately preceding the assignment. Upon assignment, Assignee or its designee, shall mail future payments directly to plaintiff. The State of Washington shall have no obligation with regard to the performance of the annuity contracts after a qualified assignment is completed.

4.5. RIGHT TO PURCHASE AN ANNUITY

The State of Washington, itself or through its Assignee, reserve the right to fund the liability to make the Periodic Payments in Paragraph 4.1.b through the purchase of an annuity policy from Allstate Life Insurance Company. The State of Washington or the Assignee shall be the sole owner of the annuity policy and shall have all rights of ownership. The State of Washington or the Assignee may have Allstate Life Insurance Company mail payments directly to the Payee. The Plaintiff shall be responsible for maintaining a current mailing address for Payee with Allstate Life Insurance Company.

4.6 DISCHARGE OF OBLIGATION

Upon making such "qualified assignments", Assignor shall be fully released from all obligations to make the Periodic Payments and only Assignees shall be obligated to make the Periodic Payments. Discharge of the liability to make any Periodic Payment shall be determined by the payment mode in which the payment is made. If the payment mode is by check sent by the United States mail, discharge occurs upon the mailing of a valid check, in the amount of such payment, to Payee's address as shown in Assignees' records. If Payee reports a lost check, a replacement check will be issued according to current check re-issue procedures. If the payment mode is by electronic funds transfer, discharge occurs upon the electronic transferring of funds, in the amount of such payment, into Payee's bank account as shown in Assignees' records. If any other payment mode is employed, discharge occurs upon transmitting funds, in the amount of such payment, as appropriate for that payment mode to Payee's address or account as shown in Assignee's records. Whatever mode of payment is used for any Periodic Payment, Assignee shall make payment on or before the due date of such payment.

5. Attorney's Fees and Costs. The State of Washington shall also pay within 10 days after the entry of the order of dismissal, as specified below, the total sum of \$50,000 directly to the plaintiffs' attorney, Christopher Bawn, at 1013 Tenth Ave. SE Olympia, WA 98501 for all legal fees and costs recoverable by Plaintiffs from the STATE OF WASHINGTON and its

officers, agents, employees, agencies, defendants, and departments herein. Otherwise, the parties shall bear their own costs and fees.

6. **Annual Leave Payout.** The employee shall receive within 10 days after the entry of the order of dismissal specified below a lump sum payment of \$ 7,790.00 for annual leave accumulated as of the date of this agreement. Payment of this amount shall be made directly by the Department of Health to Mr. Bricker.

7. **Approval by the Division of Risk Management.** This release contains the entire agreement of the parties, but it shall not be binding upon the STATE OF WASHINGTON until accepted by the head or governing body of the agency or department of state government or the designee of any such agency, and approved by the Attorney General of the State of Washington.

8. **References.** The parties agree that any requests for references regarding Mr. Bricker shall be referred to Katherine Deuel, the Human Resources Director of the Department of Health or her delegee, who shall confirm the dates of employment and job function. In seeking any future reference from the Department of Health, Edwin Bricker will submit all future requests for references through to Katherine Deuel, or her successor, for processing centrally by the agency. Supervisors and managers still at the department, who have been in the chain of supervision for him, will be instructed to refer such inquiries to the Human Resources Director of DOH without comment. The employee shall also receive, as of the effective date of this agreement, the attached letter of reference. See Attachment A.

9. **Personnel File.** The parties agree that Mr. Bricker's personnel file is proper in its current form and does not require further expungement, and that Mr. Bricker has received a copy of his personnel file.

10. **Resignation, Agreement not to Seek Further State Employment or Interact with the Department.** As part of this agreement, Mr. Bricker agrees not to seek or accept at any time employment with the Department of Health or the State of Washington. He further agrees that he will not have any further professional or official contact with the Department of Health. Mr. Bricker shall immediately resign from the department. Mr. Bricker shall immediately provide to the Department of Health a written letter of resignation which will state, "By this letter, I formally submit my notice of resignation from my position as Health Physician 2 with the Department of Health, effective at the close of business. April 15, 2005." The Department of Health will not contest verbally or in writing unemployment compensation benefits sought by Mr. Bricker based on a resignation for good cause under RCW 50.20.050.

11. **Confirmation of No Pending Actions:** The parties affirm that any and all pending complaints or requests of the other have been withdrawn with prejudice as of the effective date of this agreement, and that there are no pending actions or investigations against each other in any court, administrative tribunal, other government agency, nor any other forum, and both parties forswear any further filings against the other, including requests for information, public disclosure requests, or requests or complaints of any kind, and that any and all tools or documents of employment have been exchanged, signed or returned. However, under RCW 51.04.060, this agreement does not modify or otherwise interfere with rights the employee may have under workers' compensation laws of the STATE OF WASHINGTON.

12. **Order of Dismissal with Prejudice.** Plaintiffs shall agree to entry by the Court of an order dismissing with prejudice, and without costs or fees assessed against any party, their complaint filed in the United States District Court (Western District of Wash.) under *Bricker v. State et. al*, Cause No. C02-5626FDB. Failure of the Court to enter the Order of Dismissal with prejudice shall render this agreement null and void.

13. **Non-Admission of Liability:** The settlement embodied in this agreement is intended solely to resolve the conflict between the parties and related claims in dispute and to completely sever the employment relationship between this employee and the State of Washington. The parties recognize that this settlement is not an admission of liability or wrongdoing by the plaintiffs, the STATE OF WASHINGTON and its officers, agents, employees, agencies and departments, and any defendants, and no portion of this agreement may be used or characterized as such. Neither the terms of this agreement nor its substance may be introduced in any form or forum as evidence of liability, or as an admission or statement of liability or bad faith by either party.

14. **Reliance.** The Plaintiffs warrant that they have had access to counsel of their choosing in considering and agreeing to this settlement. They further warrants that they have not relied on the advice of any official or employee of the State of Washington or anyone associated with the State as to the legal, tax or other consequences of any kind arising out of this agreement, and that no promises have been made to him by the STATE OF WASHINGTON and its officers, agents, employees, agencies and departments, and any defendants, except those expressly set forth in this agreement. The Plaintiffs further represent that they have entered into this agreement freely and voluntarily.

15. **Entire agreement.** This agreement embodies the entire agreement and understanding between the parties with respect to the subject matter addressed herein. There are no other agreements, covenants, understandings, representations or warranties written, with respect to the subject matter of this agreement other than those expressly set forth and referred to herein. This agreement is the whole agreement and there are not additional provisions or offers, whether oral or written, that pertain to this settlement.

16. **Dispute resolution.** In the event of a dispute between the parties hereto with respect to the validity, interpretation or enforcement of the agreement, it shall be construed and interpreted in accordance with the laws of the state of Washington. The sole remedy for any violation of this Agreement is to seek specific performance in Thurston County Superior Court. The predominantly prevailing party shall be entitled to reasonable attorneys fees as determined by the court.

17. **Dissemination.** The terms of this Settlement Agreement shall not be disseminated or published by the parties, except as required by statute, rule, court order or public disclosure laws, or when necessary to ensure compliance with this Agreement, such as to family members, tax and financial advisers.

18. The parties agree to hold harmless, jointly as well as individually, the mediation team and staff

19. The undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted, for the purpose of making a full and final compromise, adjustment and settlement of any and all claims, disputed or otherwise.



Edwin Bricker
Address: 1019 Cardigan Loop NW
Olympia, WA 98502



Cynthia Bricker
Address: 1019 Cardigan Loop NW
Olympia, WA 98502

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, the undersigned, a notary public in and for the State of Washington, hereby certify that on this 15th day of April, 2005, Edwin Bricker and Cynthia Bricker personally appeared before me, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that he and she signed and sealed the same as his and her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last written.



T. Diane Demar
Notary Public in and for the
State of Washington, residing
at Olympia
My Commission Expires: 2-19-08

Approved:

ROB MCKENNA
Attorney General

DANIEL J. JUDGE, WSB#17392
Assistant Attorney General

Accepted:

April 19, 2005

BRUCE J. GLAVIN
State of Washington
Office of Risk Management



STATE OF WASHINGTON
DEPARTMENT OF HEALTH
DIVISION OF ENVIRONMENTAL HEALTH
*NewMarket Industrial Campus, Bldg 2 • PO Box 47820
Olympia, Washington 98504-7820*

April 15, 2005

To Whom It May Concern:

Ed Bricker worked in the Office of Radiation Protection from November 4, 1991 to April 15, 2005. This office is responsible for regulating the various uses of radiation within the state, monitoring radioactivity in the environment, and maintaining radiological emergency preparedness. During his employment, his primary responsibilities were reviewing Hanford-related documents (November 4, 1991 to June 5, 2000), training our Emergency Response Duty Officers (June 5, 2000 to November 1, 2002), and conducting inspections of x-ray facilities (November 1, 2002 to April 15, 2005).

He was employed as a Radiation Health Physicist I from November 4, 1991 to August 10, 1993. Effective August 10, 1993 to April 15, 2005, he was employed as a Radiation Health Physicist II. During his initial years with the Office, his reviews of documents and reports on defense wastes and radioactive air emissions from Hanford were thorough and well written. In mid-career, he ably facilitated the necessary training of our Duty Officers. He was also asked to review and make recommendations on issues related to the state's Potassium Iodide "KI" policy. He successfully interacted with members of the public, pharmacists, drug company executives, federal scientists, Washington State Board of Pharmacy, and others regarding our policies and procedures on how best to handle emerging issues related to KI. Later, as an x-ray inspector, he was often praised by those businesses that he inspected for his positive interaction with them. In addition, he was known to provide practical problem solving ideas to assist providers with compliance. We received numerous letters of praise and positive survey results regarding Mr. Bricker's work from the businesses with whom he worked.

Sincerely,

Mike Odlaug
Radiation Health Physicist 3

ATTACHMENT A



APPENDIX

B

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The Honorable FRANKLIN D. BURGESS

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

EDWIN BRICKER and CYNTHIA
BRICKER,

Plaintiffs,

v.

Washington State Department of Health
(DOH), Radiation Protection Division;
NANCY ELLISON, Deputy Secretary of
the DOH; BILL WHITE, Assistant
Secretary, DOH, Environmental Health
Programs, JOHN ERICKSON, Director
of the Division of Radiation Protection
DOH, and AL CONKLIN, Manager, Air
Emissions and Defense Waste Section,
Radiation Protection Division,
Environmental Health Programs,
Washington State Department of Health
(DOH), each person is sued individually
and in their official capacities,

Defendants.

NO. C02-5626FDB

STIPULATION AND JUDGMENT

Judgment Summary (RCW 4.64.030):

Judgment Creditor: **EDWIN BRICKER AND CYNTHIA BRICKER**
Judgment Creditor's Attorney: **CHRISTOPHER BAWN**
Judgment Debtor: **STATE OF WASHINGTON**

1 Principal Judgment Amount: **\$190,000.00**
2 Pre-Judgment Interest: **None**
3 Post-Judgment Interest: **None**
4 Taxable Costs and Attorneys' Fees: **\$50,000**

5 **STIPULATION**

6 Plaintiffs, EDWIN BRICKER and CYNTHIA BRICKER, by and through their attorney,
7 Christopher Bawn, and the Defendant, State of Washington, acting by and through their attorneys,
8 Rob McKenna, Attorney General, and Daniel J. Judge, Assistant Attorney General, having made a
9 stipulation pursuant to RCW 4.92.150 settling and compromising this action, hereby agree that
10 judgment should be entered against the State of Washington in the above-entitled cause for the
11 present-day value of One Hundred Ninety Thousand and 00/100 Dollars (\$190,000.00) in
12 damages, and for Fifty Thousand and 00/100 Dollars (\$50,000.00) for costs and attorneys fees to
13 be paid as detailed below. The parties agree that the settlement is reasonable.

14 The settlement amount will be paid by the State of Washington as follows:

15
16 The State of Washington will purchase an annuity which will fund the future
17 periodic payments set forth below for a total present value of One Hundred
18 Ninety Thousand 00/100 Dollars (\$190,000.00):

18 **Payee:** Edwin Bricker:

19 Beginning 7/1/2005, \$1,000 per month, guaranteed 15 years, beginning 07-01-
20 2005 and ending 06-01-2020.

21 \$123,223.39 guaranteed lump sum payable 07-01-2020.
22

23 Within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as
24 amended ("Code"), the State of Washington, on their own behalf and on behalf of all
25 other Releasees ("Assignor") may make "qualified assignments" to Allstate Assignment
26 Company ("Assignee") of Assignor's obligation to make the future payments as
described above.

1 Plaintiffs EDWIN BRICKER and CYNTHIA BRICKER hereby consent to such an
2 assignment and agree that plaintiff's rights to the Periodic Payments and against Assignee shall be
3 no greater than those of a general creditor, that Assignee is not required to set aside specific assets
4 to secure such Periodic Payments, and Assignee's obligation to make Periodic Payments shall be
5 no greater than those of Assignor immediately preceding the assignment. Upon assignment,
6 Assignee or its designee, shall mail future payments directly to plaintiff. The State of Washington
7 shall have no obligation with regard to the performance of the annuity contracts after a qualified
8 assignment is completed.

9 As part of this Judgment, Plaintiffs have signed a Release and Settlement Agreement, and
10 upon purchase of the annuity and payment of attorneys' fees as directed below, plaintiffs agree to
11 execute and file a Satisfaction of Judgment with the court.

12 The parties recognize that this settlement is not an admission of liability or wrongdoing
13 by the plaintiffs, the STATE OF WASHINGTON and its officers, agents, employees, agencies
14 and departments, and any defendants, and no portion of this agreement may be used or
15 characterized as such. Neither the terms of this agreement nor its substance may be introduced
16 in any form or forum as evidence of liability, or as an admission or statement of liability or bad
17 faith by either party.

18 **JUDGMENT**

19 THIS MATTER having come on regularly before the undersigned judge of the above-
20 entitled court, the Plaintiffs EDWIN BRICKER and CYNTHIA BRICKER, acting by and
21 through their attorney, Christopher Bawn, and the Defendants, State of Washington, acting by and
22 through its attorneys, Rob McKenna, Attorney General, Daniel J. Judge, Assistant Attorney
23 General, having made the foregoing stipulation, and it appearing to the court, after a review of the
24 files and records herein and statements of counsel in open court and the court being fully advised,
25 now, therefore
26

1 IT IS HEREBY ORDERED that the plaintiffs shall have judgment against the Defendant,
2 State of Washington as detailed below:

3 The settlement amount will be paid by the State of Washington as follows:

4 The State of Washington will purchase an annuity which will fund the future
5 periodic payments set forth below for a total present value of One Hundred
Ninety Thousand 00/100 Dollars (\$190,000.00):

6 **Payee:** Edwin Bricker:

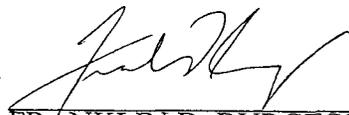
7 Beginning 7/1/2005,\$1,000 per month, guaranteed 15 years, beginning 07-01-
8 2005 and ending 06-01-2020.

9 \$123,223.39 guaranteed lump sum payable 07-01-2020.
10

11 IT IS FURTHER ORDERED, ADJUDGED AND DECREED The State of
12 Washington shall also pay within 10 days after the entry of this order of dismissal, as specified
13 below, the total sum of \$50,000 directly to the plaintiffs' attorney, Christopher Bawn, at 1013
14 Tenth Ave. SE Olympia, WA 98501 for all legal fees and costs recoverable by Plaintiffs from
15 the STATE OF WASHINGTON and its officers, agents, employees, agencies, defendants, and
16 departments herein. Otherwise, the parties shall bear their own costs and fees.
17

18
19 IT IS HEREBY ORDERED, ADJUDGED AND DECREED this matter is
20 DISMISSED WITH PREJUDICE.

21 DONE this 22nd day of April 2005.

22
23 
24 FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE
25
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1 Presented by:

2 ROB MCKENNA
3 Attorney General

4 /s/ Daniel J. Judge
5 DANIEL J. JUDGE, WSBA #17392
6 Assistant Attorney General
7 Attorneys for Defendants

8 **Approved for Entry:**

9 /s/ Christopher Bawn
10 CHRISTOPHER BAWN, WSBA #
11 Attorney for Plaintiffs
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 21, 2005, I caused to be electronically filed the foregoing
3 document with the Clerk of the Court using the CM/ECF system which will send notification
4 of such filing to the following:

5 Christopher Bawn cwbawn@earthlink.net

6
7 /s/ Daniel J. Judge
8 DANIEL J. JUDGE, WSBA #17392
9 Assistant Attorney General
10 Torts Division
11 P.O. Box 40126
12 Olympia, WA 98504-0126
13 (360) 459-6600
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APPENDIX

C

RCW 49.60.210

Unfair practices — Discrimination against person opposing unfair practice — Retaliation against whistleblower.

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW 74.04.012, unless the individual has willfully disregarded the truth in providing information to the office.

[2011 1st sp.s. c 42 § 25; 1992 c 118 § 4; 1985 c 185 § 18; 1957 c 37 § 12. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

Notes:

Findings -- Intent -- Effective date -- 2011 1st sp.s. c 42: See notes following RCW 74.08A.260.

Finding -- 2011 1st sp.s. c 42: See note following RCW 74.04.004.

RCW 64.44.005
Legislative finding.

The legislature finds that some properties are being contaminated by hazardous chemicals used in unsafe or illegal ways in the manufacture of illegal drugs. Innocent members of the public may be harmed by the residue left by these chemicals when the properties are subsequently rented or sold without having been decontaminated.

[1990 c 213 § 1.]

RCW 64.44.010

Definitions.

The words and phrases defined in this section shall have the following meanings when used in this chapter unless the context clearly indicates otherwise.

(1) "Authorized contractor" means a person who decontaminates, demolishes, or disposes of contaminated property as required by this chapter who is certified by the department as provided for in RCW 64.44.060.

(2) "Contaminated" or "contamination" means polluted by hazardous chemicals so that the property is unfit for human habitation or use due to immediate or long-term hazards. Property that at one time was contaminated but has been satisfactorily decontaminated according to procedures established by the state board of health is not "contaminated."

(3) "Department" means the department of health.

(4) "Hazardous chemicals" means the following substances associated with the illegal manufacture of controlled substances: (a) Hazardous substances as defined in RCW 70.105D.020; (b) precursor substances as defined in RCW 69.43.010 which the state board of health, in consultation with the state board of pharmacy, has determined present an immediate or long-term health hazard to humans; and (c) the controlled substance or substances being manufactured, as defined in RCW 69.50.101.

(5) "Officer" means a local health officer authorized under chapters 70.05, 70.08, and 70.46 RCW.

(6) "Property" means any real or personal property, or segregable part thereof, that is involved in or affected by the unauthorized manufacture, distribution, or storage of hazardous chemicals. This includes but is not limited to single-family residences, units of multiplexes, condominiums, apartment buildings, boats, motor vehicles, trailers, manufactured housing, any shop, booth, garden, or storage shed, and all contents of the items referenced in this subsection.

[2006 c 339 § 201; 1999 c 292 § 2; 1990 c 213 § 2.]

Notes:

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Finding -- Intent -- 1999 c 292: "The legislature finds that the contamination of properties used for illegal drug manufacturing poses a threat to public health. The toxic chemicals left behind by the illegal drug manufacturing must be cleaned up to prevent harm to subsequent occupants of the properties. It is the intent of the legislature that properties are decontaminated in a manner that is efficient, prompt, and that makes them safe to reoccupy." [1999 c 292 § 1.]

Effective date -- 1990 c 213 §§ 2, 12: "Sections 2 and 12 of this act are necessary for the immediate preservation of the public peace, health, or safety or support of the state government and its public institutions, and shall take effect on the effective date of the 1989-91 supplemental omnibus appropriations act (SSB 6407) [April 23, 1990] if specific funding for this act is provided therein." [1990 c 213 § 17.]

RCW 64.44.060

Certification of contractors, supervisors, or workers — Denial, suspension, revocation, or restrictions on certificate — Penalties — Fees — Decontamination account.

(1) A contractor, supervisor, or worker may not perform decontamination, demolition, or disposal work unless issued a certificate by the state department of health. The department shall establish performance standards for contractors, supervisors, and workers by rule in accordance with chapter 34.05 RCW, the administrative procedure act. The department shall train and test, or may approve courses to train and test, contractors, supervisors, and workers on the essential elements in assessing property used as an illegal controlled substances manufacturing or storage site to determine hazard reduction measures needed, techniques for adequately reducing contaminants, use of personal protective equipment, methods for proper decontamination, demolition, removal, and disposal of contaminated property, and relevant federal and state regulations. Upon successful completion of the training, and after a background check, the contractor, supervisor, or worker shall be certified.

(2) The department may require the successful completion of annual refresher courses provided or approved by the department for the continued certification of the contractor or employee.

(3) The department shall provide for reciprocal certification of any individual trained to engage in decontamination, demolition, or disposal work in another state when the prior training is shown to be substantially similar to the training required by the department. The department may require such individuals to take an examination or refresher course before certification.

(4) The department may deny, suspend, revoke, or place restrictions on a certificate for failure to comply with the requirements of this chapter or any rule adopted pursuant to this chapter. A certificate may be denied, suspended, revoked, or have restrictions placed on it on any of the following grounds:

(a) Failing to perform decontamination, demolition, or disposal work under the supervision of trained personnel;

(b) Failing to perform decontamination, demolition, or disposal work using department of health certified decontamination personnel;

(c) Failing to file a work plan;

(d) Failing to perform work pursuant to the work plan;

(e) Failing to perform work that meets the requirements of the department and the requirements of the local health officers;

(f) Failing to properly dispose of contaminated property;

(g) Committing fraud or misrepresentation in: (i) Applying for or obtaining a certification, recertification, or reinstatement; (ii) seeking approval of a work plan; and (iii) documenting completion of work to the department or local health officer;

(h) Failing the evaluation and inspection of decontamination projects pursuant to RCW 64.44.075; or

(i) If the person has been certified pursuant to RCW 74.20A.320 by the department of social and health services as a person who is not in compliance with a support order or a *residential or visitation order. If the person has continued to meet all other requirements for reinstatement during the suspension, reissuance of the license or certificate shall be automatic upon the department's receipt of a release issued by the department of social and health services stating that the person is in compliance with the order.

(5) A contractor, supervisor, or worker who violates any provision of this chapter may be assessed a fine not to exceed five hundred dollars for each violation.

(6) The department of health shall prescribe fees as provided for in RCW 43.70.250 for: The issuance and renewal of certificates, conducting background checks of applicants, the administration of examinations, and the review of training courses.

(7) The decontamination account is hereby established in the state treasury. All fees collected under this chapter shall be deposited in this account. Moneys in the account may only be spent after appropriation for costs incurred by the department in the administration and enforcement of this chapter.

[2006 c 339 § 206; 1999 c 292 § 7; 1997 c 58 § 878; 1990 c 213 § 7.]

Notes:

***Reviser's note:** 1997 c 58 § 886 requiring a court to order certification of noncompliance with residential provisions of a court-ordered parenting plan was vetoed. Provisions ordering the department of social and health services to certify a responsible parent based on a court order to certify for noncompliance with residential provisions of a parenting plan were vetoed. See RCW 74.20A.320.

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Finding -- Intent -- 1999 c 292: See note following RCW 64.44.010.

Short title -- Part headings, captions, table of contents not law -- Exemptions and waivers from federal law -- Conflict with federal requirements -- Severability -- 1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Effective dates -- Intent -- 1997 c 58: See notes following RCW 74.20A.320.

RCW 64.44.070

Rules and standards — Chapter administration, property decontamination.

(1) The state board of health shall promulgate rules and standards for carrying out the provisions in this chapter in accordance with chapter 34.05 RCW, the administrative procedure act. The local board of health and the local health officer are authorized to exercise such powers as may be necessary to carry out this chapter. The department may provide technical assistance to local health boards and health officers to carry out their duties under this chapter.

(2) The department shall adopt rules for decontamination of a property used as a laboratory for the production of controlled substances and methods for the testing of porous and nonporous surfaces, groundwater, surface water, soil, and septic tanks for contamination. The rules shall establish decontamination standards for hazardous chemicals, including but not limited to methamphetamine, lead, mercury, and total volatile organic compounds.

[2009 c 495 § 7; 2006 c 339 § 207; 1999 c 292 § 8; 1990 c 213 § 9.]

Notes:

Effective date -- 2009 c 495: See note following RCW 43.20.050.

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Finding -- Intent -- 1999 c 292: See note following RCW 64.44.010.

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