

NO. 28375-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION,

Appellants,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY WOLCOT

Respondents, individually, and on behalf of
all other nonmembers similarly situated.

RESPONDENTS' SUPPLEMENTAL BRIEF ON RESTITUTION

ELLIS, LI & McKINSTRY PLLC

By: Steven T. O'Ban
WSBA # 17265
Attorneys For Respondents
Two Union Square
601 Union Street, Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

FILED
COURT OF APPEALS
DIVISION II
08 JUN 29 PM 1:39
STATE OF WASHINGTON
BY: [Signature]

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT.....2

 A. The undisputed facts support a claim for restitution-i.e., unjust enrichment.....3

 B. The undisputed facts support restitution as a remedy for the Teachers’ private right of action under RCW 42.17.760....7

 C. The undisputed facts support restitution as a remedy for the Teachers’ conversion claim9

 D. A statutory private right of action is not required where a common law claim exists.....11

III. CONCLUSION14

TABLE OF AUTHORITIES

CASES

Chadwick Farms Owners Ass’n v. FHC, LLC, 139 Wn. App. 300,
160 P.3d 1061 (2007), review granted, 163 Wn.2d 1021 (2008)5

Chicago Teachers Union v. Hudson, 475 U.S. 292,
106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).....8

Crisman v. Pierce County Fire Protection District No. 21,
115 Wn.App 16, 60 P.3d 652 (2002)6

Davenport v. Washington Educ. Ass’n, __ U.S. __, 127 S. Ct. 2372,
168 L. Ed. 2d 71 (2007).....1, 8, 9, 13, 14

Elvin v. Oregon Public Employees Union,
832 P.2d 36 (Ore. 1992)8

Holland v. Parker, 469 F.2d 1013 (8th Cir. 1972)6

International Ladies’ Garment Workers’ Union v.
Donnelly Garment Co., 121 F.2d 561 (8th Cir. 1941)6

Lang v. Hougan, 136 Wn. App. 708, 150 P.3d 622 (2007)
review denied, 163 Wn.2d 1018 (2008)9

In re Marriage of Langham and Kolde, 153 Wn.2d 553,
106 P.3d 212 (2005).....9

Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173,
157 P.3d 847 (2007)2, 11

Nelson v. Appleway Chevrolet, Inc., 129 Wn. App. 927, 121 P.3d 95
(2005) aff’d 160 Wn.2d 17311

Oil, Chemical and Atomic Workers Intern. Union, AFL
277 F.2d 694 (6th Cir. 1960)6

In re Parentage of L.B., 155 Wn.2d 679,
122 P.3d 161 (2005), cert. denied, 547 U.S. 1143 (2006)11

<u>Pierce County v. State of Wash.</u> , __ Wn. App. __, __ P.3d __, 2008 WL 2223877 (May 28, 2008) (citation omitted)	4
<u>Wareham Education Ass'n v. Labor Relations Comm'n</u> , 713 N.E.2d 363 (Mass. 1999)	7, 8
<u>Washington State Bank v. Medalia Healthcare L.L.C.</u> , 96 Wn. App. 547, 984 P.2d 1041 (1999) <u>review denied</u> , 140 Wn.2d 1007 (2000)	9

RULES AND REGULATIONS

RCW 41.59.100.....	13
RCW 42.17.400(4)	6
RCW 82.04.500	12
RCW 42.17.760	7, 13
CR 15(a)	5
CR 15(c)	5

OTHER

Bryan A. Garner, <u>A Dictionary of Modern Legal Usage</u> 243 (2 nd ed. 1995).....	3, 7
Douglas Laycock, <u>Modern American Remedies</u> 523 (2 nd ed. 1994).....	2, 3
Chaim Saiman, <u>Restating Restitution: A Case of Contemporary Common Law Conceptualism</u> 52 Vill. L. Rev. 487 (2007)	2
C. Wright and A. Miller, <u>Federal Practice and Procedure</u> § 1489, at 450 (1971)	6
Restatement (First) of Restitution § 1 (1937)	3, 4
Restatement (First) of Restitution § 128 (1937).....	10

I. INTRODUCTION

When they filed this lawsuit, Gary Davenport and the other plaintiffs were current or former public school teachers (“Teachers”) who chose not to join the teachers union, the Washington Education Association (“Union”). The Teachers sued the Union for collecting and using the Teachers’ wages, as “agency fees,” for political purposes without the Teachers’ affirmative authorization, as required by RCW 42.17.760. On appeal from the Washington Supreme Court decision declaring the statute unconstitutional, the United States Supreme Court upheld the constitutionality of the statute, stating, “§760 is not fairly described as a restriction on how the union can spend “its” money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* [Teachers’] money.”¹ After remand, on February 25, 2008, the Court heard oral argument. And on May 13, 2008, the Court asked the parties to address two questions.

First, the Court asked, “Do the undisputed facts support a claim of restitution?” The answer is plainly, “Yes.” The facts support an independent claim for restitution—i.e., unjust enrichment. The facts also support restitution as a remedy for the Teachers’ private right of action

¹*Davenport v. Washington Educ. Ass'n*, __ U.S. __, 127 S. Ct. 2372, 2380, 168 L. Ed. 2d 71 (2007) (emphasis in original).

under Section 760. And the facts support restitution as a remedy for the Teachers separate, common law conversion claim.

Second, the Court asked, “Does *Nelson v. Appleway*, 160 Wn.2d 173, 157 P.3d 847 (2007), apply here?” Yes, it does. *Appleway* confirms that where a party is harmed by conduct that is unlawful under a statute, a private right of action may exist—but is not necessary—for the party to recover under a common law claim such as restitution.

Based on previous briefing, and the argument below, the Teachers ask the Court to rule that the Teachers have a Section 760 private right of action (with a five-year statute of limitations) and a separate conversion claim (with a three-year statute of limitations). The Teachers ask the Court to order the trial court to determine what portion of the Teachers’ money the Union used for political purposes and then award the Teachers a judgment for that amount, plus prejudgment interest.

II. ARGUMENT

The term “restitution” is given varied meanings. The term refers to at least two different, but related, concepts. One recognized concept is “restitution” as a substantive area of the law—like contract or tort—that imposes certain obligations and liabilities.² The second recognized

² Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism* 52 Vill. L. Rev. 487, 490-93 (2007) (“Saiman”); Douglas Laycock,

concept is restitution as a remedy for liability under substantive areas such as contract and tort.³ Under this meaning, “restitution” refers to the remedy of returning what the defendant gained, as opposed to “damages,” a remedy based on what the plaintiff lost.⁴ Of course, restitution and damages may look the same where the plaintiff’s loss and the defendant’s gain are the same.

In this case, the undisputed facts support a claim for restitution, support restitution as a remedy under Section 760, and support restitution as a remedy for conversion. Each of these is an independent basis for the Court to rule in favor of the Teachers.

A. The undisputed facts support a claim for restitution—i.e., unjust enrichment.

A restitution claim is a claim for unjust enrichment. “[T]he law of restitution is the law related to all claims, quasi-contractual or otherwise, [that] are founded upon the principle of unjust enrichment.”⁵ Thus, section 1 of the Restatement (First) of Restitution says, “A person who has

Modern American Remedies 523 (2nd ed. 1994) (“Laycock”) (“The law of restitution is both substantive and remedial.”).

³ Laycock at 523.

⁴ See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 243 (2nd ed. 1995) (“Garner”).

⁵ Garner at 765 (emphasis in original; quotation marks and citation omitted).

been unjustly enriched at the expense of another is required to make restitution to the other.”⁶

In discussing restitution, this Court recently said that a “person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity.”⁷ And the Court confirmed the elements of unjust enrichment:

(1) There must be a benefit conferred on one party by another; (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.⁸

These elements exist in this case. The Union received the benefit of the Teachers’ wages withheld by their employers and transmitted to the Union at the direction of the Union. The Union knew it was receiving a valuable benefit--money. And because the Union retained the money in violation of Section 760, it would be inequitable for the Union to retain the money without paying its value.⁹

⁶ Restatement (First) of Restitution § 1 (1937) (“Restatement”).

⁷ *Pierce County v. State of Wash.*, __ Wn. App. __, __ P.3d __, 2008 WL 2223877 ¶ 78 (May 28, 2008) (citation omitted).

⁸ *Id.* (citation omitted).

⁹ The Union admitted in the Stipulation of Facts, Violations and Recommendations, attached to the Amended Complaint, that it had violated 760.

The trial court has a solid basis to rule that the Union was unjustly enriched and to order the Union to repay the Teachers' agency fees, plus interest.

The Teachers did not assert an unjust enrichment claim in their Amended Complaint. But for two reasons, this should give the Court no pause. First, leave to amend a complaint must be freely given.¹⁰ "This rule serves to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party."¹¹ Unless amendment would result in prejudice, refusal to grant leave to amend is an abuse of discretion.¹²

Here, the Amended Complaint, dated September 2001, alleges facts sufficient for an unjust enrichment claim. Because the "new" claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."¹³ Moreover, no discovery took place on substantive issues in the four months prior to the Union seeking

¹⁰ CR 15(a).

¹¹ *Chadwick Farms Owners Ass'n v. FHC, LLC*, 139 Wn. App. 300, 313, 160 P.3d 1061 (2007) (quotation marks and citation omitted), *review granted*, 163 Wn.2d 1021 (2008).

¹² *See id.* at 314.

¹³ CR 15(c).

discretionary review on January 28, 2002. There is no credible argument that adding unjust enrichment would prejudice the Union.

Additionally, the Court should permit the Teachers leave to amend after remand in light of the fact that the trial court ruled that the Teachers had a private right of action under 760 and the Union sought discretionary review, prior to this Court's ruling in *Crisman v. Pierce County Fire Protection District No. 21*, 115 Wn.App. 16, 60 P.3d 652 (2002). While in prior briefing Teachers have shown that *Crisman* is distinguishable from the instant case, and that in any event they gave the notice and met the requirements of RCW 42.17.400(4), if this Court concludes that the Teachers do not have a private right of action under *Crisman*, Teachers could not have pled their claims in September 2001 in anticipation of *Crisman*. Under these circumstances, the Court has the discretion to remand and permit Teachers to add the unjust enrichment claim presented for the first time on appeal.¹⁴

¹⁴ An amendment can be proper after remand to the lower court even if the claim was presented for the first time on appeal or had not been presented to the lower court in a timely fashion. *Holland v. Parker*, 469 F.2d 1013, 1015-16 (8th Cir.1972); *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F.2d 561, 563 (8th Cir.1941); *Oil, Chemical and Atomic Workers Intern. Union, AFL*, 277 F.2d 694, 698 (6th Cir. 1960), (quoting, *Marranzano v. Riggs Nat. Bank of Washington, D.C.* 184 F.2d 349 (D.C. Cir. 1950)) ("For this reason we feel constrained to make the same disposition of this case as was done by the Court of Appeals ... 'The ends of justice would be better served in this case, we think, by remanding it so that appellant may be afforded an opportunity to amend her complaint.'"); C. Wright and A. Miller, *Federal Practice and Procedure* § 1489, at 450 (1971).

Second, as explained below, adding a new claim is not necessary because restitution is an appropriate remedy for causes of action already in the Amended Complaint.

B. The undisputed facts support restitution as a remedy for the Teachers' private right of action under RCW 42.17.760.

The parties disagree about whether the Teachers have a private right of action under Section 760. And the parties have already briefed and argued that issue. But in examining restitution, it is important to note that if the Teachers do have a private right of action under Section 760, restitution is the logical remedy. In its remedial sense, restitution refers to compensation, reimbursement, or reparation.¹⁵ And other courts have approved restitution when deciding cases similar to this one. For example, in *Wareham Education Ass'n v. Labor Relations Comm'n*, non-union teachers complained that the union violated a state statute that prohibited a union from collecting dues unless it had a procedure to, at a non-member's request, rebate the non-member's share of the union's political expenditures.¹⁶ The state Labor Relations Commission ordered the union to "dissolve the escrow fund in which the [non-member] teachers' agency

¹⁵ See Garner at 765.

¹⁶ *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 713 N.E.2d 363, 363-64 (Mass. 1999).

fees were being held, and return the withheld fees to the teachers.”¹⁷ The Massachusetts high court affirmed.¹⁸

In *Elvin v. Oregon Public Employees Union*, non-union public employees objected to the collection and use of “fair share” fees assessed against them.¹⁹ The Oregon Employment Relations Board found that the union had collected the fees in violation of state law and without the First Amendment safeguards required by *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).²⁰ On that basis, the Board ordered the union to refund the fees to the non-union teachers.²¹ The Oregon Supreme Court affirmed the Board’s order.

As the U.S. Supreme Court has said in this litigation, even after the Union collected the Teachers’ agency fees, the Union was holding the Teachers’ money.²² If the Teachers have a private right of action under Section 760, the money used in violation of Section 760 ought to be refunded to them.

¹⁷ *Id.* at 364.

¹⁸ *Id.* at 367.

¹⁹ *Elvin v. Oregon Public Employees Union*, 832 P.2d 36, 39 (Ore. 1992).

²⁰ 832 P.2d at 39-40.

²¹ *Id.* at 40.

²² *Davenport*, 127 S. Ct. at 2380, (money regulated by Section 760 not “it’s [Union’s] money”; it is “other people’s [Teachers’] money”) (emphasis in original).

The Court should rule that the Teachers have a private right of action under Section 760 and order the Union to restore the agency fees used in violation of Section 760, plus interest.

C. The undisputed facts support restitution as a remedy for the Teachers' conversion claim.

The Teachers asserted a conversion claim in their Complaint. "Conversion is the [1] unjustified, [2] willful interference with [3] a chattel which [4] deprives a person entitled to the property of possession."²³ "Unjustified" and "willful" do not mean that a defendant must have intended to act wrongly. Good faith is not a defense.²⁴ "Chattel" refers to tangible and intangible property.²⁵ And a conversion plaintiff "is under no obligation to take back the converted property rather than seek monetary recovery."²⁶

Here, the interference with the Teachers' money was unjustified. Apart from statute, the Union has no legal right to collect, and use, non-member Teachers' wages.²⁷ That statutory authorization does not permit the Union to use Teachers' wages for certain political purposes without

²³ *Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.3d 622 (2007) (citation omitted) *review denied*, 163 Wn.2d 1018 (2008).

²⁴ *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 560, 106 P.3d 212 (2005) ("neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action [in conversion]") (quotation marks and citation omitted).

²⁵ *Lang*, 136 Wn. App. at 718.

²⁶ *Washington State Bank v. Medalia Healthcare L.L.C.*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999) *review denied*, 140 Wn.2d 1007 (2000).

²⁷ *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. at 2378.

their affirmative consent. Thus, the Union had no legal right to possess the Teachers' wages that it used for election purposes and its continued refusal to return their wages is unjustified. The interference was willful—i.e., the Union knew it was using the Teachers' money. The property involved is the Teachers' money. And the interference deprives the Teachers' of their money.

Restitution is a recognized remedy for conversion. For example, the Restatement (First) of Restitution states: "A person who has tortiously obtained, retained, used, or disposed of the chattels of another, is under a duty of restitution to the other."²⁸ Indeed, under the Restatement, even an "innocent converter" must provide restitution:

An innocent converter is a person who takes a chattel of another tortiously but in good faith and without knowledge that he is not entitled thereto. Despite his good faith he is under a duty to restore the chattel to the other or, if he cannot do this, to pay its value. . . . A converter is not entitled to a profit from an appreciation in value of the converted chattel so that if he retains it and refuses to return it as appreciated . . . he is under a duty to pay an amount equal to its value at that time.²⁹

Based on the undisputed facts, the trial court has a solid basis to rule that the Union converted the Teachers' agency fees and order the Union to restore the fees used in violation of Section 760, plus appreciation, i.e., interest. The Court should affirm the trial court's denial

²⁸ Restatement § 128 ("Conversion and Other Tortious Dealings With Chattels").

²⁹ *Id.* § 154 cmt. a.

of the Union's motion to dismiss and permit the Teachers to proceed to trial to seek restitution from the Union of their wrongfully withheld wages.

D. A statutory private right of action is not required where a common law claim exists.

Nelson v. Appleway confirms that where a party has a common law claim, the existence of a related statute does not necessarily preclude the common law claim.³⁰ This is true even if violation of the statute fulfills the "wrongfulness" element of the common law claim.³¹

In *Appleway*, a buyer sued a car dealer and sought a declaration that the dealer unlawfully passed on a business and occupation tax to the buyer.³² The complaint also asserted that the plaintiff "should receive restitution because [the dealer] has been unjustly enriched."³³ The Court held that the dealer's manner of collecting the B & O tax was unlawful.³⁴

The dealer and the *Appleway* dissent argued that the plaintiff needed a "private right of action"—under a statute—in order to recover

³⁰ *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007); *See In re Parentage of L.B.*, 155 Wn.2d 679, 695 n. 11, 122 P.3d 161 (2005) ("Whether a statutory enactment acts to preempt or diminish common law rights is determined by legislative intent and it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent."), *cert. denied*, 547 U.S. 1143 (2006). There is nothing in RCW 42.17 to suggest the Legislature intended to preempt common law claims, such as restitution and conversion.

³¹ *See id.* ("Because Appleway illegally charged Nelson the B & O tax . . . Appleway has been unjustly enriched") (emphasis added).

³² *Id.* at 178.

³³ *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 933, 121 P.3d 95 (2005), *aff'd*, 160 Wn.2d 173 (2007).

³⁴ 160 Wn.2d at 183.

money for the wrongfully-collected tax.³⁵ But the majority disagreed. In the majority's view, the plaintiff already had a private right of action: The plaintiff "brought a private right of action in his unjust enrichment claim" and the dealer "has been unjustly enriched with money properly belonging to" the plaintiff.³⁶ Thus, the majority concluded: "We need not address whether RCW 82.04.500 implies a private right of action because Nelson brought an independent claim of restitution [or unjust enrichment]."³⁷

Moreover, there is nothing to suggest that the majority's reasoning was limited to a restitution claim. Had the *Appleway* plaintiff asserted a conversion claim, the Court's reasoning would apply.

The argument for a common law claim here is even more compelling than it was in *Appleway*. In *Appleway*, the statute was the basis for the enrichment being unjust.³⁸ That is, absent the statute, there was nothing unlawful about the dealer passing on a cost—the B & O tax—to its customers, most of whom paid this cost willingly. Still, the Court did not require a private right of action under the statute.

³⁵ *Id.* at 187, 196.

³⁶ *Id.* at 187-88.

³⁷ *Id.* at 188.

³⁸ *Id.*

Here, the Union had no right to take any fees from the non-union Teachers except by the force of statute.³⁹ Conceptually, taking the Teachers' money begins as an unjustified, unjust taking and only becomes justified to the extent that the Union complies with the statutes that authorize taking and use—the combination of RCW 41.59.100 and RCW 42.17.760. When the Union retained the Teachers' money in violation of Section 760, that retention remained unjustified and unjust. Thus, properly understood, once the Union took the Teachers' money, they had claims for conversion and unjust enrichment and the portion of fees retained in violation of Section 760 was never shielded from this common law liability.

The Union may try to distinguish *Appleway* because the plaintiff there also asserted a declaratory judgment claim. But that is not material. The *Appleway* majority was clear that the restitution claim did not depend on the existence of a declaratory judgment claim. Thus, the plaintiff did “not invoke the UDJA [Uniform Declaratory Judgment Act] to obtain

³⁹ See *Davenport*, 127 S. Ct. at 2380 (“public-sector agency fees are in the union’s possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees,” as opposed to situation where “a regulated entity” has “money that has come into its possession without the assistance of governmental coercion of its employees”).

monetary relief.”⁴⁰ Nor did he need to. “Rather, he brought a private right of action in his unjust enrichment claim.”⁴¹

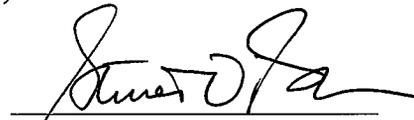
III. CONCLUSION

For the foregoing reasons, the Teachers respectfully request that the Court affirm the trial court’s denial of the Union’s motion to dismiss and instruct the trial court to proceed to trial to determine what portion of the Teachers’ money the Union used for political purposes as defined in 760 and award the Teachers judgment for that amount, plus prejudgment interest.

RESPECTFULLY SUBMITTED, June 26, 2008.

ELLIS, LI & MCKINSTRY PLLC

By:



Steven T. O’Ban
WSBA No. 17265
Chad Allred
WSBA No. 28424
Attorneys for Respondents

⁴⁰ *Id.* at 187 (quotation marks omitted).

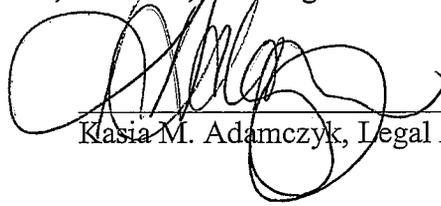
⁴¹ *Id.*

Proof of Service

I declare under penalty of perjury under the laws of the State of Washington that today I caused a copy of this brief to be delivered to the Appellant's attorney at the following address:

Judith Lonnquist, Esq.
1218 Third Avenue, Suite 1500
Seattle, Washington 98101

SIGNED this June 26, 2008, at Seattle, Washington.



Kasia M. Adamczyk, Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
08 JUN 26 PM 4:39
STATE OF WASHINGTON
BY _____
DEPUTY