

No. 68343-8-I

88323-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DUANE STORTI, and a class of faculty members,

Petitioners,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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A. IDENTITY OF PETITIONERS

Duane Storti and a class of faculty members, plaintiffs below, ask the Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its 2-1 decision on December 17, 2012.

A copy of that decision is in the Appendix at pages A-1 through A-19.

C. ISSUES PRESENTED FOR REVIEW

1. Where the University's unilateral contract – set forth in the Faculty Handbook and the President's Executive Order 64 – provided that any faculty member whose performance was deemed meritorious was entitled to a 2% merit salary increase in the upcoming academic year, and the work of class members like Professor Storti in year 2008-09 was found to be meritorious, did the University breach its contract with faculty members by suspending in April 2009 the merit salary increase for academic year 2009-10, after the faculty had substantially performed its obligations entitling them to the 2% merit increase?
2. Where the University previously maintained in May, 2002 (after the academic year was nearly over) that it did not have to comply with the Faculty Salary Policy for work performed during 2001-02 and Storti and the plaintiff class (same class as here except the years are different) successfully litigated the same contract defenses raised by the University here (the 2% raise was discretionary and conditioned on legislative funding) and the court expressly rejected these defenses and determined that the faculty were owed the 2% raise for the 2002-03 academic year, which the University then paid, is the University barred by res judicata and collateral estoppel in this, the second *Storti v. University* class action concerning the same unilateral contract?

D. STATEMENT OF THE CASE

While the Court of Appeals opinion provides an overview of the facts in this case, certain facts bear emphasis for this Court as it decides whether to grant review pursuant to the RAP 13.4(b) criteria.

(1) The University's Faculty Salary Policy

Since 1999-2000, in response to internal University of Washington ("University") faculty and administration discussions involving faculty salary issues, the University had a policy¹ in place in its Faculty Handbook and by an Executive Order of its President *mandating* 2% annual salary increases for faculty whose service in the previous academic year was deemed "meritorious." ("Faculty Salary Policy"). CP 1241-43.

Before the Faculty Salary Policy was approved by the faculty and adopted by the University, the President, Provost, and faculty leaders repeatedly told the faculty that the proposed policy would guarantee the University's commitment of annual 2% merit salary increases to any meritorious faculty and *that such commitment did not depend on receiving*

¹ This Policy was adopted to deal with major faculty pay problems –that money available for pay raises was being focused on "recruitment" (new hires) and "retention" (keeping "star" faculty) while the bulk of the faculty normally received *no* raises. The pre-1999 salary policy meant that (1) new faculty members recently out of graduate school could make as much or more than long-term faculty and (2) faculty members who threatened to leave or obtained offers from other institutions could obtain much larger salaries than other faculty members. Accordingly, the primary function of the policy was to establish small minimum raises for all meritorious faculty as a matter of "first priority." CP 1242.

additional funds from the Legislature for that raise. CP 270, 271, 272, 279, 288-89, 290, 296, 300, 303, 1075-76, 1118-19, 1195, 1305-06.²

After receiving these assurances, the faculty approved the Policy, and the President then promulgated Faculty Handbook §24-70.B, which required that a “salary increase . . . shall be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review” and §24-71.A.1, which required that the President “shall each year make available funds to provide an initial minimum increase to all faculty deemed meritorious under Section 24-55.” CP 1069. After establishing this Policy, the President reported to the

² The University fully recognized the funding implications of this salary policy in times of economic weakness. Provost Lee Huntsman told the Faculty Senate Executive Committee on February 22, 1999:

[T]he real significance of the new policy is however, the priority position given to this sort of merit salary increase. We are saying that, independent of what Olympia does, independent of what the market does, we will make this a first priority from our own available resources. In an era with a budget cut from Olympia, we’re going to be downsizing new-faculty positions in order to fund this first priority. We’re saying than when real crunch times come, we’re no long going to balance the budget on the backs of the continuing faculty in favor of retaining “stars.” We’re going to fund a minimum level of “career progression.”

CP 270. Again, on March 1, 1999, the Provost pointed out the real significance of the policy would be in “lean” years:

[T]he essence of the proposed policy . . . will have almost no impact in normal years, when there is enough to fund everything, but it will have a profound impact in lean years, when it will mean that, despite the lack of additional funding from the Legislature, we will use the recapture money first to do this –even if we have to reduce the faculty count by cannibalizing vacancies. That’s where the power of this policy is.

CP 271.

University Regents in September 1999 that “[a]ll the major recommendations regarding faculty . . . salaries” have been “approv[ed] by the President” and “the new policies . . . provide for minimum annual salary increases for meritorious faculty.” CP 296. After consulting with the faculty, President Richard McCormick, then issued Executive Order 64 on January 7, 2000 which stated:

All faculty shall be evaluated annually for merit and for progress towards reappointment, promotion and/or tenure, as appropriate. A faculty member who is deemed to be meritorious performance *shall* be awarded a regular 2% merit salary increase at the beginning of the following academic year. Higher levels of performance shall be recognized by higher levels of salary increases as permitted by available funding.

CP 305 (emphasis added).

(2) Storti I Litigation

The effect of the Faculty Salary Policy was previously litigated by Professor Duane Storti in a case filed in the King County Superior Court (“*Storti I*”) when the University failed to provide the 2% increase to faculty whose work in the 2001-02 academic year was found to be meritorious. CP 355-71.³ The trial court, the Honorable Mary Yu,

³ The University recognized the 2% increase for meritorious service in academic years 1999-2000, 2000-01, and 2002-03. CP 703 n.1.

certified the class of faculty members CP 487-91.⁴ The court granted summary judgment in favor of the class, ruling that “the plain language [of the Faculty Salary Policy] creates a mandatory duty that requires the University to provide meritorious faculty an annual increase of at least 2%.” CP 704. The court rejected the University’s argument that it retained discretion to not fund a 2% merit raise or that and such increase was conditioned upon legislative funding, ruling that the funding caution in the Faculty Salary Policy allowed the University to “reevaluate” the policy, but agreed with the class that the provision reserved the University’s right to change the policy at some future date, going forward, not to revoke or repeal it in after the work for the raise had been substantially performed. CP 705-06.

After losing on the merits in *Storti I*, the University settled with the class, agreeing to provide back pay and re-setting faculty salaries to reflect the omitted 2% raise. CP 707-35. The court approved the settlement, entering findings of fact and conclusions of law. CP 736-42.

(3) Storti II Litigation

At the beginning of the 2008-09 academic year, the Faculty Salary Policy remained in place, promising Storti and fellow faculty members that they would receive a 2% raise for meritorious work performed in

⁴ The *Storti I* class is the same as the *Storti II* class although the years at issue are different. CP 1485.

2008-09. Because of budget-related fears, in April 2009, after the faculty's work was substantially performed for academic year 2008-09, the President and the Board of Regents voted to suspend the policy for a two-year period; Executive Order 29 was issued to implement that suspension policy. CP 1244-45.

In the meanwhile, Professor Storti's performance for the academic year 2008-09 was found in May 2009 to be meritorious in accordance with the Faculty Handbook. CP 1105. He, like other faculty members, was denied a 2% increase for academic year 2009-10, because the University applied Executive Order 29 to work already meritoriously performed in 2008-09. CP 2, 6.

The present case ("*Storti II*") was commenced in the King County Superior Court in December, 2010. CP 1-8.⁵ Judge Hilyer certified the same class of faculty members as in *Storti I*. CP 1483-86. Both parties filed summary judgment motions. The class contended that the University breached its unilateral contract with the faculty in the Handbook and Executive Order 64 by applying the suspension of Executive Order 29 to work performed for 2008-09,⁶ and that the University was also precluded

⁵ It was assigned to the Honorable Bruce Hilyer after the University filed an affidavit of prejudice against Judge Yu.

⁶ The class did not claim Executive Order 29 was invalid, only that it did not apply for the raises required in academic year 2009-10.

by principles of res judicata from re-litigating the legal issues inherent on the Faculty Salary Policy resolved in *Storti I*. The University opposed the class's motion and supported its own on the same grounds that it argued in *Storti I*, i.e., that a provision in Executive Order 64 made the 2% merit raise discretionary with the University and contingent on legislative funding. ("Re-Evaluation Provision").⁷ The trial court granted the University's motion and denied the class's motion on liability. CP 1040-41, 1487-89.

The Court of Appeals affirmed the trial court in a 2-1 decision, determining that the Re-Evaluation Provision authorized the University to not only "reevaluate" its unilateral offer to the faculty but implicitly to withdraw it,⁸ even though the faculty had substantially performed its acceptance of the offer for the bulk of academic year 2009-10 in reliance

⁷ It states:

This Faculty Salary Policy is based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can only be rewarded at the expense of the size of the University faculty. Without the influx of new money or in the event of decreased State support, a re-evaluation of this Faculty Salary Policy may prove necessary.

CP 1290.

⁸ The trial court determined that the Re-Evaluation Provision implicitly allowed the University to revoke its offer. RP 24.

upon the Faculty Salary Policy. Op. at 7-12. The majority opinion was oblivious to the substantial performance of the offer and did not cite this Court's key decision in *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 (1985) on the need of a public agency to *expressly* reserve the authority to modify a unilateral offer. *Carlstrom* rejects the notion of an "implicit" reservation of rights.

The majority also rejected the class's res judicata argument by asserting that the two cases did not involve the same cause of action, even though *precisely the same issues involving the same contract* were present in both cases, albeit in different academic years. Op. at 14-16.

The majority opinion provoked a sharp dissent from Judge Applewick, no stranger to faculty salary issues from his service for many years in the Legislature, in which he stated:

The contract adjusts compensation based on the academic year. It provides for performance evaluations based on the academic year. It promised a raise for the subsequent academic year based on that evaluation. The contract must be analyzed in light of these temporal provisions. I acknowledge that the contract contained a "Funding Cautions Section" that stated, "[A] re-evaluation of this Faculty Salary Policy *may* prove necessary." This is a possibility, in the future. Properly read, re-evaluation has application to future academic years. It cannot be reasonably read to be an agreement by the faculty that the University of Washington had the unilateral right to modify or cancel the promised raise for meritorious faculty in the middle of and effective for the current academic contract year.

The promise of the 2 percent raise for meritorious faculty performance was critical of the University of Washington's desire to retain quality faculty. It worked, the faculty stayed. The promise was not that the University of Washington in its discretion "might" grant a raise. The language is "shall." And, the funding caution was not self-executing. It did not expressly condition the promised 2 percent raise for the academic year as due only if specific legislative funding was provided. Nor did the policy expressly state that the raises promised were subject to cancellation if overall funding by the legislature was deemed inadequate. The promise was not expressly conditional as to the current academic year's work and the right to raises in the following year.

. . .

The faculty has substantially performed their service when the executive order was promulgated. The right to the promised raise was vested. The performance was evaluated as meritorious. The University of Washington breached the agreement when it failed to pay the promised raises.

Dissent at 1-2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED⁹

Both issues, the unilateral contract of the faculty and the res judicata issue, merit review.¹⁰

⁹ This Court is fully familiar with the criteria governing acceptance of review in RAP 13.4(b). This case merits review under RAP 13.4(b)(1), (2), or (4).

¹⁰ This case involves public employment at a major State institution, the University of Washington. The decision also has significant potential expenditure implications. This Court granted review of Court of Appeals decisions or direct review in similar cases. *See, e.g., Carlstrom, supra* (dispute between community college and teachers union over cancelling of contractual raises after the Governor declared a fiscal emergency—direct review); *Caritas Services, Inc. v. Dep't of Soc. & Health Servs.*, 123

(1) The Court of Appeals Misapplied the Law on Subjecting Public Contracts to a Legislative Funding Contingency

The parties agreed below that the Faculty Salary Policy is a unilateral contract. Here, the Faculty Salary Policy, as set forth in the Handbook and Executive Order 64, constituted a part of the University's unilateral contract with the faculty.¹¹ This contract is subject to a traditional contract analysis. *Multicare Med. Ctr. v. Dep't Soc. & Health Servs.*, 114 Wn.2d 572, 583-84, 790 P.2d 124 (1990); *St. John Med. Center v. State ex rel. Dep't of Soc. & Health Servs.*, 110 Wn. App. 51, 38 P.3d 383 (2002). Op. at 10.

The class members performed, or substantially performed, in

Wn.2d 391, 869 P.2d 28 (1994) (impairment of existing nursing home contracts by subsequent legislative action—direct review); *Mader v. Health Care Authority*, 149 Wn.2d 458, 70 P.3d 931 (2003) (entitlement of part-time faculty to health insurance -- review of Court of Appeals decision); *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008) (retired employees entitlement to continued health care and welfare benefits provided in collective bargaining agreement—review certified by Court of Appeals); *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011) (entitlement of public defenders to public pension—direct review). This is a case of substantial public interest that should be decided by this Court, given the issues involving a major public institution and its employees with significant fiscal implications for the State and its potential effect on future public contracts. RAP 13.4(b)(4).

¹¹ That an employer's offer of a bonus or a raise to an employee after work is performed is a "unilateral contract" binding upon the employer when the employee accepts the offer by performing the work is clear in the case law. *Scott v. JF. Duthie & Co.*, 125 Wash. 470, 471, 216 Pac. 853 (1923) (employer bound by promise to given employee bonus when employee accepted the offer by performing); *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 159-60, 19 P.2d 919 (1933) (employer's practice of paying a year-end bonus created an implied contract for a bonus which the employee accepted and earned by working); *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 292-94, 505 P.2d 1291 (1973), *review denied*, 82 Wn.2d 1004 (1973), *cert. denied*, 414 U.S. 975 (1973). The majority distinguished these controlling cases only on the basis of the Re-Evaluation Provision. Op. at 11-12.

response to the University's offer by providing meritorious service in academic year 2008-09. That was the requisite offer and acceptance for a unilateral contract. But the majority opinion is largely oblivious to the fact that the University could not unilaterally withdraw the policy so as to deprive the faculty of the 2% merit increase for the 2009-2010 academic year precisely because the faculty substantially performed in academic year 2008-09 in reliance on the University's offer in the Faculty Salary Policy. *Carlstrom, supra* (faculty pay raise could not be rescinded). This Court explained again that "[i]n the employment context, an employee who renders service in exchange for compensation has a vested right to receive such compensation." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828 n.5, 194 P.3d 221 (2008). Indeed, "a unilateral contract becomes enforceable and irrevocable 'when performance has occurred in response to a promise.'" *Id.* at 848. The Court stated that "[a]n employer cannot expect to accept the benefit of continued service from its employees while reserving the right to not compensate those employees once it has received the full benefit of their service." *Id.* at 848-49.¹² The majority misses the

¹² This Court in *Navlet* cited 1 *Corbin on Contracts* § 3.16 at 388 (1993) with approval, *id.* at 848, which states:

[A]n employer's promise is usually made on condition that the employees remain in service for a stated period. In such cases ... it [is] unnecessary for the employee to give any notice of assent. It is sufficient that the employee continues in the employment as expressly

point of *Navlet* by focusing on the fact it was a deferred compensation case. Op. at 12-13.

Washington recognizes the doctrine of substantial performance in contract law. *Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994); *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340, *review denied*, 132 Wn.2d 1009 (1997) (client may not avoid paying contingent fee by terminating lawyer once that lawyer has substantially performed contract).

In the public employment context, this Court has offered some latitude to public employers to make employment contracts contingent on appropriations from legislative bodies to fully fund *prospective* elements of the employment contract. But such latitude must be *expressly* articulated in the contract. *Carlstrom*, 103 Wn.2d at 394-95. (provision making contract for future percentage pay raises for community college faculty “subject to all present and future acts of the legislature” did not make contractual salary increase contingent on legislative funding; in absence of express language making increase contingent on legislative appropriation, State impaired contract when legislation was enacted

or impliedly requested.... A unilateral contract exists when the period of service is substantially completed. Prior to that time the offer becomes irrevocable.

2 *Corbin on Contracts* § 6.2 at 217 (2005) states that “although the bonus is not fully earned until the service had continued for the full time, after a substantial part of the service has been rendered the offer of the bonus cannot be withdrawn without a breach of contract.”

abrogating increases). This Court emphasized that “[t]he Legislature knows how to use plain English to make existing contracts subject to future modification,” 103 Wn.2d at 398.¹³

In public contracts, this Court has often employed *Carlstrom’s* directive that if a public agency wishes to make a contract contingent on legislative appropriations or budgetary concerns, such contingency must be express. In *Caritas, supra*, the issue was whether amendments to the nursing home reimbursement statute unconstitutionally impaired contract rights by retroactively reducing reimbursement rates under Medicaid. The contract there provided that the contract was governed by existing Medicaid law or the law as it may be amended in the future. 123 Wn.2d at 404. This Court found such language was not sufficiently specific to allow the Legislature to subject the existing contract to future, retroactive modification. “[O]ur case law requires such reservation clauses to be made *explicitly* contingent on future acts of the Legislature with retroactive effect.” *Id.* at 406 (emphasis in original). The Court stated: “To forestall confusion, we note that states or agencies may put potential

¹³ To make a seeming promise of additional pay discretionary in the private contract setting, the employer must *explicitly* state that the additional pay is optional or discretionary. *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 457-58, 287 P.2d 735 (1955); *Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 200-03, 665 P.2d 414, *review denied*, 100 Wn.2d 1011 (1983). The majority relies on these illusory promise cases, erroneously believing the language in the promises there was similar to that of the Re-Evaluation Provision. *Op.* at 11.

contractors explicitly on notice that the terms of a public contract are subject to retroactive adjustments as the whims or the budgetary necessity of the state may dictate.” *Id.* at 406-07 n.9. *See also, Wash. Fed’n of State Employees v. State*, 127 Wn.2d 544, 563, 901 P.2d 1028 (1995). The Court has also reiterated that reservation clauses must adhere to policies of fairness, such as those underlying the public pension cases.¹⁴

But the majority’s analysis of the Re-Evaluation Provision is at odds with this clear authority. The majority affirmed the trial court’s decision that was based on the belief that the Provision implicitly reserved the University’s rights stating that the Re-Evaluation Provision put the faculty on notice that the Policy was subject to modification. *Op.* at 8. Implicit notice, however, is not the test. *Nowhere* is there an *express* reservation by the University that the Policy is subject to legislative appropriation. Rather, the clause at issue speaks *only* in terms of re-evaluation. As the majority notes, re-evaluation means precisely that someone will look again at something. *Op.* at 9 n.8. It is not the same as what *Carlstrom* required: an *express* statement that the public contract (here, the offer) is *no longer valid* if the Legislature fails to appropriate the

¹⁴ *Caritas*, 123 Wn.2d at 407 n.9, citing Laurence H. Tribe, *American Constitutional Law* 618-19 (2d ed. 1988) (“noting that the most basic purposes of the contract clause point to the simple principle that the government must keep its word”), and citing *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 117 L. Ed.2d 328 (1992) (retroactive legislation presents problems of unfairness where it deprives citizens of legitimate expectations).

requisite resources. The Re-Evaluation Provision is insufficient to meet this Court's *Carlstrom* test.¹⁵

The majority also makes passing reference to *Nye v. University of Washington*, 163 Wn. App. 875, 263 P.3d 1000 (2011), *review denied*, 173 Wn.2d 1018 (2012). Op. at 13-14. However, that decision does not support its analysis of the class's claim here. In that case, Professor Nye focused on the propriety of the procedure by which Executive Order 29 was adopted. He did not argue that the Faculty Salary Policy created a unilateral contract, the class's core contention here. The *Nye* court did not address the Re-Evaluation Provision, nor did it discuss substantial performance. *Nye* simply does not affect the issues at stake here.

It is important for this Court in lean budget times, when state and local government employees' employment contracts are impacted, to reaffirm that the foregoing principles of unilateral contract apply. The Court of Appeals decision contradicts this Court's decisions in *Carlstrom*, *Caritas* and *WFSE*. Review is merited. RAP 13.4(b)(1).

(2) The Decision in *Storti I* Has Preclusive Effect

A second issue for review is the preclusive effect of the court's decision in *Storti I*. Under res judicata principles, the University is

¹⁵ The majority asserts that raises are different than other types of compensation such as bonuses. Op. at 11. *Carlstrom* rejected this position, holding that a raise could not be withheld. 103 Wn.2d at 394-95.

precluded from making the arguments it now advances on the Faculty Salary Policy. Under that doctrine, issues resolved in *Storti I* carry preclusive effect in *Storti II*. That doctrine requires a concurrence of identity between the cases as to (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons or person for or against whom the claim is made. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009).¹⁶ Res judicata is the rule in Washington, not the exception. *Hisle v. Todd Pacific Shipyard Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

The present case qualifies on all of the res judicata grounds — a summary judgment was entered on liability, the case involves the same subject matter (the University’s unilateral contract is the same, only the year of the breach is different), and it involves the very same parties. In fact, in the earlier *Storti I* case, Judge Yu determined that the Faculty Salary Policy created a contract between the University and the faculty, and *rejected the University’s argument that the Re-Evaluation Provision was an express reservation of any right on the University’s part to walk away from the contractual obligation to the faculty if legislative appropriations were inadequate* — the core of the Court of Appeals’

¹⁶ Those principles apply here, even though *Storti I* was resolved on summary judgment and later settled. *Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004) (res judicata applies to issues resolved on summary judgment).

majority opinion. In adopting the Faculty Salary Policy, the University made an express determination that the 2% increase policy would persist at the beginning of each academic year, even in times of inadequate funding by the Legislature and even if other fiscal choices such as layoffs were required.

The center piece of the Court of Appeals majority opinion's res judicata analysis is its determination that *Storti I* and *II* do not involve the same claims. Op. at 14-15. The court recognized the proper test for determining if claims are identical articulated by this Court in *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983):

(1) prosecuting the second action would destroy rights or interests established in the first judgment, (2) the evidence presented in the two actions is substantially the same, (3) the two actions involve infringement of the same right, and (4) the two actions arise out of the same transactional nucleus of facts.

Op. at 14-15. But it decidedly misapplies the test. The very same core issues were at stake in *Storti I* and *II* — What is the meaning of the Faculty Salary Policy and the existence of a unilateral contract for faculty members? Did the Re-Evaluation Provision constitute an express reservation of the University's rights?

In order to satisfy the identity causes of action prong of the four-part test for res judicata in Washington, the causes of action in the two

cases need not be identical in every respect, although *Storti I* and *II* involved identical causes of action by essentially the identical class. Two recent Court of Appeals decisions from Division II and III are illustrative. In *Marshall v. Thurston County*, 165 Wn. App. 346, 267 P.3d 491 (2011), Division II applied res judicata in a case where the plaintiffs filed suit against the County in 2003 for damages arising out of floods between 1996 and 1999. They settled their claims with the County. When a further flood occurred in 2009, the plaintiffs again filed suit. The Court upheld dismissal of the 2009 action on res judicata grounds because the causes of action were identical:

Except for the separate damages caused by the separate floods, all of the evidence necessary to recover on each suit is identical. In both suits, the Marshalls assert the same rights—the rights to compensation for the County’s negligence, trespass, and inverse condemnation, based on the installation of the storm water diversion device. And the transactional nucleus of facts for both actions is the same—the County’s installation of the storm water diversion device, which did not provide for adequate runoff and, instead, redirected surface storm water onto the Marshall’s property.

Id. at 354-55. The majority there rejected the dissent’s view that the 2003 and 2009 complaints did not arise from the same transactional nucleus of facts.¹⁷

¹⁷ The fact that this case and *Marshall* both provoked dissents suggests a need for clarification by this Court of the identical causes of action facet of the test for res judicata.

In *Spokane County v. Miotke*, 158 Wn. App. 62, 240 P.3d 811 (2010), *review denied*, 171 Wn.2d 1013 (2011), Division III applied res judicata where citizens filed a challenge to Spokane County's expansion of the urban growth area for the County under the Growth Management Act before the Growth Management Hearings Board. The Board found the County's UGA expansion to be improper and the County withdrew it, which the Board approved. The citizen filed a new action challenging the withdrawal of the UGA expansion. Division III upheld the trial court's dismissal of the second action on res judicata grounds:

While Ms. Miotke argues the subject matter of her second petition is different (i.e., the adoption of a UGA versus the withdrawal of the designation of a UGA) the subject matter involves claims and issues that were litigated, or might have been litigated in her first petition.

Id. at 67-68.

The causes of action in *Storti I* and *II* were identical, as both pertained to the effect of the Faculty Salary Policy and the University's Re-Evaluation Provision. The Court of Appeals decision here cannot be squared with cases like *Marshall* and *Miotke*.

The trial court erred in allowing the University to relitigate the very same issues it lost in *Storti I*. Review is appropriate under RAP 13.4(b)(1) and (2).

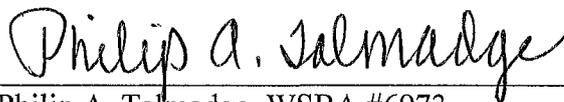
F. CONCLUSION

This case presents two significant issues for this Court's consideration under RAP 13.4(b). Both issues involve a major State institution and public employment contracts, and carry significant fiscal implications. The principles at issue here have implications for other public employment contracts. Review under RAP 13.4(b) is merited.

This Court should reverse the Court of Appeals and remand the case to the trial court with directions to enter summary judgment on behalf of the class and to award the class its fees. Costs on appeal, including reasonable attorney fees, should be awarded to the class.¹⁸

DATED this 14th day of January, 2013.

Respectfully submitted,



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¹⁸ Insofar as the class is seeking fees on the basis of the common fund exception, the Court may wish to remand all fee issues to the trial court. RAP 18.1(i).

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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DUANE STORTI, and a class of faculty)	
members,)	No. 68343-8-1
)	
Appellants,)	DIVISION ONE
)	
v.)	
)	
UNIVERSITY OF WASHINGTON,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: <u>December 17, 2012</u>

Spearman, A.C.J. — Duane Storti, representing a class of over 3,000 faculty members at the University of Washington, appeals an order dismissing the class’s breach of contract claim against the University on summary judgment. At issue in this appeal is (1) whether the University breached the terms of the Handbook by suspending 2 percent raises for meritorious faculty for the 2009-2010 academic year and (2) whether res judicata bars the University’s arguments. We hold the University did not breach the terms of the Handbook as a matter of law. Although the raise provision set forth in the Handbook made percent raises for meritorious faculty mandatory, the provision was not in effect at the relevant time, in the beginning of academic year 2009-2010. To the extent

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the class claims the raise provision made an offer for a unilateral contract, we must give effect to all of the Handbook's terms in defining the nature of any offer or promise. The Handbook plainly and expressly cautioned faculty that the salary policy, including the raise provision, was subject to change and that any changes, if imposed by executive order, would be effective when the order was signed. Finally, res judicata does not apply. Concluding that the trial court properly dismissed the class's breach of contract claim, we affirm.

FACTS

This appeal involves provisions in the University's handbook ("the Handbook") addressing faculty salary.¹ On January 7, 2000, University president Richard McCormick issued Executive Order No. 64 (EO 64), titled "Faculty Salary Policy" ("salary policy"). Clerk's Papers ("CP") at 254, 1241-43. The salary policy, incorporated into the Handbook, was designed "to allow the University to recruit and retain the best faculty" by "[providing] for a predictable and continuing salary progression for meritorious faculty." CP at 1241. One provision ("raise provision") of the salary policy, in a section titled "Allocation Categories," states:

All faculty shall be evaluated annually for merit and for progress towards reappointment, promotion and/or tenure, as appropriate. A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year. Higher levels of performance shall be recognized by higher levels of salary increases as permitted by available funding.

¹ The Handbook contains rules, regulations, and executive orders related to students, faculty, staff, and the administration.

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CP at 1243. The salary policy concludes with a "Funding Cautions" Section that states:

This Faculty Salary Policy is based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can only be rewarded at the expense of the size of the University faculty. Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.

CP at 1243.²

From academic year 2000-2001 through academic year 2008-2009, the University awarded 2 percent raises for meritorious faculty each year, except for academic year 2002-2003. In 2002, the Washington State Legislature did not appropriate funds for University employee pay raises. That year, the University's board of regents, in adopting a university budget, made the decision not to provide 2 percent raises to faculty for academic year 2002-2003.

Subsequently, Storti, an associate professor at the University, filed a class action lawsuit ("Storti I") in superior court, alleging that the University had

² A section titled "Allocation Procedure" further describes funding of faculty salaries:

Resources from both external and internal sources are used to fund faculty salaries. The Faculty Salary Policy anticipates new resources being made available from the Legislature, including legislative allocations for faculty salary increases and special legislative allocations for recruitment and retention, or through funds from tuition increases. Funds centrally recaptured from faculty turnover, grant, contract, and clinical funds available to individual units, and other internal resources which the Provost might identify are also used to support the plan.

CP 1241-42.

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breached a contractual obligation under the salary policy to pay merit increases to eligible faculty during the 2002-2003 academic year. The court certified the class of faculty members. It then granted the class's motion for summary judgment, concluding that "the plain language [of the salary policy] creates a mandatory duty that requires the University to provide meritorious faculty an annual merit increase of at least 2%." CP at 704. The court found that "the word 'reevaluation' reserves the right of the University to change the policy at some future date," but the court did not reach the question of "what process would have been utilized to repeal, evaluate, or modify the Faculty Salary Policy." CP at 705-06. Before the court entered final judgment, the University settled with the class. The settlement agreement was approved by the court on May 12, 2006.³

In March 2009, faced with a 12 percent budget reduction for the 2009-2011 biennium, University president Mark Emmert and David Lovell, chair of the faculty senate, appointed faculty and administration members to a "Committee to Re-Evaluate Executive Order No. 64." CP at 1226. The committee's reevaluation resulted in a proposed executive order, which Emmert submitted to the faculty senate for review in accordance with the procedures set forth in the Handbook. The faculty senate reviewed the proposed executive order. Lovell consulted with Emmert about revisions proposed by the faculty, and Emmert incorporated many of those suggestions into his executive order.

³ The settlement agreement provided that the agreement could not be used to establish liability in any subsequent proceeding.

On March 31, 2009, Emmert issued Executive Order No. 29 ("EO 29"). EO 29 suspended certain portions of EO 64 (the salary policy), including the 2 percent raise provision, until the conclusion of the 2009-2011 biennium. It states, in pertinent part:

Partial Suspension of Executive Order No. 64. In light of the economic circumstances facing the University, the following portions of Executive Order No. 64 must be and are immediately suspended:

1. The phrase "regular merit" in the first sentence of the subsection entitled *Allocation Categories*.
2. The sentence that reads, "A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year."
3. The sentence that reads, "If deemed meritorious in the next year's review, the faculty member shall receive a regular 2% merit increase at the beginning of the following academic year."
4. The phrase, "In addition to regular merit salary allocations," in the sentence in the subsection entitled *Promotion*.

All other portions of Executive Order No. 64 remain in effect. This suspension shall expire at the conclusion of the 2009-11 biennium.

CP at 1244.

Faculty members were notified of the promulgation of EO 29 in an April 10, 2009 e-mail from Lovell. The board of regents endorsed EO 29 and directed that it be added to the Handbook on April 16. The board resolved that EO 29 "will prevail over any University policies, rules, or codes or regulation to the extent they may be inconsistent." CP at 1247. In May 2009, the class members' performance for academic year 2008-2009 was found to be meritorious. But because EO 29 was in effect, they did not receive raises in academic year 2009-

2010.

In October 2009, associate professor Peter Nye filed a putative class action lawsuit in superior court, alleging that the University committed a breach of contract by suspending the 2 percent raises for the 2009-2011 biennium. Nye argued that the University lacked authority to unilaterally suspend the salary raise and that, even if it had such authority, the suspension could not apply to the 2009-2010 academic year because he had already earned a merit raise for that year. The superior court dismissed Nye's action on summary judgment. This court affirmed, and review was denied. Nye v. University of Washington, 163 Wn. App. 875, 260 P.3d 1000 (2011), rev. denied, 173 Wn.2d 1018, 272 P.3d 247 (2012).

While Nye's appeal was pending, Storti filed the present class action against the University in December 2010.⁴ The superior court certified the same class of faculty members as in Storti I.⁵ The action was, like Nye's, a breach of contract claim based on the University's suspension of the 2 percent raises for the 2009-2010 academic year. The class's theory was that the University breached a unilateral contract by suspending raises for 2009-2010 because the class had substantially performed in the 2008-2009 academic year. The class also argued that res judicata principles precluded the University from relitigating issues resolved in Storti I.

⁴ Nye was granted permission to intervene in this case, but only for the limited purpose of opposing certification. The superior court certified the class, excluding Nye from the class.

⁵ A different superior court judge was assigned to the second class action case brought in Storti's name.

Both the class and the University moved for summary judgment. The class also filed a motion for judgment on the pleadings. The superior court granted the University's motion and dismissed the action. The court stated it is "implicit in the promise [of a 2 percent raise] that it is changeable upon review" and that the inquiry was "really the nature of the promise." Report of Proceedings (RP) at 24. It denied the class's motions. This timely appeal followed.

DISCUSSION

We review the trial court's summary judgment decision de novo. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. CR 56(c).

Breach of Contract

In determining whether the trial court properly ruled that the University did not breach its contract as a matter of law, we focus on the terms of the salary policy and the greater Handbook. Our review of those terms is governed by traditional principles of contract law. Kloss v. Honeywell, Inc., 77 Wn. App. 294, 298, 890 P.2d 480 (1995) (employment contracts governed by same rules as other contracts). Under such principles, our goal is to effectuate the intent of the parties by giving the words in a contract their ordinary, usual, and popular meaning unless a different meaning is clearly indicated. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). We read the terms of a contract together, so that no term is rendered ineffective or

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meaningless. Cambridge Townhomes v. Pac. Star, 166 Wn.2d 475, 487, 209 P.3d 863 (2009).

The main issue in dispute is when EO 29 and its changes to the salary policy—specifically, its suspension of the raise provision—could begin to take effect; the parties agree that the University had the authority to reevaluate the salary policy and that it followed the Handbook-prescribed procedures for doing so. The class argues EO 29 could not take effect until academic year 2010-2011, while the University maintains it was effective on the date EO 29 was signed by Emmert (March 31, 2009) and therefore applied to academic year 2009-2010.

We agree with the University. First, we observe that the salary policy made the 2 percent raises mandatory (“shall be awarded”⁶) if the specified conditions were met and the raise provision was in place at the time faculty reviews were conducted and raises were determined. But the raise provision was suspended and not in effect at the beginning of academic year 2009. Moreover, such suspension was undisputedly proper. The University’s contractual obligation to provide the raise did not exist at the relevant time.

Furthermore, it is also undisputed that the “Funding Cautions” and other language of the Handbook notified faculty that the salary policy was subject to modification.⁷ The “Funding Caution” states that “[w]ithout the influx of new

⁶ The word “shall” creates a mandatory duty, not a discretionary or optional duty. Scannell v. City of Seattle, 97 Wn.2d 701, 704-05, 648 P.2d 435 (1982).

⁷ The class’s brief concedes this point, stating, “[T]he ‘reevaluation’ language notified the faculty that the promise of a 2% raise for meritorious work was not permanent and it could be changed

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money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.”⁸ Furthermore, Section 12-21 of the Handbook addresses the president’s authority to promulgate executive orders and describes the process and timeline for doing so. Finally, Section 12-12 declares the board of regents’ ultimate authority to manage the University and to amend or modify any existing rule or executive order.

The class argues, however, that under the “reevaluation” language of the “Funding Cautions Section,” any changes to the salary policy could only apply prospectively. But we find no language in the salary policy or elsewhere in the Handbook that suggests that changes to the policy would not be effective until the following academic year. To the contrary, the Handbook states that an executive order “become[s] effective on the day signed by the President. . . .” CP at 1234. Likewise, we are unable to ascertain any promise in the salary policy that as soon as meritorious work is performed for most of an academic year, the raise is vested or earned at that time. Indeed, such a promise would be untenable where a faculty member’s performance over an academic year cannot be determined meritorious until the conclusion of that year.

The class’s position that the suspension of the raise provision could not begin until academic year 2010-2011 is based on its theory that the salary policy

in the future, but such a change could apply only prospectively.” Brief of Appellant at 2.

⁸ “Reevaluation” is defined as “the act or result of evaluating again.” Webster’s Third New Intern. Dict. Unabridged, p. 1907 (1976). “Evaluate” means “to examine and judge concerning the worth, quality, significance, amount, degree, or condition of.” *Id.*, p. 786. Therefore, the condition of the raise provision could be reexamined, with the clear implication that upon reexamination it could be changed.

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made, at the beginning of the 2008-2009 academic year, an offer for a unilateral contract.⁹ Specifically, an offer of a 2 percent raise to be awarded at the beginning of the 2009-2010 academic year if meritorious work is performed for 2008-2009. The class asserts that it accepted the offer by performing meritoriously (i.e., substantially performing) for most of the 2008-2009 academic year, thus triggering the University's obligation to award the raise for 2009-2010. The University responds that whether the salary policy is characterized as a unilateral contract, a bilateral contract, or a policy, its terms (along with other provisions in the Handbook) permitted the University to suspend the raise provision for 2009-2010 and informed faculty that it could do so.

We again agree with the University. The interpretation of a unilateral contract, as with any other contract, is governed by the specific language of that contract. St. John Medical Center v. State ex rel. Dep't of Soc. & Health Servs., 110 Wn. App. 51, 65, 38 P.3d 383 (2002). Regardless of how the raise provision specifically is characterized, all of the terms of the salary policy and the greater Handbook must be read together in determining whether the University breached the contract. Even if the raise provision constituted an offer for a unilateral contract, any terms of the offer necessarily included the "Funding Caution" and its express warning that the salary policy could be reevaluated.¹⁰

⁹ The difference between a unilateral contract and a bilateral contract is the method of acceptance; the latter is created by a mutual exchange of promises while the former is created by the offeree's performance in response to the offeror's offer. Higgins v. Egbert, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947); Multicare Medical Center v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 584, 790 P.2d 124 (1990). In a unilateral contract, once the party to whom the offer is made performs, the offer is accepted and the contract becomes executed. Cook v. Johnson, 37 Wn.2d 19, 23, 221 P.2d 525 (1950).

The class's reliance on cases involving implied or unilateral contracts for bonuses is misplaced. It cites Powell v. Republic Creosoting Co., 172 Wash. 155, 19 P.2d 919 (1933), Scott v. J.F. Duthie & Co., 125 Wash. 470, 216 P. 853 (1923), and Simon v. Riblet Tramway Co., 8 Wn. App. 289, 505 P.2d 1291 (1973). In Powell and Simon, the courts held that employers' practices of paying annual bonuses for over ten years created implied contracts for bonuses, which the employees accepted and earned by working. Powell, 172 Wash. 155 at 158-60; Simon, 8 Wn. App. at 291-93. In Scott, the court held that an employer was bound by its promise of a bonus to an employee, made to induce the employee to continue working for the employer until the completion of a project, where the employee accepted the offer by performing. Scott, 125 Wash. at 471-72.

These cases are distinguishable because they do not involve the contractual language present in this case, informing faculty that the salary policy could be reevaluated and informing faculty that changes made by executive order are effective when the order is signed. Such language makes this case more similar to cases in which employers expressly informed employees that they retained discretion to withhold or decrease bonuses. See Spooner v. Reserve Life Ins. Co., 47 Wn.2d 454, 457-59, 287 P.2d 735 (1955) (no enforceable contract for bonus where company told employees in bulletin that bonuses were voluntary and could be withheld by employer with or without

¹⁰ We need not, and do not, make a determination as to whether the raise provision constituted a unilateral contract or a bilateral contract.

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notice); Goodpaster v. Pfizer, Inc., 35 Wn. App. 199, 200-03, 665 P.2d 414 (1983) (no enforceable contract for bonus where employment manual stated bonuses were discretionary and employer reserved right to make decisions affecting amount of bonus). While the salary policy did not make the raises themselves discretionary if the conditions were met and the policy was in place, the policy expressly warned that it could be reevaluated.

Furthermore, Powell, Scott, and Simon involve bonuses owed to employees for work already completed. The class argues that a raise is similar to a bonus because they are both “additional compensation” earned after satisfactory performance, a bonus being added to an employee’s base pay and a raise increasing an employee’s base pay. But for purposes of the issue before us, we believe there is a critical distinction between bonuses that are compensation for work already completed and raises that are conditioned on and based on past meritorious performance but relate to future, as-yet unearned compensation. See Nye, 163 Wn. App. at 887 (past wages earned differ from raise, an increase in future wage or salary).

A future raise is also unlike a vested right to retirement benefits, so the class’s citation to Navlet v. Port of Seattle, 164 Wn.2d 818, 194 P.3d 221 (2008) is likewise inapposite. The Navlet court held:

[R]etirement welfare benefits conferred in a collective bargaining agreement constitute deferred compensation where the parties negotiate for such benefits as part of the total compensatory package. The compensatory nature of the benefits creates a vested right in the retirees who reached eligibility under the terms of the applicable collective bargaining agreement. Once vested,

the right cannot be taken away and will survive the expiration of the agreement.

Id. at 841 (citing Litton Fin. Printing Div. v. Nat'l Labor Relations Bd., 501 U.S. 190, 207, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991)). The circumstances in Navlet are not present here. This case does not involve vested retirement benefits or any other type of deferred compensation.

Our conclusion that the University did not breach its contract is supported by our decision in Nye, which involves substantially the same facts and the same legal claim, breach of contract. See Nye, 163 Wn. App. at 877. We held there was no breach of contract because “the evidence in the record clearly demonstrates that the university acted pursuant to its statutory and contractual authority when it suspended the faculty merit raises.” Id. at 888. To distinguish Nye, the class contends that Nye asserted different arguments—specifically, that the suspension of the salary policy breached a bilateral or implied contract and that EO 29 was insufficient to suspend the raises. Id. at 885-88. But we stated:

Nye also contends that the handbook is a bilateral contract, which the president and board may not unilaterally amend. Even if Nye is correct, any distinction between bilateral and unilateral contracts makes no difference when the provisions of that contract allow for the modification that occurred. The handbook’s express terms warn faculty that the provision of merit raises may be reevaluated, allow the president to issue executive orders, and state that the board may modify rules formulated by the president or faculty.

Nye, 163 Wn. App. at 886 (emphasis added). Though the class’s specific argument may be different from Nye’s, both plaintiffs asserted a breach of contract claim based on the University’s alleged failure to abide by the salary

policy. The class's arguments as to why unilateral contract principles merit a different result here are not well taken.

Res Judicata

The class also argues that summary judgment should be reversed because res judicata principles preclude the University from relitigating issues decided in Storti I. Res judicata is an issue of law reviewed de novo. Martin v. Wilbert, 162 Wn. App. 90, 94, 253 P.3d 108 (2011), rev. denied, 173 Wn.2d 1002, 268 P.3d 941 (2011). Res judicata is a doctrine of claim preclusion designed to bar the relitigation of claims that were or should have been litigated in a former action. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 859, 762 P.2d 1 (1986). It applies where the subsequent action involves the same (1) subject matter, (2) cause of action, (3) persons or parties, and (4) quality of persons for or against whom the decision is made as did a prior adjudication. Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011). To apply res judicata, the prior case must have been resolved by a valid and final judgment on the merits. Schoeman, 106 Wn.2d at 860.

The University argues that res judicata does not apply because the "same cause of action" requirement was not met.¹¹ We agree. The following criteria are helpful in determining whether two causes of action are identical:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same

¹¹ The University also disputes that Storti I was resolved by a final judgment on the merits.

transactional nucleus of facts.

Kuhlman v. Thomas, 78 Wn. App. 115, 122, 897 P.2d 365 (1995) (quoting Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)) (emphases added).

This lawsuit does not involve “substantially the same evidence” as Storti I, nor does it arise out of the “same transactional nucleus of facts.” Storti I involved the University’s refusal to fund raises in 2002 while leaving EO 64 intact. This case arises from the University’s 2009 decision to reevaluate and suspend raises under EO 64 by promulgating EO 29. The purpose of res judicata is to “bar the relitigation of claims that either were or should have been litigated in a former action.” Schoeman, 106 Wn.2d at 859. The claims here (based on events in 2008-2009) could not have been litigated in Storti I (filed in 2004).

The class’s language in arguing that the two cases involve the same cause of action is telling; it repeatedly stresses that the “issues” are identical. It argues that the “claims by the class here mirror those in Storti I” and that “[t]he case involves the same subject matter and virtually the same issues and defenses (only the year of the University’s breach of its unilateral contract with the faculty is different).” Brief of Appellant at 36. But similarity of subject matter, legal issues, or legal arguments is not the inquiry under the “same cause of action” requirement.

The class cites Riblet v. Spokane-Portland Cement Co., 41 Wn.2d 249, 248 P.2d 380 (1952) overruled on other grounds by Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985) and Riblet v.

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Ideal Cement Co., 54 Wn.2d 779, 345 P.2d 173 (1959), cases involving property owners' claims against a cement company for dust emanating from the company's plant.¹² Those cases are of no assistance to the class. In the first, our supreme court reversed the dismissal of the landowners' claims and held that they stated a cause of action in nuisance but that a two-year statute of limitations applied and damages were limited to the two years preceding suit. Riblef, 41 Wn.2d at 256-60. After that decision, the landowners filed claims against the company every two years. Riblef, 54 Wn.2d at 781. The second case was an appeal from a verdict against the company. The class cites the portion of that case in which the court stated that "[i]n the absence of a major factual change, the prior judgment binds these parties." Id. at 782 (quoting Bodeneck v. Cater's Motor Freight System, 198 Wash. 21, 86 P.2d 766 (1939)). But the court was discussing the effect of collateral estoppel on the landowners' consecutive suits. Id. Indeed, the court specifically noted that collateral estoppel was different from res judicata, "for which the requirements are more stringent and which has a wider range of conclusiveness." Id. at 782 n.1. Here, the class does not argue collateral estoppel.

Attorney's Fees on Appeal

The class requests attorney's fees on appeal, citing RCW 49.48.030 and the "common fund exception" to the general rule against attorney's fees (the

¹² The Spokane-Portland Cement Co. was predecessor to the Ideal Cement Co. Riblef, 54 Wn.2d at 781.

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latter as described in Covell v. City of Seattle, 127 Wn.2d 874, 891-92, 905 P.2d 324 (1995)). Because the class does not prevail, we do not award fees.

Affirmed.

Speckman, A.C.T.

WE CONCUR:

Verallan J.

No. 68343-8-I Duane Storti v. University of Washington

Appelwick, J. (dissenting) — I respectfully dissent.

The faculty plaintiffs taught at the University of Washington in the academic year 2008-2009. They were evaluated and determined to be meritorious. They continued in employment in the subsequent academic year, 2009-2010. Prior to the academic year, the University of Washington made an explicit contractual promise to increase their rate of pay by 2 percent for the academic year 2009-2010 for faculty who met these conditions. Late into the 2008-2009 academic year, the University of Washington withdrew that promise. It subsequently refused to pay the raises. This is a clear breach of contract.

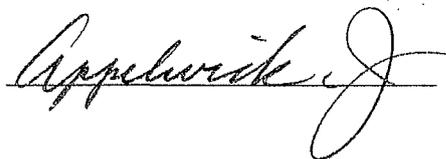
The contract adjusts compensation based on the academic year. It provides for performance evaluations based on the academic year. It promised a raise for the subsequent academic year based on that evaluation. The contract must be analyzed in light of these temporal provisions. I acknowledge that the contract contained a "Funding Cautions Section" that stated, "[A] reevaluation of this Faculty Salary Policy *may* prove necessary." This is a possibility, in the future. Properly read, reevaluation has application to future academic years. It cannot be reasonably read to be an agreement by the faculty that the University of Washington had the unilateral right to modify or cancel the promised raise for meritorious faculty in the middle of and effective for the current academic contract year.

The promise of the 2 percent raise for meritorious faculty performance was critical to the University of Washington's desire to retain quality faculty. It worked, the faculty stayed. The promise was not that the University of Washington in its discretion

“might” grant a raise. The language is “shall.” And, the funding caution was not self-executing. It did not expressly condition the promised 2 percent raise for the academic year as due only if specific legislative funding was provided. Nor did the policy expressly state that the raises promised were subject to cancellation if overall funding by the legislature was deemed inadequate. The promise was not expressly conditional as to the current academic year’s work and the right to raises in the following year.

I fully understand the University of Washington was facing significant fiscal challenges that drove its change of policy. I agree that the reevaluation clause allowed the University of Washington to modify this promise for future academic years. I agree that the University of Washington followed the proper procedures. I agree that Executive Order 29 was effective immediately to cut off any promise of a raise in 2010-2011 based upon academic service in the year 2009-2010. However, I strongly disagree that the change could lawfully deny the promised 2 percent salary increase for 2009-2010. The faculty had substantially performed their service when the executive order was promulgated. The right to the promised raise was vested. The performance was evaluated as meritorious. The University of Washington breached the agreement when it failed to pay the promised raises.

I would reverse the grant of summary judgment to the University of Washington, direct the trial court to enter summary judgment for the plaintiffs, and I would award the plaintiffs their reasonable attorney’s fees.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written in black ink.

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the following document: Petition for Review in Court of Appeals Cause No. 68343-8-I to the following:

Louis Peterson
Mary Crego
Michael Ewart
Hillis Clark Martin & Peterson
1221 Second Avenue, Suite 500
Seattle, WA 98101

David Stobaugh
Stephen Strong
Bendich Stobaugh & Strong PC
701 5th Avenue, Suite 6550
Seattle, WA 98104-7097

Original sent with filing fee check for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

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

DATED: January 14, 2013, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick