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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUN 18 AM 9:51

NO. 65003-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
SEATTLE, DIVISION I

HOUSING AUTHORITY OF THE CITY OF SEATTLE,
WASHINGTON, a public body corporate and politic,

Plaintiff/ Appellant.

v.

KHADIJA BIN, ET. AL.,

Defendant/ Respondent

APPELLANT'S BRIEF

Linda J. Brosell, WSBA #22260
Seattle Housing Authority
P.O. Box 19028
Seattle, WA 98109-1028
206-615-3571
Appellant/Seattle Housing Authority

Table of Contents

1	Statement of Issues	1
2	Statement of the Case	1
3	Standard of Review	6
4	Argument	7
5	Conclusion	20

Table of Authorities

Statutes

RCW 2.43	17-19
RCW 2.43.020	18
RCW 2.43.030	17-19
RCW 35.82	1
RCW 59.18.290	8, 12

Codes and Regulations

24 CFR966 <i>et seq</i>	2, 4
24 CFR 966.4	2
72 FR 2732	14, 15
42 USC 2000d	15, 16

Court Rules

CR 41	9, 10
-------	-------

Rules of Professional Conduct

RPC 1.5	12,
---------	-----

Executive Order

EO 13166	14, 15
----------	--------

Judicial Decisions

Alexander v. Sandoval 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).	16, 17
City Taliesen Corp. v. Razore Land Co., 135 Wash.App 106, 144 P.3d 1185 (2006).	6
Counsel House, Inc., v. Hawk, 136 Wash.App. 153, 147 P.3d 1305 (2006).	9
Granat v Keasler, 99 Wash.2d 564, 663 P.2d 830 (1983)	7, 10
Hawk v. Branjes, 97 Wash.App. 776, 782, 986 P.2d 841 (1999).	9
Housing Authority of Everett v. Kirby, 226 P.3d 222 (March 2010).	7, 8, 9, 10
Housing Authority of Everett v. Terry, 114 Wn.2d 558, 789 P.2d 745 (1990).	8
Keystone Masonry, Inc. v. Garco Constr., Inc. 135 Wn.App 927, (2006).	6
Kustura v. Department of Labor and Industries 142 Wash.App. 655, 175 P.3d 1117 (2008).	19
Laffranchi v. Lim, 146 Wash.App. 376, 190 P.3d 97 (2008).	8
Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998)	12, 13
Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 786 P.2d 265 (1990).	12
State v. Northwest Magnesite Co., 28 Wash.2d 1, 42 182 P.2d 643 (1947).	9
U.S. v. Hoffman 154 Wash.2d 730, 116 P.3d 999 (2005).	18
Wachovia SBA Lending v. Kraft, 138 Wn.App. 859, 158 P.3d 1271, (2007).	6
Walji v. Candyco, Inc., 57 Wash.App. 254, 288, 787 P.2d 946 (1990).	9

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

- A. DID THE COURT ERR IN AWARDING COSTS AND ATTORNEY FEES WHEN THE COURT DISMISSED THE ACTION BEFORE THE MERITS OF THE CASE WERE ADJUDICATED?**
- B. DID THE COURT ABUSE ITS DISCRETION IN AWARDING COSTS AND ATTORNEY FEES ON ISSUES THAT WERE NOT DECIDED BY THE COURT?**
- C. DID THE COURT ABUSE ITS DISCRETION BY AWARDING ATTORNEY FEES ON ISSUES UPON WHICH A PARTY COULD NOT HAVE PREVAILED HAD THE ISSUES BEEN DECIDED?**

II. STATEMENT OF THE CASE

A. Introduction

The Seattle Housing Authority (hereinafter “SHA” or “the Housing Authority”) is a municipal corporation, organized pursuant to the State Housing Authorities Law (Chapter 35.82 RCW) to provide decent, safe and sanitary housing for low-income people in the City of Seattle. The Housing Authority owns and manages more than 6,000 units of low income public housing. Under the Low Income Public Housing Program (hereinafter the “Program”) the Housing Authority receives an annual grant from the US Department of Housing and Urban Development

(hereinafter “HUD”) to fund rental subsidies for low-income tenants who pay thirty percent of their income for rent.

The Housing Authority’s administration of the Program is heavily regulated by HUD (see generally 24 CFR 966 *et seq.*) which gives the Housing Authority the discretion to terminate tenants who fail to comply with their lease and their resident obligations.

B. Facts

Respondent, Khadija Bin (“Bin”) is a participant in the Program. She and the members of her household reside in a community known as Yesler Terrace. CP 39, 189. As a participant in the Program, Bin is obligated to report all household income, all changes in household income, and any changes in the composition of her household. CP 39, 189. The household income and composition of all Program participants is reviewed to determine the household’s portion of rent. The reporting process was changed in 2005 to require residents to report actual income received through out the year which would have substantially increased Bin’s portion of the rent. CP 61-62. Ms. Bin’s husband, Ali A. Aden was listed as a household member until July, 2005 when SHA was notified that Mr. Aden was no longer a household member. When Mr. Aden was removed from the household, his income was no longer included in the annual calculation of rent. CP 62.

Although Mr. Aden was removed from the lease and his income was not included in the calculation of the rent, he was frequently seen coming and going from Ms Bin's unit. CP 62-63. In addition, SHA staff was told by members of the Bin household that Mr. Aden was Ms. Bin's brother who was visiting. CP 62. In February 2007, after SHA began making inquiries concerning Mr. Aden's status, Ms Bin asked to have Mr. Aden again included as a household member. SHA, believing that Mr. Aden never left the household, asked Ms Bin to provide information concerning Mr. Aden's income from July, 2005 to February 2007, the period that his income was not included in the household's income. CP 63-64. SHA also repeatedly requested information concerning Mr. Aden's income after February 2007. CP 63-64.

In 2008, the household provided the 2005-2006 tax records to SHA. CP 64, 78-81. The tax records gave Mr. Aden's address as the subsidized Yesler Terrace unit. Based on this submittal and SHA staff observations, the rent for the household was retroactively adjusted for the period of March 2005 to December 31, 2007 and the household was assessed the subsidy received in excess of that lawfully allowed. CP 64-65. The household continued to not meet its obligation to provide documentation required by SHA, including records concerning Mr. Aden's income. CP 64-65. Because of the continuing non-compliance the

household was issued a 10 day notice to pay the inappropriately received subsidy or vacate. CP 70-78. The notice also advised Bin that her lease would not be renewed when it expired on August 31, 2009 because of her persistent failure to provide required information. CP 71. Bin neither paid the subsidy SHA determined that she unlawfully received nor vacated the unit when her lease expired August 31, 2009. CP 3-7.

HUD's regulations impose upon all housing authorities an obligation to provide the opportunity for an informal grievance hearing for tenants who are terminated from the Program. 24 CFR 966 Subpart B. Bin's Grievance Hearing was rescheduled at her request on several occasions from July to early September and was eventually held on September 8, 2009. CP 40-41, 69, 127. At the hearing Bin requested an additional continuance which was denied by the Hearing Officer, who held that he lacked the authority to act on her request. The Hearing Officer then took testimony, reviewed the evidence and on September 24, 2009, issued a written decision upholding the termination. CP 127-133. On October 27, 2009, SHA served Bin a summons and complaint commencing an unlawful detainer action in King County Superior Court to terminate her tenancy. CP 1-10.

On January 15, 2010, Bin's Motion for Summary Judgment, challenging the validity of the informal grievance hearing, was heard. Bin

argued that the court could not proceed because the informal grievance hearing did not comply with HUD's regulations and did not comply with constitutional due process standards. CP 15, 23-27. In addition, she argued that she was not provided translations of certain documents related to the termination and the grievance hearing. CP 23 P 5, 7-13. The court held that the Hearing Officer's refusal to act on Bin's request for a continuance violated HUD's regulations and dismissed the unlawful detainer action without making any finding on any other theory or claim, and without reaching the merits of the case. CP 149-153.

On January 25, 2010, Bin filed a Motion for Costs and Attorney Fees. CP 154-188. SHA presented a brief in opposition to the Motion. CP 189-209. On February 9, 2010, the court entered an Order for Costs and Attorney Fees finding that "Defendant [Bin] incurred reasonable costs of \$1199.77 in this action ...[and] attorney fees of \$7375 are reasonable in this action ..." CP 217-218. The Court deducted from the attorney's fee award "fees that appeared to be duplicative, seemed excessive on a particular issue or did not have enough details that court could discern the subject, as well as some costs not allowed." CP 218. The court also held that "Defendant [Bin] is entitled to attorney's fees on issues such as required translation. Issues were properly raised [and] not decided against

the defendant just not reached by the court because of the Court's ruling.”
CP 218.

On February 26, 2010, Appellant, SHA, filed its Notice of Appeal
in this court. CP 219.

III. STANDARD OF REVIEW

The standard of review of an award of attorney fees is de novo when the meaning of an attorney fee statute is at issue. *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 859, 158 P.3d 1271, (2007) citing *Keystone Masonry, Inc. v. Garco Constr., Inc.* 135 Wn.App 927, 936-37, 147 P.3d 610 (2006). If the court had authority to award attorney fees under a statute, the standard for review is whether the court abused its discretion when it awarded attorney fees. *Wachovia* at 859, citing *City Taliesen Corp. v. Razore Land Co.*, 135 Wash.App 106, 141, 144 P.3d 1185 (2006).

IV. ARGUMENT

A. THE COURT ERRED IN FINDING BIN TO BE THE “PREVAILING PARTY” AND AWARDING COSTS AND ATTORNEY FEES WHEN THE ACTION WAS DISMISSED BEFORE THE MERITS OF THE CASE WERE ADJUDICATED.

In *Housing Authority of Everett v. Kirby*, 154 Wn.App 842, 226 P.3d 222, (March 2010), the Superior Court dismissed an unlawful detainer action without prejudice but refused to award costs and attorney fees. Kirby appealed to this court, arguing that the dismissal should have been with prejudice and the court erred in not awarding him costs and attorney fees. The opinion of this court stated the following:

An unbroken line of cases establishes that “[i]n an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues.” [Citing, *Granat v. Keasler*, 99 Wash.2d 564, 571, 663 P.2d 830 (1983)]. Any noncompliance with the statutory method of process prevents the superior court from acquiring subject matter jurisdiction over the unlawful detainer proceeding. Lack of such jurisdiction “renders the superior court powerless to pass on the merits of the case.” In this circumstance, dismissal without prejudice is the limit of what a court may do. *Kirby*, 850, 226.

This court, in reviewing Kirby’s claim repeated a holding in another of its cases stating that the, “tenants must prove either that the lease was not terminated or that they held over under a valid court order.”

Kirby, 852, 227, citing *Laffranchi v. Lim*, 146 Wash.App. 376, 190 P.3d (2008). According to this court the Superior Court in *Kirby* could not, by law, pass on the merits of the case, and therefore the appellant could not be a prevailing party on the merits of the case and was therefore not entitled to attorney fees. As the Court explained:

In this case, the court lacked authority to proceed under the unlawful detainer statute and decide the merits of the case. It never decided whether EHA's notice terminated Kirby's lease. Therefore, Kirby, like the tenants in *Laffranchi* and *Terry*, has not satisfied the requirements of RCW 59.18.290(1) or (2) and is not entitled to fees under either subsection. *Kirby*, 854 228.

The issue in this appeal is similar to *Kirby* in all material respects. The Superior Court held that SHA could not proceed with an unlawful detainer because of procedural irregularities in the administrative proceeding. In *Kirby* there were defects in the summons. In this case the Superior Court held that the case could not proceed because there was a defect in the grievance hearing. In *Kirby* the Court held that “tenants must prove either that the lease was not terminated or that they held over under a valid court order.” In this case, Bin did not prove that the lease was not terminated or that she held over under a valid court order. Having not reached the merits of the case, and having not decided whether SHA’s notice terminated Bin’s lease, the Superior Court erred in finding Bin the “prevailing party” and erred in awarding Bin costs and attorney fees.

In *Kirby*, the court's decision was based on the superior court's lack of authority to address the merits of the case, not on whether the court had jurisdiction of the case. *Kirby*, 224, FN1. This court in *Kirby* cited a case, *State v. Northwest Magnesite Co.*, 28 Wash.2d 1, 42 182 P.2d 643 (1947), in which the superior court had subject matter jurisdiction but "had no power to pass upon the merits of the state's case as against those parties' and could only dismiss the case without prejudice" *Kirby*, 851, 226, quoting *Magnesite*, supra.. at 226. This court, quoting *Magnesite*, continued, "the superior court ...lacked power to decide the merits of the case. Thus, it was precluded from making any ruling regarding the merits of the litigation other than dismissal without prejudice." *Kirby*, 851, 226.

Bin, in her Motion for costs and attorney fees, relied upon *Counsel House, Inc., v. Hawk*, 136 Wash.App. 153, 147 P.3d 1305 (2006), a case in which the defendant was awarded attorney fees but the court did not adjudicate the merits of the case. CP 191-198. In *Counsel House*, both the trial court and this court found that the tenant was the prevailing party because the plaintiff (landlord) agreed to a voluntary non-suit pursuant to CR 41(a)(1)(B), making the defendant (tenant) "the prevailing party, because when a plaintiff takes a voluntary dismissal, the defendant has prevailed for the purposes of fees." *Id.*, 159-160 citing, *Hawk v. Branjes*, 97 Wash.App. 776, 782, 986 P.2d 841 (1999); *Walji v. Candyco, Inc.*, 57

Wash.App. 254, 288, 787 P.2d 946 (1990). The landlord, in essence, abandoned the claim.

In this case, SHA (landlord) did not take a non-suit, it did not abandon its claim and the merits of the case were not addressed. In fact, the court specifically found that “SHA is barred from bringing is [sic] unlawful detainer action against Ms. Bin at this time.” CP 153. The effect of this ruling was that the court could not hear the arguments. Having found that SHA could not bring the unlawful detainer action, the court could not proceed to the merits of the case. The court dismissed the action without prejudice without addressing whether Bin was in unlawful detainer and later, in the award of attorney fees, declared Bin the “prevailing party.” CP 217-218. The court erred in finding that Bin was the “prevailing party” and in awarding Bin costs and attorney fees. CP 45.

The court’s review of Bin’s argument regarding the translation of documents is not authorized by the unlawful detainer statutes, and the award of costs and attorney fees for the review is improper. Alternately, it is improper to award costs and attorney fees when the court failed to make a finding on such issues. This court continues to hold that the unlawful detainer action is a special summary proceeding to “summarily decide the issues authorized by [the unlawful detainer] statute and not as a court of general jurisdiction to hear and determine other issues.” *Kirby at 850, 226*

quoting, *Granat v. Keasler*, 99 Wash.2d 564, 571, 663 P.2d 830 (1983)

The court lacked the authority to award costs and attorney fees in this case on any issue, including issues not decided by the trial court.

B. THE COURT ABUSED ITS DISCRETION IN AWARDING COSTS AND ATTORNEY FEES ON ISSUES THAT WERE NOT DECIDED BY THE COURT.

If this court finds that the Superior Court had jurisdiction to award costs and attorney fees, SHA submits that the court abused its discretion in awarding costs and attorney fees for issues not decided by the court.

In her motion for summary judgment, Bin argued that she did not receive a grievance hearing that meets due process standards. Bin additionally argued that she was not provided translations of the termination notice and grievance hearing decisions as required by state and federal law. The trial court held that the hearing officer's failure to hear her request for a continuance was contrary to law and determined that the case should be dismissed on this issue alone, stating that the court would not address the question of "whether SHA was required to translate the documents into Somali." CP 153. The court continued, "this issue is "not reached and not decided." CP 153. Nevertheless, the court found it appropriate to award costs and fees because the issues were "properly raised and not decided against the defendant ..." CP 218.

Factors to consider in awarding fees in an unlawful detainer action are listed in the Residential Landlord Tenant Act. The Act provides,

"Reasonable attorney's fees", where authorized in this chapter, means an amount to be determined including the following factors: The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved *and the results obtained*, and the experience, reputation and ability of the lawyer or lawyers performing the services. RCW 59.18.290. (Emphasis added.)

See also, RPC 1.5 (citing similar factors as a basis for determining fees under the Rules of Professional Conduct).

In *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998), citing, *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990), the appellate court addressed general factors to be considered when awarding costs and attorney fees and specifically found it necessary to:

“determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours *and any hours pertaining to unsuccessful theories or claims.*” *Mahler*, 434 (emphasis added).

Unlike unlawful detainer actions, the *Mahler* court sat as a court of general jurisdiction over the controversy, and its authority was not limited by the summary proceedings. *Mahler* illustrates that even when the court has general jurisdiction and the authority to award costs and attorney fees

to the prevailing party, the court is prohibited from awarding costs and attorney fees on unsuccessful theories or claims. *Id.*

If Bin is deemed the “prevailing party” in this case and therefore entitled to costs and attorney fees, such costs and attorney’s fees, even in a court of general jurisdiction is limited to “the reasonable number of hours in securing a successful recovery ... and exclude any hours pertaining to unsuccessful theories or claims.” *Mahler* 434. If the court did not make a finding on a theory or claim advanced by Bin, then Bin was not successful and no costs or attorney fees should be awarded.

The trial court, in its order dismissing the action specifically said that it was not deciding the translation claims. Despite this specific acknowledgement, the court held that it was appropriate to award costs and fees because the “issues were properly raised ... just not reached by the court.” CP218. See also, CP 153. The superior courts decision is clearly contrary to the Court’s holding in *Mahler*, and its award of costs and attorneys fees on issues upon which Bin did not prevail was plainly an abuse of its discretion.

C. THE COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY FEES ON ISSUES UPON WHICH RESPONDENT [BIN] COULD NOT HAVE PREVAILED HAD THE THEY BEEN DECIDED.

1. Translations are not required by federal law: and individuals are specifically precluded to proceed to court to allege violations of EO 13166 or the HUD LEP Guidance.

In her motion for summary judgment Bin argued that the federal Limited English Proficiency (hereinafter “LEP”) Guidelines require translation of eviction notices and grievance hearing decisions. There is no basis is law for this argument.

HUD’s LEP Guidance is published pursuant to Title VI, Title VI regulations, and Executive Order 13166.” (72 FR 2732- 01, 2007 WL 130301, page 13). CP 134. According to HUD, the purpose and intent of the guidance is as follows:

“ . . . to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law. This policy guidance clarifies existing legal requirements for LEP persons by describing the factors recipients should consider in fulfilling their responsibilities to LEP persons. The policy guidance is not a regulation, but rather a guide. Title VI and its implementing regulations require that recipients take responsible steps to ensure meaningful access by LEP persons. This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are limited English

proficient. These are the same criteria HUD will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations. (72 FR 2732- 01, 2007 WL 130301, page 11).

The Housing Authority adopted its Interpretation and Translation Policy (hereinafter “ITP”) CP 136-137 to implement Executive Order 13166, HUD’s LEP Guidance, and Title VI. Executive Order 13166, HUD’s LEP Guidance and the Housing Authority’s ITP are, therefore, part of a single federal regulatory framework governing translation of documents for non-English speaking people.

Section 5 of Executive Order 13166 provides:

Sec. 5. Judicial Review.

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

In Section XV of its LEP guidance, HUD explains that “Neither EO 13166 nor HUD LEP Guidance grants an individual the right to proceed to court alleging violations of EO. 13166 or HUD LEP Guidance.” (72 FR 2732-01, 2007 WL 130301, page 38).

Executive Order 13166, HUD’s LEP Guidance and the Housing Authority’s ITP were adopted pursuant to Section 602 of Title VI of the

Civil Rights Act of 1964 (42 U.S.C. 2000d - 1), which gives federal agencies the authority to effectuate the provisions of the Title VI

“ . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.”

Section 602 continues stating that

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.* (Emphasis added)

No private cause of action is authorized to enforce federal regulations or program requirements created pursuant to Section 602. In *Alexander v. Sandoval* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), the plaintiff filed suit to enjoin a state English language only requirement, arguing that the requirement violated Justice Department regulations prohibiting policies and practices that had the effect of subjecting non-English speakers to discrimination based on their national

origin. The Court held there is no private right of action to enforce regulations adopted under Section 602. As the Court said:

Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists. *Alexander v. Sandoval*, 293, 1523.

Bin may not seek judicial enforcement of HUD's LEP Guidance or the Housing Authority's ITP. If Bin believes the Housing Authority, in either adopting or implementing its ITP, or has not complied with HUD's LEP Guidance, Bin's sole remedy is to file a complaint with HUD's Office of Fair Housing and Equal Opportunity and await the outcome of HUD's investigation. See, Section XV of HUD's LEP Guidelines.

Bin's LEP claim was barred by the federal law and regulation and Bin should not be awarded costs and attorney fees for time devoted to making an argument devoid of merit in seeking to delay an unlawful detainer action.

2. Translations are not required by state law: interpreters are required and SHA provided an interpreter as required by RCW 2.43.

In her Motion for Summary Judgment, Bin cited RCW 2.43.030 (1)(c) as imposing a duty on the Housing Authority "to translate the grievance decision." CP 18. RCW 2.43, however, governs the provision of *interpreters* at legal proceedings, and who bears the cost of providing

interpretation services. RCW 2.43.030 (1) addresses the appointment of interpreters and provides:

Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

RCW 2.43.030(1)(c), the specific provision cited by Bin as imposing the duty to provide translations, states “[W]hen a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified *interpreter*.” (Emphasis supplied). RCW 2.43.020(2) defines an interpreter as:

“. . . a person who is able readily to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English.”

The Housing Authority appointed a qualified interpreter for Bin for the hearing. CP 41, 122, 127. Nothing in RCW 2.43 mentions translations or imposes an obligation upon the Housing Authority to provide translated documents. In interpreting statutes, definitions in the act control the meaning of words used in that act. As the court explains in *U.S. v. Hoffman* 154 Wash.2d 730, 741-743, 116 P.3d 999, 1004 - 1005 (2005), “It is an axiom of statutory interpretation that where a term is defined we will use that definition.” Chapter 2.43 RCW imposes a duty to

provide interpreters, who are defined as “persons.” It imposes no duty to provide documents of any kind, including translated documents.

In *Kustura v. Department of Labor and Industries* 142 Wash.App. 655, 675-681, 175 P.3d 1117, 1127 - 1129 (2008), plaintiff argued that RCW 2.43.030 required the Department of Labor and Industries to provide a qualified interpreter “throughout the proceedings,” including all discussions on and off the record, all arguments, all rulings, all witness testimony and all communications with counsel. In rejecting the argument, the Court said:

The statute “applies only to hearings before the Board and requires the Board to appoint an interpreter to assist a non-English-speaking claimant ‘throughout the hearing,’ which “does not include matters beyond the hearing itself, including communications with counsel outside of the hearing and other trial preparation.” *Kustura*, 655, 1129.

Bin’s claim under the state act is without merit. RCW 2.43.030 (1)(c) imposes no duty upon state agencies to provide translated documents.

5. CONCLUSION

The court erred when it found Bin to be the prevailing party in this action and awarded her costs and attorney fees. The action was dismissed on Bin's motion, on a finding that the administrative hearing was defective, and therefore, the merits of the case could not be addressed at trial. Because the merits of the unlawful detainer were not adjudicated, there was, no prevailing party, and the court lacked the authority to award costs and attorney fees.

If Bin was a prevailing party and an award of costs and attorney fees is appropriate, any award should be limited to the issue upon which Bin prevailed. She should not be compensated for all the unsuccessful theories and claims advanced, and upon which she did not and could not prevail.

Respectfully submitted this 18th day of June, 2010.



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2010 JUN 18 AM 9:51

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SEATTLE, DIVISION I

HOUSING AUTHORITY OF THE
CITY OF SEATTLE, a public body
corporate and politic,

NO: 65003-3-1

Plaintiff/Appellant,

DECLARATION OF
MAILING

v.

KHADIJA BIN, ET AL.,

Defendant/Respondent.

I declare under penalty of perjury under the laws of the State of Washington that on June 18, 2010, I caused a true and correct copy of Appellant's Brief to be mailed by the U.S. Postal Service, First Class, to Eric Dunn, attorney for Defendant/Respondent, Khadija Bin at Northwest Justice Project, 401 Second Avenue S., Suite 407, Seattle, WA 98104. .

DATED this 18th day of June, 2010.



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