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SUPREME COURT
OF THE STATE OF WASHINGTON

DUANE STORTI and a class of faculty members,

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

APPELLANTS' REPLY BRIEF

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A. INTRODUCTION

The University of Washington (“University”) largely wastes the Court’s time by focusing on the responsibilities of its Board of Regents, President, and Faculty Senate. The class represented by Professor Duane Storti does not dispute the authority of the University to *prospectively* change the Faculty Salary Policy at issue here. The University, however, could not retroactively change the offer of a 2% merit raise, nine months into academic year 2008-09, when the faculty had accepted the offer and substantially performed the work for the merit raise.

Not surprisingly, the University gives little attention to *Storti I*, a case that resolves the *very same issues* presented in this case in a fashion adverse to the University. Res judicata bars the University from relitigating those issues.

B. ARGUMENT

1. **The University’s Argument That The Merit Raise Was “Expressly” Conditioned on Legislative Funding is Contrary to the Faculty Code’s Express Language.**

The University does not dispute that a unilateral contract is created when one party (here, the University) promises to do something (provide a 2% raise in the 2009-10 academic year) in the event the other party (the faculty) performs certain acts (perform meritorious work for the 2008-09 academic year). *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950); *Multicare Medical Center v. Dept. of Soc. & Health Services*, 119 Wn.2d

572, 584, 790 P.2d 124 (1990). Nor does the University dispute that a unilateral contract offer of compensation for employees cannot be withdrawn after substantial performance has occurred by the University's employees in response to the offer. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 848, 194 P.3d 221 (2008) ("a unilateral contract becomes enforceable and irrevocable when performance has occurred in response to a promise" [internal quotations omitted]). *Navlet* said (*id.* at 849, quoting case): "[w]hen services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or any other form of compensation, and the lack of a promise to vest does not revoke the employer's obligation to pay." *Accord*, *Knight v. Seattle First National Bank*, 22 Wn.App. 493, 497-98, 589 P.2d 1279 (1979); 1 *Corbin on Contracts* §3.16 at 388, cited with approval in *Navlet*, 164 Wn.2d at 848, *Restatement of Contracts* §45; 2 *Corbin on Contracts* §6.2 at 217 (2005). See also Appellants' Br. 15-19.¹ It is also not disputed by the

¹ The University asserts that it did not agree below that the Faculty Salary Policy is a unilateral contract. Resp. Br. 18 n. 6. This is not correct. The University in fact did not dispute that the Faculty Salary Policy is a contract and it always maintained "for purposes of argument" "it's a contract" (RP 19) and that it should be interpreted "[u]nder long settled contract law." CP 1210. Similarly, the University here accepts "for purposes of this argument that contract principles apply." Resp. Br. 18 n. 6. The University has never contended that the Faculty Salary Policy is something other than a contract and it agrees with Storti that it is "construed under traditional contract principles." Resp. Br. p. 19, quoting Storti's brief. Even if this contract is called an employment "policy," as the University suggests, Resp. Br. 18 n. 6, such a policy is enforceable in accordance with its terms. *Roberts v. King County*, 107 Wn.App. 806, 27 P.3d 1267 (2001), *review denied*, 145 Wn.2d 1024 (2002).

University that Storti and the faculty class members had substantially performed the 2008-09 work that earned the promised raise.

The University nevertheless argues that it could revoke the 2% raise offered to the faculty *after* the faculty had accepted the offer for the 2009-10 pay raise by substantially performing the work. Resp. Br. 13-18. Under the University's argument, for example, if the Faculty Salary Policy was in effect for academic year 2008-09 until June 29, 2009 (and the University then revoked the policy) and the faculty had performed meritorious work from July 1, 2008 to June 29, 2009 (one day less than the entire academic year), the University was absolved from paying the 2% merit increase to the faculty in the academic year starting July 1, 2009. *Id.* The University in fact went even further below, arguing it could rescind the merit raise in December 2009 *after* the class had *fully performed* the work and *after* it had commenced paying the merit raise. RP 20-22. According to the University, the only issue was whether it could claw back the raise already paid for several months before it was rescinded in December. *Id.*

The University's theory is that the Faculty Salary Policy's language stating the promise was subject to "reevaluation" in future years meant it "retained . . . explicit discretion to withhold payments otherwise owed to employees[.]" Resp. Br. 21, 22. The provision 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 1290.)

The University's argument based on this paragraph is wrong for numerous reasons. Words in a contract are construed according to their ordinary meaning, *Cambridge Townhomes v. Pac. Star*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009), and the word "reevaluation" ordinarily means "the act or result of evaluating again." Webster's Third New Intern. Dict. Unabridged, p. 1907 (1976). And "evaluate" means "to examine and judge concerning the worth, quality, significance, amount, degree or condition of." *Id.*, p. 786. The word "reevaluation" does not mean withhold, rescind, revoke, subject to retroactive revocation, or discretionary. *Id.* The "reevaluation" provision thus notified faculty that a 2% raise was not guaranteed throughout their academic careers and the University could change it *prospectively*.

A contract must also be construed as a whole so that no part is ineffective or meaningless. *Cambridge Townhomes*, 166 Wn.2d at 487. The University agrees: "Traditional contract principles require a court to give meaning to all terms in an agreement." Resp. Br. 19. But the

University ignores this; it reads the reevaluation language in complete isolation and contends that “reevaluation” means that it has discretion to withhold or revoke the raise. But the “reevaluation” language must be construed in light of the entire Faculty Code. *Id.* And the Code repeatedly says the University “shall” pay the raise to faculty who perform meritorious work in an academic year: §24-70.B.1, a “salary increase ... **shall** be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review;” §24-71.A.1, “**shall** each year make available funds to provide an initial minimum increase to all faculty deemed meritorious under Section 24-55;” and Executive Order 64, “[a]ll faculty shall be evaluated annually for merit... 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.” Appendix (“App.”) 2-3 (emphasis added).

The word “shall” in the merit raise provisions creates a *mandatory* duty, not a discretionary or optional duty. *Scannell v. City of Seattle*, 97 Wn.2d 701, 707, 656 P.2d 1083 (1982); *Roberts v. King County*, 107 Wn.App. at 815. And this is especially true here because the Faculty Code uses both “shall” and “may,” stating that the University “shall” pay the merit raise and it “may” provide other raises such as retention. *See* EO 64, §§24-70.B.1 and -70.B.6, and §§24-71.A.1 and -71.B.3 (App. 2-8). And

“when both ‘may’ and ‘shall’ are contained in the same provision, ‘may’ presumably indicates a permissive duty, while ‘shall’ indicates a mandatory duty.” *Scannell v. City of Seattle*, 97 Wn.2d at 707.

The University ignores these principles. It reads the word “shall” out of the Policy, making the intended mandatory merit raise provisions discretionary and meaningless.

Moreover, for a future pay raise promised in a contract to be revocable due to legislative funding, it must be *expressly* contingent on funding by the Legislature. *Carlstrom v. State*, 103 Wn.2d 391, 392-96, 398, 694 P.2d (1985). The University weakly argues that “the facts in *Carlstrom* were significantly different.” Resp. Br. 21. The facts, however, are quite close, *i.e.*, the State failed to pay a promised pay raise to college faculty because of a severe economic downturn. In any event it is *Carlstrom*’s holding that matters – a contract is not contingent on funding unless it explicitly states it is contingent on funding. *Carlstrom*, 103 Wn.2d at 394-96.

Carlstrom also found it important that in contracts with different college faculties the State had “made the salary schedule contingent on the availability of legislative appropriation” (103 Wn.2d at 394) and it thus knew how to use “plain English” to make a contract subject to future modification (*id.* at 398). And the fact the State did not include the

language in the contract at issue led the Court “to conclude as a matter of law that the parties did not intend to make the salary increases contingent on the availability of legislative appropriations.” *Id.* at 395.

Here, the University knew how to use “plain English” to make a promise contingent on legislative funding. *Carlstrom* explained how to do it 15 years before the University’s Salary Policy was adopted. And the Faculty Code drafters knew how to make limitations on raises – the Code said that, “resources permitting,” it would pay faculty “salaries commensurate with those of their peers elsewhere” (§24-70.A), which would “require a 20 percent increase in full professor salaries [.]” CP 1164. Because the “resources permitting” limitation on parity with peer institutions does not apply to the 2% annual merit raise, a different intent is evidenced for the merit raise. *Carlstrom*, 103 Wn.2d at 394.

Furthermore, the Faculty Salary Policy itself expressly provides that merit raises were *not* contingent on legislative funding. The Policy states: “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.*” Executive Order 64 (“EO 64”) at App. 8 (emphasis added). In other words, without legislative funding of the raises, the University might have to not fill vacancies or not increase the number of faculty positions to pay for salary increases. The architects

of the Faculty Salary Policy specifically accepted this possibility in 1999-2000 when the Policy was created.

The Faculty Salary Policy therefore expressly recognized that legislative funds were only one of many sources to fund the promised 2% raises, and these other sources included “funds from tuition increases” and funds from “faculty turnover, grant, contract, and clinical funds” and “other internal resources.” EO 64, App. 6. Other funding sources, such as tuition and savings from not filling vacant positions, thus remained available to provide the 2% raises for the meritorious faculty.²

In the Faculty Salary Policy the merit raise for the vast majority of the faculty was also expressly made a priority over “retention” raises for the small number of “star faculty.” Appellants’ Br. 4-9. It states that the University “shall” pay the merit raise and it “may” pay retention raises. EO 64, App. 7. The University, however, as it did in *Storti I*, disregarded this priority rule and paid retention raises with money that it could have used for the merit raise. CP 1244, 1253, 1308, 583-584, 1293.

² The University also says, in its statement of facts, that under ESSB 5460, enacted by the Legislature in 2009, “state funds could not be used to fund any salary increases.” Resp. Br. at 6 n. 1 and 6-7. In *Storti I* the University made the *exact same argument* that legislation “expressly prohibited the University from using any state funds to provide salary increases to faculty[.]” CP 286, citing ESSB 6387, Sec. 601(2)(a) (April 5, 2002). The legislation had no effect on the use of other funds such as tuition revenues and grants to fund the raises. EO 64, App. 6. The legislation also only prohibits agencies from “grant[ing]” a raise with state funds, not from paying a raise already promised and earned. Legislation that tried to prohibit paying a raise already promised and earned would unconstitutionally impair an existing contract, as the Court held in *Carlstrom*, 103 Wn.2d at 394-96, 398.

Furthermore, if the Faculty Code is at all ambiguous as to whether the University's promise that it "shall" pay the merit raise was conditioned on legislative funding, then the Court could consider the history behind the Faculty Salary Policy and the statements made at the time the Policy was adopted. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). And the history of the Faculty Salary Policy and the contemporaneous statements directly contradict the University's *post hoc* litigation position that the promised raise was subject to legislative funding. Indeed, there is *not one single contemporaneous statement* that supports the University position.

The University's contemporaneous statements made by the Provost before the Policy was adopted explained to the faculty that they would be entitled to the merit raise even in "lean years" with budget cuts and no legislative funding for merit raises:

[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 that when real crunch times come, we're no longer 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.

[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.

Provost Huntsman’s statements that the Faculty Salary Policy would guarantee merit raises irrespective of legislative funding was repeated by other University officials involved in drafting the Policy:

- In April 1999 Faculty Senate Chair Ted Kaltsounis told the Faculty Senate that “in conversations with the President and Provost, over drafts of their proposed Executive Order implementing this new policy, the annual merit percentage is 2%, [and] these are indeed ongoing commitments (accompanied by ‘shall’ in the Code language), which means that even where there are no additional funds forthcoming from Olympia such increases will be funded from internal resources.” CP 288-89.
- In April 1999 Professor Robert Holzworth told the Faculty Council on Faculty Affairs that “the administration has verified that they will have the funds to afford at least a 2% increase every year due to the increase in tuition and by returning more of the recaptured funds to the salary pool.” CP 1118-19.
- In January 2000, when President McCormick signed EO 64, he said that it is “in this Executive Order that I make the commitment to a 2% salary adjustment every year for faculty who are deemed meritorious.” CP 303.
- In 2001 the Secretary of the Faculty told new faculty in a guide concerning “faculty rights and responsibilities,” that in the Faculty Salary Policy the “University has committed to providing every faculty member whose performance is deemed meritorious with a 2% yearly increase. Additional levels of increase are dependent on funding.” CP 1195.

The history of the Faculty Salary Policy also shows that it was created expressly because the Legislature was *not* providing regular funding for merit increases. CP 1159-70; 1302-03. The University thus

intentionally made merit pay raises both mandatory and the highest priority, EO 64, App. 7, and expressly stated these raises would occur regardless of whether the Legislature provides funding. CP 270, 271, 288-89, 290, 303, 1118, 1195, 1305-06; see also CP 1305-06 and CP 1398-1401, which quote the relevant portions of cited CP provisions.

Accordingly, the “reevaluation” language did not make the raise contingent on legislative funding. Instead, it notified the faculty that the 2% annual merit raise was not guaranteed for their entire academic careers and it could be changed prospectively. The University’s argument is thus directly contrary to (1) the language stating the University “shall” pay the raise and other language in the Faculty Code recognizing the raise was not dependent on legislative funding, (2) the contemporaneous statements explaining the promised merit raises were not contingent on legislative funding, and (3) the University’s stated intent to create the Salary Policy because the Legislature was not funding merit raises.

2. The General Authority of the University Regents and President to Modify the Faculty Code Provides Neither Explicit Nor Implicit Power to Retroactively Revoke the Promised Merit Raise After the Faculty’s Substantial Performance.

The trial court ruled that the University had discretion to not pay the merit raise after substantial performance by the faculty because the trial court said it is “implicit in the promise that it is changeable upon review[.]” RP 21; RP 24 (“promise implicitly is repealable”). The trial

court's decision is based on the University's argument that a raise is discretionary because the University Regents and President have the general authority to modify provisions in the Faculty Code. Resp. Br. 2-18, discussing procedures for changes.

The Court has rejected precisely this argument. In *Caritas v. DSHS*, 123 Wn.2d 391, 869 P.2d 28 (1994), DSHS argued -- just as the University argues here -- that it could retroactively modify an existing contract because the contract said the parties' rights and obligations were subject to the laws of Washington "as now existing or hereafter adopted or amended[.]" 123 Wn.2d at 404, 406. DRS argued that this clause in its contracts with health care providers meant that "any contractual rights were subject to future alteration by the State Legislature." *Id.* at 406. DSHS also argued that a "statutory reservation of powers clause" allowing DSHS to adopt rules also authorized it to retroactively modify the contract to change the payment amounts for work performed. *Id.* at 406 and n. 8.

Caritas explained that "states or agencies may put potential contractors explicitly on notice that the terms of a public contract are subject to retroactive adjustment as the whims or the budgetary necessities of the state may dictate." *Id.* at 406 n. 9. But "our case law requires such reservation clauses to be made *explicitly* contingent on future acts of the Legislature with retroactive effect." *Id.* at 406 (emphasis by Court), *citing*

Carlstrom, 103 Wn.2d at 393-95, 398-99.

And unless explicitly contingent on future legislative acts with retroactive intent, a reservation clause is “simply to render applicable to future transactions the requirements of state law then in existence so long as imposition of those requirements does not modify pre-existing contracts.” *Caritas*, 123 Wn.2d at 407 (internal quotations and brackets omitted). And “[b]ecause neither the contract nor the statute explicitly mentions future retroactive modification of pre-existing or already performed contracts, we hold they are insufficient to reserve the power to retroactively modify the contracts between DSHS and [the health care providers].” *Id.* at 407.

Caritas further said that “construing the clause in the manner DSHS suggests would allow DSHS unilaterally and retroactively to modify its contracts at will and without prior explicit notice.” *Id.* at 407. But “[th]is result is antithetical to the intent of the contract clause” because “[a] promise in a contract that gives one party the power ‘to deny or change the effect of the promise, is an absurdity.’” *Id.* (citations and internal quotations omitted).

Here, the University seeks to achieve this “absurdity” (*id.*) – the power to unilaterally and retroactively modify a contract promising faculty a 2% raise in exchange for meritorious work. In addition to the word

“reevaluation” in the Faculty Salary Policy (*supra* pp. 3-7), the University’s argument is based solely on the general authority of the University Regents and President to modify provisions in the Faculty Code. But the general statutory authority of the Regents and President does not constitute an *explicit* reservation of the right to retroactively revoke the offer of a merit raise any more than the reservation of rights in *Caritas* did, where it said the parties’ rights and obligations were determined by state law “as now existing or hereafter adopted or amended[.]” *Caritas*, 123 Wn.2d at 406; *accord, Carlstrom*, 103 Wn.2d at 394-96, 398 (general acknowledgement that the community college faculty contract was subject to present and future legislative acts did not authorize State to forgo promised pay raise). The University Regents and President, like the Legislature, have no authority to revoke or retroactively modify an existing contract because of future or current budgetary concerns. *Carlstrom*, 103 Wn.2d at 394-95, 398; *Caritas*, 123 Wn.2d at 406. Indeed, the University is obligated on its contracts just the same as any private party. *Id.*; *Architectural Woods v. State*, 92 Wn.2d 521, 527-29, 598 P.2d 1372 (1979).³

³ The University’s assertion in its brief that cases like *Karr v. Bd. of Trustees of Mich. St. Univ.*, 325 NW.2d 605 (Mich.App. 1982), and *Subryan v. Regents of the Univ. of Colorado*, 698 P.2d 1383 (Colo.App. 1984), do not involve the reservation of authority to the governing bodies analogous to that of the regents claimed by the University is patently incorrect. In *Karr*, the court rejected the very same argument now advanced by
(continued)

The University relies on “illusory promise” cases to argue that its discretion “to change the policies” gives it unilateral discretion to withhold promised raises after performance. Resp. Br. 14. The University relies (*id.*) on *Goodpaster v. Pfizer Inc.*, 35 Wn.App. 199, 200,203, 665 P.2d 414, *review denied*, 100 Wn.2d 1011 (1983). Resp. Br. 14, 16; CP 1211-12, 1216. *Goodpaster* in turn relied on *Spooner v. Reserve Lite Ins. Co.*, 47 Wn.2d 454, 457-58, 287 P.2d 735 (1955).

But under these cases an apparent contractual offer of compensation to employees is optional or discretionary (*i.e.*, an illusory promise) only when the employer *explicitly* states its promise is optional or discretionary. *Spooner*, 47 Wn.2d at 757-58; *Goodpaster*, 35 Wn.App. at 200, 203. In *Spooner* the company told the employees, in a company-wide bulletin announcing a bonus, that it was “voluntary” and could be “withheld . . . by the employer with or without notice.” 47 Wn.2d at 457. The Court explained that the “ordinary meaning of ‘withhold’ is ‘to refrain from paying that which is due’” and the employer thus told the employees “in plain English that the company could withhold or decrease the bonus with or without notice.” *Id.* at 459. *Spooner* held that there was no enforceable contract because the apparent promise was illusory. *Id.*

the University, noting that the university board of trustees had *constitutional* authority over university expenditures and statutory right to fix employee salaries, 325 NW.2d at 607-08. The *Subryan* court analogized the powers of University of Colorado regents to those of the Legislature to make laws. 698 P.2d at 1384.

Wn.2d at 459; *Goodpaster*, 35 Wn.App. at 200.⁴

3. The Handbook Cases Cited by the University Do Not Contradict or Overrule the Black Letter Law Governing Unilateral Contracts and Substantial Performance.

Although the University recognizes that in compensation cases there must be “explicit discretion to withhold payments otherwise owed to employees” (Resp. Br. 22), because the University can point to no language providing any such “explicit” discretion, the University also argues that “[e]mployers may also change their policies even when the policies do not expressly reserve the employer’s right to do so.” Resp. Br. 14-15. The University cites *Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), and other handbook cases. Under these cases employers of at-will employees may unilaterally alter *prospectively* the conditions of employment set forth in employee handbooks upon proper notice to the affected employees. The handbook cases are not pertinent here because they do not address nor do they overrule the black letter law that an employer’s offer of compensation cannot be revoked after substantial performance by an employee has occurred in response to the offer. *Navlet*, 164 Wn.2d at 848-49; *Knight*,

⁴ The trial court also additionally erred because a contractual term will be implied only if it is necessary to *effectuate* a contract, *i.e.*, it is “legally necessary” to “save the otherwise invalid contract.” *Brown v. Safeway Stores*, 94 Wn.2d 359, 370-72, 617 P.2d 704 (1980); *Oliver v. Flow Int’l. Corp.*, 137 Wn.App. 655, 660-63, 155 P.3d 140 (2006) (implied covenants in contracts are disfavored).

22 Wn.App. at 497-98; 1 *Corbin on Contracts* §3.16; 2 *Corbin on Contracts* §6.2 and *Restatement of Contracts* §45.

4. Res Judicata Bars the University's Arguments Here.

The University agrees with the class's recitation of the elements of res judicata,⁵ but argues that although *Storti I* and *II* each involved payment of the mandatory 2% faculty salary increase under the Faculty Salary Policy, the cases "arise out of different facts." Resp. Br. 30. Other than the fact that *Storti I* addressed academic year 2001-02, and the present case involves academic year 2008-09, the issues in the cases were identical. Appellants' Br. 33-37.

The University's discussion of the trial court's decision in *Storti I* is particularly wrong. Resp. Br. 5-6. King County Judge Mary Yu decided not only that the Salary Policy "constitutes the employment contract between the University and its faculty" (CP 702), but also that its "plain language creates a mandatory duty that requires the University to provide meritorious faculty an annual merit increase of at least 2%."

CP 704. "The court cannot find any language that makes the merit salary

⁵ The University argues in a footnote without citation to *any* authority that Judge Yu's summary judgment in *Storti I* was not a final judgment. Resp. Br. at 29, n. 10. It *ignores* the cases on final judgment set forth in the class's brief at 31-32. *See also Hadley v. Cowan*, 60 Wn.App. 433, 439 n.6, 804 P.2d 1271 (1991). "A final order or judgment, settled and entered by agreement or consent of the parties is no less as a bar of estoppels than one which is rendered upon contest and trial. *LeBrie v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 418 [128 P.2d 308] (1942). "

The University apparently concedes the other elements of res judicata are met by declining to raise them.

increase contingent on funding.” *Id.*

The University nevertheless tries to assert that the *Storti I* and *Storti II* actions are different because it supposedly “reevaluated” the promise of a 2% raise in the 2008-09 academic year, but in the 2001-02 academic year it “did not change its policy.” Resp. Br. 31. The University says the “Superior Court in 2004 also did not address substantial performance, or when a policy change could take effect after a reevaluation.” *Id.*

The University is wrong; indeed, in its motion for summary judgment in *Storti I* the University specifically argued that it had “reevaluated” whether to “provide merit increases when the Legislature failed to provide increased funding.” CP 603, 602-04, 695.

The class in *Storti I* disputed whether the University had properly “reevaluated” the policy, CP 673-74, but the class further argued that “[e]ven if the UW had ‘rescinded or amended’ the Faculty Salary Policy in May 2002, the change could have only operated prospectively because the faculty had already performed the necessary meritorious work in the 2001-02 academic year to obtain the ‘2% merit salary increase at the beginning of the following academic year,’ *i.e.*, on July 1, 2002.” CP 674, 585-86, 632-33 (citing same substantial performance cases on employee bonuses that are relied on here [Appellants’ Br. 15-19] in *Storti II*).

In the University's argument in *Storti I* that it had reevaluated whether to pay the 2% raise, the University correctly summarized the argument by the class (CP 603):

Under a 'unilateral contract' theory [Storti] claims that even if the University had the authority to deny the merit increase, because he 'partially performed' by teaching 'meritoriously' in academic year 2001-02, the University could not withhold a raise in 2002-03.

Judge Yu then decided in *Storti I* that she "need not reach the question of what process would have been utilized to repeal, evaluate, or modify the [policy]" not because she had made a decision as to whether the University had properly "reevaluated" the policy -- a matter in dispute -- but because "the court is persuaded by Plaintiff's argument that the word 'reevaluation' reserves the right of the University to change the policy at some future date[.]" *i.e.*, only prospectively. Order, p. 5, CP 705.

Accordingly, there is absolutely no difference between *Storti I* and *Storti II* other than the academic years, and if the class had lost *Storti I*, the University would now be vociferously arguing that the class claim in *Storti II* was barred by res judicata. The doctrine of res judicata, however, is not a one-way street that applies only to plaintiffs. Res judicata precludes the University relitigating the class claim here.

5. The University's Statements To The Faculty That The Policy Would Guarantee A 2% Merit Raise Even If There Were A "Budget Cut From Olympia" Are Admissible.

The University argues that the Court should not consider the

contemporaneous statements made by the University (quoted on pp. 9-10, *supra*) because supposedly they are “hearsay.” Resp. Br. 25-26.⁶ The trial court, however, denied the University’s motion to strike below and the University never assigned error. RP 2. The University’s argument is thus waived. *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993).

The University is also wrong because contemporaneous statements made during the course of contract formation are considered in determining the parties’ intent. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 352-53, 103 P.3d 773 (2004); *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 651 (1990); *Hearst Communications, Inc.*, 154 Wn.2d at 502-04; Tegland, 5B *Evidence*, §801.10. The same consideration is given to legislative history of regulations, to which the University compares the Faculty Code (Resp. Br. 25). *Tobin v. DLI*, 145 Wn.App. 607, 616 n. 7, 187 P.3d 780 (2008).

Furthermore, the statements by the University President, Provost

⁶ There is real irony in the University’s argument that contemporaneous “extrinsic evidence” on the Policy’s intent should not be considered. The University asserts that such evidence is “inadmissible hearsay of the most unreliable kind.” *Id.* at 26. According to the University, the historical materials surrounding the adoption of the Salary Policy are inadmissible hearsay, but statements by Professor Lovell about a different executive order made years after the Policy was adopted are admissible. Resp. Br. 10-11. Moreover, although Mr. Lovell said “the process worked” in 2009 (*id.*), the faculty plainly never agreed with Mr. Lovell as shown by the Faculty Senate minutes that show the Faculty Senate never voted on the matter because the University had unilaterally suspended EO 64. CP 1275, 1296-98.

and other officials are admissions by a party opponent. *Momah v. Bharti*, 144 Wn.App. 731, 750-51, 182 P.3d 415 (2008); ER 801(c)(2). Indeed, the statements directly contradict the University's *post hoc* argument on the Policy, as Judge Yu stated in *Storti I*. Order, p. 3, CP 703.⁷

6. Nye Is Not Binding on the Class.

The University argues that *Nye* binds the class. Resp. Br. 17-18, citing *Nye v. UW*, 163 Wn.App. 875, 260 P.3d 1000 (2011). The University is wrong because individual actions such as *Nye*'s cannot bind classes, even if the same subject is at issue. *Smith v. Bayer Corp.*, ___ US ___ 131 S.Ct. 2368, 2374-81 and n. 11 (2011). In *Smith* the U.S. Supreme Court held that “[n]either a proposed class action nor a rejected class action may bind nonparties.” 131 S.Ct. at 2380; *accord*, *Ortiz v. Lyon Management Group, Inc.*, 69 Cal.Rptr. 3d 66, 78-79, 157 Cal.App. 4th 604 (2008); see also Appellants’ Br. at 37.

If the University wanted the *Nye* decision to bind the class, it would have agreed to *Nye*'s class certification. Instead, the University talked *Nye* out of moving to certify. CP 1430, *Nye* Dep. p. 15. If there

⁷ The University contends that the Faculty Senate minutes may not be accurate. Resp. Br. 26. But the Faculty Senate minutes are required and authorized by the University Faculty Code. The Code states that the “Secretary of the Faculty shall keep the minutes and records of the Senate.” §22-56(D.). And “[t]he minutes of all meetings will be approved by the Executive Committee of the Senate[.]” §31-32 (Rule 2). The Senate Executive Committee includes, among others, the University President, the Provost, and the Senate Chair. §22-62. The “minutes of the Senate may be examined in the Secretary’s office by any member of the faculty.” §22-81. Thus, the minutes are official and correct.

had been a class certification motion in *Nye*, *Storti* and the rest of the class would have had an opportunity for input on the arguments made, or they could have opposed class certification of *Nye*'s claims. CP 23. Here, the University improperly wants it both ways – *Nye*'s case was not certified, thus keeping the *Storti* class members from having any say, but the *Storti* class is still supposedly bound by the outcome in *Nye*'s case.⁸

The University's characterization of the *Nye* litigation is also woefully inaccurate. Resp. Br. 11-12. The reasons why the *Nye* case is different from the present litigation are set forth in detail in Appellants' Br. 37-42. Most significantly, the focus of *Nye*'s complaint was that the suspension of the Faculty Salary Policy breached a *bilateral or implied contract*, and that Executive Order 29 was ineffective to suspend the Faculty Salary Policy. 163 Wn.App. at 884-88.

The University concedes that the class here presents "Alternative Legal Theories" to those argued in *Nye*. Resp. Br. 18. In particular, the *Storti II* class has never contended, as *Nye* did, that the Faculty Salary Policy could not be unilaterally suspended or revoked. 163 Wn.App. at 886. Indeed, the *Storti II* class assumes the University did effectively suspend the

⁸ The University notes that *Nye* was allowed to intervene in *Storti*'s case, Resp. Br. 12, n. 4, implying a connection between the cases. Actually, *Nye* was allowed to intervene in the *Storti* case for only the limited purpose of opposing certification of the *Storti II* case. CP 1417, 1499. The trial court certified the *Storti II* case anyway and expressly excluded *Nye* from being a member of the *Storti II* class. CP 1485.

policy. CP 5 ¶26. The *Storti II* class, unlike Nye, argued that such a suspension or revocation could not apply to an academic year when the work required for the promised raise had been substantially performed. CP 7 ¶39. And although the *Nye* court acknowledged *Storti I*, 163 Wn.App. at 879-80, it did not consider whether the *Storti I* decision was res judicata. Resp. Br. 18-19. The Court of Appeals decision in *Nye* therefore did not address and does not affect either element of the present action.

7. The Class Is Entitled to Fees.

The University does not dispute that the attorney fees and expenses should be awarded under the common fund doctrine and RCW 49.48.030 if the class prevails. The amount of these fees should be determined by the trial court on remand. RAP 18.1(i); see also Appellants' Br. 42-43.

C. CONCLUSION

The University's Faculty Salary Policy constituted an offer under traditional principles of unilateral contract. The class accepted that offer by their performance of services in accordance with that offer for at least nine months in academic year 2008-09. They were entitled to a 2% salary increase in 2009-10 consistent with long-standing principles of unilateral contract and substantial performance. The University would have this Court turn its back on such principles, and res judicata as well, for the sake of expediency -- to address budgetary issues, balancing the University's budget on the backs of its faculty. This Court should reject the

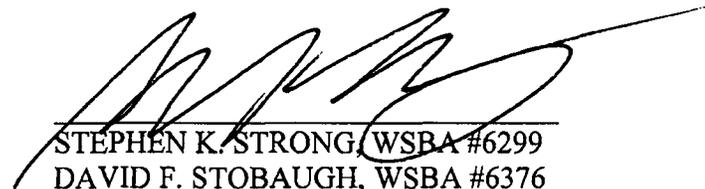
University's argument of expediency.

With regard to res judicata, the University has it completely backwards because it wants the class members to be bound by Nye's decision in which they were not parties and their legal theory was not raised, while the University is not bound by the *Storti I* class action decision in which the University was a party and its legal theories were resolved.

This Court should reverse the summary judgment in favor of the University and the denial of partial summary judgment in the class's favor, and remand the case to the trial court with directions to enter a partial summary judgment in the class's favor.

Respectfully submitted this 27th day of January, 2012.

BENDICH, STOBAUGH & STRONG, P.C.



STEPHEN K. STRONG, WSBA #6299

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Attorneys for Appellants

DECLARATION OF SERVICE

I, Monica I. Dragoiu, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:

On January 27, 2012, I served via email and USPS regular mail a copy of Appellants' Reply Brief to:

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

DATED: January 27, 2012, at Seattle, Washington.



Monica I. Dragoiu, *Legal Assistant*

FACULTY CODE EXCERPTS

Section 24–70 Faculty Salary System: Policy and Principles

- A. Faculty at the University of Washington shall be salaried on a merit-based system that reflects the University's standing among its peer institutions. Under this system, all faculty deemed meritorious shall be regularly rewarded for their contributions to their department, school/college, and university. Resources permitting, the University shall provide its meritorious faculty with salaries commensurate with those of their peers elsewhere.
- B. Advancement in salary can be effected in several distinct, but not mutually exclusive, ways. A salary increase:
1. Shall be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review (conducted in accord with procedures of Section 24–55);
 2. Shall attend, in addition to awards under Subsection B.1 above, promotion in rank (approved in accord with Section 24–54);
 3. Shall be awarded to raise individuals' salaries to the minimum salary for each faculty rank (in accord with Section 24–71, Subsection A.3 below);
 4. May be awarded as an additional merit salary increase beyond that available under Subsection B.1 (following review procedures of Section 24–55);
 5. May be awarded as a result of unit-level adjustment (in accord with Section 24–71, Subsection B.2 below);
 6. May be offered in response to a potential or actual external offer of appointment (upon review in accord with Section 24–71, Subsection B.3 below); and
 7. May be allocated as a University-wide increase in the faculty salary base that shall be distributed in equal dollar amounts or equal percentage salary increases to all meritorious faculty.

S–A 99, July 9, 1999 with Presidential approval.

Section 24–71 Procedures for Allocating Salary Increases

- A. The Provost shall consult with the Senate Committee on Planning and Budgeting and, each biennium, shall subsequently recommend to the President the allocation of available funds for salary increases, for distribution among all categories listed in Section 24–70, Subsection B. The President shall make the final decision on these allocations and shall report the decision to the Faculty Senate.
1. This allocation shall each year make available funds to provide an initial minimum

equal-percentage salary increase to all faculty deemed meritorious under Section 24-55.

2. This allocation shall each year make available funds to provide salary increases to all faculty awarded promotions approved in accord with Section 24-54.
 3. Every two years, the Provost shall, after consultation with the Senate Committee on Planning and Budgeting, determine the minimum salary for each faculty rank. This determination shall take account of the recent salaries of beginning assistant professors at the University of Washington, and shall endeavor to reflect in the floors for other ranks the general expectation of salary advancement for faculty.
- B. The Provost may distribute, in the course of a biennium, funds allocated by the President:
1. To provide additional merit salary increases (beyond those awarded under Subsection A.1). This allocation shall be distributed as equal-percentage increases to all units to fund merit increases for faculty (in accord with Section 24-55).
 2. To address the market "gap" of an individual unit. Allocation of such funds to units shall follow close consideration of individual units and consultation with the Senate Committee on Planning and Budgeting. The Provost shall periodically gather updates on salary information from appropriate sources, including unit heads, and shall make those findings available to the faculty. The department chair (or dean in an undepartmentalized school/college) shall consult with the unit's voting faculty who are senior (or, in the case of full professors, equal) in rank—or the unit's designated faculty committee(s)—about the appropriate distribution of these funds; and
 3. To retain a current faculty member, based on the recommendation of the dean. Prior to preparing a response, the dean shall first consult with the unit's chair. The faculty of each academic unit shall be provided the opportunity to cast an advisory vote on the appropriate response; alternatively, the faculty may establish, consistent with the procedures of Chapter 23, Section 23-45, a different policy regarding the level of consultation they deem necessary before a competitive salary offer may be made. This policy shall be recorded with the dean's office of the appropriate unit and a copy forwarded to the Secretary of the Faculty. The faculty shall vote whether to affirm or amend this policy biennially.
- C. The deans of the schools and colleges shall, after consultation with their elected faculty councils (Chapter 23, Section 23-45, Subsection B), allocate to the faculty of the constituent units of their school/college, all funds made available to provide salary increases under Section 24-70, Subsection B. Distribution of these awards to individual faculty shall be carried out following the requisite procedures of Chapter 24.

S-A 99, July 9, 1999; S-A 105, May 6, 2002: both with Presidential approval.

**EXECUTIVE
ORDER
NO. 64**



University of Washington Office of the President, Box 351230

AUTHORIZATION TO REVISE THE UNIVERSITY HANDBOOK

TO: Professor Lea Vaughn
Secretary of the Faculty
Box 351271

FROM: Richard L. McCormick
President
Box 351230

SUBJECT: New Executive Order – University of Washington Faculty Salary Policy

I certify that the attached statement has been properly approved and may now be published as a revision to the *University Handbook*.

Richard L. McCormick
Signature

President
Title

January 7, 2000
Date

bc: Dr. Mary B. Coney
Dr. Lee L. Huntsman
Mr. Weldon B. Ihrig
Ms. Carol S. Nicolls ✓
Dr. Steven G. Olswang
Dr. Gerry F. Philipsen

Executive Order

University of Washington Faculty Salary Policy

The fundamental purpose of the University of Washington Faculty Salary Policy is to allow the University to recruit and retain the best faculty. To accomplish these two objectives, the faculty must have confidence that their continuing and productive contributions to the goals of their units and to the University's missions of teaching, research, and service will be rewarded throughout their careers. To compete for the best faculty, the University must be competitive with its peers. To retain the best faculty requires a similarly competitive approach. Therefore, the University places as one of its highest priorities rewarding faculty who perform to the highest standards and who continue to do so throughout their appointments at the University. This new policy is designed to provide for a predictable and continuing salary progression for meritorious faculty.

Salary funds must be used to attract, retain, and reward those faculty whose continuing performance is outstanding, while recognizing that disciplinary variations exist in the academic marketplace. Accordingly, the University's Salary Policy must allow for differential allocations among units. This provides the necessary flexibility to address the market gaps that develop between UW units and their recognized peers, acknowledges existing and future differentials in unit performance and contribution, and also recognizes that differing funding sources and reward structures exist among schools and colleges. The policy must ensure that equity considerations and compression are also addressed as needed.

The University's Salary Policy is founded upon the principle that individual salary decisions must be based on merit as assessed by a performance review conducted by faculty and administrative colleagues. Salary adjustments for performance and retention, as well as salary awards stemming from differential unit performance and marketplace gaps, are based upon a consultative process of faculty and administrative evaluation. Merit/performance evaluations are unit-based and reward the faculty for their contributions to local units as well as to the University's goals.

Allocation Procedure

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.

Prior to the beginning of each biennium, the Provost will meet with the Board of Deans, the Faculty Senate Planning and Budget Committee, and the University Budget Committee to formulate a recommendation for a salary distribution plan. After consultation with the above

groups, the Provost shall make a recommendation to the President for faculty salary allocations. The President shall decide faculty salary allocations for the biennium, and this decision shall be reported to the Faculty Senate and to the University community more broadly.

Allocation Categories

Consistent with the stated objectives, the first priority shall be to support regular merit and promotion awards to current faculty. Further, each biennium the minimum salaries by rank will be reviewed and, if adjusted, support will be provided to ensure those minimum levels are achieved. Other funds, as available, may be allotted among the following faculty salary adjustments:

1. Additional merit to all faculty;
2. Differential distributions by unit to correct salary gaps created by changing disciplinary markets or assessments of unit quality;
3. Recruitment and retention;
4. Systemwide adjustments to raise the salaries of all meritorious faculty.

The University commits to support salary adjustments based on performance evaluations for those faculty deemed meritorious after a systematic review by faculty colleagues, department or unit head, Dean, and Provost. In order for these performance evaluations and merit salary recommendations to be meaningful, they must be done systematically and over an appropriate length of time to be able to make true quality assessments about performance and progress, considering the cumulative record of faculty.

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.

Any faculty member whose performance is not deemed meritorious shall be informed by the Chair/Dean of the reasons. 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. A departmental advisory committee, appointed consistent with Section 24-55H of the Faculty Code, will consider the development needs of faculty members not receiving regular merit salary increases for two consecutive years.

Promotion

In addition to regular merit salary allocations, each faculty member who is promoted in rank shall be awarded a 7.5% promotion salary increase beginning on the date the promotion is effective.

Unit Adjustments

Additional salary funds may be allocated by the Provost to colleges and schools at any time during the biennium, after appropriate consultations with the Faculty Senate Planning and Budgeting Committee, to address differentials occurring in the academic labor markets and to reflect assessments of the quality, standing, and contributions of units to College, School, and University goals. Unless specifically allocated by the Provost for a particular unit or purpose, the Deans shall consult with their elected faculty councils before distributing any additional salary increase funds among their constituent units. The procedures of Section 24-55 of the Faculty Code will be followed in distributing funds allocated to adjust faculty salaries based on merit.

Retention Adjustments

With approval from the Provost, college-administered or University funds may be used to adjust faculty salaries as a means to retain faculty members at the University of Washington either at the time of merit reviews or at other times as necessary throughout the academic year. Assessments of a faculty member's quality and unit contribution are essential elements in decisions to make retention adjustments. Consultative processes to recommend retention adjustments shall be established at the unit level following the procedures set forth in Section 24-71 of the Faculty Code.

Funding Cautions

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.

OFFICE RECEPTIONIST, CLERK

To: Monica Dragoiu
Cc: Jake Ewart; ldp@hcmp.com; Mary Crego; phil@tal-fitzlaw.com
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Rec. 1-27-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Monica Dragoiu [<mailto:mdragoiu@bs-s.com>]
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To: OFFICE RECEPTIONIST, CLERK
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Attached please find Plaintiffs' Reply brief (with an 8 pages Appendix).

The following information is provided in accordance with the rules for e-filing:

Case name: Storti v. UW

Case number: 86310-5

Name, phone number, bar number and email address of the attorney signing this document:

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Thank you.

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