

FILED: October 8, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

KEN LEWIS and UTILITY REFORM PROJECT,
Plaintiffs-Respondents,

v.

LEE BEYER, RAY BAUM, and JOHN SAVAGE,
Defendants,

and

OREGON PUBLIC UTILITY COMMISSION,
Defendant-Appellant.

Marion County Circuit Court
07C11429

A150592

Paul J. Lipscomb, Senior Judge.

On respondents' petition for reconsideration filed June 6, 2014, and appellant's response to petition for reconsideration filed on September 3, 2014. Opinion filed April 23, 2014. 262 Or App 486, 325 P3d 59.

Daniel W. Meek for petition.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Karla H. Ferrall, Senior Assistant Attorney General, for response.

Before Duncan, Presiding Judge, and Armstrong, Judge, and Schuman, Senior Judge.

SCHUMAN, S. J.

Reconsideration allowed; former opinion modified and adhered to as modified.

1 SCHUMAN, S. J.

2 In this proceeding under ORS 183.490 to compel the Public Utility
3 Commission (PUC) to order four utilities to establish "automatic adjustment clauses," we
4 reversed a supplemental judgment of the trial court awarding attorney fees to plaintiffs
5 Ken Lewis and the Utility Reform Project (URP), concluding that there was no statutory
6 authorization for the award. *Lewis v. Beyer*, 262 Or App 486, 325 P3d 59 (2014). On
7 plaintiffs' petition for reconsideration, we adhere to our conclusion but write briefly to
8 correct errors in the opinion that are immaterial to the outcome.

9 The first error is a statement, *id.* at 492, that the appeal arises from a
10 proceeding initiated by plaintiffs on October 29, 2007. In fact, that is the date that
11 plaintiffs filed their amended complaint; they filed their original petition in February
12 2007, and we correct that statement accordingly. Also, we wrote:

13 "Indeed, it could *not* be a valid petition for review of an agency
14 order because the order in question issued in April 2007, the deadline for
15 filing a petition for review expired 60 days later in June 2007, and this
16 action was not filed until October 2007."

17 *Id.* at 496-97 (emphasis in original). We delete that sentence from the opinion, because it
18 is incorrect; however, its deletion does not alter our analysis or conclusion that the
19 proceeding is not one for which attorney fees are available under ORS 183.497, because
20 it is not the type of proceeding for which attorney fees are authorized under the statute.
21 262 Or App at 496.

22 Plaintiffs contend that we mischaracterized their claim in the trial court as
23 one seeking a refund of overpayments made prior to 2006 when, in fact, the claim was for

1 a refund of overpayments for periods commencing January 1, 2006. We did not. Neither
2 the amended complaint nor the briefing in this case made reference to the years for which
3 a refund was sought. But it is clear from the amended complaint that the alleged inaction
4 by the PUC that formed the basis for plaintiffs' claim was the rejection of plaintiffs'
5 request to establish an automatic adjustment clause within 60 days from the PUC's
6 November 22, 2005, threshold finding, which was, in turn, based on the utility tax filings
7 due October 15, 2005, for the three previous years. We were not mistaken in our
8 characterization of plaintiffs' claim. Nonetheless, the trial court's judgment limited
9 plaintiffs' relief and ordered that the PUC put into effect an automatic adjustment clause
10 "to account for any and all difference between taxes actually paid to units of government
11 and those collected on or after January 1, 2006." Thus, although plaintiffs' claim related
12 to prior years, the trial court's judgment related only to amounts collected on or after
13 January 1, 2006. But it related to the same alleged "inaction" by the PUC--the failure to
14 establish an automatic adjustment clause based on the October 15, 2005, tax filings. If
15 and to the extent that our opinion may have suggested that the trial court's judgment
16 pertained to taxes collected for years prior to January 1, 2006, *see* 262 Or App at 497, we
17 correct that inaccuracy. However, there has never been a contention that the PUC failed
18 to respond to plaintiffs' efforts to have the agency impose an automatic adjustment
19 clause; the PUC just rejected them. We therefore adhere to our discussion and
20 conclusion that this case does not involve a failure to act, but an alleged erroneous
21 decision by the PUC to reject plaintiffs' request for the establishment of an automatic

1 adjustment clause based on the October 15, 2005, tax filings, whether for the period
2 before or after January 1, 2006.

3 We reject plaintiffs' remaining contentions without discussion.

4 Reconsideration allowed; former opinion modified and adhered to as
5 modified.