IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BEN DAVIS, FLOYD FULMER, ROY HYETT, DICK OLSON, individually and on behalf of all persons similarly situated, Respondents, v. STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION, Appellant.	No. 40019-7-II ORDER CORRECTING CAPTION

On January 21, 2011, this court issued its unpublished opinion in the above matter. The caption contained a typographical error in the appellant's name. It is hereby

ORDERED that the appellant's name in the caption is changed to:

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION.

IT IS SO ORDERED.

DATED this _____ day of _____, 2011.

CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BEN DAVIS, FLOYD FULMER, ROY HYETT, DICK OLSON, individually and on behalf of all persons similarly situated, Respondents, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Appellant.	No. 40019-7-II UNPUBLISHED OPINION

Bridgewater, J.P.T.[1] — The Washington State Department of Transportation (DOT) appeals an award of attorney fees under RCW 49.48.030 to plaintiffs in a class action lawsuit in which we held the plaintiffs were unsuccessful. We hold that RCW 49.48.030 does not entitle the plaintiffs to attorney fees. We vacate and reverse.

FACTS

In 2004, the DOT ferry engine room employees (plaintiffs) filed this lawsuit seeking to recover wages for performing watch change activities. Watch change is a process in which an oncoming shift relieves an off-going shift. The off-going shift had mandatory procedures that frequently continued past the scheduled start of the next watch, but the off-going workers were not compensated for this time.

[1] Judge Bridgewater is serving as judge pro tempore of the Court of Appeals, Division II, under RCW 2.06.150.

The DOT moved for summary judgment, asserting that the lawsuit should be dismissed because plaintiffs failed to exhaust their administrative remedies under the terms of their collective bargaining agreements (CBA). Plaintiffs filed a cross motion for summary judgment, asserting that RCW 49.52.050 and .070 entitled them to recovery. The trial court granted summary judgment for plaintiffs and awarded them attorney fees based on the common fund doctrine.

The DOT appealed to this court, arguing that the trial court erred in granting summary judgment because plaintiffs had failed to follow their CBA grievance procedures, in effect not exhausting their alternative remedies. *Davis v. Dep't of Transp.*, 138 Wn. App. 811, 825-26, 159 P.3d 427 (2007), *review denied*, 163 Wn.2d 1019 (2008). Plaintiffs responded that their claims had nothing to do with the CBA and, thus, a grievance proceeding before the Marine Employees Commission (MEC) would be futile. *Davis*, 138 Wn. App. at 820.

In *Davis*, plaintiffs denied that they had a remedy under the CBA and instead argued that RCW 49.52.050 and .070 entitled them to relief. *Davis*, 138 Wn. App. at 820. We disagreed and held that the correct statutory remedy was under RCW 47.64.150, which directed the plaintiffs to follow the CBA grievance procedures. *Davis*, 138 Wn. App. at 824. Because the plaintiffs had failed to follow those procedures, we reversed and remanded to enter judgment for the DOT. *Davis*, 138 Wn. App. at 826. Plaintiffs also requested attorney fees in *Davis*, which we denied, stating, "Because the employees at this time have not recovered any wages owed, we do not award attorney fees under either RCW 49.48.030 or RAP 18.1." *Davis*, 138 Wn. App. at 826.

In March 2008, the plaintiffs' union, the Marine Engineers' Beneficial Association (union), filed a request for grievance arbitration with the MEC to recover wages for watch change

activities. The individual plaintiffs could not file for grievance arbitration on their own behalf; that could only be done by the union.

In July 2009, the MEC sustained the union's grievance and awarded back pay for watch change activities. The MEC's decision entered the following findings of fact relevant to this appeal:

> 2. . . . [T]he WSF has never paid engine room employees for the time involved in performing the watch turnover, even though watch turnover extends the employee's work beyond the regular assigned work shift.
>
> . . . .
>
> 5. The Washington Court of Appeals reversed the Superior Court's ruling, dismissing the class action lawsuit because the employees' claims should have been brought pursuant to RCW 47.64.150, which required them to seek a remedy through procedures in the CBA or procedures established by the MEC. However, the Court of Appeals also held that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. **And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration**." (Emphasis added.)
>
> . . . .
>
> 7. The parties agree that each watch turnover takes less than fifteen (15) minutes.
>
> 8. [The CBA provides] that, when work is extended less than 15 minutes beyond the regularly assigned workday, the minimum payment is 15 minutes at the overtime rate.

CP at 1106-07. The MEC also entered the following relevant conclusions of law:

> 3. The Washington State Court of Appeals has ruled that engine room employees are to be compensated under the Collective Bargaining Agreements for time spent on watch turnover.
>
> 4. [The CBA] provide[s] compensation for work that is extended beyond a regular assigned work day.

CP at 1108.

In addition to these findings of fact and conclusions of law, the MEC stated the following

in a discussion:

> It is the view of the Commission that the State of Washington Court of Appeals overstepped its bounds and directed us, in advance of arbitration, as to what our findings should be. We strongly believe it was inappropriate of the court to have given advance instructions to the Commission on the interpretation of the collective bargaining agreement.
>
> However, the matter is before us as an agency of the State of Washington and we are governed by the courts of this State. We therefore concede to the directive of the Court and find that the matter of whether or not watch changeover is "work" within the meaning of the statutes of the State of Washington has already been determined, and our challenge is to determine the proper remedy.
>
> *It is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift.*
>
> . . . [T]he Court properly concluded that the contract requires watch turnover pay is owed to engine room employees at WSF."

CP at 1109 (emphasis added).

The union requested that the MEC award the plaintiffs attorney fees for their action before the MEC and for the plaintiffs' litigation in *Davis*. The MEC awarded the union attorney fees for bringing the grievance before it but denied the union's request to also award plaintiffs attorney fees.

In October 2009, the plaintiffs, not the union, filed a motion in trial court seeking attorney fees in *Davis*. They also filed an alternative motion to reopen the case solely for consideration of an award of attorney fees, but not costs. The plaintiffs argued that we left open the possibility that they could recover attorney fees because the *Davis* opinion stated, "Because the employees *at this time* have not recovered any wages owed, we do not award attorney fees." *Davis*, 138 Wn. App. at 826 (emphasis added). The trial court granted plaintiffs' motion for attorney fees

and costs.

ANALYSIS

We award attorney fees only if authorized by a contract, statute, or recognized ground of equity. *Bowles v. Dep't of Ret. Syss.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). We review de novo a trial court's decision that a particular contract, statute, or recognized ground in equity authorizes an attorney fee award. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

The threshold question is whether the trial court had authority to hear plaintiffs' motion for attorney fees. The State argues that the court lacked such authority because we issued a mandate in *Davis*, in which we denied plaintiffs' request for attorney fees. Plaintiffs respond that *Davis* did not make a final decision on his request for attorney fees, but rather held, "'Because the employees at this time have not recovered any wages owed, we do not award attorney's [sic] fees under either RCW 49.48.030 or RAP 18.1.'" Br. of Resp't at 13-14 (quoting *Davis*, 138 Wn. App. at 826). They argue that RAP 12.2 allowed the trial court to hear his motion because we left open the possibility that they could recover attorney fees if the employees recovered wages owed.

Under RAP 2.2(a)(3), a party may appeal a decision determining the action, unless a statute or court rule otherwise prohibits the appeal. RAP 12.2 governs the trial court's authority after an appellate mandate has issued. The rule provides that "[u]pon issuance of the mandate . . . the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9." RAP 12.2. The rule continues,

"After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court." RAP 12.2.

Plaintiffs point out that our decision in *Davis* did not unequivocally foreshadow recovering attorney fees but, rather, left open the possibility that plaintiffs could recover attorney fees after recovering back wages, which they have. Specifically, the plaintiffs recovered back wages via the union's claim before the MEC, an action in which the union also recovered attorney fees. But the union's attorney fee recovery, although benefiting the plaintiffs, was an award to the union, not to the plaintiffs for their litigation that culminated in *Davis*. Accordingly, plaintiffs now ask us to award them attorney fees for litigating *Davis.*

To answer plaintiffs' request, we must determine whether a statute or court rule authorized plaintiffs' postjudgment motion for attorney fees and costs. RAP 12.2. Plaintiffs contend that RCW 49.48.030 entitles them to attorney fees for litigating *Davis*.

RCW 49.48.030 provides that "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." Plaintiffs construe "action" to include *Davis*, which the plaintiffs first brought to trial court, and a separate action, which the union first brought to the MEC and actually recovered lost wages. Reduced to its core, plaintiffs essentially contend that without *Davis*, the union would not have been able to recover lost wages for watch change procedures for its engine room employees. Plaintiffs, in part, base their conclusion on the assumption that they were unable to originally bring

their claim under the CBA in *Davis* because their union and employer refused to do so, believing instead that the CBA did not address compensation for watch change.

Plaintiffs' first premise is that a series of different litigation steps can collectively constitute an "action" under RCW 49.48.030. But the cases they cite are inapposite. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002); *McIntyre v. State Patrol*, 135 Wn. App. 594, 141 P.3d 75 (2006). In both *Fire Fighters* and *McIntyre*, one action established the right to recover back wages, and the second action recovered attorney fees for the first action. *Fire Fighters*, 146 Wn.2d at 32-33; *McIntyre*, 135 Wn. App. at 597. Here, *Davis* granted judgment in favor of the DOT and rejected plaintiffs' request for attorney fees. In a completely separate action that the union brought before MEC, the union successfully argued that the engine room employees were entitled to back wages for watch change activities under the CBA. Plaintiffs now request attorney fees for litigating *Davis*. Unlike *Fire Fighters* and *McIntyre*, in which the parties requesting attorney fees had prevailed, plaintiffs did not prevail in *Davis*, the action for which they now request attorney fees. The plain language of RCW 49.48.030 allows a person to recover attorney fees only if they are "*successful* in recovering judgment for wages or salary owed." (Emphasis added).

But plaintiffs argue that they were successful in *Davis* because, in effect, that decision was necessary to the MEC's decision that actually awarded their lost wages. They contend that *Davis* held that the CBA gave them the right to recover wages for watch change and that the MEC merely determined the amount of wages owed. We disagree. Although *Davis* gave direction to the MEC about whether the CBA addressed compensation for watch changes, the MEC had

authority to interpret the CBA as it saw fit, which it did, coming to the same conclusion as we did in *Davis*.

The MEC's decision observed,

> It is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift . . . [and] the Court properly concluded that the contract requires watch turnover pay.

CP at 1109. The MEC also entered a conclusion of law stating that the CBA "provide[d] compensation for work that is extended beyond a regular assigned work day." CP at 1108. And the MEC's findings of fact 2, 7, and 8 supported the MEC's decision to award watch turnover pay. Thus, despite our direction in *Davis*, the MEC independently found that the CBA provided overtime compensation for work shift changes. Plaintiffs were unsuccessful in *Davis*, and that decision was not necessary to the MEC's decision to award wages. The CBA gave the MEC authority to award wages, not *Davis*.

To the extent that the MEC entered findings of fact or conclusions of law that projected *Davis* as precedent as to the issue of the right to recover lost wages, the MEC misunderstood the nature of *Davis*. *Davis* ultimately held that plaintiffs could not first bring an action to court without exhausting the issue with the MEC. Plaintiffs ask us to award them attorney fees in a case they lost (*Davis*) merely because that case indicated, in analysis separate from its ultimate holding, that the employees could pursue recovery under the CBA. *Davis* was not the first step in a multi-step action to recover back wages; instead, *Davis* held that the courts were not the first

step, and, because we rejected plaintiffs' theory in *Davis* that they could recover under a lawsuit that they first filed in court, plaintiffs are not entitled to attorney fees for that action (*Davis*). RCW 49.48.030. It is axiomatic that an award of attorney fees is based on successful litigation.

Plainly said, the plaintiffs were not successful in the court action culminating in *Davis*. The plaintiffs cannot claim attorney fees for that unsuccessful action. Because of our decision, we need not address the State's challenge to the amount of attorney fees that the trial court awarded. Plaintiffs are not entitled to attorney fees for either the unsuccessful original action in *Davis* or for this appeal. RCW 49.48.030; RAP 18.1. We vacate and reverse the trial court's order granting plaintiffs' attorney fees and costs.

Vacated and reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.P.T.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.