IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STUART DAGG, MICHAEL BRADLEY and LAUREL REILLY,	)	**No. 27890-5-III**
Appellants,	)	**Division Three**
v.	)	
MILLER, DEVLIN & McLEAN, P.S. formerly MILLER, DEVLIN, McLEAN & WEAVER, P.S. and CHRISTINE WEAVER, Attorney at Law,	)	**UNPUBLISHED OPINION**
Respondents.	)	

Kulik, C.J. — Spokane School District No. 81 (District 81) employed Stuart Dagg, Michael Bradley, and Laurel Reilly as tutors. When attorney Christine Weaver failed to timely appeal District 81's decision to treat the tutors as leave replacement employees, thereby denying them continuing contracts, the tutors sued Ms. Weaver. Despite finding Ms. Weaver negligent, the trial court concluded that she did not proximately cause any damages to the tutors because their claim to continuing contracts would have failed on the merits. Thus, the trial court denied damages to the tutors. The tutors appeal, asserting

their claim for continuing contracts under RCW 28A.405.210 would not have failed absent the negligence of Ms. Weaver and, therefore, they are entitled to damages. Because we conclude that the statute does not require a teacher's certificate for the tutor position, even though District 81 chose to require a certificate, we affirm the trial court's order in favor of District 81.

FACTS

Stuart Dagg, Michael Bradley, and Laurel Reilly (hereinafter referred to collectively as "the tutors") were employed as tutors by Spokane School District No. 81. The tutors met with attorney Christine Weaver on May 13, 2003, to discuss the merits of their efforts to obtain continuing contracts with the District. The tutors retained Ms. Weaver who sent a letter dated May 16, 2003, to the Washington Education Association (WEA) addressing the strength of their claim and encouraging the union to underwrite the tutors' litigation. Around June 2, the tutors received a letter from general counsel for the WEA stating that they would not fund the tutors' litigation "'because of the very low chance of success.'" Clerk's Papers (CP) at 76.

A few days later, the Spokane Education Association (SEA) provided the tutors with the District's "'last, best, and final offer,'" along with notice of a meeting with the District to discuss the offer with the tutors on June 9. CP at 76. Mr. Dagg sent an e-mail

to Ms. Weaver on Friday, June 6, informing her of the "'last, best and final offer,'" as well as the meeting scheduled for June 9. CP at 76. The e-mail requested a meeting between the tutors and Ms. Weaver before June 13, the deadline the SEA set for settling the issue. Mr. Dagg also provided Ms. Weaver with a copy of the offer on June 6. Ms. Weaver did not have an opportunity to review the document until Monday, June 9. Ms. Weaver failed to advise the tutors not to sign any contract, or anything relating to their employment with the District, unless she had the opportunity to review it first.

At the meeting on June 9, the District insisted that the tutors sign the contracts offered, designating the tutors as leave replacement employees. The tutors signed the contracts and met with Ms. Weaver on June 10. Ms. Weaver advised the tutors that the contracts were in their favor and that the contracts would have no negative impact on the tutors' ability to pursue continuing contract rights.

At the end of May, the District notified the tutors that, due to budget cuts, the tutors' positions were terminated as of the 2003-2004 school year. On July 11, Ms. Weaver filed a declaratory judgment action seeking adjudication that the tutors were entitled to continuing teaching contracts under RCW 28A.405.210.

On October 15, Ms. Weaver filed a motion for summary judgment. In January 2004, the District filed a cross-motion for summary judgment asserting, for

the first time, that the tutors' claim was time barred by the 30-day limitation in RCW 28A.645.010. The trial court granted the District's motion for summary judgment, concluding that the tutors were aggrieved by their classification as leave replacement employees, and that their failure to appeal within 30 days—as required by RCW 28A.645.010—deprived the court of subject matter jurisdiction. The trial court denied the tutors' motion for reconsideration and this court affirmed the dismissal of the tutors' declaratory judgment action. The Supreme Court denied review.

The tutors brought this action, asserting Ms. Weaver was negligent in two ways: (1) she failed to advise the tutors not to sign employment contracts without first having her review them, and (2) she failed to file an appeal within 30 days of the change in the tutors' classification to leave replacement employees. We first address the merits of the underlying case.

Each of the tutors started as a substitute teacher, eventually became employed in a tutor position, and held that position for at least two years prior to the end of the 2002-2003 school year. After the 2002-2003 school year, the District eliminated the tutor positions for various reasons, including financial constraints.

Each of the tutors held valid Washington State Teacher's Certificates during their employment with the District. The District required each of the tutors to have a Washington State Teacher's Certificate, although state law does not require certification for tutors. The District compensated certificated tutors more than noncertificated tutors.

The tutoring positions were either with a home hospital program or a tutor-mentor program. The home hospital program provided tutors for students who were unable to attend school because of a physical condition or illness. The tutor-mentor program provided tutors for at-risk students. Eventually, one of the established locations for the tutor-mentor program was Bryant Center. Mr. Dagg and Mr. Bradley worked at Bryant Center. Ms. Reilly worked at a middle school. The purpose of the tutor program was to maintain a student's performance so that the student could return to their regular classroom with minimal disruption and delay.

Each tutor position was on an on-call basis. The tutors worked from two to seven hours per day, based on the District's need. The tutors submitted time cards entitled "'Certificate Tutor Timecard'" to distinguish them from noncertificated tutors, and they were paid hourly. CP at 68.

The District hired tutors based on student needs. Generally, tutors did not start at the beginning of the school year, particularly at Bryant Center, where students had to be

referred to the program. Sometimes tutors would not be called until November or even later in the school year. The District kept a tutor list and, when it needed a tutor, the District called one from the list. Tutors had no obligation to work when they were called and could decline without penalty.

A certificated teacher provided a tutored student's curriculum and the tutors worked under either a tutor facilitator or the student's classroom teacher. The tutors provided each student with supervision and individualized instruction on their assignment for the day. Generally, tutors would work with two students at a time, for two hours. Bryant Center scheduled up to three two-hour sessions each day, depending on the number of students in the program at any given time. The tutor facilitator or classroom teacher was ultimately responsible for each student's progress. The tutors reported to the tutor facilitators at Bryant Center, and the tutor facilitator reported to the student's regular classroom teacher.

Tutors were not required to arrive before, or stay after, a session or a school day. Tutors did not have to attend faculty meetings or participate in faculty committees or activities. Tutors were not subject to formal observation and evaluation procedures.

After the start of the 2001-2002 school year, a group of tutors, including the tutors here, sought union representation to bargain with the District for increased compensation

and benefits. Ultimately, the tutors wished to obtain continuing contract rights as certificated teachers. The SEA declined representation of the tutors. The tutors contacted the Public Service Employees' Union, but ultimately were included in the SEA certificated bargaining unit. The SEA represents almost all school employees in the District, whether certificated or classified.

On August 26, 2002, Barb Wright, Assistant Superintendent of Human Resources for the District, notified the tutors that they had been included in the collective bargaining unit, and they could expect work for the 2002-2003 school year. She made no guarantees beyond that year.

Negotiation between the District and the SEA, relating to the tutors, began in September or October 2002, and concluded on June 3, 2003. During the negotiation process, Assistant Superintendent Wright conducted a fact-finding procedure in which she concluded that while tutors were required to have teacher's certificates, their duties and functions were substantially different from typical continuing contract teachers. She also noted that there were two levels of tutors in the District—classified tutors without a teacher's certificate and tutors with teacher's certificates. Tutors with certificates received higher pay.

Around April 2, Assistant Superintendent Wright informed the SEA that the

District intended to classify the tutors as leave replacement employees. Leave replacement employees are not entitled to continuing contracts under state law. The SEA did not actively promote continuing contracts for the tutors during the bargaining process.

On June 3, the District and the SEA agreed that the appropriate classification for the tutors would be a subset of the certificated group of employees. This was the first time the tutors were formally recognized as certificated employees. The tutors were offered one-year contracts as leave replacement employees, retroactive to the 2002-2003 school year.

The tutors urged their union representatives to advocate for continuing contracts. The union representatives told the tutors that the leave replacement decision was a separate issue from the continuing contract issue and that entering into the leave replacement contracts would have no adverse effect on the tutors' continuing contract rights. Subsequently, the tutors retained attorney Christine Weaver.

The trial court found that the District treated the tutors as classified employees before offering them the leave replacement contract, although the tutors testified they were never told they were classified employees. The District's decision to treat the tutors as classified employees occurred several years prior to their efforts in 2002-2003 to change their employment status.

The trial court concluded that Ms. Weaver was negligent both by failing to tell the tutors not to sign any employment contracts and by failing to file the appeal within 30 days. However, the trial court also concluded that Ms. Weaver's negligence did not contribute to the outcome of the underlying case and, therefore, the court did not award damages to the tutors.

Specifically, the trial court found that the tutors were not injured or damaged by Ms. Weaver's failure to tell the tutors not to sign any employment contracts. In fact, the contracts were advantageous to the tutors by providing increased pay as well as health and other benefits not previously provided.

The trial court concluded that the tutors' challenge to their initial classification for any damages prior to 2002 was time barred by RCW 28A.645.010. Therefore, any damages awarded in their claim for continuing contract rights would have been limited to losses occurring during and after the 2002-2003 school year.

The trial court further concluded that the tutors would not have prevailed in their claim for continuing contract rights. Leave replacement employees are not entitled to continuing contracts, so the tutors could not prevail after signing their contracts. Before signing their contracts, the court concluded that the duties, functions, and responsibilities of the tutors would not entitle them to continuing contract rights under

RCW 28A.405.210.

The tutors appeal, asserting they are entitled to damages. No findings of fact are contested on appeal, and Ms. Weaver's negligence is not contested on appeal.

ANALYSIS

Statutory construction is a question of law, which this court reviews de novo. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993).

The tutors assert that they were certificated employees, and the benefits of RCW 28A.405.210 would have applied to them, but for Ms. Weaver's negligence. The elements of legal malpractice are: (1) an attorney-client relationship that gives rise to a duty of care, (2) a breach of that duty, (3) damage to the client, and (4) a proximate cause between the breach and the damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Here, Ms. Weaver's negligence is not challenged on appeal—only the damages elements are at issue. We review as a matter of law whether Ms. Weaver's negligence proximately caused damage to the tutors. If the tutors would not have prevailed in their claim on the merits, then there is no proximate cause between Ms. Weaver's actions and damage to the tutors.

In issues of statutory construction, the court assumes the legislature intends what it says. We will not look beyond the plain meaning of the words in the statute absent

ambiguity. *Bennett v. Seattle Mental Health*, 150 Wn. App. 455, 460, 208 P.3d 578 (2009). The court will look to legislative intent only if the statute is ambiguous. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999).

The statute in question here is RCW 28A.405.210, which states:

> No teacher . . . or other certificated employee, holding a position as such with a school district, hereinafter referred to as "employee", shall be employed except by written order of a majority of the directors of the district at a regular or special meeting thereof, nor unless he or she is the holder of an effective teacher's certificate or other certificate required by law or the state board of education *for the position for which the employee is employed*.
>
> The board shall make with each employee employed by it a written contract, which shall be in conformity with the laws of this state, and except as otherwise provided by law, limited to a term of not more than one year.

Former RCW 28A.405.210 (1996)[1] (emphasis added).

Employees covered by the statute are entitled to continuing contracts. And renewal is guaranteed unless the District has probable cause not to renew the employee's contract. RCW 28A.405.210 also provides a number of due process rights.

By the statute's plain language, (1) a covered employee must be certificated, (2) a covered employee must hold a position as such, and (3) a certificate must be

[1] This was the law applicable in 2003. Subsequently, "state board of education" was changed to "Washington professional educator standards board." Laws of 2005, ch. 497, § 216. Otherwise, no substantive changes have been made to RCW 28A.405.210.

required by law or the state board of education for the position for which the employee is employed.

The dispositive question is whether the law or the state board of education requires certification for the position. Even though the District chose to hire some certificated teachers as tutors, no law requires the District to do so. And the Washington State Board of Education did not require persons employed as tutors to be certificated. These tutors were simply tutors with certificates and were not covered by RCW 28A.405.210 or entitled to continuing contracts. Dr. Gene Sharratt testified as an expert witness that the Washington Professional Educator Standards Board did not require certification for tutor positions.

Because the tutors would not have prevailed in their claim on the merits, this court cannot hold that Ms. Weaver's actions proximately caused the tutors' damage. We do not address the tutors' remaining arguments because these arguments rely on coverage under RCW 28A.405.210.

We affirm the trial court's order in favor of District 81.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Brown, J.