The Honorable Hollis R. Hill

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ZOE & STELLA FOSTER, minor children by and through their guardians MICHAEL FOSTER and MALINDA BAILEY; AJI & ADONIS PIPER, minor children by and through their guardian HELAINA PIPER; WREN WAGENBACH, a minor child by and through her guardian MIKE WAGENBACH; LARA FAIN, a minor child by and through her guardian MONIQUE DINH; GABRIEL MANDELL, a minor child by and through his guardians VALERIE and RANDY MITCHELL; JENNY XU, a minor child by and through her guardians YAN ZHANG & WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY RESPONSE TO PETITIONERS' MOTION FOR ATTORNEY FEES

I. INTRODUCTION

A qualified party prevailing in judicial review of an agency action may be awarded up to $25,000 in attorney fees "unless the court finds that the agency action was substantially justified." RCW 4.84.350(1). Petitioners' Motion for Attorneys' Fees & Costs (Motion)

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should not be granted for a number of reasons. First, it is not clear that Petitioners are a qualified party as required under RCW 4.84.350. Second, contrary to Petitioners' assertion, they did not prevail in the earlier stages of this case: rather, this Court upheld the Washington State Department of Ecology (Ecology) decision to deny their petition for rulemaking. Third, although this Court granted Petitioners' motion to vacate portions of the Court's November 19, 2015 decision, Petitioners are not entitled to attorney fees because Ecology's actions were substantially justified. Finally, Petitioners did not obtain the relief they were seeking. Indeed, the relief provided in the May 16, 2016 order in this case is limited to requiring Ecology to do what the agency had already committed to doing (adopting a rule by the end of 2016) and taking an action that Petitioners did not ask for (making a recommendation to the 2017 Legislature). Therefore, Ecology respectfully asks this Court to deny Petitioners' Motion for Attorneys' Fees & Costs.

II. ARGUMENT

A. Petitioners Have Not Adequately Shown That They Are a "Qualified Party" Under the Equal Access to Justice Act

Under the Equal Access to Justice Act, a "qualified party" is either "(a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed" or "(b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141J(a)), may be a party regardless of the net worth of such organization or cooperative association." RCW 4.84.340(5). Petitioners do not base their claim to qualify as parties on acting as an organization. Instead, they claim to have filed as individuals, and claim, through the declaration of their attorney, that their net worth is less than

one million dollars. Motion at 3; Declaration of Andrea K. Rodgers in Support of Petitioners' Motion for Attorneys' Fees & Costs (Rodgers Decl.) ¶ 3. Neither Petitioners nor Ms. Rodgers offer any evidence to support this claim. Ms. Rodgers' claim that these children and their guardians, by and through whom they filed suit, have a net worth of less than one million dollars does not constitute sufficient evidence that Petitioners meet the requirements for qualifying parties under RCW 4.84.350. *See Shaw v. Dep't of Ret. Sys.*, 193 Wn. App. 122, ___ P.3d. ___ (2016) (denying attorney fees under RCW 4.84.350 because Mr. Shaw failed to demonstrate that he met the definition of "qualified party").

B. Petitioners Did Not Prevail in the Earlier Proceedings

In addition, Petitioners are not entitled to attorneys' fees for the earlier proceedings in this case because they did not prevail in those proceedings. At the end of those proceedings, this Court issued an order affirming Ecology's denial of Petitioners' petition for rulemaking. November 19, 2015 Order Affirming the Department of Ecology's Denial of Petition for Rule Making (November 19, 2015 Order). The Court noted that Ecology was fulfilling its duty under the state Clean Air Act by developing a rule to limit greenhouse gas emissions in Washington. November 19, 2015 Order at 4, 7. The November 19, 2015 Order recognized that the rulemaking did not result from Petitioners' efforts, but was occurring at the direction of Governor Inslee. *Id.* at 4, 7. Moreover, the Court recognized that the rulemaking was not aimed at adopting the particular rule Petitioners sought. *Id.* at 4, 7, 9.

Recognizing that they had not prevailed, Petitioners did not ask for attorneys' fees at that time. This Court's May 16, 2016 order did not change any of these results. Ecology continues to work on developing a rule to limit greenhouse gas emissions in Washington under the directive issued by Governor Inslee.

C. Although the Court Granted Petitioners' CR 60(b) Motion, They Are Not Entitled to Attorney Fees for That Action Because Ecology's Actions Were Substantially Justified

"Substantially justified means justified to a degree that would satisfy a reasonable person." *Moen v. Spokane City Police Dep't,* 110 Wn. App. 714, 721, 42 P.3d 456 (citing *Plum Creek Timber Co. v. Forest Practices Appeals Bd.,* 99 Wn. App. 579, 595, 993 P.2d 287 (2000)). It "'requires the State to show that its position has a reasonable basis in law and fact.'" *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (quoting *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.,* 122 Wn. App. 402, 420, 97 P.3d 17 (2004) (quoting *Constr. Indus. Training Council v. Apprenticeship & Training Council,* 96 Wn. App. 59, 977 P.2d 655 (1999) (citing *Aponte v. Dep't of Soc. & Health Servs.,* 92 Wn. App. 604, 623, 965 P.2d 626 (1998))). That is, it need not be correct, only reasonable. *Pierce v. Underwood,* 487 U.S. 552, 566 n.2, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988).

An agency action that is arbitrary and capricious is not substantially justified. *Raven v. DSHS*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013) (citing *Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife,* 157 Wn. App. 935, 952, 239 P.3d 1140 (2010)). On the other end of the spectrum, RCW 4.84.350(1) contemplates that an agency action may be substantially justified, even when the agency's action is ultimately determined to be unfounded. *Raven,* 177 Wn.2d at 832. This is especially true when the agency's decision-making process "involves the balancing of sensitive, sometimes competing or conflicting interests in a controversial area and requires analysis of close questions on which there is no clear precedent on point." *Plum Creek Timber Co.,* 99 Wn. App. at 595–96.

1. Ecology's rulemaking actions are substantially justified

In the November 19, 2015 Order, this Court found that to the extent Ecology had a duty to adopt emission limits on greenhouse gases, the agency was meeting that duty because, in accordance with a directive from Governor Inslee, Ecology had begun the process of adopting

a rule to limit emissions of greenhouse gases. November 19, 2015 Order at 4, 7, 9, 10. In a declaration provided to the Court on August 7, 2015, Ecology stated that the agency was committed to adopting the rule by the end of 2016. Declaration of Stuart Clark ¶ 8. From that day till now, Ecology has continued to be engaged in that rulemaking effort. On January 5, 2016, Ecology issued the proposed rule accompanied by all necessary documents, including the language of the proposed rule. Second Declaration of Sarah Louise Rees (Second Rees Decl.) ¶6, Ex. B. On February 26, 2016, Ecology withdrew the proposed rule because comments from stakeholders made it clear that the rule needed substantial modifications. Second Rees Decl. ¶ 9.

Under the Administrative Procedure Act (APA), if an agency makes substantial changes to a proposed rule, the agency must re-propose the rule and reopen the proceedings for public comment. RCW 34.05.340(1). Once Ecology realized the rule would need substantial changes, Ecology withdrew the rule. Ecology withdrew the rule when it did rather than waiting for the end of the public comment period (as allowed by the APA) for several reasons. First, Ecology wanted to give the public notice as soon as possible that the agency would be making substantial changes to rule language the public was at that time reviewing. Second Rees Decl. ¶ 9. Second, the agency wanted to avoid holding public hearings on rule language the agency knew would be substantially changing. *Id.* Finally, Ecology knew withdrawing the rule earlier rather than later would be more efficient, and result in earlier adoption of the rule. *Id.*

After withdrawing the proposed rule, Ecology continued to work vigorously on the rule and remains on track to adopt the rule by the end of 2016. Second Rees Decl. ¶¶ 8, 10. As part of its ongoing rulemaking effort, Ecology held a webinar on April 27, 2016, to explain to stakeholders some of the changes the agency is considering making to the rule. Second Rees Decl. ¶ 10, Ex C. Throughout this process, Ecology has been (and continues to be) on a path that will enable the agency to adopt a final rule before the end of 2016. *Id.* Given that Ecology

is doing exactly what it told the Court it would do, there is no basis to claim that Ecology's actions are in any way inconsistent with the statement made to the Court. Under these circumstances, there is also no basis to claim that Ecology's actions throughout this rulemaking process have not been substantially justified.

2. Ecology's decision not to make a recommendation to the Legislature was substantially justified

In her June 2015 declaration to this Court, Hedia Adelsman stated that Ecology would make a recommendation on greenhouse gas emission limits in the state of Washington to the 2016 Legislature following the December 2015 Paris Conference of Parties on climate change. Declaration of Hedia Adelsman ¶ 12. This Court's November 19, 2015 Order did not mention or in any way rely on this commitment. To the contrary, the Court's November 19, 2015 Order made it clear that the Court's decision was based on Ecology's commitment to adopt a rule limiting carbon dioxide emissions in Washington. November 19, 2015 Order at 4, 7, 9, 10. As discussed above, Ecology is actively engaged in adopting such a rule.

In December 2015, when the time came to make the recommendation, Ecology determined that such a recommendation would be futile. Second Rees Decl. ¶ 11. Ecology determined that it would make better use of resources by focusing on the greenhouse gas rule it was developing at the behest of the governor. Second Rees Decl. ¶ 11. Ecology also knew that the law does not require the state to perform a futile act. *See, e.g., State v. Smith*, 148 Wn.2d 122, 132, 59 P.3d 74 (2002); *Music v. United Ins. Co. of Am.*, 59 Wn.2d 765, 768–69, 370 P.2d 603 (1962).

Ecology's decision not to make the recommendation to the Legislature "has a reasonable basis in law and fact." Moreover, in making its decision, Ecology was "balancing . . . sensitive, sometimes competing or conflicting interests in a controversial area." *Plum Creek Timber Co.*, 99 Wn. App. at 595–96. Under those circumstances, Ecology's decision to forego making a recommendation to the 2016 Legislature was substantially justified. *See, e.g.,*

Plum Creek Timber Co., 99 Wn. App. at 595–96 (affirming the superior court's decision that the agency's actions had been substantially justified because the agency's decision-making process "involves the balancing of sensitive, sometimes competing or conflicting interests in a controversial area and requires analysis of close questions on which there is no clear precedent on point").

D. Although the Court Granted Petitioners' CR 60(b) Motion, They Are Not Entitled to Attorney Fees for That Action Because the Relief Provided by the Court Was Not the Relief Petitioners Sought

"A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit *that the qualified party sought.*" RCW 4.84.350(1). In this case, the Court ordered Ecology to take two actions. First, Ecology must finalize the rule the agency has been working on by the end of 2016. Second, Ecology must make a recommendation to the 2017 Legislature concerning the levels of greenhouse gas emissions in Washington under RCW 70.235.020. Neither of these actions was sought by Petitioners.

In their opening brief, Petitioners asked this Court to "issue an order directing Ecology to initiate rulemaking proceedings to promulgate a rule with an enforceable schedule to comply with the legal obligations outlined in the November 19, 2015 Final Order." Petitioners' Rule 60(b) Motion for Relief From Judgment at 12. In their reply, Petitioners asked the Court to "enter an order directing Ecology to promulgate a rule that complies with the law of this case, and to do so in a meaningful timeline." Petitioners' Reply Brief in Support of Rule 60(b) Motion at 9. Nowhere in their briefing did Petitioners ask the Court to require Ecology to make a recommendation to the 2017 Legislature. Nor did they ask the Court to order Ecology to do what Ecology was already committed to doing—adopt a rule limiting greenhouse gas emissions in Washington by the end of 2016.

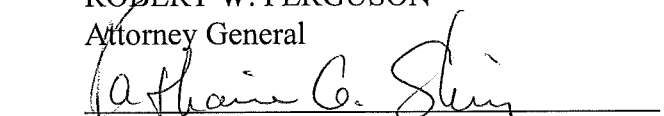
Because the relief provided by the Court was not the relief Petitioners sought, Petitioners cannot be considered to be a prevailing party under RCW 4.84.350(1). For this reason also, Petitioners are not entitled to attorney fees.[1]

III. CONCLUSION

As outlined above, there is no basis for awarding Petitioners' attorney fees. Petitioners have not shown that they are a "qualified party," and they did not prevail in the earlier proceedings. Although the Court granted Petitioners' motion for relief under CR 60(b), they are not entitled to relief under that motion because Ecology's actions were substantially justified. In addition, under that motion, Petitioners cannot be considered a prevailing party because they did not get the relief they sought. Ecology therefore asks this Court to deny Petitioners' Motion for Attorneys' Fees & Costs.

DATED this 15th day of June 2016.

ROBERT W. FERGUSON
Attorney General



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[1] Petitioners argue they are entitled to enhanced rates of $400 per hour for the work performed by Ms. Rodgers in this case and $450 per hour for Ms. Olson. Motion at 6. Ecology does not agree. Under RCW 4.84.340(3), prevailing parties are entitled to attorneys' fees at an hourly rate of at most $150 "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." RCW 4.84.340(3). Applying the cost of living adjustments provided by Petitioners, the maximum hourly rate in 2016 would be approximately $245. While environmental law is a specialized field, Ecology does not believe the availability of qualified environmental attorneys is sufficiently limited to justify the $150 per hour enhancement necessary to reach the $400 rate Petitioners are seeking for Ms. Rodgers, or the $200 per hour enhancement needed to reach the $450 rate sought for Ms. Olson.