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SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL DURLAND and KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Petitioners/Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER and ALAN STAMEISEN,

Respondents.

WES HEINMILLER'S AND ALAN STAMEISEN'S ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

The Petition for Review involves (1) Petitioners' request that this Court review the fee award against Petitioners and in favor of the individual Respondents, and (2) a claim asserted against San Juan County under 42 U.S.C. § 1983 alleging that the County's issuance of a residential building permit for a neighbor's garage addition constituted a violation of Petitioners' due process rights. The Appellants/Petitioners are Michael Durland, Kathleen Fennell and Deer Harbor Boatworks, who own property adjacent to that of Respondents Wes Heinmiller and Alan Stameisen, on Orcas Island, Washington. San Juan County is also a Respondent. Petitioners are referred to collectively herein as "Durland," Respondents Heinmiller and Stameisen as "Heinmiller," and Respondent San Juan County as the "County."

Heinmiller respectfully urges the Court that the attorney's fee award made by the Court of Appeals was in fact mandated by RCW 4.84.370, and as such, cannot implicate an issue of substantial public importance that should be determined by the Supreme Court. The ruling of the Court of Appeals awarding attorney's fees in favor of Heinmiller is exactly the type of fee award for which RCW 4.84.370 was designed: to be made against repeated and unsuccessful land use appellants. Durland cannot escape application of the fee-shifting statute.

Durland's claims against the County concerning due process rights are based on the theory that the County should have given individual

notice to Durland of the routine building permit application. He also contends that the County's Code is unconstitutional. Although these § 1983 claims are not raised against Heinmiller, Heinmiller joins in the County's analysis.

A. Procedural background.

In 2012, Durland filed three Court of Appeals cases, all arising out of the issuance of the same building permit (a second-story addition to an existing garage). The first appeal, COA No. 68453-1-I, was an appeal of the Skagit County Superior Court's dismissal of Durland's appeal of the County's building permit (Durland having skipped the step of appealing to the Hearing Examiner as required by the County Code). The Court of Appeals affirmed the Superior Court's dismissal and awarded fees in favor of Heinmiller.[1]

The second appeal, COA No. 68757-3-I, flowed from the San Juan County Superior Court appeal track instituted by Durland. In this appeal, Durland first appealed to the County's Hearing Examiner (the "Examiner"), who dismissed the appeal. Durland then appealed the Examiner's decision to San Juan County Superior Court, making claims under the Land Use Petition Act (RCW 36.70C, "LUPA") against Heinmiller and the County, *and* claims under 42 U.S.C. § 1983 ("§ 1983")

[1] Durland appealed this decision to the Supreme Court, and the Supreme Court accepted review under No. 89298-3. Heinmiller has been represented by a different law firm at Superior Court, in the Court of Appeals, and at the Supreme Court in this particular appeal track. There were no claims made against San Juan County under 42 U.S.C. § 1983 in that case. The issues presented for review in that case are different than the issues in this case, and No. 89298-3 has been set for oral argument.

against the County. COA No. 68757-3-I was the appeal of the San Juan County Superior Court's ruling dismissing the Land Use Petition Act claim on a CR 12(b) motion. However, because the claim under § 1983 against the County was not yet dismissed in that same Superior Court case, the Court of Appeals set a hearing on appealability, Durland subsequently filed a voluntary motion to dismiss, and review was terminated.

This Petition for Review arises from the third appeal, COA No. 69134-1-I, again concerning the same routine building permit issued by the County to Heinmiller. This Petition for Review flows from the same San Juan County Superior Court case described in the preceding paragraph. This appeal is to be distinguished from Supreme Court case No. 89298-3, as the underlying action in this instant appeal is styled as a Land Use Petition under LUPA *and* Complaint for violation of civil rights against San Juan County under § 1983. Again, as with the other two appeals, the County and Heinmiller were made Respondents. The County did not request attorney's fees under RCW 4.84.370 at the Court of Appeals; Heinmiller did request these fees, which request was granted. It is this award of fees which is the basis for Heinmiller's involvement in this Supreme Court proceeding.

II. ISSUES PRESENTED FOR REVIEW

Heinmiller does not assign error to the Court of Appeals' decision. Heinmiller believes that the attorney's fees issue presented by Durland's Petition for Review is:

Shall reasonable attorney's fees be awarded to the prevailing party under RCW 4.84.370 on appeal of a decision by a county to issue a building permit, when that prevailing party duly requested his fees and prevailed before the County Hearing Examiner, the Superior Court, and at the Court of Appeals?

III. FACTUAL BACKGROUND

On August 8, 2011, Heinmiller applied to the County to add a room above his existing garage to use as an office and entertainment area. (CP 90.) The existing garage was built approximately 13 years ago, the County having issued the building permit in October, 2000, with the garage receiving final inspection and approval in January, 2001. (CP 89.) On November 1, 2011, San Juan County approved the building permit application for the addition to the existing garage. (CP 90.) It is undisputed that the San Juan County Code does not mandate that notice be given to neighbors or to the public of decisions on standard building permit applications. (CP 7; CP 161.) However, building permits and

related files are available as public records in the County's Department of Community Development and Planning. (CP 7.)[2]

The deadline for appealing the building permit decision was 21 days after its issuance under the SJCC. (CP 10; CP 24.) Durland filed an appeal of the building permit with the Examiner on December 19, 2011. (CP 10.) This was 48 days after the building permit decision was issued. (CP 24.) The Examiner dismissed Durland's challenge based on absence of jurisdiction, because the appeal was not filed within the 21-day appeal period provided in the County Code. SJCC 18.80.140.D.1. (CP 14.) The Examiner likewise declined to apply equitable tolling, as urged by Durland. (CP 14.)

After the Examiner dismissed Durland's appeal, Durland filed his "Land Use Petition and Complaint" in San Juan County Superior Court. The "Land Use Petition" aspect of this proceeding sought to challenge the Examiner's decision under LUPA. (CP 4-12.) In this same action, Durland asserted a claim under § 1983, based on an alleged violation of his procedural due process rights. The § 1983 claim constituted the "Complaint" portion of Durland's "Land Use Petition and Complaint."

At the San Juan County Superior Court, the Honorable Donald E. Eaton dismissed Durland's LUPA Petition on CR 12(b) motions filed by

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[2] Durland's Petition for Review contains numerous unsupported allegations about the Heinmiller property, which Heinmiller notes for the Court are unsupported by the citations and are heavily disputed. <u>See</u> <u>e.g.</u> Petition for Review at pp. 4-5 (Durland's representations as to where the Heinmiller existing garage is located, and claiming that the permit for the garage addition "violated numerous code provisions.")

both Heinmiller and the County, based on Durland's failure to exhaust remedies by timely challenging the building permit issued to Heinmiller. (CP 108-110.)

Subsequently, the Court granted the motions for summary judgment of Heinmiller and the County to dismiss the damages claim under § 1983. (CP 156-158; CP 163-64.) (Because the identity of the defendants under the § 1983 claim was not entirely clear at the time, Heinmiller also sought summary judgment as to this claim.)

Durland then appealed both rulings – the order dismissing the LUPA Petition, and the summary judgment ruling as to the County, to the Washington Court of Appeals, under COA No. 69134-1-I.

At the Court of Appeals, Durland appealed the Superior Court's Order dismissing the LUPA Petition. Appellants' Brief at COA at 30-36. Durland also used § 1983 to request the injunctive relief of the "opportunity to be heard" on the permit before the Superior Court. Appellants' Brief at COA at 3. He asked that the Court of Appeals remand the matter to Superior Court to "proceed on the merits." Appellants' Brief at COA at 32.

Heinmiller prevailed at the Examiner, at the Superior Court, and at the Court of Appeals. The building permit as issued on November 1, 2011 stands as it was originally issued. At all appeal levels on this particular appeal track – the Hearing Examiner, Superior Court, and Court of Appeals – Durland's appeals were dismissed.

Heinmiller respectfully asks this Court to deny discretionary review under RAP 13.4(b), as to the attorney's fees award under RCW 4.84.370. The Court of Appeals' Order properly held that Heinmiller is a substantially prevailing party respecting the order granting the motion for dismissal of the Land Use Petition, and that he is entitled to fees under RCW 4.84.370(1). Order Granting Heinmiller's Motion for Reconsideration and Modifying Opinion. (Exhibit C to Petition for Review.) This Court should deny review, at least as to the attorney's fees issue. Heinmiller also believes the Court should deny review as to the § 1983 claims raised by Durland, and joins in the County's arguments in this regard.

IV. STANDARD OF REVIEW

Acceptance of review by the Supreme Court is governed by RAP 13.4(b), which states:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As to Durland's arguments regarding RCW 4.84.370 – that the Court of Appeals applied the statute in contravention of the "American rule," and that the statute doesn't apply in any case – Durland's argument for review

is RAP 13.4(b)(4), "substantial public interest." Petition for Review at 18. But given the clear mandate from the Washington Legislature to award attorney's fees in this case, the Court of Appeals correctly awarded fees, and review should not be granted as to the attorney's fees issue.

V. ARGUMENT

A. RCW 4.84.370 Mandates Reasonable Attorney's Fees to a Prevailing Party of a County's Decision to Issue a Building Permit that is Upheld Before the Hearing Examiner, Superior Court, and Court of Appeals.

RCW 4.84.370 cautions persistently unsuccessful litigants to carefully consider the wisdom of continued appeals. Durland nonetheless repeatedly and unsuccessfully appealed the LUPA Petition. Heinmiller prevailed at all levels below, and the Court of Appeals' decision awarding fees to Heinmiller should be affirmed. The text of RCW 4.84.370 shows that the attorney's fee award was mandated, and therefore properly made at the Court of Appeals:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or

> town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; <u>and</u>
>
> (b) <u>The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings</u>.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party <u>if its decision is upheld</u> at superior court and on appeal.

(Emphasis added.) This text instructs:

- The fee award is mandatory (twice using the word "shall") when the prerequisites to its award are met.
- As prerequisites, the prevailing party must have been the prevailing party or substantially prevailing party in all prior judicial proceedings concerning the land use decision at issue.
- The fee award is proper only at the Court of Appeals or Supreme Court level.
- A government entity whose decision is on appeal is a prevailing party "if its decision is upheld" at the Superior Court and Court of Appeals.

The types of land use decisions to which the statute applies are broad: rezones, site-specific rezones, conditional use permits, variances, shoreline permits, building permits, site plans, and any "similar land use approval or decision." The statute has also been applied when the

decision at issue was per-unit school impact fees assessed against a residential developer (Wellington River Hollow, LLC v. King County, 121 Wn.App. 224, 54 P.3d 213 (2002)), road related impact fees imposed against developers of a commercial development (Pavlina v. City of Vancouver, 122 Wn.App. 520, 94 P.3d 366 (2004)), and a City moratorium on shoreline development (Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 169 P.3d 14 (2007)).

The statute applies in this case, and the Court of Appeals correctly awarded fees. "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002), citing State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Heinmiller was the prevailing party in all three proceedings below of a decision by the County to issue a building permit. Durland does not dispute this point. At all levels, the building permit was upheld. It was never invalidated, or even changed, conditioned, or modified. As such, it falls squarely within the language of Subsection (1) ("a decision by a county ... to issue ... a building permit . . .").

That fees were correctly awarded is further supported by RCW 4.84.370(2), which states that a County is a prevailing party "if its decision is upheld" at superior court and on appeal. This section makes it abundantly clear that the government entity may also be a prevailing party.

Here, the County's decision – to issue the permit – was upheld. Although the County has not requested its fees, if it had, it should have received fees also, because its decision was upheld. If the County should have been awarded fees under RCW 4.84.370(2) because its decision was upheld, so should Heinmiller.

Durland argues that the statute should not apply because the decision he appealed does not fall within the scope of RCW 4.84.370. He seeks to recast his LUPA appeals of the building permit by claiming that he is appealing "a hearing examiner's dismissal of an administrative appeal on timeliness grounds." Petition at 20. But this is a red herring, diverting attention from central facts in the analysis: Durland filed two LUPA appeals to Superior Court and the Court of Appeals regarding the building permit. Durland appealed the granting of Heinmiller's building permit to the County's hearing examiner, as is required by the County Code. When that appeal was dismissed, Durland then appealed the dismissal to San Juan County Superior Court by a LUPA Petition, with which he joined § 1983 claims. When that appeal was dismissed, he appealed the Superior Court's decision to the Court of Appeals, including an appeal of the LUPA issues. The LUPA issues are briefed at the Appellants' Opening Brief at COA at 30-36, and their Reply Brief at COA at 23-24. When the dismissal was again affirmed, he requested review of the Court of Appeals' decision at the Supreme Court.

Durland appealed the building permit repeatedly throughout this appeal track. At the Superior Court and Court of Appeals, Durland appealed the building permit by making LUPA claims, which has necessitated a LUPA response from Heinmiller (and from the County). Durland added § 1983 claims against the County for the first time at Superior Court, and repeated those claims at the Court of Appeals. Durland could have brought his § 1983 claims against the County in another case. "[A] land use applicant is not required to join any potential § 1983 and § 1988 claims with a petition to review a governmental land use decision." Gig Harbor Marina, Inc. v. City of Gig Harbor, 94 Wn.App. 789, 802, 973 P.2d 1081 (1999).

> [E]ven if the claims are joined, RCW 4.84.370 authorizes an award of fees on appeal only of a governmental "land use approval or decision." Thus, where a land use petition is joined with § 1983 or § 1988 claims, attorney's fees can be awarded under RCW 4.84.370 only for the land use portion of the action.

Id. But Durland chose to litigate the claims together, and as the Court of Appeals ruled, Heinmiller as the prevailing party was entitled to his attorney's fees under RCW 4.84.370 for responding to the LUPA issues.

The procedural history of the LUPA Petition in this matter, and the plain language of RCW 4.84.370, show that the Court of Appeals properly made the fee award.

B. The Washington Legislature Created RCW 4.84.370 as One of Many State Law Exceptions to the American Rule.

"Attorney fees may be awarded only if authorized by 'contract, statute or recognized ground in equity.' " Bowles v. Washington Dep't of Retirement Sys., 121 Wn.2d 52, 70, 847 P.2d 440 (1993), quoting Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch. Dist., 96 Wn.2d 806, 815, 638 P.2d 1220 (1982); Seattle Sch. Dist. 1 v. State, 90 Wn.2d 476, 540, 585 P.2d 71 (1978). Heinmiller agrees that the "American rule" generally applies in litigation, but in this case, there is a statutory exception to the American rule that must be applied. RCW 4.84.370 is one Washington statute that creates an exception to the American rule. This exception is one of many Washington statutory exceptions to the American rule:

> The court may award reasonable attorney's fees to the prevailing party in various actions and proceedings specified by statute. Familiar examples include actions for dissolution of marriage, other family law actions, actions brought under the Consumer Protection Act, and eminent domain proceedings. Other examples mentioned in recent cases include worker's compensation cases, probate proceedings, proceedings under the Public Disclosure Act, discrimination cases, usury cases, and others.
>
> The Equal Access to Justice Act authorizes an award of attorney fees to the prevailing party in actions challenging certain administrative decisions and certain land use decisions.
>
> Scores of other examples can be found, and new provisions are enacted in virtually every legislative session. No effort is made here to offer a complete list of such statutes, or the

> cases interpreting them, but compilations are readily available elsewhere.

K. Tegland, 14A Wash. Prac., Civil Procedure § 37:13 (2d ed. 2013) (footnotes omitted). See also RCW 7.28.083, which allows an award of attorney's fees in certain adverse possession cases.

Durland argues that this Court should grant review to "correct an erroneous interpretation of RCW 4.84.370 and to ensure that the American rule, and the important public policies that it protects, are not abrogated without a clear legislative directive that they be abandoned." Petition for Review at 20. Heinmiller respectfully submits that RCW 4.84.370 provides a clear legislative directive to apply fee shifting in this case, and that the Court of Appeals correctly applied RCW 4.84.370. Indeed, to not apply fee shifting in this case would be contrary to the clear direction in the statute.

RCW 4.84.370 was enacted in 1995 as part of Engrossed Substitute House Bill No. 1724, entitled "AN ACT Relating to implementing the recommendations of the governor's task force on regulatory reform on integrating growth management planning and environmental review." This bill had 904 sections and included the Growth Management Act, State Environmental Policy Act, Shoreline Management Act, and other land use related provisions. 1995 Wash. Legis. Serv. Ch. 347 (S.H.B. 1724) (West). The Governor stated:

> This is a landmark piece of legislation. The result of eighteen months of work by the Governor's Task Force on Regulatory Reform, it represents a remarkable consensus of business, environmental, labor, neighborhood, and governmental interests. This measure is an example of real regulatory reform. It provides for consolidated and streamlined procedures, encourages more efficient use of both private and public resources, provides for better planning which leads to greater certainty, and maintains and enhances the quality of life in our state.

Governor's Explanation of Partial Veto, attached as Appendix A.

RCW 4.84.370 is in effect today. It was not vetoed in whole or in part by the governor when enacted, nor has it been amended or deleted since its inception in 1995. It has withstood constitutional challenges. See e.g. Gig Harbor Marina v. City of Gig Harbor, 94 Wn.App. 789, 799, 973 P.2d 1081 (1999). This statute is one of many exceptions to the American rule, and is to be applied against persistently unsuccessful land use litigants. The Court of Appeals correctly applied the statute in awarding Heinmiller his attorney's fees.

C. Heinmiller Should be Awarded Attorney's Fees and Costs in this Matter.

Pursuant to RAP 18.1 and RCW 4.84.370, Heinmiller requests an award of reasonable attorney's fees in this action.

VI. CONCLUSION

For all of the above reasons, Heinmiller respectfully asks this Court to deny discretionary review as to the attorney's fees issue under RCW 4.84.370.

DATED this 14th day of January, 2014.

LAW OFFICES OF WILLIAM J. WEISSINGER, P.S.

By: *Mimi M. Wagner*
Mimi M. Wagner, WSBA #36377
Attorneys for Respondents
Heinmiller and Stameisen

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Appendix A

To Heinmiller's Answer to Petition for Review
No. 89745-0

NEW SECTION. Sec. 903.** ***If specific funding for the purposes of this act, referencing this act by bill number, is not provided by June 30, 1995, in the omnibus appropriations act, this act shall be null and void.
***Sec. 903 was vetoed. See message at end of chapter.**

NEW SECTION. **Sec. 904.** Sections 801 through 806 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect June 1, 1995.

Passed the House April 23, 1995.
Passed the Senate April 11, 1995.
Approved by the Governor May 15, 1995, with the exception of certain items which were vetoed.
Filed in Office of Secretary of State May 15, 1995.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to sections 103, 302, and 903, Engrossed Substitute House Bill No. 1724 entitled:

"AN ACT Relating to implementing the recommendations of the governor's task force on regulatory reform on integrating growth management planning and environmental review;"

This is a landmark piece of legislation. The result of eighteen months of work by the Governor's Task Force on Regulatory Reform, it represents a remarkable consensus of business, environmental, labor, neighborhood, and governmental interests. This measure is an example of real regulatory reform. It provides for consolidated and streamlined procedures, encourages more efficient use of both private and public resources, provides for better planning which leads to greater certainty, and maintains and enhances the quality of life in our state.

Sections 103 and 302 amend RCW 36.70A.030 and 90.58.030 respectively. These same sections are amended by Engrossed Senate Bill No. 5776. The amendments to these sections in the Senate bill are identical to the amendments included in Engrossed Substitute House Bill No. 1724, with the exception that Engrossed Senate Bill No. 5776 includes an exemption for inadvertent wetlands created as a result of road construction. The language included in Engrossed Senate Bill No. 5776 is preferable to and fully effectuates the changes included in sections 103 and 302 of Engrossed Substitute House Bill No. 1724.

Section 903 provides that this bill will not become law if by June 30, 1995 the legislature fails to enact a budget and reference the bill by number in that budget. Although I do not doubt the legislature will adopt a budget and provide funding, such a provision places this legislation at unnecessary risk.

For these reasons, I have vetoed sections 103, 302, and 903 of Engrossed Substitute House Bill No. 1724.

With the exception of sections 103, 302, and 903, Engrossed Substitute House Bill No. 1724 is approved."

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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: Margaret [mailto:margaret@sanjuanlaw.com]
Sent: Tuesday, January 14, 2014 11:46 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Mimi Wagner'; 'William J Weissinger'
Subject: Durland v. San Juan County & Heinmiller/Stameisen

Dear Clerk of the Supreme Court:

Re:
Michael Durland and Kathleen Fennell, and Deer Harbor Boatworks v. San Juan County, Wes Heinmiller and Alan Stameisen
Case No. 89745-0
Submitting attorney:
Mimi M. Wagner
WSBA # 36377
Phone: 360-378-6234
mimi@sanjuanlaw.com

Attached for filing are the following:

- Wes Heinmiller's and Alan Stameisen's Answer to Petition for Review;
- Appendix A to Heinmiller's Answer to Petition for Review; and
- Declaration of Service.

Thank you for your assistance.

Margaret Hall, Legal Assistant
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