

FILED
SUPREME COURT
STATE OF WASHINGTON
6/20/2019 9:12 AM
BY SUSAN L. CARLSON
CLERK

97347-4

IN THE WASHINGTON STATE
SUPREME COURT

MUHAMMAD AHSAN and FAIZA AHSAN, Petitioners,

v.

SLOANS ENTERPRISES OF AMBOY, LLC, Respondent

PETITION FOR REVIEW

Muhammad and Faiza Ahsan, pro se
2424 NW Iris Court
Camas, WA 98607
360-566-5384
ahsanmsheikh@yahoo.com

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

A . IDENTITY OF PETITIONERS.....1

B . DECISION.....1

C . ISSUES PRESENTED FOR REVIEW 1-2

D . STATEMENT OF THE CASE.....2

E . ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....3-5

F . CONCLUSION.....5

Signatures and Certificate of Service.....5-6

TABLE OF AUTHORITIES

Cases

Grisby v. Herzog, 362 P.3rd 763 (2015).....4,5

Johnson-Forbes v. Matsunaga, 181 Wash.2d 346 (2014).....4

State v. Kirkman, 59 Wash. 155 P. 3d 125.....4

Tortes v. King County, App. 1, 84 P.3d 252 (2003).....5

Weyerhaeuser Company v. Commercial Union
Insurance Company, 142 Wash.2d 654 (2001).....3,4

Rules

RAP 2.5.....4

RAP 2.5(a)(3).....1,2,4

A . IDENTITY OF PETITIONERS

Muhammad and Faiza Ahsan ask this court to accept review of the decision designated in Part B of this motion.

B . DECISION

The Petitioners seek discretionary review of the Decision of the Division II Court of Appeals, affirming an adverse verdict in a civil matter, the Decision having been entered on June 11, 2019. The decision affirmed an adverse jury verdict, from which the Petitioners appealed, alleging that, irrespective of Petitioner's counsel failure to object to an expert witness question, such question presented a fundamental error, removing the case from the jury, whereby the trial court was tasked with acting as gatekeeper for such questions.

C . ISSUES PRESENTED FOR REVIEW

- 1 . Under RAP 2.5(a)(3), was the question and answer of and by the expert witness of such a manifest error as to deprive the Petitioners of their fundamental right to a trial by jury?

2 . Does the Decision of the Appellate Court,
Division II, conflict with decisions in this Court, and in
Division I, so as to trigger review by this Court?

D . STATEMENT OF THE CASE

After a jury trial, and an adverse verdict, the Petitioners, plaintiffs in the original action, reviewed the transcript of the trial. Petitioners noticed the questioning of the expert witness of the defendant, by defense counsel. Upon conducting research, the Petitioners filed an appeal, arguing that the question and the answer were an improper invasion of the province of the jury, resulting in fundamental error. The Petitioners were so accurate in their review that, in fact, the Decision from which this appeal is taken, quotes the actual question and answer, at page 2 of the Decision.

The Respondent/defendant, argued, in its answer brief, that the Petitioners waived the objection, by not raising it during trial.

The Petitioners argued, in their Reply Brief, however, that the question and answer were of such significance as to have resulted in fundamental error, under RAP 2.5(a)(3), arguing that the trial court abrogated its duty of acting as a gatekeeper during expert witness testimony.

The Decision addresses only the issue of the waiver of the objection, and avoids the question of the fundamental error, in the context of the gatekeeper analysis shown by cases decided by this Court.

E . ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1 . The Decision conflicts with decisions in this Court.

In this matter, the Decision omits the analysis, as briefed by the Petitioners in their Reply Brief, of this Court's decisions on the gatekeeper role of the trial judge. In other words, assuming, correctly as the Decision points out, the failure of counsel for Petitioners to object to the question, why did the trial court not step in to strike a clearly improper question and answer? Or, in fact, sua sponte, order a new trial?

This Court's analysis and opinion in *Weyerhaeuser Company v. Commercial Union Insurance Company*, 15 P.3d 115 (2001), shows a clear conflict with the Decision in this matter. The Petitioners argued *Weyerhaeuser*, supra, in their main and reply briefs, because the factual situation of a highly technical case, with experts, was so crucial. In *Weyerhaeuser*, supra, this Court described, in great detail, the gatekeeper function of the triall judge, the attention that the trial judge was paying to the testimony, the great caution, therefore, being exhibited by counsel in asking the questions, and the great care in allowing or not allowing answers. This court highlighted all of those key functions, because of the significant error that occurs when an expert's testimony takes a question out of the hands of the jury, with the resulting fundamental error of depriving the Petitioners to their right to a jury trial.

In *Johnson-Forbes v. Matsunaga*, 181 Wash.2d 346 (2014), another expert witness case, this Court granted a petition for review from a Division II case, further highlighting the conflict with this Court's opinions. In both *Weyerhaeuser*, supra, and *Johnson-Forbes*, supra, the clear language by this Court, emphasizing the role of the trial judge as gatekeeper when expert testimony is presented, demonstrates the conflict. For, whereas, in both cases, testimony was permitted, such was done in the presence of keen oversight by the trial judge. In the instant matter, not only does the Decision directly quote from the record, the offending question and answer, but also, omits completely the analysis of that gatekeeper role.

Grisby v. Herzog, 362 P.3rd 763 (2015), would not prevent this Court from granting the petition, even though both the instant matter and *Johnson-Forbes*, supra, are Division II cases. In fact, the Decision in the instant matter, despite the Petitioners having briefed *Johnson-Forbes*, supra, does not mention any such intra-Division conflict.

In *In State v. Kirkman*, 59 Wash. 155 P. 3d 125 (2007), a RAP 2.5 case, this Court granted the petition for review, where a number of expert witness opinions were challenged, and the objections rejected, where it became clear that the experts were not testifying as to the ultimate issue.

In each of these cases, there was a clear high level of participation by the trial court, during the course of the expert testimony. Such was simply lacking in the case brought by the Petitioners, notwithstanding the failure of their counsel to object.

2 . The Decision conflicts with decisions in Division I.

Importantly, the Decision conflicts with another case, argued by the Petitioners in their Reply Brief, *Tortes v. King County*, App. 1, 84 P.3d 252 (2003). In *Tortes*, the trooper's testimony crossed into the realm of consisting of a legal conclusion. The Division I opinion concluded that a keen eyed trial judge properly excluded affidavit testimony of the trooper.


Grisby, *supra*, at footnote 8, points to other decisions where petitions were granted in cases of conflicts with other Divisions.

F . CONCLUSION

This Court should, respectfully, accept review for the reasons indicated in Part E, and set a briefing schedule for the parties.

RESPECTFULLY SUBMITTED,

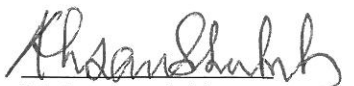
Muhammad and Faiza Ahsan, pro se
2424 NW Iris Court
Camas, WA 98607
360-566-5384
ahsanmsheikh@yahoo.com


Muhammad Ahsan


Faiza Ahsan

CERTIFICATE OF SERVICE

WE HEREBY certify that on the 20th day of June, 2019, the original of this Petition for Review, was provided to the Clerk of the Supreme Court, by uploading same onto the Court's website for electronic filing, and that a copy of the email and of this Petition for Review was provided by electronic mail to: Peter D. Motley, Esquire, WSBA #36070, Attorney for Appellee, to: Peter.Motley@LibertyMutual.com, and Kathryn R. Morton, Esquire, cassie.morton@libertymtual.com, and Amber L. Pearce, Esquire, APearce@floyd-ringer.com.


Muhammad Ahsan


Faiza Ahsan

IN THE WASHINGTON STATE
SUPREME COURT

MUHAMMAD AHSAN and FAIZA AHSAN, Petitioners,

v.

SLOANS ENTERPRISES OF AMBOY, LLC, Respondent

APPENDIX TO PETITION FOR REVIEW

Muhammad and Faiza Ahsan, pro se
2424 NW Iris Court
Camas, WA 98607
360-566-5384
ahsanmsheikh@yahoo.com

COPY OF THE DECISION

June 11, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MUHAMMAD AHSAN and FAIZA AHSAN,
husband and wife and the marital community
composed thereof,

Appellants,

v.

SLOANS ENTERPRISE OF AMBOY, LLC, a
Washington limited liability company,

Respondent.

No. 51261-1-II

UNPUBLISHED OPINION

SUTTON, J. — Muhammad and Faiza Ahsan, pro se, appeal the trial court's entry of judgment in favor of Sloans Enterprise of Amboy LLC following the jury's verdict. The Ahsans argue that Sloans Enterprise's expert improperly opined on an ultimate issue of fact. Because the Ahsans did not object at trial, we determine that they failed to preserve the issue, and thus, we affirm.

FACTS

The Ahsans filed a negligence action against Sloans Enterprise. The Ahsans alleged that Sloans Enterprise caused a mudslide at their house by negligently removing boulders and soil from their property during their mitigation/excavation work. Sloans Enterprise denied the allegations and asserted affirmative defenses.

No. 51261-1-II

At trial, both parties presented expert testimony to the jury regarding whether Sloans Enterprise breached a duty of reasonable care when it performed landslide mitigation/excavation work around the Ahsans' home. The Ashans' expert, Mark Swank, an engineering geologist, testified that based on the report he prepared, it was not appropriate for Sloans Enterprise to perform the excavation work under the conditions that existed on December 12, 2015. He opined that Sloan Enterprises excavation work was a "trigger" that caused subsequent soil instability, leading to more damage to the Ahsans' home. 3 Verbatim Report of Proceedings (VRP) (July 12, 2017) at 483.

John Zipper, a geotechnical engineer, testified as an expert on Sloans Enterprise's behalf. He reviewed Swank's report and disagreed with his opinions regarding what caused further damage to the Ahsans' home. Zipper opined that the landslide continued to move before and during the excavation work, a record setting rainfall triggered the landslide, drainage issues existed on top of the hill above the Ashans' home, the soil was of poor quality, and the whole area slid previously in 2006. Zipper opined that the landslide in 2015 would have continued to occur regardless of whether Sloans Enterprise performed excavation work on the property and it was reasonable for the Ahsans to "at least make some attempt to clear soil from the side of [the] house that day." 3 VRP (July 12, 2017) at 576-77.

Relevant here, defense counsel then asked Zipper:

[Defense counsel]: And was there anything unreasonable then about Mr. Sloan going ahead and performing the work that Mr. Ahsan asked him to do?

[Zipper]: No.

3 VRP (July 12, 2017) at 577. The Ahsans did not object.

No. 51261-1-II

The jury found that Sloans Enterprise had not been negligent. The trial court entered judgment in favor of Sloans Enterprise. The Ahsans appeal.

ANALYSIS

The Ahsans were represented by counsel at trial, but are now pro se. The Ahsans assign error to Zipper's testimony that Sloans Enterprise's actions were not "unreasonable," arguing that his opinion was an improper opinion on the ultimate issue of fact and not admissible. Br. of App. at 4. We determine that because the Ahsans did not object below, they failed to preserve the issue as to whether Zipper improperly opined on an ultimate issue of fact.

Under RAP 2.5(a), this court "may refuse to review any claim of error which was not raised in the trial court." Further, under ER 103(a)(1):

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and

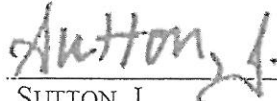
. . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.

A party may not appeal an error based on a ruling that admits evidence unless a timely objection or motion to strike is made. *Faust v. Albertson*, 167 Wn.2d 531, 547, 222 P.3d 1208 (2009).

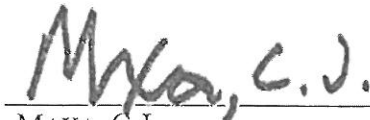
The Ahsans did not object during Zipper's testimony. Because the Ahsans failed to object at trial, thus, they failed to preserve the issue of whether Zipper improperly opined on an ultimate issue for appeal. Accordingly, we affirm.

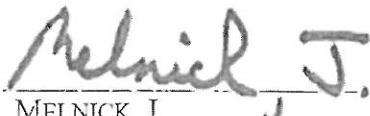
No. 51261-1-II

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 in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

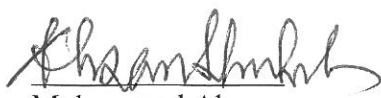
We concur:


MAXA, C.J.


MELNICK, J.

RESPECTFULLY SUBMITTED,

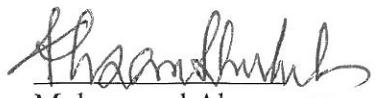
Muhammad and Faiza Ahsan, pro se
2424 NW Iris Court
Camas, WA 98607
360-566-5384
ahsanmsheikh@yahoo.com


Muhammad Ahsan


Faiza Ahsan

CERTIFICATE OF SERVICE

WE HEREBY certify that on the 20th day of June, 2019, the original of this Appendix to Petition for Review, was provided to the Clerk of the Supreme Court, by uploading same onto the Court's website for electronic filing, and that a copy of the email and of this Petition for Review was provided by electronic mail to: Peter D. Motley, Esquire, WSBA #36070, Attorney for Appellee, to: Peter.Motley@LibertyMutual.com, and Kathryn R. Morton, Esquire, cassie.morton@libertymtual.com, and Amber L. Pearce, Esquire, APearce@floyd-ringer.com.


Muhammad Ahsan


Faiza Ahsan

MUHAMMAD AHSAN - FILING PRO SE

June 20, 2019 - 9:12 AM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Muhammad & Faiza Ahsan, Appellants v. Sloans Enterprise of Amboy, LLC,
Respondent (512611)

The following documents have been uploaded:

- PRV_Petition_for_Review_Plus_20190620090937SC606843_6712.pdf
This File Contains:
Certificate of Service
Petition for Review
The Original File Name was Supcourt Petition.pdf

A copy of the uploaded files will be sent to:

- APearce@floyd-ringer.com
- cassie.morton@libertymutual.com
- peter.motley@libertymutual.com
- sklotz@floyd-ringer.com

Comments:

Sender Name: Muhammad Ahsan - Email: ahsanmsheikh@yahoo.com
Address:
2424 NW IRIS CT
Camas, WA, 98607
Phone: (360) 566-5384

Note: The Filing Id is 20190620090937SC606843