

FILED
SUPREME COURT
STATE OF WASHINGTON
8/27/2019 3:47 PM
BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SHARON KAY and JIM HOWE,
Respondents,
and
THOMAS and MARIE DICKENS,
Plaintiffs,
vs.
KING COUNTY, a municipal
corporation,
Petitioner.

No. 97507-8
ANSWER TO MOTION TO
STRIKE

Petitioner King County respectfully requests that this Court deny respondents' motion to strike.

I. STATEMENT OF FACTS AND PROCEDURE

King County has petitioned this Court for review of the June 3, 2019, decision of the Washington State Court of Appeals. Appendix C to the Petition for Review are excerpts of the trial court proceedings, in particular, testimony of Jim Howe on September 26, 2017, testimony of Sharon Kay on October 2, 2017, and testimony of Richard Hagar on October 3, 2017. Appendix D is an April 27, 2018, Inspection Report of the Kay property. Respondent has moved to strike Appendices C and D.

II. ARGUMENT

A. THE TRIAL TESTIMONY IS NOT ADDITIONAL EVIDENCE

Appendix C to the Petition for Review is evidence that was presented at the trial court. It consists of excerpts of the trial testimony of

Mr. Howe, Ms. Kay, and Mr. Hagar. It is not additional evidence. Additional evidence consists of proof that was submitted to the trial court. *See* RAP 9.11(a). There is no question that these witnesses testified. There is no question that the witnesses' testimony was presented during the trial.

To the extent Appendix C was not included in the record on appeal, King County asks this Court to accept the testimony as a supplement to the record on appeal. When Kay appealed to the Court of Appeals, the record on appeal consisted of the clerk's papers. Appellant Kay filed a Notice Regarding Statement of Arrangements that "there will be no reported proceedings in this case because there was no hearing regarding the Motion which led to this appeal." See Attachment A, February 12, 2018, Notice Regarding Statement of Arrangements.

Based on the limited scope of Kay's appeal—the superior court's ruling on the motion for attorney's fees—no trial testimony was required. The trial testimony presented about the value of Kay's property was not an issue in dispute until the Court of Appeals' decision which rewrote the statute-- RCW 8.25.075(3).

B. THE POST-TRIAL APPRAISAL REPORT IS ADDITIONAL EVIDENCE THAT ONLY BECAME RELEVANT AFTER THE COURT OF APPEALS' DECISION.

As with the trial testimony excerpts, Appendix D--the April 2018 inspection report--did not become pertinent until the Court of Appeals'

decision. Unlike Appendix C, Appendix D is additional evidence which did not exist at the time of the trial. King County respectfully submits the April 2018 report qualifies under RAP 9.11(a). The rule provides:

“The appellate court may direct that additional evidence [on the merits of the case] be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.”

State v. Ziegler, 114 Wn.2d 533, 541, 789 P.2d 79 (1990).

The April 2018 inspection report is necessary to fully resolve the issues presented for review. It demonstrates that the evidence at trial and the jury’s conclusion about the value of Kay’s property was inconsistent with the reality of the property’s condition. Had the inspection report been available at the time of trial to challenge the proof about the property’s condition, the jury’s conclusion about value would likely have been different, i.e., a lower amount.

There is no question that King County is excused from presenting the inspection report at the trial. The report did not exist at that time. And King County was not permitted access to the Kay property to conduct an

inspection. Neither a post-judgment nor a new trial would be adequate. The only post-judgment relief would be to seek a new trial. That would be unnecessarily expensive to retry the entire case.

The situation here is that the Court of Appeals' decision that looked at the jury's conclusion about the fair market value of the property rather than the judgment obtained, revised the debate about what numbers are to be compared for purposes of an attorney fee award under RCW 8.25.075(3). The debate moved from a comparison of the judgment amount and King County's highest written offer to a comparison of the jury's valuation and what Kay would have received had she accepted King County's highest offer. It would be inequitable to decide the issues presented now without the inspection report.

C. CONSIDERING THE TRIAL TESTIMONY EXCERPTS AND THE APRIL 2018 INSPECTION REPORT WOULD SERVE THE ENDS OF JUSTICE.

RAP 18.8(a) allows the Court to waive any of the RAP's "to serve the ends of justice." The trial testimony and the inspection report establish that the Court of Appeals' decision that focused on the property value is unjust. Not only does the decision rewrite RCW 8.25.075(3) to include words not used by the legislature, the decision is premised on evidence about the property's condition that did not reflect reality.


Should this Court conclude that either Appendix C or Appendix D is improper, King County asks the Court to exercise its authority under RAP 18.8(a) and include the Appendices in consideration of the Petition for Review. Exercising its RAP 18.8(a) authority is particularly appropriate here where the Declaration of Brad Jones in Support of respondent Kay's motion to strike includes nine exhibits, seven of which were never presented to the trial court and three of those seven are dated after the appeal was commenced.

III. CONCLUSION


King County respectfully requests that this Court deny the motion to strike and consider Appendix C and Appendix D as part of King County's Petition for Review.

DATED this 27th day of August, 2019.

REED McCLURE

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SHARON KAY and JIM HOWE,

Appellants,

v.

KING COUNTY SOLID WASTE DIVISION, a
municipal corporation,

Respondent.

NO. 77935-4-I
KING COUNTY SUPERIOR COURT NO.
15-2-08235-3 KNT (Consolidated with No.
15-2-08485-2 KNT)

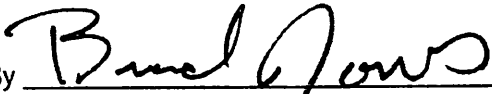
NOTICE REGARDING STATEMENT OF
ARRANGEMENTS

Bradley Jones, attorney for Appellants SHARON KAY and JIM HOWE, states that there will be no reported proceedings in this case because there was no hearing regarding the Motion which led to this appeal.

This notice that there will be no Report of Proceedings is required by RAP 9.2(a).

Dated this 12th day of February, 2018February, 2018.

GORDON THOMAS HONEYWELL LLP

By 
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bjones@gth-law.com
Reuben Schutz, WSBA No. 44767
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Attorneys for Petitioners

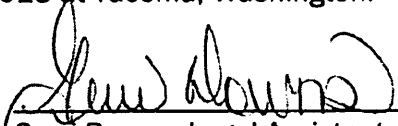
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this date I caused to be served in the manner indicated below a copy of the foregoing on the following:

Timothy Repass, WSBA #38373 Wood Smith Henning & Berman LLP 520 Pike Street, Ste. 1524 Seattle, WA 98101-1351 Tel: 206-204-6802 trepass@wshblaw.com cborgman@wshblaw.com rfaulds@wshblaw.com	<input type="checkbox"/> Hand Delivered <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> King County E-Service <input checked="" type="checkbox"/> Electronic Mail
Stephen J. Tan, WSBA No. 22756 Valerie K. Fairwell, WSBA No. 46812 Cascadia Law Group PLLC 1201 3 rd Ave., Ste. 320 Seattle, WA 98101-3075 Tel: (206) 292-6300 stan@cascadialaw.com vfairwell@cascadialaw.com	<input type="checkbox"/> Hand Delivered <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> King County E-Service <input checked="" type="checkbox"/> Electronic Mail

DATED this 12th day of February, 2018 at Tacoma, Washington.



Gerri Downs, Legal Assistant
gdowns@gth-law.com
Gordon Thomas Honeywell LLP

GORDON THOMAS HONEYWELL LLP

February 12, 2018 - 2:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77935-4
Appellate Court Case Title: Sharon Kay, Appellant v. King County Solid Waste Division, Respondent
Superior Court Case Number: 15-2-08235-3

The following documents have been uploaded:

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Sender Name: Gerri Downs - Email: gdowns@gth-law.com

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August 27, 2019 - 3:47 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97507-8
Appellate Court Case Title: Sharon Kay and Jim Howe v. King County Solid Waste Division

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Comments:

Answer to Motion to Strike

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