No. 85865-3-I



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

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION,

Respondent,

and

DEUTSCHE BANK AG, JONES, SHAWN C.,

Defendants,

v.

MICHELLE MERCERI,

Petitioners.

# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Michelle Merceri asks this Court to accept review of the Division I opinion below that terminates review.

## B. COURT OF APPEALS DECISION

Division I issued its decision terminating review on April 1, 2024, a copy of which is in the Appendix.

## C. ISSUES PRESENTED

1. When government takes a property owner's property and withholds compensation for an extended period, is an owner entitled to compound interest on the damages for the value of the land taken by the government as an element of constitutional "just compensation?"

2. Is a property owner entitled to attorney fees under RCW 8.25.075(3) to obtain just compensation where a trial was commenced and the parties partially settled, but further trial proceedings ensued in which the property owner recovered interest on the inverse condemnation settlement award, resulting in an overall recovery that exceeded by more than 10% the government's offer for the damage to her property?

## D. STATEMENT OF THE CASE

Division I's opinion is very selective in its discussion of the facts and procedures here, glossing over critical factual points

bearing on this Court's review. Op. at 1-4. This more complete statement of the case follows.

Merceri bought her home in 2006, in a residential community surrounding Lake Washington's Fairweather Basin. CP 622-23. She made this purchase with the expectation that her property would retain its value, due to its location and residential character with attractive landscaping and trees that provided a buffer to nearby SR 520. *Id.* The property was protected by a covenant that limited construction to residential construction and limited the height of walls to four feet to preserve park-like views within the residential community. CP 54-56, 623-24.

By 2011, the Washington State Department of Transportation ("WSDOT") engaged in extensive construction in the area as part of its expansion of SR 520 that was not residential in character. CP 54-56, 623-24. It tore out mature landscaping and tall trees that provided a natural buffer to the highway. It constructed industrial, water management systems and a maintenance road that abutted Merceri's property.

WSDOT forever changed the nature of what was an all residential community. CP 623-24. WSDOT did not pay Merceri for the damages its construction caused to her property in violation of the property's residential covenant, or for the devaluation of her property.

When Merceri sued WSDOT for inverse condemnation, CP 1-8,[1] the trial court denied WSDOT's motion to dismiss, CP 482-504, ruling that WSDOT was liable for violating the community's residential covenant, reserving the issues of damages and just compensation for trial. CP 479-81. Not noted by Division I, on August 19, 2022, WSDOT made only what it described as a *partial* offer to settle under RCW 8.25.010. CP

[1] Division I's opinion makes reference to an interest on the part of Shawn Jones and Deutsche Bank in Merceri's property. Op. at 3. Jones never appeared at trial or on appeal in this matter. CP 902-04. Deutsche Bank only contested Merceri's counsel's attorney lien in Cause No. 85690-1, and acted as a free rider on Merceri's appeal on interest and fees that renowned to the Bank's benefit. The trial court denied a motion to alter its judgment that referenced Jones and the bank as judgment creditors. CP 1047-49.

806. That offer did not include interest or fees. *Id.* WSDOT *expressly* confined its offer to the terms set out in it, and nothing else; the offer expressly excluded intertest and fees. CP 971. Merceri agreed to that offer, noting that further trial proceedings on interest and fees remained. CP 973.

The trial on just compensation began. Not noted by Division I, the trial court empaneled a jury, but the jury was not sworn. CP 1051; the court heard motions *in limine*. WSDOT sought to exclude all of Merceri's witnesses who would testify as to the devaluation of the Merceri property resulting from WSDOT's construction on the lots that adjoined the Merceri property in its motion in *limine*. The trial court granted that motion. CP 792-96. The parties thereafter entered into the *partial* settlement agreement in which WSDOT paid Merceri $205,000 for her damages, but reserved interest and fees to be decided later. CP 803-05. In its proposed judgment to effectuate the settlement, WSDOT did not provide for interest on the $205,000 settlement. CP 806-15.

Ultimately, only after the contemplated hearing (during the trial process), the trial court determined that WSDOT's offer required payment of prejudgment interest, but the parties disagreed on the amount. Merceri argued that compound interest was necessary for just compensation; had she received the $205,000 when she sustained damage to her property back in May 2011, the funds would have significantly appreciated in value in the nearly 11.5 years she would have had to invest the funds.

Merceri submitted declarations to prove the need for compound interest to effectuate just compensation. Professor Ed deHaan, an accounting professor from the University of Washington, testified that compound interest is standard in the financial world and routine when calculating the time value of money over such a long time period. CP 831-40. Professor deHaan noted that even the Internal Revenue Service uses interest, compounded daily, when calculating penalties for late payments. Merceri submitted another declaration from a local

businesswoman, Vickie Reynolds. Reynolds testified that daily compound interest is routine among local financial institutions with which she has accounts. CP 841-42. She testified that as a prudent investor she "would never accept simple interest" for her investment/savings accounts. CP 842. Merceri testified to the same, as did her lawyer who also noted that daily compound interest is the standard for accounts at his financial institutions. CP 843-50.

Not noted by Division I, WSDOT did not controvert the declarations submitted by Merceri on compound interest to implement constitutional just compensation. Rather, it merely argued for simple statutory interest. CP 867-77. The trial court awarded only $282,664.11 in simple interest on the $205,000 principal that should have been paid nearly 11.5 years ago. CP 895-01.[2] Critical to any analysis of whether the trial court abused

[2] Thus, Division I's observation, op. at 14, that just compensation was established by settlement after the jury was selected but before it was sworn is belied by the post-settlement trial proceedings that resulted in an award of interest.

its discretion on interest, the trial court's order *was devoid of any reasoning* whatsoever on compound vs. simple interest. CP 898. However, despite the trial court's lack of analysis, Division I supplied lengthy after-the-fact rationale *sua sponte* for the trial court's decision for the first time on appeal. Op. at 11-12.

Merceri also asked the trial court to enter a supplemental judgment awarding her litigation fees and expenses she incurred to obtain full just compensation for having to pursue the inverse condemnation action against WSDOT. CP 911-45. The trial court, however, denied an award of the litigation fees and expenses Merceri incurred in successfully obtaining just compensation by its order entered on November 4, 2022, simply on the basis that trial allegedly had not begun when settlement occurred, CP 1053, a determination unsupported by the actual events below, without the rationale later supplied by Division I. Op. at 14-17.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This is an inverse condemnation case under article I, § 16 of our Constitution.[3] "An inverse condemnation occurs when the government takes or damages property *without the formal exercise of the power of eminent domain*." *Kay v. King County Solid Waste Div.*, 9 Wn. App. 2d 1012, 2019 WL 2342348 (2019) at *2 (emphasis added). In such actions, the property is taken before just compensation is paid:

> In a conventional eminent domain proceeding, property is not taken or damaged until just compensation is paid. But in an inverse condemnation … property is taken before just compensation is paid. In these cases, we have held that interest is necessary to compensate the property owner for the loss of the use of the monetary value of the taking or damage from the time of the taking until just compensation is paid.

[3] Article I, § 16 states: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner." This Court has taken cases involving eminent domain issues on direct review under RAP 4.2(a)(4). *See, e.g., Central Puget Sd. Regional Transit Auth. v. WR-SRI 120th No. LLC*, 191 Wn.2d 223, 422 P.3d 891 (2018) (Sound Transit condemnation of City electrical transmission line easements); *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019) (defining regulatory takings).

*Sintra v. City of Seattle*, 131 Wn.2d 640, 655, 935 P.2d 555 (1997) *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.2d 694 (2019). Thus, there are often long delays between the taking and an award of just compensation, during which the citizen would normally have had the ability to invest and earn interest on money that should have been paid long ago.

Because inverse condemnation actions occur throughout the State and involve all levels of government,[4] this case has statewide implications and the issues presented here will recur until this Court resolves them. RAP 13.4(b)(4).

(1) Division I Erred in Its Treatment of Compound Interest Due to Merceri as Just Compensation for the Taking of Her Property

The trial court erred in awarding simple statutory interest in this case, misreading this Court's precedent and

[4] *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980), an early inverse condemnation case involved a port. *Kay* involved a county.

misunderstanding the overwhelming trend in takings cases to permit compound interest in such cases. RAP 13.4(b)(1). Where there is no question that Merceri is entitled to prejudgment interest for the damage done to her property by WSDOT, and the trial court correctly concluded that Merceri had a right to such interest, it should have awarded compound interest for the reasons the *Sintra* court articulated.

This case has a constitutional dimension because interest is an element of a property owner's constitutional just compensation under article I, § 16 for delay in being paid for the government's taking of the owner's property interest. *E.g.*, *Decker v. State*, 188 Wash. 222, 228, 62 P.2d 35 (1936) ("The general rule is (and this court is committed to it) that interest is to be added to the amount of the award from the time possession of the property was actually taken" in an inverse condemnation case); *Sintra*, 131 Wn.2d at 656 ("Interest in this context is not an award of prejudgment interest on a liquidated sum in the traditional sense, but it is a measure of the rate of return on the

property had there been no delay in payment."). Payment of appropriate interest on any award inheres in the overall analysis of just compensation:

> Just compensation requires that the property owner be put in the same position monetarily as he or she would have occupied had the property not been taken. It consists of the full equivalent of the value of the property paid contemporaneously with the taking.

*Id*. at 655.

The importance of compound interest is nothing new. Federal courts routinely award compound interest.[5] Even the IRS pays compound interest on tax refunds. CP 832. Division I's belief that federal eminent domain law somehow does not compel payment of compound interest for a taking, op. at 11-13, is incorrect. An early Washington federal court case, *United*

[5] Judge Learned Hand observed a century ago, "Whatever may have been our archaic notes about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value." *Procter & Gamble Distrib. Co. v. Sherman,* 2 F.2d 165, 166 (S.D.N.Y. 1924).

*States v. No. Pac. Ry. Co.*, 51 F. Supp. 749 (E.D. Wash. 1943) approved of compound interest under Washington law. Contrary to Division I's dismissive treatment, op. at 13, that case is consistent with federal law.

Compound interest in eminent domain proceedings is well-recognized in federal law, part of the just compensation required under the Fifth Amendment in takings cases.

The reason for compound interest where a taking has occurred is clear. The payment of compound interest is mandated from the date of the taking because it is necessary "to accomplish complete justice" under the Fifth Amendment's Takings Clause. *Phelps v. United States*, 274 U.S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083 (1927).[6] Where a property owner does not receive immediate payment for a taking, the owner must receive interest sufficient to place the property owner in as good a position as

[6] *See also*, *Schneider v. County of San Diego*, 285 F.3d 784, 789 (9th Cir. 2002); *Dynamic Corp. of Am. v. United States*, 766 F.2d 518, 520 (Fed. Cir. 1985).

he/she would have had if the payment had coincided with the taking. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984) (citing *Phelps*, 274 U.S. at 344).

The Federal Court of Claims has often re-affirmed the principle that compound interest must be awarded. "Where the government delays its payment for 'taken' property, an award of compound interest is appropriate." *Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411, 414 (1994). "Simple interest cannot put the property owner 'in as good a position pecuniarily as [he or she] would have occupied if the payment had coincided with the appropriation,' because it undervalues the worth of the property. *Id.* at 415 (quoting *ITT Corp. v. United States*, 17 Cl. Ct. 199, 240 (1989)); *Brunswick Corp. v. United States*, 36 Fed. Cl. 204, 219 (Fed. Cl. 1996), *aff'd*, 152 F.3d 946 (Fed. Cir. 1998) (compound interest shall be paid "since no prudent, commercially reasonable investor would invest at simple interest."). Denial of compound interest after a long delay would

effectively undercut the protections of the Fifth Amendment because it would provide property owners with less than if they had been compensated at the time of the taking. *Whitney Benefits*, 30 Fed. Cl. at 415.

In *Vaizburd v. United States*, 67 Fed. Cl. 499, 504 (2005), the Court of Claims awarded compound interest based on United States' "decade-long delay in compensating Plaintiffs for their [interfering with their] easement." There, the party requested compound interest based on "general references to the requirement of full compensation for loss due to delay." *Id.* As this Court stated in *Sintra*, the federal court noted that what makes for full compensation is a fact question "based on the particular circumstances of a given case." *Id.* But even without specific proof about the need for compound interest from the requesting party, the Court of Claims allowed interest to compound because "Compounding [is] a routine means by which a reasonable person would protect themselves, over an extended period of time, from erosion of their investment." *Id.* In *Jackson*

*v. United States,* 155 Fed. Cl. 689 (2021), the court rejected the application of the federal statutory takings interest rate and upheld the compounding of interest that a prudent investor would earn.

Division I's labored effort to distinguish these federal authorities, in a fashion never argued by WSDOT or articulated by the trial court below, op. at 11-13, should be rejected. The trial court did not analyze compounding of interest at all, and remand is appropriate to correct that obvious error. Division I engaged in what amounted to improper fact-finding on appeal.

Twenty-six years ago, this Court addressed interest in a taking case in *Sintra*. No case since has addressed prejudgment interest in an inverse condemnation action. The *Sintra* court recognized that interest is not a cost, but an *element of constitutional just compensation*. 131 Wn.2d at 656 ("…interest is necessary to compensate the property owner for the loss of the use of monetary value of the taking or damage from the time of the taking until just compensation is paid."). Such damage may

be measured by simple interest, but compound interest may be employed if simple interest fails to effectuate just compensation for the property owner. *Id*. at 660-61.

The *Sintra* court overturned an award of compound interest in an inverse condemnation case, not because of any prohibition on such, but because Sintra failed to produce any evidence that the trial court's award of compound interest was necessary to provide just compensation to the property owner. Failure to produce evidence caused the Court to overturn the compound interest element of the "just compensation." The Court stated that simple interest was the rule for just compensation unless

> a party proves by presenting evidence that statutory simple interest does not afford just compensation, [then] the trial court has discretion to award compound interest. Absent such proof, however, a property owner in a temporary regulatory takings case is entitled only to simple interest under RCW 8.28.040 as part of just compensation. In this case, where no evidence was offered from which the trial court could base an award of compound interest, we hold the trial court is guided by and should follow RCW 8.28.040 in calculating interest.

*Id*. at 660-61 (citations omitted).

*Sintra* provided the road map on how landowners may obtain compound interest – by producing evidence related to the loss of the use of the monetary value of the delayed payment of just compensation for the government's property damage. Division I ignored that roadmap.

In this case, Merceri followed *Sintra's* direction. She produced *uncontroverted* evidence that WSDOT did not pay any money for the damage it did to her property, that her property had been damaged by WSDOT's actions since 2011, and that compound interest was necessary to provide her just compensation. If the value of her loss had been invested in a simple interest-bearing savings account, she would have earned interest compounded daily. She documented her loss in her own declaration, the declaration of attorney Woodley, and the declaration of businessperson Vickie Reynolds.

Importantly, the declaration of the University of Washington Foster School of Business Associate Professor Ed deHaan addressed the fact that simple statutory interest was not enough to result in just compensation because "[c]ompound intertest is fundamental in modern finance …" CP 832. He testified that online compound interest calculators such as the one offered by the United States Securities and Exchange Commission at investor.gov (https://www.investor.gov/financial-tools-calculators/calculators/compound-interest-calculator (last visited April 16, 2024)) are a reliable way to calculate compound interest, and easy to calculate. CP 833. WSDOT offered *no evidence* to rebut the foregoing evidence that interest compounded is required to provide constitutional just compensation to Merceri.

Division I misunderstood the thrust of Merceri's contention regarding the application of the federal rule that compound interest should be paid for a taking. Op. at 13.

Washington eminent domain law in recent years has

become consistent with federal law. In fact, the Legislature amended Washington's eminent domain statutes to accomplish that purpose in order to access federal funds to pay property owners' expenses. As the *Kay* court explained:

> RCW 8.25.075 was enacted, and RCW 8.25.070 was amended, as part of the Relocation Assistance and Real Property Acquisition Policy Act, Laws of 1971, 1st. Ex. Sess., ch. 240. This act was passed so that state and local governments could obtain financial aid in acquiring property by meeting the requirements of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4654.4655, that litigation expenses, including attorney fees, be paid in certain cases.

*Kay*, *supra* at *5 n.3. *See also*, *City of Seattle v. McCoy*, 112 Wn. App. 26, 32, 48 P.3d 993 (2002). The federal government makes funds available to states to pay takings-related costs. Those costs include attorney fees. 42 U.S.C. § 4654(c). *Haggart v. Woodley*, 809 F.3d 1336, 1344 (Fed. Cir. 2016). The Washington Legislature amended RCW 8.25.070(3) in 1988 to make the award of fees under that statute mandatory. By bringing Washington eminent domain law into conformity with federal

law and its payment of compound interest, the State will have the benefit of federal funds.

Here, too, compounding interest is a proper means by which to provide Merceri just compensation for WSDOT's taking of her property right. She would have prudently invested the funds in 2011 and earned intertest compounded daily. Merceri presented specific, uncontroverted evidence from a local accounting professor, a businessperson, and a lawyer discussing the routine, expected application of compound interest to her lost property right over 11 years. Awarding her only simple statutory interest did not adequately account for the time value of money in the decade-plus time it took to resolve this case. She did not receive constitutionally-mandated just compensation.

To award any less than compound interest undercuts the protections of our Constitution's takings clause and undercompensates Merceri for the significant loss in value of property she incurred since 2011.

Review is merited in this case because Division I's opinion

contravenes *Sintra*. RAP 13.4(b)(1). This Court needs to reaffirm and delineate the principles on interest as constitutional just compensation in inverse condemnation actions. This case checks all the boxes for review by this Court – clarification of an important constitutional principle, involving public funds, and a case capable of recurrence at all levels of government across the state.

(2) Division I Erred in Failing to Conclude that Merceri Was Entitled to a Fee Award under RCW 8.25.075 to Preserve Her Just Compensation for the Taking of Her Property

This Court has long recognized that the failure to award fees and litigation expenses detracts from the just compensation to which a property owner is constitutionally entitled when the government takes her or his property. *State v. Roth*, 78 Wn.2d 711, 712, 479 P.2d 55 (1971). As the *Roth* court noted, the Legislature attempted to ameliorate that result. *Id*. at 712-13. While the Court's discussion addressed RCW 8.25.070, relating to formal eminent domain proceedings, it is no less true as to

RCW 8.25.075 that addresses inverse condemnation actions. In *Kay*, *supra*, Division I itself summarized that policy:

> Thus, RCW 8.25.075(3) protects landowners who might otherwise exhaust their resources in litigating a takings claim by ensuring they are compensated for their attorney fees and costs and, in this way, vindicating their right to full and fair compensation for their losses.

*State v. Chambers*, 9 Wn. App. 2d 1019, 2019 WL 2423317 (2019) at *3. Simply put, fee awards are critical to effectuate a constitutionally-based public policy of just compensation.

The trial court declined to award fees under RCW 8.25.075(3), apparently because no verdict was rendered in the case, CP 1050-53, despite the fact that only a trial prompted the resolution of Merceri's entitlement to obtain just compensation. As will be discussed *infra*, that interpretation, later seemingly adopted by Division I, op. at 14-16, is wrong.

But RCW 8.25.075(3) only requires that fees be awarded if the recovery exceeds the State's offer by 10% as the *result of trial*. *See* Appendix. The result here met the 10% requirement.

The judgment entered by the trial court plainly exceeded by 10% the best offer made by WSDOT: Merceri recovered $487,664.11, which exceeded WSDOT's best offer of $205,000.

This Court in *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795 (2004) focused on the comparison under RCW 8.25.073(3) between the actual offer by the government and the result precipitated by the trial, including interest. *Id*. at 474-75.[7] Here, as in *Kay*, the value of the ultimate judgment of $486,787.95, *far* exceeded the value of the State's $205,000 offer.

As for the second element, Division I erred in its belief that a trial to verdict was necessary under RCW 8.25.075(3). Nothing in the express language of RCW 8.25.070(3) requires trial *to a verdict*. CR 38(a) defines a trial as "the judicial

[7] This reflects practice elsewhere. *See e.g., McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 534, 128 P.3d 128 (2006), (addressing an analogous statute, RCW 49.48.030, that awarded fees the trial result improved upon what was offered in settlement; Division III held that the judgment of $139,053.68, that included prejudgment interest, exceeded the offer of $125,000, and the plaintiffs were entitled to fees).

examination of the issues between the parties, whether they are issues of law or of fact." Clearly, the rule contemplates trial *as a process*. It is not simply the verdict or the judge's bench trial decision. Indeed, here, Division I's own opinion acknowledges that the trial involved *three phases*. Op. at 3. Only phase 1 was resolved in settlement. And in phases 1 and 2, the trial court "judicially examined" whether WSDOT took Merceri's property, declining to grant WSDOT's motion to dismiss her inverse condemnation claim, the court assessed WSDOT's settlement offer, and judicially determined interest and fees issues thereafter.

Moreover, Division I was flatly wrong when it averred that the payment of interest arose from parties' partial settlement, op. at 15; it overlooked what really occurred here. Trial proceedings were commenced prior to that partial settlement. Merceri's judgment that included damages and interest was entered after motions *in limine* were argued and decided, CP 784-96, trial briefs were submitted to the court, CP 756-59, 797-802, and a

jury had been empaneled in the case. The settlement was *partial* only. CP 852-53. Further court proceedings were contemplated to fully resolve issues in the case. *Id.* In the post-settlement trial proceedings, the trial court awarded Merceri interest, albeit not as much as she merited. CP 895-901. But for *the entirety of the trial process*, Merceri would not have received just compensation. CP 479-504.

Historically, courts have not rigorously adhered to the necessity of a trial with all the bells and whistles for fees to be recoverable under RCW 8.25.075(3), in any event. In *Petersen supra,* this Court had no trouble in awarding fees to a property owner in an inverse condemnation action where a trial in the conventional sense never occurred. Division I's attempt to distinguish the case, op. at 15, by saying that just compensation and interest in this case "followed as a result of a settlement," is flatly wrong. Compensation was the subject of a *partial* settlement; interest was *not*. Trial proceedings resulted in WSDOT paying interest to Merceri. In *Petersen,* a judgment was

entered on agreed facts. That was not a "trial" in any conventional sense. The *Petersen* court reversed the trial court's denial of fees. 94 Wn.2d at 488-89. *See also, City of Snohomish v. Joslin*, 9 Wn. App. 495, 513 P.2d 293 (1973) (fees allowed in a case resolved by motion). Contrary to Division I's belief, op. at 15-16, *Joslin* remains persuasive authority for the principle that courts award eminent domain fees without a trial to a verdict.

Division I's ruling, with its crimped RCW 8.25.075(3) analysis denying fees, upsets two key public policies. First, the fact that a trial to verdict was not held should not prejudice Merceri's right to fees, particularly considering this Court's strong public policy favoring settlement. *Seafirst Center Limited P'ship v. Erickson*, 127 Wn.2d 355, 366, 898 P.2d 299 (1995) (recognizing "Washington's strong public policy of encouraging settlements"). For the trial court to adhere to a strict policy that a full "trial" is necessary before fees may be awarded makes little practical sense. Cases settle. Indeed, this Court's public policy fully supports settlement of cases. To force a trial to verdict

before a property owner may recover fees to preserve her/his just compensation for the taking of her/his property by government action is bad policy.

Second, Division I's statutory analysis upsets the public policy upheld by this Court in inverse condemnation actions – preserving the property owner's just compensation by awarding the property owner fees and expenses, just as the Legislature expected, to make the owner whole:

> The legislature has recognized that awards in eminent domain proceedings, though constitutional, may fall short of complete compensation because of litigation expenses. Consequently, it has enacted laws designed to encourage settlement and limit extended litigation expense.

*Petersen*, 94 Wn.2d at 487. In *Kay*, *supra*, Division I stated:

> Thus, RCW 8.25.075(3) protects landowners who might otherwise exhaust their resources in litigating a takings claim by ensuring they are compensated for their attorney fees and costs and, in this way, vindicating their right to full and fair compensation for their losses.

9 Wn. App. 2d 1019 at *3. Simply put, fee awards are critical to effect a constitutionally based public policy of just

compensation.

The trial court rendered a judgment for Merceri that exceeded the offer by WSDOT by more than ten percent only because she participated in a trial process as in *Petersen* or *Joslin*. Merceri should recover her documented fees and litigation expenses. And again, this case checks off all the reasons why review should be granted. Division I's opinion is contrary to Supreme Court and Court of Appeals precedent in requiring a trial to verdict, contrary to the language of RCW 8.25.075(3) and the definition of a trial in CR 38(a). It violates this Court's public policy favoring settlement. The opinion involves eminent domain issues that occur across the State, and is capable of recurrence. Review is merited. RAP 13.4(b)(1, 2, 4).

## F. CONCLUSION

This Court should grant review, RAP 13.4(b), and reverse the interest award and remand the case to the trial court with instructions to compound interest, and it should award Merceri

her fees and costs on appeal.[8]

This document contains 4,900 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of April, 2024.

Respectfully submitted,

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[8] Merceri requested fees at trial and on appeal in accordance with RAP 18.1(a) below. Br. of Appellant at 33.

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# APPENDIX

RCW 8.25.075(3):

A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.

FILED
4/1/2024
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| MICHELLE MERCERI,<br><br>Appellant,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,<br><br>Respondent,<br><br>DEUTSCHE BANK AG a/k/a DEUTSCHE BANK, doing business in the United States as DEUTSCHE BANK USA, and as DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2; and SHAWN CASEY JONES,<br><br>Defendants. | No. 85865-3-I (linked with<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |
| MICHELLE MERCERI,<br><br>Appellant,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, DEUTSCHE BANK AG a/k/a DEUTSCHE BANK, doing business in the United States as DEUTSCHE BANK USA, and as DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking | No. 85690-1-I) |

association, as trustee for holders of the BCAP LLC Trust 2007-AA2,

Respondents,

SHAWN CASEY JONES,

Defendant.

BIRK, J. — In this inverse condemnation action, landowner Michelle Merceri filed an action against the State of Washington, in which she joined as defendants a fellow putative owner and a lender holding a deed of trust, seeking compensation for a state highway expansion's taking of restrictive covenant rights benefiting her property. The superior court bifurcated trial, entered judgment determining the amount of compensation and interest due because of the taking, and denied Merceri an award of attorney fees, but has not yet determined the allocation of the recovery among Merceri, the putative other owner, and the lender. Merceri filed a notice of appeal from the judgment challenging the award of interest and denial of attorney fees. While the first notice of appeal was pending, Merceri unsuccessfully sought to enforce an attorney lien against the compensation recovery and separately filed a notice of appeal from the denial of that motion. We affirm the superior court's rulings denying Merceri's motions for attorney fees and compound interest, we conclude the denial of Merceri's motion to enforce an attorney lien is not appealable and so we do not review it, and we remand.

I

In a complaint filed August 6, 2021, Merceri alleged ownership of a lot in the Fairweather Basin subdivision in Hunts Point, Washington, which was subject to

protective restrictions and covenants. She alleged the State effected a taking by condemning two neighboring lots for a highway project and putting them to use in violation of the covenants. Merceri joined as parties Shawn Jones, who is on the title to Merceri's property but according to her has disclaimed any interest in the claim for just compensation, and Deutsche Bank National Trust Company, which purports to be the beneficiary of a 2006 deed of trust encumbering the property. As memorialized in a partial summary judgment order dated April 15, 2022, the State agreed its construction on the two lots violated one of the covenants, the superior court granted Merceri summary judgment on that issue, and the court reserved the amount of damages for trial. By summary judgment order dated September 6, 2022, the court limited certain of Merceri's damages claims, but otherwise ruled there was evidence requiring a jury determination of the diminution in value of Merceri's property. On September 9, 2022, the court entered an order directing that trial proceed in three phases: "(1) determination on the amount of compensation on Plaintiff's inverse condemnation claim as against [the State], (2) determination of interest on any award to Plaintiff and attorneys' fees, and (3) Deutsche Bank's entitlement to and recovery from any such award to Plaintiff."

On October 4, 2022, Merceri filed a notice of settlement between herself and the State, reflecting that Merceri had accepted the State's pretrial offer under RCW 8.25.070. The State presented a proposed judgment for the agreed amount of just compensation plus statutory interest of 12 percent from the date of taking on May 11, 2011. Merceri filed an objection to the proposed judgment. Merceri sought compound interest, citing Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935

P.2d 555 (1997), abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.2d 694 (2019). Following a presentation of judgment hearing, on November 4, 2022, the court entered its judgment and decree of appropriation for the agreed amount of just compensation and statutory interest of 12 percent. Statutory 12 percent simple interest on $205,000.00 from 2011 to 2022 amounted to $282,664.11. Merceri filed motions to amend the judgment and for an award of litigation costs including attorney fees incurred to obtain just compensation. By orders dated November 29, 2022, the court denied both motions. On December 1, 2022, Merceri filed a notice of appeal directed to the Supreme Court designating the judgment and these orders.

Separately, on May 16, 2023, Merceri filed in the superior court a "Motion to Enforce Attorney Lien Claim on Judgment." In that motion, Merceri sought disbursal of funds from the court registry to satisfy a claim of lien for attorney fees asserted by her counsel. The superior court denied this motion, and on July 14, 2023, denied reconsideration. On July 31, 2023, Merceri filed a notice of appeal directed to this court designating these orders.

This court's clerk's office docketed Merceri's July 31, 2023 notice of appeal under matter number 85690-1-I. By order dated October 3, 2023, the Supreme Court transferred Merceri's December 1, 2022 appeal to this court. The clerk's office docketed this appeal under matter number 85865-3-I. By letter, the court advised the parties that the matters would be linked for purposes of argument and disposition.

II

In advance of oral argument, the court advised the parties of its notation ruling stating, "[T]he parties are directed to be prepared at oral argument to address whether there is an appealable final judgment before the court within the meaning of RAP 2.2." The November 4, 2022 judgment states, "There is no just reason to delay entry of this Judgment and Decree of Appropriation as to the just compensation arising from the State's condemnation of the Covenant, this is a final judgment at the express direction of the Court." However, the judgment does not include findings supporting that statement, as required by RAP 2.2(d). In the absence of such findings, such a judgment is generally not appealable. Pepper v. King County, 61 Wn. App. 339, 349, 810 P.2d 527 (1991).

RAP 2.2(a) provides that "[u]nless otherwise prohibited or provided by statute or court rule," a party may appeal from only designated superior court decisions. A judgment adjudicating less than all the claims or counts, or the rights and liabilities of less than all the parties, is generally subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties. RAP 2.2(d). Generally, when a judgment is not appealable because RAP 2.2(d) is not satisfied, the appellate court must dismiss an appeal. Schiffman v. Hanson Excavating Co., Inc., 82 Wn.2d 681, 687-88, 513 P.2d 29 (1973); Pepper, 61 Wn. App. at 346 & n.4. Despite the court's direction in advance of argument, no party identified a statute or court rule making the

November 4, 2022 judgment appealable as a matter of right.[1] The court's additional research has identified RCW 8.04.150, which states,

> Either party may seek appellate review of the judgment for damages entered in the superior court within thirty days after the entry of judgment as aforesaid, and such review shall bring before the supreme court or the court of appeals the propriety and justness of the amount of damages in respect to the parties to the review: PROVIDED HOWEVER, That upon such review no bond shall be required: AND PROVIDED FURTHER, That if the owner of land, the real estate or premises accepts the sum awarded by the jury, the court or the judge thereof, he or she shall be deemed thereby to have waived conclusively appellate review, and final judgment by default may be rendered in the superior court as in other cases: PROVIDED FURTHER, That no review shall operate so as to prevent the said state of Washington from taking possession of such property pending review after the amount of said award shall have been paid into court.

State v. Scheel held that when determining the allocation of a condemnation award, the trial court had no authority to alter the judgment for just compensation because it had not been appealed. 74 Wn.2d 137, 137, 140, 443 P.2d 658 (1968). The court said, "Having failed to give notice of appeal within 30 days according to law and rule, [the appellants] cannot now reopen the matter in a subsequent trial for equitable distribution." Id. at 140. In State v. Wachsmith, the court held the portion of a condemnation judgment awarding attorney and expert witness fees is appealable under RCW 8.04.150. 4 Wn. App. 91, 96, 479 P.2d 943 (1971). In a

[1] Merceri sought to rely on the superior court's CR 54(b) direction, despite its lack of the required findings, or alternatively discretionary review under RAP 2.3(b). Wash. Court of Appeals oral argument, Merceri v. Dep't of Transp., No. 85865-3-I (Feb. 28, 2024), at 1 min., 49 sec. to 2 min., 02 sec. and 2 min., 52 sec. to 3 min., 36 sec, https://tvw.org/video/division-1-court-of-appeals-2024021466/. The State sought to rely on RCW 8.04.110 and .130, but those statutes do not address appealability. Id. at 11 min., 38 sec. to 12 min., 12 sec. and 19 min., 04 sec. to 19 min., 31 sec.

motion to dismiss the appeal, Wachsmith argued the portion of the judgment awarding such fees was not appealable because they did not qualify as "the propriety and justness of the amount of damage." Id. at 92, 96. We disagreed, noting the enactment of RCW 8.25.070 permitted a trial court to award attorney fees in the judgment for damages in an eminent domain proceeding, the trial court made such an award and included it in the judgment for damages, and this award merged in the total judgment for damages. Id. at 96. Accordingly, the "remedy of review by appeal is proper." Id. (citing RCW 8.04.150). These decisions satisfy us that the November 4, 2022 judgment is appealable under RCW 8.04.150.

The same is not true of the superior court's later orders denying Merceri's motion to enforce an attorney lien. RCW 8.25.070 speaks to the condemnor's liability for attorney fees as part of the gross award of just compensation, and RCW 8.04.150 contemplates appeal of the amount of just compensation separate from subsequent proceedings to determine the allocation among claimants. The July 2023 superior court orders lack any CR 54(b) certification, as well as the supporting findings required under RAP 2.2(d). The parties have identified, and the court has located, no statute or court rule making the July 2023 orders denying enforcement of an attorney lien appealable as a matter of right.

In the absence of an appealable final judgment, a party seeking review is limited to discretionary review. RAP 5.1(c) states that "[a] notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review." Thus, when CR 54(b) and RAP 2.2(d) are not met, an appellate court may still accept review if the criteria for discretionary review under

RAP 2.3(b) are met. Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 156 Wn.2d 253, 257, 261 n.4, 126 P.3d 16 (2006); Glass v. Stahl Specialty Co., 97 Wn.2d 880, 883, 652 P.2d 948 (1982). Here, they are not. Regardless of whether the superior court's rulings denying current enforcement of an attorney lien are error, which we do not decide, they are not "obvious" or "probable" error, and even more plainly they do not "render further proceedings useless" or "substantially alter[] the status quo or substantially limit[] the freedom of a party to act." RAP 2.3(b)(1)-(2). To the contrary, they expressly contemplate that further proceedings must occur.

As to Merceri's July 31, 2023 notice of appeal, matter number 85690-1-I, review is dismissed. Because neither Merceri nor Deustche Bank has prevailed on review, we direct that no party is awarded attorney fees or costs at this time, but this direction is without prejudice to any party's establishing an entitlement to attorney fees or costs in subsequent proceedings.

III

Merceri argues the superior court erred by failing to award compound interest.[2] We disagree.

The state constitution requires that "just compensation" be paid in case of a governmental taking of private property. WASH. CONST. art. I, § 16. An inverse condemnation claim seeks to recover the value of property that the government

[2] The State argues Merceri's alleged error concerning interest cannot be reviewed, because she did not supply a report of proceedings from a November 3, 2022 presentation hearing. The parties presented their arguments to the superior court in the form of proposed judgments and their respective written objections to each other's proposed judgments. The record affords a basis for review.

appropriated without a formal exercise of its eminent domain powers. Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrig. Dist., 175 Wn. App. 374, 388, 305 P.3d 1108 (2013). "Just compensation requires that the property owner be put in the same position monetarily as he or she would have occupied had the property not been taken. It consists of the full equivalent of the value of the property paid contemporaneously with the taking." Sintra, 131 Wn.2d at 655-56. In an inverse condemnation action, interest is necessary to compensate the property owner for the loss of the use of the monetary value of the taking or damage from the time of the taking until just compensation is paid. Id. at 656. Interest in this context is a measure of the rate of return on the property owner's money had there been no delay in payment. Id.

RCW 8.28.040 requires a court in an eminent domain proceeding tried to verdict by the jury or the court to impose postverdict interest as part of the compensation for the taken or damaged property. The interest must be set at the maximum interest rate permitted at that time under RCW 19.52.020 from the date of entry of the verdict to the date of the payment. RCW 8.28.040. The maximum interest rate allowable under that statute is 12 percent. RCW 19.52.020(1)(a).

In Sintra, the court held that awarding compound prejudgment interest instead of simple interest constituted error. 131 Wn.2d at 660. The trial court awarded 12 percent interest on the compensation award compounded annually. Id. at 651. The Supreme Court reversed, noting RCW 8.28.040 guides the trial court's determination of a prejudgment interest award as part of the award of just compensation. Sintra, 131 Wn.2d at 660. Because RCW 19.52.020 "does not

specifically provide for the compounding of interest, only simply interest is allowed." Sintra, 131 Wn.2d at 660. However, if a party proves by presenting evidence that statutory simple interest does not afford just compensation, the trial court has discretion to award compound interest. Id. Absent such proof, "a property owner in a temporary regulatory takings case is entitled only to simple interest under RCW 8.28.040 as part of just compensation." Sintra, 131 Wn.2d at 660-61. We review the superior court's decision to allow simple interest and not compound interest for an abuse of discretion. See id. at 660. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

Merceri submitted several declarations in support of her request for daily compound interest instead of simple interest to fully compensate her. University of Washington Accounting Associate Professor Ed deHaan stated compound interest is "fundamental in modern finance . . . for standard financial products such as savings accounts or loans," "is what the financial world earns and pays in everyday transactions," and "daily compounded interest is relatively easy to calculate on[e]self." Vickie Reynolds, a businesswoman and investor residing in King County, stated she expected financial institutions would pay daily compound interest and she would "never accept simple interest because simple interest is not the standard for the payment of interest on savings accounts in Washington." Merceri filed her own declaration stating, "Paying me less than interest compounded daily would not provide just compensation and would not make me

whole." She claims, "No reasonably prudent investor or involuntary creditor, which I am, would accept less than interest compounded daily" and repeats that she is entitled to full just compensation, which means interest compounded daily.

Merceri does not show based on this evidence that it was an abuse of discretion by the superior court to award statutory 12 percent simple interest on $205,000 from 2011 to 2022, amounting to $282,664.11. Merceri relies on primarily federal case law supporting compound interest. But her argument, and the above evidence, ignores the rates at which federal authorities have allowed compound interest. Merceri's authorities, discussed below, use commercial interest rates, in contrast to Washington's statutory rate.

The rule allowing compound interest in takings cases is based on the constitutional intent to provide just compensation. See Sintra, 131 Wn.2d at 660. The purpose of allowing interest in cases where the property owner is not paid at the time of the taking is to ensure the owner "is placed in as good a position pecuniarily as [the owner] would have occupied if the payment had coincided with the appropriation." Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10-11, 104 S. Ct. 2187, 2194, 81 L. Ed. 2d 1 (1984). In Whitney Benefits, Inc. v. United States, the court held just compensation required awarding compound interest in that case because of the government's delay in payment, the taken property's characterization as commercial and income-producing, consistency where the discount rate used at trial for future earnings adopted a compound interest rate, and consistency where Congress's recent amendment to the Declaration of Taking Act, 40 U.S.C. § 258e-1 (1988), provided that compound interest would be

awarded where the government exercised its eminent domain authority. 30 Fed. Cl. 411, 414-16 (1994). While there was delay in this case, for reasons the parties dispute, the other factors relied on in Whitney Benefits are absent.

In Brunswick Corp. v. United States, a patent infringement case, the court imposed interest rates compounded annually "since no prudent commercially reasonable investor would invest at simple interest. Compounding interest annually, therefore, is more likely to place the patentee in the same financial position it otherwise would have held had royalties been timely paid." 36 Fed. Cl. 204, 219 (1996). The court ordered compound interest "commensurate with the prime rate." Id. at 207. Noting that determining the appropriate rate of interest in Court of Claims takings cases is a question of fact, the court rejected the condemnee's own after-tax weighted average cost of capital as the measure of just compensation, which the condemnee asserted ranged from 8.76 percent to 12.5 percent. Id. at 219. Another case allowed compound interest at a federal statutory rate requiring use of " 'the weekly average one-year constant maturity Treasury yield.' " Vaizburd v. United States, 67 Fed. Cl. 499, 504 (2005) (quoting 40 U.S.C. § 3116). Another used "the seven-year Treasury STRIPS [Separate Trading of Registered Interest and Principal of Securities] rate" as the measure of just compensation. Nat'l Food & Beverage Co., Inc. v. United States, 105 Fed. Cl. 679, 704 (2012) (footnote omitted). These cases look to what " 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal' " would receive. Schneider v. Cnty. of San Diego, 285 F.3d 784, 792 (9th Cir. 2002) (quoting United States v. 50.50 Acres of Land,

931 F.2d 1349, 1355 (9th Cir. 1991)). Merceri cites United States v. N. Pac. Ry. Co., 51 F. Supp. 749, 749-50 (E.D. Wash. 1943), in which the court allowed compound interest at 6 percent, but the court did not explain the reason for its selection of that rate, and it is no longer consistent with Court of Claims decisions.

The combination of Merceri's evidence not addressing rates and these decisions using commercial rates does not support that statutory 12 percent simple interest for the delay from 2011 to 2022 was inadequate to place Merceri "in as good a position pecuniarily as [she] would have occupied," Kirby Forest, 467 U.S. at 10, based on a reasonable return while maintaining safety of principal, if payment had been made in 2011. The superior court was within its discretion to decline to compound interest.

Merceri argues the Washington legislature has changed eminent domain law to conform with federal law, but the changes made do not include amending RCW 19.52.020 to mandate interest be compounded. Merceri points to provisions of Washington law enacted to match the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and its corresponding regulations under 49 C.F.R. §§ 24.1-24.306. Chapter 8.26 RCW and its corresponding regulations in chapter 468-100 WAC contain substantially the same provisions. Both these federal and state statutes indicate that their primary purpose is to minimize the hardship of displacement for individuals and businesses affected by public projects by providing uniform procedures for providing relocation assistance. 42 U.S.C. § 4621(b); RCW 8.26.010(1)(a). They do not address interest on takings.

IV

Merceri argues she was entitled to attorney fees under RCW 8.25.075. We disagree.

Reasonable attorney fees incurred in an inverse condemnation action are not available unless provided in contract, statute, or recognized equitable principles. State v. Costich, 152 Wn.2d 463, 469-70, 98 P.3d 795 (2004). RCW 8.25.075(2) authorizes an acquiring government agency's attorney to include in the settlement amount reasonable attorney fees, when appropriate, where a claim is settled in an inverse condemnation action. Daviscourt v. Peistrup, 40 Wn. App. 433, 442 n.9, 698 P.2d 1093 (1985). RCW 8.25.075(3) provides that in an inverse condemnation action, a plaintiff is entitled to attorney fees "but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial."

Merceri does not dispute that the amount of just compensation in her case was established by settlement after the jury was selected but before it was sworn. She relies on Petersen v. Port of Seattle, where the court reversed the trial court's denial of an award for attorney and expert witness fees in an inverse condemnation case. 94 Wn.2d 479, 481-82, 489, 618 P.2d 67 (1980). The plaintiffs sought recovery of the diminished value of their property resulting from the Port of Seattle's operation of Sea-Tac Airport. Id. at 481. A proceeding began in superior court to test the validity of defenses asserted by the Port. Id. Several days of hearings followed where several witnesses were called and subjected to direct and

cross-examination and closing arguments were made to the court. Id. at 481, 488. The court rejected the defenses. Id. at 481. The trial to determine the amount of compensation due to the plaintiffs was never held because the superior court entered a judgment on agreed facts. Id. at 481-82. The Petersen court viewed the series of hearings to test the Port's defenses as the first portion of a bifurcated trial. Id. at 488. The Port was held liable for attorney and expert witness fees under RCW 8.25.075 because its written settlement offer was not made 30 days before the start of those series of hearings. Id. "This is in keeping with the legislative encouragement to avoid trials." Id. "In light of the legislative objective of settling rather than trying matters such as this, it seems anomalous to contend that the evaluation of defenses requiring the taking of testimony for several days is not at least a portion of a trial." Id. at 488-89.

Petersen is distinguishable. In Petersen, while there was not a full trial, the obligation to pay just compensation was established through a contested adjudication of the Port's defenses. Here, the amount of just compensation and the State's undisputed payment of statutory interest followed as a result of settlement. The statute makes an award of attorney fees available in cases where the amount of compensation was determined as a result of trial. In this case, the amount was determined by settlement in advance of trial.

Merceri also cites City of Snohomish v. Joslin, 9 Wn. App. 495, 500, 513 P.2d 293 (1973). There, we remanded for an award of attorney fees, explaining that RCW 8.25.075 was not limited to condemnation actions. Id. at 498-99, 500. We said RCW 8.25.075 "clearly manifests a legislative intent that if a condemnor

chooses to take property without instituting condemnation proceedings, the owner shall be reimbursed for his costs of litigation in obtaining his constitutionally guaranteed just compensation." Id. at 500. But Joslin is not applicable, because it was decided before the 1977 amendment to RCW 8.25.075 limiting the availability of attorney fees to only cases determined "as a result of trial." See LAWS OF 1977, Ex. Sess., ch. 72, § 1, at 296. Because the amount of just compensation and the admitted statutory 12 percent interest were not determined to be owed "as a result of trial," the superior court did not err by denying Merceri's motion for attorney fees.

Pointing to the language of RCW 8.25.075(2) making it discretionary for the agency whether to include an attorney fee award in a settlement offer, Merceri argues the legislature set no standards guiding the agency's discretion. Merceri does not cite authority that a legislative grant of discretionary authority to an executive branch official fails simply because of the possibility of arbitrary implementation, she does not point to circumstances indicating that the attorney general's decision not to offer compensation for attorney fees in her case was arbitrary, and she does not suggest to the court any construction of the statute to provide the guidance she says is required. Cf. People's Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm'n, 104 Wn.2d 798, 808, 711 P.2d 319 (1985) (deference accorded to regulatory agency where the statute "in very broad terms, basically just direct[ed] them to set [utility rates] which the agencies determine to be just and reasonable.").

Merceri seeks attorney fees on appeal, but because she does not prevail we decline to award them.

V

In matter number 85690-1-I, review is dismissed and no party is awarded attorney fees or costs at this time, without prejudice to any party subsequently establishing such an entitlement in future proceedings. In matter number 85865-3-I, we affirm the superior court's November 4, 2022 judgment, and its rulings denying compound interest and denying attorney fees under RCW 8.25.075. We direct that this opinion shall be filed in both matter number 85690-1-I and matter number 85865-3-I. We remand for proceedings consistent with this opinion.

Birk, J.

WE CONCUR:

Feldman, J.

Dwyer, J.

Kiwanis Vocational Homes for Youth is one of the largest boys' homes in the state of Washington. Beyond our functions as a licensed group home, we are a dream that is growing.

KVH began as one man's dream, and became the shared dream of the Western Washington Kiwanis Clubs. This sharing has meant that a great many people have been instrumental in making a dream reality.

Kiwanis Vocational Homes for Youth provides shelter, education, and nourishment for the more than 50 young men in our care.

The nourishing environment at KVH is made up of a set of definable components held firmly in place by an almost palpable atmosphere of caring.

**More Than 50 Strong and Growing**
**we're your brothers, sons, and neighbors**

Our family of boys at Kiwanis Vocational Homes for Youth includes over 50 young men between the ages of 13 and 18 years.

Our boys are placed by court referral through the Department of Social and Health Services. The Juvenile Courts can legally remove youngsters from unsafe, unsuitable, or inappropriate home settings.

Our "family" also consists of over 40 child care workers, counselors, teachers, vocational instructors, cooks, and all the usual administrative and support staff necessary to keep our growing family well supplied with the services and skills it requires to thrive.

We provide a variety of services to meet the variety of needs in our resident population. Some youngsters are placed with us for just 90 days, although most remain until they are fully prepared to re-enter a traditional home situation.

Each new placement at KVH presents an entirely new set of needs and demands for our staff. We meet those needs to the best of our abilities, learning and growing ourselves in the process. We focus on making each young man in our family better prepared to meet the demands of society in constructive, appropriate ways.

## OUR HISTORY; OUR FUTURE

In December, 1979, Kiwanis Vocational Homes for Youth opened its doors, and 8 boys came in to live. We had 4 buildings, a great deal of enthusiasm, tremendous community support, and 320 beautiful acres of land.

We're now one of the largest group homes in the state of Washington, we still have 320 acres, well over one dozen hand-crafted buildings, and enthusiam and support coming from the entire state and region. The rural location of KVH, with ready access to the Twin Cities, works strongly in favor of being able to remove the boy from the external pressures and temptations of big city life, yet give him access to a small city when he is ready to function responsibly in that setting.

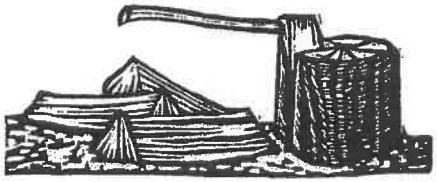
As the remarkable growth of both our program and physical plant continues we will maintain the down to earth, rustic enviroment that is so much a part of our signature, as well as maintain our mortgage free status.

Our future holds more boys, increasing quality in care and staffing (complacency will never be a problem here!), and the power of each of our friends spreading the good news about KVH to his friends, neighbors, and community.

## THE KIWANIS COMMITMENT

From our inception in 1979, the Kiwanis Clubs of Western Washington have given emotional and material support to our program. When we've needed shoes for the boys, Kiwanis has been there. When we've needed materials for the boys to expand and improve the buildings in which they live, Kiwanis has been there.

As our commitment to excellence has continued, Kiwanis has been there every step of the way. As our facility and programs expand, so do our needs, and the guy who stops by with a few hours to spare on a Saturday afternoon is just as welcome as he was back in 1979. So do keep dropping by. Our place is really your place, too. And don't forget to bring your hammer and paintbrush along!



## COMMUNITY INVOLVEMENT

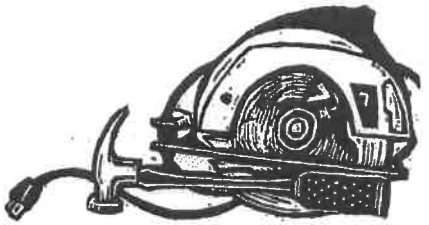
If the following anecdote sounds like full-circle community involvement, then we guess we've got it, thanks to all of you!

"Remember that extra ax that was standing in your garage, the one you never used any more? You remember, you tossed it in the back of your car the last time you brought us a care package of some jeans, shoes, and that neat basketball hoop for the boys.

Well, that ax is now splitting firewood in the hands of one of our boys. And that firewood is being donated by our wood program to low income senior citizens in town."

There's no doubt that community involvement is a two way street at KVH.

Our boys also volunteer at the Food Bank, help low income families in the Twin Cities complete necessary repairs to their homes, and are active in assisting with the Special Olympics.



## VOCATIONAL EDUCATION

Our vocational program is one of KVH's strongest assets. On any given day you'll find the boys learning FOOD TECHNOLOGY AND PREPARATION in the kitchen facility, improving both their skills and the facility's vehicles in the AUTOMOTIVE SHOP, repairing chain saws and doing seasonal wood harvesting as part of the FORESTRY component, or shining up the FIRE TRUCK.

The CARPENTRY CREW not only constructs our new buildings, but maintains and remodels our existing structures, as they become conversant with the County Building codes.

Our future includes the expansion and diversification of the existing programs, as well as the incorporation of additional vocational experiences. High on the list for new experiences are a metal and welding shop, a plumbing, electrical and heating program, and vocational agriculture.

# EXHIBIT 12

**PACIFIC NORTHWEST DISTRICT** OF KIWANIS INTERNATIONAL

ROY H. FRANK, SECRETARY AND TREASURER

P.O. BOX 747
BEAVERTON, OR 97075
503/641-8869

January 21, 1987

Allan G. Wood
District Governor
P. O. Box 3385
Lacey, WA 98503

Dear Allan:

Upon returning from our meeting in Kelso, a research of the Board Minutes dated February 4, 1979 produced a statement that sheds light on our discussion with Dave Potter. (See enclosure, paragraph XIX.)

From this I would deduct that "Lewis County Youth Enterprises, Inc." is the legal entity under which the home was incorporated. There is no evidence on record here that they have officially petitioned Kiwanis International for use of the Kiwanis name. It seems also that the District did not lend support to the name use unless it would "be strictly and entirely a Kiwanis project".

Of course permission to use the Kiwanis name and logo must be solicited from Kiwanis International which holds registration of the same. Bill Brown in Indianapolis would be the one to give direction on this.

It is hoped that concerns expressed last night (and previously) do not reflect any negative implication on the boys home whatsoever. On the contrary, we recognize the good work done, the impact on young lives, and the potential for continuation of this service. In these days of liability risk, I believe we need to ensure that our clubs, District and International won't be held liable for any wanton act by any resident of such an institution.

Best wishes,

Roy H. Frank
District Secretary & Treasurer

RHF/sco
cc: Governor-elect Gene O'Brien
David R. Potter

# PACIFIC NORTHWEST DISTRICT OF KIWANIS INTERNATIONAL

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Best wishes,

Roy H. Frank
District Secretary & Treasurer

RHF/

FROM BOARD MINUTES 2/4/79

The matter of solicitation of funds by and for the Lewis County Youth Enterprises, Inc., came up for discussion. It was the consensus of opinion that the project must be strictly and entirely a Kiwanis project in order for the Lewis County Youth Enterprises, Inc., to use the Kiwanis name and insignia in any manner. Also, it was the consensus that any Kiwanis Club involved in any portion of the project must adhere to the Kiwanis International Policy which states..."all solicitations for funds by a Kiwanis club shall be confined to the general area in which the club functions except by mutual understanding and agreement of clubs in a division or district for a common purpose. Should controversy arise between clubs over solicitation of funds or the promotion of fund raising projects, in such controversies, every effort should be expended by all parties concerned to amicably resolve the differences."

KI 001306

XV continued

There was considerable support expressed for changing our District Conventions to Spring rather than August and no dates or sites beyond the 1980 convention in Yakima, Washington, have been set.

XVI The District Secretary brought up the matter of clubs paying district dues on memberships less than the September 30th and March 31st figures of Kiwanis International. Clubs are deleting members after the September 30th reports are made and the District has billed them for the underpayment.

* On Motion by Allan Peschek, Second by Gary Sorensen, the Board directed the District Secretary to strictly adhere to the Bylaws in the collection of district dues. Deletions made after September 30th and after March 31st will not be considered in the billing of district dues.

XVII It was reported that Kiwanis International has been informed that the proposed raise in subscription rate for the Kiwanis Magazine falls within the guidelines of President Carter.

* XVIII On Motion by Maurice Wilkins, Second by Paul Webb the Board voted approval for the Kiwanis Club of Illinois Valley, Cave Junction, OR, to organize new clubs at Brookings and Gold Beach.

The matter of which division the new clubs would join is a matter for later determination.

XIX The matter of solicitation of funds by and for the Lewis County Youth Enterprises, Inc., came up for discussion. It was the consensus of opinion that the project must be strictly and entirely a Kiwanis project in order for the Lewis County Youth Enterprises, Inc., to use the Kiwanis name and insignia in any manner. Also, it was the consensus that any Kiwanis Club involved in any portion of the project must adhere to the Kiwanis International Policy which states..."all solicitations for funds by a Kiwanis club shall be confined to the general area in which the club functions except by mutual understanding and agreement of clubs in a division or district for a common purpose. Should controversy arise between clubs over solicitation of funds or the promotion of fund raising projects, in such controversies, every effort should be expended by all parties concerned to amicably resolve the differences."

* XX The old problem of clubs taking the properties of another club was discussed. On Motion by Ben Carnahan, Second by John Dilworth, the Board took the following action..."The Board of Directors of the Pacific Northwest District of Kiwanis International unanimously condemns the action of any Kiwanian or group of Kiwanians in appropriating the property of any Kiwanis Club under the pretext of generating interclub activity or for any other reason."

XXI Administrator Lou Rucker and Sponsorship Co-ordinator Erling Larsen reported on Key Club activity:

1. There are 80 active clubs including two new ones this year.
2. Dues for 1750 members have been paid by 60 clubs.
3. The Key Club District Convention will be held at the Ridpath Motor Hotel in Spokane, Washington, April 20-21-22, 1979. Registration fees, including housing will be $55.00 for Key Clubbers and $65.00 for adults. Adults desiring separate rooms will bear the additional cost.
4. Key Club International Convention will be in Washington, D.C., one week after the Kiwanis International Convention in Toronto.
5. Attention was called to the PNW Key Club District ranking 29th in payment of International dues and plans to remedy the situation.

continued----------

# EXHIBIT 13

RICHARD J. THOMPSON
Secretary

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
LK-12 • Olympia, Washington 98504-0001 • (206) 586-8985 • (SCAN) 321-8985

March 28, 1990

A. George Wieman, Governor
Pacific Northwest District
Kiwanis International
1 - 92nd Ave. N.E.
Bellevue, Wa. 98004

RE: Kiwanis Vocational Homes

Dear Governor Wieman:

I am currently the group care program manager for the Division of Children and Family Services in Region 6, Department of Social and Health Services. It is my responsibility to manage the contracts with group care providers in Region 6. I also process all referrals to the group homes and consult with group care providers on program and management issues.

During the early 70s I had contact with Ben Martin from Centralia who expressed a desire to develop what he called a boys farm on property he owned near Centralia. Ben was never able to do this until he became associated with the Centralia Kiwanis and Jerry Robbins. In the process Ben deeded 300 acres to the Kiwanis organization and Chuck McCarthy was hired to accomplish the dream Ben had not been able realize on his own.

Since 1979 Kiwanis has grown from one home caring for eight or nine boys to a network of eight homes and two dorms serving 69 boys. They have employed the Teaching Family Home model and Behavior Motivation system with great success, permitting most of these boys to experience successes for the first time in their lives and reenforcing this positive behavior. An on site school permits the same positive changes and success experiences to occur in school as well.

Chuck McCarthy, with his training and years of experience in the State Division of Juvenile Rehabilitation and Juvenile Court, was able to develop a program uniquely able to met the needs of the boys requiring care. Through the efforts of the Kiwanis Clubs, the staff at Kiwanis Vocational Homes and many supporters in the community and around the State of Washington, the dream first envisioned by Ben Martin has been realized.

The State Department of Social and Health Services is proud of

70040278

the success Kiwanis Vocational Homes has had with the boys in their care. This success has been recognized by the State, as recently as March 1, 1990, through the awarding of a new contract raising Kiwanis Vocational contract limit from 54 boys to 69 boys. Over the years, Kiwanis Vocational Homes has demonstrated an ability and willingness to adapt their program to met the changing needs of the population requiring group care. This spirit of cooperation has earned Kiwanis Vocational a respected position in the State reflected in the volume of requests received every month for them to consider more boys than there is space for, as candidates for placement.

The Division of Children and Family Services is fortunate to have a program of this quality to care for children entrusted to their care.

Sincerely,

Marvin L. Christensen
Group Care Coordinator
Division of Children & Family Service
Region 6

70040279

# EXHIBIT 14

The Board of Trustees
Kiwanis International
3636 Woodview ~~Terrace~~ Trace
Indianapolis, Indiana 46268

Re: Name Registration for
Kiwanis Vocational Homes for
Youth, ~~Co~~ Centralia, Washington

Gentlemen:

The Kiwanis Vocational Homes for Youth of Centralia, Washington respectfully request of the Board of Trustees, Kiwanis International expressed written consent for the use of the Kiwanis name to our organization, operations and facilities in careing for underprivileged Youth

Mr. Roy H. Frank, Secretary and Treasurer of the Pacific Northwest District brings to our attention that we may not be in compliance with your articles 120.3 and 120.4. Although we have assumed authority by District Governor, Mr. Otto Lawrence in 1979 that we had privilege to use "Kiwanis" in our name we most certainly wish to comply with your requirements as we cherish the name and it is most vital in continuance of our

endeavors to help abandoned, neglected and distressed children.

For your consideration in evaluating this request the following information and documents are attached:

1. Summary of Organization, Purpose, Operations and Achievements.
2. Facilities Constructed and Owned
3. Kiwanis Clubs Sponsorship and Sources of Monetary Support
4. Incorporation Documents (copy)
5. Insurance Protection (copy).
6. Hold Harmless Agreement for Pacific Northwest District Kiwanis International and Kiwanis International.

As previously stated the incorporation of the name Kiwanis is very vital to continuance of our work. A change at this time would cost us 6 month delay in funding, (about $40,000.00) from the State of Washington Department of Social and Health Services. We feel our work is actual example of fullfilling the theme and philosophy of Kiwanis to help underprivileged children and makes Kiwanis International as proud of us as

## Phil Talmadge

**From:** Phil Talmadge
**Sent:** Wednesday, April 24, 2024 1:54 PM
**To:** Berg, Peter; Warner, Margaret; McDougall, Jodi
**Cc:** Bowzer, Dava Z.; Matt Albers
**Subject:** RE: Univar v. FFIC, et. al., Court of Appeals Case No. 86309-6-I - Northbrook's and ICSOP/New Hampshire's Motion to Dismiss Appeal

It does seem that they're tired of waiting for the judge. Perhaps we should discuss next steps. It seems to me that we should send this motion to Judge Segal's bailiff. We should also ask Div. 1 to stay any further proceedings and certainly any decision on this motion pending the outcome of the Segal ruling on certification.
Phil

---

**From:** Berg, Peter <PBerg@cozen.com>
**Sent:** Wednesday, April 24, 2024 1:41 PM
**To:** Warner, Margaret <mwarner@mwe.com>; McDougall, Jodi <JMcDougall@cozen.com>; Phil Talmadge <phil@tal-fitzlaw.com>
**Cc:** Bowzer, Dava Z. <dbowzer@cozen.com>; Matt Albers <matt@tal-fitzlaw.com>
**Subject:** FW: Univar v. FFIC, et. al., Court of Appeals Case No. 86309-6-I - Northbrook's and ICSOP/New Hampshire's Motion to Dismiss Appeal

Phil—

It looks like Northbrook got tired of waiting for Judge Segal to rule on our motion to certify.

Not sure if we need to discuss, but let us know if you think we do.

Peter

**Peter Berg**
**Member | Cozen O'Connor**
999 Third Avenue, Suite 1900 | Seattle, WA 98104
P: 206-373-7265 F: 206-926-9405
Email | Bio | LinkedIn | Map | cozen.com

---

**From:** Kay M. Sagawinia <ksagawinia@karrtuttle.com>
**Sent:** Wednesday, April 24, 2024 1:22 PM
**To:** M. Re Knack <rknack@omwlaw.com>; Geoff J. Bridgman <gbridgman@omwlaw.com>; Daniel F. Shickich <dshickich@omwlaw.com>; Sheryl D. Bordeaux <sbordeaux@omwlaw.com>; Doreen Fadaeiforghan <doreenf@omwlaw.com>; Frederick R. Polli <fpolli@omwlaw.com>; Kristen E. Lange <klange@omwlaw.com>; Terence A. Jackson <tjackson@omwlaw.com>; Hamzza A. Ahmed <hahmed@omwlaw.com>; 'dverfurth@gordonrees.com' <dverfurth@gordonrees.com>; 'sallykim@gordonrees.com' <sallykim@gordonrees.com>; 'cmundy@grsm.com' <cmundy@grsm.com>; MAT[randerson@hsplegal.com] <randerson@hsplegal.com>; MAT[dwaitzman@hsplegal.com] <dwaitzman@hsplegal.com>; McDougall, Jodi <JMcDougall@cozen.com>; Berg, Peter <PBerg@cozen.com>; Bowzer, Dava Z. <dbowzer@cozen.com>; 'alex.potente@clydeco.us' <alex.potente@clydeco.us>; 'brad.harding@clydeco.us' <brad.harding@clydeco.us>; 'soha@sohalang.com' <soha@sohalang.com>; 'edmundson@sohalang.com' <edmundson@sohalang.com>; 'yurich@sohalang.com' <yurich@sohalang.com>; 'barnhill@sohalang.com'

<barnhill@sohalang.com>; 'mwarner@mwe.com' <mwarner@mwe.com>; 'cavanaugh@sohalang.com' <cavanaugh@sohalang.com>; 'cjohnson@hsplegal.com' <cjohnson@hsplegal.com>; 'phil@tal-fitzlaw.com' <phil@tal-fitzlaw.com>
**Cc:** Jacquelyn A. Beatty <JBeatty@karrtuttle.com>
**Subject:** Univar v. FFIC, et. al., Court of Appeals Case No. 86309-6-I - Northbrook's and ICSOP/New Hampshire's Motion to Dismiss Appeal

****EXTERNAL SENDER****

Good afternoon,

Attached find Northbrook's and ICSOP/New Hampshire's Motion to Dismiss Appeal, which has been filed with the court.

Thank you.

**Kay M. Sagawinia**
Legal Secretary | ksagawinia@karrtuttle.com | Office: 206.224.8157 | Fax: 206.682.7100
Karr Tuttle Campbell | 701 Fifth Avenue, Suite 3300 | Seattle, WA 98104 | www.karrtuttle.com
*Celebrating 120-Years of Service*

DECLARATION OF SERVICE

On said day below I electronically served via King County E-service a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 85865-3-I to the following:

Teresa M. Shill
Matthew D. Huot
Office of the Washington
Attorney General
PO Box 40100
Olympia, WA 98504-0113

Anne Melani Bremner
Anne Bremner, P.C.
1200 Fifth Avenue,
Suite 1900
Seattle, WA 98101-3135

Justin D. Balser
Troutman Pepper
Hamilton Sanders LLP
5 Park Plz, Suite 1400
Irvine, CA 92614-2545

Gordon Arthur Woodley
Woodley Law
PO Box 53043
Bellevue, WA 98015-3043

Original electronically filed by appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 29, 2024 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

# TALMADGE/FITZPATRICK

## April 29, 2024 - 12:25 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 85865-3 |
| **Appellate Court Case Title:** | Michelle Merceri v. Dept. of Transportation et al. |

**The following documents have been uploaded:**

- 858653_Petition_for_Review_20240429122411D1531305_0774.pdf
  This File Contains:
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**A copy of the uploaded files will be sent to:**

- MattH4@atg.wa.gov
- abremner@freybuck.com
- astocking@freybuck.com
- brad@tal-fitzlaw.com
- christine@tal-fitzlaw.com
- justin.balser@troutman.com
- teresa.shill@atg.wa.gov
- tpcef@atg.wa.gov
- woodley@gmail.com
- woodleyjustice@gmail.com

**Comments:**

Petition for Review

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Sender Name: Brad Roberts - Email: brad@tal-fitzlaw.com
**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

**Note: The Filing Id is 20240429122411D1531305**