

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
May 22, 2015, 12:15 pm  
BY RONALD R. CARPENTER  
CLERK

E CRF  
RECEIVED BY E-MAIL

Washington State Supreme Court Case No. 91653-5

THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

---

AIRPORT INVESTMENT COMPANY, INC.,

Appellant,

vs.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, dba  
SOUND TRANSIT, et al.,

Respondents.

---

---

SOUND TRANSIT'S ANSWER TO PETITION FOR REVIEW

---

---

Marisa L. Velling, WSBA# 18201  
Matthew R. Hansen, WSBA# 36631  
Ester Gordon, WSBA# 12655  
Jacqualyne J. Walker, WSBA# 45355  
MILLER NASH GRAHAM & DUNN LLP  
Pier 70  
2801 Alaskan Way ~ Suite 300  
Seattle, Washington 98121-1128  
(206) 624-8300  
Attorneys for Respondent Sound Transit

 ORIGINAL

## TABLE OF CONTENTS

	Page
IDENTITY OF PETITIONER.....	1
COURT OF APPEALS DECISION.....	1
RESTATEMENT OF ISSUES AIRPORT INVESTMENT PRESENTS FOR REVIEW.....	1
A.    Attorney Fees and Costs.....	1
B.    Airport Investment’s Value Opinion.....	2
STATEMENT OF THE CASE.....	3
A.    Sound Transit’s Taking: The Two Easements.....	3
B.    The Appraisals.....	7
C.    Sound Transit’s 30-Day Offer.....	9
D.    TCE Motion in Limine.....	9
E.    Sandra Oh Value Opinion.....	10
F.    Argument, Deliberation, and Verdict.....	11
G.    Airport Investment’s Motion for Fees and Costs.....	12
ARGUMENT.....	12
A.    The Court of Appeals Applied the Fee Statutes as Written and Consistently with Prior Cases.....	13
B.    The Court of Appeals Properly Applied ER 801(c) and ER 801(d)(2) to Ms. Oh’s Value Opinion and Distinguished <i>SentinelC3</i> .....	16
C.    The Issues Presented Rest on Idiosyncratic Pretrial and Trial Procedures that Do Not Call for Supreme Court Review.....	19
CONCLUSION.....	20

**TABLE OF AUTHORITIES**

**Page**

**STATE CASES**

*In re Municipality of Metropolitan Seattle v. Kenmore Properties, Inc.*,  
67 Wn.2d 923, 410 P.2d 790 (1966)..... 14-15

*SentinelC3, Inc. v. Hunt*,  
181 Wn.2d 127, 331 P.3d 40 (2014)..... 16-19

*State v. Basin Development & Sales Co.*,  
53 Wn.2d 201, 332 P.2d 245 (1958)..... 14-15

*State v. Buckley*,  
18 Wn. App. 798, 572 P.2d 730 (1977)..... 14-16

*State v. Costich*,  
152 Wn.2d 463, 98 P.3d 795 (2004)..... 13

**FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS**

ER 801(c)..... 16-17, 19

ER 801(d)(2)..... 16-19

**STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS**

RCW 8.25.070 ..... 14, 16

RCW 8.25.070(1)..... 13

RCW 8.25.075 ..... 16

RCW 8.25.075(1)(b)..... 14

## **IDENTITY OF PETITIONER**

Petitioner Airport Investment Company owns a 130-room hotel just south of SeaTac Airport. Sound Transit took a permanent easement and a temporary construction easement (“TCE”) along the back of the property to install an elevated light rail guideway.

## **COURT OF APPEALS DECISION**

After a two-week trial, the jury awarded Airport Investment \$225,000—\$163,497 for the permanent easement, and \$61,503 for the TCE. Airport Investment appealed, but did not challenge the trial court’s jury instructions or other substantive rulings. Instead, Airport Investment isolated two evidentiary disputes (only one of which is raised in the Petition for Review) and claimed it was entitled to attorney fees because Sound Transit modified the TCE after making its thirty-day offer. The Court of Appeals affirmed in an unpublished opinion.

## **RESTATEMENT OF ISSUES AIRPORT INVESTMENT PRESENTS FOR REVIEW**

### **A. Attorney Fees and Costs.**

A condemnee has a statutory right to attorney and expert witness fees when it obtains a just compensation judgment at least ten percent higher than the condemnor’s highest settlement offer in effect thirty days before trial, or if there was no such offer. Thirty days before trial, Sound

Transit offered Airport Investment \$463,500. At trial, Airport Investment recovered \$225,000. Did the trial court err in denying fees?

Sound Transit originally sought a non-exclusive three-year TCE, with exclusive occupancy as needed for construction (projected to total ten to twelve weeks over the three-year term). Responding to Airport Investment's concerns, Sound Transit reduced the TCE area, and placed a 160-day ceiling on the total number of exclusive-occupancy days. Did these changes compel the trial court to hold that Sound Transit had abandoned the proceeding or nullified its thirty-day offer, and award fees?

The TCE changes reduced Sound Transit's TCE appraised value by about \$7,000 to \$61,503, which was higher than Airport Investment's highest appraised TCE value, and insignificant in the context of Airport Investment's damage and lost-profit claims. Were the TCE changes so material that they compelled the trial court to hold that Sound Transit had abandoned the proceeding or nullified its 30-day offer, and award fees?

**B. Airport Investment's Value Opinion.**

An admission by a party opponent is not hearsay, nor is an in-court statement. Sound Transit elicited in court testimony from Airport Investment's President, Sandra Oh, about a prior opinion of value that Airport Investment had communicated to Sound Transit. Did the trial court abuse its discretion in admitting this evidence?

Ms. Oh volunteered that the prior opinion of value was based on an appraisal. Airport Investment did not move to strike or request a curative instruction, choosing instead to elicit Ms. Oh's testimony about the appraisal's perceived limitations. May Airport Investment argue that it is entitled to a new trial based on the appraisal evidence that it introduced?

### **STATEMENT OF THE CASE**

#### **A. Sound Transit's Taking: The Two Easements.**

Sound Transit acquired a permanent guideway easement and a TCE over the Airport Investment property. The permanent easement allows Sound Transit to operate an elevated light rail line behind the hotel along 28<sup>th</sup> Avenue South, about 77 feet from the back wall of the hotel. VRP 538; CP 1002, 1007-12; Exs. 23, 40, 134. Airport Investment may continue to use the easement area below the guideway for landscape and parking. CP 1007. Sound Transit also took a three-year TCE for construction. CP 1002, 1014-19. The TCE area extends about ten feet farther into the property than the permanent easement. Exs. 134, 135.

The original TCE included an area the contractor would need only if the guideway column placement required a driveway relocation. CP 56, 1414. Once Sound Transit confirmed the driveway would not be relocated, it agreed to exclude this area to partially address Airport Investment's concerns about TCE parking impacts. CP 1414. Before

trial, Sound Transit confirmed this in writing and provided an updated parcel map and updated right-of-way plan, which reduced the TCE area by about 1,000 square feet. CP 405, 1019, 1414-15. Airport Investment did not oppose the square-footage reduction. CP 405; VRP 42-46.

The original TCE provided that except for times Sound Transit required exclusive occupancy, Airport Investment would retain the right to use the TCE area for any purpose that did not interfere with Sound Transit's construction activities:

[Sound Transit] shall have the right *at such times as may be necessary*, to enter upon the Easement Area ... for the purpose of constructing aerial guideway, street connections, and utility connections. ... [Sound Transit] shall have the right to fence all or a portion of the Easement Area *from time to time* during the Term. [Sound Transit's] right to use the Easement Area shall be exclusive *at such times and for such durations*, as [Sound Transit's] construction requires, in [Sound Transit's] discretion. *At all other times, [Sound Transit's] right to use the Easement Area shall be non-exclusive.* ...

...

... Except for those times when [Sound Transit] is making exclusive use of the Easement Area, *[Airport Investment Company] shall retain the right to use and enjoy the Easement Area ... so long as such use does not interfere with [Sound Transit's] construction* of the public improvements described in this Easement.

CP 53 (emphasis added). Sound Transit consistently told Airport Investment that it would require only sporadic use of the TCE area, and for most of the three-year TCE term Airport Investment would retain the

ability to use the area as it was currently used—for hotel parking. CP 1416; VRP 30-31; *see* Ex. 148.

In its motions in limine filed the week before trial, Airport Investment requested the trial court to exclude evidence that Sound Transit would use the TCE area for less than the entire three-year term. CP 396. This was important at the time because Airport Investment sought \$900,000 in lost profits and valet parking expenses that it claimed as damages for the full three-year term of the TCE. CP 348, 1413; VRP 444-45, 1306-08, 1484-87. The trial court agreed with Airport Investment that if Sound Transit had the *right* to exclusive use of the TCE area for the entire three-year term it could not show the jury that its *actual* use would be far less. VRP 31-37, 60-61. As a result, Sound Transit stated it would craft new TCE language to limit Sound Transit's exclusive right to use the TCE area to be more consistent with its anticipated use. VRP 388. The trial court granted Airport Investment's motion in limine, "provided, however, this ruling ... does not preclude [Sound Transit] from submitting a revised form of [TCE] providing for the actual time of use of the easement area." CP 904.

Sound Transit quickly revised the TCE and provided it to Airport Investment after jury selection, but before trial began. CP 1417; VRP 447. The revised TCE retained the nonexclusive three-year term, and gave

Sound Transit the right to exclusive use of the TCE area for up to a total of 160 non-consecutive days during that term:

Grantee's right to exclusive use of the Easement Area shall be limited to a maximum of one hundred sixty (160) non-consecutive days between August 1, 2013 and July 31, 2016. Grantee may group one or more days of exclusive use into periods of exclusive use to accommodate the various phases of construction ...

CP 1015. The 160-day limit on exclusive use was about twice what Sound Transit anticipated and had told Airport Investment it would need,<sup>1</sup> thereby allowing for construction delays, schedule changes, and other contingencies. CP 1417. Airport Investment complained the revised language was still too vague, but did not otherwise oppose it. VRP 36-37, 399-401, 448, 570-71, 1284, 1431-36. Trial proceeded under the revised TCE. VRP 550-57, 610-15, 1695-96; Ex. 149.

---

<sup>1</sup> Airport Investment erroneously complains that Sound Transit refused discovery on this issue. Petition for Review at 4, n.1. After the discovery cutoff expired without Airport Investment noting any depositions, Airport Investment moved to continue the trial because its new appraiser could not complete his appraisal on time. CP 1413. Sound Transit did not object, but asked the trial court to extend the time for conducting Sound Transit's previously-noted depositions until after Airport Investment's appraisal was complete. *Id.* The court granted the continuance on those terms. CP 284. Despite missing the discovery cutoff, Airport Investment then noted depositions of Sound Transit's appraiser and a Sound Transit representative. CP 1414. Sound Transit allowed Airport Investment to depose its appraiser and gave Airport Investment the choice to either depose Sound Transit's representative, or meet with him informally. *Id.* Airport Investment initially chose the latter, but later also conducted a deposition (by agreement) the day before trial. *Id.*

**B. The Appraisals.**

In May 2012, Sound Transit offered to purchase the easements for \$142,300 based on an initial appraisal by Murray Brackett, the appraiser who testified for Sound Transit at trial. CP 216. Sound Transit provided Airport Investment with Mr. Brackett's initial appraisal and informed Airport Investment that it had the right to obtain its own appraisal at Sound Transit's expense. CP 204, 216. Airport Investment did so, hiring Patrick Lamb, who valued the acquisition at \$485,000. CP 204, 219, 257. Airport Investment submitted the Lamb appraisal to Sound Transit in July 2012, with a letter that expressed Airport Investment's strong belief that it was entitled to \$485,000 for the two easements. Unadmitted Ex. 158.

Early in 2013, Airport Investment informed Sound Transit that it would be engaging another appraiser. CP 206. That appraiser was Scott Biethan, who testified at trial for Airport Investment. CP 257. Mr. Biethan completed his appraisal in late May 2013. CP 675. He valued the permanent easement at \$210,000 based on 100% of the land value. VRP 1391-92, 1502, 1559-60. He also concluded that the easement would damage the remainder of the hotel property in the amount of about \$1.6 million (reduced to \$1,457,000 at trial). CP 348, 1412-13; VRP 1538-39.

Sound Transit's appraiser, Murray Brackett, updated his appraisal in May 2013. CP 533-34; VRP 1110-11. He valued the permanent easement at \$113,169, based on a 50% reduction in land value due to the easement. CP 535; VRP 1054-59, 1072. He concluded that the easement and guideway would not damage the remainder. VRP 1072, 1111. Based on the original TCE square footage, Mr. Brackett valued the TCE at \$68,657. CP 535, 1415. The smaller TCE reduced this valuation to \$61,503. CP 1415; VRP 1119-20.

Based on the original TCE square footage, Airport Investment's appraiser valued it at \$56,000.<sup>2</sup> CP 1415. He also concluded that the TCE would result in damages totaling about \$900,000 in lost room-rents and valet-parking expenses. CP 694, 1413. At trial, Mr. Biethan valued the TCE at \$32,124. CP 1415; VRP 1502. The decrease reflected the smaller TCE, but was mostly due to correcting the term to three years. CP 1415.

Although Airport Investment would, for most of the TCE term, retain the ability to use the TCE area, both appraisers always valued the

---

<sup>2</sup> Airport Investment's appraiser's \$56,000 valuation was erroneously based on a four-year TCE, rather than a three-year TCE with a fourth-year option. CP 1415. Sound Transit's TCE valuation was always higher than Airport Investment's because Sound Transit's appraiser included compensation for the entire area of the parking stalls rendered unusable by the TCE even if the TCE encompassed only parts of the stalls. VRP 1090-91.

TCE at 100% of the fair market rental value, as if Sound Transit would have exclusive use of the TCE area throughout the TCE term. CP 1418; VRP 1093-94, 1501-02. As a result, the revised TCE language that limited Sound Transit's exclusive use of the TCE to a total of up to 160 days did not change either appraiser's TCE valuation. CP 1415-17. The ruling that mattered (which Airport Investment did not appeal) was the trial court's decision that, as a matter of law, Airport Investment's claim for \$900,000 in lost income and consequential damages was not compensable. CP 348, 1413, 1417; VRP 444-45, 1306-08, 1484-87.

**C. Sound Transit's 30-Day Offer.**

Sound Transit made its 30-day offer on June 14, 2013 in the amount of \$463,500. CP 1334, 1414. By that time the parties had fully discussed Sound Transit's plan to reduce the TCE square footage and Airport Investment knew Sound Transit anticipated it would need exclusive use of the TCE area for a total of only ten to twelve weeks out of the three-year TCE term. CP 1414-16. The offer remained open until July 17, the first day of trial. CP 1414.

**D. TCE Motion in Limine.**

Both parties filed multiple motions in limine, heard on the first day of trial. VRP 3-81. Airport Investment asked the trial court to prohibit Sound Transit from introducing evidence "that Sound Transit will use the

[TCE] for a period of time less than the term set forth in the easement.” CP 396. This motion had no impact on the TCE value, which both appraisers had already based on 100 percent occupancy for the full three-year TCE term. CP 1417. But it was critical to Airport Investment’s claim for lost profits and consequential damages. CP 1416. Before Sound Transit prevailed on its argument that those items were not compensable, it planned to show that the \$900,000 claim was unwarranted because Airport Investment would still be able to use the TCE area for hotel parking for most of the three-year TCE term. *Id.* Airport Investment sought to keep that fact from the jury. CP 1416-17.

**E. Sandra Oh Value Opinion.**

During its case in chief, Sound Transit alerted the trial court and Airport Investment outside the presence of the jury that it planned to introduce as a party admission Airport Investment’s statement in Exhibit 158 (a letter Airport Investment sent Sound Transit after obtaining the Lamb appraisal) that as of the date of the letter, the owner believed Sound Transit’s taking should be valued at \$485,000. VRP 1078. The trial court ruled that Sound Transit would need to show that the letter’s signator, Jonathan Choi, who signed as “HR & Legal Department Lead,” was Airport Investment’s speaking agent. VRP 1083-85. The next morning, the trial court heard argument on this issue outside the jury’s presence, and

ruled that Sound Transit had not yet laid a sufficient foundation, but could attempt to do so through Sandra Oh, Airport Investment's President, who was in the courtroom. VRP 1186-91.

Sound Transit called Ms. Oh to the stand, where she was vague about Mr. Choi's authority and her own knowledge. VRP 1191-98. The court had the jury step out and inquired further. VRP 1198-1202. Ms. Oh eventually admitted that in July 2012 her belief was consistent with what the letter said—that Airport Investment was entitled to \$485,000 in just compensation for the two easement takings. VRP 1202. The trial court ruled Sound Transit could inquire about that belief. VRP 1202-04.

When the jury returned, Sound Transit asked: "as of July 16, 2012, was it Airport Investment Company's and your belief, strong belief, that Airport Investment Company was entitled to a total of \$485,000 for just compensation?" VRP 1205. Ms. Oh responded: "I based compensation on whatever the appraiser said." *Id.* Upon direction by the court that the question called for a "yes" or "no" response, Ms. Oh responded: "Okay. Yes." VRP 1205-06. Airport Investment did not move to strike Ms. Oh's reference to the appraisal or ask for a limiting instruction. VRP 1207-09.

**F. Argument, Deliberation, and Verdict.**

During closing, counsel for Sound Transit briefly referred to the \$485,000 owner opinion of value as of July 2012, and the fact that it was

based on an appraisal by someone who had not been called to testify and which Airport Investment had come to disagree with. VRP 1761-62. There was no objection or request for a curative instruction. *Id.* When the jury asked about the “third appraiser” during deliberations, the trial court—after consulting with counsel by phone—responded: “You may consider all the testimony and exhibits that were admitted into evidence and assign it what weight you believe it is worth.” CP 726, 953.

After deliberating for more than a day, the jury awarded Airport Investment \$225,000: \$163,497 for the permanent easement, and \$61,503 for the TCE. CP 725-27, 995. The award was less than half of Sound Transit’s 30-day offer. CP 1412. The TCE amount was the exact value Sound Transit’s appraiser ascribed to the TCE, which was higher than Airport Investment’s highest appraised value for the TCE. CP 1415.

**G. Airport Investment’s Motion for Fees and Costs.**

Airport Investment moved for fees and costs, arguing that when Sound Transit changed the TCE, it “abandoned” the condemnation or nullified its 30-day offer. CP 1295. The motion was denied. CP 1430-31.

**ARGUMENT**

Airport Investment has failed to show grounds for Supreme Court review. The Court of Appeals opinion (the “Opinion”) does not conflict with any Supreme Court or other Court of Appeals decision. And the

Petition for Review fails to raise any issue of substantial public interest that the Supreme Court should determine. Rather, both the fee issue and the evidentiary issue rest on idiosyncratic testimony and unique pretrial and trial procedures.

**A. The Court of Appeals Applied the Fee Statutes as Written and Consistently with Prior Cases.**

RCW 8.25.070(1) provides, in relevant part:

[I]f a trial is held for fixing the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make *any* written offer in settlement to condemnee at least thirty days prior to the commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement ... by condemnor in effect thirty days before the trial.

(Emphasis added.) *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004), holds the statute is unambiguous and is to be construed according to the plain meaning of the statutory language “and that language alone.” That’s what the Court of Appeals did below when it held that Airport Investment did not qualify for fees because Sound Transit made a written settlement offer at least thirty days before trial, and Airport Investment recovered less than the offer. Opinion at 14, 16-17.

The Court of Appeals went on to explain that this result also comports with the purpose of RCW 8.25.070 to encourage good faith settlement negotiations, and that the TCE changes Airport Investment relied on to claim attorney fees were consistent with what Sound Transit had already communicated and of minor consequence. Opinion at 17-18.

The other statute Airport Investment relied on, RCW 8.25.075(1)(b), provides for a fee award to the condemnee if “[t]he proceeding is abandoned by the condemnor.” [Emphasis added]. The Opinion again examined the statute’s plain meaning and ruled that, because Sound Transit pursued the condemnation through to judgment, it had not abandoned the proceeding and Airport Investment’s argument had no merit. Opinion at 19.

Airport Investment claims these rulings conflict with three appellate precedents: *In re Municipality of Metropolitan Seattle v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 410 P.2d 790 (1966); *State v. Basin Development & Sales Co.*, 53 Wn.2d 201, 332 P.2d 245 (1958); and *State v. Buckley*, 18 Wn. App. 798, 572 P.2d 730 (1977). They do not.

First, neither *Metro v. Kenmore*, nor *State v. Basin*, even *mentions* the attorney fee statutes at issue here. In *Metro v. Kenmore*, the court held that the description of an easement taking is sufficient if it enables the owner to understand the nature of the taking and evaluate the resulting

damages; no particular form is required. 67 Wn.2d at 927. And *State v. Basin* confirms the condemnor's right to revise its construction plans at trial in order to mitigate damages. 53 Wn.2d at 204-05. The Court of Appeals decision is not inconsistent with these principles or these cases. *See* Opinion at 17-18. The TCE changes were immaterial to Airport Investment's valuation case because both appraisers valued the TCE as if Sound Transit would exercise exclusive use for the entire three-year term, and Sound Transit's TCE valuation was always higher than Airport Investment's. *Id.* The TCE changes impacted only Airport Investment's claim for alleged lost profits and consequential damages—a claim the trial court ultimately excluded in a ruling Airport Investment did not appeal.

Airport Investment's third case, *State v. Buckley*, does discuss the eminent domain fee statutes, but is largely irrelevant. In *Buckley*, the parties stipulated to possession and use and the State deposited the required funds, took possession, and held the land for three years. 18 Wn. App. at 799-800. The State then decided it didn't need the entire parcel and unsuccessfully attempted, over the condemnees' objection, to amend the taking, tender back the excess land, and recover the funds it had paid for the land it no longer needed. *Id.* Here, in contrast: (1) Sound Transit reduced the TCE area in response to Airport Investment's parking concerns and Airport Investment did not object; (2) Sound Transit, with

the court's permission, clarified the TCE exclusive-use language in response to a motion by Airport Investment; and (3) Sound Transit did not seek reimbursement of the funds it had paid or even reduce its settlement offer. Opinion at 15-20. The *Buckley* court held the condemnees were not entitled to attorney fees because: (1) RCW 8.25.070 applies only if trial is held to determine value—but the *Buckley* condemnees waived trial and accepted the State's deposit as full compensation; and (2) RCW 8.25.075 applies only if a condemnation is abandoned—but the court rejected the State's attempt to abandon and entered a condemnation decree. The Court of Appeals decision is not inconsistent with *Buckley*. The only relevant *Buckley* holding—that a condemnation is not abandoned when a decree is entered—supports the decision that there was no abandonment here.

**B. The Court of Appeals Properly Applied ER 801(c) and ER 801(d)(2) to Ms. Oh's Value Opinion and Distinguished *Sentinel*C3.**

Airport Investment makes the impenetrable argument that: (1) because Ms. Oh's in-court testimony was not hearsay under ER 801(c), the Court of Appeals erroneously justified admitting it under ER 801(d)(2); and (2) therefore Airport Investment's hearsay objection should have been sustained. Petition for Review at 17-19. In fact, the Court of Appeals properly concluded that Ms. Oh's testimony was not hearsay under ER 801(c) *and* it was not hearsay under ER 801(d)(2) *and* Airport

Investment did not preserve its objection to Ms. Oh's volunteered testimony about the Lamb appraisal. Opinion at 10-13. None of the grounds relied on by the Court of Appeals to affirm the trial court contravenes *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014).

An out-of-court statement is not hearsay if it is "offered against a party and is (i) the party's own statement, ... or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party." ER 801(d)(2). As the Court of Appeals ruled, the statement made in a letter dated July 16, 2012 from Airport Investment to Sound Transit (Unadmitted Ex. 158)—that Airport Investment "strongly believe[d]" it was "entitled to a total of \$485,000 for just compensation"—was offered against Airport Investment to undercut Airport Investment's much larger appraisal presented at trial. Opinion at 11-12. Ms. Oh's colloquy with the trial court and her testimony established that she and Airport Investment had manifested an adoption or belief in its truth such that it was not hearsay under ER 801(d)(2). Opinion at 10-12. Moreover, the Court of Appeals correctly noted that the testimony was also not hearsay under ER 801(c) because it was not an out-of-court statement. Opinion at 12.

As a result, the trial court did not abuse its discretion in allowing the testimony.

In addition, it was Airport Investment, not Sound Transit, who referred to the Lamb appraisal. Based on the trial court's ER 801(d)(2) ruling, Sound Transit asked Ms. Oh: "as of July 16, 2012, was it Airport Investment Company's and your belief, strong belief, that Airport Investment Company was entitled to a total of \$485,000 for just compensation?" VRP 1205. Ms. Oh "could have responded 'yes' or 'no,' without ever mentioning the foundation of her belief and without alluding to Lamb's out-of-court appraisal." Opinion at 12, n.7. But instead Ms. Oh responded: "I based compensation on whatever the appraiser said." VRP 1205. Airport Investment did not move to strike Ms. Oh's reference to the appraisal or ask for a limiting instruction, choosing instead to examine her about the appraisal and why, in her current view, it was not accurate. VRP 1207-09. As a result, the Court of Appeals ruled that Airport Investment had failed to preserve its objection to Ms. Oh's testimony about the Lamb appraisal. Opinion at 12-13.

None of these alternative grounds for affirming the trial court is inconsistent with *SentinelC3*. In that case, minority shareholders argued that an unauthenticated, unsworn, valuation report was sufficient to create a fact question and survive summary judgment. 181 Wn.2d at 136. The

report was an out-of-court statement, so unlike Ms. Oh's testimony, it was hearsay under ER 801(c). And it was introduced *by* the shareholders, not against them, so ER 801(d)(2) did not apply. And the party opposing the report did not elicit the hearsay valuation evidence or fail to object. The Court of Appeals decision is not inconsistent with *SentinelC3*.

**C. The Issues Presented Rest on Idiosyncratic Pretrial and Trial Procedures that Do Not Call for Supreme Court Review.**

The Court of Appeals decision on the two issues presented for review is grounded on longstanding, well-established legal principles. The issues rest on the application of those principles to the unique facts of this case and the idiosyncratic pretrial and trial strategies and procedures adopted by Airport Investment.

As to the fee issue, Sound Transit requested publication because the Court of Appeals decision illustrates the factors that guide the courts in evaluating a condemnor's good faith compliance with the statutory requirements and has the potential to promote good faith accommodations between condemnors and condemnees to mitigate damages. But the issues presented involve the application of established law to unique facts, and do not call for Supreme Court determination.

The evidentiary issue is truly unique to Ms. Oh's testimony and of no public interest.

## CONCLUSION

Sound Transit respectfully requests that the Court deny Airport Investment's Petition for Review. The Court of Appeals correctly determined the issues presented under well-established legal authorities. There is no conflict with any Supreme Court or other Court of Appeals decision. And the application of established legal principles to the singular procedural and factual circumstances presented here does not present an issue of substantial public interest that should be determined by the Supreme Court.

DATED this 27<sup>th</sup> day of May, 2015.

MILLER NASH GRAHAM & DUNN LLP

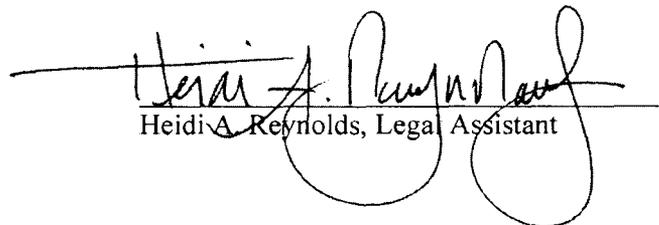
By Jacquelyne Walker  
Marisa L. Velling, WSBA# 18201  
Matthew R. Hansen, WSBA# 36631  
Ester Gordon, WSBA# 12655  
Jacquelyne J. Walker, WSBA# 45355  
Attorneys for Respondent Sound Transit

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true, correct and complete copy of **SOUND TRANSIT'S ANSWER TO PETITION FOR REVIEW** to be served by the method indicated below, and addressed to each of the following parties:

Averil Rothrock, WSBA# 12144 Joaquin M. Hernandez, WSBA# 31619 Milt Reimers, WSBA# 39390 Schwabe, Williamson & Wyatt, PC U.S. Bank Centre 1420 5th Avenue; Ste. 3400 Seattle, WA 98101-4010 Jhernandez@schwabe.com mreimers@schwabe.com jhicok@schwabe.com rrebusit@schwabe.com arothrock@schwabe.com <i>Attorneys for Respondent Airport Investment Company</i>	<input type="checkbox"/> <input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email
Margaret A. Pahl, WSBA# 19019 King County Prosecuting Attorney Civil Division Peggy.pahl@kingcounty.gov Lebryna.Tamaela@kingcounty.gov <i>Attorneys for Respondent King County</i>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email (pursuant to E-Service Agreement)
IBEW 77 International Blvd LLC 321 16 <sup>th</sup> Avenue South Seattle, WA 98144 <i>Pro Se</i>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email

Dated this 22<sup>nd</sup> day of May, 2015.

  
 Heidi A. Reynolds, Legal Assistant

## OFFICE RECEPTIONIST, CLERK

---

**To:** Reynolds, Heidi A.  
**Cc:** Jhernandez@schwabe.com; Milt Reimers (mreimers@schwabe.com); Hicok, Jennifer M.; rrebusit@schwabe.com; arothrock@schwabe.com; Peggy.pahl@kingcounty.gov; Tamaela, Lebryna; Velling, Marisa L.; Hansen, Matt R.; Walker, Jackee J.  
**Subject:** RE: Airport Investment Company v. CPSRTA, WA State Supreme Court Case No. 91653-5

Received 5-22-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Reynolds, Heidi A. [mailto:Heidi.Reynolds@millernash.com]  
**Sent:** Friday, May 22, 2015 12:07 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Jhernandez@schwabe.com; Milt Reimers (mreimers@schwabe.com); Hicok, Jennifer M.; rrebusit@schwabe.com; arothrock@schwabe.com; Peggy.pahl@kingcounty.gov; Tamaela, Lebryna; Velling, Marisa L.; Hansen, Matt R.; Walker, Jackee J.  
**Subject:** Airport Investment Company v. CPSRTA, WA State Supreme Court Case No. 91653-5

Dear Clerk of the Supreme Court,

Attached for filing with the Court is Sound Transit's Answer to Petition for Review in:

- Airport Investment Company, Inc., v. Central Puget Sound Regional Transit Authority, dba Sound Transit
- WA Supreme Court Case No. 91653-5
- Filed by:

Marisa L. Velling, WSBA# 18201  
[Marisa.Velling@millernash.com](mailto:Marisa.Velling@millernash.com)  
Matthew R. Hansen, WSBA# 36631  
[Matthew.Hansen@millernash.com](mailto:Matthew.Hansen@millernash.com)  
Esteria Gordon, WSBA# 12655  
[Esteria.Gordon@millernash.com](mailto:Esteria.Gordon@millernash.com)  
Jacqualyne J. Walker, WSBA# 45355  
[Jackee.Walker@millernash.com](mailto:Jackee.Walker@millernash.com)  
MILLER NASH GRAHAM & DUNN LLP  
Pier 70  
2801 Alaskan Way ~ Suite 300  
Seattle, Washington 98121-1128  
(206) 624-8300  
Attorneys for Respondent Sound Transit

Thank you,

Heidi

**Heidi A. Reynolds**

Assistant to Jeffrey A. Beaver, Marisa L. Velling, Matthew R. Hansen, and Jackee J. Walker

**Miller Nash Graham & Dunn LLP**

Pier 70 | 2801 Alaskan Way - Suite 300 | Seattle, Washington 98121

Direct: 206.777.7545 | Office: 206.624.8300 | Fax: 206.340.9599

**E-Mail | Web | Social | Blogs**

*Please consider the environment before printing this e-mail.*

.....  
**CONFIDENTIALITY NOTICE:** This e-mail message may contain confidential or privileged information. If you have received this message by mistake, please do not review, disclose, copy, or distribute the e-mail. Instead, please notify us immediately by replying to this message or telephoning us. Thank you.  
.....