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NO. 93812-1

IN THE SUPREME COURT OF WASHINGTON  
(Court of Appeals No. 74300-7-1)

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CITY OF KIRKLAND,

Respondent,

v.

HOPE A. STEVENS,

Petitioner.

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CITY'S ANSWER OPPOSING  
PETITIONER'S SUPPLEMENTAL BRIEF IN LIGHT OF THIS  
COURT'S RECENT DECISION IN *STATE OF WASHINGTON*  
*V. ASCENSION SALGADO-MENDOZA*, CASE NO. 93293-0

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A. IDENTITY OF RESPONDENT

Respondent, City of Kirkland, asks this Court to deny Petitioner Hope A. Stevens' motion to modify Commissioner Narda Pierce's ruling in light of Petitioner's supplemental briefing regarding *State of Washington v. Ascension Salgado-Mendoza*.

B. DECISION BELOW

Pursuant to RAP 17.7, Stevens seeks modification of the February 10, 2017 ruling by Commissioner Narda Pierce denying discretionary review by the Washington Supreme Court. Commissioner Pierce ruled that the decision of the Court of Appeals and superior court "represent the application of well-established law to the unique facts and procedural circumstances." Commissioner's Ruling at 8. Finding no obvious or probable error, or a departure from the usual course of judicial proceedings, Commissioner Pierce denied review.

C. ISSUES PRESENTED FOR REVIEW

1. Did Commission Pierce err when she denied discretionary review?
2. Did the RALJ judge commit obvious error in light of this Court's ruling in State of Washington v. Ascension Salgado-Mendoza?

D. STATEMENT OF THE CASE

The City of Kirkland charged Hope A. Stevens with two counts of Assault in the Fourth Degree, Domestic Violence for conduct toward her

half-sister, Teresa Obert, and her nephew, C.O. – Ms. Obert’s son - on June 21, 2014. See Appendix A.<sup>1</sup>

Ms. Obert and C.O. retained Mary Gaston as independent legal counsel. See Appendix B at ¶ 7. At the request of Stevens’ attorney, Mr. Maybrown, Ms. Gaston offered two separate opportunities to interview the witnesses in October. Id. and Appendix A. He declined to conduct those interviews. See Appendix C. Over the City’s objection, the trial court ordered the witnesses to sit for depositions. See Appendix D.

Mr. Maybrown scheduled the depositions of Ms. Obert and C.O. for November 25, 2014 and mailed notices of depositions to the witness’s attorney. See Appendix E. The prosecutors cleared their schedules in order to attend. See Appendix F at ¶ 8. On the morning of the scheduled depositions, Ms. Gaston informed the parties that her clients would not be present for the depositions because (1) C.O. was hospitalized on that date, and (2) Ms. Gaston read CrRLJ 4.6 to require the witnesses to be under subpoena. See Appendix G at 13:13-17. The prosecutors immediately provided alternative dates. Id. at 13:21-22.

Stevens then moved to dismiss under CrRLJ 8.3(b) “because the City’s witnesses have refused to be interviewed and/or deposed.” See

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<sup>1</sup> The appendices, cited herein, were filed in this Court along with Respondent’s Answer Opposing Petitioner’s Motion for Discretionary Review.

Appendix H. Counsel based his motion on the witness's behavior, stating "the witnesses have made it virtually impossible for counsel to prepare....," attributing much of this difficulty to the witness's independent counsel. See Appendix B at ¶¶ 7, 14, 18 – 20.

The City arranged for the witnesses to be available for depositions on December 19, 2014. See Appendix F at ¶¶11-15. The City subpoenaed the witnesses to appear for the deposition. See Appendix I. Both witnesses sat for depositions on December 19, 2014, each lasting for approximately ninety minutes. See Appendix G at 26:25- 27:1. Both witnesses answered counsel's questions, except for what medications C.O. may have been using at the time of the alleged assault and about a recent hospital stay. Id. at 27:2-6; 27:8-10; 28:1-2. Private counsel objected based on HIPAA privilege. Id. at 27:6-7; 27:12; 28:2-4.

Stevens renewed her request for dismissal under CrRLJ 8.3(b) and CrRLJ 4.7, citing her belief that the depositions were inadequate. See Appendix J at ¶ 36. Counsel claimed the witnesses "hijacked" the proceedings and used "obstructionist" tactics when they failed to answer questions. See Appendix G at 8:22; Appendix J at ¶¶ 2:6-4:4. He stated that the information was "material to the defense for several reasons" but did not elaborate on those reasons. See Appendix J at ¶ 11. Additionally,

counsel claimed that the City had failed to provide interview notes from the City's October 22, 2014 interview of the two witnesses. Id. at ¶ 24-28.

On December 29, 2014, the City filed an amended witness list, adding four fact witnesses. The list included contact information and a summary of the expected testimony. See Appendix K.

The trial court heard oral arguments on December 30, 2014. See Appendix G. The trial court ordered the City to produce all notes and recordings from the City's interview of the witnesses by end of business the day. Id. at 29:19-22. The trial court further ordered the two material witnesses to appear for additional depositions on January 2, 2015 to answer questions regarding C.O.'s medical history and medications used, finding this line of questioning to be "relevant." Id. at 29:23-25, 30:8-13.

The City subpoenaed C.O. and Ms. Obert to appear for a second deposition, as ordered. See Appendix F at ¶ 19. The City arranged for a Kirkland Police officer to personally serve the witnesses, but the officer was unsuccessful. Id. at ¶¶ 19, 21. City Prosecutor Lacey Offutt spoke with Ms. Obert by phone to inform her of the trial court's ruling. Ms. Obert responded that she did not know if they were available. Id. at ¶ 22. The second deposition did not take place. See Appendix L at ¶ 8.

On January 6, 2015, Mr. Maybrow conceded that, but for the witnesses' absence at a second deposition on January 2, 2015, "[w]e would

be prepared for trial in mid-January, if all of this hadn't been created by the **misconduct of these witnesses...**" See Appendix M, 8:6-10 (emphasis added). The trial court ruled that defense has a right to interview witnesses prior to trial, noting that the "defense does not have to wait to hear to questions for the first time while the jury is sitting there." Id. at 26:12-15. The trial court stated that "the witnesses have chosen not to respond to the second deposition. That's up to the witnesses." Id. at 26:23-24. The trial court ordered a third deposition of C.O. and Ms. Obert to occur on January 8, 2015. The court once more instructed the witnesses to reveal "whether or not the [witness] was under the influence of medicines and narcotics and alcohol" and to answer "questions concerning what the [witness] was seeing the doctor for." Id. at 28:6-8.

Once again, the City prepared subpoenas for the witnesses to appear for the January 8, 2015 depositions. See Appendix N. The City again arranged for a Kirkland Police officer to personally serve the witnesses with the subpoenas, but again were unsuccessful. See Appendix O at ¶ 7. Both prosecutors made repeated attempts to call the witnesses, unsuccessfully. Id. at ¶10. City prosecutor Offutt provided notice to Ms. Gaston via telephone on January 6, 2015. The witnesses failed to appear for the third ordered deposition. See Appendix P at 12:18-20.

On January 13, 2015, the trial court heard Steven's third motion to dismiss. See Appendix P. The court dismissed the case pursuant to CrRLJ 8.3(b) and 4.7. Id. at 15:25-16:1. In its oral ruling, the trial court noted the "pattern of the City's witnesses' failure to cooperate with defense interviews...." Id. at 10:13-14. The trial court specifically noted that, at the "one and only interview" with defense counsel, the witnesses declined to answer questions regarding C.O.'s medication use and mental status at the time of the alleged assault, claiming medical privilege and lack of relevance. Id. at 10:20-11:3. The Court also found the witnesses failed to sit for the second deposition to answer questions the trial court deemed relevant, without analysis of whether the medical information was material to the defense. Id. at 11:9-10. The trial court also considered the witnesses' failure to appear for the third-ordered deposition on January 8, 2015 and the logistical strain the repeated depositions had on defense counsel to hire a stenographer and rearrange his schedule. Id. at 12:9-13; 12:18-20.

Additionally, the trial court found that the City endorsed four additional witnesses "less than two weeks before trial readiness," finding it significant that the City disclosed the witnesses six months after filing the charges. Id. at 12:22-13:1. Of those four witnesses, the two named medical professionals declined to speak with Mr. Maybrown due to doctor-patient privilege. Id. at 13:11-13. Jeff Obert failed to appear for a scheduled

interview on January 8, 2015. Id. at 14:2-3. Cori Parks did speak to the defendant's investigator, but declined to be interviewed over the phone. Id. at 14:12-15. The trial court found that the defendant would "clearly be impermissibly prejudiced" due to defense counsel's inability to interview these four witnesses. Id. at pg. 15:4-8.

Ultimately, the trial court dismissed the case finding that Ms. Steven's right to a fair trial had been materially affected because she was forced to choose between proceeding to trial and hear testimony from the additional witnesses for the first time at trial, or forfeit her right to a speedy trial and ask for another continuance "in hopes that witnesses may cooperate." Id. at 15:9-24. The City sought review of the dismissal via RALJ appeal and argued that the trial court abused its discretion when it dismissed this case under CrRLJ 4.7 and CrRLJ 8.3. See Appendix Q.

The superior court remanded the case to the Kirkland Municipal Court. See Appendix R. The superior court found the trial court had abused its discretion because it did not follow the two-prong standard of CrRLJ 8.3 that requires a showing of governmental misconduct or arbitrary action **and** prejudice to the rights of the accused which materially affected her rights to a fair trial. See Appendix S at pg. 15:20-22. The superior court found that, while there was "significant evidence" of prejudice to the defendant, there was no governmental misconduct or arbitrary action. See Appendix S at pg. 16:9-12. Without first finding both

requirements, the trial court could not have reached the extraordinary, or “nuclear,” remedy of dismissal. See Appendix S at pg. 14:1-5.

Petitioner sought discretionary review on November 4, 2015, at the Court of Appeals for the superior court decision that the trial court had abused its discretion for dismissing under CrRLJ 8.3 and 4.7. See Appendix T. The City filed a response on January 22, 2016. See Appendix U. Petitioner replied on January 29, 2016. See Appendix V. All parties appeared for oral arguments regarding the motion for discretionary review on May 27, 2016. On June 7, 2016, Commissioner Masako Kanazawa, denied Petitioner’s motion for discretionary review, stating that:

Stevens fails to demonstrate that the superior court’s decision is in conflict with any Washington precedent, that her appeal involves an issue of public interest that should be determined by this Court, or that the superior court so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

See Appendix W at pg. 13. Stevens filed a motion to modify the commissioner’s ruling on August 5, 2016. See Appendix X. Petitioner’s motion to modify was denied by the Court of Appeals on October 4, 2016. See Appendix Y. Stevens then sought discretionary review from the Washington Supreme Court. On February 10, 2017, Commissioner Narda Pierce denied review. Stevens now seeks additional review of

Commissioner Pierce's ruling in citing this Court's recent finding in *State of Washington v. Ascension Salgado-Mendoza*.

E. ARGUMENT: MODIFICATION SHOULD BE DENIED

A decision denying a motion to modify a ruling of a Supreme Court Commissioner, which denies a motion for discretionary review, is an interlocutory decision and is subject to the restrictions imposed by RAP 13.5(b). Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

- (1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or
- (2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
- (3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 13.5(b)

On February 10, 2017, Commissioner Pierce ruled that the Court of Appeals denial of discretionary review could not be deemed obvious or probable error, or a departure from the usual course of judicial proceedings warranting Supreme Court review. Stevens now seeks a modification of Commissioner Pierce's ruling, but again fails to demonstrate that

Commissioner Pierce or the Court of Appeals erred in their decisions denying review. Therefore, a review should be denied.

1. COMMISSIONER PIERCE DID NOT ERR WHEN SHE DENIED DISCRETIONARY REVIEW.

Commissioner Pierce, after a thorough review of the entire record, denied discretionary review due to Stevens failure to demonstrate that the Court of Appeals denial of review was obvious or probable error, or that it was a departure from the usual course of judicial proceedings. Commissioner Pierce found no error in Commissioner Kanazawa's assessment that there was no evidence to support a finding of the City's misconduct or arbitrary action that would warrant dismissal.

“I cannot say that the Court of Appeals committed obvious or probable error in denying review of the superior court's determination that the trial court's limited statements, quoted above, fail to establish an inferred finding of City mismanagement.”

Commissioner's Ruling at 6-7

The Court of Appeals denial of discretionary review was based on Stevens' failure to demonstrate that (1) the superior court ruling was in conflict with any Washington precedent, (2) that an issue of public interest was implicated, or (3) that the superior court so far departed from the accepted and usual course of judicial proceedings. See Appendix W.

Washington court rules are clear and unambiguous, a superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction. RALJ 9.1(b). If there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Id. at 644 (quoting State v. Halstein, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). While the court has an obligation to reasonably infer facts from the trial court's judgment, it would be difficult to determine what should be inferred if the record is not clear. State v. Weber, 159 Wn. App. 779, 786, 247 P.3d 782 (2011). It is a long-recognized logical fallacy to draw an affirmative conclusion from a negative premise. Id. In other words, a court on review cannot infer a finding where no facts support such a finding. Id. If nothing in the record would support an inference, the reviewing court cannot infer facts that have no substantial evidentiary support. Id. Where there are no written finding of facts and conclusions of law from the lower court, a reviewing court should not remand solely to complete the formality of adding written findings and conclusions where

the reasons for the trial court's ruling was evident from the court's oral ruling. State v. Wilson, 149 Wn.2d 1,9, 65 P.3d 657 (2003)(quoting State v. Sonneland, 80 Wn.2d 343, 350, 494 P.2d 469 (1972)).

Here, the superior court did not misapply or disregard the dictates of RALJ 9.1(b). It did not "reject" the trial court's oral statements from which Steven's urged the superior court to infer governmental misconduct or arbitrary action. Rather, the superior court was quite clear that there was nothing in the trial court record from which to infer governmental misconduct. See Appendix S at 12:1-4. The only evidence the superior court could point to was a "presumed" prejudice to the defense. Id. at 17:14-18. The superior court assured Stevens if there was something in the record that would allow the court to "infer" the trial court found governmental misconduct then it would certainly look at that part of the record. Id. at 16:5-12. But it did not exist. Id. at 16:9. The superior court was very clear that the trial court did not properly apply the well-established two-prong rule for dismissal under CrRLJ 8.3, and that it could not infer the trial court found governmental misconduct from the record presented. Id. at 16:5-12. Therefore, the dismissal under CrRLJ 8.3 was an abuse of discretion by the trial court and the case was remanded back to the trial court.

The Court of Appeals decision to deny discretionary review was based on a similar analysis. The Court determined that the superior court's oral ruling "viewed in its entirety, appears to apply the correct standard" that showed "[d]iscretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." Appendix W at pg. 9 (quoting State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997)). The Court of Appeals commented on the superior court's conclusion that "the trial court improperly conflated the city's obligations with the witnesses' conduct" but found no governmental misconduct to support the dismissal under CrRLJ 8.3.

Commissioner Pierce viewed the rulings of the Court of Appeals and the superior court as the "application of well-established law to a unique pattern of factual and procedural circumstances." Commissioner's Ruling at 8. Because Stevens fails to show that Commissioner Pierce or the Court of Appeals erred in denying discretionary review, this Court should deny Stevens's motion to modify the Commissioner's ruling.

2. THE RALJ JUDGE DID NOT COMMIT OBVIOUS ERROR IN LIGHT OF THIS COURT'S DECISION IN STATE v. SALGADO-MENDOZA.

The decision in State v. Salgado-Mendoza should not alter the ruling made by Court Commissioner Narda Pierce. 189 Wn.2d 420 (2017).

In Salgado-Mendoza, this Court found that to dismiss a case under CrRLJ 8.3 a two-prong test must be applied. Id. at 436. The party seeking relief has the burden to show both mismanagement and actual prejudice. Id. Ms. Stevens has not been able to show there was governmental misconduct or simple mismanagement even considering the ruling in Salgado-Mendoza. She now asks this Court to overturn precedent and common sense to find that the commissioners erred in their interpretation of the rules and the case law based solely on the recent ruling in Salgado-Mendoza. The City asks this Court to reject Steven's argument.

Unlike in Salgado-Mendoza, the entire record presented here does not show nor was it articulated by the trial court, a finding of mismanagement by the government agency. Ms. Steven's argument that there was a "cavalcade of discovery violations" is simply disingenuous and an inaccurate representation of the record and has been found not to rise to simple mismanagement. The City added four additional witnesses twenty-two days prior to the Readiness hearing, the week prior to the actual trial date. Under CrRLJ 4.7, the Prosecutor's obligations for discovery and disclosures are not relegated to a specific timeline, but rather are an ongoing process. The City made reasonable efforts to

disclose witness information, including a summary of expected testimony, nearly a month prior to the expected trial date.

Further, Ms. Steven's characterization of these witnesses is distorted. Salgado-Mendoza was a charge of Driving Under the Influence. The toxicologist was characterized as an "expert" witness for the State for purposes of presenting testimony regarding DUI testing procedures, a critical piece of testimony in a DUI trial. Id. at 425. The two medical personnel in this case were never designated as "experts" but as witnesses who were to testify to their observations of the victim's injuries. The other two witnesses were not eyewitnesses to the alleged assaults and therefore could not be found as "critical" for the City's case in chief. In Salgado-Mendoza, a toxicologist on a case of DUI is undeniably material. In contrast, the four additional witnesses in this case were solely for the purpose of clarifying the facts. As such, Salgado-Mendoza does not apply with regard to the extraordinary remedy of dismissal.

Consistent with Commissioner Pierce's ruling, the RALJ judge in this case did not commit obvious error in not finding governmental misconduct. Therefore, the trial court abused its discretion when it dismissed this case under CrRLJ 8.3(b) and discretionary review should be denied.

F. CONCLUSION

This case does not present an appropriate issue warranting discretionary review pursuant to RAP 13.5(b). For the foregoing reasons, the City asks this Court to deny the petitioner's motion to modify Commissioner Pierce's ruling denying discretionary review.

DATED this 31st day of March, 2017..

Respectfully Submitted,



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## Transmittal Information

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### Comments:

City's Answer Opposing Petitioner's Supplemental Brief in Light of This Court's Recent Decision in State of Washington v. Ascension Salgado- Mendoza, Case NO. 93293-0.

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