101877-1

Court of Appeals No. 835963

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY, a political subdivision of the State of Washington

Plaintiff,

v.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,

Defendant.

CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,

Third-Party Respondent,

v.

D&R EXCAVATING, INC., a Washington corporation; DOUGLAS D. HOFFMAN and SUSAN K. HOFFMAN, and the marital community Composed thereof,

Third-Party Appellants.

D&R EXCAVATING, INC., a Washington corporation,

Fourth-Party Appellant,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND PAYMENT BOND NO. 9283912,

Fourth-Party Respondent.

KING COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This legal dispute arises over Petitioners'[1] placement of recycled asphalt pavement, also referred to as asphalt grindings, on various properties on Vashon Island in violation of the King County Code.[2] Following trial, the jury returned a verdict in favor of King County on its nuisance claim. On appeal, D&R challenged jury instructions 9 and 10 regarding nuisance per se, however the Court of Appeals affirmed the verdict and judgment below. Pet. at Appx. A.

D&R contends that the decision of the Court of Appeals' ("Decision") is contrary to this Court's precedent and a decision of the Court of Appeals and asks this Court to accept pursuant to

[1] Petitioners shall be referred to collectively as D&R throughout the remainder of King County's Answer.
[2] The terms "Plannings," "Grindings," "Millings," and "Recycled Asphalt Pavement," referenced in exhibits and clerk's papers refer to the asphalt grinding from the Project. *See,* CP 413, Ex.46.

RAP 13.4(b).

However, the Decision is not contrary to this Court's precedent, or a decision of the Court of Appeals. In fact, the Decision is consistent with precedent from this Court in *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 720 P.2d 818 (1986). There exists no basis under the criteria listed in RAP 13.4(b) for this Court to accept review and this Court should decline to do so.

II. STATEMENT OF THE CASE

A. KING COUNTY CONTRACTS WITH ICON FOR THE VASHON ISLAND HIGHWAY SW PAVEMENT PROJECT.

King County and ICON executed Contract No. C01241C18 ("the Contract") on May 15, 2018, for ICON to remove, repair and replace 11.76 miles of roadway on Vashon Island. Clerk's Papers (CP) 414 at ¶5; Ex.2. The 2018 Vashon Island Highway SW Pavement Preservation Project ("Project") included removal of pavement markings, planing bituminous

surfaces, pavement repair excavation, paving with hot mix asphalt and other work. Ex. 2 at 3.

The Contract required ICON to dispose of the asphalt grindings from the Project CP 415 at ¶6-7. ICON entered into a subcontract with D&R to haul and dispose of the asphalt grindings from the Project. Ex. 17. D&R agreed to be bound by all terms and conditions of the Contract regarding the work it agreed to perform. *Id.* at 1.

B. KING COUNTY DISCOVERS THAT D&R IS STOCKPILING ASPHALT GRINDINGS ON VASHON ISLAND.

ICON initially proposed to temporarily stockpile asphalt grindings at the Williams Property Holdings site located at 19429 Vashon Hwy SW. Ex. 13. However, King County rejected ICON's proposal to stockpile asphalt grindings at the Williams Property Holdings site. Ex. 18. Despite this, King County learned that D&R hauled and stockpiled a large quantity of asphalt grindings there and sent a follow-up letter to ICON. Ex. 20. King

County also received complaints from residents on Vashon Island that D&R hauled and stockpiled a large amount of asphalt grindings at other locations including the Hoffmann property. RP Vol. 2, 103.

King County directly informed D&R in an email dated July 12, 2018, that recycled asphalt could not be used on Vashon Island pursuant to King County Code (KCC) 16.82.100A.4.d. Ex. 1155. The King County Prosecuting Attorney's Office (KCPAO) also notified D&R that the unpermitted stockpiling, disposal, and retail sale of recycled asphalt pavement was illegal and should cease immediately. Ex. 454 at 6.

ICON sent several letters to D&R regarding D&R's improper placement of asphalt grindings and requested corrective action. Ex. 46. ICON eventually terminated its contract with D&R due to D&R's improper placement of asphalt grindings and refusal to remedy the situation. *Id.*

C. ICON REMOVES THE ASPHALT GRINDINGS FROM WILLIAMS PROPERTY HOLDINGS AND MISTY ISLE FARMS.

On December 21, 2018, King County issued a written emergency authorization for ICON to proceed with the removal of the asphalt grindings from Misty Isles Farms. CP 3375 at ¶16. King County issued ICON a clearing and grading permit for Misty Isle Farms on January 3, 2019. CP 3376 ¶18. By March 22, 2019, ICON was able to remove all the asphalt grindings from the Misty Isles Farms property. *Id.* at ¶17.

On January 19, 2019, Permitting issued another emergency authorization to ICON this time for the removal of asphalt grindings from the Williams Property Holding site. *Id.* at ¶19. By May 1, 2019, all the asphalt grindings had been removed from the site but there were some site stabilization measures that ICON still had to address following the asphalt grinding removal. *Id.* at ¶20. King County issued a clearing and grading permit for

the Williams Property Holding site to ICON on May 21, 2019. CP 3377 at ¶21.

King County issued the emergency authorizations in order to the expedite the removal of the asphalt grindings from Vashon Island due to concerns raised by residents and because Vashon Island is a CARA. *Id.* at ¶22.

D. KING COUNTY COMMENCES ACTION AGAINST ICON FOR BREACH OF CONTRACT.

King County initiated a lawsuit against ICON for breach of contract regarding the other locations on Vashon Island where D&R placed asphalt grindings from the Project. After all third-party, cross, and counterclaims were made by and against the respective parties, the case proceeded to trial.[3]

[3] During the trial, King County and ICON stipulated to a dismissal with prejudice of King County's claims against ICON and ICON's counterclaims against King County. *See*, CP 1717.

E. THE PARTIES AGREE NO EVIDENCE REGARDING TOXICITY OF ASPHALT GRINDINGS WILL BE OFFERED AT TRIAL.

The parties appeared before the Honorable Suzanne Parisien for pretrial hearings. CP 1195-97. King County's Motion in Limine No. 12 sought exclusion of any evidence offered that recycled asphalt pavement/asphalt grindings are not hazardous, dangerous, or toxic pursuant to ER 401-403. CP 999-1000. D&R objected to this motion in limine because D&R wanted to offer testimony that asphalt grinding are not dangerous to the environment. RP Vol. 1, 37.

In response, King County argued that this was a nuisance per se claim and as such, King County only had to show that there was code a violation and the "remaining determination as it relates to the illegality of the action and the issue with respect to the health, safety, and repose as a result of said action are deemed basically proven." RP Vol. 1, 39.

King County also noted its concern that allowing this type of evidence would contradict the jury instructions. RP Vol. 1, 39. After further discussion, including King County's representations that it did not intend to offer evidence regarding the toxicity of asphalt grindings, the parties reached an understanding. RP Vol. 1, 40-43.

Regarding King County's Motion in Limine No. 12, the trial court ruled: "Reserved at this point. If the County does not offer any testimony that recycled asphalt pavement is hazardous, dangerous, or toxic, then no evidence to the contrary shall be admissible." *Id.* at 1233.

Based on the County's assertion of per se violations and the agreed understanding of the parties, no evidence regarding the toxicity of recycled asphalt pavement was presented at trial.

F. THE TRIAL COURT INSTRUCTS THE JURY REGARDING NUISANCE PER SE.

Following the close of evidence, the trial court instructed the jury on the applicable law. Relevant to the petition for review are Instructions 9 and 10.

Instruction 9 stated:

> Any civil violation of King County code is detrimental to the public health, safety and environment and is declared public nuisances.
>
> King County Code Title 16.82.100A.4.d states that recycled asphalt shall not be used as fill in areas subject to exposure to seasonal or continual perched ground water, in a critical aquifer recharge area or over a sole-source aquifer.
>
> If you find that Third-Party Defendants violated King County Code 16.82.100 A.4.d., then you must find that the Third-Party Defendants committed a public nuisance, and that King County has satisfied its burden of proving the first and second propositions found in instruction No. 10.

Instruction 10 stated:

> King County has the burden of proving each of the following propositions with respect to the claim of nuisance:
>
> (1) That D&R Excavating Inc., Douglas and Susan Hoffman acted unlawfully; and
>
> (2) That the unlawful act: annoyed, injured, or endangered the comfort, repose, health, or safety of others; and
>
> (3) That D&R Excavating Inc., and/or Douglas and Susan Hoffmanns' acts were the proximate cause of damages to King County. Damages may include but are not limited to the following: costs related to remediation, mitigation and/or removal of the asphalt grindings from the private properties on Vashon Island.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for King County on the nuisance claim. On the other hand, if any of these propositions has not been proved, your verdict should be for D&R Excavating Inc. and/or Douglas and Susan Hoffmann, on the nuisance claim.

CP 1706-07. The jury returned a verdict in favor of King County on the nuisance claim. CP 1725-26.

III. ARGUMENT

A petition for review will be accepted by this Court only if the criteria identified in RAP 13.4(b) has been met. D&R contends that this Court should grant review pursuant to RAP 13.4(b)(1) and (2). Pet. at 29.[4] However, D&R has failed to establish that the Decision is contrary to Supreme Court precedent or a decision of the Court of Appeals. Therefore, this Court should not accept review.

A. The Decision does not conflict with a decision of this Court or the Court of Appeals.

The Decision is not contrary to the precedent of this Court or the Court of Appeals. A nuisance per se is any activity that is not permissible under any circumstances such as an activity forbidden by statute or ordinance. *Kitsap County v. Kitsap Rifle and Revolver Club,* 184 Wn. App. 252, 276-77, 337 P.3d 328

[4] D&R refers *Tiegs v. Boise Cascade Corp.,* 83 Wn. App. 411, 922 P.2d 115 (1996) (*Tiegs I)* and *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998) (*Tiegs II).*

(2014). Nuisance per se results in strict liability. *Tiegs v. Boise Cascade,* 83 Wn. App. 411, 418, 922 P.2d 115 (1996).

A nuisance that affects equally the rights of the entire community or neighborhood is a public nuisance. *See,* RCW 7.48.130. The legislature has conferred on county legislative authorities the power to declare by ordinance what shall be deemed a nuisance within each respective county. RCW 36.32.120(10).[5]

The King County Council by express language has declared that all civil code violations constitute a public nuisance pursuant to King County Ord. 16278 § 2 (2008),[6] which has been

[5] RCW 36.32.120 states in pertinent part: "The legislative authorities of the several counties shall: (10) Have the power to declare by ordinance what shall be deemed a nuisance within the county…to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance…"

[6] King County Ord. 16278 § 2 states in pertinent part: "Ordinance 13263, Section 4, and K.C.C. 23.02.030 are hereby amended as follows: A. All civil code violations are hereby determined to be detrimental to the public health, safety and environment and are hereby declared public nuisances…"

incorporated into the King County Code.[7] KCC Title 23-Code Compliance "identifies the processes and methods to encourage compliance with all county laws and regulations that King County has adopted…to promote and protect the general public health, safety and environment of county residents." KCC 23.01.010A. It is in within this title of the King County Code where it is declared that "All civil code violations are hereby determined to be *detrimental to the public health, safety and environment and are hereby declared public nuisances*." KCC 23.02.030A (emphasis added).

The Decision correctly determined that Jury Instruction 9 and 10 were not legally erroneous since "the King County legislative authority has declared use of recycled asphalt in critical aquifer recharge areas to be unlawful and declared such use constitutes an injury to the public, there was no need for King

[7] KCC 1.03.020 states: "The laws enacted by the King County Council are codified in the King County Code."

County to separately prove an act and injury." Decision at 11. Additionally, the Decision states, "neither jury instruction 9 nor 10 are inconsistent with jury instruction 8, as D&R contends." Decision at 12, Fn6.

The rationale of the Decision is directly on point with this Court's decision in *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138, 720 P.2d 818 (1986) (engaging in any business or profession in violation of the law regulating or prohibiting the same is a nuisance per se). In *Kev Inc.*, this Court noted the principle that an ordinance that states that a violation constitutes a nuisance is in itself an injury to the community and it is not the role of the court to interfere with this legislative decision *Id.* at 139 (quoting *County of King ex rel. Sowers v. Chisman*, 33 Wn. App. 809, 819, 658 P.2d 1256 (1983)).

Tiegs I and II, involved a public nuisance per se claim brought by a private person due to pollutant discharge into waters in violation of RCW 90.48.080. Although distinguishable from

this case, the underlying principle as it relates to nuisance per se is the same. In fact, in *Tiegs I* the same rationale is noted:

> When the conditions giving rise to a nuisance are also a violation of statutory prohibition, those conditions constitute a nuisance per se, and the issue of the reasonableness of the defendant's conduct and the weighing of the relative interests of the plaintiff and defendant is precluded because the legislature has, in effect, already struck the balance in favor of the innocent party…The declaration of the Legislature is conclusive, and its determination will not be second guessed. The result for practical purposes is the same as strict liability.

Tiegs v. Boise Cascade Corp., 83 Wn. App.411, 418, 922 P.2d 115 (1996) (quoting *Branch v. W. Petroleum, Inc.,* 657 P.2d 267, 271, 276 (Utah 1982)).

D&R makes several specious claims in its petition for review in attempt to undermine the Decision. First, D&R alleges that there is no provision in the KCC that makes using recycled asphalt in a CARA a nuisance. Pet. at 22. However, this argument conveniently ignores the express language of KCC

23.02.030A, which declares any civil code violation a public nuisance. D&R's acts constituted a violation of KCC 16.82.100(A)(4)(d) and thereby constituted a nuisance per se.

Next, D&R attempts to mischaracterize the record by arguing that it was only cited for failing to obtain a permit for the use of recycled asphalt in a CARA and implying that King County would provide a permit to place recycled asphalt on Vashon Island. Pet. at 23-27. These arguments are not factually correct. King County warned D&R that placing recycled asphalt on Vashon Island violated KCC16.82.100A.4.d, which expressly prohibits the use of said material in CARAs. Ex. 1155.

Further, King County would not grant D&R, or anyone for that matter, a permit to place recycled asphalt pavement on Vashon Island because it is a prohibited material. RP Vol. 2, 152-153, 155.

IV. CONCLUSION

For the reasons stated herein, this Court should decline to accept review because none the criteria listed in RAP 13.4(b) have been met.

This document contains 2,515 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 9th day of June, 2023.

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