NO. 70958-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

91653-5

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, dba SOUND TRANSIT,

Respondent,

vs.

AIRPORT INVESTMENT COMPANY, a Washington corporation, dba Hampton Inn;
HORIZON AIR INDUSTRIES, INC., a Washington corporation; IBEW 77 INTERNATIONAL BOULEVARD, LLC, a Washington limited liability company; JP MORGAN CHASE BANK, N.A., fka The Chase Manhattan Bank, as Trustee for the Registered Holders of Prudential Securities Financing Corporation Commercial Mortgage Pass-Through Certificates, Series 199-C2; KING COUNTY; and ALL UNKNOWN OWNERS and UNKNOWN TENANTS,

Appellants.

PETITION FOR REVIEW BY AIRPORT INVESTMENT COMPANY

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I. IDENTITY OF PETITIONER

Petitioner Airport Investment Co. ("Airport Investment") is a small business located near SeaTac Airport. Airport Investment runs a Hampton Inn hotel property. This is an eminent domain proceeding taken through trial to determine just compensation for two easements that Sound Transit required across Airport Investment's property for a light rail project.

II. CITATION TO COURT OF APPEALS DECISION

Airport Investment seeks review of the unpublished January 26, 2015, decision of Division I of the Washington Court of Appeals affirming the jury verdict and the trial court's denial of statutory attorney fees to Airport Investment. *See Central Puget Sound Regional Transit Authority v. Airport Investment Company*, No. 70948-5-I ("Decision," App. A). The Decision terminated review. The Decision is curiously unpublished, despite addressing a statutory interpretation issue of first impression. The Decision approves conduct that Sound Transit is likely to repeat.

III. ISSUES PRESENTED FOR REVIEW

1) Did the trial court err post-trial as a matter of law when it denied Airport Investment's request for fees under the plain, bright-line requirements in RCW 8.25.070(1)(a) or RCW 8.25.075(1)(b) that fees *shall* be awarded if the condemnor fails to make a thirty-day offer to settle the taking tried to the jury, when Sound Transit failed to abide by these clear statutory requirements?

2) Did the trial court err during trial when it overruled Airport Investment's hearsay objection to the admission, through direct

examination of a lay adverse party, of the valuation opinion of a non-testifying expert as the lay witness's "*belief* of value," notwithstanding that voir dire revealed the lay witness held no independent opinion but based her "belief" exclusively on what the non-testifying expert had told her was the value? Should the trial court have sustained the hearsay objection based on principles this Court explained in *SentinelC3* instead of compelling the lay witness to parrot the non-testifying appraiser's valuation to the jury?

IV. STATEMENT OF THE CASE

Airport Investment, a small business owning a hotel property near SeaTac Airport, went to trial against Sound Transit on the issue of just compensation for two takings. The hotel building is a 4-story, 130-room Hampton Inn. CP 525, 535, 544, 558; Exhibit 135; 7/22/13 VBR 531-32. The family business is run by Sandra Oh, who took responsibility for it on behalf of her family after her Korean immigrant father unexpectedly died in 2008. 7/25/13 VBR 1215:18-1222:1.

As part of a "design-build" project to create service to the airport known as the "South Link" light rail project, Sound Transit demanded two easements: a permanent easement for an elevated track across the property on which the transit would run, and a temporary construction easement ("TCE"). *See* CP 1-56 (Petition); CP 116-28; CP 401-02; 7/22/13 VBR 538. Airport Investment stipulated to possession and use as of November 26, 2012. CP 111-14. The fair value trial took place over ten days from July 17 to July 30, 2013, before the Honorable Catherine Shaffer.

A. After a just compensation trial before which Sound Transit had never made a thirty-day offer of settlement for the Temporary Construction Easement presented to the jury, the trial court denied the landowner's post-trial motion for fees under the eminent domain statutes RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b).

Airport Investment moved post-verdict for an award of attorney and expert fees it asserted was required by RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b) because Sound Transit had changed its Temporary Construction Easement ("TCE") on the second day of trial. CP 1295-306.

The possession and use order had incorporated the original TCE. CP 1048-65 (App. 5). The original TCE described the permanent easement area and an additional 10 feet onto the property, i.e., where the permanent easement is 11.5 feet wide, the temporary easement is 21.5 feet wide. CP 52-56. It included the right to use the TCE exclusively at times to be designated over three years. CP 53.

At least thirty days before trial, Sound Transit made a lump sum offer of settlement that included the permanent taking and the original TCE. CP 1334 (lump sum offer 6/14/13); *Decision* 14 (offer of $463,500). Leading up to trial, Sound Transit toyed with the possibility of altering the TCE taking, but refused to commit to any altered description. CP 1312 ¶¶ 4-6; *Decision* at 15-16. Fourteen days before trial, Sound

Transit informally stated it would change the TCE taking to reconfigure the driveway and reduce the TCE area by 1,000 square feet. *Decision* 15.

When Airport Investment's pre-trial pleas for a final TCE taking description produced no definitive response on which Airport Investment could base its trial position,[1] Airport Investment moved *in limine* to prevent Sound Transit from changing the TCE taking at trial. *See Opening Brief* at 17-18, citing CP 396, 398-99; 7/16/13 VBR 30-37. Airport Investment argued that Sound Transit's conduct interfered with its trial preparations and evaluation of Sound Transit's thirty-day offer. CP 396 at #1; CP 398-99 (seeking to exclude "Evidence That Sound Transit will use the Construction Easement for a period of time less than the term set forth in the easement."); CP 401-403:11. *See* 7/16/13 VBR 30:7-37:12.

During argument of the motion *in limine*, the trial court correctly identified one of the problems, stating to Sound Transit, "If you're taking for three years, then you can't undercut their compensation by saying to the jury, But actually we'll be taking for less than that period." 7/16/13 VBR 33:11-14; *see also* 33:15-37:3. The trial court "granted" Airport

[1] Sound Transit refused to produce a witness for deposition on the construction schedule and duration of use of the TCE, only granting Airport Investment an off-the-record interview with an engineer on May 30, 2013. CP 401:12 to 402:11. This was an unhelpful conversation indicating that Sound Transit's proposed modifications were in a state of flux. CP 1312 ¶ 6. Information provided by that engineer later was amended by Sound Transit. CP 401:19-20.

Investment's motion, yet permitted Sound Transit to revise the TCE taking at some indeterminate time. CP 904 at #1. Despite Airport Investment's effort, Sound Transit did not alter its original TCE taking.

On July 17, 2013, the trial began. CP 1312-13 ¶¶ 7-8. Sound Transit withdrew its thirty-day settlement offer. CP 1312 ¶ 7; CP 1336. On the second day of trial and just one day after withdrawing its thirty-day offer (CP 1336-45), Sound Transit presented a new TCE description and construction schedule. CP 1313 ¶ 8; CP 1336-45 (revised TCE); Exhibits 148-49. Cf. CP 1048-65 (Order on Possession and Use). These new descriptions not only formalized changes Sound Transit had mentioned within thirty days of trial, but also reduced the duration of its exclusive occupancy of the TCE from three years to 160 days. *See Decision* 15-16. Sound Transit had not made a thirty-day offer that included this new TCE.

Airport Investment had notified Sound Transit and the trial court that it would seek attorney and expert fees if Sound Transit changed the TCE taking at the last minute. CP 402:12-403:11. At the conclusion of the trial, Airport Investment made the motion for fees, not because it had improved on Sound Transit's thirty-day lump sum offer for the permanent taking and the original TCE taking (*see* RCW 8.25.070(1)(b)), but under RCW 8.25.070(1)(a) for lack of a thirty-day pre-trial offer for the property condemned, and RCW 8.25.075(1)(b) for abandonment of the original

TCE. The trial court denied this motion. CP 1430-31.

The Court of Appeals was sympathetic to Sound Transit, noting when affirming that "Sound Transit was consistently learning new information from its contractor about what it would require for the TCE in the time leading up to trial," *Decision* 17, and that Sound Transit faced "uncertainties about its construction needs" leading up to trial. *Decision* 18. Excusing Sound Transit's failure to comply with the thirty-day offer requirement, the Court of Appeals affirmed the denial of fees.

B. The trial court, over a hearsay objection, required a lay adverse party to testify on direct examination to the opinion of value by a consulting expert not called to testify on the theory that the expert's opinion was admissible as the lay witness's "belief" of value.

At trial, during its direct examination of Airport Investment's President Sandra Oh, Sound Transit sought to elicit the valuation opinion of Airport Investment's consulting valuation expert. Before Airport Investment was represented, *see* CP 1438 ¶ 4, to facilitate discussions about its condemnation action, Sound Transit offered to reimburse Airport Investment for an appraisal of its property. 7/25/13 VBR 1201:20-1202:3. Accepting Sound Transit's offer, Airport Investment obtained a preliminary appraisal from Lamb Hanson Lamb, who prepared an appraisal valuing "just compensation" at $485,000. *Id. See* Exhibit 158

(Not Admitted) (Hanson appraisal and invoice in letter from Airport Investment's Mr. Choi to Sound Transit). At this time, Airport Investment was ignorant of many factors relevant to the taking. *See* 7/25/13 VBR 1209 (testimony of Oh).

Sound Transit first sought to introduce that letter—unadmitted Exhibit 158—containing the preliminary valuation opinion of $485,000 by the consulting expert appraiser. *See* 7/25/13 VBR 1186:13-1191:4.[2] This effort was not successful because it was not clear Mr. Choi was a speaking agent for Airport Investment. *See* 7/25/13 VBR 1186:13-1191:4. No party disclosed the valuation expert as a testifying expert or called him at trial. *See* CP 498-99 (Joint Statement of Evidence).

On direct examination of Ms. Oh, Sound Transit did not ask Ms. Oh for her lay opinion of valuation. See 7/25/13 VBR 1191-1207. Sound Transit began to question Ms. Oh about the letter, but the trial court interrupted Sound Transit's direct examination of Ms. Oh and sent the jury out. *Id.* at 1198:10. The trial court conducted voir dire of Ms. Oh, *id.* at 1198-1202, concluding that Sound Transit could introduce the non-testifying appraiser's opinion as Ms. Oh's belief:

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[2] The settlement letter had been the subject of a motion *in limine* for exclusion. CP 396 at #5, 406-08. The trial court had denied that motion, CP 904-07 at #5, reasoning that the letter was not labeled "for settlement purposes." 7/16/13 VBR 47:8-55:12.

> **THE COURT:** Was there a belief that you were entitled to $485,000 for just compensation?
> **MS. OH:** Whatever was in the appraisal and what the appraiser came up with with—
> **THE COURT:** Is that an accurate statement, Ms. Oh? Did you believe you're entitled to $485,000? When you said it in July, was that an accurate statement about what your belief was?
> **MS. OH:** My belief was whatever the appraiser said was—
> **THE COURT:** Yes. Focus on the letter and the date and tell me if this was your belief.
> **MS. OH:** Well, that was my belief from the information from the appraiser.
> **THE COURT:** Okay. Thank you. May I have this?
> **MS. OH:** Oh, sorry.
> **THE COURT:** I'm going to let you question her about this letter—
> **MS. LINDELL:** Okay.
> **THE COURT:** —okay, directly. We don't need to get into whether Mr. Choi did or didn't have authority, because I don't think we're ever going to get a clear answer on, but I do think it's clear that this is a statement of something that she believed at the time and you can bring it in as her party admission.

7/25/13 VBR 1202:4-1203:5.

Airport Investment's attorney objected based on hearsay, advising the trial court that no exception allowed admission of the expert's valuation opinion. *Id.* at 1203, line 12 ("I don't think we meet the hearsay exception."). The trial court responded, "She just said that this was her belief at the time. That's not hearsay. It's her belief." *Id.* at lines 14-16.

Before the jury, Sound Transit then asked questions requiring Ms. Oh to reveal Lamb Hanson Lamb's initial valuation opinion:

> **Q:** Ms. Oh, I'm handing you what has been marked as Petitioner's Exhibit 158, and ask you if you recognize that letterhead, SOIM

Airport Investment Company LLC?
A: Yes, I recognize the letterhead.
Q: And that's letterhead for your company, correct?
A: Yes, for that office.
Q: And the three hotels at the top are the three hotels that your family owns?
A: Yes.
Q: And this letter is dated July 16, 2012; is that right?
A: Yes, that's what it says.
Q: Okay. And 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?
A: I based compensation based on whatever the appraiser said.
THE COURT: That's a yes or no question.
Q (BY MS. LINDELL): That's a yes or no question.
A: Okay. Yes.

7/25/13 VBR 1205:3-1206:2. Throughout this questioning by the trial court and Sound Transit's attorneys, Ms. Oh was consistent that $485,000 was not her personal opinion of value but that at the time of these discussions with Sound Transit, she "based compensation based on whatever the appraiser said." *Id.* at 1205:20.

Subsequently, Sound Transit highlighted this testimony in its closing, urging that the jury consider the Lamb Hanson Lamb appraisal substantively—for its own truth. 7/30/2013 VBR 1761:21-1762:15.[3] During deliberations, the jury sent a question referring to the estimate

[3] Sound Transit argued: "Ms. Oh, the president of Airport Investment, testified that Airport Investment hired someone to come in and to research and locate the best appraiser they could find and to value this property for the condemnation, and they did that. The appraiser came back with an opinion of value in the amount of $485,000 as of July of 2012."

"from a third appraiser":

> How should we consider the estimate from a third appraiser, who was briefly mentioned? We think that estimate was $485,000. Can we consider this as evidence or witness testimony?

CP 952. The trial court responded to that question as follows:

> You may consider all the testimony and exhibits that were admitted into evidence, and assign it what weight you believe it is worth.

CP 953.

The Court of Appeals affirmed the admission of this testimony over Airport Investment's hearsay testimony, reasoning that "hearsay" was not the right objection and Airport Investment should have invoked Evidence Rule 701 if it wanted an objection sustained. *Decision* 13.

V. ARGUMENT WHY THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(B)(1) AND (B)(4) OF THE COURT OF APPEALS' AFFIRMANCE OF TWO TRIAL COURT RULINGS

This case concerns fundamental issues of fairness and law arising in eminent domain proceedings. The case is significant because Sound Transit frequently condemns property from Washington citizens. If the Court does not review and correct Sound Transit's unjustified tactics, Sound Transit will repeat its conduct in future eminent domain proceedings to the prejudice of landowners. Additionally, the unpublished Decision will not go unnoticed by parties and trial courts. Both rulings

challenged here were incorrectly decided and contradict principles established in other cases. This Court should take review under RAP 13.4(b)(1) and (b)(4) to ensure fair eminent domain proceedings.

A. The legal holding affirming the denial of statutory fees impermissibly replaces the bright-line thirty-day rule established by the legislature with judicial discretion instead of enforcing the legal repercussions under the fee statute when Sound Transit changed the TCE description on the second day of trial.

Airport Investment was due attorney and expert fees as a matter of law pursuant to the eminent domain fee statutes. Sound Transit did not make a thirty-day offer for the TCE it presented to the jury. Sound Transit *changed* the TCE description on the second day of trial and presented the jury a *different* TCE than the one for which it took possession and use and for which it made a thirty-day offer. The trial court and Court of Appeals refused to apply the plain language of RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b) to award attorney and expert fees to Airport Investment. *See* Appendices B-C. The Decision is inconsistent with these statutes and conflicts with appellate case law, justifying review under RAP 13.4(b)(1). This case concerns issues of public importance, including the legislative encouragement of timely settlement offers to safeguard the public purse against unnecessary trials and proper fee awards to landowners in

condemnation proceedings. Review under RAP 13.4(b)(4) is warranted.

The Court of Appeals was not confident its holding should be precedential. The Court of Appeals refused Sound Transit's request to publish the Decision, even though the Decision resolved this statutory interpretation issue of first impression.

The Decision disregards the legislature's express requirement that the condemnor make any offer to settle a particular taking proceeding thirty days before trial or be liable for fees. The Decision refused to acknowledge that Sound Transit had no legal basis on which to avoid a fee award when Sound Transit opted to change the TCE taking during trial. Sound Transit altered the taking long after Sound Transit's thirty-day offer was statutorily required in order to avoid a fee award under RCW 8.25.070(1)(a). *See* Appendix B. And, because Sound Transit changed horses at trial, dispensing with its original TCE description, an award was triggered under RCW 8.25.075(1)(b) for abandonment of the original TCE taking. *See* Appendix C. A fee award was due as a matter of law. This Court should accept review to properly interpret the statutes and hold Sound Transit to them.

Sound Transit asserted that its inability to fully delineate its needs prior to trial was a function of the design/build nature of its project and should not trigger a fee award, an excuse that the Court of Appeals

embraced. *Decision* 17-18. No matter the reason for Sound Transit's delay, the statute says what it says. The statute makes no exception whether failure to make a thirty-day offer is due to innocent rationales or tactical gamesmanship by the condemnor. Sound Transit must grapple with its choice to do a design/build project and may not shift the risks and uncertainties of such a project to the landowner. Sound Transit's choice should not disadvantage the landowner, as it did in this case. The design/build nature of Sound Transit's project is of no legal consequence, and the Court of Appeals was wrong to reason otherwise.

The Decision plays into Sound Transit's hands by creating uncertainty about the fee statutes and inviting case-by-case determinations by trial courts whether an offer sufficiently met the statute's goal of inviting reasonable settlement negotiations for a particular taking[4] or to what degree a reduction might be said to have been significant to a jury's

[4] The Decision excuses Sound Transit's failure to follow the statutory scheme with the supposition that the parties still could negotiate to avoid a trial based on Sound Transit's thirty-day offer and therefore the goals of the statute were met even though its plain terms were not. Decision 17 and 17 fn 8 ("While Sound Transit did not present the revised easement to Airport Investment with a full 30 days before trial, the timing of Sound Transit's revision still afforded Airport Investment the opportunity to carry out the intent of the statute—to negotiate with Sound Transit in an effort to avoid trial."). Through this rationale, the Court of Appeals substituted its apparent satisfaction with the outcome for an accurate application of the statute.

award.[5] This approach requires speculation that the statute does not allow. A correct holding would apply the bright-line thirty-day rule and require a fee award. The Decision cannot be reconciled with the clear statute.

Both the plain language and the history of the statute demonstrate that courts do not have discretion to determine whether or not to award fees. In *State v. Roth*, 78 Wn.2d 711, 715-16, 479 P.2d 55 (1971), this Court reasoned that "may" in RCW 8.25.070 (1967) was mandatory. The dissent argued it was discretionary, allowing a trial court to look at the totality of the circumstances. *Roth*, *supra*, at 717-18 (dissent). The legislature then amended the statute to "shall." RCW 8.25.070 (1987). RCW 8.25.075(1) similarly employs "shall." The trial court and Court of Appeals seized discretion from a statute that allows none.

The holding is inconsistent with three appellate precedents. First, *State v. Buckley* establishes that a condemnor may not place on the landowner the risk that it condemns property it does not need. 18 Wn. App. 798, 572 P.2d 730 (1977). Here, Sound Transit shifted that risk to Airport Investment by changing the TCE taking at the last minute and

[5] The Court of Appeals examined the appraised values for the different takings and speculated that the changes would not have influenced the jury's award. *See* Decision 18. This speculation is not relevant to the legal inquiry. No correlation exists between the thirty-day offer and the TCE valuation in isolation where the offer was a lump sum not broken out by the two separate takings. Furthermore, this gray area of judicial speculation is of no consequence under the statutory scheme.

never allowing the landowner to consider an offer on the new TCE taking.

Second, this Court established in *State v. Basin Development & Sales, Co.*, 53 Wn.2d 201, 332 P.2d 245 (1958), that "the burden is on the condemnor to present sufficient construction plans to understand the extent of the loss to the owner." 53 Wn.2d at 204-05. Here, as the Decision at 15 recognizes, Sound Transit failed to do this even informally until fourteen days before trial, and did not formalize its altered TCE plans until after the trial had started. *Basin Development* instructs that Sound Transit must suffer the consequences of failing to meet its burden.

Finally, in *In re Municipality of Metro. Seattle v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 410 P.2d 790 (1966), this Court noted facts very similar to the ones at bar: the condemnor's taking description "was not completed in final form until the second day of the trial of the condemnation action." *Id.* at 928. The Court remarked, "It would appear that this permitted the landowner no time to adequately prepare for trial." *Id.* The Court, however, granted no relief because—unlike in this case—the landowner had not sought any in the appeal and had not objected to the tardy description at trial or made "any pretrial motions to secure the details of the taking." *Id.* at 928. The Court advised landowners they would be protected from such dilatory conduct by a condemnor. *Id.* at 928. The Decision offers no such protection. It is inconsistent with these principles

announced in *Buckley*, *Basin Development*, and *Kenmore Properties*.

Review is justified by the important public interests of fairness to landowners caught in eminent domain proceedings and by the legislative policy choice to require condemnors to make thirty-day settlement offers to facilitate settlement and save taxpayer dollars. The Decision undermines these interests by endorsing Sound Transit's one-sided view that it can amend a taking right up to or during trial without the consequence required under the statutory scheme. Sound Transit is free to employ this tactic again absent correction by this Court.

This Court should be persuaded that the Decision ignores plain statutory provisions amenable to straightforward application. This Court should accept review to enforce the legislature's bright-line rule.

B. This Court should decide whether, under its *SentinelC3* decision, hearsay was an appropriate objection to prevent a lay witness from being compelled to parrot a non-testifying expert's opinion of value to the jury.

The Court should accept review to consider whether the hearsay objection to the testimony of Sandra Oh parroting a non-testifying expert's valuation of the condemned property should have been sustained. The Court of Appeals misread or failed to properly apply *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 128, 331 P.3d 40 (2014), when it concluded that hearsay

was not a correct objection. This is an issue of substantial public interest for its likely recurrence in condemnation trials involving Sound Transit and regarding valuation testimony generally. The Decision conflicts with *SentinelC3*. Review is proper under RAP 13.4(b)(1) and (4).

The hearsay objection should have been sustained where Sound Transit failed to elicit any testimony showing that the $485,000 valuation stated on direct examination by Ms. Oh was anything other than her conveying a non-testifying third party's opinion. The voir dire testimony illustrated that it was not her own opinion. The voir dire record is explicit that the valuation was solely a third party's and that Ms. Oh believed the third party. That Ms. Oh personally believed the appraiser does not make his opinion admissible through Ms. Oh. She never testified that she independently valued the property at $485,000. The Supreme Court's *SentinelC3* decision demonstrates that if a witness simply parrots an appraiser's valuation, that testimony is hearsay and therefore inadmissible. The *SentinelC3* decision supports "hearsay" as a proper objection. The Court of Appeals, had it properly applied *SentinelC3*, should have corrected the trial court's failure to sustain that objection.

The Decision mistakenly analyzes Ms. Oh's "belief testimony" as if it were an out-of-court statement when it was not. *See Decision* 11-12. The discussion of ER 801(d)(2) is gratuitous and incorrect. As the

Decision later appears to recognize, the valuation was given *in court*. *Decision* 12. Under ER 801(c), hearsay is a statement outside of court. Ms. Oh's testimony occurred in the courtroom. No evidence was admitted of any prior statement or prior manifestation *by Ms. Oh* regarding value. ER 801(d)(2) does not come into play. Further, the Decision repeats this incorrect analysis when it states that "in July [2012]" Ms. Oh "made a statement of value" that she believed. *Decision* 13. Ms. Oh was not the author of the 2012 settlement letter containing the valuation. She made no prior statement of value. She was not even being cross-examined—Sound Transit elicited this testimony in its case in chief. And the July 2012 letter never was introduced.[6]

Sound Transit chose not to call the appraiser to present his opinion of value. The voir dire demonstrated that Ms. Oh held no opinion of her own and—at Sound Transit's and the trial court's insistence—only was parroting a third party's out-of-court opinion. In these circumstances, *SentinelC3* demonstrates that hearsay is a proper objection. In *SentinelC3*, this Court repeatedly referred to unsubstantiated opinion of value as

[6] Sound Transit first had attempted to introduce as an admission of a party opponent the valuation through the July 2012 letter. 7/25/13 VBR 1195-1206. This attempt was unsuccessful. The letter—clearly an out-of-court statement—was potentially objectionable as hearsay. Sound Transit failed to lay a foundation for any exception, including one under 801(d)(2). The letter never was admitted. 7/25/13 VBR 1206 (trial court denying offer of the letter, stating, "Denied. Okay. You have her testimony.").

"hearsay," characterizing the reversible error as accepting a valuation opinion put into evidence through affidavits and interrogatory answers of the litigant "even though they were based entirely on a consulting expert's valuation that 'constituted hearsay.'" 181 Wn.2d at 139 n.5. The *SentinelC3* court criticized the Court of Appeals' recognition of this evidence "even if it is inadmissible because it is hearsay." *Id.* The Supreme Court reversed the Court of Appeals' holding "that hearsay and unsubstantiated 'belief' are sufficient to defeat a motion for summary judgment." *Id.* at 139-44. *SentinelC3* supports that hearsay is a proper objection when a witness parrots a third party's valuation.

In *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976), an authority cited in *SentinelC3*, the Supreme Court addressed the plaintiff's affidavit stating that he believed Governor Evans was a candidate for public office based on new reports, stating that such testimony "is not based on personal knowledge, but upon evidence, hearsay in its nature." *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 507, 546 P.2d 75 (1976). This indicates what lawyers know: the flip side of testimony "not based on personal knowledge" is that the testimony is hearsay in its nature. No case law holds that "hearsay" is not a proper objection to convey that the witness is impermissibly repeating what someone else said, yet this is the view taken by the Court of Appeals. See

Decision 13. The Decision adopts an unjustifiably restrictive view of the proper objection. The Decision opens the door for Sound Transit to utilize pre-trial valuations, valuations for which it pays to initiate settlement discussions with landowners (often unrepresented), later in trial as weapons to undermine a landowner's valuation case.

This evidentiary issue warrants this Court's scrutiny for consistency with *SentinelC3*. The issue is significant for just compensation trials. Sound Transit is likely to repeat its tactic that met with such success in this trial and received the Court of Appeals' blessing.

VI. CONCLUSION

The Decision is incorrect as to both rulings challenged here. Not only is the Decision wrong on the law—and in conflict with principles announced in numerous precedents—but it condones future abuses. Sound Transit will continue to employ these approaches in future condemnation proceedings. Review will ensure fairness in future condemnation proceedings for landowners and the public.

Dated this 22nd day of April 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Averil Rothrock, WSBA #24248
Attorneys for Petitioner Airport Investment

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, dba SOUND TRANSIT, Respondent, v. AIRPORT INVESTMENT COMPANY, a Washington corporation, dba Hampton Inn, Appellant, HORIZON AIR INDUSTRIES, INC., a Washington corporation; IBEW 77 INTERNATIONAL BOULEVARD, LLC, a Washington limited liability company; JPMORGAN CHASE BANK, N.C., fka The Chase Manhattan Bank, as Trustee for the Registered Holders of Prudential Securities Financing Corporation Commercial Mortgage Pass-Through Certificates, Series 199-C2; KING COUNTY; and ALL UNKNOWN OWNERS and UNKNOWN TENANTS, Defendants.	No. 70958-5-I DIVISION ONE UNPUBLISHED OPINION FILED: January 26, 2015

APPELWICK, J. — A jury awarded AIC $225,000 in just compensation for Sound Transit's condemnation of easements across the company's Hampton Inn property. AIC argues that the trial court abused its discretion when it excluded evidence of damages

based on Hampton Inn's franchise requirements and business practices. AIC claims the trial court abused its discretion when it connected the admissibility of one of AIC's earlier appraisals with the admissibility of an earlier Sound Transit appraisal. It contends the trial court abused its discretion by admitting testimony from the company's president that was based on an appraiser's out-of-court valuation. It argues that it is entitled to an award of attorney fees under either RCW 8.25.070(1)(a) or RCW 8.25.075(1)(b). We affirm.

FACTS

Airport Investment Company (AIC) owns property just south of SeaTac Airport. The property consists of approximately 112,626 square feet of land area and is developed with a four story, 130 room hotel. AIC operates the hotel under a Hampton Inn franchise. On July 28, 2011, Sound Transit decided to acquire a permanent guideway easement and a temporary construction easement (TCE) over the AIC property. The permanent guideway easement is to provide for the operation of an elevated light rail line along the property's western boundary. Sound Transit also sought a three year TCE to enable it time to construct the guideway. In November 2012, AIC stipulated to Sound Transit's early possession and use of the easements. In exchange, Sound Transit made a deposit with the clerk of the court. The parties subsequently exchanged valuations by their respective appraisers, but could not agree on a value for the takings and proceeded to trial.

After the jury trial, the jury awarded AIC $225,000 in just compensation—$163,497 for the permanent easement and $61,503 for the TCE. The trial court denied AIC's request for attorney fees and expenses.

AIC appeals and seeks reversal, because it claims it was denied appropriate just compensation. It contends that there were prejudicial evidentiary errors at trial that denied it just compensation for the taking. AIC also contends that it is entitled to attorney fees below and on appeal, because either RCW 8.25.075(1)(b) or RCW 8.25.070(1)(a) provide for a fee award.

DISCUSSION

I. Hampton Inn's Franchise Requirements and Business Practices

AIC claims that the trial court erred when it prevented AIC's appraiser, Scott Biethan, from supporting his opinion with references to the Hampton Inn franchise agreement and related business practices. It contends that the evidence is relevant and therefore admissible under the well-accepted income method of appraisal.

At trial, the parties' testifying appraisers presented two very disparate just compensation values. Both appraisers utilized the income method of appraisal and the sales comparison method in reaching their appraisal values.[1] Sound Transit's appraisal expert, Murray Brackett, testified that the permanent easement was worth $113,169, the TCE was worth $61,503, and that there were no severance damages. Severance damages are the amount by which the permanent easement damages the property remainder. In contrast, AIC's testifying expert, Biethan, testified that the permanent easement was valued at $210,000 and the TCE was worth $32,124. But, unlike Brackett, Biethan also included $1,457,000 in his appraisal representing severance damages. Consequently, Biethan testified that $1,699,124 in just compensation was appropriate.

[1] Murray Brackett, Sound Transit's appraiser, also utilized a cost method.

Biethan's original appraisal was even higher as to severance damages. The appraisal was based, in part, on certain franchise requirements and business practices imposed on AIC's hotel operations by the Hampton Inn franchise agreement. In light of Biethan's appraisal calculation methods, Sound Transit filed a motion in limine to exclude any evidence of franchise operation requirements and business practices currently imposed on AIC's property. It argued that the evidence should be excluded, because business losses and consequential damages are not compensable in eminent domain actions.

AIC responded that evidence of the franchise agreements was relevant, because Sound Transit's construction activities would essentially put AIC in breach of its franchise agreement. The franchise agreement requires AIC to provide one parking space per room. AIC argued that Sound Transit's construction would limit the amount of parking spaces available, rendering it unable to comply with the franchise parking requirement. AIC claimed that it would be forced to use valet services during construction to help mitigate the parking issue and that evidence of this mitigation should be admitted. Further, it claimed that both the temporary and permanent easements would result in a loss of property value, because the hotel would be forced to honor its 100 percent money back guaranty more often due to the construction. AIC claimed that it was not introducing the evidence to seek lost profits or consequential damages, but to show that the property's value would decrease. The trial court granted Sound Transit's motion in limine.

On appeal AIC renews this argument and contends that the trial court's ruling prevented Biethan from adequately supporting and explaining his opinion that AIC would suffer a great loss for diminution to the remainder of the property after the taking. It

contends that the evidence is relevant and therefore admissible under the well-accepted income method of appraisal.[2]

This court reviews relevance issues for abuse of discretion. City of Bellevue v. Kravik, 69 Wn. App. 735, 741, 850 P.2d 559 (1993). A trial court abuses its discretion only if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. Gorman v. Pierce County, 176 Wn. App. 63, 84, 307 P.3d 795 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 495 (2014).

AIC cites to cases that it claims endorse the income approach of appraisal.[3] But, whether the income approach is an admissible method of appraisal is not at issue. Both appraisers were allowed to testify to value under the income approach. Acceptance of the income approach to appraisal does not mean that there are no limitations in a condemnation proceeding on that approach or on what is properly recoverable. The issue is whether the trial court properly excluded consideration of AIC's franchise specific damage claims.

It is well established law in Washington that an eminent domain award must relate to the property's market value, not the business conducted there. See Seattle & Mont. R.R. v. Roeder, 30 Wash. 244, 264, 70 P. 498 (1902). It is the property of the condemnee, not the business, which is condemned. See Chicago, Milwaukee & Puget Sound R.R. v.

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[2] Sound Transit contends that AIC failed to preserve this issue for appeal, because it did not present an offer of proof showing how the evidence was relevant to property value as opposed to noncompensable business losses or other consequential damages. But, this is effectively the issue at the heart of the appeal—whether the trial court abused its discretion by excluding AIC's evidence, which AIC contends is both relevant to the property value appraisal and legally admissible. As such, we reach the merits of AIC's argument.

[3] State v. Obie Outdoor Adver., 9 Wn. App. 943, 946-47, 516 P.2d 233 (1973); Tiger Oil Corp. v. Yakima County, 158 Wn. App. 553, 563, 242 P.3d 936 (2010).

True, 62 Wash. 646, 650, 114 P. 515 (1911). Damages cannot be allowed for the loss of profits of a business maintained on the property. Renton v. Scott Pac. Terminal, 9 Wn. App. 364, 368-69, 512 P.2d 1137 (1973). Just compensation should reflect the land's objective value and its lesser desirability to a willing buyer, not its desirability to a specific owner. See Martin v. Port of Seattle, 64 Wn.2d 309, 319, 391 P.2d 540 (1964). Further, Washington cases establish that consequential damages, including lost profits, are not available in eminent domain proceedings. See City of Tacoma v. Nisqually Power Co., 57 Wash. 420, 434, 107 P. 199 (1910); True, 62 Wash. at 650 (1911); Fix v. City of Tacoma, 171 Wash. 196, 200, 17 P.2d 599 (1933).

Biethan's original appraisal accounted for specialized Hampton Inn franchise requirements and business practices that gave rise to franchise specific damages to AIC. This claim is clearly one of damage to the specific business operating on the property, not to the property itself. These damages would not apply to every buyer seeking to purchase or rent the hotel property at fair market value. Only those buying the franchise with the property would be constrained by those same restrictions.[4] The case law excludes recovery of these damages.

The trial court did not abuse its discretion in finding the proposed evidence irrelevant and inadmissible.

[4] AIC argues that because Sound Transit's appraiser accounted for the fact that the hotel property is suitable for maintaining a national brand means that Hampton Inn-specific practices should be admitted into evidence also. But, not every potential buyer on the market, even one interested in acquiring a hotel property suitable to support a national brand, is seeking to acquire a Hampton Inn. Evidence that a hotel property is generally of franchise quality is different from evidence that a Hampton Inn business would stand to lose income because of constraining franchise requirements.

II. Earlier Appraisals

In May 2012, Sound Transit sent AIC a valuation offer of $142,300 for the easements based on an initial appraisal by its appraiser. Sound Transit stated that AIC had the right to obtain its own appraisal at Sound Transit's expense. Consequently, AIC hired Patrick Lamb to provide an appraisal. Lamb valued the easements at $485,000. AIC submitted the Lamb appraisal to Sound Transit in July 2012 with a letter expressing its strong belief that it was entitled to $485,000.

On January 2, 2013, AIC told Sound Transit that it would be hiring another appraiser. AIC hired Biethan as its new appraiser. Biethan appraised the permanent easement at $210,000. He also concluded that the permanent easement would damage the remainder of the property by $1.6 million.[5]

Sound Transit's appraiser, Brackett, then updated his original appraisal in May 2013. He valued the permanent easement at $113,169 and the TCE at $68,657.

Sound Transit made a 30 day offer for the easements on June 14, 2013. Sound Transit's 30 day offer was marked "For Settlement Purposes Only." Sound Transit offered AIC $463,500 for both the permanent easement and the TCE. Sound Transit's offer remained open until July 17, 2013, the first day of trial. AIC did not accept Sound Transit's settlement offer, and the valuation case proceeded to trial.

Prior to trial, AIC filed a motion in limine requesting that evidence of AIC's initial Lamb appraisal be excluded from trial as work product produced by a consulting expert and as evidence related to settlement discussions. Sound Transit argued that Lamb's

[5] At trial, Biethan testified that the permanent easement damaged the property remainder by $1,457,000.

initial appraisal was not protected as a settlement offer, because it was not labeled as such. Alternatively, it argued that if the trial court construed Lamb's appraisal as a part of a settlement offer, then Sound Transit's (Brackett's) first appraisal should also be excluded under the same rationale.

The trial court found that it was not convinced from the record that it had a sufficient showing for either the work product privilege or the settlement privilege to apply to Lamb's appraisal. It said that it was not convinced either applied, because they were both waived when AIC sent Sound Transit Lamb's appraisal without delineating it as "for settlement purposes only." But, it declined to make a final determination regarding either privilege. The trial court finally concluded, "So I'm going to let you folks figure out if you want to get into this history. If one of you does, the other one can. All right? I'm going to do a tradeoff here." The court further opined that it preferred neither side address the earlier appraisals as they are unimportant and confusing for the jury to consider.

On appeal, AIC argues that the trial court erred when it did not unequivocally grant its motion in limine to exclude Lamb's out-of-court valuation independent of Sound Transit's earlier appraisal. It claims that the two positions could not be equated—Sound Transit's appraiser would testify at trial and AIC's would not. AIC argues that it should have been able to impeach Brackett without the threat that its initial appraisal would also be admitted.

The trial court's ruling on a pretrial motion to exclude evidence is within the discretion of the trial court, and is reviewed for abuse of discretion. See Gammon v. Clark Equip. Co., 38 Wn. App. 274, 286, 686 P.2d 1102 (1984), aff'd, 104 Wn.2d 613, 707 P.2d 685 (1985).

The two appraisals were communicated around the same point in time (May 2012 and July 2012) and both were communicated in advance of any litigation. Neither of the initial appraisals were labeled as settlement communications on their faces. Whether the initial appraiser was a consulting or testifying expert has no bearing on whether the earlier appraisals were settlement offers when communicated. It was not an abuse of discretion for the trial court to equate them and reserve judgment as to whether they were in fact protected settlement offers.[6]

Even if it had been error, it was clearly harmless. AIC wanted to impeach Brackett without Lamb's appraisal being admitted into evidence. AIC was afforded the opportunity to cross-examine and impeach Brackett regarding his earlier appraisal and it seized that opportunity. And, Lamb did not testify nor was his appraisal admitted. This was AIC's desired outcome when it moved to exclude Lamb's earlier appraisal. The value Lamb provided came in through AIC's president, Sandra Oh, as a result of a separate evidentiary ruling. Even if the trial court had explicitly granted AIC's motion in limine, that ruling would not have precluded the trial court's ruling admitting Oh's testimony. Any prejudice from the admission of Lamb's appraisal value turns on the correctness of the trial court ruling about Oh's testimony, not on the ruling on AIC's motion in limine.

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[6] On appeal, AIC argues that it was an abuse of discretion for the trial court to deny its motion in limine because it was "unopposed." In response to AIC's motions in limine below, Sound Transit said that it agreed generally to the exclusion but that it wished to present some caveats and clarifications in light of AIC's arguments about the issues. Sound Transit argued that Lamb's appraisal was not a settlement offer and that if it was, Brackett's earlier appraisal was too. The trial court did not abuse its discretion in treating AIC's motion in limine as an opposed motion. Further, AIC provides no support for its assertion that a trial court abuses its discretion when it does not grant an unopposed motion. RAP 10.3(a)(6); In re Marriage of Fahey, 164 Wn. App. 42, 59, 262 P.3d 128 (2011) (an appellate court does not address arguments that are not supported by cited authorities).

III. Sandra Oh's Testimony

AIC contends that the trial court erred when it required Oh to provide testimony about her belief of the value of the property that was based on Lamb's out-of-court valuation opinion. AIC claims that Oh's statements were hearsay, because they were based on Lamb's out-of court valuation. Alternatively, AIC contends that Oh's testimony should have been excluded, because the valuation opinion of an owner is not admissible when it is based entirely on an expert's valuation.

Sound Transit called Oh as a witness. With the jury excused, the parties discussed the admissibility of Oh's testimony regarding her belief of the property value. The court questioned Oh:

> THE COURT: Was there a belief that you were entitled to $485,000 for just compensation?
>
> MS. OH: Whatever was in the appraisal and what the appraiser came up with with --
>
> THE COURT: Is that an accurate statement, Ms. Oh? Did you believe you're entitled to $485,000? When you said it in July, was that an accurate statement about what your belief was?
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> MS. OH: My belief was whatever the appraiser said was --
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> THE COURT: Yes. Focus on the letter and the date and tell me if this was your belief.
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> MS. OH: Well, that was my belief from the information from the appraiser.
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> . . . .
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> THE COURT: . . . I do think it's clear that this is a statement of something that she believed at the time and [Sound Transit] can bring it in as her party admission.

AIC then objected, contending that Oh's belief testimony would not satisfy the party admission hearsay exception. The court responded that Oh's belief was not hearsay.

Oh then testified in front of the jury. Counsel for Sound Transit asked Oh, "And 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." Oh responded that she, "based compensation on whatever the appraiser said." When pressed to answer either "yes" or "no" to Sound Transit's question, Oh responded, "Yes."

This court reviews the correct interpretation of an evidentiary rule de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Once the rule is correctly interpreted, the trial court's decision to admit or exclude the evidence is reviewed for an abuse of discretion. Id. As such, whether Oh's testimony is hearsay or inadmissible opinion testimony is first subject to de novo review.

The trial court ruled that Oh's belief of value was not hearsay and was admissible as a party admission. It authorized Oh to testify as to her belief of value. An admission by a party opponent is not hearsay. ER 801(d)(2); Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 859, 292 P.3d 779 (2013). An admission qualifies as an admission by a party opponent if the statement is offered against a party and is (i) the party's own statement, (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent acting within the scope of authority to make the statement for the party. ER 801(d)(2).

Here, Oh's statement regarding her belief of the property's value was clearly offered against AIC as a method of undercutting a larger appraisal that was admitted at

trial. There was no dispute below that as president, Oh is a principal authorized to make a statement concerning AIC's beliefs. In voir dire, Oh admitted to adopting the belief of the $485,000 value that AIC sent to Sound Transit via letter on July 16, 2012. Oh then repeated in trial that she believed the property was worth $485,000. Oh's belief of value falls within the definition of a party admission under ER 801(d)(2) and is therefore not hearsay. The trial court did not abuse its discretion.

Still, AIC argues that Oh's testimony went beyond the scope of ER 801(d)(2)'s exclusion. Even if ER 801(d)(2) did not apply, the testimony that the trial court authorized—Oh's belief of the property value—is simply not hearsay by definition. Hearsay is an out-of-court statement made to prove the truth of the matter asserted. ER 801(c); In re Det. of Law, 146 Wn. App. 28, 38, 204 P.3d 230 (2008). Oh's belief of value is quite simply not an out-of-court statement.[7] The trial court did not abuse its discretion in admitting Oh's belief testimony as nonhearsay.

When Oh referred to Lamb's appraisal while testifying and communicated an out-of-court statement in the process, AIC did not object or move to strike. AIC claims that it did not need to object again during Oh's questioning, because it had previously objected and was overruled during voir dire. AIC claims that it was entitled to treat the ruling as the "law of the trial." But, during voir dire, AIC's hearsay objection was overruled as to

[7] The trial court did not rule that it would not be hearsay if Oh testified as to Lamb's appraisal. Similarly, the trial court did not authorize Sound Transit to ask Oh, "What did Lamb say the property was worth?" which would have elicited a response citing to an out-of-court statement. Based on the trial court's ruling and the question Sound Transit asked, 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.

Oh testifying about her belief of value of the property, not as to Lamb's appraisal or statements by Lamb. The issue has not been preserved.

AIC also argues that Oh's belief of the value of the property is inadmissible opinion testimony, because the valuation opinion of an owner is not admissible when it is based entirely on the hearsay of an expert's valuation. AIC cites to SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 331 P.3d 40 (2014), which relies on ER 701 for this assertion. ER 701 limits a lay witness's testimony to opinions and inferences based on the perception of the witness. In SentinelC3, dissenting shareholders wished to testify to establish their shares' values in order to withstand summary judgment. 181 Wn.2d at 136, 142. Relying on ER 701, the court found the shareholders' testimony inadmissible, because it was not based on firsthand knowledge or observation and the valuation report of the experts filed with the court was never authenticated. Id. at 142. Unlike in SentinelC3, Oh did not offer her opinion of what the property was worth to establish a fact necessary or favorable to her case. Rather, Oh's testimony verified that in July when she made a statement of value she believed the statement. It was a statement against her interest. The basis of that belief and the correctness of that belief were not sought by the questions asked. To the extent she volunteered testimony that may have been objectionable under ER 701, AIC did not object on that basis below. Any error is not preserved.

The trial court did not abuse its discretion in admitting Oh's testimony.

IV. Attorney Fees

AIC argues on appeal that the trial court erred when it denied its request for fees under RCW 8.25.070(1)(a) or RCW 8.25.075(1)(b). RCW 8.25.070 sets out the conditions for an award of attorney fees:

> [I]f a trial is held for the fixing of 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:
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> (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or
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> (b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

Sound Transit made a 30 day offer to AIC of $463,500 for both easements. AIC did not recover 10 percent more than Sound Transit's 30 day offer at trial, 509,850. At trial, AIC received a verdict of $225,000 for both easements. Therefore, under the plain language of the statute, AIC was ineligible to recover fees.

AIC nonetheless contends it is entitled to fees under RCW 8.25.070(1)(a), because Sound Transit failed to satisfy its obligations under the statute by not making a 30 day offer on the actual TCE at issue. AIC implies that Sound Transit deliberately exaggerated its taking at the commencement of the condemnation proceedings in order to later present the jury with a lesser taking and insulate itself from exposure to a fee award under RCW 8.25.070(1)(b). AIC interprets 8.25.070(1)(a) to require a 30 day offer on the exact easement at issue at trial.

Statutory interpretation is a legal question that this court reviews de novo. State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). This court begins its analysis with the plain language employed by the legislature recalling that the primary goal is to give effect to the legislature's intent. Id. If the language is unambiguous, this court gives effect to that language. Id. The purpose of RCW 8.25.070 is to encourage settlement negotiations before trial and ensure that each side makes a good faith effort to settle.

Olympic Pipe Line Co. v. Thoeny, 124 Wn. App. 381, 399, 101 P.3d 430 (2004); Port of Seattle v. Rio, 16 Wn. App. 718, 720-21, 559 P.2d 18 (1977).

The TCE initially provided for a 3,883 square foot easement area. This area included a space Sound Transit's contractor would need only if the guideway column placement required a driveway relocation. AIC was concerned about the size of the TCE, because it would reduce available parking at the hotel. The TCE would eliminate about 25 parking spaces, and it was also going to make it difficult to use six more parking spaces abutting the building. The original TCE provided for a three year term of use.

On June 14, 2013, Sound Transit made a 30 day settlement offer for the value of the easements. On July 1, 2013, Sound Transit informed AIC that it would change the configuration of the TCE, because it no longer needed to relocate the driveway. Sound Transit provided AIC with an updated parcel map and updated right of way plan showing the change on that same day. This modification reduced the TCE area to 2,885 square feet—nearly a 1,000 square foot reduction. Sound Transit's initial offer remained open for more than two weeks after it provided AIC with the revised parcel map and right of way of plan. AIC did not oppose the reduced TCE square footage.

The TCE provided Sound Transit with exclusive occupancy of the TCE for the three year period, but allowed AIC to retain the right to use the TCE for all purposes except those inconsistent with Sound Transit's construction activities. Despite the language in the TCE, Sound Transit had communicated to AIC that its construction would only require sporadic use of the TCE area during the three year period.

AIC filed motions in limine prior to trial. In its motions, AIC requested the exclusion of any evidence that Sound Transit would use the TCE for a period of less time than was explicitly set forth in the easement. Sound Transit responded that it would try and change the language in the TCE to limit its exclusive right to use the TCE in order to make the language more consistent with its anticipated use. The trial court agreed with AIC that if Sound Transit had the right to exclusive use of the TCE area for the entire three year term, it could not attempt to show the jury that its actual duration of use would be less. The trial court granted AIC's motion, but specifically provided that its ruling did not preclude Sound Transit from submitting a revised TCE providing for the actual anticipated time of use of the TCE area.

With leave of the trial court, Sound Transit revised the TCE language regarding time of use and gave it to AIC, after jury selection, but before opening arguments. The revised language still provided for a three year easement term, but limited Sound Transit's exclusive use of the TCE area to a total of 160 nonconsecutive days during the term. The TCE also required 14 days' notice to AIC before each exclusive use period.

AIC filed a posttrial motion for fees and costs based on the argument that when Sound Transit changed the size of the TCE and the durational language of the TCE, it either nullified its 30 day offer or abandoned the condemnation proceeding altogether. The trial court denied AIC's motion.

The plain language of RCW 8.25.070(1)(a) says the condemnor must fail to make any written settlement offer in order for the condemnee to be entitled to fees. RCW 8.25.070(1)(a). The only statutory requirements are that the offer must be "in settlement,"

"written," and made at least 30 days prior to the beginning of trial. Id. Sound Transit satisfied these requirements.

Further, Sound Transit satisfied the purpose of RCW 8.25.070 when it made its 30 day offer. Sound Transit made an offer based on how much land its contractor believed it would need for the build at that time. By submitting its original 30 day offer, Sound Transit began settlement negotiations so the parties could attempt to work together and avoid trial.[8] The offer was more than twice the appraisal value from Sound Transit's appraiser. AIC was free to accept that offer. The evidence does not support that this number was not submitted in good faith.

Moreover, there is no evidence that the reason Sound Transit reduced the initial taking after making its initial 30 day offer was to avoid an attorney fee award. The TCE changes were made, in part, in response to complaints from AIC about the TCE's impact on parking. Sound Transit originally believed it would need the additional property for the TCE to accommodate a driveway relocation. But, the contractor was able to make changes later that enabled Sound Transit's work to have less of an impact on AIC's property. Sound Transit was consistently learning new information from its contractor about what it would require for the TCE in the time leading up to trial.

Further, prior to the hearings on the motions in limine, Sound Transit communicated to AIC that it would likely use the TCE for a shorter period of time than is set forth in the actual TCE. Consequently, AIC moved to exclude any evidence that

[8] Sound Transit's 30 day settlement offer remained open for two weeks after it provided AIC with the revised parcel map and right of way plan. While Sound Transit did not present the revised easement to AIC with a full 30 days before trial, the timing of Sound Transit's revision still afforded AIC the opportunity to carry out the intent of the statute—to negotiate with Sound Transit in an effort to avoid trial.

Sound Transit would use the TCE for less than the period designated in the easement. Despite the fact that Sound Transit was confident it would not need 160 day exclusive use of the TCE—the period designated in the revised easement—its appraiser valued the TCE for the full three year period. Because of its uncertainties about its construction needs, Sound Transit effectively agreed to pay for more exclusive use of the easement than it believed it was actually going to need during construction. There is no indication that the TCE changes were not made in good faith or were manipulated in order to prevent the fee statute from being triggered.

Moreover, after the size reduction, Sound Transit's appraiser valued the TCE at $61,503—the amount presented at trial. This resulted in roughly a $7,154 reduction in fair market value.[9] In order to satisfy RCW 8.25.070(1)(b), AIC needed to win a verdict of at least $509,850 at trial. The jury awarded AIC $163,497 for the permanent easement and $61,503 for the TCE. Even if Brackett's higher TCE appraisal had been presented to the jury and accepted, that $7,154 increase would not have taken the judgment anywhere near the offer, let alone 10 percent above it. Because the combined highest appraisals of the permanent easement and the TCE were substantially below Sound Transit's offer, AICs hope of recovery of attorney fees was solely dependent on recovery of sufficient severance damages. The trial court did not err when it did not award AIC attorney fees under RCW 8.25.070(1).

[9] AIC's appraiser valued the original TCE at $56,000. After the reduction, AIC's appraiser valued the TCE at $32,124—a $23,876 reduction. This comparatively larger reduction in value by AIC's appraiser accounts for both the reduction of square footage for the TCE and accounts for the elimination of an erroneous additional fourth year previously included in the calculation.

Alternatively, AIC argues that it is entitled to fees and costs under RCW 8.25.075(1)(b), because the change of the TCE constitutes an abandonment of the original taking. It contends that Sound Transit abandoned its taking by materially modifying the TCE during trial and put before the jury a different taking than the one for which it petitioned and obtained possession and use. AIC argues this is so, because the property Sound Transit is actually condemning is smaller and for a shorter amount of time than it was at the time of the 30 day offer. AIC cites to a 25 percent decrease in the area of the TCE and a reduction in duration of two and a half years.

RCW 8.25.075(1) provides:

> A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert fees if:
>
> . . . .
>
> (b) The proceeding is abandoned by the condemnor.

A plain language reading of this statute indicates that AIC's argument is without merit. The statute says that the court will award fees and costs if the comdemnor abandons the proceeding. Here, there is no indication that Sound Transit abandoned the condemnation proceeding. In fact, Sound Transit pursued the condemnation through to judgment.

Further, even if the statute were construed to allow for abandonment of the original easement instead of the proceeding, AIC has not provided support for its argument that abandonment is present in this case. AIC relies solely on authority from other

jurisdictions.[10] The case law that AIC relies on interprets abandonment to mean a change more significant than the changes made to the TCE here. All of the cases from other jurisdictions cited by AIC involve much more substantial substitutions of property rights or more substantial reductions in the amount of property taken.

Here, the permanent easement—the more substantial taking—did not change. The overall TCE location did not change, the nature of the TCE did not change, and the land area was reduced by about 25 percent. This resulted in a $7,154 reduction in Brackett's highest TCE appraisal. Further, the duration of the exclusive use language was simply clarified without changing either party's appraisals. AIC claims that the TCE duration was reduced by 2.5 years, but this mischaracterizes the changes Sound Transit made to the TCE. The revised TCE did reduce the amount of exclusive use to 160 days, but the duration of the easement was still for three years. The modification of the TCE was less significant here than the modifications that were found to be abandonments in the other jurisdictions. The trial court did not err in denying AIC's posttrial motion for attorney fees and costs under RCW 8.25.075(1)(b).

Additionally, AIC argues that it is entitled to attorney fees on appeal pursuant to RAP 18.1 if it prevails. A prevailing party may recover attorney fees only if provided by statute, agreement, or equitable principles. Tacoma Northpark, LLC v. NW, LLC, 123

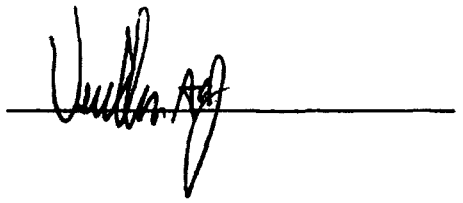
[10] Dep't of Transp. v. N. Trust Co., 59 Ill. App. 3d 1053, 1054, 376 N.E.2d 286 (1978) (area taken reduced to one-sixth of area encompassed in original petition); County of Kern v. Galatas, 200 Cal. App. 2d 353, 354-55, 19 Cal. Rptr. 348 (1962) (original area taken reduced by 35 percent and the taking changed from oil, gas, hydrocarbon, and mineral interest to mere right of entry); Montgomery County v. McQuary, 26 Ohio Misc. 239, 240, 265 N.E.2d 812 (1971) (sewer route changed to take different course across different part of property); FKM P'ship, LTD v. Bd. of Regents of the Univ. of Houston Sys., 255 S.W. 3d 619, 624, 51 Tex. Sup. Ct. J. 989 (2008) (amount of property taken reduced by more than 97 percent).

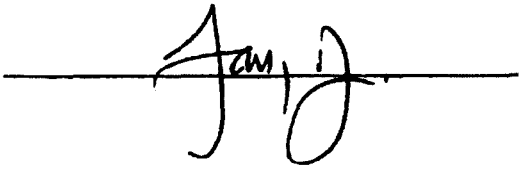
Wn. App. 73, 84, 96 P.3d 454 (2004). As AIC is not the prevailing party, it is not entitled to attorney fees on appeal.

The trial court did not abuse its discretion in making the evidentiary rulings challenged by AIC. The trial court did not err when it denied AIC's motion for attorney fees and expenses. We affirm.

Appelwick, J.

WE CONCUR:





RCW 8.25.070

Award of attorney's fees and witness fees to condemnee — Conditions to award.

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of 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 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 submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.

[1984 c 129 § 1; 1971 ex.s. c 39 § 3; 1967 ex.s. c 137 § 3.]

Notes:

Court appointed experts: **Rules of court:** ER 706.

RCW 8.25.075

Costs — Award to condemnee or plaintiff — Conditions.

(1) A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

(a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or

(b) The proceeding is abandoned by the condemnor.

(2) In effecting a settlement of any claim or proceeding in which a claimant seeks an award from an acquiring agency for the payment of compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner, the attorney general or other attorney representing the acquiring agency may include in the settlement amount, when appropriate, costs incurred by the claimant, including reasonable attorneys' fees and reasonable expert witness fees.

(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.

(4) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to the provisions of subsection (4) of RCW 8.25.070 as now or hereafter amended.

[1977 ex.s. c 72 § 1; 1971 ex.s. c 240 § 21.]

Notes:

Severability -- 1971 ex.s. c 240: See RCW 8.26.900.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 22nd day of April, 2015, I arranged for service of the foregoing PETITION FOR REVIEW BY AIRPORT INVESTMENT COMPANY to the parties to this action as follows:

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