No. 94129-7

SUPREME COURT OF THE STATE OF WASHINGTON

OVERLAKE FARMS B.L.K. III, LLC,

Respondent,

v.

BELLEVUE-OVERLAKE FARM, LLC,

Petitioner.

PETITIONER BELLEVUE-OVERLAKE FARM, LLC'S OPPOSITION TO MOTION TO STRIKE REPLY IN SUPPORT OF PETITION FOR REVIEW

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The Kapelas ask this Court to review a new issue by requesting this Court to affirm on grounds that were neither present in the Court of Appeals' decision nor the subject of the Petition. *See* Reply at 1–2, 6–7 (Mar. 31, 2017). Because the Kapelas find it difficult to defend the narrow grounds on which the Court of Appeals made its decision, the Kapelas fashion an alternative basis, which they submit to this Court as a basis for affirmance. *See* Answer at 2 (Mar. 20, 2017) ("Did the Court of Appeals correctly hold that cotenancy property that is capable of division without material economic loss may not be sold at [a] sheriff's sale based solely on the desire of one of the cotenants to avoid the inconvenience of disagreement over a development expense the other cotenant expressly agreed to share?"). The Kapelas cannot mask their request that this Court affirm on new and alternative grounds by merely labeling the new issue as a "restatement" of issues not present in the Petition.

The Kapelas' "restatement" ***presupposes*** that physical partition can be made "without material economic loss"—the opposite conclusion that the trial court reached and a finding that the Court of Appeals never made. Instead, the Court of Appeals reversed only on narrow grounds: "The statute does require a showing of prejudice to all the owners. The trial court abused its discretion by ordering a sale without that showing." *Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC*, 196

Wn. App. 929, 938, 386 P.3d 1118 (2016). In other words, the Opinion is based solely on the Court of Appeals' conclusion that (contrary to prior rulings by this Court) the legal test under RCW 7.52.130 requires a showing of great prejudice to all co-owners rather than one co-owner. The legal error in this holding is the subject of this Petition. The Court of Appeals then remanded to the trial court to apply and determine whether great prejudice exists under this standard.

The fallacy behind the Kapelas' "restatement" is further compounded by their attempt to manufacture alternative grounds on which the Court of Appeals did not base its Opinion. Contrary to the Kapelas' "restatement," the trial court did not order—and the Court of Appeals did not reverse the order for—partition by sale "based solely on the desire of one of the cotenants to avoid the inconvenience of disagreement over a development expense the other cotenant expressly agreed to share." Answer at 2.

The Sferras' Reply directly addresses these new issues presented in the Kapelas' Answer. For this reason, the only case the Kapelas cite in their motion to strike is distinguishable. *Compare Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 261 n.17, 178 P.3d 981 (2008) ("The Oltmans [] filed a reply to the answer to the petition for review, primarily responding to a footnote in the answer that factually reports the orders

issued by the federal court in a suit the Oltmans filed after the state action was dismissed, and to a copy of the federal complaint appended to the answer. The answer does not raise any new issues and a reply is therefore not authorized by the rules of appellate procedure . . . . We decline to consider it." (citation omitted)), *with Chevron U.S.A., Inc. v. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn.2d 131, 140 n.6, 124 P.3d 640 (2005) ("A party may file a reply brief to the opposing party's answer to a petition for review only if the answer has raised new issues not addressed in the original petition . . . . Here, the only new issue is Woodway's request for attorney fees. To the extent that Chevron's reply brief addresses the issue of attorney fees, the reply brief is accepted. The remaining portions of the reply are stricken.").

In accordance with RAP 13.4(d), the Reply responds to new issues raised in the Answer. Therefore, the motion to strike should be denied.

Respectfully submitted this 11th day of April, 2017.

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CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On April 11, 2017, I caused a true and correct copy of the foregoing document to be served on the parties listed below in the manner indicated:

Brian E. Lawler Denise M. Hamel Jameson Babbitt Stites & Lombard, PLLC 801Second Avenue, Suite 1000 Seattle, WA 98104	☐ Via Legal Messengers ☒ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail
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DATED this 11th day of April, 2017.

Florine Fujita