No. 94452-1

SUPREME COURT OF THE STATE OF WASHINGTON

No. 46895-6-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant.

ANSWER TO PETITION FOR REVIEW

Patrick J. Schneider, WSBA #11957
Steven J. Gillespie, WSBA #39538
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: pat.schneider@foster.com
steve.gillespie@foster.com
Attorneys for Plaintiffs/ Respondents Port of Tacoma

Eric Christensen, WSBA #27934
CARINCROSS HEMPELMANN PS
526 2ND Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Email: echristensen@cairncross.com
Attorneys for Plaintiffs/ Respondents Maytown Sand and Gravel, LLC

John E.D. Powell, WSBA #12941
Jed Powell & Associates PLLC
7525 Pioneer Way, Suite 101
Gig Harbor, WA 98335-1165
Telephone: (206) 618-1753
Email: jed@jedpowell.com
Attorneys for Plaintiffs/ Respondents Maytown Sand and Gravel, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

While the facts of this case are extraordinary, the legal issues are routine. The issues identified by the County do not meet the criteria of RAP 13.4, and this Court should therefore reject the County's petition.

The County does not challenge any of the jury's findings, including the finding that the County's behavior "shocked the conscience." Rather, the County asks the Court to accept a theory of the Land Use Petition Act ("LUPA") that contradicts the language of the statute and that both this Court and the Court of Appeals have already rejected. Asserting that its Commissioners were merely "overzealous," the County implicitly asks the Court to ignore the jury's multiple, unanimous verdicts by viewing the evidence in the light most favorable to the *County*. Finally, the County asks the Court to reject the decision of the Court of Appeals on the cross-appeal, a decision wholly consistent with prior law, simply because the Court of Appeals is not this Court.

II. IDENTITY OF ANSWERING PARTIES

The Port of Tacoma ("Port") is a port district organized under Title 53 RCW. Maytown Sand and Gravel, LLC ("Maytown") is a Washington limited liability company organized under Chapter 25.15 RCW.

III. COUNTER-STATEMENT OF ISSUES

1. *LUPA Exhaustion.* LUPA "does not apply to . . . [c]laims provided by any law for monetary damages or compensation," and case law confirms LUPA has no application where damages are caused by

something other than a land use decision. The damages in this case were caused by a years-long course of politically-motivated interference with an issued permit rather than by any "land use decision." Should the plaintiffs have appealed a favorable land use decision in order to preserve the right to recover damages for tortious conduct that began well before, and ended well after, the favorable land use decision? **No.**

2. *Requirements to show deprivation of substantive due process.* Maytown had a constitutionally protected property right under its mining permit. Through a series of contrived legal maneuvers aimed at destroying the value of the permit, the County destroyed the value of the permit. The jury found the County actions, which included a County Commissioner's direction that staff "find me an emergency" in order to prevent all development, and also included all three Commissioners' undisclosed membership in a group that brought appeals before the Commission opposing the mine, destroyed the value of the permit in a manner shocking to the conscience. Did the Court of Appeals act inconsistently with established case law in upholding the jury's verdict? **No**.

3. *Attorneys' Fees Under 42 U.S.C. § 1983.* Plaintiffs requested attorneys' fees at the Court of Appeals, but the County asserted its first response only *after* the Court of Appeals awarded the request for fees. Did the County waive the right to assert, as justification for review in this case, an alleged procedural impropriety in the original request for fees? **Yes.**

4. *Litigation Expenses As an Element of Damages.* Tortfeasors are liable for all damages, including professional fees, flowing naturally from their torts. The jury found the County's intentional torts proximately caused Plaintiffs to incur legal fees to repair or prevent harm to the SUP. Are those fees recoverable as damages in a subsequent damages action? **Yes.**

IV. COUNTER-STATEMENT OF THE CASE

In 2005, after a three-year process, Thurston County approved a Special Use Permit ("SUP") allowing gravel mining. *See* Ex. 89. In 2006, the Port purchased the mine and its SUP. RP 2656:1. When the Port's

plans for the site fell through, the Port sold the mine to Maytown. RP 794:2-18. But before the sale, the Port sought and received assurances from County staff that the SUP remained valid, Ex. 85, and that the updated groundwater monitoring reports requested by the County "meet[] all conditions" of the SUP. Ex. 145. Before purchasing the mine, staff confirmed to Maytown that the SUP was valid, RP 3236:11-16, that it had no "skeletons in the closet," and that mining could begin within 30-60 days. RP 2226:17-2227:11; Ex. 122.

Despite these assurances, when Maytown tried to begin work to satisfy the SUP's pre-mining requirements, staff prohibited ground-disturbing activities, which ultimately delayed work for 17 months. *See* RP 1988:12-18. By that time, Maytown had missed major market opportunities, RP 2610:15-2613:4; RP 2124:7-15, and the SUP's value, Maytown's investment made in reliance on the SUP, and the value of the Port's contract with Maytown, had been destroyed. RP 2138:19-2139:10.

The record established the County's highest elected officials abused their power to stop the mine. One or more Commissioners:

- Directed staff actions regarding the SUP, despite knowing individual members of a legislative body have no authority to do so, *see, e.g.*, RP 3066:4-3067:3; RP 2892:25-2893:8;
- Directed staff to "find me an emergency" that would prevent development of the mine, RP 801:12; 892:25-894:6;
- Concealed their support for a citizen-proposed downzone of the

mine before approving the downzone, Ex. 91 at 3-4; 1865:9-23; RP 1991:25-1992:12;

- Concealed their membership in the Black Hills Audubon Society, RP 1822:23-1823:16, 1788:8-1789:9, then ruled in favor of the Society's appeal of SUP issues, RP 1884:20-1885:19; 1716:17-20, in a ruling the Superior Court would reverse as arbitrary and capricious, CP 2590-92;

- Asked staff "why can't we agree w/[project opponent's] atty that we must reopen entire SEPA," Ex. 114 at 29, and sought to re-open SEPA review of the full mine, Ex. 94 at 47 & RP 1849:9-19;

- Without any legal basis, required staff to prohibit mining until staff issued a "letter to proceed" which staff would not even process until project opponents opined on the SUP's validity, Ex. 361;

- Directed staff to apply a new critical areas ordinance to the existing mine, RP 1734:3-11, despite knowing there was no evidence of unexamined critical areas in the mine, RP 1738:14-1739:5, and knowing it would violate Washington law, *see City of University Place v. McGuire,* 144 Wn.2d 640, 649-52, 30 P.3d 453 (2001). In reversing the County's position, the Hearing Examiner found County's claims "lack common sense," are "inconsistent with land use law as interpreted and applied by the Washington courts," and that the "record is devoid of evidence upon which the Examiner could or should invalidate the permit." Ex. 429 at 46-47.

These and other abuses became so blatant that the County's staff lead apologized to Maytown's attorney: "John, I'm sorry we're doing this. I think you know the commissioners want us to do it." RP 1269; *accord* RP 1499:14-25. Both the County's lead staff and the County's Deputy Prosecutor charged with overseeing the SUP feared for their jobs because Commissioners felt they treated Maytown too generously. RP 1189:20-24.

Ignoring these abuses and many more, the County's Petition

focuses on a single issue: the SUP's groundwater monitoring condition and the County's invented requirement that the Port and then Maytown amend it. Although before the property sale staff assured both the Port and Maytown that all SUP conditions were being met, the County reversed course and required SUP amendments related to groundwater monitoring. Ex. 371. But these amendments related chiefly to the commencement of monitoring, Ex. 62 at 5, 6, and staff agreed they had no environmental impact whatsoever. *E.g.*, Ex. 11 at 45; RP 975:1-17, 3297:24-3298:15. In an unappealed decision, staff concluded the amendments were minor and could be approved by staff. Had that happened, mining would have started within the 30-60 days originally promised by the County.

But in a break with more than twenty years of County practice, RP 3301:2-3302:6, the County instead required a hearing examiner process which barred ground-disturbing activities, including those required to comply with SUP conditions, until all appeals were exhausted. RP 1422:15-21, 1514:2-16; 1323:11-1324:5. The County lead staff told Maytown's attorney he had "been told from on high" to adopt this unprecedented process. RP 1359:15-1360:3. Despite the admitted lack of environmental impact, the County required full SEPA review of the amendments, RP 3306:16-23, creating yet another appeal opportunity for opponents. Although the Hearing Examiner agreed with Maytown that

this was improper, the County's Petition assumes Maytown could have appealed merely because it disagreed with a portion of her reasoning.

Mine opponents took advantage of the contrived appeals processes, and the delay helped kill the mine. Maytown and the Port then sued the County for damages. After a four-week jury trial documenting a pattern of abuse that this discussion only starts to describe, the jury found the County liable on every theory presented, and awarded general damages of $8 million to the Port and $4 million to Maytown. The Superior Court awarded Maytown $1.3 million in attorneys' fees as costs under 42 U.S.C. § 1988. However, the Superior Court excluded evidence of damages consisting of attorneys' fees incurred in defending the SUP.

The Court of Appeals upheld the damage awards but concluded that the Superior Court should have allowed Plaintiffs to present evidence of legal fees as damages. The County now seeks this Court's review.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

None of the issues raised by the County meets the criteria in RAP 13.4(b). The County's LUPA theory contradicts the statute, as well as precedent of this Court and the Court of Appeals. The County's constitutional theory is simply a veiled attempt to challenge the jury's factual findings. Its claims regarding the award of attorneys' fees under 42 U.S.C. § 1988 were waived and are wrong in any event. Finally, the

County offers no substantive reason that the decision of the Court of Appeals incorrectly interpreted the American Rule.

A. The Court of Appeals properly held that LUPA does not bar this damages action

There is no basis under RAP 13.4 for this Court to review the Court of Appeals' decision regarding LUPA, because that decision is consistent with LUPA and with the prior decisions of this Court and the Court of Appeals. The County asserts that, before seeking damages for tortious abuse of regulatory authority, a plaintiff must first pursue LUPA appeals, even if such appeals, with the attendant cost and delay, will increase damages rather than mitigate them, and even if the hearing examiner ruled in favor of the plaintiff's substantive claims. The argument makes no sense.

To start with, it is contrary to the plain language of LUPA, which expressly "does not apply to . . . [c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c). It is also contrary to this Court's decision in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926-27 & n.11, 296 P.3d 860 (2013), which concluded that plaintiffs seeking compensation for inverse condemnation need not first pursue a LUPA appeal. This Court also determined that the cases the County relies upon are inapposite to a claim, such as the one presented here, that "only seeks compensation rather than a reversal or modification

of a land use decision." 176 Wn.2d at 925.

The Court of Appeals' decision in this case is also consistent with all other appellate decision addressing the issue, most recently, *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 25, 352 P.3d 807 (2015). Woods View sued for damages arising from delay in obtaining a favorable land use decision. 188 Wn. App. 1, 25, 352 P.3d 807 (2015). In its cross-appeal, Kitsap County made the same argument Thurston County makes here – that the plaintiff should first have appealed the favorable land use decision under LUPA. *Id.* at 24-25. After observing that the plaintiff there was "not challenging the actual land use decisions below because it received all of the permits it asked for nor is it challenging any conditions imposed," the Court of Appeals ruled that RCW 36.70C.030(1)(c) excused the plaintiff from seeking relief under LUPA before filing an action for damages. *Id. Woods View* is on all fours with this case. *See also Libera v. City of Port Angeles*, 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013) (plaintiff seeking damages for intentional interference with economic relationship need not pursue LUPA appeals); *Holy Ghost Revival Ministries v. City of Marysville*, 98 F.Supp.3d 1153 (2015) (failure to pursue LUPA appeal does not bar claim under 42 U.S.C. § 1983).

The cases the County relies on hold only that when an *unfavorable*

"land use decision"[1] causes damage, a court must reverse the decision under LUPA before a plaintiff can recover. *See Lakey*, 176 Wn.2d at 926-27 & n.11 (collecting cases). This is because even an incorrect land use decision becomes valid as a matter of law if not successfully appealed under LUPA. *Chelan County v. Nykreim*, 146 Wn.2d 904, 925-26, 52 P.3d 1 (2002). However, where the land use decision did *not* cause the damages, tort victims may seek an award of damages without filing a LUPA appeal. *Id.*; *Woods View*, 184 Wn.2d at 25.

The County incorrectly asserts the Court of Appeals adopted the interpretation this Court rejected in *James v. Kitsap County*. Pet. at 11. In fact, this Court expressly declined to rule on this issue because, as the majority wrote, "[a]t no time have the Developers argued they are not subject to the procedural requirements of LUPA because their claims fall within one of the exceptions enumerated in RCW 36.70C.030(1)." 154 Wn.2d 574, 115 P.3d 286 (2005).

Further, the County's claim makes no sense because the Plaintiffs *prevailed* on their land use claims and therefore could not have pursued an appeal. As is the case in ordinary appellate practice,[2] LUPA requires the

---

[1] LUPA defines "land use decision" in relevant part as the "final determination" on an "application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used". RCW 36.70C.020(2).

[2] *See, e.g.*, RAP 3.1 and RCW 34.05.526.

appellant to be aggrieved in order to appeal.[3] The County asserts that Plaintiffs should have appealed the July 2011 decision by the Board of County Commissioners to grant the amendments to the SUP that the County required Maytown to seek – a decision that came after the Commissioners' tortious actions had already caused more than fifteen months of delay. The County argues that Plaintiffs should have appealed the Commissioners' favorable land use decision because the prior, also favorable, SEPA administrative decision by the Hearing Examiner had not agreed with all of the particulars of Maytown's argument. But mere disagreement with the reasoning of an administrative tribunal's decision does not establish aggrievement. *See Henrickson v. State,* 140 Wn.2d 686, 691 n.1, 2 P.3d 473 (2000); *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793, 796 (1987).

In fact, the law actually *prohibited* Maytown from appealing these decisions. SEPA and the Thurston County Code absolutely prohibit additional administrative appeals of Hearing Examiner SEPA decisions.[4] And as the prevailing party on the underlying decision, Maytown could not have appealed this underlying decision to grant the SUP amendments that Maytown requested. Nor could it appeal the Hearing Examiner's

[3] *See* RCW 36.70C.070(7)–(8) (requiring statement of "errors" in challenged decision, as well as facts supporting alleged errors).

[4] RCW 43.21C.075 (administrative appeals "[s]hall allow no more than one agency appeal proceeding on each procedural determination"); *accord* WAC 197-11-680(3)(a); Thurston County Code 17.09.160.K (prohibiting second administrative SEPA appeal).

SEPA decision because SEPA appeals "shall be of the governmental action together with its accompanying environmental determinations." RCW 43.21C.075. Hence, Maytown could not have appealed the Hearing Examiner's SEPA decision even if it had been *unfavorable* because the underlying decision regarding the SUP amendments was *favorable*.

Even if one assumes *arguendo* that the Hearing Examiner's decision had been adverse to Maytown *and* assumes that Maytown had a SEPA appeal available to it, no LUPA appeal would have been required because tortious interference lies if government acts for "improper purposes," even if the means employed are otherwise legal. *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989). The Commissioners and staff acted for the improper purpose of delaying the mine, even if nothing they did was otherwise improper. The Hearing Examiner's favorable decision, however, was not tortious.

LUPA exists to provide a clear and expedited means to resolve challenges to "land use decisions." As the Legislature recognized when it excluded damages action from its coverage, LUPA's expedited, closed-record appeal of limited issues, with no discovery, is ill-suited to damages actions. The Court of Appeals correctly applied the plain language of RCW 36.70C.030(1)(c), and correctly recognized that Plaintiffs mitigated their damages by not appealing a favorable land use decision. There is no

reason for this Court to review this decision of the Court of Appeals.

B. The Court Of Appeals Decision Does Not Involve A Significant Or Novel Question Of Constitutional Law.

1. The Appeals Court's affirmance of the jury award to Maytown under 42 U.S.C. § 1983 presents no reviewable issue

Applying the legal standard the County (Pet. 13-14) concedes is correct, the jury concluded that the County's abuses destroyed Maytown's property rights in a manner that "shocks the conscience," RP 3971, justifying damages under 42 U.S.C. § 1983. In upholding this conclusion, the Court of Appeals properly followed both Washington and federal law. The County identifies no conflict justifying further review.

The County claims that, because Maytown's vested permits had conditions, Maytown's property rights were not protected by the Constitution. This is wrong. This Court has held repeatedly that when, as here, a government agency issues a final permit allowing a landowner to develop its property, a vested property right protected by the U.S. and Washington Constitutions is created. *See Mission Springs, Inc. v. City of Spokane,* 134 Wn.2d 947, 958, 954 P.2d 250 (1998) ("development rights are beyond question a valuable right in property" (citation omitted)). This is true even if the permit has conditions so long as the conditions impose "significant substantive restrictions" on government decision-making. *Id.,* 134 Wn.2d at 963; *Bateson v. Geisse,* 857 F.2d 1300, 1304-05 (9th Cir.

1988). The water quality conditions relied upon by the County here were so restricted. As long as Maytown satisfied those conditions, it was permitted to mine. The County could not treat the conditions, as it did here, as a license to destroy Maytown's property rights through delay. Nor could it use contrived procedures to create a Catch-22 – Maytown was required to meet several pre-mining SUP conditions but the County's invented procedures barred land-disturbing activities and thereby prevented Maytown from meeting these conditions.

The County cites *Dorr v. Butte County,* involving a Section 1983 claim by a probationary employee. 795 F.2d 875, 876 (9th Cir. 1986). While a probationary employee has no vested property right in employment, once the employment becomes permanent, employment vests as a property right. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538-39 (1985); *Wheaton v. Webb-Petett*, 931 F.2d 613, 616–17 (9th Cir. 1991). The vested right to employment, equivalent to Maytown's vested land use rights here, cannot be denied without due process of law. *Loudermill,* 470 U.S. at 542. Because Maytown's property rights were vested, the Court of Appeals acted consistently with well-established case law in upholding the jury's verdict.

The County's claim that its conduct did not, as a matter of law, shock the conscience is equally without merit. At bottom, the County

simply disagrees with the jury's "shocks the conscience" finding. But, as the Appeals Court correctly recognized (slip op. 21-22), the jury's findings must be upheld unless "clearly unsupported by substantial evidence," and the inferences to be drawn from the evidence and the credibility of witnesses are matters for the jury and not the courts. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994) (*citing State v. O'Connell,* 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). The Appeals Court's deference to the jury is particularly appropriate in the context of Section 1983 substantive due process violations, which are necessarily fact-intensive. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir. 1990).

Further, the County fails to identify any conflict between the Appeals Court's opinion and established case law. In fact, the jury's finding that the County's gross misconduct violated Section 1983 is consistent with the conclusions of this Court and other Courts of Appeal, which have often found Section 1983 violations in circumstances far less egregious than in this case. *See, e.g., Mission Springs*, 134 Wn.2d at 965-66 (delay in issuing grading permit for permitted development violated Section 1983); *Lutheran Day Care*, 119 Wn.2d 91, 96-97 & 124-25, 829 P.2d 746 (1992); *Norquest/RCA-W Bitter Lake Partnership v. Seattle*, 72 Wn. App. 467, 481, 865 P.2d 18 (upholding Section 1983 damage award

where City arbitrarily delayed issuance of building permit in response to political pressure and improperly sought to require master use permit), *rev. denied*, 124 Wn.2d 1021 (1994).

It is likewise consistent with federal case law. *See, e.g., Del Monte Dunes*, 920 F.2d at 1508; *Bateson*, 857 F.2d at 1302-03; *Royal Crown Day Care, Inc. v. Dept. of Health*, 746 F.3d 538, 544-45 (2d Cir. 2014) (defendant's decision to shut down day care center based on improper motive states claim under Section 1983); *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 785 (2d Cir. 2007) (permit process was tainted with "fundamental procedural irregularity"); *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 177 (3d Cir. 2006) (Township's "obstructive course of conduct" states a substantive due process claim); *Simi Investment Co. v. Harris County*, 236 F.3d 240, 251 -54 (5th Cir. 2000), cert. denied, 534 U.S. 1022 (2001); *Brady v. Town of Colchester*, 863 F.2d 205, 208-09, 213 (2nd Cir. 1988) : *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983).[5]

[5] *See also, e.g., Schneider v. County of Sacramento*, 2016 WL 3213553, at *39 (E.D. Cal. June 9, 2016) (evidence that county imposed large increase in mine reclamation bond due to political concerns rather than legitimate interest in enforcing laws states a substantive due process claim), *appeal pending*; *David Hill Development, LLC v. City of Forest Grove*, 2012 WL 5381555 at *24-*25 (D. Or. 2012); *Ruff v. County of Kings*, 2008 WL 4287638 at *13 (N.D. Cal. 2008). .

2. The Court of Appeals properly awarded costs under 42 U.S.C. § 1988 and the County's contrary arguments fail to justify review by this Court

Although it filed a 48-page reply brief at the Court of Appeals, the County did not object to the request for costs, including attorneys' fees, until after the Court of Appeals had granted the request. The County thus waived the issue. *See, e.g.*, *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."); *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) (same).

The County's arguments regarding attorneys' fees fail on the merits, as well. The County incorrectly asserts that Maytown requested attorneys' fees on appeal only in the 'Conclusion' section of its principal brief, and therefore failed to comply with RAP 18.1(b). Maytown's principal brief included a 14-page section addressing the County's attempts to escape liability under 42 U.S.C. § 1983, specifically arguing that Maytown is "entitled to damages under 42 U.S.C. § 1983, and attorneys' fees and costs under 42 U.S.C. § 1988 because the County," acting under color of state law, "subjected Maytown to a deprivation of Maytown's Constitutional right to substantive due process." Port/Maytown Opening Br. at 78. Maytown therefore plainly satisfied RAP 18.1. *See, e.g., Bay v. Jensen,* 147 Wn. App. 641, 661, 196 P.3d 753,

763 (2008) (Rule 18.1(b) "requires argument and citation to authority to advise us of the appropriate grounds for an award of attorney fees and costs"); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 363, 110 P.3d 1145, 1152 (2005) (same).

Even if the County's claim were not waived and were factually correct, it should be rejected for two additional reasons. First, the Court of Appeals correctly applied Section 1988 to award Maytown's fees on appeal, slip op. at 28-29, and the County's argument alleges, at most, a technical error in applying RAP 18.1, but no substantive disagreement with any case justifying review under RAP 13.4(b). Second, Section 1988 creates a federal right to attorneys' fees for litigants who bring a successful claim under Section 1983 and contrary state requirements are therefore unenforceable. *Bernhardt v. County of Los Angeles,* 339 F.3d 920, 928 (9th Cir. 2003) (Section 1988 may bar a "statute, policy, or practice" precluding payment of attorneys' fees in Section 1983 cases).

Plaintiffs respectfully request an award of attorneys' fees for filing this response in accordance with 42 U.S.C. § 1988 and RAP 18.1(j).

C. The Court Of Appeals Decision Is Consistent With Other Authority Regarding The Award of Attorney's Fees.

1. The Court of Appeals applied the American Rule consistent with Washington law.

As the Court of Appeals wrote, "when an intentional tort causes

damage that requires legal action to repair the damage, then the attorney fees for the legal action to defend can be considered as damages in a different and subsequent proceeding." Slip Op. at 28. While this Court affirmed a jury award that included such fees in the *Pleas v. City of Seattle* case, the County appears to be the first party to argue that the American Rule bars recovery of such damages. Yet, the County's Petition offers no substantive explanation why that court's ruling is contrary to law or otherwise not deserving of respect.

An exception to the general rule that a tortfeasor is liable for all reasonably foreseeable harm flowing from its torts, the American Rule "cuts the causal chain" at attorneys' fees incurred in an action for damages. However, the American Rule does not apply to damages such as doctor bills, mechanic bills, or other professional fees incurred to repair the harm caused by a defendant's tortious actions. Similarly, it should not apply to attorneys' fees incurred repairing damage to intangible property such as a land use entitlement, separate from the fees incurred in a subsequent action to recover damages. The former are damages caused by the tort; the latter are costs incurred in litigation. Here, the County's intentional interference harmed the SUP, and only legal action could repair the damage, and prevent additional damage.

Washington courts have not examined the distinction between

attorneys' fees as damages and attorneys' fees as costs incurred in a subsequent litigation. This Court's discussion of attorneys' fees as damages in *City of Seattle v. McCready* was *dictum*; the case itself involved a request for *costs*—those fees incurred earlier in the declaratory judgment action before the Court, specifically in defendants' successful motion to quash warrants. 131 Wn.2d 266, 277-78, 931 P.2d 156 (1997).

The Court of Appeals decision is also consistent with the larger body of case law construing the American Rule. For example, the California Supreme Court held:

> The attorney's fees are an economic loss – damages – proximately caused by the tort. These fees must be distinguished from recovery of attorney's fees qua attorney's fees, such as those attributable to the bringing of the bad faith action itself. What we consider here is attorney's fees that are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action.

Brandt v. Superior Court, 37 Cal. 3d 813, 817, 693 P.2d 796 (1985).

The Court of Appeals properly ruled that the attorneys' fees sought by Plaintiffs are not damages barred by the American Rule. The ruling was consistent with the common equitable thread running through the cases establishing exceptions to the American Rule: where an intentional tort proximately forces a plaintiff to engage in litigation separate from an action to recover damages, those fees are recoverable. *See Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492, 862 (1994). The Court of

Appeals' ruling was consistent with these cases and therefore none of the criteria of RAP 13.4(b) justifies further review.

VI. CONCLUSION

Although the factual setting of this case may be unusual, the legal issues are not. The decision of the Court of Appeals is consistent with statute and case law, and the County's Petition raises no issue of broad public import. The County seeks a last opportunity to escape liability for what the unchallenged jury findings establish was intentional and shocking official interference. Plaintiffs respectfully request the Court decline to review the case and award attorneys' fees and costs under 42 U.S.C. § 1988.

RESPECTFULLY SUBMITTED this 5th day of June, 2017.

s/Patrick J. Schneider
s/Steven J. Gillespie
Patrick J. Schneider, WSBA #11957
Steven J. Gillespie, WSBA #39538
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: pat.schneider@foster.com
steve.gillespie@foster.com
Attorneys for Plaintiffs/Respondents Port of Tacoma

s/John E.D. Powell
John E.D. Powell, WSBA #12941

JED POWELL & ASSOCIATES, PLLC
7525 Pioneer Way, Suite 101
Gig Harbor, WA 98546
Telephone: (206) 618-1753
Email: jed@jedpowell.com
Attorneys for Plaintiffs/Respondents Maytown Sand and Gravel, LLC

s/Eric Christensen
Eric Christensen, WSBA #27934
CARINCROSS HEMPELMANN PS
526 2ND Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Email: echristensen@cairncross.com
Attorneys for Plaintiffs/Respondents Maytown Sand and Gravel, LLC

CERTIFICATE OF SERVICE

I hereby certify that, on Monday, June 05, 2017, I caused to be served, in the manner indicated below, a true and correct copy of the foregoing document on each of the following:

Elizabeth Petrich
Thurston County Deputy
Prosecuting Attorney
2000 Lakeridge Dr. SW, Bldg. 2
Olympia, WA 98502
petrice@co.thurston.wa.us
Served via electronic mail

Carolyn A. Lake
Goodstein Law Group PLLC
501 S. G Street
Tacoma, WA 98405
253-779-4000
Fax: 253-779-4411
clake@goodsteinlaw.com
Served via electronic mail

Michael B. King
Jason W. Anderson
Rory Drew Cosgrove
Carney Badley Spellman, P.S.
701 5th Avenue, Ste. 3600
Seattle, WA 98104
(206) 622-8020
king@carneylaw.com
anderson@carneylaw.com
cosgrove@carneylaw.com
Served via electronic mail

Mark R. Johnsen
Karr Tuttle Campbell
Special Deputy Prosecuting
Attorney for Thurston County
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
mjohnsen@karrtuttle.com
Served via electronic mail

Don C. Bauermeister
James Hertz
FRIEDMAN | RUBIN
1126 Highland Avenue
Bremerton, WA 98370
(360) 782-4300
don@friedmanrubin.com
jhertz@friedmanrubin.com
Served via electronic mail

DATED Monday, June 05, 2017, at Seattle, Washington

s/ Brenda Bole
Brenda Bole

FOSTER PEPPER PLLC

June 05, 2017 - 2:13 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94452-1
Appellate Court Case Title:	Maytown Sand and Gravel, LLC v. Thurston County, et al.
Superior Court Case Number:	11-2-00395-5

The following documents have been uploaded:

- 944521_Answer_Reply_20170605135541SC600057_6142.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- anderson@carneylaw.com
- brenda.bole@foster.com
- clake@goodsteinlaw.com
- cosgrove@carneylaw.com
- don@friedmanrubin.com
- dpinckney@goodsteinlaw.com
- jed@jedpowell.com
- jhertz@friedmanrubin.com
- king@carneylaw.com
- mjohnsen@karrtuttle.com
- pat.schneider@foster.com
- petrice@co.thurston.wa.us
- sdrobinson@karrtuttle.com

Comments:

Sender Name: Steven Gillespie - Email: steve.gillespie@foster.com
Address:
1111 3RD AVE STE 3000
SEATTLE, WA, 98101-3292
Phone: 206-447-5942

Note: The Filing Id is 20170605135541SC600057