Supreme Court No. 96952-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46963-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KRISTINE GODFREY, husband and wife and their marital community composed thereof,

Respondents,

v.

STE. MICHELLE WINE ESTATES, LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Petitioners,

AND

ROBERT KORNFELD,

Additional Respondent.

PETITIONERS' REPLY TO ISSUE RAISED IN JOINT ANSWER TO PETITION FOR REVIEW FROM REMAND

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I. REPLY ARGUMENT

Pursuant to Rule of Appellate Procedure 13.4(d), Petitioners Ste. Michelle Wine Estates Ltd., and Saint-Gobain Containers, Inc. respectfully submit this reply to an issue raised in Plaintiffs and Appellants Rolfe and Kristine Godfrey and Robert Kornfeld's (the "Godfrey Respondents") Joint Answer to Petition for Review (the "Joint Answer").

As set forth in the Petition for Review (the "Petition"), Petitioners seek review of the unpublished decision terminating review in *Godfrey v. Ste. Michelle Wine Estates Ltd, et al.*, issued by Division II of the Court of Appeals on December 27, 2018 (the "Decision") on the ground that it conflicts with this Court's decision in *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017) ("*Lile*"). The Godfrey Respondents' Joint Answer requests that, if this Court grants review of that issue, the Court should also review what the Godfrey Respondents characterize as the trial court's "error in excluding nearly all of Mr. Godfrey's liability evidence and imposing $10,000 in sanctions against Mr. Kornfeld." Joint Answer at 16. Respondents' request that the Court review this additional issue—which comprises a total of three sentences at the end of the Joint Answer—should be denied for four clear reasons.

First, the Godfrey Respondents' claim that they have "consistently argued" that the trial court's sanctions order constituted error ignores the fact that neither the Court of Appeals nor this Court have *ever* reviewed the sanctions ruling and the Godfrey Respondents have waived their ability to seek review of that decision.

The Court of Appeals' July 19, 2016 opinion in this matter reversed on the ground that the trial court erroneously held that the Godfrey Respondents' notice of disqualification was not timely filed. With respect to trial court's sanctions order, it stated only that reversal was merited because that order occurred after the trial court's failure to allow the affidavit of prejudice. *See Godfrey v. Ste. Michelle Wine Estates Ltd. et al.*, No. 46963-4-II, 195 Wn. App. 1007 (July 19, 2016) (unpublished opinion) at *6 ("Here, the trial court imposed sanctions against Kornfeld after rejecting Godfrey's affidavit of prejudice. Because the trial court erred in rejecting Godfrey's affidavit of prejudice, the trial court's imposition of monetary sanctions was improper.").

Petitioners sought review of the Court of Appeals' July 19, 2016 opinion holding that the Godfrey Respondents' affidavit of prejudice was timely. In the Godfrey Respondents' joint answer to that petition, they improperly raised the sanctions issue in a footnote on the very last page of their brief. *See* Godfrey Respondents' November 14, 2016 Joint Answer to Petition for Review at 17 n.6; *see also State v. Korum*, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006) (refusing to consider issue raised for first time in argument section of brief on ground that RAP 13.7(b) and 13.4(c)(5) require issues to be raised in concise statement of issues presented for review). Petitioners opposed the Godfrey Respondents' attempt to side-step the requirements of RAP 13.4(d), which was amended in 2006 to require that if the answering "party wants to seek review of any issue not raised in the petition for review, including any issues that were raised but not decided in

the Court of Appeals, the party must raise those new issues in an answer." RAP 13.4(d). Suggesting in a footnote that they may be dissatisfied with the trial court's sanctions ruling, without any analysis of why this Court's review is warranted under RAP 13.4(b)(1) is insufficient to "seek review of any issue that was not raised in the Petition." This Court's November 8, 2017 ruling granting Petitioner's petition for review did not also grant review of the sanctions issue raised in the footnote in the joint answer, nor did it remand the sanctions issue to the Court of Appeals. Instead, this Court remanded the case to the Court of Appeals only "for reconsideration in light of" *Lile*.

On remand, the Godfrey Respondents devoted a mere two sentences to arguing that "[i]n the unlikely event" the Court of Appeals reconsidered its prior ruling in light of *Lile*, it should nonetheless reverse the trial court's ruling on the sanctions issue. *See* Appellants' Supplemental Brief to Address *State v. Lile* at 9. Tellingly, the Court of Appeals' remand decision of which Petitioners seek review did not even mention, let alone address, the sanctions issue. The Godfrey Respondents' attempt to portray the sanctions issue as having "consistently" been a part of this appeal is belied by the actual substance and procedural history of the appeal.

Second, the Godfrey Respondents' request that the Court review the trial court's sanctions ruling falls short of this Court's standard for discretionary review set forth in RAP 13.4(b). As the Court is well aware, that rule provides that this Court will accept review only where the Court of Appeals' decision at issue is either in conflict with a decision of this Court

or another published decision of the Court of Appeals, involves "a significant question of law under the Constitution of the State of Washington or of the United States," or involves "an issue of substantial public interest." RAP 13.4(b)(1)-(4). The first two bases for review are inapplicable for the simple reason, described in detail above, that the Court of Appeals has never addressed the Godfrey Respondents' sanctions argument. There is no Court of Appeals decision on the sanctions issue, let alone one that is "in conflict" with another appellate decision. The third basis for review in RAP 13.4(b) is similarly inapplicable because the trial court's sanctions ruling did not implicate any constitutional concern, let alone a "significant" one. Finally, the Godfrey Respondents provide no argument that the fourth ground for review in RAP 13.4(b) is applicable in the current context.

Third, the Godfrey Respondents' claim that the Court should review the trial court's "error in excluding nearly all of Mr. Godfrey's evidence" misstates both the actual substance of the trial court's sanctions ruling and the propriety of that ruling under Washington law.

For one, the Godfrey Respondents' claim that the trial court excluded "nearly all" of their liability evidence is belied by the actual record below. The trial court's sanctions order prohibited the Godfrey Respondents from offering into evidence any exhibit to which Petitioners objected, and prohibited the Godfrey Respondents from objecting to any of Petitioners' trial exhibits. CP 587-88. The trial court did *not* enter a blanket order excluding the Godfrey Respondents' liability evidence and, indeed,

the Godfrey Respondents presented expert testimony from two liability experts, in addition to the testimony of Mr. Godfrey himself, in support of their claim that Mr. Godfrey was injured by a construction defect in the wine bottle at issue. *See* CP 690-93; *see also* RP 137-53, 173-227, 323-83 (William C. Hamlin); RP 403-521, 531-89 (Eric Heiberg). The trial court expressly found that neither of the Godfrey Respondents' liability experts rebutted Petitioners' showing that the fracture pattern on the subject bottle indicated that the fracture originated inside the bottle and was likely caused by Mr. Godfrey's misuse, and further found that Mr. Heiberg's opinion was "unpersuasive" when compared to the "credible and persuasive" presentation of Petitioners' liability expert Rick Bayer. CP 691-92. The Godfrey Respondents' claim, that they were somehow barred from presenting a liability case as a result of the trial court's sanctions ruling, is simply not accurate.

Moreover, the trial court's sanctions ruling was more than warranted under Washington law. The trial court entered its order as a result of the Godfrey Respondents' failure to participate in the drafting or filing of the joint statement of evidence required by the Pierce County Local Rules, as well as the Godfrey Respondents' bulk designations of more than 15,000 pages of distinct, undifferentiated documents as three trial "exhibits." *See* CP 437-42. The trial court found these failings constituted a "willful violation" of not only the trial court's scheduling order, but also the trial court's pretrial order expressly mandating that the parties comply with all pretrial deadlines. CP 587; *see also* CP 450 (scheduling order stating that

"[c]ompliance with the schedule rules is mandatory and failure to comply shall result in sanctions appropriate to the violation"); CP 462-64 (pretrial order directing that "[t]he Court expects Counsel to abide by the case schedule deadline for filing of the Joint Statement of Evidence"). The consideration of lesser sanctions sufficient to further the purposes of deterrence, punishment, and compensation as articulated in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) and its progeny was inherent in the trial court's sanctions order, and there is no colorable argument that the trial court's sanctions order was erroneously entered in light of its direct proportionality to the Godfrey Respondents' willful violation of the trial court's orders. *See* CP 437-42 (Petitioners' motion for sanctions arguing that Petitioners' requested sanctions were "appropriate to the violation"); CP 587-88 (sanctions order finding Godfrey Respondents' failure to participate in drafting and filing the joint statement of evidence was a "willful violation" of the trial court's orders); *see also Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009) ("An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record.").

Fourth, and most fundamentally, any error the Godfrey Respondents attempt to assign to the trial court's sanctions order was harmless and would not merit reversal by this Court even if review were proper. As noted above, the Godfrey Respondents were afforded a more than adequate opportunity to present a liability case against Petitioners over the course of the twelve day bench trial, which included three full days of testimony from Godfrey's

expert witnesses on liability issues. The additional liability evidence the Godfrey Respondents claim was erroneously excluded would merely have been cumulative. *See Jones v. City of Seattle*, 179 Wn.2d 322, 355-56, 314 P.3d 380 (2014) (trial court's error in excluding three defense witnesses without making adequate *Burnet* findings was harmless where witnesses' testimony would have been cumulative). Moreover, because the Godfrey Respondents' claims were tried to the court and not to a jury, the finder of fact was by definition exposed to the full spectrum of the Godfrey Respondents' liability evidence in the course of ruling on Petitioners' motion to exclude that evidence and was not wrongfully prevented from receiving relevant evidence. *Cf. Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015) (trial courts must consider *Burnet* factors before excluding evidence "that would affect a party's ability to present its case").

II. CONCLUSION

In sum, the Godfrey Respondents have waived their ability to seek review of the trial court's sanctions ruling in this appeal. Even if they had not waived, the Godfrey Respondents fall far short of meeting RAP 13.4(b) because the Court of Appeals has not issued an opinion on the sanctions issue. The Court should grant the Petition as to the Court of Appeals' recent ruling in light of *Lile* and reject the Godfrey Respondents' attempt to inject a new substantive issue into this appeal.

Respectfully submitted this 10th day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the *Petitioners' Reply to Issue Raised in Joint Answer to Petition for Review from Remand* on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 8th day of May, 2019.

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