No. 97347-4

IN THE WASHINGTON STATE
SUPREME COURT

MUHAMMAD AHSAN and FAIZA AHSAN, Petitioners,

v.

SLOANS ENTERPRISES OF AMBOY, LLC, Respondent

REPLY OF PETITIONERS TO ANSWER OF RESPONDENT, TO PETITION FOR REVIEW

Muhammad and Faiza Ahsan, *pro se*
2424 NW Iris Court
Camas, WA 98607
360-566-5384
ahsanmsheikh@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

A . ARGUMENT[1]

1 . SUMMARY OF THE ISSUES RAISED IN THE ANSWER, AND REPLIED TO HERE:[2]

a) the alleged raising for the first time, an issue in the Reply Brief below;

b) the rearguing, by the Respondent, of the identical points argued in the Response Brief below;

c) the allegation that any provisions of RAP 13.4 have not been met.

2 . SUMMARY OF THE FACTS TO THIS REPLY[3]

In its Answer to this petition, Respondent claims that 'justice has been served,' because it achieved a defense verdict, by having its counsel ask the question, and receive an answer, that the appellate court was able to zero in on, as infirm. 'Justice' in the eyes of the Respondent, is indeed served, because, going forward, absent relief by this Court, every lawyer will know that it

---

[1] This Reply is made, consistent with the requirements for reply briefs, as set forth in RAP 10.3.

[2] Consistent with RAP 10.3(a)(6).

[3]Also, consistent with RAP 10.3(a)(6). In addition, for reasons that are not known, Respondent, again, raises the issue of the Appellants appearing *pro se*, without providing any legal or logical conclusion to that statement. The appellate court made no mention of any issues with either the Appellant's brief or reply brief, or any mention of any defects in the presentation. Therefore, the notion that, somehow, the Respondent needs to raise this issue, seems out of place. Importantly, the Court may be informed that, although the Petitioners are appearing *pro se*, they are backed by their legal team.

For example, Respondent cites *Matter of Rhem,* 394 P.3d 367 (2017), in support of the proposition that *pro se* litigants are treated equally to represented parties. Petitioner does not quibble with this argument, but fails to see the relevance to these proceedings.

can ask the infirm question, and, so long as the trial judge misses acting as the gatekeeper, get away with it. All to the detriment of litigants on both sides achieving a fundamental right to a jury trial. Respondent cites no case, anywhere, that holds such.

1

Importantly, the appellate court rejected the complete factual analysis of the Respondent, appellee below, as to the 'dueling experts,' scenario. In its Answer to the petition here, the Respondent simply copy/pasted that same, identical argument from its Response Brief below, asking this Court to, again, review that issue. Such is not the standard here. The Respondent simply did not prevail on that issue.

The opinion of the appellate court makes no mention that the Reply Brief raises an issue not raised in the Brief.

The Respondent, appellee below, filed no motion to strike the Reply Brief, including no motion to strike on the ground that it raises issues not found in the Brief.

The Respondent's Answer here, therefore, that the Petitioners raised RAP 2.5 for the first time in Petitioner's Reply Brief below, is factually incorrect. The contents of the three briefs, however, show otherwise, and Respondent appears to confuse the citation of a rule in the Reply Brief with the raising of a new issue. Further, Respondent appears to confuse the fact that it, through counsel, raised the 'waiver of objection' issue, not the Petitioners, appellants below. The recitation of a rule in support of the main issue raised in a brief, in a reply brief, and additionally, in reply to an issue raised in a response brief, does not constitute the raising of an issue for the first time in a reply brief.

The term 'waived because of a failure to object,' is not found in the Brief of the

Petitioners, appellants below. It was raised, for the first time, by the Respondent in its Response

Brief below. The Reply Brief below, simply addresses the issue as raised by the Respondent. The Petitioners had no duty to argue Respondent's position, actually guess what it may be, and then defend it *a priori,* in their Brief. The same cases cited in the Brief, were cited, again, in the Reply Brief, as to the same issue raised, not a new one.

Importantly, the writings in all three briefs below, fail to support Respondent's argument that a new issue was raised in the Reply brief.

The Brief of the Petitioners, appellants below, provides, among other things:

a) page 4 "Washington State Court Rule of Evidence 704, prohibits an expert witness from testifying on matters which are within the province of the jury, such as whether a party acted 'reasonably' or not;"

b) page 4: "In this matter, Mr. Zipper's testimony, that the respondent's actions were not 'unreasonable' was not 'otherwise admissible' under the rule. Only the jury can decide as to what is, or is not reasonable;"

c) page 4: "The court addressed the same issue in *Johnson-Forbes v. Matsunaga,* 181 Wash.2d 346 (2014). Unlike in this matter, however, in *Johnson, supra,* both defense counsel, and also the expert witness, took extreme precautionary measures to avoid invading the province of the jury.... Because the trial court performed its proper gatekeeping function, we affirm. *Id.* at 393;"

d) page 5: "In the instant matter, the trial judge did not perform the proper 'gatekeeping' function. Unlike in *Johnson, supra,* defense counsel in this matter never assured the trial judge that he would refrain from asking Mr. Zipper about 'reasonableness.' To the contrary, defense counsel, without warning, specifically asked Mr. Zipper the above-stated question during trial, that is in the sole province of the jury."

Thus, the entire Brief of the Petitioners, appellants below, was built upon the issue of the fundamental error of the infirm question invading the province of the jury.

The Respondent, appellee below, in turn, acknowledged the issue in its Response Brief below, thusly:

a) page 1: "The Ahsans now contend[4] that the trial court erred in admitting defense expert testimony falling within the ambit of Evidence Rule 704 (stating that "testimony in the form of an opinion or inferences not otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact");"

b) page 8: "They (the Petitioners, appellants below) argue that Mr. Zipper's opinion on the "ultimate" issue was inadmissible and invaded the province of the jury."

Having, therefore, acknowledged that the issue of the fundamental right to a jury trial was in the Brief of the Petitioners, appellants below, the Respondent cannot, here, be heard to

[4] In their Brief.

complain that it was raised for the first time on appeal.

c) page 10: "...*see also, State v. Brush,* 32 Wn. App. 445, 456, 648 P.2d 897 (1982), *review denied,* 98 Wn 2.d 1017 (1983).

It is this citation, by the Respondent, not the Petitioners, that for the first time anywhere in the case, cites to RAP 2.5. The Petitioners had to respond to it.

The Reply Brief of the Petitioners, appellants below, provides:

a) page 2: "The holding in *Johnson-Forbes v. Matsunaga,* 181 Wash.2d 346 (2014), analyzed in the Appellant's main brief, clearly states that the trial court has a gatekeeper role, that is irrespective of what counsel at trial may say or do. Once an expert takes the stand, the trial judge must be ever vigilant;"

b) page 4: "*Kirkman, supra,* stands in stark contrast with both the question by defense counsel, and the answer by defendant's expert witness in this matter. Defense counsel asked his expert if he, the expert, believed that the defendant's acts were unreasonable;"

c) page 6: "This analytical framework in mind, and under either prong, removing from the jury its right to evaluate the party defendant, or testimony that is a legal conclusion, the cases cited by the Respondent are inapposite."

This quote is significant to the allegations being made by the Respondent here. That analytical framework includes the RAP 2.5 analysis, which, according to Respondent, the Petitioners raised for the first time in their Reply Brief below. Such, however,

are not the facts, as shown in this next subsection;

d) page 10: "*State v. Brush,* 648 P.2d 897 (1982), is a Division III opinion, which turned on RAP 2.5."

The Respondent, appellee below, therefore, raised the issue, and cited case law to it. The Petitioners, appellants below, had to respond in their Reply Brief. An appellant, including the Petitioners here, is not required to guess *a priori,* what argument an appellee may make, nor to waive a reply to any issues raised by such appellee in a response brief.

3 . THE REPLY BRIEF BELOW ADDRESSES THE ISSUES TO WHICH IT IS DIRECTED, NAMELY, THE ISSUE IN THE LAST BRIEF, THAT OF THE APPELLEE.

Although not specifically identified as such, the cases reviewed for this Reply, by the Petitioners, appear to apply a *de novo* standard of review[5] to the issue of whether a new issue has been raised in a reply brief. *Grange Ins. Ass'n v. Roberts,* 320 P.3d 77 (2013); *State v. Barton,* 2006 WL 465394 (2006).

RAP 10.3(c) states, specifically: "A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed."

---

[5]See, RAP 10.3(a)(6), encouraging a recitation of the standard of review.

In *Grange, supra,* the Court held, specifically: "The reply brief is limited to a response to the issues raised in the responding brief."

In *Lacombe v. Ju,* 2017 WL 3602080 (2017), at footnote 1, the Court said: "A reply brief is 'limited to a response to the issues in the brief to which (it) is directed.'"

Even in the cases cited by the Respondent, the rule holds. In *State v. Pleasant,* 684 P.2d 761 (1984), the specific language is identical: "The scope of a reply brief is limited to those issues raised in the brief to which the reply brief is directed." *Id.* at 764. In *Pleasant, supra,* the appellant found some new evidence, apparently, during the appeal process. He sought to raise the issue as to that new evidence for the first time on appeal. This case is, therefore, inapposite, because under the facts shown here, the issue of the fundamental error was raised by the Petitioners, and replied to by the Respondent, in the course of all three briefs.

In *Dickson v. USF&G,* 468 P.2d 515 (1970), the question of the agency relationship of an agent, was raised, clearly upon a review of the record, for the first time in the reply brief. The Court stated the rule as to that scenario, with which the Petitioners here do not quibble: "Defendant did not argue or discuss this assignment of error in its opening brief, so we consider the assignment abandoned." *Id.* at 518.

In *Frosbe v. State,* 424 P.2d 901 (1967), the Court found that the issue was properly raised on appeal, but the substance of the issue, a boat ramp access, was raised only for the first

time in the reply brief.

These latter three cases are inapposite, particularly where, as here, it was the Respondent that raised the RAP 2.5 issue in its case citations in its Response Brief below.

The fundamental doctrine in the reply brief cases is that new issues may not be raised, because such deprive the appellee of the opportunity to respond, and, therefore, deprive the appellate court of the opportunity to know the position of the appellee to such new issue. That did not occur here.

4 . THE ANSWER BRIEF DOES NOT ALLOW AN OPPORTUNITY FOR THE PETITIONER TO REARGUE ITS FAILED POINTS ON APPEAL.

Seeking to avoid taking responsibility for asking the improper question that the appellate court quoted, the Respondent, literally, copy/pasted the 'dueling experts' part of its Response Brief, into its Answer here.

RAP 10.3(b), provides: "The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner."

RAP 13.4(d), provides, specifically: " Answer and Reply. A party may file an answer to a petition for review... If the party wants to seek review of any issue that is 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."

8

Here, the Court of Appeals, did decide the 'dueling experts' argument of the Respondent, appellee below, and found favorably to the Petitioners. The Court reviewed all of the briefs, and simply rejected the 'dueling experts' theory as propounded by the Respondent, appellee below. The Respondent, under the rule, cannot raise that issue anew here.

5 . THE PETITION IS CONSISTENT WITH THE REQUIREMENTS OF RAP 13.4 (b)(1) and (4).

The Petitioners have briefed this issue in their petition, with supporting case law.

The Respondents made no argument, other than citing to the rules, and some mildly anecdotally abrasive comments, to rebut that analysis.

The Petitioners, therefore, readopt the briefing on this issue, as contained in the Petition.

B . CONCLUSION

This Court reviews the issue of whether the Reply Brief below, raises a new issue, upon a *de novo* standard of review.

The Reply Brief below is directed to the last event, namely the Response Brief of the Respondent, appellee below, which itself, raised the issue of RAP 2.5., and therefore, conforms to RAP 10.3(c).

RAP 13.4(d) prohibits the Respondent from rearguing its 'dueling experts' scenario here, where, clearly, the appellate court read Respondent's brief, but rejected that argument.

9

From the Brief, to the Reply Brief below, the Petitioners have shown a conflict with this Court's significant standard of requiring the trial judge to act as the gatekeeper, with respect to the presentation of evidence by expert witnesses.

The contention of the Respondent, that, so long as they can get away with the trial judge not noticing the improper question, they may proceed, eviscerates that gatekeeper function.

This Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED,

Muhammad and Faiza Ahsan, *pro se*
2424 NW Iris Court
Camas, WA 98607
360-566-5384
ahsanmsheikh@yahoo.com

Muhammad Ahsan

Faiza Ahsan

CERTIFICATE OF SERVICE

WE, HEREBY certify that on the 17th day of July, 2019, the original of this Reply was provided to the Clerk of the Supreme Court, by uploading same onto the Court's website for electronic filing, and that a copy of the Reply was provided by electronic mail to: Peter D. Motley, Esquire, WSBA #36070, to: Peter.Motley@LibertyMutual.com, and Kathryn R. Morton, Esquire, cassie.morton@libertymtual.com, and Amber L. Pearce, Esquire, WSBA # 31626, APearce@floyd-ringer.com Attorneys for Respondent.

Muhammad Ahsan

Faiza Ahsan

MUHAMMAD AHSAN - FILING PRO SE

July 17, 2019 - 3:56 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97347-4
Appellate Court Case Title:	Muhammad and Faiza Ahsan v. Sloans Enterprise of Amboy, LLC
Superior Court Case Number:	16-2-01347-7

The following documents have been uploaded:

- 973474_Answer_Reply_20190717155411SC323792_3472.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Petition for Review
  The Original File Name was 7 17 2019 Ahsan Reply 2 Answer-signed.pdf

A copy of the uploaded files will be sent to:

- APearce@floyd-ringer.com
- cassie.morton@libertymutual.com
- peter.motley@libertymutual.com
- sklotz@floyd-ringer.com

Comments:

Sender Name: Muhammad Ahsan - Email: ahsanmsheikh@yahoo.com
Address:
2424 NW IRIS CT
Camas, WA, 98607
Phone: (360) 566-5384

Note: The Filing Id is 20190717155411SC323792