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SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SHARON KAY and JIM HOWE, Respondents, and THOMAS and MARIE DICKENS, Plaintiffs, vs. KING COUNTY, a municipal corporation, Petitioner.	No. 97507-8 RESPONDENT KAY'S REPLY IN SUPPORT OF MOTION TO STRIKE

In its Answer to Respondent Kay's Motion to Strike, King County continues to misrepresent the nature of this dispute and its history. Nonetheless, the County's Answer falls far short of establishing the six required elements of RAP 9.11, and Respondent's Motion should be granted.

A. The County Misrepresents The Nature And History Of Kay's Request For Fees

The crux of the County's argument is this: the County claims that Kay's motion for fees at the trial court was very narrow and Kay's

appeal of the trial court's decision was of "limited scope."[1] But then, according to the County, the Court of Appeals veered dramatically off course when it "looked at the jury's conclusion about the fair market value of the property rather than the judgment obtained, [and] revised the debate about what numbers are to be compared for purposes of an attorney fee award . . . The debate moved from a comparison of the judgment amount and King County's highest written offer to a comparison of the jury's valuation and what Kay would have received had she accepted King County's highest offer."[2]

Here again the County mispresents Kay's argument both to the trial court and below—which is identical to its argument today. In moving the trial court for an award of fees and costs Kay wrote:

> The jury determined that the fair market value of Ms. Kay's property was $650,000. King County only offered $552,000. Ms. Kay beat the County's offer by 17.75%. In order to sever Ms. Kay's statutorily-mandated attorneys' [and] expert witness fees, the County needed to offer to purchase the property for at least $590,910

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1 Answer, p. 2.

2 Id., p.4.

($590,910 x 110% = $650.001) and it did not do this.[3]

Kay has always and consistently argued that the relevant numbers for purposes of her claim for fees and costs are : 1) the jury's $650,000 unimpaired valuation, which is contained in the Judgment; 2) the County's offer of $552,000 to buy her home; and 3) the result of the Judgment under which Kay received $96,221.37 in inverse damages and retains title to a home that in its damaged state is worth $585,000. That has always been Kay's position. The fact that the County wants the Court to ignore those numbers and look at different ones does not change the fact the Kay's argument has never changed. Thus any attempt to rest its need for the new evidence on changed circumstances fails.

B. The County Fails To Establish The Six Elements Required By RAP 9.11

The County's effort to establish each of the six elements necessary to supplement the record under RAP 9.11 is cursory, at best, and uncompelling. The County's brief simply makes conclusory statements, with no analysis. The County has never argued that it was in any way deprived in either discovery or at trial from developing and

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[3] CP 82.

presenting whatever evidence it wanted concerning the condition of Kay's home. Any fault in discovery or trial preparation rests with the County, and is not a basis for supplementing the record.

The greatest inequity would result from a denial of Kay's motion because Kay is deprived of any ability to substantively respond. The County apparently ordered daily transcripts from the court reporter, yet Kay's counsel has never seen them.[4] And since the County never went through the required process in RAP 9.2, Kay was deprived of any ability to counter—designate additional portions of any transcripts. Had Kay's counsel had access to the full transcripts of trial, Kay could show all the points at trial where the County attacked the valuations of Kay's appraiser, as well as the valuation testimony of Kay and Howe. Kay could point to testimony of the County's appraiser discussing the condition of Kay's home. And Kay could show how the County's counsel argued in closing about the condition of Kay's home and its value. Instead, all Kay has are the self-selected excerpts the County's lawyers chose as the best evidence to support their arguments. Equity does not blind one side to the evidence while permitting the other unfettered access and use.

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[4] Affidavit of Bradley B. Jones In Support of Respondent Kay's Motion to Strike, ¶ 3.

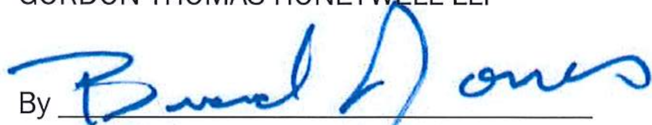
Finally, the County makes the strange argument that since Kay offered evidence in support of the motion to strike that is not part of the record on review, and for which she did not seek leave to introduce under RAP 9.11, equity demands the Court deny Kay's motion. But as the County's experienced appellate counsel knows, RAP 17.4(f) provides that "Rule 9.11 does not apply to affidavits and other papers submitted in connection with a motion other than a motion on the merits." Simply stated, the rules of appellate procedure contemplate that motion practice may well include evidence beyond the record, but not for merits purposes.

CONCLUSION

The County failed to follow the rules. It did not formally designate any transcripts, as required by RAP 9.2. It did not move to introduce the evidence under RAP 9.11. It did not and cannot establish the six necessary elements. And it would be inequitable and unjust to permit this new evidence while denying Kay any ability to respond. For all of the foregoing reasons, Kay respectfully requests that you grant her motion to strike.

Dated this 6h day of September, 2019.

Respectfully submitted,
GORDON THOMAS HONEYWELL LLP



By ______________________________
Bradley B. Jones, WSBA # 17197
Reuben Schutz, WS44767BA #
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Savanna L. Stevens, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on September 6, 2019, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of September, 2019.

Savanna L. Stevens
Legal Assistant

[4815-6043-0756]

GORDON THOMAS HONEYWELL LLP

September 06, 2019 - 2:05 PM

Transmittal Information

Filed with Court:	Supreme Court
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