Supreme Court No. 97889-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PORT OF ANACORTES, a Washington municipal corporation,
Respondent,
v.
FRONTIER INDUSTRIES, INC., a Washington corporation;
EINO "Mike" JOHNSON and LORIE A. JOHNSON, a married couple;
and ITOCHU INTERNATIONAL INC., a foreign corporation,
Petitioners.

JOINT ANSWER TO RESPONDENT'S MOTION TO STRIKE

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I. PETITIONERS' REPLY IS PROPER BECAUSE IT IS LIMITED TO ADDRESSING THE NEW ISSUE RAISED IN RESPONDENT'S AMENDED ANSWER

Rules of Appellate Procedure ("RAP") 13.4(d) provides that a petitioner may file a reply to an answer to a petition for Supreme Court review "if the answering party seeks review of issues not raised in the petition for review." Wash. R. App. P. 13.4(d). A reply in that instance is proper if it is "limited to addressing only the new issues raised in the answer." *Id*.

Petitioners argued in their Joint Petition for Review ("Petition") that Supreme Court review should be granted under RAP 13.5. The Petition was silent with respect to RAP 13.4. In its Amended Answer to Petitioners' Joint Petition for Review ("Amended Answer"), Respondent argued that review should not be granted under RAP 13.5 *or* RAP 13.4. Petitioners filed a reply that was limited to addressing only the new issue of whether review should be granted under RAP 13.4. Petitioners' Joint Reply to New Issue Raised in Amended Answer to Joint Petition for Review ("Reply") is proper.

There is no question that whether this appeal qualifies for Supreme Court review under RAP 13.5 is a separate issue from whether this appeal qualifies for Supreme Court review under RAP 13.4. The two issues

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involve two separate rules with two different standards. There is a difference between solely arguing that the Petitioners applied the wrong standard under RAP 13.5 and conducting an analysis of the petition under RAP 13.4, which would be unrebutted but for Petitioners' Reply.

Respondent's attempt in its Motion to Strike to frame these two separate issues as a single issue under a "whether this Court should grant review" umbrella is unpersuasive. Resp. Mot. to Strike at 1. First, Respondent previously acknowledged in its Amended Answer that the issue of whether review should be granted under RAP 13.4 was a separate and *new* issue from the issue of whether review should be granted under RAP 13.5 raised in the Petition. *See* Resp. Ans. to Petition for Review at 10 (stating that Petitioners "fail[ed] to discuss RAP 13.4(b)" in the Petition and incorrectly arguing that "[t]he failure to raise and brief [the] *issue* in the opening petition requires this Court to disregard any argument on reply.") *Id*. (emphasis added). Respondent recognized that it was raising a new issue in its Amended Answer by making an argument under RAP 13.4. *Id.*

Second, Respondent does not cite to any authority for its new, contrary proposition in its subsequent Motion to Strike that two separate rules involving two separate standards constitute a single issue for purposes of RAP 13.4(d)'s provision on reply briefs. The cases cited by Respondent

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do little more for Respondent than to confirm the basic rule: the Supreme Court will consider replies under RAP 13.4(d) insofar as they respond to new issues raised in an answer. In *Chevron USA, Inc. v. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. 2d 131, 124 P.3d 640 (2005), the Supreme Court in a footnote stated the rule under RAP 13.4(d) then confirmed the petitioner's reply brief was accepted insofar as it was limited to the new issue of attorney fees raised in the respondent's answer. *Id.* at 140 n 6. In *Oltman v. Holland America Line USA, Inc.*, 163 Wn. 2d 236, 178 P. 3d 981 (2008), the Supreme Court noted in a footnote that since neither (1) a factual footnote in the answer regarding court orders issued in a subsequent suit filed by petitioners nor (2) the attachment of a copy of the complaint in that subsequent matter to the answer did not amount to "new issues" for purposes of RAP 13.4(d), a reply addressing the same would not be considered. *Id.* at 262 n 17. Here, as with in *Chevron,* a new legal issue was raised in Respondent's Amended Answer. Petitioner's Reply limited to addressing that new legal issue is appropriate.

Finally, given the flexibility the Supreme Court has shown in accepting review under different rules regardless of how or when they are presented, the Petitioners' thoughts about the application of RAP 13.4 versus 13.5 are highly relevant and valuable with little to no prejudice to the

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Respondents. *See, e.g., State v. Howland*, 182 Wn. 2d 1008 (2015) (review was sought under RAP 13.4(b), but the deputy clerk redesignated the submission as a motion for review under RAP 13.5); *State v. Hand*, 308 P.3d 588 (2013) (granting review of case under RAP 13.5 despite Appellant having argued under RAP 13.4).

II. A SUR-REPLY IS CONTRARY TO RAP 13.4(D) WHICH ALLOWS ONLY A SINGLE DISCUSSION OF EACH ISSUE BY EACH PARTY ON PETITION FOR REVIEW

Respondent's request that it be permitted to file a sur-reply runs contrary to the express language of RAP 13.4(d), which clearly states that with respect to petitions for Supreme Court Review each party may brief a given legal issue only once. The rule specifies that a party may file a petition, the opposing party may answer that petition, if and only if a new issue is raised in the answer the petitioning party may file a reply, and that (unlike with traditional pleading practice) the reply must be limited to addressing only the *new* issue raised in the answer. The rule does not state that sur-replies are permissible. The result is that under RAP 13.4(d) each side may brief all issues once but only once. To grant a sur-reply would permit Respondent the opportunity to speak twice on the same issue in violation of RAP 13.4(d)'s clear intent that petitioners and respondents brief a given issue only once.

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III. CONCLUSION

Respondent raised the new issue of whether this appeal qualified for review under the standards found in RAP 13.4 for the first time in its Amended Answer. Petitioners filed a reply addressing only that issue. Petitioners respectfully request that this Court deny Respondent's motion to strike.

DATED this 14th day of February, 2020.

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CERTIFICATE OF SERVICE

I, Sarah Emigh, state that on the 14th day of February, 2020, I caused the copies of the foregoing to be filed in the Supreme Court of the State of Washington and a true copy of the same to be served on the following in the manner indicated below:

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DATED this 14th day of February, 2020, in Seattle, Washington.

s/ Sarah Emigh

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