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 REPLY TO NEW ISSUE RAISED IN AMENDED ANSWER TO JOINT PETITION FOR REVIEW

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I. A REPLY LIMITED TO ADDRESSING NEW ISSUES RAISED IN THE ANSWER IS PROPER

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*.

In its Amended Answer to Petitioners' Joint Petition for Review ("Amended Answer"), Respondent seeks review of the following issue not raised in the Joint Petition for Review ("Petition"): whether Supreme Court review of the Court of Appeals' August 19, 2019 decision ("Decision") should be granted under RAP 13.4(b).[1] Petitioners' Petition argued that review should be granted under RAP 13.5. A reply limited to addressing review under RAP 13.4(b), raised in the Amended Answer, is proper.[2]

[1] Respondent also discussed factual issues that are neither discussed in the petition for review nor supported by the record.

[2] The cases cited by Respondent in opposition to any reply briefing do not change the propriety of this reply. Neither *State v. Korum*, 157 Wn. 2d 614, 141 P.3d 13 (2006), nor *In re Detention of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999), involved reply briefing.

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II. SUPREME COURT REVIEW UNDER RAP 13.4(B) IS PROPER

RAP 13.4(b) provides:

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Wash. R. App. P. 13.4(b).

Three of the four independent grounds for review are met in the instant action—(1), (2), and (4). Review is proper.

A. The Petition Involves an Issue of Substantial Public Interest That Should be Determined by the Supreme Court

Review by the Supreme Court is proper where the Court of Appeals decision involves an issue of substantial public interest. Wash. R. App. P. 13.4(b)(4). Such an interest arises when a Court of Appeals decision has the potential to affect both the parties to the instant proceeding as well as parties to similar proceedings in the future. For example, in *In re Flippo*, the Supreme Court found that a Court of Appeals' dismissal of a personal restraint petition challenging the

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imposition of Legal Financial Obligations as time barred involved an issue of substantial public interest. 185 Wn.2d 1032, 380 P.3d 413 (2016).[3] The Supreme Court reasoned that since the decision had the potential to affect a number of similar proceedings, review was warranted on substantial public interest grounds.

Similarly, in *State v. Watson*, this Court found a Court of Appeals' ruling that a policy memorandum on drug offender sentencing alternatives was an improper ex parte communication to involve an issue of substantial public interest. 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The Supreme Court reasoned that since the Court of Appeals' holding affected both parties to the proceeding as well as potentially parties to other similarly situated proceedings, "invite[d] unnecessary litigation," and "create[d] confusion," review on substantial public interest grounds was warranted. *Id.* at 577[4]

[3] Contrary to Respondent's assertion at page 9 of its Amended Answer, the Supreme Court did not examine what does not qualify as a substantial public interest in *In re Flippo*.

[4] Respondent's characterization of *State v. Watson* as involving a decision that "had the immediate potential to affect all sentencing hearings in Pierce County" is unfounded. *See* Resp't Am. Answer at 9. The subject Court of Appeals decision only had the potential to effect a subset of sentencing hearings in Pierce County, not all sentencing hearings as Respondent alleges. See *Watson,* 155 Wn.2d at 577 ("The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue"). Nor was the potential effect of the decision necessarily "immediate" as Respondent alleges. *Id*.

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Similar to the decisions in both *In re Flippo* and *Watson*, the Decision stands to affect both parties to the current proceeding as well as parties to other similarly situated proceedings. As discussed in the Petition, the Court of Appeals' failure to issue a clear ruling limited to the certified issue forces Petitioners to decide whether to (1) join other parties on grounds Petitioners fundamentally disagree with and take the risk of paying those parties' attorneys' fees if Petitioners' own argument on wood debris is successful, or (2) choose to not join other parties and thus forego the opportunity to offset remedial costs. Petition at 9-11. The Petition also explains how since this is a contribution action, the issue of whether wood debris is a hazardous substance under the Model Toxics Control Act ("MTCA") as a matter of law has serious, clear consequences as to how liability will be apportioned among the litigants at trial. *Id.* at 12-14. By affirming the Superior Court's ruling on the *unappealed* question of liability under RCW 70.105D.040(1)(b) for designated hazardous substances such as phenols alleged to be present at the site, the Court of Appeals left its holding on the certified question, which is a critical legal issue in this case and others, in a place of limbo. *Id*. at 14.

The hardships resulting from the Court of Appeals' failure to limit its ruling to the certified question are not unique to Petitioners. They are

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applicable to every other defendant in current and future MTCA contribution actions that involve a cleanup site where wood debris is or could be present. Given the pervasiveness of wood debris in Washington and the frequency of contribution actions under MTCA, the number of impacted proceedings is likely to be quite large at present and in the future.

Additionally, as with *Watson,* the Decision stands to create unnecessary litigation and confusion. Timber is historically among the largest industries in Washington. Thousands, if not millions, of entities have been involved in some aspect of log hauling operations in and/or adjacent to marine environments throughout Washington's history. Beyond the timber industry, it is nearly impossible to quantify how many individuals and entities have been involved in activities that may have resulted in wood debris entering the marine environment. The scope includes decades of Department of Ecology, National Oceanic and Atmospheric Administration, and other entities placing wood debris into marine environments as part of restoration efforts. It also includes countless individual landowners with forested land abutting water bodies. Despite the nearly limitless sources of wood debris in Washington, this case is only the second case in the 30 years since MTCA was enacted to

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address the issue of whether wood debris is a hazardous substance under MTCA.[5] Presumably this is because to the vast majority of practitioners in this area, it was clear that raw wood debris itself is not a hazardous substance. Now, at best, the Decision stands to create an enormous amount of uncertainty as to whether those countless individuals and entities involved in activities that may have resulted in wood debris entering the marine environment may suddenly be liable under MTCA. At worst, the Decision will result in a flood of unnecessary litigation under MTCA regarding a substance the Court of Appeals agreed does not meet the definition of hazardous substances.

This case is distinguishable from *In re Dependency of P.H.V.S* cited by Respondent. In *In re Dependency of P.H.V.S.,* the Supreme Court rejected petitioners' arguments that the Court of Appeals decision conflicted with case law and/or or raised a significant constitutional question warranting review under RAP 13.4(b)(1) and (3) respectively. 184 Wn.2d 1017, 389 P.3d 460 (2015). The Supreme Court went on to state that the petitioners had failed to otherwise identify any reviewable

[5] The only other case to address the issue of whether wood debris is a hazardous substance under MTCA ruled in an unpublished decision that it is not. See *Arkema, Inc. v. Asarco, Inc.*, 2007 WL 1821024 at 7 (2007).

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error by the Court of Appeals. *Id.* Contrary to Respondent's contention, the Supreme Court did not specifically mention, let alone deny, review based on a determination that the issue raised was not of substantial interest.

B. The Decision of the Court of Appeals is in Conflict with Decisions of the Supreme Court

The Supreme Court has repeatedly found that a Court of Appeals exceeds its authority if it bases its decision on issues not raised for review, including issues pertaining to Superior Court rulings for which no error was assigned. For example, in *State v. Hubbard*, the Supreme Court reversed a Court of Appeals decision based on the Court of Appeals' conclusion on a ruling neither party appealed. 103 Wn.2d 570, 573-74, 693 P.2d 718 (1985). In *Allied Daily Newspapers v. Eikenberry*, the Supreme Court confirmed that "[a] ruling of the trial court to which no error has been assigned is not subject to review," therefore any issues pertaining to such a ruling are not properly before the appellate court nor will the appellate court address them. 121 Wn.2d 205, 213-14, 848 P.2d 1258 (1993). In *Babcock v. State*, the Supreme Court held that "[i]n reviewing [a] trial court's decision, [appellate courts] confine [them]selves

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to the issues the parties have raised." 116 Wn.2d 596, 606, 809 P.2d 143 (1991).

Here, the Decision is in direct conflict with *Hubbard, Allied Daily Newspapers,* and *Babcock* in that it is based on non-appealed issues beyond the scope of the *sole* issue appealed, certified for review, and accepted for review: whether wood debris itself is a hazardous substance under MTCA. Petitioners brought two distinct requests for summary judgment in a single pleading at the trial court level. The first was a request for the Superior Court to grant summary judgment confirming that wood debris itself is not a hazardous substance under MTCA. The second was a request for summary judgment dismissing Respondent's MTCA claims based on actual designated hazardous substances due to the lack of evidence of the release of the same during Petitioners' alleged periods of operation. The Superior Court denied both summary judgment requests in a single order.

The RAPs permit review of only part of an order. *See e.g.* Wash. R. App. P. 2.4 ("The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal"). Upon Petitioners' motion, the Superior Court only certified the first summary judgment issue of whether wood debris itself is a hazardous

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substance under MTCA for interlocutory review by the Court of Appeals. Similarly, Petitioners *only* designated the Superior Court's ruling on the first summary judgment issue of whether wood debris itself is a hazardous substance under MTCA for review in their Notice of Discretionary Review and Motion for Discretionary Review filed with the Court of Appeals. *See* Pet'rs' Notice of Discretionary Review at 1; Pet'rs' Mot. for Discretionary Review at 1.

The Rules of Appellate Procedure provide that "upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted." Wash. R. App. P. 2.3(e). The Court of Appeals did precisely that, once again confirming that the *sole* issue for consideration on appeal was whether wood debris itself is a "hazardous substance" under MTCA as a matter of law. Notation Ruling of Commissioner Mary Neel Granting Review, 78726-8-I at 4 (2018) ("the certified issue, whether wood debris is a hazardous substance under the MTCA, is a question of law.").

Petitioners did not appeal, the Superior Court did not certify for interlocutory review, and the Court of Appeals did not designate for review the distinct and separate factual issue of whether Petitioners are liable for clearly designated hazardous substances such as metals, PAHs,

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phenols, dioxins, and furans alleged to be present at the site. That issue remains before the Superior Court.

The Court of Appeals resolved the sole issue on appeal in favor of Petitioners, concluding that wood debris is not a hazardous substance under MTCA: "Ecology . . . essentially conced[ed] that wood debris itself does not fit into the definitions of a hazardous substance in [MTCA]. *We agree*." A-10 (emphasis added). Having resolved the only issue on appeal, the Court of Appeals should have stopped its analysis there, reversed the portion of the Superior Court's order addressing this particular summary judgment issue (and only this issue), and remanded the case for further proceedings consisting with this ruling.

Instead, the Court of Appeals improperly went beyond the only issue for review on appeal and applied the summary judgment standard to the *non-appealed* issue of whether, viewing all evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, a material issue of fact existed as to whether Petitioners might be liable for the release of clearly designated hazardous substances alleged to be present at the site. A-10 – A-11. That ruling is not only immaterial to the certified question, it pertains directly to the summary judgment ruling Petitioners and Superior Court intentionally did

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not raise for interlocutory review. On this basis, the Court of Appeals issued a blanket affirmation of the Superior Court order denying summary judgment on both issues in conflict with *Hubbard, Allied Daily Newspapers,* and *Babcock*. The Court of Appeals should have limited its decision to its conclusion that wood debris is not a hazardous substance under MTCA and reversed only that portion of the subject order.

C. The Decision is in Conflict with Published Decisions of the Court of Appeals

Courts of Appeal have repeatedly issued rulings consistent with *Hubbard, Allied Daily Newspapers,* and *Babcock*. For example, in *Richardson v. Denend*, the Court of Appeals, Division 2, declined to review issues pertaining to a ruling that was not assigned error on review. 59 Wn. App. 92, 795 P.2d 1192, 1195 n. 2 (1990).

The Decision is in conflict with *Richardson* and similar Court of Appeals decisions under *Hubbard, Allied Daily Newspapers,* and *Babcock*, in that, for the reasons stated above, the Court of Appeals exceeded its authority as a reviewing court.

The Court of Appeals has ruled in cases such as *Pacific Marine Ins. Co. v. State ex rel. Dept. of Revenue*, 181 Wn. App. 730, 329 P.3d 101 (Div. 2 2014) and *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385

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P.3d 233 (Div. 1 2016) that it may affirm an *appealed ruling* on a motion for summary judgment on any ground supported by the record. Those cases do not address, let alone stand for, the proposition that a Court of Appeals has authority to rule on a separate summary judgment ruling not presented for review on appeal, as was the case here. They have no bearing on the clear rule of law under *Hubbard, Allied Daily Newspapers,* and *Babcock* prohibiting the exceedance of authority found in the Decision.

Petitioners do not contest that the Court of Appeals could properly affirm the appealed ruling, *i.e.* the trial court's ruling on the issue of whether wood debris is a hazardous substance under MTCA as a matter of law on any ground supported by the record. Petitioners assign no error to the Court of Appeals' determination that wood debris is not a hazardous substance under MTCA. The error occurred when the Court of Appeals went beyond that certified issue and proceeded to ultimately rule on an issue not raised on appeal in direct conflict with *Richardson* and other Court of Appeal decisions under *Hubbard, Allied Daily Newspapers,* and *Babcock*.

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III. RESPONDENT'S MISSTATEMENTS ARE IMPROPER

In its Amended Answer, Respondent makes a number of inaccurate statements to the Court without support in the record.

First, Respondent improperly represents to the Court, without any authority in the record, that Petitioners "admitted" to a "historical practice of depositing industrial wood waste debris in the marine environment." Resp't Am. Answer at 1. To the contrary, Petitioners dispute not only "operator" status but also responsibility for wood debris in the marine environment at the site. In fact, as counsel for Petitioner Frontier noted during summary judgment oral argument, Petitioner Frontier was prevented by contract from performing functions for the Port of Anacortes in the marine environment portion of the site. Report of Proceedings (June 21, 2018) at 33:3-7 ("[Frontier] wasn't even allowed, by contract, to enter the [marine environment]. They weren't allowed to actually load logs onto the ship."). Petitioners have repeatedly stated their position that it was Respondent's own use of its facility for log handling for 50 years that resulted in the deposit of wood debris in the marine environment. *See e.g.* CP 4

Second, Respondent misrepresents to the Court, without reference to any authority in the record, that "Defendants broadly argued [to the

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Court of Appeals] that they had no liability whatsoever under MTCA for the industrial wood waste they deposited into the marine environment." Resp't Am. Answer at n4. However, during oral argument before the Court of Appeals, Petitioners were clear that the issue of their liability for any designated hazardous substance alleged to be present at the site, including any resulting from wood debris decomposition, is currently before the Superior Court. Petitioners never asserted to the Court of Appeals that they were free from any "liability whatsoever" under MTCA.

Finally, Respondent misrepresents the nature of its briefing before the Court of Appeals when it states:

> In short, the Court recognized that wood debris itself was not included in the definition of a hazardous substance in RCW 70.105D.020(13). But this was never the argument of the Port, who instead discussed the particular issue of industrial wood debris in the marine environment. Thus, the Port's briefing addressed the relationship between MTCA and the [Sediment Management Standards ("SMS")].

Resp't Am. Answer at 13. Not only did Respondent make the very argument it now denies making, the entirety of Respondent's SMS argument in its briefing was limited to the issue of whether wood debris is a hazardous substance under subpart (e) of MTCA's definition of hazardous substance set forth at RCW 70.105D.020(13). *See* Br. of Resp't Port of Anacortes. MTCA's definition of hazardous substances set forth at

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RCW 70.105D.020(13) lists five exclusive categories of hazardous substances. Respondent argued that by way of the SMS, Ecology had discretion under one of the five definition categories to determine wood debris to be a hazardous substance at a given site on a case-by-case basis. Respondent's entire SMS argument was limited to the proposition that wood debris met the statutory definition of "hazardous substance" under MTCA vis-à-vis the SMS. Respondent's statements otherwise are without support.

IV. CONCLUSION

While not originally raised in the original petition for review, Supreme Court review of the Court of Appeals' August 19, 2019 Decision is proper under RAP 13.4(b)(1), (2), and (4). Petitioners respectfully request that this Court grant the Petition for Review.

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DATED this 5th day of February, 2020.

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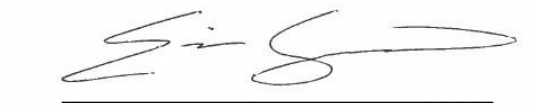

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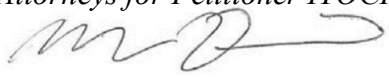

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CERTIFICATE OF SERVICE

I, Sharon Reinhart, state that on the 5th day of February, 2020, I caused the copies of the Joint Reply to New Issue Raised in Amended Answer to Joint Petition for Review 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 5th day of February, 2020, in Seattle, Washington.

s/ *Sharon L. Reinhart*

BEVERIDGE & DIAMOND - SEATTLE

February 05, 2020 - 3:37 PM

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