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SEATTLE
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No. 76954-1
(Court of Appeals No. 53920-5-1)

SUPREME COURT OF
THE STATE OF WASHINGTON

JOSEF VENTENBERGS, KENDALL TRUCKING, INC., a Washington
Corporation, RONALD HAIDER, and HAIDER CONSTRUCTION,
INC., a Washington Corporation,

Petitioners,

v.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC
UTILITIES, and CHUCK CLARKE, in his official capacity as Director of
Seattle Public Utilities,

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste
Management of Seattle, a Delaware Corporation,

RABANCO, LTD., a Washington corporation,

Respondents.

**PETITIONERS' REPLY TO SEATTLE RESPONDENTS' ANSWER
TO PETITION FOR REVIEW**

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ORIGINAL

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I. INTRODUCTION

In its Answer to the Petition for Review, the City chooses not to defend the reasoning, such as it is, used by the Court of Appeals to affirm the trial court in this case. Perhaps realizing that the Court of Appeals' decision is analytically unsupportable, the City implicitly rejects the Court of Appeals' rationale and instead argues alternative methods to arrive at the same conclusion. Petitioners agree that the reasoning of the Court of Appeals' decision is not worth defending. However, as discussed in this Reply and demonstrated in the briefing below, the City's reasoning is no more persuasive than that used by the Court of Appeals.

By mischaracterizing Petitioners' claims, the City attempts to restrict the scope of the Privileges or Immunities Clause of the Washington Constitution to exclude a right recognized as fundamental for 180 years. Instead of ignoring this Court's decision in *Grant County Fire Protection District Number 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) ("*Grant County II*"), as did the Court of Appeals, the City argues that *Grant County II* "pared back" the fundamental rights to which the Privileges or Immunities Clause applies. To the contrary, *Grant County II* adopted and reaffirmed well-settled protections – including protecting the right to earn a living – already extant in both federal and state case law.

The City also urges a reading of RCW 35.21.156 – the statute setting out the procedures by which municipalities may enter into contracts such as those at issue here – that would render the entire statute superfluous and result in absurd consequences.

Finally, in making its arguments, the City seriously misrepresents Petitioners’ response to the motions to publish filed in this case by Rabanco and Waste Management. For the same reasons the Court of Appeals decision was unsuitable for publication – a failure to cite *Grant County II* and a general failure to conduct a substantive analysis of the important issues raised by Petitioners – a grant of the Petition is all the more appropriate here. Petitioners deserve to have their claims heard by a court that will apply the correct standards and follow applicable case law.

II. ARGUMENT

Instead of focusing on the reasoning of the Court of Appeals’ decision as discussed in the Petition, the City raises a number of new issues in its Answer for which a reply is appropriate. RAP 13.4(d).

A. ***Grant County II* Did Not “Pare Back” the Protections of the Privileges or Immunities Clause**

The City urges a strained reading of the Privileges or Immunities Clause inconsistent with the text, history, and purpose of that provision. The City argues that the Court of Appeals correctly ignored *Grant County*

II because that case “pare[d] back the classification of ‘fundamental rights’ the Supreme Court had previously decided in *Grant County I*.”¹ Answer at 18. It argues that because the protections of the clause have been limited, Petitioners have no fundamental right at issue here. The City is wrong. *Grant County II* affirmed the protection of fundamental rights already existing in federal and state law, including the right Ventenbergs seeks to vindicate here.

In *Grant County II*, this Court adopted the definition of fundamental rights contained in *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). *Vance*, in turn, paraphrases the classic statement of the scope of the privileges and immunities guaranteed by Article IV, Section 2 of the United States Constitution in *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 F. Cas. 546 (No. 3, 230) (CCED Pa. 1823). In *Corfield*, Justice Washington, sitting as Circuit Justice, held that the Privileges and Immunities Clause protects only fundamental rights and not every public benefit established by positive law. Justice Washington held that such fundamental rights would “be more tedious than difficult to enumerate,” but included the right “to pursue and obtain happiness” and the right of the citizen to pass through or reside in another state “for purposes of trade, agriculture, professional pursuits, or otherwise” *Corfield*, 6 F. Cas. 551-52. It is

¹ *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (“*Grant County I*”).

well established that the fundamental rights discussed in *Corfield*, and adopted by this Court in *Vance* and *Grant County II*, include protection of “professional pursuits.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 n.10, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985). As the Supreme Court has stated,

Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity.

United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 219, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984) (internal citations omitted).

By recognizing that the protections of the Washington Privileges or Immunities Clause apply to those “fundamental rights” also protected by the federal Privileges and Immunities Clause, this Court did not “pare back” the protections of article I, section 12 to exclude the right at issue here. Rather, by adopting this definition of “fundamental rights,” this Court recognized that the right claimed by Ventenbergs – whether it is classified as the right to pursue a common calling,² the right to hold specific private employment and follow a chosen profession free from unreasonable government interference,³ or the right to work for a living in

² *United Bldg.*, 465 U.S. at 219.

³ *Plumbers & Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 906, 915, 724 P.2d 1030 (1986).

the common occupations of the community⁴ – is fundamental under both the United States and Washington Constitutions.

Nonetheless, the City argues that a municipality may condition the exercise of this fundamental right on the citizen's ability to obtain a contract from the municipality allowing the citizen to exercise that right. Answer at 16. The City's argument results in the following syllogism that, if adopted, would essentially gut the protections of the Privileges or Immunities Clause: because the City has conditioned the exercise of a right of citizenship on its grant of a contract, citizens may be denied their fundamental rights for no reason or for any reason⁵ because they do not possess a right to a government contract.⁶ Petitioners have located nothing in the text, history, or cases interpreting article I, section 12 that grants the government unlimited authority to so condition the exercise of a fundamental right. Certainly, *Grant County II* did nothing to restrict the long line of federal and state cases holding that the right to pursue an occupation free from unreasonable governmental restrictions is protected

⁴ *Truax v. Raich*, 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131 (1915).

⁵ Or, as is the case here, because the government wishes to avoid a meritless lawsuit. CP 516.

⁶ Petitioners demonstrated below that the case the City cites for the proposition that a person does not have a right to a government contract did not involve situations where the party who was unable to obtain such a contract was legally forbidden from practicing his or her profession at all, as is the case here. See Appellants' Reply to Seattle Respondents at 9 (discussing *Quinn Const. Co. v. King County Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 44 P.3d 865 (2002)).

under our constitutional system.⁷ To the contrary, the government may only condition or interfere with the exercise of such a fundamental right if it can prove that the reason for such interference rests on “reasonable grounds for distinguishing between those who fall within the class and those who do not, and . . . the disparity of treatment [is] germane to the object of the law in which it appears.” *United Parcel Serv., Inc. v. Department of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984).⁸ It was this analysis the Court of Appeals failed to conduct.⁹

⁷ See *Plumbers & Steamfitters Union Local 598*, 44 Wn. App. at 915; *Duranceau v. City of Tacoma*, 27 Wn. App. 777, 780, 620 P.2d 533 (1980) (“The right to hold specific private employment free from unreasonable government interference is a fundamental right which comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment”) (internal quotation marks and citation omitted); *AK-WA, Inc. v. Department of Labor & Indust.*, 66 Wn. App. 484, 492, 832 P.2d 877 (1992); *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (Fourteenth Amendment includes a generalized right to choose one’s field of private employment, albeit subject to reasonable governmental regulation); *Examining Bd. of Eng’rs v. Otero*, 426 U.S. 572, 604, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976) (protection of the right to work for a living in a common occupation was the purpose of the Fourteenth Amendment); *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) (“the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment”). As the U.S. Supreme Court has stated:

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

Truax, 239 U.S. at 41.

⁸ Despite the Court of Appeals’ conclusion and the arguments of the Respondents, this standard is not the deferential “rational basis” test. In *Grant County I*, Justice Madsen elaborated on the difference between the two standards:

[E]arly cases indicate that the constitutional standard [of reasonable grounds review] is not the same as the present equal protection “rational basis” test, where any conceivable legislative reason for a classification will suffice.

B. Petitioners' Statutory Claims are Entitled to Review

The City does not attempt to defend the Court of Appeals' conclusion that the Petitioners' claims regarding RCW 35.21.156 are moot.¹⁰ It appears that the City agrees with Petitioners that the Court of

Instead, the . . . classification must rest on some real difference between those within and without the class that is relevant to the . . . asserted purpose of the legislation.

Grant County I, 145 Wn.2d at 741 (Madsen, J., concurring and dissenting) (emphasis added).

⁹ Had the Court of Appeals conducted such a review, it would have discovered that the City's justifications for excluding Ventenbergs from practicing his profession failed this standard. Although the City attempts to provide *ex post facto* justifications for avoiding required statutory processes and negotiating and contracting solely with Rabanco and Waste Management, these reasons are fatally undermined by the testimony of the City employee in charge of negotiating the contracts. None of the City's purported public health and safety justifications were dependent on restricting the market to Rabanco and Waste Management, and each could be achieved with more than two haulers. CP 543. In fact, the City decided to contract with Rabanco and Waste Management simply because it feared these companies would sue the City. CP 516. The City's argument that it had some other reason for choosing Rabanco and Waste Management over other haulers, is simply false because the City did not know there were any other haulers when it signed the contracts with Rabanco and Waste Management. CP 898. The City's argument that Mr. Hoffman's testimony shows that Mr. Hoffman – the man that negotiated these contracts and oversees their performance now – did not know whether the City's health and safety goals are achieved by the City's grant of monopolies is merely sophistry – presumably, if someone employed by the City could make this connection, the City would have produced some evidence from such a person. It has not.

¹⁰ RCW 35.21.156(1) provides that the legislative authority of a city or town

may contract with one or more vendors for one or more of the design, construction, or operation of, or other service related to, the systems, plants, sites, or other facilities for solid waste handling in accordance with the procedures set forth in this section. Solid waste handling systems, plants, sites, or other facilities constructed, purchased, acquired, leased, added to, altered, extended, maintained, managed, utilized, or operated pursuant to this section, RCW 35.21.120 and 35.21.152, whether publicly or privately owned, shall be in substantial compliance with the solid waste management plan applicable to the city or town

RCW 35.21.156(1).

Appeals' decision on this point is fatally flawed. Petition at 17-19. Instead, the City argues that RCW 35.21.156 is merely a permissive statute that the City, or any other municipality, may follow at its discretion. Answer at 14-15. This reading would create an absurd result inconsistent with the plain language of the statute.

RCW 35.21.156 provides that municipalities “may” contract for solid waste handling systems if they wish – that is, the Legislature grants municipalities the power to enter into such contracts. In that regard, a municipality only has those powers delegated to it by the Legislature. *Employco Personnel Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 617, 817 P.2d 1373 (1991). The word “may” in RCW 35.21.156(1) thus plainly grants municipalities the power to “contract with one or more vendors for . . . service related to . . . systems . . . for solid waste handling . . .” If the municipality chooses to enter into such contracts, however, such contracting is to be done “in accordance with the procedures set forth in this section.” This is the plain and unequivocal meaning of the statute.¹¹ The City does not deny that it contracted with Rabanco and

¹¹ The City also states that *Shaw Disposal, Inc. v. City of Auburn*, 15 Wn. App. 65, 546 P.2d 1236 (1976) “confirmed” that there is no constitutional requirement that a municipality issue contracts through competitive bidding. Answer at 15. This is simply wrong. The *Shaw Disposal* court specifically stated, “[I]t is clear that Auburn . . . may contract for garbage disposal without restriction unless prevented by the constitution, general law, or ordinance.” *Shaw Disposal*, 15 Wn. App. at 66 (emphasis added). After a thorough analysis of the particular statutes at issue in that case – ones that are not at issue here – the court held that these statutes did not specifically require a code city to

Waste Management without following the procedures for issuing contracts set forth in RCW 35.21.156.

Courts are instructed to construe statutes so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The City's argument that RCW 35.21.156 is essentially a friendly suggestion from the Legislature that municipalities may ignore renders the entire statute meaningless and superfluous. If a municipality possesses the power to contract with vendors in any manner, why did the Legislature bother writing this law in the first place? The City's reading of RCW 35.21.156 renders the entire statute purposeless. Courts, however, should avoid readings of statutes that result in unlikely, absurd or strained consequences. *Id.* Here, the City's absurd reading would erase this statute from the Revised Code of Washington. This issue is of substantial public interest and review is proper.¹²

conduct a public bidding process to extend a waste collection contract. *Id.* at 66-67. Importantly, the court specifically noted that the case did not involve a constitutional challenge to the city's extension of its contract. *Id.* at 66.

¹² The City also claims that the unidentified, undated, and anonymously-authored documents it claims are legislative history were properly authenticated because such documents were "verified by declaration of Seattle's paralegal." Answer at 14 n. 28. The City posits that this proves the documents were "obtained by contacting the State Archives in Olympia." *Id.* However, the City cannot self-authenticate public documents produced and held by separate governmental entities. The City's declaration does not comport with the standards of ER 901, CR 44, or RCW 5.44.040, regarding the authenticity of public records and reports. Under these rules, copies of public documents must be authenticated and certified by judges or public officers with legal custody of the

C. Review is Appropriate for the Same Reasons Publication was Inappropriate

The City argues that Petitioners' response to the motions to publish filed by Rabanco and Waste Management undermines Petitioners' arguments in favor of review. The City has confused the standards for publication – which the Court of Appeals' decision manifestly failed to meet – with the standards for granting review. This case raises important issues consistent with the standards for granting review, but the Court of Appeals did not bother to address them. For instance, this case raises important issues of constitutional law regarding the application of this Court's recent decision in *Grant County II* – a case the Court of Appeals' decision did not mention. It also raises important issues of public interest that the Court of Appeals either summarily dismissed or failed to comprehend. For these reasons, review is warranted.

1. The Court of Appeals' Decision Fails to Address the Issues Raised by Petitioners

A petition for review will be granted if, among other things, “the decision of the Court of Appeals is in conflict with a decision of the

originals. The City's attempt to authenticate these documents with the statement of a City employee who apparently does not, and did not, have legal custody of the originals and who is not an employee of the State Archives fails to meet these standards. These unauthenticated documents cannot be classified as legal authority because there is no legally sufficient proof of their identity, origin or veracity and they were never submitted to the trial court, where Petitioners could have tested the validity of their contents. The City should therefore be sanctioned pursuant to RAP 10.7.

Supreme Court,” “[i]f a significant question of law under the Constitution of the State of Washington . . . is involved,” or “[i]f the petition involves an issue of substantial public interest” RAP 13.4(b) (emphasis added).¹³ On the other hand, publication is appropriate when “the decision” of the Court of Appeals “determines an unsettled or new question of law,” “modifies, clarifies or reverses an established principle of law,” or “is of general public interest or importance” RAP 12.3(e) (emphasis added).

The decision in this case met none of the standards for publication. While this case raised important issues of constitutional and statutory law, the Court of Appeals ignored or failed to comprehend them. For instance, this case could have been one of the first appellate cases to interpret the scope of *Grant County II*. Instead, the court simply ignored this critical decision. While this case raises important issues that would have been worthy of publication had the Court of Appeals bothered to address them, the court’s February 14 decision did no such thing.

Despite the City’s characterization of the requirements for publication and granting review as “parallel,” Answer at 2, these standards

¹³ As demonstrated in the Petition, the Court of Appeals’ decision is in conflict with this Court’s decision in *Grant County II*, as well as *Manufactured Housing Communities v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000). Moreover, the Petition raises significant questions of law under the Washington Constitution and involves issues of substantial public interest. See Petition for Review at 14-19.

are distinct, with the standards for publication primarily focusing on the nature of the decision and the standards for granting a petition focusing on the nature of the issues in the case.¹⁴ Thus, this Court's decision to grant review is not dependent solely on the nature of the Court of Appeals' decision, but looks to the substance of the case and the issues raised by the parties. Because Petitioners have raised issues meeting the standard for review – which the Court of Appeals' decision failed to substantively address – publication was not appropriate but review should be granted.

2. The City Misrepresents Petitioners' Response to the Motions to Publish

The City's Answer fails to note that Petitioners' response to the motions to publish of Rabanco and Waste Management focused on these companies switching their position on the nature of the controversy in this case. In short, before the trial court and the Court of Appeals, Rabanco and Waste Management asserted that this case was governed by well-established case law. As soon as they won at the Court of Appeals, however, these companies suddenly viewed the court's decision as

¹⁴ For instance, the City asserts that Petitioners are inconsistent in urging this Court to find the takings issue raises a significant question of law, arguing "the takings issue did not even raise an 'unsettled or new question of law' (RAP 12.3(d)(1)) to them when they filed their Response to Motion to Publish" Answer at 12 n. 26 (emphasis added). The City gets the standard wrong. The takings issue does indeed raise a significant question of law – however, the Court of Appeals' decision did not comprehend it and failed to even mention *Manufactured Housing*. Thus, the Court of Appeals decision was unsuitable for publication, while this issue is suitable for review by this Court.

“interpreting an evolving question.” Waste Management Motion to Publish at 1. Petitioners’ response merely reminded the Court of Appeals of the companies’ previously stated positions. As stated in Petitioners’ response to the “joinder” of amicus Washington Refuse and Recycling Association (a coalition of monopoly providers of waste hauling services wishing to preserve their monopolies):

In arguing that this Court’s [February 14] decision simply accepted Appellees’ arguments and therefore publication is not necessary, Appellants’ response repeated Appellees’ arguments that this case was determined by such cases and this Court’s conclusion accepting such arguments. Appellants’ response is not an admission that Appellants believe these cases to be applicable or even relevant or that the Court’s February 14 decision reflected current Washington law.

Appellants’ Response to Washington Refuse and Recycling Association Joinder in Motions at 2.¹⁵

D. The Takings Issue was Properly Raised and is Appropriate for Review

In arguing that this Court should not accept review of Petitioners’ takings claim, the City asserts that this issue was not properly before the trial court. Answer at 13. The City is wrong. As discussed in the Petition, the takings claim was pled in response to the City’s Counterclaim, portions of which the trial court granted and portions it did

¹⁵ Copies of the Joinder and Petitioners’ Response thereto are attached to this Reply as Exhibits A and B, respectively.

not. Petition at 15 n. 4. The City does not explain how an issue that was not dismissed before the trial court's grant of summary judgment was improperly before that court. Just because the trial court did not explicitly address the issue in its explanatory letter does not mean that the trial court found some unmentioned procedural flaw in the Petitioners' pleading of the issue. *See Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978) (the function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists, not to resolve issues of fact or to arrive at conclusions based thereon, and findings and conclusions on summary judgment are therefore superfluous).

The City's substantive arguments are wrong as well. The City claims that because Haider pays Ventenbergs to take construction, demolition and landclearing ("CDL") waste from his worksites, this presumably means that he never possessed the CDL to begin with and Haider cannot raise a takings claim regarding it. Answer at 13. However, the fact that Haider pays Ventenbergs to take CDL from his work sites supports the validity of Petitioners' takings claim. That is because Haider pays Ventenbergs less for better service in removing the CDL than he would receive from Rabanco and Waste Management. CP 16. Like the Court of Appeals, the City is confusing the right to alienate property with the property itself. It is Haider's right to freely alienate his property that

the City has taken and transferred to private parties in violation of article I, section 16. Because he pays less for better service when he uses Ventenbergs instead of the expensive and nonresponsive monopolies the City orders him to use, his right to alienate his property to Ventenbergs is very valuable. Petition at 16.

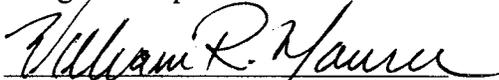
III. CONCLUSION

For the reasons discussed above and in the Petition, this Court should grant review of the Court of Appeals' decision terminating review.

RESPECTFULLY submitted this 3rd day of May 2005.

INSTITUTE FOR JUSTICE

Washington Chapter

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DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On May 3, 2005, a true copy of the foregoing Reply was placed in envelopes addressed to the following persons:

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which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 3rd day of May 2005 at Seattle, Washington.


Yvonne Maletic

EXHIBIT A

REC'D

MAR 14 2005

13 Washington

No. 53920-5

(King County Superior Court No. 03-2-25260-3 SEA)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOSEF VENTENBERGS, KENDALL TRUCKING, a
Washington corporation, RONALD HAIDER and HAIDER
CONSTRUCTION, INC., a Washington corporation,

Plaintiffs/Appellants,

vs.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE
PUBLIC UTILITIES, CHUCK CLARKE in his Official Capacity
as Director of Seattle Public Utilities; WASTE MANAGEMENT
OF WASHINGTON, INC., d/b/a Waste Management of
Seattle, a Delaware corporation; RABANCO, LTD., a
Washington corporation,

Defendants/Respondents.

AMICUS CURIAE WASHINGTON REFUSE AND RECYCLING
ASSOCIATION'S JOINDER IN MOTION TO PUBLISH
AND RESPONSE TO PLAINTIFFS/APPELLANTS'
RESPONSE TO MOTION TO PUBLISH

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COMES NOW amicus curiae Washington Refuse and Recycling Association (WRRRA) and respectfully submits the following for the Court's consideration:

Amicus WRRRA supports the Motions to Publish filed by Rabanco and Waste Management of Washington. As indicated in its amicus brief, WRRRA represents over 60 solid waste collection companies in Washington. Many of these businesses contract with cities for service; all have Washington Utilities and Transportation Commission Certificates of Public Convenience and Necessity (G-permits) by which they serve geographical areas, including many cities which choose not to contract or provide the service themselves.

Illegal hauling is a major concern for WRRRA and its members. This decision clarifies what illegal hauling is in the context of "contract cities" such as Seattle. The hauling of "CDL"¹ has been the subject of much discussion and, perhaps, confusion within the industry and this Court's clarification that CDL is, in fact, solid waste as per RCW

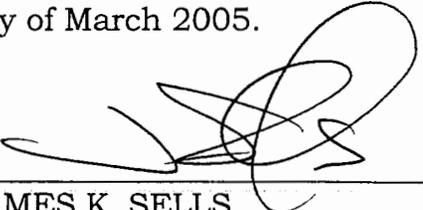
¹ Construction, demolition and land clearing

70.95.030(22) and Seattle Municipal Code Sec. 21.36.012(5) will be very helpful in resolving this issue.

Appellants' contention that since defendants argued that these issues have long since been decided, therefore there is no need for another published opinion, is confusing at best, and self-accusatory at worst. One has to wonder why, if this is a well-settled issue, plaintiffs/appellants brought this lawsuit in the first place.

This is an issue that is of continuing interest and is subject to continuing discussion and consideration by cities and solid waste haulers. Publication of this decision will assist in resolving current situations and perhaps help to avoid future issues before they become confrontational.

DATED this ____ day of March 2005.



JAMES K. SELLS
WSBA No. 6040
Attorney for Amicus Curiae
Washington Refuse and
Recycling Association

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the foregoing AMICUS CURIAE WASHINGTON REFUSE AND RECYCLING ASSOCIATION'S JOINDER IN MOTION TO PUBLISH was served by first class mail, postage prepaid, on:

William R. Maurer
Jeanette M. Petersen
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Seattle, WA 98101-2380

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

DATED this 11th day of March 2005 at Silverdale, Kitsap County, Washington.

A handwritten signature in cursive script that reads "Cheryl L. Sinclair". The signature is written in dark ink and is positioned above a horizontal line.

Cheryl L. Sinclair

EXHIBIT B

MAR 14 2005

No. 53920-5

**COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

JOSEF VENTENBERGS, KENDALL
TRUCKING, INC., a Washington
Corporation, RONALD HAIDER, and
HAIDER CONSTRUCTION, INC., a
Washington Corporation,

Plaintiffs/Appellants,

v.

THE CITY OF SEATTLE, a municipal
corporation, SEATTLE PUBLIC
UTILITIES, and CHUCK CLARKE, in his
official capacity as Director of Seattle Public
Utilities, WASTE MANAGEMENT OF
WASHINGTON, INC., d/b/a Waste
Management of Seattle, a Delaware
Corporation, and RABANCO, LTD., a
Washington corporation,

Defendants/Respondents.

**APPELLANTS' RESPONSE
TO JOINDER OF
WASHINGTON REFUSE AND
RECYCLING ASSOCIATION
IN MOTIONS TO PUBLISH**

Appellants respond briefly to the undated "Joinder in Motion to Publish" submitted by Amicus Curiae Washington Refuse and Recycling Association (WRRRA). Appellants specifically respond to the argument that Appellants' response to the initial motions of Waste Management of Washington, Inc. and Rabanco, Ltd. was some sort of admission by Appellants as to the merits of their own suit.¹

¹ Appellants also note that such a "joinder" does not seem to be contemplated by the Rules of Appellate Procedure.



COPY

Appellants' response to Rabanco and Waste Management's motions to publish is emphatically not an admission that Appellants' suit was anything but well-grounded in current law, specifically the Washington Supreme Court's decision in *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004). However, this Court's February 14 decision rejected Appellants' arguments that this case was determined by *Grant County*, accepted the Appellees' arguments that the outcome was determined by a number of cases cited by Appellees, and rejected Appellants' arguments that such cases were inapplicable or distinguishable. In arguing that this Court's decision simply accepted Appellees' arguments and therefore publication is not necessary, Appellants' response repeated Appellees' arguments that this case was determined by such cases and this Court's conclusion accepting such arguments. Appellants' response is not an admission that Appellants believe these cases to be applicable or even relevant or that the Court's February 14 decision reflected current Washington law.

In sum, Appellants believe that this Court should hold Appellees and the WRRRA to their earlier characterization of the cases upon which they relied as determinative and deny the motions to publish.

RESPECTFULLY submitted this 14th day of March 2005.

INSTITUTE FOR JUSTICE
Washington Chapter

By 

William R. Maurer, WSBA #25451

Jeanette M. Petersen, WSBA #28299

Charity Osborn, WSBA #33782

811 First Avenue, Suite 625

Seattle, Washington 98104

(206) 341-9300

Attorneys for Appellants

DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington.

On March 14, 2005, a true copy of the foregoing Response was placed in envelopes addressed to the following persons:

Polly McNeill
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
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which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of March, 2005 at Seattle, Washington.



Yvonne Maletic