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THE SUPREME COURT
FOR THE STATE OF WASHINGTON

AIRPORT INVESTMENT COMPANY, INC.,

Petitioner,

vs.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, dba
SOUND TRANSIT, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT SOUND TRANSIT

Marisa L. Velling, WSBA# 18201
Matthew R. Hansen, WSBA# 36631
Ester Gordon, WSBA# 12655
Kellen Andrew Hade, WSBA# 44535
MILLER NASH GRAHAM & DUNN LLP
Pier 70
2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300
Attorneys for Respondent Sound Transit

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I. INTRODUCTION

The scope of this appeal changed considerably after the Court of Appeals. Petitioner Airport Investment Company (“AIC”) submitted to this Court only two of the errors that it assigned below. And while this is an eminent domain case neither of the two errors claimed by AIC relate to the issue of just compensation. AIC’s first alleged error is that the trial court erred in denying its request for a fee award. The right to a fee award is not a right afforded as part of the constitutional right to just compensation. It is controlled by statute.

AIC asks this Court to read into the pertinent eminent domain attorney fee statutes, RCW 8.25.070(1)(a) and .075(1)(b), “plain, bright-line requirements” that would mandate a fee award to a condemnee if the condemnor presents to the jury one or more specific property interest that is changed in any way, even a de minimus change, from the take on which the thirty-day offer is based. This limitation has never been adopted by the legislature, does not exist in the statutes as written and is contrary to the plain meaning of the statutes and existing case law. AIC’s interpretation of these statutes would cripple the spirit of settlement and inhibit the very settlement discussions the legislature intended the statutes.

The reality is that AIC is asking the public to pay for a disappointing trial result by reading additional requirements into the plain language of the attorney fee statutes to advance.

AIC’s second alleged error is that the trial court abused its discretion in admitting in court testimony from AIC’s president, Sandra

Oh, about a prior opinion of value that AIC communicated to Sound Transit.

Respondent Sound Transit asks this Court to interpret RCW 8.25.070(1)(a) and .075(1)(b) exactly as the legislature wrote them. Sound Transit also asks this Court to uphold the trial judge's discretion to admit testimony impeaching the property owner's claim that just compensation should exceed \$1.6 million. The Court of Appeals should be affirmed in its entirety.

II. FACTUAL BACKGROUND

This appeal is part of an eminent domain proceeding that began when Sound Transit filed its Petition in Eminent Domain and thereby initiated a proceeding to acquire two easements across AIC's property and to fix the just compensation owed (also referred to as the "fair market value").¹ Clerk's Papers (CP at 2-3). As part of this proceeding, Sound Transit condemned both a permanent easement and a temporary construction easement ("TCE") along the back edge of the subject property in order to construct and operate an elevated light rail guideway as part of Sound Transit's Link Light rail project (the "Project").

At issue on this appeal is the form of the TCE. The original form of TCE covered a 3,883 square foot area. CP 56, 1414. And it provided

¹ The facts and procedural history are discussed in detail in Sound Transit's Answer to the Petition for Review, which Sound Transit incorporates here along with the arguments on the merits also presented therein. Sound Transit restates the relevant facts for the Court's convenience.

for a non-exclusive three-year term, with exclusive use as needed for construction (anticipated to be ten to twelve weeks). CP at 53. Several weeks before trial Sound Transit's contractor concluded it could finish the work in a smaller footprint than originally anticipated. Based on this Sound Transit reduced the TCE area by nearly 1,000 square feet to respond to AIC's concerns about TCE parking impacts. CP at 405, 1019, 1414-15. The revised TCE retained the non-exclusive three-year term, and capped Sound Transit's exclusive use at a total of 160 non-consecutive days during that term.² CP at 1015.

Also at issue on this appeal is the admission of testimony from AIC's President, Sandra Oh as to AIC's and her belief with regard to the just compensation due. AIC engaged a pre-trial appraiser who opined that the just compensation due was \$485,000. CP at 204, 219, 257. AIC forwarded that appraisal to Sound Transit in July, 2012, with a cover letter sent on AIC's letterhead. The letter stated that AIC disagreed with Sound Transit's appraisal finding it to be "highly insufficient and inaccurate." It continued:

² During periods of non-exclusive use, AIC retained the right to continue to use the TCE area for hotel parking. CP at 53. At trial, Sound Transit intended to explain to the jury its use would be sporadic and only expected to be about ten to twelve weeks out of the three year term. CP at 1416. AIC moved to exclude Sound Transit's explanation so that AIC could more persuasively present the jury with its claim of \$900,000 in lost profits and valet parking expenses as damages for the full three-year term of the TCE. CP 396, 3481. Under this pressure from AIC, and with leave of the trial court, Sound Transit presented a revised form of TCE to AIC and to the jury.

Contrary to [Sound Transit's] appraisal, we believe [AIC's] appraisal accurately reflect what compensates for "just compensation."

We strongly believe we are entitled to a total of \$485,000 for just compensation. . . .

Unadmitted Trial Ex. 158 (emphasis added).³

Later AIC engaged a trial appraiser who opined that just compensation due was more than \$1.6m. CP 206, 257.

Thirty days before trial began, Sound Transit made a written settlement offer to AIC for \$463,500. CP 1334, 1414. By that time the parties had fully discussed Sound Transit's plan to reduce the TCE square footage and to use only a limited number of exclusive use days. CP 1414-16. AIC did not accept that offer and the matter proceeded to trial.

At trial, AIC's appraiser testified that total just compensation due was in excess of \$1.6 million. Sound Transit elicited in court testimony from AIC's President, Sandra Oh, about the prior opinion of value that AIC had communicated to Sound Transit in the July, 2012 letter. Sound Transit did not ask about the earlier appraisal, only about Ms. Oh's opinion of value in July 2012. VRP at 1202-06. Ms. Oh volunteered that the prior opinion of value was based on an appraisal. VRP 1205-06. AIC did not move to strike or request a curative instruction, choosing instead to

³ For the Court's convenience, AIC's July, 2012, letter is attached to this brief as Appendix A. Although never admitted at trial, AIC supplemented the record on March 19, 2014 to designate the letter for appellate review. The letter is also attached to AIC's opening brief at the Court of Appeals.

introduce testimony regarding the appraisal's perceived limitations. VRP 1207-09.

After a 10-day trial the jury awarded AIC \$225,000 in just compensation for the two easements. The trial judge denied AIC's post-verdict motion for attorneys' fees under RCW 8.25.070(1)(a) and .075(1)(b).

III. ARGUMENT

The trial court did not err, and AIC is not entitled to a fee award under either of the eminent domain attorney fee statutes at issue – RCW 8.25.070(1) or RCW 8.25.075(1)(b). Statutory interpretation is a legal question that the Court reviews de novo. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The trial court did not abuse its discretion in admitting Ms. Oh's in-court testimony from AIC's President about the prior opinion of value that AIC had communicated to Sound Transit in the July, 2012. A trial judge's evidentiary rulings, including the admissibility of alleged hearsay, are reversed only for an abuse of discretion. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

A. **ATTORNEY'S FEES**

The right to an award of attorney fees is not a right afforded as part of the constitutional right to just compensation. It is instead controlled by statute. *Peterson v. Port of Seattle*, 94 Wn.2d 479, 487, 618 P.2d 67 (1980). This court's interpretation of RCW 8.25.070(1)(a) and .075(1)(b)

begins, as with any other statute, with an analysis of the plain language used by the legislature, with the primary goal of giving effect to the legislature's intent. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

1. RCW 8.25.070(1) and RCW 8.25.075(1)(b) are clear and unambiguous and should be interpreted as written.

While the two eminent domain fee statutes at issue are similar in result, they differ in their application. According to the clear and unambiguous terms, RCW 8.25.070 applies only *if a trial is held* to determine value and RCW 8.25.075 applies only if the condemnation *proceeding* itself is abandoned. See, e.g., *State v. Buckley*, 18 Wn. App. 798, 572 P.2d 730 (1977).

- a. **A trial was held to fix just compensation, AIC is not entitled to attorney fees under RCW 8.25.070(1)(a).**

The parties could not agree on the amount of just compensation due and trial was held to fix the amount of just compensation to be paid. The jury awarded AIC \$225,000 in just compensation. The form and timing of Sound Transit's thirty-day offer defeats AIC's claim to fees under RCW 8.25.070(1)(a).

RCW 8.25.070(1)(a) provides, in relevant part:

[I]f a trial is held for fixing the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make *any* written offer in settlement to condemnee at least thirty days prior to the commencement of said trial;

Under the plain language of RCW 8.25.070(1)(a), a fee award is proper only if the condemnor fails to make any written offer in settlement to the condemnee more than thirty days before trial. This subsection of the statute, as drafted, requires only three things: (1) written offer; (2) in settlement; (3) thirty days before trial. The record is clear and it is undisputed that Sound Transit extended a written offer in settlement in the amount of \$463,500 to AIC more than thirty days before trial. The form and timing of Sound Transit's offer meets these three statutory requirements and defeats AIC's claim to fees under this the statute.

b. AIC mis-reads RCW 8.25.070(1)(a) to require the thirty-day offer to be based on the exact take presented to the jury and if not to mandate a fee award to the condemnee.

AIC interprets what it calls the "plain, bright-line requirements" of RCW 8.25.070(1)(a) to require the condemnor's thirty-day offer to be based on the exact take presented to the jury. This reads into the statute a fourth requirement that the take on which the thirty-day offer is based must be the take presented to the jury.

Compare RCW 8.25.070(1), as drafted by the legislature:

[T]he court shall award the condemnee reasonable attorney's fees: (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to the commencement of said trial

With RCW 8.25.070(1), as interpreted by AIC:

[T]he court shall award the condemnee reasonable attorney's fees: (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to the commencement of said trial *for the actual and exact take presented to the jury*

This interpretation of RCW 8.25.070(1)(a) would mean that if the condemnor makes *any* change, even a de minimus change, to any one or more of the property interests that comprise the overall take, after the date of the thirty-day offer, then as a matter of law, the offer is void and the original of the revised property interest be deemed abandoned. That would result in a mandatory fee award to the condemnee.

Not only does AIC's interpretation read into the statute words that are not there, but it fails to accomplish the legislature's intended result. As the Court of Appeals explained, the purpose of RCW 8.25.070 is to encourage good faith settlement negotiations.

c. A trial was held to fix just compensation and therefore the condemnation proceeding was not abandoned and AIC is not entitled to attorney fees under the plain language of RCW 8.25.075(1)(b).

The record is clear and it is undisputed that Sound Transit instituted this condemnation proceeding by filing its petition to acquire the subject property, the matter then proceeded to trial. The fact of the trial and decree defeats AIC's claim that the proceeding was abandoned and therefore AIC's claim to fees under this section of the statute.

RCW 8.25.075(1)(b) provides, in relevant part:

(1) A superior court having jurisdiction of *a proceeding initiated by a condemnor to acquire real property shall*

award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

(b) The proceeding is abandoned by the condemnor.

It is clear from the plain language of this statute that the “proceeding” that must be abandoned is the proceeding “initiated by [the] condemnor to acquire real property.” RCW 8.25.075(1). Here, the “proceeding” was not abandoned. The trial defeats AIC’s claim to fees under this section of the statute.

d. AIC mis-reads RCW 8.25.075(1)(b) to mean that a revision of one or more of the specific property interests after the thirty-day offer constitutes an abandonment of the “proceeding” mandating a fee award to the condemnee.

AIC asserts without authority that any revision to the specific property interests comprising the overall take is an abandonment of the “proceeding”. A “proceeding instituted by a condemnor to acquire real property” means exactly what it says: initiating a proceeding by filing a condemnation petition and paying just compensation to take the property. A condemnor abandons the proceeding when it abandons its effort to acquire the property from and pay just compensation to the condemnee. Nothing in the plain language of RCW 8.25.075(1)(b) suggests the legislature intended that statute to prevent condemnors from making reasonable changes to one or more of the specific property interests it ultimately acquires at the conclusion of the condemnation proceeding.

AIC’s interpretation of “proceeding” to equate one or more of the specific property interests comprising the overall total take is not

supported by the plain language of the statute. Nor is it supported by a reading of other eminent domain statutes that use “proceeding” to reference the condemnation action itself. *See, e.g.*, RCW 8.25.270 (If the property of a minor is to be taken during the condemnation proceeding court shall appoint a GAL); RCW 8.25.290(3) (Once insufficient notice of final action is cured the condemnor may file a new petition to commence a subsequent proceeding within one year after discontinuance).

This Court has already held that RCW 8.25.075(1)(b) is “clear and unambiguous” and applies when a condemnor abandons a proceeding and never takes any property as a result. *See, Port of Grays Harbor v. Citifor, Inc.*, 123 Wn.2d 610, 619, 869 P.2d 1018 (1994) (holding condemnor “clearly *abandoned* the condemnation proceedings” under RCW 8.25.075(1)(b) because it never acquired property). It is absurd to interpret “proceeding is abandoned” where Sound Transit prosecuted the condemnation to a jury verdict and has now defended that verdict all the way to the Supreme Court.

AIC avoids the commonsense interpretation of “proceeding” in RCW 8.25.075(1)(b) by reading the word out of the statute altogether. It contends Sound Transit is liable for fees because it “abandon[ed] the original TCE taking.” Petition for Review at 12. But again, the plain language speaks to a condemnor abandoning the proceeding as a whole, not any specific property at issue in the proceeding. Sound Transit always sought a temporary easement and ultimately acquired one. It never

abandoned the TCE, much less the proceeding itself. The plain language of RCW 8.25.075(1)(b) simply does not apply here.

The Court can begin and end its interpretation of RCW 8.25.070(1)(a) and .075(1)(b) with the plain language of those statutes, which are unambiguous and were properly applied by the trial court.

2. The plain language and intent behind RCW 8.25.070(1)(a) is to encourage settlement.

This language is unambiguous. RCW 8.25.070(1) encourages condemnors and condemnees to take a hard look at settlement options and avoid needless trials. A fee award is mandatory under RCW 8.25.070(1)(a) when a condemnor fails to extend any offer of settlement.

The parties unsuccessfully attempted settlement leading up to trial. More than 30 days before trial, Sound Transit wrote to AIC and offered \$463,500 to settle the proceeding, CP at 1067. Had AIC accepted this written offer, it would have avoided both the fees it incurred at trial and the jury's disappointing award of \$225,000.

This Court aptly recognized that "avoid[ing] the time, expense, and trouble litigation entails" is as important to the parties and the public in condemnation settlements as is paying just compensation. *Costich*, 152 Wn.2d at 475. AIC's interpretation of this statute would cripple the spirit of settlement and inhibit the very settlement discussions the legislature sought to inspire when it enacted legislation requiring the condemnor to extend a thirty-day offer of settlement in the first place. It would remove the incentive of the condemnor and condemnee to work

together cooperatively to mitigate damages or to settle the case if to do so would involve modifications or revisions to one or more of the specific property interests that are part of the overall take.

Condemnation proceedings are a vehicle by which public agencies are able to condemn private property for public projects. These projects generally call for construction of some or all of the project on the subject property. As construction plans become final, the condemnor is frequently required to make revisions to the specific property interests to acquire the rights necessary for the project and to mitigate the landowner's damages.

If the statutes require attorneys' fees for some changes and not others, that determination is best left to the trial judge. In *Costich*, this Court held there "may be factual scenarios" in which a 30-day offer under RCW 8.25.070(1)(a) would be invalid, but refused to speculate about what those circumstances would be, if they exist at all. *Costich*, 152 Wn.2d at 479. The trial judge in this case was well-versed in both the original and revised TCE and determined the change did not implicate either RCW 8.25.070(1)(a) or .075(1)(b). Again, AIC's position is that *any* change requires attorneys' fees, and for the reasons discussed above the Court should reject that premise. But if it determines there is room in the statutes for fact-finding, it should reserve that task to the trial judge who is familiar with the conduct of the litigation.

3. Tools of statutory construction also favor Sound Transit.

If the Court nonetheless finds ambiguity in these statutes, it can construe their meaning using the traditional tools of statutory construction.

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). The result favors Sound Transit for at least three reasons.

First, the Court should strictly interpret RCW 8.25.070(1)(a) and .075(1)(b) because those statutes deviate from the common law. Under the American rule, parties in civil actions generally must pay their own fees and costs. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666, 669 (2006). Landowners were also responsible at common law for the costs of a just compensation trial. *Peterson*, 94 Wn.2d at 487. Because RCW 8.25.070(1)(a) and .075(1)(b) are in derogation of both common law rules, they “must be construed narrowly.” *Ondeo*, 159 Wn.2d at 303. AIC’s interpretations of these statutes are far from narrow; they would subject condemnors to attorneys’ fees any time one or more of the specific property interests needed for the project is changed in *any* way.

Second, RCW 8.25.075(1)(b) is modeled on a federal attorneys’ fee statute that is also construed narrowly. The legislature enacted RCW 8.25.075 “to bring Washington law into conformity with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.” *City of Seattle v. McCoy*, 112 Wn. App. 26, 32, 48 P.3d 993 (2002). The federal act includes an attorneys’ fee statute virtually identical to RCW 8.25.075⁴ that Congress intended to be restrictive. *United States*

⁴ 42 U.S.C. §4654(a)(2) (“The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property . . . shall award the owner . . . reasonable

v. *4.18 Acres of Land*, 542 F.2d 789, 789 (9th Cir. 1976). The legislative history is replete with concerns that a broad right to attorneys' fees does not encourage efficient use of public resources:

Ordinarily the Government should not be required to pay expenses incurred by property owners in connection with condemnation proceedings. The invitation to litigation is evident.

Id. (quoting H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. (1970)). RCW 8.25.075 should likewise be construed narrowly to mean a proceeding is abandoned only when the action itself is dismissed. *See Daviscourt v. Peistrup*, 40 Wn. App. 433, 444 n.11, 698 P.2d 1093 (1985) (restating that RCW 8.25.075 is "in conformity with the 1970 federal act's attorney fee provision [and] essentially requires payment of the condemnee's litigation expenses, including attorney fees, where the action is dismissed).

Third, RCW 8.25.075's predecessor statute (former RCW 8.25.030 (1970)) was more expansive but ultimately repealed, further evidencing the legislature's intent to narrow the right to attorneys' fees. *See, Gorre v. City of Tacoma*, 184 Wn.2d 30, 46, 357 P.3d 625 (2015) (prior versions of statutes can indicate legislative intent). Former RCW 8.25.030 (1970) provided for attorneys' fees if "a condemnor . . . shall fail to proceed to acquire the property or abandons the proceedings." But, as discussed above, the legislature replaced former RCW 8.25.030 with RCW 8.25.075

costs, disbursements, and expenses . . . if . . . the proceeding is abandoned by the United States.").

to align Washington's statute to federal law. LAWS OF 1971, 1st ex. Sess., ch. 240, § 22. Thus, the legislature deliberately limited the right to attorneys' fees under that statute to total abandonment of the proceedings.

For those reasons, the Court should interpret RCW 8.25.070(1)(a) and RCW 8.25.075(1)(b) consistently and narrowly and reject AIC's attempt to broaden those statutes.

4. The policy underlying these attorneys' fees statutes also favors Sound Transit's interpretations.

Finally, if neither the plain language of RCW 8.25.070(1)(a) and .075(1)(b) nor the applicable tools of construction compel Sound Transit's interpretation of those two statutes, policy should. When it enacted RCW 8.25.075, the legislature included a statement of the policies it intended that statute to further, including:

To encourage and expedite the acquisition of real property for public works programs by agreements with owners, [and] to reduce litigation and relieve congestion in the courts . . .

LAWS OF 1971, 1st ex. Sess., ch. 240, § 1. Those policies should apply equally to RCW 8.25.070, and are frustrated, not furthered, under AIC's interpretations of both statutes.

Policy also favors condemnors working before and during trial to minimize damages the condemnation causes, thereby benefiting both the public and the condemnee. *State v. McDonald*, 98 Wn.2d 521, 530, 656 P.2d 1043 (1983) ("Ordinarily the condemning party should describe in its petition the property it desires to take, but cases will often arise

where an unanticipated claim for damages interposed by the landowner may be lessened or entirely obviated by a stipulation or waiver on the part of the condemning party” (quoting *Tacoma Eastern R.R. v. Smithgall*, 58 Wash. 445, 451, 108 P. 1091 (1910)).

AIC offers only one reason why its interpretations are good policy. The thrust of that argument is that Sound Transit, either through gamesmanship or bad faith, changed the temporary construction easement during trial and prejudiced AIC’s preparations. Of course, the dynamic nature of a large public works construction project, not trial strategy, dictated changes to the easement. But even so, AIC’s due process-like fairness argument has some superficial appeal. Here is why it misdirects the issue.

Assume for argument that AIC is right: that by reducing the size and scope of the TCE it needed, Sound Transit impacted the way AIC presented its just compensation opinion to the jury. That fact has no bearing on the issues involved in this appeal, because AIC does not allege that changing the TCE rendered the trial substantively unfair or affected just compensation owed.⁵ There is no constitutional violation here. Rather, AIC alleges prejudice from changing the TCE only within the context of an attorneys’ fees statute. Had AIC asserted a right to fees under RCW 8.25.070(1)(b)—which ties attorneys’ fees to the difference between a

⁵ In fact, the jury awarded AIC *more* just compensation for the revised TCE than AIC’s appraiser testified it was worth. CP 1415.

settlement offer and the jury's determination of just compensation—this argument might be more viable, since the value of the TCE presented to the jury would actually matter. *But AIC did not move for fees under RCW 8.25.070(1)(b)*. CP at 1430-31. It sought fees only under RCW 8.25.070(1)(a) and .075(1)(b), both of which are limited to a condemnors' pretrial conduct (offering to settle and abandoning the proceedings).

The distinction is critical between the legislative grant of attorneys' fees (which is at issue) and the constitutional right to a fair trial and just compensation (which is not). AIC relies on cases discussing only the latter; in other words, when the lack of information prevents witnesses from "understand[ing] exactly the nature of the taking, and evaluat[ing] the owner's resultant damages"—i.e., just compensation. *In re Municipality of Metro. Seattle v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 927, 410 P.2d 790 (1966). Certainly some changes to the take will affect *just compensation* owed. But none of AIC's cases discuss trial preparation or just compensation in the context of RCW 8.25.070(1)(a) or .075(1)(b), much less create a bright line rule that an condemnor can never change the scope of the property interests taken without paying a condemnee's attorneys' fees.

In sum, the plain language, statutory tools, and policy all favor interpreting these two attorneys' fees statutes as Sound Transit does. RCW 8.25.070(1)(a) requires only that a condemnor make any written settlement offer within 30 days of trial, and RCW 8.25.075(1)(b) requires

only that a condemnor actually take property in the condemnation proceeding. Sound Transit did both, and the Court of Appeals should be affirmed.

B. SANDRA OH'S TESTIMONY

AIC also argues this Court should reverse the trial judge and order a new trial because the judge abused her discretion by admitting alleged hearsay testimony of AIC's president, Sandra Oh. The Court reviews the admission or exclusion of testimony in an eminent domain case for abuse of discretion just as in any other, and may reverse only if her ruling is manifestly unreasonable or relies on untenable grounds. *State v. Paul Bunyan Rifle & Sportsman's Club, Inc.*, 132 Wn. App. 85, 90, 130 P.3d 414 (2006).

AIC's briefing often describes what they call the hearsay issue as the admission of "a non-testifying expert's valuation of the condemned property." Petition for Review at 16. From that characterization it might seem like the trial judge entered the expert's appraisal into evidence or required Ms. Oh to read from it aloud. Neither is true. Factually this issue arises out of a statement under AIC's letterhead that: "We strongly believe we are entitled to a total of \$485,000 for just compensation."

The trial judge permitted Sound Transit to question Ms. Oh in open court not about the prior appraisal, but rather if she, as AIC's president, believed at the time of the July 2012 letter that \$485,000 was the just compensation Sound Transit owed. Ms. Oh testified "yes," VPR at 1205-

06, and the trial judge ruled that testimony both adopted the out-of-court statements in AIC's letter and was an in-court party admission, neither of which is hearsay. ER 801(c), (d)(2).⁶ The judge excluded the letter and appraisal themselves.

The only case AIC cites in support of its argument that the trial judge abused her discretion is this Court's recent decision in *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014). But as the Court knows well, the holding in *SentinelC3* is that litigants cannot survive summary judgment by merely offering unauthenticated and unsworn statements to support their case. *Id.* at 141.

AIC likely seizes on *SentinelC3* for the case's alluring soundbites: the unauthenticated statement at issue concerned a "consulting expert's" opinion of a "company's valuation." *Id.* at 135, 141. *SentinelC3* is distinguishable. In that case a defendant sought to introduce his own consulting expert's report in support of his own claims. Here Sound Transit elicited testimony at trial from AIC's president about her own belief of value to impeach testimony from AIC's trial appraiser about the amount of just compensation owed. Unlike in *SentinelC3*, there is no question Ms. Oh's testimony was properly authenticated. It was the

⁶ Although Ms. Oh's testimony as to her belief of the value of the property in July 2012 was not elicited for the purposes of presenting the owner's opinion of value, "a property owner is allowed to testify as to the value of the property in question, even if the owner does not otherwise qualify as an expert." CP at 310 (citing *Cunningham v. Town of Tieton*, 60 Wn.2d 434, 436, 374 P.2d 375 (1962)).

subject of a lengthy voir dire the trial judge conducted outside the jury's presence.

Ms. Oh's in-court statement was neither hearsay nor was it unauthenticated. The trial judge did not abuse her discretion in admitting the testimony, under *SentinelC3* or otherwise.

Even if this Court finds the trial judge abused her discretion by allowing Ms. Oh's testimony, the error was harmless. An evidentiary error is harmless "unless it was reasonably probable that [the error] changed the outcome of the trial." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008). In other words, to reverse and remand for a new trial this Court must find with reasonable probability that Ms. Oh's testimony affected the jury's award of just compensation. It did not.

Valuing just compensation comes down to expert testimony, not a property owner's opinion. This is what occurred below. Sound Transit's appraiser told the jury the easements were worth \$174,672; AIC's appraiser valued them at \$242,124, in addition to \$1.4 million for damage to the remaining property. VRP 1054-59, 1119-20, 1391-92, 1502, 1559-60. The jury weighed the testimony from both appraisers and ultimately awarded \$225,000. This number alone makes clear that Ms. Oh's testimony did not affect the jury's verdict with reasonable probability. If anything, her testimony may have acted in AIC's favor, since the value of the easements to which she testified (\$485,000) was significantly more than AIC's appraiser told the jury they were worth.

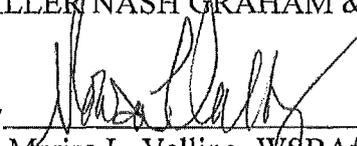
This Court should not reverse the jury's verdict. If Ms. Oh's testimony was error at all, one statement from a lay witness in such an expert-dependent trial was harmless.

IV. CONCLUSION

While AIC may be disappointed with the outcome at trial, a jury awarded it just compensation for the property Sound Transit condemned. This appeal offers no basis to order a new trial or award AIC attorneys' fees. The Court should affirm the Court of Appeals' opinion in its entirety.

DATED this 23rd day of November, 2015.

MILLER NASH GRAHAM & DUNN LLP

By 

Marisa L. Velling, WSBA# 18201
Matthew R. Hansen, WSBA# 36631
Estera Gordon, WSBA# 12655
Kellen Andrew Hade, WSBA# 44535
Attorneys for Respondent Sound Transit

APPENDIX A

SOIM

Airport Investment Company, LLC

Hampton Inn 19445 International Blvd Seattle, WA 98188 T 206-978-1700 F 206-824-0720	Wingate LAX 10300 La Glenega Blvd. Inglewood, CA 90304 T 310-846-3200 F 310-845-6925	Scottish Lodge 6871 Riverside Dr. Ferndale, WA 98248 T 360-384-4040 F 360-390-1111
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Received by _____

July 16th, 2012

JUL 17 2012

Real Estate Dept.

Dear Jennifer Corrigan,

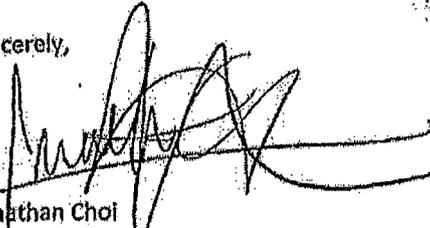
I am sending you the new appraisal, and the invoice for the appraisal service. The total cost of the appraisal service was \$6,000. Please advise us of our next step to obtain reimbursement.

After evaluating both appraisals extensively, we have concluded that Allen Brackett Shedd's appraisal to be highly insufficient and inaccurate. We believe they did not have all the right information to appraise our property properly nor did they employ the right tools to assess our property in the "after" state, thus discrediting their conclusion for "just compensation". Contrary to Allen Brackett Shedd's appraisal, we believe Lamb Hanson Lamb's appraisal accurately reflect what compensates for "just compensation".

We strongly believe we are entitled to a total of \$485,000 for just compensation.

Please let us know where we go from here. Also, on top of obtaining reimbursement for our appraisal service, we would also like to know what steps we need to take to receive potential reimbursement for attorney fees.

Sincerely,


Jonathan Choi
HR & Legal Department Lead
SOIM Airport Investment Co. LLC.
Email: Seattlemco.jc@gmail.com
Tel: 206-212-6116 (ex.152)

Corporate Office

21400 International Boulevard #301 Seattle, WA 98188 • Tel: 206-212-6116 • Fax: 206-853-7473 • Page 1 of 2

UnAdmitted Ex 158

Lamb Hanson Lamb Appraisal Assoc., Inc.

Professional Real Estate Appraisers & Consultants

File Number: S012-068

***** INVOICE *****

File Number: S012-068

Received by _____

07/03/2012

SOIM Airport Investment Co. LLC
Jonathan Choi
1237 S Sunset Dr
Tacoma, WA 98465

JUL 17 2012

Real Estate Dept.

Borrower:

Invoice #: S012-068
Order Date: 05/16/2012
Reference/Case#:
PO Number: 0

#28314
AP 7/13/12
(final) 3000.00

10445 International Boulevard
Seattle, WA 98188

Hampton Inn Seattle \$6,000.00

Invoice Total:	\$6,000.00
State Sales Tax @	
Deposit	(\$3,000.00)
Deposit	\$0.00
Amount Due	\$3,000.00

Terms: Balance due upon receipt. We accept Visa, Mastercard & AMEX.

Please make Check Payable To:
Lamb Hanson Lamb Appraisal Assoc., Inc.
4025 Delridge Way SW, Suite 530
Seattle, WA 98106-1262

Fed. I.D. #: 91-1093249

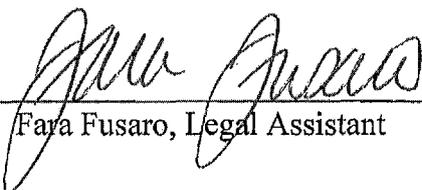
transit final appraisal

CERTIFICATE OF SERVICE

I hereby certify that I caused a true, correct and complete copy of
SUPPLEMENTAL BRIEF OF RESPONDENT SOUND TRANSIT to
be served by the method indicated below, and addressed to each of the
following parties:

Averil Rothrock, WSBA# 12144 Joaquin M. Hernandez, WSBA# 31619 Milt Reimers, WSBA# 39390 Schwabe, Williamson & Wyatt, PC U.S. Bank Centre 1420 5th Avenue; Ste. 3400 Seattle, WA 98101-4010 Jhernandez@schwabe.com mreimers@schwabe.com jhicok@schwabe.com rrebusit@schwabe.com arothrock@schwabe.com Attorneys for Respondent Airport Investment Company	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email (<i>pursuant to e- service agreement of the parties</i>)
Margaret A. Pahl, WSBA# 19019 King County Prosecuting Attorney Civil Division Peggy.pahl@kingcounty.gov Lebryna.Tamaela@kingcounty.gov Attorneys for Respondent King County	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email (<i>pursuant to E- Service Agreement</i>)
IBEW 77 International Boulevard, LLC 19415 International Blvd Seattle, WA 98188 Pro Se	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email

Dated this 23 day of November, 2015.



Fara Fusaro, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Fusaro, Fara
Subject: RE: Airport Investment Co. v. Sound Transit, et al.; Case # 91653-5; Supplemental Brief of Respondent Sound Transit

Received on 11-23-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Fusaro, Fara [mailto:Fara.Fusaro@MillerNash.com]
Sent: Monday, November 23, 2015 4:16 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Airport Investment Co. v. Sound Transit, et al.; Case # 91653-5; Supplemental Brief of Respondent Sound Transit

Dear Sir or Madam,

Please find attached the following pleading for filing: Supplemental Brief of Respondent Sound Transit.

Case Name: Airport Investment Co. v. Sound Transit, et al.;

Case # 91653-5;

Attorney for Respondent: Marisa Velling (Bar # 18201)

Address: Miller Nash Graham & Dunn, 2801 Alaskan Way,
Suite 300 Seattle, WA 98121

Phone # 206-624-8300.

Email address of filer: fara.fusaro@millernash.com

If you should have any questions, or need anything further, please do not hesitate to contact us. Thank you.

Sincerely,

Fara Fusaro

Assistant to Jeffrey Beaver, Matt Hansen, Marisa Velling, and Jackee Walker

Miller Nash Graham & Dunn LLP

Pier 70 | 2801 Alaskan Way - Suite 300 | Seattle, Washington 98121

Direct: 206.777.7408 | Office: 206.624.8300 | Fax: 206.340.9599

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