

FILED
April 15, 2016
Court of Appeals
Division I
State of Washington
No. 74041-5-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MIKALA McCULLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Instruction 8 constituted an impermissible judicial comment on the evidence and deprived Ms. McCulley of her right to a jury trial.

Over defense objection, the court instructed the jury:

“Physical damage” in addition to its ordinary meaning, includes any diminution in the value of any property as a consequence of any act.

“Damages” include the reasonable cost of repairs to a damaged automobile to restore it to its former condition, including any sales tax imposed.

CP 66 (Instruction 8). The second paragraph, which does not track the statutory definition of damages, directs the jury to include the cost of repairs and tax in its determination of damages.

The determination of damages and the measure of damages employed is a factual issue for the jury alone to decide. Const. art. I, § 21; *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711, *amended*, 780 P.2d 260 (1989). Moreover, a jury instruction violates Article IV, section 16 if it directs the jury to reach a particular factual resolution of an issue. *State v. Brush*, 183 Wash. 2d 550, 559, 353 P.3d 213, 218 (2015). Instruction violates both provisions by directing the jury that it must include both the cost of repair and sales tax in determining the amount of damages.

The State's position at trial and again on appeal conflates what is permissible with what is required. As discussed in Ms. McCulley's initial brief, the cases on which the State relies say only that it was permissible for a factfinder to employ certain measures of damages. These cases do not require a factfinder to employ those measures.

The State also contends Instruction 8 actually gave the jury three alternative measures of damages: (1) the ordinary meaning; (2) the diminution of value, and (3) the cost of repair and tax. Brief of Respondent at 9.

State v. Ratliff concluded that because the "ordinary meaning" of damages includes the reasonable cost of repair. 46 Wn. App. 325, 328-29, 730 P.2d 716 (1986). Thus, setting it out as alternative measure to the "ordinary meaning" as the State now contends is improper. Further, RCW 9A.48.010(1)(b) requires "'damages', in addition to its ordinary meaning . . . shall include any diminution in the value of any property as a consequence of an act." Therefore, that is not an alternative measure either.

Instead, the only reasonable reading of the instruction is that it qualifies the "ordinary meaning" to require inclusion of diminution and repair costs and taxes. By separately instructing the jury that damages

“include” these items the instruction conveys two points. First, these items are not a part of the ordinary meaning. Second, the instruction told the jury that as with diminution in value the jury must include the cost of repair and tax. No reasonable reader could view that instruction as giving the jury the discretion to exclude the cost of repair and/or tax.

It would be a correct statement of the law to instruct the jury it **may** include the cost of repairs and taxes, it is not a correct statement to tell the jury they **must**. Instruction 8 told the jury they must include these discretionary items removing that factual question from the jury and constituted a comment on the evidence. The Instruction violated both Article I, section 21, and Article IV, section 16.

B. CONCLUSION

For the reasons above, and those set forth in her prior brief, this Court should reverse Ms. McCulley’s convictions.

Respectfully submitted this 15th day of April, 2016.

s/ Gregory C. Link
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DIVISION I**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 74041-5-I
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MIKALA MCCULLEY,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 15TH DAY OF APRIL, 2016.



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