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SUPREME COURT CASE No 1040849

COURT OF APPEALS, DIVISION I CASE No 870840

SUPREME COURT OF THE STATE OF WASHINGTON

MARCUS GERLACH and SUZANNE GERLACH

Petitioners/Appellants

v.

CITY OF BAINBRIDGE ISLAND

Respondent/Appellee

APPELLANTS' RESPONSE BRIEF TO MOTION TO STRIKE

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I. WSSC's *SUA SPONTE* MOTION TO STRIKE REPLY

Despite the Respondent seeking review on new issues to Petitioners' brief to the Washington State Supreme Court ("WSSC"), Clerk, Sarah R. Pendleton indicated [*sua sponte*] "a Clerk's Motion To Strike the reply will be set for consideration without oral argument by a Department of the Court at the same time that the Court considers the pending petition for review." Sarah Pendleton cited RAP 13.4(d) "[A] reply to an answer to a petition for review may be filed 'only if the answering party seeks review of issues not raised in the petition for review.'" A reply brief was filed because Respondent sought new issues under RAP 13.4(b) specifically claiming, "Petitioners do not cite to RAP 13.4(b) nor identify the provision(s) through which they are entitled to review." (Resp Brf Pg 14) The Reply brief was predicated on Respondent's cite to RAP 13.4(b)(2), "[T]his Court will only accept review in limited circumstances. If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or [RAP 13.4(b)(3)] 'If a significant question of law under the Constitution of the State of Washington or the United States is involved;' or [RAP 13.4(b)(4)] '[T]he petition involves an issue of substantial public interest...'"

II. RESPONDENT RAISED NEW ISSUE: CASE LAW

Respondent's brief raised a new issue regarding a conflict with a published decision. Petitioners correctly identified a conflict in law by the Court of Appeals ("COA"). COA's failure to apply *Westmark Dev v City of Burien* 140 Wash.App. 540, 166 P.3d 813 (2007) requires review. *Westmark* brought a claim for negligence, tortious interference and negligent misrepresentation, [similar to Petitioners' Complaint] after *Westmark* filed a modified building permit application. *City of Burien*, like Respondent Bainbridge Island, misrepresented facts and claims to Plaintiffs. Bainbridge Island's 2022 Building Revision Request denial, asserted "pertinent laws" as the basis to deny the 2021 Revision Request [to Petitioners' existing permit]. Burien and Bainbridge Island both engaged in excessive delays in processing modified applications. Bainbridge Island claimed their 120-day land use decision requirement [BIMC 2.16.020] was merely "aspirational."

Westmark claimed *Burien* provided false, incomplete and misleading information. Petitioners confirmed Bainbridge Island asserted false, incomplete and misleading information to the court. *Burien*, like Bainbridge Island, claimed "quasi-judicial immunity" [*Id* at 551] for deliberate and/or negligent acts of malfeasance.

Under Respondent's new issue [RAP 13.4(b)(2)] the WSSC must also accept review and address the Kitsap County Superior Court's [KCSC] Order on summary judgment, which was based on the declarations of Jennifer Forbes ("Forbes") and Respondent's Patricia Charnas ("Charnas"). Forbes' declaration relied on an altered map [RCW 40.16 violations]. Charnas did not appear to even read her declaration before signing it and presenting it to KCSC judge Kevin Hull ("Hull"). Fraud is a public concern.

III. RESPONDENT'S NEW ISSUE: CONSTITUTION

Washington State Constitution Article 1 Section 3 stated, "No person shall be deprived of life, liberty or property without due process of law." Respondent ignored their own "aspirational" code [BIMC 2.16] violating due process of law. In addition, Respondent cited "pertinent laws" to deny the request in opposition to the Pollution Control Hearing Board ("PCHB") [# 20-022], Thurston County Superior Court ("TCSC") [#21-2-01227-34] and COA [#57308-3-II] *Sound Action v Gerlach* 26 Wash.App.2d 1039 (2023) [unpub]. Respondent's 2022 Revision Request denial was predicated upon vague/ambiguous "pertinent laws" that were presumably the same laws applied by PCHB, TCSK and COA. Respondent's targeted denial inequitably applied state laws.

IV. RESPONDENT'S NEW ISSUE: PUBLIC INTEREST

Despite WSSC's *sua sponte* Motion To Strike, Petitioners' Reply brief was also proper because Respondents raised a new issue under "substantial public interest that should be determined by the Supreme Court." [RAP 13.4(d)(4)] It is of paramount concern to property owners that KCSC or COA appear to actively protect municipalities, even if predicated by false declarations.

COA's 2024 decision exonerated RCW 40.16 and Court Rule ("CR") 56(e). Respondents' Motion For Summary Judgment relied on Forbes' 2012 declaration to Judge Benjamin Settle ("Settle") and Charnas's 2024 declaration- during which Charnas was not a municipal employee when the 2021 Revision Request was submitted and denied on April 4, 2022. Settle's own past included hearing cases where Settle held stock in a defendant - Amgen. Settle's 2012 Order gave the window washing planner, Machen, immunity before granting Respondent's dismissal. In 2022, Settle again assisted Respondent with dismissal in *Dufresne v City of Bainbridge Island* 2022 WL 17847449 after *Dufresne* filed a negligence claim. Settle was finally reviewed and overruled in a U.S. Supreme Court case, *Shilling v US* _S.Ct._ 2025 WL 1300282. Settle's actions are a matter of public interest/concern.

Even after Petitioner's identified Planning Commissioner, Maradel Gale's direction to single out Petitioners' original permit, [similar to state representative Georgette Valle in *Westmark* (560)] and a singling out in *Pleas v City of Seattle* 112 Wash.2d 794, 774 P.2d 1158 (1989), COA refused to apply the Appearance of Fairness Doctrine [*Gerlach v City of Bainbridge Island* 185 Wash.App. 1004 (2014)]. Maradel Gale was also the president of *Sound Action*. Commissioner Gale's actions are of public concern.

Rather than impose sanctions against Forbes, Charnas and City for fraudulently signed declarations as the court in *Westmark* did, Hull claimed Respondent's attorneys were "**high caliber**" and rewarded CR 56(g) violations with fees to City. Inequitable application of CR or RCW by Hull/COA is an issue of substantial public interest. This is a matter of public interest / public concern.

V. CONCLUSION

Respondent raised new issues. WSSC's *sua sponte* Motion To Strike will avoid discussion of these new issues and is a matter of public concern. Petitioner's Reply was filed pursuant to RAP 13.

Dated June 27, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document contains 955 words, excluding the parts of the document exempted by RAP 18.17.

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