

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 14, 2013, 3:50 pm
BY RONALD R. CARPENTER
CLERK

NO. 89323-3

E OCF
RECEIVED BY E-MAIL

**SUPREME COURT OF THE
STATE OF WASHINGTON**

SUE ANN GORMAN, Petitioner

v.

PIERCE COUNTY, et al., Respondents

**PIERCE COUNTY'S ANSWER TO SUE ANN GORMAN'S
PETITION FOR DISCRETIONARY REVIEW**

MARK LINDQUIST
Prosecuting Attorney

By
DONNA Y. MASUMOTO
Deputy Prosecuting Attorney
Attorneys for Pierce County

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-4289

 ORIGINAL

Table of Contents

	<u>Page</u>
I. IDENTITY OF RESPONDING PARTY	1
II. ISSUE PRESENTED FOR REVIEW	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT WHY REVIEW SHOULD BE DENIED.....	3
V. CONCLUSION.....	7

Table of Authorities

Page

Cases

<i>Browne v. Cassidy</i> , 46 Wn. App. 267, 269, 728 P.2d 1388 (1986).....	6
<i>Bryant v. Dollar General Corp.</i> , 538 F.3d 394 (6th Cir. 2008)	6
<i>Estate of Blume v. Marian Health Center</i> , 516 F.3d 705 (8th Cir. 2008)	7
<i>Fuesting v. Zimmer, Inc.</i> , 448 F.3d 936, 940 (2006)	7
<i>Gorman v. Pierce County et al.</i> , ___ Wn. App. ___, ___ P.3d ___, (2013) (2013 WL 4103314, at 14).....	6
<i>Hanks v. Grace</i> , 167 Wn. App. 542, 552-53, 273 P.3d 1029, <i>review denied</i> , 175 Wn.2d 1017 (2012).....	passim
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 193 n.20, 23 P.3d 440 (2001), <i>overruled on other grounds by</i> <i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	6
<i>Mega v. Whitworth Coll.</i> , 138 Wn. App. 661, 668-69, 158 P.3d 1211 (2007).....	4
<i>Metcalf v. Bochco</i> , 200 Fed. Appx. 635 (9th Cir. 2006).....	7

Other Authorities

4 Karl B. Tegland, <i>Washington Practice: Rules Practice</i> , CR 50 Drafters' Comment, at 211 (5th ed. 2006)	5
---	---

Rules

CR 50 passim

CR 50(a)(1) 3

CR 50(a)(2) 3

CR 50(b)..... 3

RAP 13.4(b)(4) 3

I. IDENTITY OF RESPONDING PARTY

Pierce County answers the Petition for Discretionary Review filed by Sue Ann Gorman. Pierce County was a defendant in the trial court and an appellant in the Court of Appeals.

II. ISSUE PRESENTED FOR REVIEW

To preserve the opportunity to renew a CR 50 motion after a verdict, a party must move for judgment as a matter of law before the trial court submits the case to the jury. *Hanks v. Grace*, 167 Wn. App. 542, 552-53, 273 P.3d 1029, *review denied*, 175 Wn.2d 1017 (2012). Should this Court deny Gorman's petition for review because the Court of Appeals correctly ruled under *Hanks* that Gorman failed to preserve her argument that she had no legal duty of care to close her door when Gorman failed to timely raise this argument before submission of the case to the jury?

III. STATEMENT OF THE CASE

Gorman was attacked inside her home by two dogs that gained entry through her open sliding glass door. The case was tried before a jury. On August 12, 2011, the jury reached its verdict and found Pierce County and the other defendants liable. CP 902. The jury also found 1% comparative fault on Gorman's part.

/////

/////

On August 26, 2011, Gorman filed a "Motion For Judgment Notwithstanding the Verdict Re: Comparative Negligence." CP 1467. In this motion, Gorman challenged the jury's 1% comparative fault finding by arguing, for the first time, that she had no legal duty to close her sliding door. CP 1471.

On September 13, 2011, Defendant Evans-Hubbard filed a written response to Gorman's motion in which Evans-Hubbard specifically objected to Gorman's attempt to raise a new argument after the jury had already reached a verdict in the case. See CP 1505. That same afternoon, Pierce County filed a written response joining in Defendant Evans-Hubbard's opposition to Gorman's motion. CP 1495. The first sentence of Pierce County's written response contains this joinder: "Defendant Pierce County joins in the Response of Defendant Evans-Hubbard, and opposes the Plaintiff's Motion for Judgment Notwithstanding the Verdict with regard to comparative negligence." CP 1495.

The trial court denied Gorman's motion. The Court of Appeals affirmed the trial court's denial of Gorman's motion.¹

//////

//////

¹ Pierce County has filed a Petition for Review with regard to the Court of Appeals' holding on the public duty doctrine.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b)(4) provides that review will be accepted by this Court if the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." Gorman argues for review under this court rule, but she has not shown that review is merited.

The Court of Appeals holding is consistent with existing Washington precedent. CR 50 permits a trial court to enter judgment as a matter of law if "during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue" CR 50(a)(1). Regarding timing, CR 50 provides that "[a] motion for judgment as a matter of law may be made at any time before submission of the case to the jury." CR 50(a)(2). If the trial court denies the motion, the moving party "may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." CR 50(b).

A moving party must initially raise its motion for judgment as a matter of law before the case is submitted to the jury, and the failure to do so constitutes waiver. *Hanks v. Grace*, 167 Wn. App. 542, 552-53, 273 P.3d 1029, review denied, 175 Wn.2d 1017 (2012).

In *Hanks*, Defendant Grace failed to move for judgment as matter of law prior to submission of the case to the jury. The jury found Grace's negligence proximately caused Hank's damages. After the verdict, Grace moved for judgment as a matter of law on two theories: (1) that insufficient evidence supported the jury's finding of proximate cause; and (2) that noneconomic damages were not recoverable in a negligence action. *Hanks*, 167 Wn. App. at 547-8. The trial court denied Grace's motion, and Grace appealed.

On appeal, Division One held that the trial court did not err in denying Grace's motion for judgment as a matter of law because Grace's motion was not timely raised:

The rule makes clear that a party must move for judgment as a matter of law before the trial court submits the case to the jury to preserve any opportunity to renew its motion after the case is submitted (footnote omitted). Because Grace first moved for judgment as a matter of law after the jury's verdict, the trial court did not err by denying his untimely motion.

Hanks, 167 Wn. App. at 552-53.

The *Hanks* court noted that prior to a 2005 amendment, CR 50 allowed a party to move for judgment as a matter of law after the case had been submitted to the jury "whether or not the party has moved previously for judgment as a matter of law." *Hanks*, 167 Wn. App. at 553 fn. 213 (quoting *Mega v. Whitworth Coll.*, 138 Wn. App. 661, 668-69, 158 P.3d

1211 (2007) (quoting former CR 50(b)). In proposing the amendment, the Committee concluded that requiring a motion for judgment as a matter of law before the case is submitted to the jury:

enhances the administration of justice because the parties and/or the court can correct possible errors before the verdict. Absent such a motion before submission of the case to the jury, a party may not bring a motion for judgment as a matter of law thereafter.

4 Karl B. Tegland, *Washington Practice: Rules Practice, CR 50 Drafters' Comment*, at 211 (5th ed. 2006). The 2005 Amendment to CR 50 thus requires parties to give the trial court the opportunity to correct any possible errors by raising their arguments before submission of the case to the jury.

Gorman, like the party in *Hanks*, failed to timely raise her argument. The trial court did not have the opportunity to consider Gorman's challenge to her legal duty prior to submission of the case to the jury. The Court of Appeals correctly determined that Gorman failed to preserve her argument for appeal:

On the issue of her own comparative fault, Gorman asserted in her original CR 50 motion that she bore no fault because the *evidence was insufficient* to show that leaving the door open was a breach of her legal duty. For the first time in her renewed motion, Gorman argued that, *as a matter of law*, she had no legal duty to close the door. This argument is not proper because a renewed CR 50 motion cannot present new legal theories that were not argued before the verdict.

Gorman v. Pierce County et al., ___ Wn. App. ___, ___ P.3d ___, (2013) (2013 WL 4103314, at 14) (emphasis in original) (citing *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193 n.20, 23 P.3d 440 (2001), overruled on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Browne v. Cassidy*, 46 Wn. App. 267, 269, 728 P.2d 1388 (1986)).

Gorman argues that *Hanks* is distinguishable because "the court did not address what rules would apply if a purely legal issue were presented." Petition for Discretionary Review, at 6. The court in *Hanks*, however, held that the party had failed to preserve two issues, one of which was a purely legal issue, *i.e.*, the issue of whether "noneconomic damages are recoverable in negligence." See *Hanks*, 167 Wn. App. at 547-8. *Hanks* cannot be distinguished on this basis.

Gorman argues that the Court of Appeals decision is inconsistent with federal case law decided under CR 50's federal counterpart. The cases cited by Gorman, however, are distinguishable. These cases involve parties who, unlike Gorman, **did** raise their issue pre-verdict, but did not renew their issue in a post-verdict challenge. See *e.g. Bryant v. Dollar General Corp.*, 538 F.3d 394 (6th Cir. 2008)²; *Estate of Blume v. Marian*

² The Sixth Circuit's decision in *Bryant* was not based on Rule 50. *Bryant*, 538 F.3d at 397 fn. 2 ("Because we conclude that Dollar General's objections to the jury instructions preserved its claim for appeal, we need not resolve the parties' dispute regarding the

Health Center, 516 F.3d 705 (8th Cir. 2008) (party preserved for appeal legal issue concerning immunity by having trial court rule on issue twice before submission of case to jury); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 940 (2006) (party's evidentiary error was preserved during trial); *Metcalf v. Bochco*, 200 Fed. Appx. 635 (9th Cir. 2006) (unreported) (party not required to raise a Rule 50 motion to preserve for appeal evidentiary challenges that were raised and heard during trial court proceedings).

Finally, Gorman argues that Pierce County waived its objection to Gorman's failure to timely raise her legal duty challenge. The record reflects, however, that Pierce County did not waive its objection. Instead, Pierce County timely joined in Defendant Evans-Hubbard's objection before the trial court. CP 1495. Gorman's argument should be rejected.

V. CONCLUSION

Pierce County respectfully requests that the Court deny Gorman's petition for review. The Court of Appeals decision with regard to Gorman's failure to timely raise her challenge to her legal duty is in accord

//////

//////

//////

effect of *Unitherm* on Dollar General's failure to renew, postverdict, its Rule 50 motion"

with existing Washington case law. Gorman has not met the standard of showing an issue of substantial public interest.

DATED this 14th day of October, 2013.

MARK LINDQUIST
Prosecuting Attorney

s/ DONNA Y. MASUMOTO
DONNA Y. MASUMOTO
State Bar Number 19700
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-4289 / Fax: 253-798-6713
E-mail: dmasumo@co.pierce.wa.us

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing PIERCE COUNTY'S ANSWER TO SUE ANN GORMAN'S PETITION FOR DISCRETIONARY REVIEW was delivered this 14th day of October, 2013, by electronic mail and to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to counsel of record as follows:

Michael J. McKasy
Shelly K. Speir
TROUP, CHRISTNACHT,
LADENBURG, McKASY &
DURKIN, INC., P.S.
6602 – 19th Street West
Tacoma, WA 98466
Email: mjmckasy@tclmd.com;
skspeir@tclmd.com

David P. Lancaster
HOLLENBECK LANCASTER &
MILLER
15500 SE 30th Place, Suite 201
Bellevue, WA 98007-6347
Email: david.lancaster@
farmersinsurance.com

Nathaniel Justin Ree Smith
Nancy Kathering McCoid
SOHA & LANG PS
1325 4th Ave Ste 2000
Seattle WA 98101-2570
Email: smith@sohalang.com
mccoid@sohalang.com

Bradley Dean Westphal
Lee Smart PS Inc
701 Pike St Ste 1800
Seattle WA 98101-3929
Email: bdw@leesmart.com

s/ CHRISTINA SMITH _____
CHRISTINA SMITH
Legal Assistant
Pierce County Prosecutor's Office
Civil Division, Suite 301
955 Tacoma Avenue South
Tacoma, WA 98402-2160
Ph: 253-798-7732 / Fax: 253-798-6713
Email: csmith1@co.pierce.wa.us

OFFICE RECEPTIONIST, CLERK

To: Christina Smith
Cc: Donna Masumoto; 'mjmckasy@tclmd.com'; 'skspeir@tclmd.com'; 'smith@sohalang.com'; 'mccoid@sohalang.com'; 'david.lancaster@farmersinsurance.com'; 'bdw@leesmart.com'
Subject: RE: Supreme Court No. 89323-3 -- Gorman v. Pierce County, et al. -- Answer to Petition for Review

Rec'd 10-14-13

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: Christina Smith [<mailto:csmith1@co.pierce.wa.us>]
Sent: Monday, October 14, 2013 3:49 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Donna Masumoto; 'mjmckasy@tclmd.com'; 'skspeir@tclmd.com'; 'smith@sohalang.com'; 'mccoid@sohalang.com'; 'david.lancaster@farmersinsurance.com'; 'bdw@leesmart.com'
Subject: Supreme Court No. 89323-3 -- Gorman v. Pierce County, et al. -- Answer to Petition for Review

Clerk of the Court,

You will please find attached for filing Pierce County's Answer to Sue Ann Gorman's Petition for Discretionary Review.

Christina Smith | Legal Assistant 3 | Pierce County Prosecutor's Office - Civil Division
955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402
Phone: 253-798-7732 | Fax: 253-798-6713 | Email: csmith1@co.pierce.wa.us



Think Green. Please help to maintain the wellbeing of the environment by refraining from printing this e-mail message unless necessary.

