

NO. 93306-5

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775NW,
Appellant/Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES and FREEDOM FOUNDATION,
Respondent/Defendants,

RESPONDENT DSHS' RESPONSE TO MOTION TO ALLOW
ADDITIONAL EVIDENCE ON REVIEW

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I. IDENTITY OF RESPONDING PARTY

COMES now the State of Washington, Department of Social and Health Services, and files its response to the Appellant's Motion to Allow Additional Evidence on Review.

II. ARGUMENT

The State takes no position on Appellant's Motion to Allow Additional Evidence on Review but provides its analysis of the law and procedural facts related to the motion.

The motion for additional evidence is brought pursuant to RAP 9.11, which provides:

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if:

(1) additional proof of facts is needed to fairly resolve the issues on review,

(2) the additional evidence would probably change the decision being reviewed,

(3) it is equitable to excuse a party's failure to present the evidence to the trial court,

(4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive,

(5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and

(6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

The appellate courts will not accept additional evidence on appeal unless all six criteria in RAP 9.11(a) are satisfied. *Harbison v. Garden Valley Outfitters, Inc.* 69 Wn.App. 590, 849 P.2d 669 (1993). Failure to act promptly to present the evidence to the trial court, such that the court could have altered the issues and decisions decided below, may result in the motion being denied. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn.App 695, 702, 683 P.2d 215 (1984).

The information the SEIU wants this court to consider is all new evidence that did not exist at the time the trial court made its ruling on the preliminary injunction. However, some of the evidence now being proposed did exist prior to argument before the Court of Appeals on January 13, 2016. The SEIU did not bring a motion at that time for it to be considered. On that basis, a court could rule that the equities tip against granting SEIU's motion as to the evidence that could have been made available to the Court of Appeals. *Mission Ins. Co.*, 37 Wn.App. at 702.

All of the new evidence in question appears to support the SEIU's argument that the Freedom Foundation's underlying motive is to eliminate the SEIU as a competitor, which it asserts is a commercial purpose. The

Court of Appeals considered this argument, finding that the Freedom Foundation's public record request was not for a commercial purpose because it would not directly generate revenue or financial benefits for the Foundation. Decision at p.26. The court defined the "commercial purpose" in RCW 42.56.070(9) to include a business activity by any form of business enterprise intended to generate revenue or financial benefit. Decision at p.22. The SEIU is asking that this Court review that determination.

The Court of Appeals found that the Freedom Foundation's intent was to make individual providers aware of their constitutional right to refrain from union membership and fee payments. Decision at p. 25. Declarations considered by both the Superior Court and the Court of Appeals from the Freedom Foundation disavowed any intent to use the lists to directly generate revenue for the Freedom Foundation or any third party. Decision at p. 25.

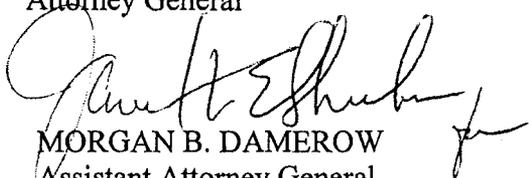
This evidence could not have been considered by the Trial Court, nor is it information that could have been discovered through further inquiry on the part of the agency at the time it was making its analysis of the public records exemptions.

III. CONCLUSION

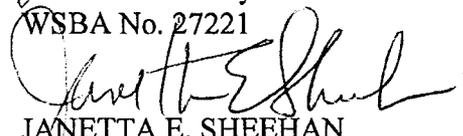
The State takes no position on the request for additional evidence under RAP 9.11(a) at this stage of the proceedings.

RESPECTFULLY SUBMITTED this 18th day of August 2016.

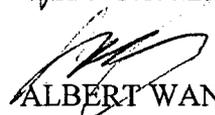
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Aug 01, 2016, 4:58 pm

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SEIU HEALTHCARE 775NW,

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v.

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES AND
FREEDOM FOUNDATION,

Respondents.

CERTIFICATE OF
SERVICE

I certify that I served a copy of the Respondent's, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Answer to Petition for Review, Respondent DSHS' Response To Motion For Injunctive Relief Preserving The Status Quo And For Expedited Consideration Of The Motion, Respondent DSHS' Response To Motion To Allow Additional Evidence On Review and this Certificate of Service on all parties or their counsel of record on August 1, 2016 as follows:

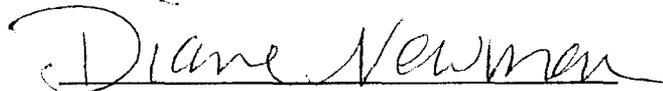
XX Via e-service Agreement.

TO: Dmitri Iglitzin
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 1 day of August, 2016 at Olympia, WA.


DIANE NEWMAN

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 01, 2016 4:59 PM
To: 'Newman, Diane (ATG)'
Subject: RE: SEIU Healthcare 775NW v. State of Washington, DSHS and Freedom Foundation Cause No. 93306-5

Received 8/1/16.

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From: Newman, Diane (ATG) [mailto:DianeN@ATG.WA.GOV]
Sent: Monday, August 01, 2016 4:53 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Good Afternoon:

Please find attached for filing the following documents:

Respondent DSHS Response to Motion for Injunctive Relief Preserving the Status Quo and for Expedited Consideration of the Motion;
Answer to Petition;
Respondent DSHS' Response to Motion to Allow Additional Evidence on Review.
Certificate of Service

Thank you,

Diane Newman

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