

NO. 76534-1

SUPREME COURT OF
THE STATE OF WASHINGTON

PERMANENT OFFENSE, SALISH VILLAGE HOMEOWNERS
ASSOCIATION, AND G. DENNIS VAUGHAN,

Appellants,

v.

PIERCE COUNTY et al.,

Respondents

DIRECT APPEAL FROM THE FINAL RULINGS OF THE SUPERIOR
COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
AFTER REMAND BY THE STATE SUPREME COURT,

Honorable Mary Yu, Presiding, (King County Case No. 02-2-25125-5)

**APPELLANTS' RESPONSE TO SUPREME COURT CLERK'S
JANUARY 18, 2005 INQUIRY RE:
IS RAP 2.2(d) APPLICABLE?**

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Appellants Permanent Offense, Salish Village Homeowners Association, and Mr. G. Denis Vaughan (“Citizens” hereafter) hereby respond to the Court Clerk’s January 18, 2005 letter inquiry whether RAP 2.2(d) is applicable.

It is not surprising that the Court should raise its RAP 2.2(d) question given the multiplicity of parties and claims, the perfunctory Trial Court orders, and the fact that this is the second direct appeal to the State Supreme Court spawned by this single lawsuit. Given the fact that Sound Transit believed that all of its claims were appropriately resolved by CR 56 motion, and given the fact that the Trial Court agreed with Sound Transit — isolating Sound Transit’s “bond impairment” claim for later determination (over Citizens’ objection) — was inexcusable. It has necessitated two trips to this Court.

This Court’s concern would have been appropriate to the first appeal, but does not apply to this appeal.

A. SHORT ANSWER OF APPELLANT CITIZENS

1. The Trial Court entered a “final judgment” within the meaning of RAP 2.2(a)(1).
2. RAP 2.2(d) is inapplicable.
3. Appellants’ Notice of Appeal should not be treated as a Notice For Discretionary Review pursuant to RAP 5.1(c).

B. EXPLANATION OF PROCEDURAL BACKGROUND.¹

1. Trial Court — "Round One":²

a. Parties and Claims — The case was filed in King County Superior Court on November 27, 2002 in the same month that State voters adopted I-776 (which was to become law on December 5, 2002). The Plaintiffs consisted of two groups — the original Plaintiffs (which included King County) and the Intervenor Plaintiffs (which included Sound Transit). Among them, these Plaintiff groups made two (2) categories of challenge to the constitutionality of I-776:

- 1) Facially Unconstitutional: All Plaintiffs challenged I-776 “on its face” as violating multiple provisions of the Washington State Constitution, including alleged “single subject expressed in title” violations and a handful of other facial challenges, which can be briefly summarized: due process protections, home rule restrictions, and scope of initiative power limitations.
- 2) “Contract Impairment:” Both King County and Sound Transit had issued bonds “pledging” various local option taxes and their “full faith and credit” (double barreled bonds). Based upon the fact that I-776 repealed provisions of State law that had previously authorized some of the local option taxing power, both King County and Sound Transit

¹ Because no trial court record has yet been designated or produced, Citizens will refer to copies of orders attached to their January 13, 2005 Notice of Appeal, and will attach hereto copies of other material trial court documents discussed in Part B-3 below.

² Citizens believe that the “Round One” trial court record is not a matter of dispute, and to avoid unnecessary bulk will simply rely on the record and rulings produced and generated in Supreme Court Case No. 73607-3.

challenged I-776 for allegedly violating the rights of their bond purchasers contrary to Washington Constitution Article One § 23.

b. Trial Court Disposition: On February 10, 2003, the Trial Court issued its decision on summary judgment. On March 14, 2003, after the Citizens moved for reconsideration and for modification pursuant to CR 54, the Trial Court:

- 1) ruled that I-776 was facially unconstitutional for violating Washington Constitution Article Two § 19;
- 2) ruled that I-776 violated Washington Constitution Article One § 23 for “impairing” the contract rights of King County bond purchasers, and
- 3) refused to decide any other claims (including Sound Transit’s “bond impairment” claim) or to enter CR 54(b) findings.

2. Supreme Court in "Round One:"

a. Appellants’ Issues — Appellants the State of Washington and Citizens both challenged the Trial Court’s rulings that I-776 violated Washington Constitution Article Two § 19 and Article One § 23. In addition, the Citizens — Salish and Vaughan — challenged the Trial Court’s refusal to decide all claims and/or to enter required CR 54(b) findings, and asked the Supreme Court to require a single trial court disposition or to decide the Sound Transit “bond impairment” claim in its de novo CR 56 appeal on the merits. Citizens argued that this would avoid the necessity for two separate appeals (see Citizen Appellants’ briefs in Supreme Court Case No. 73607-3).

b. Respondents' Issues — The Respondents — including Sound Transit — raised all of their other “facial challenges” to I-776 (even though not decided by the Trial Court) pursuant to *Ertman v. City of Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980). Significantly, Respondent Sound Transit did not include its “bond impairment” claim in the bundle of claims it raised to the Supreme Court in case No. 73607-3.

c. Supreme Court "Round One" Disposition — *Pierce County et al., v. State of Washington, et al.*, 150 Wn.2d 422, 78 P.3d 640 (2004). In this decision, the Supreme Court:

- 1) reversed the Trial Court’s Washington Constitution Article Two § 19 decision and its decision on King County’s Article One § 23 “contract impairment” challenge;
- 2) rejected the additional “facial” challenges raised by the Respondents; but
- 3) did not address the CR 54 complaints raised by Citizens or provide a remedy, creating the virtual certainty of two appeals to resolve the constitutionality of I-776.

On March 31, 2004, the State Supreme Court issued its Mandate. That left for decision by the Trial Court following remand the following:

- 1) Sound Transit’s Article One § 23 “bond impairment” challenge to I-776;
- 2) The Citizens’ affirmative defenses to Sound Transit’s Article One § 23 “bond impairment” claim; and

3) Remedies of (a) the refund of illegally collected Vehicle License Fees ("VLF") by King County and (b) a potential award of attorney fees and the refund of illegally collected Motor Vehicle Excise Tax ("MVET") by Sound Transit depending on the disposition of Sound Transit's "bond impairment" claim.

3. The Trial Court — "Round Two":

a. Defining Remaining Claims — On remand, the first order of business was to define the remaining claims surviving the Supreme Court's decision in *Pierce County et al., v. State of Washington, et al.* supra. On April 6, 2004, the Trial Court held a status conference by telephone with all counsel of record ordering all counsel to submit a list of issues remaining in the case no later than Friday, April 30, 2004. Only the Citizens responded to the court by that date (Defendant the State of Washington submitted its issues list on Monday May 3, 2004 largely endorsing the Citizens' issues). On Monday May 3, 2004 the Trial Court issued its Order setting forth the trial schedule and the issues remaining in the case on remand. A copy of that Order is attached herewith at Exhibit ("A").³ The remaining issues on remand were:

1. Does Wash. Const. Art. I, Sec. 23 bar enforcement (in whole or in part) of I-776's repeal of Sound Transit's MVET taxing power during all (or part) of the period that bond contracts (existing prior to the effective date of I-776 between Sound Transit and bondholders) require collection of the MVET?

³ That Order adopted and attached the Citizens' proposed order (copy also attached) including the statement of remaining claims consistent with the summary set out in paragraph 2(c) above. On page 2 of the Trial Court's Order, Judge Yu specifically noted that "the Ct. received no responses from any other Parties."

2. Intervenor Defendants' additional defenses/claims that:
 - a. That Sound Transit had no legal authority to impose the MVET or to issue valid bonds pledging the MVET because the enabling legislation for regional transit authorities was unconstitutional.
 - b. If I-776 is wholly or partially constitutional, what is the appropriate disposition of any MVET refunds?
 - c. Are Intervenor Defendants entitled to recover their reasonable attorney fees as taxpayer representatives?
 3. How should refunds of the \$15.00 VLF be handled? If the State handles the refunds of the VLF amounts collected by DOL, what is the net amount King County and Pierce County must pay to the State for the administrative costs associated with the State's handling of those refunds?
- b. Trial Court Disposition of Remaining Claims: The Trial Court rulings below were: ⁴
- 1) By Order dated July 21, 2004, the Trial Court ruled that the State of Washington and King County must refund taxes illegally collected from tax payers, but without interest (see Exhibits "A" and "B" to Appellant Citizens' Notice of Appeal);
 - 2) By Order dated November 5, 2004 — see Exhibit "C" to Citizens' Notice of Appeal — the Trial Court:
 - a) granted Sound Transit's motion for partial summary judgment that I-776 impaired contract rights of its bond purchasers, and violated

⁴ See copies of the Trial Court Orders attached to Appellant Citizens' Notice of Appeal.

Washington Constitution Article One § 23, which bars repeal of any portion of MVET taxing authority by I-776 so long as any of the bonds remain outstanding;

- b) rejected Citizens' defenses;
- c) rejected Citizen's affirmative defenses by ruling, in pertinent part:
 - 1) that RCW 81.112.030 was properly amended and that Sound Transit was properly formed without a citizen vote;
 - 2) that RCW 81.104.180 authorized the Sound Transit MVET pledge, and
 - 3) that Citizen's affirmative defenses are barred by laches.

c. Citizen's Request For Clarification of The November 5, 2004 Trial Court Order:

1) Citizen's Motion/Reply For Clarification — Because the Trial Court was deciding cross motions for partial summary judgment, and because the Trial Court's November 5, 2004 Order did not address the question of finality, on November 15, 2004 the Citizens moved for Clarification and for Reconsideration, a copy of which is attached hereto at Exhibit ("B"). Though it appeared that the Trial Court had either ruled against or avoided (by laches) all of Citizens' defenses to Sound Transit's bond impairment claim, and that the remedies sought by Citizens would necessarily fail as a consequence, the November 5, 2004 Trial Court Order did not expressly resolve those remedy claims. Given a looming December 13, 2004 scheduled trial date, Citizen's sought clarification. Also, given the earlier "Round One" CR 56 problems and the Supreme Courts decision in *Pierce County et al., v. State of Washing-*

ton, et al., supra, Citizens sought clarity for a number of reasons including certainty of appeal rights. Citizens requested entry of a final judgment consistent with the Supreme Court’s prior Opinion [see Citizens’ December 14, 2004 Reply attached hereto at Exhibit (“C”)].

2) The Opposing Party Response — On December 10, 2004, a joint Response was filed by Sound Transit and the State of Washington [copy attached at Exhibit (“D”) hereto]. On the relevant question of finality, the responding position was:

“Although the parties’ cross motions were each designated as motions for partial summary judgment, the Court’s disposition of both motions collectively resolved all of the issues.....As a result, there is no need for this Court to enter any further findings under CR 56(d) (a discretionary mechanism that applies only when a portion of the case is resolved on summary judgment), or certify its Order under CR 54(b) (another discretionary mechanism that applies only when judgment is to be entered on less than all claims). All that remains is entry of final judgment on all claims.....Sound Transit and the State, therefore, propose that the Court enter the final judgment summary presented with this joint response. The time for SV to appeal would then run from entry of judgment.....” [see Exhibit (“D”) pages 2-3, emphasis added by underlining].

That joint Response did not address the need for entry of a judgment dismissing the claims rejected by the Supreme Court in *Pierce County et al., v. State of Washington, et al.*, prior to remand.

3) The Trial Court Rulings — In keeping with prior practice, on December 16, 2004 the Trial Court simply signed Sound Transit’s proposed order simply denying the Citizens’ Motion For Clarification (a copy is attached at Exhibit "D" to the January 13, 2005 Notice of Appeal). That Order announced the Trial Court’s intent to enter its final judgment on December 22,

2004, which it did. The Final Judgment the Trial Court entered was that proposed and submitted by Sound Transit with its Responding Brief on December 10, 2004, again in keeping with prior practice (see copy attached at Exhibit "E" to the Notice of Appeal).

Citizens' own Proposed Final Judgment — submitted to the Trial Court on December 14, 2004 and which expressly included all claims — was ignored by the Trial Court [see copy attached hereto at Exhibit ("E")].⁵

Where Citizens' had sought a final judgment that included express, as opposed to implied, Trial Court disposition of all claims, the Trial Court chose to expressly dispose of Sound Transit's claims, and to ignore entry of a judgment of dismissal of all other claims required by the Supreme Court's decision in *Pierce County et al., v. State of Washington, et al.*,^{supra} and expressly implied the dismissal of dependent remedy claims.

C. ARGUMENT:

It is little wonder that the Supreme Court's review of the Orders attached to Citizen's Notice of Appeal created confusion. The Court's confusion is matched by Citizens' consternation over the Trial Court's refusal to enter a final judgment that expressly dismissed claims required by this Court's decision in *Pierce County et al., v. State of Washington, et al.* ^{supra}. However, the Trial Court's refusal to do so does not deprive its December 22, 2004 Judgment of "finality" for RAP 2.2 appeal purposes.

⁵ That proposed Judgment necessarily included alternative provisions given the fact that the Trial Court had not yet ruled on the pending Motion for Clarification / Reconsideration.

1. The Trial Court Decision is Appealable Pursuant to RAP 2.2(a):

The Trial Court's Judgment can be appealed, as a matter of right, under RAP 2.2(a)(1) or (3). There can be no question that the Trial Court expressly considered its judgment to be both final pursuant to RAP 2.2(a)(1) and to be its decision terminating the action pursuant to RAP 2.2(a)(3). There can be no question that all Trial Court relief available to Citizens was exhausted by the Trial Court's December 2004 rulings and judgment, and that the Citizen's sole remaining remedy was to appeal.

There can be no question that the Trial Court's Summary Judgment Order, its denial of Citizen's request for Clarification and Reconsideration, and its subsequent entry of the December 22, 2004 Judgment — with language inserted by Trial Judge Mary Yu's interlineation that “(t)here are no remaining claims & final judgment is now properly entered” — constituted a "Decision Determining Action" and was clearly a "written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action" pursuant to RAP 2.2(a)(3).

2. RAP 2.2(d) Does Not Apply:

All claims of all parties have been disposed of. All claims of the Plaintiffs and all claims of Sound Transit (except its bond impairment claim) were disposed of on the merits by the Supreme Court in *Pierce County et al., v. State of Washington, et al.*, supra. The Supreme Court's RAP 12.5 Mandate was issued following that decision. Sound Transit's remaining bond impair-

ment claim was disposed of on the merits by the Trial Court on remand, as well as the King County VLF refund. The question of whether or not the Trial Court was required to enter a judgment specifically dismissing those claims rejected on the merits by the Supreme Court in *Pierce County et al., v. State of Washington, et al.* affects the scope of review, not the finality of the judgment. Nor does it change the fact that the Trial Court's decisions terminated the action.

The fact that the Trial Court would only enter a Judgment endorsing a Plaintiff claim, while refusing to enter a Judgment dismissing Plaintiff's claims constitutes reviewable error, but does not create a RAP 2.2(d) question. In the Appellants' Opening Appeal Brief, the Supreme Court can expect to find an assignment of error challenging the Trial Court's final refusal to enter a judgment dismissing the Plaintiffs' and Intervenor Plaintiffs' claims that were finally determined on the merits in this Court's decision in *Pierce County et al., v. State of Washington, et al.*, supra. RAP 12.7(b) Such a challenge to the failure of the Trial Court to comply with a final decision of the Supreme Court is properly raised by initiating a separate review of the lower court decision entered after issuance of the Mandate, as is done in this case. RAP 12.9(a)

3. *Fox v. Sunmaster Products*, 115 Wn.2d 498, 798 P.2d 809 (1990)
Does Not Apply:

Fox v. Sunmaster involved an appeal from a ruling to the Supreme Court of a ruling of a Court of Appeals commissioner while additional matters admittedly remained before the Court of Appeals for a decision on the merits.

The appeal was taken from a lower court with unfinished business. Nothing remains in the Trial Court below for its additional action. The Trial Court's rulings below foreclose additional action.

4. The Orders Upon Which Review Is Sought Leaves The Trial Court With No Additional Decisions And The Appellants With No Additional Trial Court Remedies:

The Trial Court has disposed of all claims, including Citizens' claim that the Trial Court must enter broader judgments. The Trial Court has rejected, by its orders, any additional action below.

5. The Notice of Appeal Should Not be Redesignated a Notice For Discretionary Review:

As illustrated above, all claims of all parties have been disposed of on the merits. RAP 2.2(d) does not apply. Requiring Citizens, under these facts, to seek discretionary review raises the specter of declination of discretionary review, with a wholly useless, time consuming and fruitless remand to a Trial Court that has already decided it will not make its final decision differently than it already has.

In the meantime, approximately \$5,000,000.00 (\$5 million) monthly in MVET revenue continues to be collected by Sound Transit from taxpaying citizens, and the legality of doing so remains in question. Having already ruled that local governments and the State of Washington are not liable for interest on the refund of illegally collected taxes, the Trial Court has determined that any financial loss of any needless delay burdens taxpayers, not the government.

D. CONCLUSION:

There is no question as to the reviewability of this case as a matter of right. The Trial Court entered a Final Judgment and it specified that it disposed of all the claims of all parties in the case. The Notice of Appeal cannot be redesignated as a Notice For Discretionary Review.

DATED this 27th day of January 2005.

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