IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

YAKIMA COUNTY, a political subdivision of the State of Washington,	)
	)
Respondent,	)
	)
v.	)
	)
MAXINE AGNES SCHREINER, as her separate estate; MAXINE AGNES SCHREINER and JOHN DOE SCHREINER, wife and husband,	)
	)
Appellant,	)
	)
THE BANK OF NEW YORK TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT SERIES 200330; NACHES-SELAH IRRIGATION DISTRICT NO. 60; ILENE THOMSON, YAKIMA COUNTY TREASURER, as tax assessment collection agent for Yakima County, Weed District No. 2; PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY, a foreign corporation,	)
	)
Defendants.	)
	)

No. 28072-1-III

Division Three

UNPUBLISHED OPINION

Kulik, C.J. — On December 21, 2006, Yakima County (the County) served Maxine Schreiner with a condemnation petition and a request for stipulation for order of immediate use and possession of a 35-foot strip of property along the Selah Loop Road. One year later, the County discussed with and then presented to Ms. Schreiner's counsel a stipulated order for immediate use and possession. Ms. Schreiner's counsel signed it, and the County filed it on December 21, 2007. Ms. Schreiner then sought attorney fees under RCW 8.25.070, contending that she had complied with the statute's 30-day requirement for stipulation. The trial court denied Ms. Schreiner's fees and costs.

We agree with the trial court's conclusion that although Ms. Schreiner stipulated to the County's assertion of public use and necessity, she did not timely agree to

immediate possession and use of the property. We, therefore, affirm the trial court's denial of fees and costs.

FACTS

In December 2006, the County initiated a condemnation proceeding against Maxine Schreiner and four other property owners. The condemnation proceeding involved a public road project widening Selah Loop Road in Selah, Washington. The condemnation would take a 35-foot strip along the front of Ms. Schreiner's property. The proposed road project would also render the Schreiner septic and irrigation systems inoperable.

On December 21, 2006, the County served Ms. Schreiner with the condemnation petition and a "REQUEST FOR STIPULATION FOR ORDER OF IMMEDIATE USE AND POSSESSION."[1] Clerk's Papers (CP) at 101-02. This pleading read:

> The petitioner, Yakima County, pursuant to Chapter 8.25 RCW, hereby requests respondents to stipulate to an order of *immediate use and possession* of the property being condemned in the above-entitled action.

CP at 102 (emphasis added).

The County did not serve a proposed order with the request. On January 26, 2007, a hearing was scheduled on the issue of public use and necessity of the project. The

[1] We note that RCW 8.25.070(3) states, "immediate possession and use."

hearing was not held, but the parties stipulated to an order of public use and necessity.

Between the time Ms. Schreiner's counsel, James Carmody, filed his notice of appearance on January 4, 2007, and January 26, 2007, the date of the order on public use and necessity, Mr. Carmody and the County's counsel, Kenneth Harper, communicated about the public use and necessity of the Schreiner property. Mr. Carmody sent a letter dated January 17, 2007, to Mr. Harper, informing the County that Ms. Schreiner would not challenge the County's use of the Schreiner property. The letter read, in part:

> We will not contest the *use and necessity*, but need to make sure that the legal description for the property subject to the condemnation is correct.

CP at 209 (emphasis added).

Mr. Carmody met with Gary Ekstedt, a representative from the County, and Mr. Harper on January 26, 2007. They discussed Ms. Schreiner's possible agreement to immediate use and possession and potential timetables for the project because other work had to be done to keep the Schreiner property habitable.

In November 2007, the County filed a motion for summary judgment regarding the issue of attorney fees and costs allowed under RCW 8.25.070. On December 10, 2007, Ms. Schreiner filed a cross-motion for summary judgment. The hearing was scheduled for December 21, 2007. Mr. Harper advised Mr. Carmody by telephone that he was preparing an order for immediate use and possession. After the summary judgment

hearing, Mr. Harper presented Mr. Carmody with a stipulated order for immediate use and possession. He signed it, and the court entered the order.

Neither Mr. Carmody nor anyone associated with Ms. Schreiner asked Mr. Harper to prepare this document. The court denied the County's motion for summary judgment on attorney fees and costs. Although the County requested immediate use and possession in its initial pleadings, this was the first and only time that Ms. Schreiner had been provided with an order for immediate use and possession.

The County began work on the road in March 2008. The trial on just compensation for the property began in July 2008. By the time of the trial, Ms. Schreiner's property had been significantly altered.

The County made an offer to settle within the time allowed in RCW 8.25.070(1). The jury awarded $171,004.10. Because the condemnation judgment exceeded the County's settlement offer by more than 10 percent, Ms. Schreiner brought a motion for an award of fees and costs pursuant to RCW 8.25.070(1)(b). But the court denied Ms. Schreiner's fees and costs because she had not complied with the provision of the statute requiring her to stipulate to immediate possession and use within 30 days after the County's written request. Ms. Schreiner appeals.

ANALYSIS

Attorney Fees Under RCW 8.25.070. This court reviews a summary judgment de novo. *Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994). Ms. Schreiner appeals the order denying her cross-motion for partial summary judgment and the order denying her post-trial motion for fees. The order denying fees followed a hearing and resulted in findings of fact, which cannot be overturned if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

An award of attorney fees and expert witness fees in a condemnation case is governed by RCW 8.25.070. The portion of the statute primarily at issue in this case is RCW 8.25.070(3) which provides:

> Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded *only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property* being condemned within thirty days after receipt of the written request, *or within fifteen days after the entry of an order adjudicating public use whichever is later* and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law.

(Emphasis added.)

The operation of this statute creates incentives for both the state and the property owner. *State ex rel. Wash. State Convention & Trade Ctr. v. Allerdice*, 101 Wn. App. 25, 31-32, 1 P.3d 595 (2000). In *Allerdice*, the court explained that:

> The property owners have an incentive to tender immediate use and possession when requested by the State prior to the valuation trial because they must do so in order to preserve the opportunity to collect fees. This allows the State to begin work on its project earlier than it otherwise would be able to.

Id. at 32.

To obtain a mandatory fee award from the court, three events must occur: (1) the parties must stipulate to an order of immediate possession and use of the property within the time frames set forth in the statute, (2) the condemnor deposits an agreed amount of compensation into the court registry, and (3) the condemnee must deliver possession of the property. RCW 8.25.070(3); *State v. Trask*, 91 Wn. App. 253, 270, 957 P.2d 781 (1998). The second and third requirements are not at issue. The first requirement is the basis of controversy here.

The issue is whether Mr. Harper's request for Mr. Carmody to sign the written order for immediate use and possession on December 21, 2007, and Mr. Carmody's signature on that order the same day, satisfies the requirements of RCW 8.25.070. The County asserts that it requested Ms. Schreiner to stipulate to immediate use and possession when it served its initial pleading on December 21, 2006, one year earlier. The County, thus, argues that because Ms. Schreiner failed to stipulate to immediate use and possession within 30 days, she cannot satisfy the requirements of the statute. Ms.

Schreiner argues that the presentation of the stipulation at the hearing on December 21, 2007, constituted a second request for immediate use and possession that reopened a new 30-day window for Ms. Schreiner's consent.

Ms. Schreiner challenges findings of fact 1, 2, 3, and 6[2] to the extent they imply that no previous offers to stipulate were made by the County or that a timely acceptance of any offer was not made. We review findings of fact under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Ms. Schreiner's argument is unpersuasive. On December 21, 2006, the County served Ms. Schreiner with a written request that she stipulate to an order for immediate use and possession. At that time, Ms. Schreiner did not stipulate. One year later, on December 21, 2007, the County presented a stipulated order for immediate use and possession. Counsel for Ms. Schreiner signed the order and it was entered. Based on these facts, a rational, fair-minded person could be persuaded that the County requested that Ms. Schreiner stipulate to an order for immediate use and possession but she did not

[2] In her reply brief, Ms. Schreiner raises issues concerning other findings, technical compliance, and contract law. We will not address new issues raised in a reply brief. *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008).

do so until one year later.

Ms. Schreiner also contends that the issue here is one of statutory construction. She urges the court to choose the construction that best advances the legislative intent. Ms. Schreiner maintains that the County made a second request to stipulate when it presented her counsel with an order for immediate use and possession at the December 21, 2007 hearing.

A statute is ambiguous if it can reasonably be interpreted in more than one way. *Spain v. Employment Sec. Dep't*, 164 Wn.2d 252, 257, 185 P.3d 1188 (2008). To support her interpretation of RCW 8.25.070(3), Ms. Schreiner relies on *Allerdice*. In *Allerdice*, a portion of RCW 8.25.070(3) was found ambiguous as it related to the interaction of an order adjudicating public use (OAPU) and the right to recover fees. *Allerdice*, 101 Wn. App. at 30-31. The court determined that there was no legislative intent to penalize property owners who wished to exercise their constitutional right to appeal an OAPU. *Id.* at 33. Consequently, "RCW 8.25.070(3) must be interpreted to permit property owners to stipulate to an OAPU within 15 days after entry of a final OAPU." *Id.* at 35.

But *Allerdice* considered a different portion of RCW 8.25.070(3) than we consider

in this case. Here, we review whether Ms. Schreiner's acts were sufficient to invoke the right to fees. RCW 8.25.070(3) requires, in part, that attorney fees "shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor." The trial court found that "no other written request [except for the written request served on Ms. Schreiner on December 21, 2006] to stipulate to an order of immediate use and possession was made in this matter." CP at 21. Hence, Ms. Schreiner did not meet the requirements of RCW 8.25.070(3) in that she failed to stipulate to a request for immediate possession and use within 30 days or to stipulate to the entry of an order adjudicating public use within 15 days. Because the clause in RCW 8.25.070(3) under consideration here is plain on its face, no statutory construction is required.

City of Everett v. Weborg, 39 Wn. App. 10, 691 P.2d 242 (1984) is helpful. It involved an attorney fees dispute following a condemnation trial. In June 1981, the city of Everett served Harriet Weborg with an offer of settlement and request for immediate possession and use. *Id.* at 12. Ms. Weborg refused. In November, an order of public use and necessity was entered, but it was not until January 1982—203 days after the city's offer of settlement and 37 days after the order of public use was entered—that Ms. Weborg offered to stipulate to immediate possession and use. *Id*.

In *Weborg*, the court reversed the trial court's award of attorney fees and expert

witness fees finding that Ms. Weborg did not agree to stipulate to immediate possession and use within the requisite time frame. *Id.* at 15-16. Significantly, the court concluded that "'[RCW 8.25.070] is not vague, ambiguous or irrational on its face. Where there is no ambiguity in a statute, there is nothing for this court to interpret.'" *Id.* at 15 (quoting *State v. Roth*, 78 Wn.2d 711, 714, 479 P.2d 55 (1971)).

Ms. Schreiner argues that the "original" request of December 21, 2006, was defective. She maintains this document requesting immediate use and possession was served on her but that it requested that "respondents" enter into the stipulation. Ms. Schreiner believes that she should have been presented with a written request, addressed to her alone, asking her to enter into a stipulation. But Ms. Schreiner is a member of the "respondents," and the request was directed to her.

Ms. Schreiner maintains that the County failed to follow through on its obligation until December 21, 2007, when it finally drafted an order and provided it to Ms. Schreiner's counsel. She asserts that Mr. Carmody stipulated to immediate use and possession in a timely manner by virtue of his January 17, 2007 letter. However, this letter refers to *public use and necessity* not *immediate possession and use*. Specifically, the letter stated that Ms. Schreiner "will not contest the use and necessity."[3] The order

[3] CP at 209.

adjudicating public use and necessity was entered on January 26, 2007. But tendering immediate possession and use is required. RCW 8.25.070(3). Thus, the trial court properly denied fees and costs.

Finally, Ms. Schreiner contends that the County carries the burden of proof under RCW 8.25.070(3). Ms. Schreiner acknowledges that the trial court's order does not improperly allocate the burden of proof, but she infers that the trial court committed error. For example, Ms. Schreiner complains about the court's use of the phrase that Ms. Schreiner did not "carry the day." Report of Proceedings (Dec. 12, 2008) at 6, 8. However, the court's oral remarks cannot be the basis of an appeal unless they are incorporated into written findings of fact or conclusions of law. *Johnson v. Whitman*, 1 Wn. App. 540, 541, 463 P.2d 207 (1969).

Attorney Fees on Appeal. Ms. Schreiner requests fees on appeal. Because she does not prevail, we deny her request.

We affirm the trial court's denial of fees and costs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kulik, C.J.

WE CONCUR:

_____ _____

Sweeney, J. Korsmo, J.