No. 58881-1-II

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

SAVE THE DAVIS-MEEKER GARRY OAK,
Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,
Respondent.

ANSWER OF RESPONDENT MAYOR DEBBIE SULLIVAN TO AMICUS CURIAE BRIEF OF DEPARTMENT OF ARCHEOLOGY AND HISTORIC PRESERVATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

I. INTRODUCTION

Respondent Debbie Sullivan, Mayor of the City of Tumwater, hereby responds to the brief submitted by the Amicus State of Washington on behalf of the Department of Archaeology and Historic Preservation.

II. FACTS RELEVANT TO MOTION

The State of Washington filed a Motion for Leave to File Brief as Amicus on October 3, 2024. That motion was granted by Commissioner Bearse on October 7, 2024. Respondent relies on the facts set forth in her principal brief.

III. ARGUMENT

The Amicus in their brief has made arguments concerning two issues: (1) whether the issue of whether an archeological permit is required under Ch. 27.53 RCW was properly raised; (2) whether the tree at issue is an archaeological object. The Respondent agrees that the issue was not properly raised but denies that the statute applies to the tree at issue.

A. APPELLANTS FAILED TO PROPERLY RAISE THE ISSUE OF WHETHER AN ARCHAEOLOGICAL PERMIT IS REQUIRED TO REMOVE A TREE.

Respondent agrees with the Amicus that the issue of archaeological resources was not properly raised by the Appellants below. Though Respondent contests the applicability of RCW 27.53, she agrees that the statute does not contain a private cause of action and enforcement rests solely in the Department of Archeology & Historical Preservation (DAHP). Amicus Brief at 15. Because this issue was not properly raised in the trial court, it therefore cannot be raised on appeal.

1. The Complaint failed to raise claims under the State Archeology statute, Ch. 27.53 RCW.

The issue of whether the Davis Meeker Garry Oak is an archaeological object could arise in a variety of contexts both judicial and administrative, but the DAHP would necessarily be a party to any such case from the outset. The issue of archaeological resources was not properly raised and should not be considered.

The Superior Court determined that the issue of the State Archeological Permit was not properly before the Court, noting that the issue was not briefed. This is so because the issue was not mentioned in the complaint, CP 5, and was first raised in an untimely submitted declaration one day before the hearing of the motion to dissolve the TRO. CP 137. Any further statements of the Court on that issue are dicta and were not needed to reject this claim. Further, the issue cannot be resolved because it was not properly briefed below.

"The court will ordinarily refuse to consider new issues raised by the moving party in its rebuttal to the response because the nonmoving party has no opportunity to respond." 14A Karl B. Tegland, Wash Prac. Civil Procedure § 25.4, at 105 (2nd ed. 2009). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992). "[F]ailure to raise an issue before the trial court precludes a party from raising it on appeal." *Lunsford v. Saberhagen*

Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), aff'd, 166 Wn. 2d 264, 208 P.3d 1092 (2009).

This court should not consider claims based on RCW 27.53 because they are raised for the first time on appeal. *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 303, 253 P.3d 470 (2011). Similarly, appellate courts do not consider theories not presented below. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Here, the trial court acknowledged that SDMGO did not brief or plead RCW 27.53. SDMGO did not seek any amendment of their Complaint to add such a claim. It was not the basis for the *ex parte* TRO issued by Judge Amamillo. CP 26. As such, the application of RCW 27.53 was not properly raised in the trial court and cannot now be raised in the Court of Appeals.

2. Amicus correctly observes that the Plaintiff lacks standing to assert claims under the State Archeology statute, Ch. 27.53 RCW.

Respondent agrees with DAHP that plaintiff lacks standing and cannot enforce the provisions of RCW 27.53. RCW

27.53 contains no private cause of action. A cause of action should not be implied, but is determined by a three part test derived from *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). The 'Bennett' factors are considered when determining whether to imply a cause of action, they are: "(1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation." *Keodalah v. Allstate Ins. Co.*, 194 Wn. 2d 339, 346, 449 P.3d 1040 (2019).

The first factor is not met because the statute was created to benefit the public as a whole, not a specific class of persons. "[I]f the statute serves the general public welfare instead of an identifiable class of persons, then there is no duty to any individual unless a specific exception applies." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 210, 304 P.3d 914 (2013).

The second factor is not met because not only is there no explicit cause of action, but no duty is imposed in relation to the public. Also, ample alternative avenues of enforcement are provided in the statute, specifically through DAHP. Finally, the exhaustive permitting process outlined by the Amicus, which is clearly intended to centralize decision making, would not be served if private persons could utilize a cause of action to pursue their own archaeological agenda via private litigation. Amicus Brief at 8-11. Thus, nothing suggests legislative intent for a private cause of action.

The third factor fails as RCW Title 27.53 was intended to regulate archaeological resources and vest supervision and enforcement in the Department, therefore implying a private cause of action would be inconsistent with the purpose of centralizing and rationalizing archaeological resource management. As the three 'Bennett' factors fail, no private cause of action should be implied. Therefore, Appellant's claims should be dismissed for lack of standing as Amicus suggests.

B. THE TREE IS NOT AN ARCHAEOLOGICAL OBJECT UNDER RCW 27.53.

Respondent opposes Amicus' contention that RCW 27.53 applies to the Davis Meeker Garry Oak. Amicus argues that both the plain language of RCW 27.53 and the legislative intent behind the statute suggest that RCW 27.53 applies to trees. In both arguments Amicus relies on the unsubstantiated assumption that trees can be archaeological objects/resources. Thus, upon closer inspection both purportedly separate arguments collapse into one argument, i.e., that a tree can be an archaeological object.

It should be noted that the Respondent has not denied that a tree significantly modified by human activity can ever be an archaeological object. Instead, Respondent has argued that a mere tree, without more, cannot be an archaeological object and that the Davis Meeker Garry Oak is not an archaeological object. This was explained in detail in Respondent's Brief at 31-37.

In considering the definition of "archeological object," the plain language of the statute does not even suggest the inclusion of trees. Amicus DAHP points to the language of the following definition from RCW 27.53.030(2) to demonstrate trees are included: an archaeological object "comprises the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products." A mere tree, standing alone, no matter how venerable is not "evidence of an indigenous or subsequent culture" nor is it the "remains of past human life". DAHP's reading is not merely expansive but counterintuitive and thus does not represent the plain language meaning of the statute.

In fact, Amicus has not even met the burden of proving its more general premise—that a tree can be an archeological object. DAHP has cited to no state cases to support this premise as none exists. Beyond overwrought conclusory statements, the Amicus relies on three authorities to substantiate this key assumption: (a)

a master's thesis; (b) an unpublished district court opinion that mentions the subject in passing; and (c) foreign law. None of these purported authorities are sufficiently substantial to successfully carry this key assumption.

1. Amici's claims that a tree is an archeological object are not supported by the master's thesis relied upon.

Amicus claims that their assumption "is clear from the science of archaeology." Amicus Brief at 22. Amicus argues that, by consensus of the field, culturally modified trees (CMTs) are archaeological objects and that the Davis Meeker Garry Oak arguably belongs to that category. In support of this proposition, Amicus has mustered a single master's thesis. A master's thesis published in a University's own "graduate school collection" is not authoritative because it does not represent the consensus of the field and science of archaeology. Amicus Brief Appendix A.

The argument and its singular support suffer from four defects: (1) the thesis does not claim to represent the dominant view of archaeological science; (2) it is unclear from the thesis

whether CMTs are archaeological resources;(3) nothing in the thesis or in the record developed below suggests that the Davis Meeker Garry Oak is even arguably a CMT; & (4) the thesis's purpose is to advocate that existing archaeological principles be abandoned in favor a new, grander paradigm which is beyond the legal scope of archeology assigned to DAHP in RCW 27.53.

The thesis does not claim to represent the dominant view of archaeological science but rather the bleeding edge of the field. This thesis's purpose in its own words is to "deconstruct the dominant perspective of CMTs" through emphasizing "indigenous definitions … and non-archaeological worldview approaches[.]" Amicus Brief Appendix A at 1, 2. The thesis attempts to "unlearn elements of Western archaeology" in favor of "community-centered heritage work[.]" Amicus Brief Appendix A at 7. As this thesis is from the Summer of 2023, it is implausible that the dominant view has been irreparably shaken and replaced by a master's thesis in a mere year.

The court should not be persuaded by a thesis which would be inadmissible under the *Frye* test, also known as the "general acceptance" test, used to determine the admissibility of expert scientific testimony. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). Under the *Frye* standard, scientific evidence is admissible only if the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community. *In re Detention of Pettis*, 188 Wn. App. 198 (2015); *State v. Copeland,* 130 Wn.2d 244, 255, 922 P.2d 1304, 1312 (1996). The thesis by its own words does not represent the generally accepted view of the relevant scientific community and therefore would not be admissible as scientific evidence. On that point alone the thesis fails to function as evidence supporting DAHP's position and its rogue conclusions lack persuasive value.

Further, within the thesis, CMTs are never defined as archaeological resources except when saying that view is one the field must "move away from." Amicus Brief Appendix A at 48.

Rather, CMTs are defined as "ethnographic resources." Amicus Brief Appendix A at 10. In fact, the thesis acknowledges that: "CMTs are not typical 'archaeological sites' and should not be considered as such." Amicus Brief Appendix A at 47.

The thesis seeks to expand the reach of legal protections to "ethnographic resources," which are not mentioned by Washington law. "[E]thnographic resources can be defined as landscapes, culturally significant or sensitive plants, viewsheds, sites, and structures, that are significant or fulfill a sense of meaning, purpose, and way of existence." Amicus Brief Appendix A at 10. (emphasis added). CMTs can also be conceptualized as "vivio-facts, eco-facts, and living artifacts." *Id*. at 80.

"Ethnographic Resources" as a category are significantly broader than the definition of archaeological objects defined in RCW 27.53. See RCW 27.53.030. DAHP cannot unilaterally change the scope of its purview from archaeological resources to ethnographic resources. It is Legislature's role to determine if

DAHP's purview should be expanded to consider these nonarchaeological factors and it has not done so. For this reason as well the thesis cannot serve as evidence of DAHP's conclusion.

Further, the thesis posits that the dominant view of CMTs is that they "are living trees from which materials are harvested (edible inner bark, pitch, resin, bark, branches) or modified through coppicing and pollarding."[1] Amicus Brief Appendix A at 13. According to the thesis, the dominant view is that only "easily identifiable bark-stripped Western red cedar trees" are CMTs. Amicus Brief Appendix A at 4. The Davis Meeker Garry Oak is not a bark-stripped red cedar identifiable as a CMT.

In the United States, CMTs require observable features to be eligible for the National Register of Historic Places (NHRP).

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[1] "Coppicing" is a traditional woodland management technique that involves felling trees at their base where new shoots will grow. https://www.nationaltrust.org.uk/discover/nature/trees-plants/what-is-coppicing. "Pollarding" is a method of pruning that keeps trees and shrubs smaller than they would naturally grow. https://www.rhs.org.uk/plants/types/trees/pollarding.

Amicus Brief Appendix A at 54. The Davis Meeker Garry Oak does not have observably modified features. The dominant view is "influenced by neo-European ontology" with its undue emphasis "on observationally visible remnants of the past." Amicus Brief Appendix A at 8.

As far as observationally visible remnants of the past (old things) can be equated with "physical evidence of culture," then the thesis is actually criticizing RCW 27.53.030(2). The statute archaeological object as "the physical evidence of an indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products." RCW 27.53.030(2). Amicus relies on this statutory definition to assert that the Davis Meeker Garry Oak as an archaeological object. Upon close reading, the thesis posits that, under the dominant view, the Davis Meeker Garry Oak is not a CMT, which is a perquisite for classification as an archeological object. The thesis then proceeds to criticize this consensus view of archaeology that RCW 27.53 is predicated on.

This is unsurprising given that the thesis does not explore and explain CMTs' archaeological significance but rather makes a policy argument implicating archaeology, environmental protection, and native sovereignty. The author advocates for native sovereignty to play a greater role in environmental stewardship as part of a preservation program that transcends archaeology and includes land use decision making. The scope of the thesis's advocacy manifests in its opposition to "entirely visible 'sites' with discrete temporal/spatial boundaries" in favor of the broader conception of "culturally managed landscape." Amicus Brief Appendix A at 19, 20. Therefore, the thesis and its definitions burst the boundaries of archaeology into other fields in pursuit of a grander paradigm. If DAHP is adopting this thesis's view, it is unilaterally expanding its legal jurisdiction beyond what is defined by statute.

Allowing DAHP to adopt this thesis's definitions would greatly expand DAHP's jurisdiction, which is the legislature's role, not that of the agency. As a state agency, DAHP only has

the powers delegated to it by the Legislature. Administrative agencies are considered "creatures of statute" and can only exercise powers that are expressly granted to them by the legislature or necessarily implied from those grants. *Jaramillo v. Morris*, 50 Wn. App. 822, 750 P.2d 1301 (1988). These limitations would be contradicted if DAHP can unilaterally expand its authority over trees that have not been included in the definitions of archeological object in RCW 27.53.030(2). That role is up to the legislature.

Similarly, DAHP is not entitled to expand its purview and prerogatives by adopting the views of an academic article and then claiming their view is entitled to deference. See Amicus Curiae brief at 26. Courts have the final authority to interpret statutes that define an agency's jurisdiction. Washington courts do not "'defer to an agency the power to determine the scope of its own authority'" under a statute. *Washington Rest. Ass'n v. Washington State Liquor & Cannabis Bd.*, 10 Wn. App. 2d 319, 331, 448 P.3d 140 (2019). Similarly, the Supreme Court has held

that determining the extent of an agency's authority is a question of law, which is a power ultimately vested in this court. *Local 2916, IAFF v. Pub. Employment Relations Comm'n*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995), *amended* (Jan. 26, 1996).

This thesis relied upon by DAHP does not represent the view of archaeological science, does not argue that trees like the Davis Meeker Garry Oak are CMTs and does not argue that CMTs are archaeological resources. Instead, it argues for abandoning accepted narrow archaeology for a grander conception which is in excess of DAHP's role under the statute. For these reasons, the thesis does not demonstrate that RCW 27.53 applies to the Davis Meeker Garry Oak.

b. A naturally occurring oak tree would not be considered an archeological object under federal law.

The Amicus argues that federal law is similar to Washington State Law on this issue and therefore both should be interpreted similarly. Amicus Brief at 28. There is no need to argue the underlying premise when the sole representative of

federal law that could be mustered is an unpublished district court case.

Amicus relies on a purported determination of the District Court, which was merely a sentence in the Court's explication of existing law. *Franco v. U.S. Dep't of the Interior*, No. CIV S-09-1072 KJM, 2012 WL 3070269, (E.D. Cal. July 27, 2012). In fact, this dicta was not necessary to the remainder of the analysis. That dicta observed: "[o]therwise naturally occurring objects or organic matter may constitute an archaeological resource where they evince human involvement." *Id.* at *10. The Court cited the following definition to support this:

> "Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, middens)[.]" 43 C.F.R. § 7 .3(a)(3)(I).

(Emphasis added).

The only organic matter described in *Franco* is "horticultural/agricultural gardens or fields" and no mention is made of isolated, naturally occurring trees. Such "gardens or fields" are inherently connected to human activity because they were by definition cultivated by humans, unlike an ancient tree growing near a trail. Further, the Court did not in a separate memorandum opinion for a motion for summary judgment find that "Grandfather Vines" constituted an archaeological resource. Instead, in a memorandum opinion granting a motion to dismiss on statute of limitations grounds, the Court mentioned, again that Grandfather Vines could be an archeological resource. This dicta was irrelevant to the issue before the court and is unpersuasive.

No comparable provision exists in the state definition in RCW 27.53.030(2). The state definition is limited to human activities, of which a naturally occurring tree does not fall under. Perhaps a garden or vineyard or agricultural cultivation could be "archeological" under the statute, but not an isolated, naturally occurring tree.

Further, the issue at stake in *Franco* concerned decisions of the Interior Board of Land Appeals regarding the Alaska Native Claims Settlement Act and a presidential proclamation establishing a national monument. Such decisions are irrelevant to the determination of whether a tree constitutes archaeological resources under Washington law.

Therefore, even if federal law is similar to Washington Law on this issue, Amicus has pointed to no evidence supporting its contention that under federal law a naturally occurring tree is an archaeological resource, absent human activity to set it apart.

c. Foreign Law Is not Useful in Interpreting whether a tree is an archeological object under RCW 27.53.

Amicus, lacking in local authorities, points to Canadian and Australian law to support the notion that trees are archaeological resources. However, Amicus' own article states that Canada has stronger protections for CMTs than in the United State, since the Haida Gwaii, "actively litigated legal protection for CMTs" and for "significant ethnographic resources [to be] considered in land use strategies." Amicus Brief Appendix A at

46. Further, the Canadian law cited by DAHP protects "heritage property" not archaeological objects, so the language employed is not the same. Heritage Conservation Act, R.S.B.C. 1996, c. 187, p.1.2. (Can.).

Amicus points to Australian law protects certain significant trees with ties to Aboriginal heritage. Amicus Brief at 32. The nature and scope of this Australian law is not elucidated, nor is explained how this law has any bearing on Washington law defining archaeological objects. Our courts have held that, when interpreting Washington statutes, the laws of other states is largely irrelevant to determining the intent of Washington's legislature. *Fed. Home Loan Bank of Seattle v. Barclays Capital, Inc.*, 1 Wn. App. 2d 551, 564, 406 P.3d 686 (2017), *rev'd on other grounds and remanded sub nom. Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 449 P.3d 1019 (2019). Thus, the determinations of foreign tribunals have no precedential authority and are at most persuasive.

Without similarity between the relevant statutes and jurisprudence on the subject, foreign law is not even persuasive.

IV. CONCLUSION

The issue concerning the applicability of RCW 27.53 to the Davis Meeker Garry Oak have not been properly raised, the record is inadequately developed and the issue should not be considered. The issue was not raised by the plaintiff's complaint and was only mentioned in an untimely declaration. The trial court's passing remarks on this improperly raised topic show it was not properly part of this case and should not be addressed.

Insofar as it is considered, RCW 27.53 does not apply because the Davis Meeker Garry Oak is not an archaeological object. The master's thesis; unpublished district court opinion; and foreign law relied upon by Amicus are insufficient to demonstrate that the Davis Meeker Garry Oak is an archaeological object. None of these authorities support the conclusion that the Davis Meeker Garry Oak is an "archeological" object.

I certify that this brief contains 3,689 words as determined by computer word count in conformity with RAP 18.17.

DATED this 31st day of October, 2024.

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CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the foregoing document all to be served to the below listed party by the Washington State Court of Appeals e-filing system as well as by electronic mail per service agreement upon the following person(s):

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DATED this 31st day of October, 2024.

/s/ Lisa Gates
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LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

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