



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

MARY MERTENS JAMES
Circuit Court Judge
PHONE: (503) 373-4303
FAX: (503) 373-4305

August 1, 2007

James D. Vick
Attorney at Law
698 12th St SE Ste 200
Salem, Or 97301-4001

Erika Hadlock
Assistant Attorney General
1162 Court Street NE
Salem, Or 97301

Re: Sullivan v State of Oregon, DAS
Case No. 06C20159

Dear Counsel,

The Court granted Plaintiff's Motion for Summary Judgment on July 9, 2007. Plaintiffs were represented by James Vick, attorney at law. Defendants were represented by Assistant Attorney General Erika Hadlock. The court took the matter of petitioner's request for attorney fees under advisement. At issue was whether plaintiffs could recover attorney fees under ORS 197.352(6), which creates a right to those attorney fees, expenses and costs "reasonably incurred to collect the compensation" that a government is ordered to pay under section 6. In the course of the summary judgment hearing, defendants pointed out that because the defendant DLCD's order would approve the claim and not apply certain laws to claimants' use of the property in lieu of compensation, and because plaintiffs waived their claim for compensation, there would be no entitlement to attorney fees.

The day after the hearing, and before an Order was submitted or entered, defendants filed a Notice of Withdrawal of Final Order M122455, issued an Amended Order on Plaintiffs' Measure 37 claim allowing the claim and on July 11, 2007, filed a Motion to Dismiss for Lack of Jurisdiction, supported by a Declaration of Darsee Staley in Support of Motion to

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Trial Division, Dept. of Justice
Salem, Oregon

Dismiss. The state argued that the declaratory relief plaintiffs seek has been granted, making the case moot, since there is no longer an existing controversy. Plaintiffs filed a response to the Motion to Dismiss, within the time permitted by law.

Defendants rely on *Yancy v. Shatzer*, 337 OR 345, 347 (2004). *Yancy* holds that the court's judicial power does not include the authority to adjudicate cases in which no "justiciable controversy" exists. *Id.* "A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between the parties having adverse legal interests." *Id.*, at 349.

One case that the *Yancy* court relied upon was *Kay v. David Douglas Sch. Dist. No. 40*, 303 Or 574, 577 (1987) (no justiciable controversy existed between the parties when the circuit court entered judgment, because the commencement activities had already transpired by the time it was entered. The court concluded the case was moot and should have been dismissed.) That case is particularly instructive here because of its similarities to this dispute. In *Kay*, the trial court announced its decision from the bench, and went on to award attorney fees to plaintiffs. But, the dispute (commencement prayers) had already resolved by the time the order was signed and judgment was entered. Both sides argued on appeal that the controversy was justiciable because the issue was likely to repeat, and because of the judgment awarding attorney fees. Plaintiffs here argue that defendants could change their mind and issue another amended order putting them back in conflict and that the attorney fee claim is still disputed.

The Supreme Court held,

"The court's oral opinion from the bench following the May 4 hearing was not an order or a judgment. . . . in fact, [the judge] spoke in the future tense and asked plaintiffs' attorney to prepare an order. . . .

Consequently, there was no effective judgment until it was signed and entered according to ORCP 70B. On the face of the pleadings and the interests asserted by these plaintiffs, there was by that date nothing for the court to decide. The circuit court should have dismissed the proceedings after the commencement exercises

James Vick
Erika Hadlock
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were over. The Court of Appeals should have so decided on its own motion. As the judgment for attorney fees would fall along with the

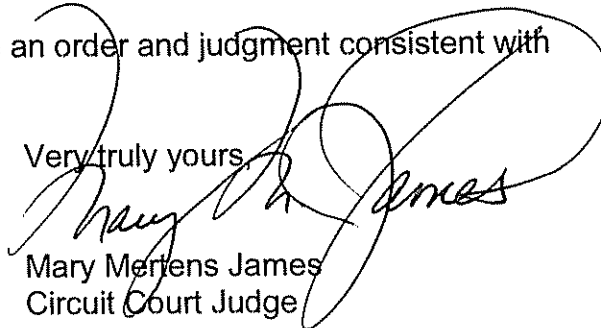
belated judgment entered by the circuit court, defendants' reason for maintaining their appeal also would disappear.

The decision of the Court of Appeals is reversed, and the case is remanded to the circuit court with instructions to vacate the judgment, with no costs to either party in that court or on appeal." *Kay*, 303 at 578-578.

I have carefully reviewed the pleadings and the arguments at hearing, together with applicable authorities, and find that the Motion to Dismiss is well taken. Accordingly, the Motion to Dismiss for Lack of Jurisdiction is allowed. Because the Motion to Dismiss is allowed, plaintiffs' request for attorney fees is moot. Section 6 of ORS 197.352, Measure 37's only attorney fees provision, provides that, "the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs and other disbursements reasonably incurred to collect the compensation." If, as here, the cause of action for compensation is not justiciable, the provision that permits one claim entitlement to attorney fees in connection with the cause of action cannot stand alone.

Will Ms. Hadlock please prepare an order and judgment consistent with this letter opinion?

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Mary M. James". The signature is written over the typed name and title below it.

Mary Mertens James
Circuit Court Judge

MMJ/sg
cc: File

1 STATE OF OREGON
2 Marion County Circuit Courts
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STATE OF OREGON
Marion County Circuit Courts
AUG 01 2007
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

5 STANLEY L. SULLIVAN and)
6 HELEN E. SULLIVAN,)
7)
8 Plaintiffs,)
9)
10 v.)
11 STATE OF OREGON, DEPARTMENT OF)
12 LAND CONSERVATION AND)
13 DEVELOPMENT,)
14)
15 Defendant.)

Case No. 06C20159

**ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT**

VICK & CONROYD, LLP

ATTORNEYS AT LAW
698 1/2TH ST. S.E. SUITE 200
SALEM, OREGON 97301-4001
TELEPHONE (503) 364-8488

12 THIS MATTER came before the court on Plaintiffs' Motion for Summary Judgment and
13 Defendant's Cross Motion for Summary Judgment. James D. Vick appeared on behalf of the
14 plaintiffs and Erika L. Hadlock appeared on behalf of the defendant. Plaintiffs withdrew their
15 claim for money compensation in the amount of \$200,000. The court having jurisdiction in this
16 matter, having heard the matter, and being fully advised in the premises; NOW, THEREFORE,

17 IT IS HEREBY ORDERED;

- 18 1) Plaintiffs' Motion for Summary Judgment is granted as to Plaintiffs' having been continuous
19 owners of the property since July, 1969; and
20 2) Defendant's Cross Motion for Summary Judgment is denied.
21

22 DATED: _____
23

24 _____
25 CIRCUIT COURT JUDGE

26 **ORDER PREPARED BY:**
James D. Vick, OSB No. 72273
VICK & CONROYD, LLP
Of Attorneys for Plaintiffs

ORDER

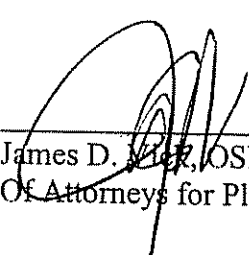
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CERTIFICATE OF MAILING

I, James D. Vick, hereby certify that I served the foregoing Order Granting Plaintiffs' Motion for Summary Judgment on the parties listed below, by mailing copies thereof, duly certified by me as such, in the United States Post Office at Salem, Oregon, to their last known address as listed below on the 23rd day of July, 2007.

Erika L. Hadlock
Sr. Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096

VICK & CONROYD, LLP



James D. Vick, OSB No. 72273
Of Attorneys for Plaintiff

CERTIFICATE OF TRUE COPY

I hereby certify that the foregoing is a complete and exact copy of the original.

James D. Vick, OSB No. 72273
Of Attorneys for Plaintiff

VICK & CONROYD, LLP

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