No. 76242-7-I

WASHINGTON COURT OF APPEALS
DIVISION I

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

ABIGAIL BROCKWAY, ET AL.,
Defendants-Petitioners.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George Bowden, Judge

AMICUS CURIAE BRIEF OF CLIMATE DEFENSE PROJECT IN SUPPORT OF PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

Climate Defense Project ("CDP") submits this *amicus curiae* brief in support of Defendants-Petitioners Brockway et al.'s ("Brockway's") Opening Brief to show the Court that there was no reasonable alternative to Brockway's actions because the protestors sought vindication not just of personal beliefs, but protection of fundamental rights that are not being safeguarded by government. Under the public trust doctrine, the state of Washington holds common natural resources such as tidelands, shorelands, and navigable waters in trust for present and future generations of citizens. Evidence presented at trial documented: (1) the certainty and legal cognizability of the harms to public trust resources caused by crude oil transport specifically and climate change generally; and (2) the lack of sovereign governmental action to require climate change mitigation, given the constitutional nature of the duties at issue and the government's history of violation of such duties. For these reasons, CDP respectfully requests that this Court reverse the trial court's refusal to instruct the jury on necessity.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

CDP is a non-profit legal organization based in Berkeley, California that advocates for innovative legal solutions to climate change

and provides legal support to climate activists who pursue action to address climate change through political protest. The organization works with and coordinates environmental and criminal defense attorneys to develop legal theories responsive to the pressing crisis of global climate disruption, connects attorneys with climate movement activists, and distributes educational materials related to the intersection of law and climate change.

CDP and the undersigned counsel are the sole authors of the attached *amicus curiae* brief. No person or entity other than CDP or counsel made a monetary contribution to fund the preparation or submission of the *amicus curiae* brief. Neither CDP nor the undersigned counsel represent Brockway in this or in any other matter. CDP as *amicus curiae*, by and through undersigned counsel, are familiar with the issues presented in this case and has reviewed the underlying superior court's decision, as well as Brockway's opening brief filed in this Court.

III. ASSIGNMENT OF ERROR

CDP adopts the assignment of error set forth in Brockway's Opening Brief.

IV. STATEMENT OF THE CASE

CDP adopts the Statement of the Case set forth in Brockway's Opening Brief.

V. ARGUMENT

A. PETITIONERS' ACTIONS WERE NECESSARY TO ADDRESS ONGOING HARM TO CITIZENS' RIGHTS AS PUBLIC TRUST BENEFICIARIES.

This Court's analysis of the application of the climate necessity defense in this case can be aided by understanding the legal nature of the rights sought to be expressed and protected by Brockway's actions of political protest. Rather than providing a distinct criminal defense or mandating specific conduct by a trial judge, the public trust doctrine helps to define the legal rights that Brockway sought to protect through their actions of protest. Well-established harms to existing public trust resources, as testified to at trial, illustrates the constitutional dimensions of the ongoing climate crisis. *See, e.g.,* RP 417 (testimony of Dr. Richard Gammon that the current climate is unstable and to stabilize the climate we must stop emitting carbon dioxide); RP 420-21 (warming caused by climate change causes ocean acidification and decimates shellfish, the effects of which are being seen today); RP 421 (decline in snow pack is currently diminishing salmon runs). Impairment to public trust resources is also well documented by the Washington Department of Ecology, the state's "central clearinghouse for relevant scientific and technical information about the impacts of climate change on Washington's ecology, economy, and society . . . ." RCW 43.21M.010(2); Ecology,

Washington Greenhouse Gas Emission Reduction Limits: Report Prepared Under RCW 70.235.040 (December 2016), available at https://fortress.wa.gov/ecy/publications/documents/1601010.pdf ("Anthropogenic, human caused climate change poses an immediate and urgent threat"); *Id.* ("On a regional level in the Pacific Northwest, in recent years we have observed devastating wildfires, drought, lack of snowpack, and increases in ocean acidification.").

"The public trust doctrine requires government to hold vital natural resources in trust for . . . public beneficiaries, both present and future generations." Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6(2) Wash. J. Envtl. L. & Pol. 633, 647-48 (2016); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892) ("The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."). The public trust doctrine is an inherent attribute of state sovereignty—reflected in Washington's Constitution,[1] statutes,[2] and common law[3]—which operates

[1] Wash. Const. Art. XVII, Sec. 1. The Public Trust Doctrine is also an expression of the inherent natural right retained by the People to sustain the public trust *res* for themselves and future generations. Wash. Const. art. I, §§ 1 ("All political power is inherent in the

to secure fundamental rights to use, access and enjoy essential public trust resources, including tidelands, shorelands and navigable waters. *Ill. Cent. R.R. Co.*, 146 U.S. at 455.

"[T]he sovereignty and dominion over the state's tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public." *Caminiti v. Boyle*, 107 Wn2d. 662, 669, 732 P.2d 989 (1987). As such, it is only the state, as sovereign, that has the legal obligation and responsibility to take action to protect trust resources and to prevent such resources from being substantially impaired. The Doctrine, which has always existed under Washington law,[4] has traditionally been interpreted to protect the right of the public to use and access navigable waters. More recently, the doctrine has been expanded to protect public interests such as "navigation, commerce, fisheries, recreation, and environmental quality." *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998) (quoting Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)).

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people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights"), 30 (the enumeration of certain rights does not deny others retained by the People); *Robinson Twp. v. Commonwealth*, 83 A3d 901, 947 (Pa. 2013) (explaining that such natural public trust rights are inherent, indefeasible and preserved and not created by the PA constitution).

[2] *See, e.g.,* RCW 70.94.011 (declaring that air is "an essential resource"); RCW 90.03.010 ("[A]ll waters within the state belong to the public").

[3] *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987).

[4] *Caminiti*, 107 Wn.2d at 670.

Based on its historic underpinnings as recognized, adopted and enforced by the Washington Supreme Court, and the inherent flexibility of the Doctrine to protect public rights, it is common sense that the Doctrine applies to all commonly shared, essential natural resources, including the atmosphere. *Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) ("Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects."); *Caminiti*, 107 Wn.2d at 668-69 (recognizing that the Public Trust Doctrine dates to the Code of Justinian and English Common law); *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 240, 858 P.2d 232 (1993) (Guy, J., dissenting) ("The Institutes of Justinian, a compilation and restatement of the Roman law first published in 533 A.D., states: '[T]he following things are by natural law common to all – the air, running water, the sea and consequently the sea-shore.'"); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1255 n. 10 (D. Or. 2016) (noting, while not deciding the issue of an atmospheric trust, that "[e]ven Supreme Court case law suggests the atmosphere may properly be deemed a part of the public trust res.").

The duties imposed on Washington State by the public trust doctrine, while not in issue at trial, shed light on the harms sought to be prevented by Brockway in their acts of political protest. *State v. Gallegos*, 871 P.2d 621, 625 (Wash. App. 1994) (describing the elements of the

necessity defense). Climate change is not simply a political dispute,[5] but the impacts are so severe the government's failure to address the crisis is actively leading to the impairment of constitutionally-reserved rights. Specifically, Article XVII, Section 1 of the Washington State Constitution provides:

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high tide within the banks of all navigable rivers and lakes . . . .

Wash. Const. Art. XVII, § 1. The Washington Supreme Court interpreted this constitutional declaration of ownership as having "partially encapsulated" the public trust doctrine. *Rettkowski*, 122 Wn.2d at 232. This constitutional ownership carries with it a corollary duty to maintain control over the *jus publicum* or act to promote the interests of the public in the *jus publicum* or not substantially impair the resource. *Caminiti*, 107 Wn.2d at 669.

At trial, Brockway testified that they acted to curtail a number of environmental and climate harms caused by crude oil transport. CP 0752-

[5] This fact is made evident by the Legislature's recognition that "Washington is especially vulnerable to climate change because of the state's dependence on snow pack for summer streamflows and because the expected rise in sea levels threatens our coastal communities. Extreme weather, a warming Pacific Northwest, reduced snow pack, and sea level rise are four major ways that climate change is disrupting Washington's economy, environment, and communities." RCW 80.80.005(1)(a).

53. The record contains substantial evidence of those harms — evidence largely uncontested by the prosecutor — including oil spills, catastrophic explosions (an oil train derailment in Québec killed 47 people), and significant emissions of carbon dioxide leading to global climate change. CP 0517. Pipeline expert Eric DePlace described the risk of these harms as "very immediate," CP 0518, and cited a 2014 crude oil train derailment in Seattle that narrowly avoided becoming a major catastrophe, CP 0523-24. Dr. Frank James described the specific health effects of particulate matter generated by the trains, including increased risk of heart attack and stroke, CP 0297-98, as well as the cancerous effects of oil spilled during transit (which amounts to .5 to 3% of the total oil shipped), CP 0302. In targeting activities that contribute to climate change, the evidence at trial showed that Brockway sought to prevent further harm to constitutional rights and the public trust *res* suffered by Brockway and by all Washington citizens as trust beneficiaries, including future generations.[6] The harm targeted by Brockway's actions is therefore a matter not of personal political opinion but of constitutional rights and duties.

[6] The contrast with abortion protest cases is instructive: courts almost always deny the necessity defense to anti-abortion protesters because abortion is a constitutionally protected activity. *See, e.g.*, *City of Missoula v. Asbury*, 265 Mont. 14, 18 (Mont. 1994) (finding that, in light of abortion's legality, there was no "unlawful force" that defendants convicted of trespass, criminal contempt, and failure of disorderly persons to disperse could seek to prevent). Here, by contrast, Petitioners were targeting legally *prohibited* activity in the form of crude oil permitting and transport in a manner that violates the constitutional rights of citizens and causes substantial impairment to public trust resources.

That harm encompasses, in addition to local and global environmental harms resulting from climate change, concrete and immediate harms to personal rights, including Brockway's use and access of public trust resources that are being impaired by climate change and not being adequately safeguarded by state government. Brockway testified that they reasonably believed that their actions would help avert those harms because civil disobedience has been shown to be an effective, and at times necessary, means of forcing policy change when traditional policy avenues are blocked. *See* CP 0746-0750. Brockway's belief that their actions helped to avert harm is reasonable given the legal and political context of climate change and its implications for the rights of Washington citizens.[7] Therefore, it was appropriate for the jury to be instructed on the elements of the necessity defense.

B. PETITIONERS HAD NO LEGAL ALTERNATIVE TO THEIR ACTIONS GIVEN THE SOVEREIGN NATURE OF PUBLIC TRUST DUTIES AND CONSISTENT VIOLATION OF THOSE DUTIES BY THE STATE.

The trial court found that Petitioners failed to show that reasonable

[7] The reasonableness of a defendant's belief does not hinge upon objective proof that her actions in fact averted the harm, or that they were the only factor in averting it. *See State v. Greenwood*, 237 P.3d 1018, 1025 (Ak. 2010) ("The implausibility of a defendant's story, or any weakness in the evidence supporting that story, is not a relevant consideration."); *Commonwealth v. Berrigan*, 325 472 A.2d 1099, 1115 (1984), *rev'd*, 501 A.2d 226 (Pa. 1985) (holding that defendants' "belief . . . that their action, *in combination with* the actions of others, *might accelerate a political process* ultimately leading to the abandonment of nuclear missiles" was not unreasonable as a matter of law).

legal alternatives were available. RP 0377. In their own defense, Brockway testified to the futility of current legal efforts directed at state government — the public trustee — which has repeatedly failed to meet its fiduciary duties to prevent substantial impairment to essential public trust resources. *See, e.g.,* RP 280 (Defendant Mazza testified that the "political system has responded inadequately."). Several other witnesses testified to the state government's failure to respond to the climate crisis. For example, Dr. Fred Millar testified to decades of failed attempts to force government action to make crude oil transport safer, CP 0597-0626, while Abby Brockway described writing to state officials and testifying at Department of Ecology to get the Legislature to act, CP 0562-93).

It would be absurd to deny Petitioners' necessity defense on the basis that they did not petition the Legislature for relief. The Petitioners, and countless other Washingtonians, have attempted to do this and have failed to get governmental action to ensure that even the existing (and mandatory) state greenhouse gas reduction targets are met. RCW 70.235.020 (emphasis added) ("The state *shall* limit emissions of greenhouse gases to achieve the following emission reductions for Washington state."). The state admits it is not on track to meet these mandatory emission reduction requirements in spite of repeated attempts

by Brockway and others to hold the state accountable.[8] Brockway testified about several failed legislative attempts, demonstrating a reasonable belief that further legislative efforts would not happen, or would not happen fast enough to address the urgency of the climate crisis. CP 0581, 0743-50, 0796-7. Even the Washington Department of Ecology has testified in a court of law that it would be "futile" to make a recommendation to the Legislature to update existing greenhouse gas emission limits, even though it was statutorily obligated to do so. *See Foster, et al. v. Ecology*, King County Superior Court No. 14-2-25295-1 SEA (Dep't of Ecology Resp. to Pet.'s Mtn. for Relief Under CR 60(b)) (filed April 19, 2016) (Appendix A) at 6 ("Ecology believes any attempt to persuade the 2016 Legislature to change the [greenhouse gas] emission limits in RCW 70.235 would have been futile.").

Further, Petitioners presented ample testimony that executive and legislative action on climate change is not a realistic legal alternative, especially in light of the urgent need for immediate action to reduce

[8] Ecology, Washington Greenhouse Gas Emission Reduction Limits: Report Prepared Under RCW 70.235.040 (December 2016), *at* https://fortress.wa.gov/ecy/publications/documents/1601010.pdf (last visited November 1, 2017) (Appendix A) at 14 ("While Washington is pursuing several initiatives to reduce greenhouse gas emissions, our current business as usual (BAU) projection shows that under existing state and federal policies, our state's emissions will only decline slightly and we are not on track to meet the limits set by the Legislature . . . .").

greenhouse gas emissions.[9] *See* Ecology, Washington Greenhouse Gas Emission Reduction Limits: Report Prepared Under RCW 70.235.040 (Appendix A) at v ("Washington has long recognized the urgent threat anthropogenic climate change poses to our state's economic well-being, public health, natural resources, and environment"). It is still less realistic where prolonged and repeated efforts by the Petitioners themselves have failed to bring about legislative compliance with public trust obligations. CP 0562-93. Brockway's belief that their actions helped to avert harm is reasonable given the legal and political context of climate change and its implications for the rights of Washington citizens, as well as the well-established effectiveness of civil disobedience in such circumstances. *See generally* Erica Chenoweth & Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, 33(1) International Security 7 (2008); *see also* Petitioner's Opening Brief at 21-24 (listing many cases in which civil disobedience defendants have been acquitted by reason of necessity).

Petitioners acted to curtail and draw attention to serious, ongoing harm to their constitutionally protected rights under the public trust

[9] These facts militate against adopting the rule of *United States v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1991) that the necessity defense is inapplicable to "indirect civil disobedience" because of hypothetical legislative remedies. Contrary to *Schoon*, the existence of a legislative remedy in cases of indirect civil disobedience is not conclusive as to whether a legal alternative actually exists for the purposes of the necessity defense, at least when public trust rights are at issue.

doctrine, a harm to which the political process has become chronically unresponsive. While efforts to secure protection of the public trust through civil litigation are important, admirable and ongoing, those efforts have likewise not yet resulted in effective emissions regulation or a reversal of the government's long-standing failure to protect against the harms of climate change. With global temperatures continuing to rise and the window of opportunity to avert serious climate consequences narrowing, the trial court erred in denying Brockway the chance to present evidence of their well-supported belief that all other alternative strategies have failed to yield results.

The remote possibility of "futile" legislative action or a judicial remedy that has not yet come to pass cannot in this case be cited to show the existence of legal alternatives, a legislative determination of values regarding climate policy, or the nonexistence of a legally cognizable harm. At the very least, the existence of reasonable legal alternatives to Petitioners' actions is controversial, and Brockway provided sufficient evidence that could lead a juror to conclude that no realistic alternatives existed. As such, the determination of the "legal alternatives" element should have been left to the jury, and it was error for the trial court to decide the matter itself. *See State v. May*, 100 Wn. App. 478, 482, 997

P.2d 956, *review denied*, 142 Wn.2d 1004, 11 P.3d 825 (2000).[10]

VI. CONCLUSION

To vindicate their constitutional rights and the rights of present and future generations as public trust beneficiaries, citizens with limited financial resources have few options for action (legislative or otherwise). Brockway's invocation of the necessity defense in this case is supported not just by the severity and legal nature of the harms Brockway sought to avert, but by the concrete and immediate constitutional legal injuries suffered by Brockway and the citizens of Washington as public trust beneficiaries, and by the futility of appealing to the State for redress. In cases such as this, the public trust doctrine offers a perspective on the fundamental rights that form the core of the citizen's decision to engage in civil disobedience when survival resources are at stake. With the added

[10] Notably, two courts have recently permitted protesters engaged in civil disobedience in defense of the climate to present evidence of necessity at trial. Judge Debra Hayes of the Spokane County District Court allowed the Reverend George Taylor to mount a necessity defense against charges of trespass and obstructing or delaying a train stemming from a 2016 blockade of coal and oil trains. *See* Mitch Ryals, *Spokane judge OK's necessity defense for climate change lawbreaker*, Inlander.Com (Oct. 13, 2017), available at https://www.inlander.com/Bloglander/archives/2017/10/18/spokane-judge-oks-necessity-defense-for-climate-change-lawbreaker. Similarly, a Minnesota court found that individuals who had engaged in an act of civil disobedience against a tar sands pipeline had met their burden and would be allowed to present the defense at trial. Order and Memorandum, *Minnesota v. Klapstein*, No. 15-CR-16-413 (Ninth Jud. Dist. Ct., Minn., Oct. 11, 2017) (Appendix B) at *5. Trials have not yet been held in these cases.

weight of public trust considerations, the trial court erred in ruling that no reasonable juror could find that the Petitioners lacked reasonable legal alternatives to their protest action. *Amicus* CDP respectfully requests that this Court grant Brockway's request to reverse the Superior Court's decision denying the necessity defense and remand the case for further proceedings.

Respectfully submitted this 17th day of November, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by one copy of this *amicus brief* on the following:

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APPENDIX A

The Honorable Hollis R. Hill

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ZOE & STELLA FOSTER, minor children by and through their guardians MICHAEL FOSTER and MALINDA BAILEY; AJI & ADONIS PIPER, minor children by and through their guardian HELAINA PIPER; WREN WAGENBACH, a minor child by and through her guardian MIKE WAGENBACH; LARA FAIN, a minor child by and through her guardian MONIQUE DINH; GABRIEL MANDELL, a minor child by and through his guardians VALERIE and RANDY MITCHELL; JENNY XU, a minor child by and through her guardians YAN ZHANG & WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY RESPONSE TO PETITIONERS' MOTION FOR RELIEF UNDER CR60(B)

I. INTRODUCTION

On November 19, 2015, this Court issued its decision dismissing Petitioners' complaint in this matter because the Washington State Department of Ecology (Ecology) was acting on Governor Inslee's July 28, 2015 directive to adopt a rule to reduce carbon dioxide emissions in

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Washington. Petitioners now ask the Court to vacate that ruling based on two very different claims against Ecology. The first claim is that Ecology, without justification, allegedly abandoned the process to adopt a rule limiting carbon dioxide emissions in Washington. This claim is not true. Ecology continues to be diligently developing a rule to limit carbon dioxide emissions in Washington and is on track to adopt a rule by the end of 2016. Petitioners' second claim is that Ecology did not make a recommendation to the Legislature to change the greenhouse gas limits in RCW 70.235.020. This second claim, even though true, provides no basis for relief, because whether or not Ecology made such a recommendation was not material to the Court's November decision. Petitioners' Rule 60(b) motion is without merit and should be denied.

II. ARGUMENT

A. Standard of Review and Burden of Proof

As a general rule, a motion under Civil Rule (CR) 60 is a motion to vacate, not a motion to modify the substance of the judgment because circumstances have changed. 15 Karl B. Teglund, *Washington Practice: Civil* Procedure § 39:13 (2d ed. 2015). The remedy under CR 60 is limited to vacating the judgment or order in question. *Id.* In a proceeding under CR 60, the court cannot grant affirmative relief. *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 248 P.3d 1047 (2011).

In this case, Petitioners bring their claims under CR 60(b)(4), which provides post-judgment relief for fraud or misrepresentation, and CR 60(b)(11), which provides post-judgment relief for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(11). "The party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence." *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P. 2d 526 (1990); see also *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P. 2d 1056 (1989). "Relief under Civil Rule 60(b)(11) is confined to situations involving extraordinary circumstances not covered by any other section of the

rule." *Summers v. Dep't of Revenue*, 104 Wn. App. 87, 93, 14 P.3d 902 (2001), citing *In Re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998), review denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

"In order to prove fraud, the plaintiff must establish each of the following elements by clear, cogent, and convincing evidence: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage." *Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001). Misrepresentation is defined as "The act of making a false or misleading statement about something, usually with the intent to deceive." *Black's Law Dictionary 813* (Abridged 7th ed. 2000), entry for "*misrepresentation.*"

B. Ecology's August 7, 2015 Statement Concerning Rulemaking and the Rulemaking Timeline Remain Accurate

In responding to the June 23, 2015 order from this Court, Ecology made the statement quoted by Petitioners, that the agency was "committed to initiating the formal Administrative Procedure Act rulemaking process in 2015, and adopting a final rule by the end of 2016." Ecology Response to June 23, 2015 Court Order (August 7, 2015) at 9; Petitioners' Rule 60(b) Motion for Relief from Judgment (Petitioners' Motion) at 6. Petitioners claim that Ecology has failed to follow through on this commitment. Petitioners' Motion at 2.

Despite Petitioners' claim to the contrary (Petitioners' Motion at 8), Ecology's statement to the Court remains accurate. Ecology initiated formal rulemaking in 2015. Second Declaration of Sarah Louise Rees (Second Rees Decl.) ¶ 5, Ex. A. Ecology filed a proposed rule with all required related documents on January 5, 2016. Second Rees Decl. ¶ 6, Ex. B. On February 26, 2016, Ecology withdrew that proposed rule. Second Rees Decl. ¶ 8. Petitioners seem to believe Ecology's withdrawal of the proposed rule means Ecology has

abandoned the rulemaking process. *See, e.g.*, Petitioners' Motion at 2, 6, 11. Petitioners are mistaken. Ecology withdrew the proposed rule because comments from stakeholders made it clear that the rule needed substantial modifications. Second Rees Decl. ¶ 9.

Under the Administrative Procedure Act (APA), if an agency makes substantial changes to a proposed rule, the agency must re-propose the rule and reopen the proceedings for public comment. RCW 34.05.340(1). Once Ecology realized the rule would need substantial changes, Ecology therefore withdrew the rule. Ecology withdrew the rule when it did rather than waiting for the end of the public comment period (as allowed by the APA) for several reasons. First, Ecology wanted to give the public notice as soon as possible that the agency would be making substantial changes to rule language the public was at that time reviewing. Second Rees Decl. ¶ 9. Second, the agency wanted to avoid holding public hearings on rule language the agency knew would be substantially changing. *Id.* Finally, Ecology knew withdrawing the rule earlier rather than later would be more efficient, and result in earlier adoption of the rule. *Id.*

Since withdrawing the proposed rule, Ecology has continued to work vigorously on the rule and remains on track to adopt the rule by the end of 2016. Second Rees Decl. ¶¶ 8, 10. As part of its ongoing rulemaking effort, Ecology has scheduled a webinar for April 27, 2016, to explain to stakeholders some of the changes the agency is considering making to the rule. Second Rees Decl. ¶ 10, Ex C. Petitioners, as always, are free to participate in the webinar, and provide their comments concerning the rule to Ecology.

Under these circumstances, there is no basis to claim that Ecology's actions are in any way inconsistent with the statement made to the Court. Nor is there any basis for a claim that Ecology's statement constitutes fraud or misrepresentation. Finally these circumstances provide no basis for post-judgment relief under CR 60(b)(11), as Ecology is doing exactly what it told the Court it would do.

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C. Ecology's Statement Concerning a Recommendation to the Legislature Does Not Provide Grounds for Relief Under CR 60(b)

Petitioners next point to Ecology's statement that "Ecology . . . will be ready to decide what changes to Washington's limits [in RCW 70.235] are appropriate and recommend these changes to the Legislature in 2016, shortly after the negotiations by the UNFCCC members are concluded and the commitments by the various nations, including the United States, are finalized." Petitioners Motion at 8, quoting a statement from the Declaration of Hedia Adelsman ¶ 12. Petitioners correctly point out that Ecology did not make a recommendation to the 2016 Legislature to change the limits in RCW 70.235. Petitioners' Motion at 8, 10. Petitioners attempt to elevate this fact into grounds for relief under CR 60(b).[1] Petitioners' Motion at 8, 10. Petitioners' attempt is without merit.

Nothing in the Court's November 19, 2015 order in this case can be construed as requiring Ecology to make a recommendation to the Legislature. Nor does anything in the Court's November 19, 2015 order indicate that its decision was based on Ms. Adelsman's statement regarding a recommendation to the Legislature in 2016. To the contrary, the Court's order makes it clear that the Court's decision was based on Ecology's commitment to adopt a rule limiting carbon dioxide emissions in Washington. Order Affirming the Department of Ecology's Denial of Petition for Rule Making (Court's Order) at 4, 7, 9, 10. As discussed above, Ecology is actively engaged in adopting such a rule.

The need for an agency rule to limit greenhouse gas emissions was triggered by the fact that the 2015 Legislature did not enact cap and trade legislation to address greenhouse gas emissions. Declaration of Stuart Clark (Clark Decl.) Ex. B; Second Rees Decl. ¶ 11. Since then, Ecology's top priority has been adopting a rule within existing state authority to get

[1] Petitioners characterize Ecology's statement as a promise to make a recommendation to the Legislature in 2016. It goes without saying that at this time, it is only April 2016, and more than half of 2016 is still to run. Therefore, it is possible that, if circumstances warrant, Ecology could make a recommendation to the Legislature in 2016.

emissions reductions now. Second Rees Decl. ¶ 11. By contrast, the law does not require the state to perform a futile act (*see, e.g., State v. Smith*, 148 Wn.2d 122, 132, 59 P.3d 74 (2002); *Music v. United Ins. Co. of Am.*, 59 Wn.2d 765, 768–69, 370 P.2d 603 (1962)), and Ecology believes any attempt to persuade the 2016 Legislature to change the limits in RCW 70.235 would have been futile (Second Rees Decl. ¶ 11). Consequently, Ecology did not make a recommendation to the 2016 Legislature to change the limits in RCW 70.235. Second Rees Decl. ¶ 11.

Under these circumstances, Ecology's decision not to make a recommendation to the Legislature regarding the limits in RCW 70.235 does not provide grounds for relief under CR 60(b).

D. Petitioners Are Not Entitled to Relief Under CR 60(b)(4) for Fraud or Misrepresentation

Petitioners claim that they are entitled to relief under CR 60(b)(4) for fraud or misrepresentation. Petitioners' Motion at 10. There is no evidence that either of the two Ecology statements cited by Petitioners meets any of the elements required for fraud or misrepresentation. There is no evidence that either of Ecology's statements was false or that in making these statements, Ecology intended to make false statements.[2]

Petitioners claim that the fact that a fraudulent act occurs after judgment does not bar relief. Petitioners' Motion at 7, citing *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 863 P.2d 1377 (1993). However, Petitioners point to no fraudulent act that

[2] Petitioners claim that there need be no evidence that Ecology intended to make a false statement because innocent misrepresentation can also provide a basis for relief under CR 60(b)(4). Petitioners' Motion at 9, citing *Peoples State Bank*, 55 Wn. App. at 371. Petitioners misunderstand the meaning of innocent misrepresentation. Innocent misrepresentation is defined as "A false statement not known to be false; a misrepresentation that, though false, was not made fraudulently." *Black's Law Dictionary* 813 (Abridged 7th ed. 2000), entry for "*innocent misrepresentation.*" Ms. Adelsman's statement does not meet the definition of innocent misrepresentation because her statement was a true statement at the time it was made. It was therefore not a false statement not known to be false.

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occurred after the Court's decision in this case.[3] That is, Petitioners point to no false statement, misrepresentation of the truth, or concealment of a material fact by Ecology after the Court's decision in this case. Therefore, there is no fraud and no misrepresentation, and thus no relief available to Petitioners under CR 60(b)(4).

E. Petitioners Are Not Entitled to Relief Under CR 60(b)(11)

Petitioners next claim that, even if relief is not available to them under CR 60(b)(4), their claim warrants relief under CR 60(b)(11). Petitioners' Motion at 10–11. "Relief under Civil Rule 60(b)(11) is confined to situations involving extraordinary circumstances not covered by any other section of the rule." *Summers*, 104 Wn. App. at 93, citing *In Re Marriage of Thurston*, 92 Wn. App. at 499, review denied, 137 Wn.2d 1023.

Courts have provided relief under CR 60(b)(11) when a material condition in an earlier decision has not been met. *In Re Marriage of Thurston*, 92 Wn. App. at 503 (finding that the award of property to former spouse was a material condition of the dissolution settlement and that the nonoccurrence of that condition constituted extraordinary circumstances warranting relief under CR 60(b)(11)). Here, however, the criteria for relief under this rule are not met, because there is no material condition in the court's earlier order that has not been met.

The Court was very clear that its November decision was based on Ecology's commitment to adopt a rule setting carbon dioxide emission limits in Washington. *See, e.g.*, Court's Order at 4 ("Governor Inslee's directive requires Ecology to initiate a rulemaking to set a regulatory cap on carbon dioxide emissions and to develop reductions in carbon dioxide emissions using its existing authority. This rulemaking effort [ongoing rulemaking] has begun and indications are that a rule will be enacted no later than the end of 2016."); 7 ("But, Ecology is not failing to fulfill this obligation given that it is engaging in rulemaking under the directive

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[3] A fraudulent act is the representation of an existing fact as false. *Kirkham*, 106 Wn. App. at 183. *See also Black's Law Dictionary* 529 (Abridged 7th ed. 2000) entry for "*fraud*": fraud is "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

to establish standards for greenhouse gas emissions."); 9 ("Now that Ecology has commenced rulemaking to establish greenhouse emission standards taking into account science and [sic] well as economic, social and political considerations, it cannot be found to be acting arbitrarily or capriciously."); 10 ("For the foregoing reasons, the petition for review is DENIED due to the Department of Ecology having commenced the aforementioned rulemaking process as directed by the Governor.").

All the Court's statements reference Ecology's action to adopt a rule limiting greenhouse gas emissions. Ecology continues to move forward on the rulemaking and is on track to adopt a rule by the end of 2016. Therefore there is no basis for relief under CR 60(b)(11).[4]

Petitioners make the serious allegation that Ecology has abandoned the rulemaking that formed the basis for the Court's decision in this case to uphold Ecology's denial of Petitioners' petition for rulemaking. As discussed in Section II.B. above, that allegation is false. Ecology continues to vigorously engage in the rulemaking process, and is on track to adopt a rule by the end of 2016 as promised. Therefore, Ecology's actions concerning the rulemaking provide no basis for post-judgment relief under CR 60(b).

Petitioners also allege that Ecology's failure to make a recommendation to the Legislature to change the greenhouse gas emission limits in RCW 70.235 provides a basis for relief under CR 60(b). As discussed in Section II.C. above, the Court's November 19, 2015 order in this case did not require Ecology to make such a recommendation to the Legislature. Nor is there any evidence in that order that Ecology's commitment to make such a

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[4] Finally, it is not clear that, even if Petitioners' claims had any merit, the Court could provide the relief they request (a court-ordered timeline for Ecology to adopt the rule). As a general rule, a motion under CR 60 is a motion to vacate, not a motion to modify the substance of the judgment because circumstances have changed. 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 39:13 (2d ed. 2015). The remedy under CR 60 is limited to vacating the judgment or order in question. *Id.* In a proceeding under CR 60, the court cannot grant affirmative relief. *Geonerco, Inc.*, 159 Wn. App. 536.

recommendation was a material condition in the Court's decision in this case. Therefore, the fact that Ecology did not make such a recommendation does not provide grounds for relief under CR 60(b).

III. CONCLUSION

As outlined above, because Ecology is diligently engaged in adopting a rule to reduce carbon dioxide emissions in Washington, there is no basis for providing relief to Petitioners under CR 60(b). Ecology therefore asks this Court to deny Petitioners' Motion for Relief under CR 60(b) and decline to vacate the Court's previous judgment in this case.

DATED this 19th day of April 2016.

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APPENDIX B

STATE OF MINNESOTA
COUNTY OF CLEARWATER

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

ANNETTE MARIE KLAPSTEIN,
EMILY NESBITT JOHNSTON,
STEVEN ROBERT LIPTAY, and
BENJAMIN JOLDERSMA,

Defendants.

Court File No. 15-CR-16-413
15-CR-16-414
15-CR-15-425
15-CR-16-25

ORDER AND MEMORANDUM

The above-entitled matter came on for a contested omnibus hearing before the undersigned Judge of District Court on August 15, 2017, at the Clearwater County Courthouse, Bagley, Minnesota. The State of Minnesota was represented by David Hanson, Clearwater County Attorney, 213 Main Avenue North, Bagley, Minnesota. Defendants, Annette Klapstein, Emily Johnston, Steven Liptay, and Benjamin Joldersma, were personally present and represented by their attorney, Timothy Phillips, 2836 Lyndale Avenue South, Minneapolis, Minnesota.

On November 16, 2016, the State filed a Notice of Motion and Motion to Consolidate all four Defendants' cases for trial purposes. All four Defendants initially objected to their cases being consolidated. However, Defendants Klapstein and Johnston agreed to be joined for trial purposes. Defendants Liptay and Joldersma did not stipulate to any agreement to be joined. The Court has yet to rule on consolidation for trial purposes. Defendants did not object to being joined for purposes of the omnibus phase. Therefore, the Court joined all four Defendants for a consolidated contested omnibus hearing.

On December 20, 2016, Defendants filed a Notice to Present Necessity Defense at Trial. The State objects to Defendants presenting the necessity defense at trial. The State's Motion to Consolidate will be addressed in the same order as Defendants' Necessity Defense Notice.

On May 11, 2017, prior to the contested omnibus hearing, Defendants submitted three affidavits from various experts in support of Defendants' necessity defense. At the contested omnibus hearing, all four Defendants testified in support of the necessity defense. The State did not present any witnesses. The Court allowed the parties to simultaneously file any additional briefs by September 15, 2017. Both parties timely filed additional briefs. On August 17, 2017, Defendants filed expert declarations. The Court took the matter under advisement on September 18, 2017.

Based upon all the files, records, and proceedings herein, the Court makes the following:

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Clearwater County, MN

ORDER

1. The State's Motion to Consolidate is **DENIED in part** and **GRANTED in part**. Defendant Klapstein's and Defendant Johnston's trials shall be joined. Defendant Liptay's and Defendant Joldersma's trials shall be joined.

2. Defendants' Motion to Present Necessity Defense at Trial is **GRANTED**.

3. The Clearwater County Court Administrator shall promptly schedule all the above-entitled matters for pretrial/settlement conferences.

4. The attached Memorandum of the Court is incorporated by reference herein.

IT IS SO ORDERED.

BY THE COURT:

Robert D. Tiffany

Tiffany, Robert
Oct 11 2017 11:41 AM

Robert D. Tiffany
Judge of District Court

Filed in Ninth Judicial District Court
10/11/2017 12:54 PM
Clearwater County, MN

MEMORANDUM

A. Joinder of Defendants for Trial

Under Minn. R. Crim. P. 17.03, subd. 2, a court should consider the following factors in determining whether multiple defendants' cases should be joined for trial: (1) the nature of the offense; (2) the impact on the victim; (3) the potential prejudice to the defendant(s); and (4) the interests of justice. This rule neither favors nor disfavors joinder. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). Extended duration of multiple trials favors joinder. *State v. Powers*, 654 N.W.2d 667, 675–76 (Minn. 2003).

The court has approved joinder of criminal trials in cases where codefendants acted in close concert with one another. *See State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005). "The identical nature of the charged offenses and the nearly identical evidence against each defendant supports the trial court's decision to join [defendants] for trial." *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999).

Here, Defendants Klapstein and Johnston are both charged in a four count complaint with I) Criminal Damage to Property of critical public facilities, utilities, and pipelines in violation of Minn. Stat. § 609.594, subd. 2; II) Aid and Abet Criminal Damage to Property of critical public service facilities, utilities, and pipelines in in violation of Minn. Stat. § 609.594, subd. 2, with reference to Minn. Stat. § 609.05, subd. 1 and subd. 2; III) Trespass on critical public service facility, utility, or pipeline in violation of Minn. Stat. § 609.6055, subd. 2(b); and IV) Aid and Abet Trespass on critical public service facility, utility, or pipeline in violation of Minn. Stat. § 609.6055, subd. 2(b), with reference to Minn. Stat. § 609.05, subd. 1 and subd. 2.

Defendants Liptay and Joldersma are both charged in a two count complaint with I) Trespass on critical public service facility, utility, or pipeline in violation of Minn. Stat. §

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Clearwater County, MN

609.6055, subd. 2(b); and II) Aid and Abet Trespass on critical public service facility, utility, or pipeline in violation of Minn. Stat. § 609.6055, subd. 2(b), with reference to Minn. Stat. § 609.05, subd. 1 and subd. 2.

Criminal Damage to Property of critical public facilities, utilities, and pipelines is defined as "[w]hoever causes damage to the physical property of a critical public service facility, utility, or pipeline with the intent to significantly disrupt the operation of or the provision of services by the facility, utility, or pipeline and without the consent of one authorized to give consent…" Minn. Stat. § 609.594, subd. 2. Trespass on critical public service facility, utility, or pipeline is defined as "[w]hoever enters an underground structure that (1) contains a utility line or pipeline and (2) is not open to the public for pedestrian use, without claim of right or consent of one who has the right to give consent to be in the underground structure…" Minn. Stat. § 609.6055, subd. 2(b). Aid and Abet is defined as when an individual "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime," and an individual is also liable for a crime in pursuance of the crime if "reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subd. 1 and subd. 2.

Defendants argue that the State has not shown a need to consolidate because the case is not so complex as to require joinder, the alleged victim has not demonstrated that separate trials would impact it in any way, joint trials present the potential of substantial prejudice, and the interests of justice favor separate trials.

The State argues that because Defendants have the same defenses, are part of the same behavioral incident, are charged with the same or affiliated crimes, and are represented by the same attorney, the joinder of trials of all four Defendants is appropriate.

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The facts present do not lead to any bright-line determination. Rather, the Court has determined to join the defendants whose apparent roles in the protest and whose pending charges most closely align and are similar. The Court does not find consolidation of all four cases in a single trial to be appropriate. The Court makes no determination as to any heightened potential for conflict of interest for the individual defendants based upon this ruling. The Court strongly encourages defense counsel and each individual defendant to thoroughly review and discuss the conflict issues present. Accordingly, the Court hereby DENIES in part and GRANTS in part the State's Motion to Consolidate.

B. Defense of Necessity

"A party is entitled to an instruction if the evidence produced at trial supports the instruction." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). To be entitled to a jury instruction on the necessity defense, a defendant must make a *prima facie* showing of necessity. *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995). The necessity defense is a common-law affirmative defense that has been applied in criminal cases. *State v. Hanson*, 468 N.W.2d 77, 78 (Minn. Ct. App. 1991), *review denied* (Minn. June 3, 1991). Minnesota's standard for the necessity defense is high; to successfully assert the defense, a criminal defendant must show that the harm that would have resulted from obeying the law would have significantly exceeded the harm actually caused by breaking the law, there was no legal alternative to breaking the law, the defendant was in danger of imminent physical harm, and there was a direct causal connection between breaking the law and preventing the harm. *State v. Rein*, 477 N.W.2d 716, 717 (Minn.App.1991), *review denied* (Minn. Jan. 30, 1992). The defense "applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question." *State v. Johnson*, 289 Minn.

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Clearwater County, MN

196, 199, 183 N.W.2d 541, 543 (1971); *see Weierke v. Comm'r of Pub. Safety*, 578 N.W.2d 815, 816 (Minn. Ct. App. 1998) ("The necessity defense applies in emergency situations w[h]ere peril is imminent and the defendant has no other option but to violate the law.").

The Court GRANTS Defendants' request to present evidence on the defense of necessity at trial. The Court's grant is not unlimited and the Court expects any evidence in support of the defense of necessity to be focused, direct, and presented in a non-cumulative manner. The State of Minnesota may object at trial on the above or other lawful grounds.

Tiffany, Robert
Oct 11 2017 11:42 AM