

The Daily Transcript®

San Diego's Business Daily

Tuesday, May 19, 2009 | Vol. 124, No. 99 | sddt.com

Appellate decision posthumous victory for Wheeler

By DOUG SHERWIN

The Daily Transcript

SAN DIEGO — A Ramona woman will get another chance to have her eminent domain case heard in court, following a ruling by a federal appellate panel last week.

Joan Kearney filed suit against the Ramona Unified School District and its law firm, **Foley & Lardner LLP** — first in state court and then in district court — for allegedly hiding evidence during the trial to determine her property's value.

She was unsuccessful until the Ninth Circuit Court of Appeals ruled in her favor May 12, sending the case back to the trial court.

The decision marked the final victory in the legal career of San Diego attorney Jay Wheeler, who died unexpectedly at the age of 60 in the middle of the litigation.

"Jay believed in the rightness of his legal theory," said Jill Sullivan, an attorney with **Chapin Wheeler** who argued the case before the Ninth Circuit. "He was brave and steadfast in filing the appeal. I wanted to vindicate his thought process in filing the appeal as he did.

"It's the kind of decision that's downplayed by the defense because it's not a decision on the merits. But for us, to live to fight another day on behalf of Joan Kearney is enormous."

San Diego attorney Mark Zebrowski, who is helping represent Foley & Lardner, said the Ninth Circuit panel had to take everything

that was alleged as true because it was the pleading stage.

"When we move onto the factual stage, it's quite different than what's alleged," he said, adding his clients didn't hide anything.

Kearney accused Foley & Lardner, two of its attorneys and the business manager of the Ramona school district of intentionally hiding the results from a percolation test done on her 52-acre lot in Ramona. A percolation test is used to determine how many buildings the land can sustain.

"That piece of evidence would have significantly increased the value of this property," Sullivan said. "Experts on both sides said it would have made a big difference."

Attorney Daniel Shinoff, who represented Ramona Unified School District business manager Michael McCarty, was disappointed with the Ninth Circuit's decision but he wasn't particularly surprised.

"They weren't making a decision based upon the merits," Shinoff said. "They simply said the (district) judge applied a cannon that they said didn't apply."

During the trial to determine the property's worth, results from a percolation test taken in 1996 was presented to the jury and debated by both parties' experts. Kearney claims a more recent test was completed, one that would suggest the land could sustain more development, but that evidence was not revealed during discovery or shown to the judge and jury.

The jury eventually awarded Kearney nearly \$1 million.

Shinoff, of the firm **Stutz, Artiano, Shinoff & Holtz**, disputes that any evidence was hidden.

"I just can't imagine why the plaintiff would believe the head of business services would have some sort of motive to do that," he said. "What would be the motivation to damage your career like that?"

According to Sullivan, the school eventually released the results of a later test, but only "at a time when no state court could, as a matter of procedure, consider the evidence."

Wheeler and Sullivan's litigation in federal court was first dismissed by the district court, which also ordered Kearney to pay the defendant's attorney's fees.

The Ninth Circuit, however, reversed the dismissal and remanded the case back to the trial court.

"I was pleased that the Ninth Circuit, in its opinion, took note to say that the district court's premise that the plaintiff should have done more to find hidden evidence was misplaced," Sullivan said.

"Jay was looking down and smiling that I had satisfied my responsibility, not only to my client, but to my mentor," she added, "and the outcome was fitting to him and his memory as a lawyer. He was a brilliant lawyer and a brave lawyer."

doug.sherwin@sddt.com
Source Code: 20090518tba