NO. 100619-5

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTOPHER and ANGELA LARSON,

Petitioners,

v.

SNOHOMISH COUNTY et al.,

Respondents.

RESPONDENT STATE OF WASHINGTON'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

The Court of Appeals' unanimous opinion in this matter correctly affirmed the dismissal of the Larsons' civil suit against Governor Jay Inslee and Attorney General Bob Ferguson concerning the foreclosure on the Larsons' property. After defaulting on their mortgage, the Larsons attempted to forestall foreclosure by bringing suit against these State officials, as well as Snohomish County officials, and the bank and loan servicers who handled their mortgage and non-judicial foreclosure. Their suit alleged that the loan documents were fraudulent and that Snohomish County failed to have a functioning Torrens system through which they could register their land. The Larsons sought to compel Governor Inslee and Attorney General Ferguson to direct the actions of the Snohomish County judiciary and officials with regard to the Torrens Act even though implementation of the Torrens Act is a purely local decision not within the authority of either the Governor or Attorney General.

The superior court correctly dismissed both the Governor and Attorney General from the case due to a lack of justiciable controversy when the Larsons failed to properly invoke the Torrens Act. The Court of Appeals affirmed that dismissal because the State Defendants have neither the duty nor the authority to force the County or its judges to take the action demanded by the Larsons and such an order would violate the separation of powers doctrine. *See Larson v. Snohomish Cnty.*, 20 Wn. App. 2d 243, ¶ 52, 499 P.3d 957, 973 (2021). The Larsons now seek review by this Court, not on that decision on the merits, but rather on whether the Court of Appeals properly affirmed the superior court judge's decision not to recuse himself.

Review of that portion of the Court of Appeals' decision is unwarranted because the Larsons fail to meet any of the grounds for review under RAP 13.4(b). Specifically, the Larsons (1) fail to articulate and argue any conflict between the Court of Appeals' decision here and any other Washington Supreme

Court or Court of Appeals case, *see* RAP 13.4(b)(1)-(2); (2) fail to articulate and argue any significant question of law under the Constitution of the State of Washington or United States, *see* RAP 13.4(b)(3); and (3) fail to put forth any issue of substantial public importance that this Court should address, *see* RAP 13.4(b)(4). Review should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. The rule of necessity is recognized by this Court and prohibits disqualification of a judge from hearing and deciding a case where there is no alternate or substitute provided to hear and decide the case. Did the trial judge here properly decline to recuse himself under the rule of necessity when the Larsons sought to disqualify all judges in the State

of Washington from hearing and deciding their case?

2. Whether the trial judge properly declined to recuse himself when he had no financial or personal interest in the case?

III. COUNTERSTATEMENT OF THE CASE

A. The Larsons Defaulted on Their Mortgage on Their Snohomish County Property

Christopher and Angela Larson purchased property in Snohomish County in 2006. CP 3986-87. In 2007, the Larsons received their first notice of default. CP 4008. Over the next eleven years the Larsons did not respond to requests for payment and received four more notices of default. CP 3987, 4008-11. The final notice of default was issued on December 22, 2017, CP 3209-16, and on May 17, 2018, a foreclosure trustee was appointed, CP 3218-19.

B. The Larsons Sought to Use the Torrens System and a Skagit County Civil Suit to Forestall Foreclosure

In June 2018, in an effort to forestall the foreclosure of the property, the Larsons sought to register the property in their name under the Torrens system. CP 3996, 3985-4031. On October 18, 2018, the Larsons filed suit in Skagit County Superior Court seeking quiet title to their home on the basis that Snohomish County had not implemented a Torrens system. CP 3985, 4030-31.

Prior to its recent repeal by the Legislature,[1] the Torrens Act was an optional system of registering land titles in Washington. *Larse v. Campbell*, 186 Wash. 319, 323, 57 P.2d 1246, 1248 (1936); RCW 65.12.225 (allowing land owners to withdraw land registered under the Torrens Act from the registry). The Act was adopted by the legislature in 1907 and created a system similar to the process for registering

[1] *See* Laws of 2022, ch. 66 (formerly House Bill 1376, repealing the Torrens Act effective June 9, 2022).

automobiles. Overview of the system, 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate* § 14.13 (2d ed. 2021). But, at the time the Act was adopted and through to today, Washington uses a land recording system. *Id.* The Torrens Act never became popular because converting land that was already recorded into registered land requires the time and expense of a "kind of quiet title action in court to establish the title and other interests." *Id.*

While the Larsons were trying to use the Torrens Act to forestall their foreclosure, the Trustee's sale of the property was scheduled. CP 3228. Initially the sale was scheduled for October 12, 2018, but was postponed to November 16, 2018. CP 3137. Despite notice of the scheduled sale and further postponement, the Larsons never moved to enjoin the Trustee's sale and the property was sold to the winning bidder that same day. CP 3137-38.

C. The Larsons Continued to Litigate after Foreclosure and Unsuccessfully Requested All Skagit County Superior Court Judges Be Disqualified

Despite their property being sold in the foreclosure sale, the Larsons continued to litigate their Skagit County case. The suit named various Snohomish county officials, all the Snohomish County Superior Court judges (Snohomish County Defendants), several banks, the trustee, the loan servicers, and two State Defendants: Governor Inslee and Attorney General Ferguson. CP 3985-86. The Larsons alleged that the State Defendants failed to compel Snohomish County to implement a Torrens System. CP 3985-4031.

The State Defendants moved to dismiss and, among other arguments, argued that they lacked authority to direct county officials and members of the judiciary. CP 3955-71; Wash. Const. art. XI, §§ 4, 10 (treating counties and cities as separate political subdivisions of the State). But, at the Larsons' request, the State pushed out the noting date of that motion and, instead, the State joined the County's motion to dismiss and

motion to transfer venue to Snohomish County. CP 3341, 3343-44. The County's motion to dismiss was based on the Larson's failure to satisfy the requirements to invoke the Torrens Act process and thus their failure to establish a justiciable controversy. CP 3923-28.

The Larsons opposed this motion and, relevant to this appeal, argued that the case could not be transferred to Snohomish County because they had named all the Snohomish County judges as defendants. CP 3794. However, the Larsons also argued that no judge from a county without a functioning Torrens system could hear their case—and that no Washington county had a functioning system. CP 3471 (listing every county that allegedly failed to have a Torrens system, and listing all counties in Washington). At the hearing, the Larsons argued that the assigned judge, Judge Svaren, as well as all Skagit County

Superior Court judges had to disqualify themselves on this basis. CP 3343.[2]

Judge Svaren denied the request to disqualify himself and granted the motion to dismiss the State and Snohomish County Defendants. CP 3340-42. Because there were still remaining claims against the private defendants, the court also granted the motion to change venue to Snohomish County. *Id.*

D. After Dismissal of the Public Defendants and Transfer of the Remaining Claims to Snohomish County, the Larsons Unsuccessfully Moved to Amend Their Complaint

Eight months later, the Larsons sought to amend their Complaint to bring the same claims against the State Defendants and to add the Washington State Treasurer and Washington State Investment Board as defendants. CP 2773-2927. The Larsons admitted this was partially to challenge the motion to dismiss.

[2] There is no Verbatim Report of Proceedings for this portion of the hearing because midway through the hearing the courthouse power went out and the recording of the hearing was lost. However, this argument was recorded on the contemporaneous Clerk's Minutes. CP 3343-44.

CP 2779-80. At this point, the Larsons moved to disqualify all the Snohomish County superior court judges. CP 2745-51. Those judges recused themselves and ordered the case be heard by Judge Svaren in Skagit County Superior Court. CP 576-78.

The State opposed the motion to amend because the Larsons still could not show that they satisfied the requirements to invoke the Torrens Act process. CP 349-355. On Reply, the Larsons included a new argument: that any judge who participated in the Washington State retirement system should be disqualified from deciding the case because the State retirement system invests in mortgage-backed securities. CP 254-84. The Larsons, however, did not ask Judge Svaren to recuse himself at this time. *Id.*; VRP Vol. II. Judge Svaren denied the Motion to Amend the Complaint. VRP Vol. II p. 46-47.

E. The Larsons Unsuccessfully Moved to Disqualify Judge Svaren, Who Subsequently Granted Summary Judgment to the Remaining Private Defendants

In October 2019, in their Opposition to Summary Judgment filed by Private Defendants, the Larsons finally sought

to disqualify Judge Svaren on the basis that he participated in the Washington State retirement system. CP 123-24. The superior court denied the Motion to Disqualify because Judge Svaren was not a party to the case and granted summary judgment on behalf of the remaining defendants. CP 44-45.

F. Proceedings before the Court of Appeals

On appeal, the Larsons argued that Judge Svaren should have recused himself from the case because he served as a judge in a county without a functioning Torrens system. Appellant's Opening Br. at 39-40. However, the email from Skagit County that the Larsons attached as proof of this claim actually stated that the Torrens Act could be used to register land in Skagit County but that they "would have to research the land to which [they] would like to register to see if it qualifies as a Torrens Act piece of land." CP 3479 (*sic* throughout). The Larsons also argued that judges are "unconstitutionally incentivized to approve foreclosures" because of the rules regarding judges' retirement funds. Opening Br. 44-45.

The Court of Appeals rejected these arguments. *Larson*, 499 P.3d at 982-83. Regarding the argument that Judge Svaren could not rule impartially because Skagit County lacked a Torrens system, the Court (1) held this was unsupported by the record, and (2) applied the rule of necessity because the Larsons were arguing that no judge could hear their case. *Id.* The Court applied the rule of necessity to effectuate that rule's purpose: to "provide[] for the effective administration of justice while preventing litigants from using the rules of recusal to destroy what may be the only tribunal with power to hear a dispute." *Id.* at 982 (quoting *Glick v. Edwards*, 803 F.3d 505, 509 (9th Cir. 2015)). Regarding the argument that Judge Svaren had a personal interest in allowing foreclosures to occur due to how his retirement fund is invested, the Court rejected this argument holding that this was "pure speculation." *Id.* at 983.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Decision Adheres to Precedent

There is no conflict with a Washington Supreme Court case that would justify this Court accepting review under RAP 13.4(b)(1). The Larsons cite *Kennett v. Levine*, 50 Wn.2d 212, 219-20, 310 P.2d 244 (1957), in their petition as a decision from this Court that conflicts with the Court of Appeals' application of the rule of necessity. Petition for Review (PFR) 19. However, the Larsons do not explain how the Court of Appeals' decision conflicts with *Kennett*, nor is it apparent from the language they quote from that case in their petition:

> It is established by the great weight of authority that where a public officer . . . is given exclusive jurisdiction to conduct a hearing . . . and no alternate or substitute is provided, disqualification will not be permitted to destroy the only tribunal with power in the premises.

See PFR 19 (quoting *Kennett*, 50 Wn.2d at 219-20).

This Court should decline to consider this argument because it is not supported by "adequate, cogent argument and

briefing." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009). Nor would argument in a forthcoming reply, should one be permitted, cure the defect. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Nonetheless, there is nothing inconsistent with the Court of Appeals' decision and the holding in *Kennett*. Rather, the opposite is true: the Court of Appeals decision here adheres to the *Kennett* Court's decision. The Larsons sought to disqualify every single judge in the State of Washington on the basis that they either served in a County where the Torrens System was not actively in use or on the basis that they were vested in Washington's retirement system. Where the superior court had original jurisdiction, RCW 2.08.020, this was effectively an attempt to destroy the only forum that could hear the case.

The Larsons' argument that a pro tempore judge should have been appointed is a red herring. *See* PFR 19. As noted by the Larsons, Judge Svaren was serving as a judge pro tempore

for Snohomish County Superior Court. PFR 7. And yet, the Larsons argued that, as a Snohomish County pro tem judge, Judge Svaren should have been recused on the basis of res judicata of all Snohomish County judges having recused themselves previously. PFR 7. Thus, it seems that the Larsons would have sought to disqualify any Snohomish County pro tem judge.

There is also no conflict with a published decision of the Court of Appeals that would justify granting discretionary review under RAP 13.4(b)(2). Although the Larsons passingly cite to RAP 13.4(b)(2) as a ground for accepting review, PFR 37, the Larsons do not cite a single Court of Appeals opinion in their petition either as authority or as a case in conflict with the decision. Indeed, at least one prior Court of Appeals decision are consistent with the decision below in this case. *Filan v. Martin*, 38 Wn. App. 91, 94-95, 684 P.2d 769 (1984) (applying the rule of necessity when a litigant attempted to disqualify all judges).

Finally, conflict with a United States Supreme Court decision is not grounds to grant discretionary review. *See* RAP 13.4(b). Nonetheless, the Larsons point to such decisions and state, without meaningful argument, that the Court of Appeals' decision conflicts with them. PFR 27. Specifically the Larsons argue that—even though the standards are similar—they were entitled to have the Court of Appeals base its decision on whether Judge Svaren should have recused himself under due process or RCW 2.28.030 rather than the Code of Judicial Conduct. These arguments are without merit.

First, this Court should decline to accept review given the lack of any meaningful argument explaining how or why these United States Supreme Court cases conflict with the decision at hand, *Satomi*, 167 Wn.2d at 808, and the fact that conflict with a United States Supreme Court case is not a basis for granting review under RAP 13.4(b). But additionally, this argument fails where it is well established that the Court of Appeals may affirm on any basis supported by the record. *Pearson v. State Dep't of*

Labor & Indus., 164 Wn. App. 426, 441, 262 P.3d 837 (2011) , *as modified* (Nov. 28, 2011). Here, the Court of Appeals affirmed Judge Svaren's decision not to recuse himself using the Code of Judicial Conduct, using facts supported by the record. The Court was not required to analyze the facts under a specific legal theory put forth by the Plaintiff.

This Court should decline review under RAP 13.4(b)(1) and (2).

B. There is no Significant Question of Constitutional Law Requiring Review

There is no significant question of constitutional law requiring or permitting review by this Court under RAP 13.4(b)(3). First, there is no question of significant constitutional law regarding the meaning of Washington Constitution, article IV, section 7. The Larsons fail to adequately brief and argue this point and specifically fail to articulate what about that provision needs clarification, especially given that they already had a judge pro tempore assigned to their case.

Second, there is no significant question of constitutional law regarding the standard for judicial neutrality or which standard should have been used by the superior court.

1. The interpretation of Washington Constitution, article IV, section 7 is not in dispute

There is no significant question of constitutional law regarding the meaning of Washington Constitution, article IV, section 7. *See* PFR 19. That constitutional provision states, in relevant part:

> A case in the superior court *may* be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule.

Wash. Const. art. IV, § 7 (emphasis added).

The Larsons, yet again, fail to articulate why this case presents a significant question of constitutional law justifying review under RAP 13.4(b)(3). And, again, without "adequate,

cogent argument and briefing" this Court should decline to consider this argument. *Satomi,* 167 Wn.2d at 808.

And, regardless, there is no issue regarding the interpretation of article IV § 7 because Judge Svaren, as a Skagit County judge, was already a judge pro tempore for Snohomish County Superior Court. *See* PFR 7. To the extent the Larsons wanted a judge pro tempore who was not a sitting elected judge, they point to no attempt in the record to seek the written agreement of the parties to have such a non-elected judge approved by the court and sworn to try the case.

The language of article IV, section 7 is clear and does not need any clarification. Given that the Larsons fail to articulate what the issue of constitutional importance is related to this provision, and the fact that they already had a judge pro tempore, this Court should decline to accept review of this issue under RAP 13.4(b)(3).

2. There is no significant question of constitutional law regarding the standard for judicial neutrality

This case does not present a significant question of constitutional law regarding the standard for judicial neutrality or which standard should have been used by the superior court. The Larsons make two equally unavailing arguments attempting to manufacture a significant question of constitutional law.

First, there is no significant question of constitutional law regarding whether the Larsons were entitled to have the Court of Appeals apply standards of due process and RCW 2.28.030 rather than the Code of Judicial Conduct when rendering its decision. *See* PFR 26-27. The Larsons do not cite any authority to support this claim. *Id.* Rather, an appellate court is not bound to affirm or reverse on a specific argument raised by the parties. Further, an appellate court may affirm on any ground supported by the record. *Pearson*, 164 Wn. App. at 441.

Second, there is no significant question of constitutional law regarding whether Judge Svaren properly declined to recuse

himself. A judicial officer "shall not act as such in a court of which he or she is a member in any . . . action, suit, or proceeding to which he or she is a party, or in which he or she is directly interested." RCW 2.28.030. "Due process, appearance of fairness and the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned." *State v. Leon*, 133 Wn.App. 810, 812, 138 P.3d 159 (2006).[3] Further, "[t]he party [seeking recusal] must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough." *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 24, 317 P.3d 481, 487 (2013) (citing *In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000)).

There is no significant question of constitutional law where the Larsons failed to provide any non-speculative

[3] The Larsons concur that this standard is correct. *See* PFR 25.

evidence of actual or potential bias or any personal or pecuniary interest on the part of Judge Svaren. Although the Larsons believe that the burden should not be on them to establish the disqualification of a judge, PFR 34-35, case law holds otherwise. *Kok*, 179 Wn. App. at 24. Because there is no significant question of constitutional law, this Court should decline review under RAP 13.4(b)(3).

C. There is No Issue of Public Importance Requiring Review

Finally, there is no issue of substantial public importance justifying review under RAP 13.4(b)(4) because the Court of Appeals' decision applied well settled law to a unique set of circumstances.

An issue is one of substantial public importance allowing for review under RAP 13.4(b)(4) when it "immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally." *Washington State Hous. Fin. Comm'n v.*

Nat'l Homebuyers Fund, Inc., 193 Wn.2d 704, 718, 445 P.3d 533, 540 (2019) (quoting *Wash. Nat. Gas Co. v. Public Utility Dist. No. 1*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969)).

Here, the Court of Appeals properly applied the rule of necessity to a situation where the Larsons were arguing that there were no judges in any county that could hear their case. There is no issue of substantial public importance where a court applies well-established precedent to the specific facts of a case, as happened here.

The Court of Appeals also properly applied well-settled standards for reviewing a judge's discretionary decision to the very specific facts of this case which include that the Larsons failed to support their arguments for recusal with specific evidence.

The Larsons make two arguments for why Judge Svaren should have recused himself. First, they argue that Judge Svaren should have recused himself because Skagit County judges were allegedly refusing to comply with their duties under the Torrens

Act. PFR 11, 29; *see also* CP 3343. But the email from Skagit County submitted by the Larsons as proof states that the Torrens system could be used in Skagit County. CP 3479. Of course, this is no longer the case because the Legislature has since repealed the Torrens system. Laws of 2022, ch. 66. There can accordingly no longer be any issue of substantial public importance deriving from the Torrens system itself. Second, the Larsons argue that Judge Svaren had an economic interest in the case because the judicial retirement system was allegedly invested in mortgage backed securities and that deciding the Larsons' mortgage was unenforceable would depreciate the value of the retirement account. PFR 29-31. But this argument also fails because judges' pension programs are "defined benefit programs" meaning judges receive a set amount based on years in service. CP 1003. Further, the Larsons failed to provide any evidence that their particular mortgage was ever sold as a mortgage backed security or that the Washington State Investment Board ever held an

interest in a mortgage backed security that included the Larsons' home.

Thus there is no issue that the Larsons have identified that would affect anyone other than themselves or that would otherwise affect commerce, finance, labor, industry or agriculture. *Washington State Hous. Fin. Comm'n*, 193 Wn.2d at 718. Review should not be accepted under RAP 13.4(b)(4).

V. CONCLUSION

The Court of Appeals' decision does not conflict with any Washington Supreme Court or Court of Appeals' case law. And where the decision applied well-settled law to a unique set of facts there is no significant question of constitutional law or issue of substantial public importance. Review should be denied.

This document contains 3,948 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 18th day of April 2022.

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CERTIFICATION

I hereby certify that the foregoing was served on all parties on this date through the Court's electronic filing system.

DATED this 18th day of April 2022.

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WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

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