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No. 100903-8 (Supreme Court)  
Court of Appeals, Division III No. 379647  
Spokane County Superior Court Cause No. 19-202579-32

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THE WASHINGTON STATE SUPREME COURT

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THE EAGLE RIDGE HOA  
Respondent,

v.

NIKOLAY NIKONCHUK,  
LUDMILA NIKONCHUK,  
Petitioners

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ANSWER TO PETITION FOR REVIEW

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## **I. INTRODUCTION**

Respondent Eagle Ridge Homeowners Association submits this Answer to the Petition for Review filed by Petitioners Nikolay Nikonchuk and Ludmila Nikonchuk. Eagle Ridge requests that the Supreme Court reject the Nikonchuks' Petition for Review, upholding the decision of the Court of Appeals, Division III, dated March 17, 2022. In their Petition for Review, the Nikonchuks fail to identify and/or substantiate why review should or can be accepted under one or more of the tests established in RAP 13.4(b).

## **II. STATEMENT OF THE CASE**

This case arises out of the Nikonchuks' refusal, beginning in June 2013, to pay their assessments as members of the Eagle Ridge HOA, where they have resided and been part of since 2001.

In June 2019, Eagle Ridge filed its summons and complaint for money due to collect the outstanding assessments and related charges under the HOA governing documents. After Eagle Ridge filed a Motion for Summary Judgment on December 18, 2020, the Honorable Judge Timothy Fennessy of

Spokane County Superior Court granted Eagle Ridge's motion and awarded it a monetary judgment of \$19,003.85, which included an award of attorney's fees and costs of \$10,010.00.

The Nikonchuks filed a Notice of Appeal on January 19, 2021. After the matter was briefed to the Court of Appeals, on March 17, 2022, Division III of the Washington State Court of Appeals, in an unpublished opinion, upheld Judge Fennessy's grant of summary judgment and further awarded Eagle Ridge its reasonable attorney's fees and costs on appeal.

The Nikonchuks then filed this Petition for Review, seeking that the decisions of both Judge Fennessy and the Court of Appeals be overturned.

### **III. STANDARD OF REVIEW**

While the applicable standard of review for an order granting summary judgment, generally, is de novo (McDevitt v. Harborview Medical Center, 179 Wn.2d 59, 64, 316 P.3d 469, 472 (2013)), a different standard of review is applicable to a petition for review being filed by a party alleging to have been aggrieved by a Court of Appeals final ruling.

RAP 13.4 provides as follows:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

#### **IV. LEGAL ARGUMENT**

This Court should deny the Nikonchuks' petition for review as they completely fail to identify and support why

review should be accepted under one or more of the tests established in Section 13.4(b). They further fail to comply RAP 13.4(c)(7), which requires a direct and concise statement of the reason why review should be accepted under one of those tests. For these reasons alone, the Nikonchuks' Petition for Review should be denied.

The Nikonchuks also fail to provide sufficient argument and/or authority to support any review by the Supreme Court of the decision of the Court of Appeals, which went into great detail to evaluate the Nikonchuks' appeal below and to explain why their arguments were insufficient to require reversal of Judge Fennessy's order on summary judgment.

A. The Nikonchuks fail to state a valid ground for acceptance of this Petition for Review by the Court.

Although the Nikonchuks briefly cite to RAP 13.4(b), their Petition for Review is not supported by argument that makes it clear exactly upon what ground or grounds they believe the Supreme Court should accept their petition. They do not identify any decisions from the Supreme Court or another division of the Court of Appeals which they believe are

in conflict with Division III's ruling in this matter, which would satisfy the requirements of RAP 13.4(d)(1 or 2). The Nikonchuks do not identify a reason, or make any argument, that this private collection dispute involves an issue of substantial public interest. RAP 13.4(b)(4).

The Nikonchuks do briefly allege that their constitutional rights were violated by the Court of Appeals' decision, in particular, Sections 3, 7, 10, and 14 of the Washington State Constitution. The Nikonchuks' argument under any constitutional ground fails as a matter of law as they identify no state action which would support a constitutional claim under RAP 13.4(c).

This Court has consistently held that for a private person to sustain a claim for violation of the State Constitution, the claim has to concern a state action by a governmental entity, or at least a person acting within or associated with a role of the State. In South Center Joint Venture v. National Democratic Political Committee, a shopping center owner sought declaratory judgment that political organizations had no right to solicit contributions at the shopping center. 113 Wn.2d 413,



780 P.2d 1282 (1989). On appeal to the Washington State Supreme Court, the Court held “the free speech provision of the Constitution of the State of Washington (Constitution Article 1, Sec. 5) affords protection to the individual against actions of the state. It does not protect an individual against the actions of other private individuals. Id. at 419. Rationalizing its holding, the Court went on to say: “It follows that the fundamental nature of a Constitution is to govern the relationship between the people and their government, not to control the rights of the people vis a vie each other.” Id. at 422, quoting T. Cooley, *General Principles of Constitutional Law* 23 (Third Edition 1898). *See also*, State v. Boland, 115 Wn.2d 571, 575, 800 P.2d 112 (1998), where the Court stated “the fundamental purpose of the State Constitution is to govern the relationship between the people and their government rather than to govern the relationship between private parties.” Citing South Center, 113 Wn.2d 413.

For these reasons, the Nikonchuks’ allegations that Eagle Ridge violated Section 3 of the State Constitution by “invading [their] liberty”, violated Sections 7 and/or 10 by sending a

letter or non-itemized bill which they felt was not authorized by law, or Section 14 by imposing upon Nikonchuks' excessive attorney's fees, all fail as Eagle Ridge is not a governmental entity, but rather only sought to enforce private rights under an agreement between private parties. The Nikonchuks' allegations that the Court of Appeals violated the Constitution are frivolous and cannot be sustained.

B. The Nikonchuks' additional arguments raised in their Petition for Review are without merit and do not support the Court reviewing this matter.

The balance of the Nikonchuks' Petition for Review does little more than re-state the arguments which they believe the Court of Appeals incorrectly resolved or failed to consider in entering the decision upholding the grant of summary judgment in favor of Eagle Ridge. These arguments were properly considered by the Court of Appeals and resolved against the Nikonchuks. Mere disagreement with a Court of Appeals' decision does not constitute grounds for seeking review by the Supreme Court, unless one of the requirements of RAP 13.4(b) are cited in that.

The Nikunchuks do raise a “new argument” at several points in their Petition for Review not previously raised before either the Superior Court or the Court of Appeals. Although arguments raised for the first time on appeal are not generally considered by the court (In re Detention of Ambers, 160 Wash.2d at 557 n.6, 158 P.3d 1144 (2007)), Eagle Ridge will address this new issue, which essentially argues that the Court of Appeals (and possibly also Eagle Ridge’s counsel and the Superior Court) violated the policies set forth by the Washington State Diversity, Equity, and Inclusion (DEI) program.

The DEI was a “best practices” policy adopted by the State Human Resources Division, Office of Financial Management in September 2019. Importantly, its title is “Diverse, Equitable and Inclusive Employee Life Cycle Best Practices.” Its Overview section clearly establishes the DEI is intended merely as a policy adopted to insure Washington State governmental agencies/employers act properly toward their employees:

To ensure respect for differences and coaching for positive change towards inclusive practices for all employees.

By its own terms, the DEI is limited to situations involving a governmental employer and its actions toward its employees. It has no relevance toward a private lawsuit between individual parties, nor does it have any application toward the proper treatment by a judicial court or judge toward litigants. While Mr. Nikonchuk may have become knowledgeable of the DEI policy through his alleged employment with the long-term care department of Washington State, it is irrelevant to this proceeding, and any application of that program to this action should be disregarded by the Court.

The Nikonchuks' remaining arguments consist entirely of personal observations that they have been wronged by Eagle Ridge and the Washington judicial system, based on their status as pro se litigants, or even a blatant allegation that they are the victim of bias and prejudice based upon their Ukrainian decent. As pointed out by the Court of Appeals in its decision, the Nikonchucks are held to the same standard as pro se litigants as

would they be as licensed counsel. Kelsey v. Kelsey, 179 Wn. App. 360, 368, 317 P.3d 1096 (2014). Their allegations of possible racial prejudice and/or bigotry against them by Eagle Ridge and the Appellate Court are insulting and frivolous and should be disregarded by the Court.

C. Eagle Ridge is entitled to its attorney's fees on appeal.

For the same reason argued before the Court of Appeals, Eagle Ridge is entitled to an award of its attorney's fees and costs in responding to this Petition for Review, pursuant to RAP 18.1(a), based on the HOA governing documents which provide that the prevailing party in a dispute be awarded reasonable attorney's fees and expenses. Upon rejection of the Nikonchuks' Petition for Review, the Court of Appeals should be empowered to award additional attorney's fees and costs in Eagle Ridge's favor for having to respond to this baseless and groundless Petition for Review.

## V. CONCLUSION

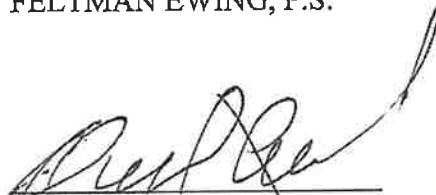
The Nikonchuks' Petition for Review must be rejected as they have not raised grounds pursuant to RAP 13.4(b) for this Court to consider their petition. They cite no conflicts with other decisions from this Court or other appellate divisions, do not allege a violation of a substantial public interest to be determined by this Court, and their brief references to provisions of the Washington State Constitution do not allege any state action which would support those constitutional claims in any fashion.

The Nikonchuks are simply in disagreement with the Court of Appeals' decision, which upheld the opinion of the Superior Court in granting summary judgment to Eagle Ridge on the basis of the HOA declarations and admitted nonpayments by the Nikonchuks of their dues and assessments thereunder. Their petition should be denied, and the Supreme Court should order that Eagle Ridge's attorney's fees on appeal should be awarded by the Court of Appeals.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of

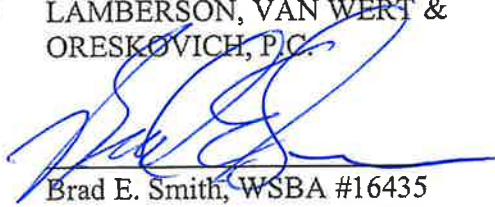
June, 2022.

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**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington: On the date set forth below, I served the document to which this is annexed by first-class mail and electronic mail to:

Nikolay and Ludmila Nikonchuk

7214 So. Shelby Ridge Rd.

Spokane, WA 99224

Signed at Spokane Washington on June 17, 2022.

  
Bonita L. Felgenhauer



**ETTER, MCMAHON, LAMBERSON, VAN WERT & ORESKOVICH, P.C.**

**June 17, 2022 - 7:42 AM**

**Transmittal Information**

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