

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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No. 101181-4

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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GEORGE BERKA,

Petitioner,

v.

WEDGEWOOD MANOR HOMEOWNERS ASSOCIATION,

Respondent.

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RESPONSE TO PETITIONER'S  
PETITION FOR REVIEW

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## 1. IDENTITY OF RESPONDENT

Wedgewood Manor Homeowners Association (“Wedgewood”), was the Plaintiff before the trial court, and is Respondent both on appeal and before this Court answering Appellant George Berka’s (“Berka”) Petition for Review.

## 2. ANSWER TO RESTATED ISSUES PRESENTED TO REVIEW

2.1. Whether this Court should grant review, under RAP 13.4(b)(4) as a matter of substantial public importance, where an appellant asserts that the lodestar method of computing reasonable attorney fees is “significantly flaw[ed] for failing to take into account the overall value of the case or the amount of the final judgment”? No.

2.2. Whether this Court should grant review, under RAP 13.4(b)(4) as a matter of substantial public importance, where an appellant moved for, after court ordered deadlines to do so, and was denied a continuance of a trial date, and where the trial court granted the opposing party’s motion for summary judgment?

2.3. Whether this Court should grant review, under RAP 13.4(b)(4) as a matter of substantial public importance, where an appellant moved for, after court ordered deadlines to do so, and was denied a continuance to pursue discovery regarding maintenance and repairs to his condominium unrelated to the issue before the trial court, *i.e.*, admittedly unpaid monthly condo association assessments? No.

### 3. RESTATEMENT OF THE CASE

3.1. Berka owns a condominium located at a condominium complex managed by Wedgewood. (CP at 47); *Wedgewood Manor Homeowners Ass'n v. Berka*, 82746-4-I, 2022 WL 2800528, at \*1 (Wash. Ct. App. July 18, 2022). Pursuant to the Declaration and Covenants, Conditions, Restrictions and Reservations (the "Declaration"), owners such as Berka are required to pay monthly assessment to Wedgewood. (CP at 54-55); *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1.

3.2. Beginning in March 2018, Berka began reducing the amount he paid for his monthly assessments. (CP 28-39, 103-

248). By July 2019, Berka had discontinued making all payments to Wedgewood. (CP 28-39). By September 2019, his Wedgewood account balance had reached \$7,887.54 resulting in the association filing a lien to secure the debt. (CP 28-39, 47, 59, 103-248).

3.3. In July of 2020, having received no response from Berka after recording a lien against him, Wedgewood commenced this lawsuit in King County Superior Court to compel Berka's payment of his assessments. (CP at 28-39). Wedgewood requested that, "in the event [Berka] does not satisfy the judgment in this action promptly upon its entry, the lien of the Judgment [may] be foreclosed." (CP at 35); *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1. Additionally, Wedgewood requested an award of attorney fees and costs pursuant to the Declaration. *Id.*

3.4. On October 10, 2020, Berka filed his amended answer. (CP 1-8). In this answer, Berka "admit[ted] . . . that he has not paid the requested dues and special assessments in full

lately.” (CP at 47); *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1. He asserted that he should be personally exempt from paying these assessments because, in essence, he believed that Wedgewood did not frugally manage the condominium complex. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1.

3.5. On March 31, 2021, Berka filed his Motion to Postpone Trial Date. (CP 9-10). He sought to continue the trial date one year from a date in June 2021 to the end of June 2022. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1. Berka asserted that, as a result of the COVID-19 pandemic, he did not feel safe traveling in an airplane from his residence in Connecticut to Washington. *Id.*

3.6. On April 12, 2021, Wedgewood filed its Opposition to Berka’s Motion to Postpone Trial Date. (CP 40-62). Wedgewood pointed out that Berka's motion was untimely because the order setting the case schedule contained a deadline of March 22, 2021, to request a change to the trial date. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1. On April 20,



2021, the trial court denied Berka's Motion to Postpone Trial date. (CP 11-13).

3.7. On May 4, 2021, Wedgewood filed its Motion for Summary Judgment. (CP 103-248). Wedgewood supported the motion and amounts due from Berka with various documentation as well as a copy of the Declaration and a declaration of the president of the board of Wedgewood. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*1. The president testified that Berka's "unpaid assessments, fees and costs total[led] \$18[, ]222.14." *Id.* Wedgewood also requested an award of attorney fees and costs pursuant to Section 13.11 of the Declaration. *Id.*

3.8. On May 14, 2021, Berka filed his Response to Plaintiff's Motion for Summary Judgment. (CP 14-17). He did not contest that he failed to pay the assessments and other charges in question. Instead, Berka claimed that (1) the cost of a plumbing repair project at the condominium complex may be excessive, (2) Wedgewood has not explained why the front gate

of the condominium complex had not been operational for 21 years, (3) the assessments imposed by Wedgewood should be reduced, (4) Wedgewood violated its fiduciary duty as a result of the manner in which it spent money received from the assessments, and (5) the award of attorney fees requested by Wedgewood was unreasonable. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2.

3.9. None of these arguments explained, or raised issues as to, why Berka should be relieved of paying monthly assessments that all owners were also required to pay.

3.10. On May 20, 2021, Berka filed his Request to Inspect Plumbing Repair Project. (CP 18-19). He sought a continuance to obtain additional discovery. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2. Berka requested to be allowed to inspect the proposed plumbing repairs at the Wedgewood condominium complex “within the next three (3) calendar months.” *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2.

3.11. On May 25, 2021, Wedgewood filed its Opposition

to Berka's Request to Inspect Plumbing Repair Project. (CP 249-58). Wedgewood explained how Berka's request was untimely because the order setting the case schedule contained a discovery cut-off date of May 10, 2021. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2. On June 1, 2021, Wedgewood filed its Reply. (CP 259-62). On June 2, 2021, Trial Court denied Berka's Request to Inspect Plumbing Repair Project. (CP 20-22).

3.12. On June 4, 2021, the trial court had the summary judgment hearing via a video teleconference. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2. After argument, the trial court granted summary judgment in favor of Wedgewood Manor. (CP 23-27). It reasoned that "Mr. Berka does not dispute that he has not paid" the assessments and other charges in question. The trial court pointed out that Wedgewood was entitled to an award of attorney fees and costs pursuant to the Declaration. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2. The written order from the trial court stated that, "[s]hould the Defendant George Berka, Jr. fail to satisfy the monetary portion

of this judgment within sixty (60) days of its entry, the Plaintiff's lien filed against Defendant George Berka, Jr[.]'s Wedgewood Manor Homeowners Association's property . . . may be foreclosed.” *Id.*.

3.13. Berka filed his Notice of Appeal. (CP 271-76). He argued that the trial court erred in granting summary judgment. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2. According to Berka, Wedgewood breached its fiduciary duty under RCW 11.98.071 by not adequately managing the money received through the assessments imposed on condominium owners. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*2-3.

3.14. Division 2 affirmed the trial court's grant of summary judgment reasoning that RCW 11.98.071 was inapplicable and that Berka did not cite to authority in support his claim of breach of a fiduciary duty. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*3-4. It also reasoned that Berka did not dispute that he failed to pay the assessments and other charges in question. *Id.*

As to Berka's continuance requests, Division 2 affirmed the trial court's denial of a Berka's motions. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*4. It reasoned there were several reasons "Berka [wa]s not entitled to appellate relief on this claim." *Id.* The first reason was that Berka's motions for continuances were not timely filed. *Id.* Second, Berka's request for time for additional discovery "did not explain how the information that he sought [*e.g.*, information about various projects at the condominium unrelated to the admittedly unpaid assessments,] would raise an issue of material fact to preclude summary judgment." *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*4. Third, the trial court properly granted summary judgment, and Berka, therefore, was not prejudiced by the denial of the requests for continuance. *Id.*

As to attorney fees and costs before the trial court, Division 2 affirmed the trial court's award to Wedgewood. *Id.* at 5. It reasoned that the Declaration provided for an award of attorney fees and costs and that Berka failed to demonstrate the

award was unreasonable. *Id.* at \*4.

Last, Division 2 granted Wedgewood attorney fees and costs on appeal as the prevailing party. *Wedgewood*, 82746-4-I, 2022 WL 2800528, at \*4. A commissioner of Division 2 found Wedgewood’s fees on appeal reasonable.

3.15. Berka subsequently has filed his Petition for review, claiming his appeal raises issues of substantial public importance under RAP 13.4(b)(4): First, the “lodestar” method of calculating attorney fees has a “significant flaw of failing to take into account the overall value of the case or the amount of the final judgment.” (Petition at 2). Second, relatedly, he argues that the “appeals process” is “encumbered” by this “significant flaw.” (Petition at 3-4). Third, and more of another brief on the merits of the appeal than a description of any issues of public importance, Division 2 erred by not reversing the trial court’s orders denying him continuances. (Petition at 4-9).

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#### 4. ARGUMENT IN RESPONSE TO PETITION FOR REVIEW

One reason a “petition for review will be accepted by the Supreme Court only. . . . [is i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). Summary Judgment is properly granted when there are no material issues of fact, and the moving party is entitled to a judgment as a matter of law. CR 56.

##### 4.1. Berka Presents No Issues of Substantial Public Importance Regarding the Lodestar Method.

Fee decisions are entrusted to the discretion of the trial court. *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 65, 738 P.2d 665 (1987). Under the lodestar method, this Court, en banc, held that the trial court should examine an attorneys’ billing records and determine the number of hours that were reasonably expended in pursuing the litigation. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632, 651 (1998), *order corrected on denial of reconsideration*, 966 P.2d 305 (Wash. 1998). In doing so, it is

important the court “take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.” *Id.* at 434. Courts then may adjust an award “upward or downward.” *Id.*

Here, Berka argues the “lodestar” method of calculating attorney fees has the “significant flaw of failing to take into account the overall value of the case or the amount of the final judgment.” (Petition at 2). Berka’s “significant flaw” argument is without merit as he misunderstands existing law.

A trial court may already adjust a reasonable attorney fee award “upward or downward” when taking “an active role in assessing the reasonableness of fee awards.” This could be because an attorney spent too much time on the matter and did *not* “expend[] a reasonable number of hours in *securing a successful recovery for the client.*” *Mahler*, 135 Wn.2d at 434 (emphasis added). Or it could be because hours spent were wasteful or duplicative. *Id.*



In other words, the lodestar method does not have the flaw Berka alleges. The lodestar method already requires the trial court to consider the hours reasonably spent to obtain a “successful recovery for the client.” This is just another way of taking into account the amount in controversy, *e.g.*, judgment amount, compared to the total hours and fees charged as Berka believes is important.

To the degree Berka believes that it is *per se*, or otherwise, unreasonable for both attorney fees and the amount in controversy to be thousands of dollars and comparable in total amounts, courts under the lodestar method already consider such circumstances on a case-by-case basis. When circumstances require it, courts have authority under the lodestar method to adjust attorney fee awards downwards if the fee amount requested is unreasonably disproportionate to the amount in controversy and any work done to secure that judgment was unnecessary.

Contrary to Berka's assertions, the appeal process is similarly unencumbered by utilizing the lodestar method. The lodestar method applies to courts of appeal as much as it does to trial courts when deciding the reasonableness of attorney fees. Fees are awarded on appeal if and only if the amount requested is reasonable. One of the factors taken into account under lodestar method is whether the work done is commiserate with securing a successful result on appeal. Duplicative or wasteful work is discounted and not awardable.

In the matter at hand, for example, Division 2 properly considered Wedgewood's fees on appeal. It took into account the work done by Wedgewood to secure the favorable result on appeal. Berka in his Petition to this Court did not attempt to demonstrate how Wedgewood's fees were unreasonable or how Division 2 erred in granting the association fees.

In sum, Berka raises no substantial issue of public importance. Rather, he presents only a misunderstanding of existing law. This is because the lodestar method already

considers the very thing he believes is important. While he is unhappy that the trial court found Wedgewood's attorney fees reasonable, that ruling was within the trial court's sound discretion. The trial court factored in Berka's late filed motions causing Wedgewood's attorney fees to increase significantly. It considered the work done to secure the favorable result. Berka, for his part, failed to show there was any duplicative or wasteful work done. Upon review, Division 2 affirmed, and also awarded fees on appeal. Berka again failed to demonstrate Wedgewood's billing entries, or that the overall award, was unreasonable. Consequentially, the trial court did not abuse its discretion, Division 2 did not err, and Berka raises no issue of substantial public importance. This Court should deny his petition.

4.2. Berka's Arguments Regarding the Denial of a Continuance of the Trial Date or to Obtain Discovery Raise No Issues of Public Importance.

"The decision to grant a continuance is at the discretion of the trial court and its decision will be upheld absent an abuse of discretion." *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872

(2004). “A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary.” *Id.*

Here, Berka admitted that he did not pay the assessments that Wedgewood sued to recover. His defense was erroneous, believing that he was legally absolved of the requirement to pay such assessments, based on his unilateral assertion that Wedgewood was not frugally maintaining the condominium.

The trial court, confronted with a defense not based in law, did not abuse its discretion by denying Berka’s motion to continue the trial date. Nor did it do so by denying his motion for time to pursue discovery. For one reason, both motions were filed after court ordered deadlines to do so. For another reason, Berka did not proffer what material issue of fact would be raised with proffered discovery—*regarding the issue before the court, i.e., his admitted failure to pay assessments*. Regardless, summary judgment was granted, and he demonstrated no prejudice

because neither trial nor further discovery was necessary where Wedgewood was entitled to a judgment as a matter of law.

Berka's appeal of these issues then cited inapplicable authority. He failed to show how the trial court abused its discretion by denying his late filed motions for continuances.

In his Petition, he now reargues the merits of his appeal regarding these continuance issues. But rearguing the merits of an appeal is not proper argument in a petition for review. Instead, Berka's burden is to demonstrate how these continuance issues are of substantial public interest under RAP 13.4(b)(4). He has failed to do so, let alone show how Division 2 ruled contrary to settled law. This Court should deny his Petition.

#### 5. ATTORNEY FEES AND COSTS

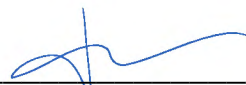
Pursuant to RAP 18.1(j), this Court may award costs and attorney fees if applicable law grants a party the right to recover fees and cost on appeal and the party was awarded such fees by the Court of Appeals.

Here, Wedgewood was awarded attorney fees and costs on appeal based on RAP 18.1 and Section 13.11 of the Declaration. Berka's Petition is without merit. It is based on a misunderstanding of the law and raises no issues of public importance. Even when arguing the merits of his appeal, he fails to show how Division 2 ruled contrary to settled law. Wedgewood respectfully requests attorney fees and costs for having to respond to this Petition.

#### 6. CONCLUSION

Pursuant to RAP 13.4, Wedgewood respectfully requests this Court deny review, for the reasons stated herein. It requests attorney fees for having to respond to this Petition.

Respectfully submitted this 20th day of September, 2022,

  
\_\_\_\_\_  
Drew Mazzeo  
WSBA No. 46506  
Attorney for Respondent

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HARBOR APPEALS AND LAW,  
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