

FILED
SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 1019301

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Moon Hur & Seungja Hong, Appellant

v.

Patti Kim, Respondent

PETITION FOR REVIEW REPLY

Tuella O. Sykes,
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WSBA, No. 36179

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I. REPLY

A. Patti Kim Has No Response to the many Arguments & Issues Raised by the Appellants in their Petition for Review.

Moon Hur & Seungja Hong (hereafter “Hur” or “Appellant”) arguments presented on appeal are neither frivolous, moot or presented with an intent to hinder or delay. In relation to an award for attorney fees in *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980), the Court of Appeals held that a court should consider that: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no possibility of reversal. Patti Kim (hereafter “Kim or “Respondent”) incorrectly states that the only issue presented by the Appellants is whether the Appellant has identified a consideration justifying further review under RAP 13.4(b). Br. of Resp’t, 3. The Appellants correctly briefed the issue of RAP 13.4 as it is a requirement for a petition for review to the Supreme Court in order to explain the reasons why this Court should accept review. Specifically, RAP 13.4(b) provides that a petition for review will be accepted by the Supreme Court only for four separate reasons including subsection four which reads: [i]f the petition

involves an issue of substantial public interest that should be determined by the Br. of Appellants, P.16, 18 (citing *Corinthian Corp.*).

The Appellants properly raised the relevant option to purchase issue related to the Subject Property, where they currently reside commonly known as 1106 E 52nd St Tacoma, WA 98404 (hereafter “Subject Property”) which Appellants were making payments to purchase from the Respondent. Br. of Appellants, P. 4, 8-9, 12 This option to purchase issue is the crux of controversy of the two parties and is also the subject of this review. Br. of Appellants, P. 4, 8-9, 12, 14, 16 -19, 23 – 24. The Respondents’ argument regarding the option to purchase the Subject Property fails. As the Appellants are enumerating a clear issue of substantial public interest regarding the presumption in favor evaluating the enforceability “option to purchase” agreements & contractual in the public interest. *See* RAP 13.4(4).

The Respondent then raises the issue of the Court of Appeals ability to exercise discretion in relation to the Appellants’ raising the issue of “excusable neglect” in their responsive brief. Br. of Resp’t, 3, 8, 9; Br. of Appellants, 5 – 6, 16, 21 – 23. The Respondent somehow concluded that the Appellants were conflating the ability of the Court of Appeals not to exercise discretion with their decision not to do so. Br. of Resp’t, 3. This, however, is an incorrect interpretation of the Appellants argument regarding RAP 2.5. As stated in

Appellants' brief nothing in RAP 2.5(a) expressly prohibits an appellate court from accepting review of an issue not raised in the trial court. *Id. State v. Russell*, 171 Wash.2d 118, 249 P.3d 604 (Wash. 2011). Br. of Appellants, 5 – 6.

B. Patti Kim's Request's For Attorney's Fees Should be Denied

Respondent's request for attorney's fees and costs should be denied. An appeal is frivolous if, considering the entire record, no debatable issues are presented upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal. *In re Guardianship of Wells*, 150 Wn. App. 491, 504, 208 P.3d 1126 (2009). Here, there are debatable issues of merit upon which reasonable minds might differ and the Respondent's requests for attorney's fees should be denied.

The appellate court on its own initiative or on motion of a party may order a party or counsel...who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. RAP 18.9(a). Petitioners, Moon Hur & Seungja Hong, (Hereafter "Hur" or "Appellants") timely filed their appeal, a motion for reconsideration with the Court of Appeals was filed and considered by the Court. A petition for review was then filed in

this Court as there are viable issues to be considered. Br. of Appellants, 7. Specifically, the petition warrants review because ensuring the proper standard for evaluating the enforceability of “option to purchase” agreements is a matter of public interest & contractual predictability. RAP 13.4(b)(4). Br. of Appellants, 16, 24.

An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wash.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id. Advocates for Responsible Dev. v. Western Wash. Growth Mgmt. Hearings Bd.*, 245 P.3d 764, 170 Wash.2d 577 (Wash. 2010). "Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. *See Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wash.2d 427, 443, 730 P.2d 653 (1986)." *In re Western Wash. Growth Mgmt. Hearings Bd.*, at 581 (Wash. 2010). As is the case here, one of the assignments of errors raised and discussed throughout the Appellants' briefing was the September 2021 request for a continuance of the trial date. Div. I, OB. of Appellants, P. 20. Noted in the Court of Appeals decision footnote 4 the Respondent did not object to this portion of the opening

brief as outside the scope of the assignments of error. (App. P. 28). The Respondent's Motion for fees and sanctions should be denied as the Appellants' "action was not frivolous in its entirety..." *In re Western Wash. Growth Mgmt. Hearings Bd.*, at 577 (Wash. 2010).

C. Patti Kim's Motion to Dismiss the Petition Should Be Denied

The guardian in *Wells*, citing RAP 18.9(c), sought dismissal of the appeal, arguing that the appeal is frivolous." The Court of Appeals found that while there is little merit to Mayberry's claims on appeal, they did not find it to be entirely frivolous. *In re Guardianship of Wells*, 208 P.3d 1133 (2009). Here, the Petitioners presented the following five issues for review to this Court:

- (1) Whether the Court of Appeals err in affirming that the trial court's Motion to Dismiss;
- (2) Whether the trial court committed error by failing to consider Hur's Motion to Continue Trial & entering Finding & Facts & Conclusions of Law following trial on October 13, 2021;
- (3) Whether the Court of Appeals committed an error by failing to consider issues raised by the Petitioner in direct response to the Respondent's issues in the brief to which the reply brief is directed. RAP 10.3(c).
- (4) Whether the Court of Appeals committed an error by failing to consider the Petitioner's viable claim for "excusable neglect" RAP 2.5(a).
- (5) Whether the trial court committed error by failing to consider Hur's excusable neglect claim.

Kim's Motion to Dismiss should be denied as their application for review is neither frivolous, moot, or solely for the purpose of delay. RAP 18.9(c)(2).

D. The Appellate Timeline has not been Undue Burdensome to the Respondent

In the Respondent's brief she also raises issues of the appellate timeline post judgment. Br. of Resp't, 4 – 6. Here, the Appellants paid the full amount of the supersedeas bond as ordered by the trial court pursuant to RAP 8.1(b)(2) & (c)(2). Br. of Resp't, 5; CP2486. The Respondent, in her brief, incorrectly states that "Appellant was ordered to be evicted over 2 years ago." Br. of Resp't, 5 – 6. A Writ of Restitution Issued was entered by the trial court on October 27, 2021. CP 2450. However, on October 29, 2021, the Pierce County Sherriff's Office, issued a Sheriffs Return on Writ of Restitution. CP 2479. The caption "return to court" reads as follows:

The Sherriff's Department is unable to act on this document for the following reasons: There is no title in the caption of the document submitted, the body of the document lacks statutorily required language, and the language contained therein is more consistent with a Writ of Ejectment which is not the appropriate type of writ for an unlawful detainer case. These problems could have been avoided by adhering to the court rules requiring electronic filing.

Contrary to what the Respondent claimed in her brief no other Writ of Restitution has been issued for the Subject Property since the Sheriffs Return on Writ of Restitution. Br. of Resp't, 5 – 6, CP 2479.

Another issue raised by the Respondent in relation to the appellant timeline is extensions perfecting review. Specifically, on 1/5/222 where the Appellant

requested an extension, and it was approved by the Court, due to the inclement weather and inability of their counsel to leave her home until January 3, 2022 to access some of the records. Br. of Resp't, 5. A second request was made on 1/25/22 and approved due to counsel's inability to contact some of the court reporters as one of the reporters has retired or they have indicated that they did not attend the hearing as noted in the Minutes of Proceedings. The third and final request was made on 4/26/22 where there were two outstanding statements of arrangements remaining. Br. of Resp't, 5.

The Respondent raised the issue regarding a Motion for Extension to file their Reply Brief as counsel was locked out of access to the Court's website. Br. of Resp't, 5. A ruling was received by the Clerk on October 17, 2022 stating that pursuant to RAP 18.17 the motion for extension did not include the word certification. The Appellants immediately, filed a certification separately to rectify the issue and it was attached it to the document by the Clerk per their instructions. In relation to the Appellants' brief that was filed on 8/16/22 a ruling was entered by the Court of Appeals stating that pursuant to RAP 10.4(a) the attachments are not filed with the brief. *Id.* Appellants were given until August 26, 2022 to submit and re-serve a corrected brief. *Id.*

In relation to the appeal timeline the Respondent raises three rules that she states: "Division I concluded that Appellant failed to comply with each of RAP

2.5, 10.3(a)(4), 10.3(g) and 10.4(c) as bases for decision rejecting Appellant's Appeal on multiple issues because Appellant failed to preserve the issue raised here for appeal." Br. of Resp't, 5. This is a very loose interpretation of the Court of Appeals decision. As is applicable in this case RAP 1.2(a) states:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

The Court of Appeals raised both RAP 10.3(a)(4) & 10.3(g) in relation to the trial court's denial of the Appellants' September 2021 request for a continuance of the trial date, this issue is not one of their assignments of error. The Court of Appeals stated that both parties devoted substantial portions of their briefing to this question, and they subsequently declined to reach this issue. *See* (App. P. 28) In that same paragraph that Respondent raises it appears that the Court of appeals ruled "unjust enrichment with \$60k". *See* (App. P. 28).

E. The court of appeals abused its discretion in denying consideration of Appellants' Motion for Continuance & Excusable Neglect claim because it applied the wrong legal standard.

Under these facts, a technical violation of the rules should not have precluded Appellants' appellate review. *See* (App. P. 26) This Court

specifically addressed the effect of RAP 1.2(a) in *Daughtry v. Jet Aeration Co.*, 91 Wash.2d 704, 592 P.2d 631 (1979). There this Court stated:

RAP 1.2(a) makes clear that technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review. In these circumstances, where the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, we will consider the merits of the challenge. *Daughtry v. Jet Aeration Co.*, 91 Wash.2d at 710, 592 P.2d 631. *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629, 633 (Wash. 1995).

The Appellants briefed in detail the issues related to the September 2021 Motion for Continuance in their opening brief and the Respondents replied. Div. I, OB. of Appellants, P. 20; Resp. Reply Brief, P. 15. However, the Court of Appeals noted that the Appellant did not include the issue of the September 2021 Motion for Continuance issue as one of their assignments of error, nor was it set out as an issue associated with an assignment of error. (App. P. 28.) The Court of Appeals noted in footnote 4 that “Kim did not object to this portion the opening brief as outside the scope of the assignment of error.” (App. P. 28). The trial court denied the Motion For Continuance in its Orders on Motions Heard 9/24/2021. (CP 1920- 1921). This Court found in *Olson* the Appellants’ technical violation of the rules, as it is in this case, should normally be overlooked and the Appellants’ case should be decided on the merits. *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629, 631 (Wash. 1995). This result is particularly warranted where the violation is minor, as is here, and results in no

prejudice to the other party and no more than a minimal inconvenience to the appellate court. *Id* at 631. “Grant or denial of a continuance is a discretionary ruling because the court must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, & the possible impact of the result on the trial.” *State v. Guajardo*, 50 Wash.App. 16, 19, 746 P.2d 1231 (1987).

The Court of Appeals raised RAP 2.5(a) as a reason to deny consideration on appeal and cited two reasons: (1) this issue is raised for the first time on appeal; (2) perhaps more critically as it prevents the respondent from presenting argument on the issue, Hur makes this assertion for the first time in their reply. (App. 33). Contrary to Respondent’s argument that the Appellants failed to perfect the appeal as RAP 2.5(a) is discretionary. Br. of Resp’t, 8. Where an appellate rule is discretionary, this court reviews the lower court's application of the rule for abuse of discretion. See *Roberson v. Perez*, 156 Wash.2d 33, 42, 44, 123 P.3d 844 (2005). A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision "is based `on untenable grounds' or made `for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*,

149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995)). Moreover, a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054. *State v. Rafay*, 222 P.3d 86, 167 Wn.2d 644 (Wash. 2009).

The trial court's denial of the Motion For Continuance in its Orders on Motions Heard 9/24/2021 is a discretionary ruling. (CP 1920- 1921). "Grant or denial of a continuance is a discretionary ruling because the court must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, & the possible impact of the result on the trial." *State v. Guajardo*, 50 Wash.App. 16, 19, 746 P.2d 1231 (1987). Here, the denial of Hur's September 2021 Motion For Continuance was prejudicial to his trial preparation as his attorney was acutely ill. Hur's counsel, via supporting declarations, provided the Court with supporting documentation of her acute illness which required a short trial continuance. (CP 1585, 1586, 1589, 1596, 1598). *In the Matter of The Recall of Mark E. Lindquist*, 172 Wash.2d 120, 258 P.3d 9 (Wash. 2011).

Hur's counsel provided specific documentation of her illness & it was clear that the trial could not move forward. (CP 1639 – 1896). A short continuance would have been reasonable as cause clearly existed for a

continuance. CR 40(d). By denying Hur's continuance it prejudiced Hur's ability to prepare for pre-trial matters, prior to trial as well as negatively impacted the entry of the Findings of Fact & Conclusions of Law & Judgment on October 22, 2021 as counsel was acutely ill. (CP 2362 – 2363). The trial court abused its discretion in denying a continuance.

F. The Viability & Enforceability of the Option to Purchase the Subject Property was an Issue in Trial Court.

The Respondent's own declaration in trial court provided a basis that a material fact existed in relation to the timeline between the parties with the option to purchase the Subject Property. In Kim's declaration she states, Kim's own declaration raises material issues of fact as she states the following:

“I offered to sell him the house for \$150,000 if he completed payment within 2 years. There was no written agreement although I did put those terms into an email...The email is dated September 11, 2016 & it I gave Mr. Hur up to 2 years to complete payment.” (CP 952 – 953).”

These facts clearly show a revision of their agreement as noted by her own admission in her declaration in support of her motion to dismiss. (*Id*).

This is two years & eleven months from the date Kim purports the option to purchase contract ended in support of her Motion to Dismiss from the beginning of their agreement on August 2016. (CP 952 – 953). Hur had a viable claim for his “option to purchase” the Subject Property with Kim as she had collected some \$60,000 towards their agreement. If the option to purchase

agreement cannot be enforced, the presumption in favor of evaluating the enforceability “option to purchase” agreements & contractual predictability will have lost all meaning in the public interest. *See* RAP 13.4(b). However, the Court of Appeals determined these facts were outside the scope of this appeal, even though their own decision provides “unjust enrichment with \$60k” where the only party who could have been unjustly enriched was the Respondent. The Court of Appeals could have considered that the Appellants had established a basis for appellate relief. *See* RAP 1.2(a).

Specifically, RAP 1.2(a) makes clear that technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review. In these circumstances, where the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, we will consider the merits of the challenge. *Daughtry v. Jet Aeration Co.*, 91 Wash.2d at 710, 592 P.2d 631. *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629, 633 (Wash. 1995). Here, as stated in the Appellants’ Reply, the Respondents’ request for attorney’s fees, sanctions and motion to dismiss should be denied.

For all the reasons enumerated above this petition warrants this Court’s review & correction.

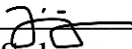
II. CONCLUSION

The petition for review should be granted, reverse the Court of Appeals & remand & for a new trial.

I certify this petition is in Times Roman 14-font & contains 3295 words in compliance with Rules of Appellate Procedure, excluding those portions exempt under RAP 18.17(b).

Dated this: June 1, 2023

Respectfully submitted,



Tuella O. Sykes
WSBA No., 36179
Attorney for Petitioners

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true & correct:

That on June 1, 2023, I arranged for service of the foregoing Reply Petition for Review, to the Washington Supreme Court & to the parties to this action as follows: Office of Court Clerk - Washington Supreme Court - 415 12th Ave SW W, Olympia, WA 98504

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