

FILED
Court of Appeals
Division I
State of Washington
1/30/2024 1:26 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
1/31/2024
BY ERIN L. LENNON
CLERK

102670-6

NO. 846949

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

Zhi H (Frank) Feng,

Appellant (Plaintiff).

v.

Jen Turner

Liz Shier

Ghivizzani R Jean Nokes
Better Properties - Metro,

Respondents (Defendants).

ANSWER TO PETITION FOR REVIEW

Jeffrey P. Downer, WSBA No. 12625
Pedro Melesio, WSBA No. 51322
LEE SMART, P.S., INC.
701 Pike Street, Suite 1800
Seattle, WA 98101-3929
(206) 624-7990
Attorneys for Respondents Better
Properties - Metro, Turner, and Shier

TABLE OF CONTENTS

	Page
I. IDENTITY OF RESPONDING PARTY	1
I. CITATION TO COURT OF APPEALS DECISIONS	1
II. ISSUES PRESENTED FOR REVIEW	1
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	3
A. Mr. Feng does not establish grounds for review under RAP 13.4.....	3
B. The Court of Appeals’ decision to affirm dismissal is not in conflict with any other Washington decision.	5
C. The Court of Appeals’ decision to affirm the superior court’s decision to vacate the order of default does not conflict with any other Washington decision.	8
D. The Court of Appeals’ decision is unpublished and has no precedential value.	9
E. Mr. Feng does not establish grounds for review under RAP 13.4(b)(4).....	10
V. CONCLUSION.....	13

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Gutierrez v. Icicle Seafoods, Inc. 198 Wn. App. 549, 394 P.3d 413 (2017).....8

Ha v. Signal Elec., Inc., 182 Wn. App. 436, 332 P.3d 991 (2014).....8

In re Mines, 146 Wn.2d 279, 45 P.3d 535 (2002).....11

Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002).....7, 8

State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)...11

Vaughn v. Chung, 119 Wn. 2d 273, 830 P.2d 668 (1992).....7

Statutes

RCW 59.18.150(1).....12

Rules

GR 14.1(a).....9

GR 14.1(c).....10

RAP 13.4(b)(1).....4, 5

RAP 13.4(b)(2).....4

RAP 13.4(b)(3).....4

RAP 13.4(b)(4).....4, 10, 11

Other Authority

Wash. Appellate Prac. Deskbook § 27.11 (1998).....6, 10

I. IDENTITY OF RESPONDING PARTY

Defendants-Respondents are Jen Turner, Liz Shier, and Better Properties-Metro (collectively, “Metro”).

I. CITATION TO COURT OF APPEALS DECISIONS

Feng v. Turner, No. 84694-9-I, 2023 WL 7297142 (Wash. Ct. App. Nov. 6, 2023).

II. ISSUES PRESENTED FOR REVIEW

Whether this Court should deny Plaintiff-Appellant Zhi H. Feng’s petition for review under RAP 13.4(b), where:

1. Mr. Feng fails to establish any basis for review under RAP 13.4;
2. Mr. Feng fails to establish the Court of Appeals’ decision conflicts with any other reported Washington decision that would warrant review under RAP 13.4(b)(1) or (2);
3. The Court of Appeals’ decision is unpublished and therefore has no precedential value; and

4. This case involves no substantial public interest under RAP 13.4(b)(4) because the present dispute involves no one but the parties to this action and will not recur.

III. STATEMENT OF THE CASE

Metro adopts by reference its Statement of the Case in their Joint Brief of Respondents to Division One Court of Appeals. However, Mr. Feng's Petition for Review attempts to distort the timeline of events and needs to be corrected.

Mr. Feng mischaracterizes the record by asserting that his claim of intentional infliction of emotional distress was based on the allegation that co-defendant Dr. R. Jean Nokes-Ghivizzani sent an armed man to the Rental Home to collect past due rent. Petition 17-19. The alleged incident with the gunman did not occur until after the Superior Court had dismissed his Complaint. CP 451. Mr. Feng's Complaint alleged intentional infliction of emotional distress based on the meritless claim that Metro performed unnecessary inspections and that Ms. Turner told Mr. Feng's wife that he lived with a

woman before her. CP 5-6. Mr. Feng falsely portrays these allegations as if they were all part of the original complaint when they were not.

IV. ARGUMENT

A. Mr. Feng does not establish grounds for review under RAP 13.4.

Mr. Feng does not mention RAP 13.4 anywhere in his Petition for Review. RAP 13.4(b) provides that the Supreme Court will accept a petition for review 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 decision of another division 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.

Mr. Feng argues that the Court of Appeals' decision is in conflict with previous Washington Supreme Court and Court of Appeals decisions but does not cite RAP 13.4(b)(1) or (2). Regardless, Mr. Feng misinterprets and misapplies those previous decisions and argues conclusions that are not compatible with the law.

Mr. Feng makes no argument that would suggest this case raises a significant question of law under the Washington or United States Constitution. Therefore, he concedes that review is not warranted under RAP 13.4(b)(3).

Mr. Feng offers no argument that would suggest this case raises an issue of significant public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). Mr. Feng briefly argues the Court of Appeals' decision sends a "wrong message to the public." Mr. Feng has failed to establish any grounds to review this case under RAP 13.4(b)(4).

B. The Court of Appeals' decision to affirm dismissal is not in conflict with any other Washington decision.

Mr. Feng's petition for review should be denied because it fails to satisfy either basis under RAP 13.4(b)(1) or (2).

Furthermore, nothing in RAP 13.4 or in Washington law entitles Mr. Feng to review by this Court simply because he disagrees with the Court of Appeals' decision:

[I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...

The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big

picture” will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

The Court of Appeals’ decision does not conflict with any Supreme Court or Court of Appeals decision. Mr. Feng falsely claims that the Court of Appeals’ decision conflicts with several Supreme Court decisions, but he misapplies the law to these facts.

Mr. Feng claims that the Court of Appeals did not consider all facts affirming the superior court’s dismissal and this is in conflict with several Supreme Court decisions. Petition for Review at 11-13.

Mr. Feng is wrong. The Court of Appeals considered all the facts reviewed by the trial court including emails between the parties which the Court of Appeals found showed no evidence of breach of contract or breach of good faith and fair dealing. Opinion at 9-12.

Mr. Feng also asserts that the Court of Appeals did not find that his affidavits are insufficient and baselessly claims the case was dismissed on procedural technicalities in conflict with *Vaughn v. Chung*, 119 Wn.2d 273, 830 P.2d 668 (1992).
Petition for Review at 13-14.

Vaughn is a Washington Supreme Court case that has nothing to do with the sufficiency of an affidavit. Instead, *Vaughn* determined whether a trial court may consider a party's motion to vacate a dismissal upon motion of the clerk for lack of prosecution. *Vaughn*, 119 Wn.2d at 274.

Regardless, Mr. Feng is wrong. The Court of Appeals opinion clearly considered the merits of Mr. Feng's case when affirming the superior court's dismissal and not on a procedural technicality. Opinion at 9-17.

Mr. Feng claims that the Court of Appeals erred when it did not indicate on the record that it had considered less harsh sanctions before affirming dismissal in conflict with *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41

P.3d 1175 (2002). Petition for Review at 19-20. The Court in *Rivers* held that a court needs to make a record that it considered less harsh sanctions when dismissing a case as a sanction for discovery violations. *Id.* at 696. *Rivers* has nothing whatever to do with a dismissal on summary judgment.

Mr. Feng then claims that the Court of Appeals' decision is in conflict with *Gutierrez v. Icicle Seafoods, Inc.* 198 Wn. App. 549, 557-558, 394 P.3d 413 (2017). He argues that dismissal with prejudice should be exercised only in limited circumstances. Petition for Review at 20. Mr. Feng again cites case law that has nothing to do with the issues in this case. The *Gutierrez* Court determined a trial court's discretion to order a voluntary dismissal with prejudice. *Id.* at 557-558. There is no voluntary dismissal at issue in this case.

C. The Court of Appeals' decision to affirm the superior court's decision to vacate the order of default does not conflict with any other Washington decision.

As in his appeal brief to the Court of Appeals, Mr. Feng wrongly cites *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 332

P.3d 991 (2014), which analyzes the higher standard for vacating a default judgment, not a default order as was at issue in this action.

Here, the superior court vacated a default order, not a default judgment. The Court of Appeals affirmed, finding that Mr. Feng violated King County Superior Court LCR 55(a)(1) because he did not provide notice of his motion to a party that had appeared in the case. The Court of Appeals' decision does not conflict with Washington precedent.

D. The Court of Appeals' decision is unpublished and has no precedential value.

Mr. Feng bases his Petition for Review on an unpublished decision by the Court of Appeals. Because the Court of Appeals' Decision is unpublished, it has no precedential value and is not binding on any court. GR 14.1(a). A court may consider an unpublished opinion for its persuasive value as the court deems appropriate. *Id.*

The Court of Appeals' decision here has no precedential value. Appellate courts are prohibited from citing or discussing

unpublished opinions in their opinions unless necessary for a reasoned decision. GR 14.1(c). Therefore, there is no realistic danger that the Court of Appeals' decision creates bad precedent because it is not precedent at all.

E. Mr. Feng does not establish grounds for review under RAP 13.4(b)(4).

Mr. Feng briefly argues that the Court of Appeals' decision sends the “wrong message” to the public but does not establish that the issues in this case are a matter of substantial public interest under RAP 13.4(b)(4).

Mr. Feng has the burden of persuading the Court that its petition involves an issue of substantial public interest because “the issue is recurring in nature or impacts a large number of persons.” *Wash. Appellate Prac. Deskbook* at § 27.11. No reported Washington Supreme Court decision includes a detailed analysis of the “substantial public interest” criterion of RAP 13.4(b)(4), but this Court weighed what amounts to “public interest” when considering the related question of whether to decide a moot issue.

When determining the requisite degree of public interest, courts should consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (internal quotation marks omitted). Where the Court has directly addressed the “substantial public interest” criterion of RAP 13.4(b)(4), it has used these principles. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

In *Watson*, the issue was whether a prosecutor’s office delivered a memo to all members of the bench regarding its decision not to recommend drug offender sentencing alternative (DOSAs) sentences was an improper ex parte communication. This Court held that the Court of Appeals’ decision was reviewable under RAP 13.4(b)(4) because the ruling (1) could affect every sentencing proceeding involving a DOSA sentence; (2) created confusion and invited unnecessary litigation; and (3)

could chill policy actions by both attorneys and judges in the future. *Id.*

Here, Mr. Feng argues that the inspections that occurred at the property violated his covenant of quiet enjoyment. Petition for Review at 24. Mr. Feng raises this issue for the first time in this petition after previously claiming the inspections were intentional or negligent infliction of emotional distress. Regardless, Mr. Feng does not establish that this issue is a matter of significant public interest that the Supreme Court must resolve.

Mr. Feng makes brief mention of potential abuses by landlords against tenants in violation of RCW 59.18.150(1). *Id.* However, the Court of Appeals held that the inspections did not violate the statute since he was given notice and the purpose of each inspection was statutorily permitted. Opinion at 13-14.

Further, the dispute here involved only these private parties, and Mr. Feng does not establish any likelihood that the situation will recur.

Therefore, RAP 13.4(b)(4) does not provide a basis for review of the Court of Appeals' decision.

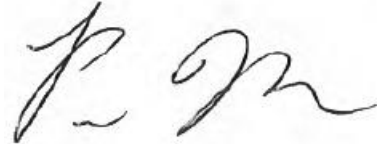
V. CONCLUSION

Mr. Feng has presented no grounds under RAP 13.4 on which this Court should grant review. Accordingly, Metro respectfully request that Mr. Feng's Petition for Review be denied.

Respectfully submitted this 30th day of January, 2024.

I certify that this memorandum contains 1999 words, in compliance with RAP 18.17.

LEE SMART, P.S., INC.



By: _____
Jeffrey P. Downer, WSBA No. 12625
Pedro Melesio, WSBA No. 51322
Of Attorneys for Better Properties -
Metro, Jen Turner, and Liz Shier
Lee Smart, P.S., Inc.
701 Pike Street, Suite 1800
Seattle, WA 98101
Phone: (206) 624-7990
Fax: (206) 624-5944
Email: jpd@leesmart.com
pm@leesmart.com

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on January 30, 2024, I caused service of the foregoing pleading on each and every attorney of record herein via email:

Mr. Zhi H. Feng
9801 63rd Ave S
Seattle, WA 98118
Main (206) 395-4486
E-mail heredocs1@yahoo.com

Mr. Daniel J. Oates
Ms. Elena Thompson
2801 Alaskan Way, Suite 300
Seattle, WA 98121
Email: Dan.Oates@millernash.com
Elena.Thompson@millernash.com

DATED this 30th day of January, 2024.

Vicki Milbrad

Vicki Milbrad
Legal Assistant

LEE SMART P.S., INC.

January 30, 2024 - 1:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 84694-9
Appellate Court Case Title: Zhi H. Feng, Appellant v. Jen Turner, et al., Respondents

The following documents have been uploaded:

- 846949_Briefs_20240130131722D1802736_4204.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondents Better Properties Answer to Petition for Review.PDF

A copy of the uploaded files will be sent to:

- Dan.Oates@millernash.com
- elena.thompson@millernash.com
- heredocs1@yahoo.com
- jpd@leesmart.com
- kxc@leesmart.com
- pm@leesmart.com
- thompson@millernash.com
- vlm@leesmart.com

Comments:

Respondents Better Properties - Metro, Turner, and Shier's Answer to Petition for Review

Sender Name: Taniya Chai - Email: ttc@leesmart.com

Filing on Behalf of: Pedro Melesio - Email: pm@leesmart.com (Alternate Email: jne@leesmart.com)

Address:
701 Pike Street, Ste. 1800
Seattle, WA, 98029
Phone: (206) 627-7990

Note: The Filing Id is 20240130131722D1802736