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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 1029721

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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**ROBERT S. APGOOD, individually and as Trustee for the ROBERT S.  
AND NANCY B. APGOOD LIVING TRUST,**

**Petitioner,**

**vs.**

**ROGER A. PLAUTZ AND LINDA S. PLAUTZ, individually and the  
marital community composed thereof; JAMES S. GLENN AND JANE  
DOE GLENN, individually and the marital community composed  
thereof; and LEGACY HOME INSPECTIONS LLC, a Washington  
Limited Liability Company,**

**Respondents.**

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**APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT  
Honorable Anna G. Alexander, Judge  
Honorable Millie M. Judge, Judge**

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**ANSWER TO PETITION FOR REVIEW OF RESPONDENTS  
ROGER A. PLAUTZ AND LINDA S. PLAUTZ**

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## **I. NATURE OF THE CASE**

Plaintiff bought a house from Mr. and Mrs. Plautz. In the Purchase and Sale Agreement, plaintiff selected a “Waiver of Inspection” option which expressly provided: “Buyer has not relied on representations by Seller.” But plaintiff sued Mr. and Mrs. Plautz anyway, asserting liability based on alleged misrepresentations. The Court of Appeals correctly affirmed the trial court’s ruling that plaintiff waived the right to do so.

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

### **A. STATEMENT OF RELEVANT FACTS.**

#### **1. Seller Disclosure Statement.**

On February 25, 2018, Mr. and Mrs. Plautz signed a Form 17 Seller Disclosure Statement. The statement stated: “Seller makes the following disclosures of existing material facts or material defects to buyer based on seller’s actual knowledge of the property at the time seller completes this disclosure statement.” It further provided: “This information is for

disclosure only and is not intended to be a part of any written agreement between buyer and seller.” CP 186.

The sellers checked a box indicating that the roof had not leaked within the last 5 years. CP 188. Mr. Plautz testified that this representation was correct. The Plautzes were not aware of any leaks in the previous 5 years. CP 163, 165.

Mr. and Mrs. Plautz signed the disclosure, indicating that the answers were “complete and correct to the best of Seller’s knowledge.” CP 190.

## **2. Purchase and Sale Agreement.**

On March 14, 2018, Mr. and Mrs. Plautz listed the property for sale. On May 17, 2018, they accepted an offer from plaintiff Robert Apgood. CP 165. The sale closed on July 2, 2018. CP 166.

On May 17, 2018, the parties to the sale executed the Purchase and Sale Agreement, including an “Inspection Addendum to Purchase and Sale Agreement.” CP 166. The addendum provided that it was “part of the Purchase and Sale

Agreement dated May 17, 2018.” CP 191. The parties initialed the addendum on May 17, 2018. CP 191. The addendum included four options which could be selected. CP 191-92. Plaintiff selected and initialed option 4, which provided:

WAIVER OF INSPECTION. Buyer has been advised to obtain a building, hazardous substances, building and zoning code, pest or soils/stability inspection, and to condition the closing of this Agreement on the results of such inspections, but Buyer elects to waive the right and buy the Property in its present condition. Buyer acknowledges that the decision to waive Buyer’s inspection options was based on Buyer’s personal inspection and **Buyer has not relied on representations by Seller, Listing Broker or Selling Broker.**

CP 192 (emphasis added).

By plaintiff’s own admission, this Waiver of Inspection was made in the context of a hot housing market where “[h]ouses were selling quickly, and frequently sold before he could physically travel to Washington.” CP 96. Plaintiff chose to rely on his son and a real estate agent to inspect properties and look for potential problems. CP 115. Therefore, it appears plaintiff

agreed to accept the risk that he might find damage or defects in the property in order to ensure he was the successful buyer.

The Purchase and Sale Agreement provided that “if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys’ fees and expenses.” CP 297.

The Agreement contained the following integration clause:

This Agreement constitutes the entire understanding between the parties and **supersedes all prior or contemporaneous understandings and representations.** No modification of the Agreement shall be effective unless agreed in writing and signed by Buyer and Seller. . . .

*Id.* (emphasis added).

**B. STATEMENT OF PROCEDURE.**

On March 16, 2023, the trial court entered an order granting the motion of Mr. and Mrs. Plautz for summary judgment. The court ruled: “Plaintiff Apgood knowingly and voluntarily waived his right to inspect the property and his claims are barred by the Economic Loss Rule. . . .” CP 41-42.



On March 18, 2024, the Court of Appeals, Division I, affirmed the trial court’s ruling in an unpublished opinion. The court held:

Apgood . . . expressly agreed that he “ha[d] not relied on representations by Seller, Listing Broker or Selling Broker” in deciding to waive his inspection options. And Apgood further agreed that his agreement with the Plautzes, captured in the PSA and addendum, “supersedes all prior . . . representations.” Apgood’s decision to intentionally and voluntarily waive his right to rely on any prior representations by the Plautzes is fatal to his fraud claim.

(Slip. Op. at 5)

### III. ARGUMENT

Discretionary review is allowed only under the limited circumstances described in RAP 13.4(b), which provides:

(b) **Considerations Governing Acceptance of Review.** A petition for review will be accepted . . . 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.

Plaintiff seeks review under RAP 13.4(b)(1), (2), and (4). The Petition for Review should be denied because petitioner has not and cannot demonstrate that this case satisfies any of the requirements of RAP 13.4(b).

**A. DIVISION I'S OPINION DOES NOT CONFLICT WITH OTHER WASHINGTON APPELLATE DECISIONS.**

Plaintiff's petition appears to be based on misapprehensions of the facts and of the basis for the Court of Appeals decision. These two misapprehensions are fatal to his position that the decision conflicts with other appellate decisions as required by RAP 13.4(b)(1)-(2).

First, plaintiff asserts that the Inspection Addendum to Purchase and Sale Agreement was executed after the Purchase and Sale Agreement, and that it was not part of the "underlying contract." (Petition at 6) This is not true. The addendum was initialed contemporaneously with execution of the Purchase and Sale Agreement, and expressly provided that it was "part of the Purchase and Sale Agreement dated May 17, 2018." CP 166,

191. The Court of Appeals noted this in its decision. (Slip op. at 6)

Second, plaintiff repeatedly asserts that the decision of the Court of Appeals was based on plaintiff's waiver of the right to inspect, even asserting that under this decision "if a buyer waives inspection, the buyer is also waiving any claims of fraud against the seller for any intentional misrepresentations on Form 17." (Petition at 20) This also is not true. The Court of Appeals based its decision on plaintiff's agreement that he had not relied on representations by the seller, and that the Purchase and Sale Agreement and addendum superseded all prior representations. "Apgood's decision to intentionally and voluntarily waive his right to rely on any prior representations by the Plautzes is fatal to his fraud claim." (Slip op. at 5)

"The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled." *In re Estate of Petelle*, 195 Wn.2d 661, 669, 462 P.3d 848 (2020). This includes statutory rights. *Id.* at 668-69.

The nine elements of fraud include the plaintiff's right to rely on the allegedly fraudulent misrepresentation. *Alejandre v. Bull*, 159 Wn.2d 674, 690, 153 P.3d 864 (2007). Since plaintiff waived the right to rely on representations by the Plautzes, he cannot establish this element. His fraud claim fails.

**1. *Weitzman v. Bergstrom.***

The Court of Appeals' decision is not inconsistent with *Weitzman v. Bergstrom*, 75 Wn.2d 693, 697, 453 P.2d 860 (1969). *Weitzman* considered the general rule:

When a party claiming to have been defrauded, after discovery of the fraud receives from the party guilty of fraud some substantial concession or enters into new arrangements or engagements concerning the subject matter of the contract claimed to have been procured by fraud, he is deemed to have waived any claim for rescission, and under certain circumstances for damages.

*Weitzman*, 75 Wn.2d at 697.

The Court did not hold fraud could not be waived as plaintiff asserts. To the contrary, the Court stated: "The general rule that the entering into a new agreement regarding the subject matter evidences an intention to waive a claim of fraud is sound."

*Id.* at 699. The Court further stated that to prove waiver of fraud, it is “necessary to show that the party who it is claimed has waived a right, did so intentionally and with full knowledge of his right.” *Id.* However, the Court held the trial court’s finding of no intent to waive was supported by substantial evidence. *Id.* at 701.

In contrast, here plaintiff expressly waived the right to rely on any representations. This case is not inconsistent with *Weitzman*.

## **2. *Stieneke v. Russi.***

The Court of Appeals’ decision is not inconsistent with Division II’s decision in *Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008), *rev. denied*, 165 Wn.2d 1026 (2009). In *Stieneke*, the Purchase and Sale Agreement did not have an inspection waiver addendum like the one at issue here, which provides “the decision to waive Buyer’s inspection options was based on Buyer’s personal inspection and Buyer has not relied on representations by Seller, Listing Broker or Selling Broker.”

CP 192. More importantly, in *Stieneke*, Division II did not address a waiver argument.

**B. PLAINTIFF FAILS TO SHOW THAT THE PETITION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.**

Plaintiff relies upon RAP 13.4(b)(4). However, he has failed to meet his burden to show that the petition involves an issue of substantial public interest that should be determined by this Court.

This case concerns a waiver in a Purchase and Sale Agreement between two private parties arising from contract language specific to the subject agreement. Specifically, plaintiff waived the right to rely on representations by the sellers.

Waiver is intentional relinquishment of a known right. *Panorama Residential Protective Ass'n v. Panorama Corp. of Wash.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982). To avoid waiver, a buyer can simply choose not to waive the right. Buyers can decline to agree to language providing that they have not relied on representations by sellers.

Plaintiff chose to waive this right in the context of a hot housing market where “[h]ouses were selling quickly, and frequently sold before he could physically travel to Washington.” CP 96. He accepted the risk that he might find damage or defects in the property in order to ensure he was the successful buyer. He cannot avoid his economic calculation after the fact, when it was necessary to achieve his goal to beat his competition in the marketplace and purchase the house.

Plaintiff asserts that “[f]or the first time ever,” the Court of Appeals determined that the doctrine of waiver bars a fraud claim. (Petition at 22-23) This is simply not true. *See, e.g., Owen v. Matz*, 68 Wn.2d 374, 413 P.2d 368 (1966).

Plaintiff asserts dire consequences from allowing inspection waivers to bar fraud claims. That is not Division I’s holding. Here, plaintiff expressly waived the right to rely on representations by the sellers. Without a right to rely, there is no fraud.

In issuing the opinion in this case as an unpublished opinion, Division I determined that its decision has no precedential value. RCW 2.06.040; *see also State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *rev. denied*, 80 Wn.2d 1003 (1972) (legislature recognized that opinion without sufficient precedential value affecting common law should not be published). *See also State v. Sanchez*, 74 Wn. App. 763, 765, 875 P.2d 712 (1994) (unpublished status means decision has no precedential value), *rev. denied*, 125 Wn.2d 1022 (1995). The Petition should be denied.

**C. ATTORNEY FEES AND EXPENSES SHOULD BE AWARDED UNDER RAP 18.1(j).**

The trial court awarded attorney fees to respondents based on the provision of Paragraph p. of the Purchase and Sale Agreement for the recovery of reasonable attorney fees and costs to the prevailing party in any suit concerning the transaction. CP 280-81, 297.

The Court of Appeals awarded respondents attorney fees and costs on appeal. (Slip op. at 9) This Court should award



respondents reasonable attorney fees and expenses for having to respond to the petition pursuant to RAP 18.1(j).

As discussed above, there is no conflict between the panel's decision and other appellate decisions, and there is no issue of substantial public interest requiring this Court's review.

#### **IV. CONCLUSION**


This case has not met any of the criteria of RAP 13.4(b).  
The petition should be denied.

#### **CERTIFICATE OF COMPLIANCE**

I certify that the Answer to Petition for Review of Respondents Plautz contains 2,089 words.

Dated this 26th day of April, 2024.

**REED McCLURE**

By   
**Michael S. Rogers WSBA #16423**  
**Attorneys for Respondents**  
**Plautz**

## **CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 2024, a copy of the following document was served on counsel as follows via the Washington State Appellate Court's Electronic Filing Portal:

Answer to Petition for Review of Respondents  
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 26th day of April, 2024, at Lillian, Alabama.

*Kate McBride*

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032550.000001/1708820

**REED MCCLURE**

**April 26, 2024 - 9:57 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 102,972-1  
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