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**No. 100970-4**

No. 82405-8-I Court of Appeals, Division I

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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Terrace15, LLC, a Washington Limited Liability Company

*Respondent*,

v.

Mr. Yong S. Kim and Jane Doe Kim, individually and the
marital community thereof,

*Petitioners.*

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# RESPONDENT ANSWER TO PETITION FOR REVIEW

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Holmquist & Gardiner PLLC
Robert Maxwell, WSBA #46636
Attorney for Respondent

HOLMQUIST + GARDINER, PLLC
1000 Second Ave, Suite 1770
Seattle, Washington 98104
p: 206-438-9083 f: 206-694-4601
rob@lawhg.net

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# I. INTRODUCTION

Division I of the Court of Appeals ("Division I") got it exactly right when they affirmed the Trial Court's decision in excluding the untimely filed declarations in Respondent's motion for summary judgment and denying Petitioner's request to vacate the summary judgment granted in Respondent's favor. As the Trial Court stated and Division I quoted in its opinion, "[T]his is just gamesmanship. That's all I see this as. It's a way to manipulate and delay, obfuscate the record, confuse the Court of Appeals. Enough." Opinion at 4. This dispute concerns recovery of earnest money due to a breach of contract from a purchase and sale agreement for real property to be sold by Respondent to Petitioner. The Trial Court determined the Petitioner and Susann were jointly and severally liable for the earnest money, prejudgment interest, and attorney fees and costs. The Trial Court entered judgment in favor of and awarded Respondent $133,781.09.

Petitioner continues to manipulate and delay, obfuscate the record, and confuse the courts. Division I affirmed *each and every* one of the Trial Court's decisions and found that the Trial Court did not abuse its discretion in denying the motion to vacate. Petitioner is now before the Washington

State Supreme Court ("Supreme Court") speaking out of both sides of his mouth to argue that a defaulted party (his Sister Susann Kim) had no authority to act on his behalf while also arguing that she had the authority *and* was submitting late documents on his behalf in a convoluted attempt to have this Court look past his prior actions, inexcusable neglect, pattern of procedural abuses and delay tactics.

The Supreme Court should deny the Petition for Review because Petitioner has failed to demonstrate that the decision of Division I is in conflict with any decision of the Supreme Court or another decision of the Court of Appeals. None of the considerations governing acceptance of review under RAP 13.4(b)(1) or RAP 13.4(b)(2) have been satisfied. If this Court denies Petitioner's Petition for Review, Respondent respectfully request an award of attorney fees under RAP 18.1 et seq. for having to timely answer this Petition for Review.

## II. IDENTITY OF RESPONDENT

Respondent and Plaintiff, Terrace15, LLC, a Washington Limited Liability Company, ("Terrace15") requests the relief set forth herein.

## III. STATEMENT OF THE CASE

The facts are well summarized in Division I's decision at pages 1- 4 of the unpublished opinion (Appendix A to Petition for Review).

## IV. ISSUE

Should the Supreme Court accept review of a decision by Division I affirming the Trial Court's decision in granting Respondent's motion for summary judgment when Petitioner failed to respond and deny Petitioner's motion to vacate when Division I's decision was an unpublished opinion, makes no new law, and Petitioner failed to prove that the decision is in conflict with a decision of this Court or reported decisions of the Court of Appeals?

## V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Whether review should be granted is decided by reference to the considerations set forth in RAP 13.4. Petitioner asserts review under RAP 13.4(b)(1) and 13.4(b)(2) on the grounds that Division I's decision is in conflict with decisions of this Court and reported decisions of the Court of Appeals.

## A. Division I's Decision is Consistent With Washington Precedent.

Division I's decision is an unpublished opinion that is not only consistent with Washington precedent, but makes no new law. Petitioner fails to show why review should be granted under RAP 13.4(b)(1) or 13.4(b)(2).

### i. Division I's Decision to Affirm the Trial Court's Decision in Excluding Late Filed Declarations From a Defaulted Party is not in Opposition to *Keck v. Collins* and Does Not Warrant Review Under RAP 13.4(b)(1) or RAP 13.4(b)(2).

Keck v. Collins, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015), and Burnet v. Spokane Ambulance, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997), involve a party's evidence that is sufficient and available at the time of decision but that is disregarded because it was tardily produced. Civil Rule 56(c) requires the nonmoving party submit supporting affidavits, memoranda, or law no later than 11 days before the hearing. In Keck, Plaintiff's counsel had submitted an affidavit of plaintiff's medical expert report timely, then a second affidavit after the 11-day limit imposed by CR 56(c). It was the third affidavit submitted by Plaintiff's counsel that was found by this Court to be an abuse of its discretion by not considering the Burnet factors before excluding it from the motion for summary judgment.

Keck, 184 Wn.2d at 366-367.

On appeal, a ruling to exclude untimely produced documents is reviewed for an abuse of discretion. *Id.* at 373-374. The trial court decision will not be overturned unless the trial court exercised its discretion on untenable grounds or for untenable reasons. Shaw v. City of Des Moines, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002).

Here, as Division I correctly noted, it was within the Trial Court's discretion and evidentiary ruling to find that the filings were made by a defaulted party (Susann) with orders of default entered against her by both Respondent and Petitioner. Op. at 6. "A trial court's decision to admit or exclude evidence lies within its sound discretion." Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Appellate courts will not overturn the trial court's evidentiary rulings absent a manifest abuse of discretion. *Id*. Division I noted the Trial Court's frustration with the 11$^{th}$ hour declarations, gamesmanship, and inexcusable neglect by Petitioner for not responding to Respondent's *second* motion for summary judgment. Op. at 2 - 4. The Trial Court properly excluded the untimely filed pleadings because Susann was not entitled to participate without leave of the court. CR 55(a)(2). As Division I's opinion points out,

this case differs significantly from Keck and "the trial court did not abuse its discretion by excluding Susann's evidence without considering the Burnet factors. The trial court properly granted summary judgment for Terrace15." Op. at 6-7.

The Trial Court and Division I's holdings were proper and are not in conflict with Keck or other decisions of this Court under RAP 13.4(b)(1) or reported decisions of the Court of Appeals under RAP 13.4(b)(2). Petitioner continues to try to take another bite at the apple after inexcusable neglect, sanctions, delays tactics, gamesmanship, efforts to obfuscate the record, and confuse the court. The Trial Court and Division I properly noted this, and Petitioner has not met the burden for showing why this Court should expend its resources reviewing Division I's decision. Review on this issue must be denied.

**ii. Petitioner Asserts New Argument Not Before the Trial Court or Division I for the First Time in His Petition for Review.**

The Supreme Court of Washington does not generally consider issues not raised before the appellate court. *See* Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (citing State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993)); State v. Clark, 124 Wn.2d 90, 104-

05, 875 P.2d 613 (1994) (Supreme Court generally declines to review issues not raised before a lower appellate court), reversed on other grounds by State v. Catlett, 133 Wn.2d 355, 361, 945 P.2d 700 (1997). Further, Petitioner presents no compelling reason why the court should address the issue here.

A trial court's decision to admit or exclude evidence lies within its sound discretion. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Trial courts are in the best position to view how a case has transpired and have the most experience enforcing local rules. Whether to accept an untimely filed affidavit is the sort of case management decision best left in the trial court's hands. *See* Pitzer v. Union Bank of Cal., 141 Wn.2d 539, 556, 9 P.3d 805 (2000).

Petitioner asserts for the first time that Susann's declarations were filed for Petitioner and not on behalf of herself, a defaulted party. Petition at 7. Not only did Petitioner fail to raise this argument in the Trial Court, but Petitioner also failed to raise this in their Brief to Division I ("Petitioner's Brief"). In Petitioner's Brief, Petitioner devotes an entire section (page 16 of Brief) claiming the trial court abused its discretion by not considering the Burnet factors before striking the affidavit, *period*.

Petitioner's Brief is completely void of distinguishing between whether the late filed declarations were filed on behalf of Petitioner or Susann, a defaulted party. The irony of this new argument cannot be missed; Petitioner continues to assert that Susann had no authority to act on his behalf while also claiming (when convenient on appeal now) now that she had full authority to handle the litigation and was acting on his behalf. This Court must see through this disingenuous position and argument.

Division I's Opinion stated, "We will not overturn the trial court's evidentiary rulings absent a manifest abuse of discretion. Id." Op. at 5-6. Division I properly concluded that the Trial Court did not abuse its discretion by excluding Susann's evidence without considering the Burnet factors not only because she was a defaulted party with orders of default entered against her by both Terrace15 *and* Yong/Petitioner, but because she also never moved nor requested leave to file untimely documents, was not an opposing party to the motion for summary judgement and was not entitled to participate in the summary judgment proceedings. Op. at 6-7.

Division I aptly noted how the Trial Court recognized this was the second motion for summary judgment Petitioner had failed to answer and "there just isn't any evidence whatsoever for his excusable neglect…" Op.

at 8. The Opinion goes further to state, "Yong explains no basis for relying on Susann, who was an adverse party against whom he had taken a default, to act on his behalf. It is wholly understandable that the trial court expressed the strong opinion that the failure to respond to the summary judgment motion was not excusable." Op. at 8.

Washington courts have consistently concluded that whether to accept an untimely filed affidavit is the sort of case management decision best left in the trial court's hands. *See* Pitzer v. Union Bank of Cal., 141 Wn.2d 539, 556, 9 P.3d 805 (2000). Again, Division I's Opinion in this matter is aligned with Washington precedent and did not abuse its discretion by excluding Susann's evidence without considering the Burnet factors.

**iii. Petitioner Fails to Show how Division I's Holding Affirming the Trial Court's Decision to Grant Respondent's Motion for Summary Judgment Should Be Reviewed Under RAP 13.4(b)(1) or RAP 13.4(b)(2).**

Petitioner asserts that neither Division I nor the Trial Court address whether sufficient grounds existed to grant summary judgment. Petition at 10. The validity of the purchase and sale agreement was before the Trial Court on summary judgement and Petitioner, without any excuse, failed to respond. Petitioner had two separate opportunities to respond to summary judgment motions and inexcusably failed to make any response. Petitioner

presented these arguments for the first time on appeal.

Appellate courts will not entertain issues or consider theories not presented below in the trial court. RAP 2.5(a), Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008), John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991). In addition, under RAP 9.12, the factual allegations raised by the Petitioner here should not be considered on review because it was not in the Trial Court's record as evidence or issues when summary judgment was granted for the Respondent.

Both the Trial Court and Division I found that "Yong did not file a response to Terrace15's motion for summary judgement. As a result, Yong failed to set forth specific facts or issues of law to defeat summary judgement. Terrace15 was entitled to judgment as a matter of law." Op. at 5.

As presented in Respondent's Motion for Summary Judgment, the facts concerning the purchase and sales agreement, seller and real property were not disputed. Respondent established that there was no genuine issue of material fact regarding the transaction and the burden shifted to Petitioner to establish specific facts to demonstrate the existence of a genuine issue of

material fact. Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 157, 52 P.3d 30 (2002). Petitioner, *twice,* did not file any response to the motion for summary judgment and thus, failed to meet the burden to establish an issue of fact to preclude summary judgment on the facts asserted.

**iv. Not Erroneous for Division I to Hold Petitioner Lacked Standing to Appeal Co-Defendant's Default Judgment and Review Must be Denied Under RAP 13.4(b)(1) and RAP 13.4(b)(2).**

Division I correctly quotes Forbes v. Pierce County, 5 Wn. App. 2d 423, 433, 427 P.3d 675 (2018), in support of its decision to hold it was not Petitioner's issue to appeal Susann's default judgment. However, Petitioner fails to include that the Appellate Court in Forbes first determined if the party had standing to make a legal claim or seek judicial enforcement of a right before determining if a litigant can or cannot assert the legal rights of another person. *Id.* Susann did not seek review of the decision. Division I's unpublished opinion regarding the validity of the judgment against Susann is not Petitioner's issue to appeal and is not in conflict with a decision from this Court or a published decision from the Court of Appeals under RAP 13.4(b)(1), (2), respectively.

Moreover, Petitioner has failed to show how vacating a default

judgment against Susann, a co-defendant in which Petitioner has a default order and judgment against, will be beneficial to him. Petitioner cites to federal case law, Frow v. De La Vega, 82 U.S. 552 (1872), to assert that Division I's analysis to hold Petitioner lacked standing to challenge entry of a default judgment against co-defendant, Susann, was improper.

The present case is distinguishable as it involves issues of joint and several liability whereas Frow involves only joint liability. Here, the entry of judgment against one but not all defendants is not precluded. (*See* Sompo Japan Ins. Co. of Am. v. Network FOB, Inc., No. CV 13-02851 RSWL (JCGx), 2013 U.S. Dist. LEXIS 198653, at *6 (C.D. Cal. Nov. 6, 2013) Petitioner claims it is well settled that Petitioner has standing to challenge the entry of the default judgment against Susann citing In re Uranium Antitrust Litig., 617 F.2d 1248, 1256 n.32 (7th. Cir. 1980), United States v. Harvey, No. CIV. 13-4023-KES, 2014 WL 2455533 (D.S.D. June 2, 2014), and Diamond Servs. Corp. v. Oceanografia S.A. De C.V., No. 10-0177, 2013 WL 312368 (W.D.La. Jan. 24, 2013).

However, Petitioner's citation to In re Uranium Antitrust Litig., 617 F.2d 1248, 1256 n.32 (7th Cir. 1980) is equally as unpersuasive and actually confirms that Frow does not preclude entry of a default judgment against

more than one, but less than all of the defendants when liability is joint and several. *Id.* at 1256. In addition, CR 54(b) allows for the entry of judgment against less than all defendants.

Petitioner relies on United States v. Harvey, No. CIV. 13-4023-KES, 2014 WL 2455533, at 4* (D.S.D. June 2, 2014) to argue that he has standing to challenge the entry of the default judgment against Susann. In Harvey, the court determined that, while a non-defaulting defendant may have standing to challenge the entry of default on behalf of three defaulted *subsidiary* entity defendants, the challenger failed to show good cause to set aside the entry of default as to the defendants. *Id.* In deciding whether good cause exists to set aside an entry of default, the court considered: (1) whether the conduct of the defaulting party was blameworthy or culpable; (2) whether the defaulting party has a meritorious defense; and (3) whether the other party would be prejudiced if the default were excused. *Id*. at 10.

Here, similar to the court's analysis in Harvey, no good cause exists to set aside an entry of default. Susann had actively participated in this matter following defaults by both parties, and never once moved to vacate the defaults. Susann's conduct demonstrated a willful failure to comply with the civil rules or oppose the lawsuit. Additionally, there is no evidence

with the trial court Susann has a meritorious defense to the allegations in the complaint. Further, Respondent would be prejudiced if the entry of default were set aside after over two and a half (2.5) years of litigation. *Id*. at 11. Petitioner's arguments and conduct throughout the matter demonstrates the continued intent to ignore procedure, obfuscate the record, and manipulate and delay court proceedings. To reverse the Trial Court's Orders would reward Petitioner's obstructionist strategy.

Accordingly, review by this Court should be denied because it was not erroneous of Division I to hold the Petitioner lacked standing to challenge entry of Susann's default judgment when Petitioner also had a default judgment against the same party and co-defendant never moved to vacate it. Petitioner falls short in showing this Court why the defaulted judgment against a co-defendant should be vacated and reviewed under RAP 13.4(b)(1) and RAP 13.4(b)(2).

### B. <u>The Court Should Award Respondent Attorney's Fees and Costs Under RAP 18.1.</u>

Respondent is seeking an award of attorney's fees and expenses under RAP 18.1(j) for having to prepare and file a timely answer to the petition for review. Request for attorney's fees was previously denied by Division I for failing to devote a section of its briefing to the request as

required by RAP 18.1(b). Op. at 8-9. Under RAP 18.1(b), "requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j)."

Respondent is not only seeking attorney's fees under RAP 18.1(j) for its answer to this Court, but also request the opportunity to seek an award of attorney's fees that was denied in Division I. Respondent was the prevailing party in Division I because Appellant's request was denied. Op. at 1. Accordingly, upon prevailing in this Court, Respondent respectfully requests reasonable attorney's fees and costs be awarded under RAP 18.1(j) if this Court denies the Petition for Review and make a separate award under RAP 18.1 for fees incurred by Respondent in the Appellate Court as well.

Respondent/Plaintiff filed a complaint for breach of contract against Defendant/Petitioner in December 2018. The Trial Court granted summary judgment for Respondent after Petitioner failed to respond to the motion not once, but *twice.* Petitioner then moved to vacate the summary judgment on excusable neglect and vacate the default issued against Susann, a co-defendant. The Trial Court denied Petitioner's request and so did Division I in its unpublished decision on March 14, 2022. Respondent prevailed on their contract claim and RCW 4.84.330 supports awarding attorney fees to

a prevailing party under a contractual provision whenever the party-opponent would have been entitled to attorney fees as a prevailing party. Herzog Aluminum, Inc. v. Gen. Am. Window Corp., 39 Wn. App. 188, 197, 692 P.2d 867 (1984). Where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal. Sharbono v. Universal Underwriters Ins. Co., 139 Wn. App. 383, 423, 161 P.3d 406 (2007).

Petitioner filed a Petition for Review with the Supreme Court, but has failed to demonstrate that the decision of Division I is in conflict with any decision of the Supreme Court or another decision of the Court of Appeals. As the Petitioner did not prevail in the Appellate Court and if their Petition for Review to this Court is denied, this Court should award reasonable attorney fees and expenses under RAP 18.1(j) for Respondent's preparation and filing of the timely answer to the petition for review. In addition, Respondent is requesting attorney's fees be awarded under RAP 18.1 for being the prevailing party on appeal and now complying with RAP 18.1(b). If fees are awarded, Respondent will submit an affidavit of fees and expenses within the time and in the manner provided in RAP 18.1(d). Respondent continues to bear the litigation expenses of Petitioner's

gamesmanship, procedural abuses, and willful disregard of the court system and would only be just to be awarded attorney's fees.

## VI. CONCLUSION

The Petitioner has failed to demonstrate that the decision of Division I is in conflict with any decision of the Supreme Court or another decision of the Court of Appeals. None of the considerations governing acceptance of review under RAP 13.4(b)(1) or RAP 13.4(b)(2) have been satisfied. This case does not meet the criteria for acceptance of review by the Supreme Court. It does not resolve conflicting court rulings. It does not resolve a significant question of law under the Constitution of the State of Washington or of the United States. The Petition for Review should be denied.

I certify that this memorandum contains __3,477__ words, in compliance with RAP 18.17.

//

//

DATED this 24th day of June 2022,

Respectfully submitted by,

/s/ Robert D. Maxwell

Robert D. Maxwell WSBA# 46636
HOLMQUIST + GARDINER, PLLC
1000 Second Ave, Suite 1770
Seattle, Washington 98104
p: 206-438-9083 f: 206-694-4601

**DECLARATION OF SERVICE**

I, Kesha Fountain, under penalty of perjury under the laws of the State of Washington, hereby declare that on June 24th, 2022, the following documents were served on the following individuals in the manner indicated below:

1) ANSWER TO PETITION FOR REVIEW

| Christopher W. Pirnke, WSBA #44378<br>Attorneys for Appellants Yong Kim<br>10900 N.E. 4th Street, Suite 1500<br>Bellevue, WA 98004<br>Tel: 425-455-1234<br>Fax: 425-635-7720<br>Email: Cpirnke@insleebest.com | ☐ U.S. Mail<br>☐ Messenger<br>☐ U.S. Mail<br>X E-service<br>X E-mail: |
|---|---|

Dated this 24TH day of June 2022 at Seattle, Washington.

/s/ Kesha Fountain
Kesha Fountain
Paralegal

## HOLMQUIST & GARDINER, PLLC

## June 24, 2022 - 1:25 PM

## Transmittal Information

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