No. 101675-1

SUPREME COURT
OF THE STATE OF WASHINGTON

OLASEBIKAN AKINMULERO,

Petitioner,

v.

ALLIED RESIDENTIAL-CARRIAGE HOUSE,

Respondent.

RESPONSE TO PETITIONER'S PETITION FOR REVIEW

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1. IDENTITY OF RESPONDENT

Allied Residential-Carriage House ("Respondent") is the Respondent to this Petition for Review filed by Olasebikan Akinmulero ("Petitioner").

2. ANSWERS TO RESTATED ISSUES PRESENTED TO REVIEW

2.1. Whether the superior court erred in granting summary judgment, instead of proceeding to trial, and whether Division One did erred in affirming the superior court's ruling? No.

2.2. Whether the superior court erred in denying Petitioner a jury trial and whether Division One did erred in affirming the superior court's ruling? No.

2.3. Whether granting summary judgment is unconstitutional? No.

2.4. Whether the superior court erred in applying CR 56 and whether Division One did erred in affirming the superior court's ruling? No.

2.5. Whether the Eighth Amendment applies to the private towing of a vehicle, not used as a dwelling unit, pursuant to a contract where no government entity was involved? No.

2.6. Whether the superior court committed a due process violation by granting Respondent's motion for summary judgment? No.

3. RESTATEMENT OF THE CASE

3.1. In May of 2019, Petitioner rented an apartment from Respondent. (CP at 41-53). It is uncontested that Petitioner resided solely in the rented apartment and nowhere else. *Akinmulero v. Allied Residential-Carriage House*, 24 Wn. App. 2d 1021 (2022).

3.2. Section 28(d) of that lease provided vehicles on the property must maintain current registration and be operable: "All vehicles must maintain current registration and be currently in good operating condition to remain parked on the property." (CP at 48).

3.3. Section 21(a) of that lease provided that the

respondent, as landlord, may with 24 hours of notice remove any vehicles on the property that were either inoperable or with expired license tabs:

> Without notice and without liability, LANDLORD may remove any vehicle from any parking space or carport, which in LANDLORD'S opinion is parked illegally or which remains inoperable for a period of twenty-four (24) hours. For purposes of this agreement, the term inoperable means inoperable according to Washington State law and includes any vehicle with expired license tabs.

(CP at 46).

3.4. During a routine inspection of the parking lot in March 2021, the Respondent's management found two vehicles without current registration tabs affixed to them. (CP at 30). Both vehicles were tagged for towing. (CP at 30, 35-39). Petitioner's vehicle was one of those vehicles. (CP at 30, 35-39). His tabs indicated that his registration had expired in 2018. (CP at 30, 33). On March 8, 2021, when Appellant had not removed his vehicle from the parking lot or updated the registration tabs on the vehicle, the car was towed. (CP at 30).

3.5. The towing company sent Petitioner the required redemption documents to redeem the car. (CP at 30, 35-38). Petitioner never completed nor submitted the form to challenge the validity of the tow. (CP at 30). He chose not to redeem the vehicle from the tow lot, electing only to retrieve personal property from the vehicle. (CP at 30, 68-69). After the car had been stored for the requisite time period provided to Petitioner by the towing company, it was sold at auction. (CP at 35-38).

3.6. At the time of the towing of the vehicle, Governor Inslee's emergency order 20-19.5 prohibited landlords from evicting residents from residential dwelling units. (CP at 60).

3.7. Later in March of 2021, instead of redeeming the car from the tow lot, and instead of challenging the towing of the vehicle in municipal or district court, Petitioner sued Respondent in superior court. (CP at 2). He claimed the towing of the vehicle was illegal under the Governor's proclamation (citing no particular proclamation provision), was a violation of the lease agreement (citing no particular lease provision), and contrary to

Chapter 59.18, RCW, the residential landlord tenant act (citing former RCW 59.18.375(6), governing nonpayment of rent and payment into the registry of the court in certain circumstances before issuance of a writ of restitution in a residential unlawful detainer action regarding a dwelling unit) . (CP at 2-6)

3.8. In January of 2022, Respondent moved for summary judgment and also moved to dismiss for failure to prosecute. (CP at 22-28). The summary judgment motion pointed out the lease provisions stated above and the fact that the Governor's proclamation was entirely inapplicable as it covered residential dwellings not unregistered vehicles and did not create a private cause of action. (CP at 22-28). The motion to dismiss for failure to prosecute explained that Petitioner failed to abide by the trial court's scheduling order, that the proper forum to contest a towed vehicle was in municipal or district court, under RCW 3.66.020 and RCW 56.55.120(2)(b), and that the superior court lacked jurisdiction to hear Petitioner's complaint.

3.9. Later in January of 2022, Petitioner responded to

the motions by Respondent. (CP at 65-95). He provided the trial court unauthenticated photos vehicles and a license plate showing a 2018 registration date, an email to Respondent about his vehicle being towed, and no declarations or any substantive evidence under oath. (CP at 65-95). He argued Respondent violated the Governor's proclamation by towing the vehicle, that doing so was an unlawful eviction under Chapter 59.12 and Chapter 59.18. RCW, that his registration tag on his vehicle was stolen, that he had registered the vehicle, that Respondents were not police and could enforce law requiring registration of vehicles, and that Respondent had no right contractually or otherwise to have the vehicle towed. (CP at 65-73).

3.10. In February of 2022, the trial court dismissed the action brought by Petitioner. (CP at 96-97). It reasoned "P[etitioner]—who has the burden of proof at trial—did not submit any sworn affidavits or declarations under penalty of perjury" and that "[b]ecause Plaintiff has not done so, there is no genuine issue of material fact. . . summary judgment is

appropriate."

3.11. On appeal, Petitioner argued the following in pertinent part:

- The trial court violated "several procedural and constitutional law of Washington State." (Amended Brief of Appellant at 4).
- Respondent's "allegation action violated the Governor's order during the pandemic." (Amended Brief of Appellant at 5).
- Trial court erred at summary judgment by not "assum[ing] that . . . P[etitioner's] allegations [we]re true" and not "consider[ing] hypothetical facts not of the formal record." (Amended Brief of Appellant at 6).
- Trial court erred by not allowing the case to proceed to trial. (Amended Brief of Appellant at 7-8).
- Trial court by not recognizing that Petitioner certified service of his summary judgment response under oath and that this certification under oath applied to the substance of

his Response. (*See* Amended Brief of Appellant at 11).

- Respondent's property manager was not an expert therefore her declaration was inadmissible. (*See* Amended Brief of Appellant at 12).

- Governor's proclamation required a new lease from Respondent to Petitioner, that was not done, and trial court erred by recognizing this legal reality. (*See* Amended Brief of Appellant at 13).

- Respondent's emails with the trial court regarding scheduling the summary judgment hearing was improper ex-parte communication. (Amended Brief of Appellant at 15-16).

3.12. In November of 2022, Division One issued an unpublished decision affirming the trial court's dismissal of Petitioner's complaint. (*Akinmulero*, 24 Wn. App. 2d 1021).

- It reasoned that Respondent's admissible evidence "shifted the burden" of Petitioner to "come forward with specific admissible evidence showing a genuine issue of material fact." (*Id.* at 5).

- Further, that Petitioner "did not assert, much less established through admissible evidence" any genuine issue of material fact. (*Id.*). No affidavit, declaration, or other sworn testimony was provided by Petitioner as required by CR 56. (*Id.* at 5-6). "Even assuming a factual dispute" was claimed Petitioner "fail[ed] to explain how that status was material to his claims" as the Governor's proclamation was inapplicable to towed vehicles and no provision in the lease supported Petitioner's contractual claims. (*Id.* at 6-8).

- Petitioner "d[id] not explain how a dispute about the status of his registration or an alleged theft of "the previous year tab" creates an issue of fact as to the breach of the lease." (*Id.* at 8).

- Respondent's rental manager was not required to testify as an expert. (*Id.* at 9).

- The trial court did not violate and procedure under state or local rules and no inappropriate ex-parte communication occurred regarding the scheduling of a hearing that contained

nothing substantive as to the matter at hand. (*Id.* at 9-11).

3.13. Division One denied Petitioner's motion for reconsideration.

3.14. In February of 2023, Petitioner filed Petition for Review at hand. In pertinent part he does not provide reasons this Court should take review under RAP 13.4(b), but rather how he believes both the trial court and Division One ruled incorrectly[1]:

- His vehicle was properly registered and should not have been towed. "[W]ith no warning, the vehicle was towed." (Petition at 1).

- The trial court and Division One "cherry picked" evidence in making their decisions and Petitioner was "den[ied his] day in court." (Petition at 2).

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[1] Liberally construing the Petition, Petitioner attempts to stitch together a public policy argument under the Eighth Amendment that when people live in their cars, it is an "excessive fine[]" to have their cars towed. The problems for Petitioner are that this case neither involves a car used as a dwelling nor does it involve or invoke the Eighth Amendment because the government was not involved.

- The trial court "prevented due process by granting summary judgment." (Petition at 3).
- The trial court and/or Division One discriminated against Petitioner. (Petition at 3-4).
- Public records are admissible without authentication and unauthenticated photo of a license plate showing a 2018 registration date established a genuine issue of fact. (Petition at 7).
- The lease agreement was unconscionable. (Petition at 7-8).
- Respondent's attorney in the Brief of Respondent committed perjury when he wrote Petitioner "failed to comply with the terms of th[e] rental agreement to keep the vehicle properly licensed." (Petition at 8).
- The trial court committed a due process violation by "depriving [Petitioner] right to present witnesses" at trial. (Petition at 8).

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4. ARGUMENT IN RESPONSE TO PETITION FOR REVIEW

4.1. Petitioner's Failure to Comply with RAP 13.4(b) and RAP 13.4(c)(7) Mandate this Petition be Denied.

RAP 13.4(c)(5), requires "[a] concise statement of the issues presented for review." *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13, 19 (2006). Other issues are not reviewed. RAP 13.7(b); *Korum*, 157 Wn.2d at 625. In addition, RAP 13.4(c)(7) requires both a concise statement *and* argument "of the reason why review should be accepted under one or more of the tests established in section [RAP 13.4](b)."

Here, Petitioner's Petition does not explain why this Court should take review under RAP 13.4(b). Rather, it requests this Court overturn Division One's affirming of the trial court's decision. (Petition at 2-3). The argument sections within the Petition do not contain any citations to RAP 13.4(b). No concise statements exist explaining how specific provisions of RAP 13.4(b) support the Petition. "[T]he reason why review should be

accepted under one or more of the tests established in section [RAP 13.4](b)" is unknown because such "tests" are not mentioned.

Consequently, Respondent must guess at which provision of RAP 13.4(b) the Petition is based. This failure to comply with RAP 13.4 is fatal to this Petition. *See* RAP 13.4(b); RAP 13.4(c)(7); RAP 13.7(b); *Korum*, 157 Wn.2d at 625. It should be denied on this basis alone.

4.2. Petitioner Raises Arguments in His Petition that Not Only Lack Merit But that Were Not Raised to the Trial Court or On Appeal.

An "appellate court may refuse to review any *claim of error which was not raised to the trial court*." RAP 2.5(a) (emphasis added); *In re Marriage of Choate*, 143 Wn. App. 235, 245, 177 P.3d 175, 179 (2008). A party fails to preserve and waives alleged errors by failing to object, or by failing to claim error, at the time the error is allegedly made. *In re Det. of Audett*, 158 Wn.2d 712, 724, 147 P.3d 982, 987 (2006) (citing *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (holding "a

litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal."); *Marriage of Vanwey*, 82063-0-I, 2021 WL 960820, at *4.

Here, not only does Petitioner fail to cite or argue any reason under RAP 13.4(b) for this Court to grant review, but he makes new arguments, also frivolous, that were never presented to the trial court nor Division One. For example, Petitioner attacks the trial court judge and panel of judges at Division One as "discriminatory" and accuses those justices of "cherry picking" evidence rather than applying CR 56 to case Petitioner brought against Respondent. He further argues the lease agreement as "unconscionable" and accuses Respondent's counsel of committing perjury in an argument section of an appellate brief. Finally, he raises inapplicable due process and Eighth Amendment arguments. None of these arguments were made to the trial court nor Division One. All of which should not be considered by this Court under either RAP 13.4(b) or RAP 2.5(a), and this Petition should be denied.

4.3. Division One Correctly Affirmed the Trial Court, No Error Law was Committed, No Conflict of Existing Law was Presented by Petitioner, and No Issue of Substantial Public Interest Has Been Demonstrated.

Under RAP 13.4(b) a "petition for review be accepted by the Supreme Court only" where a conflict in published law exists, there is a significant constitutional question presented, or issues of substantial public interest are presented. As Division One held, CR 56 requires and genuine issue of fact and the non-moving party cannot rely on "having its affidavits considered at face value" and "must make a factual showing sufficient to establish an element essential to that party's case. . . ." (*Akinmulero*, 24 Wn. App. 2d at 5).

Here, Petitioner does not cite or argue what provision of RAP 13.4(b) he is basing his Petition on. This Petition should be dismissed. (*See* Section 4.1). Regardless, RAP 13.4(b)(1), (2), (3), and (4) are a not a basis for review, unless this Court *wants to entertain creating a conflict* with this Court's well-settled precedent.

Moreover, Petitioner provided no required affidavits at all, let alone sufficient ones, as both the trial court and Division One ruled and held. Division One affirming the trial court's dismissal is a noncontroversial ruling. *See e.g.*, CR 56(c). Dispositively, no evidence of a 2021 registration tab, as required by the lease, was ever provided showing that such registration was affixed to Petitioner's vehicle and license plate. The Governor's proclamation did not apply to vehicles, only to dwelling units, and Respondent violated no law or contract by having the vehicle towed. Petitioner for his part improperly brought suit in superior court rather than properly contesting the towing of the vehicle in district or municipal court.

Additionally, even if a factual dispute about the status registration of Petitioner's vehicle was presented to the trial court, Petitioner failed to explain how *the status—as opposed to affixing registration tabs to the vehicle and license plate as required by the lease*—was material to his claims. The lease required registration tabs to be visibly affixed to the vehicle and

if not the lease agreement allowed Respondent to tow the vehicle. Alleged theft of his "previous year tab", arguendo, even if it was somehow supported by evidence Petitioner presented could not create a material issue of fact.

Last, Petitioner's arguments that the manager could not testify or that improper ex-parte communication occurred when Respondent scheduled a hearing or that the trial court abused its discretion in deciding the matter without oral argument are frivolous arguments unsupported by any authority. State and local rules, as held by Division One, all supported that the trial court acted properly.

5. ATTORNEY FEES AND COSTS

Under RAP 18.9(a), "An appeal is frivolous when the [it] presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *Stiles v. Kearney*, 168 Wn. App. 250, 267–68, 277 P.3d 9, 17 (2012). In *Stiles*, frivolity was found, and fees awarded, because the arguments lacked merit, relied on

"misunderstandings", and were not adequately brief.

Here, this Petition was cut from the same cloth as *Stiles*. The Petition was not adequately briefed as the heart of the Petition—a single reason to grant review under RAP 13.4(b)—is not cited nor articulated. Its "naked castings into [RAP 13.4(b)] are not sufficient to command judicial consideration and discussion." *See State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090, 1102 (2014), *as amended* (Mar. 13, 2014). Several arguments raised were not made to the trial court or appellate court at all. The arguments made to the trial court, and to Division One and then remade in this Petition demonstrate no conflict with published law and point out no error by Division One. The issue of towing an unregistered vehicle from an apartment complex pursuant to a contractual agreement is not of substantial public interest.

Respondent should not have had to pay an attorney thousands of dollars to respond to this Petition, having to restate many decades of well-settled caselaw and applying such law to

these particular facts. Respondent should recover attorney fees under RAP 18.9(a).

6. CONCLUSION

Pursuant to RAP 13.4, Respondent respectfully requests this Court deny review, for the reasons stated herein, and award attorney fees and costs pursuant to RAP 18.9(a) for having to respond to this frivolous Petition.

Respectfully submitted this 13th day of March, 2023,

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