SUPREME COURT NO. 1018819
COURT OF APPEALS NO.: 82644-1-I

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON NO. 19-2-23880-1 SEA

NAIXIANG LIAN,
Petitioner.

v.

ARUN NAGARAJAN and INDHU KRISHNA SIVARAMAKRISHNAN,
Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Defendant-Respondents are Arun Nagarajan and Indhu Krishna Sivaramakrishnan (hereinafter collectively "Mr. Nagarajan). Mr. Nagarajan respectfully requests that the Court deny Mr. Lian's petition for review of the decision designated in Part II.

II. CITATION TO COURT OF APPEALS DECISION

The unpublished opinion, issued on February 6, 2023 under Cause No. 82644-1-I, is attached to Mr. Lian's petition at as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny a petition for review of the Court of Appeals' unpublished decision pursuant RAP 13.4 where that decision: (1) does not conflict with any other Court of Appeals decision; (2) does not involve an issue of substantial public interest; and (3) does not involve a significant issue of Constitutional law or legislative enactment.

IV. STATEMENT OF THE CASE

The unpublished decision of the Court of Appeals

succinctly and accurately sets forth the facts that are central to Mr. Lian's petition for review. *See* Liant's Petition for Review, Appendix A. Mr. Nagarajan adopts the Court of Appeals' statement of facts by reference.

V. ARGUMENT

Mr. Lian incorrectly believes that grounds for review exist under RAP 13.4. As a preliminary matter, the Court of Appeals decision is unpublished. Therefore, the decision cannot conflict with any other decision because, by its very nature, it is not precedent. Similarly, the unpublished decision does not – and cannot – substantially affect the public interest. Indeed, even if the Court of Appeals incorrectly decided the matter, Mr. Lian is the only person harmed. Again, the decision does not apply to anyone else.

Further, this Court should reject Mr. Lian's petition for for review because he fails to set forth any basis for review as RAP 13.4(b) requires. Mr. Lian claims that the Court of Appeals' decision conflicts with a decision of this Court

pursuant RAP 13.4(b)(1), but fails to establish any such conflict. Mr. Lian also claims that, under RAP 13.4(b)(2), the Court of Appeals' decision conflicts with another Court of Appeals decision, which he also fails to establish. Additionally, the decision of the Court of Appeals does not involve an issue of substantial public interest under RAP 13.4(b)(4) because it is neither one that is recurring in nature nor one that impacts a large number of people. Moreover, the issues in Mr. Lian's petition do not implicate Constitutional principles or legislative enactments, nor does Mr. Lian even assert that that they do. Accordingly, this Court should reject Mr. Lian's petition for review.

A. Mr. Lian fails to establish a basis for his petition for review under RAP 13.4(b).

Supreme Court review of a Court of Appeals decision is an extraordinary step. Indeed, there must be a "compelling need," Wash. Appellate Prac. Deskbook § 27.11 (1998), for this Court to decide an issue presented. Pursuant to RAP 13.4, this Court will grant 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.

RAP 13.4(b).

Mr. Lian's petition for review should be denied because it fails to satisfy any of the above stated grounds for Supreme Court review.

Furthermore, nothing in RAP 13.4 or in Washington law entitles Mr. Lian 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).

Here, Mr. Lian asserts the issues presented for review are whether Division One "erred" by (1) denying Mr. Lians "right to recovery of his over six years' damages for a debated theory of 'intentional tort' or 'negligence'"; (2) 'requiring [a] tenant witness for Petition Lian to recover his damages"; and (3) "denying Lian's exclusive rights to recovery because 'Lian did not specify the amount of lost rental income.'" Petition for Review, at pp. 7-8. None of these assertions are true. Even so,

RAP 13.4(b) is not a vehicle permitting Supreme Court review merely to correct alleged errors by the Court of Appeals. Rather, Mr. Lian must show that this case is sufficiently exceptional to "transcend the particular application of the law in question." Wash. Appellate Prac. Deskbook § 27.11.

Mr. Lian fails to establish sufficient cause for review. Thus, none of the issues presented meets RAP 13.4 to warrant the extraordinary step of review by this Court.

B. The Court of Appeals' unpublished decision does not conflict with any decision of this Court.

The Court of Appeals' decision does not conflict with any Supreme Court decision pursuant RAP 13.4(b)(1).

Mr. Lian contends Division I's decision is in conflict with "multiple prior decisions" of the Supreme Court pertaining to the protection of property rights. Petition for Review, at p. 22. Mr. Lian incorrectly asserts that it conflicts with the following Washington State Supreme Court decisions: (1) *Brown v. Pierce County*, 28 Wash. 345, 68 P. 872 (1902); (2) *Kuhr v. City of Seattle*, 15 Wn.2d 501, 131 P.2d 168 (1942) and

(3) *Gaasland Co. v. Hyak Lumber & Millwork, Inc*., 42 Wn.2d 705, 257 P.2d 784 (1953). Petition for Review, at pp. 24-25.

1. *Brown v. Pierce County.*

In *Brown*, this Court affirmed the Court of Appeals use of jury instructions related to the measure of damages for a building that had been destroyed by fire by an unknown person. *Brown*, 28 Wash. at 352, 68 P. 874. The building had been seized by Brown and used as a quarantine station for persons who were afflicted with smallpox for the preservation of public health; after its demolition, the County believed Brown was indebted to it for the "value of the property and the value of its use and occupation. *Id*., at 348. Both the County and Brown introduced testimony directed to the value of the property, but not as to the value of its use. *Id*., at 351. The trial court instructed the jury to measure the damages using based on what the it believed the evidence proved to "be the fair and reasonable rental value of that property for the purpose for which it *was taken and used*," or "what damage the property

sustained by reason of having been used for a pesthouse." *Id*., at 351-52.

In the instant petition, Mr. Lian asserts the Court of Appeals "prohibited Lian from recovery using imputed rental income," which directly disregards the holding in Brown "directing Washington courts to measure private homeowner's damages using imputed rental values." Petition for Review, at p. 26. Notably, Mr. Lian incorrectly states the holding in *Brown*, which does not require the imputed rental values be included in the measure of damages. Rather, the *Brown* decision explains it was proper to instruct the jury to measure damages based on evidence of the building's value *and* use, especially where its use − and therefore, overall value − was rendered nonexistent given the evidence of its use as a "pesthouse." *Brown*, at 352. It is unclear how, or in what way, the Court of Appeals unpublished decision conflicts with *Brown*. In any event, Mr. Lian is simply wrong and fails to

show the unpublished decision conflicts with this Court's decision in *Brown*.

2. *Kuhr v. City of Seattle.*

In *Kuhr*, this Court considered whether the municipality of the City of Seattle could be liable for property damages caused by an earth slide on private roads which had "never been opened and improved for public travel." *Id*., 15 Wn.2d, at 502-503 (internal citation omitted); 7 McQuillin, Municipal Corporations, 2d Ed., p. 64, § 2924). Although *Kuhr* involved an encroachment cause of action, this Court ultimately entered a judgment based on a decision it observed was "inapposite" to the case at hand, explaining:

> When this right against encroachment is invaded, we think it of little moment what the theory of the injured party's cause of action may be. Whether it be brought on the theory of trespass, nuisance, negligence, or violation of rights guaranteed by Art. 1, § 16, of the Constitution, is not important. If, under the facts and circumstances of the particular case, the theory of the cause of action is adapted to the relief sought, it is sufficient.

Id., at 504. In other words, appellant's theory of the case in *Kuhr*, whether brought under "trespass, nuisance, negligence, or violation of rights guaranteed by Art. 1, § 16, of the Constitution" did not preclude the Court from relying on what might otherwise be considered factually distinct precedent given the well-recognized rights and liabilities of adjoining landowners. *Id*.

Mr. Lian contends Division I's decision is "inconsistent" with the holding in *Kuhr* because it allegedly suggests Mr. Lian could not recover damages under the theory of negligence. Petition for Review, p. 19. He baselessly contends the Court of Appeals created a new rule that he "must plead under intentional torts rather than negligence." Petition for Review, p. 25. Notably, Mr. Lian attempted to raise this as a new issue on appeal, which the Court of Appeals correctly declined to review. *See Matter of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367, 370 (2017) ("Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere naked castings

into the constitutional sea are not sufficient to command judicial consideration and discussion") (internal quotes omitted). Regardless, Mr. Lian identifies no actual conflict, instead complaining that the Court of Appeals should have decided the case differently. As such, there does not appear to be any valid challenge to the *Kuhr* decision pursuant RAP 13.4(b)(1).

3. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*

In *Gaasland Co*., this Court considered whether the defendant's motion for a nonsuit was properly dismissed. *Id*., 42 Wn.2d at 706. The motion was premised on two grounds: (1) plaintiff had failed to present sufficient establish a *prima facie* case of contract; and (2) the evidence presented failed to establish damages. *Id*. It was dismissed only on the first ground. *Id*. This Court reversed the appellate decision to affirm the trial court, concluding the evidence construed in favor to the non-moving party was sufficient to establish a *prima facie* case of contract. *Id*., at 710. Further, this Court

addressed the issue of damages, specifically whether the asserted "rule of certainty"[1] applied to contract damages. *Id*., at 712.

The *Gaasland Co*. decision discusses the "harsh effects of a rigorous application of the rule," cautioning there is a difference "in the quantum of proof needed to establish the *fact* of damage as against that needed to establish the *amount* of damage." *Id*., at 713. The rule operates to assure one will recover only where he can first establish the fact he has been damaged, to avoid later speculation by the fact-finder who determines the amount of damages. *Id*. This Court reconciled these aims, concluding "[o]nce such a *prima facie* showing is made, there is sufficient evidence in the record to permit reasonable inferences to be drawn therefrom as to the extent of damage." *Id*., at 713-14.

Again, Mr. Lian incorrectly asserts homeowners are not required to provide specific amounts for the purposes of

[1] *See* I Restatement of Contracts, 515 § 331 and McCormick on Damages 99, § 26.

recovery under *Gaasland*. Petition for Review, p. 25. Mr. Lian also incorrectly asserts he must "provide tenant witnesses to recover damages in rental values," or "specific the specific amount of damages." *Id*. Notably, Mr. Lian failed to produce evidence during discovery, which led to the denial of his attempt to introduce evidence of lost rental income damages at trial. The Court of Appeals correctly affirmed the trial courts granting of Mr. Nagarajans' renewed motion in limine and corresponding CR 50 motion. Mr. Lian's petition confuses the legal concept that he is required to present some evidence to "establish the fact of damage" and "permit reasonable inferences to be drawn therefrom" and avoid speculation. *Gaasland*, 42 Wn.2d at 714. More importantly, he disregards the procedural basis for the Court of Appeals determination of the matter, using the petition as a tool to complain it should have decided the matter differently. Thus, there does not appear to be any valid challenge to the *Gaasland* decision pursuant RAP 13.4(b)(1).

C. The Court of Appeals unpublished decision does not conflict with another Court of Appeals decision.

With respect to RAP 13.4(b)(2), Mr. Lian must show the Court of Appeals decision conflicts with another Court of Appeals decision.

As discussed, an unpublished decision is not precedent, and therefore cannot conflict with another decision. Nonetheless, Mr. Lian asserts the Court of Appeals decision conflicts with *Holmquist v. King Cnty*., 192 Wn. App. 551, 563 (2016). To the contrary, the decision fully comports with settled Washington law. The *Holmquis*t court concluded damages may be quantified using rental values where a party has been deprived of ownership rights. *Id*., 192 Wn. App., at 563. This was consistent with well-established law regarding the measure of damages.

Here, the Court of Appeals did not even apply the *Holmquist* decision, and it defies logic that it somehow conflicts. As discussed *infra*, § B, 3, this claim stems from Mr.

Lian's failure to produce evidence during discovery, which eventually led to the denial of his attempt to introduce evidence of lost rental income damages at trial. Thereafter, the Court of Appeals correctly affirmed the trial courts granting of Mr. Nagarajans' renewed motion in limine and corresponding CR 50 motion. Even if the Court of Appeals' unpublished decision could somehow conflict with another appellate decision, Mr. Lian identifies no actual conflict, once again instead complaining that the Court of Appeals should have decided the case differently.

Indeed, Mr. Lian simply disagrees with the Court of Appeals' decision on the merits. Accordingly, he cites cases that he believes that the Court of Appeals should have applied. However, as noted above, the Supreme Court, "in passing upon petitions for review, is not operating as a court of error." Wash. Appellate Prac. Deskbook § 27.11. Therefore, because the Court of Appeals' decision is completely consistent with other Washington law and merely distinguished on its facts, Mr. Lian

is not entitled to review under RAP 13.4(b)(2) and the Petition for Review must be denied.

D. The Court of Appeals' unpublished decision does not involve an issue of substantial public interest.

As discussed, by its very nature, an unpublished decision cannot affect anyone except the parties to that specific case. Nevertheless, assuming that one could, this Court has considered what constitutes an issue of public interest:

> The criteria to be considered in determining whether sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.

Dept. of Ecology v. Adsit, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Further, an issue that meets these criteria will almost always implicate constitutional principles or the validity of legislative enactments. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *Gen. Tel. Co. of the Northwest, Inc. v. City of Bothell*, 105 Wn.2d 597, 716 P.2d 879 (1986); *Adsit*,

103 Wn.2d at 705; *State ex rel. Chapman v. Superior Court*, 15 Wn.2d 637, 642-43, 131 P.2d 958 (1942); *State ex rel. Yakima Amusement Co. v. Yakima County*, 192 Wash. 179, 73 P.2d 759 (1937).

Under RAP 13.4(b)(4), Mr. Lian has the burden of persuading the Court that his 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* § 27.11.

Here, even if the Court of Appeals' decision somehow could affect anyone but Mr. Lian, his request for discretionary review still does not present a question that (1) is public in nature, (2) impacts the conduct of governmental officers, or (3) recurs in nature. Further, although Washington law demonstrates that a petition for review under RAP 13.4(b)(4) will usually raise a constitutional or statutory issue, Mr. Lian's petition fails to address any such issue in any fashion. Instead, Mr. Lian's petition baldly asserts, with no supporting argument:

"the public interest is that this decision has the potential to affect the rights of property owners throughout the State of Washington. Further, this case involves a disabled minor's rights." Petition for Review, at p. 22.

Thus, in reality, Mr. Lian is merely challenging how the Court of Appeals applied established principles of law to the particular facts of his case, broadly complaining that the Court of Appeals' unpublished decision undermines the "homeowners' property rights." *Id*. Indeed, the focus of Mr. Lian's entire petition is the perceived injustice involving "homeowners' rights to recovery damages using rental values." *Id*., at p. 34. Even accepting his allegations as true, review is still not appropriate because such concerns are not "global in nature" as Washington law requires.

Accordingly, this Court should deny discretionary review because Mr. Rubin fails to satisfy RAP 13.4(b)(4).

VI. CONCLUSION

Mr. Lian has not presented grounds under RAP 13.4(b) on which this Court should grant review. Accordingly, Mr. Nagarajan respectfully requests that Mr. Lian's petition be denied.

Respectfully submitted this 25 day of May, 2023.

I certify that this memorandum contains 3,081 words, in compliance with RAP 18.7.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on May 26, 2023, I caused service of the foregoing pleading on each and every attorney of record herein:

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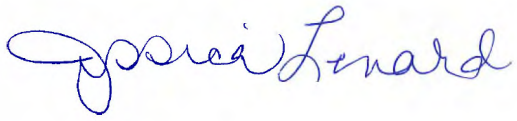

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