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Supreme Court Cause No. 93798-2

**SUPREME COURT OF THE STATE OF WASHINGTON**

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WILL T. PAYNE,  
Petitioner/Appellant/Plaintiff,

v.

JOHN "STACY" and SHARIE KAY RUEGSEGGER,  
Respondents/Defendants.

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**RESPONDENTS' ANSWER TO  
PETITION FOR DISCRETIONARY REVIEW**

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 ORIGINAL

**TABLE OF AUTHORITIES**

**Cases**

*City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991) ..... 10

*Ellis v. William Penn Life Assur. Co. of America*, 124 Wn.2d 1, 873 P.2d 1185 (1994) ..... 10

*Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015)..... 8

*Hedges v. Hurd*, 47 Wn.2d 683, 289 P.2d 706 (1955)..... 1, 5, 6

*Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 469 (1952) ..... 1, 5, 6

*Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993), *holding modified on other grounds by Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995) ..... 1, 5, 6

*Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 325 P.3d 327 (2014) ..... 2, 8

*State v. Bustamante-Davila*, 138 Wn.2d 964, 983 P.2d 590 (1999)..... 10

**Rules**

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

RAP 13.4(b)(1) ..... 7

RAP 13.4(b)(2) ..... 7

RAP 13.4(b)(3) ..... 9

RAP 13.4(b)(4) ..... 9

## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | IDENTITY OF RESPONDENT .....   | 1  |
| II.  | COURT OF APPEALS DECISION .....  | 1  |
| III. | ISSUES PRESENTED FOR REVIEW .....  | 1  |
|      | 1. Whether the Supreme Court should conclude that the Court of Appeals' Decision does not conflict with <i>Kruse v. Hemp, Hubbell v. Ward</i> , and <i>Hedges v. Hurd</i> ? .....                    | 1  |
|      | 2. Whether the Supreme Court should conclude that the Court of Appeals' Decision does not conflict with <i>Landstar Inway, Inc. v. Samrow</i> ? .....  | 2  |
|      | 3. Whether the Supreme Court should conclude that no significant question of constitutional law concerning due process or property rights exists? .....  | 2  |
|      | 4. Whether the Supreme Court should conclude that no issue of substantial public interest is involved where the case concerns only the enforcement of an alleged private real estate contract? ..... | 2  |
|      | 5. Whether an unpublished Court of Appeals' Decision affects the Supreme Court's consideration of a Petition for Discretionary Review? .....   | 2  |
| IV.  | STATEMENT OF THE CASE .....  | 2  |
| V.   | ARGUMENT .....   | 4  |
|      | A. Review Should Be Denied Because The Petition Does Not Satisfy the Criteria Under RAP 13.4(b) .....  | 4  |
|      | 1. The Court of Appeals' Decision is Consistent with <i>Kruse v. Hemp, Hubbell v. Ward</i> , and <i>Hedges v. Hurd</i> .....   | 5  |
|      | 2. No Significant Question of State or Federal Constitutional Law or Issue of Substantial Public Interest Exists .....   | 7  |
|      | 3. Denial of Petitioner's Motion to Publish the Court of Appeals' Decision Does Not Affect His Petition for Discretionary Review .....   | 9  |
| VI.  | CONCLUSION .....   | 10 |

## I. IDENTITY OF RESPONDENT

John Stacy Ruegsegger and Sharie Kay Ruegsegger are the named Respondents herein and ask the Court to deny Petitioner's Petition for Discretionary Review.

## II. COURT OF APPEALS DECISION

Respondents respectfully request that the Court deny Petitioner's Petition to review the following Court of Appeals decisions: *Will T. Payne v. John "Stacy" and Sharie Kay Ruegsegger*, 194 Wn. App. 1034 (2016) (No. 335377-2-III) filed June 14, 2016, and the Order Denying Motion for Reconsideration or to Publish Opinion filed September 20, 2016 (hereinafter "Court of Appeals' Decision").

## III. ISSUES PRESENTED FOR REVIEW

1. Whether the Supreme Court should conclude that the Court of Appeals' Decision does not conflict with *Kruse v. Hemp*<sup>1</sup>, *Hubbell v. Ward*<sup>2</sup>, and *Hedges v. Hurd*<sup>3</sup>?

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<sup>1</sup> 121 Wn.2d 715, 722, 853 P.2d 1373 (1993), holding modified on other grounds by *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995).

<sup>2</sup> 40 Wn.2d 779, 782-83, 246 P.2d 469 (1952).

<sup>3</sup> 47 Wn.2d 683, 687, 289 P.2d 706 (1955).

2. Whether the Supreme Court should conclude that the Court of Appeals' Decision does not conflict with *Landstar Inway, Inc. v. Samrow*?<sup>4</sup>
3. Whether the Supreme Court should conclude that no significant question of constitutional law concerning due process or property rights exists?
4. Whether the Supreme Court should conclude that no issue of substantial public interest is involved where the case concerns only the enforcement of an alleged private real estate contract?
5. Whether an unpublished Court of Appeals' Decision affects the Supreme Court's consideration of a Petition for Discretionary Review?

#### IV. STATEMENT OF THE CASE

This case concerns the enforceability of a signed writing concerning the sale of real estate from Petitioner to Respondents. Petitioner sued Respondents for specific performance of a real estate contract in a "Complaint for Monies Owed" ("Complaint"). CP 1-8. The Complaint asserted no claims, causes of action, or requests for any sort of equitable relief. CP 3-6.

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<sup>4</sup> 181 Wn. App. 109, 325 P.3d 327 (2014).

Respondents denied all allegations of the Complaint and alleged counterclaims against Petitioner. CP 13-14. Respondents then moved for summary dismissal of Petitioner's Complaint. CP 54-55.

In response, Petitioner also moved for summary judgment. In support of his motion, Petitioner filed a memorandum that alleged claims for equitable estoppel, unjust enrichment and restitution, and constructive trust for the first time. CP 203-05.

At the March 13, 2015, summary judgment hearing, the trial court concluded as a matter of law that the signed writing at issue was not an enforceable real estate contract because it lacked the essential elements of such a contract. RP 3-4. As to Petitioner's unpleaded equitable claims, the trial court judge stated: "This is an issue of statute and case law. I don't know that equity applies to this. So the Court will deny any relief on an equitable basis." RP 5. Accordingly, the trial court granted the Respondents' Motion for Summary Judgment and dismissed Petitioner's action. RP 3-4.

The Petitioner moved for reconsideration. CP 211-215. The trial court denied reconsideration because "the Plaintiff did not make any equitable claims in the complaint." CP 228.

The Court of Appeals affirmed the trial court in an unpublished opinion, which specifically declined to review the dismissal of Payne's equitable claims because the claims were not plead and "the record

confirms that the trial court did not address the merits of the theories.”  
Petition for Discretionary Review of Petitioner Will T. Payne, Appendix  
A-17. The Court of Appeals also denied Petitioner’s request for  
reconsideration and to publish the opinion. *Id.* at A-23. Petitioner now  
seeks discretionary review of the Court of Appeals’ Decision.

## V. ARGUMENT

### A. Review Should Be Denied Because The Petition Does Not Satisfy the Criteria Under RAP 13.4(b).

A petition for review will be denied unless the Petitioner can show:

(1) the decision to be reviewed conflicts with another decision of the  
Supreme Court or Court of Appeals; (2) the case involves a significant  
question of state or federal constitutional law; or (3) the petition involves  
an issue of substantial public interest:

A petition for review will be accepted by the Supreme  
Court 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.

RAP 13.4(b). Petitioner Payne has failed to show that his Petition satisfies  
any of these criterion.

**1. The Court of Appeals' Decision is Consistent With *Kruse v. Hemp*<sup>5</sup>, *Hubbell v. Ward*<sup>6</sup>, and *Hedges v. Hurd*<sup>7</sup>.**

Petitioner has failed to show the Court of Appeals' Decision conflicts with another decision of the Supreme Court or Court of Appeals. Mr. Payne argues that the law at issue here is not well settled and that the Court of Appeals' Decision conflicts with *Kruse v. Hemp*<sup>8</sup>, *Hubbell v. Ward*<sup>9</sup>, and *Hedges v. Hurd*<sup>10</sup>.

The law at issue here concerns the specific enforcement of a real estate contract. The 13 necessary terms of an enforceable real estate contract have been settled for over 60 years:

(a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

*Hubbell*, 40 Wn.2d at 782-83. Here, the Court of Appeals upheld the trial court's summary judgment decision that the parties' signed writing could not be specifically enforced as Petitioner requested because the writing lacked many of the 13 material terms of a real estate contract. This ruling

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<sup>5</sup> 121 Wn.2d 715, 722, 853 P.2d 1373 (1993), *holding modified on other grounds by Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995).

<sup>6</sup> 40 Wn.2d 779, 782-83, 246 P.2d 469 (1952).

<sup>7</sup> 47 Wn.2d 683, 687, 289 P.2d 706 (1955).

<sup>8</sup> 121 Wn.2d at 722.

<sup>9</sup> 40 Wn.2d at 782-83.

<sup>10</sup> 47 Wn.2d at 687.



is consistent with *Kruse*, which cites *Hubbell* for the rule of law that 13 material terms must be present to grant *specific enforcement* of a real estate contract. *Kruse*, 121 Wn.2d at 722 (citing *Hubbell*, 40 Wn.2d at 782-83). The Court of Appeals' Decision is also consistent with *Hedges*, which holds that fewer essential elements of a binding real estate contract must be present in an action *for damages* rather than for specific performance. 47 Wn.2d at 708.

Here, Petitioner Payne did not seek damages; instead, he sought specific performance of an alleged real estate contract, which undisputedly lacks many of the 13 material terms, including the method of payment of principal or interest, payment of taxes, property insurance, liens on the property, payment for water or utilities, possession, escrow deposit, and conveyance by deed. Given the facts of this case, the Court correctly applied the rule in *Kruse* and *Hubbell* rather than the rule in *Hedges*. And it correctly concluded as a matter of law that the parties' signed writing was not an enforceable real estate contract because it lacked essential elements of such a contract. Petitioner cites no authority for the proposition that the rule in *Kruse* and *Hubbell* "should not be applied mechanically or in a Machiavellian fashion." Petition for Discretionary Review of Petitioner Will T. Payne at 11.

The Court of Appeals' Decision does not conflict with a Supreme Court decision or a published decision of the Court of Appeals. Accordingly, this Court should deny review under RAP 13.4(b)(1) and (b)(2).

**2. No Significant Question of State or Federal Constitutional Law or Issue of Substantial Public Interest Exists.**

Petitioner argues that a significant question of constitutional property rights and due process or substantial issue of public importance exists. First, this case does not involve an issue of substantial public interest or question of constitutional property rights. The alleged real estate contract was a private writing between the parties to this action, and the enforceability of the writing affects only these private parties. The writing at issue in this case does not affect public interest.

Second, case law shows the Court of Appeals provided proper due process here. Petitioner relies upon the Honorable Robert Lawrence-Berrey's dissent in the Court of Appeals' Decision to argue that "due process" required the Court of Appeals to review the trial court's ruling on equitable issues that Petitioner did not plead but raised for the first time in his response and cross-motion for summary judgment. The Honorable Lawrence-Berrey concluded that the Court of Appeals must review unpleaded issues argued to and decided by the trial court on summary

judgment pursuant to Division Two's opinion in *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 121-22, 325 P.3d 327 (2014). Petition for Discretionary Review of Petitioner Will T. Payne, Appendix A-21.

Not only is *Landstar* not binding authority<sup>11</sup> and not based on constitutional grounds, but also it is factually distinguishable. In *Landstar*, the Plaintiff moved to amend its complaint to add two theories of personal liability against a Defendant before the Defendant's motion for summary dismissal was heard. 181 Wn. App. at 118. Despite the Plaintiff's pending motion to amend its complaint, the parties argued the merits of Plaintiff's proposed additional theories of liability at the summary judgment hearing, and "the trial court granted the motion for summary judgment after *determining that the facts did not justify disregarding the corporate form or imposing personal liability on [Defendant].*" *Id.* (emphasis added).

Unlike the trial court in *Landstar*, the trial court here did not determine the facts of Petitioner Payne's equitable claims on summary judgment. *See* RP 5. In its oral ruling at the summary judgment hearing, the trial court determined only the facts underlying whether an enforceable real estate contract existed and simply denied Petitioner's request for

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<sup>11</sup> *See Grisby v. Herzog*, 190 Wn. App. 786, 809-10, 362 P.3d 763 (2015) (explaining that a decision by a panel of the Court of Appeals are not binding precedent on the other divisions).

equitable relief as inapplicable to the proceedings. RP 2-5. Indeed, Petitioner sought reconsideration because “[t]he court did not specifically note or observe the legal significance of these alternative remedies posed by the plaintiff.” CP at 212. The trial court then expressly denied Petitioner’s motion for reconsideration and request for equitable relief because Petitioner did not plead equitable relief in his Complaint. CP 228. Because this case is factually distinguishable from *Landstar*, the Court of Appeals Decision correctly declined to apply *Landstar* and to review Petitioner’s non-pleaded equitable claims under a summary judgment standard for the first time on appeal.

No question of constitutional law or issue of substantial public interest justifies granting Petitioner’s request for discretionary review. Review should be denied under RAP 13.4(b)(3) and (b)(4).

**3. Denial of Petitioner’s Motion to Publish the Court of Appeals’ Decision Does Not Affect His Petition for Discretionary Review.**

Petitioner argues without citation to authority that “the court of appeals should not be allowed to circumvent acceptance of discretionary review by way of an unpublished opinion.” Petition for Discretionary Review of Petitioner Will T. Payne at 14. Petitioner’s suggestion that the Court of Appeals’ decision not to publish its opinion in this case may


somehow influence or determine this Court's decision on his Petition for Review is contrary to applicable law. RAP 13.4(b) sets forth the criteria governing acceptance of review by the Supreme Court. Deference to the Court of Appeals and whether an opinion is published or unpublished are not part of RAP 14.3's criteria. See RAP 13.4(b). Indeed, the Supreme Court accepts review of even unpublished decisions. *E.g.*, *State v. Bustamante-Davila*, 138 Wn.2d 964, 983 P.2d 590 (1999); *Ellis v. William Penn Life Assur. Co. of America*, 124 Wn.2d 1, 873 P.2d 1185 (1994); *City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991). Petitioner's concerns about the unpublished nature of the Court of Appeals' Decision are meritless.

## VI. CONCLUSION

Based on the foregoing, Respondents Ruegsegger respectfully request that the Court deny Petitioner Payne's Petition for Discretionary Review.

DATED this 16<sup>th</sup> day of November, 2016.

STAMPER RUBENS, P.S.

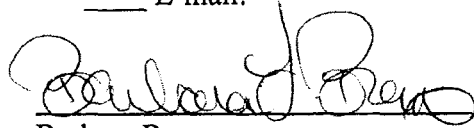
  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of November, 2016, I caused to be served a true and correct copy of the foregoing RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW by the method indicated below, and addressed to the following:

Michael J. Beyer  
Attorney at Law  
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- U.S. mail, postage prepaid
- Hand-delivered
- Overnight delivery
- Facsimile:
- E-mail:

  
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Barbara Brown