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SUPREME COURT OF THE STATE OF WASHINGTON

No. 775693-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JUANITA COUNTRY CLUB CONDOMINIUM
OWNERS ASSOCIATION
Respondent - Plaintiff

v.

PHILLIPS REAL ESTATE SERVICES, L.L.C.
Petitioner - Defendant

JUANITA COUNTRY CLUB CONDOMINIUM OWNERS
ASSOCIATION'S ANSWER TO PHILLIPS REAL ESTATE
SERVICES, LLC'S PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Juanita Country Club Condominium Owners Association (the “Association”) respectfully requests that this Court deny review of the March 4, 2019 unpublished opinion of the Court of Appeals in *Juanita Country Club Condominium Owners Association v. Phillips Real Estate Services, LLC*, 7 Wn. App.2d 1062 (2019) (the “Decision”). The Court of Appeals correctly applied well-settled law of this Court to determine that the handwritten reasonable care standard in Section 8 of the Management Agreement drafted by Phillips Real Estate Services, LLC (the “Agreement”) prevails over the conflicting boilerplate, printed willful misconduct or gross negligence provision in Section 10 of the Agreement.

This Court’s discretionary review is not warranted. The Court of Appeals’ unpublished Decision is fact-specific, entirely consistent with settled Washington law, and establishes no precedent. Phillips Real Estate Services, LLC (“PRE”) provides no reasonable argument to support its contention that the issues in this case present a conflict with a decision by the Supreme Court, a conflict with a decision of the Court of Appeals, or qualify as issues of substantial public interest requiring further guidance by this Court. Accordingly, this Court should deny review.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly applied decisions of the Supreme Court in reaching its Decision and, therefore, the Decision is consistent and not in conflict with the decisions of this Court?

2. Whether the Court of Appeals' Decision is consistent and is not in conflict with another decision of the Court of Appeals?

3. Whether the Court of Appeals' unpublished Decision involves an issue of substantial public interest that should be determined by this Court when Court of Appeals followed legal precedent of this Court and made no new law?

4. Whether the Decision of the Court of Appeals reversing summary judgment dismissal of the Association's lawsuit against PRE should be affirmed regardless of the outcome of PRE's petition when PRE abandoned its appeal of the reversal by the Court of Appeals?

5. Whether the Association is entitled to an award of its attorneys' fees and costs on appeal?

III. RESTATEMENT OF THE CASE

On or about June 2012, the Association and PRE entered into the Agreement drafted by PRE. CP 279-84. In exchange for performing its services under the Agreement, PRE was paid a monthly fee. *Id.* PRE also charged the Association "additional Charges for Services" rendered under

the Agreement. CP 284. The Agreement was signed on behalf of PRE by its Designated Broker, Diane Castanes. CP 283.

The Agreement, drafted by PRE, contained a boiler-plate exculpatory provision seeking to release PRE from any liability for its actions other than those arising from willful misconduct or gross negligence:

Paragraph 10.0 of the Agreement entitled “Responsibility” states:

Agent shall be responsible for willful misconduct or gross negligence but shall not be held responsible for any matters relating to error of judgment, or for any mistakes of fact or law, or for anything, which it may do or refrain from doing which does not include any willful misconduct or gross negligence. Agent shall not be responsible for the acts or omissions of independent contractors engaged by Agent on behalf of the Association.

CP 280. (emphasis added).

The Agreement also contained a provision that expressly incorporated Real Estate Agency Law provided for in RCW 18.86 and included an express provision that PRE was providing the Association with the required pamphlet on Broker Duties. Paragraph 8 stated:

REAL ESTATE AGENCY LAW Association
acknowledges the receipt from Agent of a pamphlet on the
law of real estate agency as required by RCW 18.86.030(1).

CP 280.

But, because he believed PRE owed the Association the duties of reasonable care and good faith in the performance of its responsibilities

under the Agreement, the President of the Association, Frank Sloan, on behalf of the Association, wrote in bold large letter font under Paragraph 8: **“(Honesty, Good Faith, Reasonable Care, Material Facts).”** Ms. Castanes, of PRE, initialed the handwritten revision to the Agreement demonstrating her acceptance of the modification to the Agreement. Notably, she did strike other handwritten changes. CP 268, ¶¶ 4-7.

Prior to PRE’s resignation, the Association raised numerous complaints concerning PRE’s failure to fulfill its duties under the Agreement. (Opinion, at pp. 2-5) Because PRE refused to fulfill its obligations under the Agreement thereby causing the Association damages, on May 12, 2016, the Association filed a lawsuit against PRE. CP 1-5.

The Association and PRE filed cross-motions for summary judgment with the trial court. The Association moved for partial summary judgment requesting that the court determine that the standard of care due under the Agreement was one of “reasonable care” and that the exculpatory language limiting PRE’s liability to breaches of gross negligence or willful misconduct was unenforceable pursuant to Washington statute, RCW 18.86.030, and for violation of public policy. CP 13-23. *See also*, CP 392-96. PRE moved for summary judgment seeking the dismissal of the Association’s claims in their entirety. CP 49-72. *See also*, CP 246-66; and CP 267-78.

The trial court held that the contractual duties of care were indeed reasonable care and good faith, but it determined the Association was not entitled to a recovery *of damages* for PRE's breach unless it could establish that the breach of contract rose to the level of willful misconduct or gross negligence. CP 429; CP 448. The trial court also dismissed all of the Association's claims but for its accounting claims. CP 448.

Both parties moved for reconsideration of the trial court's order. Association's Motion (CP 410-422); Association's Declaration (CP 423-448); Association's Reply (CP 691-698). On October 6, 2017, the trial court entered its order granting PRE's Motion for Reconsideration and denying the Association's Motion for Reconsideration ("Reconsideration Order"). CP 699-701. The Reconsideration Order granted summary judgment to PRE on all issues, both legal and factual, and awarded PRE attorneys' fees and costs. *Id.*

On March 4, 2019, the Court of Appeals issued its Decision overturning the trial court. *See* Decision. Contrary to the arguments made by PRE, the Decision was not the equivalent of a grant of summary judgment "*sua sponte*" to the Association. Rather, the Court of Appeals' Decision that the handwritten modification to Section 8 of the Agreement drafted by PRE requires the reasonable care standard to control was a matter of contract interpretation in accordance with precedence of this Court. *Id.*

IV. ARGUMENT

A. Standard for Review.

Rules of Appellate Procedure (“RAP”) 13.4(b) provides that a petition for review to this Court is 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.

RAP 13.4(b).

PRE contends that review is warranted because “(1) the decision of the Court of Appeals is in conflict with a decision of this Court or with a published decision of the Court of Appeals; or (2) the petition involves an issue of substantial public interest.” PRE petition, at pp. 3-4. As discussed further below, PRE’s petition fails to satisfy any of these criteria for acceptance of review.

B. The Decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.

A vast majority of PRE’s facts and arguments are focused on its groundless assertion that the Court of Appeals granted summary judgment to the Association by way of its Decision, and that material issues of fact precluded the Court of Appeals from granting summary judgment to the

Association. (See PRE petition, at Argument §§B-C) However, that is a mischaracterization of the Decision and, for purposes of its petition, PRE's arguments should be focused on attempting to establish that the Court of Appeals' Decision was in conflict with a decision of this Court. However, PRE does not argue that the Decision is in conflict with a Supreme Court decision and cannot do so because Supreme Court precedent supports the Decision.

In reaching its Decision, the Court of Appeals relied upon the Supreme Court's decision in *Green River Valley Found., Inc. v. Foster*, 78 Wn.2d 245, 473 P.2d 844 (1970). (See Opinion, at pp. 9-11) In *Green River*, the Supreme Court held that "written or typed provisions prevail over conflicting printed clauses." *Id.* (citing *Creditors Ass'n v. Fry*, 179 Wash. 339, 37 P.2d 688 (1934)). "Where provisions of the same transaction are clear but conflicting, the operative provisions prevail over the recitals." *Id.* (citations omitted). Accordingly, the Court of Appeals properly followed legal precedent of this Court in holding that "[b]ecause the handwritten modification prevails over the conflicting printed willful misconduct or gross negligence provision in section 10, the handwritten reasonable care standard controls." (Opinion, at p. 11)

In *Green River*, the Court relied upon this Court's decision in *Creditors Ass'n*, that "[i]t is a rule of general application that, if in a contract

there appears a printed and a typewritten clause which are irreconcilable one with the other, the typewritten clause will prevail.” *Id.* at 342 (citing *German-American Mercantile Bank v. Illinois Surety Co.*, 99 Wash. 9, 168 P. 772; *Eighme v. Holcomb*, 84 Wash. 145, 146 P. 391; *Davis v. Lee*, 52 Wash. 330, 100 P. 752, 132 Am. St. Rep. 973; 13 C. J. p. 536, § 498). Moreover, this Court has upheld and cited with approval the Court’s holding in *Creditors Ass’n*. See *Franklin v. Northern Life Ins. Company*, 4 Wn.2d 541, 559, 104 P.2d 310 (1940) and *Preugschat v. Hedges*, 41 Wn.2d 660, 664, 251 P.2d 166 (1952).

Based upon the foregoing, the Court of Appeals’ Decision does not conflict with a decision of this Court. Rather, the Decision is consistent with legal precedent established by the Supreme Court. As such, PRE’s petition must be denied because the Decision is not in conflict with a decision of the Supreme Court.

C. The Decision of the Court of Appeals is not in conflict with a decision of the Court of Appeals.

Likewise, PRE does not argue that the Court of Appeals’ Decision is in conflict with another decision of the Court of Appeals. PRE cannot do so because the Decision is consistent with other Court of Appeals decisions. Like the Supreme Court, appellate courts have upheld and consistently applied the law established in *Green River* and *Creditors Ass’n* that written

or typed provisions prevail over conflicting printed clauses. *See*, for example, *Eichhorn v. Lund*, 63 Wn. App. 73, 79-80, 816 P.2d 1226 (1991) (Div. 1) and *Weaver v. Fairbanks*, 10 Wn. App. 688, 693-694, 519 P.2d 1403 (1974) (Div. 2).

Rather than arguing or attempting to establish that the Decision is in conflict with other appellate court decisions, PRE devotes its petition to addressing evidentiary issues as they relate to contract interpretation and standards for summary judgment. (*See*, generally, PRE petition, at Argument §B) Specifically, PRE claims that “appellate courts have adopted conflicting standards for when contract interpretation is ripe for summary judgment.” (PRE petition, at p. 5) While not germane to this Court’s decision to accept or deny PRE’s petition, its allegation that the Court of Appeals granted the Association summary judgment *sua sponte* must be addressed.

As stated in this Court of Appeals’ Decision regarding “Written Modification of the Management Agreement,” “[c]ontract interpretation is a question of law we review de novo.” (Decision, at p.11) The Court of Appeals thereafter addressed both facts and law supporting its conclusion that the handwritten reasonable care standard controls. (*Id.*) The Court of Appeals did not grant the Association summary judgment as PRE contends. To the contrary, by holding that “section 10 of the Management Agreement

does not violate RCW 18.86.030(1),” the Court actually affirmed the trial court’s denial of the Association’s motion for partial summary judgment. (Decision, at pp. 8-9)

With respect to the trial court’s orders granting PRE’s motion for summary judgment and motion for reconsideration, the Court of Appeals engaged in contract interpretation as a matter of law. (Decision, at pp. 8-11) “Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

In this case, this Court of Appeals’ contract interpretation did not depend on the use of extrinsic evidence. Rather, the Court of Appeals applied the objective manifestation theory of contracts and determined the parties’ intent by focusing on the objective manifestations of the parties and the Agreement, rather than on the unexpressed subjective intent of the parties. (Decision, at p. 9 (citation omitted)) The Court of Appeals found that the parties modified the Agreement by way of “an agreement in writing” and that the parties both acknowledged the handwritten change to incorporate the good faith standard of care. (*Id.* at pp. 10-11) Because, pursuant to the Supreme Court’s holding in *Green River*, the handwritten

modification prevails over the conflicting printed misconduct or gross negligence provision in Section 10, the Court of Appeals properly decided that the handwritten reasonable care standard controls. (Decision, at p. 11) As a result, the Agreement has only one reasonable meaning with respect to the applicable standard of care.

In order for its petition to be accepted, PRE must establish that the Court of Appeals' Decision is in conflict with another decision of the Court of Appeals. It does not even attempt to do so. Rather, PRE makes a wide-ranging request for relief, which includes overturning cases that were not cited in the Decision (*Wm. Dickson*) and establishing new law without demonstrating that the Decision conflicts with any other appellate court decision:

This Court should accept review and ask for supplemental briefing on the proper standard for when contract interpretation is a question of law, and whether "reasonableness of the interpretations urged by the parties" is extrinsic evidence. The Court should overrule the standard in cases such as *Wm. Dickson*, 128 Wn. App. 488, and hold that when there is no extrinsic evidence, or the extrinsic evidence is undisputed, interpretation of language is a question of law - even if that language has two or more reasonable meanings. It should also hold that "interpretations urged by the parties" are not extrinsic evidence unless the urging came from a witness before the disputes arose, or is a party admission.

(PRE petition, at p. 8) Because PRE's requested relief is wholly outside of the purview of the petition before this Court and due to PRE's failure to

demonstrate a conflict with the Decision and other appellate court decisions, review should not be granted on this basis.

D. The Decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

PRE's final contention is that the Decision involves an issue of substantial public interest. A substantial public interest exists, for example, where the Court of Appeals' holding below will affect numerous other individuals. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (noting case before it "presents a prime example of an issue of substantial public interest" because the "Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue.")

In its petition, PRE argues the Court of Appeals' Decision is an issue of substantial public interest because "[t]he standards of contract interpretation, and when contract interpretation is question of law, ... arise in almost every contract dispute." (PRE petition, at p. 5) PRE also claims that the Decision is an issue of substantial public interest because:

It is a substantial public interest that courts interpret contracts applying consistent rules because it affects how contracts are negotiated, and confidence in judicial enforcement of contracts is vital to a democracy and free market economy.

(PRE petition, at p. 8)

Here, there is no substantial public interest apparent in PRE's request that this Court revisit an unpublished opinion applying well-settled law on contract interpretation. Moreover the Court of Appeals' Decision will not affect other litigants and is not a threat to democracy or free market economy as the Decision cannot be cited for precedent and, in any event, is entirely consistent with settled Washington law. Accordingly, review should not be granted on this basis.

E. PRE abandoned its appeal of the Decision of the Court of Appeals reversing summary judgment dismissal of the Association's lawsuit against PRE.

PRE did not petition this Court for review of the Court of Appeals' Decision reversing summary judgment dismissal of the Association's lawsuit against PRE. (Decision, at pp. 11-15) A party abandons an issue on appeal if it has not assigned error and has not briefed the issue. *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). Accordingly, the Court of Appeals' Decision reversing summary judgment dismissal of the Association's lawsuit against PRE must be affirmed regardless of the outcome of PRE's petition.

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F. The Association is entitled to an award of attorneys' fees and costs.

The Association requests its attorneys' fees and costs associated with PRE's petition pursuant to RAP 18.1. Section 11 of the Agreement provides for an award of fees in any action "to enforce any of the provisions hereof or to protect its interest in any manner arising under this agreement or to recover damages for breach of this agreement." The Association sued PRE for breach of the Agreement, seeking damages and/or to "protect its interest" under the Agreement. The Court of Appeals overturned the trial court's orders granting summary judgment dismissal of the Association's lawsuit against PRE.

Should this Court deny PRE's petition, pursuant to Section 11 of the Agreement and RAP 18.1, the Association requests an award of attorneys' fees and costs associated with the time associated with preparing an answer to the petition. *See Marine Enterprises v. Sec. Pac. Trading*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988) (holding contract fee award also available on appeal). While this Court should affirm the Court of Appeals' Decision in its entirety, the Association is nonetheless entitled to a fee award for time incurred on any portion of the Decision that is affirmed or which PRE failed to petition this Court for review; namely, the reversal of the trial court's granting summary judgment in favor of PRE.

V. CONCLUSION

For the foregoing reasons and those set forth in the Association's underlying briefing, the Association respectfully requests that this Court deny PRE's petition for review.

DATED this 31st day of July, 2019.

FIFTH AVENUE LAW GROUP PLLC

By: /s/ David F. Betz
David F. Betz, WSBA No. 28518

Attorneys for Respondent Juanita
County Club Condominium Owners
Association

DECLARATION OF SERVICE

I, Tori Harris, certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the foregoing Juanita County Club Condominium Owners Association's Answer to Phillips Real Estate Services, LLC's Petition for Review was filed with the Court via e-filing and sent to the parties via ECF as participants in the electronic court filing notice list and as indicated on July 31, 2019, to the addresses listed as follows:

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