Supreme Court No. 101881-9

In the
Supreme Court of the State of Washington

Naixiang Lian
Petitioner

v.

Arun Nagarajan and Indhu Krishna Sivaramakrishnan,
Respondents

PETITION FOR REVIEW

Court of Appeals No. 82644-1-I

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I. IDENTITY OF PETITIONERS, CITATION TO APPELLATE DECISION & INTRODUCTION

Homeowner's rights matter. Such rights are protected by U.S. and Washington Constitutions and laws, and rule established one century ago by *Brown v. Pierce County*, 28 Wn.2d 345, 352 (1902) still holds today: damages for lost use of private property should be measured by "fair and reasonable rental value of that property." This rule has not changed. Recently, rental value was awarded for a homeowner who did not "intend[] to rent the property" because "rental value is a well-established measure of damages". *Holmquist v. King Cnty*.,192 Wn.App. 551, 563 (2016). Here, Nagarajan's negligence led to Lian being denied his fundamental castle rights for six years, causing significant damages.

Petitioner Naixiang Lian ("Lian") asks this Court to accept view of the Court of Appeals' opinion (App A) and of its Order Denying Reconsideration (App. B) in favor of Respondents Arun Nagarajan and Krishna Sivaramakrishnan

("Nagarajan") relying upon inapplicable laws and irrelevant and misleading or false facts. This issue of a homeowner's right to recovery affects all individual property owners in this state. This Court should accept for review.

II. ISSUES PRESENTED FOR REVIEW

1. For over one century, Washington courts have consistently ruled that the homeowners' paramount right to exclude should be respected and homeowners' damages should be compensated when the exclusive use rights were interfered. *e.g., Bradley v. Am. Smelting & Ref Co.,* 104 Wn.2d 13 677, 692-93, 709 P.2d 782 (1985); *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 11, 548 P.2d 168 (1942); *Kuhr v. City of Seattle*, 15 Wn.2d 501 (1942). Where encroachment interferes with owner's right to exclusive use, enjoyment, and possession, Washington courts care about homeowner's rights to recovery by announcing, "we think it of little moment what the theory the injury's

cause of action may be." *Peterson v. King County*, 41 Wn.2d 907 (1953) (*quoting Kuhr v. City of Seattle*, 12 Wn.2d 501 (1942).). Should Lian be denied the right to recovery of his over six years' damages for a debated theory of "intentional tort" or "negligence"?

2. Washington courts have consistently ruled that homeowner is entitled to recovery damages using "fair and reasonable rental value of that property." *Brown v. Pierce County*, 28 Wn.2d 345, 352 (1902). The right to recover in the form of rental values *does not* require the presence of a renter witness. In *Holmquist*, the Court awarded damages in rental value for a private property owner, Holmquist who did not "intend[] to rent the property", reasoning that "rental value is a well-established measure of damages". *Holmquist v. King Cnty*., 192 Wn. App. 551, 563 (2016). Did the Courts below err in requiring tenant witness for Petitioner Lian to recover his damages?

3. As summarized by this Court, "the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damages*." *Gaasland Co. v. Hyak Lumber & Millwork, Inc.,* 42 Wn.2d 795, 712 (1963) (quoting 15 AM. JUR. Damages § 23, at 414-16 (1938)). Did the Courts below err in denying Lian's exclusive rights to recovery because "Lian did not specify the amount of lost rental income"?

III. FACTS RELEVANT TO PETITION FOR REVIEW

In the Opinion, some critical facts were omitted; some irrelevant or false or highly misleading facts were included.

This is a simple "your dead trees, my nightmare; your intentional ignorance, my six years' damages" case, but it was complicated by Nagarajan's innovative defense strategy - filing

baseless claims[1] and filing excessive and repetitive pleadings[2] on the same issues on Lian's damages.

Notice came from multiple neighbors, six arborists[3] and one pediatrician (medical director of University of Washington)

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[1] Nagarajan's innovative defense for their negligence was through filing a baseless trespass claim with zero evidence supporting their claims. To maintain the baseless allegation, they also added person without real interests as defendant with no service. CP 400-402. Nagarajan obtained an alleged sanction order in this baseless claim through asking questions related to the unserved defendant, and later used to confuse the new judge who did not have all knowledge about the case. Opinion, at P.5. When that person submitted the affidavit, contesting the false allegation. CP 375-382; 400-402. Nagarajan moved to dismiss the baseless allegations with prejudice. CP 371.

[2] Following recusal of Judge Shaffer, Nagarajan filed repetitive motions relitigating the issues before Judge Cahan, Judge Richardson, and Judge Chung who eventually granted their motion.

[3] The Court of Appeals appeared to have some misunderstanding about Nagarajan's witness, Anderson's role and his credential. P.2. Anderson did not possess the necessary Tree Risk Assessment Qualification (TRAQ) to conduct the basic tree risk assessment he completed in January 2018, which he admitted in deposition that this action was "against ISA guideline". CP 1157-1158. Furthermore, in 2015, Anderson only inspected one tree, but Lian disputed Nagarajan's ten hazardous trees. CP 502-507, 515-516.

who was also concerned about the safety of the hazardous trees due to the child injury, and personally contacted the King County Code Enforcement Office. CP 562, Opening Brief at 7. Nagarajan had substantial notice from Lian, arborists, and multiple witnesses, yet they intentionally chose not to act.

Of the six arborists, three were retained by Lian, three were retained by Nagarajan. Over the years, Nagarajan was given multiple notices, from witnesses and professional arborists that their trees were dangerous, and removal was required. Nagarajan ignored all notices and took no action.

Lian has not been able to use and enjoy the property. Due to concerns about the trees and their impact on the property, Lian had to move his family to a small condo. However, for the past six years, he has paid a monthly mortgage of $3,500 for the property and an additional monthly $1,570 for the condo.

A. Nagarajan's Hazardous Trees Interfered with Lian's Exclusive Rights to Use.

Nagarajan purchased their home in 2013. Their yard contained several trees, including a large cedar and nine cypress trees along the border of the property. In 2015, the cedar tree had a failure when a co-dominant branch fell. CP 48, 824. Nagarajan was informed that they needed to continue to check the trees for safety reasons. CP 516

Lian moved next door to Nagarajan in 2016. He was concerned about the trees and the possible danger to his property. He informed Nagarajan of this danger. CP 510-511, 853-862. Despite this notice, Nagarajan did not take any action.

Lian continued to have concerns about the trees after the injury of his minor child (who did not understand the risk of the trees) caused by the falling branches. He moved out of the property in October 2017. Lian then rented the property to Carl Li. CP 883-890, 1043, 1045. In November 2017, the 40-foot codominant branches of Nagarajan's cedar trees fell on Lian's

property. Carl Li broke the lease. CP 957-964. Lian has been unable to rent the property since that time. CP 805-818, 932-995, 996-1011, 1107-1115.

After the branches fell onto Lian's property, Nagarajan received seven additional notices on the dangers of their trees. CP 531, 533, 536-541, 545-546, 549-556, 558. Six arborists (three retained by Nagarajan) were involved in evaluation of Nagarajan's trees. All six arborists agreed that some of the trees were "long dead". CP 323; 325; 331; 539; 911-916. They also agreed that removal was recommended, and that regular maintenance was advised. *Id.*

The damage done to Lian could have been avoided. The former president of International Society of Arboriculture, Pacific Northwest Chapter, John Hushagen testified that "if one of a pair of co-dominant stems falls or is removed, the proper tree care practice is to remove the second stem soon as it will invariably fail within a few years. I have seen many examples of this second failure in my 40-year career as an arborist." CP

903. Hushagen pointed out that the 2017 failure could have been avoided if Nagarajan had exercised proper care for removing the remaining co-dominant branches. *Id.* Despite these notices, Nagarajan took no action with regards to the trees. CP 614. In fact, they did not take any action regarding the trees until October 2020, two months after the court denied their motion for summary judgment, when they removed the nine dead cypress trees. CP 591, 863.

For these years, Nagarajan not only ignored notices from Lian, but they also further ignored professional recommendations from six arborists. CP 614. It should be noted that in 2018, Nagarajan's retained arborist, Andrew Baker specifically concerned about the multiple co-dominant branches of the cedar trees by writing "the codominant leaders of the cedar tree will be an issue of concern for the future" and advised to "install tree cabling". Baker recommended removing dead trees. CP 926. Two months later, another of

Nagarajan's retained arborists, Andy Anderson recommended a series of tree works, including removal of dead trees. CP 835.

Nagarajan's intentional failure to act had effectively deprived Lian of his exclusive rights to use and enjoy his property to this day. In fact, the branches from Nagarajan's tree remain on the Lian's property. CP 1016-1020.

B. Trial Court Found a Sufficient Issue to Allow the Negligence Claims Against Nagarajan to Proceed to Trial.

Lian brought claims against Nagarajan because Lian was deprived of the constitutional and exclusive rights to use and enjoy his property since November 2017. Despite having notice, Nagarajan failed to remedy the ten hazardous trees, and Nagarajan's 40-foot branches trespassed (and continued to trespass as of today) onto Lian's property.

At the crux of this case involves Nagarajan's negligence and intentional ignorance and Lian's rights to recovery:

1. Nagarajan ignored a total of eight notices over three years and took no action. The court found there was

sufficient issue of material fact regarding their years of negligence and intentional ignorance of the safety of adjacent lands and the issue was allowed to proceed to trial. After this decision, Nagarajan finally removed nine of the hazardous trees. CP 591.

2. Lian had shown damages in the over six years' inability to use and enjoy the property he owned and his inability to rent the property. *e.g.,* CP 932-955.

Washington law requires that upon notice, tree owner "has a duty to take corrective actions." *Lewis v. Krussel*, 101 Wn. App. 178, 186-187 (2000). Nagarajan's negligence is composed of two parts: (1) pre-2017 negligence for ignoring Lian's 2016 notice; and (2) post-2017 negligence for ignoring six arborists' instructions of dangerous condition of the subject trees.

As advised by Hushagen and Stemple, the failure of the multiple 40-foot branches was from the failure to remove the co-dominant branches of Nagarajan's cedar and could have

been avoided. Nagarajan submitted an email in 2015, seemingly to suggest that the several sentences could permanently immune them from liability. Their attempts failed for two reasons.

First, Courts are poor predictors of future condition – this is why the *Lewis* court explicitly requires tree owners to act ***after*** receiving notice, thus, anything occurred prior to that was irrelevant. In other words, Anderson's one sentence in 2015 cannot negate Nagarajan's liability *after* receiving Lian's notice in 2016. Additionally, this email from Anderson was to inform Nagarajan of the previous failure and defects. Nagarajan was well aware of the cedar tree's defects and its prior failure but nevertheless chose to ignore Lian's timely notice.

For the post-2017 negligence, Nagarajan provided no arguments for having ignored six arborists' advice and multiple witnesses' reminders for the following three years. Nagarajan could not and did not explain why they continued to maintain

ten dead and dying trees, without considering the safety of the adjacent property.

C. Judge Shaffer Denied Two Motions for Summary Judgment, Finding Factual Disputes on Negligence and Damages for Jury, Judge Chung Overruled Judge Shaffer.

Lian sued Nagarajan for damages and equitable relief. CP 1- 3. During the pendency of the court case, Nagarajan filed two separate motions for summary judgment. The first sought to dismiss all of Lian's claims. The second sought to limit Lian's damages to $3,000.

The court allowed the negligence claim to move forward and found that Lian's testimony was sufficient to show he lost rental income:

> [Lian] can testify that he was unable to do so. [Lian] can't say why other people didn't want to rent from him, but he can say he couldn't do it. That's enough for an inference from the fact that he lost Mr. Li, that he lost rental income.
> RP 11.

Additionally, the court stated that Lian:

> testified that for whatever reason he failed to rent the property. A jury could reasonably infer, you

> know, he couldn't do it because of his problem with the trees.
> RP 12.

In their Response Brief, Nagarajan did not deny they failed to take any action regarding the condition of the trees despite multiple notices. Reply Brief p. 29-30. They took no action for several years. However, after the denial of the motion for summary judgment on the negligence issue, Nagarajan finally removed nine of the disputed trees from their property, finally acknowledging that the trees needed to be removed.

After Judge Shaffer's recusal from the case, Nagarajan filed additional and repetitive motions relitigating this very same issue before several different new judges in trial court. The motions before Judge Cahan and Judge Richardson were unsuccessful. Nagarajan was finally successful with their motion before Judge Chang who dismissed the case on the eve of trial.

In their motion in limine, citing CR 50, Nagarajan challenged the sufficiency of Lian's evidence of damages. In his response, Lian presented evidence about paying $3,500 monthly mortgage for a property the family was unable to use and enjoy, in addition to $1,570 monthly fees for alternative living. CP 940; 932-995. Lian also asked the court to follow the Washington precedents to quantify the damages using rental values. CP 805-818. However, the trial court did not follow precedent.

CR 50 requires the court to decide the motion *after* giving the party opportunity to present the evidence, but the court dismissed the whole claim prior to trial. The trial court erred in granting the motions in limine on the eve of trial. The Court of Appeals erred in upholding the trial court's decision.

D. The Court of Appeals Disregarded Well-Established Precedents and Denied Lian's Right to Recovery.

In affirming the dismissal denying Lian's recovery in the form of rental value, the Court of Appeals opined that Lian failed to provide specific amount of his damages, even though

Lian's tenant witness was unable to testify (due to an international relocation). Opinion p.10. Additionally, the Court of Appeals also stated that Lian could not recover damages under theory of negligence. Opinion p.12. Lian moved for reconsideration, arguing that the Court of Appeals' opinion overlooked and misapprehended the applicable Washington laws protecting homeowner's rights to use property and for recovery if that use is denied. *e.g., Holmquist v. King Cnty.,* 192 Wn. App. 551, 368 P.3d 234 (2016). The holding in *Holmquist* is instructive for the following:

1. The Court of Appeals held in situations where homeowner's exclusive use and enjoyment was interfered with, the homeowner is entitled to recovery for "even minimal interference with an owner's right of exclusive use and possession." *Id.* at 562.

2. The Court of Appeals in *Holmquist* sets forth that the homeowner's only burden is "***fact*** of damages," not the exact amount of damages. *Holmquist* also held that "*mere uncertainty as to the amount will not preclude the right of recovery." Id.* at 561 (*quoting Gaasland Co. v. Hyak Lumber and Millwork, Inc.,* 42 Wn.2d 705, 713, 257 P.2d 784 (1953).)

3. The homeowner is entitled to recovery using imputed rental value even if the homeowner did not actually rent the property because "[r]ental market value of the land represents the value of possession or use." *Id.* at 563 (*quoting* Restatement (Second) of Contracts Sec. 348(1) (1981).)

4. Using imputed rental value to quantify the homeowner's damages is a "reasonable" method and "appropriate measure" for homeowner to recover damages. *Id.*

5. When the opposing party failed to raise alternative methods for calculating damages, the appellate court ruled that the homeowner's calculation using rental value should be accepted as the only calculation. *Id*

In his motion for reconsideration, Lian pointed out that the Court of Appeals' opinion that Lian cannot recover damage under theory of negligence inconsistent with this Court's decision in *Kuhr v. City of Seattle,* 15 Wn.2d 501. 504 (1942) ("Where encroachment interferes with owner's right to exclusive use and enjoyment," this Court would "think it of little moment what the theory of the injured party's cause of action may be"). Court of Appeals denied motion for reconsideration, Lian petitions for review.

IV. WHY THIS COURT SHOULD ACCEPT REVIEW.

This case merits reviews under RAP 13.4 (b)(1)-(4). The Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4 (b)(4). *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Specifically, 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. CP 562. The Court of Appeals decision involves a significant question of law under the Constitution of the State of Washington and the United States that should be determined by the Supreme Court under RAP 13.4 (b)(4) because this case involved the deprivation of homeowners' property rights and their right to use and enjoy their property.

The Court of Appeals decision is in conflict with multiple prior decisions of the Supreme Court pertaining to the protecting of property rights, which should be reviewed by the

Supreme Court under RAP 13.4 (b)(1). Finally, the Court of Appeals decision is in conflict with another decision of the Court of Appeals, specifically and most notably *Holmquist v. King Cnty.,* which should be reviewed by the Supreme Court under RAP 13.4 (b)(2).

V. ARGUMENT

A. The Court Of Appeals' Decision Creates a New Rule Prohibiting Homeowner's Rights to Recover Damages in Form of Rental Value, Conflicts with *Gaasland*, *Holmquist*, *Kuhr*, *Brown*, and Raises an Issue of Substantial Public Interest that this Court Should Decide.

"A man's home is his castle." The castle rights are protected by U.S. and Washington Constitutions. Individuals have an exclusive right to use and enjoy their private property without any interference and to recover for any damages to their property as a result of any interference with that right. Washington courts do not give less protection. Washington courts have consistently ruled that the homeowner's paramount right to exclude should be respected and homeowner's damages should be compensated when the exclusive use rights were

interfered with. *See e.g., Bradley v. Am. Smelting & Ref Co.*, 104 Wn.2d 677, 692-693 (1985); *Olwell v. Nye & Nissen Co.,* 26 Wn.2d 282, 286 (1946); *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wn.2d 6, 11 (1942); *Kuhr v. City of Seattle,* 15 Wn.2d 501 (1942).

The Court of Appeals has recognized a homeowner's rights as "one of the most essential sticks in the bundle of rights that are commonly characterized as property.' *Holmquist* 192 Wn. App. at 562 (*quoting Kaiser Aetna v. United States,* 444 US. 164, 176 (1979). Washington courts assess damages for even minimal interference with a property owner's right of exclusive use and possession and established the below principles:

1. For the purpose of recovery, damages of private property should be measured by "fair and reasonable rental value of that property." *Brown v. Pierce County*, 28 Wn.2d 345, 352 (1902).

2. For the purpose of recovery, the underlying theory of the claims brought by homeowners will not affect their rights to recovery. *Kuhr v. City of Seattle,* 15 Wn.2d 501 (1942) (where encroachment interferes with owner's right to exclusive use and enjoyment, "we think it of little

moment what the theory of the injured party's cause of action may be").

3. For the purpose of recovery, homeowners are not required to provide specific amounts. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.,* 42 Wn.2d 705, 712 (1953).

4. For the purpose of recovery, homeowners are not required to provide any tenant witness for claiming damages in rental values. *Holmquist v. King Cnty*., 192 Wn. App. 551, 563 (2016).

5. The homeowner is entitled to compensation for "even minimal interference with an owner's right of exclusive use." *Id.* at 562 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 422. 102 S. Ct. 3164. 73 L. Ed. 2d 868 (1982)).

Instead of following these well-established precedents, the Court of Appeals created new rules prohibiting Lian from recovery damages. Specifically,

1. Lian must provide tenant witness to recover damages in rental values;
2. Lian must specify the specific amount of damages;
3. Lian must plead under intentional torts rather than negligence.

Washington courts' long-term rule is to permit homeowner recover damages in form of rental values. As this Court held over one century ago, the private property owner's damage should be measured by rental values. *Brown v. Pierce County*, 28 Wn.2d 345, 352 (1902). When a homeowner's exclusive right to use and enjoy is interfered with, he is entitled to recover damages in rental value, even if he/she did not actually rent the property. In *Holmquist*, the Court awarded the homeowner rental values even though the property owner, *Holmquist* did not "intend[] to rent the property." *Holmquist,* 192 Wn.App. at 563.

The Court of Appeals prohibited Lian from recovery using imputed rental income, this decision disregarded this Court's century-long decision in *Brown* directing Washington courts to measure private homeowner's damages using imputed rental values. In applying its new rules, the Court of Appeals requires Lian to provide "specific amounts" for the damages.

(App A, p. 10). This new rule was inconsistent with *Gaasland Co.,* which states:

> *uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.*

Gaasland Co., 42 Wn.2d at 713 (italicized in original).

The Court of Appeals' reasoning relied upon an *inapplicable* civil rule, CR 9 (special damages). Special damages arise from the special circumstances of the case, are the result of an injury, and are mostly related to bills for medical care. *e.g., Durkan v. Leicester,* 62 Wn.2d 77 (1963) (medical treatment costs as results of an automobile accident); *Lipshay v. Barr,* 54 Wn.2d 257 (1959) (the same); *Palmer v. Jensen,* 132 Wn.2d 193 (1997) (the same); *Cox v. Charles Wright Academy,* 70 Wn.2d 173 (1967) (the same); *Richards v. Sicks' Rainer Brewing Co.,* 64 Wn.2d 357 (1964) (the same).

In applying its new rule, the Court of Appeals further requires Lian to submit his tenant witness to recover his damages in rental values. This new requirement conflicts with

the Court of Appeals' prior decision in *Holmquist*. In *Holmquist*, the Court of Appeals awarded rental values to Holmquist who did not actually rent the property and did not intend to rent the property. While the Court of Appeals did not require Holmquist to provide a tenant witness for the purpose of recovering damages in rental values, but nevertheless Lian was required to produce Carl Li, who was unavailable due to an international relocation, to prove his damages. [4]

[4] Washington laws does not require tenant witness Carl Li's presence for the purpose of Lian's recovery for the imputed rental income. Out of caution, Lian provided facts related to Nagarajan's misrepresentation before the Court of Appeals that they were unable to depose Carl Li, the facts were that they did not want to depose Carl Li who was known to them 20 months earlier, they had phone conversation with Carl Li, but chose not to depose him. In fact, Nagarajan never issued a subpoena to Carl Li or brought any discovery motions. When Judge Chung suggested deposing Carl Li, Nagarajan refused in writing saying that they did not want to depose Carl Li. *See* CP 336, 931, *also* Opening Brief, at 14. Although unnecessary, Lian submitted Carl Li's international flight tickets and asked for two weeks' extension for Carl Li. Nagarajan also made multiple misstatements about facts related to *this* case. The alleged discovery violation was untrue as Nagarajan never filed any discovery motions in their capacity as Defendants before the Superior Court. They conveniently cited irrelevant facts in

In applying its new rule, the Court prevented Lian from recovery, reasoning Lian's claims were under theory of negligence, not intentional tort. This reasoning conflicts with this Courts holding:

> "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. I, § 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."
>
> *Peterson v. King County*, 41 Wn.2d 907, 912 (1953) (*quoting Kuhr v. City of Seattle,* 15 Wn.2d 501 (1942)).

The Court of Appeals decision in this case has effectively overruled Washington courts' multiple well-established precedents, *e.g., Gaasland, Holmquist, Kuhr, Brown*, and more, meriting reviews under RAP 13.4 (b)(1)(2) & (4).

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other (baseless) case, which was already dismissed with prejudice, trying to distract the court's attention from actual issues. The alleged order was entered by a judge recused six months earlier. CP 338.

B. The Court of Appeals' Decision on Making Determination on Damages Not only Undermines the Role of the Jury, but also Raises Serious Constitutional Concerns that Require Immediate Attention and Resolution by this Court.

Washington Constitution states that "[t]he right of trial by jury shall remain inviolate." Const. art. I, § 21. In *Sofie v. Fibreboard* Corp., 112 Wn.2d 636, 771 P.2d 711 (1989), this Court held that RCW 4.56.250 violated Const. art. I, § 21 for imposing a statutory limit on the damages since it operated to "tak[e] a jury's finding of fact and allow it to conform to a predetermined formula." *Sofie* 112 Wn.2d at 653. "The jury's role in determining noneconomic damages is perhaps even more essential." *Id*, at 646. "To the jury is cosigned under the constitution the ultimate power to weigh the evidence and determine the facts – and the amount of damages in a particular case is an ultimate fact." *James v. Robeck*, 79 Wn.2d 864, 869 (1971). "Regardless of the court's assessment of the damages, it may not, substitute its conclusions for that of the jury on the amount of damages. The jury decides whether the injuries are

insignificant, minor, moderate, or serious, and its determines the amount of damages." *Cox v. Charles Wright Academy, Inc.,* 70 Wn.2d 173, 176 (1967).

Similarly, Washington courts have repeatedly held that a plaintiff must be given the opportunity to present not just part, but all, of his or her evidence before the trial court could rule on the sufficiency of that evidence. *See Esmieu v. Schrag,* 88 Wn.2d 490, 497 (1977); *Olympic Forest Prods. v. Chaussee Corp.,* 82 Wn.2d 418 (1973); *In re Hendrickson,* 12 Wn.2d 600 (1942); *Smith v. Fourre,* 71 Wn.App. 304 (1993). In the case *Smith v. Fourre,* the appellate court reversed and remanded for a new trial because the trial court erred in dismissing the case before the plaintiff had completed her case in chief. Specifically, the court held,

> [u]nder the circumstances present here, Smith was entitled to complete her presentation before the trial court ruled on the sufficiency of her evidence, and she is now entitled to a new trial at which she will have, for the first time, the opportunity to present her entire case in chief." *Id*. at 307.

Here, Nagarajan challenged Lian's sufficiency of evidence on damages. This was an issue that should be determined by the jury at trial. However, the trial court improperly took over jury function, and dismissed Lian's claims under CR 50. The court is required to take the evidence most favorable to the nonmoving party (here, Lian). *Levy v. North Am. Co. for Life Health Ins.*, 90 Wn.2d 846,586 P.2d 845 (1978). Furthermore, CR 50 requires the decision be made after giving plaintiff a full opportunity to present the evidence.

In *Holmquist*, the homeowner proposed to quantify their damages using rental values of approximately $3600 per month. The Court held that, due to the opposing party's failure to propose an alternative, Holmquist's methodology of quantifying damages should be accepted. Similar to *Holmquist*, Lian proposed quantifying his damages using rental values. Nagarajan failed to propose an alternative.

Nagarajan challenged Lian's damages before Judge Shaffer who denied that motion and subsequent motion for reconsideration.

They engaged in "a continuing pattern of intransigence" by filing separate six identical motions (in addition to the motion for summary judgment and reconsideration, they filed three similar motions in motions in limine and motion for directed verdict). CP 684. They re-litigated the same issue before multiple judges – Judge Cahan, Judge Richardson and Judge Chung. It was only Judge Chung who improperly overruled Judge Shaffer. Judge Chung did not have authority to overrule a decision from a judge from the same level court. Article IV, § 5 of the Washington Constitution specifically notes the authority of each judge. *State ex rel. Campbell v. Superior Court for King County*, 34 Wn.2d 771, 775 (1949). The Court of Appeals sanctions intransigence for filing excessive and unsubstantial motions. *In re Marriage of Burrill*,

113 Wn.App. 863, 873 (2002); *In re Marriage of Wallace*, 111 Wn.App. 697, 710 (2002).

Given the constitutional issues, this Court should accept for review. RAP 13.4 (b)(3).

VI. CONCLUSION

This Court should accept review under RAP13.4 (b)(1)-(4) to examine the important issues involving homeowner's rights to recovery damages using rental values that was determined by this Court over century ago.

This document contains 4985 words, excluding the parts of the documents exempted by the word count by RAP 18.17.

Respectfully submitted this 10 day of April 2023.

THE APPELLATE LAW FIRM

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Appendix A
Opinion
2/6/2023

FILED
2/6/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARUN NAGARAJAN and INDHU SIVARAMAKRISHNAN, Respondents, v. NAIXIANG LIAN, Appellant.	No. 82644-1-I DIVISION ONE UNPUBLISHED OPINION
NAIXIANG LIAN, Appellant, v. ARUN NAGARAJAN and INDHU SIVARAMAKRISHNAN, Respondents.	

MANN, J. — Naixiang Lian sued Arun Nagarajan and Indhu Sivaramakrishnan (Nagarajans) for negligence, private nuisance, and injunctive relief arising from allegedly dangerous trees in the Nagarajans' backyard. The trial court dismissed the claims on summary judgment, and under a CR 50 motion for judgment, as a matter of

law. Lian appeals and argues that the court erred in (1) dismissing the nuisance claim on summary judgment, (2) dismissing the emotional distress claim absent damages, (3) granting the Nagarajans' motion in limine to exclude evidence of lost rental income damages, and (4) dismissing the negligence claim for failure to produce evidence of damages. We affirm.[1]

I.

Factual Background

The Nagarajans and Lian are neighbors. The Nagarajans' and Lian's backyards abut each other with a boundary line fence.

The Nagarajans purchased their property in July 2013. The property included a cedar tree near the center of the backyard and a row of approximately nine cypress trees along the common boundary line. In 2015, the Nagarajans consulted an International Society of Arboriculture (ISA) certified arborist, Duane "Andy" Anderson, with Blue Ribbon Tree & Landscape Specialists, Inc. to assess the health of the trees on their property. Anderson explained that the top of the cedar broke off at some point in the past and that it was fixed, "but we want to tell you that it should be checked again in the next 3 or 4 years. Certainly no longer than 5 years. Just to check its safety factor. But, you are good to go for a few years at least."

In 2016, Lian moved into the abutting property. Lian observed the trees as a risk and sent the Nagarajans requests to have the trees cut down. During a windstorm on November 13, 2017, a branch from the Nagarajans' cedar tree broke off and fell into

[1] Lian moved to strike the Nagarajan's sur-reply brief. We agree and grant Lian's motion to strike.

Lian's yard. Within two weeks, Lian's attorney sent the Nagarajans a letter insisting that the trees be removed.

In December 2017, Lian again insisted the Nagarajans remove the cedar tree and cypress trees. In response, the Nagarajans hired Anderson to re-inspect the cedar and to perform an ISA basic tree risk assessment. Anderson's report stated, "[t]he probability of large failure is virtually non-existent" and "I do NOT believe that tree needs to be removed." He also stated the cedar tree should be reexamined in three or four years. Regardless of the report, Lian's new counsel sent the Nagarajans a letter and draft complaint for damages and injunctive relief demanding the trees be removed. Soon after, Lian also hired a certified arborist, Matt Stemple, to inspect the cedar tree. Stemple did not know that the trees were not on Lian's property until he arrived; therefore, the report only contained a visual assessment. Stemple recommended that "to reduce risk to a tolerable level is to drastically reduce or remove the Cedar."

In April 2018, the Nagarajans retained a second opinion from a certified arborist, Andrew Baker, with Arborists NW, LLC. Baker performed core sampling to examine for rot and inspected the top of the trees using a drone. He recommended "to continue regular maintenance of the tree, this can be achieved by a crown cleaning with the aim of removing dead and failing branches" and "continue to make observations on the conditions of concern."

Throughout 2018, unsatisfied with the reports and refusal to remove the trees, Lian filed a complaint with the English Hill Homeowners' Association, contacted local media, and complained to the King County Executive. All with no avail.

In June 2019, an apparent trespasser entered the Nagarajans' backyard and poisoned the cedar and cypress trees. Anderson came to the property to inspect the trees, smelled diesel fuel, and found rock salt around the base of the trees. At Anderson's and Baker's recommendation, Nagarajan removed several inches of soil around the base of the trees. In July 2020, Anderson inspected the trees again. He found "five of the nine Leland Cypresses had deteriorated considerably. Three were dead and the other two showed significant signs of poor health. The western red cedar tree also showed signs of stress." He opined the deterioration was a direct result of the poisoning.

On October 12, 2020, Anderson removed all nine cypress trees. Anderson reassessed the cedar and determined its health had improved significantly. He removed four dead limbs on the top and thinned the canopy to minimize the risk of any future harm. He concluded there is "virtually no risk of this cedar failing and causing damage [to] any neighbor's property." Lian hired an arborist, Alan Haywood, to inspect the Nagarajans' trees. Haywood determined, "the western red cedar . . . appeared to be in good health, with no dead branches present. The foliage was a little sparse on the tree, possibly indicating some stress, but it did not have an unusual amount of seasonal dead foliage."

Procedural Background

On September 4, 2019, Lian filed suit against the Nagarajans for negligence, nuisance, and injunctive relief. Lian argued that the Nagarajans were negligent and created a nuisance by failing to take corrective action to maintain the safety condition of the trees both before and after the 2017 incident. Lian sought monetary damages and

injunctive relief to remove the trees. The Nagarajans countersued asserting claims for timber trespass and outrage based on the belief that Lian poisoned their trees. The court consolidated the cases under King County Cause No. 19-2-23880-1 SEA.

The Nagarajans moved for summary judgment seeking dismissal of Lian's negligence, nuisance, and injunctive relief claims. In August 2020, the court dismissed the nuisance claim but found a question of material fact as to the negligence claim and injunctive relief.

After Lian failed to produce evidence of alleged damages, the Nagarajans filed another motion for partial summary judgment. The trial court granted the relief sought by the Nagarajans except for Lian's claim for lost rental income. The order dismissed claims for property damage, diminution in property value, wage loss, emotional distress, non-party minor child's bodily injury damages, and requested injunctive relief.

While awaiting trial assignment, the court entered an order for sanctions prohibiting Lian from submitting any evidence or testimony at trial that had not been disclosed in discovery. The court found that Lian repeatedly violated discovery rules and failed to abide by several court orders over discovery. Thus, the court previously imposed less severe sanctions striking witnesses and ordered Lian to re-appear for deposition.

The Nagarajans' settled their trespass claims directly with Lian's homeowners' insurance and the Nagarajans moved for voluntary dismissal of the action under CR 41. The court granted the dismissal. On May 21, 2021, the court clarified that the sanctions order remains in effect:

> The 12/31/[20] sanctions order is valid and enforceable against Mr. Lian with respect to the remaining claims in this action and is intended to limit the evidence and testimony Mr. Lian may introduce at trial.

The Nagarajans filed pretrial motions in limine to bar Lian from introducing evidence at trial regarding lost rental income damages. Upon hearing the motion, the court struck the trial date and ordered Lian to produce Carl Li for deposition within 14 days. Lian failed to produce Li. The Nagarajans filed a renewed motion to exclude evidence of lost rental income damages and included a motion to dismiss Lian's negligence claim pursuant to CR 50. The trial court dismissed the negligence claim for Lian's inability to prove damages.

Lian appeals the order granting the motion in limine, CR 50 motion, dismissal of his emotional distress damages claim, and dismissal of the nuisance claim.

II.

We review an order on summary judgment de novo. Meyers v. Ferndale Sch. Dist., 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). "Summary judgment is appropriate where there is no genuine issue as to any material fact, so the moving party is entitled to judgment as a matter of law. We view the facts and reasonable inferences in the light most favorable to the nonmoving party." Meyers, 197 Wn.2d at 287; see also CR 56. We review the facts in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

A.

Lian argues that the trial court erred in dismissing his claim for emotional distress damages based on the Nagarajans' intentional ignorance and deliberate indifference over the condition of their trees. We disagree.

Lian did not claim an intentional tort. Now characterizing the Nagarajans' actions as intentional ignorance or deliberate indifference does not create an intentional act or a claim for an intentional tort. A party may not raise a new argument on appeal, thus, we decline to consider the argument. In re Estate of Reugh, 10 Wn. App. 2d 20, 69, 447 P.3d 544 (2019) (citing In re Det. of Ambers, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007)).

In the absence of physical injury, in negligence cases we allow recovery when the emotional distress is: (1) within the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given the circumstances, and (3) manifested by objective physical symptomology. Bylsma v. Burger King Corp., 176 Wn.2d 555, 560, 293 P.3d 1168 (2013). Objective symptomology, meaning physical injury or bodily harm, is not a prerequisite to recovery of damages only when intentional emotional harm has been inflicted. Kloepfel v. Bokor, 149 Wn.2d 192,198, 66 P.3d 630 (2003) (emphasis added).

Lian failed to show objective symptomology as a required element of a negligent infliction of emotional distress claim. Lian failed to submit evidence to support his claimed damages. The only evidence Lian submitted was his own deposition where he testified that he suffered nightmares, difficult sleeping, and financial pressure. While Lian claimed he was treated by physiologist Dr. Junghee Park-Adams, it is unclear when, for how long, and if a condition was diagnosed. Lian identified Dr. Park-Adams as a witness, yet opposed the Nagarajans' efforts to obtain Dr. Park-Adams's records, claiming doctor patient privilege. To recover under negligent infliction of emotional distress, Lian needed to present sufficient evidence to make the question of damages a

genuine issue of material fact. Because he did not, the trial court correctly dismissed the claim.

B.

Lian argues that the trial court erred in dismissing his nuisance claim because it was based on intentional conduct, not negligent action. Again, we disagree. Lian never alleged intentional conduct by the Nagarajans and he did not argue it below. We thus do not need to consider this argument on appeal. Reugh, 10 Wn. App. 2d at 69 (citing Ambers, 160 Wn.2d at 557 n.6).

"In Washington, a 'negligence claim presented in the garb of nuisance' need not be considered apart from the negligence claim." Atherton Condo. Apt. Onwers Ass'n Bd. v. Blume Dev. Co., 115 Wn.2d 506, 527-28, 799 P.2d 250 (1990) (quoting Hostetler v. Ward, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985)). "In those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied."[2] Atherton, 115 Wn.2d at 527 (citing Hostetler, 41 Wn. App. at 360). Because Lian's nuisance claim is grounded in negligence, or the nuisance is the result of negligence, the court properly dismissed the nuisance claim in the wake of a present negligence action.

C.

Lian argues that the trial court erred in granting the Nagarajans' renewed motion in limine to exclude evidence of lost rental income, arguing that the order was inconsistent with its prior ruling on summary judgment. He also argues that the trial

[2] To establish negligence, a plaintiff must prove (1) the existence of a duty owed by defendant to the plaintiff, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between breach of duty and injury. Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

court erred in granting the CR 50 motion for judgment as a matter of law because there was a genuine dispute of material fact as to whether the Nagarajans knew their trees were dangerous. We disagree.[3]

We review a trial court's grant of a motion in limine for abuse of discretion. Medcalf v. Dep't of Licensing, 83 Wn. App. 8, 16, 920 P.2d 228 (1996). "A trial court abuses its discretion only when its ruling was based upon untenable grounds or untenable reasons." Medcalf, 83 Wn. App. at 16.

We review a CR 50 motion de novo. Paetsch v. Spokane Dermatology Clinic, P.S., 182 Wn.2d 842, 848, 348 P.3d 389 (2015). "A reviewing court reviews the evidence in the light most favorable to the aggrieved party and determines whether the trial court correctly applied the law." Sounders v. Lloyd's of London, 113 Wn.2d 330, 335, 779 P.2d 249 (1989). Granting a motion for judgment as a matter of law is appropriate when there is no substantial or reasonable inference to sustain a verdict for the nonmoving party. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." Lodis v. Corbis Holdings, Inc., 192 Wn. App. 30, 61-62, 366 P.3d 1246 (2015).

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[3] Lian also argues that the order excluding evidence of lost rental income violated his constitutional right to a jury trial. While the right to a jury trial is fundamental, the particular right protected is to have the jury decide factual questions. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). "It was not the purpose of [article I, section 21] to render the intervention of a jury mandatory . . . where no issue of fact was left for submission to, or determination by, the jury." Dillon v. Seattle Deposition Reps., LLC, 179 Wn. App. 41, 89, 316 P.3d 1119 (2014) (citing Brandon v. Webb, 23 Wn.2d 155, 159, 160 P.2d 529 (1945)). The court did not err in excluding evidence Lian failed and refused to produce. The lack of such evidence leaves no factual question for the jury to determine. The court did not abuse its discretion or violate Lian's right to a jury.

The Nagarajans moved for partial summary judgment to dismiss Lian's damages and injunctive relief claims. The court granted the motion in part, leaving only Lian's claim for lost rental income. The basis for Lian's lost rental income claim is that no one would rent his property after the 2017 incident because of dangerous conditions. During discovery, Lian did not specify the amount of lost rental income or the method for calculating damages. CR 9. In response to the Nagarajans' interrogatories, Lian objected to the request for detailed damages and production of such damages. He stated the request was "unintelligible, overbroad, compound, burdensome, and seeks private financial information." Lian identified Li as a former tenant to testify that he entered into a two-year residential lease with Lian, but breached the lease and refused to rent the property after the incident. Lian failed repeatedly to produce Li for the deposition.

The Nagarajans moved for sanctions against Lian for failure to fulfil discovery obligations. On December 31, 2020, the court imposed sanctions, limiting Lian's evidence at trial to evidence fully disclosed in discovery. The sanctions order stated:

> The Court's orders compelling have been disobeyed. The case is now awaiting trial assignment. The least severe sanction the Court can impose at this point is to bar any evidence or testimony from Mr. Lian not already fully disclosed in discovery. Any such evidence (including any late disclosed witness(es)) is barred.

In May 2021, the Nagarajans moved in limine to exclude evidence of lost rental income based on Lian's continued failure to specifically plead damages, failure to specify the amount and basis of damages, and obstruction of access to Li. CR 9(g). The court denied the motion, but required Lian to produce Li for deposition within 14 days of the entry of the order. Lian failed to produce Li. The Nagarajans' filed a

renewed motion in limine on the same grounds as before, in addition to Lian's failure to produce Li for deposition by July 9th as required by the court's recent order. Lian's counsel advised the court that Li would not appear for deposition nor would he testify.

The court granted the Nagarajans' renewed motion in limine because Lian repeatedly failed to produce Li after previously finding him in violation of various discovery orders. "The rules are clear that a party must fully answer all interrogatories and all requests for production, unless a specific and clear objection is made." Wash. State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 353-54, 858 P.2d 1054 (1993). Because Lian failed to produce evidence of lost rental income during discovery, aside from his personal declaration, the court did not err in excluding evidence of lost rental income at trial.

Because the court excluded evidence of lost rental income, it granted the Nagarajans' CR 50 motion.

A party seeking judgment as a matter of law may submit a motion at any time before submission of the case to the jury. CR 50(a)(2); Univ. of Wash. v. Gov't Emps. Ins. Co., 200 Wn. App. 455, 461, 404 P.3d 559 (2017). CR 50(a)(1) provides:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . . that cannot under the controlling law be maintained without a favorable finding on that issue.

The trial court correctly granted the Nagarajans' renewed motion in limine and corresponding CR 50 motion; dismissing Lian's negligence claim for an inability to prove evidence of lost rental income damages. The court dismissed all other alleged

damages on summary judgment. Lian's refusal or inability to produce Li left no legally sufficient evidentiary basis for a reasonable jury to find that Lian's alleged damages were proximately caused by the condition of the Nagarajans' trees. Simply, Lian cannot prove damages—an essential element of a negligence claim. Young, 112 Wn.2d at 225. Failure of one element disposes of the negligence claim. Young, 112 Wn.2d at 225.[4]

IV.

Lian argues that the court erred in denying his motion for summary judgment and conversely granting the Nagarajans' motion to voluntarily dismiss the trespass and outrage claims. We disagree.

The Nagarajans' sued Lian for trespass and outrage. Lian moved for summary judgment on the claims. The Nagarajans' settled outside court and moved for voluntary dismissal of the claims under CR 41(a)(1)(B).

Under RAP 2.2(a), only final judgments are appealable as a matter of right. The denial of a summary judgment motion is not a final order that can be appealed as a matter of right. In re Estates of Jones, 170 Wn. App. 594, 605, 287 P.3d 610 (2012). A voluntarily dismissal under CR 41(a)(1)(B) is also not an appealable order because it is not a final judgment on the merits and does not result in an entry of judgment. Alliance

[4] Lian contends that he did not have a full opportunity to be heard on his claim for lost rental income damages. But Lian was represented by counsel, filed briefing in opposition of the renewed motion in limine and CR 50 dismissal, and was allowed oral argument. He was given multiple opportunities to produce Li.

One Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 399, 325 P.3d 904 (2014). As a result, we decline to consider Lian's arguments.[5]

Affirmed.

Mann, J.

WE CONCUR:

[5] Lian included challenges to 20 trial court orders in the notice of appeal. We will not consider any argument identified in the notice of appeal but not argued in Lian's briefing. Cowiche Canyon Conservancy, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Skagit County Pub. Hosp. Dist. No. 1 v. Dep't of Revenue, 158 Wn. App. 426, 440, 242 P.3d 909 (2010).

Appendix B
Order Denying
Motion for
Reconsideration
3/9/2023

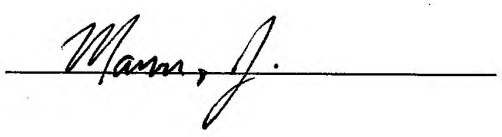
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARUN NAGARAJAN and INDHU SIVARAMAKRISHNAN, Respondents, v. NAIXIANG LIAN, Appellant.	No. 82644-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION
NAIXIANG LIAN, Appellant, v. ARUN NAGARAJAN and INDHU SIVARAMAKRISHNAN, Respondents.	

Appellant Naixiang Lian moved to reconsider the court's opinion filed on February 6, 2023. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



CERTIFICATE OF SERVICE

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the law of the United States and the State of Washington that on April 10, 2023, I caused the following document:

To be served on the following via Email through the Courts E-service.

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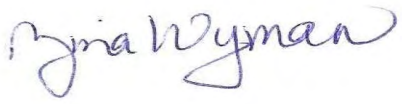
I declare that the foregoing is true and correct.

Dated: April 10, 2023



Zina Wyman
Senior Appellate Paralegal
The Appellate Law Frim

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Appellate Court Case Title:	Naixiang Lian, Appellant v. Arun Nagrajan and Indhu Krishna Sicaramakrishnan, Respondents (826441)

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