Case No. 93693-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER GUEST and SUZANNE GUEST,
Petitioners,
v.
DAVID LANGE and KAREN LANGE,
Respondents.

RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW ON APPLICATION FROM COURT OF APPEALS, DIVISION II, NO. 47482-4-II

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I. INTRODUCTION

Petitioners, Suzanne and Christopher Guest, have filed two Petitions for Discretionary Review which are currently pending before this Court; this Answer is in response to the second Petition. Both Petitions arise out of the same lawsuit, which centered on a dispute between two neighbors about the rebuilding of a deck in the exact same footprint as it had always been located long before either neighbor purchased their home. The Guests' two Petitions raise an identical issue: whether an indemnity provision in a Patio or Deck Easement can be interpreted to require the Respondents, David and Karen Lange, to indemnify the Guests for this lawsuit which the Guests filed against the Langes, and further requires the Langes to actually fund the Guests' lawsuit against them. The Court of Appeals in both instances properly applied Washington Supreme Court precedent to hold that the indemnity provision did not apply to the facts of this lawsuit, because the provision was intended to protect the Guests from liability for injuries sustained on the easement portion of the Langes' deck arising from the utilization of the easement. This simply does not involve an issue of substantial public interest nor is the Court of Appeals' decision in conflict with any Washington law. As such, the Petition for Review should be denied.

II. IDENTITY OF RESPONDENTS

Respondents are David Lange and Karen Lange ("the Langes").

III. COURT OF APPEALS DECISION

The Court of Appeals decision was filed on August 2, 2016 and the Guests' motion for reconsideration was denied on September 2, 2016.

IV. STATEMENT OF THE CASE

As a preliminary matter, the Guests' Petition for Discretionary Review violates RAP 13.4(c)(6) because it fails to provide any citations to the record below to support the facts in the Statement of the Case or in the Argument section. In addition, the Petition asserts a multitude of "facts" that are wholly irrelevant to the issues raised in the Petition, were never presented to the trial court, and/or are false. The Langes set forth below the accurate and relevant facts, together with proper citation to the record.

A. Procedural Facts

The Langes and the Guests currently own adjacent lots in the planned unit development neighborhood of Spinnaker Ridge in Gig Harbor; the Langes own Lot 4 and the Guests own Lot 5.[1] When the Langes purchased their home in 1993, it had a deck located in the space between

[1] CP 512, ¶2.

their property and their neighbor's property.[2] Eleven years later, in 2004, the Guests purchased the home next to the Langes.

Both properties are subject to recorded CC&Rs and a "Patio or Deck Easement."[3] The Langes' property is benefitted by a Patio or Deck Easement over the Guests' Lot 5; the Guests' property is similarly benefited by a Patio or Deck Easement over the adjoining Lot 6.[4] The Patio or Deck Easement benefitting the Langes' property reserves an easement to a small area of land, measuring 5' x 21', on Lot 5 for the Langes' patio or deck.[5] In addition, the CC&Rs include a blanket encroachment provision allowing for unintentional minor encroachments by a deck or patio over adjoining lots beyond the boundaries of the Patio or Deck Easement.[6]

Over the years, the Langes' deck suffered extensive deterioration, so they rebuilt the deck in April 2011. Contrary to the Guests' unsupported

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[2] *Id.* at ¶¶3-4. Many of the other homes in Spinnaker Ridge have similar deck configurations. *Id.* at ¶6; CP 10-12.

[3] CP 320, ¶2; 421, ¶¶3-5; CP 323-325. All of the owners of homes in the Spinnaker Ridge development are subject to recorded CC&Rs and a series of easement grants and reservations affecting lots in the development. CP 320-321; 323-337.

[4] CP 321, ¶6; CP 335-337.

[5] CP 321, ¶5; CP 333-334.

[6] CP 320, ¶2; CP 323-324; The CC&Rs are recorded under Pierce County Auditor's No. 8608080472. *Id.* The Encroachment Easement is also included in the amended and restated CC&Rs at paragraph 15.4, recorded under Pierce County Auditor's No. 200705290274. CP 321, ¶3; CP 326-329.

assertion, the deck was rebuilt in the same location and in the same footprint as it had when the Langes' purchased their home eighteen years earlier.[7]

On December 6, 2011, the Guests filed this lawsuit claiming the Langes' deck improperly encroached on the Guests' property beyond the Patio or Deck Easement.[8] They asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, trespass, and indemnity.[9] In their Answer, the Langes denied the Guests' claims and counterclaimed to quiet title in the disputed deck area.[10] On January 16, 2013, the Guests filed a lis pendens in the trial court clouding title to the Langes' property, and subsequently filed the lis pendens with the Pierce County Auditor.[11]

The trial court dismissed the majority of the Guests' claims against the Langes on summary judgment, including their claim for indemnity, and a jury ultimately rendered a verdict in the Langes' favor.[12] The trial court entered judgment on the verdict on September 19, 2014, dismissing all of the Guests' claims with prejudice and quieting title in the Langes to "exclusively use, maintain, repair and replace the deck . . . as it now exists

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[7] CP 517, ¶21.
[8] CP 486-489.
[9] CP 490-499.
[10] CP 500-511.
[11] CP 7-10.
[12] CP 549-553; CP 554-555.

against any claim of the plaintiffs," and awarding the Langes attorney's fees.[13] The Guests appealed.[14]

Thereafter, the Langes filed a motion to cancel the lis pendens, which the Guests opposed, arguing that they intended to file a supersedeas bond under RAP 18.1(b).[15] The day before the hearing on the Langes' motion to cancel the lis pendens, the Guests submitted a $1,000 cashier's check to the Pierce County Superior Court Clerk, claiming the finds were to be held as a bond to supersede the judgment entered in the Langes' favor.[16] The Langes filed a motion objecting to the amount of supersedeas the Guests posted, arguing that the lis pendens was preventing them from refinancing their home, and requested that if the lis pendens was not cancelled, the Guests be ordered to post a supersedeas in the amount of $215,000 to ensure the Guests had the funds available to pay all damages and loss that would result to the Langes by their inability to refinance.[17] Following oral argument on the motions, the trial court granted the Langes' motion canceled the lis pendens.[18] The trial court also determined that

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[13] CP 87-89.

[14] CP 24-26.

[15] CP 1-10; 12-16.

[16] CP 42-43. The Guests also submitted a $3000.00 cashier's check that same day, claiming those funds were intended to supersede an Order entered against them on April 11, 2014, which imposed terms against the Guests for non-compliance with a previous court order involving a different defendant in this action. CP 45-46.

[17] CP 60-66; 73-75.

[18] CP 222-23.

because the lis pendens was cancelled, the $1,000 cash supersedeas the Guests had posted was adequate to cover the Langes' damages that may result from the stay.[19]

B. The Guests Appealed The Dismissal Of The Lis Pendens And Claimed That The Indemnity Provision In The Patio Or Deck Easement Obligated The Langes To Pay The Guests' Attorney's fees Below And On Appeal

The Guests appealed, arguing that the trial court erred by cancelling the lis pendens.[20] They also sought to recover attorney's fees, costs and expenses on appeal, claiming they were entitled to such an award under the indemnity provision in the Patio or Deck Easement.[21] The Guests' claim for attorney's fees was premised on the identical indemnity claim that the trial court had dismissed on summary judgment, which ruling has been affirmed by the Court of Appeals in a companion case.[22] In short, the Guests argue that the indemnity provision obligates the Langes to defend

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[19] *Id.*

[20] Appellants' Brief in the Court of Appeals below, at pps. 8-15.

[21] *Id.* at p. 19.

[22] *Guest v. Lange*, 194 Wn. App. 1031, 2016 WL 3264419 (June 14, 2016). *See* Appellant's Brief in the Court of Appeals at p. 19. The Guests have also filed a Petition for Discretionary Review of the Court of Appeals' June 14, 2016 decision (which affirmed the Judgment entered in the Lange's favor and the trial court's rulings on various motions and evidentiary issues) seeking review by this Court, among other things, of the Court of Appeals' holding affirming the dismissal of the Guests' indemnity claim. Thus, the Guests are seeking review of the same indemnity issue in both of their Petitions for Discretionary Review currently pending before this Court.

and indemnify the Guests in this lawsuit.[23] The indemnity provision provides as follows:

> Grantee promises, covenants, and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and [sic] all judgments that may result from said claims, actions and/or suits.[24]

Notably, the Guests did not provide citation to any legal authority to support their argument they were entitled to recover attorney's fees under the indemnity provision.[25]

C. Court of Appeals' Decision

The Court of Appeals held that the trial court erred in cancelling the lis pendens, finding that the action below was not yet settled, discontinued, or abated as required under RCW 4.28.320 for purposes of cancelling the lis pendens.[26] *Guest v. Lange,* 195 Wn. App. 330, ¶28, __ P.3d__ (2016). The Court remanded for proceedings consistent with its opinion, but also specifically stated that "[o]n remand, the trial court should ensure that the

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[23] *See* Appellant's Brief in the Court of Appeals at p. 19.

[24] CP 461. The indemnity provision is found at Paragraph D of Patio or Deck Easement; the Easement document in attached hereto as Appendix A.

[25] Appellants' Brief in the Court of Appeals, at pp. 19-20.

[26] The Langes did not appeal from the Court of Appeals' decision.

amount of any supersedeas bond is sufficient to compensate the Langes for any damages they incur due to the appeal and lis pendens." *Id.*

The Court of Appeals denied the Guests' request for attorney's fees, relying on *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012), in which this Court rejected a very similar argument as the Guests make here. *Guest v. Lange*, 195 Wn. App. at ¶¶29-30. The Court of Appeals held that the "plain language" of the indemnity provision in this case established that "it is an indemnity provision intended to protect the Guests from liability for injuries sustained on the easement portion of the Langes' deck . . . arising from the 'utilization of said easement.'" *Id.* at ¶30. The Guests filed a motion for reconsideration of the denial of their request for attorney's fees, which was denied. They now seek discretionary review by this Court, of the Court of Appeals denial of their request for attorney's fees.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Review Should Be Denied Because The Indemnity Provision Does Not Apply To The Facts Of This Case Nor Does The Guests' Request For Attorney's Fees Raise An Issue Of Substantial Public Interest That Merits This Court's Review.

Notably absent from the Guests' Petition for Discretionary Review is any argument or reasoned analysis to establish that the Court of Appeals' denial of the Guests' request for attorney's fees raises an issue of substantial public interest, as required for this Court to accept discretionary review

under RAP 13.4(b)(4). Instead, the Guests summarily claim that this Court has recognized the "importance of addressing indemnification and indemnity rights as evidenced by their acceptance of review in *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012)."[27] What the Guests fail to recognize is that this Court in *City of Tacoma* already addressed – *and rejected* - a virtually identical interpretation of an indemnity provision as the Guests make here. *City of Tacoma*, 173 Wn.2d at 593-594. Consequently, nothing about Guests' request for attorney's fees raises an issue of substantial public interest meriting this Court's review. The Petition for Discretionary Review should be denied.

Furthermore, this Court's holding in *City of Tacoma* and prior case law, fully supports the trial court's and Court of Appeals' repeated rejection of the Guests' interpretation of the indemnity provision found in the Patio or Deck Easement. "Indemnity agreements are subject to the fundamental rules of contract construction, *i.e.*, the intent of the parties[']controls; this intent must be inferred from the contract as a whole; the meaning afforded the provision and the whole contract must be reasonable and consistent with the purpose of the overall undertaking." *Knipschield v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994). An indemnity provision

[27] Petition for Review at p. 15-16.

must be read as the average person would read it; it should be given a "practical and reasonable rather than a literal interpretation," and not a "strained or forced construction" leading to absurd results. *Eurick v. Pemco Ins. Co.*, 108 Wn. 2d 338, 341, 738 P.2d 251 (1987), quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986).

In *City of Tacoma*, 173 Wn.2d 584, Tacoma sued the defendant municipalities under a franchise agreement to determine whether the municipalities or the City of Tacoma was responsible for certain water costs. The Court held that the franchise agreement required the City of Tacoma to pay the water costs. *Id.* at 591-92. Then, just as the Guests argue here, the municipalities argued that an indemnification provision in the franchise agreements required the City of Tacoma (indemnitor) to indemnify the municipalities with respect to the lawsuit the City filed against them, and hence, the indemnity provision precluded Tacoma's lawsuit. *Id.* at 593. The indemnification and hold harmless provision provided as follows:

> [Tacoma] hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City . . . from any and all claims, costs, judgments, awards or liability to any person.

Id. Just as the Guests argue here, the municipalities argued that the indemnity provision broadly applied to "any and all claims," thereby precluding the City of Tacoma from filing *any* action against the municipalities. *Id.* This Court expressly rejected this argument:

> While this language [in the indemnity provision] is undeniably broad, it does not prevent Tacoma, a party to the contract, from suing the Municipalities, another party to the contract. Concluding otherwise *would produce the absurd result of precluding a party to a contract from disputing its obligations under that contract.*"

Id. (emphasis added)

Similarly, under a second indemnity provision, just as the Guests' do here, the City of Federal Way argued that the City of Tacoma was required to defend Federal Way in Tacoma's lawsuit because the indemnity provision applied to "any and all claims." *Id.* at 594. That second provision provided as follows:

> [Tacoma agrees to] indemnify and hold harmless and defend [Federal Way] from any and all claims, demands, losses, actions and liabilities (including costs and all attorney's fees) to or by any and all persons.

Id. at 594. As with the municipalities' claims, this Court rejected Federal Way's argument, holding that to interpret the indemnity provision so as to force Tacoma to bear all costs of litigation when there was any dispute over

contractual performance between parties, likewise "produces an absurd result." *Id.* at 594.[28]

Just as this Court rejected the municipalities' arguments in the *City of Tacoma*, the Court of Appeals below rejected the Guests' argument that the indemnity provision in the Patio or Deck Easement requires the Langes to indemnify the Guests and bear all litigation costs for "any and all claims" related to the easement. *Guest v. Lange*, 195 Wn. App. at ¶¶29-30. Just as in *City of Tacoma,* the Guests' interpretation produces an absurd result - it precludes the Langes from asserting their lawful rights under the Patio or Deck Easement, and requires them to actually fund the Guests' lawsuit against them. The Court of Appeals properly followed *City of Tacoma* in rejecting the Guests' claim for attorney's fees, and instead, gave the indemnity provision a practical and reasonable interpretation, holding that it is intended to protect the Guests from liability for injuries sustained on the easement portion of the Langes' deck arising from the utilization of the easement. *Id.* at ¶30. The Court of Appeals' holding is consistent with, and supported by, Washington law.

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[28] *See also, Taylor v. Browning*, 129 Idaho 483, 493, 927 P.2d 873 (1996) (holding that indemnity clause did not bar indemnitor's claim against indemnitee because there was no liability to a third party); *ProteoTech, Inc. v Unicity Int'l, Inc.*, 547 F. Supp. 2d 1174, 1180 (W.D. Wash. 2008) (rejecting as unreasonable, plaintiff's interpretation of an indemnity agreement as seeking to "transform the indemnification clause into a blank check to sue and collect attorneys' fees").

Nor is the Court of Appeals holding in conflict with the Court of Appeals decision in *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86, 285 P.3d 70 (2012), *review denied*, 176 Wn.2d 1015 (2012). The indemnity provision at issue in *Newport Yacht Basin* was between a seller and purchaser of property. The indemnity provision required the seller to indemnify the buyer for "any and all liabilities or claims . . . arising in respect of the Property." *Id.* at 101. The seller had, unbeknownst to the buyer, failed to convey proper title to the buyer. After the buyer sold the property to a third party, the improper title was discovered. The third party asserted a claim against the buyer for the bad title, and the buyer sought indemnification from the seller under the indemnity provision. The indemnification provision provided as follows:

> Seller [Radovich] hereby agrees to indemnify and hold Purchaser [Burbridge/Bridges] harmless from: . . . (b) *any and all liabilities or claims,* whether accrued, absolute, contingent or otherwise, *arising in respect of the Property which relate to any period prior to the closing*, whether any such liabilities or claims have been asserted prior to or after the closing.

Id. at 100 (emphasis added). The trial court determined that the indemnity agreement required the seller to indemnify the buyer, and the Court of Appeals agreed. *Id.* at 101. According to the Court, because the third party's claims against the buyer were based on the seller's failure to convey proper title, the third party's claim against the buyer arose "in respect of the

Property" and related to a "period prior to the closing," the claims were covered by the indemnity agreement and the seller had an obligation to indemnify the buyer. *Id.*

Nothing about the Court of Appeals' interpretation of the indemnity provision in the Patio or Deck Easement conflicts with the court's analysis in *Newport Yacht Basin.* While the court in *Newport Yacht Basin* noted that the phrase "'any and all claims' is to be given its ordinary meaning and includes all types of claims," it did so in the context of requiring the seller indemnity the buyer for claims asserted against the buyer by a third party – a claim in "respect of the Property." *Id.* at 101. In other words, the indemnity provision applied to require that the seller defend and indemnify the buyer because a third party was asserting a claim falling directly within the terms of the provision: the third party was asserting a claim against the buyer "arising in respect of the Property which relate[d] to any period prior to the closing." *Id.*

The indemnity provision in this case, however, *does not* apply to any and all claims related to the easement, as the Guests appear to argue. Instead, it applies only to third party claims asserted against the Guests for injuries sustained on the easement portion of the Langes' deck arising from the "utilization of the easement." There simply is no conflict between the holdings in *Newport Yacht Basin* and the Court of Appeals decision below.

Finally, the Guests' assertion that the indemnity provision should be interpreted to require the Langes to indemnify the Guests for the Guests' own wrongful conduct is nonsensical. The indemnity provision in the Patio or Deck Easement does not contain any language purporting to require the Langes to indemnify the Guests for the Guests' wrongful conduct. Finally, even if the indemnity provision in the Patio or Deck Easement applied to the facts of this case, which it does not, the Guests would not be entitled to recover any attorney's fees incurred in connection with the dispute over the interpretation of the indemnity agreement. *Jones v. Strom Constr. Co*, 84 Wn.2d 518, 523, 527 P.2d 1115 (1974) (holding that "in the absence of express contractual terms to the contrary, an indemnitee may not recover legal fees incurred in establishing his right to indemnification").

In the final analysis, there is simply no basis upon which the Guests are entitled to recover attorney's fees. Washington courts follow the American rule – each party in a civil action is obligated to pay its own attorney's fees and costs, unless an obligation to pay the others' attorney's fees and costs is clearly set forth in a contract, statute or a recognized ground in equity. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc*, 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006). The Court of Appeals properly rejected the Guests' request for attorney's fees because there is no legal basis upon which to award fees on appeal or for any proceedings below. As

such, the Guests' Petition does not raise any issues of substantial public interest. The Petition for Discretionary Review should be denied.

B. Review Should Be Denied Because The Guests' Second Issue Identified For Review Was Not An Issue In The Trial Court Or Before The Court of Appeals.

The Guests' second purported issue in their Petition for Discretionary Review is nonsensical, particularly in the context of this case. The Guests' second issue is somewhat unclear but appears to relate to the mechanics of posting a supersedeas bond under RAP 8.1, but that was never an issue raised in the trial court or before the Court of Appeals. Indeed, the Guests do not even identify any holding by the Court of Appeals addressing the issue for which they seek discretionary review. The only issues before the Court of Appeals on this appeal by the Guests, which was limited to the cancellation of the lis pendens, was whether the trial court properly cancelled the lis pendens the Guests had filed, whether the trial court abused its discretion in denying the Guests' motions to conduct discovery and to strike portions of David Langes' declaration, and whether the Guests were entitled to recover attorney's fees on appeal.[29] Neither party raised issues regarding the mechanics of filing a supersedeas bond under RAP 8.1 in the trial court or the Court of Appeals, nor did the Guests raise the issue in their

[29] *See* Assignments of Error and Issue Statements in Appellants' Brief in Court of Appeals, p. 2-3.

motion for reconsideration before the appellate court. In short, issues relating RAP 8.1 and/or the mechanics of filing a supersedeas were never raised, briefed or argued in the trial court or the Court of Appeals. There is, therefore, no basis for discretionary review. *See* RAP 2.5(a) (an appellate court "may refuse to review any claim . . . not raised in the trial court"). Further, courts are not authorized to render advisory opinions. *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn. 2d 800, 805, 359 P.2d 1040 (1961) (explicitly holding that "[w]e do not give advisory opinions"). Finally, the Guests' conclusory one sentence argument that the application of RAP 8.1 "is a matter of substantial public interest," is nothing more than an unsupported assertion and is completely insufficient under RAP 13.4(b)(4) to merit this Court's review, particularly on an issue never before presented in this litigation.

VI. CONCLUSION

The one actual issue raised by the Guests in their Petition— that the Court of Appeals erred in denying the Guests' request for attorney's fees based on the indemnity provision in the Patio or Deck Easement—has no ramifications beyond the parties to this dispute or the particular facts of this case. It is simply not an issue of substantial public interest meriting review by this Court. The Court of Appeals decision is based on well-settled Washington law regarding indemnity provisions and does not conflict with

any Supreme Court case or other Court of Appeals decision. As such, the Langes respectfully request the Court deny the Guests' Petition for Discretionary Review in its entirety.

RESPECTFULLY SUBMITTED this 2 day of November, 2016.

KELLER ROHRBACK L.L.P.

By _____

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CERTIFICATE OF SERVICE

I, Chris Jarman, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, I caused a copy of the foregoing document to be served on the individuals identified below:

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SIGNED this 2 day of November, 2016, at Seattle, Washington.

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