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SUPREME COURT NO. 98922-2

(Court of Appeals No. 53126-7-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM G. PARDEE and SHANNON D. PARDEE husband and wife,

Appellants/Petitioners,

v.

EVERGREEN SHORES BEACH CLUB, a Washington nonprofit corporation, NICHOLAS PALMER and JANE DOE PALMER, husband and wife, JOHNNY KRAWCHOOK and JANE DOE KRAWCHOOK, husband and wife, KRIS KINNEAR and JOHN DOE KINNEAR, husband and wife, JON KNUTSON and JANE DOE KNUTSON, husband and wife, BRUCE BAMFORD and JANE DOE BAMFORD, husband and wife, SYLVIA DAVENPORT and JOHN DOE DAVENPORT, husband and wife, PAT ANDERSON and JANE DOE ANDERSON, husband and wife, ASHLEY LIEB and JOHN DOE LIEB, husband and wife, ZENE SNIDER and JOHN DOE SNIDER, husband and wife, AARON MACLEAN and JANE DOE MACLEAN, husband and wife, DAN SOLIE and JANE DOE SOLIE, husband and wife, and VANTAGE COMMUNITY MANAGEMENT, INC., a Washington profit corporation,

Respondents.

**ANSWERING BRIEF OF RESPONDENT
EVERGREEN SHORES BEACH CLUB**

Shawna M. Lydon, WSBA #34238
Luisa E. Taddeo, WSBA #48677
Betts Patterson & Mines, P.S.
701 Pike Street, Suite 1400
Seattle WA 98101-3927
Telephone: (206) 292-9988

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I. INTRODUCTION

The Petitioners have failed to demonstrate that any one of the issues raised in their Petition for Review meets the standards for review under RAP 13.4(b). The Court of Appeals' decision affirming summary judgment is entirely consistent with precedent and does not deviate from any previous decision made by the Supreme Court of Washington, or any decisions in Divisions I, II, or III of the Court of Appeals. In fact, there are multiple decisions from each Division and the Supreme Court of Washington that are in accord with the Court of Appeals in this case. There are zero decisions in opposition. Thus, the Petition for Review fails under RAP 13.4(b)(1) and RAP 13.4(b)(2).

Additionally, the Court of Appeals properly followed straightforward precedent in affirming summary judgment in favor of the Evergreen Shores Beach Club ("ESBC") since there was no genuine issue of material fact regarding any of the issues raised. Even if the arguments made in their Petition for Review had merit (a point to which ESBC neither agrees with nor concedes), the Petitioners are unable to point to any evidence on the record that would create any genuine issue of material fact as to any of the issues of consequence, which would warrant a reversal of the Court of Appeals' decision.

Lastly, the Petitioners have failed to show that their Petition for

Review meets the substantial public interest requirement under RAP 13.4(b)(4). The Court should, therefore, deny the Petition for Review.

II. COUNTER-STATEMENT OF ISSUES

1. Whether this Court should accept review when the Court of Appeals' decision follows precedent from all three Divisions of the Court of Appeals and is consistent with the Washington State Supreme Court's prior decisions on the interpretation of Washington's Law Against Discrimination ("WLAD"), RCW 49.60.030(1)(b), governing discrimination and retaliation.

2. Whether this Court should accept review when the Court of Appeals' decision properly affirmed the trial court's denial of the Petitioner's request for declaratory judgment related to the Black Lake Regatta's rental of the park, consistent with precedent from all three Divisions of the Court of Appeals and the Washington State Supreme Court.

3. Whether this Court should accept review when the Court of Appeals' decision correctly affirmed the trial court's decision that the enforcement actions of the ESBC were not in violation of the governing documents, as is clear from the record and the plain language of ESBC's Covenants, Conditions, and Restrictions ("CCR").

4. Whether this Court should accept review when the Court of Appeals' decision correctly affirms the trial court's ruling that the

Petitioners did not present sufficient evidence to warrant a trial on the claims of defamation and defamation *per se*, consistent with precedent from all three Divisions of the Court of Appeals and the Washington State Supreme Court.

5. Whether this Court should accept review when the Court of Appeals' decision correctly affirmed the trial court's summary judgment because the Petitioners have failed to show any genuine issue of material fact for any of the issues for which they seek review.

6. Whether this Court should accept review when there is no issue of substantial public import warranting the same, as is required under RAP 13.4(b)(4).

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background

Petitioners (the "Pardees") and the individual Respondents are members or former members of the Evergreen Shores Beach Club ("ESBC"), a homeowner's association. Additionally, most of the individual Respondents are current or former board members of the ESBC Board of Trustees ("Board").

The case arises from a series of disputes involving the Pardees in opposition to ESBC and the Board. Specifically, the Pardees alleged violations by ESBC and the Board of ESBC's governing documents,

including the Covenants, Conditions and Restrictions (“CCRs”), the Articles of Incorporation (“Articles”) and the Bylaws (collectively “governing documents”).

Additionally, on August 7, 2018, the Pardees filed a Second Amended Complaint (“Complaint”) (CP 32-43) in which they alleged that they were the victims of discrimination, retaliation, defamation and that the defendants named in that Complaint violated the governing documents and should be liable for damages related to those claims and violations. The basis of the Pardees’ Complaint was that Mrs. Pardee was treated unfairly by the ESBC and the Board as the result of her being a member of a protected class. Then, when Mrs. Pardee took issue with the allegedly unfair treatment, the Pardees claim that the ESBC and the Board defamed her and retaliated against her by removing her from her Board position and from a Facebook page.

Following a lengthy period of discovery, including depositions of many of the principal parties, the Respondents filed a motion for summary judgment with prejudice against the Pardees (“MSJ”) (CP 97-123). As part of that motion, the ESBC explained to the trial court - using clear evidence from the depositions of the parties and the prevailing case law - that there was no discrimination against Mrs. Pardee based on her status as a member of a protected class. Additionally, the ESBC demonstrated that the

statements that allegedly defamed Mrs. Pardee were either statements of fact that were at least generally true or were statements of opinion. Finally, the ESBC successfully established that the issues by which the Pardees sought declaratory and injunctive relief were related to either hypothetical disputes, moot issues (by the Pardees' own testimony), or that the actions taken by the ESBC were allowed by the plain text of the governing documents.

The Pardees tried to argue that the term "creed", as used in Washington's Law Against Discrimination ("WLAD") (RCW 49.60), could mean a person's personal, undefined beliefs as opposed to a religion or specific religious or spiritual belief and that was the basis of the alleged discrimination. The Pardees also attempted to argue that unflattering comments about a person made within a small community of homeowners constituted defamation. Finally, the Pardees claimed that a difference in opinion on the interpretation of bylaws, and even a minor deviation from the strict adherence to specific provisions, constituted a *per se* violation under Washington law for which the ESBC and the Board should be liable to the Pardees for damages as a result.

The trial court granted the Respondents' MSJ on February 4, 2019 (CP 581), opining that the Pardees "failed to present evidence warranting a trial on any of their claims under CR 56." *Id.* The trial court also found

that, “while it is clear that Plaintiffs [the Pardees] unfortunately have a difficult time with their neighbors, Plaintiffs have failed to prove there is a genuine issue of material facts as to any of their remaining claims.” *Id.* The Pardees filed a motion for reconsideration (CP 582-597), which was denied on February 15, 2019. (CP 600). The Pardees then filed their appeal with the Court of Appeals, Division II. Oral argument was cancelled due to developments related to the COVID-19 virus, and no arrangements were made by the parties for the Court of Appeals to hear oral argument in some manner other than the prohibited in-person court appearance following receipt of the cancellation notice.

On June 23, 2020, the Court of Appeals issued its Unpublished Opinion. In its Opinion, the Court of Appeals affirmed the trial court’s decision on the following issues: (1) discrimination under the WLAD; (2) defamation, defamation *per se*, and false light; (3) various violations of the ESBC’s governing documents; and (4) civil conspiracy. Following the Court of Appeal’s decision, the Petitioner’s again sought reconsideration of the dismissal of their claims, which was again denied on July 20, 2020.

The Pardees now seek review of the Court of Appeals’ decision regarding discrimination and retaliation under the WLAD, defamation and defamation *per se*, as well as dismissing various alleged violations of the ESBC’s governing documents. The Pardees have not petitioned this Court

to review the Court of Appeals' decision related to the claims of false light and civil conspiracy.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Pardees' Petition for Review Does Not Meet the Criteria Set Forth by the Rules Governing Acceptance of Review and Should be Denied

The Rules of Appellate Procedure ("RAP") allow a petition for review to be accepted by the Supreme Court *only* if one of the following criteria set forth in RAP 13.4(b) is met:

- 1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
- 2) The decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;
- 3) A significant question of law under the Constitution of the State of Washington or of the United States is involved¹; or
- 4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As set forth in more detail below, since none of the above criteria is met by the Pardees, the Supreme Court must deny review.

¹ This factor need not be discussed as it is undisputed that it does not apply here.

1. The Court of Appeals' Decision Affirming Dismissal of the Pardees' Discrimination and Retaliation Claims under the WLAD is Not in Conflict with Any Court of Appeals or Supreme Court Case

The Court of Appeals' ruling is entirely consistent with the theme in *Galbraith*, both with respect to its upholding of the purpose of the WLAD as established in that case, and in finding that the Pardees' failed to make the requisite showing of the elements to defeat summary judgment of their discrimination and retaliation claims.

In *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946-52, 946 P.2d 1242 (Div. 2) (1997), a case concerning a credit unions decision to terminate a member's membership, the Court stated that the "WLAD is not limited to employment discrimination but rather guarantees the right to be free of discrimination in non-employment settings as well." *Id.* The Court, however, avoided using "employment" language by stating that, to defeat summary judgement, the plaintiff had to show that "(1) he opposed practices prohibited under WLAD or assisted with an anti-discrimination proceeding brought under WLAD; and (2) retaliation for this protected activity was a substantial factor behind [the credit union's] decision to expel him." *Id.*

The Court of Appeals also acknowledged another retaliation case that followed the *Galbraith* decision in Division I, where the Court

concluded that the plaintiff, a captain of a trawler, could not sue his co-captain for his part in refusing to rehire the plaintiff because the co-captain was not an employer. *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 930, 965 P.2d 1124 (Div. 1) (1998). Here, the ESBC has maintained, and continues to take the position, that *Malo* is the controlling precedent as it is the most recent and factually analogous decision to the instant case.

The Pardees disagree and contend that *Galbraith* should be applied to the facts at issue in this case. In their Petition for Review, the Pardees assume, without explanation, that the Court of Appeals “effectively overrule[d]” *Galbraith* in affirming the trial court’s dismissal of the WLAD claims. The Pardees’ main argument is that, since other post-*Malo* cases support the holding in *Galbraith*, the Court of Appeals’ decision was contrary to precedent. To support this argument that the Court of Appeals somehow ignored precedent with respect to the Courts’ reception of *Galbraith*, the Pardees cite to *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 590, 338 P.3d 860, 872 (2014) and *Zhu v. North Central Ed. Serv. Dist. – ESD 171*, 189 Wash.2d 607, 404 P.3d 504 (2017). However, the Pardees fail to argue anywhere in their briefing that there is any genuine issue of material fact as to the WLAD claims justifying reversal of the decision *even if* the Court of Appeals applied *Galbraith* to the set of facts in this case. The Pardees further fail to acknowledge the Court of Appeals’

holding that the Pardees could not satisfy the elements of their claims for discrimination and retaliation under the WLAD, or point to any set of facts on the record that show a genuine issue of material fact as to the elements of the WLAD claim.²

Even if the Pardees were able to show that the Board is functionally similar to an employer (which they have not), they cannot and have not provided any evidence that Mrs. Pardee was retaliated against for engaging in a protected activity or that the protected activity was a substantial factor behind the Board's decision to remove her from office.³ The Board, even if it was considered a functional employer under *Gailbraith*, did not vote Mrs. Pardee off of the Board. The 300 members of the community voted to remove Mrs. Pardee from her Board position due to a plethora of legitimate

² In their Petition for Review, the Pardees claim they have provided evidence that, at a minimum, shows the lawsuit was a "factor" in the Respondent's decision to remove Mrs. Pardee from the Board. However, the Pardees fail to dispute the existence of the multitude of other facts on the record that were clearly of consequence on this issue. *See Respondent's Answering Brief to the Court of Appeals, Division II*. Regardless, none of the evidence in this case, even construed in the light most favorable to the Pardees, presents a genuine issue of material fact.

³ The Pardees similarly appeal the Court of Appeals' treatment of the word "creed" as used in the WLAD; however, the Pardees fail to cite any authority from the Court of Appeals or the Supreme Court that is in conflict with the treatment of that word. Instead, the Pardees actually provide this Court with a different definition of "creed" consistent of the Court of Appeals' use of that term, and fail to make any sort of connection as to how their preferred definition of the word "creed", not only is in conflict with precedent, but how it creates a genuine issue of material fact that would otherwise warrant a reversal of dismissal of the discrimination claim.

nondiscriminatory reasons including, but not limited to, Mrs. Pardee's disagreements with Board members and her disruptive activities, which long-preceded the filing of the subject lawsuit.

Notably, in its Petition for Review, the Pardees do not allege or cite to any Supreme Court decision that *actually* conflicts with the Court of Appeals' decision affirming the dismissal of the WLAD claims - because none exist. Instead, the Pardees rely on innuendo and presumption to argue points that even if taken as true, still do not warrant reversal of the Court of Appeals' decision.

Thus, for all these reasons, this Court should affirm the Court of Appeal's holding and reject the Pardees' Petition for Review on this issue.

2. The Court of Appeals' Decision Affirming Dismissal of the Pardees' Claims Regarding Violation of the ESBC's Governing Documents is Not in Conflict with Any Court of Appeals or Supreme Court Case

The Pardees similarly disagree with the Court of Appeal's dismissal of their claims related to alleged violations of the ESBC's governing documents, such as the CCRs, in relation to the Black Lake Regatta's use of the park, as well as with respect to the intent of the language "proceeding in law and equity." Like the issues surrounding the WLAD, the Pardees do not cite to any Court of Appeals or Supreme Court case that **is in conflict with** the Court of Appeals' decision, as is required under RAP 13.4(b)(1)

and (2). Again, the Pardees simply reiterate arguments rejected by both the trial court and the Court of Appeals **twice**, respectively. In addition to failing to meet the standard of RAP 13.4(b)(1) and (2), the Pardees do not present any genuine issue of material fact as to whether the Regatta violates the CCRs.

Similarly, the Pardees do not present any genuine issue of material fact as to their assertion that the provision of the governing documents indicating that enforcement shall be by “proceeding at law or in equity” equates to legal proceedings in a court of law. The plain meaning of the quoted language is inapposite to the Pardees’ assertion. The word “or” comes before “in equity” meaning that in equity is clearly meant to have a different meaning (which it literally does) than “at law”. A proceeding in equity can (and here it does) mean a proceeding of any kind seeking a fair outcome. Here, the alleged action in violation of this provision was the creation of a Fine and Fee schedule for violations of the CCRs by the ESBC homeowners. That schedule was created by the Board for the purpose of equitably enforcing minor violations of CCRs without incurring the costs of litigation over minor offenses. Any dispute regarding the terms of that policy could be brought to the attention of the Board or, if necessary, litigated. Notwithstanding, the initial creation of the policy is clearly allowed by the plain language of the CCRs and does not violate governing

documents in any way. The trial court made this same determination, and so did the Court of Appeals. There is not a case in existence that contradicts the Court of Appeals' decision on this issue and, therefore, the Pardees' Petition on the issue of violating the governing documents should be denied.

3. The Court of Appeals' Decision Affirming Dismissal of the Pardees' Defamation and Defamation per se Claims is Not in Conflict with Any Court of Appeals or Supreme Court Case

At the trial court level, the ESBC carefully analyzed each of the statements that formed the basis of the Pardees' defamation claims and established in support of its MSJ that all of the statements were either substantially true or were personal opinion and were, therefore, not defamatory.

The Court of Appeals similarly reviewed these statements that formed the bases of the Pardees' defamation and defamation *per se* claims, and also determined they were opinions, substantially true, or not shown to be provably false. The Court of Appeals correctly determined that the Pardees did not meet their burden to submit evidence of either the falsehood of the statements or that the speakers were negligent in making them. Also, the Pardees were unable to support their assertion with any admissible evidence that would create a genuine issue of material fact, or meet their

burden of establishing a prima facie case for defamation or defamation *per se*.

The Pardees simply reiterate the same position that the statements are false, without meeting the burden. Notably, the Pardees never argue in their Petition for Review that they met their burden in proving the falsehood of the statements. In the case of their defamation *per se* claims, the Pardees also fail to support any of their assertions with admissible evidence. Instead, the Pardees make a blanket assertion that the statements made against them to the police were defamatory *per se* because of their criminal nature, without proving negligence. This simply makes no sense, as it would mean that any report of a crime of moral turpitude would be defamation, regardless of whether that statement was actually made or not.

Given the Pardees' failure to demonstrate that the Court of Appeals' decision affirming the dismissal of their defamation and defamation *per se* claims is in conflict with any decision from the Court of Appeals or the Supreme Court, their Petition for Review must be denied.

4. The Court of Appeals' Decision is Good Policy; Granting the Petition for Review Advocates Bad Policy and is Inconsistent with RAP 13.4(b)(4) Requiring Review of Only Issues of Substantial Public Import

The lawsuit resulting in this appeal is simply a dispute amongst neighbors taken too far. When the Pardees did not get their way, they could

not reconcile that reasonable people could possibly disagree with them and instead chose to make everybody's life incredibly difficult. When the Respondents did not bend to the will and outbursts of the Pardees, they instigated litigation using theories of law designed to protect vulnerable members of our society. The pettiness of the claims was evident from the beginning, and the trial court recognized as much when it granted the Respondents' MSJ.

If the Petition for Review were granted, it would encourage a litany of litigation that does not further the law's protection of the vulnerable members of society, but instead provide certain individuals with an avenue to circumvent the laws that were created to prevent such discrimination in favor of a class of people for which the laws are not meant to protect. There would be no benefit to the public, substantial or otherwise, in granting review to the Pardees (nor is one alleged by the Pardees at all in any of its briefing, as is required under RAP 13.4(b)(4)). Thus, review should be denied.

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

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RESPECTFULLY SUBMITTED this 18th day of September, 2020.

BETTS, PATTERSON & MINES, P.S.

By /s/ Luisa E. Taddeo
Shawna M. Lydon, WSBA #34238
Luisa E. Taddeo, WSBA #48677
Betts Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Tatyana Stakhnyuk, declare as follows:

1) I am a legal resident of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, P.S., One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on September 18, 2020, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Answering Brief of Respondent Evergreen Shores Beach Club; and**
- **Certificate of Service.**

Counsel for Plaintiffs William G. Pardee and Shannon D. Pardee

William G. Pardee
5305 80th Ave SW
Olympia, WA 985812
cpknw@comcast.net

- U.S. Mail
- Hand Delivery
- Facsimile
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of September, 2020.

s/ Tatyana Stakhnyuk
Tatyana Stakhnyuk, Legal Assistant

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Sender Name: Tatyana Stakhnyuk - Email: tstakhnyuk@bmplaw.com

Filing on Behalf of: Luisa Taddeo - Email: ltaddeo@bmplaw.com (Alternate Email: ltaddeo@bmplaw.com)

Address:
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Comments:

Answering Brief of Respondent Evergreen Shores Beach Club

Sender Name: Tatyana Stakhnyuk - Email: tstakhnyuk@bplaw.com

Filing on Behalf of: Luisa Taddeo - Email: ltaddeo@bplaw.com (Alternate Email: ltaddeo@bplaw.com)

Address:
701 Pike St.
Suite 1400
Seattle, WA, 98101
Phone: (206) 292-9988

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