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Supreme Court No. 999848
Court of Appeals Cause No. 373207
Superior Court Cause No. 19-2-00121-38

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

PATRICIA L. WEST and CHERYL A. RITTS, as Co-Trustees of the
Breden Family Trust and Survivors Trust,

Plaintiffs/Respondents

v.

MARK S. RITTS,

Defendant/Appellant

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Mark Ritts ("Ritts" or "Mr. Ritts") was properly evicted from farmland that he failed to work, on which he failed to eradicate weeds, that he failed to insure, and for other breaches of a Crop Share Lease. Mr. Ritts' disagreement with the Court of Appeals over his failure to properly preserve matters on appeal does not present a basis for discretionary review under RAP 13.4. Therefore, the Petition for Review should be denied.¹

II. RESPONDENTS' ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE

A. Whether Ritts has raised grounds for discretionary review under RAP 13.4(b)? As stated below, he has not.

III. STATEMENT OF THE CASE

The relevant facts are set forth in the Court of Appeals' unpublished decision (the "Unpublished Decision"). Briefly, before the Court of Appeals Mr. Ritts argued a holdover tenancy under RCW 59.12.035 (which required he be in possession of the property) while at the same time arguing he was not in possession of the premises citing RCW 59.12.060 and therefore could not be evicted. The Court of Appeals correctly determined that Ritts did not preserve his arguments for appeal

¹ Cheryl Ritts passed away in May of 2021. A motion to change the title of this case pursuant to RAP 3.4 is forthcoming.

due to his failure to raise issues under RCW 59.12.035 and RCW 59.12.060 before the trial court. Unpublished Decision, pp. 7-9. Mr. Ritts' motion for reconsideration was denied on June 15, 2021.

IV. ARGUMENT

RAP 13.4(b) provides:

A petition for review will be accepted by the Supreme Court **only**: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(emphasis added). Court of Appeals exercised its discretion to refuse to entertain Ritts' unpreserved arguments. Doing so was clearly authorized by RAP 2.5(a) and the applicable case law. The Court of Appeals decision did not conflict with a decision of the Supreme Court or a decision of the Court of Appeals as claimed by Ritts.

A. The Court of Appeals' Exercise of Discretion Did Not Conflict with *Bennett v. Hardy*.

RAP 2.5(a) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party **may** raise the following claimed errors for the first time in the appellate court: (1) lack of trial court

jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(emphasis added).

The language of the rule is plain. The Court of Appeals has discretion to refuse to hear claims of error that were not properly preserved. No part of RAP 2.5(a) requires the Court of Appeals to consider claims of error not raised before the trial court. Mr. Ritts failed to adequately raise either of the issues he attempted to pursue on appeal. Unpublished Decision, pp. 7-9. The Court of Appeals' properly exercised its discretion to decline review his unpreserved claims of error and clearly articulated its basis in doing so:

Our Supreme Court has explained the rule of error preservation:

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal This standard comes from RAP 2.5(a), which permits a court to refuse to consider claimed errors not raised in the trial court, subject to certain exceptions. . . .

The purpose underlying our insistence on issue preservation is to encourage "the efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Issue preservation serves this purpose by

ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

State v. Robinson, 171 Wn.2d 292, 304-05 (2011).

Unpublished Decision, pp. 7-8.

Bennett v. Hardy expressly recognizes that application of RAP 2.5(a) is a matter of discretion. "Finally, we note that the application of RAP 2.5(a) is ultimately a matter of the reviewing court's discretion." 113 Wn.2d 912, 919 (1990) (citing *Obert v. Environmental Research & Dev. Corp.*, 112 Wn.2d 323, 333 (1989)). Declining to review unpreserved matters was well within the Court of Appeals' discretion under RAP 2.5(a). The rule against raising issues for the first time on appeal has been recognized in Washington for more than 100 years. *Samuel & Jessie Kenney Presbyterian Home v. Kenney*, 45 Wn. 106, 110 (1906).

The Unpublished Decision does not conflict with *Bennett v. Hardy*, or other Supreme Court decisions. No part of RAP 2.5(a) or *Bennett v. Hardy* required the Court of Appeals to review Mr. Ritts' unpreserved claims of error. Mr. Ritts' disagreement with the Court of Appeals' declining to review his unpreserved claims of error is not grounds for discretionary review under RAP 13.4(b).

B. The Court of Appeals' Decision Did Not Conflict with *Roberson v. Perez* or *In re Adoption of T.A.W.*

As stated above, the Supreme Court has repeatedly recognized that

the Court of Appeals has discretion to decline review of unpreserved issues. *Roberson v. Perez*, is no different. "In general, issues not raised in the trial court may not be raised on appeal. See *RAP 2.5(a)* (an 'appellate court may refuse to review any claim of error which was not raised in the trial court'). However, by using the term 'may,' *RAP 2.5(a)* is written in discretionary, rather than mandatory, terms." 156 Wn.2d 33, 39 (2005). No part of *Roberson v. Perez* required the Court of Appeals to review the unpreserved claims of error.

In re Adoption of T.A.W., also recognized that review of unpreserved issues is discretionary, not mandatory. "Under *RAP 2.5(a)*, we generally do not review any claim of error not raised in the trial court. However, *RAP 2.5(a)(2)* provides that an appellant **may** raise for the first time on appeal the 'failure to establish facts upon which relief can be granted.'" 188 Wn.App. 799, 807-08 (2015) (emphasis added). Nothing in *Adoption of T.A.W.* required the Court of Appeals to review the unpreserved claims of error.

Further, Division II of the Court of Appeals has repeatedly held that review may be declined where the appellant has failed to preserve issues on appeal. See e.g., *In the Matter of Detention of M.S.*, No. 54665-5-II, 2021 WL 3360091 at *2 (Aug. 3, 2021); *In the Matter of Detention of B.M.*, 7 Wn.App.2d 70, 88-89 (2019); *Timberland Bank v. Mesaros*, 1

Wn.App.2d, 602, 606 (2017). Again, Mr. Ritts' disagreement with the Court of Appeals exercise of discretion to decline review does not present grounds for discretionary review under RAP 13.4(b). His petition for review fails to meet the requirements for discretionary review under RAP 13.4(b) and should be denied.

C. The Respondents Should Be Awarded Attorney's Fees and Costs.

Pursuant to RAP 18.1(a) and (j), and Paragraph 13 of the Crop Share Lease (CP 23), the Respondents request attorney's fees and costs relating to this petition for review.

V. CONCLUSION

For the reasons stated above, Mr. Ritts has failed to establish grounds for discretionary review under RAP 13.4(b). As a result, his petition for review should be denied.

RESPECTFULLY SUBMITTED, this 13th day of August, 2021.

WITHERSPOON · KELLEY

/s/ Daniel J. Gibbons
DANIEL J. GIBBONS, WSBA No. 33036
Counsel for Plaintiffs/Respondents

DECLARATION OF SERVICE

On the 13th day of August, 2021, I caused a true and correct copy of the foregoing document to be sent by the method indicated below addressed to the following parties:

Lloyd A. Herman LLOYD A. HERMAN & ASSOCIATES, P.S. 213 North University Rd. Spokane Valley, WA 99206 Email: lloydherm@aol.com <i>Attorney for Appellant/Defendant</i>	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail/E-Service
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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 13th day of August, 2021.

/s/ Daniel J. Gibbons

DANIEL J. GIBBONS, WSBA No. 33036

WITHERSPOON KELLEY

August 13, 2021 - 11:44 AM

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