No. 1034164

Court of Appeals, Division I No. 850156

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GREGORY RYAN AND NEREYDA RYAN,

Plaintiffs/Appellants,

v.

CITY OF RENTON and DANIEL WIITANAN,

Defendants/Respondents.

RESPONDENT CITY OF RENTON'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

TREATED AS ANSWER TO PETITION FOR REVIEW

GREGORY E. JACKSON
WSBA #17541
Jackson & Nicholson, PLLC
900 SW 16th Street, Suite 215
Renton, WA 98057
(206) 582-6001
Attorney for Respondent City of Renton

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I. INTRODUCTION

Respondent City of Renton requests that the Court deny Petitioners Gregory and Nereyda Ryan's motion for discretionary review of the June 10, 2024, Decision of Division One of the Washington State Court of Appeals affirming the superior court's summary judgment dismissal of their claims (Appendix A to Petitioners' Motion) and the July 29, 2024, Order of the Court of Appeals Denying the Ryans' Motion for Reconsideration. (Appendix B to Petitioners' Motion).

II. STATEMENT OF THE CASE

Petitioners Gregory and Nereyda Ryan, husband and wife, and Co-Defendant Daniel Wiitanen were involved in a two-vehicle head-on collision on S. Talbot Rd in the City of Renton on March 13, 2016. CP 5 (¶ 5.1.) Petitioners averred that Co-Defendant Wiitanen drove negligently when his vehicle veered into the opposite lane of travel and collided with Petitioner's vehicle that was traveling in the opposite direction. CP 3 (¶ 4.7).

Co-Defendant Wiitanen's Answer to Appellants' Complaint admitted that the allegations alleging his fault were true. CP 10 (¶¶ 4.7, 4.8, 4.9). Furthermore, Co-Defendant Wiitanen admitted liability through declaration: "I believe that I fell asleep while driving. I awoke to the sound of honking, which I believe came from Gregory Ryan's vehicle. The collision occurred at almost that same moment…. I do not believe that any other individual or circumstance contributed to the causation of the collision." CP 105.

Talbot Rd. at the point of impact between the vehicles is comprised of one lane in each direction separated by a center line comprised of split yellow raised pavement markers (RPMs). CP 128, CP 581, CP 126. North of the point of impact, S. Talbot Rd. is configured with a center turn lane that allows northbound and southbound traffic to make left-hand turns across the roadway. CP 130. Appellant's Complaint alleged that Respondent "City of Renton failed to design, maintain, or

operate Talbot Road South in a reasonably safe condition." CP 3 (¶ 4.5).

Respondent's Motion for Summary Judgment at the superior court was granted based upon Petitioners' failure to present evidence that Respondent breached a duty to design and maintain S. Talbot Rd. in a condition that is reasonably safe for ordinary travel and based upon Petitioners' failure to present evidence that Respondent's negligence was a proximate cause of Petitioners' injuries. Appendix A to Amended Petition, pg. 3. The trial court also denied Petitioners' motion to continue the summary judgment hearing so that Petitioners could take additional discovery. *Id.* Significantly, Section IV Issues Presented for Review, A-D, of the Petition, does not challenge the decision of the trial court or the Court of Appeals that Petitioners failed to establish that the alleged highway defects were a proximate cause of their injuries. See Appendix A to Amended Petition, pgs. 2 and 3.

The Court of Appeals affirmed the summary judgment dismissal of Petitioners' Complaint and affirmed the trial court's denial of Petitioners' CR 56(f) motion to continue the summary judgment hearing based upon Petitioners' failure to provide a good reason for the delay in obtaining the desired evidence, Petitioners' failure to state what evidence would be established through more discovery, and Petitioners' failure to state that the desired evidence would raise a genuine issue of material fact. Appendix A to Amended Petition, pg. 5.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners' motion for discretionary review should be denied because Petitioners fail to present any evidence or argument that review is appropriate under RAP 13.4(b), that provides in pertinent part that review will be accepted if:

> (1) the Court of Appeals decision is in conflict with a decision of the Supreme Court;
> (2) If the Court of Appeals decision conflicts with a published decision of the Court of Appeals;

> (3) If the petition involves a significant question of law under the Constitution of the State of Washington or of the United States; or
> (4) If the petition involves an issue of substantial public interest.

Petitioners' Motion for Discretionary Review fails to establish any of the four requisite criteria for RAP 13.4(b) review, and therefore the Amended Petition for Review should be denied.

A. The Court of Appeals decision does not conflict with a decision of the Court of Appeals (RAP 13.4(b)(2)

Petitioners' claim that the Court of Appeals decision to affirm the denial of Petitioners' motion for a continuance of the summary judgment hearing pursuant to CR 56(f) conflicts with decisions of the Court of Appeals is not supported by the record before this Court. The Court of Appeals decisions *In re Estate of Fitzgerald*, 172 Wn. App. 437, 448, 294 P.3d 720 (2012), and *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d (1986), relied upon by Petitioners, supports rather than conflicts with the decision of the Court of Appeals here.

Geraldine and John Lewis appealed the trial court's summary judgment dismissal of their outrage suit against Danial and Nancy Bell. *Lewis v. Bell*, 45 Wn. App. 192, at 193. The Lewises argued on appeal that the trial court erred in denying their motion to continue the summary judgment hearing until they could complete discovery by taking the depositions of the Bells. *Id*. at 196. The Court of Appeals explained that CR 56(f) provides a remedy for parties who have a good reason to continue a summary judgment hearing:

> When a trial court has been shown a good reason why an affidavit of a material witness cannot be obtained in time for a summary judgment proceeding, the court has a duty to accord the parties a reasonable opportunity to make the record complete before ruling on a motion for summary judgment. *Cofer v. County of Pierce*, supra.

Lewis v. Bell, 45 Wn. App. at 196. The Lewises, however, did not have a good reason for why they could not obtain the depositions of the Bells before the summary judgment hearing and therefore the Court of Appeals affirmed the denial of the

request for a continuance of summary judgment hearing and affirmed the dismissal.

> No explanation was given as to why Nancy and Robert Bell had not been deposed during the 16 months the action was pending. The Lewises failed to even speculate as to what evidence they hoped to establish through the depositions or what genuine issues of material fact would be developed. In view of this, it cannot be said denial of the request for a continuance was a manifest abuse of discretion. See *Jankelson v. Cisel, 3 Wash. App*. 139, 473 P.2d 202 (1970).

Lewis v. Bell, Id. at 196.

The Court's decision *In re Estate of Fitzgerald*, 172 Wn. App. 437 is no more helpful to Petitioners than the Court of Appeals decision in *Lewis*. Mountain-West Resources Inc. appealed the superior court's determination that its creditors' claims against the estate of Fitzgerald were time-barred in the probate hearing. *In re Estate of Fitzgerald*, *Id.* at 440. Mountain-West argued that the Commissioner of the superior court erred when the Commissioner denied their motion to continue the TEDRA hearing until after Mountain-West took

additional discovery. The Court of Appeals affirmed the Commissioner's decision to deny Mountain-West's motion to continue the hearing by analogizing the request to a party who requested the continuance of a summary judgment hearing pursuant to CR 56(f).

> [i]n the context of a summary judgment proceeding, we will not disturb a trial court's decision to deny a continuance absent a showing of a manifest abuse of discretion. *Lewis v. Bell*, 45 Wash.App. 192, 196–97, 724 P.2d 425 (1986). In such proceedings, where good reasons are established as to why the affidavit of a material witness cannot be timely obtained, the trial court must "accord the parties a reasonable opportunity to make the record complete before ruling on a motion for summary judgment." *Lewis, 45 Wash. App.* 196, 724 P.2d 425.

In re Estate of Fitzgerald Id at 449. Thus, *Lewis* and *In re Fitzgerald* stand for the proposition that when a party identifies a good reason for requesting a continuance pursuant to CR 56(f), the trial court must give the party an opportunity to make his or her record. The cases do not stand for the proposition that a trial court should grant a motion for the continuance of

summary judgment hearing when the requesting party, as Petitioners in this case, offer no reason at all.

The decision of the Court of Appeals, like the decision of the superior court before it, correctly cited the applicable law:

> [A] continuance is properly denied where (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact." Fitzgerald, 172 Wn. App. at 488 (citing Lewis, 45 Wn. App. at 196).

Appendix A to Amended Petition, pg. 4.

The Court of Appeals correctly applied *Lewis* and *Fitzgerald,* and correctly determined that Petitioners failed to offer a good reason for the delay in obtaining discovery; that Petitioners did not identify the evidence that they expected to obtain from the additional discovery; and that Petitioners did not explain how the requested evidence would create an issue of fact. Appendix A to Amended Petition, pg. 5. The Court of Appeals decision does not conflict with other decisions of the

Court of Appeals, but follows *Lewis, Fitgerald,* and CR 56(f) case law explicitly.

Petitioners' additional claims that the Court of Appeals erred in its failure to find that Petitioners were prejudiced at the summary judgment hearing by the delay in taking Respondent's CR 30(b)(6) representatives' depositions, and by what Petitioners describe as the lack of preparation of certain of the CR 30(b)(6) witnesses, are not properly before this Court because the trial court and the Court of Appeals can hardly be faulted for the failure to enforce a discovery order that the Petitioners never obtained. It is undisputed that Petitioners, after multiple months of litigation, never filed a motion to compel discovery. Appendix A to Amended Petition, pg. 7. It is also undisputed that Petitioners never explained to the trial court or to the Court of Appeals how the allegedly missing evidence would have created a disputed issue of material fact. Appendix A, *Id.* The Court of Appeals properly determined that the issued was not properly before the Court because

Petitioners failed to file a motion to compel for the allegedly missing discovery in the trial court. "Plaintiffs did not file a discovery motion, a point which arose during oral argument on the motion for summary judgment… Finally, the Court notes that Plaintiff's counsel in his declaration does not identify how specific evidence he seeks would create a disputed issue of material fact…" Absent a motion to compel the discovery that Petitioners claim is missing, and absent a showing that the allegedly missing discovery would have created a material fact, the trial court and the Court of Appeals decision to deny Petitioners' request for a continuance for this discovery was proper and not a manifest abuse of discretion.

Petitioners' citation to *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009) is misplaced. As noted by the Court of Appeals, the issue in *Magana* was the appropriate sanctions to be applied for discovery violations pursuant to CR 37. *Magana* did not address the requirements to continue a summary judgment pursuant to CR 56(f). The

Magana decision and CR 37 sanctions have no applicability to the current decision of the Court of Appeals at all.

B. The Court of Appeals Decision Does Not Conflict With CR 56(c)

Petitioners fail to identify a single case to support Petitioners' claim that the Court of Appeals decision conflicts with "Every Washington Case Involving CR 56(c)." Appendix A, Amended Petition for Review, pg. 20. The failure of Petitioners to cite any case to support their argument is strong evidence that no such case or conflict exists. The failure of Petitioners to advance argument or citations to evidence in the record to support their arguments precludes appellate review. RAP 10.3(a)(5). *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

C. The Decision of the Court of Appeals Does Not Conflict the Decision of This Court in *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995).

Petitioners' claim that the Court of Appeals decision expands or conflicts with this Court's decision in *Ruff v. County*

of King, 125 Wn.2d 697, 887 P.2d 886 (1995) is specious. The Court of Appeals decision accurately stated that "a municipality need not update every road to present-day standards." Appendix A, Amended Petition for Review, pg. 9. The quote is taken directly from *Ruff*:

> We recognize that the duty to maintain a roadway is a reasonable condition may require a county to post warning signs or erect barriers if the condition along the roadway makes it inherently dangerous or of such character as to mislead a traveler exercising reasonable care, or where the maintenance of signs or barriers is prescribed by law. This duty does not, however, require a county to update every road and roadway structure to present-day standards.

Ruff v. County of King, 125 Wn.2d 697, *Id.* at 705 (citations omitted).

The Court of Appeals decision does not conflict with *Ruff*, nor does it expand it. The Court of Appeals decision correctly determined:

> But the Ryans present no evidence that the City was required to make such improvements, inspect Talbot Road S. more often, or replace RPMs more often than once every other year. The City did not

> design Talbot Road S. and was not required to update the road even if the standard or guideline in 2016 called for a double strip of RPMs in the approach to the intersection. Ruff, 125 Wn.2d at 706.

Appendix A to Amended Petition for Review pg. 11.

D. The Decision of the Court of Appeals Does Not Conflict With Existing Case Law Regarding Notice

Petitioners' claim that Respondent City of Renton had constructive notice that missing RPMs on S. Talbot Rd. created a hazardous condition is unsupported by the record. The Court of Appeals, assuming that some RPMs were missing, correctly ruled that Petitioners failed to present evidence that the RPMs, even if missing, created a dangerous or hazardous condition.

> Neuman's belief that the road markings were defective, without more, is insufficient to create a genuine issue as to whether the City breached its duty to maintain Talbot Road S. in a manner reasonable safe for ordinary travel….Without a complaint of missing RPMs or notice of a dangerous condition due to center line visibility or confusion, the City's duty cannot reasonably include inspection of this portion of Talbot Road. S. more often than it already does or replacement of each RMP at the moment it wears out or goes missing.

Appendix A, Amended Petition for Review, pg. 12. Petitioners fail to identify any evidence to support their claim that Respondent City of Renton had actual or constructive notice of missing RPMs, but more importantly, Petitioners fail to present any evidence that the allegedly missing RPMs created a hazard or unreasonable risk of injury to motorists that Respondent was required to correct.

IV. CONCLUSION

The decision of the Court of Appeals correctly determined that Petitioners failed to establish that Respondent City of Renton negligently maintained Talbot Rd. South, and Petitioners failed to identify any evidence or argument in the Petition to challenge the determination of the trial court and the Court of Appeals that Petitioners failed to establish that the design or maintenance of S. Talbot Rd. South was a proximate cause of Petitioners' injuries. The trial court did not commit an error in granting Respondent's motion for summary judgment and the Court of Appeals did not err in affirming it.

The trial court and the Court of Appeals correctly determined that Petitioners failed to satisfy the requirements for a continuance of a summary judgment hearing prescribed in CR 56(f), and the Amended Petition, like Petitioners in the trial court, do not identify a good reason for the delay in obtaining the desired discovery; do not identify what evidence would be established by the desired discovery; and do not identify how the desired discovery would raise a genuine issue of material fact. The trial court did not error in denying Petitioners' motion to continue the summary judgment hearing and the Court of Appeals did not err in affirming the trial court's decision.

Furthermore, Petitioners fail to identify any of the four considerations governing the acceptance of review required by RAP 13.4(b). Petitioners fail to present any evidence or viable argument that the Court of Appeals decision conflicts with a decision of this Court; that the Decision of the Court of Appeals conflicts with a published decision of the Court of Appeals; that the decision of the Court of Appeals raises a significant

question of law under the Washington State or United States Constitutions; and Petitioners fail to establish that their Amended Petition involves a significant question for this Court to resolve.

For these and all the above reasons, Petitioners failed to satisfy any of the considerations for acceptance of review and their Petition for Discretionary Review should be denied.

I hereby certify this brief contains 2,862 words pursuant to RAP 18.17(b).

DATED this 30 day of September, 2024.

JACKSON & NICHOLSON, P.S.

GREGORY E. JACKSON, WSBA #17541
Attorneys for Respondent
City of Renton

CERTIFICATE OF SERVICE

I certify that I served a copy of *Respondent's Answer to Petition for Review* on all parties or their counsel of record on the date below as follows:

Jonathan R. Rappaport, WSBA #20028
Law Office of Jonathan R. Rappaport
P.O. Box 31997
Seattle, WA 98103
JRR@LawyerJon.com
Attorneys for Petitioner

☒ Via Washington State Appellate Courts' Portal
☐ Facsimile
☐ E-Mail

Paul L. Crowley, WSBA#31235
Crowley & Kay, INC., P.S.
524 Tacoma Avenue S.
Tacoma, WA 98402
253-383-4704
Crowley@524law.com

☒ Via Washington State Appellate Courts' Portal
☐ Facsimile
☐ E-Mail

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of September, 2024, at Olympia, Washington.

Jenny Singleton, Paralegal

JACKSON & NICHOLSON, P.S.

September 30, 2024 - 12:59 PM

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