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Case No. 93677-3

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. 46802-6-II

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TABLE OF CONTENTS

	Table of Authorities.....	iii-iv
I.	IDENTITY OF RESPONDENTS.....	1
II.	COURT OF APPEALS DECISION	1
III.	STATEMENT OF THE CASE.....	1
	A. Facts Surrounding The Langes’ Home Deck.....	1
	B. Procedural History	3
	1. The Trial Court’s Rulings On Summary Judgment	3
	2. The Guests Did Not File A Motion For Reconsideration.....	6
	3. The Guests’ Objections to Jury Instructions	8
	4. Jury Renders A Verdict In The Langes’ Favor	9
	C. The Court of Appeals’ Opinion	9
IV.	ARGUMENT WHY REVIEW SHOULD BE DENIED.....	11
	A. The Petition Fails To Establish That The Issues Are Of Substantial Public Interest To Warrant Supreme Court Review	11
	1. Review Should Be Denied Because The Guests Waived Their Right To Appeal From The Trial Court’s Ruling That The Easement Was Valid.....	12
	2. Review Should Be Denied Because The Trial Court Properly Exercised Its Discretion In Not Considering The Late Filed Guest Declaration	14

B.	The Petition Fails To Establish That The Court of Appeals Decision Is In Conflict With Any Decision Of The Supreme Court Or Another Court of Appeals Decision	16
1.	Review Should Be Denied Because The Court of Appeals Properly Followed Washington Law When Affirming The Trial Court's Dismissal Of The Indemnity Claim	16
2.	Review Should Be Denied Because The Guests Waived Objection To The Inadvertent Failure to Give The Good Faith And Fair Dealing Instruction	19

APPENDIX A and B

TABLE OF AUTHORITIES

	Page(s)
Washington State Cases	
<i>Am. Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1, 802 P.2d 784 (1991).....	13
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991).....	20
<i>Barrett v. Friese</i> , 119 Wn. App. 823, 82 P.3d 1179 (2003).....	10, 15
<i>Brown v. Peoples Mortg. Co.</i> , 48 Wn. App. 554, 739 P.2d 1188 (1987).....	15
<i>City of Tacoma v. City of Bonney Lake</i> , 173 Wn.2d 584, 269 P.3d 1017 (2012).....	17, 18
<i>Coulos v. Desimone</i> , 34 Wn.2d 87, 208 P.2d 105 (1949).....	20
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	13
<i>Eurick v. Pemco</i> , 108 Wn.2d 338, 738 P.2d 251 (1987).....	17
<i>Green v. Normandy Park</i> , 137 Wn. App. 665, 151 P.3d 1038 (2007).....	15
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn. 2d 355, 753 P.2d 517 (1988).....	16
<i>Guest v. Lange</i> , 194 Wn. App. 1031, 2016 WL 3264419 (June 14, 2016).....	<i>passim</i>
<i>Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.</i> , 168 Wn. App. 86, 285 P.3d 70 (2012).....	18, 19

Orion Corp. v. State,
 103 Wn.2d 441, 693 P.2d 1369 (1985).....16

In re Recall of Reed,
 156 Wn.2d 53, 124 P.3d 279 (2005).....15

Rekhter v. Department of Social & Health Services,
 180 Wn.2d 102, 323 P.3d 1036 (2014).....20

Regulations and Rules

CR 56(e).....16

CR 56(f)6, 7

CR 597, 10

CR 59(a).....7

CR 607

RAP 2.5(a)13, 19

RAP 9.12.....10, 15

RAP 12.3(d)12

RAP 13.4(b)(1)19

RAP 13.4(b)(2)19

RAP 13.4(b)(4)11

I. IDENTITY OF RESPONDENTS

Respondents are David Lange and Karen Lange (“the Langes”).

II. COURT OF APPEALS DECISION

The unpublished Court of Appeals decision was filed on June 14, 2016. Guests’ motion for reconsideration was denied on August 31, 2016.

III. STATEMENT OF THE CASE

A. Facts Surrounding The Langes’ Home Deck

This case is really nothing more than 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 Langes purchased Lot 4 in the Spinnaker Ridge development in 1993.¹ Eleven years later, the Guests purchased Lot 5 next door. The lots in Spinnaker Ridge are subject to recorded Covenants, Conditions and Restrictions (CC&Rs), and most are subject to a recorded “Patio or Deck Easement,” that benefits the next door neighbor’s lot. The Patio or Deck Easement on the Guests’ Lot 5 covers a 5' by 21' area for the benefit of the Langes’ deck.² The CC&Rs also allow for unintentional minor encroachments by a deck or patio over adjoining property beyond the boundary of the Patio or Deck Easement.³ The Langes’ deck, as originally

¹ CP 382.

² *Guest v. Lange*, 194 Wn. App. 1031, 2016 WL 3264419, at *1 (June 14, 2016).

³ *Id.* at *2; CP 419, ¶2; CP 422-424. See Appendix A & B.

constructed, was built within the Patio and Deck Easement and the encroachment easement.

In 2011, the Langes wanted to rebuild their wooden deck because of its age and questionable structural integrity.⁴ They were incorrectly led to believe by a Gig Harbor City employee that the deck as it existed, was outside the boundaries of the applicable easements.⁵ The Guests and Langes had several conversations about the Langes' intent to replace their deteriorated deck.⁶ The Guests told the Langes that (1) the Patio or Deck Easement required the Langes to share their deck with the Guests; and (2) the Langes had to obtain the Guests' approval before the Langes could replace their deck.⁷ In fact, it was the Guests that convinced the Langes that they did not have the right to reconstruct their deck on the original footprint as it existed when the Langes purchased their home, and that the Langes had to reduce the size of their deck.⁸ As a result, believing they were legally required to do so, the Langes considered building a smaller deck.⁹ They drew up new plans, labeling as "vacated easement" the portion of their existing deck that they, at the time, believed was unlawfully encroaching on

⁴ *Id.* at *1.

⁵ CP 384.

⁶ CP 384-85, ¶11.

⁷ CP 384-86, ¶¶11-15.

⁸ *Id.*; CP 385, ¶12; CP 386, ¶¶15, 17.

⁹ CP 384-85, ¶¶10-13; CP 386, ¶¶15, 17.

the Guests' property.¹⁰ When Mr. Lange later sought independent legal advice, he learned they were, in fact, legally entitled to rebuild their deck in the exact same footprint as it had existed for decades.¹¹ The deck was rebuilt in April 2011, in the same footprint as it had been in 1993 when the Langes' purchased their home.¹²

B. Procedural History

1. The Trial Court's Rulings On Summary Judgment

The Guests sued, alleging claims for trespass, breach of contract, indemnity, and breach of the covenant of good faith and fair dealing.¹³ The trespass claim involved two separate areas of the deck. The first was a 5' wide strip of deck located within the bounds of the Patio or Deck Easement. In their complaint, the Guests maintained both parties were bound by the Patio or Deck Easement¹⁴ but they claimed that the Langes made a contract with them to vacate the Easement.¹⁵ The second area was an approximately 3' x 5' minor encroachment past the edge of the Patio or Deck Easement boundary, which the Langes contended was authorized and allowed under

¹⁰ CP 385, ¶13; CP 398-99.

¹¹ CP 386-87, ¶18.

¹² CP 387, ¶21.

¹³ CP 32-41.

¹⁴ CP 37, ¶3.17; CP39-40.

¹⁵ CP 458-461; 641-644.

the encroachment easement in the CC&Rs.¹⁶

The Langes filed a motion for summary judgment to dismiss the Guests' four claims.¹⁷ They argued that the Guests' **trespass claim** should be dismissed because replacing the deck in the exact same footprint was consistent with their legal rights under the two easements.¹⁸ In opposition, the Guests argued that the Patio or Deck Easement only created a revocable permissive license.¹⁹ The trial court rejected the Guests' argument and dismissed the trespass claim in part, finding that the Patio or Deck Easement created an easement for the 5' x 21' section of the Langes' deck, and that the Langes had the right to rebuild and use their deck pursuant to that Easement.²⁰ However, the court concluded there was a question of fact as to the right to use the 3' x 5' area of minor encroachment and whether the Langes knew that the deck encroached beyond the boundaries of the Easement.²¹ Notably, despite filing a nearly 50 page brief in opposition to the Langes' motion for summary judgment, the Guests did not argue at summary judgment or even raise the issue that the Easement was a forgery

¹⁶ CP 647, lines 2-12; CP 465-467; 650-51; *see also*, RP (April 19, 2013) at p. 12, lines 22-25, p. 13, lines 1-14.

¹⁷ CP 448-474.

¹⁸ CP 463-467; 647-651; *see also*, CP 477, lines 10-19; CP 433.

¹⁹ CP 601-602.

²⁰ RP (April 19, 2013) at p. 41, lines 16-20; p. 36, lines 8-11.

²¹ RP (April 19, 2013) at p. 41, lines 21-25; p. 42, lines 1, 14-16.

and not signed by the true owner.²²

The court also dismissed the Guests' **indemnity claim**. The Guests argued that paragraph D of the Patio or Deck Easement barred the Langes from even defending against the Guests' claims in this lawsuit or from asserting any counterclaims, and further required the Langes to defend the Guests with respect to any counterclaims alleged. The indemnity provision in paragraph D 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.²³

The trial court found the provision applied when third parties file suit against the Guests for injuries incurred when using the easement area²⁴ and therefore, dismissed the Guests' indemnity claim.²⁵

²² See, CP 556-609.

²³ CP 431.

²⁴ RP (April 19, 2013) at p. 35, lines 4-12; lines 23-24; p. 78, lines 9-14.

²⁵ *Id.* The trial court also dismissed the Guests' **breach of contract** claim that was based on an alleged breach of the encroachment easement in the CC&Rs, finding that the CC&Rs did not create a contract between the Langes and the Guests. RP (April 19, 2013) at p. 67, lines 14-25; p. 68, lines 1-3. The Court of Appeals affirmed dismissal of that claim, explaining that the CC&Rs did not create a contractual relationship between the Langes and the Guests. *Id.* at *6. While the Guests made passing reference to their breach of contract claim in their Petition, they did not identify it as an issue presented for this Court's review and therefore, the Langes do not address it here.

After the rulings on summary judgment, the issues that remained for trial were: (1) whether the Langes entered into a contract with the Guests to vacate the Patio or Deck Easement; (2) whether the Langes breached a duty of good faith and fair dealing by building the deck after allegedly entering into a contract not to; and (3) whether the 3' x 5' minor encroachment was trespassing on the Guests' property.

2. The Guests Did Not File A Motion For Reconsideration

At the presentment hearing for entry of the orders on summary judgment, which did not occur until several weeks after the summary judgment hearing, the Guests verbally sought to postpone entry of the orders.²⁶ Significantly, the Guests did *not* tell the court *or* argue that they had evidence that they believed would prove that the Patio or Deck Easement was invalid; instead, they sought the postponement to give them time to move to amend the complaint to add the former owners of Lot 5 to seek defense and indemnity from them.²⁷ While the Guests verbally stated that they would be filing a CR 56(f) declaration, no such declaration had yet been served on the Langes' counsel nor had a copy been given to the trial court.²⁸ The trial court denied the Guests' verbal request, reasoning that the

²⁶ CP 936 – 938; RP (May 6, 2013) at pps. 1-42.

²⁷ RP (May 6, 2013) at p. 4-8.

²⁸ CP 937; RP (May 6, 2013) at p. 6.

trial date was less than a month away, discovery was to close in two weeks, the Langes had an interest in getting the litigation resolved, and the potential defense and indemnity claims the Guests wanted to assert against the prior owners had no bearing on the orders on the parties' summary judgment motions.²⁹ The orders on summary judgment were then entered.³⁰

That same day, the Guests belatedly filed Suzanne Guests' CR 56(f) 16 page declaration, accompanied by 48 pages of unattested exhibits ("Guest declaration").³¹ The Guests did not file a motion with the declaration: they did not file a motion for reconsideration of the denial of the verbal motion for continuance, or a motion for reconsideration of the Order on summary judgment under CR 59, or a motion to vacate or re-open the Order on summary judgment under CR 60.³² They simply filed the Guest declaration. In the declaration, Ms. Guest alleges, for the first time, that the grantor of the Patio or Deck Easement was not the owner of the development and that the signature on the Easement was a forgery, and therefore, the Patio or Deck Easement was invalid.³³ *It is this declaration, which was never properly presented to the trial court for consideration, on*

²⁹ RP (May 6, 2013) at pps. 6-8.

³⁰ CP 939-943; 944-946.

³¹ CP 870-935.

³² The Guests failed to invoke the possible relief in CR 59(a) or CR 60, despite the fact the trial court told them during the presentation hearing that they had the right to seek relief under those rules. RP (May 6, 2013) at p. 40, lines 23-25; p. 41, lines 19-23.

³³ CP 879-880.

*which the Guests now rely in their Petition for Discretionary Review to argue that the trial court erred in ruling on summary judgment that the Patio or Deck Easement created an easement.*³⁴

3. The Guests' Objections to Jury Instructions

At trial, the Guests objected to Jury Instruction No. 17, which told the jury that the court had determined, as a matter of law, that the Langes had the right to rebuild their deck in the area described in the Patio or Deck Easement.³⁵ The trial court gave the instruction reasoning that it had already determined on summary judgment that the Patio or Deck Easement created an easement, as a matter of law, and the instruction did not prohibit the Guests from arguing their theory of the case, which had always been that despite the Langes' right to rebuild their deck, they had agreed with the Guests to give up that right.³⁶

The trial court agreed to give the Guests' proposed jury instruction on an implied duty of good faith and fair dealing, but the instruction was not included in the court's packet of jury instructions.³⁷ However, before the instructions were read to the jury, the court asked both parties to review the instruction packet to verify that it contained all

³⁴ Petition for Review, at pps. 9-10.

³⁵ RP (July 15, 2014) at p. 98, lines 15-17.

³⁶ RP (July 15, 2014) at p. 99, lines 9-18.

³⁷ RP (July 15, 2014) at p. 103, lines 18-25; p. 104, line 1.

instructions.³⁸ Both parties confirmed the packet was complete; the Guests did not bring the omission to the court's attention.³⁹ When the trial court read the jury instructions aloud, the Guests did not object or bring the omission to the court's attention. Likewise, when the jury asked a question during deliberations about the implied duty of good faith and fair dealing, the Guests did not object to the trial court's answer.⁴⁰

4. Jury Renders A Verdict In The Langes' Favor

The jury returned a defense verdict finding that the Langes did not breach a contract to vacate the Patio or Deck Easement, did not breach a duty of good faith and fair dealing, and that the 3' x 5' portion of the Langes' deck did not trespass on the Guests' property.⁴¹ Based on the verdict, the court entered final judgment dismissing the Guests' claims and quieting title in the Langes to "exclusively use, maintain, repair and replace the deck . . . as it now exists against any claim of the plaintiffs."⁴²

C. The Court of Appeals' Opinion

It is important to note that when the Guests appealed the trial court's rulings they did *not* appeal from the trial court's summary judgment ruling

³⁸ RP (July 15, 2014) at p. 121, lines 18-25, p. 122, lines 1-2.

³⁹ RP (July 15, 2014) at p. 122, lines 1-12.

⁴⁰ CP 4761; RP (July 16, 2014) at p. 42, lines 14-17.

⁴¹ CP 4764. In finding no trespass, the jury implicitly found that Mr. Lange did not rebuild the deck intending to encroach in that small space beyond the Patio or Deck Easement.

⁴² CP at 4855-56.

that the Patio or Deck Easement created an easement, as they now argue in their Petition for Discretionary Review. *Guest v. Lange*, 2016 WL 3264419, at *5 n.6, *9-10. Instead, the Guests appealed the trial court's decision to not consider their untimely filed Guest declaration, the declaration filed after the orders on summary judgment had been entered. *Id.* at *5, 7. (These are significant facts, well-noted by the Court of Appeals, but not addressed in the Guests' Petition for Review.) While the Court of Appeals mistakenly believed the Guest declaration had been filed the morning of the presentation hearing, (rather than after the hearing), it nonetheless properly held that the trial court did not abuse its discretion when it declined to consider the untimely Guest declaration. First, following *Barrett v. Friese*, 119 Wn. App. 823, 851, 82 P.3d 1179 (2003), the Court of Appeals held that because the Guests failed to timely move for reconsideration under CR 59, they were precluded from relitigating the facts and issues previously decided on summary judgment. *Id.* at *8. Second, citing RAP 9.12, the Court of Appeals held that no further consideration was authorized because the Guest declaration was not called to the trial court's attention in connection with the motions for summary judgment and it was not designated in the orders entered on summary judgment. *Id.*⁴³

⁴³ The only declaration authored by Ms. Guest designated in the Order on Summary Judgment is Ms. Guest's declaration dated April 17, 2014, filed two days before oral

With respect to the instruction that the Patio or Deck Easement created an easement, the instruction was based on the earlier summary judgment ruling from which the Guests did not appeal.⁴⁴ *Id.* at *9. Given the absence of an appeal from the ruling on summary judgment, the Court of Appeals affirmed the trial court's decision to give the jury instruction. *Id.* at *10. The Court of Appeals also properly affirmed the trial court's dismissal of the Guests' indemnity claim holding that the only reasonable interpretation of the indemnity provision is that it applied to suits related to injury or where a plaintiff might sue the Guests because of injury caused by or on the Langes' deck. *Id.* at *6-7. Finally, the Court of Appeals held that the Guests waived any appeal from the trial court's inadvertent failure to give the good faith and fair dealing instruction because they failed to object at trial despite having three opportunities to do so. *Id.* at *10.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Unpublished Court Of Appeals Decision Raises No Issues Of Substantial Public Interest To Warrant Supreme Court Review.

The Guests rely on RAP 13.4(b)(4) in an effort to invoke this Court's review, but that requires the petition to raise an issue of "substantial public interest that should be determined by the Supreme Court." The Guests fail

argument on the motions for summary judgment. CP 728-796. That declaration did not address the validity of the Patio or Deck Easement.

⁴⁴ RP (July 15, 2014) at p. 98, lines 15-17.

to meet this standard. First, they assert without any reasoned analysis that this case “presents issues pertaining to easements and indemnity . . . meriting [Supreme Court] review.”⁴⁵ This is nothing more than an unsupported, bare-bones assertion and is woefully insufficient to merit review. Second, the Guests ignore the fact that they waived the right to appeal the summary judgment ruling that the Patio or Deck Easement created a valid easement because they did not raise it in the Court of Appeals. Moreover, the evidence on which the Guests rely was never timely brought to the attention of the trial court. Third, the Guests offer no real argument to establish that the trial court’s ruling on summary judgment on an easement that applies to one development involves substantial public interest meriting this Court’s review. Fourth, this is an unpublished decision, so the Court of Appeals clearly determined that none of the issues were important or of general public interest. RAP 12.3(d). In short, none of the issues raised in the Petition have any ramifications beyond the parties to this dispute or the particular facts of this case. The Petition for Discretionary Review should be denied.

- 1. Review Should Be Denied Because The Guests Waived Their Right To Appeal The Trial Court’s Ruling That The Easement Was Valid.**

⁴⁵ Petition for Review at p. 7.

As recognized by the Court of Appeals in this case, the Guests did not appeal the trial court's ruling on summary judgment that the Patio or Deck Easement was valid. Nor did they argue on appeal that the evidence submitted on summary judgment raised a genuine issue of fact as to the validity of the easement, as they now attempt to do for the first time in their Petition for Discretionary Review. Instead, on appeal they argued that the trial court erred in not considering the additional evidence they belatedly presented long after the trial court ruled on summary judgment.⁴⁶ Having failed to appeal from the trial court's ruling, the Guests have waived their right to do so now. RAP 2.5(a); *see also*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). Similarly, the Court of Appeals properly held that the Guests waived their claim that the trial court erred in instructing the jury that the Easement was valid because the Guests failed to appeal the trial court's ruling on summary judgment that the Easement was valid. (Instruction No. 17). *Guest v. Lange*, 2016 WL 3264419, at *9-10. The law of appellate waiver is well settled in

⁴⁶ Guests' Appellate Brief at pps.24-27; *Guest v. Lange*, 2016 WL 3264419, at *5 n.6, 5-7, 9-10 (explaining that the Guests "argue the trial court erred by granting summary judgment on the validity of the Easement because it did not consider new evidence included in their CR 56(f) declarations," and "[t]he Guests do not argue that the trial court improperly granted summary judgment based on the information it had at the time[;] [r]ather, they argue that with the new information contained in the declarations, summary judgment should not have been granted").

Washington and given the undisputed waiver in this case, there is no issue of “substantial public interest” meriting this Court’s review.

Finally, contrary to their assertion, the Guests did not present any evidence at trial that the Patio or Deck Easement was invalid. First, the validity of the Easement was not an issue before the jury, instead, as the trial court repeatedly explained to the parties, their focus and their proof was to be directed to the 3' x 5' minor encroachment.⁴⁷ Second, the testimony the Guests rely on in their Petition—Ms. Lange’s testimony wherein she was asked to read the names of two entities identified on the Spinnaker Ridge final plat as owners of the property and her statement that she did not see an easement outlined on Lot 4 or 5 on the final plat—does not support their assertion that the Easement was invalid. The Guests did not present any expert testimony or citation to legal authority to establish the legal significance of the final plat and information contained therein or to explain the effect of later created easements on a final plat. Thus, there was no competent evidence that raised an issue of fact.

2. Review Should Be Denied Because The Trial Court Properly Exercised Its Discretion In Not Considering The Late Filed Guest Declaration.

A trial court has the discretion to accept or reject untimely filed

⁴⁷ RP (July 9, 2014) at p. 114, lines 6-25; p. 115, lines 1-25; p. 116, line 1.

affidavits. *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987), citing *In re Recall of Reed*, 156 Wn.2d 53, 61, 124 P.3d 279 (2005). And, on review of motions for summary judgment, an appellate court may not consider evidence that was not brought to the trial court's attention and is not designated in the orders on summary judgment. RAP 9.12; see also, *Green v. Normandy Park*, 137 Wn. App. 665, 677-80, 151 P.3d 1038 (2007) (refusing to consider two declarations designated by the appellant in the clerk's papers because the declarations had not been called to the trial court's attention on summary judgment and they were not listed in the summary judgment order). Here, the Court of Appeals properly affirmed the trial court's refusal to consider the Guest declaration (which the Guests argue created a question of fact as to the validity of the Easement), because the declaration was not timely filed, was not brought to the trial court's attention in connection with the motions for summary judgment, and was not designated in the orders on summary judgment. *Guest v. Lange*, 2016 WL 3264419, at *8.

The Guests' argument was also properly rejected because when "a party fails to timely move for reconsideration, the party is 'not entitled to relitigate the facts and issues decided on summary judgment.'" *Id.* quoting *Barrett v. Friese*, 119 Wn. App. at 851 (holding that where plaintiff failed to timely move for reconsideration of a summary judgment order, trial court

properly prohibited plaintiff from later providing additional evidence and argument on the issues previously decided by that order). It is undisputed that the Guests failed to file a motion for reconsideration of the trial court's ruling on summary judgment, therefore, the Court of Appeals properly affirmed the trial court's refusal to allow the Guests to later relitigate the validity of the Easement.⁴⁸ *Guest v. Lange*, 2016 WL 3264419, at *8-9.

B. The Petition Fails To Establish The Court of Appeals Decision Is In Conflict With Any Decision Of The Supreme Court Or Another Court of Appeals Decision.

1. Review Should Be Denied Because The Court of Appeals Properly Followed Washington Law In Affirming The Dismissal Of The Indemnity Claim.

The Court of Appeals properly affirmed the trial court's dismissal of the indemnity claim, holding that “[a] plain reading of [the indemnity provision] shows that it is to bind the indemnitor with respect to the claims asserted against the indemnitee by third parties.” *Guest v. Lange*, 2016 WL 3264419, at *7. An indemnity provision must be read as the average person

⁴⁸ Even if the Guests had timely filed a motion for reconsideration when filing the Guest declaration, the declaration was insufficient under CR 56(e) to create a genuine issue of material fact. Under CR 56(e), a declaration must be made on personal knowledge, set forth such facts as would be admissible in evidence, and affirmatively show that the declarant is competent to testify to the matters stated in the declaration. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 359, 753 P.2d 517 (1988). Unsupported conclusory statements and legal opinions are not to be considered. *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985). Ms. Guests' declaration merely states unsupported conclusory statements and legal opinions; it does not establish that Ms. Guest has personal knowledge as to any of the allegations or conclusions, or that she is competent or qualified to testify as to forged signatures or the ownership of the property at the time the Easement was executed.

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*, 108 Wn.2d 338, 341, 738 P.2d 251, 252 (1987). Here, the Guests proposed interpretation—that the indemnification provision requires the Langes to indemnify the Guests for any and all claims related in any way to the easement—produces the absurd result of precluding the Langes from asserting their lawful rights under the Patio or Deck Easement and would require the Langes to bear all costs of litigation when there is any dispute over the parties rights vis-a-vie the easement.

The Court relied on *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012), which interpreted indemnity provisions that were very similar to the one at issue in this case, to reject this argument. The two indemnification and hold harmless provisions at issue in *City of Tacoma* both provided in relevant part that Tacoma would indemnify, defend and hold harmless “from any and all claims.” *Id.* at 593-94. The municipalities argued that Tacoma was required to indemnify them with respect to the lawsuit Tacoma filed against them, and therefore, the indemnity agreement precluded Tacoma’s lawsuit. In other words, the broad indemnity provision that applied to “any and all claims,” precluded Tacoma from filing *any* action against the Municipalities. *Id.* at 593. This Court expressly rejected this argument, holding:

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). Federal Way likewise argued that its’ indemnity agreement applied to “any and all claims,” and therefore, Tacoma had to defend Federal Way in the lawsuit. This Court again disagreed, holding that such interpretation would produce the absurd result of forcing Tacoma to bear all costs of litigation when there was any dispute about the contract. *Id.*

Like the municipalities in the *City of Tacoma*, the Guests argue the indemnity provision requires the Langes to bear all litigation costs related to this lawsuit. This 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’ interpretation. *Guest v. Lange*, 2016 WL 3264419, at *7.⁴⁹

The Guests also argue review should be accepted because the Court of Appeals “failed to reconcile” *City of Tacoma* with *Newport Yacht Basin*

⁴⁹ Nor does the indemnity provision in this case contain “two separate hold harmless, release and indemnification clauses” as the Guests argue. Instead, in one single sentence, the provision clearly provides that the Guests are not liable for injuries to the Langes or third parties arising from the use of the easement and that the Langes will hold the Guests harmless, and defend and indemnify them from any such claims that a third party may assert against the Guests arising from the use of the easement.

Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 86, 285 P.3d 70 (2012), but they do not argue that the two decisions are at odds with one another, nor do they argue that the Court of Appeals' decision in this case is at odds with either of those two decisions, as required to merit Supreme Court review. RAP 13.4(b)(1)&(2). On this basis alone, the Petition fails. In addition, there is nothing to "reconcile." While the Guests argue the *Newport Yacht Basin* decision stands for the proposition that a court must enforce a duty to indemnify "regardless of whether the indemnified party prevails," the question of who prevailed is not relevant to interpreting the indemnity agreement in this case. Moreover, the indemnity provision in *Newport Yacht Basin* was interpreted to bind the indemnitor for *third party* claims asserted against the indemnitee, which is entirely consistent with the Court of Appeals' holding in this case. 168 Wn. App. at 101-02. The Court of Appeals properly affirmed the trial court's dismissal of the Guests' indemnity claim. Supreme Court review is not warranted.

2. Review Should Be Denied Because The Guests Waived Objection To The Inadvertent Failure to Give The Good Faith And Fair Dealing Instruction.

It is fundamental law that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); *Guest v. Lange*, 2016 WL 3264419, at *10. The Guests failed object to the trial court's inadvertent failure to give the instruction on good faith and fair

dealing despite numerous chances to do so. They failed to object after reviewing the packet to verify all instructions were included, they failed to object after the court read the instructions to the jury but did not read the instruction at issue, and they failed to object when the jury asked a question about the duty and the trial court provided a response. Having repeatedly failed to object, the Guests waived their right to raise the issue on appeal.⁵⁰

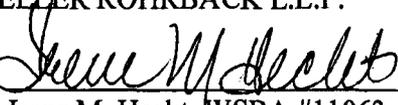
VII. CONCLUSION

The Langes respectfully request the Court deny the Guests' Petition for Discretionary Review in its entirety. Likewise, the Guests' request for attorney fees and costs on appeal should be denied because (just as they did below) the Guests failed to adequately address the issue or cite to any legal authority in their Petition.

RESPECTFULLY SUBMITTED this 27 day of October, 2016.

KELER ROHRBACK L.L.P.

By


Irene M. Hecht, WSBA #11063

Maureen M. Falecki, WSBA No. 18569

Attorneys for Respondents

David and Karen Lange

⁵⁰ The Guest rely on *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) and *Rekhter v. Department of Social & Health Services*, 180 Wn.2d 102, 323 P.3d 1036 (2014) to argue that the Court should have instructed the jury on the duty of good faith, but there is no independent duty of good faith and fair dealing in the absence of a contract. *Coulos v. Desimone*, 34 Wn.2d 87, 208 P.2d 105 (1949). In *Badgett* and *Rekhter*, contracts existed between the parties giving rise to an implied duty of good faith. Here, however, the jury concluded that the Langes did not contract to vacate the Easement, hence, the Langes did not owe an implied duty of good faith, so these cases have no application.

Appendix A

6704290509

ESM Inc.

A CIVIL ENGINEERING, LAND SURVEY, AND PROJECT MANAGEMENT CONSULTING FIRM



Nu-Dawn Homes
Job No. 195-02-861
April 29, 1987

PATIO OR DECK EASEMENT

For and in consideration of mutual benefit and other valuable consideration, receipt of which is hereby acknowledged, Nu-Dawn Homes, Incorporated, owner of Lot 5, hereinafter called "Grantor," hereby grants to the owner of Lot 4 and their successors and assigns, hereinafter "Grantee," a perpetual easement for the installation, enjoyment, and maintenance of a patio or deck upon the following described property in Pierce County, Washington, to wit:

COMMENCING at the most northerly corner of Lot 4, plat of Spinnaker Ridge as recorded in volume 308, pages 1447 through 1451 inclusive, records of Pierce County, Washington;

THENCE S 28°30'00" E, 21.00 feet along a line common to Lot 4 and Lot 5 of said plat to the TRUE POINT OF BEGINNING;

THENCE N 61°30'00" E, 5.0 feet;

THENCE S 28°30'00" E, 51.00 feet;

THENCE S 61°30'00" W, 5.0 feet to a point on said common line;

THENCE N 28°30'00" W, 51.00 feet along said common line to the TRUE POINT OF BEGINNING.

In exchange for the easement herein above described, the Grantee hereby does covenant and agree as follows:

- A. Grantee shall be solely responsible for the care, repair, and maintenance of the property contained in this easement and for any and all improvements placed thereupon.
- B. It is hereby agreed that the materials, design, and general construction type as first installed by the developer, shall be maintained at a level of existing quality constructed or higher, unless a change in construction standards is approved by the then owner of the lot granting the easement.
- C. Grantee shall be responsible for the removal and/or restoration of any improvements placed upon this easement if same is necessitated in the future for the purpose of a utility improvement, the renovation and/or restoration of any existing improvement, and/or the removal and restoration of an improvement having been damaged by fire, windstorm, natural deterioration, and/or acts of God.

EXCISE-TAX EXEMPT DATE 4-29-87
Pierce County
By *[Signature]* Auth. Sig.

6

Job No. 195-02-861
April 29, 1987
Page Two

D. Grantee premises, 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 all judgements that may result from said claims, actions and/or suits.

E. These special covenants shall be not binding upon the Grantee herein but also Grantee's successors, assigns and/or personal representatives.

IN WITNESS WHEREOF, the parties hereto have set their hand and seals at the day and year below written.


John Jones, Inc.

4-29-87
Date

Date

cs3/DND1

DUPLICATE

BRIAN SCOTT
AUDITOR
APR 29 1987

07 APR 29 7:23 AM

Appendix B

8608080472

VOL 0349 PAGE 0060

When Recorded, Return to:

James C. Middlebrooks
1520 Plaza 600 Building
Seattle, Washington 98101

RECORDED

86 AUG 8 P 3: 56

RICHARD A. GREGG AUDITOR
PIERCE COUNTY WASH
DEPUTY

CHICAGO TITLE AUG 8 1986

8-516-W

For reference only, not for re-sale.

SPINNAKER RIDGE DECLARATION OF
COVENANTS, CONDITIONS, RESTRICTIONS AND RESERVATIONS
PIERCE COUNTY, WASHINGTON

6000

agencies, institutions or lenders financing and/or title insuring the purchase of a Lot from the Developer.

ARTICLE 16
EASEMENTS

16.1 Association Functions: There is hereby reserved to Developer and the Association, or their duly authorized agents and representatives, such easements as are necessary to perform the duties and obligations of the Association as are set forth in the Declaration, or in the bylaws, and rules and regulations adopted by the Association.

16.2 Utility Easements: The Board, on behalf of the Association and all members thereof, shall have authority to grant utility, road and similar easements, licenses and permits, under, through or over the Common Area, which easements the Board determines are reasonably necessary to the ongoing development and operation of the Property.

16.3 Access to Public Streets: Each Owner and his guests and invitees shall have a perpetual, non-exclusive easement across the Common Areas and across all roadways constructed within the project, thereby providing access throughout the Property and to public streets.

16.4 Encroachments: Each Lot and all Common Areas are hereby declared to have an easement over all adjoining Lots and Common Areas for the purpose of accommodating any encroachment due to engineering errors, errors in original construction, reconstruction, repair, settlement or shifting or movement of any portion of the building, or any other similar cause, and any encroachment due to building overhang or projection, and any encroachment for a deck, patio and/or parking area or driveway constructed (and assigned for the use of a Lot) by Developer. There shall be valid easements for the maintenance of said encroachments so long as they shall exist, and the rights and obligations of Owners shall not be altered in any way by said encroachment, settling or shifting; provided, however, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful act or acts with full knowledge of said Owner or Owners. In the event a Lot or Common Areas are partially or totally destroyed, and then repaired or rebuilt, the Owners agree that minor encroachments over adjoining Lots and Common Areas shall be permitted, and that there shall be valid easements for the maintenance of said encroachments so long as they shall exist. The foregoing encroachments shall not be construed to be encumbrances affecting the marketability of title to any Lot.

ARTICLE 17

CONDEMNATION OF COMMON AREAS

17.1 Consequences of Condemnation: If at any time or times during the continuance of the development, all or any part of the Common Areas shall be

CERTIFICATE OF SERVICE

I, Keeley Engle, 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:

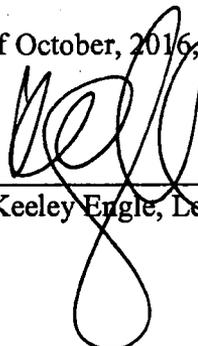
via email and First Class U.S. mail, postage prepaid:

Mr. Philip A. Talmadge, WSBA #6973
Ms. Sidney C. Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor Suite C
Seattle, WA 98126-2138
Fax: (206) 575-1397
Email: phil@tal-fitzlaw.com
Sidney@tal-fitzlaw.com
Counsel for Appellants Guest

via email:

Mr. Timothy J. Farley
Farley & Dimmock LLC
2012 34th Street
Everett, WA 98201-5014
Email: tjarley@farleydimmock.com
Counsel for Respondents

DATED this 27th day of October, 2016, at Seattle, Washington.



Keeley Engle, Legal Assistant