NO. 97535-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LISA STEEL, individually and as Guardian *ad litem* for J.T., a minor; DOUGLAS THOMPSON and KRISTI BARBIERI, individually and as Guardian *ad litem* for S.R.R., a minor,

Appellants/Plaintiffs,

v.

OLYMPIA EARLY LEARNING CENTER, et al.,

Respondents/Defendants,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Respondent/Intervener

RESPONDENT PHILADELPHIA INDEMNITY INSURANCE COMPANY'S ANSWER TO APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Petitioners are plaintiffs in this action (hereinafter, "Plaintiffs") who have sued Defendants Rose Horgdahl, Steve Olson and Olympia Early Learning Center ("OELC") in this action. Defendants are insureds under insurance issued by Intervenor Philadelphia Indemnity Insurance Company ("Philadelphia").

Plaintiffs' petition for review arises out of 13 stipulated settlements of claims against Defendants related to sexual misconduct and alleged sexual misconduct by Eli Tabor, a former employee of OELC, executed in September 2012 by Plaintiffs and Defendants. Since 2012, the Plaintiffs have asserted that Philadelphia should be barred from conducting discovery regarding the *Glover* reasonableness factors that the trial court will consider in evaluating the reasonable amount of the stipulated settlements.[1]

In response to the second interlocutory appeal related to discovery in this matter, the Washington Court of Appeals correctly held that the trial court had discretion to allow deposition discovery limited to non-

[1] *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *abrogated on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

privileged information known to at least one of the parties at the time of the settlement related to the *Glover* factors.

This Court's discretionary review is not warranted. The Court of Appeals' unpublished decision regarding discovery is fact-specific, entirely consistent with settled Washington law, and establishes no precedent. Plaintiffs provide no reasonable argument to support their contention that the issues for which they seek review present a conflict with a decision by the Supreme Court, a conflict with a decision of the Court of Appeals, or qualify as issues of substantial public interest requiring further guidance by this Court. Accordingly, this Court should deny review.

II. ISSUES PRESENTED FOR REVIEW

Is there any basis, as required under the Washington Rules of Appellate Procedure, Rule 13.4(b), for this Court to accept discretionary review of an unpublished decision of the Court of Appeals addressing an interlocutory order of the trial court?

III. NATURE OF THE CASE AND DECISION

In late 2011 and early 2012, Plaintiffs filed six lawsuits against Philadelphia's insureds alleging that Defendants were negligent in hiring and supervising a former employee, who was alleged to have molested minor plaintiffs. Philadelphia provided a complete defense to its insureds,

never disputed coverage, defended without reserving rights, and offered its policy limits to resolve the claims.

During this pre-settlement phase, Defendants Rose Horgdahl and Steve Olson testified in deposition that the employee had cleared two background checks and that they had no knowledge of any misconduct occurring at the learning center. CP 3655 – 3659; CP 3661 – 3662.

Prior to the stipulated settlements, a dispute developed between *Plaintiffs'* counsel and Philadelphia regarding the amount of available insurance limits, with Philadelphia maintaining that available limits were $1 million and with Plaintiffs' counsel insisting that there were $4 million in limits.[2] Accordingly, on August 24, 2012, Philadelphia filed a separate interpleader action in federal district court asking the court to determine the amount of the applicable policy limits and then to distribute those limits. CP 2805. Federal District Court Judge Ronald B. Leighton would later reject Plaintiffs' counsel's contention and rule in Philadelphia's favor finding: "the limit of insurance available for bodily injury arising from multiple claims of abuse over multiple policy periods is exactly and only $1 million."[3]

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[2] To be clear, this dispute did not arise between the insured defendants and Philadelphia.

[3] *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, 980 F. Supp. 2d 1266, 1273 (W.D. Wash. 2013).

However, on September 24, 2012, before **either** side had conducted expert discovery and before potential witnesses had been disclosed in three of the cases, Defendants agreed to Plaintiffs' counsel's request that they stipulate to entry of judgments totaling $25 million for the 6 child plaintiffs and their parents in exchange for Plaintiffs' written agreement that they would only seek to collect the judgments from Philadelphia.[4] CP 470; CP 3828. The proposed stipulated judgments were supported by factual "confessions" signed by Defendants, which contradicted Defendants' prior, pre-settlement deposition testimony. CP 1922. Defendants' factual confessions were drafted by Plaintiffs' counsel without any input from Defendants or defense counsel and were merely presented to Defendants for signature with the final draft of the settlement documents as a *fait accompli*. CP 478.

Shortly after the settlement, Defendants produced to Plaintiffs' counsel the complete, un-redacted files of defense counsel, including all attorney-client communication and mental impression work product, thus waiving any attorney-client and work product privilege of Defendants. CP 3879; CP 4675; CP 4915.

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[4] Police and DSHS investigated and uncovered no evidence that Tabor abused 5 of the 6 minor plaintiffs.

As part of the settlement, Plaintiffs' counsel now "represents both Plaintiffs and Defendants in seeking a reasonableness determination concerning the settlement." CP 2399. In his capacity as dual counsel for both Plaintiffs and Defendants, plaintiff/defense/appellant counsel has instructed the defense attorney appointed by Philadelphia not to discuss substantive issues related to this matter with Philadelphia. CP 1303. Thus, Philadelphia's only opportunity to learn what Defendants knew at the time of the settlement regarding liability, damages, and other information pertinent to the *Glover* factors that the trial court will consider is through deposition testimony of defense counsel and the Defendants.

In the first appeal in this matter, S*teel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 381 P.3d 111 (2016) ("*Steel I*") the Court of Appeals held that Philadelphia was not entitled to Plaintiffs' attorney-client communications or mental impression work product, but held that the trial court had discretion to allow Philadelphia to depose Plaintiffs:

> [A]t the trial court's discretion, Philadelphia can depose the plaintiffs to determine the strength of the abuse allegations in order to evaluate the settlement amount and the validity of the supporting confessions.

On remand, the trial court conducted several hearings related to discovery issues. On June 22, 2017, the trial court issued an order permitting some, but not all, of the deposition discovery Philadelphia

requested on limited topics pertaining to the *Glover* reasonableness factors. CP 7849 - 7851. The court ordered that: 1) "[Defense Counsel] may be deposed with respect to risk of litigation, preparation for trial, and his opinion regarding liability" (Factors 2, 3 and 5); 2) Defendants "may be deposed with respect to defendant's ability to pay or contribute to settlement or the judgment, and in their opinion, the veracity of the factual confessions" (Factors 4, 6, and 7); 3) the adult plaintiffs "may be deposed with respect to facts necessary to evaluate both liability and damages known by plaintiffs at the time of settlement" (Factors 1 and 2); 4) the settlement guardians ad litem ("SGALs") "may be deposed with respect to circumstances regarding their retention, how they were retained, by whom, what the process was, what information was provided to them, whether they were influenced, for lack of a better term, by either, both, or any counsel regarding their reports"[5] (Factor 7); and 5) "[Plaintiffs' counsel] will not be deposed." VRP 40:5-41:3.

Plaintiffs obtained discretionary review of this interlocutory order. On May 29, 2019, the Court of Appeals issued its unpublished decision. With regard to discovery, the Court of Appeals held that the trial court did not err by allowing some discovery and set the following parameters for

[5] The trial court expressly reserved on the issue of whether any evidence obtained from depositions of the SGALs would be admissible at the reasonableness hearing. CP 5485 - 5486.

the trial court: 1) the discovery can only involve information known to at least one of the parties at the time of the settlement; 2) it cannot be for privileged information or information otherwise undiscoverable; and 3) it must take into consideration the *Glover* factors. This ruling is entirely consistent with Washington Supreme Court and Court of Appeals decisions governing reasonableness determinations.

IV. REASONS REVIEW SHOULD BE DENIED

A. Standard of Review

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), a petition for review to the Washington Supreme Court is accepted 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 another 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.

RAP 13.4(b). Plaintiffs contend that review is warranted based on the argument that insurers should be precluded from deposing any witnesses in reasonableness proceedings and that the unpublished decision involves an issue of substantial public interest – a position that is not supported by existing Washington law. As discussed below, Plaintiffs are mistaken and

review is not warranted under any of the criteria established in RAP 13.4(b).

B. The Court of Appeals' Unpublished Decision Does Not Conflict with any Supreme Court or Court of Appeals Decisions

Trial courts tasked with determining the reasonableness of stipulated settlements through the reasonableness hearing process have purposely been given broad discretion on what procedures to use and how to manage discovery. *See e.g., Brewer v. Fibreboard Corp.*, 127 Wn. 2d 512, 529, 901 P. 2d 297 (1995) ("The trial judge faced with this task must have discretion to weigh each case individually."); *Schmidt v. Cornerstone Investments, Inc*., 115 Wn.2d 148, 159, 795 P.2d 1143 (1990) ("we are confident that trial judges will develop their own procedures for handling these cases"); *Pickett v. Stephens-Nelsen, Inc*., 43 Wn. App. 326, 335, 717 P.2d 277 (1986) ("the procedures for handling evidence at these hearings are within the trial court's discretion.").

Reasonableness is determined by what information was known by the parties at the time of settlement, not what was known to a defendant's insurer at the time of settlement. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 775–76, 287 P.3d 551 (2012) (trial court was required to address the viability of "claim based on what was known to the parties at the time of settlement."); *Green v. City of Wenatchee*, 148 Wn. App. 351,

369, 199 P.3d 1029 (2009) (directing trial court "to enter findings of fact reflecting its consideration of each relevant [*Glover*] factor based upon the facts and law at the time of the settlement.").

Plaintiffs confuse the process of discovering the information the parties knew at the time of settlement, as permitted under the trial court's order here, with the introduction of the parties' post-settlement knowledge, which is not sought here by Philadelphia. The discovery ordered by the trial court is limited to questions about what was known by the parties at the time of the settlement.

This discovery is regularly permitted in the reasonableness hearing context and may be vital to ensuring the integrity of these proceedings, as illustrated by *Water's Edge Homeowners Ass'n v. Water's Edge Assocs*., 152 Wn. App. 572, 216 P.3d 1110, (2009), *review denied*, 228 P.3d 17 (2010). In *Water's Edge*, the Court of Appeals upheld the trial court's determination that a stipulated settlement was not reasonable based upon evidence obtained through discovery after a covenant judgment. There, the trial court permitted the intervening insurers to conduct discovery related to the reasonableness of a stipulated judgment between a homeowners association and developer. Based upon evidence developed through this discovery and presented at the reasonableness hearing, the trial court determined that the reasonable settlement value of

that case was $400,000 rather than the $8.75 million stipulated settlement. It is apparent from the appellate court's lengthy discussion that the court considered the evidence obtained by the intervenors through discovery to be critical to the trial court's reasonableness determination, which it affirmed. *Id.* at 585-599.

In *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 773, 287 P.3d 551, 560 (2012), this Court held that "Washington law has shaped and approved [the reasonableness hearing] process as a settled and appropriate means of balancing the multiple interests of plaintiffs, insureds, and insurers." This Court held that an insurer's due process rights were not violated where the trial court granted the insurer's motion to intervene, motion for a continuance, and motion for discovery and the reasonableness hearing was conducted over the course of four days and was fiercely contested. *Id.* at 763.

Washington law is clear: trial courts have broad discretion to decide the extent to which insurers may conduct discovery regarding the reasonableness of a stipulated settlement based upon information known by the parties at the time of settlement. Thus, the Court of Appeals' decision affirming the trial court's discretion in this regard is consistent with and does not conflict with any Supreme Court or Court of Appeals decisions.

In *Steel I* Plaintiffs filed a Motion for Clarification or Reconsideration to request a clarification of the Court of Appeals' ruling that "Philadelphia can depose the plaintiffs to determine the strength of the abuse allegations in order to evaluate the settlement amount and the validity of the supporting confessions." There, Plaintiffs argued, as they do in the current Petition, that allowing Philadelphia to depose the plaintiffs "regarding objective facts (such as the facts of their abuse and other merits issues) would be improper, as that evidence—i.e., the deposition testimony—did not exist and was not considered by the parties at the time of settlement and, thus, is not relevant to challenging the settlements' reasonableness." (CP 7441-7442). In *Steel I*, the Court of Appeals rejected this argument and held that at the trial court's discretion, "Philadelphia can depose the plaintiffs to determine the strength of the abuse allegations in order to evaluate the settlement amount and the validity of the supporting confessions." *Steel,* 195 Wn. App. at 838.

Thus, the current Court of Appeals decision is consistent with its *Steel I* decision. Moreover, Petitioners are precluded from seeking discretionary review of the *Steel I* decision at this time because Petitioners failed to seek discretionary review of the *Steel I* decision within 30 days of the Court of Appeals' October 4, 2016 ruling terminating review of the

first appeal under RAP 13.4 (a). *State v. Gossage*, 165 Wn.2d 1, 9, 195 P.3d 525 (2008).

Petitioners also misinterpret the holdings in *Red Oaks Condo Owners' Ass'n v. Sundquist Holdings, Inc.,* 128 Wn. App. 317, 116 P.3d 404 (2005) and *Howard v. Royal Specialty Underwriting, Inc*., 121 Wn. App. 372, 379-80, 89 P.3d 265, *rev. den.*, 153 Wn.2d 1009 (2005). These decisions did not rule it was error to permit an intervening insurer to conduct discovery, but merely held that the trial courts did not abuse their discretion by making their discovery rulings in the factual circumstances presented in those cases given the discretionary nature of discovery decisions in reasonableness hearings. Indeed, these decisions underscore the importance of preserving a trial court's broad discretion to manage discovery in a reasonableness hearing on a case-by-case basis.

Plaintiffs' heavy reliance on *Dana v. Piper* is also misplaced. There, the Court of Appeals held that Troy Dana did not waive his attorney-client privilege with respect to attorneys who represented him in a suit for breach of a stock-purchase agreement by later suing another law firm that had drafted the stock-purchase agreement for malpractice. *Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013). The *Dana* Court found that the defendant law firm, which sought privileged communications regarding a settlement in support of its defense, did not meet any of the

three-part test for waiver of privilege. With regard to the third part of the test, the Court of Appeals held the defendant law firm failed to show that attorney-client communications regarding the reasonableness of the settlement was vital to the defense of the malpractice case. *Id.* at 776.

Here, the trial court's discovery order does not involve any privileged communications; this issue was resolved in *Steel I*. Thus, the holding in *Dana* that the trial court's reasonableness determination did not depend upon privileged communications between Dana and his attorneys is irrelevant to the current appeal.

C. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by This Court.

Plaintiffs' final contention is that this discovery issue involves an issue of substantial public interest. This Court will accept a petition for review if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). A substantial public interest exists, for example, where the Court of Appeals' decision will affect numerous other individuals. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005) (noting that the a Court of Appeals holding that held the potential to affect "every sentencing proceeding in Pierce County after November 26, 2001 where a DOSA

sentence was or is at issue" was a prime example of an issue of substantial public interest).

Here, there is no substantial public interest in Plaintiffs' request that this Court revisit an unpublished opinion applying settled law regarding a trial court's exercise of discretion to allow discovery in the context of a reasonableness hearing in a case involving unique case specific facts. The Court of Appeals' opinion will not affect other litigants as the opinion cannot be cited for precedent. *See* GR 14.1(a).

Moreover, "Washington law has shaped and approved this process as a settled and appropriate means of balancing the multiple interests of plaintiffs, insureds, and insurers." *Bird*, 175 Wn.2d at 773.

Plaintiffs' inexplicable assertion that the Court of Appeals' unpublished decision will somehow incentivize insurers not to fulfill their duty to defend their insureds defies logic and ignores the fact that Philadelphia defended its insureds in this case without a reservation of rights and offered to pay its policy limits. Moreover, the deposition discovery permitted by the trial court in this case is limited and specifically tailored to the facts of this case and the reasonableness factors the trial court will consider in making its determination. There is no basis in law or fact to support Plaintiffs' assertion that the Court of Appeals' unpublished decision upholding the trial court's decision to allow limited

discovery regarding facts known to the parties at the time of settlement pertinent to the reasonableness factors in this case will have any impact in any other matter let alone discourage settlement or provide an incentive to insurers to act in bad faith.

V. CONCLUSION

For the reasons stated above, Philadelphia requests that this Court deny Plaintiff's Petition.

DATED this 4th day of September, 2019.

SOHA & LANG, P.S.

By: *s/Paul Rosner*
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CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On September 4, 2019 I served a true and correct copy of **RESPONDENT PHILADELPHIA INDEMNITY INSURANCE COMPANY'S ANSWER TO APPELLANTS' PETITION FOR DISCRETIONARY REVIEW** on the parties in this action via court electronic service and courtesy email:

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Executed on this 4th day of September, 2019, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

SOHA & LANG, P.S.

By: *s/Helen M. Thomas*
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