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SUPREME COURT NO. 98434-4

COURT OF APPEALS NO. 79490-6-I

SUPREME COURT OF THE
STATE OF WASHINGTON

UNITED STATES FIDELITY AND GUARANTEE COMPANY,

Petitioner,

v.

KAREN ULBRICHT, Individually and as Personal Representative of the Estate of ROBERT P. ULBRICHT, et al.,

Respondents.

RESPONDENT KAREN ULBRICHT'S RESPONSE TO *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION

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I. INTRODUCTION

The Complex Insurance Claims Litigation Association ("CICLA"), as amicus curiae, asks this Court to grant review "to reconcile conflicting case law … and to resolve an issue of substantial public importance." However, CICLA's concerns rest upon the very same faulty factual premise advanced by Petitioner United States Fidelity & Guaranty Company: that the trial court below increased the amount of a covenant judgment to include the costs and attorneys' fees of a future bad faith litigation. There remains absolutely nothing in the record to suggest that this occurred and, taking away this erroneous view of the Findings of Fact and Conclusions of Law, there exists no conflict within the case law and no issue of substantial public importance. RAP 13.4(b)(1), (2), and (4).

The Court of Appeals did not err in holding that the trial court properly considered the risk of an adverse outcome in a future coverage action as one component of one factor weighing on the reasonableness of the covenant judgment amount. Indeed, the Court of Appeals made clear in its unpublished opinion that the trial court's reasonableness determination may stand entirely on the basis of unchallenged findings supporting the other nine factors under *Chaussee v. v. Maryland Cas. Co.*,

60 Wn. App. 504, 803 P.2d 1139 (1991). App. at 11–15.[1] In view of this, CICLA does not explain how review would in any way change the underlying conclusions of this case. CICLA also does not confront the fact that the covenant judgment amount fell within the anticipated verdict range envisioned by counsel for *both* parties, a fact that runs contrary to the claim that the trial court enhanced the covenant judgment amount to include future costs and fees. App. at 5. For all these reasons, the Court should decline to accept discretionary review.

II. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals held that it was not an abuse of discretion for the trial court to "contemplate the risks and costs involved when evaluating the reasonableness of the proposed covenant judgment." App. at 10. Nowhere, as CICLA claims, did the trial court increase the covenant judgment amount to "*include* amounts that reflect the risks of pursuing a future bad-faith claim against the insurer." Br. of Amicus at 4 (emphasis supplied). Simply put, there is a difference between recognizing the risk taken by plaintiffs entering into a covenant judgment agreement and arbitrarily increasing the amount of a covenant judgment beyond what is reasonable to include future costs and fees. Here, the trial

[1] For the Court's convenience and to avoid repetition, Respondent refers to the appendix attached to the Response to the Petition for Discretionary Review.

court did the former, not the latter, and only the latter would give rise to any conflicts or issues of substantial public importance.

Numerous other Washington courts weighing the nine *Chaussee* factors have recognized that the court need not ignore the risks undertaken by a plaintiff entering into a covenant judgment agreement. *See, e.g.*, *Sykes v. Singh*, 5 Wn. App. 2d 721, 736, 428 P.3d 1228 (2018), *review denied*, 192 Wn.2d 1025, 435 P.3d 265 (2019) (discussing the risk of the jury in a later action finding that the insurer did not act in bad faith); *Werlinger v. Warner*, 126 Wn. App. 342, 350-51, 109 P.3d 22 (2005) (holding that the trial court was obliged to "keep[] in mind that the sole purpose of the covenant judgment was to serve as the presumptive measure of damages in a separate bad faith lawsuit"); *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 706, 187 P.3d 306 (2008) (same). CICLA's arguments to the contrary are without merit.

A. The Court of Appeals' Unpublished Opinion Does Not Conflict with Any Published Decisions.

CICLA argues that "the reasonableness of a covenant judgment, like other settlements governed by RCW 4.22.60, assesses the claimant's *damages* against the policyholder." Br. of Amicus at 4 (emphasis in original). Strictly speaking, this is inaccurate in several ways. First, as the

Court of Appeals noted, "a covenant judgment is distinct from a cash settlement … ." App. at 9. Second, while one of the nine *Chaussee* factors directly examines evidence of the claimant's damages ("the releasing person's damages"), many of the factors have nothing at all to do with that aspect of the case. Instead, these factors work together to assess "the reasonableness of the resolution holistically." App. at 10. Such factors include evidence of bad faith, fraud, or collusion; the merits of the claimant's liability theory and the released person's defense theory; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released. *Chaussee*, 60 Wn. App. at 512.

To create its "irreconcilable conflict with existing authority," CICLA argues that *Sykes*, *Werlinger*, and *Issaquah Ridge* provide no support for the position that a trial court may recognize and acknowledge the future risks accompanying a covenant judgment agreement. Br. of Amicus at 3–4. However, a review of the precise language of each opinion sufficiently disposes of this argument. In *Sykes*, Division One noted that the covenant judgment "did not prevent Zurich [the insurer] from defending itself in the bad faith action." 5 Wn. App. 2d at 736. "If the jury found Zurich did not act in bad faith, Zurich would not be liable

for any of the settlement amount." *Id.* Clearly, Division One contemplated the *Sykes* plaintiffs' risks in a future bad faith action.

As to *Werlinger*, CICLA and the Petitioner both argue that the Court considered the insured's bankruptcy status under the "released person's ability to pay" factor, and not under the "risks of continued litigation" factor. Br. of Amicus at 7–8. However, there is no citation to the *Werlinger* opinion to support this interpretation. Rather, the Court simply stated that, "[b]y virtue of the bankruptcy discharge, Warner had a complete defense to personal liability." 126 Wn. App. at 351. This language, "a complete defense to personal liability," is more relevant to the plaintiff's ability to obtain a judgment—i.e., the risks of proceeding with litigation—and less relevant to the defendant's financial *ability* to pay such a judgment.

Regardless, Division One expressly stated that "the trial court was obliged to measure the settlement for reasonableness using the *Glover / Chaussee* factors, as contemplated in *Besel*, and keeping in mind that the sole purpose of the covenant judgment was to serve as the presumptive measure of damages in a separate bad faith lawsuit." 126 Wn. App. at 350–51 (internal citations omitted). Upon this language, the trial court was not only permitted but *obliged* to recognize that a covenant judgment

carries risks for the plaintiff in a future action. CICLA is silent as to this forceful mandate by the Court of Appeals.

Finally, CICLA argues that Respondent's citation to *Issaquah Ridge* "is even further afield." Br. of Amicus at 8 n.6. However, citing *Werlinger*, the Court in *Issaquah Ridge* expressly reaffirmed that the "'sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit.'" *Issaquah Ridge*, 145 Wn. App. at 706 (citing *Werlinger*, 126 Wn. App. at 350–51). As a result, the only interest of the insurer as a party not being released by the agreement "was that of bad faith, collusion, or fraud by the settling parties." *Id.* The Court did not, and could not, have held that the trial court must turn a blind eye to the "sole purpose of the covenant judgment."

B. The Court of Appeals' Unpublished Opinion Does Not Raise an Issue of Substantial Public Importance.

The brief parade of horribles envisioned by CICLA finds no support in the record of this case. CICLA claims that by allowing the appellate court's unpublished opinion to stand, "all covenant judgments under the Court of Appeals' formulation here would necessarily lead to higher settlements." Br. of Amicus at 9. Yet under established law, trial courts—and by extension litigants—are obliged to recognize that the "sole

purpose of the covenant judgment was to serve as the presumptive measure of damages in a separate bad faith lawsuit." *Werlinger*, 126 Wn. App. at 350–51. Claimants already contemplate their risks of future litigation when negotiating a covenant judgment agreement, and trial courts already utilize the nine *Chaussee* factors to holistically assess the reasonableness of a covenant judgment agreement. Nothing in the underlying unpublished opinion of this case will change that practice, nor will covenant judgment amounts necessarily increase and exceed the bounds of reasonableness as a result of this unpublished opinion.

CICLA's concern about the unpublished decision "violat[ing] an important public policy interest" is unfounded because, again, it relies upon the faulty premise that the trial court *added* future costs and attorneys' fees into the covenant judgment amount. Br. of Amicus at 9–10. CICLA writes that, "[b]y treating the risk and expense of pursuing bad-faith litigation as part of 'presumptive damages,' the Court of Appeals decision subjects insurers to the cost of the coverage action both as part of the covenant judgment, and as part of the awardable costs under the claimant's later Insurance Fair Conduct Act ('IFCA') claim." Br. of Amicus at 10. Respondent agrees that requiring insurers to pay twice for the costs of coverage litigation violates basic principles of equity; however, that did not occur here. Nowhere did the trial court enhance the

covenant judgment amount with the expenses of a future bad-faith litigation. There is no issue of substantial public importance raised by the Court of Appeals' unpublished opinion.

C. The Court of Appeals' Holding Survives Even Without the Challenged Analysis.

Even if CICLA's view of the trial court's ruling were correct, discretionary review would be inappropriate because "[n]o one factor controls and the trial court has the discretion to weigh each case individually." *Chaussee*, 60 Wn. App. at 512. The Court of Appeals explained that even if Petitioner were correct and the court disregarded the four challenged Conclusions of Law, "the reasonableness ruling could still be independently affirmed on the basis of any number of the unchallenged findings and conclusions." App. at 12. Neither the amicus brief by CICLA nor the petition for discretionary review references the substantial evidence supporting the unchallenged factual findings, which in turn support the unchallenged conclusions of law applicable to the other eight *Chaussee* factors. App. at 12-14. Indeed, the following portion of the Court of Appeals holding is positively fatal to the petition for discretionary review:

> The superior court properly utilized the factors laid out in Chaussee and the conclusions of law entered by the court logically flow from the unchallenged facts that were found in the case. The conclusions show the trial court's work in

> evaluating each of the factors under Chaussee. We have upheld trial courts' weighing of the factors even without such a clear record. Here, USF&G's assignment of error to conclusions of law found by the court are without merit. Further, as noted above, USF&G does not assign error to even half of the conclusions under the four corresponding Chaussee factors. Again, as precedent is clear that no one factor controls, the court's reasonableness determination could be affirmed even if we disregarded those findings and conclusions challenged by USF&G.

App. at 14 (internal citation omitted).

III. CONCLUSION

The covenant judgment amount in this case did not include future costs and attorneys' fees. Absent this fiction of the record, there exists no conflict with existing law and no issue of substantial public importance. The trial court, applying all nine of the *Chaussee* factors, determined that the covenant judgment amount was reasonable. Yet even if CICLA were correct and the trial court misapplied the "risks of continuing litigation" factor, discretionary review of the Court of Appeals' unpublished opinion would not be warranted because the reasonableness of the covenant judgment could be upheld solely on the basis of the unchallenged findings and conclusions.

For the foregoing reasons, Plaintiffs-Respondents requests that the Court deny discretionary review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 13th day of July, 2020.

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CERTIFICATE OF SERVICE

I certify that on July 13, 2020, I caused to be served a true and correct copy of the foregoing document upon:

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Respondent's Response to Amicus Curiae

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