IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

Court of Appeals No. 47778-5-II

CEDAR COURT APARTMENTS, LLC
a Washington Limited Liability Company

Respondent/Plaintiff

v.

GUSTAVO & MARIA COLORADO
husband & wife, and the marital community composed thereof

Appellants/Defendants

ANSWER TO PETITION FOR DISCRETIONARY REVIEW
CEDAR COURT APARTMENTS, LLC

Attorney for Respondent/Plaintiff:

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I. IDENTITY OF RESPONDENT

Respondent Cedar Court Apartments, LLC, ("Cedar Court") through its counsel of record, hereby provides its Answer to Petitioners' Gustavo and Maria Colorado's (the "Colorados") Petition for Discretionary Review.

II. COURT OF APPEALS' DECISION

In an unpublished decision, the Court of Appeals affirmed the Trial Court's granting of Cedar Court's request for Judgment as a matter of law ("JNOV"). The Court held that: "Viewing the evidence in a light most favorable to the Colorados, . . . there is neither substantial evidence nor a reasonable inference to support the jury's verdict . . . ." [1]

III. INTRODUCTION

The Court of Appeals correctly affirmed the Trial Court's granting of JNOV based on the record that showed that the jury had only speculation, at best, as to Cedar Court's negligence. Petitioners do not agree with the decision of the Court of Appeals and the Trial Court and seek to argue that circumstantial evidence somehow proves that Cedar Court was the negligent party. This is not the evidentiary standard and the

[1] Petition for Review: Exhibit A: *Cedar Court Apartments, LLS, v. Gustavo and Maria Colorado*, No. 47778-5-II (Slip-Op.), (January 18, 2017) Unpublished.

Colorados have failed to establish that they are entitled to review pursuant to RAP 13.4(b). The only grounds Colorados have raised in support of review is that the Court of Appeals decision "directly conflicts" with Washington appellate case law, citing to RAP 13.4(b)(1) and (2). The Colorados have not only failed to present case law or support in the record for this position, but have mischaracterized the testimony in their efforts. Their Petition simply reargues what they have alleged from the beginning – all of which being innuendo and guess work. The Court of Appeals correctly affirmed the Trial Court's JNOV. Review by the Washington Supreme Court is not warranted and the Colorados' Petition should be denied.

IV. STATEMENT OF THE CASE

Petitioners Gustavo and Maria Colorado originally rented an apartment from Cedar Court Apartments in Tacoma, Washington in 2008. (RP 182). On February 12, 2013, the Colorados renewed their rental contract and received a free carpet cleaning as an inducement to renew their current lease. (RP 206). On February 21, 2013, Mr. Colorado went to the Cedar Court management office to coordinate the carpet cleaning. (RP 207). While in the office Mr. Colorado also completed a request for maintenance on the apartment stove, stating that the large burners did not turn on. (RP 207).

The Colorados prepared for the carpet cleaning by moving all the furniture into their bathroom and kitchen. (RP 206). Mr. Colorado testified that he stacked boxes and furniture, including a mattress, around the stove in the kitchen in a manner that blocked access to the stove. (RP 211-212). The Colorados then left the apartment around 10:00 a.m. (RP 208). Mr. Colorado returned to the apartment around 2:00 p.m. to check on the status of the carpet cleaning. He discovered that the carpet had not yet been cleaned, and then left the apartment again. (RP 209). The Colorados returned again to the apartment around 4:00 p.m. and again found that the work had not been done. (RP 210 - 211).

The Colorados left the apartment and went to the library (RP 214). At approximately 4:15 p.m. a resident of the Cedar Court apartments reported to the office manager that there was a fire in unit 94. (RP 316). By the time the Colorados had returned to the complex, the fire was already extinguished.

Lt. Kenneth Hansen, a Fire Investigator for the City of Tacoma, arrived on scene. After his investigation, he concluded that the fire was caused by a paper product set on top of the stove. In his undisputed testimony, Lt. Hansen stated:

> From the timeframe that the residents left the apartment, to when the fire was dispatched, to the amount of damage that was done, it was my conclusion that something was left on

> top of the stove, the stove was accidentally turned on, and a fire had started in such a manner. Due to the heat of the stove igniting, what I'm guessing is a paper product. The fire -- there is a short duration of time. There is a lot of fire there in that short amount of time. I went with the paper product on top of the stove.

(RP 137).

On February 14, 2015, Cedar Court commenced suit for breach of contract and negligence. (CP 1-6). On April 14, 2014, the Colorados answered, and filed counterclaims alleging breach of contract, tortious interference with business expectancy, emotional distress and negligence. (CP 7-14). All of the Colorados' counterclaims, except the negligence counterclaim, were dismissed through partial summary judgment. (CP 19-44; 161-163).

The case proceeded to a jury trial in February 2015 on the negligence claims. At the conclusion of the trial, Cedar Court moved to dismiss the Colorados' negligence counterclaim, which the Trial Court denied. (RP 420-437). The Jury returned a verdict in favor of the Colorados, finding that the cause of the fire was the negligence of Cedar Court. Cedar Court then filed its motion for JNOV which the court granted on June 5, 2015.

On February 12, 2016, the Colorados appealed the Trial Court's ruling to the Court of Appeals. The Court of Appeals

affirmed the JNOV in its unpublished opinion on January 18, 2017, holding that there was no substantial evidence, or any reasonable inference, that could be made to support the jury's verdict. The Colorados have now petitioned this Court for discretionary review. The Colorados' Petition should be denied because they present no grounds for review under RAP 13.4(b).

V. ARGUMENT

Pursuant to Rules of Appellate Procedure (RAP) 13.4(b) Considerations Governing Acceptance of Review, a petition for review will be accepted by the Supreme Court only:

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

This Court should deny the Petition for Review because none of the required considerations are present. The Court of Appeals' decision does not conflict with another Court of Appeals or Supreme Court decision, nor does it involve a constitutional law question or issue of public interest.

A. The Court of Appeals' Decision is Consistent with Decisions of the Court of Appeals and the Supreme Court.

The Colorados seek review under RAP(b)(1) and (2), asserting nakedly that the Court of Appeals decision is in conflict with "over 100 years of Washington appellate case law." (Petition for Review at ¶V). Incredibly, the Colorados argue that the Court of Appeal's opinion is in conflict with other Court of Appeal's decisions and Supreme Court decisions without citation to a single case that conflicts with the Trial Court's holding. Without providing specificity for their argument, the Colorados simply cite various cases that discuss when a court will overturn a jury's verdict and when the Court of Appeals should affirm or overrule such holding. The cases cited by the Colorados actually *support* the holding in favor of Cedar Court and undercut the Colorados' argument for discretionary review.

The Colorados misquote what the Court stated in *Valente v. Bailey*, 74 Wn.2d 857, 859, 447 P.2d 589 (1968). In that case, Plaintiff was asking the Court to overturn a jury verdict on personal injuries caused by a vehicle accident. Contrary to what Colorados claim the court stated,[2] the Court actually stated that "[a]s we have said on so many occasions, this is something we do only rarely, *and then only when it is clear that there is*

[2] Colorados state in PTR at 12 that the "Courts will sparingly overturn a jury verdict." *Valente v. Bailey*, 74 Wn.2d 857, 447 P.2d 589 (1968), when in fact the court stated ". . . something we do only rarely. . ."

no substantial evidence upon which the jury could have rested its verdict." (Emphasis added). The correct language and remainder of the Court's statement are critical to understanding the Court's decisions. In that case, the Defendant - driver testified to specific acts he engaged in that would have placed the other driver on notice that the Defendant was about to make a turn. In addition, the Plaintiff testified that he observed the Defendant vary his speed and look left and right as if he was trying to locate something. *Id*. Evidence of verifiable knowledge of the Defendant's actions were present, unlike in the case at hand.

Here, no witnesses could provide anything more than speculation or conjecture as to whom, *if anyone*, ever entered the apartment except for Mr. Colorado. This is significantly different than *Valente* with regard to the type of evidence presented, and therefore this case does not contrast with the Court's decisions.

Another case the Colorados present is *Burke v. Pepsi-Cola Bottling Co*., 64 Wn.2d 244, 391 P.2d 194 (1964). In that case the court affirmed the jury's verdict after the plaintiff appealed. The question in *Burke* was whether the Court erroneously denied the plaintiff's motion for directed verdict after plaintiff argued that the expert defense witness was discredited by other witnesses and during cross-examination. The Court affirmed the lower court's ruling after finding that there was "ample"

evidence to support the jury's verdict. This is different from this case, in which the Colorado Trial Court and the Court of Appeals each found that **no substantial evidence was present**. Again, this is not in conflict with past appellate decisions.

Yet another case cited by the Colorados, *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995), dealt with a statute of limitations issue as to when a repudiation occurred. There was undisputed testimony regarding conduct and conversations between the parties. The Court reversed the JNOV in that case, finding that there was a reasonable interpretation of evidence to support the jury verdict.

Here, the Colorados incorrectly attack the Court of Appeals' ruling based on an argument that the Trial Court abused its discretion in weighing the credibility of the witnesses and by ignoring the existence of abundant *circumstantial* evidence. That argument is based on the flawed premise that there actually was circumstantial evidence in the record that would lead to a reasonable inference.

In reality, the Colorados failed to set forth even circumstantial evidence in support of their position. With no such evidence, the Court of Appeals correctly observed that evidence was speculative as to whether anyone had accessed the apartment outside of the Colorados themselves. (Slip-Op. 11). This is further illustrated in the undisputed expert

testimony of Lt. Hansen, who testified that the fire likely started within the time frame of 4:00 p.m. to 4:30 p.m. Mr. Colorado testified that he returned to the apartment at 4:00 p.m. and did not smell any smoke or see fire at that time. This entire issue became a matter of timing. No evidence was provided by either party confirming that anyone entered the apartment other than Mr. Colorado. The Colorados attempt to speculate that someone from the cleaning company entered the apartment, or perhaps "Alex the maintenance man" had entered. The Colorados presented nothing more than loose theories and speculation.

As the cases cited by the Colorados demonstrate, the Court of Appeals' holding is not in contrast with other Courts' rulings, and in fact, actually *follows* those rulings. The Trial Court and Court of Appeals clearly outlined that this was a matter of sufficiency of the evidence, and based on the lack of evidence, no reasonable inferences could be made. The Court of Appeals correctly held that the jury found only what could "possibly" have occurred. "Possibility" is not the legal standard for circumstantial evidence. This speaks to the point that their entire position was based upon speculation, and not circumstantial evidence as the Colorados attempt to argue. As the Courts have consistently held, and as

specifically noted by the Court of Appeals [3], a verdict cannot be founded on mere theory or speculation. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999).

VI. CONCLUSION

Based on the preceding argument, Cedar Court respectfully requests that the Court DENY review in this matter. The Colorados have failed to show that review is appropriate under RAP 13.4(b)(1) and (2). The record and applicable law show that the Court of Appeals correctly decided all of the issues presented. As such, this Court should DENY any further review of this case.

RESPECTFULLY SUBMITTED this 20th day of March 2016.

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[3] See Slip-Op at 9.