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No. 97347-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MUHAMMAD and FAIZA AHSAN,

Petitioners,

v.

SLOANS ENTERPRISE OF AMBOY, LLC

Respondent,

RESPONDENT SLOANS ENTERPRISE OF AMBOY, LLC'S
ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

Respondent Sloans Enterprise of Amboy LLC (Sloans Enterprise), the Defendant in the trial court and Respondent in the Court of Appeals, submits its Answer to Muhammad and Faiza Ahsan's Petition for Discretionary Review.

II. COURT OF APPEALS DECISION

In its June 11, 2019 unpublished decision, Division II affirmed the trial court's entry of judgment in favor of Defendant/Respondent Sloans Enterprise, following a defense jury verdict.

On appeal, the Ahsans, *pro se*, argued that Sloans Enterprise's expert improperly opined on an ultimate issue of fact. However, the Ahsans did not object or move to strike. "Because the Ahsans did not object at trial, we determine that they failed to preserve the issue, and thus we affirm." Slip Op. at 1.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Should this Court deny the Ahsans' Petition for Discretionary Review because none of the RAP 13.4(b) tests has been addressed, much less satisfied, and even if it had, the Court of Appeals properly affirmed the entry of judgment in favor of Defendant/Respondent

Sloans Enterprise because the Ahsans never objected to the admission of evidence it now contends was erroneously admitted.

Should this Court deny review because the Ahsans' assignment of error is predicated on a new issue that was improperly raised in their reply brief and never considered by the Court of Appeals.

IV. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case and the Appeal

This is a property damage case wherein the Ahsans allege that Sloans Enterprise breached a duty of reasonable care when it performed landslide mitigation/excavation work around the Ahsans' home.

After a three-day jury trial in which each party presented competing expert testimony about causation, the jury rendered a defense verdict and judgment was entered for Sloans Enterprise.

The Ahsans appealed the judgment, contending that the defense expert erroneously opined on an ultimate issue of fact. However, they never objected during the defense expert's testimony. Because they failed to timely object and thus did not preserve the purported error for appellate review, the Court of Appeals—relying

on RAP 2.5(a), ER 103(a)(1) and Supreme Court precedent—affirmed the defense judgment.

The Ahsans' petition to this Court raises a new issue that the Court of Appeals did not address, presumably because it was only raised for the first time in the Ahsans' reply brief. Because the issue was neither fully briefed nor addressed by the Court of Appeals, this Court should decline review.

B. Each Party Presented Competing Expert Testimony Before the Jury Rendered a Defense Verdict.

At the three-day trial, each party presented expert opinion testimony concerning whether Sloans Enterprise breached a duty of reasonable care when it performed landslide mitigation/excavation work around the Ahsans' home.

The Ahsans' expert, Mark Swank (an engineering geologist), testified that it was not appropriate for Sloans Enterprise to perform the excavation work under the existing conditions on December 12, 2015. Verbatim Report of Proceedings (VRP) at 475:16-20 (07/21/17).

Q: In your opinion would the property have suffered the damage that it did suffer if this excavation had not taken place?

A: In my opinion, yes.

Q: It would have or wouldn't?

A: It would not have had the extensive amount of damage.

VRP at 481:14-19. Mr. Swank opined that Sloans Enterprise's excavation work was a "trigger" that caused subsequent soil instability, leading to more damage to the Ahsans' home. VRP at 482:13-484:5. Sloans Enterprise vigorously cross-examined Mr. Swank, VRP at 483-540, then moved for a directed verdict after the Ahsans rested.

The trial court denied the motion for a directed verdict, stating that the expert opinion evidence presented in Mr. Swank's testimony was sufficient to establish that Sloans Enterprise "should have known that removing the dirt would increase the landslide danger, that there were multiple causes to the landslide specifically on December 12; however, there was one trigger and that was the excavation. If the jury finds that testimony credible, then that'll be

sufficient I think for, for the Plaintiff to succeed, but that's within their, their purview, so I deny your motion." VRP at 552:22-553:7.

Sloans Enterprise called its first witness, defense expert John Zipper (licensed civil and geotechnical engineer). Mr. Zipper testified that he had reviewed Mr. Swank's report, VRP at 565:5-21, and disagreed with his assessments, calculations, and opinions about what caused further landsliding and damage to the Ahsans' home on December 12, 2015. VRP at 565:12-571:7. Referring to the Ahsans' expert, defense counsel asked defense expert, Mr. Zipper:

Q: Ultimately, Mr. Swank said that the excavation that was done, whether it was the rock wall or it was the extent of the excavation into the backyard, the slide debris removal [performed by Sloans Enterprise], that triggered further sliding on the 12th. What's your opinion about that?

A: My opinion is no, it did not.

VRP at 571:8-14. Mr. Zipper then explained the bases of his opinion, VRP at 571:14-576:7, including his opinion that the landslide was continuing to move before, during, and after Sloans Enterprise's excavation work; a record-setting rainfall triggered the landslide;

drainage issues on top of the hill above the Ahsans' home were a factor; poor quality soil was a factor; and the fact that the "whole area slid previously" in 2006 was a factor. VRP at 574:1-2. Mr. Zipper explained all of the efforts that the Ahsans could have made (but did not) after the 2006 landslide to avoid another landslide. VRP at 574:5-575-5.

Finally, Mr. Zipper opined that the December 2015 landslide would have continued to occur, regardless of whether Sloans Enterprise performed excavation work, VRP at 576:17-22, and that it was reasonable for the Ahsans to "at least make some attempt to clear soil from the side of the house that day." VRP at 576:23-577:1. Mr. Zipper testified that a "homeowner's got to do what they can to try to protect their property, and it's a very reasonable thing to do is to try to get the amount of work done that, that can reasonably be done within a short period of time, you know, basically an emergency basis to remove the mud that has already damages these deck posts." VRP at 577:4-11. Defense counsel then asked:

Q: And was there anything unreasonable then about Mr. Sloan going ahead and performing the work that Mr. Ahsan asked him to do?

A: No.

VRP at 577:13-16. The Ahsans lodged no objections to these questions or answers, and cross-examined Mr. Zipper at length. VRP at 577:21-603:16. Sloans Enterprise rested, VRP at 603:20. The jury returned a defense verdict on July 13, 2017, first answering “no” to whether Sloans Enterprise was negligent. CP 138-39. That verdict was reduced to a Judgment on August 24, 2017. CP 131.

C. The Ahsans Appealed and Raised a New Issue in their Reply Brief that the Court of Appeals Did Not Address.

The Ahsans appealed the defense verdict, contending that the trial court abused its discretion under ER 704 by allowing defense expert, John Zipper, to provide an opinion on an ultimate issue. Opening Br. at 3-4. In their opening brief, they argued that Mr. Zipper’s opinion on the “ultimate” issue was inadmissible and invaded the province of the jury. *Id.* at 4, 6.

In derogation of RAP 10.3(c), their reply brief raised a new issue wherein they argued for the first time that the trial court committed a “manifest error affecting a constitutional right” by allowing Mr. Zipper to opine on an ultimate issue. Reply Br. at 2, (quoting RAP 2.5(a)). Division II did not address this new issue in its

slip opinion, presumably because the Ahsans did not assign error or address it in their opening brief.

In the Supreme Court, the Ahsans abandoned their reliance on ER 704; failed to address Division II's slip opinion; and raised again the new issue that the trial court committed a "manifest error affecting a constitutional right." Pet. at 2.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Review Should Be Denied Because None of RAP 13.4(b) Criteria Is Satisfied.

Rule of Appellate Procedure (RAP) 13.4(b)(1)-(4) sets forth four independent tests governing acceptance of review by the Supreme Court. Notably, RAP 13.4(b) states that the four tests are the "only" ones that apply.

Here, the Ahsans do not reference, much less explain why review should be accepted under any test. See RAP 13.4(c)(7) ("Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.")

Instead, their petition wholly ignores Division II's slip opinion, and now faults the trial court—instead of themselves—for failing to

“sua sponte” strike a purported “improper question and answer” or order a new trial. See Pet. at 3.

The Ahsans’ failure to apply one of the four tests under RAP 13.4(b)(1)-(4) renders their petition toothless. Here, as in the Court of Appeals, the Ahsans are *pro se*, however the Court holds self-represented litigants to the same standards as attorneys. *In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367 (2017). Discretionary review should be denied on this basis alone.

Division II’s short slip opinion does not conflict with any decision of the Supreme Court or with any published decision of the Court of Appeals. RAP 13.4(b)(1)-(2). Nor does Division II’s slip opinion address any significant questions of law under the state or federal constitution. RAP 13.4(b)(3). Finally, the Court of Appeals decision does not involve an issue of substantial public interest. RAP 13.4(b)(4).

In sum, the Court of Appeals—applying RAP 2.5(a), ER 103(a)(1), and a Supreme Court decision—correctly opined that because the Ahsans did not object during Mr. Zipper’s testimony they failed to preserve their concern that he improperly opined on an ultimate issue. See Slip Op. at 3.

B. Review Should Be Denied Because the Ahsans Raise a New Issue Not Properly Before the Supreme Court.

The Ahsans not only fail to explain how RAP 13.4(b) applies to Division II's decision, but they also improperly raise in their petition a new issue of whether the trial court committed "manifest error affecting a constitutional right." They raised this contention in their reply brief, but it was not fully briefed or addressed by the Court of Appeals. It is well settled that an issue cannot be raised for the first time in a reply brief. *State v. Pleasant*, 38 Wn. App. 78, 81, 684 P.2d 761, *review denied*, 103 Wn.2d 1006 (1984) (stating that an "issue cannot be raised for the first time in a reply brief" therefore the new argument "is not properly before this court"); *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970) (stating that the party "did not argue or discuss this assignment of error in its opening brief, so we consider the assignment abandoned. Contentions may not be presented for the first time in the reply brief"); *Fosbre v. State*, 70 Wn.2d 578, 424 P.2d 901 (1967) (stating that "a contention presented for the first time in the reply brief will not receive consideration on appeal"); see *also* RAP 10.3(c) (stating that a reply brief "is limited to a response to the issues in the brief to which the

reply brief is directed”).

Because the Ahsans raised a new argument in their reply brief, the Court of Appeals properly declined to consider it. Likewise, the Supreme Court should decline review. The Ahsans assign no error within the confines of Division II’s slip opinion, so the Supreme Court should deny review.

VI. CONCLUSION

Justice has been served. The Ahsan received a jury trial in which the experts submitted competing opinions. If an error occurred in the admission of expert testimony, they failed to object and thus failed to preserve the issue. The Court of Appeals correctly affirmed the trial court’s entry of judgment for Sloans Enterprise. The Supreme Court should deny the Ahsans’ petition for discretionary review.

Respectfully submitted this 10th day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on 10th day of July, 2019, I caused to be served via email and first class mail a true and correct copy of the foregoing Brief of Respondent to:

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- VIA WASHINGTON STATE APPELLATE COURTS' E-FILING PORTAL
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- VIA MESSENGER
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I declare under penalty of perjury that the foregoing is true and correct.

DATED at Seattle, Washington on the 10th day of July, 2019.

/s/ Susan L. Klotz
Susan L. Klotz
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RESPONDENT SLOANS ENTERPRISE OF AMBOY, LLC ♦ S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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