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 UNITED STATES FIDELITY AND GUARANTEE COMPANY'S PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Forty-eight hours before trial, PM Northwest had lost summary judgment on its statute of repose defense, been stripped of its employer negligence and contributory negligence defenses and was facing a spoliation motion involving contradictory testimony between its records custodian and corporate representative. PM Northwest's testimony that it never worked with asbestos was contradicted by three former employees, and its own industrial hygiene expert admitted that the company's asbestos work practices violated state and federal regulations. Bereft of any indemnity commitment from its insurers, PM Northwest faced imminent bankruptcy if confronted with a judgment over $1 million.

Faced with a living mesothelioma plaintiff with a spouse and dependent children and having no defense or indemnity commitment from its insurers, PM Northwest entered into a $4.5 million covenant judgment that fell within the anticipated verdict range of both parties' counsel. The trial court, weighing all nine of the *Chaussee* reasonableness factors, determined that the covenant judgment amount was reasonable, and the Court of Appeals unanimously affirmed in an unpublished opinion.

Petitioner United States Fidelity & Guaranty Company ("USF&G") seeks discretionary review based on the false premise that the trial court increased the amount of the covenant judgment to include the

costs and attorneys' fees of a future bad faith litigation. There is absolutely nothing in the record to suggest that this occurred, and the Court of Appeals did not err in holding that the trial court properly considered the risk of an adverse outcome in Plaintiff-Respondents' ("the Ulbrichts") future coverage action in determining the reasonableness of the covenant judgment on which such an action would be based. App. at 10 ("It is proper for the trial to contemplate the risks and costs involved when evaluating the reasonableness of the proposed covenant judgment."). The trial court, considering all nine of the *Chaussee* factors, never found that the covenant judgment contained anything other than what might have been recovered in the form of a verdict had the case proceeded to trial.

Stripping away USF&G's erroneous reading of the trial court's Findings of Fact and Conclusions of Law, there is nothing in the unpublished opinion that conflicts with any published decision by the Court of Appeals, nothing that raises a question of law under the Constitution of the State of Washington or the United States, and nothing involving an issue of substantial public importance. RAP 13.4(b)(2)-(4). Nevertheless, USF&G advances the untenable and absurd proposition that the Ulbrichts' attempt to recover on the covenant judgment under the Insurance Fair Conduct Act ("IFCA") demonstrates error in the appellate court's analysis or that this Court should remand the case to pre-litigate

the parameters of a subsequent IFCA action. The Court should reject this invitation and decline to accept discretionary review.

II. COUNTERSTATEMENT OF THE CASE

A. Relevant Factual Background.

Karen Ulbricht is the widow of Robert Ulbricht who died of mesothelioma on November 4, 2018 and is the personal reprehensive of his estate. Robert Ulbricht resided in Stanwood, Washington with his wife and their two disabled adult children, who were also named plaintiffs. Appendix ("App.") at 3. In November 2017, Mr. Ulbricht was diagnosed with mesothelioma, a signature disease of asbestos exposure. *Id.* Mr. Ulbricht was exposed to asbestos at the Texaco Oil Refinery in Anacortes, Washington, as a result of work performed by PM Northwest, a maintenance contractor. *Id.*

B. Procedural History.

In January 2018, the Ulbrichts filed a personal injury action in King County Superior Court against PM Northwest and other defendants as a result of Mr. Ulbricht's asbestos-related illness. *Id.* In the ensuing litigation, the trial court denied PM Northwest's motion for summary judgment based on the statute of repose and later struck 17 of PM Northwest's affirmative defenses, including employer negligence and superseding cause. *Id.* Counsel for PM Northwest, an experienced

asbestos litigator of nearly twenty years, recognized that his client was a "major player" in the case and admitted that two of his three key defenses were not likely to prevail. App. at 3-4.

Moreover, PM Northwest's insurers—including USF&G—had abandoned their insured and refused to either defend or indemnify. App. at 4. At a court-ordered mediation, counsel for PM Northwest noted that the Ulbrichts' demand of $3.5 million was too high *for a funded settlement*, not for a verdict. App. at 5 ("PM Northwest's counsel described [the demand] as 'ridiculous' and 'too high' for a settlement."). Because of PM Northwest's precarious litigation posture, the assigned mediator, a retired judge experienced in asbestos litigation, suggested that PM Northwest consider a covenant judgment. *Id.*

Following the failed mediation, "much had worsened as to PM Northwest's prospects at trial." App. at 5. PM Northwest's president testified that his company never worked with asbestos, testimony that was flatly contradicted by several former employees. *Id.* Moreover, PM Northwest's industrial hygiene expert testified that the defendant's conduct at the Texaco plant violated safety regulations, and the Ulbrichts had a pending spoliation motion. *Id.* Based on all of this, counsel for the Ulbrichts anticipated a verdict in an amount exceeding $6 million that, after offsets of prior settlements, would result in a net judgment of

between $4.5 to $5.5. million. *Id.* Counsel for PM Northwest, meanwhile, advised his client that a potential adverse verdict could range from $1 to $6 million. *Id.*

Two days before trial and still without any insurance defense or indemnification, counsel for both parties met to explore settlement possibilities one last time. App. at 6. At that time, the parties entered into a covenant judgment agreement in the amount of $4.5 million. App. at 6. This amount fell within the potential verdict range envisioned by both parties. *Id.* After substantial pre-hearing discovery, on November 29, 2018, the trial court held a reasonableness hearing where both parties submitted written and oral argument. *Id.* The court entered written extensive written findings of fact and conclusions of law deeming the covenant judgment amount to be reasonable. *Id.*

III. COUNTERSTATEMENT OF THE ISSUE

Whether review should be denied where the Petition does not raise an issue of substantial importance, does not demonstrate that the Court of Appeals' opinion conflicts with any published decisions, and does not involve a significant question of constitutional law.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

In an unpublished decision, the Court of Appeals unanimously held that the trial court did not abuse its discretion in determining that the

covenant judgment amount was reasonable based upon its consideration of all nine *Chaussee* factors. The Court of Appeals did not, as USF&G claims, determine that the trial court awarded as actual damages the costs of a future litigation. *See* Petition at 1 (claiming that the covenant judgment amount "covers future collection costs as actual damages"), 7 (claiming that the covenant judgment amount "includes the future cost of pursuing the insurance coverage litigation"), 11 ("No Washington decision has gone so far as to award the same litigation expenses twice—once as damages and again as awardable attorney's fees."). This unsupported factual claim is the cornerstone of the petition for discretionary review, yet nowhere is this Court provided a single citation to the Court of Appeals opinion, or the underlying trial court record, demonstrating that the trial court *increased* the amount of the covenant judgment to include future costs of litigation. Absent this factual fiction, USF&G's arguments regarding the unprecedented legal impact of a nonexistent holding are unfounded, and USF&G has failed to meet any of the criteria under RAP 13.4(b)(2)-(4).

A. Trial Courts Review the Reasonableness of Covenant Judgments Using Nine *Chaussee* Factors.

Washington courts have long approved of stipulated judgments accompanied by covenants not to execute in exchange for an assignment

of rights against the defendant's insurers—otherwise known as covenant judgments. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736-37, 49 P.3d 887 (2002); *accord Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 287 P.3d 551 (2002). However, "[a] carrier is liable only for reasonable settlements that are paid in good faith." *Besel*, 146 Wn.2d at 738. Thus, covenant judgments are valid only where the trial court has determined that the covenant judgment is reasonable based upon the totality of the circumstances at the time the agreement was reached. *See* RCW 4.22.060(1); *Besel*, 146 Wn.2d at 738. In making this reasonableness determination, the trial court should consider the following nine elements known as the "*Chaussee* factors":

1) The plaintiffs' damages;
2) The merits of the plaintiffs' liability theory;
3) The merits of the defendant's defense theory;
4) The defendant's relative faults;
5) The risks and expenses of continued litigation;
6) The defendant's ability to pay;
7) Whether there is any evidence of bad faith, collusion, or fraud;
8) The extent of the plaintiff's investigation and preparation of the case; and
9) The interests of the parties not being released.

Besel, 146 Wn.2d at 738 (citing *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991)). No single factor is determinative, and not all nine factors are relevant in every case. *Id.* at 739 n.2; *Chaussee*, 60 Wn. App. at 512.

The Court of Appeals recently clarified that the court views "the *process of considering* the [*Chaussee*] factors as sufficient to protect insurers from collusive settlements and excessive judgments if the insurer has notice of the reasonableness hearing and has an opportunity to argue that the settlement is not reasonable." *Sykes v. Singh*, 5 Wn. App. 2d 721, 728, 428 P.3d 1228, 1235 (2018), *review denied*, 192 Wn.2d 1025, 435 P.3d 265 (2019) (emphasis supplied). Because a trial court's reasonableness inquiry necessarily involves factual determinations, such findings will not be disturbed on appeal if supported by substantial evidence. *Id.* Consequently, the trial court's ultimate determination of reasonableness is reviewed for abuse of discretion. *Id.*

B. Petitioner's Citation to the Record is Misleading and Incomplete.

RAP 13.4(b) provides the exclusive circumstances by which this Court will accept discretionary review. None of the four tests permit the petitioner to mischaracterize the evidentiary record as found by the trial court and affirmed by the Court of Appeals. Indeed, most of the factual

findings supporting the trial court's determination of reasonableness went unchallenged by USF&G, as the Court of Appeals observed. App. at 12 (holding that the reasonableness ruling could still be independently affirmed on the basis of "any number of the unchallenged findings and conclusions"). The Court of Appeals examined the evidentiary record on review and set forth the facts in its opinion based upon the trial court's written findings of fact, which when supported by substantial evidence are not disturbed on appeal. App. at 3-6. Nowhere did the Court of Appeals indicate that the trial court increased the covenant judgment amount to include future attorney fees and costs of bad faith litigation, as USF&G boldly claims. Petition at 6. Rather the *parties* agreed to the covenant judgment amount and the trial court, applying all nine of the *Chaussee* factors, deemed the amount to be reasonable. The Court of Appeals found no abuse of discretion and even noted that the unchallenged findings and conclusions were sufficient to affirm the reasonableness determination.

The sole factual basis cited by USF&G to support its interpretation of the covenant judgment amount arises from the trial court's Conclusion of Law No. 23, which USF&G quotes partially and out of context. Petition at 6 (citing CP 1199). The full language of Conclusion of Law 23 is as follows:

> *While covenant judgments and settlements overlap in many ways, they are nevertheless separate and distinct agreements that cannot be referred to interchangeably.* Although the covenant judgment in this case alleviated PM Northwest's risk of continued litigation, the contingent nature of the recovery under its insurance assignment ensured that Plaintiffs would undertake additional risk that would not have been presented by a monetary settlement. In order to obtain any recovery from PM Northwest's insurers, Plaintiffs will have to prosecute a collateral insurance coverage action to a successful conclusion. In adjudicating the reasonableness of the $4.5 million covenant judgment entered in the case, the Court must consider the possibility that Plaintiffs may recover nothing from PM Northwest's insurers. The contingent nature of the settlement in this case justifies a larger covenant judgment amount than would be reasonable *if PM Northwest and Plaintiffs had entered into a cash settlement with sure payment on a date certain.*

CP 1199 (emphasis supplied). Addressing this Conclusion of Law, the Court of Appeals rejected USF&G's interpretation and noted that the trial court made six conclusions under the "risks and expenses of continued litigation" factor and considered the reasonableness of the covenant judgment holistically. App. at 10. USF&G's interpretation of the trial court's holding is not found anywhere in the record or in the Court of Appeals opinion.

Apart from this key misrepresentation of the trial court's factual findings, USF&G includes numerous other claims with citations not before this Court. For example, USF&G suggests (without any citation to the record) that the Ulbrichts "believed that despite the lack of evidence

linking PM Northwest to his exposure to asbestos, through expert testimony, he could establish a link." Petition at 3. This peculiar mischaracterization of the evidentiary record was rejected both by the trial court and by the Court of Appeals. *See* App. at 3-4 (defense counsel believed the lack of causal link defense was "not very good"). USF&G also claims that the "Ulbricht plaintiffs belatedly concede [that] the award of future insurance coverage fees/costs as part of defendant's damages is unprecedented," citing to a Hayes declaration that is not before this Court. Petition at 9.[1] No such concession was made because future litigation costs were not, in fact, added to the covenant judgment amount by the trial court. Finally, USF&G cites to various portions of the Clerk's Papers to again relitigate its view of the facts, rather than cite the findings of fact entered by the trial court or the factual recitation set forth by the Court of Appeals. Petition at 3-6.

It is well-settled that this Court will not consider arguments that are "not supported by any reference to the record nor by any citation of authority." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809,

[1] Along with the Hayes declaration, USF&G cites to numerous documents that were not included with its petition, including a motion for reconsideration (Petition at 7, 11) and a motion to publish the Court of Appeals opinion (Petition at 6). RAP 13.4(c)(9) provides that the appendix for a petition for discretionary review should contain only a copy of the Court of Appeals decision, a copy of the order denying a motion for reconsideration, and copies of statutes or constitutional provisions relevant to the issues presented for review. Inasmuch as USF&G cites to information outside its own appendix, the Court should not attempt to divine the content and context of these filings to adjudicate this petition.

828 P.2d 549 (1992) (citing RAP 10.3(a)(5); *McKee v. Am. Home Prods*., Corp., 113 Wn.2d 701, 705, 782 P.2d 1045 (1989)). RAP 13.4 provides the precise record that should govern whether to accept discretionary review "under one or more of the tests established in section (b)." Here, USF&G's petition for discretionary review is a cavalcade of unsupported factual claims that flatly ignore the established evidentiary record within the Court of Appeals opinion.

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

USF&G argues that the appellate court's analysis of the "risks and expenses of continued litigation" factor conflicts with *Chaussee v. Maryland Casualty Company*. Petition at 9-10 (citing *Chaussee*, 60 Wn. App. at 513). 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. USF&G argues that the *Chaussee* court expressly limited this factor to only the underlying litigation and only to reduce the amount of a covenant judgment. Petition at 9. This is an incorrect reading of the law.

In *Chaussee*, the trial court relied upon evidence presented in a summary judgment motion to determine whether the underlying covenant judgment amount was reasonable. *Chaussee*, 60 Wn. App. at 513. The

court did not hold that the amount of the covenant judgment was unreasonable, as USF&G claims. Petition at 9. Rather, the court noted simply that the trial court did not consider each of the nine factors and thus its determination was not, in and of itself, evidence of reasonableness. *Chaussee*, 60 Wn. App. at 513 ("Although the settlement was judicially approved … we do not believe this determination alone was sufficient."). Under the particular facts of *Chaussee*, the trial court should have considered "the risk and cost of proceeding to trial." *Id.* The Court of Appeals did not hold, as USF&G claims, that this factor is *limited* to trial in the underlying case. Moreover, the Court noted that this factor "*may* serve to reduce the amount of a settlement." *Id.* (emphasis supplied). It did not hold, again as USF&G claims, that this factor applies only "to reduce (not increase) the amount of a reasonable settlement." Petition at 9. The Court of Appeals opinion is not in conflict with *Chaussee*.

Further, the unpublished opinion does not conflict with the holding in *Werlinger v. Warner*, 126 Wn. App. 341, 350-51, 109 P.3d 22 (2005). USF&G argues that in considering the bankruptcy of the defendant, the *Werlinger* court based its holding on the sixth *Chaussee* factor, the defendant's ability to pay, and not on the risk and expense of continued litigation. Petition at 10. However, there is no support for this argument contained in the language of the opinion.

In *Werlinger*, the trial court held that a $5 million covenant judgment amount was unreasonable after having been briefed on all nine of the *Chaussee* factors. *Werlinger*, 126 Wn. App. at 347. Instead, the court entered judgment in the amount of $25,000, which had been previously paid by the defendant's insurance carrier after the insurer properly defended its insured. *Id.* at 347, 351. The court noted that not every *Chaussee* factor is relevant in every case and held that the liability and damages factors "were not relevant in view of the fact that not a penny could ever be collected from Warner personally." *Id.* at 351. However, the court did not indicate precisely which factor it relied on when considering the defendant's bankruptcy. Certainly a bankruptcy may affect a defendant's *ability* to pay a future judgment, but the legal immunity of the bankruptcy proceedings themselves created an absolute defense to liability, which is better categorized as a risk of continued litigation—*e.g.*, that the defendant faced no risk whatsoever in the underlying trial and the plaintiff faced an insurmountable risk in future bad faith litigation. The Court of Appeals opinion does not conflict the language and holding of *Werlinger*.

Finally, it is not accurate to suggest that "every prior decision in the State of Washington … evaluates the [*Chaussee*] factors exclusively with reference to the merits of [the] underlying case as presented by the

parties, not based upon any future insurance coverage litigation." Petition at 10. Numerous other Washington courts weighing the *Chaussee* factors have recognized the risks attendant to the plaintiff in securing later recovery on the covenant judgment. *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*, 126 Wn. App. at 350-51 (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). Indeed, the Court of Appeals in *Werlinger* recognized that a covenant judgment can be reasonable per se in a case where, as here, the insurer breached its duty to defend or otherwise wrongfully exposed its insured to bankruptcy. *Werlinger*, 126 Wn. App. at 350. In its petition for discretionary review, USF&G makes no reference whatsoever to either *Sykes* or *Issaquah Ridge*. USF&G has failed to demonstrate that discretionary review is appropriate under RAP 13.4(b)(2).

D. The Court of Appeals' Unpublished Opinion Does Not Raise a Significant Question of Law Under the Constitution of the State of Washington or of the United States.

There exists no argument whatsoever in USF&G's petition, apart from a cursory citation of the most offhand nature, that the Court of Appeals decision implicates the Constitution of the State of Washington or of the United States. RAP 13.4(b)(3). Neither are cited anywhere throughout the petition, and even RAP 13.4(b) is cited just once in the introductory paragraph. Petition at 1. Such an absence of discussion is peculiar inasmuch as the rule provides the only bases by which discretionary review may be granted. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). USF&G has failed to demonstrate that discretionary review is appropriate under RAP 13.4(b)(3).

E. USF&G's Unsupported View of the Covenant Judgment Does Not Raise an Issue of Substantial Public Interest.

"Painting a pumpkin green and calling it a watermelon will not render its contents sweet and juicy." *Arruda v. Sears, Roebuck & Co*., 310 F.3d 13, 24 (1st Cir.2002). As discussed above, nowhere did the Court of Appeals determine that the covenant judgment amount included an

allocation of future litigation costs. Instead, the court simply recognized that covenant judgments are distinct from settlements and that plaintiffs entering into a covenant judgment agreement must necessarily contemplate the risks of future coverage litigation. App. at 10. The trial court made no effort to calculate future litigation costs. Instead, the trial court simply acknowledged the undisputable fact that, unlike a cash settlement, the coverage action necessitated by a covenant judgment agreement may result in no recovery whatsoever and that this risk was a valid consideration in assessing the reasonableness of the covenant judgment amount. The Court of Appeals agreed with Conclusion of Law No. 23, observing that "Washington courts recognize that covenant judgments are distinct from settlements." App. at 9 (citing *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 765, 287 P.3d 551 (2012); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002)). Indeed, the trial court did not abuse its discretion "by considering the future bad faith litigation that would be necessary to enforce the covenant judgment." App. at 10.

Consequently, USF&G's suggestion that the future litigation costs are found in the difference between the "underlying settlement value" and the covenant judgment amount is entirely unsupported by both the

evidentiary record and the case law. Petition at 12.[2] The Court of Appeals explained not only how settlement discussions are not determinative of the *Chaussee* reasonableness determination, App. at 8, but also how the many changes to the case since the failed mediation increased the likely amount of a verdict at trial. App. at 5 ("Between this July 18th mediation and an August 1st meeting of counsel, much had worsened as to PM Northwest's prospects at trial."). Accordingly, the covenant judgment amount represented "the possible verdicts contemplated by both parties." App. at 10. It did not contemplate or attempt to calculate the costs of future litigation, and because of that, there is no basis to remand this matter to establish an amount of future litigation costs that were not included in the first instance.

USF&G points to the Ulbrichts' subsequent notice under the Insurance Fair Conduct Act (IFCA), RCW 48.30.015, as an attempt to make a double recovery, but this argument also fails. Because the covenant judgment amount did *not* include a calculation of future litigation costs, there will not be an "award [of] the same litigation expenses twice." Petition at 11. Rather, the covenant judgment represents

[2] USF&G's petition contains a table purporting to calculate the portion of the covenant judgment that represents future litigation costs by comparing prior settlement discussions to the final covenant judgment amount. This table has no citation to any evidentiary support in the record.

the actual damages incurred by PM Northwest and serves as the presumptive measure of damages in the future bad faith litigation. *W. Beach Condo. v. Commonwealth Ins. Co. of Am*., 11 Wn. App. 2d 791, 455 P.3d 1193 (2020); *Miller v. Kenney*, 180 Wn. App. 772, 802, 325 P.3d 278 (2014); *see also* App. at 9 (citing *Besel*, 146 Wn.2d at 738). IFCA expressly permits the Ulbrichts to pursue an action to recover the actual damages incurred as a result of USF&G's unreasonable denial of coverage, "together with the costs of the action, including reasonable attorneys' fees and litigation costs." RCW 48.30.015(1). Of course, if the Ulbrichts succeed in their IFCA claim, the court overseeing the case can certainly review the reasonableness of their attorney fee claim and adjust its award as necessary to avoid double recovery or unnecessary work.

To be sure, if the trial court had increased the amount of the covenant judgment to award future speculative attorneys' fees and costs, USF&G's petition might have merit. But that did not occur. Rather, the trial court holistically considered the uncertain outcome of a future coverage action in association with the other eight *Chaussee* reasonableness factors for which there exists overwhelming factual support. The Ulbrichts' IFCA notice is not a smoking gun placing the petitioner in an "untenable situation" but is the predictable and statutorily required step in the Ulbrichts' ongoing attempt to recover from this insurer

the damages flowing from its bad faith conduct. *See Werlinger v. Warner*, 126 Wn. App. 342, 350-51, 109 P.3d 22 (2005) (holding that the "sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit"). USF&G has failed to demonstrate that discretionary review is appropriate under RAP 13.4(b)(4).

V. CONCLUSION

The covenant judgment amount in this case did not include future attorneys' fees and costs of coverage and bad faith litigation. The trial court, taking into consideration the Ulbrichts' future risk of recovery along with evidence and conclusions supporting each of the other *Chaussee* factors, determined that the covenant judgment amount was reasonable. USF&G has failed to meet any of the criteria under RAP 13.4(b). For the foregoing reasons, Plaintiffs-Respondents requests that the Court deny discretionary review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 1st day of May, 2020.

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APPENDIX

Washington State Court of Appeals, Division One, Unpublished Opinion

FILED
2/10/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; ELLIOTT COMPANY, d/b/a ELLIOTT TURBOMACHINERY COMPANY; FRASER'S BOILER SERVICE, INC.; GENERAL ELECTRIC COMPANY; GOULDS PUMPS (IPG), INC.; HONEYWELL INTERNATIONAL INC., successor-in-interest to ALLIED SIGNAL, INC., successor-in-interest to BENDIX CORPORATION; IMO INDUSTRIES, INC., individually and as successor-in-interest to DE LAV AL TURBINE, INC., and ADEL WIGGENS; INGERSOLL-RAND COMPANY; ITT CORPORATION, as successor-in-interest to FOSTER VALVES; MET ALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PM NORTHWEST, INC.; SABERHAGEN HOLDINGS, INC., as successor to TACOMA ASBESTOS COMPANY and THE BROWER COMPANY; SEQUOIA VENTURES, INC., formally known as and as successor in interest to BECHTEL CORPORATION, BECHTEL, INC. BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.;	)	No. 79490-6-I (Consolidated with No. 79590-2-I) DIVISION ONE UNPUBLISHED OPINION

SULZER PUMPS (US), INC., formally known as SULZER BINGHAM PUMPS, INC.;
UNION CARBIDE CORPORATION;
WARREN PUMPS, LLC, individually and as successor in interest to QUIMBY PUMP COMPANY;
ZURN INDUSTRIES, LLC, as successor in interest to ERIC CITY IRON WORKS,

Appellant,

v.

ROBERT PAUL ULBRICHT and KAREN ULBRICHT, husband and wife; HEIDI L. ULBRICHT, ROBERT S. ULBRICHT,

Respondent.

FILED: February 10, 2020

HAZELRIGG-HERNANDEZ, J. — Intervenor United States Fidelity & Guarantee (USF&G) appeals a superior court's determination of reasonableness of a $4.5 million covenant judgment in favor of Robert and Karen Ulbricht and their dependent adult children (collectively, Ulbrichts). The covenant judgment was reached by counsel for the Ulbrichts and the sole remaining defendant in the suit, PM Northwest, days before trial was to commence and as PM Northwest was still left with uncertainty as to their insurers' position on defending them. The insurers for PM Northwest, USF&G and National Union Fire Insurance Company, intervened in the proceedings on reasonableness with the agreement of the parties. USF&G avers the court improperly considered previous asbestos verdict information and assigns error to a number of the findings of fact. We affirm the superior court's determination of reasonableness.

FACTS

In January 2018, Robert Ulbricht and his wife, Karen,[1] filed suit against 20 defendants, including PM Northwest, seeking damages for bodily injury from exposure to asbestos. The record indicates that Robert came into contact with asbestos through activities involving various contractors between 1973 and 1999 when he worked at the Texaco Oil Refinery (the plant) in Anacortes, Washington. In April 2018, the Ulbrichts amended their complaint a second time to include their two dependent adult children as plaintiffs. Due to Robert's mesothelioma diagnosis, the case was given an expedited trial date of August 6, 2018.

PM Northwest was a maintenance contractor at the plant; it did not manufacture asbestos or bring asbestos insulation onto the site. The duration of PM Northwest's work at the plant was disputed. PM Northwest asserted several defenses to the Ulbrichts' claims, including one based on the statute of repose which was denied on summary judgment. Prior to the summary judgment motion, the trial court struck 17 of PM Northwest's affirmative defenses, including employer negligence and superseding cause.

Attorneys for both the Ulbrichts and PM Northwest were deposed in preparation for the reasonableness hearing. Counsel for PM Northwest has defended asbestos cases since 2001. He estimated that 80 percent of all his cases ended in defense "victor[ies]." PM Northwest's counsel also recognized PM Northwest as a "major player" in the case. The attorney identified three key defenses for his client: 1) a lack of causal link, 2) comparative negligence on

[1] Because all of the plaintiffs share the same last name, we use their first names for clarity. We intend no disrespect.

Robert's part, and 3) assertion of error as to trial court's decision on the statute of repose. Counsel acknowledged that the chance of prevailing on the first two defenses was "not very good." The defense also recognized the difficulty that PM Northwest had with credibility challenges if the case proceeded to trial, given the expected testimony of four former PM Northwest employees discrediting the company president's denial of working with insulation at the plant. Counsel knew that a "formidable witness" who was an expert in asbestos was expected to testify for the plaintiffs. Perhaps most critically, he was also aware of the likelihood that his client would have to declare bankruptcy if an adverse verdict was entered.

Counsel for the Ulbricht family has represented plaintiffs in asbestos litigation since 1994, taking approximately 20 cases to verdict. The attorney's firm handles approximately 30 asbestos cases a year. The attorneys for PM Northwest and the Ulbrichts tried numerous asbestos cases against each other over the years. The Ulbrichts' attorney was aware of the mounting obstacles that PM Northwest was facing as trial approached.

In March 2018, PM Northwest notified one of its insurers, United States Fidelity & Guaranty Company (USF&G) of the Ulbrichts' claim. USF&G refused to defend or indemnify under the policy and would take no further action until PM Northwest located and produced a copy of the applicable policies. On July 10, 2018, PM Northwest obtained the policy information, but not the formal policy documents, and contacted Travelers and AIG Insurance seeking to open claims under these policy numbers. Shortly after, PM Northwest provided the insurers with the demand letter from Plaintiffs. Defense counsel tendered the claim to

Travelers and AIG, through a risk management company, during the mediation on July 18, 2018, but the insurers still refused to take any action. At that time, PM Northwest advised the insurers that trial was set to begin on August 6, 2018. The Ulbrichts sent PM Northwest a $3.5 million settlement demand, which PM Northwest's counsel described as "ridiculous" and "too high" for a settlement. No counter offer was made.

During the mediation on July 18, 2018, the assigned mediator, a retired judge experienced in asbestos litigation, suggested to defense counsel that PM Northwest consider a covenant judgment given that they had yet to receive authority to extend an offer since no insurance company had agreed to defend or indemnify. Between this July 18th mediation and an August 1st meeting of counsel, much had worsened as to PM Northwest's prospects at trial. PM Northwest's president testified in a deposition that they never worked with asbestos, in direct contrast to the testimony of former employees. PM Northwest's industrial hygiene expert witness testified that she agreed PM Northwest's conduct at the plant violated safety regulations, and the Ulbrichts had brought a spoliation motion. Both sides were actively preparing for trial. The Ulbrichts' attorney expected a verdict above $6 million based on recent asbestos verdicts in Washington and Oregon. After offset of the aggregate settlements already obtained, a verdict would likely result in a judgment of $4.5 to $5.5 million against PM Northwest. Defense counsel similarly estimated the likely outcome of a trial and advised PM Northwest that a potential adverse verdict could range from $1 to $6 million.

Counsel for both sides decided to meet two days before trial to explore settlement possibilities one last time. At the meeting, defense counsel revealed that the insurers had thus far declined to provide defense or indemnity. Both parties' attorneys then began to explore resolution through covenant judgment. Plaintiffs' counsel identified the risk of such a resolution for his clients due to "trading one litigation for the other." Given the recent developments since the last mediation and the contingent nature of such a resolution, Plaintiffs' counsel increased the demand by $1 million from their previous settlement offer to a total of $4.5 million. Defense counsel did not see another alternative to protect his client and also considered the recent verdicts in Washington State. Defense counsel felt $4.5 million was "within the range of possible verdicts" and advised his clients to agree to the covenant judgment in that amount, with an assignment of all rights to pursue a coverage action against its insurers.

Following entry of the resolution, both parties stipulated to intervention by PM Northwest's insurers to challenge the reasonableness of the amount of the covenant judgment.[2] A reasonableness hearing occurred on November 29, 2018 with video testimony by Robert and live testimony from Karen. The parties provided both written and oral argument. The superior court entered its findings of fact and conclusions of law on December 26, 2018 and determined the covenant judgment was reasonable. USF&G timely appeals the superior court's ruling on the reasonableness of the covenant judgment.

[2] The second insurer, National Union Fire Insurance Company, also intervened in the litigation as to reasonableness with USF&G and initially joined in their appeal of that ruling. However, National Union voluntarily dismissed their appeal during the pendency of the matter before this court.

ANALYSIS

I. Reviewing a Reasonableness Determination

We review a superior court's determination of reasonableness for abuse of discretion. Water's Edge Homeowners Ass'n v. Water's Edge Assocs., 152 Wn. App. 572, 584, 216 P.3d 1110 (2009). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." Boguch v. Landover Corp., 153 Wn. App 595, 619, 224 P.3d 795 (2009).

"When an insurer refuses to settle a claim, the insured may negotiate a settlement on its own and then seek reimbursement from the insurer." Chausee v. Maryland Cas. Co., 60 Wn. App. 504, 509-10, 803 P.2d 1339 (1991). An insurer is only liable for the amount of a settlement that is reasonable and made in good faith. Evans v. Cont'l Cas. Co., 40 Wn.2d 614, 628, 245 P.2d 470 (1952). In Chausee, this court adopted the factors from Glover v. Tacoma General Hospital, to apply to the reasonableness of covenant judgments. Chausee, 60 Wn. App. at 512; Glover, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983). RCW 4.22.060 provides the opportunity for a party to request a reasonableness hearing and places the burden on the party requesting settlement to prove the reasonableness of such. Application of the Chausee factors focuses on weighing them based on the facts of the case at issue.

When a trial court evaluates a covenant judgment for reasonableness the factors applied are:

> [T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses

> of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Chausee, 60 Wn. App at 512 (citing Glover, 98 Wn.2d at 717) (alterations in original). Perhaps most critically for our examination, courts have consistently held that "[n]o one factor controls and the trial court has the discretion to weigh each case individually." Id.; See also Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 739, 49 P.3d 887 (2002).

II. Consideration of Previous Verdicts

USF&G argues that the superior court improperly considered "a purely hypothetical settlement amount based on the range of verdicts," instead of the amounts that had been discussed at the prior mediation and were all rejected. This was not improper. A reasonableness hearing examines the amount of the proposed covenant judgment by applying the Chausee factors, not necessarily the amounts previously discussed. See, e.g., Chausee, 60 Wn. App. at 510; Hidalgo v. Barker, 176 Wn. App. 527, 537, 309 P.3d 687 (2013). In the current case, the parties were in quite different positions when they arrived at the covenant judgment days before trial than they were during the court-ordered mediation session.

In Sharbono v. Universal Underwriters Insurance Co., both the plaintiff and defendant submitted jury verdict research at the reasonableness hearing. 139 Wn. App. 383, 404, 161 P.3d 406 (2007). The defendants argued on appeal that the research submitted by the plaintiff included verdicts that were unrepresentative for

the case. Id. Division Two of this court held that the court properly relied on the research, which included past jury verdicts, when evaluating the reasonableness of the covenant judgment. Id. In the current case, the court's consideration of recent verdicts provided by both counsel for PM Northwest and the Ulbrichts operated as a basic framework from which to evaluate reasonableness and was not an abuse of discretion. This situation is analogous to Sharbono, except that instead of critiquing the specific past verdicts that were reviewed at the hearing, USF&G challenges the court's ability to look to previous verdicts at all. This argument by USF&G is unsupported by the case law. The court's consideration of past asbestos verdicts in applying the Chausee factors did not constitute abuse of discretion.

III. Plaintiffs' Risk and Expense of Pursuing a Bad Faith Claim

USF&G next argues that the court erred by considering the risk of continued litigation for the Ulbrichts in the overall reasonableness determination. Washington courts recognize that covenant judgments are distinct from settlements. "[T]he amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable." Besel, 146 Wn.2d at 738. A covenant judgment is distinct from a cash settlement, in that it does not release a tortfeasor from liability and is only an agreement to seek recovery from a specific asset. Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 765, 287 P.3d 551 (2012). "The insurer still must be found liable in the bad

faith action and may rebut the presumptive measure by showing the settlement was the product of fraud or collusion." Id.

The trial court did not abuse its discretion by considering the future bad faith litigation that would be necessary to enforce the covenant judgment. It is proper for the trial to contemplate the risks and costs involved when evaluating the reasonableness of the proposed covenant judgment. This is what the Chausee factor "risks of continued litigation" encompasses for a court to consider and weigh. At oral argument, USF&G advanced the notion that this factor does not include possible future suits and only refers to the risk of continuing the current suit; we are not persuaded.

As the Ulbrichts point out, the covenant judgment was within the possible verdicts contemplated by both parties. USF&G focuses on conclusion of law 23, where the superior court recognized "[w]hile covenant judgments and settlements overlap in many ways, they are nevertheless separate and distinct agreements that cannot be referred to interchangeably." The court went on to discuss the risks of continued litigation to PM Northwest in the current suit and the risk that the Ulbrichts "may recover nothing from PM Northwest's insurers" in a future bad faith suit. This sort of reasoning is exactly what the Chausee factor "risks of continued litigation" is designed to capture. The superior court made a total of six conclusions of law under this factor of risks and expenses of continued litigation and considered the reasonableness of the resolution holistically.

Further, if the court could not consider litigation beyond the current suit, as USF&G argues, then courts would be unable to consider outside bankruptcy

proceedings as they did in Werlinger v. Warner. 126 Wn. App. 342, 350-51 109 P.3d 22 (2005). The contemplation of the risks associated with a covenant judgment that were considered by the attorneys for both PM Northwest and the Ulbrichts during their meeting before the start of trial reinforces the conclusion that it was something the court should and did consider in terms of how the final covenant judgment was reached. USF&G argues that PM Northwest's motivation for pursuing this covenant judgment is to escape exposure. This is the very nature of a covenant judgment and likely the most common reason that they are pursued, which is why a court has the authority to review a proposed covenant judgment for reasonableness. The court did not abuse its discretion by considering the risks inherent in future suit against the insurers in the context of a reasonableness determination.

IV. The Superior Court's Findings and Conclusions

USF&G further argues that a number of the superior court's findings were not supported by substantial evidence. We disagree. A reasonableness hearing necessarily involves factual findings which will not be disturbed as long as substantial evidence supports them. Water's Edge, 152 Wn. App. at 584. Our review is limited to whether substantial evidence supports the findings, and if so, whether the findings support the conclusions of law from the trial court. Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise." Id. The burden is on

the challenging party to show that the finding of fact is not supported by the record. Id.

"Washington courts have found a trial court's reasonableness determination to be valid even when the trial court fails to list any of the Chausee factors and instead simply mentions that the parties addressed the factors in their briefs and the trial court considered the briefs." Water's Edge, 152 Wn. at 585. Even more dispositive, "[n]o one factor controls and the trial court has discretion to weigh each case individually." Chausee, 60 Wn. App. at 512. USF&G only assigns error to conclusions under four of the nine Chausee factors. Additionally, the four conclusions identified by USF&G in its assignments of error on appeal are not the only conclusions under those corresponding factors. Even if we disregarded all four conclusions as urged by USF&G, the reasonableness ruling could still be independently affirmed on the basis of any number of the unchallenged findings and conclusions.

In looking to the two findings challenged on appeal, finding 8 has five factual components, each of which is supported by substantial evidence and occurred in the three weeks between the mediation and the attorneys' meeting days prior to trial. First, the record before this court makes it clear that "all remaining defendant's settled." Second, "PM Northwest's CR 30(b)(6) representative reaffirmed testimony from a decade ago that the company had no involvement with asbestos materials in stark contrast to the testimony of Mr. Ulbricht and PM Northwest's own employees." This is supported by the July 24, 2018 deposition of PM Northwest's representative, Richard Huntley Jr. Third, "PM Northwest's sole

expert testified that the company violated OSHA regulations in its handling of asbestos materials, causing Plaintiffs to subpoena the expert in their case in chief." This is anchored in the deposition of the Ulbrichts' counsel regarding the expert's testimony and by the witness list provided in preparation of trial.

Fourth, "[p]laintiffs filed a spoliation motion based on evidence that work records had been destroyed after the company had become aware of its asbestos liabilities." This motion was included in the record. The fifth component is "PM Northwest had repeated communications with representatives of intervenors USF&G and National Union apprising them of the fast approaching trial date, neither insurer agreed to furnish defense of indemnity prior to trial." This also is supported by copies of email communications with the insurers and depositions of counsel which make clear that this was the crux of the reasoning behind PM Northwest's counsel determination that it was necessary to explore a covenant judgment.

Finding 11 addresses the procedural posture and history of the case and is supported, in part, by the simple fact of a covenant judgment coming before the court on a reasonableness hearing. This finding states:

> Based on PM Northwest's perilous litigation posture and, in the absence of indemnity coverage, inability to satisfy a multi-million verdict in this case, the parties discussed resolution through covenant judgment. Plaintiffs' counsel proposed that PM Northwest enter into a $4.5 million stipulated judgment together with a covenant by Plaintiffs not to execute said judgment against Defendant's assets and limit their recovery to any insurance coverage available to PM Northwest to satisfy the judgment. PM Northwest's counsel agreed to discuss the proposed settlement with his client.

In the record there are emails and depositions that support the assertion that the Ulbricht's' counsel proposed that PM Northwest enter into a $4.5 million judgment. PM Northwest's counsel admitted that as trial approached he felt their chances of winning were getting worse, that his client would be unable to satisfy the possible judgment against it, and that this compelled him to discuss the possibility of a covenant judgment. The record supports the portion of finding stating that there was an "absence of indemnity coverage." The fact that PM Northwest's counsel admitted he would discuss the proposal with his clients is supported by the signed agreement itself. Each of the component parts of the two challenged findings are well supported by the record; therefore, substantial evidence exists to support them.

The superior court properly utilized the factors laid out in Chausee 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 Chausee. We have upheld trial courts' weighing of the factors even without such a clear record. See Martin v. Johnson, 141 Wn. App. 611, 620, 170 P.3d 1198 (2007). 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 Chausee 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. However, we find that the superior court's findings and conclusions in their entirety were proper

as they were supported by substantial evidence in the record, and the conclusions of law properly followed.

The trial court's determination of reasonableness is affirmed.

WE CONCUR:

CERTIFICATE OF SERVICE

I certify that on May 1, 2020, I caused to be served a true and correct copy of the foregoing document upon:

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Dated at Seattle, Washington this 1st day of May 2020.

BERGMAN DRAPER OSLUND UDO, PLLC

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