NO. 98791-2

SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFREY WOOD AND ANNA WOOD, husband and wife; MILIONIS CONSTRUCTION, INC., a Washington corporation; STEPHEN MILIONIS, an individual,

Respondents/Petitioners,

v.

THE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY,

Appellant (Intervenor Below)

ANSWER TO PETITION FOR REVIEW

Gary Sparling, WSBA # 23208
Sarah Davenport, WSBA # 45269
SOHA & LANG, P.S.
1325 Fourth Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 624-1800
Facsimile No.: (206) 624-3585
Attorneys for Appellant The Cincinnati Specialty Underwriters Insurance Company

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A. INTRODUCTION

Appellant The Cincinnati Specialty Underwriters Insurance Company, Intervenor below, ("Cincinnati") submits this Answer to the Petition for Review (the "Petition") filed by Jeffrey and Anna Wood (collectively, "Petitioners").

B. COURT OF APPEALS DECISIONS

Petitioners are seeking review of an April 28, 2020 decision by Division III of the Washington Court of Appeals, in *Wood v. Milionis Constr., Inc.*, Case No. 36286-8-III; 2020 WL 2042964, and also the Court of Appeals' June 16, 2020 decision denying Petitioners' Motion for Reconsideration. Cincinnati is not seeking review of these decisions.

C. COUNTER-STATEMENT OF ISSUES ON REVIEW

1. Review should be denied under RAP 13.4(b)(1), because the Court of Appeals' decision is not in conflict with this Court's decision in *Glover v. Tacoma Gen. Hospital*, 98 Wn.2d 708 (1983); and
2. Review should be denied under RAP 13.4(b)(2), because the Court of Appeals' decision is not in conflict with any published decision of the Washington Court of Appeals.

D. COUNTER-STATEMENT OF THE CASE

1. Nature Of The Case Below

Petitioners sued Cincinnati's insured, Milionis Construction, Inc. ("MCI"), in Spokane County Superior Court alleging, *inter alia*, claims for breach of contract, negligence, and violation of the Washington Consumer Protection Act, RCW 19.86, arising out of a construction dispute involving MCI's agreement to build a custom home for Petitioners in Newman Lake, Washington.

Cincinnati defended MCI in Petitioners' suit under a reservation of rights, CP at 145 ¶ 19, and it retained Spokane attorney Shane McFetridge as MCI's defense counsel. Cincinnati also filed an action against MCI and Petitioners in federal court, seeking a declaration that its policy did not cover Petitioners' claimed damages because MCI failed to satisfy certain conditions for coverage. *See* CP at 138-147.

Cincinnati participated in three mediations in Petitioners' suit, the last of which was on October 19, 2018. Just before that third mediation, MCI's defense expert, Nick Barnes, estimated Petitioners' repair costs at $224,772.59. CP at 415. Mr. McFetridge then reduced that number to $146,102.18, to account for fault attributable to Petitioners' own architect and engineer; he then added $200,000 for Petitioners' prior repair work. *Id*. Based on these computations, Mr. McFetridge estimated MCI's

exposure for Petitioners' damages at $326,102.18, and he recommended settlement authority of $350,000 to Cincinnati. *Id*.

At the conclusion of the October 19, 2017 mediation, Petitioners and MCI signed a "Binding CR2A Mediated Settlement Agreement, wherein they agreed to settle for $399,514.58 – an amount they wanted to be funded entirely by Cincinnati. CP at 395-396. The next day, defense counsel McFetridge told Cincinnati that prior to the mediation he had "grappled with the idea of increasing his recommended settlement amount to $400,000," but he now recommended that Cincinnati pay the settlement amount reached in the mediation. CP at 420. Due to its serious coverage concerns, however, Cincinnati offered to contribute $100,000 toward the agreed amount.[1] CP at 303. MCI refused to contribute anything toward the settlement, and the case then proceeded to arbitration pursuant to the parties' construction contract. The arbitration was scheduled for May 29, 2018. CP at 422.

Mr. McFetridge sent a supplemental case report to Cincinnati on March 28, 2018. In his report, Mr. McFetridge stated that he would be filing motions in the arbitration that could result in the dismissal all of

[1] The federal court subsequently ruled that MCI's breach of policy condition voided any coverage under Cincinnati's policy. *See Cincinnati Specialty Underwriters Ins. Co. v. Milionis Constr., Inc.*, 352 F. Supp. 3d 1049 (E.D. Wash. 2018).

Petitioners' claims except for breach of contract. CP at 423. He also noted that Petitioners' expert estimated repair costs at $761,234.00, that Petitioners claimed an additional $200,000.00 for prior repairs, and that Petitioners were also claiming $180,000.00 for attorney fees and costs. CP at 424. Based on Petitioners' numbers, Mr. McFetridge estimated that Petitioners could recover "a total, net award . . . in the amount of $1,141.234.00."[2] *Id.*

Nonetheless, Mr. McFetridge told Cincinnati that defense expert Barnes still estimated Petitioners' total repair costs at $224,772.59, which led to a total damages estimate of $346,102.18 after reducing Mr. Barnes' estimate for the fault of Petitioners' architect and engineer, and after adding $200,000 for prior repairs. *Id.* Thus, shortly before the arbitration was scheduled to begin, Mr. McFetridge again recommended settlement authority for the $399,514.58 settlement amount reached in the October 2017 mediation. *Id.*

On the eve of arbitration (and unbeknownst to Mr. McFetridge), Petitioners and MCI agreed to settle the Petitioners' claims for $1.7 million. CP at 201-202. As part of the settlement, MCI admitted full liability for the Petitioners' damages, stipulated to entry of a judgment for

[2] This appears to be source of confusion regarding the $1.2 million number: defense counsel's report describing Petitioners' position.

$1.7 million, and assigned its insurance rights against Cincinnati to the Petitioners; in return, Petitioners promised to satisfy the judgment through Cincinnati's insurance only. CP at 201-203.

2. The Reasonableness Hearing

On June 29, 2018, Petitioners and MCI filed a joint motion for entry of their stipulated judgment. CP at 34-129. Cincinnati moved to intervene so that it could participate in the reasonableness hearing. CP at 173-188. Cincinnati also moved to continue the hearing and requested leave to conduct limited discovery into the parties' settlement negotiations. CP at 173-174, 183-187.

Early in the July 13, 2018 hearing, the trial court expressed a belief that MCI's own defense expert Barnes had opined that Petitioners' damages were $1.2 million:

> THE COURT: Then you, also, have that [defense] expert that said 1.2.

RP at 22. MCI"s counsel then latched onto and repeated this "fact" in his argument:

> [BY MR. CUNNINGHAM: Cincinnati had] everything they needed to evaluate the damages in this case, and they've had all the expert reports, including [the] defense expert who had the damages [of] at least $1.2 million.
>
> * * *

> The Woods' own experts damages put it at well over $1.7 million into the $2 million range. Cincinnati's own expert, which it hired, had it at $1.2 million. . . .

RP at 25-26. The trial court subsequently repeated its belief that MCI's defense expert had estimated Petitioners' damages at $1.2 million:

> Originally I thought we can continue [the reasonableness hearing], but when you're looking at in the meantime CPA claims, individual liability, emotional claims and the defense expert, yes, hired by [defense counsel] McFetridge, is saying this is worth $1.2 million, we're talking about a $500,000 difference from your own [expert].

RP at 47 (emphasis added).

At the conclusion of the parties' initial arguments, the trial court granted Cincinnati's motion to intervene, but it declined to continue the hearing or to grant the discovery requested by Cincinnati.[3] CP at 48-49.

When the hearing recommenced on July 20, 2018, Mr. McFetridge testified that he believed MCI's summary judgment motions filed in the arbitration would be meritorious. RP at 83. Mr. McFetridge also testified, consistent with his reports to Cincinnati, that defense expert Barnes estimated the Petitioners' contract damages at $224,772.59, and that he had recommended settlement authority of $350,000 prior to the mediation. RP at 70-72. Mr. McFetridge further testified that his settlement

[3] The trial court said it was initially inclined to permit Cincinnati to take limited discovery, until it learned that the "*defense* expert [said] this is worth $1.2 million." *See* RP at 47 (emphasis added).

recommendation had increased from $350,000 to $399,514.58, between the mediation and May 2018. *See* RP at 120-121.

Significantly, Mr. McFetridge testified that he did not recall receiving a damages estimate of $1.2 million from the defense expert:

> [COUNSEL]: . . . There was a discussion and argument earlier about a defense expert that estimated the repairs or the damages of $1.2 million, and you were in the seats. Did you hear that discussion?
>
> [MR. McFETRIDGE]: I heard that number.
>
> [COUNSEL]: And is that correct what was represented?
>
> [MR. McFETRIDGE]: I don't recall specifically. . . .

RP at 68.

Mr. McFetridge's gave the same answer when he was again asked that question by the court:

> THE COURT: When did you get the defense expert recommendation I believe it was Blair just because I don't have of $1.2 million[?]
>
> THE WITNESS: Mr. Blair was the claim handling to whom I reported. I believe you are asking about Mr. Barnes.
>
> THE COURT: Mr. Barnes. I'm sorry.
>
> THE WITNESS: That's okay.
>
> THE COURT: Do you remember when you got that?
>
> THE WITNESS: Well, I don't recall ever getting a number from him that was $1.2 million. The numbers that I got from Mr. Barnes were his evaluation.

RP at 121.

At the conclusion of the hearing, the trial court ruled that the $1.7 million stipulated amount was reasonable. CP at 145.

3. The Court Of Appeals' Decision

Cincinnati appealed to Division III of the Washington Court of Appeals, which reversed and remanded. The Court of Appeals found that the trial court's reasonableness determination was based on two important "facts" that were not in the record: (1) that MCI's own defense expert estimated the Petitioners' damages at $1.2 million; and (2) that MCI's defense counsel had substantially increased his evaluation of damages between the October 2017 mediation and the May 2018 settlement. *See* Opinion at 19-22. The record, however, demonstrated that these "facts" were actually assumptions by the trial court that were unsupported by and contrary to the evidence presented in the hearing. *See id*. Accordingly, the Court of Appeals concluded that the trial court's reasonableness determination was not supported by substantial evidence, and it reversed and remanded for another hearing.[4] *See* Opinion at 22.

Petitioners now ask this Court for discretionary review under RAP 13.4(b)(1) and (2), arguing that the Court of Appeals failed to apply the proper standard of review under *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d

[4] The Court of Appeals also suggested that Cincinnati should be allowed to conduct discovery before the next reasonableness hearing. Opinion at p. 22.

707 (1983), and that the Court of Appeals improperly weighed the evidence and substituted its own discretion for that of the trial court.

E. REASONS WHY REVIEW SHOULD BE DENIED

Petitioners' request for discretionary review should be denied, because the Court of Appeals applied the proper standards and did not weigh the evidence when it reviewed and reversed the trial court's reasonableness determination. Contrary to Petitioner's contentions, the Court of Appeals correctly found that the trial court's reasonableness determination was based on two key "facts" that were not "facts" at all – they were merely assumptions having no basis whatsoever in the record. The trial court's factual determinations, therefore, were not supported by any evidence, much less "substantial evidence," and the Court of Appeals did now weigh any evidence to reach its conclusion.

A trial court's determination of "reasonableness" is reviewed for abuse of discretion, and the "trial judge faced with this task must have discretion to weigh each case individually." *Glover v. Tacoma Gen. Hospital*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). "A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons."

Water's Edge Homeowners Ass'n v. Water's Edge Assocs, 152 Wn. App. 572, 584 ¶[24 (2009).

Moreover,

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

In re Marriage of Fiorito, 112 Wn. App. 657, 663-64 (2002).

As part of its "reasonableness" review, the trial court must also make certain factual determinations, which are reviewed under the "substantial evidence" standard, *i.e.*, the trial court's factual determinations will not be disturbed on appeal when they are supported by substantial evidence. *See, e.g., Bird v. Best Plumbing Group, Inc.*, 175 Wn.2d 756, 774-75 (2012).

In this case, the trial court ruled that the $1.7 million stipulated judgment amount was reasonable based on two key "facts." First, the trial court believed that MCI's own defense expert, Nick Barnes, opined that Petitioners' damages were $1.2 million:

> Originally I thought we can continue [the reasonableness hearing], but when you're looking at in the meantime CPA claims, individual liability, emotional claims and the defense expert, yes, hired by [defense counsel] McFetridge, is saying this is worth $1.2 million, we're talking about a $500,000 difference from your own [expert].

RP at 47 (emphasis added).

The uncontroverted evidence presented in the hearing, however, confirms that Mr. Barnes never estimated Petitioners' damages at $1.2 million; rather, he consistently estimated the Petitioners' repair costs at $224,772.59:

- Before the October 2017 mediation, CP at 415; and
- Shortly before the scheduled arbitration, CP at 424.

Defense counsel McFetridge also testified, twice, that he did not recall receiving a $1.2 million damages estimate from Mr. Barnes. *See* RP at 68, 121.

The trial court, however, continued to adhere to its erroneous belief regarding Mr. Barnes's opinions, and it approved the stipulated $1.7 million settlement by reasoning that the stipulated amount fell between $1.2 million and Petitioner's claimed damages in excess of $2 million.[5] *See* RP at 143-145.

Thus the trial court's reasonableness determination was based on an erroneous "belief" that was not even a "fact" at all. In so doing, the court manifestly abused its discretion under *Glover, supra*, and it also made a key factual determination that was unsupported by any evidence,

[5] Contrary to Petitioners' contentions, the trial court's reasonableness analysis also took into account Petitioners' tort and Consumer Protection Act claims, as well as their claims against MCI's officers. *See* RP at 142.

much less "substantial evidence." This alone warrants denial of the Petition.

Petitioners contend that the Court of Appeals' decision conflicts with other decisions by this Court and other published Court of Appeals decisions, claiming that the Court of Appeals ignored the fact that the trial court's discretion "is far reaching," and citing to a number of appellate decisions that review the factual determinations allowed when a trial court makes a reasonableness determination. *E.g., Bird v. Best Plumbing Group, LLC*, 175 Wn. 2d 756, 774-75 (2012); *Eastlake Const. Co. v. Hess*, 102 Wn.2d 30, 47-48 (1984); *Glover*, 98 Wn.2d at 718, 658 P.2d 1230; *Hidalgo v. Barker*, 176 Wn. App. 527, 548-49 (2013). This misconstrues the Court of Appeals' decision. The Court of Appeals did not reverse the trial court's reasonableness determination after conducting a *de novo* review of the *Glover* factors and reaching its own factual determinations; it reversed because the trial court based its reasonableness determination on mistaken assumptions and "facts" that were not even in the record.

Second, the trial court's reasonableness determination was also based on a belief that the defense damages estimates increased substantially between the October 2017 mediation and the May 2018 settlement. *See* RP at 141. The record, however, tells a totally different

story, because Mr. McFetridge's settlement recommendations remained within the same range over time, and they never went above $400,000:

- Before the October 2017 mediation, he recommended settlement authority of $350,000, CP at 415;
- Shortly after the October 2017 mediation, Mr. McFetridge increased his recommendation to $399,514.58, corresponding to the agreed amount from the mediation, CP at 420; and
- On March 28, 2018, shortly before the scheduled arbitration, he again recommended settlement authority of $399,514.58, CP at 424.

Mr. McFetridge also testified that his defense damages evaluation did not change significantly between October 2017 and May 2018:

> THE COURT: Hang on just a second. I may have a question that was based on Mr. Pool's question. He asked you if your recommendations for settlement authority went up over time from November of '16 [sic] to May of '18. Did your recommendations to Cincinnati go up?
>
> THE WITNESS: Within that timeframe, my recommendation went up, but I tried to be as specific as I could by my answer. It did go up immediately following the October mediation because we had learned some additional information in terms of expenses that were claimed to have been paid. So that's how we got [] to the 399 number as opposed to my prior recommendation that they fund up to 350.

RP at 120-121 (emphasis added).

Despite the undisputed evidence in the record and Mr. McFetridge's testimony, the trial court somehow concluded that the defense damages estimates did increase significantly between the final mediation and the settlement, and the court based its reasonableness determination on that belief:

> [THE COURT:] When you look at what Mr. Milionis and the liability of the corporation and the officers of the corporation and the damages, I look at it in October, but since October, they did a lot more negotiations. They did depositions. You got experts involved on the defense side, too, that gave a lot higher numbers than the $399,000 that happened in October.

RP at 141 (emphasis added).

Thus the second key "fact" found by the trial court was likewise based on the trial court's erroneous belief and not on any evidence in the record – much less "substantial evidence," and the Court of Appeals did not have to weigh any evidence to reach that conclusion. Discretionary review should also be denied for this additional reason.

F. CONCLUSION

For the reasons set forth in Part E, above, the Court of Appeals' decision does not conflict with any decision of the Supreme Court, nor does it conflict with any published decision of the Court of Appeals. The Petition, therefore, does not satisfy the requirements of RAP 13.4(b)(1) or (2), and discretionary review should be denied.

DATED this 17th day of August, 2020.

SOHA & LANG, P.S.

By: */s/Gary Sparling*
Gary Sparling, WSBA # 23208
Sarah Davenport, WSBA # 45269

Attorneys for Appellant The Cincinnati Specialty Underwriters Insurance Company

CERTIFICATE OF SERVICE

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

I hereby certify that on August 17, 2020, I caused to be served a true and correct copy of the foregoing ANSWER TO PETITION FOR REVIEW on the following named person(s) via E-MAIL:

Brook Cunningham
Randall | Danskin, P.S.
601 West Riverside, Suite 1500
Spokane, WA 99201
Tel: (506) 747-2052
Fax: (509) 624-2528
Email: blc@randalldanskin.com

Kevin W. Roberts
Roberts | Freebourn, PLLC
1325 W. 1st Avenue, Suite 303
Spokane, WA 99201
Tel: (509) 381-5262
Fax: (509) 777-2215
Email: kevin@robertsfreebourn.com
Attorneys for Defendant Anna Wood and Jeffrey Wood

Dated August 17, 2020.

/s/Angela Murray
Angela Murray
Legal Secretary to Gary Sparling

SOHA & LANG

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Phone: (206) 624-1800

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