NO. 99561-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JENNA J. WHEELER, on behalf of herself and her minor daughter, CHASTITY YOUNGBLOOD, and as Personal Representative of the Estates of NIKOLAS W. WEISENBACH and OMEN W. WEISENBACH,

Petitioners,

vs.

MARVIN G. BOCK and NADINE EVANS, husband and wife, and the marital community composed thereof; SUBARNA KAKSHAPATI, a single person; MACPHERSON'S PROPERTY MANAGEMENT, INC., a Washington corporation; and PEAK IMPROVEMENTS, LLC, a Washington limited liability corporation,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara L. Linde, Judge

ANSWER TO PETITION FOR REVIEW OF RESPONDENTS BOCK AND EVANS

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I. NATURE OF THE CASE

This case involves the death of two individuals, Omen and Nikolas Weisenbach, who succumbed to smoke inhalation in a residential fire. Petitioners' lawsuit against the property owners (respondents Bock & Evans) and the property manager (respondent MacPherson) required proof that respondents breached a duty of care and that the breach proximately caused the deaths. Petitioners allege the breach of duty was the lack of a self-closing door between the kitchen and the family room set up in the garage space.

To establish proximate cause beyond speculation, petitioners were required to present admissible proof that had the self-closing door been in place, Nikolas and Omen would have escaped the fire. Petitioners' theory is that the fire went out of control and prevented Nikolas and Omen from escaping the second floor when the exterior door to the family room/garage space was opened. Petitioners' expert, Mr. Rice stated unequivocally that he could not testify whether or not Nikolas and Omen were alive when the exterior garage door was opened. In a later declaration, Mr. Rice testified that had the self-closing door been installed, the fire would not have spread upstairs and caused the deaths.

Division I correctly affirmed the superior court's orders granting summary judgment because petitioners failed to present admissible

evidence from which a jury could conclude without speculation that an operating self-closing door would have allowed Nikolas and Omen to survive the fire. Division I's opinion is consistent with this Court's opinions and the opinions of other Courts of Appeal. There are no grounds for review and this Court should deny review.

II. ISSUES PRESENTED

1. Should this Court deny review where Division I correctly determined that petitioners failed to present admissible proof upon which a jury could conclude the lack of a self-closing door was the cause of Nikolas and Omen's deaths?

2. Should this Court deny review where no grounds exist for review and where Division I's decision does not conflict with any Supreme Court or Court of Appeals' opinions?

III. ARGUMENT

This Court only accepts review if one or more RAP 13.4(b) criteria exist:

> 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.

The petition generally claims a conflict with a decision of the Court of Appeals and a conflict with a decision of this Court. *See* RAP 13.4(b)(1), (2). There is no conflict and this Court should deny review.

IV. STATEMENT OF THE CASE

Respondents Bock and Evans rely on the facts and procedure set forth in their Brief of Respondents and the Court of Appeals opinion. For the sake of brevity, those facts and procedure are not repeated here.

V. ARGUMENT

A. MR. RICE'S OPINION DID NOT CREATE GENUINE ISSUES OF MATERIAL FACT.

The Court of Appeals and the superior court correctly concluded that Mr. Rice's statements did not create a genuine issue of material fact. Petitioners contend Mr. Rice's opinions should not have been stricken under *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989) because (a) Mr. Rice's declaration did not directly contradict his deposition testimony, and (b) Mr. Rice provided a reasonable explanation for why his declaration statements differed from his deposition testimony. Mr. Rice's declaration directly contradicted his deposition testimony and his "explanation" for the inconsistency was neither reasonable nor plausible and certainly does not create an issue of material fact.

1. *Marshall* Applies Because Mr. Rice's Amended Declaration Directly Contradicted His Deposition Testimony.

Mr. Rice unequivocally testified at his April 2018 deposition that he could not testify whether or not Nikolas and Omen were still alive when the exterior garage door was opened. (CP 183, 185)

Months later, in his November 16, 2018 declaration in opposition to summary judgment, Mr. Rice stated:

> 23. I have no doubt that the broken self-closing and self-latching mechanism on the door between the garage and the remaining living area of the home was a proximate cause of the death of Nikolas and Omen Weisenbach. If this self-closing and self-latching mechanism had been functioning properly, this door would have been closed. The fire in the kitchen would thus have been unaffected by the opening of the garage door. Since it was broken, the door remained open. As a result, when the garage door was opened, it permitted a tremendous influx of air into the kitchen fire. *This additional fuel caused what had been a relatively modest kitchen fire to explode into an inferno, which in turn, caused the deaths of both Nikolas and his son, Omen.*

(CP 471-72) (emphasis added).

The deposition testimony and declaration statement directly conflict. In his deposition, Mr. Rice did not know whether Nikolas and Omen were alive before the garage door opened. In his declaration, Mr. Rice purported to know that Nikolas and Omen died after the garage door was opened. Mr. Rice's contradictory statements cannot be reconciled, and

Division I and the superior court properly concluded Mr. Rice's testimony did not create triable issues of fact.

In his declaration, Mr. Rice also stated that when the exterior garage door was opened, the fire became an inferno and neither Nikolas nor Omen had a chance to survive. (CP 465-66) This statement not only contradicts Mr. Rice's deposition testimony that he had no opinion about whether Nikolas and Omen were alive before the garage door was opened, the statement also contradicts his other deposition testimony. At his deposition, Mr. Rice testified he did not have any opinion about how long someone can survive without protective gear in smoke and heat. (CP 185)

2. Mr. Rice's Amended Declaration Did Not Explain Away the Direct Contradiction from his Deposition Testimony.

Petitioners contend that Mr. Rice explained why his declaration statements differed from his deposition testimony and a jury should assess whether the explanation is plausible. (Petition at 10-12) Mr. Rice's explanation is neither reasonable nor based on facts.

Petitioners argue that the declarations of Ms. Chaney and Mr. Smith combined with Deputy Fire Marshall Monsebroten's findings "establish beyond any doubt that Nikolas was alive when the exterior garage door was opened." (Petition at 13-14) (emphasis in original) There is no evidence to support this conclusion. Petitioners rely on impermissible speculation.

Citing CP 14, petitioners contend that Mr. Monsebroten found that "Nikolas opened the second floor bedroom window before the exterior garage door was opened." (Petition at 13-14) (emphasis in original) CP 14 is page 6 of the 16-page Valley Regional Fire Authority Scene Exam Report prepared by Deputy Fire Marshal John Monsebroten ("Report"). (CP 9) Page 6 of the Report does explain how fire, heat, smoke, and other combustions would spread. The Report does not, however, provide a timing of the sequence of events. It states:

> When the occupants evacuated unit A they left the slider door open. The ventilation flow path for the fire changed to bilateral air movement from the opening. The open slider door allowed smoke and products of combustion to vent out the upper aspect of the doorway as well as to entrain fresh air in from the lower aspect of the opening; resulting in greater fire growth. As the fire grew in intensity the open kitchen pass-through window allowed heat, smoke and other products of combustion to rise up the stairwell to the second floor.
>
> The garage door being opened effected ventilation of the fire. The open slider vent path and garage vent path openings allowed fresh air to be entrained inward and increased fire growth in the garage and kitchen area. The fire growth in the kitchen area intensified and spread the fire to adjacent areas.
>
> As the fire grew and more radiant heat and convective heat spread the fire to other nearby items and other areas.
>
> The environment of the second floor where the victims were found changed to untenable conditions. The heat and smoke conditions would have become worse. The byproducts of the smoke and fire would have increased toxic gases and further reduced oxygen levels.

> When father attempted to open a window on the second floor in the child's bedroom it allowed the ventilation pattern to change. The ventilation flow path changed from a lateral flow path on floor 1; to a vertically flow path out the ventilation opening on floor 2.

(CP 14) Deputy Fire Marshall Monsebroten did not find that the second-floor window was opened before the exterior garage door was opened.

Moreover, petitioners refer to Mr. Rice's explanation from his declaration on the motion for reconsideration. (Petition at 11 citing CP 602-603) The Court of Appeals specifically declined to consider any materials petitioners submitted on the superior court reconsideration motion. See Slip Opinion, p. 8, footnote 3.

Petitioners also contend, citing CP 480, that Deputy Fire Marshall Monsebroten found that the "fire did not reach the second floor before the exterior garage door was opened." (Petition at 14-15) CP 480 is page 57 of Mr. Monsebroten's March 28, 2018, deposition. The deposition states:

> Q. . . . Assuming those facts, is it fair to say that there would have been fire and heat into the Weisenbach/Wheeler's upstairs prior to the garage door – exterior garage door being opened?
>
> . . .
>
> A. I cannot make that assumption. The fire behavior and fire report I have indicates that – from my point of origin that that fire behavior doesn't behave that way to my knowledge and to what I saw. So based on the initial part of the interview that it's more than probable or less than probable, 51 percent, I can't say that.

(CP 479-80) Mr. Monsebroten testified he could not say when the fire reached the upstairs. He does not say that the fire did not reach the upstairs. Moreover, whether or not the fire reached upstairs before the exterior garage door was opened, does not provide a basis in fact for Mr. Rice to conclude that Nikolas and Omen would have been able to escape the home had there been a self-closing door. Nothing in Mr. Monsebroten's report justifies the contradictions between Mr. Rice's unequivocal deposition testimony and his declaration statements.

When the fire reached the upstairs is not the relevant question because, as the coroner's report confirms, the cause of death was toxic asphyxia due to smoke inhalation. (CP 79, 88) Nikolas and Omen did not die due to fire. The conditions upstairs were incompatible with human life. (CP 272) Before Chastity Youngblood left the upstairs bedroom to alert others, the smoke in the children's bedroom was already 3 to 4 feet high. (CP 274) Deputy Fire Marshall Monsebroten testified that the upstairs occupants were exposed to a variety of harmful components: smoke, combustion, diminished oxygen levels, increased carbon monoxide, hydrogen, cyanide, other combustion byproducts "all of which have detrimental effects of life." (CP 272-73) He testified that no one, even a firefighter with protective equipment, would have survived what happened on the second floor. (CP 275)

And the declarations of Ms. Chaney and Mr. Smith do not provide the facts that petitioners argue. Mr. Rice's amended declaration states that "[a]ccording to Ms. Chaney, after the fire started she could see Nikolas moving around in the children's bedroom **before the garage door was opened. There was no fire upstairs. Her testimony establishes that Nikolas was alive before the garage door was opened.**" (CP 466-67, ¶ 14) (emphasis added). Ms. Chaney's declaration does not provide any testimony about when the garage door was opened. The only statement in her declaration about the garage door is the statement the garage door was closed when she and Mr. Smith first arrived. (CP 517, ¶ 2)

Ms. Chaney testified that she could see through the upstairs window that Nikolas was moving around. (CP 517, ¶ 2) When she and Mr. Smith first arrived, there was no fire in the upstairs bedroom and the garage door was closed. (CP 517, ¶ 2) Ms. Chaney testified that what had been a relatively small fire in the kitchen "suddenly and unexpectedly turned into a massive fire enveloping the entire unit." (CP 517, ¶ 3) Ms. Chaney testified that when she looked up again, the upstairs window was open and there was fire in the bedroom. (CP 517, ¶ 4)

Trevor Smith testified he did not remember whether the exterior garage door was opened or closed. (CP 520, ¶ 3) When he got to the slider door, Mr. Smith said the fire erupted from "being nothing much at all to an

inferno." (CP 520, ¶ 3) Mr. Smith looked up and saw the upstairs bedroom was "engulfed in flames." (CP 520, ¶ 3) Mr. Smith, without explaining where he was standing or the time interval, testified he "could see through the flames in the kitchen and through the doorway into the garage that the garage door had been opened. I remember seeing someone leaning into the garage who was spraying water into the flames with a garden hose." (CP 521, ¶ 5)

As Division I noted, "[n]o witness could have observed the bedroom window and the garage door at the same time because the bedroom window, located above the sliding glass door, was on a different side of the unit and out of the line of sight from the bedroom window." Opinion at 14. See CP 63 (photograph of outside of apartment unit A), CP 127-28 (Deputy Fire Marshall Monsebroten's description of apartment unit A), CP 311 (diagram of first floor of apartment unit A).

The Chaney and Smith declarations do not provide grounds for Mr. Rice's declaration, let alone a revision from Mr. Rice's earlier unequivocal deposition testimony. As the superior court noted, while there was a sequence of events, the evidence does not provide a basis of how long each sequence took. (RP 53) The superior court concluded:

> I'm going to grant summary judgment. But I'm going to do it actually on both grounds, they – the grounds that there is not evidence that the victims were alive and there's not

> evidence from which reasonable inferences can be drawn other than to allow the jury to speculate, which they cannot do, at the critical time that's related to the alleged negligence, which is the failure to repair that door to bring it up to building code to make it self-closing. There simply is an absence of that, an inability to prove that causation element.
>
> And then I just want to briefly say that, with respect to the negligence of the – the allegation that it was negligence to fail to repair the – to bring up to the building code the internal garage door, the Court is persuaded, as a matter of law, that the – that this isn't a jury question because it is undisputed that the room was not used as a garage.

(RP 53-54)

Division I and the superior court correctly concluded that Mr. Rice's opinions were conclusory and unsupported and, if considered, would not create a genuine issue of material fact. (Opinion at 10-11; RP 52) Washington law has long required that an expert's opinion must be based on facts. *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990). An opinion that is simply a conclusion or based on assumptions does not create an issue of fact for a jury. *Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997); *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993). Division I correctly affirmed the superior court's order on summary judgment. This Court should deny review.

Division I's conclusion that, when construing the evidence in the light most favorable to petitioners, there might be an issue of fact regarding

whether Nikolas was alive when the exterior garage door was opened, does not alter the outcome of the case. (Opinion at 14-15, Petition at 11) The operative question here is not whether or not Omen or Nikolas were alive when the exterior garage door was opened. The operative question is whether there was evidence to establish that Omen or Nikolas could have survived the effects of the fire if a self-closing door was installed. Petitioners failed to present admissible evidence on this critical element of their case. A jury would have to speculate to conclude that Omen and Nikolas would have been able to escape without death or injury if a self-closing door was installed. This Court should deny review.

B. DIVISION I'S OPINION DOES NOT CONFLICT WITH ANY DECISIONS OF THE COURT OF APPEALS.

Petitioners argue Division I's opinion conflicts with *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 14 P.3d 789 (2000), *rev. denied*, 143 Wn.2d 1015 (2001); *Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998), *rev. denied*, 138 Wn.2d 1002 (1999), and *Safeco Ins. v. McGrath*, 63 Wn. App. 170, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010 (1992) and review should be granted. (Petition at 11-12) Petitioners cite these cases for the rule that an appellate court cannot determine facts, weigh the evidence, or determine a witness's credibility. It is a well-established principle of Washington law that a court on summary judgment

does not determine facts, weigh evidence, or determine the credibility of witnesses. Division I did none of these things.

Division I analyzed whether Mr. Rice's expert opinion was admissible, i.e., whether the opinion was supported by facts. Such determinations are legal determinations for a court. ER 104(a). If an expert does not support his opinion with specific facts, the court will disregard the opinion on summary judgment. *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 135, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988). The Court of Appeals, like the superior court, correctly concluded that Mr. Rice's statement was conclusory and unsupported. (RP 52-53) Mr. Rice's declaration directly contradicted his unequivocal deposition testimony. And his explanation for the contradiction was not plausible or reasonable. Certainly, Mr. Rice had the opportunity to review the declarations of Ms. Chaney and Mr. Smith. Yet, nothing in those declarations provides a basis for the statements.

And *Berry*, *McGrath*, and *Duckworth* are distinguishable. In *Berry*, the affidavit and deposition testimony did not conflict. *Berry* was an asbestos case in which a major issue was identifying which manufacturer's insulation was purchased when. The affidavit and deposition discussed purchases at different periods of time. The testimony did not contradict.

McGrath was procedurally different. The witness first swore an affidavit and later provided deposition testimony that elaborated on the subjects in the affidavit. In *Duckworth*, a declaration was compared to allegations in a complaint. The declaration and complaint allegations did not contradict each other. Division I's opinion does not conflict with *Berry*, *McGrath*, or *Duckworth*. This Court should deny review.

C. THE RULING ON DR. WILLIAMS' DECLARATION WAS CORRECT.

Petitioners argue it was error to conclude that Dr. Williams' declaration did not create a material issue of fact. (Petition at 14-16) Petitioners maintain that Dr. Williams' declaration creates a reasonable inference from which a jury could conclude that Nikolas and Omen died from burn injuries and not smoke inhalation. *Id.* at 14-15.

Neither Division I nor the superior court was required to even consider Dr. Williams' declaration because it was submitted only on Petitioners' superior court motion for reconsideration. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999). Petitioners offered no explanation at the superior court, and offered none on appeal, as to why Dr. Williams' declaration was not available for the initial opposition to the summary judgment motion.

Citing *Keck v. Collins*, 184 Wn.2d 358, 374, 357 P.3d 1080 (2015), petitioners argue a *Burnet* analysis should have been conducted prior to rejecting Dr. Williams' declaration. (Petition at 15-16) *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Petitioners did not raise the issue until their amended motion for reconsideration to Division I. Because it was not raised before the superior court and not raised in its opening appellate brief, this argument should rejected. *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 683, 997 P.2d 405 (2000).

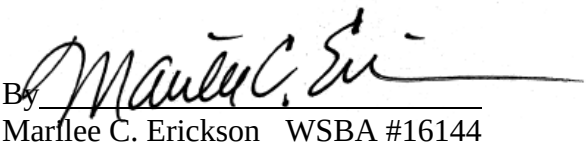
Finally, nothing about Dr. Williams' declaration justified a different result here. Dr. Williams' declaration did not establish any basis or inference from which a jury could conclude that Nikolas and Omen died from burn injuries and not smoke inhalation. Dr. Williams' declaration was speculative because his proffered testimony did not meet the threshold required for a medical opinion---on a reasonable degree of medical certainty or more probably than not. *McLaughlin v. Cooke,* 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989). Dr. Williams' declaration merely stated there is a possibility that thermal injury "may have been a contributing cause" of death. (CP 566) This Court should deny review.

VI. CONCLUSION

Division I and the superior court correctly concluded that petitioners presented nothing more than speculation on the issue of whether or not Nikolas and Omen Weisenbach would have been able to survive the fire had there been a self-closing door between the kitchen and the garage space used as a living space. Division I's decision is consistent with this Court's opinions and the opinions of the Courts of Appeals. The petition for review should be denied.

DATED this 8th day of April, 2021.

REED McCLURE

By 
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2021, a copy of the Answer to Petition for Review of Respondents Bock and Evans, along with this Certificate of Service, was served on counsel below via the Washington State Appellate Court's Electronic Filing Portal:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 8th day of April, 2021, at Seattle, Washington.

Angelina de Caracena

REED MCCLURE

April 08, 2021 - 9:02 AM

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