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SUPREME COURT
STATE OF WASHINGTON

2008 APR 18 P 2:12 Supreme Court No. 80420-6

BY RONALD R. CARPENTER

~~IN THE~~ SUPREME COURT OF THE STATE OF WASHINGTON
CLERK

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE
OWNERS' ASSOCIATION,

Appellants.

APPELLANTS' MOTION REGARDING RECORD ON REVIEW

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**FILED AS ATTACHMENT
TO E-MAIL**

I. IDENTITY OF MOVING PARTY

Appellants Villas at Harbour Pointe Owners Association ("Association") and T & G Construction, Inc. ("T & G"), ask for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Under RAP 13.7(a) and 17.1(a), Appellants respectfully request an order allowing portions of the record in Court of Appeals No. 56144-8-I, which was formally linked to the present appeal (Court of Appeals No. 57679-8-I), to be incorporated into the record on review to be considered by this Court. The documents were part of the record in the Court of Appeals' review of this appeal and would be instrumental in allowing this Court to have a complete record upon which to base its decision.

III. FACTS RELEVANT TO MOTION

This appeal arises from judgment entered against Respondent Mutual of Enumclaw ("MOE") in an insurance declaratory judgment and bad faith action. The insurance action arose from acts related to an underlying condominium construction defect lawsuit. In the underlying action, the Association obtained a judgment against T & G, MOE's insured.

In the underlying construction defect lawsuit, the Association initially settled with all parties except fourth-party defendant T & G, the

siding subcontractor for the condominium project. The Association obtained an assignment of claims against T & G, and eventually settled with the subcontractor. Under the settlement, T & G assigned to the Association all claims against MOE in consideration for entry of a judgment with a covenant not to execute against T & G. The trial court in the underlying action conducted a reasonableness hearing and determined the settlement was reasonable in the amount of three million dollars.

Concurrent with resolution of the underlying action, MOE filed an insurance declaratory judgment action that is the basis of this appeal. The Association filed a counterclaim for bad faith. The parties litigated coverage issues and following several summary judgment rulings, judgment was entered against MOE and in favor of the Association.

MOE filed an appeal of the judgment entered against T & G in the underlying action (Court of Appeals No. 56144-8-I). MOE also filed a separate appeal of the judgment entered against it in this insurance action; specifically, assigning error to the trial court's rulings on three summary judgment motions and entry of judgment against MOE (Court of Appeals No. 57679-8-I).

The Court of Appeals formally linked the two appeals and set them for oral argument on the same day. Because the cases were linked and involved overlapping issues and evidence, in briefing submitted to the

Court of Appeals in this case (Court of Appeals No. 57679-8-I), the Association incorporated by reference certain Clerk's Papers, exhibits from the reasonableness hearing and the verbatim Report of Proceedings from the linked appeal (Court of Appeals No. 56144-8-I). Specifically, the Association's briefing ("Respondent's Brief") included the following references to the record in the linked appeal:

... The factual background and procedural history of the Construction Suit are included in Respondent's Brief in the linked appeal and are adopted and incorporated by reference into this brief.
[Respondent's Brief at p. 2]

* * *

During the reasonableness hearing, there was substantial testimony as to the precise type of property damage at Villas that resulted from T & G's defectively installed siding, e.g., water intrusion dry rot, deterioration and elevated moisture content to wood sheathing, gypsum sheathing and wood framing components within exterior walls and water intrusion damage to wood trim and gypsum wall board of interior units. (RP 75-77, 83-85, 117-76, 200-46, 269-91, 297-382) (FN 1; RP from the linked appellate case, Case No. [56144-8-I] [improperly referred to as Case No. 57679-8-1 in the original brief] The majority of testimony presented during the reasonableness hearing was from expert witnesses. The remaining testimony was provided by the parties and an Enumclaw adjuster that focused primarily on T & G's purported dissolution and circumstances surrounding the settlement and damages. (RP 26-90; 389-404) *[Respondent's Brief at p. 4]*

* * *

The expert testimony focused almost exclusively on the results of the intrusive investigations; which, in essence, addressed "coverage" issues identifying the type and scope of property damage. There were over 105 photos entered into evidence that showed physical damage to property that resulted from T&G's defective siding installation. (Reasonableness Hearing Exhibit 1: Photos from Interface Management, Inc.; Reasonableness Hearing Exhibit 3: Color Photos of Building) (FN 2: Reasonableness Hearing exhibits are designated from the linked appellate case.) The remainder of the expert testimony involved cost of repair of the damaged property. (FN 3: See Reasonableness Hearing Exhibits 3, 6, 7.) [*Respondent's Brief at pp. 4-5*]

The documents that Appellants seek to be included in this Court's record relate directly to insurance coverage issues, e.g., the precise type of property damage at Villas that resulted from T&G's defectively installed siding, including water intrusion dry rot, deterioration and elevated moisture content to wood sheathing, gypsum sheathing and wood framing components, and as such, are vital to determination of coverage issues to be reviewed by this Court in this appeal. Most importantly, these documents were part of the Court of Appeals' record and the appellate court reviewed the documents in analyzing the assignment of errors on appeal. Because this Court accepted review of this appeal, but not the linked appeal, the Court's official record does not include the aforementioned documents. Oral argument is set for May 27, 2008.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Under RAP 13.7(a), “the record in the Court of Appeals is the record on review in the Supreme Court.” Here, portions of the record from the linked appeal were relied upon by the Court of Appeals for this appeal, and therefore, should be incorporated into this Court’s record for the instant appeal. Specifically, the Association cited and relied upon the reasonableness hearing’s Report of Proceedings and Exhibits 1, 2, 3, 6 and 7 from the underlying action in its Court of Appeals’ briefing. Testimony contained within the Report of Proceedings and the selected exhibits relate directly to insurance coverage issues to be reviewed and decided upon by this Court, *e.g.*, extent and type of property damage.

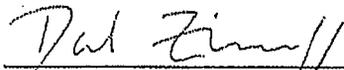
In its briefing and during oral argument before the Court of Appeals in this appeal, the Association argued that MOE litigated several coverage issues during the two-day reasonableness hearing in the underlying action, and as such, should be estopped from doing so again in this case. That precise issue is before this Court in the instant appeal. Therefore, the documents which Appellants seek to incorporate into this record are instrumental for this Court to make a reasoned ruling.

Because the Court of Appeals linked both appeals, and since a portion of the record from the linked case was incorporated by reference into this appeal and is vital to this Court’s ability to make a consistent

ruling in this appeal, this Court should grant Appellants' Motion Regarding Record on Review and incorporate into the record the Report of Proceedings and reasonableness hearing Exhibits 1, 2, 3, 6 and 7 from Court of Appeals No. 56144-8-I. If this Court were to deny Appellants' motion, such action would lead to the unjust result whereby this Court would have less of a record upon which to review than did the Court of Appeals.

Respectfully submitted this 18th day of April, 2008.

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