66636-3

SUPREME COURT
STATE OF WASHINGTON

LAKE CHELAN SHORES HOMEOWNERS ASSOCIATION, a Washington non-profit entity,

Appellant,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a foreign corporation,

Respondent,

and

NORTHERN INSURANCE COMPANY OF NEW YORK, a foreign corporation,

Defendant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

St. Paul insured the LCS condominiums only for collapse that occurred during St. Paul's policy periods. LCS did not make a claim until 8 years after the last St. Paul policy expired. Because there is no generally accepted scientific method for determining whether the claimed "collapses" occurred during St. Paul's policy periods, the trial court excluded LCS's rot timing evidence and granted St. Paul summary judgment on coverage.

Once it was determined that no scientifically valid investigation method existed, it automatically followed that there was no point in St. Paul stripping the siding to determine what the current conditions were. St. Paul thus did not breach a duty to investigate. In addition, the insurance claim was not made until after LCS already had decided to strip all the siding off its buildings. Since LCS was going to perform this work regardless of what St. Paul did, St. Paul's inaction was not a proximate cause of the alleged damages.

LCS's motion to compel only concerned discovery for the bad faith claims. None of the discovery sought by LCS was relevant to the grounds on which St. Paul was moving for summary judgment: The lack of a viable investigation method and proximate cause. The trial court did not abuse its discretion in denying the motion.

II. STATEMENT OF ISSUES

1. Did LCS raise a genuine issue of material fact as to what alleged "collapse" conditions existed during St. Paul's policy periods, where the only evidence dating the conditions back to those periods was inadmissible under *Frye*?

2. When an insurance claim is first made eight years after the last policy period and there is no scientifically accepted method for determining whether the claimed damage existed during the insurer's policy period, is that insurer required to physically investigate the buildings' current condition?

3. Can an insured maintain bad faith or Consumer Protection Act claims absent evidence the alleged wrongful acts proximately caused the claimed harm?

4. Did the trial court abuse its discretion by denying a motion to compel discovery of privileged documents and prior claim files, when the discovery was not relevant to summary judgment on the extracontractual claims?

5. Did the trial court abuse its discretion by denying a motion to continue the motion for summary judgment on the extracontractual claims, when the discovery sought was not relevant to the motion?

III. STATEMENT OF THE CASE

1. Pertinent Policy Provisions

St. Paul Fire & Marine Insurance Co. insured the premises of appellant Lake Chelan Shores Homeowners Association (LCS) under three annual policies, effective August 3, 1996 to August 3, 1999. (CP 6) Each St. Paul policy provides:

> **Collapse coverage.** We'll insure covered property against the risk of direct physical loss or damage involving collapse of a building or any part of a building.
>
> The collapse must be due to any of the following causes of loss:
>
> . . . .
>
> • hidden decay;

(CP 177; 280; 377; appendix A)

> **Exclusions – Losses We Won't Cover**
> ---
>
> **Collapse**. We won't cover loss resulting from collapse other than that described in the collapse coverage under the Covered Causes Of Loss section.

(CP 178, 281, 378; appendix A)

> **Wear – tear – deterioration – animals**. We won't cover loss caused or made worse by:
>
> •wear and tear;

•deterioration, mold, wet or dry rot, rust or corrosion including fungal or bacterial contamination;

(CP 181, 284, 382; underline added; appendix A)

2. Facts Relevant To Coverage

A time line of significant dates is found in appendix D.

Lake Chelan Shores ("LCS") is a 20-building condominium complex in Chelan, built between 1980 and 1994. (CP 74, 677, 679) LCS's coverage theory is that portions of the buildings were in a state of "collapse" due to "hidden decay" between August 3, 1996, to August 3, 1999, when St Paul insured the premises. (CP 7, 903) LCS's experts identified 121 separate "collapse" conditions. (CP 74) They called a collapse condition "SSI," short for "substantial structural impairment."[1] (CP 1036)

St. Paul first received notice of plaintiff's claim on July 5, 2007, almost 8 full years after its last policy terminated. (CP 1601) LCS produced internal records going as far back as 1988, but none mentioned decay, much less "collapse" caused by decay, during St. Paul's policy periods. (CP 144) Former manager Steve Davis could not recall

[1] LCS uses a somewhat confusing set of acronyms, because its experts issued their findings of "SSI" in documents they called "ASI's," short for "Architects Supplemental Information." Each "SSI" condition generated a corresponding ASI. Many ASI's, however, addressed construction issues not relevant to this claim, so the ASI numbers and the SSI numbers do not correspond to each other.

observing decay in any of the structures in the late 1990's, but suggested board president Alan Lamsek would be the best source of information. (CP 867-68) Lamsek could not recall decay during St. Paul's policy period, and suggested talking to Davis. (CP 878-80)

LCS thus had no contemporaneous documents or any lay witness identifying any decay or "collapse" during St. Paul's policy periods. Lacking direct evidence, LCS produced two alleged experts, who purported to trace the progression of decay at each of the 121 "collapse" conditions from the particular building's original construction date (1980-94) to the date each condition was first observed and measured (2007-09). Their end product was a list placing 55 of the 121 "collapse" conditions in St. Paul's policy period. (CP 677-680; appendix B)

Plaintiff's first expert, Justin Franklin, is a civil engineer at Olympic Associates, a Seattle architectural and engineering firm. (CP 796) Franklin has no academic training in the biology of wood deterioration. (CP 797) When asked what qualified him to time rot, he claimed it "would be the experience that I've had at Olympic Associates and being involved in buildings that have rot." (CP 799) However, most of his work at Olympic Associates involved structural design for small commercial buildings, not field work. (CP 796) The Lake Chelan Shores project was the first time he had ever attempted to time rot or the onset of

"collapse" conditions. (CP 809) When LCS's counsel first asked in November 2006 if rot could be timed, Franklin initially "told him that all we can say is that the rot presently exists but that we cannot state when the rot and subsequent SSI occurred." (CP 906)

Franklin knew two things: When each building was built and the rot depth at each condition when uncovered in 2007-09. He applied the mathematical formula $y = ax^2 + c$ to trace the progression of rot between these two times. (CP 812) The formula means that the percentage of decay "y" progresses according to the square of the number of years "x," times a decay rate "a," plus a constant "c." (CP 814)

The "c" allegedly allows for a time lag between completion of construction and the start of decay. (CP 814) For each "collapse" condition, Franklin assumed decay began one year after construction was complete. (CP 814; 789) Franklin had no input into this assumption, "which was decided among the engineers at Olympic Associates." (CP 816) While the assumption thus apparently represents the collective experience of these engineers, Franklin could not identify a single eastern Washington project, other than this one, in which Olympic Associates had been involved. (CP 816)

Franklin's justifications for the one-year lag assumption varied. Rot fungi will not begin to grow absent sufficient moisture. (CP 478; 96)

At first he said it generally takes one year for stucco exteriors to crack from building settlement, thereby allowing water entry. (CP 815) His written submissions thus say "water intrusion which caused the decay started 1 year after construction." (CP 789) There is, however, a time lag between when water entry begins and when enough moisture builds up to reach a "saturation" point conducive to rot growth, so the start of water intrusion and the start of decay are not the same thing. (CP 478; 95) To account for this, Franklin changed the story and claimed that in virtually every instance of SSI, "the moisture entered the structural cavity via a construction defect created during original construction" and that "[w]ithin a year sufficient water reached the SSI locations to achieve a moisture content conducive to decay growth." (CP 1029) He made the assumption even though his boss, architect Larry Cross, said the buildings did not have similar weather exposures, so "[n]o two buildings, therefore, have similar conditions from which similar moisture intrusion issues would be expected[.]" (CP 1947)

Franklin agreed decay would not, in fact, have begun exactly one year after construction was complete. "[T]here would be a range. Not every building is going to be the same." Asked what that range would be, he simply replied "I don't know." (CP 815-16)

Having adopted this 1-year time lag assumption, Mr. Franklin inserted the number 1 into the "c", making the equation $y = ax^2 + 1$. (e.g, CP 1259) He then applied this equation to each instance of SSI. This resulted in a series of curves purporting to plot the progression of rot at each location from the time of original construction to the time the rot was measured. (CP 1041-1283; example in appendix C) A "collapse" date was assigned at the point the rot first reached the SSI threshold. This date then was compared to the insurance policy periods, and responsibility was assigned to St. Paul, Northern or, when the SSI date came after both policies, neither. (CP 677-680; appendix B)

Franklin's equation did not come from any scientific literature. Instead, Franklin got it from another Olympic Associates engineer, Mr. Dunham (CP 812-13):

> Q. What work has Mr. Dunham done to verify the accuracy of that equation that you know of?
>
> A. I don't know. I don't know what...

Franklin described his calculations as "educated guesses." (CP 813-14) Other than other Olympic Associates employees, he was unable to identify any other person or literature stating that $y = ax^2 + c$ is a proper equation for estimating rot progression. (CP 800-01)

LCS also retained Kevin Flynn, a California wood scientist. Asked about his experience back timing rot progression, he said: "Back time? Don't really know that I've ever tried to back time so much." (CP 823) The only similar experience he could identify was two real estate lawsuits where "they were trying to determine whether or not degradation existed[2] at the time of the transaction." (CP 823) He had no field experience with decay anywhere in Washington, let alone in Eastern Washington. (CP 841-44)

Flynn could not identify any support in the scientific community for the proposition that decay advances according to the square of the number of years, i.e, the "x^2" term in Mr. Franklin's equation. (CP 828-9) Nor could he identify any time when anyone, anywhere, had used Franklin's equation to model decay progression. (CP 829-30)

Flynn used an Australian software package called "TimberLife." TimberLife was not used to create the "collapse" dates, which were generated by Franklin's equation. (CP 676; 687) Rather, LCS contended that a comparison of the output from Timberlife with the output from Mr. Franklin's equation "validated" the equation. (Id.)

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[2] Whether degradation "existed" is different than whether the amount of degradation can be traced back with sufficient precision to determine the onset of "collapse".

Timberlife is a service life prediction package. (CP 102) Unlike auto accident reconstruction software, TimberLife is not a forensic package that predicts values with optimum precision, and it has not been accepted for use as forensic software. (CP 850; 101) It is a design tool, intended to assist building designers in selecting materials, and it has a built-in tendency to overestimate the amount of decay. (CP 850; 102) It predicts only median values applicable to a large population, not the way decay progressed in a specific piece of wood. (CP 102; 844; 850)

Even if TimberLife could reproduce decay progression in individual wood structural members, it was developed for Australia, which has no climate zone comparable to Chelan. (CP 836-37; 100-101) The TimberLife manual specifically warns that inputting certain specific local climate conditions is required to make valid estimates. (CP 431-2; 685) But Flynn did not have that climate data. Instead he used the closest Australian climate zone, which is not a generally accepted method of applying the software. (CP 838; 431-2)

3. Facts Relevant To Extracontractual Claims

LCS first discovered its rot problem in mid-2006. (CP 1766) It hired Franklin's firm, Olympic Associates, to inspect. Olympic's September 2006 report concluded that of 48 inspected areas, 42 suffered from moisture intrusion and 22 of the 42 suffered from SSI. (CP 1617)

Since the report only addressed current conditions, LCS's attorneys began seeking rot timing opinions two months later. (CP 906)

On October 5, 2006 the board decided to engage in an "Exterior Restoration Project," which included a scope of work developed by Olympic Associates to repair SSI. (CP 1757) By April 2007 LCS had decided to contract for a repair project that would include removal and replacement of all siding. (CP 1805; 1814-15) On July 11, 2007 the board adopted a formal resolution for financing the Exterior Restoration Project. (CP 1788) On July 27, 2007, Olympic Associates submitted its design documents to the City of Chelan Building Department. (CP 1801)

St. Paul first received a notice of loss on July 5, 2007. (CP 1596; 1601) The claim was assigned to Dennis Luoma, a property adjuster with 34 years' experience. (CP 1595) Luoma contacted LCS's counsel by phone on July 23, 2007, and on July 26 sent him an initial letter including a document request. (CP 1596; 1663-4) On July 27 Luoma sought to contact a structural engineer. (CP 1597)

LCS never responded to Luoma's document request. (CP 1598) Instead, on August 27, LCS's counsel wrote Luoma that construction would begin to mobilize on September 4, 2007. (CP 1668) He also requested reimbursement for $303,424 in "investigation costs". (CP 1669-1721) On August 31, Luoma responded (CP 1666):

> To assist us in achieving a timely investigation of this claim, I renew my request for documents from your client enumerated in my July 26, 2007 (copy enclosed).

Unbeknownst to Luoma, on August 30, 2007, LCS had sued St. Paul for breach of contract, bad faith, and Consumer Protection Act violations. (CP 1) Once Travelers realized it had been sued, all communication took place through attorneys, and information was developed through the legal process. (CP 1598)

Whether any of the "collapse" conditions could be traced back to St. Paul's policy period was the key question. (CP 1599) LCS claimed it could do so, but did not produce any evidence for almost two years. (CP 1599) Interrogatories seeking the information received the cryptic response "[t]his information is being compiled and will be provided when it is available." (CP 901) When St. Paul sought an early disclosure date, LCS said Franklin was too busy and would not be able to attend to the timing issue until after construction was complete. (CP 2409; 2410) The other expert, Flynn, was not hired until late 2008. (CP 824)

St. Paul thus faced a dilemma. If it denied the claim before LCS produced its timing information, it would be accused of bad faith for failure to consider the insured's evidence. On the other hand, if it waited until that evidence was produced, it would be accused of taking too long. St. Paul chose the second option. LCS did not disclose its experts'

opinions until July 2009, and then only after St. Paul had moved to compel their production. (CP 2432; 1852; 676)

After receipt, Luoma reviewed the evidence and denied the claim on September 22, 2009, primarily on the basis that LCS had failed to produce scientifically valid evidence showing the loss existed during St. Paul's policy period. (CP 1599; 1746-7)

4. Statement Of Procedure

On October 22, 2009 St. Paul moved for partial summary judgment on the ground there was no evidence of coverage or, in the alternative, for a *Frye* hearing on the admissibility of plaintiff's expert testimony. (CP 20) On November 23, 2009[3] the trial court granted the motion without a *Frye* hearing and dismissed the coverage claims. Reconsideration was denied. (CP 2310; 2290)

On November 12, 2009, St. Paul moved for summary judgment on LCS' extracontractual claims. (CP 1578) On November 24, 2009, LCS moved to compel discovery. (CP 1826) On December 11 the trial court entered summary judgment dismissing the extracontractual claims[4] and also denied LCS's motion to compel. (CP 2288; 2317)

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[3] The Order was signed November 23 and filed November 24.

[4] A revised Order correcting a technical issue with the original was entered on January 11, 2010.

IV. ARGUMENT

A. LCS Failed to Establish A Required Element Of Coverage.

1. LCS Had The Burden To Prove Which "Collapse" Conditions Existed During The Policy Period.

When a plaintiff lacks evidence sufficient to support a necessary element of its case, summary judgment must be entered. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21-22 851 P.2d 689 (1993). The first question, therefore, is what must LCS prove? It must prove which alleged "collapse" conditions existed during St. Paul's policy period:

> Mercer Place thus argues that once the predicate covered damage (here, collapse caused by progressive structural decay) occurs during the policy period, those damages that reach collapse after the policy period are also covered under the policy. The problem with Mercer Place's argument is that under this policy the predicate for coverage is collapse, not the precursors of collapse such as dry rot, water seepage, or design or construction defects leading to such losses. Since the policy specifically excludes coverage for damage from hidden decay that has not yet reached a point of collapse during the policy period, collapse that occurs after the policy period is specifically excluded from coverage.

Mercer Place Condominium Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 605, 17 P.3d 626 (2000).

In *Mercer Place* there was no doubt that "collapse" conditions existed when State Farm insured the property. The question was whether the existence of some collapse conditions during the policy period meant the insurer was liable for all collapse conditions even if the conditions occurred later. The answer was "no." This means LCS cannot carry its burden of proof simply by showing that some unquantified number of "collapse" conditions might have existed when St. Paul insured the property. Rather, LCS must show which of the 121 claimed conditions existed at that time, because under *Mercer Place* St. Paul is not liable for those that came thereafter.

Each SSI condition is unique and the cost to repair one subset of SSI conditions would be is different from the cost of repairing another subset. (CP 74 lines 12-16) Therefore, the actual members of the subset applicable to Travelers must be determined.

St. Paul's policies are similar to the *Mercer Place* policy, as St. Paul's policy only covers decay after it reaches the point of "collapse." The insured bears the initial burden of showing the loss falls within the scope of the policy's insured losses. *Schwindt v. Underwriters at Lloyd's*, 81 Wn. App. 293, 298, 914 P.2d 119 (1996). The covered event here is "collapse." *Mercer Place,* 104 Wn. App. at 605. The insured bears the burden of showing the covered event took place during the

insurer's policy period. *See Wellbrock v. Assurance Co. of Am.*, 90 Wn. App. 234, 241, 951 P.2d 367 (1998). "The insured has the burden to prove the existence of collapse caused by one of the named perils." *Malbco Holdings, LLC v. AMCO Ins. Co.*, 629 F. Supp. 2d 1185, 1199 (D. Or. 2009); *see, Roberts v. Assurance Co. of America*, 163 Cal.App.4th 1398, 1407, 78 Cal.Rptr.3d 361, 369 (2008).

The same result is reached if the Collapse coverage is treated as an exception to the Collapse exclusion. The policy excludes collapse "other than that described in the collapse coverage under the Covered Causes Of Loss section." (CP 178, 281, 378) The insured bears the burden of showing that an exception to an exclusion applies. *See, Smith v. State Farm Fire & Cas. Co.*, 656 N.W.2d 432, 436 (Minn. App. 2003); *Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1190, 959 P.2d 1213, 1216 (1998); *Hudnell v. Allstate Ins. Co.*, 190 Ariz. 52, 54, 945 P.2d 363, 365 (App. 1997).

LCS tries to avoid its burden of proof by arguing it only has to show a "risk" of collapse. This proposition does not change the burden of proof, it only affects the level of damage implicating the collapse coverage—the damage can be less than a complete disintegration of the building and can include an imminent danger that part of a building will

fall. *See generally Assurance Co. of Am. v. Wall & Assocs. LLC*, 379 F.3d 557, 563 (9th Cir. 2004).

For purposes of this appeal, St. Paul assumes that "SSI" is the correct measure and that "SSI" arising before St. Paul's first policy term can be covered. Both propositions are irrelevant since LCS is unable to show any general acceptance of its theories and methodologies for tracing decay back in time. Without such proof, it makes no difference what amount of decay is required for a "collapse," or if the coverage period is 3 years or 10. Stated colloquially: *It doesn't matter how big the bull's-eye is if you don't have any arrows for your bow.*

2. LCS's Opinion Testimony Was Properly Excluded

The crux of LCS' case is: A jury could find that certain "collapse" conditions existed during St. Paul's policy period not because anyone observed such conditions at the time, but because 10 years later Mr. Franklin used $y=ax^2+c$ to calculate when each "collapse" came into existence.

a. *Frye* Was Appropriately Applied

For expert testimony to be admissible, it first must satisfy the *Frye* standard and then must meet the other criteria in ER 702. *See State v. Gregory*, 158 Wn.2d 759, 829-30, 147 P.2d 1201 (2006); *Ruff v. Dept. of Labor & Indus.*, 107 Wn. App. 289, 299-300, 28 P.3d 1 (2001).

> Under *Frye,* novel scientific evidence is admissible where (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

State v. Sipin, 130 Wn. App. 403, 414, 123 P.3d 862 (2005).

> Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye.*

State v. Gregory, supra, 158 Wn.2d at 829.

> Under the *Frye* test, we do not determine if the scientific theory underlying the proposed testimony is correct. Rather, we must look to see whether the theory has achieved general acceptance in the appropriate scientific community

Grant v. Boccia, 133 Wn. App. 176, 179, 137 P.3d 20 (2006)(citation omitted)

The burden of showing admissibility is on the party offering the evidence. *See, State v. Smith*, 87 Wn. App. 345, 348, 941 P.2d 725 (1997); *E.I. DuPont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). If a significant dispute exists between qualified scientists as to the validity of either the theory or the particular methodology, general acceptance is not established and the evidence is

not admissible. *Grant,* 133 Wn. App at 179; *see also Gregory,* 158 Wn.2d at 829.

This last point is especially important, because LCS confuses the summary judgment standard with the *Frye* standard. LCS thinks a dispute between experts creates issues of fact. Summary judgment can be denied, however, only if the nonmoving party produces admissible evidence creating a fact dispute. CR 56(e); *Lynn v. Labor Ready, Inc.,* 136 Wn. App. 295, 306, 151 P.3d 201 (2006). LCS's rot-timing evidence is not admissible.

LCS also argues that when there is a dispute between experts, the Court cannot make "factual determinations" without conducting a *Frye* hearing. (Opening brief at 24) The "fact dispute" would have to be over whether general acceptance has been reached, not over the validity of the science. *Grant,* 133 Wn. App. at 179. There was no genuine dispute here because LCS's experts were unable to identify a single, independent scientist anywhere who has even discussed, let alone accepted, their methodology. Regardless, LCS never requested a *Frye* hearing. Only St. Paul asked for such a hearing, and only in the alternative. (CP 40-41) LCS cannot claim the trial court erred by failing to hold a hearing LCS never requested. RAP 2.5(a).

LCS also complains that the trial court did not issue "findings." Since review of a *Frye* ruling is *de novo* and the Court can go beyond the trial court record, findings would be irrelevant. *See, Ruff v. Dep't of Labor & Indus., supra,* 107 Wn. App. at 300; *Int'l Broth. of Elec. Workers v. TRIG Elec. Const. Co.,* 142 Wash. 2d 431, 435, 13 P.3d 622 (2000).

b. Franklin's Conclusions Were Properly Excluded

To perform a *Frye* analysis, courts consider three sources of information:

> To determine whether a consensus of scientific opinion has been achieved, the reviewing court examines expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions. However, "the relevant inquiry is general acceptance by the scientists, not the courts."

Eakins v. Huber, 154 Wn. App. 592, 599-600, 225 P.3d 1041 (2010) (citations omitted)

For two of these three categories, LCS didn't even bother to swing at the pitch. LCS provided no articles, peer reviewed or otherwise, or any secondary legal sources or legal authority, suggesting it is possible to accurately trace rot progression in situations analogous to the present one, much less that Mr. Franklin's equation is the way to do it.

LCS swung at the third pitch, but struck out. Expert testimony only is considered to the extent that it bears on the issue of general acceptance, not so a court can determine on its own whether the theories and implementation methods are correct *Grant,* 133 Wn. App. at 179. The testimony here does not demonstrate any general acceptance of Franklin's equation.

To justify his formula, Franklin said it "is merely an equation for graphing the wood rot's lag phase and accelerated growth phase that is universally accepted in the scientific community. Equations such as this are commonly used by engineers and others for various applications." (CP 1029) Such testimony does not show general acceptance of Mr. Franklin's formula in any relevant community. Rather, it is little more than an assertion that the second half of the *Frye* analysis is unnecessary: Franklin suggests that the theory (lag followed by growth) is generally accepted, so he should not have to show that his particular implementation is generally accepted. The opposite is true: Both the theory and the method used to implement it must have gained general acceptance in the scientific community. *Gregory,* 158 Wn.2d at 829; *Sipin,* 130 Wn. App. at 414.

The theory is not, in fact, generally accepted. Rot fungi growing in a perfect laboratory environment can exhibit a lag phase followed by

exponential growth and then logarithmic decline (which Franklin ignores). Nature is more complex than a petri dish, so fungi in the real world exhibit a highly variable and fragmented growth pattern determined by numerous environmental factors not accounted for in Franklin's model. (CP 94-96)

Franklin also suggests that since engineers in general use "equations", his particular equation must be acceptable—math is math, so any old math will do.[5] However, the only other mathematical decay progression model provided to the Court (by St. Paul, not LCS) bears no resemblance to Franklin's simplistic equation. (CP 768)

The second expert, Flynn, said "while no single mathematical model has been accepted to the exclusion of others, the concept of applying a mathematical model such as Mr. Franklin's to approximate the exponential curve that describes the progress of wood decay is generally accepted in the scientific community." (CP 1289; underline added) Flynn literally admits that Franklin's equation has not gained general acceptance. Other than Franklin, he could not identify anybody who had ever used the equation. He also was unable to identify general

[5] Engineers apply equations to inanimate objects; living things do not cooperate well with tidy mathematical formulae. (CP 94-5)

acceptance of the equation's major premise: That decay progresses according to the square of the number of years. (CP 828-30)

c. Use Of Timberlife Was Properly Excluded

Even though LCS's claims as to timing were generated exclusively by Franklin's formula, LCS also tried to "validate" Franklin's output with Timberlife, an Australian life cycle analysis program. (CP 676; 687)

LCS's attempted use of Timberlife cannot be squared with *Frye*. Under *Frye* "we do not determine if the scientific theory underlying the proposed testimony is correct. Rather, we must look to see whether the theory has achieved general acceptance in the appropriate scientific community." *Grant,* 133 Wn. App. at 179. A peer-reviewed scientific publication might rely on software to help validate or invalidate the theory or methodology under consideration. Here, however, LCS is asking *the Court* to perform this exercise itself, and to consider whether Timberlife's output validates the output from Franklin's equation. Since this is not the Court's task, Timberlife is irrelevant to the *Frye* analysis.

Even if it were relevant, Timberlife was not properly applied. Timberlife is designed to predict median values applicable to large populations, not the specific life spans of individual pieces of wood. (CP 102; 844) It is not accepted for use as forensic software. (CP 102; 850)

Using Timberlife to determine how a particular piece of wood decayed would be like using the life expectancy table in WPI 34.04 to assign a date of death to a particular person. Flynn acknowledged this problem, saying that correcting it would have required him to "reverse engineer" the software. (CP 848) In addition, Timberlife's authors recommend calibrating it to the climate. (CP 685; 432) Proper calibration requires using several weather factors specific to the particular environment. (CP 431-432) That data was not available, so Flynn was unable to calibrate the software. (CP 838)

d. An "Expert" Cannot Avoid *Frye* By Emphasizing His Alleged Qualifications

Attempting to skip the *Frye* analysis altogether, LCS argues its experts would have reached an identical conclusion without the Franklin equation, based on their qualifications and experience. (Opening brief at 22) The "experts" actually had no experience in timing rot progression in eastern Washington. *See discussion, supra,* pp. 5-6, 9. Regardless, the argument confuses the issue of whether a proposed expert qualifies to testify with whether his opinions pass muster under *Frye*. Both standards must be met or the evidence is not admissible.

> Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. . . .

> Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact. ER 702;

Gregory, 158 Wn.2d at 829-30 (citations omitted); *Ruff*, 107 Wn. App. at 299-300. *See, also, Eakins, supra* 154 Wn. App. at 600-1 (qualified doctors' opinions not admissible when *Frye* not met).

The duality exists because ER 702 contains both a qualification component and a reliability component, i.e., *Frye*:

> Of course, the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable *any* conceivable opinion the expert may express. . . Quite simply, under Rule 702, the *reliability* criterion remains a discrete, independent, and important requirement for admissibility.
>
> . . . If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong.

United States v. Frazier, 387 F.3d 1244, 1261 (11th Cir. 2004)(selected citations omitted; italics in original); *see, Hassett v. Long Island R. Co.*, 787 N.Y.S.2d 837, 839 (Sup. Ct. 2004); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1045-46 (Pa. 2003).

B. The Bad Faith Claims Were Properly Dismissed Because LCS Could Not Demonstrate Breach Or Proximate Cause.

1. Gross Misstatements Of Fact In Appellant's Brief

Four of LCS's assertions are so grossly inaccurate as to require special attention.

a. Load Tests Of Actual Conditions

LCS claims that St. Paul performed load tests on four decks even though LCS never identified them as suffering SSI, and this demonstrates bad faith on St. Paul's part. (Opening brief at 32) LCS's argument is based on a letter, sent before the tests, saying the four decks had not yet been identified as being SSI. (CP 1987) The decks where at units 15-7, 15-8, 16-5 and 16-7. (CP 1984) Mr. Franklin *subsequently* identified all four as suffering from SSI. (CP 1999, 1997, 1995, 1991) The tests showed that although Olympic Associates purported to define SSI as the point when a structure could no longer support code-required loads, those loads in fact could be supported. (CP 1036; 1726)

b. Twisting The Meaning of A 95% Confidence Interval

Because St. Paul's wood deterioration expert, Dr. Goodell, said he uses a 95% confidence interval when evaluating laboratory data, LCS repeatedly asserts St. Paul has tried to hold LCS to "a laboratory standard

of 95% certainty." (Opening brief at 8) The assertion then is spun into an asserted conspiracy to hold LCS to an impossible burden of proof.

An analogy helps explain the fallacy of LCS's claim. Faced with the possibility of disease, a layperson unfamiliar with medical terminology might be disappointed with "negative" test results, since negative means bad. Misapplication of technical terms twists the truth by 180 degrees. That is exactly what LCS has done.

Dr. Goodell testified:

> Q Can you attach a level of probability to the phrase reasonable scientific certainty?
>
> A Not without being asked, you know, a specific statistical measure, for example, 95 percent certainty.
>
> Q Do you think that reasonable scientific certainty is more than, something different than a more probable than not standard?
>
> A I actually don't know, and I don't usually use the term more probable than not.
>
> Q Do you think that somebody can form an opinion that is more likely than not, meaning 51 percent versus 49 percent, that that would be an opinion held with reasonable scientific certainty?
>
> A If you have good data-- on good data and a good model, yes, you can model it with certain statistical certainty and come up with the probability that it would be more than 51 percent.

> Q But if you think something was 51 percent more certain to have occurred than not would that be reasonable scientific certainty in your mind?
>
> A It would be 51 percent probability of occurring, with reasonable scientific certainty I think that's a judgment issue, as I mentioned before.
>
> Q I'm trying to learn your understanding of these things, so I need to know what your judgments are as applied to this.
>
> A When I do analysis of data usually I like to see side bars, if you will, of 95 percent probability.
>
> Q Versus 51 percent, for instance?
>
> A Yes, that's in a scientific laboratory situation.

(CP 2268-69; underline added)

The "side bar" referenced above is also known as a "confidence interval." A confidence interval describes the range of error in a predictive model. (CP 103-4) A range of error is the opposite of accuracy—it describes how inaccurate the model is allowed to be.

For example, a weather model might predict rainfall of 2 inches, but the actual rainfall likely will be greater or less. A 95% confidence interval describes the range within which the actual rainfall will be expected to fall 95% of the time. The model might say that while 2 inches is most likely single outcome, it is 95% probable the actual rainfall

will be between 1.3 and 2.7 inches. A meteorologist would say she is 95% confident of rainfall between 1.3 and 2.7 inches. (CP 103)

A model that predicted rainfall between 0 inches and infinity would be so inaccurate as to be useless. However, our hypothetical meteorologist would be 100% confident of the actual rainfall being somewhere between those two numbers. LCS's misinterpretation would characterize this wildly inaccurate model as being overly rigorous and "requiring 100% accuracy." The opposite is true—the wider the confidence interval the less rigorous the standard, as the allowed range of error is expanded. (CP 103-04)

A 95% confidence interval allows for a wide range of error—95% of the predictions are taken into account and only the least likely 5% are eliminated from consideration. A 51% confidence interval is narrower and more restrictive: 49% of the predictions are discarded as too inaccurate and only 51% are taken into account. (CP 104) Dr. Goodell's reference to a 95% confidence interval is the opposite of what LCS claims. (CP 104)

There is no qualified expert testimony supporting LCS's assertion that a 95% confidence interval corresponds to a rigorous standard of proof. One of LCS's "experts," Flynn, testified that "Dr. Goodell was asked by Mr. Derrig to render his opinions to a standard of reasonable

scientific certainty.[6] At his deposition Dr. Goodell testified that he understood this phrase to require 95% accuracy[.]" (CP 1285-86) The assertion misstates Dr. Goodell's testimony. Regardless, Flynn testified he is not a statistics or modeling expert, so his assertion is just a layperson's mischaracterization of what actually was said. (CP 840 lines 12-17; 827 line 12)

c. Previous Rot Timing Experts

LCS says St. Paul had previously hired experts to time rot. (Opening brief at 31) The opposite is true: Two other Travelers entities[7] had previously taken a position that rot could not be back timed. In *Misawa On The Green LLP v. The Travelers Indemnity Co.*, the court denied the insured summary judgment in part because "Travelers' argument that wood decay proceeds at variable rates depending on a number of factors," prevented the Court from concluding that some "collapse" conditions existed while Travelers was on the risk. (CP 928) In *Dally Properties, LLC v. Truck Ins. Exchange, et. al.*, Travelers' expert declared that rot and "collapse" could not be back timed. (CP 955)

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[6] As far as courts are concerned, "reasonable scientific certainty" is the same as "more probable than not." *See, Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 167, 231 P.3d 1241 (2010).

[7] Several years after the LCS policies lapsed, in 2004 St. Paul merged with the Travelers group of companies.

In *Dally* Mr. Dethlefs, a structural engineer for an unrelated insurer (Lexington), stated his belief that "SSI" first began after Lexington's policy period. (CP 974) St. Paul hired Mr. Dethlefs here to do something different: perform structural analysis such as load tests. (CP 1723) Hiring a structural engineer to analyze structures is quite different from hiring a structural engineer to time rot.

d. Assertion St. Paul "Did Nothing."

LCS says St. Paul "did nothing" for 30 days after receiving the claim. (Opening brief at 29) The assertion is perplexing, because within 30 days after it got the claim, St. Paul contacted the very attorneys who wrote LCS's appellate brief, exchanging phone calls and correspondence. (CP 1596) St. Paul also contacted a structural engineer. (CP 1597)

2. An Insurer Cannot Breach Its Duty To Investigate When No Scientifically Valid Investigation Method Is Available

An investigation cannot be "inadequate" when the very basis for the insurer's denial is that a complete investigation no longer is scientifically feasible. *Cf. Key Tronic Corp. v. St. Paul Fire & Marine Ins. Co.*, 134 Wn. App. 303, 307, 139 P.3d 383 (2006). None of the investigation demanded by LCS could avoid the irrefutable conclusion that there is no scientifically valid method for establishing "collapse" during St. Paul's policy period. The only way the Court could conclude

otherwise would be to consider *inadmissible* evidence, as LCS's "proof" to the contrary does not meet the *Frye* test.

Nevertheless, LCS doggedly argues that St. Paul had a duty to investigate the current rot conditions at the complex, even to the extent of completely stripping all the stucco in search of hidden SSI. *But see, Lakehurst Condo. Owners Ass'n v. State Farm Fire & Cas. Co.*, 486 F. Supp. 2d 1205, 1214 (W.D. Wash. 2007)("requiring such an investigation would be unreasonable in itself"). The current conditions, however, were relevant only to the extent they could be timed back into St. Paul's policy period.

An insurer's investigative duty must be linked to the potential for coverage. Otherwise, LCS could have tendered its claim to its ***auto*** insurer and demanded an investigation, as the potential for coverage and the duty to investigate would be completely divorced from each other. Put another way: While the duty to investigate is implied in every contract, *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 132, 196 P.3d 644 (2008), that implied term has to be read in context with the express terms. *See, Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 756-7, 748 P.2d 621 (1988); *Myers v. State* 152 Wn. App. 823, 828, 218 P.3d 241 (2009). Thus, an insurer cannot have an implied duty to perform "investigation" that has no possibility of leading to coverage.

See, Capelouto v. Valley Forge Ins. Co., 98 Wn. App. 7, 19, 990 P.2d 414 (1999) (no breach of duty to investigate when "[f]urther investigation . . . would not have invalidated the insurer's defense."); *Peterson v. Big Bend Ins. Agency, Inc.*, 150 Wn. App. 504, 522-4, 202 P.3d 372 (2009); *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 347 (Iowa 1999)("where an insurer has an objectively reasonable basis to deny coverage, it has no duty to investigate further before denying the claim").

St. Paul is not claiming that coverage ultimately must exist for a bad faith claim to be viable. *See, Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). In *Coventry* the insurer conceded its investigation was performed in bad faith and argued a lack of contractual liability automatically precluded extracontractual liability. 136 Wn.2d at 276. Here, in contrast, the issue is whether an investigation into coverage can even be performed when the claim is first made 8 years after the policy has lapsed and there is no direct, contemporaneous evidence that the alleged condition existed when the policy was in force.

3. The Alleged Investigative Failures Were Not A Proximate Cause Of Damage.

a. The Cost Of Removing And Replacing Siding

LCS has never identified any extracontractual damages other than "the costs of conducting its own investigation," namely, the cost of

removing exterior stucco cladding to determine where "SSI" currently existed. (CP 903; opening brief at 37) LCS alleged the tort of bad faith and violations of the Consumer Protection Act. To establish both claims, LCS had to prove proximate cause. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., supra* 165 Wn.2d at 130. A proximate cause is one which "produces the injury complained of and without which the injury would not have occurred." *Fabrique v. Choice Hotels Internat'l, Inc.,* 144 Wn. App. 675, 683, 183 P.3d 1118 (2008)(citation omitted; underline added). Thus:

> If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 64, 204 P.3d 885 (2009)(citation omitted).

Here, LCS's decision to strip and reclad its buildings was made months before it even put St. Paul on notice. (CP 1805; 1814 -15) LCS was going to incur that expense regardless of what St. Paul did, not because of what St. Paul did. Thus there is no proximate cause.

b. Alleged Untimely Investigation

LCS claims that St. Paul violated WAC 284-30-370 by failing to conduct a timely investigation. A bad faith claim based on a delayed investigation should not be confused with a bad faith claim based on a

coverage position's substantive merits. An insurer does not commit bad faith if it denies coverage based on meritorious factual contentions or an arguable interpretation of existing law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn. 2d 133, 155, 930 P.2d 288 (1997); *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 757, 87 P.3d 774 (2004); *Capelouto, supra*, 98 Wn. App. at 19. St. Paul had meritorious defenses to coverage. To prevail on the delay claim, LCS thus would have to show that if St. Paul had issued its good faith denial of coverage earlier, LCS would not have suffered damages

If St. Paul had issued an earlier denial letter, LCS still would have incurred costs to strip and reclad the buildings. After all, LCS decided to incur that cost before it even put St. Paul on notice of a claim.

Furthermore, under *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990) St. Paul had to consider information presented by the insured after litigation commenced. *Id.* at 913. LCS elected to delay producing its expert's contentions until after the repair project was finished. (CP 901; 2409; 2510; 2432) LCS cannot blame St. Paul for delay caused by its own decision on when it would supply information. *See Carter v. Geico Direct*, 520 F. Supp. 2d 1212, 1222 (D. Haw. 2007); *accord, James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 118 Wn. App. 12, 16-17, 74 P.3d 648 (2003), *review denied*, 151 Wn.2d

1010, 89 P.3d 712 (2004)(insured's failure to supply correct information could not form basis for CPA claim against insurer).

c. Allegedly Biased Investigation

LCS argues that St. Paul's investigation was biased in favor of Dr. Goodell's position. (Opening brief at 31) But an allegedly "biased" investigation that nonetheless reaches a correct result would not proximately cause any damage, as an unbiased investigation would reach the same correct result. *See, Petcu v. State,* 121 Wn. App. 36, 55-9, 86 P.3d 1234 (2004); *Peterson v. Knutson*, 305 Minn. 53, 63, 233 N.W.2d 716, 722 (1975).

Knowing the current state of science on a subject is not "bias." Bias is when experts "routinely find for the insurer when faced with contrary evidence." *Cardiner v. Provident Life & Acc. Ins. Co.,* 158 F. Supp. 2d 1088, 1101 (C.D. Cal. 2001). LCS has not shown that any unbiased, independent scientist, anywhere at any time, subscribes to the theories and methodologies of its "experts" in this case.

LCS tries to circumvent this problem by introducing materials from other cases and then incorrectly arguing that related entities[8] had

[8] *See* footnote 7, *supra.*

employed experts in these cases to time rot.[9] This argument is irrelevant because it is the scientific community, not insurance companies, that determines if the evidence represents sound science. *Eakins*, 154 Wn. App. at 599-600. If the evidence is not sound science, it is not admissible. *Id.* LCS thus has not introduced admissible evidence showing an "unbiased" investigation would have reached a different result, or that Dr. Goodell's position is based on anything other than an understanding of his field of study.

LCS's "bias" argument suffers from a second deficiency: It depends on allegations about St. Paul's subjective state of mind. Washington, however, applies an objective standard to bad faith claims. "The question in bad faith claims is always whether the insurer acted reasonably under the facts and circumstances of the case." *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 411, 161 P.3d 406 (2007)(citation omitted). The question is not whether the insurer acted intentionally, fraudulently, or maliciously. *See James E. Torina Fine Homes, Inc. v. Mutual of Enumclaw Ins. Co., supra,* 118 Wn. App at 20. "The absence of a reasonable basis for denying the claim is an objective

[9] As discussed at pages 30-31, in those other suits the other Travelers entities actually were arguing the rot could not be reliably timed.

element." *Sampson v. American Std. Ins. Co.*, 582 N.W.2d 146, 150 (Iowa 1998).

C. Denying the Motions To Compel & For A Continuance Was Not An Abuse of Discretion.

1. Standard Of Review

A trial court's denials of a motion to compel and of a CR 56(f) motion are reviewed for abuse of discretion. *Clarke v. Office of Att'y Gen'l*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006); *Mossman v. Rowley*, 154 Wn. App. 735, 742, 229 P.3d 812 (2009). "A court abuses its discretion when it bases its decision on unreasonable or untenable grounds." *Clarke, supra.* The trial court's decision will be sustained on any basis established by the record. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

The reasonableness of the discretionary decision depends in part on the case's procedural posture at the time. LCS did not move to compel further production or for a continuance until after *Frye* had been applied and summary judgment of no coverage had been granted. (CP 2310, 1826, 2236) Therefore, the motions only concerned the extracontractual claims.

2. Facts

In July 2009, two years after the Complaint was filed, LCS sent its first set of interrogatories and requests for production. (CP 1, 1866) St. Paul's response included a complete copy of its claim file except for portions redacted on attorney-client grounds. (CP 1847; 1850, 2153-57) A work product privilege also was asserted, but all of the work product documents in the claim file also were attorney-client documents. (CP 2153-57)

Similarly, St. Paul declined to produce a litigation file created after suit by an in-house attorney. (CP 1845; 1860) The file consists of documents concerned only with defense of the case and does not include "claim" documents except to the extent an extra copy of a document already in the claim file might wind up in the litigation file. The in-house attorney is not a claim adjuster and does not have authority to accept, deny, or pay claims, even after litigation is filed. The in-house attorney monitors defense of the suit, such as reviewing pleadings and reports from defense counsel and making decisions on defense strategy. (CP 2147-48)

St. Paul also withheld on work product grounds a file maintained by its subrogation department. (CP 2157) The subrogation department does not accept, deny, pay or otherwise adjust claims. It did not hire

experts to assess any issues at LCS. (CP 2148-49). Rather, it analyzed whether reimbursement could be sought in suits against third parties and closed its file when it became clear there were no third parties to pursue. (Id.)

In addition to the claim file, LCS sought information and documents regarding prior claims or other litigation for the last 20 years in which St. Paul had (1) litigated whether "substantial impairment of structural integrity or any similar collapse concept existed," (2) litigated when such a condition "first existed," and (3) retained "engineering professionals" to provide an opinion on when such a condition first occurred. (CP 1854-56)

St. Paul objected that it does not keep a database of this information and would have to manually search tens of thousands of files to provide it. (CP 1853-43; 1855; 1856; 2149-50) However, in an effort to provide the information that was available without a database search, St. Paul searched its corporate memory and was unable to recall any such litigations or retentions. (Id.) Information was not provided for other Travelers companies because the discovery expressly asked for prior actions by "St. Paul." (CP 1853; 2148)

3. The Requested Discovery Was Irrelevant To The Pending Motion.

St. Paul's pending summary judgment motion on extracontractual claims spelled out the following three grounds for dismissing the bad faith claims:

1. A prior insurer has no duty to make a physical investigation of present "collapse" conditions when there is no scientifically valid way to determine the level of decay existing during the insurer's policy period.

2. Because LCS incurred, decided to incur, or obligated itself to incur expenses before putting St. Paul on notice, an alleged "bad faith failure to investigate" cannot be a proximate cause of those expenses; and

3. St. Paul is not obligated to pay for investigation expenses LCS incurred, decided to incur, or obligated itself to incur before putting the insurer on notice of the loss. (CP 1584)

LCS's discovery requests were not relevant to any of these grounds. The discovery requests were not relevant to #1 because the court had already ruled for St. Paul on the *Frye* issue. Once the trial court determined there is no established science for timing rot, St. Paul's lack of duty (or lack of breach of any duty) followed as a matter of law.

LCS's requested discovery was not relevant to #2 or #3 either. The proof that LCS had incurred, decided to incur, or obligated itself to incur expenses before putting St. Paul on notice came from LCS's own records and witnesses, such as it president and board minutes. (CP 1757-98; 1805; 1814-15) Discovery into St. Paul's attorney-client documents, subrogation files, other claim files, etc., would not shed any light on the issue.

LCS claims the requested discovery is relevant to its bias argument—that St. Paul chose Dr. Goodell, not some other expert, as part of a nefarious plot hatched by counsel to deny LCS's claim (Opening brief at 34) Bias, however, was not relevant to the grounds for St. Paul's motion for summary judgment—lack of duty and proximate cause. Plus, as already has been shown, Washington follows an objective approach to bad faith and St. Paul's *Frye* position was correct. *See discussion, supra* at p. 37.

Magana v. Hyundai Motor Am., 167 Wn. 2d 570, 220 P.3d 191 (2009), does not require a different result. That was a product liability action in which plaintiff sought information about prior accidents in similar vehicles. The relevance of such evidence is established by statute and was not disputed. *See* RCW 7.72.030(1)(a); 5 *Tegland* Wash. Practice § 402.11 (5th ed. 2010). LCS sought highly burdensome

discovery that was not relevant to the pending motion for summary judgment. The trial court did not abuse its discretion.

4. LCS Did Not Overcome the Privileges.

LCS says that without the privileged materials it "was denied the opportunity to prove what St. Paul did or did not do, and the reasons for its actions, based on St. Paul's contemporaneous record of events." (Opening brief at 47) What St. Paul did and did not do is objectively verifiable through observation. What LCS really wanted was discovery into why St. Paul decided to do or not do something, i.e., the mental processes discussed in privileged communications. Because Washington applies an objective standard to bad faith claims, however, the inquiry is irrelevant. *See discussion, supra,* at p.37.

Even if an inquiry into subjective intent were relevant, LCS failed to establish a basis for vitiating the attorney-client privilege. In *Cedell v. Farmers Ins. Co.*, 157 Wn. App. 267, 237 P.3d 309 (2010), a first-party property coverage case, the court said:

> We hold that an insurance company has a right to attorney-client privilege in a first-party-insurer claim for bad faith absent showing an established exception to the privilege applies, such as fraud. Further, we hold that the trial court abused its discretion by requiring an in-camera review without Cedell first establishing a sufficient factual basis of fraud.

157 Wn. App. at 269-70. *See also, Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 743 P.2d 832 (1987)("The exception is usually invoked only upon a prima facie showing of bad faith tantamount to civil fraud") LCS has not made a *prima facie* case for bad faith, let alone fraud.

Cedell, like the instant case, involved first party property insurance, not a third party liability insurance. The first party/third party distinction is crucial because a third party case involves the actions of an attorney hired by an insurer to represent the insured. When that attorney's client is the insured, not the insurance company, the attorney client and work product privileges apply much differently, if at all. Here, *the attorneys always and only represented the insurance carrier.*

Similarly, when the work product privilege is applied in a third party context, the relevant litigation usually is one in which the insured was a defendant and some third person was a plaintiff. The "work product" is the insurer's evaluation of that underlying litigation (which usually is over). Here, by contrast, LCS seeks work product generated by St. Paul to defend St. Paul in an ongoing litigation in which LCS is the plaintiff. That is the very definition of work product. *See, Heidebrink v. Moriwaki*, 104 Wash. 2d 392, 706 P.2d 212 (1985); *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

With respect to the litigation file opened by St. Paul's in-house attorney, all internal communications would be privileged since he would be a lawyer speaking with his client. As for the work product rule, LCS cannot demonstrate substantial need for the work product because an insurer's *litigation* strategies and techniques are not relevant, even if the insurer had not completed an investigation when suit was filed. *See, Knotts v. Zurich Ins. Co.,* 197 S.W.3d 512, 519 (Ky. 2006).

LCS tries to avoid *Cedell* by arguing St. Paul's defense attorney acted as a "claim adjuster," so the attorney-client relationship did not exist. (Opening brief at 48) However, St. Paul had a claim adjuster assigned to the matter the entire time—Mr. Luoma. (CP 1595) The sole portion of the record cited for the proposition that defense counsel acted as a claim adjuster is Mr. Luoma's testimony that after LCS stopped responding to his information requests and "the litigation commenced all communications took place between counsel and investigation was performed through the legal process." (CP 1598)

St. Paul had no choice but to communicate through its counsel. LCS presented its claim through its attorneys. By industry practice and claim regulations, if an insured is attorney represented the insurer communicates with the attorney, not the insured. WAC 284-30-030(19) (CP 1596) Thus, St. Paul's communication had to be to the insured's

attorney. When St. Paul was sued, it was obligated to appear through counsel. Once that happened, both parties were attorney represented and the attorneys could only communicate with each other. RPC 4.2.

That information is developed through the legal process does not make an attorney a "claim adjuster." Because *Kallevig*, 114 Wn.2d at 913, requires an insurer to consider information presented by the insured after suit, St. Paul had to wait for LCS to present its rot timing theory. (CP 1599) Appearing in litigation and using the discovery process to request such information, especially when the insured does not respond to the adjuster's information requests and instead files suit, is not "claim adjuster" activity. A claim adjuster attempting to do so would be practicing law without a license, which is a crime. RCW 2.48.180(b).

LCS also suggests that once St. Paul's defense attorney appeared, the investigation automatically was biased because an attorney owes duties of loyalty and advocacy to his client. (Opening brief at 32) But as agents of their principal, adjusters also have a loyalty duty. *Moon v. Phipps*, 67 Wash. 2d 948, 954, 411 P.2d 157, 161 (1966). As for advocacy, LCS should read the Rules of Professional Conduct. An attorney has a duty to "exercise independent professional judgment and render candid advice." RPC 2.1. "A client is entitled to straightforward advice expressing the lawyer's honest assessment," which includes

informing the client of unpleasant facts and alternatives. *Id*, comment (1).

5. St. Paul Was Not Required To Immediately Move For A Protective Order.

With respect to the discovery into prior claims and litigations, St. Paul objected that a complete response would require a manual search of thousands of claim files. (CP 1853-6) LCS argues that under *Magana v. Hyundai, supra,* St. Paul was required to file for a protective order rather than objecting. In *Magana*, however, the discovery dispute had been ongoing for years, had repeatedly been brought before the trial court, and Hyundai had never moved for a protective order at any time. This is vastly different from a rule requiring a party to move for a protective order immediately upon deciding that requested discovery is overly burdensome. Such a rule would burden trial courts with thousands of potentially unnecessary protective order motions.

The more reasoned procedure is to allow the objection to be made and then to require the parties to hold the discovery conference required by CR 26(i). If the parties cannot work out their differences, then motions can be filed. CR 26(c) does not place a time limit on when protective orders can be requested, and trial courts are granted substantial

latitude to decide whether such orders are appropriate. *See, King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 371, 16 P.3d 45 (2000).

Here, a discovery conference was not held until November 17, 2009 and the motion for summary judgment was scheduled for December 11. (CP 1877) LCS admittedly beat St. Paul to the punch by filing its motion to compel on November 24, before St. Paul had been able to move for a protective order. (CP 1826) A race to the courthouse should not decide the victor, and when LCS filed its motion to compel the entire dispute had the potential to become moot if the trial court agreed with St. Paul's grounds for summary judgment, which were not relevant to the discovery sought. The issue of whether a protective order might be appropriate thus has not been litigated. If the Court of Appeals reverses any part of the summary judgment order on the extracontractual claims, this discovery issue should simply be remanded for further proceedings.

V. CONCLUSION

For the above reasons, the trial court's orders should be affirmed.

DATED this 23rd day of November, 2010.

JAMES T DERRIG ATTORNEY AT LAW PLLC

/s/ James T Derrig

James T. Derrig, WSBA 13471
Attorney for St. Paul Fire & Marine Ins. Co.

APPENDIX A

We'll also cover this property while:
- in the open within 1000 feet of the insured location; or
- within vehicles in the open within 1000 feet of the insured location.

The most we'll pay for the property of any one person is $1,000.

Covered Causes Of Loss

We'll insure the covered property against risks of direct physical loss or damage unless it's excluded in the Exclusions-Losses We Won't Cover section. However, the following restrictions apply.

Collapse coverage. We'll insure covered property against the risk of direct physical loss or damage involving collapse of a building or any part of a building.

The collapse must be due to any of the following causes of loss:

- fire, smoke, lightning, wind, hail, explosion, vehicles, aircraft, vandalism, malicious mischief, civil disturbance, riot, leakage from fire extinguishing equipment, sinkhole collapse or volcanic action;
- building glass breakage, falling objects, water damage, weight of ice and snow or sleet;
- hidden decay;
- hidden insect or vermin damage;
- weight of people or business contents or other business property;
- weight of rain which collects on a roof; or
- use of defective material or methods in construction, remodeling or renovation if the collapse occurs before such work is completed.

Collapse doesn't include settling, cracking, bulging, shrinking, or expansion.

Property with limited collapse coverage. Even if the types of property listed below are specifically included, we'll cover only causes of loss listed in paragraphs 1 and 2 above unless the damage is the direct result of the collapse of a building:
- fences, retaining walls;
- outdoor swimming pools;
- piers, wharves, docks;
- beach or diving platforms and appurtenances;
- patios, walks, roadways and other paved surfaces;
- outdoor radio or TV antennas or towers including their lead-in wiring;
- gutters or downspouts; or
- awnings or yard fixtures.

Exclusions – Losses We Won't Cover

When we use the word "loss" in this section we also mean damage.

Acts or decisions of people. We won't cover loss caused by any act or decision or by the failure to act or decide, of any person, group, organization or unit of government. But if a loss not otherwise excluded results, we'll pay for that resulting loss.

Boilers. We won't cover loss to a hot water boiler or any other equipment for heating water when the loss is caused by any condition or event within such equipment other than an explosion.

We won't cover loss to a steam boiler, steam pipe, steam turbine, or steam engine when the loss is caused by any condition or event within such equipment. Nor will we cover loss caused by the explosion of a steam boiler, steam pipe, steam turbine or steam engine that you own, operate or lease.

If a loss results from fire or explosion that would otherwise be covered, we'll cover the resulting loss. We'll also cover loss caused by the explosion of accumulated gas or unconsumed fuel in the firebox or combustion chamber of a fired furnace or in the flues or passages leading from the firebox chamber.

But, this exclusion doesn't apply to the additional benefits for accounts receivable or valuable records research.

Breakage of fragile items. We won't cover breakage of business contents consisting of glass, glassware, marble, Chinaware, porcelains, statuary or other fragile or brittle articles unless the breakage is caused by:

- fire;
- smoke;
- lightning;
- wind or hail;
- explosion;
- vehicles or aircraft;
- vandalism;
- civil disturbance or riot;
- burglary;
- sprinkler leakage;
- sinkhole collapse;
- volcanic action;
- falling objects;
- weight of snow, ice or sleet; or
- water damage.

If wind or hail makes openings in your building, we'll cover breakage of fragile items in the building caused by wind or hail coming through those openings.

However, bottles or similar containers holding property you sell or photographic or scientific lenses or glass that is part of a building or structure are not subject to the above limitations.

Collapse. We won't cover loss resulting from collapse other than that described in the collapse coverage under the Covered Causes Of Loss section.

Delay – loss of market. We won't cover loss caused by delay, loss of market, loss of use, or any indirect loss.

Disappearance – inventory loss. We won't cover loss of property that is missing where the only evidence of the loss is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

Dishonesty. We won't cover loss caused by any fraudulent, dishonest or criminal act committed by you or by a partner, director, officer, trustee, agent or employee of yours. Nor will we cover dishonest acts of anyone entrusted with covered property. But this exclusion won't apply to acts of destruction by an employee of yours other than theft.

Earth movement. We won't cover loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. This exclusion doesn't apply to a covered theft loss or to loss to property in transit.

1. Any earth movement (other than sinkhole collapse) such as earthquake, landslide, mine subsidence or earth sinking, rising or shifting including that caused by subsidence, settling, contraction or expansion of soils.

Sinkhole collapse means sudden sinking or collapse into a sinkhole of the earth supporting your property.

But we won't cover any of the following due to loss from sinkhole collapse:
- loss for the value of land;
- the cost of filling sinkholes;
- loss of use or any other indirect loss; or
- subsidence of man-made underground cavities.

Sinkholes are underground empty spaces created by the action of water on limestone or similar rock formations.

If fire or explosion results from any of these causes of loss, we'll pay for the damage directly caused by the fire or explosion. For example:

An earthquake causes a wall in your building to collapse, breaking a gas pipe. The gas explodes and starts a fire. We won't cover the damage to the wall or pipe caused by the earthquake. But we'll cover the damage caused by the fire.

2. eruption, explosion or effusion of a volcano other than volcanic action.

Volcanic action means only:
- volcanic blast, airborne shockwaves;
- ash, dust, particles; or
- lava flow

that results from the eruption of a volcano.

If more than one volcanic eruption occurs within any 168 hour period we'll consider this one occurrence.

But for Debris Removal Coverage, we'll only pay for removal of ash, dust, or particles that have caused direct damage to covered property.

But, this exclusion doesn't apply to the additional benefits for accounts receivable or valuable records research.

Settling – smog – temperature. We won't cover loss caused or made worse by:

•changes or extremes in temperature or humidity;
•smog, smoke, vapor or gas from agricultural or industrial operations; or
•settling, cracking, bulging, shrinking or expansion of a pavement, foundation, swimming pool, wall, roof or ceiling.

If a loss not otherwise excluded results, we'll pay for that resulting loss.
But, this exclusion doesn't apply to the additional benefits for accounts receivable or valuable records research.

Utility failure. We won't cover loss caused directly or indirectly by the failure of power, or other utility service supplied to an insured location if the break in service occurs away from that location. Such loss is excluded regardless of any other event that contributes concurrently or in any sequence to the loss.

But if loss or damage by a cause of loss not otherwise excluded results, we will pay for that resulting damage. For example:

A windstorm takes down power lines away from your insured premises causing a power outage to your premises. The power outage shuts off your furnace and water pipes in your building freeze and break. Such water damage would be covered because water damage that results from a broken pipe is not otherwise excluded. However, food in your freezer that spoils because of the power outage would not be covered because spoilage is an excluded cause of loss.

Voluntary surrender. We won't cover the loss if covered property is voluntarily sold or given to someone who obtains it by trick, false pretense or other fraudulent schemes.

War. We won't cover loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
•war (declared or undeclared);
•warlike action by a military force, including anything done to hinder or defend against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents;
•invasion or insurrection;
•rebellion, revolution or civil war;
•seizure of power; or
•anything done to hinder or defend against these actions.

Water. We won't cover loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
•flood, surface water or spray, waves, tidal waves or overflow of any body of water, even if driven by wind;
•mudslide or mudflow;
•water backup from a sewer or drain; or
•underground water exerting pressure on or flowing through a sidewalk, driveway or other paved surface, foundation, wall, basement, floor, door, window or other opening.

If a fire or explosion or loss from sprinkler leakage results from any of these water causes of loss, we'll pay for the damage directly caused by the fire or explosion or sprinkler leakage.

This exclusion doesn't apply to a covered theft loss or to loss to property in transit. Nor does this exclusion apply to the additional benefits for accounts receivable or valuable records research.

Wear – tear – deterioration – animals. We won't cover loss caused or made worse by:

•wear and tear;
•deterioration, mold, wet or dry rot, rust or corrosion including fungal or bacterial contamination;
•contamination, shrinkage, evaporation, loss of weight;
•changes in flavor, color, texture or finish;
•animal and insect pests, including birds, mice, rats and termites; or
•the inherent nature of the property.

APPENDIX B

ASI	Description	Completion Date of Building	SSI	Years to SSI	SSI Date	Responsible Insurer
1	stairs	July-80	N			
2	pony wall base plate	July-80	Y	11	June-91	St. Paul
3	deck	July-80	N			
3	deck	July-80	Y	25	June-05	post coverage
4	stairs & landing	July-80	Y	17	July-97	St. Paul
5	deck	July-80	N			
5	deck	July-80	Y	21	July-01	Northern
7	exterior wall	July-80	Y	11	July-91	St. Paul
11	sill plate chimney	July-80	Y	11	July-91	St. Paul
14	exterior wall	July-80	Y	14	July-94	St. Paul
15	roof framing, barge rafter	July-80	Y	15	July-95	St. Paul
16	deck	July-80	N			
16	deck	July-80	Y	16	July-96	St. Paul
18	wall base plate	July-80	Y	10	July-90	St. Paul
18	stairs & landing	July-80	N			
21	stair framing wall	July-80	Y	17	July-97	St. Paul
22	stair guard wall framing	July-80	Y	21	July-01	Northern
22	stair guard wall framing	July-80	Y	21	July-01	Northern
23	deck	July-80	Y	21	July-01	Northern
23	deck	July-80	N			
24	exterior wall	July-80	Y	14	July-94	St. Paul
26	exterior wall	July-80	Y	14	July-94	St. Paul
27	exterior wall	July-80	Y	24	July-04	post coverage
33	exterior wall	July-80	Y	10	July-90	St. Paul
34	deck	July-80	Y	27	July-07	post coverage
35	deck	July-80	Y	16	July-96	St. Paul
36	common parapet wall	July-80	Y	13	July-93	St. Paul
36	common parapet wall	July-80	N			
38	roof framing	July-80	Y	14	July-94	St. Paul
39	parapet wall	July-80	Y	21	July-01	Northern
39	exterior wall	July-83	N			
40	stairs & landing	July-80	Y	2	July-82	St. Paul
41	stair wall sheathing	July-80	Y	2	July-82	St. Paul
43	roof framing	July-80	Y	17	July-97	St. Paul
43	roof framing	July-80	Y	17	July-97	St. Paul
45	deck	July-80	N			
45	deck	July-80	Y	21	July-01	Northern
45	deck	July-80	Y	21	July-01	Northern
46	common parapet wall	July-80	Y	20	July-00	Northern
46	common parapet wall	July-80	Y	20	July-00	Northern
51	stairs	July-80	Y	2	July-82	St. Paul
52	stairs & landing	July 80	Y	17	July-97	St. Paul
53	stairs	July-80	Y	2	July-82	St. Paul
54	exterior wall	July-80	Y	24	July-04	post coverage
55	deck	July-80	N			

ASI	Description	Completion Date of Building	SSI	Years to SSI	SSI Date	Responsible Insurer
55	deck framing	July-80	Y	16	July-96	St. Paul
55	deck framing	July-80	Y	16	July-96	St. Paul
56	common parapet wall	July-80	Y	14	July-94	St. Paul
56	common parapet wall	July-80	Y	14	July-94	St. Paul
57	roof framing	July-80	N		July-80	St. Paul
57	roof framing	July-80	Y	15	July-95	St. Paul
57	roof framing	July-80	Y	15	July-95	St. Paul
59	exterior wall	July-83	Y	12	June-95	St. Paul
60	deck	July-83	N			
60	deck	July-83	Y	18	June-01	Northern
62	stairs & landing	July-83	Y	2	June-85	St. Paul
63	stairs & landing	July-83	Y	2	June-85	St. Paul
66	roof framing	July-83	Y	13	June-96	St. Paul
68	exterior wall	July-83	Y	21	June-04	post coverage
70	chimney	July-83	Y	16	June-99	St. Paul
74	exterior wall	July-83	Y	12	June-95	St. Paul
75	stair framing	July-83	Y	21	June-04	post coverage
76	elevated deck framing	July-83	Y	19	June-02	Northern
78	common parapet wall	July-83	Y	13	June-96	St. Paul
78	common parapet wall	July-83	Y	13	June-96	St. Paul
79	exterior wall	July-83	Y	13	June-96	St. Paul
80	exterior wall	July-83	Y	21	June-04	post coverage
82	exterior wall	July-83	Y	10	June-93	St. Paul
83	deck	July-83	Y	18	June-01	Northern
84	exterior wall	July-83	Y	13	June-96	St. Paul
89	exterior wall	July-83	Y	10	June-93	St. Paul
90	deck	July-83	Y	23	June-06	post coverage
92	exterior wall	July-83	Y	18	June-01	Northern
93	stairs & landing	July-83	Y	10	June-93	St. Paul
94	exterior wall	July-83	Y	12	June-95	St. Paul
100	roof framing	July-80	Y	7	June-87	St. Paul
101	exterior wall	July-80	Y	10	June-90	St. Paul
102	exterior wall sill plate	July-80	Y	10	June-90	St. Paul
103	roof framing	July-80	Y	16	June-96	St. Paul
110	exterior stair bldg 16, pony wall under stair	October-90	Y	18	September-08	post coverage
111	exterior stair bldg 16, all sheathing	October-90	Y	9	September-99	Northern
113	exterior stair bldg 17 pony wall sheathing	May-91	Y	13	April-04	post coverage
114	exterior stair bldg 18, stair stringer	August-92	Y	11	July-03	post coverage
115	exterior stair bldg 18, pony wall under stair	August-92	Y	8	July-00	Northern

ASI	Description	Completion Date of Building	SSI	Years to SSI	SSI Date	Responsible Insurer
116	exterior stair landing to bldg 19	November-92	Y	12	October-04	post coverage
117	bldg 19 walkway framing	November-92	Y	9	October-01	Northern
118	Bldg 20 stair, pony wall under stair	March-94	Y	11	February-05	post coverage
119	Bldg 20 walkway framing	March-94	Y	13	February-07	post coverage
125	elevated deck framing	March-94	Y	9	February-03	post coverage
126	elevated deck framing	March-94	Y	9	February-03	post coverage
127	elevated deck framing	March-94	Y	9	February-03	post coverage
130	elevated deck framing	March-94	Y	9	February-03	post coverage
138	exterior wall	November-92	Y	6	October-98	St. Paul
138	exterior wall	November-92	Y	8	October-00	Northern
138	exterior wall	November-92	Y			
139	exterior wall	November-92	Y	8	October-00	Northern
139	exterior wall	November-92	N			
139	exterior wall	November-92	N			
139	exterior wall	November-92	N			
141	deck	November-92	N			
143	deck	November-92	Y	9	October-01	Northern
144	deck	November-92	Y	9	October-01	Northern
145	deck	November-92	Y	9	October-01	Northern
146	deck	November-92	Y	12	October-04	post coverage
147	deck	November-92	Y	9	October-01	Northern
148	deck	November-92	Y	9	October-01	Northern
152	exterior wall	August-92	Y	11	July-03	post coverage
153	deck	August-92	Y	10	July-02	Northern
154	deck	August-92	Y	10	July-02	Northern
155	exterior wall	August-92	Y	12	July-04	post coverage
155	exterior wall	August-92	Y	12	July-04	post coverage
156	exterior wall	August-92	Y	12	July-04	post coverage
157	exterior wall	August-92	Y	14	July-06	post coverage
157	exterior wall	August-92	N			
157	exterior wall	August-92	N			
157	exterior wall	August-92	N			
158	deck	August-92	Y	7	July-99	St. Paul
159	deck	August-92	N			
160	exterior wall	August-92	Y	12	July-04	post coverage

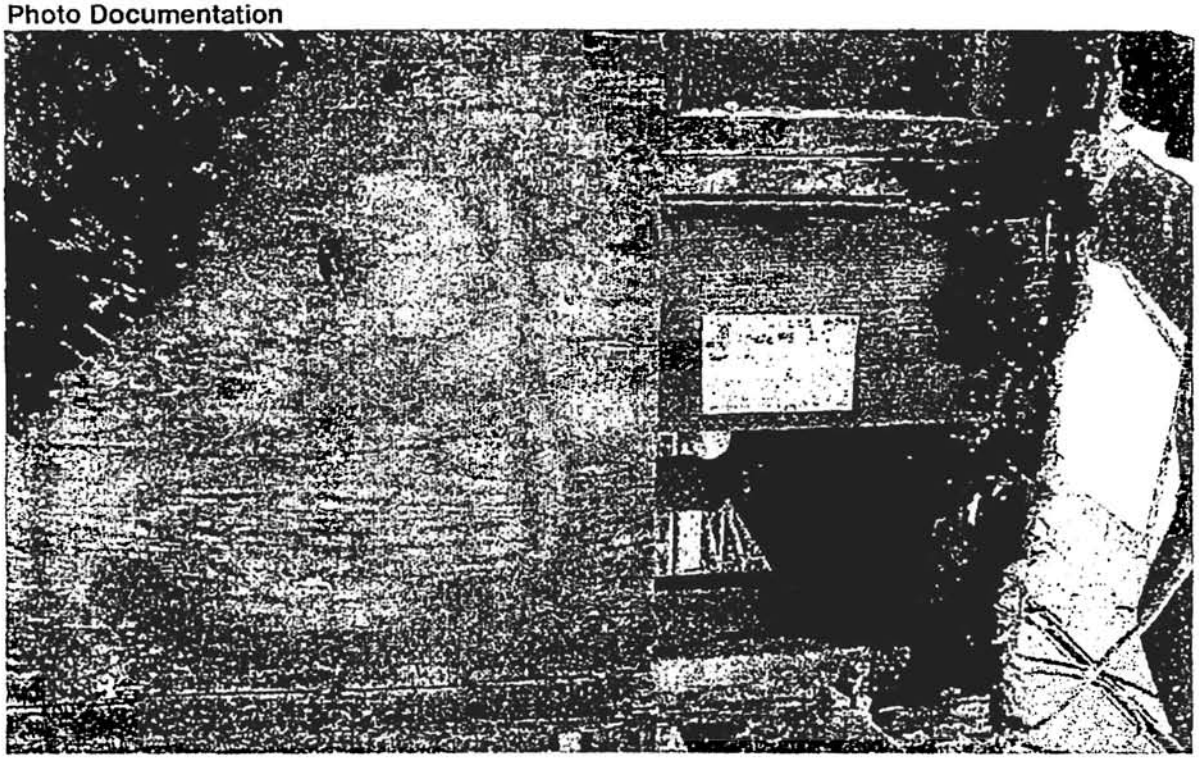
ASI	Description	Completion Date of Building	SSI	Years to SSI	SSI Date	Responsible Insurer
162	exterior wall	May-91	Y	13	April-04	post coverage
164	exterior wall	May-91	N			
164	exterior wall	May-91	N			
164	exterior wall	May-91	Y	13	April-04	post coverage
164	exterior wall	May-91	Y	13	April-04	post coverage
165	deck	May-91	Y	8	April-99	St. Paul
166	deck	May-91	Y	11	April-02	Northern
167	exterior wall & deck framing	May-91	Y	11	April-02	Northern
167	exterior wall	May-91	N			
168	deck	May-91	Y	13	April-04	post coverage
169	deck	May-91	Y	11	April-02	Northern
170	exterior wall	May-91	N			
170	deck framing	May-91	Y	11	April-02	Northern
171	exterior wall	May-91	N			
171	deck framing	May-91	Y	11	April-02	Northern
172	exterior wall	May-91	Y	11	April-02	Northern
172	deck	May-91	N			
174	deck	October-90	Y	13	September-03	post coverage
175	deck	October-90	Y	13	September-03	post coverage
176	chimney flue framing	October-90	Y	11	September-01	Northern
177	deck	October-90	Y	11	September-01	Northern
178	deck	October-90	Y	11	September-01	Northern
182	chimney framing	October-90	Y	11	September-01	Northern
182	exterior wall	October-90	N			
184	exterior wall	October-84	Y	18	September-02	post coverage
185	landing	October-84	Y	15	September-99	Northern
186	deck	October-84	Y	18	September-02	post coverage
187	deck	October-84	Y	12	September-96	St. Paul
189	deck	October-84	Y	12	September-96	St. Paul
190	deck	October-84	Y	13	September-97	St. Paul
192	exterior wall	October-84	Y	15	September-99	Northern
195	elevated walkway framing	October-84	Y	15	September-99	Northern
195	landing & exterior walls	October-84	N			
197	elevated walkway framing	October-84	Y	15	September-99	Northern
198	elevated walkway framing	October-84	Y	18	September-02	post coverage
198	landing & exterior walls	October-84	N			
199	deck	October-84	Y	12	September-96	St. Paul
200	deck	October-84	Y	13	September-97	St. Paul
201	deck	October-84	Y	15	September-99	Northern
202	deck	October-84	N			

APPENDIX C

Substantial Structural Impairment

Project	Lake Chelan Shores
Prepared By	Justin Franklin
SSI #	16
Corresponding ASI #	16
Description of Damage	Unit 3-8 elevated deck framing. The end of the floor joist shown has rotted away to the point where an insufficient bearing condition is created.

Photo Documentation



Substantial Structural Impairment

Building Code 1976 Uniform Building Code

Building Life 28 yrs

	full member depth (in)	observed decay depth (in)	% Decay
Observed Decay	3.5	2.5	71.43%

	dead loading (psf)	live loading (psf)	total (psf)
Critical Loading	60	60	120

	span (ft)	tributary width (ft)	member stress (psi)		
Maximum Stress	18	0.5	fc' = [120*9*0.5*]5.25	=	103

	section properties	allowable stress (psi)		
Allowable Stress	A = 5.25	Fc' = 455*1.0*1.0*1.0	=	455

	full member depth (in)	critical decay depth (in)	% Decay
Critical Decay	3.5	0.75	21.43%

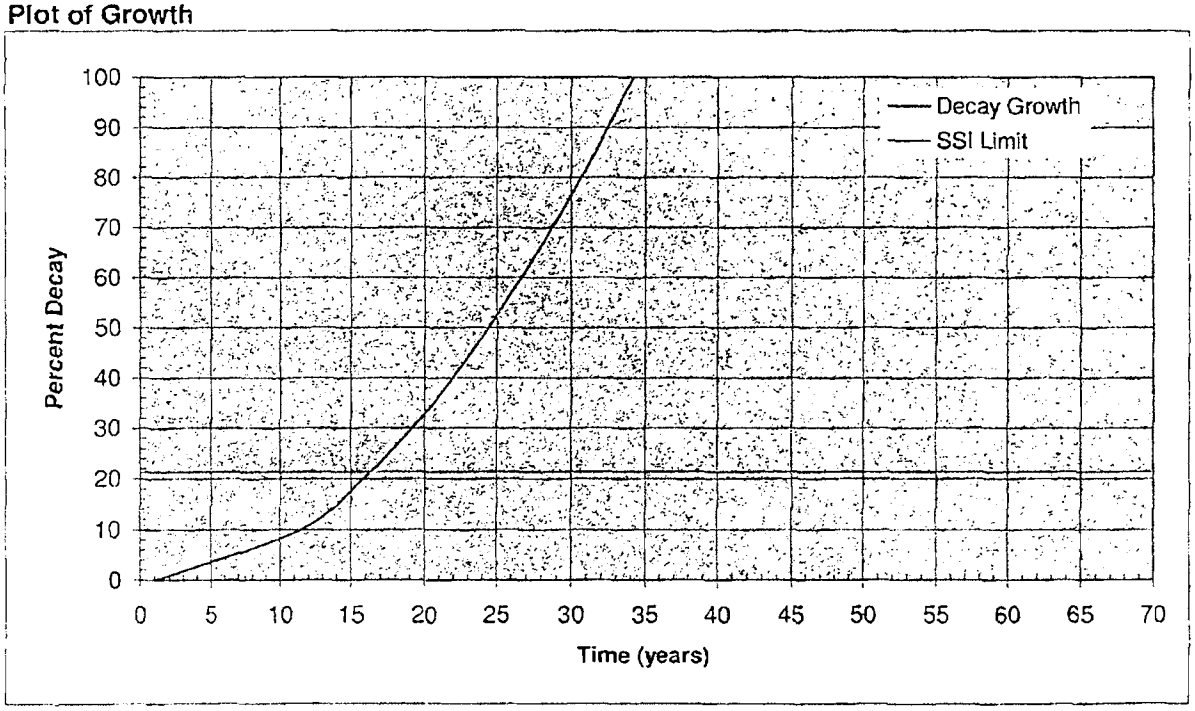
Assumptions

1. The water intrusion which caused the decay started 1 year after construction
2. Consistent wetting and temperature cycles occurred annually throughout the life of the building.
3. Exponential Growth

Growth Equation

y = 1 + a * x^2
a = 0.091108
y = 1+ 0.091108 * x^2

Plot of Growth



APPENDIX D

TABLE OF SIGNIFICANT DATES

- July 1980: Construction of first LCS buildings completed (CP 677)
- July 1982: First instance of SSI per Franklin calculation (CP 677)
- March 1994: Construction of last LCS buildings completed (CP 678)
- August 1996: First St. Paul policy begins (CP 6)
- August 1999: Last St. Paul policy ends (CP 6)
- September 2006: Initial Olympic Associates report to LCS board (CP 1603)
- October 2006: Board acts on "exterior restoration project" (CP 1757)
- November 2006: LCS's counsel first seeks rot timing opinion from Franklin (CP 906)
- April 2007: Decision to strip all siding as part of project (CP 1805, 1814-5)
- July 2007: St. Paul receives first notice of claim (CP 1601)
- August 2007: LCS sues St. Paul (CP 1)
- September 2007: Exterior restoration project begins (CP 1668)
- September 2008: Last instance of SSI per Franklin calculation (CP 678)
- December 2008: LCS hires Flynn as expert (CP 824)
- June 2008: Court compels LCS to disclose rot timing opinions (CP 2432)
- July 2009: LCS discloses rot timing opinions (CP 676)
- September 2009: St. Paul denies coverage (CP 1744)

OFFICE RECEPTIONIST, CLERK

To: Jim Derrig
Cc: petrie@ryanlaw.com; Curran, Robert J.
Subject: RE: No. 84530-1

Rec. 11-24-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jim Derrig [mailto:jim.derriglaw@me.com]
Sent: Wednesday, November 24, 2010 9:16 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: petrie@ryanlaw.com; Curran, Robert J.
Subject: No. 84530-1

I am attaching the Respondent's Brief in cause no. 84530-1.

Sincerely,

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