No. 97083-I

(Court of Appeals No. 76490-0-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY,
a foreign insurance company,

Respondent/Cross-Petitioner,

vs.

LEDCOR INDUSTRIES (USA) INC., a Washington corporation, ADMIRAL WAY, LLC, a Washington limited liability company, and SQI, INC., a Washington corporation,

Petitioners/Cross-Respondents.

REPLY TO ZURICH'S ANSWER TO PETITION FOR REVIEW

Martens + Associates | P.S.

Richard L. Martens, WSBA #4737
Jane J. Matthews, WSBA #41729
Angeli-Ann Kim, WSBA #49836

Attorneys for Petitioners
Ledcor Industries (USA) Inc.,
Admiral Way, LLC, and
SQI, Inc.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104-4436
Telephone: (206) 709.2999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WA State Case Law

Statutes

Court Rules

I. IDENTITY OF PETITIONERS

Ledcor Industries (USA) Inc., Admiral Way, LLC and SQI, Inc., (collectively "Ledcor") appellants in the Court of Appeals, are the Petitioners and file this reply to Zurich American Insurance Company's ("Zurich") answer to the Petition for Review.

II. COURT OF APPEALS DECISION AND REPLY ISSUES

"Under Washington law, insureds and insurers are in a quasi-fiduciary relationship." *Figueroa v. Mariscal,* ___ Wn.2d ___, __ P.3d __ (2019) [No. 95827-1, May 23, 2019] citing *Van Noy v. State Farm Mut. Auto. Ins. Co.,* 142 Wn.2d 784, 793, 16 P.3d 574 (2001) and *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986). "This quasi-fiduciary 'relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers.' *Tank,* 105 Wn.2d at 385 [footnote omitted]. Thus the quasi-fiduciary relationship arises not only out of the contract but also out of the type of occurrences that are covered by insurance, the high stakes of insurance litigation, and the necessary trust and reliance than an insured places on its insurer." *Id.*

Zurich ignores that bed-rock principle.

Zurich raised four discovery/evidentiary issues in its cross-appeal to Division I of the Court of Appeals. The decision issued by the appellate court discusses only one of those issues – Zurich's counsel's failure to comply with discovery orders, withholding documentary evidence and subsequent monetary fine as a sanction by the trial court – and then only to note that Zurich's counsel's multiple discovery abuses did not "rise to the level of bad faith." *Appellate Opinion* at 17. Zurich raises the exact same four issues in its Answer here. All of them are discovery or evidentiary decisions made by the trial court and left undisturbed by the Court of Appeals. The only issue that could be clarified by this Court is at what point do multiple discovery abuses by an insurance company "rise to the level of bad faith" either individually or collectively with a pattern or course of conduct. Except as part of its pattern of discovery abuse and whether that rises to the level of bad faith, none of the issues raised by Zurich relate to the core issues regarding insurance and insurance bad faith set forth in the Petition for Review, nor do they rise to meet the considerations provided by RAP 13.4(b) for acceptance of review. Accordingly, Ledcor respectfully requests that its Petition for Review be

accepted so that this Court may clarify important insurance issues involving substantial public interest, and deny Zurich's request to add discretionary discovery and evidentiary issues that have no weight and only serve as distractions. The only potential exception is to specify when discovery abuses singularly rise to the level of bad faith, or when they can be considered in conjunction with other evidence of an insurance carrier's breach of the obligation of good faith and fair dealing.

III. REPLY TO ZURICH'S ISSUES

A. Summary of Reply.

Zurich requests that, should Ledcor's Petition for Review be granted, four other issues be reviewed as well: (1) that it was wrong for the trial court to issue financial sanctions after Zurich's counsel repeatedly failed to provide discoverable documents to Ledcor, even after the trial court granted Ledcor's motion to compel those documents; (2) that the trial court made an evidentiary error when it did not strike a declaration by Thomas Lofaro, Esq., an officer of Ledcor Industries (USA), Inc.; (3) that the trial court erred in granting Ledcor's motion for a protective order and quashing a deposition subpoena directed to Gregory Harper, Esq., who had been one of Ledcor's former counsel; and, (4) that the trial court made an

evidentiary error when it did not strike a declaration by Mr. Harper, Ledcor's coverage counsel.

Unlike the insurance bad faith issues raised in Ledcor's Petition, these evidentiary issues do not affect the public at large. Zurich's Answer offers no legal argument to support review of these issues along with those presented in Ledcor's Petition for Review. None of these decisions by the trial court had any noticeable impact on the litigation below. Ledcor's claims against Zurich were dismissed by summary judgment. That Zurich was not allowed to depose Ledcor's former counsel because such a deposition could easily invade the attorney-client privilege and/or the attorney work product doctrine seems self-evident. Both privileges are integral components of Washington law. In fact, one is statutory. *See* RCW 5.60.060. The trial court was on solid ground in quashing the deposition. The two affidavits that Zurich now argues should have been stricken were not given much weight by the trial court, as Zurich's summary judgment motions were granted. Regardless, evidentiary rulings are largely discretionary. And Zurich has failed to demonstrate an abuse of discretion.

B. Abuse of Discretion is Standard of Review for Discovery Sanctions.

In the event of acceptance of the Petition for Review and potential reversal and remand, Zurich requests that the sanctions imposed by the trial court for discovery violations against it should be considered as well. Those sanctions might be considered by this Court as evidence of bad faith. Nevertheless, Zurich advances no cogent reason and no authority for reversing the trial court or the Court of Appeals on the matter of sanctions.

Sanctions on discovery matters are discretionary rulings. A trial court can be reversed for discovery matters only if there was a clear showing of a manifest abuse of discretion. *See T.S. v. Boy Scouts of Am.,* 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). Zurich tried, and failed, to obtain discretionary review of the trial court's order. *See Zurich v. Ledcor,* Wash. Court of Appeals, Div. 1, Cause Nos 64463-7-I and 65022-0-I, before raising this issue on appeal. Even with multiple bites of the apple, it simply has not established any abuse of discretion, let alone a clear showing of a manifest abuse.

Nor can Zurich deny that it continued to withhold documents the trial court ordered it to produce and that it was sanctioned for violating the trial court's order compelling the production of those documents. While Zurich may take the position that it "substantially complied with the

court's discovery order"[1], it seems evident that both the trial court and Court of Appeals disagreed.

Ledcor had argued that Zurich's discovery abuses, when taken in context of the other issues that Ledcor presented, should be considered evidence of bad faith and extra-contractual violations that should be considered by a jury. *See, e.g., Brief of Appellants* at 74. The trial court and the Court of Appeals disagreed. If the matter is to be considered at all, guidance from this Court would assist the lower courts and counsel.

C. Abuse of Discretion is Standard of Review for Ruling on Motion to Strike.

Review of a trial court's ruling on a motion to strike is for an abuse of discretion as well. *See Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655, 150 Ed. Law Rep. 502 (2001), *citing King County Fire Prot. Dists. No. 16, 36, 40 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Orion Corp. v. State*, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985). Again, on appeal Zurich failed to establish an abuse of discretion in the trial court's rulings and ultimately, the affidavits considered had no impact on the litigation because Zurich had the claims against it dismissed as a matter of law. With the possible exception discussed above, there is no

[1]Zurich's Answer to Petition for Review at p. 5.

reason to include review of these orders should this Court accept review of the issues raised by Ledcor in its Petition for Review.

D. Abuse of Discretion is Standard of Review for Ruling on Motion for Protective Order to Quash Subpoenas.

"An appellate court reviews a trial court's discovery order for an abuse of discretion." *T.S. v. Boy Scouts of Am.*, *supra*, at 423, *citing John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991). Protective orders and orders quashing deposition subpoenas fall under this standard. *See Olympic Pipeline Co., et al. v. IMCO Gen'l Construction Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2001). In this instance, the trial court granted a motion to quash the deposition of Ledcor's former counsel. Here again, as in its cross-appeal, Zurich fails to provide the court with the "clear showing" that the trial court's exercise of discretion on this discovery matter was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *See Boy Scouts, supra*, at 423, *citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). There is no good reason pursuant to RAP 13.4(b) to accept review of this issue.

IV. CONCLUSION

Ledcor respectfully requests that the Supreme Court accept its

pending Petition for Review and take this moment to address and clarify the insurance issues the petition raises, issues involving significant public interest, but that it decline Zurich's invitation to rehash discretionary evidentiary rulings and discovery sanctions imposed by the trial court except as a pattern of discovery abuse that can support a breach of the obligation of good faith and fair dealing owed by an insurance carrier to its insureds.

RESPECTFULLY SUBMITTED this 29th day of May, 2019.

Martens + Associates | P.S.

By_____
Richard L. Martens, WSBA #4737
Jane J. Matthews, WSBA #41729
Angeli-Ann Kim, WSBA #49836
Attorneys for Petitioners Ledcor Industries (USA) Inc., Admiral Way, LLC, and SQI, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2019, I caused to be served true and correct copies of the foregoing on all parties as follows:

Counsel for Zurich American Insurance Company/ Assurance/Maryland Casualty Jacquelyn A. Beatty, Esq. Karr Tuttle Campbell 701 5th Avenue, Suite 3300 Seattle, Washington 98104-7055	☐ ☐ ☑	U.S. Mail Hand Delivery (ABC Legal) Clerk's E-Service
Counsel for Transportation/Transcontinental H. Matthew Munson, Esq. Betts Patterson & Mines, P.S. 701 Pike Street, Ste. 1400 Seattle, WA 98101	☐ ☐ ☑	U.S. Mail Hand Delivery (ABC Legal) Clerk's E-Service
Counsel for Admiral Way , LLC Bruce A. Winchell, WSBA # 14582 Mills Meyer Swartling 1000 Second Avenue, 30th Floor Seattle, Washington 98104	☐ ☐ ☑	U.S. Mail Hand Delivery (ABC Legal) Clerk's E-Service
Counsel for Virginia Surety Patrick N. Rothwell, Esq. Davis Rothwell Earle & Xochihua 520 Pike Street, Ste.2500 Seattle, WA 98101	☐ ☐ ☑	U.S. Mail Hand Delivery (ABC Legal) Clerk's E-Service

Counsel for North Pacific Insurance Company Gregory Worden, Esq. Lewis Brisbois Bisgaard & Smith 1111 Third Avenue, Ste. 2700 Seattle, Washington 98121	☐ U.S. Mail ☐ Hand Delivery (ABC Legal) ☑ Clerk's E-Service
Counsel for First Mercury Thomas Lether, Esq. Lether & Associates, PLLC 1848 Westlake Ave. N., Ste. 100 Seattle, Washington 98109	☐ U.S. Mail ☐ Hand Delivery (ABC Legal) ☑ Clerk's E-Service

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

SIGNED THIS 29th day of May, 2019, at Seattle, Washington.

By_____
Matthew Morgan
Paralegal for Martens + Associates | P.S.

MARTENS + ASSOCIATES P.S.

May 29, 2019 - 2:45 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97083-1
Appellate Court Case Title:	Zurich American Ins., et al. v. Ledcor Industries Inc., et al.
Superior Court Case Number:	09-2-12732-8

The following documents have been uploaded:

- 970831_Other_20190529144025SC254552_3634.pdf
  This File Contains:
  Other - Reply to Zurich's Answer
  The Original File Name was 190529 Ledcor Reply to Zurich Answer re Petition for Review.pdf

A copy of the uploaded files will be sent to:

- APunzalan@martenslegal.com
- Gregory.Worden@lewisbrisbois.com
- aarmitage@millsmeyers.com
- bbeecher@hackettbeecher.com
- bbeecher@me.com
- bbrady@karrtuttle.com
- beardm@lanepowell.com
- bwinchell@millsmeyers.com
- cfeig@nicollblack.com
- collins.dave67@gmail.com
- docketing@davisrothwell.com
- eneal@letherlaw.com
- jannest@millsmeyers.com
- jbeatty@karrtuttle.com
- jbender@corrcronin.com
- jjackson@bpmlaw.com
- kbrown@millsmeyers.com
- ksagawinia@karrtuttle.com
- linda.morlin@lewisbrisbois.com
- mmunson@bpmlaw.com
- mtemple@bpmlaw.com
- prothwell@davisrothwell.com
- rradcliffe@karrtuttle.com
- rweber@millsmeyers.com
- sally.gannett@andrews-skinner.com
- scolito@letherlaw.com
- sdamon@corrcronin.com
- sgriffin@davisrothwell.com
- stephen.skinner@andrews-skinner.com
- tlether@letherlaw.com
- tobzzz@yahoo.com
- vicki.milbrad@lewisbrisbois.com
- wearle@davisrothwell.com

Comments:

Sender Name: Matthew Morgan - Email: mmorgan@martenslegal.com
Filing on Behalf of: Richard Lawrence Martens - Email: rmartens@martenslegal.com (Alternate Email: mmorgan@martenslegal.com)

Address:
705 5TH AVE S
STE 150
Seattle, WA, 98104
Phone: (206) 709-2999

Note: The Filing Id is 20190529144025SC254552