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Supreme Court No. 102421-5

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SUPREME COURT  
FOR THE STATE OF WASHINGTON

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MARIANNE MONTLER, Respondent/Cross Appellant

v.

FIRST AMERICAN PROPERTY & CASUALTY  
INSURANCE CO., Appellant/Cross Respondent

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FIRST AMERICAN PROPERTY & CASUALTY  
INSURANCE CO.'S ANSWER TO RESPONDENT/CROSS  
APPELLANT MARIANNE MONTLER'S  
AMENDED PETITION FOR REVIEW

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## I. INTRODUCTION

The Amended Petition for Review filed by respondent/cross appellant Marianne Montler (“plaintiff”) fails to establish any errors on the part of Division III of the Court of Appeals<sup>1</sup> and fails to demonstrate any justification for Supreme Court review under RAP 13.4(b). The Court of Appeals correctly rejected plaintiff’s assignments of error, correctly reversed the trial court’s ruling that appellant/cross respondent First American Property & Casualty Insurance Co. (“First American”) had breached the insurance policy at issue, and correctly reversed the trial court’s award of attorney fee to plaintiff pursuant to *Olympic Steamship*. There are no grounds for further review under RAP 13.4(b). This Court should deny plaintiff’s Amended Petition for Review.

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<sup>1</sup> The Court of Appeals’ opinion (“Opinion”) is unpublished. A copy of the opinion is attached to plaintiff’s Amended Petition for Review.

Although First American does not agree with the Court of Appeals' rulings on First American's concealment and misrepresentation affirmative defense and CR 11 assignments of error, First American does not seek review of those decisions.

## **II. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**Issue 1.** Is the Court of Appeals' decision consistent with prior Washington case law regarding appraisal?

**Issue 2.** Did the Court of Appeals correctly rule that the efficient proximate cause rule does not apply?

**Issue 3.** Did the Court of Appeals properly reverse the trial court and rule that First American did not breach the insurance policy, given the lack of any damages to plaintiff?

**Issue 4.** Did the Court of Appeals correctly rule that plaintiff is not entitled to any award of attorney fees, given plaintiff's failure to prevail on any claim?

**Issue 5.** Did the Court of Appeals correctly reject plaintiff's argument that First American had "admitted" the covered water loss caused the mold damage, even though causation was specifically in dispute throughout the case?

**Issues 6 and 7.** Did the Court of Appeals correctly rule that substantial evidence supported the trial court's factual findings?

### **III. STATEMENT OF THE CASE**

In October 2017, plaintiff experienced a toilet overflow from an upstairs bathroom that caused damage to her home ("the covered water loss event"). The home was insured by First American. First American accepted coverage for that loss, fully paid for the remediation work relating to that loss, and fully reimbursed plaintiff for the cost of repairs to her home that were caused by the covered water loss event.

Several months later, plaintiff additionally claimed that there was mold on the first floor of the home that was caused by the water loss event and claimed significant additional repair



costs, damages to her personal property, and the cost of temporary housing for her and her family while the home was repaired. First American investigated and determined that the mold damage was not related to the covered water loss event. There was a significant history of water leaks, water damage, and mold in the home predating the covered water loss event and predating the inception of the policy, including a prior insurance claim by plaintiff.<sup>2</sup>

Plaintiff filed suit and demanded appraisal. First American objected to appraisal of the mold damage, because it disputed causation and coverage for that damage. The trial court (Judge Veljacic) required the parties to move forward with appraisal and required First American to continue paying additional living expense (“ALE”) coverage, while the dispute continued. CP 329-30.

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<sup>2</sup> See, e.g., CP 2338-39, ¶¶ 3-7 (trial court findings regarding the documentation of mold in the home prior to 2017).

In light of the causation/coverage dispute, the appraisal panel prepared separate repair estimates for the “Mold Appraisal Award” and the “Water Dama[g]e Appraisal Award.” The appraisal panel also specified that they were not deciding any causation or coverage issues.<sup>3</sup>

Judge Veljacic confirmed the amount of the appraisal awards, but acknowledged that the disagreement regarding causation and coverage remained. Judge Veljacic denied plaintiff’s motion for summary judgment regarding breach of

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<sup>3</sup> See, e.g., Trial Exhibit 163; CP 786 (email from appraisal umpire Judge Bennett stating that determining which damage was caused by which water events was “the type of factual dispute that is not within the task assigned to the appraisers”); CP 333-34 (appraisal awards specifying that the appraisal “does not address policy coverage, policy limits, prior payments by Insurer, and all terms and conditions of the insurance policy remain in force”).

contract and breach of the Washington Insurance Fair Conduct Act (IFCA).

Plaintiff also sued the prior owners of her home for mold related damage and subsequently settled that case. During the course of the litigation, First American discovered that plaintiff had sought the same damages from the prior owners as they sought from First American. Plaintiff based her damages demand to the prior owners on the same repair estimate by Adam Blagg and the same mold inspection report by Jason Kester that plaintiff presented to First American as evidence of damage caused by the covered water loss event. First American amended its answer to assert an affirmative defense of misrepresentation and concealment, after this discovery.

A four-day bench trial occurred before the trial court (Judge Sheldrick) in August 2021. After hearing testimony from both sides and reviewing the evidence, the trial court found that “First American promptly investigated and remediated the water loss event” after plaintiff reported it.

CP 2339, ¶ 12. After considering the evidence and testimony, the trial court also concluded that “the mold located in the Home is not attributable to the October 17, 2017 water loss event.” CP 2341, ¶ 22. In other words, the downstairs water damage and mold damage claimed by plaintiff did not result from the covered water loss event, and the Policy did not cover those damages.

Consequently, the damage estimates set forth in the Mold Appraisal Award were not attributable to the water loss event. CP 2342, ¶ 33. The damage estimates set forth in the Water Damage Appraisal Award were attributable to the water loss event, and First American had already paid plaintiff an amount in excess of the Water Damage Appraisal Award. CP 2342, ¶¶ 34-35.

The trial court also set forth conclusions of law. The court ruled that plaintiff had failed to establish that First American violated IFCA or its regulations. CP 2342, ¶ 1. The court also ruled that the water loss event did not cause the mold

damage and that First American had not breached the Policy by refusing to pay for the damages set forth in the Mold Appraisal Award. CP 2343, ¶ 3. First American also did not breach the Policy because it promptly investigated and evaluated the damage and promptly paid plaintiff for the covered loss. CP 2343, ¶¶ 4-5. First American could stop paying plaintiff's Loss of Use/Additional Living Expense ("ALE") benefits. CP 2343, ¶ 6.

In light of the June 2019 motion to compel ruling, however, the trial court ruled that First American "breached the Policy by failing to promptly appoint an appraiser after Montler demanded an appraisal." CP 2343, ¶ 1. The court also concluded, however, that plaintiff had not been damaged, because plaintiff had already been fully compensated for the covered losses before the appraisal. CP 2343-44, ¶ 7.

The trial court entered Amended Findings of Fact and Conclusions of Law in February 2022, after plaintiff filed a motion for reconsideration. CP 2760-63. In the amended

findings and conclusions of law, the trial court found that First American had not submitted the matter to appraisal because it disputed causation and coverage for the mold-related damages. CP 2761, ¶ 1. The court noted that plaintiff had continually received ALE benefits from First American during the case and that plaintiff had not established any violation of the prior trial court order to continue paying ALE. CP 2761, ¶¶ 2, 4.

Even though plaintiff was not the prevailing party in the action, the trial court awarded plaintiff \$18,771, on an “equitable basis,” for attorney fees and costs for prevailing on a breach of contract claim against the insured” in the original motion to compel appraisal and continue payments of ALE, pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54 (1991). CP 2762, ¶¶ 6-8.

Both First American and plaintiff sought reversal of some of the trial court rulings on appeal. As discussed below, Division III of the Washington Court of Appeals rejected all of plaintiff’s assignments of error. The Court of

Appeals agreed with First American, however, that it had not breached the insurance contract, in light of the trial court's factual findings, and that plaintiff was not entitled to any attorney fees pursuant to *Olympic Steamship*. The Court of Appeals, therefore, reversed those rulings.

Plaintiff's Amended Petition for Review rehashes her prior arguments to the trial court and Court of Appeals. Those arguments largely rely on assertions of fact that differ from the trial court's findings, which the Court of Appeals confirmed were supported by substantial evidence.

Plaintiff fails to demonstrate that the Court of Appeals' Opinion conflicts with prior decisions by the Washington Court of Appeals or Supreme Court. There is no argument that the issues identified by plaintiff raise a significant question under either the State of Washington or United States Constitutions. Plaintiff also fails to show any issue of substantial public interest. Because plaintiff fails to demonstrate that her disagreement with the Court of Appeals' Opinion justifies

Supreme Court review, as required by RAP 13.4(b), the Court should reject plaintiff's Amended Petition for Review.

#### **IV. ARGUMENT**

##### **Issue 1: The Court of Appeals' Decision Is Consistent With Washington Case Law Regarding Appraisal.**

Plaintiff argues that the Court of Appeals "failed to enforce the Mold Appraisal Award," in conflict with Washington case law holding that appraisal provisions are valid, enforceable, and binding unless a party cannot show bias or prejudice in the appraisal process. The Court of Appeals' decision, however, conflicts with no Washington case law or other authority.

The Court of Appeals recognized that the appraisal panel had specifically bifurcated the appraisal award into two separate awards (one for water damage and one for mold damage), in recognition of First American's objections that the mold damage was not caused by the covered water loss event. Opinion, p. 28. The Court of Appeals also recognized that



Judge Veljacic expressly did not decide the ongoing causation/coverage dispute when he entered a limited confirmation of the appraisal awards. Opinion, p. 28.<sup>4</sup> The Court of Appeals correctly confirmed that the trial court’s finding that the appraisal award did not decide the disputed coverage issues was supported by substantial evidence. Opinion, p. 28.

Washington case law establishes that “[t]he authority and control over the ultimate disposition of the subject matter [of an appraisal] remains with the courts.” *Keesling v. W. Fire Ins. Co. of Fort Scott, Kansas*, 10 Wn. App. 841, 845, 520 P.2d 622 (1974); *see also Mercer Int’l, Inc. v. U.S. Fid. & Guar. Co.*, 938 F. Supp. 680, 683 (W.D. Wash. 1996) (denying a motion to

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<sup>4</sup> *See, e.g.*, RP 78, lns 16-18 (Judge Veljacic’s statement that “I will not speak as to the legal effect of this confirmation. I understand that to be in dispute. ... I don’t know that I’m required to speak to the legal effect of that at this point.”).

compel appraisal and stating that “an appraisal now would be useless” because the parties contract dispute needed to be resolved first, to “set the parameters for an appraisal”).

The trial court correctly ruled that disputed coverage issues needed to be resolved before the appraisal awards could be enforced, and the Court of Appeals properly affirmed that ruling, Opinion, p. 28. Plaintiff does not demonstrate any Washington case law or authority that requires a different result. Supreme Court review of this issue is not warranted.

**Issue 2: The Court of Appeals Correctly Ruled that the Efficient Proximate Cause Rule Does Not Apply.**

Plaintiff contends that the Court of Appeals’ confirmation that the efficient proximate cause rule does not apply, Opinion, p. 27, was “legal error.” Plaintiff is wrong.

The efficient proximate cause rule provides

“where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss, even though

other events within the chain of causation are excluded from coverage.”

*Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 273–74, 109 P.3d 1 (2004) (internal quotation marks omitted). In this matter, however, the trial court found that the covered water loss event did not cause the mold damage or set that damage into motion. The Court of Appeals confirmed that substantial evidence supported the trial court’s conclusion. Opinion, pp. 24-27. There is no predicate for application of the efficient proximate cause rule, in the light of the facts established at trial.

Plaintiff shows no “legal error” and no justification for Supreme Court review of this issue.

**Issue 3: The Court of Appeals Correctly Ruled that First American Did Not Breach the Insurance Contract.**

At the Court of Appeals, First American argued that the trial court erred in ruling that First American had breached the insurance contract by objecting to appraisal, because (1) the coverage and causation issues should have been decided before the parties, trial court, and appraisal panel wasted time

appraising damages that were not covered by the policy and (2) there was no breach of contract, as a matter of law, because plaintiff had suffered no damages. The Court of Appeals agreed with First American's second argument (and declined to address the first argument). Opinion, p. 33.

The trial court determined that First American had fully compensated plaintiff for damages covered by the insurance policy, before the appraisal. Therefore, plaintiff suffered no damages as a result of any delay in the appraisal. Generally, damages are a necessary element in a breach of contract claim. Opinion, p. 33. *See DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 227, 317 P.3d 543 (2014) (“In suits for money damages for breach of contract a court may dismiss a breach of contract action if damages have not been suffered.”); *Myers v. State*, 152 Wn. App. 823, 218 P.3d 241 (2009) (stating that the elements of a breach of contract claim are “(1) a contract that imposed a duty, (2) breach of that duty, and (3) an economic loss as a result of the breach.”). Because

there were no damages, plaintiff's breach of contract claim failed as a matter of law; the trial court erred in ruling otherwise. Opinion, p. 33.

Plaintiff makes no effort to show why review of this issue is warranted under RAP 13.4(b). Instead, she argues that she did suffer damages, because she and her family were displaced from her home and their personal property was damaged by mold. Plaintiff's argument, however, requires this Court to ignore the trial court's finding that the mold damage in the home was not caused by the covered water loss event. The Court of Appeals correctly found that the trial court's conclusion was supported by substantial evidence. Opinion, pp. 25-26.

Regardless of whether plaintiff felt displaced and harmed by moving out of her home, First American's handling of plaintiff's insurance claim was not the cause of that harm. In fact, First American paid approximately \$150,000 in ALE benefits for plaintiff's alternative living arrangements—benefits

that plaintiff was not ultimately entitled to receive. First American has not sought reimbursement of those ALE benefits. Plaintiff's alleged damages were simply not caused by any breach of First American's duties to plaintiff. The Court of Appeals correctly reversed the trial court's ruling that First American had breached the insurance contract.

Plaintiff does not demonstrate that the Court of Appeals erred in reversing the trial court's breach of contract ruling and does not demonstrate any grounds for Supreme Court review of the Court of Appeals' ruling on that issue.

**Issue 4: The Court of Appeals Correctly Reversed the Trial Court's Award of Attorney Fees to Plaintiff.**

Despite finding that plaintiff was not the prevailing party, the trial court awarded plaintiff attorney fees pursuant to *Olympic Steamship* for prevailing on her motion, prior in the litigation, to compel appraisal and continue ALE benefits. First American argued to the Court of Appeals that the trial court

erred in awarding plaintiff any attorney fees. The Court of Appeals agreed and reversed that ruling. Opinion, p. 36.<sup>5</sup>

*Olympic Steamship* held that an award of attorney fees “is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract.” 117 Wn.2d at 53. In this matter, however, plaintiff was not compelled to assume the burden of legal action to obtain the full benefits of her policy. Instead, First American had already paid plaintiff the full amount of benefits to which she was entitled, prior to plaintiff’s legal action.

As the Court of Appeals confirmed, all of plaintiff’s claims—including breach of contract—failed as a matter of fact and law. Plaintiff was not the prevailing party on any claim and, therefore, was not entitled to attorney fees. *See United Servs. Auto. Ass’n v. Speed*, 179 Wn.App. 184, 204,

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<sup>5</sup> The Court of Appeals ruling was not “sua sponte,” as plaintiff contends. Amended Petition for Review, p. 28.

317 P.3d 532, 543 (2014) (denying the insured’s request for fees pursuant to *Olympic Steamship* because the insured was not the prevailing party); *Humleker v. Gallagher Bassett Servs. Inc.*, 159 Wn. App. 667, 686, 246 P.3d 249,258 (2011) (same).

Plaintiff’s attempt to argue that *New York Life Ins. Co. v. Mitchell*, 1 Wn.3d 545, 528 P.3d 1269 (2023), supports her position is ineffectual. In *New York Life Ins.*, this Court noted that decisions following *Olympic Steamship* had granted fees only when the insured was the prevailing party. *Id.* at 570. The Court declined to award fees, because the insured “had not prevailed in this court.” *Id.* Likewise, plaintiff did not prevail on any claim in this litigation. As in *New York Life Ins. Co. v. Mitchell*, there are no grounds for awarding fees to plaintiff in this matter.

The fact that plaintiff prevailed on an intermediary motion does not entitle her to attorney fees for ultimately unsuccessful claims. As the Court of Appeals stated, plaintiff “won the battle and lost the war.” Opinion, p. 38. Plaintiff does not demonstrate that the Court of Appeals erred in making that



ruling and does not show any grounds for Supreme Court review of that decision.

Plaintiff also argues that the Court of Appeals should have reversed the trial court's decision not to award any attorney fees pursuant to IFCA. Plaintiff did not prevail on her IFCA claim, however. The fact that Judge Veljacic made oral comments regarding delay, during a hearing on an intermediate ruling, does not make plaintiff the prevailing party on her IFCA claim. Instead, the trial court specifically ruled that plaintiff failed to establish her IFCA claim. CP 2342, ¶ 1.

Again, plaintiff fails to demonstrate any error in the Court of Appeals' decision or any reason why this Court should review the rulings by the trial court and Court of Appeals declining to award attorney fees under IFCA.

**Issue 5: The Court of Appeals Correctly Ruled that First American Had Not “Admitted” Causation and Coverage.**

Plaintiff next argues that First American and its agents “admitted” and agreed that the mold damage was covered by the insurance policy. This assertion is contrary to the arguments

in all of First American's trial court briefings and arguments, as the Court of Appeals recognized. *See* Opinion, pp. 24-25.

First American's filings and pleadings filed in the trial court and Court of Appeals were premised on the coverage dispute and the parties' disagreement as to whether mold-related damages at the residence were caused by the covered water loss event. The insurance claim that First American and its agents were adjusting involved the covered water loss event. First American concluded that the mold damage in the home was not part of or caused by that covered loss.

Plaintiff's argument that First American somehow "admitted" that there was coverage for the mold damage claimed by plaintiff, by referring to the covered water loss in the course of handling and adjusting the covered water loss, is simply nonsensical. Certainly, plaintiff does not identify any issue that warrants Supreme Court review.

**Issues 6 and 7: The Court of Appeals Correctly Ruled that Substantial Evidence Supported the Trial Court’s Factual Findings.**

Both Issues 6 and 7, as enumerated by plaintiff, raise the same issue. Plaintiff argues that the trial court’s factual rulings, including the conclusion that the mold damage was not caused by the October 2017 water loss event, were wrong. In making that argument, plaintiff relies on and cites her own testimony and the testimony of her own witnesses.

Plaintiff concedes that there was evidence submitted at trial supporting the trial court’s findings, but claims that her evidence was stronger. First, the evidence supporting the trial court’s findings—including the testimony of multiple witness and numerous reports establishing the presence of mold in the home before 2017—is far more extensive than plaintiff admits.<sup>6</sup> The Court of Appeals correctly ruled that the trial court’s

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<sup>6</sup> See, e.g., CP 2338-39, ¶¶ 3-7 (discussing the reports and prior claims documenting mold in the home prior to 2017).

finding were supported by substantial evidence in the trial court record. Opinion, pp. 25-26.

Second, as the Court of Appeals emphasized, appellate courts must defer to the trier of fact regarding issues of witness credibility, conflicting testimony, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Neither the Court of Appeals nor this Court should substitute its own opinion regarding the weight of evidence for the trial court's conclusions, as long as there is substantial evidence supporting the trial court's conclusions, as there is in this matter.

Plaintiff does not demonstrate that the Court of Appeals applied the wrong standard of review. Plaintiff's disagreement with the trial court's findings is not grounds for reversal. Nor is it grounds for Supreme Court review. The Court should deny

plaintiff's request that it review and reverse the trial court's factual findings.

## V. CONCLUSION

A petition for review should be granted only:

“(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”

RAP 13.4(b). Plaintiff fails to demonstrate that any of those grounds for review are satisfied or even implicated, in her Amended Petition for Review.

Plaintiff shows no conflict between the Court of Appeals' Opinion and any Washington Court of Appeals or Supreme Court case law. To the contrary, the Court of Appeals' Opinion properly applies Washington case law, statutes, and regulations. Although plaintiff argues that insurance claims, generally, pose

an issue of public interest, she makes no showing that the issues that she identifies for review would impact the public at large. Plaintiff shows no error in the Court of Appeals' reasoning, standards, or application of Washington law.

In summary, plaintiff fails to establish that she is entitled to Supreme Court review under RAP 13.4(b). Therefore, the Court should deny plaintiff's Amended Petition for Review.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains - 4195 words, excluding the caption, tables, signature blocks, and certificate of service (word count by Microsoft Word), in compliance with the word count limitations in RAP 18.17(c)(10).

*/s/ Robert S. May*

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Dated: November 8, 2023

CERTIFICATE OF SERVICE

I certify that on the 8th day of November, 2023, I caused a true and correct copy of this FIRST AMERICAN PROPERTY & CASUALTY INSURANCE CO.'s ANSWER TO AMENDED PETITION FOR REVIEW to be served on the following in the manner indicated below:

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**November 08, 2023 - 3:08 PM**

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