102443-6

No. 840819

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID M. SIMMONDS and
DEBRA K. SIMMONDS, husband and wife,

Appellants,

v.

PRIVILEGE UNDERWRITERS RECIPROCAL
EXCHANGE, dba PURE INSURANCE,

Respondent.

APPELLANTS' PETITION FOR REVIEW

David M. Simmonds, WSBA #6994
6128 – 204th Drive N.E.
Redmond, WA 98053
(425) 417-5414
davemsimmonds@gmail.com

Attorney for Appellants and Appellant Pro Se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Case

Statutes, WAC Provisions & Rules

Statutes

WAC Provisions

Rules

I. INTRODUCTION

The decision of the Court of Appeals conflicts with a "long line" of Washington Supreme Court decisions imposing an enhanced obligation of good faith on insurers.

Although the Court of Appeals' decision is unpublished, its failure to call out PURE's conduct as bad faith will have far-reaching ramifications. PURE Insurance will have no incentive to change its claims handling conduct; nor will other insurers which engage in similar conduct.

Review is necessary to prevent wrongful denial of Washington homeowner claims resulting from insurer conduct that contravenes the good faith foundation of Washington insurance law "imposed on the insurance industry" by the Supreme Court and the Legislature. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386 (1986); RCW 48.01.030.[1]

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[1] The case has drawn national attention due to its subject matter.

August 08, 2023 | *Insurance Authority Exclusive*

LAW360 Wash. Panel Seals Insurer's Win In Shower Leak Damage Fight

II. IDENTITY OF PETITIONERS

Petitioners David and Debra Simmonds, husband and wife, seek review.

III. COURT OF APPEALS DECISION

The Court of Appeals decision was entered on August 7, 2023. Appx. A-1. Reconsideration was denied on September 5, 2023. Appx. A-24.

IV. ISSUES PRESENTED FOR REVIEW
RAP 13.4(b) (1), (2) and (4)

(1) Whether, under "[t]he duty of good faith … imposed on the insurance industry in this state by a long line of judicial decisions" which "the Legislature has imposed … as well,"[2] it is the insurer, PURE, or the insured, Simmonds, who is entitled to judgment on Simmonds' bad faith, IFCA and CPA claims.

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[2] *Tank v. State Farm*, 105 Wn.2d at 386.

(2) Whether denial of Simmonds' motions in limine gave them standing objections to the testimony, conclusions and qualifications of PURE's "experts," or were they "unopposed" because objections/challenges were not explicitly made at trial.

(3) Whether PURE is permitted to satisfy its burden to prove an exclusion to a covered loss through speculation and conjecture when PURE and its expert acknowledged that an exclusion "could not be identified" and "was indeterminate" "without demolition" and "destructive testing."

(4) Whether a report and related testimony of a designated lay witness involving opinions "within the scope of rule 702" are inadmissible under ER 701(c).

(5) Whether an expert's subjective-based "methodology" ("qualitative estimates…[which] are reasonable") for which the expert is unable to provide evidence of acceptance in "the relevant scientific community," and which is not "capable of producing reliable results," satisfies *Frye's* "threshold inquiry" as required under Supreme Court precedent.

(6) Whether the report and related opinions of experts, who admitted to inaccurate assumptions and the oversight of critical facts in arriving at those opinions, lacked required factual foundation.

(7) Whether an expert's report and related testimony are admissible under ER 702 when the "expert" admits to having only "a general understanding" of the very subject matter on which he opines as an expert.

V. STATEMENT OF THE CASE

A. The Hairdryer Incident

Appellants David and Debra Simmonds ("Simmonds")[3] are husband and wife residing in Redmond, Washington. Since 2013, their residence has been insured under an all-risks homeowner's policy issued by respondent PURE Insurance ("PURE"). CP 88:9-10.

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[3] Depending on context, "Simmonds" refers to both David and Debra Simmonds as appellants and David Simmonds individually.

In late-July 2018, Simmonds noticed what he thought was slight condensation within the glass block wall surrounding two sides of his primary bathroom shower. He used a hairdryer on a bottom glass block to evaporate the condensation. He left the hairdryer on and left the room. After approximately 45 minutes he heard a loud pop and noticed the bottom glass block had cracked. The glass blocks are wavy and what Simmonds thought was condensation turned out to be hard water spots on the outside of the glass. CP 90:20-26.

In early-August 2020, Simmonds noticed wet carpeting in his closet that shares a wall with the primary shower. He removed an on/off handle cover plate and water sprayed out from behind the shower wall. CP 88:10-23.

Simmonds went into the crawl space to see if water had leaked under the house. He was able to locate the area under the shower when he saw puddles of water on the visqueen vapor barrier covering the crawl space ground. When Simmonds removed insulation from the underside of the subflooring in the

area beneath the shower, he discovered extensive wood rot. He reported the water leak and rot damage to his insurance broker, who filed a claim with PURE. CP 88:11-25.

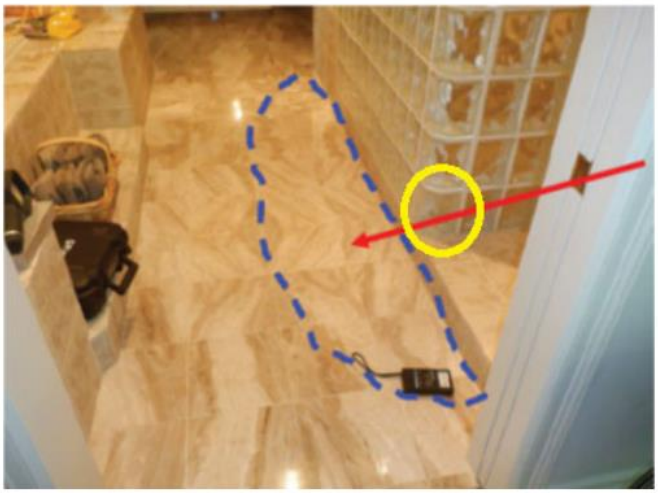
During a subsequent PURE inspection, it was determined that the leak causing the rot damage was not the shower handle as first thought. The shower handle issue was very recent and had not caused any damage. Rather, a second leak was discovered along the glass block wall on the opposite side of the shower. CP 89:16-24.

Later that night, Simmonds recalled the cracked glass block that he had thought was cosmetic but which he now understood to be directly above the area the technician indicated as the location of the rot-causing leak. He reported the hairdryer incident to PURE the next morning, and later that day provided PURE with photographs of two cracks in the glass block. CP 90:6-12.

After Simmonds reported the incident, PURE provided him with the inspection report from American Leak Detection

("ALD"). The report contained photographs, including the one below to which PURE, in a court filing, added the yellow circle indicating the location of the cracked block relative to the technician's moisture meter reading. CP 90:9-19.

Mr. Simmonds provided pictures of the cracks in the one glass block that is on the corner of the shower near the entrance to the shower (circled in yellow below).



CP 236.

B. PURE's Denials of Simmonds' Claim

PURE initially denied Simmonds' claim in an August 17, 2020 phone call from claims adjuster Shawn Roessler, CP 89:9-12, and then again on September 2, 2020 in an email from

Roessler. CP 120-24. PURE reaffirmed its coverage denial on October 27, 2020. CP 162-64.

Simmonds challenged PURE's denials citing overlooked Washington law and incorrect or unsupported factual statements. CP 89:12-15; CP 140-43; CP 391-97.

C. Litigation History

Simmonds filed suit on April 5, 2021, alleging breach of contract and violations of Washington's Insurance Fair Conduct Act and Consumer Protection Act.

On March 7, 2022, the trial court denied PURE's motion for summary judgment on Simmonds' contract claim, but granted PURE's motion dismissing Simmonds' bad faith, IFCA and CPA claims. The trial court denied on procedural grounds Simmonds' *flip-side* cross-motion for summary judgment, CP 699, and motion for reconsideration. CP 548.

The case was tried to the court on April 4-6, 2022. The trial court rendered its oral decision on April 6. RP 408:18-415:11. Simmonds filed a motion for reconsideration of that

decision on April 13. CP 622-37. The trial court denied Simmonds' reconsideration motion on May 4, 2022. CP 712.

Simmonds filed their appeal on May 23, 2022. CP 695. Oral argument was heard on May 31, 2023. The Court of Appeals entered its decision on August 7, 2023. Appx. A-1. Simmonds filed a motion for reconsideration of the Court of Appeals decision on August 28, which was denied on September 5. Appx. A-24.

VI. ARGUMENT FOR GRANTING REVIEW

> [A]n insurance company has an elevated or "enhanced" duty of good faith … .
> ….
> That duty, as has been described by the courts of this state on several occasions, is a duty to exercise a high standard of good faith which obligates it to deal fairly and give "equal consideration" in all matters to the insured's interests.

Van Noy v. State Farm Mut. Auto. Ins. Co., 16 P.3d 574, 579, 142 Wn.2d 784 (2001) (citing *Tank*, 105 Wn.2d at 386). The

Court of Appeals' affirmation[4] of the trial court's summary judgment rulings and post-trial legal conclusions conflicts with "[t]he duty of good faith [that] has been imposed on the insurance industry … ." *Tank v. State Farm*, 105 Wn.2d at 386 (citing "long list of judicial decisions" and RCW 48.01.030).

A. Roessler's Call to Simmonds

On August 17, 2020, PURE claims adjuster Roessler returned to the office after an absence and learned of the rot damage. Roessler then left a voicemail with Simmonds' broker to give her "a heads up" that she was going to call Simmonds "to explain" that PURE "won't be able to pay him for [the rot damage repair]" because "[i]t is definitely rotted and decayed, which, as you know, is specifically excluded." RP 179:12-19.

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[4] The Court of Appeals deemed Simmonds' multi-issue summary judgment appeal as "not properly briefed … to warrant review." Appx. at A-16-17. Simmonds sought reconsideration citing misapprehension of fact and law. Appx. A-32-34.

The effect of the Court of Appeals' reconsideration denial is affirmation of the trial court's summary judgment rulings.

Roessler then called Simmonds and told him that coverage was being denied because of the rot damage exclusion. RP 179:7-23; 251:17-252:11. This all occurred within a few hours of Roessler first learning of the rot damage.

Roessler testified that, "Yeah, most likely" the claim would have been closed on that day had Simmonds not contested the coverage denial by raising the efficient proximate cause rule. RP 181:12-19. Roessler admitted the efficient proximate cause rule had not been considered when she made her call to Simmonds denying coverage. RP 208:18-209:3.

"[T]he efficient proximate cause rule remains an important part of Washington insurance law." *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 189, 393 P.3d 748 (2017). PURE's failure to conduct any investigation into the efficient proximate cause of the leak and rot damage before informing Simmonds the claim was being denied violated IFCA and the CPA.

> [I]t is an unfair practice for an insurer to deny payment of a claim without first conducting a reasonable investigation. WAC 284-30-330(4).

Certification from the U.S. Dist. Court for the W. Dist. of Wash. in *Krista Peoples v. United Servs. Auto. Ass'n,*, 452 P.3d 1218, 1220 (Wash. 2019). *See also, Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 331-32, 2 P.3d 1029 (Div. 1, 2000) (***single violation*** of WAC 284-30-330 or 350 constitutes per se violation of IFCA and CPA). *But for* Simmonds' familiarity with the efficient proximate cause rule, the claim would have been closed after that one call denying coverage without any investigation by PURE into the efficient proximate cause of loss.

Unquestionably, only a small percentage of Washington homeowners are familiar with the efficient proximate cause rule. Neither are most insurance brokers who serve as gatekeepers when contacted by homeowner clients about losses.

The critically important pro-insured benefit of the efficient proximate cause rule is that there can be coverage for a loss that is explicitly excluded under the policy.

> Under Washington law, … "'[i]f the initial event, the "efficient proximate cause," is a covered peril,

> then there is coverage under the policy regardless whether subsequent events within the chain, which may be causes-in-fact of the loss, are excluded by the policy.'"

Xia v. Probuilders, 188 Wn.2d at 182-83 (citations omitted). An *insured's* assertion of this "important part of Washington insurance law" in disputing coverage denial should not be a prerequisite to an *insurer's* obligation to investigate the efficient proximate cause of its insured's loss.

Simmonds seek injunctive relief under the CPA. PURE, and other insurers providing homeowner coverage in Washington, must provide clear policy language to advise homeowners of the rule and its effect. Otherwise, losses for which there is coverage under Washington law will continue to be wrongfully denied or, in many cases, not pursued.

Similarly, the policy's "sudden and accidental" coverage requirement is materially misleading to the detriment of Washington's insured homeowners. It must be modified to accurately reflect Washington law that interprets "sudden and accidental" as "unexpected and unintended" without

a "temporal" component. *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 91-95, 882 P.2d 703 (1994).

While not explicitly asserted as a basis for its coverage denial, interpreting the policy's "sudden" language in the temporal sense clearly influenced PURE's denial decision. RP 100:9-101:9 ("wasn't sudden like the policy said it should be").

B. Roessler's September 2, 2020 Coverage Denial

(1) Defective Construction Exclusion as *Catch-All*

Citing Schneider's ALD report, Roessler again denied coverage on September 2, 2020. CP 120-124. The stated basis for the denial was the policy's "construction defect exclusion." Schneider did not mention defective construction or improper installation in his report, but his reference to shower pan failure was enough for PURE to assert the exclusion.

> [T]ypically when we have a leak detection company that is telling us it's a shower pan and ***we think*** it's because of faulty installation, that is enough to support the coverage denial.

RP 160:10-13 (emphasis added). Simmonds' claim was denied on that basis, RP 161:22-162:6, notwithstanding PURE's later admission showing that the "we think" component of its coverage denial was based on nothing more than speculative bias.

> With regard to the lack of a known specific problem with the pan liner, we agree that the specific problem with the liner and the way it was installed could not be identified without demolition of the shower.

RP 195:18-25. PURE's admission is irreconcilable with the stated basis for its coverage denial.

(2) Schneider Unaware of Cracked Block

The shower was constructed in 1998. Therefore, PURE had to eliminate the 2018 hairdryer incident as a possible cause in order to assert the defective construction exclusion. In pursuit of that result, Roessler cited Schneider's non-mention of the cracked glass block as his ***purposeful*** decision to eliminate the glass block issue as a possible cause. ("[T]he ALD report does

not mention the breakage of or leaking of the glass as an issue," CP 123: ¶ 4). Simmonds challenged PURE's statement.

> [T]he ALD tech never considered the glass block breakage – or its cause – not because he did not think it to be an issue but because he didn't know anything about it. [5]

CP 401: ¶ 4.

Not once – over the course of the next ***18 months*** – did PURE simply ask Schneider if he was aware of the glass block cracks during his inspection or when he wrote his report. CP 381:14-19. Instead, PURE was indignant in its unverified speculation that he had.

> It is unreasonable to assume, as Plaintiffs do, that Mr. Schneider would not have noticed the cracked glass block during his inspection.

CP 247:8-11, 251:4-6 ("difficult to believe" Schneider unaware of crack); ("PURE understands that the fractured glass block was

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[5] Simmonds had not mentioned the glass block incident to Schneider because Simmonds realized its related significance only after Schneider's inspection. *Supra* at p.6.

apparent and obvious [6] at the time of Mr. Schneider's inspection."). CP 367:21-25 (emphasis added).

Contrary to PURE's repeated insistence, Schneider testified: "I was not aware of any cracked glass blocks." RP 277:5-12.

(3) Roessler's Lack of Confidence in Schneider

When asked why she had not simply called Schneider to confirm the assumption she specifically cited as a necessary basis for denying coverage, Roessler testified that Schneider

> can tell me if something is leaking, and he can rule out plumbing lines and what; but [evaluating the hairdryer incident] would definitely not be something … that I would call him for.

RP 158:12-16.

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[6] PURE's own expert testified otherwise.

> You know, the glass is pretty wavy and you have to have the right angle to see the crack. So, it may show a crack on that flat spot, or that may be, you know, a reflection off the glass.

RP 356:19-357:1.

Notwithstanding Roessler's lack of confidence in Schneider's ability to conduct failure analysis, RP 159:21-160:5, (which she described as "figur[ing] out … why something failed," RP 222:16-20), Roessler cited her interpretation of Schneider's ostensible failure analysis as ***the*** support for PURE's construction defect-based September 2020 coverage denial. CP 123 ¶¶ 2, 3, 4.[7]

(4) Schneider's Timeframe

In his report, Schneider gave a timeframe estimate of "more than one year prior to my inspection [in 2020]," CP 316, which cannot reasonably be interpreted as endorsing a 1998 construction defect. PURE nonetheless tried:

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[7] The Court of Appeals declined to address Simmonds' appeal of the trial court's denial of their motion in limine to exclude Schneider's report and related testimony under ER 701(c), stating that "Simmonds provides no citation to authority or argument to support his position." Appx. A-18-19.

In fact, Simmonds cited 701(c) as it related to Schneider throughout their opening and reply briefs and devoted more than 500 words specifically to their 701(c) argument. Appx. A-28-31.

> Mr. Simmonds … has admitted that the construction of his house [in 1998] occurred more than a year prior to Mr. Schnyder's [sic] inspection [in 2020].

CP 243:8-12. Again, for obvious reasons, PURE never simply asked Schneider whether his "more than one year" prior to 2020 timeframe meant 1998, as was necessary to support PURE's defective construction-based coverage denial.

C. The ARCCA Report – PURE's Continuing Bad Faith

Although PURE's September 2, 2020 coverage denial was explicitly based on Schneider's failure analysis, PURE retained ARCCA because, as Roessler testified, Simmonds "graciously educated her" on Washington law, RP 208:8-10, and she did not consider Schneider qualified to "figure[] … out why something failed." RP 157:20-158:16, 222:16-20.

Touting itself as the "preferred choice" of insurance companies, CP 93:23-24, and advised in advance by PURE of its defective construction position and Simmonds' challenges to that position, CP 287, ARCCA's Kurt Ahlich conducted an inspection on September 29, 2020, and issued a report on

October 15, 2020. CP 330. In its letter to Simmonds dated October 27, 2020, PURE relied heavily on the ARCCA report, making specific reference to Ahlich's timeframe determination in reaffirming its coverage denial. CP 345: ¶ 3.

On November 2, 2020, Simmonds notified PURE of issues with the ARCCA report. CP 391-97. Included among them was Ahlich's purported ability to determine an accurate timeframe for wood decay. Ahlich had *narrowed* the timeframe to between 4 and 22 years prior to his inspection in 2020, which, coincidentally, would include defective construction in 1998 but exclude the 2018 hairdryer incident. Simmonds cited the reported opinion of a U.S. Department of Agriculture Forest Products Laboratory expert specializing in the bio-deterioration of wood: "There is no way even to crudely estimate the rate of wood decay or its age." CP 393.

When asked by Simmonds to explain its disregard of this discrepancy (Ahlich had cited his timeframe as ***the*** basis for

dismissing the hairdryer incident, CP 334 ¶ 1), PURE represented to Simmonds:

> We do not agree [with the U.S. Agriculture Department expert]. While we appreciate that many variables might affect wood decay and prevent an exact dating of rot, we rely on Mr. Ahlich's best estimation ***based on his experience***.

CP 408-09 (emphasis added).

Once again, PURE's representation to Simmonds – its insured to whom it owed an '"enhanced' duty of good faith" – was not true.

Roessler, who reviewed and approved PURE's representation prior to its being sent to Simmonds, RP 194:19-195:14, nonetheless testified she never discussed with Ahlich "any experience he may have had in estimating the duration of wood decay or wood rot," and that she "wasn't really relying on him to advise me of the age of wood rot." RP 198:16-24.

Roessler's testimony directly conflicted with her coverage denial in which she relied ***entirely*** on Ahlich's timeframe as "confirm[ation]" of Schneider's "investigation."

> Mr. Ahlich's report confirms the previous investigation that the glass block was not the cause of the leak. The damage in fact is long-term, likely originating prior to the breakage of the glass block and stemming back to original construction.

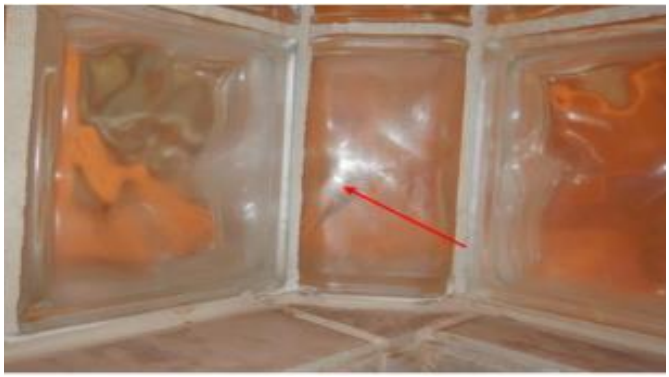
CP 345: ¶ 3.

Ahlich aside, Roessler misrepresented Schneider's "previous investigation." Far from determining "that the glass block was not the cause of the leak," Schneider testified: "I was not aware of any cracked glass blocks." RP 277:5-12. Moreover, Roessler testified Schneider was "definitely" not qualified to evaluate whether the glass block breakage had caused the leak. RP 158:12-16.

After being advised of the Agriculture Department expert's view, Ahlich admitted to having only a "general understanding" of wood decay and retreated from his 4 to 22-year timeframe. CP 342-43.

Most egregious was PURE's invention of facts designed to cover up the critical oversight of "experts" Ahlich and Mason. Both had based their conclusion that this single crack

(pictured below from their report) was confined to within the glass block ("the damage patterns indicated that damage caused by the glass cracking was localized to the block itself"). CP 334: ¶ 1.



Both had overlooked these other, significantly more probative cracks which were ***not*** "localized to the block itself."

When asked to explain this, PURE ***lied*** to its insureds by stating that the experts focused on that single crack "because it

is the crack you recall causing," CP 411; intentionally inferring that PURE's experts had, in fact and importantly, considered the other cracks in arriving at their conclusions. That statement was demonstrably false, which PURE was later compelled to admit. CP 383:1-13 ("not accurate").

Both Ahlich and Mason would testify they were unaware of these other two cracks when they conducted their analyses and wrote the report, RP 352:21-23: 374:21-375:3, removing any doubt that PURE had invented this false narrative to promote coverage denial without regard to truth. Similar to the Schneider issue, a phone call would have revealed the true reason for Ahlich's and Mason's reference to the single crack; a call PURE would have made had its objective been to provide its insured with a truthful response.

As further detailed in Simmonds' motion in limine to exclude the ARCCA report and related testimonies of Ahlich and Mason, which the trial court denied:

- The report cited the absence of damage to the grout or mortar below the glass block as critical evidence of the lack of energy resulting from the hairdryer incident to have damaged the shower pan. CP 334. In arriving at that conclusion, Ahlich and Mason had overlooked that Simmonds had previously advised PURE that damage to the grout had been repaired in 2019, prior to Ahlich's inspection. CP 394: ¶ 3.[8]
- Ahlich based his timeframe conclusion on assumptions of intermittent shower usage and the locale's cool climate. Ahlich had overlooked the effect of the moisture-retaining insulation that continually - rather than intermittently - subjected the subflooring to moisture and warmth. CP 393-94.

The Court of Appeals' affirmation of the trial court's denial of Simmonds' motion in limine conflicts with prior decisions that expert testimony lacking a factual basis is

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[8] PURE's response was that the statement in the ARCCA report that there was no damage in 2020 was not "inconsistent" with the fact the grout damage had been repaired in 2019. CP 410.

Considering the purpose for which the "no damage" statement was made in the ARCCA report, PURE's response was, at minimum, disingenuous.

inadmissible "despite the court's discretion in determining the admissibility of expert testimony." *Davidson v. Municipality of Metropolitan Seattle*, 719 P.2d 569, 578, 43 Wn.App. 569 (Div 1, 1986) (review denied).

More fundamentally, ER 702 defines an expert as one with "scientific, technical, or other specialized knowledge." Ahlich admitted to having only a "general understanding" of wood decay. CP 342.

> "An expert may not testify about information outside his area of expertise."
> ….
> [C]ourts must consider whether the expert has "sufficient expertise in the relevant specialty."

L.M. By And Through Dussault v. Hamilton, 193 Wn.2d 113, 135, 436 P.3d 803 (2019) (citations omitted).

Most telling is Ahlich's ARCCA report admission.

> [T]his membrane system had failed. The failure mechanism of this system was indeterminate. … Destructive testing of the shower pan/curb would be required to try to determine the membrane failure mechanism; such testing was outside the scope of this report.

CP 333: "Discussion" ¶ 2. If Ahlich cannot determine how the system failed, he cannot credibly determine the cause of the "indeterminate" failure.

> Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.

Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703 (1994); *See also, Davidson*, 719 P.2d at 577-78 (speculation does not provide factual basis for expert opinion).

D. PURE's Experts' Testimony was Not "Unopposed"

The Court of Appeals cites the testimonies of Ahlich, Mason and Schneider as unopposed. Appx. A-22. That position conflicts with decisions of the Supreme Court and Court of Appeals.

> The Washington Supreme Court has explained that "the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial," so a standing objection arises " '[u]nless the trial court indicates that further objections at trial are required when making its ruling.' "

State v. Roosma, 498 P.3d 59, 63 (Wn.App. 2021) (citing *State v. Powell*, 126 Wash.2d 244, 256, 893 P.2d 615 (1995) (citation omitted)); *See also, State v. Dillon*, 456 P.3d 1199, 1206 (Div. 1, 2020).

The trial court denied Simmonds' motions in limine without indicating further objections were required. Simmonds thereby maintained standing objections to:

- those portions of the ALD Report, and testimony or other references to the analyses, conclusions, or the opinions of designated lay witness Schneider contained therein, that are "within the scope of rule 702" (CP 525:19-526:4);
- the ARCCA report, and testimony or other references to the analyses, conclusions, or the opinions of Ahlich and Mason contained therein for failing *Frye's* "threshold" requirements for admissibility (CP 539:6-11);
- Ahlich's qualification as an expert based on his admitted lack of specialized knowledge and expertise as required under ER 702 (CP 539:6-9, 12-15);

- the admissibility of Ahlich and Mason testimony under ER 702 for lack of factual foundation. (CP 544:21-27, 545:21-546:4).

E. PURE's Experts Failed *Frye* Threshold

> Frye requires experts to base their conclusions on generally accepted science. The relevant scientific community must generally accept both " 'the underlying theory' " and the " 'techniques, experiments, or studies' " applying that theory. The techniques, experiments, or studies must be " 'capable of producing reliable results.' "

L.M. v. Hamilton, 193 Wn.2d at 128 (citations omitted). "[T]he Frye analysis is a threshold inquiry to be considered in determining the admissibility of evidence under ER 702." *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn.App. 168, 181, 313 P.3d 408 (2013) (citation omitted).

Ahlich was never able to provide any evidence of his methodology having been generally accepted in the relevant professional community. CP 542:8-20. Nor was he able to articulate an understandable methodology.

On the morning of trial, after the *Frye* methodology issue had been raised by Simmonds and briefed by the parties at the summary judgment and motion in limine stages of litigation, and Simmonds' *Frye*-methodology-based motion to exclude the ARCCA report had been denied by the court at summary judgment, the trial court expressed uncertainty as to Ahlich's methodology.

> THE COURT: Mr. Worden, I have a question.
> ….
> What is the methodology that Mr. Ahlich uses with respect to the wood decay?

RP 45:11-14.

Moreover, Ahlich's timeframe estimate of between 4 and 22 years, based on "qualitative estimates" he considered "reasonable," CP 342 ¶ 3, is hardly proof of methodology "capable of producing reliable results" as the Washington Supreme Court stated is required under *Frye*.

F. DiGrande's Clear Recollection

PURE's discovery responses and court filings, subject to CR 11 and CR 26(g) certification requirements, Appx. A-25 & 26, repeatedly represented that Frank DiGrande, PURE's Sr. VP of Claims, lacked ***any*** recollection of his September 17, 2020 email concerning Simmonds' claim. CP 453:11-12. PURE characterized Simmonds' efforts to gain insight into DiGrande's email as "burdensome to PURE and a waste of the Court's time and resources," CP 516:16-22, and

> [t]o require Mr. DiGrande to appear when he has no recollection of the claim and attempts to refresh his memory via written discovery resulted in no additional recollections, is nothing more than an attempt to harass him and require additional PURE employees to give up their valuable time in defending against Plaintiffs' meritless claims.

CP 592:17-23.

Contrary to PURE's repeated and unequivocal representations, DiGrande had clear recollection of the email and provided a detailed explanation for what he stated in his email. RP 129:2-20. Counsel's excuse:

> Mr. DiGrande did testify to more recollection of the email then [sic] Pure understood him to have when responding to discovery and when bringing the motions in limine,

CP 670:4-6, falls flat; particularly in light of counsel's unfettered access to DiGrande and his certification obligations under CR 11 and CR 26(g).

G. Significance of DiGrande's Testimony

DiGrande's testimony revealed system failure as a covered loss under the policy. RP 129:11-20. PURE's counsel agreed.

> THE COURT: … Mr. Worden, do you agree that if it was a failure in contrast to construction defect it would have been covered?
>
> MR. WORDEN: … So, if there's a failure and it's not excluded, sure, [coverage] would apply. Mr. DiGrande's testimony is consistent with that.

RP 403:8-22.

WAC 284-30-350 (1) required PURE to disclose this "pertinent" coverage to its insured, Appx. A-27, which is of special significance in this case. PURE did not. Instead, PURE concealed this coverage in violation of WAC 284-30-350 (2), *id.,* and then obstructed Simmonds' discovery efforts by

giving untruthful responses to clear discovery requests. CP 452:1-10; 453:11-12.

There is no dispute whether there was system failure in this case. As stated in the ARCCA report:

> ***[T]his membrane system had failed.*** The failure mechanism of this system was indeterminate. … Destructive testing of the shower pan/curb would be required ***to try to determine*** the membrane failure mechanism; such testing was outside the scope of this report.

CP 333: "Discussion" ¶ 2 (emphasis added).

The issue is whether PURE satisfied its burden "to prove" policy-excluded defective construction caused – and thereby excluded – the policy-covered system failure.[9] Both PURE and its expert agreed that PURE had not and could not even "try" to

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[9] When an insured establishes a prima facie case giving rise to coverage under the insuring provisions of a policy, the burden is then on the insurer to prove that a loss is not covered because of an exclusionary provision in the policy.

American Star Ins. Co. v. Grice, 121 Wn.2d 869, 875, 854 P.2d 622 (1993).

provide that proof without "demolition" / "[d]estructive testing." In reducing PURE's burden to more likely than the hairdryer incident rather than actually having to prove the defective construction policy exclusion, the Court of Appeals' decision conflicts with that of the Supreme Court in *American Star* (requiring insurer "to prove" exclusion). Without that proof, the policy "would appropriately provide coverage if [like here] the pan had failed." RP 129:11-20.[10]

With system failure established as a covered risk, the only relevance of the hairdryer incident was its being ***an*** obstacle – not ***the*** obstacle – to PURE establishing defective construction as an exclusion to the insured risk of system failure.

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[10] DiGrande approved coverage denial because he was told that Schneider, PURE's "expert," had definitively determined improper installation "causation." RP 128:5-16; CP 415-16.

DiGrande was not told that Schneider was not an expert, "definitely" not qualified to determine causation, RP 159:21-160:5, or that the purported "improper installation" determination had been made by claims adjuster Roessler, not Schneider. RP 160:10-13.

PURE did not do what both PURE and its expert acknowledged could not be done. Viewed differently, if PURE had actually proven defective construction as the cause of the leak and rot damage, then Simmonds would have a proven case against the shower installer. However, Simmonds' hypothetical case would unquestionably fail if based on the same *evidence* affirmed by the Court of Appeals as *proof* of defective construction.

The claim would get no further than the acknowledgment by *plaintiff's* expert that the "[t]he failure mechanism of this system was indeterminate," or *plaintiff's* admission "that the specific problem with the liner and the way it was installed could not be identified without demolition of the shower." Failure analysis from a leak technician who *plaintiff* conceded was "definitely" not qualified to conduct failure analysis would not have been helpful.

H. PURE Ignored Probative Information Undermining Defective Construction

Simmonds provided information to PURE detailing a pest control company's crawl space inspections in 2014 and 2017. During neither inspection was standing water mentioned to Simmonds. CP 158.

Both Simmonds and PURE expert Ahlich reported puddled/ponded water in 2020 on the visqueen covering the crawl space directly below the damaged subflooring. CP 88:10-14; CP 332 •5. The absence of a sixteen-year accumulation of water on the visqueen ground cover in 2014, and the absence of a nineteen-year accumulation of water in 2017, would be inconsistent with Ahlich's conclusion that "it was most probable that moisture intrusion began to occur around the time the dwelling was constructed [in 1998]." CP 334: "Conclusions" ¶ 3. Work performed in the crawl space by the pest control company (re-anchoring visqueen ground covering to the perimeter foundation) in 2014, which was re-inspected in 2017,

included a section only 14 ft. from the area of puddled/ponded water observed by Simmonds and Ahlich in 2020. CP 360:1-4.

Despite its obligation to give "'equal consideration' in all matters to the insured's interests," PURE summarily dismissed this information without any *meaningful* consideration. CP 160; CP 383:21-27; CP 187:9-13 (pest control workers not "hired" or "trained to identify … water leakage" / "standing water").

VII. CONCLUSION

PURE's conduct throughout this matter – literally from beginning to end – fell far below that required of an insurer under Washington law. Supreme Court review is necessary to reinforce to insurers that the "long line of judicial decisions" imposing an enhanced duty of good faith on the insurance industry is of statewide importance and is safeguarded by Washington courts.

RAP 18.17(b) Certificate of Compliance

The undersigned hereby certifies that this document contains 4,971 words calculated in accordance with the procedures specified under this rule.

DATED this 4th day of October, 2023.

David M. Simmonds, WSBA #6994
Attorney for Appellants and Pro Se Appellant
6128 -204th Dr. NE
Redmond, WA 98053
(425) 417-5414
davemsimmonds@gmail.com

DECLARATION OF SERVICE

On the date below, I electronically served a true and correct copy of Appellants' Petition for Review in Court of Appeals Division 1 Cause No. 840819, as follows:

Respondent PURE Insurance

Gregory S. Worden
Sarah D. Macklin
LEWIS BRISBOIS
1111 Third Avenue, Suite 2700
Seattle, WA 98101

Via E-mail:

Gregory.Worden@lewisbrisbois.com
Sarah.Macklin@lewisbrisbois.com

Original E-filed with:

Court of Appeals, Division 1, Clerk's Office

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

DATED this 4th day of October, 2023, at Redmond, Washington.

David M. Simmonds
6128 204th Dr. NE
Redmond, WA 98053
(425) 417-5414
davemsimmonds@gmail.com

APPENDIX

FILED
8/7/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID M. SIMMONDS and DEBRA K. SIMMONDS, husband and wife,

Appellants,

v.

PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE, dba PURE INSURANCE,

Respondent.

No. 84081-9-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Homeowners challenge the denial of insurance coverage for rot damage from a leak surrounding their bedroom shower. After learning about the leak, the insurer engaged multiple experts to investigate and determined that the claim was not covered by the policy because the cause of the leak was an excluded construction defect. The homeowners sued their insurer alleging breach of contract and extra-contractual claims of violations of the Insurance Fair Conduct Act (IFCA) and Consumer Protection Act (CPA). Only the breach of contract claim survived a summary judgment hearing. Following a bench trial, the trial court found in favor of the insurer. We affirm.

FACTS

David and Debra Simmonds built their home in Redmond, Washington in 1998. At issue is the 2020 discovery of rot in the subfloor and joists underneath a leaky shower that has a glass block shower surround adjacent to their primary bedroom.

In July 2018, Simmonds[1] used a hair dryer to remove what he thought was condensation on some of the glass blocks of the shower. After 45 minutes of heating the bottom glass block, he heard a loud "pop" and saw that he cracked the glass block. Neither he or his wife ever had anyone come out to address the glass block after it cracked.

In August 2020, Simmonds discovered water leaking from a shower handle. When he looked in the crawl space, he discovered significant puddles of water on the visqueen, damp insulation, and rot in the plywood subfloor and flooring joists. The rot was "pretty significant."

Simmonds called his insurer, Privilege Underwriters Reciprocal Exchange d/b/a PURE Insurance (PURE), which has insured the home since 2013. Shawn Roessler was the assigned claim adjuster out of California. Roessler engaged Crawford and Company (Crawford), an independent local adjuster, to review the claim and visit the home. Crawford told Roessler of the possible rot exclusion. Roessler informed Simmonds that she thought the rot exclusion was going to "come into play." Simmonds

[1] Because David Simmonds, an attorney who proceeded pro se, is the person who discovered the rot, was the main point of contact with the insurer and their experts, and was the only Simmonds to testify at trial, we use "Simmonds" to refer to David Simmonds while acknowledging that both David and Debra Simmonds are listed as plaintiffs.

then described Washington's efficient proximate cause rule[2] to her, disagreeing with Roessler's assessment of the policy. According to Roessler, at that time both of them thought the rot may be related to the leak from the shower valve. Simmonds therefore believed because that leak was covered the rot should be as well. Roessler told Simmonds that PURE would do an additional review. As a result, PURE retained Washington coverage counsel. PURE also asked American Leak Detection (ALD) to conduct a full inspection.

ALD technician Zachary Schneider conducted the inspection. Schneider confirmed a leak from the right-hand shower valve. The affected area of the closet and wall cavity containing the shower valve did not appear to have any long-term damage.[3] Schneider also did not see rot below that leak area. Testing on the shower pan revealed water manifesting from below the glass block and thermal imaging revealing that the leak was lower than the glass blocks. Based on his observations, including absence of damage to the shower and testing, Schneider concluded that there appeared to be an issue with the shower pan membrane. He testified that when a shower is installed, the membrane is integrated with the shower drain. Then, mortar is placed over everything before laying down the tile; it is the membrane that keeps the water contained. Schneider hypothesized that the membrane may not have been adequately lapped over the threshold dam to provide a proper waterproof seal.

[2] The essence of the "efficient proximate cause rule" is that when an insured cause of a loss sets in motion other causes which may not be insured, the loss is covered. Am. States Ins. Co. v. Rancho San Marcos Properties, LLC, 123 Wn. App. 205, 213, 97 P.3d 775 (2004).

[3] Coverage for damage related to the valve leak is not at issue and not part of this appeal.

Schneider had seen leaks develop because membranes were not high enough. He noted that he was not aware of the exact age of the shower, but if someone had built it correctly, it should probably last at least 30 years. Because he did not see anything that appeared to have happened to the shower to have otherwise caused this leak, he believed the membrane issue was "likely either a result of wear and tear or construction defect."

Simmonds had not mentioned the cracked glass block to Schneider during his inspection. Schneider later testified at trial that he did not see any cracked glass during his inspection and a review of the photos he took did not show any cracked glass blocks, but clarified that he did not consider any cracked glass because he knew that "the surround composed of glass blocks is not where the leak was located."

After Schneider's inspection, Simmonds remembered the hairdryer incident and emailed Roessler the next morning asking for a convenient time to talk, explaining, "I think I figured out what happened." After PURE received ALD's report, PURE discussed the claim internally and discussed it with coverage counsel. They determined that the rot-related claim appeared to involve a non-covered loss, which was a construction defect. The policy provides a list of excluded coverage areas including property loss caused by faulty, inadequate, or defective planning; loss caused by presence, growth, proliferation, spread of wet or dry rot; and loss from wear and tear, deterioration or mechanical breakdown. These excluded coverage areas formed the basis of why PURE denied coverage related to the rot. PURE sent Simmonds the ALD report and Simmonds and Roessler spoke by phone. Roessler followed up by emailing

Roessler two photos of the cracked glass block that shows a crack that extends to the bottom of the block to the grout line. Simmonds contested the ALD report.

To address Simmonds' concerns, PURE hired ARCCA structural engineer Kurt Ahlich to conduct a failure analysis. Ahlich reviewed Schneider's report, met with Simmonds for background, examined the shower and the shower surround, conducted a limited water test of the shower and bathroom floor, and inspected the crawl space and the condition of the wood framing below the shower area. Ahlich documented the scene, including taking photographs of the cracked glass block. Water testing revealed heat signatures along the curb of the shower and moisture readings also were elevated along the shower curb, especially the northern part. Ahlich had considered the hairdryer incident, but stated that the moisture level readings and the heat signature showed that water was leaking along the length of that curb, so it was a wider spread phenomenon than just a point source that one would expect with a glass block. Ahlich also confirmed some measurements with the layout of the shower with what he saw in the crawl space area. Ahlich observed that there did not appear to be any wood damage around the drain and Ahlich concluded the grout was working properly. He did not see anything that would have led him to believe there had been some type of catastrophic event that had damaged it.

Ahlich also consulted with ARCCA materials scientist James Mason. Mason obtained information from Ahlich and reviewed Ahlich's photographs. The photographs showed a crack near the top of the glass block. Mason observed that the cracks did not propagate all the way through the glass, and the cracks in the glass blocks were too

small for water to be able to flow through them. Mason opined that there was not enough energy and force for the cracks to cause any damage to the surrounding area.

After conducting his investigation, Ahlich drafted a report that included observations and conclusions from him and Mason. The report concluded the following:

> 1. The wood decay in the structural framing underlying the shower stall was the [sic] caused by long-term, ongoing water intrusion at and along the shower curb. The source of this water was normal use of the shower itself.
>
> 2. The moisture intrusion along the shower curb was the result of a failure of the shower pan/curb's waterproofing system. The specific mechanism of leakage through the shower's waterproofing system was indeterminate; however, it was most likely due to penetrations or incomplete coverage of a waterproofing membrane overlaying the curb framing. Such conditions would be considered construction defects.
>
> 3. The leakage was a long-term phenomenon, and had been ongoing for a minimum of four to six years. However, it was most probable that moisture intrusion began to occur around the time the dwelling was constructed.
>
> 4. The leakage was not caused by the glass block cracking.
>
> The report from ARCCA solidified PURE's decision to deny coverage.

Simmonds continued to dispute PURE's conclusion. After receiving PURE's coverage opinion, Simmonds emailed PURE a detailed response taking issue with the ARCCA report. In his response, Simmonds quoted a non-technical online article from aceweekly.com that, in turn, reported that Leslie A. Ferge, a biological technician from the U.S. Department of Agriculture's Forest Products Laboratory, told the author that "[t]here is no way even to crudely estimate the rate of wood decay or its age." Simmonds again included his photos of the cracks in the glass block that reached the bottom of the block. PURE asked Ahlich to review Simmonds' response and to address

Simmonds' concern about wood decay and its duration. Ahlich responded in August 2021 by explaining that his estimate of the duration of wood decay was an engineering opinion based on his general understanding of wood decay and experience as an engineer and contractor. He explained that "the decay had caused complete cross sectional loss of joists and extensive degradation of subflooring; this decay had occurred in an unconditioned space in a relatively cool climate" leading him to conclude that "the decay was a long-term, cumulative condition, the duration of which would be measured in years."

PURE did not change its position that the rot claim was not covered. Simmonds sued PURE asserting breach of contract and extra-contractual claims of violating the IFCA and the CPA. As part of its breach of contract claim, Simmonds alleged that PURE did not fairly and objectively investigate his claim. Simmonds did not retain any of his own experts and chose not to depose any of PURE's experts.

PURE filed a motion for summary judgment on all claims. Simmonds opposed the motion and in the same pleading also moved for summary judgment and to strike PURE's expert reports. Without having requested a Frye[4] hearing, Simmonds asserted that expert reports from structural engineer Ahlich and material scientist Mason were not admissible and should be stricken because they did not provide information as to their methodology so that the court could conduct a Frye analysis. Simmonds cited Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.

[4] The purpose of a Frye hearing is to determine whether experts reached their conclusions by properly applying accepted underlying principles to the information presented. Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

App. 168, 313 P.3d 408 (2013) (rejecting expert's methodology for using a formula to backdate rot decay because it was not shown to be generally accepted in the scientific community) and relied on the article with the quote from Ferge. The trial court had previously granted PURE's motion to strike the article as hearsay and the Ferge quote in the article as double hearsay.[5]

The court granted PURE's summary judgment motion to dismiss the extra-contractual claims but denied summary judgment as to the breach of contract claim. The trial court denied Simmonds' motion to strike the expert reports and denied Simmonds' cross-summary judgment motion because it was not properly raised or noted.

A bench trial was held in April 2022. During motions in limine, Simmonds again moved to exclude Ahlich's and Mason's testimony and their report under Frye and ER 702. This time, Simmonds did not rely on the Ferge quote but did base its argument on this court's holding in Lake Chelan.

During argument, the court asked PURE, "What is the methodology that Mr. Ahlich uses with respect to the wood decay?" PURE read Ahlich's August 2021 response and argued it was a general engineering opinion and not novel subject to Frye. The court agreed, but observed, "I don't think it's easy to put a date on wood decay; but, that goes to weight, not admissibility." The court also rejected Simmonds' other arguments as to PURE's experts.

[5] The motion was made in context of what Simmonds submitted to support his motion to compel discovery, which was denied after the court conducted an in-camera review.

At trial, the ALD and ARCCA reports were only admitted for the limited purpose of its effect on PURE's actions and not for the truth of the matter asserted.

Simmonds testified that no communication about water occurred when pest inspectors came to the house in 2014 and covered the dirt surface in the crawl space with a visqueen. During a pest reinspection in 2017, again, there was no communication about water. Simmonds also introduced the photographs he took of the glass block that showed different cracks than in the photos taken by Ahlich. These photos showed cracks that reached the bottom of the block. Simmonds conceded that after he cracked the block in July 2018, he and his wife did not have anyone address the cracks. Simmonds also introduced a photo that showed a cracked grout area at the bottom of the glass blocks near the glass block that was cracked. Simmonds testified that this photo reflects his claim that he had the shower surround grout resealed about a year earlier from when ALD conducted the inspection, which was in August 2020. Simmonds conceded that he did not provide this photo to PURE prior to the filing of the lawsuit but explained it was because he was not aware of it.

Mason testified that sometime after the ARCCA report was written, Mason reviewed another photograph showing a crack near the bottom, though he could not recall the source of that later photograph. He testified to fracture mechanics explaining that cracks require energy to grow, and if there is an excess of energy in the material, the crack grows all the way through and then the excess energy is released. The cracks in the glass block did not go all the way through, meaning it ran out of energy. No fluid flowed through these cracks and there was not enough energy and force for these cracks to cause any damage to the surrounding area.

Simmonds called Frank DiGrande, PURE's Senior Vice President of claims, as a witness. Simmonds asked DiGrande about a declination letter he had reviewed and approved to deny coverage to Simmonds. The letter stated, "The shower pan was not installed correctly (did not fail) contributing to loss and water slipping past the grout as the secondary cause." DiGrande testified that he had inserted "did not fail" into the letter because ALD did not state that the pan had failed. He further testified that had the pan failed, the ensuing loss would have been covered.

Ahlich, unlike Schneider, was aware of the cracked glass block when he conducted his investigation. He testified that his water testing revealed heat signatures and moisture readings along the shower curb. Ahlich explained, "It was a wider spread phenomenon than just a point source that one would expect with just a cracked glass block." After examining the crawl space, Ahlich confirmed measurements with the layout of the shower with what he saw below the crawl space. He did not see anything that would lead him to believe that there had been some catastrophic event that damaged the shower pan. He described the shower pan as primarily a membrane that underlies the tile and mortar of the shower surface. The membrane sits on top of another mortar bed and together they are the shower pan. Ahlich testified that the house was roughly 20 years old, so Ahlich did not think 20 years would have caused the pan failure just purely on wear and tear. Ahlich concluded the cause was a construction defect because the rot was caused by water from the shower that somehow bypassed the shower pan and worked its way into the subfloor and the framing. Ahlich testified that while his report only referenced the interior crack in the glass block, the fact that exterior cracks existed did not change his conclusions. Ahlich explained that how the

light reflected on the glass block influenced how easy or hard it was to see the cracks. Ahlich also opined that even if there had been prior grout repair before his inspection, that would not change his conclusions. Ahlich explained that water goes through grout, and the shower pan is designed to stop water that goes through the grout. Ahlich was asked specifically about the timeframe of the decay on direct examination. Ahlich explained that engineers like himself investigate the length of decay and rot in determining a timeframe. He testified that his process is commonly accepted in the engineering community and involves analysis "of the source of water; the extent of decay, both, you know, in a geographic sense and then also the degree of actual decay in any wood member; and then an analysis of the elements that are present, such as temperature, source of moisture, you know, fuel, you know, being wood and so on." Ahlich opined that the rot was "a longer-term phenomenon and that it had preceded" the hairdryer incident. Simmonds elected not to cross-examine Ahlich.

At the conclusion of trial, the court ruled in favor of PURE, issuing 31 findings of fact and 12 conclusions of law. The court concluded that PURE did everything it needed to do by timely and promptly responding to plaintiffs. PURE engaged experts to investigate the cause of the leak and responded to and addressed plaintiffs' contentions. The court ruled that plaintiffs did not meet their burden in proving that PURE did not deal with them in a manner that was fair. The court found that unopposed testimony and conclusions from Schneider, Ahlich, and Mason supported a finding that the cause of the leak resulting in the rot were issues with the shower curb/pan waterproofing system. The court found that the failures were the result of construction defects, which were excluded under the insurance policy, and that plaintiffs

did not establish that the hairdryer incident caused the leak resulting in the rot. The court concluded that the efficient proximate cause rule did not apply because the loss was caused by faulty construction. The court concluded that plaintiffs did not meet their burden in providing a breach of contract and entered a verdict in favor of PURE.

Simmonds filed a motion for reconsideration under CR 59(a)(3) and (4) and attempted to present measurements he took of his bathroom after trial. The court denied the motion. Simmonds, continuing to appear pro se, appeals.

DISCUSSION

Findings and Conclusions

We first address Simmonds' multiple challenges to the court's findings of fact and conclusions of law.

"[W]here the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). We "will not substitute [our] judgment for that of the trial court even though it might have resolved a factual dispute differently." Id. at 879-80. We apply "a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007).

Simmonds first challenges finding of fact 5, which provides, "During the investigation, it was discovered that the subflooring in the crawlspace below the affected shower had extensive rot. There was rot and/or deterioration to the plywood and flooring joists in the area." Simmonds argues that the rot damage was first discovered by Simmonds, not PURE. The finding did not assert that PURE was the first to discover rot. The trial court was merely stating that during PURE's investigation, it discovered rot. Substantial evidence supports finding of fact 5.

Simmonds next challenges finding of fact 8, which provides that "[a]fter [Crawford and Company's] inspection of the crawlspace and wood rot, PURE claim handler, Shawn Roessler, informed [Simmonds] there would be coverage issues related to any rot and arranged to have an additional inspection to determine the cause of the rot." Simmonds takes issue with the court's verbiage "would" instead of "could." Roessler testified that during their phone conversation, she told him that she thought the rot exclusion "would come into play." Substantial evidence supports this finding.

Finding of fact 20 provides that Simmonds "disputed PURE's findings, so PURE retained structural engineer Kurt Ahlich and material scientist James Mason, PhD to inspect and opine as to the cause and duration of the leak." Simmonds calls this a "half-truth" because he prefers additional findings. Substantial evidence supports the court's finding through uncontroverted testimony at trial.

Simmonds also challenges finding of fact 31, which states that DiGrande, "who approved the declination letter to Plaintiffs[,] testified that a failure could be covered under the policy." Simmonds argues that DiGrande testified that a failure "would" be covered if the pan had failed. Simmonds is correct. DiGrande's testimony explained

that ALD did not find that the shower pan had failed, but if the pan had failed, PURE "would appropriately provide coverage" for the ensuing loss. Substantial evidence did not support the trial court's finding that DiGrande testified that a failure *could* be covered if the pan had failed.

We need not separately address the remaining challenged findings 14, 17, 19, 21, and 23-30, because they are encompassed within other issues discussed below.

Simmonds next makes multiple challenges to the court's conclusions of law. We review conclusions of law de novo. Sunnyside, 149 Wn.2d at 880. We must determine whether the findings of fact support the conclusions of law. Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998).

First, Simmonds challenges conclusion of law 3, which provides that the "efficient proximate cause rule does not apply in this case because the loss was caused by faulty construction and resulted in rot—both of which are excluded by unambiguous provisions in the Policy." Simmonds does not provide any argument as to why the efficient proximate cause rule would apply given the evidence admitted at trial. Thus, we do not address this claim. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Next, Simmonds challenges conclusion of law 7: "Use of the term 'failure' does not bring an uncovered claim into coverage. 'Failures' are not specifically covered under the terms of the policy. Only a loss that meets the insuring agreement and is not otherwise excluded would be covered under the policy." Simmonds argues that failures need not be specifically covered under the policy for there to be coverage because he had an all-risks policy. The policy described property coverage as insurance "against all

risks of sudden and accidental direct physical loss or damage to your dwelling, contents and other structures unless an exclusion applies." Contrary to Simmonds' suggestion, the court did not conclude that failures must be specifically covered to establish coverage. Simmonds does not otherwise dispute that the loss cannot be a loss that is excluded under the policy.

Simmonds next challenges conclusion of law 8: "Plaintiffs did not establish the claimed loss was covered under the Policy." Simmonds argues that Roessler's testimony agreeing that the specific problem with the installation of the liner could not be identified without demolition of the shower constitutes a system failure and that DiGrande's testimony supports an interpretation that a system failure is covered as part of an all-risks policy. Simmonds mischaracterizes the record. Roessler agreed at trial that she wrote that "with regard to the lack of a known specific problem with the pan liner, we agree that the specific problem with the liner and the way it was installed could not be identified without demolition of the shower." Schneider testified that because he could not take the shower apart, he had no idea what kind of membrane was installed, such as vinyl or a liquid applied painted on membrane. Schneider, from ALD, also testified that he "didn't see anything that would indicate that anything had occurred to the shower to have caused the membrane to fail" and that is why he concluded the leak likely was the result of either wear and tear or a construction defect. DiGrande testified that, in fact, ALD did not find that the pan failed. Simmonds fails to cite to any findings or evidence in the record that contradict the court's conclusion, which is supported by the court's findings of fact.

Simmonds further challenges conclusions of law 10 and 11. Conclusion of law 10 provides, "In handling Plaintiffs' claim, PURE did everything it needed to do. It timely and promptly responded to Plaintiffs, it engaged experts to investigate the cause of the leak, and responded to and addressed Plaintiffs' contentions." Conclusion of law 11 states, "Plaintiffs have not met their burden in proving that PURE did not deal with him in a manner that was less than fair." Simmonds' contention that PURE could have done more does not answer the question of whether PURE's continued response to Simmonds' contentions was less than fair. PURE timely responded to Simmonds in their correspondence, it considered Simmonds' claims and theories when considering coverage, and it hired multiple experts to visit the home and conduct multiple tests. The findings support these conclusions.

Simmonds finally challenges conclusions of law 5, 6, 9, and 12 without providing any argument other than they "do not flow from proper findings of fact." This is not sufficient to warrant review. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

Summary Judgment

Simmonds challenges the trial court's decision to grant PURE's motion for summary judgment and dismiss the extra-contractual claims. Simmonds also challenges the trial court's dismissal of its cross-summary judgment motion on procedural grounds. Simmonds has not properly briefed these issues to warrant review.

This court reviews a summary judgment order de novo, and it engages in the same inquiry as the trial court. Citizens All. for Prop. Rights Legal Fund v. San Juan

County, 181 Wn. App. 538, 542, 326 P.3d 730 (2014). This court grants summary judgment if there is no genuine issue as to any material fact. CR 56(c). When we make this determination, we consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Simmonds spends a considerable amount of the argument section of his opening brief reciting the facts involving PURE's investigation of the claim. Simmonds then summarily writes, "As detailed above, *supra* pp. 20-46, and as set forth in their Opposition and Cross-Motion for Summary Judgment, CP 481-488, the Simmonds' CPA, IFCA and bad faith[6] claims are supported by the facts, governing statutory law and administrative regulations, and authoritative caselaw." Trial court briefs cannot be incorporated into appellate briefs by reference. Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

Below, PURE had argued that Simmonds' cross-motion should be denied for being substantively and procedurally deficient. PURE contended Simmonds did not comply with CR 56(c), and King County LCR 7(b)(4)(B), and LCR 7(b)(5). The trial court denied the cross motion for summary judgment because it "was not properly raised or noted."[7]

Instead of directly addressing the applicable King County local rules to explain why Simmonds believes the court's denial was in error, Simmonds cites to Hood Canal

[6] Simmonds' extra-contractual "bad faith" claims related to IFCA.

[7] After Simmonds filed a motion for reconsideration, the trial court denied the motion and clarified that the denial of the cross motion for summary judgment was denied "both substantively and because it was not properly noted."

Sand & Gravel, LLC v. Goldmark, 195 Wn. App. 284, 381 P.3d 95 (2016), a Jefferson County case that has no relevance as to the application of King County local rules.

We decline to address the inadequately briefed issues. Norcon Builders, 161 Wn. App. at 486.

Evidentiary Error

Simmonds next challenges the trial court's denial of motions in limine that related to PURE's experts.

We review evidentiary rulings for abuse of discretion. Hollins v. Zbaraschuk, 200 Wn. App. 578, 580, 402 P.3d 907 (2017). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Seattle Times Co. v. Benton County, 99 Wn.2d 251, 261, 661 P.2d 964 (1983) (citing Friedlander v. Friedlander, 80 Wn.2d 293, 298, 494 P.2d 208 (1972); State v. Alford, 25 Wn. App. 661, 665, 611 P.2d 1268 (1980).

First, the trial court denied Simmonds' motion to exclude portions of the ALD report and related testimony under ER 701(c). Simmonds argues that because PURE listed Schneider as a fact witness rather than an expert witness, portions of the ALD report and testimony "based on scientific, technical, or other specialized knowledge within the scope of rule 702" should have been excluded under ER 701(c).[8] The ALD report was only admitted for a limited purpose at trial and not for the truth of the matter

[8] Simmonds asserts that this court's review of the trial court's ruling on the motion in limine is de novo because it was "based on its interpretation of a court rule." However, Simmonds is mistaken. The trial court did not interpret any rule, but instead applied the rules to the facts in order to make its determination. The standard of review is abuse of discretion as described above.

asserted. Simmonds provides no citation to authority or argument to support his position, and we decline to address it. RAP 10.3(a)(6); Cowiche Canyon, 118 Wn.2d at 809 (argument unsupported by reference to the record or citation to authority will not be considered).

Next, Simmonds contends that the ARCCA report as well as the testimony of Ahlich and Mason should have been excluded both at summary judgment and at trial under Frye.

In order for expert testimony regarding novel scientific evidence to be admissible, it first must satisfy the Frye standard and then must meet the other criteria in ER 702. Lake Chelan, 176 Wn. App. at 175. "Under Frye, the trial court must exclude evidence that is not based on generally accepted science." L.M. by & through Dussault v. Hamilton, 193 Wn.2d 113, 117, 436 P.3d 803 (2019) (citing Anderson v. Azko Nobel Coatings, Inc., 172 Wn.2d 593, 603, 260 P.3d 857 (2011)). Washington courts apply the Frye standard, asking whether both the underlying scientific principal and the technique employing that principle find "general acceptance in the appropriate scientific community." Lake Chelan, 176 Wn. App. at 175-76 (citation omitted). "Frye excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable." In re Det. of McGary, 175 Wn. App. 328, 339, 306 P.3d 1005 (2013). "[T]rial courts should admit evidence under Frye if the scientific community generally accepts the science underlying an expert's conclusion; the scientific community does not also have to generally accept the expert's theory of specific causation." L.M., 193 Wn.2d at 129. We review whether the evidence should be barred by Frye de novo. Id. at 128.

First, the ARCCA report was admitted for a limited purpose and not for the truth of the matter asserted. We thus turn to Ahlich's trial testimony.

Simmonds cites to Lake Chelan to argue that Ahlich opining about the timeframe of the rot without identifying a methodology that is generally accepted in the scientific community was error.

In Lake Chelan, this court upheld a summary judgment dismissal on behalf of the insurer because the plaintiffs' experts' use of a formula to link the current building decay to a state of "collapse" during a previous policy period to establish coverage did not satisfy Frye. Lake Chelan, 176 Wn. App. at 175. The insurer set forth evidence indicating the methodology of the plaintiffs' experts was not generally accepted. Id. at 172. This court observed that while the wood expert had stated that models approximating exponential curves that describe wood decay are generally accepted, that did not address the critical issue of whether the civil engineer's formula used to backdate to the onset of the collapse condition is generally accepted in the scientific community. Id. at 179.

Unlike the plaintiff's expert in Lake Chelan, Ahlich did not use a formula and instead testified that engineers like himself investigate the length of decay and rot by analyzing

> the source of water; the extent of decay, both, you know, in a geographic sense and then also the degree of actual decay in any wood member; and then an analysis of the elements that are present, such as temperature, source of moisture, you know, fuel, you know, being wood and so on.

Ahlich testified that this process was commonly accepted in the engineering community. Ahlich opined that he believed the rot was a longer-term phenomenon that preceded the

hairdryer incident. Notably, Simmonds did not present any evidence to contradict Ahlich's testimony. Simmonds did not call his own expert and elected not to cross-examine Ahlich at trial. Unlike the insurer in Lake Chelan, Simmonds never set forth evidence challenging Ahlich's testimony.

Even if it was error for the trial court to have allowed Ahlich to testify that the rot preceded the hairdryer incident, such error was harmless. See State v. Sipin, 130 Wn. App. 403, 421, 123 P.3d 862 (2005) (applying a harmless error analysis when the court improperly admitted evidence under Frye); L.M., 193 Wn.2d at 142 (Gonzalez, J. concurring) (determining the admittance of challenged expert testimony under Frye was harmless error because challenged expert testimony was insignificant when compared to the evidence admitted through otherwise qualified experts). The test for harmless error is whether the outcome of the trial would have been materially affected. Needham v. Dreyer, 11 Wn. App. 2d 479, 497, 454 P.3d 136 (2019).

Even without Ahlich's testimony that the rot began prior to July 2018, there was undisputed evidence that (1) eliminated the cracked glass block as the source of the leak that led to the wood rot, and (2) supported a conclusion that the leak was from shower pan membrane issues that were the result of a construction defect. Mason's testimony eliminated the cracked shower block as the source of the leak or damage to its surroundings. Multiple experts conducted water testing that showed water seepage along the shower curb and not concentrated near the cracked glass block. Both Schneider and Ahlich testified that they did not observe any evidence of damage to the shower. When Schneider testified that it could be a construction defect or wear and tear, he noted that he was not aware of the age of the shower and that one that was

built well and maintained should probably last at least 30 years. Ahlich testified that the house was roughly 20 years old and that he did not think 20 years would have caused the pan failure purely on wear and tear, which is why he concluded the leak was because of a construction defect related to the membrane. As the court concluded, the "unopposed testimony and conclusions from Mr. Schneider, Mr. Ahlich, and Dr. Mason support a finding that the cause of the leak resulting [in] the rot were issues with the shower curb/pan waterproofing system. These failures were a result of construction defects, which are excluded under the Policy. The subsequent rot is also excluded under the policy." The policy also excluded wear and tear.

This record does not establish that the trial court erred in denying Simmonds motion to exclude Ahlich's testimony. However, any alleged error regarding the admission of Ahlich's testimony was harmless.[9]

Motion for Reconsideration

Lastly, Simmonds filed a motion for reconsideration under CR 59(a)(3) and (4). CR 59 allows the court to reconsider any decision "materially affecting the substantial rights" of the moving party. CR 59(a). The rule sets out various grounds for reconsideration including the following:

> (3) Accident or surprise which ordinary prudence could not have guarded against;

[9] Simmonds also assigns error to the trial court ruling that he had an obligation to supplement discovery by disclosing a voicemail Roessler made to Simmonds' insurance broker. Because the court denied PURE's motion to exclude the voicemail and Simmonds was allowed to use the voicemail as he intended—to impeach Roessler—any alleged error in the court's ruling was harmless and we see no need to further address it. Needham, 11 Wn. App. 2d at 497 (test for harmless error is whether the trial would have been materially affected by the alleged error).

> (4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial.

CR 59(a)(3-4). However, "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. Perry v. Hamilton, 51 Wn. App. 936, 938, 756 P.2d 150 (1988).

Simmonds makes no attempt to address how his motion satisfies CR 59(a)(3) or (4) and instead attempts to argue the underlying merits. Simmonds has not adequately briefed this issue to warrant review. Norcon Builders, 161 Wn. App. at 486.

Affirm.[10]

Colum, J.

WE CONCUR:

Chung, J.

Mann, J.

[10] Because we affirm, we need not consider Simmonds' request for attorney fees.

FILED
9/5/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID M. SIMMONDS and
DEBRA K. SIMMONDS,
husband and wife,

Appellants,

v.

PRIVILEGE UNDERWRITERS
RECIPROCAL EXCHANGE, dba
PURE INSURANCE,

Respondent.

No. 84081-9-I

ORDER DENYING
MOTION FOR
RECONSIDERATION

The appellants, David Simmonds and Debra Simmonds, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Colum, J.

CR 11
SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact,

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

[Adopted effective July 1, 1967; Amended effective January 1, 1974; September 1, 1985; September 1, 1990; September 17, 1993; October 29, 2002; September 1, 2005.]

CR 26

GENERAL PROVISIONS GOVERNING DISCOVERY

….

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

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PDF **WAC 284-30-350**

Misrepresentation of policy provisions.

(1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(2) No insurance producer or title insurance agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(3) No insurer shall deny a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so.

(4) No insurer shall, except where there is a time limit specified in the policy, make statements, written or otherwise, requiring a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices the insurer's rights.

(5) No insurer shall request a first party claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment.

(6) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage which contain language which release the insurer or its insured from its total liability.

(7) No insurer shall make a payment of benefits without clearly advising the payee, in writing, that it may require reimbursement, when such is the case.

[Statutory Authority: RCW **48.02.060** (3)(a) and **48.17.010**(5). WSR 11-01-159 (Matter No. R 2010-09), § 284-30-350, filed 12/22/10, effective 1/22/11. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-350, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-350, filed 7/27/78, effective 9/1/78.]

E. The Court Overlooks Simmonds' ER 701(c) Citations to Authority, References to Record, and Argument

The court states:

> Simmonds provides ***no*** citation to authority or argument to support his position [that specified portions of the ALD Report and Schneider's related testimony within the scope of rule 702 should have been excluded under 701(c)], and we decline to address it.

Dec. 19 [bracketed language and emphasis added). The court overlooks the following from Simmonds' opening and reply briefs (indicated in red):

> PURE was insistent that Schneider was a fact – not expert –witness. CP 498:9-11. Accordingly, portions of the ALD report and testimony "based on scientific, technical, or other specialized knowledge within the scope of rule 702," should have been excluded under ER 701(c). CP 525-33.

Op.Br. 55.

> Simmonds are appealing the trial court's denial of their motion in limine to exclude, under ER 701(c), those portions of the ALD report and related opinion testimony of designated lay witness Schneider that are "based on

scientific, technical, or other specialized knowledge within the scope of rule 702." Simmonds Br. 55-56, CP 525-33.[1]

PURE does not challenge Simmonds' ER 701(c) legal position. It does not mention ER 701(c) in its responsive brief. Instead, PURE glosses over the issue claiming it relied only on Schneider's "factual account" in contrast to the expert opinions of Ahlich and Mason. PURE Br. 45. However, throughout the rest of its brief, PURE cites the opinion of Schneider – far beyond his "factual account" – as every bit as authoritative on matters "within the scope of 702" as those of Ahlich and Mason. *See*, e.g., PURE Br. 48.

- "[T]he testimony of Ahlich and Schneider [was] that the shower pan or its membrane was improperly installed."
- "Mason, Ahlich, and Schneider all testified that the hairdryer incident and resulting cracked glass block could not have been the cause of the leak."

Most problematic, however, was the court's reliance on testimony of lay witness Schneider which was clearly "within the scope of 702" and inadmissible under ER 701(c).

> Mr. Schneider, Mr. Ahlich and Dr. Mason all testified in their professional opinion credibly that this was -- well, Mason doesn't say that, but Ahlich

[1] As part of their motion in limine, Simmonds filed a highlighted version of the ALD report indicating those portions of the report that should be excluded under ER 701(c). CP 530-33.

and Schneider, that this was likely a construction defect.

RP 413:10-13.[2]

The ER 701(c) issue should be considered against the backdrop of PURE's insistence that Schneider was a lay – not expert – witness, CP 498:9-11, and Roessler's testimony that Schneider was not qualified to conduct "failure analysis," RP 160:2-5, and "definitely not be something that … I would call him for." RP 158:12-16.

A. My thinking was we really need to get somebody who understands how things are put together to answer your question.

Q. And he [Schneider] wasn't the person to -- to do that; is that correct?

….

A. Not in my mind. He's for determining if there's a leak, but, like, failure analysis and delving into your -- understanding your theory to see if that was a plausible chain of events, he wouldn't have been the expert for that.

Notwithstanding her testimony, Roessler relied on her interpretation of Schneider's "failure analysis" and her false assumption that he purposefully ruled out any issue pertaining to the cracked block in "formal[ly]" denying coverage on September 2, 2020. CP 435, PURE Br. 28.

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[2] As previously stated, *supra* at 9 n.6, the court's denial of Simmonds' motion in limine to exclude portions of Schneider's testimony within the scope of ER 702 gave Simmonds a standing objection to such testimony.

Reply 21-23.

The court's stated basis for declining to address Simmonds' ER 701(c) challenge cannot be reconciled with the foregoing.

(I) The Court Misapprehends Simmonds' Opening Brief by "Declin[ing] to Address" Summary Judgment Issues[3]

The Decision declines to address ***any*** of Simmonds' summary judgment issues based on not being "properly briefed." Dec. 16.

The court cites *Holland v. City of Tacoma*, 90 Wn. App. at 538, for the proposition that, "Trial court briefs cannot be incorporated into appellate briefs by reference." Dec. 17. The court views Simmonds' opening brief's "and as set forth" reference to the "Opposition and Cross-Motion for Summary Judgment," as improperly incorporating by reference support for the CPA, IFCA and bad faith claims. It is not.

The language at issue reads as follows:

> As detailed above, supra at pp. 20-46, ***and*** as set forth in their Opposition and Cross-Motion for Summary Judgment, CP 481-488, the Simmonds' CPA, IFCA and bad faith claims are supported by the facts, governing statutory law and administrative regulations, and authoritative caselaw.

Dec. 17 (emphasis added).

The support for Simmonds' CPA, IFCA and bad faith claims is described in detail in Simmonds' opening brief. Op.Br. 20-46. Simmonds' reference to the "Opposition and Cross-Motion for Summary Judgment" was to show that same support – as detailed in the opening brief – had been

[3] Assignments of Error (1) and (3).

provided on summary judgment; not to incorporate that portion of the summary judgment brief into the appellate brief.

The court then states:

> Instead of directly addressing the applicable King County local rules to explain why Simmonds believes the court's denial was in error, Simmonds cites to Hood Canal Sand & Gravel, LLC v. Goldmark, 195 Wn. App. 284, 381 P.3d 95 (2016), a Jefferson County case that has no relevance as to the application of King County local rules.

Dec. 17-18.

Hood Canal Sand & Gravel is a published opinion from Division 2 of the Court of Appeals of Washington. It was not cited by Simmonds as authority on "the application of King County local rules," but rather as a well-reasoned, directly pertinent decision on the larger, overriding issue. As such, it should be given "respectful consideration." *In re Arnold*, 190 Wn.2d 136, 147, 410 P.3d 1133 (2018).

While the local rules of King and Jefferson counties differ, both have calendar and noting requirements. The ***material*** facts of the two cases are virtually identical in that both focused on cross-motions in responsive pleadings without compliance with the calendar and noting requirements of the respective counties; both cross-motions were the "flip-side" of the noted motion; no facts were in dispute; and there was no prejudice asserted by the opposing party.

The differences between the local rules of the two jurisdictions have no bearing on the doctrinal value of the analysis undertaken by the court in *Hood Canal*.

Simmonds cited additional support for the *Hood Canal* position which the court overlooks.

> Simmonds' cross-motion was merely the flip-side of PURE's motion. As such, summary judgment can be appropriate even where ***no*** motion or cross-motion has been made.
>
> > When the relevant facts are not in dispute, the reviewing court may order entry of summary judgment in favor of the nonmoving party.
>
> *Schuck v. Beck*, 497 P.3d 395,423 (Wn.App. 2021) (citing [Washington Supreme Court in] *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992)).

Op.Br. 52.

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