No. 97096-3

(Court of Appeals No. 76405-5-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY,
Respondent/Cross-Appellant

vs.

ADMIRAL WAY, LLC,
Appellant

RESPONDENT/CROSS-APPELLANT ZURICH AMERICAN INSURANCE COMPANY'S ANSWER TO ADMIRAL WAY'S PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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I. INTRODUCTION

Respondent Zurich American Insurance Company ("Zurich") submits this Answer to Appellant's Petition for Review pursuant to RAP 13.4(d). Review is unwarranted. Appellant Admiral Way LLC ("the LLC") fails to satisfy its burden under RAP 13.4(b)(1) and (4), and the Court of Appeals' decision as to Zurich, affirming the trial court, is correct.

The LLC's Petition involves the same condominium project in West Seattle known as The Admiral that is the subject of No. 97083-1 (Ct. Ap. 76490-0-I), filed by Ledcor Industries (USA) Inc. ("Ledcor"). The two matters were linked in the Court of Appeals.

The Court of Appeals affirmed two determinations of the trial court that the LLC appealed: 1) the LLC, which had no insurance of its own, was not an insured under the policies Zurich issued to Ledcor. (Although the LLC initially sought coverage under the 2005-2006 and 2006-2007 Zurich policies, the LLC appealed only the trial court's decision regarding the first policy); and 2) Zurich did not engage in bad faith. The LLC does not challenge the Court of Appeals' holding that the LLC is not an insured, nor does it challenge the application of the exclusions Zurich relied upon to disclaim coverage: the residential building exclusion and the exclusion for continuous or progressively deteriorating injury.

The Court of Appeals' decision to affirm the trial court's determination that Zurich did not commit bad faith as a matter of law was correct:

> Zurich's declaratory judgment action occurred years after the original complaint, after the parties in the underlying [case] had already attended multiple mediations, and relies on substantially the same evidence as was already available to the parties. Moreover, unlike in *Mutual of Enumclaw,* Zurich did not interfere with the underlying action to the detriment of its insured. Admiral Way remained independently represented by counsel of its choice, funded by Zurich, and there was no evidence that the mediation was affected by Zurich's actions.

Slip Op. at 23.

II. COUNTERSTATEMENT OF THE CASE

In 2007, residential members of the Admiral Condominium Owners Association (the "COA") sued the LLC over the construction of The Admiral. The COA alleged that "property damage" caused by various construction defects was "continuous and ongoing throughout the Condominium" and "commenced at or shortly after the completion of each building or element of infrastructure," in 2003. CP 184, ¶ 8. The COA's complaint was preceded by a March 2007 Notice of Construction Defects, later amended on June 2, 2008. CP 288; CP 408-21. Underpinnings for the Notice and the COA's complaint included investigations and reports generated years earlier by a consultant, Morrison Hirschfeld, hired first by the LLC and then by Ledcor. The LLC's Petition refers to a single "MH Report," but there were several. CP 294-96 (Dec. 21, 2001); CP 298-302 (Sept. 30, 2002);

CP 304-36 (Dec. 20, 2002); CP 344-45 (March 4, 2003); CP 357-93 (May 30, 2003). These materials are discussed further below. All were the subject of discovery in the COA case and were in the public record before Zurich took any action in this case.

Under a reservation of rights Zurich defended the LLC (and Ledcor) in the COA case from 2007 through its mediated conclusion in July 2009. CP 1053-59. During this two-year period, neither entity took issue with Zurich's actions. The LLC was defended by Hecker Wakefield, counsel of the LLC's own choosing. CP 1015. Slip Op. at 23. Marc Gartin himself (the LLC's managing member, CP 2325-26), had no criticism about how the defense was handled by Zurich, other than complain Zurich declined to contribute to settlement. CP 1019-20.

Zurich commenced this action in March 2009 to determine its insurance obligations. CP 7-21. Zurich sought a ruling that the two insurance policies it issued to Ledcor, under which the LLC sought coverage as an additional insured, provided no coverage because: (1) the policies excluded coverage for residential construction, including condominiums—and The Admiral was a condominium; and (2) the exclusion for "continuous or progressively deteriorating" injury applied because property damage at The Admiral allegedly commenced years before the Zurich policies were issued.

CP 7, 19; CP 446-47. Zurich also sought a declaration that the LLC was not an insured. CP 17.

After commencing this action in March 2009, Zurich set about scheduling a summary judgment hearing date with opposing counsel. When Ledcor's counsel requested a delay until July, Zurich contacted the LLC's attorney, Angela Wesch,[1] and proposed a hearing date of July 31, 2009. CP 976-77 at para. 13; CP 1117-19. Ms. Wesch responded that date was not acceptable, but said any Friday other than July 24 or 31 would be. CP 1118. Zurich then noted its motion for August 21, 2009. CP 1119.

Ms. Wesch's objection to the hearing date did not evince any concern that Zurich's motion might prejudice the LLC's position in the COA lawsuit. CP 1118. Indeed, when the LLC first answered Zurich's complaint in August 2009 (after Zurich filed its motion and after the COA case settled), the sole basis for the LLC's bad faith counterclaim was alleged misrepresentation of insurance policy provisions, based on Zurich's denial of the LLC's insured status. CP 1099. Not until January 2010 did the LLC first allege that Zurich's summary judgment motion filed on July 24, 2009, CP 446 *et seq.*, and which was continued multiple times and not heard until June 4, 2010, was an act of bad faith. CP 1111.

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[1] Ms. Wesch later withdrew, and the firm Mills Meyers substituted as counsel for the LLC.

Meanwhile, the underlying COA action was first mediated in 2009 in June, before Zurich filed its motion. CP 1016. A second mediation was set for July 28. CP 974-95; CP 1016. On July 2, the COA, Ledcor, and the LLC filed cross motions against each other. *E.g.* CP 1305-1313 (Ledcor's motion); CP 2325-33 (Marc Gartin's declaration in response, describing the Morrison Hirschfeld materials). These Morrison Hirschfeld materials were attached to both the LLC's and Ledcor's submissions.[2]

Zurich filed its (first) summary judgment motion in this action *afterwards—on* July 24, 2009. CP 2159. Zurich's motion relied on its policies, the underlying complaint, Amended Notice of Construction Defects, documents obtained from the public recorder's office (showing The Admiral was a condominium and had not been converted to apartments), and documents the underlying parties had filed against each other on July 2, 2009—*exclusively*. *See* Appendix One. Zurich's motion sought a determination that its policies' exclusions for residential construction and continuous in-

[2] *See Appendix One* hereto. This is a copy of Appendix One to Zurich's brief in the related Ledcor matter, Court of Appeals, No. 76490-0-I. It is a table that identifies the sources of all of the evidence that Zurich relied upon in its motion for summary judgment. The table was prepared in the litigation below in answer to Ledcor's argument that Zurich engaged in bad faith when it filed its motion. *See* CP 13368-70, which is part of CP 13337-81 (No. 97083-1 / Court of Appeals, No. 76490-0-I), Zurich's Opposition to Ledcor's Motion for Summary Judgment.

jury barred coverage for the COA claims. Each item of evidence accompanying Zurich's motion (the Morrison Hirschfeld materials included) had been exchanged between, and was well known by, all parties in the underlying case—the COA, the LLC, and Ledcor—before Zurich did anything. Each document already existed in the public record because it had been put there by one or more of those parties. *See* Appendix One. Zurich did not, for example, file confidential information from defense counsel or use information it had developed that was outside the public domain in the underlying case. Nor was Zurich seeking the adjudication of any fact or legal defense adverse to the LLC in the underlying action. Indeed, the LLC's Marc Gartin attached and discussed the Morrison Hirschfeld materials in his own declaration filed in the underlying COA case on July 20, 2009—four days before Zurich filed its motion. CP 2325-33.

As it turned out, Zurich's motion was not heard until June 4, 2010. CP 446. By then, ten months had passed since the COA case settled. The trial court made no factual findings–nor could the court have done so in any way that would have impacted the LLC's interests in the COA case even if that action were still pending. Issues and parties in the two cases were not the same, so nothing decided in this action could bind the parties in the COA case. The trial court simply granted Zurich's motion on the second policy and denied Zurich's motion on the first. No facts were adjudicated. CP

949-53. Not until October 2011 did Zurich finally and fully prevail on all of its affirmative claims and defeat the LLC's (and Ledcor's) extra-contractual counterclaims. CP 2086-89.

In its Petition, the LLC claims it "did submit evidence that Zurich's conduct effected [sic] the outcome of the mediation," citing only a single reference in the record, CP 3125. (Petition at 19.) This is an excerpt of Marc Gartin's deposition testimony, which says nothing about Zurich, nor about the summary judgment motion Zurich had filed.

> What Chris Soelling [the mediator] believed was if we ended up in court, we were going to lose and there would be a judgment put up against us, and since I had no insurance company stepping up and protecting me, as I thought I should, since I was an additional insured on all these policies, I felt I had to protect my other assets....

CP 1319.

As it was, the LLC had been on notice from Zurich for almost two years before the final mediation of Zurich's position that the LLC was not an additional insured; that the exclusions in the Zurich policies for continuous injury and residential construction applied; and that for these reasons there was no coverage for the LLC under the Zurich policies. CP 1407-11. If the LLC was caught unawares at mediation, and Marc Gartin felt pressured to settle with the COA using his own funds, it was not because Zurich had moved for summary judgment motion four days before and attached

(among numerous other exhibits) seven-year old Morrison Hirschfeld materials the parties in the COA case, including the LLC itself, had filed days if not weeks earlier. Rather, if Mr. Gartin felt abandoned it was because American Home, which had been defending the LLC along with Zurich but which sent its only reservation of rights letter to the LLC just 11 days before the July 28 mediation, CP 1066-67 & CP 1070-82, declined to pay anything on the LLC's behalf. And as it argued to the Court of Appeals, the LLC had also been abandoned by Virginia Surety and AISLIC. Slip Op. at 4, 7 *et seq.*

III. ARGUMENT

A. Division One Had A Complete Record Before It and Correctly Determined The LLC's Bad Faith Claim Was Unsustainable As A Matter of Law

The LLC's theory that Zurich's motion was filed in bad faith is factually insupportable and is unsustainable as a matter of law. An insurer does not act improperly merely by disputing coverage. *Sharbono v. Universal Underwriters Ins. Co.,* 139 Wn. App. 383, 161 P.3d 406 (2007), *review denied,* 163 Wn.2d 1055 (2008). This Court has specifically instructed insurers that the best course of action when disputing a duty to defend is to (1) defend under a reservation of rights and (2) file a declaratory judgment action to obtain a judicial declaration of the insurer's obligation. *Truck Ins. Exch. v. VanPort Homes, Inc.,* 147 Wn.2d 751, 761, 58 P.3d 276 (2002). The LLC

appears to want this Court to establish a bright line rule, which the *Dan Paulson* case did not do, that insurers must stay any declaratory judgment action on the duties to defend and indemnify until the underlying liability is fully resolved. Such a rule is unjustified.

The indisputable facts demonstrate that Zurich's filing of a summary judgment motion in this action during the summer of 2009 did nothing to prejudice the LLC's position in the underlying case. Zurich's reservation of rights letter, sent in 2007, had given the LLC nearly two years' warning that although it would defend the LLC, Zurich contested coverage and would not pay indemnity. CP 1053-59. Zurich did not develop or "marshal"[3] new evidence, and then put such evidence in the record, to its *alleged* insured's detriment. Every document supporting Zurich's motion was part of the public record in the underlying case in which the parties had already filed cross motions for summary judgment against each other. The LLC's assertion that Zurich sought factual findings that would enhance the value of the COA's case in chief, is nothing more than attorney argument, borrowed from Ledcor, and lacks any evidentiary support.

While the LLC's Marc Gartin may have felt pressure during the mediation to settle, there is no evidence Zurich's motion was the cause. There

[3] The LLC's Petition at p. 17.

is nothing in the record indicating the mediator used the pending coverage action or summary judgment motion to pressure the LLC into settlement. *See generally* Gartin deposition testimony at CP 1016-18. And, nothing about Zurich's position regarding coverage for the LLC had changed during the summer of 2009 when the second mediation took place.

There was, however, a new pressure on the LLC during this time. It came from American Home, which had been defending the LLC along with Zurich for nearly two years, but without a reservation of rights – until it sent the LLC such a letter on the eve of the second mediation. CP 1066, 1070-82. The LLC may have been wronged, but Zurich was not the culprit.

Although the LLC has argued that Zurich pressed issues on summary judgment that were prejudicial to it in the underlying action, the LLC has not and cannot point to any fact, argument, or proposed order put forward by Zurich that possibly could have affected the outcome of the COA case. Summary judgment motions do not adjudicate contested facts, and the legal issues in this insurance coverage case and the claims asserted against the LLC in the underlying construction defect case were entirely different. Nothing to be decided on Zurich's motion – which was based on Zurich's contention that The Admiral was a residential building, and on the existence of allegations (made by the LLC and Ledcor against each other, and by the COA) that property damage preceded the issuance of Zurich's

policies—would have had any *res judicata* or collateral estoppel value in the underlying action. Both doctrines require identity of issues, which is completely absent here.

Moreover, nothing in Zurich's summary judgment filing disclosed information about the underlying COA case that was not already known to all parties to that case. Coverage under the Zurich policies was not at issue in the COA action, so there was not even a theoretical possibility that Zurich's summary judgment motion could have harmed the LLC's position in that action. The absence of even a possibility of harm confirms Zurich acted in good faith.

The LLC asserts it was prejudiced under the "*Spearin* doctrine" because evidence of design defects would tend to inculpate a property owner like the LLC. This is more attorney argument and speculation. The LLC has cited no evidence that Zurich's summary judgment motion made any design arguments and would otherwise establish any facts adverse to the LLC. The LLC's "design liability," if any, would have had nothing to do with whether The Admiral was a condominium, or whether the claims against the LLC were for continuous injury that preceded Zurich's first policy. That such injury was alleged was no secret to anyone in July 2009 when Zurich filed its motion. It was part of the LLC's affirmative claim against Ledcor. CP 277-92. (The "continuous injury" endorsement in the

Zurich policies had no knowledge component. CP 97. The only requirement was that property damage preexisted Zurich's policies, which neither LLC nor Ledcor disputed.)

Having adopted a consistent, clearly stated, reasonable position regarding coverage, and having availed itself of legal process to seek a judicial declaration of its rights and obligations in a setting that did not ask the court for any factual finding that could affect the LLC's underlying liability exposure,[4] Zurich did nothing that could possibly give the LLC an ounce of support for its bad faith counterclaim. The Court of Appeals was correct to affirm the trial court on the record before it.

B. *Dan Paulson* Distinguished.

The Court of Appeals, and the trial court before it, properly considered this Court's decision, *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007), and rejected its application to the facts of this case. *Dan Paulson* is distinguishable on many levels and it certainly does not categorically preclude insurers from seeking a declaratory judgment ruling regarding coverage before the underlying liability case concludes.

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[4] Compare, for example, a matter in which an insurer, before the liability case against its insured resolves, seeks a factual determination in the coverage case that its insured intended to harm a claimant to enforce a policy's intentional harm exclusion.

In *Dan Paulson,* Mutual of Enumclaw inserted itself directly into an underlying proceeding by issuing, *ex parte* (without notifying its insured), comprehensive subpoenas to the arbitrator at a time when no perfected separate declaratory judgment action was pending between it and its insured. Mutual of Enumclaw's conduct, this Court found, created uncertainty over prejudicing of the arbitrator. According to this Court, the insurer's actions constituted direct interference with the arbitrator and interjected coverage issues into the arbitration proceeding. Then, after learning of the subpoena, Mutual of Enumclaw's insured vigorously objected, as did the arbitrator, but Mutual of Enumclaw refused to back down. Nothing even remotely similar occurred in this case.

Here, the LLC did not protest the filing of Zurich's motion. Here, the LLC's claim that Zurich's filing constituted bad faith first surfaced months afterwards—after Ledcor made the argument. Here, Zurich did not "interject coverage issues" into the COA case. Zurich did nothing to prejudice the decision-maker in that action or otherwise affect the LLC's uninsured liability exposure. Although Zurich's motion sought application of its continuing injury endorsement, which required allegations in the COA case that property damage preexisted the issuance of Zurich's first policy in 2005, both the COA in its complaint against the LLC, and the LLC in its third-party complaint against Ledcor, made such allegations. CP 1681-88;

CP 277-92. Because there is no conflict between the Court of Appeals' decision in this case and *Dan Paulson*, Admiral Way fails to satisfy the requirements of RAP 13.4(b)(1).

IV. CONCLUSION

On a well-developed record, the trial court and Court of Appeals concluded Zurich did not act in bad faith. Zurich's motion for summary judgment, filed after two years of defending the LLC, did not rely on evidence that Zurich "marshalled" or otherwise developed independently to the detriment of its putative insured, the LLC. Instead Zurich relied on the fact that The Admiral was a condominium—which was not a contested issue in the COA case, and the allegations made by the COA and the LLC itself (as well as by Ledcor) that property damage commenced well before Zurich's policies came into effect in 2005. Indeed, that was a proposition with which the LLC and Ledcor obviously agreed, as evidenced by their pursuit of coverage under pre-2005 policies.

Even if Zurich somehow breached a duty of good faith to the LLC, which was not its insured, by filing its motion for summary judgment four days before a second mediation—there is not one scintilla of evidence that Zurich's motion, which relied on the public record exclusively, caused Marc Gartin to contribute his own funds to the underlying settlement or otherwise resulted in harm of any kind. Admiral Way does not show that a matter of

substantial public interest is involved and thus also fails to establish grounds for review under RAP 13.4(b)(4).

Respectfully submitted this 17th day of May 2019.

KARR TUTTLE CAMPBELL

By: _____
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APPENDIX ONE

FROM BRIEF OF RESPONDENT/CROSS-APPELLANT
ZURICH AMERICAN INSURANCE COMPANY IN NO. 76490 0-1

TABLE OF SOURCES OF EVIDENCE CITED BY ZURICH WHEN MOVING FOR SUMMARY JUDGMENT

Barton Declaration[5] Exhibit	**Document Supporting Motion for Summary Judgment**	**Location in Record of Underlying Action**	**Ledcor's Admissions in This Action**
G	December 21, 2001 Memorandum from Andy Lang of Morrison Hershfield to Seth Hale of CDA Architects	Exhibit 6 to Crouse (Ledcor) MSJ Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of Ledcor's motion in Underlying Action. (Admission #1)
H	September 30, 2002 Memorandum from Stephane P. Hoffman of Morrison Hershfield to Ron Jarvis of Ledcor Industries (USA), Inc. or Ledcor Industries, Ltd.	Exhibit D to Wakefield (Admiral Way) MSJ Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of LLC's motion in Underlying Action. (Admission #2)

[5] The Barton Declaration, CP 22 *et seq.*, was the vehicle Zurich used to offer documents in support of its summary judgment motion.

Barton Declaration[5] Exhibit	Document Supporting Motion for Summary Judgment	Location in Record of Underlying Action	Ledcor's Admissions in This Action
I	Morrison Hershfield's December 20, 2002 Admiral Way Mixed Use Project Building Envelope Assessment	Exhibit 3 to Crouse (Ledcor) MSJ Declaration (7/2/09); Exhibit F to Wakefield (Admiral Way) Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of Ledcor's motion in Underlying Action. (Admission #4)
J	December 23, 2002 letter from Marc Gartin, owner of Admiral Way, LLC, to Larry Prescott of Ledcor Industries	Exhibit 6 to Scisciani MSJ Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of Ledcor's motion in Underlying Action. (Admission #5)
K	January 10, 2003 letter from Larry Prescott of Ledcor Industries to Marc Gartin of Admiral Way, LLC	This reference is in Admiral Way LLC's motion (7/2/09), but Gartin's actual/filed declaration has different and fewer exhibits. The actual document is Ex. J to Wakefield 6/17/09 mediation submission, which was provided to Zurich's coverage counsel at the mediation.	Ledcor "admits that the referenced January 10, 2003 letter … was included as part of Exhibit J to … Wakefield's mediation letter of June 17, 2009 … ." (Admission #6)

Barton Declaration[5] Exhibit	Document Supporting Motion for Summary Judgment	Location in Record of Underlying Action	Ledcor's Admissions in This Action
L	March 4, 2003 Memorandum from Stephen Cork of Morrison Hershfield to Ledcor Industries	Exhibit N to Wakefield (Admiral Way) MSJ Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of Ledcor's motion in Underlying Action. (Admission #10)
M	January 27, 2004 letter from Jack Calvo of Perma-Dry Waterproofing to Mark Schulz of Ledcor Industries	LED063465; produced to Admiral Way; Exhibit O to Wakefield mediation submission (6/17/09)	Ledcor "admits that the referenced January 10, 2003 letter … was included as part of Exhibit O to … Wakefield's mediation letter of June 17, 2009 … ." (Admission #12)
N	February 17, 2004 letter from Mark Schulz of Ledcor Construction to Steve Gardner of SQI Roofing	LED063469; produced to Admiral Way; Exhibit Q to Wakefield mediation submission (6/17/09)	Ledcor "admits that the referenced January 10, 2003 letter … was included as part of Exhibit Q to … Wakefield's mediation letter of June 17, 2009 … ." (Admission #14)

Barton Declaration[5] Exhibit	Document Supporting Motion for Summary Judgment	Location in Record of Underlying Action	Ledcor's Admissions in This Action
O	October 10, 2002 letter from Carl F. Pirscher of CDA Architects, Inc., to Ron Jarvis of Ledcor Industries	Exhibit 4 to Crouse (Ledcor) MSJ Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of Ledcor's motion in Underlying Action. (Admission #3)
P	February 27, 2003 letter from Carl F. Pirscher of CDA Architects, Inc., to Larry Prescott of Ledcor Industries	LED045219-220; produced to Admiral Way; Exhibit K to Wakefield mediation submission (6/17/09)	Ledcor "admits that the referenced January 10, 2003 letter … was included as part of Exhibit K to … Wakefield's mediation letter of June 17, 2009 … ." (Admission #7)
Q	Morrison Hershfield's May 20, 2003 Building Envelope Owners Manual Admiral Way	Exhibit O to Wakefield (Admiral Way) MSJ Declaration (7/2/09)	Admits document was filed on July 2, 2009 in support of Ledcor's motion in Underlying Action. (Admission #11)

Barton Declaration[5] Exhibit	Document Supporting Motion for Summary Judgment	Location in Record of Underlying Action	Ledcor's Admissions in This Action
R	May 1, 2009 report letter from Wetherholt and Associates, Inc. to Admiral Way, LLC	Exhibit 2 to Betz (Owners) MSJ Declaration (7/2/09)	Admits document filed on July 2, 2009 in support of Owners' motion in Underlying Action. (Admission #16)

CERTIFICATE OF SERVICE

The undersigned certifies that on May 17, 2019, I caused to be served the foregoing document to:

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

DATED May 17, 2019, at Seattle, Washington.

Kay M. Sagawinia
Legal Assistant to Jacquelyn A. Beatty
and Robert A. Radcliffe

KARR TUTTLE CAMPBELL

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