No. 1024436

SUPREME COURT
OF THE STATE OF WASHINGTON

David M. Simmonds and Debra K. Simmonds, husband and wife,
Appellants

v.

Privilege Underwriters Reciprocal Exchange d/b/a PURE Insurance,
Respondent

RESPONDENT'S ANSWER TO APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

Respondent is Privilege Underwriters Reciprocal Exchange ("PURE"), a foreign entity authorized to perform the business of insurance in Washington.

II. COURT OF APPEALS DECISION

The Court of Appeals filed an unpublished decision on August 7, 2023. It generally affirmed the King County Superior Court's April 4, 2022 finding of facts and conclusions of law following a bench trial that found in favor of PURE. It also affirmed the numerous pre-trial and post-trial determinations by the trial.

III. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

(1) Did the Court of Appeals appropriately affirm the trial court's entry of judgment in favor of PURE when substantial evidence supported the cause of the claimed loss and damage was excluded under the policy?

(2) Did the Court of Appeals appropriately affirm the trial court's entry of judgment in favor of PURE when PURE considered all information presented to it during the handling of the claim?

IV. COUNTERSTATEMENT OF THE CASE

The facts of this case are accurately set out in Division I's unpublished opinion.[1]

Petitioners (also referred to as "Simmonds") built their home in Redmond, Washington in 1998.[2] PURE insured the home since 2013.[3] In August 2020, David Simmonds alerted PURE of a water leak in the Simmonds' primary bedroom shower later discovers rot in the subflooring.[4] Approximately 1.5-2 years prior Mr. Simmonds ran a hairdryer against one of the glass block surrounds at his shower until he heard a pop and noticed a crack in the glass block.[5]

Upon receiving the claim, PURE retained Crawford and Company to initially inspect and estimate repairs for the claim.[6] After their inspection, PURE claim handler, Shawn Roessler, informed Mr. Simmonds there would be coverage issues related to any rot or mold and arranged to have an additional inspection to determine the cause of the rot.[7] During this

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[1] Appellate Opinion dated 8/7/23 ("Op.") at 2–12.
[2] Op. at 2. Clerk's Papers ("CP:) 2 ¶¶3, 5; Report of Proceedings ("RP") 228:23, 231:4-5
[3] Op. 2; RP 243:15-16.
[4] Op. 2; CP 230, CP 257 ¶¶ 12, 13, CP 294; RP 90:8-22; 239:18-244:11, 241:7-242:19.
[5] Op. 2; CP 259 at ¶ 20.
[6] Op. 2; CP 258 ¶14, 311-14.
[7] Op. 2-3; CP 258 ¶¶15-16, 291; RP 208:3-15.

call, Mr. Simmonds contended Washington's Efficient Proximate Cause doctrine provided coverage.[8] As a result, PURE retained coverage counsel to advise it as to the Efficient Proximate Cause doctrine.[9] PURE then retained American Leak Detection ("ALD") to inspect the home.[10]

After inspecting the home and conducting various tests, ALD technician Zachary Schneider concluded the leak causing the rot in the subflooring was due to issues with the shower pan membrane and the shower pan.[11] Schneider believed the failure to be due to a construction defect or wear and tear.

After receiving the ALD report and learning of the hairdryer incident, which was not initially raised by Simmonds, PURE declined coverage for the loss citing the construction defect, wear and tear, and rot exclusions.[12]

PURE then retained an engineer to examine and opine as to the cause of the leak and subsequent rot.[13] ARCCA engineer Kurt Ahlich, P.E., examined the shower and accompanying rot, conducted his own testing, spoke with Mr. Simmonds (and read his position on coverage), and read the

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[8] *Id.*
[9] Op. 3; CP 258 ¶18; RP 208:18-209:3.
[10] Op. 3; CP 258 ¶16; 209:4-20.
[11] Op. 3-4; CP 316-19; RP 278:20-279:1, 280:8- 284:10, 287:3-289:21.
[12] Op. 4; CP 325- 28 (Exs. 106, 107); RP 209:18-210:7, 210:17-24.
[13] Op. 5; CP 259 ¶¶ 22, 308-09; RP 218:6-219:9.

ALD report before reaching his opinions.[14] Ahlich determined the shower pan failed as a result of a construction defect.[15] Ahlich also determined the rot in the crawlspace was long-lasting.[16] Ahlich testified as to his vast experience in civil engineering and failure analysis.[17] He testified about his inspection of the Simmonds' home and his conclusions including his rejection of Simmonds' theory that the leak was cause by the hairdryer incident.[18] Ahlich's conclusion, like Schneider's, was that the shower pan failed due to construction defect.[19] As to the wood rot duration, Ahlich testified engineers like him investigate the length of wood decay and rot, he described the method he used to analyze the duration which was commonly accepted in the engineering community.[20] At trial, Simmonds did not cross-examine Ahlich.[21]

Ahlich consulted with a colleague, materials scientist James Mason, Ph.D. P.E., who opined that the cracked glass block could not be the source of any water leak because water could not penetrate the crack.[22]

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[14] Op. 5; CP 330-41; RP 343:16-347:17.
[15] Op. 5-6; CP 334; RP 347:18-350:22.
[16] Op. 5-6; CP 334; RP 350:23-352:10.
[17] RP 338-43.
[18] RP 345-50.
[19] RP 348-49.
[20] RP 351-352.
[21] CP 363.
[22] Op. 5-6; CP 331; RP 369:18-374:3.

Based on the findings of Mason and Ahlich, PURE confirmed its declination of coverage by letter to Simmonds.[23] Having not resolved the claim in their favor, Simmonds filed suit asserting breach of contract and extra-contractual claims related to the handling of the claim.[24] PURE filed a summary judgment motion seeking dismissal of all claims.[25] Simmonds opposed the motion and in the same filing affirmatively asked the court to award them summary judgment on all claims.[26]

Simmonds' summary judgment motion was "denied both substantively and because it was not properly noted."[27] The trial court granted PURE's motion on the extra-contractual claims dismissing them with prejudice.[28]

Following a bench trial, the court returned a verdict in favor of PURE.[29] Finding 31 facts that supported 12 conclusions of law that the cause of the leak was construction defect, which was excluded under the policy, and therefore there was no breach of contract.[30] The Court determined that "PURE did everything it needed to do" in handling

[23] Op. 6; CP 260 ¶25, 344-46; Ex. 113; RP 219:14-22, 220:12-221:14.
[24] Op. 7; CP 1-85.
[25] Op. 7.
[26] Op. 8; CP 460-90.
[27] Op. 8; CP 548.
[28] Op. 8; CP 884-86.
[29] RP 408-14; CP 990-97.
[30] CP 990-97.

Simmonds' claim and that Simmonds did not meet their burden in proving that PURE did not deal with Simmonds in a manner that was less than fair.[31]

After an unsuccessful motion for reconsideration, Petitioners appealed the trial court's determination citing essentially every adverse decision as a basis for appeal. Upon review, the Court of Appeals affirmed the verdict the vast majority of issues raised by Petitioner.[32] Specifically, it affirmed the verdict and the findings that substantial evidence supported the ruling in PURE's favor.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners fail to address why review of the well-reasoned decision of the Court of Appeals should occur. Instead, Petitioners submit 38 pages of regurgitated *factual* argument failing to address how any of the determinations of the underlying courts conflict with any precedent in Washington or involve any issues of substantial public interest.

RAP 13.4 sets forth the considerations governing acceptance of review:

> **(b) Considerations Governing Acceptance of Review**. A petition for review will be accepted by the Supreme Court only:

[31] CP 996 (FoF 10-11).
[32] The Court of Appeals did find some errors in the various finding of facts and conclusions of law but none required a change in the outcome of the trial.

> (1) If the decision of the Court of Appeals is in conflict with a published decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.[33]

Petitioners do not address those considerations in their submission and the petition should be rejected.

A. The Petition Should Be Rejected Because the Primary Argument Presented Concerns Petitioners' Extra-Contractual Claims Which Were Not Properly Before The Appellate Court

Petitioners' primary argument focuses on the allegation that PURE acted in bad faith. Petitioners' extra contractual claims, including the bad faith claim, were dismissed at summary judgment in the trial court. The Court of Appeals citing *Holland v. City of Tacoma* noted that Petitioners did not adequately brief their arguments related to the summary judgment decisions and they were, therefore, not properly before the Court.[34]

In this Petition, Petitioners do not contend that the non-consideration

[33] RAP 13.4(b).
[34] Op. at 17.

of the denial of his motion for summary judgment conflicted with any Washington decision. Nor did they raise any issue related to the granting of PURE's summary judgment. Petitioners had an opportunity to appeal that decision, failed to adequately brief it, and cite to no case law conflicting with the Court's decision not to address the merits of that issue. The petition fails on those grounds alone.

B. The Petition Should Be Rejected Because The Decision Of The Court Of Appeals Does Not Conflict With Any Decision Of The Supreme Court Or The Court Of Appeals

Petitioners only vaguely address either of the first two considerations for granting appeal under RAP 13.4. The vast majority of their argument sections (pages 9-36) do not contain a single citation to Washington law—let alone citations to any Washington law allegedly in conflict with the decision. Notably, Sections B (pages 14 – 19), the majority of Section C (pages 19 – 25), Section F (pages 31- 32), the majority of Section G (pages 32-35, with one exception), and Section H (pages 36 – 37) do not contain any citations to any cases.[35] Simply, Petitioners have not argued and cannot argue that the decision by the Court of Appeals is in conflict with any Washington decision.

[35] Section D (pages 27-29) also does not contain argument related to an alleged conflict of law. Instead, it focuses on the courts' use of the word "unopposed." Petitioners misconstrue the courts' use of the word.

1. The Instant Decision Is Consistent With Washington's Laws Concern An Insurer's Duty of Good Faith and Fair Handling

Petitioners contend, "The decision of the Court of Appeals conflict with a 'long line ' of Washington Supreme Court decisions imposing an enhanced obligation of good faith on insurers." It does not. Petitioners' argument is based on two theories, and neither are convincing.

Petitioners' first argument fails because the trial court and the appellate court have both considered whether Petitioners' claim was wrongfully denied and the trial court, considering all the evidence, found that the coverage determination by PURE was correct.[36] The Appellate court affirmed this decision finding no reversable error. Petitioners do not substantively address the coverage determination in their petition and no prior Washington decision requires a finding of coverage.

Petitioners' claim that the investigation was not done in food faith is equally unconvincing. Petitioners cite only generally to the *Tank* standard (and its progeny) that an insurer has a duty of good faith.[37] Nothing in the

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[36] Although Simmonds' extra-contractual claims were dismissed the court allowed evidence of a potential bad faith claim arising from the contractual obligations. Accordingly, the trial court allowed and considered significant claims handling evidence in reaching its verdict.

[37] *See Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 386, 715 P.2d 1133 (1986)("The duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions…Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well…"); *Van Noy v. State Farm*, 142 Wn.2d 784, 794, 16 P.3d 574,

Court of Appeal's determination contradicts these standards. To establish the tort of bad faith, an insured must prove the insurer's actions were unreasonable, unfounded, or frivolous.[38]

Petitioners argue that PURE's lack of knowledge of the efficient proximate cause doctrine was *per se* bad faith. They cite no case law supporting this argument—because there is none. Indeed, as the Appellate Court noted, the Petitioners did not, "provide any argument as to why the efficient proximate cause rule would apply given the evidence admitted at trial."[39]

Even so, this cannot be the basis of a bad faith claim under Washington law. When the efficient proximate cause doctrine was brought to the claim handler's attention, PURE retained coverage counsel and continued its factual investigation. An insurer alerting an insured to its initial opinion related to a potential exclusion (even if wrong) is not a declination of coverage or bad faith if, as it was here, that opinion was subsequently corrected and the insured suffered no harm or damages. Nor is telling an insured that is claiming rot damage that an unambiguous rot

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579 (2001) ("an insurance company has an elevated or 'enhanced' duty of good faith which requires it to 'deal fairly,' giving 'equal consideration' to its insureds."(quoting *Tank*, 105 Wn.2d at 386)).

[38] *Kirk v. Mt. Airy Ins. Co*., 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

[39] Op. 14.

exclusion in the policy will preclude coverage an indication that the insurer is "predisposed" to deny coverage. If PURE had not investigated the efficient proximate cause doctrine after it was raised by Mr. Simmonds, then there may have been a basis for bad faith. But this did not occur and review should not be granted based exclusively on a hypothetical scenario not based on reality of this claim.[40]

Petitioners also contend that alleged factual inaccuracies during the investigation amount to bad faith.[41] The vast majority of issues raised by Petitioners are alleged factual inaccuracies that Simmonds did not raise during trial or are inconsistencies between trial testimony and prior statements that were not before the trial court.[42] To the extent the disputed facts were before the trial court, and then Appellate Court, they were not convincing to either Court. Even if review was granted, which it should not be, it is not an opportunity for Petitioners to retry new evidence and argument related to conclusions of law and finding of fact from the bench

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[40] CP 258 ¶¶16-18; CP 320-28. The determination similarly does not conflict with Washington's laws on the Consumer Protection Act ("CPA") or the Insurance Fair Conduct Act ("IFCA"). *See Perez-Crisantos v. State Farm Fire & Cas. Co*., 187 Wn.2d 669, 684, 389 P.3d 476 (2017); *Hangman Ridge Training Stables v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[41] *See* Pet. at 15- 24 (Section B.(2) – (4), C., F., and H.).

[42] Those not previously raised are waived. *Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp*., 122 Wn. 2d 299, 333-34, 858 P.2d 1056 (1993).

trial.[43] This Court "will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently."[44] The Court applies "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."[45] That is, courts review all reasonable inferences in the light most favorable to the prevailing party.[46]

Accordingly, even if there were factual disputes, that is not a basis to grant review. Petitioners cite no legal authority to support their contention that assumptions made by an insurer during its investigation that may conflict with later discovered information but ultimately do not change the coverage conclusion or otherwise damage the claimant constitute bad faith. This includes Petitioners argument that:

- PURE assumed ALD investigator saw and considered the cracked block when he did not.
- PURE failed to give enough consideration to information they

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[43] *See Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); *State v. Neff,* 163 Wn.2d 453, 462, 181 P.3d 819 (2008) (review is "deferential" where "judge considered testimony"); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001)(review of bench trial limited to limited to determining whether substantial evidence supports the findings and whether the findings support the conclusions of law).

[44] *Id*. at 879-80.

[45] *Frank Coluccio Constr. Co. v. King Cnty*., 136 Wn. App. 751, 761, 150 P.3d 1147 (2007); *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000).

[46] *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).

provided related to pest control.

- Whether a PURE recalled making a certain statement

Petitioners argue these incorrect assumptions, and PURE's failure to verify, constitute bad faith. However, PURE's assumptions were reasonable and therefore complied with Washington bad faith law. The fact that these allegations did not have Simmonds' desired impact on the coverage determination does not mean that PURE did not consider the information or that its handling of that information was bad faith. Notably, Petitioners were free to introduce this allegedly conflicting evidence during trial to discredit PURE and its witnesses. In most instances Petitioners chose not to do so. Their strategic decision not to introduce conflicting information is not a viable basis for an appeal.

2. The Instant Decision Is Consistent With Washington's Laws Concern Expert Testimony under ER 702 and *Frye*

Petitioners next argue that Kurt Ahlich's testimony should have been excluded under ER 702 or *Frye*.[47] His testimony was properly allowed.

[47] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

"[U]nder ER 702, the trial court must exclude testimony from unqualified experts and testimony that is unhelpful to the jury."[48] Testimony is unhelpful to the jury if it is unreliable, or lacks adequate foundation.[49] Under ER 702, scientific evidence is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact at issue."[50] "[T]rial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion."[51]

"Under *Frye*, the trial court must exclude evidence that is not based on generally accepted science."[52] Washington courts apply the *Frye* standard, asking whether "both the underlying scientific principal and the technique employing that principle find general acceptance in the scientific community."[53] "*Frye* excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is

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[48] *L.M. v. Hamilton*, 193 Wn.2d 113, 118 128, 436 P.3d 803 (2019) (citing *Lakey v. Puget Sound Energy, Inc*., 176 Wn.2d 909, 918, 296 P.3d 860 (2013)).
[49] *Id.* (*citing Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014)).
[50] ER 702.
[51] *Johnston-Forbes*, 181 Wn.2d at 352. Simmonds did not articulate any standard of review for the ER 702 rulings in their brief. The appropriate standard is, again, abuse of discretion.
[52] *L.M.*, 193 Wn.2d at 117 (*citing Anderson v. Azko Nobel Coatings, Inc.*, 172 Wn.2d 593, 603 260 P.3d 857 (2011)).
[53] *City of Bellevue v. Lightfoot*, 75 Wn. App. 214, 222, 877 P.3d 247 (1994).

reliable."[54] In other words, *Frye* is implicated where "either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community."[55]

Petitioners suggest the Court permitting Ahlich's testimony conflicts with the holding in *Davidson v. Metro. Seattle* in which the appellate court found an expert's testimony should have been excluded because it "lacked a factual basis."[56] Ahlich's opinions did not lack factual basis. In *Davidson* an expert disregarded witness testimony in order to draw his own speculative conclusions about what a bus driver could have done to avoid an accident.[57] Here, Ahlich's opinions were based on his own testing, observations, and the conclusions and observation of others. Unlike the *Davidson* case, there was no conflicting testimony from any other expert (or witness).

Petitioners also argue Ahlich (and the other witnesses) should have been excluded because their testimony was impermissibly speculative.[58]

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[54] *In re Det. of McGary*, 175 Wn. App. 328, 339, 306 P.3d 1005 (2013).
[55] *Lakey*, 176 Wn.2d at 919.
[56] 43 Wn. App. 569, 719 P.2d 569 (1986).
[57] *Id.* at 575-578.
[58] Petitioners did not raise this argument during trial, and it was not properly preserved for appeal. Merely seeking to exclude a witness via a motion *in limine* on other grounds does not *carte blanche* preserve an appeal as to a separate unbriefed and unraised basis for exclusion. Petitioners' motion *in limine* as to Ahlich was limited to his opinions related to wood rot and did not discuss his other conclusions. Accordingly, while a filing a motion *in*

Petitioners argue Ahlich's conclusions were impermissibly speculative because he stated the precise "failure mechanism of this system was indeterminate" without tearing into the shower.

Ahlich's testimony does not contradict any Washington law. Experts need not testify with absolute certainty. Here, Ahlich met the required certainty to testify despite not being able to view the actual failure of the shower pan because it was covered by tile. There was more than theoretical speculation for Mr. Ahlich to base his testimony. He examined the shower and accompanying rot, conducted his own testing, spoke with Mr. Simmonds (and read his position on coverage), and read the ALD report before reaching his opinions.[59] Petitioners' argument that until something can be conclusively proven it is speculative is not supported by any prior Washington decision. Allowing Ahlich's testimony did not contradict any Washington law.[60]

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limine may preserve an objection for appeal on the issue briefed it does not apply to unraised arguments.

[59] CP 330-41; RP 343:16-347:17.

[60] Petitioners argue the PURE's witnesses were not "unopposed" citing language related to Motions *in Limine* preserving an objection. PURE reads the Court's use of the term unopposed as a substitute for uncontradicted. Not that Petitioners did not object to their admissibility—although the objection was not limitless as Petitioners suggest.

Finally, Petitioners' argument that allowing Ahlich's testimony violated *Frye* is unsupported.[61] The Court of Appeals cited and applied the cases cited in the Petition. There is nothing *novel* about the opinions being offered by Ahlich (or the other witnesses).[62] As our Supreme Court emphasized in *Lakey, Frye* is implicated only where the scientific methodology itself is novel.[63] There is no question that a civil engineer doing failure analysis and a materials expert opining as to the fragility and energy needed to crack a material are not novel. Similarly, there is nothing novel about dating wood rot. While *Frye* governs the admissibility of novel scientific testimony, the application of accepted techniques to reach novel conclusions does not raise *Frye* concerns.[64] Importantly, Petitioners offered no contrary evidence that Ahlich's statement that his methodologies and

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[61] Again, Petitioners are attempting to rewrite history and the record. The did not initiate a *Frye* hearing and this issue was not properly preserved. *See Johnston-Forbes*, 181 Wn.2d at 356. Second, Petitioners' only *Frye* arguments concerned the admissibility of the ARCCA report—the content of which was not admitted by the trial court. RP 201-04. Therefore, although his motion to exclude the ARCCA report under *Frye* was denied, in practice, the exhibit they sought to exclude (the ARCCA Report) was excluded for substance. Accordingly, even if the Court erred in its determination to deny Petitioners' motion, which it did not, that determination did not impact the ultimate verdict.

[62] The Petition uses the word "experts" but only discusses Ahlich's testimony.

[63] *Lakey*, 176 Wn.2d at 919 (emphasis added).

[64] *Id*. at 919.

process were generally accepted by the scientific community was inaccurate.[65]

Furthermore, even if Ahlich's testimony was allowed in error, it was harmless error in light of the substantial evidence supporting the trial court's determinations. Ahlich's testimony is not a valid basis for additional review.

3. The Instant Decision Is Consistent With Washington's Laws Concerning the Appropriate Burdens of Proof

Petitioners' final argument is based on a bazaar misinterpretation of the burdens of proof. It is not compelling.

An insured contesting the denial of coverage must first show that the loss falls within the scope of the policy's covered losses.[66] The insurer then must show that the claim of loss is excluded.[67] The Plaintiff has the burden of proof in a breach of contract claim. Petitioners cites *American Star Ins. Co. v. Grice* for the burden mechanism: "When an insured establishes a *prima facie* case giving rise to the coverage under the insuring provision of

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[65] See Op. at 21.
[66] *Nw. Bedding Co. v. Nat'l Fire Ins. Co. of Hartford*, 154 Wn. App. 787, 791, 225 P.3d 484 (2010) citing *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999).
[67] *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 71, 882 P.2d 703 P.2d 718 (1994).

a policy, the burden is then on the insurer to prove that the loss is not covered because of an exclusionary provision in the policy."[68]

PURE does not dispute that once a prima facie case for coverage is made, the insurer has the burden of proving an exclusion applies and that this standard was applied. However, Petitioners confuse proof with certainty. The standard of proof in this instance would be preponderance of the evidence.[69] The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true."[70] The trial court applied this burden: "So, Plaintiff has failed to prove by a preponderance of evidence that this loss is covered. And, in fact, Defendant has proved by a preponderance of evidence that the loss is excluded."[71]

Petitioners failed to present any evidence of a potentially covered loss, so Petitioners failed to present a prima facie case such that the burden would shift. However, even assuming they did present enough evidence to

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[68] 121 Wn.2d 869, 875, 854 P2d 622 (1993).
[69] *See Frank Coluccio Constr. Co.*, 136 Wn. App. at 756 (applying a preponderance of the evidence burden in the context of a contract dispute including related to evidence of applicable exclusions in an insurance contract); *Gould v. Mutual Life Ins. Co*., 95 Wn.2d 722, 629 P.2d 1331 (1981)(applying a preponderance of evidence burden to proving suicide as an exclusion for life insurance benefits).
[70] *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768, 773 (2005).
[71] RP 413:7-10.

shift the burden, eliminating the only alternative cause presented in evidence is enough to satisfy a preponderance of the evidence standard because it follows that based on the evidence it was "more probably true than not true" that the damage was caused by an excluded mechanism. Accordingly, PURE met its burden because there was no contradicting evidence.

C. The Petition Should Be Denied Because The Decision Does Not Involve An Issue of Substantial Public Interest That Should Be Determined By The Supreme Court.

The Petition should be denied because there is no issue of substantial public interest that requires determination by this Court and Petitioners have no legitimate public interest argument. In their petition, Simmonds seek determinations and injunctive relief from the Court that would require rewriting insurance policies in Washington. Essentially, they ask that the Supreme Court instruct Washington insurers to rewrite certain portions of their policies or include additional disclaimers to advise insureds of certain Washington rules.[72]

Petitioners ask for "injunctive relief under the CPA" to requiring PURE and other Washington insurers to "provide clear policy language to

[72] As previously noted, Petitioners' CPA claim was dismissed at summary judgment by the trial Court. That dismissal was not properly before the Appellate Court and, was therefore, not reviewed. It is not reviewable by this Court. However, the merits of this argument are unpersuasive.

advise homeowners of the [efficient proximate cause] rule and its effect."[73] Without such relief, Petitioners argue that "loss for which there is coverage under Washington law will continue to be wrongfully denied, or in many cases, not pursued."[74] The underlying trial court and court of appeals both determined that the efficient proximate cause rule did not apply to this loss. Accordingly, this request seeks a prohibited advisory opinion.[75]

Similarly, Petitioners' plea that the Court require insurers to change the language related to "sudden and accidental" because it is misleading was not an issue before any court in this case.[76] Petitioners admits this provision was "not explicitly asserted as a basis for its coverage denial." Because this was not an issue before the underlying court, this would also amount to a prohibited advisory opinion.[77]

Furthermore, the resolution of this unpublished dispute between an insured and an insurer about a heavily fact dependent coverage issue has no public interest. Washington Courts "rarely" invoke public policy to override express insurance contract provisions, even in instances where those

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[73] Pet. at 13.
[74] Pet. at 13.
[75] *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994) ("We choose instead to adhere to the longstanding rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions.")).
[76] Pet. at 13-14.
[77] *Walker*, 124 Wn.2d at 418.

express terms may "seem unnecessary or harsh in their effect."[78]

Petitioners seek an order requiring insurers to rewrite their policies to include what they believe would be clearer language based on Washington case law. While this Court could invalidate a provision of the contract which could prompt insurers to reconsider their contractual language—injunctive relief requiring the rewriting of a policy based on a heavily fact dependent issue is not valid. Mere dissatisfaction and disappointment that a loss falls outside the scope of coverage offered by a policy does not constitute a substantial public issue. Belief that the insurer could have handled the claim in a different manner (even when it was handled in good faith) is not a public policy violation—particularly when the alleged concerns did not harm the insured.

VI. CONCLUSION

Petitioners failed to establish any of the considerations governing acceptance for review. The decision is not contrary to any decision of the Court of Appeals or Supreme Court and the petition does not raise an issue of substantial public interest.

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[78] *See Allstate Ins. Co. v. Raynor*, 93 Wn. App. 484, 499, 969 P.2d 510 (1999) quoting *Cary v. Allstate Ins. Co*., 130 Wn.2d 335, 340, 922 P.2d 1335 (1996); *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984) (citations omitted) (*emphasis added*).

None of the criteria set out in RAP 13.4(b) have been met. This Court should deny the Petition for Review.

I certify that this submission contains 4,995 words, exclusive of the Title Page, Table of contents and Table of Authorities.

DATED this 3rd day of November, 2023.

Respectfully submitted,

s/Gregory S. Worden

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