No. 89552-0

SUPREME COURT
STATE OF WASHINGTON

LAKE CHELAN SHORES HOMEOWNERS ASSOCIATION, a Washington non-profit entity,

Appellant,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a foreign corporation,

Respondent,

and

NORTHERN INSURANCE COMPANY OF NEW YORK, a foreign corporation,

Defendant.

ANSWER AND OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

Lake Chelan Shores ("LCS") seeks review under RAP 13.4(b)(1), arguing the decision below[1] conflicts with Supreme Court decisions. The petition should be denied because:

1. LCS's primary contention, that the *Frye*[2] standard should not apply in civil cases, was never argued or briefed in the Court of Appeals.

2. LCS's experts attempted to time rot progression using a mathematical formula not found in any scientific literature. The formula's primary premise—that decay increases according to the square of the number of years—also is not supported by any scientific literature. The Court of Appeals' decision thus does not conflict with *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011) or *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 9909, 296 P.3d 860 (2013).

3. The Court of Appeals' ruling on LCS bad faith claim was grounded on well-established notions of proximate cause and upon the fact that LCS had no admissible evidence supporting its claim. This holding does not conflict with Supreme Court precedent.

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[1] *Lake Chelan Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, ___ P.3d ___ (2013).

[2] *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

4. Whether a trial court abused its discretion in ruling on discovery is not an issue warranting review by the Supreme Court. The trial court's exercise of discretion was not based on *Cedell*-type[3] issues, but on the discovery's lack of relevance to the summary judgment motion that was pending at the time.

II. STATEMENT OF THE CASE

Saint Paul accepts the Facts as stated in the Court of Appeals' decision.

III. ARGUMENT

A. APPLICATION OF *FRYE* TO CIVIL CASES WAS NOT ARGUED OR BRIEFED TO THE COURT OF APPEALS

In criminal cases, Washington previously adopted *Frye and* rejected *Daubert*[4] with respect to the admissibility of novel, allegedly science-based evidence. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304, 1312 (1996). LCS's first issue for review is whether the opposite result—adopt *Daubert* and reject *Frye*--should be reached in civil cases.

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[3] *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 295 P.3d 239 (2013).

[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

LCS never argued this issue in the Court of Appeals. "An issue not raised or briefed in the Court of Appeals will not be considered by this court." *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270, 282 (1993), *citing State v. Laviollette*, 118 Wn.2d 670, 679, 826 P.2d 684 (1992). LCS's Issues Pertaining To Assignments Of Error did not identify the applicability of *Frye* to civil cases as an issue on appeal. (*see* Appendix)

LCS's petition for review does not mention *Daubert*, but presumably that standard would apply if *Frye* did not. LCS's opening brief below did not cite *Daubert,* nor did the reply brief. (*see* Appendix)

At the trial level, LCS spent approximately one page of one brief arguing *Daubert* should apply. (CP 919-20) However, by failing to include argument or authority in connection with that issue in its appellate filings, Lake Chelan abandoned the issue on appeal. *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 873, 30 P.3d 8 (2001). Just raising an issue at trial is not enough: "'Only issues raised in the assignments of error ... and *argued* to the appellate court are considered on appeal. If this court allowed parties to expand the issues subject to appeal by reference to trial memoranda, the Rules of Appellate Procedure would be rendered meaningless.'" *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn. 2d 654, 692-93, 15 P.3d 115, 136

(2000), *quoting State v. Kalakosky*, 121 Wn.2d 525, 540 n. 18, 852 P.2d 1064 (1993)(emphasis in original).

B. THE DECISION BELOW DOES NOT CONFLICT WITH THE *AKZO* OR *LAKEY* DECISIONS

1. THE OPINION BELOW CONTAINS NO STATEMENTS CONTRADICTING SUPREME COURT PRECEDENT

RAP 13.4(b)(1) says review may be accepted "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." LCS argues that Division One's opinion conflicts with *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011) and *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013).

The original opinion in the present case was issued a few days before the Supreme Court issued *Akzo*. The case thus was remanded with instructions for Division One to evaluate it in light of *Akzo*. Division One now has done just that. *Slip op.* at 10. Division One also considered *Lakey*. *Slip op.* at 11 n.3.

Normally, the task of applying Supreme Court precedent to the specific facts of individual cases is left to the trial courts and the Court of Appeals. While LCS's argues there is a "conflict," LCS fails to identify any specific portion of Division One's opinion that contradicts or clearly misapplies *Akzo* or *Lakey*, so as to create confusion or doubt as to application of these precedents in other cases. In other words, LCS does

not show why this case presents the sort of "conflict" which might warrant Supreme Court review.

What LCS really is arguing is that Division One's application of *Akzo* and *Lakey* to the specific facts of this case was incorrect. Saint Paul will show it was correct, but that is not really the issue here.

2. THE THEORY AND METHODOLOGY WAS NOT GENERALLY ACCEPTED AS REQUIRED BY *AKZO*

Akzo says:

> In our courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community.

Akzo, supra, 172 Wn.2d at 606, 260 P.3d at 864(citation omitted).

LCS's wood decay opinions were based on a novel theory not generally accepted in any scientific community. Specifically, LCS's two experts applied the formula $y = ax^2 + c$ to trace wood decay progression. (CP 812) Structural engineer Franklin of Olympic Associates could not even identify the equation's origins. He did not get it from scientific literature. Instead, he got it from another Olympic Associates engineer, Mr. Dunham (CP 812-13):

> Q. What work has Mr. Dunham done to verify the accuracy of that equation that you know of?
>
> A. I don't know. I don't know what...

(CP 813)

Franklin described his calculations as "educated guesses." (CP 813-14) Other than other Olympic Associates employees, he was unable to identify any other person or literature stating that $y = ax^2 + c$ is a proper equation for estimating rot progression. (CP 800-01)

At its heart the formula assumes that wood decay—the "x" variable in the equation—progresses according to the square of the number of years. (CP 814) The second expert, wood scientist Flynn, could not identify any support in the scientific community for the proposition that decay advances according to the square of the number of years:

> Q. Are you aware of any papers or publications that state as a general proposition that decay advances according to the square of the number of years.
>
> Mr. Curren: Objection to the form.
>
> A. Um, no. I don't believe I can think of any.

(CP 828-9)

No one identified any time when anyone, anywhere (other than at Franklin's firm), had used Franklin's equation to model decay progression. (CP 829-30) In fact, there is no generally accepted mathematical model for predicting decay progression. (CP 92)

And that is the end of this case. In *Akzo* it was undisputed that the basic scientific theory underlying the expert's analysis was generally accepted in the scientific community. 172 Wn.2d at 611 ("There is nothing novel about the theory that organic solvent exposure may cause brain damage and encephalopathy"). Here, in contrast, LCS's experts purported to trace decay progression using a formula without any support in the scientific community at all. This is exactly the sort of novel science excluded by *Frye* and Division One's opinion does not present an issue for review.

3. LIKE THE EXPERT IN *LAKEY*, LCS'S EXPERTS FAILED TO APPLY PROPER METHODOLOGY TO DERIVE THEIR CONCLUSION THAT ROT GROWTH FOLLOWS THEIR EQUATION

LCS also says the opinion below conflicts with *Lakey, supra.* In *Lakey* an expert concluded, after reviewing epidemiological studies, that electromagnetic fields emanating from a power substation posed a health hazard to nearby households. 176 Wn.2d at 915. The trial court excluded the opinion and the Supreme Court affirmed. The expert's conclusions failed to meet ER 702 because his methodology in reviewing the relevant scientific literature was unsound:

> Carpenter failed to follow proper methodology, rendering his conclusions unreliable and therefore inadmissible. Carpenter did not consider all relevant data as basic

> epidemiology required. Carpenter discounted entire epidemiological and toxicological studies, especially the newer epidemiological studies. Carpenter failed to consider the later, better studies about the links between EMF and health harms, seriously tainting his conclusions because epidemiology is an iterative science relying on later studies to refine earlier studies in order to reach better and more accurate conclusions.

Lakey, supra, 176 Wn.2d at 920-21.

The present case is even stronger. LCS's experts did not just selectively chose between competing literature, they adopted a formula supported by no literature whatsoever. The "methodology" used to select the formula consisted of receiving it from another engineer at Mr. Franklin's employer. When Mr. Flynn reviewed published literature, he was unable to identify any support for this formula. *Lakely* thus favors the present trial court's decision to exclude this evidence. There is no conflict and no issue warranting review.

LCS says the Court of Appeals erred because "[b]oth *Azko* and *Lakey* equate 'methodology' under *Frye* with data collection, not the method of reaching conclusions." (Pet. at p.14) LCS then argues that the experts collected their field data by measuring decay depth, performing visual inspections, looking at weather records and using other accepted data collection methods. (Petition at 15)

If LCS's argument was correct, then *Lakey* would be wrongly decided, as there was no suggestion that the expert improperly collected data. Doubtless, for example, he was able to use a measuring tape to determine the distance from the power plant to the homes and a voltmeter to measure the strength of the electromagnetic fields. The problem wasn't his data collection, but the method he used to apply the data—selectively applying epidemiological studies that adopted an outdated, minority viewpoint.

Return now to RAP 13.4(b)(1). Where is the conflict warranting review? *Akzo* holds that if the relevant scientific community generally accepts a theory and methodology, then *Frye* is not implicated. Division One holds that if there is no evidence of such general acceptance, then *Frye* applies. *Lakey* says if an expert fails to apply proper methodology when reviewing literature to support his conclusion, ER 702 excludes the opinion. Division One affirmed exclusion of an opinion when the experts could not identify any literature whatsoever verifying their formula. There is no conflict to resolve and LCS fails to show why review should be granted.

C. THE EXTRACONTRACTUAL CLAIMS, DISPOSED OF ON PROXIMATE CAUSE GROUNDS, DO NOT PRESENT ISSUES JUSTIFYING REVIEW

LCS's arguments claims that Saint Paul committed bad faith by failing to adequately investigate LCS's claim that the buildings were in a statue of "collapse" when Saint Paul insured them in 1996-2000. *Slip op.* at 12-13. In alternative holdings, Division One said that LCS failed to establish proximate cause, and also that because there was no admissible evidence that such an investigation is scientifically feasible, Saint Paul could not have committed bad faith by not performing it.

LCS says that the opinion below amounts to a "holding that St. Paul had no duty to investigate so long as it had an expert who believed the task was impossible[.]" (Pet. at 18)

LCS ignores the holding that it never proved proximate cause. (Slip op. at 13) The law of proximate cause is well established and does not present an issue requiring review by the Supreme Court. In fact, Division One depended on a Supreme Court case to reach its conclusion regarding proximate cause. *Id.*, *citing Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64, 204 P.3d 885 (2009).

LCS also mischaracterizes Division One's statement about the reasonableness of LCS's position. When the trial court heard the summary judgment motion on bad faith, the trial court already had, in a

prior motion, excluded LCS's evidence about back-dating decay. (CP 2310) At the hearing on bad faith, LCS thus had no admissible evidence supporting the feasibility of the proposed investigation to back date decay into Saint Paul's policy periods. If an insurer's expert contends an investigation is not feasible and an insured can present admissible evidence that it is, then perhaps a jury question arises. Here, however, there was no admissible evidence that the proposed investigation was even feasible, much less that Saint Paul's conduct was unreasonable:

> As is described above, the method by which LCS claims St. Paul should have attempted to determine the date of "collapse" a decade earlier was not generally accepted in the scientific community. It is difficult to say the trial court erred in concluding such an investigation would not have been "reasonable."

Slip op. at 13, *citing Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 19, 990 P.2d 141 (1999).

There is no conflict here warranting Supreme Court Review

D. THE TRIAL COURT'S DISCRETIONARY DISCOVERY RULING IS NOT AN APPROPRIATE SUBJECT FOR SUPREME COURT REVIEW

Division One affirmed the trial court's denial of LCS's motions to compel discovery and continue the summary judgment hearing on bad faith. "An appellate court reviews a trial court's discovery order for an abuse of discretion." *T.S. v. Boy Scouts of Am.,* 157 Wn.2d 416, 423, 138

P.3d 1053, 1056 (2006)(citation omitted). Because of this standard, such orders seldom are a viable candidate for discretionary review.

LCS argues, however, that the opinion below conflicts with *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 295 P.3d 239 (2013). That case involves application of the attorney-client privilege to pre-litigation activity of an insurance company's attorney. The trial court's exercise of discretion here, however, was not based on *Cedell*-type issues. Instead, it was on the lack of relevance of the discovery sought to the summary judgment that was pending at the time. *Slip op.* at 14-15. A simple relevance ruling is not an appropriate candidate for discretionary review.

After the trial court granted Saint Paul's motion for summary judgment on coverage based on the inadmissibility of LCS's expert testimony, Saint Paul moved for summary judgment on the bad faith claims. (CP 1578) The basis of that motion was the argument described above—that LCS could not show Paul should have investigated the "collapse" claim when the proposed investigation method involved inadmissible, novel science, and that LCS could not prove proximate cause. (CP 1584). While the motion was pending, LCS moved to continue the motion and to compel discovery. (CP 1826)

Saint Paul's attorney-client communications had no relevance to the pending summary judgment motion. The trial court already had ruled on the admissibility of LCS's expert testimony. That ruling was based on the current state-of-the-art in wood science, something which could not be affected by communications between Saint Paul and its attorney. The other ground—proximate cause—was based on the fact that LCS had contracted to incur its "investigation" expenses before it put Saint Paul on notice of a claim. *Slip op.* at 13-14. Since any communications between Saint Paul and its attorney took place, *a fortiori*, after Saint Paul received notice of the claim, those communications couldn't impact the summary judgment motion.

There was no abuse of discretion and certainly there is no issue warranting Supreme Court review.

IV. CONCLUSION

For the above reasons, the Petition For Review should be denied.

DATED this 2nd day of December, 2013.

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CERTIFICATE OF SERVICE

I certify that on December 2, 2013, service of a true and complete copy of the foregoing Answer And Opposition To Petition For Review was made on following attorneys of record:

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Appendix
Appellant's Brief
Issues Pertaining To Assignments Of Error

LCS also seeks review of its motions to compel and for a CR 56(f) continuance. After similar motions were granted compelling answers to identical discovery requests from co-defendant Northern Insurance Co. of New York ("Northern"), Northern was held to have investigated the collapse conditions at Lake Chelan Shores in bad faith.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting St. Paul's Motion for Summary Judgment dismissing all coverage claims.

2. The trial court erred in granting St. Paul's Motion for Summary Judgment dismissing all extracontractual claims.

3. The trial court erred in denying LCS's Motion to Compel.

4. The trial court erred in denying LCS's Motion for a CR 56(f) continuance.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether LCS met its burden of proof at summary judgment when it demonstrated there was a risk of loss involving collapse from hidden decay during St. Paul's policy periods? (Assignment of Error No. 1).

2. Whether a policyholder must prove that a loss occurred during a particular policy period when the insurer issued identical policies for three consecutive years and there is no requirement that the loss commence within a policy period? (Assignment of Error No. 1).

3. Whether the trial court erred by resolving disputed issues of fact at summary judgment regarding the qualifications and opinions of experts and failed to enter findings? (Assignment of Error No. 1).

4. Whether an insurance carrier breaches its duty to conduct a fair and

impartial investigation when it delegates its investigation to defense counsel, who thereafter conducts the investigation in the context of a zealous defense? (Assignment of Error No. 2).

5. Whether an insurance carrier breaches its duty to investigate in good faith when it retains an expert knowing he holds predetermined opinions beneficial to the carrier? (Assignment of Error No. 2).

6. Whether an insurance carrier acts in bad faith when it imposes a burden of proof for which there is no legal authority on its policyholder as a precondition to conducting an investigation? (Assignment of Error No. 2).

7. Whether the attorney-client privilege applies when an attorney conducts insurance adjusting functions such as the investigation of a claim? (Assignments of Error Nos. 3, 4).

8. Whether it was an abuse of discretion to deny LCS's Motion to Compel and Motion for a CR 56(f) continuance when the trial court granted similar motions against St. Paul's co-defendant Northern resulting in summary judgment establishing bad faith? (Assignments of Error Nos. 3, 4).

IV. STATEMENT OF THE CASE

A. The parties.

Appellant LCS is the homeowners' association for a condominium resort known as Lake Chelan Shores. CP 1914-15. Lake Chelan Shores is a 21-building, multi-family complex, built in three phases between 1980 and 1992. Id.; CP 1723. The defendants are respondent St. Paul and Northern, which together insured the resort from August 1996 to August 2002.[1] CP 21. Northern settled after summary

[1] After 2002, insurance companies typically limited their collapse coverage to actual collapse where the building falls to the ground.

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