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Court of Appeals Cause No. 66636-3-I

SUPREME COURT
OF THE STATE OF WASHINGTON

LAKE CHELAN SHORES HOMEOWNERS ASSOCIATION,

Petitioner,

v.

NORTHERN INSURANCE COMPANY OF NEW YORK,

Defendant,

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Respondent.

PETITION FOR REVIEW

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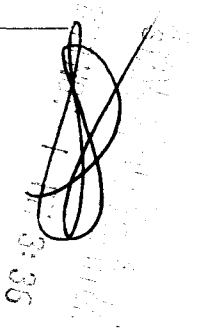

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A. IDENTITY OF PETITIONER

Petitioner Lake Chelan Shores Homeowners Association ("LCS"), appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in part B.

B. COURT OF APPEALS' DECISION

The Court of Appeals issued its second decision after remand from this Court in *Lake Chelan Homeowners Ass'n. v. St. Paul Fire & Marine Ins. Co.*, COA 66636-3-I, on August 19, 2013. Appendix A. LCS filed a motion for reconsideration which the Court of Appeals denied on October 2, 2013. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by requiring expert opinion testimony in a civil case to meet the *Frye*[1] test for admissibility?

2. Did the Court of Appeals err by requiring that the methods by which an expert reaches his or her conclusions must pass the *Frye* test for admissibility?

3. Did the Court of Appeals err in holding that St. Paul did not violate its duty to investigate in good faith as a matter of law?

4. Did the Court of Appeals err by affirming that discovery of the claim file could not lead to evidence of St. Paul's bad faith?

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

D. STATEMENT OF THE CASE

1. Introduction

The Court of Appeals' opinion on remand fails to properly apply three recent decisions of this Court: *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011); *Lakey v. Puget Sound Energy Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013); and *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013). The decision assumes that *Frye* applies in all civil cases, improperly applies *Frye* to the manner in which LCS's experts reached their conclusions by confusing the methodology for collecting data with the method of reaching conclusions, and affirms the refusal to compel discovery of the claims file in an insurance bad faith case.

The case was remanded to the Court of Appeals with instructions to reconsider its decision in light of *Akzo*. In the twelve months before the Court of Appeals reached a decision, this Court issued its decisions in *Lakey* and *Cedell*. Both cases were cited to the Court of Appeals as supplemental authority. Notwithstanding, the decision on remand is almost unchanged from the original. This Court should grant review and reverse.

2. Factual Background.

Lake Chelan Shores is a condominium resort consisting of 20

residential buildings and a clubhouse. CP 1914-15. Construction began in 1980 and continued in phases until 1992. CP 1914-15, 1723.

St. Paul insured the property from 1996 to 1999. CP 146-261; 263-346; 348-246. The policies covered the risk of loss or damage involving collapse of a building due to hidden decay that existed during or before the policies were in effect. CP 177, 280, 377. A structure need not actually fall down for this coverage to apply; instead, the structure need only be in a state of "substantial structural impairment" ("SSI").[2] Northern Ins. Co. of New York ("Northern") insured the property under similar policies from 1999 until 2002. CP 21.

In 2006, LCS discovered hidden decay throughout the complex. CP 1915-16. An initial investigation opened 44 areas, 41 of which had moisture intrusion with approximately half in a state of SSI. *Id.* The estimated repair cost was $13 million. CP 1597.

LCS sent a notice of claim to Northern and St. Paul. CP 1916-17. When neither insurer investigated, LCS filed suit. CP 1-13. The complaint (1) requested coverage under the St. Paul and Northern policies, and (2) alleged the failure to investigate in good faith and violation of the Washington Consumer Protection Act. *Id.*

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[2] For purposes of its summary judgment motion, St. Paul did not dispute that SSI was a collapse condition under the policies. CP 20-42.

St. Paul retained attorney James Derrig to oversee its investigation. CP 1598. Derrig retained Dr. Barry Goodell, a wood scientist, whom Derrig had engaged in a prior case. Derrig knew that Goodell would opine it was impossible to backdate decay to a "reasonable scientific certainty." CP 1881, 1024-25. Goodell testified that he understood this to mean 95% certainty, the standard he would apply in a laboratory. CP 1955-60, 1962.

St. Paul never conducted more than a perfunctory investigation of the decay, relying on Goodell's pre-existing opinion to claim it could not backdate decay. CP 2044-45. St. Paul never asked Goodell to determine whether the decay at Lake Chelan Shores could be backdated to the 19-year period relevant to its policies on a more probable than not basis, and Goodell never attempted to do so. CP 1958. St. Paul ultimately denied coverage. CP 2159.

3. The trial court grants St. Paul's summary judgment motion dismissing LCS's coverage claim.

St. Paul moved for summary judgment relying upon Goodell's declaration. CP 20, 90-104. LCS opposed the motion, submitting the declarations of its experts, engineer Justin Franklin and wood scientist Kevin Flynn. CP 907-937; 1026-1283; 1284-1577.

Justin Franklin was the structural engineer on the LCS project

from 2006 until its completion. CP 1026-27. During Franklin's career as an engineer, he evaluated numerous wood framed buildings of various ages with structural decay. CP 1026-27. Franklin inspected the framing of all 20 residential buildings at Lake Chelan Shores after the exterior cladding had been stripped. CP 1028-31. He found 200 instances of SSI, concluding that more probably than not 49 of these had reached SSI prior to the termination date of St. Paul's policies. CP 677-80; 1041-1283. Franklin used a mathematical model to graph his conclusions and testified that, even without this model, he would have come to the same conclusions regarding SSI based on his education, training, and experience. CP 1028-30, 1032.

Kevin Flynn is a wood technologist with 20 years of experience evaluating wood structures and wood degradation. CP 1284. After inspecting the complex with Franklin, and reviewing his data and the photographic record, Flynn concluded that Franklin's opinions were accurate to a more probable than not standard. CP 1287. Flynn compared Franklin's conclusions to the results produced by "Timberlife," a software program designed to predict the useful life of wood structures, and found a 75% correlation. CP 1286-89. Flynn testified that even if a model had not been used, Franklin's estimates were still accurate on a more probable than not basis.

> Whether or not a mathematical model is used, it is reasonable to conclude that the fungi growth at Lake Chelan Shores went through an initial lag phase which commenced shortly after the buildings were completed and rain water and snow melt started to intrude into the building structures. It is also reasonable to conclude that the lag phase progressed into an accelerated phase during which the degradation progressed at an accelerated rate on an annual basis because it was exposed to similar weather conditions each year. Finally, it is reasonable to conclude that this accelerated phase continued on a similar year to year progression until the hidden decay was uncovered in 2007 and 2008. These conclusions are substantiated by the photographic and documentary record at Lake Chelan Shores which shows similar amounts of decay in similar construction details over similar periods of time. CP 1290.

Both Franklin and Flynn testified that they observed similar amounts of decay in similar construction details develop over similar periods of time at Lake Chelan Shores. CP 1290. According to Flynn, this indicated that the numerous variables cited by Goodell, while possible, did not have an appreciable effect on the progression of decay at the complex or there would have been more variability. CP 1290.

The trial court granted St. Paul's motion and dismissed LCS's coverage claims, holding that Flynn and Franklin's opinions were inadmissible under *Frye* and ER 702. CP 1888-90.

4. The trial court denies LCS's motion to compel and grants St. Pauls' motion for summary judgment on bad faith, but does precisely the opposite in regard to Northern.

LCS submitted identical interrogatories and requests for

production to St. Paul and Northern seeking their claim files and related documents. CP 1842-66, 2295-96. St. Paul produced a heavily redacted set of documents, and moved for summary judgment on bad faith. CP 1578-94. In its response, LCS moved to compel and requested a CR 56(f) continuance. CP 1826-36; 2236. The trial court denied LCS's motions and granted St. Paul's motion for summary judgment. CP 2315-16; 2292-94.

Shortly thereafter, LCS moved to compel responses from Northern. The trial court granted the motion and ordered the production of numerous documents including the claim file after an in camera review. CP 2295-98. Based upon documents which showed that Northern had investigated in bad faith, LCS moved for summary judgment. The motion was granted. CP 2299-2302.

After reaching a settlement on damages with Northern, LCS appealed the dismissal of claims against St. Paul. CP 2303-19. On November 28, 2011, the Court of Appeals rendered its first decision, *Lake Chelan Shores v. St. Paul Fire & Marine*, 167 Wn. App. 28, 272 P.3d 249 (2011), affirming the trial court. This Court granted a petition for review and remanded with direction to reconsider the decision in

light of *Akzo*, 172 Wn.2d 593.[3] On August 19, 2013, the Court of Appeals issued a revised decision. Appendix A.

5. The Court of Appeals distinguishes *Akzo* and *Lakey* on remand, affirming dismissal of all claims.

The decision on remand closely follows the original, leaving its holdings on coverage, bad faith, and discovery of the claim file unchanged. The decision briefly addresses *Akzo,* but only to distinguish it. Opinion at 10-11. The decision deals with *Lakey* in a footnote, distinguishing it without discussion. Opinion at 11.

The Court of Appeals acknowledged that "general acceptance of the science of wood decay is not at issue in this case." Opinion at 11.

> Rather, the issue here is whether LCS's experts' application of that science, i.e., the formula Franklin used to back-date the decay process to the point of collapse, is generally accepted. See *Akzo*, 172 Wn.2d at 603 ("both the scientific theory underlying the science and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye"). Stated another way, the issue here is not the scientific community's general acceptance of Franklin's and Flynn's conclusions regarding the onset of the stated collapse, but instead whether the methodology by which those conclusions were reached is generally accepted. Thus, *Akzo* is of no help to LCS.

Id. (emphasis added). The Court of Appeals then determined that the formula and software were not accepted methodologies, holding that all

[3] *Lake Chelan Shores Homeowners Assoc. v. St. Paul Fire & Marine Ins. Co.*, 174 Wn.2d 1017, 282 P.3d 1069 (2012).

issues relating to the witnesses' special knowledge and experience were pertinent to ER 702, but not to *Frye.* Opinion at 12. Nowhere is there a discussion of the 95 percent confidence standard used by Goodell, the 19-year period relevant St. Paul's policies, or whether SSI could be backdated to 1999 or prior on a more probable than not basis.

The Court of Appeals again affirmed dismissal of the extra contractual claims using domino logic: i.e., if decay could not be backdated, an investigation was futile, the failure to investigate could not be in bad faith as a matter of law, and the expense to strip and reclad the buildings could not have been proximately caused by St. Paul. Opinion at 12-15. In regard to proximate cause, the Court of Appeals ignored the declarations of the Board President and LCS's insurance expert to find there were no factual issues. CP 1914-20, 1931-40.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals' decision warrants review because it conflicts with this Court's precedent and presents an issue of substantial public interest. RAP 13.4(b)(1), (4).

The Court of Appeals improperly applied *Frye* in a civil case, ruling that ER 702 issues are irrelevant unless *Frye* standards are met. Even if *Frye* applies in civil cases, its application here conflicts with this Court's recent decisions in *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). Together, these decisions hold that *Frye* does not apply to the methods by which an expert arrives at his or her conclusions, only to acceptance of the underlying science and the methodology by which the expert acquired data. The Court of Appeals' decision also limits an insurer's duty to investigate a claim in good faith, and to produce claim files, contrary to *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013). Review is necessary and appropriate.

1. The *Frye* standard is not an appropriate test for admissibility of expert testimony in a civil case where the evidentiary standard is a preponderance of the evidence.

This case presents an opportunity to directly address an issue with broad public policy implications: whether the *Frye* standard applies in civil cases. *See* RAP 13.4(b)(4). This Court has repeatedly expressed concern that *Frye* is incompatible with civil cases:

> [S]cientific standards and legal standards do not always fit neatly together. Generally, the degree of certainty required for general acceptance in the scientific community is much higher than the concept of probability used in civil courts. While the standard of persuasion in criminal cases is "beyond a reasonable doubt," the standard in most civil cases is a mere "preponderance." ... To require the exacting level of scientific certainty to support opinions on causation would, in effect, change the standard for opinion testimony in civil cases.

Akzo, 172 Wn.2d at 607-08. *See also Reese v. Stroh*, 128 Wn.2d 300, 311, 907 P.2d 282 (1995) (Johnson, J. concurring) ("never has [*Frye*] been, nor now should it be, adopted as the rule in civil cases"). Despite raising these concerns, the Court has never ruled on whether *Frye* applies in civil cases.

The application of *Frye* to this case had precisely the negative effect courts and commentators have feared: it raised the standard of proof from a preponderance to a laboratory standard of 95% certainty, even though the opinions offered were based on field observations and not laboratory experiments or procedures. ER 702 should be sufficient to address issues relating to the reliability of expert opinions in civil cases. This is an issue for the State's highest Court to decide.[4]

2. The Court of Appeals' application of *Frye* to the facts of this case conflicts with this Court's decisions in *Akzo* and *Lakey*.

Even if *Frye* applies, its application here conflicts with *Akzo,* 172 Wn.2d 593 and *Lakey,* 176 Wn.2d 909, two recent, unanimous Supreme Court decisions. Together, these decisions limit the application of *Frye.*

Akzo involved a claim by a former employee that exposure to toxic paint while her son was *in utero* caused him to suffer birth defects. In support, the plaintiff offered the testimony of a medical expert who

[4] LCS identified this improper standard of proof as a reason *Frye* should not apply early in this case. CP 919-20; Opening Br. of Appellant at 24-25.

was prepared to testify "within a reasonable degree of medical certainty" that there was a causal link between the exposure to toxins and her son's birth defects. *Akzo*, 172 Wn.2d at 603. The trial court granted a motion to exclude the expert testimony under *Frye* and dismissed the plaintiff's claims at summary judgment.

This Court reversed on direct review, holding that *Frye* does not require that every deduction drawn from accepted scientific theories be generally accepted, and that conclusions drawn from accepted science do not implicate *Frye*. *Akzo*, 172 Wn.2d at 611. The opinion includes a discussion of the proper application of *Frye* and its limitations:

> Courts must interpret evidence rules mindful of their purpose: "that the truth may be ascertained and proceedings justly determined." ER 102. Generally, the admissibility of expert testimony in Washington is governed by ER 702. Expert testimony is usually admitted under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons.

Akzo, 172 Wn.2d at 600.

> The *Frye* test is only implicated where the opinion offered is based upon novel science. It applies 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. . . . *Frye* does not require that the specific conclusions drawn from the scientific data upon which [plaintiff's expert] relied be generally accepted in the scientific community. *Frye* does not require every deduction drawn from generally accepted theories to be generally accepted. . . . Because [plaintiff's expert's] testimony was not based upon novel science, *Frye* was not implicated in this

> case. Other evidentiary standards properly balance the parties' right to advance their theories of the case.

Akzo, 172 Wn.2d at 611.

Frye therefore does not require that conclusions drawn from the data be generally accepted. *Akzo*, 172 Wn.2d at 610-11. Many expert opinions "are pure opinions based upon experience and training rather than scientific data" and are appropriately based upon a reasonable degree of certainty or probability, and not the 95 percent certainty required for a laboratory procedure. *Akzo*, 172 Wn.2d at 608, 610. This Court reversed, holding the plaintiff's expert should have been allowed to testify on a more probable than not basis. *Akzo*, 172 Wn.2d at 612.

Lakey, 176 Wn.2d 909, also narrowed the inquiry under *Frye*. In *Lakey*, several neighbors sued Puget Sound Energy claiming a substation emitted electromagnetic fields (EMFs) creating a nuisance. The homeowners presented testimony of Dr. David Carpenter that EMF was a possible cause of several serious diseases. Carpenter acquired his data by conducting a literature review. Carpenter admitted he discounted studies that showed no link between EMF and disease.

The trial court ruled that Carpenter's theories lacked general acceptance in the scientific community and that he failed to follow epidemiological methodology, and excluded his testimony under *Frye*.

The Court reversed on the *Frye* issue, but held the testimony was inadmissible under ER 702.

Although PSE had argued that *Frye* required the exclusion of Carpenter's testimony because his methodology was flawed, this Court disagreed, holding that Carpenter's "methodology" for *Frye* purposes was limited to the literature review he conducted to acquire his data.

> Carpenter performed a literature review and used the data from peer reviewed epidemiological studies to reach his conclusions. *Frye* therefore does not apply to Carpenter's testimony. Any novelty came in Carpenter's conclusions, but novel conclusions do not implicate *Frye*.

Lakey, 176 Wn.2d at 920. The errors in Carpenter's analysis of the data went only to the weight or reliability of his testimony under ER 702, and not to whether the testimony was admissible under *Frye*.

3. The methodology used by Franklin and Flynn to acquire data was neither new nor novel.

The Court of Appeals viewed the principal issue before it as "whether the methodology by which [Franklin and Flynn's] conclusions were reached is generally accepted." Opinion at 11. After *Akzo* and *Lakey*, this is not an allowable area of inquiry under *Frye*.

Both *Akzo* and *Lakey* equate "methodology" under *Frye* with data collection, not the method of reaching conclusions. As the Court held in *Akzo*:

> The *Frye* test is only implicated where the opinion

> offered is based upon novel science. It applies 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.

Akzo, 172 Wn.2d at 611; *see also Lakey*, 176 Wn.2d at 919. Applying this standard, the Court in *Lakey* held that the expert's selective use of data did not implicate *Frye* because it related to his conclusions and not his acquisition of data through a literature search. *Lakey*, 176 Wn.2d at 920. This was true even though the Court excluded the expert's testimony under ER 702 because he "failed to follow proper methodology rendering his conclusions unreliable and therefore inadmissible." *Lakey*, 176 Wn.2d at 920.

Franklin and Flynn acquired their data in the manner engineers and wood scientists accumulate data in the field, according to generally accepted practices of the engineering community. CP 973-4, 1027-30, 1286-7. They made visual inspections and took field measurements CP 1028, 1287; inspected similar construction details within the complex to determine if there were similar amounts of decay over similar time periods CP 1031, 1290; determined the cause of the water intrusion and thus the time at which water likely started to intrude CP 1030, 1946; and inspected weather records to determine if the complex had been subject to similar weather patterns year to year. CP 1287. All of this was

documented in notes, summaries and photographs. CP 1028, 1040-1283, 1290. Nothing in the record questions the methodology used to collect the data or the accuracy of the data relied upon.

4. The Court of Appeals' opinion improperly delves into the manner in which Franklin and Flynn reached their conclusions.

As set forth in *Akzo* and *Lakey*, the process of reaching conclusions is not a proper area of inquiry under *Frye*. A court's gatekeeper function under *Frye* ends when it determines that the underlying science is not novel and the methodology for acquiring data is generally accepted as capable of acquiring reliable results.[5] *Lakey*, 176 Wn.2d at 920; *Akzo*, 172 Wn.2d at 611.

The Court of Appeals decision rejecting Franklin's and Flynn's conclusions on *Frye* grounds is based entirely upon the manner in which they reached their conclusions, an inquiry which is contrary to *Akzo*.

> The *Frye* test is only implicated where the opinion offered is based upon novel science. It applies 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. . . . *Frye does not require that the specific conclusions drawn from the scientific data . . . be*

[5] It is generally recognized that when data collection involves taking basic measurements or physical comparisons, *Frye* is not implicated because the jury is fully capable of evaluating the basis for the expert's opinion. *State v. Brewczynski*, 173 Wn. App. 541, 556, 294 P.3d 825 (2013) (citing with approval *State v. Hasan*, 205 Conn. 485, 490 (1987) (the *Frye* test has been either ignored or rejected when the method used by the expert was a matter of physical comparison rather than scientific test or experiment)).

generally accepted . . . .

Akzo, 172 Wn.2d at 611 (italics added). Like the medical expert in *Akzo*, LCS's experts are qualified by their education, experience and specialized knowledge to draw conclusions from what is admittedly "old science" and present opinion testimony on a more probable than not standard. As explained in *Akzo*, *Frye* does not require that specific conclusions be generally accepted, nor that every deduction be accepted. *Akzo*, 172 Wn.2d at 610-11. *Lakey* further clarified that the means by which an expert reaches his or her conclusions is beyond the scope of allowable inquiry under *Frye*. *Lakey*, 176 Wn.2d at 920.

The testimony of LCS's experts should not have been excluded. They drew reasonable conclusions from the evidence based upon the established science of wood decay and data accumulated from field inspections. CP 1031, 1285. Jurors are fully capable of determining the weight to be given expert testimony of this type. *Reese*, 128 W.2d at 309. It was error for the Court of Appeals to dictate the outcome.

5. The Court of Appeals' decision improperly narrows an insurance company's duty to investigate.

Insurance companies have a duty to investigate an insured's claim regardless of whether the claim is covered. *Coventry Associates v. American States, Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). Where an insurer fails to investigate an alternative factual basis for an insured's

claim, a jury may find that the insurer violated its duty to investigate. *Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990). Additionally, insurers must construe any uncertain or equivocal issues of state law in favor of the insured. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 59-60, 164 P.3d 454 (2007); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 389, 920 P.3d 31 (2010). The common thread is that any doubt must be resolved by the insurer in favor of the insured.

The Court of Appeals' holding that St. Paul had no duty to investigate as long as it had an expert who believed the task was impossible conflicts with the public policy reflected in *Coventry*, *Kallevig, Woo,* and *American Best Food.* Contrary to the Court of Appeals decision, *Coventry* holds an insurer has an affirmative duty to conduct a reasonable investigation. It cannot presume the results or hire an expert to give a predetermined opinion. Contrary to *Kallevig*, the Court of Appeals held St. Paul did not act in bad faith by retaining an expert who it knew would opine that an investigation was impossible. Contrary to *Woo* and *American Best Food*, the Court of Appeals held that an insurer *in its investigation* could presume there would be a failure of proof by its insured if the claim were denied. Any uncertainty in Washington law about the application of *Frye* should have been resolved

in LCS's favor and an actual investigation should have been conducted.

6. The Court of Appeals discovery decisions relating to St. Paul are contrary to this Court's holding in *Cedell v. Farmers Ins. Co. of Washington.*

The holding that discovery of St. Paul's claim file could not lead to admissible evidence of bad faith as a matter of law is nothing short of astounding. As the Court held recently in *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013), a claim file provides the best evidence of bad faith by an insurer. This is a position LCS has taken throughout. CP 1826-36. Like the insurer in *Cedell*, St. Paul produced only what it chose to produce. CP 1826-81, 2185-90. As in *Cedell*, St. Paul used its attorney to oversee the investigation, to select its expert, to define the scope of the expert's engagement, to retain engineers to conduct load testing and to correspond with its insured and counsel when an investigation of the clubhouse was requested. CP 1881, 1886, 1928-30, 1982-83, 1887-88, 1583. These are discoverable, "quasi-fiduciary tasks of investigating" the claim. *Cedell*, 176 Wn.2d at 701.

Under *Cedell*, the entire claims file is presumptively discoverable. *Id.* at 697. Even if St. Paul could overcome the presumption, the withheld documents should still undergo an in camera review. *Id.* at 699. Yet, when LCS moved for a CR 56(f) continuance and an order compelling discovery, the trial court denied the motions and

the Court of Appeals affirmed. These rulings are all the more baffling since the trial court granted an identical motion to compel against Northern, conducted an in camera review, and after ordering the production of claim file documents, granted summary judgment establishing Northern's bad faith. CP 2295-2302. Accordingly, the assertion that the claims file could not lead to discoverable evidence of bad faith as a matter of law is both legally untenable and contrary to the history of this case.

F. CONCLUSION

The Court of Appeals' decision contradicts this Court's case law and will be used to deny coverage and impartial investigations to insureds facing the risk of substantial structural damage to their homes. The Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 1st day of November, 2013.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 1st day of November, 2013, I caused to be served the foregoing document on counsel, as noted:

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Dated: November 1, 2013

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APPENDIX A

IN THE COURT OF APPEALS FOR THE 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.	)	No. 66636-3-I DIVISION ONE PUBLISHED OPINION FILED: August 19, 2013

SPEARMAN, A.C.J. — The main issue in this insurance coverage case is whether the method by which expert witnesses for Lake Chelan Shores condominiums homeowners association (LCS) established that "collapse" conditions occurred years earlier was generally accepted within the scientific community. In its summary judgment motion, St. Paul Fire & Marine Insurance Company set forth evidence indicating the methodology of LCS's experts was not generally accepted. The burden then shifted to LCS to come forward with evidence the methodology was generally accepted. Because LCS provided no such evidence, the trial court properly concluded there was no

admissible evidence of "collapse," a prerequisite for coverage under the policy. We affirm.

FACTS

St. Paul insured the premises of LCS under three annual policies, effective from August 3, 1996 to August 3, 1999. Each of those policies provided coverage for "collapse" that occurred during the policy period:

> **Collapse coverage.** We'll insure covered property against the risk of direct physical loss or damage involving collapse of a building or any part of a building.
>
> The collapse must be due to any of the following causes of loss:
>
> . . . .
>
> • hidden decay.

The policies contained the following relevant exclusions from coverage:

> **Exclusions — Losses We Won't Cover**
>
> . . . .
>
> **Collapse.** We won't cover loss resulting from collapse other than that described in the collapse coverage under the Covered Causes Of Loss section.
>
> . . . .
>
> **Wear — tear — deterioration — animals.** We won't cover loss caused or made worse by:
>
> • wear and tear;
>
> • deterioration, mold, wet or dry rot, rust or corrosion including fungal or bacterial contamination . . . .

The LCS condominiums were built between 1980 and 1994. LCS first discovered a problem with rot in mid-2006. LCS hired Olympic Associates, an architectural and engineering firm, to inspect and report on the problem. By April 2007,

LCS had decided to contract for a repair project that would include removal and replacement of all siding. On July 11, 2007, LCS adopted a resolution for financing the project, and on July 27, 2007, it submitted design documents to the City of Chelan Building Department.

LCS tendered its claim to St. Paul on July 5, 2007. On July 23, a St. Paul property adjuster contacted counsel for LCS, and on July 26, the adjuster sent a letter to counsel, asking for documents relating to the loss. Counsel for LCS did not respond to the request. On August 27, counsel for LSC sent a letter to St. Paul, requesting reimbursement for $303,424 in investigation costs. Three days later, on August 30, 2007, LCS sued St. Paul for breach of contract; bad faith; and Consumer Protection Act (CPA) chapter 19.86 RCW, violations.

In July 2009, LCS disclosed its experts' opinions. On the basis of these opinions, St. Paul denied the claim and moved for partial summary judgment as to coverage. St. Paul argued there was no coverage, because LCS's experts had no generally accepted scientific basis on which to link the current building decay to a state of "collapse" during the St. Paul policy periods. In the alternative, St. Paul asked for a Frye[1] hearing on LCS's experts' methods. The trial court agreed with St. Paul, and granted the motion.

LCS then moved to compel discovery as to its remaining extracontractual claims. St. Paul moved for summary judgment on the extracontractual claims. LCS sought a

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

CR 56(f) continuance. The trial court denied LCS's motion and granted St. Paul's motion for summary judgment, dismissing the rest of the claims. LCS appeals.

DISCUSSION

Summary Judgment on Coverage Claims

The trial court granted St. Paul's motion for summary judgment on coverage. The court agreed that the opinions of LCS's experts that the condominiums were in "collapse" 10 years earlier was not based on any theory generally accepted in the scientific community. The trial court thus found LCS had failed to present evidence of coverage, and it granted the motion. We agree with the trial court.

LCS offers multiple arguments as to why this was error, but those arguments rest upon two main, interconnected premises: (1) conflicting opinion testimony offered by opposing experts cannot be resolved at summary judgment and (2) the trial court essentially weighed evidence as if it was presiding over a Frye hearing as opposed to a summary judgment hearing. LCS is correct that disputed opinion testimony, offered by qualified experts, cannot be resolved at summary judgment. See Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 119-20, 11 P.3d 726 (2000). In its brief, LCS provides a list comparing and contrasting the expert deposition and declaration testimony of its experts versus St. Paul's expert.

But LCS misunderstands the nature of St. Paul's motion and the trial court's ruling. St. Paul did not ask the trial court to weigh the testimony of opposing experts and the trial court did not do so. St. Paul argued that the opinions of LCS's experts were

inadmissible under Frye and in the absence of that testimony, LCS could not establish that collapse occurred during the policy period. St. Paul contended that LCS's experts' opinions were not admissible under Frye because the undisputed evidence showed that the methodology upon which LCS's experts relied to form their opinions was not generally accepted within the scientific community. The trial court agreed and dismissed LCS's collapse coverage claims. The trial court did not err.

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. See State v. Gregory, 158 Wn.2d 759, 829-30, 147 P.2d 1201 (2006). Under Frye, expert testimony is admissible where

> (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

State v. Sipin, 130 Wn. App. 403, 414, 123 P.3d 862 (2005). Both the theory underlying the evidence and the methodology used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under Frye. Gregory, 158 Wn.2d at 829. When applying the Frye test, courts do not determine if the scientific theory underlying the proposed testimony is correct; rather, courts "must look to see whether the theory has achieved general acceptance in the appropriate scientific community." State v. Riker, 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994). It is not necessary that the relevant scientific community be unanimous in its acceptance of a

particular theory or methodology. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). To perform a Frye analysis, courts consider four sources of information:

> To determine whether a consensus of scientific opinion has been achieved, the reviewing court examines expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions. However, "the relevant inquiry is general acceptance by the scientists, not the courts."

Eakins v. Huber, 154 Wn. App. 592, 599-600, 225 P.3d 1041 (2010) (citations omitted) (quoting State v. Cauthron, 120 Wn.2d 879, 888, 846 P.2d 502 (1993)).

In its motion, St. Paul set forth what it believed showed a lack of general acceptance. The only evidence purporting to show a state of collapse from hidden decay during the St. Paul policy periods came in the form of two opinions from LCS's experts. One of the experts, Justin Franklin, was a civil engineer at Olympic Associates. Regarding whether it was possible to backdate from the present rot condition to the initial onset of a state of collapse, Franklin sent an e-mail in 2006 saying it could not be determined:

> We did an investigation on a building in Chelan which has lots of rotten framing. The attorney for the [homeowner's association] would like to know if we can estimate when the rot occurred. Apparently their insurance coverage ended in 2002 and of course he would like us to state the rot was present in 2002. I told him that all we can say is that the rot presently exists but that we can not [sic] state when the rot and subsequent SSI [substantial structural impairment] occurred.

At his 2009 deposition, however, he claimed to be able to trace the progression of decay at the LCS properties with only two pieces of information: (1) the date each building was built and (2) the depth of the rot when it was uncovered during remediation in 2007-2009. He applied a formula, $y = ax^2 + c$, to trace the progression of rot between

these two times. The formula means that the percentage of decay "y," progresses according to the square of the number of years "x," times a decay rate "a," plus a constant "c." The constant "c" allows for a time lag between completion of construction and the start of decay, which Franklin assumed to be one year.

Franklin then applied the formula $y = ax^2 + 1$ to every area in which Olympic Associates had identified a collapse condition during its 2007-2009 inspection. This application resulted in a series of curves purporting to plot the progression of rot at each location from the time of construction to the time the rot was discovered by Olympic Associates. Franklin assigned a "collapse" point at the first point the rot reached a collapse condition, and then compared that date to policy periods.

Franklin's equation did not come from any scientific literature. Instead, he got it from another Olympic Associates engineer, Lee Dunham. When asked, "What work has Mr. Dunham done to verify the accuracy of that equation that you know of?", Franklin testified, "I don't know." Franklin also testified that the engineers at Olympic Associates simply assumed decay began one year after construction was complete. He did not testify that the assumption was generally accepted in the scientific community. Franklin described his calculations as "educated guesses" and was unable to identify any other person or literature stating his formula is a proper equation for estimating rot progression.

LCS's second expert was Kevin Flynn, a wood scientist from California. 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 as is set forth in Franklin's equation. LCS hired Flynn because it claimed Flynn's use of a software package called "TimberLife" validated Franklin's equation. But neither Flynn nor any other witness testified that it was generally accepted in the scientific community to use TimberLife to determine or confirm when a state of collapse began by working backward from present rot conditions. Instead, Flynn testified that TimberLife is a design tool intended to guide building designers in selecting appropriate building materials.

In its response to the summary judgment motion, LCS argued that the opinions of its experts were not subject to a Frye analysis because the opinions were based on the experts knowledge, experience and training, and because they were not based on novel or new science. Furthermore, even if the opinions were subject to Frye, they were nonetheless admissible because they were based on "accepted scientific knowledge of the process of wood rot...." Clerk's Papers (CP) at 912. And the "use of equations similar to the one used by Mr. Franklin to model the progress of wood decay has been accepted in the scientific community." CP at 913. In support of its opposition to St. Paul's motion, LCS submitted a declaration from Franklin, in which one paragraph addresses whether his formula was generally accepted within the scientific community:

> This is a formula defining an exponential curve which approximates my observations, and those of other engineers in the field. Thus, this formula is merely an equation for graphing the wood rot's lag phase and accelerated growth phase that is universally accepted in the scientific community. Equations such as this are commonly used by engineers and others for various applications.

While Franklin states that it is generally accepted in the scientific community that rot has a lag phase and an accelerated growth phase, he does not say that the formula is generally accepted within the scientific community as a method of backdating when rot has progressed to the point of collapse.

Likewise, in Flynn's declaration only one paragraph appears to discuss the merits of St. Paul's allegations regarding the general acceptance of Franklin's formula:

> Thus, while no single mathematical model has been accepted to the exclusion of others, the concept of applying a mathematical model such as Mr. Franklin's to approximate the exponential curve that describes the progress of wood decay is generally accepted in the scientific community.

Here, Flynn simply states that models approximating exponential curves that describe wood decay are generally accepted. He does not address the critical issue: whether the use of such formulas, and in particular, Franklin's formula, to backdate to the onset of the collapse condition, is generally accepted in the scientific community.

LCS is correct that in general, the moving party on summary judgment bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). However, where a plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" the trial court should grant the motion. Id. at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). A moving defendant may meet the initial burden by "'showing'— that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." 225 n.1, (quoting Celotex, 477

U.S. at 325). That is exactly what happened here: St. Paul pointed to an absence of evidence that the bases of the opinions offered by LCS's experts were generally accepted and LCS failed to respond. In light of this unrebutted evidence, the trial court did not err in concluding that the opinions were inadmissible and that LCS could not prove a collapse condition existed during the coverage period. Accordingly, the trial court properly granted St. Paul's summary judgment motion.

LCS also contends that Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 260 P.3d 857 (2011), which was decided shortly before oral argument in this case, is directly on point and requires reversal.[2] We disagree. In Akzo, the Supreme Court reversed the trial court, which had dismissed on grounds that plaintiff failed to demonstrate general acceptance of its theory that a child's mental abnormalities were caused by in utero exposure to toxic materials. The Court held "that the Frye test is not implicated if the theory and the methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community." Akzo, 172 Wn.2d at 597. Thus, under Akzo, so long as the science and methods used to generate the opinions about causation are generally accepted in the relevant scientific community, Frye does not require a similar consensus on the ultimate issue of causation.

[2] LCS first made this argument in a motion for reconsideration to this court. We denied the motion for reconsideration. The Supreme Court granted LCS's petition for review and remanded to us for reconsideration in light of Azko. By separate order, the previous opinion filed on November 28, 2011 is withdrawn and this opinion is substituted in its place.

LCS contends this case is like Azko. It argues that the science of wood decay is not new or novel but instead is well known and well established. And further, that the mathematical equation used by its experts relies upon that accepted science to draw conclusions about when the rot caused certain buildings to reach a state of collapse. LCS contends the trial court below, like the trial court in Azko, improperly required general acceptance of its experts' conclusions. LCS also argues that because its experts' opinions are based on practical experience and knowledge, Frye is inapplicable. LCS is mistaken on both counts.

Contrary to LCS's arguments, general acceptance of the science of wood decay is not at issue in this case. Rather, the issue here is whether LCS's experts' application of that science, i.e. the formula Franklin used to backdate the decay process to the point of collapse, is generally accepted. See Akzo, 172 Wn.2d at 603 ("Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye"). Stated another way, the issue here is not the scientific community's general acceptance of Franklin's and Flynn's conclusions regarding the onset of the state of collapse, but instead whether the methodology by which those conclusions were reached is generally accepted. Thus, Akzo is of no help to LCS.[3]

[3] In statements of supplemental authority, LCS also cites Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 (2013) and Advanced Health Care, Inc. v. Guscott, 173 Wn. App. 857, 295 P.3d 816 (2013). Given both of these cases reiterate the holding in Azko, they have no application here for the reasons stated above.

LCS next contends that even if its experts' opinions were properly excluded to the extent they relied upon the mathematical formula, its experts would have reached the same conclusions based solely on their knowledge and practical experience. LCS argues that Frye is inapplicable to opinions founded on this basis. LCS is incorrect.

Knowledge and experience are relevant factors when determining the admissibility of expert opinion testimony under ER 702. But if the testimony concerns novel scientific evidence, the first hurdle to its admissibility is whether it meets the Frye test. See Riker, 123 Wn.2d at 360 n.1 ("Nevertheless, in this state, we continue to adhere to the view that the Frye analysis is a threshold inquiry to be considered in determining the admissibility of evidence under ER 702"). Only if Frye is satisfied do ER 702 considerations, such as knowledge and experience become relevant. State v. Gregory, 158 Wn.2d at 829-30. Moreover, it makes little sense to conclude that an expert could avoid the application of Frye simply by eschewing the use of any particular methodology or technique and purporting to rely only on their knowledge and experience. See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997). Here, having failed to satisfy Frye, the knowledge and experience of LCS's experts are irrelevant and not a basis for the admission of their opinion testimony.

Summary Judgment on Extracontractual Claims

LCS next argues the trial court erroneously granted St. Paul's motion for summary judgment on its extracontractual claims, namely the claims for bad faith and CPA violations arising from the alleged failure to adequately investigate, both under a

common law duty to investigate and a Washington Administrative Code-imposed duty to investigate. We reject LCS's arguments.

Generally, "[a]n insurer must make a good faith investigation of the facts supporting a claim and may not deny coverage if a reasonable investigation would have proved the insurer's defense to be without merit." Capelouto v. Valley Forge Ins. Co., 98 Wn. App. 7, 18-19, 990 P.2d 414 (1999) (citing Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 917, 792 P.2d 520 (1990)). LCS contends that because St. Paul did not undertake its own investigation of the rot, i.e., by removing the exterior cladding on the condominiums to try to determine when the "collapse" occurred, LCS was forced to "incur the full cost of stripping and recladding all 21 buildings at Lake Chelan Shores." We disagree.

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." Id. at 19. Moreover, any costs LCS incurred in recladding the buildings was not proximately caused by any alleged failure to investigate by St. Paul. Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 64, 204 P.3d 885 (2009) ("If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established") citing Sambor v. Omnia Credit Servs., Inc., 183 F. Supp. 2d 1234 (D. Haw. 2002). Indeed, it is undisputed that LCS had decided by April 2007, about three months

before LCS even tendered to St. Paul, to contract for a repair project that would include removal and replacement of all siding. The trial court thus properly dismissed LCS's extra-contractual claims.

Denial of Motions To Compel and Continue

LCS also contends the trial court abused its discretion by denying two motions: (1) a CR 56(f) continuance of St. Paul's summary judgment motion on the extracontractual claims and (2) a motion to compel discovery regarding St. Paul's investigation of LCS's claims. We reject the arguments for the reasons described herein.

A trial court's denial of a motion to compel or a CR 56(f) motion for a continuance are reviewed for an abuse of discretion. See Clarke v. Office of Attorney Gen., 133 Wn. App. 767, 777, 138 P.3d 144 (2006); Mossman v. Rowley, 154 Wn. App. 735, 742, 229 P.3d 812 (2009). "A court abuses its discretion when it bases its decision on unreasonable or untenable grounds." Clarke, 133 Wn. App. at 777 (citing Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

Here, the CR 56(f) motion sought a continuance of St. Paul's summary judgment motion on extracontractual claims "until a reasonable date following St. Paul Fire & Marine's compliance with any order issued by this Court following hearing on the Plaintiff's Motion to Compel Discovery." The motion to compel discovery sought "St. Paul's "subrogation file," documents "relating to the investigation of this claim in an

unredacted condition," and supplemental responses to interrogatories about St. Paul's involvement in other claims regarding backdating of rot.

The motion to compel thus sought information relating to St. Paul's alleged deficient investigation. But as is described above, the method by which LCS claims St. Paul should have attempted to investigate was not generally accepted in the scientific community, and any costs LCS incurred in recladding the buildings were not proximately caused by an alleged failure to investigate by St. Paul. In short, the motion sought information not reasonably calculated to lead to admissible evidence, see CR 26(b)(1), and there was no need to continue the summary judgment hearing to obtain such information. As such, the trial court did not abuse its discretion by denying the motion to compel and the CR 56(f) motion for a continuance.

Affirmed.

Spearman, A.C.J.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS FOR THE 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.	No. 66636-3-I DIVISION ONE ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

Appellant Lake Chelan Shores Homeowners Association filed a motion for reconsideration of the opinion filed in the above matter on August 19, 2013. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 2nd day of October 2013.

Presiding Judge