No. 97083-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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ADMIRAL WAY, LLC, *et. al*,

Appellants/Cross-Respondents,

v.

ZURICH AMERICAN INSURANCE CO. *et. al*.,

Respondents/Cross-Appellants

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# RESPONDENT FIRST MERCURY INSURANCE COMPANY'S ANSWER TO APPELLANTS' PETITION FOR REVIEW

**Of a Court of Appeals Decision in Case No. 76490-0-I**

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## I. IDENTITY OF RESPONDENT

Respondent First Mercury Insurance Company (hereinafter "FMIC") respectfully asks that this Court decline to accept discretionary review of the decision of the Court of Appeals.

## II. RESPONSE TO PETITIONERS' ISSUES PRESENTED FOR REVIEW

This Petition follows years of litigation over a relatively simple construction defect matter. This includes coverage-related litigation involving a number of insurance carriers.[1] Each carrier prevailed at the Trial Court level. The insurance coverage issues were then brought before the Court of Appeals. With respect to FMIC, the Court of Appeals upheld the decisions by the Trial Court. The Court of Appeals similarly upheld the decisions involving Zurich American Insurance Company and North Pacific Insurance Company. The Court of Appeals reversed decisions as to Virginia Surety Company and Transportation Insurance Company and returned claims against those two carriers to the Trial Court.

Now, Ledcor Industries (USA) Inc. and Admiral Way, LLC, both individually and as assignees of SQI, Inc. (hereinafter collectively "Ledcor") petition this Court for further review. However, Ledcor has failed to identify an actual basis for review. In its statement of issues that

[1] Ledcor's pursuit of the insurance carriers has been funded by AIG Commercial Insurance Company of Canada (hereinafter "AIG") per the terms of AIG's agreement with Ledcor. CP 588. Under this Agreement, Ledcor assigned all claims against its insurers and its subcontractor's insurer to AIG. CP 588. AIG agreed to handle the pursuit of such claims, and to keep Ledcor and Admiral Way advised as to the status of same. CP 588.

are being presented to this Court, Ledcor provides lengthy and rhetorical statements about the purpose of insurance. It fails to justify, however, why review is permissible under the enumerated conditions governing review under RAP 13.4(b). Ledcor simply asserts generally that most of the issues presented warrant review under RAP 13.4(b)(1) and (4). However, when Ledcor raises issues regarding FMIC's handling of SQI's claim, and Ledcor's status as an additional insured, it fails to identify any basis for review under Rap 13.4. As a result, FMIC cannot ascertain what procedural basis Ledcor has identified for review of these issues.

Moreover, the issues presented are based on incomplete or mischaracterized facts. For example, Ledcor claims FMIC defended SQI for 42 months and then "disclaimed" coverage. Pet. at 3. In fact, FMIC fully defended SQI until the defenses was no longer required because SQI entered into a stipulated settlement and covenant not to execute. CP 10425. Ledcor's statement of the issues for review is based in large part upon similar mischaracterizations of the facts of this matter.

Furthermore, the issues presented by Ledcor in large part are not analyzed, or even addressed, in its argument. Specifically, Ledcor asserts as issues for review FMIC's handling of its defense of SQI, the dismissal of Ledcor's assigned extra-contractual claims, and a baseless allegation that FMIC commingled its defense and coverage files. In addition to the lack of factual support, Ledcor never returns to address these issues in its

argument for review. The only issues addressed in the actual argument are Ledcor's status as an additional insured under the Ongoing Operations Endorsements in the FMIC policies, and whether the Court of Appeals improperly applied the burden of establishing coverage to Ledcor. As set forth below, there is no compelling reason for this Court to accept review of these issues.

The decision by the Court of Appeals resulted from the application of clear, well-founded law. There is no conflict between the decisions at issue here and any prior decision by the Court of Appeals or the Supreme Court. There are no constitutional concerns. There is no compelling public interest reason for this Court to accept review. Rather, as is clear in the Petition, Ledcor asks this Court to review decisions for the simple fact that those decisions were not in Ledcor's favor. This is an inappropriate use of this Court's time, efforts, and resources. Ledcor's Petition for Review should be denied.

## III. STATEMENT OF THE CASE

It is FMIC's position that the recitation of the facts by the Court of Appeals is correct. Op. at 3-8; 33-35. However, there are factual mischaracterizations or omissions in Ledcor's Petition which require attention.

Ledcor alleges that FMIC disclaimed coverage for SQI. Pet. at 3. This is false. FMIC defended SQI, and engaged in efforts to settle the claims against SQI, until SQI entered into a stipulated settlement

agreement. CP 10425. At no time did FMIC disclaim a duty to defend SQI.

Ledcor also alleges SQI sued FMIC for negligence. Pet. at 5. This is incorrect. Ledcor, on its own behalf and as assignee of SQI, asserted claims against FMIC for breach of the duty to indemnify, breach of the duty to good faith, violation of the Insurance Fair Conduct Act, Violation of the CPA, reformation, declaratory relief, and breach of contract. CP 1643-1671; 7105-7129. At no time did Ledcor assert a negligence claim against FMIC.

Finally, Ledcor claims FMIC commingled the defense file with the coverage file and assigned a single adjustor to supervise both. Pet. at 6. This is not true, and Ledcor cites to no evidence in support of this allegation.

## IV. ARGUMENT

### A. Ledcor Fails To Support Its Petition As Required By RAP 13.4

Ledcor's Petition fails to comply with RAP 13.4. Specifically, Ledcor was required to file a Petition containing "a concise statement of the issues presented for review." RAP 13.4(c)(5). Ledcor must also provide"[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument." RAP 13.4(c)(7). The tests established under this rule are as follows:

> **(b)** ***Considerations Governing Acceptance of Review.*** A petition for review will be accepted by the Supreme Court only:
>
> **(1)** If the decision of the Court of Appeals is in conflict with a 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.

RAP 13.4(b)(1-4)

Ledcor's statement of the issues is not concise. It is largely rhetorical, and the presentation of the issues being raised for review are difficult to understand. Most appear to be mere disagreements with the Court of Appeal's decision.

When Ledcor does identify the basis for review under RAP 13.4, it does not supply any analysis. Ledcor asserts that the dismissal of Ledcor's extra-contractual claims was improper, and that FMIC improperly commingled its coverage and defense files. Again, no actual analysis or argument as to why these issues are proper for review under RAP 13.4 is provided. Neither of these issues are addressed, even remotely, in Ledcor's arguments. Ledcor only makes the blanket statement that these issues "warrant[] review under RAP 13.4(b)(1) and (4)." Pet. at 3-6.

As set forth above, RAP 13.4(b)(1) supports review "[i]f the decision of the Court of Appeals is in conflict with a published decision of

the Court of Appeals . . . .” Ledcor does not identify other decisions by the Court of Appeals that are apparently in conflict. FMIC should not have to analyze this statement and determine whether there is any potential or perceived conflict with any other appellate decision in the State of Washington. In the absence of Ledcor providing the analysis or rationale required by the rules, there appears to be no basis for this Court to accept review under this test.

RAP 13.4(b)(4) also allows for review if “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” Again, Ledcor fails to explain exactly what issues involve substantial public interest that should be determined by the Supreme Court. The issues before the Court of Appeals were not novel, and involved no issue of first impression. Ledcor does dedicate a large portion of its argument to a statement of bad faith law in Washington. Op. at 11 to 14. However, this section only contains statements of law. It sets forth no analysis of any issue. Ledcor never states how the public interest is implicated by the Court of Appeal’s decision. Again, it would be improper to FMIC to speculate on the reason for Ledcor’s Petition or to venture a guess as to the legal basis for the same.

In light of Ledcor’s failure to properly raise these issues for review in compliance with RAP 13.4, FMIC respectfully asks that this Court decline to accept discretionary review.

## B. To The Extent Ledcor Has Appropriately Raised Issues For Review By This Court, They Are Unsupported By The Facts Or The Law

In its argument, Ledcor discusses only two issues. First, it contends that the Court of Appeals improperly shifted the burden of establishing coverage to Ledcor. It then argues briefly that the decision finding that Ledcor did not qualify as an additional insured under the FMIC policies issued to SQI was incorrect. As set forth below, neither issues merit review by this Court.

### *1. The Court Of Appeals Properly Applied the Burden To Ledcor*

Ledcor argues that the Court ruled in favor of FMIC by inappropriately shifting a burden of proof to Ledcor. It is FMIC's understanding, based upon arguments raised prior, that Ledcor is referring to the "known loss" doctrine. However, Ledcor mischaracterizes the Court of Appeal's decision.

The Court of Appeals determined the actual evidence established that "SQI knew of the damages before it purchased the FMIC policies . . . ." Op. at 36. The Court did not find that Ledcor failed to carry its burden. It merely compared the evidence presented by FMIC with the evidence presented by Ledcor. The Court of Appeals stated specifically as follows:

> FMIC provided substantial evidence that SQI knew, at least in part, that the damage to the roofing had occurred at The Admiral as of at least 2004. FMIC further provided evidence that SQI failed to repair the damage that it was asked to repair in 2005, and that some of the claims arose of that damage. SQI only presented evidence that SQI may

> have believed that they had fixed all of the damage when they returned to do further maintenance in 2005.[21] Moreover, the evidence showed the damage occurring after 2005 would have been a "continuation, change or resumption" of the original damages. Because there is no reasonable dispute that SQI knew of the damages before it purchased the FMIC policies in 2006 and in 2007, summary judgment was appropriate concluding that SQI's damages were not covered under the FMIC policies.
>
> . . .
>
> [21]Ledcor cites several cases considering the common law "known loss" principal, however these cases do not support his [*sic*] argument. See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 806, 881 P.2d 1020 (1994).

Op. at 36 (emphasis original)

This is the same rationale applied by the Trial Court, which explained its analysis as follows:

> FMIC has submitted evidence that, prior to the policy period, SQI knew, at least in part, that the damage at issue had occurred. In response, Ledcor has submitted evidence that SQI repaired the roof in 2005; and that, consequently, after inspection, Malarkey reinstated its warranty. But even viewed in a light most favorable to Ledcor, this evidence merely indicates that SQI believed that the roof had been repaired. **Neither this evidence, nor any other items of evidence on the record,** show there is a material issue of fact as to SQI's knowledge; the evidence does not show that SQI's knowledge prior to the policy period was of separate property damage.

CP 8536 (emphasis added)

Therefore, the issue is not that Ledcor was tasked with proving that SQI had no knowledge of the property damage prior to the policy period. The real issue is that Ledcor had no rebuttal for FMIC's evidence that SQI knew of the property damage prior to the policy period. While FMIC

disagrees with Ledcor about which party has the burden, it is immaterial. The fact is Ledcor has presented no evidence sufficient to either meet this burden, or to rebut the evidence presented by FMIC.

Based upon the foregoing, the Court of Appeals did not base its decision on Ledcor's failure to satisfy the burden. Instead, it looked at the evidence presented by both FMIC and Ledcor, and rendered its decision. The application of the burden was not at issue, and therefore would not be appropriate for review by this Court.

### *2. The Insuring Agreement Does Not Violate Washington Law*

Ledcor also contends that the addition of the "known loss" requirement in the Insuring Agreement in FMIC's policies violates Washington law. Relying on *Xia v. ProBuilders,* Ledcor claims the inclusion of this term in the Insuring Agreement represents an effort to draft around established Washington law. However, Ledcor never identifies the principles of insurance law the "known loss" provision attempts to circumvent.

In fact, the insured is deemed to know about the potential "property damage" when it becomes aware by any means that the damage has occurred or has begun to occur. This requirement was previously found only in the common law and was known as the "known loss" doctrine, which stood for the proposition that a person cannot insure against a loss that they know will occur at the time of the purchase of the

policy. *Hillhaven Props. Ltd. v. Sellen Constr. Co*., 133 Wn.2d 751, 758; 948 P.2d 796 (1997).

As a result, the "known loss" provision is not an attempt to "circumvent" Washington law. It is rather an attempt to make the policy consistent with Washington common law. It is set forth in polices approved by the Washington Office of Insurance Commissioner, and no other Court has even entertained a challenge to its validity. There is simply no legal or factual support for Ledcor's claim that the "known loss" provision violates Washington insurance law. There is no merit to Ledcor's request that this Court review this issue.

### C. The Court Of Appeals Properly Determined Ledcor Did Not Qualify As An Additional Insured Under The Policies Issued To SQI By FMIC

Ledcor argues that it should have qualified as an Additional Insured under the "Ongoing Operations" endorsements in the FMIC Policies. Ledcor focuses its argument on the meaning of the term "ongoing operations." Specifically, Ledcor claims the Court of Appeals improperly applied *Hartford v. Ohio Casualty,* 145 Wn.App. 765, 189 P.3d 195 (2008).

This argument mischaracterizes the Court of Appeal's decision. The Court did not rely on *Hartford* with respect to FMIC. Rather, the Court of Appeals concluded Ledcor did not qualify as an Additional Insured under the "Ongoing Operations" endorsements because Ledcor

had no ongoing operations during FMIC's policies. The endorsements state that "status as an additional insured . . . ends when your operations for that additional insured are completed." CP 10338, 10386; see Op. at 31. As SQI's operations ended no later than 2005, and the FMIC Policies first incepted on May 1, 2006, the Court of Appeals determined there were no ongoing operations during FMIC's policies. Op. at 32-33. In fact, Ledcor never even argued that it had such operations. Op. at 32. As a result, the Court of Appeals concluded that Ledcor could not have qualified as an Additional Insured under these endorsements.

Ledcor's argument that there is some error in the Court of Appeal's construction of the term "ongoing operations" is frankly unclear. It relies on a number of unpublished decisions. Specifically, *Valley Ins. v. Wellington Cheswick, LLC.* In *Valley,* the Western District of Washington found that while the damage did not occur during ongoing operations, the liability did. *Valley,* 2006 U.S. Dist. LEXIS 81049, *20, 2006 WL 3030282 (W.D. Wash, Oct. 20, 2006). As a result, the Court determined that additional insured coverage existed under the "Ongoing Operations" endorsement.

There is no compelling reason to apply *Valley* over *Hartford.* *Valley* is an unpublished federal court decision. *Hartford* is a decision by Court of Appeals of the State of Washington. Moreover, *Valley* was decided years before *Hartford.* In fact, later case law expressly called into

question the applicability of *Valley. See Absher Constr. Co. v. North Pac. Ins. Co.*, 861 F. Supp. 2d 1236, fn 7 (2012)("The court notes that, although the decision in *Valley Ins. Co* . . . come to a different conclusion, with respect to the interpretation of an "ongoing operations" clause, it was decided prior to the Washington Court of Appeals decision in *Hartford* . . . . In light of the decision in *Hartford,* that court cannot conclude that *Wellington Cheswick* would be decided in the same manner today.")

The other case cited by Ledcor in support is *Tri-Star Theme Builders, Inc. v. OneBeacon Ins. Co.,* 426 Fed. Appx. 506, 2011 WL 1361468 (9th Cir. 2011). This is another unpublished decision. It also applies Arizona law. It has no precedential value in this matter, and certainly should not be applied over published and uncontroverted Washington case law.

*Tri-Star* is also distinguishable on its facts. In *Tri-Star,* there were two endorsements at issue. The second omitted the language "[a] person's or organization's status as an insured under [the automatic status endorsement] ends when your operations for that insured are completed." *Tri-Star,* at 512-513. The Court found that the omission of this language raised a question as to whether Tri-Star was covered as an additional insured for damages occurring after the named insured's operations for Tri-Star were completed. *Tri-Star* at 513.

No such omission is contained in the FMIC policies. Each policy contained the same Ongoing Operations Additional Insured endorsement. CP 10338, 10386. Each endorsement stated that "[a] person's or organization's status as an addition insured under this endorsement ends when your operations for that additional insured are completed." CP 10338, 10386. As a result, even if *Tri-Star* had any precedential value, it would not apply based upon the language of the endorsements at issue.

Moreover, Arizona Courts have rejected the finding of *Tri-Star*. See *Colorado Casualty Ins. Co. v. Safety Control Co., Inc.,* 230 Ariz. 560, 568, 299 P.3d 764 (Ariz. 2012)("The phrase 'ongoing operations" in this context is not ambiguous."). The *Colorado Casualty* decision was issued after *Tri-Star*. As a result, this case clearly provides no support for Ledcor's argument.

Finally, Ledcor includes an argument that appears to state that the Court of Appeals denied Ledcor the full benefits under the policy by concluding it did not qualify as an insured. Ledcor provides no legal or factual support for this argument.

There is no dispute that additional insureds receive the same coverage as the named insured. This is established Washington law. This does not mean, however, that every person or organization qualifies as an additional insured. Had there been ongoing operations during the FMIC policy periods, Ledcor likely would have qualified as an additional

insured. That coverage would have been subject to the coverages, exclusions, and conditions set forth in the policies. However, Ledcor did not qualify as an insured. This is not denying Ledcor some contractual benefit it was owed. Rather, this is limiting the population of additional insureds in accordance with the terms of the policy. As a result, there is no merit to Ledcor's argument that the decision on whether it qualified as an insured is rooted in actual coverage for the claims against Ledcor under the FMIC policies.

### D. Ledcor's Argument Regarding Bad Faith Is Unclear

Ledcor includes in its argument a lengthy section restating Washington law on the duty of good faith. However, there is no issue identified, or argument provided. It is merely a statement of the law. FMIC cannot respond to an issue Ledcor has failed to identify. To the extent this Court considers reviewing any issue as it related to Washington law regarding the duty to good faith, FMIC respectfully asks that the Court identify the issue and allow FMIC to respond.

## V. CONCLUSION

Based upon the foregoing, FMIC respectfully asks that this Court decline to accept discretionary review of the decision of the Court of Appeals.

DATED this 16th day of May, 2019

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DATED this 16th day of May, 2019.

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## May 16, 2019 - 4:08 PM

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| **Appellate Court Case Number:** | 97083-1 |
| **Appellate Court Case Title:** | Zurich American Ins., et al. v. Ledcor Industries Inc., et al. |
| **Superior Court Case Number:** | 09-2-12732-8 |

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